

1 BEFORE THE PUBLIC SERVICE COMMISSION

2 STATE OF MISSOURI

3 _____
4 TRANSCRIPT OF PROCEEDINGS

5 Proposed Rulemaking Hearing

6 December 5, 2011

7 Jefferson City, Missouri

8 Volume 1
9 _____

10
11 In the Matter of

12 A Proposed Amendment To)

13 The Commission's Rule)

14 Regarding Ex Parte And Extra) File No. AX-2012-0072

15 Record Communications)

16 _____
17 MORRIS WOODRUFF, Presiding

 CHIEF REGULATORY LAW JUDGE

18
 KEVIN GUNN, Chairman (via telephone)

19 TERRY M. JARRETT

 ROBERT S. KENNEY, (via telephone)

20 Commissioners
21 _____

22
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ALSO PRESENT: Dave Overfelt, Missouri Retailers
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1 JUDGE WOODRUFF: Let's go ahead and get
2 started. It's now 10:00 a.m., and we're here for a
3 public comment hearing regarding a proposed
4 rulemaking, and that's proposed by the Public Service
5 Commission to amend its ex parte and extra record
6 communication rule.

7 There's been a number of parties that
8 have filed written comments, and we do have at least
9 one commissioner on the phone.

10 Commissioner Gunn, I believe you're on
11 the phone.

12 CHAIRMAN GUNN: Yes.

13 JUDGE WOODRUFF: Commissioner Kenney, are
14 you there also?

15 (No response.)

16 JUDGE WOODRUFF: I believe Commissioner
17 Kenney is going to be joining us later.

18 Essentially, the procedure is that I'll
19 give everybody a chance to speak who wants to speak.
20 Our rule indicates that parties supporting the rule
21 or supporting the amendment to the rule would go
22 first, unless otherwise ordered, so we'll start out
23 with the parties that are supporting the rule. And
24 I'll swear you in, if you wish to give testimony. If
25 the attorneys just want to make comments, the rule

1 now provides that you don't have to be sworn. That
2 was a recent amendment to our procedural rules.
3 After you've had a chance to make your comments or
4 testify, the Commissioners will have an opportunity
5 to ask questions.

6 I believe the party most supportive of
7 the rule that I see in the room right now is Ameren,
8 so if you'd like to go first --

9 MR. LOWERY: Thank you, your Honor.

10 JUDGE WOODRUFF: Why don't you come up to
11 the podium. It'll be easier to hear.

12 MR. LOWERY: Just for the record, I'm Jim
13 Lowery. I represent Ameren Missouri. Ameren
14 Missouri appreciates the opportunity to provide
15 comments on the Commission's proposed amendments to
16 its communications rule.

17 We filed comments in support of most of
18 the proposed amendments, and we also filed comments
19 supporting some additional changes to the rule, some
20 of which are in the nature of what I would say are
21 minor clarifications or tweaks, and one of which is
22 occasioned by a couple of fundamental principles that
23 I'll talk about a little bit more in a moment.

24 First, the first fundamental principle
25 that drives, probably, the most significant comment

1 that we had is the fundamental unfairness of treating
2 one litigant or class of litigants differently than
3 another and, second, what we believe is a fundamental
4 misapplication of or misunderstanding of the
5 Commission's statutory rule as a policymaking delegatee
6 of legislative authority.

7 I'm going to work backwards from how we
8 actually filed our written comments and then get to
9 the most substantive of our comments. We suggested a
10 change to Section 1(g), which is the definition of
11 "ex parte communication," and I think that this
12 change is necessary just because there -- what we
13 believe to be a typographical error in the original
14 rule.

15 The original basically says, Ex parte
16 communication is defined as -- except Section 3,
17 which spells out what an ex parte communication is.
18 I think what the Commission was trying to do is to
19 accept from ex parte communications those
20 circumstances where a commissioner is
21 inadvertently -- gets into a communication that it
22 becomes apparent is going to be an ex parte
23 communication withdrawal, so I think that -- I think
24 that that's just a typographical error and that
25 reference in the definition of "ex parte

1 communication" should be to 3(d), not just to 3.

2 The second change we suggested is a
3 couple of changes to Section 10(a), which I'll --
4 I'll colloquially call the Safe Harbor provision of
5 the rule. We're suggesting a couple of things here.
6 First, for the day-to-day types of events and
7 associated information that are covered by the
8 exclusions of 10(a), we think it needs to be clear
9 that it's not nearly a notification in the sense that
10 if there's a communication about those subjects, the
11 Commissioners need -- or the technical advisory staff
12 or presiding judge need to be able to ask a follow-up
13 question. There needs to be some ability to have
14 some exchange, and I think, honestly, that's how it
15 has, in practice, been working, but the rule appears
16 to be unduly narrow in just literally saying that
17 it's a notification.

18 And secondly, we are suggesting three
19 additional exclusions that our experience has
20 indicated would be helpful to facilitate the exchange
21 of information about these three very general and
22 narrow topics that we're suggesting, and they are
23 this: We think the Commissioners need to be in a
24 position to be educated about new technology, Smart
25 Grid, Cyber security, those types of things about

1 customer service problems, and the amendment we're
2 proposing is actually ones that have been brought to
3 the utility's attention by the Commission or OPC and
4 others, or about being able to explain -- if the
5 Commissioners aren't sure if a facility will be able
6 to actually talk about the operation of the facility
7 and answer basic questions without it -- without
8 either the utility or the Commissioners being in a
9 position of fearing of being accused of violating the
10 rule or otherwise triggering a lot of bureaucracy in
11 terms of filings and those types of things about
12 those kinds of subjects.

13 We don't believe any of these items are
14 the kinds of things that we generally see
15 substantive -- in substantial Commission cases,
16 including the rate cases, and we believe adding these
17 three exclusions strikes an appropriate balance
18 between -- a lot of the Commissioners have
19 communications about these types of general subjects,
20 but also striking a balance between what the rule
21 itself is trying to do.

22 The next change that we suggest deals
23 with Section 5, and that is when an anticipated party
24 has to notify -- has to make some kind of filing
25 regarding an extra record communication.

1 By definition, an "anticipated party" is
2 a party that knows they're going to be a party to
3 that contested case, or they anticipate they're going
4 to be, they actually have that anticipation, or they
5 should know, and we believe that there's no real
6 justification under those circumstances for that
7 anticipated party not to go ahead and file the notice
8 of the communication that would be covered, an extra
9 record communication, within three business days,
10 rather than waiting until they actually become a
11 party.

12 The next section I want to talk about --
13 and this is sort of a mechanical suggestion to try to
14 reduce the burdensomeness on utilities and on others
15 as well. Section 4 deals with filing these
16 notifications and summaries of communication, and
17 what we're suggesting is a tweak that sort of plays
18 off how the Commission handles certain other areas,
19 like agendas, notices of issues by dele-- ordered by
20 delegation, press releases, those kinds of things.

21 What we're suggesting is: Instead of
22 there having to be a filing in every case -- we had a
23 recent filing where we ended up with a filing in 33
24 cases which, you know, we have complainants, so it's
25 a contested case, we have filings in all these case

1 files.

2 The complainants is getting a notice that
3 there's been this filing of this meeting that took
4 place that has nothing to do with their case and is
5 probably confused by why they're getting this notice,
6 so what we're suggesting is: Set up a repository in
7 EFIS so whenever a filing has to be made, it goes to
8 the repository; any interested person can subscribe
9 to get all those notices or get notices about
10 particular utilities, and then they get a notice that
11 there's been this filing made and it's available on
12 EFIS, but it doesn't have to literally -- the paper,
13 so to speak, doesn't literally have to end up in 33
14 files at one time.

15 It's really a -- it's not something -- we
16 certainly can do what we've been doing, but it seems
17 like we can take advantage of the technology in a way
18 that would be more efficient.

19 There is one area -- the judge indicated
20 that we were, perhaps, generally the most supportive,
21 but there is an area or two where we were not
22 entirely supportive of the proposed amendment. Let
23 me talk about the first one now.

24 That's Section 13, which, as I read it,
25 essentially is dealing with the postmortems after a

1 contested case is over. We can appreciate the
2 Commission's desire to learn from those cases. We
3 think that's a laudable goal. It makes sense, but
4 our concern is that -- for example, consider if we
5 have a Rate Case A. We had -- ROE was at issue in
6 that rate case, which is probably going to be the
7 case, and we had issues within that issue dealing
8 with proxy groups, growth rates, is the Cap M an
9 appropriate model in these economic conditions or
10 not, all those kinds of issues that we typically see
11 in that kind of discussion.

12 That case is over, but Rate Case B
13 involving another utility is still going on and,
14 really, those very similar issues are really at issue
15 in that second case.

16 And we think the Commission may be
17 putting itself in a position of having a difficult
18 time drawing the appropriate line if they are
19 immediately ostensibly in the context of talking
20 about what just happened in Rate Case A, really
21 debating some of those same issues that really is
22 still before them to decide in Rate Case B.

23 And we're suggesting that those
24 postmortems about those issues shouldn't be taking
25 place if there is another rate case taking place in

1 that same issue, or a substantially similar issue is
2 still pending.

3 The most substantive comment problem that
4 we had about the rule deals with Section 8, and this
5 is the section that only applies to the regulated
6 entities, and that is, I think, our primary problem
7 with the section.

8 When the KCPL and Aquila merger case
9 controversy arose, merger opponents, principally,
10 argue that commissioners were judges. They argued
11 that the judicial canons applied to what the
12 commissioners do, and they argued effectively the
13 commissioners are supposed to have blank minds
14 when they walk into the hearing room, and that's
15 neither -- neither is that the reality of the jobs
16 the commissioners have, nor is it the reality of the
17 law.

18 The Staff counsel at that time contested
19 those arguments. We also contested those arguments
20 in the rulemaking that led to this rule, and the
21 Supreme Court recently, once again, clarified and
22 reaffirmed the commissioners do not exercise judicial
23 powers. They are not judges. They are not subject
24 to judicial canons.

25 We, of course, agree commissioners

1 shouldn't have actual bias. We, of course, agree
2 commissioners have an interest in the outcome of the
3 case, but that doesn't mean commissioners come to the
4 case in the same way the judge comes to the case.

5 Commissioners are delegees of legislative
6 authority. They are expected to have knowledge of
7 even adjudicated facts about a case, as long as they
8 don't have an unalterable prejudgment about that
9 case. There's nothing wrong with that.

10 Commissioners presume to not have a bias or an
11 interest.

12 And finally and fundamentally -- the
13 rule, as written, is fundamentally unfair and
14 discriminatory, to be blunt about it. The regulated
15 entities are not able to have communications that
16 others can have. Well, if there is -- and I don't
17 agree that there is, given the Commission's unique
18 roll, but if there is something wrong with the
19 commissioners having knowledge of adjudicated facts
20 or having a discussion with a litigant to the case,
21 if there's something wrong with that, then it doesn't
22 matter whether it's the regulated entity, it's the
23 Office of the Public Counsel, it's a consumer group.
24 It doesn't matter who it is. Those kinds of
25 communications shouldn't be taking place.

1 Our position is that they can take place
2 but there shouldn't be a rule that's being applied in
3 a discriminatory fashion, and that really flies in
4 the face of the Commission's duty to be fair to all
5 parties and to balance the interest of all
6 stakeholders in its proceedings.

7 So those were all of the comments and
8 additional amendments that we had. I'd be happy,
9 obviously, to answer any questions Commissioners or
10 your Honor might have.

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

13 CHAIRMAN GUNN: I do, actually. Jim,
14 thanks very much for the comments. They're
15 appreciated.

16 I want to go back to your issue about
17 anticipated parties. So you're suggesting that
18 they -- that if they are under the definition of
19 "anticipated party," they should be required to file
20 a notice within three days.

21 Is that true even if they ultimately
22 decide not to become a party to the rate case? I
23 mean, isn't that why we said that the notice wasn't
24 filed, that ultimately those groups may decide that
25 they're not a party and decide not to intervene?

1 MR. LOWERY: That's true, but they -- they
2 are defined already is that [sic] they've anticipated
3 or they know they're going to become a party, or they
4 should know, and it seems that if we're -- the idea
5 behind the rule, once we get into that 60-day window
6 and through the contested case, the value behind the
7 rule is to have maximum disclosure and transparency.
8 It seems like this fosters that goal.

9 I understand your point, but it just
10 didn't seem like there was sufficient justification
11 for those communications not to be disclosed.

12 CHAIRMAN GUNN: Yeah. I just don't know
13 how -- for example, if AARP says, Hey, we're thinking
14 about getting into this case, so then they would
15 become an anticipated party, but then also decide
16 because of, for whatever reason, resource
17 allocations, whatever event, that they say, You know
18 what, we're going to sit this one out, why they
19 should -- what jurisdiction, necessarily, would have
20 over them inquiring of the file if they're not in the
21 case, which they are not a party and have
22 affirmatively decided not to intervene.

23 MR. LOWERY: Well, in terms of being in
24 the case, I mean, I think our idea that we actually
25 just have a repository might solve that issue. Your

1 point -- I understand your point. We just felt like
2 it was -- if they're just thinking about getting in
3 the case, I'm not sure they're an anticipated party.

4 If they have decided, yes, we're getting
5 into the case and then something later intervenes and
6 they change their mind, that's one thing, but if they
7 literally are anticipating getting in the case, then
8 within the definition, they are an anticipated party.

9 I understand -- I understand your point.
10 This is not -- this is not one of those comments that
11 we would say, Oh, we're -- you know, we would stamp
12 our feet if the Commission didn't agree with us, but
13 we thought it was an -- we thought it was an
14 improvement.

15 CHAIRMAN GUNN: No, it's a good point. I
16 appreciate that.

17 I want to move on to your postmortem
18 comment. You bring up a very interesting point which
19 is, How do we avoid unduly influencing the
20 proceedings in a postmortem if there are -- not
21 necessarily for the regulated entity that we just
22 finished, but for future?

23 So would you be okay with that, if there
24 were certain restrictions put on it saying that we
25 couldn't talk about issues that were substantial --

1 that were currently pending that were substantially
2 similar to issues decided in the last rate case?

3 MR. LOWERY: I believe so, Chairman Gunn.
4 I mean, I think the specific language that we
5 suggested on that issue -- and let me try to read it
6 real briefly here. You know, the rule starts out,
7 Notwithstanding any provision of this rule to the
8 contrary, and I see I have a typo -- I apologize for
9 that -- with any person regarding any procedural or
10 substantive issue related to such case so long as the
11 same or substantially the same procedural or
12 substantive issue is not the subject of another
13 regulated entity's pending contested case or
14 anticipated contested case.

15 So if it's not the same issue in Rate
16 Case B or it's not substantially the same then, yes,
17 you can have all of the communications postmortem
18 about rate cases that you want. That really was our
19 suggestion.

20 CHAIRMAN GUNN: How broadly would you
21 define it? Would you say that -- ROE is going to be
22 a determination in every rate case, so would that
23 mean that we would not be able to have any sort of
24 rate discussion about ROE when any rate case was
25 going on, or would it be more specific about --

1 MR. LOWERY: I think ROE is a tough
2 example, to be honest. I think you -- I think I
3 might have concerns about -- I suppose there could be
4 a situation where there's some narrow aspect of ROE
5 in Rate Case B that had nothing to do with any of the
6 arguments in Rate Case A, and it wouldn't be an
7 issue, you know, but generally it's difficult to
8 separate the various components of the various models
9 and the various components of information, so ROE
10 might be a tough one.

11 Depreciation -- I mean, I'll give you an
12 example on depreciation. I don't think that if there
13 was some kind of depreciation issue in Rate Case A
14 that you're precluded about -- precluded from talking
15 about a totally different depreciation issue in Rate
16 Case B.

17 For example, you were talking about
18 T and D net salvage for transmission lines in Rate
19 Case A, and in Rate Case B you're talking about
20 combustion turbine generators or steam plants or
21 something like that, or a nuclear plant. I mean,
22 those are -- those are two totally different issues,
23 and I'll be the first one to admit the "substantially
24 similar" language is not -- perhaps it's not
25 perfect. I'm not sure there is a perfect phraseology

1 we can find, but I think you'd have to make a case-
2 by-case determination as to -- as to where the line
3 fell.

4 CHAIRMAN GUNN: Okay. I want to give you
5 a hypothetical on a totally different issue on this
6 kind of catchall phrase issue that we've been talking
7 about.

8 So I'm just trying to figure out how this
9 would operate and what your view would be on how this
10 operates. Let's say you have a transmission company
11 that's trying to figure out whether or not -- that
12 would like to potentially build wires that cross
13 service lines in the state of Missouri.

14 So they're trying to figure out whether
15 or not they, A, want to come into the state; B,
16 whether they should file -- or whether to even file a
17 certificate and; C, whether they would essentially be
18 the utility, but they haven't made any of that
19 determination yet, and Missouri is one of the few
20 states they're looking at.

21 Under the catchall phrase, would you
22 believe that they could not have a meeting with the
23 Commission?

24 MR. LOWERY: Chairman Gunn, could you
25 clarify when you say "catchall phrase" which

1 provision you're talking about.

2 CHAIRMAN GUNN: It's the one that says,
3 All persons in a potential future case --

4 MR. LOWERY: Oh. It's the -- it's
5 Section 11, the one that's being proposed for repeal.

6 CHAIRMAN GUNN: Right.

7 MR. LOWERY: If you bear with me just a
8 second, let me take -- actually take a look at the
9 language. Well, of course, one question is, Are they
10 likely to be a party, which I -- in your
11 hypothetical, it's not clear to me, and maybe you're
12 saying -- you're assuming that they are likely to be
13 a party. I'm not sure.

14 If they're not likely to be a party, then
15 I don't think they're caught by the rule.

16 CHAIRMAN GUNN: But they are potentially a
17 party if they have to file as a utility, and then the
18 determination of whether they build those lines would
19 be in a rate case.

20 MR. LOWERY: Right, they're potentially a
21 party. The language of the rule says "likely to be a
22 party" which, I guess, means they're more likely than
23 not. There's preponderance of thought that they're
24 going to be a party.

25 But I think -- I think -- I think if

1 they've crossed that "likely" line, then I guess
2 they're covered by Section 11 as written, it would
3 appear to me.

4 CHAIRMAN GUNN: Well, if they say, Hey,
5 we're pretty sure we're going to come to Missouri,
6 but a lot of it just depends on how we decide to --
7 do you think that would be prohibited from me talking
8 to them?

9 MR. LOWERY: If it's about a substantive
10 issue and they're likely to be a party, it certainly
11 looks to me like it would be.

12 CHAIRMAN GUNN: All right. Let me ask
13 this: Let's say there's legislation going on that
14 would alter what could be recoverable in a rate
15 case. So let's say there's legislation that involves
16 whether bad debt could be recovered in a certain way
17 through a rate case, and I'm walking through the
18 hallways of the capital. Can -- what my feelings are
19 about this particular piece of legislation?

20 MR. LOWERY: Well, if I read your rule
21 correctly, legislation is part of general regulatory
22 policy, and general regulatory policy is excepted
23 from ex parte and extra-record communications.

24 CHAIRMAN GUNN: Even if it's likely to
25 become a substantive issue in a rate case?

1 MR. LOWERY: Well, I don't -- the
2 legislative change about what the law is, I'm not
3 sure if that would be -- if the law says bad debt
4 expense shall be included in rates, then I'm not sure
5 that bad debt expense is going to be a substantive
6 issue. The law just is what it is.

7 CHAIRMAN GUNN: What if it's a main
8 provision? What if it says, Bad debt may be
9 recoverable --

10 MR. LOWERY: Right. I --

11 CHAIRMAN GUNN: -- outside of a rate
12 case?

13 MR. LOWERY: Right.

14 CHAIRMAN GUNN: Just talking about
15 legislation is different than talking about specific
16 provisions that may become substantive issues in
17 legislation. I agree with you that under some of the
18 other statutory provisions and other aspects of the
19 rule that was specific -- that's a specific
20 exclusion, but I'm concerned about, and what I think
21 the general counsel has raised to us is, Does this
22 phrase kind of -- how do you make the determination
23 whether this phrase controls or whether the
24 substantive issues in the rate case controls, or
25 whether the general idea of legislation -- exception

1 of the legislation controls?

2 MR. LOWERY: Well, the Company -- Ameren
3 Missouri generally supports the repeal of that
4 provision, as our comments indicated, but I think if
5 you are going to preveal [sic] that provision, it
6 highlights the need to either repeal Section 8, which
7 we are advocating should be done for the reasons I
8 gave, or at least make it -- make Section 8 apply
9 evenly, because if you repeal the provision, you open
10 up a great many communications for a great many
11 parties, yet the utilities are still even more --
12 being treated in an even more differential fashion
13 than the other parties are.

14 CHAIRMAN GUNN: So you view this section,
15 Section 11, as the only provision that inhibits
16 communication between the Commissioners --

17 JUDGE WOODRUFF: I think we lost the last
18 part of your statement, Mr. Chairman.

19 CHAIRMAN GUNN: All right. I'm sorry.
20 So this Section 11 is the section that
21 could potentially prohibit nonregulated entities from
22 having conversations with the Commissioners, but if
23 we repealed Section 11, you believe that all
24 regulated utilities' meetings would still be subject
25 to the other provisions of the ethics rule?

1 MR. LOWERY: Section 8 is extremely broad.
2 It says, "Any communication between a regulated
3 entity and a commissioner." There is no --

4 CHAIRMAN GUNN: So the repeal of Section
5 11, in your view, doesn't do anything to -- how
6 should I say -- lighten the utilities' ethics
7 requirements under Section 8?

8 MR. LOWERY: It doesn't appear to me to do
9 so, no.

10 CHAIRMAN GUNN: Okay. But your fear is,
11 is that if you repeal Section 11 and don't make
12 Section 8 apply to everyone, then you then open up
13 the Commission to conversations with parties other
14 than the utilities that could be about substantive
15 issues in a rate case.

16 MR. LOWERY: Absolutely. That is the
17 concern, and when you're talking about the definition
18 of "pending contested case" and "anticipated
19 contested case," of course there's a period of time
20 where that could not take place, but there's a great
21 period of time where it could take place, and it
22 would be -- it would be treatment for one set of
23 litigants, folks who are just about as commonly
24 litigants in cases before you as the utilities are,
25 be one set of rules that would apply there and

1 there'll be a different set of rules applying to the
2 utilities themselves.

3 CHAIRMAN GUNN: Okay. Thank you. I don't
4 have anything else. I heard a beep, so Commissioner
5 Kenney might be on.

6 JUDGE WOODRUFF: We'll go to Commissioner
7 Jarrett first.

8 Do you have any questions?

9 COMMISSIONER JARRETT: Yeah, just a
10 couple. Thank you, Mr. Lowery. I appreciate your
11 filings in the case -- in the rulemaking, and I
12 actually appreciate all the parties that filed
13 comments in the rulemaking.

14 I just had a -- I wanted to talk a little
15 bit about Section 11, because that's sort of the
16 catchall, like you say, the Safe Harbor catchall
17 rule. You know, that begins with the language, No
18 person who is likely to be a party to a future case
19 before the Commission shall attempt to communicate
20 with any commissioner or member of the technical
21 advisory staff regarding any substantive issue that
22 is likely to be an issue within a future contested
23 case, unless otherwise allowed by this rule.

24 Do you agree with me that that seems to
25 put the onus on the person who is likely to be the

1 party, not the Commissioners?

2 MR. LOWERY: I do agree it's a prohibition
3 on the person who is communicating to or toward the
4 Commission. It appears that's correct.

5 COMMISSIONER JARRETT: Do we have any
6 regulatory or any statutory authority to regulate
7 people that we don't -- that aren't investor-owned
8 utilities? Can we put a prohibition on people to
9 communicate with us if we don't regulate them?

10 MR. LOWERY: In general, I would say the
11 answer to that question is probably no. Now, whether
12 you have some ability to deal with -- if they do
13 intervene in the case, whether you have some ability
14 to deal with communications they may have had, that's
15 a different question.

16 COMMISSIONER JARRETT: I guess one of the
17 problems that I have with 11 is, it seems so broad.
18 You know, who's supposed to determine who's likely to
19 be a party? Is it the party itself or is it the
20 commissioner?

21 If somebody comes in, wants to talk to us
22 that we don't regulate, are we the ones that have to
23 determine whether they're likely to be a party in a
24 future rate case five years from now?

25 I mean, I don't under--

1 MR. LOWERY: It seems it's them. I mean,
2 it seems by the literal terms of the rule, it's them.

3 COMMISSIONER JARRETT: Okay.

4 MR. LOWERY: And, you know, as I
5 indicated, the Company understands your concerns
6 about the breadth of this rule and understands the
7 practical concerns that Mr. Reed has indicated.

8 The concern we have, though, is not
9 perpetuating what we already think is an unfair
10 situation in some fashion. Maybe the solution is
11 there needs to be a coordinated solution to address
12 that problem and also address the concerns that you
13 were raising about Subsection 11.

14 COMMISSIONER JARRETT: Well, I have a
15 hypothetical too. I'll one-up Chairman Gunn.

16 You know, let's say we have a wind
17 producer here in Missouri that, of course, we do not
18 regulate. They're an independent wind producer.

19 MR. LOWERY: Right.

20 COMMISSIONER JARRETT: They want to come
21 in and talk to us about some issue and so they come
22 in. They say they're not likely to be a party in a
23 future rate case, okay, so we take them at their
24 word.

25 They come in and meet with us about

1 certain issues. Three years later they decide to
2 intervene in a case and they come in and say, You
3 know, we met with Commissioner "X" three years ago
4 and we talked about some of the -- the exact same
5 issue that -- that's at issue in this rate case so,
6 Commissioner, we want you to recuse yourself because
7 we talked to you about this three years ago.

8 I mean, it seems that this leaves open a
9 lot of mischief for folks to come in and cherry-pick
10 commissioners out of cases that -- you know, that
11 they know eventually they might intervene in, but at
12 the time they can say, Well, we're not going to be a
13 likely party, Commissioner, so you can meet with us.

14 MR. LOWERY: I -- I actually agree with
15 you, Commissioner, and I think that this rule and
16 Section 8 as well, that they reflect that fundamental
17 misapplication of what your role is. Those kind of
18 communications that you just described, you're
19 expected to have. There's nothing wrong with having
20 them. You're presumed not to have bias. You're
21 presumed not to have done anything wrong because you
22 have those kind of communications and -- and, you
23 know, when folks -- when you have a rule like this
24 and folks are sort of able to use the rule as a sword
25 to try to get people recused, I think that's a

1 problem, and that's one of the concerns that we have.

2 COMMISSIONER JARRETT: I mean, is there
3 any way that you can see on Section 11, you know, to
4 fix that in any way or tweak it in such a way that it
5 wouldn't put -- you know, it puts the Commissioner in
6 a bad spot because the onus, again, is on the party
7 to do all of this?

8 You know, as a Commissioner, since the
9 onus is on the party, you know, my inclination would
10 be, Well, I'm not dealing with anybody because
11 there's no way I can comply with this because I don't
12 know what's in other people's minds.

13 MR. LOWERY: Right.

14 COMMISSIONER JARRETT: Is there any way
15 that can be tweaked to make it fairer, to make it
16 workable? Can you think of any way?

17 MR. LOWERY: Well, I probably should have
18 thought about your hypothetical more before I got
19 here this morning, but I think that -- I think that
20 if commissioners are going to be appointed and
21 confirmed, that we've got to leave that in the hands
22 of the commissioners to make good judgement about --
23 and to be acting in good faith and take the legal
24 presumption at its word and say, Commissioners are
25 not -- just because commissioners have

1 communication -- I mean, in the case that led to this
2 rule in the first place, there were a lot of
3 allegations made. That's all they were, allegations,
4 and I, for one -- just because a commissioner's
5 recused of something, I don't -- a commissioner has
6 recused or should recuse, I think the burden ought to
7 be on the other party to make good on the allegation.

8 If they're going to make allegations of
9 impropriety, then they ought to back up those
10 allegations, and the -- and the alle-- a lot of the
11 allegations that were being made, again, were ground
12 in this idea that commissioners were judges and
13 commissioners can't know anything about -- they have
14 to come with a blank mind which, really, is not -- is
15 fundamentally not true, so I think that -- I think
16 that if you're going to have some kind of rule
17 here -- you know, if a commissioner -- you know, if
18 the commissioner has knowledge or the commissioner
19 has interest, I mean, I think maybe it has to be --
20 come from the other direction if you're going to have
21 a rule along these lines, that it probably does have
22 to come from the other direction for the reasons you
23 gave. You can't know what's in somebody's mind.

24 There's a question about whether you even
25 can apply your rule to Wind Developer X, who --

1 there's not -- it's not like the transmission
2 developer that Chairman Gunn was talking about that
3 may be or may be not a subject to jurisdiction. It's
4 clear that a wind developer is not subject to
5 jurisdiction and never would be, unless -- unless
6 the -- suddenly the laws change.

7 COMMISSIONER JARRETT: Right. Okay. I
8 appreciate that. And, you know, the Commission,
9 really, unanimously supported these ethics rules, and
10 obviously my goal is -- I think everybody's goal
11 is -- that we want to make these -- keep these as
12 robust as possible but, you know, when we seek things
13 that are unworkable in practice, that we tweak them
14 and make them better.

15 I appreciate your comments and, again,
16 appreciate all the parties' comments that filed in
17 the ratemaking, so thank you, Mr. Lowery.

18 MR. LOWERY: Thank you.

19 JUDGE WOODRUFF: Commissioner Kenney?

20 COMMISSIONER KENNEY: Mr. Lowery, thank
21 you for your presentation.

22 MR. LOWERY: Good morning.

23 COMMISSIONER KENNEY: Good morning to
24 you as well. I have one quick question. Do you
25 perceive -- this is just a general question.

1 Do you perceive that Section 11 of 4020
2 is in conflict with 386.210 in any regard?

3 MR. LOWERY: That's a good question. I'm
4 trying to remember the exact language of the lead-in
5 to 386.210 that the Supreme Court just construed, and
6 I can't remember if it deals with the Missouri
7 Commission and only another state commission or the
8 FERC, or it deals -- it deals with other persons,
9 generally.

10 I think I'm going to have to say I don't
11 know the answer to your question because I can't
12 remember the statutory language very well right now.

13 COMMISSIONER KENNEY: And I think you're
14 referring to 386.210.1 --

15 MR. LOWERY: Yes.

16 COMMISSIONER KENNEY: -- which reads, The
17 Commission may confer in person, comma, or by
18 correspondence, comma, by attending conventions,
19 comma, or in any other way, comma, with the members
20 of the public, comma, any public utility or similar
21 commission of this and other states and the United
22 States of America, comma, or any official --
23 et cetera, et cetera, et cetera.

24 MR. LOWERY: So it clearly does -- that
25 clear does -- clearly does talk about members of the

1 public. I think there might be a conflict,
2 Commissioner, based on that.

3 You know, I don't know whether somebody
4 would argue that the public doesn't involve --
5 doesn't include legal entities or corporations or
6 LLCs. I don't know whether there -- the public --
7 for purposes of that rule or not but [sic] -- but I
8 think there's -- I think you raise a -- certainly a
9 good law school question about -- a fair question
10 about whether that would be a -- be in conflict.

11 COMMISSIONER KENNEY: What do we do if
12 there is a rule that's in conflict with the statute?

13 MR. LOWERY: Well, the rule's
14 unenforceable, certainly.

15 COMMISSIONER KENNEY: Okay. I don't have
16 any other questions. Thank you.

17 MR. LOWERY: You're welcome.

18 JUDGE WOODRUFF: Thank you, Commissioner.
19 I do have a question. It's a procedural question.
20 Would it be procedurally appropriate for the
21 Commission to make these additional changes in this
22 proceeding, or would we have to start over with a new
23 proposed rule?

24 MR. LOWERY: I -- I believe the Commission
25 can make the changes to this proceeding. If you'll

1 look at 536.021, the Commission can adopt the rule
2 with further changes or without further changes.

3 You know, I would point out, for example,
4 Section 8, which I've talked a lot about this
5 morning. Section 8 wasn't in the notice of proposed
6 rulemaking that led to this rule in the first place.
7 No party proposed Section 8, for example, in that
8 rulemaking.

9 Section 8 came up, as I recall it -- to
10 the best of my knowledge, Section 8 came up -- first
11 time I ever heard about it in that form came up
12 during agenda discussions where the Commission was
13 deliberating about the comments that they heard, and
14 the Commission adopted it in response to other
15 comments but -- but I -- I don't think the Commission
16 is proscribed to only thumbs up or thumbs down on the
17 proposed amendments that it has here.

18 Has to be -- has to be support under the
19 general -- the standards that apply to rulemakings,
20 so if there's -- if we're wanting a comment that
21 would support a particular change, then that would
22 be, I think, a problem, 'cause you have to give the
23 reasons for the change, as your Honor knows, under
24 536.021, but you couldn't just out of the blue nobody
25 mention repealing Section 8 and suddenly you repealed

1 it. I think that would be a problem. As long as
2 there's support in the rulemaking record, I believe
3 you can do it.

4 JUDGE WOODRUFF: Thank you, Mr. Lowery.

5 MR. LOWERY: Thank you.

6 JUDGE WOODRUFF: I notice that Staff
7 counsel is represented in the room.

8 Ms. Dale, did you wish to offer
9 comments?

10 MS. DALE: No. In fact, I just wanted to
11 reiterate the Staff has no comments and no position.

12 JUDGE WOODRUFF: All right. Then I'll go
13 through the list of parties who have filed prefiled
14 comments, and then if anyone else is in the room left
15 to file -- make a statement who has not prefiled
16 comments, we'll certainly allow that also.

17 Anyone here from the Missouri Retailers?

18 MS. OVERFELT: I am here, but I'm just
19 going to allow my written comments to --

20 JUDGE WOODRUFF: Okay. If you could
21 identify yourself for the record.

22 MS. OVERFELT: David Overfelt, president
23 of the Missouri Retailers Association.

24 JUDGE WOODRUFF: All right. Thank you.

25 I will ask the Commissioners if you have

1 any questions for Mr. Overfelt. CHAIRMAN GUNN?
2 Commissioner Kenney?

3 CHAIRMAN GUNN: Yeah, I'd like to -- I'd
4 like him to -- see if he has any comment on some of
5 the hypotheticals and some of the other questions
6 that were involved.

7 I guess, fundamentally, through this I'd
8 like the parties to answer this question: The repeal
9 of Section 8 -- or of Section 11 that we are
10 discussing, does that -- in your opinion, how does
11 that fundamentally alter -- in light of Section 8 and
12 in light of Mr. Lowery's comments, how does it, if it
13 does, fundamentally alter the burden upon utilities
14 to limit contacts with commissioners?

15 MR. OVERFELT: Well, I don't think it
16 limits the contact with commissioners. Quite
17 frankly, if you look at 11, it first says -- it does
18 say if contacts are made that you shall make these
19 filings. I mean, I disagree with that premise and
20 that hypothetical.

21 CHAIRMAN GUNN: Do you disa-- well, but so
22 utilities are limited under Section 8 from contacts
23 with Commissioners. Would you agree with that
24 premise?

25 MR. OVERFELT: Yes, I -- that Section 8.

1 CHAIRMAN GUNN: Right.

2 MR. OVERFELT: -- but 11 kind of goes --

3 CHAIRMAN GUNN: Eleven is the "likely,"
4 that no person that's likely to be a party shall have
5 contact, so Section 11 deals with everyone. Section
6 8 specifically applies to the utilities. Would you
7 agree with that?

8 MR. OVERFELT: Section 8 applies to
9 everybody, correct?

10 CHAIRMAN GUNN: No, Section 8 just
11 applies --

12 MR. OVERFELT: Section 11 applies to
13 everybody, and 8 applies to utilities.

14 CHAIRMAN GUNN: Okay.

15 MS. OVERFELT: Yes.

16 CHAIRMAN GUNN: So my question is: If we
17 remove that Section 11 provision, does that do
18 anything to change the prohibitions or the burdens
19 on -- and I don't use "burden" as if they shouldn't
20 have to do it, but does that do anything to lighten
21 the regulatory requirements or lighten the regulatory
22 limits on utility contacts with Commissioners?

23 MR. OVERFELT: I can't answer that
24 question. I'm -- let me think about it --

25 CHAIRMAN GUNN: Okay.

MR. OVERFELT: -- and take a hard look at it.

CHAIRMAN GUNN: I'd like everybody that have made comments to think about that, and maybe they can answer it as to how it does in their comments, but that's fine. We can come back.

That's all the questions I have.

JUDGE WOODRUFF: Commissioner Kenney, any questions?

COMMISSIONER KENNEY: No, I'll wait till everybody comes up. Thank you.

JUDGE WOODRUFF: Thank you, Mr. Overfelt.

MR. OVERFELT: Thank you.

JUDGE WOODRUFF: MIEC? And if you could identify yourself, please.

MS. VUYLSTEKE: Sure. Diana Vuylsteke,
attorney for the Missouri Industrial Energy
Consumers.

I really, actually, support the comments of the Office of Public Counsel, the AARP, and the Consumer Counsel, and they provided much more detailed comments than the MIEC, so I would just like to go on record that we adopt and support their comments.

Regarding the issue of the inconsistency

1 alleged between Section 8 and Section 11, I think
2 Section 11 is critically important for the fairness
3 of the Commission process and the integrity of the
4 process, and a great deal of time and debate went
5 into consideration of that rule.

6 I think that if there is an issue
7 regarding Section 8 that the Commission ought to take
8 briefing or comments on that issue and see if that's
9 a problem, rather than kind of throwing the -- what I
10 would view as throwing the baby out with the bath
11 water and deleting Section 11.

12 I also think that Ameren has raised a
13 number of issues which weren't incorporated or
14 encompassed in the Commission's proposed rule in
15 whether or not the Commission has the authority to
16 consider those in this hearing and in this
17 rulemaking.

18 I think it would be a wiser decision, on
19 a policy basis, for the Commission to actually go
20 ahead and have a full hearing of those changes,
21 rather than just adopting them without a full
22 opportunity of all of the parties to be heard, given
23 the importance of this rulemaking and the very public
24 nature of it.

25 JUDGE WOODRUFF: Chairman Gunn, any

1 questions?

2 CHAIRMAN GUNN: Yes, I do.

3 You said it's critical to the rule. What
4 I'm trying to figure out is -- I'm not talking about
5 an inconsistency between 11 and 8, because right now
6 I'm not talking about doing anything to Section 8.
7 That's why I'm confused here.

8 I'm trying to figure out, according to
9 what Mr. Lowery's comments have said, you said that
10 by deleting Section 11, what you are, in fact, doing
11 is, because Section 8 exists, we are not doing
12 anything to change what the regulatory burden is
13 on -- or ethical disclosure and prohibitions to the
14 utilities, but we are, in fact, doing it to everybody
15 else, so I'd like to figure out -- and, like you
16 said, it's critically important, so I want to figure
17 out how you see that it alters the burdens on --
18 because this is the core of the issue here: What
19 difference in substance does it make to the
20 utilities' behavior -- what does repealing Section 11
21 allow that Section 8 doesn't prohibit that
22 fundamentally alters the ethic's rule?

23 MS. VUYLSTEKE: Well, I think if we go
24 back to the record in the rulemaking case that led to
25 Section 11, there was an issue of a commissioner --

1 an allegation of a commissioner who met with a
2 utility prior to a merger proceeding regarding issues
3 in that proceeding, and the idea is to avoid any
4 effort by utilities to raise issues that are going to
5 be addressed in contested cases and provide an
6 advantage to the utilities that could make the
7 Commission less impartial and create an appearance
8 of -- of the Commission being not impartial, and I
9 think that appearance and that reality are addressed
10 by Section 11. That was the purpose of it. And I
11 think if there is a need to expand that to other
12 parties who frequently appear before the Commission
13 so that they can't bring up issues like that, I think
14 that's a worthy undertaking to explore that.

15 CHAIRMAN GUNN: But the disclosure -- the
16 prohibitions on what we can talk about, the
17 disclosure requirements and the requirements that
18 Public Counsel be invited to these meetings, that's
19 all contained in Section 8; right?

20 MS. VUYLSTEKE: There is a requirement
21 that those be disclosed, but Section 11, I think, is
22 a little bit broader, and it says that if you think
23 something's going to be an issue, a substantive issue
24 in the case, you can't talk about it with the
25 Commissioners, and nobody can, and we think that

1 should be consistent and it should carry over --
2 there shouldn't be any conflict or inconsistency
3 between Section 11 and Section 8, if I'm
4 understanding your question.

5 CHAIRMAN GUNN: No, that's not my
6 question. I think -- I don't necessarily agree that
7 there shouldn't be -- that the utilities shouldn't be
8 held to a higher standard than nonregulated
9 entities. I don't necessarily buy into Mr. Lowery's
10 premise, that Section 8 needs to be, even, for
11 everybody.

12 My question is, is that, When we have
13 this -- the catchall phrase, the Section 11, which
14 says "that no person that's likely to be a party," if
15 we remove that, how does it fundamentally change the
16 way utilities interact with commissioners, because
17 they still have to -- and I just -- I don't -- I'm
18 trying to figure out what it is, because I don't know
19 that there is that much difference from what is
20 contained in Section 8.

21 I think that it -- this appears to be a
22 kind of catchall, that's kind of like all other
23 duties as assigned, that is meant to prohibit this
24 stuff, but I am not sure that it doesn't conflict
25 with the statute, and I'm not sure that it doesn't

1 prohibit me from speaking on -- for example, if one
2 of your -- if Niranda wanted to have a meeting with
3 me about the early site permit legislation, that
4 could become a substantive issue in a rate case, if
5 the legislation passes about whether or not we -- if
6 we may -- if the legislation says we may permit early
7 site permit monies to be recovered, if Niranda wants
8 to meet with me about that on the legislation,
9 doesn't Section 11 prohibit that?

10 MS. VUYLSTEKE: I think so, yes.

11 CHAIRMAN GUNN: Okay. Well, Niranda is
12 now in violation of the ethics rules because they did
13 have a meeting with me regarding that in the last
14 legislative session.

15 MS. VUYLSTEKE: If you believed and they
16 believed at the time that that was going to be an
17 issue in a rate case and proper procedures weren't
18 followed, I think that would be an issue.

19 CHAIRMAN GUNN: Well, according to this,
20 that's prohibited, in that the -- the disclosure
21 isn't a cure, or the disclosure is just to let people
22 know it's a cure to the prohibition -- to the
23 prohibited meeting.

24 The meeting can't take place under this
25 rule, and that -- and the disclosure is only a cure

1 to the prohibited meeting.

2 MS. VUYLSTEKE: I guess, Chairman, I would
3 say that, you know, we believe that any kind of
4 meeting about an issue that's going to be in a case
5 by any party is something that the Commission should
6 avoid and continue to protect against with this rule.

7 CHAIRMAN GUNN: No, I'm just --

8 MS. VUYLSTEKE: I think that should --

9 CHAIRMAN GUNN: Take into --

10 MS. VUYLSTEKE: -- so you're --

11 CHAIRMAN GUNN: This should stay into
12 account, so I cannot talk to any of your industrial
13 clients.

14 MS. VUYLSTEKE: I think that, you know,
15 you have to look at what's going to be a substantive
16 issue arising --

17 CHAIRMAN GUNN: Could I --

18 MS. VUYLSTEKE: -- to arise in a future
19 contested case, and I think that's going to be the
20 standard that drives what can and cannot be
21 discussed.

22 CHAIRMAN GUNN: All right. I appreciate
23 that.

24 I don't have any further questions.

25 JUDGE WOODRUFF: Commissioner Kenney, do

1 you have any --

2 MS. VUYLSTEKE: Oh, I'm sorry.

3 JUDGE WOODRUFF: Commissioner Kenney?

4 COMMISSIONER KENNEY: I just have one
5 question.

6 Ms. Vuylsteke, thank you, and good
7 morning.

8 MS. VUYLSTEKE: Good morning.

9 COMMISSIONER KENNEY: Section 11, do you
10 think or do you perceive that it's potentially in
11 conflict with 386.210?

12 MS. VUYLSTEKE: It might provide a greater
13 protection than the statute, but I'm not sure that
14 it's in conflict, and I would like to give that some
15 additional thought, Commissioner.

16 COMMISSIONER KENNEY: Okay.

17 MS. VUYLSTEKE: And perhaps if the
18 Commission would allow -- since the Commissioners are
19 very focused on that particular issue and it is a
20 really important question, if the Commission would
21 give the parties an opportunity to provide, perhaps,
22 an additional pleading on that, we would appreciate
23 it.

24 COMMISSIONER KENNEY: Let me ask you a
25 pointed question, because I don't know if everybody

1 understood it, or if it's just me, but -- and so I
2 don't want to direct you to write something
3 additional if nobody else is interested in it.

4 But if I read 11, Section 11, it says,
5 Nobody may become a party to a case at some point in
6 the future. It talks about a substantive issue
7 that's likely to be an issue within a future
8 contested case, so is a substantive -- well, couldn't
9 some issue that's of general regulatory policy be
10 morphed into a substantive issue at some point?

11 MS. VUYLSTEKE: I think it could. I think
12 it's going to be a judgment call. The language is, I
13 think, broad enough to allow for some flexibility on
14 what that means. I think, certainly, the Commission
15 could, perhaps, explore defining what those types of
16 issues are a little bit.

17 To me it seems that the intention of the
18 rule is, You know it when you see it. When
19 somebody's going to talk about an issue that's going
20 to come up in a rate case and is going to be a key
21 issue specifically in that case, you're talking about
22 specifics but, you know, you could always put some
23 more definition around what that is.

24 COMMISSIONER KENNEY: And I agree --

25 MS. VUYLSTEKE: And "substantive" does

1 allow a lot of flexibility.

2 COMMISSIONER KENNEY: And I agree. The
3 obvious case is a little -- are going to be obvious
4 and self-evident, but my concern is that we set
5 inadvertent traps for ourselves that prohibit us from
6 engaging in effective communication that 386.210.4
7 contemplates, so I guess I'm wondering if that's what
8 Section 11 has inadvertently done, and its taken away
9 from us or narrowed our ability to engage in
10 discussions of general regulatory policy with members
11 of the public.

12 And I guess the broader threshold
13 question for you and anybody else in the room to
14 think about is, Does everybody agree that 386.210.4
15 is a laudable provision consistent with commissioners
16 carrying out their duties as commissioners?

17 MS. VUYLSTEKE: Well, you know,
18 Commissioner Kenney, we certainly think it is a
19 laudable rule that demonstrates the Commission's
20 commitment to a fair process.

21 Regarding, you know, it being overbroad,
22 I think that the solution might be, if it's
23 potentially capturing discussions of general
24 regulatory policy, I mean, I think the intent is
25 clear, that we don't want the Commission to hear

1 about a case and be lobbied about a case when a case
2 is about to be filed.

3 And it's true the utility, generally, is
4 going to know more about the cases it's going to file
5 and we're guessing, but customers file cases too.
6 All different types of parties file cases.

7 I don't think anybody thinks it's right
8 for us to, in here, talk about issues that we expect
9 are going to become the subjects of a contested case.

10 When you get into issues of general
11 regulatory policy, I think that rather than deleting
12 this rule, the Commission could consider putting a
13 little bit more definition around that to make sure
14 that we're being very consistent between 386.210 and
15 the Commission's intent behind this rule, and maybe
16 that is the solution here, rather than simply
17 deleting it.

18 COMMISSIONER KENNEY: Let me ask you a
19 question about it. I agree with you that nobody is
20 going to want us talking about an issue that is going
21 to come up in a case, but 11 doesn't place any
22 temporal limits on new -- when that issue may become
23 an issue, so doesn't Section 8 and the 60-day --

24 MS. VUYLSTEKE: I'm sorry, Commissioner
25 Kenney. Doesn't Section 8 -- are you saying that

1 that accomplishes what Section 11 is already doing,
2 or that it's already accomplishing what Section 11 is
3 doing?

4 COMMISSIONER KENNEY: Well, what you said
5 was that nobody wants us sitting around talking about
6 issues that may become -- that are going to be
7 brought up in a contested case, and I agree with
8 that, and so my question, though, was that Section 11
9 places no time limit on when such an issue may be
10 brought up in the future. It just says "a future
11 contested case," number one, and secondarily, doesn't
12 Section 8, in conjunction with the 60-day blackout
13 period, address the very concern that you're
14 discussing?

15 MS. VUYLSTEKE: I think that -- I think
16 that Section 8 does address partially the issue, and
17 I think that if you're concerned, I think that you
18 have to focus on "likely," the word "likely" in
19 Section 11. You know, when is a party -- and you
20 have to look at it from the perspective of the
21 parties at the time that they would be having the
22 communication.

23 At what point does the party know that
24 it's likely that something's going to be an issue
25 in a contested case? It could be in a different

1 time frame entirely than 60 days, and it could be
2 90 days. It could be a year.

3 I think the real question is, you know,
4 the intent of the parties at the time that they're
5 making the communication to the Commission, and
6 that's the very broad language of the rule.

7 And I think that, again, if there's a
8 need to put some definition around this, I don't know
9 if it would be so much a temporal limit on 11, but
10 maybe on the question of substantive issue.

11 COMMISSIONER KENNEY: Well, okay. That's
12 an interesting suggestion. I think it's clear, and I
13 want to just make certain that it is clear, that we
14 certainly aren't attempting to excise any provision
15 of the rule that would make the disclosure
16 requirements and the prohibition on discussing
17 substantive issues any less robust, but it occurs to,
18 I think, all of us on the Commission that Section 11
19 is so overly-broad as to be potentially laying traps
20 for us that would conflict with what's contemplated
21 by 386.210.4, so -- all right.

22 That's all the questions I have. Thank
23 you.

24 JUDGE WOODRUFF: Commissioner Jarrett.

25 COMMISSIONER JARRETT: Good morning,

1 Ms. Vuylsteke.

2 MS. VUYLSTEKE: Good morning.

3 COMMISSIONER JARRETT: Sorry I walked in
4 late. I did have a few questions, and I asked
5 Mr. Lowery earlier much of these same questions.

6 I know that my ex-position is that they
7 oppose deletion of Section 11, and in reading
8 Section 11, does that put the onus on the person who
9 is likely to be a party to comply with that section,
10 or does it put the onus on the commissioner?

11 MS. VUYLSTEKE: I think I agree with
12 Mr. Lowery. It puts the onus on the person who is
13 making the communication, because only -- only they
14 are in a position -- they're certainly in the best
15 position to know what is likely to be an issue, and
16 then also the rule, by its terms, addresses the
17 person who is making the communication.

18 COMMISSIONER JARRETT: Okay. How is that
19 policed? Let's say somebody violates that.

20 MS. VUYLSTEKE: I think it's policed by,
21 and it has been policed by, evidence that comes out
22 later about the communication. I agree it's not an
23 easy rule to enforce.

24 I think, first of all, all of us who
25 knows the Commission's rules intend to observe them,

1 and they have great force just by being in the rule
2 book, even sometimes if they're not easy to enforce.

3 And that's true with many of our most
4 important laws and regulations, not just concerning
5 the Commission, but all laws, in some respect,
6 operate to tell people, you know, what the intent is,
7 what is legal behavior.

8 But I do think that there will come --
9 and the -- and the basis of this rule was based on a
10 record where there was evidence brought forward in a
11 case regarding a communication, and sometimes it will
12 come out after the fact, but it's still significant
13 and important if it does come out and potentially is
14 going to affect the determination of issues in a
15 contested case later, so it's kind of a protection
16 that sometimes will be enforced in hindsight.

17 COMMISSIONER JARRETT: But the problem
18 is -- in the instance you bring up, it was the
19 commissioner that was punished by the
20 communication -- it wasn't the person who made the
21 communication -- so how do we punish the person that
22 made the communication?

23 MS. VUYLSTEKE: Well, they -- I think
24 since this rule is violating -- it speaks in terms of
25 the person who's making the communication, and they

1 violated the rule, then all of the provisions that
2 the Commission has to insure compliance with this
3 rule could be employed by the Commission.

4 And I don't know if you speak in terms of
5 punishment or if you speak in terms of, you know,
6 limits on evidence or additional opportunities for
7 parties to bring forward evidence to counter things
8 that may have been said prior to the filing of the
9 contested case. I mean, I think there's a variety of
10 remedies available to insure that justice occurs.

11 COMMISSIONER JARRETT: Well, did you hear
12 my hypothetical to Mr. Lowery?

13 MS. VUYLSTEKE: Yes. I think --

14 COMMISSIONER JARRETT: How would you
15 handle that?

16 MS. VUYLSTEKE: Okay. Could you refresh
17 me? I think there were several --

18 COMMISSIONER JARRETT: Yeah. Let's say
19 there's a wind producer in Missouri that is an
20 independent wind producer. We don't regulate them.
21 They come in. They tell us -- tell me as a
22 commissioner, We're not going to be a party. We're
23 not likely to be a party in any of your cases, so I
24 meet with them, talk about whatever issues they want
25 to talk about, and then three years later they decide

1 to intervene in a case and they come forward with a
2 motion for me to recuse because they said, Three
3 years ago we met with Commissioner Jarrett and we
4 talked about this substantive issue that's in this
5 case that we've intervened in, and we want him to
6 recuse.

7 MS. VUYLSTEKE: I would go back to the
8 language of the rule, Commissioner Jarrett, "would
9 already likely to be an issue," and I think that if a
10 party is using the rule or abusing the rule in such a
11 fashion as to try to limit the Commission's ability
12 to address issues and is using it in a disingenuous
13 fashion, I think you go back to the word "substantive
14 issue that's likely to be an issue in a contested
15 case" and look at the facts and circumstances to see
16 if that was really something that was in the
17 intentions of the parties' minds or of the
18 commissioner's mind at the time.

19 I think the temporal distance is
20 certainly a factor to consider, as Commissioner
21 Kenney raised. I mean, 60 days is a lot different
22 than a year, but I don't think you can come up with a
23 hard-and-fast rule.

24 What if the wind company -- that was done
25 within a year and it biased your potential view of an

1 issue or a fact? I mean, I think that in certain
2 cases the Commission -- the commissioner might have
3 to recuse himself.

4 The bottom line is, Is the commissioner
5 able to see the issues fairly, or has the
6 commissioner heard information that they shouldn't
7 have heard outside of the contested case? Time is
8 one factor, and there may be many other factors that
9 determine the reasonableness of it.

10 COMMISSIONER JARRETT: And that's my
11 point, because then the onus is on the commissioner,
12 and this rule does not -- this section does not put
13 the onus on the commissioner. It puts the onus on
14 the party.

15 So is there any way we can draft 11,
16 Section 11, in a way that's workable? I mean, that's
17 simply not workable, as a commissioner, that I'm told
18 by a person that they're not likely to be a party and
19 we're discussing things that are not likely to be in
20 any case, and then a year later they come in and
21 say -- they intervene and say, Well, this was -- this
22 is going to be a substantive issue, and I want you to
23 recuse.

24 It puts me in a possible position,
25 because now the onus is on me, and this section does

1 not put the onus on me. It puts the onus on the
2 party.

3 MS. VUYLSTEKE: I think that the
4 commissioners can restrict the parties -- the
5 evidence in the case or what the parties can bring
6 forward or, at a minimum, disclose, for example, the
7 communications that occurred.

8 The idea is that all parties should be
9 able to respond to things that are said; that if it's
10 an issue in a contested case, that everybody should,
11 at a minimum, be able to say, Hey, we disagree with
12 that. That wasn't true.

13 And if at least there's notification that
14 it occurred in the case, then even if the parties --
15 the wind developer's an intervenor, the parties could
16 at least respond to it, and I think that would create
17 more justice.

18 It's not about the Commission -- the
19 commissioners recusing themselves, necessarily.
20 There's a variety of remedies.

21 And, particularly, I think if you have
22 the person that engaged in the communication seeking
23 a recusal, I think that in a court's mind or the
24 Commission's mind that would certainly set off a red
25 flag that this rule is being used improperly.

1 And I think that as far as the rule being
2 unworkable, in my experience with the rule and as
3 short as our experience has been, I haven't been
4 aware of any problems with the rule. I think that
5 everybody believes that this is a solution that makes
6 the process more fair, and I haven't seen these
7 hypothetical situations coming up so far, but I would
8 say, Address it by looking at the broad-spectrum
9 remedies you have to control evidence and provide
10 parties opportunities to respond.

11 COMMISSIONER JARRETT: Okay. So your
12 position is you're fine with Section 11 as it is; you
13 don't have any reason for any improvements or changes
14 that would make it better?

15 MS. VUYLSTEKE: I think it's fine the way
16 it is. I think that, you know, the commissioners
17 today have raised an interesting -- some very good
18 points that I hadn't thought of, and I think that it
19 sounds to me like the most important thing, if you
20 were to change it, would be to put in some greater
21 definition of what is a substantive issue.

22 And then if you had to go any further, I
23 would say the definition around "likely," but I don't
24 know that that's necessary or even easily defined. I
25 think I would focus on what is a substantive issue so

1 you can talk about general policy issues without
2 restriction and kind of get to the meat of when is
3 something going to be an issue in a case.

4 COMMISSIONER JARRETT: Right. And my
5 hypothetical sort of assumes that there's bad faith.
6 It could be perfectly good faith. I mean, a wind
7 developer could come in and legitimately in good
8 faith think they're never going to be a party in one
9 of our cases and discuss something that they don't
10 think is a substantive issue with me, but then two
11 years later or a year later it suddenly becomes one
12 and they suddenly want to intervene. Certainly no
13 bad faith in their part, no bad faith on my part, and
14 suddenly I'm being asked to recuse when everybody was
15 acting in good faith. That doesn't seem like a fair
16 rule, does it?

17 MS. VUYLSTEKE: I don't think that it
18 would be. I think the remedy is not really clear
19 here on -- in some cases it would probably be
20 appropriate for a commissioner to recuse. In your
21 particular hypothetical, there might be other
22 remedies the Commission can engage in to make sure
23 there is no unfairness.

24 COMMISSIONER JARRETT: Okay. Well, thank
25 you. That's all I had. Thank you, Ms. Vuylsteke.

1 JUDGE WOODRUFF: Chairman Gunn, you had
2 another question.

3 CHAIRMAN GUNN: Yeah. I want to,
4 actually, go back to the whole reason why we started
5 talking about this rule in the first place, this
6 postmortem comment by Mr. Lowery.

7 Do you have the same concerns, and would
8 you be supportive of the same restrictions on the
9 postmortem that says we couldn't talk with our Staff
10 about substantially similar issues, you know, if they
11 were pending in other rate cases?

12 MS. VUYLSTEKE: You know, Chairman Gunn, I
13 don't have a position on the postmortem aspect, and I
14 apologize for that. I think that a lot depends on
15 the ability of the parties to be present and have
16 some participation and response to that, if
17 necessary.

18 I'm not sure that addresses your
19 question, and I apologize. I don't actually have a
20 position on that.

21 CHAIRMAN GUNN: No, that's fair enough. I
22 appreciate it. Thanks. That's all I have.

23 JUDGE WOODRUFF: Thank you, Ms. Vuylsteke.

24 Move on to AARP, Consumer Council. If
25 you could identify yourself --

1 MR. COFFMAN: Good morning. May it please
2 the Commission. My name is John Coffman. I'm going
3 to attempt to make comments today that reflect both
4 the clients that I'm representing here, AARP, as well
5 as the Consumers Council of Missouri, since I haven't
6 discussed every potential hypothetical of every
7 proposed provision of Ameren or others that have been
8 raised today just yet.

9 Before I get started, I have a letter
10 from Joan Bary, the chair of the Consumers Council.
11 She was unable at the last minute to be here, but she
12 has a letter that she'd like to give the Commission,
13 and could I ask this to be attached to the
14 transcript?

15 JUDGE WOODRUFF: Sure. We'll make it
16 Exhibit 1.

17 (Exhibit No. 1 was marked for identification.)

18 MR. COFFMAN: In general, the letter
19 reiterates the main issue that my clients have, which
20 is the proposed elimination of Subsection 11. We
21 believe that this is a very important part of the
22 rule and the product of lots of cases and workshops
23 and discussions that have gone on in the past years.

24 And I can certainly understand that there
25 are hypotheticals in situations where workability

1 might seem confusing. You can come up with law
2 school hypotheticals that are confounding, perhaps,
3 but we still believe that this is an important
4 provision that lays the groundwork for the
5 expectations that I think most parties have about how
6 the parties and the commissioners are supposed to
7 conduct themselves in contested cases.

8 And I don't see significant conflict with
9 that provision, and the Section 386.210 of the
10 Revised Statutes of Missouri, which do make it clear
11 that there's an exception for discussions of general
12 regulatory policy, and I might add that issues that
13 come up in rulemakings are not considered contested
14 cases and are generally of matters, you know, that
15 apply generally, and that the general expectation and
16 point of Subsection 11 is to address the matter of
17 contested cases where the Commission is wearing more
18 of a judicial hat or quasi-judicial hat.

19 So I think that it is important, and if
20 I -- I will attempt to address Chairman Gunn's
21 question about the -- whether, I guess, it's
22 necessary or whether it's -- the ethical requirements
23 of a regulated utility would be lessened.

24 Since we still have Subsection 10, I
25 think it would be lessened. I think that the phrase

1 about whether an issue is likely to be a substantive
2 issue in a future contested case is the -- is the
3 core issue that we're concerned about and that we --
4 we do believe should be in the Commission's rules and
5 should -- should bind parties, and future potential
6 parties, from engaging in those substantive issues.

7 Of course, it's an issue that's subject
8 to interpretation about what is a substantive issue.
9 There could be issues of interpretation about who is
10 likely to be a party at a particular time, whether
11 they knew that, but I still think that it is
12 important enough that it needs to be in the rule, and
13 it's even more important, in my mind, since the
14 Praxair case came down, and we now have the Supreme
15 Court of Missouri saying that the canons of judicial
16 conduct do not necessarily apply in every situation
17 to Public Service Commission, so to the extent that
18 there is a rule that addresses the situation where
19 there might be an appearance of impropriety, where
20 there might be a future issue coming up, all we have
21 is the rule, so we very much support retaining
22 Subsection 11 and making it clear that it's not --
23 it's not generally considered ethical for a party to
24 have a private discussion with a commissioner about
25 an issue that they know is likely to come up in the

1 future in a contested case.

2 I don't know that there's much else I
3 need to elaborate on that, although I do think that
4 the Safe Harbor provisions in the rule itself, as
5 well as the statute that we discussed, do provide, I
6 think, enough leeway that a commissioner can discuss
7 with legislatures pending legislation about how the
8 Public Service Commission might conduct itself.

9 I think that's a general regulatory
10 matter, even if a particular statute discusses the
11 Commission having the ability to then make
12 determinations going forward, provided that those
13 discussions don't actually address specific contested
14 issues that they know are coming up in a future case.

15 I think I can agree with a couple of
16 things that Mr. Lowery said on behalf of Ameren. I
17 think -- although I -- I believe that in many
18 instances it does make sense to put a higher ethical
19 burden on a regulated entity, the one that has been
20 granted, essentially a monopoly to provide service,
21 that the requirements of Subsection 8, I think, could
22 be applied to all anticipatory parties, parties that
23 are likely to come before the Commission in a
24 contested case.

25 And although I haven't discussed every

1 potential hypothetical of how this would work with my
2 clients, I don't think we would have a problem with
3 that -- those reporting notice requirements and
4 requirements of reporting under Subsection 8 applying
5 to other parties other than Ameren, and if that helps
6 relieve a concern that is being applied
7 discriminatorily, I think that might be workable, at
8 least in my mind, rather than repealing one of these
9 sections. I don't think that would be necessary.

10 I mean, a couple of the tweaks that
11 Ameren has raised, I think, might add some clarity to
12 the rule, although I think there's some concern about
13 the -- making an exemption for new technology. I
14 think that is potentially worrisome, and I don't want
15 to certainly give any carte blanche approval to
16 everything that Ameren has suggested, but perhaps
17 this raises the point that there are still things
18 that we could discuss in a workshop or in a further
19 exploration of these topics, but I would urge the
20 Commission not to adopt something that hasn't been
21 fully vetted and make sure that they put as much care
22 into making further changes to this particular ethics
23 rule as they did with the rule that was adopted in
24 2010, which was actually several cases and several
25 years of discussion.

1 JUDGE WOODRUFF: All right. Just for the
2 record, Exhibit 1, which is a letter from Senator
3 Bray, will be made a part of the record.

4 (Exhibit No. 1 was admitted.)

5 JUDGE WOODRUFF: Commissioner questions?
6 Chairman Gunn?

7 CHAIRMAN GUNN: Yes. So you said a couple
8 things, John, that I want to -- and I appreciate
9 that -- I want to talk with you about. So the
10 Supreme Court didn't say that the judicial canons
11 don't necessarily apply on occasion. They basically
12 said that they don't apply.

13 MR. COFFMAN: They did. I think -- I
14 think that's accurate, but they also --

15 CHAIRMAN GUNN: Well, I just wanted to be
16 clear that the Supreme Court made a very clear
17 distinction that we are different than judges and
18 that the judicial canons do not apply to us.

19 MR. COFFMAN: But they also repeated what
20 has been said in previous cases, that the same high
21 standards that apply to judges apply to
22 commissioners, and that's, I think --

23 CHAIRMAN GUNN: That's included in the
24 statutes, and that's included in the ethics rules.
25 We can't prejudge. We can't be biased. We can't

1 create the appearance of impropriety, those
2 specific -- I did -- you were very conditional about
3 that, and it's a very interesting point. I just want
4 to be clear.

5 MR. COFFMAN: I -- I think -- I think that
6 you're right. It is fair to say that the Praxair
7 decision does say the canons, the judicial canons, do
8 not directly apply to Public Service commissioners.

9 CHAIRMAN GUNN: I appreciate your
10 comments, and I think that what you're saying is, is
11 that you think that because the Section 11 is
12 prospective in looking forward, then that's how --
13 and it's finally -- you know, that's the clearest
14 someone has said it -- that's why you think it's
15 fundamentally different from Section 8.

16 MR. COFFMAN: Yeah, in that it deals with
17 an issue that is likely to become a substantive issue
18 in a future contested case.

19 CHAIRMAN GUNN: So how do you deal with
20 the other questions that have come up both in terms
21 of no limitation on that? So if, for example,
22 someone talks to me with a nuclear power -- a second
23 nuclear power unit, and then in ten years, unless --
24 assume someone would want to stay on the Commission
25 that long and then we're able to get reappointed,

1 that ten years down the road it becomes an issue in
2 the rate case, and that's when some of those things
3 are filed.

4 I mean, is it the fact that there are no
5 time and space requirements in some of the
6 hypotheticals that Commissioner Jarrett talked about
7 where this can be used as a sword, rather than -- I
8 described some of it as -- the way that it's been
9 described to me is a little bit like an appendix;
10 right? I mean, it doesn't do a whole lot to prohibit
11 communications and it can really kind of be harmful
12 later on.

13 I just am curious about how you would
14 deal with the fact that there are no time and space
15 requirements and some of the hypotheticals where
16 someone intervenes that affirmatively states that
17 they weren't -- they weren't planning on becoming a
18 party to a case.

19 MR. COFFMAN: Obviously, I mean, I think
20 in the hypothetical that Commissioner Jarrett gave,
21 it seems as if that party is trying to gain in the
22 system.

23 COMMISSIONER JARRETT: Well, I clarified
24 that, also, and said also in good faith it applies,
25 so don't pin that on me.

1 MR. COFFMAN: And I think -- I think in
2 that case it would be a fact-based inquiry about
3 exactly what was the substantive issue involved. Was
4 it of a general nature? Was it about general
5 policies of sitting and permitting and -- or was it
6 about more specific issues of how, you know, a
7 particular case might be addressed in a particular
8 future matter?

9 I think -- I think the time -- and I
10 think time would attenuate the applicability of that
11 rule if it was ten years later, but I think -- I
12 think it's intent-- it has to be intentionally broad,
13 you know, to say "substantive" and to say "likely" in
14 the rule, but I think without this rule we wouldn't
15 have the clear -- the clear standard that you are not
16 intended -- you're not supposed to have these
17 conversations about matters that are coming up in the
18 future.

19 CHAIRMAN GUNN: But isn't that the
20 fundamental problem with what you just said? In
21 order to have a clear standard, you can't have an
22 individually fact-based analysis. You either have to
23 prohibit these things or not prohibit them, because
24 what you are then relying upon and what you create is
25 a patchwork of conversations that individual -- what

1 may be a determination by one commissioner, that this
2 will become a future thing at some point five years
3 down the road, may be different from what another
4 commissioner realizes or anticipates, and then so you
5 are not creating a clear standard.

6 What you are creating is actually that
7 you should either prohibit these conversations
8 totally or you should not, or you -- or you allow
9 them and have protections on that.

10 What this provision does, and I'd like to
11 get your comments on that, that there really is no --
12 the disclosure requirement is a cure for -- or a
13 potential cure from a prohibitive meeting, and that
14 the prohibitive meeting, once it takes place, was
15 still prohibited, and the fact that someone discloses
16 it later doesn't fix what your -- what your
17 fundamental problem is, which is that potentially the
18 ability to bias a commissioner has taken place.

19 So -- so -- and since there is no actual,
20 I mean, recusal standard that we have that it's up to
21 the individual commissioners 'cause the other
22 commissioners don't have the authority to tell
23 somebody that they should each recuse from a case, so
24 how do you avoid -- I mean, this is -- this
25 rulemaking is bringing up a lot of other issues.

1 I mean, maybe we should take a look at
2 this, look at some of the ways this works, but aren't
3 we creating a fundamental inconsistent model all the
4 way through when we have this kind of -- we have to
5 have these individual determinations by individual
6 commissioners about theoretical future implications
7 with no time or space restrictions?

8 MR. COFFMAN: I -- I think I heard a
9 couple of questions, a couple of issues there. One
10 is about the enforceability of it against a party,
11 and one is what standard a commissioner should apply
12 to know whether they're engaging in a prohibitive
13 communication.

14 And I think that the Commission has some
15 remedies with regard to a party. Once it has become
16 a party, I mean, there's sanction and so forth if
17 there have been improper conduct, and I think that --
18 I think the rule necessarily does put a commissioner
19 in a situation where they do have to use some
20 judgment, but I don't -- I don't think the remedy
21 here is to repeal this section.

22 My clients feel like this is a very
23 important ethical provision that was hard-fought and
24 is -- certainly is intended to address problems that
25 have occurred, not just even this decade, but in

1 previous decades. I mean, there have been ethical
2 controversies that have arisen as far back as the
3 1970s. I'm sure there was even before that.

4 This has never been an easy issue to deal
5 with, but we believe that no matter what controversy
6 may or may not arise in the future, it's important
7 that the expectation is clear, and I don't
8 necessarily see the same -- I think there is still a
9 distinction.

10 There is -- there is both an
11 understanding that parties are not supposed to
12 contact commissioners about future contested cases
13 they have some reason to know about, and yet there's
14 also the ability to talk about general regulatory
15 matters in -- you know, with regard to noncontested
16 proceedings, and I think that the rule needs to
17 navigate between those, and if we don't have the
18 judicial canons to rely upon, I think that we need
19 provisions like this in the rule; otherwise, public
20 competence will be -- will suffer.

21 CHAIRMAN GUNN: And I agree with you that
22 we absolutely need to make sure that we have rules
23 that are very, very tough in place to make sure that
24 we're not making those decisions, but I also have a
25 theory, kind of a cheap little -- cheap-bake theory

1 that I think is a concern, and I saw it when I was up
2 on Capitol Hill and talking to staffers where, when
3 you make a rule so restrictive that people think
4 that -- so, for example, if people think that if a
5 rule prohibits a constituent from going on to Capitol
6 Hill from giving a staffer a baseball cap from the
7 Future Farmers of America, that when people see that,
8 they think that that provision is too restrictive and
9 seems kind of silly. That implicates the larger rule
10 as a whole, that it makes people feel like, Well, if
11 there's -- if this rule does nothing to -- or is
12 silly enough to make that kind of prohibition, which
13 doesn't really matter, doesn't it undercut the
14 entire -- the entire purpose of the rule?

15 So I think that I've seen that and I've
16 seen people operate under that where they -- where
17 it's a progression, where they start by taking off
18 a -- taking a baseball hat and then, you know, it'll
19 turn into a coffee mug, and then it turns into a
20 lunch, and then it -- you know, ultimately you see it
21 ending up with free golf in St. Andrews in Scotland,
22 and you have to have a rule that, as a practical
23 matter, can be enforced in order to make a -- and can
24 enforce and cut down on the very important things,
25 rather than -- rather than not fundamentally doing

1 what it's supposed to be doing, so this incredible
2 time and space restriction is really -- is --is
3 bothersome.

4 I don't -- I'm getting a sense -- and I
5 think I get your point about where you're saying
6 this, but doesn't this really -- because of the other
7 restrictions, this really makes it -- I'll go back.
8 I'm sorry.

9 At what point -- and Commissioner Kenney
10 asked this question before -- does a general
11 regulatory matter merge or evolve into a substantive
12 issue in a rate case?

13 I'll give you that ESP, the early site
14 permit issue. If the legislation says that a company
15 may recover money regarding early site permits, at
16 what point can I have a conversation, or can I have a
17 conversation in the legislative process, about a
18 provision that may fundamentally become an issue in a
19 rate case?

20 MR. COFFMAN: I -- it's been my
21 interpretation that you can discuss the legislation,
22 but you can't -- you can't discuss how you might rule
23 if it became a law and you were then implementing the
24 law through a contested case.

25 CHAIRMAN GUNN: Can someone -- and, again,

1 to Commissioner Jarrett's point. This is on the
2 parties' position, so can a party come in and tell me
3 all the fundamental reasons why a company should not
4 be able to recover money from an early site permit,
5 and that's why this legislation shouldn't allow it,
6 so they are, in fact, making substantive arguments
7 that they will make in a rate case, but they are
8 making it to affect legislation rather than to issue
9 -- if the legislation passed they will be making a
10 new rate case? Doesn't that raise the line a lot?

11 MR. COFFMAN: At some point it is -- there
12 is a gray line or a gray area, and I agree with you,
13 but commissioners certainly have the ability to
14 discuss pending legislation.

15 CHAIRMAN GUNN: To a point.

16 MR. COFFMAN: Right. It would just -- it
17 would just, I guess, matter what was -- what was
18 specifically said. I mean, if -- if someone asked
19 you, If this became law, how would you rule, that
20 would be improper, but if you were asked, What do you
21 think? What are the general policy concerns about
22 whether this should become law or not, that would be
23 a proper area of discussion. I mean, it's clearly
24 not easy to wear both quasi-legislative and quasi-
25 judicial hats.

1 CHAIRMAN GUNN: You know what? I agree
2 with you. That is a fundamental problem with what
3 we're doing, and you kind of want people to decide,
4 What should we be. Should we be quasi-legislative?
5 Should we be quasi-- I don't know. It's a more
6 fundamental question, but I agree with you. It's one
7 of the most difficult things out there.

8 MR. COFFMAN: I think the reality is that
9 you're both.

10 CHAIRMAN GUNN: Right. I agree.

11 MR. COFFMAN: So --

12 CHAIRMAN GUNN: I don't have anything
13 further.

14 MR. COFFMAN: We certainly urge that you
15 be very careful in making any further changes.

16 JUDGE WOODRUFF: Commissioner Jarrett.

17 COMMISSIONER JARRETT: Yes. Thanks.
18 Mr. Coffman, just a couple of things.

19 The Exhibit 1, the Joan Bary letter, I
20 note that at the top of the letter it says, Joan
21 Bary, Missouri Senator, Retired, and then it has her
22 address, telephone number, e-mail, then the letter
23 itself, and then she signs it, Regards, Joan Bary,
24 Missouri Senator, Retired.

25 MR. COFFMAN: Uh-huh. Yes.

1 COMMISSIONER JARRETT: So my question is:
2 Is she filing this exhibit as an individual only, or
3 is it meant to be as part of a group that she
4 represents?

5 MR. COFFMAN: I think it was her hope to
6 be here today and speak as an individual, as a
7 retired senator. I think that her views are
8 consistent with the Consumers Council with the --

9 COMMISSIONER JARRETT: But in this letter,
10 she's not speaking for the Consumers Council; she's
11 speaking entirely for herself?

12 MR. COFFMAN: I think that's correct.

13 COMMISSIONER JARRETT: Thanks. Just
14 wanted to clarify that.

15 I did want to follow up, just briefly, on
16 Commissioner Gunn's first point on canons of judicial
17 conduct. You said in your answer to him that you
18 agree that the canons of judicial conduct do not
19 apply directly to commissioners. Don't you think
20 they don't apply either directly or indirectly; they
21 don't just -- they simply don't apply at all?

22 MR. COFFMAN: Um --

23 COMMISSIONER JARRETT: Don't you think
24 that's what the case says?

25 MR. COFFMAN: I think that may be a fair

1 reading of the Praxair case, that they cannot be used
2 as a citation, I guess, but throughout the decision,
3 there are other statements in the opinion which
4 analogize to the same standards and apparently still
5 leave that quote, unquote, the same high standards
6 apply, so it's obviously some quasi-version of the
7 ethical standards that apply to judges that apply to
8 commissioners.

9 COMMISSIONER JARRETT: Sure. I mean,
10 there's cases that talk about, you know, executive
11 branch decision-makers and --

12 MR. COFFMAN: I mean, I don't know that it
13 would be inappropriate, even after the Praxair
14 decision that they analogized to the canons in some
15 respect but, yeah, I would agree with you under this
16 decision they don't apply.

17 COMMISSIONER JARRETT: Right. And there
18 may be -- like I said, there's the line of cases that
19 talk about quasi-judicial administrative bodies
20 making decisions, and certainly they have standards,
21 ethical standards, that apply to them, but some of
22 them may be similar to some of the canons, but
23 there's some that are not similar to the canons as
24 well; isn't that correct? Wouldn't that be a correct
25 statement?

1 MR. COFFMAN: Yes, which, again, just
2 heightens the importance of this rule that we're
3 talking about today.

4 COMMISSIONER JARRETT: And getting to
5 Chairman Gunn's last point -- I thought was a very
6 good one -- talking about, you know, we sit -- we
7 have two hats. We have the quasi-judicial hat, we
8 have the regulatory hat, and blurring the line there
9 sometimes is very difficult. It's a gray area,
10 what's a regulatory -- general regulatory policy
11 today may be a substantive issue in a quasi-judicial
12 sense later.

13 Do you think it's important to have
14 bright-line rules for commissioners to follow and for
15 the public to follow to know whether or not
16 commissioners are complying with the ethics rules?

17 MR. COFFMAN: Yes, that's -- certainly,
18 but --

19 COMMISSIONER JARRETT: So to the extent --
20 well, go ahead. I'm sorry.

21 MR. COFFMAN: You know, I mean, I wouldn't
22 agree that it's important in a hat -- it's more
23 important that there be a bright line, that there be
24 a standard that applies. I mean, you've got a bright
25 line. There's no ethical standard.

1 I think it's more important that the
2 expectations that commissioners don't have private
3 discussions about case -- you know, specific matters,
4 is in the black letter of the law, of the rules.

5 COMMISSIONER JARRETT: Right.

6 MR. COFFMAN: And that may -- and that may
7 necessitate some broad interpretive language, because
8 we can't -- you can't draw a bright line. I mean, I
9 think a bright line is good to have, but where it
10 is -- where it's difficult, I think we still need to
11 have the standard there in the rule.

12 COMMISSIONER JARRETT: Okay.

13 MR. COFFMAN: I wouldn't throw it out
14 simply because it has workability issues.

15 COMMISSIONER JARRETT: But to the extent
16 that it can be tweaked or improved, would you have
17 any suggestions on Section 11 that would make it more
18 of a bright line and more clear and less ambiguous?

19 MR. COFFMAN: No. I mean, given -- I
20 mean, given time, I think -- I think if there was a
21 workshop or further opportunities to elaborate on it
22 and -- we possibly could, given what the -- what the
23 goal of it was, sure. I don't know that there --
24 there couldn't be some further refinement.

25 COMMISSIONER JARRETT: Okay. Well, thank

1 you. I appreciate your being here today.

2 JUDGE WOODRUFF: Commissioner Kenney.

3 COMMISSIONER KENNEY: Mr. Coffman, thank
4 you. Good morning.

5 JUDGE WOODRUFF: Questions from
6 Commissioner Kenney.

7 COMMISSIONER KENNEY: Can you hear me?

8 JUDGE WOODRUFF: Yeah.

9 MR. COFFMAN: Sorry. I'm back.

10 COMMISSIONER KENNEY: Okay. I'm going to
11 ask you the same questions I've asked everybody: Do
12 you perceive that there's any conflict between
13 Section 11 and 386.210?

14 MR. COFFMAN. No, I think they could be
15 reconciled. I think that, while matters of general
16 regulatory policy can be discussed, generally that --
17 when -- when those communications veer towards
18 discussion of a likely contested case, a future case,
19 then that's -- that's off limits.

20 COMMISSIONER KENNEY: Do you think that
21 the provisions contained in 386.210.4 allowing for
22 the free exchange of ideas on general regulatory
23 policy is, you know, a laudable provision of the
24 statute?

25 MR. COFFMAN: Yes, just as Subsection 11

1 of your rule is laudable.

2 COMMISSIONER KENNEY: Well, that brings up
3 a good segway to my next question. Does the concern
4 that Subsection 11 of the rules intends to address --
5 aren't those addressed by Section 8 and the 60-day
6 blackout period that are contained elsewhere in the
7 rules?

8 MR. COFFMAN: Not completely.

9 COMMISSIONER KENNEY: How not?

10 MR. COFFMAN: Well, because it -- it still
11 does not prevent a party with communicating with you,
12 or attempting to communicate with you, about a case
13 that they -- they know is going to be filed, or they
14 very well should know about, and I think that, you
15 know, the 60-day blackout provision and the notice of
16 provision don't go far enough. They don't go far
17 enough to address the -- some of the difficult
18 situations we've seen over the years, and we would
19 not -- you know, we -- we would not throw out
20 Subsection 11.

21 COMMISSIONER KENNEY: What difficult
22 situations are you talking about?

23 MR. COFFMAN: Well, there have been
24 allegations that -- of communications that have
25 occurred, you know, maybe -- usually within a year

1 but, you know, more than 60 days that, you know, I
2 think -- you know, the temporal period is of some
3 help but still does not directly address the issue of
4 a party intentionally having a private discussion
5 about a case they know is going to come up that
6 they're going to file that's going to be a contested
7 case.

8 COMMISSIONER KENNEY: It was a difficult
9 situation you're talking about with utilities though.

10 MR. COFFMAN: Yes, usually.

11 COMMISSIONER KENNEY: So what if we
12 changed Section 8, or modified Section 8, to
13 encompass public utilities and any other party?

14 MR. COFFMAN: Like I said, I'm not
15 sure that I would object to that change, but I
16 certainly -- that does not alleviate the need for
17 Subsection 11.

18 COMMISSIONER KENNEY: Well, what would be
19 left in Subsection 11 that wouldn't then be covered
20 under my proposed amendment to Subsection 8? The
21 time period?

22 MR. COFFMAN: Well, that -- well, it
23 does -- I mean, Subsection 8 allows a -- I guess, for
24 some notice and disclosure of communications and --
25 but Subsection 11, you know, states the general

1 principle that no -- that no person is to make a
2 statement or is to attempt to make a statement about
3 an issue they know is going to come up in a future
4 case, and that was the product of years of ethics
5 workshops and hearings that we've had, and I feel
6 that that's a positive standard to have in your rule,
7 and I know -- I don't think that Subsection 8 goes
8 that far.

9 COMMISSIONER KENNEY: Do you think --

10 MR. COFFMAN: It may -- go ahead.

11 COMMISSIONER KENNEY: Do you think that
12 it's appropriate for Section 11 to be unlimited in
13 its scope of time?

14 MR. COFFMAN: Yes, although -- although I
15 think time -- I think time would vitiate it or
16 mitigate it, to some degree. I think, certainly,
17 that would -- it would impact how long a party
18 would've known that they were likely to be a party
19 and whether they would've known or should've known
20 that a particular subject matter wouldn't be a
21 substantive -- substantive issue in a future case.

22 It would be a -- it would depend on the
23 facts of the situation, and I -- I can certainly
24 sympathize with commissioners who feel this is a
25 really difficult thing for them to interpret, but we

1 think it's important, nonetheless, to have this
2 ethical standard down.

3 I mean, if there's -- if there's no
4 judicial canon for us to rely upon, this is all we
5 got. I mean, judicial canons are, you know,
6 interpretive and don't always provide bright lines
7 and require some judgements to be made.

8 COMMISSIONER KENNEY: Well, I don't want
9 to get into the discussions of the judicial canons.

10 MR. COFFMAN: But --

11 COMMISSIONER KENNEY: They're not
12 applicable, and I just -- I don't think it -- I don't
13 think they're -- the analogy is applicable, but I
14 appreciate it.

15 I don't have any other questions. Thank
16 you.

17 JUDGE WOODRUFF: Commissioner Jarrett, you
18 had another question.

19 COMMISSIONER JARRETT: Yes, and I
20 apologize, Mr. Coffman, but Commissioner Kenney, in
21 his questioning, kind of brought this up.

22 You were here when Ms. Vuylsteke was
23 testifying.

24 MR. COFFMAN: Yes.

25 COMMISSIONER JARRETT: And I think she

1 kind of hit on the head the point I want to discuss
2 with you. She talked about it being the fact that
3 all the parties in the case know what happened, so
4 notice, and an opportunity to respond to it; notice,
5 opportunity to be heard.

6 I mean, isn't that the whole purpose of
7 our contested case hearings is that everybody gets a
8 fair hearing and they get their due process? Would
9 you agree?

10 MR. COFFMAN: That's -- that's the core of
11 due process.

12 COMMISSIONER JARRETT: Right. And so if
13 we have a system, as Commissioner Kenney said, where
14 we tweak Subsection 8 where everything is disclosed
15 and the contents of a meeting in that notice are
16 disclosed, then all the parties to a future rate case
17 will have notice of that and an opportunity, then, to
18 respond to it in the rate case. Isn't that enough
19 protection to ensure a fair hearing and due process?

20 MR. COFFMAN: It -- no, we -- we would
21 prefer Subsection 11. Now --

22 COMMISSIONER JARRETT: Well, I understand
23 you --

24 MR. COFFMAN: Due process is a separate
25 question from whether, you know --

1 COMMISSIONER JARRETT: So you think you
2 deserve more than due process in a case.

3 MR. COFFMAN: Yeah, I think there are --
4 are specific ethical issues that require a rule like
5 this.

6 COMMISSIONER JARRETT: Well, I know, but,
7 I mean, if we have a rule that's robust, a notice
8 rule that's robust and discloses the meeting and the
9 contents of the meeting, I don't understand why
10 that's not enough to comply with statutes,
11 constitutional rights.

12 MR. COFFMAN: Apparently, that's all you
13 need, necessarily, at the federal level, at the FDRC
14 or the FCC, and many states operate in that matter,
15 but I -- I would hope that Missouri would hold itself
16 to a higher standard. I'm not really pleased with
17 the way those processes work in those other states.

18 COMMISSIONER JARRETT: I mean, is your
19 concern is that you're skeptical that people are
20 going to lie and --

21 MR. COFFMAN: The cases that you hear --

22 COMMISSIONER JARRETT: -- not know -- you
23 don't know what's going on, even though notice has
24 been filed? I mean, isn't that what you're saying
25 is: We don't trust the commissioners or parties?

1 Even in a notice situation where they're
2 going to file a notice and they're going to file the
3 contents of the meeting, we really don't trust those
4 parties, and so we want those -- any types of those
5 communications prohibited?

6 MR. COFFMAN: I mean, I always assume good
7 motives, but the cases that the Public Service
8 Commission hears involve hundreds of millions of
9 dollars, and there -- and I think, you know, history
10 will show that -- I mean, there -- it's such
11 important issues and issues of such large amounts of
12 money, in fact, so many segments of -- of the public
13 economically, that it's really important to have high
14 standards.

15 COMMISSIONER JARRETT: Well, I mean, does
16 FERC decide cases and issues with a lot of money,
17 probably a lot more money that we decide here in this
18 little old state?

19 MR. COFFMAN: Well, I would prefer that
20 they had higher ethical standards that apply there.

21 COMMISSIONER JARRETT: Okay. Well, thank
22 you.

23 JUDGE WOODRUFF: Chairman Gunn, I believe
24 you had another question also.

25 CHAIRMAN GUNN: Yeah. I always forget to

1 ask this, so I'd like the parties to address it.
2 Mr. Coffman, Ameren brought up they're uncomfortable,
3 or they were slightly uncomfortable, with this
4 postmortem language where we would be allowed to talk
5 to our Staff about rate cases after it left our
6 jurisdiction, not because of the pending rate -- the
7 rate case that just left our jurisdiction, but
8 because of substantive issues that were similar in
9 other pending rate cases. Do you have a position on
10 that, or do you --

11 MR. COFFMAN: I -- I think that the
12 recommended language of Ameren is good. I think the
13 addition of "the same" or "substantially the same
14 procedural or substantive issue," I think that
15 revision would -- would improve that.

16 CHAIRMAN GUNN: And just as a follow-up,
17 Do you think that then you would do it based on a
18 category basis where you would say, Okay, because ROE
19 is going to be talked about, you should talk to your
20 Staff about ROE?

21 MR. COFFMAN: That's -- that's a difficult
22 question, and I guess we'd just have to think about
23 the particular matter. I -- I mean, I would be -- I
24 would be comfortable with language that's "the same"
25 or "substantially the same," and I know that doesn't

1 give you a bright line but --

2 CHAIRMAN GUNN: No, that's fair enough.

3 MR. COFFMAN: -- that's -- I think I would
4 support that.

5 CHAIRMAN GUNN: Okay. Thank you.

6 JUDGE WOODRUFF: Thank you, Mr. Coffman.

7 MR. COFFMAN: Thank you.

8 JUDGE WOODRUFF: Public Counsel? If you
9 would, identify yourself for the record, please.

10 MR. MILLS: Yes. Good morning. For the
11 record, my name is Lewis Mills, Public Counsel.

12 There's been a lot that's been covered
13 this morning I'm going to try to see if I can go from
14 my scribbled notes and address, but some of the
15 questions that have come up that -- if I miss one --
16 there was not a thing that has been said this morning
17 that I don't have an opinion about, so if I miss
18 something, please ask me again, because I can -- I
19 will be happy to talk about it.

20 I think one of the very first things that
21 I want to clarify is that I disagree with Mr. Lowery
22 with respect to the scope of what you can do in this
23 particular rulemaking. 536.021(3) says that in a
24 notice of proposed rulemaking [sic] shall contain the
25 text of the entire proposed rule or the entire text

1 of any affected section or subsection of an existing
2 rule which is proposed to be amended, so I think to
3 the extent that you don't have a section or a
4 subsection in your proposed notice, you can't deal
5 with it in this rulemaking, which takes out,
6 unfortunately, a big chunk of Section 8, all of
7 Section 4, Section 5, so I think to the extent that
8 we're having discussion about the interplay between
9 Sections 11 and Section 8, I'm not sure that we
10 really can resolve that in this particular case,
11 simply because the notice that the Commission sent
12 out was so limited.

13 With respect to -- there were a couple of
14 questions about 386.210 and how that -- whether or
15 not that conflicts with Section 11. 386.210 is
16 entirely permissive. It does not place any
17 requirement on the Commission to converse with anyone
18 about anything. It simply gives broad categories in
19 which communication is allowed, and so to the extent
20 that the Commission, in its rules, wants to regulate
21 some communications, that's not at all in conflict
22 with 386.210.

23 But what 386.210 does talk about is the
24 communications that the Commission has with entities,
25 and I don't believe that it has any mention of public

1 utilities, and I would disagree with the premise that
2 members of the public in this context intended to
3 encompass utilities, but it does talk about
4 communications with entities other than regulated
5 utilities, which sets forth the authority for the
6 Commission to regulate such communication, and I
7 think that was part of -- one of the questions in
8 Commission Jarrett's hypothetical.

9 Under 386.210, a wind interest would be a
10 member of the general public because they're not a
11 regulated utility, and because 386.210 talks about
12 how you can talk to them, I think your rules give you
13 the authority to set parameters about how the
14 communications in 386.210 occur, so I think you do
15 have authority to regulate communications and the
16 scope of communications, the manner in which
17 communications are made with members of the general
18 public, not just regulated utilities.

19 And just because so many people have
20 talked about it, I'm going to talk about how
21 Section 8 and Section 11 relate, just to clarify the
22 record, but I don't want it to be misconstrued to --
23 in conflict with any earlier comments that I don't
24 really think you can get into Section -- the subparts
25 of Section 8 because they weren't in your notice of

1 the rule.

2 But one of the big differences between
3 Section 8 and Section 11 is that Section 11 prevents
4 discussion; Section 8 allows discussion but requires
5 disclosure, you know, except for rule to strike to
6 the 60-day rule, but I think that's one of the
7 biggest differences between the two is, one is sort
8 of a preventative measure and one is a remedial
9 measure, or a notice measure, whether you consider it
10 remediation or not.

11 Some of the questions from the
12 commissioners had to do with hypotheticals about
13 communications, and I think, really, the key to
14 Section 11 is that it requires knowledge on the part
15 of the communicator, and so, for example, in
16 Commission Jarrett's hypothetical about the wind
17 developer who conveys something that turns out to
18 later be a contested issue and then comes back three
19 years later and says, Ha, got you, I don't think it's
20 designed as a "gotcha" provision.

21 In that instance, either the situation
22 was at the time of the communication that the wind
23 interest -- the person representing the wind interest
24 either didn't know that they were likely to be a
25 party to a contested case or they did knew [sic] --

1 they did know and they lied about it, and in either
2 of those cases there is no ground, simply because the
3 communication took place, to require a commissioner
4 to recuse himself.

5 If the communication took place and it is
6 of such a -- such a damning nature that it can't be
7 cured by having been made public, then perhaps a
8 commissioner should be recused, but I honestly cannot
9 imagine the kind of information that could be so
10 prejudicial that once it's brought out and made
11 public on the record that would require a
12 commissioner to recuse himself, either on the grounds
13 that, you know, the utility at the time realistically
14 didn't know that they would be a party, in which case
15 there wasn't a rule violation, or did know that they
16 were likely to be a party and deliberately and, you
17 know, affirmatively violated the rule. Neither of
18 those things, I think, require in and of themselves a
19 commissioner to recuse himself, so I don't see how
20 Section 11 operates as a gotcha that someone could
21 later use as a sword against a commissioner.

22 You know, I think those of us who have
23 been around through a lot of this process over the
24 last few years, Section 11, when it was introduced by
25 the commissioners, was intended, at least in part,

1 and I think for at least one of the commissioners in
2 a fairly significant part, to protect commissioners,
3 because when you have meetings with just one
4 commissioner and a utility representative, if the
5 commissioner and the utility representative later
6 have a different memory of what took place in that
7 meeting, it can -- the fact that that meeting took
8 place and that the utility representative thinks
9 something that happened that the Commission didn't
10 happen [sic], that can reflect badly on a
11 commissioner, so to prohibit that kind of one-on-one
12 behind-closed-doors meeting had at least some
13 commissioners thinking that would be a protection to
14 commissioners as well.

15 I'm sorry I'm jumping around a lot,
16 because these came up at different points and with
17 different previous witnesses. The question about
18 postmortems, you know, I think one -- one of the ways
19 that some of the issues that Mr. Lowery brought up
20 can be solved is simply to do postmortems with all
21 the parties to a case when the case is closed, rather
22 than just the Staff.

23 You know, certainly some of the
24 discussion with the commissioners and Staff may be of
25 a nature that it's a personnel matter, and of course

1 those can be closed, but if they're just general
2 discussions about the issues in the case, how it
3 went, I don't see any reason why all the parties to
4 the case couldn't be invited to those discussions and
5 a free flow of information among all the parties to a
6 closed case with commissioners shouldn't run afoul of
7 any of these rules.

8 Some of the questions, I think -- and I
9 think these came up in the recent discussion with
10 Mr. Coffman about notice and disclosure. You know,
11 to a certain extent it depends on the communication,
12 but there are instances in which, you know, a
13 one-page notice of the topics discussed in a meeting
14 with commissioners is really not an adequate amount
15 of information to other parties.

16 So, for example, if, you know, the day
17 before a 60-day notice is filed a utility comes and
18 meets with commissioners and talks about a lot of
19 issues, some of which are likely to come up in a
20 contested case -- this is assuming that Section 11 is
21 repealed as the Commission has proposed -- that kind
22 of meeting would not be prohibited under the rules,
23 so that issues that are going to come -- that the
24 utility knows are likely to come up in the rate case
25 can be discussed 61 days before the rate case is

1 filed.

2 A mere notice filed later, about a page
3 long, that talks about an hour meeting, doesn't give
4 other parties who are going to be litigating that
5 case any information about the tone of the meeting,
6 the reaction of commissioners to particular issues,
7 and so it gives -- it can give a significant
8 advantage to the party that held that meeting and
9 then got to see -- you know, when they talked about
10 the DCF and all the commissioners shook their heads
11 and made pooh-poohing noises to, you know, that they
12 don't like the DCR -- or ROE anymore, and nobody else
13 in the case knows about that, that wouldn't
14 necessarily be revealed in the kind of notice that's
15 required under Section 8, but yet having had that
16 meeting 61 days before a rate case was filed and
17 knowing that kind of information that no other party
18 to the case knows gives a great advantage to the
19 party that had that meeting.

20 Some of the questions, I think, had to
21 do with the question of, you know, the fact that
22 Section 11 doesn't set a bright line, that you can't
23 say absolutely with 100 percent certainty in every
24 situation exactly what the answer is, that not
25 everyone gives the same answer.

1 Well -- and that certainly is true, but I
2 don't think that that's -- that that's necessarily a
3 reason to jettison the whole section. You know, all
4 the commissioners are lawyers. Most of the people in
5 this room are lawyers, and we're all subject,
6 whether -- whatever kind of practice we have, to the
7 ethics rules, and those aren't always clear.

8 We have -- we have, you know, the Office
9 of the Chief Disciplinary Counsel giving out
10 opinions, literally, on a daily basis to lawyers who
11 say, You know, I've read all these ethics
12 requirements. Here's the -- here's the situation I'm
13 facing. I don't know what to do. In good faith I'm
14 trying to do the best I can. I don't know what to
15 do.

16 Those kind of things come up all the
17 time, but that doesn't mean that we get rid of the
18 ethics requirements because it's not 100 percent
19 clear from the get-go exactly how a lawyer is
20 supposed to react in every situation, and you have to
21 make a good-faith effort to try and comply with it,
22 and that's the best we can do.

23 I think that, to a large extent,
24 addresses most of the questions. There were some
25 questions, and I guess I'll just -- I'll close with

1 this and then answer any questions that the
2 commissioners may have -- well, two things. First
3 with respect to how Section 11 could perhaps be made
4 more tightly, and I think this is implicit, but you
5 could certainly add, when you're talking about a
6 substantive issue that is likely to be an issue in a
7 future contested case, it's implicit that the person
8 making the communication must know or should know
9 that it's likely to be an issue, but if you want to
10 put that language in there, that makes it -- that may
11 make it a little more explicit, to make it clear that
12 the standard is what the communicator knows or should
13 know at the time about whether it's likely to be a
14 substantive issue.

15 And, certainly, I think you could make a
16 broader exemption to Section 11 such that Section 11
17 doesn't even apply when these communications are made
18 in a public forum. If they're made in public, you
19 don't have the same kind of issues that I think this
20 section is trying to circumvent, which is that
21 communications are made and, well, after-the-fact
22 disclosure of the general theme or the general topics
23 of those communications does something to mitigate
24 the un-- the possibly unfair advantage the
25 communicator has, you can get rid of that entirely by

1 having -- you know, by making exemption for
2 communications that are made in public.

3 And then finally -- and, you know, I
4 don't know if the commissioners are going to want to
5 address this or not, but we've got three of the four
6 commissioners here on the record. I'm just -- I'm
7 curious if you-all are willing to tell us in what way
8 Section 11 has in real world hindered your ability to
9 get information that you need to do your jobs.

10 I mean, is there a particular situation
11 that's arisen that's requiring us to get rid of this
12 provision, or is this just the general concern about
13 some of the hypotheticals that you raise that may
14 come up in the future?

15 I'll certainly answer your questions, if
16 you have any questions for me.

17 JUDGE WOODRUFF: Chairman Gunn.

18 CHAIRMAN GUNN: Yeah, I do. Thanks,
19 Mr. Mills. I think this is actually very helpful,
20 and I think that I'll answer your question in a
21 second, but I have a couple questions for you.

22 The notice -- you talked about how the
23 notice requirement would not be -- sometimes isn't
24 enough to make the determination, and my question is
25 to -- Mr. Lowery suggested --

1 JUDGE WOODRUFF: Mr. Chairman?

2 Mr. Chairman?

3 CHAIRMAN GUNN: Yes.

4 JUDGE WOODRUFF: Your phone cut off for
5 about ten seconds there. We missed half of what you
6 said.

7 CHAIRMAN GUNN: I'll start over again.

8 Mr. Mills, your statement about how
9 sometimes the notice isn't -- sometimes doesn't give
10 you enough information, does that argue for a docket
11 and a central repository, and if we gave the parties
12 the ability to request more information within that
13 docket, does that make that case for kind of a
14 centralized ethics repository?

15 MR. MILLS: Well, I think there are a
16 couple of questions there, and I guess that's one of
17 the points that Mr. Lowery raised that I didn't
18 address. He suggested that rather than have notices
19 go out in every contested, or arguably contested,
20 case about a meeting, that they be filed in a more
21 centralized way and, you know, depending on how
22 logistically you allow people access to those
23 notices, that certainly could be workable.

24 I wouldn't have an objection to that.

25 It's certainly -- you know, is a personal matter. It

1 does get difficult sometimes to wade through the
2 docket sheets on a big case in EFIS because, you
3 know, a lot -- a lot of what you're seeing are
4 notices of meetings, so I think we could, perhaps,
5 work out a way in which affected entities and members
6 of the public could have access to those without
7 making it a requirement that it be filed in every
8 single contested, or arguably contested, case.

9 And if that was your question, that's my
10 answer. I think there might've been more to it than
11 that.

12 CHAIRMAN GUNN: That was, but my follow-up
13 question is: Then would you be supportive of a
14 provision or something that would allow parties to
15 request more information from the filing parties?

16 MR. MILLS: Certainly.

17 CHAIRMAN GUNN: So if we had a perpetual
18 open docket, theoretically motions could be filed in
19 that docket for more definite things or clarification
20 on what they file?

21 MR. MILLS: Yes, but to be clear, I'm --
22 I'm not suggesting that as an alternative to the
23 currently-affected Section 11.

24 CHAIRMAN GUNN: No. I understand that. I
25 understand that.

1 So I want to get to that. I think I
2 agree with you on terms of whether or not we could
3 take specific actions in this particular one with
4 respect to Section 8, but we can certainly make a
5 determination not to go forward if you think that we
6 need to have a more holistic view of the rule. I
7 mean, you're -- these discussions are appropriate;
8 right?

9 MR. MILLS: Oh, yes. Absolutely. We
10 certainly -- you know, I think a lot of the things
11 that have been brought up today and in the comments
12 of Ameren are worth discussing. I just don't think
13 procedurally some of them can be addressed in this
14 particular rulemaking.

15 CHAIRMAN GUNN: So if Section 11 isn't
16 supposed to be a gotcha, kind of what is it -- isn't
17 the goal to be a gotcha? I mean, don't we want to
18 prevent these conversations from happening? I mean,
19 we want to have a rule out that says, Don't have the
20 conversations.

21 MR. MILLS: And that -- and maybe -- maybe
22 I should define the way I use the word "gotcha."
23 The way I was using it is it's not designed to be
24 something that's -- that you use as a trap to later,
25 you know, catch a commissioner offguard and get them

1 booted out of the case for -- for, you know, tactical
2 reasons.

3 It's designed to be a preventative
4 measure that keeps these conversations from happening
5 in the first place.

6 CHAIRMAN GUNN: And I agree with that 100
7 percent. I think that's some of the concern that
8 people have, is that the way that it's set up now,
9 that it is so broad that it could be used as a gotcha
10 rather than a preventative measure.

11 And what is really -- what you really
12 need to do is you need to, you know, give enough time
13 to make the -- put the meetings on a public calendar
14 so that people can make inquiries as to what the
15 subject of the meetings are and whether it's
16 appropriate, and then you have the notice filed
17 afterwards, and then you have, for at least a period
18 of time -- and we had discussions about -- about -- I
19 think we can probably have those discussions again,
20 but if you put those provisions in Subsection -- or
21 Section 8 and made Section 8 applicable to everybody,
22 wouldn't that solve the problem without being
23 overbroad?

24 MR. MILLS: Well, let me answer at least
25 one part of that separately, and that is with -- you

1 know, in a proper rulemaking in which Section 8
2 was -- was in play, I certainly would have no
3 objection being subjected -- no objection to being
4 subjected to the same kinds of restrictions that the
5 utilities are.

6 But with respect to the broader question
7 of whether that solves the problem, I don't
8 necessarily think that it does for the same reasons
9 that I talked about earlier, which is that, you know,
10 a notice after the fact about what topics were
11 brought up at a meeting isn't really necessarily the
12 same thing -- isn't necessarily as much of -- as much
13 information as other parties would like to have, and
14 in some cases would need to have in order to get a
15 fair hearing is actually preventing that kind of
16 communication from happening in the first place
17 [sic].

18 CHAIRMAN GUNN: So let me ask you this:
19 Is it ever -- so our rule now requires that if I have
20 a private meeting, it has to be disclosed and you
21 have to be invited; correct?

22 MR. MILLS: Yeah. Well, under Section 8,
23 yes, under -- under most circumstances.

24 CHAIRMAN GUNN: Right, without -- with --
25 with the exceptions that are included.

1 MR. MILLS: Right.

2 CHAIRMAN GUNN: So that says that -- so, I
3 guess, isn't -- is there times when there's
4 information that can be shared between public
5 counsel, a utility, and a Commission that's not
6 appropriate to be shared out --

7 MR. MILLS: You got cut off there, but I
8 think I got the gist of the question, and the
9 question I'm answering, if it's not the one you asked
10 because we didn't hear it all -- the question I'm
11 answering is: Are there times at which there are --
12 that information can be shared by the utility with
13 commissioners and with Public Counsel that can't be
14 made publicly available? That certainly is true.
15 There are SEC requirements that would prohibit
16 broader disclosure of information that the utility
17 can convey to Public Counsel and the commissioners
18 and have it protected under 386.480, but that -- but
19 there are ways to capture that information and
20 preserve it so that it can be released to the public
21 at a later time.

22 So, for example, if -- you know, if
23 there's something that, for whatever reason, needs to
24 be conveyed -- you know, say it's an announcement of
25 a merger or, you know, some kind of -- something

1 that'll have a significant financial impact that has
2 not yet been disclosed and so it can't be publicly
3 disclosed but the utility feels it's important for
4 the commissioners to know about that, you know, then
5 those meetings can be -- can be transcribed or -- or
6 recorded and preserved as highly confidential until
7 such time as, you know, the -- the prohibition on
8 public disclosure has passed and then they can be
9 made public.

10 CHAIRMAN GUNN: Let me ask you this
11 question -- I'll flip it on you -- Are there times at
12 which information that Public Counsel might have to
13 give the Commission, or other parties might have to
14 give to the Commission, that's not appropriate to be
15 shared with the public utilities?

16 MR. MILLS: I can't imagine that that
17 would be -- that there would be those kind -- that
18 kind of information that would become contested
19 issues in a rate case, certainly not from my
20 perspective. I can't think of any kind of
21 information that I would want to give to
22 commissioners that I wouldn't want to give publicly
23 about any issue that might be coming up in a rate
24 case, and I don't -- I don't think that it would be
25 different for other customer representatives.

1 CHAIRMAN GUNN: So let me -- let me ask --
2 so that gets into the question about when does an
3 issue about, say, legislation morph into a
4 potentially -- a likely issue in a future rate case?

5 So can you tell me your private thoughts
6 about the contents of a bill pending for early site
7 permit that the legislation will inherently make it
8 an issue, a substantive issue, in a rate case in the
9 future?

10 MR. MILLS: And I -- I heard you ask that
11 hypothetical earlier, and I'm -- I'm having
12 difficulty seeing how the legislation becomes a
13 contested issue later but --

14 CHAIRMAN GUNN: It's the substance of the
15 legislation that would become a contested issue
16 later. If the legislation were permissive and
17 allowed us to do it a certain way and you came to me
18 and wanted to tell me all the reasons why a company
19 should not be able to recover, and this legislation
20 would potentially allow it.

21 MR. MILLS: Yeah, that -- that
22 conversation should be prohibitive, if that's what
23 you're talking. No, I absolutely agree. That
24 conversation shouldn't happen.

25 CHAIRMAN GUNN: Even if the legislation

1 hasn't been enacted yet, so let's say if it was about
2 KWIP, right, and the arguments were in all the
3 reasons why KWIP shouldn't be granted to a public
4 utility, and maybe specifically to one particular
5 public utility that wants to deal with a particular
6 project --

7 MR. MILLS: All right.

8 CHAIRMAN GUNN: -- even though legislation
9 isn't enacted and we can talk about legislation,
10 because that is internally to the legislation are
11 potentially substantive issues [sic], you don't think
12 that conversation should occur in private?

13 MR. MILLS: If you're talking just about
14 me as the communicator, if I judge it likely to be a
15 contested issue in a contested case, that
16 conversation shouldn't happen in private.

17 I mean, that conversation absolutely
18 should happen. I would -- you know, I would be happy
19 to tell you all the reasons why that should not be
20 allowed in a rate case, but that should be a public
21 conversation. That shouldn't be happening between
22 you and me or me and any other commissioner.

23 I mean, if we want to talk about the
24 merits of the legislation, if we want to talk about,
25 you know, the merits of cost recovery of a site

1 permit or the, you know, KWIP or the alternatives to
2 KWIP or potential repeal of KWIP and how that may
3 affect rates, I think that conversation should
4 happen. It just shouldn't happen in secret.

5 CHAIRMAN GUNN: Okay. Fair enough.

6 I just want to clarify something you
7 said. You said that 386.210 didn't mention public
8 utilities. Did I misunderstand you?

9 MR. MILLS: No, I did say that.

10 CHAIRMAN GUNN: Okay. Well, it does. I
11 mean, in 386.210(1) it talks about any public
12 utilities.

13 MR. MILLS: No, it talks about any public
14 utility commission. That's -- that's -- this came up
15 in a case before the Western District, and I cited
16 them eats, chutes, and leaves about the --

17 CHAIRMAN GUNN: I gotcha. I'm thinking --
18 I got it. I got it. You're right. You're correct.
19 Sorry.

20 MR. MILLS: So the argument there is that
21 when the reference to members of the public is so
22 broad that it encompasses regulated utilities, I've
23 heard that argument. I don't buy it. I think that's
24 talking about -- that, almost by definition, people
25 and entities who are not regulated utilities.

1 CHAIRMAN GUNN: I gotcha. I understand
2 what you said. Okay.

3 I don't think I have anything else.
4 Thank you, Mr. Mills. I appreciate it very much.

5 MR. MILLS: Thank you.

6 JUDGE WOODRUFF: Commissioner Jarrett.

7 COMMISSIONER JARRETT: Yeah, I did want to
8 answer your question, Mr. Mills --

9 MR. MILLS: Okay.

10 COMMISSIONER JARRETT: -- about whether or
11 not this -- any examples of Section 11, I guess,
12 chilling my behavior, and I would say, Yes. There
13 have been times when I have refused to meet with
14 people, even though I thought it was legitimate for
15 me to do so and it was about general regulatory
16 policy, but I do feel I did not meet with them
17 because I felt that the appearance would be such that
18 I would be dinged for it so, yes, it does chill me,
19 and I think it -- the broad language of Section 11
20 has chilled me as far as gaining information that I
21 think might be valuable to me as a regulator, so I
22 would like to see a rule that is less ambiguous, less
23 broad.

24 Certainly I understand your concerns
25 about meetings being public and so forth, and that's

1 well and good, but the purpose, at least for me, of
2 this rulemaking is to try to make this rule better --

3 MR. MILLS: Yeah.

4 COMMISSIONER JARRETT: -- and to try to
5 make it less broad, to try to make it less ambiguous,
6 to try to make it easier for everybody to interpret,
7 not just the commissioners but the public, so that
8 they can understand when it's okay for a commissioner
9 to take a certain action and when it's not, and it's
10 not left to different interpretations, so to the
11 extent we can do that, I'm hopeful we can.

12 My question is -- you started out with, I
13 think, the 536, talking about the sections.

14 MR. MILLS: Uh-huh.

15 COMMISSIONER JARRETT: Would you read that
16 provision again.

17 MR. MILLS: Yes. This is 536.021.2 --
18 021.2(3,) which starts out by saying, The text for
19 the entire proposed rule, or the entire text of any
20 affected section or subsection of an existing rule
21 which is proposed to be amended.

22 COMMISSIONER JARRETT: Okay. All right.
23 There is a -- I would deem it a minor change to
24 Section 8 in the -- sort of the preamble, I guess.

25 MR. MILLS: There is, although I think

1 what Mr. Lowery was suggesting were significant
2 changes to the subsections, which were not
3 reproduced.

4 COMMISSIONER JARRETT: Well, I think you
5 did a pretty good job, I think, of summarizing some
6 of the questions that I had but, again, do you today
7 have any changes, any improvements you could see to
8 Section 11 --

9 MR. MILLS: Yeah. Yeah, and I --

10 COMMISSIONER JARRETT: -- that would make
11 it easier?

12 MR. MILLS: And I can -- what I would
13 suggest, and I'm not sure that this is absolutely
14 necessary, because I think it's implicit, but you can
15 certainly make it explicit so that you could start
16 out Section 11 by saying, "Except in a public
17 meeting" and so the rest of the provision only
18 applies to meetings that are not public meetings in
19 which everyone doesn't get a chance to see what
20 someone said.

21 And then I would add the words "the
22 person knows or should know" on -- and I'm looking at
23 the way the rule is formatted in the notice of
24 Secretary of State, so that's the third line down,
25 and insert that in it, "that is likely to be an

1 issue."

2 COMMISSIONER JARRETT: Okay.

3 MR. MILLS: In fact, it probably ought to
4 be in both places: No person who knows or should
5 know that they are likely to be a party in a future
6 case before the Commission shall attempt to
7 communicate with any Commissioner or member of the
8 technical advisory staff regarding any substantive
9 issue that the person knows or should know is likely
10 to be an issue in a future contested case.

11 So it makes it very clear that it's a
12 question of what the communicator knows or should
13 know and not, really, the commissioners. Although
14 having that said, you know, I will say that, you
15 know, a commissioner has to use some common sense,
16 and so if the meeting starts out by, you know,
17 someone from the utility saying, We're going to be
18 filing a rate case in a couple of months and I want
19 to talk about return on equity because I don't think
20 return on equity will be a contested issue, and we're
21 going to ask for 17 percent return, I think you can
22 use some judgment to say that's not a good-faith
23 interpretation of the rule. That is likely to be an
24 issue in a contested case, but generally speaking,
25 you're right. The onus is on the communicator, not

1 the commissioner.

2 COMMISSIONER JARRETT: Well, and then one
3 of the, I guess, ambiguous areas for me in Section 11
4 is "substantive issue."

5 MR. MILLS: Well, "substantive issue" is a
6 defined term in your rules.

7 COMMISSIONER JARRETT: I know, but, for
8 example, ROE is always a substantive issue in a
9 case but, I mean, there's levels of discussing ROE.

10 MR. MILLS: Sure.

11 COMMISSIONER JARRETT: You know,
12 discussing ROE in a very general theoretical type of
13 situation, it's different than discussing, like,
14 different models of ROE and which is preferable and
15 that type of thing.

16 So I mean, Section 11 -- for example,
17 let's say -- I'll just throw somebody's name out. It
18 could be any witness, but say, like, Maurice
19 Brubaker. I'm at NARIC and he's on a panel, and I
20 know he's a witness for MIEC all the time on ROE.
21 He's on a panel discussing general theoretical ROE,
22 okay?

23 He is now -- he's the likely party for
24 the Commission. He's attempting to communicate to
25 me, since I'm the audience, something regarding a

1 substantive issue that's likely to be an issue in a
2 future contested case.

3 Do I have to get up and announce to
4 Mr. Brubaker: Mr. Brubaker, stop talking to me.
5 Stop talking, because I'm in the audience and you --
6 you can't talk about ROE because you're likely to be
7 a witness in a future rate case on ROE so please
8 refrain from speaking anymore.

9 MR. MILLS: No, I don't think you do,
10 because I think under -- and I think its somewhere
11 else, but I know under Section 8 it talks about
12 public statements at a public event. Those are
13 exceptions, and so I think if Mr. Brubaker is making
14 these statements in public at a public event, that
15 doesn't trigger the implications of Section 11.

16 COMMISSIONER JARRETT: Well, I don't
17 know. Maybe it's a conflict. Maybe it conflicts.
18 Maybe this swallows up that section.

19 MR. MILLS: Well, if that's the case, then
20 my suggestion to preface Section 11 with the phrase,
21 "except in a public forum" would cure that.

22 COMMISSIONER JARRETT: So we could put,
23 "except in a public forum in Section 11, as you
24 indicated.

25 MR. MILLS: Uh-huh.

1 COMMISSIONER JARRETT: Okay. But don't
2 you think sometimes that that would chill frank
3 discussion of issues? I mean, I know there's always
4 the balance between public discussion and people
5 feeling free to frankly discuss issues. Would you
6 agree?

7 I mean, would you been chilled? I mean,
8 would you say everything in public that you might
9 want to tell me in private?

10 MR. MILLS: I'd like to think that I
11 would. If it has to do with issues that are likely
12 to be contested cases -- issues in contested cases,
13 yes.

14 COMMISSIONER JARRETT: Well, I understand
15 that, but sometimes we need frank discussion that
16 people might not want to say in public, and it might
17 not be anything to do with the substantive issue in
18 the case.

19 MR. MILLS: Well, but Section 11 is only
20 talking about substantive issues in cases.

21 COMMISSIONER JARRETT: Well, yeah, but how
22 are we going to know that at the time?

23 MR. MILLS: Like I said, with respect to
24 ethics, you're not going to -- there's not going to
25 be a bright line that you can say that in every case

1 this word you can say, that word you can't say, but I
2 think it's fairly clear what the section's intended to
3 do.

4 It's intended to keep people from
5 deliberately talking about issues that they know are
6 likely to be contested issues.

7 COMMISSIONER JARRETT: Yeah, I know, but
8 the statute's a pretty bright line, isn't it? What,
9 the one statute that talks about we can discuss prior
10 to a filing of a rate case, any issue with the --

11 MR. MILLS: -- with members of the public
12 and other public utility commissions.

13 COMMISSIONER JARRETT: Right.

14 MR. MILLS: But I don't think -- I don't
15 think that gives you any authority to -- if that's
16 the source of the authority for these communications,
17 I would argue that that doesn't give you any
18 authority to get any of that information from
19 regulated public utilities.

20 COMMISSIONER JARRETT: Well, no, but the
21 public -- somebody in the public might intervene in
22 our rate case, so I guess I shouldn't follow the
23 statute, because if somebody from the public comes in
24 and wants to talk about ROE, I should say, Well, you
25 know, you might be a party down the road sometime, so

1 let's not talk about ROE.

2 MR. MILLS: And I don't think that's not
3 following the statute. As I said earlier, the
4 statute is permissive. The statute does not require
5 you to stop and listen to anybody at any time talk
6 about anything.

7 COMMISSIONER JARRETT: Right, but --

8 MR. MILLS: It allows discussion.

9 COMMISSIONER JARRETT: -- isn't it for a
10 commissioner to understand ROE and try to get as much
11 information from differing viewpoints about what ROE
12 is and how you determine it and what are the
13 different methods? I mean, it's very important.

14 MR. MILLS: And those are important, and I
15 think all that can be done in a public forum, but I
16 thought your question was about following the
17 statute, and I think you can follow the statute and
18 still comply with Section 11.

19 COMMISSIONER JARRETT: But I mean, the
20 public has the right to rely on the statute too,
21 that -- the statute basically is meant to have us be
22 open to --

23 MR. MILLS: Yes.

24 COMMISSIONER JARRETT: -- receiving
25 information, and certainly the public and other

1 people have a right to come and talk to us about
2 those things. I mean, that's really what that is
3 about, free exchange of information.

4 MR. MILLS: Under certain circumstances
5 and like when a case is not pending.

6 COMMISSIONER JARRETT: Right.

7 MR. MILLS: All Subsection 11 does is
8 extend that to things that are likely to be cases,
9 likely to be contested issues in contested cases.

10 COMMISSIONER JARRETT: Yeah, but that's
11 the trick, isn't it, trying to figure that out.

12 MR. MILLS: With all due respect, I don't
13 see it as that tricky. I think there could sometime,
14 in a course of a number of years, have some gray
15 area. I think most of the time this is going to be a
16 not very difficult question, to talk about whether or
17 not this party -- this person is likely to be a party
18 and whether or not what they're talking about is
19 likely to be an issue in a contested case.

20 COMMISSIONER JARRETT: Okay. Thank you,
21 Mr. Mills.

22 Oh, I did want to ask: You made a
23 point -- and I wanted to ask Mr. Lowery. I didn't
24 want to interrupt you, but you had said something
25 about that you didn't see it as an issue for the

1 regulated utility not to hear what you might have to
2 say, or another party might have to say in a
3 meeting. Do you remember that conversation,
4 Mr. Lowery?

5 MR. LOWERY: I think so, yes.

6 COMMISSIONER JARRETT: I want to give you
7 a chance to respond to that, since you're here
8 representing the regulated utility.

9 MR. LOWERY: Well, I mean, off the top of
10 my head, in general, I think I would have to agree
11 with that.

12 COMMISSIONER JARRETT: Okay. That's all I
13 want. Thanks.

14 JUDGE WOODRUFF: Okay. Commissioner
15 Kenney.

16 COMMISSIONER KENNEY: Yes. Good
17 afternoon, Mr. Mills.

18 MR. MILLS: Good afternoon.

19 COMMISSIONER KENNEY: I want to ask about
20 Section 11 and 386.210, not Section 1, but 210.4 --

21 MR. MILLS: Yeah.

22 COMMISSIONER KENNEY: -- which provides
23 that nothing in this section or any other provisions
24 of law should be construed to impose any legal
25 limitation on the free exchange of ideas to any

1 person in the Commission on matters of general
2 regulatory policy. I've kind of abbreviated it a
3 little bit.

4 MR. MILLS: Uh-huh.

5 COMMISSIONER KENNEY: Do you perceive any
6 conflict between Section 11 of the rules and that
7 specific statutory provision?

8 MR. MILLS: I do not, because like Section
9 1, that is also permissive. That says that this
10 statute doesn't impose any limitation, but it
11 doesn't -- like subsection 1, it does not require you
12 to hear everything that everyone has to say whenever
13 they want to say it under all circumstances.

14 COMMISSIONER KENNEY: So Subsection 11, as
15 you read it, doesn't place or impose a limitation on
16 the free exchange of ideas?

17 MR. MILLS: It does pose some limitations
18 on a free exchange of ideas, but I don't see that as
19 a conflict with the statute, because the statute
20 doesn't say that -- the statute doesn't say that you
21 can't impose reasonable restrictions on the free flow
22 of ideas.

23 It just says that this statute does not
24 impose those restrictions, so it's like Section 1.
25 It's permissive. It allows any communications. It

1 doesn't prohibit any communications, but it doesn't
2 prescribe that you have to entertain all
3 communications at all times.

4 COMMISSIONER KENNEY: Does your reading of
5 "person" in 386.210.4 embrace public utilities?

6 MR. MILLS: In that, yes.

7 COMMISSIONER KENNEY: Okay. So there's
8 no --

9 MR. MILLS: And "person," I think, is
10 defined elsewhere in the Commission's rules to be
11 very broad.

12 COMMISSIONER KENNEY: Yeah, so a person or
13 if an individual or a firm or a corporation or a
14 partnership, et cetera.

15 MR. MILLS: Right.

16 COMMISSIONER KENNEY: So that would
17 embrace, I mean, the public utility -- regulated
18 public utility.

19 MR. MILLS: I think it does, yes.

20 COMMISSIONER KENNEY: Okay. Well, I think
21 everybody can agree that we don't intend to suspend
22 any part of the rule that would allow for secret
23 communications, and you asked the question about
24 whether the rules as written have chilled any
25 particular communications, and I don't know that I

1 can say that Section 11 has chilled any of my
2 communications.

3 I think that that -- to the extent that
4 any of my communications have been chilled is self-
5 imposed out of an abundance of caution, and you're
6 invited to any communications I have had, but I do
7 worry that Section 11 does potentially impose a
8 limitation on the free exchange of ideas with respect
9 to general regulatory policy, at least to the extent
10 that general regulatory policy at some point could
11 morph in to a substantive issue, and there's no
12 temporal limitation in Section 11.

13 And I understand that it wasn't written
14 with the intention of being a "gotcha" statute with
15 laying traps, and I'm sure that that wasn't the
16 intent, but it certainly has the potential, and
17 that's -- that's the concerns that I have.

18 MR. MILLS: Well, there is -- really,
19 there is a -- a temporal limitation because it's --
20 it's the -- the knowledge that exists at the point of
21 time of the communication. That's the temporal
22 limitation.

23 I mean, if you presuppose that everyone
24 you're talking to knows what's going to happen ten
25 years from now, then there may be an issue there, but

1 the way it's limited, it's limited by the knowledge
2 that the person who's attempting to make these
3 communications has.

4 And to the extent that someone knows that
5 a topic of general regulatory discussion is likely to
6 be a contested issue in a particular contested case,
7 then it imposes a limitation on them, but if -- if in
8 good faith the communicator doesn't see it as a
9 likely issue, substantive issue, in a contested case,
10 then there is no limitation.

11 COMMISSIONER KENNEY: One final question:
12 Subsection 11, as you read it, does it place any
13 limitation on our ability to conduct postmortem with
14 our Staff as we're proposing?

15 MR. MILLS: I don't -- well, yeah, I
16 suppose it would. I'd have to look at the definition
17 of "person" again, but I think -- I think Staff,
18 under the definition of "person," would be a person.
19 I think Staff would likely be a party to a future
20 contested case, and to the extent that the postmortem
21 talks about specific issues in Case A that are likely
22 to be issues in Case B, then I think it would impose
23 a restriction on that.

24 COMMISSIONER KENNEY: Let me just parse
25 that area a bit more. An issue that we're discussing

1 in concluded Rate Case A in a proposed postmortem, is
2 there a circumstance you can envision that that issue
3 wouldn't then be an issue in a future contested
4 case?

5 MR. MILLS: Sure. Yeah, you know,
6 something in like -- like in the UE rate case where
7 you're talking about, you know, under the terms in a
8 consent decree, what -- you know, what's an
9 improvement? I mean, that's -- that's unlikely to
10 come up again.

11 COMMISSIONER KENNEY: But if we're talking
12 about ROE as it pertains to concluded Case A, that
13 would be prohibited by Subsection 11.

14 MR. MILLS: Yeah, and I -- and I -- and
15 rightly so. I think if you're talking to one party,
16 even if it's the Staff, and you're -- you know,
17 you're getting information from them about what they
18 really meant by their testimony, you're telling them
19 what you didn't like about their testimony and
20 they're going to use that to their advantage in the
21 next case, I think that's exactly what's intended to
22 be prevented by Subsection 11.

23 COMMISSIONER KENNEY: So there's no fix
24 that we could provide to Subsection 11 that would --
25 I mean, you don't think we should have that

1 discussion, period.

2 MR. MILLS: I think you should have that
3 discussion. I think you should have it in public. I
4 think you should have it with all of the parties to
5 the case invited.

6 To the extent that it delves into
7 personnel issues, then you can close those, subject
8 to Chapter 610, but other than that, I think -- I
9 think those discussions would be absolutely
10 beneficial, and I think all the parties to the case
11 should be invited and they ought to be held in
12 public.

13 COMMISSIONER KENNEY: If we wanted to have
14 the postmortem to discuss nonrate case-specific
15 issues, such as attorney performance, is that
16 something that you think would need to be done in the
17 open?

18 MR. MILLS: Depending on the discussion.
19 As I said, I think that's -- that could very well be
20 a personnel issue that you would -- you would close
21 pursuant to the Sunshine law as personnel.

22 COMMISSIONER KENNEY: But say we didn't
23 like how you cross-examined this person. Would that
24 need to be subject to the Sunshine Law? I mean,
25 would that be a personnel issue subject to 610 or

1 another issue subject to Subsection 11 or some other
2 section of the rules?

3 MR. MILLS: If it has to do with the way
4 cross-examination was conducted on an issue that is
5 likely to be at issue in another contested case, then
6 I think -- then I think that's, you know, something
7 that probably would have to be -- that would be
8 prohibited by Section 11.

9 If you're trying to coach one party about
10 how to more effectively persuade the Commission on a
11 contested issue in a future contested case, then I
12 think that's prohibited.

13 COMMISSIONER KENNEY: No. No. I'm not
14 suggesting that. I'm suggesting that -- we're not
15 saying that, You need to be more persuasive or that,
16 Here's how you could be more persuasive on a specific
17 issue; rather, Here's how your general performance as
18 an attorney could be improved during the following
19 cross-examination techniques.

20 MR. MILLS: Then I don't think that's
21 prohibited by Section 11 because it's not having to
22 do with a -- an issue that is likely to be a
23 contested issue in a future contested case.

24 COMMISSIONER KENNEY: Okay. Well, you've
25 given us quite a bit -- you've given me quite a bit

1 to think about. Thank you.

2 MR. MILLS: Thank you.

3 JUDGE WOODRUFF: Commissioner Jarrett, you
4 had another question?

5 COMMISSIONER JARRETT: Yeah. I'm sorry,
6 Mr. Mills. Your discussion with Commissioner Kenney
7 brought up a -- kind of a good point.

8 As you indicated, I think, and as a lot
9 of the witnesses have indicated today, Section 11 is
10 really, I think, from your perspective, is the person
11 who's likely to be a party. You know, what's their
12 intent? Why -- what are -- they have to determine
13 what's likely or not likely to be a substantive issue
14 in a future rate case, so that's the focus.

15 But the problem is, I think, from a
16 decision-makers perspective -- really, isn't what
17 we're trying to figure out here is bias? We're
18 trying to prohibit or trying to lessen the chance of
19 bias of a decision-maker, because we don't want
20 somebody talking about something that might influence
21 that decision-maker down the road, so it's really
22 about bias so -- and I'll let you comment on this, as
23 I explain this.

24 So it really doesn't matter whether the
25 person is likely to be a party or not. It's really

1 the information that's conveyed that's the issue,
2 because it might influence or bias the decision-
3 maker, and that's the problem I have with this rule.

4 Ultimately, it's going to be on the
5 commissioner or the decision-maker to determine all
6 of this, not the person who's likely to be a party or
7 who's likely to know or should know whether it's
8 going to be a substantive issue or not.

9 They may or may not think that, but
10 ultimately they may say something, even if they don't
11 intend to be a party or they're never going to be a
12 party or they don't intent to discuss any substantive
13 issue, down the road they may have said something in
14 that meeting that potentially might bias the
15 decision-maker, and I guess that's what I would like
16 to see, is a rule that's crafted -- if we're going to
17 keep Section 11, craft it not in a way of putting the
18 onus on a person who's likely to be a party or likely
19 to be a substantive issue, because it's really the
20 information itself that's the problem.

21 MR. MILLS: That certainly is a problem.
22 I think the rule, as written, and -- is designed to
23 also either eliminate or at least limit the
24 appearance of impropriety --

25 COMMISSIONER JARRETT: Right, but --

1 MR. MILLS: -- which I think is -- it's a
2 lesser concern than actual bias, but it's still a
3 concern.

4 COMMISSIONER JARRETT: Right.

5 MR. MILLS: And I think you're right. I
6 mean, for example -- and I hate to pick on the
7 electronic utilities, but something that would be
8 improper for Mr. Lowery as a representative of
9 Ameren, arguably under this rule would not be
10 improper if it came from Tray Davis on behalf of
11 MEDA, even though it may be the exact same
12 information we have --

13 COMMISSIONER JARRETT: See, I disagree
14 because that information might bias me in a case. It
15 might come from somebody that I meet in a grocery
16 store -- might say something that might bias me in a
17 case.

18 MR. MILLS: And that's what I'm saying.
19 The way the rule is written, it would prohibit the
20 communication of the exact same information from
21 Mr. Lowery, but not from Mr. Davis.

22 COMMISSIONER JARRETT: But see, it puts
23 the onus on that person, not the commissioner.

24 MR. MILLS: Yes, it does.

25 COMMISSIONER JARRETT: And ultimately it's

1 going to fall on the commissioner to make the
2 determination, and that's why I indicated that I have
3 not met with people, refuse -- you know, I've
4 declined to meet with people, because I don't want to
5 run afoul of this subsection, and so out of an
6 abundance of caution, I haven't met with someone when
7 it may have been a very productive meeting and been
8 very helpful for me as a regulator, but out of an
9 abundance of caution, because I don't really know
10 what the information is going to be shared.

11 It's -- I don't have the meeting, and I
12 guess that's -- that's where I see the problem in
13 this, is because it puts -- everybody says it puts
14 the onus on the person and, oh, we can punish the
15 person who brings it in, or if they're acting in bad
16 faith, we can punish them somehow.

17 It's really the information that's the
18 problem, not the person, and it's really going to be
19 the commissioner or the decision-maker who has to
20 make the call, not that person. It's really the
21 Commissioner that's going to be published -- punished
22 if something is said in those meetings that later
23 comes back and turns out to be a substantive issue.

24 MR. MILLS: As I said, the onus, I think,
25 is on the person. It doesn't relieve the

1 Commissioner of all responsibility to make an
2 independent judgment about whether or not the
3 information or the Commissioner is getting in this
4 fashion you shouldn't be getting, that it runs afoul
5 of the spirit of the section.

6 COMMISSIONER JARRETT: And I would like to
7 see a rule crafted that makes it harder -- make sure
8 we don't get the information that's going to bias us
9 or, you know, have the appearance, but still allows
10 us to meet with folks to talk about things that
11 aren't permitted, and I don't know if there's
12 something we can do to tweak this that would make it
13 better, but I know you have some suggestions and I
14 thank you for those. Thanks.

15 JUDGE WOODRUFF: Chairman Gunn, do you
16 have any further questions?

17 CHAIRMAN GUNN: Yes. I just -- talk about
18 the postmortem brought up a question, and I'd be
19 interested in your thoughts. I mean, shouldn't we be
20 able to recognize that the Staff is kind of a unique
21 player in these rate case proceedings?

22 I mean, when you look at it, they are a
23 party to these cases, but they don't have a
24 particular group that they are representing like
25 Public Counsel or Consumer Counsel or the utilities

1 so -- and I get your point about having personnel
2 matters that you think would be perfectly okay to
3 be -- perfectly okay to be closed, but isn't the
4 Staff in a little bit of a different position than
5 everybody else? Essentially, we are -- the
6 Commission is responsible for the Staff.

7 MR. MILLS: And there certainly are
8 aspects that the Staff is unique, but with respect to
9 their participation as parties litigating cases and
10 advancing positions on contested issues in future
11 cases, I think in that role they are not different
12 from my office or from the utility and that the same
13 kinds of restrictions ought to apply to them that is
14 applied to my office or a utility or any other
15 intervener.

16 CHAIRMAN GUNN: Even though they
17 fundamentally have a dif-- they fundamentally
18 represent a different interest and have a different
19 roll in the process than you or someone else?

20 MR. MILLS: I would be hard-pressed in the
21 heat of a contested rate case to identify that they
22 have a different roll than I do. When we're
23 litigating against each other on an issue and they're
24 taking a position, conducting cross-examination and
25 sponsoring witnesses and taking positions and doing

1 discovery and then doing everything that any other
2 parties does to advance their issue and try and
3 convince you to rule their way.

4 CHAIRMAN GUNN: I don't disagree with
5 that, so I don't want you to think that my next
6 question is disagreeing with that.

7 Who is their client?

8 MR. MILLS: I don't know.

9 CHAIRMAN GUNN: Okay. That is a
10 philosophical question that I've wondered ever since
11 I was appointed to the Commission. It's just such an
12 interesting kind of bizarre setup that we have here,
13 and I'm not saying that they -- this is in no way a
14 comment on their performance or the roll that they
15 play, because I think they do a great job, so this is
16 not a comment on that.

17 It is -- it is a very -- I think from
18 outsiders looking in, a very unique setup that staffs
19 of public utility commissions have when they are both
20 informing the Commission as observers but also
21 advocates in litigated proceedings.

22 It's something that, especially for a
23 lawyer, it's a little bit difficult in the beginning
24 to wrap your head around. And I don't know whether
25 it wouldn't be appropriate to kind of acknowledge

1 that they do play a unique roll in that they could
2 potentially be treated differently than other
3 litigants.

4 I'm not saying that this particular
5 issue, we would treat them differently, I'm not
6 prejudging that, but it's an interesting question, so
7 I don't have anything further. Thank you.

8 JUDGE WOODRUFF: Mr. Mills, I just have
9 one question. It's kind of a scenario, but it's been
10 kind of troubling me, and I haven't heard it
11 mentioned by the commissioners, so maybe it's not a
12 concern to them, but I'll put it out to you.

13 It's dealing with emergency situations,
14 an ice storm, the Joplin tornado, a house blows up.
15 Would this Section 11 as it exists now conclude a
16 commissioner from talking with the utility about that
17 emergency situation, because it might very well be an
18 issue in a future case?

19 MR. MILLS: Certainly there could be
20 aspects of the situation that should not be talked
21 about. You know, if the utility says, you know, We
22 lost -- we lost 20,000 customers in Joplin last
23 night, and, boy, that's really going to hit our
24 earnings and we're going to be asking for some
25 recovery in the next []. That would clearly be

1 inappropriate.

2 So I mean, that certainly shouldn't
3 happen, but if the utility says, We lost 20,000
4 customers. Here's what we're doing to try and bring
5 them back. Here's what we're doing to try to ensure
6 downed power lines or broken gas lines are being
7 repaired and talk all about the situation, I don't --
8 you know, some of the cost implications of those
9 actions may be an issue in a future rate case, but I
10 don't think that is the kind of situation that
11 Section 11 is designed to cover.

12 I think if the conversation deliberately
13 veers into cost recovery --

14 JUDGE WOODRUFF: Uh-huh.

15 MR. MILLS: -- then that's --

16 JUDGE WOODRUFF: Well, aside from cost
17 recovery, though, presumably somebody could bring a
18 complaint against a company if they didn't take
19 whatever actions were necessary to restore customers
20 as quickly as possible, and that sort of thing could
21 be a contested case apart from rate issues.

22 MR. MILLS: If whoever the person at the
23 utility has already heard that there's a customer
24 who's likely to bring one of those complaints, then
25 that raises a different situation, but just the mere

1 speculation that someone might say in some future
2 case, You're not doing everything you can, does not
3 trigger Section 11 . It doesn't require, you know,
4 the communicator to steer clear of all the recovery
5 efforts.

6 JUDGE WOODRUFF: Does it come down to the
7 likelihood?

8 MR. MILLS: Yeah.

9 JUDGE WOODRUFF: Thank you. That's very
10 helpful. I think that's all then, Mr. Mills.

11 Mr. Mills was the last person who'd filed
12 a written comment. Is there anyone else in the room
13 who wishes to make a statement at this point?

14 (No response.)

15 JUDGE WOODRUFF: I don't see anyone else
16 coming forward. Mr. Chairman, is there anything else
17 you wanted to bring up?

18 CHAIRMAN GUNN: Was that to me?

19 JUDGE WOODRUFF: Yes.

20 CHAIRMAN GUNN: Look. I just want to
21 thank everybody for coming in today. I think
22 Commissioner Kenney said it, and I want to reiterate
23 the fact that there I don't -- there is no intent on
24 behalf of this Commission to kind of weaken strong
25 ethics rules that we have, so I think I want to make

1 sure that we make that perfectly clear. We're trying
2 to get a workable framework that gets us the best --
3 as Commissioner Jarrett said -- the best rule that we
4 could possibly get, so I think it's a very
5 interesting group of comments. I appreciate it.

6 JUDGE WOODRUFF: Commissioner Jarrett,
7 anything else?

8 COMMISSIONER JARRETT: No. I echo that,
9 and certainly I appreciate the robust debate that
10 we've had, and I certainly reiterate that the purpose
11 here of my questioning and my comments, and I think
12 both other commissioners, was to try to probe some of
13 the points that could be ambiguous or problem areas
14 and to try to get some feedback from you-all as to
15 how we can make this rule better, so thank you all
16 for indulging me in some of my hypotheticals and
17 scenarios. Appreciate it.

18 JUDGE WOODRUFF: Commissioner Kenney.

19 COMMISSIONER KENNEY: No, except to thank
20 everybody for taking the time to come in and having
21 this conversation.

22 JUDGE WOODRUFF: Thank you all very much,
23 then, and with that we are adjourned.

24 (The hearing concluded.)
25

1 CERTIFICATE

2 I, Nancy L. Silva, RPR, a Certified
3 Court Reporter, CCR No. 890, the officer before
4 whom the foregoing hearing was taken, do hereby
5 certify that the witness whose testimony appears
6 in the foregoing hearing was duly sworn; that
7 the testimony of said witness was taken by me to
8 the best of my ability and thereafter reduced to
9 typewriting under my direction; that I am
10 neither counsel for, related to, nor employed by
11 any of the parties to the action in which this
12 hearing was taken, and further, that I am not a
13 relative or employee of any attorney or counsel
14 employed by the parties thereto, nor financially
15 or otherwise interested in the outcome of the
16 action.

17
18 _____
19 Nancy L. Silva, RPR, CCR
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