

Before the Nebraska Public Service Commission

In the Matter of the Application

of

**TransCanada Keystone Pipeline LP
For Route Approval of Keystone XL
Pipeline Project, Pursuant to MOPSA**

Intervenors:

**Susan Dunavan and William Dunavan, et
al**

Intervenors.

**Application No: OP-003
(Filed by Applicant on 2/16/17)**

**Landowner Intervenors'
Response to TransCanada's 9-point
Motion *in Limine***

Landowner Intervenors' Response to TransCanada's 9-point Motion *in Limine*

1. The Nebraska Public Service Commission has broad discretion and authority in these proceedings to consider numerous factors when analyzing whether or not the single proposed preferred route is "will serve the public interest" of Nebraska. The interests of no other state are relevant to the PSC's inquiry. It is wholly irrelevant for instance, that Applicant proposed a certain route in any other state. This powers of the PSC include the ability to completely reject the proposed preferred route or require a new route such as closely paralleling Keystone 1.

2. The explicit purpose of MOPSA¹ is to:

- 2.1. Ensure the welfare of Nebraskans, including protection of property rights, aesthetic values, and economic interests; and to
- 2.2. Consider the lawful protection of Nebraska's natural resources in determining the location of routes of major oil pipelines within Nebraska; and to

¹ <http://nebraskalegislature.gov/laws/statutes.php?statute=57-1402> (1)

2.3. Ensure that the location of routes for major oil pipelines is in compliance with Nebraska law.

3. In addition to these extremely broad and expansive consideration for the Commission are also the considerations of:

3.1. (a) Whether the pipeline carrier has demonstrated compliance with all applicable state statutes, rules, and regulations and local ordinances; and

3.2. (b) Evidence of the impact due to intrusion upon natural resources and not due to safety of the proposed route of the major oil pipeline to the natural resources of Nebraska, including evidence regarding the irreversible and irretrievable commitments of land areas and connected natural resources and the depletion of beneficial uses of the natural resources; and

3.3. (c) Evidence of methods to minimize or mitigate the potential impacts of the major oil pipeline to natural resources; and

3.4. (d) Evidence regarding the economic and social impacts of the major oil pipeline; and

3.5. (e) Whether any other utility corridor exists that could feasibly and beneficially be used for the route of the major oil pipeline; and

3.6. (f) The impact of the major oil pipeline on the orderly development of the area around the proposed route of the major oil pipeline; and

3.7. (g) The reports of the agencies filed, [only if requested by the PSC] from:

3.7.1. the Department of Environmental Quality,

3.7.2. the Department of Natural Resources,

3.7.3. the Department of Revenue,

3.7.4. the Department of Roads,

3.7.5. the Game and Parks Commission,

3.7.6. the Nebraska Oil and Gas Conservation Commission,

3.7.7. the Nebraska State Historical Society,

3.7.8. the State Fire Marshal, and

3.7.9. the Board of Educational Lands and Funds; and

3.8. (h) The views of the governing bodies of the counties and municipalities in the area around the proposed route of the major oil pipeline.

4. Given the foregoing and the wide range of potential considerations and evidence required to address each and every hurdle required for Applicant, TransCanada, to overcome, its Motions *in Limine* discussed below must be overruled as they each impermissibly attempt to unreasonable narrow issues ripe for consideration and evidence presentation at the time of Hearing on this matter.

5. Landowner Intervenors further discuss each of Applicant's impermissible Motions *in Limine* by repeating each request and responding with argument:

5.1. TC MIL #1: Any exhibit not produced during the course of discovery and identified on the parties' exhibit lists filed in accordance with the Case Management Plan ("CMP")

Response: TransCanada was to have responded to all discovery served on it by Landowners not later than ten (10) days from the date of service. They failed to do so. In fact, Landowners received more than 50,000 pages of discovery from TransCanada receiving some as recent as July 14, 2017. Clearly, Landowners were unable to list all their exhibits on or before June 7, 2017 when tens of thousands of documents were received much later. TransCanada will not be prejudiced in any manner by offer of Landowners' exhibits as found on its 1st Amended Exhibit List. Further, given that there is an ongoing duty to supplement relevant discovery, this Motion *in Limine* as worded would allow the addition of trial exhibits at least up and until the commencement of the Hearing on August 7th.

5.2 TC MIL #2: Any testimony of any witness on direct examination which was not contained in that witness' admissible pre-filed testimony.

Response: This request is impossible to police. While all witnesses for all parties should strive to keep their live testimony closely aligned to the pre-filed testimony, some leeway must be allowed. If witnesses are held word for word to pre-filled testimony then Landowners will read each and every pre-filled testimony into the record and we will need two additional weeks for this hearing. Additionally, if any relevant facts have changed or new relevant facts been discovered since the date of the filing of testimony those matters should be available for inquiry. Applicant invites the Commission to a warped interpretation of the pre-filed testimony concept as outlined in the CMP. While we agree a witness who has not filed any testimony at all cannot participate in the hearing there is nothing in the CMP that prevents a witness who has complied by timely filling pre-filed testimony from being restricted only from testifying word-for-word as to the pre-filed testimony. No such rule exists and this motion must not be granted.

5.3 TC MIL #3: Any testimony by any person who has not submitted admissible pre-filed testimony in accordance with the CMP in this matter.

Response: This motion cannot be granted as phrased given "admissibility" of pre-filled testimony will be determined at the time of the hearing. This issue is not ripe at this time. We agree however, that if pre-filed testimony or portions thereof are deemed inadmissible at the time of the hearing that obviously they will not be received into evidence.

5.4 TC MIL #4: Any cross examination of any witness or argument on topics relating to pipeline safety including but not limited to the risk or impact of pipeline leaks and spills, terrorist attacks, depth of cover, the chemical characteristics of crude oil, and spills or leaks from the Keystone Mainline.

Response: “Safety” is an undefined and ambiguous term within MOPSA, specifically when used at *Neb Rev Stat* § 57-1407(4) and (4)(b). Importantly, this statute can only pertain to Applications that are made on or after July 1, 2017, the “Operative Date” of § 57-1407. TransCanada filed its Application on February 16, 2017, therefore the alleged restrictions of § 57-1407 related to “safety” do not apply to the February 16, 2017 Application. See Attachment #1.

TransCanada’s Application for its proposed KXL pipeline extensively discusses spills and leaks. If this was not a relevant inquiry for the Commission to make then why did Applicant spend so much time in its Application discussing foreseeable spills and leaks. Applicant clearly acknowledges the relevance of this inquiry and anticipated it in its Application. TransCanada has opened the door.

TransCanada’s Application is 403 pages long. The following pages of the Application discuss “spill” or “leak” in the context of construction, maintenance, and or operation of the proposed KXL as they seek to have it routed in Nebraska: 30, 31, 34, 35, 46, 57, 84 aka Appendix C5, 95 aka Appendix D7, 97 aka Appendix D9, 105 aka Appendix D17, 106 aka Appendix D18, 107 aka Appendix D19, 108 aka Appendix D20, 109 aka Appendix D21, 110 aka Appendix D22, 111 aka Appendix D23. Further, Federal Law does not preempt the PSC from reviewing, on behalf of Nebraska’s citizens and stakeholders, the risks and impacts of potential spills and leaks when determining the most prudent and intelligent location, if any, of such a major oil pipeline across Nebraska. Any law of this state purportedly restricting the PSC in such a manner unconstitutionally limits the power of the very constitutional body that is charged with the responsibility on behalf of the entire State of Nebraska to site major oil pipelines. If the PSC is prohibited from considering the risk and impact of foreseeable and predictable spills and leaks of tar sands crude oil and other dangerous chemicals, who exactly is looking out for Nebraska’s general welfare, property rights and the economic interests in this regard?

There is no restriction whatsoever with in MOPSA regarding limitations on “depth of cover.” Testimony and evidence on this issue must be allowed. Applicant specifically discusses this relevant issue at Section 21, and Appendix D Section 2.9

“Minimum Depth of Cover” and at Appendix D Section 4.8 and Appendix D Section 5.1, 5.2, and 5.3.

There is no MOPSA restriction on terrorist attacks and evidence associated with the selection of the route as more or less prone to attack is relevant for the PSC’s consideration. This has nothing to do with the “safety” of the pipe or construction – it has to do with intelligence of route placement.

Language of a statute is to be given its plain and ordinary meaning. *Lincoln Lumber Co. v. Lancaster*, 260 Neb. 585, 618 N.W.2d 676, 680 (2000). Only if a statute is ambiguous does a court turn to other rules of construction to determine its meaning. While Section 15-1407 references “spills or leaks,” it is not a blanket prohibition. The reference to “spills or leaks” is only in the context of and as an example of “safety considerations.” Thus, in order to be excluded from the Commission’s evaluation, a matter related to spills or leaks must be a “safety consideration.” That is clear from the very language of the statute which makes “the risk or impact of spills or leaks” solely an included item of “safety considerations.” In other words, “spills or leaks” is an example of “safety considerations” and not its own separate matter. Applicant’s proposed reading of prohibiting any mention of spills or leaks tweaks the plain language of the statute and actually negates the word “including” and the fact that “spills or leaks” is part of an example clause. “It is an elementary rule of construction that effect must be given, if possible, to every word, clause, and sentence of a statute.” *Ulbrick v. Nebraska City, Otoe County*, 180 Neb. 229, 230, 141 N.W.2d 849, 851 (1966). Applicant would violate the most basic rules of statutory construction by removing words from the statute and rewriting it to say the Commission “shall not evaluate [] the risk or impact of spills or leaks.” But, that is not what the statute says. If the Nebraska legislature wanted to prevent the Commission from considering anything regarding spills or leaks, it would have said so; it would have written the statute the way Applicant urges, to say, “shall not evaluate the risk or impact of spills or leaks.” But, it did not do so – it referenced spills or leaks only in the context of “safety considerations.”

The basis for removing evaluation of safety considerations is provided in the legislature's findings and purpose under MOPSA. The legislature noted that the state has full authority to determine the location and siting of major oil pipelines so long as the state "does not regulate in the area of safety as to the design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of major oil pipelines...." NEB. REV. STAT. § 57-1403(1). The basis for this exclusion is the legislature's reading of federal law preempting the state's authority with respect to oil pipeline safety. Similarly, the legislature stated that the purpose of MOPSA shall not be "construed to regulate any safety issue with respect to any aspect of any interstate oil pipeline," but shall handle all issues "apart from safety considerations." *Id.* § 57-1402(2). The legislature intended that MOPSA reach all issues beyond safety considerations by providing that MOPSA and the considerations of the Commission shall cover "the remaining sovereign powers and purposes of Nebraska which are not included in the category of safety regulation." *Id.* In other words, to the extent Section 57-1407 requires any construction with reference to legislative intent, the phrase "safety considerations, including the risk or impact of spills or leaks" must be construed narrowly to ensure that "the remaining sovereign powers and purposes of Nebraska" are retained. Therefore, Section 57-1407 cannot be read as a complete prohibition on the mentioning or consideration of leaks or spills, but only leaks or spills in terms of "the evaluation of safety considerations."

The broad reading proposed by Applicant is also contrary to the considerations the legislature mandated the Commission consider. Section 57-1407 requires the Commission to evaluate "methods to minimize or mitigate the potential impacts of the major oil pipeline" on natural resources and "social impacts of the major oil pipeline." *Id.* § 57-1407(4)(c), (d). Notably, these sections do not instruct the Commission to only look at the impacts of "the siting or location" of the pipeline; they include social impacts and impacts on natural resources related to the pipeline overall. Read together and giving effect to each word, clause, and sentence in the context of the legislature's declared findings and purpose, it is clear that MOPSA requires the Commission to evaluate *all* social impacts and impacts on natural resources, excluding only "safety considerations." Therefore, to the extent discussion of the impacts of a leak or spill do not involve "safety

considerations” and deal with impacts of the pipeline, the Commission is not only empowered to consider the matter, but mandatorily required to consider the matter.

5.5 TC MIL #5: Any cross examination of any witness or argument on topics relating to the identity or nationality of the individuals or entities which own Keystone.

Response: Applicant has produced documents and provided discovery responses to relevant requests that show the ultimate owner of Applicant is TransCanada Corporation. This is a fact. This fact is publically known and available through public filings giving TransCanada is a publically traded corporation. There is no prejudice to this fact and no motion limiting who actually is behind Applicant or ultimately responsible for acts of Applicant is appropriate. The Applicant’s identity and ownership may go to its fitness, ability to perform certain legal requirements related to the route, and whether or not such a project will serve the public interest of Nebraska.

5.6 TC MIL #6: Any cross examination of any witness or argument on topics relating to Keystone XL’s necessity or commercial viability, including but not limited to Keystone’s customers or their respective contract terms, the finite nature of the Canadian oil sands, or the energy needs of Nebraska.

Response: The concept of “public interest” is so broad and MOPSA contains no restrictions upon nor does it prevent discussion of the threshold question underlying “public interest” which is need. Need or necessity of a route for a proposed tar sands sludge pipeline that would dissect our great state is a fundamental question for the Commission to consider. No determination exists that Nebraska needs the proposed preferred route for Keystone XL nor that such route “will serve the public interest” – this is the specific purpose of the trial and whether or not the route is necessary is clearly within the Commissions purview and not limited in any way by MOPSA.

It is difficult to image how a proposed route on, under, through, and across Nebraska of the proposed KXL pipeline is in the “public interest” if the route itself is not needed. TransCanada seems to suggest Nebraska “take one for the team” but fails to

realize this is the Nebraska Public Service Commission which is review the Application in terms of Nebraska and has no duty to consider the interests, if any, of any other State or entity or any kind in regards to what is the best for Nebraska and what is in Nebraska's "public interest" therefore, we must have inquire into the lack of necessity and need of such a route within Nebraska or the Commission will be prevented from fully evaluating the Application and Applicant in reference to the numerous and broad factors of MOPSA.

Admissions of Applicant as to whether or not it even intends to build the Keystone XL pipeline are also relevant. See Attachment #2.

5.7 TC MIL #7. Any cross examination of any witness or argument on topics relating to easement terms (including appraised values of property, compensation via lease or one-time payments), prior or future easement negotiations, the alleged treatment of land owners by land agents, or eminent domain (in the past or future).

Response: There can be no issue more directly related to the concept of a "route" for a pipeline than the Easement and Right-of-Way Agreement which contains all the rights, responsibilities, and restrictions the bind the Grantee and Grantor of the easement which is the route. There can be no route without an Easement. There can be no determination of whether or not Applicant has meet its burden of whether or not property rights and economic interests are being protected, the specific purpose of MOPSA, without evaluation and evidence regarding the Easement terms which include compensation terms among others.

The rationale of the hearing officer is the Commission's Order of June 14, 2017 was legally incorrect. There is no mechanism in either the County Court or the District Court to force or require a re-negotiation on TransCanada's unfair one-sided easement terms. Only the PSC can level the playing field for its citizen landowners.

Regarding Applicants treatment of Landowners, this is material to the fitness of applicant, whether Applicant is likely to protect property and economic interests of Landowners or not, whether the route will serve the public interest of Nebraska.

5.8 TC MIL #8: Any cross examination of any witness or argument on topics relating to any person associated with Keystone that participated in the legislative process when the Siting Act was developed.

Response: This request is overly broad and seeks to prematurely limit cross examination prior to hearing the direct examination. It is impossible to make such a pre-trial ruling and any such objections are more appropriate to be made at the time of trial.

5.9 TC MIL #9: Any use of exhibits marked “confidential” without prior approval of and notice to the Hearing Officer so that the Hearing Room may be cleared in advance of confidential business information being publicly disclosed.

Response: Only upon showing my Party claiming such document to be “confidential” after affirmative showing that the Party claiming the privilege is unable to disclose such information under applicable law or such information is otherwise non-public protected information. It is important to note that while a Party may claim information is confidential, that does not preclude offer of such relevant evidence at the time of the hearing to be made part of the record. Simply stamping a document “confidential” does not make it so. It will be impractical to clear the entire ballroom every time such a document is discussed. The burden should be upon the party claiming the confidentiality to show the document is in fact confidential.

6. Based on the above, Landowner Intervenors respectfully request the Commission issue an Order denying each and every motion in limine of Applicant

July 28, 2017.

Susan Dunavan, et al., Intervenors,



By: _____

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Certificate of Service

Pursuant to 291 *Neb Admin Code* § 015.01(b), a copy of the foregoing is served upon all Intervenors of record to this proceeding or their attorneys of record as follows:

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s/ Brian E. Jorde
Brian E. Jorde

Attachment # 1

57-1407. Commission; duties; public meetings; agency reports; approval by commission; considerations.

(1) After receipt of an application under section 57-1405, the commission shall:

(a) Within sixty days, schedule a public hearing;

(b) Notify the pipeline carrier of the time, place, and purpose of the public hearing;

(c) Publish a notice of the time, place, and purpose of the public hearing in at least one newspaper of general circulation in each county in which the major oil pipeline is to be constructed; and

(d) Serve notice of the public hearing upon the governing bodies of the counties and municipalities through which the proposed route of the major oil pipeline would be located as specified in subdivision (2)(d) of section 57-1405.

(2) The commission may hold additional public meetings for the purpose of receiving input from the public at locations as close as practicable to the proposed route of the major oil pipeline. The commission shall make the public input part of the record.

(3) If requested by the commission, the following agencies shall file a report with the commission, prior to the hearing on the application, regarding information within the respective agencies' area of expertise relating to the impact of the major oil pipeline on any area within the respective agencies' jurisdiction, including in such report opinions regarding the advisability of approving, denying, or modifying the location of the proposed route of the major oil pipeline: The Department of Environmental Quality, the Department of Natural Resources, the Department of Revenue, the Department of Transportation, the Game and Parks Commission, the Nebraska Oil and Gas Conservation Commission, the Nebraska State Historical Society, the State Fire Marshal, and the Board of Educational Lands and Funds. The agencies may submit a request for reimbursement of reasonable and necessary expenses incurred for any consultants hired pursuant to this subsection.

(4) An application under the Major Oil Pipeline Siting Act shall be approved if the proposed route of the major oil pipeline is determined by the Public Service Commission to be in the public interest. The pipeline carrier shall have the burden to establish that the proposed route of the major oil pipeline would serve the public interest. In determining whether the pipeline carrier has met its burden, the commission shall not evaluate safety considerations, including the risk or impact of spills or leaks from the major oil pipeline, but the commission shall evaluate:

(a) Whether the pipeline carrier has demonstrated compliance with all applicable state statutes, rules, and regulations and local ordinances;

(b) Evidence of the impact due to intrusion upon natural resources and not due to safety of the proposed route of the major oil pipeline to the natural resources of Nebraska, including evidence regarding the irreversible and irretrievable commitments of land areas and connected natural resources and the depletion of beneficial uses of the natural resources;

(c) Evidence of methods to minimize or mitigate the potential impacts of the major oil pipeline to natural resources;

(d) Evidence regarding the economic and social impacts of the major oil pipeline;

(e) Whether any other utility corridor exists that could feasibly and beneficially be used for the route of the major oil pipeline;

(f) The impact of the major oil pipeline on the orderly development of the area around the proposed route of the major oil pipeline;

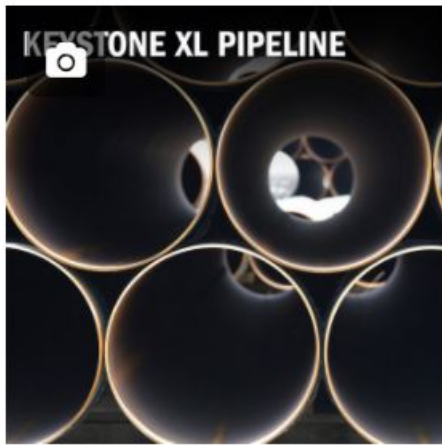
(g) The reports of the agencies filed pursuant to subsection (3) of this section; and

(h) The views of the governing bodies of the counties and municipalities in the area around the proposed route of the major oil pipeline.

Source: Laws 2011, First Spec. Sess., LB1, § 8; Laws 2017, LB339, § 180.
Operative Date: July 1, 2017

Report: TransCanada may decide not to build Keystone XL

Lincoln Journal Star 1 hr ago (4)



TransCanada Corp. told investors in a quarterly earnings call Friday that the company might decide not to build the Keystone XL pipeline, The Hill reported.

Paul Miller, president of TransCanada's liquid pipelines business, reportedly said the company is seeking contracts for the pipeline through September and still needs approval from Nebraska for its route through the state.

The Nebraska Public Service Commission has a formal hearing scheduled Aug. 7-11 at the Cornhusker Marriott in Lincoln to consider whether to approve the route.

Miller told investors that TransCanada would likely decide in November or December whether to build the pipeline, according to The Hill report.

He reportedly said Keystone XL had lost some potential customers with former President Obama's 2015 rejection of the pipeline, though many have come back with President Trump's approval of the permit to cross the Canadian border.

MORE INFORMATION



People weigh in on Keystone XL during final public hearing

RALSTON — Members of the general public looking to weigh in on the Keystone XL pipeline and its route through Nebraska got their last in-perso...