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STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

TRANSCRIPT OF PROCEEDINGS

Roundtable Discussion

January 7, 2008
Jefferson City, Missouri
Volume 1

In the Matter of a Review of the)
Missouri Public Service)
Commission's standard of Conduct) Case No. AO-2008-0192
Rules and Conflicts of Interest)
Policies)

HAROLD STEARLEY, Presiding,
REGULATORY LAW JUDGE.

JEFF DAVIS, Chairman,
COMMISSIONER.

REPORTED BY:

KELLEN K. FEDDERSEN, CSR, RPR, CCR
MIDWEST LITIGATION SERVICES

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

2 JUDGE STEARLEY: Good morning. For those
3 of us who are technologically impaired, I think we're
4 going to have all our equipment working here this morning.
5 I welcome everyone today. Today is Monday, January 7,
6 2008, and we are here for a roundtable discussion in Case
7 No. AO-2008-0192, which is a workshop docket captioned In
8 The Matter of a Review of Missouri Public Service
9 Commission's Standard of Conduct Rules and Conflicts Of
10 Interest Policies.

11 My name is Harold Stearley and I'm the
12 Regulatory Law Judge. I will be serving with the Chairman
13 this morning as moderator for our discussion. The court
14 reporter this morning is Kellene Feddersen, and I do want
15 to remind everyone of a few items before we get started.

16 One, we would really appreciate that
17 everyone sign in on our sign-in sheets whether you're
18 actually going to give presentations or comments today or
19 if you're just here to listen in. We'd like to keep a
20 good record of everyone who's here, so please sign in.

21 I do want to let everyone know that our
22 microphone system in here for the webcasting and the
23 videotaping is very sensitive. So even those of you in
24 the back, if you're wanting to say something that you
25 don't wish to go out over the webcast today, I would

1 caution you to reserve your comments 'til a later time
2 because these microphones are very sensitive. I would ask
3 that you all please turn off all cell phones, Blackberries
4 or other communication devices because they do interfere
5 with our webcasting and recording.

6 And another important matter for those of
7 you who may not be familiar with floor four of the
8 building and the ballroom here, if people are needing to
9 use restrooms, there is a women's restroom straight out
10 across the hallway to the right. The men's restroom you
11 have to go to the left down the stairs to the third floor,
12 and those restrooms are located on the right-hand side of
13 the coffee shop down there.

14 Today, just to kind of give you a
15 preliminary overview of the procedure we'll be following,
16 we're going to begin with some scheduled presentations,
17 and those presenters may take comments or questions, and
18 we have microphones positioned around the room to take
19 those comments and questions. Those will need to be
20 switched on when you go to use those microphones. We have
21 them switched off right now to cut down on the feedback.

22 If you do ask questions or have comments to
23 make, we'll ask you to introduce yourself and spell your
24 name so our court reporter can get that recorded
25 correctly. And we'll ask that we only have one person

1 speaking at a time so it's easier for our court reporter.
2 We will be taking breaks periodically throughout the
3 roundtable today. Not only give everyone in the room a
4 break, but will also give our court reporter a break so
5 that we don't wear her fingers out too quickly here.

6 With that, those introductory remarks, I'm
7 going to pass the microphone to Chairman Davis for
8 introductory remarks from the Chairman.

9 CHAIRMAN DAVIS: Thank you, Judge. Almost
10 every utility consumer in this state is served by a
11 utility regulated here at the Public Service Commission.
12 For people to have confidence in the decisions that we are
13 making, I think it is essential that those customers also
14 have confidence in the process.

15 I've opened this docket as Chairman to get
16 input from national experts, consumer groups, individual
17 citizens, as well as the utilities themselves on changes
18 that we can make that can improve the communication and
19 strengthen consumer confidence and make the PSC better
20 able to meet the needs of citizens in today's challenging
21 energy environment.

22 That being said, I want to introduce our
23 first guest speaker today. This man is a recognized
24 expert in the area of utility regulation. He has more
25 than 20, 25 years of experience. Scott Hempling is the

1 executive director of the National Research Regulatory
2 Institute. He has provided legal and policy advice to
3 public and private sector clients involved in regulated
4 industries. Mr. Hempling received a bachelor of arts cum
5 laude in economics and political science from Yale
6 University where he was a recipient of a Continental Grain
7 Fellowship and Patterson Research Grant. He received a
8 juris doctorate degree magna cum laude from Georgetown
9 University where he was a recipient of the American
10 Jurisprudence Award for constitutional law.

11 Mr. Hempling has appeared numerous times
12 before committees of the United States Senate, the United
13 States House of Representatives and before state
14 legislative committees in Arkansas, California, Maryland,
15 Minnesota, Nevada, North Carolina, South Carolina, Vermont
16 and Virginia.

17 Mr. Hempling is a former employee of the
18 Missouri Public Service Commission on a contract basis.
19 In 1997 Mr. Hempling began a series of annual seminars at
20 the introductory and advanced level for students of
21 electricity law. Attendees and purchasers of the
22 accompanying seminar books have come from all 50 states,
23 all sectors and all professional disciplines within the
24 electric industry.

25 So without any further ado, I'd like to

1 introduce our first speaker, Mr. Scott Hempling.

2 MR. HEMPLING: Thank you, Mr. Chairman. Is
3 this microphone working in the back? Can you all hear me
4 okay?

5 Thank you very much, Mr. Chairman, for the
6 opportunity to speak to you today. My name is Scott
7 Hempling. I'm the executive director of the National
8 Regulatory Research Institute. NRRI is an independent,
9 nonprofit corporation funded primarily through voluntary
10 dues contributed by state public service commissions. Its
11 mission is to provide the research services state utility
12 commissions need to make regulatory decisions of the
13 highest possible quality.

14 Chairman Davis asked me to initiate today's
15 discussion. A few caveats first. My thoughts are my own,
16 not NRRI's nor any state commission's. I do have a
17 history with the Missouri Commission, having served it as
18 outside counsel for electricity matters at the federal
19 level between 1992 and 2006.

20 I've discussed some of my thoughts with
21 Chairman Davis, but neither he nor any other Missouri
22 Commissioner has confined, guided or influenced my
23 comments, and as you will see, I allocate responsibilities
24 for your present difficulties on an equal opportunity
25 basis.

1 I'd like to start by also emphasizing I
2 have no specific knowledge of the pending merger, I've not
3 reviewed any of the filings other than those involving the
4 motion to dismiss the merger application. My thoughts
5 today are informed by your procedural debate, but they're
6 not specific to Missouri, and they're not specific to
7 mergers.

8 Personally, I've been on all sides of the
9 decision-making process, as a litigant, as a commission
10 advisor, as a brief writer, as an opinion writer. So I've
11 had to live often uncomfortably with all manner of
12 procedural practices.

13 I wish to focus this morning on how we can
14 modify those practices to help regulators do the best jobs
15 they can. I'll ask three questions. First, what
16 procedural principles best serve regulation's purposes?
17 Second, can informality coexist with objectivity? And
18 third, is there a trust problem here?

19 First, what procedural principles best
20 serve regulation's purposes? Let me start with some
21 thoughts on the purpose of regulation. Economic
22 regulation seeks to align private behavior with the public
23 interest. For today's regulators, the public interest is
24 becoming difficult to discern. New interest groups,
25 accelerated technological change, higher customer

1 expectations, lower investor patience, and growing
2 instability in corporate and market structures all are
3 combining to blur regulatory vision.

4 Enlarging the problem is the uncertain
5 stature of state commissions. Underfunded and
6 understaffed relative to their responsibilities, they also
7 face a common political dichotomy. Citizens support
8 regulation when it protects but reject regulation when it
9 obstructs.

10 To preserve this political effectiveness,
11 regulation cannot ignore these pressures, but to preserve
12 its professionalism, regulation cannot succumb to them.
13 Otherwise, regulation becomes mere conflict resolution
14 rather than public interest promotion.

15 For the public interest to prevail,
16 regulators have to gather facts and create opportunities
17 for objective analysis. So what procedures best carry out
18 these purposes? I have two main thoughts. First, we need
19 to shift the focus from the parties' interest to the
20 regulatory interest. The present debate in Missouri seems
21 focused on the parties' behavior, what does the law permit
22 and prohibit parties to say and do, who said what to whom,
23 when and under what circumstances.

24 Rules on parties' behavior like the rules
25 on athletic contests are indispensable because they define

1 boundaries and thus build trust in the outcomes. But
2 unlike athletic contests, regulations should not be a
3 forum in which private interests fight for a chance to
4 win. It should be a forum in which government officials
5 carry out their obligation to align private behavior with
6 the public interest.

7 I suggest, therefore, that we focus less on
8 what parties need to win their case and more on what
9 regulators need to do their duty. A few thoughts on that
10 subject. First, regulators need full information and they
11 need objective analysis. Like all people, regulators
12 gather and absorb information in different ways, some by
13 listening, some by talking, some by writing, some by
14 reading, some by all of the above.

15 Some learn by causing opposing views to
16 confront each other publicly. Others learn by sitting in
17 a room quietly meeting with one person at a time. Some
18 like to hear from the parties first then study objective
19 materials. Others prefer to study the objective materials
20 first and then, thus educated, turn to the parties.

21 The regulator needs to find the right
22 person to talk to at the right time. The right person is
23 not necessarily the parties' designated witness, and the
24 right time is not necessarily during a litigated case.

25 Second thought. Regulators are forced to

1 learn on the job. It's a fact of life. It's true in
2 Missouri. It's true in every one of the 50 states.
3 Regulators are rarely as well educated in terms of utility
4 regulation as the professionals appearing before them.
5 That differential creates opportunities for exploitation.

6 an advocate who takes advantage of that
7 differential by telling only half the story, by omitting
8 contrary arguments, by shading the facts, by
9 oversimplification through power point, contributes to the
10 degradation of the forum and the process. She is being
11 penny wise and pound foolish. In the long run no one
12 benefits from a forum that makes decisions based on a
13 party's self interest arguments. Rather than take
14 advantage of a regulator's experience, parties should help
15 them to learn on the job.

16 Now, in addition to shifting the focus from
17 the parties' needs to the regulatory needs, we have to
18 find the right mix of formality and informality, formality
19 and informality of pros and cons, benefits of informality.

20 The author Russell Baker wrote, quote, an
21 educated person is one who has learned that information
22 almost always turns out to be at best incomplete and very
23 often false, misleading, fictitious, mendacious, just dead
24 wrong, close quote.

25 The key to becoming educated is to ask the

1 uneducated question. The great explorers from Galileo to
2 Edison to Watson, Creek, made their discoveries by asking
3 ignorant questions. So do inexperienced regulators, but
4 some would rather ask their ignorant questions in private.

5 How about the risks of informality? They
6 include unequal access arising from and exacerbating
7 asymmetry of resources. They come from secret deals,
8 incomplete information, subjective information, misleading
9 information. There are benefits of formality, including
10 clarity of the evidentiary rules, boundaries on what goes
11 into the record, the discipline of cross-examination, the
12 higher level of expertise in the official presentations,
13 and the public trust that goes along with those practices.

14 But there are problems with formality. In
15 the strictly formal setting the parties in fashioning
16 their cases have great influence over what the
17 Commissioners hear, how they hear it, when they hear it,
18 from whom they hear it. Putting on a case for a private
19 client is stage craft. I've been there. An exercise in
20 persuasion that easily becomes manipulation.

21 Now, you might say, but the adversarial
22 system produces truth. That maxim with its origins in the
23 judicial context is overstated in the regulatory context.
24 In regulation the purpose is not to choose between private
25 party positions, but to advance the public interest.

1 Regulators are not judges. They're policy makers.
2 Sometimes they use adjudication as a procedure to make
3 policy, but they make policy for all residents and all
4 citizens. In an adversarial focus, the focus is on the
5 adversaries. In regulation the focus must be on the
6 public.

7 Now, I've been talking about regulation's
8 purposes and what procedural principles could serve those
9 purposes. Let me now turn to my second major area, which
10 is, can informality coexist with objectivity? You have
11 been having disputes about ex parte contacts and
12 prejudgment. Underlying the legal prohibitions, the
13 traditional legal prohibitions against ex parte contacts
14 and prejudgment is a goal of objectivity. Are there ways
15 to preserve objectivity while allowing informality?

16 In informal conversations, questions can
17 get asked, precision can be sought. Here are six simple
18 suggestions to preserve the positives while diminishing
19 the negatives. First, the purpose of an informal
20 prefiling conversation should not be to read tea leaves.
21 Prior to the issuance of a final order, the Commissioners
22 are barred from expressing an opinion, so seeking an
23 opinion in private is an invitation to violate the
24 integrity of the process.

25 A party committed to the integrity of the

1 process will not invite a Commissioner to violate it.
2 Think about it. If you came to a Commission's office with
3 the purpose of, quote, feeling them out, close quote, you
4 are headed toward undermining the integrity of the
5 process.

6 Second, the purpose of an informal
7 prefiling conversation should be twofold, to pay the
8 courtesy of advanced notice and to see what questions or
9 concerns a Commission might have. Why the courtesy of
10 advanced notice? It's more than a courtesy. It allows
11 the Commissioners to begin their preparation. They can
12 seek objective reading material. They can assign
13 assistants to draft internal briefing papers. They can
14 determine the necessary staffing. They can start the
15 process of retaining consultants. They can get their feet
16 firmly on the ground before the public filing occurs.

17 What about eliciting Commissioner questions
18 and concerns? That allows the parties to focus their
19 submissions on the public interest. Provided a
20 Commissioner makes clear she has no fixed position, where
21 was the prejudgment or impropriety with the Commissioner
22 making the following statements, for example, quote,
23 assertions of merger benefits that go beyond three years
24 make me uneasy because it becomes hard to predict what a
25 utility's cost structure would have been absent a merger,

1 close quote. No problem for the commissioner raising that
2 point informally.

3 How about this: The last time witness X
4 appeared on the stand, he had lost some credibility with
5 me because he testified that absent the 13 percent return
6 on equity, the company would be crippled. Yet one week
7 later the company settled on 11.8 ROE, and the company
8 seems to be doing fine.

9 Or thirdly, if you file a merger
10 application, I hope you will provide evidence on whether
11 the return on the customers' dollar in terms of cost
12 reductions flowing from the acquisition premium you expect
13 customers to pay at least matches the return the company
14 could earn on alternative investments of comparable risk.
15 I hope you will provide evidence on that question.

16 Or fourth, the way you describe your
17 proposal, it seems to me you are asking the ratepayers to
18 take definite risks in return for indefinite benefits.
19 There seems to be an asymmetry here, but I am not sure. I
20 hope your application and testimony and briefs will
21 address this issue with precision.

22 Or how about this: Put on whatever witness
23 you want, but I find it difficult to credit testimony from
24 CEOs who speak in platitudes. And lastly, I'd like to see
25 more witnesses at the lower levels in the company's

1 hierarchy, the ones who actually make the utility run.

2 Those are six examples of what I think are
3 proper probes by a Commissioner in a private meeting that
4 have the effect of inducing the company to present
5 evidence later that will be helpful to the regulatory
6 process. They are not prejudgments. They are statements
7 of concern, statements of interest that a company should
8 listen to carefully.

9 Some more recommendations for a Commission
10 in terms of allowing prefiling meetings, informal private
11 prefiling meetings. The third one would be the
12 Commissioners should ask questions but express no final
13 opinions, and as I've just indicated, probing questions
14 should not be confused with negative conclusions. When
15 two retail monopolies propose to merge, it is reasonable
16 to probe.

17 Fourth, if the company uses written
18 materials, they should become public within 24 hours.
19 Fifth, the Commissioner should place notice of the meeting
20 on the public record. And sixth, others should have
21 opportunities to discuss the same issues with the same
22 Commissioners.

23 Implementation of these six ideas seem to
24 me to remove any basis for taint while preserving the
25 flexibility necessary for clearheaded prefiling and

1 information gathering. Notice I haven't recommended
2 public transcripts of the back and forth of these informal
3 meetings because, as I've argued to you, I think the
4 informality, the ability to show ignorance, the ability to
5 ask tough questions without misinterpretation in writing
6 seems to me a useful tool.

7 Another major point I'd like to discuss
8 with you is the tendency to confuse unequal access with
9 improper access. It's an indisputable fact the major
10 utilities have more regulatory affairs resources than do
11 the intervenors. A commission can say to the utility, I
12 want to talk to a load forecasting person to understand
13 the methodologies used to predict the industrial load for
14 2010. The utility can make such a person available in 24
15 hours at no incremental cost because the base costs are
16 being covered by rates. The consumer advocate cannot make
17 comparable resources available to the Commission.

18 This asymmetry of access creates
19 opportunities to take advantage. Even a straight
20 objective presentation creates an advantage, a bond, a
21 reputation, a responsiveness, a dependency. That's why
22 people seek face time with commissioners. The people not
23 present, those with fewer access resources lack those
24 opportunities and advantages.

25 This asymmetry of access is exacerbated by

1 irony, irony that the asymmetry is funded in part by
2 ratepayers, because regulatory relations is a cost of
3 doing business recoverable in rates.

4 But unequal access is not improper access.
5 The solution is not to limit access, but to expand it by
6 creating comparable resource bases for the customer side.
7 I see no reason why regulated utilities would not support
8 legislation which grants to Public Counsel and other
9 intervenors a level of ratepayer funded regulatory
10 resources bearing some reasonable relation to the
11 utility's ratepayer funded resources. That is not the
12 present case. Why not?

13 A few words on prejudgment. We should take
14 care to distinguish bias from hunch. A bias is an
15 inability or an unwillingness to examine all facts and to
16 reason objectively. A hunch is a tentative conclusion
17 based on education and experience that a particular set of
18 propositions is more likely to be true than false and
19 that, if true, requires a particular outcome.

20 No one wants a bench saying, my mind is a
21 complete blank. The regulatory mind is not blank. It's
22 full of experiences, prior readings, straight facts, both
23 diligently and casually acquired and evaluated. Those
24 straight facts lead to hunches. Hunches are unavoidable,
25 and they are useful as long as a regulator establishes a

1 systematic objective method for testing them.

2 And the expression of a hunch in public or
3 private is not prejudgment. Expressing a hunch gets a
4 reaction, and the Commissioners can learn from that
5 reaction. Let's avoid dampening interactions in the name
6 of unachievable procedural purity. Hunches publicly
7 expressed are okay.

8 A few words on appearance of impartiality.
9 The law is clear, the mere fact of a meeting not ex parte
10 does not signal partiality, nor does a flurry of post-
11 meeting e-mails from the non-commissioner attendees about
12 how positive the meeting was. It's human nature to
13 deceive oneself about a meeting's outcome. I've lost
14 track of the number of lawyers, including me, who left
15 their oral arguments thinking they won because the bench
16 was friendlier to their side.

17 It would help if meeting participants
18 characterized their meetings more cautiously. Rather than
19 saying things like, the Commissioner reacted positively,
20 try this: He asked good questions, more questions than I
21 expected, more questions than I wanted, but good
22 questions. We better get to work on the answers.

23 My last comments to you involve this
24 question: Is there a trust problem here? In your present
25 difficulties, the parties have framed their dispute in the

1 language of procedural law, but I wonder if the underlying
2 problem is one of trust. Consider three examples. And as
3 the footnote says, these are hypothetical examples only.
4 Any resemblance to the real word is completely
5 coincidental.

6 First, if one employee says the meeting's
7 purpose was merely courtesy and education while his boss
8 says its purpose was to gauge the commissioners' reactions
9 before he signed a multi-billion-dollar contract, trust
10 diminishes. If a party seeks commissioner
11 disqualifications through a motion that, one, ascribes to
12 the commissioners no act other than attending a lawful
13 meeting, two, asserts the appearance of impropriety on the
14 sole bases that a non-commissioner participant later
15 characterized the commissioner's views as favorable,
16 three, cites no case supporting the argument that a lawful
17 meeting becomes unlawful solely because a non-commissioner
18 participant writes hearsay about a commissioner position,
19 and four, offers no independent evidence of commissioner
20 prejudgment, then trust diminishes.

21 Thirdly, when after 20 years of continuous
22 merger proposals there remains in the regulatory community
23 no clear principles on how to measure, compare and
24 allocate merger costs and benefits so that prospective
25 merging partners have to come in and probe and ask

1 informally what's the expectation of the Commissioners,
2 then trust also diminishes.

3 Trust breeds rigidly, where regulation
4 requires flexibility. I hope you can find a way to
5 restoring trust. We have a ways to go, and I wonder if
6 one place to start is to focus on our common goal, which
7 is high quality regulation. I personally work with and
8 know of hundreds of commissioners in this state and about
9 30 others. Commissioners are mostly diligent, unbiased,
10 committed to good faith practices and behaviors. They are
11 also mostly inexperienced at regulation and painfully
12 aware of their inexperience. Their mistakes, especially
13 procedural ones, are often mistakes of inexperience.

14 What is the regulatory community doing to
15 solve this problem? The disparity among parties in terms
16 of resources, pay scale and professional preparation is
17 indisputable. Do the stakeholders approach the
18 legislature and argue as allies for the resources needed
19 by the Commission and the Public Counsel? Do they work
20 cooperatively to fashion a state-specific curriculum from
21 the regulators, or do they behave as if the status quo,
22 well meaning but undereducated regulators dependent on
23 prefiling meetings for education is a good thing?

24 Do we understand regulation as a
25 comprehensive, coherent system designed to ensure

1 accountability to the public, or do we view it as a
2 process we gain for temporary advantage? Is your debate
3 here in Missouri really about administrative procedure or
4 is it about your commitment to high quality utility
5 regulation?

6 By way of conclusion, the U.S. Court of
7 Appeals in a Federal Power Commission case wrote, quote,
8 the Commission has claimed to be the representative of the
9 public interest. This role does not permit it to act as
10 an umpire with blandly calling balls and strikes for
11 adversaries appearing before it. The right of the public
12 must receive active and affirmative protection at the
13 hands of the Commission.

14 If we can design administrative procedures
15 that recognize that the Commission's powers are broader
16 than declaring winners and losers, we have a shot at
17 giving the public the active and affirmative protection it
18 deserves. Thank you very much for the opportunity to
19 speak today.

20 JUDGE STEARLEY: We have restricted our
21 microphones up here so we don't have too much feedback
22 going on. Can you-all hear me well enough? Okay. Can
23 everyone hear me all right now? At this time Mr. Hempling
24 is going to take questions from members of the audience
25 and other participants. In order that we can all hear

1 your questions well, we have positioned microphones at two
2 locations in the room. Those microphones are switched off
3 at this time. So those people wanting to ask questions
4 when they approach the microphones will need to turn those
5 on. Anyone have any questions for Mr. Hempling?

6 Mr. Mills, if you'd please grab a
7 microphone. And Mr. Mills, if you'd please identify
8 yourself for the audience before you ask your question.

9 MR. MILLS: My name is Lewis Mills. I'm
10 the director of the Public Counsel's Office in Missouri.

11 Scott, your discussion on pages 4 and 5
12 about prefiling meetings, the six categories, is it your
13 belief that those meetings should be private meetings or
14 public meetings?

15 MR. HEMPLING: My recommendation -- can
16 you-all hear me in the back? The question was whether in
17 terms of the six -- is this okay? In terms of the six
18 thoughts I gave with respect to prefiling meetings, my
19 assumption, perhaps my written description wasn't clear,
20 is that those are private meetings for which the
21 Commissioner would identify publicly afterwards that they
22 occurred, and any materials that are associated with them
23 would be made public, but they would be casual meetings
24 inside somebody's office. That was my premise, yes, sir.

25 MR. MILLS: What would the harm be in

1 having all of those things take place but take place
2 publicly?

3 MR. HEMPLING: Well, the harm is the
4 argument I gave, that somebody with a great deal of
5 ignorance, myself, I often hesitate to ask ignorant
6 questions in front of a whole crowd of people who are
7 going to go evaluate me afterwards.

8 And as I argued, if it's prefiling such
9 that anything that later has to be on the record gets
10 placed on the record, it seems to me that the fact of
11 undereducated commissioners and the fact of individuals
12 learning in different ways makes the pros outweigh the
13 cons in terms of the ability to engage informally.

14 In fact, I argue that informal education
15 occurs anyway. People pick up journals in the library.
16 They go to conferences and hear speakers. There's no way
17 to stop the flow of informal information. It would be
18 better just to recognize it as part of the process but
19 ensure the relative equality of access through publication
20 of the fact of a meeting.

21 MR. MILLS: And you say the pros outweigh
22 the cons. Apparently the cons against making those public
23 is that it would make -- it could make the Commissioner
24 feel uncomfortable; is that right?

25 MR. HEMPLING: That's correct. That's one

1 argument that I made. And the fact is, informal
2 conversations, not everything gets said that might get
3 said. And there can be a tendency, and I'm sure you've
4 been part of the same meetings I've had, where meetings
5 become endless because everybody wants to have the last
6 say. And as somebody who's often had to absorb all those
7 statements, there becomes a point of diminishing returns,
8 where you just want to cut it off, think about what you've
9 heard, and if you've heard from the company one day, you
10 call up Lou Mills the next day, say, I want you to come in
11 and talk to me about something.

12 MR. MILLS: Do you see certain advantages
13 to having those meetings public?

14 MR. HEMPLING: Well, at least I think
15 there's a clear advantage. I wouldn't say that there are
16 no pros to making it public. The public being -- the
17 advantage of making it public is everybody knows what
18 everybody is saying. But as I argued, it's a personal
19 judgment as to, being somebody who's often ignorant
20 himself, that the pros of hearing things informally are
21 better.

22 The key, though, is that nothing becomes
23 the basis of a decision unless it is on the record.
24 That's what's key.

25 MR. MILLS: Okay. Well, okay. I'll leave

1 it there.

2 JUDGE STEARLEY: Any other questions for
3 Mr. Hempling? Please take the microphone.

4 MR. COFFMAN: Hello. My name is John
5 Coffman. How are you, Scott? I'm representing AARP here
6 today, and I had questions regarding your subpoints on
7 paragraph 4, where you list some hypothetical quotes that
8 might be asked in what I think -- I think you're saying
9 might be appropriate communication in a private meeting
10 about a future contested case.

11 And I would ask you, and I'm assuming that
12 you would not think these would be appropriate
13 communications if they were to occur with a circuit court
14 judge or with a -- an appellate court judge prior to a
15 contested case in a regular court, but that you're making
16 an argument that public service commissioners are
17 different than regular judges?

18 MR. HEMPLING: Yes. I want to understand
19 your question. It's hard to imagine a hypothetical where
20 if I were filing a complaint for negligence in trial court
21 I would go visit the judge ahead of time and say, gee, if
22 I wrote a complaint with the following arguments in it,
23 would you be skeptical? How would you feel about it?
24 What questions might you have? I can't imagine that
25 conversation ever taking place.

1 I can imagine it taking place in a
2 regulatory context because I think the results would be a
3 clearer filing. It's harder for a Commissioner once a
4 filing has been made to say, you know, you haven't
5 addressed half of the questions that are important to me,
6 so now what do I do, reject the application and cause the
7 chaos on Wall Street that happens when they misinterpret a
8 commissioner move? That's what I'm comparing it to.

9 I've been in many situations where, quite
10 frankly, as both the commission advisor and as an advocate
11 in a merger case, at least half of the questions that I
12 think ought to be asked in a merger case aren't addressed
13 in the merger filing because those aren't the questions
14 that the company thought needed to be asked. And so much
15 of my concern arises from the need to ensure that private
16 parties don't control the framing of the issues in a time
17 sensitive transaction like a merger.

18 MR. COFFMAN: Now, in these hypothetical
19 communications that would be held privately and in
20 anticipation of a contested case, would they, in your
21 mind, be actions that the Commissioner was participating
22 in in a quasi-judicial manner?

23 I mean, I assume you agree that the
24 Commissioners act in several capacities, including
25 quasi-legislative and quasi-judicial, but in this

1 capacity, it appears that they -- because it's in
2 anticipation of a contested case, they are acting as a
3 quasi-judicial officer. Is that your understanding?

4 MR. HEMPLING: When the merger gets filed,
5 it would be, I assume in this case under state
6 administrative procedure law, it would be an adjudicated
7 case.

8 I want to make one other point that perhaps
9 I might have made in the written comments. If I were the
10 commissioner asking all those questions, I'd put them in
11 writing and I'd make sure they went out to all the
12 parties. And if I really had three votes out of five, I'd
13 make sure they were in the Commission's rules as questions
14 that needed to be addressed by every merger that got
15 filed.

16 I will tell you that that public approach
17 is a better approach than raising the questions privately,
18 but I think raising the questions privately is better than
19 not raising them until after the application is filed.
20 And perhaps that's really the larger message here, when as
21 one of my three assignments of blame I argue that merger
22 policy remains so unclear, it would help to cut down on
23 the number of private meetings that cause your offices
24 concern if there were more clarity about regulatory
25 expectations to begin with. Then you wouldn't have CEOs

1 asking for private meetings to probe at what the concerns
2 are.

3 So that's why I've argued that the larger
4 question here is the question of equality of regulation
5 and the clarity with which regulators speak, and I think
6 the debate we're having is only part of that problem.

7 MR. COFFMAN: I appreciate that. If I
8 could, I'd just like to leave with one more question.
9 That is, this issue about whether the judicial canon of
10 conduct applies to Public Service Commissioners has been
11 hotly debated. The Staff of the Commission and others
12 have argued that perhaps they don't apply at all, and I
13 sense that you believe that, if they apply at all, they
14 apply differently.

15 And I just would like you to address that
16 specifically with what degree of -- my opinion is that
17 they apply when the action is a -- when the Commissioner's
18 acting in a quasi-judicial capacity, but I'm very
19 interested in your opinion.

20 MR. HEMPLING: I'm going to have to address
21 your question nonsatisfactorily. I'm going to plead total
22 ignorance of state law on judicial canons. So the
23 commentary that I was making had to do with the purpose of
24 regulation and regulatory practice and that regulators are
25 policymakers and not what we call judges in sort of the

1 traditional decisions between adversaries. Whether the
2 actual canons and rules apply to the Commissioners versus
3 courts, I'm not here to talk about. I'd get it wrong if I
4 tried. But I understand it's part of your debate.

5 I thought both of your questions were
6 excellent. I'm glad you raised them.

7 JUDGE STEARLEY: Any additional questions
8 for Mr. Hempling?

9 MS. VUYLSTEKE: My name is Diana Vuylsteke.
10 I'm with the law firm of Bryan Cave, and I represent large
11 industrial consumers. And when you talked about private
12 meetings and you talked about some of the policy
13 considerations that would make a private meeting
14 preferable to a public meeting, you talked about the need
15 for the Commissioners to avoid embarrassment with the
16 questions they might ask. And you also talked about the
17 importance of meetings not going on and on, keeping the
18 meetings shorter. You talked about the pro being that
19 everyone would know what everyone else was saying if the
20 meeting was public.

21 And my question is, would it not be an
22 appropriate policy choice if the Commission were to decide
23 that it is enough of a pro to have everyone else know what
24 everyone else is saying, wouldn't it be appropriate for
25 the Commission to decide that that outweighed the

1 Commissioner embarrassment/shorter meeting issue and just
2 make a policy decision that they'd rather have these be
3 public?

4 MR. HEMPLING: Of course it would be
5 appropriate. I'm stressing just based on my experience
6 of being on both sides of this, it's a personal weighing
7 of what I think works better. I can see somebody coming
8 out the other way. I don't mean to undercut what I just
9 said. I think to eliminate the informality of education
10 is going to make things tougher in terms of educating
11 undereducated Commissioners, but there's nothing
12 illegitimate or inappropriate about saying everything
13 shall be on a public record.

14 I just don't think it's effective, and I'd
15 rather see more trust among the parties, more equality of
16 resources among the parties and, therefore, more tolerance
17 for the informality that accompanies good education.

18 JUDGE STEARLEY: Are there any additional
19 questions for Mr. Hempling? Mr. Chairman, would you like
20 to address anything to Mr. Hempling as follow-up?

21 CHAIRMAN DAVIS: No questions, Judge.

22 JUDGE STEARLEY: Very well. Thank you,
23 Mr. Hempling. We appreciate your time and your
24 presentation this morning.

25 MR. HEMPLING: Thank you very much to the

1 audience for listening.

2 JUDGE STEARLEY: The next person we have
3 listed for presentation this morning is Mr. Lewis Mills,
4 the Public Counsel from the Office of the Public Counsel.

5 MR. MILLS: Thank you. I appreciate the
6 opportunity to speak this morning. I'm going to go
7 quickly through the proposed rule that my office, along
8 with virtually all of the regular representatives of
9 consumers before the Commission, have proposed which
10 you've also gotten a copy of that. The Commission's
11 notices provided that.

12 And really, I think perhaps one of the
13 things that struck me when reading the Commission's
14 existing rules is starting at the very title. It's called
15 conduct during proceedings, as though that there is some
16 black and white period of time at which if the case is not
17 filed, anything goes; if the case is filed, almost
18 anything doesn't go.

19 To me, that's just wrong. I don't think
20 that's implied by the due process clause. I don't think
21 it's -- I don't think it's fair. I think if you can -- if
22 you can do things on the way to making a filing literally
23 that you couldn't do on the way away from making a filing,
24 then I think there's a problem with the rules. I think
25 you can have as much influence a day, an hour, a couple of

1 months before a filing occurs as you can when it does
2 occur.

3 So the very first change that we proposed
4 is to change the title of the rule from conduct during
5 proceedings to code of conduct. And we've proposed -- the
6 Commission's current rules don't define ex parte
7 communications specifically, so we proposed adding a
8 definition.

9 The Commission's rules don't talk about
10 advisors. These rules are old enough, they predate the
11 Commission having advisors. So we provided a definition
12 of that.

13 The general notion of these rules is to,
14 with all due respect to Mr. Hempling, is to essentially
15 eliminate the possibility that when one party has access
16 to the Commissioners to talk about things that either are
17 pending issues or will reasonably be foreseen to be
18 pending issues and either -- either give that party's side
19 of the issues to the Commission or find out the
20 Commission's inherent prejudices, inherent infirmities,
21 and somehow gain an advantage by talking to Commissioners
22 outside of the hearing of other parties.

23 I think with regard to Mr. Hempling's
24 examples, I think some of those actually are objectionable
25 if they are done ex parte. For example, If I were to file

1 a case and I went to a Commissioner and the Commissioner
2 said, well, don't put on such and such a witness because
3 he's really bad, well, doesn't that give that party an
4 advantage? Or a party to a case finds out that a
5 Commissioner has real trouble understanding a particular
6 point but not so much another one, doesn't that give them
7 the advantage to know how to file their testimony, how to
8 write it, how best to convince the Commissioner that their
9 side is correct?

10 I think it does. I think -- I think it
11 should not be a practice of the Commission to allow that
12 kind of access and to allow parties to explain to them
13 what they think the right answer is or, even worse, take
14 away from a Commissioner what the Commissioner tends to
15 think about things or where the Commissioner needs more
16 information and get that kind of advantage over another
17 party.

18 So some of the changes that we propose, in
19 fact all of the changes really address all of those
20 things. For example, in new Section 6, simply change that
21 to add in the possibility that the communications to
22 advisors can have the same effect as communications to
23 Commissioners themselves. And you'll see that change in a
24 number of places throughout the rules.

25 One of the most significant changes from

1 practice that we have today is eliminating the provision
2 in paragraph 7 that the prohibitions apply only from the
3 time that a case is docketed as a time on the record
4 proceeding is set for hearing, because as I said, I think
5 that gives the opportunity for parties to come in ahead of
6 that to gain an advantage over other parties.

7 The ex parte communication rules as they're
8 currently drafted put the onus on a Commissioner to file
9 an ex parte notice. There's no real provision for a party
10 who is involved in that communication to also file an ex
11 parte notice. I think that's important. It sometimes may
12 be that a Commissioner doesn't believe something was an ex
13 parte communication or simply doesn't file a notice, and
14 it should be --should be incumbent on anybody who's
15 involved in such a communication to file the notice, not
16 just the Commissioner.

17 Now, with respect to what I'll call
18 prefiling communications, the Staff has objected to the
19 rules on the -- at least partly on the grounds, on other
20 grounds as well, but partly on the grounds that anything
21 that anybody would want to talk to a Commissioner about
22 can be foreseen to be a contested issue in some case. And
23 I think that's really kind of a strong hand argument.

24 But the rules -- the way we have drafted
25 the rules, and of course this is drafting and different

1 people could do it differently, and I'm sure there are
2 better ways to say some of these things, but the idea here
3 is that something that is reasonably foreseen to be an
4 issue before the Commission is not something you should
5 talk about the Commissioners with, even if it has not yet
6 been filed.

7 To me, that's just another simple fairness
8 thing. It doesn't mean that if, not to pick out on
9 anybody, but with Union Electric, if -- if they may five
10 years from now be talking about a new unit at Callaway 2,
11 it doesn't mean that they can't talk to the Commissioners
12 now about anything having to do with nuclear power. On
13 the other hand, if they know that they're going to file
14 next month, they shouldn't be in here talking to the
15 Commissioners about the different cost allocation
16 strategies that's going to be in their filing a month or
17 two months from now.

18 So I think you can -- throughout the law,
19 there is a reasonable man standard that simply sets a
20 reasonable man standard for what can be and cannot be
21 talked about with the Commissioners. So if it's
22 reasonably foreseen to become an issue, then you should
23 not be talking about it ex parte. You can you still talk
24 about it with Commissioners. You just can't talk about it
25 ex parte.

1 Now, one of the -- one of the other things
2 that our proposed changes to the rule do is it makes all
3 of the public meetings of the Commission transcribed or
4 recorded and a recording kept. And I think in a number of
5 ways that would be very helpful. One is, you will no
6 longer have the situation of, you know, some -- one
7 attendee at a meeting being able to say, well, this is
8 what happened, and it was clear that so and so said such
9 and such.

10 There'll be a recording so that you won't
11 get into the he said/she said kind of argument after the
12 fact, but it will be either a recording or transcription
13 of both. And everyone who was interested in the outcome
14 of a particular matter will be able to look at what
15 happened in a particular meeting and say, ah, that's what
16 happened, that's a problem, or that's what happened and
17 regardless of what this other person said, it's not a
18 problem.

19 I think from any particular standpoint,
20 other than the prospect that a Commissioner may have asked
21 a question that reveals a certain amount of ignorance,
22 other than the prospect of personal embarrassment, I don't
23 see that there's really any down side to transcribing
24 official business of the Commission.

25 Now, with respect to Section 12 of the

1 proposed rule, this is one we struggled with. There
2 really ought to be some authority for someone other than
3 the Commission itself on occasion to investigate whether
4 there are rules -- whether there are rule infractions.

5 If, for example, there is a situation in
6 which a majority or a quorum is thought to have or alleged
7 to have violated a particular rules or rule, it doesn't
8 really make a lot of sense to have the accused weighing
9 off whether or not a rule was or was not violated. The
10 rules drafted gives Public Counsel and really any party
11 the authority to look at that.

12 And it seems to me that the Commission as a
13 matter of public trust would welcome participants in the
14 cases before it having the opportunity to be able to fully
15 investigate and say, you know, we think that the
16 Commission did nothing wrong or we think they did and be
17 able to make that case.

18 Right now, and this has actually come up in
19 the real world, there is no one who really has the
20 authority to investigate whether or not a particular
21 Commissioner or a group of Commissioners has acted in an
22 improper way. Somebody should have that authority. I
23 think it makes sense that when it arises in the context of
24 a particular case, it ought to be the parties to that
25 case, the ones who are most interested in the outcome.

1 And really, that's all I have to say. It's
2 kind of a quick run through. I know you-all have got
3 copies of these rules. I think -- I know at least for the
4 most part most of the changes that we've suggested are
5 self explanatory. I think they're worthwhile ones.
6 They're not designed, in fact I don't think they have the
7 effect of reducing the Commissioners' ability to receive
8 information. In fact, I think, if anything, it enhances
9 it. It doesn't make any particular meetings illegal. It
10 simply gives other people the right to attend and find out
11 what goes on in those meetings.

12 So the flow of information, except for the
13 caveat that perhaps Commissioners won't ask questions that
14 they would ask in private, with that one minor caveat, I
15 don't think that this would do anything to impinge on the
16 ability of Commissioners to get information and get good
17 information. And I'll be happy to take any questions.

18 JUDGE STEARLEY: Questions for Mr. Mills?

19 MR. MILLS: I guess before I take
20 questions, I was not -- and I'd be happy to take all the
21 blame, but I certainly can't take all the credit. I was
22 not the only drafter of these rules. If any of my fellow
23 consumer representatives will have anything to add or any
24 different perspective, I'd like to offer them the
25 microphone now. I will offer them the opportunity to do

1 that before I take questions.

2 MR. HENDERSON: Lewis, I have a question
3 regarding your -- you made a statement about transcribing
4 meetings. Did you give any thought to how that would
5 actually work as far as cost involved or FTE, new FTE?

6 MR. MILLS: Well, actually, I did. As
7 you're aware, and many of the -- I hate to say old, but
8 many old timers are aware, the Commission used to have a
9 cadre of court reporters on staff. I don't -- I haven't
10 done the analysis lately, but I would not be at all
11 surprised if it wouldn't turn out to be cheaper --
12 Kellene, with all due respect, I don't want you out of a
13 job, but it wouldn't be cheaper to have some court
14 reporters on staff to be able to transcribe meetings. And
15 it's not like these things are going to regularly come up
16 at a moment's notice where you can't schedule a court
17 reporter.

18 MR. HENDERSON: You're also aware, though,
19 of the problem of obtaining a new FTE?

20 MR. MILLS: Yes. There are, yes.

21 MR. HENDERSON: There are some --

22 MR. MILLS: On adding FTE, but certainly in
23 a worthwhile situation, I don't think that there's a
24 blanket prohibition on adding FTE. We're not talking
25 about adding a huge number of FTE, and I don't know that

1 it couldn't be done with contract court reporters either.
2 If it turns out to be cheaper to do with FTE, then I think
3 that makes sense.

4 JUDGE STEARLEY: Any other questions
5 for
6 Mr. Mills? I notice we're having trouble with that
7 microphone. If you could please speak very directly into
8 it.

9 MR. THOMPSON: I'll be happy to shout,
10 Judge, if that's what you'd like.

11 Mr. Mills, I have a lot of questions for
12 you about these proposed rules. And on behalf of Staff
13 I've already filed a response, so I was going to limit
14 myself today at this moment to your proposed paragraph 11
15 and ask you, for what public purpose would the
16 Commission's closed public meetings be transcribed?

17 As you know, I represent the Commission in
18 court. I meet with the Commission in closed agenda
19 meetings in order to have attorney/client privileged
20 discussions. For what public purpose would those be
21 transcribed?

22 MR. MILLS: Well, because -- and there are
23 certainly -- will be instances in which the transcriptions
24 can and should be closed. If you have a closed meeting
25 that that meeting is properly closed and should be closed,

1 then the transcript as well should be sealed.

2 But there are instances, I'm sure, and I
3 can't think of any specific, in which a party may
4 challenge that a meeting was properly closed, and usually
5 that's not going to be able to happen until after the
6 meeting's taken place. If a party was successful in
7 challenging a meeting that was closed, then it would be
8 helpful to have a transcript of what went on during that
9 improperly closed meeting. That's one public purpose that
10 a closed meeting transcript could serve.

11 MR. THOMPSON: To your knowledge,
12 Mr. Mills, are any other public governmental bodies in the
13 state of Missouri required to transcribe closed portions
14 of their public meetings?

15 MR. MILLS: Not that I'm aware of. I don't
16 know whether they are or not actually.

17 MR. THOMPSON: Thank you.

18 JUDGE STEARLEY: Any other questions for
19 Mr. Mills?

20 MR. CONRAD: I'll just ask one question.
21 I'm Stu Conrad, and I frequently represent some folks
22 before the Commission. Lewis, do you recall when we added
23 the statute about the advisors?

24 MR. MILLS: Yes.

25 MR. CONRAD: Does that, in your view,

1 address some of the concerns Mr. Hempling raised about
2 informed Commissioners?

3 MR. MILLS: Sure, it should. I think
4 that's the whole reason that the personal advisors and the
5 Staff advisors as well were put into place, because the
6 Commissioners tend to be shut off from some communications
7 by procedures, and having a group of trained advisors
8 should help them to get better information, be able to
9 spend more resources in learning about different topics.

10 JUDGE STEARLEY: We have Commissioner
11 Clayton in the back.

12 COMMISSIONER CLAYTON: Thank you, Judge.
13 Probably get myself in trouble asking questions. I
14 appreciate the Chairman holding this meeting here. I hope
15 it's all right that I can participate.

16 First of all, I don't think I've ever heard
17 the word ignorant and Commissioners used so often together
18 at the same time than in this room today.

19 MR. MILLS: I tried to avoid that. If I
20 have, I apologize.

21 COMMISSIONER CLAYTON: Frankly, I'm going
22 to start studying really hard and promise to do better. I
23 had a couple of general questions that I wanted to ask,
24 and I appreciate the filed comments or the suggested rules
25 that you have filed. I haven't studied them in depth, but

1 I think I have the gist of them.

2 I wanted to ask you basically two
3 questions, and they're general questions and you can
4 answer them as you see fit.

5 First of all, your rule suggests that
6 communications prior to the filing of a case need public
7 disclosure if those communications are between utilities
8 and Commissioners, and I don't think the rule is drafted
9 for inclusion or public disclosure of all communications,
10 because there are other parties that practice before us,
11 and it seems like more and more parties come out every
12 day. So we have intervenors, we have Staff, we have
13 Public Counsel, we have utilities. We potentially have
14 the public who do make contact with us on a regular basis.

15 So I wanted -- and before you -- I know
16 you're ready to -- just let me throw these things out. So
17 I wanted to ask about that. Should they be treated
18 equally, all the parties?

19 Secondly, I wanted to see if you
20 differentiate between the types of cases that you're
21 referring to. You mentioned in your opening comments
22 related to contested cases. Of course, that's just part
23 of what we do around here. We have uncontested dockets.
24 We have full Commission investigations. We have
25 rulemaking dockets. We have -- frankly, we have

1 individual Commissioner investigations that some people
2 like, some people don't like so much, but we still have
3 those independent investigations that go on. And I want
4 to know where you draw the line, and you know, on the
5 level of communications, especially with Staff, because,
6 you know, as policymakers we do, you know, have to work
7 with Staff to some degree in working out policy. So I
8 wanted to see if you would address each of those issues.

9 MR. MILLS: Sure. I'd be happy to. I
10 think those are good questions. The rule as drafted
11 really does talk about utility representatives. For the
12 most part, it's the utilities that drive Commission cases.
13 But there are instances in which other parties do, and I
14 think that the restrictions that are here on utilities
15 should apply to everyone, and that if I have the intention
16 to file a complaint, an early complaint against a utility,
17 I should not be able to come to the Commissioners and say,
18 you know, we've looked at all this stuff, and boy, they're
19 overearning, let me just talk to you about a couple of
20 really egregious examples. I shouldn't be able to do that
21 any more than a utility should be able to come and talk to
22 you-all about why they need a rate increase.

23 Yeah, I think it should apply to everyone.
24 The reason it's drafted this way is because more often
25 than not the utility knows what's coming. They know what

1 issues are going to come before the Commission. But to
2 the extent that somebody else has an issue that they can
3 reasonably foresee will be required to have the
4 Commission, they should be subject to the same
5 restrictions. I think that would be a worthwhile change
6 to these rules.

7 With respect to the second issue, what was
8 that one again?

9 COMMISSIONER CLAYTON: Type of cases.

10 MR. MILLS: The type of case. Thank you.
11 Thank you. The type of cases, yeah, this is really --
12 this is really intended to restrict the Commission in
13 cases in which it's going to be acting in a quasi-judicial
14 manner. Rulemaking, investigations, things in which
15 rights and responsibilities of parties are not adjudicated
16 by the Commission, this wouldn't necessarily apply.

17 So that it really is designed to restrict
18 information that you-all get as judges in cases where
19 you're acting as judges, not in policy determinations, not
20 in rulemakings, not in uncontested kinds of matters. And
21 if it's not clear in the rule as drafted, then it should
22 be changed to make that clear.

23 JUDGE STEARLEY: Additional questions?

24 CHAIRMAN DAVIS: Mr. Mills -- and this is
25 questions of your entire coalition, so I'd like to get an

1 answer from each member. Do you think the canons of
2 judicial conduct apply to Commissioners?

3 MR. MILLS: I do. I absolutely think they
4 do. I think there are two different spots in the Slavin
5 case where it says that the code of conduct that applies
6 to judges applies to quasi-judicial officers, and I don't
7 think there's any question about that.

8 And let me caveat that. In cases in which
9 the Commissioners are acting as judges. There are lots of
10 things you do that are quasi-legislative, and there are a
11 lot of things you do that are quasi-judicial. There
12 should not be situations in which it's not clear which
13 capacity you're acting. It's not as though it's sometimes
14 one and sometimes the other and sometimes both together.

15 In cases in which the Commission is called
16 upon to decide the rights and responsibilities of parties
17 as judges, then I think the judicial canons apply.

18 CHAIRMAN DAVIS: Mr. Coffman?

19 MR. COFFMAN: I agree with what Mr. Mills
20 said. The Slavin case does say that the rules and
21 standards that apply to judges in the state of Missouri
22 apply to Public Service Commissioners. They aren't
23 very -- the case isn't very explicit about citing specific
24 canons, but the only rules that I'm aware of that apply to
25 judges are the -- the canons of judicial conduct

1 standards, I assume are just the standards of due process.

2 The obvious confusion that I've seen here
3 and I've seen in other public utility commissions is when
4 an issue involves both a contested case and something else
5 that the Commission does. Obviously you wear different
6 hats at different times, and there can be some difficult
7 judgment calls about what -- which hat you're wearing at a
8 particular time.

9 but I don't think that the law is ambiguous
10 at all about the fact that when you are acting as a
11 quasi-judicial officer, that those same rules that apply
12 to other judges apply to you. I think -- does that answer
13 the question?

14 CHAIRMAN DAVIS: Uh-huh.

15 MR. CONRAD: Yes.

16 CHAIRMAN DAVIS: Ms. Vuylsteke?

17 Ms. Langeneckert?

18 MS. VUYLSTEKE: I just want to say that I
19 would continue to support the proposed rules, and we think
20 it's very critical to establishing trust in the PSC
21 process. We're happy to look at any modifications to
22 these and hope that maybe an outcome of the forum today or
23 additional filings of the parties we can perhaps refine
24 the rule. We support Mr. Mills' comments.

25 CHAIRMAN DAVIS: Do the canons of judicial

1 conduct apply?

2 MS. VUYLSTEKE: Oh, I'm sorry. I think
3 they do, as Mr. Coffman said, in set circumstances where
4 the Commissioners are acting in a quasi-judicial capacity
5 in a contested case.

6 CHAIRMAN DAVIS: Okay.

7 MS. LANGENECKERT: Ditto.

8 CHAIRMAN DAVIS: All right. Now,
9 Mr. Mills, I want to go back to what Commissioner Clayton
10 was asking you about. You agreed that we have an
11 obligation of impartiality?

12 MR. MILLS: Yes.

13 CHAIRMAN DAVIS: Okay. By asking us to
14 adopt a rule that only applies to Commission contacts with
15 utilities and not other parties, are you not, in fact,
16 asking this Commission to violate that obligation of
17 impartiality?

18 MR. MILLS: No, I don't believe so. I
19 mean, I think -- as I just conceded, I think it probably
20 would have been better to address the possibility that
21 another party would be able to foresee an issue that comes
22 before you and preclude them as well from having these
23 conversations, but, you know, in my own defense, this
24 arose out of a particular situation. It was intended to
25 be at first to address a particular situation.

1 I agree that it should apply to all parties
2 who have the opportunity to bring action before the
3 Commission, and it should preclude them from raising
4 matters to the Commission that are reasonably foreseen and
5 come before the Commission for a decision.

6 CHAIRMAN DAVIS: Anyone in the coalition
7 disagree with that statement?

8 MR. COFFMAN: On behalf of my clients, my
9 client would have no objection to expanding the provisions
10 that apply to utilities to all parties and would have no
11 problem abiding by that. I think there are a variety of
12 arguments why I think you could apply higher standards to
13 utilities being the regulated entity, and often the entity
14 that has much more at stake and much more temptation to
15 attempt to influence the body. But I see no reason why
16 your point is not well taken why it shouldn't apply to all
17 parties.

18 MR. CONRAD: Nor do I.

19 CHAIRMAN DAVIS: Mr. Mills, is there
20 anything in this proposed rulemaking that applies to
21 contracts between utilities and industrial consumers that
22 the Commission may not be aware of or as well as
23 agreements between yourself as Office of Public Counsel
24 and other parties to the cases that are appearing before
25 us that we're not aware of, to make those -- to make those

1 contracts and agreements be disclosed?

2 MR. MILLS: I'm not sure I understand the
3 question. But there -- the agreements that I'm aware of
4 that parties to cases come up with are filed in the case.
5 The negotiations that lead up to them are not. This
6 certainly would not change that in any manner.

7 CHAIRMAN DAVIS: Okay. Are you aware that
8 those negotiated agreements are filed in the past, that
9 we've had some disputes over the meanings of those
10 negotiated agreements? Are you aware of some of those
11 disputes?

12 MR. MILLS: Certainly.

13 CHAIRMAN DAVIS: Would it not be helpful to
14 this Commission to record all those negotiations between
15 the Office of Public Counsel, the Staff, and all the
16 parties leading up thereto to that agreement to help this
17 body in determining what that contract actually means?

18 MR. MILLS: There may be some advantages to
19 seeing what all the negotiation went on, but I think that
20 would be far outweighed by the disadvantage that the
21 parties would not negotiate freely and openly if they knew
22 that every offer they made, every counter offer they made,
23 every proposal they threw out would be ultimately revealed
24 to the decision maker.

25 CHAIRMAN DAVIS: So we would have one

1 standard for Commissioner contacts and another standard
2 for the parties?

3 MR. MILLS: I think you would have one
4 standard for the decision maker and another standard for
5 negotiators. I don't really see the problem with that.

6 CHAIRMAN DAVIS: Okay. So Mr. Mills,
7 you're not aware of any side deals between utilities and
8 industrial consumers that may be contracts that haven't
9 been disclosed in any rate cases, are you?

10 MR. MILLS: I know there are special
11 contracts in some instances between utilities and
12 customers. I -- to the best of my knowledge, those are
13 filed in some partially obscured fashion in the utilities'
14 tariffs. I don't know of any deals between a utility and
15 a customer that are entirely subrosa.

16 CHAIRMAN DAVIS: Mr. Mills, I've got a
17 hypothetical question for you. If you were applying to be
18 a member of the Public Service Commission and you advised
19 Ms. Vuylsteke, Ms. Langeneckert, and Mr. Conrad, maybe
20 Mr. Coffman as well, in such a manner that they were
21 induced to potentially lobby the Governor's office on your
22 behalf for that appointment, should there be a required
23 public disclosure to both the utilities and the consumers
24 in this state, you know, concerning those contacts?

25 MR. MILLS: I wouldn't have a problem with

1 that. I think the more likely to shed on the information
2 that Commissioners and prospective Commissioners get who
3 they talk to, the better.

4 CHAIRMAN DAVIS: You think it would be
5 easier if we just made PSC Commissioners a member of the
6 judicial branch and made us judges, made us subject to the
7 commission, retirement, removal and discipline of judges,
8 required us to have the training that judges have? Would
9 that make this process simpler?

10 MR. MILLS: I don't know that it would make
11 it simpler. Certainly I don't think that -- and I'm not
12 here to talk about whether or not a particular retirement
13 package would be better or not, but there are aspects of a
14 Commissioner's job that are very much like judges. There
15 are certainly aspects in which they're not.

16 But in terms of when the Commission itself
17 is acting as a judge, I think it certainly wouldn't hurt
18 to have some training and -- as judges. And I don't
19 think -- I think there was more to your question than
20 that, and I'm going to try to get it all in. The
21 training and retirement are the ones that kind of jumped
22 out at me.

23 CHAIRMAN DAVIS: Well, assuming -- assuming
24 that it was done in a responsible manner so that no
25 existing Commissioner could receive any financial gain

1 from it, what is your opinion? Yes? No? Maybe?

2 MR. MILLS: On changing the retirement
3 system?

4 CHAIRMAN DAVIS: No, just -- should we be
5 judges, yes, no, maybe?

6 MR. MILLS: No, you should not be judges
7 because there's much more to your job than that. But in
8 instances in which you-all act as judges, you should act
9 as judges and act in the same way.

10 CHAIRMAN DAVIS: Judge, I don't have any
11 further questions. Thank you.

12 JUDGE STEARLEY: Mr. Mills, I had one
13 question for you. From the perspective of a Regulatory
14 Law Judge regarding subsection 14 of your proposed rule --

15 MR. MILLS: Uh-huh.

16 JUDGE STEARLEY: -- which states a
17 Commission, Regulatory Law Judge or advisor that makes an
18 ex parte communication or, and that word or is in the
19 disjunctive, fails to disclose the ex parte communication
20 shall immediately recuse from the case. And if I'm
21 reading that correctly, that appears to be a mandatory
22 recusal provision. Is my interpretation correct there?

23 MR. MILLS: No. I think you're right, and
24 upon reading this again, that may be too strict and too
25 stringent. It may not necessarily -- because as in most

1 things there are shades of gray. There may be
2 communications that meet the definition of ex parte that
3 wouldn't require immediate -- or a failure to disclose,
4 that could simply be an oversight or happen later, but it
5 certainly shouldn't be immediately disclosed and I think
6 in many instances would require immediate recusal. It
7 probably should not be as black and white as we read here.

8 JUDGE STEARLEY: The way it's written now
9 appears to be sort of a strict liability standard, and the
10 reason I ask for clarification is the courts of course
11 have different standards for actual bias, actual
12 impropriety, and the appearance of impropriety, and this
13 sort of strict liability standard appears to me to
14 actually be holding the Commissioners, Regulatory Law
15 Judges, and advisors to a much higher standard than even
16 our Missouri Supreme Court judges would be held to.

17 MR. MILLS: And I agree, there probably
18 should be some flexibility there.

19 JUDGE STEARLEY: So that one perhaps would
20 be subject to revision?

21 MR. MILLS: Yes.

22 JUDGE STEARLEY: Thank you for that
23 clarification.

24 CHAIRMAN DAVIS: Mr. Mills, let me go back
25 and ask you a couple more questions real quick. The

1 pertinent portions of the Slavin case or I guess it would
2 actually be Union Electric, could you and Mr. Coffman
3 potentially highlight those selected portions of that case
4 in support of your positions and file that for the record?

5 MR. MILLS: In the record in this case?

6 CHAIRMAN DAVIS: Yes.

7 MR. MILLS: Yes, I'd be happy to.

8 CHAIRMAN DAVIS: And second of all, you
9 agree that we do have a state statute on the books that
10 says Commissioners can meet with anyone to talk about
11 anything prior to the case being filed, is that -- and
12 maybe that's not a fair characterization, but if that's
13 not, I'd like for you to characterize what the meaning of
14 that statute is, and how do we conduct ourselves in
15 harmony with that statute until it's either revised, or if
16 we had to live with it, how do we do that?

17 MR. MILLS: Two things. First of all, if
18 it's not -- it's even broader until a case is filed, it's
19 actually -- you can talk with anyone about anything until
20 a case actually has an evidentiary hearing set. And I
21 think the way that you would live with that is that you
22 have to read that in harmony with the due process clause,
23 and that you can talk with anybody about anything at any
24 time unless that that -- unless those discussions infringe
25 upon the rights of other parties to get fair and equal

1 treatment.

2 So I don't think just because it permits
3 you to talk to people means that you can talk to anybody
4 literally about anything at any time and use that statute
5 as a defense against an allegation that somebody's due
6 process rights have been violated. I think you have to
7 read it in conjunction with the due process provisions.

8 CHAIRMAN DAVIS: Thank you. Mr. Coffman?

9 MR. COFFMAN: I agree with what Mills said.
10 I wanted to add an additional point on that. I know that
11 the Staff of the Commission has argued that that statute
12 would contradict or prohibit the rules that we've
13 proposed, and I don't -- I agree with Mr. Mills' analysis.
14 I don't think that it would prevent more restrictive rules
15 from the Commission about its own behavior, and it's
16 important to look at the statute that you reference in
17 that it speaks as to the Commission's right to do
18 something.

19 And so I don't think there would be any
20 direct conflict or prohibition as far as the Commission
21 restricting its own freedom to speak in a manner that
22 would be more consistent with the due process provisions
23 in the Constitution and I agree.

24 JUDGE STEARLEY: Yes. Mr. Pendergast? We
25 can form a line at the microphone if you wish.

1 MR. PENDERGAST: Lewis, I appreciate your
2 comments with regard to any additional enhancements to the
3 rules that may be made should apply to all parties, that
4 there need to be exceptions for rulemaking proceedings so
5 forth and so on.

6 And, you know, without addressing the issue
7 of whether or not there's really a need for any
8 enhancements at all, Let me ask you this question: You've
9 said in your rule that if an issue is reasonably
10 foreseeable, at that point the various restrictions in
11 your particular rule would come into play, and, you know,
12 in other forms of litigation sometimes the fundamental
13 issue is is something reasonably foreseeable. It takes a
14 rather lengthy hearing to make that determination.
15 Sometimes it takes a jury of 12 people to go ahead and
16 make a determination of whether something was or wasn't
17 reasonably foreseeable.

18 I guess my question to you would be, are
19 you confident that that's an easy standard to go ahead and
20 implement and for parties to really know what the rules of
21 the game are, when an issue is reasonably foreseeable and
22 when it isn't?

23 Let me give you a hypothetical. Let's say
24 that there's a utility in this state that wants to build a
25 nuclear plant and it has decided that it wants to move

1 forward with that nuclear plant. It's reasonably
2 foreseeable that the issue of whether or not that nuclear
3 plant should be built and how its costs should be
4 recovered and whether it should be a regulatory plan
5 associated with it, so forth and so on, is at some point
6 going to come before the Commission. At that point in
7 time, when it's reasonably foreseeable that it will be, is
8 the Commission precluded from discussing issues relating
9 to nuclear plants, its relative pros and cons, safety
10 considerations and that sort of thing because it may be
11 reasonably foreseeable that those issues will be coming
12 before the Commission at some point in time?

13 I mean, if I wanted to err on the side of
14 caution and I were a Staff person, I might go ahead and
15 say, well, I can't discuss those kinds of things with you
16 because that's an issue that may come up three or four or
17 five years down the road. And my concern would be that
18 that is going to have a destructive impact on the ability
19 of Commissioners to obtain the kind of information they
20 need to carefully address those issues when they come up.

21 So anything you can offer on how you go
22 ahead and separate, you know, when something is reasonably
23 foreseeable, how you go ahead and deal with generic issues
24 and principles and that sort of thing, I think would be
25 really helpful, because I think right now as the rule is

1 written that's going to go ahead and be a tough issue for
2 having to deal with.

3 MR. MILLS: And those are good questions.
4 But I think the answer is in those situations, if you
5 think that something is reasonably foreseeable, you still
6 get to convey that information to the Commission. You
7 just have to let the other people who may be interested in
8 that issue know what you're telling them.

9 So you're not -- you're not precluded from
10 talking to the Commission about the merits of a regulatory
11 plan for a nuclear plant. You're not permitted from
12 talking to the Commission about whether or not nuclear
13 power is a good or a bad thing. You just -- you can't do
14 that behind closed doors and not let other people who may
15 be interested know what you're talking about.

16 MR. PENDERGAST: And I understand that's a
17 general proposition, but in applying that specific
18 circumstance, does that mean if somebody on the Commission
19 wants to talk to somebody on the Staff, somebody on the
20 engineering staff, they want to go ahead and talk about,
21 well, what's new in the nuclear world these days, what's
22 happening with nuclear plants, what's the relative cost
23 benefits, is that something that because that's going to
24 be an issue before the Commission in four or five years,
25 that has to be noticed up to everybody?

1 MR. MILLS: No.

2 MR. PENDERGAST: Why not?

3 MR. MILLS: If it's something that, for
4 example, the Commissioner or the Staff member has reason
5 to believe is likely to come up as a contested issue in a
6 case, not is it a general matter four or five years in the
7 future, then it's reasonably foreseeable. You know, we
8 could argue all day about how difficult it is to apply a
9 reasonableness standard. The reasonableness standard is
10 throughout the law.

11 And one of the questions you asked is is it
12 easy? No, it's not always easy, but anything that is not
13 black/white is not going to be easy. Yeah, there's going
14 to be some gray areas, but to my way of thinking it's
15 better to have a standard there than none at all.

16 MR. PENDERGAST: Well, I guess my question
17 to you is, do you think it might be helpful to go ahead
18 and perhaps have some additional bright lines? Maybe you
19 don't like the bright lines that exist today, but
20 something more robust than just saying if it's an issue
21 that's reasonably foreseeable, whatever that might be, to
22 put some sort of parameters on it so that people have a
23 better idea of when something is something they need to go
24 ahead and follow additional procedures and when it's not?

25 MR. MILLS: Any -- yes, as long as you

1 don't set the parameters so that they make things that I
2 think are impermissible permissible. Then I think, again,
3 any time you can make it more clear, then that's good,
4 because it doesn't serve anybody's interest to try to
5 figure out, you know, to spend -- how we're trying to
6 figure out is this reasonably foreseeable or not.

7 The idea is to be able to get information
8 to the Commissioners but let other parties know that
9 information is flowing and it's likely to affect them. If
10 it's not likely to affect them, then they don't have the
11 same problem, but if it is, then they should know what the
12 person is going to decide the case is hearing from their
13 opponent or likely opponent.

14 MR. PENDERGAST: And final question. You
15 were asked about the statutory provisions that also govern
16 this particular area. Is it your view that those
17 statutory provisions are superseded by the canon on
18 judicial ethics?

19 MR. MILLS: No, not specifically. It's my
20 view that -- that the -- the canon on judicial ethics
21 basically codifies certain due process rights that parties
22 have regardless of whether there are written down canons
23 or not. So it's my position that the due process rights
24 can be in some circumstances more narrow than the broad
25 provisions in 386.210.

1 MR. PENDERGAST: Okay. And does that --

2 MR. MILLS: Does that answer your question?

3 MR. PENDERGAST: Well, yeah. And I guess
4 my question would be, is it your view that the legislature
5 cannot modify those due process rights by what it writes
6 into legislation and what it says as far as when a
7 hearing's required and so forth and so on, or is that
8 simply something that the judicial canon of ethics is
9 going to control?

10 MR. MILLS: There's two different questions
11 there. One is can the statutes override the equal
12 protection, the due process provisions, and my answer is
13 no, they can't. So if you have due process protections,
14 the legislature cannot say those don't matter in this
15 particular case. You don't get due process, you get
16 something different.

17 MR. PENDERGAST: And so the legislature in
18 your view doesn't have the power to say that certain kinds
19 of procedures have more due process rights than others?

20 MR. MILLS: They have the right to tailor,
21 but they can't enact a statute that conflicts with the
22 constitution.

23 MR. PENDERGAST: No. I agree that they
24 can't.

25 MR. MILLS: That's what I'm talking about.

1 MR. PENDERGAST: They can make statutory
2 due process provisions more robust or less robust?

3 MR. MILLS: I don't think they can make
4 them less robust than the constitution.

5 MR. PENDERGAST: So they can, for example,
6 say that a contested case is one thing and rulemaking
7 proceedings are a different one?

8 MR. MILLS: They can, so long as neither of
9 those give you less protection than the constitution does.

10 MR. PENDERGAST: Okay. And that's --

11 MR. MILLS: That's the bottom line here.
12 They can't give you anything less in terms of protection
13 than the Constitution does.

14 MR. PENDERGAST: So would it be your view
15 that the constitution doesn't provide any greater
16 protection than what's normally afforded in a rulemaking
17 proceeding?

18 MR. MILLS: Say that again.

19 MR. PENDERGAST: Would it be your view that
20 the constitution doesn't provide any greater protections
21 than what's available in a rulemaking proceeding?

22 MR. MILLS: Well, I hadn't really thought
23 about the due process provisions in a quasi-legislative
24 setting because that's really not what these rules are
25 about and that's not what we're talking about.

1 I'm sure there are some sorts of due
2 process protections that are extended even to rulemakings.
3 The right not to have a judge bribed or coerced in some
4 fashion I would think would extend even to rulemaking, but
5 they certainly are not as robust as they are in
6 quasi-judicial proceedings.

7 MR. PENDERGAST: And do you believe the
8 legislature has the authority to determine when a
9 proceeding will be a contested case and when it will be a
10 rulemaking?

11 MR. MILLS: Within reason. I mean, I don't
12 think, you know, if there is a case in which your rights
13 are adjudicated, then I think constitutional provisions
14 apply. I think the legislature can clarify what it thinks
15 are legislative and what it thinks are judicial, but it
16 can't simply make something in which your rights are
17 adjudicated into something that's not judicial?

18 MR. PENDERGAST: Okay. Thank you.
19 Appreciate it.

20 JUDGE STEARLEY: Additional questions for
21 Mr. Mills?

22 MS. VUYLSTEKE: I don't have a question,
23 but I do --

24 JUDGE STEARLEY: Ms. Vuylsteke, would you
25 please use the microphone? I know we're kind of informal

1 and a lot of the people know one another here today, but
2 if you wouldn't mind please restating your name for our
3 court reporter, that would help her immensely in keeping
4 good track here.

5 MS. VUYLSTEKE: Diane Vuylsteke on behalf
6 of the Missouri Industrial Energy Consumers, and I simply
7 wanted to respond to Chairman Davis' comments about -- or
8 question about whether there was an inconsistency between
9 the proposed rules and the statutes, and I think that's a
10 very important question, and I think that our view of that
11 is in addition to we agree obviously with what Mr. Coffman
12 and Mr. Lewis said about due process being required in
13 addition to whatever is in the statutes, but also in
14 addition to due process being an overlay to that, what
15 we're asking for here is that something be made public.

16 The communications can still occur. It's
17 just a question of are they going to be public or are they
18 going to be private, and that's the really critical
19 question. You know, Mr. Pendergast talked about the
20 difficulty of a reasonable man standard, what's reasonably
21 foreseeable. I think if the Commission errs on the side
22 of public, all the communications can occur. It's just a
23 question of providing notice. You're going to talk to a
24 private party about an issue that could come up in a
25 future case, it's simply a matter of providing notice.

1 Yes, that's a little inconvenient, but when you think
2 about the benefits that are obtained of having that
3 process occur in public, it's very consistent we think
4 with the statute and there's no conflict at all.

5 JUDGE STEARLEY: Mr. Coffman?

6 MR. COFFMAN: I was wanting to make one
7 more comment about the coalition's proposal. The -- what
8 I think is maybe the key provision, of course the one
9 we've been talking about as far as disclosing
10 communications if they're about matters that could be
11 reasonably foreseen to be a part of a contested case, this
12 is not something that hasn't been tried. This is language
13 that comes from the South Carolina Public Service
14 Commission, and it is a standard that I believe they
15 adopted many years ago and have lived with successfully,
16 in my understanding from conversations with parties in
17 South Carolina.

18 The -- another standard that we looked at,
19 because obviously this is one of the areas of most intense
20 interest, there is at least one other state that applies a
21 retroactive ex parte prohibition, and I forget whether
22 it's three months or six months, and I don't recall
23 whether it's Colorado or Wyoming, but I believe it's a
24 western state that does that.

25 We'd be -- we toyed with that idea, of

1 putting some time limit. No matter what you pick there is
2 going to be some sort of judgment call made. It appeared
3 to us that just applying the reasonableness standard is
4 the best way to go at it. Obviously, you know, many of us
5 believe that it is inappropriate to have a party come in
6 the day that they file something and completely lay out
7 their case and have a lot of give and take in that matter.

8 Of course, a communication that's many,
9 many months before a case and is maybe generic and not
10 specifically related to what the pleadings are may be not
11 so much, but that's what we're struggling with, and those
12 are the two best ideas that we had to work with to address
13 the issue at hand, and one is a retroactive communication
14 and the other is just a standard that just applies, you
15 know, what could reasonably be foreseen.

16 Just want to let you know, we were looking
17 at what others have done and maybe 80, 90 percent of
18 what's in the proposal has been done in one PUC
19 jurisdiction or another.

20 JUDGE STEARLEY: Any additional questions
21 or comments? Mr. Chairman, do you have any follow-up?

22 CHAIRMAN DAVIS: No.

23 JUDGE STEARLEY: At this time our next
24 presenter is Mr. Boudreau. Mr. Boudreau, I don't think
25 you have a real lengthy presentation.

1 MR. BOUDREAU: I do not. I will make very
2 brief comments.

3 JUDGE STEARLEY: Okay. I think we will go
4 ahead with your presentation prior to breaking for lunch.
5 Mr. Boudreau is the legal counsel for the Missouri Energy
6 Development Association.

7 MR. BOUDREAU: Thank you for that
8 introduction. I might also point out that the Missouri
9 Energy Development Association is an industry association
10 whose members are comprised of AmerenUE, Kansas City Power
11 & Light Company, the Empire District Electric Company,
12 Aquila, Inc., Laclede Gas Company, Missouri Gas Energy,
13 Atmos Energy Corporation, and Missouri-American Water
14 Company.

15 And on behalf of MEDA, which is the acronym
16 for the Missouri Energy Development Association, I would
17 like to thank the Chairman and the Commission for the
18 opportunity to present its initial views concerning its
19 standard of conduct and conflict of interest policies as
20 currently codified in the statute, rule and executive
21 order.

22 MEDA filed a brief, written comments on
23 January 3rd, so I'll keep my comments here today very
24 brief. MEDA has not offered any particular suggestions to
25 change the practice rule or statute in the context of this

1 proceeding. The current statutory provisions governing
2 authorized communications and conflicts of interest, I
3 think are clear and fair to all parties. Moreover, the
4 Commission's rules appear to be in accord with statutory
5 guidelines. Now, those guidelines not only permit but
6 encourage the free flow of information outside the context
7 of a pending case and to a lesser degree during the course
8 of a proceeding.

9 And as for this roundtable proceeding, MEDA
10 does not know where it may lead, but if changes are
11 proposed to current practices which do not address the
12 three overarching principles set forth in its prepared
13 comments, the Commission would be doing itself and the
14 general public a disservice.

15 The first principle that was addressed in
16 the written comments is the preservation of the
17 Commission's access to information. And I always think
18 it's helpful in these cases to keep in mind what the law
19 states, and the law as to favoring free flow of
20 information is codified in 386.210 RSMo. The free and
21 robust exchange of information MEDA believes is essential
22 if the Commission is to properly discharge its duties.

23 As you know, Mr. Chairman, the utility
24 regulation is a highly complex enterprise and requires a
25 substantial degree of expertise concerning very many

1 moving parts. And just for illustration, the Commission
2 needs to be familiar with industry market structures,
3 needs to be familiar with principles of pricing. It needs
4 to be familiar with quality of service concepts. It needs
5 to be aware of the adequacy of facilities and practices of
6 the company subject to its jurisdiction. It needs to be
7 familiar with financing of operations of utilities. It
8 also needs to be familiar with corporate structure and
9 governance, just to name a few.

10 and none of these issues, as complex as
11 they are, are in a vacuum. The Commission must also keep
12 familiar with the context in which such issues arise and
13 the topical public policy considerations at any particular
14 time. And those involve, again for illustration, economic
15 theory concerning the regulation of markets. They need to
16 be familiar with concepts of the federalism, and in
17 particular jurisdictional considerations, and in that
18 vein, you need to be -- keep apprised of actions and
19 policies taking place at the federal level in the energy
20 field with FERC, in the telecommunications field with the
21 FCC. You need to be familiar with the dynamics in the
22 capital markets at any particular time. The Commission
23 needs to be familiar with the emerging technologies and
24 how those may affect service for the public in the state
25 of Missouri. Need to be generally familiar with changes

1 in tax laws, and the Commission also needs to be familiar
2 with a myriad of environmental issues that may impact
3 utilities' operations throughout the state.

4 again, that's just an illustrative,
5 certainly not an exhaustive list. I don't want to let one
6 concept go unchallenged. I think it's important to point
7 out that the Commissioners are not judges and canons of
8 judicial conduct simply don't apply and have no bearing in
9 this case. This goes to the simple concept of separation
10 of powers. The executive branch is a co-equal branch of
11 government, and I don't think that the Slavin case stands
12 for the proposition that it's been offered for today.
13 I'll leave that debate to another day. I just don't want
14 the concept to go unchallenged.

15 I think that you need to think about the
16 converse. It's no more appropriate for the judicial
17 branch of government to establish a code of conduct for
18 executive officers than it is for the executive branch to
19 establish through executive order a code of conduct for
20 judges. These are coequal branches of government. They
21 govern their own policies.

22 This doesn't go to the concept of due
23 process which, as Public Counsel has so ably pointed out,
24 it's a sort of constitutional baseline. But I don't want
25 the concept to go unchallenged that the canons somehow

1 apply to the conduct of Commissioners or any other
2 executive officer that has quasi-judicial duties on a day
3 to day basis.

4 As to the second overarching principle, I
5 think it's important that there be parity of application
6 to the extent that any new rules or practices be adopted
7 or proposed insofar as these are really driven by
8 fundamental principles of due process, they require they
9 be applicable to all participants and that any rules that
10 would disadvantage a party should not be considered.

11 I think that particular concept has already
12 been discussed by some of the previous presenters and
13 addressed in certain questions.

14 The third overarching principle, again, I
15 think this may have already been addressed, I think the
16 Commission needs to keep in mind that the Missouri Supreme
17 Court recently distinguished the Commission's rulemaking
18 practices from those that occur in a contested case, and
19 to the extent that the context of these discussions or
20 proposals arise out of practice in contested cases,
21 rulemakings need to be excluded.

22 Again, the converse of that is there can
23 be, as Commissioner Clayton pointed out, different sorts
24 of proceedings, and I think that needs to be taken into
25 account. I think Mr. Mills has recognized that -- that is

1 an appropriate consideration.

2 I would like to make one last comment.
3 Public Counsel's proposed rule changes were not
4 consolidated with this proceeding. I think they were
5 given a separate docketed number. I think it's
6 AX-2008-0201, and consequently MEDA has not made and is
7 not yet prepared to make or offer any specific comments
8 regarding that filing, other than to note it is not -- it
9 is not consistent with the three principles that I've just
10 outlined. MEDA reserves the right at the appropriate
11 proceedings to offer its comments regarding that proposal.

12 But beyond those general observations, I
13 would not presume to speak today on behalf of MEDA's
14 various members concerning any specific proposal that has
15 been made or that may be made. Instead, I'll defer to the
16 able representatives of those members who are here today
17 and who may wish to weigh in on a particular topic.

18 With that, I'll conclude my remarks, and
19 again, thank the Chairman and the Commission for this
20 opportunity.

21 JUDGE STEARLEY: Thank you, Mr. Boudreau.
22 Are there any questions for Mr. Boudreau? Mr. Chairman,
23 do you have any follow-up for Mr. Boudreau?

24 CHAIRMAN DAVIS: Mr. Boudreau, would you
25 characterize the filing by Office of Public Counsel, et al

1 as an attempt to level the playing field or an attempt to
2 level the competition?

3 MR. BOUDREAU: I think what I'd like to
4 do -- to be perfectly honest, I haven't had an opportunity
5 to review the proposed rule in a lot of detail. It did
6 not seem to me that it was a particularly evenhanded
7 approach to the issue.

8 I would hope that to the extent that any
9 discussion of dialog concerning those proposals as they
10 move forward, that they'd -- that there would be more
11 discussion as between the Office of Public Counsel and the
12 other members of that particular coalition, as I believe
13 Mr. Coffman described it, to visit with the industry to
14 address those and see what may be workable, what may not
15 be workable, but I'd prefer not to characterize the
16 proposed rule.

17 CHAIRMAN DAVIS: Do you think settlement
18 negotiations ought to be made public?

19 MR. BOUDREAU: Well, I think it was my
20 expectation coming into this proceeding that there would
21 be some opportunity for the interested parties, many of
22 whom are here today, to have a more informal discussion
23 about their views on the particular topics. I don't know
24 what you, Mr. Chairman, or the Commission had in mind in
25 terms of the conduct of proceeding in terms of bringing

1 this to a conclusion. I think that was my expectation,
2 but then again, I have no particular insight as to your
3 preference. I think it might be helpful to the extent the
4 discussions go forth.

5 JUDGE STEARLEY: Anything else for
6 Mr. Boudreau? Commissioner Clayton?

7 COMMISSIONER CLAYTON: Thank you, Judge.
8 Mr. Boudreau, I just had a couple of really, I hope, quick
9 questions. Would you agree with me that we're talking a
10 great deal here today about Section 386.210?

11 MR. BOUDREAU: I believe that's the
12 beginning point for any discussions. I believe that that
13 was most recently amended, I think, around the 2003 time
14 frame.

15 COMMISSIONER CLAYTON: That was going to be
16 my next question. I believe there was an amendment that
17 was passed by the General Assembly in 2003 as I recall.
18 Would you agree with that generally?

19 MR. BOUDREAU: I believe that's correct,
20 and if my memory serves me right, I think it was also in
21 conjunction with either the enactment or the amendment of
22 Section 386.135 which was mentioned earlier. Deals with
23 the Commission's technical staff and advisors. I believe
24 that that was all part of a broader discussion about
25 conduct of proceedings and free flow of information to the

1 various Commissioners.

2 COMMISSIONER CLAYTON: I understand, but
3 the Section 210 was passed in 2003, I think you said you
4 agreed with that. I wanted to ask, if we -- I'm sorry?

5 MR. BOUDREAU: Well, I was going to say,
6 some sections of it. There were new sections that were
7 added. There were some sections that had -- had
8 preexisted. So it was an amendment to an existing
9 statute.

10 COMMISSIONER CLAYTON: Perhaps you can give
11 me some guidance here, because I think you've been
12 practicing in this area longer than I have. Prior to the
13 passage of those amendments in Sections 1 and 2 of
14 386.210, is it MEDA's position that communications among
15 parties and Commissioners before the filing of a contested
16 case would be appropriate? If the statute didn't exist as
17 it is written right now, was it common practice before
18 2003 or is it legal for those communications to occur
19 prior to the filing of a contested case? I guess that's
20 kind of two questions. What is MEDA's position and then
21 what is your recollection?

22 MR. BOUDREAU: Let me answer from my
23 recollection, because I don't know that MEDA has a
24 position on the particular issue, so I'll speak to it from
25 my recollection of practice, and I think that there were

1 some -- I think there were communications between various
2 parties and the Commissioners previously, but I also think
3 that that was the source of some -- there was some
4 uncertainty about the scope, and we're revisiting some of
5 that, I think, here today.

6 And the idea of that point, I think it came
7 from the sense that the Commissioners felt like they were
8 living in something of a regulatory cocoon where they were
9 expected to promulgate meaningful decisions on the various
10 complex issues that came before them, but that somehow the
11 parties or even the Commissioners themselves felt that
12 they weren't able to get the sort of background
13 information, the depth of information that they felt like
14 they needed to have -- to have in order to make informed
15 decisions.

16 And I think that these statutory provisions
17 and the enactment of the provision that gave the
18 Commission access to technical staff was intended to
19 enable them to become better prepared, more knowledgeable
20 about the background of the industries that they're
21 regulating, so that when these cases came before them,
22 that they just didn't happen, they just didn't come out of
23 thin air as far as regulation is concerned, like they
24 thought they were, I think there was -- my sense of it was
25 the Commissioners felt that they were insulated from the

1 reality of the things they were supposed to be regulating,
2 and the concept or the idea behind the statutory
3 provisions was to authorize to make clear that they could
4 get this information on an ongoing basis.

5 COMMISSIONER CLAYTON: I understand the
6 purpose of the statute. I think my question is, if the
7 statute wasn't there, is it MEDA's position that those
8 communications would be allowed or legal? Or do you think
9 that they would be illegal?

10 MR. BOUDREAU: I think preceding the
11 enactment of the legislation, I think that those
12 conversations were authorized even under the existing
13 legislation to some extent and the Commission's rules at
14 the time. I think this just added some clarifying
15 language.

16 COMMISSIONER CLAYTON: Do you know, did
17 MEDA actively support the Sections 1 and 2 of 386.210 in
18 the legislative session in 2003?

19 MR. BOUDREAU: I'm not sure that I can
20 speak to that. I'm not sure I know the answer to that,
21 but I can find that out.

22 COMMISSIONER CLAYTON: It seems like your
23 reference to a cocoon and worm, there's a good joke in
24 there somewhere, but I'm going to show restraint. Thank
25 you.

1 JUDGE STEARLEY: Anything else for
2 Mr. Boudreau?

3 MR. CONRAD: Just one quick one. Paul, do
4 you drive to Columbia every once in a while?

5 MR. DeFORD: Occasionally.

6 MR. CONRAD: What's the speed limit up
7 there?

8 MR. BOUDREAU: I believe it's -- as far as
9 I know on 63 it's 70 miles an hour.

10 MR. CONRAD: In that stretch of road where
11 it's 70, have you ever gotten a ticket for driving 65?

12 MR. BOUDREAU: I've never gotten a ticket
13 period.

14 MR. CONRAD: Do you think you would get one
15 for driving 65?

16 MR. BOUDREAU: Well, I suppose it's
17 possible to get one for a broken taillight.

18 MR. CONRAD: No further questions.

19 CHAIRMAN DAVIS: Before we go on break
20 here, just a couple of more questions for all the persons
21 present here to consider.

22 Is it appropriate for Public Service
23 Commissioners to maintain campaign accounts? Is it
24 appropriate for Public Service Commissioners to make
25 political donations, particularly where that political

1 donation may be to a party in a case?

2 Answer that after lunch or later. I see
3 some puzzled looks. So I thought that would be a good
4 ponder for folks to think about.

5 JUDGE STEARLEY: And with those questions
6 in mind, I think this is a good time for us all to break
7 for lunch. We will reconvene at approximately 1:15, and
8 when we come back, we'll be picking up with presentations
9 from Ms. Julie Noonan and Kevin Thompson, Staff of the
10 Missouri Public service Commission.

11 (A BREAK WAS TAKEN.)

12 JUDGE STEARLEY: All right. I think we're
13 about ready to go back on the record. If I may have your
14 attention, we're going to go ahead and go back on the
15 record and pick up with your next presenter. Ms. Noonan.
16 And our next presenter is Ms. Julie Noonan. She is a
17 Missouri citizen and a member of stopaquila.org.
18 Ms. Noonan has also filed comments under this docket, and
19 they are available on EFIS.

20 Ms. Noonan, we appreciate your comments and
21 we're happy to have you here presenting today.

22 MS. NOONAN: Thank you, Chairman Davis,
23 Judge. And I apologize in advance for my voice.

24 I also appreciated the opportunity to hear
25 the presentation this morning from Mr. Hempling, and I

1 would submit to you that the comments that I would share
2 and the concepts that I am here to share this afternoon
3 speak specifically to a desire to see the Public Service
4 Commission better able to help align public behavior with
5 public increase and also to help increase public trust.

6 One of his primary questions this morning
7 was, is there a trust issue? And I would submit to you
8 that beyond that which most of the people in this room are
9 very specifically involved in relative to the merger case,
10 there may be other areas where the public trust is at
11 question.

12 I am not a lawyer. I am not a member of
13 the PSC, nor am I affiliated with any state laws of
14 utilities, regulation, what have you. Nonetheless, I am a
15 citizen, and I have been significantly and permanently
16 impacted by actions and lack of actions of the Public
17 Service Commission and a utility.

18 I would -- I would pray that all of us in
19 this room would understand that the recommendations I
20 provide are probably more conceptual, and there is every
21 real possibility that something that I assume may be
22 requiring informal action actually requires something
23 formal or even state statute and vice versa. So I would
24 ask for your patience in my limited understanding of what
25 constitutes the different types of actions, and instead I

1 would ask that folks consider these recommendations as
2 concepts that would, I believe, help align public behavior
3 with public interest and help increase the public trust.

4 Additionally, my plan is, given additional
5 personal time because this is not a professional pursuit
6 for me, that I would, prior to the Commission's targeted
7 31st of January deadline, add additional legal court
8 opinion and other type of reference documentation that is
9 more specifically and generally part of these type of
10 matters.

11 Under informal actions that the Commission
12 can take, and again, understand that this could be
13 something other than informal, when I look through the
14 standards of conduct, the code of conduct, executive
15 orders and all types of disparate laws that pertain to the
16 PSC, regulated utilities, it seems to me a little
17 disjointed. It also would seem as if some of it is
18 prescriptive rather than specifically adopted and espoused
19 by the PSC Commission as an attempt to do their business.

20 So in my first recommendation, I talk about
21 adopting PSC standards of conduct, and that is not to say
22 that I don't understand there's already something codified
23 as standards of conduct, but this would be something that
24 would help bring both existing standards of conduct, codes
25 of conduct, laws that pertain specifically to the

1 regulation of utilities, and perhaps some concepts that
2 are not currently included into a single source.

3 Additionally, when you look at the current
4 standards of conduct, codes of conduct and other documents
5 that the Commission relies upon today and those that
6 practice before Commission and are served by the
7 Commission rely upon, it appears a great deal of
8 interspersed of accountability for the Commission and
9 their behavior and also those that would practice before
10 the Commission, and I think it would be helpful to have a
11 single source that brings in those things which apply to
12 the conduct of the Commission specifically as they perform
13 their duties.

14 And that's what this is a recommendation
15 that the Commission adopt of their own accord a body of
16 standards of conduct for their specific business as it
17 pertains to regulation.

18 The subsequent recommendations that I have
19 offered as informal recommendations are all specific
20 concepts of specific standards of conduct that should be
21 included. That's not to say that there -- that this is an
22 all-inclusive list of what should be included. I in
23 particular have been impacted most specifically by an
24 electric company, and so some of the standards of conduct
25 that I propose would pertain specifically to that area.

1 The second recommendation that I have is
2 that the -- that the PSC Commission implement standards of
3 conduct affidavit, and this would tie specifically to
4 these self-imposed standards of conduct that I propose in
5 here. In this instance, it's a recommendation that all
6 commission orders include an affidavit from the Regulatory
7 Law Judge acting as the hearing officer that all PSC SOC's
8 were observed and upheld leading up to the issuance of the
9 Commission Order.

10 If that is a practice that is already in
11 place, I apologize. If it is not, I think it would be
12 beneficial. Even if it is in place, it isn't in place to
13 a specific set like I'm recommending. That speaks only to
14 Commission comportment.

15 Just a couple of ideas in support of this
16 concept. A self-imposed requirement of the PSC's
17 standards of conduct affidavit would provide positive and
18 documented assurance to citizens served by the Commission
19 and all who have matters before the PSC that the
20 Regulatory Law Judge acting as hearing officer carefully
21 monitors and ensures compliance with the PSC standards of
22 conduct.

23 While the current statutes and rules may
24 imply such accountability, and in some cases even
25 prescribe such accountability, the PSC standards of

1 conduct affidavit and the practice of tying the affidavit
2 to specific actions and orders of the Commission provides
3 affirmative assurance that all SOC's were indeed honored by
4 the Commission in the particular matter at hand.

5 And I have a list of approximately 14, I
6 think, recommendations for standards of conduct that I
7 would personally like to see included and that I believe
8 that myself and my neighbors and others that are citizens
9 and lack the resources that Mr. Hempling alluded to
10 earlier today would also find comfort in and find an
11 increase of public trust. Some of these already exist
12 within the existing law, while others do not. And I'm not
13 saying that these are -- if they do not exist within the
14 law, I'm not saying that I believe that they are outside
15 of existing laws. I'm saying that I don't think that
16 they -- to my knowledge, they're not specifically
17 documented within the body of the law that I see, while
18 others are.

19 So that recommendation No. 3 for standards
20 of conduct is affirmation of the PSC constitutional public
21 protection.

22 JUDGE STEARLEY: Excuse me, Ms. Noonan. I
23 don't mean to interrupt you. Some of our observers --
24 we've had various problems with our audio in this room.
25 If you could try to speak a little more directly into that

1 microphone, they can hear you better on the webcast.

2 MS. NOONAN: And I apologize, too. My
3 voice is just not good today.

4 JUDGE STEARLEY: And I understand.

5 MS. NOONAN: No one should have to listen
6 to it, but that's what I've got.

7 JUDGE STEARLEY: We do appreciate that.

8 MS. NOONAN: Okay. So one of the rules of
9 conduct that I would recommend for inclusion would be an
10 affirmation of the PSC constitutional public protection.
11 The PSC respects citizens' rights and refuses to condone,
12 reward or act in collusion with regulated entities who
13 subvert citizen rights granted in the United States
14 Amendment XIV and Missouri Constitution, Article I Bill of
15 Rights.

16 I know that the duties and responsibilities
17 of the Commission are very broad. However, I think that
18 they're all based in law, and that whereas there are
19 different bodies of the public that are served by the
20 Commission, that the constitutional rights are not
21 anything that are expendable. And I'd like for that to be
22 a statement.

23 Statements in support. My prescription is
24 that through inattention to standards of conduct that
25 would specifically prescribe affirmation of constitutional

1 public protection, myself and others have expended
2 thousands of dollars, hundreds of hours, in some cases
3 thousands of hours, been through multiple PSC cases,
4 multiple court cases. I don't even know that there'll
5 ever be an end to it.

6 My prescription is, had the majority of the
7 Public Service Commission simply done their job and
8 honored both the letter and intent of existing laws, rules
9 and many of the policies in place, we wouldn't have to go
10 through this, or -- we're working on four years, and who
11 knows how much longer it's going to be.

12 If we were able to trust the PSC were
13 actually upholding both the letter and the intent of the
14 constitution, statutes, rules of the Department of
15 Economic Development, code of ethics and established
16 procedures, we really wouldn't have to scour the Internet
17 and papers to see what's up next. You know, we wouldn't
18 have to keep in constant contact with our legislators to
19 make sure that somebody wasn't going to try to sneak a new
20 or changed law in to try to legalize that which is illegal
21 today.

22 In this particular instance -- and the
23 particular instance that I'm speaking of is the building,
24 the siting, building and operation of South Harper peaking
25 facility by Aquila. In this particular instance, Aquila

1 ratepayers and Missouri citizens were generally and
2 specifically harmed by improper education -- adjudication
3 associated with that facility, despite numerous improper
4 and/or illegal siting, permitting, business and
5 development practices on the part of Aquila.

6 They were desperate to transfer three old
7 technology turbines purchased on the unregulated side of
8 their business to the regulated side where they could and
9 did request that ratepayers help subsidize their past poor
10 management decisions and take advantage of tax shelter and
11 debt service rates not otherwise available to them.

12 Aquila deprived citizens of property
13 without due process of law through refusal to request
14 rezoning or a special use permit from Cass County, the
15 local government with jurisdiction of zoning, master
16 planning, and associated permitting and authorization
17 authority. They selected a site, built and turned up the
18 power plant despite an injunction and in record time, all
19 in haste to include project costs in the summer 2005 rate
20 case.

21 The assessed value of my home decreased
22 approximately 20 percent in 2007. My understanding is
23 that the decreased valuation is a direct result of the
24 proximity of my home, within one-half mile, to South
25 Harper. All other homeowners living in close proximity to

1 South Harper also saw significant decline in the assessed
2 value of their property as a direct result of the
3 illegally built power plant.

4 I present these real and significant
5 statements in good faith after a conversation with Curtis
6 Koons, the Cass County assessor at the time my property
7 assessment was conducted. I have requested and will
8 pursue specific confirmation and other evidence that
9 supports this fact.

10 The next recommendation is affirmation of
11 PSC legal compliance intent. PSC honors the letter of the
12 law and seeks to fulfill the spirit and intent of the law
13 as suggested in 4 CSR 240 Executive Order 92-04. PSC also
14 shall conduct the business of state government in a manner
15 which inspires public confidence and trust as suggested in
16 the code of conduct.

17 I've become more educated this morning
18 about some of the specifics around the merger case and
19 ex parte, and I had intended to include this formal
20 recommendation saying I have concurring opinion with
21 Mr. Mills and others in regards to this.

22 I know, too, that in many other states that
23 ex parte isn't limited from the time of official hearing,
24 and as a member of the public with extremely limited
25 resources compared to anyone else who's in this room, I

1 would personally significantly appreciate it if all such
2 conversations were indeed available on record.

3 And I would even propose that in respect of
4 the concurrence that were brought up relative to the
5 financial impact, that we are in a technical age now, and
6 that if one of the primary concerns for changing the
7 approach and the requirements of ex parte and full
8 disclosure for all who would like to be involved and may
9 be impacted, that certainly wave files exist, and I can't
10 fathom that, you know, a recording, an audio recording
11 posted to the web, as everything else in Public Service
12 Commission law is posted, I can't fathom that that would
13 be a large financial burden for the Public Service
14 Commission. And I would just offer that that might be
15 another avenue to fulfill that suggestion at a lesser
16 financial impact.

17 I too in the past have had concerns about
18 ex parte contact that is similar to that which I guess is
19 at issue in this case. Not about ex parte contact
20 happening during a formal hearing, but about ex parte
21 contact that happens prior to the official filing.

22 In particular, you know, my first concern
23 regarding this particular area was the very first meeting
24 I ever attended about this proposed power plant. It was a
25 public hearing -- or it wasn't a hearing. It was a public

1 forum sponsored by Aquila in Peculiar, the town that is
2 nearest where they built this power plant. And at the
3 time Jon Empson, a VP, declared that the PSC preferred
4 that Aquila build that power plant at that site.

5 I was in shock, and immediately asked,
6 well, you know, is someone from the Public Service
7 Commission here? Have you already had the case or -- you
8 know, well, no. Well, are you presuming to speak on
9 behalf of the Public Service Commission? Well, he backed
10 down.

11 But it was very concerning to me that
12 something as significant as a proposed power plant that
13 ended up being built in record time, six months or less,
14 that there were discussions potentially or at least
15 alleged. Maybe not even alleged. My assumption was that
16 Mr. Empson was referring to the Commission, and I was in
17 shock.

18 So when I followed up on that concern, my
19 first -- the first thing that I did after that meeting,
20 one of the first things I did was to attempt to file a
21 complaint on the PSC website, and I had several
22 conversations with Warren Wood and was told in no
23 uncertain terms that the Public Service Commission has
24 absolutely nothing to do whatsoever with power plants,
25 where they're built. It just didn't seem to jive.

1 Not only did that seem in conflict, but
2 within a week after a permanent injunction prohibiting
3 Aquila from building, operating that specific power plant,
4 Commissioner Appling visited the South Harper peaking
5 facility site. He also visited Greenwood that day,
6 another site that's been retired or something. I don't
7 know. It isn't obviously a candidate for expansion. The
8 very next day was the first day that there was major
9 concrete pouring at that site.

10 I believe in no uncertain terms that this
11 relates very closely or similarly to one of the examples
12 that Mr. Hempling, you know, was pointing out this morning
13 about trust. I have no idea what transpired during that
14 meeting, and I do know that a case was filed within a
15 couple of weeks after that meeting. But it certainly
16 doesn't inspire my trust as a member of the public, and it
17 does -- it just does cause me concern, and I would think
18 that it would cause reasonable people concern.

19 Recommendation No. 5 for specific
20 self-imposed standard of conduct is affirmation of the PSC
21 enforcement pertaining to site specific certificates of
22 need and necessity. The PSC affirms and demonstrates that
23 the Commission respects the Missouri Constitution, the
24 revised Missouri state statutes and the direction within
25 the final Western District 64985 opinion of the Missouri

1 Court of Appeals that specifies that a utility must secure
2 site specific certificate of need and necessity prior to
3 disturbing the first spadeful of soil when planning to
4 build or expand power generation facilities.

5 The PSC requires that utilities seeking a
6 site specific CNN comply with all applicable local laws,
7 and no site specific CNN will be awarded unless the
8 utility provides undisputed (by local governments where
9 such facilities are proposed to be located/expanded) proof
10 of compliance with applicable local laws, ordinances,
11 permitting, zoning, et cetera.

12 That was a mouthful. I do believe that.
13 Like I said, I haven't had the time and I don't have the
14 expertise, I don't have all the references, but they'll be
15 there.

16 I'm going to limit the number of comments I
17 make in this area in part because of my voice and in part
18 because of the audience. It has absolutely no impact,
19 though, on how strongly I feel about this, not just in my
20 particular circumstance, but for the public. How
21 ridiculous is it to think that a private corporation
22 granted a monopoly is allowed unfettered decision-making
23 to impact the public with nothing more than an air permit
24 from MDNR.

25 In court in multiple -- on multiple

1 occasions the question was asked and answered, does that
2 mean that Aquila or any other utility could set any type
3 of generation facility, or sewage treatment I think was
4 the topic of one, anywhere they wanted? The answer was
5 yes. I propose that is ludicrous. It flies in the face
6 of anyone's reasonable reading of the existing laws and
7 statutes and the intent of our Legislature.

8 OSC Recommendation No. 6, provide -- it
9 would be an affirmation of full, fair and impartial
10 hearings. With the assistance of the Regulatory Law Judge
11 acting as hearing officer, the PSC -- with the assistance
12 of the Regulatory Law Judge acting as hearing officer, the
13 PSC Chairman ensures that all hearings are full, fair and
14 impartial.

15 My experience -- in my experience, I have
16 been subject to proceedings that I believe lacked either
17 fullness, fairness or impartiality, perhaps not intended,
18 but nevertheless it impacted me. And I realize that all
19 of these comments I'm making are only my perception.

20 In EA-2005-0248 in which Aquila requested
21 confirmation that existing certificates were sufficient to
22 build the SHPF or in the alternative a site specific CNN,
23 Commissioner Davis halted proceedings abruptly in the
24 middle of Cass County cross and prior to allowing
25 stopaquila.org or other intervenors to question. All

1 opposed were not allowed to put on any witnesses. I
2 believe that the proceeding was not full, fair or
3 impartial.

4 Also associated with the same case,
5 Commissioner Davis made a statement to the effect that
6 impacted parties should properly be heard in a subsequent
7 rate case. The interpretation I have was that our
8 concerns and interests were not proper for consideration
9 of the Commission with regard to whether Aquila could or
10 should build, but only after they had done so, to argue
11 that Aquila should be burdened with financial
12 repercussions.

13 It is wholly and completely inappropriate
14 and unacceptable to exclude intervenor concerns and
15 information from proceedings regarding CNNs. I would much
16 rather that my rights and rights of other citizens
17 similarly impacted in this or in future cases be afforded
18 the consideration of inclusion and due process. A slap on
19 the offending utility's wrist after the fact is simply
20 insufficient.

21 In 0309, EA-2006-0309, Commissioner Murray
22 was questioning PSC Staff member Warren Wood and asked if
23 Aquila had to dismantle the already built South Harper
24 peaking facility, and it was already built, but then we
25 were in proceedings for a site specific CNN and already

1 had an injunction against it, a permanent injunction that
2 it be dismantled before it was even built, Aquila -- she
3 basically asked if Aquila ran out of power, should Cass
4 County be the first to forego having power?

5 I was shocked and appalled at the
6 suggestion that, my perception was, that because Cass
7 County was properly asserting their responsibility to
8 uphold the laws and protect Cass County citizens, that
9 they should be punished if a power shortage should occur.
10 This was only one of multiple instances that it appeared
11 that a Commissioner or PSC Staff was either advocating on
12 behalf of Aquila or displayed partiality. If nothing
13 else, I saw that as not being courteous, and I know that
14 there are -- that the code of conduct or one of those
15 things talks about being courteous.

16 Recommendation No. 7, affirmation of
17 applicant burden of proof. The PSC ensures that the
18 burden of proof for need and necessity and other requested
19 orders from the PSC is upon the applicant and not on
20 intervenors.

21 In AO-2006-0309, the majority of the PSC
22 improperly shifted the burden of proof to intervenors as
23 discussed in the dissenting opinion of Robert M.
24 Clayton III and Steve Gaw. Commissioner Appling's
25 concurring opinion also confirms that the burden was

1 shifted from Aquila to others by stating that there is no
2 compelling reason to deny the company's request for a
3 certificate of convenience and necessity.

4 Although the Regulatory Law Judge stated up
5 front that the burden of proof would be upon Aquila, it
6 seemed that during the entire proceeding the Commission
7 majority and Staff sided with Aquila and asked intervenors
8 to disprove the necessity and/or Aquila's site selection
9 without even confirming what process the Commission would
10 ultimately use until the order was -- the final report and
11 order.

12 Obviously we felt a significant
13 disadvantage, and although I don't -- I can't personally
14 point to it, my understanding and my expectation is that
15 when the utility or other applicant comes to the
16 Commission asking for orders, whether it's a CNN or other
17 orders, that the burden of proof would be on them and not
18 on others who are impacted by their request.

19 Recommendation No. 8, affirmation of PSC
20 and/or independent evaluation of applicant claims. The
21 PSC ensures that Staff and/or others independently examine
22 all applicant claims relative to least cost options and
23 insist upon adherence to least cost options unless there
24 is a competing objective of decreased dependence on
25 generation utilizing fossil fuels.

1 No. 9, affirmation of PSC public protection
2 in matters of long-term planning and ratemaking. The PSC
3 must ensure that utilities make continual progress toward
4 implementing long-term planning to reduce customer
5 exposure to fossil fuel volatility and that reflects
6 appropriate mix between types of power generation.

7 If the utility's long-term plan indicates
8 that they need base and intermediate power, then peaking
9 power plants just because they have those assets and
10 they'd like to get compensated by ratepayers doesn't make
11 that an appropriate choice in my opinion.

12 Recommendation No. 10, affirmation of PSC
13 commitment to approve rate inclusion limited to actual
14 facilities and generation that is both used and useful.
15 The PSC only considers and contemplates approval of
16 reasonable expenses for actual facilities that are both
17 used and useful.

18 In ER-2005-0436, the PSC considered
19 expenses incurred by Aquila related to South Harper. At
20 the time of the decision, the facility had three turbines,
21 was not operating and had a permanent injunction against
22 its construction and operation.

23 In the same case, the PSC also considered
24 expenses for non-existent generation for two additional
25 turbines that they either didn't have or weren't at that

1 site or what have you.

2 The following is an excerpt from
3 Commissioner Gaw's dissenting opinion: This agreement
4 places in rate base a gas-fired combustion turbine
5 generating facility with around 500 megawatts of capacity.
6 Approximately 300 megawatts are based upon what Staff
7 deems to be prudently incurred costs of the South Harper
8 facility. An additional 200 megawatts more or less
9 represent what Staff believes would be the prudently
10 incurred cost of adding an additional two combustion
11 turbines to that same location.

12 Any charge made -- and then there's a
13 reference, Section 393.135, Revised Statutes of Missouri
14 2005 states, any charge made or demanded by an electric
15 corporation for service or in connection therewith which
16 is based on the costs of construction in progress upon any
17 existing or new facility of the electrical corporation, or
18 any other cost associated with owning, operating or
19 financing any property before it is fully operational and
20 used for service is unjust and unreasonable and is
21 prohibited.

22 I'm not going to read verbatim everything
23 that is within that dissent, and I haven't even included
24 in this document everything that is within the dissent.
25 However, another section talks about, this order sets a

1 precedent which in effect erases 393.135. As stated, the
2 legal logic used places a phantom plant in Aquila's rate
3 base to account for the South Harper facility which cannot
4 be in the rate base and includes additional fictional
5 generation as well to replace an expiring contract for
6 generational at the Calpine-owned Aires plant.

7 Why can't this same logic be used in any
8 case before the Commission to place any surrogate plant in
9 rate base that may be contemplated or under construction
10 even though the actual facilities could not be in rate
11 base under law?

12 Some might argue that in light of Aquila's
13 situation with the South Harper facility, it is
14 understandable parties would attempt to be to be inventive
15 in assisting Aquila out of its self-made predicament, but
16 this Commission cannot ignore the law, nor should it set
17 such a precedent.

18 SOC Recommendation No. 11, affirmation of
19 PSC regulation of regulated utility asset disposal. The
20 PSC ensures that no utility is granted an order
21 authorizing it to sell, sign, lease, transfer, mortgage,
22 or otherwise dispose of or encumber the whole or any part
23 of its franchise, works or system, necessary or useful in
24 the performance of its duties to the public, nor by any
25 means, direct or indirect, merge or consolidate such works

1 or system or franchises or any part thereof with any other
2 corporation, person or public utility without first
3 having -- without first having secured from the Commission
4 an order authorizing it to do so.

5 I imagine everyone in this room is familiar
6 with that. Everyone else in the room can probably tell me
7 exactly what numbers go with it.

8 Statements in support. In EO-2005-0156,
9 Aquila asked to transfer and lease back assets after
10 Aquila had already completed the transaction.

11 It appears to this citizen that the law
12 requires request and authorization prior to such action.
13 Furthermore, the law indicates that transactions that do
14 not comply with the law specifies that unlaw transactions
15 are void.

16 As in other areas of concern, the majority
17 awarded Aquila -- rewarded Aquila for illegal and
18 inappropriate behavior.

19 In addition to the fact that Aquila entered
20 the agreement prior to requesting and receiving Commission
21 approval, Aquila testified as if the transaction had not
22 yet transpired.

23 Again, it is totally unacceptable to act
24 first and seek forgiveness later, to do that which the law
25 prohibits and then expect others to compensate. These

1 acts subvert the law and regulation by the PSC. The PSC
2 should not continue to reward such behavior.

3 I've included an excerpt from the dissents
4 of Commissioners Robert M. Clayton III and Steve Gaw. It
5 is clear from the foregoing discussion that the CTs used
6 in the South Harper generation facility were considered
7 necessary by Aquila in the performance of Aquila's duties
8 to the public. The necessary nature of these assets is
9 admitted by Aquila in its application as well as in its
10 pending rate proceeding.

11 As such, Section 393.190 specifically
12 prohibits any sale -- and I'm not going to read the whole
13 thing. Recognizing Aquila had not yet obtained the
14 approval of the Commission, this transaction is
15 necessarily void. No amount of accounting or legal
16 gymnastics can correct this legal deficiency.

17 There's some additional information that
18 the Commissioners, and rightly so, I believe, made
19 specific note of five very specific instances of Aquila
20 behavior during that transaction that were part of
21 violating the intent and letter of the law.

22 SOC Recommendation No. 12, affirmation of
23 PSC freedom from outside influence. The PSC avoids any
24 interest or activity which improperly influences or gives
25 the appearance of improperly influencing the conduct of

1 official duties. In addition to the familial
2 relationships specified within the law, any Commissioner
3 or Regulatory Law Judge who has a personal relationship
4 with the representative or member of an applicant should
5 recuse themselves from all cases that involve that
6 applicant in order to ensure fair and impartial
7 decision-making by the Commission.

8 13, affirmation of PSC compliance with
9 limitation of powers. The PSC refrains from extending
10 powers beyond that which are specifically bestowed on the
11 Commission by Missouri State statutes. Obviously I've
12 spoken to several areas to which I believe that has not
13 been the case and that has significantly impacted me.

14 In 0309, PSC Staff created a new process to
15 be used in determining whether a CNN should be granted for
16 the already built South Harper peaking facility. The
17 process was introduced, but not confirmed as the process
18 that would be used by the Commission to make a
19 determination until issuance of the Report and Order. How
20 difficult for anyone impacted, interested or an intervenor
21 to prepare and argue that case.

22 The process, created by PSC Staff member
23 Warren Wood, relegated zoning and/or permitting to a
24 status that was a discardable factor. Clearly multiple
25 intervenors were at a huge disadvantage, and it really

1 flies in the face of the Western District opinion that
2 indicated that there are -- there's a possibility of
3 competing for leased power, and in such instances they
4 should be harmonized.

5 The process referenced was also recommended
6 as a process to be followed only for the South Harper
7 peaking facility, and not used for any future CNN cases.
8 Public trust is not enhanced by failing to inform all
9 parties of the criteria for decision making or by making
10 up the rules as you go.

11 That concludes the specific recommendations
12 that I would like to see included in a self-imposed
13 standards of conduct that would have a correlating
14 affidavit to be signed in conjunction with issuance of
15 orders. Certainly, like I said before, these are
16 concepts. I haven't written them as the final formal
17 verbiage, but I think that we're all adults and we
18 understand intent.

19 In addition to those that I have described
20 as possibly informal, I have a couple of formal action
21 recommendations and a couple of recommendations relative
22 to statutory changes.

23 Recommended actions requiring formal
24 Commission action. The first one has to do with PSC
25 complaint support, and really it's a pretty simple one,

1 and it may not even require rulemaking. But the concept
2 is, although EFIS is a fabulous resource and I really
3 appreciate it and I utilize it a lot myself, if you look
4 into the area for complaints, it appears at least to me
5 that the complaint form suggests that proper consideration
6 for use of that form is limited almost solely to
7 individual billing concerns and/or service suspension
8 concerns.

9 And as a member of the public who's been
10 impacted most specifically and significantly by actions
11 and contemplated actions of the PSC that have absolutely
12 nothing to do with my concerns about billing or service
13 suspension, I would like for that form to be more
14 all-inclusive.

15 Additionally, I was really kind of
16 surprised to see that within the current standards of
17 conduct and/or some other documentation, and I apologize,
18 it talks about the difference between informal and formal
19 complaints, and that if an individual or entity files an
20 informal complaint, then they are also afforded the
21 opportunity to file a formal complaint.

22 And I really think it would be more
23 beneficial for public education and public interest and
24 any entity that might have a complaint if that information
25 was a little bit more visible and available, either the

1 link prior to the complaint form or within the complaint
2 form, and additionally any individual who calls the PSC
3 and talks to Staff about complaints, I think deserves to
4 have visibility to that type of information.

5 The second recommendation that I have
6 formal, and may require something more than formal, would
7 be the establishment of an intervenor fund. Create and
8 enforce a rule modeled off of a concept contained within
9 New York state law that establishes an account funded by
10 the applicant for the purpose of defraying the cost of
11 representation for local intervenors, governmental bodies
12 that are not the applicant and other local parties.

13 While I sincerely appreciate and value the
14 service that Mr. Mills and his office, the Office of the
15 Public Counsel, provide for the general public, and
16 primarily focused on issues around rates, there are
17 certainly subsets of the public that are significantly
18 impacted by requests of utilities for orders of the
19 Commission.

20 And it seems an incredibly unlevel playing
21 field at this point in time, and the concept is that it
22 would establish a fund that would either be administered
23 by the PSC or by the Office of Public Counsel for each
24 instance in which a utility requests either a CNN or rate
25 case or a merger, and those funds would be dispersed to

1 intervenors to help defray. The New York law was limiting
2 to help defray the cost of expert witnesses, but I would
3 say that it's certainly -- I would propose that this would
4 also defray cost of legal counsel.

5 While the business of the PSC is conducted
6 in what is described as a quasi-judicial setting, the
7 financial implications to those impacted by applicant
8 requests are significant. Cost of participation is such
9 that many who are impacted by actions and requests of
10 entities regulated by the PSC may not be able to
11 participate. Those that do proceed with participation may
12 be significantly limited in their ability to engage
13 experts and have legal counsel representation in all
14 pertinent matters and proceedings.

15 I cannot tell you the number -- although
16 our informal group, organization did have legal counsel
17 during our proceedings, I can't tell you the number of
18 hours and hours and hours that we tried to do our own
19 research, our own preparation, write our own drafts to
20 minimize that impact, but still I have a \$5,000 bill that
21 comes to my house every month, and I don't know how I'm
22 going to pay it.

23 I understand and appreciate, like I said,
24 the Office of the Public Counsel, but I believe that it's
25 equally important that not only the broadest section of

1 the public and geared towards rate impact, I also think
2 that there's an important obligation that the -- that more
3 specifically impacted people are able to afford
4 representation and participation in these types of cases.

5 There's two recommendations relative to
6 statutory changes. The first one really doesn't recommend
7 a specific change, but instead it states a concern about
8 potential change. My recommendation is the PSC refrains
9 from sponsoring or supporting changes that legalize that
10 which is illegal.

11 My primary concern and recommendation is
12 that the PSC does not engage in sponsoring or supporting
13 any changes to Missouri state statutes that would result
14 in attempting to legalize that which is illegal today.
15 In making this recommendation, I intend that it include
16 refraining from sponsoring or supporting any changes to
17 laws referenced throughout the informal recommendations
18 provided within this docket.

19 I understand and appreciate that
20 Commissioner Davis and I may have still have differences
21 in our interpretation of what is and is not legal today.

22 During my three-year ordeal and counting,
23 I've witnessed and have been drastically impacted by a
24 utility seeking to engage multiple government entities in
25 collusion to enable and approve their irresponsible and

1 illegal behavior. While it is certainly true that the
2 Missouri State Statutes and rules of the PSC are not as
3 prescriptive as the laws in some states, I am reluctant to
4 trust that new laws are necessarily the answer.

5 I am aware of attempts to attach amendments
6 to proposed law within the past three years that would
7 result in an either exemption for or authorization of
8 Aquila's illegally built South Harper peaking facility.

9 I'm also cognizant that the Legislature
10 relies heavily on the input from the PSC when considering
11 matters pertaining to the business of and laws impacting
12 regulated utilities.

13 In this recommendation I am not ascribing
14 any inappropriate intent or making any accusations. I am
15 simply making a request of public protection.

16 Recommended statutory change No. 2. I
17 agree with Mr. Hempling that the workload of the Public
18 Service Commission is incredible, overwhelming and
19 astounding. And to that end, and that being the case, in
20 the proceedings that I have been party to over the last
21 several years, it would seem that the Commissioners are
22 very torn, that they have competing schedules, conflicting
23 schedules, and that they -- while they may be observing or
24 reading transcripts or whatever, there is a notable lack
25 of majority participation in the majority of the time.

1 Maybe I didn't say that right.

2 But my concern is that in order to afford a
3 fair, full and impartial hearing, it really deserves
4 undivided attention, and in order to help facilitate that,
5 a recommendation for statutory change is that Commission
6 members and attendance. Expand the number of
7 Commissioners of the PSC so that committees of
8 Commissioners are assigned to cases before the PSC. In
9 addition to increasing the number of PSC Commissioners,
10 the law or associated rules should include additional
11 provisions which ensure that:

12 A prescribed number of Commissioners, not
13 less than three, are in physical attendance or attending
14 via video conference all hearings and meetings related to
15 a case;

16 That the Presiding Regulatory Law Judge
17 would call for questions of Commissioners attending via
18 video conference just as if the Commissioner were
19 physically present the room;

20 Commissioners required attendance in a
21 minimum of X percent, you know, 80, 90, some reasonable
22 percent that shows that that Commissioner was actively
23 participating and engaged in the case the majority of the
24 time in order to be eligible to vote upon a case.

25 The Presiding Regulatory Law Judge or court

1 reporter will make record of all time each Commissioner is
2 in attendance during each part and for the entirety of the
3 case. Records will be reviewed prior to voting on the
4 matter, and the Regulatory Law Judge will announce
5 eligibility of each Commissioner to vote on the case.

6 Statements in support. I'm making this
7 recommendation due to a perception that the load of cases
8 before the PSC may be such that Commissioners are unable
9 to commit to full engagement in proceedings and that an
10 informal approach has been implemented to either divide
11 and concur or -- and I don't -- I have no idea. I don't
12 know whether they discuss it, say, well, who's going to be
13 here this time versus this time or anything like that, and
14 I'm not -- again, I ask for your patience in my lack of
15 experience in this forum.

16 But the concept is, I believe that there's
17 too much work there for everything to have full, fair and
18 impartial commitment by the Commissioners. It was very
19 disturbing that multiple Commissioners appeared to be
20 absent most of the time when hearings were under way under
21 various cases I've attended during the last three years.

22 And I believe that although I today speak
23 officially only for myself, I know that opinion is shared
24 by many members of the public that took time out of their
25 personal lives to attend hearings, whether they be public

1 commentary hearings or whether they be the official
2 hearings here in Jeff City.

3 While I'm required to take vacation to
4 prepare, attend and support my rights, it appears to me
5 personally that the Commission places insufficient
6 requirements on Commissioner attendance/participation in
7 proceedings. Granted, it may be physically and load
8 impossible at this point, but that's why I'm recommending
9 expansion of the number of Commissioners.

10 Expansion of the PSC and corresponding
11 implementation or practices outlined that I just walked
12 through would significantly improve my faith in the
13 Commission's ability to fulfill the obligation they have
14 to fully support the workload of the Commission, allow
15 full and meaningful participation, and afford all parties
16 full and impartial decision-making.

17 Again, I appreciate the opportunity to
18 share my suggestions on informal recommendations that the
19 Commission can implement, formal actions, and potential
20 statutory changes.

21 JUDGE STEARLEY: Thank you, Ms. Noonan. Do
22 we have any questions for Ms. Noonan? You may have to
23 switch that microphone back on. We may have switched it
24 off during the break.

25 MR. WILLIAMS: Denny Williams. I'm with

1 Aquila. Thank you for your presentation. I know you've
2 taken many hours over the last three years on the South
3 Harper issue, and while I don't necessarily agree with all
4 your characterizations of the legal matter, I also am not
5 going to debate them with you today because I'm not an
6 attorney and South Harper is before the courts and I'm
7 willing to let it lie there.

8 But that was -- in my mind, that's a lot of
9 what I heard today was the South Harper issue. I also
10 heard you talk some about the personal impact on you, and
11 I'm -- I'm not going to get into the difference between
12 assessed value and market values and all those kind of
13 things either because you can't argue that people are
14 affected personally. Your perception of how you're
15 impacted I'm certain is different than my perception of
16 how you're impacted.

17 I live within a thousand feet of Greenwood,
18 which by the way has not been shut down. It is still
19 operating. It has less sound attenuation than South
20 Harper does, and I'm fine with it. But I understand where
21 you might not be with South Harper.

22 There is one item that I need to correct
23 for the record today, something that you said. That gets
24 into kind of the third point you had about ex parte
25 communications Aquila -- you point to Aquila having with

1 the PSC, and you used as your example of that a
2 conversation with Mr. Empson. Mr. Empson is our senior
3 vice president of operations and regulatory services.

4 I know and I can say unequivocally that
5 Mr. Empson did not make a statement that you alleged he
6 did. I know you did not challenge him, and I know he did
7 not back down, because you see I can state that
8 unequivocally because I was at that meeting at the Lyon's
9 Club and Mr. Empson was not. Mr. Empson did not make
10 those statements, and that's -- that's fact. He wasn't
11 there. I just wanted to clarify that for the record.

12 MS. NOONAN: I appreciate that comment, and
13 I apologize if it was made in error. In previous
14 testimony within -- with numerous cases that we've been in
15 over the years, I indicated that conversation, and it is
16 absolutely totally -- it's absolutely probably fact at
17 this point that I ascribed it to the wrong Aquila official
18 that was there speaking, and perhaps you remember who the
19 official was.

20 However, I and others absolutely know that
21 there was discussion in that vein. Warren Wood knows that
22 there -- that I perceived that there was discussion in
23 that vein due to my follow-up conversation with him and
24 the fact that evidently there was at least some concern on
25 his part because after our initial discussion, and I told

1 him at the time, I really couldn't tell him the name of
2 the specific Aquila official because it happened quick and
3 I'm not -- I wasn't privy to know anything about Aquila
4 before that time that I saw the article in the paper
5 announcing the public hearing.

6 But it was evidently at least some concern
7 to him because he called me back with one or more lawyers
8 in the room to further discuss it. So my apologies if I
9 attributed it to the wrong individual. Certainly I guess
10 there's a possibility in any conversation that I
11 misinterpreted, but like I said up front, the comments
12 that I make today are all about concepts and my
13 perception.

14 JUDGE STEARLEY: Any additional questions
15 for Ms. Noonan? Mr. Chairman?

16 CHAIRMAN DAVIS: Ms. Noonan, I do want to
17 thank you for -- obviously you've taken a lot of time to
18 put together these comments, and certainly some of the
19 concepts here about being -- there being an attendance
20 requirement for participating in the decisions of certain
21 cases, I think there are some very valid concepts here
22 that we need to explore further.

23 I think there are also some concepts that I
24 do find very troubling, and I'm also -- I want to extend
25 to you this offer, that I would be happy to come over to

1 Cass County to, you know, have another public forum to
2 meet with StopAquila or with any group of concerned
3 citizens there in Cass County to discuss why I voted the
4 way I did and the fact that I did vote to grant that site
5 permit not once but twice.

6 So I do want to make that offer to you. I
7 don't know that we have enough hours here today to do
8 that, but I want to make sure that that offer is, and it
9 can certainly be on the record and everyone can have
10 notice and be there to discuss. That is a live case in
11 courts, and it may very well be back in front of us again.

12 So anyway, but I do want to once again say
13 thank you for coming today. Thank you for your comments.
14 They are very helpful. I have read them. I'm probably
15 going to have to read them two or three more times. And
16 appreciate listening to you today, and certainly I look
17 forward to working with you in the future. Thank you.

18 MS. NOONAN: Thank you.

19 JUDGE STEARLEY: All right. I am going
20 down my list. I believe Staff of the Missouri Public
21 Service Commission is up next. General Counsel Kevin
22 Thompson.

23 MR. THOMPSON: Thank you, Judge,
24 Mr. Chairman. It's an honor to address this assembled and
25 energetic group of people interested in the regulatory

1 process. I particularly am impressed by the participation
2 of Ms. Noonan, who I think exemplifies exactly the type of
3 citizen activism which is most important and most
4 necessary for our democracy to work. And I'm not running
5 for anything I'm very sincere in those remarks.

6 On behalf of Staff, it's our view and
7 certainly my personal view, that no change to the
8 Commission's rules are necessary, and if any change is
9 desirable, Staff has suggested that the change to be
10 enacted should be a transfer of a greater amount of the
11 Commission's adjudicatory authority to the regulatory law
12 judges, perhaps moving to a two-tiered adjudication
13 structure such as Department of Labor and Industrial
14 Relations uses, certainly a model well known in
15 administrative law, where the initial evidentiary
16 proceeding is conducted by the Administrative Law Judge
17 who would produce a proposed decision that the Commission
18 could adopt or not adopt.

19 But let me reiterate that it is Staff's
20 view that no change is necessary, and in particular I
21 don't think that anyone would be well served by rushing to
22 judgment by being stampeded into making ill-considered and
23 ill thought out changes. And while I'm into those sorts
24 of adjectives, I have filed written comments in response
25 to the proposed rulemaking that the coalition has filed.

1 I view the proposed rules as unnecessary,
2 unworkable, unlawful, poorly drafted and poorly thought
3 out. No offense to anyone of course. This is an
4 administrative body. You know -- most of you here are
5 lawyers, you know what administrative law is.
6 Administrative law has to do with finding facts in a
7 highly technical environment, whether those are facts that
8 have to do with utility regulations or facts that have to
9 do with property tax or facts that have to do with
10 Medicaid reimbursement or the behavior of chiropractors or
11 any of a dozen, or scores of other areas where the state
12 has created an administrative body to do the first level
13 of decision-making and to direct and guide public policy
14 with respect to some important area of public endeavor.

15 These Commissioners are not judges. They
16 are regulators. They are law enforcement officers. They
17 exercise quasi-legislative power and they exercise
18 quasi-adjudicative power in order to do the ground tier
19 level of the public's business in the area of utility
20 regulation. It ain't perfect, and the courts have made it
21 clear that while it ain't perfect, it's acceptable.

22 In the Rose case, which was State Board
23 of -- excuse me, State ex rel Rose versus State Board of
24 Healing Arts, this was prior to creation of the
25 Administrative Hearing Commission, Dr. Rose complained

1 that the board was both judge and jury, prosecutor as
2 well, and the Missouri court said that's okay because you
3 have judicial review. The Board of Healing Arts can't
4 stray too far because a real judge is going to review that
5 decision, and if it's not solidly based on the facts of
6 records, it will not stand.

7 Well, that's exactly the situation we're in
8 with the Public Service Commission. Their primary job is
9 fact finding. If you don't believe me, read the Supreme
10 Court's decision in State Tax Commission versus Public
11 Service Commission, which talks about the scope and the
12 proper character of administrative adjudication. Their
13 job is to find the facts and apply existing law to those
14 facts to resolve disputes within their area of
15 jurisdiction, end of story.

16 The case then goes on for judicial review
17 where all of the problems the parties have will be heard
18 and ironed out in the final resolution of the case.

19 So the canons of judicial ethics, and I
20 agree 100 percent with Mr. Boudreau's remarks, not only do
21 not apply but cannot apply. Cannot apply. And I
22 challenge you to look in Slavin or any of the other cases
23 that compare administrative officers to judges and find
24 where the court has cited to the canons to say that this
25 administrative officer has violated this particular canon.

1 The Slavin court didn't say that. The court in Friskies
2 versus Thompson, a case I happen to recall myself, did not
3 say that.

4 It is the due process requirements of fair
5 adjudication by impartial officers that apply to these
6 administrative decision makers in an equal measure to the
7 way they apply to judges in the judicial majesty.

8 And if you look at the case of Fitzgerald
9 versus City of Maryland Heights, I think you will see that
10 the degree of pre-knowledge allowed to an administrative
11 officer is great. They are not only allowed but expected
12 to have opinions on matters of public policy in the area
13 committed to their regulation. They are permitted to
14 already have knowledge of the evidentiary facts of a given
15 case. They can even have a tentative conclusion.

16 Take a look at that case, and that case is
17 based on United States Supreme Court talking about what's
18 acceptable among federal administrative decision makers.
19 The only time you can remove a Commissioner for prejudice
20 is when the mind is made up based on evidence outside the
21 record. And the burden is on the challenger to show that.

22 I will say I think the Commissioners recuse
23 too quickly, not only does that deprive the stakeholders
24 of a five member Commission, which they deserve, it also
25 deprives us of judicial commentary on whether the

1 challenge was -- had any merit in that particular
2 circumstance. I think that we need judicial guidance or
3 we wouldn't be here today.

4 Staff's remarks in written form have been
5 filed. They're available to all you. Thank you very
6 much. Any questions?

7 JUDGE STEARLEY: Questions for
8 Mr. Thompson?

9 MR. MILLS: Just a couple of quick ones.
10 Are there cases that you're aware of that say the judicial
11 canons do not apply to administrative decision makers in
12 Missouri?

13 MR. THOMPSON: None that I'm personally
14 aware of.

15 MR. MILLS: Are you aware of cases in other
16 states in which it clearly states that the judicial canons
17 do apply to Public Service Commissioners and other
18 administrative decision makers?

19 MR. THOMPSON: I haven't researched other
20 states. It could be that there are such cases.

21 MR. MILLS: And with respect to the
22 Fitzgerald case, is it your review of the case that that
23 was essentially a rule of necessity case, that the court
24 found that the three, what were they, councilmen or
25 aldermen, I don't recall which, I think they were

1 councilmen, that is correct, the three councilmen should
2 have found themselves to be not impartial, and should have
3 recused, but that the rule of necessity required that they
4 decide the case anyway?

5 MR. THOMPSON: It may have been. I don't
6 recall. Frankly, I don't recall. Certainly the rule of
7 necessity allows participation where otherwise you would
8 have recusal.

9 MR. MILLS: And does the rule of necessity
10 not require that a different scope or at least a different
11 flavor, I should say of judicial review takes place
12 without the normal deference?

13 MR. THOMPSON: Absolutely. Requires more
14 strict scrutiny.

15 MR. MILLS: Thank you.

16 MR. THOMPSON: Certainly.

17 JUDGE STEARLEY: Any additional questions?
18 Mr. Conrad?

19 MR. CONRAD: Yeah, just one. Kevin, when
20 you were up here this morning and questioning Mr. Mills,
21 I'll not fall in the trap and call Mr. Mills --

22 MR. THOMPSON: Mr. Lou Mills.

23 JUDGE STEARLEY: We need more funding.

24 MR. CONRAD: You indicated that you were --
25 you were appearing for the Staff, and I think you just did

1 that, and you'd filed comments on their behalf, correct?

2 MR. THOMPSON: That's correct.

3 MR. CONRAD: And in response to the rules
4 proposed rules suggestion, you had some questions about
5 how you dealt with closed meetings of the Commission and
6 indicated that you had participated as Commission
7 statutory attorney in those closed meetings representing
8 the Commission as an attorney.

9 Now, I guess I'm a little bit curious and
10 perhaps you can help me, because I'm always interested in
11 learning at your temple, Kevin, how you'd go through the
12 ethical gymnastics of representing the agency while you're
13 simultaneously representing a party before that agency?

14 MR. THOMPSON: Different matter,
15 Mr. Conrad.

16 MR. CONRAD: Is that universally true?

17 MR. THOMPSON: I believe so.

18 MR. CONRAD: Will the Commission's minutes
19 bear that out?

20 MR. THOMPSON: I don't know.

21 MR. CONRAD: Is that true with respect to
22 all members of your General Counsel Staff?

23 MR. THOMPSON: I believe that is our
24 practice.

25 MR. CONRAD: Or is that only true with

1 respect you personally, sir?

2 MR. THOMPSON: I said I believe that's my
3 practice.

4 MR. CONRAD: That's your practice, how
5 about the rest of your Staff?

6 MR. THOMPSON: I can't tell you how much
7 I've looked forward to answering your questions today,
8 Stu.

9 MR. CONRAD: Well, why don't you go right
10 ahead, then.

11 MR. THOMPSON: I think what I said, for the
12 third time, is that I believe that is our practice.

13 MR. CONRAD: So I would then find no
14 exceptions to that?

15 MR. THOMPSON: I don't believe so.

16 MR. CONRAD: Well, I'll be happy to show
17 you one if you want to look.

18 MR. THOMPSON: Sure.

19 MR. CONRAD: I'm just kind of curious as to
20 ethical gymnastics. Your analysis is it's different
21 cases, that you can represent the agency in case A, and
22 appear before them as counsel for a party in case B, even
23 though case A and case B are very similar?

24 MR. THOMPSON: Well, I believe that's my
25 obligation, yes. You know, Stu, if you have a problem

1 with it, why don't you file a bar complaint?

2 MR. CONRAD: How do you sort that out,
3 then? Are you inviting me to do so?

4 MR. THOMPSON: Go ahead.

5 MR. CONRAD: Well, I'll invite you to a
6 little party we may have sometime in the future with
7 respect to whether or not the Commission functions are
8 quasi-adjudicative or quasi-judicial, 'cause I think the
9 0374 case is like a laser targeted right at that. So
10 you'll have your opportunity to have judicial definition
11 of that.

12 MR. THOMPSON: Thank you, Mr. Conrad.

13 JUDGE STEARLEY: Any additional questions
14 for Mr. Thompson? Mr. Coffman?

15 MR. COFFMAN: Thank you. Mr. Thompson, I
16 wanted to just ask one question about subsection 12, your
17 pleading criticizes the idea that the Public Counsel or
18 another party would have the authority to investigate an
19 alleged violation of the rule regarding code of conduct --

20 MR. THOMPSON: Yes, sir.

21 MR. COFFMAN: -- by a Commissioner. I
22 wondered if you had an opinion about who should have the
23 authority to investigate alleged misconduct of a
24 Commissioner?

25 MR. THOMPSON: I think by statute the

1 Governor does.

2 MR. COFFMAN: Which statute is that?

3 MR. THOMPSON: It's the statute that
4 provides for the removal of a PSC Commissioner. I don't
5 have it here in front of me.

6 MR. COFFMAN: So if there is --

7 MR. THOMPSON: If the Governor doesn't act,
8 then the Senate can act.

9 MR. COFFMAN: If there is an allegation in
10 the midst of a contested case, does any party, in your
11 opinion have the right to seek discovery to further
12 explore such?

13 MR. THOMPSON: I think there's a fairly
14 longstanding case on that. I think the cite is Firemen's
15 Funds, in which it more or less indicates that you have an
16 absolute right to voir dire the member of an
17 administrative tribunal where there's a belief of
18 prejudice, so I think the proper way to go about that
19 would be to voir dire the Commission members on the record
20 that you want to challenge.

21 MR. COFFMAN: And -- but apart from that --
22 but apart from that, I guess your belief is that the
23 Governor is the only entity that has a right to
24 investigate alleged improper activity?

25 MR. THOMPSON: Well, I know there's a

1 statute that as I told you, allows the Governor to remove
2 a Public Service Commissioner for cause, and three
3 different types of cause are listed. The statute goes on
4 to say that the Senate can act, I guess, if the Governor
5 chooses not to. As I said, I don't have the statute in
6 front of me that lists three different words for cause,
7 which perhaps are intended to be synonyms and perhaps not;
8 it's not entirely clear to me, there's no reported cases.

9 MR. COFFMAN: Refresh my memory. Doesn't
10 that statute deal with only removal of a Commissioner
11 permanently from their seat on the Commission and not
12 simply from a particular case?

13 MR. THOMPSON: I believe that to be true.
14 You asked who has authority to investigate, that's the
15 only authority I'm aware of. Of course the Slavin case
16 makes it clear you can also seek a writ, and -- to
17 displace a Commissioner from a particular matter where
18 you've asked for recusal and you haven't gotten it. I
19 think following the immediate case, you have to get your
20 writ from the court of appeals or the Supreme Court, but
21 none the less, Slavin is still good law in my opinion and
22 a writ would apply.

23 MR. COFFMAN: Thank you for your opinion.

24 JUDGE STEARLEY: Any additional questions
25 for Mr. Thompson? Mr. Mills?

1 what's the best way to sort out the question of whether or
2 not a writ should even -- the factual basis for whether or
3 not a writ should be sought?

4 MR. THOMPSON: Well, when I was practicing
5 on behalf of Protection and Advocacy, and I was litigating
6 against state officials rather than representing state
7 officials, where I felt a challenge for bias or prejudice
8 or some other cause would lie, I then would request to
9 voir dire that member of the tribunal on the record. And
10 the case in question makes it clear that it's reversible
11 error if you're not accorded that opportunity.

12 So that's your chance to make the factual
13 record that would then support your renewed request for
14 recusal, and if it's denied, then I think you've got the
15 records you need to go get your writ. Certainly that's
16 the way I did it in the past.

17 MR. MILLS: Is there opportunity in that
18 process for discovery of written documents or
19 interrogatories or depositions?

20 MR. THOMPSON: No, not that I'm aware of.

21 MR. MILLS: Okay. Thank you.

22 JUDGE STEARLEY: Additional questions for
23 Mr. Thompson? Mr. Chairman?

24 CHAIRMAN DAVIS: I guess my question would
25 probably go to Mr. Coffman and to Mr. Mills. At any time

1 here in the last three and a half years as part of the
2 discovery procession, have you or are you aware of any
3 party to any case being denied the opportunity to submit
4 data requests on anything that, you know, they were
5 seeking information on? I'm not aware of any, but if --
6 if -- Mr. Conrad is shaking his head yes.

7 MR. CONRAD: Yeah. We filed a declaratory
8 judgment action in an attempt basically to do that, and
9 your General Counsel's Office succeeded in convincing the
10 court at that point in time to dismiss that action. Now,
11 that may not be over and done with. We had in the course
12 of that asked for a request to admit, those were also
13 filed with some interrogatories, and they might have been
14 pursued further depending on the nature of the answers of
15 the responses that were made thereto, but that process was
16 intercepted.

17 So if -- that one narrow point, I agree
18 with Mr. Thompson there seems at least as the law stands
19 right now to be no ability to inquire into the documentary
20 record to obtain e-mails, to obtain electronic
21 documentation that the rest of the world has to live with.

22 CHAIRMAN DAVIS: Okay.

23 MR. CONRAD: And the unanswered question
24 which Mr. Mills chose, I think perhaps wisely, and I'll
25 not be so circumspect, what happens if the Commissioner

1 to -- proposed to be voir dired simply refuses to show up
2 or is told not to? Is that reversible error?

3 CHAIRMAN DAVIS: In my opinion it probably
4 would be.

5 MR. CONRAD: Wouldn't or would?

6 CHAIRMAN DAVIS: Would.

7 MR. CONRAD: Okay. We'll add that to our
8 points.

9 CHAIRMAN DAVIS: Mr. Coffman, Mr. Mills,
10 any other?

11 MR. MILLS: I don't recall in the last
12 three and a half years attempting to try to force that
13 issue. I know in the past I have deposed sitting
14 Commissioners on certain issues. I don't recall having
15 done that recently.

16 CHAIRMAN DAVIS: Okay. Mr. Coffman?

17 MR. COFFMAN: Yeah. I think I was probably
18 remembering a similar case that Mr. Mills and I probably
19 worked on a case involving Commissioner Crumpton, and
20 there were various skirmishes about what information had
21 been made available, and has the information been denied,
22 yes, in some cases, but I couldn't say that it has been
23 chronic. A lot of information has been made available.
24 There are almost always disputes about whether everything
25 or that had been requested needs to be made, but there --

1 I would say there are in these situations that involve
2 questions about what was said behind closed doors, whether
3 there was improper communications or whether there was
4 some type of bias, there have always been confusion about
5 what the procedures are.

6 And I think whether or not things have
7 worked themselves out in the past, I think that the
8 process would certainly be improved if some brighter lines
9 were drawn about what happens in that particular instance,
10 who has what authority to represent who, who has the right
11 to ask questions of what, particularly if you're in the
12 middle of a case. I think it would serve everyone's
13 interest to have some better guidance than we now have.

14 CHAIRMAN DAVIS: Okay. Mr. Conrad, can I
15 go back and ask you one question?

16 MR. CONRAD: Sure.

17 CHAIRMAN DAVIS: Okay. Getting back to the
18 point where you have an attorney representing the
19 Commission in case A and then he is appearing before the
20 Commission in case B, which is a very similar case, is it
21 your position that that is a conflict of interest and that
22 that should -- that conduct should not occur?

23 MR. CONRAD: It's not just my position but
24 it's apparently the position of now former Judge Brow. He
25 dealt with some Staff personnel who were called in after

1 having given testimony in the proceeding -- in a
2 proceeding to be advisors to the particular Commissioners
3 or Commission as a whole in a subsequent case involving
4 virtually the same issues. It was a telephone case. And
5 he basically said that's conflict. You can't do that.

6 CHAIRMAN DAVIS: Right.

7 MR. CONRAD: The case that your counsel
8 seems to not be familiar with is one involving 19-- rather
9 2000 Missouri American case, which as you well remember
10 has been bent back and forth several times between
11 courthouses and the Commission. But at one point Judge
12 Brown remanded part of that back to the Commission,
13 retaining part of it at the court, and we had an instance
14 in which the attorney for the Commission from the General
15 Counsel's Office, I won't blame Mr. Thompson for that
16 specifically because that was before his occupancy of this
17 term, his occupancy of that position, that one attorney
18 was simultaneously on the record as attorney for the
19 Commission in the courthouse before Judge Brown and
20 announced and entered an appearance for the Staff at the
21 resurgence of that part of the matter before the
22 Commission.

23 so not only can it happen, but it does
24 happen, and yes, I think personally it's conflict of
25 interest. I don't see how you can do it. That's why I

1 asked Mr. Thompson what ethical gymnastics he went through
2 in order to justify that. If he's able to sort it out and
3 say, well, you know, would -- we can compartmentalize
4 things and say, well, this case is this case, and that
5 case is that case, and never the twain shall meet, that's
6 fine, but at least the ethical rules that I read aren't
7 quite that compartmentalized.

8 In fact, they have implications where
9 attorneys move back and forth between law firms and we
10 have to have Chinese walls and all sorts of things like
11 that, which I've dealt with over the years in my practice.
12 I've been in the unenviable situation of having to decline
13 major clients because of representation of other clients
14 in other matters.

15 So that's just -- you know, I appreciate if
16 he's able to do get by that way, but in the specific
17 situation of the water case that I mentioned, that
18 particular general counsel's attorney went to the
19 disciplinary council of the bar and asked the question,
20 asked that question whether that was a problem. We
21 subsequently got a copy of the opinion he got back and
22 that was the end of the matter because the opinion he got
23 back was not the opinion that he hoped for.

24 In fact, it went somewhat beyond that and
25 suggested that not only the same persons but even

1 fraternization within the general counsel's office,
2 Mr. Chairman, even to the point of using the same computer
3 system, the same secretaries, the same support staff was
4 also objectionable.

5 I think the Missouri Supreme Court not
6 terribly long ago in a case involving Planned Parenthood
7 spoke harshly on that issue. It was a different case, so
8 I guess it doesn't apply, different parties, so I guess it
9 doesn't apply, but at least it's the same court, same
10 brick building.

11 CHAIRMAN DAVIS: Okay. I've got one more
12 question for you, and I need -- I'm asking you for advice
13 here, Mr. Conrad.

14 MR. CONRAD: Okay. Who do I charge for it?

15 CHAIRMAN DAVIS: Well, I guess whoever --
16 whoever you're billing.

17 MR. CONRAD: I don't want to get in trouble
18 giving you legal advice if I'm going to be appearing
19 before you.

20 CHAIRMAN DAVIS: Well, I'm asking for your
21 opinion. Okay. Where I personally sit on the Regional
22 State Committee that oversees the Southwest Power Pool,
23 where I sit on the OMS oversight board, the Organization
24 of MISO States, where there are probably a finite group of
25 people in this country let alone at this Commission that I

1 have that I can depend on for technical expertise, is it
2 -- is it your opinion that we should make, you know, some
3 of those people, quote, advisory staff so that they never
4 appear in the hearing room, or is it possible for, you
5 know, me to be able to talk with those Staff witnesses in
6 terms of relying on their expertise for making
7 recommendations related to, you know, RSC for SPP or OMS
8 oversight and, you know, how -- how should we -- how
9 should we be handling that? Because obviously I can think
10 of those witnesses could be appearing, you know, here in
11 front of us at the Commission, you know, in any rate case
12 regarding transmission costs, and I just want to make sure
13 that we -- I'd like to avoid any future problems if we
14 can.

15 Certainly Mr. Mills, Mr. Coffman, anybody
16 else can chime in on that, too.

17 MR. CONRAD: I'm not as familiar. Perhaps
18 I'm slightly confused. You're talking about Missouri
19 staff members or are you talking about SPP staff members?

20 CHAIRMAN DAVIS: Missouri staff members.

21 MR. CONRAD: And your circumstance is
22 you're looking to them for advice and counsel, and then
23 they would subsequently appear before the Missouri
24 Commission on an issue that was either directly on point
25 with what you had asked them about or something so close?

1 CHAIRMAN DAVIS: Close to it or indirectly.
2 For instance, I'll just throw somebody out here as a name.
3 Mike Proctor.

4 MR. CONRAD: Sure. And let me tell you
5 what I would do.

6 CHAIRMAN DAVIS: Okay.

7 MR. CONRAD: I would step aside on that
8 case if I was in that situation. I would step aside on
9 that case and say why.

10 CHAIRMAN DAVIS: As a --

11 MR. CONRAD: As a Commissioner.

12 CHAIRMAN DAVIS: As a --

13 MR. CONRAD: Yes, sir, because I would --
14 the way I look at is it if there is a tension, and you're
15 feeling a tension, then that's all you need, because that
16 creates -- that in itself creates the problem and raises
17 the question. That's what I think is getting kind of
18 missed in the 0374 case. It's kind of like, you know,
19 well, there's a circumstance here, but nothing really
20 happened, and it was -- and with all respect, and I don't
21 want to depart from your point, but what you had in the
22 291 case, the 0291 case on KCPL and we had the issue that
23 Mr. Mills already took to the Western District and one of
24 the Commissioners recused on that, Mr. Chairman, you put
25 before the group, like you said it was going to be a two

1 hour, or one hour thing we're going to get into this,
2 we're going to understand what went on, the very fact that
3 you had to do that at all was evidence of the appearance
4 of impropriety.

5 And that, with all respect to your general
6 counsel, is a violation of the standards, and the
7 standards for judicial conduct do apply to you and to the
8 other four Commissioners when you function in a
9 quasi-judicial capacity. And the only way I think that I
10 could escape that were I sitting in your chair, praise the
11 Lord I'm not, in the circumstances I'm understanding it, I
12 would simply say I have consulted with this person, I
13 regard them as an expert in this field, and therefore, I
14 can not objectively assess their evidence on this point,
15 and I'll either -- I don't know if it's possible to recuse
16 on an issue. I don't know what the nature of the issue
17 would be, or if you have to get out of the whole case.
18 But if it were up to me, I probably would say, I'm sorry,
19 guys, you know, it's your choice.

20 Now, we had -- we had an instance, it
21 happened to be in conjunction with the interpretation of a
22 contract which had been bounced back and forth between the
23 Commission and the courthouse for several cycles involving
24 a pipeline's charges to a national gas distribution
25 company, and at one point in time a former general counsel

1 of the Commission was put forward as a witness as to what
2 was meant in that context.

3 And because I had a pretty high respect for
4 that particular individual, I visited with another friend
5 of mine who had considerable more experience than I did in
6 administrative law, a former administrative hearing
7 commissioner, and he said, well, you might want to make
8 that gentleman aware of the particular statute, which I
9 did the next morning. And upon his reading of that
10 statute, he decided that he would withdraw his testimony.

11 There are things we got into in that case,
12 and I can't remember who the law judge was. It may have
13 been a lady who's no longer in that position with the
14 Commission. But she had called us all to the Bench, and I
15 believe the Staff attorney was saying, well, we waive
16 that, Staff has waived it. She said, wait a minute. This
17 person was general counsel for the Commission, not for the
18 Staff. I don't think you can waive that. And she was
19 expressing the comment that she wasn't even sure that the
20 Commission, sitting Commission at that time, which was a
21 different Commission than the one this person had served
22 on, and the fact that it very well may take an act of the
23 legislature to waive that conflict.

24 So these are pretty serious questions, and
25 the problem is, to me, as somebody who likes to litigate a

1 case and put it behind us, contrary to what Mr. Thompson
2 may think, when you litigate a case, you try to clean it
3 up. You try to make it clean so whatever decision comes
4 out of it is over and done with rather than having a bunch
5 of tail end issues, Mr. Chairman, that continue for
6 several years on as in the case of that water thing, as in
7 perhaps in the case of these ladies' complaints about
8 South Harper and all that that involves which continues to
9 spin out, and heaven only knows where this 0374 case is
10 going, but I understand you're -- you're out of that one,
11 so maybe praise the Lord from your perspective on that, I
12 don't know.

13 But you asked me for an opinion. That's
14 the best I can give you based on the set of the facts that
15 you --

16 CHAIRMAN DAVIS: Mr. Coffman, Mr. Mills,
17 any other comments along that vein or back to the original
18 question?

19 MR. MILLS: I'm sorry. I forgot what the
20 question was.

21 MR. COFFMAN: I'm not sure -- I think I
22 understand the situation. I'm not sure I have an answer
23 to it.

24 CHAIRMAN DAVIS: I guess --

25 MR. COFFMAN: It's complicated, although I

1 certainly agree with Mr. Conrad that I believe that the
2 canons of judicial conduct apply to the Commission and
3 that you should avoid the appearance of impropriety, even
4 when nothing -- no wrongdoing has occurred, then protect
5 the process and is the right thing to do.

6 I'm not sure in this particular situation
7 where I guess someone you were working with in the OMS/
8 southwest Power Pool would be appearing as a witness, I'm
9 not sure whether or not that is a --

10 CHAIRMAN DAVIS: Right. Okay.

11 MR. COFFMAN: I'm not as sure Mr. Conrad.

12 MR. MILLS: And I think it turns in part on
13 the nexus between what they're testifying about as a
14 witness and what they advised you about as an advisor.
15 The closer the nexus, the worse the problem. If they're
16 very remote, you may not have a problem at all.

17 MR. CONRAD: I agree with that. I have a
18 tendency to err on the side of caution.

19 COMMISSIONER DAVIS: I guess the best --
20 the best course of action is to make sure that there are
21 no problems in the future is to make sure that the Staff
22 person who is advising me on those issues is on my side of
23 the wall and not on the Staff's side of the wall.

24 MR. CONRAD: Or have SPP get another
25 witness. Be sure they understand that if that witness is

1 presented, you have a problem. Now, I don't know how
2 you're going to do that in the context of an ex parte.

3 JUDGE STEARLEY: If there's no further
4 questions for Mr. Thompson, we will release him from the
5 podium. I'd like to thank him for his presentation today.

6 We've had the scheduled presentations we
7 had outlined for today. Is there anyone else in the
8 audience today that wishes to make any suggestions,
9 comments, statements for the Chair?

10 Mr. Chairman, I know you have some final
11 comments to make. Let me get a feel for time here,
12 though. My poor court reporter been going here close to
13 two hours. She says she's doing okay. If you would like
14 to continue on with your final.

15

16

17 CHAIRMAN DAVIS: I don't know if I can say
18 anything profound, but if nothing else, I'll try to be
19 merciful and be brief.

20 I do want to thank each and every one of
21 you for coming here today, for preparing comments, for
22 participating in this process. They are very important.
23 I initiated this discussion because I agree that I think
24 this Commission needs to do some things to enhance the
25 transparency of the process. I think for the public to

1 have confidence in our decisions, they have to have
2 confidence in the process by which those decisions are
3 being made.

4 We may disagree on what recommendations
5 ultimately come out of this process or how far they should
6 go, but I think we've accomplished one goal here today in
7 that we have created a record for both the Governor and
8 the General Assembly that, if they do want to take further
9 action on this issue, they are going to have a wide range
10 of recommendations that have at least been vetted on some
11 level from which to act going forward.

12 I think I took away something from each and
13 every presentation that was made today. My initial
14 reaction is that Stu, Mr. Conrad is always fond of saying
15 be just and fear not, and I've certainly always attempted
16 to adhere to that principle in all of my dealings here
17 with each and every one of you at the Commission.

18 The fact is that I have met with the vast
19 majority of everyone here in this room as well as any
20 other group or person who's ever expressed an interest in
21 meeting me, meeting with me about an interest of public
22 policy. In fact, I think probably Ms. Noonan and her
23 friend are probably the only persons in this room that I
24 haven't met with at one time or another, you know,
25 regarding a whole host of issues, some of which have been

1 or may yet be subject to future cases.

2 Based on the testimony that we've had here,
3 based on the prefiled comments, I think there are two
4 issues that are in definite need of clarification. The
5 issue of lawful Commission contact with parties on matters
6 that are not related to pending cases or future cases, but
7 the fact that those contacts, you know, are not
8 necessarily being disclosed at the time casts doubt on the
9 regulatory process.

10 A second point is that I think both parties
11 and Commissioners need greater certainty as to how case
12 law regarding Commissioner conduct is interpreted and how
13 disputes over the law in this area should be resolved. I
14 think some of the points that resonated with me are that
15 whatever actions that are taken by this Commission and the
16 Legislature should apply to all parties to cases, should
17 apply to all Commissioners equally.

18 I think Ms. Noonan raised the issue, I
19 don't think she necessarily intended to raise it in this
20 context, but it is difficult at times when you have a
21 Staff that is an independent party in cases, you know,
22 they are out there taking positions that, you know, may be
23 adhering to past Commission precedents that the Commission
24 has set, but it also, you know, can take on a life all of
25 its own, and then at some point we're -- you know, those

1 positions are attributed to us, whether or not the current
2 Commission has ever actually opined on the issue.

3 I think Mr. Mills and the coalition have
4 raised a very valid point about prior to meeting with
5 parties, you know, to PSC cases or persons likely to
6 become parties, that individuals should -- individual
7 Commissioners should make public notice of those meetings
8 in a manner designed to reasonably inform all of the
9 interested persons, you know, of the purpose of the
10 meeting at least 24 hours in advance.

11 I still have mixed feelings on whether or
12 not that should be a, quote, public meeting, but I agree
13 that there should be some notice that, you know, the
14 public has a contemporaneous right to be informed of
15 what's going on.

16 In terms of it being ex parte contact or
17 not, I almost think we need another means of notice to say
18 that this -- a notice system designed to say that these
19 communications that aren't ex parte but would be a public
20 interest and interest to all the parties are in existence,
21 and that those notice requirements should apply to all
22 parties and Commissioners alike, that the duty shouldn't
23 be solely on the Commission, it -- or the individual
24 Commissioners, nor should it be solely on the counsel
25 appearing for the Commission, that I think that duty

1 should extend to everyone.

2 I think it was Mr. Mills that brought up
3 this morning about, you know, particularly where there is
4 a Commission meeting, I think we do need to consider
5 whether we broadcast, record all Commission meetings, all
6 Commission hearings, where technically feasible. We may
7 go have some hearings in rural majority or a majority of
8 us may get invited to something where it's not possible to
9 broadcast that over the Internet. But I think in terms of
10 increasing transparency, it's something that we should
11 definitely consider.

12 In terms of looking at the aspect of hiring
13 a court reporter, bringing a court reporter back in house
14 or the possibility of maintaining recording equipment,
15 either video, audio or both, here at the Commission where
16 it would be possible that when someone calls, when someone
17 says, Mr. Chairman, I need to talk to you right now, that
18 we are able to make that contemporaneous recording, so if
19 there is any doubt about what's being said, then we have
20 the opportunity to -- we have the facilities available to
21 make those things happen.

22 Certainly those are not the only things
23 that need to be addressed. I think Mrs. Noonan's either
24 assertion that there ought to be an attendance requirement
25 or an -- some sort of affirmative representation that we

1 have reviewed the entire record in the case certainly is
2 something we should all be willing to sign that document
3 saying we've done it.

4 I don't have any other questions or any
5 other questions or comments. These are my initial
6 thoughts, you know, based on my review of the prefiled
7 comments so far and what's come in here today. There
8 probably will be some more things that catch me later.

9 Going forward, it's my intent to try to get
10 this transcript and to get something produced here within
11 the next week and to distribute copies of that publicly,
12 to make sure that -- like for the Governor, like for
13 the -- at least for -- I don't want to necessarily make a
14 copy for every member of the General Assembly, but to make
15 it available to those elected representatives, everything
16 in total, so they can see Mrs. Noonan's comments, they can
17 see the ideas that have been expressed by everyone here
18 today, as well as those that subsequently get filed so
19 that if they choose, you know, to take more action than we
20 take here at the Commission, they're at least going to
21 have some ideas to base those actions on as well as say at
22 least we have begun the discussion of investigating those
23 ideas.

24 So that being said, you know, I've asked
25 people questions here today. You know, certainly if I'm

1 going to ask questions, I need to be ready to stand and
2 respond to questions, and I'll take this opportunity for
3 Mr. Mills, Mr. Conrad, Mr. Coffman, Ms. Noonan, for anyone
4 else who wants to ask questions of me.

5 MR. CONRAD: I'll ask one. This is an AO
6 docket. Mr. Mills' filing which the rest of us
7 participated in --

8 UNIDENTIFIED SPEAKER: Could we have go
9 Mr. Conrad go to a microphone, please?

10 MR. CONRAD: Sure. Sorry. This is an AO
11 docket. The other docket that Mr. Mills initiated is an
12 AX docket. They're not, as far as I understand it,
13 consolidated. Are you expecting at this point,
14 Mr. Chairman, that the AX docket just proceeds as any
15 other petition for rulemaking or motion for rulemaking
16 goes and what -- where do these lines converge, if ever?

17 CHAIRMAN DAVIS: I would -- yes, I believe
18 the AX docket should proceed. I guess the question is,
19 with regard to the AX docket, do we need to have a hearing
20 on necessity? I think that's an issue that we'll have to
21 discuss here in the near future, or whether or not the
22 Commission can just enter an order finding necessity. I
23 think that's the question that will have to be answered
24 here in probably the next week or so, you know, and to go
25 forward and to discuss that rule.

1 And certainly I can see in that rulemaking
2 taking notice of some of the comments or, you know, of
3 some form of being able to judicial notice to take all of
4 this record and put it into that docket or, you know --
5 and obviously there'll be a chance for anyone in that
6 docket to file whatever they want to in that docket. Does
7 that answer your question?

8 MR. CONRAD: Yes. I guess I could ask, but
9 I don't think I will.

10 CHAIRMAN DAVIS: I think I answered that
11 question in the Kansas City Business Journal. Anything
12 else for the good of the order?

13 (No response.)

14 JUDGE STEARLEY: Hearing no other further
15 questions or comments, I do want to make everyone in
16 attendance aware that we are expediting transcripts in
17 this matter. Also, there was a question asked during a
18 break about the recording of these proceedings, if that is
19 available. If someone wishes to make a request for a CD
20 of the actual recording of this roundtable, they may
21 direct that request to me at my e-mail address here at the
22 Commission, and we can get a CD burned and sent to you.
23 That's harold.stearley@psc.mo.gov.

24 Additionally, for anyone who's not here or
25 watching on the webcast, if they wish to file written

1 comments, they can go to the PSC's web page and file
2 comments under this case docket number. I believe since
3 we're finished with our --

4 MR. BYRNE: How long will comments be
5 accepted?

6 JUDGE STEARLEY: The docket is right now
7 slated to remain open until the 31st. There may be an
8 initial report coming out much sooner than that, and a
9 supplemental report will come out after that date, which
10 would encompass any additional comments that come in
11 beyond that initial report.

12 Mr. -- Chair -- Commissioner Clayton?

13 COMMISSIONER CLAYTON: Be careful what you
14 say there, Judge. This docket is set up as an individual
15 Commissioner's investigation, so certainly this is going
16 to be the Chairman's prerogative, but I wanted to ask, in
17 terms of the discussion that we've had here today, in
18 terms of anticipating the level of discussion that's going
19 to come out of this, I assume that this docket would be
20 turned into some sort of report or compilation and then
21 that would feed into another docket, whether it be a
22 rulemaking or otherwise.

23 What I wanted to ask is, a number of these
24 concepts perhaps go beyond just a rulemaking. Do you
25 anticipate this docket or any other docket discussing

1 proposed legislation or will -- and this is beyond what
2 the Commission does, but do you anticipate or do the
3 parties anticipate there will be any discussion about
4 proposed legislation or is that well beyond the scope?
5 I just want to know what to anticipate and what not to
6 anticipate.

7 JUDGE STEARLEY: I believe that's beyond
8 the scope of this particular docket. The Chairman, once
9 he's had a chance to review everything that's come in in
10 this docket, may make -- have future roundtables. He may
11 open some additional dockets, but that would be the
12 Chairman's discretion.

13 COMMISSIONER CLAYTON: Well, I know it's
14 going to go to the General Assembly. I just assumed that
15 it would be appropriate for suggestions if they're going
16 to go over there. Maybe that's not the case.

17 CHAIRMAN DAVIS: Certainly to the extent
18 that people here have had legislative suggestions, I think
19 those should be communicated to the respective leaders in
20 the General Assembly, both Republican and Democrat, in
21 unredacted form, because although I can't prevent, you
22 know, legislators from scratching out amendments with
23 paper and pencil on the floor, I think if they are going
24 to be taking action, I would like them to have this
25 information sooner rather than later and have it in a

1 format where they have time to properly craft it so that
2 they're not dealing with it in the next -- certainly if
3 there's -- if there's anything worthy of Commission
4 consideration in terms of statutory, then I would bring
5 that to the Commission in terms of a legislative
6 discussion for the Commission to discuss.

7 COMMISSIONER CLAYTON: The only reason I
8 bring this up, it's hard to be talking about a rulemaking
9 concept if the whole statutory scheme underneath that
10 rulemaking concept is going to change. I thought maybe
11 the discussion would be all-inclusive. But I understand,
12 I think, what you're saying.

13 JUDGE STEARLEY: Unless there's any further
14 comment or questions?

15 (No response.)

16 JUDGE STEARLEY: Hearing none, this
17 roundtable discussion in Case No. AO-2008-0192, in the
18 matter of a review of the Missouri Public Service
19 Commission's standard of conduct rules and conflicts of
20 interest policies, is hereby adjourned. We are off the
21 record.

22 WHEREUPON, the roundtable discussion was
23 concluded.

24

25

1 C E R T I F I C A T E

2 STATE OF MISSOURI)
3) ss.
4 COUNTY OF COLE)

5 I, Kellene K. Feddersen, Certified
6 Shorthand Reporter with the firm of Midwest Litigation
7 Services, and Notary Public within and for the State of
8 Missouri, do hereby certify that I was personally present
9 at the proceedings had in the above-entitled cause at the
10 time and place set forth in the caption sheet thereof;
11 that I then and there took down in Stenotype the
12 proceedings had; and that the foregoing is a full, true
13 and correct transcript of such Stenotype notes so made at
14 such time and place.

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

17 Kellene K. Feddersen, RPR, CSR, CCR
18 Notary Public (County of Cole)
19 My commission expires March 28, 2009.
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