Rehraska Public Service Commission

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August 2, 2017

CERTIFICATION

To Whom It May Concern:

I, Michael G. Hybl, 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 2nd day of August 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, this2nd day of August 2017.

Sincerely,

Michael G. Hybl Executive Director

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MGH:da

Enclosure

cc:

Service Lists: U.S. Mail and Email



BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application) Application of TransCanada Keystone Pipeline,)
L.P., Calgary, Alberta, seeking) ORDER Gapproval for Route Approval of the DENYING Keystone XL Pipeline Project) OBJECTI Pursuant to the Major Oil Pipeline) STRIKE Siting Act.

) Application No. OP-0003
)
) ORDER GRANTING IN PART,
) DENYING IN PART,
) OBJECTIONS AND MOTIONS TO
) STRIKE DIRECT TESTIMONY
)
) Entered: August 2, 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").

On March 31, 2017, the Hearing Officer entered orders granting petitions for formal intervention. 1 Formal Intervention was granted to 95 landowners along the proposed route of the pipeline, all represented by The Domina Law Group PC LLO ("Landowner Intervenors"). Formal interventions limited to areas of stated interest were also granted to 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"), the Ponca Tribe of Nebraska ("Ponca") and the Yankton Sioux Tribe of South Dakota ("YST") (collectively "Tribes"), and Bold Alliance ("Bold"), the Sierra Club, Nebraska Chapter ("Sierra Club") and 36 other with natural individuals expressing concerns resources/environmental issues.

On April 5, 2017, the Hearing Officer entered an order adopting a case management plan ("CMP") and giving notice of the public hearing in the above-captioned docket.

On July 24, 2017, prehearing motions seeking to strike certain portions of direct pre-filed testimony and other prohibitions on subject matter discussed by witnesses were filed by TransCanada and Landowner Intervenors. Landowner Intervenors also file a Motion for Specific Findings of Facts. Various parties filed written Responses to the prehearing motions

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 $^{^{1}}$ Petitions for informal intervention were also granted in the March 31, April 5, and July 26, 2017 Orders

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A Prehearing Conference was held on July 31, 2017, and arguments made to the hearing officer on all the outstanding motions.

OPINION

I. Objections to Prefiled Testimony

A. Preface

TransCanada filed specific objections to the prefiled testimony of the Landowner Intervenors, Michael J. O'Hara, Lorne Stockman, Joseph P. Suntum, Sean Sweeney, Thomas Hayes, Joseph Trungale, Paul Johnsgaard, Shannon Wright, Jason Cooke and Wrexie Bardaglio. No other Party filed specific objections to the prefiled testimony of any other party. Arguments on TransCanada's objections were made in writing and at the prehearing conference.

In previous orders issued in the proceeding, the Commission has concluded that its authority under the Siting Act is limited. As a preface to my evidentiary rulings I repeat the following from an order issued on June 14, 2017, as it sets the basis from which my evidentiary rulings follow.

"The Siting Act specifically prohibits the Commission from considering safety considerations including the risk of spills and leaks and therefore any data on the subject is clearly outside the scope of this proceeding."

"The Siting Act deals exclusively with the route of the proposed KXL pipeline and does not direct or permit the Commission to conduct a need and necessity analysis. The decision regarding need and necessity for an interstate pipeline is not within the purview of a State Commission, but is a Federal decision."

"[D]ocuments regarding condemnation proceedings initiated by the Applicant in 2015 that were subsequently withdrawn are irrelevant to the Commission determination regarding the pipeline route in the current proceeding."

"[T]he specific energy needs of the State of Nebraska is outside the scope of the Siting Act."

"The finite capacity of the Alberta tar sands is also outside the scope of the Siting Act."

"The negotiations that occur between private individuals and the [Applicant] are not under the purview or authority of the Commission."

"[A]ny analysis regarding potential terrorist attacks [is] highly speculative."

"[I]nformation . . . regarding the easement terms is clearly within the domain of the county courts and it is not within the Commission's authority to make judgments regarding the legal terms within a contract between two private entities."

B. Objections to the testimony of the Landowner Intervenors

TransCanada's objections to testimony regarding the Landowner Intervenors' interactions with representatives of TransCanada in the months preceding and during the 2015 condemnation proceedings, including terms of any proposed agreements as well as their perceptions of TransCanada's attitude and behavior towards them are sustained.

TransCanada's objection to testimony concerning the 2015 Federal lawsuit filed by Magellan Midstream Partners is sustained

TransCanada's objection to the Landowner Intervenor's opinion that the preferred pipeline route or any other route is not in the public interest is sustained. The objection to testimony regarding the reasoning for those opinions is also sustained.

TransCanada's objection to the Landowner Intervenors' testimony concerning the value of their land, including if it were to be leased or sold, is overruled.

TransCanada's objection to testimony regarding the risk or impact of pipeline leaks or spills is sustained. This does not preclude testimony of soil or water damage from construction of the pipeline or from some other source related to the pipeline's construction or maintenance.

TransCanada's objections to testimony regarding whether the Landowner Intervenors, or anyone of their acquaintance, owns products they would like to ship in the pipeline is overruled.

TransCanada's objections to testimony regarding the potential restrictions on the development or use of Landowner Intervenors' land related to the existence of a pipeline on such property is overruled.

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TransCanada's objection to the testimony relating to the Landowner Intervenors' opinion of TransCanada's arguments in favor of the preferred route is sustained.

TransCanada's objection to Jeanne Crumly's testimony at 2:15-17 and 24:7-19 is overruled. The foundational objection at 33:3-7, 33:14-18 and 36:12-18 are sustained. Landowner Intervenors are given leave to elicit additional direct testimony at the hearing to address this objection.

TransCanada foundational objection to Patricia Grosserode's testimony at 28:9-11 is sustained. Landowner Intervenors are given leave to elicit additional direct testimony at the hearing to address this objection.

TransCanada's objection to Lloyd Hipke's testimony at 4:25-27 and Vencille Hipke's testimony at 4:28-5:3 is overruled as to the first sentence of the answers and sustained as to the second. The objections on the basis of foundation of Lloyd Hipke's testimony at 5:23-28 and 7:11-19 and Vencille Hipke's testimony at 5:27-6:4 and 7:17-25 are sustained. Landowner Intervenors are given leave to elicit additional direct testimony at the hearing to address this objection.

TransCanada's foundational objections to the testimony of Robert Krutz found at 20:1-3 and 27:26-28:5 is sustained. Landowner Intervenors are given leave to elicit additional direct testimony at the hearing to address this objection.

TransCanada's foundational objections to the testimony of David Loseke at 20:16-18; 25-26 and 28:12-14; 21-22 is sustained. Landowner Intervenors are given leave to elicit additional direct testimony at the hearing to address this objection.

TransCanada's foundational objections to the testimony of Ann and Richard Pongratz found at 27:24-25 is sustained. Landowner Intervenors are given leave to elicit additional direct testimony at the hearing to address this objection.

TransCanada's foundational objection to the testimony of Kenneth Prososki at 27:19-20 is sustained. Landowner Intervenors are given leave to elicit additional direct testimony at the hearing to address this objection.

TransCanada objection on the basis of foundation to the testimony of Richard Stelling at 28:9-10 is sustained. Landowner Intervenors are given leave to elicit additional direct testimony at the hearing to address this objection.

TransCanada's foundational objection to the testimony of Gregory Walmer at 29:12-21 is sustained. Landowner Intervenors are

given leave to elicit additional direct testimony at the hearing to address this objection.

TransCanada's objection on the basis of foundation to the testimony of Bonnie Kilmurry on page 20 is sustained. Landowner Intervenors are given leave to elicit additional direct testimony at the hearing to address this objection.

TransCanada's foundational objection to the testimony of Art Tanderup at 20:13-20 and Helen Tanderup at 20:2-9 is sustained. Landowner Intervenors are given leave to elicit additional direct testimony at the hearing to address this objection.

TransCanada's objection on the basis of foundation to the testimony of Bob Allpress found at 29:3-19 and 30:14-21 are sustained. Landowner Intervenors are given leave to elicit additional direct testimony at the hearing to address this objection.

TransCanada's foundational objection to the testimony of Karen Berry at 2:16-19 and Seth Davis at 2:10-13 is sustained. Landowner Intervenors are given leave to elicit additional direct testimony at the hearing to address this objection.

TransCanada's objection on the basis of foundation to the testimony of Lonnie and Sandra Breiner, found in both parties' testimony at 20:1-6 is overruled as to the first sentence and sustained as to the remainder. Landowner Intervenors are given leave to elicit additional direct testimony at the hearing to address this objection.

TransCanada's foundational objection to the testimony of Jerry and Charlayne Carpenter found in both parties' testimony at 28:8-18 and 29:2-3; 7-8 is sustained. Landowner Intervenors are given leave to elicit additional direct testimony at the hearing to address this objection.

TransCanada's objection on the basis of foundation to the testimony of Tammy Cheatum at 2:26-27 is sustained. Landowner Intervenors are given leave to elicit additional direct testimony at the hearing to address this objection. TransCanada's objection to Ms. Cheatum's testimony at 27:28-28:3 is sustained.

TransCanada's foundational objections to the attachments to the direct testimony of the Dunavans, Kilmurrys, Steskals, and Tanderups are sustained. Landowner Intervenors are given leave to elicit additional direct testimony at the hearing to address this objection.

TransCanada's objections to the entirety of testimony of Lori and JB Collins, Galen Heckenliable, Randy Thompson, Lorne Stockman

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and Joseph Suntum are sustained. With respect to the testimony and attachments of Sean Sweeney and Michael O'Hara, the Commission will disregard any portion which deals with (i) pipeline safety including the risk or impacts of leaks and spills, (ii) the need and necessity for the pipeline, (iii) eminent domain, and (iv) easement terms and negotiations between the Applicant and landowners.

With respect to the standalone exhibits that Landowner Intervenors intend to offer, but do not discuss in their prefiled testimony, any such exhibits or portions thereof, that relate to the risk or impact of spills from operation of the pipeline, eminent domain, including easement terms or the negotiation thereof, and necessity of the pipeline are not relevant and the objections thereto are sustained. Statements made by representatives of TransCanada during the legislative process to enact the Siting Act may be offered as admissions against interest and may be used for impeachment purposes. Any additional objections to these exhibits are overruled.

C. Objection to testimony of Wrexie Bardaglio

Ms. Bardaglio conceded all but one of TransCanada's objections and they will be sustained. Ms. Bardaglio disagrees with TransCanada's argument that testimony regarding the availability of water in the Athabasca River used in the production of tar sands oil in Alberta Canada is irrelevant. I find the testimony regarding the Athabasca River to be irrelevant and TransCanada's objection is sustained.

D. Objections to the testimony of Shannon Wright and Jason Cooke

TransCanada's objection to testimony of Jason Cooke and Shannon Wright regarding the risk or impact of pipeline spills or leaks is sustained. This does not preclude testimony of soil or water damage from construction of the pipeline or some other source related to the pipeline's construction or maintenance.

The objections to questions 45 and 46 in Shannon Wright's testimony are overruled. Wright's position as the Ponca Tribe's Historical Preservation Officer provides sufficient foundation to permit an answer to this question. This is a question of weight rather than admissibility. TransCanada's objection to the Wrights' opinion testimony that any route is, or is not, in the public interest is sustained.

TransCanada's objection on the basis of foundation to Cooke's testimony regarding "man camps" is sustained. YST is given leave to offer additional direct testimony at the hearing to address this objection.

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E. Objections to the testimony of Thomas Hayes, Joseph Trungale, Jr. and Paul Johnsgard

TransCanada's objection to testimony of Hayes, Trungale Jr. and Johnsgard regarding the risk or impact of pipeline spills or leaks is sustained. This does not preclude testimony of soil or water damage from construction of the pipeline or some other source related to the pipeline's construction or maintenance.

TransCanada's objection to the opinion testimony that any route is, or is not, in the public interest is sustained. TransCanada's objection to Hayes' testimony at 13:29-14:8 is overruled.

TransCanada's foundational objection to Hayes' testimony at 13:17-22 is sustained. Bold and Sierra Club are given leave to offer additional direct testimony at the hearing to address this objection.

TransCanada's objection on the basis of foundation to Johnsgard's testimony quantifying the economic benefits derived from tourism related to whooping cranes is sustained. Bold and Sierra Club are given leave to offer additional direct testimony at the hearing to address this objection.

II. Landowner Intervenor's Motion for Specific Findings on Identified Issues of Fact and Law

The final order of the Commission in this proceeding will contain its findings and conclusions as required by applicable statutes. To the extent this motion requests more, it is denied.

III. TransCanada's Nine Point Motion in Limine

Regarding paragraphs 1-3, the parties shall offer the prefiled direct testimony of their witnesses without additional oral testimony except where they have been permitted to ask questions in response to a foundational objection which was sustained. If a party wishes to cross-examine a witness, that witness shall be called and sworn for cross-examination. Cross-examination shall be limited to the scope of a witness's direct testimony and redirect shall be limited to the scope of cross-examination. There will be no re-cross. Without good cause shown, no witness that did not submit pre-filed written testimony pursuant to the CMP shall be permitted to testify at the hearing. Except for good cause shown, no exhibit will be received into evidence that was not previously listed on a party's exhibit list. To the extent TransCanada's motion is consistent with the forgoing it is granted, to the extent it is not it is denied.

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Regarding paragraphs 4-8, the Hearing Officer will rule on objections at the hearing, not before. This portion of the motion is denied.

Regarding paragraph 9, any party intending to offer exhibits that are confidential pursuant to a protective order agreed to by the parties, is to notify the Hearing Officer beforehand so as to avoid public disclosure of such confidential information. This portion of the motion is granted.

IV. TransCanada's Motion in Limine

This motion asks that the Hearing Officer prohibit cross-examination of witnesses by parties with aligned interests. The point of the motion is to prohibit parties from using cross-examination to elicit evidence which should have been provided in the pre-filed direct testimony. TransCanada also asserts that granting the motion will prevent cross-examination of witnesses by parties on matters beyond the scope of their limited intervention. The Hearing Officer finds that the procedures and rules of evidence discussed in the prehearing conference and reflected in the rulings set forth in III above are sufficient to meet these concerns. The motion is denied.

V. First Amended Landowner Intervenors' Motions in Limine

With respect to paragraph 1.1, regarding other lawsuits in which Landowner Intervenors have been involved, the motion is sustained, except where such evidence may be offered for impeachment purposes.

Paragraphs 1.2 through 1.5 are denied.

With respect to paragraphs 1.6 and 1.7, both are addressed in the procedures set forth in III above. To the extent Landowner Intervenors' motion is consistent with paragraph [G] it is granted, to the extent it is not, it is denied.

With respect to paragraphs 1.8 through 1.18, in the absence of specific objections to the testimony and exhibits TransCanada intends to offer, the motions are denied. That said, the Commission's rulings set forth in section I(A) above apply to the evidence offered by all parties, including TransCanada. If the Applicant's answers to interrogatories are different from those in its direct testimony, that is a matter for impeachment. Objections made to testimony elicited on cross-examination and re-direct will be ruled upon at that time.

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Application No. OP-0003

ORDER

IT IS THEREFORE ORDERED by the Hearing Officer that the Prehearing Motions are hereby granted in part and denied in part as found herein.

ENTERED AND MADE EFFECTIVE at Lincoln, Nebraska this 2^{nd} day of August, 2017.

BY:

Judge Karen B. Flowers (ret.) HEARING OFFICER

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