

**BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION**

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

**BOLD ALLIANCE’S OBJECTION TO HEARING OFFICER’S ORDER AND MOTION FOR FURTHER RECONSIDERATION OF HEARING OFFICER’S ORDER**

Bold Alliance (“**Bold**”), by and through its counsel of record, respectfully objects to the Order of the Hearing Officer entered on April 13, 2017 denying its Motion for Reconsideration of the Hearing Officer’s Order of March 31, 2017 and requests that the Nebraska Public Service Commission (the “**Commission**”) schedule a hearing on its Motion for Reconsideration of the March 31, 2017 Order before the full Commission as requested in Bold’s Motion of April 10, 2017.

In support of the Motion, Bold states and alleges as follows:

- 1) The Order of April 13, 2017 was not from the Commission as requested by Bold, but from the Hearing Officer. This Order was an insufficient response to the Motion for action by the Commission and constitutes material interference with the procedural rights of Bold. This action was inconsistent with Rule 017 which provides that motions addressed to the Commission will be ruled upon by the Commission.
- 2) Both the April 13, 2017 and the March 31, 2017 Orders improperly rely on the Nebraska Administrative Procedures Act, (APA) specifically section 84-912.02, in limiting the roles of intervenors.
- 3) The Nebraska Supreme Court has ruled that the underlying authority of the Commission derives from Neb. Rev. Stat. § 75-110, rather than the APA. The Commission is prohibited from taking any action affecting persons subject to the Commission’s jurisdiction unless

such action is taken pursuant to a rule, regulation or statute (*See* Neb. Rev. Stat. § 75-110). *Chase 3000, Inc. v. Public Service Commission*, 273 Neb. 133, 728 N.W.2d 560 (Neb. 2007) and *In re Application No. C-1889 of GCC License Corporation*, 264 Neb. 167, 647 N.W.2d 45 (Neb. 2002).

- 4) The Nebraska Supreme Court has stated that the Commission is bound by the rules set forth in Title 291, Ch. 1, Section 015.01.<sup>1</sup> The Court stated: “In summary, the rules set forth who may be a party, how a party may intervene, and what rights the parties may have based on the type of intervention. These rules and regulations are binding on the Commission in the same manner as if they were statutes. The Commission is required to conform to these rules.” *Jantzen v. Diller Telephone Co.*, 245 Neb. 81, 100, 511 N.W.2d 504, 517 (1994).
  - 5) The Commission’s rules on intervention adopted pursuant to section 75-110 provide as follows: Section 015.01C: “A formal intervenor shall be entitled to participate in the proceeding **to the extent of his/her express interest in the matter** (emphasis added). Such participation shall include, without limitation, presentation of evidence and argument, cross-examination of witnesses and submission of rebuttal evidence.”
  - 6) LB 263, passed by the Legislature on April 24, 2017 by a vote of 49 to 0, amends section 75-110 as follows: For purposes of granting or denying a petition for intervention, the commission shall be exempt from section 84-912.02. The Commission testified in support of this statutory change.
  - 7) The March 31, 2017 Order correctly recognizes that Bold is entitled to intervene in this proceeding pursuant to the Commission’s Rules of Procedure.
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- 8) However, the March 31, 2017 Order incorrectly relies on the APA as authority for its “broad discretion” to impose conditions on a formal intervenor’s participation in the proceeding, because the Commission is not governed by the intervention provisions of the APA as noted by the previous authority, including the statutory change authorized by the passage of LB 263.
- 9) The Order of March 31, 2017 improperly limits the scope of Bold’s participation in the proceedings authorized under the Rules and violates the due process rights of intervenors to be heard in a meaningful way.
- 10) The limitations of the March 31, 2017 Order are arbitrary and capricious for the following reasons: a) they lump together 36 individuals and four organizations representing several million people into one category as “natural resources intervenors”; b) although the Major Oil Pipeline Siting Act, found at Neb. Rev. Stat. section 57-1401 to 57-1413, lists several natural resources issues that are to be considered by the Commission, the natural resources intervenors are limited to a single witness on such issues; c) the Order of March 31, 2017 lists four categories of natural resources issues, “environmental impact; soil permeability, distance to groundwater, and impact on plant life and wildlife in and around the proposed route;” no single witness can cover all these issues; d) it is unlikely that any one witness would be able to qualify as an expert on all the natural resources issues set forth in the siting act or described in the Order; e) the individuals and organizations lumped together in this category have interests in other aspects related to whether the proposed pipeline route is in the “public interest”, which is the standard of the siting act.



- 11) Bold's Petition provided an extensive statement of its interest in the proceedings and the grounds upon which the intervention is made, including the facts and circumstances relied upon for such intervention, as required by the Rules.
- 12) The interests of Bold have been improperly limited and combined with the interests of other intervenors, which prevents Bold from participating in the proceedings "to the extent of its express interest in the matter" as required under the Rules and improperly restricts the presentation of relevant information concerning the issues which the Commission is required to consider under the Major Oil Pipeline Siting Act.
- 13) The March 31, 2017 Order also improperly limits the rights of other intervenors to present their own unique evidence to the extent of their respective interests in the proceeding.
- 14) This matter is one of great public interest, as manifested by the following: a) The 2011 Special Session of the Legislature which created the procedure being used by the Commission in this matter; b) more than 1000 people participated in each of the three US State Department hearings conducted in the State of Nebraska; c) more than 800 people participated in the Department of Environmental Quality hearing in December 2012; d) this issue has been part of recent national election campaigns; e) this issue has been the subject of a wide range of national news coverage; f) hundreds of thousands of people have provided comments to state and federal agencies about this issue. Bold and the other intervenors have a right to participate to "the extent of their interest" on behalf of all the people who are engaged in this issue.
- 15) Bold recognizes the desire of the Commission to conduct the proceedings with reasonable efficiency and to avoid undue duplication of testimony and will cooperate with reasonable limitations to achieve such efficiency, however administrative efficiency cannot outweigh

the due process rights of Bold and other intervenors to present relevant evidence concerning its legal interests as provided under the Rules.

- 16) Bold believes that the interests of the Commission will be preserved and maintained by granting and administering Bold's Petition on the basis of i) the Commission's Rules, ii) Nebraska statutes granting its authority to promulgate the Rules, and ii) adherence with the Commission's historic procedural practices authorized and recognized by the Nebraska Supreme Court. To do so will not impede the prompt and orderly conduct of the Application, nor prejudice the interests of the Applicant or Bold.

WHEREAS, Bold respectfully requests that the Commission schedule this Motion for Further Reconsideration of the Hearing Officer's Order for Hearing and Oral Argument before the full Commission.

Respectfully submitted the 24<sup>th</sup> of April, 2017.

BOLD ALLIANCE

By: 

Kenneth C. Winston, #16961

1120 K Street, #200

Lincoln, NE 68508

(402) 476-6583

[kwinston@inebraska.com](mailto:kwinston@inebraska.com)

Attorney for Bold Alliance

## CERTIFICATE OF SERVICE

Pursuant to 291 Neb. Admin Code § 015.0 (b), and the ruling of the hearing officer at the scheduling conference on April 10, 2017 a copy of the foregoing was served upon all parties of record to this proceeding or their attorneys of record as follows (see attached list):

A handwritten signature in blue ink, appearing to read 'K. C. Winston', is written over a horizontal line.

Kenneth C. Winston