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**SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION**

THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE APPLICATION BY  
TRANSCANADA KEYSTONE PIPELINE, LP FOR  
A PERMIT UNDER THE SOUTH DAKOTA ENERGY  
CONVERSION AND TRANSMISSION FACILITY  
ACT TO CONSTRUCT THE KEYSTONE XL PROJECT

HP09-001

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Transcript of Proceedings  
September 23, 2009

**ORIGINAL**

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BEFORE THE PUBLIC UTILITIES COMMISSION,  
DUSTIN JOHNSON, CHAIRMAN  
STEVE KOLBECK, VICE CHAIRMAN  
GARY HANSON, COMMISSIONER

COMMISSION STAFF

Rolayne Ailts Wiest  
John Smith  
Kara Semmler  
Greg Rislov  
Bob Knadle  
Nathan Solem

APPEARANCES

James E. Moore	appearing on behalf of the Applicant
Brett M. Koenecke	appearing as co-counsel on behalf of the Applicant
James White	(by telephone) appearing as co-counsel on behalf of the Applicant
Paul Blackburn	appearing on behalf of Dakota Rural Action
Caitlin F. Collier	appearing as co-counsel on behalf of Dakota Rural Action

Reported By Cheri McComsey Wittler, RPR, CRR

1                   TRANSCRIPT OF PROCEEDINGS, held in the  
2 above-entitled matter, at the South Dakota State Capitol  
3 Building, 500 East Capitol Avenue, Pierre, South Dakota,  
4 on the 23rd day of September, 2009, commencing at  
5 8:30 a.m.

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1           CHAIRMAN JOHNSON: We will call this Ad Hoc  
2 Meeting of the South Dakota Public Utilities Commission  
3 to order. This is September 23 at about 8:30 in the  
4 morning, and we're in the State Capitol. This is the  
5 time and place that was noticed for this meeting.

6           I am Dusty Johnson. My colleagues, Commissioner  
7 Steve Kolbeck and Gary Hanson, are also here this  
8 morning. We only have one item on our agenda that does  
9 deal with the TransCanada Keystone XL case.

10           But the question before us today deals with  
11 discovery. And my thought, subject to check with my  
12 colleagues and the parties, is that perhaps we'd allow  
13 each side a few minutes to give a general overview of  
14 their arguments, but then we would after that was  
15 completed really take each discovery request individually  
16 and allow arguments.

17           Is that acceptable? Great.

18           So with that, we sort of have it a little bit of  
19 order here, but if no one objects, I would treat DRA,  
20 Plains Justice, as the moving party and allow you to go  
21 first. The order of filing was a little different, but I  
22 think that makes sense to key up that way.

23           So with that, go ahead. Proceed.

24           MR. BLACKBURN: Thank you, Commissioner Johnson,  
25 and thank you to the other Commissioners as well. I

1 appreciate the structure -- I appreciate the structure  
2 you've suggested, and I think it's the way we should  
3 proceed.

4 In terms of the general overview of our  
5 arguments, essentially what TransCanada has proposed --  
6 or has argued in many of these different discovery  
7 disputes is that the Commission is without jurisdiction  
8 to consider these issues.

9 And I think it's important for the Commission to  
10 decide some of these jurisdictional issues because the  
11 Commission should -- I mean, obviously values its own  
12 time, and we are concerned that Interveners, TransCanada,  
13 and others not spend time on issues that the Commission  
14 believes is not jurisdictional.

15 So to the extent that these issues are  
16 nonjurisdictional, we would like the Commission to rule  
17 on which issues it would like to take testimony and  
18 evidence on and which issues it would like to not take  
19 evidence and testimony on so that we don't end up  
20 producing testimony or evidence that the Commission does  
21 not choose to consider.

22 I also think it's important for the landowners  
23 who are involved here to know clearly what kinds of  
24 issues and what kinds of relief the Commission is  
25 empowered to and capable of providing and what kind of

1 issues it would like to hear from landowners so that they  
2 don't provide information to the Commission not  
3 understanding that the Commission's jurisdiction is  
4 limited in a particular area, the Commission has limited  
5 powers to remedy their particular concerns.

6 Obviously there are different federal forums,  
7 and there's other ways that the landowners can  
8 participate to make sure that the concerns are heard and  
9 considered and addressed.

10 In terms of the overall structure of how we  
11 proceed, there is the first -- there's a general  
12 objection related to the scope of discovery and to  
13 TransCanada and its affiliates. You know, the actual  
14 Applicant, TransCanada Keystone, is, as I understand it,  
15 a purpose developed -- a purpose setup organization,  
16 company, to develop the Keystone Pipeline system.

17 And because of that, it itself does not operate  
18 pipelines, and instead it's corporate parent has. And  
19 that's the way these kind of structures are set up. But  
20 because of that, it can't be expected to have all the  
21 documents relative to TransCanada's operating experience.

22 So, for example, and different kinds of matters  
23 related to TransCanada's effectiveness of its spill  
24 prevention programs, for example, it's looking at  
25 TransCanada documents, not at Keystone Applicant's

1 documents itself. So that issue is first, and I suggest  
2 you address that. And then, yes, we can move through the  
3 other issues there.

4 As I said the primary concern we --

5 CHAIRMAN JOHNSON: Just a reminder to those  
6 folks on the telephone that you are coming through so  
7 please mute your phones when you're not speaking.

8 Apologies, Mr. Blackburn. Go ahead.

9 MR. BLACKBURN: We would very much appreciate  
10 clarity from the Commission about which issues in our  
11 discovery are jurisdictional and which issues are not.  
12 And we're prepared to argue those.

13 CHAIRMAN JOHNSON: Thank you. TransCanada.

14 MR. MOORE: Good morning. Thank you.  
15 James Moore on behalf of TransCanada.

16 I agree with you that some of these issues in  
17 the abstract are not nearly as helpful to talk about as  
18 just discussing the particular discovery requests and the  
19 responses and the objections, and I think that will be  
20 more productive than sort of a general overview.

21 My only opening comments would be that  
22 TransCanada has nothing to hide in terms of discovery.  
23 There were 24 document requests that were propounded by  
24 Dakota Rural Action. TransCanada served its objections  
25 early so that those could be resolved as quickly as

1 possible if there were issues. We timely produced a  
2 great volume of information. I brought along a couple of  
3 bankers boxes full of the documents that we produced  
4 today.

5 Of the 24 requests, there were only two subject  
6 areas where TransCanada produced no documents. One was  
7 with response -- with respect to the Emergency Response  
8 Plan, and the other was a series of requests all related  
9 to demand.

10 And aside from those, TransCanada has provided a  
11 lot of information, and I think that at this proceeding  
12 the burden is really on Dakota Rural Action to explain  
13 why either the responses are insufficient in the cases  
14 where TransCanada produced documents and Dakota Rural  
15 Action is here seeking more documents or to explain why  
16 the objections that TransCanada raised with respect to  
17 relevance or jurisdiction or federal preemption are  
18 without merit.

19 CHAIRMAN JOHNSON: Thank you, Mr. Moore. We've  
20 got a number of other parties. We will just see if -- it  
21 doesn't appear as though any of them are here in person  
22 or on the telephone. We'll pause to see if they are.

23 Okay. Commission staff.

24 MS. SEMMLER: Thank you, Mr. Chairman.

25 Staff does not have any opening comments to make

1 but would reserve any comments as you go through the  
2 individual discovery requests.

3 CHAIRMAN JOHNSON: If at any point another  
4 Intervener joins the line or comes in, please, anybody  
5 who sees them let me know. Otherwise, we'll just presume  
6 that they're not here and not participating, and  
7 certainly if we figure out they're here, then we'll work  
8 them in.

9 So with that, I'm kind of working off Dakota  
10 Rural Action's motion as a template. We'd take it in  
11 that order, which was just the numeric order of the  
12 requests that were under dispute.

13 So with that, we'll bring up request number 1,  
14 related to the damage caused by a crude oil pipeline  
15 rupture.

16 Mr. Blackburn.

17 MR. BLACKBURN: Thank you, Commissioner. I  
18 understand that you can see the documents that -- the  
19 couple of boxes that were provided by TransCanada. But I  
20 think the issue -- first off, the majority of those,  
21 probably three-quarters to, you know, 80 percent of them,  
22 relate to this particular request.

23 And I disagree with TransCanada about the  
24 request, not in terms of the volume because the volume is  
25 certainly there but in terms of the quality of the



1 documents and the responsiveness of the documents.

2 In particular, I went through the documents, and  
3 a lot of them are somewhat marginally relevant. The  
4 discovery request we propounded was really directed at  
5 trying to figure out setbacks, setbacks about how far the  
6 physical damage of the pipeline could be in a rupture.

7 So the oil we know is up to 1,600 psi. And if  
8 it blows, the oil could be projected a long distance,  
9 catch fire, and there is a certain physical damage that  
10 is caused by pipelines when they rupture.

11 We've seen pictures of, for example, a pipeline  
12 that was shot by a bullet, and it spewed oil hundreds of  
13 feet from that little hole. And obviously it's an  
14 above-ground pipeline so it's different. And we've seen  
15 pictures of an oil pipeline rupture in Washington state  
16 where the oil was jetting out of the ground long distance  
17 and covering everything along in all directions with oil.

18 And landowners have a very simple question, and  
19 that is how far could the physical damage from the  
20 pipeline spread if it ruptures. And, you know, that  
21 would include fire or other kinds of immediate damages.  
22 And that I think is a very reasonable question they have.  
23 Because even though the federal construction setback is  
24 50 feet, that was set in 1981. It was set for sort of as  
25 a one-size-fits-all setback for construction. And the

1 pipelines back then didn't operate -- weren't as large  
2 and operate at the same pressures and temperatures  
3 typically. So they would like to know what the zone of  
4 damage is for this pipeline.

5           Because a lot of land it goes through is not  
6 under any particular zoning, other than the, you know,  
7 agricultural zoning and the farmers and ranchers are free  
8 to build a lot of structures there. And they would like  
9 to know for their own purposes why -- you know, how far  
10 away they should be from the pipeline to make sure that  
11 whatever they build is not potentially threatened by the  
12 pipeline in terms of its direct and immediate physical  
13 damages under a fire that could be caused by the  
14 pipeline.

15           So that was what we were getting at. Now I  
16 understand that the discovery request could be read  
17 extremely broadly, but if you look at it as a whole, it  
18 talks about the distance that oil could be projected  
19 through the air.

20           CHAIRMAN JOHNSON: Maybe bring the whole base a  
21 little closer Mr. Blackburn. I think that will help.

22           MR. BLACKBURN: So and the other -- how far the  
23 fire could spread from it, what kinds of risks of fire  
24 there are, what the effect of projecting the oil would be  
25 on houses, those sorts of things. And that is the kind

1 of information we were seeking.

2 And the discovery request could be read to ask  
3 for everything related to any issue about damage from a  
4 pipeline, including, you know, damage to water supplies  
5 or surface water impacts or whatever. And that really  
6 wasn't what we were getting at.

7 And to the extent that the discovery request is  
8 read as a whole, I think it's clear that it was focusing  
9 on this issue of setbacks.

10 And, unfortunately, TransCanada decided to read  
11 that as a kitchen sink request for everything related to  
12 pipeline damage. And that's unfortunate they spent time  
13 responding to it. If they had called me, asked me what  
14 we were trying to get it, if they needed more clarity,  
15 I'd be happy to talk to them about that.

16 And then the kinds of documents they replied  
17 with some of them were nonlegible. Some of the maps they  
18 provided were colored maps copied in black-and-white  
19 without a key. You look, you know, at the small words.  
20 You can't really read them. And they're not useful.

21 Also they provided things like the Big Stone II  
22 Power Plant Application. And I have no idea why the  
23 Big Stone II Power Plant Application is related to damage  
24 from pipelines. I mean, there may be something in that  
25 Application that has to do with oil spills from the power

1 plant. You know, I don't really know. I didn't bother  
2 reading through it because it didn't seem to be at all  
3 relevant to this proceeding.

4 So and there are a lot of other documents like  
5 that that just really were filler. And I didn't try to  
6 go through and index and document every single why every  
7 one of them was nonresponsive or illegible or, you know,  
8 irrelevant because there were 232 of them, and that would  
9 have taken a very long time to index them.

10 I did that for Exhibit B, which was responsive  
11 to our request 2. But I didn't have time to do it. As  
12 it was, it took a long time.

13 Also the documents provided -- this, I suppose,  
14 what people do. But the documents were provided in large  
15 piles of white paper with white separating pages between  
16 them. They weren't stapled or Bates-stamped. They  
17 weren't -- so basically I had to flip through page by  
18 page to figure out where one document started, and it  
19 took a lot of time, frankly, to go through and try to  
20 organize the material.

21 So there's a lot of -- the quantity is there.  
22 Undoubtedly, the quantity is there. The quality, there's  
23 nothing there that I can tell that's related to setbacks.  
24 I didn't see anything related to how far this pipeline or  
25 any engineering about how far this pipeline might impact

1 the zone of danger on this pipeline or other pipelines as  
2 far as I can tell.

3           There may have been things in there, but it was  
4 so hard to get through it all. So what we're looking for  
5 is specific information that would help the farmers and  
6 ranchers understand where the setbacks are there. The  
7 other thing you should know is other communities have  
8 looked at this issue and have imposed local land use  
9 zoning requirements to protect communities.

10           So, for example, the City of Austin, Texas has a  
11 500-foot setback from hazardous liquid and natural gas  
12 pipelines for things like nursing homes, day care  
13 centers, hospitals, you know, those kinds of facilities  
14 that you don't want to necessarily have it tooth by jowl  
15 with an industrial facility of this type.

16           And, you know, the Commission may want to  
17 consider either itself or encouraging the counties to say  
18 that there should be reasonable land use provisions to  
19 protect certainly kinds of vulnerable communities and  
20 facilities from potential risk. It may be a small risk,  
21 but do you really want a hospital built right next door  
22 to a pipeline like this? And we believe the answer to  
23 that is no.

24           Or do you want a local first responder, you  
25 know, a fire station, built close to these or some other

1 kind of water treatment plant or pumping station or water  
2 supplies near these kinds of facilities. And we believe  
3 they should not be allowed near these kinds of  
4 facilities.

5 So, I mean, that is totally within the  
6 Commission's jurisdiction to decide how we'd like to  
7 proceed and protect communities beyond what that 50-foot  
8 federal threshold setback is.

9 Thank you.

10 CHAIRMAN JOHNSON: TransCanada.

11 MR. MOORE: Thank you, Mr. Chairman.  
12 TransCanada did not file any objection to this particular  
13 request. It was a very broad request asking for all  
14 documents concerning the potential damage caused by a  
15 crude oil pipeline rupture.

16 We went to the people working on the KXL project  
17 and said please give us the documents you have that are  
18 responsive to this request. I got the documents. I  
19 indexed them. I reviewed them. I thought that they were  
20 all responsive. We produced them.

21 I don't know what more Dakota Rural Action  
22 wants, and I don't know what more TransCanada can do.  
23 Because we don't have additional documents in the  
24 Keystone files that are responsive to this request.  
25 We've produced everything that we have.

1           And, in fact, Mr. Blackburn's objection seems to  
2 be that we produced too much. It's just not what he was  
3 hoping to find. And I don't have any control over that.  
4 We produced the documents we have that are responsive to  
5 the request.

6           And, in fact, Mr. Blackburn's argument goes so  
7 far as to say at the bottom of page 11 of his most recent  
8 filing that it is possible that some relevant  
9 information's buried somewhere in the thousands of pages  
10 of documents provided.

11           We didn't object to this. We produced the  
12 documents. I don't know what more we can do.

13           CHAIRMAN JOHNSON: Commission staff.

14           MS. SEMMLER: Kara Semmler for staff. You know,  
15 I think we have to take the Applicant at face value when  
16 it says it produced the information that it has. If it  
17 has nothing else responsive, so be it.

18           It does seem that the analysis of how far a  
19 crude oil spill -- I mean, that seems like an analysis  
20 that could be done by an expert of Dakota Rural Action  
21 and that would be part of its testimony if it thinks it  
22 is relevant to the Application.

23           MR. WHITE: Commissioner Johnson, can you hear  
24 me? This is Jim White.

25           CHAIRMAN JOHNSON: Yes, Mr. White.

1 MR. WHITE: I wonder if I could just add one  
2 thing to Mr. Moore's comments.

3 CHAIRMAN JOHNSON: Okay.

4 MR. WHITE: There is one document that's  
5 arguably responsible that was not produced, and that was  
6 a document that's subject to the objection to the extent  
7 that materials involve high consequence areas.

8 There's a document called Evaluation of Risk to  
9 High Consequence Areas, which defined portions of the  
10 project, which if a spill occurred, would have the  
11 potential to reach a high consequence area. And as we  
12 dealt with in the initial Keystone proceeding, documents  
13 that disclose the location of high consequence areas are  
14 subject to confidentiality at the direction of the DOT  
15 PHMSA because they identify high consequence areas and we  
16 obtained high consequence locational information from DOT  
17 PHMSA subject to a confidentiality requirement. So that  
18 single document was not produced.

19 CHAIRMAN JOHNSON: Okay. Thank you.

20 With that, questions?

21 Mr. White, Mr. Moore, I mean, in previous  
22 proceedings we've had, siting proceedings dealing with  
23 high consequence areas, I mean, opposing counsel has had  
24 an opportunity to review that information subject to some  
25 confidentiality agreements and some very stringent



1 protocols.

2 Is there a reason why those protocols won't work  
3 in this situation with that particular document?

4 MR. WHITE: Essentially the same reason that we  
5 discussed in the last Keystone proceeding, which is the  
6 commitment that we make to DOT PHMSA not to disclose this  
7 information outside of government agencies once we  
8 receive it from them.

9 CHAIRMAN JOHNSON: Well, somebody, anybody,  
10 remind me what happened last time then. Because it seems  
11 to me that Mr. Hohn in particular had an opportunity to  
12 review that information.

13 Mr. Smith.

14 MR. SMITH: Well, again, I regret to say I  
15 didn't bring the protective order from the first case  
16 here. I'm going to just go on my recollection,  
17 Mr. White, is that we did not allow the turning over of  
18 such documents that identify HC areas to the Interveners  
19 in the first case.

20 But we did establish a procedure by which -- and  
21 this is my recollection, and it was subject to these  
22 people having to come here and under our custody and with  
23 observation from us have access to those documents for  
24 the purposes of review and but not to copy and take away  
25 copies.

1           And, again, I'm just going from memory, but  
2 that's what I recall. We did not have an utter  
3 prohibition concerning the ability of Interveners to at  
4 least look at and understand what those documents  
5 contained.

6           Does anybody disagree with that  
7 characterization?

8           MR. KOENECKE: Commissioners and staff, this is  
9 Brett Koenecke. That recitation by Mr. Smith comports  
10 completely with my recollection. My recollection is that  
11 Mr. Hohn did come down to the Commission offices and  
12 review the documents with a member of the staff. I don't  
13 know who that was, but that's my recollection.

14           MR. BLACKBURN: And, Commissioner, if I may,  
15 this may be simplified too because, as I said, we are not  
16 seeking the location of high consequence areas. And to  
17 the extent that that is the primary concern of PHMSA, we  
18 are not looking for that particular kind of information.

19           What we're looking for is any information about  
20 how far the physical damage of the pipeline would  
21 project. That may be able to be provided in a redacted  
22 copy or just the sections that are relevant. So I think  
23 that that is one way to resolve that.

24           Another issue that we didn't address, which I'm  
25 not sure if the Commission would like to, is whether this

1 is just from the files of Applicant or whether this is  
2 from the files of Applicant and its corporate parent,  
3 TransCanada.

4 What's the scope of they say they have only  
5 these documents? I believe that the Applicant has only  
6 these documents. Is that just Applicant's documents, or  
7 does that include TransCanada's corporate parent's  
8 documents or their affiliates that may have produced this  
9 kind of engineering?

10 MR. WHITE: All right. So the document search  
11 on this particular item was done broadly, but given that  
12 TransCanada Keystone is the only TransCanada entity with  
13 oil pipeline experience, that's where the search  
14 generated the responsive documents.

15 And I guess with response to Mr. Blackburn's  
16 further comment, if, you know, his interest is in seeing  
17 this risk assessment absent the HCA locational  
18 information, that may be a good compromise result here.

19 CHAIRMAN JOHNSON: Okay. Other questions?

20 If there aren't any -- oh, yes. Commissioner.

21 COMMISSIONER HANSON: Thank you, Mr. Chairman.

22 As -- I'm understanding that this information on  
23 air travel propulsion, distance of -- and I see crude oil  
24 in my notes. I'm not sure if that's exactly what was  
25 asked for, if it was crude oil or if it was defined

1 differently. And I forget in your request.

2 MR. BLACKBURN: Crude oil.

3 COMMISSIONER HANSON: But assuming that we hear  
4 it's different substances, assuming that Keystone is  
5 going to be operating this pipeline, they certainly  
6 should have an idea of to an extent the substance going  
7 through it. And assuming that, then they should be able  
8 to I would think in their own interest know the air  
9 travel distance of the substance.

10 Are you telling us you just don't have that  
11 information?

12 MR. WHITE: This was a document request. So it  
13 wasn't in the form of an Interrogatory. So, I mean, my  
14 response would be that we do not have documents that  
15 would be responsive to that particular request relating  
16 to air travel of crude oil.

17 COMMISSIONER HANSON: I'm puzzled by that. I'm  
18 just -- I'm really surprised at that. I just can't  
19 believe that you don't have some information written down  
20 somewhere that shows the distance of the air travel.

21 You certainly have that information. It's not  
22 in someone's head. What is the disconnect here? Why am  
23 I not understanding that there isn't a document showing  
24 this information?

25 MR. WHITE: Well, typically a crude oil leak is

1 not propelled through the air but rather leaks out either  
2 onto the ground or whatever the environment is where the  
3 leak occurs. And that's the focus of leak assessments.

4 COMMISSIONER HANSON: But you have a document of  
5 some sort setting that information out, do you not?

6 MR. WHITE: Yes, we do.

7 COMMISSIONER HANSON: Has that been shared with  
8 the other parties?

9 MR. WHITE: Yes. The risk assessment and spill  
10 volume analysis with respect to potential crude oil leaks  
11 was shared. The additional piece of that is the Risk to  
12 High Consequence Area document that we discussed. And,  
13 you know, it has high consequence area location  
14 information in it. However, it could be provided without  
15 that locational information.

16 COMMISSIONER HANSON: All right. Thank you.

17 CHAIRMAN JOHNSON: Okay. I mean, it sort of  
18 seems as though the parties have -- that we're close to  
19 an agreement on this. Maybe we're even there.

20 You know, let's throw this out and see if  
21 anybody disagrees, but that that risk assessment of risk  
22 to HCAs would be provided, specific locations would be  
23 redacted, and that, Mr. White, it's my understanding then  
24 that information could be provided outside of a  
25 protective order; is that right?

1 MR. WHITE: Correct.

2 CHAIRMAN JOHNSON: Does that not work for  
3 anyone?

4 MR. BLACKBURN: That's acceptable to DRA.

5 CHAIRMAN JOHNSON: Okay. Then I would so move  
6 that with regard to discovery request number 1.

7 Any discussion?

8 Hearing none, we'll proceed to vote.

9 Hanson.

10 COMMISSIONER HANSON: Aye.

11 CHAIRMAN JOHNSON: Kolbeck.

12 COMMISSIONER KOLBECK: Aye.

13 CHAIRMAN JOHNSON: Johnson votes aye. Motion  
14 carries 3-0.

15 All right. Request number 2 deals with the  
16 potential for pipelines to lose their earth cover.

17 Mr. Blackburn.

18 MR. BLACKBURN: Again, here the issue the DRA  
19 landowners are concerned about is a pretty common sense  
20 issue. The pipeline for safety reasons is buried beneath  
21 the ground. It's supposed to be -- likely be required to  
22 have a 4-foot minimum depth of cover over it.

23 We know that over time pipeline -- soil erodes.  
24 Pipelines tend to come to the surface. And, in fact, I  
25 was visiting with an attorney in Iowa after coffee hour

1 at church a couple of weeks ago, and he was representing  
2 landowners, farmers in an action dealing with a Williams  
3 Pipeline that had come above the ground and they were  
4 worried about having their implements hook the pipeline  
5 as they went over it. These were very old pipelines.

6 But what we're concerned about is the life of  
7 the proposed pipeline is claimed to be 50 plus years.  
8 Over 50 years soil can erode a substantial amount. And  
9 some parts of the state of South Dakota have highly  
10 erodible soils. And depending on how well remediation  
11 works or other kinds of climatic events happen, the  
12 pipeline could have less than 4 feet of soil. It could  
13 come close to the surface.

14 So they'd like to know where the risks are for  
15 that kind of erosion to happen. They'd also like to know  
16 what kind of monitoring TransCanada will do to ensure  
17 that that 4-foot depth of cover is maintained over time.  
18 Because at this point we understand it's a helicopter  
19 flyover. I don't think helicopter flyovers can determine  
20 how deep the soil is over a pipeline.

21 And, third, they'd like to know what happens if  
22 the pipeline loses cover. Because then it -- my  
23 understanding is they would be required to bring in more  
24 soil to maintain that 4-foot depth of cover, and that  
25 could obviously interfere with farming and ranching

1 operations. So, you know, that is the core of the  
2 concern here.

3 Now the response -- the documents we were  
4 provided by TransCanada included things like earthquake  
5 records for Montana and South Dakota, Nebraska. It  
6 included general descriptions of how land slides happen  
7 and other kinds of general geologic information. It also  
8 included the study about where coal deposits are in  
9 South Dakota.

10 I don't understand why -- I mean, some of the  
11 documents did not seem to be relevant or -- and/or  
12 helpful. Other documents were somewhat helpful in a very  
13 conceptual sense. But none of the documents addressed  
14 how is the monitoring going to occur or how it is -- what  
15 happens if the depth of cover is lost. Except for there  
16 is some language in -- the Keystone I Construction  
17 Mitigation and Reclamation Plan that described for that  
18 pipeline in very general terms how this process had  
19 worked to maintain depth of cover.

20 They're very conclusory and summary statements,  
21 and the farmers and ranchers would like to know in more  
22 detail how that's going to be maintained and what happens  
23 if the depth of cover is lost.

24 CHAIRMAN JOHNSON: TransCanada, your comments  
25 with regard to request number 2.



1 MR. MOORE: Thank you, Mr. Chairman.

2 Again, we asked Keystone personnel to search  
3 files for documents responsive to the broad request,  
4 which were all documents concerning the potential for  
5 pipelines to lose their earth cover due to soil erosion,  
6 movement of earth, or movement of the pipe. And we  
7 produced the documents that were collected in response to  
8 that request.

9 We did not state any objection to this  
10 particular request. And I think that Dakota Rural  
11 Action's response indicates that while they didn't find  
12 exactly the information they were hoping, there were  
13 responsive documents that were produced. Again, this was  
14 a document request, not an Interrogatory asking for a  
15 particular explanation of how things that are indicated  
16 in the Construction Mitigation Reclamation Plan, for  
17 instance, would be done.

18 And at the top of page 15 of its motion DRA says  
19 that they believe that TransCanada has greater  
20 information about monitoring depth of cover. And I think  
21 that to come before the Public Utilities Commission and  
22 say TransCanada or Keystone has an obligation to produce  
23 additional documents, there needs to be some greater  
24 showing than that, given that we did not object to this  
25 request and produced the documents that were located and

1 found in Keystone's files.

2 CHAIRMAN JOHNSON: Commission staff.

3 MS. SEMMLER: I don't know that staff really can  
4 add a whole lot to the arguments made other than again to  
5 take the Applicant at face value. It says it has nothing  
6 left that's responsive. Staff would have no reason to  
7 know whether it does or doesn't.

8 CHAIRMAN JOHNSON: Questions? Commissioner  
9 Kolbeck?

10 COMMISSIONER KOLBECK: Yes. I think what DRA is  
11 after is basically with any other utilities or any other  
12 of the thousands of miles of pipeline, there is going to  
13 be some monitoring done. Spring rains will cause  
14 erosion. Anything could cause a shift, maybe some  
15 settling.

16 Does Keystone have any -- is that an agreement  
17 with the landowners, anything that you could produce that  
18 way that says we will maintain the land, anything like  
19 that?

20 MR. MOORE: Well, actually, Commissioner, I  
21 think that that issue is addressed in the Construction  
22 Mitigation Reclamation Plan, which is referred to in  
23 DRA's response. And, I mean, the document says that  
24 TransCanada takes efforts to monitor that very issue  
25 after construction of the pipeline.

1           COMMISSIONER KOLBECK: Okay. And that was my  
2 understanding also. So what is it, I guess, Mr.  
3 Blackburn, that you're after?

4           MR. BLACKBURN: Well, what kind of monitoring?  
5 I mean, all they say is they are planning to do  
6 monitoring. Does that mean coming on the land with metal  
7 detectors that can determine how deep the soil cover is?  
8 Does that mean they need regular access every few years?

9           It's not that -- we agree we understand they  
10 plan to do monitoring, are required to do monitoring.  
11 Landowners have no idea what that monitoring looks like.  
12 And they would like to know because if they are going to  
13 monitor, we believe they have to come on landowners' land  
14 to do so. And landowners would like to know, you know,  
15 what that monitoring looks like.

16           And then also if depth of cover fails, who pays  
17 for it and how is it fixed and those kind of issues.  
18 Again, it's a very practical issue. Just saying there  
19 will be monitoring, trust us, it's good enough, is not  
20 what landowners are looking for. And we believe that the  
21 technology is understood about how to monitor for actual  
22 depth of cover and what kinds of equipment you need to  
23 bring on land and how often it should be done and those  
24 sorts of things.

25           The Construction Mitigation Reclamation Plan

1 says there will be visual observations of erosion. So  
2 that's more like you fly over with a helicopter, you see  
3 that there's been a storm or rain and adding to erosion  
4 at this particular place.

5 Well, when you're talking about erosion on  
6 farmland, especially cropland, the erosion can happen  
7 over time. And there isn't any dramatic appearance of  
8 loss of soil cover that you can see from the air. And  
9 also the same thing can happen on rangeland, that over  
10 time the soil can slowly erode, and that is the kind of  
11 issue that they would like more information about.

12 So it's not just merely monitoring but it's the  
13 kind of monitoring, when it would happen, how often it  
14 would happen, and what would be the result if they have  
15 to bring on more soil to fix the depth of cover.

16 MR. MOORE: May I just respond to that? Again,  
17 this was a document request, not an Interrogatory, and  
18 many of the issues Mr. Blackburn is talking about can be  
19 addressed through testimony.

20 But I just want to point out that the face of  
21 the CMRP, which is quoted in DRA's own brief says that  
22 there are going to be methods to monitor soil erosion  
23 other than helicopter flyovers. And one of those which  
24 is principally mentioned is direct communication with the  
25 landowners. The document says Keystone shall maintain

1 communication with the landowner and/or tenant throughout  
2 the operating life of the pipeline to allow expedient  
3 communication of issues and problems as they occur.

4 The document also says that any erosion  
5 identified shall be reclaimed as expediently as is  
6 practicable by Keystone or by compensation of the  
7 landowner to reclaim the area.

8 So I think those issues are addressed. To the  
9 extent that Mr. Blackburn wants further development, I  
10 think it's an appropriate issue for testimony.

11 MR. BLACKBURN: Commissioner, I understand that  
12 we weren't looking for an Interrogatory on that. I was  
13 just surprised that there weren't responsive documents  
14 that talk about what kind of equipment would be used to  
15 do that kind of monitoring.

16 And it seems like from that language that the  
17 landowners have been obligated to monitor that  
18 themselves, that, yes, they will be in communication with  
19 landowners. But does that mean that the landowners, that  
20 they're responsible for going out and figuring out what  
21 that depth of cover is and insisting it should be done,  
22 or should TransCanada have that burden.

23 And landowners believe TransCanada should have  
24 that burden of monitoring and maintaining the depth of  
25 cover, and they shouldn't trust the landowners to keep

1 track of how deep that pipeline is on an annual basis.

2 CHAIRMAN JOHNSON: Mr. Moore, at some point you  
3 had said that Keystone doesn't have that information.  
4 Was the document request for this request done more  
5 broadly?

6 MR. MOORE: It was not, based on the general  
7 objection Keystone raised. And since Keystone is the  
8 Applicant here, the request was made to the people  
9 working on the Keystone XL project.

10 CHAIRMAN JOHNSON: I wonder if -- I mean, this  
11 may be a recurring issue. I mean, one wonders if we  
12 shouldn't take up and have some ruling on to what extent  
13 the corporate parent should be subject to these discovery  
14 requests.

15 Mr. Smith, thoughts.

16 MR. SMITH: Yeah. I mean, in the end, you know,  
17 I took a look at the legal authority that Mr. Blackburn  
18 cited. And I -- you know, I found it to be in accord  
19 with the argument you make, subject to -- with some  
20 subject-tos. And they're right in the cases that you  
21 cite.

22 And those subject-tos -- the problem with the  
23 subject-tos, like all discovery requests, we always end  
24 up back in the same spot. And that is breadth and  
25 burden. And, you know, I think that's where this cuts.

1 And, you know, without some inquiry of TransCanada on  
2 this particular issue, I have no idea, you know, what's  
3 involved in that, what would be involved.

4 And, again, whether anything more could be  
5 gained than what they could gain through  
6 cross-examination, I'm not sure. But, you know, maybe  
7 that's where we ought to take this, is down that specific  
8 path.

9 Because basically what the cases say is that  
10 discovery doesn't end at an affiliate level. But there's  
11 some subject-tos. And that is showing that -- first of  
12 all, is availability and access. And some other  
13 subject-tos are reasonableness of breadth and assessment  
14 of burden.

15 So I think that's where it cuts. And I  
16 apologize, Mr. Chairman, that everything always ends up  
17 in that mushy realm. But that's exactly what the case  
18 says, and it even characterizes it that way.

19 MR. WHITE: Commissioner Johnson, if I could  
20 comment on that.

21 CHAIRMAN JOHNSON: Yes, Mr. White.

22 MR. WHITE: I guess one of the reasons for --

23 CHAIRMAN JOHNSON: Actually, Mr. White, let's  
24 just hold on a second. Because if we're going to open up  
25 a legal debate on this topic, I want to make sure we

1 maintain the proper order here. So hold on just a  
2 second.

3 Mr. Smith, what I was asking specifically was,  
4 does it sort of make sense to take this particular  
5 issue -- hold that in abeyance until we determine what  
6 the Commission feels about this affiliate corporate  
7 shield legal issue?

8 MR. SMITH: Sure. If you want to have a general  
9 discussion about that, I think that's fine. And if you  
10 want to make sort of a broad ruling, that would be fine.  
11 Again, I just want to point out, though, that the cases  
12 that are out there, and there aren't -- I mean, there's  
13 not a whole lot of authority, but in the end you always  
14 get down to the issue of having to rule on everything  
15 somewhat case by case because of the limiting parts of  
16 it.

17 CHAIRMAN JOHNSON: Okay. Well, maybe we won't  
18 make one motion, and maybe we will, depending on what my  
19 colleagues want to do, that deal with this issue  
20 specifically, but because it's germane to this particular  
21 request, let's go ahead and take some comments on it.

22 We've read the briefs. Is there anything in  
23 addition to what you've included here that the Commission  
24 should know about this issue about corporate affiliate  
25 and to what extent their discovery requests apply to the



1 corporate parent?

2 MR. BLACKBURN: I would just emphasize I agree  
3 with Mr. Smith that there is a certain amount of judgment  
4 and discretion involved here in terms of how far  
5 discovery should reach.

6 At the same time I don't believe here it would  
7 be particularly onerous for TransCanada Keystone to  
8 inquire of its engineering staff and Canada about, you  
9 know, what kinds of monitoring equipment is available to  
10 ensure depth of cover and, you know, how that process  
11 should happen.

12 I don't see this as being particularly onerous,  
13 and I see that they regularly have access to documents  
14 from their corporate parent and are probably in fairly  
15 close communication with that corporate parent about a  
16 lot of these matters.

17 So in a very practical sense I think there's an  
18 engineering staff in Canada. There's probably  
19 engineering staff in other places perhaps, and that some  
20 of this issues is not that complicated and not that  
21 burdensome or onerous for them to cross the border with a  
22 telephone call or an e-mail and find out.

23 CHAIRMAN JOHNSON: Okay. Mr. Moore,  
24 Mr. White -- since I cut you off, Mr. White, please go  
25 ahead.

1           MR. WHITE: Thank you. Yeah. I guess I have  
2 to -- I just have to note that it appears that  
3 Mr. Blackburn has suddenly redefined this request. The  
4 original request was for all documents relating to soil  
5 erosion, movement of earth, movement of pipe, and means  
6 to monitor depth of pipeline.

7           If we went back and searched for documents that  
8 touch on those topics across the 63,000 miles of pipeline  
9 that TransCanada operates in North America, it would be a  
10 massive request. It's not a phone call across the  
11 border. If the request is being redefined to seek only  
12 information relating to monitoring equipment and how  
13 monitoring might be done, that's a completely different  
14 question, and it's, you know, considerably more  
15 manageable to be done on a corporate basis.

16           CHAIRMAN JOHNSON: Okay. Thank you.

17           Mr. Moore, anything to add?

18           MR. MOORE: No, Mr. Chairman.

19           CHAIRMAN JOHNSON: Okay.

20           Okay. Other questions? If not, perhaps --

21           MR. SMITH: I have a question.

22           CHAIRMAN JOHNSON: Go ahead.

23           MR. SMITH: I mean, he threw out something like  
24 an olive branch there, Mr. Blackburn. What's your  
25 response?

1 MR. BLACKBURN: I think that that would be  
2 acceptable. Like I said, there are three basic issues  
3 that we're getting to here I think that are the core of  
4 this. And that is the monitoring, how to maintain what  
5 happens practically to maintain depth of cover and any  
6 liability or who pays for all of that. Because, you  
7 know, if you're going to be doing that during the  
8 cropping -- during the summertime, it could damage farm  
9 and ranch income.

10 So those are the issues we're looking at. And  
11 to the extent we narrow them to those particular issues,  
12 that's acceptable to DRA.

13 CHAIRMAN JOHNSON: For discussion sake, I will  
14 move that the Commission approve the Motion to Compel for  
15 request 2 with regard to monitoring and remediation and  
16 that that would also include search through the corporate  
17 parent but to deny request number 2 on all other areas.

18 Discussion?

19 Hearing none, we'll proceed to vote.

20 Hanson.

21 COMMISSIONER HANSON: Aye.

22 CHAIRMAN JOHNSON: Kolbeck.

23 COMMISSIONER KOLBECK: Aye.

24 CHAIRMAN JOHNSON: Johnson votes aye. Motion  
25 carries 3-0.

1           With that, we'll proceed to request number 3  
2 which deals with the abandonment of pipelines.

3           DRA.

4           MR. BLACKBURN: Again, this is a very practical  
5 concern for landowners along the pipeline route. Once  
6 pipelines reach the end of their useful life, which all  
7 inevitably do, that pipe is still there, and the  
8 landowners would like to have more clarity and  
9 understanding about it and are seeking documents about  
10 what happens to that pipe after it's at the end of its  
11 operational life.

12           Having a 3-foot diameter pipe, you know, at that  
13 point hopefully at 4 feet underground could present  
14 safety and problems of other kinds -- have other kinds of  
15 impacts on the activity, use of land along the pipeline  
16 route.

17           The question becomes, you know, what kinds of  
18 options are there for covering the pipe be addressed.  
19 And it can either be left in place. It can be left in  
20 place and filled with some kind of solid material like  
21 gravel or other kinds of grouts. Or it can removed.

22           And what happens in a particular location is  
23 something of a judgment call that the landowners would  
24 like to know their rights to be involved in.

25           Also removal of the pipe or any of these

1 remediation efforts does result in cost. And the  
2 landowners do not want to be stuck with a large white  
3 elephant across their property in 50, 60, 70 years. And  
4 this issue is not -- has not been an issue that's -- it's  
5 come up in other parts of the country, but because not  
6 many of these kinds of large pipelines have been  
7 abandoned at this point, it isn't that there's a lot of  
8 evidence or data about the problems that are coming up.  
9 But we do know that for smaller, older pipelines that  
10 there have been issues and problems with abandonment.

11           And there's a real set of legal things that can  
12 develop around these abandonment issues. Because  
13 although the landowner owns the land, the utility has the  
14 easement. The utility also owns the steel pipe in the  
15 ground. There's case precedent on that. So when the  
16 pipe is no longer used, the question becomes, well, when  
17 does the land revert to the landowner and who has  
18 responsibility for addressing the pipe.

19           TransCanada provided a single document on this  
20 relating to its internal policy. We understand that  
21 TransCanada's parent company has been involved in a  
22 rather detailed study in Canada and regulatory process in  
23 Canada to determine how -- what kinds of -- how to deal  
24 with this abandonment issue and we should pay for the  
25 costs of when the pipe needs to be either removed or

1 filled or dealt with when it's done being used.

2           So we believe there's a fair amount of  
3 information in TransCanada's corporate files about this  
4 abandonment issue. And yet all we've received is simply  
5 their internal policy. We also expect that because they  
6 have a corporate policy on abandonment that they did some  
7 kind of investigation and research to develop that  
8 policy. And, therefore, they probably have more  
9 documents and information about, you know, what the  
10 options are and how to address abandonment issues.

11           So we don't -- we don't believe that the only  
12 document that TransCanada should provide here is just  
13 their own internal corporate policy. We believe that's a  
14 fairly self-serving document and that there are a lot  
15 of -- that there's a great deal of other information  
16 about this particular issue.

17           And, again, it's a very practical issue. The  
18 landowners in western South Dakota, many of them have  
19 been there for a long time. They are very concerned  
20 about the land that they live on. They take care of it.  
21 They maintain the land. And they are concerned about not  
22 leaving a big white elephant of an underground 3-foot  
23 diameter pipeline running through their land for their  
24 grandkids to deal with.

25           And I think recently in Canada they recently

1 required that the companies determine how much it would  
2 cost to deal with these abandonment issues. Because the  
3 big problem here is that it's very expensive to remove  
4 pipe from the ground. And the farmers and ranchers do  
5 not want to be stuck with the costs of removing the pipe.

6 Also there's a good chance that TransCanada will  
7 transfer the ownership of this pipeline at some point to  
8 another company that may or may not have money to pay for  
9 the abandonment costs. So the Canadians again decided to  
10 set up a special fund that all consumers essentially paid  
11 for through the cost of the oil transport to make sure  
12 that landowners weren't stuck with the burden that was a  
13 benefit to the entire country without having the country  
14 pay them to make sure that they're made whole when this  
15 entire pipeline effort -- the life of the pipeline ends.

16 And I've heard things that it could be used for  
17 telecommunications equipment. You know, possibly. It  
18 could be used for other kinds of purposes. It's  
19 possible. But that doesn't mean it will be used for  
20 those purposes. And the landowners are looking for  
21 documents from TransCanada about this abandonment issue.  
22 We believe they have more, and we believe they should  
23 produce them.

24 CHAIRMAN JOHNSON: TransCanada.

25 MR. MOORE: Thank you, Mr. Chairman. Again,

1 this is a request to which TransCanada and Keystone did  
2 not object. The document that was produced is a  
3 operating procedure of TransCanada. And my understanding  
4 is that there are no additional corporate documents that  
5 TransCanada has related to that operating procedure.

6 Mr. Blackburn to some extent has again redefined  
7 this request and talks on page 16 of his motion about  
8 TransCanada -- not Keystone's but TransCanada's  
9 participation in the Land Matters Consultative Initiative  
10 before the Canadian National Energy Board.

11 To the extent that there are public documents  
12 related to that proceeding, they were developed in  
13 connection with Canadian regulatory matters. The  
14 operating procedure that was produced in response to the  
15 request was designed by TransCanada to comply with  
16 applicable Canadian and United States codes.

17 And certainly that document is responsive.  
18 There's not an argument about the relevance of  
19 abandonment to the proceedings before the PUC. But we  
20 thought that at the time that this request was made and  
21 answered that it was a legitimate request and it was  
22 adequately answered.

23 CHAIRMAN JOHNSON: Commission staff.

24 MS. SEMMLER: Again, staff doesn't know whether  
25 there are or are not documents in TransCanada's office



1 that are relevant here. So nothing further to add.

2 CHAIRMAN JOHNSON: Questions?

3 So, Mr. Moore, I want to make sure that I  
4 understand you right. You're saying you searched through  
5 the corporate entity and that no other documents existed  
6 that were responsive to this request and more  
7 specifically what Mr. Blackburn has said today he's  
8 trying to get to.

9 MR. MOORE: Jim White, correct me if I'm wrong  
10 because you actually made the request. But my  
11 understanding is that there are no additional corporate  
12 documents related to TransCanada's operating procedure  
13 concerning abandonment.

14 MR. WHITE: That's right. So just to make sure  
15 that we're clear on this, we did not search the corporate  
16 files for all documents concerning abandonment of  
17 pipelines, which was the request, but I did refocus in on  
18 internal documents that would support the TransCanada  
19 operating procedure that was produced, and I was advised  
20 that there were no internal documents that -- in addition  
21 to that particular TOP.

22 You know, I do concede that TransCanada  
23 participated in the Land Matters Consultative Initiative  
24 before the NEB. As to whether there are additional  
25 corporate documents that "concern abandonment of

1 pipelines," I have not made that inquiry.

2 CHAIRMAN JOHNSON: The work product from that  
3 process, the final work product that was done with  
4 Canadian regulators, that's a public document?

5 MR. WHITE: Correct. I believe there are a  
6 number of public documents that came out of that NEB  
7 proceeding.

8 CHAIRMAN JOHNSON: Mr. Blackburn, I mean, what  
9 say you? If they don't have anything else and the work  
10 product from the process standard took is public, do you  
11 have knowledge of something specific else that they  
12 should be offering up?

13 MR. BLACKBURN: On the web, what's available  
14 from the Land Matters Consultative Initiative is, as far  
15 as I can tell, only their order from a few other  
16 supporting procedural documents about the process that  
17 they're going through.

18 But I was not able to locate, for example,  
19 discussions of the kinds of impacts that -- adverse  
20 impacts that abandoned pipelines could have on  
21 communities. What they have on-line is just simply their  
22 final order that doesn't discuss all the facts in detail.  
23 It just has conclusions about how they're going to  
24 address it.

25 So I couldn't find, you know, what kinds of

1 impacts there would be, what the options should be, when  
2 certain kinds of remedial processes should be undertaken,  
3 whether you should fill a pipeline or whether you should  
4 remove it.

5 They looked at a lot of different detail. There  
6 were two streams. One was the financial impacts of  
7 pipelines, and one was the physical impacts of pipelines.  
8 The final document for the entire process on-line does  
9 not mean that it's easy to get access to or I have access  
10 to all the documents that went into that process  
11 preceding it, which was quite a long process.

12 And my understanding is that TransCanada has  
13 those kinds of documents. Because it wasn't just the  
14 final order that, you know, is relevant here, but it was  
15 all the other evidence that was brought to bear in that  
16 Canadian proceeding that is useful here.

17 And that material is available somewhere.  
18 TransCanada I assume has it. But it is not available  
19 generally to the public or on-line.

20 Now if I call up and request from the Canadian  
21 government that they send all of that material, I suppose  
22 I could do that. But if TransCanada has it already and  
23 it's subject to discovery, then they should have  
24 disclosed that material to us as part of discovery.

25 CHAIRMAN JOHNSON: Commissioners, questions?

1           COMMISSIONER KOLBECK: I guess my question goes  
2 to Mr. Smith. Is that part of the question that they  
3 asked? Is that part of the discovery that they actually  
4 asked, or is Mr. Blackburn actually into another realm of  
5 this study that the Canadian government has?

6           Because if TransCanada says they produced all  
7 that they had, should have he asked a different question  
8 pertaining to this study?

9           MR. SMITH: Well, again, the request is very  
10 broad. So documents like that would be within the scope  
11 of the original, I think. You know, Mr. White or  
12 Mr. Moore can argue with me, but it's so broad that it --  
13 it's hard to imagine anything dealing with abandonment  
14 that wouldn't be within that.

15           MR. WHITE: These documents would fall within  
16 the scope of the request. They were not produced because  
17 they are -- they were not Keystone documents. However, I  
18 would add that TransCanada does have certain documents  
19 that came out of the Land Matters Consultative Initiative  
20 that are in addition to the final NEB order that  
21 Mr. Blackburn has referred to.

22           And if it would facilitate resolution of this  
23 issue, I would certainly undertake to provide him with  
24 the other documents from that proceeding that are in  
25 TransCanada's corporate possession.

1 MR. SMITH: Does that get us there, or --

2 MR. BLACKBURN: Provided that the definition  
3 isn't just the public documents but also other documents  
4 that are discoverable that are perhaps not as part of the  
5 Docket of that particular proceeding that we believe that  
6 all of those documents should be disclosed, and we do not  
7 think it's unduly burdensome because, you know, I assume  
8 that they have those kinds of materials in their files  
9 and they're organized.

10 This is a very important matter. The Canadians  
11 have done a lot of work on it. The Commission should  
12 have the benefit of all the relevant factual information  
13 about abandonment TransCanada has in its files wherever  
14 those files are located. And I believe those are just  
15 primarily in Canada because that's as far as we know the  
16 only place that TransCanada has been involved in such an  
17 event and proceeding.

18 I think the other thing I should add is, you  
19 know, I did some research to try to find out whether the  
20 abandonment issue had been addressed in the  
21 United States. And it really hasn't been addressed, but  
22 there have been problems that have propped up around the  
23 country because of abandonment. Iowa has a statute on  
24 abandonment. Kansas has a statute on abandonment, only  
25 related to the abandonment of construction easements, not

1 utility easements. I believe Texas and Louisiana do a  
2 little bit of work on abandonment too.

3 Because of all of these pipelines in Texas, they  
4 just have this ongoing problem of dealing with abandoned  
5 pipelines. There's is this financial structure set up in  
6 Texas, I think -- I haven't been able to track all of  
7 this down -- related to abandonment. So it is been the  
8 state's prerogatives to do that. The material is there.  
9 We think we can get this material to you from  
10 TransCanada.

11 CHAIRMAN JOHNSON: Any other questions? If not,  
12 is there a motion?

13 COMMISSIONER KOLBECK: I guess I'll motion in  
14 Dakota Rural Action's request number 3 to grant the  
15 discovery request for TransCanada to supply all the  
16 relative materials that they have in the I believe --  
17 I'll just stop right there.

18 CHAIRMAN JOHNSON: National Energy Board. Both  
19 public and documents that haven't yet been made public  
20 regarding that process?

21 COMMISSIONER KOLBECK: Exactly. Not limited to  
22 documents that can be found in the public domain.

23 CHAIRMAN JOHNSON: Any discussion on the pending  
24 motion?

25 Hearing none, we'll proceed to vote.

1 Hanson.

2 COMMISSIONER HANSON: Aye.

3 CHAIRMAN JOHNSON: Kolbeck.

4 COMMISSIONER KOLBECK: Aye.

5 CHAIRMAN JOHNSON: Johnson votes aye. Motion  
6 carries 3-0.

7 I sort of feel like the different parties are  
8 also getting into the habit of reciting most of what they  
9 filed. And so if we could -- I mean, the Commissioners  
10 have read that. I don't mind a brief summary of your  
11 argument, but if we could highlight the specifics and add  
12 any other important legal points maybe you didn't  
13 include. But if we can keep this -- I mean, we have  
14 read.

15 So with that, we'll move to request number 5,  
16 which deals with liability for damages.

17 DRA.

18 MR. BLACKBURN: Thank you, Commissioner.

19 The issue here is frankly not so much one of  
20 what's been responded to so far but one of jurisdiction,  
21 that TransCanada has in their objections, said they  
22 objected to this request because the Commission has no  
23 jurisdiction to consider this issue. The issue of  
24 liability of TransCanada for oil spills.

25 Now I understand the Commission investigated

1 this in the Keystone I proceeding and, therefore, DRA  
2 believes that it is jurisdictional. However, if  
3 TransCanada believes that it has an argument that this  
4 subject matter is not jurisdictional to the Commission,  
5 then we would like to have a ruling now about whether the  
6 subject issues related to liability are subject to  
7 jurisdiction so that we don't go to the effort of putting  
8 testimony in on this matter and then have TransCanada  
9 argue later that it's not jurisdictional.

10 We might as well decide, you know, up front  
11 whether the Commission would like information relevant to  
12 the probable liability. And I understand that the  
13 Commission last -- in the Keystone I proceeding looked at  
14 liability. But what we're particularly concerned about  
15 is not just the technical definition of liability or the  
16 scope of liability for TransCanada but also the procedure  
17 for getting resources -- you know, to get recovery for a  
18 spill.

19 It's one thing to have a right to go to court to  
20 get damages for a spill. It's an entirely different  
21 thing to be able to pay a lawyer and the experts  
22 necessary to get those -- to get -- you know, to go to  
23 court and to recover damages. So it's not just the level  
24 of liability, but it's also the process for recovery to  
25 make sure that it is a process that's fair and equitable



1 for landowners.

2 CHAIRMAN JOHNSON: TransCanada.

3 MR. MOORE: Thank you, Mr. Chairman. On page 19  
4 of DRA's motion I think that DRA essentially again redrew  
5 this request and says that DRA requests nonprivileged  
6 documents containing statements about oil spill liability  
7 provided by Applicant to nonprivileged parties. And  
8 those would be documents not constituting any sort of  
9 admissions.

10 Based on that request, TransCanada has done an  
11 additional search, and Jim White can clarify this, but my  
12 understanding is that there are several responsive  
13 nonprivileged documents that we will provide to Dakota  
14 Rural Action as a result of that further inquiry in  
15 response to that specific request.

16 MR. WHITE: That's right. There are at least  
17 three documents that fall into that category and two  
18 other documents that I'm reviewing now for privilege that  
19 may or may not fall into that category.

20 MR. MOORE: To the broader question about  
21 jurisdiction, I don't view this as much as a  
22 jurisdictional matter as it is just a question about this  
23 is a legal issue, and ultimately legal liability for a  
24 pipeline spill is a matter for the courts. And this is a  
25 document request, and to the extent that it's been

1 narrowly defined on page 19, we can respond to that.

2 CHAIRMAN JOHNSON: Time line on the offering up  
3 of these other documents?

4 MR. WHITE: Within 48 hours.

5 CHAIRMAN JOHNSON: Okay. Thank you.

6 Commission staff.

7 MS. SEMMLER: Again, I don't -- I agree that it  
8 may not be appropriate today to deal with the legal  
9 arguments surrounding liability, and that may be best  
10 left for the hearing as we deal with it. It is a  
11 discovery request, and it sounds as if there's a  
12 compromise.

13 CHAIRMAN JOHNSON: Questions?

14 COMMISSIONER KOLBECK: Mr. Blackburn, does that  
15 suffice? Those documents that would be coming from --

16 MR. BLACKBURN: I will review them, but I think  
17 that will probably be sufficient, that scope of discovery  
18 would be sufficient. Thank you.

19 COMMISSIONER KOLBECK: And then we can wait  
20 until hearing to make the other determination?

21 CHAIRMAN JOHNSON: Yeah. I don't know. I sort  
22 of have a tendency to agree with Mr. Blackburn that if  
23 we're not going to dive in, if we're not going to wade  
24 into the legal liability argument, it may be fairest to  
25 the parties to let them know that now.

1 I will tell you I don't think that's going to be  
2 in the public interest. I don't think that's part of the  
3 Commission's job in this proceeding, that legal liability  
4 really is a circuit court issue. Now maybe we don't need  
5 to take a vote on that. But maybe if the Commissioners  
6 disagree with me they can -- or you can be silent. But,  
7 I mean, he's asked for some guidance. I don't think it's  
8 an inappropriate request on his part.

9 COMMISSIONER KOLBECK: And I guess I would  
10 comment on that too. I do agree that's probably a  
11 Circuit Court issue. I don't think the issue of  
12 liability without knowing what the circumstances are  
13 to -- an event that hasn't even happened yet. I know  
14 that liability is well drawn out. The court is set up  
15 for that type of a matter.

16 COMMISSIONER HANSON: Mr. Chairman, it would be  
17 hard to imagine for me at least that we would want to  
18 deal with that issue.

19 CHAIRMAN JOHNSON: With that, then perhaps I  
20 would move that in this request the Commission would  
21 approve the Motion to Compel with regard to the three  
22 documents that TransCanada is offering up and deny the  
23 request on other grounds.

24 Any discussion?

25 Not other grounds but for other components of

1 that request.

2 Hearing no further discussion, Hanson.

3 COMMISSIONER HANSON: Aye.

4 CHAIRMAN JOHNSON: Kolbeck.

5 COMMISSIONER KOLBECK: Aye.

6 CHAIRMAN JOHNSON: Johnson votes aye. Motion  
7 carries 3-0.

8 With that, I think request 6, which deals are  
9 with ERP.

10 MR. BLACKBURN: Thank you, Mr. Chairman.

11 The Emergency Response Plan issue raises a whole  
12 nother set of jurisdictional questions about what is  
13 appropriately considered and reviewed by the Commission  
14 with regard to different federal requirements.

15 The Emergency Response Plan is required by  
16 federal law, and it is the primary document -- in fact,  
17 as I understand it, it is the only document that the  
18 purpose of which is to ensure that if there is an oil  
19 spill, the communities are protected from that oil spill.

20 You know, it discusses things, for example,  
21 about where you're going to put spill equipment and what  
22 kind of personnel that are available to respond to the  
23 spill and how TransCanada's contractors or its personnel  
24 will communicate and interface with local emergency  
25 personnel. There's a lot of very nuts and bolts things

1 in the Emergency Response Plan. And it is required by  
2 federal law.

3           However, TransCanada then argues that because  
4 it's a federal law that, therefore, the Commission has no  
5 authority to inquire into how well that federal law's  
6 being complied with, you know, what the particular  
7 components of the Emergency Response Plan are, and, you  
8 know, whether there's more that the Commission should do,  
9 for example, by providing additional state resources for  
10 emergency response personnel in this state.

11           So even though this is a federal issue, the  
12 Commission can inquire into what protections are  
13 required -- or provided by the federal law and to see  
14 whether it's adequate to protect the state of -- the  
15 citizens of South Dakota.

16           Obviously, sometimes the Federal Government does  
17 a better job. Sometimes they do a bad job of  
18 implementing their own laws, and the Commission  
19 commenting and participating in these processes can help  
20 protect the citizens of the state. You speak for a lot  
21 of the citizens of state with regard to the Federal  
22 Government.

23           And in the past the Commission has looked at  
24 federal issues. For example, in the Keystone I  
25 proceeding you requested that TransCanada treat the

1 Middle James Aquifer as a high consequence area. Now  
2 that's a federal definition and a federal standard of a  
3 high consequence -- you know, regulations are federal.  
4 But the Commission looked at those issues and said, well,  
5 we think that the implementation of these federal laws  
6 should include the Middle James Aquifer, that the  
7 Commission will look and make sure the Federal Government  
8 does a good job with this plan. Because it really is the  
9 heart and sole of protecting the communities from oil  
10 spills.

11 So that is why we're requesting information on  
12 the Emergency Response Plan. Also TransCanada argues  
13 that it's not going to be done until operations start.  
14 Well, the Commission will issue its decision before  
15 operation starts so if the Commission's going to have any  
16 role, any say, in making sure the Federal Government  
17 implements this law, you know, the way it should and to  
18 weigh in with its weight to protect the citizens, it  
19 needs to do that during the development of the plan, not  
20 after the plan is there after the pipeline is operating.

21 So that's really the heart of it, that we're  
22 looking for information about -- very practically about  
23 what is going to be -- you know, how the Federal  
24 Government is going to protect the interests of the state  
25 and what the Public Utilities Commission could do to

1 supplement, if necessary, federal requirements.

2 CHAIRMAN JOHNSON: TransCanada.

3 MR. MOORE: Thank you, Mr. Chairman.

4 As with the Keystone Pipeline, we expect to have  
5 to provide, excuse me, a copy of the Emergency Response  
6 Plan to the PUC and to DENR. It's required by state  
7 statute when it is completed and when it has been  
8 submitted to the federal agency with authority, which is  
9 the Pipeline and Hazardous Material Safety  
10 Administration.

11 But beyond that, I think that the request is  
12 enormously burdensome. It asks for all documents  
13 associated with the preparation of that document. And as  
14 we indicated, there are Keystone employees who have  
15 worked for the better part of a year in preparing the  
16 Emergency Response Plan.

17 I think it is only tangentially related to the  
18 issues that will be before the PUC for determination and  
19 approval of the permit and to the extent that it is  
20 explicitly an issue governed by federal law, I just don't  
21 think that the request is warranted for information  
22 beyond providing the ERP once it's completed to the  
23 Public Utilities Commission.

24 CHAIRMAN JOHNSON: Commission staff.

25 MS. SEMMLER: Staff took the position in the

1 first TransCanada docket and does again in this pipeline  
2 siting that that Emergency Response Plan is regulated by  
3 PHMSA, the contents are regulated by PHMSA, and the  
4 Commission does not have an opportunity to change those  
5 PHMSA requirements.

6 So we would maintain the same argument that the  
7 Commission should have a copy once it's produced per  
8 PHMSA regulations, but beyond that I don't think this  
9 Commission has jurisdiction.

10 CHAIRMAN JOHNSON: I don't know, Mr. Blackburn.  
11 I know the ERP is a big deal. I am having a hard time --  
12 I mean, it almost seems as though you're arguing the PUC  
13 should be playing an oversight function over federal and  
14 other levels of government. I mean, where does it end?

15 I mean, you know, of course, you know, the  
16 four-part test of the burden of proof you do have to  
17 follow all applicable federal and state and local laws.  
18 But, I mean, are we to verify that they're paying people  
19 above federal minimum wage? Are we to verify that the  
20 meals being served on site meet, you know, health codes?  
21 How about speed limits? How about vehicle design, safety  
22 construction standards?

23 I just don't -- I mean, it seems to me if we  
24 start to say that it's the PUC's job in this proceeding  
25 and to make sure that every other level of government



1 that has an oversight function over this project and the  
2 operation of this plan, that we're supposed to  
3 double-check their work, we're going to be here a long  
4 time.

5 I mean, where am I wrong? Where are my concerns  
6 misplaced?

7 MR. BLACKBURN: As I said, there are -- the  
8 Commission in other times has looked at federal  
9 requirements and commented on those with the agencies.  
10 Even though the Commission doesn't have authority to  
11 require that the Federal Government do something, it  
12 certainly has commented in the past on a variety of  
13 issues of federal concern to weigh in with its concerns  
14 about how the federal law's being implemented, even if it  
15 can't require them to do something.

16 Now because the Emergency Response Plan is so  
17 key to protecting the citizens of South Dakota, we  
18 believe that the Commission needs to -- and PHMSA should  
19 provide greater opportunity for public input into this  
20 process of developing the emergency response plan.

21 If the Emergency Response Plan was developed for  
22 hurricanes in Louisiana, you would expect citizens to be  
23 involved in that planning process. As I understand it,  
24 there is no process that the Federal Government for  
25 citizen participation in development of this Emergency

1 Response Plan.

2 And because of that, even though there are  
3 obviously a lot of areas that the Commission should not  
4 weigh into, this really is a very key issue for the  
5 landowners and a great concern to them. And I understand  
6 it could be a larger amount of work, and I don't know all  
7 of the documents that are in -- I don't know any of the  
8 documents in TransCanada's files. And I understand it is  
9 an awkward or somewhat difficult situation to resolve how  
10 much should the Commission look at this and how does the  
11 Commission help to protect citizens from inadequate  
12 federal behavior.

13 And at the same time if the Commission chooses  
14 not to provide any opportunity for reviewing this plan or  
15 chooses not to look at it, we would like a clear -- you  
16 know, a ruling from the Commission that it is not going  
17 to consider this issue within its procedure, and I'll  
18 leave it at that.

19 MR. MOORE: Mr. Chairman, the only thing I would  
20 have to add is in connection with Keystone Pipeline,  
21 Keystone actually considered and responded to particular  
22 requests from staff concerning the preparation of the  
23 Emergency Response Plan.

24 So there has been conversation between Keystone  
25 and staff in the past concerning the ERP. It's not as if

1 Keystone is here saying that this is a subject that's  
2 completely off limits for the PUC. But for the purposes  
3 of this discovery request, I think the jurisdictional and  
4 the preemption arguments are good ones.

5 CHAIRMAN JOHNSON: So, I mean, I'll follow up  
6 with that. I mean, if TransCanada's been willing to  
7 respond to requests before regarding the ERP, why not  
8 now?

9 MR. MOORE: Well, I --

10 CHAIRMAN JOHNSON: It's just the scope, the  
11 breadth of the request?

12 MR. MOORE: I think it's the scope, and I think  
13 to the extent there was particular conversation with  
14 staff, that's a different matter than the broad --  
15 extremely broad request for all documents associated with  
16 the preparation of the Emergency Response Plan.

17 CHAIRMAN JOHNSON: Well, I mean, the argument  
18 with breadth and scope may carry some weight. I'm not  
19 sure who asked on the question matters.

20 MR. KOENECKE: Commissioner, perhaps I could be  
21 responsive. This is Brett Koenecke. The interchange  
22 with staff about the ERP was for the Keystone base  
23 pipeline, the original project. And that was after the  
24 ERP had been almost fully developed and was ready to be  
25 put in place. And, in fact, it had been submitted to

1 PHMSA.

2 The request here is for an ERP which is not at  
3 nearly that stage of development. And, thus, the timing  
4 is, I think, completely different with respect to that  
5 process that happened then with Commission staff and also  
6 with the people at DENR. And in this case where it's,  
7 you know, becoming developed, those thousands of pages  
8 are out there. And I see a tremendous difference myself  
9 in the timing of that interchange.

10 Is that helpful to you? I'm not sure that it  
11 is, looking at your face.

12 CHAIRMAN JOHNSON: So when do we get to the  
13 analogous spot in this proceeding? I mean, when is that  
14 ERP going to be submitted to PHMSA? When will  
15 TransCanada be comfortable having those conversations  
16 with staff and Interveners?

17 MR. WHITE: Commissioner, this is Jim White.  
18 Maybe I can address that. My understanding is that the  
19 ERP for Keystone XL will be completed sometime in 2010.  
20 I don't know specifically whether it will be before or  
21 after March of 2010. It may well be after that as  
22 Keystone XL will not be going into operation until late  
23 2010 and 2011, and that's in the Gulf Coast area. So it  
24 may well be that the ERP, the final ERP, would be  
25 submitted after the Commission's order issues. Which I

1 believe is the same situation that occurred on the  
2 Keystone I case.

3 CHAIRMAN JOHNSON: Other questions?

4 COMMISSIONER KOLBECK: Well, this may be -- I'm  
5 not sure if this is for staff or -- but I understand that  
6 we can't tell what the meal's going to be but we should  
7 be able to look at the pork and beans before we eat the  
8 meal. I think what we're talking here -- and I  
9 understand the request is that we want to know what's in  
10 the Emergency Response Plan, not necessarily dictate how  
11 the Emergency Response Plan comes out.

12 Is that what you're after, Mr. Blackburn?

13 MR. BLACKBURN: Roughly, yes.

14 COMMISSIONER KOLBECK: So is that under our  
15 jurisdiction? I don't necessarily have a problem with  
16 seeing what are the documents flowing from TransCanada to  
17 the Federal Government if we can get those documents.  
18 I'm not saying -- I'm not saying that we should tell the  
19 Federal Government what to do but on the side line seeing  
20 what passes from one entity to the other I would think is  
21 a reasonable request.

22 MR. SMITH: Yeah. I don't know. This is  
23 John Smith here. I don't know. Mr. White, do you have a  
24 response to that?

25 MR. WHITE: I just want to make clear that, you

1 know, we would have no objection to a condition similar  
2 to that which was in the Keystone I order that we file  
3 the ERP with the Commission at such time as it's filed  
4 with PHMSA.

5 CHAIRMAN JOHNSON: Mr. Kolbeck. I'll support  
6 your comments. I mean, I agree with you 100 percent.  
7 Mr. Blackburn started to lose me when he said that, well,  
8 the Federal Government doesn't have an open enough  
9 process so you all can be -- you know, by proxy that  
10 process whereby people can influence the drafting of an  
11 ERP. I agree with you 100 percent.

12 I mean, I think what it is matters, but us to  
13 dictate -- we don't have the authority to probably  
14 dictate, you know, Xs and Ys.

15 COMMISSIONER KOLBECK: I don't think that we can  
16 say that we disagree with PHMSA and oh, no, it should  
17 have been an X instead of a Y, but the material that goes  
18 into that I think should be released.

19 Now what I don't know is if that process -- how  
20 open that process is on the Federal Government's side.  
21 Is that like we have open dockets any time something is  
22 filed? Is that put on the web? Is that something that  
23 is fairly accessible? Which if it is, then I think  
24 producing this to Dakota Rural Action would be burdensome  
25 to TransCanada if it's already being provided someplace

1 else.

2 MR. SMITH: Yeah. I can't answer that. You  
3 know, I would probably allow -- you know, Mr. Blackburn's  
4 made a representation that he -- Dakota Rural Action  
5 can't intervene as a party in that proceeding and be  
6 involved in it. I don't know the answer to that. I did  
7 not research that prior to today.

8 CHAIRMAN JOHNSON: Commissioner Hanson.

9 COMMISSIONER HANSON: Thank you, Mr. Chairman.  
10 I recognize that PHMSA, that we don't have jurisdiction  
11 over PHMSA, but so I don't mean this question to reflect  
12 that.

13 However, would we in the PUC -- would the ERP  
14 have -- be subject to review by the PUC, meaning that  
15 even though it is approved by PHMSA, would we be able to  
16 look at that if we did not feel it satisfactory and state  
17 that additional work needs to be completed by Keystone?

18 MR. SMITH: After it's done?

19 COMMISSIONER HANSON: After it is done if we  
20 believe that the Emergency Response Plan is not  
21 satisfactory in our eyes -- it's satisfactory to PHMSA  
22 but does the State have the ability, the PUC have the  
23 ability to say, no, there are some areas that are lacking  
24 here?

25 MR. SMITH: We don't have the right to decide

1 that. But you would have the ability and it's why we put  
2 the condition in the first one that we did so that you  
3 would get that at the time of filing at PHMSA so you  
4 would have the comment period available at PHMSA in order  
5 for you to be able to make comments to get any changes  
6 that you believe were necessary at that point.

7 COMMISSIONER HANSON: Okay. However, but once  
8 it's completed, then you're saying that the State of  
9 South Dakota cannot state that we have some question  
10 about the Emergency Response Plan and we want X component  
11 to be completed differently?

12 I know we can't tell PHMSA that. But can we as  
13 a state state that the Emergency Response Plan that has  
14 been presented on this from the standpoint of the  
15 citizens of the State of South Dakota we just don't  
16 believe that it's complete so you're not going to change  
17 the plan necessarily to please PHMSA but it has to pass  
18 muster in South Dakota as well?

19 Do we have that ability?

20 MR. SMITH: You know, I've got to say, you know,  
21 the preemption statute to me with respect to certain  
22 things like design specifications, you know, the  
23 calculations related to pipe strength and all of that  
24 stuff, I think the preemption argument is pretty darned  
25 cut and dried on that.



1           You know, this may be just me personally. The  
2 ERP gets to a point where I see -- you know, I think in  
3 the end the approval of the ERP is a PHMSA matter. And  
4 that's that. I mean, the oddity about the ERP is because  
5 it splashes over into domains other than those within  
6 either PHMSA or TransCanada's control, namely local  
7 government and State type of facilities and that -- it's  
8 one of those awkward places, Commissioner Hanson, where  
9 that one's a harder one to say absolutely black-and-white  
10 where that cuts for me.

11           I don't know that -- maybe somebody has a case  
12 or something on that. I'm not aware of one.

13           COMMISSIONER HANSON: So we need to maintain our  
14 ability to be able to comment on it in the process that  
15 you elaborated on just --

16           MR. SMITH: Well, that's one reason I think why  
17 we put the condition we did is so that it would afford  
18 the Commission an opportunity to comment before PHMSA has  
19 acted and approved so that they would have the ability to  
20 consider any comments that you might have.

21           COMMISSIONER HANSON: Thank you. And one last  
22 question on that. It's my understanding -- and I want to  
23 just make certain that I recollect correctly -- that the  
24 operation of the pipeline is subject to the ERP being  
25 completed.

1 MR. SMITH: Yes.

2 COMMISSIONER HANSON: Okay.

3 MR. SMITH: The reason it's not finalized prior  
4 to the final days until the pipeline is complete is  
5 because you can't necessarily -- you can't finalize all  
6 the potential inputs into it until you know precise  
7 location and those kinds of things. Because the ERP has  
8 to be somewhat tailored, you know, with respect to that.

9 You know, you have different things in there  
10 depending on what you're having to plan for  
11 contingency-wise, if that makes sense.

12 COMMISSIONER HANSON: Thank you, Mr. Chairman.  
13 Thank you, Mr. Smith.

14 CHAIRMAN JOHNSON: I think you're right there on  
15 top of it.

16 Any other questions?

17 MR. SMITH: I just had one. And, again, I hope  
18 I'm not getting us off the track here. But just  
19 recalling back to the first case, you know, we had an  
20 awful lot of testimony on flow rates and streams and --  
21 from both staff and from Ms. Tillquist and from others  
22 and that kind of thing and the impacts of those kind of  
23 data inputs into planning for the ERP. You know, and  
24 that occupied a whole lot of the hearing time that we  
25 did.

1           Are we talking about those basic kinds of  
2 hydrologic and other assumptions that go into the ERP as  
3 having been objected to here and not relevant for  
4 discussion -- or for discovery or production?

5           MR. BLACKBURN: Mr. Chairman, if I may, DRA was  
6 not intending to look at all of the -- this discovery  
7 request. And we may provide testimony. It's not  
8 intending to look at all of the information available  
9 about the size of oil spills or the potential kinds of  
10 damage that are there or that. We believe that that will  
11 come out.

12           But what this discovery request to the Emergency  
13 Response Plan does is saying given the range of possible  
14 spills, you know, here is the level of equipment that's  
15 needed. Here's the level of personnel that's needed to  
16 respond to that range of spills. We believe that the  
17 worst-case scenario, which we have a discovery request  
18 about later, sets the outer range for what kinds of  
19 equipment would be needed, the maximum amount.

20           And between that and small amounts of oil, you  
21 know, we just need to know most of what the maximum  
22 amount would be and how much equipment and what kind of  
23 response would be required. So it wouldn't need to get  
24 into the same level of detail about that.

25           And I'll leave it at that.

1           CHAIRMAN JOHNSON:  Other questions?  Any action?

2           COMMISSIONER KOLBECK:  Well, I guess I'd maybe  
3 approve in part -- grant it in part.  I'll just throw  
4 this out for discussion's sake, but I'll move to approve  
5 the DRA request that they produce all documents  
6 concerning the preparation of the Emergency Response  
7 Plan, period.

8           I don't see where they could give the  
9 information that Mr. Blackburn is after right now, but I  
10 do feel that they should be allowed to be seeing the  
11 information flow from Keystone to the Federal Government.  
12 So I guess I'll grant it in part, just limit it to the  
13 documents concerning the preparation of the Emergency  
14 Response Plan.

15           CHAIRMAN JOHNSON:  Okay.

16           MR. WHITE:  If I might comment on that.  The  
17 documents that are being developed in conjunction with  
18 preparation of the ERP are not going to the Federal  
19 Government.  It's the ERP itself once it's finalized that  
20 goes to the Federal Government.

21           So while there are, you know, hundreds of man  
22 hours and thousands of documents going into the  
23 preparation of the document, it's only the ERP itself  
24 that flows to the government.

25           CHAIRMAN JOHNSON:  Okay.  Thanks, Mr. White.

1           COMMISSIONER KOLBECK: Thank you for that  
2 clarification. I guess my motion can still stand, just  
3 that TransCanada produce all the documents concerning the  
4 preparation of the Emergency Response Plan.

5           CHAIRMAN JOHNSON: Motion is made. Open for  
6 discussion. And I -- as you were talking, Commissioner  
7 Kolbeck, I mean, I did find that I agreed with you that  
8 information that's flowing to the Federal Government we  
9 want to see. The motion, as it stands, all documents  
10 pertaining to the preparation of ERP I think probably  
11 goes from a scope and breadth perspective is a little too  
12 big for me.

13           So with the motion as it's made, I mean, I would  
14 be opposed to it. But I think in the big picture I'm  
15 headed the same way you are.

16           Other discussion?

17           COMMISSIONER HANSON: Mr. Chairman, I agree with  
18 your comments.

19           My concern is that the State of South Dakota  
20 have the ability and that we do participate and that all  
21 the parties have the ability, Interveners have the  
22 ability to participate from the standpoint of commenting.

23           But I don't know that we need to see the  
24 documents that are used to prepare the information. I  
25 think what we need to see is that final document so that

1 we can see whether or not that complies with all of  
2 everyone's concerns. So a motion of that nature I'll  
3 support.

4 CHAIRMAN JOHNSON: Unless there's any further  
5 discussion, we'll proceed to vote.

6 Hanson.

7 COMMISSIONER HANSON: No.

8 CHAIRMAN JOHNSON: Kolbeck.

9 COMMISSIONER KOLBECK: Aye.

10 CHAIRMAN JOHNSON: Johnson votes nay. The  
11 motion fails 1-2.

12 Any further motions?

13 COMMISSIONER HANSON: Do we need a motion in  
14 order to -- we have the ability and the Interveners have  
15 the ability, do they not, to examine that document?  
16 Isn't that a part of the process?

17 MR. BLACKBURN: Mr. Chairman, if I may, we do  
18 not -- that document will not be produced until this  
19 process is over. So we won't have the opportunity during  
20 this process to review that document. It won't be  
21 produced until after this proceeding is finished. It  
22 cannot be logically produced until after the proceeding  
23 is finished.

24 COMMISSIONER HANSON: Mr. Chairman, if I may.

25 MS. COLLIER: One potential compromise is

1 normally in any kind of process you get to the point  
2 where there is a draft. It may not be the final version  
3 that is going to be prepared, but it is usually at the  
4 point where it is responding to the majority of the  
5 federal requests.

6           Would it be possible rather than going with all  
7 of the documents to look at a compromise of a first  
8 draft, again, understanding that TransCanada may not be  
9 submitting that final version that we get but it would  
10 give the landowners a chance to at least have some idea  
11 prior and it would give the PUC also that opportunity  
12 without, again, holding them to that being the final  
13 version. It would at least be a compromise as a kind of  
14 winnowing down of material.

15           COMMISSIONER HANSON: Mr. Chairman, a question  
16 of Mr. Smith or whomever could answer it.

17           Is it not a part of the process, standard  
18 operating procedure, for PHMSA to allow comment on that  
19 document? They don't have Interveners, they don't  
20 have -- it's just presented to them, they make the  
21 decision and that's it?

22           MR. SMITH: I think it is, yeah. I think that's  
23 it. I think our thought on the first one was if we felt  
24 there was an inadequacy and we made a comment, maybe  
25 they'd listen to us anyway.

1           COMMISSIONER HANSON:   Wow.

2           MR. SMITH:   But in terms of a formal process,  
3 no, it's just strictly a PHMSA decision.

4           COMMISSIONER HANSON:   I'm concerned certainly  
5 that the state and the citizens have the opportunity to  
6 make a comment.   I'm not sure how to make that motion,  
7 but on the structure of it I don't see how we can tell  
8 PHMSA to do that.

9           MR. KOENECKE:   Commissioner, apologize for  
10 interrupting you.   The 2008 legislature adopted a  
11 statute.   The Emergency Response Plan has to satisfy a  
12 number of areas -- I believe my recollection is it's  
13 eight or nine specific areas of inquiry -- and be  
14 submitted to the Department of Environment and Natural  
15 Resources before the pipeline can be -- it has to be  
16 approved by them before the pipeline can be operated.  
17 That's a State statute that's in place and has been  
18 effective for both projects based on its timing.

19           So I wouldn't want you to have the feeling that  
20 there's nothing more than the PUC process at play here  
21 with respect to the ERP.   That process is out there, and  
22 we've filed the document for the Keystone Pipeline, the  
23 original one, with that department and have engaged them  
24 in those discussions.

25           Similarly, the document's been filed here with



1 staff. And staff, of course, did ask us for some  
2 clarification and some changes to be made, and my  
3 recollection is that those were made.

4 But the place where we'd get into problems would  
5 be if staff or the department asked us to make changes to  
6 that document, which we've always said was a living  
7 document subject to changes as conditions along the  
8 pipeline route change, that that document we've always  
9 said would be a living, breathing document, and staff  
10 certainly had the opportunity to speak on behalf of all  
11 people in the state. They represent the public interest.  
12 And staff had that opportunity and took that, and we took  
13 that as well.

14 The place like I was leading to before where  
15 we'd get into problems is if someone asked us to make a  
16 change that PHMSA would not then approve, then we'd be  
17 set up for difficulties. But I confess, I don't see the  
18 requirement or the need for the document or the documents  
19 leading to it to be proposed for this Commission in order  
20 to make an order and a permit in the spring, you know,  
21 posthearing.

22 Because of those processes that are in place,  
23 I've got to say I don't see the need for the Commission  
24 to do anything more than what we've done in the past.  
25 Because there are places, multiple stops along that

1 process, where those comments can be brought back and put  
2 into the document.

3 Because the Interveners in the previous Keystone  
4 document didn't avail themselves of that, I can't -- you  
5 know, not for me to tell them what their business was,  
6 but I don't see -- given those processes and the things  
7 which weren't coming through, I don't think anybody had  
8 told you that there was a statute and the Department of  
9 Natural Resources is involved in that previously. I hope  
10 that's helpful to you.

11 COMMISSIONER HANSON: Thank you for reminding me  
12 of that process of what we did last time, Mr. Koenecke.  
13 I just simply want to be certain that we maintain that  
14 opportunity. And I recognize we've had very strong  
15 citizen advocates on the Commission who will continue to  
16 maintain those relationships. But I just want to be  
17 absolutely certain that we have that ability to comment  
18 somewhere along the line and that we use that process,  
19 whether it's in the DENR or the PUC. I just want to make  
20 certain that that communication flows.

21 Thank you, Mr. Chairman.

22 CHAIRMAN JOHNSON: Yes, Mr. Blackburn.

23 MR. BLACKBURN: If I may, please. Staff has the  
24 opportunity to comment, but Interveners don't have the  
25 opportunity to comment. I don't know that public

1 citizens have the opportunity to comment on that.

2 CHAIRMAN JOHNSON: From my perspective, you  
3 know, state law has DENR playing that role. If there  
4 need to be revisions to the statute, I think that makes  
5 sense.

6 But what we're talking about here is the PHMSA  
7 process. People wanting more input into the PHMSA  
8 process. I want to make sure that we're focused on our  
9 process and getting our job right. I think the state  
10 statute does deal with this situation.

11 So with that, I would make a motion to deny  
12 request number 6. Not saying that the ERP is important.  
13 I'm not saying that there shouldn't be some public input.  
14 I'm not saying that the PUC isn't interested in giving  
15 lots of input to PHMSA because I think we are. But I  
16 don't think request number 6 is the way to get there.

17 Any further discussion?

18 Hearing none, we'll proceed to vote.

19 Hanson.

20 COMMISSIONER HANSON: Aye.

21 CHAIRMAN JOHNSON: Kolbeck.

22 COMMISSIONER KOLBECK: Aye.

23 CHAIRMAN JOHNSON: Johnson votes aye. Motion  
24 carries 3-0.

25 With that, let's take a 10-minute break. We

1 will be back -- well, we'll come back at 10:20.

2 (A short recess is taken)

3 CHAIRMAN JOHNSON: With that, it is 10:20.  
4 We'll come back on the web. I believe we are up to  
5 request number 7. This deals with advisory bulletin  
6 ABD-0901.

7 Dakota Rural Action.

8 MR. BLACKBURN: Mr. Chairman, this is another  
9 issue related to federal law. And there is a certain  
10 amount of information available about it on the web but  
11 only a very limited amount. My understanding is what  
12 this advisory bulletin is about is that all companies  
13 that build pipelines have quality control requirements in  
14 place to make sure the pipe they use is both -- meets  
15 standards so that it won't burst and, you know, complete  
16 oil spills.

17 Apparently what happened was that some  
18 companies -- and I believe they are natural gas companies  
19 which use similar kind of pipe as oil companies or crude  
20 oil pipelines tested their pipe and it burst. And where  
21 it burst was along the longitudinal seams of the pipe.  
22 So this was not, as I understand it, the joints between  
23 the pipes and the field weld. Actually the pipe itself  
24 failed.

25 And, as I understand it -- and I don't know what

1 the full answer here is unless we're trying to find the  
2 answer to -- something went wrong with the quality  
3 control mechanisms that these companies have in place,  
4 which I imagine are very similar to what TransCanada has  
5 in place.

6 And either the metallurgy or the metal itself  
7 was defective or the welding of the fabrication -- first  
8 they form steel plates and they roll it into the pipe  
9 shape and then they weld the edges of the steel plate  
10 together to form a pipe. Or the welding failed or  
11 something failed. But it was the failure of quality  
12 control.

13 So PHMSA put out an advisory to said check into  
14 this situation and, you know, make sure that you don't  
15 have this same problem, essentially. I mean, there's  
16 more detailed words about it. But that's essentially  
17 what they're saying. And it makes sense that if some  
18 company's bad pipe got through quality control then other  
19 companies -- because there are only a limited number of  
20 pipe mills and a limited number steel mills in the world  
21 that other companies could have had, you know, defective  
22 pipes slide through their safety nets too.

23 Now TransCanada sent you a letter that said that  
24 essentially in a variety of ways that our quality control  
25 structures are adequate and that we've been complying

1 with the law and regulations for a very long time. At  
2 the same time, those same quality control structures  
3 similar ones in other companies failed. So what we would  
4 like to know is whether TransCanada has procured pipe or  
5 intends to procure pipe from the -- one of these steel  
6 mills or pipe fabrication mills that managed to sneak  
7 around the U.S. standards for pipes or managed to avoid  
8 those standards for pipes.

9           So we believe that there is other information  
10 the Commission should do a more thorough investigation of  
11 what compliance TransCanada did with this to make sure  
12 that the pipeline will not have defective pipe.

13           I'm sure it was a heartbreaking thing for those  
14 natural gas companies to hydrotest those pipes and have  
15 them blow. That's something that a project developer  
16 would -- you know, it's like a very bad day for them.  
17 But, nonetheless, these things happen. These things  
18 happen. And PHMSA was so worried that the quality  
19 control systems, which TransCanada's provided a lot of  
20 information on, failed that they wanted to know whether  
21 TransCanada had actually put pipe, defective pipe in  
22 place. Joints of pipe is the word they used. In other  
23 words, segments of pipe that might have been defective.

24           MR. MOORE: Thank you, Mr. Chairman. This is an  
25 issue over which PHMSA has jurisdiction. PHMSA has taken

1 an active role in the matter by issuing the advisory  
2 bulletin. TransCanada has complied with the advisory  
3 bulletin by investigating the issue that is addressed in  
4 the advisory bulletin. And Robert Jones addressed the  
5 specific manner in which Keystone has responded to the  
6 advisory bulletin in his letter to the Public Utilities  
7 Commission.

8 The investigation is not a matter that is  
9 completed. It is an ongoing obligation. And it  
10 pertained to both the Keystone Pipeline and the  
11 XL Pipeline.

12 So I think that the document that has been  
13 produced in response to the request is responsive. But I  
14 also think that a broad request for documents concerning  
15 this matter is really not helpful to the proceeding,  
16 given that this is ultimately a matter within the  
17 jurisdiction of PHMSA.

18 CHAIRMAN JOHNSON: Commission staff.

19 MS. SEMMLER: Staff takes a similar position,  
20 that the documents in the procedures surrounding that  
21 advisory bulletin are within the jurisdiction of PHMSA,  
22 not one that this Commission has jurisdiction over.

23 CHAIRMAN JOHNSON: Questions?

24 If there are no questions, is there any action?

25 COMMISSIONER KOLBECK: I'll move to deny

1 Dakota Rural Action's request number 7.

2 I'll agree that it was a PHMSA advisory  
3 bulletin. The company has responded. They've responded  
4 to the Commission. They've responded to Dakota Rural  
5 Action. And they say they don't have anything more. So  
6 I'll go with that.

7 CHAIRMAN JOHNSON: Okay. Motion has been made.  
8 Is there any discussion on the motion?

9 Hearing none, proceed to vote.

10 Hanson.

11 COMMISSIONER HANSON: Aye.

12 CHAIRMAN JOHNSON: Kolbeck.

13 COMMISSIONER KOLBECK: Aye.

14 CHAIRMAN JOHNSON: Johnson votes aye. Motion  
15 carries 3-0.

16 With that, we will proceed to request number 8  
17 which deals with the design factor of the pipe.

18 Dakota Rural Action.

19 MR. BLACKBURN: Thank you, Mr. Chairman. This  
20 is another similar issue. I think this issue has been  
21 reviewed by the Commission in the Keystone I proceeding.  
22 And I don't think I need to go into anymore detail about  
23 this particular issue.

24 CHAIRMAN JOHNSON: TransCanada.

25 MR. MOORE: Again, there's a jurisdictional



1 issue here. But not withstanding that, we produced the  
2 special permit Application that was filed, and it  
3 contains documents that are directly responsive to the  
4 request, and I've heard no argument from Dakota Rural  
5 Action about why the data that has been provided is  
6 insufficient or what additional documents would be  
7 relevant to any further proceedings before the Public  
8 Utilities Commission.

9 CHAIRMAN JOHNSON: Staff.

10 MS. SEMMLER: Staff again takes the position as  
11 it did in the first crude oil pipeline docket that this  
12 is a nonjurisdictional issue.

13 CHAIRMAN JOHNSON: Questions?

14 Hearing none, is there any action?

15 COMMISSIONER HANSON: I move to deny.

16 CHAIRMAN JOHNSON: Motion has been made. Is  
17 there any discussion?

18 Hearing none, we'll proceed to vote.

19 Hanson.

20 COMMISSIONER HANSON: Aye.

21 CHAIRMAN JOHNSON: Kolbeck.

22 COMMISSIONER KOLBECK: Aye.

23 CHAIRMAN JOHNSON: Johnson votes aye. Motion  
24 carries 3-0.

25 With that, we will proceed to request number 9

1 which deals with the composition of the materials to be  
2 transported by the proposed pipeline.

3 Dakota Rural Action.

4 MR. BLACKBURN: What Dakota Rural Action is  
5 looking for is information about the kind of materials  
6 the pipeline will produce -- or will transport. This is  
7 basic factual information about the operation of the  
8 pipeline. And we believe that the information about the  
9 contents of the material that the pipeline will transport  
10 is necessary to a full environmental review. It's  
11 necessary to understand the potential impacts to humans.  
12 It's also necessary to the problems of internal corrosion  
13 of the pipeline.

14 Now Keystone has said that it's only provided  
15 its FERC tariff. The Federal Engineering Regulatory  
16 Commission, FERC, does not regulate pipeline safety.  
17 They do have in their tariff a requirement that oil meet  
18 certain kinds of very minimal composition requirements so  
19 that it can be pumped so that oil from different sources  
20 can be pumped through the pipeline and not contaminate  
21 each other. But it doesn't have to do with -- those  
22 requirements in the FERC tariff don't have anything to do  
23 with preventing internal corrosion, for example. That's  
24 not a FERC jurisdictional issue.

25 So the responsive document that TransCanada

1 provided to this request, the FERC tariff, is just not  
2 relevant to this, and all it provides is just a very  
3 general sense of what the quality of the oil should be  
4 from a commercial point of view, not from a safety point  
5 of view.

6 Also TransCanada has stated, and I mentioned  
7 this in the brief, that internal corrosion is a problem.  
8 It's not a problem with new pipelines, but they haven't  
9 said it's not a problem with old pipelines. There are  
10 internal corrosion problems with old pipelines.

11 Also this material is not like the kind of crude  
12 oil that's been transported by the industry in the past,  
13 which has primarily transported syn crude from Canada,  
14 which is a refined product, a semi-refined product. And  
15 what we are concerned about is the chemical composition  
16 of the nature of the product that's being transported may  
17 have an effect on the operational life of the pipeline  
18 because it could increase corrosion and it may be more  
19 sour, it may include more mineral components that could  
20 produce erosion, could be more water. And even though  
21 it's not the same thing, we'd like to know what that is.

22 Now TransCanada also they said they objected to  
23 this, to providing more information, but in request 1  
24 they actually provided a fair amount of information about  
25 chemical composition of all Canadian crude oils. So

1 they're saying two things here, that, one, they shouldn't  
2 provide the information. But then they provided it in  
3 response to another discovery request.

4 And that's -- we appreciate that they provided  
5 that information about the chemical composition, but it's  
6 for all crude oils in Canada. What we'd like to know is  
7 more information about the kind of crude oils that they  
8 intend to actually ship because we think that they can --  
9 because they know many of the shippers and they know the  
10 kinds of crude oil that will be come out of Canada in the  
11 future, it won't be as much syn crude. It will be more  
12 of this bitumen blend. We believe that they can provide  
13 a greater understanding of how fast internal corrosion  
14 would happen inside these pipes.

15 CHAIRMAN JOHNSON: TransCanada -- Keystone.

16 MR. MOORE: To the except that this is a  
17 document request that asks for specific information, it  
18 was hard to respond to because the specifics of the kind  
19 of oil to be transported through the pipeline is, in  
20 fact, governed by the tariff which was produced in draft  
21 form, and apparently that's not what DRA was looking for.

22 To the extent that what DRA is looking for is  
23 some sort of internal study by Keystone concerning the  
24 abrasive characteristics of the crude oil expected to be  
25 transported through the pipeline and what effect that may

1 have on internal corrosion, Keystone has not done such a  
2 study. And the reason is because I think fundamentally I  
3 disagree with some of what Mr. Blackburn said. The kinds  
4 of oil shipped from the oil sands are already being  
5 transported in pipelines run by other companies.

6 And TransCanada has not conducted its own  
7 internal study regarding the matter that Mr. Blackburn is  
8 apparently looking for documents on.

9 It seems to me that given the characteristics of  
10 the oil to be transported through the pipeline which has  
11 been disclosed through the tariff, that this is really a  
12 subject that DRA could produce expert testimony on and  
13 develop on its own. I just don't think that we have  
14 documents that are -- that are what he's looking for.

15 MS. SEMMLER: Staff has nothing further to add  
16 regarding what documents Keystone may or may not have.

17 CHAIRMAN JOHNSON: Okay. Questions?

18 Incidentally, I mean, I find myself do thinking  
19 that this is an area that's relevant to discuss. But,  
20 Mr. Blackburn, if they don't have the documents, they  
21 don't have the documents.

22 MR. BLACKBURN: Mr. Chairman, we can't predict  
23 what documents they do or don't have. Again, I'd ask  
24 whether this is the stuff that the review went to just  
25 the Applicant or whether to TransCanada in Canada. Or,

1 you know, they may have an understanding of what the  
2 performance is of the pipelines from their competitors.

3 CHAIRMAN JOHNSON: Fair question. Keystone, was  
4 this document search done throughout the corporate  
5 entity?

6 MR. WHITE: Commission, let me address that. I  
7 believe that this document -- this request went back to  
8 the corporate entity. But, again, because Keystone is  
9 the only oil pipeline entity within the corporate  
10 structure, that would be the responsive entity.

11 I hear a frustration with respect to, you know,  
12 our position that we can't say specifically which type of  
13 crude will be transported because that's the matter  
14 within the control of the shippers and there will be a  
15 range of crudes transported.

16 I would say that maybe as a means of  
17 facilitating this request, you know, there are generally  
18 two types of crude, Western Canadian Select, which is  
19 diluted bitumen, and Suncor, synthetic A, which is the  
20 syn crude, which are sort of representative of the ends  
21 of the spectrum. And if it would be helpful, we could  
22 provide assays of the components of those types of crude  
23 as sort of benchmarks for sort of the range of crudes  
24 that might be transported.

25 CHAIRMAN JOHNSON: Other questions?

1           COMMISSIONER KOLBECK: Not necessarily a  
2 question. Well, maybe to TransCanada.

3           I know that Mr. Jones and Ms. Kothari in our  
4 other proceedings here have given a lot of different  
5 information about the oil that does go down the pipeline.

6           Has that information been given to Dakota Rural  
7 Action?

8           MR. WHITE: I guess, Commissioner, I'm not quite  
9 clear on what types of information you're referencing.

10          COMMISSIONER KOLBECK: Well, I guess I would go  
11 right back to what you just said, you would give the  
12 information. And I remember Mr. Jones talking about the  
13 two types of crude.

14          MR. WHITE: Okay.

15          COMMISSIONER KOLBECK: I think he basically said  
16 exactly what you said, there were two main types, two  
17 base types that would flow through.

18          MR. WHITE: Okay. So my response is we have not  
19 provided that information to DRA to date but would be  
20 willing to do so as a compromise here.

21          COMMISSIONER KOLBECK: All right. Thank you.  
22 Is that sufficient, Mr. Blackburn?

23          MR. BLACKBURN: I think that's all we're going  
24 to get so it's sufficient, Commissioner.

25          COMMISSIONER KOLBECK: Thank you.

1 CHAIRMAN JOHNSON: Any further discussion or  
2 questions? Not necessarily action. Is there any action?

3 Did you have a question?

4 COMMISSIONER HANSON: No. Do you need a motion  
5 then that Keystone will provide -- is to provide the  
6 information to the extent possible on the -- on the  
7 spectrums of the two types of oil?

8 That would be my motion.

9 CHAIRMAN JOHNSON: Any discussion on the motion?  
10 Hearing none, we'll proceed to vote.

11 Hanson.

12 COMMISSIONER HANSON: Aye.

13 CHAIRMAN JOHNSON: Kolbeck.

14 COMMISSIONER KOLBECK: Aye.

15 CHAIRMAN JOHNSON: Johnson votes aye. Motion  
16 carries 3-0.

17 With that, I believe that brings us to request  
18 10, which deals with a worst-case spill assessment.

19 Dakota Rural Action.

20 MR. BLACKBURN: The worst-case spill assessment  
21 is again a matter of federal law. It's a factual issue,  
22 how much oil would spill in a worst case. That fact  
23 about how much oil would come out and where it would come  
24 out are facts. That's not a matter -- that's not a  
25 federal -- it's not a federal law. It's not a federal



1 regulation. It's a simply fact about where the  
2 worst-case oil spill would be and how much it would be.

3 Now we're sensitive to the fact that the  
4 disclosure of the exact location of that worst-case event  
5 would be inappropriate because that would, for example,  
6 allow somebody to understand where to sabotage the  
7 pipeline and that would create an enormous disaster and  
8 we wouldn't want to have everybody and their brother  
9 knowing where that location was.

10 That being said -- the precise location was.  
11 That being said, we understand that knowing what the  
12 worst-case volume is is not sensitive information. And  
13 knowing, for example, what county that would occur in,  
14 you know, or where -- again it relates somewhat to the  
15 Emergency Response Plan because it determines where the  
16 equipment is located and whatnot.

17 Knowing generally where that would happen would  
18 enable local first responders and citizens to understand  
19 that if an event happens in this county, there could be  
20 a -- it could be a catastrophic event and that the state  
21 may -- and local governments may want to ensure that  
22 additional equipment and additional resources are  
23 available to respond to such an event. Even if we don't  
24 know exactly where it is, if there isn't -- if there  
25 aren't prepositioned resources for spilled response

1 nearby, then they won't -- they won't anticipate it.

2 So what we're looking for again is relatively  
3 focused information about where -- how much -- what the  
4 volume of the worst-case spill event would be.

5 CHAIRMAN JOHNSON: Applicant.

6 MR. MOORE: That information -- excuse me. That  
7 information has been provided. It is in that portion of  
8 the risk assessment report that was produced as Exhibit I  
9 in this case. It's on pages A24 and A25. It indicates  
10 the amount, the volume of oil that could be spilled in a  
11 worst-case scenario. It's been provided.

12 CHAIRMAN JOHNSON: Commission staff? Nothing?  
13 Okay. Mr. Blackburn, a response?

14 MR. BLACKBURN: I looked through that document,  
15 and I saw a lot of discussion about theoretical, you  
16 know, amounts, but in the process for doing that perhaps  
17 I missed it. I'll have to go back and look at it again.  
18 I didn't see the actual numbers for a worst-case spill  
19 response, but I could have missed it. So I'll have to  
20 check.

21 CHAIRMAN JOHNSON: Well, perhaps -- this is just  
22 one Commissioner, but, I mean, I do feel like a  
23 worst-case spill assessment is valid. It is relevant.  
24 And so to the extent Mr. Blackburn that it's not in  
25 there, I mean, let the Commission know, and we can take

1 this up again. That's my thought.

2 MR. WHITE: Mr. Johnson, if I could help  
3 Mr. Blackburn.

4 CHAIRMAN JOHNSON: Yes.

5 MR. WHITE: If he would look at Section 5.4.4 on  
6 page A24 and then the chart at the top of page A25, I  
7 think you'll see the information you're looking for.

8 MR. BLACKBURN: So it's in a chart.

9 MR. WHITE: It's also in a paragraph.

10 CHAIRMAN JOHNSON: Well, I don't speak for the  
11 Commission so let's pause and see if anyone disagrees  
12 with what I said.

13 COMMISSIONER KOLBECK: Could we make a motion to  
14 grant the discovery request that they should produce it  
15 if they have not already had -- have produced it subject  
16 to the protective order in the HCA protective provisions.

17 That should cover us. If they haven't provided  
18 it, then they should. And if they have, then there's no  
19 obligation to TransCanada.

20 MR. WHITE: If I might, the actual data request  
21 or discovery request itself asked for "all documents  
22 concerning worst-case spill."

23 And what we're saying is we've provided the key  
24 document that generates that worst-case spill number.  
25 Not all documents relating to that. That's subject to

1 our burdensomeness request.

2 CHAIRMAN JOHNSON: Mr. White, does that document  
3 discuss release rate? I mean, how quickly a product  
4 would be --

5 MR. WHITE: Commissioner Johnson, I'm going to  
6 have to plead the 5th on that one. It's an extensive  
7 document, and I have not recently read it so I don't know  
8 whether it has release rate in it.

9 CHAIRMAN JOHNSON: Okay. Commissioner Kolbeck,  
10 if I might, I'd like the motion -- to narrow it from all  
11 documents just to something specific that I think is more  
12 germane.

13 Can we say all documents -- or -- can we focus  
14 it just on the volume that I think Dakota Rural Action is  
15 most interested in?

16 COMMISSIONER KOLBECK: Sure. I think we could  
17 do a --

18 MR. BLACKBURN: Mr. Chairman, I guess I would  
19 like it a bit beyond that and look at the documents that  
20 provide information and the methodology for coming to  
21 that number. Because just having the raw number by  
22 itself is not as useful as understanding how that number  
23 was derived. Because we would like to understand how the  
24 number was derived as well as the number itself. And  
25 that may be a narrower set of documents.

1           But we need to understand the methodology.  
2       Because without the methodology the raw number, you know,  
3       we don't know how they got to it.

4           MR. WHITE:   So that methodology is actually set  
5       forth in the document we've been discussing.

6           MR. BLACKBURN:   The methodology is set forth but  
7       not with any numbers attached to it.   It says in general  
8       here's how you do a worst-case spill assessment, but it  
9       didn't actually provide any calculations, I don't  
10      believe, of how that number was --

11          CHAIRMAN JOHNSON:   Let me step in here a little  
12      bit.   Commissioner Kolbeck has a pending motion.

13          Commissioner Kolbeck, did you want to tweak that  
14      in any way or --

15          COMMISSIONER KOLBECK:   I understand what  
16      Mr. Blackburn's getting at.   Maybe we can do this.   We  
17      can grant request number 10 as it relates to the  
18      worst-case spill and how the numbers are derived of a  
19      worst-case spill, subject to any protective order and HCA  
20      protective provisions.

21          CHAIRMAN JOHNSON:   Okay.   Motion has been made.  
22      Any discussion?

23          Hearing none -- go ahead, Commissioner.   Did you  
24      have something?

25          COMMISSIONER KOLBECK:   I was just going to say

1 that my motion should be to the extent that TransCanada  
2 has it in their possession.

3 CHAIRMAN JOHNSON: Okay. Motion has been made.  
4 Is there any further discussion?

5 COMMISSIONER HANSON: I'm not quite clear on the  
6 specific information that's being required of Keystone  
7 here.

8 CHAIRMAN JOHNSON: Let me --

9 COMMISSIONER HANSON: TransCanada. Excuse me.

10 CHAIRMAN JOHNSON: Let me try to restate the  
11 pending motion and the motion -- correct me if I'm wrong.  
12 But Keystone should produce documents that identify the  
13 volume and -- the volume of worst-case release as well as  
14 methodology for deriving that information.

15 COMMISSIONER HANSON: Thank you.

16 CHAIRMAN JOHNSON: Any discussion on the motion?  
17 Hearing none, we'll proceed to vote.

18 Hanson.

19 COMMISSIONER HANSON: Aye.

20 CHAIRMAN JOHNSON: Kolbeck.

21 COMMISSIONER KOLBECK: Aye.

22 CHAIRMAN JOHNSON: Johnson votes aye. Motion  
23 carries 3-0.

24 Okay. With that, we'll proceed to request 12  
25 through 19. This deals with projected demand.

1           Dakota Rural Action.

2           MR. BLACKBURN: This is again a jurisdictional  
3 question as raised by TransCanada. The information that  
4 we're trying to find here is what the impact of that  
5 economic downturn and the decreased forecast for oil  
6 production in Canada have on the timing for the  
7 construction of this pipeline and the need and the demand  
8 for this pipeline.

9           We all know that the economy has gone down, and  
10 I think that the Commission probably understands that oil  
11 consumption in the U.S. has gone down. We also -- you  
12 probably understand that a lot of projects -- quite a  
13 number of the projects in Canada in the tar sands have  
14 also been cancelled or delayed because of the lack of  
15 demand for this oil.

16           TransCanada argues that this is not a matter of  
17 jurisdiction for the Commission and instead argues that  
18 because the Department of State will determine the  
19 national interest for they say the pipeline I say it's  
20 for the border crossing itself, but, therefore, the  
21 Commission should not investigate the demand for this  
22 pipeline. Yet state law requires -- state regulation  
23 requires that the Commission consider demand.

24           And, again, demand is related not only to the  
25 ultimate need for the pipeline, but it's also related to

1 when the pipeline construction start date would be, which  
2 is also within the Commission's jurisdiction.

3 As TransCanada mentioned earlier, this pipeline  
4 is being -- Keystone XL is being developed in two phases.  
5 The first phase goes from Oklahoma to Texas, and the  
6 second phase from Alberta to Steel City.

7 The understanding I have is that based on  
8 TransCanada's red line of their Application and from some  
9 of the statements they've made in the press is that the  
10 construction start date for this project has been slid  
11 off from originally they were told -- they were telling  
12 the press that in 2010 they'd start construction on the  
13 Steel City segment. Later in the press they said they'd  
14 start construction on the Steel City segment on 2011  
15 instead of 2010. Recently there have been some comments  
16 by TransCanada spokespeople that they are going to start  
17 construction in 2012.

18 Well, the landowners would like to know when the  
19 construction is going to start. And we believe that that  
20 determination is based in large part on projected demand  
21 for the pipeline.

22 Now TransCanada in its Application relied on the  
23 Canadian Association of Petroleum Producers Report 2008,  
24 even though the 2009 material was coming out and has been  
25 out since they red lined their Application. The 2009 cap



1 report Canadian Association of Petroleum Producers  
2 Report, the cap report. 2009 showed a dramatic decrease  
3 in oil forecasted oil production in Canada.

4 Even though that may or may not have an impact  
5 on the long-term demand for the pipeline, it definitely  
6 would have an impact on the construction start date for  
7 the pipeline. And we believe that's one of the reasons  
8 why the construction start date seems to have been  
9 delayed by up to two years at this point. So that is the  
10 kind of information we want.

11 Now we believe the Commission should have the  
12 most up-to-date information about demand for this  
13 pipeline, and we would be asking this as an Interrogatory  
14 for an explanation about how this decreased demand and  
15 the forecast of decreasing demand would impact the  
16 development of the pipeline.

17 And we think that's a reasonable question to  
18 ask, and we would like an answer to that question. We  
19 think the Commission deserves an answer, and we think the  
20 landowners should have a clear understanding about  
21 whether the pipeline will start reduction and if it isn't  
22 needed because it's possible demand could stay down for a  
23 long time and they don't necessarily need this northern  
24 part because they can get oil -- once the phase one from  
25 Oklahoma to Texas is done, they can actually bring oil

1 down all the way from Kansas to Texas without this  
2 segment being built. At some point demand will be  
3 sufficient they hope for this northern segment.

4 But when will that be, and if it isn't  
5 sufficient, are we putting landowners through an awful  
6 lot of trouble for no good reason.

7 CHAIRMAN JOHNSON: Thank you. Keystone.

8 MR. MOORE: Several points. First of all, the  
9 subject of demand is an issue that is subject to federal  
10 law. The pipeline cannot be constructed without a border  
11 crossing permit to be granted by the Department of State.

12 As part of that process under NEPA there is a  
13 purpose and need analysis that is done. So the demand  
14 issue will clearly be determined as part of that, and if  
15 the presidential permit is granted, it's granted because  
16 this pipeline is in the national interest, meaning that  
17 there is demand for the pipeline.

18 Second of all, this is a multibillion dollar  
19 project, and it strains credulity to believe that  
20 TransCanada would pursue that kind of investment if there  
21 were no demand for oil to be shipped through the  
22 pipeline.

23 Thirdly, as I listened to Mr. Blackburn's  
24 comments today, his primary concern seems to be about  
25 scheduling. And, Jim White, correct me if I'm wrong, but

1 my understanding is that the schedule for the Keystone  
2 Pipeline has not changed from what was submitted in the  
3 Application to the PUC. And I said Keystone Pipeline. I  
4 meant KXL.

5 MR. WHITE: Correct. Start date for the  
6 Steel City segment is 2011.

7 CHAIRMAN JOHNSON: Thank you. Commission staff.

8 MS. SEMMLER: Staff does not believe that need  
9 is an issue for this Commission to decide. And it is a  
10 nonjurisdictional issue that is not within the burden of  
11 proof that this Commission will consider at the hearing.

12 Although demand is one of the items required by  
13 statute and some of the Administrative Rules that be  
14 produced, it's not part of the burden of proof. Thus, I  
15 believe that the information that's been provided is  
16 adequate to meet the needs of -- or the requirements of  
17 that statute and Administrative Rule.

18 MR. MOORE: Mr. Chairman, could I just add a  
19 comment about the particular administrative rule?

20 I think it makes sense and should be understood  
21 in the context of an intrastate facility where there  
22 would be demand for the facility within the state in the  
23 context of an interstate pipeline that has no terminus in  
24 South Dakota, I don't think that that demand requirement  
25 makes sense in the regulation and the context in which

1 the information has been sought in the discovery requests  
2 here.

3 MR. BLACKBURN: Mr. Chairman, if I may respond,  
4 that may be or may not be the case. The law,  
5 nonetheless, requires that the Applicant include  
6 information about demand in the Application.

7 The DRA believes that a failure to require  
8 TransCanada to update information about demand would  
9 mean -- and to explain what situation is happening with  
10 oil production would mean that they could put whatever  
11 they wanted to about demand in their Application and then  
12 nobody would be able to say or comment on it with any  
13 meaning because, as Ms. Semmler has said, it's not  
14 jurisdictional.

15 Why put something in a statute if you can't -- I  
16 mean, if it's not jurisdictional, it can't be considered  
17 by you. It cannot be considered by you. And if that's  
18 the case, then why put it in the statute. We think that  
19 that would make that particular regulatory provision  
20 irrelevant. You know, they can put whatever numbers they  
21 want in. Nobody can question them. Nobody can challenge  
22 those numbers. Nobody can get information out of them  
23 about those numbers, and it becomes a meaningless piece  
24 of information that has no bearing on the Commission's  
25 proceeding.

1           We do not believe that the legislature or the  
2 Commission in promulgation of its own regulations  
3 promulgates regulations that are meaningless. If you're  
4 going to consider demand, you need to consider it.  
5 Otherwise, we believe it's a violation of law.

6           CHAIRMAN JOHNSON: Mr. Blackburn, I do have a  
7 tendency to think demand is of some interest to the  
8 Commission in this proceeding. Some of your requests are  
9 for what I presume are publicly available analyses about  
10 demand.

11           Is there a reason why Keystone should be  
12 gathering those numbers rather than DRA?

13           MR. BLACKBURN: It's their business to gather  
14 those numbers, and the numbers that are publicly  
15 available aren't necessarily the same quality and  
16 character as the information that TransCanada would have  
17 in its files related to demand.

18           You know, the numbers that -- the only numbers  
19 we have access to are industry prepared numbers from a  
20 general report. You know, they may or may not be that  
21 accurate. We believe that TransCanada provides much  
22 closer tracking of demand for its pipeline, and we  
23 believe that they should be more forthcoming about how  
24 the impact of this economic downturn and decreased demand  
25 for oil is affecting their business plans for this

1 project. That is relevant information, and it's  
2 information the Commission should have.

3 General public statements found in, you know, an  
4 industry give us an indication, the DRA an indication  
5 that there is a problem, but we don't have access to the  
6 information about how those numbers were derived. We  
7 don't know how it might affect TransCanada's planning for  
8 this project. But we know that if those numbers in the  
9 cap report are correct, that that could have a dramatic  
10 effect on TransCanada.

11 And with respect to Mr. Moore, project  
12 proponents and developers -- and I've been on the  
13 development side. Proposed projects, you know, all time  
14 they can't predict the future. Nobody can predict the  
15 future obviously. So, you know, the mere fact they're  
16 going ahead with the development of this project does not  
17 mean it will be successful in its execution.

18 And that's the question, one of the questions  
19 for the Commission to consider is, you know, is demand  
20 sufficient for the northern segment of the pipeline and  
21 when would that demand be sufficient to justify the start  
22 of construction. And the shippers agreements TransCanada  
23 also claimed it's enough to start regulatory process, not  
24 to construct the project. Perhaps that's changed, but  
25 that's what their website says.

1           So we think that having more information about  
2 the effect of this very dramatic economic situation on  
3 this pipeline is relevant to the Commission's proceeding  
4 and very important to the landowners.

5           CHAIRMAN JOHNSON: Okay. Thank you.

6           Mr. Moore, again, I'm just one person, but I am  
7 leaning toward allowing information on demand to be  
8 discoverable here. So then I -- sort of my next -- the  
9 next hurdle to clear is what would be overly burdensome.

10           Would you make any argument that any of the  
11 requests 12 through 19 are overly burdensome?

12           MR. MOORE: I want to include Mr. White in this  
13 conversation because he may have a better sense than I do  
14 of the documents. The requests are certainly broad. And  
15 I can't help but note that Mr. Blackburn has sort of  
16 argued both sides of this issue.

17           On the one hand he said that TransCanada  
18 shouldn't be in a position where it can submit numbers in  
19 its Application and then he can't challenge. On the  
20 other hand he responded to you and said I need this  
21 information because TransCanada has the only good numbers  
22 and I can't get any other numbers.

23           I have a little bit of trouble with that.

24           Jim, do you have any comments about specific  
25 requests that are burdensome?

1 MR. WHITE: I'm looking at requests 12, 13, 14,  
2 and 15, which are produce all documents requests, which,  
3 again, are very broad and potentially quite burdensome.

4 I also note that 16, 17, 18, and 19, excuse me,  
5 are a bit more focused in that they are sort of  
6 Interrogatory requests going to specific questions.  
7 Perhaps it might be constructive if we agree to respond  
8 to the specific and directed Interrogatories in lieu of  
9 the broad requests for all documents associated with  
10 demand.

11 CHAIRMAN JOHNSON: So your compromise offer,  
12 Mr. White, would be that Keystone would produce requests  
13 16 through 19 but not 12 through 15 if that was amenable  
14 to Dakota Rural Action.

15 MR. WHITE: Yes. That's correct.

16 CHAIRMAN JOHNSON: Okay.

17 MR. BLACKBURN: Mr. Chairman, that is not  
18 acceptable to us. That is not acceptable to us, to  
19 Dakota Rural Action. The numbers that TransCanada has,  
20 they may or may not wish to disclose. That they have  
21 better numbers with us doesn't mean that the numbers they  
22 developed themselves or, like I said, that they would  
23 choose to disclose those kind of numbers.

24 So the fact that I'm asking them for the best  
25 numbers they have doesn't mean that, therefore, I'm



1 somehow being hypocritical about, you know, wanting  
2 information.

3           And also if we -- if TransCanada only answers --  
4 gives an explanation, they can give an explanation for  
5 how this would be and it may or may not be detailed. But  
6 we'd like to see the actual numbers, the actual data, for  
7 what's happening in Canada and what their projections  
8 are, their own in-house projections for the demand for  
9 this pipeline. We think that the numbers will provide  
10 some confidence that what TransCanada is saying is  
11 correct.

12           And besides that, it is relevant information,  
13 and it is discoverable. And I don't believe -- I also  
14 disagree that it would be unduly burdensome. I don't  
15 know all the documents they have in their files, but I  
16 can't imagine for a multibillion dollar company that they  
17 couldn't collect information related to demand and demand  
18 forecasts and provide that to us.

19           We could talk about that more perhaps with them  
20 and they could provide us an index or some sense about  
21 why this would be burdensome. But, you know, all  
22 discovery requests are burdensome. The standard isn't  
23 whether they're burdensome. It's whether they're unduly  
24 burdensome, given the particular party that's supposed to  
25 produce them.

1           We don't see that they would have truckloads of  
2 information about this kind of issue. And to the extent  
3 that they do have a lot of information, we would be happy  
4 to talk to them about what kinds of information they have  
5 available to find out what would be appropriate. But we  
6 would disagree that simply allowing a response to an  
7 Interrogatory would provide the information that the  
8 Commission needs to determine demand.

9           CHAIRMAN JOHNSON: I've got a few more  
10 questions, but I should give my colleagues an  
11 opportunity.

12           Any other questions?

13           COMMISSIONER KOLBECK: I think Commissioner  
14 Johnson and I are on the same wavelength here. I don't  
15 think that we can totally exclude demand, but I haven't  
16 been totally sold by Mr. Blackburn why TransCanada's  
17 offer is not sufficient.

18           I understand the numbers. You want the numbers  
19 from TransCanada, but that's not to say that  
20 TransCanada's numbers are anymore right than the  
21 industry's numbers. I don't understand how their numbers  
22 would be more relevant than what you can get on an  
23 industry basis.

24           MR. BLACKBURN: I don't know for sure, but one  
25 of the points of discovery is find out, you know, whether

1 they do have more detailed numbers. The cap report is  
2 fairly summary. You know, it doesn't provide a lot of  
3 detail. And I don't -- and also the cap report, the most  
4 recent one was 2009. The next midterm will come out in  
5 the middle of the year, but I assume there's a lot of  
6 data that goes into the background of that cap report.

7 And we would like to be able to not just take  
8 the industry's word for what the demand is but actually  
9 look at their numbers.

10 COMMISSIONER KOLBECK: Thank you.

11 CHAIRMAN JOHNSON: Commission staff, any  
12 enlightening comments?

13 MS. SEMMLER: Well, as we were chatting here, we  
14 did have an idea that -- we heard that there are binding  
15 shipper agreements and wouldn't that be the demand, those  
16 shipping agreements?

17 And beyond that, what is the relevancy?

18 CHAIRMAN JOHNSON: A fair comment.

19 Mr. Blackburn.

20 MR. BLACKBURN: The binding shipper agreements  
21 we're not sure are sufficient to allow actual  
22 construction of this northern segment because  
23 TransCanada's website says it's sufficient to allow going  
24 ahead with permitting. That's not the same thing as  
25 going ahead with construction.

1           Also they're called binding shipping agreements  
2 but agreements as all lawyers know are more or less  
3 binding depending on what the terms of those agreements  
4 are, and we're not entirely sure because we've never seen  
5 the agreements how binding they are. We take  
6 TransCanada's word for it that they are commercially  
7 binding, but that depends on what the penalties would be  
8 for withdrawing from those agreements.

9           For example, if demand continued to crash, the  
10 northern segment may not be used for a long time and  
11 could theoretically be not built. In that case  
12 presumably the shippers would be able to get out of those  
13 agreements. But again we don't know what the terms of  
14 those agreements are.

15           We don't know, for example, what level of demand  
16 is required for actual construction. And we also  
17 don't -- and TransCanada if their shipper agreements --  
18 the shipper agreements are an indication of intent for  
19 the future, but shippers, if they don't have oil to ship,  
20 are not going to be complying with those agreements. And  
21 they won't have oil to ship if demand continues to drop  
22 and production of oil in Canada falls.

23           That there is a certain demand, the demand is  
24 from the shippers, but the shippers can't read the future  
25 either. But the forecasts are indicating that the

1 shipper demand is dropping dramatically right now. And  
2 we'd like to know how that demand in shipper interest is  
3 affecting the planning for the pipeline.

4 CHAIRMAN JOHNSON: Other Commissioner, advisor  
5 questions?

6 MR. SMITH: I have a question or maybe a couple  
7 of them for Mr. Blackburn.

8 I guess maybe to clarify on the end result of  
9 all of this, I guess, could you point me to the  
10 particular -- you know, when we get down to the burden of  
11 proof, which inevitably that's where we wind up  
12 regardless of what the Application section says, which  
13 particular provision of that burden of proof would the  
14 Commission be able to make a finding or render findings  
15 and conclusions based on generalized demand data and deny  
16 a permit on that basis, I guess.

17 Is there one of those you can point to me where  
18 we would be able to deny the permit on the basis that  
19 there isn't an adequate demonstration airtight of demand  
20 for the facility?

21 MR. BLACKBURN: Mr. Smith, I think your question  
22 is in opposite. The burden of proof is not -- does not  
23 solely determine what the scope of discovery -- what's  
24 relevant in a proceeding. If that were the case, then  
25 there would be a large amount of information provided by

1 the Applicant that would be irrelevant to this  
2 proceeding.

3 The demand is required by law. Therefore, it  
4 needs to be in there. In terms of the burden of proof I  
5 would say, though, that I believe it's the second  
6 paragraph, second point there, requires consideration of  
7 the socioeconomic impacts on the -- of the project on  
8 South Dakotans.

9 Now it also doesn't -- it doesn't have to be  
10 only things that would result in a denial of the permit  
11 because the Commission can also condition the permit on,  
12 you know, vary -- with different conditions related to,  
13 for example, the start date or demand for the project.

14 Because certainly when the project will start  
15 and if it would start is related to socioeconomic  
16 conditions of the state.

17 So the problem that the Commission faces is that  
18 the burden of proof is TransCanada's burden of proof, and  
19 that is a very general set of burdens of proof. But if  
20 it's narrowed, if it's read as you have to find it right  
21 within Section 22, the burden of proof, then all kinds of  
22 information in the Application become irrelevant. And we  
23 believe that that would be a violation of law.

24 So it's not just that it has to stop. If the --  
25 if the standard for discovery is that the information has

1 to be a but-for result -- could be the but-for result of  
2 denying the permit, that is a far too narrow reading of  
3 the law and such that, you know, the information related  
4 to whether -- what the legislature and regulations  
5 require to be included in the permit should be  
6 included -- should be subject to discovery.

7 And to the extent that the Commission can  
8 condition the permit, it should do so and not just on  
9 what's in the burden of proof. Because the Commission's  
10 authority to condition the authority is much broader than  
11 what's in the burden of proof.

12 MR. SMITH: And I don't disagree with the fact  
13 that discoverable materials are not within that which we  
14 can say is within the very narrow reading of that  
15 section. I think my question I asked it for the reason  
16 of because whenever we get down to discovery requests we  
17 always get down to some kind of reasonableness balancing  
18 of burden versus the usefulness for something in the end.  
19 And that was the reason for asking it.

20 MR. BLACKBURN: And I think it's very simple.  
21 It's very simple. You know, we all know that demand for  
22 oil is dropping. We all know that production in Canada  
23 is dropping dramatically right now.

24 Those will have an effect on the operation of  
25 the pipeline. They'll have an effect on the construction

1 start date of the pipeline. Even though TransCanada has  
2 said they're still on schedule to start in 2011, their  
3 own spokespeople have suggested it could be as late as  
4 2012.

5 And, you know, they want -- they hope to have it  
6 in 2011, but their plans aren't necessarily going to come  
7 to fruition if the economy continues to go down and if  
8 production in Canada goes down and demand in the  
9 United States stays flat.

10 So it's a very practical question. You know, is  
11 the economy having an effect on their schedule, and is it  
12 going to have an effect on the need for this project?

13 MR. SMITH: Well, on that subject I might just  
14 point out that under our statute, Section 27 provides  
15 that there's a four-year term for beginning of  
16 construction. So, I mean, we're -- even at -- I'm just  
17 making an observation there that based upon the black  
18 letter law in our code, you know, in 2012 we're well  
19 within that.

20 But --

21 MR. BLACKBURN: If you're a landowner, you want  
22 to know more than a four-year window when they're going  
23 to be on your property.

24 MR. SMITH: Right. I'm just saying from an  
25 actual legal conclusory standpoint. But regardless of



1 that.

2 I think my other question was -- and what you're  
3 asking for here -- just for clarification, you're asking  
4 for existing documents. Because a couple of those  
5 questions sounded like requests for somebody to go out  
6 there and develop documents that don't exist.

7 MR. BLACKBURN: No. We're asking for existing  
8 documents, but we're also asking for an explanation from  
9 TransCanada about how the current market is affecting  
10 their business planning. And in that sense it's the  
11 nature of an Interrogatory.

12 And I have no doubt that TransCanada is very  
13 closely tracking what the current markets are doing to  
14 its planning for this pipeline in terms of its  
15 construction start date, in terms of its profitability,  
16 in terms of how the shippers are going to respond to it.

17 This is their core business to understand, you  
18 know, how markets are evolving and then adapting to those  
19 markets to make sure that they're profitable. If they're  
20 not doing that, they're not doing their business.

21 CHAIRMAN JOHNSON: Okay. Mr. Blackburn, I want  
22 to try to cut to the chase here.

23 I do find myself believing that demand is --  
24 could potentially be of some relevance. But when I look  
25 at the four-year limit in state statute, when I look at

1 the federal role with demand, when I look at, you know,  
2 the request for all documents in eight different requests  
3 for information, I find myself -- I find myself wishing  
4 we could reach some compromise that we had with some  
5 earlier data requests where you're able to get what you  
6 want by scaling back your request.

7 Now Keystone made an offer that was not  
8 sufficient in your mind. What I'm asking you is I'd like  
9 to give you some information, but I'm not sure what  
10 you've asked for -- I think we may be overreaching just a  
11 little bit there. But is there something you can offer  
12 by way of we can make sure you get what you need without  
13 asking for anything more?

14 MR. BLACKBURN: We'd like their data, their  
15 projections for forecast for demand and their forecast  
16 for production in Canada.

17 CHAIRMAN JOHNSON: Are there specific data  
18 requests that would get you what you need? Or no?

19 MR. BLACKBURN: Well, 12 would get us data for  
20 the production forecasts in Canada. And we'd like their  
21 numbers on their production forecast for Canada. Also we  
22 know that the Alberta Clipper Pipeline has been permitted  
23 and is likely to start construction. And so there's also  
24 a demand for export capacity from Canada --

25 CHAIRMAN JOHNSON: What I just want is I don't

1 want an explanation of everything you're looking for.  
2 What I want to do is have you throw something on the  
3 table, and we're going to see if we can get Keystone to  
4 be comfortable with it. If they're not, then we can  
5 burrow into the details.

6 But I've got to believe that we can come to an  
7 agreement here on getting you what you need and having  
8 them agree to get you that info.

9 MR. BLACKBURN: We'd like their data for  
10 production forecasts for Canada. And we'd like the data  
11 they use for demand forecasts for the United States. And  
12 that would be 12 and 14. We would like to know what the  
13 binding shipper agreements -- commercial terms are with  
14 regard to how binding they are, what the penalties are  
15 for cancelling those agreements. And I think that then  
16 if they agree or if I were to agree to provide answers to  
17 16, 17, 18, 19, that would be acceptable to us.

18 CHAIRMAN JOHNSON: TransCanada, thoughts.

19 MR. WHITE: If I might respond, I think Keystone  
20 would be comfortable responding to data requests 12 and  
21 14.

22 With respect to the request for the binding  
23 shipper agreements, that gets into a real confidentiality  
24 concern as those agreements are subject to  
25 confidentiality agreements with the shippers.

1           CHAIRMAN JOHNSON: Mr. White, are those  
2 agreements uniform, or do they vary?

3           MR. WHITE: In all honesty, I don't know the  
4 answer to that question. There may be shipper specific  
5 variability in that. I don't know that.

6           CHAIRMAN JOHNSON: Thank you. Sorry for the  
7 interruption. Proceed.

8           MR. WHITE: I thought I heard Mr. Blackburn  
9 state earlier even if they're binding shipper agreements,  
10 they may not be binding. So I'm not sure of the value  
11 there.

12           With respect to the Interrogatories in 16  
13 through 19, again, I thought Mr. Blackburn rejected my  
14 initial offer to provide those because he was afraid that  
15 the responses would be self-serving. So I'm not sure  
16 that there's a whole lot of value in providing responses  
17 to those. So I guess at this point what I'm offering is  
18 a response to 12 and 14.

19           CHAIRMAN JOHNSON: Listen, guys. I mean, we can  
20 go -- what you're leaving the Commission with is at a  
21 crossroads. We're going to need to painstakingly examine  
22 each of these requests to try to get what we think the  
23 Interveners are entitled to.

24           I don't mind doing it if that's what we've got  
25 to do. It just seems to me we should be able to get a

1 little closer like you have been willing to do with some  
2 of these other requests.

3 So is there room -- first Mr. Blackburn and then  
4 Mr. White. Is there room for you to adjust where you're  
5 at?

6 MR. BLACKBURN: Mr. Chairman, I think we've come  
7 together a little bit closer than we were before and  
8 would acknowledge that. I do not believe that providing  
9 data for forecasts for 12 and 14 would be particularly  
10 burdensome or onerous for TransCanada to provide. I  
11 believe they have that information probably fairly well  
12 at hand and it would not be horribly voluminous or  
13 difficult for them to provide that information.

14 In terms of the binding shipper agreements, my  
15 understanding is that when they have the open season for  
16 these pipelines they have a packet that they provided  
17 to --

18 CHAIRMAN JOHNSON: Mr. Blackburn, I'm sorry to  
19 interrupt. I'm not asking you to justify your current  
20 stance. I get it. If where you're at is where you're  
21 at, then I don't have a problem with that. I just want  
22 to know.

23 MR. BLACKBURN: You asked about whether the  
24 agreements are uniform. I just wanted to say that my  
25 understanding is they provide a uniform packet to every

1 one of the shippers, and I don't know beyond that. I  
2 just want to say that.

3 So I don't think our request is unreasonable as  
4 it stands, and I'll leave it at that.

5 MR. WHITE: Let me see if I can --

6 CHAIRMAN JOHNSON: Hold on just a second,  
7 Mr. White. Hold on.

8 Would that uniform packet that is provided to  
9 shippers be -- would that be acceptable to you rather  
10 than every shipper agreement?

11 MR. BLACKBURN: I think that would be helpful  
12 and provided that we have the ability to ask TransCanada  
13 about the uniformity of those terms within other shipping  
14 agreements. And even though it could be that 16 through  
15 19 could be self-serving, we'd still like to have an  
16 explanation from TransCanada as, you know -- since this  
17 is their business about how this market's affecting their  
18 business. And it would be helpful to the Commission, I  
19 believe.

20 CHAIRMAN JOHNSON: Okay. Mr. White, I'll give  
21 you an opportunity to respond. But first I want to ask  
22 you this: If the Commission were to -- some Commissioner  
23 were to move to allow request 12, 14, 17, 18, and 19 and  
24 then a partial with 16 asking Keystone to provide a  
25 single uniform packet that provides the starting point

1 for negotiations with shippers, what objections do you  
2 have to that?

3 MR. WHITE: Okay. If I can just clarify, I  
4 think you mean a partial answer to 15?

5 CHAIRMAN JOHNSON: Yes. I'm sorry. That's  
6 exactly right.

7 MR. WHITE: I would not have an objection to  
8 that, subject to the possible need to request some  
9 protection for the open season package under some sort of  
10 a protective order simply because I don't know at this  
11 point whether there is confidentiality around that open  
12 season package.

13 If there's not and if it was completely made  
14 available on a public basis, then I would have no  
15 objection to that as well.

16 CHAIRMAN JOHNSON: Okay. For discussion's sake  
17 then I would move the Commission approve data request 12,  
18 14, 16 through 19, deny 13, deny 15, except as it relates  
19 to providing a single uniform packet that provides the  
20 starting basis for negotiation and that any of those that  
21 would need to be subject to a confidentiality agreement  
22 would be.

23 Discussion? And this can be -- we'll be a  
24 little liberal here. Certainly if the parties want to  
25 weigh in because the motion's bad, let us know.

1 First Commissioners. Kolbeck.

2 COMMISSIONER KOLBECK: I think that's a good  
3 motion. I think that's exactly what I have written down.  
4 The single uniform packet I think should be sufficient.

5 All of those other numbers that are being  
6 produced should be well sufficient to determine demand  
7 plus what's in the public domain. That should be very  
8 well adequate.

9 COMMISSIONER HANSON: Mr. Chairman, I agree with  
10 the motion with the exception that I'm curious about I  
11 don't see the relevance on number 19, the impact on  
12 domestic production, why that would be anything that we  
13 would be concerned with.

14 CHAIRMAN JOHNSON: Well, and if it's important  
15 to you, I don't mind out taking out 19. I'd make it a  
16 friendly amendment. I was just trying to get to yes more  
17 than anything.

18 COMMISSIONER HANSON: Sure. I just don't -- I  
19 agree fully. I think you articulated the motion well.  
20 It's just on that one I just don't see why South Dakota  
21 would bother with denying or approving a pipeline based  
22 upon the domestic oil production.

23 CHAIRMAN JOHNSON: Mr. Blackburn.

24 MR. BLACKBURN: That's acceptable.

25 CHAIRMAN JOHNSON: With that, I'm happy to make



1 the friendly amendment to deny rather than approve  
2 request 19.

3 Other discussion?

4 Hearing none, we'd proceed to vote or -- yeah.  
5 We'll proceed to vote.

6 Hanson.

7 COMMISSIONER HANSON: Aye.

8 CHAIRMAN JOHNSON: Kolbeck.

9 COMMISSIONER KOLBECK: Aye.

10 CHAIRMAN JOHNSON: Johnson votes aye. Motion  
11 carries 3-0.

12 With that, we'll proceed to request number 23,  
13 which deals with the identification of alternative  
14 routes.

15 Dakota Rural Action.

16 MR. BLACKBURN: As you said, request 23 relates  
17 to alternative routes. TransCanada has asserted that the  
18 question of alternatives is not jurisdictional to this  
19 Commission. We cannot see how that argument can stand  
20 because not only do the Commission's regulations require  
21 that the Commission look at alternative routes but also  
22 the Environmental Impact Statement being prepared for  
23 this project will have information for alternative routes  
24 in it. And, therefore, the Commission will consider  
25 alternative routes.

1           Dakota Rural Action's concerned that the  
2 evaluation of alternatives was not sufficient.  
3 TransCanada provided their analysis of alternatives.  
4 That is their opinion about alternatives. We believe  
5 there's more information on other routes that may have  
6 been considered related to alternatives and request  
7 information about other alternative routes that may or  
8 may not have been included by TransCanada in development  
9 of that analysis.

10           Now in terms of the burdensomeness, we're not  
11 looking at every single little bit of documentation that  
12 went into alternative development. For example, they may  
13 look at particular land uses or other sorts of things.  
14 We're looking at a little bit higher elevation analysis  
15 of looking at identification of the different routes that  
16 were considered if there were any beyond what TransCanada  
17 provided. And so more general documents about the  
18 process that they developed for developing those  
19 alternatives.

20           We believe that there are possible routes  
21 outside of South Dakota that would remove the burden of  
22 this pipeline from South Dakotans entirely and that the  
23 Commission should look and ensure itself that this route  
24 is necessary. Because it does impose a burden on the  
25 landowners, and if there are alternatives that would be

1 superior to this alternative, the Commission -- that's  
2 relative to the Commission's decision and it should allow  
3 discovery on those.

4 CHAIRMAN JOHNSON: Keystone.

5 MR. MOORE: I think Mr. Blackburn's argument is  
6 contrary to statute, and I would simply refer to  
7 49-41B-36.

8 And, secondly, we've produced documents  
9 responsive to the request. That section of the  
10 presidential permit application describing the routing  
11 process has been produced. There is routing information  
12 that was submitted in the application, and as I listened  
13 to Mr. Blackburn's argument and read DRA's motion, I  
14 don't see any other specific documents that have been  
15 requested.

16 CHAIRMAN JOHNSON: Commission staff.

17 MS. SEMMLER: Staff takes the position it did on  
18 the first siting docket again and believes that the  
19 Commission does not have jurisdiction to dictate route.  
20 Thus, the requested material is irrelevant.

21 CHAIRMAN JOHNSON: Commissioner questions?  
22 Advisor questions?

23 COMMISSIONER HANSON: I have a question,  
24 Mr. Chairman. I understand that -- perfectly clear to me  
25 that we cannot route a pipeline, and thank heavens for

1 that. But we can consider other routes, can we not?

2 CHAIRMAN JOHNSON: Well, Mr. Smith's probably  
3 the best one to answer that. But 36 says that the  
4 chapter shall not be construed to be read as though the  
5 Commission's got the ability to route or dictate a  
6 location for an energy conversion facility or  
7 transmission line.

8 But, I don't know. Mr. Smith, your --

9 MR. SMITH: Yeah. I mean, again, it's one of  
10 those oddities where we have a rule that's somewhat at  
11 loggerheads with this particular statute. Or it's an  
12 irony. I guess I'd put it that way.

13 You know, I don't know that zero consideration,  
14 you know. The answer is no. You can't say you should  
15 put it over here. I guess the bottom line would be is it  
16 at least relevant to the extent that, you know, any  
17 weighing, I guess, of whether a particular project meets  
18 the four standards or at least the three of the four.  
19 And particularly those I guess on environmental and --

20 COMMISSIONER HANSON: We can either state -- we  
21 can either approve it, disapprove it, or approve it with  
22 conditions.

23 MR. SMITH: Conditions. That's it. You can't  
24 say, no, it should be over here. Now, you know, I mean,  
25 if there were a ridiculous -- you know, I think the

1 reason for maybe the rule is that, you know, there's  
2 always some weighing involved. And if there was a very,  
3 very serious route selection discrepancy, I guess, you  
4 know, you might deny and say, well, it's just  
5 unreasonable or something like that.

6 But you can't route it and say, no, it should  
7 have been over here or it should be there or anything  
8 like that.

9 COMMISSIONER HANSON: It's an interesting  
10 situation where we then somewhat could present additional  
11 evidence showing a better route in order to dissuade us  
12 from approving it.

13 However, we get into that, and we could have  
14 100 different presentations of that nature, could we not?

15 MR. SMITH: Yes. I will say that we did permit  
16 the introduction of evidence in the first Keystone  
17 proceeding by Interveners regarding a potential  
18 alternative route.

19 COMMISSIONER HANSON: Certainly.

20 MR. SMITH: In that case we did that. But in  
21 terms of the -- I guess the one little thing you said or  
22 that Mr. Blackburn stated that is of concern to me I  
23 guess is Keystone has stated in their filing that's what  
24 their routing process was. It's a description of that.  
25 And I got from you that you're asking them to go beyond

1 that and talk about not what their routing process was  
2 but what it might have been, you know. And is that --

3 MR. BLACKBURN: That's not correct, Mr. White --  
4 Mr. Smith. I am looking for information more detailed  
5 about that routing process, not what it might have been  
6 but what information they looked at in developing their  
7 conclusory document about routing.

8 They may very well have looked at other routes.  
9 I don't know. They may have more information about the  
10 merits of those different routes. They have a conclusion  
11 that they filed with the Department of State. I presume  
12 there's more information beyond that conclusion, and I  
13 think the Commission should look deeper and allow  
14 discovery beyond mere conclusory statements about what  
15 TransCanada came up with from the data that they have on  
16 alternative routes.

17 You know, we're looking again for data, not for  
18 conclusions. They've provided their conclusions. We can  
19 get those other places. We want the information that  
20 they based it on.

21 COMMISSIONER HANSON: Thank you, Mr. Blackburn.

22 MR. BLACKBURN: And I believe the struggle too  
23 is that the environmental review process requires the  
24 Commission to consider alternatives, the state -- the  
25 Environmental Impact Statement process requires

1 consideration of alternatives.

2           And one of the problems the Commission is likely  
3 to face is I talked to Brian Duggan at the Department of  
4 State, and he said they're likely not to have the  
5 Environmental Impact Statement out until November, maybe  
6 later than that. That means the Environment Impact  
7 Statement will come out after the Commission's hearing.

8           That means landowners and citizens will not have  
9 an opportunity to have any information about other  
10 alternatives before the Commission's proceeding that  
11 would normally be in the Environmental Impact Statement.  
12 So not only would we not have access to information  
13 through TransCanada, we wouldn't have the Environmental  
14 Impact Statement to look at alternatives either.

15           And I think that creates somewhat of a  
16 scheduling problem for the Commission as well. In the  
17 Keystone I proceeding the Environment Impact Statement  
18 came out before the Commission had its hearing. Here  
19 it's likely to come out afterwards so it won't be able to  
20 inform the Interveners in the proceeding.

21           COMMISSIONER HANSON: Thank you, Mr. Blackburn.  
22 Thank you, Mr. Smith.

23           Mr. Chairman, I think I'm clear on the issue  
24 from my perspective now.

25           I can see a very protracted hearing process if

1 we just went through a process of trying to ascertain  
2 every foot that could be trekked through South Dakota.  
3 And I think it makes a great deal of sense for us to  
4 continue from the process of examining this from the  
5 standpoint of either we approve it, disapprove it, or we  
6 approve it with conditions.

7 Certainly we can ask during the hearing process  
8 if we have questions about a particular route or  
9 something of that nature. Thank you.

10 CHAIRMAN JOHNSON: Yeah. You know, it's  
11 interesting the statutes don't say it's got to be the  
12 best route. It just says that this pipeline's got to be  
13 safe and consistent with the economic use of the area and  
14 not cause, you know, undue harm. So to a certain extent  
15 weighing of the various merits of different routes is not  
16 really considered in the statute other than to tell us  
17 not to do it -- or not not to do it but not to route the  
18 line specifically. So your points are well taken.

19 Other questions?

20 If there are no questions, is there any action?

21 COMMISSIONER HANSON: Mr. Chairman, I move to  
22 deny request 33, 34, and 35.

23 MR. BLACKBURN: Mr. Chairman, point of  
24 clarification. Could you provide a little more  
25 information about why. Because there's a lot of fuzzy



1 language about whether it's jurisdictional or not  
2 jurisdictional and what the basis for that is so we  
3 understand whether we should even present information at  
4 all.

5           Because it's one thing to say, well, you can  
6 provide a little information if you want, but it's an  
7 entirely different thing for us to be able to have access  
8 to the information in the first place. If we don't have  
9 access to the information, then the theoretical right to  
10 provide discussion and alternatives does not help us.

11           And if it's really what's happening is that this  
12 is not -- to be jurisdictional, I think the Commission  
13 should be clear about whether Interveners are allowed to  
14 present information on alternatives.

15           And if we are allowed to present that  
16 information, we should also be allowed to discover that  
17 information. If we're not allowed to discover it because  
18 it's not jurisdictional, then the Commission should be  
19 clear that we should not present alternatives to the  
20 Commission and waste the Commission's time.

21           CHAIRMAN JOHNSON: You know, Mr. Blackburn, this  
22 is one of the many areas where I think this Commission  
23 has frustration. At least this Commissioner has  
24 frustration. Because as you know with the way the  
25 federal laws and rules are written, with the way the

1 state statutes are written, perhaps this Commission  
2 doesn't have as much discretion as it would like. So one  
3 concern I have is just looking at what the law tells us  
4 we can do and trying to apply that to this very real life  
5 situation.

6 I don't know exactly why the Commission allowed  
7 Mr. Rahn's testimony with the last pipeline. I don't --  
8 I think we did it with an abundance of caution. You  
9 know, that we wanted to allow that sort of information  
10 in.

11 He didn't rely on information from the  
12 Applicant. He relied on his own believe and professional  
13 and academic credentials about what route would have been  
14 better.

15 I don't know that that information was  
16 particularly helpful to building a record and helping the  
17 Commission make a decision. I don't know.

18 Mr. Smith, Commissioners?

19 COMMISSIONER HANSON: Mr. Chairman.

20 Mr. Chairman, I made the motion on the basis that as what  
21 I had said when I made the motion, that in ascertaining  
22 whether the route is a good route or not, whether it's  
23 acceptable or not, it does not fall at least I believe on  
24 our shoulders to try to figure out whether or not there  
25 is a different acre of land or a slightly different

1 variance in the direction of that or if there's a major  
2 change in that pipeline that might be slightly better  
3 for -- for Keystone to run it. Our job is to ascertain  
4 whether there are problems with the actual route that  
5 they're asking for.

6           There may be 100 different routes that they can  
7 take through South Dakota. All of them could be good  
8 routes. One of them could be slightly better than any  
9 others. It's not up to us to try to search out the very  
10 best route from the standpoint of every single prairie  
11 dog and creek. Our job is to ascertain is there a  
12 problem with the actual route that they have presented to  
13 us.

14           If we see that, see a problem with it, then it's  
15 our job to deny or to have them take care of that  
16 problem. Thank you, Mr. Chairman.

17           MS. COLLIER: Mr. Chairman, in response the only  
18 thing that comes to mind, however, is how would you  
19 determine if there was a problem with a specific route if  
20 you have nothing to compare it to? If you only have one  
21 alternative -- and, yes, I certainly would agree with the  
22 Commissioner that, for example, if there was something  
23 that was clearly wrong that would pose some great hazard  
24 that would be clear and obvious, you would certainly get  
25 that simply by looking at the route.

1           But other things can only be done in comparison  
2 to something else. And that is perhaps my concern.

3           I don't know as far as the last time that this  
4 issue came up and that alternative route was proposed  
5 what the basis for that alternative proposal was. I  
6 don't know -- I wasn't part of that so I don't know what  
7 the -- the evidence was or how that was presented as an  
8 alternative route. But I do think there have to be some  
9 standards by which you compare things.

10           If you have one thing standing alone, either  
11 there is no comparison, there is no way of judging  
12 whether that is good or bad or inadequate. So I would  
13 just simply suggest there should be some basis on which  
14 to make the determination of whether there are problems  
15 with a specific route. And I don't know how you can do  
16 that beyond the clear and obvious dangers unless you  
17 compare it to something.

18           COMMISSIONER HANSON: Mr. Chairman.

19           CHAIRMAN JOHNSON: Yes. Commissioner Hanson and  
20 then Mr. Rislov.

21           COMMISSIONER HANSON: The alternative route for  
22 the Keystone Pipeline was presented by Interveners. And  
23 we received some information from the parties at that  
24 time.

25           Like I say, I don't believe that it's up to --

1 and I think that is far more appropriate than to have  
2 Keystone try to present 100 different ones and say pick  
3 the best one. From our standpoint, again -- well, I  
4 guess I should add during that particular process when we  
5 looked at the Keystone Pipeline there were changes made  
6 in the routing as we went through the process. So it's  
7 not a fixed and concrete at that juncture, as certainly  
8 those changes can still take place.

9 But the fact is that alternative routes were  
10 suggested by Interveners, not by Keystone.

11 MR. BLACKBURN: Commissioner Hanson, if I may,  
12 what we're trying to do is to collect factual information  
13 about all other alternative routes from the Applicant.  
14 We're not asking the Applicant to do a theoretical  
15 analysis of all the possible routes out there. We  
16 believe they've already done an analysis of, you know,  
17 the alternative routes and they've provided a conclusory  
18 statement about which one they chose.

19 That doesn't mean there's not information and  
20 facts that would help Interveners find which alternative  
21 routes might exist and be reasonable. So we're not  
22 asking anything new. We're asking for more detail of  
23 what they've already done so that we can hopefully have  
24 the opportunity to present alternatives should they  
25 appear to be merited.

1           MR. RISLOV: This is Greg Rislov. And because  
2 it appears to deal with a comparison that will have to be  
3 reviewed during the case it struck me that my wife makes  
4 a pretty decent apple pie. I can taste it, and I know  
5 it's a decent apple pie. I have certain standards that  
6 are inherent to me. My mother makes a better one. I  
7 would make one I would throw out.

8           I can make that judgment without necessarily  
9 comparing every apple pie in South Dakota or the  
10 United States. The problem I have -- and I don't want to  
11 get into legal standards. I'm not an attorney. But it  
12 seems to me the Commissioners are trying to judge that  
13 comparative apple pie and whether or not it meets  
14 standards I guess to make it edible. Is it edible?

15           And, frankly, I understand what your problem is,  
16 but if we're going to go into every possible apple pie  
17 and taste it, you know, is that really where the  
18 Commission's jurisdiction lies?

19           I'll let you attorneys argue it. But, frankly,  
20 there's a real problem with developing the type of  
21 material and for the Commission to sit and make judgments  
22 on it beyond the standards and I'll compare them to rate  
23 cases fair and reasonable. Is it a reasonable standard  
24 you're approaching, or is it a perfect standard you're  
25 approaching? And what really is this designed to get at,

1 other than something beyond a reasonable standard? Just  
2 a thought.

3 CHAIRMAN JOHNSON: I think -- Ms. Collier's  
4 comments I think are right. I do think there is some  
5 value generally in comparison. I think that provides  
6 context. I think it provides framework.

7 The only reason I don't find that argument  
8 wholly compelling is that we're really -- we're making an  
9 incomplete comparison. And you've got a route that has  
10 been fully vetted from a hydrology perspective, from a  
11 archeological perspective, from a flora and fauna  
12 perspective, and you have some other routes that have not  
13 undergone quite the same testing.

14 I am nervous that comparing what hopefully in  
15 this process -- well, not hopefully, will need to be a  
16 fully vetted route in comparison -- in comparing it  
17 against others gives us an incomplete comparison that may  
18 lead the Commission into conclusions that are not indeed  
19 accurate.

20 I would agree wholeheartedly that if we had two  
21 routes that had both undergone a full vetting, that I  
22 would want to compare and contrast those routes because I  
23 do think it would provide context. I'm not sure that's  
24 the situation we have here.

25 And just one more thing. I mean, I appreciated

1 Mr. Rislov's analogy. I would just tweak it only by  
2 saying that I don't think this route has to be edible. I  
3 think the standard is higher than that. And I think  
4 Mr. Rislov would probably agree with that.

5 You know, edible is a low threshold. I think  
6 the burden of proof is rather a hefty in this instance.  
7 So tasty perhaps.

8 Other questions?

9 COMMISSIONER KOLBECK: I just wanted to say that  
10 I think -- I understand your comments that you  
11 referenced, but in all reality there probably will never  
12 be a good route. There will always be people -- across  
13 the State of South Dakota there will always be one or two  
14 people who think there will always be a better route.

15 So I think that's one reason for the law. It's  
16 very, very clear in 49-41B-36, extremely clear, that we  
17 cannot do that route, we cannot change that route. So I  
18 think we have a motion on the floor, though, if I'm not  
19 mistaken.

20 COMMISSIONER HANSON: Mr. Chairman, my -- my  
21 motion stands as I stated. I did not include the portion  
22 saying that we did not have jurisdiction because I  
23 believe that precludes us really from looking at  
24 additional information that may be presented to us for an  
25 alternative route, and I did not want to deny the



1 Interveners that opportunity to do that.

2 My problem with Mr. Blackburn's statement about  
3 having Keystone present all of the additional information  
4 on all routings that they considered, that opens up the  
5 entire discussion then. If there's additional  
6 information on another route, then it begins the entire  
7 discussion from Interveners as to in order to properly  
8 assess that in comparison with the other route then we  
9 have to look at all information pertaining to that route,  
10 just as if it's being applied for at the same time.

11 So basically our challenge is doubled at that  
12 juncture. And it just -- it does not make sense for us  
13 to go through all of those hoops when, in fact, our job  
14 is to ascertain whether the present route is satisfactory  
15 or not.

16 CHAIRMAN JOHNSON: All right. Commissioner  
17 Kolbeck is right. There is a pending motion.

18 Further discussion on the motion.

19 Hearing none -- and the motion is to deny  
20 request 23 --

21 COMMISSIONER HANSON: 23. Yes.

22 CHAIRMAN JOHNSON: 23.

23 Hanson.

24 COMMISSIONER HANSON: Aye.

25 CHAIRMAN JOHNSON: Kolbeck.

1           COMMISSIONER KOLBECK:  Aye.

2           CHAIRMAN JOHNSON:  Johnson votes aye.  The  
3 motion carries 3-0.

4           I think those are the data requests, but I'll  
5 look at the parties to see if there's anything I have  
6 missed, anything we have missed.

7           MR. BLACKBURN:  No.  Mr. Chairman, those are all  
8 the requests we had concerns with.

9           CHAIRMAN JOHNSON:  I think maybe a motion I made  
10 and the Commission voted on earlier dealt with the ERP,  
11 the Emergency Response Plan.  We denied that data  
12 request.  Part of me still feels like Ms. Collier's point  
13 was well taken that when we get to a draft point perhaps  
14 that document could be provided to those people who have  
15 entered into a protective order and have specifically  
16 asked for it.

17           Not even necessarily -- I don't know to the  
18 extent that that would be helpful to them in this  
19 process.  But again to the extent we're concerned about  
20 the PHMSA process that may be of value to the broader  
21 national process.

22           So I would just stop and ask my colleagues or  
23 the parties if perhaps that would be an appropriate thing  
24 to request or order Keystone to do.

25           MR. KOENECKE:  Commissioner, this is

1 Brett Koenecke. If I could respond, I'd really like a  
2 chance to learn more about the universe of information on  
3 the development of the ERP for this particular process  
4 before we'd respond to that. I think we've got time to  
5 do that. And if I could ask for your indulgence in that,  
6 I'd really appreciate a chance to find out more about  
7 exactly where we're at in the development, what the time  
8 line might be and come back.

9 CHAIRMAN JOHNSON: I think that's fair. I'll  
10 just leave it as a default in my mind that if we don't  
11 hear something from Keystone, that they will provide when  
12 they have not necessarily a final draft but something  
13 between a preliminary and a final draft, that they will  
14 provide that. Dakota Rural Action specifically asked for  
15 it and so that they -- and staff would be provided a copy  
16 at that point. Unless we hear otherwise from you, I'll  
17 just sort of presume that's the default.

18 MR. KOENECKE: Thank you.

19 MR. BLACKBURN: Mr. Chairman, the concern I  
20 think I would express is about the time. TransCanada has  
21 addressed that question. Because a draft may not be  
22 available until after the Commission's action.

23 CHAIRMAN JOHNSON: I understand that, but I  
24 think -- I mean, if that's when it's done, that's when  
25 it's done. The concerns expressed by Commissioner Hanson

1 I agree with 100 percent. Dakota Rural Action's made  
2 similar concerns. We want an opportunity to have our  
3 voices heard at PHMSA. That opportunity may be after  
4 this particular regulatory process is concluded. I still  
5 think the ERP would be of assistance to all of us, even  
6 after that fact.

7 MR. BLACKBURN: Well, we still disagree that the  
8 information contained in that process would not be  
9 helpful to this Commission. We think it would be. But I  
10 understand the Commission has already denied that  
11 motion -- or denied the request.

12 CHAIRMAN JOHNSON: I'm just trying to make sure  
13 that the agreements that you made that I agree with most,  
14 that we're able to make sure you get the information that  
15 is going to be helpful -- I mean, you spoke a lot about  
16 the PHMSA process so let's make sure you get the tools  
17 that will be beneficial to that process.

18 Other questions, issues?

19 MS. SEMMLER: It wasn't noticed to be decided  
20 here today but yesterday was the prefilled testimony  
21 extension time frame and nothing was filed, I don't  
22 believe. So I don't know if the Commission has the  
23 ability to address that today, if we need to change that  
24 procedural schedule around again.

25 CHAIRMAN JOHNSON: Well, perhaps we can just do

1 some information gathering here. Again, I'd be reticent  
2 to take action not having it be noticed. But let's -- I  
3 mean, is there a reason -- should we expect that  
4 something will be late filed, or do we have any  
5 information from the parties?

6 MR. BLACKBURN: We assumed that our testimony  
7 would be based in large part on what we gathered or in  
8 part on what we gathered from TransCanada. So we can't  
9 draft things that -- we can't draft based on not knowing  
10 whether we get information or not.

11 We have greater clarity now about what access we  
12 have to information, and based on that clarity and also  
13 TransCanada's agreed to provide some additional  
14 information so we would need to have a chance to look at  
15 that information. We need to have a chance to evaluate  
16 whether it's worthwhile for us to present certain kinds  
17 of information or not or testify on certain issues or  
18 not. So, you know, we couldn't produce testimony without  
19 information.

20 CHAIRMAN JOHNSON: Well, it has been the  
21 standard operating procedure of this Commission I think  
22 in most cases that someone would file their comments with  
23 the information they have. If the Commission made other  
24 information discoverable, but, I mean, additional  
25 comments could be filed after that.

1 I think it does put the process in a -- I mean,  
2 it -- it does affect the process with the fact that there  
3 are no comments filed, there were no comments filed at  
4 the deadline.

5 Other comments by anyone?

6 MS. SEMMLER: Maybe we'll communicate informally  
7 regarding a time frame that you think you can produce  
8 testimony, and the Commission may need to extend the  
9 deadline to accept such testimony should Dakota Rural  
10 Action choose to file it.

11 MR. BLACKBURN: And, Mr. Chairman, I would also  
12 note that because of the Environmental Impact Statement  
13 delay, likely the entire process -- the Commission as I  
14 understand it can't make a decision until they have the  
15 draft -- Final Environmental Impact Statement in front of  
16 them.

17 If the same schedule's applying between the date  
18 the Draft Environmental Impact Statement comes out and  
19 the final, that would be roughly four months between  
20 those documents, four or five months. That means the  
21 Federal Government is not going to complete its  
22 Environment Impact Statement until sometime in the  
23 spring. Therefore, there's not really any rush here  
24 because the Commission can't make a decision, as I  
25 understand it, until the DEIS is finished -- or until the

1 final Environment Impact Statement is finished.

2 CHAIRMAN JOHNSON: Mr. Blackburn, what leads you  
3 to believe that? I haven't been around a long time, but  
4 most of the siting cases we've ruled on, the Commission's  
5 ruling has been done prior to the completion of the  
6 federal EIS.

7 MR. BLACKBURN: You know, it is possible I am  
8 wrong. I understand how the Federal Government operates,  
9 and in terms of their Environment Impact Statements, they  
10 cannot make a decision until the final Environment Impact  
11 Statement is finished and approved.

12 Now the State of South Dakota doesn't have the  
13 same rules. They can make a decision before the Final  
14 Environmental Impact Statement is approved. It presents  
15 a problem that it appears the Commission is making a  
16 decision without the benefit of the environmental review  
17 because they don't have the final environmental review  
18 before them at the time they make the decision.

19 CHAIRMAN JOHNSON: Ms. Semmler, did you get the  
20 information you were seeking?

21 MS. SEMMLER: Not really, but I don't know if we  
22 can get it. It doesn't sound like that will be made  
23 available to us.

24 MR. BLACKBURN: I didn't disagree we would be  
25 willing to talk about it. I just added the extra point

1 that the Commission should consider whether it wants to  
2 have a decision before any environmental information is  
3 presented to it.

4 And in terms of the exact schedule for how we do  
5 the testimony, I would like to see what information we  
6 get from TransCanada. I'd like to combine it all at one  
7 place and put the testimony in as we see appropriately.

8 I think it's a good subject for further  
9 discussion between Ms. Semmler and myself. I'm not  
10 prepared today to say what date would be appropriate.

11 CHAIRMAN JOHNSON: And that's fine. We'll let  
12 the parties work this out off line. I mean, if memory  
13 serves, the procedural schedule did have some potential  
14 hearing dates set aside.

15 MS. SEMMLER: It does. And it's frustrating  
16 those prior efforts made by staff and the Commission may  
17 have been futile.

18 CHAIRMAN JOHNSON: Now I'm hearing one of the  
19 parties feels it's very important the Commission have a  
20 final EIS done prior to making a decision. Did anybody  
21 expect that was going to be done by December?

22 I mean, and if not, why wasn't that concern  
23 raised during the time we were doing scheduling? It  
24 is -- if we're going to take the time to do scheduling  
25 orders, then I think the kind of concerns that were



1 brought up by Dakota Rural Action would have been best  
2 raised at that time rather than now.

3 MR. BLACKBURN: I think that's a basic sense of  
4 my habit of law of thinking that the Commission would  
5 want to make a final decision after the Final  
6 Environmental Impact Statement out, that they would have  
7 that to inform --

8 CHAIRMAN JOHNSON: Did anybody expect that to be  
9 done by December? I've never heard we'd be done by  
10 December. So why did we all agree to hearing dates in  
11 December?

12 MR. BLACKBURN: Mr. Chairman, I believe the  
13 Final Environmental Impact Statement was expected to be  
14 completed sometime in January or possibly February, and  
15 the Commission's final order on this I believe was  
16 scheduled for March. And that's what -- and that's  
17 roughly the order that things happened in the Keystone I  
18 proceeding.

19 The Final Environment Impact Statement was out  
20 before the Commission's final order in Keystone I. I  
21 assumed that the Commission would want to wait for its  
22 final decision until the Final Environment Impact  
23 Statement was out. I mean, that is a reasonable  
24 assumption to make.

25 MR. WHITE: Well, I'm not sure what the basis

1 for that assumption was. But the State Department  
2 doesn't publish indications of when it expects to issue  
3 the Final Environmental Impact Statement. And it was  
4 certainly not our expectation that there would  
5 necessarily be a Final EIS prior to the March 12-month  
6 run on the Commission's procedure.

7 There will, however, be a extensive Draft EIS  
8 available in the November time frame well in advance of  
9 the Commission's order date.

10 CHAIRMAN JOHNSON: I mean, I think the concern,  
11 Mr. Blackburn -- two of them. If it was expected to be  
12 out in January or February and you say the Commission  
13 would want before making its decision to see that, then  
14 why did we agree to December hearing dates and a decision  
15 that could have been done any number of weeks after that?

16 Second concern. And this is -- I know you  
17 wouldn't have any reason to know about the history of the  
18 Commission's siting cases over the last five years, but  
19 we do have a 12-month time frame. We would have been in  
20 violation of state law if we would have waited for the  
21 Big Stone II Final EIS, which did not come out for I feel  
22 like it was something like two years after the  
23 Commission's statutory limits for deciding -- for that  
24 case.

25 So maybe we just have a failure to communicate.

1 But I am disappointed that December hearing dates were  
2 agreed upon if it was not expected a Final EIS would be  
3 agreed upon by that time.

4 MR. SMITH: Actually I think the hearing date's  
5 in November.

6 I might note too for the record -- I'm just  
7 going to note this is our statute regarding the  
8 Environmental Impact Statement is permissive. It's  
9 pretty clear. And so is Chapter 34A-9, that this  
10 thing -- the statute, the relevant statute says "may."  
11 And our case law has consistently stated that in  
12 South Dakota.

13 You know, you look at the SDDS case or the Etsi  
14 Pipeline case, the Supreme Court in there was crystal  
15 clear that there is no obligation. There's no obligation  
16 in this state to have a Final EIS prior to rendering a  
17 decision or an EIS at all. It's not required. Usually  
18 agencies if they're -- like to have environmental  
19 information.

20 In this case I'm assuming we'll have a whole lot  
21 of it. But it is not necessary that the federal EIS be  
22 completed legally.

23 CHAIRMAN JOHNSON: Well, we're not going to  
24 resolve this yet today. It's clear the parties have some  
25 discussion to do with regard to changing the time line.

1           Unless there's any other business to come before  
2 the Commission today, is there a motion to adjourn?

3           COMMISSIONER KOLBECK:   So moved.

4           CHAIRMAN JOHNSON:   Motion has been made.

5 Proceed to vote.

6           Hanson.

7           COMMISSIONER HANSON:   Aye.

8           CHAIRMAN JOHNSON:   Kolbeck.

9           COMMISSIONER KOLBECK:   Aye.

10          CHAIRMAN JOHNSON:   Johnson votes aye.   Motion  
11 carries 3-0.   Thanks very much.

12          (The hearing is concluded at 11:53 a.m.)

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1 STATE OF SOUTH DAKOTA)

2 :SS

CERTIFICATE

3 COUNTY OF SULLY )

4

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

8 DO HEREBY CERTIFY that as the duly-appointed  
9 shorthand reporter, I took in shorthand the proceedings  
10 had in the above-entitled matter on the 23rd day of  
11 September, 2009, and that the attached is a true and  
12 correct transcription of the proceedings so taken.

13 Dated at Onida, South Dakota this 1st day of  
14 October, 2009.

15

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19

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

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