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STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION  
  
TRANSCRIPT OF PROCEEDINGS  
Rulemaking Hearing  
February 16, 2017  
Jefferson City, Missouri  
Volume 1

In the Matter of the )  
Proposed Amendments to )  
4 CSR 240-2.135, ) Case No. AX-2017-0068  
Confidential Information )  
)

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

DANIEL Y HALL, Chairman  
MAIDA J. COLEMAN,  
COMMISSIONERS.

REPORTED BY:  
KELLENE K. FEDDERSEN, CSR, RPR, CCR NO. 838  
MIDWEST LITIGATION SERVICES

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

2 (WHEREUPON, the rulemaking hearing  
3 began at 9:00 a.m.)

4 JUDGE WOODRUFF: Welcome to the  
5 comment hearing regarding the Commission's proposed  
6 rule. This is a proposed amendment of  
7 4 CSR 240-2.135, which is the Commission's  
8 confidential information rule.

9 In a moment I'll ask the people out  
10 there to come forward and give your comments. This  
11 is an informal process. I'm not going to swear in  
12 anyone to tell -- to testify or anything because  
13 you're giving comments, not testimony. The  
14 Commissioners and myself may have questions after  
15 you've made your statements, so please remain at  
16 the podium after you've given your comments.

17 Chairman Hall, do you wish to make  
18 some remarks?

19 CHAIRMAN HALL: Yeah. Good morning.  
20 I just wanted to make a couple of comments  
21 explaining, at least from my perspective, why we  
22 are looking at revising this important rule, and I  
23 basically have four reasons why.

24 And the first is, we are not trying  
25 to make public information and documents that are

1 proprietary or confidential in nature, and I cannot  
2 reiterate that enough. There's a lot of  
3 information, there's a lot of documents in hearings  
4 before this Commission that are properly designated  
5 confidential and should not be made public for a  
6 host of reasons. Those documents are not, at least  
7 in my mind, the target of the amendment.

8           What we're trying to do is to prevent  
9 what I think frequently happens is there are  
10 blanket designations of documents and testimony as  
11 confidential and they're really not and nobody  
12 really cares that much about whether or not those  
13 documents or that testimony gets disclosed. And a  
14 commissioner or maybe a party might at a hearing  
15 say, hey, why is that designated confidential? And  
16 everyone will look around and they'll say, well,  
17 it's really not, and then we'll take that  
18 designation off.

19           That's not the proper way to be  
20 reviewing confidential designation. So those are  
21 the types of documents, that's the type of  
22 information that we are really targeting, at least  
23 from my perspective, with this amendment to our  
24 rule.

25           The second main reason for the

1 amendment is there is -- there has been confusion,  
2 and it's shared by the Commission as well as the  
3 parties, that the distinction between proprietary  
4 and confidential. Our current rule has separate  
5 designations, but they get misapplied all the time,  
6 and there -- so that's the second reason why we are  
7 looking at amending a rule, amending the rule.

8           The third is we wanted to provide a  
9 framework for as much protection as might be  
10 necessary for a particular document or piece of  
11 information. In other words, we want to be able to  
12 customize the amount of protection to the actual  
13 document or piece of information, and our current  
14 framework doesn't really allow for that.

15           And then fourth, and by far the most  
16 important, is to promote transparency. It is  
17 critical that when the Commission renders decisions  
18 based upon a record, that as much of that record as  
19 possible be public.

20           So with that, I'll turn it back to  
21 the judge, and I look forward to hearing your  
22 comments.

23           JUDGE WOODRUFF: All right. As I  
24 indicated, this is kind of an informal process. I  
25 don't have any sort of list of who's going to go

1 first, other than I would like Staff to go last so  
2 they have an opportunity to respond to the comments  
3 from the other people who are interested here  
4 today. So I'll open it up to the audience out  
5 there. Who wants to go first? Mr. Fischer's  
6 coming forward.

7 MR. FISCHER: Judge, I'll come up.  
8 We filed --

9 JUDGE WOODRUFF: First of all, for  
10 the benefit of the record, tell us who you are.

11 MR. FISCHER: Yes. For the record,  
12 I'm Jim Fischer, and I filed comments on behalf of  
13 Kansas City Power & Light and KCPL Greater Missouri  
14 Operations Company, or GMO. I don't really have a  
15 statement I wanted to make, but since we did file  
16 comments that were fairly brief, I wanted to make  
17 myself available for questions.

18 Also, as a long-time practitioner  
19 that has some experience going back before the old  
20 confidential -- the current confidentiality rule  
21 was there, I might be able to add some clarity to  
22 the concerns that KCPL raised in their comments.

23 Their particular concern I think is  
24 that the HC and the proprietary designation were  
25 developed years ago really to address the problem

1 of having competitors or people that had their own  
2 interest in our cases, and the highly confidential  
3 designation particularly in the telecommunications  
4 industry at the time was developed so that only  
5 outside attorneys and outside -- or excuse me,  
6 attorneys and outside consultants would have access  
7 to the most sensitive information that the company  
8 had and it was designated as highly confidential.

9 Before our current rule was put into  
10 place, we did have a process much like this rule is  
11 calling for where you could come forward and ask  
12 for a motion for protective order, and often it was  
13 designed to address that question as well as what  
14 is going to be kept confidential.

15 What happened back in the old days  
16 was we spent a lot of time wrangling over the terms  
17 of that protective order. And while I understand,  
18 I think, the Chairman's concerns that he's raised  
19 here today and we probably are not doing as good a  
20 job with it under the current rule as we could, we  
21 have a concern that we're going to be taking a step  
22 backward into the situation that we had years ago  
23 where we would spend a lot of time wrangling over  
24 the specific terms of that protective order and how  
25 to protect it.

1                   And there is -- there is an  
2   unbelievable amount of information that is never  
3   seen by the Commission that is designated as  
4   confidential in one way or another. We're  
5   concerned that behind the scenes when we do our  
6   data requests, thousands of data requests, that  
7   some of them -- many of them are confidential, that  
8   we may have a lot of disputes at that level, too,  
9   if we amend the rule the way you're suggesting.

10                  But I'm open for your questions. Be  
11   happy to try to address our specific concerns in  
12   more detail.

13                  JUDGE WOODRUFF: Any questions?

14                  CHAIRMAN HALL: Yeah. Good morning.

15                  MR. FISCHER: Good morning.

16                  CHAIRMAN HALL: So under the current  
17   regime, when you designate something as  
18   confidential or proprietary, don't you get in those  
19   same fights with other parties that you would get  
20   into if we had to follow the procedure set forth in  
21   the new rule?

22                  MR. FISCHER: You know, Mr. Chairman,  
23   I think that over the years the practitioners have  
24   become pretty good about working those issues out  
25   and we have an understanding among the parties

1 about what's going to be designated, and there's  
2 not a lot of fights right now.

3 CHAIRMAN HALL: Then why can't that  
4 same practice carry through under the new regime  
5 where if you designated something as confidential  
6 and sought additional protection, which is the only  
7 time you would need to file a protective order is  
8 if you were seeking additional protection beyond  
9 the confidential nature, why couldn't that same  
10 good working relationship between the practitioners  
11 continue forward under that regime?

12 MR. FISCHER: Well, I think it  
13 probably could to some extent, but as I'm sure  
14 you're aware, we've gone to a system of discovery  
15 where we give, even on a long -- on a normal course  
16 we'll give 20 days to give up information and after  
17 rebuttal testimony maybe 10 days.

18 I can foresee a situation where we're  
19 going to be coming in with ten days to answer a  
20 data request and now needing to work on a  
21 protective order because we consider it to be more  
22 sensitive than just confidential, maybe what used  
23 to be considered highly confidential, coming to the  
24 judge saying we've got these problems.

25 I think what's really going to happen



1 is we're probably going to try to work out a  
2 protective order that will include some highly  
3 confidential designation that would only be  
4 available to outside consultants and attorneys in  
5 almost every case up front because it will be too  
6 difficult to wait until we actually get information  
7 that's being requested in the discovery process to  
8 get all that resolved.

9 CHAIRMAN HALL: Well, and so what I  
10 would imagine happening is working out an agreement  
11 that certain documents can only be seen by the  
12 attorneys and outside consultants, and then each  
13 party would need to designate which of those  
14 documents fit within that protective order and file  
15 a protective order request and then the -- that  
16 designation could be reviewed.

17 And so if all the parties agreed,  
18 99 times out of 100 it's going to be fine for the  
19 Commission. It's -- the problem under the current  
20 structure, from my perspective, as I noted, is that  
21 no one's really watching. I mean, we get a blanket  
22 designations for a whole bunch of information that  
23 really is not confidential in any way, shape or  
24 form.

25 MR. FISCHER: Well, I agree with you

1 that the parties can do a better job in that  
2 regard. I think sometimes what happens, though, in  
3 that -- in those instances, information is  
4 initially considered confidential and then it may  
5 be made public in some SEC filing at some point and  
6 so it is no longer considered confidential, and by  
7 the time we get to the hearing room we can  
8 designate it as public.

9 I understand your frustration with  
10 having the Commission having to ask before it gets  
11 reclassified as public. But I think what our  
12 concern is, is that if we go back to the system  
13 where we have to basically negotiate up front in  
14 almost every case a protective order that does  
15 include some process where highly confidential  
16 information can be kept only from -- or only --  
17 given only to the outside consultants rather than  
18 the employees, directors or officers of a  
19 competitor or somebody that is using the  
20 information in their own business plan or whatever,  
21 that we're basically going to be having to do that  
22 in every case because in almost every case  
23 something like that comes up.

24 And what the current rule does is it  
25 gives us -- we know what the rules are going to be

1 going in and we don't have to worry about it. So  
2 if we have a dispute about the designation, we can  
3 deal with that with the judge, but it's not like we  
4 have to start out negotiating, okay, who's going to  
5 get -- is every case going to have some information  
6 that is only available to the outside consultant  
7 rather than the employees, directors or officers or  
8 other people in those competitors?

9 CHAIRMAN HALL: When's the last time  
10 you had to take a confidentiality or highly  
11 confidential designation to the judge for  
12 resolution? I mean, I remember in cases, in  
13 hearings frequently a commissioner, sometimes me,  
14 asking and then everyone agrees and the judge never  
15 has to make a ruling on it. Everyone just says,  
16 okay, that's fine. I can't remember an instance  
17 ever where the judge was forced to make a -- make a  
18 decision on a contested issue there.

19 MR. FISCHER: I think the one that I  
20 remember where we had a special master designated,  
21 we actually went through several days of process in  
22 front of the special master, Harold Stearley.

23 CHAIRMAN HALL: And what year was  
24 that?

25 MR. FISCHER: That was in the Iatan 1

1 or 2 case, which would have been 2000 -- what was  
2 that, 2010 maybe.

3 CHAIRMAN HALL: Okay. Before that?

4 MR. FISCHER: Well, before that we  
5 had a lot -- a lot of times in discovery disputes  
6 you have questions about whether it should be kept  
7 confidential or whether it's really propriety or  
8 not but --

9 CHAIRMAN HALL: Disputes that went to  
10 the judge for resolution?

11 MR. FISCHER: Occasionally, yeah.  
12 Usually we could work it out.

13 CHAIRMAN HALL: That's my point is  
14 that you -- I think you can work it out under the  
15 current regime and you can work it out under this  
16 potential new regime. I guess I'm still confused  
17 as to why this new regime is going to cause more  
18 conflicts. I think, if anything, what it might do  
19 is reduce the number of documents that are  
20 designated confidential, and if there is a dispute,  
21 it gets framed for the Commission in a way that  
22 allows the Commission or more likely the judge to  
23 make a determination in a reasoned manner.

24 MR. FISCHER: It sounds very good in  
25 theory, Mr. Chairman. I hope that's how it turns

1 out, but I know how much time we spent back in the  
2 old days negotiating about the protective orders.  
3 I'm just concerned that we're maybe going back  
4 there.

5 CHAIRMAN HALL: Are there  
6 improvements to the proposed rule that would  
7 significantly improve it from your perspective? I  
8 understand your overarching concerns with the  
9 amendments, but in terms of specific changes to  
10 improve it?

11 MR. FISCHER: Well, we made a few  
12 comments of a specific nature beginning on page 3  
13 of our comments, but I think it largely goes to the  
14 overarching concern.

15 One of the things that struck me was  
16 the addition of some information that basically  
17 every consultant or every attorney, their overall  
18 bill was going to be always kept public. I don't  
19 know if that was designed to be specifically in a  
20 rate case where you want to make sure that the  
21 public knows what every consultant is being paid  
22 or -- but it struck me that that provision would go  
23 way beyond that. Every consultant, every attorney,  
24 every -- all the information that is in a rate case  
25 that doesn't specifically do with preparation of

1 the rate case might very well now be made public.

2 So that if Burns & McDonnell or  
3 Fischer & Dority are doing work outside of the  
4 context of a rate case, whatever they charge, that  
5 would be public even though that's -- might be  
6 considered proprietary information otherwise.  
7 That's one provision I noticed that I had a concern  
8 about. Seemed to be overly broad.

9 But I think the overriding concern is  
10 how do you keep competitors, officers, employees  
11 and directors from having access to it?

12 The other specific thing that we had  
13 a concern about was, currently if it's things like  
14 board minutes, those are generally reviewed on the  
15 premises, not allowed to be copied and all that,  
16 and some folks would very much not -- they don't  
17 like that and they'd like to have it in their  
18 offices. Of course, once you lose control of it,  
19 you don't get it back usually.

20 CHAIRMAN HALL: Yeah. I was  
21 sympathetic to that concern. I guess my thought  
22 was that that could be included in a protective  
23 order, that provision, but you make a good point  
24 that maybe that should be expressly included in the  
25 rule. So I think that's something that we'll

1 consider for sure.

2 MR. FISCHER: Okay. Other questions?  
3 That's our overriding concern, and just from a  
4 practitioner's standpoint, I'm concerned we are  
5 going to have to negotiate a protective order in  
6 every case.

7 JUDGE WOODRUFF: I have some  
8 questions also. I do remember the days when we  
9 used to issue a standard protective order at the  
10 beginning of every case. And this rule when it was  
11 created, and actually I believe I wrote most of it,  
12 the current rule, the big concern was coming from  
13 the telephone companies.

14 MR. FISCHER: Yeah. Back in those  
15 days I think we really -- we were entering  
16 competitive eras and there were lots of competitors  
17 in every case. The energy industry today -- I'm  
18 sorry I cut you off.

19 JUDGE WOODRUFF: No, no. Please.

20 MR. FISCHER: The energy industry  
21 today is becoming more competitive, and you see --  
22 you see people that are out providing solar panels  
23 and energy strategies intervening in the utilities'  
24 cases. You also see other utilities intervening in  
25 cases, and in the merger and acquisition area, they

1 may be competitors even though they have their own  
2 service territories.

3 So I think that some of the concerns  
4 that were definitely there back when  
5 telecommunications was becoming competitive are  
6 today certainly there in the energy field, and  
7 that's a concern to the energy companies.

8 JUDGE WOODRUFF: The other thing I  
9 recall about the original rule, it has two  
10 categories, proprietary and highly confidential.  
11 As I recall, when we were creating it, the thought  
12 would be that most things would be proprietary.  
13 Only the exceptional things would be highly  
14 confidential. As a matter of practice, basically  
15 everything now is highly confidential.

16 MR. FISCHER: I tend to agree with  
17 you, Judge. I think we've done not a very good job  
18 of only designating highly confidential information  
19 as highly confidential. It's easier just to stamp  
20 it and admit it, and then if somebody has a  
21 question about it, we deal with that later on.

22 But you're right. I think more  
23 things are proprietary. All the financial  
24 information that we exchange should be designated  
25 as proprietary rather than highly confidential.



1 It's the -- well, the specific areas, the  
2 marketing, the customer specific stuff that's  
3 clearly what was designed to be highly  
4 confidential. I don't think the practitioners have  
5 done as good a job trying to make sure that it's  
6 designated as proprietary.

7 From a practical standpoint, it's --  
8 most folks, if they're not employees or directors,  
9 they're not -- they don't need to have highly  
10 confidential stuff at all and they get the  
11 proprietary stuff, but --

12 JUDGE WOODRUFF: If we were to amend  
13 this rule to create a -- continue the two  
14 categories, is there any way we could put something  
15 in the rule that would create an incentive for  
16 people to correctly designate information as  
17 proprietary rather than just making everything  
18 highly confidential?

19 MR. FISCHER: I think I need to think  
20 about that, if there's some incentive there. I  
21 mean, there is incentive to do it right. We always  
22 try to do it right. But, you know, I think the  
23 more -- as I say, the parties have found under the  
24 current rule, they've been pretty good about  
25 dealing with each other and working out any

1 problems that might be there.

2 I'm not sure that codifying something  
3 would help that in some way or not. But I'll think  
4 about that.

5 JUDGE WOODRUFF: If you want to come  
6 back up later, you can.

7 MR. FISCHER: Great. Thanks.

8 JUDGE WOODRUFF: Thank you,  
9 Mr. Fischer. Who wants to go next?

10 Good morning. Tell us who you are.

11 MR. ZUCKER: Good morning. My name  
12 is Rick Zucker, Z-u-c-k-e-r. I am an attorney for  
13 Laclede Gas and MGE.

14 And my first comment was going to be  
15 what problem we are addressing, but the Chairman  
16 has made it very obvious the problem that we're  
17 addressing, and I think he's right. I think that  
18 we have become lax on designating highly  
19 confidential and pro-- and the distinction between  
20 highly confidential and proprietary and highly  
21 confidential itself.

22 And we at Laclede and MGE have  
23 stopped using it as much because it's a burden to  
24 make up the two documents and put in the asterisks  
25 and the lines and make sure it all lines up. But

1 when in doubt, I'll tell you from my perspective I  
2 would designate something HC because it was -- as  
3 the Chairman pointed out, it's a lot less  
4 controversial to call it HC. You get little  
5 pushback. And so if I've designated something HC  
6 that wasn't, not much happens. But if I fail to  
7 designate something HC that was, then I get in some  
8 trouble back home.

9                   So the question is how to get there.  
10 I mean, I think -- let me just say that I don't  
11 object to us having to justify our HC designations  
12 or our proprietary designations. And I guess my  
13 first question would be, did we need to change the  
14 rule to get there or, ironically, would an ex parte  
15 announcement by the Commission that -- of some  
16 dissatisfaction by the Commission create the  
17 discipline necessary for us to look a little --  
18 adhere a little more closely to the current rule?

19                   I support KCPL's comments. Some  
20 specific concerns are the elimination of the  
21 proprietary designation, and that's just for  
22 private business information, information that's  
23 not really highly confidential but needs to not be  
24 public because it hasn't been offered to the public  
25 in the way that the SEC would like.

1                   The other issue Mr. Fischer  
2 mentioned, having other parties come on site to  
3 view certain things and to -- and to view  
4 voluminous documents instead of having to copy them  
5 would be helpful.

6                   And maybe the most objectionable  
7 change is that it looks like we are eliminating the  
8 attorney work product doctrine, which I don't know  
9 if we meant to do that, but under the highly  
10 confidential, we would be designated -- under  
11 No. 5, we would be designating attorney work papers  
12 as highly confidential, which means we would be  
13 handing them over to the attorney on the other side  
14 and the consultants on the other side, and I'm  
15 hoping we didn't mean to do that.

16                   We deleted what used to be 3C that  
17 says that the rule doesn't require the disclosure  
18 of information that would be protected from  
19 disclosure by privilege, rule, or the Missouri  
20 rules of civil procedure, and I would hope to  
21 restore that.

22                   One other comment. We did not -- as  
23 opposed to the ex parte rulemaking, which we're  
24 going to do this afternoon, we did not have a  
25 workshop on these issues, on this highly

1 confidential issue, and that may have been helpful  
2 prior to changing the rule.

3           And I also remember the days where  
4 you would file a case and you would immediately  
5 within 24 hours file for a motion for protective  
6 order, and then it would get negotiated out. And  
7 what happened over time, we were doing this every  
8 single case, and finally Judge Woodruff was  
9 assigned to take the outcome of all of those  
10 negotiations, which had narrowed to a certain  
11 range, and turn it into a rule. And over the past  
12 several years we've saved a lot of time not -- not  
13 filing the motions for protective orders and  
14 working them out.

15           So I think that part of the rule has  
16 worked very well. I congratulate you, Judge  
17 Woodruff, on your efforts there. And I hope that  
18 we can have a system that doesn't require a lot of  
19 extra work.

20           At the same time, I understand that  
21 not adhering to the rule has caused some issues  
22 with the Commission at hearings, and I think that  
23 that maybe can be addressed without having the rule  
24 changed just yet.

25           And I'll wait for any questions you

1 have.

2 CHAIRMAN HALL: I have a few. Good  
3 morning.

4 MR. ZUCKER: Good morning.

5 CHAIRMAN HALL: Let me start with,  
6 there was absolutely no effort or design to require  
7 disclosure of attorney work product. So to the  
8 extent that you believe the current -- the amended  
9 rule does that, we'll have to go back and look at  
10 that to make sure that that's not the case, because  
11 that would, of course, be inappropriate.

12 You said that you have no concerns  
13 with needing to justify proprietary -- a  
14 proprietary designation?

15 MR. ZUCKER: Yes, sir.

16 CHAIRMAN HALL: And I appreciate  
17 that. So if you look at the -- at the amended  
18 rule, the information, the documents, testimony  
19 that previously might have been designated as  
20 proprietary you would merely need to designate as  
21 confidential and indicate that and explain why it's  
22 properly designated as such and that would be the  
23 end of it. And so the system on that would be  
24 identical to the current system, other than you  
25 would need to justify it.

1 MR. ZUCKER: Okay. So you're saying  
2 what used to be in proprietary, it looks like we  
3 picked up trade secrets and put them in  
4 confidential, but financial business information  
5 that has not been made public.

6 CHAIRMAN HALL: You think that would  
7 fall outside of trade secrets?

8 MR. ZUCKER: Yes. These wouldn't be  
9 trade secrets. This is just --

10 CHAIRMAN HALL: Let's look at Section  
11 417.453. Do you by chance have that in front of  
12 you?

13 MR. ZUCKER: I don't.

14 CHAIRMAN HALL: Well, let's look at  
15 that and see what it says.

16 JUDGE WOODRUFF: Mr. Zucker, here's a  
17 copy.

18 MR. ZUCKER: Okay. So I thought it  
19 sounded like the number you were giving was a  
20 statute number. Was it a rule number?

21 CHAIRMAN HALL: No. It's a statute  
22 number. The proposed rule -- I'm sorry. The  
23 proposed rule says trade secrets as defined in  
24 Section 417.453.

25 MR. ZUCKER: Okay. I see it there.

1 CHAIRMAN HALL: And my -- at least my  
2 understanding of the intent here was for that  
3 definition to encompass what you're talking about.

4 MR. ZUCKER: Okay.

5 CHAIRMAN HALL: But I guess we need  
6 to review that statute. Anyone got the statute?

7 MR. ZUCKER: One of these young guys  
8 will have it on the Internet.

9 MR. JOHNSON: I have it pulled up on  
10 my phone actually.

11 MR. ZUCKER: Okay. I think that can  
12 be interpreted to cover that. If that's the  
13 intent, I would just like to make that clear.

14 CHAIRMAN HALL: Okay. Yeah.

15 MR. ZUCKER: That is fine.

16 CHAIRMAN HALL: That was the intent.  
17 And I just pulled it up as well, and I think it  
18 would fit within that definition as well, though we  
19 could certainly look at making that more clear.  
20 And so then -- okay. I guess that's all the  
21 questions I have.

22 JUDGE WOODRUFF: Thank you,  
23 Mr. Zucker.

24 MR. ZUCKER: Thank you.

25 JUDGE WOODRUFF: Who wants to go



1 next? Mr. Opitz.

2 MR. OPITZ: Good morning. For the  
3 record, I'm Tim Opitz and I work for the Office of  
4 Public Counsel.

5 Just briefly, I would say that I  
6 think we are okay with this rule as proposed by the  
7 Commission. For members of Public Counsel to  
8 disclose nonpublic information, it is a crime under  
9 386.480, and so I appreciate efforts to ensure that  
10 there aren't overdesignations of information that  
11 should properly be public because when it's  
12 overdesignated it creates a legal risk for myself  
13 and for members of the Office of Public Counsel to  
14 disclose that.

15 I think the part of this revision  
16 that I appreciate the most is the removal of the  
17 time frame to move to challenge the confidential  
18 designation. Frankly, when we have workloads that  
19 are not just specific to an individual utility, we  
20 have dozens. Some of our experts are working on  
21 all of the cases. And so for us to review and  
22 within that seven-day time period have looked at  
23 every single of the, as was mentioned, thousands of  
24 DRs in a number of cases can be quite burdensome.

25 So my practice is, when I look at

1 documents, I always look at the most confidential  
2 version of it first, and that's how I proceed  
3 throughout the case process. In the weeks leading  
4 up to the hearing and when I'm preparing opening  
5 statements, cross-examination, that's when I will  
6 look at the public information, and if something  
7 jumps out at me as something that is designated or  
8 is missing from that document, that's when I will  
9 look at the confidential designation and seek to  
10 get it redesignated.

11 Now, there is -- in this recent KCPL  
12 case, I did file a motion to redesignate  
13 surveillance reports. The company had agreed to  
14 make them public, but out of an abundance of  
15 caution, because again there was something saying  
16 that they were highly confidential, I'm not going  
17 to go out and say that without something from the  
18 Commission saying that, yes, this is now public.

19 In my experience, the things that I  
20 most attempt to redesignate are surveillance  
21 reports, which are related to the FAC, and those  
22 aren't necessarily going to be impacted -- well,  
23 the designation of those isn't going to be impacted  
24 by this rule here because there's a separate  
25 section, and I don't have it off the top of my head

1 but I can get it, in the electric utility section  
2 of the Commission's rules that designate those as  
3 highly confidential. So that would presumably  
4 still require, if I wanted them to be made public,  
5 a motion or some other way, an agreement among the  
6 parties.

7 I think that that is probably the  
8 number one thing that parties try to redesignate,  
9 as was evidenced in the, I believe it was the  
10 EC-2014 cases related to Noranda and Ameren  
11 Missouri. Ultimately the parties said it was okay  
12 to designate a number of those. There were some  
13 where I believe that were not made public.

14 The other thing that I've tried in  
15 the past to designate as public are the amounts  
16 that attorneys and consultants are paid for their  
17 work in rate cases. This is largely done in the  
18 electric cases, but I have worked on a few water  
19 and sewer cases where we've asked to have the  
20 consultants' fees be made public in those cases.

21 So to the extent that those can be  
22 designated as public, I think that that is  
23 something that the public is very interested in  
24 finding out because they do pay for a lot of these  
25 rate cases to proceed.

1                   So we appreciate the rule, and to the  
 2 extent that it removes the time frame to challenge  
 3 the designation of confidential information, we --  
 4 Public Counsel supports that. So I'm happy to  
 5 answer any questions.

6                   CHAIRMAN HALL: Just a few. Good  
 7 morning. Other than surveillance reports, what was  
 8 the last time you sought to have a document or  
 9 portion of testimony redesignated?

10                  MR. OPITZ: So in this recent KCPL  
 11 case I did ask for the redesignation of the  
 12 surveillance reports and the testimony that  
 13 referenced those. So aside from that, the -- I  
 14 think the most recent case I can recall was Kansas  
 15 City Power & Light's previous rate case,  
 16 ER-2014-0370, and that was related to the  
 17 attorneys' fees in that case, and I believe there  
 18 was a -- it related to the consultants' fees as  
 19 well in that case.

20                  CHAIRMAN HALL: So other than  
 21 surveillance reports, attorneys' fees and  
 22 consultant fees, have you ever sought outside of  
 23 the hearing room to redesignate a confidential or  
 24 proprietary designation?

25                  MR. OPITZ: I can't recall a specific

1 instance, but I know that there are instances  
2 where -- and I -- and I can't speak for the other  
3 attorneys in my office. They may do it more  
4 regularly. But I do believe there have been times  
5 where I have talked with counsel for other parties  
6 and said, you know, is this -- does this need to be  
7 confidential or -- usually it's designated highly  
8 confidential and say, you know, can this be public?

9 But I guess my practice with that is,  
10 if there is such a situation, I try to get  
11 something filed within the case that, you know,  
12 even if there is an e-mail exchange between myself  
13 and the attorney, I really want to make sure that  
14 we are following 386.480.

15 CHAIRMAN HALL: Okay. So other than  
16 surveillance reports, attorneys' fees and  
17 consultants' fees, it doesn't sound like you can  
18 remember in your practice any other specific  
19 examples where you've attempted to redesignate  
20 proprietary or confidential information.

21 MR. OPITZ: None that I have reviewed  
22 and decided this is to such a level where I believe  
23 the public needs to view it. That isn't to say  
24 that I agree with every designation that's out  
25 there.

1                   CHAIRMAN HALL: Well, and that's  
 2 exactly our point. That's exactly our point. In  
 3 some -- some could argue that it's OPC's  
 4 responsibility because they represent the public to  
 5 be the entity that litigates every designation if  
 6 it's improperly so designated, and I think that's a  
 7 completely unrealistic expectation of your office.

8                   That's one of the main reasons why we  
 9 are considering is -- that I'm considering this  
 10 rule change is to take that burden away from your  
 11 office and put it on the party that is seeking that  
 12 designation. Thank you.

13                   MR. OPITZ: Thank you.

14                   JUDGE WOODRUFF: I have just one  
 15 question. You talked about public disclosure of  
 16 consultant and attorney fees in the rate case  
 17 context. Does that apply to also outside the rate  
 18 case situations? That was one of the comments that  
 19 some of the parties had brought in.

20                   MR. OPITZ: I can't recall a  
 21 situation where we have sought that information  
 22 outside of a rate case. I think perhaps that kind  
 23 of goes into the way those costs are recovered  
 24 outside of a rate case, and perhaps I will be  
 25 corrected if I'm wrong, but within a rate case or

1 within a rate case test period it goes into rate  
2 case expense and can be collected from it that way.  
3 If there's no rate case going on or you're outside  
4 of the test period, it might fall under a different  
5 category like legal expense, which there's usually  
6 an amount built into rates to cover that.

7 So that's, I guess, the most likely  
8 reason why we're not looking at that is because  
9 it's not going to be directly recovered as would be  
10 a rate case expense.

11 JUDGE WOODRUFF: Thank you.

12 MR. OPITZ: Thank you.

13 MR. FISCHER: Judge, could I just  
14 jump in?

15 JUDGE WOODRUFF: Sure.

16 MR. FISCHER: I did want to bring to  
17 the Commission's attention a practice that maybe  
18 you're not aware of regarding the designation of  
19 confidential and highly confidential information  
20 that routinely occurs, especially in gas cases,  
21 where, for example, an ACA case, the Staff will  
22 routinely give the companies a preview of their  
23 staff recommendation with the specific request that  
24 we take a look at what would be considered  
25 confidential information as a part of that staff

1 recommendation, and they will give the company the  
2 opportunity to designate information as  
3 confidential and there will be a discussion about  
4 each of those things.

5 That often happens, too, in the  
6 filing, and Staff can confirm this, other Staff  
7 reports that are being filed before the Commission.  
8 Before it ever gets filed, often the Staff will  
9 give the company the opportunity, which is very  
10 much appreciated, the opportunity to review the  
11 information, not for the substance of what's in the  
12 report, but rather whether some of the information  
13 that is being discussed would be considered  
14 confidential or proprietary or highly confidential.

15 That routinely goes on almost -- in  
16 almost every kind of report that's filed.  
17 Certainly in the ACA context, I think almost every  
18 case I've been involved with we do that. So there  
19 is a more -- a broader discussion about  
20 confidential information than what we may be giving  
21 the impression here today.

22 CHAIRMAN HALL: Well, so in what way  
23 would the new rule impede that exact process that  
24 you just described?

25 MR. FISCHER: I'm not sure the new



1 rule would, except that we would still have that  
2 conversation going on, and it would -- rather than  
3 deciding whether it's highly confidential or  
4 proprietary, we'd just be designating it as  
5 confidential. But that -- I would hope that  
6 conversation would still continue, but I wanted to  
7 make sure you understood that there was quite a  
8 discussion going on all the time about some of  
9 these -- some of this stuff. We don't always do  
10 it. We don't always get into disputes about  
11 designations in the context of rate cases. We try  
12 to avoid those and certainly -- but anyway...

13 CHAIRMAN HALL: Thank you. I  
14 appreciate that.

15 JUDGE WOODRUFF: Anyone else wishing  
16 to come forward and make a comment? Mr. Moody.

17 MR. MOODY: Mr. Chairman, Judge.  
18 Chris Moody with the Missouri Cable  
19 Telecommunications Association. We've submitted  
20 written comments to you. Mr. Chairman, you've  
21 already addressed that you'll be looking  
22 potentially at the change to subsection 5. Aside  
23 from that, I thought that I would offer myself up  
24 to answer any questions you may have about our  
25 comments.

1                   CHAIRMAN HALL: I don't think I have  
2 any questions, but I do appreciate you being here  
3 today and I do appreciate your -- the comments you  
4 submitted. Thank you.

5                   MR. MOODY: Thank you very much.

6                   JUDGE WOODRUFF: I just have one  
7 question. It kind of goes back to something I  
8 mentioned earlier, that when we first created these  
9 rules 15 years ago, the telecommunications industry  
10 was highly competitive and had a lot of concerns  
11 about confidential information being passed around  
12 to competitors. Is that still true today at all?

13                   MR. MOODY: I actually believe that  
14 it's probably more competitive than it's been in  
15 the past, speaking from cable's perspective at  
16 least where telecommunications companies such as  
17 CenturyLink and others are competing with cable at  
18 this point, or in this case I suppose the cable's  
19 competing with them because we provide competing  
20 services.

21                   JUDGE WOODRUFF: I guess my -- the  
22 other aspect of that is that so much less  
23 telecommunication issues are coming before the  
24 Commission. Is there still concern about  
25 confidential information being shared with the

1 Commission and with competitors from the  
2 telecommunications industry?

3 MR. MOODY: I believe that we'll let  
4 our comments stand. I don't know that I can answer  
5 that with my limited knowledge right now.

6 JUDGE WOODRUFF: Okay. Just thought  
7 since I had you here, I'd ask the question.

8 MR. MOODY: If any time you would  
9 like to reach out, I'd be happy to talk about it or  
10 try to find more information for you.

11 JUDGE WOODRUFF: Thank you very much.

12 MR. MOODY: Thank you very much.

13 JUDGE WOODRUFF: Anyone else wishing  
14 to come forward?

15 CHAIRMAN HALL: Actually, I'm sorry,  
16 Mr. Moody, could you -- you made a point that I  
17 think was very good, and I want to make sure I  
18 understand it, and then I was actually going to ask  
19 other attorneys for their -- for their thoughts  
20 about it.

21 On page 5 you suggest that while the  
22 motion for a protective order is pending, you would  
23 only need to provide the subject matter and  
24 description of the information about which the  
25 disclosure is directed as opposed to the actual

1 documents themselves, and I think that makes some  
2 sense in some circumstances. I was just wondering  
3 if you could give -- if you could just elaborate a  
4 little bit on why you're suggesting that, and then  
5 I would be interested if any of the attorneys had  
6 responses to it.

7 MR. MOODY: I'll be honest, Judge, I  
8 can't answer the question.

9 CHAIRMAN HALL: Okay. Well, let me  
10 ask any of the attorneys out in the hearing room if  
11 they -- what their thoughts are on that revision to  
12 the amendment, because I think it makes some sense.

13 MR. JOHNSON: Judge -- or excuse me.  
14 Chairman, Mark Johnson with Staff. I agree it does  
15 make some sense. I can see some certain instances  
16 where the subject matter alone may not be enough to  
17 come up with a determination.

18 But in regards to, take the example  
19 provided by MTCA in their comments with the Form  
20 477 information, if it would be information that is  
21 confidential through other law, simply referring to  
22 the type of information and the applicable law I  
23 think would be sufficient to make a determination  
24 on whether or not it deserves more confidential  
25 treatment.

1                   CHAIRMAN HALL: I tend to agree with  
2 that. Any other attorneys wishing --

3                   MR. FISCHER: Mr. Chairman, I may not  
4 totally understand the question, but I think as a  
5 practical matter, the companies would not give up  
6 information even though it was due in 10 days or 20  
7 days if there was a concern about that this was  
8 very sensitive information that should be kept only  
9 to the counsel and their -- and outside experts.  
10 They would -- they would bring that to the  
11 attention of the Commission immediately and in the  
12 meantime withhold providing that data until they  
13 were ordered to do so. So I think as a practical  
14 matter, that's how it would work.

15                  CHAIRMAN HALL: Well, but that would  
16 be -- that would not be consistent with the rule.  
17 So I mean, there's some documents that a party by  
18 federal law can't disclose, and so if that document  
19 is requested by another party, under the current  
20 rule and under the proposed rule as drafted, that  
21 document would need to be provided to the -- to  
22 opposing counsel.

23                         And so what we're looking at here is,  
24 instead of that document having to be disclosed, it  
25 would only be necessary to provide what the subject

1 matter of that document is and why it should be  
2 protected. And I can see in some circumstances why  
3 that would be necessary.

4 MR. FISCHER: Yeah, that would be  
5 probably similar to what happens whenever we claim  
6 a legal privilege and we -- we give a description  
7 of the document but not the document itself. I did  
8 not interpret the new rule to say we would need to  
9 give it to counsel while we were disputing this in  
10 front of the Commission. I think that will be a  
11 problem.

12 CHAIRMAN HALL: Yeah. And that's  
13 what -- I think the current rule would require you  
14 to provide that document to opposing counsel, and I  
15 think the proposed rule as drafted would do the  
16 same. So I think that this amendment -- excuse me,  
17 this revision to the amended rule makes a lot of  
18 sense. Now, I think we need to make it clear that  
19 it's not the case for all documents, but if -- I  
20 think we do need to make it clear that it is a  
21 protection to be provided for some documents.

22 Now, I really want the rule to  
23 provide the framework for this process as opposed  
24 to just whatever the good practice is that's been  
25 worked -- that's been in place. So any other

1 counsel?

2 MR. ZUCKER: Yes, Chairman. Rick  
3 Zucker with Laclede Gas and MGE. Today we call  
4 what's called in the new rule confidential, today  
5 we call it highly confidential, and highly  
6 confidential information goes to the opposing  
7 attorney or the requesting attorney and their  
8 outside expert. So to the extent that that's what  
9 4A is meant to do, then that's not a problem.

10 If this is some information that's at  
11 a higher level than what we today call highly  
12 confidential, I think that the person who is  
13 asking, who has filed the motion may also ask in  
14 the motion that they not be required to turn over  
15 the information but just describe it. I guess it  
16 would be their option. If they didn't ask for  
17 that, then they'd turn over the information. If  
18 they did, they would have to put that in their  
19 motion.

20 CHAIRMAN HALL: Okay. That makes  
21 sense. Thank you.

22 MR. OPITZ: I would just say that to  
23 the extent that the information is detailed,  
24 provided it's detailed enough to enable parties to  
25 challenge the protective order, I think that would

1 at a minimum be necessary. I don't foresee a  
2 situation where Public Counsel would challenge  
3 something that was designated so by the Missouri  
4 Cable Television Association to that matter. But  
5 there was a recent case where a protective order  
6 was granted where, I believe it was related to a  
7 merger between ITC and Fortis, transmission lines,  
8 where as a part of their application they included  
9 a redacted, blacked-out version of a contract that  
10 they attached to their application, and they filed  
11 a protective motion concurrently with their  
12 application. And when that was granted, they then  
13 filed that attachment I believe as highly  
14 confidential. So it was only then that I was able  
15 to see it.

16 Now, in that case it wasn't an issue  
17 for me there, but, you know, I think to the extent  
18 that when there are areas where there is not going  
19 to be information provided to counsel or to, I  
20 guess, experts working for the Office of Public  
21 Counsel, I think that we need to make sure that  
22 there is a level of detail provided that is --  
23 doesn't necessarily have to be everything but  
24 sufficient to allow us to challenge those  
25 designations for protective orders prior to them



1 being issued. Thank you.

2 CHAIRMAN HALL: Thank you.

3 JUDGE WOODRUFF: All right. Anyone  
4 else -- before I go to Staff, anyone else wishing  
5 to make a comment? All right. We'll go to Staff.

6 MR. JOHNSON: I'm Mark Johnson  
7 appearing on behalf of Staff. I have with me today  
8 Natelle Dietrich, our Staff Director.

9 I'd just like to say, in general  
10 terms Staff's not opposed to a simplification of  
11 the confidentiality rules. We understand that the  
12 interests of Staff are not necessarily similar to  
13 the other parties in a rate case, utility and third  
14 parties. Just as OPC, we have a statutory  
15 requirement to keep all confidential information  
16 secret, and we try to do so as adherently as  
17 possible.

18 In regards to Mr. Fischer's  
19 discussion about disclosing or running by copies of  
20 the report prior to filing in a case, we do do  
21 that, not necessarily always providing a copy or a  
22 full version of the report, but generally Staff  
23 does communicate regularly with the utility, not  
24 just to ensure that the information we are  
25 providing in our filing is correctly designated HC,

1 but sometimes our Staff members, being familiar  
2 with the types of information that's typically  
3 designated HC, will see information in their  
4 responses or filings and will check with the  
5 companies generally to ensure there was no mistake  
6 made.

7           Otherwise, Staff did not file any  
8 comments in this filing, and I have no other  
9 prepared comments today, other than I would like to  
10 bring to your attention one statute that appears to  
11 direct the Commission to designate certain  
12 information as proprietary.

13           I will say first, I don't necessarily  
14 find it to be a conflict with the proposed changes,  
15 but just to head off any confusion potentially in  
16 the future, I would like to bring it to your  
17 attention. It is Section 392.550. It pertains to  
18 interconnected voice over Internet protocol service  
19 providers. The information that would be  
20 designated as proprietary would be the number of  
21 customer lines served in each exchange. My  
22 understanding is this information is currently  
23 provided in annual reports by the service providers  
24 and, as such, those reports are designated as  
25 proprietary.

1                   The statute states the information  
 2 shall be designated as proprietary and not  
 3 available to the public. I believe just the common  
 4 definition of proprietary business information  
 5 would be covered by the definition of trade secrets  
 6 under 417.453. And additionally, since the new  
 7 listing of confidential in the proposed rule would  
 8 essentially keep the information from becoming  
 9 public, it wouldn't necessarily be a problem.

10                   As I said, just to head off any  
 11 potential confusions, I would like to bring that to  
 12 the Commission's attention. And I do have copies  
 13 of that statute if you'd like to see it.

14                   CHAIRMAN HALL: Sure.

15                   MR. JOHNSON: The specific provision  
 16 will be on the second page. It is highlighted.

17                   JUDGE WOODRUFF: Anything else?

18                   MR. JOHNSON: No. Otherwise, I'd be  
 19 happy to answer any questions you may have.

20                   JUDGE WOODRUFF: Any questions?

21                   CHAIRMAN HALL: Yeah, just a few. In  
 22 your practice with Staff, have you ever sought to  
 23 redesignate a confidential, a highly confidential  
 24 or proprietary designation?

25                   MR. JOHNSON: I have never asked for

1 a redesignation. To my knowledge, very rarely has  
2 Staff done so in the past.

3 CHAIRMAN HALL: That's my  
4 understanding as well. Second, the process that  
5 both you and Mr. Fischer described of Staff sharing  
6 reports with the utility and seeking utility input  
7 on whether portions of it should be designated  
8 confidential or not, I think that's an important  
9 process. I want to make sure that the proposed  
10 rule does not impede that process.

11 Is there anything in the proposed  
12 rule that would make that process more difficult?  
13 Is there anything in the proposed rule that should  
14 be modified so as to further facilitate that  
15 process?

16 MR. JOHNSON: I don't think anything  
17 in the proposal would limit it, and my experience,  
18 it's generally been a fairly informal process.  
19 Staff's -- Staff wants to ensure that we are not  
20 violating the law by disclosing HC information.

21 And generally, in my experience, what  
22 will happen is I will get an inquiry from a Staff  
23 member or I may see something through my review and  
24 then I will contact counsel for the utility and  
25 just ensure that we have designated the information

1 properly.

2 CHAIRMAN HALL: I have no further  
3 questions. Thank you.

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

6 COMMISSIONER COLEMAN: No.

7 JUDGE WOODRUFF: Thank you.

8 MR. JOHNSON: Thank you.

9 JUDGE WOODRUFF: I believe that's  
10 everyone that wished to make a comment. Anything  
11 anybody else wants to bring up at this point? All  
12 right. Then we are adjourned.

13 (WHEREUPON, the hearing concluded at  
14 10:03 a.m.)

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C E R T I F I C A T E

STATE OF MISSOURI     )  
  ) ss.  
COUNTY OF COLE         )

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

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



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

**RULEMAKING HEARING VOLUME 1 2/16/2017**

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