

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION BY
OTTER TAIL POWER COMPANY ON BEHALF OF
BIG STONE II CO-OWNERS FOR AN ENERGY EL05-022
CONVERSION FACILITY PERMIT FOR THE
CONSTRUCTION OF THE BIG STONE II PROJECT

Transcript of Proceedings
Telephone Conference
March 1, 2006

COMMISSION STAFF

Patricia Van Gerpen
John Smith
Karen Cremer

ORIGINAL

APPEARANCES (continued on next page)

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BOYCE, GREENFIELD, PASHBY & WELK,
Attorneys at Law, P.O. Box 5015,
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appearing on behalf of Big Stone II;

TODD GUERRERO,
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appearing on behalf of Big Stone II;

ELIZABETH GOODPASTER,
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Environmental Advocacy, 26 East Exchange Street #206,
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appearing on behalf of Minnesota Center for
Environmental Advocacy, Izaak Walton League of
America, Minnesotans for an Energy Efficient
Economy and Union of Concerned Scientists;

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APPEARANCES (cont.)

SANJAY NARAYAN,
Attorney at Law, Sierra Club,
85 Second Street, 2nd Floor,
San Francisco, California 94105,
appearing on behalf of the Sierra Club;

MARY JO STUEVE,
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South Dakota 57104,
appearing pro se.

Reported by Carla A. Bachand, RMR, CRR

1 WEDNESDAY, MARCH 1, 2006

2 MR. SMITH: What I'd like to do to start with, I am
3 going to call the meeting to order and what I'm going to do
4 first is call roll so that the court reporter and so that we
5 all know who is on the call and make sure that we have all the
6 participants whom we thought we would have on the call. Again,
7 my name is John Smith, I am the commission's counsel in this
8 case. Karen, do you want to introduce yourself.

9 MS. CREMER: Karen Cremer, staff attorney.

10 MR. WELK: This is Tom Welk and Chris Madsen from
11 Boyce, Greenfield, Pashby & Welk, representing applicant.

12 MR. GUERRERO: Todd Guerrero, T-O-D-D G-U-E-R-R-E-R-O,
13 with the law firm of Lindquist, L-I-N-D-Q-U-I-S-T, and Vennum,
14 V-E-N-N-U-M, Minneapolis, also on behalf of the applicants.

15 MS. GOODPASTER: This is Beth Goodpaster,
16 G-O-O-D-P-A-S-T-E-R, appearing on behalf of intervenors
17 Minnesota Center for Environmental Advocacy, Izaak Walton
18 League of America, Minnesotans for an Energy Efficient Economy,
19 and Union of Concerned Scientists.

20 MR. SMITH: Anybody else on the call?

21 MR. NARAYAN: This is Sanjay Narayan, S-A-N-J-A-Y
22 N-A-R-A-Y-A-N, from the Sierra Club Program on behalf of
23 intervenor, the Sierra Club.

24 MR. SMITH: Others?

25 MS. STUEVE: This is Mary Jo Stueve, Mary space Jo

1 Stueve, spelled S as in Sally, T as in Tom, U-E-V as Victor, E,
2 appearing pro say.

3 MR. SMITH: My recollection is that's everyone, but is
4 there anyone else on the line that has not weighed in? I'd
5 also like to note that Patty VanGerpen, who is the executive
6 director of the South Dakota Public Utilities Commission, has
7 also joined the meeting physically here in our conference room.
8 Is there anything else that anybody wants to bring up before I
9 commence the business of the meeting? I'd like -- Mary Jo, I'd
10 like to thank you for reminding me that I had forgotten to send
11 out the bridge number.

12 MS. STUEVE: You're welcome.

13 MR. SMITH: I appreciate that and I don't know what
14 happened. I got distracted and just forgot about it. Okay,
15 with that, the purpose of the meeting, the primary purpose,
16 original purpose was to consider the items in -- that are
17 stated in Otter Tail's motion to clarify scheduling and
18 procedural order, and again when I refer to Otter Tail, I'm
19 referring to Otter Tail as the representative company of all of
20 the applicants. Mr. Welk or Mr. Madsen, would you like to
21 begin and take your motion items one at a time and we will sort
22 of just -- why don't we take them up in order and then we will
23 just have a round robin discussion about them and see if we
24 can't reach consensus, and if we can't with respect to
25 anything, then we will have to bring it before the commission

1 at the next meeting. Does that sound like a reasonable
2 procedure?

3 MR. WELK: I can do them all three at one time,
4 whatever you would like.

5 MR. SMITH: However you want to do it. Do any of the
6 rest of you have any preferences?

7 MR. WELK: This is Tom Welk that was just talking.
8 I'll go ahead and we will take them one at a time and maybe we
9 will work as John suggested. The first matter in the motion
10 was a clarification as to the hearing date, and as Mr. Smith
11 indicated, there must have been some confusion on the hearing
12 date itself. We believed that we were going to have a complete
13 week of the hearing and the hearing would have actually started
14 on Monday, June 5th rather than on June 6th because we thought
15 because of the number of witnesses that would be available and
16 the cross-examination would take a full week. So that's why we
17 made that portion of the motion saying we thought it was June
18 5. I understand that there may be some discussion on the date
19 itself, but that's the first item. It was a simple was there a
20 typo error on the order, the scheduling order, because we
21 thought we had five days. That's the first matter.

22 MR. SMITH: The answer I can tell you from my
23 standpoint, it was not a typo, it was a misunderstanding. I
24 did not -- I had the 6th through the 9th written down for
25 whatever reason, whether it was my mathematical ineptitude or

1 whatever, but that's what I had written down. But we did in
2 fact block out that entire week and so it was available. The
3 problem I now have is I have one commissioner with a serious
4 conflict that has come to light, and I will say he regretted to
5 have to admit that he had not checked his calendar as
6 thoroughly as he thought before he gave us the okay on those
7 dates, and now I've got a conflicted commissioner.

8 So that puts me in a tough spot and what I'd like to
9 do is discuss the possibility of moving the hearing back
10 approximately two weeks to June 26th through the 30th, and I
11 apologize to everyone, all of the parties and their attorneys
12 for having to bring this up, but at least to air it, I have no
13 choice because the commissioner is my boss and the judge in the
14 case. I'd like to hear from the parties, and I don't care, we
15 can start with Otter Tail. Do you want to react to those dates
16 and give us your take on it, Otter Tail?

17 MR. WELK: Well, the proposed date is June 26th
18 through the 30th, is that the dates?

19 MR. SMITH: Those are the dates.

20 MR. WELK: That is a complete week, then, so it's not
21 four days rather than five?

22 MR. SMITH: I believe it is. Let me see, 26th, 27th,
23 28th, 29th, yes, that's five days. That's an entire week. I
24 am looking at an actual calendar.

25 MR. WELK: I wanted to explain to Mr. Smith and to

1 other counsel, just so you know, we are in the process as
2 required by the order of preparing our prefiled testimony and
3 right now it's anticipated that somewhere between 20 and 30
4 witnesses will file prefiled testimony. Right now if I were to
5 ask for a reasonable estimate, it would be closer to the 25,
6 and we have contacted those witnesses and we have asked and
7 told them that the dates they need to be available for were the
8 original hearing dates, although we did tell them we thought it
9 was the entire week. We have sent, at the request of Mr.
10 Smith, out just to try to check with all of our witnesses, we
11 haven't heard back from them whether there may be an isolated
12 witness who scheduled a vacation because of that or not, so I'm
13 not in a position -- we have not heard back from all of our
14 witnesses as to whether they will be available.

15 One of the concerns that the applicant has -- there's
16 really two. Number one, that if this hearing was continued to
17 the 26th through the 30th, would the statutory deadline still
18 be met by the commission that was in the scheduling order?
19 Because at this point in time, we would not intend to waive any
20 argument that the commission must render it by the one-year
21 statutory period. And secondly, if there is a continuance, we
22 want to make sure that any continuance that would be granted
23 here or extension of the time more appropriately would not be
24 leveraged in any proceedings, particularly in Minnesota, to
25 walk in and say, well, we set the Minnesota schedule based on

1 the South Dakota schedule and now the Minnesota schedule needs
2 to be shifted another three weeks. So those are the concerns
3 we have, and I guess I'd like to listen to others on their
4 comments regarding those issues.

5 MR. SMITH: Well, shall we go down the list? Mr.
6 Guerrero is your co-counsel, right, Tom?

7 MR. WELK: Yes.

8 MR. SMITH: Now we are down to Beth Goodpaster. Do
9 you want to weigh in on the scheduling glitch here?

10 MS. GOODPASTER: Sure.

11 MR. SMITH: Before you begin, Beth, I'm going to tell
12 you this. My feeling, Tom, is that the law is clear on the
13 one-year time frame in this state. By moving the hearing date
14 back two weeks, we are going to have to accomplish that by
15 reducing the time for post hearing proceedings. It's that
16 simple. One way or another, the order will come out within the
17 statutory time frame. Okay?

18 MR. WELK: I understand.

19 MR. SMITH: Sorry about that, Beth. Do you want to
20 proceed?

21 MS. GOODPASTER: Sure. I guess I came to this hearing
22 with your stated preference in your e-mail, John, about the
23 June 26th to the 30th date but also had in the back of my mind
24 the alternative date that you had put out there of May, I can't
25 remember the exact date, so I was going to let you know that

1 our witnesses aren't available on the May date, but the June
2 one would be feasible. As far as interaction with the
3 Minnesota proceeding, I don't see a direct conflict there. The
4 proceeding is going there, but our testimony in the Minnesota
5 proceeding isn't due until September and this change would not
6 materially affect our participation there I don't think. So
7 that I don't see as an issue. I am surprised to learn that
8 there's 20 to 30 witnesses filing testimony on March 15th and
9 so I guess that gives me added desire to have more time for
10 case preparation, given other issues that we are going to be
11 discussing on this call. That's all I have on that topic.

12 MR. SMITH: Next would be -- thank you. And we can
13 talk about those other things as to whether any other schedule
14 adjustments -- we are obviously going to have to make some on
15 the back end, and I've got some thoughts on that. But whether
16 the parties believe some should be made on the front end
17 because of the moving back of the dates, assuming that's what's
18 done, Sanjay, you want to proceed on behalf of Sierra Club?

19 MR. NARAYAN: The June dates are fine for us.

20 MR. SMITH: Mary Jo.

21 MS. STUEVE: Yes, June dates are fine.

22 MR. SMITH: I know, Mary Jo, you had expressed some
23 concern actually at our first prehearing conference about the
24 earlier June dates maybe even being sort of jamming it a little
25 bit on time, and so I guess if there is a good thing to this,

1 it would push this back a little bit and allow more of the
2 environmental impact process and those things to have occurred
3 before we go to hearing.

4 MS. STUEVE: Yes, that's true.

5 MR. SMITH: Okay, it looks like everybody has those
6 dates available, and so I'm going to -- I will redo the order
7 and we will do an amended scheduling order that will reschedule
8 the hearing for the five days of that week. I have also
9 requested the commissioners, and just to let you guys know,
10 because of the very large number of witnesses that Otter Tail
11 has indicated it intends to call, I have requested that they
12 not schedule anything on any of the evenings during that week
13 as well. So that in case we feel it's prudent or necessary,
14 that we can continue the hearings into the evening as we feel
15 we must. Do any of you have any thoughts on that?

16 MR. WELK: No. This is Tom Welk. I don't and we are
17 prepared to do that. The only thing that since I haven't heard
18 back from the number of witnesses and I know that we have to
19 deal with the reality of life, if somebody has -- if one of our
20 witnesses has, as a result of the prior order, gone ahead and
21 booked some ticket for their families going on some vacation at
22 the end of June, I'm assuming what we are going to have to end
23 up doing is probably taking that person's deposition or oral
24 testimony to be included in the record. We can't hold the
25 proceeding up for one or two, but I certainly don't want to be

1 precluded from making a full record because of a change that
2 wasn't prompted by any of the parties but was a scheduling
3 matter in deference to the commission. So I want that -- if I
4 run into a problem with a witness or two, that's what I would
5 intend to do.

6 MR. SMITH: Okay. And something we have done in the
7 past, because we always have in complicated cases, we have
8 scheduling problems with witnesses. Another thing that we do
9 that sometimes will alleviate it is things like allow certain
10 testimony out of order, as long as we can do it without
11 prejudicing anyone's rights. I would probably -- it depends on
12 the witness, too, I think, attorneys, that some witnesses are
13 witnesses for whom cross-examination or with respect to whom
14 hard cross-examination is not terribly valuable, you know, and
15 for others like technical witnesses, it is. And so that makes
16 a difference. But to the extent we can, we have a history here
17 at least of doing what we can to accommodate the practical
18 realities that parties may have. And just giving you a heads
19 up on that and we do try to do that, though we insist on doing
20 it in a way that affords everybody their full procedural rights
21 here.

22 With that now, assuming, then -- I'm basically saying,
23 then, that the hearing will be rescheduled to June 26th through
24 the 30th. We will try to hold at least many of the nights
25 open, and I think we will be able to get done fairly easily

1 with that amount of time set out.

2 Now, let's back up from that. Given that we are
3 backing up the hearing dates, are there any thoughts any of the
4 parties have about any of the other dates that we had put in
5 the order? I'm talking now about prehearing dates, not post
6 hearing dates. We are obviously going to have to change at
7 least some of the post hearing procedure here. As of right now
8 what we have got is we have got the prehearing conference
9 scheduled for May 30th and all of the prefiled should have been
10 done by then. When is the last prefiled date, Karen? I don't
11 know if I have got my order. On May 19th. That would give a
12 month and a week after the last prefiled date that we have
13 under the current schedule. I don't know, does anybody feel we
14 need to change the prefiled scheduling at all?

15 MS. GOODPASTER: Mr. Smith, this is Beth Goodpaster.
16 And this is related, I think, to the applicant's next issue of
17 clarifying what goes in when and all that, but I wanted to
18 suggest that we have an opportunity following May 19th for
19 surrebuttal to new issues, new material that is put in the
20 record on May 19th, and by moving the schedule as we have to
21 June 26th, that is more easily accommodated, but we were
22 prepared to switch it in otherwise, but I think that a limited
23 opportunity for surrebuttal would be appropriate for all
24 parties.

25 MR. SMITH: Okay. And something else we have seen in

1 the past, it's not infrequent, especially in phone company
2 cases, is when we finally get to the end of the line on
3 prefiled, it's not unusual for one or more parties to have one
4 last usually fairly limited round of discovery requests that
5 they feel they need in order to obtain information regarding
6 late or testimony filed in the last round. So that's another
7 thing that I think can be beneficial about having a little more
8 time between the last testimony filing and the hearing.

9 MR. WELK: This is Tom Welk. In reference to the
10 request by Ms. Goodpaster, this will segue into the second
11 issue. I don't mind moving things a little bit, you know, to
12 give parties maybe an opportunity, but I am concerned of what I
13 saw happening in the Minnesota proceedings about the perception
14 of what the intervenors' direct testimony would rebut, and it
15 is our position that when the applicant makes the filing on
16 March 15th, that all of the testimony of the intervenors and
17 staff that is going to be in opposition to that be filed on
18 that date and that the final rebuttal then would be the
19 applicant who bears the burden of proof that would have to
20 rebut whatever is filed by the intervenors and staff testimony.

21 I understand there may be cross issues between the
22 intervenors or staff perhaps that maybe don't go to the
23 applicant, but maybe they want to respond to another
24 intervenor. I don't mind having that all done at the same
25 time, but the surrebuttal process is not something that I

1 believe ought to be appropriate. There ought to be a direct,
2 there ought to be a filing of the intervenors and then if
3 there's going to be a final rebuttal date, then we will file
4 against all of that, and the intervenors, if they want to rebut
5 cross rebuttal, that's fine, they should be responsible for
6 that date. But there ought to be three separate filings, I
7 don't want to deal with four, and that's at least our position.

8 MS. GOODPASTER: This is Beth Goodpaster. May I speak
9 to the concern that the applicants have raised?

10 MR. SMITH: Please.

11 MS. GOODPASTER: Speaking for the groups that I'm
12 representing here, and I'm sure it's true for others, too, but
13 we have absolutely no intention of holding back a part of our
14 case. We will be putting our entire case in as we see it on
15 the record that exists on April 28th, but I did want to -- and
16 Mr. Welk has clarified this, too, there may be a need for us to
17 file something on May 19th in response to staff or other
18 intervenors, but then I come back to the potential for
19 surrebuttal and that is, in Mr. Welk's terms, a fourth
20 opportunity to say something prior to the hearing. Because as
21 the South Dakota commission has already experienced in other
22 cases, things come up that are new or involve new record
23 development or whatever, but that are new issues that could not
24 have been dealt with earlier and thus an opportunity is
25 appropriate to respond in writing ahead of the hearing.

1 MR. SMITH: Do any of the other intervenor counsel or
2 Ms. Stueve have any observations on this particular issue?

3 MS. STUEVE: I do not, this is Mary Jo.

4 MR. NARAYAN: I have nothing further on that.

5 MR. SMITH: Karen, on behalf of staff.

6 MS. CREMER: Staff would not object to a round of
7 surrebuttal, but whatever commission counsel wants to do.

8 MR. SMITH: Well, we have had it in the past and when
9 we have had it, it's been when we have had the situation happen
10 that Ms. Goodpaster described, and that is when new material
11 is -- when new material basically is interjected at the
12 rebuttal phase. If we stick to pure, pure rebuttal,
13 surrebuttal may not be appropriate. I will tell you this, too,
14 in general the commission is relatively, because of the
15 prefiled testimony limitations, you know, in terms of -- well,
16 its inherent limitations, the commission is fairly liberal in
17 allowing parties ample opportunity at hearing to address issues
18 that may have been raised in later rounds of testimony. In
19 fact of addressing anything. And so I wouldn't feel -- I
20 wouldn't feel terribly paranoid about getting completely
21 sandbagged and being left with no recourse of getting your
22 record made.

23 That said, here is maybe a middle ground and maybe
24 this is where I'll cut this. I agree with you, Tom, and that
25 was what I meant in my original order and I apologize for not

1 making that more clear. What I was thinking is that would
2 offer -- really I should have used the word response because
3 what I meant with respect to staff and all parties and
4 intervenors was that they would be responding to the testimony
5 that's presented by the other party in the earlier round, and
6 the other party being other intervenors and staff.

7 How about this, how about if we write into the order
8 something that states to the effect that one or more parties,
9 intervenors or staff, will have the opportunity to request
10 surrebuttal if they can make a showing that new material has
11 been interjected at the rebuttal stage. How does that grab
12 you? And that way you can just make a showing to us, and
13 again, I'm telling you the commission is liberal in terms of
14 allowing such requests, provided there's some grounds for it.
15 Beth, you have a response, or Tom?

16 MS. GOODPASTER: This is Beth, and that sounds
17 reasonable, I just have a question. So that would happen in
18 writing by motion following receipt and review of the May 19
19 testimony?

20 MR. SMITH: Yes. That's right. You would make -- if
21 you looked at it and you said, hey, wait a minute, now they are
22 bringing this up, again, I don't think we are trying to play
23 gotcha in this proceeding, and so I think what we want is a
24 full airing of the facts and if there's a situation develop
25 where you haven't had an opportunity to do that, I believe

1 justice would require that an opportunity to do so be given.
2 And I think we would want to do that, but I think what Tom is
3 trying to get at is just that we not have people sitting on
4 things and waiting and have this endless round of new material
5 interjected in the case. I don't know, Tom, do you have any
6 observations?

7 MR. WELK: No. I can't legitimately say that if
8 there's a good cause, as long as there's a good cause and it's
9 not I gotcha or we have got something new, if we haven't
10 properly disclosed what should be disclosed, that's a different
11 issue, but if there is a reason, legitimately something
12 develops and they can make a showing of good cause as to why
13 they didn't file it, then it's going to be up to the commission
14 to allow them to do that. I just want it that that is an
15 exception, that there must be a good cause requirement. I
16 don't want it an automatic because at the end of the day, we
17 carry the burden of proof and we have the opportunity to
18 expound last.

19 MR. SMITH: And that would be -- I agree, that would
20 definitely be the ordinary procedural flow. I will tell you in
21 past cases, generally speaking, we do not schedule surrebuttal
22 in the original procedural order, but we do very frequently
23 receive requests by parties to file surrebuttal testimony and I
24 am unaware of an instance in which we have not granted that
25 request. So I think unless I hear a violent objection, that's

1 what I'm going to do, with the understanding that the threshold
2 for leave to so file will be pretty low. All right?

3 MS. GOODPASTER: Okay.

4 MR. SMITH: Let's move on to point three, Tom.

5 MR. WELK: Point three, and I guess I want to make an
6 understanding before I go on to that, then, John, as to the
7 moving of the hearing date. We are going to retain the
8 original filing dates, you are just going to expand in the
9 amended scheduling order, to be clear, that as Ms. Goodpaster
10 indicated, that the rebuttal to the applicant's case will be
11 filed on April 28th and then we will have the original schedule
12 on May 19th. Now, I don't know if we are going to continue to
13 retain the May 30th prehearing conference at that point in
14 time, because then there will be May 30th to now June 26th. Is
15 that okay?

16 MR. SMITH: Maybe that's worth talking about now. The
17 prehearing is on the 30th at 1:30. I can see good and bad to
18 doing that, and again if we have had issues with respect to
19 discovery testimony in that, a good thing about having that
20 meeting early would be we could address those things, you know,
21 if there are additional discovery problems or anything like
22 that that might be lurking out there or things that might be
23 done relative to readjusting the schedule or anything like
24 that. The other thing we could do, though, is we could try to
25 reach agreement here on another date for a date closer to the

1 hearing if you want to, so that we have an alternative date,
2 for one thing, in case we have a round of surrebuttal, we may
3 not be completely ready for a final prehearing conference yet.
4 We have the other thing is the only thing I want to point out,
5 immediately before the hearing, so we are going to have to
6 schedule around that.

7 MS. CREMER: This is Karen Cremer from staff. What I
8 was going to suggest is let's hold that May 30th prehearing
9 conference, but then at that point we should be able to
10 determine if we need another prehearing conference a couple
11 weeks down the road, and we would have a better idea. So I
12 don't know that we need to try to figure out a place between
13 May 30th and June 26th, but if we need to, we could.

14 MR. GUERRERO: This is Todd Guerrero, if I could
15 inject for a second. This may have bearing on the prehearing
16 conference. With respect to the surrebuttal testimony, should
17 there be a deadline under which a motion has to be filed and
18 surrebuttal testimony filed?

19 MR. SMITH: Yes, I think there should and what would
20 you recommend? How long should a party have to take to read
21 the Otter Tail rebuttal? Intervenors, how long do you feel you
22 will need to read and evaluate Otter Tail's testimony in order
23 to know whether you feel you need to make a motion to submit
24 surrebuttal?

25 MS. GOODPASTER: This is Beth Goodpaster and I was

1 thinking as Karen was speaking that the 30th prehearing
2 conference would be a date by which we would be able to speak
3 to the need for surrebuttal.

4 MR. SMITH: That's on a Tuesday. I'm going to throw
5 something out. What about Friday, the 26th? That gives you
6 more than a week, right? Or is that exactly a week? That's a
7 week. How is that, if you file your motion by then? That way
8 on the date of the conference, in case it's something that's
9 disputed, we can discuss it on the Tuesday meeting.

10 MR. WELK: I have maybe a discussion that will help
11 all of this. That is why don't we leave that they can file the
12 motion on May 30th but it has to include the testimony itself,
13 so in other words, it would be a motion, here is the testimony
14 that we would like to file as surrebuttal and we know what the
15 issues are then. That gives them a certain number of days not
16 only to evaluate it but to write it and so we know when we look
17 at the motion, we know what we are dealing with.

18 MR. SMITH: Okay. The only thing I was thinking is if
19 the date for the prehearing is on the 30th, how are we going
20 to -- we won't have been able to even look at it before we have
21 our meeting.

22 MR. WELK: Well, except the obvious is we have a week
23 on our calendar that was June 6th to the 9th.

24 MR. SMITH: That's true.

25 MR. WELK: We have all got five days on our calendar,

1 at least we had five, maybe you had four.

2 MR. SMITH: No, we had five.

3 MR. WELK: That you could make that prehearing
4 conference and just slip it into sometime of that week that we
5 were going to have and then at that point in time, that would
6 give them more than -- if they filed on May 30th, here is the
7 motion, here is the testimony and we could just slide the
8 prehearing conference a week.

9 MR. SMITH: Which date -- let's set aside a date
10 that's certain here. Do you want to set aside Tuesday, the
11 6th, or Monday?

12 MS. CREMER: What's this for?

13 MR. SMITH: An alternative prehearing date.

14 MS. GOODPASTER: This is Beth. I'm not fully
15 following on all the suggestions here. The 30th -- we are
16 talking about not having a prehearing conference on the 30th
17 but instead having one the following week but then having the
18 26th as a date?

19 MR. SMITH: No, I think Tom's suggestion is the 30th
20 be your motion and that you file both your proposed
21 surrebuttal, if you are going to have any, and your motion for
22 leave to file it on the 30th; is that correct, Tom? Is that
23 what you were suggesting?

24 MR. WELK: That is correct, Mr. Smith.

25 MR. SMITH: That is the date that we have set aside

1 right now for the prehearing conference, so we could end up in
2 the position of both having a prehearing conference and having
3 filings that we really haven't had a chance to look at.

4 MS. GOODPASTER: This is Beth again. I don't have a
5 problem with filing any motions and generally identifying the
6 issues for surrebuttal, but it seems a little bit aggressive to
7 try to file the testimony with the motion. Compressing it that
8 much seems somewhat unnecessary, given that the hearing is not
9 the following week, so I would ask that we not -- that we file
10 our motion with some general description of the pieces for it,
11 which obviously tells you something about the surrebuttal, but
12 not actually file the surrebuttal on that same day but perhaps
13 the following week.

14 MS. CREMER: This is Karen Cremer from staff, and I
15 would agree with Beth. I think requiring testimony by the 30th
16 is very aggressive, and then the prehearing conference, too,
17 would not -- are you anticipating, John, that -- the
18 commissioners aren't going to be there to make a determination
19 on the 30th as to whether or not -- I mean --

20 MR. SMITH: The surrebuttal would be allowed?

21 MS. CREMER: Right, it would be an issue for like this
22 group so you may need the following week, the 6th or whatever
23 for a meeting with the commissioners, but keep in mind they
24 have a conflict then. So finding a date may be difficult that
25 week.

1 MR. SMITH: What do we currently have for commission
2 meeting dates in there, Patty? Just in case we have issues
3 like this that we have to be aware of.

4 MS. CREMER: I think it was June 14th, wasn't it?

5 MR. SMITH: The commissioners that had conflicts, it's
6 mainly one that had a serious conflict that week, it wasn't the
7 entire week, but it was enough of it to make it impossible to
8 have five full days, I'll put it that way. So that's what
9 happened. And I think we could find a day within that week
10 that we could set aside for any commission actions that will
11 be -- that will have shaken out by then relative to necessary
12 prehearing procedural rulings. We haven't gotten into this yet
13 so I don't know what the issues are going to be in the case.
14 By then, I don't know how you guys see it, but parties may have
15 motions to make. Are there going to be motions in limine or
16 any one of a number of things?

17 MR. WELK: We could use that date during that to have
18 those motions heard. If you want to put a May 30th date as to
19 the filing of all motions to be heard, including those, I still
20 believe that it's not a burden on surrebuttal, that's what we
21 are talking about here, we are not talking anything else but a
22 filing of surrebuttal testimony on May 30th. But if we want to
23 have motions, you can provide that they will be filed on May
24 30th and pick some day, the 6th to the 9th, that's available
25 for the commission and we will have that be the prehearing

1 conference and motion date.

2 MR. SMITH: Any other thoughts? I don't know, and you
3 guys, in terms of what you are planning, what you think in
4 terms of time for possible surrebuttal. Normally I tell you,
5 normally that final type of surrebuttal, if you want to call it
6 that, those final rounds of responsive testimony when they are
7 granted usually are relatively limited in their scope and don't
8 involve -- unless something comes up, I don't think we want to
9 see probably a couple hundred pages come in. I think what we
10 are assuming is if there's one fairly outlying matter that has
11 come in relatively new by a later filing, that the surrebuttal
12 would stay relatively limited to those new matters. So I don't
13 see a huge amount of time, but whatever. What would two weeks
14 from the 19th be? What's that date?

15 MS. CREMER: For what?

16 MR. SMITH: That's June 2nd?

17 MS. CREMER: What do you want?

18 MR. SMITH: As a date for the surrebuttal testimony to
19 be filed.

20 MS. CREMER: Well, wouldn't they be filing their
21 motion and a general idea of what they want on the 30th?

22 MR. SMITH: On the 30th?

23 MS. CREMER: Right. It wouldn't have to be the
24 testimony itself, but just an idea, and then sometime like that
25 week of the 5th through the 9th we could find a day, if need

1 be, it may not require commission action.

2 MR. SMITH: The one thing, as you guys have seen, it's
3 hard enough to get the commissioners, for me to -- I mean
4 absolutely firm, firm commitments on schedule under the best of
5 circumstances, so what I like is if possible to at least get
6 them pinned down to some open dates so if we have to, we can
7 get things resolved. Here is one, we have a commission meeting
8 scheduled for June 13th. That would provide a little less than
9 two weeks prior to the hearing and I don't know what you think
10 about that as a possibility, in case we have things that have
11 to be resolved by commission action, such as whether
12 surrebuttal testimony will be allowed. To me that's getting
13 pretty darn close to the hearing.

14 MS. CREMER: I still think we would be able to find
15 something the week of the 6th.

16 MR. SMITH: What I'm suggesting is we set aside a time
17 right now.

18 MS. CREMER: Until you know --

19 MR. SMITH: What the problem is?

20 MS. CREMER: And what the commissioner schedule is, we
21 can pick any date we want.

22 MR. SMITH: That is the problem, I don't know. I
23 guess you're right.

24 MS. CREMER: That's what I'm saying. You and I can
25 find a date after this and put it in the procedural schedule.

1 MR. SMITH: What I'm going to do, you guys, then you
2 are going to react, I'm going to find out what the
3 commissioners could do that week of June 5th through the 9th in
4 terms of scheduling a final prehearing conference, okay? And
5 then I'm going to circulate that to you so that you can react
6 to that date. How does that grab you?

7 MR. WELK: That's fine, and March 30th is going -- or
8 May 30th is going to be the date for filing of any motions?

9 MR. SMITH: Any motions, and then I'm going to -- not
10 just a prehearing conference, I'm going to try to find a date
11 when the commissioners can potentially be available that week
12 to decide any contested issues relative to these surrebuttal,
13 prefiled testimony, discovery, that kind of thing, motions.

14 MR. WELK: Or any other motions that are filed?

15 MR. SMITH: Right. Any other motions that are filed.
16 And again, May 30th is -- I will probably try and look at
17 something later in that week so we have a little more time,
18 especially if there are going to be complicated motions.
19 Hopefully we don't have any. That should be plenty of time any
20 time that week. Okay, I'll tell you what -- did somebody drop
21 off? I heard something beep.

22 MS. GOODPASTER: I also heard something beep, so
23 therefore I'm not off.

24 MR. SMITH: Beth is on there. Tom, are you on?

25 MR. WELK: I'm still on here.

1 MR. SMITH: Sanjay?

2 MR. NARAYAN: Still here.

3 MR. SMITH: Mary Jo?

4 MS. STUEVE: Yes.

5 MR. MADSEN: I'm here, John, I've got us linked in, I
6 have got Tom linked in so you have got me.

7 MR. GUERRERO: Todd Guerrero. I dropped off, I
8 apologize.

9 MR. SMITH: Why don't I see -- I think I know what you
10 guys want. We have a reporter here this time so I at least
11 have a way to remember. And what I'm going to do is circulate
12 a revised order to you for comment before we spew anything
13 forth. How is that?

14 MR. WELK: John, you will have in that order also the
15 compression, I'll call them the compression dates after the
16 hearing?

17 MR. SMITH: I didn't get to that yet. I haven't
18 thought about that. I'm going to throw out a couple of
19 possibilities.

20 MR. GUERRERO: Mr. Smith, before you do that, this is
21 Todd Guerrero again. When I dropped off, maybe you decided
22 this. Did you come up with a date for when the actual
23 surrebuttal testimony would have to be filed, assuming it will
24 have a motion for surrebuttal and the motion was granted?

25 MR. SMITH: No. Here is what we decided to do and

1 part of the problem is we don't know the commissioners'
2 schedule. What we are going to do is require the motion to
3 file surrebuttal or to file anything else related to prefiled
4 testimony by May 30th, or any motion. Obviously I don't
5 think -- we are not going to preclude a motion that's
6 justifiably filed later if there's a reason for it, but what I
7 think we will do is set the May 30th as sort of a motion
8 deadline for any prehearing motions. What we are then going to
9 do is look for a date in the week of June 5th through the 9th,
10 most of which had been blocked out by the commissioners and by
11 us, all of us, and we will try to find a date and I'm going to
12 send that out by e-mail to you as soon as I can get a firm date
13 and the reason is I want a date when the commission can meet
14 and vote and get this decided. Okay?

15 If we can't voluntarily decide it or it isn't
16 stipulated to, then we will have a commission meeting and vote
17 and they can vote on it. But I don't have that particular date
18 yet. Is there any date that week that is not good? I'm
19 assuming we all have it blocked off, so I'm assuming any day
20 that week is okay. If that's not true for someone, say so
21 right now. Or if there's a day you would prefer. I believe
22 the date that is the least desirable from the commission's
23 standpoint might be Tuesday, I think.

24 MR. WELK: This is Tom Welk. I don't think anybody
25 right now has anything scheduled because until this moment we

1 didn't know it was moving. So you just pick the date. But to
2 follow up, this is Tom Welk, on Todd Guerrero's point, I think
3 in the order we also ought to include that if there's a motion
4 filed on May 30th for surrebuttal, there should be some date
5 between May 30th and whatever date you pick that the actual
6 surrebuttal testimony has to be filed.

7 MR. GUERRERO: This is Todd Guerrero. Just as a
8 question to you, Tom, would it make sense to recommend one week
9 after whatever date we come up with for the prehearing
10 conference?

11 MR. SMITH: Right, or the commission. That could be.
12 I was assuming, you guys, that the commission would just set
13 that, if we have got to go to commission action on it, that we
14 would just set that. What I think I'm going to do right now,
15 you guys, if you don't mind, we are going to have that motion
16 filed on the 30th. What I think we ought to do is set aside a
17 time on June 6th, which is the Tuesday, to have a prehearing
18 conference, which we can always cancel, but that would at least
19 allow us an opportunity as counsel to discuss any issues that
20 might be raised by a motion, including the surrebuttal issue,
21 and we may be able to resolve them without commission action.
22 How does that grab you?

23 MR. WELK: That's fine.

24 MR. SMITH: And I'm going to suggest that on June 6th,
25 and I'm going to suggest this same time of 2 o'clock. I don't

1 know, for west coast, Sanjay, is this a good time?

2 MR. NARAYAN: Yeah, this is fine.

3 MR. SMITH: I'm going to set June 6th for a prehearing
4 conference. And then you will be hearing from me hopefully
5 later today, but maybe today or tomorrow morning about a date
6 that I'm going to get the commissioners to commit to for
7 commission action on any outstanding prehearing issues or
8 action on motions. Okay? And I would like to do that later
9 that week of June 6th through the 9th.

10 MS. GOODPASTER: This is Beth Goodpaster. If I could
11 ask for one more clarification, I apologize. My understanding
12 is that we would make a motion and that we have talked about
13 not actually submitting the testimony for which we are making
14 the motion. I would assume that we would submit that testimony
15 after our motion was granted.

16 MR. SMITH: Yes. But here is what I'm going to say,
17 is we are going to get a commission date, because if we get to
18 where it can't be stipulated to, that you can submit it, then
19 it's going to have to require commission action up or down.
20 The commission can set the time for your response in their
21 order.

22 MS. GOODPASTER: Okay.

23 MR. SMITH: If you are planning to submit surrebuttal,
24 although I don't want to put you guys to the expense of it, but
25 I think you need to have it pretty well in mind what you plan

1 to say, because you won't be given a lot of time after the
2 commission votes.

3 MS. GOODPASTER: This is Beth, and I recognize that it
4 is a limited scope, and that it wouldn't be an enormous expense
5 to put together, but it would be an expense that we would
6 prefer not to incur if we are not -- if our motion isn't going
7 to be granted, but it sounds like that's what everybody else is
8 thinking, too.

9 MR. SMITH: Any objections to that, Tom and/or --

10 MR. WELK: You just cut the order, John. I would
11 prefer to have the testimony filed sometime between May 30th
12 and June 6th so we know what we are dealing with. I am
13 assuming it's going to be limited in scope, but John, are you
14 just going to then when we move on to filing of briefs,
15 proposed findings, oral argument, are you going to change those
16 dates as well?

17 MR. SMITH: They will have to be because we won't have
18 the hearing -- the hearing will not have been held until June
19 30th, so all of the briefing dates that we had are going to be
20 not workable, because they all occurred on or before June 30th.
21 Here is a thought I had because we are going to be really
22 crammed. Sometimes what we do is we wait until the hearing and
23 we let the commissioners set the post hearing schedule at the
24 hearing, based sort of upon how the hearing goes, and we have a
25 much better idea at that point in time what we are dealing

1 with. I don't know that I would want to give up -- we have a
2 July 6th date set aside right now and July 11th date. I hate
3 to allow the commissioners to reschedule anything on those
4 days, but I don't know what you think.

5 We are going to be pretty compressed right now. If
6 the parties have suggestions on what they would like to see,
7 I'm certainly open to that. But the briefing schedule is going
8 to have to be abbreviated. And I'm going to throw out an
9 assumption and maybe this is wrong, but it's what I just kind
10 of intuitively feel about this case, is that this is going to
11 be, because of the nature of the siting law here and the way it
12 is, I don't know that -- are legal issues, do the parties
13 assume that issues of law are going to be a predominant feature
14 of this case that will require extensive briefing and citing of
15 authority, or are we mainly talking here about arguing the
16 meaning of facts in briefs?

17 MR. WELK: From the applicant's standpoint, we believe
18 it's going to be more factual in context with what the
19 regulations and the statutes provide.

20 MR. SMITH: That's what I would assume, without
21 knowing how things are going to go. Do any of you others, Beth
22 or Sanjay, have observations on that?

23 MS. GOODPASTER: I don't have observations on that at
24 the present time. I feel that this question is a little bit on
25 a tangent, but it does come back to the question that you are

1 presenting and that is, when is the final EIS expected to be
2 prepared? I know we talked at the last prehearing conference
3 about the draft EIS that WAPA is doing. Is it anticipated that
4 that final EIS is going to be available for parties to
5 incorporate into the record?

6 MR. SMITH: I don't know. I went on the Web site
7 right before -- WAPA's Web site right before we had the call
8 here to reacquaint myself with their dates, and the only date I
9 see on there is the April date, and there's nothing after that.
10 So I don't know. Now, I've heard rumors about them thinking
11 they are not going to release the final final EIS until
12 November. But I don't know why it would take them that long,
13 if the public process is going to be over before May 1st. I
14 don't know, Karen, are you privy to any of that?

15 MS. CREMER: I'm just trying to remember, but I
16 believe I have an e-mail from WAPA and I think it's November
17 2nd is the final final. There will be a final draft and I
18 can't remember, like in May or early June or something like
19 that, and they anticipate very little changes in that. Again,
20 it depends on public comment, but a lot of times when that
21 final draft comes out in, say, June, they don't anticipate much
22 will change before November, but for some reason November 2nd
23 is what sticks in my mind.

24 MR. SMITH: We are going to have to roll along here
25 because our court reporter has to leave fairly soon because of

1 a personal commitment. Tell me what you want to do and unless
2 I've got a strong objection, we will just do it that way.

3 MS. CREMER: This is Karen Cremer. I would like to
4 see, just let the commission determine if we need briefs,
5 because if we are just briefing to brief, that's of no value,
6 and there's no way I can sit in a hearing all week and then
7 turn around and put a brief out the next week. The court
8 reporter won't even have the transcripts to us.

9 MR. WELK: She will, Karen, because there will be
10 daily transcripts.

11 MS. CREMER: But I'm sitting up there all day, I can't
12 write while I'm sitting up there is my issue. You have other
13 people to work with you. I am it here. So it doesn't work for
14 me.

15 MR. SMITH: What about this? On that whole matter, if
16 we are talking facts, and again if that's all we are going to
17 be talking about, and I don't think we know that yet, we
18 haven't heard the case yet. There could be legal issues here,
19 and then briefs are -- if we are not -- if all we are talking
20 about is facts, I don't know what you guys think, but don't you
21 think oral argument is a more effective way of presenting
22 factual context to the commissioners than briefs? I don't
23 know, maybe that's not true.

24 MR. WELK: This is Tom. I have a quick suggestion and
25 that is that I am sympathetic to what Karen said about getting

1 them in maybe the 6th but there's no reason why we shouldn't
2 say that the 11th, if we could get all the briefs in and
3 findings and conclusions, and if there is going to be oral
4 argument, you can find some day between July 11th to July 21st
5 because, John, that's your time frame..

6 MR. SMITH: Right, and I'm willing to push that back
7 and we looked at that. When is the next date, Patty, the next
8 commission date?

9 MS. CREMER: In July?

10 MR. SMITH: I remember something came up and we have
11 got something that's popping up at the end of the month. The
12 11th is fine with me, that's the date we could get. I think
13 that was -- wasn't that a commission meeting date?

14 MS. CREMER: You are looking at June.

15 MR. SMITH: July 11th.

16 MS. CREMER: July 11, you want everyone to have
17 whatever is going to be required in by the 11th, is that what
18 you are saying, Tom?

19 MR. WELK: Right, findings of fact, briefs and
20 everything in by that day.

21 MR. SMITH: Are you just assuming we are going to have
22 one round of briefs, Tom?

23 MR. WELK: I am assuming one round.

24 MR. SMITH: One round of briefs, and everybody submit
25 by July 11th and then I'll have to find a date for --

1 MS. CREMER: Oral argument, if needed, or as I have
2 said, if the commission decides they don't want briefs, I don't
3 think that we should have to just because.

4 MR. SMITH: We will set aside some dates so that they
5 are there.

6 MS. CREMER: So they are there, but the commission can
7 always tell us at the end of the hearing we don't need briefs
8 out of you.

9 MR. SMITH: Tom has requested the opportunity to file
10 proposed findings and conclusions, and I did write that into
11 the original order as an optional thing. If you guys don't
12 want to, I don't --

13 MR. WELK: I think we have to do it to preserve -- the
14 parties have to do it to preserve any rights of appeal, so I
15 think you have to provide us an opportunity to do that and I
16 just as soon do it before the commission looks at it and
17 everybody can put their positions out in proposed findings and
18 conclusions.

19 MR. SMITH: Well, I don't know, Tom. Maybe you are
20 right. My recollection of the APA here is that an agency in
21 this state is not actually required to allow anyone to submit
22 proposed findings and conclusions. If they are submitted, then
23 the agency is required to rule upon each one. But I don't
24 think -- we have never here treated the submission of proposed
25 findings and conclusions as necessary to preserve issues on

1 appeal. I don't know, Karen, do you have anything?

2 MS. CREMER: I would have to look, Tom, I don't know.

3 MR. SMITH: We will set aside that date and if it's
4 true, then obviously if you guys want to -- if you research the
5 law and you feel you need to do that to preserve your rights on
6 appeal, by all means --

7 MR. WELK: July 11th, if there are going to be briefs
8 and if you want to propose anybody -- if anybody wants proposed
9 findings, July 11th is fine with us.

10 MR. SMITH: And I am going to have to try to schedule
11 probably -- I think what we are going to have to do -- just a
12 sec, can we take a short break? The reporter needs to make a
13 phone call quickly.

14 (Brief pause.)

15 MR. SMITH: We were just discussing again the last
16 scheduled commission event between the 11th and the 21st, which
17 is our statutory deadline for issuance of the decision, is the
18 11th. So what I thought is if we had that originally scheduled
19 for decision date, maybe what we should do is schedule that now
20 for oral argument date. Then Patty, we are going to have to
21 find an alternative date in there for an ad hoc for decision.
22 And I would like to have that absolutely by the end of the week
23 or absolutely no later than the 18th because that's going to
24 give me -- that would only give me four days after that to put
25 an order together and out. Actually, if we could get them to

1 maybe go to decision on or about like the 12th or -- or like
2 the 13th or the 14th would be better. We will look for that
3 date and that really isn't one that involves action by the
4 parties. So we will search for an available date for that.
5 Any other observations or comments on schedule, on dates?

6 MR. WELK: This is Tom, one final thing. I think in a
7 case of this magnitude, I think we should move the filing of
8 the briefs and everything to like the 9th so it gives us at
9 least a day, because what you have down here is 9:30 on July
10 11th. I think that's not fair to everybody to look at 5 p.m.
11 on the 10th, so if we could move it to at least look at a day
12 to give us what other people file.

13 MR. SMITH: The 9th is Sunday. Yeah, the 9th is
14 Sunday, you want to do it then or you want to do it, say, like
15 9 o'clock in the morning on the 10th?

16 MR. WELK: At least give us a day, 24 hours to look at
17 them.

18 MR. SMITH: We will say you file it by midnight on the
19 9th, how is that?

20 MR. WELK: Okay.

21 MR. SMITH: Is that okay?

22 MR. WELK: That's fine.

23 MS. STUEVE: This is Mary Jo and I appreciate having
24 that extra time because if we are looking at these filed on the
25 online electronic reading room, everybody is trying to access

1 that at the same time, it may be very slow.

2 MR. SMITH: Well, I'm assuming, too, all these filings
3 should be being done via e-mail attachment to everybody. So
4 I'm hoping you should all get those and you should all get them
5 in a format everybody can read. All right?

6 MS. STUEVE: Okay.

7 MR. SMITH: We are done with scheduling for now, and
8 again I will circulate a draft so you guys can see what we are
9 planning to do before I etch this in stone. Tom, do you want
10 to move on to issue number three?

11 MR. WELK: Yes, the third issue that's raised by the
12 motion that the applicant has filed has to do with the
13 reservation of exhibit numbers, and the reason -- this may
14 appear to be something that would be deferred to a prehearing
15 conference, but because of the number of witnesses and the
16 amount of time and effort that people are going to, we have
17 proposed that the commission's file, in other words, what is in
18 the commission's file itself, the application and that, that
19 there be certain exhibit numbers reserved for that, that each
20 party be allocated a certain number of exhibit numbers so they
21 can clearly use those, and because of the number of parties,
22 this will be impracticable to do this the morning of the
23 hearing or perhaps even a week or two before the hearing,
24 because I would like to have our exhibit numbers, and say for
25 example, the applicant is given numbers 2000 to 3000, we can

1 then have our prefiled numbered with those exhibits so
2 everybody will know there's going to be one exhibit number
3 2000, nobody else is going to use it.

4 And it will make things a lot easier as we progress to
5 the hearing where we will have an exhibit list that we can
6 reserve numbers and work off of those, especially with the
7 amount, and I guess I'm the only one that is probably on the
8 call other than our own lawyers for the applicant have seen the
9 volume that we are going to generate, and I think it's going to
10 make the hearing more productive and then people don't have to
11 worry about somebody -- how they are going to number their
12 exhibits, if we can just reserve the exhibit numbers.

13 MR. SMITH: Okay, this is John Smith. I'm going to
14 interject just a comment on the commission's normal way of
15 doing things in cases that involve many parties and lots and
16 lots and lots of exhibits. The way we have done this in the
17 years I've been here is they usually do it, Tom, by party
18 identification, and I think one reason is for the
19 commissioners, it makes it an easy way for them to keep track
20 of who's got what. I'll give you an example, in the LNP cases,
21 for example, the LNP dockets, which was a three-week and you
22 know what, Karen, a huge proceeding, in that docket we had
23 about 25 or 30 parties and the way we organized exhibits in
24 that case was to designate each party's exhibits with respect
25 quite simply to that party's name.

1 An example would be for in that case Western Wireless
2 Company, corporation, their exhibits were all designated WWC 1
3 through 75. In this case if we were to do it the way we
4 normally would do it, we would do it by Otter Tail, we would
5 say your exhibits are OT 1 through a million or OTP, however
6 you want to do it. And your exhibits would all be sequentially
7 numbered, but we would identify yours as opposed to other
8 people's through the initial letters on the exhibit. I don't
9 know, at least for us that's worked easily and that way we
10 can -- we don't have to -- we can easily remember who's who.

11 Now, I don't care, I honestly don't care. I'm just
12 telling you it works good because the commissioners, they think
13 like that, Otter Tail Power, so they will say this is Otter
14 Tail's No. 25. And it's Sierra Club, what I would recommend
15 for Sierra Club is that yours be labeled SC or Sierra. And
16 usually we call staff's, we just call them staff's one through
17 however many they are. I don't know, is that objectionable or
18 does that not work as well for people? We are trying to
19 think --

20 MS. CREMER: Beth, you would have to come up with
21 something.

22 MS. GOODPASTER: I'm thinking good guys.

23 MR. SMITH: And you have a multiplicity of them. For
24 yours it would be like -- maybe it would be, you know, just one
25 of your lead parties, but that's what we have done in the past.

1 We don't have to do it that way, we can do it with number
2 blocks, too. It does hit me that that will be harder for the
3 commissioners to figure out and remember who's who and whose
4 exhibits go to which groups of numbers go where and when they
5 are looking for stuff.

6 MR. WELK: This is Tom Welk. I don't think there's a
7 right way or wrong way. I think we are trying to make this to
8 make sure that there's no duplicates to the extent we can avoid
9 that and it's clear what the exhibits are. I've tried cases
10 with 10,000 exhibits and it's a matter of whatever the judge or
11 the finder of fact wants. The effort is to save the parties
12 time and expense, we don't have to duplicate things, we don't
13 have to watch for duplicates and if you want to do it by
14 designations, that's fine.

15 One thing that's always difficult for everybody and
16 that we need to know is what's in the commission's file and
17 what's been numbered, and so if you want to, John, take it upon
18 yourself to send out a preexhibit list and say commission, if
19 you want to call it commission exhibits, which I would view of
20 what's in the file are exhibits blank to blank, and the rest of
21 us can take the acronym of whatever is appropriate for our
22 party and use it, but there is going to be an OTP one and there
23 is going to be a staff one and that's okay if you want to do
24 that, as long as it's clear what's in the record. That's the
25 only point of the motion.

1 MR. SMITH: Okay, and I think we can do that. We
2 normally don't do an actual appeal type docket until an appeal
3 has been filed, in terms of the APA's requirement of docket
4 numbering, of page numbering in preparing the appeal docket.
5 That's usually done by our docket manager at the point when we
6 receive a notice of appeal. I don't have an objection with
7 necessarily doing a docket numbering system.

8 MR. WELK: I don't want to refile an application
9 that's 1,000 pages long when I know it's in the commission
10 file. If I know it's in the commission as Exhibit 1, I don't
11 have to file it for OPT, because we are dealing with a great
12 amount of paper here and I think to the extent it's already
13 there and if when it gets around to the rebuttal testimony and
14 Beth looks and says, OTP has got this in there, then she
15 doesn't need to file that as an additional exhibit.

16 MR. SMITH: Okay, and I want to make one caveat here,
17 just so everybody understands. The filing of an application or
18 any piece of paper in the docket, right, is not an admission of
19 that piece of paper into evidence. That will have to be done
20 via an offer and an admission into evidence at the hearing.
21 Okay? Now, we may have copies, Tom, and they may be there, but
22 I think in general one should think of this from a hearing
23 standpoint in terms of thinking in terms of having to lay a
24 foundation and request admission of everything you want as part
25 not of the docket file but as part of the hearing evidentiary

1 record done via a formal offer at the hearing into evidence.
2 And the commission will then make a ruling upon that. And we
3 have forms, which I could send you guys right now, which we
4 give to all the parties so you can keep track exactly of what's
5 going on and what's been admitted and not admitted. Does that
6 make sense to everybody?

7 MR. WELK: John, but the point of it is, if it's in
8 your file and it's Commission 1 and I make the proper showing
9 on foundation, why should we burden all the other people and us
10 of having to recopy what everybody has that's already in the
11 commission file? I know how to put the evidence in, but why
12 should we be compelled and why should anybody else be compelled
13 to reproduce that when it's already in the commission's file?

14 MR. SMITH: Right, the only reason I could see would
15 be there -- that we keep one copy in the commission file and we
16 have copies and normally I would say that's true, Tom, that
17 with things like the exhibits in these kind of cases, you have
18 the application, which may end up being an admissible exhibit.
19 I don't know. Some of the parties may object to some of it as
20 hearsay. You have the prefiled testimony, which we will have
21 copies of all that, and yes, normally with those things that
22 have been prefiled, we usually don't require parties to bring a
23 whole lot of copies because we all have that. And you guys
24 can -- all we will deal with at the hearing on those things
25 which have been presubmitted is to rule on their admissibility

1 and whether they are going to be admissible in whole or whether
2 there will have to be redactions because of objections or
3 whatever. That's a point well taken, and we can do that if you
4 want to. If you want us to index the file and let you know
5 what's in there, we can do that.

6 What I will say, though, is because -- what happens at
7 these is these documents get referenced over and over and over
8 again and they are used to -- they are subjected to
9 cross-examination, they are subjected to scrutiny and
10 testimony, rebuttal testimony by other parties, that physical
11 copies of everything that we need to have up there will have to
12 be there so that the witnesses and all the multitude of uses
13 that are going to be made of the exhibits, so that we have
14 actual physical copies of that up there so that we have them
15 for use, if that makes sense. But yes, in terms of -- in terms
16 of bringing up 10, 15, 20 copies so that everybody -- I would
17 assume that parties will bring the things that are in the file
18 already, their copies of that, to the extent they have them.
19 And that when they have been marked and entered into evidence,
20 and we could do that, if you are suggesting, Tom, that
21 everything in our file, that we have that premarked, we can do
22 that.

23 MR. WELK: Yep, as Commission 1 through whatever it is
24 and everybody knows what they are ahead of time and they bring
25 their copies and we start from there. We will lay the

1 foundation, but it will just save a lot of trees for people and
2 especially when they know what's there.

3 MR. SMITH: Do you have any objections, Karen?

4 MS. CREMER: No, I don't.

5 MS. GOODPASTER: I don't have objection to the
6 numbering of exhibits. I do have a further question.

7 MR. SMITH: Why don't you go with that. Then I want
8 to get this straight and what each party is going to be.
9 Basically I don't really care, you can call yourselves anything
10 you want to. Beth, shall we go with your question first so you
11 don't forget it?

12 MS. GOODPASTER: That would be helpful to me. My
13 question is related to the killing of trees, I guess, but I'm
14 concerned about having actual copies of the testimony as
15 opposed to 20 e-mails that I'm printing out. And I don't know
16 what the expectation is, I know we have been doing e-service to
17 facilitate things, but I just wanted to clarify that we are
18 going to get paper copies of, say, the applicant testimony and
19 if they also submit it electronically, that's great.

20 MR. SMITH: We provided in the order that at least one
21 copy of that testimony should be provided to what I'd call the
22 counsel of record, the local counsel of record.

23 MS. GOODPASTER: I didn't check that before.

24 MR. SMITH: That should be done. Again, we were
25 trying to prohibit too much paper being done here, and it will

1 be helpful I think once we know like things like prefiled,
2 those I think would be smart to have those prefiled testimony
3 in paper form, because they are very highly probable of
4 becoming exhibits.

5 MS. GOODPASTER: Yes.

6 MR. SMITH: Prior to the hearing, of course. I mean,
7 prior to the preparation of all of the exhibits, it's difficult
8 to know what's going to turn into an exhibit or not until
9 somebody offers it.

10 MS. GOODPASTER: Right.

11 MR. SMITH: I never know. I don't know, Tom, do you
12 have any thoughts on that?

13 MR. WELK: We assumed we would give a paper copy on
14 the prefiled, but one per party, so staff will get one, Beth
15 will get one, Sierra Club will get one, Mary Jo will get one
16 for the respective parties, and we assume we will get one paper
17 copy from them as well. Then you will get the electronic
18 versions.

19 MR. SMITH: That's kind of what we thought and we
20 thought it would save a whole lot on shipping large volumes of
21 paper around all over. Again, it does put some copying burdens
22 sometimes on lots of us, but there's tradeoffs in everything.

23 MR. WELK: John, here is another thing to follow up on
24 Beth. When we make the filing with the commission, I'm not in
25 my office, but we can file one paper copy and then electronic

1 copies as well, or do you want under the rule ten paper copies
2 of the testimony?

3 MR. SMITH: We were trying to avoid having to do all
4 that here. Are we just going to print here, Karen?

5 MS. CREMER: Anybody who would need a copy here can
6 then print it or copy it or whatever. I would just send one.

7 MR. SMITH: That's what we have been doing. Now, the
8 only -- what I provided in the order is that then any party can
9 request paper copies, if it's with respect to some particular
10 thing that you want a paper copy of. Examples of what's good
11 to get paper copies of are things like maps, which are
12 extremely hard, they are probably impossible like for Mary Jo
13 to print, and they are even difficult for us to print. We have
14 to go to DOT and use their huge map printer in order to do
15 that. Things like that. Tabbed, bound documents are tough to
16 take from electronic into paper form. I think common sense
17 here and communication. If people want paper copies of a
18 particular document, request that. Otherwise I think what we
19 are assuming, it's sort of like in the phone business you call
20 reciprocal compensation, we are assuming that paper is going to
21 flow both directions here and that everybody is probably going
22 to be better off if we are not sending huge stacks of paper in
23 both directions.

24 MR. WELK: I think, John -- this is Tom Welk -- I
25 understand. Insofar as the commission filing is concerned, I'm

1 trying to avoid the ten copies. We will file one paper and
2 then we will file everything and then if there's something
3 peculiar like a map or something, we will give the necessary
4 ten copies.

5 MR. SMITH: Exactly, and I think -- do we require ten
6 or four? Ten would probably be good, if it's like something
7 that's going to be tough to reproduce for us, if it's not just
8 text and/or Excel spread sheets and that kind of stuff.

9 MR. WELK: I understand, and everybody else will get
10 one paper copy then.

11 MR. SMITH: Is that okay with everybody? Again, with
12 the understanding if you want to request paper copy of
13 something, you can do that.

14 MS. GOODPASTER: This is Beth. I may be in the
15 position, Tom, of asking for an additional paper copy just
16 because I am -- we are consolidating our parties by having me
17 be the lawyer, but we might need more than one.

18 MR. WELK: Okay. It will be coming out of Todd's
19 office, Beth.

20 MS. GOODPASTER: I will work that out with Todd, then.

21 MR. SMITH: On terms of numbering, you tell me, how do
22 you want to deal with the numbering issue? Do you want to do
23 it with reservations of blocks of numbers or would you like to
24 do it through party identification followed by a number?

25 MR. WELK: We will do it the way that you have used it

1 by party designation with an acronym. Ours will be either OTP
2 or applicant and we will come up with the acronym and use it.
3 Everybody must commit to using an acronym, though.

4 MR. SMITH: Are you guys all okay with that? I don't
5 know, Beth, are your people going to be submitting exhibits for
6 each entity separate already or will those be common to all of
7 your entities?

8 MS. GOODPASTER: This is Beth. We will be doing
9 things jointly and so we will pick a lead intervenor in our
10 group to use it for an acronym.

11 MR. SMITH: That would be great. Then Sierra Club, is
12 there a problem with that?

13 MR. NARAYAN: No, no problem.

14 MR. SMITH: That sounds von da bar (phonetic). One
15 last thing that we have had -- the reporter didn't like my
16 German -- one last thing, too, I'll just note so you guys think
17 about this, and that is exhibits to be prefiled and how that
18 interplays with hearing exhibits. That has caused some
19 confusion before. Maybe we don't need to resolve that right
20 now, but you might want to think about that when you are
21 preparing your exhibits to testimony and how that's going to
22 fit in with your presentation at the hearing.

23 MS. CREMER: Well, in the past, John, a lot of times
24 it could be Staff's Exhibit 1 and then what we generally do is
25 we call it like Tim Gates attachment one as opposed to an

1 exhibit. To me you have your exhibit and then you have
2 attachments to your exhibit and so we would refer to it as
3 Gates attachment one. But that's how we have done it.

4 MR. SMITH: Any thoughts on that? I really don't know
5 that we care. It's just something to think about when you are
6 putting your attachments or exhibits to prefiled, is that
7 eventually that prefiled itself will become an exhibit and
8 sometimes there's issues and you might want to think about
9 factoring in some of those exhibits to prefiled within your
10 exhibit scheme.

11 MR. WELK: I know this might create a situation with
12 someone as multiple, but what cries out to me is if it's OTP,
13 then you make the attachments A, B, C, D.

14 MR. SMITH: That sounds good, something like that
15 works good. Then you got 1A, 1B, yep, that sounds like a way
16 to do it.

17 MR. WELK: 1A, OTP 1B and then there will be an OTP2.
18 If somebody has more than 26, attachments you are in the double
19 As, but that would be limited.

20 MR. SMITH: You will sound like a Missouri county
21 road. Do you guys -- any other matters that we need to
22 discuss?

23 MS. GOODPASTER: This is Beth, none from my end.

24 MR. SMITH: Sanjay?

25 MR. NARAYAN: None for me.

1 MR. SMITH: Otter Tail?

2 MR. WELK: Anything, Todd or Chris, we haven't talked
3 about that I have missed?

4 MR. MADSEN: I don't have anything else. We have
5 covered everything on the agenda that I had.

6 MR. GUERRERO: This is Todd Guerrero. The discussion
7 regarding the exhibits, et cetera, that will be in the draft
8 order?

9 MR. SMITH: Yes. I'll put something in there on that.

10 MR. GUERRERO: Thank you.

11 MR. SMITH: Thanks very much, and again, I apologize
12 for the glitch on the hearing, but I think we got it resolved
13 and hopefully things will go well. Appreciate your time.

14 (Whereupon, the proceedings were concluded at 3:30
15 p.m.)

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STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF HUGHES)

I, Carla A. Bachand, RMR, Freelance Court Reporter
for the State of South Dakota, residing in Pierre, South
Dakota, do hereby certify:

That I was duly authorized to and did report the
testimony and evidence in the above-entitled cause;

I further certify that the foregoing pages of this
transcript represents a true and accurate transcription of my
stenotype notes.

IN WITNESS WHEREOF, I have hereunto set my hand on
this the 3rd day of March 2006.

Carla A. Bachand

Carla A. Bachand, RMR
Freelance Court Reporter
Notary Public, State of South Dakota
Residing in Pierre, South Dakota.

My commission expires: June 10, 2006.