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THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE APPLICATION OF
BLACK HILLS POWER, INC. FOR AUTHORITY EL09-018
TO INCREASE ITS ELECTRIC RATES

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Transcript of Proceedings
June 21, 2010

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COMMISSION STAFF

John Smith
Karen Cremer
Tim Binder

ORIGINAL

APPEARANCES

Lee A. Magnuson (via telephone),
appearing on behalf of Black Hills Power,
Todd Brink (via telephone),
appearing on behalf of Black Hills Power,
Sam Khorroosi (via telephone),
appearing on behalf of the Residential Consumer
Coalition.

ALSO PRESENT

Nicole Shalla

Reported By Cheri McComsey Wittler, RPR, CRR

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TRANSCRIPT OF PROCEEDINGS, held in the
above-entitled matter, at the South Dakota State Capitol
Building, 500 East Capitol Avenue, Pierre, South Dakota,
on the 21st day of June, 2010, commencing at
11 o'clock a.m.

1 MR. SMITH: We'll just be relatively informal.
2 As you know, we've got Cheri in the room to record a
3 transcript of the proceedings today.

4 And, as I understand it, I mean, basically what
5 I assume we're doing here is just to try to resolve any
6 procedural matters that may be outstanding so that things
7 go smoothly on Monday.

8 And, with that, I had a series of things, and
9 you guys feel free to chime in with any other matters you
10 think are appropriate to bring up.

11 I guess the first item I thought -- and I don't
12 know of any, but I'll at least throw it out so we are on
13 the record here -- might be, do any parties have any
14 prehearing motions that they intend to file or even
15 perhaps make at the hearing that it would be useful for
16 the rest of us to know about so we could be prepared for
17 those?

18 Maybe we'll start with Applicant. Lee? Todd?

19 MR. MAGNUSON: On behalf of Black Hills Power,
20 we do not at the present time have any prehearing motions
21 that we will be filing at or before the date of the
22 hearing.

23 MR. SMITH: Okay. Sam. Mr. Khorroosi.

24 MR. KHOROOSI: On behalf of the Residential
25 Consumers Coalition, we don't anticipate any prehearing

1 motions at this time.

2 MR. SMITH: Okay. Staff.

3 MS. CREMER: And staff would have no motions.

4 MR. SMITH: Okay. With that then, we discussed
5 this at our conference we had here what, two, three weeks
6 ago, but where are we at, folks, and we'll take you maybe
7 one by one, but in terms of stipulated admission at least
8 in the sense of foundation?

9 You guys discussed that at the time. I don't
10 know that we reached a resolution of that. Is that an
11 issue that we ought to address as to whether we can
12 expedite things by not having to go through the drill of
13 offer and received and all of that? Or are there
14 disputes among the parties related to that?

15 MR. KHOROOSI: This is Sam Khoroosi. I can say
16 that I don't anticipate any objections to the foundation
17 on any of the exhibit lists that I've seen.

18 MR. SMITH: Lee? Todd?

19 MR. MAGNUSON: Sure. We are still taking a look
20 at what have been proposed -- or at the exhibit lists
21 that have been provided. And at least at this point we
22 don't expect that we would have any objections. We're
23 still reviewing that to see whether we might.

24 My expectation was that I would touch base with
25 Sam in the next day or two to see if we couldn't reach

1 agreement on all of those, the admission of all of those
2 exhibits. Within the next day or so we'll know for sure.
3 But, again, don't expect that we'll have any objection.

4 MR. SMITH: Okay. Staff, comments or position?

5 MS. CREMER: Staff would have no objection to
6 the exhibits.

7 MR. MAGNUSON: But, Mr. Smith, just for the
8 purposes of clarification, there's a difference between
9 objection to foundation or stipulating to the admission
10 of exhibits. And my thought was that we would try to
11 stipulate to the admission of just as many exhibits as
12 possible. Is that what you had in mind also?

13 MR. SMITH: Yeah. What I'm thinking of is just
14 the drill of, you know, with respect to particularly
15 witness testimony and all of that where, you know, in
16 terms of does that waive any objection you may have to
17 things that are buried in there somewhere? I don't think
18 so.

19 But in the past it -- and it doesn't really
20 matter to me, but it just sometimes can expedite the
21 process of not having to go through the drill with every
22 witness of did you prepare -- you know, the whole
23 business of all of that.

24 But, on the other hand, it's not a big deal to
25 me either way. I just thought I'd bring it up because to

1 the extent we can move things along in terms of needless
2 formalities, I'd like to do that. But why don't you guys
3 continue your discussions and, you know, to the extent we
4 can reach agreement on exhibit admission, stipulation,
5 that would be great.

6 I don't know that we can get any farther today
7 on that since you're still discussing it.

8 MR. MAGNUSON: If I could, just, Sam, are you
9 thinking that you would be willing to stipulate to the
10 admission of exhibits as compared to just stipulating to
11 no objection to foundation?

12 MR. KHOROOSI: I think I would, yes.

13 MR. MAGNUSON: That certainly will make it much
14 smoother. Because then what I would expect is that we
15 can stipulate to hopefully all of the exhibits on
16 everybody's exhibit list and then basically request that
17 they be admitted by the Hearing Examiner. And if we do
18 that at the beginning of the hearing, it's going to save
19 a lot of time.

20 MR. SMITH: It would seem to me to do so. And,
21 again -- and I don't know what other objections parties
22 may have. You know, in terms of the written testimony,
23 you know, we have had in the past -- in some cases we
24 have had then what I wouldn't call admissibility
25 objections really, but then sometimes substantive

1 objections to things as being irrelevant or whatever.
2 And we generally dealt with those separately from just
3 whether or not the exhibit, per se, is admitted.

4 But I don't know where you all are on that,
5 obviously. So anybody -- am I getting into confusion
6 territory there or --

7 MR. KHOROOSI: No. I think you make a valid
8 distinction. But to tell you the truth, I haven't quite
9 given it much thought. I don't know right now whether we
10 would have any of those substantive objections. But I'd
11 sure be happy to talk with the other counsel later on to
12 see if we can't stipulate to as much as we can.

13 MR. SMITH: Okay.

14 MR. BRINK: Right. And it wouldn't be that any
15 party is stipulating to the facts necessarily that are
16 included in the exhibits.

17 MR. SMITH: Absolutely not.

18 MR. BRINK: But just stipulating that they may
19 be admitted into evidence for evidentiary purposes. But
20 still be disputes over the facts that are contained in
21 the exhibits.

22 MR. SMITH: That's absolutely the case. There
23 would be no presumption by anyone stipulating to just the
24 admission that they are admitting in any way to the
25 conclusions drawn or other facts contained within any of

1 the exhibits.

2 Okay? I'm just thinking of the formality
3 aspect. If we can just shorten up the drill on
4 admission, it makes it go quicker. And we just haven't
5 had problems in the past as long as, again, we all
6 understand. And I think we're basically on the record
7 now that that in no way is to be construed as an
8 admission by anyone. Okay?

9 Okay. The next thought I think I -- what I
10 thought we might address -- and, again, this case is in a
11 slightly different posture than we usually see because of
12 the oddity of having a stipulation forming the basis of
13 the hearing. And that's order of presentation.

14 Maybe we can address that. I guess my initial
15 thought -- I'll just throw it out. And, again, this
16 differs from the norm. But usually the order we go in is
17 Applicant or Petitioner, Complainant, whoever it is,
18 secondly respondent or Interveners, and then usually
19 lastly we follow on with Staff.

20 It occurred to me in this case because we have
21 both the Applicant and Staff as the proponent of the
22 Commission approving the settlement stipulation that
23 perhaps the proper order of witness presentation -- of
24 evidence presentation might be Applicant, Staff, followed
25 by the Intervener.

1 And, again, I'm not -- I'm not prejudging that
2 issue. I just threw it out as a discussion item.

3 Applicant, position?

4 MR. MAGNUSON: On behalf of Black Hills Power,
5 we have no objection to that proposed order.

6 MR. SMITH: Staff, you're probably next on this
7 one.

8 MS. CREMER: I would prefer Staff to go last.
9 And I understand what you're saying and why and I'm not
10 going to fall on my sword over this thing. But only
11 because the Commission generally tends to look at Staff
12 as more of that neutral party. And it would be just
13 better for us if we've heard everybody's testimony so
14 that we can then comment as a whole.

15 MR. SMITH: Okay.

16 MS. CREMER: Because otherwise, I'm just
17 concerned that once we hear with the late witnesses from
18 RCC, then I'm going to have to, you know, make -- while
19 my witnesses will be available, I mean, I'd really,
20 really have to make sure they're available. But, again,
21 I guess because -- we'll go before that late witness
22 anyway, won't we?

23 MR. SMITH: Before the late one, you will. Now
24 we, I think clearly enough in our e-mail exchange, but
25 maybe we can state it here on the transcript here, that

1 my understanding is that because that witness will be
2 late and potentially sort of have been after some
3 rebuttal testimony that may or may not have been given
4 relative to those issues, that we would exercise
5 liberality for both of the other parties, Applicant and
6 Staff, to present evidence in response to what happens
7 that day.

8 And that's one reason why -- without knowing --
9 I mean, this could be short that day, on Wednesday, but
10 because of that oddity, I -- that's why I was somewhat
11 concerned about whether we really were going to be able
12 to cram this into an afternoon. And then with the
13 attendant scheduling snafus we could have, and why I'd
14 just as soon have it all if we can on one day for that
15 reason.

16 I don't know. Mr. Khorroosi, what do you think
17 on order? I mean, Karen makes in a way a good point that
18 the Commissioners do -- they do kind of look to Staff as
19 sort of, like Karen said, you know, a more neutral voice,
20 if you want to call it that. Again, in this case it's a
21 little bit unusual. Okay. I'll shut up, Sam, and let
22 you have at it.

23 MR. KHOROOSI: I mean, I guess the statutory
24 burden still lies on the utility, so I guess I don't have
25 an objection either way. So, I mean, I guess whatever

1 works best for everyone else is fine with us as well.

2 And now would probably be a good time to express
3 my appreciation not just to you, John, but to all the
4 other parties and the Commission itself for being so
5 accommodating with Chris James' testimony. But in an
6 effort to further consolidate and save the parties time
7 and money, and I had been in e-mail contact by
8 happenstance with Karen about it, and I think -- tell me
9 if I'm overstepping my bounds, Karen, in stating that you
10 didn't have an objection to our proposal. And I
11 apologize to Lee and Todd that I haven't had a chance to
12 discuss this with you yet. But if everyone would be
13 willing to stipulate to Chris James adopting David
14 Schlissel's testimony, would that be something that would
15 be acceptable? And if you would have to discuss it, I
16 understand. But I think we could save a lot of time by
17 doing that.

18 MR. SMITH: And that would -- then Schlissel
19 would not appear? Is that the idea?

20 MR. KHOROOSI: That's correct. If that's okay
21 with the other parties and the Commission.

22 MR. SMITH: Yeah. I don't know that -- I don't
23 know that the Commission itself has a preference. I
24 don't know that we really care either way. But
25 Applicant?

1 MR. MAGNUSON: I will need to visit with Todd
2 and my client regarding that proposal. I was not aware
3 of it until now.

4 The problem that you have then is you're talking
5 about -- let's say we go with the order that's being
6 discussed at this time and that is Black Hills Power
7 would go first and then South Dakota Peace and Justice
8 would go second. They would only put one witness on the
9 first week, and then Staff goes. And then we go to the
10 second -- and then we put on our rebuttal. Well, all we
11 have in at that point is Frankenfeld's testimony. So we
12 wouldn't have an opportunity to put in much rebuttal at
13 all. And then we get to the following week, and then we
14 have James adopting Schlissel's testimony. So that
15 proposal effectively tries to push all of our rebuttal
16 off to that second week, and we will not get it done in a
17 day if that's what we're talking about.

18 So I'll have to talk to Todd. My initial
19 reaction is I'm not sure that that would be acceptable.

20 MR. BRINK: I think we would have witness
21 availability issues if we were rebutting Schlissel the
22 second week. I guess the way we were thinking about it
23 is that Schlissel would go the first week, we would put
24 on of all our rebuttal witnesses related to Schlissel's
25 testimony that first week. And I know that we have at

1 least one witness that, at least based on the last
2 information I have, is not available the second week, a
3 witness that would rebut Schlissel. So, yeah, we'll have
4 to talk about that one a bit more.

5 MR. SMITH: Karen, on behalf of Staff, do you
6 have thoughts?

7 MS. CREMER: Yeah. Sam and I did exchange
8 e-mails this morning. And he was okay with Staff's
9 witnesses appearing by phone. And so at this point the
10 Staff that's in Pierre will be personally at the hearing,
11 but our four consultants will be appearing by phone.
12 And, like I said, I believe I talked to Black Hills about
13 that before and they were fine with that and Sam has also
14 agreed that he is okay with that.

15 He did ask about the adoption -- Mr. James
16 adopting that testimony. Staff has no issue with that.
17 I understand Black Hills' problem, however. We didn't
18 have rebuttal to Schlissel so we wouldn't be putting any
19 on but I can understand their concerns there.

20 Why don't we work that part out and then we'll
21 have a better idea of where Staff should put on its
22 testimony maybe.

23 MR. SMITH: Yeah. And I don't care. If you
24 guys can reach agreement on any of these things, they're
25 absolutely fine with me. So is your suggestion then that

1 you guys continue to discuss that issue and see if you
2 can reach an accommodation on it?

3 MS. CREMER: I think let's give Black Hills an
4 opportunity to ponder it and determine what they need to
5 do and check with their witnesses. And then, you know,
6 we will get back to you what our ultimate decision is if
7 we can agree. If we can't agree, then we'll get back to
8 you and schedule another prehearing conference.

9 MR. SMITH: Okay.

10 MR. BRINK: And, again, I have a question for
11 Sam, John, if you don't mind.

12 MR. SMITH: Please.

13 MR. BRINK: I guess what were you thinking 'of in
14 terms of James' adoption of Schlissel's testimony? And
15 what I mean is are you thinking that James would adopt
16 Schlissel's testimony in order to get it into the record
17 and be available for cross-examination on that testimony?
18 Or are you thinking that James would adopt Schlissel's
19 testimony and also address matters that are addressed in
20 Schlissel's testimony on direct examination?

21 MR. KHOROOSI: No. My whole purpose would just
22 be to have someone be available for cross-examination on
23 Schlissel's issues. I didn't intend to have Chris put in
24 anything new as far as the subject matter of David's
25 testimony to the extent that it wasn't covered in

1 Chris's.

2 MR. BRINK: Okay.

3 MR. KHOROOSI: We would just have him available
4 for that.

5 MR. BRINK: Okay. We can talk about that then.

6 MR. KHOROOSI: Again, this isn't a terrible
7 sticking point for me. I just figured I better bring it
8 up at this point while we were discussing the issues.
9 And, again, I apologize for not having brought that up
10 with you earlier. But I think we can reach a resolution
11 either way.

12 MR. BRINK: The way I look at it, James is kind
13 of testifying on DSM energy efficiency. Schlissel's
14 testifying on CO2 costs. So as long as James didn't
15 testify on anything other than, you know, what we expect,
16 DSM energy efficiency, that probably wouldn't change our
17 rebuttal. You know, if there weren't any additional
18 testimony, we probably still could put that rebuttal in
19 that first week if we just stipulated Schlissel's
20 testimony into the record the first week and we waived
21 cross-examination and then just put in rebuttal. You
22 know, I'm just thinking out loud. That's something that
23 might work but obviously something we need to talk about
24 a little bit more after this call.

25 MR. KHOROOSI: Sure. That's fine.

1 MR. SMITH: Okay. Well, why don't you guys see
2 what you can -- you know, I don't think the Commission
3 itself has a heck of an issue either way with it.

4 And your feeling then -- I don't know these
5 people's -- you know, the niceties of their background.
6 Your feeling, Sam, is that Mr. James would be qualified
7 and competent to undergo, if need be, cross-examination
8 relative to Schlissel's CO2 related -- CO2 cost related
9 testimony, that kind of thing?

10 MR. KHOROOSI: Yes. Yes. In fact, although
11 Mr. Schlissel was prepared specifically to talk about
12 this issue at the hearing, Mr. James will be prepared to
13 address any cross-examination that comes up.

14 And he was also the author on a number of
15 documents that were included with Mr. Schlissel's
16 testimony.

17 MR. SMITH: Okay. Any follow-on thoughts?

18 MR. BRINK: None from me, John.

19 MR. SMITH: Okay. Karen, any last --

20 MS. CREMER: No. Nothing from Staff.

21 MR. SMITH: Okay. Well, the next questions or
22 discussion I guess I wanted to go over -- and, again,
23 this is not a very big deal, but I just thought we would
24 again -- there's going to be -- we're going to have to
25 exercise some level of flexibility because of the

1 oddities of schedule accommodation and so on here. And
2 everyone's -- we're just going to have to suck it up and
3 live with that to some extent.

4 I wanted to go over a brief discussion of for
5 those of you who haven't appeared here before in a formal
6 hearing context as to just how things go in terms of how
7 we manage a hearing with prefiled testimony.

8 And, again, I think I discussed this down in the
9 conference room when we had our last session but I'll go
10 over it again. Generally, again, with admission
11 stipulated, we usually don't have to go through much in
12 the way of drill in terms of needless foundation-related
13 testimony. And usually what we do so that we don't have
14 a completely upside down order of presentation is we
15 usually permit the parties to have their witness present
16 a brief summary of what their prefiled testimony states.

17 And, again, I want to stress the word "brief."
18 And by "brief," usually what we're thinking is -- and I
19 don't know what you guys' thoughts are, but usually we're
20 thinking something along the lines of 15 minutes or so.
21 That kind of time frame. Not to exceed that. Again,
22 we've all had the benefit of the prefiled testimony.

23 But it helps to avoid the hearing being, like I
24 said, upside down in a sense.

25 Then usually we go to cross-examination and then

1 the usual order of things and then redirect. And, again,
2 the vast majority of time and so on, generally occurs via
3 the latter two.

4 We have had in the past -- I'm thinking
5 local-number portability hearing where we had some
6 witnesses that in their brief summary turned it into *War*
7 *and Peace*, you know. And I have at times exercised my
8 prerogative as Hearing Examiner and had to step in and
9 say stop.

10 But your thoughts on that? That's generally the
11 way it goes. And just any thoughts or observations by
12 any of the parties on that?

13 MR. MAGNUSON: Well, this is Lee, and that is
14 acceptable to us. Todd, I assume you agree?

15 MR. BRINK: Yep. Yep.

16 MR. SMITH: Sam?

17 MR. KHOROOSI: Nope. That's great with us as
18 well.

19 MR. SMITH: Staff.

20 MS. CREMER: That's fine with staff. I would
21 ask, you had mentioned before -- how are you going to --
22 are they going to be allowed on that 15-minute summary to
23 address like a rebuttal -- you know, testimony that was
24 filed, or is that all just going to be taken care of on
25 cross-examination? Redirect? How do you want to do

1 that?

2 MR. SMITH: I would say, again, because of the
3 oddity of prefiled testimony, it has its pros and its
4 cons, but one of the cons is in the live portion of the
5 hearing we do end up having an odd anomaly in a sense,
6 although I don't know that it much matters, where by that
7 point we will have had many -- many of the witnesses will
8 have presented both direct and rebuttal testimony.

9 Generally speaking, the way I think it works the
10 best is for in the summary portion to set it -- it's
11 already there. We can't undo that. So my feeling is
12 they're better off just addressing the totality of what
13 they presented in prefiled in their summary, both the
14 direct portion and the rebuttal portion.

15 Any thoughts on that, folks? I just don't see
16 how you can really -- like I said, you can't -- we can't
17 undo the passage of things that have happened, and so we
18 just might as well admit that. And we've basically
19 allowed that in the past, and that kind of sets us up at
20 hearing time so that we're -- the order of presentation
21 at the hearing itself is kind of restored a little more
22 to normative evidence presentation.

23 Any thoughts?

24 MR. MAGNUSON: Well, Mr. Smith, this is Lee. I
25 guess, generally speaking, I think we agree with what

1 you're saying. For our witnesses, I expect that their
2 testimony can be broken into three parts.

3 The first part would be the brief summary of
4 their prefiled testimony that you just discussed. The
5 second portion of their testimony would be testimony
6 related to support of the settlement itself. And then
7 the third part of their testimony would be rebuttal or
8 some limited rebuttal to any prefiled testimony that has
9 been prefiled by, in our case, the Intervener.

10 MR. SMITH: Yeah. And you do raise a good
11 point. Again, that's one where because of the existence
12 of the settlement stipulation here, that's probably a
13 good way to look at it.

14 And I think in that case the direct testimony
15 probably will have to be broader than the usual what I
16 call brief -- just brief summary because of the existence
17 of a status change that will require some level of --
18 particularly on the side of -- on the parts actually I
19 would say of both Black Hills and Intervener.

20 Now Staff has submitted a document that's
21 extensive, that although not labeled prefiled testimony
22 in a sense serves that function. And by that I'm talking
23 the memorandum. So they're in a little different
24 posture. But I think you make a good point, Lee.

25 Any thoughts, Sam?

1 MR. KHOROOSI: Actually, I had a similar concern
2 to Lee. And I had the same thing in mind with a little
3 bit of a wrinkle being that we would -- that the third
4 phase of our testimony would include responses to the
5 rebuttal testimony that had been filed.

6 MR. SMITH: Uh-huh. Yep. And that's usually
7 the case.

8 MR. KHOROOSI: Okay.

9 MR. SMITH: All right. Yeah. And, again, we
10 try to use common sense and enough liberality in basic
11 just procedural matters to where people are given a fair
12 opportunity to present their facts. I mean, we don't
13 want to render a decision on the basis of technical
14 preclusions of people's ability to fully explore and
15 present their cases.

16 So I -- that was a good point, Lee, and I'm
17 adding that to my list here so that we're all aware that
18 there are going to be matters that have occurred
19 subsequent to prefiled testimony that will require
20 adjustment and additional new presentation at the
21 hearing. And that would include too, Sam, your
22 witnesses' responses to any prefiled rebuttal.

23 Any other thoughts on that, on basic witness
24 presentation?

25 Are you guys okay with that?

1 MR. BRINK: Only to say that I think most of
2 that testimony still can be presented in more of a brief
3 summary type of format. It might be longer than 15
4 minutes, but I wouldn't expect -- I wouldn't expect our
5 witnesses to be -- the summary to be more than 15 minutes
6 in any case. But I would think in all cases it should be
7 30 minutes, maybe an hour at the most.

8 MR. SMITH: Right. Yeah. I think I'd just be
9 blunt about it. What we don't want to do -- and, again,
10 we've unfortunately had this happen before -- is to have
11 someone effectively repeat everything that we've received
12 in the prefiled. Because we will have had that and both
13 cross-examiners and the Commissioners themselves, by then
14 they will have extensive notes and they will burrow in to
15 it on cross-examination.

16 So my belief is that there will be a full
17 exploration of it without needless repetition in the
18 opening summary portion.

19 But, again, we do have to account for the fact
20 that we have the settlement stipulation which does change
21 the angle of attack a little bit. And with that in mind
22 and some liberality to account for that, I agree with
23 you, Todd.

24 Thoughts, Sam? Any thoughts?

25 MR. KHOROOSI: No. No. I'm in agreement with

1 everyone else.

2 MR. SMITH: Okay. Well, lastly, I was just
3 going to bring this up. It doesn't make any difference
4 to me, but I thought I'd bring it up. Especially in
5 cases involving prefiled, sometimes persons want to make
6 opening and closing statements. Other times they don't.
7 They're willing to say -- to basically waive opening and
8 closing statements.

9 I just brought it up. I don't care. I don't
10 know that it's something we need to address now. We
11 certainly don't -- I don't have an objection at all to if
12 people want to make opening and closing statements.
13 We're willing to permit that if attorneys are so
14 inclined.

15 Did you guys have any thoughts on your
16 preferences in terms of doing that or not?

17 Karen, did you have a thought? You kind of
18 brought this up to me.

19 MS. CREMER: Yeah. And I'll just mention -- the
20 reason I brought it up to John is because neither party
21 has really appeared before the Commission before. And I
22 would say as a general course, and Cheri would probably
23 know better than I do, but I would say 95 percent of the
24 time counsel just does not do either an opening or a
25 closing. Their closing, they say they'll brief it so

1 they don't need a closing. Their opening, you're not in
2 front of a jury. You don't really need to tell anyone
3 where the evidence is going here, your typical law school
4 opening.

5 But people have done it, I believe. I just
6 can't recall anybody. So that's the only reason. Staff
7 will not be doing an opening or a closing, but you guys
8 can do what you want.

9 MR. SMITH: Any thoughts from the others?

10 MR. KHOROOSI: This is Sam. I think I agree
11 with Karen. I don't really see a need to do openings or
12 closings. By then everyone's been through most of what
13 the evidence is and we'll be able to -- or I don't know
14 that we would need opening statements.

15 And as far as closing statements go, again, I
16 don't know if this is the time to address a posthearing
17 brief, but I would prefer to do that as opposed to a
18 closing statement.

19 MR. SMITH: Lee, Todd?

20 MR. MAGNUSON: I guess, if we decide that we
21 would like to do an opening statement, it would be very
22 brief. It would not be an opening argument. And it
23 would be more an order of a 2- or 3- or 4-minute outline
24 of how we intend to present our case and a brief
25 introduction of the witnesses that we intend to call,

1 just to give the Commission a broad outline of how we
2 intend to present our case. And that would be if we
3 decide to do an opening statement. No closing statement
4 is fine.

5 MR. SMITH: And, again, you may feel differently
6 about it -- my assumption is the parties in the case will
7 want to submit posthearing briefs, but I guess I don't
8 know that. If you don't, then, of course, maybe you
9 would want to make final closing to put a wrap on it.
10 But if you think you're going to want to have brief
11 submissions, then probably we're better off doing that.
12 And the Commission once in awhile then sometimes will
13 want to have oral argument on that so we end up being
14 really -- a lot of times we end up being redundant by
15 having a closing statement.

16 But, again, Applicant, I don't think I heard
17 from you or Staff on the issues of briefs. Sam, I think
18 he expressed that he felt posthearing briefs would
19 probably be his preference.

20 MR. BRINK: I think my preference would be to
21 have closing statements as opposed to posthearing briefs.
22 Or if we do have posthearing briefs, that it's a very
23 expediated schedule; that the briefs are due just a few
24 days after the hearing is done.

25 MR. SMITH: Karen, any thoughts? Let me express

1 one thought here. And I will just tell you -- we thought
2 this up especially in the closing statements. A lot of
3 times too as we go through the hearing, you know, it
4 becomes either obvious as to whether or not there
5 actually are any "legal issues" presented that are really
6 the subject of brief or whether we're strictly talking
7 just the evaluation of the evidence.

8 And in the end that might influence. And maybe
9 the issue on closing and on brief -- should we leave that
10 until we see how the hearing goes as to whether or not
11 there appear to have been raised the kinds of questions
12 that perhaps the parties believe they would want to
13 address in a brief?

14 And I totally -- I think we can accommodate an
15 expedited briefing schedule.

16 MR. BRINK: I agree with what you're saying,
17 John. I think you hit on the issue is that if you look
18 at the statement of issues that the parties have
19 submitted, it doesn't seem like there's any legal dispute
20 as to what the legal standard is and it's more a matter
21 if there's sufficient evidence to meet the legal
22 standards. So that would seem to lend itself to there
23 being no posthearing briefs. But you're right, it's
24 probably a matter that's better addressed at a later
25 time.

1 MR. SMITH: Yeah. Maybe at the end of the
2 hearing we can discuss that as to whether it's viewed as
3 necessary. And if not, then I think maybe -- I suppose a
4 closing statement to summarize what you believe has
5 happened would be in order.

6 Thoughts, Karen? Do you have a thought on that?

7 MS. CREMER: Yeah. I would agree with Todd. At
8 this point I don't see that there's a legal issue, and I
9 don't care to brief just to brief. I don't have anybody
10 else to help me. Black Hills has four or five attorneys
11 on this. Sam has Nicole. I don't have the ability to
12 turn around and do a brief in a couple of days. It's
13 just not going to happen.

14 So unless there's a reason, a legal issue, I
15 would not want to brief just to brief.

16 MR. SMITH: Sam, any last thoughts?

17 MR. KHOROOSI: That's fine. And, again, I'm
18 willing to wait to see how the hearing shakes out. But
19 if closing statements is what seems to be the prevailing
20 preference, then I'm fine with that as well.

21 MR. SMITH: Okay. And we don't know. We don't
22 know until the hearing happens. I mean, the only thing I
23 can think of is if, for example, there was a dispute
24 over -- you know, if I make an evidentiary ruling that
25 somebody views as legally challengeable, you know, we

1 don't know what's going to happen.

2 So why don't we do that. We'll just reserve any
3 judgments at all on that until we get to the hearing.
4 And at the end of it, you guys will know better whether
5 anything has occurred during the hearing that warrants
6 and justifies briefing.

7 Okay?

8 MR. BRINK: Sounds good.

9 MR. MAGNUSON: Thank you.

10 MR. SMITH: Well, I'm at about the end of my
11 list. Now I'll throw it open and start with the
12 Applicant as to any other issues that you'd like to
13 address here today.

14 MR. MAGNUSON: This is Lee. I want to make sure
15 and clarify and make sure we all agree that based on our
16 discussions that Black Hills Power will have the right to
17 put in rebuttal testimony at the end of the first week
18 when South Dakota Peace and Justice and Staff have put on
19 their case except for Mr. James. And then that we would
20 have the right to put in rebuttal after Mr. James'
21 testimony.

22 That's been my understanding. I just need to
23 clarify and make sure that that's agreeable to everybody.

24 MS. CREMER: That's agreeable with Staff.

25 MR. KHOROOSI: It's agreeable with the

1 Residential Interveners as well.

2 MR. SMITH: Okay. It's agreeable to me. And it
3 reflects to me the chain of communications that have
4 occurred among the parties thus far. And that's been my
5 understanding all along. So the answer, I think, Lee, is
6 yes.

7 MR. MAGNUSON: Thank you. And then along those
8 same lines, I would request that it be acceptable that if
9 we have additional rebuttal testimony after Mr. James
10 testifies that second week, that we would be allowed to
11 call some of those witnesses if necessary by telephone.
12 Would that be acceptable, Sam?

13 MR. KHOROOSI: Yeah. We wouldn't have any
14 objection to that.

15 MR. SMITH: Yeah. And I know, Karen -- had we
16 discussed that yet? You had requested -- we discussed
17 that already; right?

18 MS. CREMER: That's correct. And Staff is fine
19 with Black Hills' proposal.

20 MR. SMITH: I will caveat you guys in one thing
21 here. This is one where I will need to poll each of the
22 Commissioners individually to make sure they don't have a
23 personal objection. Okay? I have not -- I have talked
24 with two of them, and they had no objection. They
25 thought in the interest of saving money and -- especially

1 us. Because we've got issues here with money. And I'm
2 sure you all do.

3 But so far two of the three I have individually
4 spoken about it, and they were amenable to that. And it
5 is something we've done in the past, and we haven't had a
6 problem. Okay?

7 I'm thinking your witnesses, Staff, will never
8 have appeared physically if they testify over the phone.

9 MS. CREMER: Not the four consultants.

10 MR. SMITH: Right.

11 MS. CREMER: But, you know, our in-house Staff
12 obviously will be here in person.

13 But, as I explained in our pre-filing and our
14 response, Mr. Towers is going to speak to the settlement
15 agreement as a whole and just try to just for the
16 purposes so we're not running nine people up, swearing
17 them in and trying to answer, we're going to have him try
18 to answer as best he can all the cross-examination.

19 And then if he cannot answer it and people have
20 a particular question for a particular witness, then that
21 person will be available either here in person or by
22 phone.

23 MR. SMITH: Okay. When we do people by phone
24 I -- when I think about it, which doesn't always happen,
25 but I usually do ask the witness to stipulate to the

1 applicability of South Dakota's laws of evidence and
2 perjury statutes and agree to submit to the jurisdiction
3 of the State of South Dakota with respect to testimony
4 offered over the telephone.

5 Does that strike anyone as objectionable?

6 MR. MAGNUSON: That's fine from Black Hills
7 Power.

8 MR. SMITH: You know, we've got the issue if
9 they haven't physically entered the state, do our
10 statutes cover it? And the way I've addressed it is at
11 least to have it on the record that they have agreed to
12 constructive entry into South Dakota for the purposes of
13 presenting that testimony.

14 Any thoughts by anyone on that?

15 MR. KHOROOSI: This is Sam. That sounds fine
16 with me.

17 MR. MAGNUSON: That's fine with Black Hills
18 Power. And perhaps I need to clarify. The witnesses
19 that we have on our witness list we expect and intend to
20 have physically in Pierre the first week and to have them
21 testify.

22 So the only thing would be is after Mr. James
23 testifies on that Wednesday, if we decided that we needed
24 any of those people that we would call them by phone.
25 But they would have previously testified in Pierre --

1 MR. SMITH: They would have already been sworn
2 in. And as far as I'm concerned, they would still be
3 under the oath at that point in time.

4 Other issues? Lee, anything else?

5 MR. MAGNUSON: I've got just a few additional
6 items. I just thought I'd ask the parties -- well, I'll
7 preface this by saying because of a previous commitment
8 we intend to call Bill Avera as our first witness. He's
9 our ROE witness so we will be calling him first because
10 he's going to need to testify and leave Pierre shortly
11 thereafter.

12 I guess the question is for Staff and for
13 South Dakota Peace and Justice whether there are any
14 other witnesses of which they're aware that we might need
15 to take out of order.

16 MS. CREMER: Staff has none.

17 MR. KHOROOSI: This is Sam. No. Other than
18 what everyone's been so gracious about already with
19 Mr. James, we don't have any.

20 MR. MAGNUSON: Okay. And given that we're going
21 to have our witnesses there -- but I'm just wondering
22 whether I might -- particularly Sam on how long he
23 expects some of the cross-examination to go on our
24 witnesses so I can kind of plan out what -- how many
25 witnesses I'll have each day.

1 Do you have any idea, Sam?

2 MR. KHOROOSI: Actually, can I shoot you an
3 e-mail tomorrow morning with kind of an outline I expect
4 to go on each witness? Would that be okay? And I can cc
5 all of the attorneys here.

6 MR. MAGNUSON: Yep. That would be fine.

7 MR. KHOROOSI: Okay.

8 MR. SMITH: So his name is Avera?

9 MR. MAGNUSON: Avera is how it's pronounced.
10 And it's spelled A-V-E-R-A.

11 MR. SMITH: Well, I assumed he was probably the
12 founder of Avera McKennan.

13 MR. MAGNUSON: It took me a long time to get
14 used to pronouncing his name correctly.

15 MR. SMITH: Okay. I'm glad you -- because I
16 would have pronounced it incorrectly. Fire away then,
17 Lee.

18 MR. MAGNUSON: Just a few other things. Just
19 this morning I had to send out a corrected Exhibit 58 and
20 Sam and Karen, I assume that you received that e-mail so
21 you now have the correct exhibit?

22 MR. KHOROOSI: We did. Thanks, Lee.

23 MR. MAGNUSON: I'll work with Karen. And Karen,
24 I'm sorry. I cut you off. Did you receive that also?

25 MS. CREMER: Yes, I did. Thank you.

1 MR. MAGNUSON: I'll work with Karen and Sam on
2 the numbering of exhibits and the exchange of hard copies
3 or CDs.

4 Sam, this is for you and Nicole. I don't
5 believe that Nicole has been admitted pro hac vice yet
6 and I assume you're going to get that done before Monday.

7 MR. KHOROOSI: We will, yes.

8 MR. MAGNUSON: Okay. Mr. Smith, I'm just
9 wondering if you can confirm for me how we will be
10 handling testimony regarding confidential matters at the
11 hearing and particularly with regard to -- I assume that
12 you clear the room of anybody that's not entitled to
13 listen to confidential testimony and that you quit
14 streaming on the internet during that discussion and
15 testimony?

16 MR. SMITH: That is correct. And, again, the
17 attorneys -- and I don't think we'll have any telephonic
18 participants other than those who would be testifying so
19 I -- but, you know, it's important, though, for each of
20 the parties to be cognizant and to assist me and the
21 Commissioners in not screwing that up. Because it's
22 sometimes more difficult than you might think to
23 remember -- to keep in mind every minute. Okay, Lee and
24 everyone? I think it's mainly you're the only person,
25 right, that has confidential stuff.

1 MS. CREMER: Well, and just Staff's witnesses
2 will all be on the phone.

3 MR. SMITH: I realize that. They'll be on the
4 phone.

5 MS. CREMER: They'll be on the phone. Right.

6 MR. SMITH: But they're subject to -- I mean,
7 they can all -- they're all privy to this stuff.

8 MS. CREMER: Right. I just wanted to make --
9 you had said something about people not on the phone or
10 something. And so I --

11 MR. SMITH: Right. They'll be on the phone but
12 there won't be -- we won't have members of the public and
13 the media on the telephone. That won't happen.

14 MR. MAGNUSON: That's correct. The only people
15 that would be on the telephone then would be Staff's
16 witnesses?

17 MR. SMITH: Right. And what we do have -- what
18 we do do then is we clear the room of everyone who isn't
19 subject to protective order and/or the Staff which
20 doesn't need to be because they're subject to our
21 confidentiality rules. We clear the room of everyone
22 like that, and then we shut off the internet feed.

23 MS. AXTHELM: And check phone bridges.

24 MR. SMITH: And check phone bridges. But,
25 again, there shouldn't be any phone bridges other than

1 Staff's witnesses and/or yours, Lee.

2 MR. MAGNUSON: Okay.

3 MR. KHOROOSI: This might be too small of an
4 issue to bring up here so I apologize if it is. But if
5 Mr. Frankenfeld would like to listen to Mr. Avera's
6 testimony, would we be able to set up a bridge for him so
7 that he can participate by phone since he is subject to a
8 protective order as well? He would then be able to hear
9 the confidential portions.

10 MR. SMITH: I wouldn't have an objection to
11 that. I mean, he -- other than -- and your reasoning
12 behind that, Sam, would be because of the confidentiality
13 problem?

14 MR. KHOROOSI: That's correct. We could have
15 him listen over the internet but if confidential
16 information comes up, which is likely to, I believe, then
17 Mr. Frankenfeld would be unable to listen to the
18 testimony.

19 MR. SMITH: I have no objection to that. It
20 sounds common sense to me. And by that you would then be
21 able to minimize, correct, the amount of costs and time
22 he would have to spend physically being here?

23 MR. KHOROOSI: That's correct.

24 MR. SMITH: Lee, Todd, any objection?

25 MR. BRINK: No.

1 MR. MAGNUSON: No objection.

2 MR. SMITH: Staff?

3 MS. CREMER: Staff has no objection.

4 MR. SMITH: Okay. And, Demaris, our
5 administrative person here, that's doable, right, from an
6 administrative standpoint?

7 MS. AXTHELM: Yeah. I'll have to get a bridge.
8 As long as I know a number, how many we've got. Five
9 people?

10 MR. SMITH: Yeah. I tell you what, I don't know
11 if you have the same setup problem. You guys, Demaris,
12 you can't hear her because she doesn't have a mic. What
13 I would say is could you guys please get us a list of the
14 persons who you believe would need to be on or should be
15 on the phone during different portions of the hearing
16 because we need to make sure we have the bridge set up
17 adequate to accommodate that. Okay?

18 MR. KHOROOSI: Sure.

19 MR. SMITH: Okay. Lee, your list.

20 MR. MAGNUSON: I think that I just have two
21 minor questions. I just want to confirm that computers
22 are allowed in the hearing room?

23 MR. SMITH: Absolutely they are. And we do have
24 a wireless setup here.

25 MS. AXTHELM: This is Demaris. Say, we needed a

1 list of those who wanted internet access while they were
2 up on fourth floor.

3 MR. SMITH: Did you hear that?

4 MR. MAGNUSON: Yes. You're talking about who
5 will be getting wireless?

6 MS. AXTHELM: Correct. And you could respond to
7 Tina Douglas on that. I believe she sent an e-mail out
8 to everyone requesting if you wanted internet, to be able
9 to access the internet upstairs.

10 MR. MAGNUSON: And I have made that
11 application.

12 MR. KHOROOSI: I believe I have too as well.

13 MR. SMITH: If they have more than one box, more
14 than one computer, does each one of them need a separate
15 authorization?

16 MS. AXTHELM: I believe, yep.

17 MR. SMITH: Did you hear that, Lee? She said
18 yes.

19 MR. BRINK: I think Glynda has requested
20 wireless access also from Black Hills. And I have not.
21 I'm okay without it.

22 MR. SMITH: Okay. I am just -- you know, I
23 don't have it when I'm here because I'm unable to both
24 focus on what's going on at the hearing and mess around
25 on the internet.

1 MS. AXTHELM: You're old school.

2 MR. SMITH: Yep. Okay, Lee. Next.

3 MR. MAGNUSON: I have some other practical
4 questions but I'll just cover those with Staff or other
5 people there. So that's the end of my list. Todd, did
6 you have anything else from Black Hills Power?

7 MR. BRINK: No. I did not. Thank you.

8 MR. SMITH: Sam, any -- your issues, if you have
9 any more.

10 MR. KHOROOSI: Actually, Lee did a good job of
11 addressing my issues so I didn't have any more. Nicole,
12 did you have anything?

13 MS. SHALLA: No.

14 MR. SMITH: Staff?

15 MS. CREMER: Staff does not have anything.
16 Thank you.

17 MR. SMITH: Okay. Well, I think we have
18 concluded our business for the day.

19 You guys are going to head out after today then
20 and attempt to reach some agreements on some of the
21 things we discussed. And then if you feel the need to --
22 for a final prehearing conference, please let me know as
23 soon as possible so we can make arrangements to set that
24 up. Okay?

25 MR. MAGNUSON: Very good.

1 MR. SMITH: With that, we're adjourned. Thank
2 you very much.

3 (The proceeding concluded at 12 o'clock 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 June,
11 2010, and that the attached is a true and correct
12 transcription of the proceedings so taken.

13 Dated at Onida, South Dakota this 27th day of
14 June, 2010.

15

16

17



18

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

22

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