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APPEARANCES

Brett Koenecke and Kara Semmler, Dakota Access
Glenn Boomsma, Intervenors
Kimberly Craven, Indigenous Environmental Network and
Dakota Rural Action
Thomasina Real Bird and Jennifer Baker, Yankton Sioux
Tribe
Matt Rappold, Rosebud Sioux Tribe
Diane Best, City of Sioux Falls
Margo Northrup, SD Association of Rural Water Systems
Kristen Edwards and Karen Cremer, PUC Staff

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TRANSCRIPT OF PROCEEDINGS, held in the
above-entitled matter, at the South Dakota State Capitol
Building, Room 414, 500 East Capitol Avenue, Pierre,
South Dakota, on the 29th day of September, 2015.

1 CHAIRMAN NELSON: We have two motions to
2 resolve. The first motion is brought to us by Yankton
3 Sioux Tribe, Rosebud Sioux Tribe, Indigenous
4 Environmental Network, and Dakota Rural Action. They
5 have filed a Joint Motion to Stay Proceedings for
6 preparation of an Environmental Impact Statement.

7 Ms. Baker, are you taking this one?

8 MS. BAKER: Actually Mr. Rappold would like to
9 begin.

10 CHAIRMAN NELSON: Go ahead, Mr. Rappold.

11 MR. RAPPOLD: Good afternoon, Commissioners.
12 Matt Rappold on behalf of the Rosebud Sioux Tribe.
13 Appreciate the opportunity to hear this motion prior to
14 the hearing today starting.

15 Rosebud, Indigenous Environmental Network,
16 Dakota Rural Action, and the Yankton Sioux Tribe have
17 filed a Joint Motion to Stay these proceedings and asking
18 the Commission to order that an Environmental Impact
19 Statement be conducted.

20 We're basing this on SDCL 49-41B-21,
21 Chapter 39A-9. It's our understanding of reviewing
22 discovery that there is no federal agency that is
23 providing an overarching comprehensive Environmental
24 Impact Statement for the Dakota Access Pipeline.

25 Testimony, prefiled testimony, from several

1 witnesses, I believe -- and at a minimum the testimony of
2 Ms. Paige Olson expands on that -- or rather explains
3 that, where she states the overall project has been
4 segmented so there is no overarching lead federal agency
5 for the project.

6 Which means that the federal agencies that are
7 involved will be looking at water crossings and different
8 aspects of the project on an individual-by-individual
9 basis -- individual crossing basis. And they're not
10 doing an entire analysis of the environmental impacts on
11 the pipeline as a whole.

12 Because they're not doing a federal
13 Environmental Impact Statement, that leaves discretion
14 open under South Dakota Law for the Commission to step in
15 and order a Environmental Impact Statement to be done for
16 the portion of the Dakota Access project in South Dakota.
17 And that's what we are asking the Commission to do at
18 this point.

19 When you look at what could happen, what the
20 situation will be, if South Dakota does not order an
21 Environmental Impact Statement, we're looking at
22 279 water body crossings in South Dakota that will be
23 permitted by the Army Corps of Engineers under a single
24 combined Section 404(10) permit with no other
25 alternatives or analysis presented or further

1 environmental review performed, specifically in
2 South Dakota.

3 We have a case from Minnesota that we've cited
4 you to in this report about our position. And this case
5 stands for the proposition -- this is regarding In the
6 Matter of the Application of the North Dakota Pipeline
7 Company, LLC for a Certificate of Need for the Sand Piper
8 Pipeline Project in Minnesota.

9 Now, obviously, the case from Minnesota is not
10 going to be binding on this Commission, but under the
11 circumstances and because of the similarities of the
12 issue before the Commission, we feel that this case is a
13 case that provides good guidance for the Commission in
14 reaching a decision on this motion.

15 In this case the Utilities Commission that
16 issued the Permit did not require an Environmental Impact
17 Statement to be performed under Minnesota law. It's the
18 same type of situation where there was not a
19 comprehensive federal analysis being performed.

20 And that case was challenged and went to the
21 Supreme Court in Minnesota, and the Court ruled that
22 while the agency does have discretion to not order an
23 Environmental Impact Statement, the Court in Minnesota
24 found that not ordering the Environmental Impact
25 Statement was an abuse of discretion. On appeal that

1 decision was overturned to not order an Environmental
2 Impact Statement.

3 Because of the sensitive land areas where this
4 pipeline will traverse if it's approved, ultimately we
5 feel that it's imperative that a comprehensive
6 Environmental Impact Statement be performed prior to the
7 Commission making a decision on whether or not the
8 pipeline should be authorized to construct in
9 South Dakota at least.

10 We feel that an environmental review will
11 provide the basis for a better, more informed decision
12 for the Commission in this case, and we would ask that
13 the Commission stay the proceedings and order an
14 Environmental Impact Statement to be performed consistent
15 with the requirements of South Dakota Law.

16 In the alternative, if the Commission does not
17 grant the motion, we'd ask the Commission to consider at
18 the close of these proceedings to require an
19 Environmental Impact Statement to be performed and then
20 perhaps reopen the record after the environmental
21 assessment is done, before a decision is reached.

22 Thank you.

23 CHAIRMAN NELSON: Thank you.

24 Here's what I'm going to do. I'm going to just
25 go to the attorneys that are not part of the joint

1 motion. We're just going to go across the room.
2 We'll go to Staff, we'll go to the Applicant, and then,
3 Mr. Rappold, we'll give you brief rebuttal.

4 Ms. Best.

5 MS. BEST: The City of Sioux Falls takes no
6 position on the motion.

7 MS. NORTHRUP: The South Dakota Association of
8 Rural Water Systems does not take a position on the
9 motion.

10 CHAIRMAN NELSON: Mr. Boomsma.

11 MR. BOOMSMA: Intervenors support the motion and
12 ask to join the argument --

13 CHAIRMAN NELSON: I'm going to ask you to pull
14 the mic. really close to you because we've got folks
15 listening on the internet who need to hear that.

16 Is the cable too tight there?

17 MR. BOOMSMA: No. My papers were in the way.
18 I'll get it closer. But what I was saying is that
19 Intervenors support the motion and join in on the
20 argument.

21 CHAIRMAN NELSON: Thank you.

22 Staff.

23 MS. EDWARDS: This is Kristen Edwards for Staff.
24 The SDDS case from 1981 is the controlling case for
25 issues regarding the requirement or lack thereof of an

1 EIS statement in South Dakota.

2 The Court reaffirmed its Decision in SDDS in its
3 holding in the Hyperion case in 2013. The Court in
4 Hyperion held that an EIS is optional, not mandatory, and
5 further concluded that the evidence shows that the
6 legislative intent not to require an Environmental Impact
7 Statement every time -- or that was the Legislature's
8 intent, not to require one every time but to leave it to
9 the discretion of the board or commission.

10 The purpose of an EIS is to inform the public
11 and other public agencies as early as possible about the
12 proposed actions and to solicit comments which will
13 assist the agency in determining the environmental
14 consequences of the proposed action.

15 These purposes were addressed in the -- or will
16 be addressed in the PUC's administrative process. Staff
17 has hired consultants and performed an extensive
18 technical review of the Application.

19 From a practical point of view, a decision in
20 this docket must be reached by December 15 of this year.
21 There is no mechanism in statute through which that can
22 be extended or waived.

23 So the question becomes if by staying these
24 proceedings would the Commission create a situation where
25 there's a de facto Permit issued without conditions, and

1 that's certainly something that Staff would want to
2 avoid.

3 And we don't actually know because it's never
4 been ruled on what would happen if we went beyond
5 December 15. But that's certainly a situation that we
6 would not want to have come up.

7 The Legislature, while allowing the EIS to be
8 discretionary, has also found within one year, making it
9 quite difficult to do an EIS. But our rules do account
10 for most, if not all, of the issues that would be
11 addressed by an EIS.

12 In conclusion, Staff takes no position at this
13 time as to the request that an EIS be required as a
14 condition of the Permit.

15 Thank you.

16 CHAIRMAN NELSON: Dakota Access.

17 MR. KOENECKE: Thank you, Mr. Chairman. Good
18 afternoon Commissioners, Staff, and parties. Brett
19 Koenecke for the Applicant.

20 As Ms. Edwards correctly points out, the statute
21 is permissive, and the Supreme Court guidance is backing
22 that up. It's permissive. It's within the discretion of
23 the Commission.

24 We would urge you not to use that discretion and
25 to instead resist the motion. As Ms. Edwards pointed

1 out, the Legislature also put a one-year time limit in
2 effect that I don't believe is permissive as I read it.
3 I don't know that that statute's been tested, but it
4 makes it difficult to perceive how we could at this late
5 stage of the game start any kind of meaningful EIS
6 procedure and have this all wrapped up by December 15.

7 It distresses me some to notice that the motion
8 was dated September 23 and filed this morning somewhere
9 after 11 o'clock, and I think that's noteworthy to point
10 out. It's unfortunate that we're having to make this up
11 here on the fly this afternoon.

12 But on the other hand I would note that a case
13 that's just been released from the D.C. Circuit Court of
14 Appeals, decided today, December [sic] 29, Sierra Club v.
15 United States Army Corps of Engineers, in regarding
16 Flanagan South Pipeline built and proposed by another
17 company, a competitor or a colleague, if you will, to my
18 client, and it found that there was no federal review
19 required of the entire project.

20 And that was something Mr. Rappold brought up in
21 his argument. So it does appear to me that at least the
22 D.C. circuit has disagreed with him as late as today on
23 that point.

24 The final thing I'd like to point out is this
25 isn't my first trip through this statute and through this

1 process, and it's hard for me to understand how an EIS is
2 helpful or certainly not preferable to the process that
3 we undergo here.

4 This is an exceedingly open process. Almost
5 anybody can be a party at these proceedings. They can
6 offer discovery, call their own witnesses, cross-examine
7 our witnesses. The extensive review that the PUC
8 undergoes or puts the people through in a permitting
9 process, I think, is preferable.

10 It's exhaustive. It ferrets out the
11 information. It allows everybody to have the same
12 opportunity to examine and test the evidence and reach a
13 conclusion.

14 I don't find that with an EIS process. I find
15 that to be a much more closed and difficult process for
16 other parties to navigate than this.

17 I think what we've got is a preferable process
18 in almost every respect, if not all of them, and I would
19 urge the Commission to resist the motion and let's go
20 forward with the hearing today and proceed as we would
21 otherwise.

22 CHAIRMAN NELSON: Thank you.

23 Mr. Rappold, brief rebuttal.

24 MR. RAPPOLD: Thank you, Mr. Chairman. I'll
25 finish from my desk here.

1 That's exactly our point. The Environmental
2 Impact Statement statute is optional, not mandatory. The
3 Flanagan South case that was just referenced actually
4 supports our opinion -- or our position, rather.

5 The Flanagan South, Sierra Club v. Army Corps
6 of Engineers determined that there would not be a federal
7 review of the entire pipeline system known as Flanagan
8 South. They determined in that case the individual
9 segment review rather than the entire project review.

10 That's why we're asking you guys to order an
11 Environmental Impact Statement to take place; because the
12 Army Corps of Engineers and other federal agencies are
13 taking this same position in the Dakota Access
14 Application as they took in the Flanagan South case.
15 That's how that case supports our position.

16 I can certainly understand how Dakota Access
17 would think and feel that an Environmental Impact
18 Statement would not help this process. I can certainly
19 understand that. Because it may come to be said from the
20 environmental review process that the pipeline is not a
21 good idea, and that doesn't support Dakota Access's
22 position. So I can understand how it would -- how they
23 would think it's not helpful.

24 And you have to keep in mind they want to say
25 and they have said that the Public Utilities Commission

1 process is a good, fair way to analyze all of the issues,
2 get all of the evidence before you, and make an informed
3 decision.

4 Well, in our adversarial proceedings and this
5 adversarial process not all the evidence may come in.
6 But with an Environmental Impact Statement you have a
7 neutral third party who is performing the assessment and
8 providing the report and the recommendations of the
9 Environmental Impact Statement to the Commission. That's
10 more helpful, I believe, in the long run to everyone
11 because it does present a neutral position.

12 Dakota Access has their position, Rosebud has
13 its position, as does every single Intervenor and party
14 in this room. We all have our own positions so we're
15 necessarily going to be biased in our approach towards
16 what we're doing here, what evidence we want to come in,
17 what evidence we want to keep out.

18 The Environmental Impact Statement requirement
19 addresses those issues, and I believe that's part of the
20 reason why the Legislature put that as a possible
21 requirement in these types of situations.

22 So the facts are almost the same as the
23 Flanagan South case. Again, going back to the case from
24 Minnesota that we cited earlier, it is optional. Other
25 courts have ruled that not exercising that discretion to

1 require a review has been an abuse of discretion.

2 So Staff mentioned real quick that they've hired
3 consultants that have performed a comprehensive technical
4 review of the Application. We're only going to get to
5 hear what those witnesses think about the Application if
6 those witnesses are called and they testify.

7 If they are not called and they don't testify,
8 we're not going to know what they said. All we're going
9 to have is what they prefiled in their direct testimony,
10 but that's not going to be part of the record if those
11 witnesses aren't called.

12 And it won't be anything that you consider. It
13 won't be anything that's part of the record. And it
14 doesn't matter how stellar their technical analysis may
15 have been. The end result is the same. That is evidence
16 that you may not consider if those witnesses don't
17 testify.

18 By staying the proceedings I don't think the
19 result you get is a de facto permit that issues without
20 conditions. I just don't see how that's a result that
21 you could come up with if you stayed the hearing and it
22 wasn't resolved within the one-year statute of
23 limitations.

24 Now I don't know what the implications of that
25 would be and -- on appeal or anything like that. Because

1 I'm sure that if this proceeding is not resolved within
2 the statutory requirement of one year, someone will
3 likely appeal that.

4 But you may find that following the law and
5 exercising your discretion, optional discretion, to order
6 a review would be good cause to stay the proceedings. I
7 don't know what the end result would be. I'm just
8 speculating at this point in time on that issue.

9 So, again, we would ask the Commissioners to
10 consider strongly ordering an independent Environmental
11 Impact Statement to be conducted consistent with the
12 requirement of statute.

13 Thank you.

14 CHAIRMAN NELSON: Questions from the Commission.
15 I'll begin.

16 Mr. Rappold, what was the date that you first
17 knew that no comprehensive Environmental Impact Statement
18 was going to be part of this process?

19 MR. RAPPOLD: I don't believe I could give you
20 an exact date of what that was, but I want to tell you
21 with certainty that it was middle to end of last week.

22 CHAIRMAN NELSON: Prior to that point, what gave
23 you indication that there would have been a comprehensive
24 Environmental Impact Statement prepared?

25 MR. RAPPOLD: Nothing. I'm familiar with the

1 case Dakota Access cited, Flanagan South, and I've looked
2 at the Army Corps of Engineer requirements or, you know,
3 their position on it, and I knew that in that case they
4 had taken a segmented approach to analyzing whether or
5 not there's a federal nexus.

6 CHAIRMAN NELSON: But you had no indication
7 before last week that there was going to be a
8 comprehensive Environmental Impact Statement; correct?

9 MR. RAPPOLD: No. And it's my understanding
10 there is not a comprehensive Environmental Impact
11 Statement.

12 CHAIRMAN NELSON: It's been mentioned that this
13 motion was prepared and dated on the 23rd, six days ago.
14 It was filed with us two hours before we're to convene
15 here today.

16 Can you tell us why that delay and this was
17 dropped on us right before this hearing?

18 MR. RAPPOLD: I can speak for myself.
19 Drafting -- folks were drafting the motion, reviewing the
20 motion, finalizing last-minute preparations for this
21 trial, traveling to Pierre for this trial, and myself, I
22 had to spend a better part of yesterday responding to a
23 motion to strike our exhibits.

24 So that's speaking just for myself.

25 CHAIRMAN NELSON: And all of that was more

1 important than the Commission knowing that this was
2 coming?

3 I don't have any further questions.

4 Any other questions from my fellow
5 Commissioners?

6 Commissioner Hanson.

7 COMMISSIONER HANSON: I have to echo Chairman
8 Nelson's concern that this was so dilatory of a motion.

9 A lot of the things we received here seemed to
10 be last minute, and there's a habit for some to do that.
11 And, nevertheless, we have an important motion before
12 us.

13 Mr. Rappold, you say that there's no lead
14 federal agency for the overall project, and yet you talk
15 about the individual assessments that will take place.

16 Don't the individuals -- the sum of the
17 individual make the whole?

18 MR. RAPPOLD: Generally speaking, the sum does
19 equal the whole, yes.

20 COMMISSIONER HANSON: So in this particular case
21 is that not sufficient?

22 Is there anything that an EIS would accomplish
23 that is not presently being accomplished?

24 MR. RAPPOLD: Yes. It would provide a
25 comprehensive overarching review of the entire project

1 from South Dakota border to South Dakota border from what
2 would presumably be an outside, uninterested third party
3 that "has no stake in the game."

4 COMMISSIONER HANSON: When you say overarching
5 whole project, are you referring to the project through
6 the Dakotas and the other states, or are you referring to
7 just what is taking place within the State of South
8 Dakota?

9 I'm confused by the semantics of your argument
10 when you speak to the overarching. To me that means the
11 whole project from North Dakota to its end point.

12 MR. RAPPOLD: Ideally, yes, I think this type of
13 project is the type of project that would warrant and
14 justify federal review for the entire length of the
15 project. Ideally.

16 But that's not the situation that we have.
17 We're not going to get a full on environmental assessment
18 or Environmental Impact Statement under NEPA from the
19 Federal Government or from any federal agency.

20 When we have that situation the Legislature has
21 crafted a way for you guys -- the Commission. Sorry --
22 to address that in these types of situations by giving
23 you the optional authority to order an Environmental
24 Impact Statement to be conducted.

25 COMMISSIONER HANSON: Not withstanding what

1 you've explained and we've gone back and forth on, is
2 there anything that that EIS from the independent party
3 would provide to the Commission in South Dakota referring
4 to only South Dakota?

5 Understanding that if it provides some
6 information of what takes place in Iowa, that is not
7 something that we can rule on. It's not maybe of my
8 personal concern, but it's not my concern for my ruling
9 as a Commissioner.

10 So what would we accomplish for South Dakota by
11 having the EIS that you're referring to? Besides having
12 an independent authority.

13 Is there any information that we would glean
14 from that?

15 The environment is extremely important to me.
16 That's one of the main concerns I have here. So help me
17 with this to understand why this is important to me.

18 MR. RAPPOLD: I think one of the benefits that
19 we would get from an Environmental Impact Statement in
20 South Dakota -- and it would be limited to just
21 South Dakota. We're not talking about Iowa or any other
22 state.

23 One of the things that we would get is a
24 straight up look and assessment at the Sand Lake National
25 Wildlife Refuge and an unbiased look at the effects of

1 this project crossing that area.

2 We're not getting an unbiased look through this
3 proceeding. We're getting what Dakota Access says about
4 the potential impacts to the species in that area, the
5 endangered species in that area. We're getting a look at
6 what the independent consultants, PUC Staff witnesses,
7 say about potential impacts to crossing that area. And
8 that starts right when the pipeline enters South Dakota
9 in Campbell County, north central.

10 We don't get a full, unbiased look at anything
11 that has to do with this project because the people that
12 are asking for the permit don't want you to hear about
13 certain things. And that's just the nature of the way
14 this goes. So that's one benefit.

15 Another benefit, expanding on the wildlife
16 concept, the entire eastern portion of South Dakota is
17 broken up into four wetland management districts that are
18 managed by the Fish & Wildlife Service. The entire
19 eastern half of the State of South Dakota has been
20 recognized not only by South Dakota but the Federal
21 Government as an area that has land and resources and
22 wetlands and animals and birds and plants and trees that
23 are well worth protecting.

24 And the citizens of the State of South Dakota
25 benefit from those resources being protected. Not only

1 being protected but being further -- we have --

2 One of the things you may hear about in this
3 case is the whooping crane. There's about 300 of them
4 left in the world. And the entire pipeline route crosses
5 over some of the most pristine habitat left in the world
6 for the whooping crane.

7 And the evidence that you're going to hear
8 doesn't really allow you to properly flesh out what the
9 possible consequences could be on the whooping crane's
10 habitat if the pipeline is allowed to be constructed in
11 that area.

12 Now the testimony in the Application that we've
13 read says, well, we haven't really seen too many of them.
14 Well, you know what? There's a good reason why you
15 haven't seen too many of them; because honestly there's
16 not too many left to be seen.

17 And these are the types of things -- and that's
18 just one example. These are the types of things that the
19 people of South Dakota, the Commission, and everyone here
20 will benefit from by having an independent review, a full
21 on Environmental Impact Statement prepared for
22 South Dakota just for you.

23 COMMISSIONER HANSON: Thank you.

24 Mr. Koenecke or whomever you would like to -- if
25 I may continue, Mr. Chairman.

1 You've been in my office, and one wall is
2 totally dedicated -- nearly totally dedicated to
3 paintings of birds. So Mr. Rappold's statements --
4 there's about 400 whooping cranes in existence.

5 But make me feel more comfortable about why an
6 EIS is not necessary. Because we have required those in
7 the past. And, frankly, I'm surprised that -- I'm
8 surprised by a couple of things. One was by the routing
9 from an environmental standpoint originally going right
10 through the upper Lower Skunk Creek Aquifer areas when it
11 really didn't need to. Other routing concerns that I had
12 as well.

13 But strictly from an environmental standpoint,
14 additionally Sand Lake is an area that I've spent many,
15 many hours, days in. And so I'm concerned. I'm
16 concerned about the environment here, and I'm concerned
17 about why we don't have an EIS on this.

18 I know this is a real late -- and I called it
19 dilatory. It is to me a dilatory motion. But at the
20 same time, it came in under the -- motions are still --
21 can come in here. So I'm surprised that you guys didn't
22 have one to begin with.

23 MR. KOENECKE: There's a number of questions
24 there, Commissioner. And I don't know that I am
25 completely prepared to respond to all of them as I sit

1 here.

2 The notion about the routing of the pipeline
3 that you've recently brought up is, I think, perfectly
4 appropriate for the proceeding. I think we're about to
5 undertake and discuss those concerns in detail with
6 experts who are sworn as witnesses.

7 The EIS that -- those processes that I'm
8 familiar with have been directed by federal agencies in
9 the past. I've not been a part of a state EIS
10 proceeding.

11 I think that my experience -- my basis of
12 experience with EIS is that it's a -- very much an
13 Applicant driven process, and I've noted that my clients
14 involved in those processes for federal reasons have been
15 criticized for being -- for the level of involvement
16 that's necessary in order for an EIS to be produced.

17 And I've often thought that the open process
18 that we have here is, as I said previously, inherently
19 preferable. Almost anyone can be a party here. People
20 can bring their witnesses. They can have their day in
21 court. The Rosebud Sioux Tribe, as I remember, didn't
22 offer any witnesses, has no witnesses to appear here
23 today. And I don't know why that is. That's a question
24 for Mr. Rappold.

25 But their ability to influence this proceeding

1 with the facts as they see them or as they wish them to
2 be is substantially greater than it would be in an EIS
3 proceeding where there, from my understanding, would be
4 attempts made at whatever level to influence the outcome
5 of that proceeding without the benefit of an open hearing
6 room where we're all on microphones and being listened to
7 elsewhere and having it be reported I presume live by the
8 press.

9 And I think for us to say now that somehow that
10 would be preferable, that we'd hire and engage a
11 third-party contractor and then have the motives and the
12 tactics of the participants in that process be kept
13 essentially closed and then impugned --

14 COMMISSIONER HANSON: Excuse me. I saw some
15 people walking the hall. There might be some contractors
16 working. You might want to make sure they're not
17 interfering.

18 Excuse me, Mr. Koenecke. And I was referring to
19 federal EIS, not to a state EIS.

20 MR. KOENECKE: Thank you. I appreciate that.
21 I'm not aware of a state EIS proceeding involving any of
22 my clients. I don't believe that's happened.

23 The Commissioners' concerns are easily
24 understandable and something that we have witnesses who
25 can address. We have the maps and the ability to discuss

1 what those impacts would be and come to a reasoned
2 conclusion.

3 I don't know at what level we would have, each
4 one of us, the same ability to impact what comes out in a
5 EIS statement. The last one I saw was two binders full.
6 I've got some big binders here, and that document was
7 bigger in two books than anything I've got here.

8 Somebody had to put that together. Contractors
9 had to be engaged. It had to take a tremendous amount of
10 time. It had to be paid for by somebody. All the data
11 had to be generated. And, yet, it would be my opinion --

12 I haven't checked this out with my client and
13 boss here, but I don't see how that's preferable, and I
14 would urge the Commissioners to reach the same conclusion
15 here. I look forward to talking about the Commissioners'
16 concerns.

17 And, finally, I'll just note for the record
18 we've been going through our discovery responses here,
19 and we offered a response to Rosebud Sioux Tribe in
20 written discovery talking about an Environmental Impact
21 Statement back in June. So June 15, I think, is the date
22 of our document back that says we're not considering
23 asking for an EIS. We objected to that question. So
24 I'll just offer that up.

25 COMMISSIONER HANSON: Thank you.

1 I have some further questions for Staff.

2 Staff, do you have any familiarity with how long
3 an EIS for the State of South Dakota would take?

4 I'm guessing it's an eight-month to a year type
5 of a project.

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

8 We've never done a State one, but our analysts
9 are telling me generally from a year to a year and a half
10 is what to expect from a federal one. Something in that
11 ballpark.

12 COMMISSIONER HANSON: Thank you.

13 I'll wait to see if there's any other
14 Commissioner questions before I make my statement.

15 CHAIRMAN NELSON: Other Commissioner questions?

16 Just one additional question. Well, actually
17 two for Mr. Rappold.

18 I'd ask you the same question that was asked of
19 Staff. How long do you believe a State Environmental
20 Impact Statement would take for this kind of project?

21 MR. RAPPOLD: I have no idea honestly. My
22 thoughts are that it would not take up to a year and a
23 half. If a Federal Environmental Impact Statement takes
24 up to a year and a half, that's going to be obviously a
25 much longer, more drawn out, involved process.

1 If you just take Dakota Access, for example,
2 they would have to look at North Dakota, South Dakota,
3 Iowa, and Illinois; four states. So here we're only
4 looking at one state.

5 So maybe if we go with those numbers, we could
6 say it would take a quarter of the time. I don't know.
7 I'm just kind of making that up on the spot.

8 I don't know how long it would take. I don't
9 believe it would take a year and a half.

10 CHAIRMAN NELSON: Last question. How close is
11 Sand Lake to the proposed pipeline route?

12 MR. RAPPOLD: The wildlife refuge itself, or
13 wetland management district?

14 CHAIRMAN NELSON: Wildlife refuge itself.

15 MR. RAPPOLD: I'd have to look on a map. The
16 district itself would be -- I don't even want to guess
17 because at the risk of being inaccurate. But the refuge
18 itself is part of the district, and the district
19 encompasses, I think, 14,000 acres. 12 to 14,000 acres.
20 So that's the size that we're talking about.

21 I'd have to go to my notes to get more
22 information about how large that district actually is.
23 But the project crosses through the district itself.

24 CHAIRMAN NELSON: Thank you.

25 Any further Commissioner questions?

1 MR. KOENECKE: Commissioner, if I might.

2 CHAIRMAN NELSON: Yes.

3 MR. KOENECKE: We think 44 miles is the distance
4 from the proposed facility to Sand Lake National Wildlife
5 Refuge.

6 CHAIRMAN NELSON: Thank you. As I look at a
7 map, I would -- that looks accurate.

8 Commissioner Hanson.

9 COMMISSIONER HANSON: From my experience, it is
10 that significant distance as well.

11 A question for Ms. Wiest or one of the other
12 Staff attorneys.

13 Is it possible to proceed in this process and if
14 we reach a conclusion, which obviously we will, and have
15 it subject to an EIS for the State of South Dakota being
16 completed and the Commission subsequently ruling at that
17 time?

18 Because that obviously extends beyond 12 months.
19 But if we rule, for instance, in favor of the pipeline
20 and it's still subject to an EIS and that EIS arrives six
21 months after our ruling, is it possible to have it
22 subject to that?

23 MS. WIEST: I would probably need to look into
24 that a little bit more. Because it might -- I mean, I
25 assume people could argue that any EIS that came out of

1 the proceeding would need to be -- there had to be some
2 sort of review of that EIS.

3 COMMISSIONER HANSON: The reason I ask is that
4 EIS is becoming more and more important to me. And I
5 recognize that we have conditions that we place on all of
6 these pipelines so far, significant ones, and that those
7 conditions have to be met. And I'm wondering if that can
8 be set as a condition that they have to meet.

9 At the same time, we would have to approve it so
10 it's a little conflicting in my mind whether it extends
11 beyond statute, our ability to approve this process.

12 MS. WIEST: Again, I think I would have to look
13 into some of those EIS statutes also.

14 COMMISSIONER HANSON: All right. Thank you.

15 Mr. Chairman, I guess I've said what I wanted to
16 say. I'm very, very concerned. Environment is one of
17 the very top concerns on this issue, and I am surprised
18 that there's not more information pertaining to that. So
19 I think my support is contingent upon that, I have to
20 say.

21 So I'm looking forward to finding out what
22 counsel informs me on that. I don't feel I can rule on
23 this motion other than to vote in favor at this juncture.
24 So I think we might have to stay the Motion to Stay until
25 we find out from the -- defer the Motion to Stay until we

1 find out from counsel.

2 CHAIRMAN NELSON: Is there a motion?

3 I will move in the Joint Motion to Stay
4 Proceedings for Preparation of an Environmental Impact
5 Statement that we deny the joint motion.

6 Discussion on the motion to deny.

7 As Mr. Rappold pointed out, under statute this
8 is within our discretion. Discretion back in June or
9 sooner would have been a good thing. But to drop this
10 issue on us two hours before we're going to begin the
11 evidentiary hearing is absolutely out of line.

12 At this point under the statutory deadline that
13 we have in mid-December it's not going to be possible to
14 get this accomplished by then. And so staying this
15 proceeding is, in my mind, not possible for us to do and
16 maintain the statutory requirements that we have to wrap
17 this up by mid-December.

18 As with Commissioner Hanson, I look forward to,
19 you know, possibly the answers as to whether or not this
20 can be a condition. But so far as staying the
21 proceedings, at this point I don't believe that's
22 possible or doable.

23 Additional discussion.

24 COMMISSIONER SATTGAST: Mr. Chair, I'd echo your
25 sentiments on that as well. And I don't think that us

1 denying the stay will stop us from looking into the
2 environmental impact of the pipeline.

3 I too believe that this has come at such a late
4 date that I think it's now up to the Public Utilities
5 Commission to look into this matter, and so I would
6 support you in denying the stay.

7 CHAIRMAN NELSON: Additional discussion.

8 COMMISSIONER HANSON: Mr. Chairman, thank you.
9 I appreciate the fix that this places all of us in and
10 the question that it presents to us.

11 As I said, my position on the docket really is
12 going to be conditioned on the Applicant meeting all of
13 the requirements. The environment is supposedly just as
14 important as any one of the others, the others all being
15 of concern to us.

16 But it seems as if we're -- from the get-go here
17 we're starting with the potential without having the
18 information that we need. And my vote is going to be an
19 expression of how strongly I feel that we have to have
20 this information and that if we don't have it, I
21 absolutely cannot support this docket.

22 MS. CRAVEN: Mr. Chairman.

23 CHAIRMAN NELSON: Additional discussion by the
24 Commission.

25 We are in Commission discussion.

1 Seeing none, all those in favor will vote aye;
2 those opposed, nay.

3 Commissioner Sattgast.

4 COMMISSIONER SATTGAST: To deny the stay?

5 CHAIRMAN NELSON: To deny the stay.

6 COMMISSIONER SATTGAST: Aye.

7 CHAIRMAN NELSON: Commissioner Hanson.

8 COMMISSIONER HANSON: No.

9 CHAIRMAN NELSON: Nelson votes aye.

10 The Motion for Stay is denied.

11 That will then take us to the next motion that
12 was filed, and this is a motion by Dakota Access to
13 strike Rosebud Sioux Tribe's exhibit list filing and
14 preclude introduction of undisclosed exhibits.

15 Ms. Semmler.

16 MS. SEMMLER: Thank you. This is Kara Semmler
17 on behalf of Dakota Access, LLC.

18 Commissioners, our client had two goals moving
19 into the discovery process. One of those goals was to
20 learn as much about the various parties' positions
21 concerns, questions, and how they believe this proposed
22 project will directly impact them. Our second goal in
23 the discovery process was to avoid trial by ambush.

24 So more detail on goal one. Goal one was to
25 learn about these various parties' positions. And in

1 attempting to accomplish that goal we sent a discovery
2 request to the Rosebud Sioux Tribe. In our initial
3 request we asked very generally what their position was.

4 Their supplemental answer to that first request
5 we got a real general statement that the Rosebud Sioux
6 Tribe does not believe the Applicant can meet its burden
7 of proof.

8 Well, we wanted to know more. So we went into
9 round two and round three, and we tried to dissect that
10 further to understand their answers.

11 Round two our client asked does the Rosebud
12 Sioux Tribe have a formal position pertaining to this
13 pipeline? Now you can't get more direct than that. And
14 the answer was that their position on this pipeline is
15 not relevant.

16 We asked for all documents that support their
17 position in regards to this pipeline, and again the
18 answer was that's not relevant.

19 So it just made no sense when Rosebud Sioux
20 Tribe itself has told us that their position and the
21 documents that support their position is not relevant.
22 It made no sense. There's nothing to compel. It made no
23 sense for us to compel an irrelevant position. And it
24 made no sense for us to compel irrelevant documents.

25 How do we compel something we don't know exists

1 when the party who holds that particular position, holds
2 it very dear, I would argue, tells us it's irrelevant.
3 And if those documents and that position was irrelevant
4 on June 15 when we received that answer, I think it's
5 irrelevant today.

6 Goal two was to avoid trial by ambush, and here
7 we are dealing with that. The Rosebud Sioux Tribe has
8 not indicated they're calling any witnesses. They have
9 not filed any prefiled discovery.

10 But instead on September 23 we receive
11 hundreds -- thousands of pages of documents that they
12 intend to use in this proceeding without responding to
13 discovery in any way that we know what their position is
14 and how they intend to use those documents.

15 That's discovery -- excuse me. That is trial by
16 ambush.

17 The rules of procedure are set up to avoid such
18 a thing. So we respectfully request the Commission to
19 prohibit the Rosebud Sioux Tribe from utilizing the
20 documents as listed in our motion, 1 through 27 and 29.

21 Thank you.

22 CHAIRMAN NELSON: Thank you.

23 Mr. Rappold.

24 MR. RAPPOLD: Thank you again, Commissioners.

25 On number two of the Applicant's Motion to

1 Strike, towards the middle of number two, later that
2 answer was generally supplemented with a statement that
3 the Rosebud Sioux Tribe does not believe the Applicant
4 can satisfy statutory and other legal requirements.

5 Let's look at that. Now as counsel indicated,
6 we exchanged discovery and responded to four discovery
7 requests. I have to agree that a lot of our answers were
8 through -- were objections to what they were asking.

9 Our position is pretty clear in this case, and
10 it's been clear from day one. In our supplemental
11 response, which they specifically left out of their
12 motion, by the way -- they generally referred to it but
13 didn't specifically include it. They included three of
14 the other responses to discovery but not this one.

15 "The Rosebud Sioux Tribe objects to Dakota
16 Access's Application for the construction of the Dakota
17 Access Pipeline on the grounds, not limited to by way of
18 this answer, that the Applicant will be unable to satisfy
19 the statutory requirements of SDCL 49-41B and other
20 relevant laws, including but not limited to the Pipeline
21 Safety Act, its associated implementing regulations,
22 application of the PUC Administrative Rules" -- I'm going
23 to stop there, and then I'm going to go to the second to
24 the last sentence.

25 "Rosebud objects to Subsections A and B on the

1 grounds that the questions seek answers that are beyond
2 the scope of the requirements in the discovery statutes."

3 If they didn't like our answers, they should
4 have asked for rulings on our objections. We have the
5 right under the law to rely on our objections to their
6 questions, until such time as someone else makes a
7 determination on whether or not our objection is going to
8 be sustained or overruled.

9 At no point in time did that ever happen. I
10 never got a phone call. I never got an e-mail. We did
11 briefly discuss discovery in the hallway here during the
12 Keystone trial.

13 Counsel referenced prefiling discovery. I have
14 no -- never experienced prefiling discovery. I'm not
15 aware of discovery actually being filed or sent to the
16 Commission.

17 So we've supplemented our response. What we
18 have here is basically it appears to be an end run around
19 the discovery rules. The information, the dockets --
20 documents, rather, that we've provided are all public
21 information, things that are available on the website,
22 and information that Dakota Access sent to us in
23 discovery.

24 They're also documents that prudent
25 professionals in similar situations would have reviewed

1 in preparing this Application and for this hearing.

2 It's interesting to note in the context of this
3 motion that on -- what's today? Tuesday. On Monday,
4 Dakota Access filed revised testimony of I'm just going
5 to say Jack because I don't remember what his last name
6 was but I remember Jack.

7 On Monday, after the deadline to file prefiled
8 testimony, Dakota Access took it upon themselves to file
9 their own revised testimony for the reasons stated in the
10 letter to make it clearer for everyone because apparently
11 there was some inconsistencies with Jack's testimony and
12 other testimony on the record so they wanted to clear up
13 those inconsistencies prior to this hearing.

14 They didn't ask you for permission. They didn't
15 file a motion and say can we have your permission to file
16 amended testimony. They just went ahead and did it. And
17 it's interesting that I get called out on this, and they
18 go ahead and do that. For context.

19 If they had a problem with our responses to
20 discovery and our objections, they should have come to
21 you and asked you guys to rule on them and compel me to
22 produce information. At no point in time did they do
23 that.

24 They claim prejudice at this point by showing
25 them documents that are their own, that are publicly

1 available and that any prudent professional in a
2 similarly situated position would have reviewed in filing
3 their environmental recommendations is just absurd at
4 this point.

5 We would ask you to deny their Motion to Strike.

6 CHAIRMAN NELSON: Thank you.

7 Brief rebuttal.

8 MS. SEMMLER: Commissioners, again, I'll just
9 state we did receive an answer when we asked very
10 explicitly and expressly what the Rosebud Sioux Tribe's
11 position was on this proposed pipeline, and their answer
12 was that it is irrelevant.

13 So how do you compel something that we don't
14 know exists, didn't certainly seem they have a position
15 that they wanted to share. And they stated it's
16 irrelevant.

17 What is it to compel? I'm not sure what that
18 motion would look like. We know you have a position and
19 we want you to tell us? They've stated it's irrelevant.

20 And to Mr. Rappold's point that they made
21 objections and we should have asked this Commission to
22 rule on them, he's admitting essentially none of those
23 objections would have been valid because at this point
24 he's providing all of that material, as he intends to use
25 it at trial.

1 So how can it be an excuse to use an invalid or
2 inappropriate objection just for the sake of withholding
3 materials?

4 Nothing further.

5 CHAIRMAN NELSON: Questions from the Commission.

6 COMMISSIONER HANSON: Do you have some?

7 CHAIRMAN NELSON: No.

8 COMMISSIONER HANSON: Mr. Rappold, Ms. Semmler
9 makes some really good points here. And you knew what
10 they were looking for when you replied. And basically
11 you're telling us that they should have filed a motion to
12 us to force you to do what you knew that you needed to
13 do.

14 Is that not correct?

15 MR. RAPPOLD: No, Commissioner Hanson. With all
16 due respect, I don't believe that's correct. Because I'm
17 struggling to find out what our formal position has to do
18 with the Applicant's burden of proof, and that was the
19 grounds that I raised.

20 My objection is based on the information that
21 they asked for being irrelevant to the Applicant's burden
22 of proof. I don't have to come in here and call
23 witnesses or put on any testimony. The Applicant has the
24 burden of proof. And our formal position is not relevant
25 to them meeting their burden of proof.

1 COMMISSIONER HANSON: However, you're I would
2 say extremely knowledgeable in court processes. You're
3 extremely knowledgeable in the processes in which we
4 conduct our meetings.

5 So it would be a far reach for me to assume that
6 you didn't understand what they were asking for and
7 wanted to proceed with and that those included
8 information, what type of information, just as has been
9 requested in our dockets.

10 And part of the process here is to play fair
11 from the standpoint of allowing the Commission to have
12 information so that both -- all parties, since there's
13 far more than just one. There's multiple parties here.
14 So that everyone can participate and so that the
15 knowledge and information, the facts can arrive in our
16 ears and on our desks so that we can make the right
17 decision.

18 And that's part of the entire process here. So
19 I'm not finding fault in Ms. Semmler's arguments.

20 You may respond if you wish.

21 MR. RAPPOLD: Thank you, Commissioner.

22 As we stated, we don't believe they can meet
23 their burden of proof under the law. If you want to call
24 it a position, that's our position, and we told them
25 that. We do not believe you can satisfy your statutory

1 burden of proof.

2 I objected to the other two portions of their
3 question where they asked for me to tell them exactly
4 what laws they won't be able to comply with or exactly
5 what aspects of the burden of proof they could not meet.
6 I objected to that because I think that it's outside of
7 the scope of discovery and the Rules of Civil Procedure.

8 If they wanted that resolved, if they wanted me
9 to tell them specifically which aspects of the burden of
10 proof statute can't we meet, then they should have come
11 in here and asked you to compel me to do that and get a
12 ruling on my objection. And they didn't do that.

13 COMMISSIONER HANSON: Thank you, Mr. Chairman.

14 CHAIRMAN NELSON: Additional Commissioner
15 questions.

16 Seeing none, is there a motion?

17 I will move to deny the Motion to Strike Rosebud
18 Sioux Tribe's exhibit list filing and preclude
19 introduction of undisclosed exhibits.

20 Discussion on the motion.

21 While I would agree that Rosebud's responses to
22 the discovery requests were vague and nonresponsive, I
23 would also agree with him that there was opportunity for
24 the Applicant to come in here and file a Motion To Compel
25 simply based on the vagueness or nonresponsiveness of the

1 answers.

2 But on the flip side of that, as I looked at,
3 you know, what we're quibbling over here is the documents
4 that were ultimately produced. And when I look at the
5 question that was asked in the Request for Production of
6 Documents it's simply provide a copy of all documents
7 referenced in any answer above or which supports any
8 answer above, that to me seems vague and not as specific
9 as it could have been.

10 You could have asked for provide all documents
11 that you plan to use as an exhibit at trial. But it was
12 a much vaguer question than that. So based on that I'm
13 going to obviously move to deny the motion.

14 Additional discussion.

15 Commissioner Hanson.

16 COMMISSIONER HANSON: Commissioner, I'm going to
17 support your motion. I have strong concern with the way
18 in which the process was played out by the parties. I
19 think that Mr. Rappold should have been more forthcoming
20 with the information.

21 And, at the same time, as I've said earlier,
22 it's a matter of having as much information for us from a
23 factual standpoint in order to make the decision. And
24 even though I believe that technically I should and can
25 vote to support the motion, the motion by the Applicant,

1 I cannot do that simply because I want that information.
2 And so I'm -- I don't know if that's being selfish for me
3 or that's being pragmatic from the standpoint of making
4 certain that we have the knowledge we need in order to
5 make the decision. But I'll be supporting your motion
6 because of it.

7 CHAIRMAN NELSON: Additional discussion.
8 Mr. Sattgast.

9 COMMISSIONER SATTGAST: Mr. Chair, I too will be
10 supporting your motion on this as well. I don't want
11 anybody to feel blindsided here by not getting the
12 information that they want.

13 In that as well, I echo Commissioner Hanson that
14 we too do not want to be blindsided. I want to see what
15 kind of information we'll be looking at here.

16 And so with that, I'll be supporting as well,
17 Mr. Chairman.

18 CHAIRMAN NELSON: Additional discussion?

19 Seeing none, all those in favor of the motion to
20 deny will vote aye; those opposed, nay.

21 Commissioner Sattgast.

22 COMMISSIONER SATTGAST: Aye.

23 CHAIRMAN NELSON: Commissioner Hanson.

24 COMMISSIONER HANSON: Aye.

25 CHAIRMAN NELSON: Nelson votes aye.

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Motion to deny passes.

1 STATE OF SOUTH DAKOTA)

2 :SS CERTIFICATE

3 COUNTY OF SULLY)

4

5 I, CHERI MCCOMSEY WITTNER, 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 29th day of
11 September, 2015, and that the attached is a true and
12 correct transcription of the proceedings so taken.

13 Dated at Onida, South Dakota this 30th day of
14 October, 2015.

15

16

17

18 Cheri McComsey Wittner,
19 Notary Public and
20 Registered Professional Reporter
21 Certified Realtime Reporter

21

22

23

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