

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

=====

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 Pre-Hearing Conference
June 20, 2006

=====

COMMISSION STAFF

ORIGINAL

JOHN SMITH
KAREN CREMER

APPEARANCES VIA TELEPHONE (continued on next page)

THOMAS J. WELK and CHRISTOPHER W. MADSEN,
BOYCE, GREENFIELD, PASHBY & WELK,
Attorneys at Law, P.O. Box 5015,
Sioux Falls, South Dakota 57117,
appearing on behalf of Big Stone II;

TODD J. GUERRERO and DAVID L. SASSEVILLE,
LINDQUIST & VENNUM, Attorneys at Law,
80 South Eighth Street, 4200 IDS Center,
Minneapolis, Minnesota 55402,
appearing on behalf of Big Stone II;

PETER GLASER,
TROUTMAN SANDERS LLP, Attorneys at Law,
401 Ninth Street NW, Suite 1000,
Washington, D.C. 20004,
appearing on behalf of Big Stone II;

1 APPEARANCES (cont.)

2 ELIZABETH GOODPASTER,
 Attorney at Law, Minnesota Center for
 3 Environmental Advocacy, 26 East Exchange Street #206,
 St. Paul, Minnesota 55101,
 4 appearing on behalf of Minnesota Center for
 Environmental Advocacy, Izaak Walton League of
 5 America - Midwest Office, Minnesotans for an Energy
 Efficient Economy and Union of Concerned Scientists;

6
 7 MICHAEL D. O'NEILL,
 JOHNSON, PROVO, PETERSEN, LLP, Attorneys at Law,
 332 Minnesota Street, First National Bank
 8 Building, Suite West 975, St. Paul, Minneosta 55101,
 appearing on behalf of Minnesota Center for
 9 Environmental Advocacy, Izaak Walton League of
 America - Midwest Office, Minnesotans for an Energy
 10 Efficient Economy and Union of Concerned Scientists;

11 MARY JO STUEVE,
 196 East 6th Street #401, Sioux Falls,
 12 South Dakota 57104,
 appearing pro se.

13 Reported by Carla A. Bachand, RMR, CRR

14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25

1 TUESDAY, JUNE 20, 2006

2 MR. SMITH: Why don't we convene the meeting and get
3 started. The thing before we get on the items that I had
4 listed and that you all may have, one logistical item I wanted
5 to bring up. I discussed with Carla today whether she had made
6 preparations for daily transcribing and she has. She advised
7 me as of this point the only party that has requested such
8 service are the applicants. And I guess I was just curious
9 that if, just in fairness to Carla, if either staff or any of
10 the intervenors want that, that we should probably make those
11 arrangements now so that -- or soon and commit to that.

12 MS. CREMER: I won't need them, Carla, because I won't
13 be able to read them anyway.

14 MR. SMITH: You could just work all night.

15 MS. CREMER: I could, but I won't.

16 MS. STUEVE: This is Mary Jo, John, and a question I
17 would have, do these transcripts eventually get posted?

18 MR. SMITH: Yeah, eventually we will -- a transcript
19 will be available and it probably -- we were just talking about
20 that with Carla. You know, in the case of somebody like you, I
21 think we can make an arrangement to make sure you can get one,
22 Mary Jo.

23 MS. STUEVE: Okay.

24 MR. SMITH: Ultimately they probably will. Normally
25 we try, because of the needs of the reporter to make a living,

1 not to deprive the reporter of the ability to make her money
2 off of transcript orders, but you know, I think we can work
3 that out to where we can make sure that you have access to a
4 transcript and also that hopefully we can, because of the
5 nature of the case, we can maybe get that published --

6 MS. STUEVE: Okay.

7 MR. SMITH: -- on line.

8 MS. GOODPASTER: This is Beth Goodpaster. I don't
9 think we need the daily service that has been offered, but I
10 did have the same question as Mary Jo about -- or a similar
11 question as to when the nondaily transcript might be available.

12 MR. SMITH: I discussed that a bit with Carla this
13 morning. It seemed to me that you were assuming, Carla, and
14 she's got to take her own testimony here, but as I understand
15 it, you were planning on a rapid turnaround on this. What were
16 you thinking in the way of time? Can we go off the record for
17 a minute, guys?

18 (Discussion held off the record.)

19 MS. GOODPASTER: Right. I think we are just going to
20 try to take really good notes and our briefs will not be able
21 to have references from the transcript, given the timing of the
22 briefing is so --

23 MR. WELK: Beth, we can't hear you, you are fading
24 away.

25 MS. GOODPASTER: All I was saying is that I think we

1 are going to forego a transcript, given that the briefing
2 schedule is so close behind the hearing.

3 MR. SMITH: Okay. I mean, again the transcripts,
4 there will be a transcript that will be effectively done almost
5 simultaneously with the end of the hearing, it just won't quite
6 contain all the bells and whistles, which are very useful,
7 especially in a week long transcript, the word index and that
8 kind of thing, as I understand it, Carla, that's what you can't
9 have done right away.

10 (Discussion held off the record.)

11 MS. GOODPASTER: The only consequence I guess to our
12 not having a transcript, besides from it being nice, the fact
13 that we won't in our brief have specific cites to a transcript,
14 so I guess it's more of a question for John whether that's
15 acceptable. Normally we would have cites to a transcript, but
16 if we don't, is that okay?

17 MR. SMITH: Oh, absolutely, I don't think we are going
18 to nitpick that kind of thing and we obviously have to deal
19 with the realities the way they are and if we don't have the
20 ability to cite to specific pages, that's going to have to
21 suffice. I don't know, Tom, do you have an observation on that
22 or anyone from your team?

23 MR. WELK: I don't. It's your peril, you can say what
24 you want if the transcript doesn't support it, but nobody is
25 going to make an objection that you don't have the transcript.

1 You are going to do the best you can and try to represent what
2 it is and sometimes all of us have known that our recollection
3 is sometimes different from the transcript, but you are going
4 to do the best you can and we are not going to raise any
5 objections that any brief doesn't contain the transcript
6 reference.

7 MS. GOODPASTER: Thanks. Our intent would be to take
8 extremely good notes during the hearing.

9 MR. WELK: I think, Carla, the message for you is
10 don't screw up your 4th of July weekend. After you get back
11 from that, if you would get that out reasonably promptly,
12 that's going to be good enough.

13 MR. SMITH: Okay. That's out of the way. Do the
14 parties have any -- I sent out just a suggested agenda. Do you
15 want to go in that order or how do you want to deal with this?

16 MR. WELK: That's fine. We have some other issues,
17 but they are more housekeeping matters that can wait till after
18 your agenda has been exhausted, John.

19 MR. SMITH: Shall we start, then, with -- and again,
20 this came about -- well, there's a couple of things here.
21 Starting out, where are we at in terms of the parties being
22 able to stipulate to admissibility of prefiled testimony and
23 exhibits thereto? I just thought we would bring that up as a
24 discussion item. I'm not suggesting or trying to muscle
25 anybody to do anything, but I'm just wondering kind of what the

1 lay of the land is and whether we could cut some time out
2 through not having at least to go through too much in the way
3 of foundation and that kind of thing.

4 MR. WELK: John, maybe it would be helpful especially
5 for those that have not been in front of the commission to
6 outline again the typical way it works.

7 MR. SMITH: Sure, I will do that. Normally what
8 happens with respect to prefiled testimony, and now we are
9 down, that's an agenda item, presentation of prefiled
10 testimony. We don't normally go through a ridiculous amount of
11 foundation. Normally what we do is we basically go through a
12 fairly simple foundation process where the witness verifies
13 that that is in fact testimony that was prepared by him in
14 advance of the hearing and that that testimony would remain
15 unchanged to the present time or the time at which he's
16 testifying and that he would testify essentially precisely the
17 same if he had been called that day to give his direct
18 testimony. And ordinarily that's most of what goes into just
19 the original foundation of admission of prefiled testimony.

20 And generally speaking, with respect to sometimes when
21 there are technical exhibits or whatever about which a party
22 may have additional foundation, I guess, required for that, I
23 guess I can ask you guys that, because they were filed as
24 exhibits here, would you want -- are there situations here
25 where you feel like more of a foundation is required before we

1 go to that? Would you like to do just the testimony per se in
2 the first instance and then lay the foundation for each exhibit
3 separately?

4 MR. WELK: John, this is Tom Welk. I would say that
5 on behalf of the applicant, that the normal process would be
6 acceptable. If we have a particular objection, for example,
7 somebody put in a newspaper article that we would object on the
8 grounds of hearsay or something like that, which has happened
9 in the past, I think we would deal with those particular
10 exhibits at the time of the proffer of the testimony. And if
11 there is a motion to strike a particular portion of that, in
12 the past that's when we have raised those issues.

13 MR. SMITH: Does everybody understand that, then? I
14 notice some of the testimony, and I haven't read all of it, but
15 some of it has several exhibits. The idea, as I understand it,
16 is if you have objections, again this is just objections to
17 admissibility on the basis of either foundation or whatever,
18 that the foundation contained in the testimony is inadequate or
19 some other objection, that those be made at the time the
20 testimony is offered.

21 MR. WELK: John, for those that we are going to have,
22 at least we have been telling our witnesses that after the
23 proffer has been made, that they can then summarize in a
24 narrative fashion their testimony consistent with what's been
25 received.

1 MR. SMITH: That's exactly right. That's our normal
2 process, is once the testimony has been admitted, then we give
3 the witness -- we like to keep it pretty brief, brief to some
4 witnesses is very different than it is to others, and it's
5 usually not the attorney's fault, but we have just seen that
6 over the years, that to some people brief is a long time. But
7 I think we want to keep it relatively brief, but the purpose of
8 doing that, of allowing them to summarize, is to keep the sort
9 of oral order of proof normalized with respect to what the
10 commission hears, if that makes sense. And that way we don't
11 immediately set things up in the negative by starting with
12 cross-examination.

13 MR. WELK: This is Tom Welk again. For the
14 information of all counsel, we have at least directed our
15 witnesses to not have more than ten minutes, some will
16 obviously be much less, but that has been the guideline we have
17 provided, if that's any help to other counsel.

18 MR. SMITH: I think that's a reasonable time. Some of
19 the testimony may even, from what I've read, may require less
20 than that, but that's a good guideline. Beth, any thoughts?

21 MS. GOODPASTER: My only thought on that was just a
22 clarification that as each witness is taking the stand, I
23 assume we are having them talk about all of the testimony they
24 have put in as opposed to just their direct.

25 MR. SMITH: Tom, how do you want to do that?

1 MR. WELK: In order to expedite this, otherwise we
2 will be there forever, I think we will collapse those, Beth,
3 into rebuttal. In other words, if witness A has both a direct
4 and a rebuttal, they would collapse those so that they could do
5 a summary of both.

6 MS. GOODPASTER: Okay.

7 MR. WELK: So we don't have to get them back up again.

8 MR. SMITH: Are there any -- staff, do you have any
9 objection or comments on that?

10 MS. CREMER: No.

11 MR. SMITH: Okay, I think that's a good thought.

12 MR. WELK: As to the admissibility, John, we would
13 want to have the draft EIS stipulated in.

14 MR. SMITH: I saw where you had made a motion.
15 Because we don't have any commission action between now and
16 then, Tom, and I got two commissioners out of state, what I
17 thought is we would just do that as a first order of business.

18 MR. WELK: Does anybody have any objection on this
19 call of admitting that?

20 MS. STUEVE: I do have an objection, yes.

21 MR. WELK: What's your legal objection? Who is this?

22 MS. STUEVE: This is Mary Jo.

23 MR. WELK: What's your legal objection, Mary?

24 MS. STUEVE: I do not know what my legal objection is
25 because I have not studied the law on this, but I do know this

1 is not the record of decision and it's missing the public input
2 as far as what could, should be in there, and I would not have
3 objections if we could include the transcript from the PUC
4 public hearing in Milbank and the transcript from the public on
5 the draft EIS from this last week public hearing. So if we
6 could include admissibility with no objections to those two
7 pieces, at least we would be able to acknowledge public
8 comment, because this is not a final document.

9 MR. WELK: Let me think about that one.

10 MR. SMITH: We have the transcript here and available
11 of the public input meeting in Milbank.

12 MR. WELK: I think she's talking about the draft EIS.

13 MR. SMITH: I think both, Tom.

14 MS. STUEVE: Right, both.

15 MR. SMITH: We have got the one here and that hearing
16 is a legally required hearing. I guess my gut feeling is I
17 believe the commission can take judicial notice of what
18 occurred at its own public input hearing.

19 MR. WELK: I don't have any objection to that, John.
20 I think, Mary Jo, aren't you talking about the hearings that
21 are now under way on the draft EIS?

22 MS. STUEVE: Actually I'm talking about both. Both
23 the Milbank, because they do tie in.

24 MR. WELK: We don't have any objection on the Milbank
25 because it is required by South Dakota statute. My only pause

1 has to deal with the hearings that are proceeding outside of
2 the commission's jurisdiction and whether those ought to be
3 included and I just want to think about that.

4 MS. STUEVE: Okay, and one comment I might make to
5 that would be that I do know -- I don't know, I can't cite
6 where under the South Dakota law, but part of the process was
7 there wasn't to be a duplicate of the Environmental Impact
8 Statement and when the interconnection request was made, it
9 seems like it triggered the Environmental Impact Statement
10 coming from WAPA and EPA, the federal, so then the state did
11 not need to duplicate that, and that would be my basis for
12 wanting to have the public hearing comment thus far, and it
13 would not even include all of it because it's actually open
14 until July 3rd. So it would just be the oral comments that
15 were taken and the transcripts were made and will be made
16 available also.

17 MS. CREMER: Take that up the first day.

18 MR. SMITH: Pardon me?

19 MS. CREMER: I would suggest we can take that up the
20 first day.

21 MR. SMITH: Let me ask, are those transcripts
22 available yet?

23 MS. CREMER: That's what we are going to have to find
24 out because I don't know that they even -- I don't know that
25 those are transcribed, do you know, Mary Jo?

1 MS. STUEVE: Yes, they are transcribed and they did
2 give a means or a way and I have got it in notes or somebody
3 does as far as people having access to those as soon as they
4 were released. It was a legal process or they had
5 transcription.

6 MS. CREMER: Is there a cost associated with that?

7 MS. STUEVE: I do not know. For the public and the
8 citizens, I believe one needed to just put down a request. So
9 I do not believe so. The gal that did the transcribing was
10 actually out of Watertown and I could get her name, too. I
11 don't have it right now. Watertown, South Dakota that is.

12 MS. CREMER: Well, I think if you want it in, you
13 should probably do that.

14 MS. STUEVE: Okay.

15 MS. GOODPASTER: This is Beth Goodpaster and I just
16 would like to speak in support of Mary Jo's comments. I don't
17 object to -- I don't see an objection to taking judicial notice
18 of the draft EIS, given that the judicial -- all that could be
19 noticed is that it is a draft, but it does seem appropriate to
20 take additional judicial notice on comments on a draft and I
21 would say also the written comments that will be coming in on
22 the draft that will come in prior to the commission's
23 deliberations on the 14th.

24 MR. SMITH: Okay, well, I think we have explored that.
25 Should we just let that go over until -- again, just one final

1 thought, and I think you said it accurately, Mary Jo. It's one
2 thing for the commission to take judicial notice of the draft
3 EIS, right? By doing so, the commission doesn't take judicial
4 notice that every single thing stated in that EIS is true or
5 false. It's a public document as part of a required process
6 under federal law. And to me that's something that probably is
7 judicially noticeable. I certainly know that a transcript of
8 our own proceedings is judicially noticeable. That
9 notwithstanding, the legal effect of the admission of those is
10 another matter and I think that's what you are getting at,
11 Beth.

12 MS. GOODPASTER: Yes.

13 MR. SMITH: As to what significance that has.

14 MS. GOODPASTER: Right.

15 MR. SMITH: You guys can argue about that and the
16 weight various things should be given based upon their status.
17 At the Milbank meeting there was no cross-examination, for
18 example. I think that's something that goes to the weight
19 afforded statements when there's no opportunity to test them.
20 Is that a reasonable way to look at it? Tom?

21 MR. WELK: Yeah, that's fine. We'll get back to it.
22 I want to talk with the rest of the people whether we have any
23 problem on the other EIS public hearings, but I'm satisfied the
24 draft EIS is going to be subject to judicial notice. The
25 question is whether the other transcripts will come in.

1 MR. SMITH: Great. Anything else on the prefiled?
2 Again, we'll do what we have to at the hearing to shepherd this
3 along and allow people to -- allow this to happen in a way
4 that's fair I think to everyone. Any other questions on that?
5 Maybe we move along, then, to the next -- are there going to be
6 exhibits that -- are there going to be exhibits that parties
7 are planning to present as of this point in time that are not
8 included in the prefiled? Is there any of that?

9 MR. WELK: John, there may be impeachment exhibits and
10 one of my questions was, for everybody, how many copies of any
11 exhibit that's not previously been furnished does anyone need
12 to bring to the hearing? So if there, for example, is an
13 impeachment exhibit, how many copies should we have of that to
14 be distributed?

15 MS. CREMER: Tom, staff would need two.

16 MR. WELK: Two, okay. I was just thinking the
17 commissioners, John, you got the original, the commissioners
18 and John, two for the staff, the applicant, I think we would
19 like to have two, MCA, would you like two or one?

20 MS. GOODPASTER: We would like two.

21 MR. WELK: Two, and Mary Jo would have one. So is
22 that around 10?

23 MR. SMITH: Probably. Could we add one more, because
24 I have got Greg Rislov, who is the technical person.

25 MR. WELK: Should we say a dozen so we don't worry

1 about we have forgotten somebody?

2 MR. SMITH: It's a nice round number. We have copying
3 facilities here at the commission. If we have problems, we
4 have accommodated that many times here to allow exhibits to be
5 copied if that becomes necessary.

6 MR. WELK: I wanted to know so if somebody is going to
7 put an exhibit in, we assume that everybody is going to have
8 copies of everything else, so this would be new materials you
9 would have a dozen copies of any exhibits that you would offer
10 at the hearing.

11 MR. SMITH: Everybody okay? We included one for the
12 reporter in there, right?

13 MR. WELK: Yeah, that will be enough to cover and I'm
14 sure it's probably one or two more extra but that's kind of the
15 going number, that way everybody can have what they need.

16 MS. GOODPASTER: This is Beth Goodpaster. That sounds
17 fine. I wanted to interrupt by letting you know Mike O'Neill
18 did come in a few minutes ago.

19 MR. SMITH: Okay. Hi, Mike.

20 MR. O'NEILL: Hello.

21 MR. MADSEN: This is Chris Madsen and for Dawn's
22 benefit, I want to make absolutely clear that between the
23 parties and the court reporter, we are talking about a total of
24 13 copies of any exhibits.

25 MR. SMITH: Is that right? That's fine. Thirteen.

1 MR. MADSEN: I just want to make sure since Dawn is
2 going to be the one that's going to have to crank them out for
3 us.

4 MR. SMITH: Okay. What shall we go to next? I had
5 put stipulations and all that. I think maybe have we -- is
6 there really any need to talk about that given the way we have
7 discussed this?

8 MR. WELK: There is one stipulation, John, this is Tom
9 Welk, regarding the three witnesses to date that everybody have
10 agreed that they do not have to testify, and Chris has
11 circulated that. And so that's the only one that's out there.
12 It's our understanding that those three witnesses, which were
13 witnesses Pint, and who are the other two, Chris?

14 MR. MADSEN: Anne Ketz and Janelle Johnson.

15 MR. WELK: Johnson and Ketz, the archaeologist, the
16 finance person from Otter Tail, and Tina Pint, the geologist.
17 We will be submitting affidavits on those people because there
18 was no one that had any questions, so there was a written
19 stipulation that circulated and we are proceeding on the
20 assumption that at this point in time, those three witnesses do
21 not have to appear.

22 MR. SMITH: Is that correct, intervenors and staff?
23 That's my recollection.

24 MS. STUEVE: This is Mary Jo, and Tom, did you receive
25 my signature via mail agreeing to that?

1 MR. WELK: I don't know, I haven't seen it.

2 MS. STUEVE: I did put it in the mail and I had also
3 sent back an agreement.

4 MR. WELK: That's fine, Mary Jo. If it's in the mail,
5 that's fine. I want to make sure today on the record everybody
6 has agreed to it. We will catch up with the signatures later.

7 MS. STUEVE: Okay.

8 MR. MADSEN: This is Chris Madsen and just to let you
9 know, if you had not seen that stipulation, if for some reason
10 the commissioners themselves would have some desire to ask some
11 question of these witnesses, with probably a little bit of
12 notice, I can arrange for them to be available telephonically.

13 MR. SMITH: These are the people, are they not, that
14 we discussed a week or so ago or a couple weeks ago? Is that
15 the same three we are talking about?

16 MR. MADSEN: I don't recall discussing them.

17 MR. SMITH: I mean e-mail, we had an e-mail exchange.

18 MR. WELK: Yes.

19 MR. MADSEN: Correct.

20 MR. SMITH: I sent a question out identifying the
21 exhibits and the witness names and requested of the
22 commissioners that they get back to me with whether they felt
23 that with those witnesses they needed them physically present,
24 and they all answered no. So as far as I'm concerned, the
25 answer is still no on that. So I think the answer is no, they

1 don't have to be there. I think we can consider that done.
2 That's it. Any other stipulations the parties want to discuss
3 prior to the hearing?

4 MS. GOODPASTER: This is Beth. I don't have any.

5 MR. SMITH: Hearing nothing, then, do we want to move
6 on, then, to whether or not there are any other witnesses in
7 this -- in the particular category that led to those three
8 stipulations? In other words, parties, or witnesses, excuse
9 me, for which the parties have no intention to conduct
10 cross-examination, of whom.

11 MR. WELK: Well, the applicant, we probably have no
12 and would probably waive any cross-examination for Michael
13 Madden. I did talk to Karen, but I think he's coming anyway.
14 But just to let you know, I don't think we are going to have
15 many questions for him.

16 MR. SMITH: Any other ones or are we assuming there
17 will be cross-examination at least at this point probably of
18 everybody else?

19 MS. GOODPASTER: This is Beth Goodpaster and there are
20 some that we could forego cross of, but I guess I was wanting
21 to know first whether -- if there are -- I don't know how to
22 phrase the question, but basically wondering if there are
23 people who are going to be appearing regardless, the witnesses,
24 regardless of whether they are going to be crossed.

25 MR. SMITH: I see. Tom, did you get that?

1 MR. WELK: I think I understand the import, and for
2 example, John Lee might be one of those, if people have no
3 questions, he's probably a guy, because of his role in the
4 application, that would be there, Beth, if that's what you are
5 asking for.

6 MS. GOODPASTER: Yeah. If there's others, that would
7 be helpful.

8 MR. WELK: I think it's incumbent. I mean, I
9 circulated, John, I don't know if you got the e-mail I
10 circulated around noon today.

11 MR. SMITH: I do have it in front of me.

12 MR. WELK: We have put together a list for everyone
13 and at the present time, with the three witnesses that we
14 previously discussed, we have 29 witnesses, and some of these
15 people, frankly, there were some questions that were raised and
16 I think about Andrew Skoglund, for example, on noise, a very
17 limited amount. There was a question raised by staff. We
18 hopefully have addressed it in the surrebuttal, so I hope we
19 are not paying someone to come all the way up there to verify
20 their testimony and there's no questions and we have paid
21 somebody for a day or so to sit around, and that's what I'm
22 looking to try to avoid.

23 MS. CREMER: I would just say with your noise guy that
24 I'm guessing the commissioners will have questions of that
25 because that always seems to be a big thing with them. You

1 know, we may have one or two questions, depending on what the
2 intervenors ask, but I would think that would be one the
3 commissioners always have an interest in.

4 MR. SMITH: I would concur with that with Karen. Even
5 if they end up not having questions, they have taken such a
6 beating before on noise that --

7 MR. WELK: That's fine.

8 MR. SMITH: -- I think he should be there.

9 MR. WELK: I'm more interested in others who have
10 now -- I'm not trying to press someone to say, look, you know,
11 I'm not going to do that now, but it would seem to me by now
12 you would know whether there is any substantive cross on some
13 of these witnesses and make a representation. This is a
14 tremendous amount of time and money we are spending bringing
15 these people in and in fairness to us, I think that counsel
16 need to step up and say, well, look, I don't know but at least
17 I think I'm going to have a few. I'm not asking you to
18 disclose what it is or anything like that, but I'm only asking
19 for a good faith representation of counsel on whether they
20 intend to cross-examine or not.

21 MS. GOODPASTER: This is Beth Goodpaster and I can say
22 that we wouldn't have had anything for Andrew Skoglund, but it
23 sounds like he's going to be there, and I can name a few
24 others, if that would be helpful at this juncture.

25 MR. SMITH: It might be. And again, Beth, I think if

1 it turns out that they don't have to come, that's great. If
2 they are going to be there, I don't think -- you are not giving
3 away anything here and same way with you, Karen.

4 MS. GOODPASTER: Why don't I go ahead, then.

5 MR. SMITH: Sure.

6 MS. GOODPASTER: We thought that we don't need to have
7 Daniel Jones from BARR there, given that John Lee is going to
8 be there and their testimony in some respects overlaps. So we
9 were going to let Daniel Jones go if nobody else needed him.
10 And Dick Edenstrom. And then there were -- there's I believe
11 David Geschwind and Andrea Stomberg at MDU respectively. There
12 are other witnesses for those companies that would suffice.

13 MR. GUERRERO: Ms. Goodpaster, this is Todd Guerrero.
14 We couldn't hear you on that last part. Could you repeat that,
15 please.

16 MS. GOODPASTER: Yeah, David Geschwind and Andrea
17 Stomberg, and I then said that there were other witnesses for
18 those applicants, so it seemed like we could go without
19 Geschwind and Stomberg.

20 MR. SMITH: I'm just looking at this and I'm not
21 nearly as familiar with this. Oh, I see, you got Mr. Nguyen
22 down at the bottom for MDU.

23 MS. GOODPASTER: Right. There's another SMMPA, Larry
24 Anderson for SMMPA.

25 MR. WELK: Beth, looking at the order of witnesses,

1 I'm just looking at that column that was circulated, is that
2 five, six, 12, 15 and 25; is that what you are saying?

3 MS. GOODPASTER: Everything but 25.

4 MR. WELK: So 25 you do want?

5 MS. GOODPASTER: Yes.

6 MR. WELK: So five, six, 12 and 15?

7 MS. GOODPASTER: Right, we would have put 13 in there,
8 but somebody else wants them.

9 MR. WELK: Right.

10 MR. SMITH: Then they will end up not asking anything,
11 but I don't know. I think he should be there. Again, this is
12 a little different, Karen, because this plant's right next to
13 another big plant than what we have had in some other cases.

14 MS. CREMER: Right, but I still think for your benefit
15 you will want him there. I would agree, those were a couple of
16 the names I had marked. I had not marked all those because I
17 didn't know what Otter Tail needed to make their case-in-chief.

18 MR. SMITH: Their testimony will be admitted, right?

19 MS. CREMER: Right, their testimony will be in there
20 and all that, but I didn't know what you needed the commission
21 to hear, so those make no difference to me. Dick Edenstrom I
22 think was one that certainly doesn't need to be there.

23 MR. SMITH: And Andrea, if the other fellow down here
24 is more -- Andrea's testimony was pretty general on just the
25 resource planning, that kind of thing. Any thoughts on that,

1 then?

2 MR. WELK: Well, I think what we'll do, and I
3 appreciate counsel's representation, we will take a look at
4 David Geschwind, Andrea Stomberg, Daniel Jones, Dick Edenstrom
5 to make sure it's not part of our case and we will correspond
6 by e-mail and if we have reached the conclusion they are not
7 part of like a John Lee that we think needs to be there, we
8 will let people know and then we will just prepare the
9 affidavits that Chris has been preparing for the other three.
10 And if for some reason they are going to be there, we will let
11 you know, but it will be our decision, then, that we needed
12 them for our presentation.

13 MR. SMITH: Okay. I think legally if you feel you
14 need them, they are going -- they are part of the evidentiary
15 record.

16 MR. WELK: I appreciate we are just trying to cut time
17 and this will be helpful and I appreciate counsel working with
18 us on that.

19 MR. SMITH: Are there any of these situations with
20 respect to intervenors? You have said Mr. Madden, but staff,
21 you intend to have him there.

22 MS. CREMER: I do. I think after all this, we will
23 just have him --

24 MR. SMITH: Give his song and dance?

25 MS. CREMER: Yep.

1 MR. SMITH: Any of those, Tom or Chris or whomever,
2 Todd, that you see on the intervenor list? Again, there's not
3 nearly as many on there.

4 MR. WELK: No, I think our intention is to
5 cross-examine them.

6 MR. SMITH: Okay, so we are done with that item.

7 MS. GOODPASTER: This is Beth Goodpaster and I would
8 just add that we might, in the next couple of days, have
9 further updates on that, but we won't go back on what I said.

10 MR. O'NEILL: We may add more to the list depending
11 upon -- we are just going through.

12 MR. SMITH: Okay, I hear you, yeah. Okay.

13 MS. CREMER: This is Karen Cremer from staff. The
14 local review committee report needs to come in. I've talked to
15 those people up there that prepared it. They don't really want
16 to come down here, so I think that should just be one of those
17 exhibits on the first day, if nobody objects, we just put it in
18 the record. The statute requires that it be filed. It doesn't
19 say that it has to be presented in person or anything, unless
20 somebody wants or believes that they will be cross-examining
21 the people that put that together, that would be -- again, it's
22 not staff's exhibit, it's not -- it's something that's required
23 by statute. So if you want them, you will have to let John
24 know and somebody will make arrangements to have them here.

25 Then the only other witnesses that staff can foresee

1 calling, and I've told you all this at least twice before, if
2 not more, will be if somebody, for some reason, attacks,
3 attacks in a very general sense, DENR's process or how they do
4 what they do under air and water quality. That's nothing
5 anybody here can address, but we will call witnesses then from
6 DENR to come over and protect their own program.

7 MR. SMITH: I'm hearing deadly silence, deathly
8 silence. Could you guys hear Karen?

9 MS. GOODPASTER: Beth Goodpaster, and I heard and my
10 silence was just not understanding what she was referring to.

11 MR. SMITH: I think she's -- we never know what's
12 going to happen I think is what I heard her say and if it turns
13 out that, again, that somebody can in fact attack the DENR
14 process and there's not an -- an objection to it isn't
15 sustained, that she may have to call persons from DENR who
16 would then rehabilitate what they do over there.

17 MS. CREMER: Right. What I'm saying is staff and our
18 experts cannot in any manner address DENR's regulations or how
19 they determine what they do in permitting or anything like
20 that. That's just nothing that we would address. And if
21 somehow it becomes an issue, which I don't believe it would,
22 but if it somehow did, those would be the only other witnesses
23 staff would be calling.

24 MS. GOODPASTER: I understand that, that's fine.

25 MR. SMITH: Any thoughts from applicants or Mary Jo

1 relative to that?

2 MR. WELK: No, we understand that. Karen has told us
3 that before and we understand that those witnesses need to be
4 called or that's acceptable to us.

5 MS. STUEVE: Second round of explanation helped me out
6 a lot, thanks, Karen.

7 MR. SMITH: Next issue, are we on order of
8 presentations, then?

9 MR. WELK: Yes.

10 MR. SMITH: Tom, you have sent us a written document
11 and this is your proposed --

12 MR. WELK: Witnesses that how they would appear so
13 that counsel could prepare. Now, of course we will, as a
14 courtesy, notify any changes. I'll belay the point for a
15 little bit. We have an issue with one witness because of
16 medical issues, but we wanted people to know this is how we are
17 telling people to appear and as you might suspect, with 29, now
18 I guess we are down to 24 or 25 witnesses, telling when people
19 to show up. So just so that everybody knows sort of the
20 calculation, if each one of these witnesses took ten minutes
21 for a summary, you can figure out how much our direct would be,
22 and so what we are trying to figure out is, and I wanted to ask
23 that the other parties, and I'm not holding you to you are
24 going to cross-examine in 45 minutes or 55 minutes because I
25 think that's not fair. But we wanted just a level of magnitude

1 here how we should plan for people to show up. We are really
2 just telling people, and we have got 25 people out there and we
3 are telling them we don't know, except for the beginning
4 witnesses, what days to show up. And so it would be helpful at
5 least on a 100,000 foot level if you tell us, and I did see I
6 got Beth's e-mail that said we are thinking about a day and a
7 half or two cumulative cross, that's helpful. Are we still on
8 that so we can -- or do you want to have specific people show
9 up on given days? We would like to talk about those issues.

10 MS. GOODPASTER: This is Beth. You are asking me?

11 MR. WELK: Yeah, I am assuming, Beth, and maybe I'm
12 wrong, that your clients are going to have probably the longest
13 cross-examination.

14 MS. GOODPASTER: Probably.

15 MR. WELK: So I think the way that this normally works
16 is once the witness has concluded their summary, the cross will
17 be tendered and, John, I assume -- I don't know how the order
18 will go, you will determine that, but we just wanted, if we
19 should have witnesses one through six available for day one and
20 you can say, well, I'm going to have my longest cross is going
21 to be with Mark Rolfes and Terry Graumann, I think I'm going to
22 take the rest of the day so you can have those other people
23 show up the next day.

24 MS. GOODPASTER: Yeah, and I would like to be able to
25 give you more guidance on that than I am able to. I don't have

1 a good sense right now about that. As far as the most I could
2 tell you was what I e-mailed you, was a cumulative amount, and
3 I'll know more as the week progresses. So the only thing I was
4 wondering about as far as timing was wondering whether you had
5 a preference for when Randall Stuefen testifies, because we
6 would want Marshall Goldberg, our witness, to be there then and
7 conceivably follow soon thereafter, once we get through. For
8 example, putting Randall Stuefen at the end of your list
9 instead of in the middle where he is.

10 MR. WELK: He can't because he's got commitments.
11 I've already talked to him and he has a commitment on
12 Wednesday. He's been told to be there Monday night and his
13 expectations is he will testify on Tuesday.

14 MS. GOODPASTER: That's exactly the information I was
15 hoping to understand. Thanks.

16 MR. WELK: Right now we just -- I mean, on the first
17 day, for example, can we get any help on knowing if Mr. Uggerud
18 and Rolfes and Graumann and Lancaster will be all the witnesses
19 required for day one or do you want us to have all these people
20 just sitting in a room ready to go?

21 MR. O'NEILL: It's very likely -- this is Mike O'Neill
22 talking -- that we would be through cross-examination of more
23 than four witnesses. If we are trying to knock off potentially
24 25 in a matter of two days, it seems like we are working on the
25 cross based upon the information that we have received and we

1 are trying to get a better sense, but I think what we are going
2 to find is that we are endeavoring to have less cross and more
3 witnesses come through on Monday and Tuesday.

4 MR. WELK: So the bulk of the cross would be towards
5 the end of the witness list, then?

6 MR. O'NEILL: No, I'm not saying that, but I'm stating
7 that I don't know that any one witness, that we are looking at
8 the rebuttal witnesses primarily because of whether or not we
9 can get some of the information in through our surrebuttal and
10 if we can, that may eliminate the need for some cross. If we
11 can't, then it would add to our cross. So the way we are
12 looking at it is the witnesses who provided rebuttal
13 information may be that we have to have more cross of them, but
14 we don't know that yet. So if today is Tuesday, we will try
15 and have a better understanding on Thursday where we are at
16 with those witnesses.

17 MR. WELK: If you could just, as you progress in the
18 preparation, let us know that, look, you can bring a few more
19 people the first day. I think we tentatively have got -- we
20 were planning on probably through maybe five or six witnesses,
21 you have dropped out five and six, so if you can say, well,
22 generally you have four witnesses through Rick Lancaster, that
23 should get us through the first day. Is that a fair statement
24 do you think?

25 MR. O'NEILL: I would hope to be farther along than

1 that.

2 MR. WELK: You would want us to have more people
3 available, then?

4 MR. O'NEILL: Right now as it stands, yes.

5 MS. GOODPASTER: Speaking from our own perspective
6 obviously, so I don't know if staff has significant cross for
7 those same people that would take it longer.

8 MS. CREMER: Well, it will depend on what everybody
9 else asks. Staff will not, hopefully not ask the same question
10 that's already been asked, so depending on who's left standing
11 will depend on what we ask.

12 MR. O'NEILL: What I imagine is that the testimony is
13 in and the witness will be presented for cross. Unless there
14 is more to it than that, I can't see that we will only get
15 through four witnesses with cross on Monday.

16 MR. SMITH: I think that's true. You gotta remember,
17 though, it doesn't just necessarily -- and based on my own
18 reading of the testimony and not having been living this like
19 you guys, but I would think some of the fairly -- the first
20 people might not take that terribly long, particularly the
21 participant witnesses, maybe other than the applicants, their
22 lead off -- I mean, from the lead applicant there, particularly
23 Mark Rolfes. But then there is the other element of it and
24 that is once cross is over, then we have potentially redirect
25 and what have you, and the commissioners, who sometimes throw

1 curve balls. I would say it's probably going to be relatively
2 rare with the first group of people here.

3 MR. WELK: No, this has been helpful because then we
4 can make sure we have the bodies that are there then to get us
5 through. And this is not a precise process as we all know. So
6 all we are dealing with is good faith estimates.

7 MR. SMITH: There's one other thing, and let me bring
8 this up and the parties may have thoughts on this. I've had it
9 expressed to me from at least one of the commissioners about
10 their preference for going longer the first day and maybe even
11 the first two days, of potentially either going well beyond 5
12 o'clock or perhaps taking a break and going into the evening.
13 Again, from a daily transcript and dealing with that stuff,
14 that's a problem, but do the parties have any negativity toward
15 that? I think part of the fear on their part was we want to
16 make sure -- we must get the hearing done this week. The
17 schedule is so tight, it has to finish. So that was a thought
18 and I think just the idea that if it could be -- if we can move
19 along and have fewer days, that that might be less burdensome
20 to everybody, but again, I really appreciate thoughts
21 because -- then sure as heck I'll say that and at least one of
22 the commissioners will have a family conflict that night or
23 something like that. Any thoughts on that as to whether there
24 are negativity or objections to going into the evening if the
25 commissioners want or whether you would rather keep it on a

1 relatively like a business day?

2 MR. WELK: From the applicant's standpoint, the sooner
3 we can get the people on and off and back, the better off it
4 is. And we will be having, coming in, we will have them
5 stacked up and ready to go. So it doesn't make any difference
6 to us. We are committed to get this done, whatever the
7 commission schedule is.

8 MS. STUEVE: This is Mary Jo and I would have no
9 objections at all to that.

10 MS. GOODPASTER: Beth Goodpaster, no objections.

11 MR. SMITH: I don't know, Carla, can you handle that?

12 (Discussion held off the record.)

13 MR. GUERRERO: Tom and I haven't had a chance to talk
14 about this, but listening to the conversation, it sounds like
15 the applicants would be willing to waive the daily transcripts
16 since we are going to be getting live feed anyway and so that
17 we can assure that we can go into the evening to make sure that
18 we get done in one week. So if the transcripts are going to be
19 a problem, if we are weighing one against the other, I think
20 the applicants would prefer that we make sure we get the
21 hearing done, which would necessitate being cautious and going
22 late at least the first two days to see where we are at.

23 MR. SMITH: Again, you guys, I don't know that -- we
24 don't necessarily, maybe Carla does or whatever, but I never
25 know exactly what the commissioners are going to do. I don't

1 see this going till 10 o'clock at night, although we have gone
2 a lot worse than that before, but I'm not really thinking that.
3 But they may want to go, say, carry on until 6:00 or maybe 6:30
4 and if it looks -- they might want to take a break and go into
5 the night. Is it possible that those issues regarding daily
6 transcript and all that could be dealt with at that time
7 depending on how -- what they want to do? I'll do my best to
8 get a reading from the commissioners as to whether they even
9 think that that's going to be something we are going to want to
10 do.

11 MR. WELK: I got Beth's e-mail -- this is Tom -- this
12 afternoon saying that the cross was a day and a half or two. I
13 just accepted two days of cross of all the witnesses. If
14 that's true, we have got 25 witnesses that the direct is going
15 to be a maximum of ten minutes, and I don't think the staff has
16 a lot of cross and I don't know what Mary Jo has, but if you
17 add two days to about a day of ours, we are at three days and
18 throw in a half a day for others, we should be okay as long as
19 we are within the one and a half to two days that Beth has said
20 that they anticipate at this time.

21 MR. SMITH: Beth, does that sound -- I gotta tell you,
22 gut feeling wise, that hits me as about the way this will come
23 down. Any thoughts, Beth?

24 MS. GOODPASTER: The only thought I had, Tom, was that
25 that means that my instructions to our witnesses is they ought

1 to be ready to go on Wednesday, probably being optimistic, so I
2 should be telling them Thursday.

3 (Discussion held off the record.)

4 MR. WELK: I don't know, I'll ask the Minnesota
5 lawyers, does that seem reasonable, that we could tell Beth to
6 have her witnesses there Thursday morning?

7 MR. O'NEILL: Sure, that's fine.

8 MR. SMITH: Thursday morning or Wednesday morning?

9 MR. WELK: Well, I don't know. Assuming that she
10 takes two days, all I'm saying is one and a half to two for
11 ours, just in a very global sense, and knowing others have
12 questions to ask and just getting ten minutes from each one of
13 our witnesses, it seems to me like three days to get through
14 the applicant's case with all cross is probably a reasonable
15 estimate.

16 MR. SMITH: I understand.

17 MR. WELK: That's not going the herculean till 7
18 o'clock at night. I'm assuming Beth's was a reasonable
19 estimate. If we start and the intervenors have four witnesses
20 and there's two, it would seem to me, and I know she's got the
21 scheduling issues, but having her witnesses there Thursday
22 morning to me appears to be reasonable.

23 MS. CREMER: Well, if we run into the issue where we
24 suddenly have time on Wednesday, Dr. Denney would be here. She
25 can go, Mary Jo Stueve can go, you know, we would probably

1 have -- everybody knows you can't fly in and out of Pierre
2 anyway on Thursday morning, they are going to have to be here
3 Wednesday anyway in order to get a flight in. So they will be
4 showing up probably Wednesday afternoon anyway.

5 MR. WELK: That's a good thought. We can do Mary and
6 Dr. Denney Wednesday if we run into shortness.

7 MS. CREMER: If we end up with time, we can do that.

8 MS. GOODPASTER: Actually, two of our witnesses would
9 be available on Wednesday either way.

10 MR. SMITH: If we had that, I don't think it would be
11 a bad thing to have at least a little bit of overlap, but
12 again, I know how costly and inconvenient it is to have to sit
13 around.

14 MR. MADSEN: This is Chris Madsen. I think we would
15 know on Tuesday if we are -- sometime on Tuesday if we are
16 going to be on pace to wrap things up on Wednesday. By saying
17 that, I suggest that maybe if it's a matter of squeezing one or
18 two more witnesses into the day on Tuesday, it could make all
19 the difference. We have got to sit down and stare at the list.
20 We have knocked a few people out. We are going to have to
21 juggle it around. We will have people available. It's a
22 challenge to deal with the logistics for everybody. But I'm
23 just making the suggestion that maybe working until 6:00 or
24 6:30 on Tuesday and Tuesday only would make all the difference
25 to keep us on track, just a suggestion.

1 MR. SMITH: That's one I'll have to bring up with the
2 commissioners and again it depends on everything from what they
3 have got on their calendars, because they live here, you guys,
4 so it's a little -- sometimes they have personal commitments
5 and that kind of thing. It's a little different and they are
6 the boss, so I do what they want. We'll see. I'll see if I
7 can get some ideas from them in advance, but I like that idea
8 of if need be on Tuesday of going somewhat late.

9 Is that it, then? On order, not that maybe it isn't
10 as important maybe, Beth, and Tom, because there aren't so many
11 witnesses, but I note on Tom's schedule, your witnesses, is
12 that order the order that you have?

13 MR. WELK: Yeah, tentatively it is today, except for
14 we will talk about Mr. Morlock. Then what we will do is we
15 will recirculate this now with the reduction of five, six, 12
16 and 15 and collapse those numbers so you will have a number, a
17 tentative list of where we are going to be in that order so
18 counsel can prepare.

19 MR. SMITH: On witnesses on behalf of MCA, you have
20 got no order. Is that a problem?

21 MR. WELK: Well, no, unless if they know today, it
22 will be helpful, or they can let us know this week what order
23 they are going to be.

24 MS. GOODPASTER: Yeah, it's more arranging the travel
25 kind of things so it's not necessarily that we need to present

1 them in a specific order. There is one issue I would like to
2 talk about and that is Anna Sommer and David Schlissel, as
3 everybody knows, are cosponsoring the same testimony and when
4 they were deposed last week, it worked fine to have them act as
5 a panel of witnesses for the deposition and that would also be
6 their preference and our preference for the hearing, to have
7 them be a two person panel, so that worked fine in this
8 deposition. I don't know if the commission has done that in
9 the past and whether that's an acceptable way to do it.

10 MR. SMITH: We haven't formally done that. I would
11 have to say we have ended up with some chime-ins a time or two.

12 MS. CREMER: Excuse me. Just so I understand this,
13 they both are on the witness stand, so to speak?

14 MR. SMITH: At the same time. We would swear them
15 both and they would both be sworn and provide joint summary.

16 MS. CREMER: Do they both answer the question or does
17 the court reporter -- does she identify Mr. Whatever, Sommers
18 versus whatever? Does one answer half of it and the other
19 answer the other half? Is it a tag team effort or what is it
20 here?

21 MS. GOODPASTER: Well, at the deposition, the way it
22 worked was that counsel who is doing the cross in some cases
23 directed it to a specific witness and other times left it open
24 saying, which of you is going to be able to answer this
25 question? Then whoever it was would speak up. Or in some

1 cases where they would ask a question to this witness and the
2 if the other witness had additional information to make it a
3 more complete answer, they would speak up. That's how it
4 worked.

5 MR. GLASER: This is Peter Glaser. I'm the lawyer
6 that did the cross-examination and you were fading out at a
7 point there so I'm not sure I heard all of it. The reason at
8 the deposition that we had them both sworn in together was a
9 time saving exercise, recognizing that we only had one day.

10 MR. SMITH: Peter, can you speak up a little bit? You
11 are breaking up here a little bit.

12 MR. GLASER: Let me start over. The reason why we
13 deposed them both at the same time was a time saving exercise.
14 We didn't want to get caught in a position where we took too
15 long with one witness and therefore didn't get to the other
16 witness. We were not thinking that we were setting a precedent
17 for the way the cross-examination would work. In fact one of
18 the purposes of doing them both together was so that we could
19 get an understanding of which witness had expertise in any
20 particular area. So we goal of the deposition primarily was
21 the senior person, Mr. Schlissel, we gave him an opportunity to
22 say that on a certain area of testimony that Ms. Sommer, the
23 more junior person, took the lead on that and had more specific
24 detailed information and that way we identified which areas
25 each witness was more competent to testify than the other. It

1 would be our thought anyway that at the live hearing that we
2 would cross-examine them separately, take -- probably take
3 Schlissel, the senior person first, and if he says that there
4 are areas he's not comfortable testifying on, that Ms. Sommer
5 has a better knowledge of, we would cover that with Ms. Sommer.
6 That would be our intention.

7 MR. O'NEILL: Mike O'Neill talking. I would suggest
8 that you may find that just as time efficient at the hearing to
9 do something similar to what you did at the deposition in that
10 you control the cross. If you ask a question of Mr. Schlissel,
11 what we would do is we would have to put Ms. Sommer on on
12 redirect to get the information out. I think that if we keep
13 an open mind on it and let the process develop, I think what
14 you did at the deposition is probably the most efficient way,
15 but you certainly control the cross. But I would just suggest
16 that both -- we will have both of our witnesses there and for
17 continuity of questioning and continuity of ideas, we would
18 have them available to answer on a topic right then and there,
19 if that were the case. My thought is we will find that more
20 efficient.

21 MR. GLASER: The only concern about that efficiency is
22 that doing it the way we did it in the deposition could turn
23 into more like a round table discussion where you get both
24 witnesses offering ideas on the question and now you have two
25 witnesses testifying essentially to the same thing and you end

1 up taking longer. I did feel that at the deposition we were
2 able to establish that there were specific areas that Ms.
3 Sommer had worked on and developed data on and those were her
4 areas and she was comfortable testifying and Mr. Schlissel was
5 not comfortable testifying.

6 MS. CREMER: This is staff and I guess obviously we
7 weren't involved in the taking of the depositions and we just
8 got the transcripts today and I have not read them. My concern
9 is the record going up, should this be appealed. I think it
10 would be a very difficult record for those that are reviewing
11 it to try to figure out who is answering what, and I just
12 think, you know, I would prefer to see it done by the book, so
13 to speak, or how it's normally done. If you have to call them
14 on redirect, that's nothing out of the ordinary or something
15 that anybody can't deal with I don't believe.

16 MR. SMITH: Other thoughts on that? Beth, do you have
17 a rebuttal, or I guess it was Michael?

18 MS. GOODPASTER: I'll yield to Mike.

19 MR. SMITH: I'm sorry, Mike.

20 MR. O'NEILL: We are open to any process that works.
21 I'm suggesting we will have our witnesses available and we will
22 follow whatever process the commission and counsel want to
23 follow.

24 MR. SMITH: Let me ask you this from applicant's
25 standpoint. Is there -- there's no foundation issue with

1 respect to receiving their prefiled into evidence, is there?
2 Or is there?

3 MR. GUERRERO: This is Todd Guerrero in Minneapolis,
4 Mr. Smith. None.

5 MR. SMITH: At least -- in terms of -- we don't have
6 to create some logistical --

7 MR. GUERRERO: No, not for purposes of accepting the
8 Schlissel/Sommer testimony and the joint filed exhibits.

9 MR. SMITH: Okay. So once it's in, then it's just a
10 question of taking them on cross-examination one at a time.
11 Okay. I would say the parties, if the parties had absolutely
12 no problem with it and the reporter and everybody else, I would
13 probably not object, but why -- the parties do seem to have a
14 problem with it, so why don't we follow the normal order of
15 examination. Okay?

16 MR. WELK: Mr. Smith, we are still on witnesses.
17 Probably now is the time to bring up the issue regarding Mr.
18 Morlock.

19 MR. SMITH: Mr. Morlock.

20 MR. WELK: He is a witness for Otter Tail that is a
21 key witness and, unfortunately, he has a health issue that's
22 developed with a kidney matter and he is frankly waiting to
23 determine whether he's going to have to go into surgery or not.
24 And so we are waiting to see what happens. Hopefully
25 everything is okay. We have him on this list, but I wanted to

1 alert people, number one, that there probably is going to be a
2 flexibility issue. I think he will know better when he talks
3 to his doctors what the situation is. We just wanted to give
4 you a heads up that that is going to require some special
5 scheduling. We don't know if he does go to surgery what that
6 may mean as to his availability. I don't know if that means we
7 are going to have to have alternative arrangements for him or
8 not, but I wanted to at least bring this matter to all
9 counsel's attention. We will of course update you on that so
10 when you see his name on an order, that is going to be a
11 flexible order, depending on his health condition.

12 MR. SMITH: Any comments? Hearing none, we will move
13 on to the next item. Are there any other special witness
14 scheduling issues other than Mr. Morlock? Is that it? Okay,
15 now, are there any other issues? Otherwise the one last issue
16 that's a scheduling and also a procedural and maybe a
17 philosophical issue is the commenters under our -- under our
18 rule, nonparties do have the right to appear under the verbatim
19 rule, appear in person, and say their piece. And I've received
20 some comments back from various people, among them nonparties
21 on this issue, and I guess there's a couple of things. First
22 of all, what should we do? And second of all, when should we
23 do it? I don't know, Karen, do you want to kick that off or
24 not?

25 MS. CREMER: Well, my preference, and I think I put

1 that in my e-mail, is to take them right after the
2 case-in-chief because, as Tom has indicated, you can kind of
3 have an idea they may be done Tuesday night or early Wednesday,
4 Wednesday at noon, so if they want to comment, they should be
5 here Wednesday morning. If you are not going to do it then,
6 then I think we simply have to tell them it's at the end of the
7 hearing, and they could be here Thursday afternoon, it may roll
8 over into Friday morning. I know it was suggested that we just
9 pick a date and a time and do that. It makes it awful
10 inconvenient for everybody else who's been planning and
11 scheduling their time and trip to suddenly be preempted by 50
12 people who may want to come and comment and then now suddenly
13 they are the ones spending the night when they already had
14 other arrangements made. Because we don't know, there could be
15 two people, there could be 200 people show up. I don't know,
16 so I think I would prefer we just put them at the end and tell
17 them it's going to get over Thursday afternoon, late afternoon,
18 or possibly roll over on to Friday and they may want to be here
19 Thursday and Friday.

20 MR. SMITH: I guess the only problem I have with that
21 is that, you know -- I guess I'll use maybe I hope this isn't
22 an insulting term, but these are little people, a lot of them,
23 and they are not making a living off this, they have other
24 jobs, and personally I think by setting a time certain, it
25 affords them the ability to schedule and it kind of affords us

1 the ability to schedule around it as well. Whatever time we
2 pick, yes, it could result in some people getting kicked over
3 to the next day.

4 MS. CREMER: How do you know if you are going to have
5 four people or 40?

6 MR. SMITH: Don't.

7 MS. CREMER: How are you going to -- I mean, whatever.
8 Go ahead, but I'm saying I would hate to pick 2 o'clock in the
9 afternoon and have one person show up and then. . .

10 MR. SMITH: I don't know how to get around that, other
11 than the fact that we do that. We could pick a time, say, at
12 the end. We could estimate what you think is at the end. One
13 of the thoughts I had was perhaps Thursday afternoon, for
14 example. We may be done by then. That could happen and at
15 least it's rational to think it's a possibility we might be
16 done. Although if we are going to wait until Thursday morning
17 to start the intervenors' case, that probably won't happen.
18 But if we were to set it at -- again, so far I don't know of
19 hundreds of people. I've had a few people express an interest
20 in appearing and saying something.

21 MR. WELK: John, in order to accomodate, couldn't we
22 just set something and maybe one of these evenings, provided
23 the commissioners schedule approves, if you set it at 7 o'clock
24 Thursday night and that accommodates all of the witnesses. We
25 are going to be there till the end. Our witnesses will have

1 been hopefully gone by then, unless there's some sort of
2 rebuttal case, but if you just set it at 7 o'clock Thursday
3 night, for those that are working, it gives them a chance if
4 they want to come and that way if nobody shows up or two
5 people, we are done. We will have to plan for the
6 commissioners and the court reporter because that will be a
7 different night for her.

8 MR. SMITH: You guys certainly won't want -- I guess
9 that doesn't matter if Carla is there, but you won't want a
10 transcript or a daily transcript of that, right?

11 MR. WELK: No.

12 MR. SMITH: I'll have to check and see what the
13 commissioners schedule is. I don't know, Beth or Mary Jo, do
14 you guys have any comments? You know, I know I've heard from
15 various parties out there who have said, well, we should have
16 it both at this time and that time. I think, Mary Jo, you were
17 one of them, and Aaron Jordahl. There's a lot of things we
18 could do if we had unlimited time, but I just don't -- I think
19 we have just got to do something that's reasonable and affords
20 people a reasonable and as fair as we can opportunity to appear
21 and be heard and go with that. I don't know, do you think it's
22 better to go with an evening time?

23 MS. GOODPASTER: This is Beth and I liked Tom's
24 suggestion and his included an evening time, just because that
25 would accommodate both members of the public who have a

1 traditional work schedule as well as the witnesses that are
2 intending to be there.

3 MR. SMITH: I will check and see what we can do. Does
4 it really matter which night, you guys, if we do it in an
5 evening?

6 MS. STUEVE: This is Mary Jo here and I can really
7 appreciate the thoughtfulness that was brought up by Karen, was
8 it Tom, John, Beth here, and the biggest point right now would
9 be not really which night, and it sounds like it could help
10 everybody out to have it early evening, with people coming and
11 the process and the expert witnesses. At the same point in
12 time what would be best would be, okay, this is when it is,
13 because we are really short on time right now and as you
14 mentioned, John, people do have schedules and might have to
15 make arrangements for day care or baby care, work, some may
16 have to travel, because we were hoping, and I don't know if
17 this will be approached or not, to do some video conferencing
18 for those who can't afford or aren't able to travel, they can't
19 get care for their children, for example. But the best thing
20 that could happen right now would be to know when it is so I
21 can get that message out there.

22 MR. SMITH: Yeah, I think that's important. I'll tell
23 you what, regrettably, you guys, because if we go into the
24 evening, I have to preclear that with the commissioners because
25 I don't know exactly when they are willing to be there. It's

1 not probably of willing, it's when can they be. So I'm going
2 to have to check, but I do want to get that out to you in time
3 so that the public can know when they can come. With respect
4 to the people that have already contacted us, we know who they
5 are and we will get a direct notice to them. We also will have
6 it to everyone on what is called the interested parties list
7 that's on the Web site. And that includes a lot of the Sierra
8 Club folks in Vermillion and people like that.

9 MS. STUEVE: Do you have an idea? Because you do have
10 to clear this through the commissioners, I'm envisioning
11 this -- I know how it can take a long time sometimes, do you
12 have an estimated idea of when we could have it?

13 MR. SMITH: I was going to say -- my own thought would
14 be, Tom suggested Wednesday or Thursday night, or Thursday
15 night. I was going to suggest maybe Wednesday night or maybe
16 even Tuesday night.

17 MS. CREMER: Tuesday night we might go long.

18 MR. SMITH: We might go long, but in the end, Karen,
19 one way or another we are going to consume time. I like the
20 idea, an evening I think, Tom, was a good idea, since it's
21 acceptable to all you guys, because that would require someone
22 to take off the least amount of work for most people, unless
23 they work at night. Or earlier I had thought, well, if we do
24 it in the afternoon, it would allow most people to be able to
25 take off at noon and get over here and still get back home at a

1 reasonable hour, if we did it like, say, 2:00 or 3:00.

2 We'll think about the video conferencing idea. We
3 tried that at a meeting last week. It's tougher than you would
4 think, I'll tell you, to deal with that in terms of it was
5 acceptable in terms of a normal commission meeting. I don't
6 know that this will happen, but in terms of conducting
7 cross-examination via that medium, that would not be the
8 easiest thing in the world to do.

9 MS. STUEVE: Would there be cross-examination of the
10 commenters, though?

11 MR. SMITH: I don't know and we can talk about that.
12 My feeling on it is if the commenters' statements are going to
13 be afforded the status of evidence, the same evidentiary status
14 as the other witnesses, then I believe -- I don't know how we
15 can do that and be consistent with due process without
16 affording parties a right to cross-examine.

17 MS. STUEVE: I guess, John, I want to go back to the
18 point about knowing and my point was not necessarily can you
19 give me an idea of Tuesday, Wednesday or Thursday evening, but
20 could you give me an idea of how long it will take for you to
21 get the commissioners input on when we can do that so that we
22 know for certain? Like today is Tuesday, can I have you find
23 out by tomorrow?

24 MR. SMITH: I wish I had known, I was thinking of
25 trying to achieve that before the end of today. One thing we

1 could do is the minute we get done here -- I wonder if Heather
2 would be helpful on this at all. Maybe we can --

3 MS. CREMER: We will be done here in five, ten
4 minutes, won't we?

5 MR. SMITH: As soon as we are done, I will get at
6 this. Is there a particular day, you guys? I was kind of
7 thinking maybe Wednesday, but it's up to you. If you think
8 Thursday, maybe I'm selfish.

9 MR. WELK: We are all going to be there, John, so it's
10 going to be more for the commissioners schedule than the people
11 that would want to attend. I'm sensitive to what Karen said
12 and to Beth's witnesses, they are making travel arrangements,
13 these people are getting paid. I do think we need to
14 accommodate the witnesses and so any time that would be
15 consistent with all those considerations I think will work. I
16 just don't -- we got 25 people there, I don't want to have
17 something Tuesday when I've got some CEO sitting there waiting
18 for that, who has been sitting in the hotel room for a day. I
19 kind of like Karen's idea, we will get through our
20 case-in-chief, we get through the witnesses, pick a time when
21 we have got through all of the people that are traveling and
22 then fix a time at night to do it.

23 MR. SMITH: Thursday night would definitely probably
24 work. For some reason I've got a deal in the back of my mind
25 that one of the commissioners had something going on Thursday

1 night. But I may be misremembering that, Tom. I will check on
2 it immediately. Two of the commissioners are at MARC in
3 Columbus right now so I'd like to be able to commit and say
4 I'll be back to you in an hour, but I'm going to have to get
5 through to them.

6 MR. WELK: Wednesday night will work for us. If
7 that's a problem, let's do it and put it out there.

8 MR. SMITH: I'll see what night I can get and whether
9 the commissioners want to do it that way. I think it's a good
10 idea. I'll ask them again, we can ask them about video
11 conferencing, but I don't know. Are there thoughts from the
12 other parties? Mary Jo has weighed in on that. The statute
13 says, or rule I should say, not statute, it does say in person,
14 and I hate to say it, but sometimes there's a refuge in going
15 by what it says and that way we stick with solid ground.

16 MR. WELK: I think we would prefer to have the people
17 there to testify in person. But let's see what the
18 commissioners say.

19 MR. SMITH: Karen, do you have an observation?

20 MS. CREMER: I would prefer in person simply because
21 it just never works when we try to do anything over the RDTN or
22 any video conferencing. Somebody's end can't hear. It seems
23 like it's just a disaster. Then there we would be and then how
24 are they going to get here and testify? Then we would have to
25 deal with all of that. I just think if it's important enough,

1 they will show up, or they can always send written comment. If
2 they want something, they can always send written comment.

3 MR. SMITH: Okay. Anything else to be discussed
4 before -- again, I polled the commissioners and two of the
5 three felt that business casual dress was just fine. I don't
6 know what the weather is supposed to be like next week. For
7 those of you familiar with Pierre, you know that this can be
8 one of the hottest places in America and so being somewhat
9 casual is not all that bad.

10 MR. WELK: John, I think we are going to proceed on
11 the basis it's business casual unless you send us some message
12 that the other commissioner has some objection.

13 MR. SMITH: Well, I don't think he will. I know I'm
14 proceeding on that basis.

15 MR. WELK: I think we can tell our witnesses as well,
16 then.

17 MR. SMITH: That sounds good.

18 MR. WELK: I do have a couple of mundane things,
19 wrapping up. Again, just to reiterate, 9:30 Monday it begins,
20 at 8:30 every day thereafter?

21 MR. SMITH: Yep.

22 MR. WELK: Also, I have a question on some of the
23 technology. We are bringing our own power point projector.
24 It's my understanding that the commission does have a screen so
25 if any of the other participants are going to be using that, I

1 understand the commission will have a screen for us to use.

2 MR. SMITH: We do have a screen, I'll have to make
3 darn sure it doesn't walk out of here in the process.

4 MR. WELK: If not, we will bring our own.

5 MR. SMITH: There is technology available here in the
6 Capitol. We can find something.

7 MR. WELK: The last thing is more to the record and
8 that is, we talked about this some time ago, and frankly, I
9 can't remember the resolution, but obviously we have been
10 marking the exhibits as we have been progressing through with
11 the testimony, but those things that are already in the
12 commission record, for example, let's take the public hearing
13 transcript in Milbank, the notices of publication, John, how do
14 you want those marked for purposes of the hearing? Is that
15 going to be -- to have its own exhibit or what had we decided
16 we were going to do about the record that existed prior to the
17 testimony?

18 MR. SMITH: I mean, my feeling is, Tom, that if you
19 want them to be evidence, then they should be marked by
20 someone. One thing you can do is just request that we take
21 judicial notice of our own record, and we can do that. The
22 thing is, normally what I would say is with something like the
23 transcript of the Milbank hearing, for example, normally that
24 is, I think, under our APA, that's part of the administrative
25 record. It's not evidence. That's the distinction. It's part

1 of the record, it's part of the docket. If this goes up on
2 appeal, it will be included in that which is numbered and
3 certified as part of the record on appeal and nobody needs to
4 do anything with that.

5 With respect to -- but if you want it to be considered
6 evidence in the case, then it has to be either judicially
7 noticed by the commission within the confines of the proceeding
8 itself or somebody needs to mark it and introduce it. Does
9 that make sense?

10 MR. WELK: Yeah, I think so. Different agencies have
11 done it differently and I know the commission within its own
12 proceedings have treated things differently.

13 MR. SMITH: They have.

14 MR. WELK: I wanted everybody to hear that so if
15 there's something in the record we need to, say, take judicial
16 notice, identify what it is and if we are really concerned
17 about it, I guess we just mark it separately.

18 MR. SMITH: I think that's true, and again, if you
19 want it to be evidence, and if you want it to be as part of the
20 evidentiary record, then some kind of action needs to be taken,
21 but I will tell you my feeling is what's in our record is --
22 that's the record in terms of when an application was filed, et
23 cetera, et cetera, a pleading, the contents of a pleading and
24 when it was filed, that is part of the administrative record
25 right now. And when I make findings that are procedural in

1 nature in a decision, I make those findings on the basis of
2 that record as it stands right now. Now, when we move from
3 there into evidence, you know, in terms of the actual issues of
4 fact in a case, that's where some affirmative action needs to
5 be taken in order to have that item considered to be evidence
6 in the case.

7 MR. WELK: I understand it. One final item, and for a
8 housekeeping matter, there are some items that have been
9 designated confidential by the applicant and just so that
10 everybody understands the process, that if those materials are
11 in the record and if there are people in the room, if they have
12 not signed Exhibit A at the time of the introduction of those
13 materials, then counsel needs to say, I intend to inquire in a
14 matter that has been designated confidential and that the room
15 will be cleared except for those people that have signed
16 Exhibit A to the confidentiality agreement.

17 MR. SMITH: That's correct.

18 MR. WELK: Where out of state counsel hadn't
19 participated before, I wanted them to understand that.

20 MR. SMITH: That's right. And it's incumbent on a
21 party to call to my attention and the attention of the
22 commission when something is confidential so that we can
23 protect its confidentiality during the hearing. It's my
24 understanding that we are going to have this live cast on the
25 Web, which is not normal for a hearing, but we are going to I

1 think this time, and so the whole world potentially is going to
2 hear it, if you don't bring it to our attention that it needs
3 to be treated confidentially.

4 MR. WELK: That's all I have, unless anybody in
5 Minneapolis or Mr. Glaser has anything further from the
6 applicant.

7 MR. GUERRERO: Nothing further from Minneapolis.

8 MS. GOODPASTER: This is Beth Goodpaster. I just had
9 one question on the confidentiality thing. We understood that
10 that was the general process. I just had a question as it
11 relates to our witnesses who we have a trade secret version of
12 the testimony that was filed on May 26th and a public version
13 and so when we are putting the prefiled in, how does the
14 confidentiality restriction apply?

15 MR. SMITH: Here is what I would say, is that when you
16 are putting it in, in terms if you have marked that as
17 confidential, which you have, you might want to note it, but as
18 far as I'm concerned, that's already, in terms of the exhibit,
19 it's already been marked as confidential. What I'm getting at
20 more, I think, Beth, is if then there are specifics within that
21 document as part of either the introduction, right, that your
22 witness's abbreviated direct testimony, if you will, or the
23 cross-examination of that and you want to avoid having those
24 trade secret protected items be mentioned in a really super
25 public forum, then that will need to be -- you will need to

1 request that that be done as a sequestered proceeding.

2 MS. GOODPASTER: Okay.

3 MR. WELK: This is particularly concerning to us
4 because you have confidential information for us, so if this
5 means you are going to bring up information you got from us,
6 you have an obligation, Beth, to tell my witness is going to
7 disclose confidential information and the room needs to be
8 cleared.

9 MS. GOODPASTER: I understood that the first time it
10 was explained. Thank you.

11 MR. SMITH: Okay.

12 MS. STUEVE: This is Mary Jo. I have two questions.
13 On the live cast on the Web, when you find out when the
14 commenting period will be and get that information to me, will
15 you also give me information as far as how people can access
16 the live cast on the Web? I'm just assuming there's some means
17 one has to plug into that.

18 The other thing I was wondering, can one introduce new
19 evidence if we want it in the evidence, can that happen during
20 the hearing? Or does it have to be done previous to the
21 hearing starting? For example, when you talked about an
22 affirmative action must be taken if people want to bring
23 something in as evidence versus --

24 MR. SMITH: You mean with respect to confidentiality?

25 MS. STUEVE: No, not with respect to confidentiality,

1 No. With respect to --

2 MR. SMITH: Those things like that, you mean the items
3 in our record you mean, in our record? Yeah, I mean, those
4 things are already part of the record and I wouldn't have
5 expected someone to have dealt with that in prefiled testimony.
6 So that kind of thing I think. You know, there may be, Mary
7 Jo, and again you are not a lawyer and I'm sure we'll be less
8 rigid. By now, just in simple fairness, I think the parties
9 should have been pretty forthcoming and have tried to have
10 included most of their case in what they have already done.

11 I will tell you even in cases where we have prefiled
12 testimony, it doesn't always go that way. Once you start the
13 real live cross-examination and so on, it frequently can lead
14 to the need by a party to come back with redirect live
15 testimony, sometimes with new exhibits. That happens. The
16 DENR example for Karen, or you may have that, where it may
17 happen that someone will -- we will rule on it on the basis of
18 basic fairness, I think, and the obvious bias at the commission
19 is in the interest of full disclosure of the facts and not on
20 nitpicking over technicalities.

21 MS. STUEVE: Uh-huh.

22 MR. SMITH: Okay? But again where the rubber hits the
23 road sometimes is if it looks like somebody was either -- if it
24 looks like either somebody's lack of attention or intentional
25 game playing is going to be prejudicial to the other side,

1 that's where we'll step in and say no to the introduction of
2 new evidence.

3 MS. STUEVE: Right.

4 MR. SMITH: In addition to the other, there's a lot of
5 other reasons why evidence can be not received. There's
6 hearsay and there's foundation and there's all kinds of
7 reasons. When we have the prefiled situation, that's kind of
8 one of those, is where there's absolutely no excuse why
9 something couldn't have been contained in the prefiled, there
10 might be an objection to that.

11 MS. STUEVE: Uh-huh.

12 MR. SMITH: Okay?

13 MS. STUEVE: Yep, thank you.

14 MR. SMITH: Any thoughts or reactions to that? But
15 again, in terms of redirect or being able to respond to
16 cross-examination, we are relatively accommodating to allowing
17 you to get your point across. Okay?

18 MS. STUEVE: Yep. Then the Web access.

19 MR. SMITH: That is posted on our Web site. We have
20 it -- it's right on the main page.

21 MS. CREMER: It says like live something, join us
22 live.

23 MS. STUEVE: People just click that?

24 MR. SMITH: Yep, you just click on that and it's just
25 like going on any other Web site.

1 MS. STUEVE: Thank you.

2 MR. SMITH: Anything else? Thanks, everybody. I'll
3 try to get that answer out on the comment period as soon as
4 possible today.

5 MS. CREMER: Are we marking exhibits before?

6 MR. SMITH: 9:30 but we are -- did I say an hour or a
7 half hour?

8 MS. CREMER: I don't remember. Carla, or does anybody
9 remember, did we say 8:30?

10 MS. STUEVE: I think we said 8:30, if I remember
11 correctly.

12 MS. CREMER: That's what I thought.

13 MR. SMITH: Is that too early?

14 MS. CREMER: I don't think so.

15 MR. WELK: We will be there at 8:30 just because of
16 the number of people.

17 MS. CREMER: I think we need to be.

18 MR. SMITH: Thank you, everyone. We are adjourned.

19 (Whereupon, the proceedings were concluded at 2:43
20 p.m.)

21

22

23

24

25

C E R T I F I C A T E

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

I, Carla A. Bachand, RMR, CRR, 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 21st day of June 2006.

Carla A. Bachand

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

My commission expires: June 10, 2012.