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

HP14-001

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Transcript of Recorded Audio Proceedings
November 12, 2015

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BEFORE THE PUBLIC UTILITIES COMMISSION

CHRIS NELSON, CHAIRMAN
KRISTIE FIEGEN, VICE CHAIRMAN
GARY HANSON, COMMISSIONER

COMMISSION STAFF

Rolayne Wiest
John Smith
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Karen Cremer
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Greg Rislov
Brian Rounds
Darren Kearney
Joseph Rezac
Eric Paulson
Lorena Reichert
Patrick Steffenson
Katlyn Gustafson

Reported By Cheri McComsey Wittler, RPR, CRR

1 TRANSCRIPT OF RECORDED AUDIO PROCEEDINGS, held
2 in the above-entitled matter, at the South Dakota State
3 Capitol Building, Room 413, 500 East Capitol Avenue,
4 Pierre, South Dakota, on the 12th day of November, 2015.

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1 CHAIRMAN NELSON: HP14-001, In the Matter of
2 the Petition of TransCanada Keystone Pipeline, LP for
3 Order Accepting Certification of Permit Issued in
4 Docket HP09-001 to Construct the Keystone XL Pipeline.

5 A couple of questions to resolve today. First
6 of all, Commissioner Hanson has indicated he'd like to
7 move to reconsider our denial of certain exhibits.

8 And then also we have a Motion to Grant a
9 Motion to Strike the Proposed Findings of Fact and
10 Conclusions of Law.

11 I think the way we will begin, Commissioner
12 Hanson, did you want to move to reconsider the Motion
13 that passed at the last meeting, and then we'll go from
14 there?

15 COMMISSIONER HANSON: Thank you, Mr. Chairman.

16 As you recall, we had a discussion pertaining to
17 Exhibit 6001 of Ms. Myers' exhibits, and I would like to
18 have a reconsideration. I move to have reconsideration
19 of the Commission.

20 Actually I was in the minority on that. It was
21 a 2-1 vote.

22 CHAIRMAN NELSON: Actually I think what we need
23 to do is reconsider the final Motion that passed in which
24 you were in the majority, and then I'm going to ask you
25 to split your part off.

1 COMMISSIONER HANSON: You're right. Thank you
2 very much. That is actually what I intended to do. I
3 appreciate your --

4 I move to reconsider the vote which passed by
5 the Commission at the last -- at the meeting pertaining
6 to the exhibits, the striking of Ms. Myers' exhibits.

7 CHAIRMAN NELSON: Thank you.

8 All those in favor of reconsidering will vote
9 aye; those opposed, nay.

10 Commissioner Hanson.

11 COMMISSIONER HANSON: Aye.

12 CHAIRMAN NELSON: Commissioner Fiegen.

13 COMMISSIONER FIEGEN: Fiegen votes aye.

14 CHAIRMAN NELSON: Nelson votes aye.

15 Motion carries.

16 And at this point, Commissioner Hanson, I think
17 it would be appropriate for you to make a Motion dealing
18 strictly with 6001.

19 COMMISSIONER HANSON: Yes. That's where I have
20 a question, since I was in the minority, whether I can do
21 that. I know I can move to bifurcate and have us decide
22 6001 individually and the remaining exhibits, and that's
23 what my Motion would be.

24 CHAIRMAN NELSON: That's where we're at. Since
25 we dealt with the reconsideration, that's where you would

1 have had to have been in the majority, and you were so
2 we're fine. You can move to bifurcate.

3 COMMISSIONER HANSON: That's my Motion.

4 CHAIRMAN NELSON: Okay. We have a Motion to
5 Bifurcate.

6 Any question on that Motion?

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

9 Commissioner Hanson.

10 COMMISSIONER HANSON: Aye.

11 CHAIRMAN NELSON: Commissioner Fiegen.

12 COMMISSIONER FIEGEN: Fiegen votes aye.

13 CHAIRMAN NELSON: Nelson votes aye.

14 Motion carries.

15 We will now entertain a Motion regarding
16 Exhibit 6001.

17 COMMISSIONER HANSON: Mr. Chairman, I move that
18 Ms. Myers' Exhibit 6001 be included in -- as evidence in
19 Docket HP14-001.

20 CHAIRMAN NELSON: Discussion on the Motion.

21 COMMISSIONER HANSON: Thank you, Mr. Chairman.
22 And thank you for giving me the latitude, the
23 opportunity, to discuss this.

24 I had written a dissent in part on that
25 particular exhibit and decided with counsel's counsel

1 that I should do it individually and discuss just that
2 Motion.

3 I'm rarely compelled to dissent on a Motion.
4 There's only been three times. And, frankly, I think
5 I've only dissented maybe two or three times in the
6 12 years that I have been a Commissioner.

7 I will read in part my dissent that I had
8 written just so that I can keep my discussion as short as
9 possible.

10 You'll recall that the Applicant for XL argued
11 that the exhibit should be excluded because the Applicant
12 should be able to directly question any persons who have
13 made statements attributed to them and that the Applicant
14 was unable to question Mr. Seamans. And you'll recall
15 that there was additional discussion pertaining to what
16 is hearsay evidence such as newspapers and scholarly
17 works that can be used by expert witnesses and such.

18 My contention and concern is that it was the
19 Applicant's action and inaction that prevented the
20 Applicant from questioning Mr. Seamans at the time of the
21 Commission hearings.

22 You'll recall on August 3 during the evidentiary
23 hearings the Applicant objected to the inclusion of
24 exhibits and requested the ability to argue the reasons
25 for exclusion at a later date. They then filed on

1 September 21, seven weeks after the evidentiary hearings
2 had concluded, that they -- a Motion to Strike the
3 Exhibit.

4 On October 29 then at a regularly scheduled
5 meeting they argued the Motion to Strike on a basis that
6 it should be excluded because the Applicant should be
7 able to directly question any persons who have statements
8 attributed to them and that the Applicant was unable to
9 question Mr. Seamans regarding his statements in
10 Exhibit 6001.

11 However, it may have been true on October 29
12 that the Applicant was unable to question Mr. Seamans;
13 however, the Applicant did have the opportunity to
14 question Mr. Seamans during the hearings. Mr. Seamans
15 was not only present at the hearings, he has party status
16 to the Docket and actually participated in the hearings.
17 And so had the Applicant chosen to question Mr. Seamans
18 during the hearings, they could have done so.

19 The Applicant chose not to question Mr. Seamans,
20 and then he argued that the exhibits should be excluded
21 because he did not question Mr. Seamans. So the
22 Applicant is essentially attempting to benefit by
23 claiming he was handicapped by his own actions.

24 Ms. Myers should not be prohibited from
25 presenting information to the Commission based upon XL's

1 decision not to question Mr. Seamans, and I believe
2 Exhibit 6001 should be included in the Docket.

3 So we have an action by the Applicant, which he
4 is now arguing kept him from being able to exercise his
5 duties for XL and, in fact, that handicaps Ms. Myers. So
6 I respectfully request that 6001 be included.

7 CHAIRMAN NELSON: Additional discussion.

8 First of all, I appreciate your explanation
9 because, frankly, I wasn't sure where you were coming
10 from. And so I follow your logic. I think where I
11 would -- I think where I fall off the logic train is the
12 fact that Ms. Myers never called Mr. Seamans as a witness
13 and without having called him as a witness they still
14 wouldn't have had an opportunity to cross-examine him.
15 Even though he was in the room, even though he was an
16 Intervenor, she never called him as a witness.

17 Does that impact your thought process?

18 COMMISSIONER HANSON: No. Because he was a
19 party, and he was in attendance -- he was actually in
20 attendance at, I believe, all of the meetings. He was
21 even in attendance of the meeting when the Motion to
22 Strike was heard. He's even in the audience today. And
23 at any time he could have personally objected if that
24 evidence -- if that exhibit did not represent his
25 position. And at any time the party, the Applicant,

1 could have asked to question him.

2 CHAIRMAN NELSON: Thank you.

3 Additional discussion.

4 Any additional discussion?

5 Seeing none, all those in favor of Commissioner
6 Hanson's Motion to allow Exhibit 6001 will say aye; those
7 opposed, nay.

8 Commissioner Hanson.

9 COMMISSIONER HANSON: Aye.

10 CHAIRMAN NELSON: Commissioner Fiegen.

11 COMMISSIONER FIEGEN: Fiegen votes no.

12 CHAIRMAN NELSON: And Nelson votes no.

13 Motion fails.

14 We now have an opportunity to deal with the rest
15 of the exhibits. I will move that the rest of the
16 exhibits that had been excluded remain excluded,
17 including 6001.

18 Discussion on the Motion.

19 COMMISSIONER HANSON: Well, I bifurcated them
20 for the purpose so that I could vote for the remainder.
21 If you include 6001, as you just did, I have to vote
22 against the exhibits and file a dissent so please --
23 we've already decided 6001.

24 CHAIRMAN NELSON: No, we haven't. But your
25 point is well taken.

1 We denied your Motion. I think now we need a
2 Motion on that one again.

3 COMMISSIONER HANSON: That would be fine.

4 CHAIRMAN NELSON: So I will move that 6001 be
5 excluded.

6 All those in favor of excluding 6001 will vote
7 aye; those opposed, nay.

8 Commissioner Hanson.

9 COMMISSIONER HANSON: Nay.

10 CHAIRMAN NELSON: Commissioner Fiegen.

11 COMMISSIONER FIEGEN: Fiegen votes aye.

12 CHAIRMAN NELSON: And Nelson votes aye.

13 6001 is excluded.

14 COMMISSIONER HANSON: I was tempted to vote aye
15 just to see if I could get the two of you to vote --

16 CHAIRMAN NELSON: I'm going to take it and move
17 along pretty quickly.

18 I now move that the remainder of the excluded
19 exhibits remain excluded.

20 Any discussion?

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

23 Commissioner Hanson.

24 COMMISSIONER HANSON: Aye.

25 CHAIRMAN NELSON: Commissioner Fiegen.

1 COMMISSIONER FIEGEN: Fiegen votes aye.

2 CHAIRMAN NELSON: And Nelson votes aye.

3 Motion carries.

4 Okay. That then brings us to the Joint Motion
5 to strike the proposed Findings of Fact and Conclusions
6 of Law.

7 And before I go to that, I want to just check
8 and see if we've gotten some other folks on the phone.

9 Bruce Ellison, are you with us?

10 MR. ELLISON: Yes, sir. I am.

11 CHAIRMAN NELSON: Excellent.

12 Matt Rappold.

13 MR. RAPPOLD: Good afternoon, Mr. Chairman.

14 CHAIRMAN NELSON: Hi, Matt.

15 Okay. Peter Capossela.

16 MR. CAPOSSELA: Yes, sir. Present.

17 CHAIRMAN NELSON: Excellent.

18 Between you and Ms. Baker, who wants to argue?
19 And Mr. Clark. Who's going to take this one?

20 MS. BAKER: This is Jennifer Baker. I can do
21 that.

22 CHAIRMAN NELSON: Go ahead.

23 MS. BAKER: Thank you, Commissioners.

24 We're here on a Joint Motion filed by several
25 Intervenors to strike Keystone's proposed Findings of

1 Fact and Conclusions of Law.

2 The parties filed a initial posthearing brief in
3 this matter on October 1 in accordance with an earlier
4 Commission Order. That Order made no mention of Proposed
5 Findings of Fact or Conclusions of Law. Notwithstanding
6 the fact the Commission at no time ordered or requested
7 the filing of proposed Findings and Conclusions, Keystone
8 submitted Proposed Findings and Conclusions in
9 conjunction with its brief.

10 Unlike other routine motions that are expected
11 in proceedings of this nature and are, therefore, not
12 specifically addressed in the rules, Proposed Findings of
13 Fact and Conclusions of Law are expressly mentioned in
14 and regulated by the rules governing this Commission.

15 ARSD 20:10:01:25 specifically states that if
16 requested by the Commission, the parties shall file
17 Proposed Findings of Fact. The fact that it is expressly
18 mentioned in the rules and only authorized if requested
19 by the Commission indicates that it is improper to file
20 Proposed Findings of Fact and Conclusions of Law absent a
21 request of Commission.

22 While Proposed Findings and Conclusions were
23 submitted in the previous XL Docket, HP09-001, as well as
24 the Keystone I Docket, HP07-001, Findings and Conclusions
25 were actually requested by the Commission in those cases,

1 and those cases, therefore, did not support Keystone's
2 filings in this Docket.

3 In this Docket the Commission chose not to
4 request Proposed Findings and Conclusions, and such
5 filings are, therefore, improper. Keystone's argument
6 that Intervenor could have filed their own Findings and
7 Conclusions is no more valid than their argument that
8 their submission was proper.

9 In accordance with the rules governing
10 commissions, Intervenor refrain from filing Proposed
11 Findings of Fact and Conclusions of Law because to do so
12 would have been improper. It would be unjust inequitable
13 to allow Keystone's Proposed Findings and Conclusions to
14 remain on the record and to receive the Commission's
15 consideration without affording the Intervenor the
16 opportunity to submit the same.

17 We, therefore, respectfully ask that the
18 Proposed Findings of Fact and Conclusions of Law filed by
19 Keystone be stricken from the record.

20 Thank you.

21 CHAIRMAN NELSON: Thank you. And I'm going
22 to -- the others, Mr. Ellison, Rappold, Capossela, Clark,
23 if you've got anything briefly to add that would be
24 different than what Ms. Baker has, I will allow that.

25 MR. CAPOSSELA: Thank you, Mr. Chairman. This

1 is Peter Capossela.

2 Standing Rock has nothing further to add and
3 supports Ms. Baker's arguments.

4 CHAIRMAN NELSON: Thank you.

5 Any others?

6 MR. RAPPOLD: Rosebud takes the same position.

7 MR. ELLISON: This is Bruce Ellison for Dakota
8 Rural Action.

9 Yes. We certainly join in the arguments of
10 Ms. Baker. In sum, it's another situation in these
11 proceedings where TransCanada is being asked by the
12 intervenors to simply follow the procedural rules that
13 are to guide proceedings before this Commission.

14 And so, once again, we are here seeking that
15 Commission Order compliance.

16 I have nothing further. Thank you.

17 CHAIRMAN NELSON: Thank you.

18 Mr. Clark, anything?

19 MR. CLARK: Mr. Chairman, I don't have anything
20 substantive to add. We just join in the Motion and thank
21 you for your time.

22 Thank you, sir.

23 CHAIRMAN NELSON: Very good. I will go to
24 Mr. Moore for Keystone.

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

1 James Moore on behalf of Keystone.

2 We have submitted a written response to the
3 Joint Motion, and I'll not repeat that here. I will
4 summarize just by saying this: I think this is obviously
5 a process issue.

6 We had a contested case with a lengthy
7 evidentiary hearing. When the Commission makes a
8 decision on the Docket, Findings of Fact and Conclusions
9 of Law are required under SDCL Section 1-26-25.

10 And under the Rules of Civil Procedure in
11 SDCL 15-6-52A you can direct counsel to prepare Findings
12 of Fact and Conclusions of Law, or you can submit your
13 own proposed Findings of Fact and Conclusions of Law.

14 In either case the adverse parties at that point
15 essentially have an opportunity to respond to the
16 Proposed Findings or your Proposed Findings before they
17 are signed and adopted by the Commission.

18 So we submitted Proposed Findings and
19 Conclusions with our initial brief, not intending to gain
20 any advantage but because we thought it was a natural
21 complement to the briefing process because Findings are
22 required in the case and because we thought it would be a
23 helpful illustration to the Commission to see what
24 approval or acceptance of the certification would
25 actually look like based on the evidence presented.

1 The Intervenors have not been prejudiced in any
2 way. They could have objected or responded to the
3 Proposed Findings that we submitted with our opening
4 brief. And to the extent that the Commission chooses to
5 adopt those at the conclusion of the Docket in making a
6 decision, they will still be afforded an opportunity to
7 respond to them. In fact, they've been given additional
8 time to consider them by the fact that they were proposed
9 on October 1.

10 So I think this is really much ado about
11 nothing, and there's certainly no -- nothing in
12 South Dakota Law that would require you to grant the
13 Motion and nothing that makes this submission
14 inappropriate.

15 CHAIRMAN NELSON: Thank you.

16 Staff.

17 MS. EDWARDS: Thank you.

18 Staff has nothing to add and takes no position
19 as we did not file any proposal of our own and haven't
20 taken a position on the filing that Keystone made.

21 CHAIRMAN NELSON: Thank you.

22 Ms. Baker, rebuttal.

23 MS. BAKER: I would just simply like to point
24 out that Mr. Moore's argument cited no authority for
25 Keystone's position. And, in fact, the authority that he

1 did cite supports the position of the Intervenor, which
2 is that there must actually be a request from the
3 Commission for this submission to be proper.

4 In addition, the Intervenor is prejudiced
5 because we have not had the opportunity -- no party had a
6 proper opportunity to submit these filings, and to accept
7 something from Keystone without allowing the opportunity
8 to the Intervenor to submit the same would be unjust and
9 prejudicial to the Intervenor.

10 Finally, Keystone mentioned that Intervenor
11 could have objected or responded, and that's precisely
12 what we're doing now. They filed something improper.
13 Rather than a substantive response, it's appropriate for
14 us to file a Motion to Strike as we have done, and we'd
15 request that you grant that Motion.

16 Thank you.

17 CHAIRMAN NELSON: Thank you.

18 Questions from the Commission.

19 I have one for Ms. Baker.

20 I understand the language of the rule that
21 you're relying on, but isn't it correct that the rule
22 does not prohibit these from being filed on one's own
23 volition?

24 MS. BAKER: It's correct that the rule does not
25 expressly make that prohibition. However, the fact that

1 the rule does expressly address the issue rather than
2 being silent on it is informative of the purpose and
3 intent behind the rule and that's that no Findings or
4 Conclusions should be filed appropriately with the
5 Commission absent a request.

6 CHAIRMAN NELSON: Thank you.

7 Additional questions.

8 Hearing none, is there a Motion?

9 COMMISSIONER FIEGEN: Mr. Chairman, in HP14-001
10 move that the Commission deny the Joint Motion to Strike
11 Proposed Findings of Fact and Conclusion of Law.

12 CHAIRMAN NELSON: Discussion on the Motion.

13 Commissioner Fiegen.

14 COMMISSIONER FIEGEN: And I believe the current
15 statute that we -- or the South Dakota Law that we have
16 does not prohibit Findings of Fact and Conclusion of Law
17 to be submitted and filed to the Commission.

18 CHAIRMAN NELSON: Additional discussion.

19 Commissioner Hanson.

20 COMMISSIONER HANSON: I agree with Commissioner
21 Fiegen. Further, I fully expected all of the parties to
22 be filing their own Findings of Fact and Conclusions of
23 Law so that we could look at those and interpret them and
24 make our decision based upon that input.

25 So I'm frankly -- that seems to be standard

1 operating procedure here so I'm surprised at this
2 request.

3 CHAIRMAN NELSON: Additional discussion.

4 I'm going to support the Motion, understanding
5 that what was filed was not filed pursuant to the rule
6 because we didn't request them. But I also understand
7 that I don't think there's anything out there that
8 prohibits any party from having submitted Findings of
9 Fact, Conclusions of Law, just as Commissioner Hanson has
10 said.

11 Additional discussion.

12 Hearing none, all those in favor of the Motion
13 to Deny the Joint Motion will vote 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.

20 The Motion carries.

21 MR. ELLISON: Commissioner Nelson, this is
22 Bruce Ellison. I just want to briefly add to the record,
23 if I may.

24 CHAIRMAN NELSON: Certainly.

25 MR. ELLISON: For the purposes of later appeal.

1 The Commission has therefore taken the position
2 that anything which is not prohibited by any of the rules
3 that govern the operation of the Public Utilities
4 Commission is, therefore, allowed and permissible.

5 I just wanted to make that position because
6 that's what it seems like the Commission just said. And
7 I just want our record to be clear that Dakota Rural
8 Action believes that the arguments presented by Ms. Baker
9 are correct and that this is an improper interpretation
10 of the Commission's own rules.

11 If it is simply a standard procedure, the
12 Commission should recommend removing that or adding that
13 in the standard procedure rather than saying that it has
14 the authority to order that when it chooses to do so.

15 Thank you.

16 CHAIRMAN NELSON: Thank you, Mr. Ellison.

17 And thank you all for being on the line and
18 understand that there are more motions in this regard and
19 we will be meeting again on this particular Docket.

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1 STATE OF SOUTH DAKOTA)

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CERTIFICATE

3 COUNTY OF SULLY)

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

8 DO HEREBY CERTIFY that as the duly-appointed
9 shorthand reporter, I transcribed the audio recording of
10 the foregoing proceedings.

11 Dated at Onida, South Dakota this 8th day of
12 January, 2016.

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

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