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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

=====

Transcript of Proceedings
January 6, 2015
9:37 a.m.

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BEFORE THE PUBLIC UTILITIES COMMISSION

GARY HANSON, CHAIRMAN (by telephone)
CHRIS NELSON, VICE CHAIRMAN
KRISTIE FIEGEN, COMMISSIONER

COMMISSION STAFF

John Smith
Kristen Edwards
Greg Rislov
Darren Kearney
David Henry
Joseph Rezac
Eric Paulson
Patrick Steffensen
Brittany Mehlhaff
Deb Gregg
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 6th day of January, 2015.

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1 CHAIRMAN HANSON: HP14-001, In the matter of the
2 Petition of THE TransCanada Keystone Pipeline, LP for
3 Order Accepting Certification of Permit issued in
4 Docket HP09-001 to construct the Keystone XL Pipeline,
5 and specifically Yankton Sioux Tribe's Motion to Dismiss.

6 Before I go any further than this, I want to
7 acknowledge that we do have a court reporter today and I,
8 along with everyone, must speak slower. And I want to
9 check the phone lines again for those who didn't check in
10 earlier.

11 Bill Taylor and James Moore, have you joined us?

12 MR. TAYLOR: William Taylor and James Moore are
13 on the line.

14 COMMISSIONER NELSON: Thank you.

15 Dianna Jorgenson, have you joined us?

16 Not hearing a response there.

17 John Harter, have you joined us? John Harter?

18 Not hearing a response there.

19 Nancy Hilding, have you joined us?

20 MS. HILDING: Yes. Can you hear me?

21 COMMISSIONER NELSON: Barely. And you just
22 faded away so the answer is no.

23 MS. HILDING: Can you hear me now?

24 COMMISSIONER NELSON: Barely.

25 MS. HILDING: I'm here. I don't know why you

1 can't hear me. Let me unmute it and mute it again.

2 COMMISSIONER NELSON: Okay. Nancy has joined
3 us.

4 Here's how we're going to proceed this morning.
5 A number of the parties have filed written comments and
6 written motions either supporting Yankton Sioux Tribe or
7 joining or filing their own Motions to Dismiss. Here's
8 how I intend to proceed this morning.

9 Let me first say that we have all read all of
10 the written filings, and so that information is covered.
11 We've gone through that.

12 I am going to take limited oral testimony this
13 morning. Or I should say oral argument from the parties.
14 And the way we're going to do this is I'm going to go,
15 obviously, first to the Yankton Sioux Tribe who made the
16 initial Motion.

17 I will then give option to any of the other
18 parties who have filed written motions to make oral
19 argument and then go to any of the Interveners that wish
20 to make oral argument and then, obviously, to
21 TransCanada, the Applicant, and then finish up with Staff
22 for any oral argument that they may have.

23 Let me say to everyone who's going to be making
24 oral argument today you do not need to repeat what's in
25 your written filings. You do not need to repeat

1 information that's already been given. And, most
2 importantly, any of your oral argument needs to be
3 confined to the Motion to Dismiss and the legalities
4 involving the Motion to Dismiss.

5 We are not here today to argue the merits of the
6 case, only the Motion to Dismiss.

7 And with that, I would turn to Thomasina.
8 Welcome.

9 MS. REAL BIRD: Thank you, Vice Chairman Nelson,
10 Commissioner Fiegen, and Chairman Hanson on the phone.

11 The Yankton Sioux Tribe filed this Motion to
12 Dismiss because the project for which the company seeks
13 does not fall within the permit that the Commission
14 issued in 2010.

15 We don't contend that any of the specific
16 changes outlined in the Appendix C from the Applicant or
17 that the number of changes alone require a new permit.

18 However, here the law mandates that if a project
19 is not consistent with the findings of the original
20 permit, the permit issued in 2010 does not authorize the
21 construction of that project.

22 If we turn to South Dakota consolidated law
23 49-41B-24, the Commission's required to make complete
24 findings in rendering a decision regarding whether a
25 permit should be granted, denied, or granted upon such

1 terms as the Commission deems appropriate.

2 And this law would serve no purpose if
3 South Dakota consolidated law 49-41B-27, the law that
4 requires certification, is interpreted in a way that the
5 Commission's findings from the original permit have no
6 bearing once the Commission issues the Order approving
7 the permit and adopting those findings from 2010.

8 So in order for 49-41B-27 to apply, the project
9 now being applied for must be consistent with the basis
10 for the Commission's decision. So consistent with the
11 findings in 2010. And here, by the very terms of the
12 Application, the company has identified numerous ways in
13 which the findings -- they propose the findings be
14 changed.

15 Now the company, Keystone, has previously argued
16 that a proceeding under 49-41B-27 is not a substitute for
17 an appeal. It's not an opportunity for parties or
18 Interveners to ask the Commission to reopen the permit.
19 We heard similar statements from the Commission itself,
20 including reconsideration of the 50 conditions or to
21 reconsider the original Decision granting the permit to
22 construct and operate the project.

23 However, that's actually what Keystone is asking
24 the Commission to do, to go back and amend its findings.
25 And, in fact, 49-41B-27 does not allow for the findings

1 to be amended at this point. There was no appeal, as was
2 noted by Keystone, and so those findings correspond to
3 that permit.

4 Because the project now proposed by Keystone
5 would require that the Commission amend its findings and
6 its final Decision and because the law prohibits an
7 agency from reconsidering a final decision, there's no
8 lawful basis for Keystone's Petition.

9 The Commission based its Decision on the
10 findings, and these findings were material to the
11 identity of the project and, therefore, to the
12 Commission's decision itself to grant the permit.

13 Altering anything material to the project or to
14 the Commission's original decision necessarily removes a
15 project from the scope of the permit originally granted
16 in that decision. And, therefore, the Yankton Sioux
17 Tribe asks for this case to be dismissed as a matter of
18 law.

19 COMMISSIONER NELSON: Thank you. What I'm going
20 to do is I'm going to allow Commissioners to ask
21 questions as each argument is made. I think that might
22 be the most efficient way. We may or may not have
23 questions. But I do, if you would.

24 Obviously, the Applicant has identified a number
25 of changes in their so-called tracking table. Do you

1 feel your argument would still be valid if they had only
2 made one change instead of a number of changes?

3 MS. REAL BIRD: It's not one or the number.
4 It's the fact that they're proposing to open up the
5 findings, and those findings are inextricably linked to
6 the actual permit issued in 2010. There's no basis in
7 law to amend those findings at this stage. Only if there
8 was an appeal taken at that time or reconsideration,
9 which there actually was. From reading the past docket,
10 there were amended findings back in 2010. So now to ask
11 for amended findings, there's no basis in law for that.

12 COMMISSIONER NELSON: Thank you.

13 Additional Commissioner questions?

14 Hearing none, thank you.

15 MS. REAL BIRD: Thank you.

16 COMMISSIONER NELSON: Is there anyone from -- is
17 there anyone representing Standing Rock Sioux Tribe that
18 would like to make oral argument?

19 Is there anyone from Rosebud Sioux Tribe that
20 would like to make oral argument?

21 Mr. Rappold?

22 MR. RAPPOLD: Yes, sir. Can you hear me okay?

23 COMMISSIONER NELSON: We can.

24 MR. RAPPOLD: Rosebud agrees with the Yankton
25 Sioux Tribe. Quite simply put, the certification statute

1 requires that the Applicant show that the conditions upon
2 which they received the original permit continue to be
3 the same.

4 In this situation when TransCanada filed their
5 Application they identified at least 30 changes that are
6 different. So based on their Application, they've
7 already told the Commission that their permit does not
8 satisfy the conditions upon which it was issued four
9 years ago.

10 So it would seem to us that on the face of the
11 Petition once they've made the allegation that -- they're
12 asking for you to certify it's the same, but in their
13 filing they've said that it's not the same. So it seems
14 that the law does not permit the Commission to recertify
15 the permit as TransCanada is asking for.

16 We've also filed our own Motion to Dismiss on
17 the same issue, and we're curious as to how the
18 Commission would permit that to be heard and the timing
19 of it.

20 COMMISSIONER NELSON: We are holding -- we are
21 considering all of those Motions to Dismiss
22 simultaneously. So if you have specific argument on
23 yours, now would be the time.

24 MR. RAPPOLD: Well, the law as laid out in our
25 Motion to Dismiss, 12B-6, the law does not provide any

1 type of relief under these circumstances. Again, the
2 Commission argued -- or stated from the start the -- it
3 did not want us to reiterate everything that was in our
4 motions.

5 But quite simply put, the statute requires
6 recertification. The Commission applied the facts to the
7 law, considering Appendix C in its filing. As far as
8 identifying the number of changes that Keystone has
9 already identified, the Commission can't -- simply just
10 can't recertify this under the statute as it's written.
11 Therefore, the Commission must dismiss as a matter of law
12 for failing to state a claim for relief -- failure to
13 state a claim for which relief can be granted.

14 COMMISSIONER NELSON: Thank you.

15 Questions from the Commission?

16 Hearing none, is there anyone wishing to offer
17 oral argument on behalf of Cheyenne River Sioux Tribe?

18 Please.

19 MS. ZEPHIER: Good morning, Commission members.

20 My name is Tracey Zephier. I'm an attorney for the
21 Cheyenne River Sioux Tribe. Thank you for allowing us
22 some limited time to supplement.

23 As you know, Cheyenne River Sioux Tribe has
24 filed a joinder fully supporting Yankton Sioux Tribe's
25 Motion to Dismiss for the reasons that Ms. Real Bird just

1 discussed as well as what Mr. Rappold contributed on
2 behalf of the Rosebud Sioux Tribe.

3 The only thing that I would like to add is that
4 there definitely does seem to be a strong relationship
5 between findings and conditions. They're not -- they're
6 not separate. So if you -- under the certification
7 process, if you were going to take a look at making sure
8 the conditions were still being met, that necessarily
9 requires you to take a look at the findings again.

10 Keystone has obviously in their Appendix C
11 listed some findings that need to be looked at again
12 because they apparently have changed. So there's a
13 relationship there, I think, that has to be looked at.

14 I would -- the only other thing I would add in
15 there too is that the certification process, I believe,
16 has been used in a couple of other situations. I looked
17 at them at one time. I don't have them off the top of my
18 head anymore now. But like, I think, Otter Tail in the
19 northeast part of the state.

20 It seems to me like those situations from what I
21 read were more limited, discrete, not as complex and as
22 all encompassing across the entire State of South Dakota
23 as the Keystone Pipeline would be. And so the
24 certification process in those situations, I believe, was
25 a little more limited than it is in this situation.

1 And so for Keystone to say that, you know, this
2 is merely, you know, yes, we've met our conditions, I
3 think that it behooves -- it's the responsibility of all
4 parties involved in this to not just take them at their
5 face, not just assume that those findings are still the
6 same, that we look at not only the conditions but the
7 findings that underlie those conditions.

8 So I would urge the Commission to look back at
9 other certification proceedings before deciding this
10 today and compare those situations to this before making
11 a decision.

12 Thank you.

13 COMMISSIONER NELSON: I'm going to ask just one
14 question. I think I agree with everything that you've
15 said, but your argument seems to indicate we need to go
16 through the full process to determine those very things
17 you've talked about as opposed to dismissing outright
18 today.

19 Would you agree with that?

20 MS. ZEPHIER: Absolutely.

21 COMMISSIONER NELSON: Thank you.

22 Other questions from the Commission?

23 Hearing none, thank you.

24 Anyone wishing to offer oral argument for Dakota
25 Rural Action?

1 Mr. Ellison?

2 MR. ELLISON: Good morning, sir. Yes, sir.
3 Good morning. I'm going to be very limited.

4 We've in writing joined the Motion of Yankton,
5 and I would at this point orally join the Motion of
6 Rosebud. I think that the Commissioner is correct about
7 these issues. We need to have a full hearing on the
8 merits of the -- (Inaudible).

9 COMMISSIONER NELSON: Just a second. I'm trying
10 to move your voice up, and I think we got --

11 (Pause)

12 MR. ELLISON: All right. Let me try again.

13 I want to suggest that one of the things that
14 the Commission look at is of these changes, there are
15 certainly some material changes, such as the adding the
16 Williston Basin oil. If there are material changes, it
17 would seem to me that that would urge in favor of the
18 relief that's been requested or perhaps the alternative
19 suggestion, that we have a full blown hearing on the
20 merits of any of the changes that are material.

21 And that's really all that I wanted to add. I
22 do join all of the arguments that have been presented so
23 far on behalf of my client.

24 COMMISSIONER NELSON: Thank you.

25 Questions from the Commission.

1 Hearing none, is there anyone from Indigenous
2 Environmental Network that wishes to offer oral argument?

3 MS. CRAVEN: Good morning. This is
4 Kimberly Craven. I'm representing the Indigenous
5 Environmental Network. I'm calling from Colorado.

6 And we filed a Motion to Join the Yankton's
7 Motion to Dismiss. And we would also join the Rosebud
8 Motion to Dismiss.

9 In reviewing the 30 change conditions that were
10 filed in Appendix C, those are change conditions to the
11 original Permit, HP09-001, there are several that are so
12 significant to us that this looks like a very different
13 pipeline.

14 The capacity has been ramped up almost
15 immediately. There's been mainline valves added, four
16 additional mainline valves added. There has been
17 additional pumping stations added. And these were
18 conditions that were not part of the original permit that
19 make this a very different pipeline.

20 So I would urge the Commission to dismiss
21 the -- to dismiss the permit as it is now and to start
22 over.

23 Basically, we have a new permit. It's a new
24 ball game. And that's our position. We think that there
25 are other changed conditions. The price of oil has

1 dropped significantly, and that's a change condition that
2 is referenced a little bit in this. But I think that's
3 an important aspect to this whole -- you know, whether
4 this pipeline is still needed, and I think we need to
5 start over from the beginning.

6 I would urge the Commissioners to think about
7 the land and people of South Dakota and start over with a
8 new permitting process.

9 Thank you.

10 COMMISSIONER NELSON: Thank you.

11 Questions from the Commission?

12 Hearing none, is there anyone from Rosebud
13 Utility Commission that wishes to offer oral argument?

14 MS. WYNNE: Yes, your Honor. This is
15 Mary Wynne, and I represent the -- can you hear me?

16 COMMISSIONER NELSON: Yes.

17 MS. WYNNE: Okay. I represent the Rosebud
18 Utility Commission.

19 And I just wanted to add that we have filed, of
20 course, in support of the Motion to Dismiss, which was
21 being filed by Yankton. And it seems to me that there
22 are two very large things staring us in the face that
23 require a new permitting process, and those being the
24 fact that there have been significant spills that have
25 occurred since the time when the initial Application was

1 filed and indeed processed by XL in this case.

2 In other words, they filed -- XL filed its
3 permit, XL pursued its permit, and XL got its permit with
4 conditions, all of which were done without the knowledge
5 that a significant spill could occur in precisely the
6 same type of operation.

7 And just pointing out, for instance, the number
8 of conditions that were attached to the Enbridge --

9 COMMISSIONER NELSON: Ms. Wynne, this is
10 Commissioner Nelson. I would ask that you confine your
11 comments to the Motion to Dismiss, please.

12 MS. WYNNE: Thank you, your Honor. I don't want
13 to take up your time unnecessarily so I would simply join
14 in what I've already put in that written Motion regarding
15 the -- our support of the Motion to Dismiss.

16 Thank you.

17 COMMISSIONER NELSON: Thank you.

18 Is there anyone from the Intertribal COUP that
19 wishes to offer oral argument?

20 Hearing none, are there any other Interveners
21 that wishes to offer oral argument on the Motion to
22 Dismiss?

23 I'm not seeing anybody approach in the meeting
24 room. Is there anyone on the line?

25 Hearing none, I will turn to the Applicant,

1 Mr. Taylor, Mr. Moore, for your oral argument.

2 MR. TAYLOR: Thank you, Commissioner.

3 William Taylor speaking for TransCanada.

4 The statute that we're proceeding under,
5 49-41B-27, provides that the company must certify that
6 the facility, that is the pipeline project, continues to
7 meet the conditions upon which the 2010 permit was
8 issued. "Continues to meet the conditions," the key
9 words.

10 Yankton Sioux and those who joined in the Motion
11 argue that because certain circumstances are different
12 today in 2015 from 2009 that this is a new project and,
13 therefore, the Petition certifying that the project still
14 be constructed in the manner that comports with the
15 conditions you impose in 2010 must be dismissed.

16 So the essence of the Tribe's argument is that
17 because there are changes that have occurred in the
18 intervening four plus years, it is a different project.
19 The argument's illogical.

20 If the Legislature intended that variations in
21 the design or the construction or the operation or the
22 markets that occurred in four years' time would void the
23 permit, then the Legislature would have said that. The
24 Legislature would have said a permit is good for four
25 years. If you can't build the project within four years,

1 you have to start over and apply for a new permit.

2 But that is not what the Legislature said.
3 Rather, the Legislature said, Applicant, certify before
4 you begin construction that what you intend to do now
5 still meets the conditions in your permit. And that is
6 exactly what Keystone has done.

7 We have certified that the current iteration of
8 the project can and will be the conditions on which the
9 permit is issued. There are 40 plus persons who have
10 asked to be parties to this case, including the Yankton
11 Sioux. Presumably they asked to be parties so they could
12 challenge Keystone's contention that the project can be
13 constructed in its current iteration in a manner that
14 comply with the permit conditions.

15 Interestingly, nearly a dozen of the Interveners
16 have already served discovery requests aimed precisely at
17 that question.

18 Now we freely admit, Keystone freely admits,
19 Keystone said so in its Application, that there are
20 changes in the project since the 2009 hearing. The
21 Bakken on-ramp has been included, provision that allows
22 for Williston Basin oil to be transported on this
23 pipeline.

24 In South Dakota a number of valves have been
25 added, which are an enhanced and increased safety factor.

1 The pipeline company has decided not to apply for the
2 special permit that it had discussed earlier in the
3 proceeding. As a consequence, operational pressures are
4 reduced in the pipeline, and capacity is reduced.

5 The company has said that more stream crossings
6 in South Dakota will be accomplished by horizontal
7 directional drilling, rather than by open cut, which is a
8 benefit. There have been some small route changes
9 implemented. There has been a reduction in the high
10 impact areas that are involved in the project.

11 But the essence of the project remains
12 unchanged. It's a large scale crude oil pipeline. It
13 follows the same route across South Dakota in 2015 as it
14 followed in 2009, with minor variance. It serves the
15 same operational purpose. It operates in the same
16 manner. And it accomplishes the same tasks, that being
17 the safe and secure movement of crude oil from the
18 Canadian and Alaskan oil sands to Steele City, Nebraska.
19 The purpose being to meet the continuing demand for crude
20 oil to be refined into energy products and industrial
21 chemicals that drive the economy of the United States and
22 North America.

23 COMMISSIONER NELSON: Mr. Taylor, this is
24 Commissioner Nelson. I'm going to ask you to maybe reign
25 it in and keep it on the Motion to Dismiss.

1 Thanks.

2 MR. TAYLOR: Sure.

3 The question to be answered in these proceedings
4 is can the project in its current iteration be
5 constructed today, four years after the permit was
6 issued, in a manner that conforms to the conditions in
7 the permit. It's that simple.

8 The Tribe's argument is is that because we've
9 identified changes in design engineering, route, and
10 economics means it's a new project. And it isn't. It's
11 the same project.

12 The question is and the Commission has already
13 identified and established a process for answering the
14 question, and that is can the project be constructed
15 today in compliance with the conditions in the permit?
16 And that is exactly what we have set out to prove and to
17 do in this proceeding.

18 Accordingly, the Yankton Sioux Tribe's Motion
19 and the Rosebud Motion that matches it and the joinders
20 are inappropriate and should be denied.

21 Thank you.

22 COMMISSIONER NELSON: Questions from the
23 Commission.

24 Hearing none, I will turn to Staff.

25 Ms. Edwards.

1 MS. EDWARDS: Thank you.

2 Kristen Edwards with Staff. Staff stands by the
3 arguments in its brief and has nothing to add, but we are
4 available for questions.

5 COMMISSIONER NELSON: Questions from the
6 Commission for Staff?

7 I'm going to allow Ms. Real Bird an opportunity
8 for rebuttal, and then we will turn to Commissioner
9 questions over all.

10 Ms. Real Bird.

11 MS. REAL BIRD: Thank you. Thomasina Real Bird
12 for the Yankton Sioux Tribe.

13 It would be one thing if the Applicant were only
14 asking the Commission to recertify that it meets the
15 conditions. But here the Applicant takes it a step
16 further, a step that's not allowed by the statute, the
17 law that the Legislature put in place.

18 There is simply no process for an Applicant to
19 go back and amend 1 or 30 findings of fact. Those
20 findings of fact are inextricably linked to the permit
21 that was granted in 2010. There's no need for a full
22 evidentiary hearing because the Applicant has admitted as
23 much in its Application, and, in fact, proposes those
24 findings in Appendix C to its Application.

25 If the findings change, there must be a new and

1 different permit. And to reopen the findings of fact at
2 this stage is not permitted by the Legislature. The
3 Applicant is going beyond what's allowed in the statute.
4 The statute says do the conditions remain the same?

5 And that's what they did certify in their
6 Application, but they're going a step beyond, and that
7 extra step is not permitted by the law.

8 COMMISSIONER NELSON: Thank you. At this point
9 I'm going to ask, Commissioner Hanson, do you have any
10 questions for anyone who has argued here today?

11 CHAIRMAN HANSON: No, I do not. Thank you,
12 Mr. Chair.

13 COMMISSIONER NELSON: Thank you.
14 Commissioner Fiegen, questions.

15 COMMISSIONER FIEGEN: I just have a question of
16 our General Counsel.

17 I certainly appreciate all the Interveners and
18 the Applicant supplying us with a lot of information in
19 the last few weeks. There were a couple of things that
20 came in very late, in fact, one that came in early, early
21 this morning while I was still sleeping and then another
22 one that came in yesterday.

23 How does that normally work in our process?
24 Because that's not normal for me to see something come in
25 that late on an item.

1 MR. SMITH: Right. I mean, under the -- sort of
2 the default is statute is 15-6 -- I'm trying to remember
3 the number now. I think it's 6-6B -- or D. And it
4 usually requires that any -- the latest reply that can be
5 filed is supposed to be filed two business days prior to
6 the date of the hearing of whatever it involves.

7 In this case there was a discussion among
8 parties, you know, back when, and we did not issue an
9 order setting up, you know, an etched-in-stone procedural
10 schedule for this particular matter.

11 You know, and maybe the parties -- maybe Staff
12 or other parties want to weigh in, but, you know, there
13 was a procedural schedule. And I think what it boils
14 down to is in this case, you know, I know what was filed
15 or I -- that was filed really late. And, you know, one
16 gets down do is there any actual material impact from
17 that here, and I think maybe the answer is no.

18 But we would urge parties to -- let's stick to,
19 you know, at least a little bit -- not get quite so late,
20 and let's try to stick with either the Commission's
21 procedural schedule, if we've issued one, which can
22 change deadlines. And we have issued it from this point
23 on. Or comply with the --

24 As a default, I mean, let's assume that the
25 civil rules on response to motion deadlines are those

1 that should govern, if that makes sense. Because our
2 statutes do provide and our rules do provide that in the
3 absence of a particular statute or rule applicable to the
4 PUC that's different, the Rules of Civil Procedure are to
5 govern our conduct of cases.

6 So, again, I think part of it's courtesy, but
7 part of it is let's comply with the law. And everybody,
8 I think, was -- all of them were before the 2nd. I think
9 the 2nd would have been two business days before. And I
10 think they were all there except for the two things that
11 were filed today.

12 COMMISSIONER FIEGEN: Thank you. I appreciate
13 that.

14 I know the Commission really takes all of your
15 stuff very seriously that you send us. And when it comes
16 in late like that, we had a prior hearing before this
17 meeting so although I did have the opportunity to read
18 it, it kind of puts us under the gun because we don't
19 have enough time to do research to make sure we have all
20 the information we need on that.

21 That would be helpful. Thank you.

22 COMMISSIONER NELSON: If there are -- and I have
23 no further questions. If there are no further questions,
24 are there any motions?

25 CHAIRMAN HANSON: Mr. Chairman.

1 COMMISSIONER NELSON: Commissioner Hanson, just
2 hang on a second. I'm consulting with Mr. Smith. Just a
3 moment.

4 Mr. Smith has advised that perhaps it would be
5 prudent for us to take action first on the motions for
6 joinder so that we essentially have everything in one
7 package and can deal with it as one unit.

8 Commissioner Hanson, does that work for you?

9 CHAIRMAN HANSON: Does counsel intimate that we
10 should place all of them in one package?

11 MR. SMITH: I mean, that would be up to you.
12 But, I mean, the Motions to Join are to join in -- in the
13 Motion at issue here today, you know.

14 CHAIRMAN HANSON: So what you're looking for is
15 just simply for a motion to permit them to join with the
16 Yankton Sioux Tribe's Motion to Dismiss?

17 MR. SMITH: That's exactly correct. That's what
18 I'm getting at.

19 CHAIRMAN HANSON: Mr. Chair, if it's
20 appropriate, then I will make that Motion that the
21 Interveners who moved to join with the Yankton Sioux
22 Tribe's Motion to Dismiss be permitted to do so.

23 COMMISSIONER NELSON: Thank you.

24 Discussion on the Motion.

25 Hearing none, all those in favor will vote aye.

1 Those opposed, nay.

2 Commissioner Hanson.

3 COMMISSIONER HANSON: Aye.

4 COMMISSIONER NELSON: Commissioner Fiegen.

5 COMMISSIONER FIEGEN: Fiegen votes aye.

6 COMMISSIONER NELSON: Nelson votes aye.

7 The Motion carries, and those motions for
8 joinder have been granted.

9 Are there further motions, Commissioner Hanson?

10 COMMISSIONER HANSON: In HP14-001 I move that
11 the Commission deny Yankton Sioux Tribe's Motion to
12 Dismiss. And I have discussion -- I'd like to discuss
13 that.

14 COMMISSIONER NELSON: And would you like to put
15 the other Motions to Dismiss with that, or do you want to
16 handle those separately?

17 COMMISSIONER HANSON: That makes great sense.
18 Thank you for correcting that. I was assuming that by --
19 since they're all joined together, that a denial of
20 Yankton Sioux Tribe's Motion would be inclusive.

21 Go ahead.

22 MR. SMITH: Pardon me.

23 The only slight -- there is one additional
24 actual Motion to Dismiss, and that's the Rosebud Sioux
25 Tribe's Motion to Dismiss, which was filed on the 29th.

1 So there are actually two actual Motions to Dismiss.

2 And then with all the rest of the parties -- and
3 I haven't counted them up here. I've got them listed
4 here so -- but they're actually -- by joinder they're
5 joined in those other -- one or both of those other two
6 motions, depending on when they filed their joinder
7 motions.

8 COMMISSIONER NELSON: We have a Motion on the
9 table to deny all Motions to Dismiss.

10 Discussion on the Motion, Commissioner Hanson.

11 COMMISSIONER HANSON: Thank you, Mr. Chair.

12 It's an interesting Motion to make. However, I
13 think that -- and I'm speaking of the Motion to Dismiss
14 that was presented by Yankton Sioux Tribe. However, I
15 think that at the very best the Tribe's Motion to Dismiss
16 is premature. It's very premature.

17 The entire purpose of the certification process
18 is to examine evidence and determine whether the
19 Applicant complies with the conditions that were set in
20 place by the PUC.

21 The Interveners argue that the project has
22 changed materially enough to where it's a different
23 project. And that's the foundation of the dismissal.

24 And there may be some changes that have taken
25 place. However, we do not know whether those changes

1 make a project better or worse or are of no consequence.
2 And that's the entire purpose of the hearing. And under
3 South Dakota State Law the Applicant has the right to
4 have a hearing.

5 There would be no reason for a certification
6 process if one change or a few changes or even many
7 changes disqualified an Applicant. It just is totally
8 contrary to what the entire purpose of the Docket is.

9 So the Motion to Dismiss, in my opinion, would
10 deprive the Applicant of the opportunity for due process.
11 And we need to have the hearing and examine the evidence
12 in order to know whether or not the -- a Motion of this
13 nature should stand. But that's the entire purpose of
14 the process.

15 COMMISSIONER NELSON: Thank you.

16 Additional discussion?

17 Commissioner Fiegen.

18 COMMISSIONER FIEGEN: Mr. Vice Chairman, I don't
19 think I could say it any better than the Cheyenne River
20 lawyer, Tracey Zephier.

21 She did a great job of really telling us to look
22 into it. And she talked about the responsibility of all
23 parties to look into discovery and making sure that the
24 conditions are still met. And she was very simple in her
25 testimony today, but I absolutely believe what she said,

1 that it's premature, just like Chairman Hanson said.

2 And it is the responsibility of all the parties
3 and certainly the Commission to look into discovery and
4 listen to the evidentiary hearing.

5 COMMISSIONER NELSON: Thank you.

6 Additional discussion.

7 I would simply join myself with the comments of
8 Commissioner Hanson and Commissioner Fiegen.

9 The only additional comment that I would make
10 is, you know, I did look at the tracking table and the
11 changes that are outlined there to find, you know, was
12 there some material change to the South Dakota portion
13 that really stuck out? And in my cursory review I didn't
14 find that.

15 But as Commissioner Fiegen has indicated, I
16 think we need to go through this process to find out
17 what's there and have any of those changes impacted the
18 conditions that we laid out a number of years ago. We
19 just don't know the answers to those questions today, and
20 I believe it's incumbent upon this Commission to find the
21 answers to those questions.

22 And because of that, I will be supporting
23 Commissioner Hanson's Motion.

24 Other discussion on the Motion?

25 Hearing none, those in favor of the Motion to

1 Deny the Motions to Dismiss will vote aye. Those
2 opposed, nay.

3 Commissioner Hanson.

4 CHAIRMAN HANSON: Aye.

5 COMMISSIONER NELSON: Commissioner Fiegen.

6 COMMISSIONER FIEGEN: Fiegen votes aye.

7 COMMISSIONER NELSON: Nelson votes aye.

8 Motion carried. The Motions to Dismiss are
9 denied.

10 Is there anything else for the good of the order
11 from the Commissioners?

12 Not seeing any.

13 (Announcements are read by Commissioner Nelson.)

14 MS. CRAVEN: Since we've been spending a lot of
15 time on this Motion to Dismiss and an Order was posted
16 about a week after we had the hearing for it, I would ask
17 the Commissioners that they would grant us some extra
18 time to put together our Interrogatories and discovery
19 requests.

20 COMMISSIONER NELSON: We've had a request to
21 adjust the schedule that was laid out at the last
22 meeting.

23 I will ask Commissioner Hanson, do you have any
24 inclination to grant such a Motion?

25 COMMISSIONER HANSON: Not inclined to do so, no.

1 I don't hear -- I don't hear a strong reason why it
2 should be done.

3 MS. CRAVEN: Well, when we had the hearing the
4 actual Order itself wasn't posted until about a week
5 afterwards. So while the people that were on the line
6 were able to hear what the oral Order was, the actual
7 written Order wasn't posted for a while so it actually
8 delayed discovery from taking place or to really zero
9 down on what those limited conditions were.

10 And, you know, I'd just like to make a point
11 here that you're very concerned about the due process of
12 a foreign corporation. These are United States citizens.
13 We're asking you to please grant us an extension of time
14 to participate in this very important process by allowing
15 us to have our due process as well too.

16 COMMISSIONER HANSON: Mr. Chair.

17 COMMISSIONER NELSON: Yes, Commissioner Hanson.

18 CHAIRMAN HANSON: You know, in this process
19 we're very much aware that -- of the challenges. This is
20 not our first rodeo, so to speak. And we want to make
21 absolutely certain in everything that we do that every
22 citizen who needs to participate has the full length and
23 breadth and opportunity to participate.

24 But there's two things here. One is that we are
25 also constrained. We have one year under the time line

1 that we are given by the Legislature to go through this
2 entire process. And we're going to be getting into some
3 real deep meat and nuances on this that are going to take
4 a considerable amount of time. And we cannot afford to
5 get to a point where we have to make a decision based
6 upon a lack of information.

7 And I fully appreciate the time line of having
8 to do other things and juggling lots of things, but
9 that's the entire purpose of having all of the
10 professional people from all of the different
11 organizations who are working on this right now. And if
12 you're having challenges, I encourage you to work with
13 those other folks.

14 The fact is that when there is -- when someone
15 makes a Motion you don't just stop the work that you're
16 doing and assume that that Motion's going to go
17 somewhere. You've got to continue the process all of the
18 time.

19 And, again, I fully appreciate the challenges
20 that are involved because there's a lot of other things
21 that each of us are involved in and need to be involved
22 in, and time constraints are what we deal with in the PUC
23 all the time.

24 But we have so many other dockets and so many
25 other people in each one of those dockets that need to

1 participate. And our time is not just completely open by
2 any means. It's practically completely closed. So when
3 we move something it has to find another location. And
4 that location often means that our Staff are trying to
5 juggle other agenda items, and it becomes nearly
6 impossible for us to have all of the hearings that we
7 have to have on rate cases and the 250 dockets that we
8 deal with every year. So we have some real challenges
9 when we move something as a schedule.

10 Thank you, Mr. Chair.

11 COMMISSIONER NELSON: Thank you. I'd like to
12 make one comment, and then Commission Counsel has
13 suggested that we allow Applicant to weigh in on the
14 question.

15 The comment I would make, though, for those of
16 you who have not worked with our process -- I think this
17 will be instructive -- the written orders rarely will
18 come out the same day that we issue them. It takes our
19 attorneys some days to put those written orders together
20 and to make sure that they are right.

21 And so Ms. Craven's contention that it took a
22 week for that written Order to come out, that's not
23 unusual. Expect that, okay, as we move forward. And so
24 what that says is if you're an Intervener in this
25 particular process, you need to be listening to the

1 meetings lest there be any oral orders that will later be
2 followed up in written format. That's just the way the
3 process works.

4 Mr. Taylor, do you want to respond to the
5 request at all or not?

6 MR. TAYLOR: No. I don't think so.

7 Thank you, Commissioner.

8 COMMISSIONER NELSON: Commissioner Fiegen, do
9 you have any thoughts?

10 COMMISSIONER FIEGEN: The only other item I have
11 is it's a lot of work to be an Intervener, and we
12 certainly understand that.

13 This was filed actually in September, and then
14 Interveners were given status in October. So they had
15 the opportunity to start thinking of what they wanted to
16 do because certainly your responsibility as an Intervener
17 is you have the opportunity to ask for discovery. And so
18 you've known that for a long time.

19 Also we do have recorders so if you can't attend
20 a meeting or listen online, it's normally recorded, and
21 you can listen to that within a day normally.

22 And then also our Staff. I just can't reiterate
23 enough, Interveners, please call our Staff. 773-3201,
24 that's the phone number. Make sure you call them and ask
25 them questions, if you have questions.

1 Actually the paper -- I saw the procedural
2 schedule in the paper the next day. In fact, it was
3 probably within hours. So it was all over the internet.
4 It was in the papers, et cetera.

5 So just make sure you stay tuned and ask people
6 to help if there's something you're missing.

7 COMMISSIONER NELSON: Thank you. And I'm not
8 inclined to grant any change to that schedule either.

9 And so, Ms. Craven, thank you for your question,
10 but I'm not hearing any of the three Commissioners that
11 are inclined to move that direction at all.

12 With that, is there a Motion from the
13 Commission?

14 Commissioner Fiegen.

15 COMMISSIONER FIEGEN: I'm sorry. Is there --
16 mine was a Motion to Adjourn.

17 COMMISSIONER NELSON: That would be in order.

18 COMMISSIONER FIEGEN: Move to adjourn.

19 COMMISSIONER NELSON: It's been moved to
20 adjourn.

21 Those in favor will vote aye. Those opposed,
22 nay.

23 Commissioner Hanson.

24 CHAIRMAN HANSON: Aye.

25 COMMISSIONER NELSON: Commissioner Fiegen.

1 COMMISSIONER FIEGEN: Fiegen votes aye.

2 COMMISSIONER NELSON: Nelson votes aye. We are
3 adjourned.

4 (The proceeding is concluded at 10:30 a.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 6th day of
11 January, 2015, and that the attached is a true and
12 correct transcription of the proceedings so taken.

13 Dated at Onida, South Dakota this 7th day of
14 January, 2015.

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

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