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THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE PETITION HP14-001
OF TRANSCANADA KEYSTONE PIPELINE,
LP FOR ORDER ACCEPTING CERTIFICATION
OF PERMIT ISSUED IN DOCKET HP09-001
TO CONSTRUCT THE KEYSTONE XL
PIPELINE

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Transcript of Proceedings
December 22, 2015

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BEFORE THE PUBLIC UTILITIES COMMISSION

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

COMMISSION STAFF

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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 22nd day of December, 2015.

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

5 And a reminder to everyone, mostly myself, that
6 we do have court reporter Cheri with us, and we need to
7 speak slower than I normally speak.

8 We have a number of questions today. First,
9 shall the Commission take administrative notice as
10 requested by DRA? Second, shall the Commission grant
11 DRA's Motion to supplement administrative record? Third,
12 shall the Commission grant the Joint Motion to Dismiss?
13 And, fourth, shall the Commission grant the Motion to
14 Revoke the Permit issued in HP09-001?

15 For my fellow Commissioners' benefit, here's how
16 I would intend to proceed, unless there's disagreement:
17 I would like to take testimony on the first two questions
18 together. We will resolve those issues. And then we
19 will take the last two questions together.

20 Commissioner Fiegen, does that sound workable?

21 COMMISSIONER FIEGEN: Yes.

22 CHAIRMAN NELSON: Commissioner Hanson, does that
23 work for you?

24 COMMISSIONER HANSON: Perfect.

25 CHAIRMAN NELSON: With that, I'm going to go to

1 Dakota Rural Action first on the first two questions.

2 And I would just also encourage all of the
3 parties who are going to speak on this to not only
4 address the motions that DRA has made but also, as
5 Keystone responded, that they have requested that if this
6 is to be granted, that their response also be entered
7 into the record. And I'd like you to address that also
8 as you are speaking to us.

9 And so, with that, who from DRA wants to lead
10 off?

11 MR. ELLISON: Mr. Chairman, this is Bruce
12 Ellison. At least Mr. Martinez is going to take the
13 question of the Motion to Dismiss, and I'm going to take
14 the question or lead off on our effort to supplement the
15 record and also address Keystone's desire that if the
16 Commission grants our request to have this PHMSA report
17 be made part of the record, that they get their response
18 in.

19 CHAIRMAN NELSON: Perfect, Bruce. Go ahead.

20 MR. ELLISON: So if I may start, sir, we would
21 like to have -- and we believe that it is appropriate to
22 have the Commission review the November 20, 2015, PHMSA
23 Notice of Probable Violation and Imposition of Civil
24 Penalty.

25 We feel that -- and, in fact, TransCanada in its

1 response says in the bottom of paragraph 1 that Keystone
2 does not dispute that this is material to the testimony
3 presented at the hearing.

4 So I think that with that acknowledgment about
5 materiality and, therefore, I would assume relevance, I
6 would submit not only from Mr. Goulet but also from
7 Ms. Kothari and also Mr. King that would also be
8 involved.

9 South Dakota has a hearsay exception in
10 SDCL 19-19-803 which states that public records and
11 reports of agencies are an exception to the hearsay rule.
12 And that would be under subparagraph 8 of Rule 803. So
13 this is clearly something which is admissible.

14 But I would like to address the relevancy
15 question a little bit more for the purposes of the
16 record. This report and -- you know, I think we
17 should -- I mean, we've attached it. I don't know if we
18 should give it an exhibit number for the record. We've
19 attached it to our Motion. Whatever the Commission would
20 feel would be appropriate.

21 But referring to the November 2015 report, I
22 think it's important, and we would submit on behalf of
23 DRA, that it is important that the Commission really look
24 at this violation, proposed violation notice.

25 It goes directly to the question of the

1 corrosion that the Commission will remember testimony
2 about that was found and reported near St. Louis. But
3 what this report does is that it substantially conflicts
4 with the testimony of TransCanada's three witnesses
5 that I just mentioned and supports the credibility of
6 Evan Vokes in that there is an attitude within
7 TransCanada -- you know, they claim that safety first,
8 they follow all the regs.

9 What this additional report shows is they don't
10 follow the regs. Yes, they did report it. They reported
11 a near disaster. But there were serious violations that
12 PHMSA found despite the fact that one of the requirements
13 was that they do report such anomalies. One can only
14 imagine what would happen if this was a spill.

15 But what is important and the report states on
16 page 2 is that in December of 2011 Keystone conducted a
17 closed interval survey which identified cathodic
18 protection potential that were below criteria, along with
19 the existence of interference from other pipeline
20 operators.

21 This report shows they didn't do anything
22 despite that. And we would submit it goes to the
23 credibility of TransCanada's entire case. It also goes
24 to the substantive evidence of can TransCanada comply
25 with the Amended Conditions of this Commission, which

1 includes compliance with all PHMSA regulations.

2 And it's clear that this is another PHMSA report
3 that shows repeated ignoring of PHMSA regulations, noting
4 that the primary cause of the pitting mechanism as the
5 inadequacy of the original CP design.

6 Now that's significant because we continually
7 heard from witnesses of the great care that TransCanada
8 takes with its design, including with cathodic
9 protection. We heard specific testimony about how these
10 designs -- how they did everything right, but somehow
11 this still happened.

12 Well, that's not what this report shows. It
13 goes directly contrary to that. They notice secondary
14 cause was the timeliness of the corrective actions. And
15 certainly that is significant as well because they
16 allowed a knowing problem to get to the point that I
17 think there was a rather remarkable mass point here. You
18 know, it was approximately one one-hundredth of an inch
19 of pipeline remaining. That's pretty substantial.

20 They found on page 3 that TransCanada failed to
21 conduct tests to monitor their protective pipeline at
22 least once each calendar year but with intervals not
23 exceeding 15 months. That's a safety issue. They waited
24 much longer than that. 20 -- you know, and, therefore,
25 this is very, very important that the Commission consider

1 this, can TransCanada comply with the Amended Condition.

2 And it notes at the top of page 4, TransCanada
3 provided no rationale for the failure to conduct and
4 record the required testing. Additionally, in
5 subparagraph 3 it states that TransCanada failed to
6 correct the cathodic protection deficiencies found in 62
7 locations within a reasonable time.

8 Paragraph 4, TransCanada failed to minimize the
9 detrimental effect of interference currents on at least
10 two areas under the influence of another pipeline. They
11 did talk about this related pipeline, but they stated
12 that the stray currents existed on the pipeline over a
13 year after installing corrosion control measures to
14 alleviate the problem.

15 Now this Commission has not been presented with
16 any design plans by TransCanada in which they really have
17 corrected this particular issue. So it's highly
18 material.

19 It goes further on page 5 about TransCanada's
20 own contractor noticing in August of 2011 the strong
21 possibility for stray current interference from
22 neighboring pipelines, yet they didn't do anything. They
23 didn't correct it for almost 21 months. And that,
24 therefore, caused the -- this violation notice to occur.

25 So we would submit that this is admissible, this

1 report. It's highly relevant. TransCanada admits it's
2 material and SDCL 19-19-803 subparagraph 8 it is clearly
3 a public record report of an agency and admissible under
4 the procedural rules of South Dakota.

5 Now moving on to the question of if the
6 Commission admits this document, should TransCanada's
7 response be admitted?

8 TransCanada does not really talk about the
9 hearsay exception that such a document would be
10 admissible. We will not have had a chance unless the
11 Commission reopens the hearing because if it's going to
12 admit this document, then we need to be able to have a
13 chance to confront the author of that document as to --
14 so the Commission can decide whether, in fact,
15 TransCanada, in fact, is effectively responding to the
16 issues, other than trying to get out of as much in fines
17 as was being imposed, which seems to be the majority of
18 their direction.

19 We would submit they're not equal. The idea
20 that if the Commission allows in the PHMSA violation
21 report, that somehow their response would be an equal
22 kind of a situation is not simply the case. One is
23 authorized under the Rules of Procedure and exception to
24 hearsay rule, and the other is not. And we do waive the
25 confrontation objection.

1 I think that concludes my remarks subject to any
2 questions from the Commission.

3 CHAIRMAN NELSON: Thank you, Bruce.

4 Here's what I'm going to do. I'm going to go to
5 Keystone next and then Staff, and then, Bruce, I'll give
6 you rebuttal time.

7 So it looks like Mr. Moore is going to come
8 forward.

9 MR. MOORE: Thank you, Mr. Chairman. James
10 Moore on behalf of Keystone.

11 I think the important thing to recognize is that
12 the matter -- proceeding before PHMSA is ongoing. The
13 Notice of Probable Violation is one aspect of that
14 proceeding. To the extent that it is material and
15 relevant to the Commission's consideration of disposition
16 of the certification Petition in this Docket, it makes
17 sense that the Commission would be fully advised of what
18 is transpiring before PHMSA, and that is why Keystone
19 requested that the Commission would also take notice of
20 its response.

21 The Notice of Probable Violation is just that.
22 It's a probable violation. The proposed compliance order
23 and the proposed civil penalty are just that, they're
24 proposed.

25 TransCanada has responded to that. It has

1 requested a hearing. It has set forth a statement of
2 issues. All of that is in the response, and that will
3 not be resolved by PHMSA for several months.

4 The question of materiality and relevance I
5 think is a little bit different than Mr. Ellison argues.
6 It is material to the testimony that was presented at the
7 hearing, but we do not concede that it is ultimately
8 relevant to the disposition of this Docket for the
9 reasons that were set forth in writing in our response.

10 First of all, the issue that is addressed in the
11 NOPV relates to a design issue with the cathodic
12 protection system on the Keystone Pipeline. That issue
13 was corrected in 2013. That is evident itself from the
14 NOPV. Keystone has actually taken all of the actions
15 recommended in the proposed compliance order before the
16 proposed compliance order was issued.

17 This did not happen in South Dakota. It does
18 not relate to the proposed Keystone XL Pipeline. There
19 is no evidence in the record of an opportunity for a
20 similar incident in South Dakota on the Keystone XL
21 Pipeline. And there's no testimony that the design of
22 the cathodic protection system for the proposed Keystone
23 XL Pipeline is subject to the same issue that arose
24 here.

25 In fact, the testimony is exactly to the

1 contrary, that Keystone learned from the issues that were
2 created here, and that is part of the response that
3 Keystone submitted to PHMSA.

4 So I think it's important that if the Commission
5 grants the Motion to Consider the NOPV that it consider
6 the entirety of what has been submitted to PHMSA so far
7 in connection with that. But ultimately I think that
8 this is not an issue based on which the Commission could
9 rely to determine that Keystone is unable to meet any
10 Permit Conditions. I just don't think it reaches that
11 level.

12 Thank you.

13 CHAIRMAN NELSON: Thank you.

14 Staff.

15 MS. EDWARDS: Thank you. Unlike my usual
16 practice, I decided not to submit a response to this so
17 Staff didn't submit anything. It seemed like by doing so
18 I would just be complicating the issue.

19 And I would agree with Mr. Ellison that it is
20 material and relevant, and I would have no objection to
21 the Commission taking judicial notice of that document.

22 He also mentioned possibly putting an exhibit
23 number on it. I think if the Commission takes
24 administrative notice, then it's not an exhibit.

25 And that's something we discussed at the

1 hearing. So the document would be out there, but he need
2 not put an exhibit number on there and submit it as an
3 exhibit.

4 As far as the document that TransCanada
5 submitted, I have no objection to that either. It does
6 for the same reason appear relevant.

7 The only thing I would ask is Mr. Ellison spent
8 a great deal of time today discussing the weight to be
9 given to that document, and I hadn't, I suppose, given it
10 as much consideration so I would ask that maybe the
11 Commission give the parties until January 8 to submit a
12 five page limit supplemental brief if we would like to
13 add additional argument to our posthearing briefs based
14 on that.

15 I don't know if I would or not, but just given
16 the discussion on the weight of the evidence and its
17 bearing on the outcome, it might be helpful. With a
18 limit of five pages.

19 Thank you.

20 CHAIRMAN NELSON: Thank you.

21 Mr. Ellison, rebuttal.

22 MR. ELLISON: Yes. It's going to be pretty
23 brief.

24 The design issue that Mr. Moore talked about,
25 we've raised the design issue similar to the design issue

1 that caused a 400-barrel spill, I believe, in Ludden, and
2 it is certainly very important because of the company
3 seems to keep having design issues that are very simply
4 addressed, but they hadn't addressed it until there was a
5 problem.

6 Mr. Moore makes a statement that there's no
7 similar situation in South Dakota in terms of any foreign
8 company pipelines. Mr. Moore forgets the record, and I
9 just think I want to place it just so that it is in this
10 part of the record, that there's testimony that there's
11 metal piping of the Mni Wiconi Project that would
12 directly be crossed over by the TransCanada proposed KXL
13 Pipeline. So there is a potential problem here in
14 South Dakota.

15 The report also from PHMSA addresses cathodic
16 problems with just simply metal pipe being in the ground,
17 you know, the contact between the earth and the metal
18 pipe creating also cathodic problems. And that certainly
19 is prevalent throughout, since this is buried pipeline
20 through the entire state. So it does go beyond simply
21 what this Mr. Moore stated.

22 The other thing too, for the purposes of
23 materiality I just want to relate this exhibit -- sorry.
24 I think Ms. Edwards is correct. I don't have a problem
25 with no exhibit number. I agree if there's judicial or

1 administrative acknowledgment of this report, that it
2 doesn't need to have an exhibit number. It's part of the
3 record.

4 But I'd like to relate this to DRA Exhibit 153
5 which was admitted before the Commission, which was
6 TransCanada's study of root cause of contributing
7 factors, Keystone Pipeline erosion anomaly investigation,
8 Final Report 2-13-13. And I mention that just because of
9 a materiality question.

10 That is all I have on the issue, and I thank the
11 Commission for its time.

12 CHAIRMAN NELSON: Thank you.

13 Questions from the Commission? And I'm going to
14 begin.

15 For Mr. Moore, there's no question in my mind
16 that we should admit and grant DRA's Motion. No
17 question. In fairness, I would certainly like to have
18 your response as part of the record. But I am hung up on
19 Mr. Ellison's argument that they've not had a chance to
20 cross-examine on that and that legally that may not be
21 admissible.

22 Can you help me out from a legal perspective as
23 to why your response should be included?

24 MR. MOORE: Mr. Chairman, I think your question
25 contains the answer itself. It's a question of fairness.

1 And I don't think it makes sense for the Commission to
2 consider part of a proceeding before PHMSA out of
3 context.

4 You know, one of the issues that I think we've
5 had in this Docket is that we can go on and on with the
6 evidence in this Docket. The matter won't be resolved by
7 PHMSA for some time.

8 I think what TransCanada's response is evidence
9 of is -- one, it's largely factual. It relates to
10 specific action that was taken. But, two, to the extent
11 that it is an objection to one particular part of the
12 Notice of Probable Violation, I think it sets up a
13 situation that has to be determined by PHMSA. And
14 ultimately the Commission doesn't have any control over
15 what PHMSA determines.

16 I think that carried to its logical end,
17 Mr. Ellison's objection ends up with the Commission
18 waiting for a resolution by PHMSA, if you ultimately
19 think that it is material to your disposition of the
20 certification Petition.

21 But I don't think that leads you back to
22 Mr. Ellison is entitled to an opportunity to
23 cross-examine whatever argument TransCanada presents to
24 PHMSA. That's an issue for PHMSA.

25 CHAIRMAN NELSON: Additional questions.

1 Hearing no additional Commission questions, is
2 there a Motion regarding the first two of the questions
3 on our agenda?

4 I will move that the Commission take
5 administrative notice as requested by DRA and grant DRA's
6 Motion to Supplement the Administrative Record.

7 Discussion on the Motion.

8 It's very clear to me that this is material to
9 what was discussed during the hearing. We spent a great
10 deal of time talking about this issue, and I think this
11 particular official public record we certainly should add
12 to the record of this proceeding.

13 As I indicated earlier, I think it would only be
14 fair that we add Keystone's response but I am not
15 convinced that legally we can do that and, therefore,
16 that was not part of my Motion. Which it could have
17 been, but I don't think we can.

18 Additional discussion?

19 COMMISSIONER HANSON: Mr. Chairman, I agree with
20 your comments, and I believe we have an obligation to
21 take the judicial notice so I'll be supporting your
22 Motion.

23 CHAIRMAN NELSON: Additional discussion?

24 Hearing none, all those in favor will vote aye;
25 those opposed, nay.

1 Commissioner Hanson.

2 COMMISSIONER HANSON: Aye.

3 CHAIRMAN NELSON: Commissioner Fiegen.

4 COMMISSIONER FIEGEN: Fiegen votes aye.

5 CHAIRMAN NELSON: Nelson votes aye.

6 Motion carries.

7 Okay. That then brings us to the last two
8 questions. Shall the Commission grant the Joint Motion
9 to Dismiss? And shall the Commission grant the Motion to
10 Revoke the Permit issued in HP09-001?

11 And since these came to us together, we'll allow
12 the argument together.

13 Here's what I'm going to do: Some one person
14 from the Joint Motions -- and I don't know.

15 Mr. Martinez, is that you? Are you going to
16 argue on behalf of the joint sponsors?

17 MR. MARTINEZ: Well, Mr. Chairman, I was
18 planning on advancing an argument on behalf of DRA, but
19 I --

20 CHAIRMAN NELSON: Who's been assigned to argue
21 on behalf of the Joint Motion?

22 MR. MARTINEZ: Well, from DRA's perspective, I'm
23 going to go ahead and do that. However, our viewpoint is
24 that DRA is only one party, and, frankly, our
25 constituents are limited to one set of stakeholders --

1 CHAIRMAN NELSON: Okay. So just hang on, Robin.
2 Here's what I'm going to do then. I will let
3 Mr. Martinez lead off on behalf of the joint sponsors.
4 When he is concluded, because of the obvious importance
5 of this, I am certainly going to give each of the
6 Intervenors an opportunity to argue these two questions.

7 Now let me be very clear. We are not arguing
8 the merits of this case. We are arguing the legal
9 position on whether or not we should grant a Motion to
10 Dismiss and a Motion to Revoke the Permit issued in
11 HP09-001. So for those of you that intend to speak, be
12 sure you keep your comments within those bounds.

13 I will then go to Staff. I will then go to
14 Keystone. And then I will -- as the leadoff I guess I'll
15 give Mr. Martinez the opportunity for rebuttal.

16 With that, Mr. Martinez, go ahead.

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

18 The argument that I'm going to have is not
19 terribly long because I think the issue is fairly
20 limited. And what it boils down to is the fact that,
21 whether TransCanada likes it or not, the proposed
22 Keystone XL Pipeline is a dead project.

23 Back on November 6 the White House made a public
24 announcement and issued its finding that this pipeline
25 was not in the national interest, and it denied

1 TransCanada's Application for a Presidential Permit.

2 Under law TransCanada cannot build its pipeline
3 absent receiving that Presidential Permit.

4 You as members of the Commission recognized that
5 back in 2010 when you granted TransCanada's original
6 Permit Application. Two of the conditions specifically
7 referenced compliance with laws in permitting. Condition
8 No. 1 that you imposed on TransCanada was that they
9 comply with all applicable laws and rules. That would
10 include the executive orders and the federal law
11 requiring approval via a Presidential Permit for the
12 pipeline to cross the international border of Canada.

13 The second Condition specifically references the
14 Presidential Permit. And on top of that very strongly
15 makes it mandatory in nature. The language that you
16 included in the Condition said that TransCanada shall
17 obtain Presidential Permit. They haven't been able to do
18 that since 2010. It doesn't look like they're going to
19 be able to do that.

20 On that basis I think it's fairly clear that
21 TransCanada cannot meet the conditions of the Permit and
22 that as a Commission you've got ample basis for going
23 ahead and granting a Motion to Dismiss the
24 recertification Petition.

25 Now what TransCanada has argued, and I think

1 this is kind of interesting, is that they say no. Hold
2 on. Compliance with all of these permitting requirements
3 is purely prospective in nature. In other words, we
4 don't have to follow the shall obtain language. We can
5 simply say, yeah, we'll promise to get a Permit at some
6 point in the future.

7 I don't think that's good enough. I think all
8 of us are probably hampered a little bit by the fact that
9 under South Dakota Law there's not really a well
10 developed body of law that interprets 49-41B-27, which is
11 the recertification statute.

12 And by coming out and making this argument that
13 all they have to do is show that we promise sometime in
14 the future to maybe go ahead and get a Permit,
15 TransCanada is effectively I think urging you as a
16 Commission to adopt what I think is a radical reading of
17 the statute by basically saying that once they get a
18 Permit, it exists in perpetuity regardless of what
19 happens going forward.

20 I think that when you look at this, the
21 existence of the recertification statute itself, the
22 49-41B-27, which requires certification after a four-year
23 period is I think a huge signal on the part of the
24 Legislature of its intent that permits not be held open
25 in perpetuity. Otherwise, why would you have the

1 recertification statute in place?

2 The reality is, is that things change over time.
3 Technology changes. Potential routes change. The
4 people's understanding of the effects of a particular
5 project will change. Economics will change. That's just
6 the nature of reality.

7 In this case one big change has occurred, and
8 that is the change that wasn't in existence at the time
9 when TransCanada applied for recertification, and that is
10 the State Department's finding very clearly that this
11 project is not in the national interest.

12 Now on that basis I think that you've got ample
13 grounds to go ahead and grant our Motion to Dismiss. But
14 we'd ask you to take one additional step beyond that and
15 send a very clear signal that not only is this project
16 not in the national interest as the U.S. government has
17 found but also take further steps and under South Dakota
18 Law exercise the ability that you as a Commission have
19 under Section 49-41B-33 to go ahead and revoke the
20 underlying Permit.

21 At this point there's too much water under the
22 bridge. The project has changed tremendously over the
23 years. If TransCanada's going to try to go ahead and
24 continue to push this project through, it's going to be a
25 radically different project. They're going to have to

1 start from ground zero all over again.

2 Now the section of the law that permits
3 revocation or suspension of a Permit is pretty clear. It
4 says a Permit may be revoked or suspended by the Public
5 Utilities Commission for and the operative language is
6 "failure to comply with the terms or conditions of the
7 Permit."

8 Now TransCanada and Staff have also made the
9 argument that, wait a minute, we've got to reopen the
10 original Docket and provide notice to all the parties who
11 appeared on the original Docket. I would suggest that
12 that's not necessarily the case because the statute
13 doesn't say that.

14 And I would point out that you as the
15 Commission, TransCanada, and also Staff, have previously
16 taken the position that you as the Commission and parties
17 can take actions so long as they are not specifically
18 prohibited by either the statute or the regulations.

19 This particular statute that we're looking at
20 for revocation does not lay out a procedure. It just
21 says a Permit may be revoked or suspended. Now the
22 reality is in this case in the present Docket parties had
23 notice. Parties had an ability to intervene and
24 participate. And, frankly, I think you as a Commission
25 took that lack of participation as not wanting to provide

1 input on that Docket.

2 I think the same applies here. I think that
3 when you look at the, you know, process that you have
4 under the statute, you clearly have the ability to act --
5 it's a discretionary act. It says a Permit may be
6 revoked. And it does not put a process in place that
7 says you've got to go ahead and reopen the original
8 Docket. I just don't think that's a Condition that's
9 required under state law.

10 The way the statute is -- the way you look at
11 it, it's an action that you can take at any time.

12 So with that in mind and given the fact that
13 TransCanada is not going to be able at this point to get
14 its Presidential Permit -- we've got a clear statement
15 that it's not in the national interest -- I think it's
16 appropriate to not only dismiss the Petition for
17 Certification but take the additional step and let
18 TransCanada know that the Permit is revoked.

19 That's what I have for now.

20 CHAIRMAN NELSON: Thank you, Mr. Martinez.
21 Appreciate that.

22 Here's what I'm going to do. I've got the
23 call-in list and I'm just going to go down the list and
24 if anybody on the call-in list wants to add their
25 comments, they certainly can.

1 I thought Mr. Martinez did a nice job of keeping
2 his comments in bounds on the actual motions that are in
3 front of us. And so take that as your cue.

4 With that, Bob Gough, anything to add?

5 MR. GOUGH: Good morning.

6 Yes. On behalf of InterTribal Council On
7 Utility Policy we certainly support and underscore the
8 comments made by Attorney Martinez.

9 We would also add that changes have occurred.
10 We've attempted to introduce evidence during the course
11 of the hearing that the world has changed. We've seen
12 that now in Paris.

13 It's time for Keystone to throw in the towel and
14 declare that they cannot and will not be able to build a
15 pipeline here in the United States. It's not in the U.S.
16 interest, and that is the United States of America,
17 including South Dakota.

18 Thank you very much.

19 CHAIRMAN NELSON: Thank you.

20 Gary Dorr, have you joined us on the line?

21 Not hearing Gary.

22 So Matt Rappold.

23 MR. RAPPOLD: Good morning, Mr. Chairman. Good
24 morning Commissioners. Matt Rappold on behalf of the
25 Rosebud Sioux Tribe.

1 We support the arguments made by both
2 Mr. Martinez and Mr. Gough regarding the Motion to
3 Dismiss, as well as to revoke the underlying Permit. And
4 I just want to follow up briefly on some points that were
5 made.

6 In your deliberative process on this issue I
7 would suggest that you take the conditions of your Permit
8 and look at them in the context of triggering events.

9 What I mean by that is since 2010 when your
10 Permit issued Keystone has engaged in activities to
11 comply with the requirements of Conditions 1 and 2.
12 Specifically in this Motion to Dismiss we're addressing
13 the requirement of the law that states they have to get a
14 Presidential Permit in order to cross the border.

15 The triggering event involved in Conditions 1
16 and 2 is the Presidential decision. That event triggered
17 in this case the inability and future impossibility of
18 Keystone's ability to show that the conditions upon which
19 they've got your Permit are still the same now as they
20 were when they got it.

21 When they got it it was possible for them to
22 comply and to show compliance and to take action to
23 satisfy the requirements of these permits. But since
24 November the 6th with the Presidential denial, that event
25 has triggered the impossibility of Keystone ever being

1 able to comply with the Permit requirements of the
2 South Dakota Public Utilities Commission.

3 Take, for example, Permit Condition No. 3. This
4 is, I believe, an illustration of how this works. 1 and
5 2 require to obtain Presidential Permit and comply with
6 all laws. Condition Permit No. 3 requires Keystone to
7 comply with and implement the recommendations set forth
8 in the Final Environmental Impact Statement when issued
9 by the United States Department of State pursuant to its
10 Amended Department of State Notice of Intent to prepare
11 an Environmental Impact Statement.

12 Because the President denied the Application for
13 a Presidential Permit, that is the triggering event that
14 makes it impossible for TransCanada to comply with and
15 meet the obligations of the Public Utilities Commission
16 Permit. It's just simply impossible for them to
17 demonstrate compliance with your Permit Condition.

18 Even if in the future they reapply for a Permit
19 to construct a project, that project is dead. This
20 project no longer exists. Any new Application that may
21 come down the road in the future will be a different
22 project. They will have to reapply for a Presidential
23 Permit, and their reapplication, if it ever happens, will
24 be done and is based on the law as it exists at that time
25 in the future. Not the law that exists now.

1 So we would ask you to grant our Motion to
2 Dismiss, and also revoke the underlying Permit. We'll
3 rest at this time unless questions are requested.

4 Thank you.

5 CHAIRMAN NELSON: Thank you, Matt.

6 Nancy Hilding, have you joined us? Not hearing
7 Nancy.

8 Paul Blackburn, anything to add?

9 MR. BLACKBURN: Yes, Mr. Chairman. I'll be
10 brief. I guess speaking as, you know, the attorney who
11 was involved in the 2010 case, you know, the amount of
12 time that has passed is remarkable.

13 I'd also say that citizens -- well, first off,
14 Bold supports the positions previously stated by DRA,
15 InterTribal COUP, and Rosebud Sioux Tribe.

16 Landowners and citizens have had a sort of
17 Damocles hanging over their properties for about six
18 years. And they now face the prospect of an unending
19 administrative process.

20 They deserve more certainty in both the process
21 of revoking a Permit and not being subject to a Permit
22 without time limit. And, therefore, Bold Nebraska
23 asserts that to be fair the Commission must both be clear
24 about the process for revoking a Permit and in front of
25 that process is consideration of the certification

1 decision and also be fair with citizens not to have this
2 be unending.

3 You know, at this point it's quite possible that
4 the Permit -- that even if TransCanada intends to submit
5 an additional Presidential Permit, that this process
6 could not end for 10 years after the Commission issued
7 its Permit in 2010. That's a long time to have a Permit
8 hanging out in the open.

9 And as other parties have noted, the times --
10 you know, the project has changed and will continue to
11 change, and the terms and conditions that were imposed in
12 2010 would likely no longer be appropriate.

13 In this case it's just simply fair to the
14 landowners who were subject to this Permit to have some
15 closure and to let them move on with their lives, let
16 them move on without having continued burdens on their
17 property and business interests and to allow and to
18 decide that this is time for this process to end.

19 Thank you for your time.

20 CHAIRMAN NELSON: Thank you, Paul.

21 Peter Capossela.

22 MR. CAPOSSELA: Thank you, Mr. Chairman.

23 Peter Capossela, Standing Rock Sioux Tribe.

24 The Tribe would ask the Commission to take the
25 commonsense practical approach to the Motion and to grant

1 it under the circumstances that exist today. That's kind
2 of the obvious commonsense thing to do under the
3 circumstances.

4 And, in fact, our understanding is that
5 TransCanada is no longer seeking approval through
6 Nebraska for that very reason. This is where we're at in
7 the process, and that's the practical thing to do.

8 Our system of government is based on the
9 distribution of power between the federal, tribal, state,
10 local governments. The Standing Rock Sioux Tribe does
11 not always agree with how that power is distributed out
12 of concerns with tribal sovereignty, but the Tribe has to
13 live with the distribution of power between the
14 respective governments. That's what underpins our
15 system. TransCanada should have to respect that also.

16 And the denial of the Presidential Permit really
17 just as a practical matter should result in the denial of
18 the recertification of its South Dakota Permit.

19 Some of the arguments that have been made
20 against the Motion have an Alice In Wonderland quality to
21 them. For example, in their brief on page 4, TransCanada
22 states that "It is possible that Keystone can obtain a
23 Presidential Permit."

24 Administrative agencies don't make decisions on
25 somebody's opinion of what could be "possible." They

1 make decisions based on what's demonstrated, what's
2 proven. And TransCanada is unable to demonstrate
3 compliance with the conditions because of the denial of
4 the Presidential Permit.

5 They also -- kind of another example is they
6 contend "Nothing precludes Keystone from reapplying for a
7 Presidential Permit in the future." That's true, but
8 that's not some legal argument to deny the Motion to
9 Dismiss.

10 They can reapply to the Department of State for
11 a Presidential Permit and if that's granted -- or they
12 can reapply to this Commission for a South Dakota Permit.
13 So kind of the arguments that they're making aren't
14 really legal arguments. They're more or less throwing
15 themselves on the mercy of the Commission to keep the
16 Permit hanging out there.

17 And again it's kind of an Alice In Wonderland
18 situation where they're seeking South Dakota to recertify
19 a Permit for a pipeline, which if built would violate
20 federal law. That makes absolutely no sense.

21 Earlier this morning Chairman Nelson wisely
22 stated that he doesn't like approving things with loose
23 ends. Well, approval of the Petition for Recertification
24 of the Permit has a very, very big loose end, and
25 approval should not be granted. The Motion to Dismiss

1 should be granted.

2 With respect to revocation of the Permit, one
3 alternative action the Commission could take would be
4 granting the Motion to Dismiss the Petition for
5 Certification with prejudice. That may obviate the need
6 to revoke the Permit because of the absence of
7 certification that would lapse under South Dakota Law.
8 So that we would ask that the Commission dismiss the
9 Petition, revoke the Permit, or alternatively dismiss the
10 Petition with prejudice. That's the commonsense approach
11 to moving forward in light of where we're at in the
12 process.

13 Thank you for your time this morning.

14 CHAIRMAN NELSON: Thank you.

15 Thomasina Real Bird, anything to add?

16 MS. REAL BIRD: Yes, Mr. Chairman. Thomasina
17 Real Bird for the Yankton Sioux Tribe. Forgive my voice
18 today.

19 Yankton supports the arguments advanced in the
20 written Motion as well as by DRA, ICOUP, Rosebud, Bold,
21 and Standing Rock Sioux Tribe this morning. In addition,
22 Yankton would like to say that the Application filed in
23 the '09 Docket refers to the first Presidential Permit
24 Application, and the Commission received testimony from
25 at least one witness, Mr. Flo, regarding the contents of

1 the first Presidential Permit Application.

2 Specifically in that testimony Mr. Flo stated
3 that the Department of State will identify an
4 environmentally preferred route. And that was material
5 to the Commission. The Commission's Findings of Fact
6 took into account that evidence, and the Commission
7 included multiple findings specific in its environmental
8 findings when it issued the permits in 2010.

9 And in its Amended Findings and Conclusions it
10 also included two conditions we heard described from
11 Mr. Martinez today. And while the Applicant can continue
12 to update its Application through the evidentiary
13 hearing, that opportunity to update its Application will
14 not be available if the Commission goes ahead and grants
15 certification. So this means that again the timing must
16 be considered.

17 TransCanada's Application will be incorrect and
18 not current. If it does in fact apply for a third
19 Presidential Permit -- in fact apply for a Presidential
20 Permit for a third time, at that time if certification is
21 granted, there will not be an opportunity to update
22 through an evidentiary hearing or otherwise the contents
23 of that third Presidential Permit. And we think the
24 Commission is entitled to that information that will be
25 in the third Presidential Permit, assuming there is one,

1 and the State of South Dakota deserves that as well.

2 With regard to TransCanada's and Staff's
3 argument that the Permit conditions are only meant to be
4 met at some point in the future, both the statute and
5 prior Commission Orders make it clear that the conditions
6 are to be met in the present.

7 49-41B-27 reads, the last portion of the
8 sentence, "Then the utility must certify to the Public
9 Utilities Commission that such facility continues to meet
10 the conditions upon which the Permit was issued."

11 Similarly, in a January 6, 2015, Order denying
12 Yankton Sioux Tribe's Motion to Dismiss, the Commission
13 stated in its written Order "After hearing from the
14 parties, the Commission unanimously voted to deny the
15 Motion to Dismiss, concluding that the Commission does
16 not on its face demonstrate that the project no longer
17 meets the Permit Conditions set forth in the decision and
18 that a decision on the merits should only be made after
19 discovery and a thorough opportunity to investigate the
20 facts and proceed to evidentiary hearing, if necessary."

21 So the information accepted by judicial notice
22 today or through this Motion is that the Presidential
23 Permit's been denied and that, you know, that's been
24 conceded by all the parties to this Docket. And so with
25 that information, that's the evidence. That's the

1 current state of things. That demonstrates today that
2 TransCanada today cannot meet the conditions upon which
3 the Permit was granted. Both the statute and prior
4 Commission Orders state it in the present.

5 The Legislature did not draft the statute to say
6 will meet or will meet before construction. Similarly,
7 the Commission's Orders do not read will meet in the
8 future or at a certain point in the future.

9 The question is before the Commission today, and
10 the evidence shows that TransCanada cannot meet that
11 Permit Condition, and also those findings on the original
12 Amended Permit Condition are no longer current.

13 Alternatively, if it is that TransCanada can
14 continue to just apply for endless numbers of
15 presidential permits, the overwhelming evidence before
16 the Commission is that they're 0 for 3. So if there is
17 to be given any weight as to TransCanada's ability, I
18 think a 0 percent average should be given strong weight
19 to the Commission if the Commission accepts the
20 unsupportable argument that it's a future -- a future
21 compliance date.

22 Regarding the revocation, the Yankton Sioux
23 Tribe supports the arguments advanced by Mr. Martinez and
24 DRA. We think the statute is clear and the Commission's
25 prior decisions and positions regarding if it's not

1 specifically prohibited by the statute or a set process
2 provided by the statute, the Commission does have
3 discretion to go ahead and revoke today.

4 And it is, in fact, very telling that the
5 parties to the '09 Docket chose not to participate in the
6 2014, this current Docket, and presumably they had no
7 input to provide and, therefore, you know, they rested on
8 their chance, I guess, to weigh in on any of the motions
9 pending, including the current Motion to Revoke.

10 We are available to answer questions. Thank
11 you, sir.

12 CHAIRMAN NELSON: Thank you, Thomasina.

13 I understand that Intervenor Cindy Myers is on
14 the phone. Cindy, I'll certainly give you an
15 opportunity. Again, keep your comments to the questions
16 that we are going to resolve today.

17 Go ahead.

18 MS. MYERS: Okay. Thank you.

19 First, I support all the statements made by the
20 intervening lawyers. Second, to me it's just simple
21 commonsense that you can't leave a Permit Application
22 open indefinitely because of variants changing over time.
23 Third, I request the reapplication be dismissed and the
24 underlying Permit be revoked.

25 And that's all.

1 CHAIRMAN NELSON: Thank you, Cindy.

2 Okay. With that, we've got a large number of
3 people in the meeting room. If any of the Intervenor
4 parties would like to address these two questions --

5 Mr. Clark.

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

7 I'm not going to have a whole lot. My
8 colleagues on the phone have articulated it pretty well.
9 I do want to highlight one thing, though.

10 Mr. Martinez hit the nail on the head and,
11 frankly, Keystone alluded to this in their response as
12 well, somewhat. The certification statutes, there's not
13 a lot of clarity in the case law. It's not a well
14 developed area of case law.

15 What that means practically is whatever the
16 Commission decides to do on this matter will have long
17 lasting implications on other matters. There are really
18 two positions, two interpretations of the certification
19 statute.

20 Keystone has argued in their response that
21 essentially the Commission has one power, and that is to
22 grant the Application if they sign it and certify that
23 factually they continue to meet the conditions upon which
24 the Permit was met.

25 Our argument is -- and I think it's fair to sort

1 of infer that perhaps the Commission's already thinking
2 this way, is that that's not correct. The Commission is
3 the fact finder in this case. They have certified that
4 they can continue to meet the conditions upon which the
5 Permit was granted, and it's up to the Commission to
6 determine whether or not that's true.

7 That's why we had a hearing. The hearing was
8 over whether factually that's accurate, whether they do
9 continue to meet the conditions upon which the Permit was
10 granted.

11 So adopting Keystone's reasoning I think would
12 be dangerously narrow going forward. Because that would
13 set up a precedence where if this certification statute
14 became an issue 10, 15, 20 years from now, having a
15 precedent where basically, you know, we're going to adopt
16 Keystone's reasoning in their response to our Motion to
17 Dismiss that, well, it's just a certification, we have to
18 accept it, that's going to handcuff the Commission in
19 decisions that we can't predict that are, you know,
20 possibly going to come up later on down the road.

21 Now what does that mean in this case? Well,
22 in this case, you know, that's where those two
23 interpretations of the statute are kind of what we've
24 been wrestling; right?

25 Before this our briefs were basically mostly

1 geared towards whether Keystone had carried its burden of
2 proving that factually -- that factual assertion that
3 they continue to meet those conditions upon which the
4 Permit was granted.

5 The situation has changed. In November
6 Condition 2 became impossible to meet. So, frankly, our
7 Motion to Dismiss I think needs to be granted because
8 facially Keystone can no longer prove that they can
9 continue to meet that Condition.

10 Thank you.

11 CHAIRMAN NELSON: Thank you.

12 Others.

13 MR. DORR: This is Gary Dorr on the line.

14 CHAIRMAN NELSON: Oh. Gary, go ahead. We'll
15 take your statement now, and understand that we just want
16 you to address the Motion to Dismiss and the Motion to
17 Revoke.

18 Go ahead.

19 MR. DORR: All right. Thank you. If you look
20 at --

21 CHAIRMAN NELSON: Gary. Gary, I'm looking at
22 our court reporter, and she is not able to understand
23 you.

24 Are you on a handset?

25 MR. DORR: Hold on a minute. Can you hear me

1 now?

2 CHAIRMAN NELSON: Much better. Thank you.

3 Go ahead.

4 MR. DORR: Executive Order 11423 originally gave
5 the State Department the authority to review and approve
6 Presidential Permits. That was revised in 1994 to
7 include requirements for consulting with other federal
8 agencies.

9 The procedures for the Presidential Permit
10 applications for all the pipelines are based on Executive
11 Order 13337 issued by President George W. Bush in 2004.

12 The State Department under this process is
13 directed upon receipt of an Application to determine
14 whether a proposed project would serve the national
15 interest. They also have discretion of making national
16 interest determinations and often consider the impacts on
17 environment, economy, energy, security, and foreign
18 policy.

19 One of the things that they -- the State
20 Department has to do -- they're directed actually upon
21 receipt of an Application -- is determine whether a
22 project would serve the national interest. And they also
23 do this by a national -- a review under the National
24 Environmental Policy Act and an Environmental Impact
25 Statement.

1 These two things happen when the Application is
2 submitted. We can't say for certainty whether or not a
3 new Application submitted by TransCanada would require a
4 new EIS -- a new consultation under the NEPA policy. And
5 I think for those reasons since that is prospective, this
6 Commission cannot with any -- with any surety grant a
7 Permit now based on the fact that there are substantial
8 factors that may change in the future.

9 And I support all the other statements that have
10 been brought forward this morning. And I just thank you
11 for your time.

12 Thank you.

13 CHAIRMAN NELSON: Very good, Gary. Thank you.
14 Others in the committee room.

15 MS. CRAVEN: Good morning. Kimberly Craven here
16 on behalf of the Indigenous Environmental Network.
17 Mr. Chairman, members of the Commission, I just want to
18 add that IEN joins in all the arguments that our
19 colleagues, tribal allies, and non-Indian allies have put
20 forth this morning.

21 I think it is important to reiterate that the
22 Condition and the language in Condition Permit No. 2 does
23 say "shall." And while -- and Keystone admits that
24 South Dakota Codified Law Section 49-41B-27 simply
25 requires that Keystone certify that its project continues

1 to meet the conditions on which the Permit was issued.

2 Condition No. 2 says it shall comply with all
3 Presidential Permits, and it is not able to get a
4 Presidential Permit. That was decided in November.
5 They're just unable to get that Permit. This makes this
6 whole recertification process moot, and we urge you to
7 dismiss that.

8 Regarding the revocation of the underlying
9 Permit, Keystone in its Motion -- in its response to our
10 Motion to Dismiss says that the Commission has the
11 authority -- you have the authority -- they say that on
12 page 3 -- under South Dakota Codified Law Section
13 49-41B-33-2 to revoke a Permit for failure to comply with
14 the terms or conditions of the Permit.

15 Again, we go back to Condition No. 2. They are
16 unable to comply with that Condition. So we urge you to
17 both dismiss their certification Permit request and to
18 revoke the underlying Permit.

19 Thank you.

20 CHAIRMAN NELSON: Thank you.

21 Others.

22 MR. GOLDTOOTH: Good morning. Dallas Goldtooth.
23 And I'm going to be really brief and just say I support
24 the arguments that have been put forth and support this
25 Motion. So I just want to say that.

1 Thank you.

2 CHAIRMAN NELSON: Thank you.

3 Other Intervenors.

4 MR. SMITH: Good morning. Carolyn Smith, an
5 Individual Intervenor. I just want to go on record as
6 saying that I support the Motion to Dismiss and ask you
7 to do so, please.

8 CHAIRMAN NELSON: Thank you.

9 Paul.

10 MR. SEAMANS: Paul Seamans from Draper,
11 landowner along the KXL route.

12 And I'd just like to touch briefly on one thing
13 that Paul Blackburn said about if you let this thing go
14 on forever and ever, you have that easement hanging over
15 your head. And it's going to affect the saleability of
16 your land if you ever decide to sell it.

17 And I can speak from personal experience on that
18 because about four years ago we had our home place,
19 farm/ranch listed for sale and we had a pretty serious
20 buyer lined up and he got the thought that the Keystone
21 XL was going to cross the land that we were going to sell
22 and he -- he was ready to back out of it.

23 So I think we should get this thing settled and
24 done with one way or the other.

25 Thank you.

1 CHAIRMAN NELSON: Thank you.

2 Any other Intervenors?

3 Joye.

4 MS. BRAUN: Good morning, Commissioners. Good
5 to see you guys.

6 I want to go on record that I support the Motion
7 to Dismiss. Keystone XL is dead. The President didn't
8 give that Permit. So no matter what you guys try to do,
9 it's dead. It's not going to come across.

10 When I came to you guys first I told you it will
11 not cross Lakota country. I told you guys that. I told
12 you guys that. There was dreams. There was prayers
13 made. All kinds of stuff. Well, it happened. It's
14 true. Those things are true.

15 And I absolutely support our landowners. They
16 don't deserve to have that hanging over their heads.
17 Nobody does. You know, these are our friends over all
18 the years that we've been with them, you know. They
19 don't deserve that.

20 The Tribes don't deserve to have this threat.
21 We the people don't deserve that. And TransCanada's
22 trying to put a loophole around and trying to make you
23 guys responsible for that loophole. Well, I'm sorry, but
24 this is South Dakota. This isn't Canada or whatever, you
25 know.

1 So I definitely go on record and remind you guys
2 I told you guys it wasn't going to come through.

3 CHAIRMAN NELSON: Thank you.

4 John.

5 MR. HARTER: Thank you. John Harter, Winner,
6 South Dakota proposed to be crossed by Keystone XL.

7 I guess I'd like to go on record by supporting
8 the following actions that have been motioned to the
9 Commission by all the Intervenors.

10 And then I guess where I want to go with this is
11 constitutionally. The President has denied the Permit.
12 Under the Constitution, the Federal Constitution, it says
13 that I have the right to life, liberty, and the pursuit
14 of happiness. I haven't been very happy for about eight
15 years. So I'd like you to take judicial notice of our
16 Federal Constitution.

17 On the State Constitution level I'm going to go
18 back to Section 17, paragraph 4, Corporations subject to
19 eminent domain, police power. The exercise of the right
20 of eminent domain shall never be abridged or so construed
21 as to prevent the Legislature from taking the property
22 and franchise of incorporated companies and subjecting
23 them to public use. The same as the properties of
24 individuals. And the exercise of the police power of the
25 state shall never be abridged or so construed as to

1 permit corporations to conduct their business in such a
2 manner as to infringe the equal rights of individuals or
3 the general well-being of the state.

4 This process, as was testified by expert
5 witnesses, where it crosses so many waterways does
6 endanger our public interests. It endangers our ag
7 interests. It endangers our tourists, which are the two
8 biggest money makers in the State of South Dakota.

9 It was mentioned earlier that TransCanada
10 themselves withdrew their Permit in Nebraska. They have
11 no legal route. They have nothing going on in Nebraska.
12 And this was done, my understanding, because the
13 Presidential Permit was denied.

14 The same thing in South Dakota. They have no
15 legal route in South Dakota because the Presidential
16 Permit was denied. So I would call for you to revoke
17 their recertification and revoke their original Permit in
18 South Dakota.

19 And just for judicial record, which goes back to
20 what we talked about earlier, there are two projects in
21 South Dakota where they cross metal lines. The second
22 one is the City of Colome's water line.

23 Thank you.

24 CHAIRMAN NELSON: Thank you, John.

25 Any other Intervenors?

1 MR. TANDERUP: Good morning. Art Tanderup, an
2 Individual Intervenor. And I concur with these two
3 motions and agree this should happen.

4 As John just stated, in Nebraska after the
5 Presidential announcement, the TransCanada withdrew their
6 Permit from the Public Service Commission, your
7 counterpart down there. And they saw there was no way
8 they would receive a Permit.

9 And, you know, this thing -- I'm a farmer, and,
10 you know, we spend a lot of time thinking as we do our
11 work. And we like to consider that we have a lot of
12 commonsense out there as we do things.

13 And, you know, I put this in the perspective of,
14 okay, would I go out in the spring of the year with my
15 planter and not put any seed in it, you know? And here's
16 TransCanada. They do not have any seed to plant. They
17 don't have that Presidential Permit. So how do they
18 think that they can actually do something that they have
19 no legal authority to do?

20 So, in my opinion, the whole thing doesn't make
21 a lot of farmer sense when you look at what they're
22 asking you to do.

23 So, once again, I concur with these two motions
24 to dismiss and get rid of this thing once and for all and
25 give some peace back to the people of South Dakota.

1 CHAIRMAN NELSON: Thank you.

2 Any other Intervenors?

3 MS. BLACK MOON: I'd like to say good morning to
4 all of you. My name is Julie Black Moon. I come from
5 the Yankton Sioux Tribe, the Ihanktonwan Nation --

6 CHAIRMAN NELSON: Excuse me. Are you an
7 Intervenor in this process?

8 MS. BLACK MOON: I'm just a person who has been
9 with this movement against the pipeline. I am not a big
10 time person with an attorney.

11 CHAIRMAN NELSON: At this point we have to
12 confine our comments to those who have officially
13 intervened in this Docket, and Ms. Real Bird has already
14 spoken on behalf of the Yankton Sioux Tribe.

15 MS. BLACK MOON: Okay. Well, I just want you to
16 know that I am against it, and I hope you will have
17 listened to me.

18 CHAIRMAN NELSON: Thank you.

19 Any other Intervenors?

20 Okay. Seeing none, we will go to Staff.

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

23 I submitted a brief, and I really don't have
24 anything to add to that. Obviously, I don't have any
25 inside information as to what TransCanada's going to

1 do -- are they going to reapply for a Presidential
2 Permit -- so I just had to go at this from the
3 perspective of what position would we be in if they did
4 apply for a Presidential Permit and it was granted and we
5 went through this again. Would we be able to afford to
6 do that. So that's kind of where I was coming from.

7 I'd have to say that no truer words have been
8 spoken throughout this proceeding than when two other
9 lawyers said 49-41B-27 doesn't give a lot of guidance.
10 But I do suspect we'll have some in the near future.

11 I don't have anything to add beyond that, but I
12 would be available for questions.

13 Thank you.

14 CHAIRMAN NELSON: Thank you.

15 And Keystone.

16 MR. TAYLOR: Thank you, Commissioners.

17 William Taylor for Keystone.

18 I'll address the components of the Intervenors'
19 Motion in reverse order. The Intervenors have asked to
20 dismiss the pending certification proceeding that we
21 conducted under 47B-27. And they've asked to revoke the
22 2010 construction Permit, claiming that 49-41B-33 allows
23 such a revocation.

24 Let's talk about the revocation of the Permit
25 first. This matter was not brought in the proper Docket,

1 this particular Motion. The Motion to Dismiss, to revoke
2 the Complaint -- to revoke the Permit should have been
3 brought in the 2009 Docket.

4 A month and a half ago when this all started I
5 did a count of the number of Intervenors in this
6 proceeding that paralleled to the number of Intervenors
7 in that proceeding, and the two don't match.

8 I don't remember what the count was. But there
9 are enumerable parties to the HP09 Docket who are not
10 featured in this Docket. And they're entitled to notice,
11 and they are entitled to an opportunity to be heard and
12 an opportunity to come before the Commission and express
13 their views.

14 So the revocation Application is in the
15 improper -- is not in this Docket, not part of this
16 Docket.

17 I suspect when you read the Motion that
18 revocation of the Permit was an afterthought. It appears
19 in the last couple of sentences of the Motion, and I
20 suspect that the Intervenors didn't think about the fact
21 that the correct Docket was HP09. Had they thought about
22 that, they could have petitioned you to reopen that
23 Docket, or they could have noticed the Intervenors in
24 that Docket. Simple matter to find out who they are.
25 It's all on your website. But they chose not to do

1 that.

2 So first order of business is it's procedurally
3 incorrect. And you know the motto of the State of South
4 Dakota is Under God The People Rule. And the people have
5 delegated the power to the Legislature to decide what
6 constitutes the body of law of the State of South Dakota,
7 and the Legislature has said that we must follow the
8 procedural rules that are established so that matters of
9 law are conducted in an orderly and predictable fashion.

10 So if they really want a revocation of the
11 Permit, they need to reopen the HP09 Docket and notice it
12 in that Docket and have the hearing conducted there.

13 So having said that, do you have jurisdiction to
14 decide revocation? No. This proceeding was brought
15 under 49-41B-27, the certification statute. Your
16 jurisdiction is limited under that statute. Your
17 jurisdiction is limited to making the decision whether or
18 not Keystone can construct the project according to the
19 conditions imposed by the Permit.

20 There is nothing mentioned in 27 about
21 revocation of the Permit. There is nothing mentioned in
22 27 at all, except that the issue of certification is
23 before you. So you don't have jurisdiction to decide the
24 revocation question.

25 Think about revocation in this perspective:

1 Suppose you decide not to certify the question -- to
2 enter an order agreeing that Keystone's certification is
3 true and accurate and correct. Does that constitute a
4 revocation? No, it doesn't.

5 I think Commissioner Hanson opined -- and I
6 don't remember precisely what hearing it was but not too
7 long ago that if you decided that Keystone had not met
8 its burden of proof and had not certified -- had not
9 proven that the project could be certified, that Keystone
10 could come back for another effort at certification to
11 reprove those issues.

12 See, your jurisdiction is limited. Your
13 jurisdiction does not extend to revocation. And that's
14 why if there's going to be a revocation Motion heard, it
15 should be heard in HP09. That Docket should be opened.
16 Everybody should be noticed. I don't know. Maybe
17 reopening that Docket, the circumstance, additional
18 Intervenors would be allowed to get in. I don't know. I
19 haven't thought about it.

20 So procedure improper, and you don't have
21 jurisdiction under the statute that we're dealing with
22 today.

23 Now let's talk about dismissal of the
24 certification proceeding because the Presidential Permit
25 was denied.

1 First of all, Mr. Girling, the chief executive
2 officer for TransCanada who speaks for the company, said
3 very clearly that the company is absolutely committed to
4 the project. Absolutely committed to the project.

5 The project has not been abandoned. TransCanada
6 has not said we give up; we're not going to ever be able
7 to get this done. TransCanada has not said this party is
8 over. Rather, TransCanada has said speaking with the
9 voice of its chief executive officer the company is
10 absolutely committed to the project.

11 In 13 months we'll have a new President. We
12 don't know yet who that new President will be, and we do
13 not know what the political considerations that the
14 President may give to a Application for -- the third
15 Application for a Presidential Permit.

16 We do know that the Secretary of State speaking
17 on the record of decision in November did not make a
18 decision based on the merits of the project. The
19 Secretary of State in its record of decision is based on
20 the leverage that denying the Presidential Permit would
21 give to the United States in negotiations regarding
22 climate change with other countries.

23 It's quite clear. The record of decision is
24 right here. Very public. So we don't know what the next
25 President may do.

1 Driving up here this morning I was thinking
2 about two things. First, I passed a line of four trucks
3 just before I got to Vivian. Three of the four trucks
4 contained plastic tiling material to be used in farm
5 fields, all of which is made from petroleum, petroleum
6 products.

7 The other truck was a Harms Oil Company truck
8 hauling 10,000 gallons of gasoline to a gas station or
9 truck stop someplace. Four trucks running in a row.

10 The Iranians have the capability of closing the
11 Strait of Hormuz, and they make no secret of the fact
12 they could close the Strait of Hormuz and if the Iranians
13 close the Strait of Hormuz --

14 MS. BRAUN: Commissioners, I object.

15 MR. DORR: Commissioners, I object. This is
16 outside the realm of the argument -- of the Motion before
17 us today.

18 This is Gary Dorr.

19 CHAIRMAN NELSON: Okay. I'm going to agree with
20 the objections. I'd love to hear what you're going to
21 say but --

22 MR. TAYLOR: I'll tell you afterwards.

23 CHAIRMAN NELSON: No. Not afterwards.

24 (Discussion off the record)

25 CHAIRMAN NELSON: Who was on the line that made

1 the objection?

2 MR. DORR: Gary Dorr.

3 MS. CRAVEN: I objected here.

4 CHAIRMAN NELSON: Gary Dorr and Ms. Craven.

5 We'll stick with those two. I concur with that.

6 Mr. Taylor, if you'd take your direction and
7 bring it back to the Motion at hand.

8 MR. TAYLOR: Thank you.

9 The Condition in the Permit granted in 2010 is
10 clearly prospective in nature, as are I think 37 of the
11 50 or 31 of the 50 Conditions in the Permit that you
12 granted. They are prospective in nature. They are
13 conditions that must be complied with before the pipeline
14 can be constructed.

15 Remember that 49-41B-4, the underlying statute
16 says that a Permit must be obtained before a facility,
17 energy transport facility, can be constructed. Must be
18 obtained before a facility can be constructed.

19 In that vein you issued a Permit in 2010 that
20 said there are things that you must accomplish, company,
21 before you can construct this pipeline. We will allow
22 you to construct this pipeline if you meet those
23 prospective conditions.

24 They range from things as simple as adoption of
25 a reclamation plan through things as complex as obtaining

1 a Presidential Permit.

2 Because of the prospective nature of the
3 requirement that we obtain a Presidential Permit, we must
4 do so before we begin construction. 49-41B does not say
5 that if a Presidential Permit is denied, you cannot go
6 forward, that your Permit must be revoked, that your
7 certification must not be met.

8 49-41B-27 says you must certify that you can
9 still meet the conditions and that you must meet them.
10 Permit requires you must meet them. So it's a quite
11 simple argument.

12 It is not impossible for the project to obtain a
13 Presidential Permit. It is not an impossibility. This
14 President denied it. That doesn't mean that a Permit
15 cannot be obtained in the future.

16 Intervenors have argued that, for example, the
17 evidence -- the company has shown evidence of abandonment
18 of the project by making reference to the fact that the
19 Permit Application that was before the Minnesota -- or
20 I'm sorry. Before your Nebraska counterpart was
21 withdrawn.

22 Well, there's a 12-month window, a 12-month
23 requirement in the Nebraska statutes just like there is
24 in the South Dakota underlying Permit statute, and why
25 would you have the clock run? They had just filed the

1 Application for the Permit a short period of time before.
2 We were beginning to make progress on that when the
3 President withdrew or when the President -- Secretary
4 Kerry made his decision. So rather than have the clock
5 run, they withdrew without prejudice to refile. The
6 company can refile in Nebraska tomorrow.

7 MR. DORR: Mr. Commissioners, I object. We're
8 not discussing Nebraska here. This is Gary Dorr.

9 CHAIRMAN NELSON: Gary, I'm going to let him
10 continue.

11 MS. REAL BIRD: Mr. Chairman, may I also object
12 to the speculation. There's no Affidavit. I don't know
13 if there's a witness available to testify as to what
14 Mr. Taylor seems to be testifying as to.

15 CHAIRMAN NELSON: And this is Ms. Real Bird;
16 correct?

17 MS. REAL BIRD: Yes, Mr. Chairman.

18 CHAIRMAN NELSON: Okay. We just need to get
19 that for the court reporter.

20 The Nebraska Permit was, in fact, mentioned by
21 some of the Intervenors. And so, therefore, I am going
22 to let you continue on this line.

23 MS. REAL BIRD: Mr. Chairman, just so it's clear
24 on the record, my objection was not as to relevance. My
25 objection was to counsel testifying, and, in fact, his

1 testimony is speculation. We're not at an evidentiary
2 hearing so if he could limit it to argument about the
3 law.

4 CHAIRMAN NELSON: Thank you.

5 Go ahead, Mr. Taylor.

6 MR. TAYLOR: Thank you, Mr. Nelson.

7 The issue of abandonment of the easements, the
8 issue of the impact of the continuation of the easements
9 has been raised by a couple of Intervenors also. That's
10 not within your jurisdiction, and it's not an appropriate
11 matter for you to consider in this Motion hearing.

12 The law of South Dakota on the abandonment of
13 easements is well defined. If an easement holder in the
14 State of South Dakota believes that the easement has been
15 abandoned, there is a procedure for challenging the
16 existence of the easement that any landowner can
17 undertake at any time.

18 There's a not-too-old case from the Black Hills
19 that deals with exactly that proposition. And there are
20 several old cases that deal with railroads in
21 South Dakota and rights of way. So that is not before
22 you.

23 The issue that is before you is is the
24 certification process somehow corrupted because the
25 President acting through the Secretary of State denied

1 the Presidential Permit?

2 And the answer quite simply is that your
3 Condition was prospective in nature, and there is nothing
4 that prevents the company from coming back and applying
5 for and obtaining a Presidential Permit in the future.

6 Now there may come a time -- if the company sat
7 on its hands and did nothing for a period, you choose the
8 period, maybe it's a year, maybe it's five years -- that
9 it would be clear from the evidence that the project has
10 been abandoned.

11 But we are what, six weeks after the
12 Presidential Permit was denied, in the face of a
13 statement by the CEO of the company that the company is
14 absolutely committed to the project. There is no
15 evidence of abandonment. Granted, the life of a
16 Presidential Permit is a hurdle, but there is no showing
17 of abandonment.

18 So I submit to you that under the plain language
19 of the Permit that you granted in 2010, under the plain
20 language of the statute, TransCanada has not abandoned
21 the project. TransCanada is perfectly entitled to
22 conclude its certification process and then to make its
23 decisions on what it's going to do and then to do it.

24 One of which is if it wants to construct a
25 pipeline from Hardisty, Alberta, Canada to Steele City,

1 Nebraska, crossing the United States border, that it must
2 obtain a Presidential Permit. That's a Condition you
3 imposed, and it's prospective in nature. And we'd urge
4 you to rule accordingly.

5 Thank you.

6 CHAIRMAN NELSON: Thank you.

7 Mr. Martinez, I will give you the opportunity to
8 argue rebuttal for the Intervenors.

9 MR. MARTINEZ: Thank you, Chairman Nelson.

10 What I find remarkable about the position that
11 TransCanada is taking is that it seems to embody a lack
12 of recognition of reality, that this project is for all
13 practical purposes dead.

14 Mr. Girling's statements to the contrary, that
15 he is not abandoning this project, he's committed to it,
16 I think simply flies in the face of reality. This
17 project is not approved. The Presidential Permit was
18 denied, as not being in the nation's national interest.

19 To the extent that TransCanada in the future
20 wants to propose another project under a new President,
21 they're certainly welcome to do so. That would be a new
22 project which would require a new application and an
23 entirely new set of proceedings. It would not be the
24 same project. It would not be under this Docket. It
25 would not be under the 2009 Docket.

1 So to that extent what TransCanada is trying to
2 tell you is is that you as the Commission are limited to
3 simply making a decision based on a statement of intent.
4 They're arguing that their intentions, their wishes,
5 their hopes, their prayers, are sufficient to comply with
6 the law. That's not what your Permit provided for.

7 Your Permit provided that TransCanada shall
8 obtain the Presidential Permit for this project. That
9 was denied. They cannot get it. And so, consequently,
10 any prospective or future intent to try to get in the
11 future is moot. It no longer exists.

12 Now the statute that they're proceeding under
13 says that the utility must certify to the Commission that
14 such facility continues to meet the conditions upon which
15 the Permit was issued.

16 If you as a Commission are going to require that
17 an Applicant only have the intent to comply with the
18 Permit Conditions, then I would suggest that it would be
19 impossible for you to ever find that any Applicant can't
20 meet any kind of Permit Conditions because how do you
21 wind up disproving somebody's intent? I don't believe
22 that that is what the law intends.

23 The law of South Dakota is -- you know, as I
24 think has been pointed out by myself and a couple other
25 lawyers and acknowledged by Ms. Edwards, it does have

1 some gaps, particularly as it spells out the procedure
2 and what happens under certain circumstances.

3 But, you know, in this case what you have is
4 you've got a Permit that was granted. There's the
5 recertification statute, which clearly indicates an
6 intent that these things do not exist in perpetuity. A
7 company if they don't take any action within a four-year
8 period, they have to come back to demonstrate that they
9 can meet these conditions.

10 TransCanada was unable to do that. I think when
11 you go back and take a look at some of the statements
12 that were previously made I think by Mr. Seamans and also
13 by Mr. Blackburn, landowners I think deserve finality.
14 And I think that's what that recertification statute was
15 meant to provide, a sense of finality.

16 And an adoption of TransCanada's position --
17 which, by the way, they simply have a number of
18 assertions. There aren't really any legal arguments that
19 have been made. It's just simply an assertion. If you
20 adopt that position, I would suggest that it is
21 fundamentally unfair because you are denying the type of
22 finality that the landowners, property owners, the
23 Tribes, and the residents of South Dakota I think
24 deserve.

25 So on that basis you've got ample grounds to go

1 ahead and dismiss the Petition for Recertification. And
2 I think also bringing up the last point we had of
3 revocation of the actual underlying Permit, you know,
4 that's an interesting point. TransCanada's taking the
5 position that you as a Commission cannot make that
6 decision, that your jurisdiction is limited.

7 There are no cases citing that. And, frankly,
8 that's not what the statute says. The statute simply
9 says you've got the ability to do that. It doesn't say
10 you only have the ability to do it under limited
11 circumstances. It's within your discretion.

12 The way that statute is going to be read, you've
13 got the ability to do that at any time as a Commission,
14 if you believe then that that is in the best interests of
15 the people and the residents of South Dakota.

16 There's no statute cited to support the
17 jurisdictional argument that TransCanada makes. And if
18 you read just the plain reading of the statute, it's
19 permissive in nature. You've got the ability to go ahead
20 and revoke.

21 Now I think we can really sort of summarize the
22 arguments that have been made by pointing to a couple of
23 key things. Mr. Rappold's argument basically said that
24 any new Presidential Permit Application that TransCanada
25 might file at some point in the future is by necessity a

1 new project. It would be a different project. It is not
2 this project.

3 This project is dead. This project, the
4 Presidential Permit was denied. They cannot get it. And
5 so consequently because of that, it's just a simple fact
6 that TransCanada cannot meet the requirements of the
7 conditions that were laid out in Condition No. 1 and
8 Permit Condition No. 2, which specifically directs them
9 that they shall obtain the Permit. They just can't do
10 it. Not for this project. It is over and done with.

11 And I think you as a Commission I think really
12 need to send a very strong signal and express, you know,
13 what Mr. Tanderup has eloquently stated in terms of just
14 the commonsense that it's over with.

15 The Petition should be dismissed. The
16 underlying Permit should be revoked. And everybody
17 should be able to go on their way. And I think that
18 concludes my statements.

19 CHAIRMAN NELSON: Thank you, Mr. Martinez.

20 (A short recess is taken)

21 CHAIRMAN NELSON: We are at the point of
22 Commissioner questions.

23 MR. DORR: Mr. Chairman, could I say something
24 very quickly before you start? This is Gary Dorr.

25 CHAIRMAN NELSON: Very quickly, Gary.

1 MR. DORR: I'd just like to add from my notes I
2 failed to mention earlier federal agencies have 15 days
3 to appeal Executive Order 1337, which is a Presidential
4 Permit, and none of that appealed that so that made it a
5 final action on the Presidential Permit that it's
6 rejected.

7 Thank you.

8 CHAIRMAN NELSON: Thank you.

9 Commissioner questions.

10 Commissioner Hanson, any questions on your end?

11 COMMISSIONER HANSON: No. Thank you.

12 CHAIRMAN NELSON: I think I have just one for
13 Mr. Martinez.

14 Mr. Martinez, our court reporter is having just
15 a little trouble hearing you. Are you on speaker phone?

16 MR. MARTINEZ: No, I'm not. I'm on a landline,
17 and I don't have it on speaker.

18 CHAIRMAN NELSON: Thank you. Hopefully this
19 will be a very quick question.

20 If the Commission denies the two motions today
21 and if the Commission grants the certification at some
22 point but a Presidential Permit is never granted, will
23 Keystone be able to build this pipeline in South Dakota?

24 MR. MARTINEZ: I think the answer to that is
25 it's pretty easy. No. They have to -- they have to have

1 that Presidential Permit to proceed.

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

4 Other Commissioner questions?

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

7 COMMISSIONER HANSON: Mr. Chairman.

8 CHAIRMAN NELSON: Go ahead, Gary.

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

13 CHAIRMAN NELSON: Discussion on the Motion.

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

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

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

1 they obtain a Permit. And the fact is that if -- a
2 different president can easily make a different
3 decision.

4 The PUC Conditions require XL to accomplish a
5 number of tasks. Some of those cannot be accomplished
6 until construction begins, and some of them need to be
7 accomplished prior to construction. The Presidential
8 Permit to cross the border has to be acquired prior to
9 construction.

10 Just because it was turned down once does not
11 mean it will be turned down in the future. And XL hasn't
12 started construction yet so they're not in violation of
13 the original Permit so there's no reason to revoke the
14 Permit.

15 And those are my -- at least for now those are
16 my statements.

17 Thank you, Mr. Chairman.

18 CHAIRMAN NELSON: Additional discussion.

19 Let me just say a couple of things. First, I
20 agree with Commissioner Hanson's comments, but I'd also
21 like to comment on the flip side of that.

22 A new President may well again deny a
23 Presidential Permit. And that's a distinct possibility.
24 And that's the reason I asked Mr. Martinez the question
25 that I did is that if a new President denies the Permit

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

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

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

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

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

25 Additional Commissioner discussion.

1 Hearing none, all those in favor of the Motion
2 will vote aye; those opposed, nay.

3 Commissioner Hanson.

4 COMMISSIONER HANSON: Mr. Chairman, I was trying
5 to speak, and I noticed that I had my mute button on.

6 CHAIRMAN NELSON: That's correct. We weren't
7 hearing you, but we will hear you now.

8 Go ahead.

9 COMMISSIONER HANSON: I wanted to piggyback on
10 what you said.

11 I agree. Landowners' concerns are very
12 disconcerting. And I'm troubled by that, and I'm very
13 appreciative that you brought that up. And I thought of
14 that, and I was trying to figure out, well, is there
15 something we can do within this Docket? And, no.
16 Obviously not.

17 The Applicant has the right to their day in
18 court -- or year in court. And we have a responsibility
19 to go through the process. And the motions here simply
20 do not meet the requirements for us -- at least the
21 arguments do not meet the requirements necessary for us
22 to approve them.

23 So I do very much appreciate you bringing up the
24 landowners' concerns.

25 Thank you.

1 CHAIRMAN NELSON: Additional discussion.
2 Hearing none, all those in favor will vote aye;
3 those opposed, nay.

4 Commissioner Hanson.

5 COMMISSIONER HANSON: Aye.

6 CHAIRMAN NELSON: Commissioner Fiegen.

7 COMMISSIONER FIEGEN: Fiegen votes aye.

8 CHAIRMAN NELSON: Nelson votes aye.

9 The Motion carries.

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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 22nd day of
11 December, 2015, and that the attached is a true and
12 correct transcription of the proceedings so taken.

13 Dated at Onida, South Dakota this 20th day of
14 January, 2016.

15

16

17

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

21

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