

1 TRANSCRIPT OF PROCEEDINGS, held in the
2 above-entitled matter, at the South Dakota State Capitol
3 Building, Room 413, 500 East Capitol Avenue, Pierre,
4 South Dakota, on the 21st day of July, 2015.

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1 CHAIRMAN NELSON: That brings us to HP14-001, in
2 the Matter of the Petition of TransCanada Keystone
3 Pipeline LP for Order Accepting Certification of Permit
4 Issued in Docket HP09-001 to Construct the Keystone XL
5 Pipeline. And I am reminding myself and others that we
6 do have court reporter Cheri with us, so I need to speak
7 slower.

8 We have had a number of motions filed, and we're
9 going to go through these one at a time. My intention is
10 to only allow the parties that are actually involved in
11 each of these motions to speak so that we have some hope
12 of getting this done yet today.

13 And, as I said, we'll go through them one at a
14 time, and then we will vote as we take each one up.

15 So the first Motion that we are looking at --
16 and I'm also going to refer to these by the number that
17 they were given on our agenda. The first one that I'm
18 looking at is -- actually No. 1A, B, C, and D, and we'll
19 take this one together, a Motion by Staff.

20 Shall the Commission take judicial notice of the
21 evidentiary record in Docket HP09-001?

22 Shall the Commission take judicial notice of the
23 Final Environmental Impact Statement?

24 Shall the Commission take judicial notice of the
25 Final Supplemental Environmental Impact Statement?

1 And, Shall the Commission take judicial notice
2 of SDCL Chapter 49-41B in its entirety?

3 And, with that, I will turn to Staff for their
4 argument.

5 MS. EDWARDS: Thank you. This is Kristen
6 Edwards for Staff.

7 Staff filed this motion. After going through
8 the exhibit lists that were filed for the parties in this
9 Docket, there were a few items that came up in two
10 different exhibit lists that were appropriate for
11 judicial notice under SDCL 19-19-201. And so we filed
12 this Motion without getting into whether or not those are
13 relevant.

14 We can get into that at the hearing if the
15 parties would like to. But we've picked out these in
16 order to, you know, get them -- because they came up a
17 lot in the exhibit lists.

18 As far as what's relevant in the previous siting
19 Docket, you know, the most important thing is, obviously,
20 going to be the Order, to get that out of the previous
21 Docket. Other than that, I'd have nothing to add and
22 would stand by for questions.

23 Thank you.

24 CHAIRMAN NELSON: Thank you. And I'm going to
25 interject. I've got a procedural issue I need to do. I

1 just need to double-check on the phone lines.

2 Bruce Ellison, have you joined us?

3 MR. ELLISON: Yes, sir. I have.

4 CHAIRMAN NELSON: Excellent. Diana Steskal,
5 have you joined us?

6 MS. STESKAL: Yes, Commissioner. I'm here.

7 CHAIRMAN NELSON: Matt Rappold, have you joined
8 us?

9 MR. RAPPOLD: Yes, Chairman Nelson. I'm here.

10 CHAIRMAN NELSON: Paul Blackburn?

11 Not hearing Mr. Blackburn, but I think we've got
12 everybody else.

13 Since this Motion potentially applies to all
14 parties, I'm going to open it up to anybody who may be in
15 opposition to this to speak.

16 I'm not seeing anybody in the hearing room
17 approaching.

18 Anybody on the phone line who would wish to
19 oppose this Motion?

20 Seeing none, questions from the Commission?

21 COMMISSIONER FIEGEN: I do have a question of
22 the Public Utilities Commission Staff.

23 Your Part D kind of surprises me because
24 normally our law is just automatic, so I don't see any
25 reason why we would have to take judicial notice on that

1 because that's how we operate.

2 MS. EDWARDS: I wouldn't disagree with that
3 statement that we are bound by the law, and there is
4 nothing that we can change about that. However, there
5 were a few exhibit lists that included certain statutes,
6 and while statutes are not appropriate as exhibits, if
7 parties do want them in, the way to get them in would be
8 to have them admitted by taking judicial notice.

9 So I guess I don't have a strong position on
10 this one either way. If it's what the parties want, then
11 I have no objection to that, so I put it in my Motion.

12 CHAIRMAN NELSON: Additional questions?

13 Is there a Motion?

14 COMMISSIONER HANSON: Mr. Chairman, I'll move in
15 HP14-001 that the request -- the Motion by Staff to take
16 judicial notice for the evidentiary record in Docket
17 HP09-001, and that the Final Environmental Impact
18 Statement, and the Final Supplemental Environmental
19 Impact Statement, and that SDCL Chapter 49-41B in its
20 entirety be taken by the Commission -- be given judicial
21 notice by the Commission.

22 And forgive me for speaking so quickly. I
23 forgot that we have a court reporter.

24 CHAIRMAN NELSON: She's not looking pained, so I
25 think you're okay.

1 Discussion on the Motion.

2 Hearing none --

3 COMMISSIONER FIEGEN: Mr. Chairman.

4 CHAIRMAN NELSON: Go ahead.

5 COMMISSIONER FIEGEN: I still don't feel
6 comfortable taking judicial notice on what we're bound to
7 every day as we run our Public Utilities Commission
8 hearings and evidentiary hearing. So I don't really see
9 a need for that.

10 Maybe there are attorneys that disagree with
11 that, but I would sure like to have discussion among the
12 Commissioners to see if we really want to do that, and
13 will that be something that we continue to do at future
14 hearings or could we just amend Chairman Hanson's Motion?

15 COMMISSIONER HANSON: Well, having made the
16 Motion, if I may, Mr. Chairman.

17 CHAIRMAN NELSON: Certainly.

18 COMMISSIONER HANSON: I had some curious
19 concern, I guess, about that too. It wasn't of great
20 concern to me, so I didn't ask about it.

21 However, when Kristen -- excuse me. When
22 Ms. Edwards explained the reasoning for it, I felt that
23 it made sense from that standpoint. Obviously, you know,
24 we can say we take judicial notice of Chapter 49 in its
25 entirety as opposed to 49-41B in its entirety because the

1 PUC is bound by not only Chapter 49 but all the chapters
2 of the South Dakota Codified Law.

3 So it's kind of a curious thing. But I guess
4 I've learned through the years that it doesn't hurt to
5 include things of this nature just from the standpoint of
6 when you don't, you don't know what the repercussions are
7 later down the line.

8 And this particular Docket has lots and lots of
9 different -- I don't know if I should say chemicals, but
10 different avenues to it, and nuances to it. And I would
11 prefer not to create any potential additional challenges
12 down the line to it. So I just didn't see any harm in
13 including it.

14 Perhaps with the experience of going through
15 this Docket with it, I'll know better. But we can have
16 a -- certainly have a discussion on it, just sit down
17 sometime. And I don't know if we have to have an open
18 hearing for the three of us and Staff to sit down and
19 discuss the pros and cons of including things of this
20 nature. But I just would prefer to leave it in at this
21 juncture.

22 Thank you, Mr. Chairman.

23 CHAIRMAN NELSON: I guess I don't have a strong
24 feeling one way or the other, but I guess since it was
25 requested and nobody opposed it, I'm fine with leaving it

1 in.

2 Additional discussion.

3 Seeing none, all those in favor of the Motion
4 will vote aye. Those opposed, nay.

5 Commissioner Hanson.

6 COMMISSIONER HANSON: Aye.

7 CHAIRMAN NELSON: Commissioner Fiegen.

8 COMMISSIONER FIEGEN: Fiegen votes aye.

9 CHAIRMAN NELSON: Nelson votes aye. Motion
10 carries.

11 That brings us to No. 2, Shall the Commission
12 grant Rosebud Sioux Tribe's Motion in Limine to exclude
13 testimony. And this is in relation to Keystone witnesses
14 Tillquist, Kothari, and Mackenzie.

15 Mr. Rappold, go ahead.

16 MR. RAPPOLD: Thank you, Commissioners. Can you
17 hear me okay?

18 CHAIRMAN NELSON: Yes.

19 MR. RAPPOLD: Good morning. Matt Rappold on
20 behalf of the Rosebud Sioux Tribe. I think this is a
21 relatively straightforward Motion that's in front of you.
22 Basically Rosebud decided not to file certain testimony
23 of certain witnesses, namely the Goodman Group and
24 Richard Kuprewicz through Accufacts.

25 Our Motion in Limine is to exclude TransCanada's

1 rebuttal witnesses Tillquist, Kothari, and Mackenzie on
2 the grounds that there is no witness testimony provided
3 on direct for them to rebut.

4 Under previous rulings, the Commission on the
5 subject regarding rebuttal witness and relevant case law,
6 we feel that the grounds are satisfied to grant this
7 Motion, as there is no direct witness to rebut.

8 It's my understanding upon reviewing the record,
9 Keystone has agreed to withdraw these witnesses'
10 testimonies with the exception of certain portions that
11 relate to another witness, Arden Davis, that is not the
12 Rosebud Sioux Tribe's witness.

13 I've reviewed their response and their
14 withdrawal and am satisfied that the information that
15 they put forward -- it is what it says it is. They've
16 agreed to withdraw testimony of all the witnesses we've
17 asked to be excluded. And they've kept the testimony in
18 as it relates to Davis, and am satisfied, like I said,
19 that what they said is what they said.

20 As it relates to the Staff's response, the Staff
21 response is that they agree with our Motion to the extent
22 that the rebuttal witnesses are testifying in rebuttal to
23 witnesses that are not called.

24 Our position is this is pretty much impossible
25 because these witnesses won't be testifying in that

1 capacity, so there will be no rebuttal testimony to put
2 on as it relates to the specific witnesses in question.

3 Furthermore, Staff would recommend to allow the
4 testimony if any party opens the door on direct
5 examination. Our response to that is you kind of have to
6 take a wait-and-see-type of approach to what actually
7 happens at trial to see if the door is opened, and if it
8 is, how far.

9 I don't think that that's the sort of thing that
10 you can decide in advance of the trial. Rather, it needs
11 to play out and wait to see what actually happens at the
12 trial and then follow and apply the Rules of Evidence to
13 determine what, if anything, would be admissible as
14 rebuttal evidence.

15 Thank you.

16 CHAIRMAN NELSON: Thank you. Keystone.

17 MR. MOORE: Thank you, Commissioner Nelson.

18 James Moore on behalf of Keystone.

19 I think the appropriate Commission response to
20 the Motion is to deny it as moot at this point. I don't
21 think there's any dispute in the record based on the
22 portions of the rebuttal testimony that we have withdrawn
23 in response to the Tribe's notice that they're not going
24 to call any witness from the Goodman Group or Kuprewicz.
25 And I think that's the appropriate resolution.

1 Thank you.

2 CHAIRMAN NELSON: Thank you. I appreciate that.
3 I just want to get everybody's verbal assent to where we
4 may end up going with that. So, Staff, you've filed a
5 brief, so I'm just going to give you an opportunity if
6 you've got anything additional to say.

7 MS. EDWARDS: Nothing to add. Thank you.

8 CHAIRMAN NELSON: Okay. Questions from the
9 Commission, and I'm going to go back to Mr. Rappold.
10 It's been discussed that we can probably dismiss this as
11 moot at this point. Would that be your thought also?

12 MR. RAPPOLD: I would agree the end result is
13 the same. So we would agree with that suggestion to deny
14 the Motion as moot. There is no testimony to rebut.

15 So, thank you.

16 CHAIRMAN NELSON: Thank you. Additional
17 questions?

18 Is there a Motion?

19 Commissioner Fiegen.

20 COMMISSIONER FIEGEN: Mr. Chairman, move that we
21 deny the Motion because of the mootness and for Rosebud
22 Sioux Tribe's Motion in Limine to exclude testimony.

23 CHAIRMAN NELSON: Discussion on the Motion.

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

1 Commissioner Hanson.

2 COMMISSIONER HANSON: Aye.

3 CHAIRMAN NELSON: Commissioner Fiegen.

4 COMMISSIONER FIEGEN: Fiegen votes aye.

5 CHAIRMAN NELSON: Nelson votes aye. The Motion
6 carries.

7 Yes. John Smith has a question.

8 MR. SMITH: I'm just curious, James, in terms
9 of -- physically how is this going to work? I mean, are
10 you going to do a redacted replacement exhibit, or how do
11 we handle that? Are we just going to handle that
12 mentally?

13 MR. MOORE: I did talk to Kristen about it and
14 asked her if she thought it was sufficient that we just
15 serve notice that we were withdrawing portions of the
16 testimony, leaving the other paragraphs of the rebuttal
17 still in effect as to other witnesses, and she thought
18 that was fine.

19 If you would prefer that we file some sort of
20 amended rebuttal testimony, I can certainly do that as
21 well.

22 MR. SMITH: No. I don't really care. I just
23 kind of wanted to get the drift here of how -- because
24 this isn't the only one where we've got partial
25 exclusions, I think, as we go through the numerous

1 motions here. But okay.

2 MR. RAPPOLD: Commissioners.

3 CHAIRMAN NELSON: Yes. Go ahead.

4 MR. RAPPOLD: I would suggest that an amended
5 filing of the rebuttal testimony that would be admissible
6 would be a more appropriate way to handle this, just to
7 make sure that the testimony that's not being offered is
8 not actually on the record, would be my understanding.

9 I haven't checked with the PUC website, but it
10 might be difficult to have part of this withdrawn and the
11 other part not withdrawn, just as a matter of the way
12 things appear on the website. I think it would be more
13 efficient to have an amended filing submitted.

14 CHAIRMAN NELSON: Okay. I'm going to take that
15 as your commentary, your opinion. I guess we've got some
16 other commentary opinion.

17 If there's any other commentary on this.
18 Ms. Cremer.

19 MS. CREMER: Thank you. This is Karen Cremer of
20 Staff, and I'm helping Kristen out.

21 When it comes time at the hearing itself, it
22 would probably be easiest, I believe, to have an amended
23 testimony there, and that would be the exhibit that's
24 introduced as opposed to the one that's currently just on
25 the website.

1 Otherwise, the witness will have to go through
2 and say line six, strike words blah, blah, and blah.
3 That will take a long time.

4 Thank you.

5 CHAIRMAN NELSON: Okay. So we've got that
6 particular commentary, and that makes sense to me. But
7 I'm not sure we can force you to do things one way or the
8 other.

9 MR. MOORE: I have no objection, Commissioner.
10 If that's the easiest, we'll amend the appropriate
11 rebuttal testimony, and I'll try to have that filed with
12 the Commission by Friday, if that's acceptable.

13 CHAIRMAN NELSON: That would be great. And I
14 certainly concur with Ms. Cremer's thought that that will
15 speed things along next week. Anything in that regard is
16 a good thing.

17 Thank you. And thank you, Matt, for your
18 suggestion.

19 MR. RAPPOLD: Thank you, Commissioner Nelson.
20 You're welcome.

21 CHAIRMAN NELSON: That brings us to No. 3, Shall
22 the Commission grant the Motion for time certain witness
23 testimony? And this is a Staff Motion that also
24 implicates witnesses for Staff and Standing Rock.

25 And so with that, I'm going to go to Staff.

1 MS. EDWARDS: Thank you. Kristen Edwards for
2 Staff. I have nothing to add beyond what was in our
3 Motion.

4 We would ask for the ability to have at least
5 one of our witnesses testify on August 3.

6 Thank you.

7 CHAIRMAN NELSON: Mr. Capossela, anything to add
8 for Standing Rock?

9 MR. CAPOSSELA: Nothing to add, Mr. Chairman.
10 Thank you.

11 CHAIRMAN NELSON: I'm just going to ask, is
12 there any opposition to this?

13 Seeing nothing in the room, any opposition on
14 the phone lines?

15 Hearing none, questions from the Commission?

16 Is there a specific time that we need to
17 designate, or just that day?

18 MS. EDWARDS: No specific time for me. Thank
19 you.

20 CHAIRMAN NELSON: Okay. Thank you.

21 Is there a Motion?

22 COMMISSIONER FIEGEN: Mr. Chairman, move that
23 the Commission grant the Motion for time certain for
24 witness testimony for Staff.

25 CHAIRMAN NELSON: Discussion on the Motion.

1 COMMISSIONER FIEGEN: For Staff's witness, of
2 course.

3 CHAIRMAN NELSON: And Standing Rock's witness.

4 COMMISSIONER FIEGEN: Standing Rock's witness.

5 CHAIRMAN NELSON: Yes. Additional discussion?

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

8 Commissioner Hanson.

9 COMMISSIONER HANSON: Aye.

10 CHAIRMAN NELSON: Commissioner Fiegen.

11 COMMISSIONER FIEGEN: Fiegen votes aye.

12 CHAIRMAN NELSON: Nelson votes aye.

13 Motion carries.

14 That brings us to number 4, which is a Keystone
15 Motion asking for a number of different things.

16 Keystone, I will let you -- if you want to pitch
17 all of these in one chunk, you certainly can. My
18 intention is to probably vote on these individually since
19 they've each got their own nuances.

20 MR. TAYLOR: Thank you, Commissioner Nelson.

21 William Taylor for Keystone.

22 The way we got to this Motion is we spent some
23 time a couple of weeks ago thinking about seven days of
24 hearing, 53 witnesses, what can we do to streamline the
25 process.

1 The first point in our Motion is we suggest the
2 parties with a common interest be limited to one lawyer
3 who can ask questions on cross, which is not an uncommon
4 practice in certain courts in South Dakota.

5 I was surprised at the number of responses and
6 the Intervenors' view of the complexity that that may
7 create. So under those circumstances, it seems unlikely
8 that we'll be able to reach any accord among ourselves on
9 how this could be accomplished.

10 So I think the way to address this is to combine
11 this point, point No. 1, with point No. 3 where we ask
12 that the Commission preclude friendly cross-examination.

13 Friendly cross-examination has a meaning all on
14 its own, and friendly cross-examination is when two
15 parties whose positions are essentially the same offer
16 evidence and one party affords -- performs the
17 cross-examination of the other parties' witnesses that's
18 designed to highlight the Keystone portions.

19 Classic example. Expert witness says I'm the
20 best expert in the world on this particular subject.
21 Another party who's aligned with the first party
22 cross-examines, and the first question is, is it true
23 that you're not the foremost expert on this subject
24 worldwide?

25 There is, in this case, a great deal of

1 commonality among the Intervenors. And that
2 commonality's been expressed a number of ways. Numerous
3 parties, when one party makes an objection or seeks
4 relief from the Commission, other parties join in seeking
5 that relief.

6 Typically the Tribes seem to have significant
7 commonality in their efforts and the themes that they
8 raise. Oftentimes discovery requests were nearly
9 identical.

10 We think that the Commission should enter an
11 order and say there won't be any friendly testimony. We
12 really think you should enter an order and say, among
13 parties of common interest, you should appoint one lawyer
14 who gets to conduct the cross-examination of each
15 witness. Because of the complexities that are involved
16 in that, we really think you should say there will be no
17 friendly cross-examination.

18 Now, cross-examination obviously requires
19 listening to the question one posed. So if you enter a
20 procedural order that says no friendly cross-examination
21 when two allied defendants -- two allied Intervenors
22 exchange cross-examining of each other's witnesses, there
23 may well be questions that merit being asked.

24 But if you order an order of no friendly cross
25 and the parties are advised of that, and then when we

1 make an objection based on friendly cross, or you as a
2 Chair decide it is friendly cross, there will be no
3 surprise to any of the parties.

4 So we would ask for a no friendly cross order.

5 The next item that we think is of significant
6 importance is opening statements. And we've talked about
7 this a lot in the past. Conceivably, even at 10 minutes
8 per opening statement we could devote 200 plus minutes of
9 the first day of the hearing, which is essentially all of
10 the first day of the hearing to hearing opening
11 statements.

12 We think a 10-minute written presentation is far
13 more efficient and makes a great deal more sense, and we
14 suggest that all parties submit their opening statements
15 by Friday, close of business. And we can all read them
16 and examine them, short, concise, and to the point. It
17 should impose no burden on anyone because everyone should
18 be preparing their opening statements.

19 And I don't know how other people do it, but I
20 typically sit down with a yellow pad, and although I
21 don't write it down verbatim, I outline my opening
22 statement and very carefully write down those sentences
23 that I want to clearly express and those points that I
24 want to make. So it's no burden to anybody, and it
25 really frees up one day of the hearing.

1 There is the issue of counsel conducting
2 cross-examination. We want to be certain that we don't
3 have an experience where a represented party examines a
4 witness and the representative of the party also examines
5 the witness. That's happened in the past.

6 I'd call your attention to the 2007 hearing when
7 there was -- on the Keystone one base pipeline process.
8 So we think if a party is represented by counsel, only
9 counsel should be allowed to examine witnesses and call
10 witnesses, that the party itself does not get to conduct
11 any examination. And that's pretty basic courtroom
12 procedure.

13 The final point is cross-examination should be
14 limited to the scope of direct examination. With all due
15 deference to the Commission, you've conducted a lot of
16 hearings. None of you are lawyers. You are advised by
17 Dr. Smith, who is a competent and capable lawyer with
18 plenty of trial experience of his own.

19 The general rule is is that the scope of
20 cross-examination is limited to the scope of -- that
21 cross-examination is limited to the scope of direct
22 examination.

23 Example: A witness gives testimony on a
24 geologic subject and nothing more. It is totally
25 inappropriate for a cross-examiner to ask the witness

1 outside the scope of the geologic subject.

2 For example: It would be inappropriate for the
3 geologist to testify about funerary objects. It would be
4 inappropriate for a geologist to testify about
5 metallurgical issues.

6 So within the larger context, we would ask that
7 you advise the parties to be prepared to narrow their
8 cross-examination to the scope of a witness's direct
9 examination.

10 And that's all I have to say.

11 CHAIRMAN NELSON: Before I go to the other
12 parties, I'm just going to interject a quick question,
13 Mr. Taylor, on your very last point.

14 In some of the written filings that we've
15 received from the other parties, the point has been made
16 that statute specifically also allows cross-examination
17 dealing with the credibility of the witness.

18 Would you concur that is appropriate also?

19 MR. TAYLOR: The credibility of a witness is
20 always appropriate for cross-examination. And that, of
21 course, may be -- it's within the scope of direct because
22 every witness is offered as a credible witness.

23 CHAIRMAN NELSON: Thank you.

24 Yes, Mr. Smith.

25 MR. SMITH: I just wanted to make a comment on

1 HP07-001. The complexity that caused that, and you and I
2 both know what that was all about, but there we had a
3 situation where we had a corporate entity, WEB Water
4 System, and its very charismatic chief, manager, who
5 intervened as an individual.

6 So I got stuck with the unfortunate result of
7 having to allow that to happen because I had him as an
8 individual, too, so I couldn't stop it, you know.

9 MR. TAYLOR: We understand that. And that's one
10 of the reasons why we raised the issue of friendly
11 parties and cross-examination. Obviously WEB Water and
12 Curt Hohn were friendly parties. They were essentially
13 one in the same.

14 CHAIRMAN NELSON: Thank you.

15 Since this Motion certainly is going to apply to
16 everyone that's involved in this, I'm going to give
17 everyone an opportunity to speak on this that wants to.

18 But let me be very clear. A number of you have
19 submitted written briefs that were very, very good, very
20 detailed in your positions. I don't know that you need
21 to reiterate any of that. But you certainly have the
22 opportunity.

23 So let me go to Staff first. Anything?

24 MS. EDWARDS: Thank you. Kristen Edwards for
25 Staff. I did submit a brief, so I won't have anything to

1 add on most of these.

2 On the first one, common interest, I don't have
3 anything to add.

4 The second one, opening statements, at least one
5 individual Intervenor has indicated to me her desire to
6 give an opening statement at the hearing.

7 While I have no problem submitting Staff's in
8 writing -- in fact, as Mr. Taylor said, a lot of us do
9 write ours down, and mine is written down verbatim
10 already. So if the Commission would prefer, I can submit
11 that, but I would recommend giving the parties the 10
12 minutes, if they wish to do so, and allowing them to
13 submit in writing, if that's their preference, by Friday.

14 For friendly cross-examination, I would rely on
15 my brief and recommend that it be ruled upon on a
16 case-by-case basis at the hearing.

17 And I have nothing to add outside of what was in
18 my brief for anything else.

19 Thank you.

20 CHAIRMAN NELSON: Okay. I'm just going to go
21 down the telephone list in the order in which you're
22 listed here.

23 Anything that you would like to add, Mr. Gough?

24 Not hearing a response from Mr. Gough.

25 Mr. Ellison.

1 MR. ELLISON: Yes. Thank you, Mr. Chairman.
2 Yes, I do have points on each one of these.

3 One of the things that I believe that
4 TransCanada counsel is overlooking when he points to how
5 things normally are conducted in Circuit Court is that
6 agencies have separate procedural statutes, which I
7 believe that most of my fellow Intervenors have not
8 provided, but I want to provide them to this body.

9 First of all, as to the idea that one attorney
10 would cross on all common interest matters, SDCL 1-26-18
11 says opportunity shall be afforded to all parties to
12 respond and present evidence on issues of fact and on
13 arguments on issues of law and policy.

14 And so on behalf of DRA, we intend to conduct
15 our own examinations. Unless we want to spend a lot of
16 time trying to sort out the fine points of whether there
17 may be some common interests or not -- but even if there
18 are common interests, we have a right under the statutes
19 to ask our own questions.

20 As to the idea of combining friendly -- or
21 prohibiting, I'm sorry, friendly cross-examination, SDCL
22 1-26-19(2) says that a party may conduct
23 cross-examinations required for a full and true
24 disclosure of the facts. So that also goes to the point
25 about cross-examination being limited to the scope of

1 direct or otherwise going for the credibility of
2 witnesses.

3 Agency rules are a little different.
4 Cross-examination's required for a full and true
5 disclosure of the facts. That goes way beyond whatever
6 may be indirect.

7 I agree with Mr. Taylor that if a geologist is
8 on the witness stand, I'm not going to ask him about
9 botany, but I may ask him a lot of questions about
10 geology that Mr. Taylor may choose not to ask that are
11 related to this particular matter, and we have a
12 statutory right to do so.

13 As to opening statements, you know, this body
14 has previously stated each party gets 10 minutes. If Mr.
15 Taylor is concerned about it taking up a whole day for
16 opening statements, we should have a longer hearing. We
17 shouldn't be losing due process rights simply because of
18 expediency.

19 And I already touched upon the point of
20 cross-examination being limited to the scope of direct.
21 I think the statute's quite clear. Each party has a
22 right to cross-examine. Each party has a right to
23 cross-examine, to pull out whatever information the
24 witness may be able to provide this board, this
25 Commission, so that full and true disclosure of the facts

1 come out.

2 So that is my argument. I think the Motion
3 needs to be denied in its entirety. It is contrary to
4 South Dakota Statutory Administrative Procedural Law and
5 the procedural rights contained in those statutes.

6 MR. TAYLOR: Commissioner Nelson, may I
7 interrupt?

8 CHAIRMAN NELSON: Yes.

9 MR. TAYLOR: I omitted to say in my argument to
10 talk about no speaking objections, and it may be more
11 efficient if I mention that now so that the other parties
12 can comment.

13 CHAIRMAN NELSON: I would agree. Go ahead.

14 MR. TAYLOR: We also raised the issue in our
15 Motion no speaking objections.

16 A speaking objection is when a lawyer says I
17 object on the grounds of hearsay because this guy said
18 that out of court and I read it in the Argus Leader and
19 it's really Mercer.

20 Rather, the objection should be, objection,
21 hearsay. And then if the Commission wants to inquire and
22 listen to argument on the objection, the Commission can
23 ask for it. Very common practice in the Circuit Courts.
24 Judge Wiest, first jury case I ever tried in Circuit
25 Court, clarified that in my mind with the first objection

1 that I ever made.

2 CHAIRMAN NELSON: Thank you.

3 MR. ELLISON: May I respond, Mr. Chairman?

4 CHAIRMAN NELSON: Yes.

5 MR. ELLISON: I appreciate the lessons that we
6 get from Mr. Taylor about his experiences.

7 One of the things that I would generally agree
8 that a lot of objections can simply be made by stating
9 the nature of the objection. There may be circumstances
10 where, especially if the objection is sustained, that a
11 party may wish -- or overruled, that a party may wish to
12 supplement the record.

13 And I know Mr. Taylor would agree that every
14 party has a right to full access to the record, should
15 that be necessary.

16 But generally I would be in agreement with Mr.
17 Taylor that -- because most objections can simply be done
18 with one word, but there may be exceptions -- there may
19 be exceptions to that, and I would simply ask the
20 Commission to exercise a certain degree of latitude for
21 us, unless it becomes an unduly problem which we can then
22 discuss.

23 CHAIRMAN NELSON: Thank you. Continuing down
24 the phone list.

25 Ms. Steskal, anything to add?

1 MS. STESKAL: Yes. I personally am not going to
2 be able to attend the very first day of the hearing, so I
3 would have to send a written statement. But I also
4 believe that everybody should have the right to give an
5 oral statement.

6 Thank you.

7 CHAIRMAN NELSON: Thank you.

8 Ms. Baker.

9 MS. BAKER: Thank you, Chairman.

10 The Yankton Sioux Tribe requests that the
11 Commission deny the Motion and supports the grounds
12 proffered by the previous two Intervenors.

13 With respect to Keystone's first request
14 regarding cross-examinations by parties with a common
15 interest, essentially, while the parties and the
16 Intervenors have similar interests as far as opposing the
17 pipeline, they don't have similar interests when it comes
18 down to the specifics of their reasoning. And to permit
19 just one party's attorney from cross-examining and
20 prevent the attorney from another will almost certainly
21 weed out a number of questions that that second party
22 would like answered due to the nature of their unique
23 interest.

24 Each party should have an opportunity to ask
25 their own questions that pertain to their own unique

1 interest. To deny this would be to deny due process.

2 In addition, it would take considerable time and
3 preparation to coordinate efforts if, for instance,
4 Yankton were to want whoever was cross-examining ask
5 questions pertaining to something that might only affect
6 the Tribe, but if it was Bold that was asking those
7 questions, Yankton would have to necessarily prepare
8 those questions in advance, concur with Bold's attorney,
9 make sure that they're on the same page, and all of this
10 would have to happen prior to the hearing which is in
11 less than a week. That's simply unreasonable, and again,
12 it's in violation of due process.

13 In addition, if we were to take Keystone's
14 suggestion, and that's based on this manual that they've
15 cited, the Manual For Complex Litigation, then we should
16 take the whole thing. And that manual states that the
17 Commission would have to conduct an independent
18 interview, and that usually a hearing is advisable, to
19 ensure that counsel of clients in leading roles are
20 qualified and responsible.

21 I don't think the Commission has the time to do
22 that, and I don't think we can just pick and choose which
23 aspect of this rule or this guideline we want to follow.
24 If there's a guideline, it needs to be taken in its whole
25 or not at all because there's a reason that these other

1 aspects are there to safeguard the fairness.

2 So for those reasons, the Yankton Sioux Tribe
3 would request that the Commission deny that first request
4 of Keystone's.

5 As far as Keystone's second request regarding
6 opening statements, the rules ARSD 20:10:01:22.05 state
7 the parties may make opening statements and that further
8 oral arguments may be given.

9 This language just read from the text alone
10 implies that opening statements are oral and implies that
11 that opportunity is a right that parties have.

12 The Commission was aware at the time that it
13 issued the Order setting the schedule of the number of
14 parties and the length of time for opening statements
15 that it was allotting. The Commission wasn't somehow
16 blind sided by the amount of time this would take to
17 allow parties to present oral opening statements.
18 Commission thought about that, considered it, and imposed
19 a reasonable time limit for that time constraint concern.

20 The Commission has, therefore, given a
21 reasonable restriction and limitation on opening
22 statements while at the same time preserving the right
23 that's allotted by South Dakota Law for this oral
24 statement to be made.

25 We, therefore, request that that second request

1 by Keystone regarding opening statements be denied.

2 With respect to friendly cross-examination, the
3 Yankton Sioux Tribe requests that that request be denied
4 as well. There is nothing that prohibits this due
5 process right from being exercised under the law.
6 Keystone has made no legitimate argument against it. And
7 the parties' rights have to be protected in this
8 proceeding in order for fairness and the truth to be
9 properly presented to the Commission to make its
10 determination.

11 The only real purpose in this request from
12 Keystone's perspective is to further limit the
13 information available to the Commission, and that
14 information is precisely the purpose of these
15 proceedings. So in the interest of justice, and in the
16 interest of the Commission being able to make the most
17 informed decision possible, we request that this asked by
18 Keystone be denied.

19 As far as limiting the scope of
20 cross-examination, Yankton Sioux Tribe would like to
21 point out that the statutes define the scope of
22 cross-examination and state that not only can it -- not
23 only can cross-examination speak as to the subject matter
24 of direct examination, but also to matters affecting the
25 credibility of the witness which was previously raised.

1 It also states that the court may, in the exercise of
2 discretion, prevent inquiry into additional matters as if
3 on direct examination.

4 So the rules do expressly provide for this to be
5 available for -- I'm sorry. For cross-examination to
6 exceed the scope of direct and venture into new areas so
7 long as those areas are still relevant to the proceeding.

8 Again, the purpose of this proceeding is to
9 bring forth as much evidence as possible to shed light on
10 whether or not Keystone can continue to meet the
11 conditions upon which the Permit was granted.

12 In order to do so, we request that the
13 Commission keep a broad scope and perspective of this
14 proceeding, a broad interpretation of the scope of
15 cross-examination, which is permitted by statute, and
16 allow cross-examination to the extent permitted under the
17 law.

18 With respect to the argument of evidentiary
19 objections, we would agree with counsel for Bold that
20 there are times when speaking objections may not be
21 necessary, but at the same time there are times when they
22 are. And it is necessary to make a record, and we'd
23 request that that be brought into consideration and that
24 the parties be respected by the Commission to use their
25 judgment and discretion and permit them to make speaking

1 objections in order to make records when necessary.

2 Any minimal delay that might result from the
3 arguments on those objections is justified by the need to
4 ensure that the record is available in the event of an
5 appeal. Those delays would be very minor, very slight,
6 and the importance of the record far exceeds the few
7 minutes that might be taken up by these arguments.

8 We'd, therefore, request that Keystone's final
9 request in its Motion be denied.

10 Thank you, Commissioners.

11 CHAIRMAN NELSON: Thank you. Mr. Rappold,
12 anything new to add?

13 MR. RAPPOLD: Yes, Commissioners. Thank you.

14 The first thing that Rosebud would like the
15 Commission to take into account is the substantive Motion
16 filing deadline. It's our position that this Motion
17 should be considered a substantive Motion as the things
18 that it's asking for would substantially affect the
19 outcome of how this trial actually takes place.

20 It's our position that the substantive Motion
21 deadline has come and gone, and Keystone has taken no
22 action to raise these issues prior to that deadline.
23 We'd ask you to deny the Motion, that it's improperly
24 filed and it missed the deadline. This is the deadline,
25 the hearings that we're having today on Motions in

1 Limine.

2 We'd echo all of the other arguments that were
3 raised by Intervenors. We would ask that the Commission
4 deny TransCanada's Motion in its entirety, with the
5 exception of number 4, I believe it is, and that's
6 counsel conducting cross-examination.

7 I'm not able to envision a circumstance where
8 something like this would happen, where a party would
9 actually conduct cross instead of their lawyer or in
10 addition to their lawyer. Even with Mr. Smith's
11 explanation of what happened before, it still seems a
12 little bit difficult to envision how that would actually
13 happen.

14 We would ask the Commission to apply the Rules
15 of Evidence and the Rules of Civil Procedure in this
16 case, review those rules and apply those.

17 I think the parties have submitted competent
18 information regarding what those rules are and how they
19 should apply, and I think we've also submitted competent
20 information as to what happens if those rules aren't
21 fairly applied. That would lead -- the result is an
22 infringement of our due process rights to participate in
23 this hearing consistent with fundamental notions of due
24 process and fair play as those concepts are recognized by
25 the United States Constitution as well as the

1 South Dakota Constitution and statutes.

2 I think I have -- that's all I have at this
3 point. We would ask the Commission to follow the rules
4 and apply them.

5 Thank you.

6 CHAIRMAN NELSON: Thank you. Mr. Blackburn,
7 have you joined us?

8 MR. BLACKBURN: Yes, I have, Mr. Commissioner.
9 Thank you for allowing me to speak.

10 Bold will stand by its brief, and I would only
11 add that it requests that the Commission be particularly
12 clear in any written order in regards to the rights of
13 Individual Intervenors and nonrepresented Intervenors.

14 I'm aware there's been some confusion among them
15 about what their rights may or may not be. And some of
16 the motions presented by TransCanada tend to use unduly
17 broad brush strokes in regard to what parties are --
18 different of its motions apply to and how.

19 I know there's been some confusion, and we'd
20 just ask that the Commission be particularly clear for
21 the landowners who, as we know, are not attorneys.

22 And I'll leave it at that. I concur with the
23 other Intervenors on the other matters.

24 Thank you.

25 CHAIRMAN NELSON: Thank you. Mr. Capossela,

1 anything new to add?

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

3 He quoted the U.S. Supreme Court case Daubert
4 v. Merrell Dow Pharmaceutical, a 1993 case in which the
5 court established a fairly modest threshold for expert
6 testimony. And I think the quote in that case is --
7 really gets right to the motion that was filed by
8 TransCanada here. The Supreme Court wrote, "In this
9 regard the respondent seems to us to be overly
10 pessimistic about the capabilities of the jury and of the
11 adversary system in general."

12 I've had the honor in this proceeding to appear
13 before you numerous times, more than I thought, actually.
14 The Applicant is quite litigious. And one of the things
15 that I've learned is that the South Dakota PUC knows how
16 to run a hearing. And what TransCanada's requesting in
17 its Motion will tie the Commission's hands. And rulings
18 on cross-examination and objections and the like are all
19 things that are typically done in the judicious
20 discretion of the Hearing Officer in these types of
21 hearings, and they're not wholesale adjudicated upfront
22 for a Motion such as this.

23 Mr. Ellison on behalf of DRA I think cited the
24 proper statute, the South Dakota Administrative
25 Procedures Act.

1 The PUC regulations at Chapter 20:10:01, Section
2 15 incorporates the fair hearings procedures of the
3 South Dakota -- Administrative Procedures Act codified in
4 Chapter 1-26. Section 18 of the act spells out in some
5 detail -- this is at SDCL 1-26-18, spells out in detail
6 the rights of participants in administrative hearings
7 such as this one.

8 "Opportunity shall be afforded to all parties to
9 respond and present evidence on issues of fact and
10 arguments on issues of law or policy may be present or in
11 the giving of all evidence, may have reasonable
12 opportunity to expect all documentary evidence, may
13 examine or cross-examine the witness and present evidence
14 in support of the parties' interest."

15 It's all pretty well delineated in statute, and
16 there's really no reason to grant the Motion.

17 I would concede that the notion that a
18 represented party -- that counsel of a represented party
19 is the appropriate person to conduct cross, but that may
20 even be subject of an adversarial Motion. Under ordinary
21 circumstances, counsel outside of the record agrees to
22 these types of things all the time.

23 There's been a dearth of professional courtesy
24 prehearing in this proceeding, and items that are
25 routinely addressed through Stipulation get brought

1 before you in an adversarial way, and that's a disservice
2 to the Commission and to the process generally. And that
3 underlies much of this Motion.

4 The regs and the statutes in talking about the
5 rights of participants in the fair hearing, they use the
6 term may. But that may doesn't mean that the rights may
7 be abridged. They're just outlining those rights.

8 May means that a participant in the hearing who
9 chooses not to, say, make an opening statement doesn't
10 have to. But it does not confer on the Hearing Officer
11 the authority to prohibit them from doing so.

12 So I think that over all the Motion is poorly
13 conceived, and it is untimely. The hearing procedures,
14 if there are too many parties or too many issues, a
15 timely Motion perhaps to bifurcate the issues would have
16 been appropriate. And that's authorized under South
17 Dakota Law.

18 It would not be objectionable, for example, if
19 TransCanada said -- requested the Commission in the
20 Motion to hold a hearing on Conditions 1 through 25, say,
21 and then hold another hearing on Conditions 26 through 50
22 and so on if, in fact, it gets a little too bulky to do
23 it all at once. That probably would have been a
24 reasonable approach. But the time for that has passed.

25 The Motion is poorly conceived. It's untimely.

1 It's the type of thing under extraordinary circumstances
2 counsel consults with one another prior to the hearing.
3 There were no such courtesies or consultations afforded,
4 and the rights of participants are spelled out under
5 South Dakota Law in the Administrative Procedures Act and
6 in the Rules of Evidence, and for those reasons the
7 Motion should be denied in full.

8 Thank you.

9 CHAIRMAN NELSON: Thank you. We have a couple
10 of Intervenors in the room. Either of you care to speak?
11 Mr. Clark and Mr. Taylor, I'm going to ask if you'd move
12 back.

13 MR. GOUGH: Chairman Nelson.

14 CHAIRMAN NELSON: Was there somebody else on the
15 line here?

16 MR. GOUGH: Yes. This is Bob Gough. I was on
17 mute when you first called my name.

18 CHAIRMAN NELSON: Okay. Just hold that thought.
19 I'm going to let the folks in the room go and we'll come
20 back around to you.

21 Go ahead, Mr. Clark.

22 MR. CLARK: Thank you. Mr. Chairman. I won't
23 take up much of your time.

24 COMMISSIONER HANSON: I can hear him,
25 Mr. Chairman.

1 MR. CLARK: Very good. Again, I'm not going to
2 take up too much of your time. I just have a few things
3 I would like to highlight.

4 Firstly, it's our position that Keystone's
5 Motion, particularly when it comes to friendly
6 cross-examination and limiting cross-examination to one
7 attorney is an undue burden on our due process rights.

8 Each Intervenor in this case has very unique
9 interests, and they have formulated unique theories to
10 this case.

11 For example, Cheyenne River will be affected by
12 this pipeline in very specific and unique ways that are
13 only applicable to the Cheyenne River Sioux Tribe, and,
14 therefore, we have formulated our case based on our own
15 specific unique theory.

16 Sort of lumping the Tribes together or other
17 groups that are somewhat similarly situated, like I said
18 in my brief, I think Keystone here has sort of
19 misconstrued some overlapping interests or some
20 similarities as necessarily being identical, and they're
21 not.

22 We have a due process right to present our
23 issues, our unique position, and our unique theory in
24 this case to, you know, to your guys' judgment and
25 decision. And we need the opportunity to do that.

1 That also goes to friendly cross-examination as
2 well. We have not coordinated -- you know, the Cheyenne
3 River Tribe has not coordinated with the other
4 Intervenors' witnesses. We have just read their direct
5 testimony. And we have very specific nonduplicative and
6 relevant questions to ask them with -- concerning our
7 specific unique interests and concerns and our specific
8 and unique theory of this case. And we need the
9 opportunity to ask those questions. Denying that
10 opportunity really does unduly burden our due process
11 rights.

12 With regard to the other Motions, I really don't
13 have anything substantive to add to that. My colleagues
14 on the phone have already said, so I'm just going to
15 leave it at that. And with that we'd ask that you deny
16 the Motion.

17 Thank you.

18 CHAIRMAN NELSON: Thank you. Any others?

19 Okay. We're going to go to Mr. Gough, and then
20 we'll come back for brief rebuttal. Go ahead, Bob.

21 MR. GOUGH: Thank you. Very quickly, I would
22 just concur with the other Intervenors and would request
23 that you deny this Motion.

24 CHAIRMAN NELSON: Thank you. Appreciate your
25 brevity.

1 Mr. Taylor, brief rebuttal.

2 MR. TAYLOR: Thank you.

3 I think we agree on no speaking objections. The
4 proper process is if somebody wants to speak to an
5 objection, they ask leave of the Commission to speak as
6 to the objection to supplement the record. If they
7 believe that is necessary and the converse is true, if
8 the Commission wants argument or amplification, that's
9 also true.

10 The rest of the points I stand on my arguments.

11 CHAIRMAN NELSON: Thank you.

12 Questions from the Commission on any of these
13 points?

14 Hearing no questions, as I indicated earlier,
15 I'd like to take these one at a time since I think
16 there's nuances to all of these.

17 So I'm going to go to 4A. Is there a Motion on
18 4A?

19 Commissioner Fiegen.

20 COMMISSIONER FIEGEN: Move to deny Keystone's
21 Motion on 4A, unless you want me to read the whole thing.

22 CHAIRMAN NELSON: No. That's fine. Discussion
23 on the Motion.

24 Could I ask a question?

25 COMMISSIONER FIEGEN: Yeah.

1 CHAIRMAN NELSON: I'm inclined to support your
2 Motion. However, in referring to Staff's brief on page
3 1, Staff suggested that it would be -- that if this were
4 to be denied, that it would be wise to expressly prohibit
5 repetitive or redundant questioning.

6 And I find a lot of wisdom in that
7 recommendation, and I'm wondering if you would consider
8 that a friendly amendment to your Motion?

9 COMMISSIONER FIEGEN: We can certainly amend
10 that Motion, but I do believe that General Counsel would
11 handle that during the evidentiary hearing. But we can
12 just put that in the Motion so it's set.

13 CHAIRMAN NELSON: I'd like it set from the
14 beginning so there's no question.

15 COMMISSIONER FIEGEN: Sure. Absolutely. That's
16 a friendly amendment I'll accept.

17 CHAIRMAN NELSON: Thank you. Additional
18 discussion?

19 COMMISSIONER HANSON: I agree with the Motion
20 and the wise friendly amendment to it. So I appreciate
21 that very much.

22 CHAIRMAN NELSON: Additional discussion?

23 Hearing none, all those in favor of denying the
24 Motion but specifically and expressly prohibiting
25 repetitive or redundant questioning will vote aye; those

1 opposed, nay.

2 Commissioner Hanson.

3 COMMISSIONER HANSON: Aye.

4 CHAIRMAN NELSON: Commissioner Fiegen.

5 COMMISSIONER FIEGEN: Fiegen votes aye.

6 CHAIRMAN NELSON: Nelson votes aye.

7 The Motion carries.

8 That brings us to 4B. And I'm going to just
9 read it to make sure we're all on the same page. This is
10 a Motion requiring opening statements to be in writing.
11 Is there a Motion?

12 I will move to -- go ahead, Commissioner Hanson.

13 COMMISSIONER HANSON: Mr. Chairman, I'm going to
14 move to deny the Motion requiring opening statements to
15 be in writing.

16 CHAIRMAN NELSON: Is there discussion on the
17 Motion?

18 COMMISSIONER HANSON: Mr. Chairman, that's a
19 tough Motion for me to make. I originally had written
20 down yes to it as I was going through my processes. And
21 I've gone from a yes to a no to a yes to a no.

22 I really prefer opening statements to be in
23 writing. It does facilitate the process considerably.
24 It makes it a lot easier, frankly, for me to go through
25 the hearing process.

1 But as I look at this particular Docket,
2 recognizing it is, in fact, going to be a significant
3 challenge for some of the parties to do that, and from
4 that standpoint I have to fall on the side of the proper
5 procedure for all of the parties as opposed to the
6 convenience for me.

7 CHAIRMAN NELSON: Additional discussion?

8 Let me just say a couple of things, and I
9 probably should have said this at the beginning.

10 I do appreciate Keystone's effort to identify
11 some ways to make next week move more rapidly and more
12 efficiently. I appreciate that.

13 Now, as we've already seen, we're not going to
14 accept all of those suggestions, but I appreciate the
15 intent.

16 Commissioner Hanson, I'm going to support your
17 Motion on this also. And maybe this is more of a
18 personal thing, but I enjoy listening to the art of oral
19 persuasion. And this gives each of the folks 10 minutes
20 to give us your -- your gut and let us know where you're
21 coming from and where your case is going. I just happen
22 to enjoy that.

23 And so I would be deprived of that if we reduced
24 this to writing. And I certainly don't want to deprive
25 Ms. Edwards of giving her oral speak. And so I'm going

1 to support Commissioner Hanson.

2 Additional discussion?

3 Commissioner Fiegen.

4 COMMISSIONER FIEGEN: Question of Commissioner
5 Hanson because I agree with your Motion and, of course,
6 we've ordered this already, so it would be hard to go
7 back on our order.

8 Are you envisioning that the Commission would
9 accept written opening statements if a party so chooses
10 that option or not?

11 COMMISSIONER HANSON: Absolutely. This would
12 not prohibit opening statements to be in writing.

13 If I could digress just for a moment, if this is
14 something that Commissioner Nelson enjoys so terribly
15 much, he's almost convincing me to switch my vote.

16 CHAIRMAN NELSON: Well, I don't enjoy it that
17 much.

18 COMMISSIONER FIEGEN: So does that mean that the
19 Commission, if an Intervenor chooses that or the
20 Applicant chooses that, that they would need to do that
21 in writing by Friday, or can they submit it the morning
22 of? Just so I understand the Motion.

23 COMMISSIONER HANSON: Well, it's not a part of
24 the Motion, but if you wish to make that a part of it,
25 there will need to be a time certain for that written

1 testimony to be provided.

2 COMMISSIONER FIEGEN: So I believe if we're
3 going to leave that option, it would be nice for opening
4 statements, if someone chooses to do that as an option,
5 that they submit that by Friday at 5 o'clock, I would
6 assume.

7 COMMISSIONER HANSON: Mr. Chairman, I would
8 accept that as a friendly Motion.

9 CHAIRMAN NELSON: And if I could just ask for
10 one clarification because what I do not want is written
11 opening statements and then oral opening statements. So
12 folks need to choose one or the other.

13 COMMISSIONER FIEGEN: Correct. That's my
14 understanding, that they would choose one or the other.

15 CHAIRMAN NELSON: Very good.

16 Additional discussion on the Motion with the
17 friendly amendments?

18 Hearing none, all of those in favor of the
19 Motion to deny will say aye; those opposed, nay.

20 Commissioner Hanson.

21 COMMISSIONER HANSON: Aye.

22 CHAIRMAN NELSON: Commissioner Fiegen.

23 COMMISSIONER FIEGEN: Aye.

24 CHAIRMAN NELSON: Nelson votes aye. The Motion
25 carries.

1 That brings us to 4C, Shall the Commission grant
2 the Motion to preclude friendly cross-examination?

3 Is there a Motion?

4 I will move to deny the Motion but expressly
5 limit cross-examination only to new information.

6 Discussion on the Motion -- or question from
7 Mr. Smith.

8 MR. SMITH: And with that limitation you meant
9 additional; right? Or follow up.

10 CHAIRMAN NELSON: Yes. Additional. I don't
11 want 10 lawyers asking the same question 10 times.
12 That's what my intention is.

13 Discussion on the Motion.

14 In reading the written briefs by the
15 Intervenors, clearly this question of how do we define
16 friendly became problematic for me, and I couldn't find a
17 good answer to that. And so, therefore, my Motion would
18 be to deny.

19 Additional discussion?

20 Commissioner Fiegen.

21 COMMISSIONER FIEGEN: And I certainly believe
22 that our General Counsel John Smith can handle this on a
23 case-by-case basis. So he will have the gavel on the
24 evidentiary hearing.

25 CHAIRMAN NELSON: Additional discussion?

1 Hearing none, all those in favor of denying the
2 Motion but with a limit to only new information, new
3 questions will say aye; those opposed, nay.

4 Commissioner Hanson.

5 COMMISSIONER HANSON: Aye.

6 CHAIRMAN NELSON: Commissioner Fiegen.

7 COMMISSIONER FIEGEN: Fiegen votes aye.

8 CHAIRMAN NELSON: Nelson votes aye. The Motion
9 carries.

10 Brings us to 4D, Shall the Commission grant the
11 Motion limiting the conduct of cross-examination by those
12 parties represented by counsel to counsel?

13 Is there a Motion?

14 COMMISSIONER FIEGEN: Mr. Chairman, deny the
15 Motion of Keystone's 4D. I believe this is a practice,
16 but I believe that this Motion isn't proper, and I think
17 our General Counsel can handle this to make sure the
18 evidentiary hearing runs smoothly.

19 CHAIRMAN NELSON: Additional discussion?

20 I'm going to oppose the Motion, Commissioner
21 Fiegen, because I think both Keystone and the statement
22 by Mr. Smith have shown that in the past it has been a
23 problem. And I'd just like to make it very, very clear
24 that we're not going to let that type of thing happen
25 again. And I don't think anybody is prejudiced by

1 approving it.

2 Additional discussion?

3 COMMISSIONER HANSON: Mr. Chairman.

4 CHAIRMAN NELSON: Commissioner Hanson.

5 COMMISSIONER HANSON: Thank you. When a party
6 or parties are represented by counsel, as in the case
7 with this Docket, you can have numerous people
8 represented by the counsel, and that's one of the
9 reasons -- plus the fact that in these type of dockets
10 you really need that professional representation. And I
11 just simply believe that any time a party's represented
12 by counsel, that counsel should -- it should be limited
13 to counsel on examination as well as cross-examination.
14 So I'm going -- I'm not going to be able to support the
15 Motion.

16 CHAIRMAN NELSON: Additional discussion?

17 COMMISSIONER FIEGEN: I don't think I disagree
18 with either of you. I just believe that General Counsel
19 can handle this at the evidentiary hearing.

20 MR. SMITH: I would note, too, though, that the
21 case that Mr. Taylor talked about, we don't have that
22 situation here, I don't think. I don't think we have a
23 situation here where we have a -- an individual who is,
24 you know, an Individual Intervenor who happens to be the
25 general manager of a corporate Intervenor. And so I

1 don't know that we have that difficulty.

2 Because the fact is an individual does have the
3 right under our law to represent themselves. And
4 corporate entities do not. And most of our -- most of
5 the real involved Intervenors here are
6 organizational/corporate entities who are required by law
7 to be represented by counsel.

8 CHAIRMAN NELSON: Additional discussion?

9 Seeing none, all those in favor of the Motion to
10 deny on 4D will say aye; those opposed, nay.

11 Commissioner Hanson.

12 COMMISSIONER HANSON: No.

13 CHAIRMAN NELSON: Commissioner Fiegen.

14 COMMISSIONER FIEGEN: Fiegen votes aye.

15 CHAIRMAN NELSON: Nelson votes nay.

16 Motion fails.

17 Is there an additional Motion on 4D?

18 COMMISSIONER HANSON: Mr. Chairman, I move that
19 the Commission grant the Motion limiting the conduct of
20 cross-examination by those parties represented by counsel
21 to counsel.

22 CHAIRMAN NELSON: Discussion on the Motion.

23 Hearing none, all those in favor of granting 4D
24 will say aye; those opposed, nay.

25 Commissioner Hanson.

1 COMMISSIONER HANSON: Aye.

2 CHAIRMAN NELSON: Commissioner Fiegen.

3 COMMISSIONER FIEGEN: Fiegen votes no.

4 CHAIRMAN NELSON: Nelson votes aye.

5 The Motion carries.

6 MR. ELLISON: Mr. Chairman, this is Bruce
7 Ellison from DRA. I know it's generally not allowed and
8 the Motion's already happened, but I wanted to point out
9 to the Commission in 1-26-18 subpart 2 it talks about a
10 party in a contested case may appear in person or by
11 counselor or both.

12 And I don't anticipate there being a problem. I
13 think that the parties represented by counsel will
14 proceed through counsel. But I did want to point this
15 out to the Commission that this seems to be an
16 interesting hybrid that seems to be allowed within our
17 administrative procedural rules.

18 And this is respectfully. I don't mean to
19 interrupt. I just wanted to point the statute out.

20 CHAIRMAN NELSON: Moving on to 4E, Shall the
21 Commission limit cross-examination to the scope of direct
22 examination. Is there a Motion?

23 Commissioner Fiegen.

24 COMMISSIONER FIEGEN: Mr. Chairman, move to
25 grant 4E.

1 CHAIRMAN NELSON: Discussion on the Motion. If
2 I could ask a question, would -- do you consider a
3 friendly amendment to expand that to also allow, as I
4 believe our statute does, cross-examine the credibility
5 of the witness?

6 COMMISSIONER FIEGEN: Absolutely.

7 CHAIRMAN NELSON: Okay. With that friendly
8 amendment, additional discussion?

9 Hearing none, all those in favor of granting 4E
10 with the specific allowance to allow cross-examine
11 credibility of the witness will say aye. Those opposed,
12 nay.

13 Commissioner Hanson.

14 COMMISSIONER HANSON: Aye.

15 CHAIRMAN NELSON: Commissioner Fiegen.

16 COMMISSIONER FIEGEN: Fiegen votes aye.

17 CHAIRMAN NELSON: Nelson votes aye.

18 The Motion carries.

19 MR. ELLISON: Mr. Chairman, I must make a record
20 again. Bruce Ellison.

21 CHAIRMAN NELSON: Bruce, we're not going to get
22 into this back and forth. You all have made your
23 arguments in writing. You've made your arguments orally.
24 And we need to move through our agenda today. Okay. And
25 so this thought that you can second-guess every one of

1 our decisions after we've done it is not appropriate. We
2 are moving forward.

3 That brings us to 4F, Shall the Commission
4 preclude parties from arguing evidentiary objections
5 unless directed by General Counsel for the Commission.

6 Is there a Motion?

7 COMMISSIONER HANSON: Mr. Chairman.

8 CHAIRMAN NELSON: Commissioner Hanson.

9 COMMISSIONER HANSON: I move that the Commission
10 grant -- I'll move the Commission preclude parties from
11 arguing evidentiary objections unless directed by General
12 Counsel for the Commission.

13 CHAIRMAN NELSON: Okay. So just so I'm clear,
14 so you are moving to grant the Motion; correct?

15 COMMISSIONER HANSON: That's correct.

16 CHAIRMAN NELSON: Discussion on the Motion.
17 Commissioner Fiegen.

18 COMMISSIONER FIEGEN: Staying consistent with
19 what I have said before, I think this Motion has a lot of
20 credibility, but I also do believe that our General
21 Counsel, John Smith, can handle this at the evidentiary
22 hearing. So I am going to oppose that Motion.

23 CHAIRMAN NELSON: Yeah. I'm going to oppose it
24 also. Because, frankly, I don't know that this is going
25 to come up very often, but when it does, I think, you

1 know, if we have to get into this argument of can we and
2 can't we, I think it's going to burn up more time than if
3 we simply allow it to flow as is. So I'm going to deny
4 also.

5 Additional discussion?

6 COMMISSIONER FIEGEN: May I move a substitute
7 Motion?

8 CHAIRMAN NELSON: Certainly.

9 COMMISSIONER FIEGEN: I move a substitute Motion
10 to deny 4F.

11 CHAIRMAN NELSON: Substitute Motion to deny 4F.
12 Discussion on the substitute Motion.

13 Hearing none, all those in favor of the
14 substitute Motion will say aye; those opposed, nay.

15 Commissioner Hanson.

16 COMMISSIONER HANSON: Nay.

17 CHAIRMAN NELSON: Commissioner Fiegen.

18 COMMISSIONER FIEGEN: Aye.

19 CHAIRMAN NELSON: Nelson votes aye. Substitute
20 Motion to deny 4F is approved.

21 That brings us to number 5 which is a Keystone
22 Motion in Limine to exclude testimony of Kevin E. Cahill,
23 Ph.D.

24 And with that we will go to Keystone.

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

1 I want to rely principally on the written
2 submission that we made and just state that I think the
3 gist of this Motion is, as I understand Dr. Cahill's
4 testimony, he's critical of the methodology used in the
5 Final Supplemental Environmental Impact Statement with
6 respect to its socioeconomic analysis. He thinks that's
7 sufficient.

8 I don't see that as an issue before the
9 Commission under the standard established in 49-41B-27.
10 I think that was part of Keystone's initial burden of
11 proof under 49-41B-22 that is not being relitigated as
12 part of this proceeding.

13 I think our position is consistent with Staff's
14 position that the testimony of Dr. Cahill is not
15 appropriately responsive to the testimony that Staff's
16 witnesses have presented. And, otherwise, I'd rely on
17 our written submissions.

18 Thank you.

19 CHAIRMAN NELSON: Thank you. Standing Rock.
20 Mr. Capossela.

21 MR. CAPOSSELA: Thank you, Mr. Chairman. I want
22 to emphasize that the Tribe as an Intervenor has complied
23 in every respect with the rules of the Commission, with
24 the Rules of Evidence, with the rules of discovery, and
25 the Tribe which -- the reservations suffer from

1 socioeconomic stress. The Tribe is not blush with cash.
2 And as South Dakotans, as Intervenors that have complied
3 in every respect with the applicable rules here, the
4 Tribes' witnesses should be permitted to state the
5 Tribes' case. And, of course, Dr. Cahill was hired by
6 the Tribal Council for that purpose.

7 But I think as a matter of policy, really, to
8 exclude important witnesses of the Tribe when as an
9 Intervenor the Tribe has made earnest efforts to dot
10 every I and cross every T as required to be a productive
11 and positive Intervenor in this Docket, the message that
12 would send to South Dakotans interested in issues before
13 the Commission would be terrible. Because we really
14 tried earnestly, and we really have done everything right
15 in terms of filing documents and filing testimony and
16 disclosing information upfront.

17 Dr. Cahill was identified in discovery to
18 TransCanada properly. TransCanada made many motions to
19 sanction parties for violating discovery rules, and they
20 did not make such a Motion to Standing Rock.

21 There's no surprise here in Cahill's testimony.

22 Now, as a threshold issue also, it's very
23 unclear whether TransCanada may even file this Motion
24 because the rebuttal testimony on its face is against the
25 Staff -- testimony prefiled on behalf of Staff.

1 TransCanada is the wrong party to ask that
2 Cahill be precluded because his rebuttal testimony does
3 not rebut any of TransCanada's witnesses.

4 When the Rules of Evidence permit a party in
5 multiparty litigation to attack a third party, it says
6 so. The Rules will say so. Such as impeachment. Any
7 party -- in Chapter 6 of the Rules of Evidence -- I think
8 it's Rule 607 -- it specifically says a party may impeach
9 the witness of any other party in litigation. That's an
10 example of when parties may attack other parties'
11 witnesses in this kind of a Docket.

12 And, of course, TransCanada's Motion is bereft
13 of legal authority. It doesn't cite anything. Its
14 portrayal of relevance is antithetical to numerous
15 South Dakota Supreme Court decisions cited in our brief
16 which explain the fairly low threshold for pretrial
17 disclosure and expert testimony, especially testimony
18 that assists the trier of fact.

19 Counsel suggests that the Tribe through Cahill's
20 rebuttal testimony is relitigating issues that should
21 have been litigated in the Permit proceeding. To the
22 extent that it touches upon information that's contained
23 in the Final Supplemental Environmental Impact Statement,
24 that document didn't exist back in '09. It didn't exist
25 then. We're not relitigating anything.

1 Staff's testimony has been prefiled that the
2 release of the Final Supplemental Environmental Impact
3 Statement shows that Keystone XL was in compliance with
4 the National Environmental Policy Act, and that the
5 environmental reviews are sufficient. That's testimony
6 in 14-001. That's not testimony in '09. They couldn't
7 make that testimony in '09 because the document didn't
8 exist. Those findings by the Department of State were
9 not final.

10 And so, clearly, we're not rebutting
11 information. We're not litigating issues that should
12 have been litigated in the prior Docket in Dr. Cahill's
13 rebuttal testimony. He's specifically rebutting the
14 contentions proffered by witnesses for Staff, specific
15 contentions in Staff's prefiled testimony.

16 You know, we all see on TV, you know, generally
17 speaking it's the bad guys who want testimony and
18 evidence excluded at the hearing. The proverbial bloody
19 glove in the O.J. Simpson trial. The good guys want to
20 get the testimony submitted. Now on television
21 frequently in criminal cases the criminal defendants get
22 off because testimony gets excluded -- or evidence gets
23 excluded on a technicality. But that's criminal law.
24 Those are criminal cases when the rules are much more
25 stringent on account of constitutional rights of criminal

1 defendants.

2 In civil litigation the Rules of Evidence, the
3 rules regarding admissibility of relevant evidence are
4 not that -- are not that strict. They're much more
5 liberal. And we've quoted -- there's articulations of
6 that by the South Dakota Supreme Court in our briefs.
7 The notions of relevancy that are being advanced by
8 TransCanada in its Motion do not accurately state the
9 liberal motions relevant under South Dakota Law.

10 Now, TransCanada's remedy, as it were, is to
11 confront the witness. Dr. Cahill will need to appear.
12 To cross-examine. To put evidence in contradicting him.
13 Those are the checks and balances in our civil
14 adversarial system.

15 Earlier I quoted a sentence briefly from Daubert
16 v. Merrell Dow Pharmaceuticals. That's the seminal
17 Supreme Court case establishing a fairly moderate
18 threshold for the introduction of expert testimony in
19 civil litigation. And the Supreme Court wrote in the
20 Daubert case, "Vigorous cross-examination, presentation
21 of contrary evidence, and careful instruction on the
22 burden of proof are the traditional and appropriate
23 needs of attacking shaky but admissible evidence. These
24 conventional devices, rather than wholesale exclusion,
25 are the appropriate safeguards," in our adversarial

1 system, the checks and balances that we have in our
2 adversarial system of civil law.

3 Those are TransCanada's remedies, to vigorously
4 cross-examine and introduce evidence that may differ, as
5 well as expert evidence and opinions that may differ from
6 Dr. Cahill's expert report.

7 But there's no "wholesale exclusion" of
8 evidence, and the Motion confuses the principles of
9 relevance and weight.

10 The Commission may find Dr. Cahill's expert
11 opinion on the extent that the State department has not
12 properly evaluated the environmental and socioeconomic
13 impacts of Keystone XL in the Final EIS, which came out
14 after the '09 Docket -- the Commission may not find
15 Cahill's analysis to be dispositive, but that does not
16 mean it's irrelevant.

17 Almost all of the represented parties have
18 listed the Final Supplemental Environmental Impact
19 Statement as an exhibit, and the Staff has asked that the
20 Commission take judicial notice of its publication.

21 A lot of the parties to this Docket want to talk
22 about the Final SEIS. And under the liberal rules of
23 relevancy, it's clearly admissible. The findings in the
24 documents may not be determined by the Commission to be
25 dispositive, but they are relevant. And Dr. Cahill's

1 report is not about something that should have been
2 litigated in 2009, but it rebuts -- it is prefiled for
3 the purpose of rebutting testimony -- prefiled testimony
4 proffered by the Staff for the contention -- for the
5 opposite contention that the Final Supplemental
6 Environmental Impact Statement demonstrate that the
7 Amended Conditions in the Permit continue to be complied
8 with.

9 So we're clearly within the realm of relevant
10 and admissible evidence here. And we have a -- a variety
11 under the Administrative Procedures Act to rebut evidence
12 that's proffered by TransCanada or the Staff.

13 Now, an argument was made in the Staff memo that
14 I think it's important to note, "If a person does not
15 believe that the Federal Government has met its burden,
16 the proper procedure would be to take action against the
17 agency responsible for not fulfilling the obligation."

18 That's an argument that the Staff made in a
19 memorandum on one of the Motions in Limine. But I think
20 it applies to what we're talking about. And the
21 suggestion there is if the State department or any other
22 regulatory agency did anything wrong, that's on the
23 agency. That's not on TransCanada. And, consequently,
24 any failure by a federal or state regulator is not
25 relevant.

1 But TransCanada's the real party at interest in
2 those regulatory matters.

3 An example that I thought of is the concrete
4 plant in Rapid City, the South Dakota concrete plant.
5 They have a permit for emission of air pollution from
6 DENR. Now, if DENR somehow didn't comply with the
7 South Dakota Clean Air Act or Federal Clean Air Act in
8 that Permit, they made a mistake in their regulatory
9 activities for the concrete plant.

10 The concrete plant will be operating in
11 compliance with the Permit without a compliance with
12 state and federal law, and they can be sued for that even
13 though they're in compliance with their Permit because
14 they're the real party in interest in the regulatory
15 matter.

16 And that's the same thing with the National
17 Environmental Policy Act as well as the National Historic
18 Preservation Act for the other tribal witness.

19 TransCanada's the real party in interest. If a
20 federal regulator permits TransCanada to do something in
21 violation of its statute or regs, then Keystone XL, even
22 though they would be in compliance with their Permit,
23 would be a project that's against the law.

24 It may not be dispositive to the Commission, but
25 these contentions are relevant evidence.

1 In closing I want to harken back to something
2 that Commissioner Fiegen said on December 9, 2014. And
3 I'll paraphrase. She commented to the Intervenors at a
4 hearing on TransCanada's Motion to define the scope of
5 the proceeding that this will be a fair and open
6 proceeding, and that the concerns of the Intervenors will
7 be properly heard. I'm paraphrasing.

8 As a lawyer at that time I was very heartened by
9 that because as a lawyer that's all you ask for is an
10 unbiased decision-maker. But TransCanada's Motions in
11 Limine against Standing Rock I think could put the
12 commitment to a fair hearing to a test.

13 We're coming up to the hearing. It's time for
14 the Intervenors to present their case, and TransCanada
15 has made a slough of motions, including a Motion to
16 exclude both of the Tribes' experts. And under the rules
17 of relevance, under the rules of admissible evidence,
18 this is good evidence, and this is a good report which
19 will help the Commission in its decision-making for the
20 certification of the Permit, and the Motion should be
21 denied accordingly.

22 Thank you, Commission.

23 CHAIRMAN NELSON: Thank you. Since this
24 implicates Staff's witnesses, I'm going to give Staff an
25 opportunity if they want.

1 MS. EDWARDS: Thank you. Kristen Edwards for
2 Staff.

3 Staff would rely on its brief, and myself and
4 co-counsel, Ms. Cremer, are available if the Commission
5 has any questions.

6 CHAIRMAN NELSON: Thank you.

7 Any brief rebuttal from Keystone?

8 None.

9 Any questions from the Commission?

10 COMMISSIONER FIEGEN: Mr. Chairman, I do have a
11 question of General Counsel.

12 I have heard and read that the -- they continue
13 to think that this is an improper Motion. Would you
14 comment on that? Because I don't see that this is an
15 improper Motion.

16 MR. SMITH: Yeah. It's just a Motion to --
17 well, it's a Motion to exclude testimony, so I don't -- I
18 mean, I think the issue gets down here is -- and it's on
19 the grounds of relevancy. And, again, we've got a
20 procedure that's a little different, you know, than
21 Circuit Court where you don't usually have prefiled and
22 all of that.

23 But, you know, in this instance really the -- I
24 think -- and, you know, Mr. Capossela went into a lot of
25 detail, but I think it gets down to the issues at --

1 under Section 27 is whether the conditions continue to be
2 met.

3 COMMISSIONER FIEGEN: Right.

4 MR. SMITH: That's the issues. Okay.

5 CHAIRMAN NELSON: If I could interject. And I'm
6 not sure exactly where you were going with that,
7 Commissioner Fiegen, but I want to ask Mr. Capossela a
8 very specific question.

9 You indicated that the statutes and rules don't
10 specifically allow a party such as Keystone to file a
11 limine motion regarding someone else's witnesses. But I
12 guess my question for you, is there anything that
13 prohibits it?

14 MR. CAPOSSELA: Mr. Chairman, no. The argument
15 is where it's permitted in the rules it's specifically
16 prohibited.

17 And when the rules say under these
18 circumstances, when it's permissible, here's when it's
19 permissible, by negative implication, if the rules do not
20 authorize a Motion, then it is not permissible. And the
21 Rules of Evidence do, under certain circumstances, say
22 when in multiparty litigation any party may attack a
23 third party. And they do not authorize this kind of
24 Motion.

25 And, Mr. Chairman, I think it's significant that

1 there's no legal authority that is cited by TransCanada
2 in support of its Motion. And the South Dakota Supreme
3 Court has a number of rulings expressed with a fairly
4 modest threshold for the admissibility of expert
5 testimony. So the law's on our side.

6 CHAIRMAN NELSON: Thank you. Additional
7 questions.

8 Hearing none, is there a Motion?

9 COMMISSIONER HANSON: Mr. Chairman, I'll move
10 that the Commission grant Keystone's Motion to exclude
11 testimony of Dr. Cahill.

12 CHAIRMAN NELSON: Discussion on the Motion.

13 COMMISSIONER HANSON: Mr. Chairman, that's
14 another challenging Motion for me because the opposition
15 argued very articulate different messages and, frankly,
16 convinced me if I'm ever in need of an attorney, I should
17 probably talk to him. Very, very well stated.

18 But it boils down to the testimony of Dr. Cahill
19 is -- addresses the FSEIS. And we do not -- that's the
20 province of the Department of State, and our conditions,
21 our Permit conditions, provide that the Applicant must
22 meet all of those conditions. And it's not up to us in
23 the PUC to decide whether they meet any of those
24 conditions. It's up to the Department of State.

25 So if they don't meet those, then they're not

1 going to be able to get the Permit. They're not going to
2 be able to construct the project. It's a situation of
3 where we are requiring them to meet all of the federal
4 permits and regulations. It's not up to us then to go
5 through and do the work of the Department of State to try
6 to figure out whether they have met them or not.

7 CHAIRMAN NELSON: Additional discussion?

8 Hearing none, all those in favor of the Motion
9 to grant Keystone's Motion will say aye; those opposed,
10 nay.

11 Commissioner Hanson.

12 COMMISSIONER HANSON: Yes. Aye.

13 CHAIRMAN NELSON: Commissioner Fiegen.

14 COMMISSIONER FIEGEN: Fiegen votes aye.

15 CHAIRMAN NELSON: Nelson votes aye.

16 Motion carries.

17 (A short recess is taken)

18 CHAIRMAN NELSON: We will call the meeting back
19 to order. We are on No. 6, Shall the Commission grant
20 Keystone's Motion in Limine to preclude the rebuttal
21 testimony of Ian Goodman and Brigid Rowan. Maybe this
22 has kind of resolved itself.

23 Keystone.

24 MR. MOORE: Thank you, Commissioner.

25 I think it has. I think it can be denied as

1 moot at this point.

2 CHAIRMAN NELSON: Thank you.

3 Rosebud, would that be your concurrence also?

4 Mr. Rappold, are you with us?

5 Okay. We just -- hang on a second.

6 MR. RAPPOLD: Hello.

7 CHAIRMAN NELSON: Okay. We were doing some
8 adjustments here to try to get a little more volume.

9 Okay. Matt, just give us a 1, 2, 3.

10 MR. RAPPOLD: I agree with that statement.

11 CHAIRMAN NELSON: Okay. We heard you very good,
12 and everybody is smiling. We have agreement. After
13 months and months and months, we have agreement on one
14 very narrow issue.

15 MR. RAPPOLD: Good.

16 CHAIRMAN NELSON: Okay. With that, any
17 questions from the Commission?

18 Is there a Motion?

19 I will move on No. 6 that we deny the Motion as
20 being moot.

21 Discussion on the Motion.

22 Hearing none, all of those in favor will vote
23 aye; those opposed, nay.

24 Commissioner Hanson.

25 COMMISSIONER HANSON: Aye.

1 CHAIRMAN NELSON: Commissioner Fiegen.

2 COMMISSIONER FIEGEN: Fiegen votes aye.

3 CHAIRMAN NELSON: Nelson votes aye. Motion
4 carries.

5 That brings us to No. 7, which is Keystone's
6 Motion in Limine to preclude rebuttal testimony of
7 Jennifer Galindo and Waste Win Young.

8 Keystone.

9 MR. MOORE: Thank you. Even though these
10 witnesses are presented by different parties, their
11 testimony is similar. And both of them proposed to
12 address essentially the Section 106 process under the
13 National Historic Preservation Act.

14 And the substance of their testimony is that
15 they're critical of the process, and that they're
16 critical of the resulting programmatic agreement.

17 And the point of our Motion is that that is
18 really beyond the scope of this proceeding because the
19 Section 106 process is directed to a federal agency, in
20 this case the Department of State. It is not actually an
21 obligation imposed by federal law on Keystone.

22 Keystone's obligation imposed by the conditions
23 of the Permit is to comply with the programmatic
24 agreement. And the question then for this hearing is
25 whether Keystone can continue to meet that condition.

1 Whether a witness is satisfied with the content
2 of the programmatic agreement, which is the result of the
3 106 process, is an entirely different question. And I
4 think that that was set forth very clearly in both
5 Section 106 of the FSEIS and in the other attachments
6 that we submitted with the Motion.

7 So that's the substance of the Motion.

8 With respect to the procedural issue raised by
9 Mr. Capossela, he correctly noted that we made a
10 reference to the rebuttal testimony of both Jennifer
11 Galindo and Waste Win Young. And, in fact, Win Young's
12 testimony was direct testimony, not rebuttal.

13 I think that it's clear in the Motion what we
14 were intending to exclude. And, in fact, on page 1 of
15 the Motion it does refer to Young's direct testimony. So
16 I don't think there's any confusion there, and certainly
17 no surprise, and I don't think that that is a sufficient
18 basis to deny the Motion.

19 And other than that I'll rely on our written
20 submission, unless you have questions.

21 Thank you.

22 CHAIRMAN NELSON: Thank you. Since we have two
23 different parties implicated here, I'm going to go to
24 Rosebud first. Mr. Rappold.

25 MR. RAPPOLD: Thank you, Commissioners.

1 It appears as though the Commission is accepting
2 the fact that requiring TransCanada to show compliance
3 with matters that may be outside of your jurisdiction is
4 off the table at this point.

5 I say that in light of the fact that even though
6 these conditions were not requirements of the Permit,
7 substantive issues associated with programmatic agreement
8 and the final -- the FSEIS, TransCanada's never had the
9 requirement that they demonstrate the ability to comply
10 with those Commission -- those conditions.

11 And as Mr. Smith stated earlier in a previous
12 Motion hearing today, the issue is can the conditions
13 continue to be met? And our testimony of Ms. Galindo
14 addresses those issues.

15 First, we need to raise again the issue of
16 whether or not Keystone can challenge testimony of
17 another party's witness. Our position is that they
18 cannot. And if any party has a right to challenge this
19 testimony -- this witness's testimony, then that was the
20 State Historic Preservation Office -- or actually that
21 was the PUC Staff because the testimony that Keystone
22 seeks to exclude is testimony of a Staff witness.

23 Staff didn't take that opportunity to file any
24 motions regarding Galindo's testimony. Even though they
25 could have, they chose not to.

1 It was not until Keystone filed the Motion to
2 exclude the testimony that Staff jumped in and supported
3 Keystone again.

4 So we want to make our position on that clear
5 for the record. Again, we do not believe that Keystone
6 can challenge this witness because the witness is not
7 theirs.

8 Getting into more substance of the testimony,
9 yes, we are critical of the process and the result of the
10 programmatic agreement. We're also critical in our
11 testimony of SHPO's witness Paige Olson regarding the
12 subject matter of the programmatic agreement, and how
13 that witness envisions problems that result -- that are
14 part of the programmatic agreement would be resolved.

15 We have concerns with that portion of the
16 testimony, as well as the remainder of the testimony.

17 The testimony shows that the witness had
18 concerns from the first document -- the first Docket,
19 rather, the '09 Docket that were not addressed or
20 resolved.

21 The testimony of the SHPO witness leaves out
22 those concerns from the current testimony and adds new
23 concerns regarding concerns that it currently has that
24 were not in the original 2009 Docket and testimony.

25 So we think that those issues are clearly

1 relevant to determining a fact in issue, what is perhaps
2 only -- perhaps the only fact in issue, do the conditions
3 continue to be met?

4 Supposition of the testimony is relevant to that
5 end. Testimony that helps the finder of fact make a
6 decision on a fact at issue, it's relevant, otherwise
7 admissible for those purposes. It directly rebuts the
8 PUC Staff witness, and we would ask that the Commission
9 deny TransCanada's Motion to exclude testimony of
10 Jennifer Galindo.

11 And as I stated in my written response, there's
12 portions of this testimony that address two separate
13 witnesses. One, obviously, being Rosebud's witness, the
14 Jennifer Galindo, and the second being Standing Rock's
15 witness, by the name of Waste Win Young. And we're not
16 addressing issues associated with Ms. Young's testimony,
17 again following our own understanding of how this works,
18 is that that is their witness, and I'm not trying to
19 impede on the province of Mr. Capossela to put those
20 issues forward.

21 Thank you.

22 CHAIRMAN NELSON: Thank you. Mr. Capossela.

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

24 TransCanada urges the Commission to ignore the words of
25 its Motion and to rewrite the Motion so it -- in order to

1 make a request the striking of direct testimony and not
2 rebuttal testimony and really poo-poops the fact that the
3 Motion is drafted in a manner that really did not apply
4 to Ms. Young because she filed no rebuttal testimony.

5 That is not an insignificant fact. And there is
6 case law regarding pleadings filed that have mistakes in
7 them. And what the courts tend to do under those
8 circumstances is strike the pleading. It cannot be
9 confusing in that way.

10 Counsel suggests that the Motion can be granted
11 as it applies to Ms. Young because even though the
12 request for relief explicitly requests for the preclusion
13 of rebuttal testimony, that in the body of the Motion it
14 states her direct testimony. And because of that, the
15 Motion may be granted as it relates to Ms. Young.

16 But that's the -- the fact that it's
17 characterized one way in the request for relief in the
18 caption and it's referenced in a wholly different manner
19 in the body of the Motion, that's what creates the
20 confusion. That's what creates the ambiguity. They're
21 asking for two different things in the same document.

22 Granting the Motion would seriously violate the
23 rights of the Tribe under these circumstances.

24 So regardless of the relevancy issue, the manner
25 in which the Motion is drafted requires that it be denied

1 as it relates to Ms. Young.

2 With respect to relevancy -- even though I don't
3 think there's any need for the Commission to go there on
4 this matter -- on the applicability of the Motion to
5 Ms. Young, I looked at the prefiled testimony of
6 Ms. Olson of the SHPO's office, and there's questions in
7 her prefiled written testimony, state and explain the
8 South Dakota laws and federal regulations that protect
9 archaeological and historic resources in the state. And
10 then Ms. Olson's prefiled written testimony goes on very
11 eloquently to explain that.

12 There's another question on page 7, line 14,
13 question: Has Keystone XL, to the best of your
14 knowledge, complied with the state and federal rules and
15 regulations described previously? These are questions
16 from Staff counsel posed to Ms. Olson in her prefiled
17 written testimony.

18 Those are nearly precise questions in
19 Ms. Young's prefiled testimony on behalf of Standing
20 Rock. And so I think it would be -- it would strain
21 credulity to preclude Ms. Young, while permitting
22 Ms. Olson, to testify based on her prefiled testimony.

23 And, of course, the Standing Rock Tribe has not
24 challenged the relevance of Ms. Olson's testimony because
25 it is relevant.

1 I would also point out that in the prefiled
2 testimony of Ms. Young, she does touch upon her actual
3 real world experiences interacting with TransCanada as
4 well as personnel from the State Department.

5 And I apologize, Cheri, if --

6 THE COURT REPORTER: Thank you. Go ahead.
7 Continue.

8 MR. CAPOSSELA: And so the testimony does not
9 simply relate to issues that are being addressed in
10 Washington, D.C., by a far off bureaucracy. Ms. Young's
11 testimony touches direct on her interactions with both
12 the Applicant as well as the Department of State as well
13 as the SHPO's office.

14 And so it's -- it cannot be excluded on
15 relevancy grounds based on the fact that there's some
16 other entity not involved in the recertification process,
17 i.e., the State Department whose bailiwick this is when
18 Ms. Young's testimony talks about her experiences
19 directly with TransCanada, personnel from TransCanada,
20 and Keystone XL.

21 But I think the main point requiring the denial
22 of the Motion as it relates to Ms. Young is the words on
23 the document request an order, which is impossible for
24 the Commission to give, and at this late juncture the
25 Motion cannot be amended, and it would really be improper

1 to grant the Motion as it relates to Ms. Young for
2 testimony that she did not give. And the words of the
3 Motion dictate that it be denied at least with respect to
4 Ms. Young.

5 Thank you, Commission.

6 CHAIRMAN NELSON: Thank you. Since this
7 implicates Staff witnesses, Staff, anything to add?

8 MS. EDWARDS: I have nothing substantively to
9 add beyond what was in my brief. I would just note that
10 as far as which party is appropriate to file a Motion in
11 Limine, any party has the right to object to testimony on
12 relevancy grounds at any time during the hearing.

13 Staff's decision was to wait until the time of
14 the evidentiary hearing to raise any objections, but when
15 they were raised by Keystone in advance of the hearing,
16 Staff felt the need to sign on to those objections.

17 Thank you.

18 CHAIRMAN NELSON: Any rebuttal?

19 No rebuttal needed.

20 Questions from the Commission?

21 I'm going to ask a question to Staff. Looking
22 at your brief on this, as it relates to Ms. Galindo. And
23 the second paragraph where you're addressing that -- I'll
24 give you a minute to find it, if you want.

25 The paragraph begins Ms. Galindo bases her

1 testimony on conditions 1 and 3. It's the next sentence
2 that I want to ask about. It says she alleges that
3 Keystone can no longer meet those conditions because it
4 cannot comply with the National Historic Preservation Act
5 of 1966, specifically Section 106 of the Act.

6 Is that not enough for her testimony to be
7 relevant to this?

8 MS. EDWARDS: Our position is that burden is on
9 the Federal Government rather than Keystone. So whether
10 or not the Federal Government has complied would not be
11 relevant, and Keystone would not be able to engage in
12 satisfying Section 106.

13 CHAIRMAN NELSON: Okay. Well, I certainly get
14 the Federal Government argument.

15 Okay. I'll let that go.

16 Other questions?

17 Seeing none, is there a Motion?

18 MR. RAPPOLD: Could I chime in on your question,
19 Mr. Commissioner?

20 CHAIRMAN NELSON: Yeah. If you would, go ahead,
21 Matt.

22 MR. RAPPOLD: Briefly, I think it's interesting
23 that you bring this up. Yes, my opinion it is enough to
24 make the testimony relevant.

25 In the witness's testimony, as Mr. Capossela

1 pointed out, the witness is asked the question, is it
2 your opinion that -- and I'm paraphrasing, is it your
3 opinion that Keystone has complied with the requirements
4 of the National Historic Preservation Act?

5 So in their testimony they ask the question, are
6 they complying with the law. And here in the response
7 they turn around and say it's not their responsibility to
8 comply with the law as it relates to 106 of the National
9 Historic Preservation Act. That responsibility lies with
10 the Federal Government.

11 I just think it's interesting, and it is
12 something that should perk your attention to the
13 inconsistencies as it specifically relates to questions
14 of whose responsibility it is to comply with the law.

15 Thank you.

16 MR. CAPOSSELA: Mr. Chairman, this is Peter
17 Capossela. May I comment briefly also?

18 CHAIRMAN NELSON: No. Because I want to follow
19 up with Mr. Rappold.

20 Mr. Rappold, can you point to me in
21 Ms. Galindo's rebuttal testimony -- and I've pulled it
22 up, and I've read through it a number of times, but can
23 you point to me specifically where she's making the case
24 that Keystone cannot comply with the conditions?

25 MR. RAPPOLD: Give me a moment.

1 Keystone would not be able to comply -- strike
2 that.

3 It's not directly in the testimony that they
4 would not be able to comply. It's a combination of our
5 perspective on what the requirements are and what the
6 witness Ms. Olson has stated about their ability to
7 comply.

8 And then, of course, at the trial we would make
9 that point clear through closing arguments where we kind
10 of wrap everything up and tie the testimony to the law
11 and ask for you to reach certain conclusions.

12 CHAIRMAN NELSON: Mr. Rappold, thank you. I
13 appreciate that. That was my understanding, but I just
14 wanted to make sure that I wasn't missing something. So
15 I appreciate that.

16 Mr. Capossela, very briefly.

17 MR. CAPOSSELA: Thank you, Mr. Chairman.
18 Earlier I mentioned that there's some confusion
19 underlying these motions of admissibility on relevancy
20 grounds with the weight of the evidence of how much
21 consideration should be conferred for a piece of
22 proffered evidence. And I think that your question got
23 to that.

24 The type of -- the testimony that we're talking
25 about may not go to the ultimate issue. It may not be

1 dispositive. But that does not mean that it's
2 inadmissible on relevancy grounds.

3 It is relevant. The Commission in its
4 discretion will give it whatever weight -- in your
5 reasonable discretion will give it whatever weight you
6 deem fit. But just because it may not directly touch
7 upon the pen ultimate issue in the proceeding does not
8 make it inadmissible on relevancy grounds. And I think
9 your question implicating that concern of the Tribe.

10 CHAIRMAN NELSON: Thank you. Additional
11 questions?

12 Hearing none, is there a Motion?

13 Wait a minute. Okay. Staff is wanting a brief
14 rebuttal.

15 MS. EDWARDS: Very brief just to clarify after
16 consulting with my expert. I may have misstated about
17 the National Historic Preservation Act.

18 What our witness was testifying to is that they
19 can comply with the act through the Programmatic
20 Agreement. The Programmatic Agreement is what they are
21 supposed to comply with, and that's what she testified
22 that they are complying with on page 7 of her testimony.

23 Thank you.

24 CHAIRMAN NELSON: Thank you.

25 Is there a Motion?

1 I will move in No. 7 that the Commission grant
2 Keystone's Motion in Limine to preclude rebuttal
3 testimony of Jennifer Galindo and direct testimony of
4 Waste Win Young.

5 Discussion on the Motion.

6 Let me just address, briefly, Mr. Capossela's
7 contention that the Motion is somehow messed up. I'm
8 looking at page 1, the last paragraph, and it clearly
9 specifies that this is dealing with Ms. Young's direct
10 testimony.

11 There was no confusion on my part in what was
12 being asked for so I don't find that relevant.

13 Other discussion on the Motion?

14 Hearing none, all those in favor will vote aye;
15 those opposed, nay.

16 Commissioner Hanson.

17 COMMISSIONER HANSON: Aye.

18 CHAIRMAN NELSON: Commissioner Fiegen.

19 COMMISSIONER FIEGEN: Fiegen votes aye.

20 CHAIRMAN NELSON: Nelson votes aye. The Motion
21 carries.

22 That brings us to No. 8, Keystone's Motion in
23 Limine to preclude the testimony of Chris Saucosi or
24 something close to that.

25 MR. MOORE: Thank you, Commissioner Nelson. The

1 basis for this Motion is essentially that prefiled
2 testimony has to be more than just a general notice that
3 a witness may appear and address a particular subject.

4 As I understand prefiled testimony, the witness
5 offers prefiled testimony and then takes the stand under
6 oath and adopts the prefiled testimony and then is
7 subject to cross-examination within the scope of the
8 direct testimony that has been prefiled.

9 With respect to the testimony offered for
10 Mr. Sauncosi, who's the chief of police for the Tribe,
11 there is simply no substance there. There is a statement
12 that he may testify about the lack of interaction between
13 the Tribe and TransCanada, but that is a subject area.
14 It's not testimony.

15 And there's really nothing to cross-examine
16 there. It's almost as if that were sufficient prefiled
17 testimony, it could be offered and there may not even be
18 any cross-examination because there's no substance to it.

19 So the basis for the Motion is that the
20 testimony is insufficient because it contains no
21 substance and, therefore, it does not comply with the
22 Commission's rules.

23 Thank you.

24 CHAIRMAN NELSON: Thank you. Ms. Baker.

25 MS. BAKER: Thank you, Mr. Chairman.

1 The reason that the prefiled rebuttal was so
2 generalized is because that's exactly what Keystone has
3 done in its prefiled direct. So there was nothing
4 specific for us available to rebut. Under SDCL
5 49-41B-27, Keystone is obligated to certification that
6 the facility continues to meet the conditions upon which
7 the Permit was granted. This means that Keystone must
8 prove that the project continues to meet all 50 Permit
9 conditions.

10 The regulation ARSD 20:10:01:15.01 state that
11 the Applicant or Petitioner in a contested proceeding has
12 the burden of going forward with presentation of evidence
13 and has the burden of proof as the factual allegations
14 which form the basis for the Petition.

15 In this case that means that Keystone is
16 required to present evidence to prove that it continues
17 to meet not just one or some of the conditions, but all
18 50 of the Permit conditions. Again, that's Keystone has
19 to present evidence to each of those 50 Permit
20 conditions.

21 Keystone's direct testimony failed to address
22 all 50 Conditions such as it's required to as the burden
23 of proof. Our witnesses are prepared to address some of
24 those conditions. Because Keystone didn't include this
25 in its prefiled testimony, we were unable to specifically

1 rebut anything. There was just nothing specific to
2 rebut. But, again, it has to be presented in order for
3 Keystone to meet its burden.

4 In addition, from the Commission's own order on
5 July 2, 2015, the Commission stated that witnesses for
6 whom prefiled testimony was not filed will be precluded
7 from testifying or offering evidence at the hearing
8 except to the extent that this testimony or evidence will
9 address new facts, evidence, or opinions introduced at
10 the hearing that were not presented in a prefiled
11 testimony.

12 This necessarily implies that testimony may
13 exceed prefiled testimony on direct in which case, again,
14 it's appropriate and permissible for our rebuttal
15 witnesses to come in, and based on what they've disclosed
16 already generalized, testify more specifically to those
17 new statements, facts, or evidence.

18 We presume, based on Keystone's sparse prefiled
19 testimony, that Keystone's witnesses will present new
20 evidence that's not contained in their prefiled
21 testimony.

22 Based on the Commission's own order, our
23 rebuttal witnesses did not even need to submit prefiled
24 testimony to rebut such information. That's based on
25 that ruling from which I just quoted. Vagueness of our

1 prefilled, therefore, cannot stand to preclude rebuttal by
2 our witnesses, so long as their testimony rebuts facts,
3 evidence, or opinions that are not included in Keystone's
4 prefilled testimony.

5 Keystone is basically attempting to take
6 advantage of the process by providing intentionally vague
7 prefilled direct, and at the same time asking the PUC to
8 preclude Yankton's rebuttal for responding in kind, which
9 runs contrary to the Commission's previous orders.

10 Because our witnesses intend to rebut evidence
11 that's not expressly and explicitly stated in the
12 prefilled submitted by Keystone, but our witnesses intend
13 to rebut new evidence in accordance with the Commission's
14 order, we respectfully request that the Commission deny
15 Keystone's Motion.

16 Thank you.

17 CHAIRMAN NELSON: Any rebuttal?

18 MR. MOORE: I think there's a fundamental
19 disagreement here about the burden of proof and the
20 nature of the proceeding.

21 We've submitted a certification, including
22 detailed references to the Findings of Fact, and have
23 certified based on changes in circumstances that have
24 occurred since 2010 that we can continue to meet the
25 conditions on which the Permit was granted.

1 Our assertion that we can do that is subject to
2 cross-examination and to the presentation of evidence by
3 any Intervenor who contends otherwise. And for the
4 proposed rebuttal testimony of Mr. Sauncosi to be
5 sufficient and relevant, I think it's the Yankton Sioux
6 Tribe's burden to show that there is some condition that
7 relates to communication between the Tribe and Keystone
8 that Keystone is unable to meet and to present evidence
9 with respect to that.

10 It's not Keystone's obligation to try to prove a
11 negative in the first instance, having previously
12 submitted the certification based on the Tracking Table
13 of Changes that was presented with the certification in
14 the first instance.

15 That's all I have. Thank you.

16 CHAIRMAN NELSON: Thank you. Questions from the
17 Commission?

18 Is there a Motion?

19 COMMISSIONER HANSON: Mr. Chairman, I move that
20 the Commission grant Keystone's Motion in Limine to
21 preclude testimony of Chris Sauncosi.

22 CHAIRMAN NELSON: Discussion on the Motion.

23 COMMISSIONER HANSON: Mr. Chairman, I just do
24 not see that the testimony that -- or the information
25 that's been presented is -- or planning to be presented

1 addresses any of the conditions set forth in the Permit,
2 and that's what we have repeatedly stated that needs to
3 take place during this particular process, that we're not
4 retrying, we're not going off into different areas. We
5 are simply seeing whether or not -- going through a
6 process to determine whether or not the conditions can
7 still be met by the Applicant.

8 MS. BAKER: Mr. Chairman, I know this is
9 procedurally unusual, but if I could just make a
10 statement briefly.

11 CHAIRMAN NELSON: No. Not at this point. We're
12 in Commissioner discussion at this point. We're going to
13 move forward.

14 Additional Commissioner discussion.

15 Mr. Smith.

16 MR. SMITH: I just wanted to ask a clarifying
17 question, Commissioner Hanson. Did you intend for your
18 Motion to totally preclude Mr. Sancousi from testifying,
19 or would that be subject to our exception that we stated
20 in our earlier order?

21 COMMISSIONER HANSON: Forgive me. Thank you for
22 pointing that out. It would include, as you said, an
23 exception for that.

24 MR. SMITH: Yeah. I think you're right,
25 Ms. Baker, that we did put that in our earlier order.

1 And as much as you like to put order into things and we
2 like to because we're an administrative body and we're
3 under time constraints and everything, we did put that in
4 our order. And the reason is you can never really tell
5 what's going to happen, you know, at a hearing.

6 So to the extent that curve balls are thrown or
7 things change or there's information presented that needs
8 to be addressed that I think we think we're going to
9 exercise reasonableness and liberality in allowing for
10 parties to thoroughly vet their cases.

11 CHAIRMAN NELSON: Thank you, Mr. Smith. I
12 appreciate that. That was certainly my understanding.
13 But I want to emphasize I'm going to support Commissioner
14 Hanson on this because I saw nothing in this testimony
15 that gets at the question that we're ultimately going to
16 answer.

17 Now, will something come up during hearing that
18 he may be needed that does address the question we're to
19 answer, that might happen. But at this point I'm not
20 seeing it.

21 Additional discussion?

22 Hearing none, all those in favor of the Motion
23 to grant the Motion in Limine on No. 8 will say aye;
24 those opposed, nay.

25 Commissioner Hanson.

1 COMMISSIONER HANSON: Aye.

2 CHAIRMAN NELSON: Commissioner Fiegen.

3 COMMISSIONER FIEGEN: Fiegen votes aye.

4 CHAIRMAN NELSON: Nelson votes aye. The Motion
5 carries.

6 MR. ELLISON: Mr. Chairman, I'd just request a
7 brief access to the record, if I may.

8 CHAIRMAN NELSON: Okay. We're all looking
9 puzzled. What do you mean?

10 MR. ELLISON: Well, what I mean is I just want
11 to add something to the record. And that is at the very
12 beginning of these hearings, Mr. Hanson approached myself
13 and other people representing DRA out in the hallway and
14 we heard that after all the work that the Commission had
15 did on the 2009 hearings, DRA never presented any
16 evidence.

17 And what I'm disturbed about is that every
18 opportunity to preclude evidence in this case is not only
19 immediately first, if not seconded by Mr. Hanson, but the
20 rest of the PUC. I'm beginning to wonder what the
21 purpose of this hearing is. Because the only evidence
22 that seems to be allowable is going to be TransCanada's
23 and the PUC's. And anything that could possibly
24 challenge that is being restricted. That's what I wanted
25 to say for the record. I object to the way these matters

1 are being handled. This is a total violation of due
2 process rights of the parties.

3 CHAIRMAN NELSON: Moving on to No. 9, Shall the
4 Commission grant Keystone's Motion in Limine to preclude
5 testimony of Dr. Hansen and Dr. Oglesby.

6 Keystone.

7 MR. MOORE: Thank you. I think that there are
8 two matters that are at issue here because InterTribal
9 COUP has also now filed a Motion to reconsider that I'm
10 not sure whether it's actually on the agenda today, but
11 part of the Motion that we made is that the testimony of
12 Dr. Hansen and Dr. Oglesby had previously been excluded
13 and there had been no Motion to reconsider.

14 To the extent that that new Motion to reconsider
15 is on the table today, Keystone's position still is that
16 nothing has changed with respect to their proposed
17 testimony. The argument in the Motion to reconsider is
18 that -- is that there is a condition in the Amended Final
19 Decision and Order, that being condition number 25
20 related to adverse weather conditions and the climate
21 change and adverse weather conditions, and their
22 testimony is relevant to that condition, I think that's a
23 very farfetched argument. I think a plain reading of
24 condition 25 indicates that it's related to an obligation
25 to suspend construction activities when weather

1 conditions are such that construction cannot be safely
2 and efficaciously completed due to the weather. That's
3 an entirely different subject than what Dr. Hansen and
4 Dr. Oglesby are intending to present through their
5 testimony.

6 And, therefore, we request that the Commission
7 simply adhere to its previous rulings that their
8 testimony is not relevant and will not be admitted.

9 Thank you.

10 CHAIRMAN NELSON: Thank you. And I appreciate
11 your mentioning the Motion for Reconsideration. We did
12 post that for today in an addendum. And so what I think
13 might be most prudent is to set No. 9 aside. I think we
14 probably need to deal with the reconsideration question
15 first.

16 And so let's just set No. 9 aside. We'll deal
17 with the reconsideration question at the end and then go
18 back to No. 9.

19 MR. MOORE: Okay. Thank you.

20 CHAIRMAN NELSON: So let's move to No. 10, Shall
21 the Commission grant Keystone's Motion in Limine to
22 restrict the testimony of Leonard Crow Dog.

23 Keystone.

24 MR. TAYLOR: Thank you, Commissioners. William
25 Taylor for Keystone.

1 The Crow Dog testimony suffers from the same
2 problem that Mr. Moore has pointed up with respect to
3 other testimony. It's conclusory in nature. It does not
4 contain any facts or any statement of what evidence or
5 testimony Mr. Crow Dog may give.

6 And even to the extent that it does reveal
7 anything, all it does is express his opinions, which are
8 conclusory, that the pipeline will pass unlawfully
9 through aboriginal tribal territories.

10 So, first of all, there's no support, there's no
11 evidence, there's nothing to rebut. There's nothing to
12 cross-examine on because of the nature of the testimony.

13 Number two, he renders a legal opinion, and
14 whether or not he's qualified to render that legal
15 opinion is a matter in issue. And even if he was
16 qualified, we're entering legal opinion before this
17 Commission. It's not part of the evidence in this case.

18 He doesn't raise any issue that reaches to the
19 question of certification. So on those grounds I believe
20 his prefiled testimony should be stricken.

21 I would also make one other comment. He
22 expresses in his piece that it's his intention to testify
23 in English and Lakota. SDCL 19-3-7 says when a witness
24 cannot communicate in or understand the English language,
25 the court will appoint -- will procure and appoint a

1 disinterested translator. The law of South Dakota is if
2 you speak English, you testify in English. With all due
3 respect to Mr. Crow Dog, I know he speaks English. He
4 has said he does. So it would be inappropriate for him
5 also to testify in Lakota.

6 CHAIRMAN NELSON: Mr. Rappold.

7 MR. RAPPOLD: Thank you, Commissioners.
8 Contrary to Keystone's assertion, the testimony does
9 apply -- or does comply, rather, with the rules of
10 prefiled written testimony, provides the docket number,
11 provides the name, and it provides the name of the
12 witness. It also provides adequate notice of whose
13 testimony he's rebutting, and it provides the basis for
14 that rebuttal.

15 Keystone also makes the allegation his testimony
16 is related to aboriginal title, that's not in issue;
17 however, that concept is something that forms part of the
18 basis for the foundation of the witness's knowledge and
19 testimony.

20 Mr. Crow Dog, along with all the other witnesses
21 that will be allowed in this case, are certainly entitled
22 to express their opinions under the rules of South Dakota
23 evidence as to whether or not Keystone can satisfy the
24 burden of proof. Their witnesses express opinions on
25 that issue. It seems like when we want a witness to

1 present an opinion on that issue, we're not allowed.

2 And the testimony provides notice of four
3 particular things, and he will refute the assertions made
4 by TransCanada to certify the Permit, will rebut the
5 testimony of Corey Goulet on the grounds that it is
6 unlawfully passed through aboriginal land without due
7 regard to the Tribes and the effect the pipeline will
8 have. And I think we're seeing that played out today.
9 And also that this is done in violation of international
10 human rights laws and traditional Lakota laws.

11 Mr. Crow Dog is, my understanding, bilingual.
12 However, there are certain concepts, and it's been my
13 experience there are certain concepts that can only be
14 adequately expressed in the witness's native tongue, that
15 being Lakota.

16 Furthermore, we would ask that the Commission
17 consider denying their Motion on the grounds that the
18 Motion asks for conflicting relief. It asks for three
19 different types of relief. And because it asks for three
20 different types of relief, it's impossible for the
21 Commission to issue an order. The Motion is not in
22 compliance with the Rules of Civil Procedure which
23 require the Motion state the ground with particularity.

24 When you've asked for three different types of
25 relief, I would submit that you have not stated your

1 ground with particularity.

2 The Motion asks for -- the Motion asks for three
3 things. It asks to restrict, it asks to limit, and it
4 asks to prohibit and provide the definitions in a written
5 filing of all three of these words. And I believe you'll
6 all reach the same conclusion that I did, that restrict,
7 limit, and prohibit mean three different things.

8 Restrict means to confine within bounds. Limit
9 is something that bounds, restrains or confines or the
10 utmost extent, and prohibit means to forbid by authority
11 or prevent from doing something.

12 It's impossible for the Commission to grant
13 relief in this situation because each of the three types
14 of relief requested asks for a different result, and each
15 conflicts with the other, and such a result would violate
16 even the most basic principles and concepts of due
17 process.

18 If the Commission sees in its judgment to deny
19 the Motion to exclude Leonard Crow Dog's testimony, we
20 would ask that the Commission does appoint a translator
21 to participate in this proceeding.

22 Thank you.

23 CHAIRMAN NELSON: Brief rebuttal.

24 MR. TAYLOR: First of all, if it clarifies
25 things, I'll move to amend my Motion to not let Mr. Crow

1 Dog testify as to the matters --

2 MR. RAPPOLD: I object.

3 MR. TAYLOR: -- as to the matters contained in
4 his written submission. If that's clear enough, that's
5 my intention.

6 There seems to be some material
7 misunderstandings as to how this is going to go.
8 Mr. Crow Dog is supposed to submit written prefiled
9 rebuttal testimony. The materials that he submits as his
10 testimony, and then he is supposed to come in and say
11 this is my testimony under oath and adopt it, and he's
12 done.

13 He doesn't get to come in and say, I have given
14 you notice through two sentences in a submittal as to the
15 areas I'm going to testify to and then testify about
16 those areas.

17 So if this is his rebuttal testimony, it is
18 clearly insufficient in form and substance.

19 Number two, the subjects on which he is going to
20 testify, there's no elaboration. I will rebut the
21 testimony of Corey Goulet as it pertains to Keystone's
22 petition for certification. In what respect? How do I
23 cross-examine that?

24 Your Permit will unlawfully allow this pipeline
25 to pass through our aboriginal land without due regard

1 and consideration, et cetera. That's a conclusory
2 statement. It's not a statement of fact. It's not an
3 expression of facts that are relevant to any issue before
4 the Commission.

5 All due respect to Mr. Crow Dog, if he has
6 things to say, he has to say them in the rebuttal
7 testimony that he submits. And if he fails to do that,
8 his testimony should not be allowed.

9 Thank you.

10 CHAIRMAN NELSON: Questions from the Commission.

11 Is there a Motion?

12 Commissioner Fiegen.

13 COMMISSIONER FIEGEN: I have a question of our
14 General Counsel. Because the Motion is stated
15 restrict --

16 MR. SMITH: It is? Where is that?

17 COMMISSIONER FIEGEN: I think.

18 Shall the Commission grant Keystone's Motion in
19 Limine to restrict testimony.

20 MR. SMITH: It's actual prayer for relief at the
21 bottom. It says prohibiting.

22 COMMISSIONER FIEGEN: Okay.

23 MR. SMITH: Up above in the very first sentence
24 they use the word limit, and in the title they use the
25 word restrict. In their actual request for relief they

1 ask for prohibiting.

2 COMMISSIONER FIEGEN: It's prohibit.

3 MR. SMITH: You know, I agree there's some
4 ambiguity in that, but I think with -- but usually it's
5 the relief request sentence that I usually view as what
6 they're actually asking for. Because it's not infrequent
7 to see a word in a title that doesn't quite fit in.

8 COMMISSIONER FIEGEN: Okay. Thank you for that
9 clarification.

10 CHAIRMAN NELSON: Additional questions?

11 Is there a Motion?

12 Commissioner Fiegen.

13 COMMISSIONER FIEGEN: Mr. Chairman, I move to
14 grant Keystone's Motion in Limine to prohibit, actually,
15 the testimony of Leonard Crow Dog.

16 CHAIRMAN NELSON: Discussion on the Motion.

17 COMMISSIONER FIEGEN: His testimony appears
18 certainly to focus on aboriginal rights which we have
19 previously ruled on. And they're right, that his front
20 page of his witness testimony is correct according to
21 state law because the front page requires those four
22 things. But unfortunately, we require more than that.
23 So I believe that Motion is proper.

24 CHAIRMAN NELSON: Additional discussion?

25 Hearing none, all those in favor will vote aye;

1 those opposed, nay.

2 Commissioner Hanson.

3 COMMISSIONER HANSON: Aye.

4 CHAIRMAN NELSON: Commissioner Fiegen.

5 COMMISSIONER FIEGEN: Fiegen votes aye.

6 CHAIRMAN NELSON: Nelson votes aye. Motion
7 carries.

8 That brings us to No. 11, Shall the Commission
9 grant Keystone's testimony of Yankton Sioux witness
10 Spotted Eagle and an unnamed member of the B&C Claims
11 Committee.

12 Keystone.

13 MR. TAYLOR: Thank you, Commissioners. As to
14 Ms. Spotted Eagle's direct testimony, questions 24
15 through 33 of her direct testimony, which was filed
16 April 2, address aboriginal title and usufructuary
17 rights, which you have already ruled are inappropriate at
18 this hearing. So we stand on our past arguments on that
19 point.

20 With respect to the purported rebuttal testimony
21 filed June 26, suffers exactly from the same problem that
22 the Crow Dog testimony suffered from.

23 Statements that are general in nature, that are
24 not specific, there is no -- there's nothing that we
25 can -- in fact, the purpose of the testimony in the

1 proceeding in both the unnamed B&C member, who I now
2 understand there is a named member on the B&C witness.

3 But anyway, the B&C member's testimony and the
4 Spotted Eagle rebuttal testimony say exactly the same
5 thing, conclusory. They speak to issues with the FEIS
6 and the Final Supplemental Environmental Impact
7 Statement, cultural resources, and sacred sites, but they
8 don't say what they're going to talk about in any of
9 those.

10 They also talk about governing treaties, none of
11 which is relevant to any of the issues before the
12 Commission in this proceeding.

13 So essentially on the grounds that are argued in
14 the Crow Dog Motion, we'd argue the same grounds apply to
15 this testimony and ask that it be stricken as rebuttal
16 and that they be not allowed to testify.

17 CHAIRMAN NELSON: Ms. Baker.

18 MS. BAKER: Thank you, Mr. Chairman.

19 We would reiterate the arguments that were made
20 in support of Sauncosi's testimony to some extent
21 regarding the rebuttal here. However, in light of the
22 Commission's ruling and the fact that this rebuttal
23 testimony, like Mr. Sauncosi's testimony, is intended to
24 be used in accordance with the Commission's order and
25 that exception, I won't go into all of that.

1 With respect to Ms. Spotted Eagle's direct
2 testimony, admittedly a few of the questions did pertain
3 to aboriginal and usufructuary rights that were
4 identified by TransCanada. However, not all of those
5 did.

6 Questions 24 through 29 and 32 and 33 do not
7 address aboriginal title or usufructuary rights.
8 Therefore, they should not be excluded.

9 In addition, going back to the general nature of
10 the testimony, I'd like to point out that, like the
11 testimony of Mr. Crow Dog, these testimonies contain all
12 the statutorily required elements as far as form,
13 content. They meet the minimum standards set forth by
14 statute.

15 If the Commission has imposed additional
16 requirements, we have failed to become apprised of those
17 and would like to point out that those were never made
18 available. And have so we have, in fact, complied with
19 the requirements for prefiled testimony.

20 And the statements that are generalized that
21 speak to what can be testified about, the subjects that
22 were just previously identified by TransCanada, that
23 again is just -- it's taking a page from TransCanada's
24 book because their Prefiled Direct Testimony simply
25 states, you know, a number of things about their Tracking

1 Table of Changes, which are irrelevant, and I know we'll
2 discuss those later at the hearing. And then they say I
3 can talk about X, Y, and Z, and to my knowledge there's
4 no reason that TransCanada can't continue to meet the
5 conditions on which it was granted. So that generalized
6 language is actually taken directly from TransCanada's
7 direct testimony. That's all they've provided us.

8 One final point. The testimony regarding
9 treaties is very much relevant like a number of issues
10 that our witnesses plan to testify about because they do
11 speak directly to conditions from that original Permit.

12 For example, there is a condition -- I believe
13 it's the first condition -- that the parties comply with
14 all relevant laws. Federal law is a relevant law. The
15 United States Constitution is a relevant law, and
16 treaties are, by the United States Constitution,
17 governing law in this country and they, therefore, are
18 relevant to this proceeding.

19 With that, we would respectfully request that
20 you deny Keystone's Motion.

21 Thank you.

22 CHAIRMAN NELSON: Any rebuttal?

23 MR. TAYLOR: I'd just make a couple of points.
24 24 and 25 and Ms. Spotted Eagle's direct testimony, it is
25 true they do not -- those two questions do not reach

1 directly to usufructuary and treaty rights. What they
2 are is foundational for the opinion that she renders.
3 One of those questions is she's a member of the certain
4 part of the general council, and the second question is
5 explain how that steering committee works.

6 So technically Yankton is right, those do not
7 reach usufructuary rights, but they are foundation for
8 the usufructuary rights testimony.

9 CHAIRMAN NELSON: Questions from the Commission.
10 Hearing none, is there a Motion?

11 I will move that the Commission grant Keystone's
12 Motion in Limine to restrict testimony of Yankton Sioux's
13 witness Spotted Eagle and unnamed member of the B&C
14 claims committee.

15 Discussion on the Motion.

16 Hearing none, all those in favor will vote aye;
17 those opposed, nay.

18 Commissioner Hanson.

19 COMMISSIONER HANSON: Aye.

20 CHAIRMAN NELSON: Commissioner Fiegen.

21 COMMISSIONER FIEGEN: Fiegen votes aye.

22 CHAIRMAN NELSON: Nelson votes aye. The Motion
23 carries.

24 Brings us to No. 12, Shall the Commission grant
25 Keystone's Motion in Limine to strike Paula Antoine's

1 rebuttal testimony and prohibit her from testifying at
2 the evidentiary hearing.

3 Keystone.

4 MR. TAYLOR: Thank you, Commissioner.

5 Mrs. Antoine's testimony is a little different than the
6 two previous motions we've already undertaken. Her
7 testimony is divided into two or perhaps two and a half
8 parts.

9 The first part of her rebuttal testimony is a
10 discussion of the spirit camp and how the spirit camp
11 affects her and how she feels about the spirit camp.

12 A spirit camp is a couple of miles distant from
13 the right of way. There is no allegation made any place
14 anywhere that the spirit camp is within Keystone's right
15 of way. And so any testimony regarding the spirit camp,
16 in particular the testimony about how Ms. Antoine feels
17 about the spirit camp and the region in which the spirit
18 camp is located and the community of Ideal are irrelevant
19 to any issue that's before the Commission. So that
20 portion on its own should be stricken.

21 The second part of her testimony appears to be
22 socioeconomic testimony, but what it really is is a
23 combination of her opinion and argument. The questions
24 ask, have you read and do you understand evidence that's
25 been given in both new and old testimony?

1 And she says yes, yes, and yes.

2 And then the question is, what's your opinion
3 about that? Does that testimony meet some standard or
4 burden that's imposed on Keystone? Actually, what the
5 question is is, does it meet the ultimate question that
6 you as a Commission will decide.

7 First of all, she's not qualified to render that
8 opinion. Second, it invades the province of the trier of
9 fact, which is you, and the ultimate decision-maker.
10 And, third, how she feels about how the rebuttal
11 testimony -- or how the testimony aligns with respect to
12 the burden of proof is immaterial.

13 All due respect, who cares. The question is
14 yours. Not hers. It would be like any person on the
15 street's opinion based on what they know. So it's
16 immaterial to any issue in this hearing.

17 And then 2.5, part 2.5 is her review of the 2009
18 testimony that Dr. Madden gave in which she appears to
19 attempt to impeach the testimony.

20 Well, first of all, the time to do that was in
21 2009 if Dr. Madden's testimony was to be impeached.
22 Second, there's no foundation for her expertise to
23 challenge or impeach Dr. Madden's testimony. So as well
24 meaning as I'm sure her testimony is, it is either
25 inappropriate, irrelevant, immaterial, or invades the

1 province of the Commission. And on those grounds, we'd
2 ask that it be stricken.

3 CHAIRMAN NELSON: Mr. Rappold.

4 MR. RAPPOLD: Thank you, Commissioners. Again,
5 we appear to be at the place where Keystone is asking for
6 one set of rules to apply to us and an entirely different
7 set of rules to apply to them.

8 In order to get to that point, witnesses offer
9 opinions on a regular basis about facts at issue, and
10 they're also permitted to offer opinions on the ultimate
11 issue. And the reason they're permitted to do this is
12 because the law says they can.

13 Witnesses do this all the time. And they do
14 that without invading your province as the
15 decision-maker. It's your job to determine the weight
16 and the veracity of all the evidence and testimony and
17 then apply that to the law. It's not a difficult
18 concept.

19 Staff's witnesses do that. Did you testify in
20 the first hearing? Yeah. Is there anything that would
21 change? No. Can they satisfy the Permit conditions?
22 Can they satisfy -- certify that the conditions are the
23 same? Yes, they can.

24 Well, I would submit to you that's the exact
25 same thing this witness is doing, only we reach a

1 different conclusion. Our conclusion is they can't
2 satisfy those questions in Keystone's position, and the
3 Staff's position is they can. That's the issue.

4 That's the purpose of having a hearing. That's
5 the purpose of having a trial; to offer evidence and
6 testimony to help you reach that decision. That's what
7 this testimony does.

8 The testimony also points out there's not one
9 single witness that offers any evidence or testimony as
10 it relates to Keystone's continuing burden to satisfy the
11 requirements of the statute. They offer no testimony as
12 to relates to the socioeconomic factors, particularly
13 from Finding of Fact 107 to 110.

14 The Madden report is offered to show that while
15 socioeconomic factors were considered in the underlying
16 Docket, no one's taken any action to adopt and
17 incorporate by reference the 2009 report. All his
18 testimony does is simply point that out to you.

19 It's your job then to decide whether or not
20 Keystone's satisfied their burden of proof. I'd ask that
21 you deny their Motion to exclude the testimony of Paula
22 Antoine.

23 CHAIRMAN NELSON: Thank you. Any rebuttal?

24 MR. TAYLOR: The question posed to Ms. Antoine
25 is based on review of all relevant materials and laws,

1 does it appear to you that Keystone has put in sufficient
2 evidence and testimony regarding Findings of Fact to
3 certify that the conditions in the Permit are the same?

4 So what? That's the question for you to decide.
5 It's not what Ms. Antoine thinks about that is immaterial
6 and irrelevant. It makes no difference.

7 MR. RAPPOLD: If I could interrupt, then every
8 other witness that says the same thing is irrelevant and
9 immaterial and I say, so what.

10 CHAIRMAN NELSON: Okay. Let's -- I'm going to
11 close the public input.

12 Commissioner questions.

13 Is there a Motion?

14 On No. 12 I will move to grant Keystone's Motion
15 in Limine but only as it applies to the spirit camp
16 testimony.

17 Discussion on the Motion.

18 Mr. Taylor began his argument on this one by
19 saying that this one's a little bit different than some
20 of the previous ones we've looked at. And, frankly, that
21 was my response as I read through the Motion and the
22 arguments is that this one is a little bit different.

23 There may be -- I'm not saying there is, but
24 there may be something in some of the rest of her
25 testimony that might be relevant to this and, hence, I'm

1 only willing to go as far as granting the Motion in
2 Limine as it relates to the spirit camp testimony.

3 Additional discussion?

4 Hearing none, all those in favor will vote aye;
5 those opposed, nay.

6 Commissioner Hanson.

7 COMMISSIONER HANSON: Aye.

8 CHAIRMAN NELSON: Commissioner Fiegen.

9 COMMISSIONER FIEGEN: Fiegen votes aye.

10 CHAIRMAN NELSON: Nelson votes aye. The Motion
11 carries.

12 That brings to us 13, Shall the Commission grant
13 Keystone's Motion in Limine to strike article by Linda
14 Black Elk and restrict her testimony.

15 Keystone.

16 MR. TAYLOR: Thank you, Commissioner.

17 Linda Black Elk testimony, her prefiled
18 testimony and her rebuttal testimony consists of one
19 thing. It's an article she apparently authored some
20 years ago that has to do with -- describes plants first
21 by their genus and species, and then by their common
22 Lakota name, and then explains what use of those plants
23 is made by Lakota people. Very interesting article.

24 But there is no testimony beyond that.

25 Prefiled testimony -- she's an expert, and I

1 suppose we should talk about this a little bit because we
2 are going to hear about opinion testimony again.

3 If she's an expert, she can render an opinion,
4 but first her expertise has to be established. That's
5 foundation for the opinion that she renders. That's the
6 Daubert case that we've heard talked about sometimes
7 called the Daubert case.

8 There has to be some foundation laid for her
9 opinion. What's her educational background? What work
10 did she do to acquire the knowledge that's reflected in
11 the report? So forth. None of that exists in the
12 prefiled testimony.

13 Second, it has to be demonstrated that the
14 report is somehow relevant and material to the issues
15 that are before the Commission. And that's not
16 demonstrated in the prefiled testimony either.

17 And then, third, if she is going to render an
18 opinion, or if the Tribe expects to put her on the
19 witness stand, put her under oath and have her render an
20 opinion before this Commission, I'm entitled to know what
21 that is ahead of time in the form of prefiled testimony
22 so that I can prepare my cross-examination.

23 And none of that exists in this case. And I --
24 it's hard to understand why all that would be filed is
25 her article.

1 So on those grounds her article is inadmissible.
2 There's no foundation for it, number one. And, number
3 two, without prefiled testimony fore and aft of the
4 article, there's no demonstrated relevance to anything
5 that's going to go on next week before the Commission.

6 So on those grounds I move that the report be
7 stricken, and that she not be allowed to testify for
8 failure to file the prefiled testimony.

9 Thank you.

10 CHAIRMAN NELSON: Mr. Capossela.

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

12 Discuss the Supreme Court's opinion in Daubert v. Merrell
13 Dow Pharmaceuticals, that's the standards for requirement
14 for the admissibility of expert testimony. And in
15 Daubert, as I had said earlier, the Supreme Court said
16 that "wholesale exclusion" of proffered evidence is
17 improper. And there is some wholesale exclusion going on
18 here.

19 In South Dakota SDCL Chapter 1-26, the
20 Administrative Procedures Act states in part rights of
21 parties at hearings on contested cases, opportunities
22 shall be afforded to all parties to present evidence in
23 support of the party's interest. The Standing Rock Sioux
24 Tribe has presented an expert report on the interest of
25 the Tribe, of the interest of very special South

1 Dakotans.

2 The test is whether, A, there's any surprise or
3 nondisclosure, and, B, whether the expert information is
4 helpful.

5 This documentation was disclosed to TransCanada
6 on March 10. They've had it for four months. There's no
7 surprise. There's no nondisclosure. They knew it was
8 coming.

9 Secondly, is it helpful. In part that leads to
10 relevance. But the thing that I can tell you is brief
11 testimony by Professor Black Elk, who's a professor at
12 Sitting Bull College at Ft. Yates North Dakota and
13 McLaughlin South Dakota, that the brief presentation that
14 she could make on her report would be one of the most
15 informative and enlightening presentations certainly that
16 I've ever heard in my life on something that's totally
17 unique to the region, totally unique to South Dakota.
18 These are really special issues. And the Commission
19 could learn so much.

20 Now, with respect to relevancy, the Staff has
21 presented prefiled testimony of Eric Iles who discusses
22 sedimentation in riparian areas, as well as Tom
23 Kirschemann in an exhibit in Mr. Kirschemann -- the Game,
24 Fish & Parks Department, in an exhibit in his testimony,
25 '09 testimony, in which he discussed concerns in riparian

1 areas in areas where there's nesting of threatened and
2 endangered species.

3 And as Ms. Black Elk's report demonstrates, that
4 many of these plants that she identifies, they're
5 significant to the Lakota people, are riparian plants.

6 Now, again, the Final Supplemental Environmental
7 Impact Statement has been released. It's been touched
8 upon by many Staff witnesses. It's something that did
9 not exist in 2009 when the prior Docket was adjudicated.
10 And if we can point out that there was no evaluation in
11 that document of these plants, that is -- that is
12 relevant and important evidence to the Standing Rock
13 Sioux Tribe, and relevant because of all the river
14 crossings of Keystone XL.

15 It's no surprise this is just tremendous
16 information that could be presented in very little time.
17 There's no prejudice or surprise to TransCanada. And it
18 may not be dispositive information, but it is -- it is
19 information that is really good to know that we have
20 expertise that it's available really no place else. This
21 is information that the Commission could learn no place
22 else.

23 You may not want to hang your hat on it as it
24 relates to deciding whether or not to certify the Permit.
25 But whether in light of the federal environmental reviews

1 that have come down since the Permit was issued, this
2 information is helpful to determine the overall impact
3 and whether the overall impact has been properly studied
4 by the Feds.

5 It's relevant to the certification, and we would
6 ask that you Permit the Standing Rock Sioux Tribe to
7 present evidence that is very dear to the Tribe and to
8 its way of life.

9 And that's all that I have this afternoon.
10 Thank you.

11 CHAIRMAN NELSON: Any rebuttal?

12 MR. TAYLOR: Two rhetorical questions. Where is
13 the testimony? There isn't any testimony. All there is
14 is a report. Second, is this an attempt to impeach the
15 2009 decision of the Commission? Certainly sounds like
16 it based on what Mr. Capossela just said.

17 If he didn't comply with the rules of the
18 Commission and submit prefiled testimony, the report is
19 not admissible. There's no foundation for it. And
20 Ms. Black Elk cannot come and testify and expect to cure
21 that and to offer evidence which none of us -- we don't
22 have any idea what she's going to say; me, the Staff,
23 anybody else.

24 You know, one point to keep in mind here is that
25 prefiled testimony serves a very distinct role and

1 purpose before this Commission. One of the things it
2 does is it eliminates depositions in the discovery
3 process. Ordinarily I would have subpoenaed a deposition
4 of Ms. Black Elk, and I'd know what her foundation was
5 and what she was going to say and so forth. But I didn't
6 do that because I expected prefiled testimony to be
7 filed.

8 So where is the testimony? And the purpose of
9 the 2015 hearing is not to impeach the 2009 decision.

10 Thank you.

11 CHAIRMAN NELSON: Questions from the Commission?

12 Is there a Motion?

13 Commissioner Fiegen.

14 COMMISSIONER FIEGEN: Mr. Chairman, move that
15 the Commission grant Keystone's Motion in Limine to
16 strike the article by Linda Black Elk and restrict her
17 testimony.

18 CHAIRMAN NELSON: Discussion on the Motion.

19 COMMISSIONER FIEGEN: We've been pretty clear
20 throughout the whole hearing, in fact, throughout the
21 whole year, that we're really looking at conditions and
22 we set a ground for prefiled testimony. So this does not
23 meet what we have set in previous hearings.

24 CHAIRMAN NELSON: Additional discussion?

25 I'd just like to add, I think both sides have

1 said that, you know, testimony in this regard would be
2 very, very interesting, and I don't have any doubt about
3 that. But, by the same token, when I opened up this file
4 I was struck with, yeah, but where is the testimony? It
5 isn't there. It might be a fascinating report, but
6 that's not what we're looking for. We were looking for
7 prefiled testimony, and it's simply not there. And so
8 I'm going to support the Motion.

9 Additional discussion?

10 COMMISSIONER HANSON: Mr. Chairman.

11 CHAIRMAN NELSON: Go ahead.

12 COMMISSIONER HANSON: Thank you. It's really
13 frustrating going through this process, and it appears to
14 be frustrating for some others as well, and I
15 wholeheartedly agree with both my fellow Commissioners on
16 this.

17 We made it so abundantly clear at the beginning.
18 We repeated ourselves several times that this process has
19 to do with whether or not the Applicant meets the
20 conditions of the final -- Amended Final Decision.

21 And it's frustrating from the standpoint that we
22 even stated that the number of the condition should be
23 stated when information is being presented to us, and yet
24 we're going through all of this process where -- and I
25 agree. It sounds like it would be very interesting to

1 learn this. I enjoy learning especially information of
2 this nature. But it's just not appropriate to present
3 it.

4 And I hope we don't get into the actual hearing
5 process and have a continuation of this because it's --
6 it's been pointed out so many times that we are looking
7 at whether or not the Applicant still meets the
8 conditions.

9 And look at those conditions. Look at the
10 number of conditions that you are considering that it
11 does not meet and say -- state to us that it's condition
12 27, and we do not believe they meet it because of this.
13 That's what I'm looking for.

14 I'm not looking for ancillary discussion that
15 has absolutely nothing to do with the Permit that was
16 granted previously.

17 Thank you, Mr. Chairman.

18 CHAIRMAN NELSON: Additional discussion?

19 I'm going to weigh in here, and maybe we're just
20 a little far afield, but I really appreciate what
21 Commissioner Hanson has just said. And for everybody
22 that's going to be involved next week, I am looking for
23 the same thing.

24 Talk to me about a particular condition and why
25 or why not.

1 Additional discussion?

2 Hearing none, all those in favor of the Motion
3 to grant Keystone's Motion in Limine will say aye; those
4 opposed, nay.

5 Commissioner Hanson.

6 COMMISSIONER HANSON: Aye.

7 CHAIRMAN NELSON: Commissioner Fiegen.

8 COMMISSIONER FIEGEN: Fiegen votes aye.

9 CHAIRMAN NELSON: Nelson votes aye. The Motion
10 carries.

11 That brings us to No. 14, Shall the Commission
12 grant the Joint Motion in Limine to exclude evidence
13 pertaining to Keystone's proposed changes to Findings of
14 Fact.

15 Ms. Baker, are you going to argue this?

16 MS. BAKER: Certainly I can. I would like to
17 also leave it open to anyone else to chime in when I'm
18 finished, if that's all right.

19 CHAIRMAN NELSON: Yeah. I don't care who takes
20 the lead on it. I assumed it was going to be you, but
21 whoever wants to take the lead, go ahead.

22 MS. BAKER: Okay. Thank you, Mr. Chairman.

23 As you're aware, along with this Application
24 that was filed pursuant to Section 27, TransCanada filed
25 a so-called Tracking Table of Changes pertaining to the

1 Findings of Fact from the original Keystone decision.

2 We've already had a hearing on whether or not to
3 preclude the amendment of these findings. As Keystone
4 has stated, they have not asked to amend the findings,
5 and they have no intention of doing so. And as Staff
6 pointed out, the Commission has no jurisdiction to amend
7 the findings.

8 While the Commission denied the Motion to
9 preclude amendment of the findings, it did so on the
10 grounds no special relief has been requested, and it
11 found that it has no authority to amend the findings or
12 the Final Order.

13 Despite this ruling, Keystone submitted prefiled
14 direct testimony that pertains almost exclusively to
15 finding of fact and the Tracking Table of Changes.
16 Section 27 is the statute that governs this proceeding as
17 well as Keystone's burden of proof. That statute makes
18 no mention of Findings of Fact in the original order.
19 The burden of proof rests on Keystone to show that the
20 proposed project continues to meet the conditions on
21 which it was granted.

22 It is these conditions, not the findings, which
23 are at issue in the proceeding.

24 Keystone's Tracking Table of Changes is
25 irrelevant. Testimony directed at supporting Keystone's

1 proposed changes is irrelevant to the proceeding,
2 likewise, and must be excluded.

3 In its Motions in Limine as well as its
4 procedural Motion which are set for hearing today which
5 we have heard, Keystone stated its primary concern is
6 time.

7 Keystone has sought to curtail the procedure and
8 due process rights of the Intervenors in this proceeding
9 in the interest of saving time, while simultaneously
10 seeking to proffer testimony from all five of its direct
11 witnesses, testimony that's not even relevant to the
12 proceeding.

13 There's no need, and it's not even proper for
14 Keystone to take up the Commission's time and the time
15 allotted for the final hearing to present testimony and
16 evidence on its irrelevant Tracking Table of Changes.
17 The testimony regarding Keystone's Tracking Table of
18 Changes would not only be unnecessary and an improper use
19 of the evidentiary hearing, but it's, in fact, an attempt
20 to distract the Commission from the true purpose and
21 nature of this proceeding.

22 Testimony supporting the Tracking Table of
23 Changes, the Findings of Fact is not a substitute for
24 testimony supporting its with Permit conditions. The
25 Commission must stay on track and focus on Keystone's

1 burden of proof under the law rather than straying into
2 irrelevant issues as Keystone is trying to do.

3 We, therefore, urge the Commission to exclude
4 the evidence, testimony, and any other facts offered by
5 Keystone to support its Tracking Table of Changes.

6 Thank you.

7 CHAIRMAN NELSON: Are there any of the other
8 parties in the Joint Motion that have anything they'd
9 like to add?

10 Not hearing anything.

11 I will turn to Keystone.

12 MR. MOORE: Thank you, Commissioner Nelson.
13 First, I think that this is a variant of the Motion that
14 was previously made to preclude improper relief. I think
15 the argument is essentially the same as the one made
16 before and rejected by the Commission.

17 Secondly, I'd ask just a rhetorical question in
18 response which is what's the point of the hearing if we
19 can't discuss what conditions are today as opposed to
20 what they were in 2010?

21 The premise for the certification statute is
22 that something may have changed during the last four
23 years, and that the question that may arise because
24 something has changed is can the Applicant still continue
25 to meet the conditions.

1 So it would make no sense to exclude evidence of
2 changes in circumstances that have occurred over the last
3 four years, which is the point of the Motion.

4 And, lastly, as I think we argued in our written
5 submissions, the argument that is being made in the
6 Motion would make sense if our certification statute
7 required Keystone to prove that there had been no changes
8 with respect to any of the facts over the course of the
9 last four years, and that's not what our statute
10 requires.

11 The statute requires us to prove that despite
12 changes in circumstances that may have occurred, can we
13 continue to meet the conditions. And the evidence that
14 we have presented and presented at the hearing is
15 relevant to that question.

16 Thank you.

17 CHAIRMAN NELSON: Questions from -- or any
18 rebuttal. Ms. Baker?

19 MS. BAKER: I would just like to point out that
20 the Motion is directed at excluding testimony that
21 supports the Tracking Table of Changes, not testimony
22 that's actually relevant to the purpose of the proceeding
23 which is that Section 27.

24 Other than that, I would rest on previously
25 stated and/or written motions.

1 Thank you.

2 CHAIRMAN NELSON: Thank you. Questions from the
3 Commission?

4 Hearing none, is there a Motion?

5 I will move that the Commission deny the Joint
6 Motion in Limine to exclude evidence pertaining to
7 Keystone's proposed changes to Findings of Fact.

8 Discussion on the Motion.

9 I think, as already has been said here, we're
10 not dealing with this question of changing Findings of
11 Fact. That's not going to happen. And, secondly, I
12 certainly believe that the changes that are outlined in
13 the Tracking Table of Changes are absolutely relevant to
14 this proceeding.

15 If we are to determine whether or not Keystone
16 can meet the conditions, we've got to know what's
17 changed. If nothing has changed, then why are we here?

18 And so what I see is the company has stepped
19 forward and said these are things that have changed, and
20 then they've got to prove to us how they can continue to
21 meet the conditions based on those changes.

22 And so, in my mind, those are entirely relevant
23 to what we're going to be dealing with next week.

24 Additional discussion?

25 Hearing none, all those in favor of denying the

1 Joint Motion will say aye; those opposed, nay.

2 Commissioner Hanson.

3 COMMISSIONER HANSON: Aye.

4 CHAIRMAN NELSON: Commissioner Fiegen.

5 COMMISSIONER FIEGEN: Fiegen votes aye.

6 CHAIRMAN NELSON: Nelson votes aye. Motion
7 carries.

8 Okay. Now we're going to move over to the
9 addendum agenda. And we have a Motion from COUP to
10 reconsider a particular discussion. And, Mr. Gough, I'm
11 just going to let you take it away on that one.

12 MR. GOUGH: Thank you, sir. Thank you. Can you
13 hear me clearly enough?

14 CHAIRMAN NELSON: Just a little muffled, but go
15 ahead and we'll let you know if it isn't clear.

16 MR. GOUGH: I'm sorry. I have a very raspy
17 throat. I appreciate the discussion we've just had.
18 Things have changed over the last four years, including
19 our understanding of what adverse weather we may be
20 facing over the course of the lifetime of this project.

21 And, as I understand the orders that were issued
22 with regard to precluding any testimony from Dr. Hansen
23 or Dr. Oglesby or Dr. Stilesen [phonetic], in fact,
24 preclude them from appearing.

25 And I just want to make sure that if there are

1 questions that came up with regard to understandings, our
2 understandings of adverse weather, what understandings
3 have gone into the plan that is required for Keystone to
4 put together. It's called an adverse weather plan. It's
5 stated there in finding number 16G. Yet I've never -- I
6 have not been able to find any copy of such a plan or the
7 outline of what the leaps and bounds, parameters, any
8 discussion of what they mean by adverse weather.

9 And I think that it the nation's understanding
10 of adverse weather with record breaking changes occurring
11 certainly in the last four years have been tremendous.
12 They've been devastating as well.

13 And I want to make sure to see if your order
14 precludes any testimony at all with regard to how
15 adequate their adverse weather plan may be.

16 We can cite a condition number 25, if you want a
17 particular condition to tie this to. I've said in my
18 Motion, tried to explain that while climate is a great
19 distraction, it is only going to present itself in
20 adverse weather conditions, in adverse weather events.
21 And I would like the Commission to reconsider their
22 preclusion of any witnesses or any discussion of weather
23 during this hearing.

24 CHAIRMAN NELSON: Thank you. Keystone.

25 MR. MOORE: As I understand the basis for the

1 argument in supporting the Motion to Reconsider,
2 Mr. Gough is suggesting that Dr. Hansen and Dr. Oglesby's
3 previously disclosed testimony is relevant to Keystone's
4 obligation under condition 25 and its obligation to
5 submit an adverse weather plan.

6 And as I read the testimony, they previously
7 submitted that is clearly not what it is directed to. It
8 was directed to the issue of climate change, which is an
9 entirely separate issue from the adverse weather plan
10 required under condition 25.

11 So I don't think that that's a legitimate basis
12 for the Commission to reconsider its previous ruling and
13 respectfully request that the Motion to reconsider be
14 denied for that reason.

15 MR. GOUGH: With all due respect, I don't see
16 where the expertise of counsel in determining and
17 distinguishing between adverse weather happening over a
18 series of seasons, days, years, is indistinguishable from
19 climate change.

20 Counsel is not an expert in either of those
21 fields. We're proposing that on behalf of the Tribe,
22 member Tribes in the InterTribal Council On Utility
23 Policy, those memberships and those people in
24 South Dakota have a right to have their PUC be informed
25 about the changes in weather and particularly those

1 changes in adverse weather, that Keystone is supposed to
2 have a plan for which we cannot find.

3 If they've got a plan, and they can explain the
4 definitions of adverse weather that they're looking at,
5 and if those definitions are based on only past
6 experience, then I think our climate witnesses are well
7 positioned to discuss past weather conditions going back
8 decades, centuries, if need be.

9 So on that basis of background, I think the
10 Motion to Reconsider should be approved, and our
11 witnesses not be precluded from bringing relevant
12 evidence to this question.

13 CHAIRMAN NELSON: Thank you. Questions from the
14 Commission?

15 I've got a question for Mr. Gough.

16 In either the testimony from Dr. Hansen or
17 Dr. Oglesby, can you show me where they are referring to
18 condition 25? I need to tie this together.

19 MR. GOUGH: The adverse weather plan that shows
20 up in finding 16 and in condition 25 are not directly
21 referred to in either of those testimonies which have
22 been prepared prior to this Motion for Reconsideration.

23 And the fact that we could not find any
24 references anywhere else in the documentation, limited
25 documentation that we could have access to from Keystone

1 to provide this clarification, brings us to the reason
2 they're there for rebuttal.

3 Should there be discussion of that plan and that
4 condition during the proceeding, we would like the right
5 to have them address any of those issues that come up on
6 either direct or cross-examination.

7 CHAIRMAN NELSON: Okay. Well, I didn't think I
8 could find condition 25 there, but I just wanted to make
9 sure.

10 Additional Commissioner questions?

11 Seeing none, is there a Motion?

12 I will move that the Commission deny COUP's
13 Motion for Reconsideration.

14 Discussion on the Motion.

15 As I always say, I take Motions For
16 Reconsideration very, very seriously because there are
17 times when, in the heat of trying to make these
18 decisions, we may make a mistake. And so I never want to
19 deny any party the ability to say, wait a minute, take
20 another look at it.

21 In this case that is what we have done, I have
22 done. But, as I think the discussion has shown us, the
23 testimony that was offered does not address condition 25.
24 It's simply not there.

25 And while Mr. Gough is trying to make some

1 connection, it's simply not there. And so I don't see
2 any need to reconsider this.

3 MR. GOUGH: Sir, if I may respond to that?

4 CHAIRMAN NELSON: Yeah. Very briefly.

5 MR. GOUGH: Briefly. We did ask that you
6 consider that testimony more of foundational, expert
7 witness foundation on their expertise in these areas
8 through the Application, which I am recommending be
9 allowed as other witnesses have been allowed to present
10 relevant testimony, where that may come up during the
11 course of rebuttal and during cross-examination.

12 CHAIRMAN NELSON: Okay. And I appreciate that
13 last segment that you've said. Because as we have
14 already discussed here today, if there are issues that
15 come up on direct testimony next week that haven't been
16 covered, they are open for a rebuttal witness.

17 Mr. Smith, have I stated that accurate?

18 MR. SMITH: I think that's what we're saying is
19 we can never completely predict how things are going to
20 go. You know, it -- you know.

21 MR. GOUGH: Then I would ask for the
22 clarification. Because it appears the way the Order
23 reads we are precluded from providing any testimony.

24 MR. SMITH: Yeah. Except we had an earlier more
25 general order that provided some level of flexibility to

1 that, if circumstances change, you know, during the
2 hearing process.

3 Again, though, I think, you know, relevancy in
4 this thing is going to have some -- it's going to have
5 connection to conditions because that's what -- what's at
6 issue here.

7 And I think what the chairman's -- his Motion is
8 based on the fact that all we see in the actual filed
9 testimony is stuff dealing with climate change, not
10 dealing with an appropriate adverse weather construction
11 plan, which is a completely different kettle of fish.

12 But I'm not saying, you know, you couldn't
13 have -- I guess if you want to spend the money to have
14 Dr. Hansen and Mr. Oglesby here in case they want to talk
15 about an appropriate adverse weather plan, you could do
16 that.

17 MR. GOUGH: Sir, I'm merely saying that it is
18 hard to tailor rebuttal testimony to what may be an
19 adverse weather plan that we have never seen. We would
20 like to see that plan. We would like to see the leaps
21 and bounds of it, the definitions that go with that, then
22 we can afford you proper rebuttal. But we've never
23 gotten that.

24 MR. SMITH: In the plan under the condition --
25 the plan is to be finished two months prior to the

1 commencement of production, and we're not quite there
2 yet.

3 MR. GOUGH: But what are the leaps and bounds be
4 outlined that the Commission is holding for the
5 development of that plan? That's what we're wondering
6 about.

7 CHAIRMAN NELSON: Okay. Well, Mr. Smith's last
8 statement we're not quite there yet is probably the
9 understatement of the day.

10 Further discussion by the Commissioners on my
11 Motion?

12 Seeing none, all those in favor of denying the
13 Motion for Reconsideration will say aye; those opposed,
14 nay.

15 Commissioner Hanson.

16 COMMISSIONER HANSON: Aye.

17 CHAIRMAN NELSON: Commissioner Fiegen.

18 COMMISSIONER FIEGEN: Fiegen votes aye.

19 CHAIRMAN NELSON: Nelson votes aye. The Motion
20 is denied.

21 The most patient person in the proceeding today,
22 Ms. Steskal.

23 We now have a Motion for time certain for
24 witness testimony.

25 First of all, are you still with us?

1 MS. STESKAL: Yes, I am. I'm sorry. I had it
2 on mute.

3 CHAIRMAN NELSON: We all were holding our breath
4 here. So go ahead.

5 MS. STESKAL: Yes. I am requesting a Motion to
6 be able to give my testimony on July 29 or 30. And I
7 will be unable to attend any of the other hearing dates
8 due to personal and work schedule.

9 Thank you.

10 CHAIRMAN NELSON: Thank you. I'm just going to
11 ask, is there any opposition?

12 MR. MOORE: No.

13 CHAIRMAN NELSON: Keystone has said no. Nobody
14 else is expressing any opposition.

15 MR. RAPPOLD: None from Rosebud.

16 CHAIRMAN NELSON: Okay. Is there a Motion?

17 I will move that we grant Diana Steskal's Motion
18 for time certain for witness testimony.

19 Discussion on the Motion.

20 Seeing none, all those in favor will vote aye;
21 those opposed, nay.

22 Commissioner Hanson.

23 COMMISSIONER HANSON: Aye.

24 CHAIRMAN NELSON: Commissioner Fiegen.

25 COMMISSIONER FIEGEN: Fiegen votes aye.

1 CHAIRMAN NELSON: Nelson votes aye. The Motion
2 carries.

3 Now we're going to circle around to No. 9, which
4 we had passed over earlier. That is, Shall the
5 Commission grant Keystone's Motion in Limine to preclude
6 testimony of Dr. Hansen and Dr. Oglesby.

7 We've had a Keystone argument on that, but we've
8 also had other discussion.

9 So anything that you want to add at this point
10 after our discussion?

11 MR. MOORE: Thank you, Commissioner. I have
12 nothing else to add. My understanding is that since the
13 Motion to Reconsider was denied, that the Commission's
14 previous order with respect to the proposed testimony of
15 Dr. Hansen and Dr. Oglesby is still in effect and,
16 therefore, the Motion should be granted.

17 Thank you.

18 CHAIRMAN NELSON: Thank you. And Mr. Gough.

19 MR. GOUGH: If I understand that we have the
20 opportunity to present should that testimony become
21 relevant, that we are not totally precluded from this
22 process.

23 CHAIRMAN NELSON: Okay. Here's what I'm going
24 to do. I'm going to enunciate what my understanding is.
25 And then I'm going to then turn to Mr. Smith to make sure

1 I've stated this accurately.

2 That if a topic is broached through witness
3 testimony that has not been previously disclosed, that
4 any party would have the right to present a rebuttal
5 witness on that topic only, provided that topic applies
6 to one of the Permit conditions.

7 Mr. Smith, is that an accurate recitation?

8 MR. SMITH: Again, I'm -- what? Yes. I'm over
9 65 years old, so I can't remember anything. But I think
10 that's -- I think that's what we said. We had sort of an
11 exception like that in the earlier orders.

12 CHAIRMAN NELSON: Well, then I'm going to look
13 at some of the younger attorneys in the room, and that
14 might be all of them. Is there anything in what I have
15 recited that is not of your understanding? Because I
16 think this is pretty crucial that we get this laid out
17 before we go into next week.

18 And I'm not seeing anybody disagreeing with that
19 understanding. So, Mr. Gough, does that help you out?

20 MR. RAPPOLD: Can you hear me, Mr. Nelson?

21 CHAIRMAN NELSON: Yeah. Who is this?

22 MR. RAPPOLD: This is Matt Rappold. Briefly, it
23 seems like that's my understanding what you said as well.
24 But it would also seem to be appropriate at this time
25 that if there is new information that arises at the trial

1 that should be precluded or it should not happen because
2 presumably that information would not have been disclosed
3 through the discovery process and parties would be
4 restricted from using any of that evidence or testimony
5 at the trial. I just wanted to throw that in for the
6 record.

7 CHAIRMAN NELSON: Mr. Rappold, your point is
8 very well taken, and we are all understanding of that.

9 MR. RAPPOLD: Thank you.

10 CHAIRMAN NELSON: Okay. I'm going to go back to
11 Mr. Gough. Anything additional?

12 MR. GOUGH: Thank you both for that
13 clarification. Thank you.

14 CHAIRMAN NELSON: With that, Commissioner
15 questions?

16 Seeing none, is there a Motion?

17 Commissioner Fiegen.

18 COMMISSIONER FIEGEN: Mr. Chairman, move that
19 the Commission grant Keystone's Motion in Limine to
20 preclude testimony of Dr. Hansen and Dr. Oglesby.

21 CHAIRMAN NELSON: Discussion on the Motion.

22 Hearing none, all those in favor will vote aye;
23 those opposed, nay.

24 Commissioner Hanson.

25 COMMISSIONER HANSON: Aye.

1 CHAIRMAN NELSON: Commissioner Fiegen.

2 COMMISSIONER FIEGEN: Fiegen votes aye.

3 CHAIRMAN NELSON: Nelson votes aye. The Motion
4 carries.

5 Well, we will all be back here first thing
6 Monday morning for seven days of hearing on this
7 particular topic, and then the Commission also has a
8 regular scheduled meeting at a different time. Our next
9 meeting will be August 5 at 1:30 p.m. in this room.

10 (The proceeding is concluded at 1:32 p.m.)

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1 STATE OF SOUTH DAKOTA)

2 :SS

CERTIFICATE

3 COUNTY OF SULLY)

4

5 I, CHERI MCCOMSEY WITTNER, 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 21st day of
11 July, 2015, and that the attached is a true and correct
12 transcription of the proceedings so taken.

13 Dated at Onida, South Dakota this 8th day of
14 September, 2015.

15

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18

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

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