BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

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

The Ponca Tribe of Nebraska ("Tribe") hereby responds to Applicant's Objection to, and Motion in Limine to Exclude, Evidence Offered by the Ponca Tribe of Nebraska and the Yankton Sioux Tribe.

I. SHANNON WRIGHT'S TESTIMONY MENTIONING LEAKS IS NOT WITHIN THE SCOPE OF THE LIMITATION OF MOPSA.

Applicant's first objection is to Questions 107, 108, 119, 120, and 129. The basis of Applicant's objection is that, it asserts, each of those questions involves consideration of potential spills or leaks from Applicant's proposed pipeline. While Section 57-1407 limits the Commission's consideration of spills or leaks, Applicant reads that section and the Commission's orders much too broadly. Section 57-1407 states the Commission "shall not evaluate safety considerations, including the risk or impact of spills or leaks." Neb. Reb. Stat. 57-1407(4). The Commission's Order on Formal Intervention Petitions and Order Granting in Part, Denying in Part, Motions to Compel cited by Applicant each mimic this language precisely. Order on Formal Intervention Petitions at 1 (March 31, 2017); Order Granting in Part, Denying in Part, Motions to Compel at 4 (June 14, 2017). Applicant urges the Commission to read the statute and orders of the Commission as prohibiting the Commission from considering spills or leaks in any manner or fashion. But, that is simply not the language of the statute.

A. Section 57-1407 Does Not Prohibit Any Evidence or Discussion of Leaks or Spills, Only Leaks or Spills in Reference to Safety Considerations.

From the outset, the 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.

B. Mr. Wright's Testimony Does Not Involve Safety Considerations and Is Entirely Within the Scope of Matters the Commission Is Required to Consider.

Mr. Wright's testimony in Questions 107, 108, 119, 120, and 129 is not an evaluation of or evidence related to safety considerations. While the testimony in those questions mentions a leak or a cleanup or contamination, it is solely with respect to the *impact* on the Tribe's cultural resources. Mr. Wright's testimony in Questions 107, 109, 119, 120, and 129 discusses nothing about safety considerations. He did not discuss the design, the installation, the inspection, or the maintenance of the pipeline. He did not testify about emergency plans or testing, construction, operation, or replacement of the pipeline. He solely discussed the *impacts* of the pipeline on the Tribe's cultural resources.

As the Commission noted in its Order on Formal Interventions, the Commission is required "to consider evidence of the social impacts of the project" and that "encompasses many concepts and issues, including cultural, anthropological, and historical concepts." Order on Formal Intervention Petitions at 6. Mr. Wright's testimony in Questions 107, 109, 119, 120, and 129 is precisely "evidence of the social impacts of the project" and one of the "many concepts and issues" encompassed by that consideration in relation to "cultural, anthropological, and historical concepts"

of the Tribe. Merely mentioning leaks does not make testimony an evaluation of safety considerations, despite Applicant's suggestion otherwise. Mr. Wright nowhere evaluates the safety of the pipeline with respect to leaks or spills; he only discusses the impact of the pipeline on the Tribe's cultural resources, which is precisely what the Commission is required to evaluate and consider.

C. Even If Mr. Wright's Mentioning of Leaks Could Be Excluded, Applicant Seeks to Exclude Testimony That Does Not Even Mention or Involve Leaks or Spills.

Even if Applicant is correct that any mention of the words "leak" or "spill" is "forbidden testimony," the questions Applicant objects to are not limited to leaks and spills. Neither Question 107 nor Mr. Wright's answer to that question in any manner mention spills or leaks or even safety. The Question states, "In your opinion, would the presence of the Keystone XL Pipeline along either the Preferred Route or the Mainline Alternative Route, once completed, pose any ongoing problems with regard to cultural or historic resources?" and Mr. Wright simply states, "Yes." There is no mention whatsoever of spills, leaks, or safety. Yet, Applicant seeks to exclude the question and answer. Similarly, Question 108 asks Mr. Wright to specifically explain how the presence of the pipeline would pose ongoing problems for the Tribe's cultural resources. The question makes no mention of leaks or spills. While Mr. Wright expresses that a leak could destroy cultural resources and sites, he also references destruction from repairs of the pipeline, which may not necessarily involve leaks. Mr. Wright also points out, "There also could be a question about whether the Tribe and its members will be allowed to access the sites." Applicant seeks to exclude even that statement, though it makes no mention or even a suggestion of spills, leaks, or safety – it only mentions the possibility that Applicant's pipeline would prevent the Tribe and its members from accessing its cultural sites and resources. Applicant's motion is far beyond even the scope of its objection,

suggesting a motive beyond its stated purpose of excluding the mention of leaks or spills. Even if use of the words "leak" and "spill" are prohibited, it provides no basis for Mr. Wright's testimony which does not mention leaks or spills to be excluded.

II. APPLICANT HAS NO PROPER BASIS TO EXCLUDE MR. WRIGHT'S OPINION TESTIMONY, EVEN IF THAT TESTIMONY IS AN OPINION ON AN ULTIMATE ISSUE FOR THE COMMISSION.

A. The Rules of Evidence Expressly Permit a Witness to Provide an Opinion.

Applicant objects to Questions 45 and 46 in Mr. Wright's testimony, which deal with Mr. Wright's opinion on whether not including Traditional Cultural Property ("TCP") surveys on federal and state lands complies with the National Historic Preservation Act ("NHPA") and his opinion as to whether failing to comply with the NHPA would constitute complying with all applicable laws. Such opinions are specifically allowed under Rule of Evidence 701. NEB. REV. STAT. § 27-701. Rule 701 is modeled on Federal Rule of Evidence 701, which states in its comments, "Such opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position..." FED. R. EVID. 701, cmt.

As Mr. Wright's testimony states, his very job involves the implementation of and compliance with Section 106 of the NHPA. His testimony also states that he is familiar with the NHPA and describes the legal requirements of the NHPA, including the requirement of TCP surveys. Thus, there is a precise foundation for him to opine on the requirements of the NHPA and he does have a basis for providing his opinion on what constitutes that compliance.

Applicant also objects to Mr. Wright's opinion, expressed in Questions 148 and 149, on whether the construction of the pipeline would be in the public interest with respect to cultural and social issues. As the Applicant is fond of reminding the Commission, the Tribe has been limited to

discussing social and cultural issues. Mr. Wright is the Tribe's Tribal Historic Preservation Officer and, as he testified, is charged specifically with handling consultations regarding the Tribe's cultural resources, protecting and preventing damage to the Tribe's cultural resources, monitoring construction with respect to the Tribe's cultural resources, handling of unanticipated discoveries of cultural resources, and mitigation of damage to the Tribe's cultural resources. Both Question 148 and Question 149 expressly ask for Mr. Wright's opinion and his testimony demonstrates the foundation for his opinion based on his very job. As discussed, Rule of Evidence 701 expressly permits Mr. Wright to provide opinions in his testimony.

The Commissioners can weigh and determine the credibility of Mr. Wright's opinion testimony; the mere fact that Mr. Wright provided an opinion on compliance with laws and issues he works with on a daily basis does not make that opinion inadmissible. *See State v. Myers*, 205 Neb. 867, 290 N.W.2d 660 (1980) (holding that a witness with personal knowledge of a defendant may be allowed to testify as to the mental condition of the defendant who is pleading insanity and the jury may weigh the credibility of the opinion). The Rules of Evidence precisely allow for opinion testimony and Applicant's objection is baseless and groundless, unless Applicant proposes excluding all opinions from every witness' testimony, including its own.

B. The Rules of Evidence Explicitly Permit a Witness to Testify on an Ultimate Issue to Be Decided by the Commission.

Applicant includes as a basis for its objection to Questions 45, 36, 148, and 149 of Mr. Wright's testimony that those questions involve testimony on ultimate issues to be determined by the Commission. But, this is not a proper basis to object to evidence or testimony. Rule of Evidence 704 plainly states, "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." NEB. REV.

STAT. § 27-704. In other words, the Rules of Evidence explicitly say that Applicant *cannot* object to testimony because it is opines on an ultimate issue to be decided by the Commission.

The question is not whether Mr. Wright's opinion on what constitutes compliance with the NHPA or whether any of the proposed routes' impact on cultural resources is in the public interest involves an ultimate issue for the Commission, but whether the opinion will assist the Commission to understand the evidence or determine issues before it. *State v. Reynolds*, 235 Neb. 662, 683, 457 N.W.2d 405, 419 (1990). Amongst the issues the Commission must consider is whether the Applicant has demonstrated compliance with applicable laws, NEB. REV. STAT. § 57-1407(4)(a). The Commission is also required to consider natural resources and social impacts, as recognized by the Commission in granting the Tribe's Petition of Formal Intervention and recognizing that cultural resources falls within the scope of the Commission's considerations. *Id.* § 57-1407(4)(b), (d). Each of those matters are factors the Commission must consider in order to determine whether the proposed routes are in the public interest. *Id.* § 57-1407(4).

Mr. Wright discusses the legal requirements of the NHPA, including its TCP survey requirements, and then opines on whether certain actions would constitute compliance with that law. The opinions are directly helpful to understanding his testimony with respect to the legal requirements related to cultural resources and the issue of Applicant's requirements to comply with the law. Mr. Wright's discussion about what involves compliance with laws he works with everyday is certainly relevant and may assist the Commission in determining Applicant's compliance with laws. Simultaneously, his background and experience in handling cultural resources of the Tribe – including with respect to construction and disturbance of those resources as well as mitigation – in terms of whether the impact on those cultural resources is in the public interest is also relevant and his opinion regarding the impact of the social and cultural issues in terms of the public interest may

also assist the Commission. Consequently, Mr. Wright's opinion testimony on compliance with the NHPA and whether the impact of the pipeline on the Tribe's cultural resources makes any of the proposed routes in the public interest is admissible.

In reality, Applicant's assertion that somehow the Commission cannot hear opinions on ultimate issues in this matter is patronizing and insulting to the Commissioners. The Commissioners are fully capable of weighing the testimony of each witness – whether opinion or fact and whether it involves an ultimate issue or not – and coming to their own conclusions. Applicant seems to believe that if the Commissioners hear any testimony on an ultimate issue, the Commissioners will somehow be incapable of utilizing their own intellect or exercising their own thoughts. But, the Commissioners are fully capable of performing their legal obligations and weighing the opinions of witnesses appropriately. The Rules of Evidence specifically permit witnesses to testify as to ultimate issues to be decided by the Commission and Applicant's objection is baseless and groundless.

III. CONCLUSION

The Tribe requests that the Commission deny Applicant's Objection To, and Motion in Limine to Exclude, Evidence Offered by the Ponca Tribe of Nebraska and the Yankton Sioux Tribe. However, in the event the Commission excludes Mr. Wright's mentioning of leaks, the Tribe requests that the Commission retain Mr. Wright's testimony in Questions 107 and 108 which does not make an reference to leaks or spills.

Dated: July 27, 2017

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BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE APPLICATION OF TRANSCANADA KEYSTONE PIPELINE, L.P. FOR ROUTE APPROVAL OF THE KEYSTONE XL PIPELINE PROJECT PURSUANT TO THE MAJOR OIL PIPELINE SITING ACT.	)	Application No. OP-0003 **RESPONSE TO APPLICANT'S MOTION IN LIMINE**

The Ponca Tribe of Nebraska ("Tribe") hereby responds to Applicant's Motion in Limine seeking to exclude intervenors from referring to or mentioning during argument or from eliciting any testimony or evidence regarding certain topics.

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").** Applicant seeks to exclude any exhibit not produced by an intervenor on or prior to the June 7 deadline for intervenors to submit testimony, exhibits, workpapers, and witness lists. However, there are a few errors in Applicant's reasoning.

First, Applicant had not completed serving all of its discovery by the June 7 deadline. For example, the Tribe received two disks of documents from Applicant after the June 7 deadline, one on June 8 and one on June 9. (Exhibits A, B). Consequently, the Tribe did not even receive all potential exhibits from the Applicant until *after* the June 7 deadline. The disk received on June 8 contained 165 separate documents and the disk received on June 9 contained 645 separate documents. (Exhibits C, D). This is not an insignificant amount of documents, each potentially an exhibit the Tribe could use. To deny the Tribe the ability to utilize any of that discovery in the hearing when Applicant did not produce that discovery in time for the Tribe and its witness to review that discovery by the June 7 deadline would be extraordinarily prejudicial to the Tribe and likely

violate its due process rights by improperly limiting its opportunity to be heard. It also would encourage applicants to withhold discovery until after intervenors file their testimony and exhibits in order to prevent the use of information revealed in discovery the intervenors could use.

Second, while the intervenors were required to file testimony and exhibits by June 7, Applicant was not required to file any testimony or exhibits regarding the intervenors' issues until July 17. The intervenors have the right to cross-examine Applicant's witnesses, which obviously includes the right to utilize exhibits for that cross-examination. Yet, the intervenors did not know the content of Applicant's rebuttal evidence or even the identity of Applicant's rebuttal witnesses until long after the June 7 deadline. The same is true of other intervenors, particularly those Applicant acknowledges are aligned with it – the other intervenors did not have any of their testimony or exhibits until the June 7 deadline.

In the case of the Tribe, which the Commission has limited to social and cultural issues, Applicant did not even file any testimony regarding social or cultural issues with its Application. Thus, the Tribe had no ability to know what exhibits or testimony it would need to respond to Applicant with respect to social or cultural issues until July 17. The Applicant bears the burden of proof in these proceedings, but did not actually present any initial evidence on the very issues it so diligently works to keep the Tribe limited to. To prohibit the intervenors from bringing forth any exhibits or testimony in response to Applicant's rebuttal testimony – which is actually its first presentation with respect to the majority of issues the Commission is required to consider under MOPSA – would be a gross violation of the intervenors' due process right to be heard.

The intervenors must be provided the proper opportunity to respond to the Applicant's showing under MOPSA. It is Applicant that bears the burden of proof in these proceedings, yet it never bothered to present any testimony or evidence to meet that burden of proof until *after* the

deadline for intervenors to file their initial testimony and exhibits. The intervenors – at least those opposing the proposed routes – have the right to respond to Applicant's case in chief. But, they have not yet been given the opportunity to fully do so. Their only true opportunity to do so will be cross-examination and redirect testimony of witnesses at the hearing, including presentation of exhibits. Applicant cannot be allowed to prevent any actual response to its case by having the Commission limit evidence to that provided long before the party with the burden of proof even presented the majority of its evidence.

Applicant also apparently fails to recognize that while the Commission set a first deadline of June 7 for intervenors to file exhibits, the CMP also provides a second deadline of July 31 to file a Consolidated Hearing Exhibit List. Order Entering Case Mgt. Plan, Scheduling Telephonic Planning Conf., and Not. of Hearing at 8 (April 5, 2017). Presumably, that second deadline for exhibits includes exhibits parties may wish to introduce in response to Applicant's exhibits and testimony filed on July 17 as well as testimony and exhibits filed by other intervenors. The Commission should not limit the intervenors to exhibits and testimony filed before the intervenors were even given a chance to see the Applicant's testimony and exhibits – it would be akin to requiring a defendant to present his or her case before the plaintiff or prosecutor presented any evidence and then telling the defendant he or she could not respond to the plaintiff or prosecutor.

It is notable that Applicant is not seeking to bind itself to this limitation, only requesting that the Commission limit the intervenors ability to produce any evidence or testimony in response to the Applicant. If the intervenors cannot introduce any additional exhibits in response to Applicant's rebuttal testimony, then it is clear the Applicant must also be prohibited from introducing any additional exhibits as well. Item 1 of Applicant's Motion in Limine must be denied.

2. **Any testimony of any witness on direct examination which was not contained in that witness' admissible pre-filed testimony.** Again, the Applicant is attempting to limit the intervenors to evidence and testimony they were required to produce before ever seeing Applicant's case in chief. As discussed, Applicant did not produce any testimony, exhibits or other evidence regarding social and cultural issues prior to June 7 – the Application only includes one brief discussion of handling cultural resources in a general manner with no reference to specific resources and the filed testimony in no way relates to social or cultural issues. If the intervenors are not permitted to elicit any direct testimony in response to Applicant's evidence and testimony, it would merely encourage applicants before the Commission to hide all of their evidence and testimony related to their cases in chief until after the deadline for intervenors to file their evidence has passed. It would result in the most unjust and backwards process possible, requiring respondents to present their case before the party with the burden of proof even presents a single piece of evidence. The Applicant cannot limit its initial presentation of evidence, force the intervenors to "guess" what its remaining evidence will be, and then cut off the intervenors from responding to that remaining evidence after it is presented. Item 2 of Applicant's Motion in Limine must be denied.

3. **Any testimony by any person who has not submitted admissible pre-filed testimony in accordance with the CMP in this matter.** The Tribe expresses no opinion on this requested limitation, though Applicant's Motion is written in a manner which would only apply this exclusion to intervenors. If this part of Applicant's Motion is to be granted, it must apply with equal force to the Applicant itself.

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. The Tribe does not object to limiting evidence on safety considerations, including the risk or impact of spills or leaks, to the extent required by Section 57-1407(4) of MOPSA. However, that limitation should be strictly limited to safety considerations and not any and all mention of spills or leaks or other matters, such as potential attacks on the pipeline. Applicant has attempted to expand the limitation in Section 57-1407(4) far beyond safety considerations to encompass any mention of spills or leaks. But, as discussed in the Tribe's Response to Applicant's Objection to, and Motion in Limine to Exclude, Evidence Offered by the Ponca Tribe of Nebraska and the Yankton Sioux Tribe and incorporated herein by reference, the statute is not as broad as Applicant proposes. So long as cross-examination and argument does not regard safety considerations, there is no limitation on discussing spills and leaks, particularly if that discussion is in terms of impacts on natural resources or social impacts, as the Commission is required to consider.

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.** The Tribe expresses no opinion on this requested limitation, but joins in any other parties' resistance to this requested limitation.

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.** The Tribe expresses no opinion on this requested limitation, but joins in any other parties' resistance to this requested limitation.

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**

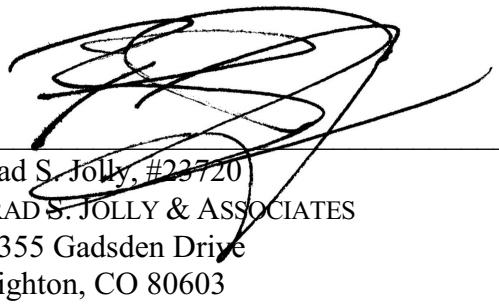
eminent domain (in the past or future). The Tribe expresses no opinion on this requested limitation, but joins in any other parties' resistance to this requested limitation.

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.** The Tribe expresses no opinion on this requested limitation, but joins in any other parties' resistance to this requested limitation.

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.** The Tribe agrees with this limitation to the extent it refers to matters covered by the May 30, 2017 Agreed Protective Order between Applicant and the Tribe, which only applies to (1) surveys and results of surveys of cultural resources, including Traditional Cultural Property ("TCP") surveys; (2) the identity, including location, of all cultural resources found or discovered along any of the proposed routes; (3) maps or other documents that identify any cultural resources found or discovered along or near each of the proposed routes; and (4) trade secrets or other confidential research, development, or commercial information. Applicant should not be permitted to expand the realm of what is "confidential" beyond those items listed in the Agreed Protective Order. If Applicant desired to protect other "confidential" business information not within the scope of the Agreed Protective Order, it should have sought a protective order for that business information in advance rather than seeking an order in limine for such information.

The Tribe requests that the Commission deny Applicant's Motion in Limine with respect to Items 1 and 2 of Applicant's Motion in Limine and limit any order granted with respect to Items 3, 4, and 9 and discussed herein.

Dated: July 27, 2017



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Rec'd 6/8/17

June 5, 2017

Brad S. Jolly, Esq.
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Re: In the Matter of the Application of TransCanada Keystone Pipeline, LP, Application No. OP-0003

Dear Mr. Jolly:

Enclosed please find a disk containing supplemental documents being produced by Applicant TransCanada Keystone Pipeline, L.P. in response to the discovery requests served by The Ponca Tribe of Nebraska in the above-referenced matter.

Very truly yours,

April N. Hook

ANH:ml
Enc.

EXHIBIT
A

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Recd 6/9/17

June 7, 2017

Brad S. Jolly, Esq.
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Re: In the Matter of the Application of TransCanada Keystone Pipeline, LP, Application No. OP-0003

Dear Mr. Jolly:

Enclosed please find a disk containing supplemental documents being produced by Applicant TransCanada Keystone Pipeline, L.P. in response to the discovery requests served by The Ponca Tribe of Nebraska in the above-referenced matter. Please note these documents have been designated as Confidential and are being produced subject to the parties' agreed upon Protective Order.

Sincerely,

April N. Hook

ANH:sh
Enc.

cc: James G. Powers, Esq.
Patrick D. Pepper, Esq.

EXHIBIT
B

Screen Shot of File List from Disc Titled “Keystone Supplemental Response to Ponca Tribe Discovery June 5, 2017”
(Rec’d June 8, 2017)

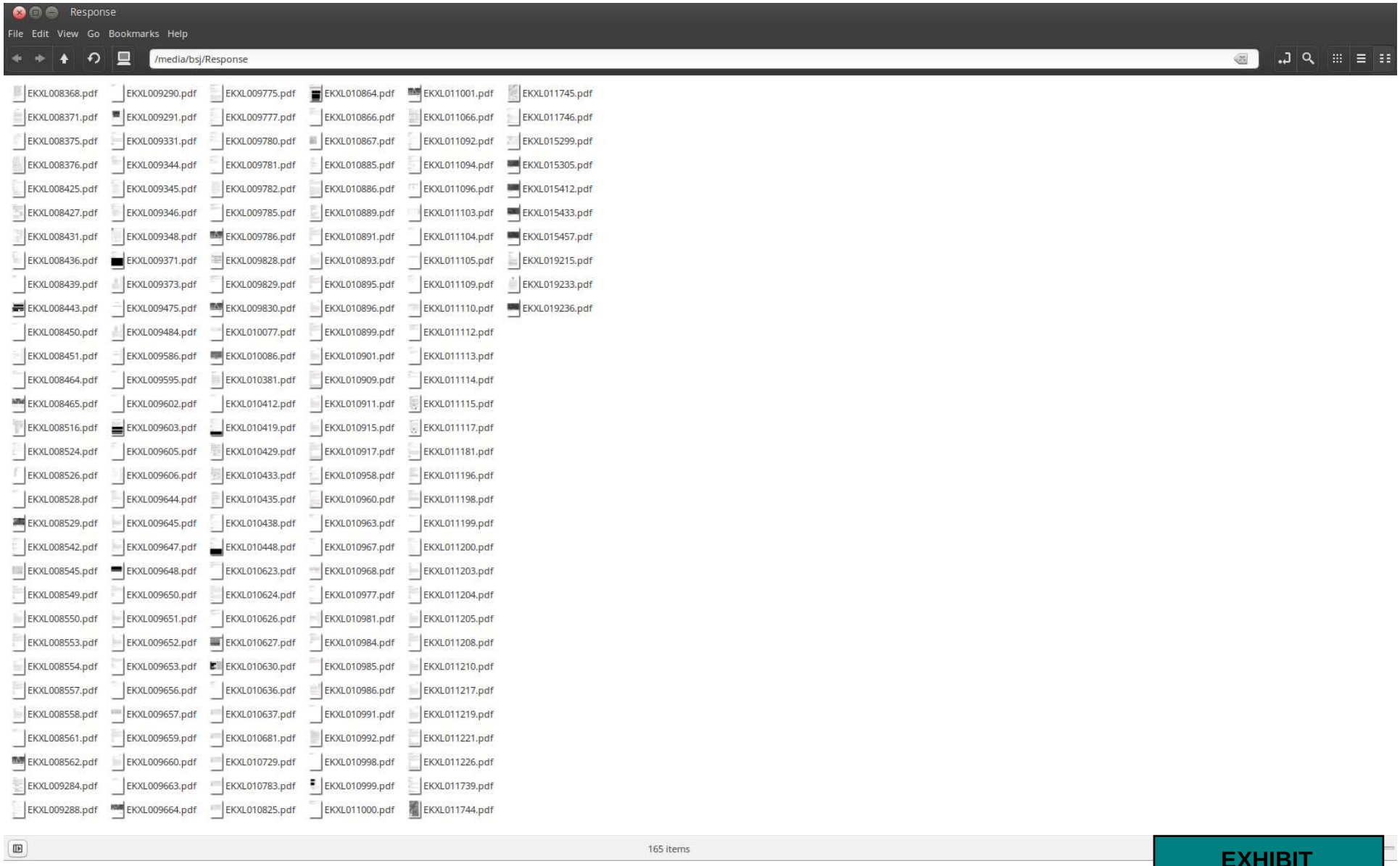


EXHIBIT
C

Screen Shot of File List from Disc Titled “Keystone Supplemental Response to Ponca Tribe Discovery June 7, 2017”
(Rec’d from Applicant June 9, 2017)

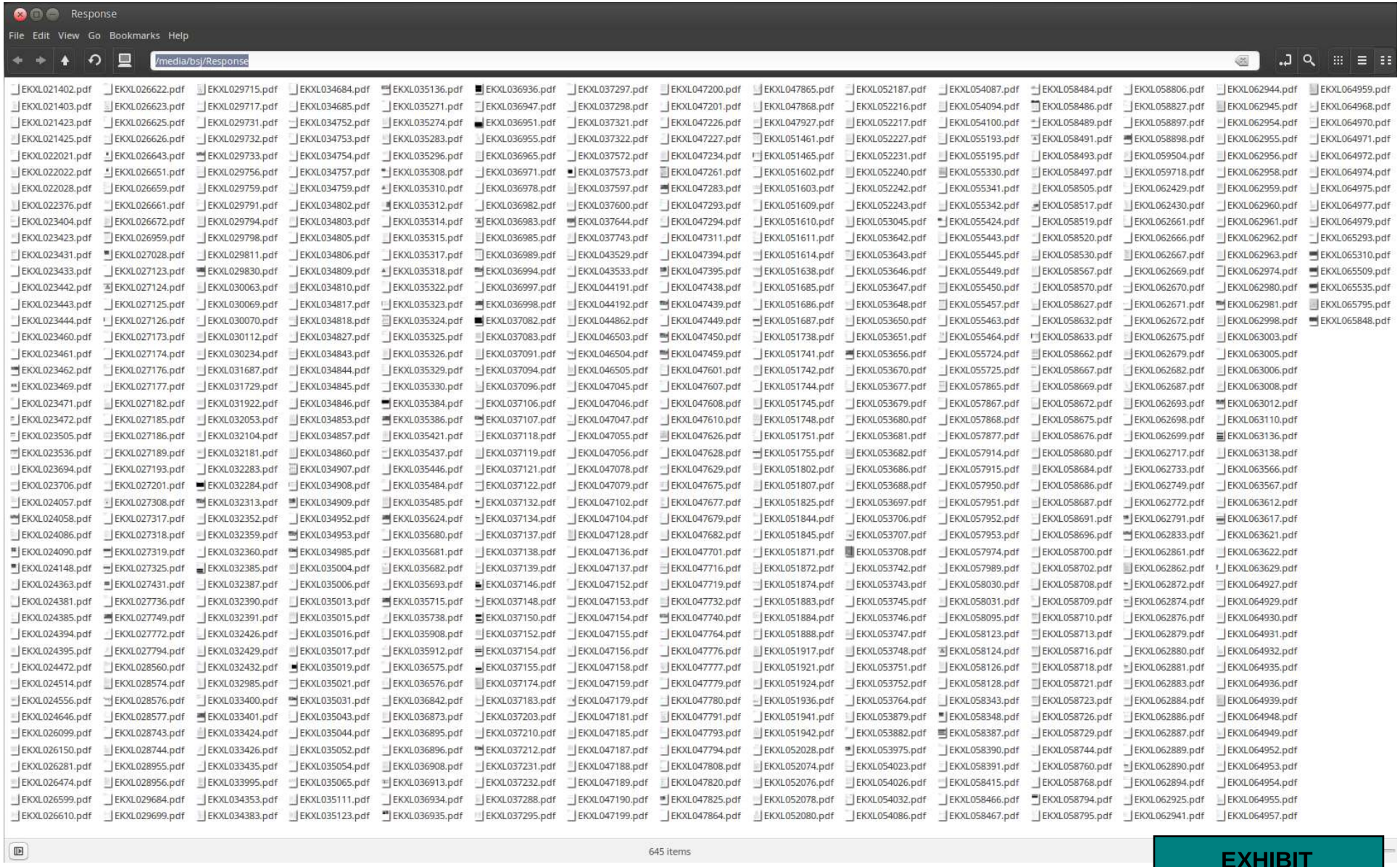


EXHIBIT
D

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE APPLICATION OF TRANSCANADA KEYSTONE PIPELINE, L.P. FOR ROUTE APPROVAL OF THE KEYSTONE XL PIPELINE PROJECT PURSUANT TO THE MAJOR OIL PIPELINE SITING ACT.	)	Application No. OP-0003 **RESPONSE TO APPLICANT'S MOTION IN LIMINE**

The Ponca Tribe of Nebraska ("Tribe") hereby responds to Applicant's Motion in Limine seeking to prohibit cross-examination of witnesses by parties with aligned interests.

I. APPLICANT'S REQUEST TO LIMIT INTERVENORS TO CROSS-EXAMINATION WITHIN THE SCOPE OF THEIR ALLOWED PARTICIPATION.

The Tribe does not express an opinion on Applicant's request to limit intervenors to cross-examination within the scope of their allowed participation as set forth in the Commission's Order on Formal Intervention Petitions, subject to the Tribe's continuing objection to the Commission excluding the Tribe from participating with respect to its governmental and other interests stated in its Petition of Formal Intervention. However, the Tribe joins in any other parties' resistance to this requested limitation and would note that Landowner Intervenors have no limit on the scope of their participation.

II. APPLICANT'S REQUEST TO PROHIBIT INTERVENORS' FROM ELICITING TESTIMONY VIA CROSS-EXAMINATION.

The Tribe strenuously opposes Applicant's further attempt to avoid any response to its case in chief, which was not revealed until long after the intervenors were required to file their testimony and exhibits. Applicant urges the Commission to prevent the intervenors "from eliciting evidence via 'cross-examination,' which should have been submitted in the pre-filed direct testimony."

Applicant apparently bases this request on the fact the Commission set a deadline of June 7 for intervenors to file their testimony and exhibits and avoiding "unfair surprise" to Applicant.

There is serious flaw in Applicant's reasoning. As discussed in the Tribe's Response to Applicant's Motion in Limine seeking to exclude intervenors from referring to or mentioning certain topics filed contemporaneously with this Response and incorporated herein by reference, Applicant had not completed serving all of its discovery by the June 7 deadline. The Tribe received two disks of documents from Applicant after the June 7 deadline, one on June 8 and one on June 9. (Response to Applicant's Motion in Limine, Exhibits A, B). Consequently, the Tribe did not even receive all discovery from the Applicant until *after* the June 7 deadline. The disk received on June 8 contained 165 separate documents and the disk received on June 9 contained 645 separate documents. (Response to Applicant's Motion in Limine, Exhibits C, D). This is not an insignificant amount of documents, each containing information the Tribe could potentially use. But, Applicant is attempting to prevent the Tribe from utilizing information it did not even receive from Applicant until *after* the deadline to file testimony. Such a denial would be extraordinarily prejudicial to the Tribe and likely violate its due process rights by improperly limiting its opportunity to be heard.

In addition, while the intervenors were required to file testimony and exhibits by June 7, Applicant was not required to file any testimony or exhibits regarding the intervenors issues until July 17. At the same time, Applicant acknowledges that some intervenors are aligned with it and in favor of the proposed routes, while others are opposed to Applicant and the proposed routes. Those intervenors who are aligned with Applicant also filed their testimony and exhibits on June 7. The intervenors have the right to cross-examine Applicant's witnesses as well as those of other intervenors. Yet, the intervenors did not know the content of Applicant's rebuttal evidence or even the identity of Applicant's rebuttal witnesses until long after the June 7 deadline. Nor did the

intervenors opposed to the proposed routes know the content of testimony or identity of witnesses of those intervenors aligned with Applicant until the June 7 deadline.

In the case of the Tribe, which the Commission has limited to social and cultural issues, Applicant did not file any testimony or provide any evidence regarding social or cultural issues with its Application. Thus, the Tribe had no ability to know what exhibits or testimony it would need to respond to Applicant with respect to social or cultural issues until July 17. Though it seems to forget it, the Applicant bears the burden of proof in these proceedings. But, it did not actually present any initial evidence on the very issues it so diligently works to keep the Tribe limited to. Thus, the Tribe had to not only elicit its own evidence and testimony, but attempt to essentially "guess" what Applicant's evidence and testimony on social and cultural issues would be. Now, Applicant purports to severely limit the Tribe from actually responding to Applicant's presentation of evidence on social and cultural issues. Applicant feigns concern over "unfair surprise," but it is actually arguing that the Commission allow it to engage in "unfair surprise" by making its case in chief after the intervenors filed their testimony and then prohibiting the intervenors from responding to that case in chief. To prohibit the intervenors from bringing forth any testimony that the intervenors failed to "guess" Applicant would later present would be a gross violation of the intervenors' due process right to be heard.

The intervenors must be provided the proper opportunity to respond to the Applicant's showing under MOPSA. It is Applicant that bears the burden of proof in these proceedings, yet it never bothered to present any testimony or evidence to meet that burden of proof until *after* the deadline for intervenors to file their initial testimony and exhibits. The intervenors – at least those opposing the proposed routes – have the right to properly and fully respond to Applicant's case in chief as well as the intervenors aligned with Applicant. But, they have not yet been given the

opportunity to do so. Their only true opportunity to do so will be cross-examination and redirect testimony of witnesses at the hearing. Applicant cannot be allowed to prevent any actual response to its case by having the Commission limit evidence to that provided long before Applicant even presented its case in chief and attempted to meet its burden of proof.

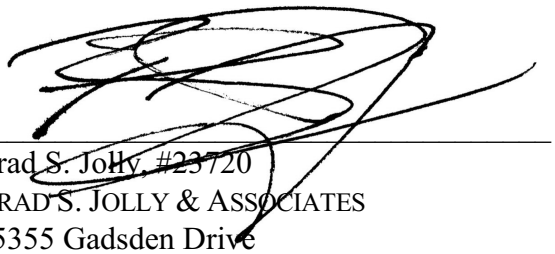
The Commission should not limit the testimony intervenors can elicit in cross-examination or redirect of their own witnesses to what the Applicant deems "should" have been filed in the intervenors direct testimony even when the intervenors did not know the content of Applicant's evidence as the party with the burden of proof. Such a limitation would be akin to requiring a defendant to present his or her case before the plaintiff or prosecutor presented any evidence and then telling the defendant he or she could not respond to the plaintiff or prosecutor beyond what the defendant presented prior to the plaintiff's or prosecutor's case in chief.

If the intervenors are not permitted to elicit any testimony in response to Applicant's evidence and testimony, it would merely encourage applicants before the Commission to hide all of their evidence and testimony related to their cases in chief until after the deadline for intervenors to file their evidence has passed. It would result in the most unjust and backwards process possible, requiring respondents to present their case before the party with the burden of proof even presents a single piece of evidence. The Applicant cannot limit its initial presentation of evidence, force the intervenors to "guess" what its evidence will be, and then cut off the intervenors from responding to that remaining evidence after it is presented.

III. CONCLUSION

In accordance with the foregoing, the Tribe requests that the Commission deny Applicant's Motion in Limine with respect to seeking to prohibit cross-examination of witnesses by parties with aligned interests.

Dated: July 27, 2017



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CERTIFICATE OF SERVICE

A COPY of the foregoing **RESPONSE TO APPLICANT'S OBJECTION TO, AND MOTION IN LIMINE TO EXCLUDE, EVIDENCE OFFERED BY THE PONCA TRIBE OF NEBRASKA AND THE YANKTON SIOUX TRIBE**, **RESPONSE TO APPLICANT'S MOTION IN LIMINE** along with **EXHIBITS A-D**, and **RESPONSE TO APPLICANT'S MOTION IN LIMINE** were served by electronic mail this 27th day of July, 2017 to the following:

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