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THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE PETITION  
OF TRANSCANADA KEYSTONE PIPELINE, HP14-001

LP FOR ORDER ACCEPTING CERTIFICATION  
OF PERMIT ISSUED IN DOCKET HP09-001  
TO CONSTRUCT THE KEYSTONE XL  
PIPELINE

ORIGINAL

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Transcript of Recorded Proceedings  
July 23, 2015

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BEFORE THE PUBLIC UTILITIES COMMISSION

CHRIS NELSON, CHAIRMAN  
GARY HANSON, COMMISSIONER (telephonically)

COMMISSION STAFF  
  
John Smith  
Kristen Edwards  
Katlyn Gustafson

Reported By Cheri McComsey Wittler, RPR, CRR

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TRANSCRIPT OF RECORDED PROCEEDINGS, held in the above-entitled matter, at the South Dakota State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota, on the 23rd day of July, 2015.

1           CHAIRMAN NELSON: It's July 23, 9:00 a.m. in the  
2 morning. This is Chairman Nelson in the hearing room.  
3 Commissioner Gary Hanson is with us on the telephone.  
4 Commissioner Fiegen will not be participating today, as  
5 she is undergoing medical treatment today.

6           The other housekeeping item, because of the late  
7 nature in scheduling this hearing we did not secure a  
8 court reporter, and so we are actually recording this in  
9 two different fashions, and it will be transcribed by our  
10 court reporter, Cheri, at a later time. But that makes  
11 it very, very important that we all identify ourselves at  
12 the beginning of speaking so that Cheri can do an  
13 accurate transcript.

14           With that, we are dealing with Docket HP14-001,  
15 In the Matter of the Petition of TransCanada Keystone  
16 Pipeline for Order Accepting Certification of Permit  
17 Issued in Docket HP09-001 to Construct the Keystone XL  
18 Pipeline.

19           The question, shall the Commission grant a  
20 motion to reconsider that has been filed by DRA? And  
21 shall the Commission grant the motion for time certain?

22           And with that, Mr. Martinez, have you joined us?  
23 Or, Bruce, are you taking this?

24           MR. ELLISON: I am taking this for the question  
25 of the motion of reconsideration.

1 MR. MARTINEZ: And I join as well. This is  
2 Robin Martinez.

3 CHAIRMAN NELSON: Excellent. Mr. Martinez, if  
4 ~~you would just identify yourself again and go ahead.~~

5 MR. MARTINEZ: Okay. Robin Martinez.  
6 Mr. Ellison is going to be taking this with respect to  
7 the motion today.

8 CHAIRMAN NELSON: I'm sorry. I misunderstood  
9 that. So Mr. Ellison, go ahead.

10 MR. ELLISON: Thank you, sir.

11 The Commission's ruling excluding a number of  
12 exhibits that we had listed and disclosed, I guess I was  
13 troubled by the extreme sanction of the exclusion. And I  
14 went and I did some further research and prepared the  
15 memorandum that I did asking for reconsideration.

16 And the main basis is that I could not find any  
17 South Dakota Supreme Court cases that came anywhere close  
18 to the factual circumstances upon which the Commission  
19 bases the decision of exclusion.

20 And, particularly, you know, as I mentioned in  
21 my brief, no South Dakota Supreme Court decision has ever  
22 affirmed excluding a party's documentary evidence  
23 disclosed three weeks prior to a trial or final hearing.  
24 As well as the fact that the Supreme Court has never  
25 found such a sanction to be appropriate where most of the

1 documents, a good probably 85, 90 percent of the  
2 documents that were excluded by the Commission, were  
3 really already in the possession of TransCanada, either  
4 created by them, sent to them, interacting  
5 correspondence.

6 And, in addition, you know, some of the  
7 documents include communications between TransCanada and  
8 the DENR, South Dakota DENR. And one of the Staff  
9 witnesses -- for example, Brian Wilson was one of the  
10 people that there was some correspondence involved.

11 The rest of the documents were -- or many of  
12 the documents had to do with the expected testimony of  
13 Evan Vokes. And he referenced generally these documents  
14 in his prior testimony.

15 And I guess one of the things that I would say  
16 about this is it would, you know, kind of strain the --  
17 you know, the credibility of TransCanada if they were to  
18 seriously assert that as soon as Mr. Vokes has been very  
19 outspoken about TransCanada -- if they did not  
20 immediately as part of their workup to question  
21 Mr. Vokes, cross-examine Mr. Vokes, that they wouldn't be  
22 looking at all of these same documents.

23 They would look at e-mail correspondence. They  
24 would look at submissions of Mr. Vokes before the  
25 National (Inaudible) Environmental Board. They would

1 look at really anything as any attorney preparing to  
2 cross-examine a witness would do and e-mail the  
3 documents.

4 So it's a little bit difficult for me to  
5 ~~understand and comport~~ that with South Dakota Law. One  
6 of the other things I would just mention too is, for  
7 example, if we look at excluded Exhibits 29 through 37,  
8 these are either TransCanada documents or Mr. Stansbury's  
9 analysis, risk analysis. To claim that there is no  
10 notice here is hard to understand because that was  
11 attached as an exhibit to the opening testimony of  
12 Dr. Arden Davis, one of our experts, our geologist.

13 So I don't know how surprise can be claimed  
14 there because that was disclosed in the initial testimony  
15 some time ago. That's No. 32, Exhibit 32.

16 Exhibits 33 and 34, for example, are the  
17 Exponent analysis of risk assessment and Battelle's  
18 analysis of independent engineering assessment. They  
19 have both been referenced in documents and are quoted in  
20 documents that TransCanada submitted in its Application.

21 So it's a little hard then to, as I said,  
22 understand the difficulties with TransCanada's claim that  
23 they couldn't be prepared.

24 Items 38 through 43 are particularly TransCanada  
25 documents related to the Emergency Response Plan.

1 Surprise is unbelievable to claim. We have a number of  
2 documents and communications between Mr. Walsh from DENR  
3 and various TransCanada officials that takes us through  
4 number Exhibit 61.

5 We then have DENR spill data relating to spills  
6 by TransCanada in 62 through 65. We then have a series  
7 of documents, 67 on, that deal with issues that we feel  
8 are critical to be presenting to this Commission to hear  
9 having to do with issues that have arisen in the prior  
10 construction of TransCanada's Keystone Pipeline and  
11 related pipelines.

12 And that, again, includes correspondence and  
13 other documents that were submitted by Mr. Vokes, which  
14 takes us to through basically 128.

15 And let's see. The next part that we have has  
16 to do with the Sibson photos. There are 12 photographs.  
17 There is a lot of interaction between the Sibsons and  
18 TransCanada over the last number of years as to  
19 the (Inaudible) of TransCanada to properly reclaim the  
20 land after installing the Keystone I Pipeline.

21 Three weeks before trial it's hard to understand  
22 why looking at 12 photographs, some of which are  
23 duplicative, or looking at a two-minute-34-second  
24 video -- so it might take a total of 10 minutes if one  
25 takes a lot of time looking at the photographs. And the

1 video, by the way, loops and actually just shows the same  
2 area over and over again.

3 There's no question TransCanada knows about this  
4 area. They've been talking to the Sibsons about it for  
5 quite some time. So, again, to claim surprise or

6 inability to prepare is a little hard to understand.

7 If one then goes to 1058 and other subsequent  
8 exhibits, either their U.S. Geological Survey reports or  
9 consulting reports particularly about the pipeline or --  
10 there was no objection to the Final Environmental Impact  
11 Statement -- or Final Supplemental Impact Statement  
12 issued in 2014. But somehow the 2011 version was  
13 considered to be something that TransCanada would be  
14 surprised about.

15 This board can certainly -- this Commission can  
16 certainly take judicial notice of any other agency's  
17 findings or action. That's also -- that's 1052.

18 1051 has to do with the geological maps of  
19 South Dakota. Professor Davis, as far as his initial  
20 statements, his initial testimony, included a small  
21 portion of this map, cited it. It doesn't -- so for  
22 TransCanada to claim that what a big surprise, we're just  
23 completely unfamiliar with this geological map of  
24 South Dakota, again, strange credulity.

25 And what I'd really have folks to do is -- I

1 mean, I think this gives us a major, major point for  
2 potential reversal of any decision by this board -- or  
3 this Commission. I apologize. And I wanted to give the  
4 ~~Commission one final opportunity to really correct it~~

5 And that's pretty much of what I would have to say in  
6 terms of a record.

7           Nothing here is a surprise. Nothing here would  
8 make it difficult for TransCanada to prepare. And all  
9 the rest of the documents that were not opposed they gave  
10 us in discovery.

11           So, with that, I guess I'm finished in my  
12 presentation, and I thank the Commission for allowing for  
13 an opportunity to make an oral argument on this  
14 particular matter. But it is very serious. This is  
15 important evidence for us. It tends to prove that  
16 TransCanada is unwilling even if it may be capable -- if  
17 it is capable -- and (Inaudible) of actually complying  
18 with any of the conditions that have been imposed by this  
19 board and now PHMSA and other agencies. So, again, I  
20 thank the Commission at this point.

21           CHAIRMAN NELSON: Mr. Ellison, thank you. I do  
22 have some questions, but I'm going to go to TransCanada,  
23 let them make their argument, and then we'll go into  
24 questions.

25           TransCanada, identify and go ahead.

1 MR. TAYLOR: William Taylor speaking for  
2 TransCanada. Thank you, Commissioners.

3 Mr. Ellison, who is a fine lawyer, skips over  
4 one very salient component of this discussion. First,

5 TransCanada requested on December 18 of 2014 that Dakota  
6 Rural Action reveal the documents that it intended to  
7 offer at trial.

8 On February 6 when Dakota Rural Action responded  
9 they said, we don't know yet. On March 10 Dakota Rural  
10 Action supplemented its Answer to TransCanada's request  
11 that all documents to be revealed at trial be produced  
12 and produced a body of documents, about 10 documents  
13 encompassing about 500 pages. That is the last we heard  
14 from Dakota Rural Action until the events of the 10th of  
15 July, followed by the posting of documents to a website  
16 three or so days later.

17 Dakota Rural Action did not seasonably  
18 supplement its answers to our Interrogatories and  
19 Requests for Production of Documents. The Supreme Court  
20 cases, Mr. Ellison said there are no Supreme Court cases  
21 with this significant a sanction. That's because of what  
22 the statutes say.

23 15-6-26E, as in echo, says in Subpart 1, "A  
24 party is under a duty to supplement at appropriate  
25 intervals the party's response to a discovery request."

1 "A party is under a duty to supplement at  
2 appropriate intervals the party's response to discovery  
3 requests."

4 15-6-37C, as in Charlie, Subpart 1 says, "A

5 party that without substantial justification fails to  
6 disclose information required by" the statute that I just  
7 read to you "is not permitted to use the information as  
8 evidence at a trial, at a hearing, or on a motion."

9 "A party that without substantial justification  
10 fails to disclose information as required by the prior  
11 statute is not permitted to use information as evidence  
12 at trial."

13 The statutes are very clear. You must  
14 supplement your discovery responses, and if you fail to  
15 do so and attempt to use the information at trial, you  
16 must then show substantial justification for the failure  
17 to disclose that information.

18 This motion need go no further than that point.  
19 DRA in its suggestions to the Commission filed before the  
20 last hearing gave no explanation of why it failed to  
21 reveal those documents at any point in these proceedings.  
22 And Mr. Ellison's -- DRA's supplemental briefing filed  
23 Monday or -- Friday or Monday or whatever -- Monday, I  
24 guess -- there is also no explanation for why DRA failed  
25 to make a timely disclosure of those documents or to

1 supplement its discovery responses.

2 In motion practice, facts and factual  
3 circumstances are explained by affidavits. It is the  
4 obligation of DRA to file an Affidavit under oath that  
5 explains their substantial justification for failure to  
6 disclose information. As I said, on those grounds alone,  
7 the motion should fail.

8 Second point: DRA makes the argument that many  
9 of these documents are documents that TransCanada either  
10 may have had in its possession, played a role in  
11 producing, or was aware of. And the contention is that  
12 because of that, there didn't need to be seasonable and  
13 timely production.

14 Well, there's more to that story. We have been  
15 busy preparing our case for presentation to this  
16 Commission since December. The discovery process is  
17 designed to bring out and bring forward the information  
18 that we -- that any party expects any other party to use  
19 in the case so that you can begin to design and tailor  
20 your offense or your defense accordingly. That's why we  
21 submitted a request for production of all documents to be  
22 offered into evidence at trial on December 18.

23 Since March 10 when DRA supplemented its record,  
24 its document request, and said here's the stuff we're  
25 going to offer at trial, we have been operating on the

1 premise that that is what they're going to offer at  
2 trial. Now maybe in April when we had extensive  
3 discovery hearings, had they produced some of these  
4 ~~documents, we'd feel different. Maybe in May, had they~~  
5 produced some of these documents while we were preparing  
6 our witnesses, we would feel differently. Maybe in June  
7 when we had four or five motion hearings they had  
8 produced these documents or even told us of their  
9 intention to use them, we would feel differently.

10 But, instead, they filed on the day that exhibit  
11 lists were required by your Order to be filed a list of  
12 1,073 files that contain many, many more documents than  
13 that. You know, filing of exhibit lists is a ministerial  
14 process. It's not a strategic or trial preparation  
15 process.

16 It took us about a half an hour to prepare our  
17 exhibit list because we had disclosed all of our exhibits  
18 either in conjunction with our witness's prefiled  
19 testimony filed in April or we had done it in response to  
20 discovery requests or in supplements to responses to  
21 discovery requests. So it didn't take us very long to do  
22 it.

23 We know, based on a meet and confer that I  
24 conducted with Mr. Martinez in advance of the last  
25 hearing, that they filed Freedom of Information Act

1 requests with PHMSA and with the State version of that  
2 with the DENR. There's no showing as to when these  
3 documents came into their hands.

4 And then let's finish up by talking about

5 Evan Vokes and the documents that he claims support his  
6 testimony. Counsel for DRA suggests that a well prepared  
7 TransCanada lawyer would have examined, found,  
8 discovered, and identified these documents a long time  
9 ago in preparation for cross-examination of Mr. Vokes.

10 Well, the plain facts are we are entitled to  
11 rely on Mr. Vokes's prefiled testimony for preparation  
12 for cross. These documents were not revealed in his  
13 prefiled testimony, just as they were not revealed in  
14 response to our discovery requests. DRA had every  
15 opportunity to presume Mr. Vokes -- this isn't stuff that  
16 Mr. Vokes ferreted out of TransCanada in the last day. I  
17 think his tenure as a TransCanada employee ended more  
18 than a year ago. Maybe several years ago. They've had  
19 ample opportunity to produce all of this material so as  
20 to allow us to properly prepare for trial.

21 This is nothing more than an effort to sandbag  
22 us, to produce this long list on the day that exhibit  
23 lists were filed, and then a couple of days later to  
24 finally produce the documents.

25 We think that your actions last Friday are

1 completely consistent with 15-6-37C that says a party  
2 that without substantial justification fails to disclose  
3 information is not permitted to use the documents as  
4 evidence at trial.

5 There's no question the documents were not  
6 produced. There's no question that the documents were  
7 not disclosed, that answers to discovery requests were  
8 not seasonably supplemented, and there is no question  
9 that the penalty for that is set forth in 15-6-37C. And  
10 the penalty is either you show substantial justification  
11 or you don't get to use the evidence.

12 We'd stand on our previous arguments, urge the  
13 board, the Commission, to deny the Motion for  
14 Reconsideration.

15 Thank you.

16 CHAIRMAN NELSON: Thank you.

17 Mr. Ellison, brief rebuttal.

18 MR. ELLISON: Thank you.

19 You know, I thought it was to some extent made  
20 clear last Friday, but let me try and clarify it a little  
21 bit more in terms of the question on substantial  
22 justification.

23 We were provided in discovery I think some  
24 64 gigs of material, and we also had independently  
25 obtained documentation. Mr. Martinez and I both have

1 busy practices. We did the best we could. The only  
2 other alternative if we would have taken Mr. Taylor's  
3 suggestion would have been to say, all right, we're  
4 trying to get through these documents, thousands and  
5 thousands and thousands of documents, and trying to sort  
6 out which ones might have relevance to these proceedings.  
7 And it took us until early July to be able to really comb  
8 that down.

9 Our only other alternative, which I'm sure we  
10 would have had objections to, would have been to just do  
11 a -- give the 64 gigs of documents back to TransCanada  
12 and say we may use any part of this, to just give a dump  
13 of any other documents that we had gotten from Mr. Vokes  
14 or from other sources and just say we may use any of  
15 these.

16 And then TransCanada would have had a -- be  
17 objecting to the fact that, well, we weren't more  
18 specific. We did the best we could within the time frame  
19 of trying to get it done before the exhibit lists were  
20 due, to sort out what we thought was relevant, and that  
21 we have done.

22 What Mr. Taylor then, I would submit, does is he  
23 says just look at the statutes. You also have to look at  
24 how the Supreme Court has interpreted those statutes.

25 And one of the things they've stated very

1 clearly as we have cited in our brief, the Schrader case,  
2 "the severity of sanction must be tempered with  
3 consideration of equity. Less drastic alternatives  
4 should be employed before sanctions are imposed which  
5 hinder a party's day in court and thus defeat the very  
6 objective of the litigation, namely to seek the truth  
7 from those who have knowledge of the facts."

8 Well, the Supreme Court has looked at various  
9 situations. Had we put Mr. Vokes on the stand and  
10 suddenly come up with this document and said, well, we  
11 want to use them as part of his documentary support of  
12 his testimony, TransCanada would have a good argument  
13 under South Dakota Supreme Court decisions to say, sorry,  
14 you're too late.

15 If we had done this first disclosure not three  
16 weeks before but three days before trial, under the  
17 South Dakota Supreme Court rulings, TransCanada might  
18 have an argument.

19 But all we could do was instead of just giving  
20 files -- our files are already problems. How do you put  
21 this on the service for the PUC. Imagine if instead of  
22 the thousand or so documents we, in fact, put tens of  
23 thousands of documents.

24 So we have done the best that we can with our  
25 limited resources to get through these documents, try and

1 make it easier for TransCanada and the Commission to have  
2 a much smaller, more relevant group of exhibits than we  
3 could have had at an earlier time.

4 And it simply occurred that the best that we  
5 could do was to give this notice three weeks beforehand.  
6 But, again, they must go back to the documents. For  
7 Mr. Taylor to argue that -- again, this kind of surprise  
8 because of Mr. Vokes's documents, TransCanada's been  
9 actively resisting, opposing the complaints and other  
10 filings of Mr. Vokes in various formal proceedings in  
11 Canada now for quite some time.

12 And it is my understanding that these documents  
13 were documents that were submitted into those  
14 proceedings. So it's a little hard to understand about  
15 that.

16 Mr. Taylor claims surprise. Mr. Taylor ignores,  
17 for example, the Stansbury report, unless he's conceding,  
18 in fact, that was more timely provided because it was  
19 available at that time or the geological map.

20 Again, my effort to bring this Motion for  
21 ~~Reconsideration was because I see this as a huge~~  
22 potentially reversible issue. And I wanted to, out of  
23 fairness, give this Commission a chance to correct that.  
24 And so that is our basis. We feel we do have  
25 substantial justification. I notice that Mr. Taylor does

1 not argue that same -- you know, that we intentionally  
2 were trying to withhold these documents for the last  
3 minute. We weren't.

4 We were just trying to get through them and try  
5 and figure out what we would -- what we -- would be  
6 appropriate to present to this Commission. Otherwise,  
7 maybe we should have like two or three months for these  
8 proceedings and we'll just go through every document. I  
9 mean, that would have been the alternative, and we didn't  
10 think that would be the right thing to do. That's  
11 essentially what I have.

12 Mr. Martinez, do you have anything else to add?

13 MR. MARTINEZ: No, I don't.

14 CHAIRMAN NELSON: Okay. This is Chairman  
15 Nelson. I'm going to close it to Commissioner questions,  
16 and I'm going to begin.

17 Several questions for Mr. Ellison.

18 MR. ELLISON: Yes, sir.

19 CHAIRMAN NELSON: I appreciate the fact that you  
20 went through some of the individual documents again with  
21 us today and explained why you didn't think TransCanada  
22 would be surprised that you would be utilizing those.

23 I didn't hear you specifically address 1059 and  
24 1060. Would you do that.

25 MR. ELLISON: Let me look at those first, sir.

1 1059 and 1060.

2 1059 was a report that was submitted as an  
3 exhibit in the 2007 Keystone I Pipeline hearing. The  
4 second -- the next document is a treatise, I believe, and  
5 you know, actually that one Mr. Martinez can respond to  
6 that one a little bit better. We were trying to throw  
7 in -- as potential exhibits some of the treatises or  
8 published works that would be supportive as some of our  
9 positions.

10 I can address 1059. I don't know that I can  
11 address 1060.

12 CHAIRMAN NELSON: Thank you.

13 MR. MARTINEZ: Mr. Chairman, this is Robin  
14 Martinez. I can address No. 1060.

15 CHAIRMAN NELSON: Please.

16 MR. MARTINEZ: That particular exhibit was  
17 actually referenced in the prefiled testimony of  
18 Dr. Arden Davis where he listed and cited the sources  
19 that he relied upon in terms of developing his testimony.  
20 So that was actually previously disclosed.

21 That's along with the rest of sort of the  
22 academic treatises that followed as well.

23 CHAIRMAN NELSON: Thank you. I appreciate that.  
24 Back to Mr. Ellison.

25 MR. ELLISON: Yes, sir.

1           CHAIRMAN NELSON: You mentioned the 64 gigs of  
2 data that TransCanada provided to you. Of the documents  
3 that we excluded last week, which of those documents were  
4 included in that 64 gigs of data?

5           MR. ELLISON: I am not sure that any of them  
6 were.

7           CHAIRMAN NELSON: So that 64 gigs of data  
8 argument is really irrelevant as it relates to what we're  
9 dealing with today; is that correct?

10          MR. ELLISON: No. It's not irrelevant in the  
11 sense that it's still part of the huge volume of material  
12 that we had to get through. And until we got through  
13 everything, we couldn't tell what really would be  
14 important.

15                 And so it is relevant in that sense because it  
16 goes into the effort that we had to take in order to try  
17 and substantially narrow down our exhibit list.

18          CHAIRMAN NELSON: The last question that I've  
19 got, and I know you have tried to do this today, but I'm  
20 going to ask it very, very plainly, very clearly. Going  
21 back to SDCL 15-6-37C, what is your substantial

22 justification for failure to timely disclose these  
23 documents?

24                 MR. ELLISON: Our substantial justification is  
25 the amount of time it took for two people to get through

1 all of these documents and to scramble to do so, to try  
2 and meet the exhibit list deadline that we did meet. And  
3 so there's been at least three weeks of notice. But  
4 that's -- it simply took an inordinate amount of time to  
5 get this.

6 And one of the other things if I may just  
7 mention too, many of these documents like e-mails and  
8 other things these were documents that we had -- and  
9 communications between TransCanada and various agencies.  
10 These are part of our discovery requests that TransCanada  
11 never complied with. And that's an important factor, we  
12 would submit, to be considered as part of the equation  
13 here.

14 But we did the best -- literally the best that  
15 we could. And I -- and I would tell the Commission I was  
16 in trial the first half of July so a lot of this ends up  
17 on Mr. Martinez who by that point, and I know from  
18 talking with him and he can verify, he spent -- did a  
19 number of 24-hour days to try and finish up the -- what  
20 was left of trying to narrow this list down.

21 ~~We have done everything that we could to narrow~~  
22 this down by July -- early July that we humanly could  
23 possibly do with the resources that we had. There was no  
24 willful hiding of anything. There was no bad faith. And  
25 under those circumstances, you know, we feel that

1 TransCanada is -- has led the Commission in the wrong  
2 direction by trying to suggest just look at the statutes.

3 Look at the Supreme Court decisions interpreting  
4 the statutes. They give a very different picture as to  
5 how these statutes are to be applied.

6 And I want to give the Commission a chance to  
7 rectify this. Thank you, sir.

8 CHAIRMAN NELSON: Thank you. That's all the  
9 questions I've got.

10 Commissioner Hanson, any questions?

11 Commissioner Hanson, we're not hearing you.

12 Commissioner Hanson.

13 Okay. We're going to be -- we're going to be  
14 just at ease for a moment here until we get Commissioner  
15 Hanson on the line.

16 COMMISSIONER HANSON: Hello.

17 CHAIRMAN NELSON: Gary are you there?

18 COMMISSIONER HANSON: Yes, I am. Thank you very  
19 much.

20 CHAIRMAN NELSON: Okay. We can hear you now.

21 COMMISSIONER HANSON: I was just calling back

22 in. You said, Commissioner Hanson, do you have any  
23 questions and I reached over to press my mute and my mute  
24 button is right next to the other button and I  
25 disconnected myself.

1 CHAIRMAN NELSON: Well, that would be  
2 substantial justification for failure to answer.

3 Any questions?

4 COMMISSIONER HANSON: Mr. Chairman, I have  
5 comments, but no questions at this time.

6 Thank you.

7 CHAIRMAN NELSON: Okay. I'm going to ask us to  
8 be at ease for just a moment while I consult with counsel  
9 Smith. So we'll be at ease for just a moment.

10 (Pause)

11 CHAIRMAN NELSON: Okay. This is Chairman  
12 Nelson. I am back. We've got some question as to  
13 whether we're still transmitting on the web so we want to  
14 take just a second and make sure that we've got that  
15 connection established.

16 Just testing for the web.

17 Okay. Just double-check. Are we good to go,  
18 Katlyn?

19 MS. GUSTAFSON: Yes.

20 CHAIRMAN NELSON: Okay. This is Chairman

21 ~~Nelson. We are concluded with questions. We are at the~~

22 point of a motion.

23 MS. GUSTAFSON: Oh, just a second.

24 CHAIRMAN NELSON: Okay. Just a second.

25 Katlyn, are we okay?

1 MS. GUSTAFSON: I don't know. They just said  
2 we're off now. I'm wondering if it's not our end. Now  
3 we're on.

4 CHAIRMAN NELSON: Okay. I've gotten the sign  
5 that we can continue.

6 In order to get the discussion started, I am  
7 going to move that we grant the Motion to Reconsider but  
8 only as it relates to documents 29 through 37, 39 through  
9 65, and 1058 through 1062.

10 Discussion on the motion.

11 As I always say, I appreciate whenever a motion  
12 to reconsider is brought in front of us. I take that  
13 very seriously. It gives us a chance to take a second  
14 look at an earlier decision to make sure we absolutely  
15 got it right.

16 In determining which of these exhibits I would  
17 include in granting this motion to reconsider, I  
18 considered very carefully the language of SDCL 15-6-37C.  
19 And the phrase "without substantial justification."

20 I'm not sure I'm fully convinced that DRA has  
21 made their case that they have substantial justification  
22 for the late disclosure. But that statute also contains  
23 a phrase "unless such failure is harmless ." Well,  
24 that's a huge judgment call. Is it harmless, or is it  
25 not?

1           But in the spirit of wanting to make sure that  
2 we have all of the information as part of our proceeding  
3 next week that might possibly be relevant, I'm going  
4 to -- or I have made my motion to reconsider for those  
5 particular documents that I just enunciated.

6           I made a comment regarding relevancy. That's  
7 still an open question on all of these that I'm sure we  
8 will deal with next week.

9           That I think is all I've got to say.

10          Additional discussion, Commissioner Hanson?

11          COMMISSIONER HANSON: Would you -- I have the  
12 information on your motion for Exhibit 29 through 37 and  
13 39 through 65, and that was the third portion that you  
14 referred to?

15          CHAIRMAN NELSON: 1058 through 1062.

16          COMMISSIONER HANSON: Okay.

17          CHAIRMAN NELSON: And if I could just say, I  
18 mean, those are documents that while they were not  
19 disclosed, I will grant that certainly were available to  
20 TransCanada in some fashion or had been referred to in  
21 ~~prefiled testimony.~~

22          The rest of those I just can't see that they  
23 were timely disclosed in any manner, and that's why I've  
24 bifurcated and accepted some and not others.

25          COMMISSIONER HANSON: All right. I -- since

1 there's just two of us on this, I'm struggling with the  
2 motion from the standpoint -- I think you've been overly  
3 generous on some of these.

4 And I know that you recognize that as well, that  
5 you're trying to be as responsible as you possibly can to  
6 the parties to make certain that everything is disclosed  
7 that needs to be disclosed to be discussed.

8 I would have granted a portion of this, but my  
9 big struggle is it's sort of like being partly pregnant.  
10 You're either pregnant or you aren't. And for my reasons  
11 not to allow this motion, I -- I appreciated your  
12 enlightenment asking the question regarding the receiving  
13 64 gigs of information and not being able to comply and  
14 provide these documents on a more timely basis.

15 The fact is we discussed that at the hearing  
16 when the parties requested all of that information, that  
17 they want all the information and they knew fully well  
18 that they were going to get gigs of information. I  
19 believe, if I recall correctly, the Applicant's  
20 attorneys -- I think it was Mr. Taylor said we're talking  
21 about semitruck loads of information if it were all in  
22 paper.

23 And then to state that they have busy practices  
24 and two people did the best to go through the  
25 information, however, no one limited them to the two

1 people. They limited themselves. They could have  
2 solicited additional people to help with the process.

3 I've stated in previous proceedings that this  
4 was not their first -- I don't think I said first rodeo  
5 but that they were well practiced, knowledgeable  
6 attorneys who have been around the block many times, and  
7 they knew the challenges here. And, in essence, we do  
8 not get to create our own problems. And that's, in  
9 essence, they were saying they were doing.

10 At the same time, I wrestle with this because of  
11 the previous reasons, that we want to make sure  
12 everything's disclosed and discussed. And I was not  
13 planning to refer to these proposed exhibits as such.  
14 However, I do strongly believe that past performance is  
15 an indication of future performance. And certainly the  
16 Keystone Pipeline performance is an indication of what we  
17 might expect from the XL Pipeline.

18 And so I was planning on -- and I still will  
19 have inquiries, including questions regarding XL's past  
20 performance.

21 The Sibson situation, I should disclose that I  
22 visited the Sibson property. They stopped and chatted  
23 with me at the Huron fair -- at the State Fair so it was  
24 some time ago obviously. And I decided to follow  
25 through, and so I drove to their property and walked the

1 property with them, drove around on -- and checked  
2 property as well.

3 So I'm very familiar with the property and  
4 intended to ask questions on it. So I wasn't surprised  
5 to see the pictures. Regardless of whether that is  
6 included as an exhibit, I will be asking questions about  
7 that.

8 I also intended to ask questions on geological  
9 information and spill data.

10 So in my wrestling with your motion, even though  
11 I believe strongly in what I said previously, that XL  
12 should be prepared to answer the Commission's questions  
13 regarding those issues, and so I -- I'm going to -- I'm  
14 going to go ahead and support your motion.

15 It's a tough call for me, but with just the two  
16 of us, I don't want to be the one to limit the process.  
17 I can see that there's some documents within that process  
18 that should be included, and I'm going to be asking  
19 questions on those anyway so it's fair to have those as  
20 exhibits so that we can discuss them freely.

21 CHAIRMAN NELSON: Thank you.

22 I have no further discussion. So those in favor  
23 of the motion to reconsider and, therefore, allow as  
24 Exhibits Nos. 29 through 37, 39 through 65, and 1058  
25 through 1062 will say aye; those opposed, nay.

1 Commissioner Hanson.

2 COMMISSIONER HANSON: Aye.

3 CHAIRMAN NELSON: And Nelson votes aye.

4 Motion carries.

5 MR. ELLISON: Chairman Nelson, may I ask a  
6 question, sir?

7 CHAIRMAN NELSON: Just hang on a second. I'm  
8 consulting on this end.

9 MR. ELLISON: Okay.

10 CHAIRMAN NELSON: Okay. Please identify and ask  
11 your question.

12 MR. ELLISON: Yes. This is Bruce Ellison from  
13 DRA. It's entirely different subject but one that I  
14 believe, Chairman Nelson, you touched on briefly today  
15 with Commissioner Fiegen's absence today.

16 You know, we're all aware of her very serious  
17 medical situation and obviously that's a concern and I  
18 know I personally expressed to her that she should just  
19 do whatever she needs to do to take care of herself and  
20 have these procedures correctly.

21 My only concern, and I raise it before the  
22 hearing, is I don't know what kind of treatment  
23 Commissioner Fiegen is undergoing today, whether it's  
24 chemotherapy, whether it's radiation, surgery, whatever.  
25 We start the trial on Monday.

1           So I just want to raise the question about I'm  
2           sure Commissioner Fiegen has been soul searching herself  
3           trying to figure out whether she can actually be  
4           100 percent at these hearings. And I just want to raise  
5           a concern that we would have as to whether or not she can  
6           do that.

7           I have no basis for saying that she can't, but  
8           obviously only she would know. I've gone through my own  
9           family experience with chemotherapy and radiation  
10          treatment and surgery, and I know how these can affect  
11          people for days on afterwards.

12          So I just know, Commissioner Nelson, if you'd  
13          have any additional information that would be helpful to  
14          us in understanding exactly what Commissioner Fiegen's  
15          situation is.

16                 CHAIRMAN NELSON: Certainly, Mr. Ellison. I  
17          appreciate the question.

18          I was planning to address this at the beginning  
19          of our hearing on Monday. And we will do that at that  
20          time also, but just so that you know where things are at.

21                 Commissioner Fiegen will not be participating in  
22          the hearing either in person or by telephone for the  
23          seven days of the hearing. She just simply won't be  
24          physically able to do that.

25                 Our statutes, however, provide that a member of

1 a board or a commission may read the entirety of a  
2 transcript of a proceeding or listen to it, a recording  
3 of that proceeding, in advance of taking any action from  
4 that proceeding.

5 And it's my understanding that Commissioner  
6 Fiegen's intention is to do one or both of those items.  
7 Following that, she will be filing an Affidavit with the  
8 Commission stating that she has either listened to or  
9 read the entirety of the proceeding prior to taking any  
10 action on the question that we are to resolve.

11 And so at this point that is the plan.

12 MR. ELLISON: I thank you for the information,  
13 sir.

14 CHAIRMAN NELSON: Certainly.

15 And, again, we will reiterate that on Monday  
16 along with the appropriate statutory citations that allow  
17 for that type of involvement in cases such as this.

18 MR. ELLISON: Thank you.

19 CHAIRMAN NELSON: With that, we have one other  
20 question to resolve, and that is a Yankton Sioux Tribe  
21 Motion For Time Certain.

22 Ms. Baker, go ahead.

23 MS. BAKER: Yes. Thank you, Mr. Chairman.

24 This motion is obviously very straightforward.  
25 Our one direct witness, Faith Spotted Eagle, will be

1 unavailable on the date of the 31st, and, we, therefore,  
2 would request that she be permitted to testify either on  
3 the 30th, which is Thursday, or on August 3, which is  
4 Monday.

5 Thank you, Commissioner.

6 CHAIRMAN NELSON: Thank you. I guess, do you  
7 want to lock in that particular date in our motion, or do  
8 you want to just leave it open? Will she be here on both  
9 of those days?

10 MS. BAKER: She will be available on both of  
11 those days.

12 CHAIRMAN NELSON: Okay. Then let's just leave  
13 that open. I guess I'll throw it out to anyone that's on  
14 the phone or Staff.

15 Is there any objection?

16 MR. TAYLOR: For TransCanada, no objection.

17 MR. ELLISON: DRA would have no objection.

18 MR. RAPPOLD: Rosebud has no objection.

19 MS. EDWARDS: No objection from Staff.

20 CHAIRMAN NELSON: Okay. With that, any  
21 ~~questions from the Commission?~~

22 Hearing none, is there a motion?

23 Go ahead, Commissioner Hanson.

24 COMMISSIONER HANSON: I was just saying I do not  
25 have any questions on it either.

1           The dates, as I understand, are either July 30  
2 or August 3; correct?

3           MS. BAKER: Yes. That's correct, Commissioner.

4           COMMISSIONER HANSON: Mr. Chairman, I move that  
5 the Commission grant the Motion For Time Certain for  
6 Faith Spotted Eagle to be allowed to testify on either  
7 July 30 or August 3, 2015.

8           CHAIRMAN NELSON: Discussion on the motion.

9           Hearing none, all those in favor will say aye;  
10 those opposed, nay.

11           Commissioner Hanson.

12           COMMISSIONER HANSON: Aye.

13           CHAIRMAN NELSON: Commissioner Nelson votes aye.  
14 Motion carries.

15           Is there a motion to adjourn?

16           COMMISSIONER HANSON: Move to adjourn.

17           CHAIRMAN NELSON: All those in favor of the  
18 motion to adjourn will say aye; those opposed, nay.

19           Commissioner Hanson.

20           COMMISSIONER HANSON: Aye.

21           CHAIRMAN NELSON: Nelson votes aye.

22           We are adjourned.

23                           (The proceeding is concluded.)

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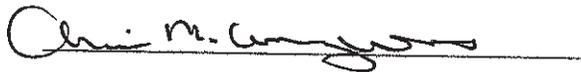
CERTIFICATE

COUNTY OF SULLY )

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

DO HEREBY CERTIFY that as the duly-appointed shorthand reporter, I transcribed the electronic recording of the foregoing proceedings.

Dated at Pierre, South Dakota this 19th day of September, 2015.



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

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