

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE APPLICATION)	APPLICATION NO. OP-0003
OF TRANSCANADA KEYSTONE)	
PIPELINE, LP FOR ROUTE APPROVAL OF)	KEYSTONE’S RESPONSE TO THE
THE KEYSTONE XL PIPELINE PROJECT)	PONCA TRIBE OF NEBRASKA’S
PURSUANT TO THE MAJOR OIL)	RESPONSE TO APPLICANT’S
PIPELINE SITING ACT)	OBJECTION, AND MOTION IN LIMINE
	TO EXCLUDE, EVIDENCE OFFERED
	BY THE PONCA TRIBE OF NEBRASKA
	AND THE YANKTON SIOUX TRIBE

TransCanada Keystone Pipeline, LP (“Keystone”) replies to The Ponca Tribe of Nebraska’s (“Ponca”) Response to the Applicant’s Objection, and Motion in Limine, to Exclude Evidence Offered by The Ponca Tribe of Nebraska and The Yankton Sioux Tribe as follows:

Pipeline Safety

The Commission shall not evaluate safety considerations, including the risk or impact of spills or leaks from the major oil pipeline. Neb. Rev. Stat. § 57-1407(4) (emphasis added). Ponca’s evidence regarding the possible impact to Ponca’s cultural resources due to possible spills and leaks from the Keystone XL pipeline is exactly the type of evidence that Nebraska excluded from consideration in the plain text the Major Oil Pipeline Siting Act. The statutory language is clear and so is the Hearing Officer’s prior ruling on the scope of this proceeding. The semantical gymnastics advocated by Ponca are an exception intended to swallow the rule.

Ponca’s testimony amounts to the argument that Mr. Wright feels the pipeline is not sufficiently safe, and that the risk of spills or leaks from the Keystone XL pipeline to the Ponca’s possible resources is too great of risk for the Preferred Route. In essence, the Ponca’s intervention attempts, in part, to force Keystone to present evidence on its pipeline integrity and to make that evidence part of the routing decision. That is contrary to MOPSA.

Consideration of that evidence in order to make regulatory decisions also violates the

express preemption provisions of the Pipeline Safety Act, which are intended to protect against risks to life and property posed by pipeline transportation. 49 U.S. § 60102; 49 U.S.C. § 60104. Federal law expressly preempts any state or local regulation regarding safety standards for interstate pipelines. 49 U.S.C. § 60104; *Kinley Corp. v. Iowa Utils. Bd.*, 999 F.2d 354, 358 (8th Cir. 1993) (holding an Iowa statutory scheme attempting to regulate pipelines was entirely preempted by federal law). The federal Pipeline Safety Act (“PSA”) is the exclusive source for interstate pipeline safety regulation and, pursuant to 49 U.S.C. § 60104(c): “A State may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation.” 49 U.S.C. § 60104(c) The analysis of whether a pipeline regulation addresses “safety” so as to be preempted hinges upon the effect rather than the stated purpose of the legislation. *Northern Border Pipeline Co. v. Jackson County, Minnesota*, 512 F. Supp. 1261, 1265 (D. Minn. 1981). Here, Ponca openly advocates for the Commission to make its routing decision based upon the possible effect of hypothetical future spills. This is clearly attempting to invade the areas of safety, which the Legislature has wisely excluded from the factors to consider in the Commission’s decision in MOPSA.

Pre-filed Evidence

Ponca’s argument that it should not be forced to limit its evidence to the pre-filed submissions because it did not receive Keystone’s discovery until after the extended deadline misses the mark. Ponca acknowledges receiving Keystone’s documents in early June. But, Ponca nevertheless failed to supplement its exhibit list prior to July 24, 2017 which was the deadline for motions and objections to evidence. Even as of the date of the Ponca’s response to this motion in limine, Ponca has failed to supplement its exhibit list or testimony. Ponca has left Keystone with no alternative but to move in limine on the existing list and existing testimony.

The Case Management Plan (“CMP”)

Ponca’s complaint that the CMP limits its ability to respond to Keystone’s rebuttal is similarly unavailing. Ponca did not seek leave from the CMP to handle its evidence differently. More to the point, Ponca did not supplement its testimony or exhibits following submission of Keystone’s rebuttal evidence prior to July 24th, which was the date for objections or motions in limine. Ponca, in fact, has never supplemented its testimony or exhibits, which is why Keystone’s motion references the only exhibit list and testimony that Ponca provided. Obviously, any submission now is too late to allow for Keystone’s objections and is clearly unfair surprise to Keystone.

Ponca is also wrong when it asserts that Keystone did not address social issues in its application. Ponca obviously thought its issues deserved greater detail and attention, but that is different than not addressing a topic. When Ponca intervened, it raised issues specific to itself and, in particular, compliance with the National Historic Preservation Act. In response to Ponca’s specific intervention, Keystone has offered rebuttal testimony concerning issues raised by Ponca and has identified Keystone’s efforts towards complying with the NHPA and Programmatic Agreement contained within the FSEIS. Ponca is aware of that agreement within the FSEIS, and Ponca admits its concerns are largely satisfied through the application of the Programmatic Agreement. Moreover, the Nebraska State Historical Society has informed the Commission that the efforts at section 106 compliance are adequate.

Ponca’s argument regarding the order of the evidence is simply wrong and ignores a critical fact. Keystone filed its application and its direct evidence at the outset of the proceeding. Ponca reviewed that evidence, then it intervened. That schedule distinguishes this proceeding from typical civil litigation where a plaintiff uses notice pleading to sue a defendant, the parties


go through discovery, and the plaintiff's exact direct evidence is not known until the time of trial. Here, Ponca knows precisely what Keystone is going to say in direct and what Keystone is going to say in rebuttal. Keystone merely asks that Ponca (and all intervenors) be similarly limited.

Mr. Wright's Testimony of Legal Conclusions is Impermissible.

Under Neb. Rev. Stat. § 701, “[o]pinion testimony by a lay witness is permitted only where it is rationally based on the perception of the witness and it is helpful to a clear understanding of his testimony or the determination of fact in issue.” See *State v. Koziseki*, 22 Neb. App. 805, 814, 861 N.W.2d 465, 474 (2015). Thus, the purpose of a lay witness “is to describe what he has observed” and not to offer unqualified legal conclusion. See *id.* (determining that a lay witness’ testimony regarding the defendant’s guilt was impermissible under Neb. Rev. Stat. §§ 27-701 & 27-704). Mr. Wright’s testimony regarding section 106 compliance is not based on his perception or observations, but it is an unqualified legal conclusion in the form of analysis of the NHPA and its application in this matter. In addition, his testimony concerning the “public interest” should not be allowed because that decision is the Commission’s to make based upon the full record, not Mr. Wright’s limited and unqualified perspective. The testimony should be excluded.

Dated this 28th day of July, 2017.

TRANSCANADA KEYSTONE PIPELINE,
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By:  _____

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CERTIFICATE OF SERVICE

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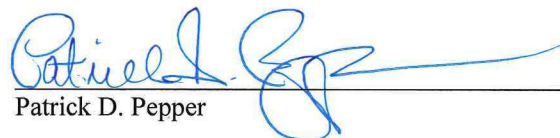
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