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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
May 26, 2015

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BEFORE THE PUBLIC UTILITIES COMMISSION

CHRIS NELSON, CHAIRMAN
KRISTIE FIEGEN, VICE CHAIRMAN (telephonically)
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 26th day of May, 2015.

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

5 At some point very shortly I'm going to have
6 that memorized.

7 Three motions we're going to deal with today.
8 Shall the Commission grant Gary Dorr's Motion to Join?
9 Shall the Commission grant the Joint Motion? And shall
10 the Commission grant the Motion to Preclude?

11 And I think the best way to go about this, Gary,
12 we're going to take your Motion first to see if we get
13 you into this, and then we'll move from there.

14 So, Mr. Dorr, if you want to come and make your
15 case.

16 MR. DORR: My name is Gary Dorr. Thank you for
17 allowing me to speak today.

18 My Motion to Join is based on the fact that I
19 have requested items through discovery of TransCanada,
20 and they have either not provided me the discovery,
21 provided me incorrect discovery, or incomplete discovery.
22 And I believe it's based on Section 15-6-37B, failure to
23 comply with an order.

24 And the Order that I am stating that TransCanada
25 did not comply with was the permit -- the Order by the

1 Public Utilities Commission to permit discovery which was
2 made on December 17, 2014. TransCanada is required to
3 comply with discovery. That is the Order that I am
4 entering this under, not the Order for the compelling of
5 evidence because I didn't -- I didn't get that.

6 Now according to 15-6-37B-2, sanctions by a
7 court in which an action is pending if a party or office
8 or director or managing agent, other party or person
9 designated under Subdivision 15-6-30B-6 or 15-6-31A to
10 testify on behalf of a party fails to obey an order to
11 provide or permit discovery including an order made under
12 15-6-37A or 15-6-35, the court in which the action is
13 pending may make such orders in regard to the failure as
14 are just and among the others the following.

15 So that is why I'm requesting to enter into
16 this, to join this. Because, as I have stated in my
17 Motion, TransCanada did not provide complete answers to
18 my requests for discovery. They provided incorrect
19 answers. They provided answers to questions that I did
20 not ask, as it was stated in my -- and I don't know if I
21 should read that for the record here.

22 CHAIRMAN NELSON: You've got it in your Brief so
23 you don't need to.

24 MR. DORR: Okay. So that is why I'm requesting
25 to be in this. Now I don't know if you want me to go

1 further into this or just state the case to come into --
2 to join the Order.

3 CHAIRMAN NELSON: I think that's sufficient.
4 I'm going to go around, and then we'll come back to you
5 for rebuttal, if there's anything that you think you want
6 to add at that point.

7 We've got a number of Intervenors, and I guess
8 I'd say to the Intervenors you obviously have the right
9 to speak but only if you have something that you need to
10 add since this is not any of your all's Motion.

11 Any of the Intervenors?

12 Not hearing anything there. We will turn to
13 Staff.

14 MS. EDWARDS: Staff has nothing to add.

15 Thank you.

16 CHAIRMAN NELSON: We will turn to TransCanada.

17 MR. MOORE: Thank you, Commissioner Nelson.

18 Keystone does not object to Mr. Dorr joining the Joint
19 Motion to Amend.

20 Keystone responds to Mr. Dorr within the context
21 of its response to the Joint Motion but does not object
22 procedurally to him joining the Joint Motion.

23 CHAIRMAN NELSON: Thank you.

24 Mr. Dorr, any rebuttal? Or anything that you
25 might have wanted to add?

1 MR. DORR: No. Not at this time.

2 CHAIRMAN NELSON: Thank you. Questions from the
3 Commission.

4 Is there a Motion?

5 COMMISSIONER FIEGEN: Mr. Chairman.

6 CHAIRMAN NELSON: Yes.

7 COMMISSIONER FIEGEN: In HP14-001, move that the
8 Commission grant Gary Dorr's Motion to Join.

9 CHAIRMAN NELSON: Discussion on the Motion.

10 COMMISSIONER FIEGEN: It looks like he is
11 prepared to state his case in the Motion. His draft
12 brief looks more like he's ready to state his case more
13 than joining the Motion. So procedurally his brief looks
14 like he could be on his own, but I believe it's very
15 proper that he joins the other motions.

16 CHAIRMAN NELSON: Additional discussion.

17 Seeing none, all those in favor of the Motion
18 will vote aye. Those opposed, nay.

19 Commissioner Hanson.

20 COMMISSIONER HANSON: Aye.

21 CHAIRMAN NELSON: Commissioner Fiegen.

22 COMMISSIONER FIEGEN: Fiegen votes aye.

23 CHAIRMAN NELSON: Nelson votes no.

24 The Motion carries.

25 That brings us then to the Joint Motion from

1 Standing Rock, Cheyenne River, Rosebud, Yankton Sioux
2 Tribe, Dakota Rural Action, Indigenous Environmental
3 Network, InterTribal Council On Utility Policy, and Bold
4 Nebraska for a Motion to Exclude Evidence and Testimony
5 by TransCanada.

6 Who is going to lead off on this one?

7 MS. REAL BIRD: This is Thomasina Real Bird for
8 the Yankton Sioux Tribe. I'll lead off on it.

9 CHAIRMAN NELSON: Very good. Go ahead. You are
10 coming in much clearer than you did last time on the
11 cellphone so you're sounding good.

12 MS. REAL BIRD: Thank you very much,
13 Mr. Chairman and members of the Commission. On behalf of
14 the Yankton Sioux Tribe, this is Thomasina Real Bird.

15 Yankton joins in the Motion because we were
16 granted an Order granting in part and denying in part a
17 Motion to Compel Discovery on April 17. Similar orders
18 were also in favor of the Dakota Rural Action and
19 Standing Rock Sioux Tribe, and it is our position in the
20 Motion that TransCanada has violated all three orders.
21 And we're asking that the Commission exclude TransCanada
22 from entering the same testimony in evidence, similar to
23 what it has done to 17 Intervenors in this case.

24 As to Yankton, we received the Order granting in
25 part for Interrogatories 15 and 21. And also for Request

1 for Production of Documents Nos. 2, 3, 4, 7, and 8. And
2 it is our position that the Request for Production on
3 three of the items were not complete. Specifically,
4 No. 2, 3, and 4.

5 Attachment C to the Motion is my letter to
6 TransCanada's counsel detailing the deficiencies and the
7 incompleteness. And so I don't know if you want me to go
8 over those, but they're relatively the same.

9 Our requests include all documents, and the
10 items that we received were reports for No. 2 and No. 3.
11 And so it doesn't seem responsive to only provide reports
12 when the request and the Order that granted the requests
13 were all documents.

14 And I believe it was Commissioner Fiegen that
15 made the distinction between all documents versus
16 something constituting an actual specific document. And
17 so these requests were pretty broad, and the responses we
18 received back were fairly narrow. So we do believe
19 TransCanada not to have complied with the Order granting,
20 in part, the Motion to Compel as to No. 2 and No. 3 RFPs.

21 As for No. 4, we requested all documents
22 relating to required permits both in South Dakota and
23 outside of South Dakota, including permit applications
24 which were denied, revoked, or suspended.

25 And our letter does detail the three ways we

1 believe that TransCanada has not complied with the Order
2 granting a Motion to Compel as to Request for Production
3 No. 4.

4 As to the Presidential Permit, we only provided
5 one -- we were only provided with one of the Presidential
6 Permit Applications. We do happen to know that there
7 were -- there was a previous one submitted in 2008 and
8 denied in 2012. And so knowing that that one wasn't
9 provided, we also wonder what else wasn't provided.

10 The response for No. 4 also contained
11 nonenvironmental permits obtained in South Dakota. We
12 need to know whether there were nonenvironmental permits
13 that were denied, revoked, or suspended. And also were
14 there environmental permits that fit in any of those
15 categories? Because the response only indicated
16 nonenvironmental.

17 And so the last one is that we received the
18 nonenvironmental permits obtained in South Dakota. And
19 our Request for Production No. 4 is applicable to both in
20 South Dakota and outside South Dakota. So we -- it seems
21 that the response was deficient in that regard.

22 And so I would also like to note that our letter
23 was sent on April 23, 2015. We did not receive a
24 response to the letter to say, you know, what you got was
25 it or why what we received is complete in the Applicant's

1 eyes. And then shortly after there were three motions
2 that were filed. I believe two were already dealt with,
3 and now we have the pending -- the pending Motion to
4 Exclude Evidence.

5 And so just to go over some of the authority for
6 this Commission to go ahead and exclude evidence, it's
7 set out pretty well in the Brief. There's various case
8 law as well as the codified laws that support it. Also
9 the Commission itself previously granted similar relief
10 upon the Application -- or the request of TransCanada to
11 exclude 17 Intervenors from participating in certain
12 parts of the hearing and the case. And so we would ask
13 that the Commission also extend that same relief to the
14 movants in this Motion.

15 And I would like to address two points that I
16 think TransCanada has made in response that it -- you
17 know, it argues that it really only had a few days to
18 comply with the orders granting the Motion to Compel.
19 And that's true if you consider only the date that the
20 orders were granted to the date that TransCanada was
21 ordered to comply.

22 But it's not true if you consider that these
23 discovery requests were submitted to TransCanada months
24 ago and TransCanada failed to comply with discovery
25 requirements. I guess I don't have the exact dates in

1 front of me, but it was over three months ago when
2 discovery had commenced. And some of the questions that
3 TransCanada was ultimately compelled to comply with date
4 back to the first round in this case.

5 And so I would just respond to that position
6 that there was little time to respond with that statement
7 that there was months to comply, and they chose not to.

8 And then, second, TransCanada's response takes
9 the position that the movants demonstrate the opportunistic
10 [sic] nature of both motions and are speaking about the
11 Motion to Continue the hearing as well as the pending
12 Motion. And Keystone takes -- or TransCanada takes the
13 position that the two motions are mutually exclusive.
14 And I would urge the Commission to consider that they're
15 not.

16 It is quite possible in many cases and again
17 here that discovery is voluminous, and it's quite a bit
18 of documents. We have on the record how many documents
19 were produced. But it is also possible and true here
20 that the discovery provided to date is still not
21 complete.

22 So I would urge the Commission to reject
23 TransCanada's characterization of the Motion as being
24 opportunistic. I think that's a very insensitive
25 response from TransCanada.

1 I believe the other movants will speak to an
2 Affidavit submitted by TransCanada's Associate General
3 Counsel that essentially acknowledged TransCanada's
4 failure to comply with the Orders granting the Motions to
5 Compel.

6 Yankton did not receive this particular
7 Affidavit so we'll leave the arguments on that portion to
8 some of the other movants.

9 Thank you.

10 CHAIRMAN NELSON: Okay. I'm just going to go
11 down the list that I've got of the other Intervenors that
12 are on the line. And then, Mr. Dorr, I'll come to you,
13 Staff, and then back to Keystone.

14 Mr. Gough.

15 MR. GOUGH: Thank you. I just had to take it
16 off of mute. I would just stand by and second the
17 testimony you just received in the argument.

18 Thank you.

19 CHAIRMAN NELSON: Thank you.

20 Kimberly Craven, first of all, have you joined
21 us? Not hearing Ms. Craven.

22 Matt Rappold.

23 MR. RAPPOLD: Thank you, Commissioner Nelson.
24 Can you hear me?

25 CHAIRMAN NELSON: Yes.

1 MR. RAPPOLD: Okay. Rosebud joined the Motion
2 on the grounds that Rosebud is entitled to receive based
3 on our Interrogatories continuing production of documents
4 in discovery and responsive to Interrogatories based on
5 our requests that Keystone TransCanada provide us answers
6 to all of the other parties' discovery requests.

7 And so we would support Ms. -- the other
8 parties' arguments on this issue. And it does appear
9 that TransCanada has not fully complied with the Order to
10 Compel granted by the Commission.

11 Additionally, we would ask that the Commission
12 take particular notice of an Affidavit provided by
13 Mr. White on behalf of TransCanada -- and I'm
14 paraphrasing here so forgive me, but basically indicating
15 to the Commission that it's impossible for us to do this
16 in a short period of time that you've allowed. And
17 because it's impossible, we're not going to do it.

18 I don't feel that that's an appropriate way to
19 respond to the Order to Compel Production of Documents
20 and Discovery. I think a better way to respond would
21 have been to ask the Commission for additional time to
22 respond more completely and fully to the Commission's
23 Order to Compel.

24 However, Keystone chose not to do it that way.
25 They chose to tell the Commission that we're not going to

1 do it. My understanding, an Order to Compel is not
2 discretionary. Compliance with an Order to Compel is not
3 discretionary, and compliance with an Order to Compel is
4 mandatory.

5 If parties don't comply with orders of the
6 Commission and Orders to Compel as the Commission has
7 made clear, there are consequences for failing to do
8 that. The Commission previously stated by order one of
9 the consequences for -- I believe it was 17 other parties
10 for failing to abide by the Procedural Schedule the
11 consequence for those parties, farmers, ranchers, regular
12 every day people, the consequence for those parties is
13 that they're not allowed to file testimony. That's their
14 consequence.

15 Now we have what has been referred to as one of
16 the largest corporations in the North American continent
17 blatantly telling the Commission that we're not going to
18 comply with your Order. We would ask that the
19 consequences for TransCanada who clearly has the
20 resources and the means to comply with Commission's
21 orders, clearly understands that if they are not able to
22 comply with an order in the time period provided, that
23 they should have asked for more time.

24 They understand the difference. They could have
25 asked the Commission for additional time to provide for a

1 time period to comply with discovery Motion -- or the
2 Order to Compel, rather.

3 After the fact, I believe they submitted another
4 Affidavit and said we might be able to comply and -- I'm
5 paraphrasing. We might be able to comply but it's going
6 to cost an awful lot and it's going to take an awful lot
7 of time.

8 I would submit to the Commission if that was
9 their position, they should have submitted that prior to
10 not complying with the Order and asked for additional
11 time to comply with the Order to Compel.

12 Based on those grounds we would ask that the
13 Commission grant the Motion to Exclude Testimony and
14 Evidence presented by Keystone for failing to abide by
15 the Commission's Order to Compel Discovery.

16 Thank you.

17 CHAIRMAN NELSON: Thank you.

18 Mr. Capossela.

19 MR. CAPOSSELA: Thank you, Mr. Chairman. Peter
20 Capossela, Standing Rock Sioux Tribe. And I thank the
21 Commission for permitting me to appear telephonically
22 today.

23 The submittal by the Staff counsel I think is
24 very helpful in setting out the analysis for the
25 decision-making process on a Motion such as the Motion to

1 Preclude that's before the Commission today.

2 I think there's kind of a two-part process
3 described by Staff counsel. A, did TransCanada violate
4 the discovery orders? And, B, is the sanction of
5 preclusion the appropriate remedy? With respect to
6 discovery orders, the Motion demonstrates that
7 TransCanada did, in fact, violate the orders in at least
8 two respects.

9 First, it didn't produce all the documents that
10 it was required to produce. Second, the manner in which
11 the documents were produced in a cloud-based storage
12 file, what were largely inaccessible or partially
13 inaccessible, in any event, it took days and weeks after
14 the time line, after the deadline established by the
15 Commission for production of documents, for TransCanada
16 to remedy that. And even still the documents have not
17 been produced in accordance with Rule 34 which requires
18 that they be produced in the manner that they're
19 organized in the ordinary course of business.

20 And a party can produce a lot of documents yet
21 still be in violation of the rules. And I think that's
22 the situation that we have here. Costs or inconvenience
23 are not excuses to not comply with the discovery rules
24 and discovery orders.

25 The documents that were produced were not

1 produced in a manner that was easily accessible and
2 timely, and they didn't produce all the documents that
3 were required. And the Motion demonstrates that,
4 documents that are in the record, which have not been
5 produced to the Standing Rock Sioux Tribe but which exist
6 in a couple of the Tribe's discovery requests.

7 So it's fairly clear that they didn't produce
8 all the documents that were required under the rules and
9 that the Order, the April 17 discovery orders, and that
10 the manner which they were produced was so inconvenient
11 and so time-consuming for the Intervenors to access those
12 documents that they're in violation of the Order.

13 I don't want to belabor it because counsel --
14 Ms. Real Bird and Mr. Rappold already touched on it, but
15 in their responsive filing TransCanada suggested that the
16 moving parties kind of played a gotcha game with respect
17 to the Affidavit of James White.

18 But the Motion is not really based on
19 Mr. White's Affidavit. The Motion is based on the
20 April 17 Order granting TransCanada's Motion to Preclude
21 Testimony and Evidence from numerous Intervenors for
22 purportedly not complying with the discovery rules, as
23 well as the acts and inactions of TransCanada itself
24 after the April 17 orders were issued.

25 It is true, nevertheless, that Mr. White's

1 Affidavit is an admission that they did not produce all
2 the documents unless required. An acknowledgement of
3 that. If this was a criminal case, it would be
4 tantamount to a confession. It is very helpful in -- in
5 working through the Motion, that Affidavit is very
6 helpful.

7 I think the moving parties have established
8 TransCanada's not in compliance with the discovery
9 orders. Then the question becomes what's the appropriate
10 sanction? Is preclusion of the introduction of testimony
11 in evidence at the evidentiary hearing, is that an
12 appropriate remedy? Is that an appropriate sanction?

13 And I think the Affidavit of Ms. Radcliffe seals
14 the deal for the Intervenors. She stated in her
15 Affidavit that her position is manager of discovery and
16 legal support. TransCanada actually has a manager for
17 discovery, Ms. Radcliffe. I don't think, for example,
18 John Harter, rancher, whose land is affected by the
19 pipeline or any of the other every day South Dakotans who
20 have intervened yet have been precluded from testifying
21 in the case in chief, I don't think that they have
22 discovery managers out on their ranches.

23 TransCanada has a lot of resources with which to
24 have responded earnestly to the discovery orders as is
25 evidenced by Ms. Radcliffe's Affidavit itself.

1 In choosing the sanction, the appropriate
2 sanction, the willfulness and the resources available to
3 the nonmoving party are the very factors to be
4 considered. And here TransCanada's own Affidavit, their
5 own witness testimony highlights the fact that it has --
6 that it has the resources. It was able to comply with
7 the Motion.

8 This is not a situation where unrepresented
9 parties through no fault of its own may not have
10 understood the rules or may not have had the resources to
11 fully respond to a discovery request.

12 TransCanada knew what it was doing, has
13 full-time staff working on these issues, yet felt they
14 could get away with not producing all of its documents
15 per Mr. White's Affidavit.

16 And, of course, the Commission did grant
17 TransCanada's Motion to Preclude Witness Testimony and
18 Evidence by very many Intervenors. I think that was a
19 precedent in this Docket and that that Order really sets
20 up a situation where TransCanada should be sanctioned
21 accordingly.

22 I think TransCanada's own tactics in this Docket
23 pose a challenge of the integrity of the Commission's
24 decision-making progression. They've been very
25 aggressive with holding the Intervenors' feet to the fire

1 with respect to compliance with discovery rules and other
2 procedural rules that apply before the Commission.

3 Consequently, now TransCanada, which chose not
4 to fully produce documents that were ordered, should
5 suffer the same fate as those Intervenors who are not
6 permitted to introduce evidence at the evidentiary
7 hearing. And for these reasons the Motion should be
8 granted.

9 Thank you.

10 CHAIRMAN NELSON: Thank you.

11 Mr. Blackburn, have you joined us?

12 I'm not hearing Paul.

13 Gary Dorr, you are now part of this, and so I'm
14 going to give you the next opportunity.

15 MR. DORR: Gary Dorr. Thank you.

16 There's a couple of things I wanted to cover
17 here. It was mentioned in Mr. White's letter that
18 compliance was not possible. And I think that's an
19 inaccurate statement, due to the nature of the indexes
20 that are inherent in all server engines.

21 And we're talking about several databases on
22 several servers that TransCanada has said they can't put
23 them all together.

24 Every single server has a server engine such as
25 SQL, which automatically indexes. All you have to do is

1 change the index to a short index, a character search, a
2 distinctive index. There's certain ways. If you do the
3 character one, it's very, very easy.

4 Frank Roberts at the Coeur d'Alene Tribe did a
5 six-line code that searches every single character of
6 every single tribal resolution on record. It also
7 searches from 1878 all the land records. You can find
8 anything with six lines of code.

9 So to say that this -- and I question the
10 qualifications of the person, this manager, this
11 information manager, because one of my degrees is in
12 computer information systems. This is not an impossible
13 task to bring this information out.

14 If you're going to create a brand new index,
15 then it's impossible. And I -- that's why I want to know
16 is what -- are we creating a whole new index? Because
17 when you buy a new server you buy a server engine with
18 it, and it's already indexing.

19 When you access any database it's indexing.
20 When you go to your gmail and you type at the top a
21 search, that's an index. There are other ways besides
22 creating an entirely new index, which would take a very,
23 very long time.

24 Based on the fact that these servers are in
25 existence, they've been in existence, I highly doubt that

1 any server manager would not have an index in place.
2 It's limited but -- because it can slow your speeds down.
3 But the indexes are there. I'm almost positive of that.

4 But, like I said, if you create a six-line code
5 on a digital basis, you can search for characters and
6 come up with a query.

7 With respect to my Motion, I have a hard time
8 with this simply because at the -- when I made the Motion
9 to Compel Discovery on TransCanada, on Keystone, my
10 Motion was denied. But immediately after that I sat back
11 there in that back row, and some of you saw Mr. Taylor
12 come back and sit next to me. And he said we have those
13 documents for those easements. We'll get them to you,
14 Gary.

15 They know they haven't complied with discovery.
16 That is obvious. He's coming -- he's told me we'll get
17 them to you. That has not occurred. So by the letter of
18 the law they're not in compliance. And that is where I
19 come into this. Because they have not complied with
20 discovery.

21 Now if you don't grant my Motion to Preclude or
22 exclude evidence -- or Preclude Testimony and Evidence,
23 what can happen, what you will allow to happen is that
24 we'll get to the hearing and quite possibly TransCanada
25 could provide evidence that I have not been provided thus

1 far. And so me, as the average every day intervenor, now
2 I'm going to be prejudiced in the hearing because I have
3 not had time to review it. I have not had -- I have not
4 seen it.

5 There was some confusion about the right-of-way
6 easements. I have the United States of America easements
7 for the Mni Wiconi water line. I do not have TransCanada
8 crossing easements for those water lines. I also do not
9 have TransCanada crossing agreements for the distribution
10 or branch lines. We had some confusion there. We came
11 to an agreement. And that's why he said we'll get you
12 those copies.

13 I also do not have crossing agreements for the
14 private water lines that come off the distribution lines.
15 So let's say the main line comes to here, and your house
16 is over there. That's the distribution line. But if you
17 have a hydrant that is a half-mile out in your field like
18 Paul Seamans does, that's private. That's Paul Seamans'
19 water line. He's responsible for that.

20 I do not have crossing easement agreements from
21 TransCanada for crossing all of those private water
22 lines. And from that map that I displayed to you,
23 there's going to be hundreds of crossing points. And I
24 do not have that. They have not provided that. He
25 stated that he had. Well, I haven't seen it.

1 So that's the main gist of why I'm here today is
2 to request some relief here. Because if we get to the
3 hearing and he presents stuff that I haven't seen, now
4 how am I supposed to be prepared for that? I can't be.
5 I've been prejudiced thus far.

6 Additionally, my Interrogatory on February 19,
7 Question 6 I asked for proof that TransCanada received
8 approval of crossing specifications from the Oglala Sioux
9 Rural Water Supply System and the Bureau of Reclamation.
10 And that is part of TransCanada's reclamation crossing
11 criteria. Their own criteria.

12 They published that, and that said that they
13 would gain compliance from these two organizations. I
14 asked for proof that they had received it. Their answer
15 was Keystone and the Bureau of Reclamation have agreed on
16 crossing criteria. The Bureau of Reclamation has
17 discussed the crossing criteria with both the executive
18 and engineering staff of the Oglala Rural Water Supply
19 System.

20 There's no proof there. I have e-mails that are
21 incomplete. One of the e-mails states that it's up to
22 the Secretary of State. So my question, my request, in
23 discovery was not answered fully or completely, and that
24 is not in compliance with the -- was that 15 --
25 15-6-37B. So they have not complied with the rules of

1 discovery.

2 I mean, and the rest of my briefing or my Motion
3 contains the further evidence of that. I think the main
4 thing is -- to point out is that they knew that they had
5 not provided discovery to me. And I'm not asking for
6 voluminous servers full of information. I'm asking for
7 some relatively simple stuff, and they have not provided
8 that.

9 So I thank you.

10 CHAIRMAN NELSON: Thank you. I'll get to you in
11 a minute. We're going to go to two others that are not
12 parties but are involved in this, if you must say
13 something.

14 Nancy Hilding.

15 MS. HILDING: Hi. Hello. I support the people
16 speaking that it's a double standard if you sanction and
17 limit the pro se Intervenors and don't do something about
18 what TransCanada's done.

19 Thank you.

20 CHAIRMAN NELSON: Thank you.

21 Staff.

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

24 As we stated in our Brief, Staff was not a party
25 to this discovery and therefore takes no position. We

1 did provide a Brief in order to provide hopefully some
2 helpful information. I hope that was helpful. And we
3 will stand by for questions.

4 CHAIRMAN NELSON: Thank you.
5 TransCanada.

6 MR. MOORE: Thank you, Mr. Chairman.

7 I think that the genesis of the Joint Motion
8 actually was the Affidavit of Mr. White that was
9 submitted in particular response to DRA Document Request
10 No. 13. And that was a request for all documents
11 regarding Keystone's compliance with PHMSA rules and
12 regulations, including external and internal
13 communications.

14 And one of the things that's missing from the
15 discussion today is what Keystone did actually produce in
16 response to that document request that is in evidence
17 before the Commission. We produced a substantial amount
18 of information in response to that request.

19 We realized at the time what we could not do is
20 a general e-mail search. And we debated how to deal with
21 that and how to address that. And ultimately what we
22 decided to do in the time allowed was to notify counsel
23 that we were not reasonably able to comply with that part
24 of the Order and that in response to the communications
25 part of the request and to see where it went from there.

1 So we did not file the Affidavit with the
2 Commission. We did not tell the Commission we're
3 refusing to comply with your Order. We raised the issue
4 with counsel.

5 We sent the Affidavit to the affected parties on
6 April 17. On April 20 we had --

7 CHAIRMAN NELSON: Okay. We are getting some
8 serious feedback. Just everybody on the phone line make
9 sure you're on mute.

10 I just turned down -- Katlyn, I turned down the
11 phone lines so it's got to be coming across the phone
12 line. I'm going to just leave it down so we can move
13 forward on this, and then we'll see where we're at.

14 Go ahead.

15 MR. MOORE: On April 20, as is reflected in
16 Mr. Taylor's Affidavit which has been filed with the
17 Commission, there was a conference call with counsel for
18 a number of the affected Intervenors, and there was
19 conversation about whether any of the extremely broad
20 requests related to all documents and particularly
21 communications could be narrowed by the parties.

22 There was discussion that we would appreciate it
23 if the parties would, to the extent that they were able
24 to, review and narrow those requests, and there was
25 discussion that some of the Intervenors would. As

1 Mr. Taylor's Affidavit makes clear, that has not happened
2 to this day.

3 What did transpire then, and keep in mind that
4 this was the lead up to the hearing that was scheduled,
5 is that based on the Affidavit of Mr. White there was a
6 Motion that was filed on April 24, and that's the present
7 Joint Motion.

8 There was also a Motion to Continue the Hearing
9 Date. And the basis for the Motion to Continue the
10 Hearing Date was that Keystone had provided a tremendous
11 amount of information in response to the Orders to Compel
12 and the parties needed time to review that and that
13 Motion, of course, was granted on the 27th of April.

14 We also initially responded to the Joint Motion
15 on April 27 and have since submitted a supplemental
16 response including the Affidavit of Dawn Radcliffe.

17 I think it's important for the Commission in
18 reviewing this Motion to keep in mind what the Motion
19 asks for. The Motion --

20 CHAIRMAN NELSON: Just a moment.

21 Okay. I'm turning back up the audio-in on the
22 phone, and we don't have the interference so -- do you
23 want me to hang up here?

24 Okay. For anybody that's on the phone bridge
25 that may be listening, we're having some troubles. We're

1 going to hang up and reset it.

2 (Discussion off the record)

3 CHAIRMAN NELSON: Go ahead, Mr. Moore.

4 MR. MOORE: Thank you, Commissioner. I left off
5 talking about the context of the Motion and the fact that
6 this is not a Motion in which any of the moving parties
7 are asking the Commission for any further order requiring
8 that Keystone produce additional documents. This is a
9 Motion for discovery sanctions.

10 MR. RAPPOLD: Excuse me. I'm sorry to
11 interrupt. This is Matt Rappold. I experienced some
12 technical difficulties with the phone line. For about
13 10 minutes I was not able to hear anything. I was then
14 disconnected.

15 Ms. Lashley just informed me to call back, and
16 I've made it on the line obviously now.

17 CHAIRMAN NELSON: Correct. Mr. Rappold,
18 everybody experienced that. We were aware of that here.
19 We were off line for most of that at ease while we got
20 everybody back. And so you did not miss 10 minutes worth
21 of discussion.

22 MR. RAPPOLD: Okay. Thanks for clearing that
23 up, sir.

24 CHAIRMAN NELSON: You're welcome.

25 MR. MOORE: Keystone has no quarrel with the

1 Staff's recitation of the standard that the Commission
2 should apply in resolving the Motion in a context of
3 request for sanctions. It's the same standard that we
4 cited in our response back on April 27.

5 Essentially the courts say that for a discovery
6 sanction to be granted the party has to be shown to have
7 acted with willfulness, in bad faith, or has to be at
8 fault. The cases also say that the party should not be
9 sanctioned for an inability to comply with discovery.

10 Sanction sought here is really the harshest
11 sanction that could be requested. It's an order
12 excluding Keystone from offering any evidence, any
13 witnesses, and the Motion specifically asks that all of
14 Keystone's prefiled testimony be stricken from the
15 record.

16 In the context of considering that Motion, I
17 think it's important to keep in mind the context of
18 discovery as a whole as well as the standard.

19 First of all, the outstanding requests that are
20 the basis for the Motion are all document requests. DRA
21 No. 13, Standing Rock Sioux Tribe Document Request No. 8
22 which asks for all documents related to Keystone's
23 compliance with the National Historic Preservation Act,
24 and then Yankton Sioux Tribe Document Request Nos. 2, 3,
25 and 4 which asks for all documents related to the

1 cultural surveys and permitting requirements.

2 With respect to Keystone's ability to comply
3 with those requests, we addressed that through the
4 Affidavit of Dawn Radcliffe, which admitted the
5 Commission did not have the benefit of -- at the time of
6 Keystone's response to the Motions to Compel. But we
7 took the opportunity provided by the continuance to
8 provide additional evidence related to is it possible for
9 Keystone to comply with, in particular, DRA request
10 No. 13.

11 But I think that the Radcliffe Affidavit
12 responds to all of the -- all document requests because
13 they're similar in nature to the extent that they ask for
14 communications, and that's what the Yankton Sioux Tribe
15 specifically asked for this morning and addressed.

16 There's nothing in the record before the
17 Commission today that speaks to --

18 CHAIRMAN NELSON: I apologize again. For those
19 listening on the internet, we've just lost our phone
20 bridge again. We're going to have to be at ease for a
21 moment while we see if we can get something back.

22 (Discussion off the record)

23 CHAIRMAN NELSON: Hopefully those of you on the
24 phone are now listening on the internet.

25 Okay. We've reestablished the phone bridge.

1 We're not sure how reliable it's going to be. The folks
2 that run the phone system for the State are trying to
3 work on the problem. Perhaps for those of you that don't
4 need to speak anymore maybe just listening on the
5 internet might be your best option.

6 But I do need to check. Commissioner Fiegen,
7 are you back with us? There's two that we need for sure.
8 We need Commissioner Fiegen, and we need Thomasina Real
9 Bird.

10 COMMISSIONER FIEGEN: Commissioner Nelson.

11 CHAIRMAN NELSON: Yes.

12 COMMISSIONER FIEGEN: Okay. I'm back again.

13 CHAIRMAN NELSON: Okay. Commissioner Fiegen's
14 back.

15 Thomasina Real Bird, are you back with us?

16 Okay. We're trying to make sure that we've got
17 her at least listening for the moment. So we're just
18 going to remain at ease.

19 (Discussion off the record)

20 CHAIRMAN NELSON: Okay. We're going to proceed,
21 and I guess if we lose you again, I definitely want to
22 give you an opportunity for rebuttal so we will
23 absolutely make sure we get that accomplished. But
24 beyond that I'm not sure how much more we're going to be
25 able to accomplish on the phone today. The internet may

1 be the best way to listen.

2 So with that, Mr. Moore, please continue.

3 MR. MOORE: Thank you, Mr. Chairman. With
4 respect to Dawn Radcliffe's Affidavit she is the person
5 at TransCanada who would be responsible for conducting
6 the kind of search that would ultimately be responsive to
7 all communications related to DRA's Document Request No.
8 13, which was what the Affidavit was specific to.

9 And Ms. Radcliffe is available by phone to
10 answer any technical questions the Commissioners might
11 have about that process.

12 But there are no facts in the record before the
13 Commission, contrary to those stated in Ms. Radcliffe's
14 Affidavit. And those facts are that TransCanada Keystone
15 could not have complied with that particular document
16 request in three days, and, in fact, it may take as much
17 as three to six months to comply with that request,
18 meaning that it may not be possible to comply with the
19 request between now and the rescheduled hearing date.

20 The cost of complying with the request would be
21 somewhere in the neighborhood of 8 to \$13 million and
22 would require the review of 12 billion pages of printed
23 text. Those are facts are not disputed in the record
24 before the Commission.

25 And in considering whether Keystone has acted in

1 bad faith, I think the Commission is obligated to
2 consider those facts, whether Keystone was able to comply
3 with the request, whether Keystone acted in bad faith by
4 raising the issue with the moving parties and by asking
5 them whether they could limit their request and by
6 getting no response from the Intervenors in response to
7 that request.

8 I think it's also important for the Commission
9 to keep in mind what Keystone actually has produced in
10 discovery and specifically with response to the document
11 requests that are the subject of the Motion.

12 You know, Mr. -- well, actually it was Ms. Real
13 Bird on behalf of the Yankton Sioux Tribe said that in
14 many ways Keystone's response was fairly narrow in
15 responding to her request.

16 I think that I don't understand how that can be,
17 given the volume of the reports that were produced, given
18 the absence of any rejoinder by the Yankton Sioux Tribe
19 that those reports are not responsive to what they were
20 looking for or any explanation of what else it is that
21 they need in the context of this proceeding to be able to
22 prepare for the hearing.

23 And, you know, Ms. Real Bird sent a letter on
24 April 23. We responded to that letter in writing. We
25 responded to it last week on May 20. We addressed the

1 points that she specifically made. We invited further
2 discussion, and have had no response from Ms. Real Bird.

3 I did not file that letter, which was sent by
4 Mr. Taylor with the Commission because frankly it seems
5 unnecessary that we would submit every conversation that
6 we have with opposing counsel regarding these matters to
7 the Commission. We have tried to work them out.

8 But essentially while Ms. Real Bird said she
9 finds it offensive that we've taken the position that
10 this Motion is to some extent opportunistic, when we
11 don't have an explanation for what else specifically is
12 needed for why what has been produced is inadequate, any
13 factual response to the fact that the requests that we're
14 being asked to comply -- I'm sorry, that we're not even
15 being asked to comply with that are the basis for the
16 request that we be sanctioned by not being able to
17 present any of evidence or testimony at the hearing would
18 require us to spend somewhere between 8 and \$13 million
19 over the next six months to comply with, that's where the
20 basis comes for that counsel are not working with us to
21 resolve the issues that they still see.

22 With respect to the issues that Mr. Capossela
23 addressed related to the manner and method of production,
24 my understanding and our understanding has been that
25 those issues have been resolved.

1 We put a massive amount of documents available
2 online for the moving parties as the most expeditious way
3 that we could find to produce the amount of information
4 that we were required to produce. We made our technical
5 people available directly to the moving parties to work
6 through issues with them. We set up a second site.

7 And all of that happened essentially a month
8 ago. And we are not aware as of today of any of the
9 moving parties who say that they are currently denied
10 access to any of the documents that have been produced.
11 I think those issues are moot by what has transpired.

12 And lastly I think it's important to address,
13 again, Keystone's overall discovery conduct and the
14 suggestion that because the Commission previously entered
15 an Order related to hearing participation by those
16 Intervenors who produced nothing in response to
17 Keystone's discovery requests, in other words, those
18 Intervenors who simply ignored the discovery process
19 altogether, that somehow the same sanction should be
20 imposed on Keystone on the basis of this Motion.

21 And again I would refer the Commission to the
22 Affidavit of Mr. Taylor that has been on file. One of
23 the things that we attached to that Affidavit was all of
24 the document requests and all of the Interrogatory
25 Answers that Keystone provided to the Intervenors in

1 discovery. Not just the moving parties, but everyone.

2 The situation is simply not comparable to
3 someone -- to a party who simply refused to participate
4 in discovery at all.

5 At the end of the day if the Commission is
6 focused on the question of good faith or bad faith and
7 whether Keystone has willfully disregarded any order of
8 the Commission or the discovery rules, I think that you
9 can ask yourself a couple of questions:

10 One, if we were acting in bad faith, would we
11 have sent Mr. White's Affidavit to counsel, or would we
12 have just simply just ignored the issue raised by the
13 request of all e-mail communications? Would we have
14 responded to counsel with a telephone call within one or
15 two days of our production and then talked through the
16 issues with them?

17 Would we have provided technical assistance to
18 the Intervenors when they said that they were having
19 trouble accessing the documents that we produced? Would
20 we have produced thousands and thousands and thousands of
21 pages of information in response to the particular
22 requests that they were responsive to?

23 I think the answers to all of those questions
24 establish that Keystone has acted in good faith, that the
25 Motion for sanctions asks for the most extreme penalty

1 that the Commission can grant, and absent a request that
2 Keystone be compelled to produce anything further or an
3 explanation of what it is that's missing that would be
4 helpful, I think that the Motion should be denied.

5 With respect to Mr. Dorr's Motion, I understood
6 it as a Motion to Join and not a Motion to add additional
7 aspects of discovery that Mr. Dorr was not happy with.

8 To the extent that the Commission has questions
9 or concerns about any of those, I know that Mr. Taylor is
10 in a position to address specifically conversations that
11 he and Mr. Dorr have had about discovery. And so I'll
12 defer to him.

13 Thank you.

14 CHAIRMAN NELSON: Thank you.

15 Yeah. My understanding of the Motion to Join is
16 the same as yours. But, Mr. Taylor, if there's anything
17 you'd like to add, you're certainly free to.

18 MR. TAYLOR: The way I see Mr. Dorr's Motion is
19 in the same manner Mr. Moore and the same way you see it,
20 Commissioner Nelson.

21 With respect to the specific issues that he
22 raised, I'm prepared to address those, but perhaps now is
23 not the time. Maybe you want to rule on this Motion and
24 we could take five minutes and address those specific
25 issues.

1 CHAIRMAN NELSON: Thank you. Yeah. I think
2 we'll move along.

3 Ms. Real Bird, are you still with us on the
4 phone?

5 MS. REAL BIRD: I am, Mr. Chairman.

6 CHAIRMAN NELSON: Excellent. Your opportunity
7 for brief rebuttal.

8 MS. REAL BIRD: Thank you. In rebuttal, I would
9 just say that the -- a lot of the positions that
10 TransCanada takes with regard to wanting Yankton or other
11 Intervenors to narrow the scope of the discovery, that
12 should have -- you know, that was discussed when the
13 Motion to Compel was granted, and Keystone was overruled
14 on those arguments.

15 So they were compelled to produce all documents
16 for our No. 2, all documents for our No. 3, and all
17 documents for our No. 6, I think.

18 And if they disagreed with that Order granting
19 that Motion to Compel, that should have probably been
20 brought before the Commission again upon a
21 reconsideration, not narrowed through conversations or
22 letters with parties if they planned not to be
23 responsive.

24 And so I would just say, you know, the parties
25 that brought the Motion are just seeking the discovery

1 asked for and the discovery that was compelled. And now,
2 I mean, even --

3 I actually had overlooked the letter from May 20
4 from Mr. Taylor, if I didn't mention it earlier. And
5 while Mr. Moore was speaking I reviewed it. And they
6 asked me to go back to our Request for Production and
7 specifically identify what we're looking for.

8 And I guess if we have to have the response now,
9 I'm looking for all documents, whatever that entails.
10 That's what was ordered to be -- that was what was
11 compelled to be produced, and that's not what was
12 produced.

13 And so I would just say that TransCanada should
14 have brought a Motion for Relief from the Order that was
15 granted if they intended and if they put all the effort
16 into, you know, affidavits and demonstrating why they
17 can't meet that. That should have been the requested
18 relief from TransCanada.

19 But now the burden was put on the parties that
20 received the orders, and we're having to burden shift a
21 little bit. So I would just say that in rebuttal that,
22 you know, focusing on what has been produced is not what
23 the Motion was brought for. The focus today is on what
24 hasn't been produced.

25 Thank you.

1 CHAIRMAN NELSON: Thank you.

2 Questions from the Commission.

3 MR. CAPOSSELA: Mr. Chairman, this is
4 Peter Capossela. Excuse me. May I briefly supplement
5 Ms. Real Bird's rebuttal?

6 CHAIRMAN NELSON: Oh, very briefly.

7 MR. CAPOSSELA: Thank you.

8 Counsel mentioned that the Affidavit outlined
9 costs for TransCanada to comply, and that has not been
10 rebutted. It cannot be rebutted because all the
11 information is with TransCanada. Ultimately, though,
12 that's irrelevant largely because the cost and the burden
13 of producing information in discovery is not relevant
14 relating to the discovery rules.

15 Counsel also mentioned that no one responded to
16 TransCanada's offer to scale down the discovery requests.
17 The Standing Rock Sioux Tribe actually proactively back
18 in February attempted to scale down its requests in order
19 to get TransCanada to comply. Subsequently, TransCanada
20 disparaged in a pleading filed with the Commission
21 Standing Rock's efforts to scale down its discovery
22 requests.

23 So it's really not true to suggest that no one
24 responded to TransCanada's offer to narrow it down, the
25 discovery requests.

1 With respect to whether or not TransCanada is in
2 bad faith, I'd just like to point out one of the
3 documents in the cloud-based storage file, one single
4 book is 186 files. That means that rather than creating
5 a single file for a single book, they did it a page at a
6 time. And it's really difficult to understand why that
7 was done if not to make it more difficult to review the
8 documents.

9 Thank you. Those are just some points that I
10 wanted to make in rebuttal as it relates to Standing
11 Rock's experience in discovery in this Docket.

12 CHAIRMAN NELSON: Thank you. Questions from the
13 Commission.

14 I'm just double-checking. Commissioner Fiegen,
15 are you still with us?

16 COMMISSIONER FIEGEN: Yes, I am.

17 CHAIRMAN NELSON: Okay. Excellent. Any
18 questions?

19 Commissioner Hanson.

20 COMMISSIONER HANSON: I just have a curiosity
21 question. On Staff's Memo Brief in response to
22 Keystone's objection to COUP's request for a time certain
23 and Motion to Preclude Witness, on page 2 on the first
24 paragraph it says See Request No. 7.

25 Just wondering if you -- do you have that in

1 front of you?

2 MS. EDWARDS: Page 2, first -- thank you.

3 See request at paragraph No. 7.

4 COMMISSIONER HANSON: Correct. It sounds like
5 someone's on their Facebook liking someone's items. If
6 they could put their phone on mute, I'd appreciate that.

7 It states none of the three areas mentioned by
8 COUP are relevant to the certification proceedings.
9 "While climate change and greenhouse gas issues may be
10 relevant as they relate to," shouldn't that read
11 "extraction of oil" instead of "transportation" because
12 greenhouse gas issues may be relevant to the extraction
13 of oil, and then state they are not relevant as they
14 relate to transportation?

15 CHAIRMAN NELSON: If I could just interject,
16 this all relates to the next Motion we're going to deal
17 with.

18 COMMISSIONER HANSON: Right. I'm just curious
19 if -- I'm reading that one in relationship to another
20 one.

21 MS. EDWARDS: Okay. This is Kristen Edwards for
22 Staff.

23 As for that statement -- and I might just turn
24 to Darren Kearney for the explanation on that. But -- if
25 that's all right with the Commission. But I believe it's

1 in the FSEIS, a statement on transportation CO2, and
2 that's where that relevance comes in.

3 COMMISSIONER HANSON: I understand that part.
4 But I believe that "transportation" should say
5 "extraction of oil" and "extraction of oil" should read
6 "transportation" and then the word "not" should be
7 eliminated.

8 Am I reading that correctly?

9 MR. KEARNEY: This is Darren Kearney from Staff.
10 And where that transportation came from was from the
11 Applicant's Findings of Fact that were amended. And they
12 specifically addressed greenhouse gases as it relates to
13 transportation of oil. And transportation is through a
14 pipeline or via truck or some other method.

15 COMMISSIONER HANSON: Right. I think you're
16 missing my point, but I'll get to that later then. I'd
17 like you to just examine that, and maybe we'll have an
18 opportunity to have a -- well, I don't know if I can talk
19 to you on a break on that, but I wanted you to think on
20 that.

21 Thank you, Mr. Chairman.

22 CHAIRMAN NELSON: Okay. Any questions on the
23 current Motion?

24 Hearing none, is there a Motion relating to this
25 Joint Motion?

1 COMMISSIONER FIEGEN: Mr. Chairman.

2 CHAIRMAN NELSON: Go ahead.

3 COMMISSIONER FIEGEN: In HP14-001 move to deny
4 the Joint Motion.

5 CHAIRMAN NELSON: Discussion on the Motion.

6 COMMISSIONER FIEGEN: It appears to me
7 TransCanada has acted in good faith according to our
8 standards, and they have given an abundance of
9 information to the Intervenors initially and during our
10 Motion to Compel. So I believe they've acted in good
11 faith, and that's why I'm denying the Motion today.

12 CHAIRMAN NELSON: Additional discussion.

13 COMMISSIONER HANSON: Mr. Chairman, I would
14 agree fully with Commissioner Fiegen's statement, and the
15 request is just far, far reaching far beyond what we
16 would -- I could possibly see granting. Plus I don't see
17 the -- that it has legitimacy to begin with.

18 CHAIRMAN NELSON: Additional discussion.

19 Hearing none, all of those in favor of the
20 Motion will vote aye. Those opposed, nay. And this
21 would be a Motion to deny the Joint Motion.

22 Commissioner Hanson.

23 COMMISSIONER HANSON: Aye.

24 CHAIRMAN NELSON: Commissioner Fiegen.

25 COMMISSIONER FIEGEN: Fiegen votes aye.

1 CHAIRMAN NELSON: Nelson votes aye.

2 The Joint Motion is denied.

3 That brings us to what I believe is the last
4 Motion of the day. And this is going to be Keystone's
5 Motion objecting to COUP's request for a time certain and
6 a Motion to Preclude Witnesses.

7 Now my presumption is the request for time
8 certain Motion is moot at this point and that we can
9 focus on the Motion to Preclude Witnesses. And if I'm
10 wrong in any of that, someone can point that out.

11 Mr. Moore.

12 MR. MOORE: Thank you, Commissioner Nelson.
13 James Moore on behalf of Keystone.

14 Again, I think that it's important to keep in
15 context -- to keep in mind the context of this Motion and
16 what was happening at the time related to the previous
17 hearing and where we are today.

18 I think given all of that it still makes sense
19 for the Commission to consider the Motion because there
20 is a substance issue here related to testimony and not
21 just a question about timing of rebuttal testimony and
22 when that's due to be disclosed.

23 First of all, the Motion arose because
24 InterTribal COUP initially refused to submit prefiled
25 testimony for witnesses it wanted to present.

1 CHAIRMAN NELSON: I'm going to interrupt here
2 for a moment. We've got a lot of noise coming back on
3 the line so please put your phones on mute.

4 Thank you.

5 MR. MOORE: In connection with its refusal
6 InterTribal COUP provided a description of what its
7 witnesses would testify at the hearing, and that was
8 included in page 5.

9 Keystone filed a Motion at that time to preclude
10 testimony from anyone who had not submitted prefiled
11 testimony, and that Motion was granted by the Commission
12 subject to a condition that witnesses could still submit
13 rebuttal testimony, especially if there was something
14 that was discovered after reviewing the documents that
15 had been produced by Keystone at that time.

16 What has transpired since with respect to this
17 Motion is that Keystone's position is that what
18 InterTribal COUP has done is taken what it had previously
19 disclosed as direct -- as the substance of the testimony
20 that its witnesses would provide under direct, and it has
21 recharacterized it as rebuttal testimony.

22 And it has now taken the position that
23 Keystone's Motion is essentially premature and untimely
24 because the deadline under the Amended Procedural Order
25 for disclosing rebuttal testimony is not until June 26.

1 I would suggest to the Commission that on
2 April 24 when InterTribal COUP filed its Notice to
3 Request for a Time Certain in paragraph 7 of that filing
4 it told the Commission what Dr. Hansen would testify
5 about.

6 And it said that Dr. Hansen would testify about,
7 A, the potential impact of the tar sands development to
8 the planet's narrowing atmospheric carbon budget, B, the
9 role of the proposed Keystone Pipeline and the economic
10 development in the tar sands and, C, the changes in the
11 level and significance of our national understanding of
12 climate change over the past four years since the permit
13 was originally granted.

14 In addition to that, InterTribal COUP in its
15 previous filing from April 2 disclosed that
16 Dr. Seiestad, one of its witnesses, would testify about
17 the realities of climate change, that Dr. Oglesby would
18 talk about the nature of natural variation in regional
19 climate change over the past centuries and the future of
20 our changing climate, and Dr. Hansen would testify about
21 the impact of tar sands development on the atmospheric
22 carbon budget.

23 Our position is that even though InterTribal
24 COUP has yet to file rebuttal testimony, which is not due
25 until June 26, it's still appropriate for the Commission

1 to act on this Motion because the -- what the Commission
2 can say is that it is not appropriate for these witnesses
3 to address these subjects because they're not relevant to
4 the proceeding and because they were previously disclosed
5 as the basis for direct testimony, not rebuttal
6 testimony.

7 InterTribal COUP's response to Keystone's
8 Motion, its most recent amended response is clearly
9 taking the position that it thinks climate change is an
10 issue that should be addressed at the hearing and that
11 Keystone opened the door through the testimony of
12 David Diakow.

13 I would refer the Commission to the testimony of
14 Mr. Diakow. There is no discussion of climate change in
15 his testimony. The only reference is in the Tracking
16 Table of Changes regarding Finding of Fact No. 27. And
17 Commissioner Hanson, as you have pointed out, that change
18 does not relate to the production of greenhouse gas
19 emissions or the issue of climate change as it relates to
20 the production of oil from the oil sands in Canada but to
21 emissions due to transportation of those -- the oil that
22 is produced in the oil sands, whether it be by pipeline
23 or by rail. That is an issue that is addressed in the
24 FSEIS. And since it was addressed there, it was included
25 in the Tracking Table.

1 That does not open the door to a general
2 consideration by the Commission about whether production
3 of oil in the oil sands in Canada is ultimately harmful
4 to the global climate.

5 So what Keystone is asking for from the
6 Commission is an order that climate change is not
7 relevant for the proceedings and is not the basis for
8 even rebuttal testimony. And that testimony previously
9 characterized as direct testimony cannot be repackaged on
10 June 26 as rebuttal testimony or we'll be back here
11 addressing essentially the same Motion at that time.

12 So I'll defer to any questions of the Commission
13 and, otherwise, leave for response.

14 Thank you.

15 CHAIRMAN NELSON: Thank you. I'm going to go to
16 Mr. Gough for his response.

17 MR. GOUGH: Thank you, Mr. Chairman.

18 Yes. InterTribal COUP's characterization of the
19 testimony of -- direct testimony initially was when
20 direct testimony was on the table. InterTribal COUP was
21 subject to TransCanada's Motion to Preclude Witnesses
22 because of -- we had a different understanding in terms
23 of the South Dakota Law application to filing and
24 pre-filing, and we were overruled by the Commission. And
25 we were precluded at that point from offering direct

1 testimony.

2 We have not challenged that order -- or that
3 being overruled and that preclusion by the Commission.
4 We've taken our lumps, unlike TransCanada who has managed
5 to avoid the opportunities of complying with the
6 previously discussed motions and regarding the Motions to
7 Compel. They have not taken any lumps in that regard.
8 They are proceeding full sale.

9 We've taken ours. But at that time we requested
10 specifically that we still had our rights to
11 cross-examination. We had our rights to rebuttal, among
12 others. And that was -- our understanding was that was
13 what was agreed to by the Commission at the time.
14 TransCanada was there and present. They did not object
15 to that condition.

16 Now they're coming and coming with a blanket
17 supposition that climate is completely off the table. It
18 is not when their own witnesses make reference to the
19 amount and kind of crude that will be transported in the
20 pipeline. We are looking at the Table of Changes and
21 updates that TransCanada is bringing forward. That
22 includes carbon intensity as one of the measures that
23 they're looking to have included in these findings.

24 We believe that there may well be opportunities
25 to look at and examine climate as discussed through

1 cross-examination of their witnesses as well as other
2 witnesses that may be stepping forward and with the fact
3 that EPA has opened the door as well with their comments
4 with regard to the changes that have taken place since
5 the 2010 permit was issued. We're looking now at a 2015
6 permit in a very different climate regime.

7 We are looking at the fact that -- and I will
8 call the attention of the Commission to the matter of
9 Otter Tail Power Company on behalf of Big Stone II and
10 the Supreme Court Decision in that case where it was
11 examined -- the PUC examined the significance of carbon
12 emissions and the reference that they may have to the
13 health and safety and well-being of people in
14 South Dakota.

15 And in 2007 it was argued. In 2008 it was filed
16 in January. And in that case you're looking at a little
17 bit different situation. In that case the Big Stone
18 pipeline was actually going to deliver energy, according
19 to South Dakota Law, to people in South Dakota in their
20 transport.

21 We're looking here at a case where nothing from
22 the pipeline is being delivered to South Dakota in any
23 direct or measurable way that I see any evidence of. So
24 the cases make this case more compelling to examine what
25 the impacts to the people of South Dakota may be because

1 we're getting none or virtually none of the stated
2 benefits of the case, unlike the Big Stone II case where
3 benefits were going. I think 6,000 megawatts of power
4 were going to the people of South Dakota and surrounding
5 area.

6 In that case the Supreme Court basically went
7 through the ways it was going to review it, and basically
8 the South Dakota PUC had done an examination of the
9 carbon factors, had found that the carbon emissions from
10 that case from Big Stone would likely be relatively
11 insignificant.

12 We don't know that to be the case with Keystone,
13 that the delivery of carbon to the atmosphere through the
14 pipeline will be relatively insignificant. We do not
15 know that. And I was heartened looking back at the
16 testimony, the transcript, Commissioner Fiegen gave the
17 very stunning -- the consideration of a Motion to Deny
18 the Stay that was requested by a number of Intervenors.

19 She said Keystone gets their day in court just
20 like all of you will get your day in court also. I
21 certainly support that.

22 And the evidentiary hearing is where we get to
23 hear the evidence that -- that the certification process
24 and if the conditions are still met. So that's when we
25 get to hear all the evidence that you all get to bring to

1 us.

2 That heartened me that this is a process that
3 will seriously consider all of the evidence and the
4 conditions and any changes in those conditions. And we
5 submit that there has been some major changes in
6 conditions with regard to our understanding of -- and the
7 importance of understanding and dealing with climate
8 issues with regard to CO2 and the amount of CO2 we are
9 loading into the atmosphere.

10 Now I understand that TransCanada can instruct
11 its witnesses not to say climate change and, therefore,
12 not to get those words in the record, but the reality is
13 if we are precluded from entering any discussion at all,
14 even in rebuttal and rebuttal testimony that TransCanada
15 has not yet seen, none of us can see it, that's part of
16 the problem of drafting rebuttal testimony and pre-filing
17 it in that we have not had access to all of the evidence.

18 We've been precluded from even looking at a lot
19 of the evidence. Other intervenors have had difficulty
20 sorting through. We're not even allowed to look at that
21 because we weren't part of the Motion requesting that.

22 So we've had our rights narrowed. And now
23 TransCanada wants to narrow them even further going
24 beyond what the Commission had agreed to back in April.
25 And they're now asking that you go further and preclude

1 us from any testimony in this matter, and we think that
2 that's overstepping their bounds and reaching into the
3 role of the Commission that does have an obligation under
4 the Big Stone to at least adequately address these issues
5 in ways that make sense under today's conditions.

6 Today's conditions, climate change is considered
7 a threat multiplier by the Department of Defense. Things
8 have changed since 2010. And if that's not going to be
9 part of the record going into this, it will certainly be
10 part of a challenge coming out of it.

11 So I would ask the Commission to live up to
12 their words that the evidentiary hearing is where we're
13 going to hear the evidence, even if it's narrowed to
14 rebuttal testimony based on what comes out of the
15 experts, what comes out of cross-examination, and what
16 comes out of the documents that have been submitted,
17 including commentary from EPA.

18 And if the Commission would like to go any
19 further with regard to how this climate change has grown
20 since the decision in Big Stone, the Big Stone Decision
21 was predicated upon the fact that neither Congress nor
22 South Dakota had taken any position with regard to
23 regulating CO2.

24 South Dakota was one of the states that lined up
25 with the EPA in the Massachusetts vs. EPA Supreme Court

1 Decision that found that CO2 can be regulated under the
2 Clean Air Act and that the EPA has an obligation to
3 examine that.

4 South Dakota lost in that hearing, in that
5 Supreme Court ruling. They were on the losing side,
6 along with EPA. EPA had to go back and rework and see
7 how carbon dioxide could be regulated, first for
8 tailpipes. Now they're doing that for the carbon plan
9 for --

10 CHAIRMAN NELSON: Mr. Gough, I'm hearing
11 arguments for something that really doesn't pertain to
12 the Motion here today.

13 Can you kind of reign it in a little bit?

14 MR. GOUGH: Sure. It pertains to the Motion
15 only to the effect that carbon is now being regulated.
16 And it was something that was not the case in the 2010
17 permit procedures. And it is the case where that's
18 what's happening today. So that is part of the change
19 condition.

20 I apologize for going off on that, but if
21 they're going to argue that it can't be discussed at all,
22 I think you've got an obligation under the South Dakota
23 Supreme Court Big Stone ruling to give it consideration.

24 Thank you very much.

25 CHAIRMAN NELSON: Thank you.

1 Are there any of the Intervenors that have
2 anything new to add? Any new argument?

3 Not hearing any response there.

4 Ms. Edwards for Staff, anything to add?

5 MS. EDWARDS: Staff has nothing to add. I would
6 just reserve the right to object to any witnesses and
7 testimony that may come up in the future if that happens.

8 Thank you.

9 CHAIRMAN NELSON: TransCanada rebuttal.

10 MS. HILDING: Nancy Hilding. I wanted to say
11 something.

12 CHAIRMAN NELSON: Okay. We can hardly hear you,
13 but go ahead and try it.

14 MS. HILDING: I do not see where if somebody
15 originally offered something as prefiled original
16 testimony, why the logic is that it cannot be offered as
17 rebuttal testimony. I do not see the logic in that.

18 That's all I've got. Thanks. Bye.

19 CHAIRMAN NELSON: Thank you.

20 Mr. Moore, go ahead.

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

22 The scope of this proceeding under
23 SDCL 49-41B-27 relates to Keystone's ability to continue
24 to meet the conditions on which the permit was granted.
25 There are no permit conditions related to climate

1 change.

2 The EPA cannot open the door in this proceeding
3 to climate change by making that a focus of the national
4 interest determination that is being undertaken by the
5 Department of State. And to the extent the Department of
6 State wants to consider that, that is part of the
7 Presidential Permit process. It is not part of this
8 limited certification proceeding.

9 And we're not trying by the motion to have the
10 PUC expand on its previous Order. The fact is that
11 InterTribal COUP has been very upfront that they intend
12 to offer this testimony.

13 It was previously characterized as direct
14 testimony. It is not responsive to anything that has
15 been submitted by Keystone's direct testimony, and,
16 therefore, it can't be recharacterized by rebuttal. And
17 it's outside the Commission's jurisdiction. And that's
18 why we're requesting relief.

19 Thank you.

20 CHAIRMAN NELSON: Thank you.

21 Questions from the Commission.

22 I have one for Ms. Edwards. I've read your
23 Brief, and it refers several times to Dr. James Hansen.
24 In InterTribal COUP's response they've talked about
25 Dr. George Seiestad, Dr. Robert Oglesby, and Dr. James

1 Hansen.

2 How would you fit the first two of those
3 gentlemen into what you've talked about in your brief?
4 Or would you?

5 MS. EDWARDS: Staff did not take a position on
6 the other two proffered witnesses because COUP did not
7 provide the scope for those as they did for Dr. James
8 Hansen.

9 So not knowing what they intended to testify on,
10 we didn't feel like we had the information to decide
11 whether or not it was relevant.

12 CHAIRMAN NELSON: Thank you.

13 Other questions from the Commission.

14 Hearing none, is there a Motion?

15 Commissioner Hanson.

16 COMMISSIONER HANSON: Mr. Chairman, in HP14-001
17 I move that the Commission grant the Motion to Preclude.

18 CHAIRMAN NELSON: Discussion on the Motion.

19 COMMISSIONER HANSON: Mr. Chairman, the
20 InterTribal COUP's argument or statement is that
21 Dr. Hansen would be testifying on tar sands development
22 and climate change, et cetera. And I need to remind
23 people here that this is a certification process, that we
24 are looking at whether or not the XL TransCanada will
25 comply with the conditions that were set forth by this

1 Commission.

2 The issues of climate change were not one of
3 those conditions. We made it quite clear at the
4 beginning of this process last year that issues in Canada
5 were not going to be issues before this Commission.

6 Issues in Wyoming and Nebraska or any other state are not
7 necessarily issues before this Commission, unless they
8 relate to South Dakota and the citizens of South Dakota.

9 And this is one of those tangents that can be
10 quite important, but they are not of a scope for us to be
11 looking at from the standpoint of certification.

12 CHAIRMAN NELSON: Additional discussion.

13 If I might, I'm inclined to support your Motion,
14 but I've got a question.

15 In Staff's Brief in their Conclusion there's a
16 sentence that says Should Dr. Hansen -- and I'm assuming
17 also the other two gentlemen, Should they offer testimony
18 on any matter relevant to this proceeding within the
19 pursue of SDCL 49-41B-27 and in a manner that is truly
20 rebuttal testimony, Staff would have no objection to them
21 being a witness within those parameters.

22 Is that something you could accept? Because I'm
23 not sure I want to completely disallow these folks if
24 they've got something that's relevant and within the
25 parameters. But I certainly agree with you that what has

1 been proffered thus far, far exceeds that.

2 COMMISSIONER HANSON: Right. And I wrestled
3 with that. I read that and reread it and thought about
4 it and then went back to InterTribal COUP's statements.

5 And they stated that his expertise is in those
6 areas of climate and that those are the items that he is
7 going to testify on. And under those circumstances, I
8 reached the conclusion that, no, he -- there is no reason
9 for him to be giving testimony if that is, in fact, what
10 his testimony is going to be about.

11 CHAIRMAN NELSON: Thank you.

12 Additional discussion.

13 Hearing none.

14 MR. GOUGH: Mr. Chairman, this is Bob Gough.

15 CHAIRMAN NELSON: We are in Commission
16 discussion at this point.

17 Any additional Commission discussion?

18 Hearing none, all those in favor of the Motion
19 will vote aye. Those opposed, nay.

20 Commissioner Hanson.

21 COMMISSIONER HANSON: Aye.

22 CHAIRMAN NELSON: Commissioner Fiegen.

23 COMMISSIONER FIEGEN: Fiegen votes aye.

24 CHAIRMAN NELSON: Nelson votes aye.

25 The Motion carries.

1 Is there anything else for the good of the
2 order?

3 I think we have worked through a very long
4 agenda in a very reasonable amount of time. I really do
5 appreciate everybody's relative brevity today as we've
6 worked through our agenda.

7 (The proceeding is concluded at 1:10 p.m.)

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1 STATE OF SOUTH DAKOTA)

2 :SS

CERTIFICATE

3 COUNTY OF SULLY)

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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 26th day of May,
11 2015, and that the attached is a true and correct
12 transcription of the proceedings so taken.

13 Dated at Onida, South Dakota this 3rd day of
14 July, 2015.

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16

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Cheri McComsey Wittler,
Notary Public and
Registered Professional Reporter
Certified Realtime Reporter

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