

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application of)	Application No. OP-0003
TransCanada Keystone, L.P. for route)	
approval of the Keystone XL Pipeline)	
Project pursuant to the Major Oil Pipeline)	
Siting Act		

**BOLD ALLIANCE’S AND SIERRA CLUB’S RESPONSE TO TRANSCANADA’S
OBJECTION TO, AND MOTION IN LIMINE TO EXCLUDE EVIDENCE OFFERED
BY BOLD ALLIANCE AND THE SIERRA CLUB, NEBRASKA CHAPTER**

Bold Alliance (“**Bold**”) and the Sierra Club, Nebraska Chapter (“**Sierra Club**”) by and through their counsel of record, submit the following responses to TransCanada Keystone, L.P.’s (“**TransCanada**”) Objection to and Motion in Limine to Exclude Evidence:

TransCanada seeks to improperly exclude portions of the pre-filed testimony of Thomas D. Hayes, Ph.D. (“**Hayes Testimony**”), Joseph F. Trungale (“**Trungale Testimony**”), and Paul A. Johnsgard, Ph.D. (“**Johnsgard Testimony**”) because it believes portions of the foregoing testimony are beyond the scope of testimony permitted in these proceedings and because of its unfounded claims that portions of the foregoing testimony are speculative and lack foundation.

It is not surprising that TransCanada seeks to exclude testimony that casts its proposed Keystone XL Pipeline project (“**KXL**”) in an ill light, as throughout these proceedings – and as exemplified by the work of its lobbyists in promoting legislation in the Nebraska Legislature intended to prevent the Commission from exercising its constitutional authority to decide this issue (see LB 1161, Laws 2012) – it has consistently sought to limit full and informed consideration of the risks posed by its project to the people, environment, and natural resources of this State. TransCanada’s Objections and Motion in Limine should be overruled in order to permit the Public Service Commission (the “**Commission**”) to fully consider whether permitting the KXL pipeline

to be routed through Nebraska as proposed by TransCanada in its application is in the public interest of the State and its citizens.

There are a number of reasons why TransCanada's objections and motion should be overruled by the Commission. First, to the extent TransCanada has objections to testimony of witnesses, it will have an opportunity to raise such objections at the hearing. Hence, its styling of its pleading as an "objection" is premature. Acceding to TransCanada's wishes with respect to its objections and motion is contrary the Commission's own rules, which clearly set out the standards for admissibility of evidence. Neb. Admin. Rules, Title. 291, Ch. 1, § 016.01 et seq.

Second, a motion in limine serves no purpose in these proceedings. The purpose of a motion in limine is to prevent prejudicial information from reaching a jury. *Golnick v. Callender*, 290 Neb. 395, 405, 860 N.W.2d 180, 190 (Neb. 2015). The Commission is not a jury. Its members are comprised of experienced regulators who are fully aware of the scope of their authority and any constitutional or legislative constraints on their decision-making processes. Commissioners are perfectly capable of considering what evidence is relevant, and conversely, determining whether it is either worth considering or the extent to which it should be given any weight. The independence of the Commission under the State Constitution is explicitly recognized by the Nebraska Supreme Court. See, *Schumacher v. Johanns*, 272 Neb. 346, 365, 722 N.W.2d 37, 51 (Neb. 2006).

Third, in filing its objections and motion, TransCanada seeks to impermissibly limit the Commission's authority and role with respect to determining the information it receives concerning whether construction of the KXL pipeline would serve the public interest. "All powers and jurisdiction of the Public Service Commission must be found in the constitutional provision creating it; the provision should not be construed so narrowly as to defeat its purpose; rather it

should be liberally construed to effectuate the purpose for which the Commission was created, which is primarily to serve the public interest. Const. art. 4, § 20; art. 10, § 7.” *In the Matter of Application No. 30466*, 194 Neb. 55, 63, 230 N.W.2d 190, 196 (Neb. 1975). The public interest is not served by restricting information that the Commission can evaluate. Serving the public interest requires full and fair evaluation of evidence. If the Commission, upon hearing and considering evidence, believes that it is not relevant to a public interest determination or that it constitutes information not within the scope of evidence it can consider, that is a determination the Commission can take that into account in rendering its decision. “Determination of issues of public convenience and necessity is one peculiarly within the province of Public Service Commission,” *Application of Kilthau*, 236 Neb. 811, 815, 464 N.W.2d 162, 166 (Neb. 1991).

In short, the Commission should have an opportunity to hear the evidence set forth by Bold’s and Sierra Club’s expert witnesses, and the Commission should not permit TransCanada to limit its authority with respect to determining what is in the public interest. In a statement relevant to this issue, the Supreme Court noted that “[d]etermination of what is consistent with public interest is peculiarly for the determination of State Railway Commission.” *Smith v. Andrews Van Lines, Inc.*, 187 Neb. 533, 539, 192 N.W.2d 406, 410 (Neb. 1971). While the *Smith* case related to the Commission’s predecessor, the State Railway Commission, this principle is still applicable.

Fourth, contrary to TransCanada’s unfounded assertions, the evidence submitted by Bold and Sierra Club is relevant and probative of facts at issue in this matter and is therefore admissible. With respect to the testimony of Hayes, Trungale, and Johnsgard there is no basis for exclusion – either as to relevancy or foundation. TransCanada’s argument to foundation rests entirely on an assertion that because a witness is not a specialist in a particular subject matter area means they are not competent to testify. That is incorrect. If that were true none of TransCanada’s witnesses

would be competent to testify. The Supreme Court notes that “every person is a competent witness in any case, civil or criminal; that the reasons for disqualifying a witness must be found in express provisions of the law; and that a witness is not to be disqualified by a strained or strict construction of a statute.” *Hazuka v. Jelinek’s Estate*, 146 Neb. 452, 457, 20 N.W.2d 325, 328 (Neb. 1945). TransCanada has provided no legal authority for disqualifying portions of testimony of Bold and Sierra Club’s witnesses. Furthermore, there is ample basis for concluding that Bold and Sierra Club’s witnesses are indeed experts, particularly Dr. Johnsgard, who is one of the world’s leading experts on whooping cranes. These witnesses are competent to testify and the Commission has the ability to give such testimony appropriate weight based on its credibility and authority.

Furthermore, the Supreme Court has noted that “[t]he nature of evidence deemed competent in the context of administrative hearings has also been established. It is that which is relevant, admissible, and tends to establish the facts in issue ...” *Beasley v. City of Omaha*, 212 Neb. 153, 155, 322 N.W.2d 377, 379 (Neb. 1982). As to determining admissibility, in contested cases, “[a]n agency may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs.” *Application of Nebraska Public Power Dist.*, 191 Neb. 556, 567, 216 N.W.2d 722, 729 (Neb. 1974). In this case, TransCanada has not presented any compelling argument as to why testimony should be excluded, other than assertions that it exceeds the scope of the limitations TransCanada would like to impose.

While MOPSA has been drafted in a manner to attempt to avoid matters regulated (ineffectively, at best) by the U.S. Pipeline and Hazardous Materials Safety Administration (“PHMSA”), nothing in MOPSA precludes the Commission from hearing evidence concerning whether the proposed KXL pipeline is in Nebraska’s public interest, which is the basis of the

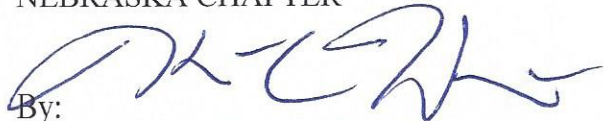
Commission's evaluation of the proposed pipeline route. The testimony of Bold's and Sierra Club's witnesses is specifically oriented toward the impact of the proposed route on Nebraska's natural resources and how TransCanada's proposed project is not the public interest of the State of Nebraska. There is no basis for exclusion.

Finally, in evaluating exclusion of evidence, the question arises as to whether the evidence unfairly prejudices the party seeking to exclude it. The general principle is that evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. See, *Wagner v. Union Pacific Railroad Company*, 11 Neb. App. 1, 28, 642 N.W.2d 821, 845 (Neb. App. 2002). TransCanada has not demonstrated how it is unfairly prejudiced by the evidence it seeks to exclude. Combined with the probative value of the testimony of Bold's and Sierra Club's witnesses as to whether the proposed KXL pipeline is in the State's public interest, TransCanada's objections and motion in limine must be overruled.

WHEREAS, Bold and the Sierra Club respectfully request that the Commission overrule TransCanada's objections and motion in limine.

Respectfully submitted the 27th day of July, 2017.

BOLD ALLIANCE and SIERRA CLUB,
NEBRASKA CHAPTER

By: 

Kenneth C. Winston, #16961

1327 H St., Ste. 300

Lincoln, NE 68508

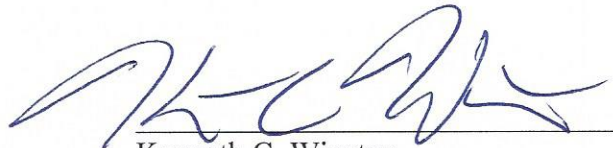
(402) 212-3737

kwinston@inebraska.com

Attorney for Bold Alliance and
Sierra Club, Nebraska Chapter

CERTIFICATE OF SERVICE

Pursuant to 291 Neb. Admin Code § 015.0 (b), and the ruling of the hearing officer at the scheduling conference, on July 28, 2017 a copy of the foregoing was served upon all parties of record to this proceeding or their attorneys of record by email as set forth in the service list provided by Commission on this 27th day of July 2017.


Kenneth C. Winston