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STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION

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TRANSCRIPT OF PROCEEDINGS

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Jefferson City, Missouri

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11 Pertaining to the Ethics         )  
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12 Service Commission                )

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

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18 REPORTED BY:

19 Pamela Fick, RMR, RPR, MO CCR #447  
Midwest Litigation Services

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

2 JUDGE WOODRUFF: All right. Good  
3 afternoon, everyone, and welcome to the proceeding  
4 this afternoon. My name is Morris Woodruff. I'm one  
5 of the regulatory law judges for the Commission, but  
6 I'm not really going to be doing much today. I'm  
7 just here to introduce our consultant -- our  
8 consultant hired by the Commission from -- from  
9 Hinshaw & Culbertson, Mr. Michael Downey. And I'm  
10 going to turn this over to him in a moment.

11 This is a little bit of an unusual  
12 procedure. This isn't a -- any sort of a formal  
13 hearing for the Commission. I'm not going to ask you  
14 to give entries of appearance and I'm not going to  
15 swear in witnesses and so forth. It's more a chance  
16 for the Commission to gather information about  
17 this -- about the subject.

18 I do -- we are going to have it  
19 transcribed and -- and we are webcasting this, so the  
20 only thing I think I'd ask is if you want to speak  
21 and respond to questions and so forth, if you'd come  
22 up to a microphone. And with that, I'll turn it over  
23 to Mr. Downey.

24 MR. DOWNEY: Well, thank you. It's  
25 always nice when you hold a meeting like this to

1 actually have people show up, so we appreciate  
2 everyone being here, and we know it's a very  
3 important subject.

4                   A little bit about myself. As  
5 mentioned, I'm with the law firm of Hinshaw &  
6 Culbertson. I'm an ethics lawyer. I spend about  
7 80 percent of my time doing professional ethics for  
8 lawyers and accountants. And one of the obvious  
9 situations that creates is that I'm not someone who's  
10 practiced before the Public Service Commission, I'm  
11 not someone who knows how the Commission operates.

12                   And so what we thought we would do is to  
13 have this meeting today to give all of you an  
14 opportunity to sort of give us initial guidance. We  
15 are in the process now of drafting the rules, and  
16 we'll talk about that in a second, but we thought  
17 rather than prepare something that then everyone in  
18 the community says this simply won't work for very  
19 obvious reasons and if you knew anything, you would  
20 have known that, we thought we'd actually give you an  
21 opportunity to speak at the outset.

22                   I'm joined today by Thad Hollie. Thad  
23 is with the law firm of Montgomery, Hollie, Austin in  
24 St. Louis, and Thad is working with us on this  
25 project. Thad has also -- Thad is -- is a little

1 more regulatory lawyer, although it's been some time  
2 since he's done this work, and he's at least trying  
3 to provide some of the perspective of a practitioner  
4 who has practiced before the Public Service  
5 Commission. So that is kind of where we are.

6                   What I'd thought I'd do today is give a  
7 very quick overview and then sort of run through some  
8 of the major issues that we've identified. If you've  
9 received the notice, you will notice on the notice --  
10 and I should mention since we're being webcast, if  
11 you -- you can pick up the notice also through the  
12 EFIS system.

13                   The notice has a listing where I sort of  
14 listed topics I expected to cover today, and some of  
15 those have been moved a little bit, but it's  
16 basically divided into three major segments, those  
17 rules where we know we should be engaging in at least  
18 significant consideration of rulemaking, those where  
19 we think rulemaking may be appropriate and some areas  
20 where, frankly, because there's relatively  
21 comprehensive rules in place or it's issues that  
22 don't seem to be of particular importance, we don't  
23 think we necessarily need to address.

24                   Now, those categories and the work that  
25 was done for today were not my attempts to influence

1 the process. Rather, it was my attempt to share with  
2 all of you where we think we're going. So one of the  
3 reasons that we're having this meeting today is for  
4 all of you to tell me it's appropriate. If there's  
5 an area that you don't think we're going to handle  
6 but we really do need to handle or there's an area  
7 that you think deserves a consideration where,  
8 frankly, it probably doesn't require consideration.  
9 So that's one of the things we'd like to do today to  
10 help you sort of organize what we're focusing on.

11 Now, if we want to go ahead and slide  
12 the first slide, I just want to kind of give you a  
13 very brief overview of what we have done and where we  
14 are. The project was -- was in response to requests  
15 for proposal and had three stages.

16 The first stage which has been at least  
17 tentatively completed was to prepare a comparative  
18 state ethics compendium. If you were to go to the  
19 EFIS system for this -- this docket which, by the  
20 way, is accessible from the front page of the Public  
21 Service Commission's web site, you will find there  
22 the ethics docket. And if you click into that,  
23 you'll find that there is a -- there's a -- an Excel  
24 spreadsheet on that database.

25 The Excel spreadsheet is used to gather

1 rules in about 30 to 33 -- there's -- actually,  
2 there's 33 categories right now. And those are  
3 divided up where we have gone through all of the  
4 state jurisdictions, some of the federal law, not all  
5 of it but some of it, and tried to gather how  
6 different states deal with different issues.

7                   And part of the thinking there is that  
8 we can use their experience and their hopeful, wise  
9 guidance to help us figure out what we need to do  
10 with the rules for Missouri, and in particular today,  
11 I'll talk about the ex parte rules.

12                   And we've determined there seem to be  
13 three different sort of refinements on what Missouri  
14 has done that we think may be able to help guide us  
15 here, but part of what we're doing today, again,  
16 is -- is to have you say will this work, will this  
17 not work. So that compendium is available.

18                   I mentioned we're sort of at the  
19 tentative stages right now. The reason I state that  
20 is I know I've done some additional formatting work  
21 and actually moved some things around. As we're  
22 finding new sections, we're adding those to them as  
23 well.

24                   There will probably be a supplemental  
25 filing in a week or so, and I wouldn't even say

1   that's the end.  If you're working with it, you find  
2   problems, you find changes that need to be made,  
3   please feel free to let us know and we'll try to  
4   continue that also if the document seems to be  
5   helpful to the process.

6                   The next stage which is the stage we're  
7   in now is -- is an attempt to actually draft rules.  
8   And the first part of that, as mentioned earlier or  
9   as -- as mentioned today, was to actually try to meet  
10  with interested parties.  And we thought rather than  
11  wait until later in the process, we'd have a  
12  predrafting meeting.

13                  That having been said, we've done some  
14  very preliminary work to try to come up with sort of  
15  a framework, but hopefully what will happen today  
16  will really provide us with guidance for where we're  
17  going to devote our time and attention over the next  
18  few months because the goal is to have a -- to have  
19  meetings with interested parties the late part of  
20  May, early part of June, actually discussing a draft  
21  of rules that should be completed on May 15th.  So  
22  May 15th we'll produce a tentative draft of rules.

23                  We'll then meet with interested parties,  
24  we'll make them available for public comment, for  
25  written comment and then try to work from that

1 process toward a final set of rules that will be  
2 submitted to the -- submitted to the Commission -- or  
3 actually submitted to the Missouri Register in July,  
4 and then submitted to the Commission hopefully the  
5 final rule on August 7th. So basically, that's sort  
6 of the format that things should follow, again, with  
7 hopefully input from people along the way.

8                   And as I'm looking at this, I suspect  
9 what's sort of missing and needs to be in here, I --  
10 my understanding is that we will prepare a draft that  
11 the Commission ultimately will sign off on, and I  
12 don't see that on the schedule, but my anticipation  
13 would be that that will be somewhere around that  
14 June/July deadline as well. So -- so let people know  
15 that's -- that's how I understand the process as  
16 working.

17                   I will also say that there's a response  
18 to request for proposal that was initially what we  
19 thought we would be doing, and if you were to compare  
20 that with this, you'll find that there is significant  
21 correlation but it's a rough correlation.

22                   As we have worked with the Commission,  
23 as we've started to get input, we've made some  
24 changes in the process, and I anticipate that may  
25 happen as we go forward as well.



1                   So the last section which would be after  
2   the final rules are actually adopted would be to  
3   prepare training materials and actually do training  
4   we anticipate for the Commission and staff. We're  
5   not exactly sure even who will be trained, but that  
6   is certainly one of the things we're looking at.  
7   That's one of the things we're hoping we can get some  
8   input as we go through this process is, do we need to  
9   include public training, do we need to include  
10  regulatory law judges in the training, information  
11  like that. So that's sort of the breakdown of where  
12  we're going.

13                  Now, what I thought we would do today is  
14  to sort of guide things a little bit instead of just  
15  having a free-for-all, was I'm going to run through a  
16  couple of areas where we know there's some  
17  regulation.

18                  For the first section, I have a little  
19  bit more detail than other sections, but I'm going to  
20  talk about some of the models we've seen and really  
21  just try to get the input -- feedback from you. So  
22  my thinking is we'll talk about a section and then  
23  get feedback if there's feedback on that section.

24                  We'll then move on to another section,  
25  and at the very end of this process, I'll then open

1 up for any other comments that people want to make or  
2 people want to revisit a section that we've dealt  
3 with earlier. So again, if you have comments, please  
4 feel free to make them.

5           The first section, if we can go ahead  
6 and slide forward, is dealing with the -- with those  
7 rules that we anticipate will receive substantial  
8 revision. And the first of these -- you can go ahead  
9 and slide again. I'm moving here pretty quickly  
10 through this -- is dealing with ex parte  
11 communications.

12           And this is the great question of, from  
13 what sources should Commissioners primarily, although  
14 perhaps also regulatory law judges, receive  
15 information, when should they be permitted to receive  
16 information without all parties to a proceeding  
17 knowing that they're receiving that information, and  
18 when should the receipt of that information result in  
19 recusal or disqualification or some other procedure,  
20 perhaps a notice procedure?

21           And I think in many ways, we sort of  
22 realized that that was the key issue that -- that the  
23 regulated community and that the Commission is really  
24 looking for guidance on. And so our hope is to -- to  
25 really focus on this.

1           In order to do that, I -- I introduced a  
2 couple models, and the first one is, should it be  
3 determined by type of proceeding. And I'm loosely  
4 calling this the California model, and, in fact, I  
5 have some slides on the California model. Go ahead.

6           Just to kind of give you a sense, you'll  
7 see that the California model does state that it  
8 applies to staff of record. You can keep going. But  
9 the biggest thing that it does is it talks about the  
10 formal proceedings, what are the ex parte  
11 communications, includes oral and written  
12 communications. And if we can go to the next slide,  
13 this is what I really want to focus on.

14           It talks about different types of  
15 proceedings. And if we're going to use this  
16 approach, obviously we need input from you as to  
17 which types of proceedings or what proceedings need  
18 to fit in the different categories.

19           You'll see there that there's -- the  
20 California system talks about quasi-legislative  
21 proceedings and says, "Our ex parte communications  
22 are allowed without restriction or reporting." What  
23 this means is that a Commissioner can receive  
24 communications from the public, from the regulated  
25 entities, from the staff, from anyone without any

1 sort of real safeguards.

2                   And the thinking is, in this role,  
3 they're really serving more like a legislator. And  
4 as you could call up your senator or your  
5 representative and say, hey, I really like this bill  
6 and I want you to do the following, the same types of  
7 things are expected to apply here. In adjudicative  
8 proceedings or adjudicatory proceedings as they say  
9 now, ex parte communications are, in fact,  
10 prohibited.

11                   And so you can see there California  
12 says, well, we're going to distinguish between these  
13 types of proceedings. And then in rate --  
14 rate-setting proceedings, ex parte communications are  
15 subject to reporting requirements but are otherwise  
16 permitted. And you'll actually see there's some that  
17 are not allowed, but generally they say you can have  
18 the communication as long as there's disclosure of  
19 that communication.

20                   Now, I'm not saying we're necessarily  
21 going to use this model. This is one of the three  
22 models we've seen, but it starts to ask the question  
23 of, okay, if we're going to use this model, how do we  
24 break down activities of the Public Service  
25 Commission and how do we drop them in categories

1 where we say this is a category where ex parte  
2 communications are okay; this other type of  
3 communication -- or this other type of proceeding is  
4 one where we either don't want to allow them or allow  
5 them only if there's notice to all involved parties.  
6 So that's sort of the rough framework there.

7                   We'll move on now. And actually, I just  
8 want to mention this as something else that -- and I  
9 dropped it because California has a provision.  
10 You'll notice that there's kind of an interesting  
11 provision under California law, and this is Rule 8.5  
12 in California for the state's commission -- utility  
13 commission. It says that the Commissioners' personal  
14 advisors are subject to all the restrictions except  
15 in certain circumstances. It's kind of a goofy  
16 situation.

17                   I frankly was surprised to see this, but  
18 it's sort of a reminder to everyone that as we're  
19 talking about this, we're not only talking about what  
20 can the public do or what can the regulated entities  
21 do, but we're also talking about what the staff can  
22 do, and in particular, at least in California, what  
23 the personal staff can do.

24                   So as we're -- and it may be an answer  
25 of really saying in Missouri, well, we're not worried



1 is sort of an interesting model, in some ways has  
2 elements of the other two, but it's actually a -- the  
3 big difference here with New Hampshire is New  
4 Hampshire has a trigger that in most proceedings  
5 communications are deemed to be permitted unless one  
6 of these trigger events happens.

7                   And if you'll slide to the next slide.  
8 What you'll see there is that whenever the Commission  
9 conducts an adjudicative proceeding, "the Commission  
10 shall designate members if an interested party  
11 participates." And you'll see I've referenced at the  
12 bottom, "Commissioners and intervenors also can  
13 designate this."

14                   But my understanding of the New  
15 Hampshire system is basically you can have any  
16 communications you want to, but if a party believes  
17 these ex parte communications may prejudice their  
18 interests and they're involved in the proceeding, or  
19 if the Commission itself deems appropriate, they can  
20 at that time say with regard to this particular  
21 proceeding, these staff are not going to be allowed  
22 to have ex parte communications with other people at  
23 the Commission.

24                   Now, one of the things that I at least  
25 have been told is, that with regard to the Missouri

1 Public Service Commission, there are certain people  
2 on staff that if we said we're going to totally  
3 bifurcate the Commission, we're going to have those  
4 people that can communicate with Commissioners  
5 without restriction and we're going to have those  
6 people that are subject to ex parte rules, that there  
7 are -- there are people that really would need to be  
8 on both sides of that bifurcation because there are  
9 technical experts and they have basically unique  
10 expertise for the Missouri Public Service Commission,  
11 we couldn't really bifurcate them.

12                   And that's why I thought perhaps  
13 something like the New Hampshire model may be an  
14 appropriate model to proceed with because it would  
15 allow for particular proceedings for the  
16 Commissioners or for someone else to make a  
17 determination.

18                   We need that technical expert to be  
19 someone that can serve in an adjudicative or an  
20 advocacy position, and therefore for that particular  
21 proceeding as well as perhaps for factually related  
22 or the same or substantially related, or however we  
23 term that for related proceedings, we would not  
24 permit them to have ex parte communications. And you  
25 could see that may be a possible solution here.



1                   That having been said, this is the last  
2   slide I had sort of on this issue. I invite initial  
3   comments or thoughts from all of you as to do you  
4   have a sense of things, do you think there are  
5   particular proceedings? I know we received Ameren's  
6   written comments which I think has said what a lot of  
7   people have said is, we'd like to have communication  
8   when appropriate, but we don't want communication  
9   when it's inappropriate. And what we're trying to do  
10  is figure out where do we draw that line.

11                   So I open it up if people have comments  
12  at the outset or we can move on to the next thing.

13                   (NO RESPONSE.)

14                   MR. DOWNEY: You're all completely  
15  overwhelmed.

16                   MR. MILLS: Just a quick question. In  
17  terms of New Hampshire, how do -- how does a party  
18  know whether or not ex parte communications have been  
19  going on and whether or not they may be prejudicial  
20  to actually trip a trigger?

21                   MR. DOWNEY: It's -- well, it's not if  
22  the communications themselves are prejudicial, it's  
23  basically a -- it's the proceeding itself. And if  
24  you look, there's certain types of proceedings that  
25  trigger these, that trigger the ability to designate.

1 Once you designate -- and I actually deleted it from  
2 this -- there is a -- a requirement they log who all  
3 are on which side of the -- of the rule and which  
4 proceedings are being handled.

5                   So what -- what you basically do is you  
6 say, okay, we have an adjudicative proceeding and  
7 either the Commissioners declare we want to -- we  
8 want a designation or a party requests designation.  
9 And then they say, okay, the following people are  
10 designated as advocacy staff for this matter, and  
11 then there's a list that's supposed to be kept up  
12 that would notify them.

13                   And I would imagine if we went with this  
14 system, we would set up something where we'd say in  
15 this particular location is a list of which parties  
16 are -- you know, are designated as advocacy staff for  
17 particular proceedings. Yes. I forgot -- I'll try  
18 to go ahead and repeat counsel's questions as well,  
19 so go ahead.

20                   JUDGE WOODRUFF: Mr. Woodsmall, if you'd  
21 just identify yourself for the -- for the court --  
22 benefit of the court reporter.

23                   MR. WOODSMALL: David Woodsmall. On the  
24 New Hampshire statute, it appears to me -- I'm a  
25 little confused. Does that just apply to the staff?

1 Is there a ban against communication with the  
2 Commission at all times? It just appears that the  
3 statute is focused on the staff, not the Commission.

4 MR. DOWNEY: Good point, and I  
5 actually -- I should clarify. It seems the general  
6 sense of things is that in adjudicative proceedings,  
7 ex parte communications with anyone should be  
8 severely limited. And in legislative or rulemaking  
9 proceedings, they should generally be permitted.  
10 It's sort of the rough things you start with.

11 And -- and what has happened in  
12 particular with the Missouri Public Service  
13 Commission, and I think at least how I saw New  
14 Hampshire being an issue is, there's the additional  
15 problem of even when you move to an adjudicative  
16 matter, what do you do with the staff. And the  
17 answer for them is there is a general prohibition  
18 regarding communications, for example, of a regulated  
19 entity with a Commissioner in an adjudicative  
20 proceeding. But this is basically to provide a  
21 special how do we handle the staff in those  
22 circumstances.

23 MR. WOODSMALL: Have you seen in your  
24 research how an adjudicative case is determined? In  
25 Missouri it's based on whether a hearing is set. Are

1 most states like that when the hearing's set or is  
2 there some other trigger?

3 MR. DOWNEY: I suspect actually as we  
4 talk about triggers in Missouri, we may need to kind  
5 of figure out exactly what that trigger should be  
6 because I think -- you know, it's interesting, we're  
7 here today and we have a regulatory law judge  
8 presiding over this meeting. One of the things  
9 that -- is that my understanding from talking to  
10 people about Missouri is that there's a concern right  
11 now because we like to put things on EFIS, and if you  
12 put things on EFIS -- EFIS, you really need to open  
13 something, and sometimes it's kind of hard to figure  
14 out what you've opened.

15 And so it may be -- I think one of the  
16 things we probably need to do is determine when do we  
17 do something in an adjudicative proceeding. There  
18 are a number of things. The basic sense of things is  
19 that if a decision is directed toward particular  
20 facts and is directed toward impacting a particular  
21 party, that should be deemed an adjudicative  
22 proceeding. If something is anticipated to have  
23 broader future impact, it's generally perceived to be  
24 rulemaking.

25 Now, the problem, of course, that

1 happens is you have circumstances where you have a  
2 party that is doing something where their conduct is  
3 really unique. And, you know, when you -- a good  
4 example of this, I know it's been in the news with  
5 this particular thing, it is talking about building a  
6 nuclear reactor in Missouri. There aren't -- there  
7 aren't 20 parties trying to do that. If we were --  
8 if the Commission were to try to come up with  
9 rulemaking dealing with that issue, it would probably  
10 be done as a rulemaking proceeding but it may, in  
11 fact, have a single impact.

12               The other thing that sometimes happens,  
13 and this creates problems in other regulatory law  
14 settings, is that you will have a adjudicative  
15 hearing where the -- the Commission, the body, will  
16 adopt a rule that then they expect to govern everyone  
17 going forward. The National Labor Relations Board at  
18 one point was sort of famous for never doing  
19 rulemaking, they only did adjudications, and this was  
20 a circumstance where they would sometimes do that.

21               So you have to kind of be careful trying  
22 to distinguish them, although I do think you're  
23 probably right because you want to say where we have  
24 contested parties, where we have factual record,  
25 we're having determinations of someone. And in fact,

1 in Missouri, the test is if we have a hearing, then  
2 we would want to say that would be an adjudicative  
3 proceeding, it would be subject to generally a  
4 prohibition against ex parte communications.

5 And then the added wrinkle as I talk  
6 about it, okay, if we have a general prohibition,  
7 what do we do with staff? How is that for a nice  
8 long answer?

9 And let me say the reasons this becomes  
10 a particular issue is if you go to the court systems,  
11 you there have a judge who -- you know, if you're a  
12 circuit court judge in Missouri or a district court  
13 judge in the federal courts, you handle absolutely  
14 everything. And the idea there is that the -- that  
15 the judge is not a person who's supposed to have a  
16 particular expertise.

17 The reason that regulatory judges exist  
18 and regulatory proceed -- adjudicative proceedings  
19 exist is there's a belief that there's a desire to  
20 have an expert, that we don't want to have ratemaking  
21 proceedings go on before a circuit judge or a federal  
22 district court judge, we want to have someone who  
23 really knows what's going on. And the tough thing is  
24 that you want to be able to have them draw upon their  
25 personal expertise and perhaps the expertise of some

1 sort of supporting body with also having the balance  
2 that you want to make sure that the parties are being  
3 treated fairly, that they're not just simply saying,  
4 okay, you're in front of us but let's go talk to our  
5 staff and our staff will make the decision and it  
6 doesn't really matter what you file. So there's a  
7 desire to try to balance those two things.

8 I like causing problems here. Does that  
9 fully answer your question?

10 MR. WOODSMALL: I -- it gets to it,  
11 yeah.

12 MR. DOWNEY: Okay. Go ahead. Please  
13 identify yourself.

14 MR. BYRNE: I'm Tom Byrne from Ameren.  
15 And, you know, we did file one sheet with --

16 MR. DOWNEY: Yeah.

17 MR. BYRNE: -- with an outline of some  
18 points that hopefully you'll take into consideration  
19 when you start drafting the rules. But I -- but, you  
20 know, what you were just talking about I think is  
21 pretty important.

22 You know, the Commission is expected to  
23 have a degree of expertise and a degree of awareness  
24 of what's going on in the utility industry, and I  
25 think -- you know, the problem we're facing right now

1 is I don't think the way contact is going with the  
2 Commission -- I mean, basically, it's -- at this  
3 point until the rules are clarified and perhaps  
4 understandably, they are very reluctant to talk to  
5 anybody about anything.

6                   And I think that's a problem because --  
7 because in order for them to have the expertise, in  
8 order for them to know what's going on, in order for  
9 them to have input from various stakeholders, not  
10 just utilities but their own staff, the Office of  
11 Public Counsel, other people with positions, you  
12 know, they -- they really need to have access to that  
13 information.

14                   So to my mind that's every bit as  
15 important as figuring out where they're prohibited  
16 from -- from getting information is setting up some  
17 rules so that they feel comfortable that they know  
18 when they're safe and they -- then -- then they know  
19 when it is fair to get information. And I -- and I  
20 think it's pretty important in order to make sure  
21 they have the expertise that they're expected to have  
22 that there are vehicles for them to talk to  
23 utilities, Public Counsel, the staff, people --  
24 people that give them points of view or give them  
25 pieces of information that are -- are useful to them



1 in carrying out their duties.

2 I mean, obviously, we've got a contested  
3 case, you've got to -- you've got to import some of  
4 those prohibitions, but hopefully those would be the  
5 exception rather than the rule and wouldn't --  
6 wouldn't prohibit them from gaining the knowledge and  
7 the expertise they need to do their jobs.

8 And the other thing I -- point I wanted  
9 to make is there is -- you know, there is a statute  
10 in Missouri that does address some of these issues,  
11 and that's probably worth taking a look at as we go  
12 forward.

13 MR. DOWNEY: Yes. And in fact, you'll  
14 notice as we -- there are some sections actually  
15 where I'll have the Missouri statutes up, we've  
16 included that as well. And part of what we  
17 understand our role is, is to work within the bounds  
18 of the statutes where we may have to be in  
19 circumstances where we go back and say to really make  
20 this system work, we need to recommend changes be  
21 made.

22 So realize that we expect to be bound by  
23 the system as it is, but at the same time, there's at  
24 least a thought of if the system as it is needs to be  
25 improved and if those changes need to be made at a

1 legislative level or some other level, that is  
2 certainly something that we should at least be able  
3 to present and say, you know, if we can get  
4 legislative changes, this is the way to go if we  
5 can't let's live with it and work within the system  
6 with perhaps other changes.

7                   And no -- I mean, I think I -- I also  
8 just want to make clear, when people said, you know,  
9 what is your goal here, I always say we want to come  
10 up with a simple, workable rule that people can look  
11 at and say, okay, now I'm okay, now I'm not okay or  
12 now I'm okay if I report or now I'm okay if I give  
13 notice to somebody or whatever it is so that then  
14 there can be some sort of pathway. And  
15 alternatively, people also say, I'm sorry, I can't  
16 talk to you, you know.

17                   MR. BYRNE: And I think right now  
18 everybody is frozen because of -- because of the  
19 uncertainty.

20                   MR. DOWNEY: Yes. This area is an area  
21 where Missouri has some guidance. You'll see later  
22 we'll talk about some areas where the prohibitions  
23 really just seem to be across the board. You know,  
24 under absolutely no circumstances can you receive  
25 gifts. We may say, well, that's fine, you know, but

1 if somebody speaks, can we give them a five-dollar,  
2 you know, baseball cap? And the answer under --  
3 under the Missouri law it appears right now is no.  
4 That may be a place where we say, you know, sometimes  
5 these rules are not appropriate. But it's at least a  
6 consideration of -- you know, sort of where we're  
7 going to draw those balances. Yes.

8 MR. BOUDREAU: I want to --

9 MR. DOWNEY: Can you -- could you  
10 announce who you are, please?

11 MR. BOUDREAU: Oh, Paul Boudreau. The  
12 topic that we're talking about actually kind of flips  
13 between two different topics. I mean, the one is  
14 ex parte communications, but we're also talking about  
15 the proper role of the staff --

16 MR. DOWNEY: Yes.

17 MR. BOUDREAU: -- in these and that I  
18 think you'll find some pretty clear guidance in the  
19 statutes as well. I mean, this is -- this is a topic  
20 that has kind of a -- an unhappy history here. But I  
21 mean, it ends up pretty much getting dealt with on a  
22 statutory basis. And I think if you look at that, it  
23 will probably start eliminating some of your choices  
24 real quickly.

25 MR. DOWNEY: Again, though, if we

1    presume that we can't change the system -- and  
2    that's -- I mean, that becomes an important thing  
3    if --

4                   MR. BOUDREAU:   Well --

5                   MR. DOWNEY:   -- you know --

6                   MR. BOUDREAU:   Well, I guess I'm going  
7    into this with the assumption that we're talking  
8    about a proposed rulemaking.

9                   MR. DOWNEY:   And that -- that --  
10   although I was also told, frankly, if the statutes  
11   need to be changed, we need to come forward with  
12   "These changes need to be made" for whatever reason.

13                   MR. BOUDREAU:   Okay.

14                   MR. DOWNEY:   So, I mean -- and that's  
15   one of -- sort of the interesting things is there  
16   are -- there are places now where the statutes are  
17   absolutely clear.

18                   MR. BOUDREAU:   Yeah.

19                   MR. DOWNEY:   The only complication the  
20   Commission staff, for instance, can receive is the  
21   following, and you say, Well, look, here's a good  
22   circumstance where we'd want them to go with  
23   reimbursement on a trip, do we need to change that  
24   statute? And -- and that's the type of thing where  
25   the answer may be well, we can't get it changed,

1   there's, you know, other legislative priorities. But  
2   at least the thinking that we have is that we -- we  
3   are anticipating we could be bound by them but we  
4   also may be in a position to make some changes.

5                   And -- and I think particularly -- I  
6   mean, to go back to your point, and I'll -- I think  
7   actually if you go to the next slide, I have sort of  
8   one of the key issues to get into.

9                   There are clearly some -- some clear  
10   guidance on things. One of the areas where I  
11   understand there's -- there's at least some concern  
12   or some desire for better, I'll -- I'll say, clarity  
13   is the role of the General Counsel, and I know he's  
14   here and his staff, because they have a role of  
15   serving the legal advisor when a matter is under the  
16   Commission's jurisdiction.

17                  But then if the proceeding is appealed  
18   to the court, they then enter more of an advocacy  
19   role. That's one in particular where people have  
20   said it can create tension, particularly if you have  
21   several procedures -- proceedings that may be  
22   factually related or legally related. And the first  
23   one may be in the court where now the General  
24   Counsel's Office is an advocacy role.

25                  Meanwhile, you have another matter

1 that's still before the Commission where they'd be  
2 more in an advisory role. And that's the type of  
3 thing where you'd say, you know, the statutes seem to  
4 make that clear, but this may be an area -- area  
5 where either some -- some provision of the lower  
6 staff needs to be handled or we need some sort of  
7 clarity or we just realized this is an area where  
8 there is this discomfort. Yes.

9 MR. LOWERY: Jim Lowery, I represent  
10 AmerenUE. Just a -- I guess a procedural question in  
11 terms of how this process is going to go and was  
12 driven by one of the answers that you gave to Paul's  
13 question. You know, if you have a statute, whether  
14 it be 386, 210 or any of the other statutes you're  
15 talking about, and the statute prescribes A, B and C,  
16 but let's say your recommendation ends up being --  
17 well, maybe that statute, we think maybe you ought to  
18 consider changing that statute in this respect or  
19 that respect. And you're also talking about drafting  
20 a rule at this point --

21 MR. DOWNEY: Yeah.

22 MR. LOWERY: -- and, you know, proposing  
23 to the Commission. I'm presuming any rule that  
24 you're drafting is going to be consistent with the  
25 statute. Some discussion of the statutory change

1 would have to be a separate -- kind of on a separate  
2 track. Is -- is that what you're referring to or --

3 MR. DOWNEY: Well, one would -- one  
4 would certainly imagine how you'd have a rule where  
5 you'd say here's rule A and we believe the statute  
6 needs to be modified in the following way, and  
7 presuming those -- those changes are made, then rule  
8 B would be a more appropriate-type thing, but yes.

9 No, I -- I would think that you  
10 necessarily are going to end up with multiple tracks  
11 unless we have legislators that suddenly decide that  
12 I should be in charge.

13 MR. LOWERY: I'm not sure if management  
14 is in charge, but thank you.

15 MR. DOWNEY: But yeah. And again, the  
16 interesting thing as -- as I mentioned, the proposal  
17 that we've been working with has sort of evolved into  
18 where we are now, and it's sort of an interesting  
19 process because, you know, I sort of presumed that  
20 we'd be coming in and we'd be working on -- on a  
21 pretty specific focus without the ability to seek  
22 legislative changes. But I've been told at least if  
23 there -- if there are -- particularly as where there  
24 need to be changes, you know, let's work for a better  
25 system.

1                   And -- and as you said, I mean, right  
2   now -- right now things are not necessarily in a --  
3   in a great working order. It may require legislative  
4   changes for these things.

5                   MR. MILLS: One of the things that --  
6   that I'm a little bit unclear on --

7                   MR. DOWNEY: And just to clarify, Lewis  
8   Mills for Public Counsel.

9                   MR. MILLS: Yes, yes, thank you. The --  
10   you know, in some states the staff has sort of got  
11   dual roles, and in particular, a staff member may be,  
12   you know, a witness in one case and an advisor to the  
13   Commission in the next case.

14                  In Missouri we don't -- we really  
15   haven't done that historically. The staff is -- is  
16   almost always -- other than a small number of  
17   advisors, the staff is almost always a party to cases  
18   rather than on the Commission's side of the wall. Is  
19   there -- is the focus on California and New Hampshire  
20   in -- in this presentation? I mean, are you -- are  
21   you anticipating driving changes to that role or --  
22   or accommodating changes to that role?

23                  MR. DOWNEY: I think there's at least a  
24   thought question there. One of the problems that  
25   I -- and again, I don't practice here before the



1 Public Service Commission. But one of the problems I  
2 understand has been happening is you'll have an  
3 adjudicative matter involving a particular entity and  
4 a rulemaking proceeding that may touch upon it. And  
5 you end up with problems because the staff -- as you  
6 said, usually in an adjudicative proceeding, the  
7 staff is a party to the case and has -- clearly has  
8 an advocacy role.

9 But they're also involved in that  
10 simultaneous rulemaking proceeding where there's --  
11 there's a problem there. And I think one of the  
12 things we're hoping to do is to come up with sort of  
13 guidelines to -- you know, maybe you're going to  
14 designate some of the staff as being in an advocacy  
15 role, others as not or, you know, some sort of  
16 guideline so that we have those type of -- types of  
17 proceedings going on.

18 I mean -- and again, California, New  
19 Hampshire and Washington are more just sort of  
20 because these seem to be models people are using.  
21 And, you know, the answer may be -- I don't think  
22 that -- I certainly know I don't have the power to  
23 unilaterally change everything for the staff, and I  
24 don't think the State has the resources or the money  
25 or the desire to change all the things. So I think

1 we're probably going to be working within the  
2 existing system but perhaps trying to make these  
3 refinements where people will be designated or maybe  
4 they will clarify certain groups of people who are  
5 really in more of an advisory role and others are  
6 not.

7                   But I think that, you know, the reality  
8 is we're not expecting to have this be a completely,  
9 you know, rebuilding of the building, but we would  
10 like to be able to rearrange stuff within that --  
11 within the office force.

12                   So -- and again, I mean, I suspect that  
13 part of it is, you know, how important is the need  
14 and how significant is the change. You know, if they  
15 say in order for the system to work we absolutely  
16 have to make this change, you know, pulling something  
17 out of there, we absolutely need somebody in the  
18 General Counsel's Office to have this designated  
19 role, whoever that person is, then we look at our  
20 resources and say that there's someone we can put in  
21 that role because that may be the only way to solve  
22 it, what is deemed to be a crucial need. And I don't  
23 have -- you know, I'm just using that as an example.  
24 I don't have that -- that perceived, you know, target  
25 right now, but that's the type of thing that I think

1     may go on, so...

2                     And again, it's -- you know, it's --  
3     it's the great question of, you know, trying to come  
4     up with -- as people said, you know, clearly there  
5     have been some problems that are identified and we're  
6     trying to figure, okay, how do we really address  
7     these -- these problems and come up with a solution  
8     that everyone can live with.   Yes.

9                     MR. BOUDREAU:   I just have one follow-up  
10    question.   Paul Boudreau again for the record.   You  
11    opened up with this started with an RFP, and I'm not  
12    familiar with the -- with the scope of the RFP.   And  
13    I guess my question to you is, has the Commission  
14    made the determination that changes to the rule are,  
15    in fact, necessary or are they soliciting a proposal  
16    of different ways to handle different topics?

17                    I mean, has the Commission already --  
18    have they basically already made the determination  
19    that changes to their rules, the standards of conduct  
20    are necessary or is this -- is this something below  
21    that level?

22                    MR. DOWNEY:   The RFP itself -- and  
23    you've asked an interesting question that I probably  
24    need a better answer for myself.   The original RFP,  
25    the three stages that I talked about, the State

1 compendium, the draft of the rules and the  
2 educational training, is directly out of the RFP.  
3 And it's actually -- it's a three-stage process where  
4 each stage is essentially assigned, completed and  
5 then paid for.

6                   So my presumption is that we're sort of  
7 marching down this way. As you said, though -- and  
8 the answer may be no, but at least from -- from the  
9 proposal, the anticipation is that there will be  
10 changes made.

11                   MR. BOUDREAU: Thank you.

12                   MR. DOWNEY: Now, I mean, the other  
13 thing that's sort of interesting here is there --  
14 there are a -- you could say, well, let's just focus  
15 all of our attention on changing the ex parte rule  
16 and nothing else. You could also say, you know, we  
17 can't solve the ex parte rule, let's focus our  
18 attention on dealing with the stuff that we can  
19 easily deal with, you know, and -- and leave the ex  
20 parte rules a mess.

21                   I mean, you know, there's -- there's no  
22 mandate that we cover all 33 topics. And, in fact,  
23 I've looked at some of them and said, frankly, you  
24 know, we probably don't need to get there.

25                   MR. BOUDREAU: Thank you.

1                   MR. DOWNEY: Any further questions or  
2 comments of this at this time?

3                   (NO RESPONSE.)

4                   MR. DOWNEY: We'll go ahead and move on  
5 to just a couple of other topics. The conflict of  
6 interest rule, I mentioned at the outset, my -- my  
7 background is really professional ethics. The  
8 interesting thing is that Missouri has very clear  
9 conflict of interest rules related to financial  
10 conflicts, and I've got the statute there.

11                  And if you switch to the next slide,  
12 Missouri also has a comprehensive executive order  
13 that very clearly states that people should avoid all  
14 conflicts of interest. And you'll see there, there  
15 are several provisions that talk about avoiding  
16 personal gain, conflicts of interest, et cetera.

17                  One of the concerns as an ethics person  
18 I see in looking at this is people don't always  
19 define exactly what conflicts of interest are the  
20 same way. And there's -- there's some issues with  
21 this that do you encompass, for example, familial  
22 relationships that could cause issues? Do you  
23 influence, you know, any other types of situations or  
24 relationships or obligations? I think this is an  
25 area that probably is not quite as attention-getting

1 as the ex parte communication rules are, but I think  
2 it's an area where there may be grounds for at least  
3 providing some refinement.

4                   So this is an area where I've at least  
5 identified, and I think that we probably want to --  
6 with -- with regard to nonfinancial conflicts, we  
7 want to at least visit this rule and ask questions  
8 as is there a need for greater refinement.

9                   So I don't know if people have run into  
10 particular instances, if there's circumstances that  
11 have come up in the past, but if there are things  
12 that you'd like to comment on at this point other  
13 than the financial conflicts of interest which I'll  
14 talk about later, is there anything else that needs  
15 to be addressed under the conflict rules?

16                   (NO RESPONSE.)

17                   MR. DOWNEY: Go ahead. Limits on the  
18 use of Commission property. You'll see there there's  
19 an -- the executive order makes clear that "Employees  
20 shall use and maintain the equipment in an efficient  
21 manner and they shall use stated equipment only for  
22 state-related purposes."

23                   One of the areas where, frankly,  
24 there's -- there's sort of the obvious pickup here  
25 would be the use of computers which is always fun to

1 do because then you can cause lots of problems. But  
2 this may be an area also where there's a need for  
3 further refinement of things. I have not heard about  
4 abuses.

5                   If there's particular things people are  
6 aware of that need to be addressed, this is the type  
7 of thing where, again, it may not have all the  
8 glamor, but it's an area where even under these  
9 executive orders, I think there's room to sort of  
10 define out what exactly is happening, and this is an  
11 area where probably additional refinement can be  
12 provided.

13                   And I know also we have several staff  
14 people here, regulatory law judges, et cetera. You  
15 may be in situations where, you know, there's a need  
16 for vehicle use or something else. This would be the  
17 type of thing where it may be suitable to have a rule  
18 that sort of explains what is and is not permitted so  
19 that then people know, if I've got a Commission  
20 vehicle or I've got Commission, you know, property, I  
21 need to do the following, is it that -- is it okay.  
22 You know, is it fine to use it as long as it's not  
23 for commercial gain or whatever the appropriate  
24 guideline might be.

25                   These are all the sexy issues, guys,

1    sorry.  Okay.  Public statements on pending matters.  
2    Sometimes these are dealt with in the context of the  
3    ex parte communications rules.  I think it's probably  
4    suitable at least to look at this again because we  
5    have Commissioners who serve in both a  
6    quasi-legislative role as well as in a -- an  
7    adjudicative role or quasi-judicial role that you may  
8    want to say, well, there's certain types of things  
9    they can talk about or they can't talk about.  When  
10   are public statements permitted?

11                   The interesting little wrinkle that's  
12   not on the slide but is -- at least is worth  
13   mentioning is, when they're reporting to the General  
14   Assembly or when they're speaking to the legislature,  
15   are there guidelines as to what they can and cannot  
16   talk about?

17                   And they're -- we're not talking here  
18   about disclosing confidences, but there's at least --  
19   and I'll get your question or comment in just a  
20   second -- but there are several things, you know,  
21   should we vary it based upon what the proceeding is?  
22   A lot of states that have prohibition state that with  
23   regard to adjudicative matters, there shall be no  
24   public statements, although some of them say except  
25   as to matters that are already in the public record,



1 and they allow those communications.

2 Also things like are you allowed to  
3 share your opinions? Some states allow their  
4 Commissioners to give opinion statements, I really  
5 think this is a good idea or a bad idea. And other  
6 rights restrict their comments to public record. Is  
7 that appropriate or is that something we want to  
8 allow?

9 That having been said, do you have  
10 questions or comments?

11 MR. BYRNE: Yeah, Tom Byrne from Ameren  
12 again. You know, this is -- at least related to  
13 this, this is a topic that comes up a lot for me.  
14 And it's not so much in terms of the Commission  
15 making public statements, but it's participants in  
16 the case, us and other participants in our rate cases  
17 or in other cases.

18 I'm always asked to what degree can we  
19 talk to the press about a pending case, and I always  
20 tend to say, you know, different -- different people  
21 apply it in different ways. And there's a rule at  
22 the Commission, and -- but I think it's being  
23 interpreted in different ways and so I'd like to get  
24 some clarification to what degree can parties on a  
25 pending case go to the press or give interviews to

1 the press or -- because -- because it's -- I always  
2 get yelled at for tying the hands of my people when  
3 everybody else talks to the press.

4 MR. DOWNEY: This is a perfect example  
5 of what we needed to hear. So no, I -- are other  
6 people having similar concerns or similar comments?

7 MR. BOUDREAU: (Nodded head.)

8 MR. DOWNEY: I'm seeing some at least  
9 nods of yes. We will put that on the list, so --

10 MR. BYRNE: Okay.

11 MR. DOWNEY: No -- and that's exactly  
12 why we're having this meeting, so I very much  
13 appreciate that.

14 MR. MILLS: You know, and maybe at least  
15 on that topic, that -- that the -- it may not be a  
16 one-size-fits-all rule for --

17 MR. DOWNEY: Sure.

18 MR. MILLS: -- for what parties can talk  
19 to the press under what circumstances. Some of us  
20 are public officials and have a duty to the public  
21 and you can't stop the press when they call.

22 MR. DOWNEY: Or perhaps they want a rule  
23 that requires them to duck the press.

24 MR. LOWERY: That's right. There could  
25 perhaps be a rule that relieves you of that quandary.

1                   MR. DOWNEY: Very good point. And I --  
2 I mean, I think the other thing, obviously, sort of  
3 following up with that is, again, when you talk  
4 about, you know, Commissioners are different than the  
5 Public Counsel is different, and the regulated  
6 entities may be different than the staff and other  
7 people when you start to -- you can splice that a lot  
8 of different ways. This is a area where it's a good  
9 thing to say let's look at this and see what we can  
10 come up with.

11                  MR. BYRNE: And there -- there is  
12 already a rule that's just kind of a -- I think it's  
13 pretty vague as it exists now.

14                  MR. LOWERY: And Mike, something you  
15 just said -- this is Jim Lowery again -- but  
16 something you just said, you know, there have been --  
17 there's some history before we got to this RFP --

18                  MR. DOWNEY: Sure.

19                  MR. LOWERY: -- and there's been a  
20 workshop docket. I don't know if it was a workshop  
21 docket, but there's been a lot of debate about parity  
22 and whatever -- whatever the rules are, whether the  
23 rules need to apply equally to all those who are  
24 appearing, and I'll use the term generally,  
25 adjudicative cases --

1 MR. DOWNEY: Sure.

2 MR. LOWERY: -- as you've used because I  
3 think rulemaking and legislative things are in a  
4 different arena, but whatever --

5 MR. DOWNEY: Or if you use the Missouri  
6 term of a contested case.

7 MR. LOWERY: Or contested versus  
8 noncontested, that kind of thing. But -- but whether  
9 or not the rules need to have parity. And I -- and  
10 I -- I think I can speak for my client that whatever  
11 the rules are, if staff is a party to all these  
12 cases, also counsel, intervenor, all these parties,  
13 the field needs to -- the playing field needs to be  
14 level on what these rules are.

15 And there was some discussion in earlier  
16 stages of this evolution. Some proposals were made  
17 that that's not the way the proposals went, and I  
18 just think it's worth saying that that doesn't seem  
19 to be appropriate to me, and I'm sure it's not  
20 appropriate to my client. But just as a general  
21 matter --

22 MR. DOWNEY: Sure.

23 MR. LOWERY: -- it doesn't seem to be  
24 appropriate.

25 MR. DOWNEY: Well, it's a great question

1 if you -- due process is the process to which you  
2 were due. And I -- and I think the real answer is  
3 that if there are variations, maybe they should be  
4 principled ones so there may be -- has to treat -- we  
5 should treat these people differently because they're  
6 in a different role and should be treated  
7 differently, not just, you know, we like the yellow  
8 team today and not the blue team or whatever it is.

9 So no, I understand what you're saying.  
10 Plus, frankly, it would make my job a lot harder to  
11 deal with each entity separately, so...

12 MR. LOWERY: And figure out what those  
13 principled reasons might be.

14 MR. DOWNEY: Yes. Other things on that?

15 (NO RESPONSE.)

16 MR. DOWNEY: Moving forward a little  
17 bit, the current system for -- go ahead -- yeah, I'm  
18 sorry. One of the things that is not covered at all,  
19 and, frankly, I don't necessarily know if we need  
20 this, although we may simply sort of include  
21 something. I know many of the people in the room are  
22 lawyers and you're probably familiar with Rule 5.1  
23 which requires that a lawyer -- or actually, probably  
24 the better example is Rule 5.2 which requires that a  
25 lawyer take responsibility for making sure that their

1 staff complies with the rules.

2                   One of the things that some other  
3 provisions have, and we may want to go ahead and add  
4 a provision here, is some sort of express requirement  
5 that the Commissioners be responsible for the  
6 activities of the their personal staff. Again, I  
7 don't think this is something where there's a lot of  
8 history, but it seems like sort of a natural place to  
9 drop something in as you're working on the rules to  
10 just make that clear.

11                   And I would anticipate if people are  
12 wondering, I don't think it would be workable to make  
13 the Commissioners responsible for all of the staff.  
14 I think it would just purely be their personal staff.  
15 Like I said, I don't think there's a whole lot of  
16 comments on that.

17                   One of the other areas that I know is at  
18 least worth looking at is -- is -- and frankly, I'd  
19 appreciate guidance on this, is the current system  
20 for what to do if someone violates the rules. There  
21 is a notice for ex parte communications that's  
22 sometimes employed. The other two, sanctions are  
23 really recusal from a matter or removal as a  
24 Commissioner. The Commissioners, I don't know,  
25 frankly, what sort of system is really set up for the

1 staff or -- as we talk about, you know, litigants or  
2 participants, if there are clear rules there as well.

3 But this may be an area as well where we  
4 can look and say can we come up with a better  
5 remedial system that will perhaps allow for minor  
6 violations to be remedied or for more major  
7 violations to result in something short of removal of  
8 people?

9 And I think it's at least -- if people  
10 have suggestions on this, I'd love to hear what they  
11 are. There are a number of other states that do  
12 employ sort of varying levels of -- of sanction and  
13 penalty, and I think they're at least worth looking  
14 at and talking about.

15 MR. LOWERY: Jim Lowery again. When you  
16 say systems that have imposed sanctions and penalty,  
17 on whom?

18 MR. DOWNEY: Normally once they're -- I  
19 mean, normally when you see these, they're directed  
20 toward the Commissioners and the staff. I mean,  
21 what -- what you may also see -- and I don't think  
22 we -- I'm not aware of this right now is, is there a  
23 need, is there a desire to have something in place  
24 where there's a party that's participating where  
25 their counsel, they would receive something? You

1 know, obviously, there are other avenues for that,  
2 but I'm not aware of really anything in place right  
3 now. Is that something we need? I don't know. No  
4 one likes to think about the sanction rules except  
5 for the ethics lawyers.

6 MR. LOWERY: Well, I don't know that  
7 I've perceived any -- any particular issue that  
8 couldn't be dealt with in -- you know, in the normal  
9 framework. I mean, certainly attorneys have ethical  
10 rules. They have the Rules of Civil Procedures which  
11 do apply to proceedings here, certainly the  
12 adjudicated proceedings.

13 So I don't know that I've really seen  
14 much occasion. I mean, there's been controversy,  
15 perhaps, about the rules about recusal of  
16 Commissioners, but there's a pretty -- pretty  
17 well-established body of administrative law in  
18 Missouri that -- that talks about what those  
19 standards are --

20 MR. DOWNEY: Sure.

21 MR. LOWERY: -- when that would be  
22 appropriate. And there certainly is a remedy to seek  
23 a writ up to the Circuit Court if the Commissioner  
24 doesn't recuse and a party believes that they are  
25 interested, prejudiced or -- or -- I forget whatever



1 the third standard is, but I mean, there's a --  
2 there's a body of law that exists for that today.

3 MR. DOWNEY: Sure. And -- and that  
4 may -- the answer may be -- I mean, it sounds like at  
5 least from your perspective that may be adequate.  
6 I'm not -- I'm not -- one of the things I wasn't sure  
7 is I'm not sure that there's necessarily universal  
8 accord on that, so...

9 And -- and part of the concern is how  
10 clear is the body of law, does it make sense,  
11 particularly as we try to figure out exactly what  
12 types of proceedings it should apply to. You know,  
13 are -- are there issues where it seems to apply to  
14 more proceedings than it should, do we need to  
15 clarify, you know, the system for recusal.

16 The other thing, of course, is that  
17 there's -- there's really no chance for review other  
18 than at the court level through a writ. There's been  
19 talk about would something be appropriate. I will  
20 say that a lot of times when you have these  
21 adjudicative -- or these -- these administrative  
22 bodies that have quasi-legislative, quasi-judicial  
23 roles, a lot of times there's -- there's an  
24 inclination not to have some sort of appeal within  
25 the body. So if Commissioner A refuses to recuse,

1 usually you don't have Commissioners B, C, D and E  
2 get involved in whether or not they should.

3 MR. LOWERY: In fact, I think that's the  
4 law today.

5 MR. DOWNEY: Yeah. So -- and it is  
6 certainly in Missouri. And I'm not -- I'm -- my  
7 sense is that that doesn't necessarily need to be  
8 changed and I'm not saying people here today that are  
9 saying yes, we really need to look at that. And  
10 maybe the scenario would be, effectively, leave it  
11 alone.

12 MR. LOWERY: Okay.

13 MR. DOWNEY: Yes.

14 MR. SCHALLENBERG: I'm Bob Schallenberg  
15 of Commission staff. I don't think you'd have a  
16 problem with that now because, as Tom Byrne brought  
17 up, there isn't much information that flows during  
18 the --

19 JUDGE WOODRUFF: Bob, if you could come  
20 up to a microphone. We -- we can't hear you.

21 MR. SCHALLENBERG: That there isn't much  
22 information -- the only way this is going to be  
23 relevant is if you open up ones that don't presently  
24 exist, then this may be something you'd need to  
25 consider that they should open it up. Because right

1 now to have an ex parte is just to write a letter to  
2 staff. We almost have zero tolerance. So I mean, we  
3 go to great lengths to avoid even having a notice  
4 issued.

5 MR. DOWNEY: Well -- and -- and realize,  
6 I mean, correctly you've stated that there's the  
7 ex parte communications but there are other issues  
8 that may lead to disciplined recusal, et cetera,  
9 that, you know -- one of the issues is, you know, how  
10 much do we open up that box if someone has, you know,  
11 received an inappropriate trip from someone before  
12 the adjudicative matter was even on the table, should  
13 there be some sort of consequences where they're not  
14 able to participate in matters related to that  
15 entity?

16 Well, what if it was a -- you know,  
17 someone who works in the water division and it's a  
18 major, you know, national meeting of water purveyors,  
19 are they going to be barred from working on any water  
20 matters if they effectively disbar themselves from  
21 working on every matter?

22 You know, I don't -- I don't know where  
23 you'd necessarily draw that, but it's at least  
24 something worth thinking about. But I agree with you  
25 there's a -- there's a system in place. I'm not sure

1 if there is -- my sense of things was, frankly, there  
2 may be room for refinement.

3 Yes. I think I'm going to have you come  
4 forward at least in some way, shape or form.

5 JUDGE WOODRUFF: If you would, please.

6 MR. MITTEN: My name is Russ Mitten, and  
7 I guess I have a general question --

8 THE COURT REPORTER: Can you tell him to  
9 come up?

10 MR. DOWNEY: Yeah, can you come forward,  
11 please?

12 JUDGE WOODRUFF: Come on up forward.  
13 The court reporter can't hear you when you're way  
14 back there.

15 MR. MITTEN: I have a general question  
16 based on something you said a moment ago. What  
17 standard or criteria did you use to determine whether  
18 or not a new rule or changes in the existing rules  
19 need to be proposed in any of the areas that you were  
20 charged to look into?

21 MR. DOWNEY: And that was the key thing  
22 I said at the outset was when we completed the State  
23 compendium, what I attempted to do was look at what  
24 was presently there. And -- and I -- just basically  
25 for purposes of trying to drive our agenda, I said,



1 the room and everybody who could positively be in the  
2 room says we don't need a better remedial system,  
3 I'll probably say, okay, then that's probably not  
4 something we need.

5 Now, I may also say to someone who's an  
6 ethics lawyer there are reasons that I think there  
7 needs to be improvements to the system. But at the  
8 end of the day, that may be something where the  
9 interest -- no, we really don't think there's an  
10 answer.

11 I -- and that's why one of the  
12 reasons -- my sense of things is that we should not  
13 be the final authorities on what the rules are or  
14 what the rules could be. Someone else needs to be  
15 that final authority. I mean, we -- my role is that  
16 we were retained to try to draft the best set of  
17 rules that we could, and included as I was trying to  
18 figure out exactly what needs to be addressed and  
19 trying to address those issues. How's that for just  
20 a...

21 MR. MITTEN: If -- if consensus is the  
22 basis for your determination that no change in the  
23 rule or no new -- new rule is necessary, I mean, is  
24 it likely you're going to achieve consensus on any  
25 issue?

1                   MR. DOWNEY: Consensus is not. I mean,  
2 as I said -- as I just said, as the ethics lawyer,  
3 part of my role may also be you-all think that  
4 everything is okay but have you thought about these  
5 concerns? No. I've already said I think that when  
6 we -- the easiest example is the ex parte rule.

7                   I think that there are some extremists  
8 that would say there should be no communications  
9 between Commissioners and staff. There's some  
10 extremists that say there should be absolute open  
11 communications between Commissioners and staff  
12 without regulation. Most people probably fall  
13 somewhere in the middle.

14                  Part of what we have to do is we've got  
15 to figure out where that line needs to be drawn. But  
16 part of what I want from you-all is guidance so that  
17 it's not just a crazy lawyer from St. Louis drawing  
18 the line, at least in the draft of the rules. It  
19 needs to be a more -- more intelligent process than  
20 that.

21                  And one of the things maybe that I'm --  
22 if I hear from all of you we really need to revisit  
23 this, as I've heard on certain issues -- you know,  
24 for example, that the ability of -- of parties to an  
25 adjudicative matter and the comments to the media

1 about that matter wasn't something I necessarily  
2 considered.

3 Now, if there is a -- if there is a rule  
4 in place, I may say, you know what, my sense of  
5 things is that the rule is adequate and I'm at least  
6 looking to you for guidance. But it's guidance, not  
7 consensus.

8 MR. MITTEN: And it's the guidance that  
9 you get in this particular forum that's going to have  
10 you determine what rules --

11 MR. DOWNEY: No. It -- it will be a  
12 factor. Okay. Frankly, if they only wanted  
13 consensus from someone, they could have -- they could  
14 have ignored hiring someone with any sort of  
15 credentials in ethics. And I think they wanted to  
16 hire someone that has, frankly, extensive credentials  
17 in ethics because they want us to provide our  
18 guidance as well as what we think you may need to be  
19 looking at that you -- that may not even be  
20 considered.

21 Part of the idea of having good rules  
22 and in going through good rulemaking is that you have  
23 something in place when a problem presents itself.  
24 People can say, okay, this situation has presented  
25 itself, let's look at the rules and let's see if it's



1     supposed to happen under the rules.  You don't want  
2     to be in a situation where each time a problem  
3     presents itself, you make an ad hoc determination and  
4     then see, you know, how those patch together in the  
5     future.

6                     But the idea of having good rules is --  
7     that good rules provide guidance for conduct and when  
8     something happens you're able to consult those and  
9     see what -- how it should be dealt with.  Yes.

10                    MR. BYRNE:  Do you have an idea of the  
11     time frame you're looking at or --

12                    MR. DOWNEY:  There -- there was a -- a  
13     sample schedule, I mean, the reality is that the way  
14     things were set up -- and it's not -- frankly, I'd  
15     love to have more time, but the idea is to try and  
16     have a draft set of rules out -- and actually, I said  
17     May 15th, it's actually May 18th now.  But the goal  
18     is to have something out on the 18th and there's a  
19     lot of work to be done.

20                    So -- now, that -- that will be  
21     something that -- that, again, will be posted, will  
22     be available for comment, for feedback, et cetera,  
23     but we'll try to provide guidance on what we're  
24     doing.  If somebody came along and said you could  
25     have 90 or 120 days, I wouldn't regret that at all.

1                   MR. BYRNE: And then -- then what  
2 happens after that? I mean, are you -- at that point  
3 after -- after the draft -- after the draft rules are  
4 done, then what -- then what happens?

5                   MR. DOWNEY: I mean, the schedule is --  
6 is filed and there's a notice of rulemaking that's  
7 available on EFIS that runs through that prepare and  
8 submit a draft of the rule, meet with interested  
9 parties, prepare written summaries to the interested  
10 parties, submit recommendations for a proposed rule.  
11 And it says here for the Missouri Register, but I  
12 don't think that's right. My thinking would be it  
13 would have to be the Commission. I mean --

14                  MR. LOWERY: I mean, I was confused when  
15 you were on your slide earlier --

16                  MR. DOWNEY: Yeah.

17                  MR. LOWERY: -- or when you were  
18 describing --

19                  MR. DOWNEY: Yeah, when I -- as I was  
20 talking about that, I thought no, that can't be  
21 right. I think I --

22                  MR. LOWERY: They would have to  
23 propose --

24                  MR. DOWNEY: Yeah.

25                  MR. LOWERY: -- a notice of proposed

1 rulemaking --

2 MR. DOWNEY: Exactly.

3 MR. LOWERY: -- so they could decide  
4 what they want to do.

5 MR. DOWNEY: Yes.

6 MR. BYRNE: But then at that point  
7 you're kind of done, you envision yourself being  
8 done?

9 MR. DOWNEY: Our role is done until  
10 the -- the RFP was accepted for all three parts so  
11 then we would come back in for training.

12 MR. BYRNE: Okay. Got it.

13 MR. DOWNEY: But yes, I mean, at least  
14 that's my sense of things.

15 MR. BYRNE: Okay.

16 MR. DOWNEY: Other questions or comments  
17 to that?

18 (NO RESPONSE.)

19 MR. DOWNEY: And to go -- I mean, to go  
20 back to the statement, one of the things that I  
21 think -- at least I'd like to look at it and -- and  
22 try and get a sense of it is the question of remedial  
23 scheme. But it is an area where it -- it has not  
24 been identified as a particular problem other than  
25 that some of the -- some of the Commissioners have

1 indicated they feel like there could be better  
2 clarification or recusal, but that may be connected  
3 more to other issues than anything else.

4           The ethics training and guidance -- and  
5 again, the only things I've mentioned here is that  
6 when I -- when I completed the RFP, my original  
7 understanding was that we would be coming in and  
8 doing at least two training sessions to the  
9 Commission and the Commission staff.

10           I had not considered at all where the  
11 regulatory judges fit into that system, whether they  
12 were in or out. I had not considered whether anyone  
13 else needed to be involved. I don't know whether we  
14 would say there are other appropriate bodies -- you  
15 know, certainly there could be interest groups that  
16 could organize continuing education programs and  
17 maybe that's adequate. Do we want to have the  
18 training open to other people? Is it better to have  
19 it closed?

20           Again, certainly really looking for your  
21 comments or guidance as to -- to what you think is  
22 appropriate. Not -- again, not necessarily saying  
23 we'll follow that, but I appreciate knowing what  
24 people are thinking. Yes.

25           MR. WOODSMALL: Dave Woodsmall again. I

1 think at least for purposes when you get the rules  
2 done, depending on how extensive the rules are, it's  
3 going to be perhaps a drastic change. And so  
4 training for other -- other attorneys that are  
5 outside the staff, I think making it available would  
6 be good.

7 MR. LOWERY: And giving CLE credit.

8 MR. DOWNEY: People love me. I'm ethics  
9 credits just waiting to happen. You should have  
10 gotten credit for this meeting.

11 MR. BYRNE: You can still apply.

12 MR. LOWERY: There are written  
13 materials. June 30th is coming, you know.

14 MR. DOWNEY: One of the things that I  
15 think may be a good thing to happen would be to have  
16 some sort of availability of an advisory opinion or  
17 guidance.

18 If you look, for example, in most of the  
19 federal regulatory bodies, they actually have an  
20 ethics officer who will serve as providing these  
21 informal ethics opinions. And one of the things that  
22 I'd like to leave behind is some sort of person or  
23 capacity that there is ability available that if  
24 people are wondering, you know, is this trip  
25 permitted, is this an adjudicative proceeding, that

1     there's someone there to provide some sort of  
2     guidance and provide a record that then other people  
3     can read and review and understand what's going on.  
4     Yes.

5                     MR. ZUCKER:   Rick Zucker with Laclede  
6     Gas Company.   In fact, you just mentioned the feds.  
7     In doing your comparative -- your state comparatives,  
8     did you have a chance to look at -- at any of the  
9     federal rules?

10                    MR. DOWNEY:   We had looked at it before,  
11     actually, when I -- when I originally started working  
12     on this, I used that heavily.   I've realized on the  
13     database it's not there, and that's actually one of  
14     the things that has to be added.   So the answer is  
15     yes, we have looked at it, but if you look at the  
16     compendium, it's not there as it should be.   Yes.

17                    MR. ZUCKER:   Have you looked at FCC or  
18     FERC?

19                    MR. DOWNEY:   We -- we looked at FERC, we  
20     looked at FCC.   And then we -- we -- I -- I --  
21     actually, I could probably give you a list of the  
22     various entities that I looked at.   But one of the  
23     problems we had, frankly, was that there's -- there's  
24     a wonderful ethics guidance for the -- the -- for the  
25     Federal Government, but when you start to get off in

1 the various agencies, you start to look, are they  
2 really comparable? You know, the FCC has guidance,  
3 but that's -- that's an independent agency. Does it  
4 really make sense to look there? We -- they have  
5 incredible other resources.

6 And one of the things that -- that I  
7 even have said at the outset was in some ways if you  
8 could adopt a federal rule, you have the advantage  
9 then of having the federal body of interpretative  
10 materials that come with it. But there again, you  
11 have to make sure it's appropriate to the setting.

12 And certainly, I mean, to the extent  
13 that -- that, you know, if -- if you're sitting there  
14 and you're saying, you know, you're talking about how  
15 to handle travel paid for by regulated entities,  
16 there's a FERC rule that would be wonderful for this.  
17 Certainly feel -- you know, make sure that we're  
18 aware of that. And really, the easiest thing to do  
19 is file something on EFIS. Even if your entire  
20 filing you do, hey, we wanted to make you aware of  
21 these three things, that could be incredibly helpful.

22 MR. MILLS: Lewis Mills from Public  
23 Counsel's Office again. Can we go back to the  
24 advisory opinion idea again? Who -- what was your  
25 thinking about who would be giving these advisory

1     opinions?

2                   MR. DOWNEY:  I just stated that I'd like  
3     to see some sort of capacity there.  I don't  
4     necessarily know who that person would be yet.  I  
5     mean, you -- you could run through, you know, is --  
6     is there someone who could be working in the Office  
7     of General Counsel that would serve that role?  I  
8     don't necessarily know, but, you know, those are the  
9     types of questions that can be asked with an answer  
10    provided or not.

11                  MR. BYRNE:  I'd be willing to provide an  
12    advisory opinion.

13                  MR. MILLS:  Maybe we could work together  
14    on that.  And to some extent it may sort of defeat  
15    the purpose if this is someone who works for the  
16    Commission who's advising the Commission.  You know,  
17    a Commissioner comes and says can I do this and --  
18    and the -- you know, the person who works for the  
19    Commissioner might have some degree of trepidation to  
20    tell that Commissioner no, you can't.

21                  MR. DOWNEY:  Exactly.  And -- and, you  
22    know, the -- the laugh was there but maybe the answer  
23    is, you know, we try to come up with a -- a panel of  
24    three or four people, you know, someone from the  
25    Public Counsel's Office, someone from regulated



1 industry. However, you know, it's combined, maybe  
2 that is the way to deal with this.

3 MR. MILLS: For the record, I would like  
4 to opt out of that. I have no interest in advising  
5 the Commissioner on -- on --

6 MR. DOWNEY: No. And -- and --

7 MR. MILLS: -- what to do or not to do.

8 MR. DOWNEY: -- realistically, is it  
9 something where -- you know, where we stay available  
10 or how -- and, you know, my goal is not to create  
11 more work for myself, but, you know, maybe that's --  
12 maybe that's the capacity. I don't -- I don't  
13 necessarily know what that capacity is.

14 But, you know, is there -- do they look  
15 to the judicial Commission, do they look to the  
16 Missouri ethics counsel, where I think, frankly,  
17 probably, you know, that may not be the right thing  
18 because they have, obviously, a different set of  
19 rules, et cetera. But there may be some sort of at  
20 least thought there of, you know, where we can look.

21 And the interesting thing I will say is  
22 to my knowledge, there -- the entities that exist,  
23 the NARUCs or those types of things, I'm not aware of  
24 anything out there that provides this. And  
25 obviously, you know, in the Federal Government,

1   there's a very active system but it's not -- it's not  
2   shared with anyone else to my knowledge.  If someone  
3   knew of another resource, you know, certainly it's  
4   worth exploring.

5                   And part of that's just simply the  
6   recognition that, you know, the world is changing,  
7   that regulations -- if we come up with a great rule,  
8   there still are probably going to be questions that  
9   we haven't anticipated.  And it would be nice to have  
10  some sort of easy vehicle available to make -- to  
11  even deal with those.

12                   I've become sort of the legal ethics --  
13  one -- well, I shouldn't say expert, but a person  
14  who's perceived as being knowledgeable about social  
15  networks for lawyers.  You know, who would have ever  
16  thought that you'd have a social network for lawyers  
17  and that you'd have to worry about, you know, what  
18  can you post there and how can -- how can you manage  
19  your connections in an ethical manner?  But, you  
20  know, it's certainly something that somebody has to  
21  look at.

22                   Evaluation of -- of a need for  
23  rulemaking is those areas that I think at least  
24  there's perhaps some need for -- for at least  
25  consideration.  The first one, I've referenced this

1 earlier, is third-party payment for travel and  
2 education. I think everyone would agree that we  
3 don't necessarily want to create a system where  
4 people that travel to foreign lands and wonderful  
5 conditions that learn absolutely nothing in the hopes  
6 that it will sway their votes. But on the other  
7 hand, there are legitimate activities.

8                   The way that the current traditions are  
9 set up is that the Missouri law provides for  
10 reimbursement from the State for travel, but the  
11 question is, well, if it's not really a State --  
12 something where the State doesn't necessarily want to  
13 be charged for that, is there an availability of  
14 having anyone else available, my understanding is  
15 right now the answer is generally no. Is that  
16 something we want to examine?

17                   I put this as one of those things that  
18 perhaps it's at least worth looking at. And I was  
19 wondering if people had issues or problems or  
20 situations that they believe is perfect for dealing  
21 with as well.

22                   Another area that's sort of related  
23 and -- and also not dealt with, although dealt with  
24 in numerous other types of ethics codes is  
25 permissibility of speaking, writing and teaching.

1 And this is sort of the dual prong thing.

2 Certainly, it's my understanding the  
3 Commissioners have an obligation to communicate with  
4 the public. They do so. But it might be good and  
5 useful to provide sort of a better framework of what  
6 they're allowed to talk about, what they're not  
7 allowed to talk about in a classroom-type setting or  
8 just in a continuing-education-type setting, which is  
9 sort of the focus of this role. No comments on  
10 those?

11 (NO RESPONSE.)

12 MR. DOWNEY: Another issue, Missouri has  
13 some pretty strict limitations. I have here the  
14 executive order on political activities and  
15 fundraising, et cetera. It's actually interesting.  
16 If you look at the comparison unless we've missed  
17 some of the guidelines, Missouri does not seem to  
18 have quite the comprehensive regulation of  
19 fundraising activity or political activity for  
20 Commissioners and Commission staff you might imagine.  
21 And that may be an area that at least is worth some  
22 thought and consideration.

23 MS. DIPPELL: Nancy Dippell, PSC  
24 regulatory law judge. There are some -- also some  
25 Office of Administration regulations on State

1 employees in general on their political activities.

2 MR. DOWNEY: And that was probably one  
3 of the guidelines we missed, and I appreciate that.

4 Anything else? And we'll certainly -- I  
5 think it make sense for us to at least look at those.  
6 We'll go ahead and add those to the compendium. And  
7 frankly -- I mean, that may sort of solve all the  
8 problems, but it may also be things that are worth  
9 looking at. Yes.

10 MR. BYRNE: Do other -- Tom Byrne from  
11 AmerenUE. Do other states have limitations like on  
12 political participation?

13 MR. DOWNEY: Yes.

14 MR. BYRNE: Okay.

15 MR. DOWNEY: Certainly more than I've  
16 seen for the -- from the bodies that we polled,  
17 although, I don't think we looked at the Office of  
18 Administration rules, though. Frankly, we may have,  
19 but I don't think we did.

20 MS. DIPPELL: And those are some --  
21 basically just, you know, what you can do on -- in  
22 the State. They're -- they're -- they don't regulate  
23 too much of what kind of political activities you can  
24 do, but...

25 MR. DOWNEY: Okay. Use of State

1 property and State equipment for purposes --

2 MS. DIPPELL: Right.

3 MR. DOWNEY: Okay. And that may  
4 actually -- I mean, we've sort of lumped those as  
5 a -- use of government property-type regulations, but  
6 that may be more applicable. And again, this may be  
7 an area where there's a need to sort of pick some of  
8 those things up.

9 Missouri actually has a statute that  
10 basically prohibits anyone who works for the  
11 Commission for getting a recommendation upon leaving  
12 if they're going to any sort of the related entity  
13 which I thought was sort of interesting.

14 And the question I just raised at the  
15 bottom there is all -- it's almost a complete ban on  
16 recommendations appropriate. The obvious thing here  
17 is that you don't want, you know, people hiring their  
18 friends so that they will get, you know, favorable  
19 decisions. But on the other hand, I did think it was  
20 interesting. And I -- I'm not sure if this is  
21 actually being followed or if it's sort of quietly  
22 being ignored, but it's at least worth exploring  
23 further.

24 Those of you that work for the  
25 Commission can -- can read this and realize that

1 they're -- you know, they're basically not allowed to  
2 say anything about you. I guess it's a  
3 date-of-hire-type law.

4                   The post Commission employment.  
5 Normally when you look at these, there are -- there  
6 are two distinct groups of -- of rules. The first is  
7 a personal ban that you as a person are banned from  
8 practice before the Commission. And you'll see there  
9 that Missouri generally does have a one-year ban.

10                   There's also a prohibition on work -- on  
11 matters that you worked on which presently exist. In  
12 the federal system, there's an additional type of  
13 provision which is a matter that you supervised.  
14 There's nothing like that under the Commission rules  
15 that we've located. And again, this may be an area  
16 where there's at least some -- some thoughts about  
17 clarifying things.

18                   The other thing that the federal rules  
19 distinguish between quite strongly is matters where  
20 you are working on the matter and matters where you  
21 are appearing on the matter, that you can, in fact,  
22 do legal work where you're not going to appear before  
23 your former colleagues far earlier and to a much  
24 greater degree than you can do work where you would  
25 actually be appearing. And the thinking there, of

1 course, is that you're less likely to have an  
2 influence if you're behind the scenes. But to my  
3 knowledge, that's not something that the Missouri  
4 Commission or its rules have dealt with.

5 Other questions or comments on that?

6 (NO RESPONSE.)

7 MR. DOWNEY: The existing rules that are  
8 likely adequate. And again, this is sort of my rough  
9 where we are. There's a very strong prohibition on  
10 the use of confidential information containing  
11 executive order. There's statutory provisions that  
12 relate to this as well. My sense of things is that  
13 this is not an area where people are seeing gaps in  
14 coverage or a need for greater releases of  
15 information, so I think that's probably where at  
16 least I don't see a need unless someone indicates to  
17 me that, in fact, there is a need to address use of  
18 Commission information or use of confidential  
19 information.

20 MR. LOWERY: Mike, Jim Lowery again.  
21 Sorry. I'm jumping back to the talk you just left.

22 MR. DOWNEY: Sure.

23 MR. LOWERY: And I can -- I can get you  
24 a site for this, but there is a Commission rule, an  
25 existing rule that I think says -- and my colleagues



1 will correct me -- but I think says that if -- if a  
2 Commission employee at least has personally and  
3 substantially participated in a matter and then  
4 leaves --

5 MR. DOWNEY: Yeah.

6 MR. LOWERY: -- they cannot appear  
7 before the Commission. There is an appearance rule.

8 MR. DOWNEY: Yes, yes.

9 MR. LOWERY: Okay. I thought you said  
10 there wasn't --

11 MR. DOWNEY: No, and that -- that's  
12 exactly there with -- yeah, the flip side is actually  
13 not dealt with can you do work on a matter where you  
14 don't appear before the Commission. And my -- my  
15 recollection is that the rule calls for appear --

16 MR. LOWERY: It does, you're right, yeah.

17 MR. DOWNEY: -- and the federal -- the  
18 federal rule actually says that if you've worked on  
19 the matter, you can't work on it. In addition, in  
20 fact, the federal also says if you've supervised,  
21 that certain levels of people that supervised matters  
22 are banned from working on it.

23 MR. LOWERY: So the federal's broader  
24 than this rule and you also cannot work on it.

25 MR. DOWNEY: Exactly, exactly.



1 I mentioned to me seem pretty strong and pretty  
2 clear. Again, also generally, they're in by statute.  
3 This is an area where, frankly, I anticipate probably  
4 will not apply. Frankly, the same thing with the  
5 limits on pay for former employers are prohibited.

6 Concurrent employment, there's already a  
7 prohibition there. The only thing I would say is  
8 that my reading of things is that it appears to  
9 prohibit staff from working in wholly unrelated jobs.  
10 And that may be or may not be something we really  
11 want to allow or not allow. And it's certainly worth  
12 at least some attention.

13 And the last thing, really, is just to  
14 throw it open to you for other issues, things I have  
15 not discussed that you think require some sort of  
16 direction or attention. And let me add, obviously,  
17 that this is what we perceive as part of a dialogue,  
18 not the end of a dialogue, so if you do have  
19 additional information to add or topics to raise,  
20 et cetera, I ask, please, those that are here present  
21 or those that are on the Internet or otherwise  
22 listening, feel free to submit things.

23 There is a -- an open docket matter  
24 that's available through the front page of the Public  
25 Service Commission's web site. I think it's under

1 the "What's New" heading. And we certainly invite  
2 everyone to -- to make all comments that they could  
3 there, will help us in the process.

4 And in particular, if -- if we can get  
5 some guidance with how to dice up the ex parte rule,  
6 I think that's one area where really I'd like a  
7 better sense of what type -- if we're going to do it by  
8 matters, what sort of matters should be treated  
9 differently? How would you define things?

10 And the question that was obviously  
11 mentioned earlier, do we -- do we say if a hearing is  
12 scheduled that's an adjudicative matter, is that an  
13 appropriate standard? And -- and if so, you know, we  
14 can certainly proceed and presume that. But if -- if  
15 you're saying no, there's -- you know, there are  
16 types of proceedings where there's no hearing  
17 scheduled that should be treated as being worked into  
18 adjudicative matters, we'd like to know what those  
19 are. Yes.

20 MR. BYRNE: Two -- two quick things.  
21 One is I think a rulemaking's different whether  
22 there's a hearing scheduled or not, a rulemaking  
23 is --

24 MR. DOWNEY: Yeah. Sure, sure.

25 MR. BYRNE: Legislative. And secondly,

1 I had a point on my one-page list that we haven't  
2 talked about. It's -- it's minor, but it's -- it  
3 annoys me, you know, when they -- when there are ex  
4 parte communications -- whatever the rules are, when  
5 there are ex parte communications, the Commissioners  
6 file these notices.

7 MR. DOWNEY: Yeah.

8 MR. BYRNE: You know, so let's say  
9 somebody -- let's say somebody sends every  
10 Commissioner a 50-page document. Well, every  
11 Commissioner files an ex parte notice with every  
12 party with each containing the 50-page document.  
13 There ought to be a more efficient way if there is an  
14 ex parte contact to notify people.

15 MR. DOWNEY: If there was a group  
16 ex parte, we can just have a list of the following  
17 people received the following communications.

18 MR. BYRNE: Yeah, you know, not -- at  
19 least not get multiple copies of the same thing or  
20 maybe it can only be -- you know, maybe you wouldn't  
21 have to do it in hard copy, post it on EFIS. I don't  
22 know. But it just seems real inefficient the way  
23 it's being done now.

24 MR. LOWERY: Well, I think there's a  
25 related issue, and -- and -- for that one, and that

1 is as you're trying to define where these lines might  
2 be and when things are truly an impermissible  
3 communication versus permissible or one that warrants  
4 some kind of notice.

5 I mean, this is just an example that  
6 comes to mind. A major storm hits, services out to  
7 20,000 customers, the utility wants the Commission  
8 and the Commissioners to know that, all those are  
9 getting filed. And not -- you know, they're getting  
10 filed every time.

11 And even those of us who may have been  
12 on different sides of some of these issues, I don't  
13 think that anybody really intends for those to be  
14 considered improper ex parte communications --

15 MR. DOWNEY: Sure.

16 MR. LOWERY: -- that suddenly were  
17 getting filed in every docket. And we've had --  
18 we've had Commissioners recently file those in every  
19 pending docket the company has, for example. Even  
20 ones that have -- I mean, they're -- they're -- we're  
21 killing a lot of trees and we're burning up a lot of  
22 megabytes of space, and -- and it just doesn't make a  
23 lot of sense.

24 MR. DOWNEY: And -- and that may be the  
25 perfect type of thing to come up with sort of a

1   preprinted form or format where you say, you know,  
2   notice of outage: We, the following utility would  
3   like to notify the Commissioners of an outage of X  
4   number of people in X area because of X reason, and  
5   you automatically state it and that's presumed not to  
6   be --

7                   MR. LOWERY: And they need to get that  
8   themselves personally quick because what happens is,  
9   the legislators from their district start calling  
10  them immediately --

11                  MR. DOWNEY: Sure.

12                  MR. LOWERY: -- even if it's nine  
13  o'clock at night or two o'clock in the morning. And  
14  instead of having a machine or it has to be filed --

15                  MR. DOWNEY: Sure, sure.

16                  MR. LOWERY: -- and go through a  
17  machine, it just doesn't make sense.

18                  MR. DOWNEY: Okay. Well, I mean, to  
19  give an example, there -- there are -- there are  
20  provisions in the Missouri -- Missouri lawyer  
21  advertising rules for what we call tombstone ads,  
22  that tombstone ads that have certain types of  
23  information don't have to have disclaimers. You  
24  could do the same type of thing and say communication  
25  regarding an outage that contains only the following

1 information doesn't -- you know, could be disclosed  
2 within 48 hours and doesn't need all of the other  
3 bells and whistles.

4 MR. BYRNE: Maybe it shouldn't --

5 MR. DOWNEY: And that may be --

6 MR. BYRNE: Maybe it shouldn't be an --

7 MR. DOWNEY: Sure, yeah.

8 MR. BYRNE: -- qualify at all --

9 MR. LOWERY: Maybe it doesn't even rise  
10 to the level of -- of, quote, ex parte or improper  
11 ex parte.

12 MR. DOWNEY: And frankly, we were  
13 talking earlier about remedial systems, and one of  
14 the things -- I'm trying to remember if it's  
15 California or Washington, but one of the two states  
16 actually has that if an -- if an improper ex parte  
17 communication occurs in certain circumstances, you  
18 can cure it by giving an ex parte communication of  
19 equal length to the parties on the other side.

20 I mean, you sort of look at that thing  
21 and wonder, but, you know, maybe -- you ask the  
22 question is that appropriate or does that really  
23 solve things, so -- but no, I was just thinking about  
24 that as you were talking.

25 But no, it's certainly -- that's the



1 type of thing also where you'd say that's -- that's a  
2 great opportunity to have a rule that says these  
3 types of things are not the types of things we're  
4 worried about so we're going to allow them to happen  
5 with either no regulation or minimal regulation or  
6 however it works out.

7 MR. WOODSMALL: Well, along those lines  
8 too, maybe the exemption would apply depending on who  
9 the person is calling the Commissioner. If you have  
10 a case going and person A, B, C has filed testimony  
11 in that case, you don't want that person talking to  
12 the Commissioner. But someone else who has nothing  
13 to do with the case, maybe they can contact the  
14 Commissioner.

15 MR. DOWNEY: Sure. Other questions or  
16 comments?

17 MR. WOODSMALL: So as this goes forward,  
18 are you unilaterally taking this and making changes?  
19 Are there ongoing communications with the Commission  
20 getting their feedback? How does this process work?

21 MR. DOWNEY: There -- there have been  
22 communications and I suspect there will continue to  
23 be communications with the Commission. My goal,  
24 frankly, is to continue having as many communications  
25 as possible with everybody. So, you know, the --

1 the -- how to do it effectively, I mean, if we keep  
2 having meetings -- this wasn't necessarily a drafting  
3 session, but I certainly would like to get feedback.

4 My anticipation will be that there will  
5 be a draft, that the draft will be shared with all of  
6 you, with the Commission, that we'll try to get  
7 comments back from every source possible and -- and  
8 try to come up with as best workable rule we can.  
9 Yes.

10 MR. BYRNE: How -- who's going to draft  
11 it? Are you -- were you going to be the draftsman,  
12 do you think, or is it the group of people?

13 MR. DOWNEY: The staffing, I think  
14 primarily my firm will be -- will be primarily  
15 involved in drafting and thus -- although I'm not  
16 going to be involved with the actual work, I will  
17 be -- I'll be where the buck stops probably for the  
18 most of it. Yes.

19 MR. ZUCKER: I'm Rick Zucker with  
20 Laclede Gas. Do you see on -- on ex parte  
21 communications, do you see a difference between  
22 whether the -- one of the litigants or people who  
23 practice -- practice before the Commission initiates  
24 the communication versus the Commissioner initiating  
25 the communication?

1                   MR. DOWNEY: Normally how these rules  
2 work is the answer is it doesn't matter, but it may  
3 be appropriate to say that, you know, in certain  
4 circumstances it should matter or -- or it does or  
5 does not matter. That's a good question to raise.  
6 Frequent -- frequently the rate -- the way the rules  
7 are written is that if someone communicates, that  
8 normally what happens is both sides can get in  
9 trouble.

10                  MR. ZUCKER: Of course, we want  
11 Commissioners to be informed in making an -- an  
12 informed decision.

13                  MR. DOWNEY: Absolutely. And I -- I  
14 think that's one of the reasons why you need to  
15 make -- I mean, what you don't want to have those is  
16 if there's a question of legitimate -- you know, if  
17 there's a question that affects every party to a  
18 matter, you don't want a Commission to call you --  
19 well, you may want that, but you don't want a  
20 Commissioner to call your adversary and say tell me  
21 how I should rule on this. You want that to be in  
22 the open.

23                  So the answer is yes, we want them to  
24 get the information, but the ex parte communication  
25 rule really is driven by a desire to provide -- I

1 mean, and I joked about it before, but due process,  
2 that people believe that everyone has a fair chance  
3 to present their case and has a fair chance to have  
4 it just -- have their -- their case ruled on based  
5 upon appropriate means or appropriate evidence.

6 MR. ZUCKER: But if a Commissioner has a  
7 question, I don't think I'd mind as much if the  
8 Commissioner asks the question to my opponent, but  
9 then --

10 MR. DOWNEY: As long as you're there to  
11 answer, yes.

12 MR. ZUCKER: And then it gives me the  
13 opportunity to either respond to it or to be prepared  
14 to respond to it at the hearing.

15 MR. DOWNEY: Sure.

16 MR. ZUCKER: Because at hearings we  
17 have, Commissioners ask whatever questions they want  
18 of anyone they want, and --

19 MR. DOWNEY: And sometimes you may not  
20 get an -- an opportunity right there, but you may  
21 hopefully have an opportunity later to say, you know,  
22 Commissioner so and so, you asked this earlier, you  
23 know.

24 MR. ZUCKER: Well, you've got to be  
25 pretty quick to be prepared for it.

1 MR. DOWNEY: Yeah.

2 MR. ZUCKER: And so if that question  
3 were asked prior to the hearing, a party could be --  
4 would have an opportunity to be more prepared than --  
5 than they would be if it just suddenly, you know,  
6 shot up at the hearing.

7 MR. DOWNEY: And I guess what you're --  
8 what you're asking is in -- and this is probably more  
9 of a procedural rule, but some sort of way that --  
10 that if Commissioners have particular issues they  
11 want addressed, even just to let people know that  
12 before the hearings. Is that what you're asking for?

13 MR. ZUCKER: Well, I -- I -- I mean, I  
14 think that's okay, but I guess what I'm saying is I  
15 would like to maybe take off the shackles of the  
16 Commissioners to be able to ask questions they have  
17 before the hearing to seek information so that --  
18 that they're prepared, more prepared at the hearing  
19 and you can be more prepared at the hearing.

20 MR. DOWNEY: You know, the  
21 interesting -- one of the reasons I find the New  
22 Hampshire rule very interesting is it's very easy to  
23 contemplate that you may have a hearing where you are  
24 a -- a party that under the New Hampshire rule would  
25 have the ability to request a designation of

1 adjudicative staff and you would opt not to exercise  
2 that. And I think that's one of the interesting  
3 things about it.

4                   You may say there are certain types of  
5 matters where we really do want to make sure that  
6 nothing's going on, but in other circumstances, we  
7 don't have those problems. And I -- and I think  
8 that's -- that's sort of an interesting wrinkle to  
9 that rule where, again, you know -- and then there's  
10 a vehicle for making clear when that happens.

11                   But -- but, I mean, that was one of the  
12 reasons that I think the New Hampshire at least is  
13 curious is because if you have the Washington model,  
14 if you have the California model, if you have really  
15 sort of where Missouri is now, these prohibitions are  
16 always in place. And New Hampshire clearly seems to  
17 contemplate that there would be circumstances where  
18 you wouldn't have it.

19                   Actually, I'm going to go back -- I  
20 know, to get --

21                   MR. BYRNE: Yeah, Tom Byrne from Ameren  
22 again. I -- you know, I -- I've got a problem with  
23 that because I'm sure what would happen is -- I mean,  
24 if there -- if you've got an -- a contested  
25 adjudicatory case and they -- you know, I don't want

1 the Commission to say, gee, I've got 100 questions,  
2 I'm going to go ask Bob Schallenberg the answer to  
3 100 questions. I mean, that -- that's really unfair  
4 to me as the parties kind of then go litigate  
5 against --

6 MR. DOWNEY: And you can see, I mean,  
7 that's -- that strengthened my concern with your  
8 statement, and that -- and that may be the reason why  
9 your company would say, you know, for these  
10 particular type of matters, we don't feel the need to  
11 designate. Then -- then you may have the one where  
12 you come up here and say, you know what, this one  
13 really matters to us or we -- we're really concerned  
14 about what may happen or we've had bad experiences in  
15 the past and we want to make sure it doesn't happen  
16 again.

17 I mean, that's why I think the New  
18 Hampshire model is sort of an interesting one is that  
19 you as the litigants can kind of say they think  
20 there's a problem there.

21 I think they're going to have you move  
22 up a little bit, if you could, for the court  
23 reporter.

24 MR. HENDERSON: My name is Wes Henderson  
25 and it -- it goes back to Rick's question. Who would

1 be responsible, then, for reporting that that  
2 communication even took place?

3 MR. DOWNEY: I mean -- and -- and,  
4 certainly, you know, that's one of the things that  
5 you'd have to ask. But, for example, it would --  
6 it -- the normal sense would be that probably the  
7 Commissioner generally has the obligation. And, in  
8 fact, the parties may even -- may end up with two  
9 reports being made. But, you know, that's something  
10 certainly to look at. You know -- and -- and I think  
11 that the -- the present way is -- is that only the  
12 Commissioners were -- have the reporting obligation.  
13 And -- and again, that may not be the vehicle we want  
14 to use.

15 JUDGE WOODRUFF: I'm going to jump in  
16 here for a moment. We've been going for about an  
17 hour and a half and our court reporter has requested  
18 a break. So we'll take about a ten-minute break and  
19 we'll come back at 3:40.

20 (A RECESS WAS TAKEN.)

21 JUDGE WOODRUFF: We should be live  
22 again. And frankly, I can -- I can say -- I can add  
23 I'm basically at the end of the materials that I  
24 planned on covering. I certainly would love to hear  
25 more comments from everyone else if they have



1     comments at this time.  Anyone have anything further  
2     to add at this point?

3                     (NO RESPONSE.)

4                     MR. DOWNEY:  Well, then, I guess --

5                     MR. MILLS:  Just -- just briefly.  One  
6     of -- one of the things that we were sort of talking  
7     about during the break and I think Rick brought this  
8     up -- oh, by the way, I'm Lewis Mills, Public  
9     Counsel.

10                    Rick brought this up before -- before we  
11    broke, and it's a question of, you know, the free  
12    inter -- exchange of information.  And certainly,  
13    it's never been my intention to try to keep  
14    information from the Commission.  I think that the  
15    goal of the rule should be to allow the Commission to  
16    get all kinds of information but just to allow other  
17    people to know what they're getting, when they're  
18    getting it and who they're getting it from.  So --  
19    and then I think that would -- I think that would  
20    address Rick's point as well.

21                    MR. DOWNEY:  Sure.  And just to clarify,  
22    usually that is a concern that is addressed with  
23    ex parte communications.  It's not to prohibit the  
24    communications, but rather to make sure they're not  
25    ex parte from one side to the other side being able

1 to participate.

2 MR. BYRNE: But I think it's different.  
3 When you're -- Tom Byrne from AmerenUE. It's  
4 different when you're in a case, though. You know,  
5 to my mind, the idea of there's no -- there's no case  
6 pending and you want to go talk to the Commission  
7 about rates of return or something, but there's no  
8 case pending and you're -- you know, that's -- that's  
9 different than if there's a case pending and that's  
10 an issue in the case, you know. In my -- my opinion.

11 MR. MILLS: Okay. Well -- and I'll have  
12 to respond to that, because, you know -- and if there  
13 isn't any prospect of that being an issue in a case  
14 in a -- in the reasonably foreseeable future, then I  
15 don't know that I would have a problem with that.

16 But if the purpose is to be talking to  
17 the Commissioners to educate them about your  
18 perspective on something that they're going to be  
19 deciding in a few months, a few weeks, in the next  
20 year or whatever, then I -- then I think everybody  
21 who is likely to be on the other side of that issue  
22 or even on the same side of that issue in the case in  
23 which the Commission does have to decide, it should  
24 know that you are talking about talking to the  
25 Commissioners about an issue that's likely to come up

1 before them.

2 MR. DOWNEY: And so people are aware,  
3 one of the things obviously also to look at in this  
4 context, some of the states do have sort of a  
5 prefiling halo around ex parte communications that 14  
6 days or 30 days prior to the filing, you're not  
7 supposed to have communications as well. And  
8 obviously -- I mean, there could be a concern there,  
9 how do we know if we're going to file, but the  
10 thinking is if you know something that's going to be  
11 filed that you can't lay the groundwork and then file  
12 and expect to have the ground -- you know, the seed  
13 that you planted bear fruit. So that is certainly  
14 one way to deal with that as well.

15 MR. WOODSMALL: Well, and one of the  
16 things that we've seen utilized in Missouri, for  
17 instance, MGE's recent case that they just filed.  
18 They came in, met with the Commissioners in an agenda  
19 session. I don't think it's the meetings that are in  
20 public that are noticed up that's the problem. It's  
21 the private meetings where no one knows anything that  
22 has caused some problems. So I think some utilities  
23 have dealt with the restrictions.

24 MR. DOWNEY: And certainly, I mean,  
25 when -- when you're talking about that as well,

1     that -- that is certainly the type of thing when you  
2     talk about the prefiling halo, maybe what you say is  
3     if a matter is not filed but you reasonably  
4     anticipate a matter will be filed, the appropriate  
5     thing to do then is talk about it in agenda, you  
6     know, give notice to Public Counsel and, you know,  
7     whoever might be affected or however we do it, we can  
8     certainly provide clear guidance on that as well.

9                     The -- the good thing about having good  
10    ex parte rules is that you really do come up with  
11    good guidance where people can look and say, okay,  
12    here's what we want to do, how do they accomplish it?  
13    And the answer more likely than not is we'll be able  
14    to have those communications as long as the other  
15    side is present, you know, and we follow these  
16    procedures or as long as we give notice or as long as  
17    we do follow-up or whatever it is. Or, in fact, we  
18    say, well, you know, we don't have to worry about the  
19    limits at all because of the type of matter we're in.  
20    Yes.

21                    MR. BUB:   Michael, Leo Bub from AT&T.  
22    Would there be a distinction to be drawn even like  
23    within a proceeding when how long you are into the  
24    proceeding? Like, for example, FCC, I believe there  
25    is a rule that once something is set for hearing,

1    then a particular level of ex parte kicks in.  But  
2    before the thing is set for hearing, is there a  
3    little bit more opportunity for exchange of  
4    information, still disclose it, but it's not an  
5    absolute prohibition?

6                   MR. DOWNEY:  And what I would say to  
7    that is that that is certainly the type of area where  
8    the parties really can provide us with guidance, that  
9    if there is some sort of triggering moment, you know,  
10   in the Missouri Public Service Commission.

11                  MR. BYRNE:  You could look at -- look at  
12   the statute too, I think.

13                  MR. DOWNEY:  Well, yeah.  No -- but I'm  
14   saying -- but, you know, again, you know, if there's  
15   some other guideline to be used or something, that's  
16   certainly a great opportunity to provide us with --  
17   with your knowledge as to what that would be.

18                  Anything further?

19                  (NO RESPONSE.)

20                  MR. DOWNEY:  Well, as -- as I said at  
21   the outset, my hope was that this was not to be a  
22   dialogue, but rather to be part of a dialogue.  And  
23   frankly, one of the things I think we would say is  
24   this is a success today as we have had many more  
25   persons now that know what's going on.

1                   I noticed that the most EFIS filing went  
2 out to a lot more e-mail addresses than the previous  
3 ones did. And -- and certainly what we would ask is  
4 for parties to go ahead and sign up so they're  
5 receiving communications, you know, at least keep  
6 some track of what's going on and let us know all the  
7 helpful information you could provide to us. We  
8 certainly will -- will consider it. We won't  
9 necessarily adopt it, but we'll certainly consider it  
10 as we try to work out good rules to at least reckon  
11 with the Commission.

12                   I think with that, Judge, I turn it back  
13 over to you.

14                   JUDGE WOODRUFF: All right. Well, thank  
15 you very much and we're adjourned.

16                   (WHEREUPON, the recorded portion of this  
17 proceeding was concluded.)

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