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SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE APPLICATION BY  
TRANSCANADA KEYSTONE PIPELINE, LP FOR  
A PERMIT UNDER THE SOUTH DAKOTA ENERGY  
CONVERSION AND TRANSMISSION FACILITY  
ACT TO CONSTRUCT THE KEYSTONE XL PROJECT

HP09-001

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Transcript of Proceedings  
October 6, 2009

ORIGINAL

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BEFORE THE PUBLIC UTILITIES COMMISSION,  
DUSTIN JOHNSON, CHAIRMAN  
STEVE KOLBECK, VICE CHAIRMAN  
GARY HANSON, COMMISSIONER

COMMISSION STAFF

Rolayne Ailts Wiest  
John Smith  
Karen Cremer  
Kara Semmler  
Terri Labrie Baker  
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Bob Knadle  
Dave Jacobson  
Jon Thurber  
Deb Gregg  
Anissa Grambihler

APPEARANCES

Brett M. Koenecke      appearing as co-counsel on behalf of the  
Applicant

Reported By Cheri McComsey Wittler, RPR, CRR

1 APPEARANCES (by telephone)

2 Jim White  
3 Paul Blackburn  
4 Bill Taylor  
5 James Moore

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7 TRANSCRIPT OF PROCEEDINGS, held in the  
8 above-entitled matter, at the South Dakota State Capitol  
9 Building, 500 East Capitol Avenue, Pierre, South Dakota,  
10 on the 6th day of October, 2009, commencing at  
11 9:30 a.m.  
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1           CHAIRMAN JOHNSON: The question for the  
2 Commission today is shall the Commission reconsider part  
3 of its decision regarding discovery?

4           I will cue this up just a little bit, and then  
5 obviously we'll take some comments from the parties. I  
6 just think when you look at the standards and the rules  
7 surrounding discovery again it's a little bit better to  
8 be safe than sorry. The more I considered this one the  
9 more I thought this was the closest call of those that we  
10 denied. And I personally felt like I'd be a little more  
11 comfortable if some of this information regarding the  
12 preparation of the ERP was made available.

13           I'm not interested in having 24 be a fishing  
14 expedition. I would be interested in hearing from the  
15 parties if there's a way that we can narrow this  
16 appropriately to get to the documents that are important  
17 and central.

18           But with that, let's go ahead and hear from --  
19 first we'll take the Applicant. Although I suppose maybe  
20 the Order makes the most sense to go with Dakota Rural  
21 Action. It was their Motion to try to compel this  
22 discovery.

23           So Dakota Rural Action? Comments?

24           I'm not hearing anyone on the telephone, and I  
25 don't see anyone in person.

1 Mr. Koenecke?

2 MR. KOENECKE: Commissioner, if I might, I've  
3 gotten several messages from Jim White in the last  
4 10 minutes indicating that he can't get in. And you  
5 probably saw me go over and talk to Ms. Grambihler a few  
6 minutes ago. They instructed him to call the main office  
7 and be transferred in. That could be what's happening to  
8 Dakota Rural Action. I don't know.

9 CHAIRMAN JOHNSON: Dakota Rural Action isn't on  
10 our list of reserved telephone lines. It doesn't mean  
11 they didn't intend to call in. Perhaps let's pause.

12 MR. WHITE: Mr. Chairman, this is Jim White.  
13 Just to be clear, I just did get in through the  
14 switchboard.

15 MR. TAYLOR: And, Mr. Chairman, Bill Taylor and  
16 James Moore just got in the same way.

17 CHAIRMAN JOHNSON: Okay. Just out of curiosity,  
18 gentlemen, what was the problem when you called in?

19 MR. WHITE: Wouldn't answer.

20 MR. TAYLOR: Sounded like a busy signal. We  
21 called the main office, and they switched us to the State  
22 board who brought us in through some other route.

23 CHAIRMAN JOHNSON: Okay. Thanks.

24 Well, Mr. Koenecke, Mr. White, if you have  
25 comments, let's hear them.

1 MR. KOENECKE: Thank you, Commissioner. We have  
2 noted the -- in discussions with staff and reading your  
3 filing that the distinction that's being made between  
4 safety and the environment -- and I guess it would be our  
5 reading as a case known as Olympic Pipeline v. City of  
6 Seattle coming out of the Ninth Circuit, I believe.

7 The purpose of the PSA, Pipeline Safety Act, is  
8 to "provide adequate protection against risks to life and  
9 property posed by pipeline transportation and pipeline  
10 facilities." We don't see a distinction there between  
11 those two.

12 That said, we did compile a list of references  
13 for the preparation of emergency response manuals, which  
14 I received late last night. And I'll be glad to hand  
15 out. I haven't counted these, but it's a page and a half  
16 of documents used.

17 If you recall, the request from the Intervener  
18 was for documents. It had no Interrogatories along with  
19 it asking questions seeking information otherwise. It  
20 was send us documents that you have.

21 So we have prepared a list, and it's extensive.  
22 I question the relevance of some of these to South Dakota  
23 specific. We've had those discussions in the past that  
24 we -- the direction I've gotten from the Commission and  
25 the Commission advisors is that things that we're going

1 to have discussed, ruled on, provided to other parties  
2 should be South Dakota specific. And I can't say that  
3 these are. But I'll be glad to get up and hand these out  
4 at this point.

5 CHAIRMAN JOHNSON: Thanks, Mr. Koenecke.  
6 Additional comments after you hand those out? Okay.

7 Staff comments?

8 MS. SEMMLER: Thank you, Mr. Chairman. Although  
9 my position regarding --

10 CHAIRMAN JOHNSON: I'm sorry to interrupt. My  
11 apologies. I feel more comfortable if we could have  
12 somebody trying to get ahold of Mr. Blackburn.

13 Are you working on that? Great. Thanks very  
14 much. My apologies. Go ahead.

15 MS. SEMMLER: My position regarding federal  
16 preemption of pipeline safety has not changed. And also  
17 unchanged is the fact that PHMSA has explicit approval  
18 authority over the Emergency Response Plan.

19 With that being said, I do understand and I  
20 appreciate that there is some environmental protection  
21 type information in the Emergency Response Plan that may  
22 not only be discoverable but admissible. And, in fact,  
23 staff through the use of four data requests amounting to  
24 147 questions but combination of both Interrogatories and  
25 document requests asked for much of the analysis and data

1 regarding that very thing and is comfortable that we can  
2 testify regarding the emergency, operational, and  
3 construction environmental protection measures that the  
4 Applicant intends to take.

5 And Dakota Rural Action has all of that. They  
6 have a copy of staff's data request, and they have a copy  
7 of the answers. So although I believe they have all the  
8 information they're seeking right now that staff obtained  
9 not through the Emergency Response Plan but through a  
10 more jurisdictional route, I understand why the  
11 Commission may feel compelled to expand its order.

12 CHAIRMAN JOHNSON: Thanks, Ms. Semmler. Do we  
13 have any -- Ms. Grambihler is checking on Dakota Rural  
14 Action.

15 You know, maybe we'll have questions of staff or  
16 the Applicant. I'll have one.

17 Mr. Koenecke, I have a tendency, and I have not  
18 reviewed this thoroughly but as I'm looking at your page  
19 and a half list it does seem as though a number of these  
20 documents are outside of what could possibly lead to  
21 admissible evidence during hearing.

22 Your point's been made. If we want to drive  
23 toward which of this information would possibly be  
24 helpful to an Intervener, do you have any thoughts?

25 I mean, I think your point about

1 non-South Dakota-specific information is well taken.

2 MR. KOENECKE: Thanks for the question,  
3 Commissioner. It would be a bit presumptuous of me to  
4 presume what Dakota Rural Action might want. However,  
5 the obvious one, Observer's Guide To Sea Ice, that one  
6 without looking at it, never seen it, have a tough time  
7 believing that's relevant to an inland place.

8 However, it might be. I just -- I wouldn't be  
9 able to say. And I simply don't know. I would guess  
10 that there are some of these -- the PHMSA guidelines to  
11 ERP preparation probably publicly available. But also  
12 probably more directly to the point of what they're  
13 asking -- or what they want to have. I don't know.

14 MR. WHITE: If I might.

15 CHAIRMAN JOHNSON: Yes, Mr. White.

16 MR. WHITE: I would concur on that, that the  
17 PHMSA guidelines to ERP preparation would probably be  
18 considered the key document to being able to understand  
19 sort of the process and requirements that go into  
20 preparing the ERP.

21 I believe those guidelines are actually  
22 published in 49 CFR but, you know, we'd certainly be more  
23 than willing to provide those guidelines to DRA if that  
24 would be helpful.

25 CHAIRMAN JOHNSON: Thanks. Mr. Blackburn, have



1     you joined us?

2             MS. GRAMBIHLER: He's just calling in now. I  
3     just got off the phone with him.

4             CHAIRMAN JOHNSON: Okay. We have been told that  
5     Dakota Rural Action is calling in so we'll pause for a  
6     moment.

7                     (Discussion off the record)

8             (Mr. Blackburn joins hearing via telephone)

9             CHAIRMAN JOHNSON: I will not reiterate  
10    counsel's arguments, but I presume you've seen the  
11    request that I made to have this put on the agenda.

12            Do you have any comments?

13            MR. BLACKBURN: The comments I have on that are  
14    that I appreciate your reconsideration of that. I would  
15    also like to add that I did look at and haven't had a  
16    chance yet to provide a written analysis of the statute  
17    that was discussed at the last hearing related to the  
18    DENR's participation and the emergency response planning  
19    process.

20            And I'd just like to note that that process does  
21    not provide for any public participation. Nor does it  
22    provide for any opportunity earlier than the filing with  
23    PHMSA of the Emergency Response Plan. So while there may  
24    be some additional governmental participation in that  
25    process, it doesn't provide for any public participation,

1 emergency response planning.

2 CHAIRMAN JOHNSON: Mr. Blackburn, staff had  
3 raised some, I think, interesting points about the fact  
4 that Dakota Rural Action has received 147 pages -- or  
5 questions? Responses to 147 questions that staff  
6 compounded to the Applicant surrounding some of these  
7 environmental protection issues. Of course,  
8 Commissioners wouldn't have been aware of that.

9 Can you explain to us why the information  
10 already in your possession is not sufficient to address  
11 some of these environmental issues? And if it isn't,  
12 specifically where are the gaps?

13 I'd like to, you know, in the interest of time  
14 and trying to balance that burden versus the information  
15 you all need to put together your case, I mean, I want to  
16 make sure that these discovery -- you know, what's turned  
17 over is tailored to meet your needs and not anything  
18 more.

19 MR. BLACKBURN: Actually I cannot. I have not  
20 had a chance to review all the staff material. I work on  
21 this by myself, you know, part time so I have a limited  
22 time to review all of that.

23 There are, as staff said, hundreds of pages of  
24 material and I wish I could speak to that but I cannot  
25 speak to that today.

1 CHAIRMAN JOHNSON: Other questions?

2 MR. SMITH: Mr. Blackburn, this is John Smith.  
3 On the issue of participation, is it then your position  
4 that whatever happens at DENR is not subject to the more  
5 general citizen and procedural rights under 1-26?

6 MR. BLACKBURN: If there was a -- if there was a  
7 process there that required a formal decision of some  
8 sort by the DENR, then I assume that -- that the  
9 procedural processes would apply.

10 But that simply does not provide for any  
11 decision-making process by the DENR. Therefore, I don't  
12 believe that the state EPA procedural requirements would  
13 apply because there would be no state action there.

14 The only thing that statute requires is that the  
15 Applicant consult with the DENR, but that's required by  
16 federal law anyway, and that it file -- the Applicant  
17 file a copy of -- of its Emergency Response Plan with the  
18 DENR. It doesn't provide any decision-making process or  
19 any other thing that would trigger the EPA. If you  
20 believe it does, I would ask that you describe how it  
21 could.

22 CHAIRMAN JOHNSON: Mr. White, have you had an  
23 opportunity to e-mail this list to Mr. Blackburn yet?

24 MR. WHITE: I apologize. I don't have  
25 Mr. Blackburn's e-mail address.

1           CHAIRMAN JOHNSON: Okay. Mr. Blackburn, what --  
2 what in -- you know, there's not an ERP done. So can you  
3 give me an idea of what -- what would you request?

4           You know, I think your original -- I don't have  
5 it in front of me, but I think your original request was  
6 all documents relating to. That seems a little broad.

7           Is there value in narrowing that? And if so, in  
8 what way?

9           MR. BLACKBURN: I think that the question, what  
10 may be helpful is a little bit along the lines of what my  
11 co-counsel, Cait Collier, suggested is to try to find out  
12 from the Applicant what their schedule is for developing  
13 an Emergency Response Plan in this particular segment of  
14 the pipeline. And seeing the sorts of documents,  
15 particular planning documents or segments of that that  
16 are not confidential that, you know, could be disclosed.

17           And I believe that the plan is a fairly discrete  
18 document, not a huge amount of material there. And I  
19 think this is more a question of the process and how that  
20 process would relate to TransCanada's drafting process.  
21 How the process -- TransCanada's drafting process would  
22 relate to the Commission's schedule for making a decision  
23 in this matter.

24           CHAIRMAN JOHNSON: Mr. Koenecke, Mr. White, does  
25 the Applicant have a -- an estimated time of when a draft

1 ERP would be completed?

2 MR. KOENECKE: I'm not aware of one,  
3 Commissioner. As you know -- the only deadline that I'm  
4 aware of, it has to be submitted to PHMSA and approved  
5 before the pipeline can be put into operation.

6 MR. WHITE: I think it's probably safe to  
7 assume, Mr. Chairman, that there will not be an ERP until  
8 after the date of the Commission's decision in this  
9 proceeding.

10 I guess that being said, if it would be helpful  
11 to DRA for us to provide a schedule for the development  
12 of the ERP -- and, as I understand it, Mr. Blackburn is  
13 interested in planning documents related to that  
14 preparation and certainly, you know, the PHMSA guidelines  
15 for ERP preparation fall within that definition, and  
16 perhaps also provide Mr. Blackburn with the list of  
17 reference materials that we've circulated this morning  
18 with a commitment that if he identifies other documents  
19 on that list, that he would like to see, that we would  
20 provide those as well. Maybe that might bridge the gap  
21 we have right now.

22 CHAIRMAN JOHNSON: Okay. So if I'm  
23 understanding you right, Mr. White, of the one-and-a-half  
24 page list that you provided to the Commission, you're  
25 willing to make available any of these documents to

1 Dakota Rural Action?

2 MR. WHITE: That's correct.

3 CHAIRMAN JOHNSON: Okay. Let's try to put  
4 some -- number one, thank you to the Applicant. Let's  
5 try to put some time frames around this. Because we're  
6 already a little further off our discovery schedule than  
7 I think any of us anticipated.

8 And so what I wouldn't want is a month from now  
9 for something on this list to all the sudden be of  
10 interest to an Intervener, a request is made, it takes  
11 the Applicant three weeks to make it available to them.  
12 You know, I think we need predictability and consistency  
13 in our schedule because I think that helps for citizens  
14 to plan. I think that helps for witnesses to plan.

15 So, Mr. Blackburn, they have -- and I know you  
16 don't have it, but they have provided a one-and-a-half  
17 page list of the various references, inputs that are into  
18 their ERP. What kind of a time frame would you be  
19 willing to say that you could look through here and make  
20 a request -- request to have them deliver those to you?

21 MR. BLACKBURN: The one-and-a-half page list  
22 then I could assume I could do it within a day or two. I  
23 don't think it would take very long to do that.

24 CHAIRMAN JOHNSON: Okay. Thank you,  
25 Mr. Blackburn.

1           To the Applicant, how long would it take you to  
2 provide that information? What kind of turnaround time  
3 would you need?

4           MR. WHITE: Sure. I guess to be on the safe  
5 side given that I'm not sure how many documents we'll be  
6 asked to locate and provide, I would ask for a week from  
7 the date that we get the request.

8           And obviously if the request is only for a few  
9 documents and they're readily available, we'll do it  
10 quicker than that.

11           CHAIRMAN JOHNSON: Okay. Well, I've been  
12 hogging the mic. I've got kind of an idea of where I  
13 want to go. But let's pause and see if my colleagues  
14 have some comments or questions.

15           Mr. Smith.

16           MR. SMITH: Thank you. And I'm sorry,  
17 Commissioner Kolbeck, for butting in here. I guess  
18 earlier -- and I can't remember, Mr. Blackburn, if you  
19 were on the phone or not but staff discussed its data  
20 requests and the responses that it received regarding not  
21 the particular I guess you'd say formula inputs into the  
22 ERP but what I'd call the data type inputs related  
23 particularly to environmental stuff.

24           We already have a discovery ruling on risk  
25 assessment and, as I understand it, the nonconfidential

1 portions of that have already been turned over. And we  
2 have another ruling now on the confidential portions of  
3 the risk assessment. As I understand what staff said, a  
4 very significant amount of the other input data such as  
5 hydrology, those kinds of things, have already been made  
6 available.

7 I guess my thought would be -- and maybe this is  
8 more directed to maybe Mr. White, but is it your view  
9 that most of those types of underlying I guess I'd call  
10 them data inputs that would eventually win their way into  
11 the ERP have already been made available? Is that a fair  
12 characterization?

13 MR. WHITE: Well, I'd say yes with one caveat.  
14 And that is that the ERP which exists now is the ERP that  
15 was prepared for the Keystone Project. Okay?

16 The inputs to that in terms of risk assessment  
17 and environmental consequence was the risk assessment and  
18 environmental consequence analysis done for the original  
19 Keystone Project. The risk assessment and environmental  
20 consequence material that's been provided in this Docket  
21 is that which underlies the KXL -- or will underlie the  
22 KXL ERP. That's what is now available in this Docket.

23 MR. SMITH: And those materials have already  
24 been made available to both staff and to DRA?

25 MR. WHITE: With the exception of the HCA



1 locational information.

2 MR. SMITH: Right. And we issued a specific  
3 order on that last time. Is that correct?

4 MR. WHITE: That's correct.

5 MR. SMITH: Okay. And so, in other words, those  
6 underlying data elements, though, that ultimately will  
7 perform the same function that those things did with the  
8 first Keystone, that underlying, you know, topographic,  
9 elevation, physical, hydrologic type of information that  
10 has already been available via staff's data requests?

11 MR. WHITE: I would agree with that.

12 CHAIRMAN JOHNSON: Other comments? Questions?

13 MR. BLACKBURN: This is Paul Blackburn. I would  
14 just point out that the assessment of risk and the data  
15 related to risk assessment is while underlying component  
16 of emergency response planning, it is not itself  
17 emergency response planning.

18 It doesn't say, for example, where equipment  
19 will be located or where personnel will be located or how  
20 local first responders will be working or how they'll be  
21 coordinated and how they'll be trained and the  
22 information provided to them. Simply those are two  
23 entirely different things. While related, providing  
24 information about the risk does not say how one is going  
25 to respond to that risk.

1           So while I appreciate having that as kind of  
2 risk assessment information, I think what landowners and  
3 local first responders are, which in some rural areas are  
4 in fact the landowners themselves -- you know, they might  
5 have a fire rig on their land, for example, or utilities  
6 they own. You know, that they're interested in how do  
7 you respond, not what the risk is.

8           And I don't know -- I've read that, but I  
9 haven't had time to look through all the things that  
10 staff's requests have provided requests about what the  
11 responses need to be. So maybe Mr. White can describe  
12 what information they've received at TransCanada and how  
13 they plan to respond to it.

14           MR. WHITE: I'm not going to be able to  
15 characterize everything that's in the responses to the  
16 staff data requests.

17           I will say that if you're looking for specific  
18 information, locational information about how an  
19 emergency in a specific location will be responded to,  
20 that simply has not been produced yet. I mean, that is a  
21 process that is sort of ongoing but has not -- has not  
22 yet come to fruition.

23           If you're looking for materials that speak to  
24 how that process is to occur, you know, then I'd suggest  
25 again the PHMSA guidelines would be useful, and perhaps

1 some of the other documents on the list of materials  
2 might be useful. But that sort of fine-tuning work has  
3 simply not yet been done on Keystone XL.

4 MR. BLACKBURN: And I appreciate that, and as I  
5 said, with these sorts of issues I understand there's a  
6 crafting component to them, but it's just important and  
7 we really appreciate clarity about what the Commission  
8 can and cannot do in the situation for -- at least for  
9 jurisdictional reasons or at least for practical reasons.

10 CHAIRMAN JOHNSON: Other questions?

11 Commissioner Kolbeck, did you have something?

12 COMMISSIONER KOLBECK: I guess I'm -- my  
13 comments pertain to the list that TransCanada has agreed  
14 to provide. I just had more of a time line on that. I  
15 don't know if we're at that point here or not.

16 But I would assume by close of business today,  
17 October 6, that TransCanada could obtain Mr. Blackburn's  
18 e-mail and get that list to him. Would that be okay?

19 MR. KOENECKE: (Nods).

20 COMMISSIONER KOLBECK: And then I would assume  
21 by the close of business on 10-8-09 Mr. Blackburn would  
22 be able to review this one-and-a-half page list and tell  
23 TransCanada exactly what he would like to see.

24 Does that seem like a good time line to you,  
25 Mr. Blackburn?

1           MR. BLACKBURN: Yeah. That's fine. In fact, I  
2 know they have my e-mail because I've e-mailed service to  
3 a lot of TransCanada people. If they get it to me this  
4 morning, I don't see that it would be a real difficulty  
5 getting back to them today unless something comes up.  
6 I'd rather have officially tomorrow, but it can happen  
7 fairly quickly if they e-mail me.

8           COMMISSIONER KOLBECK: Sure. And I think the  
9 8th would be Thursday, close of business on Thursday. If  
10 you could do it sooner, that would be great. I'm doing  
11 worst-case scenario.

12           And then I would think by the close of business  
13 on 10-15-09, which would be next week, I would think that  
14 TransCanada could supply that information that he  
15 requested which gives you a full 10 days.

16           MR. WHITE: Yes. That's fine.

17           COMMISSIONER KOLBECK: Seven days. I guess  
18 that's just my notes what I come up with.

19           CHAIRMAN JOHNSON: Great. Sounds like a Motion  
20 to me as long as you're comfortable with that.

21           COMMISSIONER KOLBECK: Yes.

22           CHAIRMAN JOHNSON: Okay. Commissioner Hanson,  
23 any questions or comments?

24           COMMISSIONER HANSON: Thank you, Mr. Chairman.

25           Yes. I need to go back to some basics here for

1 myself. Forgive me for doing this, but I'm trying to  
2 sort out a number of challenges here, at least for me in  
3 supporting the Motion. And perhaps Mr. Smith or  
4 Ms. Semmler can answer these questions for me. Certainly  
5 I don't mean to preclude other attorneys from having the  
6 opportunity to comment.

7 I'm concerned, as we all are, with the  
8 environment, but I'm also concerned with going through a  
9 considerable amount of effort here for what avail I'm not  
10 certain. I'm concerned with the purpose of the use of  
11 the materials.

12 Do I understand correctly that the Emergency  
13 Response Plan is under the complete jurisdiction of  
14 PHMSA? Do I understand that correctly?

15 MS. SEMMLER: That is staff's position, that  
16 PHMSA has complete approval authority. With that being  
17 said, items contained in that Emergency Response Plan,  
18 for example, environmental issues as they relate to our  
19 state, may be under the jurisdiction of this Commission  
20 or DENR or other state agency.

21 COMMISSIONER HANSON: It might.

22 MS. SEMMLER: I think that's arguable. I don't  
23 know if the case law is completely explicit. And I know  
24 Mr. Smith's done a lot of research on this lately, but I  
25 don't think the case law is certain.

1           COMMISSIONER HANSON: I understand that the  
2     Applicant is -- well, let me ask the question. Is the  
3     Applicant required to consult with DENR?

4           MS. SEMMLER: Yes.

5           COMMISSIONER HANSON: And are they required to  
6     include DENR's comments in their Application?

7           MS. SEMMLER: I think there's where the  
8     challenge comes in. If the Applicant -- PHMSA's not  
9     required to accept DENR's recommendation. There's the  
10    challenge.

11          COMMISSIONER HANSON: They're not required to,  
12    but is the Applicant required to include them? Do you  
13    know?

14          MS. SEMMLER: They are on the state level, but  
15    when it goes to PHMSA for ultimate approval, PHMSA may  
16    not include those items. And I don't believe there's  
17    anything DENR could do about that.

18          COMMISSIONER HANSON: Is DENR going to hold a  
19    hearing process where these folks will be able to request  
20    information to -- from the Applicant?

21          MS. SEMMLER: Although the statute doesn't  
22    require a hearing process, it does require approval. And  
23    when I look at 1-26-2, I think it is, that statute  
24    requires that any public agency making a decision make  
25    its papers and its decision process publicly available.

1           So although that oil spill response statute  
2 doesn't require a hearing, I think other statutes as  
3 Mr. Smith alluded to earlier, may require that public  
4 agencies' process be made public.

5           COMMISSIONER HANSON: On the federal level -- on  
6 PHMSA's level, are there Interveners? Are there -- do  
7 they have a process by which they allow Interveners?

8           MS. SEMMLER: Nothing formal, no. However, as a  
9 governmental agency, I know they accept comments at any  
10 time. There is not a formal process set up such as we  
11 have here at the Commission, however.

12           COMMISSIONER HANSON: With the -- does the PUC  
13 have any authority or does the State of South Dakota have  
14 any authority in the Application process other than  
15 through the DENR?

16           MS. SEMMLER: I believe that the PUC as it did  
17 in the first pipeline case could based on the evidence  
18 make suggested inclusions. And in that case the  
19 Applicant included those. It went to PHMSA and was  
20 approved. I believe that is the interaction we can have.

21           COMMISSIONER HANSON: That might be the straw or  
22 the string then that we can hold onto. I'm trying -- I'm  
23 trying to figure out why we would go through this process  
24 in the PUC if it's going to be replicated, duplicated, by  
25 the DENR and why we would go through all the different

1     machinations here if we don't have the authority to -- to  
2     provide any of that information.

3             It just seems like a whole lot of work when  
4     another state organization that is assigned to this  
5     responsibility is to be taking care of it.

6             Am I right, wrong, or indifferent on that? Do  
7     you have an opinion on that?

8             MS. SEMMLER: I think you're right, that the  
9     distinction I can make is that the DENR process happens  
10    after your process. So as we examine this from the  
11    permit perspective, we could make some suggestions  
12    related to the permitting process before DENR sees it.  
13    That's the only distinction I can make.

14            Otherwise, I agree with the statement you made.  
15    There is a different state agency assigned with looking  
16    out for emergency response as it pertains to oil spills.

17            COMMISSIONER HANSON: On a different subject,  
18    account operation of the pipeline -- as I understand it,  
19    the operation of the pipeline cannot take place without  
20    the ERP plan in place; is that correct?

21            MS. SEMMLER: Correct.

22            COMMISSIONER HANSON: My struggle, Mr. Chairman,  
23    with the Motion and with this is that we can require  
24    information of this nature. We just don't have the staff  
25    to assess it, to analyze it, to determine left, right, or



1 in between of what should be or should not be included in  
2 an ERP. We would have to hire people to do this. And  
3 the state agency that has the personnel and the  
4 experience in putting this together is the DENR.

5 And so I really think -- I want this process to  
6 take place. I don't know if our actions help to assure  
7 that will take place. But I don't think that the DENR is  
8 going to play fast and loose with this and ignore the  
9 concerns of the citizens. I have great faith in the DENR  
10 that they will go through the proper process and include  
11 this.

12 So I don't know where we would come from in  
13 being able to judge all of that information, other than  
14 requiring a whole lot of information to be provided that  
15 probably is just replicating a process that's already in  
16 place.

17 That's my concern. Thank you, Mr. Chairman.

18 CHAIRMAN JOHNSON: Certainly solid points. Any  
19 other questions or comments?

20 MR. BLACKBURN: Mr. Blackburn. I wanted to  
21 point out that even though 34A-18-2 requires -- it says  
22 no oil spill or response plan is effective until approved  
23 by the Department, as we all agree, the Emergency  
24 Response Plan is a matter of federal law. So the  
25 Department could not approve this or disapprove this

1 without being granted by federal law. So the statute,  
2 unfortunately, is constitutionally defective in that  
3 regard.

4 And I hear the comment here that the question is  
5 when is the appropriate time and what is the appropriate  
6 form for the State to consider the contents of this plan?  
7 The question here I think becomes a matter of timing and  
8 with the DENR the plan has to be filed with them but  
9 because federal law doesn't require a plan until later  
10 on, it's not exactly clear how the DENR -- when  
11 TransCanada's going to give them -- are they going to  
12 give them a draft or give them the final federal plan?  
13 Because TransCanada provides only the final federal plan.  
14 The DENR's process if it has one, would be late. And  
15 it's not clear that there would be any effectiveness to  
16 it at all.

17 So it's not a question of whether DENR is  
18 capable or not. It's a question of whether they will, in  
19 fact, do this and when they will do it.

20 CHAIRMAN JOHNSON: Thanks. Other comments on  
21 the pending Motion?

22 With regards to the ERP, I agree completely with  
23 Commissioner Hanson, and I disagree with Mr. Blackburn.  
24 I mean, the ERP I think is clearly not our business  
25 directly. I am going to support the Kolbeck Motion,

1     though, because although the ERP I think is other  
2     people's business, there I think could be some  
3     information that flows into the ERP that may help the  
4     Commission determine questions like would this project  
5     interfere with the orderly economic development of an  
6     area, which is part of our statutory -- or the statutory  
7     burden of proof.

8             I think Mr. Smith and Ms. Semmler's points are  
9     well taken. It is highly likely that information of  
10    value has already been provided to Dakota Rural Action.  
11    Mr. Blackburn said he wouldn't know because he hasn't  
12    gone through it all.

13            So this may not give Dakota Rural Action  
14    anything valuable. But I just don't think we can wait  
15    around for Dakota Rural Action to go through everything  
16    and then raise an issue that they -- you know, the  
17    Commission denied them access to something that would  
18    answer one of the fundamental questions facing the  
19    Commission.

20            So that's where I'm at. Other comments?

21            COMMISSIONER HANSON: Because I don't wish to  
22    make comment while we're voting, I'll just state that I  
23    have no argument with the Motion. I have no argument  
24    with the discussion, and your position makes sense from  
25    that standpoint.

1 I just simply think that it's a replication of a  
2 responsibility that is in another portion of State  
3 Government, and I have a great deal of faith that they  
4 will conduct themselves -- I appreciate your saying that  
5 you -- you agree with that point as well, that you have  
6 faith in the DENR by your statement.

7 And so I will be -- I will not be supporting the  
8 Motion for that reason.

9 CHAIRMAN JOHNSON: Other comments?

10 All right. With that let's proceed to vote.  
11 Hanson.

12 COMMISSIONER HANSON: No.

13 CHAIRMAN JOHNSON: Kolbeck.

14 COMMISSIONER KOLBECK: Aye.

15 CHAIRMAN JOHNSON: Johnson votes aye. Motion  
16 carries 2-1.

17 All right. I think we've taken care of that  
18 question.

19 With that, we'll proceed to what I think is the  
20 final item before the Commission today that's on our  
21 agenda. It also deals with the Keystone XL Pipeline, and  
22 it deals specifically with concerns staff has raised by  
23 the procedural schedule.

24 Ms. Semmler, comments.

25 MS. SEMMLER: Staff stands by it's written

1        comments. I don't know where the other parties stand on  
2        the issue so I'm anxious to hear theirs. We hope we can  
3        handle this hearing here the first week of November.

4                CHAIRMAN JOHNSON: Applicant.

5                MR. KOENECKE: Thank you, Commissioner. The  
6        Applicant is busily -- very busily preparing for hearings  
7        to start on November 2, and we have people coming from  
8        essentially again all over North America to be here in  
9        Pierre for those hearings.

10               I've got two trips out of state scheduled in the  
11        next couple of weeks to keep moving on that schedule that  
12        you set. We're proceeding like we're going to have a  
13        hearing on November 2 and expect that will be the case.

14               CHAIRMAN JOHNSON: Dakota Rural Action.

15               MR. BLACKBURN: Contrary to what others may have  
16        said or believe, I think that a November hearing is going  
17        to work as well too. I've never anticipated that the  
18        Commission would delay the proceeding. Rather, I said  
19        that -- the last time I just wanted to clarify -- pointed  
20        out the Federal Government -- National Environmental  
21        Policies Act process has been delayed.

22               I wasn't sure how that was going to affect or if  
23        it would affect the Commission's process. But that's not  
24        in my control, obviously. So I believe that the hearing  
25        will happen at the time that it can, and we can provide

1     our testimony in a fashion that will allow it to happen.

2             CHAIRMAN JOHNSON: You know, one concern that  
3     I'll raise, Mr. Blackburn, I mean, this Commission has in  
4     all of its big cases at least of the last five years  
5     expressed a strong preference for prefiled testimony to  
6     allow Commissioners to carefully consider details  
7     before --

8             As you know, this is very complex and  
9     complicated stuff. And I'm just talking for myself. But  
10    sometimes I get nervous that when I hear something --  
11    somebody's on the stand. They make some very good  
12    points. A question may not occur to me until a day or  
13    two later at which point that person may have flown away.

14            And so prefiled testimony at least helps me  
15    categorize my thoughts, helps me thoughtfully consider  
16    what issues need to be further fleshed out during the  
17    live testimony.

18            Dakota Rural Action will not be providing  
19    prefiled testimony. Is that my understanding?

20            MR. BLACKBURN: No. I didn't say that at all.  
21    I plan to file prefiled -- I expected that today you  
22    would set a schedule for when that would be due.

23            CHAIRMAN JOHNSON: Okay. And do you have any  
24    thoughts on that?

25            MR. BLACKBURN: Well, considering that we're not

1 going to get everything until I believe the commitment  
2 from the prior Motion was the 15th or was it the 14th, I  
3 believe that we could have prefiled testimony done by --  
4 well, I'd prefer the 22nd, but if it needs to be before  
5 then, I could probably work with that too. I could work  
6 with the 20th if you prefer that.

7 CHAIRMAN JOHNSON: Okay. Ms. Semmler, remind  
8 us, I don't have the schedule in front of me.  
9 Ms. Semmler, why don't you remind us what the schedule  
10 says right now and in what ways we will likely need to  
11 deviate from it.

12 MS. SEMMLER: Okay. I think I've pulled up the  
13 docket here. Originally Intervener prefiled testimony  
14 was due on September 8. So that date needs to change.  
15 Its extension was given to that date, however, until the  
16 22nd of September. So, excuse me, it would be the  
17 September 22nd date that would need to change.

18 And Applicant is to file rebuttal testimony on  
19 October 19. And whether or not they'd still like to do  
20 that on paper or do it at the hearing I guess I would  
21 leave that to Mr. Koenecke.

22 MR. KOENECKE: We would definitely request time  
23 to file rebuttal testimony after the Intervener files its  
24 written testimony.

25 I suspect -- let's see. The 19th is a what?

1 Thursday?

2 MR. BLACKBURN: It's a Monday.

3 MR. KOENECKE: It's a Monday? I guess I'm  
4 interested in knowing how much testimony the Intervener  
5 expects to file. That will help me with an answer. I  
6 don't know how many witnesses they have. My recollection  
7 is that they've refused to disclose that so far.

8 MR. BLACKBURN: If I may, we haven't refused to  
9 disclose that. Rather I don't believe that we will have  
10 any witnesses. We weren't sure -- because we weren't  
11 sure what kind of material was going to be provided by  
12 TransCanada, what we would be able to provide ourselves.

13 We don't have an unlimited budget for experts --  
14 we don't have any budget for experts. So at this point  
15 we don't expect we will do that.

16 I also appreciate the Commission -- I appreciate  
17 the Commission's clarification about which things it  
18 would consider testimony on relating to its jurisdiction.  
19 Because that also will significantly reduce the amount  
20 of -- has reduced the amount of testimony we will  
21 provide. And so the question will become --

22 I don't believe it will be hugely voluminous.  
23 And I think it will become very important for the  
24 Commission to provide that -- see that information.

25 CHAIRMAN JOHNSON: Okay. So how long,



1 Mr. Koenecke, will you all need to prepare your rebuttal?

2 MR. KOENECKE: I would like to ask Jim White to  
3 chime in because he understands the schedules of our  
4 witnesses better than I do, has an overall grasp of  
5 what's going on in the other states.

6 So, Jim, can you provide a response to that?

7 MR. WHITE: Yes. I think what I would say is we  
8 can certainly -- I mean, we're willing to wait in  
9 preparing testimony in response to the staff witnesses.  
10 And we could stand by the schedule for filing that  
11 testimony on the 19th.

12 I would like to reserve adequate time to review  
13 and respond to any prefiled testimony that DRA submits,  
14 and I think that would be at least a week from the date  
15 that they file their testimony. So if they were to file  
16 on the 20th, we would certainly -- certainly want to file  
17 by no earlier than the 27th of October, which leaves the  
18 Commission about four or five days to review that  
19 testimony before the hearing starts.

20 CHAIRMAN JOHNSON: Okay. So we've got the 15th  
21 as the last possible date that additional information  
22 that feeds into an ERP could be provided. The 20th is a  
23 Wednesday, which I'll propose as the deadline for the  
24 filing of Intervener prefiled testimony.

25 MR. BLACKBURN: Clarification. The 20th is a

1 Tuesday.

2 CHAIRMAN JOHNSON: Oh. Good. Okay. And then  
3 we can fiddle with this a little bit, but just for  
4 argument's sake, see where the problems are.

5 And then again one week -- one week to the  
6 Applicant for rebuttal testimony, although the 19th will  
7 remain their deadline for rebuttal. Staff witnesses, the  
8 27th. So those are the two dates, the 20th and the 27th.

9 How does that make sense? How does that sound?

10 MR. KOENECKE: That's fine for the Applicant.  
11 Thank you, Commissioner.

12 MR. BLACKBURN: That's fine for the Interveners  
13 too. Thank you.

14 CHAIRMAN JOHNSON: Staff.

15 MS. SEMMLER: Sounds good.

16 CHAIRMAN JOHNSON: Comments, questions from the  
17 Commissioners? Advisors?

18 COMMISSIONER KOLBECK: I just want to clarify,  
19 the 15th is the latest that the information can be to  
20 Dakota Rural Action; correct?

21 And then the 20th is the latest that Dakota  
22 Rural Action can have their prefiled in?

23 CHAIRMAN JOHNSON: Yeah. Although I think from  
24 a practical standpoint the information, if DRA requests  
25 any information, will be in their hands sooner.

1           Mr. Blackburn sort of indicated he didn't think  
2 he'd need two and a half days. And the Applicant said  
3 they had the information available and as long as it  
4 isn't voluminous could probably provide it within a day  
5 or two.

6           So it may be that by the 10th Mr. Blackburn  
7 could have the additional information he's requested.

8           COMMISSIONER KOLBECK: Okay. But then the  
9 latest that TransCanada has to reply is the 27th;  
10 correct?

11           So we should have our complete file to start our  
12 research on the 27th; correct? And then the hearing  
13 starts on the 2nd?

14           CHAIRMAN JOHNSON: Keeping in mind that we'll  
15 have the Applicant's rebuttal on what may be the bulk of  
16 the witnesses' testimony by the 19th and that, you know,  
17 we'll have the first round of testimony in prior to that  
18 for everyone except DRA.

19           COMMISSIONER KOLBECK: Sure. Okay. That sounds  
20 good to me.

21           CHAIRMAN JOHNSON: Other comments?

22           Hearing none, I'll move the dates that were  
23 thrown out, revising the schedule to require Dakota Rural  
24 Action to file any prefiled testimony by the 20th and  
25 extend the Applicant's deadline to the 27th for any

1 rebuttal testimony regarding Dakota Rural Action's  
2 filings.

3 Any discussion on the pending Motion?

4 Hearing none, we'll proceed to vote.

5 Hanson.

6 COMMISSIONER HANSON: Aye.

7 CHAIRMAN JOHNSON: Kolbeck.

8 COMMISSIONER KOLBECK: Aye.

9 CHAIRMAN JOHNSON: Johnson votes aye. Motion  
10 carries 3-0.

11 (The hearing is concluded at 10:35 a.m.)  
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1 STATE OF SOUTH DAKOTA )

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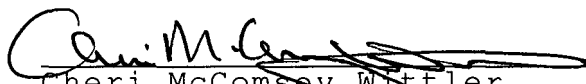
CERTIFICATE

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 6th day of  
11 October, 2009, and that the attached is a true and  
12 correct transcription of the proceedings so taken.

13 Dated at Onida, South Dakota this 26th day of  
14 October, 2009.

15  
16  
17 

18 Cheri McComsey Wittler,  
19 Notary Public and  
20 Registered Professional Reporter  
21 Certified Realtime Reporter  
22  
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24  
25

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