

Nebraska Public Service Commission

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JEFFREY L. PURSLEY

March 31, 2017

CERTIFICATION

To Whom It May Concern:

I, Jeffrey L. Pursley, Executive Director of the Nebraska Public Service Commission, hereby certify that the enclosed is a true and correct copy of the original order made and entered in the proceeding docketed OP-0003 on the 31st day of March 2017. The original order is filed and recorded in the official records of the Commission.

Please direct any questions concerning this order to Nichole Mulcahy, Natural Gas Deputy Director, at 402-471-3101.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the Nebraska Public Service Commission, Lincoln, Nebraska, this 31st day of March 2017.

Sincerely,

A handwritten signature in cursive script that reads "Jeffrey L. Pursley".

Jeffrey L. Pursley
Executive Director



JLP:rp

Enclosure

cc: Service Lists: U.S. Mail and Email

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application) Application No. OP-0003
of TransCanada Keystone Pipeline,)
L.P., Calgary, Alberta, seeking) ORDER ON FORMAL
approval for Route Approval of the) INTERVENTION PETITIONS
Keystone XL Pipeline Project)
Pursuant to the Major Oil Pipeline)
Siting Act.) Entered: March 31, 2017

BY THE HEARING OFFICER:

On February 16, 2017, TransCanada Keystone Pipeline, L.P., of Calgary, Alberta, ("TransCanada" or "Applicant") filed an Application with the Nebraska Public Service Commission ("Commission") seeking approval of a route for the Keystone XL Pipeline Project pursuant to the Major Oil Pipeline Siting Act, Neb. Rev. Stat. §§ 57-1401 - 57-1413 ("Siting Act").

The Siting Act gives the Commission narrow authority to review the route of a proposed major oil pipeline in order to make a determination whether such route is in the public interest. In making such determination regarding whether the route of a major oil pipeline is in the public interest, the Siting Act expressly prohibits the Commission from evaluating safety considerations, including the risk or impact of spills or leaks from the major oil pipeline.¹ However, the Siting Act also provides that the Commission must give consideration to certain specific issues, including:

- (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;

¹ Neb. Rev. Stat. § 57-1407(4) (2016 Cum. Supp.).

- (e) Whether any other utility corridor exists that could feasibly and beneficially be used for the route of the major oil pipeline; and
- (f) The impact of the major oil pipeline on the orderly development of the area around the proposed route of the major oil pipeline;²

Petitions for Formal Intervention were timely received from the following individuals: Mia Bergman, Kimberly E. Craven, Kimberlee A. Frauendorfer, Randall L. Frauendorfer, Troy R. Frauendorfer, Cathie (Kathryn) Genung, Louis (Tom) Genung, Andy Grier, Christy J. Hargesheimer, Richard S. Hargesheimer, Marvin E. Hughes, Judy King, Paul M. Latenser, Pamela Luger, Elizabeth (Liz) Mensinger, Janece Mollhoff, Crystal C. Miller, Greg Nelson, Julie Nichols, James Douglas Osborn, Jana Osborn, Dave Polson, Donna Roller, Cecilia Rossiter, Corey Runmann, Lois Schreur, Sandra Slaymaker, Susan Soriente, Susan Straka-Heyden, Tristan Scorpio, Kimberly L. Stuhr, Paul Theobald, Christine Troshynski, Elizabeth L. Troshynski, Julie Walker, Susan C. Watson, Susan J. Weber, Douglas Whitmore, Sandy Zdan, and Sarah Zuekerman.

Petitions for Formal Intervention were also timely filed by The Domina Law Group PC LLO ("Domina") on behalf of landowners along the proposed route of the Keystone XL Pipeline, including: Susan Dunavan and William Dunavan, Bartels Farms, Inc., Johnnie Bialas and Maxine Bialas, Bonnie Brauer, James Carlson and Christine Carlson, Timothy Choat, Gary Choat Farms LLC, and Shirley Choat Farms, LLC, CRC, Inc., Daniel A. Graves and Joyce K. Graves, Patricia A. Grosserode a/k/a Patricia A. Knust, Terri Harrington, Donald C. Loseke and Wanda G. Loseke, Arla Naber and Bryce Naber, Mary Jane Nyberg, Kenneth Prosocki and Karen Prosocki, Edythe Sayer, Dan Shotkoski and Clifford Shotkoski, Leonard Skoglund and Joyce Skoglund, John F. Small and Ginette M. Small, Deborah Ann Stieren and Mary Lou Robak, Jim Tarnick, Terry J. Van Housen and Rebecca Lynn Van Housen, Donald D. Widga, Byron Terry "Stix" Steskal and Diana Steskal, Allpress Brothers, LLC, Germaine G. Berry, Karen G. Berry, Cheri G. Blocher and Michael J. Blocher, L.A. Breiner and Sandra K. Breiner, Jerry Carpenter and Charlayne Carpenter, CHP 4 Farms, LLC, Larry D. Cleary, Jeanne Crumly and Ronald C. Crumly, Ken Dittrich, Lloyd Z. Hipke and Vencille M. Hipke, R. Wynn Hipke and Jill Hipke, Richard Kilmurry, Bonnie Kilmurry, Rosemary Kilmurry, Beverly Krutz and Robert Krutz, LJM Farm, LLC, Carol Manganaro, Frankie Maughan and Sandra Maughan, Beverly Miller and Earl Miller, Edna Miller and Glen Miller, Milliron Ranch,

² *Id.*

LLC, Frank C. Morrison and Lynn H. Morrison, Larry D. Mudloff, J.D. Mudloff, and Lori Mudloff, Constance Myers a/k/a Constance Ramold, Nicholas Family Limited Partnership, Ann A. Pongratz and Richard J. Pongratz, Donald Rech, Schultz Brothers Farms, Inc., Connie Smith and Verdon Smith, Joshua R. Stelling, Richard Stelling and Darlene Stelling, Todd Stelling and Lisa Stelling, Arthur R. Tanderup and Helen J. Tanderup, TMAG Ranch, LLC, Tree Corners Farm, LLC, Dave Troester and Sharyn Troester, and Gregory Walmer and Joanne Walmer.

Timely petitions for formal intervention were also received on behalf of the following groups: Midwest Regional Office of the Laborers International Union of America, International Brotherhood of Electrical Workers Local Union No. 265, the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, 350.org (Kendall Maxey), Oil Change International (Lorne Stockman), Bold Alliance, the Sierra Club, Nebraska Chapter, the Ponca Tribe of Nebraska, and the Yankton Sioux Tribe of South Dakota.

A petition for Informal Intervention was timely filed by Wrexie Bardaglio.

Commission rules require that petitions for formal intervention be filed within thirty (30) days of publication of notice by the Commission.³ In the above-captioned proceeding, petitions for formal intervention were due to the Commission by the end of business on March 22, 2017. As of the date of this order, the Commission has received thirteen petitions for formal intervention which were not timely filed.

On March 30, 2017, TransCanada filed a Motion to Deny and Objections to Petitions of Intervention for certain petitioners.

F I N D I N G S A N D O P I N I O N

The Hearing Officer, in managing the above-captioned docket, is tasked with balancing the requirement to adhere to the strict and aggressive timeline imposed by the Siting Act, with the need to ensure creation a complete and robust record is created that includes the opportunity for all interested parties to be fully and fairly heard. The Commission is given 210 days, or seven (7) months, to enter a decision on an application to approve a route of a major oil pipeline under the Siting Act. There is an option under the Siting Act for the Commission to extend that time, however, upon the issuance of a Presidential Permit authorizing the construction of the major oil pipeline

³ 291 NAC 1 § 015.01B (May 4, 1992).

seeking route approval in Nebraska, the Commission is not allowed any extension beyond eight (8) months after such permit issuance.⁴ The Presidential Permit for the Keystone XL Pipeline was issued on March 23, 2017, making the absolute latest date for the Commission to enter a final order, November 23, 2017.

Pursuant to Nebraska Law contained in the Administrative Procedures Act⁵ ("APA") and Commission Rules⁶, petitioners seeking formal intervention in a proceeding must demonstrate in the petition his or her legal interest in the proceeding, namely why the petitioner's legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding.⁷ Persons granted formal intervention status become full legal parties to the proceeding.

The APA and Commission rules further give broad discretion to the hearing officer regarding the approval or denial of any petitions for intervention. The hearing officer is also given the authority to impose conditions on an intervenor's participation in a proceeding, including limiting an intervenor's participation to designated issues, limiting the intervenors use of discovery, cross-examination, and other procedures, and requiring intervenors with similar interests to work together and combine their presentation of evidence and argument.⁸ All these tools can be used by the hearing officer in the interest of the orderly and prompt conduct of the proceeding. Additionally, the hearing officer has the discretion and authority to modify any grant of intervention at any time during a proceeding.⁹

Therefore, in order to balance the statutorily truncated timeframe for this proceeding, the need to consider certain statutorily required issues, with the parties' due process interests in being heard, and in the interest of maintaining an orderly proceeding under the Siting Act, I have grouped petitioners that have asserted similar interests together and will deal with each group individually below.

Landowner Petitioners

The Commission received 93 petitions from landowners that assert ownership of real property situated on the proposed route of the pipeline. Ninety-two (92) of those petitioners are represented by the Domina Law Group, and Mia Bergman, who filed *pro se*. Petitioners that own the property on the proposed route

⁴ *Neb. Rev. Stat.* § 57-1408(2) (2016 Cum. Supp.).

⁵ *Neb. Rev. Stat.* § 84-901 - § 84-920 (Reissue of 2014).

⁶ 291 NAC 1 § 015.01 (May 4, 1992).

⁷ *Neb. Rev. Stat.* § 84-912.02(1)(b) (Reissue of 2014).

⁸ *Neb. Rev. Stat.* § 84-912.02(3) (Reissue of 2014).

⁹ *Neb. Rev. Stat.* § 84-912.02(4) (Reissue of 2014).

of the pipeline have a clear and substantial legal interest in this proceeding. These petitioners have real property interests that will be directly impacted by the decision of the Commission regarding the route of the Keystone XL Pipeline. Therefore, I find the petitions of Mia Bergman and the landowners represented by Domina for formal intervenor status are hereby granted with no limitations or conditions.

Petitioners Asserting Economic Interests

The Commission received petitions for formal intervention from three different unions, the Midwest Regional Office of the Laborers International Union of America ("LiUNA"), the International Brotherhood of Electrical Workers ("IBEW") Local Union No. 265, and the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO ("UA") (collectively "Unions"). All three cite the economic interests of their members in connection with the pipeline project. None assert an interest in real property located along the route.

Although the Unions assert no legally cognizable real property interest in the land on the proposed route, the Siting Act requires the Commission to consider evidence of the economic impacts of the project in order to make its determination whether the route of the pipeline is in the public interest.¹⁰ Evaluation of the economic impact of the route potentially encompasses many concepts and issues, including considerations such as changes in business revenues, business profits, personal wages, and/or jobs, commerce, employment, or incomes and the orderly development of the area around the proposed route.

I find that the stated interests of these petitioners are compatible with the Commission's statutory charge of considering the economic impacts of the pipeline, therefore, I find the Unions shall be granted formal intervenor status but such status shall be limited to economic issues as in the preceding paragraph. Further limitations are as follows: 1) the Unions shall cooperate and combine their efforts to offer the testimony of one witness regarding such issues with accompanying exhibits at the public hearing. Such witness testimony shall be pre-filed on a date to be specified in the forthcoming case management plan; 2) petitioners shall conduct discovery only for the limited purposes of exploring the designated issue as outlined above; 3) petitioners shall be entitled to collaborate to cross-examine witnesses at the hearing, not to exceed one-hour of time per witness; 5) petitioners shall combine their efforts and

¹⁰ Neb. Rev. Stat. § 57-1407(4) (d) (2016 Cum. Supp.).

submit one joint brief on any due date as outlined in the subsequent case management plan.

Petitioners Asserting Social and Cultural Interests

The Commission received petitions from the Ponca Tribe of Nebraska and the Yankton Sioux Tribe of South Dakota (collectively "Tribes"). Each petition cites cultural, spiritual, and historical interest in the land through which the route of the pipeline is proposed to run. However neither petition cites a legally cognizable current real property interest in land encompassing the route.

Although the Tribes assert no legally cognizable current possessory real property interest in the land on the proposed route, the Siting Act requires the Commission to consider evidence of the social impacts of the project.¹¹ Evaluation of the social impact of the route potentially encompasses many concepts and issues, including cultural, anthropological, and historical concepts.

I find that the stated interests of these petitioners are compatible with the Commission's statutory charge of considering the social impacts of the pipeline route, therefore, I find the Tribes shall be granted formal intervenor status but such status shall be limited to social and cultural issues and described in the immediately preceding paragraph. Further limitations are as follows: 1) the Tribes shall cooperate and combine their efforts to offer the testimony of one witness regarding such issues with accompanying exhibits at the public hearing. Such witness testimony shall be pre-filed on a date to be specified in the forthcoming case management plan; 2) petitioners shall conduct discovery only for the limited purposes of exploring the designated issue as outlined above; 3) petitioners shall be entitled to collaborate to cross-examine witnesses at the hearing, not to exceed one-hour of time per witness; 4) petitioners shall combine their efforts and submit one joint brief on any due date as outlined in the subsequent case management plan.

Petitioners Asserting Environmental/Natural Resources Interests

The Commission received petitions for formal intervention from Bold Alliance, the Sierra Club, Nebraska Chapter, Oil Change International (Lorne Stockman), 350.org (Kendall Maxey), Kimberly E. Craven, Andy Grier, Christy J. Hargesheimer, Richard S. Hargesheimer, Marvin E. Hughes, Cathie (Kathryn) Genung, Louis (Tom) Genung, Judy King, Pamela Luger, Elizabeth (Liz)

¹¹ Neb. Rev. Stat. § 57-1407(4) (2016 Cum. Supp.).

Mensingher, Crystal C. Miller, Janece Mollhoff, Greg Nelson, Julie Nichols, James Douglas Osborn, Jana Osborn, Dave Polson, Donna Roller, Cecilia Rossiter, Corey Rumann, Lois Schreur, Tristan Scorpio, Sandra Slaymaker, Susan Soriente, Susan Straka-Heyden, Kimberly L. Stuhr, Paul Theobald, Christine Troshynski, Elizabeth L. Troshynski, Julie Walker, Susan C. Watson, Susan J. Weber, Douglas Whitmore, Sandy Zdan, and Sarah Zuekerman (collectively "Natural Resources Petitioners"). All the Natural Resources Petitioners cite as their primary interest concerns for the environment and natural resources of Nebraska as potentially impacted by the Keystone XL Pipeline route.

Although none of the Natural Resources Petitioners have asserted a legally cognizable real property interest in the land on the proposed route of the pipeline, the Siting Act requires the Commission to consider evidence of the impact due to intrusion of the pipeline upon 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. The Siting Act further requires the Commission to consider evidence of methods to minimize or mitigate the impacts of the pipeline to natural resources.¹² However, all participants in this proceeding need to keep firmly in mind that the Siting Act prohibits the Commission from evaluating safety considerations, including the risk or impact of spills or leaks from the major oil pipeline.¹³

The impact of the major oil pipeline's route to Nebraska natural resources potentially encompasses many concepts and issues, such as environmental impact, soil permeability, distance to groundwater, and impact on plant life and wildlife in and around the proposed route.¹⁴

I find that the stated primary interests of these petitioners is compatible with the Commission's statutory charge of considering the impact of the pipeline route on the natural resources of Nebraska and, therefore, I find these petitioners shall be granted formal intervenor status but such status shall be limited to the issues outlined above. Further limitations are as follows: 1) the Natural Resources Petitioners shall cooperate and combine their efforts to offer the testimony of one witness regarding such issues with accompanying exhibits at the public hearing. Such witness testimony shall be pre-filed on a date to be specified in the forthcoming case management plan; 2) petitioners shall conduct discovery only for the limited

¹² Neb. Rev. Stat. § 57-1407(4) (b) & (c) (2016 Cum. Supp.).

¹³ Neb. Rev. Stat. § 57-1407(4) and § 57-1407(b) (2016 Cum. Supp.).

¹⁴ 291 NAC 9 § 023.07B (July 27, 2013).

purposes of exploring the designated issues as outlined above; 3) petitioners shall be entitled to collaborate to cross-examine witnesses at the hearing, not to exceed one-hour of time per witness; 5) petitioners shall combine their efforts and submit one joint brief on any due date as outlined in the subsequent case management plan.

Informal Interventions

The Commission received one petition for informal intervention from Wrexie Bardaglio, which I find should be granted.

The Commission also received some petitions that were not timely filed. These petitioners include: Jayne Antony, Leverne A. Barrett, Becky Hohnstein, John Jarecki, Karen Jarecki, Taylor R. M. Keen, Michelle C. LaMere, Christine Polson, Joseph Pomponio, Collin A. Rees, Julie Shaffer, Jacques Tallichet, and Jonathan H. Thomas. As the petitions were untimely, I find these petitioners shall be granted informal intervenor status. Informal Intervenor have the opportunity for limited participation in the proceeding. Pursuant to Commission rules 291 NAC 1 § 015.02, an informal intervenor may offer the pre-filed direct testimony of one witness along with exhibits from that witness at the hearing, may participate in any oral arguments involving the interest of the intervenor, and submit briefs.

Incomplete Petitions

The Commission also received petitions that were deficient on their face, as they failed to state any kind of interest in the proceeding, a requirement to be granted either formal or informal intervention in a proceeding before the Commission.¹⁵ Therefore, the petitions of Kimberlee A. Frauendorfer, Randall L. Frauendorfer, Troy R. Frauendorfer, and Paul M. Latenser are hereby denied.

Keystone Mainline Alternative Route

The Application includes information regarding three potential routes for the proposed major oil pipeline through the State of Nebraska. One designated as the Applicant's preferred route, along with two additional alternative routes. One of the alternative routes, designated by the Applicant as the Keystone Mainline Alternative Route, partially parallels the route of an

¹⁵ See 291 NAC 1 § 015.01 & § 015.02 (May 4, 1992) and Neb. Rev. Stat. § 84-912.02(1)(b) (Reissue of 2014).

existing Keystone pipeline that passes through eastern Nebraska from the South Dakota border to Steele City, Nebraska.¹⁶

As stated above, the Siting Act requires the Commission to consider whether any other utility corridor exists that could feasibly and beneficially be used for the route of the major oil pipeline.¹⁷ Therefore, I encourage all parties to provide evidence regarding the feasibility and potential benefits and/or drawbacks of the Keystone Mainline Alternative Route. Such evidence shall be subject to any limitations regarding designated areas of interest as outlined above. Each of the limited intervenor groups described above shall be permitted one additional witness, with accompanying exhibits to provide evidence regarding the Keystone Mainline Alternative Route.

O R D E R

IT IS THEREFORE ORDERED by the Hearing Officer that the above-mentioned petitions for formal intervention are granted or denied consistent with the terms set forth herein.

ENTERED AND MADE EFFECTIVE at Lincoln, Nebraska this 31st day of March, 2017.

BY:



Tim Schram
HEARING OFFICER

¹⁶ It is noteworthy that the Sandhills Alternative Route included in the application appears to be a route that was previously rejected by Nebraska authorities. Therefore, this route has already effectively been determined to not be a viable option.

¹⁷ Neb. Rev. Stat. § 57-1407(4)(e) (2016 Cum. Supp.).