

APPENDIX D

HEARING TRANSCRIPTS

1 apologize for that, of the law relative to our needing to
2 do it.

3 Q. Do you know that the laws are ratified under
4 15 Stat 635?

5 A. No, sir.

6 Q. And that the treaty is part of that statute?

7 A. I'm sorry. I'm not.

8 MR. DORR: All right. Thank you, sir.

9 THE WITNESS: Yes, sir.

10 MR. SMITH: Any other questions following up on
11 Commissioner Nelson's question?

12 I don't see any. So redirect?

13 MR. TAYLOR: No redirect. Thank you.

14 MR. SMITH: You may step down.

15 Yes, sir.

16 MR. CAPOSSELA: Mr. Smith, I have a proposal to
17 try to save us some work. May I approach the table?

18 MR. SMITH: Sure.

19 MR. CAPOSSELA: The Standing Rock Sioux Tribe,
20 the Cheyenne River Sioux Tribe, the Rosebud Sioux Tribe,
21 the Yankton Sioux Tribe, IEN, InterTribal COUP, Dakota
22 Rural Access, and Bold Nebraska hereby move for an
23 immediate order denying certification of the Permit for
24 the Keystone XL Pipeline in South Dakota.

25 The motion is based on the -- TransCanada's

1 afternoon, and we respectfully request that the
2 Commission enter that order.

3 With that, I'm happy to turn it over for any
4 rebuttal for counsel by TransCanada.

5 MS. LONE EAGLE: Elizabeth Lone Eagle. I join
6 the motion.

7 MR. CLARK: Mr. Smith, I'm not sure what the
8 precise rules are, but just for clarification, the
9 Cheyenne River Sioux Tribe through its own counsel joins
10 the motion for reasons stated by Standing Rock Sioux
11 Tribe.

12 COMMISSIONER HANSON: Mr. Capossela, could you
13 tell me the specific -- you said Section 27 of the
14 Administrative Procedures Act.

15 Is there a specific cite, or is it the entire
16 section?

17 MR. CAPOSSELA: Section 26 of the APA governs
18 the requirements for agency action on judicial review.

19 And the South Dakota Supreme Court has
20 interpreted Section 36 of the APA to require substantial
21 evidence backing up an agency order.

22 Kind of the standard case or a lead-in case on
23 that is Therkildsen v. Fisher Beverage, which is in the
24 Reporter at 535 N.W.2d 834. It's a 1996 South Dakota
25 Supreme Court case. The citation, there's just a line of

1 that Presidential Permit to proceed.

2 CHAIRMAN NELSON: Thank you. I don't have any
3 further questions.

4 Other Commissioner questions?

5 If not, is there a Motion on either one or both
6 of the questions?

7 COMMISSIONER HANSON: Mr. Chairman.

8 CHAIRMAN NELSON: Go ahead, Gary.

9 COMMISSIONER HANSON: In HP14-001 I move that
10 the Commission deny the Joint Motion to Dismiss and that
11 the Commission deny the Motion to Revoke the Permit
12 issued in HP09-001.

13 CHAIRMAN NELSON: Discussion on the Motion.

14 COMMISSIONER HANSON: Well, piggybacking with
15 your question that you just asked, which is very
16 pertinent, the entire discussion here has been, well,
17 protracted to an extent unnecessarily but not
18 unexpectedly.

19 The Permit Condition is very simple. It
20 requires XL to obtain the Permit in question prior to
21 construction. The Permit was denied. That is true.
22 However, the Applicant can reapply for the Permit at a
23 later date.

24 So the fact that it was denied only prohibits
25 them from the standpoint of starting construction until

1 again a third time, this isn't going to be built in
2 South Dakota. And that's, I think, something to keep in
3 mind.

4 Probably the thing that is most troubling for me
5 in this is the point that Mr. Blackburn raised and
6 Mr. Seamans and Mr. Tanderup about the continuing
7 uncertainty for the landowners. And so I'm asking
8 myself, you know, how does this at some point come to a
9 final resolution for those folks who have had this
10 hanging over their heads for a lot of years?

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12 that, other than maybe it is, in fact, a Motion to Revoke
13 the Permit. But I agree with Mr. Taylor. It can't be
14 done in this Docket. It's got to be done in the original
15 Docket.

16 And so I don't think this is the appropriate
17 place for doing that. And whether you can actually make
18 the case to do that at this point or whether additional
19 time has to elapse, that may be the case there also.

20 But having said that, at this point I don't
21 believe that we have the legal ability to grant the
22 Motion to Dismiss. I don't think that would be legally
23 supportable and certainly not a Motion to Revoke since
24 this isn't the correct Docket.

25 Additional Commissioner discussion.

1 Amended Final Decision issued by the Commission on
2 June 29, 2010, in Docket HP09-001 in which the Permit to
3 construct was issued and the Commission shall, therefore,
4 accept TransCanada's certification as conforming to
5 SDCL 49-41B-27.

6 It is the Petitioner, TransCanada, that has the
7 burden of proof. And under SDCL 49-41B-27 that burden of
8 proof is to establish that the proposed facility
9 continues to meet the 50 Conditions set forth in the
10 Commission's Amended Final Decision.

11 I would like to stress again to all parties here
12 today that this case is about whether the project
13 continues to meet those 50 Conditions. It is not a
14 retrial of the original Permit proceeding.

15 All parties have the right to be present and to
16 be represented by an attorney. All persons testifying
17 will be sworn in and subject to cross-examination by the
18 parties. The Commission's final decision may be appealed
19 by the parties to the State Circuit Court and State
20 Supreme Court.

21 I'd like to remind everyone that parties
22 represented by counsel must have their attorneys conduct
23 their cross-examination.

24 Also I would remind everyone that the Commission
25 has issued a number of prehearing procedural and

1 More than four years have passed since the 2010
2 Permit issued. In September 2014 we filed on behalf of
3 Keystone a certification signed by an officer of Keystone
4 under oath that the proposed project continues to meet
5 those conditions on which the Permit was issued.

6 The Commission chose to treat the certification
7 as a new docket. 40 plus persons and organizations
8 intervened as parties. Procedural and scheduling orders
9 were debated and entered. Two rounds of discovery was
10 undertaken. Extensive discovery was exchanged.
11 Extensive motion practice was engaged.

12 The scope of the hearing has been defined, the
13 issues refined and narrowed, and per the Commission's
14 Order and standard practice, written testimony, both
15 direct and rebuttal, was prepared and filed along with
16 the exhibits that support the testimony.

17 We are here today to meet Keystone's burden of
18 proof. That is, certifying that the project continues to
19 meet the 50 Conditions on which the Permit was issued and
20 that it can be constructed and operated accordingly.

21 We'll offer the testimony of seven witnesses,
22 five of whom are direct witnesses, two of whom are
23 rebuttal. We will present exhibits that meet that burden
24 of proof.

25 The testimony of our witnesses, many of whom

1 you've heard before, will conclusively demonstrate that
2 the project will continue to meet the 50 Conditions on
3 which the Permit was issued.

4 As Commissioner Nelson said this morning, this
5 is not a retrial of the 2009 proceedings. This is not a
6 retrial of whether the Permit should have issued in the
7 spring of 2010. The time to contest whether the pipeline
8 is a good or a bad idea was five and a half years ago in
9 the initial hearing.

10 That question was resolved then and is not in
11 issue today. The scope of today's hearing is narrow,
12 limited to whether the pipeline can be constructed today,
13 continuing to meet those 50 original conditions.

14 Now we acknowledge there have been some changes
15 in circumstances in the years that have intervened since
16 the Permit was issued. We coalesced those changes into
17 the Tracking Table of Changes, which was appended to our
18 Petition.

19 As the Table of Changes demonstrate, parts of
20 the proposed project in 2009 have already been
21 constructed. The Gulf Coast extension from Cushing,
22 Oklahoma, was treated as a separate project after 2009.
23 It has been constructed, completed, and is in operation.

24 The Steele City, Nebraska, to Patoka, Illinois,
25 and the Steele City, Nebraska, to Cushing segments of the

1 took an oath of office to uphold the laws of the State of
2 South Dakota. It was not an oath that directed me to
3 make decisions based upon emotion. I was directed by
4 that oath and I am bound by that oath to make my
5 decisions based upon the facts and the law as has been
6 established through this proceeding.

7 So let's for a moment talk about that law. It's
8 acknowledged by everyone that Keystone has the burden of
9 proving that they complied with SDCL 49-41B-27. It's a
10 pretty simple statute. All of us probably have it
11 memorized, but it says in part, "The utility must certify
12 to the Public Utilities Commission that such facility
13 continues to meet the conditions upon which the Permit
14 was issued."

15 On September 15, 2014, a certification was
16 received by the PUC, signed by Corey Goulet on behalf of
17 TransCanada. The requirement to certify was met with
18 that filing.

19 Now previously I served this State as Secretary
20 of State. And in that capacity I worked with
21 certifications all the time. This is not a new concept
22 to me whatsoever.

23 The certification that came in was accompanied
24 by a Petition asking that the certification be accepted.
25 Along with that Petition was Appendix C, which we've come

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25 Along with that Petition was Appendix C, which we've come

1 to know as the Tracking Table of Changes.

2 The Petition states that the changes outlined in
3 Tracking Table don't prevent TransCanada from meeting the
4 Permit conditions. Throughout this proceeding the
5 Commissioners have urged the opponents to show us the
6 specific conditions that could no longer be met. Very
7 simply, prove to us that the certification was not valid.

8 Indeed, and I went back and I read through the
9 transcript of the close of the evidentiary hearing, and
10 Commissioner Hanson and I nearly begged the opponents in
11 your final briefs, identify for us specific conditions
12 that could not be met.

13 And, frankly, as I read through those briefs,
14 there's only one that I thought attempted to do that, and
15 that was Gary Dorr. He pointed to a specific Condition
16 and tried to make his case that the company couldn't
17 comply with that. Now at the end of the day I think his
18 argument fell short, but he tried.

19 Very simply, SDCL 49-41B-27 does not require a
20 rehashing for the requirements of the initial Permit
21 under 49-41B-22. And if there's been a very what I think
22 unfortunate part of this whole proceeding is that the
23 opponents spent their time and energy trying to litigate
24 Section 22 instead of 27, which is the one that is before
25 us.

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25 Additional Commissioner discussion.

1 It is not grounds for objection that the
2 information sought will be inadmissible at the hearing if
3 the information sought appears reasonably calculated to
4 lead to the discovery of admissible evidence.

5 CHAIRMAN HANSON: Thank you. And as the maker
6 of the Motion, you can have first opportunity on
7 discussion of the Motion.

8 COMMISSIONER NELSON: Thank you, Mr. Chairman.
9 Let me begin, first of all, by saying thank you to all
10 the parties for your written submissions. That allowed
11 me to wrestle through the positions and the issues well
12 in advance of this meeting.

13 As I began to work through this, it became clear
14 to me that the very first question that needed to be
15 answered is in 49-41B-27 what does the word "conditions"
16 refer to? That's the first question we have to answer.

17 And I will tell you of all the written
18 submissions, there is only one that I thought really
19 attempted to address that. And is Tracey Zephier here
20 from Cheyenne River?

21 MS. ZEPHIER: Yes, I am here.

22 COMMISSIONER NELSON: Tracey, I simply want to
23 commend you. You went to the heart of that issue, and
24 you stepped through that. Now you and I ultimately came
25 to a different conclusion, but of everyone you were the

1 one that attempted to answer the question, and I
2 appreciate your endeavor there. So thank you.

3 So what does that word "conditions" mean? Does
4 it mean the conditions that were added to the permit, or
5 does it mean the circumstances under which the permit was
6 originally issued? And that's the question that I
7 thought Tracey did an admirable job of trying to work
8 through.

9 But, as I said, we came to a different
10 conclusion. And I want to explain how I arrived at my
11 conclusion.

12 As Tracey said in her brief the word
13 "conditions" is not defined in this chapter. And so what
14 does it mean in relation to this chapter? And so I went
15 elsewhere within the chapter to find is this word
16 "conditions" used elsewhere?

17 And when we go to 49-41B-24 the word
18 "conditions" is used there, and it specifically speaks to
19 the conditions that we attach to a permit.

20 The alternative possibility for the definition
21 of conditions are those circumstances that existed under
22 which the permit was given. And so I looked further back
23 into the statutes to see is the word "conditions" used to
24 describe those circumstances? And in 49-41B-22.1 we
25 don't find the word "conditions." We find the word

1 "criteria."

2 And so what that tells me is that in this
3 chapter when the word "conditions" is used it is used in
4 relation to those things that we the Commission attached
5 to the permit when it was originally granted, not the
6 circumstances under which the permit was originally
7 granted.

8 And so having in my own mind answered that
9 question first, I then moved to how do we deal with this
10 Motion of TransCanada? How extensive is this?

11 And as you will find in my Motion, all of the
12 language in the Motion you will all find to be familiar.
13 It comes from two places. First of all, it comes from
14 the two points that TransCanada believes are related to
15 the conditions that we had on the original permit. And
16 it is my opinion that the matter that we are dealing with
17 in this Docket relates to those conditions. And so you
18 will find that as part of my Motion.

19 But associated with that, and Staff made a
20 correct argument, that the discovery statutes of this
21 state are broad. And you will find that language in my
22 Motion also. And that -- and I think there are a couple
23 of things that I'd like to point out.

24 I use the word "relevant." The discovery needs
25 to be relevant -- that's the statutory word -- to the two