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THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE APPLICATION
BY DAKOTA RANGE I, LLC AND DAKOTA
RANGE II, LLC FOR A PERMIT OF A WIND
ENERGY FACILITY IN GRANT COUNTY
AND CODINGTON COUNTY, SOUTH DAKOTA,
FOR THE DAKOTA RANGE WIND PROJECT.

EL18-003

ORIGINAL

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Transcript of Proceedings
May 21, 2018
1:30 p.m.

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BEFORE THE PUBLIC UTILITIES COMMISSION,
KRISTIE FIEGEN, CHAIRWOMAN (telephonically)
GARY HANSON, VICE CHAIRMAN (telephonically)
CHRIS NELSON, COMMISSIONER

COMMISSION STAFF
Adam de Hueck
Karen Cremer
Kristen Edwards
Darren Kearney
Jon Thurber
Katlyn Gustafson

APPEARANCES

Kristen Edwards,
appearing on behalf of Commission Staff.

Mollie Smith,
appearing on behalf of Dakota Range.

Teresa Kaaz and Kristi Mogen,
appearing pro se.

Reported By Cheri McComsey Wittler, RPR, CRR
Precision Reporting, 213 South Main, Onida, South Dakota

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TRANSCRIPT OF PROCEEDINGS, held in the
above-entitled matter, at the South Dakota State Capitol,
Pierre, South Dakota, on the 21st day of May, 2018,
commencing at 1:30 p.m.

1 COMMISSIONER NELSON: I will call the Public
2 Utilities Commission meeting to order. It is May 21,
3 1:30 p.m., State Capitol Building. This is Commissioner
4 Nelson. Commissioners Hanson and Fiegen are on the
5 telephone with us.

6 We are here for an Ad Hoc Meeting on EL18-003.
7 And I just remembered that we have Cheri Wittler, our
8 court reporter, with us and, therefore, I will slow down,
9 as I hope will all of the speakers.

10 This docket is in the Matter of the Application
11 of Dakota Range I, LLC and Dakota Range II, LLC For a
12 Permit of a Wind Energy Facility in Grant County and
13 Codington County, South Dakota for the Dakota Range Wind
14 Project.

15 And the question today is shall the Commission
16 grant the Motion to Exclude Portions of Testimony and/or
17 Exhibits of Intervenors Teresa Kaaz and Kristi Mogen?
18 And shall the Commission grant the request regarding
19 hearing participation? Or how shall the Commission
20 proceed?

21 Obviously, the issue today revolves around some
22 exhibits that two of our Intervenors who are not
23 represented by attorneys have offered. And we,
24 obviously, want to make sure that everybody's rights are
25 protected as we move through this particular proceeding

1 today and on into the ultimate hearing.

2 And so, with that, I'm going to have Dakota
3 Range go first since they are the ones that offered the
4 motion. I'm then going to have staff go after Dakota
5 Range to talk about your positions, and then we will come
6 with the two Intervenors and then come back around if we
7 have to for any cleanup with both Dakota Range and staff.

8 And so, with that, Ms. Smith, go ahead.

9 MS. SMITH: Thank you, Commissioner.

10 So Dakota Range has filed a Motion to Exclude
11 certain exhibits, as you noted, and we've tried to
12 outline in our motion papers what exhibits we had an
13 objection to.

14 Our goal in bringing this motion in advance was
15 to address this early on so that -- there's several
16 documents, and there's several topics covered in those
17 documents. We want to ensure that the focus of the
18 rebuttal testimony that we provide, as well as the
19 hearing process itself, is focused and as expeditious as
20 possible.

21 So, in summary, the bulk of the exhibits that we
22 have objected to appear to be articles or documents that
23 are coming from third parties, and they often are
24 technical in nature. And based on the information that's
25 provided in Ms. Kaaz's testimony and Ms. Mogen's

1 testimony, they're not topics that are within their areas
2 of expertise. They were prepared by third parties, but
3 those third parties are not going to be present to
4 testify and so would not be subject to cross-examination.
5 And so the documents would be hearsay.

6 So that's the basis of the bulk of the objection
7 to the documents that we have identified.

8 COMMISSIONER NELSON: Thank you.

9 With that, we will go to staff.

10 MS. EDWARDS: Thank you. This is Kristen
11 Edwards for staff.

12 We filed a reply, and we would largely rely on
13 that. I limited it to the hearsay and foundation
14 objections. I think any relevancy objections or anything
15 along those lines would probably be more appropriate at
16 the hearing once we have all the information and know
17 what is and what isn't relevant.

18 Further, should some of these be stricken or
19 many of these be stricken, we would have no objection to
20 the two Intervenors having a chance to correct
21 evidentiary issues and file follow-up testimony.

22 Thank you.

23 COMMISSIONER NELSON: Thank you.

24 With that, I will go to Teresa Kaaz. Anything
25 that you would like to offer?

1 MS. KAAZ: No. There's not really anything I'd
2 like to offer. I would just like to be able to be
3 included in the hearing. And if I've got anything that
4 shouldn't be in there, you know, I apologize as to how it
5 was brought in there, didn't realize that everything had
6 to have a witness to it. So for that, I apologize in
7 advance.

8 But most of it is pertinent information to the
9 Application, as far as the company information and things
10 like that.

11 COMMISSIONER NELSON: Thank you.

12 I appreciate your weighing in and certainly
13 understand everything that you have just said and
14 appreciate that.

15 Kristi Mogen, anything that you would like to
16 add?

17 MS. MOGEN: I would -- I appreciate the fact
18 that we might be able to -- and I think we should be able
19 to submit it in a corrected form, if that's what's
20 needed.

21 I'd like to address that on No. 4, the
22 clarification Exhibit No. 3, Jon Meyer is available to
23 testify.

24 As Diane Redlin, I saw that she didn't have an
25 objection to her letter, probably because she's an

1 Intervenor. But Jon Meyer will be available if we can do
2 that by phone, and he could be cross-examined.

3 On my noise exhibits, if it was read,
4 Richard James had provided me with -- and he's an
5 acoustician, an expert. He provided me with all of that
6 information, and he can be available to testify.

7 So those, I think, should definitely absolutely
8 be on the record.

9 The No. 10, Cradle To Grave Exhibit No. 2, I
10 have now taken photos. I have physically been down in
11 the turbines and taken photos. Not quite to that extent,
12 but I can show personally what I saw and what it -- it
13 relates to that picture almost exactly. Nobody's working
14 on the turbines, but there's definitely a lot of oil
15 leaks.

16 No. 22, I've asked Dakota Range to provide some
17 documents, and that is -- that would speak to No. 22, the
18 manual exhibit of the Vestas turbine. So I would ask
19 that that be addressed, that we will get some manuals
20 that I have asked for, along with 14 other documents.

21 Then I have been a realtor. That was my job for
22 quite a long time. And there's some information there --
23 I guess it's just a letter by a third party. I could
24 probably find another way to address that issue.

25 And then the socio-economical issues, I can

1 provide testimony, and some will be available for
2 cross-examination from South Dakota residents who live
3 among the turbines and their families and how they live
4 and how it affects them. And I would like the
5 opportunity to be able to provide that testimony.

6 For that I might need to be limited. Because
7 right now I think we have seven or eight so I should
8 probably pare that down to two or three, if that was
9 something that the board would allow me to do.

10 And I see that there was -- I thought there was
11 some issue with my CUP -- I think the PUC, the board,
12 addressed the Conditional Use Permit information and the
13 contracts that I submitted.

14 Those contacts and that information came from
15 the county. And I do have a landowner with a contract
16 that can also submit testimony to verify the -- that is
17 their actual contract and that's what it says. And she
18 can talk about how she feels about the contract, how the
19 contract came about, and how she feels about the
20 contract.

21 So that's all I have. Thank you for the
22 opportunity for allowing the public to have some
23 testimony and some input into things that are going to
24 affect us for the rest of our lives and our children's
25 lives. And I think it's important, and I'm grateful that

1 the PUC is allowing the public to have some input in this
2 process. So thank you.

3 COMMISSIONER NELSON: Thank you.

4 Ms. Smith, any rebuttal thoughts?

5 MS. SMITH: Yes.

6 So I understand Ms. Mogen's references to having
7 third parties. However, the time line that was set forth
8 to file prefiled testimony has passed. And, in fact,
9 Dakota Range has its rebuttal testimony due today. So at
10 this point there really should have been testimony filed
11 so that Dakota Range had the opportunity to respond to
12 whatever the testimony is going to be.

13 So we would object at this point to having
14 additional witnesses that are planning to just come to
15 the hearing to offer testimony. It should be in written
16 form so that we have an opportunity to see it in advance
17 and prepare in order to respond to it.

18 So those are the -- that would be the main
19 objection I have to the bulk of the items that have been
20 identified as having people that can testify to them. We
21 haven't seen that at this point in the process.

22 COMMISSIONER NELSON: Thank you.

23 And, Ms. Edwards, any rebuttal thoughts?

24 MS. EDWARDS: No.

25 COMMISSIONER NELSON: Commissioner questions.

1 Commissioner Fiegen, any questions?

2 CHAIRMAN FIEGEN: I do not.

3 COMMISSIONER NELSON: Commissioner Hanson, any
4 questions?

5 COMMISSIONER HANSON: Thank you, Acting Chairman
6 Nelson.

7 I just want to make certain I heard correctly,
8 so I have a question of Ms. Mogen.

9 I understand, Ms. Mogen, that you stated that
10 Jon Meyer would be available to testify and that you
11 would have him appear telephonically. And then there is
12 a David James and a Ted Hartke. Are you stating now that
13 you will not be able to have them participate?

14 MS. MOGEN: Actually, yes. I can have both them
15 participate, and I can have them do written testimony
16 prior to.

17 Ted Hartke is from out of state, and if the
18 board would so allow, I could actually get more
19 South Dakota residents because I think that's important
20 that South Dakota people -- I could exchange Ted Hartke
21 for somebody else.

22 But David James is available by phone to testify
23 also, yes. And Ted Hartke, if we so choose to call on
24 him.

25 COMMISSIONER HANSON: Well, Ms. Smith is

1 accurate in saying that you're not allowed to have
2 additional testimony and switch -- switch hitting, so to
3 speak, here at this juncture.

4 MS. MOGEN: And that's okay.

5 COMMISSIONER HANSON: So you're saying that
6 James and Hartke would be available?

7 MS. MOGEN: Yes.

8 COMMISSIONER HANSON: All right. Thank you,
9 Mr. Chairman.

10 COMMISSIONER NELSON: Thank you.

11 I've got a few questions. This is Commissioner
12 Nelson.

13 For Ms. Smith, our understanding was that any of
14 the parties, be it staff or Intervenors, had the ability
15 to bring in rebuttal witnesses without having to have
16 them file prefiled rebuttal testimony.

17 I'm taking it that you've got a different
18 understanding?

19 MS. SMITH: I do. I am looking at the Order
20 that was issued by the Commission on April 6 that
21 established the procedure -- procedural schedule. And in
22 that Order it states, "The submission of prefiled
23 testimony is a prerequisite to giving live testimony at
24 the hearing. However, each party may have persons who
25 have not submitted prefiled testimony available to

1 testify at the hearing in the event issues not addressed
2 in prefiled testimony are raised by the Commission."

3 So the intent, as I read that provision, is that
4 there's to be prefiled testimony so all parties
5 understand what is being raised by witnesses and know in
6 advance of the hearing.

7 If there's an issue that's raised by the
8 Commission, we all understand that we would not know
9 necessarily that those issues may be going to arise so it
10 would make sense to have the opportunity to provide
11 witnesses.

12 But given that we've filed direct testimony and
13 then there was a response to that and then we're filing
14 rebuttal, everything should be addressed in writing by
15 the parties themselves prior to the hearing.

16 COMMISSIONER NELSON: Thank you.

17 And I'm going to go to Ms. Edwards. If you
18 could let us know what your understanding of this
19 particular issue is.

20 MS. EDWARDS: My recollection of that particular
21 language, I believe, is the same as Ms. Smith's, that
22 when we were discussing the procedural schedule
23 Dakota Range was concerned about having questions come up
24 during the hearing and then needing to call a witness to
25 answer those questions for the Commission.

1 I would have no objection, I guess, to the
2 Commission modifying that Order if it so chooses.

3 COMMISSIONER NELSON: Thank you.

4 For the benefit of Ms. Mogen and Ms. Kaaz, and
5 we are looking at the Order that we issued when we
6 established the procedural schedule and it appears to me
7 that both Ms. Smith and Ms. Edwards are, in fact, correct
8 that any of the witnesses that were going to be giving
9 live testimony were required to file -- give prefiled
10 testimony for everyone's benefit.

11 And the only exception to that would be if
12 during the hearing Commissioners raised unique questions
13 that hadn't been addressed in any of that prefiled
14 testimony, that then any of the parties would be able to
15 bring in rebuttal witnesses at that time to answer those
16 questions raised by the Commission.

17 And so while I understand what you are offering
18 and what you are attempting to do, I'm not sure -- I
19 don't think that that complies with the initial order,
20 and, unfortunately, the parties that you've mentioned you
21 wanted to bring in did not file prefiled testimony as
22 witnesses.

23 And at this point I would offer Ms. Mogen or
24 Ms. Kaaz any opportunity for any last comment that you
25 would have.

1 Hearing nothing, is there a motion?

2 Again hearing nothing, I will give it a try.

3 In EL18-003 I move that the Commission grant the
4 motion from Dakota Range to exclude portions -- or to
5 exclude exhibits of Intervenors.

6 Discussion on the motion.

7 And I'm going to offer the first discussion.

8 The first thing I would like to say is to make a
9 clarification to make sure all understand that my motion
10 did not include excluding portions of Mogen's testimony
11 that had been requested. That is not part of my motion.
12 The motion only includes excluding the exhibits that were
13 requested.

14 This is a -- this is a difficult issue for the
15 Commission. We obviously want to give all parties,
16 including and especially the lay Intervenors, the folks
17 that are actually in that area, every opportunity to make
18 their case to us so that we have all the information that
19 we need in order to make our ultimate decision. And,
20 frankly, I think the Commission bends over backwards to
21 do that.

22 But by the same token, there are established
23 laws and rules as to what kinds of exhibits can be
24 offered. And those rules are in place to protect all of
25 the parties to make sure that the exhibits that are

1 offered are fully factual and that all parties have an
2 opportunity to cross-examine the veracity and the
3 truthfulness of those particular exhibits. And that's
4 why those laws exist.

5 And as I think Ms. Smith has adequately made the
6 case, that many of these exhibits don't meet that legal
7 threshold for admission; and, therefore, we're not going
8 to be able to, I don't believe anyway, allow those
9 particular exhibits to come into this proceeding.

10 Additional discussion?

11 COMMISSIONER HANSON: Mr. Chairman.

12 COMMISSIONER NELSON: Go ahead, Commissioner
13 Hanson.

14 COMMISSIONER HANSON: Thank you.

15 I just want to make certain I understood your
16 motion. It does not include -- as I understand your
17 motion, it does not include any of the requests by staff
18 that were outside of the Dakota Range's motion.

19 COMMISSIONER NELSON: That is correct. I wanted
20 to leave that for a separate issue if anybody wants to
21 bring that in.

22 COMMISSIONER HANSON: Thank you.

23 COMMISSIONER NELSON: Additional discussion.

24 CHAIRMAN FIEGEN: Thank you, Commissioner
25 Nelson.

1 I would agree. This is always a tricky
2 situation when -- as a legislator you get to take all
3 sorts of testimony from constituents and when you're
4 making policy and votes on bills.

5 When you have the Public Utilities Commission
6 and you're quasi-judicial, they just have to follow the
7 law and the rule of evidence. So they will still be able
8 to participate, but we do need to follow the law.

9 So I will be supporting your motion and then
10 look forward to continuing discussion.

11 COMMISSIONER HANSON: Mr. Chairman.

12 COMMISSIONER NELSON: Yes, Commissioner Hanson.

13 COMMISSIONER HANSON: I would just like to say
14 that I think all three of us see this as an unfortunate
15 situation of the challenges in laypersons working within
16 a legal system and, unfortunately, not having the
17 opportunity to participate to the extent that they would
18 like to if they understood all of the processes. And
19 it's just an unfortunate situation for them that they
20 cannot participate to that extent, although it is obvious
21 that some of the information would have been hearsay.

22 And I'm struggling a bit right now with one part
23 of the motion, and that is in regards to I recognize, as
24 I understand, that -- and correct me if I'm wrong --
25 hopefully I am.

1 Do I understand correctly that Meyer's, James's,
2 and Hartke's testimony is not prefiled and, therefore --
3 other than the exhibits, and they would not be allowed to
4 testify? Is that correct?

5 COMMISSIONER NELSON: That is -- that is
6 correct.

7 And for your benefit, Commissioners Hanson and
8 Fiegen, our attorneys here have been consulting the
9 actual Order that we issued and are in agreement that
10 because they didn't file prefiled testimony, would not
11 comply with our Order.

12 COMMISSIONER HANSON: All right. Thank you.

13 And I -- I fully appreciate the anxiety that the
14 two Intervenors have over this issue. I'm sure we all
15 do. But at the same time, we have to follow the law and
16 our orders, and it is as it is.

17 Thank you, Mr. Chairman.

18 COMMISSIONER NELSON: The only other thing that
19 I would say, and I know this isn't going to help Ms. Kaaz
20 or Ms. Mogen any, but as Commissioner Hanson was talking
21 about the fact that, you know, there are certain exhibits
22 that we can't except, there are times when lawyers offer
23 exhibits to us and we can't accept those either. It all
24 comes down to whether the law allows them to come in or
25 not.

1 With that, any further discussion?

2 Hearing none, all those in favor will vote aye.

3 Those opposed, nay.

4 Commissioner Fiegen.

5 CHAIRMAN FIEGEN: Fiegen votes aye.

6 COMMISSIONER NELSON: Commissioner Hanson.

7 COMMISSIONER HANSON: Aye.

8 COMMISSIONER NELSON: And Commissioner Nelson
9 votes aye. Motion carries.

10 Now there's a couple other probably hanging
11 issues. The Applicant had made a request regarding
12 hearing participation. Staff had addressed that in your
13 memo. I thought you addressed it to my satisfaction
14 anyway, but I guess, Ms. Smith, has it been addressed to
15 your satisfaction?

16 MS. SMITH: And maybe I'm misunderstanding, but
17 you had understood that there was -- there were data
18 requests issued to all the Intervenors, and they -- those
19 that didn't respond were identified as not participating.
20 And I worry a bit about not having an affirmative
21 statement of not planning to participate.

22 And if I misunderstood, I believe Ms. Edwards
23 will correct me.

24 COMMISSIONER NELSON: Ms. Edwards.

25 MS. EDWARDS: Mr. Kearney is checking his notes.

1 That was a survey that Ms. Reiss sent out, and she is,
2 unfortunately, not here today.

3 My recollection is that when she contacted all
4 of the Intervenor's she had four responses with two saying
5 they were going to participate, that being Ms. Kaaz and
6 Ms. Mogen, and I believe Ms. Redlin was going to be in
7 the audience.

8 COMMISSIONER NELSON: Very good.

9 Ms. Smith, does that suffice for today?

10 MS. SMITH: I think it does, as long as -- I
11 guess what we just want to make sure is we know who is
12 planning to participate going into the hearing. And if
13 that's the consensus is that Ms. Kaaz and Ms. Mogen are
14 the only Intervenor's that plan to participate, that's how
15 we will proceed.

16 COMMISSIONER NELSON: Yeah. And I think what I
17 am perceiving is that's what they have told staff.
18 Obviously, things can change, but at least at this point
19 that's what they've told staff.

20 MS. SMITH: That sounds good then.

21 COMMISSIONER NELSON: Thank you.

22 So I do not have any further motions.

23 Fellow Commissioners, do you have any further
24 motions particularly in regard to a request or two that
25 staff had?

1 CHAIRMAN FIEGEN: Commissioner Nelson, I would
2 like to ask staff about excluding MaRous's Exhibit No. 1
3 because it's already filed with the Applicant and so if
4 we should look at that motion also today.

5 MS. SMITH: This is Ms. Smith. I may not be
6 following, but what motion are you referencing?

7 CHAIRMAN FIEGEN: I'm asking staff attorney
8 Kristen Edwards. I thought staff had a Motion to Exclude
9 Exhibit 1 from Teresa's exhibit list of MaRous.

10 Is that correct, Kristine Edwards?

11 MS. EDWARDS: I haven't found it yet in our
12 response, but my recollection is, yes, it was the exact
13 same thing the Applicant had filed. So I had added it to
14 our list just because it was duplicative.

15 CHAIRMAN FIEGEN: Right. So I don't know that
16 we -- I don't think it's that imperative that we do it,
17 but it was a motion that staff suggested that we do take
18 today.

19 So, staff, I don't know if you want to comment
20 on that anymore or, Commissioner Nelson, if there's
21 anything else we should do with that or Commissioner
22 Hanson.

23 COMMISSIONER NELSON: Our lawyers are looking at
24 some things so just give us a second.

25 CHAIRMAN FIEGEN: Okay. And then the only other

1 question I had of staff is the judicial notice.

2 We didn't talk a lot about that today, but I'm
3 probably going to -- if we needed to vote on that, I
4 would deny that request today. So I don't know if we
5 need those motions today or not.

6 Those are my questions. Thank you, Commissioner
7 Nelson.

8 MS. CREMER: Ms. Smith, this is Karen Cremer and
9 the one -- and I can't find my notes on it, but the one
10 that staff tried to clarify, it's on page 2 of their
11 brief -- or their response.

12 MS. SMITH: Okay.

13 MS. CREMER: Did you include that as a part of
14 what you wanted stricken? I didn't think you did. And
15 so that's the only -- I guess I'm just asking, has it
16 already been stricken due to the prior motion?

17 MS. SMITH: So I am looking at page 2, and I am
18 not --

19 MS. CREMER: It's the first full paragraph of
20 staff's response.

21 MS. SMITH: Okay. On the market analysis.

22 No. Technically we didn't because we're not
23 going to object to it being entered because it is also,
24 as Ms. Edwards noted, one of our exhibits.

25 If it helps, we could represent to Ms. Mogen

1 that we will be -- and Ms. Kaaz that we will be putting
2 that into the record as an exhibit so you can rely on the
3 fact that we will be providing it. And so if you
4 don't -- if everybody doesn't want to deal with the issue
5 today, we can simply say we will be providing it, and
6 they can rely on our having that exhibit marked for the
7 hearing.

8 MS. CREMER: Okay. And then I think Ms. Edwards
9 was going to -- did you have a response?

10 MS. EDWARDS: I'll just withdraw the request
11 from our response regarding that exhibit, and if there's
12 anything cumulative, I suppose we can deal with that when
13 we do marking of exhibits before the hearing.

14 MS. CREMER: Thank you.

15 COMMISSIONER NELSON: Thank you.

16 Anything further from Commissioners?

17 Well, yeah. So the only other issue that's
18 hanging was Kristen's request regarding judicial notice.
19 I know there's at least two Commissioners that really
20 don't want to go there today.

21 MS. EDWARDS: Withdrawn.

22 COMMISSIONER NELSON: Oh, that's what you call
23 reading tea leaves very well.

24 Fellow Commissioners, anything further for the
25 good of the order?

1 Is there a motion to adjourn.

2 CHAIRMAN FIEGEN: Move to adjourn.

3 COMMISSIONER NELSON: Move to adjourn.

4 All those in favor will vote aye. Those
5 opposed, nay.

6 Commissioner Fiegen.

7 CHAIRMAN FIEGEN: Aye.

8 COMMISSIONER NELSON: Commissioner Hanson.

9 COMMISSIONER HANSON: Aye.

10 COMMISSIONER NELSON: And Nelson votes aye. We
11 are adjourned.

12 (The proceeding is adjourned at 2:07 p.m.)

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1 STATE OF SOUTH DAKOTA)

2 :SS CERTIFICATE

3 COUNTY OF SULLY)

4

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

8 DO HEREBY CERTIFY that as the duly-appointed
9 shorthand reporter, I took in shorthand the proceedings
10 had in the above-entitled matter on the 21st day of
11 May, 2018, and that the attached is a true and correct
12 transcription of the proceedings so taken.

13 Dated at Onida, South Dakota this 6th day of
14 June, 2018.

15

16

17

18 /s/ Cheri McComsey Wittler
19 Cheri McComsey Wittler,
20 Notary Public and
21 Registered Professional Reporter
22 Certified Realtime Reporter

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