

1 STATE OF MISSOURI
2 PUBLIC SERVICE COMMISSION
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6 TRANSCRIPT OF PROCEEDINGS
7 Rulemaking Hearing
8 February 16, 2017
9 Jefferson City, Missouri
10 Volume 1
11
12 In the Matter of Proposed)
13 Amendments to the Commission's)
14 Ex Parte and Extra-Record) Case No.
15 Communications Rule) AX-2017-0128
16
17 MICHAEL BUSHMANN, Presiding,
18 REGULATORY LAW JUDGE.
19
20 DANIEL Y HALL, Chairman
21 MAIDA J. COLEMAN,
22 COMMISSIONERS.
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26 REPORTED BY:
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28 KELLENE K. FEDDERSEN, CSR, RPR, CCR NO. 838
29 MIDWEST LITIGATION SERVICES
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1 (WHEREUPON, the rulemaking hearing
2 began at 1:05 p.m.

3 JUDGE BUSHMANN: Good afternoon.
4 Today is January 16, 2017 -- excuse me,
5 February 16, 2017 at 1 p.m. The Commission has set
6 this time for a rulemaking hearing for In the
7 Matter of Proposed Amendments to the Commission's
8 Ex Parte and Extra-Record Communications Rule, File
9 No. AX-2017-0128.

10 I'm Michael Bushmann. I'm the
11 Regulatory Law Judge who will be presiding over the
12 hearing. Since this is a rulemaking hearing and
13 not a contested case, there's no need to swear in
14 witnesses or take entries of appearance. If you'd
15 like to provide a comment to the Commission, you'll
16 just need to raise your hand. I'll ask you to
17 state your name for the record and who you
18 represent.

19 The Commission Staff will provide
20 their comments last, but other commenters will have
21 a chance to reply if Staff raises any new issues in
22 their comments. The Commissioners and I may ask
23 questions to clarify your comments so that we may
24 understand them.

25 Mr. Chairman, did you want to add any

1 comments?

2 CHAIRMAN HALL: Yeah, very briefly.
3 Good afternoon. I just want to reiterate why we're
4 here, and there are three essential goals in mind,
5 and these are set forth in the Commission's order
6 establishing the workshop docket of this particular
7 matter.

8 First and foremost, we want to comply
9 with Missouri statute 386.210, sub 4, which
10 mandates that Commission rules not impose, quote,
11 any limitation on the free exchange of ideas, views
12 and information between any person and the
13 Commission or any commissioner as long as those
14 communications do not relate to substantive matters
15 in pending cases.

16 Second, there is a goal to simplify
17 compliance with the rule. I think anyone who has
18 practiced before the Commission understands how
19 complex, cumbersome and confusing our current rules
20 are.

21 And then third, to promote
22 consistency and fairness. Our rules should treat
23 all litigants the same. The statutes don't draw a
24 distinction between utilities and other parties.
25 Our rules should not either.

1 So I wholeheartedly agree with those
2 three goals, and I look forward to hearing your
3 comments on the proposed rule. Thank you.

4 JUDGE BUSHMANN: So who would like to
5 go first? Mr. Boudreau.

6 MR. BOUDREAU: Good afternoon. I
7 have a lot of materials here, but nobody should
8 have to worry about it. My comments are very
9 short. These are just for reference should I need
10 them.

11 My name is Paul Boudreau. I'm here
12 representing Missouri Energy Development
13 Association. As you no doubt are aware, we filed
14 some prepared comments early on. I've got just a
15 couple of reinforcements of that here today and
16 maybe a couple of new thoughts.

17 One or more of the member companies
18 of MEDA may have also filed comments and may want
19 to submit additional comments today as well.

20 MEDA's comments as filed don't
21 dissect the language of the proposed rules in any
22 detailed way. Rather, those comments identify
23 three guiding principles that the Commission should
24 apply to its deliberations, and I'm happy to note
25 that I think they are quite consistent with the

1 comments that the Chairman gave at the opening of
2 the hearing.

3 The first principle that we think is
4 important is faithfulness to the requirements, the
5 standards set forth in 386.210, RSMo. and the
6 directive to enable free and open communication
7 between the commissioners and all stakeholders in
8 the development of public policy concerning public
9 utility services.

10 The second principle is parity or
11 ensuring the equivalence of conduct standards to
12 everyone and not placing special restrictions on
13 just one participant or group of participants.
14 This is simply a question I think of fundamental
15 fairness. And I'd like to illustrate that with
16 just one observation about one of the comments
17 filed by the MTCA at page 2 of their filed comments
18 where they talk about communications between
19 commissioners and a regulated utility should be
20 disclosed.

21 I'm not taking any particular
22 position on the specific topic that they're
23 addressing, other than to say that to the extent
24 the Commission decides that disclosure is
25 appropriate, that disclosure should be applicable

1 to any interested party in a case. And I think
2 that again is consistent with what the Chairman was
3 commenting on earlier.

4 The third principle is exclusion from
5 the code of conduct rules communications concerning
6 what I'll call generic or broader issues like
7 legislation, the conduct of rulemakings or broad
8 generic dockets. And again, I think that's
9 directly consistent with the language that's
10 contained in the governing statute 386.210, RSMo.

11 With that said, MEDA believes the
12 proposed rules are largely consistent with these
13 three principles and is supportive of the approach
14 the Commission is contemplating in this rulemaking.
15 The rules are simpler and straightforward, even
16 handed, and should be sufficient to ensure the
17 integrity of the record in any contested case.

18 The proposed rules are a big
19 improvement over the current rule, in my opinion,
20 which is confusing and difficult to navigate and in
21 important ways inconsistent with the governing
22 statute.

23 MEDA has only identified two specific
24 items for the Commission's consideration. The
25 first is, in the proposed rules the Commission has

1 omitted a number of what I'll call safe harbors.
 2 Those are types of communications that utilities
 3 can have with the Commission to alert them as to
 4 certain developments without running afoul of the
 5 ex parte rules.

6 I think the Commission ought to
 7 reconsider or consider retaining those safe harbor
 8 exemptions. I think those are in subsection 10A of
 9 the current rule. I would encourage the Commission
 10 to take a look at those and think about whether or
 11 not those ought to be specifically retained.

12 If the general language of the
 13 rule -- if in the Commission's view the general
 14 language of the rule makes those sort of
 15 communications okay, I think maybe some
 16 articulation of that I think would be helpful.

17 I would note that Public Counsel's
 18 comments, prefiled comments at pages 18 and 19 also
 19 address this topic. So I think that we have some
 20 of the same concerns on that front.

21 The second issue is that I think that
 22 the Commission should consider doing away with the
 23 requirement of a notice of intended case filing.
 24 If the issue, if the concern has been transparen--
 25 or process transparency, let me put it that way,

1 the same objective I think can be achieved with a
2 disclosure requirement at the time of the filing of
3 any particular case. That is, either there's been
4 no communication with the Commission or its
5 technical -- or its advisory staff or, if there
6 have been communications, to go ahead and disclose
7 at that time what those communications were and who
8 they were with. And I think that that provides the
9 procedural and due process protections that are, I
10 think, appropriate in a case before the Commission.

11 I also think this approach would
12 certainly align well with the goal of using the
13 least restrictive alternative embodied in Governor
14 Greiten's Executive Order 17.03.

15 I have just one comment on one of the
16 issues that were contained in Public Counsel's
17 filed comments. Public Counsel's proposed that the
18 Commission include provisions to address standards
19 for commissioner recusal and disqualification.
20 MEDA believes that these proposals are beyond the
21 scope of this rulemaking, which is to address
22 primarily conduct by parties before the Commission
23 in Commission proceedings.

24 As to the merits of Public Counsel's
25 proposals, MEDA doesn't see the need to address the

1 topic. General principles of ethical behavior
2 should govern the commissioners' conduct in cases
3 before it. The Commission has very able general
4 counsel to advise it on these issues as they come
5 up.

6 To the extent that the Commission
7 believes there's merit to looking at rules to
8 govern commissioner conduct, it should take place
9 in a separate rulemaking initiated for that
10 purpose.

11 With that, I'll conclude my comments,
12 and I'll certainly be happy to answer any questions
13 that the Commissioners may have.

14 CHAIRMAN HALL: Thank you. I have a
15 few. First, looking at page 6, Footnote 4 of your
16 comments.

17 MR. BOUDREAU: Yes.

18 CHAIRMAN HALL: You assert that the
19 notice period imposed an arbitrary delay on its
20 members' right to access the Commission and for
21 that reason is unauthorized by law. Are you
22 contending that there be a facial constitutional
23 violation with --

24 MR. BOUDREAU: I think there's
25 some --

1 CHAIRMAN HALL: -- that provision?

2 MR. BOUDREAU: I'm sorry. I didn't
3 mean to step on your question. I think there's a
4 constitutional question. I mean, I cited some case
5 law. The case law doesn't deal with agency-type
6 proceedings. It dealt with access to the court.
7 So there's that distinction.

8 So I think some of the same -- the
9 same general concerns are there, that if the
10 government is there to -- for the citizens to
11 petition the government for redress of grievances,
12 that there shouldn't be hurdles put in front of any
13 party that wants to come before a government
14 embodied by its agencies as a precondition to
15 basically getting in the door and making a --
16 submitting a petition or filing a complaint.

17 CHAIRMAN HALL: Isn't the law that
18 reasonable hurdles are constitutional, unreasonable
19 hurdles are not essentially?

20 MR. BOUDREAU: I think there's room
21 to look at whether or not the hurdle's a material
22 hurdle, and I don't know that I'm in a position
23 here to say that the materiality, that 60 days is
24 material versus something else. I just think it's
25 a concern that there be an artificial hurdle put in

1 front of any filing before the Commission.

2 CHAIRMAN HALL: I think I would agree
3 with you if there wasn't a waiver provision in
4 place. I think a 60-day prohibition on seeking
5 access to -- well, to the Commission might be a
6 violation. But in our case, we've got a waiver
7 provision in place, and so I don't think there
8 would be a facial challenge. I think it would have
9 to be as applied, and I think that as long as we
10 applied that provision, that waiver provision
11 appropriately, we could avoid any constitutional
12 infirmities.

13 MR. BOUDREAU: And I understand. I
14 think just watching from afar, I wasn't involved in
15 either of the cases, the two that come to mind is I
16 think that there was a circumstance where a
17 complainant filed a complaint with the Commission.
18 It was initially rejected because there wasn't --
19 no notice of intended case filing had been filed.
20 And more recently I think it was in the Clean Line
21 case and the same issue came up.

22 And I guess my reaction to that is I
23 wasn't sure what purpose was being served. I
24 understand the rule and I think I understand the
25 concern that drove the rule in the first place. It

1 seemed that there wasn't some principal -- some
2 genuine problem that the filing of the notice
3 somehow indicated.

4 Now, having said that, I'm aware of
5 the waiver. I mean, you're exactly correct. I've
6 invoked that a number of times on filings that I've
7 made on behalf of clients. And my personal
8 experience is that I've been able to work with the
9 rule as proposed or as in effect.

10 CHAIRMAN HALL: The second question
11 concerns the safe harbor communication provisions
12 that you're advocating that we maintain. And my
13 question is, for example, the health and safety
14 safe harbor provision, what if -- if a utility had
15 a legitimate health and safety issue that it wanted
16 to talk to a commissioner about but it was related
17 to a pending issue, a substantive issue in a
18 pending case? Under the rule that com-- under the
19 current rule, the current safe harbor, that
20 communication would be allowed. Under the statute,
21 which we are all governed by, it would not.

22 So that's the main reason why we
23 proposed taking those safe harbors out, because if
24 you change the current rule so that communications
25 that don't relate to substantive issues in pending

1 cases are okay, then all of those safe harbors are
2 covered. And I think you kind of alluded to that
3 exact issue in your presentation and you propose or
4 suggest that we somehow make that clear.

5 So what -- and I guess I don't
6 understand exactly what -- how we would make that
7 clear or clearer.

8 MR. BOUDREAU: That's a good point.
9 I don't know how expansive the Commission can get
10 in an order of rulemaking to offer clarification.
11 I guess to step back and to your point that the
12 current statute would not permit certain
13 communications, I think my view of the safe harbors
14 has always been that if there's an incident that
15 comes up that involves, in your example, public
16 safety or health. It's more than just an abstract
17 issue about, you know, about adequacy of
18 facilities.

19 I've always viewed it as an incident.
20 Something's come up and it may -- you know, it may
21 become something that's newsworthy, and the idea is
22 to at least inform the Commission that the event
23 has occurred so that they're aware of it and not
24 taken -- so that they don't read about it from some
25 other source, in the papers or whatnot. So at

1 least the Commission's aware that something's
2 happened.

3 I've always viewed the safe harbors
4 in a fairly narrow application, although I'll admit
5 the language doesn't necessarily reflect that.
6 That's just always been my interpretation, and I
7 believe that's been the view of the industry is
8 that this is just a way to get information on
9 special events, certain circumstances that come up
10 to the Commission as quickly as possible.

11 CHAIRMAN HALL: Yeah, and I totally
12 understand and agree that those kind of
13 communications are appropriate and necessary. But
14 I also agree with you that a literal reading of the
15 rules would seem to allow for communications that
16 are prohibited by statute.

17 And so it was -- I very much believe
18 that we need to pay proper respect for the statute
19 which is fairly specific in how it governs ex parte
20 communications, and so we cannot in any way try to
21 allow communications that would otherwise be
22 prohibited by the statute.

23 MR. BOUDREAU: I understand the
24 concern. I don't think I took it in that light
25 when I read the rule. So I appreciate that

1 thought. Thank you.

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

4 COMMISSIONER COLEMAN: I have none.
5 Thank you.

6 JUDGE BUSHMANN: Thank you.

7 MR. BOUDREAU: Thank you.

8 JUDGE BUSHMANN: Who would like to go
9 next? Mr. Zucker.

10 MR. ZUCKER: Good afternoon. My name
11 is Rick Zucker. I represent Laclede Gas and MGE.
12 First let me say, we stand behind the comments of
13 MEDA and Mr. Boudreau at today's hearing. I would
14 now like to hand out an exhibit, if I could.

15 JUDGE BUSHMANN: That will be marked
16 as Exhibit 1.

17 (LACLEDE/MGE EXHIBIT 1 WAS MARKED FOR
18 IDENTIFICATION BY THE REPORTER.)

19 MR. ZUCKER: Okay. So this handout
20 is a review of ex parte communication rules in
21 other states. Most of these states border on
22 Missouri, with the exception of the last three
23 which are some of our larger states in the -- in
24 the east and the west.

25 What these -- what this survey shows

1 is that every state has the same simple rule, with
2 one or two exceptions, and the simple rule is, if
3 there's a case pending, don't talk to the judge or
4 commissioners, and it draws a bright line. It's
5 easy to follow. And the changes that are in the
6 proposed rule today here in Missouri will bring
7 Missouri back into the mainstream and will greatly
8 simplify the process.

9 In California, they -- their rule
10 says, if there's a rulemaking, you can -- free
11 ex parte. You can talk to whoever you want
12 whenever you want to. If there is a contested
13 case, no ex parte. And if there is a rate case,
14 ex parte is permitted but the other side gets equal
15 time and everything is disclosed. So California is
16 farther, they're farther away than we are from
17 where we're coming today, which is to just prohibit
18 ex parte during cases.

19 Finally, New York, and I could
20 scarcely believe this, has an ex parte rule but it
21 does not apply to utilities specifically. So there
22 is no ex parte restrictions in New York.

23 For those who would say, Public
24 Counsel and friends, that this is going to make
25 information too secretive, I would disagree.

1 Obviously it brings us into the mainstream, and
2 anyone who thinks the Commission is trying to be
3 more secretive than appropriate should have tuned
4 in to this morning's hearing, a rulemaking on
5 confidentiality, wherein the Commission has
6 proposed a rule that is likely to lead to more
7 public information and less highly confidential
8 information.

9 One point I would also like to make
10 is that I agree with Public Counsel on one matter,
11 and that is using the word pending instead of --
12 what is the word? I don't have it in front of me,
13 but a pending case. That would match the language
14 in the statute 386.210, and it would save us the
15 trouble of trying to figure out when a case is
16 likely to be a contested case. So again, if you
17 have a case before the Commission, don't talk to
18 the commissioners or the judge about it.

19 As Mr. Boudreau said, our only
20 objection to the new rule is Section 4.017 where we
21 would still be required to provide 60 days notice
22 before being able to file a case. And the Chairman
23 asked Mr. Boudreau some questions about the law on
24 that, and it seems to me that, according to the
25 Cardinal Glennon Memorial Hospital versus Dardner

1 (phonetic) case, the key is whether this is an
2 arbitrary delay of time for filing cases.

3 And so I guess what I don't
4 understand is what is -- what is the Commission
5 trying to accomplish? And if what the Commission
6 is trying to establish is don't talk to the
7 commissioners during a case or for the 60 days
8 before you file a case, I think that can be
9 accomplished in a less restrictive way by having
10 companies who file cases either make a statement
11 that they haven't spoken to a commissioner or a
12 judge or disclose the conversations that they have
13 had.

14 Again, I'm making an assumption as to
15 what they -- why the Commission wants to keep that
16 rule. I was frankly, given the improvements in the
17 other parts of the rule, and I think it's -- let me
18 be very clear. Laclede supports the rule changes,
19 and so the only one I was surprised to see was the
20 60-day waiting period not only was kept in but
21 actually was -- actually got worse.

22 That's all the comments I have. If
23 you have any questions, I'll be glad to entertain
24 them.

25 CHAIRMAN HALL: Just a few. I want

1 to -- I appreciate the exhibit. I find it
2 interesting, though not surprising, based on my
3 understanding of where other states are, and I was
4 pretty sure Missouri was out of the mainstream on
5 how it treated ex parte extra-record
6 communications.

7 I'm curious as to the ten states that
8 you chose, are these states where Laclede has a
9 business connection? I mean, how did these ten get
10 chosen?

11 MR. ZUCKER: Okay. As to whether
12 Laclede has a business connection, my answer would
13 be not yet. Those -- most of the states -- well,
14 Alabama we actually do have a business connection,
15 but the other states all surround Missouri. So
16 these are all Midwestern states in our same
17 territory, and then I just threw in at the end, you
18 know, a large state from the east and a large state
19 from the west.

20 CHAIRMAN HALL: Okay.

21 MR. ZUCKER: I would be glad to look
22 at the other 40 if you like. It would take me a
23 little time.

24 CHAIRMAN HALL: Okay. And then I
25 briefly looked through your exhibit, and I just

1 want to make sure that you -- you summarized it
2 both verbally and on the first page that the
3 regulation concerns communications when there is a
4 pending case. And I think that's probably true,
5 but I think we also need to make clear, it's
6 substantive issues in those pending cases that
7 cannot be discussed; is that correct?

8 MR. ZUCKER: Yes, that's correct, and
9 I was remiss for not making that distinction.

10 CHAIRMAN HALL: Because -- and so the
11 proposed rule, the proposed amendment that we have
12 to our rule I believe would be very much consistent
13 with those -- with that.

14 MR. ZUCKER: I agree, Chairman.

15 CHAIRMAN HALL: I have no further
16 questions. Thank you.

17 COMMISSIONER COLEMAN: Just mulling
18 over whether Rick needs to go and pull together
19 those other 40 states for comparisons. Actually,
20 it would be 39, so it's not so bad. But I'll let
21 you know if I lean toward that. Okay?

22 MR. ZUCKER: I appreciate that.

23 COMMISSIONER COLEMAN: Thank you.

24 MR. ZUCKER: Thank you.

25 JUDGE BUSHMANN: Mr. Mitten.

1 MR. MITTEN: Good afternoon. My name
2 is Russ Mitten, and I'm here this afternoon
3 representing Union Electric Company, doing business
4 as Ameren Missouri. Ameren Missouri filed written
5 comments with a few proposed suggested changes to
6 the rules that have been proposed by the Commission
7 on February 2nd, and we filed some supplemental
8 comments addressing some of the comments that had
9 been filed by other parties this morning.

10 I don't intend to elaborate on any of
11 the points that we raised in those filings. I will
12 let the filings speak for themselves. But I did
13 want to address one issue that has come up this
14 afternoon, that Ameren Missouri disagrees with the
15 position that was expressed by Mr. Zucker.

16 We believe that the rules as drafted,
17 which apply only to contested cases, represent the
18 appropriate view. There's a sound legal basis for
19 that limitation. So we, in the supplemental
20 comments that we filed this morning, expressed
21 opposition to Public Counsel's proposal to extend
22 the rules to all pending cases. And I just wanted
23 to go on the record saying that that is our
24 position and that we do disagree with our friends
25 from Laclede on that point.

1 Other than that, I have nothing
2 additional to offer, but I will be happy to answer
3 questions.

4 CHAIRMAN HALL: Thank you. I'm sorry
5 for that delay. I was hoping that you could
6 elaborate on one issue in your -- in the comments
7 filed today, and that is where you -- where you
8 note that under -- under Missouri law, the
9 commissioners are presumed to act honestly and
10 impartially, and that is certainly the law under
11 Praxair and other cases as well.

12 And you indicate or Ameren indicates
13 that it believes many of OPC's comments regarding
14 the proposed rules appear to be driven by a desire
15 to reverse that presumption. I was wondering if
16 you could elaborate on that.

17 MR. MITTEN: Historically, if you
18 look back at when the current law was -- excuse me,
19 the current rule was adopted, it was in the wake of
20 a lot of newspaper stories about communications
21 that had taken place between sitting commissioners
22 and representatives of Aquila and KCPL in
23 connection with the acquisition of Aquila by Kansas
24 City Power & Light Company.

25 I think a lot of that rhetoric was

1 overblown. I think there were accusations raised
2 that, based upon subsequent review by the Missouri
3 Supreme Court, proved to be meritless in terms of
4 improper behavior by the sitting commissioners.

5 And we believe that there are portions of the
6 current rule that resulted from a concern that
7 maybe something wrong had taken place by the
8 commissioners who were sitting at that time.

9 We believe Public Counsel's support
10 or continued support of those very restrictive
11 provisions of the current rule suggest that it
12 doesn't agree with the Supreme Court that the
13 actions of the commissioners should be presumed to
14 be ethical.

15 We don't believe the restrictions in
16 the current rule are necessary. We believe that
17 the proposals that the Commission has advanced in
18 its proposed rule are sufficient to maintain the
19 integrity of proceedings before the Commission, and
20 that's the reason we support the proposed rule
21 rather than the current rule.

22 CHAIRMAN HALL: Thank you.

23 JUDGE BUSHMANN: Thank you.

24 Mr. Fischer.

25 MR. FISCHER: Since I think I may be

1 the last of the utility representatives, I'll step
2 in. I'm Jim Fischer representing Kansas City
3 Power & Light and the sister company KCPL Greater
4 Missouri Operations Company.

5 I was just asked to endorse the
6 position that MEDA's taken in their filed comments.
7 We are members of MEDA and signed on to those. If
8 you have questions, I can address those. That's
9 all I have. Thank you.

10 JUDGE BUSHMANN: Yes. Could you
11 please come forward? Will you state your name and
12 who you represent.

13 MS. PAGE: Yes. I'm Christine Page,
14 Director of Government Affair for Missouri American
15 Water. So you were not the last of the utilities,
16 but I'm usually not here, so that's okay.

17 I wanted to thank the Commission for
18 examining this issue. We wholeheartedly support
19 those three goals that were stated previously,
20 especially simplifying compliance. I was reading
21 through -- we have a 60-page document that goes
22 through all the ex parte rules in the states that
23 we're regulated in, and I have to say that Missouri
24 is the only state that needed a decision tree for
25 explaining if it was ex parte or not. And I have

1 to say, I think I'm more confused after reading
2 this decision tree than before I even went through
3 it. So simplifying the process would be great.

4 And then also making sure that there
5 is a free exchange of ideas, especially about
6 general policy allowed, I think would be a great
7 improvement. I work over in the Capitol building
8 most of the time, and I know the Commission has a
9 lot of experience over there, and things can change
10 in a heartbeat. Amendments are flying and
11 different committee subs are proposed, and having
12 to notice something up to talk to a commissioner
13 about a proposed change is very cumbersome.

14 And I think that even last session we
15 were in for a rate case and we thought about, well,
16 maybe we should just notice up meetings for like
17 every other day with the commissioners just to make
18 sure we're covered in case we have to talk to them
19 about a proposed change.

20 It got to the point of ridiculousness
21 because we just couldn't talk about what was
22 proposed policy that had nothing to do with our
23 rate case, but out of the abundance of caution we
24 wanted to make sure that we were on the right side
25 of the law. So certainly appreciate the lawyers

1 looking out for us there, but it was very
2 cumbersome.

3 And then the only other thing that I
4 wanted to add, one of our lawyers had a concern
5 about the 60-day notice for acquisitions. So I
6 think for the general rate cases that doesn't seem
7 to be a problem for us. We know when we're going
8 to file. We can do the 60-day notice. But if
9 we're trying to acquire especially like a small
10 troubled system, I don't know that it makes a lot
11 of sense to just wait those 60 days before
12 proceeding, especially if in some cases the OPC or
13 PSC is asking us to acquire one of those systems.

14 And I think that there was some
15 concern that the waiver requirements were
16 tightening up a little bit there, and we wanted to
17 make sure that if we did apply for a waiver, that
18 that was something that the Commission could
19 consider appropriately.

20 With that, I'm happy to answer any
21 questions.

22 CHAIRMAN HALL: Just one. The
23 document that you were referring to that summarizes
24 the ex parte rule in the states where American
25 Water exists, is that something that you could

1 submit as an exhibit or do you need to check with
2 your lawyers on that?

3 MS. PAGE: I will check with our
4 lawyers, but I hope that I can. I found it
5 helpful. And we do operate in California and New
6 York. I know those were mentioned by Laclede
7 earlier, and I found those to be interesting as
8 well. But yes, Missouri is the only one with a
9 decision tree. So if I could share that with the
10 commissioners, I think that that would be great.

11 CHAIRMAN HALL: Okay. Thank you.

12 JUDGE BUSHMANN: Next witness.

13 MR. MOODY: Good afternoon, Chairman,
14 Commissioner, Judge. My name is Chris Moody with
15 the Missouri Cable Telecommunications Association.
16 We've submitted written testimony to you-all. We
17 do appreciate the consideration that was given to
18 our previously submitted testimony or comments.

19 The only other additional thing that
20 I would say that we have taken as something that
21 needed to be commented on was the discussions -- or
22 the disclosure of the discussions of general
23 regulatory policy, and it may be more of a
24 perception issue than anything else, but we think
25 that the occurrence of oral communications between

1 commissioners and -- or technically advisory staff
2 and a regulated entity concerning regulatory issues
3 should be disclosed to prevent the potential for or
4 particularly the appearance of unfair dealing.

5 I'd be happy to answer any questions
6 if there are any, and I appreciate your time.

7 CHAIRMAN HALL: No questions. Thank
8 you.

9 COMMISSIONER COLEMAN: Thank you.

10 MR. MOODY: Thank you very much.
11 Have a good day.

12 JUDGE BUSHMANN: Mr. Opitz.

13 MR. OPITZ: Thank you. Good
14 afternoon. For the record, my name is Tim Opitz,
15 and I work for the Office of Public Counsel.

16 The prefiled comments in this case
17 reflect OPC's position that I drafted, and my
18 comments are in two parts. The first discusses why
19 the current rules are appropriate and should not be
20 changed, with a more detailed explanation included
21 in Attachment A.

22 And the second, I offer specific
23 comments to address Public Counsel's concerns with
24 the proposed draft. These comments would to a
25 large extent remediate any concerns that I have and

1 reflect the Commission's commitment to
2 transparency.

3 I have a few corrections to my
4 prefiled comments that I noticed when reviewing.
5 At page 16, there is a reference to 386.201.4.
6 That should be 386.210.4. At page 17, within the
7 text of the -- excuse me. I left my draft here.

8 CHAIRMAN HALL: Mr. Opitz, can you
9 tell me that first correction again on page 16?

10 MR. OPITZ: Yes, Chairman. On
11 page 16, if you look at paragraph 58, there is a
12 block quote, and the second to last line in that
13 block quote, it says 386.201. The correct citation
14 is 386.210, and that is just a transposition error
15 on my part when I was typing it.

16 On page 17, under paragraph 60, it's
17 within the -- the number two, immediately below two
18 is the word posed. That should be posted. At
19 page 22, the first sentence on that page, there's a
20 reference to Section 105.426.1(1). That should be
21 105.462.1(1). And again, that's just a simple
22 transposition error.

23 Page 23 --

24 CHAIRMAN HALL: I'll just note that
25 that mistake cost me 20 minutes yesterday, just so

1 you know.

2 MR. OPITZ: I was panicking when I
3 discovered it as well. I thought I had looked at a
4 different state or something for that citation.

5 And the -- on page 23, the first
6 sentence following that block quote that begins the
7 page, there is another citation to 105.426.2. That
8 should be redesignated as 105.462.2. I believe
9 that's the -- let me check here. That is the
10 entirety of the corrections that I found, and I
11 apologize if there are more.

12 So with that, I'll touch on a few
13 issues that -- questions the Chairman has raised.
14 The first is that -- was questions about
15 Mr. Zucker's Exhibit 1 that lists ex parte rules
16 within a variety of states, and I would note that
17 in Appendix A of Public Counsel's comments, there
18 is also discussion of rules in other states.

19 And at page 12 of Appendix A, there
20 is a reference to Texas, where in Texas they do
21 have the ex parte rules as was indicated in Exhibit
22 1, but I point out in that page that Texas also
23 requires disclosure to a much greater extent than
24 Missouri does here.

25 And I haven't reviewed those other

1 states that were in that Exhibit 1, but I would not
2 be surprised to find that there are similar
3 disclosure requirements, which is primarily what we
4 are interested in here.

5 There was a question about the
6 Praxair decision relating to impartiality of the
7 Commission. First I would note that that Praxair
8 case we cite -- I cite to extensively in my
9 comments in Appendix A as well as the body of my
10 comments filed in this case.

11 The due -- the impartiality
12 presumption relates to the due process, and in
13 Praxair it talked about -- in that case Public
14 Counsel contended that the Commission was subject
15 to canons of judicial conduct. That court said no,
16 the Commission is not a member of the judicial
17 branch. It is the executive branch. So that
18 touches on due process.

19 Now, what the comments or the rules
20 that we have now on ex parte and standards of
21 comments, those don't necessarily -- while they do
22 call into question certain due process, I think
23 those are specific rules designed to ensure the
24 impartiality of the members of the Commission and
25 the presiding officer. So I think that's an

1 important distinction.

2 Within that discussion there was also
3 commentary about the Cardinal Glennon Memorial
4 case, which is included in a footnote to MEDA's
5 comments. Again, those comments which opposed the
6 60-day notice requirement, I know that they --
7 there are no parties in this case that say the
8 Commission is not a court and so should not be
9 bound by these strict ex parte rules. I think
10 that -- as an initial matter, that goes more to the
11 due process, but the rules if they're in place
12 would bind this Commission. And that case law
13 again is about courts, and Praxair specifically
14 said that this Commission is not a court.

15 And I would ask you to consider that,
16 to the extent that it's a barrier, consider it --
17 if I take an issue with a decision of the
18 Commission, when I appeal that or if I'm able to
19 appeal that to a court, there are procedures that I
20 must go through. For example, even though the
21 Commission may have just issued an order, I still
22 must file my application for rehearing. You know,
23 that's something that I can't simply do straight to
24 the Western District Court of Appeals or the
25 Circuit Court.

1 So that is in a way a barrier, but I
2 don't think it's an undue barrier and it's just a
3 reasonable process to adhere to. And I don't think
4 that it can be said to be a precondition to Public
5 Counsel's and the public's access to the courts.

6 It was mentioned by -- there was a
7 discussion between the Chairman and counsel for
8 Ameren Missouri about the word pending case, and I
9 would highlight the importance of the ex parte
10 communications applying to every case. And I would
11 disagree with the footnote in their supplementary
12 comments that says, you know, MEEIA is a contested
13 case because that is contrary to the Commission's
14 report and order's findings in that Ameren's MEEIA
15 case they specifically said, you know, this is not
16 a contested case and so we're not going to make
17 findings of fact. So whether or not Ameren
18 Missouri disputes that conclusion of law, that's as
19 I see it the way the Commission interprets it.

20 And I think it would be a disservice
21 to the public to permit sort of fluid
22 communications about ongoing cases of the magnitude
23 of MEEIA, which in that particular case there were
24 approximately \$300 million at stake. So I would be
25 remiss if I didn't mention that, that that is

1 important that it should apply to all pending
2 cases, not just contested cases.

3 There was discussion about
4 legislative meetings perhaps being the impetus of
5 this rule and maybe some discussion about, you
6 know, maybe there should have been some notice
7 meetings during the session so that communication
8 could occur every day. I think that would be one
9 way to do it.

10 In the comments in Appendix B and
11 contained within the body of my comments here, I do
12 address a -- try to address a situation that would
13 resolve that concern, whereas if they are unable to
14 provide the time period of notice or the invitation
15 to Public Counsel to attend, that they hold it in
16 the agenda room and broadcast and record it. I
17 think that is not unduly burdensome and it benefits
18 transparency and the public's ability to view
19 those.

20 To say that those meetings should not
21 be attended by Public Counsel or there shouldn't be
22 a notice of that I think I discuss a little bit in
23 my comments and are discussed in more detail in
24 Appendix A.

25 This past session there was draft

1 legislation that was distributed by the Chairman,
2 and I think if that's going to the utility from a
3 commissioner, that the public should know -- Public
4 Counsel should know that those sorts of
5 communications are going on. I think it's totally
6 appropriate for the public to be made aware of that
7 sort of communication, and requiring disclosure in
8 no way prohibits that from occurring. It simply
9 requires that the public's representative and
10 members of the public be made aware through the
11 disclosure requirements.

12 I had a few comments on the
13 supplementary reply comments of Ameren Missouri
14 that were filed this afternoon or this morning.
15 One of the comments pertains to some of Public
16 Counsel's proposed additions relating to
17 commissioners' obligation to recuse themselves. I
18 would point out, as referenced in my comments, that
19 that language is tied to specific statutes that
20 exist already and that I believe already bind the
21 Commission more so than a rule would.

22 There was a comment on -- within the
23 supplemental comments of Ameren Missouri that
24 Public Counsel -- on page 6 that Public Counsel
25 failed to point out to the court that Praxair

1 confirmed commissioners are not judges and are
2 presumed to act honestly and impartially. I take
3 issue with that. I did point that out in my
4 comments. They can be found at page 24 of
5 Appendix A, and I brief why that distinction
6 doesn't matter.

7 In fact, I think the important thing
8 to take away from the Praxair court is that the
9 courts found that the canons of judicial conduct do
10 not apply to the Commission, but it still found and
11 concluded that the meetings do create an appearance
12 of impropriety. However, in that case Public
13 Counsel simply did not meet its burden to overcome
14 that due process presumption.

15 Now, if these rules are in place,
16 that doesn't necessarily pro-- that doesn't
17 necessarily prohibit these rules from occurring.
18 In fact, in a footnote in that case, because of the
19 timeline of the case processing, there was a number
20 of the rules -- the current rules had become
21 effective, and in a footnote, I believe it was
22 Footnote 9, the Praxair court seemed to discuss
23 approvingly that these current rules were in place.

24 I want to make clear that, you know,
25 we're not -- Public Counsel is not suggesting that

1 this Commission is not committed to transparency.
 2 I know and I've heard your past statements that you
 3 are. I think that the proposed rules are a step
 4 backwards. I think that with the additions I
 5 proposed in my comments at Appendix B and contained
 6 in the body thereof, it goes a long way to resolve
 7 our concerns. Alternatively, I think we could
 8 address those if this were sent back to a workshop.

9 I would also like to note that there
 10 is a distinction between the highly confidential
 11 rulemaking and this rulemaking here. The highly
 12 confidential rulemaking is an example of this
 13 Commission's commitment to transparency, and we
 14 appreciate that. However, the gravity of that case
 15 versus the gravity of what will possibly occur in
 16 this rulemaking could not be more different.

17 In the highly confidential
 18 rulemaking, the parties, the Staff, Public Counsel
 19 has represented the public are able to view that
 20 highly confidential information, and we do have a
 21 process to try to make that public. Now, it can be
 22 approved, and we support those rules to improve it
 23 that were discussed this morning.

24 However, in this case we simply want
 25 to ensure that Public Counsel is able to attend

1 these meetings that occur between sitting
2 commissioners, preside officers and regulated
3 utilities.

4 I think it's also important to note
5 that, to the extent that certain parties raised
6 parity as an issue, I would ask you to consider
7 that the Commission exists to regulate public
8 utilities. It doesn't exist to regulate the Office
9 of the Public Counsel. They have a different
10 interest. There is good reason that the public
11 utilities should be required to disclose these
12 communications that occur. And it's not to say
13 that they're prohibited. It's to say that these
14 general policy discussions should be discussed
15 because they can have implications about, you know,
16 what the public may be exposed to in the future.

17 So those are the comments I have and
18 responses to the questions as best as I could jot
19 them down that have come up, and I'm happy to
20 answer further questions.

21 CHAIRMAN HALL: Thank you. Let me
22 just start with where you ended. Do you believe
23 that it is the role of the Commission in
24 adjudicating cases to balance the interests of all
25 parties before it?

1 MR. OPITZ: I think the role of the
2 Commission is to protect the public.

3 CHAIRMAN HALL: That's not my
4 question. That's a separate issue. Do you think
5 that the Commission needs to balance all of the
6 interests of all the parties in a case before it?
7 That's not a tough one, Counselor. I mean, the
8 case law out there is abundantly clear that that is
9 one of our roles.

10 MR. OPITZ: I think that -- the
11 reason I hesitate, Mr. Chairman, is that I agree
12 that there are certainly cases that say we've got
13 to balance that interest. I think that those
14 relate to the balance -- and as I recall, refers to
15 Bluefield and Hope and cases discussing that, where
16 it says, you know, we do have to have a balance,
17 and that balance is the Commission must look at
18 enabling the utility to charge rates so that it can
19 provide safe and adequate service and so that it
20 can earn a reasonable return necessary to attract
21 capital on investments that it makes to provide
22 that safe and adequate service.

23 CHAIRMAN HALL: I think the case law
24 is much more extensive than that. I think there is
25 a handful of cases that make it abundantly clear

1 that the role of the Commission is to balance the
2 interests of the parties before it.

3 And one of the reasons why we are
4 proposing this change to the rule is because the
5 existing rule does not treat all the parties before
6 it equally. And so I -- I understand that there's
7 also case law that says that the Commission has an
8 obligation to protect the public, but I think
9 there's also ample case law that makes it clear
10 that we're supposed to balance interests. And I
11 believe that part and parcel of that balancing is
12 treating all of the parties before it the same.

13 Let me move on. Just to be clear, to
14 the extent that there was any draft legislation
15 shared with anybody, utilities, consumer groups,
16 legislators, to the extent that I had any
17 involvement with any of that legislation, it was
18 shared with all stakeholders. Do you have any
19 evidence to the contrary?

20 MR. OPITZ: Mr. Chairman, I do not
21 have any evidence to the contrary, and I believe I
22 attended some of those meetings. I will say that
23 my concern is that if the rules go into effect as
24 proposed in this rulemaking, that that may not
25 always be the case. And I'm not suggesting that

1 members of this current commission wouldn't
2 continue to provide that to all interested parties,
3 but there would be nothing to require it.

4 CHAIRMAN HALL: There's been a lot of
5 discussion about various alleged scandals that gave
6 rise to the current ex parte extra-record
7 communications rule, and I'm not going to get into
8 those -- to those allegations in any detail, but
9 are you aware of any prior incident of
10 inappropriate behavior, inappropriate communication
11 that would be authorized by this new rule?

12 MR. OPITZ: So in terms of personal
13 knowledge, I cannot say that I am personally aware
14 of any of that that would be authorized that's
15 inappropriate.

16 CHAIRMAN HALL: I'll ask that same
17 question for other attorneys who may have a little
18 more institutional knowledge than both of us.

19 MR. OPITZ: I will say, Mr. Chairman,
20 that we are fortunate to -- and I have come here at
21 a time where this Commission and members of this
22 Commission have been dedicated to transparency. So
23 I don't think that it's -- we don't have any issue
24 with this Commission. It's about preserving this
25 rule going forward.

1 CHAIRMAN HALL: Yeah, that wasn't
2 really my question. My question concerned the
3 allegations of prior misconduct. And so assuming
4 that those allegations were, in fact, accurate,
5 that whatever was alleged did in fact occur,
6 wouldn't all of that inappropriate conduct also be
7 prohibited by our new rule or at least covered by
8 our new rule?

9 MR. OPITZ: I'm not sure that I can
10 answer that question without -- if you can direct
11 me to a spec-- in my Appendix A, I do discuss
12 multiple prior allegations of misconduct, and those
13 I found from filings in the Commission's electronic
14 filing system, in newspaper articles and
15 transcripts within the Commission's electronic
16 filing system for other cases.

17 Without being pointed to a specific
18 instance there, I don't know that I can say --

19 CHAIRMAN HALL: I'll point to all of
20 them or any that you can identify that would be not
21 covered by our -- by the proposed amended rule.
22 And if you don't know as you stand here, that's --
23 that's fine. There are a couple of other attorneys
24 who might be able to take a crack at that as well.

25 MR. OPITZ: I do not know as I stand

1 here.

2 CHAIRMAN HALL: Let me ask you some
3 questions about the current safe harbors that
4 Mr. Boudreau and I discussed. Interestingly
5 enough, certain utilities and the OPC are
6 interested in putting back or maintaining certain
7 safe harbors in our current rule, safe harbors that
8 I believe are in direct conflict with the statute.

9 So let me ask you. The current safe
10 harbor for health and safety, what is OPC's
11 position on whether or not a utility could have a
12 conversation with a commissioner during a pending
13 rate case where there is an issue -- where there is
14 a health and safety issue at issue in the case, can
15 that utility have an ex parte conversation with the
16 commissioner about that health and safety issue?

17 MR. OPITZ: If I may parse that out.
18 I will say the health and health safety safe harbor
19 issue as I read it is intended to apply to things
20 that are of an immediate nature.

21 CHAIRMAN HALL: That's how it's
22 intended. Is that what it says?

23 MR. OPITZ: That's how I was reading
24 it. I don't know that -- I will tell you that I
25 did propose some edits to that, those provisions.

1 CHAIRMAN HALL: But you can make the
2 same -- we can have the same discussion about every
3 single one of those safe harbors, that to the
4 extent they relate to a substantive issue in a
5 pending case, Missouri statute would prohibit a
6 communication, would prohibit that communication.

7 I'm dumfounded that OPC is proposing
8 that we maintain those safe harbors, allowing those
9 conversations, even though Missouri law clearly
10 prohibits them.

11 MR. OPITZ: As framed there, I don't
12 think that that's -- I think it's unlikely that
13 something would occur as the proposition is framed
14 respectfully. I think that when we're looking at
15 the context of the pending case or rate case, we're
16 seeing things that, yes, there might be
17 infrastructure or there might be certain things
18 that they're spending to -- costs they're incurring
19 to ensure safety and ensure health.

20 Of course, when it's something that's
21 an immediate threat to the employees' safety or
22 health or the public's safety or health, I think
23 that it's imperative that they -- that the
24 regulated utilities do communicate with this
25 Commission as quickly as possible. Now, that's not

1 to say they shouldn't disclose it after the fact
2 about what they talked about.

3 CHAIRMAN HALL: Under the current
4 rule they won't have to because it would not be
5 considered ex parte. So the purpose of the
6 amendment is to make it clear that communications
7 with parties about substantive issues in pending
8 cases are prohibited. Other communications with
9 regulated utilities are not.

10 And so all of the issues in the safe
11 harbor, in the various safe harbors, as long as
12 they didn't relate to substantive issues in pending
13 cases would be authorized. And I'm -- I continue
14 to be confused why OPC is contending that we should
15 authorize communications that are not authorized by
16 Missouri statute.

17 I understand how -- what you think
18 the spirit of the safe harbors are, and I agree
19 with that. That's not what the words on the page
20 are.

21 MR. OPITZ: I think we also have a
22 disagreement about what the purpose and meaning of
23 the statute is. When I read that section of the
24 statute, it's those discussions and it lists ways
25 that they can be sufficiently publicly disclosed.

1 I don't think that it's intended to prohibit
2 something that goes to something as important as
3 the public health and the public safety that's of
4 an immediate concern.

5 CHAIRMAN HALL: The statute would
6 allow certain communications and then require a
7 disclosure?

8 MR. OPITZ: I believe that --

9 CHAIRMAN HALL: Let's move on. I was
10 very confused about OPC's arguments concerning the
11 Missouri Sunshine Law. Is it OPC's position that
12 if a commissioner and a public utility had a
13 communication or if a -- if a commissioner and an
14 individual agent of a utility were in a room
15 together, that that would be a public governmental
16 body?

17 MR. OPITZ: I don't -- so the
18 Sunshine Law is mentioned in a couple instances in
19 the comments prefled by Public Counsel. I think
20 the main point of it is to -- and I believe the
21 first portion of where we mention it is discussing
22 the spirit of the Sunshine Law.

23 So I will acknowledge and -- I guess
24 there's no need for me to acknowledge because
25 that's what the law is, you know, it's that it's

1 got to be working as a body. So one individual
2 commissioner may not necessarily be subject to the
3 Sunshine Law meeting with the regulated utility.

4 That said, I think the spirit of the
5 Sunshine Law is transparency and public disclosure.
6 I think that these rules as currently exist and as
7 I guess Public Counsel's suggested comments on the
8 Commission's proposed draft would go a long way in
9 pursuing that spirit of the Sunshine Law.

10 The second part of our comments where
11 we discuss the Sunshine Law I believe is -- it may
12 be contained throughout, but what's coming to mind
13 now is during the conclusion of our comments where
14 it states that Public Counsel would be prepared to
15 try and monitor the communications that occur in
16 any means that we can.

17 Now, I think that there may be
18 Sunshine Law requests that Public Counsel or that
19 other entities could make to perhaps get calendars
20 of commissioners, could get a variety of things to
21 perhaps indicate, you know, some trail of
22 communications that were occurring.

23 CHAIRMAN HALL: On page -- on page 13
24 of your -- of your comments, you suggest that the
25 Commission maintain or retain paragraph 7, which

1 states that it is improper for any person
2 interested in a case before the Commission to
3 attempt to sway the judgment of the Commission by
4 undertaking directly or indirectly outside the
5 hearing process to bring pressure or influence to
6 bear upon the Commission, its employees, et cetera.

7 I think I agree with you on that. I
8 think -- I think that that may be a provision in
9 some form that we do need to maintain in the rule.
10 I guess I'm wondering how significant you think
11 that is or is it relatively insignificant compared
12 to everything else?

13 MR. OPITZ: So I think in the current
14 rule it is significant because the current rule
15 does have a section where it enables the Commission
16 to at least implicitly impose sanctions for
17 violating any of these rules. It says that the
18 Commission can issue an order to show good cause
19 why sanctions should not be issued. So while it
20 may not necessarily explicitly say that sanctions
21 can be issued, I think the current rule says that
22 they -- implies that they can.

23 I think this is a clear policy
24 statement in paragraph 7 that would -- I guess if
25 there is the ability to give sanctions, it gives

1 teeth. In my proposed draft I believe I reinsert
2 language about the sanctions and the ability to
3 show -- or the ability to require them to show good
4 cause why sanctions should not be issued.

5 CHAIRMAN HALL: And then hopefully
6 lastly, starting on page 18 and going all the way
7 to page 21 -- or wait. Hang on. Excuse me.
8 Starting at page 21, going to -- going to 26, so 21
9 to 26, where OPC suggests that we incorporate a lot
10 of the prohibitions in Chapter 105. You don't take
11 the position that the Commission -- that members of
12 the Commission are not already governed by
13 Chapter 105, do you?

14 MR. OPITZ: No. I believe that they
15 are already governed by that chapter and simply put
16 that in there to reflect, I guess, the discussion
17 about, you know, the lawfulness of these rules. I
18 will tell you I pretty much read the Revised
19 Statutes of Missouri front to back finding various
20 things that could be included, and these were the
21 ones that I thought were most applicable.

22 CHAIRMAN HALL: Recognizing that they
23 already apply to us without putting them into the
24 rule?

25 MR. OPITZ: Yes, sir.

1 CHAIRMAN HALL: Well --

2 MR. OPITZ: I will note that there is
3 additional language in there within that section
4 that talks about the -- when the commissioners
5 should disqualify themselves and a process for the
6 motion for disqualification. And so that -- when I
7 was reviewing that, I looked largely to the state
8 of Texas for their administrative code to see their
9 process for handling those situations there. I
10 included it because I think, having put in that
11 other language, I think it was a natural fit within
12 the context of what was being discussed here.

13 CHAIRMAN HALL: And what do you say
14 in response to the -- to the position stated
15 earlier that the ex parte and extra-record
16 communications rules are designed to deal with
17 communications between parties, non-parties and the
18 office of the Commission and all of this concerns
19 commissioner conduct and therefore is beyond the
20 scope of the proposed rule?

21 MR. OPITZ: So I would say that the
22 purpose of these are to ensure that the Commission
23 is -- continues to be an impartial body to the
24 point of avoiding the appearance of impropriety. I
25 think that to say that we're limiting it to -- that

1 this is only targeted at commissioner conduct, I
2 think that that might be slicing it too narrowly,
3 because if the current rules do regulate
4 communication between regulated utilities and to
5 some extent other parties during pending cases, and
6 the Commission, there is some conduct involved by
7 the commissioners, either having received that
8 ex parte or having not disclosed or having not
9 otherwise complied with the law. So there is
10 conduct by the commissioner that is implicated
11 throughout these rules even within the Commission's
12 current proposed draft.

13 CHAIRMAN HALL: I have no further
14 questions. Thank you.

15 MR. OPITZ: Thank you.

16 COMMISSIONER COLEMAN: Thank you.
17 Mr. Opitz, thanks for that information so far,
18 particularly your comments relative to
19 transparency. I want to ask some simple little
20 questions that don't take a whole lot of thinking,
21 I believe.

22 So first of all, what's the staff
23 size of OPC?

24 MR. OPITZ: We are around a dozen.
25 We have had some staffing changes recently, but we

1 have the Public Counsel and then we have four other
2 attorneys. And then in terms of technical staff,
3 we have -- we have four auditors or accountants, we
4 have one economist, Dr. Marke, and we have Ms. Lena
5 Mantle. She works for us part-time because she is
6 retired, so she's a thousand hour employee, and she
7 is a regulatory analyst.

8 COMMISSIONER COLEMAN: Do you know
9 your annual budget?

10 MR. OPITZ: I do not know that.

11 COMMISSIONER COLEMAN: Got a ballpark
12 figure at all?

13 MR. OPITZ: I think it's near a
14 million dollars, but I don't know for certain, but
15 I believe that it's around that.

16 COMMISSIONER COLEMAN: So you had
17 some comments in your Attachment A, and I want to
18 talk in general about the interaction between
19 utilities and the commissioners. In particular in
20 your section about utility tour visits, I'd like to
21 get a better understanding of where OPC is coming
22 from.

23 So as is noted in the comments, there
24 are often invitations for commissioners to tour
25 facilities. Who in general would participate in

1 those tours on behalf of OPC?

2 MR. OPITZ: It has varied with
3 different directors. I know our immediate past
4 director tended to go to those himself. Other
5 Public Counsel, the other Public Counsel who I
6 worked for often did not attend those and would
7 send a representative in his place, which would be
8 perhaps some of Public Counsel's newer employees
9 who hadn't had the opportunity to visit those
10 facilities or, you know, barring that, you know,
11 whichever member of Public Counsel was able to take
12 a -- take a departure from their in-office
13 obligations.

14 COMMISSIONER COLEMAN: You mentioned
15 the previous director. Do you know how long he had
16 been with OPC prior to the most recently dearly
17 departed director?

18 MR. OPITZ: I believe it was
19 approximately two years.

20 COMMISSIONER COLEMAN: Two years.
21 So I'm only asking that question because one of the
22 things that is of interest to me, certainly as a
23 new commissioner, is being able to tour facilities.
24 And you-all have some very specific suggestions
25 here relative to the process by which you think

1 it's most acceptable when interacting particularly
2 in utility tours; for instance, the suggestion that
3 a quorum of the Commission participate in that
4 visit.

5 And that's why I asked -- I asked the
6 amount of time the previous director had been there
7 because since you noted that sometimes he would
8 send other people, I do note that your most recent
9 director had only been there a very short time.
10 As a matter of fact, I believe he became the
11 director after I even became a commissioner.

12 MR. OPITZ: I think it was
13 approximately one year.

14 COMMISSIONER COLEMAN: So as a result
15 of that, your director could have been very
16 interested in what he was working on, just as a new
17 commissioner would. I have found sometimes that
18 all commissioners might not be interested in
19 touring a facility as I would. I'm newer. I've
20 been on board a year and a half. And others who've
21 been here three, four or even five years may not
22 find it necessary.

23 So as I look through your
24 suggestions, I'd really like to know how we would
25 deal with -- how you suggest we deal with a

1 situation where a newer commissioner needs to be
2 educated.

3 And I guess the other thing relative
4 to that is your suggestion that a summary of the
5 tour is disclosed in each case file for the
6 sponsoring utility. I'd like you to make comments
7 on that. And my last question and comments I'd
8 like from you would be your ideas around any
9 meetings with utility officials should be noticed,
10 broadcast and recorded.

11 MR. OPITZ: I will try and take those
12 one by one. So first I will note that
13 Attachment A where the comments initially --
14 encompass the comments initially filed in the
15 working docket, that was I believe in November when
16 those were filed. The quorum language I did not
17 put into the Appendix B of the current draft in
18 this rulemaking.

19 I did re-- and I will say the
20 proposed draft that the Commission does continue to
21 require that for tours a member of the Office of
22 Public Counsel be invited.

23 COMMISSIONER COLEMAN: Certainly.

24 MR. OPITZ: However, to my
25 recollection, I believe it removes the requirement

1 that the notice be filed for those tours.

2 COMMISSIONER COLEMAN: Do you know
3 where that is in Attachment B? I'm not seeing it
4 right now.

5 MR. OPITZ: Attachment B, page 4,
6 discusses the -- and it's under parenthetical 3.
7 And the bold language is language that I reinserted
8 to say after each tour a summary shall be disclosed
9 in each open case file.

10 And I think the reason -- so I did
11 not include the quorum language in there, and I
12 think the reason that it should continue to be
13 disclosed, because there are a number of other
14 parties that participate besides the Office of
15 Public Counsel in these cases, and so they may have
16 an interest that's different than Office of Public
17 Counsel.

18 For example, the MIEC or the MECG,
19 they diverge from Public Counsel on rate design
20 issues a lot of times, whereas we're often aligned
21 on revenue requirement issues. So I think that
22 it's appropriate that they at least have some
23 access to a summary of what happened at the tour,
24 especially because they are probably not going to
25 receive an invite.

1 COMMISSIONER COLEMAN: All right. My
2 last one about meetings being noticed, broadcast
3 and recorded.

4 MR. OPITZ: So that was -- I will
5 say, so that was a general statement in the
6 Appendix A comments to say, you know what, we could
7 simplify this by saying have them in the
8 Commission's agenda room. It's my understanding
9 that when a meeting is noticed, then that machines
10 there automatically turn on and record what goes
11 on. And that would allow interested parties to
12 review the communications that occurred and are
13 permitted under the law to occur. It just allows
14 it to be disclosed to the public.

15 In the comments that reply to the
16 Commission's proposed draft in this rulemaking, I
17 insert specific language to address the concern
18 about, you know, there may be times where we're
19 unable to provide 48 hours of notice of certain
20 utilities or perhaps certain commissioners that
21 they want to be able to engage, for example, during
22 legislative session.

23 And so a suggestion that I inserted
24 in these rules is, in that circumstance we don't
25 want to prohibit that sort of language. We don't

1 want to prohibit the commissioners from being able
2 to do their job or have access to information they
3 need, but we just want it to be disclosed and have
4 interested parties to be able to access what's
5 going on.

6 So I put that proposition within the
7 section under that disclosure of all communications
8 that would, I guess, be characterized as general
9 regulatory policy, that they occur and be broadcast
10 and recorded.

11 COMMISSIONER COLEMAN: Thank you for
12 the clarification. That's all.

13 JUDGE BUSHMANN: Thank you,
14 Mr. Opitz.

15 MR. OPITZ: Thank you, Judge.

16 JUDGE BUSHMANN: Why don't we take a
17 short break. We'll be in recess for ten minutes.

18 (A BREAK WAS TAKEN.)

19 JUDGE BUSHMANN: Okay. Let's go back
20 on the record. I think we have just a couple more
21 people that would like to talk. Mr. Mills.

22 MR. MILLS: Good afternoon. For the
23 record, my name is Lewis Mills. I'm appearing
24 today on behalf of the Missouri Industrial Energy
25 Consumers. I prefiled written comments, and I'm

1 not going to rehash those this afternoon. There
2 are a couple of issues that I want to touch on. I
3 think some of them will perhaps address some of the
4 questions we've already heard from the Bench.

5 But I think one of the things that I
6 want to start off with is the question of whether
7 or not the current rules are contrary to 386.210,
8 and I think quite emphatically they are not. The
9 provision in 386.210 sub 4 that talks about not
10 restricting communications can't be taken to a
11 ridiculous extreme. If you take it to a ridiculous
12 extreme, for example, the Commission's rule on
13 business hours would be unlawful because the public
14 doesn't have the ability to come in and yell at the
15 Commission about regulatory policy after midnight
16 on any given night.

17 So I think that rule must be read to
18 allow the Commission to put reasonable restrictions
19 on how and when such communications are made, and I
20 think the Commission's current rules certainly fall
21 within that reasonable exception.

22 One of the things that came up in
23 discussion today is the question of parity between
24 utilities and other parties, and certainly I
25 believe I testified to this years ago, and I will

1 state again, I would have no problem with the rules
2 establishing parity in terms of the requirements on
3 communications from parties such as the MIEC as are
4 imposed upon utilities.

5 Having said that, you know, the
6 notion that establishing that sort of parity is a
7 central focus of the currently proposed rules I
8 think -- I don't think that's the case. I think
9 that's just a minor tweak that could easily be made
10 without a lot of the other rule changes that are
11 proposed. If all the Commission wanted to do was
12 achieve that parity, that's an easy change to make
13 within the framework of the current rules and
14 doesn't require an enormous rewrite like is being
15 proposed.

16 One of the other issues that came up
17 this afternoon is the notion that somehow the
18 Commission's current rules are outside of the
19 mainstream, and to my way of thinking, that's sort
20 of like saying that Stephen Curry's free throw
21 percentage is outside of the mainstream. Well, it
22 is, but that's a good thing.

23 Having something that is better than
24 other states is not something that we should be
25 striving to reduce our rules to the lowest common

1 denominator. There was a time, for example, that
2 when Missouri's judicial selection process was out
3 of the mainstream, it was a novel idea, but over
4 the years a lot of other states have seen the merit
5 of it and were adopting it. You could say the same
6 thing about many new processes. All of the good
7 new processes were at one point out of the
8 mainstream, but nonetheless they recognize -- they
9 become recognized for their merit and are adopted
10 by other states.

11 One thing that I do want to talk
12 about, you've heard a lot in the comments about why
13 the utilities are in favor of the changes, why
14 consumer representatives are opposed to them, but I
15 want to just highlight a little short vignette out
16 of the Aquila/KCPL merger case that sort of
17 illustrates some of the reasons why the current
18 rules actually benefit commissioners. And I'll
19 refer to a couple of documents that are public
20 documents in the Commission's EFIS system.

21 The first one is in Case
22 EM-2007-0374, the first one is EFIS entry No. 121,
23 and that's an order from the Commission
24 declassifying certain exhibits that Public Counsel
25 had moved to declassify, and the exhibits for that

1 order include a letter from Rick Green, who was the
2 CEO of Aquila at the time, to his board of
3 directors.

4 And in that letter Mr. Green talks
5 about a meeting that he had with then Chairman Jeff
6 Davis with the Missouri Commission, and Mr. Green
7 relates his take on what transpired in that
8 meeting, and it's -- his take is not very favorable
9 to then Chairman Davis. He says that Chairman
10 Davis says he wants to see a strong utility in the
11 western part of the state and is willing to move
12 quickly to get the transaction approved. He wants
13 to demonstrate that he can push deals through in
14 Missouri.

15 And it goes on in that vein. It
16 talks in detail about what Mr. Green's perception
17 of the meeting was, the way he saw how the meeting
18 progressed.

19 Shortly after that exhibit was filed
20 in EFIS that was declassified by the Commission,
21 the then Attorney General Jay Nixon wrote the
22 Public Counsel a letter which said, Recent
23 revelations concerning communications between
24 Public Service Commission Chairman Jeff Davis and
25 the chief executive officer of Aquila have made it

1 plain that Chairman Davis can no longer serve in an
2 adjudicatory role in this proceeding. Accordingly,
3 I request that you as a party immediately seek his
4 recusal and the recusal of any other commissioner
5 that you know has had similar communications in
6 this matter.

7 And that's in the record in
8 EM-2007-034 (sic) as Exhibit 127. Almost the next
9 exhibit in the case after that is the notice of
10 recusal from then Chairman Jeff Davis who, while he
11 categorically denies any wrongdoing in the matter,
12 nonetheless recused himself.

13 And the point of that recitation is
14 that, to the extent that these meetings are taking
15 place without a representative of the public, any
16 commissioner who convenes such a meeting is
17 essentially subject to having the meeting
18 characterized by whomever that commissioner has a
19 meeting with in an unfair way.

20 And if it's simply the commissioner
21 and a utility representative, a commissioner and an
22 attorney representing a party in a case before the
23 Commission, it can quickly devolve into a question
24 of he said/she said, and commissioners have no real
25 protection to say, well, that's not what happened,

1 because no one knows.

2 So in a very real sense, the current
3 rules serve to protect the commissioners as well as
4 they serve to protect the public interest.

5 A couple of other questions that have
6 come up. One of them has to do with the safe
7 harbor provision in the current rules. Again, I
8 think if the issue is that the safe harbor
9 provisions may conflict with the provisions of
10 386.210, I think that could be a relatively easy
11 fix as well. At the end of the provision regarding
12 the safe harbor types of communications, it could
13 simply say, provided, however, that such
14 communications must be made in accordance with
15 386.210 sub 3, and that will take care of that
16 issue.

17 And that's all the prepared comments
18 I have, and I'm happy to answer any questions.

19 CHAIRMAN HALL: So you're here to
20 protect us?

21 MR. MILLS: Protecting you and
22 protecting the public interests is not that far
23 apart, honestly.

24 CHAIRMAN HALL: The particular
25 communications at issue in the Aquila/KCP&L

1 transaction, would those communications have been
2 prohibited under our current rule? Excuse me.

3 Would they be prohibited under our proposed rule?

4 MR. MILLS: Would they be prohibited?

5 CHAIRMAN DAVIS: Yes.

6 MR. MILLS: No, I don't believe so.

7 CHAIRMAN DAVIS: Why not? When did
8 they occur?

9 MR. MILLS: They occurred prior to
10 the filing of the case.

11 CHAIRMAN HALL: I believe that's --
12 that was the -- what you described is a factual --
13 are the facts in the Praxair case, right?

14 MR. MILLS: Part of it. There were a
15 number of other communications. This was just one
16 of them.

17 CHAIRMAN HALL: Well, I mean, those
18 communications, according to Praxair, were 30 days
19 prior, and my understanding as to why -- why the
20 current rule has that 60-day requirement is to
21 cover exactly those communications, and the
22 proposed rule actually goes further. It requires
23 60 days. So it's more communication prohibitive
24 than the current rule and, in fact, also requires a
25 90-day look back where -- where the utility would

1 be required to provide all -- a list of all
2 communications with commissioners related to issues
3 in the case.

4 So not only would -- the proposed
5 rule would be more protective of ratepayers than
6 the current rule with regard to the exact example
7 that you just gave, or am I missing something?

8 MR. MILLS: I think you may be
9 missing something. I don't recall off the top of
10 my head when the case was filed, but I believe
11 these communications took place some three months
12 before the case was filed. So I think they would
13 have been outside of the 60-day notice.

14 CHAIRMAN HALL: They'd also be
15 outside the current rule?

16 MR. MILLS: They probably would. I
17 would have to go back and look at the exact. It's
18 a lot closer to 60.

19 CHAIRMAN HALL: Regardless, the
20 current rule is 30 days. The proposed rule is 60
21 days with a 90-day look back. So the proposed rule
22 would be more protective than the current rule?

23 MR. MILLS: Well, the disclosure that
24 we fought for in the Aquila case would not have
25 occurred under the current rule or the proposed

1 rule. But the idea that you can cure this kind of
2 communication with a notice from the utility I
3 think undermines my point that having a
4 representative of the Public Counsel at these
5 meetings as sort of a third set of eyes protects
6 both the public and the commissioners, and I don't
7 think that's proposed for under the proposed rules.

8 CHAIRMAN HALL: No, but there's a
9 presumption of impartiality and lack of bias on
10 members of the Commission, and --

11 MR. MILLS: There is.

12 CHAIRMAN HALL: The proposed rule
13 would require a notice 60 days prior, and from that
14 point onward there could be no conversations about
15 substantive issues or anticipated issues in a case.
16 So the proposed rule would have prohibited the
17 exact conversations that you're referencing.

18 So let me take that one step further.
19 Do you have any example of where there was
20 inappropriate communications between utilities and
21 commissioners that would not be covered by the
22 proposed rule? Same question I asked Mr. Opitz.

23 MR. MILLS: I believe that the
24 conversation that Commissioner Lin Appling had with
25 Chris Giles at KCPL during a plant tour would not

1 fall within the proposed rules. That occurred
2 shortly before -- well, actually it occurred in the
3 interim between rate cases. So I don't think it
4 would have fallen within the 90-day.

5 CHAIRMAN HALL: Or the current rule?

6 MR. MILLS: Or the current rule.

7 CHAIRMAN HALL: Do you have any
8 examples of any --

9 MR. MILLS: Although under the
10 current rule that meeting would have been attended
11 by Public Counsel and so again we would have had a
12 third set of eyes to say whether or not
13 Commissioner Appling's recollection was correct or
14 whether or not Mr. Giles' recollection was correct.

15 CHAIRMAN HALL: Well, in fact, this
16 was on a plant tour, so under the existing rule and
17 the proposed rule OPC is given an opportunity to
18 attend. So any other examples?

19 MR. MILLS: Not that I can think of.

20 CHAIRMAN HALL: I think that's it.

21 Thank you.

22 JUDGE BUSHMANN: Thank you,
23 Mr. Mills. Yes, sir.

24 MR. HARDENBROOK: Good afternoon. My
25 name is Jay Hardenbrook, speaking on behalf of AARP

1 Missouri. I will admit openly that I am neither an
2 attorney nor do I try to play one on TV.

3 But mostly we're here to say that we
4 are in support of the recommendations of the Office
5 of Public Counsel, especially when it comes to
6 transparency and making things as -- shining as
7 much sunlight as possible.

8 I think that the problem that we run
9 into quite often with -- corruption comes in a lot
10 of different forms, and just looking backwards
11 doesn't mean that you can find all of the different
12 ways that it might appear. Nor do we expect that
13 these will be the commissioners for the rest of all
14 time and that this rule could apply to a lot of
15 different commissioners that are coming down the
16 road.

17 So when it comes to parity between
18 the two sides, we think that that's important, but
19 also that it should be the most transparent.
20 Basically err on the side of transparency if at all
21 possible.

22 We'd also suggest that this rule
23 should have more public hearings if at all possible
24 to get them out into the rest of the communities
25 and make sure that people have the opportunity, the

1 public has the opportunity to come and speak on the
2 ethics of this Commission and the way that they see
3 things should be carried out.

4 JUDGE BUSHMANN: Questions?

5 CHAIRMAN HALL: I have no questions,
6 but I very much appreciate you being here to
7 express your views of your members.

8 COMMISSIONER COLEMAN: Thank you.

9 JUDGE BUSHMANN: Thank you, sir.
10 Mr. Coffman?

11 MR. COFFMAN: Good afternoon. May it
12 please the Commission? I am John Coffman. I'm
13 here today on behalf of Consumers Council of
14 Missouri. And the Consumers Council of Missouri
15 was previously the Utility Consumers Council of
16 Missouri and came into existence at a time when
17 there were a lot of scandals, I guess prior even to
18 there being an ex parte rule, which I believe was
19 put in place in 1975.

20 Prior to that, there were scandals
21 involving regulated entities taking commissioners
22 on hunting trips and skiing trips, and there was a
23 lot of, I think, real cozy back room interactions
24 that led to the appearance at least that there was
25 some industry capture, that there was -- needed to

1 be more notice and public transparency.

2 So I think it's important to go back
3 even before 2007 and the incidents involving
4 Chairman Jeff Davis. I don't know that there's any
5 provision in Chapter 4 that just came about because
6 someone had some philosophical or academic idea of
7 how the Commission should be. Virtually every
8 provision was written into the Commission's rule
9 after there had been some violation of the public
10 trust, and it was put in place to make sure that
11 there was something that would try to prevent that
12 from happening in the future or at least some
13 serious appearance.

14 And I think that the current -- the
15 current rule is pretty good. I practice before
16 public utility commissions in about a dozen
17 different states. So I've seen how ex parte rules
18 are applied and interpreted in a variety of places,
19 including Alabama and Georgia and a lot of places
20 where I would not recommend you emulate.

21 And I appreciate that Mr. Zucker has
22 given you some selected states, but other states
23 where I've been that I would ask that you maybe
24 examine if you're going to look at some other
25 states is Texas, Colorado, New Jersey where they

1 have, I think, more extensive prohibitions or at
2 least different prohibitions.

3 I think that the current -- the
4 current rule is good, and I think it leads to not
5 just a legal presumption of ethical conduct on
6 behalf of the Commission, but it leads -- it leads
7 me to feel that generally there is transparency and
8 there is -- you know, if I see these notice of
9 communications I might go, huh, I wonder what
10 they're talking about. But if the -- if there is
11 no longer this prior notice and if Public Counsel
12 is pushed out of some of these meetings and if I
13 can no longer access the commissioners' calendars
14 and the ways in which the proposed rule would kind
15 of scale back the notice and disclosure
16 requirements, I'm going to be a little more
17 suspicious, I'm afraid. I'm going to have less of
18 a presumption in my mind that everything is going
19 to be on the up and up.

20 And I certainly have absolutely no
21 concern, I am aware of no allegation that any of
22 the current sitting commissioners have had any
23 problem with ethical concerns. But I've practiced
24 before over 35 other commissioners in the past, and
25 I know that these issues, they come up, and there

1 are temptations and there are situations that
2 commissioners can get in.

3 And I would ask for you to think
4 about what happens after you're gone. There will
5 be others sitting in those chairs, and they may not
6 have all of the institutional knowledge and
7 history, and I think it's -- I'm looking at these
8 rules as something that might be in place for a
9 long time and would hope that you would consider
10 keeping the current restrictions in place on a
11 forward-looking basis to ensure that there is
12 greater public trust and transparency.

13 Chairman Hall, I would say that I
14 think that you are right to point out that the --
15 that essentially the same standards of conduct
16 would be in place under the proposed rule. That is
17 that the standards of conduct are not sufficiently
18 weakened. What's weakened is the ability to detect
19 and monitor and ensure that going forward there's
20 going to be an ability to find out about private
21 communications that might be inappropriate and to
22 enforce them without the current rule.

23 Under the new rule, I'm going to --
24 as Public Counsel pointed out, I'm going to feel an
25 obligation to look at other avenues, if not making

1 open records requests, Sunshine Law requests, more
2 aggressive discovery. The utilities are trying to
3 find out what's going on in these private
4 communications between utilities and commissioners,
5 and it's just -- it's just going to create a
6 different presumption and, unfortunately, I think
7 suspicion of what exactly is going on.

8 I am concerned with some of the
9 increased activity involving legislative matters
10 just because so many of the legislative proposals
11 going on overlap with some of the contested cases
12 that we have, and I would -- and I know it must be
13 very difficult to wear different hats, and I
14 certainly am sensitive to that idea.

15 But regardless of whether the -- to
16 what extent the judicial canon applies, I think
17 that commissioners at the Public Service Commission
18 serve in a quasi-judicial role, and the due
19 process -- due process requires that there be a
20 certain amount of attention paid to avoiding the
21 appearance of impropriety and giving the public
22 information.

23 I don't think that there is anything
24 in the proposals, in the Commission's proposed rule
25 that couldn't be cured with the -- with the Public

1 Counsel's proposal to record and archive these
2 meetings. And I don't think that with the current
3 technology that's available to the Commission in
4 the Commission's facilities that that couldn't be
5 done.

6 I think that we could maybe dispense
7 with what may seem to be cumbersome notice rules
8 provided that these meetings are tape recorded and
9 archived. If they're sensitive information or
10 confidential, they could be perhaps preserved. If
11 there's a question later, there would be a record
12 that could be reviewed. I think that's one way to
13 simplify things if there's a concern about it being
14 cumbersome.

15 Again, like Mr. Mills, if the concern
16 is truly that parties are not being treated fairly
17 and that regulated utilities have an extra burden,
18 I have no problem with the Commission expanding
19 that to other parties. At least as far as the
20 Consumers Council, I would have no problem
21 complying with the same notice of communication
22 requirements that the utilities now do, and I've
23 done that before just to be above board, go beyond
24 what was required. I think that is not
25 objectionable.

1 Although I think that there is a -- I
2 think it's logical to put a greater restriction on
3 a regulated entity, and -- but I -- but yes, in the
4 quasi-judicial role that you accept, you do -- I
5 agree you should fairly balance all the interests
6 equally. So no problem with that particular aspect
7 of it.

8 As far as other rules, I think
9 I've -- as far as proposing enhanced ethical
10 standards, I would point you to the Public
11 Counsel's proposal, I think in paragraph 17, about
12 commissioners not participating in cases that they
13 were involved in earlier, and I think we would
14 actually like to see a greater cooling off period
15 after a commissioner serves their term and then
16 being able to go too quickly into a role that
17 represented a regulated entity.

18 We do also support still the 60-day/
19 90-day. Our proposal at the time was to go to a
20 six month prior to filing ex parte restriction as
21 they have in Colorado. I know this is awkward, but
22 I do think it's very important. It's -- not being
23 able to meet with the judge that's going to hear
24 your case immediately before you file it is
25 certainly a disadvantage.

1 Again, that's part of the
2 justification, I think, for applying greater
3 restrictions on the regulated entity. The vast
4 majority of the time we're in situations where
5 regulated entities are requesting something,
6 requesting rate increases, greater flexibility or
7 something that will enhance their earnings, and
8 they do so without the knowledge of any other
9 party. Sometimes other parties propose things, but
10 usually it's the other way. And what we -- what we
11 hope to have is the opportunity just to simply
12 provide another view.

13 So I think that's all we can really
14 ask. If there is something that's being
15 communicated to you privately on an ex parte basis,
16 we would like the opportunity to know about what's
17 being said so that we have at least the opportunity
18 to provide the other side. And the worry is that
19 you're hearing one side of an argument and not
20 hearing the other, and maybe you don't even know
21 that there is a concern that might be helpful to
22 hear on the other side. Not that you may agree
23 with it, but at least you have the opportunity.

24 So to the extent if you do go forward
25 with this, we would ask that you keep that in mind

1 and try to consider making any communications with
2 utilities open to the public and record them so
3 that they can be viewed, commented on later, or
4 provide the opportunity for others to be there. I
5 think noticing up issues on the Commission's agenda
6 is one way. Workshops is another way. I think
7 there are plenty of ways that the Commission can
8 stay informed.

9 And although we are concerned about
10 this rule and from our opinion the proposed rule is
11 a step backwards and it is a -- does diminish the
12 protection that the public has for transparency and
13 ensuring public trust.

14 So we would ask you to reconsider or
15 at least support or grant the Office of Public
16 Counsel's request that there be some local public
17 hearings, that this rule be given a chance for the
18 general public to consider and weigh in on.

19 That's all I have.

20 CHAIRMAN HALL: I have no questions.

21 Thank you.

22 COMMISSIONER COLEMAN: No questions.

23 Thank you.

24 JUDGE BUSHMANN: Thank you,

25 Mr. Coffman. Is there anyone besides Staff who

1 would like to provide a comment that hasn't spoken?
2 Don't see any hands. Does Staff want to provide
3 any comment?

4 MR. THOMPSON: Briefly, Judge.

5 MR. COFFMAN: I'm sorry. Could I
6 provide one more thing? I was asked by Empower
7 Missouri to pass along a letter.

8 JUDGE BUSHMANN: Have that marked as
9 Exhibit 2.

10 (EXHIBIT 2 WAS MARKED FOR
11 IDENTIFICATION BY THE REPORTER.)

12 JUDGE BUSHMANN: Anything further,
13 Mr. Coffman?

14 MR. COFFMAN: No, thank you.

15 JUDGE BUSHMANN: Mr. Thompson,
16 whenever you're ready.

17 MR. THOMPSON: Thank you, Judge.
18 Kevin Thompson for the Staff of the Commission.

19 First let me say that Staff applauds
20 the Commission's taking up and rescinding the
21 existing ex parte and extra communications rule,
22 which is, I believe, entirely too complex and
23 difficult to apply. I think that the proposed rule
24 is a gigantic step forward, an improvement over the
25 existing rule.

1 Speaking perhaps for myself more than
2 for Staff, I would say you have a controlling
3 statute, 386.210. That statute is detailed and
4 specific and controlling. I think the Commission
5 is obliged to follow that statute, to comply with
6 that statute.

7 There may be a question to the extent
8 to which the Commission can promulgate any
9 provisions that go farther than, that are more
10 strict than that statute. On the one hand, 386.410
11 gives you plenary power to make procedural rules
12 for your procedures for your cases. On the other
13 hand, you have a very specific statute, and that
14 statute does not include in it a grant of
15 rulemaking authority. I notice that the proposed
16 rule moves much closer to the language of 386.210
17 than the existing rule does, and I applaud that. I
18 think that's a tremendous improvement.

19 Two things I'll point out. The
20 60-day notice requirement is not part of 386.210,
21 and so it has the effect of prohibiting speech or
22 communications that that statute, in fact, allows.

23 The other thing is that the rule
24 focuses heavily on the contested case. 386.210
25 doesn't talk about contested cases. It talks about

1 filed cases, pending cases. The determination of
2 whether or not a given administrative proceeding is
3 a contested case at any given time can be a subtle
4 and contentious one.

5 That's all that I have. Thank you.

6 CHAIRMAN HALL: Concerning that last
7 issue, what would your recommendation be?

8 MR. THOMPSON: Well, I think my
9 recommendation would be that you cue closer to the
10 language of 386.210 which speaks of cases rather
11 than contested cases. For example, in 386.210.2,
12 it talks about -- it says communications may
13 address any issue that at the time of such
14 communication is not the subject of a case that has
15 been filed with the Commission. I would understand
16 that to apply to non-contested cases equally with
17 contested cases.

18 CHAIRMAN HALL: Thank you.

19 MR. THOMPSON: Yes, sir.

20 JUDGE BUSHMANN: Thank you. Any
21 further comments by Commissioners? That conclude
22 the hearing. We are adjourned.

23 (WHEREUPON, the rulemaking hearing
24 concluded at 3:18 p.m.)

25

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C E R T I F I C A T E

STATE OF MISSOURI)
) ss.
COUNTY OF COLE)

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

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



Kellene K. Feddersen, RPR, CSR, CCR

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