

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of the Application of)	Application No. OP-0003
TransCanada Keystone Pipeline, L.P.)	
For route approval of the Keystone XL)	CONSOLIDATED MOTION FOR
Pipeline Project pursuant to the Major)	RECONSIDERATION OF
Oil Pipeline Siting Act.)	THE COMMISSION'S ORDER
)	ON FORMAL INTERVENTION
)	AND MEMORANDUM IN
)	SUPPORT OF MOTION

MOTION FOR RECONSIDERATION OF THE COMMISSION'S ORDER ON FORMAL INTERVENTION PETITIONS

COMES NOW the Yankton Sioux Tribe (the "Tribe"), by and through undersigned counsel, and hereby submits this Motion for Reconsideration, and respectfully requests that the Nebraska Public Service Commission ("Commission") reconsider its Order on Formal Intervention Petitions ("Order") entered by Hearing Officer Tim Schram on March 31, 2017, and requests a Briefing Schedule and Oral Argument on this Motion before the entire Commission.

MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION OF THE COMMISSION'S ORDER ON FORMAL INTERVENTION PETITIONS

I. BACKGROUND

The Tribe submitted a Request for Formal Intervention on March 22, 2017. On March 30, 2017, TransCanada Keystone Pipeline, LP filed a Motion to Deny and Objections to Petitions of Intervention. The Commission issued its Order the following day. In this Order, the Commission granted the Tribe's request for formal intervention status, but with significant limitations. The Commission stated that the Tribe's formal intervenor "status shall be limited to social and cultural issues." Order at 6. Additionally, the Commission's Order required that the Tribe work with the Ponca Tribe of Nebraska ("Ponca Tribe") to offer the testimony of one joint witness at the final

hearing and file one joint brief on any due date, as well as to collaborate to cross-examine witnesses at the hearing.

Because the limitations in the Order impede on the Tribe's ability to fully act as a formal intervenor in this case as provided by the Commission's Rules of Procedure at Title 291, Ch. 1, Section 015.01, the Tribe now requests that the Commission reconsider its Order, and requests a Briefing Schedule and Oral Argument on this Motion before the Commission.

II. LEGAL ARGUMENT

In the Order, the Commission improperly relied on the Administrative Procedure Act ("APA"), NEB. REV. STAT. § 84-912.02, instead of its own rule, 291 NEB. ADMIN. CODE 1 § 015.01, when setting limitations on the Tribe's status as a formal intervenor.

NEB. REV. STAT. § 75-110 required the Commission to adopt and promulgate rules of procedure, and also required that "[t]he commission shall not take any action affecting persons subject to the commission's jurisdiction unless such action is taken pursuant to a rule, regulation or statute." NEB. REV. STAT. § 75-110. Title 291, Chapter 1 of the Nebraska State Rules & Regulations ("Rules") was issued to prescribe the Commission's Rules of Procedure. Section 015.01C of these Rules states how a formal intervenor may participate in proceedings before the Commission.

A formal intervenor shall be entitled to participate in the proceeding to the *extent of his/her express interest in the matter*. Such participation shall include, *without limitation, presentation of evidence and argument*, cross-examination of witnesses and submission of rebuttal evidence.

291 NEB. ADMIN. CODE 1 § 015.01C (emphasis added). This rule plainly entitles formal intervenors to participate without limitation and to the extent of their expressed interest.

The APA, on the other hand, allows agencies to "impose conditions upon the intervenor's participation in the proceedings," such as "[l]imiting the intervenor's participation to designated

issues,” or “[r]equiring two or more intervenors to combine their presentation of evidence and argument.” NEB. REV. STAT. § 84-912.02. Thus, the Commission’s Rules guarantee formal intervenors broader participation rights than the APA guarantees.

The Nebraska Supreme Court has clearly ruled that an agency must follow its own Rules:

Generally, rules and regulations of an administrative agency governing proceedings before it, duly adopted and within the authority of the agency, are as binding as if they were statutes enacted by the Legislature. Likewise, procedural rules are binding upon the agency which enacts them as well as upon the public, and the agency does not, as a general rule, have the discretion to waive, suspend, or disregard, in a particular case, a validly adopted rule so long as such rule remains in force. . . . To be valid, the action of the agency must conform to its rules which are in effect at the time the action is taken, particularly those designed to provide procedural safeguards for fundamental rights.

Douglas Cty. Welfare Admin. v. Parks, 284 N.W.2d 10, 11-12, 204 Neb. 570, 572 (Neb. 1979).

In its Order, however, the Commission limits the Tribe’s status of a formal intervenor pursuant to the APA, not its own Rules. Instead of allowing the Tribe to present evidence and arguments without limitation, the Commission requires the Tribe to work with the Ponca Tribe to offer the testimony of one joint witness and file one joint brief. The Tribe sought to formally intervene to protect its unique interests. The Ponca Tribe does not share these unique interests. By requiring the Tribe to work with the Ponca Tribe in presenting its evidence and arguments, the Tribe cannot possibly fully present its evidence and arguments. For example, there is no way a witness for the Ponca Tribe can attest to the historical migration of the Tribe, and vice versa, because the two tribes do not share a common history. Additionally, by limiting the Tribe to “social and cultural issues,” the Tribe cannot participate in the proceedings to the extent of its express interest in the matter. There are a number of issues that arise in a proceeding such as this that are not social and cultural issues, *per se*, but that impact social and cultural issues. The Tribe cannot adequately represent its interests in social and cultural issues without delving into other matters

that may affect its interests. Therefore, the limitation on the Tribe's participation to social and cultural issues improperly restricts the Tribe in a manner not permitted by the statute.

The Commission violated its own rules when it chose to follow the APA's discretionary rules instead of its own rules, which clearly grant broad participation rights to formal intervenors. For the foregoing reasons, it was error for the Commission to rely on § 84-912.02 instead of its own Rules regarding formal intervention.

By restricting the Tribe's ability to participate in the proceeding to the extent of its interest in the matter, and limiting the Tribe's ability to present evidence and argument, the Order also violates the Tribe's due process right to participate to the extent of its express interest in the matter, and to fully present its evidence and arguments, as provided for in the Rules.

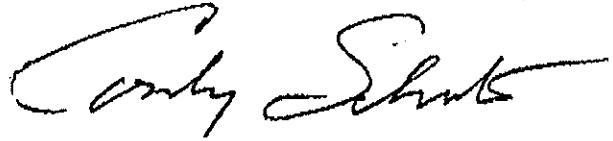
The Tribe also hereby adopts all arguments set forth in Bold Alliance's Motion for Reconsideration of Hearing Officer's Order, filed April 10, 2017, which support the conclusion that the Commission was required to follow its Rules, not the APA, when setting limitations for formal intervenors.

Conclusion

For the foregoing reasons, the Yankton Sioux Tribe respectfully requests that the Commission, for the reasons described above, grant its Motion for Reconsideration in this matter, and grant its request for a Briefing Schedule and Oral Argument.

DATED this 10th day of April, 2017.

FREDERICKS PEEBLES AND MORGAN LLP
FOR THE YANKTON SIOUX TRIBE

A handwritten signature in black ink, appearing to read "Conly Schulte". The signature is fluid and cursive, with a large initial "C" and a long horizontal stroke at the end.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing Motion for Reconsideration of the Commission's Order on Formal Intervention was served by email transmission and by United States mail on this 10th day of April, 2017, upon the following:

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