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THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE PETITION  
OF TRANSCANADA KEYSTONE PIPELINE,  
LP FOR ORDER ACCEPTING CERTIFICATION  
OF PERMIT ISSUED IN DOCKET HP09-001  
TO CONSTRUCT THE KEYSTONE XL  
PIPELINE

HP14-001

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Transcript of Proceedings  
April 14, 2015  
9:30 a.m.

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BEFORE THE PUBLIC UTILITIES COMMISSION

CHRIS NELSON, CHAIRMAN  
KRISTIE FIEGEN, VICE CHAIRMAN  
GARY HANSON, COMMISSIONER

COMMISSION STAFF

John Smith  
Kristen Edwards  
Brian Rounds  
Darren Kearney  
Katlyn Gustafson

Reported By Cheri McComsey Wittler, RPR, CRR

TRANSCRIPT OF PROCEEDINGS, held in the  
above-entitled matter, at the South Dakota State Capitol  
Building, Room 413, 500 East Capitol Avenue, Pierre,  
South Dakota, on the 14th day of April, 2015.

1           CHAIRMAN NELSON: We've had a number of motions  
2       filed. We've got a number of questions that we're going  
3       to wrestle with and answer today. In looking at the  
4       questions that we're going to answer, I think we can  
5       pretty much take these in the order in which they're  
6       printed on the agenda, on page 3 of the agenda.

7           The only change that I might make, I see  
8       Keystone's Discovery Motion and Keystone's Prefiled  
9       Testimony Motion are listed as, I think, numbers, you  
10      know, 3 and 5 or separate.

11           Should they be taken together?

12           MR. TAYLOR: Yeah.

13           CHAIRMAN NELSON: Or at least back to back. So  
14      we'll move the prefiled testimony up.

15           But other than that, unless there's objection  
16      from fellow Commissioners, we'll just go down the line.

17           With that, we are on Docket HP14-001, In the  
18      Matter of the Petition of TransCanada Keystone Pipeline,  
19      LP for Order Accepting Certification of Permit Issued in  
20      Docket HP09-001 to Construct the Keystone XL Pipeline.

21           The first question that we are dealing with  
22      today is shall the Commission grant Jeff Jensen's request  
23      to withdraw as a party to this Docket? Apparently  
24      somebody wants out.

25           Is there a Motion on that request?

1 Commissioner Fiegen.

2 COMMISSIONER FIEGEN: Mr. Chairman, in Docket  
3 HP14-001 I move that we grant Jeff Jensen's request to  
4 withdraw as a party to this Docket.

5 CHAIRMAN NELSON: Is there anyone that wishes to  
6 speak on that issue?

7 Seeing none, discussion on the Motion.

8 COMMISSIONER FIEGEN: You know, I just  
9 appreciate that he came in and withdrew if he's not going  
10 to be a party. So we certainly appreciate his Motion  
11 today.

12 CHAIRMAN NELSON: Additional discussion.

13 Seeing none, all of those in favor will vote  
14 aye. Those opposed, nay.

15 Commissioner Hanson.

16 COMMISSIONER HANSON: Aye.

17 CHAIRMAN NELSON: Commissioner Fiegen.

18 COMMISSIONER FIEGEN: Fiegen votes aye.

19 CHAIRMAN NELSON: Nelson votes aye.

20 Motion carries.

21 That brings us to the Motion to Stay that has  
22 been filed joint by Dakota Rural Action, Rosebud Sioux  
23 Tribe, Standing Rock Sioux Tribe, Cheyenne River Sioux  
24 Tribe, and Indigenous Environmental Network.

25 Let me just say how I plan to deal with these.

1 The Motions to Stay, the Motion to Appoint a Special  
2 Master, those certainly apply to everyone that's involved  
3 in this Docket, and so I will give not only the folks  
4 that are sponsoring the Motion and Keystone an  
5 opportunity to speak, but anybody else who's an  
6 Intervenor who wishes to speak on those motions will be  
7 given an opportunity to.

8 When we get to the Motions to Compel and those  
9 things dealing with discovery, those are really issues  
10 between the filing party and the Applicant, and I'm going  
11 to restrict the argument to those two affected parties.

12 I think if we don't do that, we will not only be  
13 here all day but we will be here all night and into  
14 tomorrow, and that won't serve any of us well. So that's  
15 how I plan to proceed.

16 So on the Motion to Stay who is going to do the  
17 initial argument for the parties who filed the Motion?

18 MR. MARTINEZ: That would be me, Chairman.  
19 Robin Martinez.

20 CHAIRMAN NELSON: Go ahead.

21 MR. MARTINEZ: I think the Motion fairly speaks  
22 for itself. As you've obviously seen from the length of  
23 the published Docket in this case and all of the filings,  
24 the large number of parties that have intervened, the  
25 extremely large number of issues, these are very lengthy

1 proceedings. They're also very complicated proceedings.  
2 There are a lot of issues at stake.

3           So one of the key reasons that we filed this  
4 Motion to Stay was that it did not make sense, given the  
5 fact that you have a couple of major issues that are  
6 outstanding, that really affect, I think, the decision  
7 that you have to make as to whether or not TransCanada  
8 should be permitted to build this pipeline through  
9 South Dakota, as to whether or not we actually go forward  
10 with these proceedings as they currently are in the  
11 current state of affairs.

12           We've raised in our Motion two, I think, primary  
13 reasons why a stay is appropriate. And I think both of  
14 those I think are very good reasons.

15           The first, as everyone on the phone and in the  
16 room there is acutely aware, this pipeline does not get  
17 built -- they cannot even commence construction on it  
18 until and unless there's a federal permit granted. We  
19 don't know whether or not the Federal Government is going  
20 to take action any time soon. We don't know whether or  
21 not the Federal Government is going to permit  
22 construction of the pipeline to go forward.

23           So, frankly, with that degree of uncertainty  
24 that is out there, these proceedings are a huge waste of  
25 everybody's time, energy, and effort for everyone to go

1 through the time and expense not only for the  
2 intervenors, the money that we've had to spend getting  
3 expert witnesses, the money that we're going to have to  
4 spend to get a lot of people in town next month for, you  
5 know, these hearings, but for TransCanada as well. And  
6 for you as members of the Commission.

7 A lot of time, energy, and effort is going to be  
8 spent on hearings that in the end may not make any  
9 difference if there is ultimately a decision to not  
10 permit the pipeline to be constructed by the Federal  
11 Government.

12 And so, you know, I think when you look at this  
13 the entire argument of judicial economy is one that makes  
14 a tremendous amount of sense. Given the uncertainty, why  
15 does it make sense at all to proceed with this case?

16 I think, you know, in light of that uncertainty  
17 that's out there, the better course of action from the  
18 Commission would be to basically call a halt and say  
19 we're going to stay these proceedings until we get a  
20 decision from the Federal Government as to whether or not  
21 this pipeline goes forward.

22 If the Federal Government says no, then we've  
23 avoided all of the time, energy, and expense of going  
24 through this entire process, which frankly is a great  
25 outcome for everybody; for you, for us, for TransCanada.

1           Likewise, if the Federal Government says, okay,  
2 we'll go ahead and grant the permit, TransCanada can go  
3 ahead and cross the international border and build this  
4 pipeline, at that point we'll be ready to roll.  
5 TransCanada can -- we can reopen these proceedings and  
6 you can pick up exactly where we left off, and we can go  
7 ahead, have the hearing and go forward.

8           And at that point it's really just about this  
9 whole notion of judicial economy and whether or not we're  
10 going to be wasting everybody's time, energy, and effort.  
11 So, you know, that's the first point that I think that  
12 really strongly suggests that a stay of these proceedings  
13 is appropriate.

14           You know, the second reason actually goes -- is  
15 a little more of a challenging issue. And, you know, as  
16 you've seen from the exhibits that we've filed along with  
17 the -- you know, with the Motion, TransCanada has some  
18 serious issues, serious issues with respect to its  
19 credibility, with respect to what appears to be its  
20 safety record. As witnesses have testified, you know, a  
21 corporate culture that sacrifices safety of its pipelines  
22 in favor of profits.

23           We've laid out the argument in our Motion along  
24 with the supporting exhibit that shows, you know, for the  
25 second time within the past couple of years, Canada's



1 National Energy Board, which is the major regulator of  
2 pipelines in Canada and one of TransCanada's major  
3 regulators has launched a serious investigation into  
4 TransCanada and TransCanada's safety record.

5 And, you know, ultimately the big question is is  
6 are they going to build pipelines --

7 Hello.

8 CHAIRMAN NELSON: Okay. We're getting some  
9 music coming across the telephone line.

10 MR. MARTINEZ: I knew whatever I was saying was  
11 dramatic, but I didn't realize --

12 CHAIRMAN NELSON: Okay. The music has stopped  
13 so go ahead and proceed.

14 MR. MARTINEZ: Well, you know, as I was saying,  
15 for the second time in just the past couple of years  
16 Canada's National Energy Board, which is the major  
17 regulator of pipelines throughout Canada, has launched an  
18 investigation into TransCanada's corporate and safety  
19 practices.

20 One of the key issues, I mean, that directly  
21 goes to the various permitting conditions that the  
22 Commission has imposed in this case deals with the  
23 pipeline safety and pipeline integrity.

24 Given that there are now serious questions about  
25 TransCanada's ability to even comply with those

1 conditions, once again, I think the better part of wisdom  
2 is to let the Canadian National Energy Board complete its  
3 investigation, issue the report, and see what they have  
4 to say. That in and of itself would really help inform  
5 these proceedings, would help inform the debate, and  
6 would help the people of South Dakota to get a better  
7 understanding of how likely it is that this pipeline is  
8 going to rupture, you know, how likely it is that it's  
9 going to leak.

10           You know, all of those are things that I think  
11 the Commission really should be aware of and should  
12 permit enough time to allow the record to be fully  
13 developed. And, you know, consequently those are the two  
14 reasons why I think a stay is appropriate in this case.

15           Like I say, it's just purely judicial economy.  
16 Don't waste everybody's time, energy, and effort if you  
17 don't have to. Second, let the record be fully  
18 developed. Let the Canadian National Energy Board  
19 complete its investigation and see what TransCanada's  
20 really up to.

21           And, you know, on that basis I think there's  
22 really ample reason for a stay, and I think a stay makes  
23 a lot of sense. Not just for us but also frankly for  
24 TransCanada and for you as Commissioners.

25           CHAIRMAN NELSON: Mr. Martinez, thank you.

1           Here's how I'm going to proceed. I'm going to  
2 give each of these other folks who are part of this  
3 Motion an opportunity to speak, if they wish to. Then  
4 I'm going to go to other Intervenors, if they wish to.  
5 Then I'm going to go to Staff. Then I'm going to go to  
6 TransCanada. And then I'll give Mr. Martinez an  
7 opportunity for brief rebuttal at the end.

8           So with that, Rosebud.

9           Mr. Rappold is in the room with us, and so he's  
10 going to speak from here.

11           MR. RAPPOLD: Thank you, Commissioners. Good  
12 morning. I'd echo Mr. Martinez's Motion to Stay the  
13 proceedings.

14           I think one of the issues of primary importance  
15 for us here in South Dakota as Mr. Martinez alluded to is  
16 the judicial economy and taking a careful look at how  
17 we're spending other people's money.

18           This is a long process. The people of  
19 South Dakota elected you to take an informed, considered  
20 look at -- into everything that comes before you.

21           As it stands now, TransCanada cannot build this  
22 pipeline because they do not have everything that's  
23 required to get a Presidential Permit. They don't even  
24 know if they're going to get a Presidential Permit.

25           They don't have a valid permit route in

1 Nebraska. That case -- that aspect of the pipeline route  
2 is, as you may or may not be aware, being challenged in  
3 the courts in Nebraska. The folks down there are  
4 estimating that it may take a year or two for that to  
5 resolve, the legal process, to determine if they actually  
6 do have a valid route.

7 They don't, to my understanding, have a Clean  
8 Water Act permit in this particular case here in  
9 South Dakota. So --

10 CHAIRMAN NELSON: Mr. Rappold, I'm going to stop  
11 you because I need to say this. To the folks on the  
12 telephone line, we are getting background noise. And so  
13 in -- out of respect to the folks that are speaking here  
14 today and to the Commission, please, put your phones on  
15 mute so that we can clearly hear the folks that are  
16 speaking.

17 I apologize. Go ahead.

18 MR. RAPPOLD: No problem.

19 Another thing, this case here obviously can be  
20 appealed to the Circuit Court and the South Dakota  
21 Supreme Court, which it may be, depending on your  
22 ultimate decision on the certification. We may appeal  
23 it. Other parties may appeal it. TransCanada may appeal  
24 it. That's going to take quite a while.

25 I wouldn't want to sit here and try to estimate

1     how long that process could take, but it could take a  
2     while.

3             And the other thing that I want you to look at  
4     and consider is what appears to be, to me, an arbitrary  
5     deadline on the part of TransCanada and the Commission in  
6     having this case scheduled out so fast. Other folks have  
7     said that these sorts of cases and due to the technical  
8     nature of everything that's in front of you can take a  
9     really long time to fully develop that record so that the  
10    finder of fact has as much information in front of them  
11    as possible to make the best decision possible.

12            And that's what we want you to do. We want you  
13    to have that opportunity to have as much evidence as  
14    possible to make the best and most informed decision.

15            I'd also like to reference South Dakota Codified  
16    Law 49-41B-24, which is where I think the one-year  
17    requirement to have this proceeding resolved is coming  
18    from. I could be mistaken, but it seems like that's  
19    where it's coming from.

20            And that statute references within 12 months of  
21    receipt of the initial Application for -- and I'm  
22    paraphrasing, certain things have to be done, everything  
23    has to be done within a year, 12 months.

24            Well, the only thing that's not listed in this  
25    statute is a Petition for Certification. So I would tell

1     you that this statute does not apply. There is no  
2     one-year time frame. There is no rush. We need to take  
3     our time and make an informed decision.

4             And, as Mr. Martinez said, nobody is harmed by  
5     waiting to see what happens. The other side of that is  
6     if it is rushed, what is the potential harm that could  
7     happen? And I think we all know that the potential harm  
8     of what could happen if this pipeline doesn't go the way  
9     TransCanada says it's going to go, could be very, very  
10    devastating to the people of South Dakota.

11            So not only do you have to consider spending the  
12    money of the people of South Dakota throughout this  
13    entire process to get to that point, then we're also  
14    going to be looking at other problems that the people of  
15    South Dakota are going to have as a result of a ruptured  
16    water line above the Ogallala Aquifer.

17            So we'd ask the Commission to take all of those  
18    things into consideration and grant the Motion to Stay.

19            CHAIRMAN NELSON: Thank you, sir.

20            We'll go to Standing Rock. Mr. Capossela.

21            MR. CAPOSSELA: Thank you, Mr. Chairman, and  
22    thank you for permitting me to appear by phone this  
23    morning.

24            The Tribe has joined the Motion for the reasons  
25    that have been articulated, and we'd request that it be

1 granted. But I have nothing further to this morning on  
2 this Motion.

3 Thank you for the opportunity.

4 CHAIRMAN NELSON: Thank you.

5 We'll go to Cheyenne River. Mr. Clark. And  
6 Mr. Clark is with us in the room.

7 MR. CLARK: Thank you, Mr. Chairman.

8 The Cheyenne River Sioux Tribe, obviously we  
9 second Mr. Martinez's reasoning, his very well written  
10 motion -- on this Motion.

11 We can't stress enough the importance of  
12 judicial economy. We don't know what's going to happen  
13 on the federal level. There's no way to predict if  
14 they're going to approve it, disapprove it, and if they  
15 do approve it, if it's going to be a year, three years,  
16 four or five years.

17 I was going to keep my comments really brief,  
18 but Mr. Rappold actually gave me -- a thought came to  
19 me.

20 So the certification process that we're going  
21 through right now, the permit was issued originally, and  
22 in that statute if within four years construction hasn't  
23 been initiated, we go through the certification process.

24 So what if we get through the certification  
25 process now and TransCanada's permit is recertified?

1     What happens if construction doesn't happen again for  
2     five years? This certification process isn't something  
3     that has been used a lot. There's very little case law  
4     on it.

5             So staying the proceedings now may avoid some  
6     very complicated legal fights down the road. So I would  
7     just emphasize that as well.

8             Thank you.

9             CHAIRMAN NELSON: Thank you.

10            Indigenous Environmental Network. Ms. Craven.

11            MS. CRAVEN: Thank you, Mr. Chairman, other  
12     members of the Commission. I appreciate the opportunity  
13     to appear this morning telephonically and to be heard.

14            I just want to echo what my colleagues have  
15     already stated. Those are the reasons that we did join  
16     in this Motion.

17            I think the importance of judicial economy  
18     should be stressed. And I hope that you would grant this  
19     Motion to Stay the proceedings while we wait for the  
20     federal actions to occur.

21            Thank you.

22            CHAIRMAN NELSON: Thank you.

23            I'm going to ask, are there any other  
24     Intervenors in the room that would like to speak on  
25     this?



1           Go ahead, Mr. Harter.

2           MR. HARTER: John Harter, Winner, South Dakota  
3 rancher.

4           I'd like to support the motions. It's been  
5 probably a little over two years ago that TransCanada  
6 took me to court and took my property through eminent  
7 domain proceedings. And during those proceedings they  
8 had their one major witness which was a lobbyist out of  
9 Washington, D.C. , I guess, that was stating that this  
10 thing was going to get built in the next two years. It  
11 was highly probable.

12           And, in my opinion, he just done a lot of  
13 babbling about a lot of bad facts, and none of them have  
14 come to be at the forefront yet. We're still waiting on  
15 a Presidential Permit. And I think from what I've been  
16 through with this proceeding with TransCanada's acting in  
17 several bad actions that it would be good for the people  
18 not to have this proceedings go further. Wait until they  
19 get a Presidential Permit.

20           Thank you.

21           CHAIRMAN NELSON: Thank you.

22           Any other Intervenors in the room that would  
23 like to speak?

24           If not, I'm going to go to Intervenors who are  
25 on the phone. And I'm just going to go down the list and

1 give you an opportunity to speak, if you wish.

2 Mr. Gough.

3 MR. GOUGH: Thank you, Commissioner. This is --  
4 (Inaudible).

5 CHAIRMAN NELSON: We're going to have to stop  
6 you right there. You're cutting in and out. Maybe just  
7 try speaking a little slower and see if that helps us.  
8 We do have a court reporter here that needs to catch  
9 every word.

10 MR. GOUGH: Thank you. (Inaudible).

11 CHAIRMAN NELSON: It's not working at all. If  
12 you're on the cellphone, here's what I'm going to do.  
13 I'm going to go to others and come back to you at the  
14 end.

15 MR. GOUGH: Is this any better?

16 CHAIRMAN NELSON: It is not any better. It's  
17 all muffled.

18 Mr. Goldtooth.

19 MR. GOLDTOOTH: Thank you, Commissioner.

20 I don't have much to add other than I  
21 wholeheartedly agree and would like to verbally join this  
22 Motion to Stay for all the various reasons and great  
23 reasons that the other folks have expressed.

24 CHAIRMAN NELSON: Thank you.

25 Ms. Hilding.

1 MS. HILDING: Thanks. I had it on mute.

2 I support the Motion. I join it. If you  
3 don't -- I mean, perhaps if you don't stay it forever, we  
4 could stay it for a while but I join the Motion and I  
5 support it.

6 Thanks.

7 CHAIRMAN NELSON: Thank you.

8 Mr. Blackburn.

9 MR. BLACKBURN: Thank you, Mr. Chairman.

10 BOLD Nebraska supports the Motion for the  
11 reasons that have been already articulated. And thank  
12 you for allowing us to be heard this morning.

13 CHAIRMAN NELSON: Thank you.

14 Ms. Real Bird.

15 MS. REAL BIRD: Yes, Mr. Chairman, members of  
16 the Commission, thank you. This is Thomasina Real Bird  
17 on behalf of the Yankton Sioux Tribe.

18 We do support the Motion being considered at  
19 this moment for the reasons already articulated. And I  
20 think Cheyenne River brings up a really excellent point  
21 as far as the timing. You know, we want this process to  
22 be meaningful, to have public input, and it's hard to  
23 predict the timing of whether -- if the certification  
24 process does go forward if there's no construction within  
25 four years, do we have another certification process?

1           So I think that's an excellent food for thought  
2 when considering this Motion and -- I'm sorry. Can you  
3 hear me? I'm getting some feedback.

4           CHAIRMAN NELSON: We're getting it too, but go  
5 ahead. We'll see how it proceeds.

6           MS. REAL BIRD: I'm on a landline so hopefully  
7 it's not my end.

8           Just the excellent points already articulated,  
9 Yankton Sioux Tribe supports the Motion.

10          Thank you.

11          CHAIRMAN NELSON: Thank you.

12          Viola Waln.

13          Not hearing anything from Viola.

14          I'm going to come back around to Bob Gough.

15          MR. GOUGH: Thank you, Commissioner. Is this  
16 any better?

17          CHAIRMAN NELSON: It is.

18          MR. GOUGH: Thank you. That muffling may have  
19 been my own -- I'm just recovering from pneumonia so my  
20 voice is pretty weak.

21          But I would strongly like to join -- InterTribal  
22 COUP joined in this function and support it  
23 wholeheartedly for the very reasons that have been well  
24 articulated.

25          Thank you.

1           CHAIRMAN NELSON: Thank you.

2           And I think we've gotten everybody on the phone  
3 an opportunity.

4           With that, I'm going to go to Staff and  
5 Ms. Edwards.

6           MS. EDWARDS: Thank you. Kristen Edwards for  
7 Staff.

8           Staff did file a Brief in response to this  
9 Motion. So for the purposes of saving time, we won't  
10 make any further comments. But if the Commission would  
11 like us to summarize the comments in our Brief, we are  
12 willing to do so. And we stand by for questions.

13          CHAIRMAN NELSON: Thank you.

14          With that, TransCanada.

15          MR. MOORE: Thank you, Commissioner. James  
16 Moore on behalf of Keystone.

17          We too would stand on the written submission we  
18 made with just a couple of comments. One with respect to  
19 the federal permitting process. The Commission already  
20 granted a permit in this matter four years ago. It did  
21 so despite the fact that the Presidential Permit was in  
22 process at that point.

23          One of the conditions in the permit that was  
24 granted is that before construction or operation that  
25 must be granted and obtained, and that remains true and

1     it does not affect this proceeding.

2             With respect to the argument that we need to  
3     take our time here, I would respectfully submit that this  
4     process has taken a great deal of time. This permit was  
5     granted four years ago. This Docket started in  
6     September. It's on track to be concluded in about a  
7     year.

8             That is not a hasty proceeding. That is a  
9     thoughtful, deliberate, considerate proceeding, and that  
10    is appropriate, but there's no reason to stay that  
11    proceeding.

12            With respect to proceedings that may be ongoing  
13    before the National Energy Board in Canada, the  
14    allegations that Mr. Vokes has made with respect to his  
15    prefiled testimony will be in evidence before the  
16    Commission at the hearing. That's appropriate.  
17    Mr. Vokes can testify and be subject to  
18    cross-examination.

19            And with respect to any other proceedings that  
20    may be before the National Energy Board, we don't know  
21    what they are. We don't know the scope of them. We  
22    don't know how long they may take. And I would  
23    respectfully submit that there is no basis to stay this  
24    proceeding based on what may or may not happen before  
25    some other entity.

1           To the extent that there are allegations that  
2           concern TransCanada's ability to meet the conditions on  
3           which the permit was granted in this proceeding, there is  
4           evidence that should be brought before this body for  
5           consideration and for testing at the evidentiary hearing  
6           as part of the contested case.

7           I think that's the appropriate way to proceed  
8           and for that reason respectfully request that the Motion  
9           be denied.

10          Thank you.

11          CHAIRMAN NELSON: Thank you.

12          With that, I am going to give Mr. Martinez an  
13          opportunity for any brief rebuttal before we go to  
14          Commissioner questions.

15          MR. MARTINEZ: Thank you, Mr. Chairman. Can you  
16          hear me?

17          CHAIRMAN NELSON: Yes.

18          MR. MARTINEZ: Okay. I just wanted to make sure  
19          that I had my mute off.

20          What I've heard Mr. Moore say is that -- I'm  
21          still getting an echo. Are you getting an echo as well  
22          on your line?

23          CHAIRMAN NELSON: No. It's sounding very good  
24          here.

25          MR. MARTINEZ: I'm hearing myself sort of have

1 feedback on the line. Every word I'm saying has  
2 telecommunications issues. Well, there it goes. I think  
3 that went away.

4 CHAIRMAN NELSON: We just found the problem.  
5 There was an open mic. in the hearing room here.  
6 Mr. Harter solved your problem. So go ahead.

7 MR. MARTINEZ: Thank you very much, Mr. Harter.

8 You know, I still have not heard anything from  
9 Mr. Moore, TransCanada, or from the Commission Staff in  
10 their written submissions that really adequately responds  
11 or deals with the issue that we've raised in support of  
12 our Motion for Stay which discusses the entire issue of  
13 judicial economy.

14 Now Mr. Moore basically came out and told you  
15 that you've already, as the Commission, granted the  
16 permit a number of years ago and the existence of the  
17 federal permit process -- or federal permitting process  
18 didn't affect the proceedings.

19 You know, I would be willing to bet and, in  
20 fact, having looked at the record of proceedings that  
21 occurred back then, that this argument was never raised  
22 at that point. Although it sounds like it probably  
23 should have been. And, frankly, a lot of time, energy,  
24 and effort that has gone into this process by  
25 TransCanada, by you as Commissioners, by the Intervenors,



1     could have been saved.

2             Now it's not just the federal permitting process  
3     that's in question. There are a lot of other things that  
4     simply have not been done yet that I think bear a  
5     tremendous amount of relevance ultimately that lead into  
6     your decision as to whether or not a permit should be --  
7     a recertification should be granted and TransCanada  
8     should be allowed to go forward.

9             For instance, one of the things that TransCanada  
10    is going to need before they can do anything is a  
11    wetlands permit from the Corps of Engineers. They  
12    haven't even applied for that. So we don't even know  
13    whether or not that level of permitting will be granted.

14            They also haven't even filed a Spill Response  
15    Plan with the Department of Energy and Natural Resources.  
16    We don't even know if that plan is adequate.

17            Those are all very relevant issues that I think  
18    need to be looked at to determine whether or not  
19    TransCanada can build a pipeline that won't blow up or  
20    leak, you know, that diluted bitumen all over  
21    South Dakota's waterways.

22            So when you look at all of those factors, it  
23    just makes sense to stay these proceedings.

24            The other issue that, you know, Mr. Moore has  
25    raised on behalf of TransCanada is -- goes to the second

1 point that we made with respect to the Canadian National  
2 Energy Board proceedings.

3 I thought it was very telling when he said that  
4 we don't know what the National Energy Board -- the scope  
5 of their proceedings are up to, what the time line is,  
6 how that is going to play out. And I think that's a  
7 telling statement because we should know.

8 And you as Commissioners should know what the  
9 National Energy Board has to say about TransCanada's  
10 ability to build a pipeline that won't leak or breach.  
11 That's super critical to the water of South Dakota and to  
12 the residents and the farmers and ranchers who stand in  
13 the way of possibly having their water polluted in the  
14 event of a pipeline breach.

15 Mr. Votes' testimony, which we've, you know,  
16 submitted as prefiled testimony, as well as the exhibits  
17 that we've added of his testimony before the Canadian  
18 Senate, as well as the most recent Reuters news report  
19 showing that the National Energy Board is launching yet  
20 another major investigation of TransCanada, I think go  
21 directly to the heart of why a stay is not just  
22 necessary, I think it's mandated in this case.

23 I think, you know, when you look at what we have  
24 here, this is too important of an issue to just rush into  
25 without getting all of the information in place and

1 letting it all play out.

2 So between that argument and then there's the  
3 judicial economy argument which we've pointed out, which  
4 is really frankly also a very strong argument, I honestly  
5 think you ought to stay these proceedings. It just  
6 absolutely makes the most sense.

7 Thanks.

8 CHAIRMAN NELSON: Thank you.

9 Appreciate the comments, and I appreciate  
10 everyone's relative comments in relying on your written  
11 argument. That's helpful to us.

12 With that, I will turn to Commissioner  
13 questions.

14 Seeing none, is there a Motion?

15 Commissioner Hanson.

16 COMMISSIONER HANSON: Mr. Chairman, I will move  
17 that the Commission deny the Motion to Stay.

18 CHAIRMAN NELSON: Discussion on the Motion.

19 COMMISSIONER HANSON: Mr. Chairman and audience,  
20 I -- there's a lot to agree with on the arguments that  
21 have been presented here.

22 This is a complicated Docket. It is going to be  
23 a lengthy -- it's already been a lengthy Docket. But  
24 that should not decide that it should be stayed. We have  
25 a lot of dockets that are complicated and that are

1       lengthy. We have a job to do, and we have to do it.

2               There's questions of Keystone's ability to  
3 perform, and that's exactly why we're having this Docket  
4 is to ascertain whether or not they have that ability.  
5 What Canada does or Nebraska does is of interest  
6 certainly; however, if they choose not to allow the  
7 pipeline to go through their territories, then, of  
8 course, it's not going to go through South Dakota's  
9 either. So we must do our work.

10              It is -- I agree fully it's extremely  
11 aggravating that the Federal Government has been so  
12 dilatory on making their decision. It's been six years  
13 that they've had an opportunity. And, yes, it could  
14 waste a lot of our time and our money going through this  
15 process, but we have a responsibility again to go through  
16 the process.

17              I'll be very disappointed and aggravated if the  
18 Federal Government chooses to make a decision a year from  
19 now or two years from now and they decide not to allow it  
20 to cross the border.

21              Won't be disappointed for Keystone. I'll be  
22 disappointed for all of the trouble that all of you folks  
23 and the State has gone through in the process. It seems  
24 totally unnecessary from that standpoint.

25              But to say that we should wait on the Federal

1 Government or to wait on Canada or Nebraska places  
2 Keystone in a Catch-22 position. Because then the  
3 Federal Government gets to continue to say, well, we have  
4 to see what Nebraska and South Dakota and Canada are  
5 going to do.

6 Well, that's a Catch-22 that they cannot  
7 overcome. And they have a right to have their day in  
8 court. And so we have, again, that responsibility to  
9 pursue this Docket.

10 And, gosh, I hope four years from now we're not  
11 doing this again, but if we have to, then we're going to  
12 have to do it again in four years.

13 Mr. Chairman, that concludes my remarks.

14 CHAIRMAN NELSON: Additional discussion on the  
15 Motion.

16 I would just -- I'm going to support the Motion.  
17 And the only comment that I'm going to make is I hope  
18 this Commission never gets to the point of moving at the  
19 speed of the Federal Government or taking our direction  
20 from the speed or lack thereof of the Federal  
21 Government.

22 We are tasked by the people of South Dakota to  
23 do the work of the people of South Dakota in an  
24 economical and efficient manner, and I believe that we  
25 can do that irregardless of what the Federal Government

1 may or may not be doing on this particular account.

2 Additional discussion?

3 COMMISSIONER FIEGEN: Mr. Chairman, I support  
4 the Motion to Deny the Stay. And Commissioner Hanson and  
5 Commissioner Nelson absolutely have stated a lot of my  
6 thoughts.

7 Keystone gets their day in court just like all  
8 of you will get their day in court also. So I certainly  
9 support that.

10 And just like Commissioner Hanson said, when the  
11 Federal Government uses excuses of denying the permit or  
12 actually delaying the permit because of a Nebraska  
13 process we certainly don't want that to be part of a  
14 South Dakota process either. So we want to make sure we  
15 do our work like Commissioner Nelson said.

16 And the evidentiary hearing is where we get to  
17 hear the evidence that -- the certification process and  
18 if the conditions are still met. So that's when we get  
19 to hear all the evidence that you all get to bring to  
20 us.

21 Thank you.

22 CHAIRMAN NELSON: Additional discussion.

23 Hearing none, all those in favor will vote aye.  
24 Those opposed, nay.

25 Commissioner Hanson.

1 COMMISSIONER HANSON: Aye.

2 CHAIRMAN NELSON: Commissioner Fiegen.

3 COMMISSIONER FIEGEN: Fiegen votes aye.

4 CHAIRMAN NELSON: Nelson votes aye.

5 The Motion to deny the Motion for Stay passes.

6 With that, we will move to the Motion for  
7 Appointment of a Special Master.

8 And this Motion is brought to us again by Dakota  
9 Rural Action, Rosebud Sioux Tribe, Cheyenne River Sioux  
10 Tribe, and Indigenous Environmental Networks. And so  
11 we'll go through basically the same process that we went  
12 through on the last Motion. And I will turn to  
13 Mr. Martinez.

14 MR. MARTINEZ: Thank you very much,  
15 Mr. Chairman.

16 In light of your -- the action you just took, in  
17 terms of going ahead and denying our Motion for Stay, I  
18 think that really heightens the need to go ahead and  
19 appoint a special master.

20 I don't know to what extent the members of the  
21 Commission -- with the use of special masters in complex  
22 litigation or where you have a tremendous amount of  
23 discovery that's underway.

24 But what we're basically asking is -- and, once  
25 again, this goes to the idea of economy and saving

1 everybody some time and trying to get an orderly and  
2 efficient --

3 CHAIRMAN NELSON: Excuse me. Excuse me. You  
4 cut out for just a moment. We lost you at the word  
5 "efficient."

6 MR. MARTINEZ: Oh, okay. I wish I had my own  
7 transcript here so I could repeat exactly what I said.

8 The reason we filed this Motion for Appointment  
9 of the Special Master is because it would provide all the  
10 parties to these proceedings with an efficient mechanism  
11 for resolving discovery disputes.

12 Like I said at the outset, I don't know what  
13 experience each of the members of the Commission has in  
14 terms of complex litigation and the use of special  
15 masters. They can be very, very helpful in dealing with  
16 very complex discovery issues and particularly --

17 And, I mean, just to give you a little bit of a  
18 foreshadowing of what we're going to be looking at when  
19 looking at Motion to Compel, Dakota Rural Action itself  
20 sent TransCanada something like 86 different  
21 Interrogatories, 56 document requests. Multiply that out  
22 by all of the different Intervenors in this case who have  
23 simply filed discovery requests as well as the discovery  
24 requests that TransCanada has made each of us, then you  
25 stack on all of the disputes that we are engaging in, it



1       frankly makes a lot of sense to have a special master in  
2       place to go ahead and help the parties sort through those  
3       issues.

4               Now one of the -- one of, I think, the responses  
5       I believe I read in the Staff's response to our Motion  
6       was that you as a Commission could not delegate your  
7       authority, didn't have the statutory ability to delegate  
8       your authority. To just kind of cut to the chase on that  
9       and sort of preempt that, let me state that by appointing  
10      a special master you don't have to do that.

11             What you can do is you can narrowly tailor an  
12      order that appoints a special master and tasks him with  
13      meeting with the parties, with going through all of the  
14      different discovery requests that we've made, reporting  
15      them back to you, and then permitting you to issue an  
16      order. That wouldn't be a delegation of authority. It  
17      would simply be a mechanism to afford you guys the  
18      ability to kind of cut through the chase and help make a  
19      quicker decision.

20             Instead of spending, you know, all day here in a  
21      hearing room going through every single one of the  
22      discovery disputes that every party has one by one, which  
23      I think we're going to be compelled to do, and we're  
24      going to be here for hours, to me it seems the special  
25      master is the most efficient way to do that.

1           So that's the main reason why, you know, we've  
2 suggested that, why the various Intervenors who have  
3 joined our Motion have -- also think that's the best  
4 approach. And it just, once again, boils down to an  
5 issue of economy and efficiency.

6           And we're hoping that you as Commissioners will  
7 see it that way as well and grant our Motion.

8           Thank you.

9           CHAIRMAN NELSON: Thank you.

10          Rosebud.

11          MR. RAPPOLD: Thank you, Commissioners. I'd  
12 second Mr. Martinez's comments on the Motion to Appoint a  
13 Special Master to assist with the discovery process. And  
14 I'll go back to what I've been saying from pretty much  
15 the start of these proceedings.

16          We have a discovery process that requires time  
17 to play out, to develop the record, to have all of the  
18 evidence, testimony that's required for you guys to make  
19 a full and considered decision of the issue before you.

20          And what we're faced with here, like we spoke  
21 about two weeks ago, the cart is before the horse. The  
22 cart is still before the horse.

23          We're in the process of resolving what  
24 TransCanada referred to as over 800 requests for  
25 discovery on some very complicated issues.

1           We're dealing with today motions to exclude  
2 people from these proceedings based on discovery  
3 problems. And we're addressing those issues after the  
4 fact. The Commission Ordered prefiled testimony to be  
5 filed two weeks ago on April 2. And here it is on  
6 April 14, and we still haven't figured out if they're  
7 going to be allowed to file testimony and participate in  
8 these proceedings or not.

9           Had we had a special master from this point  
10 forward to assist with discovery disputes and resolution,  
11 we wouldn't be having any of these problems now. We'd  
12 ask the court to consider -- not the court. The  
13 Commission to appoint a special master to assist in  
14 resolving discovery dispute issues consistent with the  
15 approach that Mr. Martinez articulated, that it would not  
16 be a delegation of your authority to craft an order in  
17 such a way that you ultimately are not delegating your  
18 authority, that you are the ones that are ultimately in  
19 control finally in making those decisions.

20           Thank you.

21           CHAIRMAN NELSON: Thank you.

22           Cheyenne River.

23           MR. CLARK: Thank you, Commissioners.

24           Frankly, I don't think I have anything  
25 substantive to add to what Mr. Martinez and Mr. Rappold

1     said so I'll just keep it very short and ask that the  
2     Commission grants this Motion to Appoint a Special  
3     Master.

4             Thank you.

5             CHAIRMAN NELSON: Thank you. And if you'd make  
6     sure to turn the mic. off when you leave, that will help  
7     the folks on the phone.

8             With that, we'll go to Indigenous Environmental  
9     Network. Ms. Craven.

10            MS. CRAVEN: Thank you, Commissioner.

11            I don't have anything further to add at this  
12     point in time. I'd just second what has been said by  
13     Mr. Martinez.

14            Thank you.

15            CHAIRMAN NELSON: Thank you.

16            Any of the Intervenors in the room wish to weigh  
17     in?

18            Seeing none there, we will go down the list on  
19     the phone.

20            Bob Gough.

21            MR. GOUGH: Commissioner, I would have  
22     InterTribal COUP join and support this Motion.

23            CHAIRMAN NELSON: Thank you.

24            Mr. Goldtooth.

25            MR. GOLDTOOTH: Thank you, Commissioner.

1 I, as well, would like to support and join this  
2 Motion.

3 CHAIRMAN NELSON: Thank you.

4 Ms. Hilding.

5 MS. HILDING: Yes. Thank you. I had to turn it  
6 off mute. Can you hear me?

7 CHAIRMAN NELSON: Yes.

8 MS. HILDING: Okay. I have a point of order  
9 here.

10 The deadline to submit Motions to Compel was the  
11 7th, and the deadline to respond to Keystone's Motion to  
12 Preclude Certain Intervenor was the 8th. On the 8th I  
13 submitted a Motion to Join with the guys in asking for a  
14 special master, and ladies. And in the title it also --  
15 this is in the title, Motion to Preclude Certain  
16 Intervenor From Offering Witnesses or Evidence at the  
17 Hearing and Joint Motion for Special Master and/or New  
18 Motion for PUC Review and Clarification. Okay.

19 So then starting on -- I have to see how this  
20 printed out. I think it was page 3. I go into my  
21 ultimate Motion, which you guys seem to have totally  
22 overlooked and not put on the schedule. And I could read  
23 that to you. It's on the second half of --

24 COMMISSIONER FIEGEN: May I ask a quick  
25 question?

1           Are you on speaker phone, or are you talking  
2 right into your phone? Because we're having a little  
3 trouble hearing you here.

4           MS. HILDING: Okay. Well, I was on speaker  
5 phone, but now I'm going back to my phone.

6           COMMISSIONER FIEGEN: We're having a hard time  
7 hearing so if you could slow down a little bit, that will  
8 help our court reporter and all of us.

9           Thank you.

10          MS. HILDING: Okay. What I'm saying is the  
11 deadline to apply for TransCanada was the 8th. The  
12 deadline to compel was the 7th. There's no deadline for  
13 other motions that I'm aware of.

14          So I added an additional motion, which is that I  
15 supported the Motion for Special Master. However, if you  
16 denied the special master -- and, you know, I can read  
17 this to you. It's 1, 2, 3, 4, 5 paragraphs here in my  
18 brief that I filed that seems to have been completely  
19 overlooked.

20          Do you want me to read that to you?

21          CHAIRMAN NELSON: I don't think you need to read  
22 it. But on the agenda today at the end we've got a line  
23 that says, How shall the Commission proceed on any other  
24 outstanding Motion, and we will deal with that at that  
25 point.

1 MS. HILDING: All right. Okay. I just wanted  
2 to -- you know, it was if you denied the special master,  
3 then I wanted you to do something else.

4 All right. So I have joined with the Motion for  
5 the Special Master. I'm a pro se Intervenor. I am not  
6 represented by a lawyer. I have a lot of concerns with  
7 how the Keystone filed their Interrogatories. I've been  
8 doing a good-faith effort to comply with it, but I  
9 believe the whole thing is illegally done but --  
10 (Inaudible).

11 (Discussion off the record)

12 MS. HILDING: I think that the Keystone  
13 December 18 Interrogatories -- (Inaudible).

14 CHAIRMAN NELSON: I'm sorry. We're not hearing  
15 you. If you could speak very slowly, very clearly into  
16 the phone, then we can hear you.

17 MS. HILDING: Well, I'm not on my cell phone.  
18 I'm on a landline. You still can't hear me?

19 CHAIRMAN NELSON: You're okay there. Go ahead.

20 MS. HILDING: I have -- I think based on my  
21 telephone conversations with TransCanada, they're okay  
22 with how I've responded to the discovery. I've been  
23 doing a good-faith effort to comply with discovery, which  
24 I think was illegally submitted.

25 So I think that we need -- us pro se Intervenors

1 who don't really understand what's going on really need  
2 for you guys to look at how the TransCanada's discovery  
3 request was done and is that legal and are we really  
4 supposed to be responding to it? Although I have been  
5 responding to it.

6 Okay?

7 So I agree with a special master. I think  
8 there's a lot of problems with discovery. And I join the  
9 Motion but in a written -- I sent a written filing to you  
10 saying I joined the Motion.

11 CHAIRMAN NELSON: Thank you.

12 We'll go to BOLD Nebraska. Mr. Blackburn.

13 MR. BLACKBURN: Thank you, Mr. Chairman.

14 BOLD Nebraska supports the Motion as well. We  
15 are concerned because discovery, of course, is very  
16 important for many different purposes in the hearing and  
17 believe that effective and efficient decision of all of  
18 these different matters in play will require a  
19 substantial amount of time and effort to resolve.

20 So, again, BOLD Nebraska supports the Motion,  
21 and thank you for letting us to be heard.

22 CHAIRMAN NELSON: Thank you.

23 We'll go to Standing Rock. Mr. Capossela.

24 MR. CAPOSSELA: Thank you, Mr. Chairman.

25 Today's agenda with all of these contested



1 motions, the agenda itself kind of corroborates that  
2 there's some merit to the idea of bringing in a discovery  
3 expert.

4 I don't think it's common in this type of  
5 proceeding for there to have been so little cooperation  
6 amongst the parties as was indicated by all the pending  
7 motions. So I don't think up to this point the discovery  
8 process has gone the way it ought to or the way it  
9 normally does. And there may be some merit to bringing  
10 in a special master to sort all of this out.

11 Thank you.

12 CHAIRMAN NELSON: Thank you.

13 We'll go to Yankton Sioux Tribe. Ms. Real Bird.

14 MS. REAL BIRD: Thank you, Mr. Chairman and  
15 members of the Commission. Thomasina Real Bird for the  
16 Yankton Sioux Tribe.

17 The Yankton Sioux Tribe will support the Motion  
18 for the reasons already stated. And I would also like to  
19 draw the Commission's attention to the portion of the  
20 codified law Title 15 that specifically authorizes, as a  
21 portion of its civil procedure, the appointment of  
22 referees. And I believe that would be the term that's  
23 specifically mentioned in the laws.

24 And so the appointment of a special master or a  
25 referee is something that's allowed by the law. And the

1 Yankton Sioux Tribe would argue that the discovery issues  
2 are complex, they're lengthy, they're -- you know,  
3 they're likely going to require some expertise. And  
4 that's exactly why the Legislature included this process  
5 to appoint referees in the codified laws.

6 And, specifically, I'm referencing 15-6-53,  
7 Subsection A through E. And so I would ask that the  
8 Commission review those and consider appointment of a  
9 special master or a referee in this case to address the  
10 discovery issues.

11 And as pointed out in those sections and by  
12 Mr. Martinez, the order appointing such a special master  
13 or a referee could be narrowly tailored to achieve the  
14 specific purposes requested in the Motion. So the  
15 Yankton Sioux Tribe supports the Motion for the reasons  
16 articulated and the reasons I just stated.

17 Thank you.

18 CHAIRMAN NELSON: Thank you.

19 And Viola Waln.

20 Hearing nothing from Viola, we will go to Staff.  
21 Ms. Edwards.

22 MS. EDWARDS: Thank you. Kristen Edwards for  
23 Staff.

24 For the reasons stated in Staff's Brief, we  
25 oppose the appointment of a referee. Staff does still

1 stand by its assertion that the Commission lacks the  
2 jurisdiction to appoint a special master.

3 Furthermore, given the way it was described so  
4 far today, it does seem that the duties sought by the  
5 referee might run afoul of the open meetings rules if, in  
6 fact, they're going to make decisions outside of a public  
7 forum and then just bring them here to be voted on.

8 Because typically the way things are handled  
9 here is all decisions are discussed in a public forum,  
10 and I think that is required by law.

11 Thank you.

12 CHAIRMAN NELSON: Thank you.

13 Keystone.

14 MR. MOORE: Thank you. James Moore on behalf of  
15 Keystone.

16 I would respectfully disagree with the  
17 suggestion that discovery has not gone well in this  
18 proceeding.

19 I think, as is evident from the Docket, the  
20 Commissioners know that there was a lot of discovery that  
21 was served and a lot of discovery answered in this case.  
22 I can personally tell you that I did basically nothing  
23 else the month of January except respond to discovery  
24 requests in this Docket.

25 And, frankly, I'm -- I'm a little bit proud

1       that at the end of the day we have a handful of motions  
2       concerning a handful of requests.

3               I think the process has worked. I think it's  
4       gone well. I think the Commission has a mechanism for  
5       resolving the outstanding disputes, which is the hearing  
6       that's set for today. And I think the most expeditious  
7       way to deal with the disputes is for them to be decided  
8       here today.

9               And I would, lastly, just note that we're not at  
10      the beginning of this process. We're nearing the end of  
11      this process. The Scheduling Order has been in place.  
12      We have a motions hearing set and a hearing on the merits  
13      set to begin in just a matter of a few weeks.

14              I think this has played out exactly as it  
15      should, and I would respectfully request that the Motion  
16      be denied.

17              CHAIRMAN NELSON: I'm going to remind the folks  
18      on the phone, please, put your phones on mute. We're  
19      getting some banging around again.

20              And, with that, I'll turn it over to  
21      Mr. Martinez for brief rebuttal.

22              MR. MARTINEZ: Thank you, Mr. Chairman.

23              What the discovery process is really all about  
24      is, I think, the fundamental question and issue here.  
25      And that is that the Commission and the people of

1 South Dakota need to have a full hearing of all of the  
2 relevant evidence as it relates to what TransCanada seeks  
3 to accomplish.

4 Now Mr. Moore has certainly said that this  
5 process has "played out like it should." I would suggest  
6 that, yeah, that's probably right from TransCanada's  
7 perspective.

8 I think I would like to kind of go back and echo  
9 what I said back in December when we were discussing the  
10 Scheduling Order. I've never seen an instance where  
11 we've had a large, multinational corporation on one side  
12 of a dispute where the discovery process has been in any  
13 way simple or in any instance where the parties who have  
14 been seeking discovery have gotten fully what it is that  
15 they have asked for and what they are entitled to under  
16 the discovery rules.

17 Mr. Moore may indeed be proud that there's only  
18 a "handful of motions and requests." I would say looking  
19 at the Docket, it's a little bit more than a handful.  
20 It's substantially more than a handful. It's more like a  
21 truckload.

22 Particularly when we have -- like I said,  
23 Dakota Rural Action alone had 86 different  
24 Interrogatories, 56 different Requests for Production of  
25 Documents.

1           For instance, of those 56, we've got 24 that are  
2     in dispute. That doesn't even -- you know, I haven't  
3     even counted up the number of issues that are in dispute  
4     with all the other Intervenor in this case who have  
5     engaged and sought to get discovery from TransCanada.

6           So that's, you know -- that, I think, really  
7     goes to the heart of what TransCanada's arguing here.  
8     It has not been a process where the Intervenor and  
9     Dakota Rural Action in particular have gotten what  
10    they've asked for. Like any other organization, we've  
11    had to fight tooth and nail, and, you know, they're doing  
12    everything they can to make sure we don't get the things  
13    that we've asked for.

14          Now, you know, Ms. Edwards raised an interesting  
15    issue that I do want to address briefly. She did state  
16    that the Commission certainly lacks jurisdiction. I  
17    disagree with that.

18          I pointed out earlier that an order can be  
19    drafted to where a special master can prepare a report  
20    for the Commission, and the Commission can take action on  
21    it. That does not delegate your authority. That does  
22    not in any way abrogate your jurisdiction as  
23    Commissioners.

24          And actually the answer to that also answers the  
25    open meetings objection that Ms. Edwards raised.

1 Absolutely right, the Commission's a public body. It is  
2 subject to open meetings rules, like any other public  
3 body of the State of South Dakota or for any other state  
4 for that matter that has open meetings laws. And most  
5 do.

6 And it is, indeed, correct that ultimately  
7 decisions that are made are to be made in that public  
8 forum in those open meetings. I'm not suggesting that  
9 they not be.

10 What I am suggesting is that with a special  
11 master being appointed to work with the parties, to come  
12 back and report to you in an objective and efficient  
13 manner of what is -- of what discovery disputes are  
14 outstanding, what the law says in terms of how those  
15 should be resolved, will aid you as Commissioners in  
16 making a fair and objective decision.

17 And at the end of the day by doing that, it  
18 actually helps you as Commissioners by avoiding potential  
19 due process challenges down the road to whatever decision  
20 you make. So it's really a prophylactic measure if you  
21 look at it in that way.

22 So I think there's ample reasons for appointment  
23 of a special master. And I would ask that you grant our  
24 Motion.

25 CHAIRMAN NELSON: Take just a timeout here.

1 We're having a little trouble with our internet feed.

2 Okay. We are having some technical  
3 difficulties. For some reason the internet feed is not  
4 working, but we are running our tape recorder so --

5 MS. GUSTAFSON: We're back on.

6 CHAIRMAN NELSON: Okay. Now we're back on. In  
7 any case, we're going to proceed and open it up for  
8 Commissioner questions.

9 Go ahead, Commissioner Hanson.

10 COMMISSIONER HANSON: Thank you, Mr. Chairman.

11 Mr. Martinez, would you see the special master  
12 or the referee as having the authority to compel  
13 discovery -- excuse me. How would I phrase that?

14 Do you see where any of the Intervenors or the  
15 Applicant would have the ability to compel the referee to  
16 provide information?

17 MR. MARTINEZ: Commissioner, I'm not really sure  
18 what you mean by that. But I think, you know -- let me  
19 try to answer it this way: The special master could not  
20 compel anything. The special master would be empowered  
21 to basically sit down with parties to each of the  
22 discovery disputes.

23 For instance, we have -- Dakota Rural Action has  
24 a discovery dispute with the Commission Staff. It would  
25 empower the special master to sit down, work with each of



1 us to determine whether or not objections to our  
2 discovery requests have any basis, and then come back to  
3 you with a report, at which point you could choose to  
4 basically say that, yes, we will either compel discovery  
5 and tell the Commission and Staff to turn over what we  
6 have asked for or not.

7 Ultimately, the power is in your hands. A  
8 special master is there merely to assist you and  
9 essentially avoid you having to go through and listen to  
10 every single discovery issue that we have and help you  
11 basically make a better informed decision.

12 COMMISSIONER HANSON: Sure. I understand your  
13 arguments. You're saying that the special master would  
14 not be able to compel discovery from the parties. Would  
15 the parties be able to compel information, discovery,  
16 from the special master?

17 For instance, the special master or the referee  
18 has e-mails and phone calls with parties, and in  
19 attempting to resolve or obtain information and, in  
20 essence, to formulate their opinion that they would be  
21 providing to the -- to the Commission.

22 So my question is simply would the parties be  
23 able to compel the special master or the referee to  
24 provide that information? For instance, e-mails.

25 MR. MARTINEZ: Yeah. I see where you're

1 getting, Commissioner -- where you're coming from with  
2 that question.

3 And, you know, in my experience where we've had  
4 special masters appointed in cases like that, the special  
5 master is, in essence, acting as, in some respects, an  
6 instrument of the body that has appointed him or her.  
7 And so on that basis, you know, no. A lot of the special  
8 master's own notes, formulas, thoughts would be deemed  
9 his own work product, I think could be shielded.

10 I don't think -- you know, I don't believe that  
11 the parties could compel the special master to turn over,  
12 you know, his notes, impressions, work product, that sort  
13 of thing.

14 If you wanted to, you know -- to even clarify  
15 that further, I think what you could do is is put that in  
16 the form of an order, and the parties could essentially  
17 agree to consent to that. That would be one sort of  
18 additional way of resolving that, if you see that as  
19 being an issue.

20 Because ultimately the special master, the way  
21 the appointment process typically works is it's somebody  
22 that's appointed by the consent of all the parties  
23 involved. And typically what will happen is each party  
24 will put forward, you know, three, four names, and then  
25 they'll work through a consensus to try to get to -- to

1 get to a final name of somebody who will serve in that  
2 capacity.

3 So as part of the overall agreement to have that  
4 in place, I mean, we could certainly agree that their  
5 work product would not be subject to discovery by any of  
6 us. So that's certainly a work around.

7 COMMISSIONER HANSON: Thank you, Mr. Chairman.  
8 Thank you, Mr. Martinez.

9 MS. REAL BIRD: Mr. Chairman, this is Thomasina  
10 Real Bird.

11 May I add -- and I think it might answer the  
12 Commissioner's question in that regard. Codified Law  
13 15-6-53B specifically discusses the powers of the  
14 referee. And they can basically be as broad or tailored  
15 as a Commission wishes through an order.

16 Although there are some limitations on the  
17 statute. If the Commission wishes to further tailor it  
18 and, you know, discuss the referee's -- you know, the  
19 discoverability of their notes, for example, that could  
20 be tailored in the order. And then the appointment  
21 process is 15-6-53A.

22 So I think a lot of the questions the Commission  
23 is having might be answered by specific reference and  
24 review of those codified laws, which does authorize the  
25 appointment of a referee.

1           Thank you.

2           CHAIRMAN NELSON: Thank you.

3           Additional questions from the Commission?

4           If not, is there a Motion?

5           Commissioner Fiegen.

6           COMMISSIONER FIEGEN: Mr. Chairman, in HP14-001  
7 move to deny the appointment of a special master.

8           CHAIRMAN NELSON: Discussion on the Motion.

9           COMMISSIONER FIEGEN: You know, first of all,  
10 thank you to the Intervenors for trying to save some time  
11 of the Commissioners. I mean, we certainly would have  
12 enjoyed a free week this past week of not reading all of  
13 the discovery disputes.

14           But actually we have. We have spent a lot of  
15 time since last Tuesday morning when we started to get  
16 these. We spent weekends. We spent nights. We've spent  
17 an incredible amount of time to understand all the  
18 discovery disputes and what we have to vote on today.

19           I believe the Legislature -- actually I don't  
20 believe they've intended to give our authority away. And  
21 for an example, I have a relative issue in a Docket where  
22 I have some relatives that own some land, and I had to be  
23 recused of that Docket, or I chose to be. And the  
24 Legislature says in code that in statute that it needs to  
25 be an elected official that sits in on that Docket.

1           So I absolutely -- and although that is  
2 different, I believe the Legislature has kept that  
3 authority with us.

4           As you can see, there's attorneys that disagree,  
5 and so we have several attorneys disagreeing. So I don't  
6 want to cross that line and be a maybe if we are crossing  
7 the line legally. I would rather plow ahead, move  
8 forward. We have spent a lot of time on studying what's  
9 in front of us today.

10           And I think it's important that if we think we  
11 could possibly cross the line on a legal issue with ex  
12 parte, open meetings, delegating our authority, why would  
13 we do that?

14           We need to do what we were elected to do. And I  
15 know all three of us have spent an incredible amount of  
16 time in the last week reading and being ready for today.

17           Thank you.

18           CHAIRMAN NELSON: Additional discussion.

19           Commissioner Hanson.

20           COMMISSIONER HANSON: Thank you, Mr. Chairman.

21           I agree with Commissioner Fiegen's statements.  
22 The description is also along the line of an arbitrator  
23 as it's defined in law and how arbitrators are used in  
24 divorce cases and such.

25           The reason I was curious about and asked the

1 question that I did of Mr. Martinez is that to a great  
2 extent it doesn't completely by any means but to a great  
3 extent it describes the Staff's responsibility and  
4 Ms. Edwards' responsibility in working with the parties  
5 and presenting comments and positions to the Commission  
6 after she has done that process and helped to facilitate  
7 that.

8           So I believe we already have our arbitrator,  
9 referee, working through that particular process.

10           You know, there are ways to make this simpler, I  
11 suspect, but it is what it is, and I think we have a  
12 responsibility as Commissioners to be involved. I think  
13 the more involved we are the more learned we are on the  
14 issues.

15           That was one of the main arguments for the very  
16 first motion is that we need to basically fully vent  
17 every issue. We need, as Commissioners, to be fully  
18 apprised of them and fully knowledgeable of them, and I  
19 think this process does facilitate that, as challenging  
20 as it is.

21           So I think that it behooves us to continue to  
22 work in the process that we are doing.

23           CHAIRMAN NELSON: Thank you.

24           Additional discussion.

25           I will just add a couple of thoughts.

1 Mr. Capossela made the statement that discovery hasn't  
2 gone the way that it should. And I agree with him.  
3 Mr. Moore said that we're only left with a handful of  
4 requests. I disagree with that.

5 It appears to me that in this case compared to  
6 others there has not been the level of negotiation or  
7 compromise on either side to resolve some of these things  
8 like I've seen in other cases.

9 I believe there should have been some Motions to  
10 Compel filed much earlier than they were filed.  
11 Keystone's made a number of references that they didn't  
12 receive objections until, you know, early in April, which  
13 is far, far too late for those kind of things to surface.

14 And so has discovery gone the way that it  
15 should? I don't think so. But having said that, the  
16 people of the State of South Dakota didn't elect us to  
17 dump our job on somebody else. They elected us to make  
18 the hard decisions.

19 And as Commissioner Fiegen indicated, we've  
20 spent the last week plowing through what are going to be  
21 some pretty difficult decisions today and preparing  
22 ourselves for those. And because of that, we are going  
23 to stand here today, and we are going to do the job that  
24 we were elected to do.

25 And because of that, I will not support any kind

1 of motion to give our job to somebody else. Although it  
2 would certainly be an appealing thing to do.

3 With that, any further discussion?

4 Seeing none, all those in favor of the Motion to  
5 Deny the Joint Motion for Appointment of a Special Master  
6 will say aye. Those opposed, nay.

7 Commissioner Hanson.

8 COMMISSIONER HANSON: Aye.

9 CHAIRMAN NELSON: Commissioner Fiegen.

10 COMMISSIONER FIEGEN: Fiegen votes aye.

11 CHAIRMAN NELSON: Nelson votes aye.

12 The Motion carries.

13 That brings us to Keystone has a couple of  
14 motions. One is Keystone's Discovery Motion and  
15 Keystone's Prefiled Testimony Motion.

16 Here's what I'm going to do. I'm going to let  
17 you choose which one you want to do first. I think we  
18 will take them one at a time, but your choice what you  
19 want to handle first.

20 MR. TAYLOR: Thank you, Commissioners. William  
21 Taylor for TransCanada.

22 We have two motions in front of you as a  
23 precursor. The first is a Motion to Preclude certain  
24 participation in the hearing, and the second is a Motion  
25 that deals with prefiled testimony. They're inexorably



1 intertwined and related.

2 I'll address the Motion to Preclude first, and  
3 then I'll move to the issues that are raised by the  
4 Prefiled Testimony Motion.

5 First I want to talk just momentarily to set the  
6 stage for what else is going to go on today about  
7 discovery itself. And there are some very fundamental  
8 underlying rules that relate to the issue of discovery  
9 and that tie themselves to these two motions that I'm  
10 about to present to you.

11 First of all is the scope of the proceeding. Is  
12 the scope of the proceeding is established by statute,  
13 49-41B-27. And the issue in this proceeding is now, more  
14 than four years after the initial permit was issued by  
15 this body, can Keystone construct the project according  
16 to the conditions that are in the permit? That's the  
17 issue that's in front of the Commission.

18 This is not a retrial. This is not a trial of  
19 the fundamental base underlying issues that Keystone was  
20 obligated to put before you in 2009. Unfortunately, that  
21 line has been blurred in the course of discovery.

22 There are a couple of other issues relative to  
23 discovery. There are both legal and procedural limits on  
24 the scope of discovery. A term that you often hear is  
25 "fishing expedition" when you talk about discovery.

1           In this -- proceedings before the Public  
2 Utilities Commission cast as they are here are a little  
3 different than they are in the civil courts. In the  
4 civil courts the plaintiff, who would be TransCanada,  
5 comes forward with a Complaint or a Petition and says  
6 this is what we want you to consider. And defendants or  
7 Intervenor or respondents file an answer to that  
8 Complaint, and they say this is what the plaintiff thinks  
9 is an issue. This is what we think is an issue.

10           In this process for the Public Utilities  
11 Commission there is no answer on the part of the  
12 Intervenor to define the scope of the issues that are  
13 before the Commission. So the consequence is we start  
14 discovery without a tightly defined scope of the matters  
15 that are in issue.

16           You narrowed that up a little bit with your  
17 orders in December. We propounded a motion to you, and  
18 said narrow the matters that are in issue. You tightened  
19 it up a little bit, but it isn't as tight as it would be  
20 in the civil court system. So where does that take us?

21           Where it takes us is this: The first thing that  
22 Keystone did after you set your procedural order in place  
23 within four or five days, I think, the 18th of December,  
24 something like that, we sent a set of Interrogatories and  
25 Requests for Document Production to every litigant. And

1 the Interrogatories and Document Production Requests we  
2 sent were identical. It went to all 40 odd Intervenors  
3 and the State.

4 And we said in those Interrogatories tell us  
5 what your issues are, tell us who your witnesses are who  
6 are going to address those issues, and tell us what  
7 documents you're going to produce in support of your  
8 position.

9 17 of the respondents failed to respond -- 17 of  
10 the Intervenors failed to respond at all. We have never  
11 heard anything from them. Not only did we serve them  
12 with Interrogatories but after the Interrogatory -- after  
13 the discovery period had passed we wrote to them and said  
14 what are you going to do and received no responses.

15 It is our view that those 17 persons should be  
16 precluded from offering any testimony or calling any  
17 witnesses in this proceeding. To allow them to appear in  
18 this proceeding, to call witnesses or to give testimony  
19 would be manifestly unfair to TransCanada and, for that  
20 matter, unfair to the other Intervenors because we don't  
21 know what they're going to say, and we don't know what  
22 they're going to talk about. And they have ignored the  
23 Commission's Order directing that they reveal what they  
24 intend to talk about.

25 In addition to that, four Intervenors, Harter,

1 BOLD Nebraska, Carolyn Smith, Gary Dorr, and the  
2 Yankton Sioux Tribe responded to the Interrogatories, but  
3 they said we don't have to answer them because your  
4 Interrogatories do not comply with the Commission's Order  
5 that requires that each question be tied to a specific  
6 condition.

7 Yankton Sioux Tribe said it would be frivolous  
8 for us to speculate at this early hour who our witnesses  
9 will be. And Yankton Sioux Tribe said that they had the  
10 right to assert the Work Product Doctrine to protect  
11 their documents and thoughts and plans.

12 All right. So here's the problem with that.  
13 The purpose of discovery is to allow a full and fair  
14 exchange of information as we advance towards the trial  
15 of the matter so that TransCanada knows what the other  
16 side intends to produce and that the other side intends  
17 to know -- the other side knows what we intend to produce  
18 so that the Commission can make reasoned decisions about  
19 the evidence that's put in front of it.

20 If one or more parties simply say we aren't  
21 going to respond to your Interrogatories, the system  
22 grinds to a halt. And for a party to say, TransCanada,  
23 we don't have to answer your Interrogatories because you  
24 didn't say -- there are 100 some Findings of Fact and  
25 Conditions in this case -- Dear Intervenor, taking into

1 account Conditions 1 through conclusion, what is it that  
2 you intend to say?

3 It's a preposterous argument to say that you  
4 don't have to answer the Interrogatories. Because I  
5 suppose we could have submitted Interrogatories that said  
6 there are 50 Special Conditions at the end. Here are 50  
7 Interrogatories. Interrogatory 1, what do you say about  
8 Condition 1? Interrogatory 2, what do you say about  
9 Condition 2? It's preposterous.

10 So we say you should enter an order as to those  
11 17 who failed to respond at all -- they don't get to call  
12 witnesses in the proceeding. They don't get to appear in  
13 the proceeding and offer evidence. Maybe they get to  
14 appear in the proceeding and make an opening statement  
15 and maybe they get to appear in the proceeding and make a  
16 closing statement. But to participate in the evidentiary  
17 portion of the proceeding, they forfeited their right to  
18 do that.

19 As to those respondents, those Intervenors who  
20 said we don't have to respond because your  
21 Interrogatories don't comport with the Commission's  
22 Order, you should say you had your chance to bring that  
23 issue before the Commission if you really wanted to. You  
24 didn't. And, number two is had you brought it before the  
25 Commission, your contention is frivolous and your order

1 wouldn't have been denied and so you too should be  
2 excluded from offering evidence or participating in the  
3 hearing.

4 Now maybe those -- maybe those people get to  
5 cross-examine. That's an issue that the Commission will  
6 have to decide. Maybe they get to cross-examine the  
7 witnesses that other parties bring.

8 And then there are those four who responded but  
9 failed later to disclose witnesses, and that kind of  
10 leads into the next motion, which is the motion that has  
11 to do with prefiled testimony.

12 COUP and Dakota Rural Action have taken the  
13 position that it's a constitutional due process offense  
14 for the Public Utilities Commission to request and order  
15 and direct that witnesses -- that Intervenors, parties,  
16 submit prefiled testimony.

17 Their argument is fundamentally flawed. First  
18 of all, prefiled testimony is not sworn testimony, and  
19 it's not offered in lieu of testimony at the proceeding.  
20 Prefiled testimony really, when you think about it, is  
21 part of the discovery process. It affords the parties  
22 the opportunity to narrow the scope of the issues that  
23 will come before the Commission, but most importantly  
24 what it does is it informs the Commission as to the  
25 issues that the Commission will be dealing with.

1           Then when the hearing, when the trial begins,  
2     the witness who has filed prefiled testimony appears,  
3     raises his right hand, swears under oath that that is his  
4     prefiled testimony, and adopts it as his testimony in the  
5     hearing.

6           Then the witness is submitted for  
7     cross-examination, which is exactly, precisely, what due  
8     process contemplates in conducting a proceeding of this  
9     type.

10           I personally in my career, when I was a member  
11     of the Board of Minerals and Environment, served  
12     frequently as a Hearing Officer. I required prefiled  
13     testimony in those cases that I thought it was  
14     appropriate for the very reasons I've said so that me, as  
15     the Hearing Officer, could have a better and more concise  
16     grasp of the issues that came before the Commission.

17           I've appeared before this Commission with  
18     prefiled testimony, Minnesota Public Utilities Commission  
19     with prefiled testimony, the North Dakota Public  
20     Utilities Commission with prefiled testimony,  
21     Environmental Protection Agency of the United States with  
22     prefiled testimony, the Environmental Protection Agency  
23     of the State of Indiana, State of Ohio, State of Iowa,  
24     prefiled testimony.

25           Although I have never made an appearance before

1 the Federal Energy Regulatory Commission, FERC, I've seen  
2 many applications to FERC, all which include prefiled  
3 testimony. Always managed in exactly the manner that  
4 your Commission manages it.

5 So COUP, DRA at least, it's a bold challenge  
6 that they pose to you. Not so much a bold challenge to  
7 you but a bold challenge to their own case.

8 They ignored your Order that prefiled testimony  
9 must be submitted. There has to be a consequence for  
10 that. And what is the consequence for that?

11 I submit that if -- those groups who failed to  
12 submit prefiled testimony forfeited their right to offer  
13 testimony in front of this Commission.

14 And you'll notice in the many court papers that  
15 have been filed you probably picked up the fact that  
16 Dakota Rural Action and others who challenged your  
17 authority to require prefiled testimony tried to cover  
18 their trail at the end of the day by submitting in DRA's  
19 case a couple of one-liners. We're going to call this  
20 guy who's going to talk about this, and we're going to  
21 call this guy who's going to talk about this. And then  
22 later on enhanced that a little bit by submitting  
23 narrative statements.

24 In one case it's a scholarly paper. In another  
25 case it's a statement, which I happen to know to be part



1 of a Canadian Energy Board filing. So they tried to  
2 backfill and cover their basis, but they did not succeed  
3 in doing it.

4 So we are here today to ask you to do this: As  
5 to the 17 who failed to respond to our discovery, they  
6 have forfeited their opportunity to participate in the  
7 hearing, and we'd ask you to enter an order to that. As  
8 to the Yankton Sioux Tribe who challenged the discovery  
9 process and challenged your authority, we think that they  
10 suffer from the same problem.

11 Now the Yankton Sioux Tribe did make some  
12 nominal presentation of witness testimony, and they did  
13 make some nominal effort to answer Interrogatories. So  
14 we think they don't fall into the same class as the 17  
15 who failed to respond at all. We think the Yankton Sioux  
16 Tribe should be allowed to appear, make an opening  
17 statement, and cross-examine witnesses, but they have  
18 forfeited their opportunity to provide testimony at the  
19 hearing.

20 Cindy Myers was in that group, but she resolved  
21 that with an e-mail that I think came yesterday when she  
22 said she didn't intend to call any witnesses so she's  
23 kind of out of the mix. The other four, Harter -- BOLD  
24 Nebraska has sort of resolved it because BOLD -- I don't  
25 know if the letter was filed with you or not, but they

1 wrote to us and said that they don't intend to call any  
2 witnesses, that they're going to rely on other people's  
3 witnesses so they're sort of out of the mix.

4 But for those others, Mr. Harter, Mr. Dorr,  
5 COUP, and Dakota Rural Action who failed to submit  
6 prefiled testimony, I think they have forfeited their  
7 chance, and we'd ask you to enter an order to that end  
8 also.

9 Questions?

10 CHAIRMAN NELSON: I think we'll wait with  
11 questions until the end. Thank you.

12 Here's what I'm going to do. I'm going to go --  
13 since Mr. Taylor presented his arguments on both of his  
14 motions, I'm just going to kind of start at the top of  
15 the first motion and work my way down offering folks an  
16 opportunity to make their arguments.

17 So the first question I'm going to ask is are  
18 there any of the 17 Intervenors that have been mentioned  
19 wishing to offer any testimony?

20 MR. DORR: Hello. My name is Gary Dorr.

21 CHAIRMAN NELSON: Gary, you are also in the  
22 four.

23 MR. DORR: I thought I was in both.

24 CHAIRMAN NELSON: Just hang tight. Just hang  
25 tight.

1                   Is there anybody in the 17 that wishes to  
2 speak?

3                   Okay. If not, then we are going to go to the  
4 group of four.

5                   MR. GOLDTOOTH: Can you hear me? This is Dallas  
6 Goldtooth.

7                   CHAIRMAN NELSON: I can hear you, Dallas. Are  
8 you in the group of 17?

9                   MR. GOLDTOOTH: I do believe.

10                  CHAIRMAN NELSON: Okay. Go ahead.

11                  MR. GOLDTOOTH: I hear everything that the  
12 lawyer for TransCanada has spoken. You know, it has  
13 been -- I'm not a lawyer myself, and so this is a new  
14 process for me. And I'm sure it's also a process that a  
15 lot of the Intervenors who are not lawyers who are not  
16 from organizations they're not used to this process so  
17 it's definitely overwhelming.

18                  So I definitely want to speak, you know, on  
19 behalf of a lot of the Intervenors who are among that 17  
20 who, you know -- I can speak for myself, was mindful that  
21 there was a fair amount of work involved in signing on.  
22 I do want to express that.

23                  I hope to be involved all the way up and through  
24 the evidentiary hearings. I have a -- that I can speak  
25 up in the evidentiary hearings. And also I do reserve my

1 right for rebuttal in the discovery process and from  
2 between now and the evidentiary hearing. But, as I  
3 understand it, there's a phase also for me to rebut some  
4 of the, you know, documentation that comes from  
5 TransCanada. Or also any other -- any other Intervenors.  
6 And so I really do -- I don't want to be excluded from  
7 this process in any fashion.

8 CHAIRMAN NELSON: Thank you.

9 MR. GOLDTOOTH: So, you know --

10 CHAIRMAN NELSON: Go ahead.

11 MR. GOLDTOOTH: No. The basis of it. I mean,  
12 it just -- it is frustrating, you know -- I speak -- I'm  
13 kind of, I guess, a layman in certain aspects. But to be  
14 overwhelmed with all -- this whole process and kind of  
15 learn as I go but then also after all of that and trying  
16 to catch up to speed and be on the calls and listen in  
17 and speak up when I can, to be presented with the fact I  
18 might be excluded from all of that is discouraging. And  
19 I hope -- I hope I can speak on behalf of the other folks  
20 who are in that group of 17.

21 CHAIRMAN NELSON: Thank you.

22 Anyone else in the group of 17 that wishes to  
23 speak?

24 Okay. Hearing none, we're going to go to the  
25 group of four. And I'm going to go -- Mr. Taylor, the

1 thought that issues with BOLD Nebraska may have been  
2 resolved in this regard so I'm going to go to  
3 Mr. Blackburn at this point.

4 MR. BLACKBURN: Thank you, Mr. Chairman.

5 I'd like to make a couple of clarifications  
6 because I believe that Mr. Taylor over spoke on a number  
7 of matters.

8 But before that, I note that TransCanada  
9 typically argues this is not a retrial. And I actually  
10 don't believe that that argument is -- to an extent the  
11 argument is not helpful.

12 Circumstances have changed that affect  
13 conditions or facts, that it may not be a retrial of  
14 everything in this matter, but at the same time those  
15 issues should reviewed and considered by the Commission.  
16 So merely stating that this is not a retrial is not  
17 particularly helpful in guidance to anybody.

18 Second, I believe that the reason a lot of the  
19 citizens didn't respond to the discovery, the everyday  
20 folks are trying to struggle through this process, is  
21 because it's very difficult for them to understand. And,  
22 unfortunately, the Commission's rules don't require or  
23 don't allow citizens to participate except for as formal  
24 Intervenors. And that puts a tremendous burden on  
25 everyday people. And I don't think it's particularly

1 fair, and I think the Commission should be generous with  
2 people who are -- everyday people who are struggling with  
3 this process. That's only fair.

4 Third, TransCanada incorrectly states that  
5 BOLD Nebraska argued that it didn't need to respond to  
6 these discovery requests in part because TransCanada  
7 failed to note which conditions and facts were -- that  
8 each discovery request -- each of TransCanada's discovery  
9 requests related to. In fact, BOLD Nebraska did not make  
10 that argument. And TransCanada's brief on that matter  
11 states that BOLD Nebraska didn't make that argument.  
12 Other parties, in fact, made that argument. We did not.

13 Fourth, TransCanada said that every -- that  
14 people who -- it's an issue on the Motion today and as  
15 the Commission meets today is whether or not parties can  
16 participate in the hearing essentially except for maybe  
17 making I believe -- I believe Mr. Taylor said opening or  
18 closing statements.

19 In fact, TransCanada's Motion today is not that  
20 broad. It said that it's requesting that the Commission  
21 prohibit people from offering any testimony. It does not  
22 request that people not be allowed to do  
23 cross-examination. It says nothing about opening and  
24 closing statements. The only thing it requested is that  
25 the Commission prohibit people from offering testimony.

1 Cross-examination is listed as a different issue -- or a  
2 different right and action in this -- in the Commission's  
3 rules and the state's laws and rules.

4 And TransCanada didn't ask that people be  
5 excluded from offering testimony -- or from doing  
6 cross-examination, just simply offering testimony. And  
7 so, therefore, it's simply not on the table today.

8 TransCanada didn't ask for it. We haven't  
9 argued in brief whether or not people should be allowed  
10 to do cross-examination if they haven't offered testimony  
11 themselves. It's typical in other states that various  
12 parties will offer testimony and some will not choose to  
13 offer testimony, but everybody gets to do  
14 cross-examination.

15 So it's not on the table. The Commission should  
16 not consider that issue today.

17 And, frankly, BOLD looked at all the other  
18 discovery requests and the other experts that were being  
19 offered by the parties and determined that the issues  
20 that BOLD would want to cover would be -- that the  
21 discovery requests of other parties and that the  
22 testimony we understand other parties will offer is  
23 sufficient for Bold's needs, specifically with regard to  
24 cross-examination. So, therefore, we withdrew our --  
25 essentially told TransCanada through three discovery

1 responses -- we did file three responses to TransCanada,  
2 and we said that we would rely on other parties'  
3 discovery.

4 We hoped that that would facilitate and expedite  
5 the hearing somewhat. And we do not believe it's  
6 appropriate for the Commission to punish or chastise  
7 BOLD Nebraska for making that decision and recognize that  
8 we -- that that exclusion from cross-examination or  
9 participation in the evidentiary hearing in other ways  
10 other than offering testimony is on the table today  
11 because it's not.

12 And I'll leave my comments there. Thank you for  
13 allowing us to be heard.

14 CHAIRMAN NELSON: Thank you.

15 With that, I'm going to go to John Harter, who  
16 is also one of the group of four.

17 MR. HARTER: Thank you, Commissioners.

18 Frankly, I don't know what TransCanada's afraid  
19 of hearing. More truth or what? In my opinion,  
20 TransCanada when they requested to the Commission that  
21 everything be identified by the finding of -- (Inaudible)

22 (Discussion off the record)

23 MR. HARTER: When TransCanada requested that the  
24 Intervenor must hold to the Findings of Fact, if that's  
25 what you want to call them, they did not relate to us.



1 And to me just doing that was a burden. And I didn't  
2 have the time to fully participate and go into all of  
3 that.

4 TransCanada, if they weren't going to follow  
5 their own request, when they requested that they should  
6 have had the burden to explain to the people that don't  
7 have lawyers what they were going to do. And, in my  
8 opinion, they didn't follow their own request. And  
9 that's what's been stated with some of the answers within  
10 the answers sent back to TransCanada.

11 They have the education and the knowledge.  
12 They're very good at abusing and using the laws when it  
13 suits them. But when it comes to people that are less  
14 educated in this field then they turn around and put that  
15 against you.

16 And I don't think that myself or any other  
17 Intervenor, for that fact, should -- that should be held  
18 against them if that's what they're thinking.

19 TransCanada stated that allowing the rest of us  
20 would be prejudice against them. Quite frankly, the  
21 proceedings is burdensome, and I'm involved in this  
22 because they drug me into this. They would not accept no  
23 for an answer.

24 And other people that I know that are on this  
25 list or involved in this because they support my

1 position. And I don't think that anyone should be  
2 exempted from putting testimony out. And I think a way  
3 to resolve that would be to accept public testimony and  
4 put it on record.

5 What are -- what is the Commission afraid of?  
6 Probably nothing. To hear? What's TransCanada afraid  
7 of? Hearing the facts of what they've done and how they  
8 relate to this case?

9 One of the facts that I think they're afraid of  
10 is the fact that -- and I don't have the number in front  
11 of me. I didn't take the time to look it up -- is the  
12 fact that they have no -- they are not even planning on  
13 treating southern Tripp County as a high consequence  
14 area.

15 I know what they done for my property, and it  
16 isn't even what they stated in the public utilities  
17 meetings that were happening in Winner and I believe Reva  
18 was the other one.

19 They said that all high consequence areas would  
20 have nearly three-quarter-inch thick pipeline plus under  
21 the road same statement. Under the roads and high  
22 consequence areas would have nearly three-quarter-inch  
23 thick pipeline. And now they're not doing that.

24 They stated several times that they will make  
25 and build the safest pipeline ever, and they've

1       downgraded the wall thickness of the pipeline. I don't  
2       think the two go together.

3               They are not intending to build the safest  
4       pipeline ever. And they should not be re-permitted to  
5       build this pipeline.

6               I have a lot of other things that I could go  
7       into, but I'm not going to. I would appreciate that you  
8       would open up the public comment and that all intervenors  
9       be allowed to have their say in these proceedings.

10              Thank you.

11              CHAIRMAN NELSON: Thank you.

12              Moving down the list of the four, Mr. Dorr.

13              MR. DORR: My name is Gary Dorr. My name is  
14       Gary Dorr. Can you hear me?

15              All right. In relation to the TransCanada  
16       Motion to Preclude, I'd just like to make some comments  
17       as an average everyday citizen here listening to what's  
18       being said and what's being presented to the Commission.

19              Mr. Taylor had said that they wanted the scope  
20       limited at the outset of this process. They asked for  
21       the Stipulation that we reference the number and the  
22       paragraph. Later on Mr. Taylor made a statement that he  
23       said what do you say about -- or he said -- he said the  
24       system grinds to a halt if we fail to answer these  
25       questions.

1           I take objection to that. TransCanada's  
2 compliance with the Commission's Order is what ground to  
3 a halt. They did not comply with the Order. And  
4 Ms. Edwards stated all parties have to say the number and  
5 the condition that they're talking about.

6           We asked that question. One of our Intervenors  
7 asked that question. That was not what TransCanada did.  
8 There is nothing in the Order that stipulates contention  
9 questions. There's nothing in there.

10          So when that argument was made earlier that  
11 TransCanada said, well, these are contention questions,  
12 that's not in the order.

13          Mr. Taylor said that -- he made a reference  
14 that -- he said that they could have asked questions what  
15 do you say about number 1? What do you say about number  
16 2? That would be preposterous, he said.

17          Is that what I did? What I did was  
18 preposterous? Asking every single question that I had  
19 relating to a number and a paragraph in compliance with  
20 the Order? That's the position if you take to overturn  
21 this that you're going to put me in. That I complied  
22 with it, and I did something preposterous.

23          TransCanada had that opportunity to ask every  
24 single question. Number 1, number 2, number 3, number 4,  
25 the same opportunity that I had, and I took advantage of

1 it by asking by certain question numbers and paragraphs.

2 On the part about disclosing witnesses, with  
3 regard to the prefiled testimony -- and, again, this is  
4 from an average everyday citizen reading what's been put  
5 out, the orders.

6 The wording of the Order for the prefiled  
7 testimony did not indicate that prefiled testimony was  
8 the only opportunity to name witnesses.

9 There was also some talk about that that was the  
10 time the deadline was for rebuttal witnesses. That Order  
11 does not say rebuttal witnesses. That wording is not in  
12 there. So for me as an average everyday citizen reading  
13 what the orders have been put out, again, if you deny me  
14 the right to present evidence and testimony, now you're  
15 putting -- now you've just worked against me as a  
16 Commission. So heaven help anybody else that comes to  
17 this process for another issue this happens to them.

18 You said you're here for the responsibility of  
19 the people. I am one of the people. I'm an average  
20 everyday citizen. I'm following the orders. So if you  
21 grant this motion to deny me the right to present  
22 evidence and testimony, it's going against everything  
23 that you've put out that I've read as an average everyday  
24 citizen, not as a lawyer.

25 And, again, on the prefiled testimony and the

1 witnesses, there's a pending deadline for presenting  
2 witnesses. I'm still in compliance with that. I'm  
3 compliant with your Order that you have for -- I believe  
4 it's April 21 to provide witnesses. So now which  
5 order -- if you deny me the motion -- or if you grant  
6 this Motion to Preclude me from providing witnesses and  
7 testimony, what happens on April 21?

8           There's nothing that says that's rebuttal  
9 witnesses. So if you grant this motion today, you're  
10 denying me that right based on your own Order.

11           And, again, going back to the wording of the  
12 Order, the prefiled testimony, the language said "may."  
13 The word is in there, M-A-Y. May file by the deadline,  
14 words to that effect. It doesn't say shall.

15           So I was under the impression that we could  
16 either provide a prefiled testimony or at the deadline of  
17 April 21 we could file our witnesses and our testimony.  
18 Or we didn't have to file prefiled testimony. But  
19 there's nothing in there that indicated that if we did  
20 not, then we wouldn't be able to offer anymore  
21 testimony.

22           So as an average everyday citizen I'm looking at  
23 this, and I'm wondering, well, how am I supposed to  
24 comply with all of these rules that are flying around and  
25 then we have TransCanada coming up here saying that I

1        didn't follow the rules?

2                Your intentions behind the orders may have been  
3        there, but the wording to the average everyday citizen  
4        did not come through.

5                We have a term in the army -- I served 11 years  
6        in the army. We have a term; it's called RTFM. Read the  
7        fricking manual. That's what I'm doing here, and I'm not  
8        seeing what's being argued here.

9                The other thing is Mr. Taylor and I are still in  
10       communication. In fact, if I had had time to talk with  
11       him this morning when I walked in, I was getting my  
12       thoughts together, I would have talked to him some more.  
13       We're still communicating about discovery. That process  
14       is still ongoing.

15               So I think what this goes back to was the fact  
16       that -- and I'm not trying to be offensive here, but this  
17       is a knee-jerk reaction on the part of this Commission,  
18       setting this deadline, schedule, which has put -- we're  
19       still in communication with TransCanada.

20               And so now these deadlines have become  
21       unrealistic. It's becoming obvious. We heard about the  
22       discovery process is not going the way it was intended  
23       to. And the reason is because the deadlines are  
24       unrealistic. We're still holding to that May 5, that  
25       May 5, 6, and 7. Your intentions of holding that are not

1 taking into consideration the fact that this process is  
2 not working because the deadlines are unrealistic.

3 I also filed a response to TransCanada. I'd  
4 like that noted for the record. I have more reasoning in  
5 there. But for now I would just like to make that note  
6 to the counsel that I'm an average everyday citizen. I'm  
7 reading the fricking manual, and I don't see what it is  
8 that -- what's being argued here today.

9 So for that I ask that you deny this Motion and  
10 allow me to present witnesses and testimony and allow me  
11 to present according to the deadlines that have been set  
12 by the Commission.

13 Thank you.

14 CHAIRMAN NELSON: Mr. Dorr, I'm just going to  
15 interrupt. I've got to ask a question that will help me  
16 as we move forward.

17 You made an issue of the word "may" versus  
18 shall. And I'm looking at the Order, and I'm not seeing  
19 the word "may." So where are you looking to find that?

20 MR. DORR: I thought it said may. There's  
21 somewhere in there that says may.

22 CHAIRMAN NELSON: Here's what I'm going to do.  
23 I'm going to let you find that, and we'll come back to  
24 that before we conclude.

25 MR. DORR: And I may be wrong.



1           CHAIRMAN NELSON: I'd love to see that. Thank  
2 you.

3           Are you concluded?

4           MR. DORR: Yeah. No more questions for me?

5           CHAIRMAN NELSON: Not at this point. There  
6 might be later.

7           COMMISSIONER HANSON: I'll ask one.

8           CHAIRMAN NELSON: Go ahead.

9           COMMISSIONER HANSON: I'll ask one as long as  
10 you're here.

11           Mr. Dorr, I'm surmising from your testimony  
12 right now that you intend to call witnesses?

13           MR. DORR: Yes. And part of my communication  
14 with TransCanada I have disclosed some of those  
15 witnesses. And I also in my speaking with Mr. Taylor  
16 disclosed that I will comply with the April 21 deadline  
17 to provide the list of witnesses and exhibits.

18           So, you know, no one's been prejudiced here. If  
19 anything, TransCanada, as I noted in my response, should  
20 be allowed to present witnesses on April 21 and testimony  
21 up until the 21st. Nobody's prejudiced in that case.

22           But in this case if this allows to go forward  
23 and I'm denied, now I'm being prejudiced because I can't  
24 even meet the deadline that you've set.

25           COMMISSIONER HANSON: Thank you.

1           CHAIRMAN NELSON: I'm going to ask a follow-up  
2 question on that line.

3           When did we set that May 21 deadline?

4           MR. DORR: April 21?

5           CHAIRMAN NELSON: Yeah.

6           MR. DORR: For witnesses?

7           CHAIRMAN NELSON: Yes.

8           MR. DORR: I'm not sure, sir.

9           CHAIRMAN NELSON: Thank you. Any other  
10 questions at this point?

11           If not, thank you. We may have questions later,  
12 but thank you.

13           The fourth person on the list, Carolyn Smith.  
14 Ms. Smith here? Represented?

15           Not.

16           Okay. We are going to go then to Yankton Sioux  
17 Tribe, who is the next mentioned in the --

18           Actually just hang tight.

19           Here's what we're going to do. The Commission  
20 has another matter that needs to be resolved that's going  
21 to take about 20 minutes worth of time. And so we are  
22 going to take a 20-minute recess at this point, come back  
23 at 10 minutes to 12:00.

24           And, Thomasina, we will kickoff with you at that  
25 point.

1 MS. REAL BIRD: Okay. Thank you.

2 CHAIRMAN NELSON: We are in recess.

3 (Discussion off the record)

4 CHAIRMAN NELSON: Okay. We've just had a little  
5 sidebar up here. I think we're going to extend this to  
6 about a quarter after 12:00. I'm going to give everybody  
7 just a little bit of time. If you want to go out and get  
8 lunch, you'll have to do it quickly.

9 12:30? 12:30 we will be back.

10 (A lunch recess is taken)

11 CHAIRMAN NELSON: Thomasina Real Bird, have you  
12 joined us? Thomasina, I'm not hearing you.

13 Okay. Here's what we're going to do. We're  
14 going to move past her. Certainly we'll come back to  
15 her. And we will move to Cindy Myers.

16 Cindy, do you have any response? And we are  
17 working right now on the Keystone's Amended Motion to  
18 Preclude certain Intervenor's from offering evidence or  
19 witnesses at hearing and to compel discovery.

20 Go ahead, Cindy.

21 Not hearing you. Cindy Myers. Cindy, we're not  
22 hearing you. I'm assuming maybe you're trying to call  
23 back in.

24 We're going to go to Mr. Dorr. Do you have an  
25 answer to the question I asked a little bit earlier,

1 regarding the "may" versus "shall" in our Order as it  
2 relates to prefiled testimony?

3 MR. DORR: Yes. Let me grab something.

4 This is Gary Dorr. Can you hear me?

5 Thank you, sir. I do have an answer for you.

6 January 9, 2015, in a letter from John J. Smith,  
7 Commission Counsel, to all parties in the Docket  
8 HP14-001. Let's see. It says here --

9 CHAIRMAN NELSON: While you're looking for that  
10 I'm just going to ask Mr. Smith is the letter he's  
11 referring to, is that posted in the Docket?

12 MR. SMITH: I do not know.

13 MR. DORR: Yes, it is, sir. That's where I got  
14 it from.

15 CHAIRMAN NELSON: Okay.

16 MR. DORR: Hold on. I just saw it here.

17 CHAIRMAN NELSON: Okay. It is filed in the  
18 Docket on January 9.

19 So go ahead, Mr. Dorr. Tell us where you're  
20 referring to.

21 MR. DORR: Okay. Hold on.

22 Okay. Maybe it's not. I thought I saw it  
23 there. I must have mistaken. I just looked it up, and I  
24 thought I had it here.

25 Yeah. I'm mistaken, sir. So I'll have to

1       exclude that.

2               CHAIRMAN NELSON: Thank you. And I appreciate  
3 your taking the time to try to find that. Because we  
4 want to make sure that we're looking at the right stuff.

5               MR. DORR: Okay. You did ask me also for the  
6 dates on some of the orders.

7               On December 17 the PUC Order ordered and it had  
8 wording that said prefiled direct testimony and prefiled  
9 direct rebuttal testimony. There's no mention of a  
10 witness list on the December 17 Order.

11              On the 2nd of April PUC Order now we see the  
12 term "witness lists." And that was the April 21  
13 deadline. So I don't know if you've been rid of the  
14 rebuttal testimony deadline now because it's not listed  
15 again or what happened in between there. But now I'm  
16 dealing with as the average citizen the April 21 deadline  
17 for the witness list as requested by Kristen Edwards and  
18 you passed an order.

19              CHAIRMAN NELSON: Thank you. And I appreciate  
20 you clarifying those deadlines. I guess my response to  
21 that would be on April 2 the Order that was in effect on  
22 April 2 that we issued on December 17 indicated that  
23 April 2 was the deadline to have prefiled testimony  
24 filed.

25              And my understanding is you did not have that

1 filed by that date. And so any argument that you're  
2 making that it really should have been the 21st, you  
3 didn't know that until April 2. And so you couldn't have  
4 relied upon that April 21 date that you were arguing  
5 earlier.

6 MR. DORR: But I did file some prefiled  
7 testimony.

8 CHAIRMAN NELSON: Okay. And certainly that will  
9 be taken into account.

10 MR. DORR: Okay. And then the other thing I  
11 would add to that is you also issued an order for  
12 discovery on all parties. There's no -- there's nothing  
13 that says you have to file discovery, and some of the  
14 parties have not filed -- have not requested discovery  
15 upon anybody.

16 Are we going to exclude them now because they  
17 didn't comply with the Order? There's no exclusionary  
18 language here or any language that says if you don't, you  
19 can't. All it said was is there was a deadline.

20 CHAIRMAN NELSON: Okay. And that's the question  
21 that we're here to resolve. So I appreciate -- thank  
22 you. I appreciate your time.

23 MR. DORR: Thank you, sir.

24 CHAIRMAN NELSON: We're going to go back  
25 around.

1           Thomasina Real Bird, are you on the phone?

2           MS. GUSTAFSON: She's having difficulties. Are  
3 we on the bridge? Tina seems to think we lost the  
4 bridge.

5           CHAIRMAN NELSON: Let me ask you, is there  
6 anybody on the telephone?

7           Okay. Yeah.

8           Okay. For the folks on the internet we're going  
9 to have to hold on for a second. We've got to get our  
10 telephone bridge back.

11          Okay. I think we've got the telephone bridge  
12 back up so anybody out there that needs to be calling in  
13 give it a try again.

14          Okay. Mr. Dorr, you found what you thought you  
15 had earlier?

16          MR. DORR: Yes, sir.

17          CHAIRMAN NELSON: Everybody on the phone just  
18 hang tight. We've got a little more testimony here in  
19 the hearing room from Mr. Dorr.

20          Go ahead.

21          MR. DORR: Okay. It says in here although at  
22 some point parties --

23          CHAIRMAN NELSON: Okay. And which document are  
24 you referring to?

25          MR. DORR: This is the John J. Smith letter of

1 January 9, 2015, from the Commission.

2 CHAIRMAN NELSON: Okay.

3 MR. DORR: And he writes in the third sentence  
4 "Although at some point parties may file discovery  
5 requests and responses as exhibits to a motion or  
6 prefiled testimony or offer them into evidence at  
7 hearing, discovery documents don't have to be filed with  
8 the Commission during the discovery process."

9 So the word may is in there. And as an average  
10 everyday citizen that's what I read. So this is  
11 something that's been in my mind. It came to mind when  
12 you -- when we brought this up. So in my mind there is a  
13 "may." And it's from your counsel. And that's from  
14 January 9. So this has been somewhere in the back of my  
15 mind. It doesn't say "shall." It says "may."

16 CHAIRMAN NELSON: Thank you. I appreciate that.

17 MR. DORR: Thank you, sir.

18 Okay. We're going to see if our telephone  
19 bridge is working now.

20 Thomasina Real Bird, have you joined us?

21 MS. REAL BIRD: Yes, Mr. Chairman. I'm on. And  
22 I apologize for the connection problems. I've tried  
23 several times.

24 CHAIRMAN NELSON: I'm just going to hold for a  
25 second. Katlyn, can you make sure that mic. is off?



1           Okay. And, again, everybody that's on the phone  
2 except for Thomasina, if you would put your phones on  
3 mute because we're getting some background. And with  
4 that -- let me say to everybody we had a little confusion  
5 over how long our break was going to be.

6           That's because we can't consult on those things  
7 ahead of time. So we're running on the fly. And we  
8 obviously had some differences of thought as to what that  
9 ought to be. So, hence, kind of the confusion  
10 beforehand. But we're back.

11           If there's anybody that is on the telephone that  
12 has an internet playing in the background, please shut  
13 the internet off because we're getting feedback.

14           Okay. We're going to go ahead and try this.

15           Thomasina, are you ready to make your case?

16           MS. REAL BIRD: Yes, Mr. Chairman.

17           MR. CHAIRMAN: Go ahead.

18           MS. REAL BIRD: Thank you to Katlyn on your  
19 Staff for helping to troubleshoot the connection  
20 problems. She's been great and we've been in contact and  
21 I'm glad to be connected now. Thank you.

22           So the Tribe opposes TransCanada's Motion to  
23 Preclude Certain Parties, including the Yankton Sioux  
24 Tribe. On December 17, 2014, the Commission entered a  
25 discovery order, and it mandated that in all discovery

1 requests parties shall identify by number and letter the  
2 specific condition or finding of fact addressed.

3 There were no exceptions for TransCanada. There  
4 were no exceptions for contention Interrogatories. And  
5 there's not even a description of what contention  
6 Interrogatories are in the codified laws. Nor whether  
7 the use of these contention Interrogatories would somehow  
8 elevate the Applicant above every other party or above  
9 the Commission's own order.

10 So on December 18, 2014, TransCanada did submit  
11 its Interrogatories and Requests for Production to the  
12 Tribe. Yet it failed to comply in any of its requests  
13 with the Commission's discovery order.

14 We did hear earlier from TransCanada the  
15 attorney that mentioned that parties cannot ignore the  
16 Commission's order. And so here we have the Applicant  
17 that is the party that requested the Order in the first  
18 place yet it failed to abide by that discovery order.  
19 And now it seeks to take the extraordinary remedy -- or  
20 the extraordinary act of precluding Yankton's and others'  
21 testimony and evidence just because Yankton pointed out  
22 to TransCanada that, hey, you didn't comply with the  
23 Commission's own Order and the Order that you requested.

24 Yankton, nor any other party, should be punished  
25 in this way. It's not appropriate, and it's not

1 supported by the codified law.

2 So on February 6 the Tribe did submit its  
3 answers and objections to TransCanada. In its objections  
4 the Tribe rightfully objected to each of the Applicant's  
5 requests in good faith. And one of the grounds listed  
6 was that the Applicant failed to comply with the  
7 Commission's discovery order of December 17. That's a  
8 valid and objectionable ground for not complying with a  
9 court or a Commission's order.

10 There were other grounds that the Tribe set  
11 forth in its objections. There were grounds on  
12 privileged and that discovery was ongoing and that the  
13 Tribe had not yet compiled all of its information.  
14 Because the Tribe was still formulating its case. Still  
15 is. All the parties are.

16 So then on February 12 the Applicant sent a  
17 letter to the Tribe and said the Tribe didn't comply with  
18 the South Dakota Rules of Civil Procedure and it  
19 requested the Tribe respond. However, TransCanada  
20 through that letter did not remedy the deficiencies that  
21 the Tribe pointed out to us -- pointed out to it.

22 Instead it threatened that if the Tribe did not  
23 make an effort to respond, it would seek protection  
24 including dismissal of the Tribe's Petition. Clearly,  
25 TransCanada refused to engage in good-faith discussions

1 when it did not respond to our specific objections, which  
2 we still think are valid objections.

3 There was never an attempt by TransCanada to  
4 respond or engage. It simply responded in what I can  
5 describe as a very aggressive manner. Seeking to exclude  
6 or preclude a party from presenting its witnesses and  
7 exhibits at the hearing. That's not supported by the  
8 law, and that's not supported by what has been happening  
9 here.

10 And so it did just that. It filed a Motion on  
11 March 23 seeking to preclude Yankton and other parties.  
12 Again, this is a departure from the Rules of Civil  
13 Procedure, and the Tribe thinks it's inappropriate at  
14 this point.

15 So on April 1 the Tribe did send a letter to  
16 TransCanada concerning both parties' discovery responses  
17 and specifically the Tribe's discovery responses we do  
18 reiterate again that TransCanada has still failed to  
19 remedy the deficiency contained in each of those  
20 requests. It still has not provided us with a specific  
21 Permit Condition or a Finding of Fact.

22 And I'm not belaboring this point to take up  
23 time, but this was TransCanada's own request, that the  
24 discovery order contain the specific requirements. And  
25 now TransCanada attempts to sweep it under the rug or say

1     that, you know, these were contention Interrogatories  
2     and, you know, it's ridiculous that they should have to  
3     comply.

4             Well, it's not ridiculous. This is the Order  
5     that they requested and that they received and that if  
6     parties are going to include these as bases for objection  
7     as the Yankton Sioux Tribe has it should not be precluded  
8     from providing its witnesses or evidence at the hearing  
9     because it was simply trying to hold the Applicant to the  
10    order that the Commission had entered.

11            So we did notify TransCanada through that  
12    April 1 letter that we won't be calling expert witnesses  
13    and that we will be providing an exhibit and witness list  
14    as required by the Order of the Commission. And that was  
15    the same response we received from TransCanada is that it  
16    would -- you know, it would provide an exhibit list by  
17    the deadline.

18            And so, you know, we're not -- you know, we're  
19    not asking -- I'm sorry. Let me back up. Let me finish  
20    with that letter.

21            So the April 1 letter we did conclude it by  
22    stating that if you continue to have additional and  
23    specific concerns regarding our discovery responses,  
24    please detail those to us in writing. Otherwise, we  
25    trust that this response fully addresses your concerns.

1           Because the Tribe has never and still has not  
2       received TransCanada's detailed concerns to our discovery  
3       responses. Again, the only response we received to our  
4       objections was that, well, we're going to seek to have  
5       your Petition dismissed and you can no longer be a party.

6           So, you know, that's a great departure from any  
7       discovery process that I've ever been engaged in to have  
8       a party respond so aggressively to threaten to seek to  
9       have us excluded, and that's concisely what it's seeking  
10      to have done today.

11          So after that letter we did not receive a  
12      response. And considering our final concluding remarks  
13      to TransCanada, we did trust that TransCanada was  
14      satisfied with the Tribe's response, you know, that we  
15      were not going to provide an expert witness and that our  
16      exhibit list would be provided by the deadline.

17          And, you know, we're still being targeted by  
18      TransCanada as a party it seeks to preclude. And I'm,  
19      quite frankly, appalled that TransCanada continues to  
20      push this issue considering the Tribe did file prefiled  
21      and has not violated any order with respect to its  
22      witness and intends to comply with the witness and  
23      exhibit deadline set for April 21.

24          TransCanada's request is not grounded in the  
25      laws of civil procedure, and it would certainly prejudice

1 Yankton as a party when we have engaged in the process.  
2 We've submitted an answer and objection. These were  
3 probably -- well, I know these weren't the answers and  
4 objections that TransCanada wanted to receive, but the  
5 next step is not to preclude a party from offering  
6 witnesses and exhibits.

7           The next step would have been to detail its  
8 concerns with our objections, tell us why it doesn't  
9 think privilege applies, tell us why it thinks it needs  
10 to know our trial preparation at this stage when it's  
11 still being formulated, tell us why it failed to meet the  
12 Commission's discovery order. You know, supplement.  
13 Tell us which numbers it's specifically wondering about.

14           Again, that's the request that TransCanada made,  
15 not any other party. And when it's being held to task it  
16 says that -- I heard it earlier he said it was  
17 preposterous to have to go back and do that, but that's  
18 the Order it asked for. And so the parties that stood up  
19 for that are being targeted in this way, this very  
20 aggressive way.

21           So now TransCanada wants to jump to the  
22 extraordinary and prejudicial step of excluding the Tribe  
23 from offering exhibits and witnesses. There's no basis  
24 in law. In fact, the codified law, that 15-6-37A, states  
25 the next step is for an order compelling an answer and

1 reasonable expenses.

2           The codified laws do not include the remedy of  
3 preclusion of a party from offering exhibits or  
4 witnesses, unless that party has acted without  
5 substantial justification. And here the Tribe has  
6 substantial justification. The Tribe nor any party  
7 should be required to answer without objection to those  
8 discovery requests that do not comply with the Commission  
9 Order.

10           And also we have other objections, the  
11 privileged burden, et cetera. And, you know, like any  
12 party, the Tribe is and it was and is still shaping its  
13 case. Discovery is ongoing. And to grant TransCanada's  
14 relief would be highly prejudicial. And I just have to  
15 note that it would serve as an appealable issue. You  
16 know, exclusion of witnesses and exhibits is one of the  
17 most appealed grounds and one of the most, you know,  
18 reasons for a reviewing court to overturn.

19           So I just -- it's really -- to use TransCanada's  
20 word, it's preposterous to seek such an extreme remedy at  
21 this point when the Tribe has in good faith engaged, has  
22 not received that engagement back. TransCanada still  
23 doesn't tell us why it thinks, you know, our objection  
24 X, Y, and Z is incorrect here.

25           There's been no specific discussion on our



1 objections but a blanket response that we're going to  
2 seek to exclude you. That's not permitted by the law,  
3 and it shouldn't be permitted to stand here.

4           So if TransCanada does wish to challenge the  
5 Tribe's objection without engaging in these discovery  
6 responses, the codified laws state that it should have  
7 filed a Motion to Compel, not preclude. Because the  
8 Tribe's actions are permissible under the rules of  
9 procedure, no grounds exist to preclude the Tribe from  
10 offering any testimony or evident or otherwise limit our  
11 participation in the hearing.

12           TransCanada's concern as noted in the hearing  
13 from a couple of weeks ago that the Tribe has not yet  
14 provided it with a list of witnesses or exhibits, you  
15 know, the Tribe notified through its April 1 letter that  
16 it would not call experts and it also notified the  
17 Applicants that it would comply with the Commission's  
18 order regarding the deadline for witness lists and  
19 exhibit lists. And it still intends to comply with that  
20 deadline.

21           So TransCanada, therefore, has not been  
22 prejudiced by the Tribe's valid discovery responses and  
23 objections. In the event the Commission overrules the  
24 Yankton Sioux Tribe's position, it would be premature to  
25 limit the Tribe's participation. This is precisely why

1 the codified law provides for issuance of an Order to  
2 Compel that provides for the nonmoving party to comply  
3 with an order once the Commission has decided that it  
4 must provide that information. To jump to the  
5 extraordinary remedy of preclusion of a party, violates  
6 the Tribe's rights at stake here.

7 And I just want to touch shortly on prefiled  
8 witness statements. The PUC Order dated December 17 did  
9 not make mandatory the filing of prefiled testimony, just  
10 as it did not make mandatory the issuance of its  
11 discovery.

12 If a party chose not to issue discovery, it  
13 could have, and there were several parties that did not  
14 issue discovery. That doesn't mean that they should be  
15 precluded from participating.

16 And I would note that the Commission does know  
17 how to make certain actions mandatory, as it did so, for  
18 example, when it required all parties identify the  
19 condition or finding when issuing discovery. And a  
20 second and more recent example is when the Commission  
21 amended its Order making mandatory the filing of exhibit  
22 and witness lists.

23 The Tribe argues in support of those that wishes  
24 to present witnesses that were not offered in prefiled  
25 that it may do so because the filing of prefiled was not

1 made mandatory on the face of the Commission's own  
2 Order.

3 And, moreover, on the Administrative Rules, the  
4 written testimony rule applies to both testimony and  
5 evidence, but this rule expressly allows presentation of  
6 evidence that has not yet been prefiled. And so the  
7 Commission must read testimony consistently so that  
8 testimony must be allowed if not prefiled. And those  
9 citations are 22.06 and 22.07.

10 Thank you.

11 CHAIRMAN NELSON: Thank you.

12 Cindy Myers, have you joined us?

13 MS. MYERS: Yes. I'm here.

14 CHAIRMAN NELSON: And I'm not sure if you were  
15 listening when Keystone was making their case. They  
16 seemed to indicate that based on your latest filing with  
17 us that the issue may have been resolved.

18 Is that your understanding?

19 MS. MYERS: That is my understanding. And I  
20 would just like it to be noted in the record then that  
21 TransCanada no longer has compliance issues with me as an  
22 Intervenor.

23 CHAIRMAN NELSON: Thank you. Appreciate your  
24 clarification on that.

25 That, I believe, resolves or that is all of the

1 folks that were involved in that particular Motion.

2 COMMISSIONER FIEGEN: Do you think we could do  
3 an all mute again?

4 CHAIRMAN NELSON: We can. Once again, everybody  
5 that is on the telephone if you would please put your  
6 phones on mute.

7 Perfect. I think.

8 MR. GOLDTOOTH: Commissioner, this is  
9 Dallas Goldtooth on the phone. Can you hear me?

10 CHAIRMAN NELSON: Yes.

11 MR. GOLDTOOTH: I'd like to, if it's possible,  
12 add to my response. I know you called on me earlier.  
13 I'm one of the parties mentioned in this Motion.

14 CHAIRMAN NELSON: Very, very briefly. We've got  
15 to keep moving this afternoon. But very briefly.

16 MR. GOLDTOOTH: I understand.

17 I just want to make sure that, you know, on  
18 behalf of the other 17 folks that are endangered with me,  
19 I just really want to encourage you to not approve this  
20 Motion. I think that the fact that we didn't -- that I  
21 didn't, you know, respond to it and that -- any of  
22 TransCanada's requests or even offer prefiled testimony  
23 shouldn't exclude me from doing actually doing  
24 cross-examination on evidentiary hearings or actually  
25 testifying.

1           And also I don't know the other 17, but  
2           there might -- other folks might be still working on  
3           providing a witness list for the 21st. So I think it's  
4           premature to make a decision on that.

5           CHAIRMAN NELSON: Thank you.

6           Okay. We are now going to go to the groups that  
7           are affected by Keystone's Motion to Preclude Witnesses  
8           From Testifying at the Hearing who did not file prefiled  
9           testimony.

10          MS. HILDING: Who are they?

11          CHAIRMAN NELSON: Just hang on. We're dealing  
12          with some audio issues again.

13          Again, if you don't have your phone on mute,  
14          please do so. And do not have your computer on streaming  
15          this at the same time your phone's on.

16          Okay. Here's what we're going to do. The two  
17          groups that are affected by this Motion are Dakota Rural  
18          Action and COUP. And so we are going to go to Dakota  
19          Rural Action.

20          Mr. Martinez, have you joined us on the phone?

21          MR. MARTINEZ: Yes. I'm on the phone. I  
22          believe Mr. Ellison is going to go ahead and take this  
23          one.

24          CHAIRMAN NELSON: Yes. He's approaching. Thank  
25          you.

1           Go ahead.

2           MR. ELLISON: Thank you, Mr. Chairman,  
3 Bruce Ellison on behalf of Dakota Rural Action.

4           I want to echo -- begin by echoing a little bit  
5 of comments of Ms. Red Bird [sic]. It is interesting  
6 that TransCanada has come here seeking to preclude  
7 testimony and even parties who have been granted  
8 intervention without filing a Motion to Compel first,  
9 without getting an Order to Compel.

10          Chairman Nelson, you mentioned at the beginning  
11 that that was one of the problems that it took so long  
12 for some of the parties to file Motions to Compel.  
13 TransCanada hasn't even filed one yet. They are  
14 procedurally jumping over civil procedures that are  
15 designed to be implemented by our Legislature prior to  
16 seeking the extreme remedies that TransCanada is seeking.

17          So on behalf of Dakota Rural Action I would move  
18 to dismiss the Motions to Preclude as being an improper  
19 use of the Rules of Civil Procedure, being premature, and  
20 we shouldn't have to really address this thing further.

21          However, I will. I'd like to continue further  
22 with a quote from Commissioner Fiegen earlier today when  
23 an issue arose as to TransCanada's rights to present  
24 their case.

25          Commissioner Fiegen said TransCanada gets its

1 day in court just like all of you get your day in court.  
2 And here we are with TransCanada trying to preclude many  
3 of the people that have -- that this Commission has said  
4 are proper Intervenorors in this case.

5 Under your rules 20:10:01:15.05 it states that  
6 "Once the Commission has granted intervention a person  
7 granted leave in whole or in part to intervene is an  
8 Intervenor and is a party to the proceeding. As a party  
9 an Intervenor is entitled to notice of a hearing, to  
10 appear at the hearing, to examine and cross-examine  
11 witnesses, to present evidence in support of a person's  
12 interest, to compel attendance of witnesses," et cetera.  
13 Those are your rules.

14 On behalf of Dakota Rural Action we oppose this  
15 effort by TransCanada to deny the day in court to us, for  
16 witnesses that we have not yet been able to get  
17 statements from, from witnesses that we may not even be  
18 aware of that come forward between now and the time of  
19 the hearing, the documents that we are unaware of or have  
20 not been able to obtain as of yet become available to us.

21 I would like to take a moment. Mr. Taylor was  
22 telling some stories about all the different agencies  
23 that he's been in front of. Having recently been in  
24 front of the Nuclear Regulatory Commission and spending  
25 most of 2013 in front of DENR, we didn't have any of

1     these issues at those particular hearings.

2             We didn't have a question of prefiled testimony  
3     in front of the DENR on very complex matters. That  
4     Commission or that Board, the Mining Board, the Water  
5     Management Board, wanted to hold hearings in three days,  
6     four days. Now we're looking at three to four weeks  
7     because they have recognized that in order to give proper  
8     due process to the parties, that's the way it needs to  
9     be.

10            DRA did file written testimony. We also reserve  
11    the right to submit additional, as I mentioned, and with  
12    additional documents. Many of the people that we are  
13    considering calling are ranchers and farmers. This is a  
14    terrible season, has been for a while, time of year to  
15    get ahold of people, to get them to sit down, work on  
16    testimony, try and get drafts.

17            If they have to choose, as many of them have,  
18    between trying to get some kind of testimony in prefiled  
19    or taking care of their calves, you know which they're  
20    going to do.

21            But that should not preclude them. Because they  
22    have a regulatory right, rule right. They have a  
23    statutory right for intervention.

24            We are operating on an incredibly shortened  
25    schedule. Again, in front of the DENR both of the boards



1 waited until the parties were ready because they knew how  
2 important the proceedings were, and they wanted to get  
3 everything done completely and in a proper way that  
4 allowed for all of the parties to be heard fully.

5 Now DRA is a grass roots organization. We don't  
6 have billions of dollars like TransCanada does. I'm  
7 appearing pro bono. So is Mr. Martinez. Because these  
8 issues are important to us. But it also means we have  
9 limited resources. I'm a sole practitioner. I have  
10 nobody in my office to help me.

11 But I do -- am aware that our State Supreme  
12 Court has said that parties to a contested case  
13 proceeding are entitled to due process of law. Due  
14 process of law, I would submit to this Commission, must  
15 be based upon the reality of the circumstances of the  
16 respective parties to the case and the respective issues  
17 and circumstances of the case.

18 And including in that, as I mentioned, is  
19 extreme differences in resources. And we're not asking  
20 for special favors. We're just asking for an opportunity  
21 to get what our responsibilities are to be done.

22 DRA is doing the best that it can to prepare for  
23 trial. And we will continue to do that. What we would  
24 suggest is that equity has to be looked at, balancing of  
25 interests has to be looked at. We're talking about a

1 foreign transportation company that wants to use our  
2 state to transport this stuff versus the long range  
3 potential damage to water resources and agricultural land  
4 of the people of the State of South Dakota.

5 TransCanada should not be able to take advantage  
6 of its resources against individual Intervenors or even  
7 grass roots organizations like us that are doing the best  
8 that we can.

9 Our witnesses scatter across the state. There's  
10 places where there's no cellphone coverage unless  
11 someone's in their home at the moment you call and if  
12 they don't have an answering machine, you try and you try  
13 and you can't get ahold of them.

14 So we would submit that this is premature, and  
15 due process rights would allow for the parties to, in  
16 fact, go ahead, as do the rules.

17 DRA did challenge the written testimony  
18 requirement of this PUC. And, as I mentioned, in front  
19 of the DENR in an equally as complex of situation, no  
20 less, we didn't have written testimony. Everybody had  
21 enough to do to get ready for trial. And though the  
22 Mining Board and the Water Board recognized the right of  
23 Intervenors to participate, whether they knew how to deal  
24 with discovery rules or not.

25 Now TransCanada, interestingly enough, in its

1 response suggests that what we should do is seek a  
2 declaratory ruling from this Commission as to the  
3 requirement of written testimony as a precursor or  
4 prerequisite to presenting live testimony.

5 And TransCanada cites SDCL 1-26-15 and our rules  
6 20:10:01:34 and 35. Even if a statute or rule was not  
7 cited by us in raising this issue, that's what we're  
8 asking for. We're asking for a declaratory ruling from  
9 you. And we don't know if this issue's ever come up  
10 before. We haven't found it, if it has.

11 But, essentially, that's what we're doing. So  
12 we should have had a slightly different forum or  
13 something. Perhaps that's the case. I'll take  
14 responsibility for that.

15 TransCanada also suggests that if we have an  
16 issue either with this Commission's ruling on written  
17 testimony, why it feels it is authorized to go beyond the  
18 civil procedure rules and implement this written  
19 testimony requirement as a prerequisite to testimony. To  
20 present our situation in court, to raise this issue up  
21 and ask the Circuit Court for a declaratory judgment.

22 It would seem prudent to me as an attorney to  
23 even if our Supreme Court has said you don't have to go  
24 first to the PUC, you can come straight to the Circuit  
25 Court, we're in front of you folks. It seems to me

1 incumbent that we ask you first. We ask for a ruling on  
2 this particular matter and then consider going to  
3 Circuit Court.

4 Now if we do go to Circuit Court, we're going to  
5 need a stay. Otherwise, by the time we would get a  
6 ruling it would likely be moot. Just from the realities  
7 of how busy our circuit courts are and despite our  
8 Governor's efforts and Supreme Court's efforts to appoint  
9 more and more judges. It's just part of the reality.  
10 We're here to deal with the reality of the situation  
11 before you that we are presented with and simply ask that  
12 that be accorded.

13 I would imagine there could then be an appeal  
14 for the nonprevailing party. So perhaps this should have  
15 been stuck on the Motion for Stay, but it just seems  
16 incumbent to be raised here. I know the Commission has  
17 decided that. But I just wanted you to know some of the  
18 practicalities if we were to pursue what TransCanada has  
19 suggested.

20 On the issue of preclusion of the late  
21 Intervenors. Because, like I said, we're going to try to  
22 get the witnesses. We want to present them. You know,  
23 we do the best we can. But that happens. It happens in  
24 all litigation. We'll submit some testimony or put some  
25 person's name on the witness list that we haven't been

1     able to get that testimony from. TransCanada can try and  
2     claim some kind of prejudice, and then we can resolve it  
3     at that particular point if there are appropriate motions  
4     that are filed by TransCanada.

5             Intervenors, not only by the rule that I had  
6     cited to this Commission but under SDCL 1-26-18 Subpart 2  
7     admitted Intervenors have a right to present evidence.  
8     It doesn't say if you answer TransCanada's questions. It  
9     doesn't say if they don't file a Motion to Compel, they  
10    skip some steps and go right to a Motion to Preclude.

11            And I just want to comment instead of filing a  
12    Motion to Compel a couple of months ago what TransCanada  
13    did was sent out a letter threatening the parties. You  
14    don't answer our questions, we're going to move to  
15    preclude.

16            That's not a Motion to Compel. It may be some  
17    sort of notice, but it's not a Motion to Compel. They  
18    don't have an order to compel that they are saying  
19    Mr. Commissioners, Mrs. Commissioner, this order has been  
20    issued by you, you instructed this party to answer, they  
21    have refused to answer despite your order, now we're  
22    moving for a higher sanction.

23            We would submit that should the PUC side with  
24    TransCanada, they will be depriving a lot of Intervenors  
25    their rights to due process.

1           SDCL 15-6-43A states, as TransCanada noted, in  
2 all trials the testimony of witnesses shall be taken in  
3 open court, unless otherwise provided by this chapter or  
4 by the South Dakota Rules of Evidence.

5           TransCanada then claims that based upon this  
6 statute the contention that written testimony is not a  
7 prerequisite -- or it is a prerequisite is baseless.  
8 Well, we would submit really?

9           Where in SDCL 15-6-43A does it say that  
10 testimony from witnesses shall be taken in open court if  
11 they have provided written testimony? It says "or unless  
12 otherwise provided by this chapter."

13           I haven't seen any part of the SDCL Civil Rules  
14 of Procedure cited by TransCanada that says unless you  
15 provide prefiled testimony you can't be a witness.

16           The other part of this statute says or by the  
17 South Dakota Rules of Evidence. We have not heard a rule  
18 of evidence by which TransCanada can claim that prefiled  
19 testimony is a prerequisite. And I think that with just  
20 lay parties and the shortened schedule it's impossible.

21           Dakota Rural Action further objects to the  
22 imposition of the drastic sanction of exclusion. I've  
23 already given the arguments as to the failure of  
24 TransCanada to file -- to follow proper civil procedure  
25 rules to get us to this point. And they should be made

1 to go back and do it again, but the South Dakota Supreme  
2 Court has said, and we submit that sanctions as being  
3 sought by TransCanada are inappropriate and  
4 disproportionate. South Dakota Supreme Court has said  
5 the severity of a sanction must be tempered with  
6 consideration of the equities. Less drastic alternatives  
7 should be employed before sanctions are imposed which  
8 hinder a party's day in court and, thus, defeat the very  
9 objective of litigation, namely to seek the truth from  
10 those who have knowledge of the facts.

11 Our Supreme Court has said that the only way  
12 that such an extreme sanction, assuming the other parts  
13 of the discovery procedural rules have been followed,  
14 would be if TransCanada has shown willfulness, bad faith,  
15 or fault.

16 We've heard no evidence of that. TransCanada's  
17 not presented evidence as to each respective Intervenor  
18 that they want to preclude and show how it's bad faith  
19 and an intentional disregard for the rules.

20 Equitably there is no real prejudice that has  
21 been shown at all by TransCanada. And we strenuously  
22 object to such a seeking of extreme sanctions by a party  
23 that has continually violated the rules of civil  
24 discovery procedure.

25 Without filing a Motion to Compel, no Order to

1 Compel being sought or obtained, this is, in fact, a  
2 premature and possibly even I would suggest, with all due  
3 respect, not in good faith.

4 They want to limit -- prevent you from hearing  
5 the things that are most important for you to hear. And  
6 doing what all the nonlawyers in our state, maybe around  
7 the country, keep blaming us lawyers about; these lawyers  
8 playing all their fancy little legal tricks trying  
9 basically to deny us a day in court.

10 It's not right. It's not fair. We would ask  
11 that the Motion to Preclude against DRA and the other  
12 parties be denied, as well as the Motion to Preclude  
13 being dismissed and TransCanada instructed that it should  
14 go about the civil discovery procedure rules correctly  
15 and file a Motion to Compel if it thinks that's  
16 appropriate.

17 CHAIRMAN NELSON: Thank you. And if you'd shut  
18 the mic. off as you depart, that will help.

19 We will now go to COUP's representative,  
20 Mr. Gough.

21 MR. GOUGH: Mr. Chair, and for the record it's  
22 pronounced coup, as in counting coup InterTribal Council  
23 and utility policy.

24 I apologize again for the condition of my voice,  
25 but I very much -- I'll keep this brief.



1           I very much want to underscore second and adopt  
2 completely the arguments you just heard Dakota Rural  
3 Action, number one.

4           Number two, just to -- would he would like to  
5 present four or five witnesses in direct testimony. That  
6 was our initial hope.

7           We've had to cut that list down due to  
8 financing. We are not able -- we are not an organization  
9 budgeted by litigation. This is not what we normally do.  
10 We have risen to this extraordinary level to participate  
11 on behalf of our member Tribes in North Dakota,  
12 South Dakota, Nebraska, and Wyoming and are here to  
13 supplement what they have to say, compliment what they  
14 have to present.

15           So we've had to look very carefully at how we  
16 can afford to participate in this process. I am doing  
17 this work pro bono. We are not on salary for any of  
18 this.

19           In seeking to get funding for our expert  
20 witnesses we have sought funding to compensate them for  
21 their time, to cover for their travel. We have not been  
22 able to raise enough resources to do that appropriately.  
23 Basically have had to cut our witness list down  
24 considerably.

25           We would seek to deal with the leaks along the

1 pipeline, the impacts, potential impacts on the water  
2 resources of West River South Dakota. We are looking at  
3 \$50,000 to obtain the services of reputable water  
4 resource technologists. We do not have that. We,  
5 therefore, are going to have to more strategically use  
6 our resources. And in so doing we have selected three  
7 and we have named them and have provided a scope of what  
8 their testimony is likely to be. And we are fully  
9 preparing to have some written testimony submitted by the  
10 deadline of April 21.

11 We look at the rules that have just been  
12 discussed by Mr. Ellison, and we find nothing in  
13 South Dakota Statute compelling prefiled testimony  
14 anywhere, other than the Order that was issued. And,  
15 therefore, we could not find it under South Dakota Law  
16 bona fide. We believe that it is outside of the  
17 authority of the Commission to require this as a make or  
18 break option as to whether or not we can participate in  
19 this proceeding.

20 We fully intend to have everything in by the  
21 April 21 deadline and look to have our witnesses present  
22 in open court to actually present their testimony.

23 However, we reserve those rights in that same  
24 Motion in which we objected to the Commission's  
25 requirement for prefiled direct testimony by April 2. If

1 we have to offer our witnesses as rebuttal witnesses, we  
2 believe that the prefiled testimony for rebuttal  
3 witnesses is -- the word escapes me. It's not necessary.

4 We would be waiting to see fully the evidence  
5 and the testimony presented in court, presented before  
6 the board, Commission, and rebut at that point. We would  
7 then also like to underscore the failure of TransCanada  
8 to provide appropriate discovery either in form or in  
9 content in terms of their request to us.

10 I again would underscore the comments made  
11 earlier. They requested very specific kinds of  
12 Interrogatory requests, citing chapter and verse of  
13 conditions and findings, and yet they completely ignored  
14 their own request that was then put into the Commission's  
15 order. We complied with it in our Interrogatories to  
16 them. But they did not see fit to do so to us.

17 The material and content material that they did  
18 provide seemed dated and irrelevant to the particulars of  
19 our questions, and we have not in those terms completed  
20 discovery with them. They have failed to comply with our  
21 Interrogatories. So discovery is still going on and to  
22 get testimony prefiled in this case becomes an  
23 impossibility.

24 I would just close with requesting that you deny  
25 and dismiss both of TransCanada's motions that are before

1 the board at the moment, before the Commission at the  
2 moment, and ask that you compel and seek an order to  
3 compel TransCanada to comply with the Commission's  
4 initial Order, provide us with Interrogatories that cite  
5 conditions and findings that they're asking of us, and in  
6 the meantime deny and dismiss their motions.

7 Thank you very much.

8 CHAIRMAN NELSON: Thank you.

9 Keystone, brief rebuttal.

10 MR. CAPOSSELA: Mr. Chairman, excuse me. This  
11 is Peter Capossela with Standing Rock.

12 CHAIRMAN NELSON: Yes.

13 MR. CAPOSSELA: May I make a brief statement  
14 before Keystone conducts its rebuttal?

15 CHAIRMAN NELSON: I don't believe that you're a  
16 party to these motions. Am I incorrect?

17 MR. CAPOSSELA: Well, I think the Motion to  
18 exclude testimony could be interpreted as applying to any  
19 party who has a witness to testify at the May 5 hearing  
20 who did not prefile testimony for one reason or another.  
21 And Standing Rock may have a witness or two that fits  
22 that definition.

23 We did prefile testimony per the Commission's  
24 order, but we may have witness testimony that we're going  
25 to seek to put on at the hearing who did not prefile

1 testimony. And if the Motion is to be interpreted as  
2 prohibiting the Tribe from bringing forward those  
3 witnesses, then that's a concern of the Tribe.

4 CHAIRMAN NELSON: And in the Motion it does say  
5 "and any other party." So if you're in that situation, I  
6 will allow your statement.

7 Go ahead.

8 MR. CAPOSSELA: Thank you, sir.

9 I think that TransCanada probably is not in the  
10 best situation to request equitable relief in light of  
11 concerns that have been expressed by many Intervenors  
12 that TransCanada itself violated discovery rules. I  
13 think that's a consideration.

14 The other point that I'd like to make is this  
15 proceeding is about the Keystone XL Pipeline project.  
16 It's not about this Tribe's land or a ranch over there or  
17 a medical provider's concerns with public health or any  
18 of the things that the Intervenors are -- about the  
19 Intervenors. It's about Keystone.

20 And so the flow of information and the  
21 disclosure rightfully would be dominated by information  
22 flowing from the Petitioner, TransCanada, to the  
23 Intervenors. It's not about the Intervenors.

24 Now the Intervenors have identified concerns  
25 that they would like to raise and that perhaps would

1     affect the ultimate decision on whether the permit gets  
2     recertified, but it's about the Keystone XL Pipeline  
3     project.

4             And so in making decisions with respect to  
5     witnesses and discovery, I think it should be kept in  
6     mind that what this whole thing is about is TransCanada's  
7     Petition.

8             Some of the discovery requests and some of the  
9     tactics with respect to Motions to Exclude, especially as  
10    it relates to unrepresented parties, does strike one as  
11    heavy handed. And I just think that the decision on  
12    these motions should be made with that in mind.

13            Again, though, the main concern that the  
14    Standing Rock Sioux Tribe has is that we tried very hard  
15    to comply with all of the orders and the rules and have  
16    provided a lot of information in discovery and a lot of  
17    prefiled testimony, but there may be other testimony that  
18    we may want to put on too. The fact that it's not  
19    prefiled does not reflect any bad motives on the Tribe's  
20    side.

21            We're not trying to pull a rabbit out of our  
22    hat. We're just trying to put on our case as best we can  
23    under the time frames that exist. So we're not trying to  
24    do anything that would surprise TransCanada if parties  
25    put on testimony that has not been prefiled, but it seems

1 contrary to the spirit of the proceeding to exclude  
2 testimony that has not been prefiled, especially in light  
3 of the statutory rights that Dakota Rural Action  
4 articulated to the Commission with respect to putting  
5 forward evidence and testimony on the part of  
6 Intervenors.

7 So we're a little bit concerned of Standing Rock  
8 with the Motion to exclude evidence. I think ultimately  
9 over all TransCanada is simply not in the position to ask  
10 the Commission for equitable relief because it's trying  
11 to push the Intervenors around a little bit in the  
12 discovery process, as you're learning today. But thank  
13 you for letting me speak on the Motion.

14 CHAIRMAN NELSON: You're welcome, and I  
15 appreciate you speaking up.

16 MS. HILDING: This is Nancy Hilding. I want to  
17 speak on it also. And it will be quick.

18 CHAIRMAN NELSON: So are you in the same  
19 position that you're planning to offer testimony that you  
20 haven't prefiled?

21 MS. HILDING: I may. I'm not clear on  
22 whether -- if I'm offering evidence, I have to then stand  
23 on the stand and testify that I'm offering evidence? Do  
24 you know if I have to do that?

25 CHAIRMAN NELSON: Go ahead with your argument.

1 MS. HILDING: Okay. So this is actually not  
2 that. They list 17 people. One of them is Cindy Jones.  
3 If you check the service list, there is no Cindy Jones on  
4 the service list. There's a Cody Jones and a Cindy  
5 Myers.

6 So one of their people that they're asking to be  
7 excluded is nonexistent. They have Gena Parkhurst's name  
8 wrong. Her name is spelled with G-E-N-A. I've talked to  
9 her about it. She knows this is going on.

10 Okay. This has not been raised by anybody. In  
11 their cover letter when they sent out their  
12 Interrogatories on December 18 they had this clause. It  
13 wasn't in the Interrogatories. It was in the cover  
14 letter. "Please note that under South Dakota Codified  
15 Law 15-6-33A and 15-6-34B you have 30 days from the date  
16 of service to answer the discovery." They sent this out  
17 a day after you set the schedule, and your date for  
18 answering discovery was February 6, 30 days after  
19 January 6.

20 So the day afterwards. Besides sending out an  
21 Interrogatory that was not consistent with your order,  
22 they sent out misinformation to everybody, many of whom  
23 were not lawyers about when they had to answer.

24 Okay. So when you sent out your Order that you  
25 did for the December 17 hearing, you had an Order for



1     that, on that on the Certificate of Service your  
2     Certificate of Service said that you filed this  
3     electronically. It didn't say that you filed that order  
4     by mail.

5             CHAIRMAN NELSON: Ms. Hilding, we are on  
6     Keystone's Motion to Preclude witnesses from testifying  
7     at hearing who did not file prefiled testimony.

8             You indicated to me that that was your issue.  
9     And so if you want to argue that, this is your  
10    opportunity to argue that point.

11            MS. HILDING: Oh, okay. Well, they did not  
12    properly characterize my response to their discovery.  
13    We've had conversations. They're okay with my discovery  
14    responses. But they said that I did not intend to bring  
15    witnesses, and what my answer to the Interrogatory said  
16    is while not waiving my general objections, Nancy has no  
17    witnesses planned at this time but Nancy is investigating  
18    a couple of them and if allowed may add a few later or  
19    not.

20            So I never said that I wasn't going to never  
21    bring any witnesses. I said I didn't know at that point  
22    in time. So they mischaracterized me and put me in the  
23    wrong column for that. Their facts are wrong about how I  
24    responded to their discovery.

25            And so I just wanted to be -- but we've had

1 phone conversations, and they say they're okay with what  
2 I'm doing. Okay?

3 CHAIRMAN NELSON: Okay. Thank you.

4 Mr. Taylor, I think we are to you.

5 MR. TAYLOR: Thank you. Thank you,  
6 Commissioners.

7 First, I want to talk to the nature of our  
8 Interrogatories that have been beleaguered here today.  
9 The guts of our Interrogatories are in Interrogatory 5  
10 and 6.

11 Interrogatory 5 says "Identify by number each  
12 condition in Exhibit A to the Amended Final Decision and  
13 Order of June 29, 2010, that you contend Applicant  
14 TransCanada Keystone Pipeline cannot now or in the future  
15 meet."

16 So I could rephrase that Interrogatory. And I  
17 could have said 52 times.

18 CHAIRMAN NELSON: Mr. Taylor, I apologize.  
19 Folks, whoever's on the phone please put your phone on  
20 mute. We don't need to hear heavy breathing in the  
21 hearing room, which is what we're getting right now.

22 Thank you.

23 Mr. Taylor, you may go ahead.

24 MR. TAYLOR: Thank you. I could have said  
25 52 times what do you contend about Condition No. 1? What

1 do you contend about Condition No. 2? And the Complaint  
2 we'd be hearing today is that heavy-handed TransCanada  
3 submitted 52 Interrogatories that each of which we had to  
4 answer with respect to the conditions.

5 Interrogatory No. 6 says identify by number each  
6 Finding of Fact that you contend is no longer accurate  
7 because of change of factor circumstances, et cetera.

8 There are 110 of those. So I could have then  
9 added 110 Interrogatories saying do you contend that  
10 Interrogatory 1, et cetera, et cetera. The point's well  
11 made.

12 Contention Interrogatories, that's not a term  
13 that's contained in the statute. That's a term that  
14 lawyers use. This Interrogatory is a question aimed at  
15 you to explain to me what your contentions are with  
16 respect to this case. And that's all these are. Common  
17 practice.

18 Mr. Ellison's been around almost as long as I  
19 have. I'm sure that he has seen contention  
20 Interrogatories by the trainload, as I have, in my  
21 professional career.

22 Second issue: A Motion to Compel. That's a  
23 boogeyman argument that we failed to make a Motion to  
24 Compel.

25 Understand that our contention is that these

1     Intervenors failed to comply with your Order. They  
2     failed to comply with your Order in that they failed to  
3     answer Interrogatories by the date in question.

4             So are we obligated to make a Motion to Compel  
5     first, Dear Intervenor, you failed to answer  
6     Interrogatories? Dear Public Utilities Commission,  
7     direct these Intervenors to answer their  
8     Interrogatories?

9             I suppose we could have come here and done that.  
10     Instead we wrote them a letter and said answer the  
11     Interrogatories or we will seek to exclude your  
12     testimony -- seek to exclude you from the process -- from  
13     the hearing process.

14             A Motion to Compel is used to clarify, expand,  
15     settle interpretation discovery -- interpretation  
16     differences in discovery documents. It is not used when  
17     someone is in the face of the examiner and says we're  
18     just not going to answer your questions. So it's a  
19     boogeyman argument.

20             Now let's get around to the question of prefiled  
21     testimony. I have great sympathy with Intervenors who  
22     say, well, I didn't know what my case was going to be so  
23     I couldn't list my witnesses or, B, I didn't have the  
24     money or the time to put together my prefiled testimony.

25             This started in September. Applications for

1 intervention had to be in by October. Decisions on  
2 intervention by the Commission were made promptly and  
3 shortly thereafter.

4 Presumably, if you are a litigant who wants to  
5 come to court to contest the permit certification,  
6 Application of TransCanada, the day that you intervene  
7 you have in your mind some idea of why you are there.  
8 You don't get to come to court and say, well, I just  
9 don't like this project. There has to be a why don't you  
10 like it that goes with it.

11 It is self-evident in the arguments we've heard  
12 here today that a number of the Intervenors seem to think  
13 that if you intervene, then you can use the discovery  
14 process to your advantage to determine if there are  
15 arguments that you want to make, if there is a factual  
16 basis to contest the permit.

17 The whole purpose of formulating the contentions  
18 among the parties is is so that the process can pass  
19 along an expedient line to follow a time line, in this  
20 case clearly established by the Commission in December of  
21 2014, to accomplish all of these things.

22 COUP -- I'm sorry. COUP and DRA chose to say we  
23 don't have to file prefiled testimony because you don't  
24 have the legal authority to do that, to compel us to do  
25 that. And that's a bogus argument. Nobody's said yet --

1     there has been no logical, legal argument made to explain  
2     why you can't order prefiled testimony, which is exactly  
3     what you did.

4             And they tried to hedge their bet by adding a  
5     couple of paragraphs at the end of their Motion response  
6     saying but we may call this witness or that witness.

7             We heard from Mr. Gough out of his mouth the  
8     real explanation for why they didn't file prefiled  
9     testimony. Because they didn't have the financial  
10    resources or the time to get it done. That's the real  
11    answer.

12            Well, like the citizens of South Dakota and like  
13    the Intervenors in this case, TransCanada also has legal  
14    rights, and one of those legal rights is to know what the  
15    allegations are that are being made against its  
16    Application and to have, as due process requires, an  
17    opportunity to prepare to meet each and every one of  
18    those defenses that's raised against its Application.

19            And you set the time line to do that, and we  
20    complied with the time line to do that, and everybody  
21    else should be required to comply with the time line.

22            Last point: As to the Yankton Sioux,  
23    Ms. Real Bird, I think, is making an argument that the  
24    Yankton Sioux is entitled to some exception. But I don't  
25    understand why she thinks the Yankton Sioux is entitled

1 to an exception.

2 She answered her Interrogatories all right, by  
3 saying we don't have to answer them and then making due  
4 process objections, making objections as you're inquiring  
5 as to attorney work product.

6 Well, attorney work product is not to identify  
7 what it is that you contend that is wrong with our  
8 Application. Attorney work product are the memos in my  
9 file, the research work that I've done in my file.  
10 Asking a contention Interrogatory is not a attorney work  
11 product.

12 I don't know when we looked at those Answers to  
13 Interrogatories the first time around and thought what is  
14 this about. And the only conclusion that we could come  
15 to was is that Yankton Sioux had simply chosen that they  
16 weren't going to abide by the Commission's Order. And I  
17 don't know why that is. Very dangerous stance to take if  
18 you want to litigate a case and offer witnesses and  
19 testimony.

20 And then they kind of backed off from that. As  
21 we progressed along through the discovery cycle they did  
22 offer prefiled testimony of one witness.

23 And then last week I think sometime sent us a  
24 letter saying, well, here's the things we think are  
25 wrong. But the letter is not an invitation to meet and

1 confer. The letter is simply a bold-faced statement of  
2 this is what we think is wrong with your approach.

3 As you'll find out when we move into these  
4 ongoing discovery issues, meet and confer is nothing new  
5 for us. We have met and conferred and resolved discovery  
6 issues at every opportunity and as cordial and as  
7 meaningful way as we possibly can. Because, frankly, I  
8 don't want to be here today arguing about these things.  
9 What I want to do is prepare the case for trial and get  
10 it ready.

11 So I think the way this should end up, there are  
12 17 Intervenorors who have done nothing, including a few who  
13 spoke today. They forfeited their opportunity to  
14 participate in the hearing.

15 As to -- as to Mr. Dorr, who I kind of like,  
16 we've had an exchange of conversations, and I got to know  
17 him a little bit during the lunch hour today as we worked  
18 out some differences in linguistics. I'm sorry for  
19 Mr. Dorr that he misunderstood the Application of the  
20 Order, but that's part of the way it is.

21 As to DRA and COUP, both represented by able,  
22 capable, and competent lawyers. And if you're  
23 represented by an able, capable, and competent lawyer and  
24 you do not comply with the orders of the Commission, then  
25 you suffer the consequence. And the consequence should



1 be that their participation in the hearing should be  
2 accordingly limited.

3 And I think it also serves to moot in DRA's case  
4 its upcoming argument that it's entitled to compel  
5 discovery because if they can't call any witnesses and  
6 they can't participate in the hearing, their discovery  
7 issues are moot.

8 So I'd ask you to ignore the Motion to Compel  
9 argument -- it's, I believe, a boogeyman -- and to  
10 require the persons who ignored the orders of the  
11 Commission to pay the consequences of that.

12 Thank you.

13 MR. ELLISON: Mr. Chairman, may I just briefly  
14 respond to a false statement?

15 CHAIRMAN NELSON: We're going to keep moving.  
16 I'm going to open it up for --

17 I was asked a question about whether Staff ought  
18 to be able to offer some comments, and as I said at the  
19 beginning, when we get to this point I am inclined just  
20 to ask those who are directly affected to comment.

21 So with that, are there any Commission  
22 questions?

23 Go ahead.

24 COMMISSIONER FIEGEN: I just have a real quick  
25 one. For any of the 17 or the four or five -- especially

1 the lay people because in the beginning in December we  
2 talked about how hard this is going to be. And we know  
3 it's hard, especially for lay people. And we gave the  
4 phone number and the name of Kristine [sic] Edwards.

5 Did you guys continue to call her any time you  
6 had questions, concerns? Did she help you through that  
7 process?

8 Because we certainly gave her name out there for  
9 you. So just checking to make sure that you used that  
10 resource that we gave you.

11 MR. HARTER: John Harter. I did not. I don't  
12 believe I talked to Kristen at all. Mostly because what  
13 I'm doing, I'm usually putting in 15, 18 hours a day  
14 anyway. So what I put together today was done last  
15 night.

16 And, to be quite honest with you, going through  
17 this for eight years when about two or three days ago  
18 this stuff was going through my head what we were dealing  
19 with and whether it was just tension or what, I started  
20 getting a tightness in my chest. And whether that's  
21 because of just the anger of what we've had to be put  
22 through in this stuff, what TransCanada has put us  
23 through to take our property --

24 COMMISSIONER FIEGEN: And I know, Mr. Harter.  
25 It is a lot of work. I'm sorry. I just asked a quick

1 question about whether you used Kristine Edwards. But it  
2 is a lot of work.

3 Thank you for answering that question.

4 MR. HARTER: I guess you don't want to hear it  
5 then.

6 COMMISSIONER FIEGEN: I'm sorry. You answered  
7 the question, and that's all I had is if you worked --  
8 did you work with her anymore that I did not hear.

9 MR. HARTER: No.

10 COMMISSIONER FIEGEN: Okay. I just wanted to  
11 make sure that you had an opportunity to answer that  
12 question.

13 CHAIRMAN NELSON: Okay. There are several  
14 others that have their hands up. Do you want them to  
15 answer your question also?

16 COMMISSIONER FIEGEN: Yes. If they would like  
17 to answer the question if they worked with Kristine  
18 Edwards during this process. Especially the lay people  
19 that we gave them that opportunity to work with  
20 Kristine Edwards.

21 MR. RAPPOLD: We're not directly involved in  
22 this dispute, but I --

23 CHAIRMAN NELSON: Please identify yourself.

24 MR. RAPPOLD: I'm sorry. Matt Rappold on behalf  
25 of the Rosebud Sioux Tribe.

1           We're not directly involved in this dispute  
2   that's currently playing out in front of the Commission.  
3   However, in response to your question, Commissioner  
4   Fiegen, I've -- how should you say it? There's been some  
5   discussions taking place through e-mail communications  
6   and I have seen that various Intervenors that aren't  
7   represented by counsel have gone to Ms. Edwards for her  
8   advice on how to -- how to do certain things throughout  
9   this process.

10           I'd like to point out that the most recent, and  
11   I think it's going to be the last e-mail that I saw from  
12   Ms. Edwards in response to questions from Intervenors  
13   that are not represented and I'm going to have to  
14   paraphrase now is that I'm not your lawyer. I represent  
15   the PUC Staff, and I cannot give you advice on how to do  
16   this in front of the Commission.

17           That's what I wanted to add. Thank you.

18           COMMISSIONER FIEGEN: Thank you.

19           Any other questions or comments about procedure  
20   and how that was answered?

21           She's right. She can't give you advice. That  
22   wouldn't be good for her party.

23           MS. MYERS: This is Cindy Myers on the phone.  
24   Can I make a comment?

25           CHAIRMAN NELSON: We've got somebody at the

1 witness chair in the hearing room, and then we'll get to  
2 you.

3 MR. DORR: Gary Dorr.

4 The only knowledge that I have again was an  
5 e-mail that was passed on to me where Kristen Edwards  
6 stated that all parties had to comply with the Order from  
7 the PUC by referencing finding number or amended permit  
8 condition and paragraph.

9 COMMISSIONER FIEGEN: Thank you.

10 CHAIRMAN NELSON: Go ahead, Cindy.

11 MS. MYERS: This is Cindy. I'm an individual  
12 Intervenor and I've contacted Kristine a few times and  
13 she's been very helpful to me and she's made it clear  
14 about not giving advice but she's been very helpful about  
15 procedure-wise.

16 COMMISSIONER FIEGEN: Thank you. I appreciate  
17 that.

18 Of course, she can't give advice. I wanted to  
19 make sure she helped you with procedure because as a  
20 layperson that's difficult.

21 Thank you.

22 MS. MYERS: Yeah. Thank you.

23 CHAIRMAN NELSON: Other questions from the  
24 Commissioners.

25 COMMISSIONER HANSON: Thank you, Mr. Chairman.

1           Mr. Ellison, could I ask you just one quick  
2 question?

3           Are you aware of any case in which a court has  
4 found that disclosure of witnesses prior to trial has  
5 been found to be overly broad or unduly burdensome? That  
6 we saw considerably in the -- I'll call them briefs at  
7 this point. They weren't briefs, but they were motions  
8 back and forth between you folks.

9           Would you like me to repeat that?

10          MR. ELLISON: Yeah. I'm not sure that that was  
11 a position that we took on the written testimony. I'm  
12 not sure that that was a position we took on the written  
13 testimony. But offhand, no, I'm not aware of a case.

14          COMMISSIONER HANSON: Okay.

15          MR. ELLISON: But if I may just briefly correct  
16 the record, if I may, attorney for TransCanada said that  
17 Dakota Rural Action did not file written testimony. We  
18 did, in fact, both expert and lay. We just were not able  
19 to get everybody within the time frame that we would have  
20 liked to be there.

21          So the suggestion that we should be precluded  
22 from arguing our Motion to Compel, I won't say an  
23 adjective. Just improper and blithed by the record.

24          COMMISSIONER HANSON: Thank you.

25          And I have a question for Keystone as well. Two

1 questions, I guess, Mr. Chairman.

2 I believe it was Cindy Myers who stated that you  
3 had resolved the concerns between the two of you. Is  
4 that --

5 MR. TAYLOR: She wrote to us, and I don't  
6 remember when -- quite recently -- and said that she had  
7 made the decision not to call witnesses, which resolves  
8 that issue.

9 COMMISSIONER HANSON: Okay. So that's resolved.  
10 I can understand to an extent your Motion that  
11 the 17 parties would forfeit their right to submit  
12 testimony of witnesses, but it seems extensive to  
13 prohibit them from asking questions of other witnesses.

14 MR. TAYLOR: Examining witnesses.

15 COMMISSIONER HANSON: Right. As parties  
16 shouldn't they still be allowed to ask questions?

17 MR. TAYLOR: The scope and breadth of the  
18 sanction for noncompliance with discovery is within your  
19 discretion.

20 COMMISSIONER HANSON: Yes. But you advocated  
21 that they should not be allowed to. So I'm just giving  
22 that you opportunity, knowing that it seems to me that  
23 that's going beyond --

24 MR. TAYLOR: In my mind simply ignoring  
25 discovery responses is a pretty egregious offense when

1     you're in the process of trying to develop a case for  
2     trial.

3             In the civil court system if you sued somebody  
4     and they submitted a set of Interrogatories to you and  
5     you just ignored them, the judge would dismiss your case.  
6     The judge will dismiss your case. It will start and stop  
7     right there, send you home.

8             Maybe it's appropriate to allow those  
9     Intervenors who didn't answer to make an opening and  
10    closing statement. In my mind it's not appropriate for  
11    them to participate at all. But to allow them to simply  
12    say we aren't going to tell you, TransCanada, what our  
13    contentions are and then to come in and examine witnesses  
14    to develop their contentions and then to argue those  
15    contentions seems to be right in the face of the purpose  
16    of discovery in the first instance.

17            So, yes, I think it's appropriate that they not  
18    be allowed to examine witnesses. I mean, in effect, what  
19    they're going to do if some Intervenor chooses to not  
20    answer our discovery, not tell us what's on their mind  
21    but then to show up and examine witnesses -- and it's not  
22    just our witnesses. Presumably they could ask questions  
23    of other witnesses called by other parties -- then  
24    they're making their case through the back door without  
25    telling any of us what the case is.



1 COMMISSIONER HANSON: Thank you.

2 MR. TAYLOR: Thank you.

3 CHAIRMAN NELSON: I have a question also.

4 COMMISSIONER HANSON: I don't have anymore  
5 questions with you.

6 CHAIRMAN NELSON: I understand what you're  
7 asking for based on where everything sits today. But  
8 would you agree with me that if in some of the upcoming  
9 Motions to Compel we end up compelling Keystone to  
10 provide some additional discovery, that based on our  
11 April 2 order it may be possible for some of these  
12 parties, some of these Intervenors, to utilize that  
13 discovery that's been compelled to file testimony based  
14 on that by April 27 and, therefore, those folks would be  
15 allowed to offer evidence and testify at the hearing? Is  
16 that your understanding?

17 MR. TAYLOR: I can conceive of a circumstance  
18 where that would happen. It's possible, but it's not  
19 probable.

20 CHAIRMAN NELSON: And can you follow up and  
21 explain to me why it would not be probable unless we deny  
22 all of the motions this afternoon?

23 MR. TAYLOR: Because -- okay. Suppose you  
24 suggest to us that -- you say you're compelled to answer  
25 a question on subject X and we had not answered anything

1 ever. There was no -- nothing in the public domain  
2 anyplace to know anything about issue X.

3 In that case, yes, you compel us to answer that.  
4 We reveal for the first time in recorded history the  
5 answer to issue X and somebody wants to call a witness to  
6 testify on that subject, yes, I agree with you.

7 However, this is the most studied and -- there  
8 is -- I can't -- in my lifetime I can't imagine anything  
9 that has had more public exposure than this project. And  
10 for there to be an issue X, very unlikely.

11 You know, Commissioner Hanson, when he was  
12 Mayor Hanson once said to me in a Water Rights hearing in  
13 Sioux Falls anything is possible but many things are not  
14 probable. And that is precisely my point.

15 CHAIRMAN NELSON: Thank you. Appreciate that  
16 response.

17 Commissioner Hanson, Mayor Hanson, did you have  
18 anything further to add?

19 COMMISSIONER HANSON: I've got to be careful  
20 what I say is what.

21 Just a comment to Mr. Blackburn. Mr. Blackburn  
22 made a statement that the PUC does not allow persons to  
23 participate unless they're parties. I don't know if he  
24 misspoke when he stated that. However, the PUC does not  
25 require persons to be parties to the Docket in order to

1 participate. They can, in fact, give their own personal  
2 testimony. If they're not parties, they can't call  
3 witnesses and present evidence and cross-examine and go  
4 into those processes.

5           However, they are allowed to -- any person is  
6 allowed to participate from that standpoint. And I'm  
7 just assuming it was a misspeak, that I do agree with a  
8 number of things that he said. This is very complicated  
9 and the average person has challenges following the  
10 processes that we have.

11           Thank you, Mr. Chairman.

12           MR. SMITH: May I make one kind of clarifying  
13 condition to that?

14           CHAIRMAN NELSON: Yes.

15           MR. SMITH: And I think Commissioner Hanson used  
16 the word "testify." What we usually do is it's not  
17 testify because it's not evidence. It's comment. But we  
18 do allow that. We do allow --

19           And with these lay people I, frankly, don't know  
20 that there'd probably in most circumstances be much  
21 difference as to whether it's testimony or comment  
22 because usually what we hear is pretty much personal,  
23 emotional --

24           CHAIRMAN NELSON: Okay. That's about as far as  
25 I want to go with that. I'm not sure I would concur with

1       that.

2               MR. BLACKBURN:   Mr. Chair, this is  
3       Mr. Blackburn, representing BOLD Nebraska.

4               CHAIRMAN NELSON:   Yes.   Go ahead.

5               MR. BLACKBURN:   I think I remember we were  
6       involved in a 2009 docket that there was discussion at  
7       that time related to the role of public comment and  
8       testimony.   And the Commission decided that it would be  
9       allowed as part of the record, which we appreciated that.  
10      And it sounds like you're also saying that now public  
11      comment be part of the record.

12              I would note that there's a difference between  
13      this Docket and that Docket, however.   In that Docket the  
14      public comment period and the public hearing notices were  
15      all noticed by the Commission through formal notices  
16      that, you know, talked about when the public hearing  
17      would be along with public comment.

18              Here the Commission hasn't noticed any public  
19      comment or public hearing.   Even though the Commission  
20      doesn't allow and isn't required to have at this point a  
21      public hearing, meaning that -- apart from the  
22      evidentiary hearing, as happened last time.

23              Still I believe they should be on notice there's  
24      a public comment period open.   And I'm not sure the  
25      Commission has issued such notice.   At least I have not

1     seen it in the docket. I just wanted to point it out, at  
2     least that's why I said it.

3             It's not clear to me that public comments are  
4     necessarily on the record at this time, and it also  
5     wasn't clear to me there's been a formal public comment  
6     period noticed.

7             Thank you.

8             CHAIRMAN NELSON: Thank you.

9             Commissioner questions?

10            If not, we are open for motions, and you can  
11     either offer motions on both of these or take one at a  
12     time. And it might be easier to take one at a time. But  
13     whichever is your pleasure.

14            Well, in that case, I will -- and I'm going to  
15     confine my first motions to the Amended Motion to  
16     Preclude Certain Intervenor's From Offering Evidence or  
17     witnesses at hearing or to compel discovery.

18            On page 8 of that Keystone lists four really  
19     conclusions. And these are the four things that they are  
20     asking for, and so these are the four that I'm going to  
21     respond to in my Motion.

22            The first is that we are asked to preclude the  
23     17 Intervenor's who failed to respond to discovery from  
24     offering any testimony or evidence at hearing.

25            I am going to move to grant that. And I just

1 want to point out how limited the language is in what  
2 Keystone has asked for here because we've talked about  
3 that. But notice how limited that language is.

4 Secondly, preclude the four Intervenors who are  
5 still investigating their case from making lay  
6 disclosures for the first time after the close of  
7 discovery and, therefore, also precluding them from  
8 offering witnesses or evidence at the hearing.

9 I am going to move to grant that, but realizing  
10 the question that I just most recently asked Mr. Taylor,  
11 there is still, I believe, a window for additional  
12 witnesses to be added. I believe that window may be  
13 wider than what Mr. Taylor thinks, but it's there.

14 Number three, overruling the objections of the  
15 Yankton Sioux Tribe, thereby limiting its hearing  
16 participation. I am going to move to grant the Motion to  
17 Overrule the Objections of the Yankton Sioux Tribe. I'm  
18 going to move to deny limiting their hearing  
19 participation. And I am further going to move that the  
20 Yankton Sioux Tribe be ordered to comply with the  
21 discovery requests of Keystone by Friday, which is our  
22 deadline for any discovery coming out of today.

23 And point number four, dealing with Cindy Myers,  
24 I would move to grant, although I think that's a moot  
25 point as of now.

1 Discussion on the Motion.

2 I think we've pretty much talked through all of  
3 this. The only thing I think that I would elaborate on  
4 is with the Yankton Sioux Tribe I'm going to give them  
5 one more chance. I'm going to give them the next three  
6 days to get their discovery requests back to Keystone,  
7 give them one more chance.

8 I heard the arguments. I'm rejecting those  
9 arguments. But I'm giving you another three days to  
10 comply.

11 Further discussion.

12 COMMISSIONER HANSON: Mr. Chair.

13 CHAIRMAN NELSON: Yes.

14 COMMISSIONER HANSON: Perhaps you don't have to  
15 separate those motions. In the process of going through,  
16 would you -- I'm wondering whether you would be amenable  
17 to a change on the second item.

18 You wish to preclude the four -- or your Motion  
19 is to preclude the four Intervenor who are still  
20 investigating their case from making late disclosures for  
21 the first time after the close of discovery and,  
22 therefore, also preclude them from offering witnesses or  
23 evidence at the hearing.

24 And prior to hearing the testimony here, I would  
25 have agreed with you. I believe Mr. Dorr should be

1 placed in the same basket as the Yankton Sioux Tribe. I  
2 think that -- at least I had the impression that it was  
3 an innocent mistake on his part. And we are really  
4 attempting to be as sensitive to the challenges that the  
5 lay people have in this process.

6 Obviously, I made the statement hearing just now  
7 and it should have been comment. So the semantics are  
8 important. And I would like to see him as a part of that  
9 process as well.

10 CHAIRMAN NELSON: Let me -- let's just have a  
11 discussion on that.

12 I'm open to that. I don't have a hard and fast  
13 line here, but here's the thing that I'd like to point  
14 out. You know, Mr. Dorr was kind enough to find the line  
15 in the January 9 letter that he claims led him astray.  
16 And if you read just that sentence, I get his point.

17 But you've got to read the sentence before and  
18 the sentence after and understand the context in which it  
19 was written. And the sentence before said "We've had a  
20 few parties file their Interrogatories and their  
21 discovery requests in the Docket file and also in some  
22 cases sending them to the Commissioners."

23 Okay. So this was the issue, the fact that  
24 these things were being sent to the Commissioners. And  
25 so how did Mr. Smith respond to that. "Although at some



1 point parties may file discovery responses and requests  
2 as exhibits to a motion or prefiled testimony or offer  
3 them into evidence at hearing," in other words, that's  
4 how you properly get them to the Commission. Discovery  
5 documents are not to be filed with the Commission during  
6 the discovery process.

7 And so when you read that in the context in  
8 which that paragraph is read, I think it takes on a  
9 different meaning than if you read the sentence by  
10 itself.

11 Your thoughts.

12 COMMISSIONER HANSON: I don't disagree with you  
13 on what you're saying. I guess seeing someone and  
14 speaking to them in person is obviously different than  
15 hearing them over the phone. And I saw a lot of  
16 sincerity and attempt to -- I didn't see that he was  
17 trying to mislead us in the process.

18 I think that it was an honest mistake. I know  
19 that Keystone should not be prejudiced by his honest  
20 mistake, but I think that they're big enough boys to be  
21 able to handle it.

22 And I -- you know, it's -- it's challenging.  
23 There's a lot of things to read, and it's not his job, so  
24 to speak, to -- I'd argue on the other side, on your  
25 side, saying that if someone's a party to the Docket they

1 have a responsibility. And I can argue both sides  
2 without any problem.

3 But I just lean far enough on that that I would  
4 like to support your Motion in its entirety, but I cannot  
5 just on that particular portion. So if you'd separate  
6 that one out just in case there's a question on -- so  
7 that I could vote for the remainder of it.

8 CHAIRMAN NELSON: Thank you. And I'm going to  
9 ask Mr. Taylor a question at this point. And forgive me  
10 that I don't know this off the top of my head, but are  
11 there unresolved discovery issues with Mr. Dorr, things  
12 that he's not provided to you in discovery?

13 Because my understanding was your issue with him  
14 was he hadn't provided any prefiled testimony. I'm  
15 trying to figure out how analogous his situation is to  
16 the Yankton Sioux situation.

17 MR. TAYLOR: I don't know if I can answer the  
18 question. I have to think for a minute -- give me two  
19 minutes to consult with Mr. Dorr.

20 CHAIRMAN NELSON: Absolutely. While you do that  
21 I'm going to make another point that I should have made  
22 earlier.

23 Mr. Harter, you made the statement several times  
24 what are they afraid of hearing? What is Keystone afraid  
25 of hearing?

1           And I'm not going to be argumentative with you,  
2     but my response to you is by your filing prefiled  
3     testimony that was your opportunity to tell them what  
4     they needed to hear.

5           And you've waived that opportunity. And that  
6     brings us -- that's one of the reasons we've got this  
7     particular part of the Motion here is the fact that you  
8     waived the opportunity to do exactly what you've come  
9     here asking us to do.

10          And I will give you a moment to respond while  
11     Keystone does their -- go ahead.

12          MR. HARTER: So does this mean that I cannot as  
13     a -- even a person of the community put in my comments?  
14     Is that what you're saying? I can't do anything?

15          CHAIRMAN NELSON: No. If this Motion passes,  
16     you would be precluded from offering witnesses or  
17     exhibits during the hearing. That's the limit of the  
18     Motion.

19          MR. HARTER: But I can ask questions?

20          CHAIRMAN NELSON: Yes.

21          MR. HARTER: Fine with me.

22          CHAIRMAN NELSON: Okay. Well, apparently we've  
23     still got some discussions going on. And we encourage  
24     that.

25          Other comments from Commissioners?

1           MR. SMITH: Can I ask one quick, just so I  
2 understand. Because if I understand Mr. Taylor right  
3 earlier, he drew a distinction between the people who  
4 didn't respond at all.

5           And I understood his request for relief in my  
6 main reading of it until I heard him today that people  
7 would be precluded -- and this has -- this is not  
8 involving what you just were asked, John.

9           But with respect to the people who didn't  
10 respond at all, are they still allowed to -- does the  
11 term offering witnesses and evidence refer to their  
12 evidence, or does that also preclude them from  
13 cross-examining, if they so desire?

14          CHAIRMAN NELSON: Again, reading from page 8 of  
15 what Keystone has asked for, they asked that we preclude  
16 the 17 Intervenors who failed to respond to discovery  
17 from offering any testimony or evidence at hearing.  
18 That's it.

19          MR. SMITH: Thank you.

20          CHAIRMAN NELSON: Go ahead.

21          MR. HARTER: I'd like Mr. Taylor to read how I  
22 answered their first question on -- I think it was the  
23 first question on their Interrogatory.

24          CHAIRMAN NELSON: I'm not -- we're not going  
25 there at this point. I think we've --

1           MR. HARTER: What I told them was is that I  
2 didn't have time to put questions together.

3           CHAIRMAN NELSON: Fair enough. Fair enough.

4           MR. HARTER: I didn't not respond. And I agree  
5 with the fact that they get to set the rules that they  
6 want to follow but we have to follow them completely. I  
7 think that is very prejudice against the Intervenors.

8           CHAIRMAN NELSON: Thank you. Okay.

9           Mr. Taylor, back to the question. Is there --

10          MR. TAYLOR: I regret to say neither Mr. Dorr  
11 nor I can answer the question whether he answered his  
12 Interrogatories. I can make a phone call and get the  
13 answer to that question very quickly. We didn't bring  
14 that file with us today.

15          CHAIRMAN NELSON: Okay. I don't feel so bad for  
16 not having that answer on the top of my head.

17          So I go back again to Commissioner Hanson. How  
18 does that impact what you've asked for? If there's  
19 nothing left to --

20          COMMISSIONER HANSON: Well, I think I have to  
21 include him, if there's a question.

22          CHAIRMAN NELSON: Okay. I'm fair with that.  
23 Let's go ahead -- if there's an outstanding question --  
24 apparently it's not a biggie. Okay.

25          And so I'm willing to accept your thoughts of

1 the friendly amendment. We'll put him in the same  
2 category, same criteria as Yankton.

3 MR. TAYLOR: We're not objecting to Mr. Dorr's  
4 prefiled testimony. He identified a witness in prefiled  
5 testimony. That's fine. We're okay with that.

6 CHAIRMAN NELSON: Okay. Okay. Very good. And  
7 I'm good with incorporating your comments into my Motion.

8 COMMISSIONER HANSON: Gary Dorr as part --

9 CHAIRMAN NELSON: Will be treated exactly the  
10 same way as Yankton. Yes.

11 COMMISSIONER HANSON: Thank you.

12 CHAIRMAN NELSON: Additional discussion from the  
13 Commission.

14 Seeing none, all those in favor will vote aye.  
15 Those opposed, nay.

16 Commissioner Hanson.

17 COMMISSIONER HANSON: Aye.

18 CHAIRMAN NELSON: Commissioner Fiegen.

19 COMMISSIONER FIEGEN: Fiegen votes aye.

20 CHAIRMAN NELSON: Nelson votes aye.

21 Motion carries.

22 MS. HILDING: This is Nancy Hilding. They  
23 included a Cindy Jones who does not exist. Their 17  
24 people includes a nonexistent person.

25 CHAIRMAN NELSON: And I believe you have made

1     that point already. And that will certainly be resolved  
2     before our order is written.

3             MS. HILDING: That person has not -- if it's a  
4     different name, Cody Jones, he didn't have due notice  
5     that he was on this list of 17 so he didn't have notice  
6     to come.

7             CHAIRMAN NELSON: Mr. Taylor, you might respond.

8             MR. TAYLOR: It says Cindy Myers in our Motion.  
9     Not Cindy Jones.

10            MS. HILDING: If you read your list of the 17,  
11     it goes Jerry Jones, Cindy Jones, Debbie Trapp. There is  
12     no Cindy Jones.

13            MR. TAYLOR: I'm looking at the back page of the  
14     conclusion.

15            CHAIRMAN NELSON: Okay. We are going to move  
16     along. We are going to move to Keystone's Motion to  
17     Preclude witnesses from testifying at hearing who did not  
18     file prefiled testimony.

19            Are there motions?

20            I will move to grant Keystone's Motion to  
21     Preclude witnesses from testifying at the hearing who did  
22     not file prefiled testimony.

23            Discussion on the Motion.

24            I would simply say the same thing that I did  
25     before. Let me say two things. First of all, in

1 December we established a Scheduling Order. Most of us,  
2 all of us, sat in this room, and we talked about these  
3 things. We've talked about it, and there were  
4 conferences that I wasn't part of where these things were  
5 talked about.

6 And I distinctly remember Commissioner Hanson  
7 bringing up this issue of whether or not we wanted to  
8 require prefiled testimony. And I'll be honest with you.  
9 Personally I could have gone either way on that. But  
10 Commissioner Hanson felt strongly about that. I remember  
11 that.

12 And I think anybody that was in that room  
13 probably remembers his comments on that. He felt it  
14 important that that be a precursor, that that was the  
15 best way to get the information that is important on the  
16 record ahead of time so that we could all study it before  
17 we went into the hearing.

18 It was a big deal. It was important. And,  
19 thus, it was included in our Order.

20 Failing to comply with orders does have  
21 consequences, and I would agree with Keystone on that.  
22 And the consequence is that if you have witnesses that  
23 didn't file prefiled testimony, they are going to be  
24 precluded under this Motion.

25 Having said that, I go back again to the last



1 question I asked Mr. Taylor. I believe there is still a  
2 window. If we end up compelling Keystone to provide any  
3 additional information and there are witnesses that end  
4 up filing prefiled testimony on that by April 17, I think  
5 there's a window for them to still come in.

6 Additional discussion on the Motion.

7 MS. HILDING: This is Nancy Hilding. We can  
8 still do rebuttal witnesses? You're talking -- when you  
9 talk about witnesses you mean witnesses that are not  
10 rebuttal witnesses because the deadline for that is the  
11 21st.

12 Does your Motion apply to rebuttal witnesses?

13 CHAIRMAN NELSON: The deadline for rebuttal  
14 witness testimony is April 27. My Motion applies to the  
15 deadline for prefiled testimony, which was either April 2  
16 or April 10 if you're Rosebud Sioux Tribe or the  
17 exception to that, that I just mentioned.

18 Additional discussion from the Commission.

19 Hearing none, all those in favor will vote aye.  
20 Those opposed, nay.

21 Commissioner Hanson.

22 COMMISSIONER HANSON: Aye.

23 CHAIRMAN NELSON: Commissioner Fiegen.

24 COMMISSIONER FIEGEN: Fiegen votes aye.

25 CHAIRMAN NELSON: Nelson votes aye.

1 Motion carries.

2 That brings us to Dakota Rural Action's Motion  
3 to Compel -- no. No. I'm sorry. That brings us to  
4 Standing Rock's Motion for Discovery Sanctions or to  
5 Compel.

6 We are going to take a 5-minute break, and we  
7 will back to Mr. Capossela. In recess for 5.

8 (A short recess is taken)

9 CHAIRMAN NELSON: Call the hearing back to  
10 order. We are now on Standing Rock Sioux Tribe's Motion  
11 for Discovery Sanctions to Compel.

12 And we will turn to Mr. Capossela.

13 MR. CAPOSSELA: Thank you, Mr. Chairman.

14 I know it's been a long day, and I appreciate  
15 the Commission's indulgence. I appreciate you looking  
16 closely at our Motion.

17 Our Motion maybe the only one that's fully  
18 brief, filed this last month, and it may be the only  
19 Motion or action on the agenda today that's fully  
20 briefed. The record in this case supports the granting  
21 of the Tribe's Motion.

22 Exhibit A to the Motion is a Document Request  
23 the Tribe filed back in January. Request 3 is documents  
24 on Keystone XL relating to the Oil Pollution Act of 1990  
25 and PHMSA regulations. Request 4 involves documents for

1 compliance with the Pipeline Safety Act. Request 5 is  
2 for the Clean Water Act. And so on and so forth.

3 And TransCanada didn't provide any information  
4 for most of these requests identified in the Motion and  
5 objected on the grounds that they're not asking for  
6 relevant information but the information that's preempted  
7 by federal law and that the Commission has no  
8 jurisdiction over these issues and also that the requests  
9 are overbroad and vague.

10 Now let me reference the prefiled testimony that  
11 both TransCanada and the Staff has filed in this matter.  
12 When one looks at TransCanada's testimony, all of these  
13 issues that the Tribe requested documentation in  
14 discovery are touched on in all of the prefiled testimony  
15 of TransCanada. These issues are not irrelevant based on  
16 TransCanada's own prefiled testimony.

17 For example, I refer to the prefiled testimony  
18 of Meera Kothari whose responsibilities "oversight  
19 responsibility for the design and engineering of Keystone  
20 XL." Well, the design and engineering, that's -- those  
21 standards are prescribed in the Pipeline Safety Act in  
22 the PHMSA regulations that we asked information for that.  
23 And the testimony that's been prefiled directly discusses  
24 the withdrawal of the PHMSA special permit and changes  
25 that relate to the PHMSA relations under the Pipeline

1 Safety Act.

2 TransCanada's prefiled testimony is of  
3 John Schmidt discussing the biological opinion that the  
4 Fish & Wildlife Service prepared under the Endangered  
5 Species Act. Well, that's Request for Document  
6 Production 6. Looking for documents that are in  
7 TransCanada's possession involving recent developments in  
8 areas like pipeline safety, endangered species, clean  
9 water, cultural resources, issues that may have arisen in  
10 information that they possess since the Permit was issued  
11 and the Amended Conditions were imposed in 2010.

12 Clearly relevant because all of the prefiled  
13 testimony on TransCanada's part deals with the very  
14 issues that we requested. Information and documentation  
15 for -- in discovery.

16 And I can go on. High consequence areas, high  
17 volume areas. Exhibit B to the Motion, Interrogatory  
18 No. 5, basically identify the high volume areas which the  
19 project would be located. That's an Interrogatory.

20 "Objection. This requests information that is governed  
21 by federal law and within the province of PHMSA. It's  
22 beyond the scope of PUC's jurisdiction."

23 Well, John Schmidt testify with respect to high  
24 constant areas, as did Heidi Tillquist submitted prefiled  
25 testimony in "changes in high consequence areas" based on

1 the changes in the project.

2 So the information that we asked for in  
3 discovery is precisely much of the information that  
4 TransCanada put on in prefiled testimony. So the notion  
5 that the Tribe's requests are not relevant or are  
6 preempted under federal law, TransCanada -- their own  
7 prefiled testimony undermines the very objections that  
8 they made.

9 I'd also point out with respect to the Facility  
10 Response Plan required under the Clean Water Act, the  
11 regulations for which are issued by PHMSA as well as the  
12 EPA, there are response plans for pipelines that pose  
13 less risk to the environment than Keystone XL that you  
14 can -- that oil companies have posted on the internet or  
15 state regulators have posted on the internet.

16 So when TransCanada contends that their response  
17 plan for Keystone XL need not be disclosed because it's  
18 preempted under federal law, well, other states post it  
19 right on their website. And so it's really an argument  
20 asking South Dakota to require less disclosure and less  
21 public health and safety information than other states.  
22 And that's not right.

23 Then we've heard all day arguments and counter  
24 arguments with respect to discovery and who's violating  
25 discovery rules and who isn't.

1           This is not my first rodeo. And in my  
2 experience the way this stuff is done is if a party  
3 thinks that another party asked for too much stuff, that  
4 doesn't get them -- divest them of the responsibility to  
5 respond.

6           The response to the Tribe's discovery request  
7 and document requests TransCanada could have said, okay,  
8 we have a lot of documents with respect to endangered  
9 species, for example, but we have the most recent study  
10 that South Dakota Game, Fish & Parks might have put out.  
11 Well, we'll provide that, but we're not going to provide  
12 anything else because we don't have anything else that is  
13 going to be helpful to you or relevant to the case.  
14 Here's our most recent cultural resource survey for  
15 segment X or segment Y that was done most recently.  
16 That's not in the public record. That's this is what  
17 we've got. And provide those documents.

18           And then say, okay, we have other e-mails and  
19 correspondence, but that doesn't touch on the pipeline.  
20 It doesn't touch on impacts on cultural resources,  
21 per se. But here's what we're going to provide, and if  
22 you don't like -- you know, and then we'll negotiate the  
23 rest out. And if you don't like the results in the  
24 negotiation, then go to the Commission on a motion.

25           And there's give and take. And that's very

1 common. And actually my experience it is not common to  
2 be making all of these Motions to Compel and Motions for  
3 Sanction that are before you this afternoon all day today  
4 because judges and discovery judges routinely castigate  
5 the lawyers and tells to us not act like children, get  
6 together and work it out.

7 Even on Motions to Compel. Judges will  
8 frequently say I'll give you guys two weeks to work it  
9 out. Act like adults and do it.

10 We haven't had any of that here. Standing Rock  
11 Sioux Tribe has received virtually no information in  
12 discovery with respect to the Keystone XL Pipeline  
13 project.

14 We've got some documentation in response to a  
15 request for tribal consultation, but even that  
16 documentation is just really not very helpful and not  
17 very to the point.

18 For Standing Rock's part I think this is really  
19 important. We've made every effort to comply with the  
20 rules, and in the first round of discovery on February 6  
21 the Tribe produced six substantive documents and then on  
22 the second round of discovery supplemented that on  
23 March 10, submitted 20 documents relating to  
24 TransCanada's safety records, EPA's concerns, federal  
25 EPA's concerns with the environmental reviews, impacts on

1 water and studies on drought in the upper plains, just  
2 other documents that the Tribe intends to rely upon at  
3 the hearing and produce them.

4 The Tribe takes its hand on our case at the  
5 hearing. TransCanada knows just about everything that  
6 the Standing Rock Sioux Tribe is going to say at the  
7 hearing because we told them because that's what the  
8 rules require.

9 This is about their project. Yet we've turned  
10 over 26 documents about their project, and TransCanada  
11 has turned over to Standing Rock Sioux Tribe basically  
12 nothing on the project. And that's a little backwards.

13 You know, counsel for TransCanada earlier  
14 today -- I tried to write it down precisely -- said to  
15 the effect that this whole process is established to  
16 advance an expedient process, kind of playing to the  
17 Commission's value to keep the process moving along  
18 quickly.

19 But that's not a true statement. That might be  
20 true in the People's Republic of China. But the process  
21 and the rules are not for an expedient process. The  
22 process is designed to get to the truth. And that's what  
23 discovery is about is getting to the truth.

24 And so what parties normally do in discovery is  
25 not just say that's overbroad, we don't have to respond



1     because that's overbroad. Give the information that you  
2     possess or that is readily available, and if there's a  
3     bunch of stuff that is spread all over the continent and  
4     less helpful, you negotiate that through. But here  
5     TransCanada just said, look, we don't need to do it, and  
6     we're not going to do it.

7             But I think the point is the Tribe tried  
8     earnestly to comply with the discovery rules. And by  
9     doing that because TransCanada didn't and provided no  
10    information responsive to the Tribe's discovery request,  
11    the Tribe is really at a competitive disadvantage at the  
12    hearing.

13            They know our case. We don't know theirs in  
14    advance. And we can't devise our case accordingly  
15    because they're not being forthcoming in discovery.  
16    That's precisely why parties -- why the remedies are  
17    available with respect to violations in discovery.

18            When all of this was unfolding I thought to  
19    myself what am I missing? How can they feel confident  
20    that they need to make no efforts at all to comply with  
21    our document requests? So I did what we're supposed to  
22    do, and I pulled the discovery manual off the shelf.

23            And on page 3 of the Reply Brief that we filed I  
24    quote an excerpt from the discovery manual. And it kind  
25    of is the process I just described. Many times

1 recipients of discovery requests complain that's too  
2 much, that's overbroad. So the requester, the Standing  
3 Rock Tribe in this case, it's incumbent upon the  
4 requester to try to work it out too. Both parties have  
5 an obligation to try to work it out.

6 So I contacted counsel back in February after  
7 receiving the first response to our first discovery  
8 request. Tried to have discussions early on. And then  
9 for subsequent discovery, okay, what can I do to scale  
10 down the Tribe's discovery requests.

11 And I followed the Interrogatory, which is now  
12 Interrogatory No. 51 on the Standing Rock Sioux Tribe,  
13 which is if you don't want to produce the documents that  
14 were requested, list the documents. We'll take that. In  
15 which that will enable us to pick and choose what we feel  
16 is needed to put on our case.

17 A person may not conclude that that's an  
18 adequate compromise, but we're trying to comply with the  
19 rules. We're trying to problem solve. Got nothing out  
20 of it.

21 Instead TransCanada disparaged Interrogatory  
22 No. 51 in its Brief responding to our Motion. They  
23 disparaged our efforts to compromise by saying that was  
24 broader yet than the original discovery request. But the  
25 language in that Interrogatory is actually right out of

1 Rule 26A of the Federal Rules of Civil Procedure.

2 And so it's not reasonable. If we were in  
3 Federal Court, they would have to produce all the stuff  
4 that is requested in Interrogatory No. 51. They'd have  
5 to respond to that without our even asking under the  
6 federal rules. There's not a comparable South Dakota  
7 rule. But my point is we're trying. We're trying to  
8 work it out.

9 So we have one party, South Dakota Tribe,  
10 complying with the rules, producing information,  
11 producing documentation, the party that's the Petitioner  
12 not providing any substantive documentation.

13 February 6 when we responded to their first  
14 discovery request I just want to note that the Tribe  
15 produced, sent to TransCanada two appendices in the  
16 State Department Environmental Impact Statement. We  
17 produced the documents Appendix E and Appendix H, and  
18 these documents relate to cultural resources and  
19 terrestrial wildlife habitat. Because we may use part of  
20 these documents as exhibits at the hearing.

21 So we produced them, which is what the rules  
22 require. The same day TransCanada sends its nonanswers  
23 to our discovery requests, and they responded to five  
24 document requests by listing the website to the State  
25 Department Environmental Impact Statement.

1           So they referred the Tribe in response to our  
2       discovery request to a website. We went to the website  
3       because we know some documents that we may use at the  
4       hearing from that website, downloaded the documents, and  
5       supplied them to TransCanada.

6           The rule requires that you produce documents.  
7       The South Dakota Rules of Civil Procedure do not permit  
8       you to respond to a discovery request by saying it's in  
9       the public sphere. And that -- it's stunning the same  
10      day that we produced the documents that are at that same  
11      website TransCanada failed to produce the documents and  
12      instead cited the website and told us to go look there.  
13      Well, that's not compliance with the rules.

14          And I just thought that was kind of a stunning  
15      illustrative example where we sent the docs and they  
16      listed the website.

17          One of the things that the courts do not take  
18      lightly and really is disfavored are blanket objections  
19      and boilerplate objections. Look, if you object to a  
20      discovery request, you produce the information that's not  
21      objectionable and negotiate -- tend to work out a  
22      compromise on the rest.

23          A blanket objection is where you produce  
24      nothing, and the courts look very unkindly on that. And  
25      that's what TransCanada did here. They didn't produce

1 anything. They just made generalizations that it's  
2 irrelevant, that it's broad, and that it's preempted.  
3 And none of that holds water.

4 Now the rule should apply to everybody. And  
5 TransCanada's had motions to the detriment of Intervenor  
6 today that did not cooperate in discovery. I'm not sure  
7 because of TransCanada's own conduct in this case that it  
8 should be in a position to be awarded that remedy. But  
9 certainly Standing Rock Sioux Tribe did try to fully  
10 disclose documents in discovery that TransCanada  
11 requested and answer Interrogatories and provide the  
12 information that timely way.

13 We got nothing in return. And what's good for  
14 the goose is good for the gander. They both should apply  
15 to everybody. And if some Intervenor are going to be  
16 excluded for not responding to discovery and are not  
17 going to be able to advance witness testimony or  
18 evidence, that same rule, that same sanction, should  
19 apply to TransCanada, especially in favor of the  
20 Standing Rock Tribe which did comply with the rules.

21 So I -- on behalf of the Tribe this afternoon,  
22 we ask for a finding that the Tribe complied with the  
23 discovery rules. Certainly TransCanada has not included  
24 the Tribe in any of its adverse motions that it's made  
25 against other Intervenor.

1           We'd ask you to make a finding that  
2 TransCanada's response to the identified requests for  
3 production of documents and Interrogatories violated  
4 South Dakota Rules of Civil Procedure and order the  
5 exclusion of evidence and prohibit TransCanada from  
6 introducing evidence regarding continuing compliance with  
7 conditions for which the 2010 Permit was issued by the  
8 Commission.

9           The record supports that, and I think the Tribe  
10 earnestly attempted to comply with the rules and  
11 encountered a level of noncompliance with the rules as  
12 set out in the record that justifies that result, and  
13 TransCanada itself is relying on these principles of law  
14 as it relates to the prior motions. And so we think the  
15 rules should apply to everybody and that TransCanada's  
16 evidence should be excluded.

17           Thank you.

18           CHAIRMAN NELSON: Thank you.

19           Keystone.

20           MR. MOORE: Thank you. James Moore on behalf of  
21 Keystone.

22           Just two general observations, and then I'll  
23 respond particularly to the items that are part of the  
24 Motion.

25           First of all, the suggestion that Mr. Capossela

1 made that the Tribe is tipped its hand by being fully  
2 compliant with discovery and Keystone is still hiding the  
3 ball and he has no idea what our case is about I think is  
4 contrary to the Tracking Table of Changes that Keystone  
5 filed with the Certification Petition.

6 It's essentially our case that we intend to  
7 submit through our prefiled testimony and did, in fact,  
8 submit through our prefiled testimony has been a matter  
9 of record since September. The prefiled testimony it was  
10 based is entirely consistent with the Tracking Table of  
11 Changes.

12 Secondly, we did have a meet and confer with  
13 Mr. Capossela, as he said. We tried to talk through what  
14 we thought were some extremely broad questions that were  
15 difficult, if not impossible, for us to answer because of  
16 the way that they were phrased. And these were document  
17 requests for the most part, not Interrogatories.

18 And the result of that conference was is  
19 Mr. Capossela said -- a new Interrogatory No. 51 that  
20 said fine. Just list every document in your possession  
21 related to the Keystone XL Pipeline project, which, as  
22 you can imagine since this project started before the  
23 Petition was filed in this case in 2009, is more than six  
24 years worth of documents.

25 And we said that's simply not possible. We

1     can't do that. Can you be more specific? We didn't get  
2     there, and that's why we're here today.

3             With respect to Document Request No. 3, which is  
4     the first thing that's identified in Mr. Capossela's  
5     Motion, again, this is a very broad request for all  
6     documents related to compliance with the Oil Pollution  
7     Act and PHMSA regulations.

8             Again, the reason for asserting the broad  
9     objection there was in part because the request is so  
10    extremely broad, in part because this Commission's  
11    jurisdiction does not include to matters that are the  
12    responsibility of the federal regulator in this case,  
13    which is PHMSA, and in part because compliance with what  
14    Keystone has to do before PHMSA is in the first instance  
15    a matter for PHMSA.

16            But we thought that the objection was  
17    appropriate on that basis. The more particular request  
18    that is part of that request is for the Emergency  
19    Response Plan. And as I think the response is made  
20    clear, there is no Emergency Response Plan that has yet  
21    been prepared for Keystone XL. There is a template for  
22    the Emergency Response Plan based on the Emergency  
23    Response Plan that was prepared for the Keystone  
24    Pipeline.

25            It is part of Appendix I to the Final



1 Supplemental Environmental Impact Statement, and a link  
2 to that was provided to parties during the course of  
3 discovery. That Docket, which is part of Department of  
4 State's website, is partially redacted to exclude  
5 confidential information related to the Emergency  
6 Response Plan, and, again, that was part of the basis on  
7 which we objected.

8           With respect to Document Request No. 4, the  
9 issues are essentially the same as with Request No. 3.  
10 The Integrity Management Plan is treated on the same  
11 basis. The request for all documents related to  
12 compliance with the Pipeline Safety Act is again so  
13 overly broad that it's not possible to respond to.

14           With respect to Document Request Nos. 5 through  
15 9, and I tried to be very particular about this response  
16 because we did not simply issue a broad objection and  
17 walk away from that, we responded as indicated on page 5  
18 of our Motion with respect to each of those by providing  
19 specific information in specific sections of the FSEIS  
20 that we thought was responsive to those issues.

21           And Mr. Capossela did not respond to the fact  
22 that we provided those citations in his response to his  
23 Motion, and he's not argued today why that information is  
24 insufficient for the purposes that he needs for the sake  
25 of discovery in this case.

1           And, lastly, the two Interrogatories that are at  
2     issue, Interrogatory No. 30 and 52, both relate to the  
3     matter of an incident that is disclosed again in the  
4     Tracking Table of Changes where there was an  
5     investigation that yielded evidence that there was some  
6     external corrosion on pipe due to stray current in a  
7     location where there was collocation of utilities.

8           And we answered by providing the circumstances  
9     of that, stated that because there is no shared pipeline  
10    corridor in this instance in South Dakota, further any  
11    specifics about that request were not relevant because  
12    this situation could not happen in South Dakota with  
13    respect to the Keystone XL project.

14          And I don't want to otherwise repeat the  
15    arguments that have been made in writing, and so I'll  
16    stop unless you have questions.

17          CHAIRMAN NELSON: Thank you.

18          Questions from the Commission for either side.

19          I do have questions for Mr. Capossela. And I'm  
20    going to reference the specific document requests.  
21    Mr. Moore just talked about Nos. 5, 6, 7, 8 and I'm not  
22    sure if he mentioned 9 but I'm going to throw 9 in there  
23    where he's provided a web link to the information that he  
24    believes is responsive to your request.

25          Can you tell us why that is not an adequate

1 response?

2 MR. CAPOSSELA: Mr. Chairman, under South Dakota  
3 Codified Law 15-6-34A any party may serve on any other  
4 party a request to "produce and permit the party making  
5 the request or someone acting on his behalf to inspect  
6 and copy the documents."

7 In discovery we exchange documents. That's what  
8 parties in contested cases do. And so to cite -- to rely  
9 upon documents that may be in the public's view or to  
10 refer a person to a call number in the library or to a  
11 website does not meet the standard in the statute that I  
12 just read of producing and permitting to inspect.

13 That's what we do. We give documents to one  
14 another. And that's what advances the fact-finding  
15 process. Not to point over there. That's not compliant  
16 with the rules. And I just read in Rule 34A of the  
17 South Dakota Rules of Civil Procedure.

18 CHAIRMAN NELSON: Thank you.

19 The next question I've got is in relation to  
20 Document Request 10, all documents relating to  
21 communications or meetings with the Standing Rock Sioux  
22 Tribe or other Indian Tribes in the United States or  
23 Canada.

24 Keystone indicated that any responsive  
25 nonprivileged documents would be provided on or before

1 February 6. Has that been complied with?

2 MR. CAPOSSELA: That we did get documents, yes,  
3 sir. We did get documents in response to that request.

4 CHAIRMAN NELSON: Thank you. And I think the  
5 last question I've got for you is in relation to Document  
6 Request 14. All letters, correspondence, e-mails, or  
7 instance messages to and from the South Dakota Public  
8 Utilities Commission, its employees, attorneys, or agents  
9 since January 1, 2008.

10 Can you tell us what you're looking for here  
11 that would comply with our discovery order?

12 MR. CAPOSSELA: The communications between  
13 TransCanada and the Staff may very well shed light on  
14 issues regarding compliance with the South Dakota acts as  
15 well as the federal laws, areas -- there may be  
16 admissions. There may be questions that Staff asked.  
17 There about acknowledgements by TransCanada of a need to  
18 improve this area or that area in order to get their  
19 permit. They'll need to go see if, subsequent to the  
20 permit, there's anything in the record that shows what  
21 they did or didn't do what they promised back in the  
22 prior Docket.

23 With respect to tribal consultation, in our  
24 Reply Brief I cited an Interrogatory and an Answer to an  
25 Interrogatory regarding tribal consultation that I think

1 is illustrative of their attitude in discovery.

2 It's an incomplete answer. It's an evasive  
3 answer, and it's just something that the Tribe cares  
4 about for obvious reasons. And that nonanswer to the  
5 Interrogatory with respect to not consultation with  
6 Tribes in South Dakota, North Dakota, or Canada but the  
7 Standing Rock.

8 We asked specifically cite the meetings, cite  
9 the individuals. Who did you meet with? Who did you  
10 talk with? They said that yes, they consulted, period,  
11 with no other information. And I think that answer to  
12 that Interrogatory is very reflective of their attitude  
13 in discovery as a whole.

14 And you have to lift a finger. Even if  
15 something is overly broad, you can't not give any  
16 information. You have to share what's reasonable, and if  
17 the other -- if the requesting party feels that that's  
18 insufficient, then they have -- then we would have an  
19 obligation to try to negotiate a compromise. And we  
20 tried to fulfill that obligation in this case. Obviously  
21 we weren't able to do it.

22 But I think the underlying issue is they didn't  
23 lift a finger and the Tribe did and the Tribe put a lot  
24 of resources into responding to TransCanada's discovery  
25 requests. They didn't reciprocate even though they're

1 the Petitioner. And that's why action on the part of the  
2 Commission in response to the Tribe's Motion I think is  
3 appropriate.

4 Now one thing that might get everybody off the  
5 hook would be to grant the Tribe's Motion to Exclude  
6 Evidence without prejudice and make TransCanada refile  
7 its Petition for Certification. That would give  
8 everybody a chance to do it right next time.

9 But those rules are there to the deter the kind  
10 of noncompliance that TransCanada has brought to the  
11 table in this case. And so the Tribe's Motion is  
12 meritorious and should be granted.

13 CHAIRMAN NELSON: I'd like to go back to the  
14 line of questioning I began with on Document Request 14.

15 Are you familiar with Dakota Rural Action's  
16 Motion to Compel Staff that we're going to hear later  
17 this afternoon?

18 MR. CAPOSSELA: I've read it, but, no, I  
19 don't -- I read it, sir.

20 CHAIRMAN NELSON: I appreciate that candor.

21 In my mind it covers much of the same  
22 information and perhaps the discussion on this would be  
23 better held at that time so but we'll see where the  
24 remainder of this discussion goes.

25 That's the end of my questions.

1 Other questions from the Commission.

2 Commissioner Hanson.

3 COMMISSIONER HANSON: Thank you, Mr. Chairman.

4 Could you help me out here? You made a  
5 statement, Mr. Capossela, that other states -- and you're  
6 referring to the Emergency Response Plan as not being  
7 confidential. You stated in your remarks earlier today  
8 that other states who have this file it right on their  
9 website.

10 Could you tell me what states those are?

11 MR. CAPOSSELA: I included in our Motion in the  
12 Brief the Kinder Morgan Response Plan for the Puget Sound  
13 website on the Washington State Department of Ecology  
14 website. Unredacted Emergency Response Plan for  
15 pipelines from Canada in the Puget Sound area of western  
16 Washington.

17 COMMISSIONER HANSON: Right. I saw that, but  
18 are there other ones that -- you said plural, and I'm  
19 just curious if there are other ones.

20 MR. CAPOSSELA: That is a particularly helpful  
21 website. With much of the information TransCanada  
22 refused to disclose involving contractors, emergency  
23 response contractors, the location of equipment for  
24 emergency response, and that's why I -- that's why I  
25 included that one, because it's especially helpful.

1           COMMISSIONER HANSON: Thank you. And I have a  
2 question for Keystone.

3           With I guess I'll call it Keystone East, since  
4 we have an existing Keystone Pipeline from TransCanada  
5 dissecting the eastern half our state, there was a  
6 considerable amount of discussion during that process on  
7 the Emergency Response Plan, and on the Integrity  
8 Management Plan. And much more than what is disclosed in  
9 your responses here.

10           Why could you not have responded more fully,  
11 fleshed it out a little bit more? I know that you state  
12 that it's confidential in some respects, however, and  
13 you're saying that there isn't one that exists and you  
14 use the skeleton of Keystone I for it. Why couldn't you  
15 provide more of that information with this one?

16           Certainly there's going to be a lot more  
17 information going through this process. We as  
18 Commissioners are going to have to see a lot more of that  
19 information in order to ascertain what our position's  
20 going to be.

21           MR. MOORE: I think there are a couple of  
22 responses to that. One is that the information that was  
23 available as part of the hearing process in this Docket  
24 in connection with the Permit Application is still a  
25 matter of record.



1           Secondly, to the extent that the request is for  
2 all documents related to the Emergency Response Plan,  
3 it's too broad to know where to begin.

4           Thirdly, with respect to a request for this  
5 particular Emergency Response Plan, the response has to  
6 be particular. It doesn't exist yet. But there is a  
7 template for it, and there is extensive discussion about  
8 it in connection with the pending side to the Final EIS.

9           So our position is, given all of that  
10 information, tell us specifically what more you want to  
11 know, and we'll be happy to try to comply with that.  
12 We're not there.

13           COMMISSIONER HANSON: Just one second.

14           Someone must be listening to this hearing on  
15 their website and also have their phone off of mute. You  
16 cannot do both or else we have feedback here. And the  
17 Chair has asked repeatedly for people to cooperate with  
18 that. And it's becoming very frustrating. So place your  
19 phones on mute. For whatever good that did.

20           That just doesn't seem good enough at this  
21 juncture. There are particular items with Keystone XL  
22 that do not exist with the first Keystone, such as the --  
23 well, as I recall, it was Commissioner Kolbeck who made  
24 the Motion that even 1 pint of oil that spilled had to be  
25 reported.

1           So there's things of that nature that I think at  
2 this process when you are filing a request for a permit  
3 you should have -- certainly four years, six years after  
4 the filing, after the process you should have some  
5 information available in that respect.

6           I really find it strange that an offer has not  
7 been made to flesh that out somewhat, you know, to say  
8 that it hasn't been approved yet. You know where your --  
9 the siting process is.

10           It was approved. Once it's approved it's along  
11 the same line as when I was admonishing persons who  
12 wanted to be parties to this. And I said, well, now we  
13 don't know if we're going to be parties or not. And then  
14 a month later we decided after we became parties we  
15 better find out whether we can afford to do it and go on  
16 and on.

17           Well, there's some planning in this process.  
18 And Keystone's a big company. They've done this before.  
19 They know that they're going to have to have that plan.  
20 They know they have to have that plan for the Federal  
21 Government. And in order to cross our border I would  
22 certainly think that the Federal Government would want to  
23 see that plan.

24           So it just amazes me that you're not able to say  
25 here's our plan. We've redacted those things that for

1 whatever reason the Federal Government thinks is -- has  
2 to be confidential. But it's -- excuse me. I just am  
3 amazed that you don't have that.

4 MR. MOORE: Commissioner Hanson, if Jim White is  
5 on, he can correct me if this statement is incorrect.  
6 But my understanding is that the current state of the  
7 Emergency Response Plan for the Keystone XL Pipeline is  
8 in the form that is part of Appendix I to the FSEIS.

9 COMMISSIONER HANSON: So we have the ERP, and  
10 you're saying we have the IMP, the Integrity Management  
11 Plan.

12 MR. MOORE: No. I don't think I'm saying that.  
13 I'm saying that the Commission's Order requires that when  
14 those are prepared for Keystone XL that they be filed  
15 with the Commission prior to the commencement of  
16 construction.

17 When the emergency response and the integrity  
18 management programs were discussed and considered as part  
19 of the FSEIS in the Department of State's review what was  
20 submitted is the template for the plan that will be  
21 prepared for Keystone XL but has not yet been prepared,  
22 and that is part of what's Appendix I.

23 COMMISSIONER HANSON: Correct.

24 MR. MOORE: I don't think that there's anything  
25 more that Keystone can give on that matter given the

1 state of the project, given how long the matter has been  
2 in limbo. I don't think there's any ongoing efforts to  
3 complete the Emergency Response Plan at the moment.

4 COMMISSIONER HANSON: I understand. It  
5 surprises me that it is not fleshed out considerably  
6 more. For South Dakota I would think that you'd be able  
7 to say here it is. There's going to be some slight  
8 changes to it, but here it is at this juncture. That  
9 just really surprised me.

10 MR. WHITE: Commissioner Hanson, this is  
11 Jim White on the phone. I don't know whether you want me  
12 to address that further. I could.

13 COMMISSIONER HANSON: I'd appreciate that, yes.

14 MR. WHITE: Sure. So, yes, we are working to  
15 flesh out the specifics of the Emergency Response Plan.  
16 I don't want denigrate what's in the Final SEIS.  
17 There's several hundred pages showing the template for  
18 what the Keystone XL ERP will look like. It is redacted.  
19 The State Department agreed to redacting it.

20 We're moving along for plans with specifics in  
21 South Dakota. But, frankly, given the state of the  
22 federal permitting process and given the fact that we  
23 don't file the plan with PHMSA until shortly before we go  
24 into operation, we don't have a fully flanged up plan for  
25 South Dakota that we could provide at this point.

1           COMMISSIONER HANSON: I understand that. Thank  
2 you for --

3           Thank you, Mr. Chairman.

4           CHAIRMAN NELSON: Additional questions,  
5 Commissioner Fiegen.

6           COMMISSIONER FIEGEN: I just wanted to ask a  
7 quick follow-up question on that on the discovery request  
8 on the Emergency Response Plan.

9           Could it not be beneficial to the Intervenors  
10 that are asking for this that you would maybe give them  
11 Keystone's because that has been filed? It would be a  
12 great example. And I'm sure the template is very much  
13 like it.

14           And I don't know if there's some confidentiality  
15 issues there that you would have to take portions of it  
16 out, but could you not give them Keystone's for their  
17 discovery request and say it would be similar?

18           MR. MOORE: I think that's what we tried to do  
19 with the response because that is what is part of  
20 Appendix I to the FSEIS is the Keystone Emergency  
21 Response Plan that has been redacted by Department of  
22 State.

23           COMMISSIONER FIEGEN: Okay. I thought it was  
24 the template. I'm sorry. I misheard you.

25           MR. MOORE: Well, it is the template for the XL,

1 but it is actually the template ERP.

2 CHAIRMAN NELSON: Additional Commissioner  
3 questions.

4 Okay. Hearing none, is there a Motion?

5 COMMISSIONER FIEGEN: You know, I did have one  
6 question for Standing Rock.

7 CHAIRMAN NELSON: Certainly.

8 COMMISSIONER FIEGEN: Standing Rock, you know,  
9 we certainly read your discovery request, and is it my  
10 understanding it was Standing Rock that actually asked  
11 for every single document relating to TransCanada? They  
12 asked for every single document in every single office?

13 Was that one of your requests, or was that a  
14 different Intervenor?

15 MR. CAPOSSELA: No. Commissioner what we did is  
16 after the initial request for documents were not -- we  
17 didn't get the docs. And so we filed an Interrogatory  
18 which took the very language that is in Federal Rule of  
19 Procedure 26A, which is the disclosures in Federal Court,  
20 and we didn't ask for every document that TransCanada  
21 has. We asked for every document of -- a listing.

22 We didn't ask for the documents. We asked them  
23 to prepare a bibliography of the documents that exist  
24 relating to Keystone XL for the purpose of enabling us to  
25 scale down our request.

1           So we didn't ask for every document. And the  
2 language in the Interrogatories was taken right out of  
3 the federal rule regarding disclosures. So we copied the  
4 federal rule in making that request. But, no, we did not  
5 ask for every document that TransCanada has.

6           We asked them to list documents that they have,  
7 to make a list so that we could pick and choose a smaller  
8 number of documents from the list. That's what we asked.

9           And that's -- I hope that answers your question.

10          COMMISSIONER FIEGEN: Thank you.

11          MR. CAPOSSELA: With respect to the Emergency  
12 Response Plan, TransCanada could have acknowledged three  
13 months ago, two and a half months ago that an Emergency  
14 Response Plan for Keystone XL does not exist.

15          Instead they played a game about overbroad,  
16 federal preemption, and so on and so forth. And we  
17 wouldn't have to be having this discussion now. But they  
18 had to be too cute so it came to this to discover that  
19 there's no emergency response for Keystone XL in  
20 South Dakota.

21          One other point I'd like to make, Mr. Chairman,  
22 briefly is counsel mentioned the Tracking Table of  
23 Changes. And we did request the information regarding a  
24 corrosion issue on a different pipeline. And TransCanada  
25 actually did include information on that item in the

1 Tracking Table of Changes in Meera Kothari's Prefiled  
2 Testimony. The answer didn't provide any information  
3 about that. That's exactly the kind of thing that  
4 parties disclose to one another in civil litigation in  
5 discovery. What happened? Who was the other utility?  
6 What were the circumstances? And parties don't get to  
7 self-regulate and say, well, that's a different set of  
8 circumstances. That doesn't apply here, which is  
9 counsel's argument this afternoon.

10 That's up to the world to determine. You cannot  
11 hide that information and self-regulate in discovery.  
12 They did that in their written response, and counsel did  
13 that again this afternoon.

14 One other point I'd like to make in closing is  
15 in the written response to our Motion TransCanada cites  
16 various regulatory bodies and various proceedings that  
17 they're involved with in Nebraska, in Montana with the  
18 State Department, and it seems to me it would not be  
19 overly burdensome for TransCanada to compile docs. shared  
20 with the State Department, to compile docs. relating to  
21 the pipeline that might have been submitted to regulators  
22 in Nebraska.

23 These are relatively -- documents that exist in  
24 the ordinary course of business. And they cite these  
25 various proceedings themselves. The volume of documents



1 may be a lot. And certainly the Tribe would be willing  
2 to work with them to make sure that we get information  
3 relating to the things that are most important to the  
4 Tribe.

5 But we never had that opportunity because they  
6 just didn't give anything and then did stuff like they  
7 did with the Emergency Response Plan, refused to  
8 acknowledge that it doesn't exist and made objections  
9 which they have since admitted that the doc. doesn't  
10 exist. They could have did that three months ago.

11 CHAIRMAN NELSON: Thank you.

12 Motions from the Commission.

13 If there aren't any, I do.

14 In relation to Standing Rock Sioux Tribe's  
15 Motion for Discovery Sanctions or to Compel -- and to  
16 guide me as I enunciate this Motion I'm going to read  
17 from that Motion, page 2, the last paragraph. And in  
18 that last paragraph I see three distinct items that we're  
19 to rule on.

20 The first sentence says "The Tribe moves for an  
21 order excluding the introduction of evidence by  
22 TransCanada regarding compliance by Keystone XL with  
23 applicable state and federal law." I move to deny that  
24 Motion.

25 Secondly, it says "Alternatively, the time

1 period for discovery should be extended, the hearing  
2 continued." I am going to move to deny those requests.

3 And then, thirdly, there are Motions to Compel.  
4 And I'm going to go through those individually. For  
5 Docket -- Request for Production of Documents, to the  
6 extent the documents exist I am going to move to grant  
7 the Motion to Compel for Nos. 3, 4, 5, 6, 7, 8, 9, 11,  
8 12, 13, and move to deny Motions to Compel for Nos. 10,  
9 14, 15, Interrogatory 51, and Interrogatory No. 30.

10 Discussion on the Motion.

11 First of all, I hope I got everything. Let me  
12 begin by saying back in December we set the scope of the  
13 question that is ultimately to be answered in the  
14 hearing, and that scope I still believe is relatively  
15 narrow.

16 That said, I don't believe that the law allows  
17 this Commission to limit the Intervenors' ability to  
18 access information that may relate to that relatively  
19 narrow scope of what we're going to deal with in the  
20 hearing.

21 Are some of these requests pretty broad?  
22 Absolutely. But might they lead to information that is  
23 directly applicable to the question we're going to deal  
24 with in the hearing? The answer is yes for the ones that  
25 I have moved to grant.

1           For the ones that I have moved to deny obviously  
2           in my mind the answer is no. And that's how I devined  
3           between those that I have moved to grant and those that I  
4           have moved to deny.

5           I guess the last comment that I would make based  
6           on the Order from two weeks ago, if this Motion or any of  
7           the other Motions to Compel pass, Keystone has until  
8           Friday to comply with these. And as I said two weeks  
9           ago, I said to all the parties, be prepared to comply  
10          should this Commission grant any of these Motions to  
11          Compel.

12          And so while I know there's a short three days,  
13          I think we gave adequate notice two weeks ago that this  
14          was a possibility.

15          Further discussion on my Motion.

16          COMMISSIONER HANSON: Mr. Chairman, I'm just  
17          asking for a minute or two.

18          CHAIRMAN NELSON: Absolutely.

19          COMMISSIONER HANSON: I'm looking through the  
20          different ones to see whether or not I can support the  
21          Motion.

22          COMMISSIONER FIEGEN: In your Motion could you  
23          restate the beginning? Because you kind of said like to  
24          the extent --

25          CHAIRMAN NELSON: To the extent documents exist,

1 and as we have gotten some testimony today, there may  
2 have been some misunderstanding between whether a  
3 particular document existed or not. But to the extent  
4 that it exists and is in Keystone's possession, my Motion  
5 is that it would be compelled to be turned over.

6 We will be at ease for just a moment as folks  
7 are looking through and ascertaining how far they can go  
8 with me.

9 MR. SMITH: Do you have something with those  
10 numbers on it again?

11 CHAIRMAN NELSON: I will read those to you  
12 again. And the document that I'm using is Keystone's  
13 objections to Standing Rock Sioux Tribe's First Request  
14 for Production of Documents. That's kind of my guide.

15 And for Production of Documents I said yes to 3,  
16 4, 5, 6, 7, 8, 9, 11, 12, and 13. And I said no to 10,  
17 14, 15, and then Interrogatories 30 and 51.

18 And I believe from again the last paragraph on  
19 page 2 of the original Motion -- I think I've covered  
20 everything that was asked.

21 I apologize. I did miss some Interrogatories.  
22 I'm going to supplement my Motion by moving to grant  
23 Interrogatory 15, 16, 17, 18, and deny Interrogatory 19  
24 and 20. And that, I think, covers everything that was  
25 listed in that last paragraph on page 2.

1           And I'm going to ask you, Mr. Capossela, have I  
2 covered everything that was all of the different numbers  
3 that you identified?

4           MR. CAPOSSELA: Yes, sir. Now that you've  
5 addressed Interrogatories 15 through 20.

6           CHAIRMAN NELSON: Thank you. I apologize for  
7 missing that. I'm shuffling through three sets of --  
8 four sets of papers here.

9           MR. CAPOSSELA: I understand.

10          CHAIRMAN NELSON: We're just going to be at ease  
11 here while fellow Commissioners review.

12          MR. GOUGH: Mr. Chairman, this is Bob Gough. I  
13 would like at some point to raise a point of  
14 clarification affecting InterTribal COUP when the time is  
15 appropriate.

16          CHAIRMAN NELSON: Okay. Yeah. Let's get this  
17 one resolved first. Thanks.

18          COMMISSIONER FIEGEN: Did you do anything on  
19 No. 52, Interrogatory 52?

20          CHAIRMAN NELSON: I did not because 52 is not  
21 listed in the Motion.

22          COMMISSIONER FIEGEN: Okay.

23          And just for the benefit of folks listening in,  
24 you understand that I can't confer with my fellow  
25 Commissioners before the hearing, and so they have no

1     idea where I'm coming from and I have no idea where  
2     they're coming from when we walk into these motions.

3             And so that's why we're granting some time here  
4     to make sure that they're where I'm at or can tell me why  
5     I'm way off base.

6                             (Pause)

7             CHAIRMAN NELSON:   Discussion on the Motion.  
8             Commissioner Fiegen.

9             COMMISSIONER FIEGEN:   Certainly the Motion that  
10    we have before us is going to certainly put some time  
11    pressures and some information that you'll have to get  
12    quickly to Standing Rock, but we want to make sure  
13    Standing Rock also has the information that they can  
14    develop their case and that they can move forward.

15            So I'm going to support the Motion.   It's pretty  
16    detailed, as you can guess.   But some of it it looks like  
17    you have given.   You might have to supply the documents  
18    to support it, but it looks like you have given quite a  
19    bit of the information but you'll probably have to  
20    supplement it with the documents that led to many of  
21    those items.

22            CHAIRMAN NELSON:   Additional discussion.  
23            Commissioner Hanson.

24            COMMISSIONER HANSON:   Still debating whether I  
25    was going to say something.   It may not have gone quite

1 as far in some areas and went a little further in other  
2 areas. I'm going to support your Motion. I think it's  
3 reasonably made, and I can see where it has a good deal  
4 of merit and provides -- I want to make certain that this  
5 Commission allows the parties to have the information  
6 that I really think they need to have. So I appreciate  
7 your Motion.

8 CHAIRMAN NELSON: Thank you. If Commissioner  
9 Hanson says I'm being reasonable, I'll take that any day  
10 of the week. Thank you.

11 Additional discussion.

12 Seeing none, all those in favor will vote aye.  
13 Those opposed, nay.

14 Commissioner Hanson.

15 COMMISSIONER HANSON: Aye.

16 CHAIRMAN NELSON: Commissioner Fiegen.

17 COMMISSIONER FIEGEN: Fiegen votes aye.

18 CHAIRMAN NELSON: Nelson votes aye.

19 The multisection Motion passes.

20 MR. CAPOSSELA: Thank you, Commission.

21 CHAIRMAN NELSON: Yes, Mr. Gough. I thought  
22 that was Mr. Gough who wanted to speak.

23 MR. GOUGH: Yes, Chairman.

24 Point of clarification on the Motion regarding  
25 Dakota Rural Action and InterTribal COUP. Given what was

1 resolved today, do I understand that we are precluded  
2 from bringing a written on direct? And that's the only  
3 preclusion, that we still have all of our rights for  
4 cross-examination and all other rights as parties,  
5 including providing rebuttal witnesses?

6 CHAIRMAN NELSON: That is my understanding. And  
7 I'm going to turn to Mr. Smith to make sure that I'm  
8 right on that.

9 MR. SMITH: That's my understanding of what  
10 you -- when I asked you the questions.

11 And, again, it's a little unusual because of the  
12 weird way we're set up here this year in terms of -- but  
13 my understanding is that people have responsive  
14 testimony, and they're not -- and they wish to -- they're  
15 not -- and they do prefile, that that will not be  
16 precluded.

17 Is that --

18 CHAIRMAN NELSON: Okay. Maybe we need to  
19 differentiate. If someone has not -- if a particular  
20 individual has not filed prefiled testimony, they would  
21 not be able to turn around and file rebuttal testimony.  
22 Is that -- but if there is information that comes out of  
23 Motions to Compel that are granted today, prefiled  
24 testimony can be filed on that by new witnesses by the  
25 27th. Is that -- and I'm looking at Mr. Smith. Is



1       that --

2               MR. SMITH:   Okay.   Yep.

3               CHAIRMAN NELSON:   Or am I misunderstanding?

4               MR. SMITH:   No.   I don't think so.   I'm just  
5       trying to get it clarified.   Like new witnesses, we  
6       mean --

7               CHAIRMAN NELSON:   Somebody that's not filed  
8       prefiled testimony.   I mean, the ticket in that we  
9       established in our Order was that you had to file  
10      prefiled testimony.   That was your ticket in to be able  
11      to be a witness in this proceeding.

12              Now, Ms. Edwards, you've got this really puzzled  
13      look on your face.   Am I -- talk to us.

14              MS. EDWARDS:   Forgive me.   I didn't mean to have  
15      that look.

16              CHAIRMAN NELSON:   Okay.   You're forgiven for  
17      having that look.

18              Okay.   Mr. Gough, does that clarify?

19              MR. GOUGH:   I'm not quite clear, sir.   Despite  
20      our objection, we did name three witnesses, and we  
21      included the scope of their testimony.   It was not their  
22      full direct testimony, but it was the scope of their  
23      testimony.   And identified the witnesses.

24              We received no information from Keystone during  
25      the Interrogatories with regard to any of their case

1 regarding our witness testimony. So we may have pulled  
2 them as rebuttal witnesses, but I would still like the  
3 opportunity to file a brief statement of their testimony.

4 In accordance with the schedule I was prepared  
5 for April 21. And certainly April 27 would work, but I  
6 just want to make sure that we are not precluded from  
7 bringing those witnesses forward.

8 CHAIRMAN NELSON: So my understanding is that  
9 those three did not file prefiled testimony. Is that  
10 correct?

11 MR. GOUGH: We filed a scope of testimony. Not  
12 their actual testimony. I don't have that yet.

13 CHAIRMAN NELSON: Okay. Thank you.

14 Mr. Taylor is sitting at the seat here, and I'm  
15 going to ask him what his view is of those three at this  
16 point? Is your understanding the same as mine?

17 MR. TAYLOR: It's unclear to me what your  
18 understanding is, Commissioner Nelson. If you could  
19 articulate it, I'll see if I can line up with you.

20 CHAIRMAN NELSON: The Motion that we granted was  
21 to --

22 MR. TAYLOR: I guess I should say I think I  
23 understand what your view is. I'm not sure of  
24 Mr. Gough's question.

25 CHAIRMAN NELSON: Okay. Here we go. Keystone's

1 Motion was to preclude witnesses from testifying at  
2 hearing who did not file prefiled testimony. And that is  
3 the extent of my Motion. And I'm going to read again  
4 "Keystone respectfully requests that the Commission enter  
5 an order precluding DRA, COUP, and any other party from  
6 offering testimony at the hearing, other than rebuttal  
7 testimony that meets the deadline for prefiled rebuttal  
8 testimony."

9 So I guess the question that I've got is that  
10 last phrase. When you say "other than rebuttal testimony  
11 that meets the deadline for prefiled rebuttal testimony,"  
12 and I'm going to turn to Mr. Smith to answer this  
13 question, is it usual that we would allow new witnesses  
14 to enter rebuttal testimony? Or are we limited to those  
15 that had prefiled initial testimony?

16 MR. SMITH: Well, these have been at least  
17 identified so I would say no. I mean, you know, the  
18 thing is are they only offering -- are they offering  
19 testimony that's in the nature of direct testimony, or is  
20 it truly responsive and rebuttal in nature? I think  
21 that's really more the question.

22 CHAIRMAN NELSON: Okay. I'm going to turn more  
23 to Mr. Taylor and ask what did you mean by that phrase  
24 "other than rebuttal testimony that meets the deadline  
25 for prefiled rebuttal testimony"?

1           MR. TAYLOR: Forget the "meets the deadline"  
2 part. That's self-explanatory.

3           If there is true rebuttal testimony to be  
4 offered by COUP, then, yeah, they can offer rebuttal  
5 testimony.

6           CHAIRMAN NELSON: Even if they have not offered  
7 prefiled testimony?

8           MR. TAYLOR: Right. But it's got to be rebuttal  
9 testimony. It doesn't get to be their case in chief  
10 under the hat of rebuttal testimony.

11          CHAIRMAN NELSON: Okay. That to me clarifies  
12 this. And that's exactly where I think it needs to  
13 stand. I am good with that.

14          Mr. Gough, does that answer the question?

15          MR. GOUGH: I'm not quite sure it does. The  
16 question also included my rights for cross-examination of  
17 any of the witnesses being deposed.

18          CHAIRMAN NELSON: That's open. That's not been  
19 precluded.

20          MR. GOUGH: Fine. Okay. The second part,  
21 though, has to do with the three witnesses as identified  
22 in the scope of their testimony.

23          CHAIRMAN NELSON: If they have not filed  
24 prefiled testimony, and apparently they have not, they  
25 would not be able to offer testimony. You would be able

1 to offer them as rebuttal witnesses, but as we have just  
2 discussed, only in the nature of rebuttal. Not as a  
3 precursor to put on a chief case.

4 MR. GOUGH: Thank you. Okay.

5 CHAIRMAN NELSON: And their testimony again  
6 would be due by the 27th. And if they don't file that  
7 rebuttal testimony by the 27th, then they're not in.

8 MR. GOUGH: Understood.

9 CHAIRMAN NELSON: Okay. Thank you. And I  
10 appreciate your asking for that clarification because I'd  
11 much rather get that taken care of today than on the  
12 first day of the hearing. So thank you for helping us  
13 with that.

14 MR. GOUGH: Exactly. Thank you. Thank you very  
15 much.

16 CHAIRMAN NELSON: Okay. That brings us, I  
17 believe, to -- brings us to Dakota Rural Action's Motion  
18 to Compel Keystone.

19 And who's going to handle this one?

20 MR. MARTINEZ: I will be handling that.

21 CHAIRMAN NELSON: Okay. Mr. Martinez, go ahead.

22 MR. MARTINEZ: Thank you, Mr. Chairman. I hope  
23 everybody's enjoying this long afternoon.

24 We've got a number of very similar issues that  
25 we've raised in our Motion to Compel that were also hit

1     upon by Standing Rock. So to the extent that there is a  
2     little bit of overlap there, I'll try to keep it short on  
3     those particular issues because I think, you know,  
4     there's no need to be redundant.

5             Now we had sent TransCanada on behalf of DRA an  
6     entire series of Interrogatories, approximately 86  
7     separate Interrogatories as well as 56 separate Requests  
8     for Production of Documents.

9             Under the applicable law, the South Dakota rules  
10    I think are worth taking a look at. And South Dakota  
11    Supreme Court opinions are also worth taking a look at.

12            I think there is the overriding sort of  
13    principle that applies to discovery motions and discovery  
14    rules is that they are to be very liberally interpreted,  
15    including determinations of relevance.

16            And that is actually -- that's a direct quote  
17    from one of the Supreme Court cases I think that was  
18    cited in Standing Rock's Motion, which was State By &  
19    Through the Department of Transportation v. Grudnik.

20            And, you know, the other thing that is worth  
21    pointing out and the other key case that's been cited is  
22    Kaarup v. St. Paul Fire and Marine, which talks about all  
23    relevant matters are discoverable unless privileged.

24            And that gets into the question of, once again,  
25    what's this liberal interpretation of what is considered

1 relevant. And the standard that you have is is that if  
2 there is any possibility that the information sought may  
3 be relevant to the claim or defense of any party, then it  
4 is discoverable.

5 Now that sort of lays the groundwork for what  
6 under law Dakota Rural Action is entitled to get from  
7 TransCanada during the course of discovery.

8 Now once we have that sort of framed in mind, I  
9 think the next thing to look at is what Commissioner  
10 Nelson has just referred to as the relatively narrow  
11 scope of discovery. That was a quote from just this last  
12 segment where we were discussing Standing Rock's Motion.

13 Now what's interesting is when you look at your  
14 Order of -- that was entered back in December that  
15 related to what we can or can't get into, it is actually  
16 fairly broad. Because the question then comes to what  
17 can we look at with respect to any of the conditions.

18 And the conditions cover everything from federal  
19 laws and regulations, and that includes everything from  
20 pipeline safety to environmental rules. Compliance with  
21 all applicable federal, state, and local permitting,  
22 including the Presidential Permit and all of the  
23 additional permits such as the Clean Water Act  
24 permitting, the permitting related to, for instance  
25 wetlands that I referred to in one of our prior motions,

1 compliance with, for instance, all of the recommendations  
2 set forth in the Environmental Impact Statements and  
3 presumably also the final supplemental, which was then  
4 issued by the U.S. State Department as well.

5           So there's a lot of groundwork here that can be  
6 covered. And we, unlike TransCanada, actually went  
7 through when we submitted our discovery requests and  
8 identified during the course of making those which  
9 specific findings and conditions those applied to.

10           And, you know, let me go ahead and just tell you  
11 that of the 86 Interrogatories that we had, we really  
12 made I think a very good-faith effort on DRA's part to  
13 sort of narrow that down. Frankly, we weren't happy  
14 with, you know, any number of responses that TransCanada  
15 provided to us, but we narrowed it down just because we  
16 knew this was going to be a long hearing.

17           We decided to focus on, you know, the stuff that  
18 we thought was absolutely critical as opposed to just  
19 everything we would like to have and we think is still  
20 relevant.

21           About 21 out of the 86 different Interrogatories  
22 we submitted and then 24 out of the 56 Requests for  
23 Production of Documents. Frankly, we could have gone  
24 into a lot more, but we chose to focus on those.

25           Now you'll look at the different categories.



1 And I guess you can start with the Interrogatories we  
2 had. One of the first things that we point out and what  
3 I'd like to do -- and you should have it in our Motion  
4 there, but the Interrogatories that we have in  
5 contention are No. 7, 8, 12, 13, 15, 16, 17, 21, 23, 25,  
6 26, 30, 40, 48, 56, 57, 58, 60, 76, 83, and 86. You  
7 know, those are the Interrogatories in question.

8 Let's start with, you know, No. 7, which was our  
9 very first one, where we asked TransCanada for  
10 information concerning leaks and spills of crude oil for  
11 pipelines that they own and operate. We requested  
12 information concerning their IMP, which they have now  
13 finally admitted they don't have, their SCADA systems  
14 which supervisor control and data acquisition specs, as  
15 well as their ERP, which they have also now finally said  
16 that they don't have.

17 Now what did TransCanada provide us? They  
18 provided us with a schedule that set out those leaks and  
19 spills. It's a several page, multi-page spreadsheet  
20 saying here are all the instances where pipelines have  
21 leaked, and here's how much they have leaked. Or here's  
22 where we've had spills or any kind of pipeline failures.

23 But they didn't provide any of the additional  
24 information we sought in connection with that. They just  
25 said it was confidential and not relevant.

1           How is it not relevant, given the conditions  
2           that they've got to meet, when one of the core questions  
3           we have is their ability to build a pipeline that meets  
4           the specifications and safety standards that are there?

5           DRA's got a right to know that. We've got a  
6           right to discover that. Whether ultimately at the end of  
7           the day you as Commissioners decide whether it's relevant  
8           or not with respect to actually getting it into evidence  
9           at the hearing is a completely separate question. For  
10          the purposes of discovery, we're entitled to it.  
11          TransCanada does not get to make that call.

12          You know, based on the information that we have  
13          provided and several of the exhibits -- in fact one of  
14          the exhibits, Exhibits 3 Adam Vokes' testimony that we  
15          submitted as an exhibit to our Motion, it's pretty darn  
16          clear that if this pipeline ever gets built, there are  
17          going to be leaks and spills.

18          In fact, in my Motion I refer to it as a virtual  
19          inevitability. And so consequently that information that  
20          we've sought is incredibly relevant. We've got to have  
21          it.

22          The next category -- and what I'm going to do  
23          is -- and in our Motion I grouped a number of them  
24          together, which, frankly, is going to help get through  
25          this a little bit quicker. But Nos. 8, 12, 13, 15, 16,

1 17, 26, 30, 33, 34, and 40, now we put those discovery  
2 requests together in kind of one group because from  
3 various different angles and different ways of asking for  
4 it.

5 CHAIRMAN NELSON: Just a moment.

6 COMMISSIONER FIEGEN: Could he just repeat those  
7 last -- I got the first.

8 CHAIRMAN NELSON: They're on page 5 of his  
9 Motion.

10 MR. MARTINEZ: Yeah. It's Nos. 8, 12, 13, 15,  
11 16, 17, 26, 30, 33, 34, and 40.

12 You got those recorded?

13 CHAIRMAN NELSON: Yes.

14 MR. MARTINEZ: Okay. Now in various different  
15 ways we have asked for information concerning the crude  
16 oil demand, various aspects relating to refinery  
17 capacity, and other factors that TransCanada should have  
18 considered whether or not this pipeline is even  
19 necessary.

20 Now TransCanada's, of course, making the  
21 argument that this is not even relevant. It's outside  
22 the Commission's jurisdiction. But honestly it's not.  
23 Because one of the key conditions -- in fact, you go back  
24 to Condition No. 2 within your Permit Conditions, you're  
25 talking about compliance with the Presidential Permit.

1 You're also talking about compliance with the -- with  
2 Department of State and Environmental Impact Statement  
3 recommendations.

4 All of those issues directly go to the basic  
5 need for the pipeline and whether or not alternate routes  
6 are -- you know, might be, you know, necessary or whether  
7 or not it's even, you know -- an additional pipeline is  
8 even needed given the existing pipeline capacity.

9 That's the information that we're trying to get  
10 at, which is very relevant, and they -- what blew my mind  
11 a little bit when we took a look at TransCanada's  
12 responses, they flat out told us that they did not engage  
13 in any kind of forecasting for this. They just said,  
14 hey, we felt that there was sufficient demand. We're  
15 going to go ahead and launch this pipeline project.

16 Honestly, I don't believe that. My Motion that  
17 I filed on behalf of DRA makes it pretty clear that any  
18 company that's going to engage in a project of this  
19 nature -- and I forget exactly how many billions of  
20 dollars this pipeline is going to cost in total, but it  
21 just defies credibility to believe that any company is  
22 going to launch a project like that without engaging in  
23 some actual forecasting.

24 Now this particular Interrogatory, one of the  
25 things we requested in all of our Interrogatories was

1     that TransCanada identify any documents that they relied  
2     upon in answering that.

3             So it kind of ties back to our Requests for  
4     Production, which I'll get to here in a little bit. But  
5     the response we got was, well, A, we don't think any of  
6     this is relevant. We're not going to give it to you.  
7     And, then, B, they wound up giving us essentially a  
8     couple of what looked like consulting reports or industry  
9     sort of newsletters that talked about -- that talked  
10    about crude oil demand.

11            That really wasn't what we were asking for. We  
12    were asking for TransCanada's internal materials and  
13    forecasting that we believe we're entitled to and they  
14    just flat out did not provide.

15            Now that goes for that whole group of  
16    Interrogatory requests.

17            Our next one that we asked for was No. 21, for  
18    instance. We wanted information as to whether or not a  
19    failure by TransCanada to construct this pipeline in  
20    accordance with the conditions set out by PHMSA and in  
21    Appendix Z of the State Department's FEIS would wind up  
22    being a violation of federal law.

23            The conditions of the permit talk specifically  
24    about the fact that TransCanada has to comply with all  
25    federal, state, and local permitting and regulations. So

1 it's clearly a relevant question.

2           Once again, TransCanada just basically says it's  
3 overly broad and burdensome, it's beyond the scope, and  
4 they said that they weren't -- none of this information  
5 was even binding upon them in terms of the  
6 recommendations in the Final EIS until the Department of  
7 State issued a record of decision and the Presidential  
8 Permit was issued.

9           So here -- I think earlier you had indicated --  
10 or one of the Commissioners. I can't remember. It might  
11 have been Commissioner Nelson or maybe Commissioner  
12 Hanson referred to TransCanada being a sort of chicken  
13 and egg kind of situation.

14           And this is really the condition that  
15 TransCanada is putting Dakota Rural Action in in trying  
16 to put together our case for this hearing. This is  
17 information that we've got to have, but they're saying,  
18 well, you don't get it until a permit is ultimately  
19 issued down the road. We don't know when that permit is  
20 going to be issued so we're not going to give you an  
21 answer.

22           I would suggest that that is unacceptable. And  
23 it's really an issue where they should be compelled to  
24 answer. We believe they've got information in their  
25 files and they're -- you know, in their e-mail

1 communication chains that provide all of this  
2 information. It needs to be disclosed, particularly  
3 disclosure of their correspondence with PHMSA. That  
4 could help Dakota Rural Action as we prepare our case,  
5 particularly as it relates to Mr. Vokes' testimony by  
6 showing that there may be underlying issues with respect  
7 to the integrity of the pipeline. And as Mr. Vokes has  
8 indicated, TransCanada tendency to use substandard  
9 materials when it comes to construction and ignoring  
10 their pipeline safety regulations. That's critical stuff  
11 that DRA needs to know in order to present our case.

12           Next I go to Interrogatory No. 23 where we ask  
13 specifically for dates that crude oil transportation was  
14 disrupted on pipelines that TransCanada has from the  
15 Western Canadian Sedimentary Basin.

16           Once again, I previously referred to the  
17 spreadsheet of pipeline spills they gave to us. Once  
18 again, that's all they gave us. It was not responsive to  
19 the requests that they had because we asked specifically  
20 for a date -- a range of dates in association with each  
21 of those spills where there was a disruption.

22           Now we argued that that's relevant because it  
23 could provide DRA with information concerning  
24 TransCanada's ability to actually respond to pipeline  
25 breaches or respond to any particular measures that were

1       needed in terms of clean up.

2               One of the key issues that we have, for  
3       instance, is if you do have a leak, TransCanada's not  
4       provided us with the information that we have requested  
5       regarding how long it would take them typically to detect  
6       and respond to those kinds of leaks.

7               We need to know that. And the information just  
8       hasn't been -- you know, hasn't been responded to. And I  
9       think it should be responded to.

10              Other issues. We specifically went into and  
11      asked for information about their software and data  
12      systems.

13              CHAIRMAN NELSON: Just a minute. Before you  
14      move on past 23, did Keystone provide you some  
15      supplemental information there that might have answered  
16      that?

17              MR. MARTINEZ: No. We haven't received anything  
18      from them other than a response that, yeah, maybe we'll  
19      get it to you.

20              CHAIRMAN NELSON: Okay. I'm sorry. Continue.

21              MR. MARTINEZ: Yeah. The next one we had was  
22      25. And this one was kind of a critical one for us  
23      because one of the -- one of the key things that  
24      TransCanada's been touting has been that their pipeline  
25      is so much safer now because of software security systems



1 in place and software controls.

2 Well, every time these days you turn on the news  
3 you're hearing or seeing in the news or hearing about it,  
4 major data breaches at companies everywhere. You know,  
5 everybody's heard about the one at target where, you  
6 know, millions of customers were affected. JPMorgan  
7 Chase had huge data breaches.

8 We see data breaches constantly occurring. So  
9 in light of the fact that, you know, TransCanada says we  
10 have all of these wonderful systems in place to prevent  
11 that, we'd like to know what they are. Because if  
12 they're going to be so highly reliant on software systems  
13 that are in place to detect leaks and to manage this  
14 process, we need to know whether or not those systems are  
15 safe, whether they're secure.

16 We need information about, for instance, what  
17 consultants or vendors they're using. I mean, it's one  
18 thing if, for instance, they're using IBM to help develop  
19 them as opposed to maybe they've decide to go on the  
20 cheap and hire Joe Software Company out of a garage in  
21 San Bernardino. We don't know.

22 That's the kind of information that we were  
23 looking for that is extremely relevant as to whether or  
24 not this pipeline is going to leak and spew dil. bit. all  
25 over the South Dakota waterways. Very relevant. And

1 TransCanada has not provided that, any information that  
2 we have requested. That goes to, as I put it in my  
3 Motion, core operational and safety issues. They're  
4 highly relevant.

5 Other Interrogatories. No. 40. We asked them,  
6 for instance, to talk about the potential for pipeline  
7 transportation to replace rail transit from both the  
8 Williston Basin areas in the Western Canadian Sedimentary  
9 Basins.

10 Now TransCanada's made public statements that  
11 one of the reasons that the pipelines are much more safer  
12 than rail when it comes to transporting this dil. bit.  
13 We seriously -- we wonder about that. We don't know that  
14 that's the case. That, once again, goes to pipeline  
15 safety issues, which TransCanada, you know, is, once  
16 again, not willing to provide us.

17 We think that they certainly have this  
18 information. They've -- we think they can provide it to  
19 us. They need to be compelled to do that because it's  
20 clearly relevant to what we're asking for.

21 Interrogatory No. 48, for example, we asked  
22 TransCanada to give us information concerning worst-case  
23 discharges and describe worst-case scenarios that could  
24 result from damage as a result to the various geological  
25 formations that we have.

1           That's information that, frankly, is going to be  
2           very relevant for one of our key expert witnesses who we  
3           have filed written testimony from on his behalf and that  
4           is Dr. Arden Davis. And his testimony is going  
5           significantly into detail about the geology of  
6           South Dakota and where the pipeline is coming -- is  
7           proposed to cut through the state.

8           We need to know from TransCanada the information  
9           that they have concerning those worst-case scenarios that  
10          could result from damage caused by movement or swelling  
11          in geological formations.

12          Now what's mind boggling here is TransCanada's  
13          response. Without providing any kind of statutory or  
14          regulatory authority or anything they just came out and  
15          said we can't give it to you because it's exempt under  
16          Homeland Security rules.

17          Well, we had a meet and confer, talked on the  
18          phone with Mr. Taylor, asked show us the rules. Have yet  
19          to see anything. Honestly, I don't think that those  
20          rules exist.

21          And even if they do exist, I think we're still  
22          entitled to see it, and it's incumbent upon TransCanada.  
23          At that point they've got a burden to file a motion for a  
24          protective order. That's the way the discovery rules  
25          work. They just can't tell us we're not going to give it

1 to you because of Homeland Security rules. That just --  
2 that just doesn't wash.

3 We had the same issue again with Interrogatory  
4 No. 56 where we asked about worst-case discharges along  
5 the Cheyenne and White River crossings. Water for us is  
6 an important issue. And it's a critical issue for the  
7 family farmers and ranchers that are DRA's constituents.

8 Without water, they have no crops. Without  
9 clean water, they don't have livestock. So it's -- you  
10 know, for that matter even for urban communities or towns  
11 within South Dakota, this is a critical issue for them as  
12 well. Because a lot -- I mean, if you're like -- a lot  
13 of the cities and towns in South Dakota are like the ones  
14 in Missouri and Kansas that I deal with and are familiar  
15 with, we get a lot of our water from the rivers And from  
16 the water tables that are adjacent to the rivers.

17 We need to know what the damage scenarios are in  
18 the event of a pipeline spill. Because I think that  
19 clearly goes into your duty as Commissioners to protect  
20 the natural resource of the state, including the water  
21 that both agribusiness and human populations rely on in  
22 order to survive. That's information we need to know,  
23 and that's information that TransCanada's not willing to  
24 provide us.

25 No. 57, once again, we requested the same

1 information about worst-case scenarios as it passes under  
2 channels, adjacent floodplains, and flood protection  
3 levies. TransCanada simply refused to provide it.

4 Same thing for Interrogatory No. 58 where we  
5 asked that TransCanada provide in light of spill risk  
6 assessments that were provided in the original '09 Docket  
7 to talk about and tell us a little bit about the leaks  
8 and spills on pipelines that they operated and to provide  
9 additional details concerning those worst-case spill  
10 scenarios that were posed by this proposed XL Pipeline.

11 Once again, they just said, A, it's confidential  
12 and made a totally unsupported recitation saying we're  
13 not going to give it to you because Homeland Security  
14 says we can't.

15 Well, either show us why they can't or file a  
16 motion for protective order and maybe have our expert  
17 witnesses and us take a look at it under seal. That I  
18 think is an appropriate approach. Don't just simply tell  
19 us we're not going to give it to you, which is what  
20 TransCanada's done.

21 Same thing, you know, for Interrogatory No. 60  
22 where we asked for specifically those impacts of  
23 worst-case spill scenarios in the aquifers in Tripp  
24 County. We asked TransCanada to identify any documents  
25 that would support their answers. And, once again,

1 confidentiality and Homeland Security, which I think are  
2 just totally -- I mean, they're bogus answers.

3 Interrogatory No. 76, we also asked them about  
4 slope instability. And, you know, one of the issues that  
5 our expert witness, Dr. Davis, has indicated is that the  
6 pipeline cuts through areas where you have a fair amount  
7 of bentonite deposit.

8 Bentonite is -- you know, it's a form of clay,  
9 but I guess somebody described it to me once as the best  
10 way to describe it is cat litter. You know, when it gets  
11 wet it swells up. It causes instability, and the stuff  
12 collapses.

13 So we said, well, you know, if the pipeline is  
14 going through areas where it looks like there may be some  
15 potential geological instabilities, I think it's  
16 important for us to know whether or not TransCanada has  
17 taken those factors into account and what documents they  
18 have to show that they are doing something to mitigate  
19 that.

20 Now, of course, we've asked for their Integrity  
21 Management Plan, their IMP, which they have indicated  
22 they don't have because they haven't prepared yet so I  
23 understand maybe why they haven't provided that. But the  
24 rest of it they indicated it's beyond the scope of the  
25 Commission's jurisdiction. They said it addresses the

1 jurisdiction that's within the exclusive province of  
2 PHMSA and that it's "confidential and proprietary."

3 We made -- that request in particular was very  
4 narrowly tailored. TransCanada also has said it's overly  
5 broad and unduly burdensome. I do not believe that the  
6 objections that they have raised have any merit  
7 whatsoever.

8 The question of whether or not the pipeline will  
9 pose the types of risks, the specific risks that we've  
10 asked for, is something that I know darn well that they  
11 have in their possession. They should answer it. They  
12 should be compelled to turn over information about that.

13 And if they haven't, it leads me to believe that  
14 there may be some problems here that they do not want the  
15 Commission or that they do not want the people of  
16 South Dakota to know about.

17 And that ought to be a huge concern for not just  
18 all of the Intervenor in this case but for you as a  
19 Commission as well.

20 Interrogatory 83, for instance, we asked once  
21 again for the IMP. I won't go over that, but they  
22 haven't provided that information because they don't have  
23 it.

24 86 we asked for another -- in the event of a  
25 worst-case discharge or a release of crude oil into

1 farmland and/or water resources as a result of some kind  
2 of a pipeline breach near homes or towns where people  
3 lived. We asked TransCanada how to -- you know, because  
4 they previously represented to us that the pipeline would  
5 have a minimal effect or any kind of breach or leak would  
6 have a minimal effect on health, safety, or welfare of  
7 the people of South Dakota.

8 And we asked TransCanada to explain how a  
9 worst-case spill scenario or discharge or a pipeline --  
10 you know, some type of a fire or a breach would wind up  
11 having -- or why that would only result in a minimal  
12 effect. And we asked for documents -- or TransCanada to  
13 identify any documents relying on to answer that. Now,  
14 of course, they simply objected and said it was  
15 argumentative and improper in form, calls for  
16 speculation.

17 I don't think so. If TransCanada has done its  
18 job as they should have in terms of trying to design a  
19 pipeline that isn't going to leak, blow up, or breach in  
20 any way, they have to have thought of this.

21 If they haven't, they're being negligent, and  
22 you ought to dismiss their ability -- their Petition  
23 outright and not grant them the right to build a pipeline  
24 through the state.

25 Now if they have thought about this, like I'm



1     sure they have, they at least ought to tell us about it  
2     and tell us what they've found and identify any documents  
3     they have to back up their claims.

4             Now those were the Interrogatories. We had,  
5     once again, a substantial number of document production  
6     requests that we made.

7             For instance, we asked them to produce any of  
8     the documents that they identified or referred to in  
9     their Answers to the Interrogatories.

10            Once again, they really didn't -- you know, they  
11     gave us a document of maybe -- I'd have to count it up.  
12     A little over 1,000 pages. But mostly that consisted of  
13     a couple of energy consultant reports that I previously  
14     told you they provided, a spreadsheet showing a pipeline  
15     breach -- or pipeline breaches that they've had. And  
16     then also copies of -- multiple copies of pages of the  
17     State Department's Final Environmental Impact Statement.  
18     Stuff, frankly, I mean, thank you for providing it, but  
19     we already pulled it down, you know, off Department of  
20     State's website.

21            But the request that we made, and this is  
22     Document Request For Production No. 1, was much broader  
23     than that. We asked for whatever they identified or  
24     referred to. But the problem we have is they refused to  
25     identify a lot of the documents in the Interrogatory

1 requests. So those two kind of go hand in hand.

2 Now you go to the next one we have, and that was  
3 Document Request For Production No. 9. One of the things  
4 that -- one of the key questions that we have is is about  
5 the pipeline. It's about pipeline integrity. And  
6 particularly, you know, the prefiled testimony we have  
7 attached as Exhibit 3 to our Motion for Mr. Vokes who  
8 suggested that TransCanada uses substandard materials and  
9 sacrifices safety in favor of profits.

10 So in light of that we said, well, give us some  
11 information, give us your documents concerning your  
12 decision to use the particular type of steel that you  
13 have indicated you're going to be using here in the  
14 pipeline.

15 Now they have come right out and said that,  
16 well, we're not entitled to give -- we're not going to  
17 give it to you. It wouldn't have a significant impact on  
18 the pipeline integrity, and, you know, it's overly broad  
19 and unduly burdensome is what they said.

20 I respectfully disagree with that. It may  
21 require TransCanada to do a little bit of work to gather  
22 the documents that we've asked for that relate to their  
23 decision to use this particular type of steel, but that's  
24 something that they ought to have in their files already.  
25 That's something that they should have had ready and able

1 just to basically pull from a file because they probably  
2 already provided something of that nature to PHMSA and to  
3 other regulators.

4 Why can't they provide it to us? DRA is  
5 entitled to those documents. And that includes -- you  
6 know, documents are not just reports that they've  
7 prepared but copies of their e-mail communications, for  
8 instance, with various regulators discussing this issue.

9 There's a lot of material here that, frankly, we  
10 would like to take a look at because it's relevant, it  
11 fits in with the standards that we have for -- the legal  
12 standard for what we're entitled to see in discovery, and  
13 they just really -- they haven't provided it.

14 In fact, what was interesting was was one of the  
15 words or catch phrases that TransCanada used throughout  
16 its responses to our discovery requests. They said, you  
17 know, we've -- we're going to give you some information,  
18 but they said -- and we asked them in our Interrogatories  
19 if they made a due and diligent search of their books,  
20 records, documents, to get all of the information that we  
21 were asking for.

22 And their response was, yeah, we did it, but  
23 only to the extent it was reasonably practical in  
24 attempting to respond to all of these discovery requests  
25 that were made within the time period allowed.

1           You know, I'm sorry, but reasonably practicable  
2 isn't good enough. That's just simply -- who's to decide  
3 what exactly is reasonably practicable? Under that  
4 standard TransCanada could just not give us a darn thing  
5 and say, well, it wasn't reasonably practicable for us to  
6 respond to your requests. I have a huge issue with how  
7 TransCanada has responded to our requests.

8           Now, you know, going through some of the rest of  
9 the ones we have had, we asked for information, for  
10 instance, in Request No. 10 concerning their use of  
11 fusion bonded epoxy coating, which they said is one of  
12 the key issues that's going to keep the integrity of the  
13 pipeline apparently in place and keep it from leaking.

14           Well, we wanted to know a little bit more about  
15 that. We want to know who manufactures it. We wanted  
16 to know, for instance, whatever communications that they  
17 had between TransCanada and the manufacturer of that  
18 fusion bonded epoxy so maybe we could get a better  
19 understanding of what the specifications were that  
20 TransCanada asked for, whether there were any issues  
21 relating to how it works when it's actually in the  
22 ground.

23           Now all of those issues are extremely relevant  
24 to pipeline safety and pipeline integrity and TransCanada  
25 should provide that information to us and they just --

1     they just haven't.

2             Document Production Request No. 12. We wanted  
3     to know where locations were for power lines for pumping  
4     stations. And this kind of raises an interesting issue  
5     because, you know, they basically once again relied on  
6     this Homeland Security rationale to tell us we're not  
7     going to give you location pump stations and main line  
8     valves.

9             Well, one of the prior statements, and I think  
10    it was made during the arguments that Mr. Capossela made  
11    for Standing Rock's Motion, was there was an instance  
12    where some of this fusion bonded epoxy had failed because  
13    of collocation with another utility.

14            Well, one of the -- that sort of prompted a  
15    question in my mind and I think underscored why the  
16    information we are seeking to get from TransCanada is  
17    relevant here. Because if, for instance, they're running  
18    power lines out to various pumping stations, how do we  
19    know that the same type of failure that occurred with the  
20    fusion bonded epoxy isn't going to occur again because of  
21    the proximity of the power lines out to the pumping  
22    stations?

23            We don't know that. We'd like to know that.  
24    And I think DRA is entitled to know if there's any  
25    information or any documents in TransCanada's files that

1 might shed some light on that. Because, once again, the  
2 safety of the pipeline is a critical issue. It's a key  
3 factor that ties back to the conditions that you imposed  
4 on TransCanada back, you know, five years ago. DRA's  
5 entitled to know whether or not they can meet that.

6 Our next request was No. 13, and that was really  
7 a simple request. We wanted their documents concerning  
8 compliance with PHMSA regs and conditions as well as  
9 TransCanada's communications with PHMSA and federal  
10 regulators regarding these compliance issues.

11 TransCanada said, well, it's overly broad and  
12 unduly burdensome. You know, I hate to tell TransCanada,  
13 but that's not a good objection. It may indeed be a lot  
14 of information that they're required to produce under  
15 here. It may be -- you know, it may be a couple of gigs  
16 of data, you know, on a disk. But we're entitled to see  
17 it.

18 We're entitled under the Rules of Discovery as  
19 they exist and under the rulings of the South Dakota  
20 Supreme Court as they relate to what is producible in  
21 discovery.

22 And not only that, it's crucial. Because one of  
23 the key issues you've got and conditions you've placed is  
24 TransCanada's compliance with the federal rules and state  
25 rules and even local rules and regs. We're entitled to

1 see what communications that TransCanada has engaged in  
2 with federal regulators to determine whether or not they  
3 can comply with those rules. And that's information that  
4 we're entitled to have and that they should be compelled  
5 to produce.

6 Request For Production No. 26, for instance.  
7 Once again, this kind of goes back to the idea of a  
8 failure that they had of that fusion bonded epoxy coating  
9 that was referenced that we previously referenced. We  
10 asked for documents about that. Pretty simple request.

11 They did not produce it for us. They should be  
12 compelled to produce it. It may indeed shed some light  
13 on what could happen, for instance, if they were going to  
14 run power lines out to pumping stations. That may be an  
15 issue that we need to look at. It may lead to something  
16 that's very admissible, and that's the standard for  
17 discovery.

18 Request For Production No. 28 we wanted to know  
19 information about TransCanada's decisions to use  
20 horizontal directional drilling crossing waterways.

21 Now it's important for DRA to understand that  
22 process and what thinking TransCanada engaged in when it  
23 made that decision. Because, once again, that goes to  
24 one of our core issues that's of importance to the  
25 family farmers and ranchers that Dakota Rural Action

1 works with.

2 Waterways and water crossings are crucial.  
3 Without -- you know, without water in South Dakota, and  
4 you know how scarce water's getting and it's going to get  
5 even more scarce in years ahead given what drought  
6 conditions look like, we need to -- we need all the  
7 information possible from TransCanada to understand what  
8 risks the construction methods that they have used or  
9 they're planning on using may wind up posing to the  
10 residents of South Dakota and to the risk posed to  
11 South Dakota's water resources.

12 The information was very narrowly tailored in  
13 this particular document request. And it's highly  
14 relevant to these proceedings. And I don't think you as  
15 a Commission should let TransCanada basically escape by  
16 saying we're not going to produce it because -- because,  
17 essentially they don't want to.

18 No. 29, we requested documents relating to their  
19 forecasts and projections of tax revenue. One of the  
20 wonderful things that we've heard from TransCanada's  
21 representatives and various -- the ranchers and farmers  
22 who Dakota Rural Action works with is that they've heard  
23 that TransCanada is going to pay all of these wonderful  
24 taxes to various counties throughout South Dakota. It's  
25 going to be a great economic boom. Going to be a



1       fabulous benefit to all of these counties.

2               So we simply asked, well, give us your  
3       projections. Give us the documents that went into your  
4       determination of these forecasts and how this information  
5       was wound up -- wind up being derived.

6               And, you know, once again, all they really  
7       provided to us was a schedule saying this is what we  
8       project. They did not provide anything that went into  
9       their thought processes, discussions that they may have  
10      had internally, reports that might have been prepared,  
11      e-mail communications back and forth between TransCanada  
12      managers. Maybe -- you know, who knows? Maybe there may  
13      be some documents in there in those e-mail chains that  
14      talk about whether or not they're pulling the wool over  
15      the eyes of the residents of South Dakota on these tax  
16      revenue projections. We don't know that. That's why the  
17      discovery process exists is to entitle us to take a look  
18      and see what is there.

19              It is relevant to what -- you know, to -- it's  
20      relevant to these proceedings. We're entitled to get it.  
21      Production should be compelled. And for TransCanada to  
22      basically come out and say, well, the only documents that  
23      they've got is the schedule that they gave, which we've  
24      attached as Exhibit 6 to our Motion, is just -- it's not  
25      reasonable, and it's not responsive to our request.

1           No. 30, once again, we -- we sought additional  
2 Requests for Production. They objected suggesting that  
3 the documents would be covered under the Request No. 1  
4 that we've set forth so I'm not going to go into that  
5 because we've already repeated that. We've already  
6 argued it.

7           Request For Production No. 31, this was kind of  
8 interesting because one of the key conditions that's in  
9 the original Amended Order is that TransCanada has to go  
10 and get all of its permitting in place. That is a key  
11 condition. Now we went ahead and said, okay, if that's a  
12 condition that you've got to comply with, show us the  
13 documents where you've gone and complied with that  
14 particular condition and gotten the required permitting.

15           The response we got from TransCanada was, well,  
16 it's overly broad, unduly burdensome, not relevant, not  
17 likely to lead to discovery of admissible evidence.

18           I don't think you can be more wrong in making a  
19 statement like that in terms of an objection. It is  
20 highly relevant. It may indeed be a lot of documents,  
21 but we're entitled to see them because it goes straight  
22 to the heart of whether or not TransCanada is complying  
23 with the conditions that you as a Commission have imposed  
24 on them. They should be compelled to produce it.

25           No. 33, we asked for documents concerning any

1 deviations to the route. That was kind of an interesting  
2 response because what they basically gave us were a  
3 series of route variation maps. We've referenced those  
4 in the exhibit.

5 The instruction, though, that we gave them in  
6 terms of what we wanted in terms of the Document  
7 Production Requests was a bit broader than just simply  
8 give us the map, show us where the route changed.

9 The definition section that we had in our  
10 Request for Production of Documents, I've excerpted it.  
11 It's on page 18 of our Motion that we filed. It provides  
12 for a lot more than just simply route maps.

13 DRA wants to know what decision making went into  
14 that process of deciding what route changes were  
15 appropriate. Now we had a meet and confer with  
16 Mr. Taylor, and he gave us a couple of instances of  
17 where -- you know, verbally where some route changes were  
18 made at the request of various landowners or to make  
19 certain accommodations, but we still have not seen any  
20 documentation that actually explains how and why those  
21 occurred.

22 Now I certainly, you know, had a great  
23 conversation with Mr. Taylor. He certainly, you know,  
24 explained what a couple of these were. But, once again,  
25 DRA's entitled to get documentation, and we don't have

1       that documentation. It was not provided to us.

2               No. 34, we asked for information about the  
3       appointment of a public liaison officer and  
4       communications between that officer and the landowners  
5       that were affected by the proposed pipeline project.  
6       Once again, TransCanada said, well, that was overly  
7       broad, unduly burdensome, not relevant, et cetera,  
8       et cetera.

9               It is relevant. The appointment of a public  
10       liaison officer is something that you have specifically  
11       mandated in Condition No. 7 of the Amended Order that was  
12       directed to TransCanada.

13              Now why is that relevant? Well, you know, if  
14       there's some communications in there between landowners  
15       and the public liaison officer, it could certainly reveal  
16       to us whether or not TransCanada has been in compliance  
17       with the conditions of the permit as well as whatever  
18       issues may have been raised by landowners regarding  
19       TransCanada's treatment of them, treatment of their land,  
20       for instance, or any of the other issues that are  
21       relevant to these proceedings.

22              TransCanada should be required to produce those  
23       documents that we've requested and not just simply tell  
24       us no, you're not going to get it.

25              Production Request No. 36, we wanted to know

1     what their efforts were to comply with mitigation  
2     measures that were in the Construction Mitigation and  
3     Reclamation Plan that was submitted. Now all they did  
4     was come back and state, well, all of those  
5     recommendations aren't binding on us until the Federal  
6     Government acts.

7             I think that is really kind of an ironic  
8     objection for them to make because I don't want to replot  
9     all the ground that we've raised in the Motion to Stay,  
10    but we've suggested, you know, maybe the idea should be  
11    that we don't really need to act on this until they get  
12    the information in place and get a federal permit in  
13    place, a Presidential Permit. Well, in this case they  
14    say, well, none of this stuff is binding on us so we're  
15    not going to provide it.

16            It seems like TransCanada's wanting to have it  
17    both ways here. Ultimately, their response was  
18    nonresponsive to our request, and we would ask that the  
19    Commission go ahead and compel TransCanada to comply with  
20    the highly relevant document production request that  
21    we've made.

22            I've lumped in our Motion items No. 37 and 38 on  
23    our document requests together because that specifically  
24    relates to the development of these construction  
25    reclamation units.

1           Now TransCanada has said that it's, you know,  
2   unduly burdensome and overly broad. Now from our  
3   respect, you know, in all due respect DRA's constituents,  
4   the farmers and ranchers that DRA represents, believe  
5   that is something that is highly relevant because it ties  
6   right back to the issue that we're going to have with  
7   respect to what TransCanada's required to do to reclaim  
8   the land and what kind of construction activities they  
9   engage in in the event that you decide to grant them  
10   their permit -- or grant their Petition and let them move  
11   forward.

12           Now the reason that's relevant is one of the  
13   items of written testimony we have submitted has been  
14   from another farmer/rancher who we talked to who said,  
15   you know what, I had an awful experience with those guys  
16   on Keystone I on the original XL Pipeline. They did not  
17   comply with anything that they said they were going to  
18   comply with.

19           So I think it's pretty relevant for us to  
20   understand what it is they're going to do and how they're  
21   going to go about the construction process and  
22   reclamation process.

23           Because we've got a pretty good inkling that  
24   they've been noncompliant in other areas. And this goes  
25   directly to TransCanada's pattern and practice of bad

1 behavior, something we're entitled to hear about and  
2 something we're entitled to find out about.

3 Item No. 42 we asked for -- once again, this  
4 goes to the compliance issue. This is more of a, you  
5 know, species and wildlife issue. You know, a lot of  
6 people come to South Dakota to hunt and fish. So we  
7 asked for information concerning whatever consultations  
8 TransCanada has had with South Dakota Department of Game,  
9 Fish & Parks. That's something that is clearly relevant  
10 and is clearly one of the conditions that you have in  
11 your Amended Order.

12 Now, once again, they gave us a little bit of a  
13 narrative saying that, yes, we wound up consulting with  
14 them, but that wasn't what we asked. We asked for their  
15 documents. That includes any reports, any communications  
16 they've had. Their objection was it's overly broad and  
17 unduly burdensome.

18 Well, you know, too bad. They have documents.  
19 They should be required to produce them. We're entitled  
20 to them. Their objection just doesn't hold water.

21 No. 44, that one was a crucial request. And I  
22 won't go over, you know, DRA's concerns about the water  
23 issues that we're facing, you know, throughout not just  
24 South Dakota but the entire Upper Midwest. We asked for  
25 information describing or whatever documents TransCanada

1 had concerning their efforts to comply with construction  
2 of the pipeline near any water bodies riparian areas,  
3 wetlands. We need to know what TransCanada has in mind  
4 for construction around sensitive areas where in the  
5 event of a pipeline breach you could have a negative  
6 effect on the scarce water resources of this state.

7 Now the only response that we got from them was,  
8 well, they haven't gotten their permit authorization for  
9 wetland construction yet. Okay. Fine. Maybe they won't  
10 give us a permit yet. But I find it very hard to believe  
11 that they haven't had internal communications between  
12 TransCanada's managers about what they need to do and how  
13 they're going to go about getting that.

14 To the extent that they've prepared drafts of  
15 requests or any other reports or documents, that's always  
16 in the scope of our discovery request, and that's what  
17 we're entitled to see.

18 TransCanada's answer to us was just  
19 nonresponsive to a very core critical issue relating to  
20 the water resources that DRA is interested in protecting.

21 No. 46, we asked for private and access roads to  
22 be used during pipeline construction. And that was kind  
23 of interesting because we wanted to know, okay, where are  
24 you going to be moving heavy equipment? Where are you  
25 going to be moving heavy trucks? Those are all kinds of



1 issues that can certainly affect a lot of the landowners  
2 and a lot of the sort of construction and reclamation  
3 efforts that may wind up being used.

4 Now what was interesting here is, once again,  
5 TransCanada came out and said, yeah, we're not going to  
6 tell you how we're going to use any private or access  
7 roads because it's all confidential thanks to Homeland  
8 Security.

9 With all due respect, we've not been provided  
10 any support for why that may be the case. TransCanada's  
11 not filed a motion for a protective order like they  
12 should have under the rules if indeed they believe that  
13 was information that was truly confidential in a Homeland  
14 Security nature.

15 And, you know, to be blunt about it, I think the  
16 Homeland Security argument that they're making is  
17 somewhat bogus. I mean, I just don't see, you know, ISIS  
18 in, you know, Sioux Falls being out to, you know, look at  
19 farmland and, you know, ranchland in South Dakota. That  
20 just doesn't make any sense.

21 No. 48, we wanted agreements reached with  
22 landowners, including specifically anything relating to  
23 or modifying any of the requirements or conditions that  
24 were established by the Commission in its order, Amended  
25 Order from over five years ago.

1           Now, once again, TransCanada said they're not  
2 going to give us anything. They just said our request is  
3 overbroad, unduly burdensome, their standard objections.  
4 Once again, I think that is misplaced.

5           DRA and the people of South Dakota and you as  
6 Commissioners need to know whether or not TransCanada is  
7 even upholding those conditions that were set forth in  
8 that original permit, and we specifically tailored this  
9 request to determine whether TransCanada in its  
10 communications with landowners along that proposed route  
11 remains in compliance. They've just simply refused to  
12 provide it.

13           That's wrong. They should be compelled to give  
14 it to us. It's discoverable under the rules.

15           Document -- Request For Production No. 50. We  
16 asked for assessments performed in connection with their  
17 activities in high consequence areas, including documents  
18 concerning or referencing their efforts to comply with  
19 federal regulations. Consultations that they may have  
20 had with South Dakota Geological Survey, the Department  
21 of Fish, Game & Parks, and various affected landowners  
22 and government officials.

23           Now that request was highly relevant in light of  
24 the conditions that are placed upon TransCanada with  
25 respect to their compliance with law. Compliance is a

1 key issue within those conditions and within that  
2 original permit.

3 Now what was TransCanada's response? First they  
4 said, well, it's confidential. And, second, they said  
5 it's not within the Commission's jurisdiction. Wrong and  
6 wrong on both accounts.

7 How are their communications with regulators  
8 just confidential under some sort of blanket assertion of  
9 confidentiality? They've provided no argument, no  
10 rationale for that. And if it truly were confidential  
11 under discovery rules, they've got a remedy. They can  
12 come and seek a motion for protective order. They  
13 haven't done that. Consequently, I don't think any  
14 confidentiality exists.

15 And, second, they said it's not within the  
16 Commission's jurisdiction. That's just patently  
17 incorrect. The conditions that you placed on TransCanada  
18 are spot on in terms of they are required to comply with  
19 federal state and local rules and regulations laws and  
20 ordinances. How can that not be relevant?

21 What we're looking for is what are they doing to  
22 comply, and, once again, they're not providing it.

23 Number 51, we, once again, asked hyperlogically  
24 sensitive areas, once again, because of our requests and  
25 interest in waterways and in aquifers. And what we

1 specifically focused on here was the High Plains Aquifer  
2 that's down in southern Tripp County. Now they said  
3 that's the only vulnerable and beneficial useful aquifer  
4 that was being identified in the State Department's FEIS.

5 Now, once again, TransCanada didn't provide us  
6 with any documents. They simply said this is our answer.  
7 They answered it almost like an Interrogatory or a  
8 response to an Interrogatory. But it's just simply  
9 nonresponsive. We asked for documents where they've  
10 identified those sensitive areas directly referenced in  
11 Condition No. 35 that you've imposed upon them. And they  
12 just simply have not complied.

13 They didn't provide us with a single piece of  
14 paper that relates to that. Other than going back and,  
15 once again, referencing the FSEIS.

16 Request For Production No. 53, we asked for  
17 their efforts once again to comply with protection  
18 mitigation efforts from the U.S. Fish & Wildlife Service  
19 and the South Dakota's Game, Fish and -- Game & Fish  
20 Department, relating to endangered species.

21 Once again, instead of providing us with  
22 anything, all TransCanada did was basically said -- say  
23 go look at the biological assessment and biological  
24 opinion that's in the State Department's Final EIS and  
25 the Final Supplemental EIS.

1           Again, that's nonresponsive because we've asked  
2   for their documents as it relates to compliance. That  
3   would include internal e-mails between TransCanada  
4   manager and TransCanada Staff. That would include any  
5   reports that they've prepared, any drafts of reports that  
6   they've previously prepared.

7           There has to be a tremendous amount of  
8   documentation there that is relevant, that DRA's entitled  
9   to look at, is entitled to see whether or not there is  
10  anything in that that could ultimately be admitted as  
11  evidence. We're entitled to see it. They have not  
12  provided it. I hate to keep saying they haven't provided  
13  it, but that's exactly the response that we've pretty  
14  much -- it's fairly consistent throughout our discovery  
15  requests here.

16          No. 55, we asked for information regarding  
17  documents referencing or containing information  
18  concerning cultural or paleontological resources along  
19  the route. Once again, they simply pointed back to the  
20  State Department documents and said that they're not  
21  producing any kind of a paleontological monitoring plan  
22  because it's "confidential and privileged information."

23          Once again, if it's confidential or privileged,  
24  by all means they're entitled to come and get a  
25  protective order from you and explain to you why that is

1 the case. They haven't done that. It's too late for  
2 them to do it. I think it needs to be produced. You  
3 need to put an order in place compelling them to produce  
4 the information that we're seeking.

5 Finally, thank goodness I'm getting on my very  
6 last one here, Document Production Request No. 56. This  
7 goes back to leaks and spills. We asked for incident  
8 reports. Because those incident reports are going to  
9 help us in any number of ways to present a case when we  
10 ultimately get in front of you for our hearing.

11 Those incident reports can have some very  
12 valuable information about them, such as what  
13 particularly caused a spill, what was the timing in terms  
14 of a response to those spills. What exactly -- you know,  
15 what were the consequences? How did they engage in  
16 remediation? What was reported to regulators?

17 All of that is relevant information in terms of  
18 how TransCanada as a company acts in the event that there  
19 is an inevitable spill or breach of a pipeline.

20 We're entitled to see it. It's relevant. It  
21 goes to compliance. It goes to safety issues. It goes  
22 to the consequences and risks of a pipeline breach in the  
23 event that they construct it. And, once again, they  
24 simply are not interested in providing that to us.

25 In fact, interestingly enough, they --

1 TransCanada basically came out and told us that those  
2 incident reports were not readily accessible to  
3 TransCanada where production would be a burden.

4 Well, how does a company like TransCanada  
5 operate from a compliance standpoint without containing  
6 some kind of a compliance file? And I've done work with  
7 a number of regulated industries, and every business I  
8 know of that has to deal with regulators and prepare  
9 reports and incident responses keeps a file on these  
10 sorts of things where it is readily accessible and can be  
11 easily produced.

12 Heck, I've got bars and restaurants that I work  
13 with that keep incident reports regarding their liquor  
14 licenses, much less a multinational corporation like  
15 TransCanada something a lot more serious that deals with  
16 things like pipeline spills.

17 Honestly I think their response defies  
18 credibility. I think the consistent response that  
19 they've engaged in throughout our Requests for Production  
20 of Documents and our Interrogatories has been one of just  
21 simply blowing us off. They're not going to give us the  
22 information that we've requested even though it's  
23 relevant it's discoverable under the law. We're entitled  
24 to it.

25 On that basis our Motion to Compel should just

1 be flat out granted all the way across, and that's what  
2 I'm asking you for.

3 CHAIRMAN NELSON: Thank you. That special  
4 master idea. Who voted against that?

5 At this point I'm guessing, Cheri, you're going  
6 to want -- yeah. We're going to take 5 to 10 minutes.  
7 Just for everybody's benefit, we are going to finish this  
8 deal today. But let's take 5 or 10 minutes, and we'll  
9 come back and keep plowing.

10 (A short recess is taken)

11 CHAIRMAN NELSON: Okay. I think we're all  
12 settled in, Mr. Taylor. It's your turn.

13 MR. TAYLOR: Thank you. I'm going to try and be  
14 as brief as I can my comments. I am not going to go  
15 through Mr. Martinez 24-page dissertation point by point.  
16 Rather, what -- I'm going to tell you about four things.

17 When we started out today I talked about fishing  
18 expeditions, and the discovery rules do not permit  
19 fishing expeditions. You've got to have a theory. You  
20 have to advance your discovery based on that theory. And  
21 you have to support your discovery requests accordingly.

22 You don't get to just throw the line in the  
23 water and troll for may I quote "all documents" and then  
24 retrieve all documents, whatever that is, sort through  
25 them and decide that they are relevant or not relevant to



1 the issues, that they lead to discoverable information or  
2 they do not lead to discoverable information.

3 If you carefully examine Mr. Martinez's  
4 requests, virtually every one is couched with the phrase  
5 all documents referencing or containing information  
6 concerning. And then he uses a broad brush to paint a  
7 particular subject. It's nothing more than a fishing  
8 expedition.

9 On top of that, many of his comments are  
10 disingenuous. I'll give you an example.

11 Document Request 55, DRA asks for all documents  
12 referencing or containing information concerning cultural  
13 or paleontological resources along the route. And then  
14 he argues that it's inappropriate that we say that those  
15 issues are confidential.

16 Well, first of all, they're confidential not  
17 because of TransCanada; they're confidential because the  
18 State of South Dakota says that they are confidential.  
19 Why does the State of South Dakota say that?

20 Because there have been two, three that I know  
21 of -- at least two reported Supreme Court decisions on  
22 fights over the ownership of paleontological items  
23 developed in the Elk Creek Formation in Harding County.

24 Commissioner Hanson was along for the road show  
25 in 2009 when two DRA members expressed in Harding County

1 one of their great concerns was the confidentiality of  
2 paleontological information developed off of their  
3 properties because they did not want to have some issue  
4 come up with who is the owner of valuable and rare  
5 fossils found on their property.

6 One of those people is listed as one of DRA's  
7 witnesses. The paleontological plan and the  
8 characteristics wrapped around it were in large measure  
9 developed as a consequence of the comments made in that  
10 hearing process. To now come into this room and argue  
11 that TransCanada is playing hide the ball is  
12 disingenuous.

13 The next point, I don't think listening to  
14 Mr. Martinez that he read our careful response to his  
15 Motion to Compel. We address point by point every point  
16 and every argument they made, and he ignored every one of  
17 them in the course of his arguments.

18 If I wanted to go through those with you, we  
19 would be here for another half-hour because our points  
20 were -- are well made and carefully laid out in our  
21 careful responses to his casting the line in the water,  
22 his fishing expedition.

23 CHAIRMAN NELSON: Again, whoever's on the line  
24 we need you to put your phone on mute. We're hearing a  
25 lot of coughing, et cetera going on out there.

1           Thank you.

2           MR. TAYLOR: With all due respect to  
3 Mr. Martinez, I think there's some elements of his  
4 discovery requests that he doesn't understand.

5           Let's talk about the appointment of the public  
6 liaison officer, for example. You read his discovery  
7 request and you listen to his comment made today and you  
8 come to the quick conclusion that the public liaison  
9 officer was appointed by TransCanada. The public liaison  
10 officer was not appointed by TransCanada. It was  
11 appointed by you.

12           And the public liaison officer answers to you.  
13 Doesn't answer to TransCanada. And the public liaison  
14 officer files her reports with TransCanada. Short of us  
15 issuing a subpoena to the public liaison officer,  
16 Sara Metcalf, we have no access to what notes she may  
17 have kept regarding contacts with landowners and  
18 discussions she's had and those things that Mr. Martinez  
19 reaches to.

20           Throughout his Motion to Compel there are  
21 similarities to that. I think the most efficient way to  
22 deal with this is for us to say we rest on what we said  
23 in our document. And I would say to you one last thing.  
24 Actually two. We had a meet and confer with  
25 Mr. Martinez. Lasted about an hour. Very pleasant

1 conversation. He's a delightful man to talk to.

2 Mr. Moore and I spent the better part of the day  
3 preparing for that meet and confer, anticipating that  
4 many of these issues that he has now laid before you he  
5 would lay before us.

6 Candidly, I don't think he was prepared for that  
7 meet and confer. We talked for about an hour. The only  
8 thing that we really talked about was he asked about  
9 route changes, as he said today, and I explained a couple  
10 of them to him, very simple.

11 So we're now here today because the discovery  
12 process in his mind has collapsed. The fact is that the  
13 discovery process in his mind is borderline abusive of  
14 his -- his behavior is borderline abusive of the  
15 discovery process to start with. And you can talk for an  
16 hour and a half about your motion and your memorandum,  
17 but it doesn't take away from the fact that you are  
18 still bound by the questions you ask.

19 You're still bound by the rules, one of which is  
20 all documents is not, as he said, a "narrowly tailored  
21 request" by any means.

22 Yes. We made a reasonably practicable effort.  
23 In his mind it isn't good enough. You're the ultimate  
24 deciders. We responded. We'll rest in our response.

25 CHAIRMAN NELSON: Thank you.

1                   Questions from the Commission.

2                   MR. TAYLOR: I felt like I ought to ask  
3 Mr. Moore to -- I'm sorry. Excuse me.

4                   CHAIRMAN NELSON: Commissioner Fiegen.

5                   COMMISSIONER FIEGEN: Mr. Taylor, I would like  
6 to give you a little work to do, and it might take you a  
7 few minutes to do this.

8                   MR. TAYLOR: Sure.

9                   COMMISSIONER FIEGEN: But I think as a  
10 Commission before we make a decision I would like to have  
11 you categorize the information that they're asking for.

12                   And, first of all, the question of do we have  
13 jurisdiction. And there are some -- and I think there  
14 are certainly some, but which ones are exactly the ones  
15 that we don't really have jurisdiction over that you  
16 believe that we should proceed on that information?

17                   MR. TAYLOR: Okay. See if I can restate your  
18 question so I understand what you're asking me to do.

19                   You want me to categorize those items mentioned  
20 in Mr. Martinez' Motion to Compel we believe are beyond  
21 the scope of your jurisdiction?

22                   COMMISSIONER FIEGEN: Correct. Correct.

23                   And then number two. A lot of times you state  
24 that it's confidential. Well, which ones are absolutely  
25 confidential according to law and absolutely have to be

1 precluded?

2 MR. TAYLOR: Okay.

3 COMMISSIONER FIEGEN: And then the last question  
4 is is so many of the responses can't happen because of  
5 the construction phase isn't here yet and et cetera. So  
6 which ones absolutely you can't answer because -- or  
7 can't give them additional information because of the  
8 construction phase issue?

9 MR. TAYLOR: Because the information doesn't  
10 exist because we haven't started building the pipeline  
11 yet?

12 COMMISSIONER FIEGEN: Correct. So those three  
13 type of different categories.

14 MR. TAYLOR: How would you like me to do this?  
15 Would you like me to go through their Motion to Compel  
16 and check off those numbered items that fit any one of  
17 these three categories?

18 COMMISSIONER FIEGEN: Right. For me I would  
19 like that. I don't know. I guess I'm asking the  
20 question so yes.

21 MR. TAYLOR: We'll try to do that.

22 COMMISSIONER FIEGEN: So I would certainly give  
23 you time, but the Chairman has the gavel.

24 CHAIRMAN NELSON: You have the floor. I mean,  
25 is this something where you can go through this Motion

1 and do that on the fly, or do you want five minutes to  
2 kind of collect your thoughts?

3 MR. TAYLOR: Well, my colleague, Mr. Moore and I  
4 can --

5 CHAIRMAN NELSON: He can do it on the fly?

6 MR. TAYLOR: We'll give it a shot.

7 CHAIRMAN NELSON: Whatever you're most  
8 comfortable with.

9 MR. TAYLOR: It would probably be most efficient  
10 if we took about 5, 10 minutes if we ran through the  
11 thing and just marked them off.

12 CHAIRMAN NELSON: I would agree. Let's stand in  
13 recess for 10 minutes.

14 COMMISSIONER FIEGEN: Because your testimony is  
15 so brief we're giving you this information. You can do a  
16 little extra homework.

17 MR. TAYLOR: Let me ask you are there other  
18 questions that fit into this line of inquiry that we  
19 should supplement?

20 CHAIRMAN NELSON: I have no questions.

21 COMMISSIONER HANSON: Mr. Taylor, I'm looking  
22 through my notes to see if there are any. I would think  
23 that you'll answer them as you go through that process.

24 MR. MARTINEZ: I trust you'll afford me an  
25 opportunity to respond to Mr. Taylor's statements as

1 well?

2 CHAIRMAN NELSON: Yes. 10 minutes.

3 (A short recess is taken)

4 CHAIRMAN NELSON: I think we're ready to  
5 reconvene. We think any -- whatever air movement may  
6 have been present gets shut off at 5:00. So, gentlemen,  
7 if you prefer to remove your coats, please do so. No  
8 disrespect, if you do.

9 Mr. Taylor.

10 MR. TAYLOR: I'm ready. Thank you.

11 As to jurisdiction, matters of jurisdiction, all  
12 of those Interrogatories that seek information regarding  
13 demand for the production and availability of oil, that's  
14 a national interest question to be decided by the  
15 Department of State and the President of the  
16 United States.

17 COMMISSIONER FIEGEN: So those are 8, 12, 13 --

18 MR. TAYLOR: Yeah. His No. 2,  
19 Interrogatories 8, 12, 13, 15, 16, 17, 26, 30, 33, 34,  
20 and 40 to the extent that they are focused on issues of  
21 demand.

22 His Interrogatory No. 21, which is his point  
23 No. 3, is a PHMSA jurisdiction, compliance with PHMSA  
24 regulations is obviously for PHMSA to decide, not the  
25 Commission.



1 Document Request 13 is also PHMSA compliance.  
2 And that is his No. 17. And then Document Request  
3 No. 50, which is his point No. 31, that is high  
4 consequence areas and all efforts to comply with  
5 49 CFR Part 195. So that's it for the jurisdictional  
6 points.

7 Confidentiality, his Interrogatory No. 56.8.  
8 His Interrogatory No. 48 -- sorry I was out of order  
9 there -- which is his No. 7.

10 His Interrogatories 57 and 60 which deal with  
11 worst-case spill information. His Interrogatory No. 76  
12 to the extent it deals with the Integrity Management  
13 Plan. His Interrogatory No. 83, which is a request for  
14 the current IMP, which is on file with the Commission as  
15 a confidential document. And Document Request No. 55,  
16 the paleontological inquiry.

17 And you should note that we said in our response  
18 we'll give him the paleontological plan without debate,  
19 but we won't give him the appendices which identify the  
20 areas of whatever the plural of paleontological is.  
21 Where the stuff is.

22 COMMISSIONER HANSON: Excuse me. What number  
23 was that one?

24 MR. TAYLOR: Document Request No. 55. His  
25 No. 34, point 34.

1           Then as to construction phase issues, Document  
2 Request No. 36, which asks for CMR mitigation measures  
3 that have been undertaken. And his Document Request 44,  
4 which relates to wetlands. And that's it.

5           COMMISSIONER FIEGEN: Some follow-up questions.  
6           I have a couple follow-up questions, Mr. Moore  
7 [sic].

8           Landowners: As you know, Commissioners do not  
9 see those agreements your land agents and the landowners  
10 sign, normally anyway. Is that not confidential  
11 information?

12          MR. TAYLOR: It depends on what you mean by  
13 landowner agreements. If you're talking about the  
14 easement documents themselves, the answer is no, they are  
15 not confidential. They are all filed public record.

16          If you're talking about -- he said all documents  
17 relating to negotiations with landowners. Well, here's  
18 what we have. We have a contact report for every time  
19 that a landowner is called on. Every time the landowner  
20 is called on.

21          Sometimes there are enumerable calls during the  
22 negotiation process to require an easement. Then there's  
23 a financial document that's prepared with each landowner  
24 when the deal is struck. And that financial document  
25 reached the compensation for the easement for crop loss,

1 crop damage, all of those things that are related to  
2 that. And then there is probably correspondence with  
3 landowners.

4 And then there would be School & Public Lands,  
5 all the same sorts of things with School & Public Lands.  
6 School & Public Lands has 40 some tracts that are covered  
7 by the pipeline.

8 I can't guess how broad that inquiry is and how  
9 many matters -- I also can't guess how many displeased  
10 landowners there would be in South Dakota if the  
11 financial information relative to their compensation  
12 arrangements became cafe knowledge in local communities  
13 or, for that matter, exposed to discovery here.

14 COMMISSIONER FIEGEN: So the financial  
15 information is confidential between Keystone and the  
16 landowner, just not the easement information.

17 MR. TAYLOR: There are some -- there are some  
18 that are -- there are specific confidentiality agreements  
19 that are entered into with landowners. I can remember  
20 authoring some of those.

21 The financial information, yes, I think is  
22 confidential.

23 COMMISSIONER FIEGEN: So would you list the  
24 Document Request 48 in your confidential -- oh, you did.  
25 I'm sorry. I didn't see that. See it was misnumbered.

1 That's why I missed it. You listed it as confidential.  
2 I'm sorry. That was my error because I didn't look at  
3 the order of the number.

4 How about private roads? You talked -- I  
5 thought in your filing that you gave us that the private  
6 road information may be confidential.

7 MR. TAYLOR: Well, first of all, a lot of the  
8 roads we had don't exist. The private roads won't exist  
9 until construction conditions are defined. The routing  
10 on to the right of way in the construction process  
11 depends on what surface conditions are at the time. If  
12 we're having a wet summer, for example, it makes a huge  
13 difference.

14 Secondly, there's private road information.  
15 Some of the landowners who have agreed to private access  
16 roads across their property. Mind you, when you think  
17 about western South Dakota some of those private roads  
18 could be of some length.

19 They want those roads to remain private because  
20 they don't want hunters coming on their property, number  
21 one. Number two, they are all gated, and there have been  
22 more than one instance where landowners have said, okay,  
23 we'll give you a private road agreement, but we don't  
24 want it to be public information.

25 You know, I don't think the pipeline company

1       cares very much about whether the road information, the  
2       private road information is private or not. I think  
3       that's more of a landowner concern. And the company is  
4       very oriented to trying to accommodate the landowners'  
5       wishes.

6               There are some areas of the construction project  
7       where the access road will be the right of way itself  
8       just for that very reason. Even though it's not very  
9       convenient.

10              COMMISSIONER FIEGEN: So if I'm understanding  
11       you right, the private roads on No. 46 not necessarily is  
12       confidential on Keystone's part but it's confidential on  
13       the part of your parties?

14              MR. TAYLOR: Yes.

15              COMMISSIONER FIEGEN: Okay. No. 25, the data  
16       security, the software. I don't think you listed that as  
17       one of your confidentiality --

18              MR. TAYLOR: We may have missed that.

19              COMMISSIONER FIEGEN: -- list which --

20              MR. TAYLOR: Adequate security systems and  
21       controls in place.

22              We did object to providing the details of  
23       security systems for safety and security reasons. We did  
24       say we would supplement our response. And our intention  
25       is to provide DRA with an expression of TransCanada's

1 policy, its internal corporate policy, related to data  
2 security to see if that satisfies them.

3 Mr. Martinez expressed the view he wanted to  
4 know if we had hired somebody from the garage to manage  
5 it. Well, we'll give him the information.

6 COMMISSIONER FIEGEN: Thank you. Those are my  
7 questions.

8 CHAIRMAN NELSON: Additional Commissioner  
9 questions.

10 COMMISSIONER HANSON: I just have one. Excuse  
11 me. I was doing some reading.

12 Mr. Taylor, in DRA Interrogatory No. 57 asks for  
13 the worst-case scenario from pertaining to water channels  
14 and floodplains, et cetera. And you gave a partial  
15 answer to that and stated for Homeland Security reasons.

16 There's been some discussion from the other  
17 party pertaining to potential overuse of the Homeland  
18 Security reason. I'm wondering if you'd elaborate a bit  
19 more on that.

20 I would think that if it's not a specific  
21 situation, a specific location -- and I agree. If we're  
22 giving specific locations, we're providing information,  
23 paleontological information on specific locations,  
24 situations of that nature we create challenges.

25 I'm curious, though, when it's not a specific

1 location, when it's just generally addressed.

2 MR. TAYLOR: Let me find it in his  
3 Interrogatory. Excuse me just a second.

4 It's numbered 57?

5 COMMISSIONER HANSON: DRA's Interrogatory  
6 No. 57, yes.

7 MR. TAYLOR: Describe the worst-case scenario  
8 which could occur from Keystone XL Pipeline as it passes  
9 under channels, adjacent floodplains, or flood protection  
10 levies.

11 Our response is "This request seeks information  
12 that's confidential by statute. The location and volume  
13 of worst-case scenario spills are kept confidential for  
14 Homeland Security reasons."

15 You know, I suppose that -- what I should say  
16 first is that there is a discussion of those issues  
17 within the various risk assessment materials that have  
18 been supplied. And I suppose we could describe a  
19 worst-case scenario in a generic fashion without  
20 identifying the specific focus. But the two are kind of  
21 tied together.

22 A spill in New York City, if New York City were  
23 on the route, would be more of a worst-case scenario than  
24 a spill out in the countryside. We could expand that  
25 answer if you wanted us to, but I --

1           COMMISSIONER HANSON: Well, I appreciate the  
2 challenge. And I don't mean to impugn anyone's  
3 reputation here, but obviously with as many folks as are  
4 involved there's a potential when you start describing  
5 worst-case scenarios that's going to be -- we've had  
6 situations where people place those on the front page and  
7 pretend that that's what is likely to happen. So I  
8 appreciate the consternation there from TransCanada's  
9 standpoint.

10           But I also think it's important for us to  
11 understand the process. And indeed a good deal of that  
12 information is already available. But just what is the  
13 process from the standpoint of what could happen and how  
14 would that be mitigated?

15           And, like I say, a lot of that information is  
16 already available from the previous hearings that we had  
17 on this.

18           MR. TAYLOR: Really there's a mountain of that  
19 information that's in the prior record, and that's also  
20 contained in the Department of State information.

21           And my comment about -- well, go ahead.

22           COMMISSIONER HANSON: I would think that you  
23 could at least point to that information because there  
24 are volumes of information.

25           MR. TAYLOR: Sure.



1           COMMISSIONER HANSON: Prior to this process I  
2 have spent some time reading that information again, and  
3 there is -- it's a lot to go through.

4           Mr. Chairman, I think that's the only item I  
5 have at this time.

6           CHAIRMAN NELSON: Additional questions.

7           COMMISSIONER FIEGEN: I have one more follow up,  
8 Mr. Taylor, on your confidential portions that you gave  
9 us.

10           Which ones could be given to an Intervenor under  
11 confidential agreement, and which ones are absolutely  
12 banned because you are not allowed to give that  
13 information?

14           MR. TAYLOR: I would say that the HCA  
15 information, we don't have any capacity to decide how  
16 PHMSA enforces its rules. So those that relate to HCAs,  
17 that would be 48 and 56, probably 83 in the IMP piece,  
18 and probably 55, the paleo, since it is the State of  
19 South Dakota that's imposed that constraint on us.

20           Have I missed any, James?

21           MR. SMITH: I can't remember what the statute  
22 says, but isn't cultural -- we have a state statute;  
23 right, that limits --

24           MR. TAYLOR: The dismissing of paleontological  
25 information is in our state statute, yes.

1 MR. SMITH: I'm talking cultural.

2 MR. TAYLOR: Yeah. The cultural information.

3 MR. SMITH: Yeah. I think it's more the  
4 cultural that's state statute, and the paleo came about  
5 as a result I think of our proceedings in the actual  
6 Docket back in 2009-'10.

7 MR. MOORE: I think that's right.

8 MR. SMITH: Again, I don't have that in front of  
9 me.

10 MR. TAYLOR: I may have that backwards.

11 MR. SMITH: That volume I don't have that here.

12 MR. TAYLOR: You may be right about that.

13 MR. SMITH: Yeah. I know. And the purpose of  
14 that, the reasoning behind the confidentiality  
15 requirement for cultural is thievery honestly. It really  
16 is. People find there's something, and they think it's  
17 going to be -- we've had a lot of instances it ends up  
18 being stolen from somebody's property.

19 MR. TAYLOR: And the paleontological concern is  
20 a very valid and very legitimate concern. We have two  
21 Supreme Court cases on that subject, one of which is just  
22 a couple years old.

23 CHAIRMAN NELSON: Additional questions.

24 If not, Mr. Martinez, any brief rebuttal based  
25 on any of our questions?

1           Mr. Martinez, I'm not hearing you. Are you  
2 still with us?

3           MR. MARTINEZ: Can you hear me now?

4           CHAIRMAN NELSON: Okay. Go ahead and try it  
5 again.

6           MR. MARTINEZ: Thanks. I will keep it brief,  
7 thank goodness. We've been at this for quite a while.

8           You know, I'm going to just ignore Mr. Taylor's  
9 ad hominem, you know, takes on this, but what I will do  
10 is I will address what he talked about in terms of this  
11 being a fishing expedition.

12           I think he is way off base on this. One of the  
13 first things I pointed out was that the South Dakota  
14 Supreme Court has made it very clear that the discovery  
15 rules are to be interpreted very liberally, including  
16 determinations of relevance. And all relevant matters  
17 are discoverable, unless privileged. Now let's set that  
18 privilege and confidentiality issue, you know, aside here  
19 for a moment.

20           Now it is certainly inconvenient for TransCanada  
21 to produce a lot of what we have requested. There is a  
22 large volume of information that we have requested and a  
23 fairly broad scope. But that's what discovery is about.

24           It gives us -- it gives my client, DRA, and the  
25 other Intervenor in this case an ability to determine

1     what TransCanada has in its files to be able to put  
2     together a case and challenge them when they move their  
3     Petition forward.

4             Every corporation that launches any legal  
5     action, whether it be filing a Petition in this case or  
6     filing a large lawsuit in any other case knows full well  
7     that when the discovery process gets rolling they're  
8     going to be subject to those rules and they're going to  
9     be required to fork over a lot more documents and a lot  
10    more information that they might necessarily -- not like  
11    necessarily have to have out there.

12            It isn't our fault that TransCanada has filed a  
13    Petition to seek to put the pipeline through here. But  
14    once they've done that they've put it in play. And by  
15    putting it in play they can go ahead -- they have  
16    subjected themselves to those discovery rules, and we're  
17    entitled to go take a look whether they like it or not.  
18    That's what the Supreme Court has to say.

19            Now let's talk a little bit about the  
20    confidentiality issue because I think that's a big  
21    one.

22            The point that seems to be missing here is that  
23    confidential material gets disclosed during the course of  
24    discovery all the time. I can't tell you the number of  
25    cases where we've been in where one party or another has

1     asserted that something is confidential, whether it be  
2     everything from final agreements to compliance reports,  
3     things like that, internal documents perhaps. There's a  
4     process for that.

5             If Mr. Taylor and his folks and TransCanada  
6     truly believe that all of this information is  
7     confidential, the appropriate response would have been to  
8     file a motion for protective order, and then what we can  
9     do is is we have a number of potential remedies.

10            They can disclose that information with an  
11     instruction to the attorneys to just review it attorneys  
12     eyes only. I've had a number of agreements and orders  
13     reached in other proceedings where confidential material  
14     has been released but only for the view of the attorneys.

15            There have been other instances where it's put  
16     under a protective order where it says, okay, we can let  
17     you and your clients see it, but you can't disclose it to  
18     the media or you can't publicly post it up on a website  
19     somewhere.

20            Those are all potential remedies that are easy  
21     to deal with. And, frankly, that's one of the reasons  
22     why I suggested the special master would be appropriate  
23     in this case.

24            And that covers a lot of ground. The  
25     paleontological information, cultural information that

1 we've asked for, yeah, we did ask them for all documents  
2 related to that. They've come back, and they, I think,  
3 made a pretty good argument that, yeah, we don't want to  
4 publicly disclose specific locations of key resources  
5 because it could be subject to theft. I think we're very  
6 sensitive to that.

7           And we'd certainly be happy to abide by any  
8 particular order that says it's attorneys eyes only, we  
9 can't disclose. Or, for that matter, if you say that's  
10 not disclosable, at least give us the plans for dealing  
11 with this information without necessarily disclosing  
12 specific locations. I think we could live with that.

13           The other information that they talked about,  
14 that is confidential such as the high consequence areas,  
15 up to now all I've heard is an assertion that we cannot  
16 disclose that for whatever reason, PHMSA, Homeland  
17 Security. I have not seen and we have requested specific  
18 citations.

19           Give me a statute. Give me some regulations.  
20 Give us some case law that shows that that is the case.  
21 I cannot on behalf of my client simply accept an  
22 assertion that something's secret.

23           Show me why. Show me the rules. We can talk  
24 about it then. I previously asked for that. It hasn't  
25 been forthcoming.

1           Now the final issue is one of jurisdiction. And  
2     those are a couple of areas, you know, the big one being  
3     the regulatory compliance with PHMSA and then, of course,  
4     the demand for oil and the national interest  
5     determination. When I argued the Motion I went in depth  
6     as to why that was relevant to these particular  
7     proceedings.

8           The oil demand issues and the national interest  
9     determination is clearly relevant to the Presidential  
10    permitting and the other issues that are specifically  
11    referenced as conditions in the original permit that you  
12    granted TransCanada.

13          And then the PHMSA issues, you know, it's great  
14    for Mr. Taylor to come out and say it's up to PHMSA to  
15    deal with and decide whether or not TransCanada's in  
16    compliance or not.

17          The question that we have, though, is the  
18    communications and the documents and the information we  
19    have sought from TransCanada goes to the heart of their  
20    communications with those regulators and whether they can  
21    comply and what they have discussed with in terms of  
22    compliance.

23          Because going back to the conditions that you  
24    laid out in the amended -- the amended permit conditions  
25    for that original order you come right out and say that

1 TransCanada has to comply.

2 Well, what they're asking us to do is is trust  
3 us, we're going to have compliance. Well, you know, I'm  
4 going to quote one of -- probably many of y'all's  
5 favorite presidents, Ronald Reagan, who when negotiating  
6 the SALT Treaty with the associates uttered that famous  
7 line, "Trust but verify."

8 Mr. Taylor is a great guy, have enjoyed  
9 conversations with him, but can't just simply take his  
10 word for it. Can't take TransCanada's word for it. It's  
11 up to the verification process. The discovery process  
12 that we're engaged in here is part of that verification.

13 We're entitled to see it under the rules. I  
14 think you've got to go ahead and enter an order  
15 compelling them to disclose that information.

16 It may be a lot of information. They may not  
17 like it, but we're certainly entitled to it. And we're  
18 entitled to see whether or not they're capable of meeting  
19 all of those conditions that have been laid out for them.

20 Now, you know, I guess to kind of wrap up, I'm  
21 almost inclined here and maybe I will just reassert and  
22 maybe ask you to reconsider both the Motion for Stay and  
23 the Motion for Special Master that we addressed at the  
24 very beginning of this day.

25 CHAIRMAN NELSON: Mr. Martinez, this is



1 Chairman Nelson. When I referenced that earlier I was  
2 joking. I didn't think anybody would pick up on that.  
3 So don't even go there. We need to move along.

4 MR. MARTINEZ: Okay. Well, I was going to  
5 simply say what we're dealing with here is illustrative  
6 of the argument I made for it. But at the end of the day  
7 I'm asking that you go ahead and grant the Motion to  
8 Compel. I think we've got very good reasons for it.

9 I don't think the reasons that TransCanada has  
10 provided in terms of their objections hold water. I  
11 think the law mandates disclosure.

12 MR. TAYLOR: Let me make a point.

13 CHAIRMAN NELSON: Thank you. Yes, briefly.

14 MR. TAYLOR: Make a point on the HCA.

15 If you look at -- Mr. Moore filed an Affidavit  
16 yesterday I think in response to the Rosebud Sioux Motion  
17 to Compel. It deals with the HCA data issues. And we  
18 have an e-mail dated April 13, 2015, from the National  
19 Pipeline Mapping System, which is the governance  
20 component of the Federal Government that deals with HCA  
21 data.

22 And they say "The HCA data which is available  
23 for download from the National Pipeline Mapping System  
24 website is commercially navigable waterways, highly  
25 populated areas, and other populated areas. PHMSA

1 directs TransCanada. You can distribute that information  
2 as you'd like. The rest of the HCA data is protected.  
3 Drinking water unusually sensitive areas called USAs and  
4 ecological USAs may not be distributed outside your  
5 company."

6 What's today? The 14th? Yesterday that  
7 e-mail -- we got that e-mail in response to this very  
8 issue.

9 So the Federal Government said yesterday here's  
10 what you can tell them, here's what you can't, and that's  
11 in Mr. Moore's Affidavit, which is filed.

12 The second point, it's an apples and oranges  
13 contention. We're entitled to see what conversations  
14 they've had with the regulators, et cetera, et cetera to  
15 determine whether or not they can comply with the PHMSA  
16 regulations.

17 No, they're not. Whether we comply with the  
18 PHMSA regulations is PHMSA's decision. And the  
19 correspondence that the company may have had with PHMSA  
20 is not discoverable in this proceeding because it's not  
21 within the scope of your jurisdiction.

22 You can't just brush over jurisdiction by saying  
23 we really need to know about that to know if they can  
24 comply or not. And that's what this argument is.

25 CHAIRMAN NELSON: Question.

1 COMMISSIONER FIEGEN: I do have a question.

2 CHAIRMAN NELSON: Yes.

3 COMMISSIONER FIEGEN: For Mr. Taylor, in your  
4 response to this Motion you did not give any information  
5 on Dakota Rural Action's No. 86.

6 MR. TAYLOR: 86?

7 COMMISSIONER FIEGEN: Yeah. On the worst-case  
8 discharge. And I didn't see it. Now I could have missed  
9 it because there's hundreds of pages of documents, but I  
10 didn't see that you -- and maybe you didn't care so  
11 that's why you didn't reply to that.

12 MR. TAYLOR: Let me get to 86 and see if --

13 COMMISSIONER FIEGEN: And I would assume it  
14 would be page 6 about of your information. Because you  
15 have 83, but you don't have 86.

16 MR. TAYLOR: Okay.

17 We did not respond to 86. Did they? Is there  
18 a --

19 COMMISSIONER FIEGEN: Yes. You know, they  
20 certainly have information on page 13 of their Motion.

21 MR. TAYLOR: Maybe we missed it. It was a busy  
22 weekend. And we did not respond to that. Just let me  
23 look at it for a second.

24 MR. SMITH: Is that Interrogatory 86?

25 MR. TAYLOR: Yes.

1           MR. SMITH: Am I misconstruing something?  
2 What's on page 84 of the responses?

3           Now it isn't --

4           MR. TAYLOR: Well, I'll tell you what. We'll  
5 stand on our objection to 86 as made in page 84 of our  
6 Interrogatory Answers.

7           The question asked in 86 is Explain how the  
8 project would have a minimal effect on the health and  
9 safety and welfare of inhabitants if there is a spill,  
10 explosion, et cetera.

11          The question is argumentative. It is not a  
12 question that is designed to elicit discoverable  
13 information. It's argumentative.

14          And I'm sorry. Part of the discovery process  
15 requires that you formulate your question in a proper  
16 fashion and you don't get to ask argumentative questions  
17 just for -- and that's the objection we made, and we'll  
18 stand on that.

19          COMMISSIONER FIEGEN: Okay. Thank you. I did  
20 find that. Thanks.

21          CHAIRMAN NELSON: Motions from the Commission.  
22 Okay. Commissioner Hanson.

23          COMMISSIONER HANSON: As much as there is in  
24 this Motion, there will be plenty of opportunity to  
25 discuss it.

1           To the extent that documents exist, I move that  
2     the Commission support DRA's Motion to Compel on  
3     Interrogatory No. 7, Interrogatory No. 57, 76, Request  
4     For Production No. 9, 10, 12, 26, 28, 37, and 38 and  
5     No. 56 and deny all others.

6           CHAIRMAN NELSON: Discussion on the Motion.

7           COMMISSIONER FIEGEN: Mr. Chairman, I would like  
8     to recess for like 5 to 8 minutes to look at all of this.

9           CHAIRMAN NELSON: I'm good with that. But in  
10    the interest of maybe trying to move this along, I'm  
11    going to ask you a question.

12           I can concur with all of the yeses that  
13    Commissioner Hanson has just elicited. I have an  
14    interest in going further than that. And so I guess my  
15    question is do you have an interest in going further than  
16    that, or is this --

17           COMMISSIONER FIEGEN: You know, I really need to  
18    look at it. I can't even tell you -- I mean, I have  
19    lists here, and then I have confidential requests so I  
20    just need to go through the numbers.

21           CHAIRMAN NELSON: Okay. Let's take 5 to 10  
22    minutes.

23           COMMISSIONER HANSON: If I could, just before we  
24    take that brief intermission, there are at least three of  
25    those items where I have a teeter totter, and it's really

1 going back and forth and attempting to decide.

2 CHAIRMAN NELSON: But those are all ones that  
3 you included as yeses at this point?

4 COMMISSIONER HANSON: Nos -- there's three of  
5 them that are weighted just enough to be nos for me.

6 CHAIRMAN NELSON: Okay.

7 COMMISSIONER FIEGEN: Mr. Chairman, I know that  
8 our previous Chairman didn't allow discussion and only  
9 allowed you to amend motions, but if you do have items  
10 that you would like me to research -- otherwise, when you  
11 give me those items I'm going to ask to research it  
12 again.

13 CHAIRMAN NELSON: That's fair enough. Yeah.  
14 We're in discussion at this point.

15 Let me just indicate the areas where I would  
16 perhaps be willing to go further, and that will help  
17 Commissioner Hanson also.

18 Interrogatory No. 23, 25, 48, 56, 58, 60, 83,  
19 Request For Document Production No. 1, No. 13, No. 29,  
20 No. 30, No. 31, No. 33, 34, 42, 44, 50, 53, and 55.

21 COMMISSIONER FIEGEN: 53 and 55?

22 CHAIRMAN NELSON: Yes. We will stand in recess.

23 COMMISSIONER FIEGEN: Thank you.

24 MR. SMITH: Mr. Chairman, may I?

25 CHAIRMAN NELSON: Yes.

1           MR. SMITH: Just something else to think about,  
2 and I haven't been able to thumb through these fast  
3 enough, but in a Motion is this a point in time where  
4 I -- and I don't know with respect to any of these  
5 particular items, but where the Motion ought to include  
6 to the extent an item that's in one of these is  
7 confidential that we include a protective order as a  
8 portion of the order?

9           CHAIRMAN NELSON: Well, that's certainly an  
10 issue. I think that needs to be requested, though.

11          MR. SMITH: Okay.

12          COMMISSIONER HANSON: I thought that would go  
13 without saying, but, yes, I would certainly include that  
14 in my Motion. I wrote down confidentiality in a number  
15 of areas, but I think that discussion will come up on the  
16 ones of which you have -- I don't see it as a problem  
17 necessarily with the ones that I --

18          CHAIRMAN NELSON: Okay. And so you would  
19 anticipate that we would proscriptively issue a  
20 protective order?

21          COMMISSIONER HANSON: No. If items -- if we  
22 consider items to be confidential, then certainly they  
23 have to be marked and treated as confidential. And if  
24 there's information in them that is considered to be  
25 confidential by the Feds, then that has to be redacted.

1           CHAIRMAN NELSON: And my anticipation would be  
2 that Keystone would come to us and make those individual  
3 arguments.

4           MR. SMITH: Okay. Well, I -- you know, we have  
5 done protective orders on many occasions since I've been  
6 here.

7           CHAIRMAN NELSON: Without request?

8           MR. SMITH: I don't know. I'm thinking here  
9 that because the issue is there -- and if the parties  
10 want to debate it and request it, but, I mean, the bottom  
11 line is I guess I'm really uncomfortable with having  
12 material that is confidential released without some form  
13 of protective provision.

14          CHAIRMAN NELSON: And I do not disagree with  
15 that at all, but what I don't think I can do is stand  
16 here today and say, okay, this one has a protective order  
17 and to what extent and that one doesn't.

18          I think it's incumbent upon Keystone to come to  
19 us and say this one and this is why and this is how far  
20 it goes and give the opposition an opportunity to argue  
21 that. And I don't think we're prepared to argue that  
22 tonight yet.

23          MR. SMITH: Maybe we're not. I mean, on some of  
24 them I feel confident. You know, like, for example,  
25 cultural and paleontological, I know that's confidential



1 stuff so --

2 CHAIRMAN NELSON: No disagreement with that.  
3 And I don't want that out there in a public domain at  
4 all, okay. But I think that request needs to come  
5 specifically, and we need to be able to let both sides  
6 argue that. And I don't know that anybody came prepared  
7 to argue that tonight.

8 Okay. We will be in recess.

9 (A short recess is taken)

10 CHAIRMAN NELSON: We will reconvene. We will  
11 reconvene, but we're at ease for just a moment longer.

12 (Pause)

13 Commissioner Fiegen, are you on or --

14 COMMISSIONER FIEGEN: Yes.

15 CHAIRMAN NELSON: Go ahead.

16 COMMISSIONER FIEGEN: I do have some requests  
17 for us to look at some confidential filings.

18 No. 57, I57, I76 in Mr. Hanson's Motion. I25 in  
19 the need that part of that needs to be confidential. I  
20 don't know that all of that has to be confidential, but  
21 there might be a piece in there.

22 MR. ELLISON: I'm sorry. Could you repeat the  
23 prior number?

24 COMMISSIONER FIEGEN: 25 may have a portion of  
25 that that needs to be confidential.

1           48 and 56. And then in the documents -- oops.  
2 And I have a couple more. 60 and 83. And then in the  
3 documents, No. 55 I believe is the only one I asked for.  
4 And No. 50, I guess.

5           CHAIRMAN NELSON: Okay. Some of those were not  
6 ones that Commissioner Hanson indicated; correct?

7           COMMISSIONER FIEGEN: Oh, correct. This is in  
8 discussion.

9           CHAIRMAN NELSON: Okay. Proceed.

10          COMMISSIONER FIEGEN: And so I just believe that  
11 we should be forward thinking as a Commission. I have  
12 certainly asked questions about confidentiality issues  
13 today. And I believe unless we're wrong and we can  
14 certainly take the -- we can lift the confidential issues  
15 up if we need to, but I think right now we should make  
16 those items confidential.

17          CHAIRMAN NELSON: If we are to do that, can you  
18 define confidential? What do you mean by that?

19          COMMISSIONER FIEGEN: I'm not an attorney, but I  
20 would assume that it is protected and that the people  
21 that can see that are the attorneys of both the  
22 Intervenor and TransCanada.

23               I am not an attorney, though. You would have to  
24 ask Kristine Edwards for sure and Mr. Smith. Oh, except,  
25 I mean, if you're -- I believe that would be a protective

1 order. I would think confidential is confidential from  
2 the public.

3 CHAIRMAN NELSON: I guess the real question is  
4 is it limited to only the attorney, or is it the attorney  
5 and the attorneys' client?

6 COMMISSIONER FIEGEN: I don't know. I'm going  
7 to ask General Counsel on what we think we should do  
8 here. We've talked about confidential. I don't know if  
9 that's from the public or --

10 MR. ELLISON: Excuse me. I want to interpose an  
11 objection. There is a procedure that is laid out in the  
12 rules --

13 CHAIRMAN NELSON: Okay. Yeah. Mr. Taylor, if  
14 you would let him slide in there.

15 COMMISSIONER FIEGEN: And we're in discussion  
16 because we haven't amended anybody's information.

17 MR. ELLISON: I understand that.

18 CHAIRMAN NELSON: Introduce yourself again.

19 MR. ELLISON: Bruce Ellison on behalf of Dakota  
20 Rural Action. I forgot how to work this thing.

21 There is a procedure that is set out in  
22 ARSD 20:10:01:41 that is to be followed when there is a  
23 request for confidential treatment of information. And I  
24 believe it was Mr. Nelson, but I may be mistaken.  
25 Perhaps it was Mr. Hanson. Somebody pointed out that

1       there needs to be a motion by TransCanada.

2               And so I'm interposing my objection because I  
3       know this is discussion and I appreciate it and I'm not  
4       trying to interfere with the discussion but I think it's  
5       already going in a direction than is way beyond what is  
6       allowed by the statutes and by the rules as to who is  
7       supposed to assert this.

8               And, of course, one of the things that is  
9       stated is the statutory and common law ground in any  
10      Administrative Rules that would require such  
11      confidentiality.

12              Anyway, I'm interposing an objection that in the  
13      absence of a motion from TransCanada specifying the  
14      identification of any particular document as the rule  
15      requires, that this is a premature discussion about this.

16              Thank you. I'm sorry to interrupt.

17              CHAIRMAN NELSON: Commissioner Fiegen, you have  
18      the floor.

19              COMMISSIONER FIEGEN: My question is to  
20      Mr. Smith because we've heard information, but it may be  
21      correct. There maybe needs to be a motion instead of  
22      Commission --

23              MR. SMITH: Well, there's that procedure when a  
24      party wants to have something treated as confidential.  
25      And maybe with respect to those things that are on the

1       behalf of TransCanada, I can understand that.

2               My issue here is if we're going to compel the  
3       release of information that is confidential without  
4       protective provisions, I guess that's a real concern to  
5       me.

6               And the Commission has previously during my  
7       tenure here imposed protective provisions in its orders  
8       requiring disclosure of things to parties. We've done  
9       that. Because we have to.

10              Now there are some of these that aren't like  
11       that. They're Keystone asserting its -- that it's  
12       confidential with respect to it. But certain things  
13       like, for example, the three -- like the statutory ones,  
14       for example, the cultural resources, avian species that  
15       are required by law, I mean, I would be very  
16       uncomfortable ordering the release of those in violation  
17       of those -- without the Commission itself ensuring that  
18       those are done under a confidentiality requirement.

19              MR. ELLISON: If I may, Mr. Smith, just so that  
20       my -- if I may, just so my position or DRA's position is  
21       clear.

22              We are not objecting to matters being held in  
23       confidentiality. We're just trying to get the rules  
24       followed as to a process and a procedure. And I do  
25       realize we're under -- TransCanada's under a three-day

1 time constraint. That's where we're at.

2 But I just want to be clear. It's not that  
3 we're objecting should there be a determination. We will  
4 certainly abide by any protective order. That's not an  
5 issue. I just want to make that clear.

6 Thank you.

7 MR. SMITH: And I certainly have no problem with  
8 if we were to impose protective provisions again for now  
9 for anybody -- I mean, anyone else has the ability under  
10 those rules to -- you know, to challenge, you know, its  
11 right to be protected.

12 And, again, some of these are assertions by the  
13 company with respect to its belief that for its  
14 competitive or whatever reasons it's entitled to  
15 confidential treatment.

16 But the ones that concern me are -- like I said,  
17 we've had -- like some of the statutes like the avian  
18 data I don't think that's at issue here, but, I mean, the  
19 reason that's in the law is that information gets  
20 released publicly and all of a sudden the eagle is dead,  
21 you know. But okay.

22 MR. ELLISON: Thank you.

23 CHAIRMAN NELSON: I'm going to move to amend the  
24 Motion to include an order that for any items that we  
25 compel that are confidential by law that they be covered

1 by a protective order such that only the attorney of  
2 record for the receiving party may view that data.

3 MR. RAPPOLD: I hate to interrupt. Can I make a  
4 comment?

5 CHAIRMAN NELSON: You're not part of this one so  
6 we're going to hold on that.

7 Discussion on the amendment.

8 I hope I cover what needs to be covered here.  
9 Am I entirely comfortable going this route? No. I wish  
10 we had the luxury of time to do as Mr. Ellison has said  
11 and have a party bring that forward, but we don't have  
12 that. And I think this covers the concern.

13 I agree with Mr. Smith that that is a legitimate  
14 concern. I think this covers it. And we'll see where it  
15 goes.

16 Other discussion on the amendment?

17 Seeing none, all those in favor of the amendment  
18 will vote aye. Those opposed, nay.

19 Commissioner Hanson.

20 COMMISSIONER HANSON: Aye.

21 CHAIRMAN NELSON: Commissioner Fiegen.

22 COMMISSIONER FIEGEN: Fiegen votes aye.

23 CHAIRMAN NELSON: Nelson votes aye.

24 The amendment passes.

25 We are now back to the main Motion. I guess,

1 Commissioner Hanson, I'd just ask after your review are  
2 there any other of these items that you would want to add  
3 to your list or subtract from your list before we move  
4 forward?

5 COMMISSIONER HANSON: Thank you, Mr. Chairman.  
6 I was debating from the standpoint of whether to amend my  
7 Motion to exclude the portion of denial on all of the  
8 others and just simply leave what I have made a Motion  
9 for approval of.

10 I found that there were more of them that I was  
11 challenged with than what I had thought. But I only --  
12 and I marked them as I went through with different  
13 information showing that I feel some are confidential.  
14 Quite a few of them I felt were just too confidential for  
15 us to require the Applicant to provide.

16 So I appreciate the Motion. And I was debating  
17 how that would fit within at least six of those items  
18 that I felt were -- that I gave reason not to include  
19 because I felt of their confidentiality.

20 I think some of those -- some of them have  
21 already been answered. And I guess to directly answer  
22 your question, No. 23 and No. 50 -- 23 being the  
23 Interrogatory and 50, I believe, is a Request For  
24 Production.

25 That's not taking a giant leap towards



1 supporting yours, but I felt others were answered and I  
2 don't have an answer for you on the others right now. I  
3 need to, again, look at those individually in  
4 relationship to the amendment that we just put on it.

5 CHAIRMAN NELSON: Okay. Would you like to move  
6 to amend to add those two? Interrogatory 23 and the  
7 Request For Production Document 56?

8 COMMISSIONER HANSON: 50 I believe you said.

9 CHAIRMAN NELSON: You're right. 50.

10 COMMISSIONER HANSON: Yes.

11 CHAIRMAN NELSON: Move to amend.

12 Discussion on the Motion.

13 Seeing none, all those in favor of the Motion to  
14 Amend to add Interrogatory 23 and Request For Document  
15 Production 50 will say aye. Those opposed, nay.

16 Commissioner Hanson.

17 COMMISSIONER HANSON: Aye.

18 CHAIRMAN NELSON: Commissioner Fiegen.

19 COMMISSIONER FIEGEN: Fiegen votes aye.

20 CHAIRMAN NELSON: Nelson votes aye.

21 Motion carries.

22 We are back to the main Motion as amended.

23 Discussion.

24 COMMISSIONER FIEGEN: So just a question  
25 procedurally, Mr. Chairman. So in the discussion before

1 we took the recess was that an amendment to the Motion of  
2 Mr. Hanson -- Chairman Hanson? Are all of those amended  
3 yet?

4 CHAIRMAN NELSON: No. That was not -- that was  
5 just part of the discussion to let you know what I was  
6 thinking. And I think maybe the way we might proceed --  
7 would you like me to put it in the form of an amendment  
8 so we can move past it?

9 Okay. I will move to further amend by adding  
10 Interrogatory 25, 48, 56, 58, 60, 83, Request For  
11 Document Production No. 1, No. 13, No. 29, No. 30,  
12 No. 31, No. 33, No. 34, No. 42, No. 44, No. 53, and No.  
13 55.

14 Discussion on the amendment.

15 I understand this goes considerably further than  
16 where Commissioner Hanson was at. But as I looked at  
17 each one of those, I think they meet the same standard  
18 that I use as we dealt with the last set of Motions to  
19 Compel and that these are -- while they may be broad, I  
20 think they stand the opportunity to allow for discovery  
21 of information that will ultimately -- or could  
22 ultimately be part of a narrow focus that we will  
23 ultimately be dealing with at the hearing and, hence, my  
24 Motion to include those.

25 Further discussion on that amendment.

1 COMMISSIONER HANSON: Mr. Chairman.

2 CHAIRMAN NELSON: Commissioner Hanson.

3 COMMISSIONER HANSON: Mr. Chairman, I would  
4 submit that I'm going to have trouble supporting  
5 Interrogatory 58.

6 I believe that Request For Production No. 1 and  
7 No. 29 have already been sufficiently answered. And I  
8 would have trouble supporting 33 and 55 and 42, just as a  
9 for your information.

10 CHAIRMAN NELSON: Okay. Further discussion on  
11 the amendment.

12 COMMISSIONER FIEGEN: Mr. Chairman, I think  
13 today the Commission has certainly given Intervenors an  
14 opportunity to provide their case. And we have been very  
15 broad in giving discovery request and documentation.

16 I do believe Commissioner Nelson's amendment is  
17 very consistent to what he did in the very first motion  
18 we had on compel, Motion to Compel. So it's consistent.

19 Do I think some of this is a little broad?  
20 Yeah, maybe. But I guess I'd rather be broad and allow  
21 all our Intervenors to get their information that they  
22 need to provide for their case than to deny it.

23 So today I will be supporting the amended  
24 version of Commissioner Hanson's First Amendment because  
25 I believe it's consistent, and it gives every Intervenor

1 an opportunity -- or this Intervenor an opportunity to  
2 provide their case.

3 CHAIRMAN NELSON: Okay. Additional discussion  
4 on the amendment that I just moved adding all of those  
5 additional items.

6 COMMISSIONER HANSON: I was just slightly  
7 confused as to Commissioner Fiegen's --

8 CHAIRMAN NELSON: As was I.

9 COMMISSIONER FIEGEN: I am supporting  
10 Commissioner Nelson's amendment to Commissioner Hanson's.

11 COMMISSIONER HANSON: Thank you.

12 COMMISSIONER FIEGEN: So if I did the Hanson and  
13 the Nelson wrong, I'm sorry. If my name would have  
14 stayed Olson, we could have had an Olson too. But it  
15 changed to Fiegen.

16 CHAIRMAN NELSON: Additional discussion.

17 COMMISSIONER HANSON: Mr. Chairman, on No. 13 I  
18 struggle with that because they have to comply with  
19 PHMSA. PHMSA's regulations are PHMSA's regulations.

20 And No. 34, we appointed the public liaison so I  
21 don't know what the -- why that should be included.

22 No. 55 they really can't do a lot with that  
23 until construction begins. I think they've already  
24 answered 1 and 29.

25 Taking to heart what -- I do want to support the

1 position. At the same time, I think it just goes too  
2 far. So I won't support the Motion to Amend.

3 Obviously, Commissioner Fiegen makes a very good  
4 point, and now I'm about to argue against my position and  
5 that is that we do want to make certain that we go to  
6 extraordinary measures to make certain that all  
7 parties -- that this is done right and all information is  
8 provided.

9 I have a mix. I can support more than half of  
10 what you have put up there, but I just -- I think it's  
11 just a lot of extra work that doesn't need to be done  
12 that's not going to provide any assistance to anyone.  
13 And I'm talking at length so that I can talk myself into  
14 supporting the Motion.

15 Let Keystone do the extra work.

16 CHAIRMAN NELSON: Let me just make a couple of  
17 comments in response. You mentioned the one that talked  
18 about PHMSA. And I get we're not the pipeline regulator.  
19 PHMSA is. But if there are documents that relate to  
20 their interaction with PHMSA, even though PHMSA's the  
21 jurisdictional authority there, that's still information  
22 that may be relevant to the ultimate case that we're  
23 going to decide.

24 And similarly with the public liaison, there may  
25 be documents there that TransCanada has that relates to

1     that public liaison. We don't know. I mean, if there  
2     aren't, there aren't. If there are, there are.

3             Commissioner Fiegen.

4             COMMISSIONER FIEGEN: I would agree,  
5     Mr. Chairman. I think there may not be any documents in  
6     the PHMSA because it hasn't been constructed. So it will  
7     be interesting because there may not be documents  
8     available.

9             CHAIRMAN NELSON: Additional comments on my  
10    amendment.

11            COMMISSIONER HANSON: In the interest of getting  
12    halfway done with our Docket today, I'll not speak any  
13    further.

14            CHAIRMAN NELSON: Seeing no further discussion,  
15    all those in favor of my amendment will vote aye. Those  
16    opposed, nay.

17            Commissioner Hanson.

18            COMMISSIONER HANSON: No.

19            CHAIRMAN NELSON: Commissioner Fiegen.

20            COMMISSIONER FIEGEN: Votes aye.

21            CHAIRMAN NELSON: Nelson votes aye.

22            Motion to Amend carries.

23            We are back to a heavily amended main Motion.  
24    Further discussion on the main Motion.

25            Seeing none, all those in favor will vote aye.

1 Those opposed, nay.

2 Commissioner Hanson.

3 COMMISSIONER HANSON: Aye.

4 CHAIRMAN NELSON: Commissioner Fiegen.

5 COMMISSIONER FIEGEN: Fiegen votes aye.

6 CHAIRMAN NELSON: Nelson votes aye.

7 Motion carries.

8 I believe we have concluded that particular  
9 Motion to Compel.

10 Yes, Mr. Taylor.

11 MR. TAYLOR: I have a question, point of order.  
12 Would you be so kind as to define for us what all  
13 documents is intended to mean with respect to this  
14 production?

15 All documents is perhaps the most all  
16 encompassing expression that you can formulate. It's  
17 not -- you didn't say all documents that we think are  
18 relevant. You didn't say all documents that are  
19 meritorious to the discovery inquiry. You said all  
20 documents.

21 CHAIRMAN NELSON: That is correct. Yes.

22 MR. TAYLOR: So your intention is that in the  
23 next three days we produce all documents? Let us use  
24 PHMSA communications, for example.

25 All documents with respect to Keystone I,

1     Keystone II? That's what the question asks.

2             CHAIRMAN NELSON: That is correct. And that's  
3     why two weeks ago I said to all of the parties be  
4     prepared should we grant any of these Motions to Compel  
5     because I knew the time would be short.

6             MR. TAYLOR: The point is this. I don't have  
7     any issue trying to comply. If you want us to do that,  
8     we'll do that. But the point is all documents is  
9     burdensome and oppressive and will not lead to any usable  
10    work product that will be produced in this proceeding.

11            I mean, first of all, how do you categorize it?  
12    What do I do? Back a truck up to Mr. Martinez's office  
13    and dump the stuff in his lap? No. I'm not going to do  
14    that. But you can't categorize it and you can't assemble  
15    it.

16            Commissioner, you have to define a scope  
17    narrower than all documents. It cannot be done. There's  
18    case law from me to you that says that when you ask for  
19    all documents you have to define -- there has to be a  
20    definition wrapped around all documents. Relevancy is  
21    the concept.

22            CHAIRMAN NELSON: And I'm just going to stand on  
23    the Motion. Your objection is noted. I would encourage  
24    you to work with Mr. Martinez and Mr. Ellison to see if  
25    there's an opportunity for you to narrow that in the time



1 given.

2 We will move along.

3 We are now to Mr. Dorr's Motion. And in moving  
4 to Mr. Dorr's Motion.

5 Mr. Dorr, I mean, absolutely no disrespect as I  
6 say this. And I hope this will help you as you make your  
7 presentation.

8 MR. DORR: Yes, sir.

9 CHAIRMAN NELSON: I had a really hard time  
10 following what you were actually asking for. Keystone in  
11 their response indicated that most of what you were  
12 talking about was either commentary or argument, either  
13 of which are appropriate at this point.

14 And so if you could help us focus on what you're  
15 actually asking for here, that I think would help speed  
16 us to a resolution.

17 MR. DORR: Thank you, sir. I'll be as brief as  
18 I can. Hi. My name is Gary Dorr.

19 Okay. When I was asking for the questions from  
20 TransCanada my primary -- or my primary goal out of all  
21 of this was to seek the easements for the entire water  
22 system.

23 Now I asked for a map from TransCanada of the  
24 entire water system that they had. The map that they  
25 provided, which is here, is incomplete. It's from 1999.

1 The system was not even complete at that time. We  
2 overlaid the pipeline onto the map. And I don't know if  
3 you can see all of these lighter lines coming off of --  
4 all of those lighter lines that are coming off of there  
5 are the distribution lines as TransCanada has termed  
6 them.

7 I called them the branch lines. According to  
8 Public Law 100-516 the entire system, the Lower Brule,  
9 the Cheyenne River Sioux, the Oglala Sioux, and the  
10 Rosebud Sioux and Lyman Jones and West River are all  
11 considered the system as stipulated by Congress. That's  
12 in the law.

13 So everything from the intake to the house is a  
14 system. I did ask at one point for easements where they  
15 cross the Corps lines. I also asked for where they  
16 crossed the distribution lines or the -- what did I term  
17 it? The branch lines. The term I used was branch lines.  
18 TransCanada understood it to be distribution lines.

19 You can see there are hundreds probably of  
20 crossings of the branch or distribution lines. I'm  
21 asking for an easement for every single place they cross  
22 a water line. I will limit my discussion today to  
23 primarily that in asking for those documents for every  
24 single easement.

25 My line of reasoning is because I visited -- and

1 I take a little bit of offense to the fact that I have  
2 been -- I have not been prejudiced as you stated in the  
3 last meeting.

4 I had to go up to Haakon County and Jones County  
5 on my own to find the easements that were -- and discover  
6 that TransCanada was wrong in one of the easements that  
7 they provided me.

8 I also found the as-built documents filed by  
9 Oglala Sioux Rural Water Supply System. I found the  
10 easements from Lyman Jones, which is on top of the  
11 easement for the United States. The United States has an  
12 easement for all of those water lines, and on top of that  
13 Lyman Jones issued another easement.

14 And in that easement Lyman Jones got agreement,  
15 which is even more specific to the landowners, and the  
16 landowners agreed that the only thing they would build on  
17 the water line easement is an ordinary fence. And that  
18 term is in there.

19 My line of reasoning was based on that. And I  
20 needed to see all of the easements from TransCanada for  
21 every single place and -- to be simple here, every single  
22 place where there's a water line which is connected to  
23 this, which is part of the system.

24 CHAIRMAN NELSON: I'm just going to jump in  
25 again so that I can clarify.

1           So you're not looking for the easements that a  
2           landowner entered into with the water system. You're  
3           looking for the easement that TransCanada entered into  
4           with the landowner.

5           MR. DORR: Yes. It would be in addition to the  
6           easements that are already standing. Because I feel it  
7           would be a violation. So that was my line of reasoning  
8           for asking for that.

9           CHAIRMAN NELSON: Okay. Thank you. And so  
10          that's the sum of what your request is.

11          MR. DORR: Yes. That's pretty much it.

12          CHAIRMAN NELSON: Okay. Thank you. And we  
13          probably will come back to some questions, but we'll let  
14          TransCanada respond.

15          MR. TAYLOR: We addressed a lot of other  
16          subjects with Mr. Dorr. And I think I gave him that map  
17          yesterday. I found it in my file. I don't know where it  
18          came from. I think it came from the Bureau of  
19          Reclamation. It is a 1999 map.

20          Okay. So let's start at the beginning. You are  
21          familiar from your rural electricity the difference  
22          between transmission and distribution. Transmission  
23          being wholesale transmission of electricity, distribution  
24          being retail distribution of electricity. The concept is  
25          very much the same in the water business.

1           Let me talk to you about this map for a minute.  
2   You take a look at this map.

3           CHAIRMAN NELSON: We're going to have to have  
4   you keep a mic. close.

5           Katlyn, could you just hang on to that for him.

6           MS. GUSTAFSON: Yes.

7           MR. TAYLOR: All right. So what we're talking  
8   about is the Mni Wiconi Water System. I don't remember  
9   the years and I didn't bring the legislative history with  
10   me but Senator Johnson sponsored a statute that created  
11   the Mni Wiconi Water System. And I think it was the late  
12   '80s.

13           The essence of the system is is there's an  
14   intake right up here just north of town. There's a water  
15   treatment plant out there on the flats below the dam.  
16   And then there's a pipeline that as originally conceived  
17   was a 24-inch steel pipeline called the Mni Wiconi  
18   Pipeline that ran sort of southwest and ended up on the  
19   Pine Ridge Reservation.

20           When the water system was conceived the statute  
21   said that the water system would be held in trust by the  
22   United States for the affected Tribes. Very important  
23   point.

24           Bureau of Reclamation, Department of Interior,  
25   Bureau of Reclamation is the designated federal agency

1     that manages the trust responsibility of the  
2     United States with respect to this water system.

3             Shortly after the 24-inch steel line began  
4     construction Congress passed an amendment that said it  
5     will be extended to Brule. You look on that, and there's  
6     kind of a light blue area. That's the Brule reservation.  
7     And then you see I think it's a light blue pipe that goes  
8     down to Brule.

9             Then they said it would be extended to Rosebud.  
10    And that's the red area. That's not the Rosebud  
11    Reservation. That's the Rosebud Rural Water System's  
12    territory.

13            And there's a Corps line that goes down to the  
14    Rosebud Rural Water System. That great big huge one, the  
15    yellow one, is the Lyman Jones West River. There used to  
16    be two rural water systems. West River was one. Lyman  
17    Jones was one. They combined about the time of the  
18    genesis of all of this.

19            And you'll see that there is a Corps line that  
20    goes north up in Haakon County. It's 14-inch PVC line  
21    that supplies the Lyman Jones West River system.

22            Then you'll see that sort of burnt orange color  
23    down in the bottom. That is the Oglala Sioux Rural Water  
24    System. And that is Pine Ridge and areas that surround  
25    the Pine Ridge Reservation.

1           Depicted on that map, and I'll grant you, a 1999  
2 map, it's not a build-out map, but depicted on that map  
3 are the Corps lines. And those are the Corps lines as  
4 they are today.

5           So Mr. Dorr asked me a question. He wants to  
6 know where the XL Pipeline crosses the Corps line. And I  
7 answered those questions. It crosses in two places. It  
8 crosses up in Haakon County on the 14-inch PVC pipe on  
9 some land that belongs to some people named Hostutler.  
10 And then it crosses the -- down in Jones County just  
11 north of the interstate on some land that belongs to the  
12 Dahlke-Mann family.

13           Now I made a mistake, and I'm free and quick to  
14 admit it. And I'll tell you why I made the mistake.  
15 Where the Dahlke-Mann crossing is it's in the quarter  
16 section. The quarter section is split by U.S. Highway  
17 16. The pipeline parallels U.S. Highway 16 on the south  
18 side.

19           A friend of mine Glenn Iversen owns the little  
20 north corner of that section, and the Dahlke-Mann family  
21 own the south corner. The Dahlke-Mann family hosts the  
22 Mni Wiconi Pipeline. Not Glenn Iversen.

23           I don't remember who I told, whether it was  
24 Keystone land agents or whether it was my assistant,  
25 here's the legal description. Get me the easement that

1 Keystone has in that quarter section. She gave me the  
2 Iversen easement instead of the Dahlke-Mann easement.

3 As soon as I saw Mr. Dorr's letter I went back  
4 and looked and saw that I had given him the wrong one and  
5 e-mailed him the right one within 20 minutes or so.

6 Now I never had a meaningful conversation with  
7 Mr. Dorr until today, although he did exchange some  
8 e-mail last week. The first time I heard from him after  
9 we submitted our Interrogatory Answers was Monday the  
10 6th. Late in the day he sent an e-mail, and his e-mail  
11 was in effect sort of a build up to a meet and confer.

12 The next day, the motion deadline, he filed a  
13 motion, the 7th before I even had a chance to respond.  
14 In fact, I wasn't even in town. I read his letter. I  
15 forgot if it was the evening of the 8th or the evening of  
16 the 9th and immediately started e-mailing him  
17 information. Because I could see from reading his letter  
18 that we had a fundamental misunderstanding as to what he  
19 was asking.

20 He asked for the Corps line, and he talked about  
21 branches of the Corps line. And the branches of the  
22 Corps line -- the branches of the Corps line -- the  
23 Haakon County piece, for example, is a branch of the  
24 Corps line.

25 Now if he had said to me the distribution lines,



1 I would have said to him we can get you that information.  
2 But here's what I'm going to tell you about the  
3 distribution lines. The distribution lines belong to the  
4 rural water systems.

5           You know, this whole thing is a ball of federal  
6 funding, but it comes from two different sources.  
7 There's funding for the Mni Wiconi Corps line under the  
8 statute that Senator Johnson passed. The funding for the  
9 rural water systems -- and there are four of them, the  
10 Brule Rural Water System, the Rosebud Rural Water System,  
11 the Lyman Jones West River, and the Oglala Sioux Rural  
12 Water System comes under a whole separate section of  
13 federal law. The way I understand it. Now I'm learning  
14 this on the fly the last two days, but I think I've got  
15 it down straight.

16           Those distribution lines, and there are a number  
17 of them that are crossed by the pipeline, belong to the  
18 respective rural water systems. We have an agreement  
19 with the Lyman Jones Rural Water System for crossing  
20 their distribution lines.

21           Today Mr. Dorr, he's a nice guy, a smart guy,  
22 said to me, well, can I see that agreement. I don't know  
23 where it is. It's on my desk. I had a stack of  
24 Mni Wiconi paper like that, and I didn't bring them.  
25 I'll give him the agreement.

1           Beyond that, I think we have no dispute.  
2 Nobody's trying to hide the ball.

3           Oh, one other point I should talk to you about.  
4 It's a legal point. And it's a legal point that's  
5 important to your understanding of this, and it's either  
6 going to come up now or it's going to come up in the  
7 hearing so I might as well educate you about it now.

8           It's the law of conjoin easements, and the law  
9 of conjoin utility easements in South Dakota is quite  
10 clear. I'm a landowner. I own Black Acre. And I grant  
11 the Bureau of Reclamation, the Government of the  
12 United States, the legal authority to construct a  
13 pipeline on an easement in Black Acre.

14           If the easement says we're going to construct  
15 the pipeline, water line and it says nothing else, then  
16 as the landowner I am free to make any use of that land  
17 that I choose. Including granting an easement over the  
18 same authority, a junior easement, to somebody else. And  
19 a third junior easement if necessary.

20           The law of conjoined easements is that if  
21 Mni Wiconi is the senior easement and Keystone is the  
22 junior easement, if I have permission from the  
23 Hotsuplers, me, Keystone, to build my pipeline on that  
24 property that is covered by Mni Wiconi easement, I can do  
25 it.

1           The only thing I can't do is I can't make use of  
2 the easement in a manner that would unreasonably  
3 interfere with the Mni Wiconi's use. So that's the law  
4 of conjoined easements. It's well-defined, not very  
5 complex.

6           And the fact is is that TransCanada has had  
7 extensive discussions with the Bureau of Reclamation  
8 about how they can mechanically cross the pipeline. They  
9 have had extensive discussions with the rural water  
10 systems as to how they will cross the rural water system  
11 pipelines.

12           I asked James this morning, I can't remember.  
13 Are they going to lower the water system lines and go  
14 over the top of the pipeline, or are they going to lower  
15 the pipeline? I can't remember which way it is.

16           South Dakota State University, Dr. somebody  
17 whose name I can't remember did an extensive study. You  
18 know about that. You're all attuned to that. So there's  
19 no mystery here and no surprise.

20           And I respect Mr. Dorr for not making me argue  
21 with him about treaty rights today.

22           CHAIRMAN NELSON: Before I let Mr. Dorr respond,  
23 I just want to ask a question. Is it correct that all of  
24 your easements are now publicly filed?

25           MR. TAYLOR: I think so.

1                   CHAIRMAN NELSON:   Okay.

2                   MR. TAYLOR:   You mean the landowner easement  
3 documents?

4                   CHAIRMAN NELSON:   Yes.

5                   MR. TAYLOR:   Yeah.   Sure.   I think they're all  
6 public record.

7                   CHAIRMAN NELSON:   With that, Mr. Dorr.

8                   MR. DORR:   Gary Dorr.   Thank you, sir.

9                   The reason why I'm here asking these questions  
10 is because TransCanada stated in its -- under its plan  
11 for crossing reclamation facilities, which would be the  
12 Bureau of Reclamation, that they would gain permission  
13 from Oglala Sioux Water Supply System and the Bureau of  
14 Reclamation.

15                   The answers that TransCanada provided, they said  
16 they have had discussions with the Bureau of Reclamation.  
17 And that's true.   They've had discussions, but I see  
18 nothing granting permission.

19                   When I talked to the Bureau of Reclamation  
20 regional director in North Dakota who manages this area  
21 who has jurisdiction he said they cannot provide it.  
22 Only the Department of State can provide it.   He said  
23 that he was not authorized to do that and he talked to  
24 his lawyer.

25                   So the reason we're here now and the reason why

1     this is relevant to some of the other questions is  
2     because the cultural survey was done along the pipeline  
3     routes. Well, which route are we talking about? We're  
4     on like what, the third version of the route.

5             And that's why in the other Interrogatories I  
6     asked for the cultural survey information, proof of it,  
7     and proof that they had consulted with the Tribe about  
8     the survey. Which survey have they consulted with the  
9     Tribe about? Is it the latest route or the first route?  
10    And that's where my directions to my questions were.

11            And TransCanada, like I said, in their own  
12    document they stated that they would get permission, and  
13    that has not happened. And the reason why this is  
14    important to the State of South Dakota is because the  
15    pipeline's going to be at 150 degrees Fahrenheit. What  
16    effect is that going to have on the -- number one, the  
17    PVC and the soil, the compaction that's underneath the  
18    PVC?

19            And the reason why I was alluding to the  
20    consultation with the Tribe is because this water right  
21    under -- or this water line under Codified 100-516 is as  
22    a result of the trust responsibility on behalf of the  
23    United States to the Tribes to provide safe drinking  
24    water.

25            So that Public Law 100-516 is a guiding

1 document, and it states in there that you won't break  
2 ground on the easement for the Oglala Sioux Rural Water  
3 Supply System without permission from the United States.  
4 And that's where this line of reasoning is from.

5 And the entire system, Mr. Taylor alluded to the  
6 fact that these are four different systems. It's one  
7 system, and public law 100-516 states that all four of  
8 them are the system, one system.

9 The reason why it's important to the Tribe is  
10 because all of these, the entire system, is connected,  
11 and it all -- the Tribes are at the end of the line.

12 CHAIRMAN NELSON: I guess the only question I've  
13 got is it is correct that you have received from Keystone  
14 the landowner easement for the two locations where the  
15 proposed Keystone line crosses the water transmission  
16 lines; is that correct?

17 MR. DORR: Yes. And I also have the Lyman  
18 Jones -- I found this at the county recorder's office,  
19 the additional, the junior easement from Lyman Jones that  
20 states the landowner will only build an ordinary fence on  
21 that right of way.

22 CHAIRMAN NELSON: Okay. And I think that whole  
23 issue becomes -- that's an issue we'll deal with, I'm  
24 assuming.

25 MR. DORR: That's just to guide my reasoning why

1 I'm asking these questions. And it all stems from the  
2 fact that TransCanada said they would gain permission  
3 from Oglala Sioux Rural Water supply and the Bureau of  
4 Reclamation.

5 CHAIRMAN NELSON: Questions from the Commission  
6 for either party?

7 Seeing none, is there a Motion?

8 Katlyn, thank you.

9 Well, let me kick it off. I will move to deny  
10 the Gary Dorr Motion.

11 Discussion on my Motion.

12 It looks to me like they've given him what he's  
13 asked for. He's gotten the two easements where it's  
14 crossed the transmission line, and any of the easements  
15 that deal with part of the distribution line are all  
16 public record and available. So it looks to me like  
17 things are covered here.

18 MR. DORR: Can I speak?

19 CHAIRMAN NELSON: Additional Commissioner  
20 discussion.

21 COMMISSIONER FIEGEN: I guess, Mr. Chairman, in  
22 Mr. Dorr's conclusion he talks about tribal consultation  
23 and questions regarding a map, which he does have the  
24 map. I don't know which -- and I think most of those  
25 questions have been answered so it's the tribal part that

1 I didn't hear --

2 CHAIRMAN NELSON: Do you want to ask him a  
3 question? You may.

4 COMMISSIONER FIEGEN: Yes. In fact, yes,  
5 Mr. Dorr, have you received the tribal consultation  
6 information that you deemed necessary?

7 MR. DORR: No, I have not. And just to explain  
8 my reasoning behind that, the State of South Dakota under  
9 Article 6, Clause 2 of the Constitution, the  
10 United States Constitution Treaties are the supreme law  
11 of the land. And state law cannot supersede the Treaty.

12 The Treaty rights have not been abrogated.  
13 There's usufructuary rights which are included in the  
14 Treaty. That has not been answered yet. I have not  
15 received the consultation.

16 Mr. Taylor provided me evidence of talking with  
17 certain members of the Tribal Council. Maybe he's not  
18 familiar with what -- or maybe he didn't understand my  
19 question. I said for the council, not individual tribal  
20 members of the council. Because the entire council has  
21 to be consulted because the entire council is the one who  
22 makes the decision, not the chairman, not the president,  
23 not one member.

24 Can I make one additional statement?

25 CHAIRMAN NELSON: Yes.



1           MR. DORR: From the map that I showed you  
2 there's literally hundreds of distribution lines. I  
3 don't have an easement for every -- I have three -- or  
4 two easements from TransCanada. You said I have all of  
5 them. I don't have all of them.

6           CHAIRMAN NELSON: I think my statement was that  
7 you've got the easements for where it crosses the water  
8 transmission line, not the distribution line. And it's  
9 my understanding that that's what you'd requested is  
10 where it crossed the transmission line.

11          MR. DORR: I asked that, and then later on I  
12 asked for the entire system. That's in the document  
13 that's on file, that I filed. I asked for the entire  
14 system.

15          There's a couple questions. I asked for the  
16 Corps lines is what my term was, and then I used branch  
17 lines. And then I also alluded to the entire system.

18          Now in TransCanada's own statement they called  
19 it the Oglala Sioux Rural Water Supply System. That  
20 was -- I got my terminology from them, and I then I went  
21 and looked to the law. Now I haven't received -- I have  
22 two. That crosses literally hundreds of water lines that  
23 are part of the system. I need -- I requested every  
24 single place where it crosses the system, and the system  
25 includes the distribution lines or the branch lines as I

1       termed them.

2               CHAIRMAN NELSON:   Okay.   And I think the  
3       disagreement we've got here is in the definition of the  
4       term "branch" line.

5               MR. DORR:   I had three questions.   One was Corps  
6       lines, one was branch lines, and then one was for the  
7       system.   So, I mean, I was specific on that.   So I  
8       have -- for the Corps lines.   I don't have for the branch  
9       lines or the system.   So those two would be included, the  
10      branch or the distribution lines.

11              CHAIRMAN NELSON:   Okay.   Thank you.

12              Mr. Taylor.

13              COMMISSIONER FIEGEN:   I have a question.

14              Mr. Taylor, you said on your desk you have an  
15      agreement with the Lyman County.

16              MR. TAYLOR:   With Lyman Jones West River Rural  
17      Water System.

18              COMMISSIONER FIEGEN:   Thank you.   That would be  
19      the distribution lines.

20              MR. TAYLOR:   Covers the distribution lines that  
21      are crossed by the Keystone Pipeline.

22              COMMISSIONER FIEGEN:   That's what I needed to  
23      know.   Thank you.

24              CHAIRMAN NELSON:   I've got two follow-up  
25      questions.   So he mentioned wanting any documents

1 concerning the consultation with the Tribal Council, not  
2 the individual people but the council.

3 Does that exist?

4 MR. TAYLOR: Fundamental law question underlies  
5 his position.

6 CHAIRMAN NELSON: I understand that. Does the  
7 document exist?

8 MR. TAYLOR: Rosebud Sioux, yes. There have  
9 been discussions between the Keystone -- TransCanada  
10 Keystone and the Rosebud Sioux Tribal Council, yes. And  
11 I gave him a link to the stuff that we supplied in our  
12 large body of documents.

13 Is there one with respect to crossing the  
14 Mni Wiconi Pipeline? No.

15 CHAIRMAN NELSON: Thank you. That's the --  
16 that's the question that I had.

17 Additional -- any additional questions that spin  
18 out of that?

19 I have one more, Mr. Taylor.

20 Mr. Dorr talked about asking three questions,  
21 Corps line, branch line, the system.

22 MR. TAYLOR: Right.

23 CHAIRMAN NELSON: What do you think he meant by  
24 the system, and is that the terminology that was used?

25 MR. TAYLOR: Yeah. The way he characterized it

1 is reasonably accurate.

2 The way I read the statute, the system is the  
3 Oglala Sioux Rural Water Supply System. And that  
4 consists of the intake, the plant, the Corps lines -- did  
5 I say the water treatment -- yes. The Corps lines and  
6 the pumps.

7 Then there are four rural water systems, one of  
8 whom shares the same name and may share the same  
9 management, but it is not, to my understanding, funded  
10 under the Mni Wiconi statute.

11 I'm not trying to play hide the ball. I read --  
12 the problem with answering Interrogatories is it's my  
13 obligation to answer the question he asks. And I have to  
14 do that to the best of my ability.

15 I'll be absolutely candid with you. If he had  
16 called me on March whenever and said, hey, Taylor, I got  
17 a problem with this, we would have worked it out. But I  
18 didn't hear from him until Monday. But for this hearing  
19 today we'd probably get that worked out today.

20 CHAIRMAN NELSON: Thank you.

21 Any additional questions?

22 Seeing none, additional discussion on the  
23 Motion.

24 Commissioner Fiegen.

25 COMMISSIONER FIEGEN: Your Motion also includes

1     number 2 item; right? Precluding Keystone from offering  
2     evidence. You're denying that; correct? Or are you just  
3     doing one motion?

4             Are you doing the Motion to Compel and offering  
5     evidence? Are you doing that as one motion or separate?

6             CHAIRMAN NELSON: One motion it would be a  
7     blanket motion to deny.

8             COMMISSIONER FIEGEN: Thank you.

9             CHAIRMAN NELSON: Additional discussion.  
10            Seeing none, all those in favor will vote aye.  
11     Those opposed, nay.

12            Commissioner Hanson.

13            COMMISSIONER HANSON: Aye.

14            CHAIRMAN NELSON: Commissioner Fiegen.

15            COMMISSIONER FIEGEN: Fiegen votes aye.

16            CHAIRMAN NELSON: Nelson votes aye.

17            Motion carries.

18            We are now to Rosebud Sioux Tribe's Motion to  
19     Compel Discovery, which brings Mr. Rappold to the stand.

20            I'm going to make an introductory statement, and  
21     I do not wish to impose upon your right to make whatever  
22     argument you want. The only thing I would say is you may  
23     by now have an indication of the direction we're headed.  
24     With that, I'll turn it over to you.

25            MR. RAPPOLD: May I have a moment? I need to

1 get some of my stuff.

2 CHAIRMAN NELSON: Certainly.

3 MR. RAPPOLD: And I may ask for an additional  
4 moment to get a little more organized.

5 CHAIRMAN NELSON: Certainly.

6 MR. RAPPOLD: Thank you.

7 I've spent a lot of time today here listening  
8 and observing the proceedings. Matt Rappold on behalf of  
9 the Rosebud Sioux Tribe.

10 And I appreciate the opportunity that the  
11 Commission and the parties have engaged in throughout the  
12 day to get to the point where we're at now.

13 I think some of these issues could have been  
14 resolved earlier in the process, as the Commission's  
15 pointed out. And so I have a lot of --

16 One of the things I've been figuring here is  
17 exactly where do I get started with what I want to tell  
18 you guys connected to what we've already heard today and  
19 what other folks have said today and what you guys have  
20 said today and where exactly do we go from here?

21 As you know, we do have a Motion to Compel  
22 Discovery on the table. Myself and Mr. Taylor and  
23 Mr. Moore have been trying to work through our discovery  
24 disputes.

25 Obviously we haven't been able to work all of

1 those out, and that's why we're here. We're engaged in  
2 conversations as late in the day of yesterday prior to  
3 leaving to get to Pierre.

4 But where I want to start, I think, is to --  
5 TransCanada's answer to Rosebud Sioux Tribe's  
6 Interrogatory No. 2. And prior to the Interrogatories,  
7 this has been brought up before, we made a diligent and  
8 due search of all books, records, and paper with a view  
9 of listing of all information available in this action.

10 And the response, as you guys know, is to the  
11 extent reasonably practicable in attempting to respond to  
12 over 800 discovery requests within the time allowed.

13 And as others have brought up, the Rules of  
14 Civil Procedure don't permit a party to respond to  
15 discovery requests to the extent it's reasonably  
16 practicable.

17 So we have been discussing quite a few things  
18 over the course of the last let's just say two months  
19 because we did ask for these -- our second Interrogatory  
20 filed on February 20, I believe is the date, and  
21 March 10. So I think we can say that we've been engaged  
22 in communication since at least February 20. Probably  
23 sooner than that. Or back in time further than that  
24 actually because our First Set of Interrogatories was due  
25 prior to that, and I don't recall the exact date.

1           What I wanted to bring up, and just to spend a  
2     little bit of time, have they answered the questions --  
3     everyone's questions under the Rules of Civil Procedure  
4     adequately? And I think what we're finding here today is  
5     maybe they haven't.

6           We've been asking them for certain information,  
7     and it seems to be that there's a little bit of give and  
8     take back and forth with all of this. And based off of  
9     some of the things that I heard earlier, I don't know  
10    where exactly the things I learned today fits into the  
11    context of the discussions that we've been having over  
12    the course of time.

13          Because today I learned, as did the Commission  
14    and the other parties have, they don't have an Integrity  
15    Management Plan. They don't have an IEP. They don't  
16    have an ERP is my understanding of what was presented  
17    earlier.

18          We've asked for certain things, and they haven't  
19    been provided. And as we have gone along in time certain  
20    things that we asked for before have been provided. And  
21    so that causes me to wonder did they not have them? Do  
22    they have them and they're just not giving them to us?  
23    Are they forcing us into engage in, I don't want to call  
24    it, game playing because we're not playing games?

25          But, as we talked about in law school and I



1 heard people mention today, are we playing hide the ball?  
2 I would certainly hope that we're not playing hide the  
3 ball.

4 I left my last discussion yesterday with  
5 Mr. Moore and Mr. Taylor, and I informed them that I  
6 think some of the issues on our Motion to Compel I'll  
7 consider resolved at this time. And, again, I have to go  
8 back to what I learned earlier today.

9 I don't know if I should have told them that.  
10 But I did tell them that some of our issues I thought  
11 they were resolved based on their responses. And I'm  
12 going to stick to that. And I'm not going to pull that  
13 back today just because of what I heard here. And as  
14 soon as I can find them, I'll tell you what they are.

15 And what I did tell those guys, that I would get  
16 them a list of what those things were, but I haven't been  
17 able to do that.

18 Before I do that I want to talk a little bit  
19 about the boilerplate objections and why you should  
20 overrule their boilerplate objections from the start.

21 Just in going through my Motion to Compel I  
22 counted 41 boilerplate objections. And boilerplate  
23 objections as we have talked about, and as other folks  
24 have talked about earlier, is just saying I object  
25 because the information you asked for is not relevant, I

1 object because the information you asked for is unduly  
2 burdensome, and it doesn't go the next step to say why.

3 It's like Mr. Taylor said earlier, when the  
4 witness is up on the stand you can't just say, well, I  
5 don't like this project. There has to be a why. Why  
6 don't you like this project?

7 And that's the same in the discovery process and  
8 objections. When they object to something they have to  
9 tell me they're objecting, and then they have to state  
10 why.

11 And I'll tell you they did that in some cases,  
12 and some Interrogatories they did that. And what that  
13 allowed me to do was judge the basis of their objection.  
14 And it also allowed us to reach a resolution through  
15 discussion of that objection and the grounds that support  
16 it. And those are some of the ones that we've been able  
17 to resolve.

18 Some of the other ones I've decided -- I'll come  
19 back to that.

20 So No. 10 and 11 from our First Set is a good  
21 example. They said -- so 10 and 11 through discussion we  
22 agreed to amend our Interrogatory, and they've answered  
23 it. And I will inform the Commission that we'll accept  
24 that answer at this point. That's for No. 10 and 11 in  
25 our First Set of Interrogatories.

1           I'm not sure how I feel about Interrogatory  
2 No. 78. What I didn't include in my Motion and  
3 TransCanada did in their response that they did provide  
4 me the statute. Paleontological -- cultural protection.  
5 Sorry. I can't say some words. It's a mouthful. And I  
6 didn't put that in my Motion.

7           There's a lot going on. It's just I -- I  
8 acknowledge that I got the statute that they sent to me  
9 after they told me what their objection was.

10           In consideration of Interrogatory No. 78, I  
11 would like the Commission to consider, as it did earlier,  
12 to put that information, those requests, under the scope  
13 of a protection order, similar to the order that it  
14 issued earlier, if it decides -- if the Commission  
15 decides to grant -- or to compel, rather, production.

16           The statute also permits the State Historical  
17 Society to disclose that information directly to a Tribe,  
18 and it also permits the State Historic Preservation  
19 Office to disclose that information to any state agency,  
20 regulatory body. So that's how I'd like you to deal with  
21 that.

22           I'll take 18 and 19, Request For Production, off  
23 the table.

24           Now I want to get into my Second Set of  
25 Interrogatories. We've heard mention earlier about being

1 on a fishing expedition. Through the discovery  
2 process -- and I can assure you that we are not fishing.  
3 We have a theory to our case. And it's actually pretty  
4 simple. The statute requires the Applicant to show that  
5 the conditions upon which they got the permit are the  
6 same as they were today four years ago, five years ago  
7 now almost when they got the permit.

8 And it's our contention that they can't show  
9 that. That's our theory. It's pretty simple. Are they  
10 the same or not? And we say they're not.

11 So we've hired some experts to work with us.  
12 Our theory of the case is to evaluate TransCanada  
13 Proposed Oil Spill Response Plan or worst-case discharge  
14 in a way that can be independently verified and present  
15 it to the Commission for a determination and also to  
16 evaluate changes in economic benefits and costs and the  
17 adequacy of Keystone's financial assurances in the event  
18 of a spill in South Dakota. That's part of the theory of  
19 our case.

20 One of our experts is Richard Kuprewicz. He  
21 currently serves as a member representing the public on  
22 the Federal Technical Hazardous Liquid Pipeline Safety  
23 Standards Committee, which is a technical committee  
24 established by Congress to advise PHMSA on pipeline  
25 safety regulations.

1           Mr. Kuprewicz has also advised TransCanada on  
2     Keystone. He recommended leak detection methods for the  
3     Keystone Pipeline in the vicinity of the Fordville  
4     Aquifer prepared by TransCanada Keystone LP by Richard  
5     Kuprewicz, president of Accufax, Incorporated. That was  
6     for 2007. He's also advised the Pipeline Safety Trust on  
7     maximum operating pressures on the Keystone XL.

8           The other group of experts is from The Goodman  
9     Group, and they're experts in pipeline economics.  
10    They're able to evaluate economic costs and benefits  
11    along with TransCanada's ability to provide adequate  
12    financial coverage in the event of a spill.

13          So these are the folks that we're working with,  
14    and in this case we're not fishing. We need the  
15    information that we've asked for that they haven't  
16    provided to adequately provide a proper evaluation of  
17    TransCanada's Proposed Oil Spill Response Plans or  
18    worst-case discharges that can be independently verified.

19          All the information that we're asking for is  
20    relevant to that point. As we have discussed earlier,  
21    relevancy in these proceedings is a very broad concept.

22          Interrogatory No. 1, Sub A we asked for the most  
23    recent and accurate project route and facility locations  
24    to provide an approximate elevation profile of the  
25    proposed pipeline, capturing the segments from the

1 nearest upstream north to the state border to the nearest  
2 pump stations just south of the state border.

3 We got that earlier this week. Monday? Did you  
4 send me that on Monday? Did you send me the elevation  
5 profile on Monday?

6 MR. MOORE: That was last week.

7 MR. TAYLOR: We sent it -- I think last  
8 Wednesday we sent you the data.

9 MR. RAPPOLD: That was the data. The graphic  
10 design that was earlier.

11 MR. TAYLOR: Probably Monday. What's today?  
12 Tuesday?

13 MR. RAPPOLD: Yeah.

14 MR. TAYLOR: Yesterday.

15 MR. RAPPOLD: Yesterday.

16 CHAIRMAN NELSON: For but a few more hours,  
17 Mr. Taylor.

18 MR. RAPPOLD: Boilerplate objections don't give  
19 us an opportunity prior to today to really resolve the  
20 underlying-- the underlying issue. Is what they're  
21 saying relevant? Is what they're -- what they've  
22 objected to, is it really, in fact, confidential? Or is  
23 it not?

24 When someone makes an objection on the grounds  
25 of protected information they're supposed to inform the

1 requesting party what the grounds are, what the documents  
2 are, how it's supported. Then we can look into that.  
3 And then we can decide if we agree with them or not. And  
4 maybe we'll say, hey, it is confidential, it is protected  
5 information. Okay. Well, let's go to the Commission and  
6 ask for a protective order and decide how the  
7 Commission's going to give it to us. Because it's  
8 clearly relevant.

9 Everything that we've asked for in our Motion to  
10 Compel is relevant to the issue before the Commission.  
11 Can TransCanada certify the conditions upon which they  
12 got the permit are the same today as they were four years  
13 ago?

14 CHAIRMAN NELSON: If I could interrupt just for  
15 a moment.

16 MR. RAPPOLD: Sure.

17 CHAIRMAN NELSON: Did I understand you correctly  
18 that Interrogatory No. 1 is resolved?

19 MR. RAPPOLD: That was 1A.

20 CHAIRMAN NELSON: 1A. Thank you.

21 MR. RAPPOLD: Thank you for clarifying that.

22 1B on the elevation profile provided above,  
23 Indicate the location of the pump stations, the location  
24 of all main line valves, including check valves by mile  
25 post, the type of main line valve actuation and location

1 of all valves in reference to water crossings.

2 We haven't got all of that information. It's  
3 necessary to have that information in order to adequately  
4 assess their Spill Response Plans and their Integrity  
5 Management Plans, which apparently they don't have yet.  
6 And that's concerning.

7 Not only is it concerning that they won't  
8 provide us that information, it's also concerning that  
9 they don't have those plans yet.

10 The point of contention has been high  
11 consequence areas and whether or not those are  
12 confidential and if they could be disclosed. We've asked  
13 for the high consequence areas to be superimposed on the  
14 elevation profile and we're told that they're  
15 confidential and they can't be disclosed.

16 In Exhibit D is an e-mail that we saw earlier,  
17 HCA data which is available from download from the -- I'm  
18 not going to read the whole thing because you've already  
19 got it. You've already seen it.

20 This isn't a law. It's an e-mail from somebody  
21 telling someone else what they think about a particular  
22 topic. It's not a law. It shouldn't be treated as such.

23 49 United States Code 60132 is a law. And  
24 that's the law that addresses the National Pipeline  
25 Mapping System. And that law requires information to be



1 provided to the mapping system not later than six months  
2 after the date of enactment of this section. The  
3 operator of a pipeline facility shall provide to the  
4 Secretary of Transportation the following information:  
5 Geospatial data appropriate for use in National Pipeline  
6 Mapping System. And I'm not going to read all of this,  
7 but what do they do with that information?

8           They make a map. And on that map what do they  
9 put on there? Map of high consequence areas. The  
10 secretary shall maintain as part of the National Pipeline  
11 Mapping System a map of designated high consequence areas  
12 as described in Section 60109(A) in which pipelines are  
13 required to meet integrity management program  
14 regulations, excluding any proprietary or sensitive  
15 security information.

16           This is the law. It's public information. High  
17 consequence areas are public information because the  
18 operator of a pipeline is required by law to provide  
19 those areas to this person, to this system, to make a  
20 map, to put it on the internet where people can go and  
21 get it and look at it. It's not confidential.

22           The only thing that's going to be excluded is  
23 any proprietary information or sensitive security  
24 information. What we're asking for is not sensitive  
25 security information.

1           What are unusually sensitive areas?  
2    49 USC 60109, high density population areas and  
3    environmentally sensitive areas. Locations near pipeline  
4    right of ways that are critical to drinking water  
5    including intake locations for community water systems  
6    and critical sole source aquifer protection areas.

7           We talked a little bit earlier about the  
8    Mni Wiconi water system that's operated by the Rosebud  
9    Sioux Tribe under the Congressional Act that was passed  
10   because of the United States Government's obligation to  
11   the Rosebud Sioux Tribe through a Treaty that they  
12   entered into with them many years ago before South Dakota  
13   was even a state.

14          Rosebud water supplies -- Rosebud provides the  
15   water and funding for the Tripp County Water Users  
16   Association, which is clearly right where this pipeline's  
17   going. Or planned to go.

18          There's been some information provided through  
19   testimony already that there's wells, there's production  
20   wells over there connected to the aquifer that Tripp  
21   County and some of the dependent Indian communities over  
22   on that side of the reservation, they use that water.

23          But yet we can't get a clear, definitive answer  
24   on a graphic representation that experts that do this  
25   stuff that know what they're talking about, that advise

1 PHMSA about these things, we can't get them to just give  
2 that to us. We have to be here arguing about it. And  
3 we've been talking about it for quite a while. So we  
4 would like you to order them, to compel them, to provide  
5 us this information.

6 We've asked them -- there's been reference to --  
7 and I'm moving on -- about Appendix Z, questions 4E and  
8 D. Findings 22, 60, and 90 refer to Keystone  
9 implementation of the 49 PHMSA Special Conditions.  
10 Keystone is also committed to implement mitigation  
11 recommendations from the Battelle and Exponent Risk  
12 Assessment Reports and including specifically addressing  
13 several issues in its Emergency Response Plan, which we  
14 learned earlier that they don't have --

15 CHAIRMAN NELSON: I'm sorry. I'm going to  
16 interrupt. Which Interrogatory are you on?

17 MR. RAPPOLD: I'm sorry. I'm on 4D. I'm on  
18 page 22.

19 CHAIRMAN NELSON: Thank you.

20 MR. RAPPOLD: Oil Spill Response Plan and its  
21 risk analysis that is used in the development of plans.  
22 Please explain what, if anything, Keystone has committed  
23 to in regard to implementation of mitigation  
24 recommendations from the Battelle and Exponent Risk  
25 Assessment Reports and how this affects Findings 22, 60,

1 and 90 and any other Findings.

2 And the answer that we got is that Keystone will  
3 implement additional mitigation measures included in  
4 Appendix Z. The answer is deficient. It's improper.  
5 You can't reference -- you can't answer a question by  
6 referencing the question.

7 How are you going to implement the additional  
8 requirements from Appendix Z, the 59 additional  
9 requirements. Don't you guys want to know that? One of  
10 the conditions was that they implement those new  
11 conditions, but they won't tell us how they plan to do  
12 that. They just say that we're going to do it. They  
13 don't give us the why. They don't give us the how.

14 I don't like this project. Why? You can't have  
15 it both ways.

16 So in our discussions we said here's some  
17 examples of how you could answer the question fully --  
18 more fully. And they told us, well, now you're asking  
19 extra questions. You don't get to ask extra questions  
20 was their response.

21 So an example is on 22. The answer provided  
22 does not address how Keystone plans to implement Special  
23 Condition 6, monitoring foreseen fatigue in  
24 transportation.

25 A complete answer would address how Keystone

1 plans to avoid double submerged arc weld cracking  
2 introduced during transportation and installation along  
3 the pipeline. An answer that describes Keystone's plans  
4 to implement other measures to avoid DSAW cracking  
5 introduced during transportation and installation along  
6 the pipeline would be a more complete response.

7 And I could go on and on, but it's in my Motion.  
8 They merely attempt to say they're going to do it without  
9 telling you or us or anyone else for that matter how  
10 they're going to go about doing it. And the purpose of  
11 discovery is to exchange information and develop your  
12 case.

13 I'm sorry. I'm kind of jumping out of order  
14 here. Interrogatory 1G, the location of the high  
15 consequence areas is confidential. And Keystone is  
16 required by PHMSA to keep this information confidential.  
17 What law? We could debate over what's in this e-mail.

18 We know there's water there. We know that  
19 there's water in one of these areas, and that's why we're  
20 asking for it. We don't need them to tell us there's  
21 water there. We already know that. We operate the water  
22 system. Of course we know there's water there. You get  
23 it from the aquifer.

24 So they can tell us where the high consequence  
25 area is located without actually telling us why it's

1 considered a high consequence area. We could debate the  
2 interpretation of that e-mail and their response.

3 But the fact is that in their objection they  
4 didn't state the why, the how, the what law says that  
5 these are confidential.

6 Now I have to go back and look up laws to figure  
7 it out when they were required under the Rules of Civil  
8 Procedure to state that in their objection. This is why  
9 courts reject boilerplate objections. Because it makes  
10 this process longer, and it doesn't help us get to the  
11 truth.

12 Do you want me to go through each and every one  
13 of our requests?

14 CHAIRMAN NELSON: I have read your -- everything  
15 that you have submitted. So I'm okay with you not doing  
16 that unless either of my fellow Commissioners -- I think  
17 they're both good also.

18 MR. RAPPOLD: Is it going to affect your  
19 decision?

20 CHAIRMAN NELSON: No. I think -- stand by for  
21 questions. That's going to be where if we've got  
22 anything we're -- at least in my mind where I might move,  
23 it's going to come down to questions.

24 MR. RAPPOLD: Okay. Thank you.

25 CHAIRMAN NELSON: Thank you.

1           Keystone.

2           MR. RAPPOLD: Can I say something off the  
3 record?

4           CHAIRMAN NELSON: You probably -- let's wait  
5 until we've gaveled out. The last time I tried to make a  
6 joke here some lawyer took it seriously.

7           MR. RAPPOLD: Well, it was going to be mostly  
8 serious, but I'll wait.

9           MR. MOORE: James Moore on behalf of Keystone.  
10           With respect to Interrogatory No. 78, which is  
11 part of the first request, that was the request for the  
12 location of the stone circles. The statute that says  
13 that that's protected and confidential information is  
14 1-20-21.2. It does not give Keystone the authority to  
15 disclose that information.

16           The whole process is a process between the State  
17 Historic Preservation Office and the Department of State.  
18 Keystone is just not in a position to have provided that  
19 information in response to the request.

20           With respect to the second round of discovery  
21 requests, we provided the elevation profile that takes  
22 care of 1A. The elevation profile also takes care of 1B.  
23 It provides the location of the house and the pump  
24 stations within the elevation profiles. We answered the  
25 other subparts of Interrogatory No. 1, except for the one

1 related to location of HCAs for the reason supported in  
2 the Affidavit.

3 Mr. Dorr says what PHMSA tells us is just what  
4 PHMSA says, and it's not a law. I'm sorry. That's not  
5 how Keystone responds to direction from PHMSA. PHMSA is  
6 our federal regulator, and when PHMSA says don't disclose  
7 this that's what Keystone does.

8 With respect to Interrogatory No. 4D and E with  
9 respect to the mitigation of the 59 Special Conditions --  
10 or compliance with the 59 Special Conditions. With all  
11 due respect to Mr. Rappold, the question that he asked  
12 was not explain how you will implement each of the 59  
13 Special Conditions.

14 Keystone answered the questions that he asked.  
15 He came back and now has said now I need you to explain  
16 how you will implement each of the 59 Special Conditions.  
17 That's 59 new Interrogatories. And I would submit that  
18 it's not reasonably calculated to lead to the discovery  
19 of admissible evidence.

20 Again, this is a matter that's within the  
21 exclusive jurisdiction of PHMSA. And, secondarily, you  
22 don't get to ask new questions in a Motion to Compel, and  
23 that's what it is.

24 With respect to Interrogatories 9, 10, 11, and  
25 12, for the most part we answered those. No. 10, No. 11,



1 and No. 12 related to insurance and other financial  
2 information. We answered most of it. We did object with  
3 respect to No. 11 to Subparts C and D to the extent that  
4 we thought that they were hypothetical questions based on  
5 future scenarios and that we similarly had insufficient  
6 information to answer them and could not answer them for  
7 that reason.

8 With respect to Interrogatory No. 9 the only  
9 thing that I will note there is that Mr. Rappold is  
10 seeking, you know, Keystone's distribution policy with  
11 respect to the LLC, which is clearly proprietary  
12 information to Keystone. There's no showing that that's  
13 reasonably calculated to lead to the discovery of  
14 admissible evidence in this proceeding.

15 So, you know, we've worked hard with  
16 Mr. Rappold, and, frankly, we resolved most of these.  
17 I'm very comfortable standing on the remaining objections  
18 we assert either because we answered the question and the  
19 Tribe just doesn't like the answer or because the  
20 objection is well founded.

21 Thank you.

22 CHAIRMAN NELSON: Thank you.

23 Questions from the Commission. Commissioner  
24 Hanson.

25 COMMISSIONER HANSON: Thank you, Mr. Chairman.

1 I just want to make certain I understand which items were  
2 taken off the table. Matt, if you would --

3 CHAIRMAN NELSON: And, Matt, if you want to just  
4 pull that mic. over if you're spread out there, wherever  
5 you're comfortable.

6 MR. RAPPOLD: Should be on now.

7 Interrogatory No. 10 and 11 in the First Set of  
8 Interrogatories located on page 6 of the Motion to  
9 Compel.

10 Request for Production of Documents, No. 18 and  
11 19 on page 10. No. 78 we didn't take off the table.  
12 Rather we asked you to consider a protective order for  
13 that like you've done with the other parties before us.

14 What's curious on here is that they indicated  
15 that they -- Keystone began cultural surveys in May of  
16 2008, and they found several prehistoric stone circles.  
17 But now they're saying these sites are addressed during  
18 the course of government-to-government consultations with  
19 the DOS. Site locations are confidential and cannot be  
20 disclosed outside of the consultation process.

21 How did they get it in the first place?

22 COMMISSIONER HANSON: That's the only question I  
23 have. Thank you.

24 CHAIRMAN NELSON: Any other Commissioner  
25 questions?

1           COMMISSIONER HANSON: Oh, excuse me. Forgive  
2 me. I do have another one, as I'm looking through my  
3 notes here. See if I can find it. It pertains to the  
4 insurance.

5           It's on Interrogatory No. 12 regarding the  
6 insurance. I understand, but I want to make certain I  
7 understand correctly that Keystone's intention is to have  
8 a 100 million dollar policy for the pipeline it says  
9 during operation.

10           Does that mean during construction or during the  
11 entire duration that this pipeline is in operation?

12           MR. MOORE: I think it means during operation,  
13 not including construction, is my understanding.

14           COMMISSIONER HANSON: Not including  
15 construction?

16           MR. MOORE: I didn't specifically ask that  
17 question, Commissioner Hanson.

18           My understanding of operation is it means  
19 postconstruction when it's placed into service. But I  
20 can't tell you that with 100 percent certainty.

21           COMMISSIONER HANSON: Okay. We'd like to know  
22 that.

23           MR. MOORE: Okay.

24           COMMISSIONER HANSON: And then you state an  
25 additional corporate policy with limits of 200 million

1       dollars. How does that work?

2               I've been in insurance a lot over my lifetime,  
3       and I just want to make sure I understand. The  
4       pipeline's a subsidiary of a corporation and, therefore,  
5       you have 200 on the corporation and 100 on the  
6       subsidiary; is that correct?

7               MR. MOORE: I think they're actually separate  
8       coverages. And my understanding is that the 200 million  
9       would not be dedicated specifically to South Dakota, to  
10      Keystone's operations in South Dakota. The 200 million  
11      would apply to the Keystone line whether it be in  
12      Montana, South Dakota, Nebraska.

13              COMMISSIONER HANSON: It's aggregated for all of  
14      the states?

15              MR. MOORE: That's correct.

16              COMMISSIONER HANSON: And the 100 million  
17      dollars, is that also aggregated then?

18              MR. MOORE: No, it is not. That is dedicated to  
19      operations in South Dakota.

20              COMMISSIONER HANSON: Okay. Thank you very  
21      much.

22              Thank you, Mr. Chair.

23              CHAIRMAN NELSON: Any additional questions? If  
24      not, is there a motion?

25              COMMISSIONER HANSON: If you want to make one,

1 go ahead.

2 CHAIRMAN NELSON: Okay. Let me give it a shot.  
3 And I am working off of, yeah, Rosebud Sioux Tribe's  
4 Motion to Compel. And I'm just going to name the ones  
5 that I would grant.

6 I would grant Interrogatory No. 1 to the extent  
7 there's any information that has not yet been provided.  
8 That's on page 12.

9 I would also grant Interrogatory No. 2 on page  
10 18.

11 Ladies and gentlemen, that's it.

12 Discussion on the Motion.

13 COMMISSIONER HANSON: Mr. Chairman, you're  
14 saying No. 1 and No. 2. Is that it?

15 CHAIRMAN NELSON: Yes.

16 COMMISSIONER HANSON: Okay. Thank you.

17 MR. SMITH: 12 or 2?

18 COMMISSIONER HANSON: 2.

19 MR. SMITH: Okay.

20 CHAIRMAN NELSON: Discussion on the Motion.

21 Go ahead. Commissioner Fiegen has a question.

22 COMMISSIONER FIEGEN: I just have a question on  
23 your Motion because it appears to me a lot of information  
24 has been given from Keystone. So it also appears to me  
25 the Intervenor may ask new questions of Keystone, and I

1 don't know if it's in these questions or not. So I just  
2 need to spend a little bit of time to see if they're  
3 asking new questions on this one.

4 CHAIRMAN NELSON: Certainly. Or do you want to  
5 just ask Keystone that question? Would that shortcut it?

6 COMMISSIONER FIEGEN: Sure. That would give a  
7 shortcut.

8 Are there new questions being asked from the  
9 first discovery questions or their discovery questions  
10 from this Motion to Compel?

11 MR. MOORE: I just want to make sure I'm  
12 understanding your question. Can you ask it again?

13 COMMISSIONER FIEGEN: Sure. On the two  
14 discovery items that we're looking at granting for Motion  
15 to Compel they ask two sets of questions actually. And  
16 then it looks like they came back in their Motion to  
17 Compel. And it appears that they may have asked  
18 additional questions or asked you to do it a different  
19 way to ask you new questions.

20 Are these discovery items asking new questions?

21 MR. MOORE: I'm not sure. I'm not sure I know  
22 the answer to that. Because my understanding and  
23 impression based on conversations with Mr. Rappold is  
24 that we have provided the information in response to both  
25 Interrogatories 1 and 2.

1           If he thinks there's additional information that  
2 we still have not provided, I'm going to have to talk to  
3 him and find out what it is. Because I just think we've  
4 given what we have.

5           COMMISSIONER FIEGEN: Because it appears to me  
6 that you have given a lot of information. And I just  
7 want to make sure it doesn't lead to another round of  
8 discovery, that the Commission doesn't grant another  
9 round of discovery by granting this Motion.

10          MR. MOORE: Thank you.

11          CHAIRMAN NELSON: Okay. I'm going to go back to  
12 Mr. Rappold. I want to try to drill down to this.

13          Can you give an example of something specific in  
14 1 or 2 that has not been provided?

15          MR. RAPPOLD: Yes. IR, 1C is not answered  
16 fully.

17          CHAIRMAN NELSON: Okay. So let me just -- we're  
18 going to look at it. According to Finding 20 and  
19 Reference 4, Keystone's proposing a number of changes to  
20 both the type of valves and their locations since the PUC  
21 decision of June 29, 2010. Please list these changes and  
22 indicate them on the elevation profile requested above.

23          MR. RAPPOLD: They're not on the elevation  
24 profile. In 2009 there was 15. Now there's 20.

25          CHAIRMAN NELSON: Mr. Moore, has that

1 information been provided that I've just read?

2 MR. MOORE: We provided the elevation profile in  
3 two forms. It was initially provided in tabular form,  
4 and it was 3,000 some pages long because it's actually an  
5 elevation profile, basically every foot. And it started  
6 at the first pump station north of the South Dakota  
7 border and ended at the first pump station south of the  
8 South Dakota border.

9 And pump stations and valve sites are located.  
10 You can tell when you come to the place one is. It tells  
11 you. Mr. Rappold and Mr. Taylor talked about that not  
12 being in useful form for Mr. Kuprewicz. We went back and  
13 we created a graphic form that provided the same  
14 information.

15 It's not actually information that we possessed.  
16 We created that for him and provided that. I don't know  
17 how else to answer the question.

18 CHAIRMAN NELSON: Thank you.

19 MR. RAPPOLD: We'd like to see the locations of  
20 all the valves in reference to the water crossings.

21 CHAIRMAN NELSON: And which number is that?

22 MR. RAPPOLD: It is 1B, Sub 4.

23 They have suggested that we can on our own take  
24 all of the information that's contained within the  
25 3,500-page document and then do that ourselves.



1           Certainly I believe that we could. But it would  
2 be a lot easier and a lot simpler for Keystone to do  
3 that. The information is already there. They provided  
4 an elevation profile within several hours of letting me  
5 know that it would -- you know, following an e-mail. So  
6 I don't see how that would be too hard for them to do.

7           1E is not answered entirely. 1D is not answered  
8 entirely. And No. 2, we do not have exact locations of  
9 the valves on the elevation profile. And these things  
10 are all necessary in order to analyze their system and  
11 their response plans and their ability to maintain this  
12 pipeline.

13           CHAIRMAN NELSON: I'm going to withdraw my  
14 Motion.

15           Additional motions.

16           COMMISSIONER HANSON: Mr. Chairman.

17           CHAIRMAN NELSON: Commissioner Hanson.

18           COMMISSIONER HANSON: In regards to the  
19 Commission -- the Rosebud Sioux Tribe's Motion to Compel  
20 Discovery, I would grant second round Interrogatory  
21 No. 2.

22           CHAIRMAN NELSON: Discussion on the Motion.  
23 Seeing no discussion on the Motion --

24           COMMISSIONER FIEGEN: Just wait. I just got  
25 there. Just wait a minute.

1 I guess, Mr. Chairman, I have to ask the same  
2 question.

3 CHAIRMAN NELSON: Certainly.

4 COMMISSIONER FIEGEN: It appears to me Keystone  
5 has answered most of these questions. So we want to give  
6 discovery to our Intervenors, but when it appears to a  
7 Commissioner that you have given most of your responses,  
8 I guess if the Intervenor could tell me what exactly  
9 you're still missing so --

10 I mean, first of all, I think the Commission is  
11 so thankful that Standing Rock and Keystone have worked  
12 together.

13 CHAIRMAN NELSON: Rosebud.

14 COMMISSIONER FIEGEN: Or Rosebud. Thank you.

15 CHAIRMAN NELSON: Yes. Because I wanted to say  
16 that very same thing.

17 COMMISSIONER FIEGEN: I mean, you two groups  
18 have worked together above -- I mean, it has just been  
19 pleasant to watch you guys work together.

20 But I still don't see what you're missing in  
21 No. 2. So if Rosebud could help me with that, that would  
22 be great.

23 MR. RAPPOLD: Just a moment. We have the  
24 approximate locations of 1,000, the elevation profile not  
25 by exact locations, by mile post. We do not have which

1 locations are proximate to water crossings from  
2 Interrogatory 2.

3 Again, I think we also need to go back to the  
4 boilerplate objections. Keystone, the information they  
5 gave us in the Final SEIS is outdated. There's 15 valves  
6 in South Dakota when it was provided. Now there's 20.

7 CHAIRMAN NELSON: Okay. I'm going to interrupt  
8 here.

9 But my understanding was that you've been  
10 provided with this rather large document that's got all  
11 of that information in it; is that correct?

12 MR. TAYLOR: Yes.

13 CHAIRMAN NELSON: Can I get that on the mic.?

14 MR. TAYLOR: Last Wednesday we sent a -- maybe  
15 it was Thursday. I forget. We sent -- Keystone keeps  
16 its records in a GIS -- they keep their records in some  
17 tabular format that's essentially a mystery to me.

18 We communicated that, took them a day and a half  
19 or so to get it pulled together in the format that he  
20 wanted it. And we sent it to him. I think it was  
21 Wednesday.

22 And then Friday I got an e-mail from Matt --  
23 maybe it was Thursday. I don't remember. We traveled  
24 Thursday, I guess, so it must have been Friday --  
25 suggesting that he wanted our profile. And he sent us an

1 Enbridge profile from some other pipeline as an example.

2 And I passed that on to Keystone, and they said  
3 that isn't how we do it. And then Saturday we had some  
4 discussions, and I think Saturday evening I got an  
5 e-mail, maybe Saturday afternoon, from him, and the  
6 Keystone people said, all right, we'll do one. We'll  
7 invent one. And, you know, under the discovery rules we  
8 don't have to do that.

9 So they asked me how soon do you want it? I  
10 said Monday morning. I probably could have said Sunday,  
11 and they probably would have produced it.

12 Sometime Monday morning, 10 o'clock or  
13 11 o'clock or something we get this profile that looks  
14 like the Enbridge profile. The valves are all shown on  
15 the profile.

16 CHAIRMAN NELSON: I'm going to interrupt for a  
17 moment. We're talking 20 valves, not 15; correct?

18 MR. TAYLOR: Correct. And the check valves that  
19 are on the downstream side of the major water crossings  
20 are all shown and denominated as check valves. And we  
21 e-mailed that to Matt sometime Monday.

22 And I don't know what else we can do. In the  
23 graphical -- in the tabular information it's -- they're  
24 down to I think it's every foot. So he could identify  
25 where they are by the foot.

1           CHAIRMAN NELSON: Thank you.

2           Commissioner Fiegen, you have the floor.

3           COMMISSIONER FIEGEN: Thank you so much for  
4 working together, Rosebud and Keystone.

5           It may take a while to go through all of that  
6 discovery information for -- for Rosebud, but I believe  
7 it's there.

8           MR. RAPPOLD: It's not there. The example  
9 from -- I'm sorry to interrupt you, ma'am. The example  
10 that we sent had water crossings on it. The document  
11 that we were provided doesn't have water crossings on  
12 it.

13          MR. TAYLOR: Well, I guess if there's a check  
14 valve on the downside of every major water crossing, so  
15 you back up a couple of feet, and you've got the water  
16 crossing.

17          MR. RAPPOLD: How are we supposed to deal with  
18 300,000 data end points to get that information and then  
19 put it on the map? Or on the elevation profile?

20          CHAIRMAN NELSON: Okay. I'm going to confine  
21 this to Commissioner discussion.

22          Any further discussion on the Motion to grant  
23 Interrogatory No. 2?

24          Seeing no further discussion, all those in favor  
25 of Interrogatory -- of granting Motion to Compel for

1 Interrogatory No. 2 will say aye. Those opposed, nay.

2 Commissioner Hanson.

3 COMMISSIONER HANSON: Aye.

4 CHAIRMAN NELSON: Commissioner Fiegen.

5 COMMISSIONER FIEGEN: No.

6 CHAIRMAN NELSON: Nelson votes nay.

7 Motion fails.

8 I'll just open up any further motions. I think  
9 we have concluded this. And I -- I want to echo what  
10 Commissioner Fiegen just said. I want to say thank you  
11 to Mr. Rappold. I want to say thank you to Keystone.  
12 It's apparent that you may be the two parties that have  
13 worked the best on this to try to narrow things down, and  
14 we appreciate that.

15 I will move that the Commission deny Rosebud  
16 Sioux Tribe's Motions to Compel.

17 Discussion on the Motion.

18 COMMISSIONER FIEGEN: You know, Mr. Chairman, I  
19 just do believe that the information's there. Sometimes  
20 discovery takes a lot of work to go through but I believe  
21 it's there and I will support your Motion.

22 CHAIRMAN NELSON: Thank you.

23 Additional discussion.

24 Seeing none, all those in favor will vote aye.  
25 Those opposed, nay.

1 Commissioner Hanson.

2 COMMISSIONER HANSON: I'd simply say that -- I  
3 feel compelled now to say something because I do very  
4 much appreciate the parties working together. I wish  
5 everybody had worked this well together. It would be  
6 marvelous for all of us.

7 At the same time, there's information and  
8 there's information. And this -- you know, you can be  
9 overwhelmed with some information. I think we've over --  
10 I know we've overwhelmed XL with the information they  
11 have to provide in another situation here today, but I  
12 really think that Rosebud needs to have something they  
13 can decipher a little bit more easily and obviously  
14 that's why I -- and I totally respect and understand the  
15 positions of the other Commissioners.

16 CHAIRMAN NELSON: Thank you.

17 Additional discussion on the Motion to deny?

18 Seeing none, all those in favor will vote aye.  
19 Those opposed, nay.

20 Commissioner Hanson.

21 COMMISSIONER HANSON: No.

22 CHAIRMAN NELSON: Commissioner Fiegen.

23 COMMISSIONER FIEGEN: Fiegen votes aye.

24 CHAIRMAN NELSON: Nelson votes aye.

25 The Motion is carried. It is denied. We'll

1 take 10 minutes.

2 (A short recess is taken)

3 CHAIRMAN NELSON: We'll call the hearing back to  
4 order. Our next motion is Dakota Rural Action's Motion  
5 and Supporting Memorandum to Compel Discovery.

6 Dakota Rural Action.

7 MR. ELLISON: Bruce Ellison on behalf of Dakota  
8 Rural Action.

9 Mr. Chairman, before I begin, if I may while  
10 Mr. Smith and the Commission are considering the aspects  
11 of the protection order, there are a couple of aspects  
12 that I just ask that you consider and figure out how you  
13 want to deal with.

14 And that would be we would certainly like to be  
15 able to show our experts. If it's just limited to  
16 attorneys, for example, we'd like it expanded to our  
17 experts as well to be able to show them the materials.

18 There also is the question what do individual  
19 Intervenors do who are not represented by counsel? And  
20 I'd just ask that you make some provision for that.

21 MR. SMITH: Uh-huh. Yes, sir.

22 MR. ELLISON: Thank you. I want to address the  
23 Motion to Compel. It's late. I'm tired. I can hardly  
24 see. I'll try to keep this as short as I possibly can.

25 I think the issue comes down to PUC Staff



1 counsel takes the position -- what we've asked for is  
2 we've asked for communication between the PUC Staff and  
3 TransCanada regarding this Application. And Staff  
4 counsel has suggested that -- or in an Affidavit stated  
5 that the only communications that she had were between  
6 counsel from TransCanada and that somehow this becomes an  
7 attorney privileged communication.

8 And I really -- you know, our brief sets out  
9 what the standards are. This is not a situation where  
10 Staff counsel and TransCanada are representing the same  
11 party. It's not like a joint representation. Staff  
12 counsel doesn't represent TransCanada. TransCanada  
13 doesn't represent Staff.

14 And so I'm having difficulty trying to  
15 understand how the mere fact that two attorneys talk  
16 especially one from a regulatory agency, Staff, and the  
17 Applicant -- it would seem to me that any of their  
18 communications, whether in e-mails or notes or memoranda  
19 about personal or phone conversations, that this would be  
20 discoverable. It probably would be under the public  
21 records. Well, certainly not a violation of our public  
22 records statute.

23 But I just don't see how this would involve --  
24 you know, absent the representation issue, which I don't  
25 think exists, we're not asking for mental thoughts.

1 We're not asking for impressions. We're not asking for  
2 trial strategy. We just are asking for communications  
3 between a regulatory agency and the Applicant who is  
4 applying to that agency for a permit or a relicensing or  
5 whatever it might be. We think this is something that is  
6 certainly discoverable and not protected by any attorney  
7 privilege.

8 And that's essentially what our argument is,  
9 supplementing our pleadings that we've submitted.

10 CHAIRMAN NELSON: Thank you.

11 And, Ms. Edwards, do you want to argue from  
12 there? Or wherever you're comfortable.

13 MS. EDWARDS: I'm comfortable right here. Thank  
14 you.

15 CHAIRMAN NELSON: You just stay right here.  
16 We've probably got questions.

17 MS. EDWARDS: Thank you. Kristen Edwards for  
18 Staff.

19 As much as I would love to produce these e-mails  
20 and defend my honor as it were, it would set a terrible  
21 legal precedent for Staff to produce that. Staff's role  
22 is to follow the law and to be fair to all parties.  
23 Nothing in our communications would jeopardize that. And  
24 we do take that role very seriously. We just don't want  
25 to set a poor legal precedence here.

1           A mention of the open records law was just made.  
2   I'll just address that briefly. There was no open  
3   records request made, and if there was, Staff would have  
4   to assert that correspondence of any public employee are  
5   protected, not discoverable -- or not subject to open  
6   records.

7           Beyond that, we would just stand by what we put  
8   in our brief, and we are available for questions. I am.

9           Thank you.

10          CHAIRMAN NELSON: Thank you. Any rebuttal?

11          MR. ELLISON: If there's going to be a legal  
12   precedent that would be set, we would submit it would be  
13   the sudden barring of a confidential nature which should  
14   be public record, and we think that we are entitled to  
15   it.

16          It's not just e-mails. It's any communications.  
17   Anything that there's a record of between the Applicant  
18   and the regulatory agency is discoverable and is not  
19   privileged, whether it's counsel, Staff member,  
20   engineers, whoever it might be.

21          CHAIRMAN NELSON: Thank you. Questions from the  
22   Commission.

23          Is there a Motion?

24          Commissioner Fiegen.

25          COMMISSIONER FIEGEN: Mr. Chairman, in HP14-001

1 move to deny Dakota Rural Action's Motion to Compel  
2 Staff.

3 CHAIRMAN NELSON: Discussion on the Motion.

4 COMMISSIONER FIEGEN: I mean, I believe Staff  
5 makes a lot of great points not only verbally but in  
6 their written information to us. And we don't want to  
7 set a precedence in the future that will not be able to  
8 be upheld in everything that we deal with.

9 So I believe we're okay. The open meetings law  
10 that was discussed isn't relevant, and I believe that  
11 Dakota Rural Action has been given a lot of information  
12 today before that they can create their case in a fair  
13 and equitable way.

14 CHAIRMAN NELSON: Additional discussion.  
15 Commissioner Hanson.

16 COMMISSIONER HANSON: Thank you, Mr. Chairman.

17 I agree with Commissioner Fiegen. No surprise.  
18 When Mr. Martinez was discussing the second motion  
19 pertaining to a special master, referee, arbiter, he to a  
20 great extent described the duties of our Staff. A lot of  
21 people don't realize that we have basically a trifurcated  
22 Staff, and the Chair, Commissioner Nelson, alluded  
23 earlier in the day that we don't even talk to each other  
24 about dockets outside of an open meeting.

25 By the same token, we don't discuss with Kristen

1 any dockets outside of an open meeting. She very much  
2 represents the citizens as well as the utilities. She  
3 represents all sides. She gathers that information, acts  
4 as a facilitator.

5 That's why Commissioner Fiegen stated earlier  
6 and asked the question pertaining to people in the  
7 audience if they had availed themselves to calling and  
8 chatting with her. Because that's something that  
9 Commissioner Fiegen had talked about on a number of  
10 occasions previously, to make certain that people have  
11 that availability to them.

12 And so that's one of the reasons I voted against  
13 the second motion by DRA; because we have that system in  
14 place, and that is their purpose. And it would really  
15 complicate that situation if a person is attempting to  
16 gather the information, be an arbiter, trying to resolve  
17 the issues and working for everyone in that respect and  
18 having that -- basically a relationship so that she can  
19 facilitate it.

20 And to say, okay, now Staff has to provide all  
21 of that information, it immediately destroys that wall  
22 that exists right now. I would be able then, of course,  
23 to avail myself to all of that information that's being  
24 provided to whomever.

25 MR. ELLISON: Mr. Hanson, with all due respect,

1 I don't understand how you doing your job and the way you  
2 think is right has to do with whether or not  
3 communications that are memorialized in some way between  
4 an Applicant and a regulatory agency, that that somehow  
5 makes them privileged.

6 COMMISSIONER HANSON: Well, I thought I was  
7 explaining it. I failed in explaining that to you, but I  
8 think I've sufficiently explained my reasons for how I'm  
9 going to support the Motion.

10 CHAIRMAN NELSON: Additional discussion on the  
11 Motion.

12 I'll just say I'm going to support the Motion  
13 for two reasons. Number one, if there had been  
14 communications from Staff, not the attorney for Staff but  
15 Staff analysts, I may have had to take a pretty hard look  
16 at granting that. But the testimony was that there was  
17 none of that communication, that it all came from the  
18 attorney.

19 And given that, I am convinced that that  
20 communication is all solidly covered under the work  
21 product doctrine and is not available for compel --  
22 compelling.

23 Additional -- we're in Commissioner discussion  
24 at this point. Additional Commissioner discussion?

25 Seeing none, all those in favor of the motion

1 will vote aye. Those opposed, nay.

2 Commissioner Hanson.

3 COMMISSIONER HANSON: Aye.

4 CHAIRMAN NELSON: Commissioner Fiegen.

5 COMMISSIONER FIEGEN: Fiegen votes aye.

6 CHAIRMAN NELSON: Nelson votes aye.

7 The Motion carries, and DRA's Motion to Compel  
8 is denied.

9 That brings us to Yankton Sioux Tribe's Motion  
10 to Compel.

11 Thomasina Real Bird, are you still with us?

12 MS. REAL BIRD: I am still with you,  
13 Mr. Chairman.

14 CHAIRMAN NELSON: Oh, my goodness. Give her a  
15 gold star.

16 MS. REAL BIRD: Okay. Well, we have the benefit  
17 of being a little bit more relaxed on the telephone. So  
18 I certainly appreciate all the folks still with us and  
19 value your time. So we'll try to keep it relatively  
20 short.

21 Shall I proceed?

22 CHAIRMAN NELSON: Yes. You shall.

23 MS. REAL BIRD: Okay. So our Motion to Compel  
24 was filed timely the day they were due. I won't belabor  
25 the standard, but we do believe the discovery rules

1     should be accorded a broad and liberal treatment and each  
2     of the ones -- each of the requests that we've  
3     articulated are set out in our attached April 1 letter  
4     that was sent to the Applicant.

5             Specifically, we had listed a number of those.  
6     And I'll just go down the letter there and go through  
7     them briefly for the Commission and the parties.

8             Interrogatory No. 10, our request is based upon  
9     submission No. 6. TransCanada did object that it's not  
10    relevant. However, we responded back that it is, and  
11    it's designed and calculated to lead to discovery of  
12    admissible evidence. And we site Condition No. 6.

13            Interrogatory No. 13 is similar, and we site  
14    Condition No. 13.

15            Interrogatory No. 15 is also similar, and we  
16    site Conditions 1 and 2. And I will note for  
17    Interrogatory No. 15 that in response to the Applicant's  
18    concerns we did rephrase the question, the Interrogatory,  
19    and we hope that that had addressed the Applicant's  
20    concern.

21            It turns out it didn't because it decided to  
22    rest on its earlier objection. And that's a similar  
23    approach to Interrogatory No. 16. We site Conditions 1  
24    and 2. And, again, we rephrased the question in response  
25    to the Applicant's concern but again received no



1 production of discovery.

2 Interrogatory No. 21 we cite to Condition  
3 No. 44. However, still did not receive any production of  
4 discovery. Interrogatory No. 32 we cite Conditions 1, 2,  
5 and 36. This is the one that the Applicant did provide  
6 additional discovery on April 7. They did provide  
7 coordinates so Interrogatory No. 32 is no longer at issue  
8 in our Motion to Compel. So if you'd like to make a note  
9 as to that, we're satisfied with the Applicant's  
10 supplemental discovery response for Interrogatory No. 32.

11 And on to the Requests for Production, No. 2 is  
12 still at issue, and that relates to the Finding of Fact  
13 No. 41. And in response to the Applicant's specific  
14 concerns to that Request For Production we did rephrase  
15 the request. And that's the same for No. 3. We  
16 rephrased that request as well, trying in good faith to  
17 resolve our impasse with the Applicant.

18 And that's the same with Request For Production  
19 No. 4. We -- you know, we received the Applicant's  
20 objection and in response attempted to rephrase the  
21 request in response.

22 Request For Production No. 6, this is our  
23 request regarding the Emergency Response Plan. And we  
24 heard some discussion earlier on the PUC's jurisdiction  
25 and Keystone's burden, and we do just have to note that

1 the PHMSA information that's on the Department of  
2 Transportation's website does a good job of explaining  
3 the State's -- the State's authority in these federal  
4 pipeline safety acts.

5 And so we haven't heard that discussed a whole  
6 lot, but in response to the Applicant's challenge to the  
7 PUC's jurisdiction in that regard, the State does have  
8 some authority under those acts. And so it is relevant  
9 to the proceedings.

10 And our Request For Production No. 7 and 8 are  
11 nearly identical. And this is the request that we made  
12 that the Applicant provide all documents that support its  
13 proposed changes to the Findings of Fact. And it  
14 identified those changes in its first filing with the  
15 Commission in this new Docket as Appendix C.

16 You know, the Applicant did object that the  
17 information requested is overly broad, unduly burdensome  
18 and not reasonably calculated to lead to the discovery of  
19 admissible evidence. And, you know, I guess we're not  
20 convinced. Because this Request For Production was  
21 designed to have the Applicant produce the documents it  
22 intends to rely on when it proposes its changes to the  
23 Findings of Fact. And that's one of the core reasons --  
24 one of the core areas that will be examined by the  
25 Commission.

1           And so we find that response pretty  
2   disingenuous. And, you know, if it the Applicant chooses  
3   to rest on that objection and not produce anything  
4   further, we would -- you know, we would certainly like  
5   all of our discovery requests to be compelled, and in  
6   particular for this one if the Applicant chooses not to  
7   produce anything further, we would like any of the  
8   documents not produced to be excluded from the  
9   evidentiary hearing.

10           And I know that's not something we included in  
11   our Motion, but I'm making that oral request now that,  
12   you know, it's sort of mind boggling why the Applicant  
13   wouldn't produce those documents and instead say that  
14   request is overly broad and burdensome when we're  
15   actually asking for the documents that support its  
16   proposed changes.

17           So, you know, we rephrased quite a few of them.  
18   We attempted to work with the Applicant in our request,  
19   and we -- with the exception of the one latitude and  
20   longitude coordinates, we haven't received anything  
21   supplementing the Applicant's discovery responses.

22           So we do ask today for a Motion to Compel and  
23   with regard to the Request For Production No. 7 and 8, a  
24   Motion to Compel and if nothing is produced to exclude  
25   those particular documents from use at the evidentiary

1 hearing.

2 CHAIRMAN NELSON: Thank you.

3 Keystone.

4 MR. MOORE: Thank you. James Moore on behalf of  
5 Keystone.

6 To some extent there are still two ships passing  
7 in the night here. The documents that were attached to  
8 the Tribe's Motion did not include the answers that  
9 Keystone actually provided. So I submitted those with an  
10 Affidavit and then specifically argued the ones that we  
11 clearly answered. And I've still not heard any  
12 acknowledgment from the Tribe about that.

13 With respect to Interrogatory No. 10 related to  
14 the identity of civil surveyors, we provided the names.  
15 With respect to No. 13, the environmental inspectors, we  
16 said we can't answer that; we haven't hired any of them.

17 With respect to No. 15 related to contractors  
18 who may have received any notice from a regulatory agency  
19 of a deficiency, we said with respect to the Keystone XL  
20 Pipeline we haven't hired any contractors; we can't  
21 answer that.

22 Interrogatory No. 16 relates to the same request  
23 in Canada, but the objection there is to relevance and it  
24 not being likely to lead to the discovery of admissible  
25 evidence. What issues a contractor may have had

1 regarding some pipeline in Canada at some point is not  
2 germane to this proceeding.

3 With respect to Interrogatory No. 21 regarding  
4 the identity of cultural surveyors, we identified those  
5 persons.

6 So I'm not sure what all is being asked for here  
7 in addition to the information that was provided in the  
8 Interrogatories.

9 With respect to the document requests, you know,  
10 most of those issues look familiar based on other  
11 conversations that we've had today. And I'll rest on the  
12 written responses unless the Commission has questions.

13 CHAIRMAN NELSON: Thank you.

14 Questions from the Commission for either party.

15 Is there a Motion?

16 COMMISSIONER FIEGEN: I have a question for  
17 Keystone.

18 I think you talked about No. 10, but I was  
19 writing notes on something else so I missed that on what  
20 you said about No. 10.

21 MR. MOORE: We identified the civil surveyors.  
22 We gave the names.

23 COMMISSIONER FIEGEN: Okay.

24 CHAIRMAN NELSON: I'm going to follow up.  
25 Request For Production No. 6 can you just expand,

1 Mr. Moore, on how you believe you complied with that?

2 MR. MOORE: Well, that request is specifically  
3 not all documents relating to Keystone's Emergency  
4 Response Plan but all documents constituting the  
5 Emergency Response Plan.

6 And I think as we've discussed today, the  
7 Emergency Response Plan for Keystone XL does not yet  
8 exist. So the only responsive documents, I mean, are the  
9 plan, and I think what we said is that there's a -- the  
10 redacted Keystone ERP is part of the Appendix I to the  
11 FSEIS, and I don't know how else to answer that.

12 CHAIRMAN NELSON: Thank you.

13 Additional questions.

14 Is there a motion?

15 Well, here I go. I will move to compel  
16 discovery for Interrogatories No. 15, 21, and Request For  
17 Production No. 2, 3, 4, 7, and 8.

18 Discussion on the Motion.

19 I believe that these are consistent with what we  
20 have done elsewhere today, and I would also grant that my  
21 Motion would contain a protective order similar to what  
22 we have granted in the other Motions to Compel if needed.

23 Additional discussion.

24 COMMISSIONER HANSON: Just give me two minutes.

25 CHAIRMAN NELSON: Absolutely.

1 I'm just going to note for everybody that's on  
2 the telephone, we do have an issue with our system.  
3 Apparently at 9 o'clock it's going to knock you off. We  
4 may or may not be done by 9 o'clock. If it does knock  
5 you off -- I'm looking at Katlyn. Do they dial back the  
6 same number?

7 MS. GUSTAFSON: And the same password.

8 CHAIRMAN NELSON: And the same password. So  
9 it's going to knock them off. So if that happens just  
10 dial back in on the same number.

11 COMMISSIONER HANSON: Mr. Chairman.

12 CHAIRMAN NELSON: Yes.

13 COMMISSIONER HANSON: Do you have any concern  
14 about the all documents on 2 -- excuse me. 7. 3, 4, 7?  
15 I think the point -- at least I took it pretty well that  
16 this may be a duplication of the work that they are  
17 doing, but all documents is call up to Keystone  
18 headquarters and tell them to lock the doors and all  
19 personnel inside and start making copies.

20 And I'm wondering whether the Applicant here has  
21 the -- not -- excuse me.

22 I'm wondering whether Ms. Real Bird can narrow  
23 that down at all or if she wants to receive the amount of  
24 information that she's going to get.

25 MS. REAL BIRD: This is Thomasina. Thank you

1 for this chance.

2 We're really just interested in the documents  
3 that TransCanada intends to introduce that support its  
4 changes to the Findings of Fact.

5 So to the extent those can be identified, that's  
6 really what we want. If there's other documents that  
7 would be considered "all" that won't be used at the  
8 hearing, we don't necessarily want those.

9 So, you know, we could agree to limit it to  
10 that. That's really what the request was after.

11 And if I could just still add that if, you know,  
12 some of these documents are not produced, we would like  
13 protections in the order that would allow us to exclude  
14 those at the hearing. That's really the next step after  
15 a party doesn't comply with a Motion to Compel. But we'd  
16 like those protections set out in advance if possible  
17 from the Commission.

18 COMMISSIONER HANSON: I appreciate that, that  
19 response. It does help to limit the amount of  
20 information.

21 CHAIRMAN NELSON: And if I might just respond, I  
22 will make that a part of my Motion.

23 And, Ms. Real Bird, greatly appreciate --  
24 Commissioner Hanson, I appreciate your asking the  
25 question. And, Ms. Real Bird, I appreciate your



1 willingness to help us move past that point.

2 Okay. Additional discussion on the Motion.

3 Seeing none, all those in favor -- and I want to  
4 specifically say Ms. Real Bird has asked for us to go  
5 beyond and issue an order disallowing an Applicant's use  
6 of certain information if it's not turned over. I'm not  
7 prepared to do that at this point.

8 Seeing no further --

9 COMMISSIONER FIEGEN: One additional question.

10 CHAIRMAN NELSON: Yes.

11 COMMISSIONER FIEGEN: In their Motion they were  
12 asking for attorney fees to be brought, I believe. Are  
13 you denying that?

14 CHAIRMAN NELSON: Am denying that if that's part  
15 of it.

16 COMMISSIONER HANSON: That is part of it.

17 CHAIRMAN NELSON: Okay. I'm denying that.

18 COMMISSIONER HANSON: I thought you were going  
19 to take it separate.

20 CHAIRMAN NELSON: Thank you.

21 Additional discussion.

22 Seeing none, all those in favor of the Motion  
23 will vote aye. Those opposed, nay.

24 Commissioner Hanson.

25 COMMISSIONER HANSON: Aye.

1 CHAIRMAN NELSON: Commissioner Fiegen.

2 COMMISSIONER FIEGEN: Fiegen votes aye.

3 CHAIRMAN NELSON: Nelson votes aye.

4 The Motion carries.

5 That brings us to the point how shall the  
6 Commission proceed on any other outstanding motion?

7 Now Ms. Hilding brought up the fact that she had  
8 a motion, and I believe she is no longer on the phone  
9 with us.

10 Ms. Hilding?

11 Not on the phone with us.

12 MS. HILDING: I'm on the phone. I had it on  
13 mute.

14 CHAIRMAN NELSON: Okay. If I'm understanding  
15 correctly, your Motion is on page 3 of your filing.

16 MS. HILDING: Yes.

17 CHAIRMAN NELSON: About halfway down. And it  
18 says "I alternatively ask and move that if the Commission  
19 chooses not to appoint a special master, it review  
20 TransCanada's December 18 Discovery Request and Answer  
21 for all us pro se Intervenors and those with lawyers, our  
22 objections and questions about which of their  
23 Interrogatories or Requests For Documents are legal, in  
24 part or wholly, and which we do or do not have to keep  
25 supplementing."

1           Is that your Motion?

2           MS. HILDING: Yes. We have -- (Inaudible).

3                   (Discussion off the record)

4           MS. HILDING: So we have to keep supplementing  
5 constantly, and so then the questions -- I'm a pro se  
6 Intervenor. I don't understand a lot of things.

7           You know, I was really shocked today. I think  
8 you've decided that their Requests and their  
9 Interrogatories where they didn't specifically pair it to  
10 a Permit Condition or a Finding of Fact, that's okay with  
11 you guys. That's what I heard, that you didn't think  
12 that the things about their getting into attorney's  
13 strategy, work product doctrine, you didn't seem to agree  
14 with that, that we are disclosing trial strategy. You  
15 didn't seem to agree with the overly broad, vague, or  
16 burdensome objections.

17           So what I was hearing is that everybody's  
18 objections to the Interrogatories were sort of overruled,  
19 and we should be keeping on supplementing their  
20 Interrogatories if that's -- that's the kind of feeling  
21 that I got from listening to this, but I would like to  
22 know because I'm not a lawyer and I don't understand  
23 these things.

24           And I did have a specific question about their  
25 Discovery Request. I think it's 7 and 8, which I'd have

1 to find it again. It's late. I'm sorry. I don't have  
2 it in front of me. Maybe it will take me a minute here.

3 But I think that's the one where they asked for  
4 anything else that you might have, and it was in no way  
5 geared to Findings of Fact and Permit Conditions, their  
6 No. 7.

7 No. 7 is In addition to the facts you identified  
8 in your response to -- (Inaudible).

9 (Discussion off the record)

10 MS. HILDING: I won't make you read it. It's in  
11 all of the -- it's in whole bunches of people's appendix  
12 or exhibits. It's their Interrogatory No. 7 and No. 8,  
13 which when they're not asking us to produce the Findings  
14 of Fact we're going to object to or the Permit Conditions  
15 we're objecting to, it says is there anything else you're  
16 going to raise, which is in no way geared to a Finding of  
17 Fact or a Permit Condition.

18 So I would just -- I'm a pro se Intervenor. I  
19 don't understand this stuff. I would like to know what  
20 I'm supposed to keep on supplementing? Am I supposed to  
21 keep on supplementing their entire discovery request?

22 CHAIRMAN NELSON: Thank you.

23 Keystone, response?

24 MR. MOORE: James Moore on behalf of Keystone.

25 We have no issues with Ms. Hilding. She has

1     been diligently providing copies of documents that she  
2     may introduce as exhibits at trial. Witness and exhibit  
3     lists are due next Tuesday.

4             I don't know whether her supplementation  
5     obligation is done or not. It depends on whether she's  
6     identified all the documents she intends to use. But  
7     there's no motion pending. I don't think any action is  
8     necessary.

9             CHAIRMAN NELSON: Questions --

10            MS. HILDING: They're going to kick us off in  
11     two minutes.

12            CHAIRMAN NELSON: If you do, you just need to  
13     call back on the same number.

14            Questions from the Commission.

15            Seeing none, is there a motion?

16            I will move to deny Ms. Hilding's Motion.

17            Discussion on the Motion.

18            Seeing none, all those in favor will say aye.

19     Those opposed, nay.

20            Commissioner Hanson.

21            COMMISSIONER HANSON: Aye.

22            CHAIRMAN NELSON: Commissioner Fiegen.

23            COMMISSIONER FIEGEN: Fiegen votes aye.

24            CHAIRMAN NELSON: Nelson votes aye.

25     Motion carries.

1           Are there any other outstanding motions?

2           Wow.

3           MR. DORR: It was not an outstanding motion, but  
4 I have an objection to what was spoken earlier. I'd just  
5 like to put it on the record.

6           CHAIRMAN NELSON: Certainly. Certainly.

7           MR. DORR: Gary Dorr. I would like to state for  
8 the record my objection to the statement by John Smith  
9 earlier today that any Intervenors are only offering  
10 emotional testimony.

11           I feel it is belittling and shows a complete  
12 disregard for the effort that I am taking and the other  
13 Intervenors to comply with the factual evidence amongst a  
14 twisted jungle of Orders, Amended Orders, and all the  
15 other documents that are involved with this process.

16           I feel it can only negatively color what is  
17 supposed to be an objective legal process. And I want to  
18 register that with the strongest of offense that it was  
19 spoken today from one of the Staff.

20           CHAIRMAN NELSON: Your objection is well  
21 received.

22           Mr. Smith.

23           MR. SMITH: I want to apologize for that. It  
24 was just -- and I do. I mean that sincerely. I  
25 apologize for making that comment. It wasn't called for

1 and I was sort of rambling on and I made a mistake.

2 CHAIRMAN NELSON: And I want to assure you that  
3 the Commission does not share that statement whatsoever.  
4 And I appreciate your calling us on that.

5 Commissioner Fiegen.

6 COMMISSIONER FIEGEN: Mr. Chairman, if everybody  
7 remembers, he was nearly gaveled by the Commission  
8 because we agree with you, Mr. Dorr, that you have the  
9 right to be an Intervenor, and we are going to listen to  
10 everything that you bring to us with great confidence.

11 So if you remember, the Chairman gaveled the  
12 situation and stopped it as quickly as he could.  
13 Unfortunately, not quick enough.

14 Thank you.

15 MR. DORR: It was just to register my offense to  
16 that, my objection to it.

17 CHAIRMAN NELSON: Thank you. I appreciate that.

18 MR. DORR: Thank you, sir.

19 CHAIRMAN NELSON: Is there anything else for the  
20 good -- could there possibly be anything else for the  
21 good of the order at this hour?

22 Mr. Harter.

23 MR. HARTER: This will be short. I would like  
24 for a matter of the record for the PUC Commissioners to  
25 have a copy of what I filled out for the Interrogatories

1 sent by TransCanada.

2 And I think that you have done a great injustice  
3 to somebody who has been drug into this by TransCanada.  
4 And, quite frankly, you're probably -- maybe you're sick  
5 of the fact that I've got to work 15, 18 hours a day and  
6 hearing that. I know you're in farming and ranching, and  
7 you understand that. But that's just the way it is.

8 Basically I'm forced to make a choice of whether  
9 I can take care of my business and -- so I can make my  
10 payments and stuff on my property.

11 Some of the things -- there's things that you  
12 guys don't know that if we were able to interject as  
13 Intervenors on the different -- different things that  
14 you've covered today, which we're not because you tell us  
15 that we're not party to it, which I thought was  
16 questionable as vice chair of being -- Dakota Rural  
17 Action that maybe I was, but then they're covered by a  
18 lawyer so I don't know so I didn't say nothing.

19 TransCanada when we got our first packets from  
20 them, when Protect South Dakota Resources done the  
21 negotiating they made us sign gag orders before we got to  
22 see those packets. This whole thing has been a bag of  
23 coercion to force people into these contracts. It is  
24 very overly burdensome to -- to most of the people that  
25 have been involved in this thing.



1           CHAIRMAN NELSON: Thank you. And if you want us  
2 to put those in the Docket, we will certainly do that.

3           Thank you.

4           MR. HARTER: I gave you three copies because of  
5 three. I got more. Kristen was very nice. She had  
6 it -- Mr. -- TransCanada's lawyers didn't have it with  
7 them, and I couldn't produce it from my phone.

8           Ms. Edwards had requested copies from  
9 TransCanada on it so I got six here if you need more.

10          CHAIRMAN NELSON: No. We just need one, and  
11 we'll get that into the Docket.

12          MR. HARTER: Okay. Thank you.

13          CHAIRMAN NELSON: You are welcome. Thank you.  
14 Anything else for the good of the order?

15          MS. HILDING: This is Nancy Hilding. I have a  
16 question, which you can refuse to answer, if you want.

17                I heard from one of the attorneys that if we're  
18 entering evidence, we have to be like a witness to enter  
19 evidence. Is that true?

20                I was intending to enter evidence without being  
21 a witness, but do I have to be a witness in order to  
22 enter evidence?

23          CHAIRMAN NELSON: You have to have filed  
24 prefiled testimony in order to enter evidence or present  
25 testimony at the hearing.

1 MS. HILDING: So the only people who can enter  
2 evidence now are the people who filed prefiled  
3 testimony?

4 CHAIRMAN NELSON: That is correct.

5 MS. HILDING: Well, I'm objecting to that. I  
6 had no idea of that. I'm a pro se Intervenor, and I  
7 don't know how I'm supposed to know that in order to  
8 enter evidence I had to have filed prefiled testimony.

9 Because there was never any discussion of that  
10 or anything like that. And the evidence deadline was  
11 different than the prefiled testimony. I don't know how  
12 you expect us pro se people to understand this stuff.

13 CHAIRMAN NELSON: Because that was discussed at  
14 the meeting back in December when we issued the  
15 Scheduling Order and as part of the Scheduling Order.

16 Now, Ms. Edwards, do you have anything to add?

17 MS. EDWARDS: I think -- she had left me a  
18 message regarding that, and I hadn't had a chance to get  
19 back to her.

20 I think her confusion was whether she could just  
21 bring a document and hand it to the Commission and have  
22 it entered in. And another lawyer told her no. There  
23 would have to be somebody to testify to it to lay  
24 foundation to get a document in as evidence. So that's  
25 kind of where the question is coming from.

1           So I said I suppose if there was a way to get in  
2 in rebuttal, as long as you had somebody to testify to  
3 get that document to come in, then, yes, it could come  
4 in. But, no, you can't just hand the Commission a  
5 document and have it come in. It has to have a  
6 foundation and somebody to testify to it for it to come  
7 in.

8           MS. HILDING: I don't understand that. I'm  
9 sorry. I'm not a lawyer. I cannot -- I cannot -- I  
10 mean, I've been sending all of these evidences over to  
11 TransCanada, but I cannot enter those into the record  
12 unless there is somebody standing there saying what?  
13 Saying that this is a document, this is a document from  
14 the SEIS and I downloaded it off the internet and I'm  
15 entering it as evidence?

16           I mean, we're going to be allowed to brief  
17 afterwards and --

18           CHAIRMAN NELSON: Okay. Ms. Hilding, I'm going  
19 to -- John Smith is going to be the --

20           MR. SMITH: I mean, you could be that person,  
21 Ms. Hilding, you know, conceivably. I mean, that could  
22 be you, assuming you've met the -- you know, it's  
23 something that could be testified to that isn't precluded  
24 now because of the --

25           CHAIRMAN NELSON: But she will have had to have

1 filed prefiled testimony, or if this is an item for  
2 rebuttal, she will have to file rebuttal testimony.

3 MR. SMITH: Rebuttal testimony. And then you  
4 could be a person who could lay that foundation. The  
5 other conceivable basis if it's --

6 Are these documents from the Supplemental EIS?

7 MS. HILDING: Well, there's a bunch of them.  
8 TransCanada has been getting them. So most of them are  
9 federal documents, but some of them are downloaded from  
10 Wikipedia. You know, some of it's website stuff. Some  
11 of it's documents that are fully self-explanatory.

12 MR. SMITH: Yeah. I'm not saying how the  
13 Commission or me or whoever might rule on the admission.  
14 But, you know, if they are actually from the  
15 Environmental Impact Statement, those may be able to be  
16 received based on their status as a -- as a -- a document  
17 that we can take judicial notice of, as long as we can  
18 demonstrate that they are, in fact, from that document,  
19 that they are copies of portions of the SEIS or the  
20 FSEIS. Whatever.

21 MS. HILDING: Well, this is a suggestion that I  
22 have. Permit Condition No. 3 is to say that you're going  
23 to follow the recommendations of the FEIS.

24 So, you know, I've been involved in federal  
25 stuff before. There's something called the

1 administrative record. So if you are making one of your  
2 Permit Conditions the recommendations in the SEIS, then  
3 why isn't the SEIS part of your administrative record  
4 that then -- because you've tiered a Permit Condition to  
5 it, why aren't you guys putting that up somehow in this  
6 body of evidence that people can get to without having to  
7 bring it because you've made it part of your Permit  
8 Condition?

9 I mean, why would we have to enter as evidence  
10 anything that's part of your Permit Condition?

11 MR. SMITH: Well, and, you know, for all I know,  
12 somebody may offer that entire document into evidence.  
13 We have no idea at the Commission. And it wouldn't be  
14 something that --

15 I mean, we don't introduce evidence at the  
16 Commission. But it is possible for the Commission under  
17 the Judicial Notice Doctrine to sometimes take -- we can  
18 just take notice of it, and we can view it that way.  
19 But.

20 I have no knowledge of what -- and neither do  
21 any of the Commissioners of what the various parties to  
22 this will offer into evidence. We don't know.

23 CHAIRMAN NELSON: Mr. Smith, if I could just ask  
24 a question.

25 So the document she's referring to, that's not

1 part of the 2009 Docket? Is that correct?

2 MR. SMITH: Not in its current form, unless  
3 Mr. Taylor or Mr. Moore can correct me. But quite a  
4 lot's happened, I think, at the federal level since  
5 then.

6 MS. HILDING: I'm going to answer it.

7 The FEIS was not completed when you did your  
8 Order.

9 MR. SMITH: That's correct.

10 MS. HILDING: So it couldn't have been back  
11 then.

12 CHAIRMAN NELSON: And I appreciate that. And I  
13 asked that question with some naïvety because I wasn't on  
14 the Commission at that point in time so I did not know  
15 the answer to that.

16 MS. HILDING: Well, I'm just going to object to  
17 all of this. I have come to every single one of these  
18 hearings and I have listened and I have never heard the  
19 thing about how if we were going to enter evidence, we  
20 have to testify in order to enter the evidence.

21 And I'll have to go back and listen to that  
22 December 17 thing, and I never heard that. And maybe you  
23 said it and maybe you said it in some obscure way only  
24 lawyers can understand and average people can't  
25 understand it. But I never understood that. So --

1           CHAIRMAN NELSON: Thank you.

2           With that, is there a motion from either of my  
3 fellow Commissioners?

4           COMMISSIONER HANSON: Off the record.

5                       (Discussion off the record)

6           COMMISSIONER HANSON: Mr. Chairman, I move that  
7 we adjourn.

8           CHAIRMAN NELSON: All those in favor of the  
9 Motion to Adjourn will say aye. Those opposed, nay.  
10 Commissioner Hanson.

11           COMMISSIONER HANSON: Aye.

12           CHAIRMAN NELSON: Commissioner Fiegen.

13           COMMISSIONER FIEGEN: Fiegen votes aye with 22  
14 lines.

15           CHAIRMAN NELSON: Nelson votes aye. We are  
16 adjourned.

17                       (The proceeding is concluded at 9:12 p.m.)  
18  
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22  
23  
24  
25

1 STATE OF SOUTH DAKOTA)

2 :SS

CERTIFICATE

3 COUNTY OF SULLY )

4

5 I, CHERI MCCOMSEY WITTLER, a Registered  
6 Professional Reporter, Certified Realtime Reporter and  
7 Notary Public in and for the State of South Dakota:

8 DO HEREBY CERTIFY that as the duly-appointed  
9 shorthand reporter, I took in shorthand the proceedings  
10 had in the above-entitled matter on the 14th day of  
11 April, 2015, and that the attached is a true and correct  
12 transcription of the proceedings so taken.

13 Dated at Onida, South Dakota this 13th day of  
14 May, 2015.

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Cheri McComsey Wittler,  
Notary Public and  
Registered Professional Reporter  
Certified Realtime Reporter

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