

# Nebraska Public Service Commission

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June 14, 2017

## CERTIFICATION

To Whom It May Concern:

I, Shanicee Knutson, Deputy Director of the Nebraska Public Service Commission, hereby certify that the enclosed is a true and correct copy of the original order made and entered in the proceeding docketed OP-0003 on the 14th day of June 2017. The original order is filed and recorded in the official records of the Commission.

Please direct any questions concerning this order to Nichole Mulcahy, Natural Gas Deputy Director, at 402-471-3101.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the Nebraska Public Service Commission, Lincoln, Nebraska, this 14th day of June 2017.

Sincerely,

A handwritten signature in cursive script that reads "Shanicee Knutson".

Shanicee Knutson  
Deputy Director

SK:rp

Enclosure

cc: Service Lists: U.S. Mail and Email



SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application ) Application No. OP-0003  
of TransCanada Keystone Pipeline, )  
L.P., Calgary, Alberta, seeking ) ORDER GRANTING IN PART,  
approval for Route Approval of the ) DENYING IN PART, MOTIONS  
Keystone XL Pipeline Project ) TO COMPEL  
Pursuant to the Major Oil Pipeline )  
Siting Act. ) Entered: June 14, 2017

BY THE HEARING OFFICER:

On February 16, 2017, TransCanada Keystone Pipeline, L.P., of Calgary, Alberta, ("TransCanada" or "Applicant") filed an Application with the Nebraska Public Service Commission ("Commission") seeking approval of a route for the Keystone XL Pipeline Project pursuant to the Major Oil Pipeline Siting Act, Neb. Rev. Stat. §§ 57-1401 - 57-1413 ("Siting Act").

On March 31, 2017, the Hearing Officer entered an order regarding petitions for formal intervention in the above-captioned proceeding. Formal Intervention was granted to 95 landowners along the proposed route of the pipeline, all represented by The Domina Law Group PC LLO ("Domina" or "Landowner Intervenors").

On April 5, 2017, the Hearing Officer entered an order adopting a case management plan ("CMP") and giving notice of the public hearing in the above-captioned docket.

On May 30, 2017, Landowner Intervenors filed Motions to Compel responses to certain discovery requests in the above-captioned docket.

Oral arguments on the pending Motion to Compel were held on June 9, 2017, via phone with the Hearing Officer pursuant to the CMP. Mr. Brian Jorde argued on behalf of Landowner Intervenors and Messrs. Jim Powers and Patrick Peppers argued on behalf of the Applicant. The discovery requests at issue are Interrogatory Nos. 29-38, 40, 42-44, 46-48, 50, 58, 59, 62, 63, 66, 67, 70, 71, 74, 75, 78-81, 82, 83, 86-89, 90-100, 105, 121-158, 164, 165-173, 217, 218, 221-223, 229-235, 237, 238, 240, 241, 250, 271-275, and 285-292; Requests for Production of Documents Nos.: 1-5, 7-9, 11, 12, 14, 15, 19, 20-28, and 31; and Requests for Admissions Nos.: 22-26, 29-49, 146-161, and 218. Some of the discovery requests are related in subject matter and were discussed together; therefore, those same discovery requests will be discussed together in this order.

## O P I N I O N

The Nebraska Supreme Court rules and regulations govern discovery in matters before the Commission.<sup>1</sup> Generally, "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action" and "appears reasonably calculated to lead to the discovery of admissible evidence."<sup>2</sup> The Commission is not bound by the strict rules of evidence and therefore the admissibility of evidence is typically liberally applied by the Commission.

To expedite matters due to the shortened timeframe contained within the Siting Act for the Commission to review the proposed route of the pipeline, in the CMP, I specifically limited the number of written interrogatories to fifty (50) requests, including subquestions and subparts each being considered a separate request, twenty (20) requests for production of documents, and twenty (20) requests for admission.

Timeframe for Response January 1, 2015 vs. January 1, 2010

Domina and TransCanada conferred and reached agreement on some of the disputed items. On certain requests, TransCanada has agreed to provide the information and/or documents requested back to January 1, 2015. Landowner Intervenor state two (2) years of data is too limited and request TransCanada be compelled to provide all information and/or documents back to January 1, 2010, or seven (7) years of documents/information.

In general I find that provision of information and/or documents requested by TransCanada dating back to January 1, 2015, is sufficient for purposes of this proceeding and an additional five (5) years' worth of the requested data/documents would be beyond the scope of this proceeding. The Commission's initial involvement with TransCanada did not occur until the first application was filed in 2015. Therefore, the Hearing Officer finds that the motions to compel an additional five (5) years of information and/or documents in Interrogatory Nos. 33-38, and Request for Production of Documents Nos. 1, 6 (mislabeled the second No. 5), 9, 12, and 19 are hereby denied.

Regarding Document Request Nos. 2 and 3, no timeframe was initially requested by Landowner Intervenor, however, in the motion Landowner Intervenor again seeks documents back to January 1, 2010. I find the motion to compel shall be granted in part and the Applicant shall provide responsive documents back

<sup>1</sup> Neb. Admin. Code, Title 291, Ch. 1 § 016.11 (1992).

<sup>2</sup> Neb. Ct. R. Disc. § 6-326(b) (1).

to September 1, 2015. The requests for documents prior to September of 2015, when the initial application was filed by TransCanada with the Commission, are irrelevant and beyond the scope of this proceeding.

Regarding specific requests I find the following:

Interrogatory Nos. 29-32

Landowner Intervenor seek information regarding the salaries, shares in the company, and retirement account balances of any TransCanada employees testifying on behalf of the Company in the proceeding. Further, No. 32 seeks the terms and compensation level for expert witnesses retained by TransCanada to testify on its behalf in the proceeding. TransCanada objects on the grounds that the information sought is irrelevant and not calculated to lead to admissible evidence. Landowner Intervenor argue the information goes to the bias of the witnesses. I find the information sought is more detailed than necessary for this proceeding. TransCanada discloses clearly that certain witnesses are its employees and the expert witnesses are hired to provide testimony. It is irrelevant as to the amount of that compensation, etc. in the Commission's analysis of the witness testimony.

Therefore, the motions to compel Interrogatory Nos. 29-32 are denied.

Interrogatory Nos. 40, 42-44, 46-48, 50, 100, 105, 165-166

Landowner Intervenor seek in these interrogatories for the Applicant to define various terms contained within the Siting Act, namely "public interest", "economic purpose", "aesthetic purpose", "social impact", "orderly development of the area around the proposed route", and "ensure the welfare of Nebraskans" and requests TransCanada describe what the Commission should consider in its analysis of those terms. Interrogatory Nos. 44 and 48 request TransCanada to specifically describe how the proposed route would serve the economic and aesthetic purpose respectively in Nebraska.

TransCanada objects as the meaning of terms contained with the Siting Act is a question of law and exclusively within the power of the Commission to determine. Landowner Intervenor argues in the motion that the questions do not seek a legal interpretation because they are asking what the Applicant believes not what the Applicant thinks.

I see a distinction without a difference, and find Domina is seeking legal conclusions from the Applicant that are clearly

under the purview of the Commission. I do however, think Interrogatory Nos. 44 and 48 are reasonably calculated to lead to admissible evidence.

Therefore, the motions to compel Interrogatory Nos. 44 and 48 are granted and the motions to compel Interrogatory Nos. 40, 42, 43, 46, 47, 50, 100, 105, and 165-166 are denied.

Interrogatory Nos. 58, 59, 62, 63, 66, 67, 70, 71, 74, 75, 78-83, and 86-89

Here Landowner Intervenors seek a list of each and every statute, rule, regulation, and local ordinance the Applicant has or will need to comply with in Nebraska. TransCanada objects stating that in its application it has already agreed to comply with all applicable state statutes, rules, regulations, and local ordinances. Landowner Intervenors argue that the Applicant must list the citations or fail to meet its burden. I disagree, the Applicant's response is sufficient and a list of citations to statutes, rules, regulations, and local ordinances is unnecessary, the Applicant has agreed to abide by all applicable provisions. Therefore, the motions to compel Interrogatory Nos. 58, 59, 62, 63, 66, 67, 70, 71, 74, 75, 78-83, and 86-89 are denied.

Interrogatory Nos. 90-99, 164, Requests for Admissions Nos. 22-26, and 29-49

Landowner Intervenors seek documents, information and admissions regarding leaks and spills and related information concerning the Keystone I pipeline and the KXL pipeline. Applicant objects that the information sought is overbroad, unduly burdensome, and not calculated to lead to admissible evidence. Landowner Intervenors argue that because the Applicant discusses spills and leaks in its application, it opened the door for the requests and information regarding spills and leaks. Additionally, Landowner Intervenors argue the provisions of the Siting Act are conflicting with constitutional law and Federal Law does not preempt the Commission from considering the risks of spills and leaks.

I find the Siting Act specifically prohibits the Commission from considering safety considerations including the risks of spills and leaks and therefore any data on the subject is clearly outside the scope of this proceeding. Landowner Intervenors argue that regardless of whether the information sought is ultimately offered into evidence doesn't rule out possible discovery. However, any such requests must be reasonably calculated to lead to admissible evidence, evidence regarding prohibited lines of inquiry are not reasonably

calculated to be admissible in this proceeding. Therefore, the motions to compel Interrogatory Nos. 90-99, 164, Requests for Admissions Nos. 22-26, and 29-49, are denied.

Interrogatory No. 121

In this request Landowner Intervenors seek information regarding any person associated with TransCanada that participated in the Legislative process when the Siting Act was developed at the Legislature. TransCanada objects, arguing it is irrelevant and adding in oral argument that the Siting Act is the law in Nebraska, and any individuals participating in the Legislative process through testimony Legislative proceedings are a part of the public record and available currently. Landowner Intervenors argue it is relevant to know what type of money was spent through the efforts of the Applicant when the Siting Act was under debate at the Legislature, all of which goes to the economic interests and impacts analysis of the Commission. Further, comments made on the record about the burden to the Applicant under the Siting Act before passage could lead to admissible evidence.

I find the events that occurred before the Siting Act was passed into law by the Nebraska Legislature are irrelevant to the Commission's analysis and determination under the Siting Act. The Commission is charged with following the provisions of the Siting Act regardless of any statements that may have been made during the Legislative process before ultimate passage of the Act. The motion to compel Interrogatory No. 121 is denied.

Interrogatory Nos. 122-158

In these interrogatories, Landowner Intervenors are seeking information about the need and necessity of the KXL pipeline as it pertains to the United States, Nebraska, and to each county that has part of the KXL pipeline route. They also seek similar information regarding the Keystone I pipeline for what they argue is important information as a type of case study that will provide important parallels to the KXL project. TransCanada objects stating the information sought is outside the scope of the Siting Act and this proceeding. Landowner Intervenors respond that the Siting Act doesn't state the Commission can't consider need and necessity in its analysis.

I find that the Siting Act deals exclusively with the route of the proposed KXL pipeline and does not direct or permit the Commission to conduct a need and necessity analysis. The decision regarding need and necessity for an interstate pipeline project is not within the purview of a state Commission, but is a Federal decision. Therefore, the information sought by

Landowner Intervenor is outside the scope of this proceeding and motions to compel responses to Interrogatory Nos. 122-158 are denied.

Data Request for Documents No. 4

Landowner Intervenor seeks documents containing appraisals of any Intervenor's property that TransCanada relied on when it initiated condemnation proceedings in 2015. TransCanada objects stating that the documents sought are irrelevant and questions of eminent domain are addressed in the county courts, not under the Siting Act. Landowner Intervenor argues the documents go toward issues of property rights and economic interests, two areas the Commission will evaluate in the proceeding.

I find documents regarding condemnation proceedings initiated by the Applicant in 2015 that were subsequently withdrawn are irrelevant to the Commission determination regarding the pipeline route in the current proceeding. Eminent domain proceedings are properly before the county courts and the Commission has no authority in regards to condemnation proceedings. Therefore, the motion to compel response to Request for Documents No. 4 is denied.

Document Request No. 5, Interrogatory No. 250, and Requests for Admissions Nos. 146-161

In these requests, Landowner Intervenor seeks documents and information regarding contracts, agreements, understandings, commitments and/or promises between TransCanada and any person or entity regarding shipping of product in the KXL pipeline. TransCanada objects that the requested documents and information are irrelevant and go toward a need and necessity analysis, which is beyond the scope of this proceeding. Landowner Intervenor argues that if TransCanada can't prove full commitment for the size and capacity of the KXL pipeline, then the route can't possibly be in the public interest.

My analysis is again similar to the need and necessity questions above. The contractual arrangements or lack thereof between TransCanada and potential shippers is outside the scope of the Commission's determination of a route through Nebraska. Therefore, the motions to compel Document Request No. 5, Interrogatory No. 250, and Requests for Admissions Nos. 146-161 are denied.

Interrogatory Nos. 167-173, 217-218, and 240-241

Here Landowner Intervenor seeks information about Nebraska's energy needs and how the KXL pipeline project would

supply those needs and seeks information regarding the finite nature of the Alberta tar sands. TransCanada objects that the information is irrelevant and beyond the scope of the Siting Act. Domina argues the Siting Act specifically discusses the increasing need for energy and a finite amount of tar sands directly impacts the need for perpetual easements.

I find the specific energy needs of the state of Nebraska is outside the scope of the Siting Act which tasks the Commission with determining a route for a major oil pipeline. The finite capacity of the Alberta tar sands is also outside the scope of the Siting Act and such questions again go to the need and necessity of the pipeline, not a siting analysis for the location of the proposed pipeline. The motions to compel interrogatory Nos. 167-173, 217-218, and 240-241 are denied.

Interrogatory Nos. 221-222 and Request for Documents No. 11

These questions seek information and documents regarding the treatment of landowners by the Applicant's agents and contractors and any training or educational materials used for easement acquisition agents employed by TransCanada. TransCanada objects on the grounds that the information and documents are irrelevant and not reasonably calculated to lead to admissible evidence. Domina responds that no route can be in the public interest if landowners are treated poorly and the information goes toward the fitness of the Applicant.

As with my previous rulings, the Siting Act deals with determining the route of the KXL pipeline through Nebraska. The negotiations that occur between private individuals and the Company are not under the purview or authority of the Commission, but are within the jurisdiction of the courts if improper activities occur during negotiations. The motions to compel Interrogatory Nos. 221-222 and Request for Documents No. 11 are denied.

Interrogatory No. 223

This interrogatory requests any analysis by the Applicant of the potential effect of the proposed pipeline on the risk of terrorist attacks along the route. TransCanada objects stating that it is seeking irrelevant information and safety is not a consideration under the Siting Act. Landowner Intervenor respond that the request goes to the Commission's consideration of the route and cites a certain former Navy Seal as saying twinning the current Keystone I pipeline would be safer for the pipelines in regards to terrorism.



I find any analysis regarding potential terrorist attacks as highly speculative and not reasonably calculated to lead to admissible evidence in this proceeding, as such, the motion to compel interrogatory No. 223 is denied.

Interrogatory Nos. 229-235

In these requests, Landowner Intervenors seek information from TransCanada on each and every way plants, wildlife, surface water, groundwater, soil, natural resources, and the environment will suffer or be harmed if the proposed KXL pipeline route is denied. TransCanada objects on the grounds that the request is overly broad and states that Keystone's Application addresses the impacts on these different items. Landowner Intervenors argue that the Siting Act requires the Applicant to show how the proposed route will serve the public interest, it is not neutral and the Applicant must show that if the pipeline were not built through Nebraska, something would be lost.

I find these requests highly speculative and not calculated to lead to admissible evidence. The determination of public interest is the Commission's task and how these different items enumerated would suffer if the route was denied is not relevant to our consideration of the impact to those same items. The motions to compel interrogatories 229-235 is denied.

Interrogatory Nos. 271-275

Here Domina seeks the names and address of each landowner along the proposed routes with whom the Applicant has obtained an easement and the amount agreed upon between the parties for the easement. Landowner Intervenors also seek the Applicant's definitions of certain legal terms contained within an example Easement and Right of Way Agreement. TransCanada objects that the information is irrelevant, not calculated to lead to admissible evidence and the contracts speak for themselves. Domina responds that protection of property rights and economic impacts are an important consideration for the Commission and the easement contracts are very relevant.

I find the information sought by Landowner Intervenors regarding the easement terms is clearly within the domain of the county courts and it is not within the Commission's authority to make judgments regarding the legal terms within a contract between two private entities. However, I will grant No. 271 in the following limited fashion, the Applicant shall provide the legal descriptions of any properties where they have an agreement with the landowner along the proposed route. Therefore, Interrogatory No. 271 as modified, TransCanada filing the legal descriptions of any properties where they have an agree-

ment with the landowner along the proposed route, is granted, the motion to compel the remaining information in the other interrogatories is denied.

Interrogatory Nos. 285-292 and Requests for Documents Nos. 20-28

In these requests Landowner Intervenors seek information and documents on the ownership structure of the Applicant and its subsidiaries including the name, address, and contact information of each and every person, company, corporation, partnership, fund or entity of any kind with any ownership stake in TransCanada and its subsidiaries and parents as of February 16, 2017 and May 5, 2017. Landowner Intervenors also seek the type and value of any assets and the type and value of each debt of the Applicant along with financial documents including financial statements and tax returns of the Applicant and its parents. TransCanada objects that the information is not relevant. Domina argues the information on who is ultimately behind the pipeline is relevant especially if it is owned by other foreign nations besides Canada. The financial documents also, he argues, go toward the financial health of the Applicant. Mr. Jorde during oral arguments did agree to modify the request to the most recent year financials for all the companies and not back to 2009.

I agree in a limited fashion with Landowner Intervenors that the ownership structure and financial stability of the Applicant could be relevant in determining the ability of the Applicant to keep its promises to take certain mitigating and reclamation actions contained within the application. I do not find the identity and nationality of each individual or entity that may own an interest in the Applicant or its parents is relevant to the Commission's siting duties. Therefore, I find the motions to compel shall be granted in part and the Applicant shall produce an organization chart of its ownership structure and its most recent quarterly and annual balance sheets.

Request for Documents No. 31

In this request, Landowner Intervenors seek copies of any depositions given by TransCanada since 2010. At the oral arguments, Mr. Jorde limited the request to depositions regarding pipeline projects and not internal disputes such as labor and employment actions. TransCanada objected initially that the request was too broad and seeking irrelevant information. Domina argues that previous statements by the company regarding project reclamation or any other part of a pipeline project could potentially lead to admissible evidence in the current proceeding. TransCanada argued even with the narrowing by Mr. Jorde at the

arguments, the request was still not narrow enough and burdensome on the company.

I find the request, as narrowed by Mr. Jorde, is reasonably calculated to lead to admissible evidence. Therefore, the motion to compel Document Request No. 31 as limited by Mr. Jorde is granted and TransCanada shall provide copies of any depositions given by the company in relation to previous pipeline projects and the KXL project back to 2010. This does not include litigation or arbitration on any matter not related to the construction, maintenance, or reclamation/mitigation of a pipeline project of TransCanada.

Request for Admission No. 218

At the oral arguments, Mr. Jorde withdrew his motion to compel Request for Admission No. 218.

Conclusion

After a thorough examination of all the filings, motions, and arguments in the current proceeding, I find that motions to compel Interrogatory Nos. 44 and 48 are granted. Interrogatory Nos. 271, 285-292 and Document Request Nos. 2, 3, 20-28, and 31 are granted as limited and/or modified above. I further find Interrogatories Nos. 29-38, 40, 42-43, 46-47, 50, 58-59, 62-63, 66-67, 70-71, 74-75, 78-81, 82-83, 86-89, 90-100, 105, 121-158, 164-173, 217-218, 221-223, 229-235, 237-238, 240-241, 250, and 272-275; Requests for Production of Documents Nos.: 1, 4-5, 7-9, 11-12, 14-15, and 19; and Requests for Admissions Nos.: 22-26, 29-49, and 146-161 are not reasonably calculated to lead to admissible evidence and are denied.

O R D E R

IT IS THEREFORE ORDERED by the Hearing Officer that the Motions to Compel are hereby granted in part and denied in part as found herein.

ENTERED AND MADE EFFECTIVE at Lincoln, Nebraska this 14<sup>th</sup> day of June, 2017.

BY:



Tim Schram  
HEARING OFFICER