

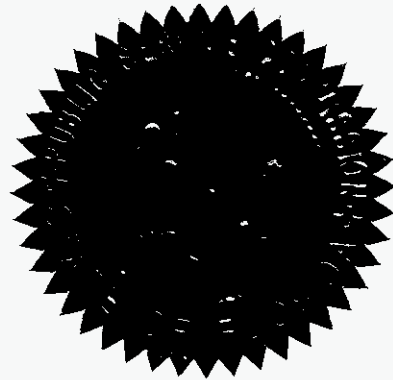
BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

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In the Matter of: DOCKET NO. UNDOCKETED

RULE 25-22.033, FLORIDA  
ADMINISTRATIVE CODE,  
COMMUNICATIONS BETWEEN  
COMMISSION EMPLOYEES AND  
PARTIES.

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PROCEEDINGS: RULE DEVELOPMENT WORKSHOP

COMMISSIONERS  
PARTICIPATING: CHAIRMAN NANCY ARGENZIANO  
COMMISSIONER LISA POLAK EDGAR  
COMMISSIONER NATHAN A. SKOP  
COMMISSIONER DAVID E. KLEMENT  
COMMISSIONER BEN A. "STEVE" STEVENS III

DATE: Wednesday, February 10, 2010

TIME: Commenced at 9:30 a.m.  
Concluded at 12:50 p.m.

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

REPORTED BY: JANE FAUROT, RPR  
LINDA BOLES, RPR, CRR  
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## P R O C E E D I N G S

1  
2           **CHAIRMAN ARGENZIANO:** Good morning. Let's  
3 call our workshop to order. If everyone will take their  
4 seats so we can begin and maybe timely end.

5           Good morning. And if staff will read the  
6 notice.

7           **MS. CIBULA:** Pursuant to notice, this time and  
8 place has been set for an undocketed rule development  
9 workshop to take input from interested persons on  
10 potential amendments to Rule 25-22.033, Florida  
11 Administrative Code, entitled Communications between  
12 Commission Employees and Parties.

13           **CHAIRMAN ARGENZIANO:** Thank you. Let's take  
14 appearances.

15           **MR. BEASLEY:** Madam Chairman, Jim Beasley and  
16 Jeff Wahlen here for Tampa Electric Company, and also  
17 Billy Stiles is here for Tampa Electric.

18           **CHAIRMAN ARGENZIANO:** Good morning.

19           **MR. STONE:** Chairman, I'm Jeff Stone of the  
20 law firm Beggs and Lane, and I'm representing Gulf Power  
21 Company.

22           **MR. MOYLE:** Jon Moyle, Keefe Anchors Gordon  
23 and Moyle, and I am here on behalf of the Florida  
24 Industrial Power Users Group, FIPUG.

25           **MS. SPENCER:** Good morning, Leslie Spencer

1 representing AARP.

2 **MR. REHWINKEL:** Good morning. Charles  
3 Rehwinkel, J.R. Kelly, Charles J. Beck, Joe McGlothlin,  
4 and Earl Poucher on behalf of the Office of Public  
5 Counsel.

6 **CHAIRMAN ARGENZIANO:** Staff.

7 **MS. CIBULA:** Samantha Cibula of the  
8 Commission's legal staff.

9 **MR. DEVLIN:** Tim Devlin, PSC staff.

10 **MS. SALAK:** Beth Salak, PSC staff.

11 **MR. WILLIS:** Marshall Willis, PSC staff.

12 **MS. MILLER:** Cindy Miller, PSC staff.

13 **CHAIRMAN ARGENZIANO:** Good morning to all.  
14 Any preliminary matters before we start?

15 **MS. CIBULA:** There is a sign-in sheet on the  
16 back table here, and we ask that everyone sign the sheet  
17 so that we have a record of who's in attendance today.  
18 And also, just a reminder, that all the materials for  
19 this workshop have been posted on the Commission's  
20 website, so those who may be listening in or watching  
21 over the Internet can follow along, if they like.

22 **CHAIRMAN ARGENZIANO:** Great. Appreciate that.  
23 Don't forget to sign in.

24 Commissioners, any opening remarks? I have  
25 none. Okay. Let's go.

1           Staff, if you would go section-by-section  
2 discussion, and we'll all jump in, we'll all be able to  
3 participate. And just wave your hand if I'm not seeing  
4 you, and we will just move on that way and add whatever  
5 anybody wants to add in.

6           **MS. CIBULA:** And I think we had it set up so  
7 that the parties could give -- or interested persons  
8 could give opening remarks, as well. So if you wanted  
9 to do that.

10           **CHAIRMAN ARGENZIANO:** Okay. Well, we can do  
11 that. If the interested parties would like to give  
12 opening remarks, that would be fine.

13           **MR. BEASLEY:** Thank you, Madam Chair.

14           We appreciate the opportunity to participate  
15 here. We filed some written comments after the last  
16 staff workshop. As we said then and we say now, we are  
17 committed to continuing to comply with whatever  
18 communications protocol the Commission deems  
19 appropriate.

20           We believe that you should assess the  
21 benefits to be derived from any extension of the rules  
22 and assess that against the impact it would have on  
23 costs and Commission administrative efficiency. We  
24 think that in some areas, like in long-term field audits  
25 and the like, where there is constant interplay

1 between -- and discussions between staff auditors, for  
2 example, and utilities that are being audited, they  
3 don't lend themselves to notice each time a  
4 communication takes place. That whole process might  
5 break down if you had to have some sort of written  
6 notice.

7 We also believe that in the rulemaking  
8 process there is some benefits to having informality as  
9 opposed to the more formal nature of adjudicatory type  
10 proceedings where substantial interests are being  
11 determined because the rulemaking process is more of a  
12 legislative type input from all source type thing.

13 Finally, we believe that fairness and  
14 symmetry would suggest that any new rule requirement  
15 that you may wish to adopt should apply to all players,  
16 all parties, all interested persons in a proceeding just  
17 to have a level playing field for everyone. We may have  
18 some initial or some additional comments as we go  
19 through the rule, but those are our preliminary  
20 comments.

21 **CHAIRMAN ARGENZIANO:** Great. Thank you.

22 **MR. STONE:** Commissioners, we echo the  
23 statements of Tampa Electric Company. We also recognize  
24 that the interests of the state as a whole benefit  
25 greatly by public confidence in the process and

1 understanding the nature of these proceedings. We do  
2 believe that it's important to acknowledge that fairness  
3 and symmetry is an important principle, but we need to  
4 be sure that there is access to information. These are  
5 complicated industries. It is your charge to regulate  
6 it, and the staff needs to have access to information  
7 from all parties in order to be able to properly inform  
8 you, the decision-makers in the process.

9 We want to be sure that whatever changes are  
10 made to the rules are workable and do not result in an  
11 unintended consequence of completely shutting down  
12 efficient and effective and necessary communications to  
13 ensure that staff is well-informed and, therefore, in a  
14 position to inform you.

15 **CHAIRMAN ARGENZIANO:** Absolutely. And I know  
16 we all feel, we hope there are no unintended  
17 consequences. But sometimes they do arise, and if they  
18 do we would hope that you all point them out and maybe  
19 we can correct them as quickly as we find them.  
20 Hopefully we wouldn't have any.

21 Mr. Moyle.

22 **MR. MOYLE:** Thank you, Madam Chairman. And  
23 just a few brief opening comments to thank you for  
24 convening this workshop to give us an opportunity to  
25 talk about these issues, to make this a better place to

1 try cases and to have matters adjudicated.

2 Just looking briefly at the handout. If I'm  
3 reading it right, the history of the rule says it was  
4 new in '93, and I don't see a place where it was  
5 amended, so it may be time that we look at this and  
6 consider some amendments and updates. But I think the  
7 goal that you all are moving toward and the direction  
8 that you are moving toward both with this rulemaking and  
9 also with your contemplated recommendations to the  
10 Legislature that I think they are taking seriously is a  
11 step in the right direction. So, thank you.

12 **CHAIRMAN ARGENZIANO:** Thank you.

13 **MS. SPENCER:** Good morning, Chairman and  
14 Commissioners. My name is Leslie Spencer with AARP. I  
15 appreciate the opportunity to be here this morning and  
16 speak to you about this issue. I am here representing  
17 not only our members, but the customers of Florida.

18 We are in support of strengthening the  
19 transparency and integrity of the regulatory process  
20 here at the Public Service Commission. And as a  
21 Commission, you make decisions based on the evidence  
22 opposing parties bring to the table. If parties are  
23 having private discussions on matters that affect  
24 ratepayers that are not part of the public debate, then  
25 this process is incomplete if not compromised. Ex parte

1 rules should do nothing to stifle the flow of  
2 information, but instead should create a more robust  
3 debate by increasing the chances that all sides of the  
4 argument will be heard and all arguments rebutted.

5 At the very least, enhanced rules  
6 prohibiting ex parte communications will give some level  
7 of confidence to the public that the regulatory process  
8 that you carry out is indeed open, fair, and balanced.  
9 Thank you for your time.

10 **CHAIRMAN ARGENZIANO:** Thank you.

11 Mr. Rehwinkel.

12 **MR. REHWINKEL:** Thank you, Madam Chairman and  
13 Commissioners.

14 The Public Counsel's Office has provided our  
15 comments in a cover letter and suggested additions to  
16 the proposal that the Commission has put out there. We  
17 recognize this is at the inception of a process as Mr.  
18 Moyle pointed out was last and only time of undertaking  
19 was 17 years ago.

20 The Office of Public Counsel has attorneys  
21 and staff with many, many years of experience, much the  
22 same as counsel for the utilities who have spoken so  
23 far. We would offer our assistance to the Commission in  
24 a constructive way to make a process better with respect  
25 to the public confidence and integrity and workability



1 and efficiency of the process.

2 Our proposals that we have put forward here  
3 today, we offer them in a constructive way to ensure  
4 that we have another 17 years of workable interaction  
5 with the staff. Times have changed. Electronic  
6 communication is much different than it was 17 years  
7 ago. There are things that were maybe unworkable then  
8 that are more workable now as far as simultaneity in  
9 communication, and we encourage the Commission to  
10 embrace that in your efforts.

11 In our letter that we filed on February 4th,  
12 we set forth what we believe are four principles that at  
13 a minimum the Commission ought to keep in mind when  
14 adopting whatever rules you adopt at the end of this  
15 process because ultimately public confidence is the most  
16 important thing in what everyone does here.

17 We think the rules should clearly prohibit  
18 ex parte communications. We think that they should  
19 provide a workable mechanism for reasonable and timely  
20 notice of intended communications. That it should  
21 provide a level communications playing field for all  
22 with interest before the Commission. And we finally  
23 think that there should be a very clear statement that  
24 nothing in the rules is designed to create loopholes  
25 that are intended to allow people to do indirectly what

1 they are prohibited from doing directly.

2 Having said all that and having provided our  
3 comments, we embrace as well the opportunity to work  
4 with others to find workable solutions. We are not  
5 trying to hamper the flow of information, but to improve  
6 it and to make sure that it is fair and level for  
7 everyone. We think our proposals fill some gaps in the  
8 initial proposal, but we are certainly willing to work  
9 within the process to ensure that that occur.

10 As part of our presentation, and it is  
11 certainly within the pleasure of the Commission how you  
12 want to handle this, but we thought it would be helpful  
13 as a backdrop and context for what we are proposing  
14 which is designed to address the way your staff and your  
15 process is currently configured, as we have provided --  
16 Mr. Poucher has prepared a presentation that gives a  
17 survey of what other commissions do just to give you an  
18 idea of other ideas that address some of the same  
19 issues. And he is prepared to give a brief presentation  
20 of that now or at whatever time you feel is appropriate,  
21 Madam Chairman.

22 **CHAIRMAN ARGENZIANO:** I think that if we would  
23 have staff start going through things. Would it be  
24 difficult for him to jump in as we go through  
25 issue-by-issue, and if you have -- and then overall at

1 the end of staff's presentation give your presentation  
2 in total, and then we have opportunity to discuss? But  
3 I would encourage you to jump in as we go through those  
4 sections where you might have suggested changes.

5 **MR. REHWINKEL:** Madam Chairman, I think what  
6 his proposal -- he doesn't have a proposal. What his  
7 presentation deals with is really more contextual from  
8 the standpoint of what's done around the country rather  
9 than directed at, you know, specific provisions in here.  
10 It's really to give the Commissioners an idea of how  
11 other people do it. Not that we are proposing that you  
12 bifurcate the staff or make any structural changes, but  
13 the way your structure drives the way communications  
14 occur. And so we just thought it would be helpful for  
15 the Commission to have a context, and so it probably  
16 either needs to happen now or at a discreet time.

17 **CHAIRMAN ARGENZIANO:** Well, let's do this.  
18 Let's do this. Let's have staff give their presentation  
19 and we'll go -- you did mention in your opening remarks  
20 that you had proposals that fill gaps of our current  
21 proposals. So at that point when we get to those, if  
22 you would speak to those that would be great, and then  
23 we will have the whole presentation given and we can  
24 work from that.

25 So let's do that. Staff, if you would start

1 the section-by-section, we would appreciate it.

2 **MS. CIBULA:** Okay. And just as, kind of, to  
3 get everyone situated, the draft rule is on Page 4 of  
4 the notice issued on January 27th. And, Commissioners,  
5 the draft rule is located at Tab 3 of your notebooks.

6 The rule pertains to communications between  
7 Commission staff and parties. The rule was implemented  
8 in 1993 in response to the 1992 grand jury report. And  
9 as was mentioned here, the rule has not been amended  
10 since it was initially implemented.

11 At the Commission's October 5th Internal  
12 Affairs meeting, the Commission directed staff to hold  
13 workshops to determine whether amendments should be made  
14 to this rule. The draft rule is staff's initial  
15 thoughts on how the rule can be amended. Staff's draft  
16 changes to the first paragraph of the rule are on Page 4  
17 beginning on Line 3.

18 Under the current rule, this paragraph sets  
19 forth the intent of the rule and states that the rule  
20 applies to staff communications with parties in  
21 adjudicatory proceedings. In a draft rule, this  
22 paragraph was amended to provide a number for the  
23 subsection. This was done for reference purposes. This  
24 paragraph was also amended to state that the rule  
25 applies to communications with both parties and

1 interested persons in docketed proceedings. Thus, the  
2 amendment extends the current rule.

3 And I guess I will open it up for any  
4 comments on the first paragraph of the draft rule.

5 **CHAIRMAN ARGENZIANO:** Mr. Rehwinkel.

6 **MR. REHWINKEL:** Yes, Madam Chairman.

7 We did not propose any changes to what the  
8 staff has proposed, but I listened to the discussion at  
9 Internal Affairs yesterday, and I would note that we  
10 have provided further on, and we will get to it, but  
11 expansion of the definition of interested persons which  
12 we think interacts with this section. But, more  
13 importantly, on Line 5 of -- well, I should look at the  
14 one you have. On Line 5 of --

15 **COMMISSIONER STEVENS:** Madam Chair.

16 **CHAIRMAN ARGENZIANO:** Yes, go ahead.

17 **COMMISSIONER STEVENS:** Mr. Rehwinkel, are you  
18 comparing staff's Page 4 to the Office of Public Counsel  
19 alternative suggestions, Page 1, is that where you are?

20 **MR. REHWINKEL:** Yes, that's where I am.

21 **COMMISSIONER STEVENS:** Okay. I just wanted to  
22 make sure I was with you. Thanks.

23 **MR. REHWINKEL:** But I will refer to your Page  
24 4, and on Line 5 the word docketed is there. And after  
25 the discussion yesterday, we have in the office kind of

1 discussed maybe that that language may not be what you  
2 want to use. And we think that the concept that we  
3 might like to offer some language on through this  
4 process would be more geared towards -- that the rule  
5 ought to be geared towards matters that are subject to  
6 your decision-making under the rulemaking sections of  
7 Section 120.54. Later you'll see that we propose it in  
8 some declaratory statements, 120.565, 120.569, and  
9 120.57 that matters that are subject to your  
10 decision-making under those sections may be the better  
11 way to state this. But this is really coming off of the  
12 discussion that you had late in the day yesterday, and I  
13 just wanted to put you on notice that we may offer some  
14 alternative language there as this process goes through.

15 **CHAIRMAN ARGENZIANO:** Well, I know we were  
16 having problems with that.

17 **MR. REHWINKEL:** Yes. And we think that maybe  
18 docketed is too narrow, because in the statute it talks  
19 about within 90 days, you know, and I think that they  
20 may take that out. So there is some subjectivity to it,  
21 but by the same token just because something is not  
22 docketed or filed does not necessarily mean that a  
23 communication relative to that matter might not need to  
24 have some safeguards, and the level playing field that  
25 we have all agreed ought to occur.

1           **MR. KISER:** Madam Chairman.

2           **CHAIRMAN ARGENZIANO:** Who is that? Sorry.

3           Yes.

4           **MR. KISER:** I think, if I heard correctly,  
5           then you would pull in virtually everything that they  
6           make a decision on, including personnel decisions, the  
7           hiring of the General Counsel, the hiring of the  
8           Executive Director, all of those things that they make a  
9           decision on would now be included in your definition.

10          **MR. REHWINKEL:** That wouldn't be the intent.  
11          The intent would be the things that they adjudicate and  
12          issue orders.

13          **MR. KISER:** Okay. But, as you have stated it,  
14          though, it would pull all of that in.

15          **MR. REHWINKEL:** Yes. And what I was saying,  
16          and this was something -- Mr. Beck can tell you, I  
17          called him on the way home from the gym today, and this  
18          something we were just kind of thinking about based on  
19          the conversations yesterday. But we think docketed is  
20          too narrow and maybe what I said is too expansive, but  
21          we are looking for --

22          **CHAIRMAN ARGENZIANO:** Somewhere in the middle.

23          **MR. REHWINKEL:** -- a workable middle ground.

24          **CHAIRMAN ARGENZIANO:** I think what you are  
25          trying to get at is the problem we were having last

1 night that the docketed may be weakening the current  
2 statute, and that's not our intent. I mean the language  
3 that we tried to change last night could do that, and I  
4 think that is what you are trying to get out. But, I  
5 think, Curt, you are right, that would mean everything.  
6 So there may be a way of reeling that in some.

7 Okay. Staff.

8 **MR. MOYLE:** Can I just jump in briefly on  
9 that?

10 **CHAIRMAN ARGENZIANO:** Oh, I'm sorry. Please.

11 **MR. MOYLE:** And I hadn't planned, really, but  
12 given the conversation, it may be worth considering some  
13 type of an analysis that relates to substantial interest  
14 of parties. There is a good body of case law about  
15 parties having substantial interest, so the notion of  
16 making a decision about employing somebody or internal  
17 stuff, you know, somebody like FIPUG wouldn't have a  
18 substantial interest in that. But if it is a decision  
19 that may be made at Internal Affairs that could affect  
20 substantial interests, that may be a way to look at it,  
21 sort of a middle ground. I would just kind of throw  
22 that out for consideration. I haven't thought it all  
23 the way through, but there is a good body of case law  
24 about substantial interest.

25 **CHAIRMAN ARGENZIANO:** Okay. Any other



1 comments? Staff?

2 **MS. CIBULA:** Staff's draft changes to  
3 Subsection (1) of the rule are on Page 4 beginning on  
4 Line 10. Under the current rule, this section sets  
5 forth the Commission matters that are exempt from the  
6 rule. In the draft rule that section was renumbered to  
7 Subsection (2).

8 **CHAIRMAN ARGENZIANO:** I'm sorry, what page  
9 were you on?

10 **MS. CIBULA:** We are Page 4 beginning on Line  
11 10.

12 **CHAIRMAN ARGENZIANO:** Line 10. Got you.  
13 Thank you.

14 **MS. CIBULA:** In the draft rule this section  
15 was renumbered to Subsection (2). Deleted from the  
16 exceptions to the rule are rulemaking proceedings  
17 conducted pursuant to Section 120.54, Florida Statutes,  
18 and declaratory statement request proceedings conducted  
19 pursuant to 120.565, Florida Statutes.

20 Language was also added stating that  
21 emergency operation center activities, field service  
22 evaluations, informal consumer complaints, and cases  
23 pending in the court system are exempt from the rule.  
24 On Line 19 the rule was amended to state the specific  
25 discovery rules that are only generally referred to in

1 the current rule, and on Lines 20 through 21 the  
2 provision stating that the rule does not apply to  
3 procedural communications was deleted.

4 **CHAIRMAN ARGENZIANO:** Comments?

5 **COMMISSIONER KLEMENT:** Madam Chair.

6 **CHAIRMAN ARGENZIANO:** Yes, Commissioner.

7 **COMMISSIONER KLEMENT:** Staff, do you note on  
8 Line 10 the need for a possessive apostrophe after the  
9 word employees?

10 **MS. CIBULA:** We'll fix that.

11 **CHAIRMAN ARGENZIANO:** Okay. Good catch. Any  
12 other comments? Okay. Staff, continue, please.

13 I'm sorry. Mr. Moyle.

14 **MR. MOYLE:** I guess the notion about cases  
15 pending in court systems -- I'm a little curious about  
16 that. I think oftentimes there are cases that are filed  
17 in the court system and then the issue is raised in the  
18 courts they say the court doesn't have jurisdiction, you  
19 know, this needs to come to the Public Service  
20 Commission and motions to dismiss are brought. So I was  
21 a little curious as to why the need to call out and have  
22 an exemption to cases in the court system.

23 **MS. CIBULA:** We were thinking in regard to  
24 docketed matters that get appealed or in the process of  
25 the docket, there is some litigation that takes place

1 and they go into the court system. And we didn't want  
2 to encompass those communications that might take place  
3 on the case while it's pending on appeal. That somehow  
4 we would have to submit all written communications and  
5 put them in the docket in regard to those cases, or have  
6 noticed meetings in regard to those litigation matters,  
7 and that is what we were attempting to do with that  
8 exemption.

9 **MR. MOYLE:** Okay. Again, because I have seen  
10 a number of cases where it's unclear whether it is  
11 properly brought in front of the PSC or a court system,  
12 and I think you are trying to not have people come in  
13 and preview things. Given that that is what they are  
14 trying to get at, you could simply say all cases pending  
15 on appeal in the court system, which would narrow it.

16 **CHAIRMAN ARGENZIANO:** Would that work? That  
17 seems to solve that problem.

18 **MS. CIBULA:** We'll look at that.

19 **CHAIRMAN ARGENZIANO:** Okay. Mr. Rehwinkel.

20 Commissioner Skop.

21 **COMMISSIONER SKOP:** Thank you, Madam Chair.

22 What is the rationale for the exemption for  
23 pending court cases? Is it coordination of briefs or  
24 between the parties, like lawyers?

25 **MS. CIBULA:** Coordination of briefs and

1 litigation strategies in regard to those cases.

2 **COMMISSIONER SKOP:** All right. Thank you.

3 **CHAIRMAN ARGENZIANO:** Mr. Rehwinkel.

4 **MR. REHWINKEL:** Yes, Madam Chairman.

5 I guess this may be the appropriate time to  
6 discuss the proposals we have. And I think before we  
7 get to the red stuff that is on Page 1 of our  
8 alternative -- well, I'll just go to those now.

9 We agree that rulemaking and declaratory  
10 statements should no longer be included. But we also --  
11 proposed agency actions and non-rate case tariffs are  
12 two issues that we have, and I would like to explain our  
13 rationale for that. Since this rule was passed, I think  
14 we may be entering an era where cases of significant  
15 import are processed as PAA, especially in the electric  
16 industry.

17 I don't want to discuss pending matters, but  
18 there have been recent cases filed where PAA treatment  
19 is asked for very significant revenue requirement items.  
20 And there has been recent discussion about limited  
21 proceedings being the way to go with respect to large  
22 chunks of discreet rate base that a utility may seek  
23 recovery for. And certainly to the extent those were  
24 processed by PAA and would have, perhaps,  
25 across-the-board base rate impact, they would be really

1 indistinguishable from a rate case and the proceeding  
2 that is traditionally expected to be covered by the  
3 ex parte rules.

4 And the same with non-rate case tariffs.  
5 There is a very allied principle involved there.  
6 Non-rate case tariffs, when in rule was first proposed  
7 really just generally dealt with very technical issues  
8 of tariffing, but you have recently had an example where  
9 a large base load item was processed through the  
10 principles that are in the Wilson series of cases that  
11 deal with non-rate case tariffs and how you process  
12 them. And those are essentially done the same as a PAA.

13 So to the extent that these matters would be  
14 processed in what is traditionally known as a PAA  
15 process or the tariff process, we find them to be -- or  
16 we believe they are to be indistinguishable from what is  
17 traditionally seen as the filed rate cases that I think  
18 is the normal notion of what an ex parte communication  
19 ought to be barred from.

20 **CHAIRMAN ARGENZIANO:** Commissioner Skop, a  
21 question?

22 **COMMISSIONER SKOP:** Thank you, Madam Chair.

23 Just a point of clarification. I think Mr.  
24 Rehwinkel mentioned the context of a limited proceeding  
25 and how ultimately that may end up in a PAA type

1 posture. Can you give an example of that? Because, I  
2 guess, I would think that a limited proceeding on a  
3 large dollar item would actually probably have a  
4 hearing, but I'm just trying to better understand your  
5 concern.

6 **MR. REHWINKEL:** Yes, sir. Commissioner, I'll  
7 go with an example that is final, and I think the recent  
8 rash -- not rash. In the 2004/2005 storm seasons, the  
9 surcharges were sought as a limited proceeding under  
10 that process, and they were at least initially sought to  
11 be processed as PAAs. Then I think at one point one of  
12 them may have been converted to a tariff filing. Either  
13 way, they were not filed -- they were filed as PAAs  
14 initially and then hearings were requested.

15 There is a recent but pending example that I  
16 don't want to get into that was done in a very similar  
17 manner. And to no fault of the pleader, sometimes the  
18 petitions will allege that they will seek proposed  
19 agency action treatment and allege that they do not  
20 expect their to be controversy, but that's just in the  
21 eye of the beholder, because a petition on a PAA can be  
22 filed within the statutory time frame.

23 So I think it's dangerous to create an  
24 exception on a matter that could ultimately result in a  
25 contested hearing. And, again, from the standpoint of a

1 levelized playing field, if a matter is likely to result  
2 in a hearing, or potentially could result in a hearing  
3 that you issue an order in, the flow of information  
4 should be fair and simultaneous and we believe that with  
5 electronic communications today that is much more  
6 possible.

7 **COMMISSIONER SKOP:** Madam Chair, just a brief  
8 follow up. I think Mr. Rehwinkel raises an interesting  
9 point to the extent that if something would normally be  
10 in a hearing posture, but, you know, goes through a PAA  
11 where it is exempt from those types of otherwise  
12 prohibited communications that would exist in some of  
13 the other proposed language that that may present an  
14 issue.

15 Would a potential work around, you know, a  
16 balancing perhaps be achieved by use of a dollar  
17 threshold? For instance, if an item coming for  
18 regulatory approval in a limited proceeding were above X  
19 threshold then, you know, you would obviously have to  
20 take it to a full hearing versus a lower ticket item  
21 that may be, in fact, less controversial?

22 **MR. REHWINKEL:** Commissioner, my reaction to  
23 that is I have only addressed the electric area, but a  
24 significant driver for our office's proposal in the PAA  
25 area comes out of the water and sewer industry, and that

1 is a completely amorphous concept as far as what's  
2 relevant for one utility could be devastating to  
3 another. So I don't know that you could really do that.

4 **COMMISSIONER SKOP:** Okay. So one size doesn't  
5 fit all on that.

6 **MR. REHWINKEL:** Yes.

7 **COMMISSIONER SKOP:** Good point. Thank you.

8 **CHAIRMAN ARGENZIANO:** Marshall.

9 **MR. WILLIS:** Chairman, I'd like to address the  
10 area of PAA and non-rate case tariffs, if you don't  
11 mind.

12 **CHAIRMAN ARGENZIANO:** Please do.

13 **MR. WILLIS:** Public Counsel's proposal causes  
14 me a lot of pause in that we have specific time frames  
15 for proposed agency action recommendations, and I'd like  
16 to address those first. Statute provides we have to do  
17 those within five months. That's not a lot of time when  
18 staff has got a big case load.

19 One of the problems we have in noticing  
20 everyone in the world, especially when you look at  
21 language such as any interested party, and we may not  
22 know who those are, is we're going to have to try and  
23 set up meetings, whereas right now we can do our  
24 informal discovery at the moment.

25 Meetings sometimes are difficult to set up.



1 We have experienced that. We have to call around, we  
2 have to e-mail around. Is Mr. Rehwinkel going to be  
3 here today? Is he not going to be here tomorrow? Is he  
4 out of town this week? Parties are like that all the  
5 time. We have difficulty in setting up meetings. It's  
6 going to slow down the process that staff uses to  
7 process PAAs. It is going to put -- to me it's going to  
8 put a tremendous burden on my staff to try and  
9 constantly set up these meetings and assure that  
10 everyone is present for any communications that go on.

11 Currently, if we have communications with  
12 companies, we normally put that in the docket file even  
13 if it's PAA. Even if it's an e-mail. If it's an e-mail  
14 request for information, we try and make sure all that  
15 information is there. But it's a lot swifter and faster  
16 for us to do this without trying to set up meetings.

17 I will point out that the PAA process is a  
18 process in which it is informal. When it comes to  
19 agenda, every single party who has an interest can come  
20 to the Commission and say their peace. The other thing  
21 that I have noticed in the past is that when you have a  
22 proposed agency action, any intervenor can intervene.

23 Now, there's probably a better procedure, in  
24 my opinion. If Public Counsel has an issue with a  
25 proposed agency action, they see it filed, they get a

1 copy of everything filed with this Commission, they can  
2 intervene. They have done it before. Any party could  
3 intervene in a case. That entitles them to get anything  
4 that staff produces. At that point we are narrowing it  
5 down to only certain proposed agency action dockets  
6 around here that we have to actually formally set up  
7 meetings for.

8 To me that's a lot more preferable to  
9 require parties to intervene in a PAA case if they want  
10 to be involved in all of this stuff. That would take  
11 care of -- to me, that would take care of Mr.  
12 Rehwinkel's problem. If you have certain electric PAAs  
13 that you think you want to be involved in, they  
14 intervene. They intervene. They are entitled to  
15 everything in the docket. We know at that point we have  
16 an intervenor. We don't have to search for any party  
17 out there or interested party. Those who are interested  
18 intervene, and we can do our set-up meetings. But it  
19 takes all those other PAA cases, all of those water  
20 cases, all those gas cases that are PAAs that really no  
21 party has an interest in until it gets to the agenda  
22 conference for us to handle in a normal way and a more  
23 expedited way so that our case load isn't burdened at  
24 that point.

25 As far as the non-rate case tariffs,

1 95 percent of non-rate case tariffs don't involve a  
2 revenue increase and never have an intervenor. These  
3 things have to be processed within 60 days. We have to  
4 have them -- we either have to have it to the agenda  
5 under the tariff statute to you to be processed in  
6 60 days for you to deny, approve, or modify. We don't  
7 really have a choice, they have got to be there. If I  
8 have to notice -- if my staff has to notice every single  
9 potential party out there of every meeting we have --  
10 because what normally happens on a non-rate case  
11 tariff --

12 **CHAIRMAN ARGENZIANO:** We may need a lot more  
13 staff. I wonder if the Legislature will give us that.

14 **MR. WILLIS:** -- we may need more staff. The  
15 problem I'm looking at is if a company files a non-rate  
16 case tariff, and really these things are done to modify  
17 tariffs, to clarify tariffs, to offer a new type of  
18 tariff which is normally a negative impact on revenue on  
19 a company. It's just a new service, a new method of  
20 providing service, no one ever intervenes in these. And  
21 lot of times we have questions about these non-rate base  
22 tariffs.

23 But what posture that puts me in if I've got  
24 to notice every single individual out there that  
25 possibly could have a concern over this? My staff may

1 look at it and say maybe we just don't need to ask those  
2 questions. It doesn't have a negative impact on revenue  
3 requirement, it doesn't have a positive, we will just  
4 ignore the questions and we'll just bring it to the  
5 Commission. That is probably the only way I could  
6 handle that kind of workload under the process of having  
7 to notice every single party on those non-rate case  
8 tariffs.

9 They are also docketed. Every intervenor  
10 who has a problem with it can intervene.

11 **CHAIRMAN ARGENZIANO:** Mr. Rehwinkel.

12 **MR. WILLIS:** Another way to handle it.

13 **CHAIRMAN ARGENZIANO:** Mr. Kelly.

14 **MR. KELLY:** I'll just make a couple of brief  
15 remarks, and then Mr. Rehwinkel can follow up. You  
16 know, I understand about the workload and so forth. But  
17 I think that we have got to be very cognizant of the  
18 fact of what we are trying to do here and that is make  
19 sure that all the processes are transparent to the  
20 public. And I agree, you know, with the comments made  
21 earlier. We have got to make it workable.

22 Number one, I don't think it's feasible for  
23 us to, you know, intervene in a case that we may have an  
24 interest in -- and we get involved in a lot of cases,  
25 especially water and wastewater that are very small that

1 we don't intervene in, but we do a lot of work because  
2 we get a lot of calls from the ratepayers.

3 Why do we intervene? It's the same reason I  
4 tell the Legislature we don't. Because if we do, and it  
5 is, say, a 25 or \$30,000 case, then we have just  
6 opened it up for the party to be able to go in and hire  
7 more attorneys, consultants, whatever, and run the rate  
8 case expense ten times what the whole increase is. So  
9 that is a major factor when we don't -- we decide not to  
10 intervene.

11 It just makes no sense to run up rate case  
12 expense \$200,000; we are taking about a \$25,000 case.  
13 But we do a lot of work; Steve Riley on our staff does a  
14 tremendous amount of work working with the ratepayers,  
15 because they will call us. A lot of times the  
16 legislators will call us saying, hey, I'm getting a lot  
17 of calls from constituents down here at Killlearn Lakes,  
18 and something about their water, and we get involved.  
19 We go to meetings. But we don't intervene because we  
20 don't want to see the rate case expense skyrocket.

21 So we do work with staff and the companies  
22 many times, and the staff are great to work with in  
23 trying to come up with something that eventually you, as  
24 the Commission, take a look at it and eventually  
25 approve. So just to say we can intervene in any case

1 that we are interested in, I don't think is a workable  
2 solution.

3 I understand the challenge of noticing  
4 meetings. But as I stated in the first workshop that we  
5 held, I believe that is a way to utilize technology and  
6 your web page. I'm going to say this, and I hope I  
7 don't hurt anybody's feelings, but I think your web page  
8 should be looked at very closely, and I think it should  
9 be modified. I think it should be revised. I think it  
10 should be maybe a whole makeover.

11 Why do I say that? Well, as Mr. Rehwinkel  
12 mentioned earlier, a lot of people in this room have  
13 been involved in the process 20 or 30 years. I haven't.  
14 I have been here a little over two years. And one of  
15 the first things that took me a while to understand and  
16 navigate was the website. It doesn't for people that  
17 work on it every day, but the average person that gets  
18 on that website -- I have reporters call me all the time  
19 saying where do you find this, where do you find that.  
20 It's there, it's just hard to find. And I would suggest  
21 that it's not that it's wrong, but as I like to say,  
22 there's more than one right way to accomplish something.

23 So I offered this suggestion back in the  
24 first workshop and I still think it's a good suggestion,  
25 is that you put a link on there on the front page,

1 meetings. And you notice the meetings there through the  
2 website. And you could -- whether it's formal or  
3 informal, you could put it on the website. And then,  
4 you know what, if you put a meeting there on a PAA case,  
5 and it says it's Friday at 9:30, and we see it and we  
6 don't show up, shame on us. Okay. That we then don't  
7 have a reason to come back and say, you know,  
8 Commissioner whomever, why weren't we notified, because  
9 it was there.

10 And I think that is a way that Mr. Rehwinkel  
11 mentioned earlier about use of technology. I mean we  
12 have come a long, long way since '93. And I think that  
13 is a way that we can address a lot of these issues. I  
14 do understand that whatever we do here, whatever changes  
15 y'all ultimately decide on is going to present new  
16 challenges not only to staff, it's going to present new  
17 challenges to us sitting on this side of the table here,  
18 both from the utilities and from intervenors of how  
19 we're going to make sure that we comply. Because, you  
20 know, I have said this before, what's good for the goose  
21 is good for the gander.

22 I don't want my office to be able to do  
23 anything beyond what any regulated entity can do.  
24 That's not fair and I would never ask for that. So we  
25 are going to have the same challenge in these instances

1 about whatever you ultimately desire and what you want  
2 to change.

3 **MR. REHWINKEL:** And, Madam Chairman, just to  
4 follow up, and Mr. Willis has been doing this even  
5 longer than I have, and I fully respect his perspective.  
6 I probably was inartful in the way I communicated what  
7 our office seeks here. He was speaking in the PAA  
8 context in the main, some of these PAAs. There are two  
9 types of PAAs that are statutorily defined; and there's  
10 water and sewer ones, and then there's the small gas and  
11 electrics. And, you know, still dovetailing to what Mr.  
12 Kelly stated about notice through the electronic means,  
13 we think notice, notice, notice is the only thing.  
14 Forget about whether I've got to pick up somebody and I  
15 can't make it to the meeting. That's my problem. But  
16 we think notice is something that the Commission ought  
17 to move towards making more transparent.

18 But there are PAAs that are requested and  
19 that they operate under the Commission's -- the common  
20 law, if you will, of what the Commission has developed  
21 as far as how you process cases through the PAA process.  
22 They are not necessarily statutory ensconced, it is just  
23 the way you have done things. And we think they have  
24 been used more and more in significant cases. So we  
25 urge you -- we would concede that there may be types of



1 PAAAs that you want to maybe have different levels of  
2 notification, because we are not trying to create  
3 adversarial proceedings where none would exist in the  
4 first place, and I think that's a big part of the  
5 concern. You know, like rate case expense. We don't  
6 want to make a case where there wouldn't be one, but we  
7 do have a fundamental concern about the development of  
8 the PAA. Because not to be critical of anybody, but  
9 human nature is that once you've invested time and  
10 effort into developing a product and someone has valid  
11 criticisms of that product, it's hard to pull it back to  
12 the middle. And that is not a criticism that anybody  
13 has done anything wrong, it's just that the burden is  
14 now a little bit higher to do that. So notice and  
15 opportunity to participate is, we think, important.

16 Non-rate case tariffs. Again, we are not  
17 trying to get down into the 95 percent, but there have  
18 been significant items processed as tariff filings that  
19 are not considered rate case or in the sense of general  
20 rate proceedings, but they have that same quality. And  
21 it's probably more of a definitional issue that we would  
22 certainly like to work with folks on. And I can give  
23 some examples to staff. I don't really want to do it  
24 here because there are some pending matters that are  
25 good examples that I'd like to kind of discuss, but

1 there are different types of tariff processing that are  
2 done via the file and suspend law, but are not  
3 considered rate case tariffs. So maybe some  
4 definitional drafting there needs to be done.

5 **CHAIRMAN ARGENZIANO:** Commissioner Stevens and  
6 then Mr. Willis.

7 **COMMISSIONER STEVENS:** I think Mr. Rehwinkel  
8 brought up something good there, and I think to step  
9 back to something Mr. Stone said, we need to be careful  
10 of unintended consequences on how we handle things. And  
11 I think if Marshall and Mr. Rehwinkel get together we  
12 can make something that's good and works and can  
13 continue another 17 years.

14 **CHAIRMAN ARGENZIANO:** Marshall.

15 **MR. WILLIS:** Chairman, just in response to  
16 that. Rate case expense is a pretty hefty item for  
17 every water and wastewater case and several small gas  
18 companies, because we have some gas companies that we  
19 regulate that are just as small as water companies, or  
20 smaller than some of our big water companies. I don't  
21 want to get in the position where my staff is having to  
22 go from calling a water company or a small gas company  
23 and just asking them to supply information -- and, by  
24 the way, a lot of times to hold down rate case expense  
25 we will go directly to the utility instead of through

1 attorneys where you have more billable hours, which is  
2 normally satisfactory with the companies, because that  
3 is always a priority, whether it's satisfactory with the  
4 company's attorney, that we can bypass all of that. But  
5 a lot of times we'll make a phone call and say we need  
6 this following information. We can do that right then.  
7 If I have to notice to call up the company and ask for  
8 that, that goes from one day to two days, because I'm  
9 not sure what a reasonable notice is.

10 **CHAIRMAN ARGENZIANO:** You're talking about  
11 even noticing electronically, is that --

12 **MR. WILLIS:** Well, if I have to put out a  
13 notice on a website, what's my time frame? That's a  
14 problem. Do I have to put out a notice a day ahead of  
15 time, two days ahead of time so that everyone has an  
16 opportunity to see this? We are delaying the process.

17 **CHAIRMAN ARGENZIANO:** Hang on. Did you hear  
18 that, Mr. Rehwinkel? What is the notice, the time  
19 frame? If he had to notice something on the web page,  
20 what would he do as far as time frame? What would the  
21 proper notice be? Is that what you're asking, Marshall?

22 **MR. WILLIS:** Yes, correct.

23 **MR. REHWINKEL:** Madam Chairman, we have not a  
24 proposal to offer in that regard with respect to the  
25 time constrained PAAs. I think that that is something

1 that we would like to give some thought to. And Mr.  
2 Reilly is not here. He sent us out here to do his  
3 bidding, but we have really kind of gotten into an issue  
4 that we probably need his expertise on. But, I mean,  
5 Mr. Willis, again we recognized when we filed this that  
6 there would be practical issues that would arise. And  
7 that doesn't mean we can't solve them, but we really  
8 need to hear from everybody about what they are so we  
9 can then kind of try to shape solutions to that. But  
10 that is a pragmatic concern.

11 **MR. WILLIS:** And the other area, Chairman, if  
12 you don't mind, the other area that's a problem is you  
13 are talking about rate case expense. You are going to  
14 see staff, if this is adopted, put a lot more in formal  
15 discovery, even if it's PAA. That assures that  
16 everything is done proper in the record. And I don't  
17 want to have the staff in order to make a phone call  
18 just requesting certain items to be filed to cover an  
19 issue or send an e-mail to a company saying I need the  
20 following documents within so many days. We do a lot of  
21 that informal discovery in these PAA rate cases, and it  
22 ultimately holds down rate case expense. But the other  
23 option is we do all formal discovery through attorneys.  
24 More rate case expense.

25 I mean, that puts it all out there and

1 everyone is able to see the whole works. It just makes  
2 things a lot more difficult and more time consuming for  
3 these when everybody has the ability to get involved at  
4 the tail end, or somebody has the ability to intervene,  
5 and then we know that you really wanted to see, or hear,  
6 or be advised of everything in the world that can happen  
7 in that docket.

8 It just seems to me that intervention is the  
9 better way to go, and that advises staff that this is a  
10 docket that you want to be involved in, and you will be  
11 involved at that point. It certainly narrows it down to  
12 me.

13 **CHAIRMAN ARGENZIANO:** Mr. Moyle.

14 **MR. MOYLE:** I just have two points I would  
15 like to make on this discussion. I mean, as Marshall  
16 points out, I have seen a lot more e-mail traffic. You  
17 know, if you need some data, you know, an e-mail which  
18 copies me, I mean, I may not care about the data, I  
19 could delete it, but at least I kind of know that it's  
20 going on as compared to a phone conversation that I do  
21 not. I don't know that you have to go necessarily to  
22 formal discovery, but rather than picking up the phone  
23 everything is moving more toward e-mail anyway.

24 So I would venture to say that there is  
25 probably is a solution to that point. But I wanted to

1 kind of just step back a little bit and talk about sort  
2 of a larger issue from my client's perspective, which  
3 is, you know, the current rule contemplates exempting  
4 staff from communications for proposed agency actions  
5 until they are voted on. And I think that's way too  
6 broad, because there could be a filing made that we  
7 know, okay, you know what, this is something that we are  
8 going to be involved in. File a petition to intervene,  
9 but we still under the current draft of the rule don't  
10 get notice of any meetings notwithstanding the fact that  
11 we have filed a petition to intervene.

12 So, I think, you know, the notion of a  
13 petition to intervene is a good framework to say, okay,  
14 we know somebody is out there; we know somebody is  
15 interested. If we're going to have a meeting or have  
16 conversations, communications with the petitioner we  
17 need to loop these folks in. But the way it's crafted  
18 now is, you know, even if they filed on day one and we  
19 filed a petition to intervene on day three, we would not  
20 have a right to be noticed of any staff discussions or  
21 meetings the way it's crafted. So I think that a  
22 modification -- you could say that proposed agency  
23 actions are exempt unless a petition to intervene has  
24 been filed and then that would still allow them to be  
25 exempt, but once a petition to intervene has been filed,

1 or a notice of interested party, that may trigger it in  
2 a different way. So I just wanted to make that point.

3 **CHAIRMAN ARGENZIANO:** Marshall.

4 **MR. WILLIS:** And, Chairman, that brought up an  
5 idea. Notice of interested party is another way. If  
6 Mr. Rehwinkel is concerned about intervention and that  
7 causing rate case expense and attorneys on the other  
8 side all of a sudden getting involved, if he could just  
9 file a notice that he's an interested party, interested  
10 parties get information. They are cc'd on everything.

11 **CHAIRMAN ARGENZIANO:** Mr. Rehwinkel.

12 **MR. REHWINKEL:** It is interesting that --

13 **MR. WILLIS:** I'm sorry, I've been corrected.  
14 Interested persons. I'm not an attorney.

15 **MR. REHWINKEL:** Mr. Willis was -- what they  
16 were talking about was something we were discussing  
17 here. And I don't know if it's -- we would like to  
18 think about it some more, but it may be that you could  
19 design a mechanism where people sign up that they want  
20 to get PAA --

21 **CHAIRMAN ARGENZIANO:** And you know ahead of  
22 time, right.

23 **MR. REHWINKEL:** So rather than kind of do  
24 things on the fly, we'd like to, kind of, digest this.  
25 And I know you are going to have another round of this,

1 but I think we're talking in the right direction.  
2 Because sometimes just the mere intervention triggers  
3 hiring of an attorney or whatever, so that's something  
4 that we are very sensitive about in the office, whether  
5 we do it or not. So we would like to consider that.

6 **CHAIRMAN ARGENZIANO:** I would urge everyone to  
7 give more thought to that. And, Marshall, if you would  
8 work on that, too, and maybe we can solve the problem  
9 that way.

10 **MR. WILLIS:** Certainly.

11 **CHAIRMAN ARGENZIANO:** Okay. Anything else on  
12 that? Let's move on.

13 **MS. CIBULA:** Staff's draft rule adds a new  
14 Subsection (3). On Page 4, beginning on Line 22, this  
15 new subsection defines the terms party and interested  
16 persons as used in the rule.

17 **MR. REHWINKEL:** And, Madam Chairman, from the  
18 Public Counsel's standpoint, on Page 2, Lines 3 through  
19 5 of our suggestions, we have really just --

20 **CHAIRMAN ARGENZIANO:** Which lines, again? I'm  
21 sorry, where are you?

22 **MR. REHWINKEL:** I'm sorry. I'm on Page 2 of  
23 the Public Counsel's proposal.

24 **CHAIRMAN ARGENZIANO:** Right. Which lines?

25 **MR. REHWINKEL:** Lines 3 through 5.



1                   **CHAIRMAN ARGENZIANO:** Okay.

2                   **MR. REHWINKEL:** I don't think this is anything  
3 inconsistent with what the staff has drafted or has put  
4 out there, but we just think that it doesn't hurt to  
5 clarify that this includes all of these individuals who  
6 might act in representative capacities, that they be  
7 considered under the penumbra of party, but that is our  
8 suggestion.

9                   **CHAIRMAN ARGENZIANO:** Any other comments?

10                  **MS. SPENCER:** Madam Chair.

11                  **CHAIRMAN ARGENZIANO:** Yes.

12                  **MS. SPENCER:** I just wanted to say that AARP  
13 supports the inclusion of the clarifying language. We  
14 had some initial concerns that the definition was not  
15 clear enough, so we support that inclusion.

16                  **CHAIRMAN ARGENZIANO:** Staff?

17                  **MS. CIBULA:** It seems like that that would  
18 work, but we'll have to give it a little bit more  
19 thought.

20                  **CHAIRMAN ARGENZIANO:** Okay, great. If you  
21 would go on.

22                  **MR. BEASLEY:** Madam Chair.

23                  **CHAIRMAN ARGENZIANO:** I'm sorry. Yes,  
24 Mr. Beasley.

25                  **MR. BEASLEY:** To the extent you're required to

1 give notice to a party, I would assume that means that  
2 if the consultants and other representatives, if you  
3 give notice to the party you are giving constructive  
4 notice to those other persons that are employed by or  
5 representing the party.

6 **MR. REHWINKEL:** That's a good point, and that  
7 would be our intent. I don't know if there needs to be  
8 some other clarifying language, but we certainly don't  
9 think you ought to have to give actual notice to all --  
10 run track down all the people that might be included  
11 here.

12 **CHAIRMAN ARGENZIANO:** Okay. Definitely.  
13 Marshall.

14 **MR. WILLIS:** That was my point, too, because a  
15 lot of times in these cases, especially electric cases,  
16 we have a multitude of witnesses. And I'm just  
17 wondering if your intent is truly that we have to cc  
18 every single witness in the case, or is that up to the  
19 party who has the witnesses to make sure they are  
20 informed. It seems like that would be the party who is  
21 engaging those witnesses who would have to keep their  
22 own witnesses informed.

23 **MR. REHWINKEL:** Yes. Our intent is that  
24 this -- and maybe we need to take another look at it,  
25 but our intent is to make sure that these folks are

1 included as parties with respect to whether -- this  
2 really goes to the ex parte communication prohibitions  
3 rather than the notice piece. So, you know, if that  
4 needs to be fine-tuned, we'll take another look at it.

5 I mean, certainly I have seen in dockets  
6 where individuals may be witnesses or consultants have  
7 also been put on the service list or entered an  
8 appearance somehow in the docket file so they get  
9 notice, but our intent is not to put these individuals  
10 as a requirement that the staff has to now expand who  
11 they notice.

12 **CHAIRMAN ARGENZIANO:** Anybody else?

13 **MR. WILLIS:** That's good to know. But it  
14 needs to be worked on, because it seems like if this is  
15 written this way that is what we would have to do.

16 **CHAIRMAN ARGENZIANO:** Mr. Moyle.

17 **MR. MOYLE:** FIPUG supports the concept which  
18 we understood was basically to prevent a witness from  
19 having a meeting with staff without any of the other  
20 parties knowing that a witness is going to be crossed  
21 spent two hours talking to staff about an issue. That  
22 is what I think it is designed to get to.

23 For somebody to be a party, I think as was  
24 pointed out, they have to take some action. You file a  
25 petition to intervene, so I think the existing rules for

1 parties would suggest that you don't have to send, you  
2 know, witnesses notice and things like that. That is  
3 not where it's going I don't think.

4 **CHAIRMAN ARGENZIANO:** Marshall.

5 **MR. WILLIS:** And, Commissioners, I would just  
6 like to point out -- and I understand where you are  
7 coming from, Mr. Moyle. You know, I can assure you that  
8 in docketed matters going to hearing, my staff, we don't  
9 talk to witnesses directly. It's all formal discovery,  
10 which I would anticipate would happen all the time. I  
11 mean, that just doesn't happen as far as talking to a  
12 witness one-on-one. It should never happen in a  
13 docketed case going to a formal proceeding as far as I'm  
14 concerned.

15 **CHAIRMAN ARGENZIANO:** Well, I think they just  
16 want it clarified that it has never happened when,  
17 maybe, you're gone, or I'm gone, or other people are  
18 gone. I think it does need to be clarified, though.

19 **MR. REHWINKEL:** I think, for example, later on  
20 where it talks about notice that you could use the  
21 terminology that notice shall be provided to parties and  
22 then maybe amend it to say as designated in the official  
23 file, or some language like that so that that tells you  
24 who you have to notice. But this part of the rule, our  
25 intent was it governs the nature of the communications

1 and whether they can or cannot occur.

2 **CHAIRMAN ARGENZIANO:** I'm sure we can find  
3 language that gets to that point, because I think that  
4 is a good point without, you know, having it misread.

5 Okay. Staff, let's go on.

6 **MS. CIBULA:** We do have a little bit of a  
7 concern with their expansion of the definition of  
8 interested persons. It seems to contemplate that you  
9 would have to try to assume who other interested persons  
10 might be that aren't officially listed in the docket  
11 file, and that could cause some problems for staff.

12 **CHAIRMAN ARGENZIANO:** Mr. Rehwinkel.

13 **MR. REHWINKEL:** Yes, Madam Chairman. And,  
14 again, this is intended to go to the substance of the  
15 communications rather than the notice requirements.  
16 What we are going at here is if you define interested  
17 persons to be only those persons who take the  
18 affirmative step of going to the Clerk's Office and  
19 saying I want to be on the notice list for this docket,  
20 you're creating a third category of people who aren't  
21 those (3)(a) people that we just discussed, or the  
22 people that have signed up, but other people who are  
23 purposefully not putting their name in the record so  
24 that they can stay -- so they can communicate even  
25 though they may have a representative interest that is

1 not in the record.

2 I'm not saying that that has ever occurred,  
3 but that is a potential loophole that exists here. So,  
4 you know, in the law, we use the term reasonable a lot,  
5 and there is a reasonable man standard that we are  
6 seeking to put here. Certainly if someone -- if there  
7 is a law firm that represents an entity, and they  
8 don't -- they are not listed as counsel of record in the  
9 docket file and they don't sign up as an interested  
10 party, but they have a representative interest, they  
11 should not be allowed to go out and discuss matters with  
12 the staff that relate to the proceeding. And certainly  
13 the nature of the communications could fall under this  
14 could reasonably presume to have language or that there  
15 may be knowledge that people have.

16 I don't know what the right way to say this  
17 is. We think that we wanted to put this out there for  
18 folks to have the opportunity to discuss. And we are  
19 not saying that there is a problem that exists, but  
20 certainly when you set out a rule, and I agree with Mr.  
21 Willis, his staff is very good about, you know, who they  
22 don't talk to, but these rules are there for a reason,  
23 and in 17 years a lot things can happen. People can  
24 change, personnel change, so we think it's good to get  
25 it right up front.

1                   **CHAIRMAN ARGENZIANO:** Marshall.

2                   **MR. WILLIS:** And I would just like to add that  
3 this section seems to put a real undue burden on us to  
4 try and figure out who these interested parties are.  
5 There are so many different organizations out there who  
6 could possibly be involved in a rate case. Conservation  
7 groups, associations, homeowner associations. I could  
8 just think of a multitude of multitude of different  
9 groups out there, and you're putting a burden on us to  
10 try and figure out who those people might be, who those  
11 organizations might be who might have an interest in a  
12 case. It just seems like -- I don't know. It's a heck  
13 of a burden.

14                   If you're looking at things like going back  
15 to these non-rate case tariffs who never have anybody  
16 intervening, and I've got to look for any interested  
17 individual or entity out there, that's a burden I don't  
18 want to have.

19                   **MR. REHWINKEL:** I think that misses the point  
20 of what we are after here. Certainly if you have got a  
21 pending matter and, you know, Public Counsel and FIPUG  
22 is involved in it, and the utility is involved in it,  
23 and somebody comes up to you and wants to talk to you  
24 about it and are not, you know, a grandmother that has  
25 got her bill in the hand and she is worried about her

1 rates going up, but they want to take to you about a  
2 time-of-use tariff or something like that that's part of  
3 the filing, you know that that is somebody who has got  
4 an interest in the docket. It's not -- there's not a  
5 hard and fast rule about this, but certainly the  
6 potential exists. And so, again, we're not trying to  
7 say this is the only way you can do this.

8 **CHAIRMAN ARGENZIANO:** Do me a favor. You  
9 mentioned loophole before, and I'm trying to, trying to  
10 connect it again. You said there was a loophole in the  
11 way it was currently, and that's what you are really  
12 trying to, to shore up.

13 **MR. REHWINKEL:** Yes.

14 **CHAIRMAN ARGENZIANO:** Can you --

15 **MR. REHWINKEL:** Okay.

16 **CHAIRMAN ARGENZIANO:** Give me an example of  
17 the loophole again.

18 **MR. REHWINKEL:** The way the rule is today is  
19 you've got parties who intervene in the, in the docket  
20 or they might have filed a petition, but you know  
21 they're an official party of record. And then you have  
22 interested persons is the people that, you know, they're  
23 monitoring it or, you know, they may be a large customer  
24 but they don't want to hire a lawyer, so they say we  
25 want to get all the notices and orders and things that



1 you send out in this docket. That's what -- that's the  
2 universe of people that get notices by matter of rote by  
3 the, by the staff.

4 If there are people who have an interest but  
5 they don't intervene and they don't sign up to get  
6 notices but they have this interest, then they could  
7 have communications with the staff about a substantive  
8 matter and the rule wouldn't apply to them at all  
9 because they do not fall into Category A or Category B.  
10 And we're saying there's a Category C, which is people  
11 that you have a good reason to believe have an interest  
12 even though they haven't taken the affirmative step to,  
13 to sign up. And Mr. Beck may want to add to that.

14 **MR. BECK:** Yeah. Madam Chair, let me try to  
15 give you an --

16 **COMMISSIONER STEVENS:** Go ahead.

17 **CHAIRMAN ARGENZIANO:** Mr. Beck.

18 **MR. BECK:** Suppose you had an industry that  
19 has ten, ten companies in it, none of them have been in  
20 for rate cases, but they're all, you know, they're all  
21 out there. One company comes in first and files a case.  
22 Those other nine companies are going to have an interest  
23 because of the precedent that's involved in the first  
24 company that comes in.

25 **CHAIRMAN ARGENZIANO:** Sure.

1           **MR. BECK:** So we wouldn't want those other  
2 companies coming in and talking to staff and trying to  
3 get them to do things that will be in their interest  
4 when they come in later because they're certainly not  
5 going to appear as that interested party in the first  
6 company that comes in.

7           **CHAIRMAN ARGENZIANO:** Marshall, it sounds  
8 reasonable.

9           **MR. WILLIS:** Yeah. This is reasonable. I  
10 don't have a problem with that because that's one thing  
11 we try and guard against all the time. I just don't  
12 want this to be tied into noticing. I don't want to be  
13 out there searching for these interested parties for  
14 noticing. If we somehow get rid of any noticing  
15 provision, if we have to start searching for people,  
16 that's fine.

17           **CHAIRMAN ARGENZIANO:** Okay.

18           **MR. REHWINKEL:** Again, this is like a party.  
19 I mean, we are not -- this is about the nature of the  
20 communications and who you should communicate with, not  
21 the --

22           **CHAIRMAN ARGENZIANO:** Okay. So this is not  
23 about noticing. It's not asking for noticing. It's  
24 just saying that --

25           **MR. REHWINKEL:** Yeah. So we were kind of

1 talking past each other. My, my concern is I think that  
2 if staff, you know, if they have people come in and they  
3 want to talk about the matter, they, you know, the radar  
4 should be on and this is a problem.

5 **CHAIRMAN ARGENZIANO:** Right. Well, I would  
6 hope so.

7 **MR. WILLIS:** And that's something we guard  
8 against all the time, Chairman.

9 **CHAIRMAN ARGENZIANO:** Okay.

10 **MR. WILLIS:** That's, that's not a problem to  
11 me.

12 **CHAIRMAN ARGENZIANO:** I think, I think -- go  
13 ahead.

14 **MR. REHWINKEL:** The absence of that definition  
15 in here, while we're sitting here fixing it, not that  
16 things are broken, but --

17 **CHAIRMAN ARGENZIANO:** Right. I understand.

18 **MR. REHWINKEL:** You know, let's just get the  
19 rule right upfront.

20 **CHAIRMAN ARGENZIANO:** It's always better in  
21 writing.

22 Commissioner Stevens.

23 **COMMISSIONER STEVENS:** (Inaudible. Not on  
24 microphone.)

25 **THE COURT REPORTER:** Could you turn your

1 mike on, please?

2 **COMMISSIONER STEVENS:** On?

3 **CHAIRMAN ARGENZIANO:** Yes.

4 **COMMISSIONER STEVENS:** Good. Okay. Sorry  
5 about that. The -- thank you.

6 Some of these things, you know, staff hasn't  
7 had a chance to absorb this recommendation from Public  
8 Counsel, and we're spending a lot of time here, and I  
9 don't think we can make -- I'm not comfortable making a  
10 decision yea or nay on this because of the  
11 implementation requirements that, you know, Tim and his  
12 staff will have on these things.

13 **CHAIRMAN ARGENZIANO:** Right.

14 **COMMISSIONER STEVENS:** So if we could have,  
15 you know, as soon as, you know, Public Counsel makes  
16 their comments, maybe it would be better for all of us  
17 and more expeditious to do the right thing to have OPC  
18 get with our attorneys, and maybe we need to notice that  
19 to everybody and make sure it's good, but get them  
20 together and let them work through it.

21 **CHAIRMAN ARGENZIANO:** Curt.

22 **MR. KISER:** I know the Public Counsel is not  
23 asking for any special powers, but that doesn't mean  
24 that you can't suggest that they expand their role a  
25 little bit. And maybe they should be the ones required

1 to notify us of these other people we've missed. Let  
2 them be the ones to say which, which people are captured  
3 by their language that aren't currently captured.

4 **CHAIRMAN ARGENZIANO:** Well, I don't, I don't  
5 think what they're asking -- I think what they're asking  
6 for is that no communication take place by an interested  
7 party. And I think, as you just heard Marshall say,  
8 that's reasonable. As long as our staff doesn't have to  
9 notice that all over the world, I don't think that's a  
10 big deal.

11 As far as OPC, I don't know how many people  
12 you've got working for you, but -- and we have the same  
13 problem here. Marshall's staff, they're strapped, and  
14 the Legislature is not likely to give us anybody else.  
15 But I think what he's asking for is saying while we're  
16 talking about communications here, here's an area you  
17 need to pay attention to. And I just agree with that.  
18 I think that's perfectly reasonable. And I, and I heard  
19 Marshall say he thought it was reasonable also.

20 So I don't think that's -- there may be  
21 other things, as Commissioner Stevens has suggested,  
22 that you guys need to get together on because some of  
23 the things we're not sure that, you know, it's not going  
24 to cause a bigger problem. And I think I heard  
25 everybody say it. But that's part of what we're doing.

1 I don't think we've had the opportunity before for  
2 everybody to come before us and give those, you know,  
3 give their input to this product.

4 Mr. Beasley.

5 **MR. BEASLEY:** Yes, ma'am. I'd pick up on  
6 Commissioner Stevens' comment. I think there's a lot of  
7 input that we're all getting, and I think that would be  
8 very ripe for us to kind of conjugate (phonetic) over  
9 all the input and do some posthearing comments after  
10 reflecting.

11 **CHAIRMAN ARGENZIANO:** Sure. I agree with  
12 that. But I also feel that certain things I hear, I may  
13 hear from all the parties I think are right dead-on, and  
14 I think that one is.

15 **MR. REHWINKEL:** Thank you. And our purpose  
16 here is we believe we're kind of at the inception of  
17 this process. And I know it's being transcribed, so I  
18 think it will be useful for everybody to kind of have  
19 these discussions because then you go back and look at  
20 it, digest it, and, and I think it'll make the process  
21 better.

22 **CHAIRMAN ARGENZIANO:** Absolutely. Absolutely.

23 **MR. KISER:** Madam Chairman.

24 **CHAIRMAN ARGENZIANO:** Yes.

25 **MR. KISER:** The point I want to get to too is

1 how are those people going to know that they're now  
2 under this requirement they can't have ex parte? I  
3 mean, if they aren't a party and they're not, they're  
4 not involved in these formal processes but yet under his  
5 definition they're going to be captured under this, how  
6 are they going to know that they are now, that they  
7 can't be making these conversations? That's part of the  
8 dilemma I have is making sure that they're, that they  
9 know that they're under this restriction as well when  
10 they're not, not into the proceeding.

11 **CHAIRMAN ARGENZIANO:** Sure.

12 **MR. REHWINKEL:** My -- our intent again, and I  
13 appreciate Mr. Kiser's comments, but I think that the  
14 people, as Mr. Beck's example was, is that the people  
15 that are making these communications or that might  
16 consider making them, they know, they know who they are.  
17 They know why they're there, I mean, to be blunt about  
18 it.

19 And that's -- I'm not saying that that's  
20 occurred, but we're wanting to make sure that people  
21 don't get the idea when you put these rules out that  
22 now, okay, well, there's a, there's a tailor-made  
23 loophole here. And this is geared at people who want to  
24 go and influence the process, not, not the innocent  
25 person.

1           **CHAIRMAN ARGENZIANO:** Well, I think, I think  
2 part of that is if it's not written into law, if we can  
3 come up with a way of doing that, then no one will ever  
4 know. If it is written into law and rule, then I guess  
5 you're going to know you're going to be dealing with the  
6 Public Service Commission. But it just needs to be done  
7 the right way, so we need to make sure that that's what  
8 we're doing. So anybody else?

9           **MS. MILLER:** Madam Chairman.

10          **CHAIRMAN ARGENZIANO:** Yes.

11          **MS. MILLER:** I was just thinking that when  
12 people do file postworkshop comments, it may be that the  
13 rule has to be restructured if you're talking about a  
14 different definition for noticing versus a different  
15 definition for prohibited communications without notice  
16 to others or some kind of restructuring.

17          **MR. REHWINKEL:** Yeah. And I think certainly  
18 when we go back and digest this that what we will  
19 probably come back with is, is some way to bifurcate the  
20 intent of that definition. So we'll give that some  
21 thought. Thank you.

22          **CHAIRMAN ARGENZIANO:** Okay. Let's move on.

23          **COMMISSIONER STEVENS:** Madam Chair.

24          **CHAIRMAN ARGENZIANO:** I'm sorry. Commissioner  
25 Stevens.



1           **COMMISSIONER STEVENS:** If we're ready to move  
2 on, this next section doesn't make sense.

3           **CHAIRMAN ARGENZIANO:** Okay. Where are you?

4           **COMMISSIONER STEVENS:** I'm on Page, Page 5 of  
5 our --

6           **CHAIRMAN ARGENZIANO:** Of our staff's? Okay.  
7 Let me get back to our staff's.

8           **COMMISSIONER STEVENS:** And I don't --

9           **CHAIRMAN ARGENZIANO:** Commissioner Skop.

10          **COMMISSIONER SKOP:** Thank you.

11          **COMMISSIONER STEVENS:** And maybe, maybe  
12 Samantha has already picked up on that.

13          **CHAIRMAN ARGENZIANO:** Okay. Hold on. Hang  
14 on.

15          **COMMISSIONER SKOP:** Commissioner Stevens, I  
16 have the same concern because I have a strike and amend  
17 for (7).

18          **CHAIRMAN ARGENZIANO:** Okay. We're on Page 5,  
19 on Number (7)?

20          **COMMISSIONER SKOP:** I think we're on (6);  
21 right?

22          **COMMISSIONER STEVENS:** No. I have (4) --  
23 (3) (a) -- no, (4), Written Communications, Page 5.

24          **CHAIRMAN ARGENZIANO:** Okay. Page 5.

25          **COMMISSIONER STEVENS:** Isn't that where we

1 are?

2 **CHAIRMAN ARGENZIANO:** Okay. Yes.

3 **COMMISSIONER STEVENS:** Right after Interested  
4 persons?

5 **CHAIRMAN ARGENZIANO:** Yes. Okay.

6 **COMMISSIONER STEVENS:** Okay. If you read  
7 that, it goes, "Written Communications," and we added  
8 the "s," "between Commission employees and parties and  
9 interested persons shall be transmitted," and I have a  
10 question on that, "to all other parties at the same time  
11 as the written communication." That doesn't read right  
12 to me.

13 **CHAIRMAN ARGENZIANO:** How about explaining the  
14 intent.

15 **MS. CIBULA:** Well, that was the way the  
16 original rule was written. The intent was that if you  
17 --

18 **COMMISSIONER STEVENS:** No. The original was  
19 "Notice of any."

20 **MS. CIBULA:** Yeah. Notice --

21 **COMMISSIONER STEVENS:** And when we took that  
22 out we left the end of the sentence in and now it  
23 doesn't make sense.

24 **MS. CIBULA:** What the intent was is that if  
25 you submit a written communication, that you should CC

1 all other parties at the same time and send that  
2 communication out at the same time so everyone is  
3 notified at the same time that you're contacting staff.

4 **COMMISSIONER STEVENS:** Why don't we say that?

5 **CHAIRMAN ARGENZIANO:** Because bills are  
6 written in a very odd way.

7 (Laughter.)

8 Curt, any --

9 **MR. KISER:** (Inaudible. Microphone off.)

10 **CHAIRMAN ARGENZIANO:** Your mike. Your mike.

11 **MR. KISER:** -- later, what's your obligation  
12 to send notices, the things to those folks who come in  
13 later?

14 **MS. CIBULA:** I thought this was just supposed  
15 to address that whenever you send out a written  
16 communication, whoever is on that docket at that time  
17 who's a party, you're supposed to send out that  
18 communication to everyone else at the same time.

19 **CHAIRMAN ARGENZIANO:** To everyone.

20 **COMMISSIONER STEVENS:** And maybe if we put a  
21 period after "at the same time" or take out the "as the  
22 written communication," so it's "transmitted to all  
23 other parties at the same time, whether by U.S. Mail or  
24 other means."

25 **CHAIRMAN ARGENZIANO:** Yeah.

1           **MR. KISER:** That would do it.

2           **COMMISSIONER STEVENS:** I don't think you  
3 need -- that "as the written communication" is, is not  
4 right.

5           **CHAIRMAN ARGENZIANO:** Yeah. Right.

6           **MS. CIBULA:** Yeah. We can make that change.

7           **COMMISSIONER STEVENS:** I'm not an English  
8 major obviously, but --

9           **CHAIRMAN ARGENZIANO:** I think -- no, I think  
10 that's -- I think you're right on. Okay. Wait. Let  
11 him finish.

12           **COMMISSIONER STEVENS:** And I have one other  
13 question. When we say -- and I know "U.S. Mail" was  
14 already there and "transmitted" is already there. Do  
15 we -- as we're working through this, I don't know if we  
16 --

17           **CHAIRMAN ARGENZIANO:** Pony Express, anything.

18           **COMMISSIONER STEVENS:** Yeah. I mean, do you  
19 need that in there?

20           **MS. CIBULA:** We probably don't need that in  
21 there anymore.

22           **COMMISSIONER STEVENS:** Okay. Okay.

23           **MS. CIBULA:** And we can make those revisions.

24           **CHAIRMAN ARGENZIANO:** Commissioner Skop.

25           **COMMISSIONER STEVENS:** Thanks.

1                   **COMMISSIONER SKOP:** Thank you, Madam Chair.

2                   And I appreciate Commissioner Stevens'  
3 comments and I share his, share his views. I would  
4 probably approach it in the same way. Trying to clarify  
5 it, I'd probably say, "Written communication between  
6 Commission employees and parties and interested persons  
7 shall be transmitted to all other parties at the same  
8 time the written communication was made or received,"  
9 period. And I think that that addresses incoming or  
10 outgoing in the same manner in which we had to kind of  
11 tweak the, that legislative language yesterday. So that  
12 might be a fix. But I agree with that --

13                   **CHAIRMAN ARGENZIANO:** Wait a minute. We're  
14 getting staff totally confused now.

15                   **MS. CIBULA:** I guess the receipt is what's  
16 confusing me. Because I think this is only  
17 contemplating that when you send something --

18                   **CHAIRMAN ARGENZIANO:** Yes. Out. Right.

19                   **MS. CIBULA:** -- you need to make sure that you  
20 send it to everyone else.

21                   **CHAIRMAN ARGENZIANO:** Right. That's what it  
22 is.

23                   **MS. CIBULA:** That you're not -- you don't  
24 exclude someone else.

25                   **CHAIRMAN ARGENZIANO:** Absolutely.

1                   **COMMISSIONER SKOP:** So it's only  
2 contemplated -- because that's not clear to me from a  
3 plain reading of this, "Written communications between  
4 Commission employees and parties," because to me that  
5 seems like it could go bilateral, either way. Maybe  
6 written communication from --

7                   **MS. CIBULA:** And it's in reverse too. So if a  
8 party sends something to the Commission, they should CC  
9 everyone else that's a party to that docket as well.

10                   **COMMISSIONER SKOP:** Yes. They have a legal  
11 obligation to do that. So you're saying that this is --

12                   **MS. CIBULA:** And that's what I think this is  
13 supposed to codify is that legal obligation to do that.

14                   **MR. MOYLE:** Somebody is always going to be  
15 transmitting, whether it's an employee or a party.

16                   **CHAIRMAN ARGENZIANO:** Right.

17                   **MR. MOYLE:** So I think transmit gets you  
18 there.

19                   **COMMISSIONER SKOP:** Okay. (Inaudible.  
20 Microphone off.)

21                   **CHAIRMAN ARGENZIANO:** I think, I think --  
22 well, you can't give up. If you're going to work on  
23 something, you've got to keep working on it. Nobody is  
24 forcing you to give up.

25                   **COMMISSIONER SKOP:** This is, this is --

1           **MS. CIBULA:** Well, we can work with it a  
2 little bit.

3           **CHAIRMAN ARGENZIANO:** Yeah. I think we know  
4 what we're trying to do here. And what gets frustrating  
5 is you want to do it Johnny-on-the-spot, and that's why  
6 what we're saying is give it thought, vet it out, and  
7 then let's go work on it and see what we come up with.

8           **MR. REHWINKEL:** Madam Chairman, the Public  
9 Counsel agrees with Commissioner Skop. What he put out  
10 there I think captures --

11           **CHAIRMAN ARGENZIANO:** Has to go --

12           **MR. REHWINKEL:** -- what, what our suggestions  
13 are. But we offer our language as a way to capture  
14 that, but we certainly agree that it can be stated the  
15 way Commissioner Skop, somewhere along that line.

16           **CHAIRMAN ARGENZIANO:** Yeah.

17           **MR. REHWINKEL:** So we support that.

18           **CHAIRMAN ARGENZIANO:** Point well taken. And  
19 that's -- staff just needed to know what --

20           **COMMISSIONER SKOP:** I'm just fatigued from  
21 yesterday.

22           **CHAIRMAN ARGENZIANO:** We all are.

23           **COMMISSIONER SKOP:** I'm just --

24           **CHAIRMAN ARGENZIANO:** Trust me, we all are.

25           **COMMISSIONER SKOP:** I've reached the point of

1 capitulation, so --

2 **CHAIRMAN ARGENZIANO:** Oh, I don't know if you  
3 should ever say that.

4 **COMMISSIONER STEVENS:** Never quit. Never wave  
5 the white flag.

6 **CHAIRMAN ARGENZIANO:** I don't quit. All  
7 right.

8 **MR. REHWINKEL:** Madam Chairman --

9 **CHAIRMAN ARGENZIANO:** Yes.

10 **MR. REHWINKEL:** -- I should also mention of  
11 course that, that we focused on the, kind of the  
12 logistics of -- and I think what Samantha was talking  
13 about is from the staff's standpoint they're only  
14 communicating out, so their obligation is to do that.

15 **CHAIRMAN ARGENZIANO:** Right. Right.

16 **MR. REHWINKEL:** But the parties who, or these  
17 defined individuals that are communicating with them,  
18 they have under the rule the obligation to do the same  
19 things.

20 **CHAIRMAN ARGENZIANO:** Right.

21 **MR. REHWINKEL:** But we have in, on our Page  
22 2 in Lines 10 through 12 we took the definition --

23 **CHAIRMAN ARGENZIANO:** I'm sorry. Sorry. Your  
24 page?

25 **MR. REHWINKEL:** Page 2, Lines 10 through 12.



1                   **CHAIRMAN ARGENZIANO:** 2, Line 12. Okay. Got  
2 you. Sorry.

3                   **MR. REHWINKEL:** Yeah. Through 12. We have  
4 put in a definition of ex parte communication, and we  
5 lifted that from the definition that existed from your  
6 prior legislative discussion. Not yesterday's, but the  
7 one before that.

8                   And we think it's useful to have that  
9 definition in there because we have also, in Sections  
10 (4) and (5) we have put in a prohibition against ex  
11 parte written communications and ex parte unwritten  
12 communications or oral communications.

13                   So we think if you're, if you're going to  
14 say as a base you cannot engage in ex parte  
15 communications, you need to define them. That  
16 definition may be fluid based on some of the things you  
17 discussed yesterday and where things go. And we think  
18 an overlay to that is, tags to the very first comment  
19 that we had about docketed may be too narrow, and, as  
20 Mr. Kiser said, what I propose may be too broad. But  
21 somewhere in there this "to a proceeding" language  
22 that's in Line 11 of our proposal may be too narrow.  
23 And we may need to -- it may need to be expanded to  
24 capture matters that are subject to the issuance of an  
25 order by the Commission. But we would, we would like to

1 in our next round of comments offer some language in  
2 that regard. But I wanted to put folks on notice is  
3 that we think this language is too narrow, much as the  
4 docketed language is too narrow. Okay?

5 **MR. KISER:** Madam Chairman.

6 **CHAIRMAN ARGENZIANO:** Let's see. Curt and  
7 then Marshall.

8 **MR. KISER:** I wanted to go back to the Public  
9 Counsel's provision on (4). I think, I think he agreed  
10 pretty much with the way Commissioner Skop had -- for  
11 the first part of the sentence or first part of that  
12 paragraph.

13 What I was a little confused about is the,  
14 is the second part of that where it says "transmittal of  
15 the communications to all required persons and parties  
16 shall be in the same form, by the same means and  
17 simultaneous with the transmittal to the recipient,  
18 whether by U.S. Mail or other means."

19 If someone writes in by U.S. Mail, does that  
20 mean that all the transmittals going back out for the  
21 copies have to be by U.S. Mail so everybody is then  
22 stuck with that one because one letter comes in, or, or  
23 do you only have to go back to the recipient with the  
24 same form of transmittal and all the other people you  
25 have to copy can then be done by e-mail, for example?

1           **MR. REHWINKEL:** I think the intent there is  
2 that, is that that would certainly not be a bad result  
3 if everyone else got it quicker, but we certainly didn't  
4 want for one party to get it faster and everyone else to  
5 get it slower.

6           **MR. KISER:** I see.

7           **MR. REHWINKEL:** And so it again --

8           **MR. KISER:** But the, but the downside of that  
9 is if that person communicating chooses, because that's  
10 the only thing they can do is send it by mail, then that  
11 means everybody, the Commission, everybody else has to  
12 then receive theirs by mail.

13           **MR. REHWINKEL:** Yeah. I think it could be a  
14 logistical problem. But what we're trying to get at is  
15 that, again, it's that level playing field concept, and  
16 if it can be done better, we're all for it.

17                   We just wanted to make sure that, that  
18 somebody didn't get a communication faster and everyone  
19 else get it slower. That was our, our main concern.

20           **MS. SPENCER:** If I can interject here. If I  
21 understand this correctly, what you're trying to say is  
22 that if a letter comes in via U.S. Mail, that when it is  
23 transmitted out to all of the parties, each person would  
24 have to be notified in the same manner via e-mail --  
25 whether that be e-mail or U.S. Mail. So that if you're

1 sending out the transmittal to all interested parties,  
2 one person doesn't get it U.S. Mail and another person  
3 doesn't get it e-mail. Is that what you're getting at?

4 **MR. REHWINKEL:** That's -- yeah. I wasn't, I  
5 wasn't --

6 **MS. SPENCER:** Okay.

7 **MR. REHWINKEL:** Yes, that's exactly what we  
8 intended. I, I thought you were talking about the  
9 initial communication. Certainly the obligation under  
10 the rule, if someone is sending something that's an ex  
11 parte communication or that would be covered by this  
12 rule, they should send it to everybody as per the rule.  
13 But if you get one in and then you have to tell  
14 everybody about it, you tell everybody about it the same  
15 way. That's what our intent is.

16 **MR. KISER:** I understand. But I just, I'm  
17 wondering logistically, you know, if there's a number of  
18 these that have to go out, if that means now everybody  
19 is going to have to do the letter form as opposed to  
20 the, the quicker way with e-mail.

21 **MR. REHWINKEL:** Our intent is not that, that  
22 if you're communi -- if you're transmitting the instance  
23 of a communication that came in by U.S. Mail, that you  
24 have to notify people that way. You know, I think this  
25 rule doesn't address the efficient way to do business.

1 I think that would be up to the staff or the other  
2 parties under the circumstances of the case.

3 **CHAIRMAN ARGENZIANO:** Marshall? Marshall.

4 **MR. WILLIS:** Chairman, two things, and they  
5 really regard defining terms. As far as Public  
6 Counsel's, on their Page 2, it's Part (3)(c), the first  
7 one would be on Line 11. It's toward the end of that  
8 sentence where it says, "Is made without adequate notice  
9 to parties."

10 Adequate to me, if I'm trying to follow this  
11 rule, needs to be defined. You know, adequate to me is  
12 one thing. Adequate to Public Counsel might be a week's  
13 notice. I don't know. I would, I would think if this  
14 language is to be used, we'd certainly want to narrow  
15 that down and define what that is.

16 Part 4, (4), Line 16, Public Counsel's new  
17 language says, "Transmittal of the communications to all  
18 required persons." It seems to me that "required" needs  
19 to be defined. Who is a required person? I think we've  
20 talked about all parties, interested parties, but when  
21 you just throw in the word "required" there without  
22 maybe throwing it back to one of the prior subsections  
23 --

24 **CHAIRMAN ARGENZIANO:** Uh-huh. J.R.

25 **MR. KELLY:** Well, just the adequate -- we took

1 it straight out of y'all's language yesterday that was  
2 discussed at the -- the adequate -- I'm looking at it  
3 right here for purposes of this section. So we, we  
4 mimicked that language. Whatever, I would say whatever  
5 you guys decide, how you -- just use the exact same  
6 definition. That was our point.

7 **MS. CIBULA:** And I also have a question about  
8 the use of the term "ex parte communications." Are you  
9 mean -- are you intending that, that this applies to  
10 communications between parties and Commissioners or  
11 parties and Commission staff in using the term "ex parte  
12 communication"?

13 **MR. REHWINKEL:** Staff. Staff.

14 **MS. CIBULA:** Because I, and I could be wrong,  
15 but I kind of always thought ex parte communications had  
16 to do with communications, one-sided communications with  
17 the decision-maker. And staff has always never been  
18 included -- you know, our communications weren't called  
19 ex parte communications when you communicate with staff.

20 **MR. REHWINKEL:** I understand, we understand  
21 that. We believe that the way the rule was originally  
22 written, that it, it, it was, it took that concept. But  
23 if you're going to have a rule that says, that talks  
24 about a level playing field, you have to broach the  
25 subject of an ex parte or as, you know, one-sided

1 communication, and that's -- if, if ex parte is a  
2 problem with respect to confusion with the statute and  
3 as it relates to the Commissioners, you know, maybe you  
4 could come up with prohibited communication or something  
5 like that. But you have to define it.

6 **CHAIRMAN ARGENZIANO:** That's what we talked  
7 about yesterday at length.

8 **MR. REHWINKEL:** You have to define it, you  
9 have to define it to say, to set a standard as you shall  
10 not engage in this kind of conduct, and then you say  
11 what drives what kind of conduct is prohibited. We're  
12 not wed to the use of that term, but we just used it  
13 because the concept is the same, is that you should not  
14 have, one party shouldn't have unequal access to, to the  
15 staff as they develop their recommendations to the  
16 Commission. That's what we're going --

17 **CHAIRMAN ARGENZIANO:** Right. Right.

18 **MS. CIBULA:** And it doesn't contemplate -- I  
19 don't know whether the way it's written now whether it  
20 means that OPC couldn't talk to the Office of Public  
21 Counsel -- I mean, OPC couldn't talk to the Attorney  
22 General's Office or OPC couldn't talk to the utility.

23 **MR. REHWINKEL:** No. This only, this, this  
24 would only -- the intent here is that it would only  
25 govern communications with the staff. And so, so if, if

1 that needs to be sharpened, then we'll deal with that.

2 **CHAIRMAN ARGENZIANO:** Commissioner.

3 **COMMISSIONER STEVENS:** I kind of hear what our  
4 staff is saying. I want to be clear, I want to be  
5 transparent, but I also want to be able to do the job.

6 **MR. REHWINKEL:** Sure.

7 **COMMISSIONER STEVENS:** And if staff can't talk  
8 to people, they can't do the job. So I think --

9 **CHAIRMAN ARGENZIANO:** Well, no, that's not  
10 what he's saying. What he's saying is that it shouldn't  
11 be one-sided. All parties should be able to talk.

12 **COMMISSIONER STEVENS:** And I agree with that.  
13 I think we're digging into some things that aren't  
14 broken. I mean, I have -- I think the additions here  
15 were to make this rule better, and some of the things  
16 that OPC has recommended are to make things better. But  
17 to look at things that are recommended without having  
18 staff, giving them the time to look at the  
19 implementation requirements and what, what it causes, I  
20 don't want to say that we can do something and then come  
21 back and it's an unintended consequence. And that's  
22 where I am. So --

23 **CHAIRMAN ARGENZIANO:** Pretty much everything  
24 we do is going to have some kind of unintended  
25 consequence.



1           **COMMISSIONER STEVENS:** Well, and I think we  
2 ought to look at where the rule is broken. It's worked  
3 for 17 years, I mean, so I don't want to foul something  
4 up.

5           **CHAIRMAN ARGENZIANO:** Well, well, wait a  
6 minute. Wait a minute now. That's why they're bringing  
7 that up because it may not have always worked. It  
8 shouldn't be that there should be unequal access to  
9 staff.

10          **COMMISSIONER STEVENS:** And I agree, there  
11 should not be unequal --

12          **CHAIRMAN ARGENZIANO:** And that's why they're  
13 talking about it now and I think everybody needs to  
14 partake in this conversation. Because it would be the  
15 same thing as if it was OPC only having access and the  
16 other, other parties could not. So I think that the  
17 broken part is that -- or what they're saying is it  
18 needs to be specified now. We need to do it the right  
19 way. But that is, this is the time to talk about that.

20          **COMMISSIONER STEVENS:** Well, I, I would think  
21 that we could look at the additions which seem to be the  
22 major fix for our issues right now. Some of these  
23 things we're picking apart are wordsmithing, so.

24          **CHAIRMAN ARGENZIANO:** That's what -- I  
25 understand what you're saying. I understand what you're

1 saying. But I think that's what the workshop is  
2 supposed to get at. Unfortunately we're probably not  
3 going to get everything that's being discussed because  
4 of the fact that we're just starting to discuss it and  
5 we're finding problems with how do you define it, how do  
6 you -- but I think that -- as a matter of fact, let me  
7 do this. Let's see if Curt -- let's go to Curt.

8 **MR. KISER:** Well, I wanted Samantha to give us  
9 what the current situation is so everybody is clear.

10 **CHAIRMAN ARGENZIANO:** That would -- that's a  
11 good idea.

12 **MR. KISER:** What's the current situation  
13 versus our draft and the suggestions by Public Counsel?

14 **MS. CIBULA:** The current situation is that  
15 there can be one-on-one conversations between outside  
16 parties and Commission staff. And you don't have to  
17 have a noticed meeting or conference call unless it  
18 changes to three people. Then you have to have a  
19 noticed meeting or conference call in regard to those  
20 communications.

21 **MR. MOYLE:** Can we ask why?

22 **CHAIRMAN ARGENZIANO:** Who, who --

23 **MR. MOYLE:** That was me.

24 **CHAIRMAN ARGENZIANO:** Okay.

25 **MR. KISER:** I'm sorry. What?

1                   **CHAIRMAN ARGENZIANO:** Are you asking --

2                   **MR. MOYLE:** I guess -- because I think -- I  
3 don't know that we're there yet, but the whole  
4 discussion about scheduled meetings and two or more, and  
5 I know OPC has said why is two the magic number? I  
6 mean, if it's substantive staff who's taken the lead on  
7 a recommendation, you know, why should have you an  
8 exemption that allows substantive staff to have, you  
9 know, unnoticed communications with someone? So I guess  
10 I ask the question why is, you know, one-on-one  
11 permissible and two, two not?

12                   **MS. HELTON:** I know when we train the staff on  
13 the communications rule, I always suggest to the staff  
14 that that should not be liberally applied. It should be  
15 when you -- for instance, if you're reading prefiled  
16 testimony and you have a question about what a  
17 particular line means that you want to conduct discovery  
18 on, I have said that through the attorney you can have  
19 someone call, ask a question about that, and then you  
20 can file your discovery question. So that's one example  
21 of when I think a one-on-one communication would be  
22 appropriate. But I've always suggested to staff that  
23 that should not be liberally used and hopefully it's not  
24 being liberally used.

25                   **MR. DEVLIN:** Madam Chairman, speaking for the

1 technical staff, and I agree with what Mary Anne said,  
2 and I think this has been perceived as a loophole, I  
3 suppose. But it's been very rarely used. It's usually  
4 just a follow-up and getting clarification on some  
5 information that, you know, we're not, we're not sure  
6 about with respect to a case.

7 I fully agree that we should close that  
8 loophole at this point. It's outlived its usefulness.  
9 I don't think it's been abused though. I want to go on  
10 record there.

11 **CHAIRMAN ARGENZIANO:** I don't think anybody is  
12 saying that, throwing accusations out there. I think  
13 somebody is saying there is a loophole and it needs to,  
14 while we're looking at it we need to close it, and I  
15 think everybody agrees.

16 **MS. HELTON:** Another example may be when the  
17 staff attorney calls Mr. Rehwinkel because he has a  
18 witness that we want to depose, and so we will call  
19 Mr. Rehwinkel first and say, "What are the witness's  
20 available dates" so we can put those out and then  
21 discuss it amongst the parties.

22 So, I mean, I hear what Mr. Devlin is  
23 saying, and this may be an area where Mr. Devlin and I  
24 disagree, because I think there may be some legitimate  
25 reasons to have these one-on-one type communications.

1 Yes, you can do it all by e-mail, but that can be  
2 awkward and it can take longer than if you could, I  
3 could pick up a phone and call Mr. Rehwinkel first.

4 **CHAIRMAN ARGENZIANO:** Okay. Let me ask you  
5 this question then. Do you see a loophole there  
6 possibility?

7 **MS. HELTON:** I've never thought of it as a  
8 loophole. I've always thought of it as if, if we need  
9 to, it's a way to do our business more expeditiously to  
10 be more --

11 **CHAIRMAN ARGENZIANO:** Well, see, you're  
12 looking at it from staff's point of view.

13 **MS. HELTON:** Yes. Uh-huh.

14 **CHAIRMAN ARGENZIANO:** There is a loophole.

15 **MR. REHWINKEL:** Madam Chairman.

16 **CHAIRMAN ARGENZIANO:** In my mind there is a  
17 loophole, and I think Mr. Devlin just said the same  
18 thing. So I disagree with Mary Anne. I understand  
19 you're looking at it from staff's point of view, and I  
20 understand -- I'm not saying it's been abused. But if  
21 there is one, then let's shore it up. Leave no, no  
22 doubt.

23 **MR. REHWINKEL:** I think from the Public  
24 Counsel's standpoint we don't perceive there to be  
25 urgency about developing this rule. We think it's good

1 to get it right --

2 **CHAIRMAN ARGENZIANO:** Just bringing it up.  
3 Okay.

4 **MR. REHWINKEL:** -- rather than do it quickly.

5 **CHAIRMAN ARGENZIANO:** Okay. Then you know  
6 what, since we brought it up, we'll all work on it and  
7 let's move on.

8 **MR. REHWINKEL:** Yeah. We just think that this  
9 would be a good legacy for the existing Commission to  
10 leave for the next 17 years because things have changed.

11 **CHAIRMAN ARGENZIANO:** Okay. Okay.  
12 Absolutely. I agree. I agree.

13 Mr. Moyle, and then we'll move on.

14 **MR. MOYLE:** And I just -- I was trying to go  
15 through. I have some comments on particular areas of  
16 the rule.

17 **CHAIRMAN ARGENZIANO:** Okay. Go ahead.

18 **MR. MOYLE:** And, again, I mean to that point,  
19 I mean, we do have I think, you know, opportunity today  
20 and comments and a public noticed work -- I mean,  
21 there's a lot of steps in this rulemaking. So I don't  
22 think you have to pull the trigger on anything today.

23 But with respect to the ex parte and  
24 defining it, I think that is, I think that's a good  
25 thing to include in this rule. Because in thinking

1 about it, it seems that that's sort of the whole  
2 underpinnings of why you have all these notices and  
3 letting everybody know because you don't want to have  
4 substantive conversations without all of the parties  
5 present.

6 And I have a point, you know, that Public  
7 Counsel has proposed including ex parte, and I have a  
8 bit of a disagreement with them on, on this point. And  
9 there are I think invariably going to be communications  
10 that need to take place between counsel to schedule a  
11 deposition, to do things that are not substantive, and I  
12 am comfortable with counsel understanding the difference  
13 between a substantive matter and a nonsubstantive  
14 matter.

15 I mean, if you, if you took as proposed the  
16 definition, I don't think I could comply with your rule.  
17 If I was running ten late, ten minutes late for a, for a  
18 meeting, I don't know that I could call one of the staff  
19 and say, hey, listen, you know, I've had to change my  
20 flat tire, I'm running ten minutes late, because that  
21 would be an ex, prohibited ex parte communication.

22 So I think, you know, the notion of when  
23 you're defining ex parte, you know, means any  
24 substantive or material communication is I think an  
25 improvement that would hopefully help staff have

1 conversations that they I think need to have to run, run  
2 their business, but then clearly indicate, look, if you  
3 start talking about witness so and so and what he or she  
4 says, that you're getting into ground that, you know,  
5 that would be prohibited.

6 **CHAIRMAN ARGENZIANO:** Comments? Anybody?

7 Okay.

8 **MR. BEASLEY:** Commissioner.

9 **CHAIRMAN ARGENZIANO:** Yes, Mr. Beasley.

10 **MR. BEASLEY:** I kind of see some, some reason  
11 there. Lawyers have to talk to lawyers all the time for  
12 various purposes: To schedule depositions; to find out  
13 if another party opposes a motion you're getting ready  
14 to file, you're obligated to call and verify whether  
15 they have a position on the motion. If we have to put  
16 out a notice in advance of doing all of that every time  
17 for each party, then it would be very unworkable.

18 **CHAIRMAN ARGENZIANO:** Commissioner Skop.

19 **COMMISSIONER SKOP:** Thank you, Madam Chair.

20 I think that in this workshop we're dealing  
21 with staff communications; whereas, the one yesterday  
22 dealt more with Commissioners and Commissioners' direct  
23 reporting staff.

24 You know, listening to the parties, I think  
25 there needs to be an appropriate balance between having



1 staff, both legal staff and technical staff, giving them  
2 the ability to do their job on, you know, procedural  
3 matters, and in times where there needs to be a  
4 prohibition, a restriction or a blackout on  
5 communication such as we'll get to in this next section,  
6 like in between the posthearing and the time a staff  
7 recommendation is filed, to me that ought to be, you  
8 know, completely blacked out.

9 So I think listening to each of the parties  
10 and trying to find a workable framework that doesn't  
11 hamstring our staff is a good thing, but then again  
12 where there's areas for improvement to close glaring  
13 loopholes and just allow one party to gain a competitive  
14 advantage over another by virtue of being able to pick  
15 up the phone, we need to take a look at those areas.  
16 Thank you.

17 **MS. CIBULA:** Well, I'll proceed to the next  
18 section.

19 **MR. STONE:** Commissioners, could I ask the  
20 Public Counsel one clarifying question about part of  
21 what their intent was on the simultaneous transmittal?

22 One of the concerns that I see in the  
23 language, and I recognize that we're going to try and  
24 refine the language, if a party, a party or interested  
25 person or whoever it is we're providing the notice to

1 doesn't have e-mail, does that mean that we cannot use  
2 e-mail with everyone else?

3 **MR. REHWINKEL:** Yeah. That's not our intent,  
4 and we certainly think that, that it needs to be made  
5 practical. So we'll take a look at that. I think  
6 that's a good catch.

7 **COMMISSIONER KLEMENT:** Who doesn't have e-mail  
8 these days?

9 **MR. STONE:** Well, one of the things I've  
10 discovered, Commissioner Klement, is that frequently I  
11 have had e-mails.

12 **COMMISSIONER KLEMENT:** Okay.

13 **MR. STONE:** And so sometimes I attempt to send  
14 an e-mail to someone and the address is bad. And so  
15 that's, that's one area of concern also.

16 **COMMISSIONER KLEMENT:** Thank you.

17 **MR. KISER:** Commissioner Klement, you just --  
18 I would tell you I've seen surveys, and a substantial  
19 percentage of people over age 65 do not have e-mail,  
20 substantial.

21 **MS. HELTON:** And we have had pro se  
22 participants or people who want to participate pro se  
23 who do not have e-mail. So that, I think that is a real  
24 issue.

25 **COMMISSIONER KLEMENT:** Very good point.

1 Samantha?

2 **MS. CIBULA:** Staff's draft rule adds a new  
3 Subsection (6) to the current rule on Page 5 beginning  
4 on Line 12. This new subsection addresses staff  
5 communications in Section 120.569 and 120.57  
6 proceedings, which are proceedings in which an  
7 administrative hearing has taken place.

8 This new subsection requires all  
9 communications except discovery requests and discovery  
10 responses to be placed in the docket file by the person  
11 making the communication within seven days of the date  
12 of the communication. The subsection also requires that  
13 any oral communications between Commission employees and  
14 parties outside of a noticed meeting or conference call  
15 be summarized in writing and placed in the docket file  
16 by the Commission employee within seven days of the date  
17 of the communication.

18 **COMMISSIONER KLEMENT:** Mr. Rehwinkel, any  
19 response?

20 **MR. REHWINKEL:** Well, did you, did you skip  
21 (5)?

22 **MS. CIBULA:** I thought we kind of already  
23 talked about (5).

24 **MR. REHWINKEL:** Oh, I thought that was (4) we  
25 were --

1           **MS. CIBULA:** We were talking about (4) and  
2 (5). They kind of bled over some.

3           **MR. REHWINKEL:** Okay. What the Public Counsel  
4 offers for your consideration with respect to (5), and I  
5 guess we -- I didn't realize that we had kind of gone  
6 through (5). You know, what, what the Public Counsel --  
7 we can -- I don't think that needs any further  
8 explication.

9           In (6), let me, let me talk about (6), we  
10 have added that we think since rulemaking has been taken  
11 out of, or proposed to be taken out of what was  
12 previously exempt from the rule, we think that, that  
13 rulemaking and declaratory statement matters should also  
14 be included in this section here.

15           We have proposed three days instead of seven  
16 days. I don't know what's the right number there. It's  
17 just a suggestion on our part that we think that three  
18 days may be just as reasonable as seven. But I think  
19 that certainly the staff -- we offer that for your  
20 consideration, and the staff can, can kind of digest  
21 that and provide their thoughts.

22           We are proposing also that there may be  
23 communications that occur on the cusp, on the eve of a  
24 hearing. So the seven days might be, might not fit. So  
25 we've offered a reasonableness standard in there that if

1 you have, if you have a communication that occurs inside  
2 of that, that whether it's three days or seven days,  
3 that the person making that communication or receiving  
4 it has the obligation to, to, to place it in the record  
5 in advance of whatever decision you're making in the, in  
6 the hearing. But we offer that for your consideration.

7 **COMMISSIONER KLEMENT:** Staff, are you --

8 **MS. CIBULA:** We'll look at that and we'll  
9 think about it.

10 **MS. MILLER:** One interesting issue is whether  
11 reasonable is, you know, sufficient guidance. And I  
12 know the Joint Administrative Procedures Committee is  
13 always telling us that we need to, you know, put in more  
14 definite time lines.

15 **MR. REHWINKEL:** The problem is that if you  
16 have -- let's say you adhere to the seven-day standard  
17 and then one of these rogue communications comes in  
18 three days before the hearing. Well, the seven-day  
19 standard obviously isn't going to apply. And if you  
20 really need to get parties to notice that this thing  
21 occurred, expedition is important. But, you know, it's  
22 very situational when you get inside of that time frame.  
23 So, you know, maybe reasonable under the circumstances  
24 or some kind of language that -- you know, you just have  
25 to, you have to put an obligation on the recipient of

1 the communication if it's inside the staff to let people  
2 know it happened, you know, not after the hearing but  
3 before. That's what we're going for.

4 **MS. CIBULA:** Yeah. I think I understand where  
5 you're coming from.

6 **COMMISSIONER KLEMENT:** Commissioner Skop.

7 **COMMISSIONER SKOP:** Thank you, Mr. Chair.

8 I guess to Mr. Rehwinkel's concerns, not  
9 only on (5) and (6), it would seem to me that the same  
10 requirements to the staff rule should apply as being  
11 proposed to those adopted by Commissioners and  
12 Commission direct reports. And I believe that's within  
13 72 hours of the communication being made or received, as  
14 well as the situation if we need to put something on the  
15 website, by the end of the next business day where it's  
16 applicable to avoid that late-filed on a, on a weekend  
17 type situation.

18 But I see the points raised by Mr.  
19 Rehwinkel, particularly in light of a filing  
20 contemporaneously made with the start of a hearing and  
21 then the parties not having access to that data. So I  
22 think staff should probably give some consideration to  
23 making, making this track on (5) and (6) with what's  
24 been proposed in the legislative language. Thank you.

25 **MS. CIBULA:** We'll look at that.

1                   **COMMISSIONER KLEMENT:** Mr. Moyle.

2                   **MR. MOYLE:** Just a couple of points again. In  
3 staff's proposed section, new Section (6), it governs  
4 all written communications without any kind of  
5 delineation between substantive communications, and I  
6 think that that --

7                   **MS. CIBULA:** All written communications except  
8 for the discovery.

9                   **MR. MOYLE:** Right. And then also all oral,  
10 all oral -- I would suggest you say all written  
11 substantive communications and all oral substantive  
12 communications.

13                   **MS. CIBULA:** Yes. It has oral communications.  
14 They are supposed to be summarized and placed into the  
15 docket file.

16                   **MR. MOYLE:** Right. But an absurd reading of  
17 that could mean if I bumped into Cindy at the grocery  
18 store and said, "Is Ragú better than, you know, this  
19 other spaghetti sauce," then that's an oral  
20 communication that, you know, we'd get to -- anyway  
21 that's the point I made previously, and I'd make it  
22 again and incorporate it.

23                   But the other point, if I could, and we kind  
24 of jumped over the section, section dealing with  
25 scheduled meetings and conference calls, and I think, I

1 think there was discussion about the two. And not to go  
2 there, but the language that Public Counsel proposed I  
3 think warrants serious consideration. I think it's  
4 good, good language. And the last sentence of their  
5 proposal says, "Meetings or calls that circumvent or  
6 which are intended to circumvent the fair and  
7 open communications purposes of this rule are  
8 prohibited." I think that's a good catchall that sort  
9 of sends a good message, and would suggest that you  
10 consider including that and then saying "meetings, calls  
11 or other communications" so that it's not just limited  
12 to meetings and calls because, you know, technology  
13 changes and things. And that way you have a broad  
14 policy statement that, you know, the intent of the rule,  
15 you've set it out and you've clearly said it's, you  
16 know, not to be circumvented.

17 **MR. KISER:** Madam Chairman.

18 **COMMISSIONER KLEMENT:** Mr. Kiser.

19 **MR. KISER:** Oh, I'm sorry.

20 **COMMISSIONER STEVENS:** I'm sorry. I didn't  
21 know you were back.

22 **CHAIRMAN ARGENZIANO:** No. That's good. Thank  
23 you. Thank you.

24 **MR. KISER:** As we know in a lot of the  
25 procurement statutes, there's a zone of silence once



1 that goes out. Well, rather than trying to wrestle with  
2 what is an appropriate time to report such things, maybe  
3 there should be a 48-hour period or some, you know,  
4 magic time that prior to the hearing that no  
5 communications can be made so that you don't, you don't  
6 get into that problem.

7 **MR. MOYLE:** Yeah. And I guess on the  
8 substantive, I mean, the substantive thing, obviously I  
9 mean if you have a witness that, you know, has a death  
10 in the family or something, you know, you need to have  
11 the ability to, you know, to communicate that.

12 And, you know, the zone of silencing, I  
13 guess at some point we're going to talk about that with  
14 Commissioner Skop's language in terms of, you know, that  
15 and have some thoughts on that.

16 **MR. KISER:** I was just saying because even on  
17 some of these things if you just even, you know, two or  
18 three days before an actual hearing if something  
19 substantive comes in, that may not be enough time to be  
20 able to react to it, to research it, to question it,  
21 whatever else. So maybe just you might want to look at  
22 doing something like they do on procurement where it's  
23 just once that procurement goes out until a decision is  
24 made, you can't contact any of those people.

25 **CHAIRMAN ARGENZIANO:** Commissioner Skop.

1                   **COMMISSIONER SKOP:** Thank you, Madam Chair.

2                   To that point, would it be sufficient -- I  
3 think that Mr. Kiser raised a good point in response to  
4 Mr. Moyle's concern. Would it be appropriate in those  
5 situations to, to at least at a minimum ensure that it  
6 is posted to the website at least for the parties to  
7 see? And there may be some interim time for responses  
8 formulated or legal research is done, as Senator Kiser  
9 has referred to. But I think at a minimum posting it to  
10 the website at least gives the parties notice that  
11 communication has been made or received and it's there  
12 for the parties to glean what they, they need to from  
13 it.

14                   **MR. MOYLE:** I think that posting it to the  
15 website works, works well. I mean, people can go to it.  
16 There's a little notice sometimes that indicates that  
17 it's there and you can, you can go find it. So I think  
18 that's probably a decent solution.

19                   **CHAIRMAN ARGENZIANO:** I just think that -- I  
20 have also had some problems with the website. I'm not  
21 very good with that website for some reason. It needs  
22 to be a little bit more friendly. And maybe if the  
23 notice is going to be there, it needs to be large enough  
24 to see and outstanding in some manner.

25                   Anybody else? Commissioner Skop.

1                   **COMMISSIONER SKOP:** Thank you, Madam Chair.

2                   And, again, when we move to (7), I'd like to  
3 speak to the strike and amend language.

4                   **CHAIRMAN ARGENZIANO:** Okay. Are we on (7)?

5                   **COMMISSIONER SKOP:** I think we're getting  
6 close.

7                   **CHAIRMAN ARGENZIANO:** Are we done with (6)?  
8 Okay. We're on (7). Commissioner Skop.

9                   **MS. CIBULA:** I can tee up (7), what we had and  
10 --

11                   **CHAIRMAN ARGENZIANO:** Commissioner Skop.

12                   **COMMISSIONER SKOP:** Thank you, Madam Chair.

13                   On the bottom of Page 5 staff's got some  
14 proposed language for Subsection (7). And if we look at  
15 Tab 5, there's a one-page submittal of some language I  
16 came up with. My concern and why I think this language  
17 is preferable to that suggested by staff is I think this  
18 language is a little bit stronger; whereas, staff's is a  
19 little bit more permissive in some areas of the  
20 exceptions.

21                   But my concern is this, is we spend a lot of  
22 time and effort and the companies spend a lot of money  
23 and the Intervenors spend a lot of time and money taking  
24 a case to hearing, and some of those hearings can go on  
25 for weeks. You know, a rate case is an example or a

1 need determination, for instance.

2 In those instances where we have a major  
3 case pending before the Commission or any case that's  
4 proceeded to a formal evidentiary hearing, there's a  
5 time between the conclusion of the hearing where the  
6 record is closed and the time under which a staff  
7 recommendation is rendered or issued or filed with the  
8 clerk. And I feel that that ought to be a complete  
9 blackout time with the sole exception of staff being  
10 able to initiate or respond to written communication,  
11 not oral, written communication for the purposes of  
12 scheduling or completing discovery. For instance, a  
13 late-filed exhibit. That should be the only two  
14 exceptions and it should be in writing.

15 The reason for that is to ensure the  
16 integrity of the staff recommendation process from the  
17 time in which that record is closed until the staff  
18 recommendation is filed. There remains some debate as  
19 to whether after the recommendation is filed the parties  
20 should be able to interact, and I think in some  
21 instances that's probably a good thing because there's  
22 times where the parties may identify to staff that the  
23 recommendation has an error in it, and that results in  
24 an oral modification when we come to the basis for a  
25 decision.

1           But I do think there needs to be, you know,  
2 a blackout period where there is no ex parte  
3 communication allowed from the time at an evidentiary  
4 hearing the docket is closed until the staff  
5 recommendation is filed, and that ensures the integrity  
6 of the written recommendation. It prevents people from  
7 being hands-on and trying to influence staff.

8           **CHAIRMAN ARGENZIANO:** Tim.

9           **MR. DEVLIN:** Thank you, Madam Chair.

10           Just a question for the Commissioner because  
11 I fully endorse and agree, but we -- just to clarify, we  
12 have rate cases, for instance. We'll have the main  
13 recommendation, that's what we're, I think that's what  
14 you're speaking to. But in many, in many instances we  
15 have also recommendations, subsequent recommendations  
16 dealing with petitions for reconsideration, et cetera.  
17 And I just -- it's really more a question of  
18 clarification, Commissioner Skop. Are you talking about  
19 that whole period from the date the record is closed  
20 through not only the main recommendation but any  
21 subsequent recommendations relating to reconsideration?

22           **COMMISSIONER SKOP:** My, my biggest concern,  
23 Tim, would be the primary recommendation as it's filed.  
24 Let's take a need determination or a pipeline or a rate  
25 case, ensuring the integrity of that recommendation from

1 the close of the record until the staff recommendation  
2 is filed.

3 The other procedural matters like a motion  
4 for reconsideration and such, that's more of a  
5 procedural legal issue. It's not really dealing with  
6 the substance of the recommendation that the Commission  
7 will render a decision on. And so what I'm trying to do  
8 is make sure that the staff recommendation, while it's  
9 being drafted, is, is uninfluenced by external forces  
10 and you guys are insulated to do your job based on the  
11 evidentiary record. And I think that's a really -- I'm  
12 trying to think of the right word -- aspirational thing  
13 to do, but it's something in light of maintaining the  
14 public trust and confidence and the integrity of the  
15 process, I think it's a good thing for this Commission  
16 to adopt.

17 **CHAIRMAN ARGENZIANO:** Commissioner Edgar.

18 **COMMISSIONER EDGAR:** Thank you. And unless we  
19 hear from either staff or other parties today or as we  
20 continue through this process some reason that that  
21 would cause a hardship or a difficulty in any party or  
22 our staff doing what they need to do, then as it sounds  
23 right now that makes a lot of, a lot of sense to me.  
24 And I do see that actually as a protection to our staff  
25 for their benefit.

1 I would suggest, and I actually had some  
2 language to maybe suggest this at the end of (9), but if  
3 indeed this is language that we are considering as we  
4 move through the process, this may be a better place to  
5 put it, but I would put forth that we should extend that  
6 same blackout period, to use your words, to again put  
7 some additional surety of integrity to that staff  
8 recommendation process and extend that to include,  
9 candidly, us and our offices. You know, that period  
10 where staff, the record has closed and the staff that  
11 are putting together -- and I don't really know how it  
12 works -- but when staff are putting together their  
13 recommendation based on the record for Commissioners or  
14 our direct reports, I think that we should also be  
15 included in that blackout period, again, as protection  
16 to us and to our staff and to our technical staff for  
17 any potential criticism that anybody has tried to, I  
18 don't know, involve themselves for lack of a better  
19 term.

20 **CHAIRMAN ARGENZIANO:** Commissioner Skop.

21 **COMMISSIONER SKOP:** Madam Chair, in responding  
22 to Commissioner Edgar's point, I think it's a good one,  
23 and as written this does address that. I think  
24 Subsection (9) addresses it a little bit more succinctly  
25 by trying to break the two. But as written, this

1 basically says, "Commission staff shall not initiate,  
2 engage in, nor consider ex parte communications."  
3 That's from anyone. So I think it does as written kind  
4 of include Commissioners, Commissioners' direct  
5 reporting staff. It's just, it's not saying parties of  
6 record. But, I mean, we can certainly clarify it I  
7 think in (9), as Commissioner Edgar suggested.

8 I think it's a good thing to let staff do  
9 their job, for them to be completely insulated so they  
10 can exercise their independent judgment. And as  
11 Commissioner Cresse once said, you know, bring your best  
12 judgment and be prepared to defend it.

13 So I think that they need to be free to do  
14 that without any influence, whether it be from  
15 interested parties or Commissioners or Commissioners'  
16 direct reporting staff. So I think that's a good catch,  
17 Commissioner.

18 **CHAIRMAN ARGENZIANO:** Now does that mean that  
19 if you ask staff the status of their recommendation?

20 **COMMISSIONER EDGAR:** I'll try to address that,  
21 Madam Chair. And I do have, have copies, but this is  
22 just a first stab, so not language that I am wed to in  
23 any way. And, Commissioner Skop, I appreciate your  
24 comments. So let me just read this.

25 "In all docketed proceedings in which a



1 hearing has been held, a Commissioner or Commissioner  
2 direct reports shall not engage Commission employees in  
3 any communications concerning the merits of the docketed  
4 proceeding during the time between the end of the  
5 hearing when the record is closed and the filing of the  
6 recommendation." And I do have copies if anybody would  
7 like to look at that.

8 But -- and I did talk with our legal staff  
9 about this a little bit prior to this, but tried to  
10 track the language that I think, Commissioner Skop, you  
11 had proposed in this that we had already been supplied  
12 and the other language. And I would, would want it  
13 absolutely, Madam Chair, to be to the merits of the  
14 proceeding and, again, not an effort to try to trip  
15 somebody up by any means.

16 **CHAIRMAN ARGENZIANO:** That's great.

17 **COMMISSIONER EDGAR:** But to give us  
18 protection, our direct reports some protection and our  
19 staff as well.

20 **CHAIRMAN ARGENZIANO:** I think it's a good  
21 idea. Staff should be free to come up with their  
22 recommendations without anybody persuading them,  
23 hounding them, bothering them or any other way, and I  
24 think that's a good idea.

25 Commissioner Skop.

1                   **COMMISSIONER SKOP:** Thank you, Madam Chair.

2                   And Commissioner Edgar's language, you know,  
3 tracks some of the proposed language that I'd come up  
4 with for Subsection (7), and I think makes the,  
5 distinguishes properly between the merits and substance  
6 on that particular issue.

7                   **CHAIRMAN ARGENZIANO:** Great.

8                   **COMMISSIONER SKOP:** So we can, you know, ask a  
9 status if something is going to be delayed.

10                   I guess my comment to Commissioner Edgar for  
11 direction to staff would be -- I know that you mentioned  
12 Subsection (9). But maybe a better way of perhaps doing  
13 that would be a (7)(a) and (7)(b) where, you know, the,  
14 the ex parte as it pertained to interested parties would  
15 be (7)(a), and then as it pertained to Commissioners and  
16 Commissioner direct reports (7)(b), and it covers both  
17 in the same subsection.

18                   **COMMISSIONER EDGAR:** I would just -- I think  
19 we're all saying, I think we're all saying the same  
20 thing. I had looked at (9), but yet (7) from this  
21 discussion looks a little more appropriate. I would put  
22 that out there, if y'all agree, for staff to look at it,  
23 consider it, and see whatever is the best place and the  
24 best format and language.

25                   **CHAIRMAN ARGENZIANO:** Absolutely. Is there,

1 is there -- I don't -- sorry, Mr. Moyle. Go ahead.

2 **MR. MOYLE:** No. I think that's, that's an  
3 excellent, excellent idea. And you can do that, you  
4 know, another way, just say neither Commissioners nor  
5 Commission staff, and I think -- and use Commissioner  
6 Skop's language. It picks up Commissioners and  
7 Commissioners' staff.

8 **CHAIRMAN ARGENZIANO:** Absolutely.

9 **MR. MOYLE:** But the substantive, one  
10 substantive point in addition to that that I'd like to  
11 bring forward is the time of the blackout period. And  
12 I, you know, thinking about this -- and we've spent a  
13 lot of time talking about staff during the, during the  
14 process, but, you know, staff -- the way I see it is is  
15 that they're involved in sort of the same process that  
16 litigants are in terms of access to information and  
17 discovery, they're here for the proceeding, and they  
18 have, you know, they have sort of the same record,  
19 record that we do.

20 And I thought it probably warranted some  
21 consideration of extending the blackout period to an  
22 earlier point in time, if you would, because, you know,  
23 you're not supposed to have these communications with  
24 staff. But rather than having it at the close of the  
25 hearing, you know, move it back to possibly the entry of

1 the, of the, of the Prehearing Order, which usually sort  
2 of starts the case moving forward and basically say,  
3 okay, no ex parte communications from that point.

4 **CHAIRMAN ARGENZIANO:** Commissioner Skop.

5 **COMMISSIONER SKOP:** Thank you, Madam Chair.

6 And I think Mr. Moyle raises a good point  
7 and it's one I considered in struggling with how to kind  
8 of craft this language as well as address the point of  
9 the blackout period.

10 My concern with that would be there are  
11 times, and I'll use a rate case as, as an example, where  
12 at the conclusion of each day's hearing our technical  
13 staff as well as our legal staff got together with all  
14 the parties present, so it wouldn't, I guess in that  
15 case it wouldn't be ex parte. But the, in the rare  
16 event that you had to leave early and you weren't here,  
17 then it might be ex parte. But to coordinate the next  
18 day's hearings and to ensure the expediency of the  
19 docketed matters and went through the evidentiary  
20 hearing process.

21 So I think staff, you know, when I mentioned  
22 the idea to them, they had some reservation about going  
23 back that far because it would tie their hands to do  
24 some of the things that I think bring efficiencies to  
25 the process at the end of the day. Because, I mean,

1 they were here many hours. I remember the nights we got  
2 out of here at 10:30 or 11:00 and they, they were here  
3 for at least an hour after that and back the next  
4 morning at 9:30. So I think it's a good point, but I  
5 think it might be, might be a little bit constraining in  
6 terms of their ability to get things done in an  
7 expeditious manner, whether it be for the hearing  
8 process.

9 **CHAIRMAN ARGENZIANO:** And I'm going to bring  
10 up an issue. It's probably -- I'm sorry. Go ahead to  
11 that point before I go off.

12 **MS. MILLER:** I'm sorry. I was trying to  
13 understand, and I look forward to seeing the language.  
14 So is this rule expanding now to beyond staff so that,  
15 like the title of it and all will include Commissioners?  
16 That's -- I was just trying to conceptualize whether  
17 we're expanding the rule.

18 **CHAIRMAN ARGENZIANO:** Commissioner Edgar.

19 **COMMISSIONER EDGAR:** Thank you, Madam Chair.

20 The reason I had -- and I have to get the  
21 language here in front of me, so give me just a moment.  
22 Okay. The reason I had -- when I was thinking through  
23 this idea yesterday was considering Section (9) or  
24 Subsection (9), Section (9) I guess, was because the  
25 title was Prohibited Communications, and it was the

1 first time I think wherein this language it refers  
2 directly to a Commissioner. And so that's, that's why I  
3 had thought that might be the appropriate place.

4 But as to, again, heading placement,  
5 subsections, I don't feel strongly one way or the other.  
6 I just again was trying to pick up on Commissioner  
7 Skop's language about insulating that time period when  
8 the record has closed but that the recommendation has  
9 not yet been filed and is being formulated.

10 **CHAIRMAN ARGENZIANO:** Commissioner Skop.

11 **COMMISSIONER SKOP:** Thank you, Madam Chair.

12 And having looked at Subsection (9) a little  
13 bit closely, I think (9) can remain intact. I think  
14 (9), the intent of Subsection (9) is generally to  
15 address the prohibition against a conduit type of  
16 situation and keeping Commissioners from speaking to  
17 staff that testifies as opposed to advisory staff.

18 So I think to, you know, perhaps address  
19 Commissioner Edgar's comments, which I think are a good  
20 one, as well as embody mine, that (7)(a)/(7)(b) type  
21 scenario might work well, or just make it just one in  
22 (7) and combine the intent of both suggestions. But I  
23 think they're both good ones and both necessary ones.

24 **COMMISSIONER EDGAR:** And, again, I would just  
25 ask -- and then from my standpoint, we can move on, but

1 I've read this language into the record, and I do have  
2 copies that I'll give staff and anybody else. It was a  
3 stab at it, and I would say take it and, if you would,  
4 make it better.

5 **MS. CIBULA:** Thank you.

6 **MR. MOYLE:** If I could just respond briefly to  
7 Commissioner Skop's points. In a rate case, I know that  
8 oftentimes those were announced from the bench. The  
9 Chair would say, all parties, we're going, there's going  
10 to be a staff meeting following the conclusion. And it  
11 was typically lawyers that were talking about process  
12 type things, so I don't see that. I guess, probably  
13 more of a pronounced concern I have is that I think the  
14 language the way it is read, the way it could be read  
15 where it talks about, you know, you shall not have ex  
16 parte communications during -- and then it starts kind  
17 of, I guess, when the record is closed. So by negative  
18 inference or implication that would allow you to have ex  
19 parte communications during the proceeding and until the  
20 last witness is on the stand.

21 **COMMISSIONER SKOP:** That's a good point. I  
22 mean, at some point you have got to trust in our staff  
23 that they are going to be doing the right things. I  
24 know that the interested parties all want to get their  
25 hands on our staff and, you know, advocate for their

1        respective position is right over that of another. But  
2        my concern, again, is to be flexible but also to say,  
3        you know, there needs to be that blackout period. And  
4        that is something staff can think about, and if there is  
5        a way to expand it to address your concern and then  
6        address the concerns from the bench, then I'm openminded  
7        to, you know, what the best solution is.

8                    **CHAIRMAN ARGENZIANO:** That's not what he just  
9        said. What he just said now was the way it's written  
10       would lead you to believe that ex parte is okay before  
11       the end. That's not what he is saying, not the going  
12       back and forth.

13                   **COMMISSIONER SKOP:** Well, by --

14                   **CHAIRMAN ARGENZIANO:** In other words, by  
15       saying engage in nor consider ex parte communications  
16       during the time period, what he's saying is that sounds  
17       like you are saying it's okay to engage in ex parte  
18       before that time period. How do you fix that?

19                   **COMMISSIONER SKOP:** I guess what I'm saying is  
20       during the course of the hearing, staff is actually  
21       talking to the parties, and that by nature in itself is  
22       ex parte under the definitions that have been adopted,  
23       you know, for the Commissioners and Commissioners direct  
24       reporting staff. It's in the same definition and would  
25       need to be made or defined. But you can't have



1 different definitions floating around out there. So if  
2 we were to say ex parte is ex parte via conduct -- I  
3 mean, being contacted, or oral or written, then, again,  
4 I think it's very important where you draw that line.  
5 And just because it's ex parte at a time before that --  
6 hold on. Because it may be ex parte under the  
7 definition doesn't mean anything bad is happening. I  
8 mean, there's good conversations that were happening.

9 **CHAIRMAN ARGENZIANO:** I understand. That's  
10 not what I'm saying. What I think you said, and I don't  
11 think this automatically would allow for ex parte before  
12 that time period, right? (Inaudible.) Oh, I see. What  
13 time do we go to lunch? No, no. No lunch. We're going  
14 to go through this thing.

15 **MR. MOYLE:** And my point was -- and it's  
16 similar to the discussion we had in the statute where it  
17 says you can't have the ex parte communication within 90  
18 days. The language here says that you shall not have  
19 that -- initiate, engage in, or consider ex parte  
20 communications during the time between the end of the  
21 hearing when the record is closed, you know, and the  
22 filing of the Commission staff recommendation. So, you  
23 know, looking at it one way you can say, well, it is  
24 okay to have ex parte communications during the  
25 discovery period, during the hearing, and I don't think

1 that's the direction you want to go in. And I think  
2 that the suggestion -- I don't know if it's right, but  
3 as early on in the process as you know it's going to be  
4 a contested, litigated matter say no ex parte. You  
5 know, black it out and have the case decided on the  
6 facts that are put on at the hearing. And have it, in  
7 my judgment, apply to Commissioners and staff on  
8 substantive matters. On the process stuff, you know, I  
9 don't think that parties feel a need -- or at least this  
10 party doesn't feel a need to be looped in on scheduling  
11 whether it's Thursday or Friday kind of thing.

12 **CHAIRMAN ARGENZIANO:** Well, okay. And then  
13 Commissioner Skop. Commissioner Skop, go ahead.

14 **COMMISSIONER SKOP:** Again, I just want to add  
15 a brief comment, you know, what is important to me and  
16 why this is so important to me is I have had instances  
17 where members not only of our legal staff, but of our  
18 technical staff have complained that people from  
19 regulated entities, you know, call them. And at least  
20 one person, who will go unnamed, calls repeatedly. They  
21 will go from one person to another to another in the  
22 course of playing them against each other trying to get  
23 information. And that just needs to be stopped. That  
24 is just wrong. I mean, they have an interest in trying  
25 to do their things, but we need to also respect our

1 process, and that's where I'm all about getting back to  
2 the basics. Make your best case. File your pleading,  
3 make your best case. Let it speak for itself on the  
4 merits and let's stop all this hands-on stuff. And I  
5 think that's why this rule is necessary to insulate  
6 staff and allow staff to get back to do their job like  
7 they used to in the good old days.

8 **CHAIRMAN ARGENZIANO:** Curt.

9 **MR. KISER:** Well, I think that all of these  
10 comments, we need to take them into account and when it  
11 gets down to redrafting and examining what the next  
12 stage of drafting of this comes out we will try and work  
13 to the greatest extent we can, and try and work those in  
14 there and address those issues. And sometimes we'll  
15 have to abide by the rule that, you know, ice cream is  
16 good and a pint of it is real good, but five gallons is  
17 way too much.

18 **CHAIRMAN ARGENZIANO:** Who says so? Okay. I'm  
19 only kidding.

20 **MR. MOYLE:** I'm not going to take any offense  
21 on that.

22 **CHAIRMAN ARGENZIANO:** You're recognized.

23 **MR. WAHLEN:** Thank you, Commissioner.

24 As we're thinking through the blackout  
25 period, we might need to give some consideration to the

1 fact that sometimes after the hearing is over the  
2 parties actually do settle issues, and it would be good  
3 to leave room for us to talk amongst ourselves about  
4 resolving an issue and still be able to call the staff  
5 and tell them we are doing it.

6 There may be some language in some of this,  
7 if we're not careful, that would preclude us from doing  
8 that. And we are not critical of any particular  
9 language, but would like to leave room for that because  
10 that's generally a good thing when that happens. Not  
11 always, but it generally is a good thing. And if we can  
12 leave room for that it would be good.

13 **CHAIRMAN ARGENZIANO:** Commissioner Skop.

14 **COMMISSIONER SKOP:** Thank you, Madam Chair.

15 And to that point, I understand that, but,  
16 again, there's nothing wrong with putting that in  
17 writing and sending it to the Commission. And that's  
18 why the substitute language I proposed, the exemption  
19 basically allows Commission staff to initiate and  
20 respond to written communications. It doesn't say oral,  
21 it says written communications. It's there for a  
22 reason, because you have that, you can put it in the  
23 record, you can put it on our website, and there is no  
24 monkey business. But for purposes of scheduling, or  
25 completing discovery, and we could easily put

1 settlements or informing someone of a settlement, but I  
2 just don't understand if there were a settlement and  
3 there was a need to inform Commission staff, then if you  
4 file a letter in the docket, you know, that's not  
5 necessarily ex parte because you are placing it in the  
6 record. You're just saying we intend to settle at the  
7 scheduled hearing or this issue has been settled. So I  
8 think that could be addressed somehow by not necessarily  
9 tweaking the language, but just by merely putting that  
10 intent in writing instead of engaging in phone calls.

11 **CHAIRMAN ARGENZIANO:** I think that could be  
12 accommodated. Mr. Kiser.

13 **MR. KISER:** I think this is a very sensitive  
14 area. And litigation settlement is so, so important.  
15 And in most situations items that are discussed in  
16 settlement are confidential unless the parties agree to  
17 release it. And, you know, if Commissioner Skop is  
18 saying that you can put a letter in the file just saying  
19 you're discussing settlement, and that is sufficient,  
20 well, that's one thing. But if you are asking them as  
21 part of their discussion to start to go into some of  
22 those issues, I think it could have a very chilling  
23 effect on settlement, and we should do everything we can  
24 to try to encourage settlement. So I think we have to  
25 be very careful how we look at that situation and make

1 sure we preserve that maneuver of settlement to the  
2 greatest extent possible and not have a chilling effect  
3 on it.

4 **CHAIRMAN ARGENZIANO:** I think that the  
5 exception or the words putting that in there allowing a  
6 written communication doesn't prohibit them from going  
7 into settlement in any way, it just says you will let us  
8 know in writing that that is what you are working on.  
9 And I think that doesn't -- in my opinion, I don't see  
10 how that would stop that, because you need to be able to  
11 have that ability to go and settle and talk about  
12 settlement. So if all that it is saying is you have to  
13 write, just give us a written notice, I don't see where  
14 that would have a chilling effect. Does anybody --  
15 Curt, do you think that would help there?

16 **MR. KISER:** I think it would probably cover  
17 things in most instances, but, you know, sometimes folks  
18 that have people representing them, they might  
19 misinterpret it all. They find out that the people  
20 representing them are now discussing settlement and, you  
21 know, a lot of times they don't want to give ground.  
22 Until you can come out with a full document, it may not  
23 be very -- it may cause some problems with some of the  
24 people. It is just a real sensitive area, and we need  
25 to think that through so that we don't make it more

1 difficult to settle cases.

2 **CHAIRMAN ARGENZIANO:** Commissioner Skop and  
3 then Mr. Beasley.

4 **COMMISSIONER SKOP:** And I agree with our  
5 General Counsel. The concern I would have is that I  
6 guess settlement is defined whether the parties have  
7 reached a settlement, like Public Counsel and the  
8 parties to a docket, and something that would not  
9 directly involve Commission staff being actively  
10 involved in the settlement negotiations versus a  
11 situation where Commission staff would actively have to  
12 negotiate on behalf of Commission staff's position. And  
13 to me, you know, at that point I don't know what they  
14 are trading away, and I guess I've got to give them the  
15 flexibility and judgment, but I can't say at the end of  
16 the day that I would accept any given settlement.

17 Actually some settlements that come before  
18 us we often criticize. So, I guess, Staff, I would just  
19 ask them to take a look at that and find out what the  
20 best practice is. But I think the blackout period in  
21 itself is a good one with narrow exceptions that are  
22 documented in writing.

23 **CHAIRMAN ARGENZIANO:** Mr. Beasley, did you  
24 have a comment?

25 **MR. BEASLEY:** No, ma'am.

1                   **CHAIRMAN ARGENZIANO:** Anybody else? Okay.

2                   Let's move on.

3                   **MS. CIBULA:** I believe we're on Page 6,  
4                   Line 4, addresses response to communications. We  
5                   attempted to mirror with this section Subsection (2),  
6                   which is now Subsection (4), about written  
7                   communications. I know there was some confusion about  
8                   that language, so we will work on revising this  
9                   language, as well, to clean it up a little bit.

10                  **CHAIRMAN ARGENZIANO:** Any comments? I have a  
11                  question not related to this, and it just hit me because  
12                  it may be the time to talk about it and I'm not sure.  
13                  And I don't if it is in current rule. Is there  
14                  anything in -- and this is more for staff -- anything in  
15                  current rule, and let me describe a situation to you so  
16                  you understand what I'm talking about. When it comes to  
17                  Commission staff, our technical staff, and our direct  
18                  staff, if a Commissioner -- let's say another  
19                  Commissioner goes downstairs and is in an office and  
20                  working on something in regards to a docketed case. Is  
21                  there anything in our rules that say that staff -- that  
22                  technical staff keep that to themselves, that that is  
23                  what that individual Commissioner is working on.  
24                  Because there have been cases, and not many, but where  
25                  one Commissioner is working on something downstairs with



1 staff and somehow everybody knows about it. And that is  
2 usually -- and I mean between Commissioners' direct  
3 staff and our other staff. Is there anything in our  
4 rules that says that should not take place?

5 I think we need to make staff know that if a  
6 Commissioner comes down and works in an office, or is  
7 talking about something they have in mind, or they are  
8 working on something, that that shouldn't be broadcast  
9 to everybody else, or any other Commissioners' direct  
10 staff.

11 **MS. CIBULA:** I don't think there is anything  
12 in any rule that addresses that situation, but that's  
13 something we can look into.

14 **CHAIRMAN ARGENZIANO:** Okay. Thank you.

15 Commissioner Skop.

16 **COMMISSIONER STEVENS:** (Inaudible.)

17 **COMMISSIONER SKOP:** Thank you, Madam Chair.

18 **CHAIRMAN ARGENZIANO:** No, no. What it is is  
19 it just shouldn't be done. Each Commissioner should  
20 feel that they can go down and talk with staff and have  
21 a work product and it shouldn't be reported back to a  
22 party or other Commission staff. And there have been  
23 cases that I have found that things have been --  
24 Commissioners have been working on either got to a party  
25 in a case or to other Commissioner staff, and I think

1 that needs to stop. And it's not widespread, but if it  
2 happens, I think at least staff should know that that is  
3 not -- that shouldn't be done. Protect everybody that  
4 way.

5 Commissioner Skop.

6 **COMMISSIONER SKOP:** Thank you, Madam Chair.

7 Briefly, in the hope of going to lunch soon,  
8 because we all didn't get one yesterday.

9 **CHAIRMAN ARGENZIANO:** Huh-uh. There you go.  
10 We're going to get done. You have got birthday cake  
11 back here.

12 **COMMISSIONER SKOP:** Yes, I know.

13 **CHAIRMAN ARGENZIANO:** He doesn't want to  
14 share.

15 **COMMISSIONER SKOP:** No, we're going to cut it  
16 open. We were too busy yesterday. I just want to  
17 briefly go back to the prior issue and address the  
18 concern that was raised, as well as Mr. Kiser's concern.  
19 And I guess in terms of settlements, here is how I would  
20 see this working out. Again, the language that was  
21 proposed is only in relation to a matter that went to  
22 evidentiary hearing. And if you set the date at the  
23 close of the record for the blackout period to begin,  
24 that means that there can be stipulations from the  
25 parties before the record is closed, as we do. That is

1 consistent with how cases are done. We get stipulations  
2 kind of worked overnight, and, oh, we don't need to talk  
3 about that issue anymore, it's not an issue, it's  
4 stipulated. So that's a good thing.

5 But I do think that there is a period of  
6 time, again, when that record is closed, let staff do  
7 their recommendation independently, and then if there  
8 needs to be a settlement after that before it comes to  
9 decision, then that can be done in the period after that  
10 recommendation is filed, and let them settle it and  
11 bring that to the Commission for action. But at least  
12 it preserves the integrity and it doesn't distract staff  
13 on focusing on settlements when they are supposed to be  
14 writing a recommendation based on the record evidence.

15 So I think that there are provisions to  
16 address a settlement instant now that I have thought  
17 about it a little bit more. Prior to the record being  
18 closed you can stipulate and after the recommendation is  
19 filed then staff is free to talk about whatever  
20 settlements the parties want to talk about before it  
21 comes to decision. So I think that covers it.

22 **MR. REHWINKEL:** We would certainly look  
23 forward to working with other parties on this issue,  
24 because it is starting to dawn on me this could be a  
25 concern. Especially -- sometimes you settle cases on

1 the eve of a decision by the Commission. Sometimes you  
2 settle them on the eve of a recommendation by the staff,  
3 and that could tilt -- you know, sometimes that's what  
4 you are trying to kind of gauge what you are avoiding.

5 **CHAIRMAN ARGENZIANO:** I think that was what  
6 Mr. Kiser was warning us about, and we need to look at  
7 that.

8 Commissioner Skop.

9 **COMMISSIONER SKOP:** But in the interest of  
10 fairness, I mean, sometimes issues are settled on the  
11 eve of a staff recommendation, but sometimes it would be  
12 equally good to see what the staff recommendation would  
13 have been, and then that way you have an objective  
14 judgment to make between whether the settlement should  
15 be adopted by the Commission versus whether it should  
16 not be. And there have been instances in the past where  
17 settlements have been criticized, and without a staff  
18 recommendation, because none exists at that time. You  
19 are just, basically, at the 12th hour you have got a gun  
20 to your head, oh, well, this is what the parties want.  
21 And, you know, if you were to armchair quarterback  
22 looking back at it, it really wasn't a good deal to  
23 begin with. So, again, there might be merits to doing  
24 it both ways.

25 **MR. REHWINKEL:** Fair point.

1           **CHAIRMAN ARGENZIANO:** I think it's something  
2 everybody really needs to look at closely to make sure  
3 they understand your concern for sure. Okay.

4           **MR. MOYLE:** I have just one point.

5           **CHAIRMAN ARGENZIANO:** I'm sorry, go ahead.

6           **MR. MOYLE:** That's all right. On the last  
7 section, the prohibited communications, you might want  
8 to just --

9           **CHAIRMAN ARGENZIANO:** I'm sorry, page and  
10 line.

11          **MR. MOYLE:** I'm sorry. Page 4.

12          **CHAIRMAN ARGENZIANO:** Back on 4. Okay.

13          **MR. MOYLE:** This is on the staff  
14 recommendation prohibited communications, Line 6.

15          **CHAIRMAN ARGENZIANO:** Uh-huh.

16          **MR. MOYLE:** I think if you take Public  
17 Counsel's recommendation of defining ex parte  
18 communications and put it in your rule, I think you can  
19 put a period after communication and delete the  
20 statutory reference, and then that gives you more  
21 control over your own destiny. You know, you don't have  
22 to necessarily be tied to that. You have already  
23 considered exceptions to that in the statute that. Just  
24 say no ex parte.

25          **CHAIRMAN ARGENZIANO:** Commissioner Stevens.

1                   **COMMISSIONER STEVENS:** I'm sorry, Mr. Moyle,  
2 were you on Page 4 of --

3                   **MR. MOYLE:** I'm sorry, I was working off of  
4 OPC's.

5                   **COMMISSIONER STEVENS:** Okay, thanks. I just  
6 wanted to make sure. Okay.

7                   **MR. MOYLE:** So on the other one it would be  
8 Page 6, Line 10, ex parte communication, period, and  
9 delete under Section 350.042.

10                   **COMMISSIONER STEVENS:** Thank you.

11                   **CHAIRMAN ARGENZIANO:** Any other comments?

12                   Okay. Staff.

13                   **MS. CIBULA:** And we also added language to  
14 that section that prohibits a staff member who acted in  
15 a prosecutorial role in a license revocation proceeding,  
16 or suspension proceeding, or a proceeding imposing  
17 administrative fines or penalties from discussing the  
18 merits of the case with a Commissioner. These types of  
19 proceedings are what we refer to as show cause  
20 proceedings, and this language was added to codify the  
21 current Commission practice of splitting staff into  
22 advisory staff and prosecutorial staff in show cause  
23 proceedings, which was based on the Florida Supreme  
24 Court's 1995 opinion in Cherry Communications versus  
25 Deason.

1                   **CHAIRMAN ARGENZIANO:** All right. Commissioner  
2 Skop.

3                   **COMMISSIONER SKOP:** And I think that Cherry  
4 case is what basically prompted me to differentiate, you  
5 know, Commissioners' direct reporting staff from the use  
6 of advisory staff that has been used, because in the  
7 Cherry case advisory staff, as it pertains to the  
8 Commission, has legal significance. And so I think that  
9 it was important to break that out, and I think staff  
10 has reflected that here.

11                   **MS. CIBULA:** I guess we're finished with the  
12 section-by-section discussion. And I guess the next  
13 stage is any additional comments by workshop  
14 participants.

15                   **CHAIRMAN ARGENZIANO:** Any comments, or can we  
16 move on to OPC's presentation? Let's do that.

17                   **MR. REHWINKEL:** I think actually the last --  
18 no, the last item you discussed is a perfect segue to  
19 what Mr. Poucher wants to talk about.

20                   **CHAIRMAN ARGENZIANO:** All right. You're  
21 recognized.

22                   **MR. POUCHER:** I'll try to speak quickly since  
23 we are approaching the lunch hour.

24                   **CHAIRMAN ARGENZIANO:** Hang on one second.  
25 Don't lose that thought, though.

1                   We are taking a five-minute break.

2                   (Off the record.)

3                   **CHAIRMAN ARGENZIANO:** Okay. Commissioner Skop  
4 will join us I'm sure when he can. Let's go on.

5                   **MR. POUCHER:** Thank you. And good noon hour,  
6 Commissioners. My name is Earl Poucher. I'm the senior  
7 legislative analyst with the Office of Public Counsel.  
8 I tend to speak rather quickly, but please be sure and  
9 interrupt me if you have any questions as you go along.

10                   Just a quick bit of background. When the  
11 Commission decided to take a look at its operating rules  
12 and how it managed dockets, one of the early questions  
13 that was posed to the Office of Public Counsel by our  
14 boss, J.R. Kelly, was how do other utility commissions  
15 around the country conduct their business?

16                   A long period of silence followed that  
17 question. And what we found was that the last complete  
18 survey, national survey of regulatory practices was  
19 conducted by NARUC in 1997. The surveys -- that is 13  
20 years ago, and the survey is on the NARUC website, but  
21 they bill you for the copies of it and we didn't want to  
22 spend good money on a 13-year old study, so we decided  
23 to do our own.

24                   **CHAIRMAN ARGENZIANO:** That sounds very wise.

25                   **MR. POUCHER:** Yes. And frugal, too. What I



1 have for you today is a PowerPoint summary of the  
2 results of our survey. It's a spreadsheet or a matrix  
3 is on top of that study and it summarizes the results  
4 for the individual responses from the 23 states that  
5 have responded to date.

6 Our goal here was to capture data from the  
7 states regarding the procedures they used to manage the  
8 regulatory process, which is what we are talking about  
9 today. We did not attempt to identify best practices.  
10 I didn't try to endorse any specific rule or regulation,  
11 and I believe that the study, if you look at it, it  
12 demonstrates that there are significant differences  
13 between the states and the way that they conduct their  
14 business, as well as some very interesting similarities.  
15 And I would encourage you individually to take a look at  
16 not my conclusions here, but the individual responses  
17 from the states that we have received that are included  
18 in the package about how these commissions go about  
19 conducting their business.

20 The survey was conducted by the Office of  
21 Public Counsel. We contacted all of the NSUCA  
22 (phonetic) offices around the country to provide basic  
23 data, and we also conducted a number of public service  
24 commission staffs to get their responses. Twenty-three  
25 states have responded thus far, and the results are

1 included in this presentation.

2 If the data proves to be useful, we will  
3 continue to try to track it and track down those states  
4 that have not responded in order to fill out the data.  
5 If it's really useful, then we may decide to do an  
6 annual update.

7 The questions that we posed in the survey  
8 are shown here. We first started with the commissioner  
9 selecting procedures and the number of commissioners,  
10 then how the commissions' staff itself is organized, and  
11 there is a lot of differences there. The use of trial  
12 judges, administrative law judges, hearing officers that  
13 are used by various commissions, and the staff  
14 procedures where there is a physical or functional  
15 separation of the advisory function versus the  
16 prosecutorial role.

17 Finally, we tried to identify the ex parte  
18 rules that apply in each of the states that we were able  
19 to survey, and here's the list of the 23 states that  
20 responded. When we get 100 percent of the states in the  
21 database, then we are going to revise this report and  
22 send it out again. But in the meantime, I believe that  
23 the 23 states that we captured provide some very useful  
24 data for you to look at and consider when you are  
25 thinking about changes in the way we do business here in

1 Florida.

2 The first question that we asked dealt with  
3 the commissioners themselves. Twenty-one of the states  
4 that we were able to survey appoint their commissioners.  
5 Two states have elected commissioners, and I believe  
6 there is probably four states in total that elect their  
7 commissioners, all of them in the south -- somebody from  
8 up north pointed out. Twelve of the states have three  
9 commissioners; ten of them have five commissioners; and  
10 one of them has four commissioners. And you've got to  
11 wonder how Tennessee reaches a decision on tough dockets  
12 with four commissioners, but they are the one state that  
13 has four.

14 **CHAIRMAN ARGENZIANO:** That may be the  
15 commission meetings to view in on. (Laughter.)

16 **MR. POUCHER:** I didn't have any substantive  
17 discussions with Tennessee folks, but it was interesting  
18 to say the least.

19 We tried to get specific information  
20 regarding the order organization by staff. And just to  
21 get the terminology straight here, no matter how you do  
22 it the regulatory process involves dockets and hearings  
23 before a group of commissioners. Someone has to assume  
24 the prosecutorial role, someone must assume the role of  
25 advisory staff to the Commissioners in reaching their

1 decisions, and so those are the two primary functions  
2 that we are talking about.

3 The prosecutorial or the advocacy role  
4 involves acting like a party, perhaps filing testimony,  
5 conducting discovery, cross-examining the witnesses.  
6 The advisory role involves listening to the evidence,  
7 responding to the Commissioners' questions, making  
8 recommendations or organizing the decision-making  
9 process to facilitate the ultimate decision.

10 And when we asked the individual states, we  
11 found that of the 23 that we surveyed 11 of them  
12 actually separate the PSC staff within the agency and to  
13 these one separate functions. One group assumes the  
14 prosecutorial role and another group assumes the  
15 advisory function. Sometimes in some cases these groups  
16 are static, they do not change. In other cases, the  
17 functional assignments are handled on a docket-by-docket  
18 basis. Georgia, for instance, assigns its public  
19 interest advisory staff on a case-by-case basis.

20 That was 11 of the states that do that. We  
21 also found that five other states in addition to those  
22 11, actually, the separation is more pronounced. It is  
23 a separate and independent organization outside of the  
24 PSC staff. They assume the prosecutorial function,  
25 assume party status in docketed proceedings that are

1 heard by the Commissioners. In these states, the PSC  
2 staff within the agency performs only the advisory  
3 function and assists the Commissioners in managing the  
4 dockets and in reaching a final decision. In total, 16  
5 out of the 23 states have a formal separation of the  
6 prosecutorial and the advisory function.

7 Finally, seven states, including Florida,  
8 perform both the prosecutorial and the advisory  
9 functions internally within the Commission staff without  
10 any real distinctions and that involves the functions of  
11 the advisory, technical, and prosecutorial functions.

12 Another area that we found very interesting  
13 was the use of trial judges, or administrative law  
14 judges, or hearing officers. They are called different  
15 things in different states. One of the surprises in the  
16 responses we received is that 19 out of the 23 states  
17 report that they use either trial judges, or  
18 administrative law judges, or hearing officers to manage  
19 the regulatory process.

20 And if you would look at those 19 states,  
21 however, you are going to find that there are  
22 significant differences in the way that they do that.  
23 So even though the 19 states use these separate hearing  
24 officers, ALJs, trial judges, there are a lot of  
25 differences between the states as to how they actually

1 manage that process.

2 The next two slides deal with the questions  
3 about the specific activities of the commission staff,  
4 and I would like for you to just ignore the second line  
5 that says advisory staff, because we're talking here  
6 about the total staff function for all of the staff  
7 functions. And the first question that we asked, does  
8 the commission staff operate as a party in the dockets?  
9 Seventeen out of 23 said yes. Does the commission staff  
10 sponsor witnesses and take positions on the issues?  
11 Seventeen out of the 23 said yes. Does the commission  
12 staff engage in discovery and cross-examine witnesses?  
13 Twenty-one out of 23 said yes. Eleven of the states  
14 indicated that the staff actually produced a recommended  
15 decision as we do here in Florida.

16 **CHAIRMAN ARGENZIANO:** May I ask you a  
17 question?

18 **MR. POUCHER:** Sure.

19 **CHAIRMAN ARGENZIANO:** I wanted to go back to  
20 the last slide that you had on the trial judges, and  
21 administrative law judges, and hearing officers. Are  
22 they in place of commissioners or act in conjunction  
23 with commissioners? Do the hearings go to the trial  
24 judge and then come back to the actual commissioners?

25 **MR. POUCHER:** I believe that I can say without

1 question that they are all in addition to the  
2 commissioners. And the decision of, for instance, an  
3 administrative law judge is then passed on to the  
4 commission. The commission then takes that in place of  
5 a staff recommendation, which we use here in Florida,  
6 and reaches the ultimate decision, but it's facilitated  
7 by all of the legal processes that go before that.

8 **CHAIRMAN ARGENZIANO:** So it would be a  
9 recommendation to the commissioners that comes back  
10 to -- the commissioners are actually going to have the  
11 final recommendation?

12 **MR. POUCHER:** Absolutely.

13 **MR. KISER:** Madam Chairman, I looked into this  
14 a lot a number of years ago, and it varies from state to  
15 state a little bit as to what role they play. But  
16 almost universally they basically compile the record,  
17 the testimony, the interview of witnesses, and then  
18 where there is a lot of differences, in some cases they  
19 may do the entire record. In some cases they will only  
20 do part of the record and staff people can do some  
21 limited part of it. And in most cases they submit a  
22 recommended or suggested order that then goes to the  
23 commission. The commission then looks -- basically,  
24 they can't look outside that record that was given to  
25 them. And in those cases where that happens, of course,

1 you don't have near the issues we have had about  
2 ex parte and all of those sort of things, because it is  
3 all done in a very judicial type setting and it goes  
4 forward that way.

5           And this was something that we looked at  
6 very heavily, you know, and the unfortunate part was  
7 that in 1974 when we revised Chapter 120, we had so many  
8 things we had to do, because what happened was that we  
9 had a Chapter 120 on the books for like 20 something  
10 years, but nobody used it. Very few state agencies used  
11 the Administrative Procedures Act as it existed at that  
12 time. They almost all either had a separate statute  
13 that said what kind of procedures they would use, or  
14 they had developed their own process and someone had  
15 challenged it in court for due process and other things,  
16 and the courts had upheld that.

17           So once they got a court decision saying  
18 that your process meets due process issues, they would  
19 continue to use that process and not use Chapter 120.  
20 So then when we made the bold statement in there that  
21 all agencies were going to have to use 120, we had quite  
22 a fight on our hands. And because, again, at that time  
23 the Commissioners at that time were only three, and they  
24 were elected, and there was severe questions brought  
25 about as to how well they were really doing their job.



1           One of the suggestions was, well, let's take  
2 away some of that and have this new hearing officer  
3 position handle that function and let them just review  
4 the record and make policy decisions based on that. But  
5 nobody felt comfortable in handing that off to them, and  
6 we had so many other things on the plate because it did  
7 take a number of years to get Chapter 120 nailed down,  
8 because for the first five or six years everybody wanted  
9 an exemption out of 120. I mean, virtually everybody  
10 wanted to get exempted, and every legislative session I  
11 was fighting off all of these people trying to get out  
12 of it.

13           And so then when we came along and did the  
14 appointed process, and at that point there were only two  
15 of the largest ten states, only two still elected them,  
16 Texas and Florida. So we then joined the ranks of the  
17 appointed states. And at that time then we made a major  
18 push, in fact, I think the language that is currently in  
19 120 about how the PSC should use administrative hearing  
20 officers, or not necessarily they should use them, but  
21 they are available, there was a real push to try to get  
22 the Commission to do more of that. And the initial  
23 group of appointed Commissioners did do a few cases.

24           It was kind of funny back at that time we  
25 all know today how much Senator Fasano figures in the

1 activities of our Commission, well, that's kind of the  
2 role I played back then about trying to get the PSC to  
3 do -- to use more hearing officer role in that.

4 **CHAIRMAN ARGENZIANO:** Well, Curt, was there a  
5 territorial thing there? You know, it seems to me there  
6 would be a --

7 **MR. KISER:** Well, there is always this  
8 feeling, and if you remember, too, that when the hearing  
9 officer concept was developed, because before that when  
10 you asked an agency for a hearing, if you disputed  
11 something they did that affected you and you asked for a  
12 hearing, all the agency did was they turned around and  
13 turned to their general counsel and said, "Give this guy  
14 a hearing."

15 So you didn't have a fair and impartial  
16 person at that level. You had an employee of that  
17 agency doing those hearings. And we said, well, that  
18 obviously wasn't very fair. We needed to separate a  
19 separate group of people out, and everybody was  
20 concerned at the beginning that these people might not  
21 be of high quality. You know, they might just be  
22 lawyers that couldn't get a job somewhere else, for  
23 example. And so it took a while for people to come to  
24 respect the quality of those administrative hearing  
25 officers.

1           And, likewise, for a long while nobody  
2 wanted to give them the new title of administrative law  
3 judges because they really weren't sure yet they would  
4 measure up to what they thought of as a judge. Well,  
5 through time I think that has proved itself and we did  
6 eventually change that to administrative law judge.

7           And, so there was a certain amount of turf.  
8 The PSC kind of wanted -- they didn't feel that the  
9 people they had doing these hearings and things like  
10 that -- they were concerned they might not get that  
11 level of expertise from an administrative law judge.  
12 But through the years it has been shown, I think, that  
13 administrative law judges handle a lot of issues, power  
14 plant siting cases, there are some really technical  
15 issues in DEP when they dealing with water quality and  
16 things like that. So they have shown that they can  
17 handle those really detailed issues.

18           **CHAIRMAN ARGENZIANO:** And it would eliminate  
19 the ex parte and that political --

20           **MR. KISER:** Well, it certainly cuts down on a  
21 lot of it, but you would still have the issue that  
22 once --

23           **CHAIRMAN ARGENZIANO:** Once it comes back. You  
24 take the recommendation or not.

25           **MR. KISER:** Yes. When it comes back to you

1 and you have got a transcript of the record, people  
2 might still want to try to influence, you know, what  
3 goes on, and you may still get some ex parte there.  
4 But, you know, my suggestion, bottom line, once we get  
5 through all of this material is that I think it would be  
6 a good time for the Commission to go back and examine it  
7 and do a little bit of experimenting on some cases,  
8 sending a few more cases over there, and see what kind  
9 of result we get.

10 It was reported to me, and the I don't know,  
11 you know, the facts on this for sure, but I asked one of  
12 the previous general counsels, I guess the first month I  
13 was on the job when everybody was calling and offering  
14 to help me. They said -- I asked them, I said, well,  
15 how come they haven't used administrative law judges  
16 more? And the response was, well, because way back when  
17 Commissioner Cresse was here, and they started  
18 experimenting with taking some more cases over there, in  
19 one of the cases when the administrative law judge found  
20 in his transcript and in his recommended order that a  
21 return on equity was a certain percentage, in that case  
22 Commissioner Cresse found out that he couldn't change  
23 that. And I think you can make an exception to that and  
24 say that when a recommended order comes back these are  
25 the things the Commission shall make final decisions on.

1           But, unfortunately at that time, and, again,  
2 I don't know the circumstances, he was told he couldn't  
3 change that. There was a lot of things he changed, but  
4 once that administrative law judge found the ROE was X,  
5 he was stuck with that. And once that happened he said  
6 that's it, we're not going back over there anymore.

7           **CHAIRMAN ARGENZIANO:** And do we know if that  
8 is still the case in many of these states that use this,  
9 or is it more of a recommendation now and take it or  
10 leave it.

11           **MR. KISER:** Well, the initial concept, Madam  
12 Chairman, was that the administrative law judges in most  
13 instances would only file recommended orders. However,  
14 what started happening was agencies -- there's an  
15 exception. The administrative law judge makes a  
16 recommendation in the recommended order, and if the  
17 Commission or the agency head, if they differ and don't  
18 like that ultimate recommendation, they can elect to  
19 rehear the case themselves and start a whole new record  
20 and then have a chance to make their own decision on the  
21 case. And we started having a number of agencies doing  
22 some of those things.

23           We had a number of cases where they didn't  
24 take the recommended order. They reversed it on  
25 improper grounds where they didn't have authority to do

1 that, and we had a number of those cases that started  
2 coming back. So little by little we started saying that  
3 the recommended order was the final order.

4 A good example of that is in DBPR where you  
5 have a lot of these regulatory boards that oversee the  
6 architects, the engineers, the doctors, everything.  
7 Well, those boards get very protective of their own  
8 members. And when they sit in judgment of one of their  
9 own members on some sort of improper conduct, they had a  
10 tendency to want to take it easy on them even though the  
11 recommended order, you know, came out and said take the  
12 person's license away, or put them on suspension for a  
13 year, or whatever. They would lessen that penalty quite  
14 a bit.

15 So we went in and changed the law and said,  
16 okay, when it comes to the recommended order on these  
17 agencies, they can't change -- they might want to change  
18 some of the other things, but they can't change the  
19 penalty. So there has been an increasing effort to give  
20 more finality to the administrative law judges orders.  
21 And that has been the trend. And I think as they have  
22 gotten better, and gotten a lot more expertise, and  
23 built up a better reputation, the legislature has been  
24 more inclined to give them more of that authority.

25 **CHAIRMAN ARGENZIANO:** Commissioner Skop.

1                   **COMMISSIONER SKOP:** Thank you, Madam Chair.

2                   And to Senator Kiser's point, at least my  
3 understanding and somebody correct me if I'm wrong,  
4 because I may be, but with an administrative law judge  
5 or if it goes over for a hearing at DOAH and they send  
6 back a recommended order that the findings of fact from  
7 the -- the findings of fact from the administrative law  
8 judge, that the Commission is bound by those findings.  
9 So, for instance, if they said the ROE was, you know, 11  
10 to 11.3, you could not depart from that at the agency  
11 level because that would be a specific finding of fact  
12 of what the appropriate ROE would be. But, you know, in  
13 terms of a recommended order, if it's not related to a  
14 finding of fact, then I think you are free to depart.  
15 Is that a correct understanding of that?

16                   **MR. KISER:** Yes, it is. And that is what I  
17 was saying, that probably -- there are several ways you  
18 could address that. One, you could require that in PSC  
19 hearings that a number like the ROE, the administrative  
20 law judge shall make a determination on a range instead  
21 of a specific number, for example, to give more  
22 flexibility. Or they could simply say that in those  
23 matters the Commission shall have final authority over  
24 that number.

25                   You could exempt -- you could pull those

1 items out and protect those on your own. Or the other  
2 way to do it is pull that section out and say we  
3 disagree with the administrative law judge, and we're  
4 going to go hold our own set of hearings, develop our  
5 own facts on just that one issue, and then we will make  
6 the final determination. So there is still a number of  
7 ways to do that, but you kind of want to do that to have  
8 that happen.

9 **COMMISSIONER SKOP:** And I have seen some past  
10 orders, I think, when the administrative act went into  
11 effect that there were -- the structure of the  
12 Commission orders changed a little bit. There used to  
13 be Commission orders with actually specific findings of  
14 fact in them, and I don't know whether that was a  
15 hearing officer concept, but then I have seen other  
16 things come back where they have actually been sent to  
17 DOAH and we have incorporated. So it's interesting how  
18 that has evolved over time.

19 I think my question would be that due to the  
20 manner in which the commissions function, I think the  
21 preference has always been for the Commission to retain  
22 jurisdiction and not send it over. As a matter of fact,  
23 I don't know anything recently -- well before I got here  
24 that has been sent over.

25 But if we were to send something over, what



1 would that do to, you know, being able to meet our  
2 statutory deadlines? For instance, if there was a need  
3 determination, once that is filed and then we have to  
4 send it over, how can we make certain that that is done  
5 in a time because it depends on DOAH's dockets, right?

6 **MR. KISER:** Well, I think DOAH would be --  
7 they would be bound by whatever the statute requires for  
8 that type of case. If it says that the time frame is,  
9 you know, 90 days, 75 days, or whatever the number is,  
10 they would be bound by, you know, their participation in  
11 that time frame. I don't think their time frame would  
12 trump that. That's something I can very easily check,  
13 though.

14 **CHAIRMAN ARGENZIANO:** I just have one other  
15 question. I'm sorry, Mr. Poucher, that we have  
16 disrupted your presentation. Just one other question.  
17 If you did that, what is the need for a Public Service  
18 Commission?

19 **MS. KISER:** Well, you have got to remember  
20 that there's a lot of policy that is still involved in  
21 these things. For example, when you decide those rate  
22 structures and how the rate structure is going to be,  
23 and where it's going to break into a different category.  
24 Likewise on the ROE, just because your staff comes  
25 forward with their recommendation, just like the cases

1 we have just seen in the last month, you weren't bound  
2 by that. You had discretion to go up or down on those  
3 things. So you would still play that same role, it is  
4 just who would be the one preparing that major record or  
5 portions of that record.

6 **CHAIRMAN ARGENZIANO:** I think that could be a  
7 problem. In certain areas I think it could work very  
8 well, but the other areas of what if as a Commissioner I  
9 don't agree with that recommendation on their particular  
10 ROE. I would be bound by that. And then, of course,  
11 the people of the state would probably want to kill us,  
12 not the administrative law judges. But unless that was  
13 a decision that you could say I will take it or change  
14 it, I think that would be problematic for me. Otherwise  
15 I don't think you would need a Commission or  
16 Commissioners.

17 Commissioner Skop.

18 **COMMISSIONER SKOP:** And to your last question  
19 which I thought was a good one, the reason for a  
20 Commission in that situation is the agency still has to  
21 render a final agency action based on the recommended  
22 order. So DOAH just makes the findings of fact and says  
23 here is what we think, and then the agency still needs  
24 to take final action on that. So there is still the  
25 need for the Commission. But the other part is --

1           **CHAIRMAN ARGENZIANO:** No, commission staff. I  
2 don't think you would need Commissioners.

3           **COMMISSIONER SKOP:** No, the Commissioners,  
4 because we are the ones appointed to do --

5           **CHAIRMAN ARGENZIANO:** Well, I beg to differ.

6           **COMMISSIONER SKOP:** Nevertheless, the unique  
7 thing, and that's why I think I like the Commission  
8 better than the ALJ or DOAH, because, again, we get to  
9 take final agency action, but we also, unlike some  
10 agencies, get to decide everything ourselves, should we  
11 choose to do so. So it gives us a little bit more  
12 control over our subject matter expertise, whereas other  
13 agencies kind of have their hands tied and have to send  
14 it over to DOAH.

15           **CHAIRMAN ARGENZIANO:** So, wait a minute, is  
16 that like if there's something we really don't want to  
17 touch we send it over there?

18           **MR. KISER:** Exactly. Exactly. Now, let me  
19 make this comment. Think about what you all have just  
20 said. Now, at different times in the two and a half  
21 months that I have now been here, I have seen passion  
22 exhibited by each of you in various areas. Maybe not  
23 all of you, but most of you. Well, likewise, you have  
24 got to understand I have a real passion here, and it has  
25 been one since 1972.

1           Think about since that Chapter 120 has been  
2 rewritten and the installation of a brand new part of  
3 government that at that time used to be the Division of  
4 Administrative Hearings and now they are Administrative  
5 Law Judges. Every secretary, every head of every  
6 department could have made all the same arguments you  
7 just did. Well, you wouldn't need a Secretary of  
8 Transportation if all my cases go to DOAH. You wouldn't  
9 need DEP. That has not happened. That has not  
10 happened. It's not that much of a threat to -- you  
11 still need the Commission to set guidelines, you still  
12 need the Commission to say, you know, this case that is  
13 coming up is a pretty significant case on policy and we  
14 want to be sure that we handle that case from top to  
15 bottom.

16           **CHAIRMAN ARGENZIANO:** I understand that.  
17 Curt, I can even feel your passion from here, but the  
18 truth is I'm trying to look at both sides of the coin.  
19 I would feel -- I was going to say neutered. I guess  
20 spayed. (Laughter.) Although some people would say,  
21 oh, no, its neutered for you. But I would feel --

22           **MR. KISER:** That has already happened. Go  
23 ahead. (Laughter.)

24           **CHAIRMAN ARGENZIANO:** I haven't been spayed or  
25 neutered yet. That will be the day. But I would feel

1 like we have lost -- unless we can come up with a final  
2 recommendation, I would feel that the Commissioners have  
3 lost most of what they are here for.

4           There may be some areas that I think it  
5 would be a great idea to have an administrative law  
6 judge or however you want to -- a hearing officer take  
7 certain cases, because of the way it's held. The no  
8 fear of ex parte at that point. The way it is just done  
9 in a more judicial than we are. The judges or hearings  
10 officers, I guess. So certain things I wouldn't mind,  
11 but I think if we're going to go through the whole role  
12 and then be told what the final outcome is, and then if  
13 each Commissioner can't say, well, I accept or reject  
14 and go through that, that would give me angst. But,  
15 otherwise, other than that I wouldn't mind that  
16 interchange if it was still left up to the Commission,  
17 but with good cause to disagree with a recommendation  
18 that came --

19           **MR. KISER:** Well, let me give you another  
20 example. In I think it was probably about 1975 or  
21 '76 the area that I represented was Clearwater.  
22 Clearwater was having a terrible time with their  
23 employee issues, particularly when there was a dispute  
24 over somebody getting fired on the staff. And almost  
25 always you had those civil service type hearings. And

1 what ended up happening was the city commission holds  
2 the hearing, compiles the record, and then they have to  
3 make a decision whether to uphold the firing of the  
4 police chief, or the fire chief, or whoever it was,  
5 whoever the manager at that time fired.

6 Well, what was happening was these cases  
7 were costing a lot of money, taking a lot of time, and  
8 they were very inconsistent. And one of the reasons  
9 that that happened was because when they would have  
10 these hearings, the labor representatives were very  
11 aggressively representing the interests of the employee;  
12 and, likewise, the people representing the city staff  
13 were aggressively representing that side. And as a  
14 result, all kinds of things were going on the record  
15 because you didn't really have judges in charge of and  
16 ruling on evidentiary matters, procedures, all of that  
17 sort of stuff. And so quite often when the commission  
18 then made their decision to uphold or whatever, they  
19 were getting overturned in court.

20 So I went to the city manager, and I said,  
21 you know, you ought to pull these cases out of the city.  
22 Send these cases to DOAH and let them compile just the  
23 transcript. They don't have to -- you don't have to  
24 have them make a recommendation. That can be part of  
25 the deal; they don't make a recommendation. They simply

1 compile the record, and then you have a clean record  
2 that you can look at. You don't have to worry about  
3 taking additional testimony, you don't have to worry  
4 about ex parte happening, you just look at the record  
5 that was compiled by a judicial officer and you make  
6 policy decisions based off that transcript. They did  
7 that, and it has worked out marvelous for them ever  
8 since.

9 So there is a number of ways you can utilize  
10 administrative law judges. You don't have to go with  
11 the format you're thinking about where all of those  
12 things -- or the key issues are out of your hand. You  
13 don't have to do it that way.

14 **CHAIRMAN ARGENZIANO:** That's great.

15 Okay. Commissioner Skop, and then we are  
16 going to get back to the -- I'm sorry. We kind of ran  
17 amuck there.

18 **COMMISSIONER SKOP:** Just briefly to that  
19 point, if DOAH were used to compile an evidentiary  
20 record and that record was the basis for the  
21 Commission's decision, how would the Commissioners be  
22 able, since the record was closed, to ask questions of  
23 the litigants or the witnesses?

24 **MR. KISER:** You would have to open that part  
25 back up and -- open that back up and bring those -- do

1 that part separately, and then go back. Once that is  
2 done, then you go back to the transcript you have plus  
3 whatever additional things you did by opening up the  
4 record.

5 **COMMISSIONER SKOP:** All right. Thank you.

6 **CHAIRMAN ARGENZIANO:** Mr. Poucher, sorry.

7 **MR. POUCHER:** Public Counsel is not promoting  
8 any one solution, but we are promoting the fact that  
9 this is a good database for you all to start working on,  
10 and there is a huge variety of ways that different  
11 commissions deal with these issues. And I would -- if  
12 any of you go to NARUC next week and you are snowbound  
13 in the hotel, track down Massachusetts. They have 19  
14 hearing officers, and I believe they are on the staff.

15 California has administrative law judges,  
16 and I personally remember numerous cases that have been  
17 reversed by the Commission in California based on a  
18 recommendation of the administrative law judge. So  
19 there is a lot of different ways to do this.

20 California, New York, Massachusetts are already doing  
21 it, and it would be worthwhile to check bases with how  
22 they think it's working out there.

23 **CHAIRMAN ARGENZIANO:** And just for those who  
24 do not go to NARUC, you can track them down by a phone  
25 call. Thank you.



1                   No, no, we're going. Hold on. Commissioner  
2 Skop.

3                   **COMMISSIONER SKOP:** Mr. Poucher, on the one  
4 point you raised with Massachusetts, I guess it is my  
5 understanding that South Carolina and Virginia perhaps  
6 also -- I know South Carolina does, has a separate  
7 prosecutorial staff. Do you have the matrix showing  
8 what states do what in your analysis?

9                   **MR. POUCHER:** Yes. If you go back into the  
10 report, underneath it we -- in fact, the individual -- I  
11 recommend that you look at the individual reports from  
12 each of the states. There was lot of flexibility in  
13 this survey. They could put down what they wanted. The  
14 New Jersey response is a one-pager. Pennsylvania has  
15 seven pages of responses to the same questions. So  
16 there's a lot of good material in there for you to look  
17 at and to consider and think about as you go forward in  
18 your process here in Florida.

19                   **CHAIRMAN ARGENZIANO:** Okay. Thank you.  
20 Please continue.

21                   **MR. POUCHER:** Okay. The next one is -- the  
22 last one was questions about how the total staff  
23 operates in the conduct of a case, but I want to zero in  
24 on the prosecutorial staff where they have separated  
25 that function. And when the staff is separated into

1 advisory and the prosecutorial functions, then that  
2 prosecutorial staff acts just like any other party in  
3 the docket. They all file briefs, they take positions,  
4 they sponsor witnesses, they engage in discovery, and  
5 they cross-examine witnesses. And when the staff  
6 separates into that function, then five out of the 11  
7 states still allow that prosecutorial staff to file a  
8 recommended decision, which puts them one up on the rest  
9 of the parties in the case.

10 Next, which probably is of most interest is  
11 that we asked a number of questions about ex parte and  
12 the next two slides cover that. First, we didn't find  
13 any states that prohibited ex parte communications  
14 between the Commissioners and the advisory staff where  
15 they were separated and clearly identified. We did,  
16 however, find that nine of the states prohibited  
17 ex parte communications between the Commissioners and  
18 the prosecutorial staff. And, remember, we just  
19 discussed those states. And there were, I believe, nine  
20 of them that were separated, and that's where the  
21 ex parte prohibitions apply between Commissioners and  
22 prosecutorial staff in those states that have them.

23 Fifteen of the 19 states that used trial  
24 judges, or ALJs, that's most of them, or hearing  
25 officers, they prohibit ex parte communications with

1 those persons. And those ex parte prohibitions apply  
2 not only generally to the parties, but they also apply  
3 to the Commissioners.

4 And, finally, we received the following  
5 responses, if you are looking up there, regarding  
6 ex parte. Nineteen out of the 23 states prohibit  
7 ex parte communications between the Commissioners and  
8 parties in docketed cases. And I would emphasize that  
9 the definition of ex parte varies between states, so  
10 there is not just one clear definition of ex parte.  
11 Nine of the states prohibit ex parte communications  
12 between the Commissioners and the parties in rulemaking  
13 dockets. So there's some of that going on in many of  
14 the states. Nine of the states prohibit ex parte  
15 communications between the Commissioners and some of  
16 their staff, and that's the prosecutorial staff that we  
17 are talking about where those ex parte prohibitions  
18 apply in nine of the states.

19 Eight states prohibit ex parte  
20 communications between the prosecutorial staff and the  
21 advisory staff all under the same commission. And nine  
22 of the states also prohibit ex parte communications  
23 between the advisory staff and the parties, which is  
24 what you have been talking about today.

25 So that's our summary of what we found when

1 we went out to the other states. I would encourage  
2 those of you who are interested to take a look at the  
3 matrix that we have included and the individual  
4 responses because they are extremely interesting. I  
5 think you will find them good reading.

6 **CHAIRMAN ARGENZIANO:** I think it's great that  
7 you did this. I really appreciate it and have already  
8 begun looking through it and am very interested. I've  
9 got a question, though. For the four states out of the  
10 23, they do allow ex parte?

11 **MR. POUCHER:** Yes.

12 **CHAIRMAN ARGENZIANO:** It would be interesting  
13 to see what happens there.

14 **MR. POUCHER:** The application of ex parte --  
15 well, there's no single thing that is uniformly adopted  
16 by the commissions around the country. The differences  
17 in how they operate are really significant, and this  
18 slide says the end, but I previously had there is more  
19 than one way to skin a cat.

20 **CHAIRMAN ARGENZIANO:** Somebody made you take  
21 that off. Can I ask what the four states were, just out  
22 of curiosity, which four states allowed ex parte?

23 **MR. POUCHER:** I can't recall the exact  
24 numbers, but, for instance, I believe based on what  
25 Debra Flanigan told me in Georgia, they have no ex parte

1 prohibitions until the blackout period after the end of  
2 the hearing and then they kick in. So there's a lot of  
3 differences in how they deal with those issues in the  
4 various states.

5 **CHAIRMAN ARGENZIANO:** Well, thank you. This  
6 is a great combination of information, and I really  
7 appreciate it.

8 Commissioners or staff, any questions, any  
9 comments?

10 **MR. POUCHER:** Thank you.

11 **MR. KISER:** Madam Chairman. Madam Chairman.

12 **CHAIRMAN ARGENZIANO:** Yes, Curt.

13 **MR. KISER:** I wanted to ask on the, on the ex  
14 parte in the states that don't have any specific  
15 prohibition, is it more of a requirement that you have  
16 to report it and put it down? You can go ahead and have  
17 them, but you must give notice to everybody else that  
18 you've got them?

19 **MR. POUCHER:** My recollection from the survey  
20 is that when -- that they report those kind of  
21 communications, and that does not then become an ex  
22 parte.

23 **MR. KISER:** Right.

24 **CHAIRMAN ARGENZIANO:** Okay. Any, any  
25 response, staff, from the OPC presentation? Anything

1 else, Commissioners?

2 **COMMISSIONER SKOP:** There's cake waiting for  
3 us upstairs.

4 **CHAIRMAN ARGENZIANO:** There's cake waiting  
5 upstairs for Commissioners and their aides. Sorry to  
6 the rest of you.

7 Okay. If that's it, thank you so much.

8 **MS. CIBULA:** And just one more thing. Sorry.

9 **CHAIRMAN ARGENZIANO:** Oh, sorry. Okay. Here  
10 we go.

11 **MS. CIBULA:** Postworkshop --

12 **COMMISSIONER STEVENS:** That would be a  
13 par-tay, not ex parte.

14 **CHAIRMAN ARGENZIANO:** Par-tay. I think we're  
15 allowed to do that. Okay.

16 (Laughter.)

17 **MR. REHWINKEL:** Madam Chairman, I've just been  
18 kind of talking to some of the parties. It really just  
19 kind of occurred to me, we had a lot of discussion, put  
20 a lot of ideas out there and --

21 **COMMISSIONER ARGENZIANO:** Where do we go next?  
22 Is that it?

23 **MR. REHWINKEL:** Yeah. And I was, I just would  
24 throw this out for your consideration is that maybe what  
25 would make sense would be for everybody here that has an

1 interest, the staff and these interested persons, not  
2 parties, but, and have maybe like a drafting session,  
3 let's go through kind of the logistical problems that  
4 people have seen, and see if we can come up with  
5 something that then we comment on. I don't know if that  
6 makes sense, but I think it might be more efficient than  
7 everybody taking --

8 **COMMISSIONER STEVENS:** (Inaudible. Microphone  
9 not on.)

10 **MS. CIBULA:** Yeah. I was going, I was going  
11 to suggest that maybe we do postworkshop comments. The  
12 transcript, it's going to take two weeks to come out,  
13 and maybe two weeks after that, which would be  
14 March 10th, we could get post workshop comments. We  
15 could take another stab at a draft rule and then have  
16 another workshop after that to discuss the draft rule.

17 **CHAIRMAN ARGENZIANO:** I think that works. And  
18 just, just so you know, any time there's a workshop, you  
19 discuss things. That's what it's about.

20 But I agree --

21 **MS. CIBULA:** Or if you would like to meet  
22 informally sometime before that to sit down around the  
23 table.

24 **MR. REHWINKEL:** That might be helpful so we  
25 don't all file comments on stuff that there's really not

1 disagreement on.

2 **COMMISSIONER ARGENZIANO:** Sure. I don't see  
3 any reason why that can't be done.

4 **MR. REHWINKEL:** And I think the staff could  
5 just schedule that with the parties. I don't --

6 **COMMISSIONER ARGENZIANO:** Sounds good.

7 **MS. CIBULA:** Okay.

8 **COMMISSIONER ARGENZIANO:** Anybody else? Okay.  
9 So that's what we're going to do. And then staff will  
10 kind of keep the Commissioners apprised of how it's  
11 coming, and we'll take it again and look at it as we  
12 come up with more information, how to iron out some of  
13 those things.

14 Any other questions? Anything anybody has  
15 to say?

16 **MR. MOYLE:** Just so I'm clear on it, we're  
17 not -- we're just -- we're going to have a meeting,  
18 staff is going to convene a meeting and we're going to  
19 work through sort of informally and then go from there I  
20 guess.

21 **CHAIRMAN ARGENZIANO:** Right. And once, once  
22 we have something that staff has worked out where we've  
23 worked out issues, even though they may be conflicting,  
24 staff will bring it back to the Commission and we'll --

25 **MS. CIBULA:** Yeah. At that point we'll



1 probably have a recommendation and that'll just be the  
2 points we disagree on, agree to disagree, and then we'll  
3 bring it to you to make the final decision.

4 **CHAIRMAN ARGENZIANO:** And, Commissioners,  
5 anything that you come up with that you want, just feel  
6 free.

7 With that said, everybody have a great day.  
8 We're adjourned. Thank you very much.

9 (Proceeding adjourned.)

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1 STATE OF FLORIDA )  
2 : CERTIFICATE OF REPORTER  
3 COUNTY OF LEON )

4 I, LINDA BOLES, RPR, CRR, Official Commission  
5 Reporter, do hereby certify that the foregoing proceeding  
6 was heard at the time and place herein stated.

7 IT IS FURTHER CERTIFIED that I stenographically  
8 reported the said proceedings; that the same has been  
9 transcribed under my direct supervision; and that this  
10 transcript constitutes a true transcription of my notes of  
11 said proceedings.

12 I FURTHER CERTIFY that I am not a relative, employee,  
13 attorney or counsel of any of the parties, nor am I a  
14 relative or employee of any of the parties' attorneys or  
15 counsel connected with the action, nor am I financially  
16 interested in the action.

17 DATED THIS 24<sup>th</sup> day of February, 2010.

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Linda Boles  
LINDA BOLES, RPR, CRR  
FPSC Official Commission Reporter  
(850) 413-6734

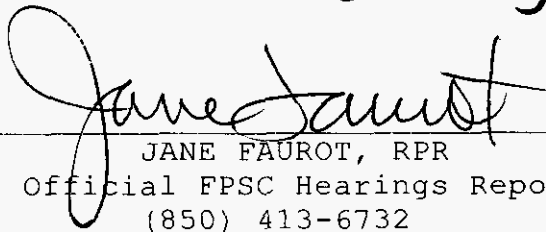
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5 I, JANE FAUROT, RPR, Chief, Hearing Reporter  
6 Services Section, FPSC Division of Commission Clerk, do  
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the time and place herein stated.

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8 stenographically reported the said proceedings; that the  
9 same has been transcribed under my direct supervision; and  
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11 employee, attorney or counsel of any of the parties, nor  
12 am I a relative or employee of any of the parties'  
attorney or counsel connected with the action, nor am I  
financially interested in the action.

13 DATED THIS 24<sup>th</sup> day of February, 2010.

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16 \_\_\_\_\_  
JANE FAUROT, RPR  
17 Official FPSC Hearings Reporter  
(850) 413-6732