



participate in the proceeding to the extent of its interests in the matter and, therefore, violates the Commission's own regulations rendering the Order invalid.

3. The Tribe's Petition of Formal Intervention ("Petition") was not limited to its interest in historic, cultural, sacred and archaeological resources. The Tribe's intervention was also based on the proposed pipeline routes' impact on the Tribe's sovereignty and self-government. As discussed in the Tribe's Petition, each of the proposed routes of the pipeline would cross the Tribe's congressionally designated Service Areas where the Tribe is recognized as having jurisdiction and sovereignty. Within the Tribe's Service Areas, the Tribe has primary responsibility for providing health care to its members and others pursuant to its contract with the United States Department of Health and Human Services entered into in accordance with the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5301 *et seq.* The Tribe also regulates and monitors the environment within those Service Areas through its Environmental Protection Department, a governmental agency of the Tribe.

4. The Tribe's interests are not limited to "social and cultural issues." The Tribe's interests also include, for example, what the Order terms "environmental and natural resources issues" since the proposed pipeline will cross through its jurisdictional area. Those interests necessarily also include health impacts on those to whom the Tribe directly provides health services and care. The Tribe's interests are similar to any other government through whose jurisdiction the pipeline would route. Yet, the Order purports to refuse to allow the Tribe to provide any participation with respect to such issues.

5. By limiting the Tribe's participation to "social and cultural issues," the Order directly denies the Tribe's right, recognized in the Commission's regulations, to participate to the extent of its express interest. Consequently, the Order is directly contrary to the Commission's regulations

and must be revised to, at a minimum, permit the Tribe to participate with respect to its interests related to the fact that the proposed routes each cross the Tribe's recognized Service Areas, potentially impacting the health, welfare, environment and natural resources of the Tribe and its members.

6. In addition to improperly limiting the Tribe's participation with respect to issues related to its interests, the Order requires the Tribe to work jointly with the Yankton Sioux Tribe and limits the two parties to a single witness and joint brief. Such a limitation on the Tribe's presentation denies the Tribe's right to participate to the full extent of its interests with respect to the "social and cultural issues."

7. The Order fails to recognize that the Ponca Tribe of Nebraska and the Yankton Sioux Tribe are two different nations with different languages, different cultures, different traditions, and different histories unique to each tribe. Sites and resources that are historic or significant to one tribe are not necessarily historic or significant to the other tribe. Nor are the areas of concern of the tribes the same since they occupy different present territories and different historic and aboriginal territories.

8. One witness cannot competently testify to the different tribes' cultures, histories and beliefs. It would likely be impossible for one witness to have the appropriate or sufficient knowledge of both tribes to testify adequately and fully with respect to the historic, cultural, sacred and archaeological resources of both tribes. Consequently, the Tribe's right to participate to the extent of its interests would be severely hindered.

9. Based on the maps provided by TransCanada, the proposed routes of the pipeline will cross the historic and culturally significant trail which the Tribe was forced to walk to and from Oklahoma lead by Chief Standing Bear, known as the Ponca Trail of Tears. These events are unique

to the Tribe and an extremely important part of its history. The trail has become known as the “Chief Standing Bear Trail” and is itself unique to the Tribe’s culture and history. The events and the trail are not part of the Yankton Sioux Tribe’s history. A single witness who is knowledgeable in the culture and history of the Yankton Sioux Tribe would not be able to competently or completely discuss the importance of the Ponca Removal and the Chief Standing Bear Trail to the Ponca Tribe of Nebraska. This would result in the Tribe completely losing its right to participate with respect to its interests.

10. The Nebraska Supreme Court has held that “rules and regulations of an administrative agency governing proceedings before it . . . are as binding as if they were statutes enacted by the Legislature. . . 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.” *Douglas County Welfare Administration v. Parks*, 204 Neb. 570, 572, 284 N.W.2d 10, 11 (1979).

11. By adopting the rule that a “formal intervenor shall be entitled to participate in the proceeding to the extent of his/her express interest in the matter,” the Commission is bound to follow that rule. The rule expressly recognizes the rights of formal intervenors to fully participate in a proceeding to the extent of their interest, but the Order expressly limits the Tribe’s participation. That limitation is not merely in terms of the quantity of evidence presented or preventing duplication of evidence, but a limitation which denies the Tribe its right to participate to the full extent of its interests by, first, actually prohibiting the Tribe from participating with respect to its express interest in the proposed routes crossing its Service Areas and, second, by impossibly limiting the Tribe’s presentation with respect to “social and cultural issues” through refusing it a competent witness and presenting evidence that can speak to the unique culture, history and interests of the Tribe separately from those unique interests of the Yankton Sioux Tribe.

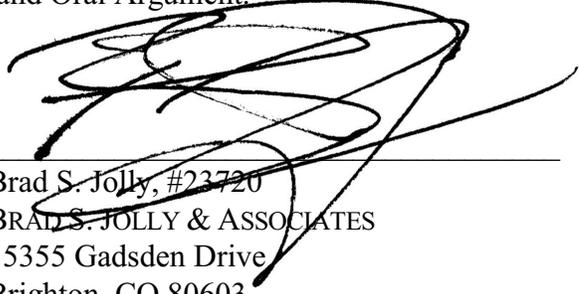
12. “To be valid, the action of the agency must conform to its rules which are in effect at the time the action is taken, particularly those designed to provide procedural safeguards for fundamental rights.” *Id.*, 284 N.W.2d at 12. The Order’s limitation of the Tribe’s participation does not conform to the Commission’s rules and, therefore, is not valid.

13. It is true that an agency is permitted to deviate from its rules under certain circumstances. But, the Order is not a lawful deviation. In this case, the Order asserts that the limitations on the Tribe’s presentation is to aid the Commission with the “truncated timeframe of this proceeding” and “maintaining an orderly proceeding.” While aiding an agency with its decision-making can, in some cases, constitute an appropriate justification for deviating from agency rules, it is not permitted when the deviation causes substantial prejudice to a party. *Application of Jantzen*, 511 N.W.2d 504, 514, 245 Neb. 81, 94 (Neb., 1994) (citing *American Farm Lines v. Black Ball*, 397 U.S. 532, 90 S.Ct. 1288, 25 L.Ed.2d 547 (1970)). As discussed, the Order actually prohibits the Tribe from participating with respect to part of its actual interest in the proceeding and prevents the Tribe from being able to fully and adequately participate with respect to the “social and cultural issues” to which the Order limits the Tribe. Such limitations are extremely prejudicial to the Tribe and violate its rights as a formal intervenor. Consequently, any deviation from the rule entitling the Tribe to fully participate to the extent of its interests is an abuse of discretion.

14. The Tribe understands the Commission’s concerns with respect to timeframes, agency economy and preventing duplication of testimony and evidence and will work with other parties to avoid duplication and assist with efficiency. However, the Tribe must be allowed to participate and present evidence related to all issues of interest to it identified in its Petition and permitted to present sufficient evidence and witnesses as well as its own brief in order to ensure that its interests unique from other parties, including the Yankton Sioux Tribe, are actually presented.

WHEREFORE, the Ponca Tribe of Nebraska respectfully requests that the Commission revise the March 31, 2017 Order with respect to limiting the Tribe participation in the proceedings and grant the Tribe's request for a Briefing Schedule and Oral Argument.

Dated: April 12, 2017



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## CERTIFICATE OF SERVICE

A COPY of the foregoing **MOTION TO RECONSIDER ORDER ON FORMAL INTERVENTION PETITIONS AND SUPPORT FOR OTHER PARTIES' MOTIONS TO RECONSIDER** was served by electronic mail this 12th day of April, 2017 to the following:

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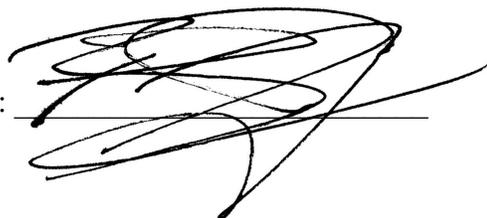
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