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THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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

HP14-001

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Transcript of Proceedings
October 29, 2015

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BEFORE THE PUBLIC UTILITIES COMMISSION

CHRIS NELSON, CHAIRMAN
KRISTIE FIEGEN, VICE CHAIRMAN
GARY HANSON, COMMISSIONER

COMMISSION STAFF

Rolayne Wiest
Kristen Edwards
Karen Cremer
Adam de Hueck
Greg Rislov
Brian Rounds
Darren Kearney
Brittany Mehlhaff
Joseph Rezac
Eric Paulson
Lorena Reichert
Patrick Steffenson
Katlyn Gustafson

Reported By Cheri McComsey Wittler, RPR, CRR

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 October, 2015.

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

5 And the question that we're going to deal with
6 today, one left over from the actual hearing that we had
7 is shall the Commission grant Keystone's Motion to Strike
8 Testimony and Exhibits of Cindy Myers.

9 And, with that, TransCanada.

10 MR. TAYLOR: Thank you, Commissioners. Good
11 morning.

12 The Commission will remember that as the
13 pipeline hearing was winding down Ms. Myers testified. I
14 had numerous objections to Ms. Myers' testimony, and we
15 agreed through the office of then general counsel
16 Mr. Smith that we would defer discussion of my objections
17 until a later date and we would just let her testifying
18 in order to bring the hearing to the conclusion within
19 the time constraints that are available.

20 This hearing today is in response to a motion
21 that I made after the hearing with respect to Ms. Myers'
22 testimony.

23 My motion details the points of her testimony
24 and her exhibit list that TransCanada finds
25 objectionable. I don't know how you want to do this. I

1 can go through them step by step.

2 There have been a couple of briefs filed. I'd
3 like to address the points raised in the briefs first, I
4 think, and then we can decide whether we need to go
5 through each objection.

6 CHAIRMAN NELSON: You know, maybe let me help
7 you through that by asking maybe a baseline question.
8 And we'll -- I think as a Commission we'll deal with the
9 motion to strike the exhibits first, but I want to make
10 sure that we're all talking about the same exhibits since
11 there were a couple of different lists.

12 And what I want to go through is a listing of
13 exhibit numbers so that we make sure that this is exactly
14 what you are objecting to. Is that fair?

15 MR. TAYLOR: Yes. We had a difficult time
16 aligning the exhibit numbers and I think I did it three
17 ways in my motion.

18 CHAIRMAN NELSON: And we spent an exorbitant
19 amount of Staff time trying to do the same thing. So I
20 want to make sure we're on the same page.

21 So the numbers that we believe you are objecting
22 to are 6001, 6003, 4, 5, 6016, 6022, 6024, 27, 28, 6030,
23 31, 32, 34, 35, 36, 37, and then two unnumbered exhibits,
24 the plastic water line survey results and the PowerPoint
25 testimony.

1 MR. TAYLOR: I think that's right.

2 CHAIRMAN NELSON: Okay. Then that is what we
3 are going to base our discussion on today. And, with
4 that, you may proceed.

5 MR. TAYLOR: Thank you. Let me get my notes
6 straightened out here.

7 The principal issue that we have with Ms. Myers'
8 testimony is two-fold. One, hearsay. General hearsay
9 objection. And number two is citations to information
10 and data that's not properly admitted into evidence. The
11 hearsay objection goes to a couple of levels.

12 First of all, there are a number of instances
13 where Ms. Myers quotes other people. For example, she
14 talked to some water plant operators and then in her
15 testimony relates what the water plant operators told
16 her. Basic hearsay. Unsworn, out of court statement
17 offered for the truth of what it contains. And that's
18 fundamentally objectionable and a ground zero objection
19 in a hearing of this type.

20 Second, she cites a number of newspaper
21 articles -- or includes as exhibits a number of newspaper
22 articles or internet articles. Those are also base
23 hearsay. They're unsworn, out of court statements
24 offered for the truth of what they contain.

25 The next -- the third thing that she does is she

1 refers to various scholarly works, sometimes quotes from
2 them, sometimes summarizes them, and adds those to her
3 testimony.

4 There are rules on how scholarly works can be
5 admitted in court and in administrative hearings. The
6 principal way is that an expert witness testifies. I am,
7 for example, Heidi Tillquist, expert toxicologist. She's
8 qualified as an expert and relates her qualifications.

9 She then can say on a particular subject that
10 the opinion that I'm going to render or that I have
11 rendered is grounded in part in scholarly or scientific
12 work X. And she identifies that.

13 Then the person who cross examines her can
14 examine her about what she knows about X or what the
15 foundation for X -- the rules say that X is not allowed
16 to be placed in evidence. Rather, if she relies on a
17 particular excerpt from X, that can be read into the
18 record.

19 And that's very clear in the Rules of Evidence.

20 So while I understand the complications that go
21 with being a lay Intervenor, I've served in your role as
22 chair of the Board of Minerals and Environment in many
23 cases where there were lay Intervenor. The law of
24 South Dakota is very clear, and that is is that we have
25 Rules of Evidence and we have rules of procedure for a

1 reason. That is so that chaos does not reign and so that
2 everyone on all sides of every question has a fair
3 opportunity to present their evidence and present their
4 exhibits in a manner that's consistent.

5 Despite what some of the Intervenors argue in
6 their briefing, the Rules of Evidence and the Rules of
7 Civil Procedure apply in this proceeding, and the case
8 law in South Dakota that says that pro se, lay parties
9 are not entitled to any deference under the rules applies
10 to this board.

11 We have a case cited by Staff, cited by us,
12 Oesterling v. Oesterling. Circuit Court Decision. It
13 says "Parties who appear pro se may not capitalize on
14 their unfamiliarity with the law. They are bound by the
15 same Rules of Evidence and procedure that bind
16 attorneys."

17 SDCL 1-26-19 from the Administrative Procedures
18 Act, second sentence says "The Rules of Evidence as
19 applied under the statutory provisions" that's the code
20 "and in the trial of civil cases in the circuit courts
21 shall be followed."

22 So there's -- despite Mr. Capossela's arguments
23 in his briefs, there is no question that the Rules of
24 Evidence apply in this case and that the Rules of
25 Evidence apply to a pro se Intervenor in the same precise

1 manner as they apply to me, as they apply to Ms. Edwards,
2 as they apply to Mr. Capossela, or any other lawyer
3 representing a party in this case.

4 So in our motion hearing -- in our motion all we
5 ask you to do is follow the Rules of Evidence and to
6 exclude those items that are hearsay and to exclude those
7 items that are quotes from purportedly scholarly articles
8 or expert documents because they're improperly offered.

9 Now if you'd like me to go through them one by
10 one, I can do that.

11 CHAIRMAN NELSON: I think that's at your option.

12 MR. TAYLOR: I know you have a busy docket
13 today.

14 CHAIRMAN NELSON: I have -- you know, I've --
15 speaking as one Commissioner, I have read your filing and
16 examined all of this. I don't have a need for you to do
17 that. Commissioner Hanson I'm sure does but we'll --
18 just kidding.

19 MR. TAYLOR: I'd just make one other point
20 rather than going through the exhibits.

21 Seeing Mr. Welk here reminds me of the Union
22 Carbide case. The Chairman of the -- the Chairman of the
23 Conservation Commission was a long time friend of mine, a
24 Russian German farmer from Bowdle, and it was his rulings
25 as Chairman of the Conservation Commission that ended up

1 in the Union Carbide decision.

2 In the course of that case Mr. Welk experienced
3 something that I've experienced a number of times when
4 there are pro se Intervenor.

5 The question is -- as raised by the Chairman of
6 the Conservation Commission was really what difference
7 does it make? Wilbert Blumhardt is who we're talking
8 about. And Wilbert used to say when he served with me on
9 the Board of Minerals and Environment I can sort this
10 out. I know what evidence is important and what evidence
11 isn't, and I can sort that out.

12 And that's a common feeling in lay boards. But
13 the problem comes on appeal. You go up on appeal, and
14 what happens on appeal is the information that was
15 improperly admitted resurfaces and you have to brief it
16 and you have to argue it and you have to consume the
17 court's time.

18 My classic case is in the Homestake water rights
19 case where Judge Zinter finally carved through a great
20 deal of material that the Water Management Board had let
21 in that it shouldn't have, made the correct decision,
22 but, nonetheless, we spent uncounted hours briefing those
23 issues.

24 So it is very important to get the record
25 straight at this end.

1 CHAIRMAN NELSON: Thank you. So far as striking
2 some of the testimony, do you want to deal with -- I've
3 got some issues to try to straighten out on that regard.
4 Do you want to deal with that now, or do you want to come
5 back?

6 MR. TAYLOR: I can address those points also.

7 CHAIRMAN NELSON: Let me go through the
8 questions I've got so we can make sure we're on the right
9 page. I think so there's some questions.

10 On page 3 of the testimony you had indicated you
11 wanted to strike paragraph C under aquifers. And then it
12 refers to the first paragraph in paragraph C.

13 So can you help us out in exactly which
14 paragraph under aquifers you're seeking to strike? Or is
15 there just a sentence?

16 MR. TAYLOR: Yeah. There's a mistake. It
17 should say sub B in 3 in my objection. It says in
18 paragraph B, the second paragraph. That should say in
19 paragraph B, the second sentence. Typographical error
20 that I discovered last night. Assumes facts not in
21 evidence and expresses an opinion which she's not
22 qualified to render. And there's no foundation for her
23 opinion.

24 CHAIRMAN NELSON: Okay. So again is it the
25 third paragraph in the section on aquifers that you're

1 seeking to strike? What is it we're --

2 MR. TAYLOR: Catch up with me. Tell me where
3 you're reading from in my motion.

4 So if we look at her sub topic, aquifers, we're
5 talking about her prefiled testimony. In the first
6 paragraph, A, that starts this massive toxic
7 infrastructure, that's argumentative.

8 In the second paragraph, B, no foundation.
9 Opinion testimony. Assumes facts not in evidence.

10 The third paragraph, C, expresses opinions for
11 which there isn't any foundation.

12 Are we there yet?

13 COMMISSIONER FIEGEN: Stay right there.

14 CHAIRMAN NELSON: Okay. So in the second
15 paragraph, the one that begins "I live where" are you
16 seek to go strike the entire paragraph or just a
17 sentence?

18 MR. TAYLOR: Well, the first sentence she can
19 say where she lives. I live where the first KXL route
20 was to cross in Nebraska. It's the rest. The route was
21 moved because of the high water table and sandy soil.
22 And then follows by the rhetorical question.

23 There's no foundation for that testimony. It's
24 opinion testimony on her part, and it assumes facts not
25 in evidence.

1 CHAIRMAN NELSON: Fair enough. So then on the
2 third paragraph are you seeking to strike the entire
3 paragraph or just a portion? The one that begins
4 "neither TransCanada".

5 MR. TAYLOR: I think there we strike the entire
6 paragraph.

7 CHAIRMAN NELSON: Okay.

8 On page 3 you indicate you want to strike the
9 third paragraph under waterways but there's only two
10 paragraphs on page 3 so are you --

11 MR. TAYLOR: Yeah. It should be the second
12 paragraph.

13 CHAIRMAN NELSON: The one that begins "we know
14 the tar sands".

15 MR. TAYLOR: Yes. What she's really doing there
16 is quoting the newspaper articles that she later offers
17 in her testimony.

18 CHAIRMAN NELSON: Okay. Thank you for walking
19 through that with us. We needed to make sure exactly
20 what we're talking about. And with that, you can go
21 ahead and argue that.

22 COMMISSIONER FIEGEN: So we'll probably have
23 some additional questions on the hearing testimony
24 because there's a couple of questions there too.

25 MR. TAYLOR: Sure.

1 COMMISSIONER FIEGEN: Just so you know that's
2 coming.

3 CHAIRMAN NELSON: Okay. The final question
4 we've got as Commissioner Fiegen indicated is dealing
5 with the actual testimony in the transcript.

6 On page 1,660.

7 MR. TAYLOR: Did you say 1,660?

8 CHAIRMAN NELSON: Correct.

9 MR. TAYLOR: Let me catch up.

10 CHAIRMAN NELSON: Is it line 12 or line 13? Or
11 line 8?

12 MR. TAYLOR: All right. You're looking at line
13 13?

14 CHAIRMAN NELSON: Yeah. How far down on that
15 page are we going?

16 MR. TAYLOR: Well, I think lines 1 through 14 on
17 1,660 lack foundation, starting with "and in the
18 emergency" which is actually in line 2.

19 CHAIRMAN NELSON: Okay. If you go through line
20 14, that's cutting a sentence in half.

21 MR. TAYLOR: Yeah. It should end at the
22 sentence at the end of line 15. No foundation and it's
23 hearsay. You know, she's talking about what someone told
24 her.

25 CHAIRMAN NELSON: Okay. I think we are clear on

1 this end. Anything else to add?

2 MR. TAYLOR: (Shakes head.)

3 CHAIRMAN NELSON: Okay. If not, we will go to
4 Ms. Myers.

5 And, Ms. Myers, just so we're clear, you heard
6 the list that I read off earlier. You heard the
7 discussion of the clarifications of what TransCanada is
8 asking for and that is what we are working for today.

9 MS. MYERS: I understand.

10 CHAIRMAN NELSON: And, Mr. Taylor, if you would
11 be so kind as to maybe take a seat in the back and give
12 her some space.

13 MS. MYERS: I do have a few comments to begin
14 with. For the record I'm Cindy Myers R.N., Individual
15 Intervenor in Docket HP14-001. I am thankful to be here
16 today as a participating citizen. Over 40 parties were
17 accepted as Intervenor in this docket and the message
18 seemed to be that the PUC recognized the importance of
19 including all interested parties.

20 Kristen Edwards, Staff attorney, was appointed
21 as a resource for us Intervenor, and I appreciate that
22 the Commissioners recognized lay Intervenor would need
23 assistance navigating this process.

24 I relied on Kristen Edwards as a resource. I've
25 participated to the best of my ability, and I've met all

1 deadlines. I've taken my commitment as an Intervenor
2 seriously.

3 Despite doing all of this, I was not allowed to
4 present my entire PowerPoint at the hearing. So when
5 Mr. Taylor says that I testified, I didn't because I was
6 cut short.

7 I'm here today because TransCanada wants to
8 strike my testimony and exhibits from the record. I'm a
9 pro se, nonfunded lay Intervenor. I feel like I'm being
10 taken advantage of by a well financed corporate team of
11 lawyers.

12 A brief history concerning my testimony and
13 exhibits may be helpful. As suggested by the
14 Commissioners, I communicated with Kristen Edwards
15 throughout the process, and she answered several of my
16 questions. Kristen e-mailed a sample exhibit list and
17 that is the format I used.

18 Shortly before the hearing John Smith assigned
19 exhibit numbers for each Intervenor, and his instructions
20 were to number our exhibits with his assigned numbers and
21 place on a thumb drive to present to the court reporter
22 on day one of the hearing and that's what I did.

23 All my exhibits were previously filed by the
24 deadline. My prefiled testimony was filed on April 2,
25 meeting the deadline.

1 I asked Kristen Edwards if I could present my
2 testimony as a PowerPoint at the hearing and she
3 responded that was allowable. Using my prefiled
4 testimony information, I created a PowerPoint for the
5 hearing, and it was based on my prefiled testimony. And
6 that's no different than when somebody files prefiled
7 testimony for an expert witness and they get on the stand
8 and it's not exactly what was in the prefiled testimony
9 but it's based on that.

10 I asked Kristen Edwards if there was a time
11 limit for presenting my PowerPoint testimony and she
12 responded there was no time limit.

13 So due to several objections at the hearing I
14 was only allowed to give a limited portion of my
15 testimony.

16 TransCanada had asked that I not present any of
17 my testimony at the hearing. So how come TransCanada did
18 not object to my prefiled testimony before the hearing?
19 It was filed on April 2, and there were deadlines to meet
20 as far as responding to prefiled testimony.

21 And TransCanada did have many objections to
22 several pieces of testimony and expert witnesses. So it
23 seems they would or should have done this by earlier
24 deadlines. Perhaps TransCanada has not followed the
25 rules.

1 The PUC Staff's response to this motion relies
2 on a Supreme Court ruling, Oesterling v. Oesterling.
3 According to the joint is your reply the Application of
4 Oesterling is limited to the circuit courts. It does not
5 apply to hearings conducted by administrative agencies.

6 And so I understand this to mean the PUC does
7 not need to strictly apply the Rules of Evidence to
8 strike my testimony and exhibits as requested by
9 TransCanada.

10 Since I'm not a legal expert, I would like to
11 use the joint sur reply filed by the Standing Rock Sioux
12 Tribe, Rosebud Tribe, and Yankton Sioux Tribe as my
13 response to TransCanada's numerous objections about my
14 exhibits and testimony.

15 When I was accepted as an Intervenor I felt
16 confident about bringing my concerns before the PUC. I
17 believe my testimony and exhibits offer other information
18 otherwise not brought forth. I believe the public has a
19 right to my information, but I believe it is information
20 TransCanada doesn't want the public to know. It is more
21 advantageous for TransCanada to sweep it under the rug.

22 I've been a registered nurse for 35 years. My
23 primary purpose for being an Intervenor is because of my
24 passion for protecting drinking water sources. My
25 testimony and exhibits aren't about making profits.

1 They're about protecting the health, safety, and
2 well-being of South Dakotans. I'm simply here for the
3 common good.

4 I've respected the entire PUC process, and I ask
5 the PUC to respect my testimony and exhibits by denying
6 TransCanada's motion and accepting my prefiled testimony,
7 my PowerPoint testimony, and my exhibits into the record
8 for Docket HP14-001.

9 And now I have a few comments to make in
10 response to what Mr. Taylor has presented.

11 He talks about these several newspaper articles
12 that I've used as exhibits. I went back through my
13 exhibit list while he was saying that. There's actually
14 two newspaper articles.

15 He mentioned about how people are -- if you're a
16 witness you can be cross-examined. I was my own witness.
17 I put myself down as an expert -- or as a witness on my
18 exhibit list as Kristen instructed me to. And I -- there
19 was the opportunity to cross-examine me at the hearing,
20 and I don't believe anybody had any questions for me.

21 Mr. Taylor talks about striking the term
22 "aquifer" because I'm not familiar with that term or I'm
23 not an expert with that term. I feel I'm very much an
24 expert on the basis I grew up in Holt County on a farm
25 where the aquifer was either at the surface or just

1 below. I know about the aquifer. You can dig a hole and
2 see the water fill the hole.

3 And I know firsthand about the route being
4 moved because of the sandy soil and the high water table.
5 I personally gave the speaker of our Unicameral,
6 Mike Flood, a tour of the area and showed him the flowing
7 wells and I explained the water situation. And I had a
8 lot of direct communication with him before the special
9 session in which the route was moved from southwest Holt
10 County because of the sandy soil and high water.

11 And I know you have a busy agenda today, but I
12 think I request that this be dealt with fairly.

13 CHAIRMAN NELSON: Thank you. Normally because
14 this is an issue between you and TransCanada, I would
15 limit argument to you, but I also know there was a
16 joint motion filed, and since you are a layperson, I am
17 going to give a little bit of leeway and allow either
18 Mr. Capossela or Mr. Rappold to offer any additional
19 arguments that they'd like to offer.

20 MR. CAPOSSELA: Thank you, Mr. Chairman. This
21 is Peter Capossela with Standing Rock.

22 Can you hear me okay?

23 CHAIRMAN NELSON: We can very good, Peter.

24 MR. CAPOSSELA: Thank you. I had some issues
25 with the sound so thank you. And I'll be brief.

1 I did consult with Mr. Rappold this morning, and
2 he agreed to defer to me on this so I'll follow up. And
3 I appreciate the Commission's review of the sur replies.
4 We got that as quickly as we can after -- we consulted
5 with one another after the filing of the reply.

6 We do submit that the interpretation of
7 Oesterling is being stretched from circuit court to the
8 agencies. The Administrative Procedures Act
9 established -- Section 19 of the South Dakota
10 Administrative Procedures Act SDCL 1-26-19, it
11 establishes the evidentiary standard.

12 And what that does is it codifies a common law
13 rule in administrative law, that the Hearing Officer of
14 an agency, administrative hearing, does have some leeway
15 in her application of the Rules of Evidence as the fact
16 finders in the furtherance of the fact-finding process
17 when it comes to unrepresented litigants.

18 The reason for that is the Hearing Officer of an
19 agency is deemed to possess expertise in the area of
20 jurisdiction of the agency. Cut the wheat from the chafe
21 in her evidence that may be borderline in circuit court
22 with respect to the rules of evidence.

23 TransCanada contends that this thing may go on
24 appeal to judicial review so it's somehow unfair to
25 strictly apply -- narrowly apply the Rules of Evidence.

1 But on appeal the Circuit Court would give great
2 deference to your findings. So as a matter of
3 administrative law -- that's what we're asking is this is
4 an administrative hearing. We're not in Circuit Court.
5 As a matter of administrative law -- at common law here
6 as officers, such as the Commissioners and the Commission
7 counsel during the hearing, are granted the latitude in
8 the Applicant issues in the Rules of Evidence because it
9 deems to have expertise and that search to further the
10 fact-finding process.

11 And that's what the rule is. And that rule is
12 codified in Section 19 of the South Dakota APA,
13 Administrative Procedures Act.

14 And that's the rule that the Commission goes by.
15 And I think it's justified. The Commission and
16 Commission Staff have a high level of expertise in this
17 area.

18 A Circuit Court judge is a generalist. They
19 hear cases from car wrecks to tax cases. The Commission
20 focuses in your area of expertise.

21 Now the Applicant asks for its motion to strike
22 to be granted, and they cite a rule which applies to its
23 administrative proceedings as much as a rule that comes
24 out of a car wreck or tax case. They're citing a rule
25 under civil procedure law when we're in administrative

1 law under the Administrative Procedures Act and the
2 statutes and procedures that apply to the agents of the
3 Public Utilities Commission. I think the Commission's
4 statutes and regulations also contemplate a much more
5 open process that be advocated by TransCanada in its
6 motion. And when you look at the steps that Ms. Myers
7 has taken, she complied with all the rules. She's
8 attempted to lay foundation. And she's attempted to come
9 up with documentary evidence to back up her testimony. I
10 think she's exactly the kind of Intervenor that the
11 Legislature contemplated participating in a process such
12 as this.

13 With respect to looking at the different pieces
14 of testimony and exhibits that TransCanada is seeking to
15 have excluded, when we look at Section 19 of the APA and
16 its directives that evidence is to be excluded when it's
17 irrelevant, incompetent, immaterial, or unduly
18 repetitious, you know, we would concede that something
19 like Dr. Davis's -- statements of Dr. Arden Davis would
20 be repetitious because he testified himself and was
21 subject to cross-examination of himself.

22 The two newspaper articles arguably are hearsay.
23 But the South Dakota Court does Permit administrative
24 agencies to accept hearsay evidence that falls under one
25 of the exceptions, and by far the overwhelming majority

1 of the evidentiary items complained upon by TransCanada
2 do fit into acceptance of the hearsay rule.

3 Most of the exhibits or many of the exhibits
4 with respect to cancer and health and some of the
5 constituents of diluted bitumen are public agency
6 records, which is an exception to the hearsay rule. So
7 most of the items that -- many of the exhibits fall into
8 that exception.

9 Counsel this morning talked about conversations
10 that Ms. Myers testified about with respect to water
11 treatment operators or the City of Colome.

12 There's an exception called the then existing
13 mental impression. And so if a city official from Colome
14 told Ms. Myers that, yes, they interacted with
15 TransCanada about the route in Tripp County, and yes,
16 TransCanada made some changes to the route in response to
17 Colome's concerns with water pollution, but that they
18 don't have a good feeling about the way the discussions
19 went or TransCanada's predisposition in those
20 discussions, that testimony is not admissible for the
21 purpose of arguing that Keystone XL will pollute the
22 aquifer. And to that purpose it's hearsay.

23 But it is admissible for the purpose of
24 demonstrating that Colome city officials have concerns
25 with the way their interactions with TransCanada went.

1 Their mental impression. Their feelings. Their
2 impression of the situation. Not for whether or not it's
3 going to be polluted by Keystone XL. That's -- that
4 would be hearsay. But for a different purpose it fits
5 under the then existing mental impression exception to
6 the hearsay rule.

7 And some of the complained upon e-mails could be
8 considered recorded recollections by city officials.

9 And so there are numerous exceptions which apply
10 here, and I think TransCanada has pointed out some items,
11 some exhibits of Ms. Myers which under Section 19 of the
12 APA arguably should be excluded. But the overwhelming
13 amount of her written and oral testimony and written
14 exhibits were proffered and should be included in the
15 record.

16 Now the statements with respect -- in her
17 written testimony with respect to the toxicity of benzene
18 and water born diseases, if Ms. Myers were a pipe fitter,
19 that testimony may not be proper. But under Rule 701,
20 which is the rule governing opinion testimony by lay
21 witnesses, clearly that's admissible testimony from a
22 nurse. Because it's rationally based on her experiences
23 as a person and it's helpful to the Commission. And
24 that's what the test is for lay opinion testimony.

25 Similarly, compilations or items that have been

1 prepared such as a map showing water treatment intakes or
2 a compilation of the population that's served by the
3 water treatment intakes downstream from Keystone XL, that
4 kind of compilation testimony is accepted by courts all
5 the time.

6 For example, in business litigation, a
7 bookkeeper of a small business who's not an expert, who's
8 not an accountant, who doesn't have a doctorate in
9 accounting will often testify on income and expense
10 statements, revenue statements of her corporation that
11 she's compiled based on her work, on her life's
12 experience.

13 She's not an expert. It's a document that that
14 witness has prepared. But courts accept that stuff all
15 the time.

16 And so the sum of the documents and the maps and
17 the information with respect to rural water systems in
18 South Dakota, that's not improper testimony. That kind
19 of testimony is accepted all the time.

20 There was some discussion this morning about the
21 third paragraph on page 3 of Ms. Myers' prefiled written
22 testimony. And it suggested that the entire third
23 paragraph should be deleted. That's another good example
24 of the hearsay exception. Ms. Myers in that paragraph
25 that they're asking be stricken states "TransCanada told

1 me meeting the project's purposes and needs is a primary
2 reason for the pipeline route." Well, a statement
3 against interests by a party is always admissible
4 evidence. So certainly that sentence is not hearsay.
5 She's quoting TransCanada there. And she's got the right
6 to do that under the rules.

7 The Standing Rock Tribe and the other Tribes do
8 have some concerns with respect to some of the prehearing
9 orders excluding evidence as it relates to tribal
10 testimony.

11 And so now here we are in posthearing, and I
12 think TransCanada's motion with respect to Ms. Myers
13 simply reached too far. Ms. Myers followed the rules,
14 the sphere of the rules, the letter of the rules, and the
15 motion should be denied.

16 And thank you for hearing the Tribes on this
17 issue.

18 CHAIRMAN NELSON: Thank you. Staff.

19 MS. EDWARDS: Thank you. As stated in our
20 response, Staff does not intend to take a position on the
21 underlying question of which exhibits or testimony should
22 be stricken. We simply filed a brief outlining the law
23 of the applicability of evidence because the one thing
24 that is a constant in all the hearings we're going to
25 have in the future is we will be a party. Therefore, we

1 need to protect precedent on what evidence we'll be going
2 up against in the future. Beyond that, we are not taking
3 any interest or position in this motion.

4 Thank you.

5 CHAIRMAN NELSON: Mr. Taylor, a brief rebuttal.
6 And, Ms. Myers, if you would offer the same courtesy.
7 Thank you.

8 MS. MYERS: Sure.

9 MR. TAYLOR: Thank you. It's very difficult to
10 argue against Mr. Capossela's contentions because he's
11 just flat wrong. And it's always very difficult to argue
12 about something that is so off the mark that there is no
13 accurate response.

14 First of all, the 701 question. Did Ms. Myers
15 present herself as an expert or a lay witness? She
16 presented herself as a lay witness with specialized
17 knowledge. There are rules about how expert witnesses
18 must testify and what they can say. There's a whole body
19 of case law that deals with that. She presented herself
20 as a lay witness. She is not entitled to give expert
21 opinions as a lay witness.

22 I respect very much that she's been a nurse for
23 35 years. I've been a lawyer for 44. There's no way in
24 hell I could give an expert opinion on matters of federal
25 income tax that are routinely handled by lawyers. Just

1 as she must demonstrate foundation for her opinions on
2 toxicology and show some specialized knowledge if she
3 wants to give those opinions. So her lay opinions cannot
4 reach expert findings.

5 Number two, the Tripp County officials. Mental
6 impressions under Rule 803(3), that's an exception to the
7 hearsay rule. There is an exception to the hearsay rule
8 that says that the mental impressions of persons can be
9 offered through hearsay. The mental impressions of
10 persons are things like I'm hurt. That's not fair. I'm
11 dying. You just killed me. There are cases that address
12 every single one of those.

13 Mental impressions that some guy in Tripp County
14 in the water system says to Ms. Myers I sort of feel like
15 maybe it wasn't fair what happened and then Ms. Myers
16 comes here and testifies to that, how can I cross-examine
17 the guy from Tripp County and say on what foundation did
18 you arrive at that conclusion that it wasn't fair? Did
19 you arrive at that by feeling the bumps on your head?
20 Did you arrive at that by listening to the arguments made
21 by TransCanada? Did you arrive at that because your wife
22 said to you when you went home that night I'm not fixing
23 you dinner if you treat those TransCanada people
24 correctly?

25 That's what hearsay's all about. Hearsay's all

1 about the hot swift sort of cross-examination bringing
2 out the truth.

3 So mental impressions, Mr. Capossela. His
4 803(3) argument just doesn't fit.

5 He talks about the public agency exception to
6 the hearsay rule, 803(8). The public agency exception to
7 the hearsay rule is very clear. 803(8) says that
8 records, reports, and data compilations that are observed
9 by an official office or agency pursuant to a duty
10 imposed by law in which there was a duty to report can be
11 offered into evidence as an exception to the hearsay
12 rule. And when the NTSB investigates an airplane crash,
13 which it is obligated by law, by federal law, to do,
14 it prepares a report. The NTSB report can be admitted
15 into evidence.

16 That does not mean that when some editorial
17 issued an order writes an article and says this is my
18 opinion, that that can be offered into evidence. That's
19 hearsay.

20 It doesn't mean that a government agency, some
21 person in a government agency, writes an opinion, that
22 that can be offered into evidence.

23 I'll give you an example. We tried a lawsuit
24 over this issue in front of the Board of Minerals and
25 Environment. Region 7 of the EPA, some guy in Region 7

1 of the EPA decided what he thought would be the proper
2 way to test the emissions, air emissions from an ethanol
3 plant. And he wrote an article about that.

4 And the EPA tried to impose those emissions as a
5 rule. That analysis, that theory that he had -- he's a
6 government employee and he prepared the report in the
7 course of his employment. But it was not a report
8 required on matters to be observed pursuant to a duty
9 imposed by law. So it's not admissible.

10 So so what if some guy in the White House writes
11 an article that says I've done this and I've done that
12 and I've read this and I've read that. The guy in the
13 White House can come here and testify so I can
14 cross-examine him.

15 Now if the guy in the White House writes an
16 official report because he has the obligation to report
17 that like the NTSB guy or the highway patrolman who
18 investigates an accident, different story.

19 The issue about agencies having latitude to
20 ignore the rules, that just simply is not the case. That
21 is not what the statutes say.

22 19 is very clear. The caption of 1-26-19 is
23 "Rules of Evidence in contested cases." That's what this
24 was, a contested case. Not lie contested case. 13
25 lawyers. A lawyer with two years less service before the

1 bar than me serving as the Hearing Officer. And the
2 statute says in the first sentence "irrelevant,
3 incompetent, immaterial, or unduly repetitious evidence
4 shall be excluded."

5 In the second sentence it says "The Rules of
6 Evidence as applied under the statutory provisions in the
7 trial of civil cases in the circuit courts of this state
8 shall be followed."

9 There isn't anything very confusing about that.

10 COMMISSIONER HANSON: Would you give us a
11 complete cite for that for the record, please.

12 MR. TAYLOR: The citation that I read from is
13 SDCL 1-26-19, Subpart 1.

14 COMMISSIONER HANSON: Thank you.

15 MR. TAYLOR: Mr. Capossela confuses a concept.
16 He says that because of an agency's expertise, the agency
17 should be shown deference. That has nothing to do with
18 evidence. What it has to do with is the concept that
19 there are agencies who have expertise in technical
20 matters and that the deference that the -- that the
21 courts showed deference to the decisions of agencies that
22 have expertise in technical matters.

23 The Board of Minerals and Environment, the Water
24 Management Board, the Public Utilities Commission, the
25 Dental Board, the medical boards. All of those boards

1 have expertise, and the cases say that the courts show
2 deference to that expertise.

3 The cases don't say that the Rules of Evidence
4 don't apply. There is a very crystal distinction. And
5 especially in this type of hearing, conducted by lawyers,
6 attended by lawyers.

7 You know, I was a junior in college when the
8 Administrative Procedures Act was adopted in
9 South Dakota, and it was controversial, 1966. The
10 concept was Wilbert Blumhardt Conservation Commission
11 approach. Lay boards, lay people, not represented by
12 lawyers, and in those situations there is some room for
13 relaxed -- relaxation of the Rules of Evidence. And our
14 code takes that into account.

15 But a professional board in a hearing conducted
16 by highly experienced lawyers -- probably conducted more
17 administrative law hearings than anybody else before the
18 Bar frankly, to make the contention that the Rules of
19 Evidence should not apply is simply ludicrous.

20 I like Ms. Myers. Her heart's in the right
21 place. She wants to do the right thing. But she has to
22 do it according to the rules. And that applies -- has
23 been uniformly applied throughout the course of this
24 hearing, and there should be no exception for Ms. Myers.

25 I'd stand on my objections. Thank you.

1 CHAIRMAN NELSON: Questions from the Commission.
2 Commissioner Fiegen.

3 COMMISSIONER FIEGEN: I have a quick question of
4 Ms. Myers. You know, I certainly read your prefiled
5 testimony and read your testimony at the hearing several
6 times and listened to it. But I just wanted to clarify
7 the exhibits that you offered that Chairman Nelson stated
8 today. They are the Exhibits 6000 through 6037 are the
9 exhibits you offered in this hearing and then the two
10 plastic water line survey results and the PowerPoint
11 testimony. I just want to make sure because I looked at
12 a whole bunch of different documents and wanted to make
13 sure those were the ones you offered.

14 MS. MYERS: I'm sorry for that confusion. I
15 used the format that Kristen provided, and then John
16 Smith requested we use the assigned numbers so that's how
17 that came about.

18 My exhibits are from 6000 to 6037. And at the
19 hearing I asked to also be admitted into evidence 6038
20 and 6039. 6038 would be the PVC, the plastic line survey
21 results, and 6039 would be the PowerPoint testimony,
22 which was based on my prefiled testimony.

23 COMMISSIONER FIEGEN: Thank you. I just wanted
24 to make sure that was clarified today. Thank you for
25 that.

1 MS. MYERS: Yes. Thank you.

2 CHAIRMAN NELSON: Additional questions.

3 Commissioner Hanson.

4 COMMISSIONER HANSON: Thank you, Mr. Chairman.
5 Mr. Capossela, are you with us still?

6 Mr. Capossela, you may be on mute?

7 MR. CAPOSSELA: Yes, sir.

8 COMMISSIONER HANSON: I assume you've read all
9 of the materials that have come through here and Staff
10 filed a -- I'll call it a neutral brief regarding
11 presentation of information from nonattorneys
12 participating as parties.

13 Are you familiar with that? Staff's brief? Let
14 me just read a portion of it to you, and you can react to
15 that. I have a question. I'd like your opinion in
16 regards to evidence.

17 You've stated that the Public Utilities
18 Commission should allow significant leeway to individuals
19 who are not attorneys. And the Staff's memo provides
20 with respect to the question -- I'm reading now from
21 their memo.

22 "With respect to the question of whether the
23 same standard concerning presentation of evidence should
24 apply to individuals who are representing themselves as
25 to those represented by legal counsel, the South Dakota

1 Supreme Court has set clear direction on this issue. The
2 Court has stated that to grant such indulgence would be
3 to work injustice in the name of justice for it will
4 allow those who freely elect to act as their own counsel
5 liberties not accorded to those who seek out members of
6 the Bar to represent them." And it gives the cite for
7 that quote.

8 MR. CAPOSSELA: Yes, sir. I'm familiar with
9 that. With the Staff's --

10 COMMISSIONER HANSON: Mr. Capossela.
11 Mr. Capossela, I haven't finished my question yet.

12 The brief goes on to state the court went on to
13 state that Parties who appear pro se may not capitalize
14 on their unfamiliarity with the law. They are bound by
15 the same Rules of Evidence and procedures that bind
16 attorneys. And a trial judge is not required to act as
17 counsel for litigant."

18 All right. That's my question. I'd like you to
19 give us your thoughts on that.

20 MR. CAPOSSELA: Yes. Thank you, Commissioner
21 Hanson.

22 I think the term "trial judge" is the key term
23 there, distinguishing that case from the motion of
24 Ms. Myers' testimony.

25 We have not argued that the Rules of Evidence do

1 not apply, contrary to counsel's assertion. What we're
2 arguing is are they to be applied strictly like they are
3 in Circuit Court, per the Oesterling case? Or are they
4 to be applied a little bit more liberally because we're
5 in an administrative agency proceeding? That's the
6 difference.

7 And so that case is distinguishable because
8 we're in a different forum. And what happened in that
9 case is for lack of a better term a dead beat dad didn't
10 get a lawyer and was trying to get out of making his
11 payments. And his argument was I don't have a lawyer.
12 And they were in Circuit Court. And so the judge -- the
13 judge and the Supreme Court ruled properly that's not an
14 excuse.

15 We're in an administrative hearing, and the
16 manner in which the Rules of Evidence are applied, the
17 Commission is permitted to be more liberal in the
18 implementation of those rules. And there's nothing in
19 the Oesterling case that prohibits that. That's the
20 common law rule, and I think that is codified in the
21 Administrative Procedures Act.

22 So I think the answer to your question is the
23 Oesterling case is distinguishable because it was in
24 Circuit Court and not before the PUC. And under
25 Section 19 of the Administrative Procedures Act the PUC

1 has discretion to confer a more liberal interpretation of
2 the Rules of Evidence than in Circuit Court. It's a
3 different forum.

4 And the difference in the forum is what
5 distinguishes the Oesterling case. And I do submit that
6 it is not binding upon the administrative agency. It's
7 binding upon the Circuit Court but not an administrative
8 agency such as the PUC.

9 So that is the rule of thumb of court, no doubt
10 but it's not the rule of thumb before an administrative
11 agency.

12 COMMISSIONER HANSON: Thank you.

13 One question for the Applicant.

14 MR. TAYLOR: Yes, sir.

15 COMMISSIONER HANSON: I've been in court a
16 number of times. Fortunately -- I might have to explain
17 that -- as an expert witness.

18 In regards to hearsay being what someone else
19 said, I clearly understand that one may not say that
20 Kristen informed me that Chris told her. You know,
21 that's obvious hearsay.

22 However, if I were in court, it's always been
23 permitted in my experience for me to say Commissioner
24 Fiegen informed me that such and such.

25 MR. TAYLOR: Sure. The difference is that you

1 always testified as an expert. When you testify as an
2 appraiser as an expert witness you can draw on this body
3 of knowledge anything you choose that you think is
4 appropriate to formulate your opinion.

5 And, for example, as an appraiser you may want
6 to interview a landowner. And so you interview the
7 landowner and you say to the landowner what about this
8 and that on your property. And then you come into court
9 and you testify. I formulated my opinion on these
10 points, comparable sales, blah-blah-blah, and what the
11 landowner told me. Perfectly admissible.

12 Then I can cross-examine you. And I can say,
13 well, what part did that landowner's decision, opinion,
14 play in your valuation opinion? And if I want, I can
15 call the landowner and impeach your opinion with what he
16 said.

17 Very different situation from me coming into
18 court and testifying Tom Welk told me that Wilbert
19 Blumhardt conducted the Union Carbide hearing in 1974.
20 That's hearsay. Tom Welk can come in and testify and say
21 I was there. Blumhardt was the Chairman. That's the
22 distinction. Unsworn, out of court statement offered for
23 the proof of its content. That's hearsay and it's not
24 admissible. Simply not admissible.

25 COMMISSIONER HANSON: Thank you.

1 MS. MYERS: May I make a comment to that?

2 COMMISSIONER HANSON: Certainly, if you wish to
3 piggyback on that, I'd entertain. Please.

4 MS. MYERS: I personally visited with these
5 people, Carol and Kevin and the water treatment plants.
6 So to me that's firsthand information. It's not hearsay.

7 And I asked their permission to use their quotes
8 and they gave their approval.

9 Before I gave my testimony I swore to say the
10 truth, the whole truth, and nothing but the truth so I
11 believe my quotes are very legitimate and relevant and
12 very supportive of my testimony.

13 CHAIRMAN NELSON: Commissioner Fiegen.

14 COMMISSIONER FIEGEN: On Exhibit 6031 for
15 Mr. Taylor I have a question on your objection of a
16 public health statement on benzene. Your objection is
17 hearsay.

18 Could you explain your objection on a public
19 record on benzene?

20 MR. TAYLOR: Just a second. I have to catch up
21 with you.

22 COMMISSIONER FIEGEN: Okay. So I'm talking
23 about 6031, the public health statement.

24 MR. TAYLOR: I don't have that document in front
25 of me. Could you tell me which one it is? Maybe I've

1 got it --

2 COMMISSIONER FIEGEN: I'll pull it up quick. It
3 is from the Agency of Toxic Substance and Disease --

4 MR. TAYLOR: Oh, the ATSRD public health
5 statement --

6 COMMISSIONER FIEGEN: August of 2007.

7 MR. TAYLOR: There has to be some foundation
8 shown that that document comports with the hearsay
9 exception that I talked about before for public records,
10 803(8). In order for that to be admitted there has to be
11 foundation shown that it is a record or a report or a
12 data compilation that was observed pursuant to a duty
13 imposed by law on the author and presumably on the agency
14 that employed the author who wrote the piece.

15 So it lacks foundation. Without the foundation
16 to demonstrate where that came from, what it stands for,
17 and the circumstances under which it was composed, it's
18 hearsay. It's an unsworn out of court statement offered
19 for the truth of its contents. There is an exception for
20 a report that's kept by an agency in its regular course
21 of business if the agency has a duty to keep that report.
22 And that's 803(8).

23 COMMISSIONER FIEGEN: Thank you.

24 CHAIRMAN NELSON: Any additional Commissioner
25 questions?

1 Seeing none, is there a motion? Commissioner
2 Hanson.

3 COMMISSIONER HANSON: Do you wish to take these
4 individually?

5 CHAIRMAN NELSON: I think you can take it all
6 together or split it out, however you prefer.

7 COMMISSIONER HANSON: All right. I'm wrestling
8 a little bit with some of them so I'll let you.

9 MS. MYERS: May I make a comment on the ATSDR?

10 CHAIRMAN NELSON: I think we're past that at
11 this point unless Commissioner Fiegen wants a response?

12 No. We're good.

13 Additional -- anybody, motions?

14 In HP14-001 I move that the Commission grant
15 Keystone's motion to strike testimony and exhibits of
16 Cindy Myers as we clarified verbally today.

17 Discussion on the motion.

18 COMMISSIONER HANSON: Mr. Chairman.

19 CHAIRMAN NELSON: Yes.

20 COMMISSIONER HANSON: I fully appreciate and
21 understand the hearsay discussion. I'm really struggling
22 with some of that. For instance, 6001 with Paul
23 Seamans' -- it seems to me that a part of that is so
24 available as Mr. Seamans has been, would have had the
25 part -- the Applicant would have had the opportunity to

1 cross-examine that person.

2 I understand the way in which Mr. Taylor
3 articulated the -- the hearsay cross. I find myself in
4 agreement with him. I just think we go too far when we
5 eliminate some of those presentations to us. That's just
6 my comfort zone at this juncture.

7 CHAIRMAN NELSON: Additional discussion?

8 I'm certainly sympathetic to Ms. Myers'
9 position. This legal stuff, if you will, obviously is a
10 new realm for you and not easy to navigate.

11 I appreciate the fact that you acknowledge that
12 Staff has been as helpful as they could be, given their
13 position.

14 But none of that negates the law that has been
15 established by our Supreme Court. And as Commissioner
16 Hanson earlier read from Staff's brief, it appears to me
17 that the law is very, very clear in that we can't --
18 while we can give you some deference in assisting you to
19 navigate how do you file this, that, and the other thing,
20 I don't believe that established law, as evaluated by the
21 Supreme Court, gives us the latitude to allow you to
22 circumnavigate the rule that has been established and a
23 law that has been established in 1-26-19. And, hence, my
24 motion.

25 Additional discussion.

1 Commissioner Fiegen.

2 COMMISSIONER FIEGEN: Thank you, Mr. Chairman.
3 It was certainly nice to meet Ms. Myers because she has
4 spent a lot of time. And I read a lot of your things
5 and listened and read and you brought a lot of things.
6 And if I was still a legislator, all of this stuff would
7 have been brought in and we would have had it on file for
8 the Legislature.

9 But now I'm in a different role, and at the
10 Public Utilities Commission I have to adhere to the law
11 that South Dakota has and the Rules of Evidence. So
12 although I have read all of your stuff, I just don't
13 believe I can take it all into consideration because of
14 the rules that this Public Utilities Commission needs to
15 go by according to the state law.

16 CHAIRMAN NELSON: Additional discussion.
17 Commissioner Hanson.

18 COMMISSIONER HANSON: Thank you, Mr. Chairman.
19 Would you for the sake of the motion run through all of
20 the -- I believe I have it all correct here, but all of
21 the items that are to be removed from the evidence?

22 CHAIRMAN NELSON: Absolutely. In dealing with
23 the Exhibits, 6001, 6003, 6004, 6005, 6016, 6022, 6024,
24 6027, 6028, 6030, 6031, 6032, 6034, 6035, 6036, 6037, and
25 then the two unnumbered exhibits, the plastic water line

1 survey and the PowerPoint testimony.

2 COMMISSIONER HANSON: And I believe those were
3 6038 and 6039, weren't they?

4 CHAIRMAN NELSON: If they were numbered, that's
5 what they would have been given.

6 COMMISSIONER HANSON: All right.

7 CHAIRMAN NELSON: And then also the testimony as
8 we stepped through that.

9 COMMISSIONER HANSON: Thank you very much.
10 Appreciate that.

11 Mr. Chairman, we have a motion before us, and
12 your motion -- for the sake of -- well, we did some clay
13 pigeon shooting over the weekend. I'm going to send up a
14 clay for the two of you to take a shot at.

15 I'm really struggling with 6001. That's my
16 concern here. I don't fully -- well, I won't
17 editorialize on it. I'm just struggling with that one,
18 should not have been included in the omission. So I'm
19 going to amend the Chairman's motion to not -- my motion
20 is to amend the Chairman's motion to exclude Exhibit
21 6001.

22 CHAIRMAN NELSON: Discussion on the motion.

23 COMMISSIONER HANSON: I believe I've already
24 briefed it.

25 CHAIRMAN NELSON: So, I mean, obviously

1 Mr. Seamans is an Intervenor here. He testified. If he
2 had testified to this, he would have been able to be
3 cross-examined at that point. And so I get all of that.

4 But as Ms. Myers introducing this it appears to
5 me that it's hearsay. So how do we get around this being
6 hearsay?

7 COMMISSIONER HANSON: It's a typed statement
8 that is in first person from Mr. Seamans, and Ms. Myers
9 has sworn that she received this from him. And so it's
10 that gray area as opposed to having her say he said this.
11 She's presenting us with a typed statement that was
12 written by Mr. Seamans, and she's presented it as a part
13 of her testimony. I think that crosses that line of
14 ambiguity as to whether or not it's accurate.

15 And if the Applicant opposed it, they could
16 present their own information pertaining to -- pertaining
17 to whether or not it's accurate.

18 CHAIRMAN NELSON: Thank you. Additional
19 discussion.

20 Commissioner Fiegen.

21 COMMISSIONER FIEGEN: I'm not going to be
22 supporting that amendment today. Mr. Seamans was a party
23 in the case. He could have put it in his exhibits or put
24 it in his prefiled. And so I just think it's a little
25 odd that we have this exhibit with another Intervenor,

1 and that's why I'm not going to support your amendment
2 today.

3 CHAIRMAN NELSON: Additional discussion on the
4 amendment to exclude 6001.

5 Seeing none, all those in favor of the amendment
6 will vote aye; those opposed, nay.

7 Commissioner Hanson.

8 COMMISSIONER HANSON: Aye.

9 CHAIRMAN NELSON: Commissioner Fiegen.

10 COMMISSIONER FIEGEN: Fiegen votes no.

11 CHAIRMAN NELSON: And Nelson votes no.

12 Amendment fails. Clay pigeon busted.

13 Additional discussion.

14 All those -- Commissioner Hanson.

15 COMMISSIONER HANSON: I just wish to state that
16 Ms. Myers's sincerity and integrity is not being
17 questioned here in any fashion by the vote that I'm about
18 to take, but I do agree with the majority of those
19 situations where newspapers are being quoted and, you
20 know, I won't go through that but there's a litany of,
21 you know, YouTubes and things like that that just cannot
22 be part of an accurate evidentiary hearing.

23 So thank you, Mr. Chairman.

24 CHAIRMAN NELSON: Additional discussion?

25 MS. MYERS: Will my prefiled testimony be struck

1 too then?

2 CHAIRMAN NELSON: The portions that were
3 objected to.

4 MS. MYERS: So not in totality?

5 CHAIRMAN NELSON: Correct.

6 COMMISSIONER FIEGEN: So actually the majority
7 of your exhibits are going to go into evidence. Just so
8 you know that. And, of course, your testimony, only
9 portions of that was stricken and only a portion of your
10 prefiled was stricken. So the majority of what you
11 brought to the Commission is going to be into evidence
12 and we appreciate that hard work.

13 MS. MYERS: How about the PowerPoint testimony?
14 Will that be portioned out?

15 COMMISSIONER FIEGEN: You know, that's a great
16 question because yesterday when I looked at that --
17 actually last week I wanted to go through every page and
18 try to figure out what was hearsay and what I could keep
19 in. And it was starting to be overwhelming and so I
20 chose not to decide on what slide and decided that the
21 whole thing probably shouldn't be in evidence.

22 CHAIRMAN NELSON: And that is part of the
23 motion, that the entire PowerPoint would not be accepted.
24 That's part of the motion.

25 MS. MYERS: I don't believe I had my question

1 answered as far as objection to my testimony. Why it
2 wasn't done before the hearing? Or it was just --

3 CHAIRMAN NELSON: And I don't think that's a
4 question we have to answer here today.

5 Any further discussion on the motion?

6 Hearing none all those in favor will vote aye;
7 those opposed, nay.

8 Commissioner Hanson.

9 COMMISSIONER HANSON: Aye.

10 CHAIRMAN NELSON: Commissioner Fiegen.

11 COMMISSIONER FIEGEN: Fiegen votes aye.

12 CHAIRMAN NELSON: Nelson votes aye.

13 The motion carries.

14 Thank you all for coming back today.

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1 STATE OF SOUTH DAKOTA)

2 :SS

CERTIFICATE

3 COUNTY OF SULLY)

4

5 I, CHERI MCCOMSEY WITTLER, a Registered
6 Professional Reporter, Certified Realtime Reporter and
7 Notary Public in and for the State of South Dakota:

8 DO HEREBY CERTIFY that as the duly-appointed
9 shorthand reporter, I took in shorthand the proceedings
10 had in the above-entitled matter on the 29th day of
11 October, 2015, and that the attached is a true and
12 correct transcription of the proceedings so taken.

13 Dated at Onida, South Dakota this 1st day of
14 December, 2015.

15

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

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