

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

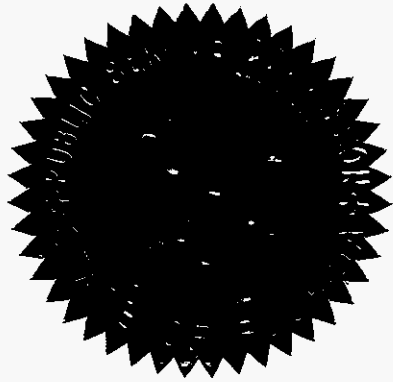
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

In the Matter of:

DOCKET NO. UNDOCKETED

JANUARY 1992 GRAND JURY
REPORT AND RULE 25-22.033,
FLORIDA ADMINISTRATIVE CODE,
COMMUNICATIONS BETWEEN
COMMISSION EMPLOYEES AND
PARTIES.

_____ /



PROCEEDINGS: RULE DEVELOPMENT WORKSHOP

DATE: Tuesday, November 24, 2009

TIME: Commenced at 9:30 a.m.
 Concluded at 12:22 p.m.

PLACE: Betty Easley Conference Center
 Hearing Room 148
 4075 Esplanade Way
 Tallahassee, Florida

REPORTED BY: LINDA BOLES, RPR, CRR
 JANE FAUROT, RPR
 Official FPSC Reporter
 (850) 413-6734

DOCUMENT NUMBER - DATE

11795 DEC-78

FPSC-COMMISSION CLERK

P R O C E E D I N G S

1
2 **MS. CIBULA:** Pursuant to notice, this time
3 and place has been set for a two-part staff workshop
4 on the 1992 Grand Jury report and Rule 25-22.033,
5 Florida Administrative Code.

6 Welcome everyone. I'm Samantha Cibula.
7 I'm a supervisor in the Commission's General
8 Counsel's Office. Here with me today are Beth
9 Salak, Director of the Commission's Regulatory
10 Analysis Division, and Tim Devlin, Director of the
11 Commission's Economic Regulation Division, and Cindy
12 Miller, a Senior Attorney in the Commission's
13 General Counsel's Office.

14 As most of you are aware, the transparency
15 and integrity of the Commission's regulatory process
16 has come under scrutiny. At its September 15th
17 Internal Affairs meeting, the Commission discussed
18 ideas on how to regain the public's confidence in
19 the Commission's process. At its October 5th
20 Internal Affairs meeting, the Commission approved an
21 action plan. As part of that action plan, staff was
22 directed to hold a workshop to discuss the 1992
23 Grand Jury report which addressed enhancing the
24 integrity of the Commission's regulatory process,
25 and Commission Rule 25-22.033 pertaining to staff

1 communications with parties. Copies of the Grand
2 Jury report and the Commission communication rule
3 are included in the agenda as Attachments A and B.

4 Our goal today is to gather input on how
5 to ensure the most transparent, fair, and workable
6 regulatory process possible. Extra copies of the
7 agenda for the workshop are on the table to my left.
8 For those who may be listening in to this workshop,
9 the agenda is available on the Commission's website.
10 There is a sign-in sheet on my left. We would like
11 everyone to fill out the sign-in sheet so that we
12 will have a record of your attendance today.

13 Also, all speakers should use microphones
14 so that the court reporter and all those who may be
15 listening can hear you. Everyone is welcome to
16 submit written comments, just something to keep in
17 mind.

18 As stated in the notice, this is a
19 two-part workshop. Unless there are any preliminary
20 questions, let's move to Part I of the workshop.

21 Seeing no preliminary questions, let's
22 move to Part I of the workshop in which we will be
23 discussing the 1992 Internal Report of the Statewide
24 Grand Jury. The 1992 report identified five issues
25 pertaining to the manner in which utilities

1 communicate with the Commission. Those issues are
2 identified as A through E in Part I of the agenda.

3 The interim report also included
4 recommended changes to the Legislature. We
5 attempted to include these recommendations in the
6 discussion points under each section of the agenda.
7 We are planning to proceed section-by-section
8 through the agenda, but also feel free to raise any
9 additional discussion points or comments in any
10 sections that you might have.

11 Are there any questions before we start?
12 Okay. Let's begin with Discussion Point A in Part I
13 of the agenda, which is the current prohibition
14 against ex parte communications in Section 350.0424
15 of the statutes applies only to Commissioners. That
16 was an issue raised in the Grand Jury report. The
17 discussion points are does Subsection 5 of the
18 rule -- of Rule 25-22.033, Florida Administrative
19 Code, which prohibits Commission employees from
20 directly or indirectly relaying to Commissioners any
21 ex parte communications sufficiently address this
22 issue. And also, if not, what amendments to Rule
23 25-22.033, Florida Administrative Code, should the
24 Commission consider implementing to address this
25 issue. And that might overlap into Part II of our

1 workshop agenda.

2 And I guess I will start to my right here.
3 Mr. Kelly, do you have any comments?

4 **MR. KELLY:** If I could. If I could have
5 your indulgence. What I would like to do is just
6 make some general overall comments.

7 **MS. CIBULA:** Okay.

8 **MR. KELLY:** About how I view today and the
9 workshop, if that would be okay, rather than sort of
10 going line-by-line.

11 **MS. CIBULA:** That's fine.

12 **MR. KELLY:** I would be more than happy to
13 do that at the appropriate time. And I can do it
14 now, I can do it later, whatever your pleasure is.

15 **MS. CIBULA:** Let's start now.

16 **MR. KELLY:** Okay. Thank you. I
17 appreciate that.

18 And first off, I want to thank the PSC for
19 holding the workshop. I think this is a great
20 opportunity for us to offer comments and participate
21 in the process, and I truly believe that the only
22 way we are going to accomplish our goals is for
23 everybody to participate and offer comments. And to
24 that extent, I can tell you that I have challenged
25 my staff to come here today and offer comments, and

1 some of them may be consistent with mine, some of
2 them may not, but that's okay. I think that is why
3 we are here today, and that is to brainstorm and
4 look for new ways, new ideas, all in an effort to
5 improve the process, make it more open and
6 transparent. And I think not just to us that deal
7 with this every day, but certainly more open and
8 transparent to the public, and do our best to remove
9 any appearances of illegal or unethical conduct in
10 communications.

11 I want to emphasize that this is a
12 brainstorming opportunity. And I challenge my staff
13 to think outside the box, and I'm going to throw out
14 some ideas in a little while. Some of you may want
15 to throw something at me, that's okay. Again, I
16 think that's why we are here.

17 I want to emphasize that that doesn't mean
18 anything that I may comment on doesn't mean you, or
19 we, or anybody that's in the process is doing
20 something wrong. I'm a firm believer that there is
21 more than one right way to accomplish our tasks, and
22 I think we all agree that what we want -- and to
23 repeat a little bit of what you said, is we want a
24 fair, open, and impartial process with respect to
25 the regulation of utility issues that fall under the

1 PSC's jurisdiction.

2 Again, I think this is a great opportunity
3 for us to talk about ways to look to changes to meet
4 the challenges of the future. More importantly, I
5 think we really, really have got to restore the
6 public trust and the public confidence in the Public
7 Service Commission and the activities that you
8 undertake.

9 I want to emphasize that I don't think we
10 should limit or restrict any suggestions or ideas
11 today. This is a workshop, and I certainly want to
12 challenge everybody, my fellow intervenors, the
13 utilities, everybody to please share with ideas no
14 matter how off the wall or crazy they may sound.

15 Specifically, I want to mention the 1992
16 Grand Jury report, and I know that is where we
17 started today, and I think it is a great place to
18 start. I think each of the items that were
19 recommended in the report should be strongly
20 considered for implementation. I'm not going to go
21 through them all right now, but certainly a couple
22 of ideas that we support is having ex parte
23 prohibitions apply not only to the Commissioners,
24 but their direct staff.

25 The idea that communications between

1 utility representatives and any PSC staff concerning
2 a regulatory function should be open and advance
3 notification given with consideration given to the
4 exceptions that are mentioned in the Grand Jury
5 report, such as the emergencies and so forth. And I
6 think hopefully at the end of the day, not today,
7 but at the end of this process that we can come up
8 with some definitive rules to the extent not
9 currently promulgated where we can develop -- that
10 can be developed regarding notice of advanced
11 meetings and conference calls that's not overly
12 burdensome, but is very open, again, and transparent
13 to the public.

14 I would also submit that the
15 recommendations that were submitted by former
16 Commissioner Katrina McMurrian should also be
17 reviewed and considered, which some I will mention
18 here in my following remarks, but I think that
19 Commissioner McMurrian did a very, very good job of
20 outlining some challenges that both staff and
21 Commissioners face and some ways to meet those
22 challenges.

23 My first recommendation would be that the
24 PSC Commissioners should be treated and act more
25 like the judiciary. I stated this recently in a

1 House committee meeting. I am not recommending and
2 will not recommend that all the Commissioners be
3 attorneys. That is not what I'm saying. But I
4 think that they should operate more like the
5 judiciary, and I would recommend that the PSC take a
6 look at the rules that govern how the administrative
7 law judges that work at DOAH, those particular
8 rules.

9 For the 20-something years that I have
10 been a lawyer and have done quite a number of DOAH
11 cases, I don't recall any problems, scandals,
12 appearances of impropriety that have arisen at DOAH.
13 I'm sure they are there, I just can't remember any.
14 So I think that would be a great place to start to
15 see what kind of rules that they have in place for
16 the DOAH Administrative Law Judges.

17 Repeating, I think, again, the same rules
18 regarding communications should apply not only to
19 the Commissioners, but also their direct staff.
20 There should be no ex parte communications between
21 Commissioners and their direct staff at any time
22 concerning any issues that falls within the
23 jurisdiction of the PSC. I think that all
24 Commissioners -- excuse me, all communications to
25 Commissioners and their direct staff should be in

1 writing and copies immediately provided to all
2 parties in docketed matters.

3 And with respect to undocketed matters,
4 the communications should be immediately posted and
5 maintained on the PSC's website in a very easily
6 identifiable location. And I'm going to talk a
7 little bit about using the website here as I get
8 near the end of my remarks.

9 Secondly, I would strongly suggest that
10 the exemptions to prohibited ex parte communications
11 for rulemaking and declaratory statements be
12 repealed. I think that is something that the
13 recommendation should be made to the Legislature.
14 And I am openminded if somebody can tell me, but I
15 don't see why ex parte communications should be
16 allowed for rulemaking and declaratory statements
17 any more than they are for cases that are pending or
18 a docketed matter.

19 Although I'm not going to offer any
20 specific changes today, I do believe that the rules
21 regarding ex parte communications should be
22 revisited. In those situations where Commissioners
23 and/or their direct staff attend conferences,
24 educational meetings, seminars, whether they are a
25 panelist or an attendee, I think it should be very

1 well laid out and clarified so that they understand
2 exactly what the rules are, and then us that are
3 parties know what the rules are so we know how to
4 conduct ourselves in those situations.

5 Okay. I want to turn now to what I have
6 said a couple of times now as thinking outside the
7 box. And this is thinking outside the box from my
8 standpoint. I have been Public Counsel now for a
9 couple of years, and something that I would like to
10 recommend be considered is changing the way hearings
11 are conducted and amending the, quote, staff
12 recommendation process. I think it should be done
13 away with. And here's some suggestions that I would
14 offer.

15 Let me first say these suggestions are not
16 offered in any way, any way whatsoever concerning
17 the quality of the work that you guys do, or any of
18 the PSC staff. That is not what I'm getting at.
19 These are offered to improve both the perception and
20 the integrity, I think, of the PSC process in the
21 eyes of the public to restore the public trust and
22 public confidence.

23 So, please, none of these are meant toward
24 the quality of work you guys do. I can tell you the
25 two years that I have served as Public Counsel, I

1 think the quality of the staff is superb and is
2 superior. But I would recommend that we eliminate
3 staff making recommendations. And here's two
4 options that we can consider. The first option, and
5 I'll use, say, a rate case as an example, but this
6 would apply equally to any type of docketed matter.

7 You handle it just like you normally would
8 with your discovery, your depositions, et cetera, et
9 cetera, up until you conduct -- I think you call it
10 the technical hearing, or the administrative
11 hearing, the trial. And I would recommend that the
12 PSC continue to have what I will call their
13 litigation or trial staff participating, but
14 participating in a little bit different manner. I
15 think the trial staff should participate just like
16 any other party. They should be required to submit
17 a position on the issues as any other party. They
18 would be allowed to cross-examine, bring in
19 witnesses, act just like any other party, meaning
20 our office, FIPUG, AARP, the utilities, whatever.
21 They would be allowed, and all parties would submit
22 post-hearing briefs similar to what happens today,
23 but the staff's brief would be given no more or no
24 less weight than any other party.

25 At this point, I think there should be a

1 separate advisory staff of the PSC, separate
2 advisory staff to prepare legal and evidentiary
3 analysis for the Commissioners. The analysis -- and
4 I'll repeat this -- would not contain
5 recommendations or decisions on each of the issues.
6 Depending on what process evolved, they could --
7 certainly they need to do a legal analysis, and what
8 I'm calling an evidentiary analysis of the
9 information, the evidence that's presented in the
10 record.

11 I certainly have no problems with allowing
12 the advisory staff to lay out options with two
13 caveats. I don't think one option should be favored
14 over another. And, secondly, each option should
15 include the impact that would result if that option
16 was selected. But I want to emphasize, again, no
17 recommendation, no decision on a particular issue
18 would be made by the advisory staff.

19 Now, when I say this, I believe that
20 certainly the Commissioners are the ones that are
21 vested with the power, more importantly the
22 responsibility to make the final decisions.
23 Therefore, I think it would be a better process
24 whereby the staff do not make a decision, a
25 recommendation, but that the Commissioners get the

1 information, review the record as they do now, the
2 legal and the evidentiary analysis of the advisory
3 staff, and then when you get to the agenda, if there
4 are questions, issues to be discussed, it's done in
5 this open forum for everyone to see. And more
6 importantly, for the public to see and to hear the
7 questions that come out.

8 I know that a lot of times -- and I'm just
9 as guilty of this as anybody, you get involved in a
10 process and we use initials instead of spelling
11 something out. We use terms of art that make it
12 very difficult, I think, for the public to perceive
13 and understand what we are talking about. And when
14 we go to an agenda or some other decision-making
15 hearing, and you speed through it, we may
16 understand, we, the people in this room, may
17 understand somewhat what's going on, but I don't
18 think the public does. And I think that is a very,
19 very important aspect that we have got to get back
20 to. Because I think the overlying concept that I'm
21 suggesting is that the more we open and make the
22 process transparent to the public, then the more
23 they will understand, the less confusion there will
24 be, and I think the more the public will appreciate
25 the job that the Public Service Commission and the

1 Commissioners have, and have to do.

2 To carry on a little bit with my thoughts,
3 the trial staff in my scenario would have the same
4 ex parte prohibitions on them as do all the other
5 parties. They would not be allowed to discuss the
6 case with the Commissioners, their direct staff, or
7 the advisory staff. It would be the advisory staff
8 that would engage in any communications with the
9 Commissioners outside of any kind of an agenda
10 hearing.

11 And I also question exactly what is the
12 need, and I'm asking this question because I don't
13 know, and not that you have to answer me right now,
14 but I don't know exactly what is the need for staff
15 when they are preparing the legal or evidentiary
16 analysis, and today they are preparing also
17 recommendations, although I am obviously suggesting
18 we do away with that, what is the necessity of
19 meeting with Commissioners one-on-one until the
20 process is open in this room and all five
21 Commissioners are sitting up there. And, again, I'm
22 suggesting this because I think it will go a long
23 way to making the process more open and more
24 transparent, again, not only to us, but to the
25 public.

1 The second option I don't favor as much,
2 but I throw it out there just thinking about it,
3 would be to conduct the -- have whatever case,
4 again, for example, a rate case. You have a
5 technical hearing with the trial staff participating
6 just like I suggested in Option 1, but in this
7 situation you have the staff -- excuse me, the
8 parties including trial staff would issue proposed
9 recommended orders, much like the DOAH process where
10 they would do a legal analysis much like their
11 briefs to do today along with findings of fact which
12 must have citations to the record place where that
13 particular finding of fact is supposedly justified.
14 And then the proposed recommended orders would go to
15 the advisory staff and then to the Commissioners.

16 But I would emphasize that the same ex
17 parte prohibitions as I suggested under Option 1
18 would still apply to the trial staff and to the
19 advisory staff. In the thing that I'm suggesting,
20 this due process, specific rules would need to be
21 developed to structure the lines of demarcation
22 between the trial staff and advisory staff. I would
23 suggest to you that no staff member can serve in
24 both capacities. You would either have to be part
25 of trial staff or part of advisory, and I think the

1 reasons are very apparent.

2 As I mentioned, I'm not sure why you would
3 have any pre-agenda, I will call them pre-agenda
4 hearings between advisory staff and Commissioners.
5 I think any questions that a Commissioner may have
6 could be submitted to the General Counsel's office
7 as a, quote, heads-up to be answered during the
8 final agenda hearing.

9 And I think that would be wise from two
10 aspects. One, everybody would get the benefit of
11 the question and the response. All five
12 Commissioners at the same time as well as the
13 audience. And remember, the audience is not just us
14 sitting in the room, but it's everybody that is
15 watching the television or listening on the
16 Internet.

17 I think rules would need to be adopted to
18 specify exactly what the purpose of the trial staff
19 should be during the process, both prehearing and at
20 the hearing. And as I have suggested, my idea I'm
21 throwing out is for them to operate just like any
22 other party. But it needs to be clear that the
23 General Counsel would need to set up separate
24 offices between trial attorneys and the advisory
25 attorneys. And I think you have got to come up with

1 a division of the attorneys who are the legal
2 advisors to the Commissioners, who I'm calling
3 advisory staff, and the attorneys who participate as
4 part of the trial staff. And I would not have them
5 be advisors to the Commissioners, because I think
6 that would put them in a very awkward position, and
7 certainly there could be an appearance of undue
8 influence.

9 Two or three more real brief questions,
10 and then I'll finally shut up here. I think that
11 there should be some consideration in submitting
12 some proposed legislation to the -- to be adopted
13 regarding the statutory guidelines that you are
14 under to issue a decision. I think that we ought to
15 look closely at the eight-month clock. I haven't
16 been around that long, but I'm not sure why we need
17 the eight-month clock. The 12-month clock I have no
18 problems with. That's more than sufficient, but the
19 8-month clock, we certainly see that this past fall
20 with the size of both the Progress Energy and the
21 Florida Power and Light rate cases, with everything
22 else going on it really presented, I think, an
23 insurmountable challenge for you guys, for staff,
24 and the Commissioners. And so I would suggest that
25 you take a look at maybe doing away with the

1 eight-month clock and just leaving it a strict
2 12-month deadline.

3 I think we need to clarify -- and if it is
4 already a clarified in a rule, then I apologize --
5 clarify that the clock starts to run when the
6 completed Minimum Filing Requirements, or MFRs, are
7 actually filed. And I would also suggest that we
8 may look at what I understand the five-month clock
9 for PAA, Proposed Agency Action decisions. I think
10 that it sometimes puts an undue burden on you guys,
11 you know, strictly speaking, the PSC staff trying to
12 turn something out in a five-month period.

13 I think the overall goal, and I think you
14 would agree with me, is to come up with a
15 well-informed reasoned decision that is supported by
16 the evidence. And I think sometimes we get carried
17 away with clocks. And I don't say this -- I know
18 that the utilities need these in place, and I
19 certainly respect that and agree with that, but I
20 think we might want to look and see about moving
21 some of these deadlines a little bit longer because
22 I think sometimes what we end up doing is putting
23 the clock, if you will, the deadline as a priority
24 instead of what I think our priorities should be,
25 and that is coming up with a good solid supported

1 decision.

2 One thing that I'm doing right now, and I
3 would suggest that it might be a good idea for PSC
4 to do, I am currently surveying my fellow members of
5 the National Association of State Utility Consumer
6 Advocates, NASUCA, about how their states do this
7 process. Some of the things that I have suggested
8 earlier are very consistent with Pennsylvania, New
9 York, and Indiana. Not perfectly, but somewhat.
10 And today I am still getting responses back, but I
11 would suggest that you might want to survey how
12 other states conduct proceedings. And let's maybe
13 plagiarize some of the good, and certainly let's
14 don't plagiarize the bad, or that we perceive as
15 bad.

16 And the last thing that I'll mention is I
17 think that as Commissioner McMurrian mentioned in
18 her remarks, I think we have got a great opportunity
19 here to use the Internet in a little better fashion.
20 Those of us that deal with the PSC website daily, we
21 know how to navigate it. But we get a lot of calls
22 in our office, and I think that the average consumer
23 finds it extremely hard to navigate and get around.
24 And what I would suggest, along with some of the
25 ideas that I have mentioned, along with some of the

1 things I think will come up today is we put some
2 very easy to understand and see links on the home
3 page. For example, notice of meetings. Put a link
4 on the front page.

5 I think the calendar is a little bit too
6 hard to navigate for some folks. It has a lot of
7 initials there, PH, and if you don't know that means
8 prehearing, you don't have any idea what it means.
9 So I would suggest maybe a link on the front page
10 that simple says notice of meetings, and you click
11 on it and it chronologically gives you everything
12 that are meetings that are set at the PSC. Maybe
13 one that says notices of hearings if you want to
14 separate the two.

15 Correspondence. I know there are some
16 suggestions in both the Grand Jury part and
17 Commissioner McMurrin's suggestions about
18 documenting certain meetings and so forth. So if
19 you have correspondence that doesn't apply to a
20 particular docket, or even if it does apply to a
21 docket, it's very easily -- if you maybe set up a
22 separate link that maybe is called correspondence or
23 something like that. Again, I think your website is
24 very good, and it's comprehensive, but I think it
25 sometimes can be difficult for the average consumer

1 that doesn't work out here like we do day in and day
2 out to navigate.

3 So I really appreciate your indulgence. I
4 hope that what I have done today has -- I've said
5 some things that are thought provoking. And nothing
6 I have said is written in stone, and it's not meant
7 to be. It is meant to throw this out and hopefully
8 get a dialogue going that we can try to make the
9 system more open and more transparent. And, again,
10 give the consumers out there, the ratepayers
11 confidence in the job that you do and in the
12 decisions that come out of here. So, thank you.

13 **MS. SALAK:** Mr. Kelly, I'd like to just
14 ask you a few questions to see if I have your
15 concept correct.

16 **MR. KELLY:** Sure.

17 **MS. SALAK:** The way I understood it your
18 suggestions only dealt with items that were going to
19 hearing. I mean, staff would not be split for a
20 PAA, staff would not be split for rulemaking, staff
21 wouldn't be split for a dec statement, per se, only
22 for --

23 **MR. KELLY:** Great question. I hadn't
24 thought that much down the road. Now, certainly for
25 staff-assisted rate cases, that just popped in my

1 mind, certainly that would require a tinkering, if
2 you will, because in the staff-assisted I know
3 that -- certainly thinking of water cases, the staff
4 have to work more one-on-one, if you will, with the
5 utility and their officials.

6 But the PAA process, I don't know that
7 there -- I don't know that that should be treated
8 any differently. And, again, I'm saying this
9 thinking off the top of my head. I don't know that
10 that should be treated any differently than any
11 other proceeding unless folks can give me a reason
12 why. I mean, that's just my initial comment on
13 that.

14 But, again, my biggest thing, I think, is
15 doing away with the recommendations and coming up
16 more with an analysis process, maybe with options,
17 and then let the Commissioners make the decisions in
18 an open proceeding up there more than adopting a
19 recommendation. Did I answer everything?

20 **MS. SALAK:** Well, just another follow-up
21 question. You mentioned that your second option was
22 to have proposed orders given to the Commission and
23 then you said that the advisory staff would put them
24 together. That is what I understood you to say.

25 So what would they do with them? They

1 would just say here are four proposed orders, or
2 would they compare and contrast with what is in
3 them, or --

4 **MR. KELLY:** Again, I threw it out there.
5 We had a staff meeting Friday and we threw a lot of
6 these ideas around, and we weren't exactly sure of
7 that, either. I mean, if that's something that the
8 Commission would want to pursue, in other words,
9 make it more aligned like what I will call the DOAH
10 process, I think there's a lot of options.

11 You could, one -- again, I'm thinking of
12 these off the top of my head. One, it could be just
13 a matter of taking all of the proposed recommended
14 orders and assembling them and giving them to the
15 Commission. You could have it where the advisory
16 staff go through them and do a legal analysis as
17 well as some kind of evidentiary analysis of the
18 proposed recommended orders. Admittedly, I'm not
19 sure exactly how that would work.

20 You know, I got the idea a little bit from
21 Pennsylvania, and not that I like Pennsylvania's
22 process altogether, but one of the things they do is
23 they have their initial hearing, their technical
24 hearing in front of an ALJ. The Administrative Law
25 Judge then prepares a proposed recommended order.

1 That goes to the Commissioners and their advisory
2 staff, but it is only one, okay. And I think they
3 call it a recommended decision.

4 I don't know that I'm recommending that we
5 have a two-step process with an ALJ, but at least I
6 wanted to throw out the idea to see what people may
7 think about, you know, maybe changing the briefs up
8 differently. Instead of the briefing we do now,
9 maybe you do it in the form of a proposed
10 recommended order like you do at -- like you are
11 required to do at DOAH, which has -- and I
12 apologize, for those who are not familiar, you have
13 your legal analysis or legal brief, then you have
14 specific findings of fact that the parties to a DOAH
15 proceeding are required to lay out. And they are
16 required to also cite a particular page or something
17 in the record that supports that finding of fact.
18 It is a little bit more detailed, and I don't know
19 how the other parties would feel about it, but,
20 again, it is just throwing out an idea to consider.

21 **MS. SALAK:** Just one more question.

22 **MR. KELLY:** Sure, fire away. That's why
23 I'm here.

24 **MS. SALAK:** You were talking about
25 splitting staff between trial staff and advisory

1 staff. Would it be a permanent split or would it be
2 on a case-by-case where depending on the case it
3 would depend on -- today I could be trial staff,
4 tomorrow I could be advisory staff.

5 **MR. KELLY:** I think that that -- I don't
6 have an answer. I think that that is something that
7 I would love to hear you all's input. If this was
8 an idea that you -- and honestly, I'm not looking
9 for an answer from you today. I don't think you
10 should give me an answer today. I think these are
11 things that we all need to go back and chew the fat,
12 so to speak, and see how it digests. But that's a
13 great question. I don't know. I just know that
14 once they are identified for a particular case, then
15 the lines of demarcation have got to be clear.

16 **MS. CIBULA:** Thank you very much, Mr.
17 Kelly. We appreciate any new ideas that anyone can
18 give us, and we would also encourage anyone who
19 wants to comment on Mr. Kelly's proposal to submit
20 comments on that, as well.

21 I guess right now maybe we could flesh out
22 your issues a little bit more as we go
23 section-by-section through the agenda. Then unless
24 someone else has some comments they want to make
25 right now on Mr. Kelly's initial proposal.

1 Mr. Moyle.

2 **MR. MOYLE:** Well, I have some comments I'd
3 like to make, and they share some similarities with
4 Mr. Kelly, and I think they are of a general nature.
5 So at the appropriate time I'd like to make those.

6 I will comment briefly on the notion -- I
7 mean, I think it is an intriguing idea that he has
8 proposed not having recommendations, and I think it
9 warrants further consideration and exploration. And
10 I will tell you in my comments today -- Jon Moyle
11 with Keefe Anchors Gordon and Moyle law firm -- you
12 know, are the result of a lot of thought on this.
13 And I have been fortunate to be practicing over here
14 for a number of years, and am familiar with the
15 process. It is a unique process, and I'll get into
16 that in my general comments.

17 But with respect to the recommendations, I
18 have often thought if you were a Commissioner and
19 you had a different view of what's in the
20 recommendation that, you know, it's probably not an
21 easy task because the recommendation is prepared way
22 in advance and it has back up and authority, and
23 here are the facts. And if you have a disagreement
24 with that, it is probably not an easy thing to do
25 sitting up there to, you know, kind of undue it or

1 move it in a different direction.

2 I know it gets done, but it doesn't get
3 done that often. And the notion of a
4 recommendation, I bet if you did a statistical
5 analysis that -- and I haven't done one, but I bet
6 that the staff recommendations are probably adopted
7 in excess of 85 percent of the time. But, if I
8 could, I mean, your pleasure, you are chairing the
9 meeting, as to whether you like my general comments.

10 **MS. CIBULA:** Sure, go ahead with your
11 comments.

12 **MR. MOYLE:** I was admitted to the Florida
13 Bar in 1987, and have practiced in many
14 jurisdictions over many years, and that includes
15 federal court, circuit court, the Division of
16 Administrative Hearings. And, you know, essentially
17 while they all have different jurisdictions, they
18 are charged with determining cases, deciding;
19 disputes. And in thinking about points to make, I
20 mean, I see the rule that the PCS plays as not
21 markedly dissimilar from those tribunals in that
22 findings of fact have to be made and then you have
23 to apply law to those findings of fact.

24 It's very similar to what a federal court
25 judge would do in a bench trial. If it's a jury

1 trial, the jury would make the findings of fact and
2 the judge would apply the law. Similar with a
3 circuit court judge and similar with a DOAH judge.

4 And in thinking about this, and I was not
5 conversant or that familiar with the 1992 Grand Jury
6 report, and in reviewing it in preparation for these
7 comments, I was kind of struck that, you know,
8 approximately 18 years ago the Grand Jury got
9 cranked up and did an investigation and came to some
10 recommendations and some conclusions that here today
11 we're having essentially the same conversation, and
12 it relates to ex parte communication.

13 I mean, if you read, you know, the
14 conclusion of the Grand Jury, the first paragraph
15 talks about closing gaps in the ex parte
16 communication section of 350. I think that one of
17 the best things that this Commission can do, or the
18 legislature has to be done is addressing the
19 ex parte communication issue. And in thinking back,
20 you know, lawyers are officers of the court, and
21 members of the bar, and have ethical guidelines, but
22 you would never more call up a federal judge's aide,
23 or a circuit judge's aide, or a Division of
24 Administrative Hearing Officer's aide, and say, hi,
25 I'd like it set up a meeting to come talk to you

1 about an issue in the case, a substantive issue in
2 the case. I mean, it's not done. The contacts are,
3 you know, we need to have a hearing, we need an hour
4 to argue this motion, and they are process and
5 procedural. And to me a huge disconnect in this
6 process is the role that, you know, staff plays in
7 receiving communications from parties that have
8 matters pending before the Commission.

9 And, you know, I appreciate sort of the
10 open nature of this. It is an informal process, and
11 I will just recount a little bit of a story. I
12 mean, we have been over here a lot of times, but at
13 one point in time -- well, I guess without going
14 into the specifics, you know, I think the rules --
15 the rules need to be clear so everybody understands
16 them.

17 I mean, you have lawyers in other parts of
18 the state that are trying to come up here and
19 represent somebody and they need to understand what
20 happens when the recommendation comes out. Is it
21 okay to go set up meetings with the aides of the
22 Commissioners and go talk to them and say, well,
23 here is all these problems with this, and here are
24 all these concerns.

25 Now, they advise the Commission on it, and

1 whether they are relating it by saying, well,
2 Mr. So-and-so from Company X came in and has these
3 concerns, or it's part of a recommendation that they
4 are making, the Grand Jury report talks about
5 directly and indirectly. I personally don't think
6 that should happen. I think that should be an ex
7 parte communication that should be prohibited as
8 Mr. Kelly recognizes and represents.

9 But, if that is not the case, and it is
10 going to be permitted, then I would argue you need
11 to tell people that so that they know. Because, you
12 know, I do some work over at the Legislature, and I
13 know how that process works, but I don't think, you
14 know, you should be lobbying recommendations at the
15 PSC. I think that when you look at this that the ex
16 parte should be extended and you need to send a
17 clear message that this tribunal should be viewed by
18 those who practice before it like a court, or
19 Division of Administrative Prehearing proceedings,
20 and you shouldn't have this murky gray area about ex
21 parte. Well, does it apply to Commissioners? No.
22 Does it apply to aides? No.

23 And I have some specific recommendations
24 that I think are in need of some review, and some of
25 them are statutory, because the 350, you know, 42,

1 and I don't know -- you know, I could ask the
2 question, but, you know, I'll point out, you know,
3 the ex parte with respect to Commissioners has some
4 room in it arguably that could be used by an
5 aggressive advocate to meet with Commissioners and
6 talk about the substance of their case, but before
7 it's filed.

8 And specifically, 350.042, ex parte
9 communications says no individual -- and I quote, no
10 individual shall discuss ex parte with a
11 Commissioner the merits of any issue that he or she
12 knows will be filed with the Commission within 90
13 days. You know, I think that could be read to say,
14 well, if it is on day 93, day 95, is it a violation?
15 You know, I think a judge might say, well, it says
16 within 90 days. If you do it outside of the 90
17 days, you know, you are not violating the ex parte
18 communication rule. I don't think that's right.

19 I don't think that's proper to go in and
20 sit down with a Commissioner and close the door and
21 have a communication where you are previewing a case
22 that is going to be filed in 95 days or 110 days.
23 So I think that that is one area that needs to be
24 clarified legislatively to say that no ex parte
25 communication shall occur on a reasonably

1 foreseeable matter and make it clear.

2 Another thing over the years that I have
3 heard is there appears to be an exception that says
4 it doesn't apply in conferences or other meetings of
5 an association of regulatory agencies. You know, I
6 understand that may have been viewed as if there is
7 a meeting of NARUC or an organization like that, and
8 it's somewhere that there is a statutory reference,
9 well, it's a conference of an association of
10 regulatory agencies, it says this section doesn't
11 apply to oral communications.

12 You know, again, I think that, you know,
13 we can spend time working on the language and the
14 words, but I think that the clear message that
15 should be sent for this Public Service Commission to
16 be a place where people have confidence that their
17 case will be decided fairly based on the facts, and
18 the evidence, and the arguments is to send a clear
19 message that ex parte is not something that should
20 take place at the Public Service Commission.

21 I don't think it should take place with
22 the Commissioners, I don't think it should take
23 place with the aides to the Commissioners, their
24 chief aides. I think Mr. Kelly called them direct
25 staff. You know, I recognize that it gets a little

1 more complicated as you get into daily issues that
2 may come up. A power plant goes down, or there is
3 something there needs to be some communication, but
4 I would suggest that may not necessarily be the
5 subject matter of a proceeding and those
6 communications probably can be permitted.

7 But I think it is somewhat incumbent on
8 practitioners to self police. I mean, like I said,
9 you would not call up a circuit court judge's
10 assistant and suggest that you set up a meeting with
11 the assistant so you could come brief them on a case
12 or talk about a substantive issue, and I think that
13 same standard should be, you know, adhered to here.

14 I think it is an opportunity. I commend
15 you all for taking the time to look into this, and
16 the Commission. You know, I was a little surprised
17 candidly to take a look at that '92 Grand Jury
18 report because, you know, the issues appear to me to
19 be the same. And I thought -- and if I could
20 just -- if you would indulge me just to read a quote
21 that I thought summed up a position very well and on
22 some of my thinking well were in the conclusion that
23 they said, "Individuals charged with responsibility
24 similar to those of a judge must conduct themselves
25 in a manner that exhibits fairness. A judge cannot

1 meet with one party alone to discuss an issue of
2 importance if the judge is the final arbiter of that
3 issue. Judges are required to avoid even the
4 appearance of impropriety. Ex parte communication
5 concerning a regulatory function with a
6 representative of a regulated utility not only
7 appears to be improper, it is improper. Moreover,
8 using a third party to receive the prohibited
9 communication does not remove the taint."

10 And this was in the conclusion of that
11 Grand Jury report. You know, I think we can spend a
12 lot of time about how to get there, and I think we
13 should, but I wanted to kind of lay out some
14 overarching points that I think should be seriously
15 considered to try to make -- to improve the
16 Commission. I mean, you have dedicated staff that
17 work hard, you are professionals, there are a lot of
18 things that somebody practicing law in the state of
19 Florida, if you dropped them in here and said try a
20 case, they would kind of scratch their heads and say
21 I'm not sure I understand what's going on here.

22 I mean, you know, the points about staff
23 and the role staff plays. Mr. Kelly, I think, has
24 brought up an intriguing point about staff being
25 separate from advocacy staff, and the first I heard

1 of it was now, and I want to reflect on it a little
2 bit more, but I think it is something that as we
3 have this conversation that we should give some
4 thought to.

5 And I also would indicate that, you know,
6 our firm represents a variety of clients in front of
7 you in different fact situations and in different
8 matters. I see this as an opportunity for
9 practitioners before you. You know, if clients can
10 understand and say, look, this is something that
11 collectively we are trying to make some solid
12 recommendations that make some sense, you know, that
13 we have wide participation from all of those
14 involved to try to constructively come up with some
15 good, sound, solid ideas based on sound thinking and
16 logic and looking at best practices. And, you know,
17 I have some specific suggestions. Maybe as we go
18 through we can have the dialogue, but I wanted to
19 kind of share those overarching thoughts. Thank
20 you.

21 **MS. CIBULA:** Thank you very much. And,
22 again, I would you like to remind people that
23 post-workshop comments will be welcome. So whatever
24 ideas you might hear here and you want to think
25 about a little bit more and submit your comments or

1 responses to those ideas, we would really appreciate
2 that.

3 I think we have probably, you know, at
4 least touched on discussion Point A. Unless someone
5 else has something else they want to add to that, we
6 can probably move to B, or if anyone else has any
7 general comments they'd like to make.

8 **MS. SPENCER:** Good morning. My name is
9 Leslie Spencer. I am with AARP. And I do not sit
10 here this morning and profess to have the technical
11 knowledge nor the expertise that many of the folks
12 or staff here possess. I am here to speak on behalf
13 of consumers, and I had planned to offer some
14 general comments. I have comments that pertain to
15 Part I, and then I can hold off on comments for Part
16 II later on, if that is okay with you.

17 **MS. CIBULA:** That's great. Thanks.

18 **MS. SPENCER:** Okay. In light of the
19 current economic recession that Florida and the
20 nation has been facing, we have heard from many of
21 our members, we have about three million members
22 here in Florida. Many of those individuals are on
23 fixed incomes and they are concerned with rapidly
24 rising costs in all areas of their lives, housing,
25 health care, prescription drugs, et cetera, and

1 utility rates. And they are very concerned about
2 their ability to afford future rate increases.

3 And because most of those members do not
4 have the wherewithal to formally intervene in a
5 contested case in front of this body, it is the
6 process itself that they count on to ensure that
7 they are indeed getting a fair shake.

8 PSC meetings are open to the public. They
9 are held with adequate prior notice and consumers
10 and others who represent the communities affected by
11 your decisions are given the opportunity to
12 participate in the Commission's proceedings. But
13 consumers are outmatched by regulated utilities when
14 it comes to representing their interests at
15 regulatory proceedings at this Commission.

16 The failure of this Commission to
17 sufficiently address ex parte communications places
18 the average ratepayer at a significant disadvantage
19 when it comes to influencing the process of utility
20 regulation. If residential customers lack an equal
21 footing or a real seat at the table in these cases,
22 then the hopes of a fair and equitable decision
23 rests at the very least with a process that is open
24 and subject to public scrutiny and accountability.
25 And that is why AARP is here in support of

1 strengthening the transparency and integrity of the
2 regulatory process here at the PSC.

3 Recent events have placed a dark cloud
4 over the Public Service Commission, eroding public
5 confidence about ethics and accountability in
6 government and the process. Steps taken today and
7 in the future may help restore that confidence. So
8 I would just like to make a couple of general
9 comments about the 1992 Grand Jury report.

10 I do agree with a lot of the comments made
11 by Mr. Kelly and Mr. Moyle regarding some of those
12 recommendations that were made almost 18 years ago.
13 The inclusion of staff in statutory prohibitions
14 regarding ex parte communication, we support that.
15 Although the subject is addressed in rule, there
16 should be consistency between all prohibitions. I
17 don't think you can ever be too clear or too concise
18 about exactly what can and cannot take place between
19 intervenors in a case, staff, and Commissioners.

20 Inclusion of staff in the statutory
21 prohibitions would subject those individuals to the
22 same guidelines and consequences regarding ex parte
23 communication as Commissioners. Penalties for ex
24 parte communication should also include when
25 Commissioners or staff initiate or knowingly and

1 willingly receive ex parte communication. Current
2 statute also fails to address penalties for
3 utilities initiating ex parte communications. It
4 seems that currently those are addressed after the
5 fact, only after the fact.

6 And the inclusion -- we support the
7 inclusion of ex parte restrictions on the rulemaking
8 proceedings. As stated in the 1992 Grand Jury
9 report, rules promulgated by the Commission can have
10 a direct impact on ratemaking and, therefore, should
11 be included in ex parte prohibitions.

12 And finally, increased communication with
13 the Office of Public Counsel. As a representative
14 of Florida's citizens, the Public Counsel should be
15 provided with all information regarding
16 communications between the PSC and regulated
17 utilities. And I will hold further comments until a
18 later time.

19 **MS. CIBULA:** Thank you very much. We
20 really appreciate your comments and you being here
21 today.

22 **MS. SPENCER:** Thank you.

23 **MS. CIBULA:** Anyone else have any general
24 comments?

25 Mr. McGlothlin.

1 **MR. McGLOTHLIN:** Joe McGlothlin with OPC.
2 Yes, I have some comments that don't fall squarely
3 within any one of the subsections in your outline
4 here. And they do relate to the general subject of
5 ex parte communications, but in a way that differs
6 from anything you have heard so far.

7 As we think about the subject of ex parte
8 communications on the merits, I believe there are
9 two responses. The first of which is obviously they
10 ought to be prohibited because on the face it's
11 unfair to other parties. But there is another
12 aspect, too, and the other response should be it is
13 also unnecessary because the Commission provides a
14 full and fair opportunity for a party to say
15 everything the party wants to say in pleadings and
16 in a public hearing.

17 And, so for that reason, I hope that this
18 workshop and this process does not divorce from the
19 consideration of ex parte communications and rules
20 on this subject the related subject of how the
21 Commission does business in public hearings, and are
22 there ways in which the Commission can improve the
23 hearing process and modify it to the extent that it
24 does reflect a full and fair opportunity for a party
25 to say anything and everything on the subject in the

1 context of pleadings and a public hearing.

2 And if there's room to fit some general
3 comments on that into this workshop, I had just
4 three or four observations to make on that subject,
5 if you think it's appropriate.

6 **MS. CIBULA:** Yes, go ahead. Thanks.

7 **MR. McGLOTHLIN:** All right. There are
8 three or four, and by way of quick background, these
9 comments are critical of the existing staff and
10 existing Commissioners, because the Commission has
11 grown into a way of doing things over probably a
12 couple of decades, and it's just the way things are
13 done. But in recent cases, the staff and
14 Commissioners have reflected on suggestions for
15 improvements and have followed through on them.

16 And I have in mind OPC's comments on the
17 way depositions are used or should not be used in
18 hearings, and also improvements in the way the staff
19 provides advanced notice prior to making large
20 documents part of the record. So those are two
21 recent improvements, and I think there are three or
22 four others that should be entertained.

23 Proposition one, the parties opportunity
24 to present evidence does not end with prefiled
25 testimony, and there should be some opportunity to

1 address the Commissioners and the staff from the
2 stand. Currently, and for as long as I can
3 remember, there has been a one-size-fits-all
4 approach to that. And let's take two very extreme
5 examples. One witness has done a depreciation
6 study, has 150 pages of testimony, and as many pages
7 of exhibits, and is preparing to do that from the
8 stand. He is provided five minutes.

9 Let's say another witness says in the last
10 rate case order the Commission required us to do a
11 study on this particular outage and report, and he
12 has ten pages. He has five minutes. And I think
13 one way the process could be improved at the level
14 of the prehearing conference perhaps would be to
15 have each party identify the scope and nature of a
16 witness' testimony and propose a time allotment for
17 that. That could be considered and ruled on by the
18 prehearing officer. And so perhaps five minutes is
19 appropriate for one witness and maybe 20 is
20 appropriate for another. And obviously that's going
21 to increase some time requirements on the direct
22 testimony aspect.

23 But my second observation would have some
24 hope of getting some savings in time on the other
25 side of the coin, which is the cross-examination

1 stage. For a long time the practice has been to say
2 to parties and the witness answer yes and no and
3 then explain. But if you think about it, if a
4 question is framed such that the answer is truly yes
5 or no, there should be no occasion for lengthy
6 explanations beyond that point.

7 I can't prove it, but I have a theory on
8 how that might have been started. And my theory is
9 this: At some point in a case a decade or two
10 decades ago, there was a witness on the stand and a
11 lawyer posed a question that perhaps didn't lend
12 itself to yes or no, but he pushed for that. And
13 the unfairness of that situation was obvious to
14 everybody, and the Chairman might have said, wait a
15 minute, let him explain. And so at that point in
16 time that was a lucid response. But I think over
17 time it has been turned into something else, and
18 that is the opportunity for witnesses to go back to
19 their prefiled testimony and launch into lengthy and
20 repetitive comments that go beyond any legitimate
21 need to explain and are, in effect, anticipatory
22 redirect.

23 And so that does two things, it really
24 gets in the way of the statutory right to
25 cross-examine and it also adds a considerable amount

1 of time to the hearing process. So if upon
2 examination we could come back and we could modify
3 the hearing process such that there is a more
4 realistic opportunity to present the prefiled
5 summaries and then a more careful limitation on the
6 ability of witnesses to interfere with the
7 cross-examination, then perhaps we might have the
8 same time requirement, but allocated more
9 appropriately.

10 The third observation is in the way issues
11 are teed up and incorporated in the prehearing
12 order. Obviously there has to be the exercise of
13 judgment and winnowing through parties' proposed
14 issues. I think over time the pendulum has swung
15 too far in the direction of what everyone calls
16 subsuming issues. The Commission is not in the
17 business of prohibiting issues from being addressed.
18 There is, of course, a need to avoid duplication of
19 issues. There is a need to identify issues that
20 simply are inappropriate to be brought in a
21 particular proceeding, and where there is a dispute
22 there is a need to rule on contesting formulations
23 of the issues.

24 But, too often, in my opinion, the
25 direction has been too far in the idea of let's pare

1 down and see how few issues we can have. And there
2 comes a point at which that has some due process
3 implications, and I think as a perhaps overall
4 directive, the Commissioners and staff could review
5 that and have a different objective in mind. Those
6 are my thoughts. Thank you.

7 **MS. CIBULA:** Thank you very much. Anyone
8 else have any?

9 **MR. DEVLIN:** It is more of a comment to
10 Joe. I appreciate your acknowledgment that we do
11 try to work with the parties on the deposition issue
12 and the -- I forget, what did we call that, the
13 composite exhibit issue. And then your three other
14 points, I think they are well taken. I just have
15 one comment on the yes/no answers, because from time
16 to time I have been a witness and sometimes it is
17 just not easy to have a yes or no answer. Sometimes
18 you have a qualification along with your yes or no
19 answer, but I understand where you are coming from.
20 Sometimes we do permit witnesses to elaborate to the
21 point where they are reinforcing points already made
22 or bringing in new points, so I appreciate the
23 points.

24 **MR. McGLATHLIN:** Thanks.

25 **MS. CIBULA:** Any other general comments

1 anyone would like to make? Well, I think we have
2 covered probably Point A unless somebody else has
3 anything additional they want to add. We will move
4 to --

5 **MR. MOYLE:** I have, I think, something on
6 A.

7 **MS. CIBULA:** Okay.

8 **MR. MOYLE:** And you are going off your
9 agenda on Point A?

10 **MS. CIBULA:** Yes.

11 **MR. MOYLE:** I guess -- and this is
12 somewhat into the weeds a little bit, but I wanted
13 to understand it. That first question you say does
14 Subsection 5 of Rule 25-22.033, which prohibits
15 employees from directly or indirectly relaying to a
16 Commissioner any ex parte communication. Does it
17 address the issue, right?

18 **MS. CIBULA:** Correct.

19 **MR. MOYLE:** And I guess part of what I
20 think has been problematic is that some of these
21 interpretations are done by -- well, you know, a
22 representative of Company X interprets this to say,
23 well, look, it doesn't apply because of this reason.
24 Like the NARUC conference example, and there is not
25 a real firm yes, it does; no, it doesn't. And so if

1 there is communications with a Commissioner or a
2 staff member and they go, okay, I see what your
3 point is and how you are interpreting that. Let's
4 have the conversation. You know, people aren't
5 aware that that conversation has taken place if that
6 is the interpretation.

7 I think that the way that the rule is
8 crafted, you know, and I don't know whether this is
9 being done or not, but I think you could argue that,
10 you know, the rule references that no Commission
11 employee shall have a communication which would
12 otherwise be a prohibited ex parte communication
13 under 350.042, okay. But if you read 350.042, it
14 says the provisions of this subsection do not apply
15 to Commission staff. So, in my reading of it, I
16 think it is arguably circular in that you are
17 referencing a statute, so you can't have a
18 communication, but -- and maybe it's a strained
19 reading. I mean, I think the intent is don't have
20 the ex parte communication. But when you reference
21 the statute, you know, the statute clearly by its
22 terms say that the provisions do not apply to
23 Commission staff. So I wanted to bring that point
24 up.

25 **MS. CIBULA:** Okay. Thank you. That is

1 something we will look at.

2 **MR. MOYLE:** And then I guess the other
3 point on that Number 5 that I wanted to bring up --

4 **MS. CIBULA:** Uh-huh.

5 **MR. MOYLE:** -- the current rule says
6 nothing in this subsection shall preclude
7 nontestifying advisory staff members from discussing
8 the merits of the pending case with a Commissioner
9 provided the communication is not otherwise
10 prohibited by law. I think this goes to the point
11 that Mr. Kelly raised, Public Counsel, that it is
12 probably not good. I mean, he is talking about the
13 demarcation between advisory staff and other staff.

14 To the extent that you are looking at
15 revising this rule, I think you could head in the
16 right direction by also suggesting that staff who
17 has had substantive conversations with a party to a
18 docket should not engage in any communication with a
19 Commissioner. So if you had staff that had
20 substantive conversations with a party in a
21 nonpublicly noticed meeting, that that would knock
22 the staff out from having communications with a
23 Commissioner.

24 Because, again, the notion is if you don't
25 want ex parte, you know, you shouldn't want it

1 directly or indirectly. And this is a way to kind
2 of get at it indirectly so that if a party had a
3 substantive conversation with staff, then that staff
4 would be knocked out of subsequently having
5 substantive conversations with a Commissioner.

6 And it would also send up a big red flag
7 if somebody started heading down that road, staff
8 would say, look, you know, I can't have a
9 substantive conversation with you, because it would
10 preclude me from having a follow-up substantive
11 conversation with a Commissioner.

12 **MS. CIBULA:** Any other additional
13 comments?

14 Commissioner Skop.

15 **COMMISSIONER SKOP:** Thank you. I just
16 wanted to briefly touch a point -- upon some of the
17 few points that have been made this morning. I
18 think that the Commission has been under a lot of
19 scrutiny as of late, and rightfully so. Again, as
20 Mr. Moyle and others have pointed out, that some of
21 the same situations are systemic and continue to
22 occur every five or ten years. You know, part of
23 that, as the Executive Director, I think, recently
24 alluded to, some would argue that that is due to any
25 major case pending before the Commission.

1 I do not subscribe to that. Again, I do
2 not agree with the Executive Director's position on
3 that. I think that these problems recur, as some of
4 the intervenors or participants in this morning's
5 panel have alluded to, and I think that in light of
6 that, the 1992 Grand Jury report and the findings in
7 that report, as I have often said, are written as
8 they were written for this very situation that we
9 find ourselves in today.

10 I think that the '92 Grand Jury report
11 findings that were prepared by Ms. Hines as amended
12 to address recent changes in technology provides the
13 framework to prevent recurrence of these same type
14 of problems from happening again. And I think that
15 those findings, although they were not codified
16 previously, or adopted by the Legislature, again,
17 provide for limiting ex parte communications to
18 Commissioners and their direct reporting staff, as
19 well as providing penalties for those that initiate
20 ex parte communications or choose to initiate ex
21 parte communications.

22 Also, I think briefly in brief response to
23 Mr. Moyle's comment about the ex parte rules
24 themselves and how, you know, it's very easy to
25 gloss over those rules to attain a desired result

1 that, you know, does not fall within the ex parte
2 prohibition. You know, recently the Commission has
3 dealt with a situation like that, and, you know, no
4 matter how one would want to gloss over a 350
5 analysis on that matter, such communications are
6 prejudicial to the party irrespective of what the
7 communications may be because other parties are not
8 privy to them. It is a straight ex parte definition
9 out of Black's Law Dictionary.

10 So, again, strengthening the ex parte
11 rules to prevent some of the things that I have
12 observed happen, that others have observed happen,
13 again, ensures that the parties to the proceeding
14 are not prejudiced and that the integrity of the
15 quasi-judicial role that the Commission plays is
16 upheld. Again, those are two very important
17 aspects. So I agree with Mr. Moyle in terms of the
18 existing wiggle room under the way that ex parte is
19 defined as it pertains to the Commission. One can
20 merely just say they weren't having a discussion on
21 the merits and that suffices to avoid any appearance
22 of impropriety, but notwithstanding, you know, the
23 fact that the discussion was held. And, again,
24 discussions of that nature clearly are prejudicial
25 to the parties that are not privy to those

1 discussions as well as undermining the integrity of
2 the process that the Commission plays.

3 So I think briefly taking a critical look
4 at the ex parte rules themselves are in order, as
5 well as those '92 Grand Jury findings. And to Mr.
6 Kelly's point about having trial staff and advocacy
7 staff, I guess that is something I have not really
8 considered. I know it has been used in the past,
9 and I am just trying to gain a better perspective
10 and it would be interesting to read the comments as
11 to how that would avoid, if at all, some of the ex
12 parte concerns that may exist. Again, advocacy
13 staff would be able to have those contacts whereas
14 the trial staff, apparently from what I heard, would
15 not.

16 So, again, it would be interesting to read
17 any comments in relation to that to see how that
18 might be readily implemented. But I just think it
19 is a -- as a general framework, though, I tend to
20 agree with Mr. Moyle's concern that the '92 Grand
21 Jury findings provide that framework for moving
22 forward either at the Commission level or at the
23 legislative level. But I think implementing those
24 findings, which are, I think, very well put together
25 would go a long way towards addressing the

1 recurrence of some of the systemic problems that
2 continue to appear at the Commission over the last
3 decades or so. So, thank you.

4 **MS. CIBULA:** Thank you, Commissioner Skop.
5 Chairman Carter.

6 **CHAIRMAN CARTER:** I was upstairs watching
7 this, and you guys look smaller on TV. I think that
8 Commissioner McMurrin had some very valid points
9 when she was saying in the context of discussion,
10 any discussion should be in writing and be available
11 to all the parties. I think that's a fundamental
12 perspective, and probably a way that everyone will
13 feel that there is no -- I mean, obviously if you
14 were in a legal perspective, if you have a client
15 and you go before the judge, whatever you present
16 before the judge he's going to say did you serve the
17 other party first. And I think that will take care
18 of a lot of the process of people perceive an ex
19 parte communication where one way not exist. So you
20 take that issue away.

21 Secondly, the context of the '92 Grand
22 Jury, I think that it's important for the
23 Legislature, if they feel strongly about it, to do
24 something about it. Implement some of those.
25 Because a lot of what we are talking about in terms

1 of our rules and our procedures, we have gone to a
2 level that I think that we're probably at the outer
3 edges of our legislative authority on that. But I
4 do believe that if the Legislature wants to go
5 further, then they need to step up and say we
6 specifically want you to do A, B, C, and D, and then
7 everyone will be on the same wavelength. The
8 parties can say, well, we know now, based upon what
9 the Legislature said, that we are going to get a
10 fair hearing based upon these perspectives here.

11 Secondly, the Legislature will be able to
12 say, well, we didn't -- sometimes there are cases
13 that are of such magnitude here where one legislator
14 may have an interest in it as opposed to the
15 Legislature itself. And one legislator may have a
16 perspective on an issue that was not the
17 prevailing -- let me see how to say that
18 diplomatically -- it didn't find itself in law.

19 So a lot of times we in the Commission --
20 and I am just kind of going to tell it the way it
21 really is, because sometimes we dance around issues,
22 but we don't want to fess up to them. Sometimes we,
23 as Commissioners, are in a process of where we don't
24 want to be disrespectful of a specific legislator,
25 but we do have rules and processes and we have the

1 law that we have to follow.

2 So I think that the Legislature has the
3 results of the '92 Grand Jury. They have the
4 process that has gone on, even before this current
5 iteration of Commissioners, and even when the next
6 iteration of Commissioners come on. And I do think
7 fundamentally is that when the perception of ex
8 parte communication can be eviscerated in a moment
9 if we just can follow what Commissioner McMurrian
10 said. Hey, everybody, any contact you have with the
11 company, put it in writing and put it in the file.

12 And most of you know me. Anytime I've got
13 a communication, even from a legislator or a
14 constituent about any matter whatsoever, I put it in
15 the file so everyone can be abreast of it and they
16 can respond to it.

17 I think that we don't want to throw the
18 baby out with the bathwater. We want to do what's
19 right. We want to do what we should be doing. We
20 want to stay within the four corners of the law, but
21 by the same token is that in the process of yelling
22 and screaming we need to step back and say, okay,
23 what do we really need to do here? What is the
24 problem? Do we burn the house down to get the kid
25 to clean up his room, or do we just discipline the

1 child and say you need to clean your room?

2 So I think that there are some good things
3 in that Grand Jury and there are some things that
4 will require legislative action. And I think that
5 in the fact that 2010 is an election year, we may
6 get more than we bargained for. But I do think that
7 as a fundamental step, and we can do that ourselves,
8 is that everything that we do, put it in writing.
9 If I talk to Mr. Kelly about an issue pertaining to
10 us, put it in writing. If I talk to Mr. Moyle about
11 an issue pertaining to a case before us, put it in
12 riding. Then everyone will have that.

13 And I think that there are times, even
14 though we have ex parte rules, there are times when
15 parties do have a legitimate concern. For an
16 example, in our last iteration of cases, one of the
17 parties said, well, we have got a witness that's
18 traveling from another state. Do you mind if we
19 take our witness out of order? I don't think that
20 is ex parte. I think that is being accommodating to
21 the parties, because you have a witness sometimes
22 that is coming from Connecticut. You may have one
23 coming in from New York. And, of course,
24 Tallahassee is the place that you just can't get
25 there from here, so we have those kind of concerns.

1 And I think that those are legitimate kinds of
2 things that happen in the course of a hearing and a
3 process like that.

4 And I think that we should continue to do
5 that. And sometimes -- I know that in one case we
6 had that one of the witnesses became ill, and you
7 don't want to start saying, well, he has got this,
8 or he has got that. In that process you want to at
9 least be able to say, well, we can move him out of
10 order, or if we don't think he's going to recover,
11 we can use someone else.

12 I know I had a trial once down in -- I
13 want to say in Kissimmee with Judge Frank Haney
14 (phonetic), and one of my witnesses had a -- I was
15 trying an eminent domain case, and my witness was
16 the economist. As you know we were talking about
17 business damages and all like that. The guy had --
18 it was either measles or chickenpox or something
19 like that. And I'm saying adults don't get those
20 diseases, but he got it, and it was a four-day
21 trial, and I didn't have a witness to put on for my
22 business damages. In essence, to refute the
23 business damages that were asked for by the other
24 party.

25 And what we did was we ended up getting

1 his assistant from the office that had worked with
2 him on the case, and then we had to go through the
3 process of qualifying him and all like that. But
4 the judge allowed us that, and the parties had an
5 opportunity to cross-examine the witness and examine
6 him based upon his experiences and things of that
7 nature.

8 So I think that in the context of saying
9 we want to do all of these great wonderful sounding
10 things, we do need to keep focused on the fact that
11 we have to have a process that's fair to all the
12 parties; fair to the consumers, fair to the
13 companies, and fair to the intervenors, and also
14 something that has a foundation in law. And I think
15 as long as we do that then we will would be fine if
16 we do that. Thank you.

17 **MS. CIBULA:** Thank you, Chairman Carter.

18 Any other general comments, or any more
19 comments on Part A?

20 **MR. MOYLE:** Can I just make one
21 overarching comment. I mean, I agree. I mean, if
22 we are talking about Thanksgiving, or a witness -- I
23 mean, I think lawyers understand the distinction
24 between that type of a discussion and one about
25 depreciation or a substantive issue in the case.

1 But the whole notion, if you look at matters that
2 are decided in other tribunals, I mean, a lot of
3 times issues are raised through pleadings. And I
4 really don't think that there should be much
5 occasion to have communications with a judge or a
6 trier of fact about a substantive matter, whether
7 it's in writing or not. It ought to be done at a
8 prehearing conference, or at a -- you know, in open
9 court, or in an open hearing. And I think --

10 **CHAIRMAN CARTER:** I agree 1,000 percent
11 with you, Mr. Moyle, because it bears on the outcome
12 of the case. My point -- and that's why I used
13 those examples. My point is that the only reason
14 that I would talk to a person would be something as
15 you do in a court case. The witness can't show up,
16 someone got sick, or I remember one time we had the
17 court reporter had to drop her daughter off to
18 school and then her car wouldn't start, so we had to
19 scramble to get another court reporter. So those
20 kinds of things are legitimate.

21 I don't think that anybody -- because you
22 cheapen and demean the process if you talk to any
23 party about anything that's pertinent, even
24 collaterally related to a pertinent issue in the
25 case. So that's why my examples were based upon

1 those kinds of things. I think those are fine, but
2 it has any bearing whatsoever on the case, or
3 anything about the case, I would say no, we
4 shouldn't talk about that at all.

5 **MS. CIBULA:** Mr. Beck.

6 **MR. BECK:** Yes, thank you.

7 Mr. Chairman, I agree with all the
8 communications necessary in the circumstances you
9 raised. I would like to throw out, again, in the
10 sense of brainstorming a notion that perhaps they
11 should do away with the procedural exception to the
12 ex parte statute.

13 In all the instances you cited, I don't
14 think anybody has a problem with the communication,
15 but the issue isn't the communication, it's whether
16 it has to be ex parte or not. And I think in the
17 instances you gave notice could be given to the
18 opposing party just as easily.

19 It seems to me that the question of
20 whether an issue is on the merits or procedural can
21 get murky at times, and the easiest way to deal with
22 that is do away with the distinction and let those
23 communications go forward in the instances you had,
24 but notice be given to the other parties, as well.

25 **CHAIRMAN CARTER:** Excuse me. I don't

1 mind -- I was watching from upstairs, and I was
2 saying maybe I should go down and just kind of chat
3 with you all just ever so briefly. But I think that
4 sometimes -- and, Mr. Beck, you are probably being
5 diplomatic, but sometimes parties will use the
6 procedural to say something that is really not
7 procedural. They will say, well, I just have a
8 procedural question that really isn't a procedural
9 question.

10 And I think you are right, when people do
11 that you have got to say, look, no, that is going to
12 the case there. That is not procedural. For an
13 example, let's say that we have the case set for the
14 16th, and a person asked under the guise of a
15 procedural can we change the date of the case. That
16 is not procedural, you know, because you've got your
17 witnesses already lined up to be here at a certain
18 day, a certain time. You have already got your
19 staff lined up to be here at a certain day, certain
20 time. Notice has gone out. All the parties and
21 everyone under the auspices know that this is there,
22 but for whatever reason one party may want to try to
23 second guess or subvert the process. That is not
24 procedural. Even though you would think something
25 like a date would be procedural, but I don't think

1 it is, because it goes to the merits. And I agree
2 with you on that. And I know that you are being
3 diplomatic, but some people do use the guise of a
4 procedural question to get into the merits of a
5 case.

6 **COMMISSIONER SKOP:** And, Mr. Beck, to your
7 point, too, I also believe that the inherent wiggle
8 room in terms of how ex parte is not really defined
9 and it speaks to the merits causes some problems in
10 that regard. I think that if you simply were to
11 strike some words within 350 as it pertains to the
12 limitations of ex parte and just refer to it as ex
13 parte communication, I think that gives a more
14 straightforward meaning to it. It's having a
15 conversation with one party without the others
16 present.

17 And, again, I think that's, you know,
18 problematic to do that to the extent that, again, it
19 is prejudicial to the parties, or perhaps
20 prejudicial to the parties in having that type of
21 discussion with one party undermines the integrity
22 of the quasi-judicial role that the Commission is
23 called upon to perform. So I am in full support of
24 tightening that language to get rid of the
25 ambiguities and better define what responsibilities

1 that the Commissioners and/or their aides, if it's
2 applied to that, are to be held to.

3 **MS. CIBULA:** Thank you. We will move to
4 Point B. And I think Ms. Spencer already raised
5 this, and the issue is the penalties for violation
6 of Section 350.042(6), Florida Statutes, which
7 requires Commissioners to report receiving ex parte
8 communications are insufficient or nonexistent
9 because the section does not address Commissioners
10 initiating or knowingly and willingly receiving ex
11 parte communication, nor utilities initiating ex
12 parte communications.

13 The discussion points are since the
14 interim report, Section 350.042(7)(b), Florida
15 Statutes, was amended to address Commissioner
16 violations of ex parte restrictions, does the
17 current statute sufficiently address the issue
18 raised by the Grand Jury.

19 Section 350.042(7)(d), Florida Statutes,
20 was amended to address other persons who violate ex
21 parte restrictions. Does the current statute
22 sufficiently address the issue raised by the Grand
23 Jury.

24 And, finally, on Page 4 of the interim
25 report the Grand Jury sets forth recommended

1 penalties for a utility's violation of ex parte
2 prohibitions. Does the Commission have the
3 statutory authority to implement rules to impose
4 fines on a utility for ex parte violations.

5 Any comments in regard to those discussion
6 points?

7 **CHAIRMAN CARTER:** I think we had some
8 discussion at one of our Internal Affairs. It may
9 have been just someone probably passed it off as a
10 throw-away line or something like that, but I do
11 distinctly remember that at one of our Internal
12 Affairs as we were talking about this issue
13 generically is that the question was raised that
14 while there are penalties involved for
15 Commissioners, but what kind of penalties are there
16 for companies that would violate it, and what would
17 be the process of doing that. And I think we talked
18 about it just ever so briefly, but we didn't go any
19 further on that.

20 And I would be interested to hear what the
21 intervenors and the parties would have to say about
22 that, because I think that everyone should feel like
23 they are getting a fair shake, the companies, the
24 intervenors. And some the intervenors that we have
25 are not necessarily represented by counsel. Some of

1 them are pro se. And I think that from the
2 standpoint of fairness, if they feel and they know
3 that there has been a violation by one of the
4 parties, or some of the parties, or a party, what
5 kind of redress would they have. And stepping back
6 for a moment from the context of a pro se person or
7 consumer, if they don't have the financial
8 wherewithal to implement this process, what kind
9 of -- I'm saying what kind of provisions are there
10 for them?

11 And we kind of talked about it only from
12 the standpoint to where there was violations and
13 penalties for Commissioners, but none for companies
14 and all. So I was taking it a step further, because
15 I know that on a number of the cases that we have
16 had before us we have had not only people
17 represented by attorneys, but we had individuals,
18 mom and dads representing themselves. I would be
19 interested to hear what you guys have to say about
20 that.

21 **MR. MOYLE:** I will take a shot at it in
22 kind of an informal conversation. I guess the first
23 point that was raised is is there authority to
24 sanction a utility if there was a violation. And
25 having not dug into it, but my understanding is that

1 the Commission has some broad-based authority over
2 companies that they regulate and that the companies
3 should comply with all the rules of the Commission.
4 And if they don't, then there is some power within
5 the Commission to take some action against them.

6 So I would think whether it is a rule
7 related to a type of service or some other thing,
8 you know, you expect your rules to be followed. I
9 think that a similar analysis could be applied with
10 respect to ex parte. If it were violated, you
11 probably would have some ability to sanction a
12 company that violated it.

13 You know, in thinking about it, you know,
14 what if an intervenor made the violation? Well,
15 typically, they are not regulated. You know, I
16 don't know that it would be symmetrical in the
17 ability to take some action. You know, typically
18 from a lawyer's standpoint, if you were accused of
19 an ex parte violation, you know, reputations are
20 very important and you would not want to have such
21 an accusation made. And, I think, typically in a
22 judicial proceeding that that would be a serious
23 thing if the conversation even came up if you were
24 accused of that.

25 The point you raised about parties that

1 are not represented, it's sort of a pro se point,
2 and, you know, I think -- again, I think clarity is
3 really what is needed in that they may charge for it
4 and blunder into something, but if you are on the
5 receiving end, you know, I think then it's incumbent
6 upon the receiver to say, listen, we have some
7 pretty clear rules on this. And I understand you
8 are not familiar with the process; I can't talk with
9 you substantively about the matter, but what you can
10 do is talk to Public Counsel, or maybe you can send
11 them in the right direction. That is maybe one way
12 to deal with it.

13 Obviously judgment has to be applied, and
14 if it was an ex parte communication with somebody
15 who had never been in front of the Commission and
16 didn't understand it, was trying to just get a
17 handle on it, it probably wouldn't be appropriate to
18 take further action than getting them in the right
19 direction.

20 **MS. CIBULA:** Thank you. Commissioner
21 Skop.

22 **COMMISSIONER SKOP:** Thank you.

23 And to that point, Chairman Carter, again,
24 I think that in Section III of the '92 Grand Jury
25 report for the legislative recommendations,

1 Section C provided for some penalties as they
2 pertain to the utilities that would engage in such
3 communication. I think that, you know, adopting
4 those as part of the '92 Grand Jury findings, again,
5 would have a deterrent effect towards utilities
6 wanting to engage in that, or violating those
7 prohibitions to the extent that it would have some
8 real financial impact should it ultimately be
9 determined that ex parte communication had, indeed,
10 occurred. The utilities would be financially liable
11 as it was recommended to the Legislature within the
12 Grand Jury findings.

13 So, again, at least from my perspective,
14 again, there has been a lot of discussion on that,
15 but at least those findings as a whole seem to
16 provide, again, a good framework or a starting point
17 for looking at what was previously done which is
18 readily applicable to the situation we find
19 ourselves in today. Just amending those, again, to
20 include the changes or advances in technology, and I
21 think that you have a good starting point for the
22 Commission to take a look at either changing its
23 internal rules and policies or having the
24 Legislature just codify the proposed findings into
25 law.

1 And I think that once it is enacted into
2 law, it serves a clear reference for what the
3 conduct of the respective parties should be. So,
4 again, I think that it was amazing to read that for
5 the first time. Like Mr. Moyle said, 19 years later
6 you are looking at a document that looks like it was
7 written last night. And it was very well done and
8 very well put together. And, again, I think
9 Ms. Hines and her team did an excellent job on that.
10 And, again, I think it should not go without
11 recognition of the quality of that product and how
12 it could be, again, just enacted today if that was
13 the will and the intent of the Legislature to do so.
14 Thank you.

15 **CHAIRMAN CARTER:** I think that Mr. Moyle
16 also raises a good point in terms of symmetrical,
17 because what is good for the goose is good for the
18 gander. If you have got penalties for companies
19 that violate the ex parte rule then you should have
20 penalties for the parties. It should be -- and that
21 way you have a level playing field. That's why I
22 like the perspective -- you remember when we went
23 down this road, Commissioner, you said that we
24 should probably function more like judges and all.
25 And I think that the judicial process does give us a

1 good framework for that, because regardless if you
2 are representing a plaintiff or the defendant the
3 rules apply to both sides.

4 And I think that in the context of this as
5 we are going forward, and I don't have any great
6 insight in terms of what the Legislature will do or
7 won't do, but I do think that it should be a
8 symmetrical process to where it's fair and balanced.
9 And so I would think that in the context of doing
10 that, particularly in -- and I know it may seem like
11 I'm making much adieu about nothing, but we do
12 have -- on most of these cases we have, we generally
13 have someone that has never been before the
14 Commission before, and they say, hey, I want to
15 represent myself because I don't have lawyer. I
16 just -- and people are entitled. I mean, that's a
17 good thing about our country is that we do allow for
18 individuals to have a right to be heard.

19 And in that context, if a person who has
20 not practiced before the Commission before, but has
21 an issue with one of the items out there and they
22 are doing that, I think it's incumbent upon us as
23 parties, just as in a court case, if one of -- if I
24 have some information pertaining to the case that --
25 it may be damaging to my client, but the judicial

1 process requires me to disclose that.

2 So I think that as we go down this road in
3 whatever recommendations we make we should make them
4 fair and balanced for both sides. And, also, with
5 the understanding that there may be some
6 opportunities to where we don't put the same
7 standards on a pro se person as we do on the
8 lawyers, but do provide some kind of leeway for them
9 in that context.

10 **COMMISSIONER SKOP:** And, Mr. Chair, I
11 think you raise an excellent point. Again, it
12 should be a level playing field. And, again, there
13 needs to be a distinction made between those that
14 may be more sophisticated and pro se litigants.
15 But, again, the remedy needs to be equally applied
16 across the board so that one party is not more
17 adversely affected or has more of a deterrent than
18 another party who can get away scot-free with it.
19 So, again, I think that is an important
20 consideration, and thank you for raising that.

21 **MS. CIBULA:** Thank you. Any additional
22 comments? Before we move to Point B, I'm going to
23 take a quick five-minute break for the court
24 reporter. So I guess we'll be back here about
25 11:15.

1 (Recess.)

2 **MS. CIBULA:** Okay, everyone, let's get
3 started again.

4 And just as a housekeeping matter, we'll
5 probably take a break around noon-ish for lunch, and
6 then take about an hour and 15 minutes and then
7 re-adjourn.

8 And I guess we can move now to Point C,
9 which is "There needs to be ex parte restrictions on
10 rulemaking proceedings." And the discussion points
11 are "Should there be ex parte communications
12 restrictions in rulemaking proceedings," and this
13 overlaps into Part II of our workshop agenda, and
14 also "Would restricting ex parte communications in
15 rulemaking proceedings require a statutory change?"

16 Mr. Moyle.

17 **MR. MOYLE:** I'll suggest that I think
18 that, that the answer to the second question is do
19 you need a statutory change is probably yes, given
20 that 350.042 has language that says that ex parte, I
21 interpret it to say, doesn't apply to proceedings
22 under 120.54, which is the rulemaking statute. So I
23 think, you know, currently the basis for ex parte
24 not applying to rulemaking in the declaratory
25 statements is statutory. So if you were going to

1 change that, I think you would need a statutory
2 change. I mean, you could probably adopt a rule,
3 but obviously the statute would trump over the rule.

4 The policy question as to should, should
5 it be prohibited, you know, I think that's fairly
6 debatable. But I would -- I think you probably
7 should come down on the side suggested by Public
8 Counsel, Mr. Kelly, which is to, to not allow it for
9 the point I think that was raised by Chairman Carter
10 and others about a slippery slope. Because if you
11 start having, you know, a whole bunch of, well, you
12 can have an ex parte communication A, B and C but
13 not D, E and F, you know, then where do you draw the
14 lines on some of those things? And so a rulemaking,
15 you know, may slip over into something that, that is
16 also the subject of a pending docket.

17 And I think, I think the objective ought
18 to be to establish clear rules and a clear line.
19 And if that becomes sort of the guiding principle,
20 you know, even though I would think there's probably
21 some arguments as to why it could be permitted to
22 have ex parte, you know, I think given the Grand
23 Jury '92 report and the fact that we're having this
24 discussion today would suggest you need a more
25 distinct, firm, clear line and you probably ought

1 not to, not to allow an exception.

2 **MS. CIBULA:** Any other comments?

3 I guess we can move to Point D. "There is
4 insufficient communication with the Office of Public
5 Counsel." And the discussion points under that are
6 "Section 120.525, *Florida Statutes*, requires all
7 notices of public hearings, meetings and workshops
8 to be published in the *Florida Administrative Weekly*
9 and on the agency's website not less than seven days
10 before the event. Does this section provide
11 sufficient notice of meetings, hearings and
12 workshops to the Office of Public Counsel and the
13 public?"

14 Also, "On Page 3 of the Interim Report,
15 the Grand Jury recommends statutory changes to
16 notify the Office of Public Counsel of meetings,
17 written correspondence, et cetera. Does Rule
18 25-22.033, *Florida Administrative Code*, address
19 these recommendations? If not, what additional
20 procedures should the Commission consider
21 implementing?" And that also could go into Part
22 II of the workshop.

23 There is currently -- and that's the two
24 discussion points under that section. Any comments
25 on those two?

1 **MR. KELLY:** I'll just repeat what I had
2 said earlier. I think that, that to the extent we
3 can use the website and make it maybe a little more
4 user-friendly and maybe put some links on the home
5 page that might be more easily understood by the, by
6 a ratepayer that doesn't live in Tallahassee and
7 doesn't, is not involved in this process every day I
8 think would help address those issues.

9 **MS. CIBULA:** Any additional comments?

10 **MS. SALAK:** Mr. Kelly, in your experience
11 has there ever been something that you weren't aware
12 of, since you're the Office of Public Counsel, is
13 there something that we've failed to notice or
14 failed that, or something we should be noticing that
15 you don't think we are?

16 **MR. KELLY:** Not that I'm aware of, but I
17 wouldn't know if there was something I didn't know
18 about. Sorry.

19 (Laughter.)

20 **MS. SALAK:** Very funny.

21 **MR. KELLY:** No. I, I -- to my knowledge
22 none of my staff have come to me with that situation
23 I can remember.

24 **MS. SALAK:** Okay.

25 **MS. CIBULA:** Point E, it really doesn't

1 have to do with ex parte communications, but it was
2 in the Grand Jury report, and it was "There is
3 currently no statutory provision requiring
4 Commissioners to rule on confidentiality issues in a
5 timely manner."

6 And the discussion points are "Is the
7 Commission's current rule on Confidential
8 Information, Rule 25-22.006, *Florida Administrative*
9 *Code*, sufficient to address requests for
10 confidential classification of documents?" And
11 also, "If not, should the Commission initiate
12 rulemaking to explore whether changes need to be
13 made to this rule?"

14 **MR. KELLY:** I'll just add that I think it
15 might be wise to put a specific time in there. And
16 I don't have a suggestion today, but I think it
17 might be a good idea and then, then everyone knows.
18 Again, it's -- you're not debating what's reasonable
19 and what is not, so.

20 **MR. MOYLE:** I would, I would echo that
21 point and just relate -- these are kind of similar
22 to the comments that Mr. McGlothlin made earlier
23 about ways in which the practice can be improved.
24 When you're at hearing it's often awkward and
25 cumbersome to deal with confidential exhibits. I

1 mean, it can be done, you know, please refer to Line
2 32 and you can't reveal the confidential
3 information.

4 I think to the extent that decisions on
5 confidentiality can be made sooner rather than later
6 so that you're, you're, you know, you have a clear
7 understanding at hearing what's confidential and
8 what's not confidential, that that would improve the
9 process.

10 I know in some of the recent hearings that
11 we've had we've had documents that have kind of come
12 in late and a claim for confidentiality, you know,
13 is made, but then the rule provides that, that you
14 have, I don't remember how many days, but 21 days or
15 some period of time to file I think the substantive
16 reasons why you claim confidentiality. And in, in
17 practice, you know, the hearing is over by the time,
18 you know, the follow-up documents are filed. And
19 that happened in some recent cases, so you end up
20 treating the document as confidential the whole time
21 without a clear indication.

22 It would be a lot easier if that
23 determination could be made in advance of the
24 hearing so you clearly know, hey, it is confidential
25 or it's not confidential. And there's give and take

1 on that. I understand things will come up and you
2 want to give people a fair opportunity to claim
3 confidentiality, but I think the process would be
4 better if we could figure out a way to get those
5 determinations made sooner rather than later.

6 **MS. CIBULA:** Any additional comments?

7 I guess we can move to Part II of the
8 workshop, unless there's anyone that wants to make
9 any last general comments on Part I of the workshop.

10 **MR. MOYLE:** One, one comment, if I could.

11 And I just want to make clear, you know, our firm
12 represents a variety of interests in here. My
13 comments today are, are given by me as a lawyer
14 practicing before the Commission and are not, not
15 those of a, of a client. I just wanted to make that
16 point clear.

17 **MS. CIBULA:** Okay. In Part II of this
18 workshop we are seeking comment on Commission Rule
19 25-22.033. This rule applies to communications
20 between Commission employees and parties. This rule
21 is made up of five subsections. Subsection (1) of
22 the rule sets forth the Commission matters that are
23 exempt from the rule. The exemptions are set forth
24 in discussion Point D of Part II of the agenda.

25 Subsection (2) of the rule requires that

1 notice of any written communications must be
2 transmitted to all parties at the same time.

3 Subsection (3) of the rule requires that
4 all parties to proceedings be given reasonable
5 notice of any scheduled meetings and conference
6 calls involving three or more persons.

7 Subsection (4) of the rule allows any
8 party to a proceeding to prepare a written response
9 to communications between Commission employees and
10 another party. This rule also requires that the
11 response be transmitted to all parties.

12 Subsection (5) of the rule prohibits
13 Commission employees from directly or indirectly
14 relaying ex parte communications to a Commissioner.
15 The rule states that it does not prohibit
16 non-testifying staff from discussing the merits of a
17 pending case with a Commissioner.

18 In Part II of the agenda we have set forth
19 seven discussion points in regard to the rule. Like
20 in Part I, we are planning to go through the agenda
21 section by section. Are there any questions before
22 we start?

23 Seeing no questions, we'll start on
24 discussion Point A, which is "Can and should the
25 rule be amended to apply to Commissioners? If so,

1 how should the rule be amended to apply to
2 Commissioners?"

3 **MS. SPENCER:** Speaking on behalf of AARP,
4 I think I would, we would support the inclusion that
5 it apply to Commissioners and probably for the same
6 reasons that I mentioned earlier, so that there is
7 some consistency between what is in statute and what
8 is in rule. Because in looking at this, from
9 someone who is not as well versed in the process,
10 there seems to be a lack of consistency and
11 clarification between what applies to Commissioners,
12 what applies to staff, and then that consistency
13 between statute and rule. So that would be our
14 recommendation.

15 **MR. MOYLE:** I think again, a point of
16 clarity, I mean the statute addresses ex parte
17 communications with a Commissioner. I think even if
18 you state it, state it twice, it would probably be
19 helpful to have it clearly stated that Commissioners
20 shall not engage in ex parte communications with
21 parties on docketed matters, you know, in terms of
22 the merits of the, of the matter.

23 **MS. CIBULA:** Any additional comments?

24 I guess we'll move to Point B, "Should the
25 rule be amended to specifically address Commissioner

1 aides, advisors? If so, should the rule
2 differentiate between Commissioner advisors and
3 Commission staff?"

4 **MR. MOYLE:** I would suggest that the rule
5 should apply to the Commission advisors. I mean,
6 that was the point in the general comments about
7 just tell us what the rules are. I mean, if, if a
8 recommendation comes out and it's fair game for
9 everybody to go talk to the advisors, then I think
10 you need to say that. If it's not fair game and you
11 don't want to do it, then I think you need to
12 clearly say that. I think the better practice is
13 not to do it, but, but it needs to be clear so that
14 everybody is playing by the same set of rules.

15 The question about Commission staff I
16 think is a bit of a harder one because there is
17 interaction that has to take place. But, you know,
18 for the notion of setting clear boundaries and clear
19 lines, I would think you might want to lean in the
20 direction of, you know, of not.

21 And I guess a thought I had, and this is
22 kind of an informal discussion, but in reading the,
23 you know, the rule where the preface says,
24 recognizes that Commission employees must exchange
25 information with parties who have an interest in

1 Commission proceedings, you know, back to
2 Mr. Kelly's point about, about maybe having trial
3 staff and other staff -- you know, once a matter is,
4 is in litigation and there's a, it's a litigated
5 matter, you know, I'm not sure there's that great of
6 a need for Commission staff to have communications
7 with one party without other parties. I mean, they
8 can do e-mails where all parties are copied, which
9 is not a problem. You know, so the, you know, the
10 notion of staff having communications with one party
11 causes a little, little discomfort, particularly
12 about substantive matters. I mean, to the extent
13 that it was, you know, procedural, less so.

14 You know, if you had a clear demarcation
15 with trial staff, you know, it would be like, you
16 know, a lawyer having a conversation with another
17 lawyer, and I think that probably would, would be
18 more comforting.

19 **MS. MILLER:** Mr. Moyle, you raised the
20 issue about that sometimes it may be necessary for
21 staff to talk with the parties in a proceeding.

22 Do you think a separate rule would be more
23 advisable for Commissioners and their communication
24 prohibitions versus the staff and their
25 communication prohibitions?

1 **MR. MOYLE:** Probably. I mean, because I
2 think, you know, clearly the Commissioners, I mean
3 they're viewed as the, as the judicial entity, the
4 judges, the quasi-judicial entity that makes the
5 decision, hears the, hears the evidence and makes
6 the call. So I think there needs to be a clear,
7 clear distinction that communications with them
8 shouldn't be taking place. I mean, it's the ex
9 parte notion.

10 To the extent that there are
11 communications with staff that are working up the
12 case, you're going to have that as part of getting
13 ready for the proceeding. And I think, you know, it
14 seems to me that in my practice with you most of the
15 time it happens, happens that there's a conference
16 call or e-mails are sent out and I guess sometimes
17 there are communications with individual parties.
18 But the more transparency, probably the better.

19 And, again, I think, you know, the more I
20 think about Mr. Kelly's idea, if you had, you know,
21 trial staff that wasn't going to be issuing any kind
22 of recommendation, that would be less problematic
23 for those conversations to take place, just like a
24 lawyer for the Retail Federation could call a lawyer
25 for one of the utilities and have a conversation

1 that not everybody would need to be part to. I
2 think it starts getting a little more murky and
3 complicated when you have staff who is going to be
4 putting together a recommendation, you know, that
5 may be relied on by the Commission on a complicated
6 issue having communications with a party.

7 **MS. CIBULA:** Any additional comments on
8 Point B?

9 **MS. CHRISTENSEN:** I would just like to
10 add, Patty Christensen with the Office of Public
11 Counsel, just on that point where you don't have
12 necessarily a matter that's scheduled for hearing,
13 if you have a PAA where you have another party
14 that's intervened, I would, I believe that you
15 would, you would want, strongly want to follow those
16 similar type of communication restrictions and not
17 treat that necessarily any differently than you
18 would any other proceeding where you have litigation
19 and parties that are privy to it, even though it's
20 not going through that formal hearing process. And
21 I think that would be helpful as well because
22 sometimes I know our office will intervene or even
23 sometimes monitor cases, particularly where we've
24 intervened in a PAA. To be privy to all the
25 communications that are going on between staff would

1 help facilitate the monitoring process where we
2 don't have to chase after the communications, so to
3 speak. But as -- being kept apprised I think will
4 help facilitate the process.

5 **MR. DEVLIN:** Just a point of clarification
6 because I was trying to struggle in my own mind
7 when, when it would be appropriate and when we
8 should do it and when we shouldn't notify parties.
9 Would it be when the OPC intervenes? Because we
10 have a lot of small cases, staff-assisted rate cases
11 where we don't have any intervention. There are
12 some cases that we have that we just, we know OPC
13 has an interest. And even though they haven't
14 intervened, we'll invite them to a meeting if we
15 have a meeting, let's say, on an accounting issue.

16 I'm just trying to figure out what, if we
17 try to put this in stone, do you think it would be
18 in those cases that not necessarily go to hearing,
19 it could be PAA type cases, but where there's
20 intervention, that's where, that would trigger
21 this --

22 **MS. CHRISTENSEN:** Well, I think at minimum
23 where you have intervention that that would be
24 triggered. It's a little bit murkier on the cases
25 that we're monitoring, and I'm not sure that I've

1 given much thought as to how notification of
2 meetings and such would be in those cases where you
3 would monitor them. But I think, as Mr. Kelly
4 suggested, if notice, notices of meetings and such
5 are available on the website with a link, even for
6 those cases that are being monitored, if even the
7 notices of meetings that are going to occur or
8 substantive conversations are going to occur, that
9 it's easily accessible where we could, if we're
10 monitoring a case, can easily access that
11 information, then that may resolve that portion of
12 the problem where we're not formally intervened.

13 I think once, once you're intervened and
14 become a party, then I think a more formal process
15 of actual e-mails or direct communication like you
16 would do in a normal litigated proceeding is
17 probably warranted.

18 **MR. DEVLIN:** Thank you.

19 **MS. SALAK:** Can we just back up for even a
20 further step from that? What if we don't have a
21 case pending at the Commission and companies want to
22 come in and just offer you information to talk about
23 some new operation they may be doing or some change
24 in operations and were just giving us company
25 information?

1 **MS. CHRISTENSEN:** I think that's
2 probably -- and, Mr. Kelly -- I would think that if
3 it's something that's new, novel, something that,
4 you know, may impact the way the Commission is going
5 to change business or is pertinent, that it would
6 probably behoove everyone to, to err on the side of
7 providing notice through the website as well as
8 maybe even an informal e-mail to OPC to let them
9 know that this is occurring.

10 I think if it's, if it warrants the
11 utility coming in and giving a special talk to staff
12 about something new and novel and something that
13 they're going to try, that it probably is worth
14 notifying the Office of Public Counsel to let us
15 know whether or not it's something that we'd like to
16 attend. That would be my thoughts, and I don't know
17 if Mr. Kelly has any additional comments.

18 **MR. KELLY:** I think this goes hand in hand
19 with what I was suggesting about notice of meetings
20 on the, on the website. I think if you, if you put
21 them there, it might not be an issue, it may not
22 involve an issue that we're involved with, but it
23 could be something that maybe folks locally, if ABC
24 Utility is located in a small town, I can't think of
25 one right off the top of my head, Zephyrhills, and,

1 and, you know, may not be something that we're aware
2 of, but if, you know, ABC Utility is located there,
3 wants to come in and talk to you and you put the
4 notice on the website where folks can check it --
5 and, I mean, we've talked amongst ourselves that
6 we'd probably check it daily and just to see what's
7 coming up for the week or the next two weeks or
8 whatever. I think that would hopefully relieve
9 y'all of a burden of maybe, as you were saying,
10 Mr. Devlin, having, should we send an e-mail out,
11 should we do this, you know, making a special call.
12 If you get into the process of putting it on the
13 website, all of them, it's there. It's transparent
14 to anybody that wants to go get it.

15 **MR. MOYLE:** I tend to agree that, you
16 know, it's not that hard to notice a meeting on the
17 internet these days. But I guess hearing the
18 conversation, it has an assumption built into it,
19 which I don't know if it's valid or not, but it
20 seems like the assumption is, is that meetings
21 between a regulated entity and staff are open, open
22 to the public. Is that, is that generally right?

23 **MS. SALAK:** Generally that's not an issue.
24 The only time it might be an issue is if it's a
25 competitor coming in and there's going to be

1 confidential information being discussed. That's,
2 that's a difficulty. I don't, I don't -- and you
3 see that mostly in the telephone industry, not in
4 electric, per se.

5 **MR. MOYLE:** Thanks.

6 **MS. MILLER:** Are you thinking about like a
7 48-hour notice or a seven-day notice or -- I just
8 wondered what we're talking about here.

9 **MR. KELLY:** I think -- I haven't given it
10 a lot of thought. I think that certainly if -- I
11 think if a meeting gets set today for two weeks from
12 today, then the notice should go when it's set. I
13 do recognize that there are going to be times when a
14 meeting is set 24 hours or 48 hours. But I think
15 the point is when it gets set, you put the notice
16 out.

17 **MR. MOYLE:** And the public meeting notice
18 and the statute that requires governmental entities
19 to notice their meetings, I don't think it has a
20 time frame on it. I think it says that they're to
21 provide reasonable notice given the facts and
22 circumstances. So, you know, I think there's
23 probably some case law on that, and a reasonable
24 notice designed to give interested parties notice.
25 You know, it may vary if there's something that

1 somebody says I want to come in and brief you about
2 a new, you know, advancement, you know, a week, ten
3 days, two weeks. If all of the sudden -- you know,
4 a few years ago lightning struck and nailed the
5 natural gas transport and there was an emergency
6 situation, you know, notice of that, you know,
7 posted three hours later you're having a meeting
8 kind of think. I think it has to have some
9 variability. And you may want to look at that state
10 statute that talks about reasonable notice designed
11 to, to provide interested persons notice without
12 having a time frame on it.

13 **MS. CIBULA:** Chairman Carter.

14 **CHAIRMAN CARTER:** Thank you. I was going
15 to say that in the context of reasonable notice,
16 that's what I really wanted to get to because if
17 there's -- when we have to do notice, we have to go
18 through this formal process, FAW and so much time
19 and things of that nature.

20 But in the context of reasonable notice,
21 particularly in the matter of a discussion with
22 staff or something like that I don't think it should
23 be as structured. But I do think, as Mr. Kelly
24 said, 72 hours, put it on the website, we're going
25 to be meeting in three days, because sometimes you

1 don't have two weeks. Sometimes you only have a
2 couple of days or something like that. And that way
3 at least, at least Public Counsel will be aware of
4 it. And then sometimes you can -- although we, we
5 make a big deal about public service announcements,
6 but we rarely get them published. I'm getting -- I
7 know y'all know that I'm partial to Lifeline. So a
8 lot of times when we ask for things like that to get
9 published it doesn't get published.

10 But I do think that in the context of this
11 area that we're operating in, if we were to put
12 it -- if we had that opportunity to put it on the
13 web in 72 hours, that would give Public Counsel and
14 any other Intervenors that normally follow our
15 processes over here to say, hey, we want to share,
16 we want to be at the meeting or we don't want to be
17 at the meeting, or is there a call-in number, can we
18 do a conference?

19 So I think in the context, Mr. Moyle, of
20 reasonableness, we need to look at that perspective
21 of it because it's not a formal hearing or a formal
22 proceeding. So then you look at the context of
23 what's reasonable? Well, what's reasonable is based
24 upon the circumstances at the time. And I think
25 that if possible, 72 hours would be appropriate.

1 **MS. CHRISTENSEN:** I'd also like to briefly
2 address it because I was going to address it under,
3 under E. But I think probably since we're
4 discussing reasonable notice on informal meetings
5 between staff and parties, I think it had been past
6 Commission practice to attempt to give seven days'
7 notice on informal meetings between staff and
8 parties wherever practical. And, and it seems to me
9 that that time frame has been getting shorter and
10 shorter to where we've gotten to two or three days'
11 notice.

12 And the problem when you get to two or
13 three days' notice and not longer is you may have
14 conflicts with other cases and other obligations.
15 And the longer the time frame that you have notice
16 of the meeting, the longer you have to, if there is
17 a conflict, to try and resolve it and to otherwise
18 make yourself available for that meeting.

19 So I think that probably a longer period
20 of time or erring on a longer period of time where
21 it's practical and not an emergency situation would
22 be reasonable. And I think when you get -- and I
23 think one of the other problems that I've seen is
24 where you have parties to a matter and a meeting has
25 been set in two or three days and there's been no

1 prescreening of whether or not there are
2 availability of all the parties, that becomes a
3 problem. So what you may treat differently for a
4 docketed matter where there's parties available
5 versus an informal meeting between staff and a
6 utility and letting people know that this meeting is
7 taking place, and you may want to consider that
8 maybe you should have two different sets of
9 standards to apply to those two different, very
10 different situations.

11 I think when you already have other people
12 or other parties involved, I think that there should
13 be some thought or consideration given to trying to
14 get some consensus on setting up meeting times with
15 the other parties and setting the dates. And I know
16 that's not always possible because sometimes they're
17 very large dockets with large multiple parties
18 involved and not everybody will be able to attend,
19 but some thought and consideration should be given
20 then to setting the meetings with sufficient time
21 that other things can be rearranged and rescheduled.

22 And I think, you know, the two- or
23 three-day time slot would be to my way of thinking
24 more of where you're having an emergency situation
25 coming up where you need to talk about something and

1 resolve it quickly. I think for most occasions in
2 my experience you set weeks, meetings a week to two
3 weeks out for, for most type situations. And so I
4 wanted to throw that out there because it becomes
5 difficult when you have a meeting set within a very
6 short period of time in a docketed matter where
7 you're a party without giving, without getting
8 really reasonable notice.

9 So I think while you may not want to set
10 out a date, absolute date in a rule, maybe there,
11 maybe there's a way of addressing guidelines for
12 certain, certain types of situations so that
13 everybody knows what they can reasonably expect.

14 **CHAIRMAN CARTER:** I, I was not speaking to
15 docketed matters because I think that process is far
16 more formal and staff would endeavor to follow the
17 procedure in FAW as well as noticing requirements.

18 I mean, I was talking about informal
19 meetings that may come up on short notice or
20 something like that. Some people -- and staff would
21 not have ample time if they only had three days and
22 they would give, try to give the maximum amount of
23 time to that. I was not speaking to docketed
24 matters, nor matters that parties have already been
25 informed of.

1 I'm talking about an informal meeting with
2 staff and a party. It doesn't have to be a company.
3 It could be, it could be someone from the financial
4 community could say, look, we're looking at a new
5 type of -- God forbid they bring derivatives on us
6 again -- but we're looking at a new type of
7 financial mechanism and we're wondering if the
8 Florida Commission would have a perspective on how
9 we finance large capital projects and all, and say
10 we're going to, we're doing a nationwide tour and
11 we're in Atlanta today, but next Thursday, which
12 would be a week from now, we're going to be in your
13 state. So at that point in time staff's got to
14 scramble to say, okay, let's, first of all, do we
15 want to talk to these guys? Secondly, if we do,
16 let's find out who in the Commission we want to talk
17 to. Then I think at that point in time, once they
18 make the decision to talk to them, then they should
19 notice on the, on the site or something like that.

20 But in a more formalized process I don't
21 think we've ever had a problem with notice because
22 it's more structured and more formalized. And I was
23 just -- the one thing I was talking about was an
24 exception. I think we need to notice no matter what
25 we do. Even in the emergency situation if we've

1 only got two days, we still need to notice that
2 because the, because of the open government law.

3 **MS. CIBULA:** Any additional questions on
4 Point C?

5 Point D is "Should some or all of the
6 exemptions in subsection (2) of the rule be
7 eliminated?" And they are rulemakings, declaratory
8 statements, staff-assisted rate cases, proposed
9 agency actions, non-rate case tariffs, workshops,
10 internal affairs, audits, telephone service
11 evaluations and electric and gas safety inspections.

12 Mr. Moyle.

13 **MR. MOYLE:** I'd like to comment on that.
14 And, I'm sorry, I did not make a comment I wanted to
15 make on C, which you asked the question should the
16 rule be amended to require notice of one-on-one
17 discussions as well?

18 And I think, I think if the notion is from
19 a broad standpoint again we need to have clear lines
20 and a clear understanding, you know, I talked about
21 the statutory conferences and the 90-day piece, you
22 know, this one-on-one is another exception or
23 exemption to that. And I don't -- you know, if
24 you're trying to prohibit the inappropriate
25 communication to have an exemption that says, well,

1 you can do it if you only have one person in the
2 room on a conference call dealing with staff, but if
3 you have two people in the room on a conference
4 call, you can't. I don't think that's enough of a
5 distinction that, that warrants an exception given,
6 you know, given the concerns that have been raised.
7 So I think you ought to look seriously at that, you
8 know, because it can be abused.

9 And I guess the other point I was going to
10 make, you know, we've gone along for a long time
11 without having, you know, I guess the '92 Grand Jury
12 report, not many of these things were put in place.
13 You know, if you do go further than you should, you
14 know, that may be a better course where you want to
15 be and then come back a little bit if you, if you
16 overshoot it as compared to, to not. So with that
17 sort of mind-set, you know, I think that one-on-one
18 communication issue warrants some serious
19 consideration and review.

20 With respect to these individual
21 proceedings, again, I made the point on rulemaking,
22 you know, if you want to have a clear, bright line,
23 you probably ought to look seriously at restricting
24 communications on some of these others. There may
25 be some that were brought up about, about

1 staff-assisted rate cases or somebody not familiar
2 that would warrant an exception. But the PAA issue,
3 you know, that's, that's a matter that the
4 Commission considers and debates and discusses. The
5 parties have an opportunity to come and make
6 argument in front of the Commissioners in an open
7 setting. I don't know that you need to have the
8 ability to go in and sit down with a Commissioner on
9 that prior to coming in front of the Commission on
10 a, you know, on an agenda conference or making your
11 arguments. So I don't, I don't understand, you
12 know, really good reasons why that, that should
13 remain exempt from ex parte if you're trying to set
14 a clear, send a clear message and set a bright line.

15 **MR. McGLOTHLIN:** Joe McGlothlin with OPC.

16 I would like to go back to topic C for a second
17 also. With respect to the definition of a
18 conference call with three or more people and the
19 distinction between scheduled and unscheduled
20 visits, as you're very much aware, one aspect of
21 this, the purpose of this workshop is to consider
22 appearances and to avoid any appearance that the
23 process is unfair. And I suggest that even if it
24 were never to happen, from the appearances
25 standpoint these definitions look like loopholes.

1 And with respect to how to perhaps modify that to
2 avoid that appearance, it appears to me that the
3 number of people on a call and whether a meeting is
4 scheduled or unscheduled is not the, are not the
5 appropriate criteria, and more emphasis should be
6 given to the nature and purpose of the communication
7 that's anticipated and less attention to the number
8 of people involved, and that may be one way to go
9 about improving, improving that aspect of the rule.

10 With respect to D, my answer is that most
11 of those should not be eliminated. I remember when
12 I was in private practice I represented a client who
13 had an interest in a gas rate case that was going to
14 be the subject of a PAA, and from that experience I
15 saw that the process almost necessarily required a
16 lot of input, one-sided input by the petitioning
17 utility during which timeframe the staff formulated
18 its recommendation. One-sided in that the utility
19 was working with the staff to, to explain and
20 obviously to persuade the staff as to its point of
21 view, and all that happened prior to the time the
22 PAA came out. And by that time, you know, there's
23 at least the possibility that some positions are,
24 are entrenched. And so even on PAA, PAA items like
25 that I think there should be more openness and a

1 more obvious point of entry for those who are going
2 to be affected by, by the outcome.

3 **MS. SPENCER:** With regards to Points C and
4 D again, I think some of my earlier comments would
5 also hold true for these sections as well. I think
6 the Commission at this point would, should be erring
7 on the side of caution with any type of
8 communication which could be conceived as ex parte.
9 And I think when you start making exemptions, you
10 get the camel's tent under -- no, camel's nose under
11 the tent. Sorry. Backwards.

12 And I think, you know, given today's
13 technology and the ability to send mass e-mails in
14 the blink of an eye there really shouldn't be any
15 reason that you could not adequately, adequately
16 provide sufficient notice to parties just to get rid
17 of any perception of impropriety that may exist.
18 Thank you.

19 **MS. SALAK:** Let me ask you specifically
20 though about under D in the exemptions about audits
21 and other field work that's done by staff. I mean,
22 those aren't meetings per se. That's, you know,
23 it's we have audit authority and, quite frankly,
24 nobody else -- you don't have audit authority. So
25 I'm wondering about audits. They're -- it's a --

1 specifically it's contained, it's -- what are your
2 feelings about the audits?

3 **MS. CHRISTENSEN:** I think there are
4 certain, at least with audits, telephone evaluations
5 and electric and gas inspections, those types of
6 activities that are done by the Commission tend to
7 be the type where you have an employee going out to
8 a site and needing to have one-on-one conversations
9 to get information and to gather information. And
10 so by the nature of what the activity is that you're
11 doing, it may not lend itself to minute-by-minute
12 notice of the one-on-one communication, but it may
13 lend itself to some sort of a notification that an
14 audit is taking place or that a gas inspection is
15 taking place at this time and place. And maybe by
16 noticing the fact that the, that the activity is
17 occurring, that if somebody were sufficiently
18 interested to want to talk to staff about it or has
19 questions about it, they could, they could
20 communicate with the technical staff.

21 I understand that there are certain
22 activities that may not lend themselves to the
23 immediate notification of every single
24 communication. Those particular ones would seem to
25 me to be the exceptions in maybe a staff-assisted

1 rate case. The other ones that have been listed as
2 exceptions seem to be things that necessarily,
3 aren't necessarily on that same level, that by the
4 very functions of them don't require that one-on-one
5 conversation to just gather information and to be
6 able to get information from the utilities. The
7 other categories seems that it would avail
8 themselves to a more formal process or an e-mail or
9 something that could communicate to more of the
10 parties.

11 So while I can see where there would be
12 still some that may require a looser one-on-one
13 communication standard, you could still notice the
14 fact that the activity was going to take place and
15 maybe that -- and I haven't given it much more
16 thought than maybe that that would be sufficient to
17 cover the communications taking place during the
18 activity.

19 Now if there was something that was beyond
20 the scope of what was necessary to get the job done
21 that was discussed, maybe that would need to be set
22 aside in a written motion or some sort of formal
23 written communication. You know, I understand in
24 the audit you have to get information and there's
25 give and take and papers and gathering information.

1 But if they brought up a subject that wasn't related
2 to the audit that you were conducting and they were
3 trying to discuss an issue that wasn't part of the
4 confines of the audit request, then that would be
5 outside of the notice that was provided that there
6 was going to be an audit taking place.

7 How you would go about crafting some sort
8 of rule or language that would give some guidance to
9 audit staff or telephone staff or the inspectors as
10 to, you know, if you're getting lobbied on something
11 that's other than what you were there to do, you
12 need to write it, put it in writing, that I haven't
13 given much thought to.

14 **CHAIRMAN CARTER:** I think, I think these,
15 particular to the audits, telephone service
16 evaluation, electric and gas and safety inspections,
17 I don't think they lend themselves to that because
18 really it's purely a -- what's the word I'm looking
19 for -- I don't want to say housekeeping function,
20 but it's a fairly basic function.

21 The other thing too is noticing for that
22 may require for the, for the remaining personnel
23 that we actually have available for that, may be
24 more than what we really want. I mean, I think that
25 what you want notice for and what you want to be

1 abreast of are things that are actually within the
2 context of like rulemaking, declaratory statements.
3 Those I can see. But in terms of the audit, the
4 telephone service evaluation, electric and gas and
5 safety inspections, those are fairly rudimentary
6 things and fundamental things. And then, and after
7 those things are done, they're still available to
8 any of the parties that want to see them.

9 So in the context of that I just, I don't,
10 I don't see the -- I mean, I'm not feeling you on
11 that one.

12 **MR. KELLY:** Well, just to throw out an
13 idea, and I understand because there, there -- it
14 might be, again, I'm just throwing this out, it may
15 be on the notice of meeting link that I've brought
16 up a time or two, maybe something on an audit goes
17 out to say that, just a notice that staff will be
18 auditing Kelly Utility during the month of December.

19 And I agree with you, if this is where you
20 were going, Chairman, I agree with you that you
21 can't sit there and have a meeting that says, okay,
22 we're going to be meeting December 2nd, then
23 December 5th, then December 10th. I agree with you
24 there. But maybe a general notice might be
25 something to consider that, for those limited areas

1 that you could put on and just say that -- or maybe
2 you have another link that, for audits and
3 inspections. Maybe that's a way to address it.

4 **MS. SALAK:** We do have, we do have a
5 letter that goes out now and it goes in the audit
6 file, in the docket file, whatever. The only ones
7 that we -- well, even undocketed we used to send you
8 a letter. I'm not sure we do anymore or not. But
9 we used to always cc Public Counsel on that. And,
10 you know --

11 **MR. KELLY:** And I'm not, again, I'm not
12 saying that we're not finding out about it. But,
13 again, I want to turn it around to the public. You
14 know, the more we can, you put out there for the
15 public to know, again, I think it's just less -- I
16 think Mr. Moyle hit on it, touched on it earlier,
17 it's just less of an appearance of, of any
18 impropriety or anything like that.

19 I beg your indulgence. I've got to leave.
20 My wife is having surgery as we speak and I've got
21 to go. I just want to say from my standpoint thank
22 you so much, Chairman, and you guys for doing this
23 workshop. Anybody that wants to contact me or talk
24 to me about any of the out of the box ideas I've
25 thrown out today, I am more than willing to do it.

1 And I will not be in tomorrow, but after the
2 holidays I am available. But, again, I think that
3 this will get us all on the right track, and I do
4 appreciate your indulgence in letting me think
5 outside the box earlier. Thank you.

6 **MS. CIBULA:** Thank you so much for being
7 here, Mr. Kelly. We really appreciate your input.

8 **MR. MOYLE:** Can I, can I just make an,
9 attempt to make a bit of a finer point on the
10 audits? I mean, I don't know, I'm not that
11 conversant on the audits candidly, but, you know,
12 clearly the other ones I am. And I think that, you
13 know, the message again to make the point should be
14 a clear message.

15 The rule makes a distinction on audits
16 between docketed and undocketed, and I presume that
17 that has different aspects of it. So to the extent
18 that, you know, docketed matters are done so because
19 there's more significance to them or it's more
20 likely they'll be contested or they're more
21 significant, you might want to think about, about
22 having the exemption apply to undocketed audits.

23 And also in a recent case, I think during
24 the middle of a case an occasion came up where an
25 audit was being conducted in the case, you know, and

1 I was under the -- I didn't -- I was under the
2 impression in that situation it should be subject to
3 notice and the parties being advised when it's a
4 live issue in a case and there's an audit that's
5 being conducted. So I think, I think if you're
6 going to revise this rule, you might want to try to,
7 try to refine it to audits that are regular and
8 routine, that are not the subject of a contested
9 proceeding. Or, you know, if my assumption about
10 docketed and undocketed is right, you know, have it,
11 have it apply only to undocketed matters.

12 **MS. CIBULA:** Any additional comments? I
13 know I said we'd probably break around noon-ish for
14 lunch, but we've been going through the agenda
15 pretty quickly. And we can probably, if everyone is
16 agreeable, probably soldier through the last couple
17 of questions and finish probably around 1:00ish, if
18 everyone is agreeable to that.

19 **CHAIRMAN CARTER:** Yeah. Let's roll.

20 **MR. MOYLE:** Let's do it.

21 **MS. CIBULA:** Okay. Question E, I think
22 we've covered it somewhat already, it is "Should the
23 rule be amended to require notices of informal
24 meetings between Commission staff and outside
25 entities be posted on the Commission's website?"

1 Does the Commission's practice of posting on its
2 calendar informal meetings between Commission staff
3 and outside entities provide sufficient notice?"

4 **MS. SPENCER:** I just want to reiterate
5 some of the comments and agree with what Mr. Kelly
6 said earlier, that the, the current practice of just
7 putting it on the calendar can be confusing for the
8 consumer. There are numbers there, there are
9 letters, it's not readily understood what the
10 meeting is about. But if somewhere on the main page
11 of the website there could be a link that provides a
12 calendar, a more defined calendar and also includes
13 just a sentence or two about what the, what the
14 nature of the meeting will be about so that if there
15 is a consumer or an interested party who wants to
16 attend or, or take part in that meeting, that they
17 have the ability to do so.

18 But when Mr. Kelly mentioned the fact that
19 he gets phone calls from people not understanding
20 and being able to understand where things are on the
21 website, I'm one of those because I will go onto the
22 website and not be able to find the sufficient
23 information. So having a clear, accessible link I
24 think would do wonders to helping make that more
25 transparent for consumers.

1 **MR. BECK:** And, Samantha, Commissioner
2 McMurrian had some specific suggestions about
3 calendars and we would support her comments.

4 **MS. CIBULA:** Any additional comments?
5 Point F is "What, if any, additional
6 communication should be committed to writing?"

7 **CHAIRMAN CARTER:** I just wanted to say
8 that I think that the list that Commissioner
9 McMurrian gave was comprehensive but not exhaustive.
10 I think there are still some areas -- and we're --
11 one of the reasons why we wanted to do this is to
12 get as much feedback as possible from parties that
13 are involved in this process.

14 One of the things that I think that we
15 could do, getting back to, just stepping back to the
16 website for a moment, we do have inside baseball
17 where you go and you see a case number and it's got
18 that and then they talk about the parties. But
19 maybe we could add a sentence like this is a case
20 with companies seeking a rate increase or this is a
21 case where the company is seeking to build a
22 spaceship or something that the average person -- a
23 lot of times we get in here and we start talking
24 about stuff and we talk about MMBtus and we talk
25 about kilowatts and gigawatts and megawatts, and the

1 average person at home is saying, you know, what a
2 bunch of yahoos. What are they talking about?

3 So I think that maybe we could do some --
4 put maybe a user-friendly sentence and say this case
5 is about X, and I think that will go a long way
6 toward having the average person informed about what
7 we're doing here.

8 **MS. CHRISTENSEN:** I have another
9 suggestion. I don't know if it was brought up in
10 Commissioner McMurrin's comments, but if you have
11 the calendar and if you could build into the
12 calendar links on the date you have a notice to the
13 notice, that might also help. So that if you have a
14 question about what's this meeting about and you
15 have a link that would pull up the meeting notice so
16 that, you know, if you have a meeting scheduled on a
17 particular day, on Monday you have several different
18 meetings and you have the links to whatever the
19 informal notice, the actual notice that y'all type
20 up and put in the docket file, it might help that,
21 that facilitation or use of the website because they
22 could go on a particular day and be able to easily
23 access and be able to find out what the meeting is
24 about.

25 **MS. CIBULA:** Any additional comments on

1 Point F?

2 Point G is "Workshop participants'
3 suggestions on other potential amendments to the
4 rule." I guess we covered everything.

5 Unless there are any other, any other
6 general questions or comments on this section --
7 Chairman Carter.

8 **CHAIRMAN CARTER:** I just wanted to say
9 that I was watching upstairs and I wanted to come
10 down personally to thank all the participants. I
11 know Mr. Kelly had to go and take care of a very
12 important matter, but I do appreciate the openness
13 and the sincerity and the fact that you guys, you
14 didn't sugarcoat it, you just laid it out on what
15 we, what we need to do to do a better job, and I
16 appreciate that and it's going to make us a better
17 organization. And I thank you for coming to us with
18 those kinds of things.

19 And like some of the things, like
20 Mr. McGlothlin was talking about in terms of
21 modifying the prehearing process, those kind of
22 things may sound like inside baseball, but it's
23 something that you've been doing it the same way so
24 much so it's just kind of like common, common to
25 you. But a lot of times change is better, and I

1 think that -- I appreciate the candid and sincerity
2 of each one of the people here that have presented,
3 as well as our staff who are doing a good job.
4 Commissioner Skop, I appreciate your hard work as
5 well in terms of, you know, making sure that we came
6 down and got involved in this process because going
7 forward we want to do better. So thank you.

8 **COMMISSIONER SKOP:** And absolutely,
9 Chairman Carter. I concur with your comments. I
10 appreciate your kind words. And I would also like
11 to thank the parties that attended this morning's
12 workshop for providing input. It's been well
13 thought out, and collectively I think through
14 hearing the comments of each individual party as
15 well as those collectively we'll get to a better
16 process and implement the required change. Thank
17 you.

18 **MS. CIBULA:** Mr. Moyle.

19 **MR. MOYLE:** At the right time I have a
20 process question. I guess we're getting close, huh,
21 since you asked it?

22 **MS. CIBULA:** Okay.

23 **MR. MOYLE:** In your -- you know, you talk
24 about the next steps, and I guess there will be a
25 Commission workshop that's envisioned.

1 **MS. CIBULA:** Uh-huh.

2 **MR. MOYLE:** And are you envisioning having
3 proposed amendments to the rule in advance of that
4 Commission workshop?

5 **MS. CIBULA:** Yes.

6 **MR. MOYLE:** Okay. And I think another,
7 another notion or, I mean, it's an informal kind of
8 workshop process, but a lot of what we've talked
9 about in your rule obviously has to flow from the
10 statute. But some of the things we've talked about
11 and you've referenced in the Grand Jury report
12 references statutes and the ex parte statute, and,
13 and I wanted to know whether there might be
14 consideration given to recommendations for statutory
15 change as well to changes to the rule. Because if
16 you come back and say, you know what, like I've
17 made, made a point about the 90-day provision, if
18 you agree with that or the Commission agrees with
19 that, you know, March is when the Legislature
20 starts, but you probably have time to also roll in
21 some statutory recommendations that, that may be
22 forthcoming. I wanted to know if thought has been
23 given to that.

24 **MS. CIBULA:** Yeah. We were envisioning
25 that we'd collect all the comments, then try to

1 figure out which ones would be rule changes and
2 which ones would be legislative changes. And then
3 we'd go forward with maybe potential rule changes
4 for the next workshop, and then the legislative
5 changes would go on a probably different track since
6 we have to present those to the Legislature. So
7 that's what we were envisioning.

8 **MR. MOYLE:** Okay. Thanks for that
9 clarification.

10 **MS. CIBULA:** And I guess the next order of
11 business is written comments. We welcome written
12 comments from everyone. And right now we have the
13 date as December 9th, but I know there were some new
14 ideas that were brought up at this workshop and that
15 people might want to see the transcript before they
16 submit their comments. So we were -- and I was told
17 by the court reporter that the transcript would be
18 available on December 7th. So we were thinking that
19 written comments should be due on December 15th, and
20 that would give you enough time to look at the
21 transcript before submitting your comments. And
22 submit the comments to me since this is an
23 undocketed matter at the address listed on the
24 agenda or the e-mail address listed on the agenda.
25 You don't have to send it to both places, I mean

1 both addresses, but at least one of those.

2 And we're going to attempt to have
3 everything posted on the website by December 24th.
4 We'll try to have -- we'll have the transcript
5 posted as soon as we get it on December 7th as fast
6 as we can get it on the website.

7 And like I said, the next step will be to
8 review all the comments and draft amendments to Rule
9 25-22.033 and any other rules that we think need to
10 be changed based on the comments, and then have a
11 Commissioner workshop next to discuss the potential
12 rule amendments, and that will probably take place
13 sometime at the beginning of next year. And we'll
14 issue notice of that workshop in advance.

15 Unless there's any other additional
16 questions or comments, we're adjourned. Thank you
17 all.

18 (Workshop adjourned at 12:22 p.m.)
19
20
21
22
23
24
25

1 STATE OF FLORIDA)
 2 : CERTIFICATE OF REPORTERS
 3 COUNTY OF LEON)
 4


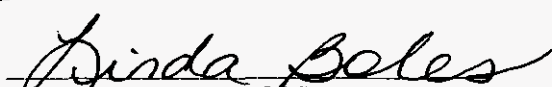
5 WE, JANE FAUROT, RPR, and LINDA BOLES,
 6 RPR, CRR, Official Commission Reporters, do hereby
 7 certify that the foregoing proceeding was heard at
 8 the time and place herein stated.

9 IT IS FURTHER CERTIFIED that we
 10 stenographically reported the said proceedings; that
 11 the same has been transcribed under our direct
 12 supervision; and that this transcript constitutes a
 13 true transcription of our notes of said proceedings.

14 WE FURTHER CERTIFY that we are not a
 15 relative, employee, attorney or counsel of any of
 16 the parties, nor are we a relative or employee of
 17 any of the parties' attorneys or counsel connected
 18 with the action, nor are we financially interested
 19 in the action.

20 DATED THIS 7th day of December, 2009.

21
 22
 23
 24
 25

 JANE FAUROT, RPR FPSC Official Commission Reporter (850) 413-6732	 LINDA BOLES, CRR, RPR FPSC Official Commission Reporter (850) 413-6734
---	---