**Nebraska Public Service Commission**

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

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**In the Matter of the Application**

**of**

**TransCanada Keystone Pipeline, LP**

**For the Keystone XL Pipeline Project, Pursuant to *MOPSA***

**Applicant,**

**and**

**Susan Dunavan and William Dunavan, *et, al*. Nebraska Landowners on Route, ("Domina Group" and "Landowners"), *et al*.,**

**Intervenors**

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# Landowner Intervenors' Rebuttal Closing Argument
# Reply to TransCanada's Brief

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## I. Overview

1. The burden of proof is at the center of every decision in a contested case. The question for the deciding Judge, Juror, or Commissioner is not "How would I like this to come out?" It is: "Was the burden of proof sustained by the party who bears it?" Proof has no surrogate. Not wistful thinking, not political preference, not popular prevarication, and not naked assertions. In 1912, a prairie lawyer, Pat Neff, reminded a jury:

> [A]ny juror who will render a verdict contrary to law violates both the letter and spirit of the most solemn oath that ever linked the soul of man to God's eternal throne, and ought to have branded on his brow the mark of Cain that all might know and shun him.

AV Sellers, *Classics of the Bar* V, p 155 (1919). The same must be said to you, Commissioners. Only a decision based on proven facts vindicates your oaths.

2. TransCanada's (herein also "KXL") "Post-Hearing Brief" displays citations to its Application, and to statements of PSC consultants hired for technical assistance, but not as **witnesses.** They were not sworn; their underlying data is the unproven Application or reports that relied on KXL data. They were not cross examined. When a witness says "I read the Application, and what I read is true" – this is not proof unless the witness demonstrates knowledge of the facts and awareness of what is true. KXL's eight witnesses did not do this.

3. The Supreme Court gave voice to the Landowners' position days ago. There must be more than: a) the Application, KXL-1, and b) direct examination saying, "Yes, this or that part of the Application is true" for an Application for a Government permit or license to prevail. On September 15, 2017, the day you received our principal Closing Arguments, Nebraska's highest Court wrote:

> "We have previously held that the ***pleadings alone are not proof but mere allegations*** of what the parties expect the evidence to show. *Wilson v. Wilson*, 238 Neb 219 (1991). We have further held that pleadings and their attachments which were not properly admitted into evidence could not be considered by the trial court. ***An application is a form of pleading.*** *Richards v. McClure*, 290 Neb 124, 132 (2015). Therefore, ***an application and its attachments are not evidence***, and the allegations therein remain controverted facts until proved by evidence incorporated in the bill of exceptions."

*In re Estate of Radford*, 297 Neb 748, 759 (Sept 15, 2017) (emphasis added). TransCanada's case comes down to its Applications and attachments, and no more. That's not enough.

## II. Jurisdiction

4. Your range of authority under *MOPSA* and its general authority were analyzed, with care, in the Landowners' Closing Argument. You, Commissioners, can approve, reject, approve subject to conditions, or permit re-application in defined circumstances. It's up to you.

5. The burden of proof is designed to solve serious problems where judgments must be made about guilt, liability, or authority to act. John Locke famously pointed out the burden of proof exists to prevent decisions based on arguments from ignorance. Locke argued:

> "Ghosts exist, because nobody has proven that they don't."

6. His point was that a negative proposition cannot be proven. The burden of proof is designed to prevent decisions based upon failure of *disproof* when *disproving* a proposition is impossible. A negative proposition cannot be proven. The burden of proof also eliminates interminable controversies that can go back and forth, without a decision until a process intervenes and says, "We have heard enough," and then adds, "You have the burden of proof. If you have not proved your proposition, you lose." The burden of proof breaks ties.

7. In this case, the burden of proof is squarely imposed on TransCanada by statute and your PSC regulations. That burden never shifts from TransCanada to the Landowners.

> "The pipeline carrier shall have the burden to establish that the proposed route of the major oil pipeline would serve the public interest."

*Neb Rev Stat* § 57-1407 (4). This burden of proof is repeated in your PSC regulations. 291 *Neb Admin* C § 9-023.07 ("The pipeline carrier shall have the burden to establish…").

## III. Statement of the Case. Issues Presented. Suggested Resolution.

8. **Issue:** Should TransCanada's Application be granted? **Answer: No.** KXL failed to prove necessity or advantage for its pipeline, and its Preferred Route. KXL did not sustain any of its three core arguments: enhanced taxes, big job increases, and a "fixed entry point". On jobs and taxes, discredited economist named Ernie Goss stands alone as the company's proof.

9. **Issue:** If not denied outright, should the proposed Preferred Route be approved? **Answer: No**. KXL's existing pipeline can be closely paralleled. The S.D. PUC Order, LO-235, circumstantially proves TransCanada can get a building permit in South Dakota for any route it proposes. By doing so, it can closely parallel its existing Nebraska Keystone Mainline. That path will disturb almost no one, stay off the aquifer, stay out of the Sandhills, stay away from highly erodible soils, cross fewer major rivers, and keep away from most of the objections raised here.

10. **Issue:** Must TransCanada enter in Key Paha County? **Answer: Not according to LO-235, ¶13 P23** and the South Dakota PUC. The PUC concluded it could not, under governing South Dakota statutes, approve any route; it could only approve a building permit for a route TransCanada chooses. No evidence proves TransCanada has tried, or been denied, a building permit for any other South Dakota route. Closely paralleling the existing line is an available option.

## IV. Statement of Facts ("SOF")

11. The Landowners' Closing Argument heeded Hearing Officer suggestions. We were told to submit Closing Arguments rich with citations. The Statement of Facts, ¶¶ 38-122 in our Closing Argument does that with 100 or more pinpoint citations. Not so with TransCanada's submission. Please recall, Commissioners, stark admissions against TransCanada by its own witnesses. These alone defeat the Application. Four key examples, from many, are as follows:

**Executive Tony Palmer - (130:3-131:20, Vol. I)**

Q. (BY MR. DOMINA) Mr. Palmer, would you agree that the question, shall we take the pipeline out of the ground or shall we abandon it, to use the language of your proposed easement filed with the commission, *in situ*? That's Latin for in place, isn't it?

A. Yes, sir.

Q. Would you agree that the decision should we take the pipeline out or should we abandon it *in situ* is a management decision?

A. It is today, sir. But I can't predict what future regulations and legislation will be in place.

Q. So now I'm looking at, if you will, Section 8.1 of your application and that section in which your lawyers or you inserted, "The Oil Pipeline Reclamation Act as amended in the State of Nebraska." That's page 16 of the application, right at mid page, where there's a recitation of the purpose of the Act. And you recognize that one of the -- that the purpose is to assure financial responsibility for reclamation costs relating to construction, operation and management of the pipeline. Do you see that?

A. I do, sir.

Q. Well, I just want to be clear, it is the testimony of the applicant today that it cannot tell us how much financial responsibility it has forecast for the management option of removing the pipeline from the ground when it is exhausted; correct?

A. Correct. We have not provided that, sir.

**Economist Ernie Goss - (280:21-281:4, Vol. I):**

Q. Is this causation or correlation to an economist: In late November, bright packages show up in stores and inventory goes up and special music is played and a month later, a holiday is celebrated. Does the store activity cause Christmas, or does Christmas cause the store activity?

A. Believe it or not, I will argue they have some -- there is some causation there.

**Engineer Meera Kothari - (636:4-24, Vol. III):**

Q. (BY MR. DOMINA) Well, do you have anything at all besides this order of the Public Utilities Commission that shows us that the State of South Dakota approved a route?

A. I do not.

Q. And you're aware, are you not, that your company is not before this commission asking for a construction permit; true?

A. Yes.

Q. As a matter of fact, Nebraska's Public Service Commission isn't empowered to grant you a construction permit, at least on this application, is it?

A. No.

Q. So South Dakota and Nebraska don't match, do they?

A. No.

**Jon Schmidt - (561:8-20, Vol. III)**

Q. (By MR. JORDE) And you would agree that it's a true statement that the Keystone main line alternative route has potential environmental benefits due to its co-location with the Keystone main line; correct?

A. Where are you reading that?

Q. Well, right. And I'm glad you picked up on that. It's an exact sentence out of the application. It's about five lines up from the bottom.

A. Yes.

Q. You would agree with that; correct?

A. Right.

## V. Argument

### A. A Very Special Concern

12. TransCanada's Brief cites 6 Nebraska statutes and 2 Nebraska regulations. Total, 8 cites. That's it. No analysis. So dismissive is KXL of the law! The Landowners' Closing Argument cites 23 judicial decisions, 1 section of the United States Code, 9 sections of Nebraska Constitution, 10 Nebraska statutes, and the Federal Constitution once. It cites 4 Federal and 3 State regulations. The Landowners cited 6 secondary authority sources. Total: 56 sources.

13. TransCanada has never acknowledged or responded to the Landowners' special concern that stems from potential sale of the pipeline to a party with interests inimical to the United States, and Nebraska. TransCanada has been challenged on this issue by the Landowners previously, and has never, yet, responded. Landowners have been asking for years.

**B. Specific Instances of Insufficient Evidence to Sustain It's Burden**

14. **Basic Insufficiency.** KXL's proof is deficient -- because it is absent. TransCanada failed to adduce *any* evidence on these essential elements it must prove under your Rule, 291 *Neb Admin C* § 9-023.07. It openly admitted failure to prove some of them:

| | |
|---|---|
| 023.07A: Compliance with all applicable State and Local law | **Admitted** No compliance with zoning, building codes, etc. |
| 023.07B: Impact on natural resources<br>023.07G: Reports of State Agencies | **Admitted** and, No rebuttal to Landowners.<br>**Admitted** No agency studies done for *this* Application as required by law. LO-243 p 6-9 |

**C. Economic Impacts are Exaggerated and False: Jobs; Taxes**

15. KXL's Brief does not mention Economist Goss until p 20. There, he is mentioned, but not defended. No rebuttal of the Landowner's economist, Dr. O'Hara is offered. The case must be decided on admissible evidence that is sworn and received under oath. KXL incorrectly says "three independent evaluators" found a significant positive tax impact, citing KXL-19, 20, 26, & 27. First, these items are not substantive evidence. Second, review of these documents reveals reliance on Goss, or sources who cite and rely on him. Tax consequences were not considered beyond the 15th year. Losses in income taxes and land value based property taxes were not calculated or considered as offsets. Jobs claims are exaggerated badly.

16. With no contributions after the 15th year, and diminished income for landowners up and down the line along with increased demand for government services, the simplest logic reveals that tax burdens, not benefits, will flow from the proposed crude oil pipeline. Dr. O'Hara's numbers, placing these total burdens at more than $20 million, were not contested or rebutted. One can only deduce that TransCanada did not dare recall Mr. Goss to the stand.

17. KXL's Brief cites Goss to claim it will create 727.6 jobs per year for the years 2018 through 2034. (That is 1 job every 1,990 feet for these years; what will the workers do if there are no spills?) The pipeline would be built in two years; and this calculation was debunked by O'Hara. So was the 42,100 jobs figure at KXL-19. (That is 153 jobs per mile for 275 miles.) Neither Goss nor KXL could defend this at trial. KXL's own full-time employee, Mr. Fuhrer, contradicted Goss. Fuhrer said there will be 8-9 total new permanent jobs. Goss and his use of daily newspaper stories as professional data made no more sense than Goss' attempt to describe a $217,000.00 annual payroll for Keya Paha County from alleged new employment of 2/10ths of one person there. (311:22-315:4, Vol. II).

18. KXL staked its position on jobs and taxes and the work of one person – Goss. Dr. O'Hara wrote a researched professional paper. This is obvious from examination of its structure and sources. Goss did not. Dr. O'Hara gave informed testimony. Goss did not. Dr. O'Hara considered both short term and long term consequences and time frames. Goss did not. Dr. O'Hara's work can be evaluated by its internal citations. Goss' cannot. (See pp 21, ¶129-25 ¶143, Landowners' Closing Statement.) Dr. O'Hara was credible; Goss was not.

19. KXL failed to sustain the burden of proving any social or economic benefits. TransCanada's claims made for average 20 & 30 second television spots. But they did not withstand scrutiny. When trial came, KXL had no real evidence. It had a "story" and nothing more. TransCanada can no more cut corners with its proof and win approval for its Application than could anyone else. "Men must turn square corners when they deal with the Government." *Rock Island CRR v. US*, 254 US 141, 143 (1920) (Oliver Wendell Holmes, Jr., J.). To turn square corners as the Applicant, TransCanada had to prove each element of its case. It failed to do so.

**D. Preferred Route is Inferior to Closely Paralleling the Existing Pipeline**

20. KXL can use its current, existing pipeline route and closely parallel it. Again its engineer admitted this. (Kothari, 649:6-650:5, Vol. III). Closely paralleling the existing route has advantages which TransCanada does not deny and cannot dispute because they are facts:

20.1. Harder soils, not highly erodible soil and sand that blows like snow.

20.2. 200 streams and rivers not now affected.

20.3. Only 2 major river crossings v. 5 on Preferred Route

20.4. Avoids hundreds of wells within one mile on sides of Preferred Route.

20.5. Landowners with deep concerns.

20.6. History Counties, Towns, and Landowners on existing pipeline route.

20.7. Intersection of the migratory bird paths.

20.8. New insults to cultural artifacts and locations.

20.9. No… absolutely no… disadvantages of a closely paralleled route to the existing Mainline route v. the Preferred Route, from the perspective of Nebraska and Nebraskans.

21. Throughout its Brief KXL cites the consultants to the PSC. But, Commissioners, those consultants are to help you *understand the evidence, not to be the evidence.* The Nebraska Supreme Court consistently holds that admission of expert reports over hearsay objections constitutes prejudicial error because such reports are not admissible evidence. *State Dept of Roads v. Whitlock* 262 Neb 615, 634 NW2d 480 (2001). *Westgate Recreation Ass'n v. Papio-Missouri River NRD*, 250 Neb 10, 547 NW2d 484 (1986)

22. TransCanada's Brief suggests "specific factors in *MOPSA*" favor its position, but all it offers to support it is a reference to the *Application*. The Application is not proof. It is the

pleading for trial. Pleadings are not evidence. An Application is not self-proving. *In re Estate of Radford*, 297 Neb 748, 759 (Sept 15, 2017); *State v. Hidalgo*, 296 Neb 912 (2017).

23. TransCanada contends that State agencies and independent consultants "are favorable to approval" (KXL Closing 25). There are many problems with this statement:

23.1. Neither the consultants' statements nor the agency reports were testified to by a witness. They were not received under oath and are hearsay.

23.2. The Commission consultants are not witnesses. They are present to help the Commission understand technical issues only.

23.3. The State agencies did not study this Application. Their work was done on a previous Application at a different time. *MOPSA* does not contain an exception for prior studies on different Applications. The Agency authors were not sworn or subjected to cross examination. And, they relied on KXL data.

24. You are well acquainted with basic due process of law requirements: Notice; Hearing; Counsel; Examination of Witnesses; Oath; Objective Decision by Unbiased Decision-maker. And, if the August hearing proves nothing else, it confirms value in cross examination of adverse witnesses. Deviation from these standards is not permissible.

## VI. Conclusion

25. TransCanada's Application is not self-proving, and was not proven by bare assertions declaring it is accurate. The Applicant's claims did not weather trial. This is not about being for or against the KXL pipeline. It is about whether an Application was proven, or was not. Evidence has a protocol. Trial has a procedure. Evidence and procedure are the bones and sinew of a society governed by the rule of law.

26. TransCanada had years, and billions of dollars to get ready for trial, and put on its best case. How did it do? The objective answer is obvious. It failed. The Application deserves the fate of failure: it deserves to be denied. TransCanada did not prove the required elements to establish that Nebraska's interests are served by the proposal in KXL's Application.

Landowner Intervenors (Domina Group),

By: David A Domina 1.25.2017

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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 on September 25, 2017:

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