

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,
Bartels Farms, Inc. et al.,

Intervenors,

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

Landowner Formal Intervenors
Dunavan et al., (“Domina Group”)
Summary of
Objections
And Exceptions
To Rulings

Major Oil Pipeline

All objections to the Constitutional invalidity of the *Major Oil Pipeline Siting Act*, *Neb Rev Stat §57-1101*, et seq., (and in instances codified elsewhere outside Ch 57) are preserved. To preserve them for the record, and without waiving prior objections, Motions, Requests or positions, but for the purpose of repeating and preserving issues, the **Landowner Formal Intervenors Dunavan et al., (“Domina Group”)** do object, and assert the following additional objections:

1. **Fact-Finding Only.** The Nebraska Public Service Commission (PSC) may act only as a neutral fact-finding body as defined by § 84–917(2)(a)(i) in the course of this proceeding. Accordingly, it may not offer evidence or engage in advocacy. *McDougle v. State ex rel. Bruning*, 289 Neb. 19, 25–27, 853 N.W.2d 159, 164–66 (2014).

2. **Qualified Commissioners Only.** Each member of the PSC who has engaged in ex parte communications with any party in this contested case or any other person outside the agency having any interest in this case, must step aside as disqualified and not participate in the hearing and proceedings. A proper examination of the PSC members is necessary to establish the presence or absence of disqualification. It is requested that this occur at the outset of the hearing. *Neb Rev Stat § 84–914(6)(b).*” *Murray v Neth*, 279 Neb 947 (2010)(“Generally, no

hearing officer or agency head or employee who is or may reasonably be expected to be involved in the decision-making process of a contested case shall make or knowingly cause to be made an ex parte communication to any party in a contested case or other person outside the agency having an interest in the contested case. *Neb Rev Stat* § 84-914(6)(b).”

3. **PSC Exhibits.** The PSC did not, as a party, disclose witnesses or exhibits in accord with time limits imposed upon other parties. Furthermore, except to the extent offered for the limited procedural purpose of illustrating compliance with procedural statutory requirements, the PSC proposed exhibits are objected to as inadmissible under *Neb Evi R* §§ 27-402 (relevance), 27-403 (materiality and undue prejudice), 27-602 (no competent witness), 27-701 & 702 (much of the information purports to include lay or expert testimony with no foundation or bases as required by either of these statutes), 27-802 (all of the tendered exhibits are hearsay and none are within an exception to the hearsay rule), 27-901 (no authentication).

4. **Direct Examination.** Submission of written direct examination makes the entire direct examination constitute testimony given in response to leading questions as it is written by the witness with the lawyer, and does not represent the spontaneous response of the witness. *Neb Evi R* § 27-611.

5. **Direct Examination – Experts.** As you mitigate his or submission of direct examination in the manner prescribed by expert witnesses does not satisfy the requirements of *Neb Evi R* §27-702 & 703 requiring that experts demonstrate that their testimony will assist the trier of fact in understanding the facts, are qualified, and have the requisite bases, methods, and other criteria for expert testimony.

6. **Rebuttal.** The prior rulings violate the *Nebraska Administrative Procedures Act* by restricting the right to present rebuttal evidence as the APA expressly provides: “(4) Every party shall have the right of cross-examination of witnesses who testify and shall have the right to submit rebuttal evidence....” *Neb Rev Stat* § 84-914 (4).

7. **Burden of Proof Improperly Narrowed.** The Rulings prior to this date have improperly construed the governing statute and improperly focused the hearing on matters that do not permit the PSC to consider:

7.1. The existence, or absence of the existence of any “need” for the proposed pipeline to be constructed within the proposed route.

- 7.2. The existence, or absence of existence of any “need” for the proposed route to be perpetual as contrasted with having a duration reasonably related to the lifetime of the project.
- 7.3. The public necessity or advantage of an approval process for the route that would permit the Applicant to abandon the pipeline and its deleterious content “in situ”, leaving it to future generations and Nebraskans to clean it up at expense levels vastly in excess of the original construction cost.
- 7.4. The terms under which the route is proposed to be acquired from Nebraska citizens, including this necessity for imposing conditions on any right to take property from Nebraska citizens under the power of eminent domain or otherwise without reasonable annual payments for interruption in the use of the land as a means of making a livelihood by Nebraska landowners in order to permit the Applicant to earn income.
- 7.5. The reasonableness of approving a Route without limitations, restrictions or conditions on its sale or transfer to a 3rd party -- including, but not limited to a potential 3rd party who may actually be an organization with great financial resources but political or economic interests inconsistent with the welfare of the United States of America or the continuity of the United States for the State of Nebraska as of political organization.
- 7.6. Prohibitions against consideration of terms under which the proposed route may be used to interfere with other approved routes for other common carriers, and for the public.
- 7.7. Reasonable requirements to assure the financial stability and continuing financial stability and fitness of the Applicant and its potential successors in interest.
- 7.8. Prohibitions against the use of the Route to transport any liquid substance other than specific substances identified in the application.
- 7.9. Prohibitions against consideration of limitations required on the terms under which the Applicant can acquire real estate from Nebraska landowners using an easement formed that shifts tort liability to them.

- 7.10. Limitations imposed by the order of August to 2017 purporting to limit the testimony of expert witness **Michael O'Hara** concerning matters specifically dealing with economics, including safety issues and need, eminent domain and easement terms.
- 7.11. Limitations imposed by the order of August to 2017 **excluding** the testimony of witnesses Joseph Suntum JB Collins, Galen Heckenliable, and Lorne Stockman.
- 7.12. Limitations imposed by the order of August to 2017 limiting the testimony of Randy Thompson, and failure of the Commission to consider the **fitness** of the Applicant to function as a common carrier.

8. **Fitness Analysis.** June 14, 2017 Order of the Commission, and the August rulings of the Hearing Officer, incorrectly construe *MOPSA* as eliminating the need for a fitness analysis to determine the fitness and credibility of the applicant.

9. **Need Analysis.** The June 14, 2017 Order of the Commission, and the August rulings of the Hearing Officer, incorrectly construe *MOPSA* as prohibiting the Commission from conducting a need analysis. Fundamentally, the commission's position is in error because it ignores the responsibility of the Commission to discharge each and all its duties under *Neb Rev Stat* § 75-101 *et seq.* and all statutes governing the responsibilities of the PSC for common carriers.

10. **Incorrect Application of Law.** The June 14, 2017 Order the Commission and the August 2 ruling of the Hearing Officer incorrectly construe and misapply the provisions of *Neb Rev Stat* § 57-1407 requiring, inter alia, the following and do so by excluding evidence of these subjects which require consideration:

(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.

(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;

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(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.

11. Incorrect Application of Regulations. The June 14 and August 2, 2017 rulings of the Commission and Hearing Officer incorrectly narrow the evidence, and ignore the requirements imposed by the Regulations of the PSC governing applications for route approval, within, through or across Nebraska for an oil pipeline. They improperly applied regulations are found at 291 *Neb Admin C* Ch 9 § 023 and include:

023.01 Scope: This section applies only to major oil pipelines. Nothing in Section 023 is intended to regulate safety as to the design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of major oil pipelines and pipeline facilities.

023.02A Content of Application: The application shall be accompanied by written agreement to pay expenses assessed pursuant to subsection 023.12 and written testimony and exhibits in support of the application. The application shall include:

023.02A1 The name and address of the pipeline carrier;

023.02A2 A description of the nature and proposed route of the major oil pipeline including a map of the proposed route and evidence of consideration of alternative routes;

023.02A3 A statement of the reasons for the selection of the proposed route of the major oil pipeline;

023.02A4 A list of the governing bodies of the counties and municipalities through which the proposed route of the major oil pipeline would be located;

023.02A5 A description of the product or material to be transported through the major oil pipeline including identification of the product or material; and for informational purposes only hazard(s) identification; composition/information on ingredients; first-aid measures; fire-fighting measures; accidental release measures; handling and storage; exposure controls/personal protection; physical and chemical properties; stability and reactivity; toxicological information; ecological information; disposal considerations; transport information; regulatory information. The requirement can be satisfied through the filing of a representative Safety Data Sheet;

023.02A6 The person who will own the major oil pipeline;

023.02A7 The person who will manage the major oil pipeline;

023.02A8 A plan to comply with the Oil Pipeline Reclamation Act; and

023.02A9 A list of planned methods to minimize or mitigate the potential impacts of the major oil pipeline to land areas and connected natural resources other than with respect to oil spills.

023.02A10 For informational purposes only, a description of the method for state agencies and emergency response personnel to obtain current Safety Data Sheet(s) for the product(s) or material(s) being transported through the pipeline in the event of an incident.

023.02A11 An applicant must notify the Commission during the pendency of the application of any material change in the representations and commitments required by this subsection within fourteen (14) days of such change.

023.02B Filing and Notice: Applications must be filed with the Executive Director at the Nebraska Public Service Commission. Pipeline carriers shall file an original paper copy of the application in addition to an electronic copy and five (5) paper copies.

023.07 **Burden of Proof:** 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 Nebraska 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:

023.07A Whether the pipeline carrier has demonstrated compliance with all applicable state statutes, rules, and regulations and local ordinances;

023.07B 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. Such evidence may include but not be limited to the following:

0023.07B1 an environmental impact study;

0023.07B2 a comprehensive soil permeability study;

0023.07B3 a distance-to-groundwater survey;

0023.07B4 evidence regarding the impact of the pipeline on wildlife; and

0023.07B5 evidence regarding the impact of the pipeline on plants located within and surrounding the proposed route.

023.07C Evidence of methods to minimize or mitigate the potential impacts of the major oil pipeline to natural resources;

023.07D Evidence regarding the economic and social impacts of the major oil pipeline. Such evidence may include but not be limited to estimates regarding tax paid by the carrier to local and state government along the route of the proposed pipeline and information regarding impact on employment in Nebraska;

023.07E Whether any other utility corridor exists that could feasibly and beneficially be used for the route of the major oil pipeline;

023.07F The impact of the major oil pipeline on the orderly development of the area around the proposed route of the major oil pipeline;

023.07G The reports of the agencies filed pursuant to subsection 023.05; and

023.07H The views of the governing bodies of the counties and municipalities in the area around the proposed route of the major oil pipeline.

291 *Neb Admin C* Ch. 9, 023

August 4, 2017.

Susan Dunavan, et al., Intervenors,

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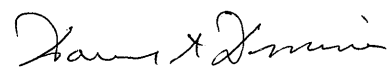
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Certificate of Service

Pursuant to 291 *Neb Admin Code* § 015.01(b), a copy of the foregoing is served upon all Intervenor of record to this proceeding or their attorneys of record as follows by email with copies to be available to other at the hearing on August 7, 2017:

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