

Arkansas Code Revision Commission, 2020-12-01

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Moderator: [0:00] Item E, Mr. Henderson.

Vince Henderson: [0:02] In your packet is a letter from LexisNexis. There are two aspects of this letter. The first has to do with this proposed schedule and possible volumes for replacements. I want to direct your attention to page three, I guess it would be.

[0:22] I'm going to deal with the replacement volumes and what we're going to recommend for the commission to consider and then I'll have Miss Metheny with Lexis discuss the price adjustment. What we're looking at is replacing four volumes in 2021, 4A, 4B, and 5.

[0:44] There will be four, because those will be reorganized and split to have an additional volume. In 2022, we're looking at replacing volume 6B, volume 21, which will be split into two volumes, and then on the next page, volumes 28A and 28B, which will become three volumes. I think I did my count correctly. That's six volumes for 2022. They put in a request that we look at volumes to replace in 2023.

[1:27] I spoke with Miss Metheny about this. I think in light of the fact that in between now and then we will have two legislative sessions, it may be a little premature for us to be trying to figure out exactly what volumes to replace at this point in time on that third year. We will have some time to look at that next year or the year after.

[1:49] We don't want to get caught, quite honestly, behind as we did in 2018. We were fairly aggressive in replacing volumes and we got caught working on replacing volumes while at the same time working on reviewing bills for the 2019 legislative session. I can explain reasons and justifications for this if you want me to.

Senator Bond: [2:19] That's a bit different than Lexis' recommendation obviously. It's a little less. As Vince said, we got a little too aggressive a couple of years ago and we got caught in a situation right as the session let up where we couldn't get done with the replacement volumes. We're trying to be a little more deliberate in our commitments on that.

Moderator: [2:40] Any questions?

Leslie Matheny: [2:45] Mr. Chairman, if I could, I would like to make one comment on that. This is Leslie Matheny from LexisNexis. Mr. Henderson and I did get a chance to talk this morning and I do appreciate his position on not identifying the third year of volumes and completely understand.

[3:07] However, I am going to say that after that conversation, I went back and talked to editorial and talked to various people and looked at the history of Arkansas. Due to the large amount of legislation, it is really incumbent to keep up with the Arkansas code that we average six RVs per year. If we only do 10, it creates a problem where you get behind.

[3:39] I understand not wanting to get in a bind, but I would suggest doing one more volume that would have a split, such as 24B, which would be one volume. It wouldn't be that much more additional work. It would be a split. It would keep the code up and would keep the code from in the future being even more of an onerous project for both our editorial staff and your staff.

Moderator: [4:18] All right, any questions or comments? Senator Bond?

Senator Bond: [4:25] We have your recommendation, right? And my understanding is she's recommending one additional volume be split?

Moderator: [4:32] Yes, that's correct. We amended their recommendation, and she is amending that recommendation. That's all the substitute motions we can have on the floor, I think, as far as replacing volumes.

Senator Bond: [4:46] Just making sure I have it straight in my head. Thank you, Mr. Chairman.

Moderator: [4:50] Can I ask Mr. Henderson, 24B, what is that?

Vince: [4:53] That's I believe the last volume of Title 23, about utilities and regulating industries.

Senator Bond: [5:01] Ma'am, what I said a moment ago, we out-kicked it as far as our commitment a couple of years ago in the pre-

session year and had trouble keeping up.

[5:14] Obviously, this isn't all we do. There is bill review, there's other duties that we have as far as the statutory review section. We've really tried to learn from what happened that time in that we got over-committed and entered session in a badly burned out place, because we had to grind so hard just to finish the replacement volumes and the work was getting backed up.

[5:37] Certainly, the commissions prerogative on what to do, that's just where our suggestion came from. We're trying to stay flexible so that we are ready to address whatever comes down the road. We rarely don't get anything done. I think with the Bureau we have a long history of completing whatever is assigned. If it's the commission's will to add a volume here, I guarantee you we'll get it done.

Leslie: [6:00] Also, I'd like to add, I think that was a situation where there were 16 volumes over a period of two years. That's a heck of a lot. That's a little bit different situation than four and eight.

Moderator: [6:14] Any other questions or comments? What's the will of the commission?

Senator Bond: [6:21] Staff recommendations.

Moderator: [6:22] Senator Bond moves staff recommendation. I think we are used to the house where we don't need a second. I think the commission, we do need a second. Is there a second?

Senator Ballinger: [6:36] I'll second it, Miss Reid.

Moderator: [6:38] Senator Ballinger seconds that. Any discussion? All in favor indicate by saying aye.

[6:43] [chorus of ayes]

Moderator: [6:47] Any opposed? The ayes have it. We'll go with the staff recommendation. All right, moving on to item F, the discussion...

Vince: [6:58] Excuse me, the next part is the price change.

Moderator: [7:00] Oh, OK. The fun part, right?

Vince: [7:03] Miss Metheny.

Moderator: [7:04] All right, Mr. Henderson?

Vince: [7:08] Leslie, do you want to explain the pricing?

Leslie: [7:13] The pricing? Certainly. Thank you. The pricing we have kept very, very modest. What we are proposing is basically for the replacement volumes, a little less than a four percent price increase. Again, for the index, a little less than a four percent and for the cum stuff it's like 4.1 percent.

[7:39] This is in comparison to the producer's price index, which tells you what the actual industry is up. If you look in the past year, the industry is up 10 percent. If you actually look in the last two years, the industry is up 15 percent. We didn't want to go there. We wanted to keep you at a modest increase and felt that the four percent range was a fair number.

Moderator: [8:15] OK, any questions or comments? What's the will of the committee?

Senator Bond: [8:28] I'm fine with the increase. Sometimes I wonder if I'm the only one still buying these books. You may still have...There's three of us maybe. I don't know if Senator Ballinger is buying them also. I assume there has to be some small increase each year they print. I don't know if our members, if Mr. Henderson has an opinion on the increase, but I'm fine with it. I would move to approve it as long as...

Vince: [8:54] I think the price increase is well in line with and made more, even better from our standpoint, as far as the cost increases. I want to point out that the pocket part supplement price will not go up until the 2023 supplements, I believe. The index placement volumes go into effect this next year.

Leslie: [9:17] Correct.

Moderator: [9:17] We have a motion for the recommendation on the price increase. Is there a second?

Woman: [9:28] Second.

Moderator: [9:29] OK. We have a second. Any discussion? All those in favor, indicate by saying aye.

[9:35] [chorus of ayes]

Moderator: [9:38] Any opposed? The motion passes. Now are we ready for item F?

Vince: [9:46] Yes sir, yes. Sorry. This is just a short explanation of Georgia vs. public.resource.org. Mr. Anders Ganten with Lexis has been working obviously with Lexis and following the case closely. I asked him if he would give a short presentation to the commission on that and what effect, if any, it has on the Arkansas code of 1987 and annotate it.

Moderator: [10:19] OK, he is recognized for the presentation.

Anders Ganten: [10:25] Thank you. Good afternoon Mr. Chairman. I'll keep this fairly brief. I certainly will be happy to entertain questions afterward.

[10:34] Earlier this spring, the Supreme Court ruled in the case of Georgia vs. public.resource.org, which had to do with the status of the official code of Georgia. The copyrightability of that law. Georgia's copyright was challenged by the entity of California. I believe Arkansas also joined in with an amicus brief.

[10:55] Ultimately, the court ruled and the ruling as these things often are isn't particularly straightforward. Long story short, the [public.resource](https://public.resource.org) declared victory in terms of the copyrightability of the annotations. What we found in our analysis, is at this time, our affirmation is that the ruling of the supreme court is not a particularly broad application.

[11:24] One of the reasons why I'm saying that is that Georgia, the way that they view their qualification work, and their code work is different from any other state. Mechanically, the work that we do with the State of Georgia is fairly similar to what we do with the State of Arkansas.

[11:43] One big difference is that there is a section at the beginning somewhere in the code of Georgia that expresses that the annotations are merged in with the rest of the legislative text. Moreover, at the end of each annual legislative cycle next year, there is a vote by the whole legislature to formally adopt the official code of Georgia annotated.

[12:08] Because they do that in that specific way and they specifically adopt the annotation legislatively, the Supreme Court can then adopt with the conclusion that everything is essentially an edict of government and as such, not copyrightable. No other state really does it that way.

[12:30] At this time, our point of view as far as LexisNexis is concerned is that the ruling and its indications, until as these things go, until it's tried otherwise, we feel that the application is limited to Georgia. It did affirm some important principles. Certainly, everybody agrees that the text of the legislation itself or the code is not copyrightable.

[12:56] There was a time when people used to think that. That certainly has been clarified it is not to be the case. It also, which was an important point, it was affirmed that unlike works by the federal government that under the Copyright Act, cannot be copyrighted at all there is nothing that precludes or prevents a state government entity for copyrighting anything as long as it is not an edict of government.

[13:25] Certainly, there were certainly things in the Supreme Court ruling with which I do not agree, and certainly some of the analysis were not entirely apt. Overall, we feel that as much as we were disappointed in the outcome in some regards, at the end of the day, it means we do not [inaudible] as a major threat to the model that has worked successfully in Arkansas.

[13:51] That's not to say that we may not come back in a year or at any point in the future and want to have a conversation to see if we need to do any changes to the contractual relationship as a result.

Moderator: [14:09] All right. Any questions?

Senator Bond: [14:13] As I understand it, at this point there is no action to be taken. It's just a report on the status.

Moderator: [14:18] That's correct. Yes. sir.

Senator Bond: [14:24] What was the holding in the case? I guess I'm just behind on that, saying that the Georgia code can't be sold or copyrighted? I haven't read it. I apologize, the case.

Vince: [14:39] Mr. Ganten, do you want to answer that question? Did you hear that? What the exact holding was of Georgia?

Anders: [14:53] Sorry, what was the question? It's tough to hear the audio in the room at times.

Man 1: [14:59] Senator Bond, what happened in the case, and Vince can chime in with me, to recall the facts, a company basically too the annotated code, put it on a flash drive and started distributing it for free, which was in violation of the copyright in Georgia. That ended up being litigated all the way to the Supreme Court.

[15:18] The party that had made the flash drive alleged that code was uncopyrightable because it was in the public domain, basically. The court generally agreed with them. As Anders said, he's arguing that it's similar, it's different than what we do here, some parts of that opinion are similar to what we do here.

[15:40] Perhaps there's more to evolve as it goes on. The issue there was the party took it, basically, and the court said that it was ultimately permissible because it existed in the public domain.

Woman: [15:58] I have a question. I have a question. May I speak?

Moderator: [16:02] Sure, you are recognized.

Woman: [16:03] I read the opinion, and I cannot distinguish it. I didn't study it intently, but I thought it sounded just like our situation, where we don't have a copyright in the annotations and that I thought it did apply to Arkansas.

[16:22] I wanted to know if Vince had studied it and some ramifications for us down the road where we would not be able to have exclusive copyright in our annotations, and therefore others would be able to contract to you to do annotations?

Vince: [16:47] That's kind of difficult to answer because of the Georgia case, the state of Arkansas owns the copyright to the Arkansas code of 1987 annotated. One of the questions that they are trying to work around to resolve was the copyrightability of the annotations by the state.

[17:12] The court went off on a tangent with that that really doesn't make a lot of sense, except maybe to them, about the annotations. What that will mean in the future, I don't know.

[17:33] The commission may end up having to discuss separating the annotations from the code itself, allowing the publisher to copyright the annotations with the contractual climate to either pass that copyright on to the state, should we for whatever reason go away from a publisher, or perhaps require them to transfer that over to a new publisher in that kind of situation.

Woman: [18:05] I know it only applied to the annotations, but it seemed to me that you could extrapolate that we wouldn't be allowed maintain a copyright in the code either.

Vince: [18:15] The actual statute language, no. I don't know if anyone's argued in a long time about the copyrightability of the actual statute language. It really fell mostly on the annotations and how it was, in Georgia's case, merged with the statute language and adopted as such by the Georgia legislature, which is what we do not do here.

Anders: [18:44] If I may, it's hard to raise your hand when you're in a Zoom meeting, but if I could emphasize two quick points.

[18:56] First of all, this would become clearer probably in the next 6 to 9 months, because under the contract, we do continue to write relatively copyright in the pieces and articles of code that we produce. At some point, the copyright office under the Library of Congress is going to come back to us they either are going to issue a certificate, or are they going to push back. How they react is anybody's guess.

[19:25] From personal experience, typically the copyright office is running about a year behind on applications from the time that we file them until we actually get the certificate back. The other part, too, is there is a fair degree of inconsistency depending on who actually looks at the application. It will be some time.

[19:45] I think at some point next year, we will have a clearer picture on how the copyright office will actually use this, because they are in some ways, they are the first arbiter of all of this.

[19:58] I do think it was said that it may be advantageous to look at the model whereby we the publisher do the annotations today, where we copyright them, where you do an arrangement such as Mr. Henderson was mentioning, or whether we at the same time execute a nonexclusive royalty free license to the state where they can use the annotations in perpetuity should somebody else become the publisher in the future.

Man 2: [20:32] To the extent that Ms. Brownstein was asking how this affects Arkansas, at a future meeting you may want the Attorney General's office to come in and discuss that. As Mr. Ganten referenced, we joined that suit and filed an amicus brief I think, in Georgia. Our Attorney General's office is familiar with the case and its holding and had an interest in it. At the appropriate time, they might be able to offer insight on that.

[20:56] It's a complicated issue. Again, there's things in common. Our code revision commission is very similar to what they have in Georgia. It's just an unsettled question there as to what the next step would look like if someone pursued it.

Moderator: [21:11] All right. Any other questions or comments? If not, we will move to item G.

Vince: [21:22] Item G, re-qualification proposals, what I have put in your packet are some proposals not for decision...