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THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE PETITION HP14-001
OF TRANSCANADA KEYSTONE PIPELINE,
LP FOR ORDER ACCEPTING CERTIFICATION
OF PERMIT ISSUED IN DOCKET HP09-001
TO CONSTRUCT THE KEYSTONE XL
PIPELINE

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Transcript of Proceedings
April 30, 2015
9 o'clock 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
Greg Rislov
Brian Rounds
Darren Kearney
Katlyn Gustafson

Reported By Cheri McComsey Wittler, RPR, CRR

1 TRANSCRIPT OF PROCEEDINGS, held in the
2 above-entitled matter, at the South Dakota State Capitol
3 Building, Room 413, 500 East Capitol Avenue, Pierre,
4 South Dakota, on the 30th day of April, 2015.

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1 CHAIRMAN NELSON: HP14-001, In the Matter of
2 the Petition of TransCanada Keystone Pipeline for Order
3 Accepting Certification of Permit Issued in Docket
4 HP09-001 to Construct the Keystone XL Pipeline.

5 On April 24, 2015, the Commission received from
6 Dakota Rural Action, Rosebud Sioux Tribe, Standing Rock
7 Sioux Tribe, Cheyenne River Sioux Tribe, Yankton Sioux
8 Tribe, Indigenous Environmental Network, and BOLD
9 Nebraska a Joint Motion to Vacate or in the Alternative
10 to Clarify or Amend Protective Order.

11 And so the question is shall the Commission
12 grant that Joint Order? And then also before we are done
13 today we will deal with an Amended Procedural Schedule.

14 With that, who is going to present on behalf of
15 the folks who filed the Motion?

16 MR. MARTINEZ: That would be me, your Honor.
17 Robert Martinez on behalf of Dakota Rural Action.

18 CHAIRMAN NELSON: Go ahead.

19 MR. MARTINEZ: Members of the Commission, I
20 think maybe the way to preface this particular Motion is
21 to indicate that we really have, I think, two issues.

22 One is just the pure procedural issue of the
23 Commission's own rules with respect to how documents are
24 to be designated as confidential. And then the second
25 category gets to whether or not those documents truly are

1 confidential, which I don't think we want to spend as
2 much time on today because what we really need is, I
3 think, a serious look at whether or not TransCanada has
4 actually followed the rules that are set out for
5 designation, the confidentiality designations.

6 And, second, the actual language of the Order
7 itself that was issued that, I believe, Dakota Rural
8 Action and the other Intervenors have all taken the
9 position that it is unduly restrictive.

10 Now we've had some negotiations with Mr. Taylor
11 who's been acting on behalf of TransCanada. He's, I
12 think, made some concessions that are reasonable. I
13 don't think that they go quite far enough, but that's
14 something we'd like to get into.

15 Now to really start with this, you know, the
16 Commission's rules for what is designated or how
17 documents are designated as confidential is actually
18 pretty clear. You've got Administrative Rule
19 20:10:01:41, which just lays out the procedure pretty
20 crystal clear.

21 It says that if confidential treatment of
22 information is sought, the party that is -- that seeks to
23 have that confidential needs to, one, identify each of
24 those documents or even the portion of those documents
25 for which confidentiality is requested. They need to

1 submit a request stating the length of time for which
2 that confidentiality is requested and how to handle it.

3 They need to add the name, address, and phone
4 number of the persons contacted regarding that request.
5 And provide specifically -- and this is one where, I
6 think, TransCanada has fallen fairly flat on, at least
7 until we got Mr. Taylor's responsive Brief, the statutory
8 or common law grounds -- rules under which
9 confidentiality is requested. And then finally the
10 factual basis that qualifies the information for
11 confidentiality.

12 Now it's interesting that none of those rules
13 were followed by TransCanada prior to the Order being
14 entered. And, you know, on that basis I think the
15 intervenors were left with a question of, okay, are the
16 rules applicable to TransCanada or not? And that's, I
17 think, a fair question to ask.

18 Now looking at the -- and I think on that basis,
19 if you just purely look at whether or not those rules
20 have been followed, to us it seems like there's no basis
21 for the Order then until TransCanada actually does comply
22 with those rules.

23 Now the important part of this is -- and this is
24 what I think is rather interesting, is that you've got a
25 second administrative regulation, the 20:10:01:42 that

1 has a very specific sentence in there that I think is
2 pretty -- is at least from my standpoint very
3 interesting.

4 And it says that "The party requesting
5 confidentiality has the burden of proving by a
6 preponderance of the evidence that the information
7 qualifies as confidential."

8 And it wasn't until we received, I think,
9 Mr. Taylor's Response Brief that we finally wound up with
10 an Affidavit from TransCanada's in-house counsel that
11 says we think these items are confidential for the
12 following reasons and I think a little more detail at
13 that point.

14 But that's information that, frankly,
15 TransCanada should have provided on the front end. And
16 on top of that, they should have -- what they've
17 essentially done by engaging in this is they have tried
18 to shift the burden of arguing over confidentiality back
19 to the individual Intervenors as opposed to assuming that
20 burden themselves, which is what the rules say that they
21 have to do.

22 And so when we look at those two factors we
23 thought that there was substantial grounds to go ahead
24 and vacate that Protective Order.

25 Now that's one issue. The second issue that we

1 have relates, I think, primarily to the actual content of
2 that Order itself. And we had a number of -- we've got a
3 number of concerns.

4 Specifically, if you look at in their Section 3
5 of that Order, it states that all confidential documents
6 that are provided as a result of the Motions to Compel
7 that you've, you know, granted from the prior hearing are
8 going to be "viewable only by attorneys of record or
9 parties to the Motion to Compel."

10 Now if we have a strict reading of that, that
11 means only the counsel. That does not mean our Staff.
12 That does not mean our witnesses. That does not mean our
13 clients. It becomes very, very difficult then for us
14 then as Intervenors to use any of these records to
15 prepare for a hearing if only the attorneys can look at
16 it and we can't go and get advice or input from our
17 expert witnesses, from potentially nondesignated expert
18 witnesses or consultants who might be helping us.

19 For instance, I'm not an engineer. You know, if
20 I take a look at some of the operations reports and
21 maintenance manuals or, for instance, their Hazardous
22 Liquid Integrity Management Program, you know, that's
23 going to be largely brief to me. I'm going to need input
24 from experts, from engineers, from folks that we may have
25 that are going to help us out to help us understand what

1 the actual meaning and import of those documents are and
2 if there are any flaws in that that provide -- you know,
3 that pose risks in terms of how the pipeline is
4 constructed, operated, or maintained. The way the Order
5 is worded we can't really do that.

6 Now Mr. Taylor had agreed and, in fact, I think
7 in Exhibit A to his Affidavit he indicated that experts
8 can review them, provided each agrees to be bound. Well,
9 that leaves open the question are we talking about only
10 the experts that are designated, that are going to
11 testify, or does that include consultants, for instance,
12 that we may have that we're not planning on using as
13 experts but, you know, who we are going to rely on to try
14 to understand the meaning of these documents.

15 I think there needs to be a real clarification
16 to that, and I think the Commission needs to really
17 expand the scope of any order, if you're going to enter
18 one, to permit us to be to engage in that type of
19 review.

20 That's not the only issue with the Order. I
21 look at, you know, another section, Section 9, for
22 instance. It talks about "Counsel shall not make
23 disclosure of any confidential fact or assertion, except
24 to other counsel of record."

25 Once again, that's an incredible limitation, you

1 know, that doesn't really help us very well in terms of
2 being able to prepare for the hearing, and I think it
3 really limits our ability to get prepared.

4 So when you look, you know, at those factors I
5 think they're ample grounds for us to go ahead and either
6 on one hand vacate the Order because TransCanada did not
7 follow the procedural requirements that are clearly
8 spelled out in your rules, or, alternatively, if you are
9 going to go ahead and enter an order, in fact, there may
10 be some documents that qualify for confidentiality.

11 Number one, you know, make sure that TransCanada
12 clearly meets the burden, which we think that they have
13 not met to date, of demonstrating by a preponderance of
14 the evidence that that's the case and deserves
15 confidential treatment. And, second, go ahead and take a
16 look at the actual language and make sure that the order
17 is worded in a way to where it's actually usable by us.

18 Like I said, I think Mr. Taylor certainly agreed
19 to a few items. For instance, he talked about the
20 ability of our experts to go ahead and review these, and
21 then I believe he extended a couple of points to where
22 one of the witnesses for one -- nonexpert witness for one
23 of the intervenors would also be allowed to look at them.

24 But at this point we can't even show documents
25 to our clients for comment. And that's a real problem

1 for us. And that's why we went ahead, and that's why we
2 filed this Joint Motion to resolve these issues.

3 CHAIRMAN NELSON: Thank you. Before we go to
4 any of the others, I'm going to ask a question, maybe
5 two, and maybe my fellow Commissioners have a question.

6 In looking at your Motion, page 9 under the
7 section Relief Sought By Intervenors, in the second
8 paragraph how does what you have asked for in the second
9 paragraph -- and that's the paragraph that begins with
10 the word "Alternatively."

11 How does that differ from the agreement that you
12 have already entered into with Keystone?

13 MR. MARTINEZ: Well, what we're asking for is is
14 really an expansion of that. We would like the
15 attorneys -- not only the attorneys of record but other
16 parties besides the attorneys of record.

17 Now Keystone's already agreed to that. They've
18 agreed to that in terms of some potential experts. But
19 we still can't, for instance, show the documents to our
20 clients.

21 You know, there's potentially a question as to,
22 you know, how do you define expert? Are those only
23 experts, for instance, who have submitted prefiled
24 testimony and are going to testify, or are they
25 consulting experts that we may be using who will not

1 testify but are there to essentially help us get a better
2 understanding of the documents.

3 And that's essentially what we're asking for.
4 We're asking for that to be read as expansively as
5 possible to build in enough flexibility to allow us to do
6 our work.

7 CHAIRMAN NELSON: Okay. So I want to drill in
8 on the language that's in that paragraph. When you say
9 "by persons working under the supervision of Intervenors'
10 counsel of record to include expert and fact witnesses,"
11 when you talk about "working under the supervision of,"
12 does that include clients?

13 MR. MARTINEZ: I don't believe I intended that
14 to be that, but, yeah, I would also ask that be extend
15 today clients as well.

16 CHAIRMAN NELSON: So essentially it would be
17 anybody that you deem to be working under your
18 supervision; is that correct?

19 MR. MARTINEZ: That is correct.

20 CHAIRMAN NELSON: Thank you. That's all the
21 questions I have at this point.

22 Any others?

23 With that, we will go to the other counsel that
24 joined in this Motion for any new information you might
25 have.

1 Mr. Rappold.

2 MR. RAPPOLD: Commissioner Nelson, I had to get
3 my phone off of mute there.

4 Matt Rappold on behalf of the Rosebud Sioux
5 Tribe. We echo Mr. Martinez in our concerns regarding
6 the issuance of the Protective Order and scope and
7 support our other parties' issue here.

8 The other thing that we're concerned with -- and
9 I believe this was discussed so I'll keep it brief but
10 being able to have experts and other witnesses and
11 clients be able to properly access the information in
12 order to determine its veracity as far as evidentiary
13 value for the trial.

14 Additional concern that we had, sometimes there
15 is a designation of confidential information that may
16 not, in fact, be entirely confidential. And our experts
17 have agreed that they would sign nondisclosure
18 agreements. However, they don't want to be restricted to
19 not being able to disclose anything that may already, in
20 fact, be in the public record -- or the public domain,
21 rather.

22 So when addressing the Motion today and deciding
23 what, if anything, to do we would ask that you take those
24 additional concerns into account.

25 Thank you.

1 CHAIRMAN NELSON: Thank you.

2 Mr. Capossela.

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

4 I'd just like to make two points. One describes
5 kind of the black letter law confidentiality and
6 disclosure. And I would also like to discuss Standing
7 Rock's experience with this issue.

8 But Rule 26 permits far-reaching discovery, but
9 it tempers that by authorizing "for good cause shown to
10 protect a party or person from annoying, embarrassment,
11 oppression, or undue burden or expense" a protective
12 order and designation of confidentiality for "a trade
13 secret or other confidential research, development, or
14 commercial information. Until good cause is required for
15 the confidentiality designation, the courts have
16 generally required a particular and specific
17 demonstration of fact that distinguishes stereotypical
18 and conclusory statements."

19 There really does have to be a demonstration of
20 injury. And that demonstration I don't think has been
21 met for most of the documents designated as confidential.
22 I think the long and short of it is is for something to
23 be a trade secret it has to affect the bottom line of the
24 parties seeking to prevent disclosure. And few, if any,
25 of the documents which have been designated as

1 confidential by TransCanada meet that description, and I
2 think that really is what's creating the burden that
3 we're discussing this morning.

4 But that's the law on the burden that
5 TransCanada has for each document that it seeks to
6 designate as confidential and to be covered by the
7 Protective Order.

8 With respect to the Standing Rock Sioux Tribe,
9 as TransCanada articulated in its responsive filing to
10 the Motion, we did make some progress for sharing
11 documents with the Standing Rock Tribal Historic
12 Preservation Office, documents that relate to cultural
13 resources, and we're going through that process now.

14 And what the Historic Preservation Office has
15 determined is the documents designated by TransCanada as
16 confidential and to be seen only -- initially only by the
17 attorneys, they already have and you have most of those
18 documents for three or four years. They got them from
19 the State Department.

20 And so documents designated by TransCanada as
21 confidential are already out there. And now folks are
22 being asked to sign agreements to maintain the
23 confidentiality of documents that they've had in their
24 files for three or four years. So there's a little bit
25 of absurdity to the extent that TransCanada has

1 designated documents as confidential, and that's why this
2 Motion is clearly germane and we need to work through
3 this together so the parties can access documents which
4 really do not have the color of confidentiality under the
5 South Dakota rules.

6 Thank you.

7 CHAIRMAN NELSON: Thank you.

8 Cheyenne River. Mr. Clark.

9 MR. CLARK: I would just reiterate the arguments
10 that have been already made by my colleagues here.

11 Cheyenne River supports the Motion. We hope that you
12 vote for it.

13 CHAIRMAN NELSON: Thank you.

14 Yankton Sioux Tribe, who now has two
15 representatives in front of us. And your choice.

16 MS. BAKER: Thank you, Commissioner. This is
17 Jennifer Baker.

18 CHAIRMAN NELSON: Go ahead.

19 MS. BAKER: Yankton Sioux Tribe joins the
20 arguments previously presented on this matter and again
21 would like to stress that TransCanada has the burden of
22 proof by a preponderance of the evidence that exhibits or
23 documents qualify as confidential, and this burden has
24 not been met. And as a practical matter it can't be met
25 without first providing those documents to the Commission

1 to review.

2 That's why the rule that applies specifically to
3 the Commission regarding confidential treatment is in
4 place and provides very specific measures and standards
5 for requesting confidential treatment.

6 TransCanada has alleged in its response that it
7 would be patently unfair to vacate the Protection Order.
8 On the contrary, what's patently unfair is for
9 TransCanada to be given carte blanche to mark anything it
10 wishes confidential without properly requesting
11 confidential treatment and meeting its burden of proof
12 under the law.

13 It's patently unfair that the burden has been
14 placed instead on the Intervenors to show the documents
15 are not confidential. As demonstrated in the
16 Intervenors' Motion, TransCanada has clearly violated the
17 standard of good faith that was imposed on it by the
18 Commission's Order for marking documents as confidential,
19 and that nullifies any equitable argument Keystone might
20 attempt to make regarding fairness.

21 Keystone also mentioned that despite the numbers
22 provided by Intervenors regarding the size and quantity
23 of documents, there were only 10 categories. I'd suggest
24 that that is irrelevant to the scope and quantity. There
25 is a massive amount of documents that requires access to

1 support Staff to be able to filter through those
2 documents in any kind of purposeful, meaningful manner.

3 In addition, there are some clear examples where
4 information was improperly designated as confidential.
5 The Biological Survey Reports mentioned in the response
6 cite the Endangered Species Act, but they don't actually
7 cite that the law itself would be violated. That's a
8 requirement for confidential treatment.

9 As far as the cultural survey record, the
10 South Dakota Statute is referenced, but that statute
11 doesn't apply to private individuals or corporations. It
12 actually applies to the State Archeologists and whether
13 the State Archeologists can release certain information.
14 And the Paleontological Monitoring Plan, which was
15 requested, TransCanada's opposition there also again
16 cites no law.

17 We'd also like to reiterate that the agreement
18 reached between the parties is still not adequate because
19 there are fact witnesses that may be necessary to review
20 some of these documents, not just expert witnesses. We
21 do have these fact witnesses who have unique skills and
22 unique knowledge and background to be able to assess the
23 potential usefulness of some of the documents requested
24 at the hearing. And so it is vital to our interests that
25 those witnesses be provided access to the relevant

1 documents.

2 In Staff's response, despite Staff's assertion,
3 the Intervenor's did not only account for the provisions
4 of ARSD 20:10:01:41, but that is, in fact, what we're
5 asking the Commission to apply.

6 Staff also made reference to the FSEIS
7 suggesting that it provides adequate information for the
8 PUC to ascertain whether or not Keystone continues to
9 meet conditions upon which the permit was granted.

10 If that was the case, if this matter could be
11 decided solely on the FSEIS, there would be no sense in
12 having parties at all. It would be a matter of just
13 reviewing the record. But that's clearly not what's
14 intended by the State Legislature when the appropriate
15 laws were passed, and that's simply not enough to make a
16 informed decision on this matter.

17 It's, therefore, not ample justification for
18 confidential treatment being provided to Keystone without
19 Keystone having met its burden.

20 And, finally, I note in the interest of the
21 pro se Intervenor's, if represented Intervenor's are
22 entitled to certain rights and privileges with respect to
23 these documents for the purposes of preparation for trial
24 and cross-examination, which they are, then the same
25 rights should apply to pro se Intervenor's. They should

1 not be granted limited ability to participate due to the
2 fact that they're not represented by counsel.

3 With that, we would request again that the
4 Commission vacate its Order due to its noncompliance with
5 the Commission's law and South Dakota State law, and in
6 the alternative we request that the Order be amended in
7 order to account for the relief requested by our Motion.

8 Thank you.

9 CHAIRMAN NELSON: Thank you.

10 Indigenous Environmental Network. Ms. Craven.

11 MS. CRAVEN: Thank you, Mr. Chairman. I would
12 like to -- I just got some feedback there, and there's an
13 echo. Sorry about that.

14 So I would like to echo what my colleagues have
15 already said. And also urge you now that we have
16 additional time to conduct this discovery to make it --
17 to vacate the previous Order and make it more equitable
18 for the attorneys who are involved in this to really use
19 the information that they're finding out by allowing
20 expert witnesses and their clients to also and other
21 attorneys to have access to the discovery.

22 And I hope that was coherent because I kept
23 hearing this echo the entire time I talked to you.

24 That's all I have to say.

25 CHAIRMAN NELSON: Thank you. And you did come

1 across here. Not a problem.

2 MS. CRAVEN: Thank you.

3 CHAIRMAN NELSON: BOLD Nebraska. Mr. Blackburn.

4 MR. BLACKBURN: Thank you, Mr. Chair. We do
5 have a bad echo. I think maybe a microphone is on
6 somewhere in the room.

7 CHAIRMAN NELSON: Thank you. We've found it.

8 MR. BLACKBURN: Three general areas I want to
9 talk about here.

10 The first is that there's been an argument that
11 because TransCanada and the parties agreed to certain
12 understandings of the Protective Order that, therefore,
13 that sufficiently doesn't -- there's no requirement for
14 Commission action on the Protective Order.

15 And that -- although it's great that the parties
16 are able and been able to agree to certain elements of
17 this, where the plain language of the Order is -- where
18 the agreement of the parties is simply in opposition of
19 the plain language of the Order, not in accordance with
20 the plain language of the Order, the Order would need to
21 be changed to comply with -- or to adopt the
22 understanding of the parties.

23 So there's certain elements there that we need
24 actual language changes in the Order.

25 The second point I'd like to make -- and BOLD

1 Nebraska is particularly concerned about paragraph 3 in
2 the second and third sentences. And Mr. Martinez
3 discussed some aspects of this, but there's one
4 particular aspect that applies to BOLD Nebraska and maybe
5 some other parties a bit differently than it does to
6 Dakota Rural Action.

7 Specifically, that language says, and I'll just
8 repeat it here, "All confidential documents provided as a
9 result of any Motion to Compel granted by the Commission
10 shall be viewable only by attorneys of record to the
11 party or the parties to the Motion to Compel. Those
12 attorneys shall abide by the Protective Order and execute
13 the Nondisclosure Agreement as referenced above."

14 BOLD Nebraska was not a party to a Motion to
15 Compel. Therefore, under this language BOLD Nebraska
16 apparently is not eligible to view any of the
17 confidential documents. And if that is the Commission's
18 understanding, I would request that the Commission
19 clarify that.

20 On the other hand, TransCanada did, in fact,
21 apparently not anticipate that or did not understand that
22 restriction and provided me, as attorney for BOLD
23 Nebraska, with a password to access confidential
24 information.

25 Because of this language, because BOLD Nebraska

1 is not a party to a Motion to Compel, I have not viewed
2 that confidential language, even though apparently
3 TransCanada believes it's acceptable for me to view it.
4 So, therefore, BOLD requests that that language be
5 changed to not require that a party -- only parties to a
6 Motion to Compel -- to a particular Motion to Compel view
7 that information.

8 I'd also like to point out that that language is
9 so specific that it says at the end of it "may be
10 viewable only by the attorney of record for the party or
11 parties to the Motion to Compel." Using the definite
12 article there, the word "the" indicates that if it's read
13 as restrictively as it could be, that only the
14 information -- that only the attorneys who requested
15 specific information through a Motion to Compel could
16 receive -- could view that information. And I think
17 that's, again, too restrictive.

18 My understanding is the -- all parties of record
19 should have access to confidential information, not just
20 those who submitted a Motion to Compel. That's my second
21 point.

22 My third point is about the scope of disclosure
23 related to how many individuals and what individuals can
24 see material from a party.

25 And I'd like to point out that, first, allowing

1 more individuals than just the attorneys of record to see
2 information wouldn't open up the floodgates willy-nilly
3 to allow anybody at any party or any member of any
4 organization to view material. Because in order to view
5 material one must have signed a nondisclosure agreement.

6 So the confidentiality provisions apply to
7 individuals, not to -- they are not a blanket -- not a
8 blanket authorization for anybody within an organization
9 to view materials. It's a personal obligation, and it
10 imposes, as I understand it, personal liability.

11 In that regard I'd like to suggest a solution to
12 that, and I'll turn to your sister Public Utilities
13 Commission in Minnesota, that they have three categories
14 of individuals who may see confidential documents.

15 The first is attorneys employed or retained by a
16 party in proceedings. And by using the word "attorneys"
17 we're generally -- that isn't the attorney of record, but
18 that means anybody within the law firm's office, which is
19 normal practice.

20 The second category is outside experts, retained
21 consultants and employees of the party who need access to
22 the material to assist the party in the proceedings,
23 provided that the assent of the disclosing party has been
24 received. In other words, that they allow longer -- or
25 more people than just the attorneys, but the disclosing

1 party, in this case TransCanada, would have the right to
2 essentially veto individuals who they don't think are
3 eligible.

4 So that would help from keeping the flood gates
5 from gushing open and allowing anybody to use the
6 material. And there needs to be some standards there for
7 reasons that it would not be unreasonably refused.

8 The third category is other additional employees
9 or other categories of people. But there they have to
10 sign a nondisclosure agreement, and, again, the
11 disclosing party, in this case TransCanada, would have
12 the ability to veto them. And then there would be an
13 opportunity -- if TransCanada did unreasonably reject
14 somebody who a party thought should see information, then
15 there would be a way for that to be appealed.

16 So those are the categories. Again, I think
17 it's reasonable. It provides adequate safeguards. It
18 allows only a limited number of individuals to see
19 confidential information. And that could provide some
20 solution here.

21 And then, finally, what happens sometimes in
22 other utility proceedings is that there are two
23 categories of confidential information. There's things
24 that are generally confidential, but then there's also
25 things that are considered extremely confidential.

1 Specifically it usually relates to critical
2 trade secret or critical commercial information and most
3 of the time would be a two-tiered approach where certain
4 documents can be designated by a party as being extremely
5 confidential, and there the restrictions are much more
6 limited usually to just the attorneys of record and
7 sometimes to consultants. But, again, that provides more
8 protection. But that isn't applied in general; that's
9 applied only to a very small set of very highly
10 confidential information.

11 So I will leave my comments at that. Again, we
12 request that the Order be amended as our Motion has
13 suggested and request, if not amendments, a clarification
14 about whether or not BOLD Nebraska may see confidential
15 information at all.

16 Thank you for your time today.

17 CHAIRMAN NELSON: Thank you. Any of the other
18 Intervenors that may have new information?

19 I'm not hearing anything. I'm going to go to
20 Staff. Ms. Edwards.

21 MR. RAPPOLD: Commissioner Nelson?

22 CHAIRMAN NELSON: We're on to Staff. Go ahead,
23 Commissioner Edwards.

24 MR. RAPPOLD: This is Rappold. I had to get my
25 phone off mute. I just wanted to add a follow that up

1 would take just a moment prior to Ms. Edwards.

2 CHAIRMAN NELSON: You know, let's hold that
3 until we come back around to rebuttal.

4 Go ahead, Ms. Edwards.

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

7 The Commission has always treated every party
8 the same when dealing with confidential information so it
9 appears the Commission is being fair to everyone by
10 treating this Docket the same as everyone it has in the
11 past.

12 Staff takes a very conservative view of the
13 Administrative Rules, and when the rule requires
14 submission of material but does not specify that
15 submission must be in writing, Staff does not believe
16 that should be inferred.

17 And at the April 14 meeting it was discussed, I
18 believe in length, that there would be some confidential
19 information, and TransCanada submitted it as such.

20 I won't go into anymore detail because we did
21 submit a Brief, and we would rely on that Brief.
22 However, if the Commission decided they would like to go
23 into in-camera session at some point to review that, just
24 yesterday the South Dakota Supreme Court did release an
25 opinion underscoring how important the in-camera session

1 is to the -- to privileged information in the discovery
2 process, and Staff would support that.

3 Thank you.

4 CHAIRMAN NELSON: Before we go to TransCanada, I
5 want to ask Ms. Edwards one question.

6 And I'm going to refer to some things that
7 Mr. Martinez said. And, Mr. Martinez, I'm going to come
8 back around to you ultimately and ask the same question.
9 But, Kristen, I'd like to get your thoughts.

10 Mr. Martinez talked about some of the
11 Administrative Rules that he felt were applicable here.
12 And as I look at 20:10:01:39, which is the definition of
13 confidential information, it appears that this -- and
14 these rules apply to information filed with the
15 Commission. I mean, in the first sentence of that it
16 says "in the possession of the Commission."

17 And it appears to me that this whole body of
18 rule applies to things that are filed with the
19 Commission, not things that are turned over through
20 discovery. Am I wrong in that? Help me out.

21 MS. EDWARDS: Our interpretation of that rule is
22 that it would necessarily apply to discovery as well
23 because any information submitted through the discovery
24 process can be submitted as an exhibit. So unless we
25 apply it to discovery as well, it could then be turned

1 around by another party and submitted nonconfidentially.
2 So if we're going to protect their rights under that
3 rule, they have to protect them under discovery as well.

4 CHAIRMAN NELSON: Okay. With that, Keystone.

5 MR. TAYLOR: Thank you, Commissioners.

6 William Taylor appearing for Keystone. With me today is
7 my partner James Moore, and Mr. Jim White, Associate
8 General Counsel for TransCanada, is here in the room with
9 us.

10 First of all, I want to talk about the
11 circumstances and remind the Commission of the
12 circumstances under which this Order that is challenged
13 today was filed.

14 We concluded a 12-hour hearing on the 14th of
15 April at about 9:00 p.m. Mr. Moore and I returned to
16 Sioux Falls and engaged Mr. White and TransCanada's Staff
17 the next morning in locating and categorizing documents
18 to be provided responsive to your -- with all due respect
19 to the Commission -- liberal approach to the Order that
20 you entered requiring production of documents.

21 We started out with this philosophy with respect
22 to documents which we would declare as protected: Three
23 categories, those which were statutorily protected, those
24 documents which are proprietary -- and by proprietary I
25 mean of significant commercial importance to the

1 company -- and the third category was those documents
2 which had been previously recognized by a Commission or
3 some other regulatory agency or body as confidential. So
4 having that in mind, we started out responding to your
5 directive.

6 About noon on Thursday knowing that 5 o'clock
7 Friday was our deadline we began a rump discussion about
8 how the confidential documents would be managed. We had
9 not yet seen an order. Nor had we discussed the issue
10 with Mr. Smith.

11 So we decided Thursday afternoon that our
12 approach would be to suggest to Mr. Smith that there be
13 some confidentiality provisions in the Order, and,
14 alternatively, if that were not going to happen, that we
15 were not going to produce the documents unless -- the
16 confidential documents, unless represented counsel,
17 parties to the motions, including Mr. Blackburn and
18 Mr. Rappold, both of whom had asked to see other people's
19 discovery -- we were going to ask them -- give them
20 access to the documents provided they agreed that they
21 would retain them as confidential until we could get
22 these issues straightened out with this Commission.

23 I composed that e-mail to send to the parties
24 and had it ready to go 3 o'clock-ish Friday afternoon.
25 Ms. Edwards told us at some time on Friday that there was

1 a confidential order in the works.

2 4:00 p.m. Friday afternoon we at that -- we were
3 within 15 minutes of having the FTP sites ready and the
4 passwords prepared to send out along with the e-mail that
5 I just described, Mr. Smith's Order came out. Your Order
6 came out authored by Mr. Smith.

7 We read the Order and at 4:40, 45 minutes or so
8 later, we decided that the Order was sufficient to
9 provide us with the protection for those three categories
10 of documents that were included, and so we sent passwords
11 to the FTP sites to all those interested persons.

12 Now Mr. Martinez raises the question of is this
13 procedurally accurate? He wants procedural precision,
14 and he wants procedural precision on the penalty that
15 your Order will be dissolved.

16 If your Order is dissolved, then those three
17 categories of documents that we in good faith provided
18 pursuant to this Order become part of the public domain.
19 Free for anybody in the world to look at.

20 Mr. White in his Affidavit has described the
21 proprietary nature of the categories of the documents and
22 has said how important those are to the company.

23 We had a very serious debate before we posted
24 some of those documents about whether we would post them
25 at all. But we decided in good faith in the face of this

1 Order, despite their extraordinary value to the company,
2 that we would post them.

3 Mr. White is here. Mr. White is prepared to
4 take an oath and answer any questions that this
5 Commission wants to ask about the nature of those
6 documents right here, right now. He came from
7 Washington, D.C. late last night for that very purpose.

8 So the first order of business, we strongly
9 resist the idea that this Order will be dissolved and
10 that these documents will be allowed to be in the public
11 domain.

12 Second order of business, as to those categories
13 of documents that are statutory or previously statutorily
14 imposed with confidentiality provision or otherwise
15 recognized by a Commission or other body, it's beyond our
16 capacity to decide as a company that we will ignore the
17 requirements of a statute or ignore the requirements that
18 another regulatory agency who may have regulatory
19 supervision far different than yours has imposed on these
20 documents. So we have no choice but to post them in a
21 confidential manner.

22 I am readily available. Many of the Intervenors
23 know my cellphone number. All of the Intervenors know my
24 office number. As is demonstrated by what happened on
25 the Monday following our Friday release, we will be

1 reasonable in our approach to management of this.

2 On the Monday following our release of the
3 documents and a long conference call, I suggested we will
4 make the documents -- you can have the documents. You
5 can show them to your experts. All we ask is you
6 identify the expert and that the expert endorse the
7 requirements of the Order. And that is that the expert
8 will sign on to keep the documents confidential.

9 This is nothing new in the litigation business.
10 This goes on all the time. The protocol that
11 Mr. Blackburn describes that's within the Minnesota PUC
12 regulations -- and I'm familiar with that. I've been in
13 front of the Minnesota PUC -- is more or less akin to the
14 common practice among lawyers with confidential
15 documents, particularly the categorization of documents
16 into general and critical confidential documents. There
17 are commonly used confidentiality agreements that reach
18 to all of those things.

19 So here's what we did. On Monday we said you
20 can show these documents to your experts. All we want to
21 know is who they are and get them to endorse the Order.

22 Number two, we don't think there's any issue
23 with attorneys and Staff in your law firms seeing the
24 documents. We think that they are bound by the same
25 ethical standards that the lawyers are bound by who are

1 parties to the agreement.

2 The third thing we did, Mr. Capossela had asked
3 if the HPO from Standing Rock could look at the cultural
4 surveys. We asked him to do one thing. We asked him to
5 verify for us that Standing Rock, which it later turned
6 out to be, is the first Tribe in the Nation who had a
7 designated HPO officer within the scope of the federal
8 statute. And he was very prompt about doing that. I
9 think the next day he sent us a copy of the designation,
10 and we very promptly said that's fine.

11 He has told us subsequently that he's also
12 showing the documents to a consultant to his HPO, and
13 that's fine with us also. All we ask is that the
14 consultant sign on to the confidentiality provisions.

15 The third question was asked of us --
16 Ms. Real Bird asked if Faith Spotted Eagle, who is one of
17 her witnesses, could examine the cultural surveys. We
18 said yes, even though she is not technically designated
19 as an expert.

20 Ms. Real Bird has said that she has expert
21 characteristics. Whether or not she renders an opinion
22 in the classical expert fashion, we don't know. So we
23 agreed to that.

24 We also suggested that hearing -- in that
25 discussion that anyone who wanted to talk about any of

1 these issues dial the phone and that we would address
2 them. So far there have been no calls. Only this
3 Motion.

4 Now the world changed a little bit a couple of
5 days ago when you decided that the hearing would be
6 continued and some of the urgency to resolve questions of
7 confidentiality, both the scope of the document
8 production that we made and the mechanism for protecting
9 confidentiality is no longer quite as urgent.

10 There have been some very reasoned suggestions
11 made by the Intervenors today about arriving at
12 modifications to your Order. We are perfectly amenable
13 to discuss modifications to the Order, much as we did a
14 week ago on our own volition.

15 We're perfectly amenable to work with Mr. Smith,
16 to work with the Intervenors, to arrive at amendments to
17 the Order that make implementation of the Order and trial
18 preparation more amenable.

19 But there are some issues, some categories, that
20 we will not agree to, and I may as well just tell you
21 those right now so that we know what the scope is.

22 First of all, it is agreeable for us that the
23 lawyers and expert witnesses see the confidential
24 documents. And here's the reason why: Every lawyer who
25 appears in this case is admitted pro hac vice in

1 South Dakota. They have solicited and obtained an Order
2 of Circuit Court admitting them to practice in
3 South Dakota for a limited basis in this proceeding.

4 They are, by so doing, underneath the
5 jurisdiction and disciplinary powers of the Supreme
6 Court. And the disciplinary powers of the Supreme Court
7 can be draconian. The Supreme Court has the power to
8 suspend the right to practice in South Dakota and has the
9 power to extend that suspension to other disciplinary
10 boards in other states.

11 Very important to lawyers, obviously, if your
12 license is challenged for breach of the rules. And
13 lawyers are very familiar with that and understand how to
14 live and work within the scope of confidentiality
15 agreements.

16 Most professional experts, testimonial experts,
17 are also very familiar with the process. We're not
18 concerned about experts because experts are retained by
19 the lawyers, and the ethical cloak that applies to the
20 lawyers also applies to the experts so we're willing to
21 let that extension be had so long as the expert says who
22 he is so that if we want, we can challenge whether or not
23 that expert is truly an expert.

24 So, number one, he has to say who he is and,
25 number two, endorse the agreement. We're perfectly happy

1 with that.

2 Now beyond the borders of attorney represented
3 parties, this Commission has very limited authority.
4 When you really get down to the bottom line, the
5 nonrepresented parties, the only real remedy that
6 TransCanada has of a nonrepresented party chooses to
7 publish information is to sue them. And that isn't much
8 of a remedy once the horse is out of the barn.

9 We are not opposed to -- if a particular
10 Intervenor, nonrepresented, wants to make a case for why
11 they should see the confidential documents, we are
12 willing to listen. And I think this Commission knows
13 that we have tried to avoid bringing issues like this
14 before the Commission.

15 We have been liberal in our approach. We have
16 come to know many of the Intervenors personally through
17 these hearings. And if lay persons want to see the
18 confidential documents, we're perfectly happy to listen
19 to their reasons and see if we can arrive at a mutual
20 accord that will allow for that.

21 But we do not think that this Commission should
22 enter an order that makes these documents, these
23 confidential documents, available to everybody who
24 happened to join in a Petition to intervene in this
25 case.

1 Here's one of the problems: Many of the
2 Intervenors are groups. BOLD Nebraska, for example, is
3 an Intervenor. Now BOLD Nebraska is represented by
4 Mr. Blackburn, who I have known for years, and we're
5 confident in our dealings with BOLD Nebraska.

6 The Rosebud Sioux Tribe is a political body. We
7 are confident in dealing with the Rosebud Sioux Tribe's
8 attorney.

9 But the Rosebud Sioux Tribe is not a single
10 person, and if you grant some blanket order that allows
11 the Rosebud Sioux Tribe to see all of these documents,
12 how do we control who those people are and what
13 dissemination of those documents is made? And so on and
14 so on.

15 So for that reason we support this outcome for
16 this hearing today.

17 If there is to be an amendment to the Protective
18 Order, it shouldn't be negotiated in front of the
19 Commission here today. Very difficult to accomplish.

20 How it should be negotiated is through a written
21 proposal. Mr. Smith, I don't like to increase his
22 workload, but he is the natural referee if there are to
23 be amendments to the Protective Order. We'll do our best
24 to accommodate in the most reasonable fashion that we
25 possibly can.

1 In the meantime, the Protective Order as written
2 should be allowed to stay in place as written. I'll
3 concede to Mr. Blackburn's observation of the last phrase
4 of the second sentence of paragraph 3 presents a problem
5 for him.

6 It does say "viewable only by attorneys of
7 record for the party or parties to the Motion to Compel,"
8 and he was not a party to a Motion to Compel, I don't
9 think, was he? No. So we're willing to adjust that to
10 allow Mr. Blackburn to look at the documents, even though
11 he was not a party to compel.

12 The reason we gave him a password is because
13 only the Rosebud Sioux Tribe and Mr. Rappold on behalf of
14 the Rosebud Sioux Tribe and Mr. Blackburn on behalf of
15 BOLD Nebraska sent us an Interrogatory or document
16 production request saying produce everybody else's
17 answers and responses to our discovery materials. That's
18 the reason that we gave him a password, the reason we
19 gave Mr. Rappold a password.

20 So, accordingly, we're willing to adjust that
21 sentence here and now to allow Mr. Blackburn to look at
22 those documents subject to the other strictures of the
23 Order as it currently stands.

24 I want to make a couple of points -- or one
25 point with respect to Mr. Capossela's comment about the

1 Cheyenne River's inquiry.

2 Mr. Capossela said that he is concerned that the
3 documents that we have offered are not truly confidential
4 because the HPO for the Tribe has seen the cultural
5 surveys some time ago.

6 Well, that may well be true. As a qualified HPO
7 and a participant in the processes, those documents may
8 well have come from the Department of State.

9 Now as to the things like the paleontological
10 survey, I'll concede we designated as confidential the
11 paleontological approach and the appendix. It's the
12 appendix that everybody's worried about because that
13 tells you where the bones are.

14 And the appendix must remain confidential. If
15 it does not, Commissioner Hanson was with us in
16 Harding County when the paleontologist from Hot Springs
17 showed up at our public hearing and suggested that all of
18 this paleontological information should be in the public
19 domain and we know exactly why those types of suggestions
20 are made.

21 Same with the cultural survey materials. Those
22 do not belong in the public domain, and the reason they
23 don't belong in the public domain is to protect the
24 confidentiality of the materials and their locus. We
25 don't have any concerns about the HPOs seeing those, and,

1 frankly, we don't have any concern about the lawyers of
2 the Tribe seeing those.

3 So it's a little disingenuous to argue that
4 because a qualified HPO had seen some of these documents
5 that, therefore, they are no longer covered by the
6 strictures imposed by the Department of State.

7 So we continue to stand on the fact that we do
8 what the Department of State tells us, we do what the
9 statutes tell us, and we do what other commissions and
10 bodies tell us until those commissions tell us otherwise,
11 and until those statutes are changed, we're going to
12 continue to do that.

13 One last issue, and that's the proprietary
14 nature of the documents that are listed in Mr. White's
15 Affidavit. I cannot emphasize strongly enough the value
16 of those documents to the business that TransCanada runs
17 and operates.

18 As Mr. White said in his Affidavit, millions and
19 millions and millions of dollars and years and years and
20 years of engineering expertise developed by the company
21 result in the information that's contained in those
22 documents. And the company treats them as confidential.
23 The company treats them as trade secrets.

24 The Federal Rules and the State Rules of
25 Discovery recognize the nature of trade secrets. It

1 happens every day in civil litigation.

2 So having said all of that, I'll conclude by
3 saying we're agreeable to change the second sentence of
4 paragraph 3, that beyond that, the Order should stay in
5 place. If there are serious issues to be discussed,
6 we're perfectly willing to discuss those just as we
7 negotiated them a week ago.

8 CHAIRMAN NELSON: Thank you. Appreciate your
9 comments. I'm going to ask questions and there may be
10 others and we'll go back around for rebuttal.

11 Mr. Taylor, I want to dig into -- and, again,
12 I'm looking at the Motion, page 9, the second paragraph
13 under Relief Sought By Intervenors where they are talking
14 about including expert and fact witnesses.

15 And I think there was some discussion about what
16 you have allowed. Are you allowing access only to
17 experts who will be testifying or other experts that may
18 be retained to review data by the Intervenors? How are
19 you defining expert and fact witnesses? How far should
20 that go in your mind?

21 MR. TAYLOR: In 2010 the Federal Rules of Civil
22 Procedure with respect to experts were amended. And the
23 Federal Rules of Civil Procedure with respect to experts
24 now identify two types of experts.

25 One is sort of a consulting expert, and the

1 other is a testimonial expert. We said experts in our
2 e-mail. You know, if they have a consulting expert that
3 they want to look at the documents, tell us who that is
4 so that we can satisfy ourselves it's an expert, and
5 that's fine. So long as that expert signs on to the
6 confidentiality provisions.

7 Same thing with testimonial experts it. Doesn't
8 matter to us. We just want to know who it is and what
9 the circumstances are.

10 Second part of your question, fact witnesses
11 engaged by counsel to assist in review of scientific or
12 technical information. I don't know what that means.

13 A fact witness is a person who knows of facts
14 specific to this case. I saw the car wreck happen.
15 That's a fact witness. An expert witness who testifies
16 is a person who says I have engaged in this body of
17 information and this body of information and based on my
18 skill and training I have an opinion and I am going to
19 tell you what that opinion is.

20 I don't know what a fact witness is that would
21 assist in review or scientific technical information.
22 Now maybe that's an IT person who says their electronic
23 computation is flawed, our math is bad. Who knows.

24 If Mr. Martinez has a fact witness who needs to
25 review this scientific or technical information, tell me

1 that. Give me a chance to understand what his position
2 is, and if I say no and he disagrees, the Commission's
3 right here, and he can come and make his Motion and we
4 can decide whether I'm right or he's right or whether
5 there's a middle ground we can reach.

6 CHAIRMAN NELSON: Thank you.

7 I guess the only other question at least at this
8 point is so you would agree with Mr. Blackburn that we
9 should amend our Order to include some of these
10 provisions that you've just talked about? That would be
11 the appropriate way to handle this?

12 MR. TAYLOR: I think, yes. And I think those
13 are imminently discussable among the lawyers. You know,
14 we get along with -- we're fairly easy to get along with,
15 and we haven't found any of the Intervenors' lawyers
16 difficult to get along with.

17 And Mr. Smith, in the 40 some years I've known
18 him, has never been intractable, that I remember. We can
19 work that out.

20 CHAIRMAN NELSON: Thank you.

21 Other questions from the Commission at this
22 point?

23 If not, we're going to go around for some brief
24 rebuttal.

25 Mr. Martinez.

1 MR. CAPOSSELA: Excuse me. This is
2 Peter Capossela. And I apologize for interjecting, but I
3 have a prior engagement and I didn't want to just hang up
4 the phone without informing you that I'm going to have to
5 leave the hearing this morning. I wanted to interject,
6 and I apologize.

7 CHAIRMAN NELSON: Thank you. And I appreciate
8 you interjecting.

9 Go ahead, Mr. Martinez.

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

11 What I think is remarkable about what we've
12 heard is actually -- probably for one of the first times
13 coming before you we're actually not that far apart.

14 I'm really encouraged by what Mr. Taylor has
15 said. In fact, I'm going to quote him that we're not
16 terribly difficult to work with. That's good to hear.
17 And, frankly, I think that I am somewhat heartened by his
18 willingness to be flexible.

19 But he did say something that I think is really
20 important, and that was how important the confidentiality
21 rules and adhering to those are for all of us lawyers.
22 That's something that we're just steeped in from day one,
23 and those are, you know, the ethical guidelines that we
24 have to abide by.

25 And that's to a large degree why we're in front

1 of you today is is because the wording of the Order is
2 such that we believed and I think all of the counsel for
3 the Intervenors believed and took the position that we
4 needed to strictly adhere to that.

5 Unfortunately, a strict adherence to that poses
6 a number of problems that we've raised today for us. So
7 that's really I think why this issue needs to be
8 addressed.

9 The second thing I'd want to point out, I think
10 a lot of this -- and after hearing what Mr. Taylor said
11 today, I think a lot of this frankly could have been
12 avoided had we had the opportunity to have been looped in
13 to the discussions that Mr. Taylor and Mr. Smith
14 apparently had about the wording of the Confidentiality
15 Order before it was issued.

16 I think, you know, had they picked up the phone,
17 looped us in on that, we could have avoided some of those
18 issues and hashed that out, but we didn't do that. I
19 would encourage maybe on a going forward basis that if we
20 are going to have discussions with your counsel and with
21 Mr. Taylor and his team, that everybody -- that all the
22 Intervenors' counsel be looped in as well so we can avoid
23 having to go through this type of a fracas in the future.
24 So that's one thing.

25 Now the other issue that I guess I have and what

1 I'm troubled by a little bit is Mr. Taylor's distinction
2 about unrepresented parties. And, you know, since I
3 don't represent those parties, obviously, I sort of feel
4 like they still have to have a little bit of a voice.

5 And what troubles me is that the way these
6 proceedings are now set up, if they're not given access
7 to the documents that the other parties are given to --
8 are given, to a certain degree you're then putting
9 individual citizens in the role of essentially being
10 second class citizens when it comes to these
11 proceedings.

12 And I don't have an answer for that. I just --
13 I'm troubled by it, and I think it's highly problematic.
14 So I would encourage you to take seriously -- take a
15 serious look at addressing a way to deal with that, as
16 far as the unrepresented parties go.

17 And, you know, Mr. Taylor made a suggestion that
18 he's certainly willing to talk with them, and if they can
19 make a case for it, he's willing to grant access. But,
20 once again, that actually flips the burden. The burden
21 is really on TransCanada to show why that should be
22 confidential. It shouldn't be on individuals who then
23 have to essentially ask TransCanada for access to what
24 they are entitled to under the rules. And I guess that's
25 the problem I have with that.

1 In terms of this distinction that was raised
2 between fact versus expert witnesses, well, let me give
3 you a great example right now. We have Mr. Evan Vokes as
4 a fact witness concerning TransCanada's -- what we
5 allege, their shoddy construction practices and shoddy
6 engineering practices.

7 He's a fact witness. He was an inside employee
8 at TransCanada and saw this stuff going on. We haven't
9 designated him as an expert witness, but I sure want to
10 be able to show him the documents that TransCanada's
11 produced to be able to verify, you know, and bolster his
12 testimony. So that I think is a pretty good example of
13 where that distinction lies.

14 And, consequently, I'm not really sure that we
15 can really make that distinction in these proceedings as
16 readily as Mr. Taylor thinks is the case.

17 So, you know, to sum that all up, you're not
18 going to get any disagreement from me that there are
19 certainly some categories of documents that should be
20 deemed confidential. You know, we deal with confidential
21 information all the time.

22 What we're largely talking about here is the
23 mechanism and who gets access, and on that basis we
24 really do need to have some sort of an amendment to this
25 order if you're not going to go and simply vacate it.

1 Thank you.

2 CHAIRMAN NELSON: Thank you.

3 And before we go to others involved in the
4 Motion, I want to make very clear my understanding is
5 that the only discussion between Mr. Smith and Mr. Taylor
6 in regard to the Order was as to the timing of when it
7 would come out, not the content of the Order.

8 Mr. Taylor, is that your understanding also?

9 MR. TAYLOR: I called Mr. Smith and I should
10 have looked in my telephone log but I think it was
11 Thursday afternoon and I said we are concerned about
12 confidentiality. What are you doing about an order? He
13 said we're working on an order.

14 I said overnight I will send you a suggestion on
15 confidentiality issues that concern us, which I did the
16 next morning, which I can also say he did not incorporate
17 one word of into his Order. That was it.

18 CHAIRMAN NELSON: Thank you. I felt it was
19 important that we all understand exactly what
20 communication did and did not take place at that point.

21 Okay. With that, let's go down the list of
22 others that were involved in this Motion for brief
23 rebuttal.

24 We'll go to Rosebud. Mr. Rappold.

25 MR. RAPPOLD: Thank you, Commissioners.

1 Matt Rappold on behalf of the Rosebud Sioux Tribe.

2 Initially, I think the major problem here is the
3 process in which the Protective Order issued and the
4 resulting designation of confidential documents by
5 TransCanada which has led to what others have referred to
6 as burden shifting.

7 And I would agree that we're in a situation here
8 where the burden has been shifted to the -- are you
9 seeking the information -- or to rather not seeking the
10 confidential information but seeking to not have
11 information that's already been designated as
12 confidential, deemed confidential.

13 That burden should be initially on the resisting
14 party, which in this case would be TransCanada, to show
15 that the documents are, in fact, confidential and order
16 protection. That leads us to what we've called burden
17 shifting.

18 An example that I'd like to bring to the
19 Commission's attention regards the treatment of high
20 consequence areas as confidential. It doesn't appear
21 from the Affidavit that -- not the Affidavit. Rather,
22 the Applicant's opposition to the Motion that the
23 document that lists high consequence areas is contained
24 in the Applicant's response on page number 2 in the
25 second paragraph where they identified the following

1 documents as being confidential. I could be mistaken,
2 but I don't believe that the high consequence area
3 document is on there.

4 But if you go back and look into the documents
5 that were provided and the confidential documents, there
6 is a rather large document in there, and I don't recall
7 what it's named off the top of my head, but it lists high
8 consequence areas and it's designated as confidential.

9 Consistent with the Protective Order and the
10 terms of it and an obvious understanding of our need to
11 comply with that Order, until such time as I were to
12 bring it in front of the Commission for resolution, none
13 of that information was shared by myself with anyone
14 else.

15 But I would also point to the Commission that in
16 the 2009 Docket, the original proceeding, TransCanada
17 responded to very similar questions through
18 Interrogatories that were posed by the Staff, PUC Staff,
19 asking for a list of high consequence areas. On the
20 Docket of the information, the response is on there. And
21 I think there's about 12 sites that are listed as high
22 consequence areas.

23 So it causes me some concern as to whether or
24 not the designation of documents is proper following the
25 way in which TransCanada was given permission to

1 designate documents as confidential.

2 Our response when we asked those similar
3 questions was that high consequence areas are
4 confidential, and we can't share them with you. I would
5 state that what's in the public record now and
6 TransCanada's previous responses, same or similar
7 questions, conflicts.

8 So it seems to me that a proper of way of
9 dealing with this is actually requiring the rules to be
10 followed for determining what is confidential
11 information. Now I would agree that some of the
12 information that they've designated as confidential
13 probably merits confidential treatment.

14 So that leaves us with the situation that if the
15 Order is vacated, all of this information may already be
16 out, released, and then I think we're kind of in a
17 quandary there as to what to do about that. We'll leave
18 that with the discretion of the Commission as to how to
19 fix that issue.

20 Also I wanted to respond to -- I think
21 Mr. Taylor already addressed this as to why Rosebud and
22 BOLD Nebraska was provided the same information as the
23 other parties, and that was addressed when he stated that
24 we both asked questions in our Interrogatories and
25 Requests for Production of Documents that TransCanada

1 provide us with all of their answers to the other
2 parties. And so that should clear up why we were
3 provided with this information.

4 There is other documents that were designated
5 that we would say we still have need for, whether they're
6 ultimately determined to be confidential or not. Those
7 would be the Cultural Survey Reports, the Integrity
8 Management Plan, the O&M Manual, the Worst Case Discharge
9 Calculations. Page 4 the response indicates that these
10 are not confidential, certain aspects of them are not
11 confidential, rather Appendix P to the Final Supplemental
12 Environmental Impact Statement is confidential and
13 redacted on the Department of State's website.

14 And the last thing I just wanted to clarify,
15 Mr. Taylor indicated that all of the parties were
16 admitted pro hac to practice in this case, and I don't
17 believe that's entirely accurate. Myself and I can't
18 speak for Mr. Ellison, but I believe that he's a member
19 of the South Dakota State Bar as well as myself.

20 I will yield to my colleagues.

21 CHAIRMAN NELSON: Very good. Thank you.

22 Cheyenne River. Mr. Clark.

23 MR. CLARK: Frankly, Mr. Chairman, I don't know
24 what else I can add substantively that hasn't been said
25 by my colleague so I'm just going to close with that and

1 ask that you grant the Motion.

2 CHAIRMAN NELSON: Great wisdom in your brevity.
3 Yankton Sioux Tribe. Ms. Baker.

4 MS. BAKER: Yes. Thank you.

5 I would just like to reiterate the importance
6 of following the rules in this process. Nothing in
7 Mr. Taylor's comments addressed the rules or why they
8 shouldn't apply. And, in fact, they should and we ask
9 that they be applied so that justice can be observed and
10 simply require the submission of a request, a proper
11 request by TransCanada, and then a determination by the
12 Commission.

13 And I would also note that the rules that I was
14 just referencing which do apply to the PUC do require a
15 showing of a law that would be violated. It's not just
16 adequate that there's a good argument, but there does
17 actually have to be a statute for common law and
18 potentially also supportive administrative law to show
19 that confidential is imposed legally.

20 With that, I would just ask the Commission to
21 please consider our request in the interest of fairness
22 and the importance of the application of the rules, and I
23 would also suggest that the parties don't have any
24 interest in making every single document that's been
25 marked as confidential at this point open to the general

1 public necessarily.

2 I mean, speaking for Yankton, we would be
3 satisfied if perhaps the Commission were to extend
4 treatment to those documents as if a request for
5 confidential treatment had been made so that they are
6 entitled to those protections temporarily until such time
7 as Keystone first executes and enters an actual request
8 under the regulations and, secondly, the Commission makes
9 a determination under the regulations about whether each
10 item is, in fact, confidential.

11 Thank you.

12 CHAIRMAN NELSON: Thank you.

13 Ms. Craven.

14 MS. CRAVEN: Thank you, Mr. Chairman. I'll also
15 be brief.

16 I just want to support what my colleagues had
17 said, and I urge you to grant our Motion.

18 Thank you very much.

19 CHAIRMAN NELSON: Thank you.

20 Mr. Blackburn.

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

22 I only have one quick point, and that is about
23 whether or not a Commission can discuss the
24 confidentiality or lack therefore of any particular
25 document today that was suggested by Mr. Taylor. At some

1 point that will need to be resolved for certain
2 documents, but since it's not on the agenda today the
3 actual confidentiality or lack thereof any particular
4 document cannot be decided by the Commission today.

5 And should you wish some language to modify
6 paragraph 3, I'd be happy to provide some suggested
7 language.

8 Thank you.

9 CHAIRMAN NELSON: Thank you.

10 Any of the other Intervenors that are on the
11 telephone line that have anything in the line of
12 rebuttal?

13 MS. HILDING: This is Nancy Hilding. Can you
14 hear me?

15 CHAIRMAN NELSON: Yes. Go ahead.

16 MS. HILDING: I would like to join the Motion of
17 the other parties and support it. And as a person
18 without an attorney, I would like there to be an avenue
19 somehow for those of us to fairly and appropriately with
20 respect to good confidentiality law have maybe access to
21 these -- to something if somehow it becomes appropriate
22 for us to do so.

23 And I would point out that, you know, they're
24 talking about all of these motions and stuff in the
25 future. In the Staff's suggested order there was a

1 deadline at the end of next week to file motions. So if
2 you're going to allow for motions to go forward to argue
3 about confidentiality, then the Friday the 8th deadline
4 for no more motions is inappropriate.

5 Thank you.

6 CHAIRMAN NELSON: Thank you.

7 Others?

8 Hearing nobody else on the phone, we do have
9 someone in the room.

10 Mr. Taylor, if you'd just step back for a
11 moment.

12 MS. BRAUN: (Speaks Lakota.)

13 My name is Joye Braun. I'm from Cheyenne River
14 Sioux Tribe, individual tribal member. I'm an
15 Intervenor.

16 First I have a piece of information for you
17 guys. I was deeply concerned when the lawyer said that
18 the tribal -- it's not just the Tribal Council's -- it's
19 the whole Tribe if you give that confidential information
20 to them.

21 Now I regularly go to Tribal Council up at
22 Cheyenne River, and I regularly get kicked out because of
23 confidential information.

24 These lawyers are smart. And they know better.
25 They know that our tribal councils, when they're dealing

1 with this kind of stuff, that they'll go into executive
2 session, and us tribal members are kicked out. We don't
3 hear what goes on in there. That's between the lawyers
4 and those tribal councils.

5 So if you let them have that information, then
6 those tribal councils can tell their lawyers, well, this
7 is what we need based on this information. And that's
8 between the client and them. I'm just letting you know.
9 This is what happens not only at Cheyenne River but
10 Standing Rock, Rosebud, Oglala, wherever you go.

11 So don't listen to them when they're saying
12 that. That's wrong. It's erroneous information because
13 I get kicked out all the time.

14 The other thing I want to tell you -- I'm going
15 to ask you guys something. I'm going to ask you to do
16 something. We live here in South Dakota, and there's two
17 very distinct cultures. There's our South Dakota
18 culture, which we are all a part of, but there's also the
19 Lakota, Dakota, Nakota culture, which you guys call the
20 Sioux culture. We call it tetuwon [phonetic].

21 In that culture there's something called opahe
22 [phonetic] where you take something and give that to
23 them, usually tobacco or chin chasha [phonetic], and they
24 ask you to do something. And then if you take that, you
25 agree to do it.

1 The reason why I am an Intervenor is because my
2 elders -- there's an elders council up at Cheyenne River
3 called Lakota Advocates. They asked me to be an
4 Intervenor for them. Those elders are asking me to do
5 something. I have to do it. It doesn't matter how sick
6 I am. I tried to call in the last time you guys had a
7 meeting, the 12-hour meeting you guys all had, because I
8 had heard that us individual Intervenors were going to be
9 sanctioned in some way.

10 I had just gotten out of the hospital, just that
11 day. And I called in, and I stayed on the phone. I
12 tried to get your guys' attention to give you my
13 perspective, and I couldn't get it. I had to keep
14 putting my phone on mute because I was coughing too hard.
15 I didn't want you guys to hear my coughing. I'm still
16 really sick, but I'm here.

17 When those elders ask you to do something, you
18 do it.

19 Now there's been reference to individual
20 Intervenors, me not having this confidential information.
21 Now I have no problem talking to these lawyers and asking
22 them for some of that information, and I might do it
23 after this meeting. I have no problem doing that as an
24 individual. Because those elders asked me to represent
25 them.

1 Now I'm a grandma. I have three grandkids. But
2 I'm not really an elder because I'm only 46, you know. I
3 don't consider myself an elder.

4 But I do think because as an individual
5 Intervenor we can question TransCanada when that hearing
6 comes up when you guys have that hearing. We need to
7 have some of that information. And I have no problem
8 signing a letter of confidentiality.

9 Now I used to be a reporter or journalist. I've
10 written for Washington Post. I've written for New York
11 Times. I used to be a photojournalist. I used to be all
12 kinds of stuff. Google Joye LeBeau, Joye Braun, and
13 you'll find my stuff all over the place. So I have no
14 problem doing that, and I'm sure other Intervenors have
15 no problem too.

16 So I'm going to ask you when you're doing all of
17 this finagling, you know, we have the right to ask those
18 questions. And they opahe'd [phonetic] me. They asked
19 me so I have to on behalf of those elders. If I don't,
20 I'm going to hear about it.

21 The other thing, this thing about -- the other
22 thing I'm going to ask you guys is, like I said, these
23 lawyers are really smart, and they've been doing law here
24 in South Dakota for a very long time. They've been
25 working -- they've worked with our lawyers, tribal

1 lawyers, and whatnot.

2 Being that, they have made little dings, little
3 snipes at my culture sitting in front of you guys. And
4 I'm catching you guys. I can hear it. But I see you
5 guys shaking your heads because you don't see it. One of
6 those that they're doing is HPO. It's not HPO. It's
7 THPO, Tribal Historic Preservation Officer. Not HPO.
8 THPO. Remember, Tribes have been here thousands of years
9 before South Dakota ever was. THPO.

10 Another one of those things that they've done
11 is, like I said, this little finger thing and saying
12 about our tribal councils not being able to handle
13 confidentiality, but then they also said something about
14 witnesses, about Faith.

15 Faith is a member of the Ihanktonwan Treaty
16 Council. Treaty Council. That's like those senators
17 over there. That's kind of a big thing. Those treaty
18 councils have been around for over -- you know, since
19 1880s. But before it was a treaty council it was a
20 council. So those councils have been around for over 10,
21 15,000 years. She's a part of that. That makes her a
22 pretty big witness.

23 So when we bring witnesses and because of me
24 being sick and whatnot since January in and out of the
25 hospital I wasn't able to turn in and say, yes, I want

1 Chief Brings Plenty here. I do want him to come here,
2 but I don't think I can anymore. But I think he might be
3 able to say something at the public meeting.

4 I do want Chief Brings Plenty here. I do want
5 Chief In The Woods here. I do want Ed Wittle [phonetic]
6 to come. There's other headsmen, other chiefs. We still
7 have those chiefs. I said those are like those Senators,
8 Congressmen, people over there. Those are ours.

9 We have our IRA government, which these guys
10 deal with, but we still have our traditional government.
11 So remember those are big people. And that's what I
12 wanted to remind you guys and let you guys know that.

13 CHAIRMAN NELSON: Thank you. Thank you.

14 Questions from the Commission.

15 Mr. Taylor, I do have one for you.

16 MR. TAYLOR: Yes, sir.

17 CHAIRMAN NELSON: And it goes back to this issue
18 of the individual Intervenors. And I fully understand
19 your position in that if we were to grant them access to
20 confidential information, we have little to no oversight
21 over them or that.

22 But here's what I'm wrestling with. When we get
23 to a hearing, and we are going to do a hearing this
24 summer, how do we handle those individual Intervenors
25 when we come to confidential information?

1 Is there going to be an opportunity to allow
2 them to sit in on that? Or how would you propose we
3 handle that?

4 MR. TAYLOR: You mean presentation of
5 confidential information in the hearing?

6 CHAIRMAN NELSON: Exactly.

7 MR. TAYLOR: Well, first of all, at some point
8 standard practice in civil litigation is is that if there
9 are items that are designated lawyers' eyes only, which
10 is very common, then there has to be a process to decide
11 that information -- how that information that's lawyers'
12 eyes only will be handled in the trial.

13 And they're fairly common mechanisms for doing
14 that. Sometimes information's redacted. Sometimes
15 summarizations are made of information, and then that is
16 what becomes the public part of the record. And there
17 can be sealed documents that are included in the private
18 part of the record. We'll just have to cross those
19 bridges when we get there.

20 The question we have now is this is a cart and
21 the horse circumstance. We put those documents out based
22 on reliance in this Order, and there are documents that
23 we would not have put out had that Order not been there.

24 The cultural surveys, for example, we would have
25 put those up probably without the Order. But the

1 proprietary documents of the company, never. So we'll
2 just have to deal with that as we get there. And it's
3 not new ground.

4 CHAIRMAN NELSON: Thank you. It's probably new
5 ground for this Commissioner.

6 MR. TAYLOR: True.

7 CHAIRMAN NELSON: So I appreciate your answer.

8 Other questions from the Commission for any of
9 the folks who have spoken today?

10 Seeing no questions, is there a Motion?

11 Commissioner Hanson.

12 COMMISSIONER HANSON: Mr. Chairman, in
13 Hydrocarbon Pipeline Docket 14-001 I move that the
14 Commission deny the Joint Motion to Vacate and in the
15 Alternative to Clarify or Amend the Protective Order.

16 CHAIRMAN NELSON: Discussion on the Motion.

17 COMMISSIONER HANSON: Mr. Chairman, there's a
18 number of reasons why I took the position that I did. Or
19 I take the position that I do.

20 I do not believe that the Commission erred by
21 issuing the Protective Order. The assertions failed to
22 take into account the fact that the Commission's own
23 Administrative Rules rather than merely the Rules of
24 Civil Procedure are to be adhered to during any
25 proceeding before the Commission, and that is in

1 ARSD 20:10:01:41.

2 During the Commission meeting we will all
3 remember that Keystone clearly stated -- I'm referring to
4 the April 14 hearings -- that there would be information
5 which was confidential and that some of that confidential
6 information would be designated not just by Keystone but
7 by law itself and by other government bodies.

8 And when the Commission moved to grant the
9 Motions to Compel the method of dealing with confidential
10 information was addressed by us. We were clearly aware
11 of it. We contemplated the way in which we wished to
12 deal with confidential information.

13 And so from that standpoint our Order was --
14 should not be surprising to anyone. The terms of the
15 Protective Order, I believe, are appropriate. No party
16 is prejudiced by the issuance of the Protective Order.
17 Confidential information is accessible by all the
18 necessary persons, including the attorneys are privy to
19 confidential information as well as Staff. The expert
20 witnesses, their co-counsel, can all view the
21 confidential information, provided they execute the
22 Protective Agreement.

23 We have an Affidavit from Mr. Taylor and
24 testimony in which he has agreed to an appropriate
25 compromise. I don't believe that -- well, I believe that

1 access to the confidential information by the pro se
2 Intervenor would be -- would be very, very much to the
3 detriment of the company. It would be highly irregular
4 for this Commission to do that.

5 The information that was deemed confidential is
6 10 areas of -- areas that when I looked over them they
7 certainly should be confidential. Those 10 areas are
8 part of 2,508 files in 222 folders. I think we're all
9 aware of that. Approximately 35.7 gigabytes of
10 information.

11 So those 10 areas certainly do not comprise the
12 majority. They may be significant pieces of information,
13 but, again, they're available. They're available to the
14 parties so that they can look through them, the parties
15 that requested this information and felt it was important
16 to have it.

17 So I just -- I think it would be very irregular
18 for a Commission to grant this type of a Motion.

19 CHAIRMAN NELSON: Discussion on the Motion.

20 If I could ask Commissioner Hanson a question.
21 I'm inclined to support your Motion, but I guess my
22 concern is our Order did not contain an allowance for
23 expert witnesses. It did not contain an allowance for
24 attorneys and staff in the law firms and the counsel of
25 record. It did not contain provisions for some of these

1 others such as Standing Rock, Tribal Historic
2 Preservation Office, and Faith Spotted Eagle that
3 Keystone has extended these opportunities to view.

4 It would seem to me that it would be appropriate
5 to amend our Order to include those folks. Your thoughts
6 on that.

7 COMMISSIONER HANSON: Well, the reason, as I had
8 stated, that I did not include those is that we have the
9 Affidavit from Mr. Taylor, and we have testimony from
10 here today stating in addition to items in which we have
11 an Affidavit from him that he will share that
12 information.

13 And absent of -- I think he -- I think Keystone
14 is dealing in good faith here, and I believe that they
15 will continue to do so in this respect. But the Motion
16 went far, far beyond what -- and, frankly, I heard from
17 his testimony today that they would be sharing
18 information to those who should properly receive it.
19 That's why I did not include additional.

20 CHAIRMAN NELSON: Yeah. And I get your points.
21 I guess I'm just concerned -- and let me just say,
22 Mr. Taylor, I appreciate the fact that you very quickly
23 worked with the other parties to carve out these
24 exceptions to help move things along. I'm just concerned
25 that those are -- I mean, technically if you look at it,

1 are in violation of our Order. And I'd like to have an
2 order on record that specifically allows for the types of
3 things that they're already doing so that they're not
4 kind of flying outside of the radar, even though at this
5 point that may be working.

6 COMMISSIONER HANSON: Could I address that?

7 CHAIRMAN NELSON: Certainly.

8 COMMISSIONER HANSON: I don't believe that
9 Keystone electing to share information that they deem
10 confidential with other persons requires the Commission's
11 permission to do so. If that's what you're troubled
12 with.

13 They have the right to share confidential
14 information with whomever they want to, whether they're a
15 party to this or not a party to this. They don't need to
16 come to the South Dakota PUC to say can we share this
17 information with someone.

18 CHAIRMAN NELSON: I'm going to break protocol
19 here for just a moment, and I want to ask Mr. Taylor a
20 question.

21 So it's my understanding that you are prepared
22 to allow confidential information to be shared with any
23 expert witness.

24 MR. TAYLOR: Yes. What I said on April 21 was
25 Keystone agrees that experts may review the confidential

1 documents, provided that each agrees to be bound by the
2 terms of the extant orders to the extent that they govern
3 document management and confidential security, use and
4 return of the documents. Keystone requires that you
5 identify the experts to whom the documents will be shown
6 in advance and that the experts make their commitment in
7 writing and that Keystone receive a signed copy of the
8 commitment. And I'll stand by that, order or no order.

9 CHAIRMAN NELSON: Thank you.

10 Additional discussion.

11 Commissioner Fiegen.

12 COMMISSIONER FIEGEN: For expert witnesses those
13 are expert witnesses with attorneys; correct?

14 MR. TAYLOR: Yes. Both categories. Consulting
15 and testimonial experts.

16 COMMISSIONER FIEGEN: Thank you.

17 CHAIRMAN NELSON: Additional discussion.

18 MR. ELLISON: Mr. Chairman, this is Bruce
19 Ellison, Dakota Rural Action. If I may just add a word.

20 As a South Dakota attorney, unless you change
21 your Order, I am bound by your Order regardless of what
22 Mr. Taylor has agreed to. And I agree they were good
23 agreements, but as a South Dakota Lawyer I cannot violate
24 your Order because counsel from the other side or another
25 side says it's okay. So we need to have the Order

1 amended at least.

2 Thank you.

3 CHAIRMAN NELSON: Additional discussion.

4 I'm going to move to --

5 MR. BLACKBURN: Mr. Chairman, Paul Blackburn.

6 CHAIRMAN NELSON: Yes.

7 MR. BLACKBURN: If I may, I would also echo
8 Mr. Ellison's comment that as a member of the South
9 Dakota Bar I will not view those documents unless the
10 Order is amended. It's simply I cannot through my
11 ethical obligations view those documents without
12 violating the express language of that Order. I takes
13 the confidentiality that TransCanada has requested very
14 seriously, and I believe it should be something that's
15 crystal clear by the Commission about who can view these
16 and who cannot view these documents.

17 It is ongoing ambiguity that would not serve the
18 Commission's interest, and I would urge clarity about
19 this and not just have it be, well, TransCanada agrees.

20 The fact is that TransCanada's actually
21 requesting the Commission's protection through a
22 Protective Order. Therefore, the fact that it's willing
23 to disclose information to people pursuant to a
24 nondisclosure agreement, if it did it without the
25 Protective Order, it wouldn't have the Commission's

1 protection.

2 So, therefore, it cannot be agreed to strictly
3 between TransCanada and the parties because that's not
4 what TransCanada's requesting, and that's not how the law
5 works.

6 Thank you.

7 CHAIRMAN NELSON: We are going to close the
8 discussion to Commissioners at this point.

9 I'm going to move to amend Commissioner Hanson's
10 Motion. I'm not sure that's even appropriate.

11 COMMISSIONER HANSON: If I may, I would like to
12 hear from counsel, at least our counsel, as to how -- if
13 that's their opinion as well, that it can't be shared,
14 and how it might be amended in order to resolve that
15 issue.

16 CHAIRMAN NELSON: Thank you.

17 I agree with that because I'm not sure what I
18 was going to propose is accurate.

19 MR. SMITH: Yeah. I mean, I certainly -- it --
20 although I do appreciate what Keystone has done, if I
21 were in the position of Mr. Blackburn or whomever, it
22 would be of concern to me to have an order that
23 explicitly would prohibit what TransCanada's willing to
24 let happen.

25 And I think we should think seriously about

1 amending the language of the Order. Again, when I
2 drafted the language I did it with some consultation with
3 the Chairman. And but the discussion the Commission had
4 that day was very limiting.

5 COMMISSIONER HANSON: My question is how should
6 it be amended?

7 MR. SMITH: I don't know. I think some thoughts
8 might be -- I did not mind, as I heard it anyway, the
9 suggestion that Mr. Taylor seemed to make and Mr. -- I
10 think it was Mr. Blackburn as well about maybe using the
11 Minnesota language as a starting point, something like
12 that.

13 I mean, the other thing we could do and what I
14 thought I heard Mr. Taylor recommend at one point is that
15 he and I together with one or more people from the
16 Intervenor side of the fence have sort of a cooperative
17 process of trying to come up with language that seems to
18 satisfy TransCanada's opinions about adequate protection
19 and yet affords people kind of what I'd call traditional
20 treatment of confidential information with respect to
21 witnesses, et cetera.

22 COMMISSIONER HANSON: Mr. Chairman, do we need
23 to defer action on this and allow all counsel to discuss
24 this and come up with a -- with amenable language?

25 CHAIRMAN NELSON: I appreciate that question.

1 And I know I said we were confined to Commissioner
2 discussion, but I want to go back to Mr. Blackburn.

3 If we were to pursue what Mr. Mr. Smith has
4 just said, perhaps a conference with you, Mr. Ellison,
5 Mr. Taylor, Mr. Smith to work out appropriate language,
6 would that be timely, or do you think we need to do that
7 today?

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

9 I think it would be timely. There is enough
10 time to resolve that. If you wanted to try to work it
11 out today, it might take some more of the Commissioners'
12 time because it would be sort of drafting by committee
13 and group.

14 I would be happy to help. As Mr. Taylor said,
15 this is not unusual, and the language can probably be
16 agreed to relatively easily.

17 Thank you.

18 MS. BAKER: Mr. Chairman, this is Jennifer. May
19 I speak on behalf of Yankton?

20 CHAIRMAN NELSON: Yes.

21 MS. BAKER: I would like to request that Yankton
22 be allowed in the discussions as well as we also have an
23 interest in the outcome of the discussions.

24 CHAIRMAN NELSON: Thank you.

25 Commissioner Hanson, do you want to verbalize?

1 COMMISSIONER HANSON: Well, Mr. Chairman, we
2 have in the past when we have run into situations like
3 this allowed the parties a few hours to work out the
4 situation and come up with some type of verbiage. And if
5 we recessed for three or four hours or something of that
6 nature, I would certainly imagine that they could come up
7 with something between them.

8 CHAIRMAN NELSON: Mr. Taylor.

9 MR. TAYLOR: If I could -- if a short-term cure
10 is to fix the second sentence of paragraph 3 for
11 Mr. Blackburn and to adopt my e-mail, paragraphs 4 and 5
12 and 6 -- 4, 5, and 6, that says that we'll let the
13 experts see it, that Staff can see it, and that
14 Ms. Spotted Eagle can see the cultural surveys, if we can
15 adopt those three points, we can be done with this in
16 15 minutes, and then we can address the issue later.

17 CHAIRMAN NELSON: Thank you. Frankly, that
18 would be my preference, given the fact we've got some
19 other things going on today.

20 And so I think what -- here's how I'd like to
21 proceed. We're going to vote on your Motion,
22 Commissioner Hanson. Then I may have a Motion following
23 that, and then we'll see where we are.

24 COMMISSIONER HANSON: Well, I'm going to
25 withdraw my Motion because I think that they should be

1 allowed to have at least a half-hour to -- I don't have
2 all of that information in front of me that Mr. Taylor
3 just explained. And I think that's a good resolution to
4 this process, provided that it resolved the challenges
5 for the others.

6 Yes, I know we have a very, very crammed
7 schedule today but --

8 CHAIRMAN NELSON: So recess for a half-hour
9 would be -- I think would be sufficient. I mean, I've
10 read your e-mail, and I'm fully in concurrence with
11 what's been proposed here so if it would just take some
12 time here.

13 COMMISSIONER HANSON: I'd like to see that in
14 front of me, and I'd like all of the others to concur and
15 have that discussion.

16 I'll move to recess for one-half hour.

17 CHAIRMAN NELSON: If this Motion to Recess
18 passes, we will come back at 11:45 central time.

19 All of those in favor of recess will vote aye.
20 Those opposed, nay.

21 Commissioner Hanson.

22 COMMISSIONER HANSON: Aye.

23 CHAIRMAN NELSON: Commissioner Fiegen.

24 COMMISSIONER FIEGEN: Aye.

25 CHAIRMAN NELSON: Nelson votes aye. We are in

1 recess for a half an hour.

2 (A recess is taken)

3 CHAIRMAN NELSON: I'm going to call us back into
4 session. We had Commissioner Hanson's Motion on the
5 table to deny the Motion to Vacate or Clarify or Amend
6 the Protective Order.

7 Further discussion on that Motion.

8 COMMISSIONER HANSON: I withdrew that Motion,
9 Mr. Chairman.

10 CHAIRMAN NELSON: Okay. That Motion has been
11 withdrawn.

12 Further motions.

13 COMMISSIONER HANSON: Do we have a resolution
14 from the parties?

15 MR. MARTINEZ: I believe we're close,
16 Mr. Commissioner.

17 CHAIRMAN NELSON: I'm going to make a Motion.
18 I'm going to move that we deny the Joint Motion to
19 Vacate -- or to Vacate and that we clarify the Protective
20 Order as has been proposed in writing in the e-mail that
21 just came from Kristen Edwards. She has a proposed
22 paragraph 3.

23 But I want to make a change in that paragraph as
24 I think some folks have just talked about. In the second
25 to last sentence, and this is the sentence that begins

1 "All confidential documents" and refers to BOLD Nebraska
2 and Rosebud Sioux Tribe.

3 I would change that to -- as part of my main
4 Motion to read "All confidential documents provided as a
5 result of any Motion to Compel granted by the Commission
6 shall be viewable as provided herein for BOLD Nebraska
7 and the Rosebud Sioux Tribe."

8 Discussion on the Motion.

9 I'm going to exercise the first right of
10 discussion. Let me just say I concur with the comments
11 of Commissioner Hanson earlier that I think the Motion to
12 Vacate is not appropriate, that we do need to leave those
13 protections in place.

14 But I think we all understand that we were under
15 some time pressure during our April 14 meeting. I knew
16 at that time when we had the Protective Order that we
17 probably weren't going to get it exactly right, and I
18 think we all agree that we didn't, and, therefore, we
19 need to make these appropriate changes.

20 I think this gives access to those confidential
21 documents to those folks that need it. And, importantly,
22 it gives anyone that is not specifically mentioned here
23 the ability to go to the Applicant and say, hey, I need
24 access to this and here is why and the Applicant can then
25 deal with those requests. It leaves that door open, and

1 certainly if there are further disputes, they can come
2 before the Commission.

3 So I believe this resolves the questions that
4 need to be resolved today.

5 Further discussion on the Motion.

6 COMMISSIONER HANSON: Mr. Chairman, I would just
7 like to say I appreciate all the parties working together
8 and the time constraint in order to come up with what
9 appears to be an amenable answer to the perplexing
10 challenge that we're faced with.

11 CHAIRMAN NELSON: Additional discussion.

12 MS. CRAVEN: This is Kimberly Craven. I'd like
13 to weigh in before we vote too.

14 CHAIRMAN NELSON: Let me finish discussion with
15 our Commissioners just a moment.

16 Commissioner Fiegen.

17 COMMISSIONER FIEGEN: Mr. Chairman, first of
18 all, I want to thank TransCanada for having that very
19 first meeting because our Protective Order was pretty
20 tight. We understood that.

21 As a Commission we absolutely believe in
22 confidentiality. And we are going to be very
23 conservative with confidentiality just like we are with
24 discovery, which I know TransCanada didn't necessarily
25 agree with some of our compels for discovery.

1 But, yeah, we gave a lot of liberal discovery
2 motions and we approved those but confidentiality is the
3 same thing. We believe in being conservative and
4 protecting TransCanada.

5 I believe TransCanada -- we had a lot of
6 discussion on April 14 on confidentiality. And, in fact,
7 I even gave them a recess at one time and asked them to
8 tell me what was confidential and why and et cetera in
9 the April 14 hearing. So I certainly appreciate that.
10 TransCanada certainly has a right, and they have -- we
11 need to be fair as a Commission and protect the interest
12 of fairness but protect the interests of confidentiality.

13 So I appreciate the Motion, and I appreciate
14 that TransCanada will meet with people individually like
15 they always have and continue to make sure that people
16 have the information that they need under confidentiality
17 issues, though.

18 CHAIRMAN NELSON: Okay. Here's what I'm going
19 to do very briefly. If anyone has a comment on the
20 specific language -- we're not going into any other
21 issues. We're going into the language of the Motion.

22 Ms. Craven.

23 MS. CRAVEN: Well, yes. You know, discovery's
24 ongoing, and since we do have an opportunity to -- since
25 the hearing has been postponed, I don't want us to have

1 any kind of language that is limiting to other
2 intervenors or other attorneys such as myself who might
3 want to see documents.

4 I, in fact, intend to put a request in to
5 TransCanada for additional information about one of the
6 change conditions as to -- as rebuttal testimony. And I
7 don't want us to be limited by not being called out --
8 and I think I also included Interrogatories, but I'd like
9 to see all the other documents that have been made
10 available since I'm preparing rebuttal testimony to the
11 change conditions.

12 So I would request then that IEN be included in
13 the list along with BOLD Nebraska and Rosebud to see the
14 other documents that everyone else has requested.

15 CHAIRMAN NELSON: Any other comments?

16 Mr. Taylor. Mr. Taylor.

17 MR. TAYLOR: All due respect to Ms. Craven, I
18 don't know how we can do that. I'm certainly happy to
19 talk to her and try and work out some arrangement off the
20 record, but we can't make an adjustment to this Order to
21 accommodate that today.

22 CHAIRMAN NELSON: Thank you.

23 Any other comments?

24 MS. HILDING: Yeah. This is Nancy Hilding. Can
25 you hear me?

1 CHAIRMAN NELSON: Yes.

2 MS. HILDING: I think that the attorneys there
3 were trying to put an additional sentence in there to
4 address concerns of pro se Intervenors. This excludes
5 pro se Intervenors who don't have an attorney.

6 I don't know. Somebody had a sentence that they
7 were going to tack in.

8 MR. ELLISON: Yes. There had been a suggestion,
9 I believe, from Paul allowing for Intervenors who want to
10 see confidential documents to first approach TransCanada,
11 and if there was no agreement, then the Intervenor could
12 approach the PUC for resolution. I think that was part
13 of the proposal.

14 The thing about this language that's as proposed
15 in paragraph 3 is that it doesn't include Intervenors who
16 are pro se. The other thing is that it states in the
17 sentence in red "In addition, nonexpert witnesses may be
18 entitled to access if the Applicant agrees to such
19 access."

20 I would like to go back to Mr. Taylor's original
21 proposal whereby attorneys for a party can show anyone as
22 long as that person signs a confidentiality agreement. I
23 don't want to create more issues. I'd like to suggest
24 that attorneys be given latitude as long as their
25 witness, expert or not, signs a confidentiality agreement

1 rather than going to TransCanada for each person first.
2 And that there should be a mechanism for these
3 nonrepresented intervenors to be able to approach
4 TransCanada for initially and see -- with request for
5 particular access. And if there's no disagreement, then
6 some language that then that the matter be brought to the
7 PUC so that there's a mechanism in place.

8 But that shouldn't have to apply to attorneys at
9 this point because I think we're covered by enough things
10 that we should just be able to do our work as long as the
11 person signs a confidentiality.

12 CHAIRMAN NELSON: At this point I want to ask
13 Mr. Taylor a question.

14 In relation to Ms. Hilding's comment in the
15 third to the last sentence that begins "In addition,
16 nonexpert witnesses." If we were to insert after that
17 the words "or any intervenor," that would seem to solve
18 the issue.

19 Can I get a response from you on that?

20 MR. TAYLOR: Yeah. I'm handicapped by my
21 scrivener's handwriting.

22 CHAIRMAN NELSON: Okay.

23 MR. TAYLOR: Okay. Start over again and tell me
24 where we are, please.

25 CHAIRMAN NELSON: The third to the last sentence

1 that begins "In addition, nonexpert witnesses."

2 MR. TAYLOR: "In addition, nonexpert witnesses
3 may be entitled."

4 CHAIRMAN NELSON: Yes. And if after the word
5 "nonexpert witnesses" we included "or any Intervenor."

6 MS. HILDING: This is Nancy Hilding. You might
7 say pro se Intervenor.

8 MR. TAYLOR: My sense -- I'll just tell you what
9 my sense of this is. Leave the sentence the way it's
10 written. If there are Intervenors unrepresented, lay
11 Intervenors who want to access the confidential
12 information, ask them to call us. Ask them to e-mail us.
13 We'll take the question up with them. If we can't come
14 to an agreement with them, we'll come back to you.

15 MR. ELLISON: Mr. Taylor, do you agree that that
16 language should be inserted into this Order?

17 CHAIRMAN NELSON: Excuse me. Who is this
18 speaking?

19 MR. ELLISON: I'm sorry. Bruce Ellison. I'm
20 sorry.

21 I was asking Mr. Taylor if he'd agree that that
22 would actually be incorporated into the Order so we don't
23 have to keep coming back and trying to redefine that.

24 MS. HILDING: This is Nancy Hilding. That you
25 put in what you just said in here, that if we want

1 something, we come to you, and we try to work it out.
2 And if we work it out, we come back to the Commission. I
3 think that's what you've just said.

4 MR. TAYLOR: Nobody's asked me yet.

5 MS. HILDING: Well, I'm asking you.

6 CHAIRMAN NELSON: Okay. Okay. At this point
7 Mr. Dorr is in the room. He'd like to speak -- do you
8 want to speak to this language specifically?

9 And then we're going to move into Commission
10 discussion. We need to move along.

11 MR. DORR: First off, I'd like to start off with
12 an objection. You opened that consultation that this
13 took place to counselors and TransCanada. You did not
14 include pro se Intervenors.

15 I did not participate in that. I participated a
16 little bit to let them know that you did not open that
17 consultation to pro se Intervenors. You said counselors
18 and TransCanada.

19 I want the pro se Intervenors included in the
20 language, and I want them included in the discussion
21 today. I do agree that that language should be in there.

22 Thank you.

23 CHAIRMAN NELSON: Thank you.

24 We're closing to committee discussion on my
25 Motion.

1 I am going to move to amend my Motion by
2 inserting -- after the word "nonexpert witnesses"
3 inserting the words "or any Intervenor."

4 Discussion on the amendment.

5 Let me just say, I mean, I hear what
6 Mr. Taylor's saying. It's in good faith. But my feeling
7 is if it's not part of this Order, we're going to end up
8 back here dealing with this question again, and I'd just
9 as soon have that dealt with up front.

10 Now I'd be open -- if Intervenor isn't the right
11 word, if we need to have pro se Intervenor, I'm open to
12 language. And I'm looking to Mr. Smith.

13 MR. SMITH: I think Intervenor includes pro se
14 Intervenor.

15 CHAIRMAN NELSON: I would agree.

16 MR. SMITH: One question here, though. Could
17 the Motion -- should the Motion, and opinion would be
18 good from anyone, do we need to amend paragraph 9 then to
19 conform to this if we need to?

20 Could we be authorized to do that?

21 CHAIRMAN NELSON: Yeah. I mean, if there's
22 language elsewhere that needs to conform, I think that
23 would be understood.

24 MR. SMITH: And I want to have a little time to
25 look at it carefully, but it may need to be changed.

1 Otherwise, it says -- because that says except
2 to other counsel of record. Well, it says -- what if we
3 just except in accordance and it's got procedures but the
4 provisions of this Protective Order and then cross out
5 the rest. Or leave it in but something like that.

6 CHAIRMAN NELSON: Yeah. Certainly we want the
7 rest of it to conform to whatever we're doing here, and
8 that would be understood.

9 Discussion on the Motion to Amend to add the
10 words "or any Intervenor."

11 Commissioner Hanson.

12 MS. BAKER: Jennifer Baker from Yankton.

13 CHAIRMAN NELSON: We are confined to Commission
14 discussion at this point.

15 MS. BAKER: Oh, I'm so sorry.

16 COMMISSIONER HANSON: Mr. Chair, would you
17 repeat the first change that appears after the words
18 "shall be viewable."

19 CHAIRMAN NELSON: Yes. "Shall be viewable" and
20 then I would strike "only by attorneys of record for the
21 party or parties to the Motion to Compel and attorneys"
22 and I would insert in lieu of the words "as provided
23 herein."

24 So it would say "shall be viewable as provided
25 herein for BOLD Nebraska and the Rosebud Sioux Tribe."

1 COMMISSIONER HANSON: Thank you.

2 CHAIRMAN NELSON: Additional discussion on the
3 Motion to Amend.

4 Seeing none, all those in favor of the Motion to
5 Amend will say aye. Those opposed, nay.

6 Commissioner Hanson.

7 COMMISSIONER HANSON: Aye.

8 CHAIRMAN NELSON: Commissioner Fiegen.

9 COMMISSIONER FIEGEN: Fiegen votes aye.

10 CHAIRMAN NELSON: Nelson votes aye. The Motion
11 carries. The Motion is amended.

12 Further discussion on the main Motion, which
13 would be to deny the Joint Motion to Vacate and to amend
14 the Protective Order as shown and as amended.

15 Commissioner Hanson? No?

16 No further discussion.

17 All those in favor will vote aye. Those
18 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. The Motion
24 carries. The Joint Motion is denied, and the Procedure
25 Order is hereby amended.

1 That brings us to the last question, and that is
2 how are we going to set a schedule to play this out?

3 Ms. Edwards stepped forward late yesterday with
4 some possible suggestions, and at this point I'm going to
5 turn it over to her.

6 MS. EDWARDS: Thank you, Chairman and
7 Commission.

8 As directed by the Commission at the last
9 hearing, Staff did come up with a proposal, and we
10 e-mailed it out late yesterday. And I apologize for all
11 the typos. There is no option 3, as many of you noticed.
12 When I was first trying to work it out I tried to work in
13 an option 3, and that didn't work out.

14 The dates I came to -- for example, the dates
15 for outstanding motions, May 26, that's a regularly
16 scheduled Commission meeting. And the due date for
17 motions, May 8, I came to that because we've had a lot of
18 motions filed on less than 10 days' notice. And the
19 burden that places on all the parties and I'm sure the
20 Commission as well is incredibly taxing, and I was just
21 hoping we could come to a date where we wouldn't be under
22 that much of a time crunch to respond to motions.

23 So counting back 10 days, which is the time
24 provided by law, put us at -- if they were heard on the
25 26th, put us at about I believe the 12th or 11th of May

1 for motions to be due. But I thought to be safe it might
2 be nice to have that weekend in there too to look at them
3 and to file responses.

4 But for the 10 days' notice I think by law it
5 was the 11th or 12th of May that those would need to be
6 due.

7 The reason that I did go with the May 26
8 Commission meeting was because should there be any new
9 information to come out as a result of any motions filed,
10 the prefiled -- the rebuttal date that I proposed was
11 June 9 or June 18, and I didn't want to end up in the
12 same crunch we've had. And we've heard about several
13 times already that people don't have time to review that
14 information so I wanted to back that up far enough.

15 And the rebuttal date that we proposed was in
16 response to a Commissioner's suggestion that they wanted
17 a full month or so to review the rebuttal. So that's
18 where those dates kind of came from. And I would be
19 willing to answer any questions that you might have.

20 CHAIRMAN NELSON: At this point this is going to
21 be a little bit difficult, but here's what I think I'm
22 going to do. I'm going to simply go down the list of
23 folks that are involved here, and I'd like to hear from
24 you two things, which is your preferred option, 1, 2, or
25 4 and with your preferred option, if there's anything

1 that concerns you with those dates.

2 I'm going to go to Keystone first.

3 MR. TAYLOR: The only option that works for us
4 is option 1. One of our critical witnesses is out of the
5 country I think August 1.

6 CHAIRMAN NELSON: Thank you. And I'm going to
7 just go down my telephone list.

8 Bob Gough.

9 Not hearing from Bob.

10 Kimberly Craven.

11 MS. CRAVEN: I would go with option number 2,
12 but I don't like the dates to have the rebuttal testimony
13 filed and the witness lists filed. I think that's
14 cutting it too close for a hearing that doesn't take
15 place until August. That gives you a whole month of kind
16 of lag time where we could be using that for discovery.

17 CHAIRMAN NELSON: Thank you.

18 Mr. Rappold.

19 MR. RAPPOLD: I would prefer an option that
20 goes with the last week of July. I would say the 27th
21 through the 31st without a break over the weekend I
22 believe is one of the options recommended, three days the
23 last week in July and four days the first week of August.

24 I did have some company coming from out of town
25 the first week of August, family members, but I just

1 think a schedule that goes through an entire week without
2 interruptions would be most productive and beneficial for
3 the Commission.

4 CHAIRMAN NELSON: Mr. Ellison.

5 MR. ELLISON: I guess my feeling is that I am
6 seeing that Commissioner Fiegen is not available Friday
7 the last week in July.

8 With all due respect, I believe that it would be
9 important for all Commissioners to be present during all
10 of the testimony as opposed to trying to catch up in
11 writing.

12 I believe that Commissioner Hanson at one point
13 talked about possibly going into the next week, and I'm
14 not sure how to resolve Mr. Rappold's conflict issues. I
15 think it's a good idea to have more than four days, and I
16 guess what I would like to recommend is two weeks be set
17 aside and we have that full following week, five days,
18 subject to Mr. Rappold's scheduling issues.

19 And I'd also like to see the Motion deadline
20 pushed back. I think that next week is way, way too soon
21 for motions. I'd like to propose several weeks after
22 that for motions and motion in limines filed a few weeks
23 before the actual hearing itself. Because then we will
24 have gotten through all the evidence, and we will know
25 what we will try and limine out if that will be an

1 appropriate approach.

2 But I think we need more than just four days,
3 and that would allow us to really proceed in a good,
4 orderly way that allows for the best presentation and the
5 best hearing of the evidence.

6 CHAIRMAN NELSON: Thank you.

7 Ms. Baker.

8 MS. BAKER: I concur with Mr. Gough's statements
9 regarding the Motion. And we would prefer option 1, but
10 we are flexible.

11 CHAIRMAN NELSON: Ms. Hilding.

12 MS. HILDING: Can you hear me?

13 The first comment is I actually have a question.
14 At one point in time Keystone I think was arguing that
15 you had to decide this within a year so you had to decide
16 everything by the date in September and then the
17 attorneys for the Intervenors argued that recertification
18 was not specifically referenced in that statute so that
19 statute doesn't apply.

20 Well, my question is are we looking at
21 everything has to be finished by some week in September
22 or not? Or have you figured that out?

23 CHAIRMAN NELSON: I don't believe that's the
24 case, no.

25 MS. HILDING: So we don't have to have it

1 figured out by sometime in September.

2 CHAIRMAN NELSON: That's my understanding.

3 MS. HILDING: Okay. So I had another question.
4 And I did ask Kristen Edwards this, but if she answered
5 me, I didn't see the answer.

6 So I had talked with her previously, and I said
7 where in this schedule is an opportunity for us to brief
8 arguments. You know, this is just about having experts
9 come and testify in front of you, which is different than
10 citing law and rule that's being violated and all of
11 that.

12 CHAIRMAN NELSON: Ms. Hilding, typically that
13 comes after the evidentiary hearing.

14 MS. HILDING: So we don't have the September
15 deadline so after this evidentiary hearing we will have
16 an opportunity to submit argument briefs which will be
17 set on the hearing date?

18 CHAIRMAN NELSON: That is the option of the
19 Commission, and typically that is what happens.

20 MS. HILDING: All right. Well, I mean, that
21 would affect how I think about this.

22 While it doesn't make any difference for me
23 personally, the Rally starts -- actually people start
24 arriving the weekend before August 3. That's when the
25 Rally starts. You know, 400 or 500,000 --

1 CHAIRMAN NELSON: Ms. Hilding, could you tell me
2 if you prefer 1, 2, or 4, please.

3 MS. HILDING: In terms of the dates of the
4 hearing, I don't care. In terms of the motions -- the
5 deadlines for motions filed, I think that is too soon in
6 every single instance. And in terms of the date for
7 rebuttal testimony being filed, I think that's too soon
8 in every instance, and in terms of witness lists, exhibit
9 lists filed, I think that's too soon in every instance.

10 So I don't care about the hearing date. I do
11 care about the deadlines for motions, rebuttal, and
12 witnesses, exhibit lists. And I would like to see those
13 moved further into the future.

14 CHAIRMAN NELSON: Thank you.

15 MS. HILDING: And another one of the people like
16 2,000 or something addressed that also.

17 CHAIRMAN NELSON: Thank you.

18 Mr. Blackburn.

19 MR. BLACKBURN: I would speak in support of
20 Mr. Ellison's comments.

21 I think having especially the Motion being
22 deferred by May 8 is just a week away, and that's
23 potentially going to create additional problems. Since
24 there's not a rush on those particular motions this
25 should be at least three weeks to a month to have those

1 motions be due.

2 Thank you.

3 CHAIRMAN NELSON: Thank you.

4 Mr. Clark.

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

6 Cheyenne River doesn't have any preference
7 regarding which option is selected for the hearing date.
8 But I would just, I guess, support what Mr. Ellison
9 talked about with the motions dates. But other than
10 that, we have no preference regarding option 1, 2, or 4.

11 CHAIRMAN NELSON: Thank you. And --

12 MR. GOUGH: Mr. Commissioner, Bob Gough. I was
13 on mute when you first --

14 CHAIRMAN NELSON: Go ahead, Bob.

15 MR. GOUGH: We would prefer 4, option 1 as a
16 fall back. And with Bruce we would join for moving
17 motion dates further back.

18 Thank you.

19 CHAIRMAN NELSON: Thank you.

20 Ms. Braun.

21 And, Mr. Dorr, you'll be next if you have any
22 comments.

23 MS. BRAUN: This is Joye Braun. I don't care
24 about the dates as far as the evidentiary hearing. It
25 doesn't matter to me. I can move anything around.

1 CHAIRMAN NELSON: Thank you.

2 MS. BRAUN: The other dates, those need to be
3 moved up.

4 CHAIRMAN NELSON: Thank you.

5 Mr. Dorr.

6 MR. DORR: This is Mr. Dorr. I support
7 everything that Bruce Ellison had said, and I'm amenable
8 to any date.

9 CHAIRMAN NELSON: Thank you.

10 Ms. Edwards, anything to add?

11 MS. EDWARDS: I suppose if the Commission wanted
12 to move the motions dates back, I guess Staff wouldn't
13 have a problem with that so long as everybody realizes
14 that that does not preclude motions from being filed
15 beforehand and, if they're preferred, now. If there's
16 information they think they're going to get out of a
17 Motion they want time to review, it might be prudent to
18 do so, file that Motion sooner rather than later so we
19 can get on the 26th agenda.

20 That being said, Staff's -- what we would
21 consider one of our critical witnesses is not available
22 that first week of July so that would present a
23 difficulty but -- and I just don't know if we're going to
24 be able to get it done in four days so that's a
25 consideration.

1 Thank you.

2 CHAIRMAN NELSON: Thank you.

3 Questions from the Commission. And I'm going to
4 start with some questions for Ms. Edwards.

5 With option number 4 would there be a reason not
6 to start with the 27th on Monday?

7 MS. EDWARDS: No reason at all. I just went
8 with the Tuesday because that's when the Commission
9 typically starts hearings. But it might actually be
10 prudent to start on Monday.

11 CHAIRMAN NELSON: Second question.

12 Dealing again with option 4, you've got rebuttal
13 testimony filed no later than June 9. And, I mean, I was
14 just surprised when I saw that because we've just, I
15 think, dramatically extended the amount of time that
16 folks have to deal with all of their discovery and to
17 process that and to incorporate it into their rebuttal
18 testimony, and then we've set the deadline for that or
19 proposed the deadline that takes about half of that time
20 away from them.

21 Why would we not make that like July 6, which
22 would give folks as much time to deal with their
23 discovery and their evidence and still give the
24 Commission about three weeks to read through it?

25 MS. EDWARDS: I'm certainly amenable to that. I

1 was just trying to give the Commission as much time as
2 they thought they needed given the amount of rebuttal
3 testimony I foresee. But certainly anything that the
4 Commission feels is enough time -- I think July 6, that
5 works for Staff.

6 CHAIRMAN NELSON: Additional Commissioner
7 questions.

8 Commissioner Fiegen.

9 COMMISSIONER FIEGEN: For TransCanada on the
10 rebuttal testimony will you do surrebuttal? So do you
11 have enough time?

12 Because it appears to me you're going to -- I
13 mean, we're all going to have a lot of rebuttal testimony
14 to read because of the new discovery that has been
15 released. Can you give me a viewpoint on --

16 MR. TAYLOR: Surrebuttal is conceivable, and I
17 would guess pretty likely. Just don't know yet. We
18 don't know how far the net is going to be cast.

19 COMMISSIONER FIEGEN: Okay.

20 CHAIRMAN NELSON: Additional questions.

21 COMMISSIONER HANSON: Mr. Chairman.

22 CHAIRMAN NELSON: Let me just ask a follow up.

23 Ms. Edwards, on the deadline for filing motions
24 as being May 8, that just strikes me as being too early.

25 Let me ask you this: Would it be problematic if

1 we did not establish a firm -- because there's going to
2 be a number of -- I mean, we've had a number of different
3 motions that have just been mentioned. If we didn't set
4 a deadline but also made it very clear that we are going
5 to need 10 days in order to notice these properly and get
6 responses and then kind of let things flow from there,
7 would that be problematic?

8 MS. EDWARDS: I don't see it being problematic.
9 No.

10 CHAIRMAN NELSON: Thank you. And I do
11 appreciate your comments about the fact that, you know,
12 we've been dealing with motions on very short time frames
13 and we need to get back to, you know, a 10-day notice,
14 and so thank you.

15 Additional questions, Commissioner Hanson.

16 COMMISSIONER HANSON: That last question really
17 threw me off. I find it extremely problematic for
18 myself, and I'm very concerned about not having a date
19 certain for filing for motions.

20 Mr. Taylor, you had stated that one of your
21 expert witnesses would not be available for a certain
22 time frame.

23 What time frame is that?

24 MR. TAYLOR: My understanding is she leaves the
25 country, August 1, and that the arrangements for her trip

1 have been made for a long time.

2 COMMISSIONER HANSON: Okay. August 1. And so
3 it would have to be prior -- do you anticipate that
4 person to participate in the entire process, or is it
5 just a presentation at some point?

6 MR. TAYLOR: Entire process. Former Chief
7 Engineer Meera Kothari. Critical witness for us.

8 COMMISSIONER HANSON: Thank you.

9 MS. HILDING: This is Nancy Hilding. Can I ask
10 a question?

11 CHAIRMAN NELSON: Very briefly, please. We are
12 up against a 12:30 deadline.

13 MS. HILDING: Some folks have asked if they can
14 have their witnesses attend by teleconference or
15 videoconference.

16 Have you figured that out generically?

17 CHAIRMAN NELSON: I don't believe so. I'm going
18 to ask -- I don't believe so.

19 Ms. Edwards.

20 MS. EDWARDS: I believe what TransCanada had
21 agreed to was that notice would need to be submitted, and
22 then TransCanada would have what, the opportunity to
23 object but otherwise as long as they submitted notice as
24 Staff did that there was no problem.

25 MS. HILDING: So do you have the capacity to do

1 videoconferencing like Skype with witnesses, or are you
2 only doing telephone audio conferencing?

3 CHAIRMAN NELSON: You know, I'm not sure we need
4 to go there at this point, Ms. Hilding.

5 Additional Commissioner questions.

6 Mr. Taylor.

7 MR. TAYLOR: On the issue of motion deadlines,
8 there should be a motion deadline for substantive
9 motions, and then there could be a second motion deadline
10 for limine motions, limine motions meaning evidentiary
11 limiting only. Substantive motion deadline's got to get
12 out of the way, and it's got to get out of the way fairly
13 soon. Limine motion deadline different story.

14 CHAIRMAN NELSON: Thank you.

15 Additional Commissioner questions.

16 I'd remind everybody on the phone to put your
17 phones on mute.

18 Thank you.

19 Motions from the Commission.

20 Commissioner Smith -- Mr. Smith.

21 MR. SMITH: With Meera's travel plans, if
22 necessary would her rebuttal potentially be able to be
23 done telephonically? If she was -- you know, if she
24 could telephonically -- where is she going to be?

25 MR. TAYLOR: John, we just don't know the answer

1 to that. I know that she -- when I spoke to her about
2 this, about the possibility of running into August, she
3 made it very clear -- I don't know if it's a business
4 trip or a pleasure trip. She made it very clear that she
5 was out of the country, and she did not think she would
6 be readily accessible.

7 COMMISSIONER HANSON: Excuse me. Mr. Chairman,
8 could I ask Mr. Taylor a question?

9 He had made a suggestion regarding two different
10 types of motions. And what was that suggestion again?

11 That primary motions --

12 MR. TAYLOR: Substantive.

13 We just got a text from Meera who said I can
14 push to the 4th if I have to, but that is as far as I can
15 go.

16 Back to the question at hand. It was
17 substantive motions versus motions in limine.

18 COMMISSIONER HANSON: Motions in limine and you
19 were referring to those as being ones which could be --

20 MR. TAYLOR: Typically motions in limine are
21 motions that deal with refined questions of
22 evidentiary -- of how evidence will be handled in the
23 case. And typically those can be heard in fairly close
24 proximity to the start of the case.

25 Substantive motions, motions that deal with all

1 the matters that we're concerned about in this case,
2 should be heard a ways away so that you have an
3 opportunity to formulate how your final presentation's
4 going to go.

5 COMMISSIONER HANSON: Thank you.

6 Mr. Chairman, could we incorporate suggestions
7 of that nature so that we could obtain -- in your motion
8 so that we could obtain --

9 CHAIRMAN NELSON: At this point we don't have a
10 motion so you can go for it.

11 COMMISSIONER HANSON: I thought you made a
12 motion. I was trying to figure out all of these dates
13 marking down what everyone's time frame was, and it
14 appears that we're not going to be able to make everyone
15 happy.

16 CHAIRMAN NELSON: Commissioner Fiegen.

17 COMMISSIONER FIEGEN: I move that we move the
18 evidentiary hearing to the week of July 27, move that we
19 have substantive motions submitted by May 26, heard on
20 June 11, move that we have rebuttal testimony filed by
21 June 26, and that the witness list is filed by July 10.

22 What I tried to do, Mr. Chairman, is move back
23 that motion. I think I'm missing maybe one more motion
24 that TransCanada needs on -- I don't even know if you
25 said limiting or --

1 COMMISSIONER HANSON: Limine.

2 MR. TAYLOR: It's a Latin word. Limine.

3 COMMISSIONER FIEGEN: So we may need to have
4 that amended. But what I looked at -- I do have a
5 commitment, but I'm going to try to work around that. I
6 do believe this hearing is extremely important and five
7 days -- it will be a long five days, I'm sure, or four
8 days or whatever.

9 MR. TAYLOR: If you set a limine motion deadline
10 that would fall fairly shortly after the witness list is
11 filed, then that would be fairly workable. Could
12 probably do it before the final witness list is filed,
13 but, you know, it's conceivable that one limine motion
14 could be that this witness is not permitted to testify
15 for reason X.

16 I would think you could do limine motions on
17 less than 10 days' notice too.

18 COMMISSIONER FIEGEN: Let me look at my July 10
19 witness list and see when our Commission meetings are
20 that --

21 CHAIRMAN NELSON: Ms. Edwards, did you indicate
22 that one of your witnesses is not available that week?

23 MS. EDWARDS: Yes. Our consultant is not
24 available that week.

25 CHAIRMAN NELSON: Not available telephonically

1 either?

2 MS. EDWARDS: No.

3 MR. GOUGH: Mr. Commissioner, this is Bob Gough,
4 InterTribal COUP. Option 4, the very last line seems to
5 preclude rebuttal to anyone but Keystone. And not
6 withstanding your Motion objecting to our presenting
7 rebuttal witnesses and moving to exclude, I would ask
8 that rebuttal be broader than just Keystone.

9 Thank you.

10 CHAIRMAN NELSON: Yeah. Those issues will be
11 dealt with later.

12 MR. GOUGH: Thank you.

13 COMMISSIONER FIEGEN: You know, Mr. Chairman, I
14 thought your witness was available by phone so I'm sorry.
15 I didn't realize that.

16 So does your witness have to be here all five
17 days and how -- because it sounds like TransCanada's
18 witness is their main witness. It's their engineering
19 person. So, I mean, they have to be here all five days.
20 Could you --

21 MS. EDWARDS: I don't think -- given the fact
22 that we are -- and I haven't run this by him obviously,
23 but given the fact that we broadcast live on the
24 internet, I think that he would not have to be here live
25 all five days because he could listen in and still know

1 what's going on.

2 COMMISSIONER FIEGEN: So is he your main
3 consultant?

4 MS. EDWARDS: Yes.

5 CHAIRMAN NELSON: If we were to -- Ms. Edwards.

6 MS. EDWARDS: Brian pointed out that, I mean, if
7 he's not available, he wouldn't even be available to
8 listen. I was just thinking could he listen outside the
9 room. I didn't consider whether or not he would be able
10 to listen from wherever he's at.

11 MR. ELLISON: This is Bruce Ellison on behalf of
12 DRA. I would just like to interpose an objection to any
13 TransCanada or Staff witnesses appearing telephonically.
14 I think even with teleprompters or -- teleconferencing it
15 would be extremely difficult for cross-examination.

16 I think it's incredibly important that the
17 Commission actually see and hear the witnesses and
18 evaluate their credibility. And at least as far as DRA
19 is concerned any TransCanada or Staff witnesses fit into
20 that category.

21 We are not suggesting in any way that we're
22 going to not challenge the credibility of any witnesses
23 or their testimony. So I would object to anything other
24 than live testimony.

25 CHAIRMAN NELSON: Thank you.

1 Mr. Taylor.

2 MR. TAYLOR: What's good for the goose is good
3 for the gander. If you want to do that, then it's all
4 the way across the board, and we're game.

5 CHAIRMAN NELSON: I understand, yes.

6 MS. HILDING: This is Nancy Hilding. There is
7 videoconferencing now --

8 CHAIRMAN NELSON: Ms. Hilding.

9 MS. HILDING: I'll shut up.

10 CHAIRMAN NELSON: Thank you.

11 COMMISSIONER FIEGEN: I have a question of
12 Staff.

13 You gave us these three options, but they're not
14 really three options. Or you are offering these options
15 because you think that the Commission can decide among
16 these three options even though your main expert is not
17 available or your main consultant?

18 MS. EDWARDS: Right. I figured if it presents a
19 challenge for Staff and I have to go back and see if
20 there's anybody else in the office that can adopt his
21 testimony, I'll do that.

22 But I didn't want to put the Commission in a
23 position where they had nothing to decide from because
24 one of Staff's witnesses was unavailable so I had to put
25 it out there and then just let the Commission decide.

1 COMMISSIONER HANSON: Excuse me. Commissioner
2 Fiegen. Would you go through -- I have a lot of notes on
3 my paper here, and I'm trying to figure out the date.
4 You said evidentiary hearing the week of July 27 through
5 the 31st and any new substantive motions to be filed no
6 later than --

7 COMMISSIONER FIEGEN: May 26, being heard
8 June 11.

9 COMMISSIONER HANSON: With responses due --

10 COMMISSIONER FIEGEN: Rebuttal testimony
11 June 26. Witness list --

12 COMMISSIONER HANSON: Just a minute. Okay.

13 COMMISSIONER FIEGEN: Witness list July 10, and
14 I'm certainly open to moving that up a little in case we
15 need to hear different motions about witness lists.

16 COMMISSIONER HANSON: And then motions in
17 limine, would you place those just after the witness
18 lists?

19 COMMISSIONER FIEGEN: I am open to that
20 amendment, correct.

21 COMMISSIONER HANSON: I'll let you amend your
22 own rather than doing it formally, if you're so inclined.

23 CHAIRMAN NELSON: While Commissioner Fiegen
24 looks at that I'm going to ask Ms. Edwards another
25 question.

1 I think at some point the week of August 10 had
2 been thrown out as a possibility, but I see that was not
3 on your options.

4 Is it an option, or do you know of conflicts
5 with that week?

6 MS. EDWARDS: I'm not aware of conflicts with
7 that week. I thought maybe one of the Commissioners had
8 a conflict, but I don't know for sure.

9 COMMISSIONER HANSON: As I recall, I sent an
10 e-mail stating that I was open for all three.

11 CHAIRMAN NELSON: Okay.

12 COMMISSIONER HANSON: All three of the options.

13 CHAIRMAN NELSON: Okay. But you don't know
14 about the week of the 10th. I'm going to look at
15 TransCanada. Is the week of the 10th any better?

16 MR. TAYLOR: We just sent a text to Meera.
17 We'll find out here in a second.

18 CHAIRMAN NELSON: Thank you.

19 Staff, I'm looking at you all.

20 COMMISSIONER FIEGEN: I know originally you had
21 some Dakota Access filings --

22 MS. EDWARDS: Dakota Access rebuttal testimony
23 is due August [sic] 14, but we know far enough out that I
24 feel we could make accommodations and get our testimony
25 in ahead of time.

1 CHAIRMAN NELSON: Okay. I'm going to ask -- at
2 my peril I'm going to ask for any of the folks on the
3 phone do you have any serious conflicts with the week of
4 August the 10th?

5 MS. REAL BIRD: This is Thomasina for the
6 Yankton Sioux Tribe. I'm attorney of record in a case
7 that's set for trial that week in northern Montana.

8 CHAIRMAN NELSON: Thank you.

9 MS. REAL BIRD: Thank you.

10 CHAIRMAN NELSON: And by that do I take it then
11 that Ms. Baker would be able to cover for you in this
12 case?

13 MS. REAL BIRD: I'm attorney of record in this
14 case as well. I also supported her pro hac, and I am not
15 comfortable sending just Ms. Baker. She's a very
16 qualified attorney, but, no. I'm going to be involved in
17 this trial as well.

18 MS. EDWARDS: Can I interject? It might help.

19 I did hear back from that witness, and he would
20 be able to call in as long as he could call in and get a
21 specific period of time to call in for the week of the
22 27th. If that helps, and I sincerely hopes it does.

23 CHAIRMAN NELSON: Okay. I need to follow up
24 with that.

25 Does this witness need to listen to all of the

1 proceeding, or do they simply need to testify for you?

2 MS. EDWARDS: We're in agreement he just needs
3 to testify. And, I mean, if there's any prefiled
4 testimony we need to send to him, we'll certainly do
5 that.

6 CHAIRMAN NELSON: Okay. If we were to extend
7 Commissioner Fiegen's Motion to include August 3 and 4,
8 would that allow your witness then to testify on the 3rd
9 or the 4th?

10 MS. EDWARDS: Yes. I actually did contact him,
11 though, and he could make that week of the 27th work as
12 long as he had a specific time.

13 CHAIRMAN NELSON: I understand. But we've got
14 an objection from one of the parties to doing that.

15 MS. EDWARDS: My understanding is he could be
16 here that first week.

17 CHAIRMAN NELSON: Oh, that first week.

18 MS. EDWARDS: That week of August 4.

19 MR. GOUGH: This is Bob Gough. I have
20 commitments the 10th through the 13th.

21 CHAIRMAN NELSON: Thank you. I think that is
22 off the table based on Ms. Real Bird's objection.

23 Commissioner Fiegen, did you find a date for the
24 deadline for motions in limine?

25 COMMISSIONER FIEGEN: I would, Mr. Chairman,

1 move to amend the witness list to be July 7 and then
2 July 10 to be the other motions.

3 CHAIRMAN NELSON: I think we'll just consider
4 that a friendly amendment as part of your main Motion.

5 I would move to amend Commissioner Fiegen's
6 Motion by extending the dates of the hearing to include
7 August 3 and 4.

8 Discussion on the amendment?

9 If I have absorbed everything correctly, I think
10 that would allow for testimony from all of the experts
11 that need to be -- they won't be able to be in the room
12 the whole time, but at least we will be able to avail
13 ourselves of their testimony.

14 I also wrestle with the question of whether or
15 not we can accomplish what we need to in five days. I
16 don't know if the answer to that is yes or no. And
17 perhaps having two extra days wouldn't be harmful.

18 Further discussion on the Motion to Amend?

19 Commissioner Fiegen.

20 COMMISSIONER FIEGEN: So, Mr. Chairman, are we
21 also stating then that all people that participate,
22 witnesses, need to be here in person?

23 CHAIRMAN NELSON: I don't think that's -- that's
24 not part of my Motion. I think that's something that can
25 be -- there's apparently already -- they've had a

1 conference on that issue, and I think that issue will be
2 handled outside of our purview.

3 COMMISSIONER FIEGEN: So your Motion is just
4 because you think seven days is better than five?

5 CHAIRMAN NELSON: And in order to allow Staff's
6 witness to be present in the room, to add those August
7 dates, yes.

8 Additional discussion on the Motion to Amend.

9 Seeing none, all those in favor of the Motion to
10 Amend by adding August 3 and 4 as hearing dates will say
11 aye. Those opposed, nay.

12 Commissioner Hanson.

13 COMMISSIONER HANSON: Aye.

14 CHAIRMAN NELSON: Commissioner Fiegen.

15 COMMISSIONER FIEGEN: Fiegen votes no.

16 CHAIRMAN NELSON: Nelson votes aye.

17 Motion carries. We have added those two dates.

18 We are now back to Commissioner Fiegen's Motion.
19 And I'm going to reread it just to make sure that
20 everybody's on the same page.

21 As amended, the evidentiary hearing would run
22 July 27 through the 31st and the 3rd and the 4th of
23 August. Motions would be required to be filed by May 26.
24 Those outstanding motions would be heard at the June 11
25 meeting. Rebuttal testimony would be filed no later than

1 June 26. Witness lists and exhibit lists would be filed
2 by July 7. Motions in limine would be filed by July 10.

3 Commissioner Fiegen; is that correct?

4 COMMISSIONER FIEGEN: Yes. That's correct.

5 CHAIRMAN NELSON: Discussion on the Motion.

6 COMMISSIONER HANSON: Mr. Chairman, do we have a
7 date for written responses due from the new -- the
8 substantive motions?

9 We have -- as I understand, the Motion states
10 that any new substantive motions to be filed no later
11 than May 26. But when are the written responses due?
12 Would that be 10 or 12 days later?

13 COMMISSIONER FIEGEN: Or June 11. Right?

14 CHAIRMAN NELSON: I would -- I mean, I'm looking
15 at Ms. Edwards. I'd propose -- well, what would you
16 propose, Ms. Edwards?

17 MS. EDWARDS: I'm thinking -- because this is
18 off the top of my head I might have to turn to one of the
19 other lawyers, but I think by law it's five days before a
20 hearing. 10 days to respond and -- am I wrong?

21 I would say five days after a Motion's filed
22 would be safe.

23 MR. MOORE: Yes.

24 MR. SMITH: Five business days?

25 MS. EDWARDS: Yes.

1 CHAIRMAN NELSON: So you said five business days
2 after the 26th; is that correct?

3 COMMISSIONER HANSON: After the 26th of May?

4 MS. EDWARDS: Yes.

5 COMMISSIONER HANSON: That would be the 2nd of
6 June?

7 CHAIRMAN NELSON: Correct.

8 COMMISSIONER HANSON: So if we could incorporate
9 that as part of the Motion, I would be --

10 CHAIRMAN NELSON: Commissioner Fiegen, are you
11 amenable to that?

12 COMMISSIONER FIEGEN: Yes.

13 CHAIRMAN NELSON: Okay. Additional discussion
14 on the Motion?

15 I guess I will simply say as I look around the
16 room there's a lot of -- nobody's happy. We'll put it
17 that way. But that's the -- I guess maybe the penalty
18 that we pay for having changed our plan and given folks
19 some more time to dig into the facts and the evidence in
20 the case. And so I think this may be the best that we
21 can accomplish.

22 Additional discussion?

23 Seeing none, all those in favor of the Motion as
24 amended will vote aye. Those opposed, nay.

25 Commissioner Hanson.

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COMMISSIONER HANSON: Aye.

CHAIRMAN NELSON: Commissioner Fiegen.

COMMISSIONER FIEGEN: Fiegen votes aye.

CHAIRMAN NELSON: Nelson votes aye.

The Motion carries.

Is there anything else for the good of the
order?

(The proceeding is concluded at 12:42 p.m.)

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 30th 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 2nd day of
14 June, 2015.

15

16

17

18 _____
19 Cheri McComsey Wittler,
20 Notary Public and
21 Registered Professional Reporter
22 Certified Realtime Reporter

23

24

25

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