

Nebraska Public Service Commission

**Application No: OP-003
(Filed 2/16/17)**

In the Matter of the Application

of

TransCanada Keystone Pipeline LP

For the Keystone XL Pipeline Project, Pursuant to *MOPSA*

Applicant,

and

Bold Alliance and Sierra Club,

Intervenors

Sierra Club and Bold Alliance Post Hearing Brief

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BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application of) **Application No. OP-0003**
TransCanada Keystone Pipeline, LP, for route)
approval of the Keystone XL Pipeline Project) POST HEARING BRIEF OF FORMAL
pursuant to the Major Oil Pipeline Siting Act) INTERVENORS BOLD ALLIANCE AND
) SIERRA CLUB

Bold Alliance (Bold) and Sierra Club, Nebraska Chapter (Sierra Club) by and through their attorney of record, Kenneth C. Winston, hereby jointly provide the following trial brief in this matter. This brief is subject to continuing objections as set forth in written filings and oral motions and submission of this brief does not waive any of those objections.

INTRODUCTION

TransCanada’s application for route approval for the Keystone XL pipeline across Nebraska should be denied for reasons that are both fundamental and numerous. Fundamental reasons include: (1) TransCanada has failed to meet its burden of proof; (2) The application is not in the public interest because it would violate private property rights and irretrievably impact natural resources, including native grasses and the endangered whooping crane; and (3) The siting statutes and process violate the constitutional rights of intervenors and the public.

I. TRANSCANADA HAS FAILED TO MEET ITS BURDEN OF PROOF

The Public Service Commission (“PSC”) is not a statutorily created state agency; rather, it is an independent regulatory body for common carriers created by the Nebraska Constitution.¹ Under Article IV, Section 20, the Nebraska Legislature can restrict the PSC’s plenary powers over common carriers through specific legislation. *See State ex. rel. Spire v. Northwestern Bell Tel. Co.*, 233 Neb. 262, 445 NW2d 284 (1989). The Nebraska Legislature has constrained the

¹ Article IV, Section 20 (“These shall be a Public Service Commission ...the powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the Legislature may provide by law...”).

PSC's powers by enacting the Major Oil Pipeline Siting Act ("MOPSA"), Neb. Rev. Stat. 57-1401 through 57-1413. Under MOPSA, the pipeline carrier has the burden to establish that the proposed route of a major oil pipe would serve the public interest. Neb. Rev. Stat. 57-1407.

In determining whether the applicant has met its burden, the Commission is required to evaluate a number of pieces of evidence, including: **evidence** of the impact due to intrusion upon natural resources; **evidence** regarding the irreversible and irretrievable commitment of land areas and connected natural resources and the depletion of beneficial uses of nature resources; **evidence** of methods to minimize the potential impacts of the major oil pipeline to natural resources; and **evidence** regarding the economic and social impacts of the major oil pipeline. Neb. Rev. Stat. 57-1407 (emphasis added).

The key word here is "evidence." In order to find that the applicant has met its burden of proof in establishing that the pipeline route is in the public interest, the PSC must be able to point to specific factual evidence the applicant has presented during the course of the administrative hearing.

TransCanada has failed to meet its burden of proof in this case, and thus its application should be denied. *See, e.g., Application of Red Carpet Limousine Serv., Inc.*, 221 Neb. 340, 344 (1985) (finding applicant before the PSC failed to meet its burden of proof necessary to establish public convenience and necessity). TransCanada's application is largely vague and generic, and much of what it presented in the hearing was not factual evidence at all; rather, the direct testimony of TransCanada's witnesses primarily consisted of recitations that the witness was responsible for certain sections of the application.

Tony Palmer, whose position and authority related to the applicant was unclear, led a parade of witnesses who repeatedly indicated they did not know the answers to basic questions

about sections of the application, as well as repeated responses passing the buck to someone else. On more than 50 occasions in the proceeding, TransCanada witnesses responded with some variation of “I can’t answer that” or “I don’t know” when questioned about sections of the application the witness supposedly prepared. *See* testimony of TransCanada witnesses August 7, 2011 and August 8, 2011. At least four witnesses referred to Meera Kothari as the person who could answer questions about sections of the application, but when asked about those sections, Kothari repeatedly responded that she was not the person to answer those questions, meaning significant details of the application were never addressed during the course of the hearing. Pp. 656 to 658.

In one of the most significant responses demonstrating TransCanada’s failure to meet its burden of proof, Palmer testified that he did not know the property descriptions of the proposed route of the pipeline, meaning there is no description of the exact route of the pipeline. Transcript p. 105, line 24 to p. 106, line 7, and p. 106, line 21 to p. 107, line 11. No other witness provided evidence regarding the exact route of the pipeline. This is significant for several reasons. First, the entire purpose of this proceeding is to determine whether a particular route for the Keystone XL tar sands pipeline is in the public interest and should be approved. It is impossible for the Commission to approve make that determination if it does not know the specific location of the route. Second, it is impossible to know the natural resources impacts that will be caused by a proposed route without knowing its exact location, since the impacts may vary widely within a range of a few hundred feet, including impacts on soils, wildlife and water resources.

The Commission’s rule on probative evidence is as follows: “Rule 016.01 General: Evidence which is admissible in civil actions under the Revised Statutes of Nebraska will be admissible before the Commission. While the Commission will not be bound to follow the

technical rules of evidence, the record will be supported by evidence which possesses probative value commonly accepted by reasonable men in the conduct of their affairs.”

The Administrative Procedures Act in Nebraska² provides a similar description related to the kind of evidence an agency can consider when making a determination. Neb. Rev. Stat. Section 84-914 (1) states that an agency may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs, and must exclude incompetent, irrelevant, immaterial and unduly repetitive evidence. Neb. Rev. Stat. Section 84-914(3) states that all evidence including records and documents in the possession of the agency of which it desires to avail itself shall be offered and made a part of the record in the case.

Here, TransCanada failed to present sufficient probative evidence to meet its burden. Instead, it made numerous assertions without factual support or offered testimony that simply was not true. The PSC cannot rely on any assertion which is not supported by relevant and admissible underlying facts in making its public interest determination. TransCanada is relying on evidence which does not have probative effect because it is not of the type that reasonably prudent people accept and rely on in the conduct of their affairs.

The Nebraska Supreme Court has rejected applicants’ attempts to present unsubstantiated testimony like TransCanada is attempting here. For example, the case of *County of Sioux v. State Board of Equalization*, 185 Neb. 741, 178 NW2d 754 (1970) involved an appeal from the action of the State Board of Equalization and Assessment ordering increases of assessed valuations in several counties. In discussing the witnesses, the Court stated:

² The Administrative Procedures Act applies to the Public Service Commission by definition. "As used in sections 84-901 to 84-916: (1) Agency shall mean each board, commission, department, officer, division, or other administrative office or unit of the state government authorized by law to make rules...." Neb. Rev Stat. § 84-901 (Reissue 1981).

He was asked if the basic data upon which he based his judgment decisions was available. He stated that the decisions involved a tremendous amount of material, and that he did not have the material with him. There would be absolutely no way in this record to determine the basis on which those decisions were made.

Id.

The Court concluded: “Clearly, none of this evidence can be used to sustain the action of the state board. To do so would be a clear violation of the Nebraska Administrative Procedures Act, section 84-914(3).” *Id.*

Similarly, if the PSC were to rely on untrue or unsupported statements from TransCanada, that reliance would also violate the rules cited above.

The testimony of Jon Schmidt is especially significant because he is the witness charged with environmental analysis regarding the proposed route and proposed route alternatives, which are central aspects of this process. His testimony contains numerous errors, fails to provide necessary documentation and is misleading in several aspects. The following is a list of general errors and misleading testimony from Schmidt:

(1) When confronted by testimony from Bold and Sierra Club’s witness Dr. Thomas Hayes that the bullet points on pages 8 and 61 of the application disclose there is a greater number of miles of endangered species range in the preferred route than in the mainline alternative, he responded by claiming that they meant “the number of ranges.” Rebuttal testimony of Jon Schmidt, p. 1, lines 10-14, p. 2, lines 15-17. The Application uses the word “ranges”, not number of ranges. The term “species range” is defined as the “area in which a species may be found.” National Geographic Society, 2017. A standard rule of construction requires a document to be strictly construed against its maker. In this case, TransCanada cannot use a term which is relied upon by the public and intervenors to be consistent with ordinary

definitions and when challenged, claim it means something else. Rebuttal Testimony, p.1, lines 10-13, p. 6, lines 115-116.

(2) When confronted by testimony from Dr. Hayes regarding the fact that Table 2-1 of the application shows more miles of erodible soils on the preferred route than on the mainline alternative, Schmidt asserts that the chart is “incomplete”. This is an incorrect characterization. “Incomplete” implies that there were numbers missing from the document, when in fact all the cells in the table were complete. He uses the word “incomplete” several times, which is both incorrect and misleading. P. 2, line 19, p.6, line 122. He also uses the word “clarifications” in referring to the errors in the application, rather than acknowledging the errors.

(3) Schmidt’s explanation regarding the inaccurate information in Table 2-1 is that the information was only partially downloaded. There is no documentation for this statement, and thus nothing to support it. There is likewise no documentation of the source of the information used to “correct” the data, so neither the PSC nor the Intervenors have any method of determining whether the new data is correct.

(4) During cross-examination, Schmidt asserted that the Northern High Plains Aquifer extended all the way to Texas, which is erroneous, since it is primarily in Nebraska. P. 574, lines 8-25.

(5) Schmidt made several erroneous statements about the whooping cranes, which are specifically addressed in a later section of this brief.

(6) Schmidt asserted that this route is the result of years of effort by many people and agencies. Rebuttal p. 11, lines 223 and 224. Yet there were errors which were pointed out by Bold and Sierra Club’s witnesses that required correction, as noted above. In response to the corrections described above, Schmidt adds several pages that he states are the result of

subsequent investigation in response to issues raised by Bold and Sierra Club's witnesses. This hardly sounds like the work of an applicant which has considered all the necessary ramifications of its proposed route on natural resources.

(7) In February 13, 2017, Schmidt swore that the facts set out in sections 2.1, 3, 13, 16, 17, and 18 were true and accurate. On July 17, 2017 TransCanada filed an 18 page sworn statement from Schmidt accompanied by a 326 page amendment to the application making changes to the facts Schmidt swore were true in February. Confronted with dueling sworn statements from the same witness, the PSC must disregard both statements and the underlying provisions of the application.

The lack of evidence concerning aquifers is especially significant. There is nothing in the Application regarding aquifers and no witness testified about the relationship between the proposed route and aquifers. Since MOPSA has specific findings regarding the value of water (Neb. Rev. Stat. section 57-1403(2) and its benefit to the agricultural economy in Nebraska, (Neb. Rev. Stat. section 57-1403(4), this omission further shows that TransCanada has failed to meet its burden of proof.

An agency decision must be supported by competent evidence, and can be neither arbitrary, capricious, nor unreasonable. A decision is arbitrary when it is made in disregard of the facts or circumstances and without some basis that would lead a reasonable person to the same conclusion. *Southeast Rur. Vol. Fire Dept. v. Neb. Dept. of Revenue*, 251 Neb. 852, 560 N.W.2d 436 (1997). An action taken by an administrative agency in disregard of the facts or circumstances of the case and without some basis which would lead a reasonable and honest person to the same conclusion is arbitrary and capricious as a matter of law. *See Wagner v. City of Omaha*, 236 Neb. 843, 464 N.W.2d 175 (1991).

The record on its face must reflect an adequate basis from which the PSC can base its decision. *See In re Application of Northwestern Bell Tel. Co., supra*. Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Neb.Rev.Stat. § 27-401 (Reissue 1989); *State v. Wood*, 245 Neb. 63, 511 N.W.2d 90 (1994); *State v. Schrein*, 244 Neb. 136, 504 N.W.2d 827 (1993) *In re Application of Renzenberger*, 225 Neb. 30, 402 NW2d 294 (1987) in which the Nebraska Supreme Court set aside a PSC order because the PSC had relied on witnesses who knew nothing about the question before the PSC, and who failed to offer any evidence that would support its finding, stands for the proposition that an agency's decision is considered arbitrary when it is against the weight of evidence.

While considering the burden of proof, the PSC is also required to make the “public input part of the record” from the “public meetings” conducted on four occasions pursuant to Neb. Rev. Stat. section 57-1407(2). The Commission has stated that the record of such proceedings will be weighed in its determining whether the proposed route is in the public interest. *See* Hearing Officer Order, July 12, 2017. Although Bold and Sierra Club are not aware of any official tally of witnesses, the fact that the overwhelming majority of witnesses at each public meeting opposed the proposed pipeline route needs to be weighed in this process, with approximately 70 percent opposing the proposed route at each meeting. The fact that almost all the opponents were Nebraska residents who were not being compensated for their time or testimony also means this input deserves additional weight. On the other hand, many of the witnesses supporting the application were not Nebraska residents and were being compensated for their time and participation, which provides a basis for a bias in their testimony.

In addition, there were hundreds of thousands of comments submitted in writing and online. Once again, in the absence of an official tally of comments, Bold and Sierra Club rely on witness input in which their organizations were involved. For example, on August 10, 2017 Bold and Sierra Club participated in the delivery of petitions with more than 450,000 signatures opposing the proposed pipeline and its proposed route. The order of July 12, 2017 states that this input will also be considered. Based on the lack of probative evidence supporting the application and the weight of evidence opposing it, the Public Service Commission should deny the application.

II. TRANSCANADA’S APPLICATION SHOULD BE DENIED BECAUSE PROPOSED TRANSMISSION LINES POSE A THREAT TO THE ENDANGERED WHOOPING CRANE

Both Nebraska and federal law recognize that it is in the public interest to protect endangered species. The proposed Keystone XL route represents a clear threat to the endangered whooping crane. Therefore, it is in the public interest to deny TransCanada’s application.

Multiple statutory provisions set forth the policy of the State of Nebraska regarding endangered species, including the following:

The Legislature finds and declares: (1) That it is the policy of this state to conserve species of wildlife for human enjoyment, for scientific purposes, and to insure their perpetuation as viable components of their ecosystems; (2) That species of wildlife and wild plants normally occurring within this state which may be found to be threatened or endangered within this state shall be accorded such protection as is necessary to maintain and enhance their numbers; (3) That this state shall assist in the protection of species of wildlife and wild plants which are determined to be threatened or endangered elsewhere pursuant to the Endangered Species Act by prohibiting the taking, possession, transportation, exportation from this state, processing, sale or offer for sale, or shipment within this state of such endangered species and by carefully regulating such activities with regard to such threatened species.

Neb. Rev. Stat. §37-803 (Legislative intent).

The Legislature hereby declares that nongame, threatened, and endangered species have need of special protection and that it is in the public interest to preserve, protect, perpetuate, and enhance such species of this state through preservation of a satisfactory environment and an ecological balance.

Neb. Rev. Stat. §37-804 (Legislative declarations).

(8) With respect to any endangered species of wildlife, it shall be unlawful, except as provided in subsection (7) of this section, for any person subject to the jurisdiction of this state to: (b) Take any such species within this state.

Neb. Rev. Stat. §37-806 (Endangered or threatened species; how determined; commission; Powers and duties; unlawful acts; exceptions; local law, regulation, or ordinance; effect).

The record in this case contains unrebutted testimony from Dr. Paul Johnsgard, one of the world's leading experts on whooping cranes, that the proposed route represents a threat to the endangered whooping crane. As the author of more than 85 books, 10 of which were written specifically on cranes, Dr. Johnsgard has expertise "pertinent to the impacts of proposed route of the Keystone XL pipeline on cranes" NR-1. P. 2, lines 13-14. Dr. Johnsgard sets forth some of the threats to whooping cranes in his direct testimony:

Q. Based on your research, study and knowledge of this issue, is it your opinion that the proposed route of the Keystone XL pipeline would lead to the loss of whooping cranes?

A: Yes. Given the location of the Project in the crane migration corridor and the increased risk of collisions from the number of planned power lines, the loss of whooping cranes over the 50-year lifespan of the Project is likely.

Q: If whooping cranes were killed by collisions from power lines constructed along the Keystone XL route, what would be the impact on the species as a whole?

A: The loss of even a few, and even one, breeding adult could jeopardize the continued existence of this protected species. This is an unacceptable risk to this iconic species.

NR-1, p. 8, lines 1-9.

Dr. Johnsgard further discussed his concerns during live testimony:

"So the loss of a single bird from a pair is, to my mind, at least, will reduce the population by a percent, if you will. And so that doesn't sound like a lot, but these

are birds that every breeding pair takes at least five, sometimes more years to become a breeding pair.”

Testimony vol. 9, p. 1012, lines 15- 21.

“So they are valuable from the standpoint of not only that particular individual but the prospects—I’m sorry—the prospects of adding to the population.”

Testimony vol. 9, p. 1012, lines 24-25 and p. 1013, lines 1-2.

“Of all the known threats to whooping cranes, collisions with power lines are the primary cause of mortality. Indeed, the principal recovery strategy for whooping cranes is to augment and increase the wild population by reducing threats, including the potential for power line collisions. Yet, the Keystone XL Project would dramatically increase the number of power lines within the central migration corridor *in areas where whooping cranes would be roosting and feeding*, and thereby significantly increase the threat of mortality from collisions.” (emphasis added).

NR-1 p.7 lines 9-15

Almost the entire proposed route, more than 250 miles, crosses the migration corridor for the whooping cranes through Nebraska. NR-6 and Application Table 2.1. Approximately 70 miles of new transmission lines for pumping stations would be constructed within the migration route. Exhibit B, amendment to Application, p. 18. NR-6 uses telemetry data to demonstrate that there are proposed transmission lines in areas where whooping cranes roost and feed. The proposed transmission lines would be a particular danger to cranes because they are usually at approximately the same height the cranes fly to the next feeding area. Testimony, p. 1000, lines 22-25, p. 1001, lines 1-8.

A leading whooping crane expert from the US Fish and Wildlife Service, Thomas Stehn, who focused his career on whooping cranes, concurs with Johnsgard’s concerns: “Collision with power lines is the greatest known source of mortality for fledged whooping cranes.” NR-7, Stehn and Wassenich (2008), pg 1, lines 4-5. Stehn goes further to say that whooping cranes, in

particular, are more likely to strike power lines than sandhill cranes, because their larger bodies cannot change course as quickly.

Dr. Johnsgard also described the enormous investment which has been made in helping the whooping crane climb back from the brink of extinction, including the Platte River Recovery project and millions of dollars invested in habitat protection. This has enabled the whooping crane to increase from 16 birds in 1941 to approximately 350 today. However, this is still far from the numbers needed for the species to be viable on a long-term basis.

Dr. Johnsgard also discusses the powerful negative impact that the loss of whooping crane as a species would have on society: “It would be a devastating blow to the millions of people who care about this beautiful and majestic bird. It would be an incredible loss to scientists, conservationists, and bird-lovers.” NR-1, page 9, lines 18-21.

The economic benefits of tourism related to the cranes are well known to all Nebraskans and the impacts of the loss of whooping cranes on that industry deserve consideration in this process as well.

The evidence of Bold and Sierra Club documenting the threat the Keystone XL pipeline poses to the endangered whooping crane population is based on testimony of renowned experts and supported by current official documents subject to peer review. In contrast, TransCanada’s attempts to rebut this evidence are based on testimony that is either inaccurate, undocumented or out of date. TransCanada’s principal witness in this misguided effort is Jon Schmidt, who admitted to having no expertise on whooping cranes. Transcript p. 593, lines 18-22. His testimony reflects such a wide variety of errors, misleading statements and lack of understanding of the issues that it should either be disqualified entirely or used as a basis for rejecting TransCanada’s application.

Mr. Schmidt's erroneous and misleading statements related to the whooping cranes include the following:

(1) Mr. Schmidt stated: "Currently, it is estimated that approximately 20 miles of new power lines associated with the project will be added within the migratory corridor [within Nebraska]" Schmidt Rebuttal Testimony, P. 3, lines 45-46. However, page 18 of Exhibit B attached to his testimony indicates there will be 70 miles of new transmission lines. Schmidt later contradicted himself in his cross-examination testimony, where he agreed that there would indeed be 70 miles of transmission lines. Schmidt Cross Examination, p. 601, line 10.

(2) Mr. Schmidt states that the whooping cranes merely fly through Nebraska during its migratory journey. Rebuttal, p. 3, lines 57-58. This statement is erroneous and was rebutted by both Johnsgard's testimony and NR-5.

(3) Mr. Schmidt states there are 5,471 miles of power lines in the migratory corridor in Nebraska, but he provides no citation or support for that statement and thus it cannot be accepted. Rebuttal testimony P.3. The statement is misleading and irrelevant. The key issue is whether the power lines are located in areas where cranes roost and feed, but Mr. Schmidt provides no location data for the supposed 5,471 miles of power lines in the migratory corridor. This attempt to minimize the impact of transmission lines on whooping cranes by pointing to overall miles of power lines is analogous to arguing a traffic light isn't needed on a busy street in front of a school because there are thousands of miles of roads where people cross the street without traffic signals.

(4) Mr. Schmidt attempts to dismiss the telemetry data collected by the US Fish and Wildlife Service which is the basis of NR-5 and NR-6, stating: "that technology's only been around for, you know, maybe 10 years. So relying on almost 100 years' worth of data is still

much more reliable.” Schmidt Cross Examination, page 583, lines 3-7. That position is rebutted by Johnsgard’s testimony who states that telemetry data is “infinitely” better and includes “thousands and thousands of data points.” P. 1041, lines 10-12. It is also common sense, as reflected in Commissioner Rhoades’ questions of Dr. Johnsgard which confirmed that an electronic transmitter that is turned on all the time generates much more accurate data than chance observations from individuals. Mr. Schmidt’s assertion that the Fish and Wildlife Service has been collecting migration data on whooping cranes for 100 years is also incorrect, since, as noted by Dr. Johnsgard, the records related to whooping crane migrations begin in 1949.

(5) Mr. Schmidt attempts to minimize power line collision mortality rates in whooping cranes: “I just know in the biological assessment, the US Fisheries and Wildlife gave four factors for the Whooping Crane’s demise. And they didn’t put them in any order or hierarchy of which one’s worse than the others.” Schmidt Cross Examination, p 588, lines 4-8. This is contradicted by whooping crane experts Dr. Johnsgard and Thomas Stehn from the US Fish and Wildlife Service, who both agree it is the primary cause of mortality. See also NR-5.

(6) When questioned about the effectiveness of bird diverters, Schmidt was dismissive. When he was asked, “And so you think that a 40 percent chance of mortality is worth risking a species?” Schmidt’s response was: “I believe Fish and Wildlife have made that determination, yes.” Schmidt Cross Examination, p 593, lines 9-13.

TransCanada places a great deal of stock in the US Fish and Wildlife Opinion from December 2012. Although Bold and the Sierra Club also appreciate the Fish and Wildlife Service, this reliance is misplaced. The opinion is nearly 5 years old and relies on much older data, not utilizing any of the telemetry data cited in NR-5. This opinion, based on out of date

data, is not a reliable indicator of the threat that the transmission lines from the Keystone XL pipeline pose to the endangered whooping crane.

On the other hand, federal law appears to mandate a new consultation under Section 7 of the Endangered species act when new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered. 50 C.F.R. § 402.16. The new telemetry data appears to be “new information” which would require a new consultation, *i.e.*, a new biological opinion. Under the circumstances, the Public Service Commission should not rely on a five-year old opinion that does not comply with the requirements of federal law.

TransCanada also places great reliance on bird diverters to prevent collision deaths. However, Dr. Johnsgard says that diverters only prevent 50-60% of collisions, which is a huge margin considering how endangered the species is. Dr. Johnsgard states: “[E]nvironmental conditions such as fog and high winds as well nocturnal flight patterns would render them effectively meaningless at certain times. Most studies have found that bird diverters are around 50-60% effective and thus do not come close to eliminating the collision risks for whooping cranes” NR-1 p. 8, lines 16-19.

TransCanada offered no witness who had expertise on the issue of whooping cranes. Schmidt admitted that he actually had no expertise on whooping cranes. Transcript p. 593, lines 18-22. TransCanada also relies on the letter from the Nebraska Game and Parks Commission. That letter makes no reference to any state analysis related to whooping cranes and appears to rely on the actions and decisions of federal agencies. The Nebraska Public Service Commission has a duty to protect Nebraska, its people and its resources. It would be improper to rely on federal bureaucrats to protect our interests.

The Nebraska Supreme Court has cited the previous codifications of Neb. Rev. Stat. section 37-803 and section 37-804 quoted above with approval. *See Central Platte NRD v. City of Fremont*, 250 Neb. 252, 549 N.W. 2d 112 (1996). The court quoted the statute as follows: “it is in the public interest to preserve, protect, perpetuate and enhance such species through preservation of a satisfactory environment and ecological balance.” *Id* at 260. The Court continues by saying: “The Legislature’s determination of a public interest and corresponding statutes are not unreasonable, arbitrary, discriminatory or confiscatory.” *Id* at 261.

Based on these clear statements of this public policy and the public interest, the Public Service Commission has an obligation to deny the application. The Public Service Commission needs to heed the words of Dr. Johnsgard, “We need to reduce the threats to this magnificent bird, not increase them.”

III. THE NEBRASKA PUBLIC SERVICE COMMISSION SHOULD DENY TRANSCANADA’S APPLICATION BECAUSE IT IS NOT IN THE PUBLIC INTEREST

A public interest determination lies at the heart of the Commission’s mandate in evaluating whether TransCanada should be permitted to route its Keystone XL pipeline project through Nebraska. The Commission’s authority is rooted in Article IV, § 20 of Nebraska’s Constitution, which provides in part that:

“The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the Legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision.”

Nebraska’s courts have consistently found that the Commission “is empowered to, and was created with the intention that it would, regulate public utilities insofar as the powers and operations of such utility affect the public interest and welfare.” *In re Application No. 30466*,

194 Neb. 55, 56, 230 N.W.2d 190, 192 (1975). The Nebraska Supreme Court explained further, noting that:

“All the powers and jurisdiction of the Public Service Commission must be found within the constitutional provision creating it. This provision should not be construed so narrowly as to defeat its purpose. Rather, it should be liberally construed to effectuate the purpose for which the commission was created, which is primarily to serve the public interest.” *Id.*, at 63.

The Commission is charged with serving the public interest and its powers may only be restricted by specific legislation. *Thompson v. Heineman*, 289 Neb. 798, 832, 857 N.W.2d 731, 757 (2015). Although the provisions of MOPSA restricted the Commission’s authority to examine issues concerning pipeline safety and the risk of pipeline leaks or spills while ignoring the inherent contradiction between these restrictions and the Commission’s charge to evaluate the public interest, MOPSA still places a tremendous amount of authority in the hands of the Commission. The legislation provides that its purpose, in part, is to “[e]nsure the welfare of Nebraskans, including protection of property rights, aesthetic values, and economic interests; and [c]onsider the lawful protection of Nebraska’s natural resources in determining the location of routes of major oil pipelines within Nebraska ...” Neb. Rev. St. § 57-1402 (1) (a) & (b).

The Nebraska legislature followed the notion that “[d]etermination of issues of public convenience and necessity is one peculiarly within the province of Public Service Commission,” *Application of Kilthau*, 236 Neb. 811, 815, 464 N.W.2d 162, 166 (Neb. 1991), by providing the following basis for an approval:

“[t]he proposed route of the major oil pipeline is determined by the Public Service Commission to be in the public interest. The pipeline carrier shall have the burden to establish that the proposed route of the major oil pipeline would serve the public interest.” Neb. Rev. St. § 57-1407(4).

This specific provision of MOPSA is crucial because it unequivocally confirms the Commission’s role to make a public interest determination – and because it places the burden of

proof upon TransCanada to show that its proposed KXL pipeline project serves the public interest.

The Nebraska legislature attempted to give direction to the Commission in MOPSA by setting forth a number of factors to include the following:

- (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;
- (e) Whether any other utility corridor exists that could feasibly and beneficially be used for the route of the major oil pipeline;

Neb. Rev. St. § 57-1407(4)(a)-(e).

Since natural resources issues are described in detail herein, more information on these issues will not be added in this section. However, an application which seeks to grant eminent domain authority to a foreign for-profit entity which provides no access to its services to Nebraskans does not protect property rights. Based on the evidence in this proceeding and as set forth herein, TransCanada has failed to meet its burden of proof to show that its proposed route is in the public interest.

IV. THE KEYSTONE XLROUTE IS NOT IN THE PUBLIC INTEREST BECAUSE IT WOULD CAUSE IRREVERSIBLE AND IRRETRIEVABLE COMMITMENTS OF LAND AREAS AND CONNECTED NATURAL RESOURCES

Neb. Rev. Stat. 57-1407(4)(b) provides that “evidence regarding the irreversible and irretrievable commitments of land areas and connected natural resources” is to be evaluated. *See*

also Commission Rules, chapter 9, Rule 023.07B. Merriam-Webster defines “irreversible” as “not reversible” and Dictionary.com defines “irretrievable” as “not capable of being retrieved, irrecoverable, irreparable.”

The evidence before the PSC demonstrates that a 36-inch tar sands pipeline such as Keystone XL would cause “irreversible and irretrievable commitment of land areas and connected natural resources” in several ways, including: (a) cutting an 80-110 foot wide construction right-of-way along the entire pipeline route, through sensitive areas including native grasslands; (b) creating and maintaining a permanent 50 foot pipeline wide right of way, in which crews will prevent anything from growing back; (c) converting high-quality forested wetlands to scrub-shrub wetlands; and (d) heating the soil several feet around the pipeline.

The record also shows that landowners whose property the pipeline will cross will be permanently prevented from using the land in the pipeline right of way in many ways, including a negative impact on their ability to grow crops, lack of restoration of native prairie grasses, and dangers of increased erosion. Art Tanderup testified that soil temperatures impact his ability to farm. Aug. 8, 2017 PSC Hearing, p. 756–57 (testimony of Art Tanderup). Because he engages no-till farming on the sandy soil, the roots of his crops would be closer to the pipe and the heat from pipeline would make it difficult to grow them. He has particular concern about the impact of the heat on the Ponca corn which has only recently been re-established and is viewed by the Ponca and many others as sacred. *Id.* Diana Steskal also had concerns about the heat from the pipeline. Aug. 9, 2017 PSC Hearing, p. 870, 874. Because she has sandy, porous soil, the ground will not freeze due to the heat from the pipeline. *Id.* at p. 874. Thus, more insects will be able to survive the winter and would require her to use more pesticides on her crops. *Id.* Furthermore, the depth of the pipeline would affect corn production. *Id.* at p. 950 (testimony of

Rick Hammond). “Corn roots go 5 foot deep. The top of this – of this 36-inch pipeline is 3 foot deep. And the productivity will definitely be reduced.” *Id.*

Susan Dunavan testified that she has spent almost four decades working to restore the native prairie grasses to its original condition. Aug. 8, 2017 PSC Hearing, p. 784 (testimony of Susan Dunavan). She testified that TransCanada would not agree to restore any of the prairie land destroyed by the pipeline. *Id.* at p. 788. She also had concerns that the pipeline would have a long-term impact on the natural resources and the land as the pipeline degrades. *Id.* at p. 794. Landowner Robert Krutz testified that he was concerned about the revegetation and restoration of the prairie lands as he uses the vegetation to feed his livestock. Aug. 8, 2017 PSC Hearing, p. 928 (testimony of Robert Krutz).

Furthermore, the pipeline’s route will pass through uplands with a shale/clay base over impermeable hard shale, and such soil has a high chance of sliding when saturated. *Id.* at p. 884 (testimony of Robert Allpress). As Allpress explained, “Within a mile of the proposed route, within – as close as 200 yards we have had significant hill slides of up to an acre, and maybe a -- 500 cubic yards of soil has moved as much as 50 yards down the hills.” *Id.* A hill slide could threaten natural plants and animals in the area and it would take years for the area to recover. *Id.* at p. 882, 902.

The permanence of these impacts is particularly evident in this case since TransCanada witnesses have testified they have no plans to remove the pipeline after its useful life is over. And it is further underscored by the fact that TransCanada is seeking authority to obtain a permanent easement to put a pipeline in the ground regardless of the wishes of the landowners or local political subdivisions. Simply put, installing a pipeline of this size, length, and magnitude

in Nebraska soil would represent an irreversible commitment of land areas, and would impact native grasses and wildlife as well as impacting agricultural operations.

Evidence of irreversible and irretrievable commitments was also demonstrated by expert witness testimony. Dave Wedin, a University of Nebraska Lincoln soil and grasslands expert, has testified before the Legislature as follows: “I don’t think restoration is possible in terms of matching the original community.” Nov. 7, 201 Hearing on LB 1, p. 176. Wedin explained that one of his concerns centers on the heating from the pipeline. *Id.* The heating will preclude vegetation over the pipeline from matching the vegetation in the surrounding pastures. *Id.* at p. 176–77. In addition, the warmer soil would likely produce a lower diversity grassland. *Id.* Wedin had noted that “just establishing grasslands is different than restoring the diverse grassland community that might be replaced in that disturbance.” *Id.* at p. 176. Restoration is returning the grassland to the diversity, productivity, and resilience comparable to the native grassland that was destroyed. *Id.* at p. 178.

Thomas Hayes testified that locating a pipeline in areas with porous, sandy soils increased the likelihood of irreversible, irretrievable and irreparable impacts to natural resources, NR-3, p. 13, lines 10-13. The removal and stockpiling of topsoil will expose subsoil to heave equipment and would cause the soil to be heavily compacted. *Id.* at p. 5, lines 19–20. This will cause a decrease in permeability that is difficult, if not impossible, to restore. *Id.* at line 21. The compaction would also significantly decrease aeration, percolation and storage of water, drainage, root biomass, and plant productivity. *Id.* at lines 21-23. Soil compaction and impermeability would also significantly reduce agricultural productivity. *Id.* at p. 6, lines 20-21. Because of this irreparable loss of natural resources, “the pipeline may be an irreversible commitment of land and natural resources.” *Id.* at p. 8, lines 2-3.

Joseph Trungale, a specialist in hydrology with a focus on in-stream flows, testified that “simply placing the pipeline with a shallow aquifer could alter flow paths which could result in irreversible and irretrievable impacts on local springs.” NR-4, p. 9, lines 25-26. There are more than 358 wells within one mile of the Preferred Route. *Id.* at p. 8. These wells have reported water levels less than or equal to ten feet below ground surface. *Id.* at p. 9, lines 1-2. Any spill or leak in a shallow aquifer could flow directly into and pollute groundwater. *Id.* at p. 9, lines 10-11. In addition, it is likely there will be dewatering where groundwater is less than the burial depth of the pipe (typically, burial is 4 to 7 feet). *Id.* at lines 12-14. “Dewatering the excavation could generate substantial localized amounts of water to be discharged.” *Id.* at lines 14-15. Moreover, the pipeline trench may act as a conduit for groundwater migration and/or may act as a barrier to near-surface flow in areas with shallow ground water. *Id.* at lines 16-17. “This could impact spring flows and the fish and wildlife species that depend on the springs.” *Id.* at lines 18-19. Thus, these different impacts would likely cause irreversible and irretrievable harm.

The landowners who testified uniformly stated that the pipeline would have irretrievable or irreparable impacts. Susan Dunavan, responded to a question about irretrievable impact as follows: “yes, I think that the – it will affect the – what grows on the land in the future, what lives on the land in the future.” P. 794, lines 24-25, p.795, lines 1-4. Diana Steskal responded to a question about irreparable damage from the pipeline as follows: “Yes, I have many concerns about our soil, about economic concerns and reclamation also.” P. 874, lines 17-22. Robert Allpress testified as follows: “Q. You believe that it would present irreparable damage to the natural resources in your area? A. Yes, Ma'am.” P. 884 lines 11-25. Robert Krutz responded to a question about irreparable harm to natural resources as follows: “Yes. Because it's just like getting a cut on your arm or so. You know, sometimes it can heal naturally. And then sometimes

you have a scar. And with that construction work, it may just end up leaving a scar of what I call no vegetation on the soil, just sand and whatnot be left there that vegetation would have a hard, hard time growing back on dryland – ground.” P. 929, lines 1-19.

This brief has previously discussed the impacts on the endangered whooping crane so additional detail on this issue will not be added at this point. However, one can hardly consider a more “irreversible and irretrievable impact” than one which creates the likelihood of threatening the continued existence of the endangered whooping crane. Proposed transmission lines for pumping stations in the midst of areas where there have been documented increased feeding and roosting activities by whooping cranes would create an “irreversible and irretrievable impact”. The PSC should support a process that allowed actions which has the very real potential to lead to the demise of the whooping crane, a cherished and iconic species.

The foregoing sets forth a strong body of evidence that the proposed route would have “irreversible and irretrievable” impacts on land areas and connected natural resources. Therefore, in order to protect the public interest, the PSC must deny the proposed permit.

V. TRANSCANADA’S APPLICATION SHOULD BE DENIED BECAUSE IT WAS MADE IN BAD FAITH.

Black’s Law Dictionary defines bad faith “as a design to mislead or deceive another, or a neglect or refusal to fulfill some duty.” Actions seeking legal benefit in bad faith have been viewed negatively by Nebraska statutes and courts. *See, e.g.*, NEB. REV. STAT. ANN. § 25-824 (attorneys’ fee may be awarded if a pleading, claim, or defense is made in bad faith); *Lambert v. Lambert*, 617 Neb. App. 661, 669, 617 N.W.2d 645, 651 (2000) (denying modification of child support when it was found the petitioner’s actions were done in bad faith).

A. TransCanada's Application Was Made in Bad Faith Because it Includes an Alternative Route Through the Nebraska Sandhills, After Promising it Would Not do so

TransCanada's current application was submitted in bad faith by considering a pipeline route through the Nebraska Sandhills. TransCanada's original, preferred route was directly through the Nebraska Sandhills, an ecologically fragile area susceptible to wind and water erosion. *See* LB 1, Nov. 7, 2011 Hearing (testimony from Dave Wedin) (p. 176–7). TransCanada acknowledged this vulnerability in its Application. *See* Sec. 3. "Compared to the Sandhills Alternative Route, the overall footprint of the Preferred Route represents less environmental impact by avoiding the Sandhills region and minimizing impacts to areas with characteristics similar to the Sandhills, including shallow groundwater and fragile soils." Application p. 13.

At the November 15, 2011, Natural Resources Committee hearing on LB 1 and LB 4, it was announced that TransCanada would reroute the proposed KXL project to avoid the Sandhills. Environmental concerns for the Sandhills appeared to be the reason for TransCanada's route change. *See* LB 1 November 15, 2011 hearing, Robert Jones. "We understand the position of the Nebraskans in the Legislature as reflected in AM37 that the revised route avoid the Sandhills, and we are working to do just that. *See* Floor Debate LB 1, November 18, 2011, Speaker Flood. "But, as you know, TransCanada stood up before the state of Nebraska, through members of the media, and did voluntarily acknowledge that they agreed to move the route of the Keystone XL out of the Sandhills."

TransCanada received benefits from its promise to avoid the Sandhills: one was the passage of fast-track legislation, LB 4, which granted the Governor route approval authority. Although the procedure under LB 4 was never carried out, it would have allowed TransCanada

to avoid a formal hearing before the Commission. LB 4 formed the basis of another bill introduced in the 2012 legislative session on behalf of TransCanada, LB 1161. Another benefit TransCanada received was withdrawal of an amendment to L.B. 1 that would have created a “statutory definition for an avoidance area through what [is] know[n] as the Sandhills”. Floor debate November 17, 2011 LB 1, P. 18. This was done after discussions about TransCanada’s willingness to avoid the Sandhills. Floor Debate, November 17, 2011, Senator Haar.

Because TransCanada’s current application continues to consider a route going through the Sandhills, its application was made in bad faith.

B. TransCanada Threatened the State of Nebraska With Legal Liability if it Passed Routing Legislation

TransCanada sent memos to legislators claiming that any legislation related to siting would be unconstitutional and that the State would be liable for millions of dollars in damages, implying that members of the Legislature would be individually liable if TransCanada were forced to change the route for the proposed KXL pipeline. See LB 1 hearing November 7, 2011, Alan Peterson.

TransCanada originally opposed LB 1, which created MOPSA. However, there were two impacts of TransCanada’s threats that affected the current proceedings before the Commission. The first is the impossibly tight schedule for review of TransCanada’s application. This heavily-truncated schedule violated the due process rights of intervenors and the public because it precludes meaningful participation and a full and fair hearing of the issues – as is constitutionally required. The second is the provision of MOPSA which prohibits consideration of pipeline safety and the risks posed by pipeline leaks and spills. Any effort to evaluate whether the proposed KXL pipeline is in the public interest of Nebraska’s citizens is rendered meaningless by a failure

to consider these critical factors. TransCanada benefits from both these provisions and the public is unconscionably penalized.

C. The 2017 Application Was Made in Bad Faith Because TransCanada's Preferred Route Still Crosses Areas With Characteristics Similar to The Sandhills

TransCanada's application indicates that its preferred route completely avoids the Sandhills. *See* Application figure 2.2-1, p 4, figure 3.0, p. 14. However, it fails to avoid soils that have the same characteristics as the Sandhills. Testimony, Bonny Kilmurry, p. 805. Testimony from Art Tanderup described the consistency and various aspects of the soil in the area as having characteristics of the Sandhills. Pp. 757-758 Jeanne Crumly testified that the soil on her property had the same aspects and characteristics as those in the Sandhills. P. 764. TransCanada acted in bad faith by proposing a route having the same characteristics and presenting the same environmental concerns as the Sandhills, regardless of how the geographic area may be defined.

D. TransCanada Made Material Misrepresentations in the Course of the Proceeding that Amount to Bad Faith.

The Burden of Proof and Impact on Endangered Species sections of this brief set forth several sworn assertions by TransCanada that were inaccurate and appear intended to mislead. Such misrepresentations are consistent with the definition of bad faith set forth above.

VI. THE NEBRASKA PUBLIC SERVICE COMMISSION SHOULD DENY TRANSCANADA'S APPLICATION BECAUSE INTERVENORS, INCLUDING BOLD AND THE SIERRA CLUB WERE DENIED PROCEDURAL AND DUE PROCESS RIGHTS IN THIS PROCEEDING

The manner in which the Commission conducted the proceedings in TransCanada's application failed to provide intervenors with the due process required by both the U.S. and Nebraska Constitutions. The hearing was held on accelerated time table, leaving inadequate time to conduct comprehensive discovery. Furthermore, limitations placed on intervenors with respect

to both the number of prospective witnesses and the subject matters such witnesses could testify about failed the citizens of Nebraska by precluding a full and fair hearing of critical issues posed by the proposed Keystone XL pipeline and whether permitting construction of the pipeline through Nebraska is in the public interest of the citizens of the State. Finally, the intervenors' due process rights were denied because the Commission failed to follow its own rules of procedure in setting forth the process by which these proceedings were conducted.

The due process requirements of Nebraska's Constitution are similar to those in the U.S. Constitution. The Fifth Amendment to the U.S. Constitution provides that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law ..." The Fourteenth Amendment to the U.S. Constitution explicitly imposes this requirement on states. Due process has two intertwined principles – substantive and procedural. Courts have viewed the due process clause as embracing those fundamental rights that are "implicit in the concept of ordered liberty." *Palko v. State of Connecticut*, 302 U.S. 319, 324 (1937). The Commission's proceedings and the manner in which they were conducted constituted a denial of due process rights to Bold Alliance and the Sierra Club, as well as to other intervenors.

The "fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Id.* (citing *Marshall v. Wimes*, 261 Neb. 846, 851, 626 N.W.2d 229, 235 (2001)); *Brock v. Roadway Express, Inc.*, 481 U.S. 272 (1987). Describing a "proper and sufficient hearing" in the administrative context, the Nebraska Supreme Court notes that:

"The right to a full hearing includes a reasonable opportunity to know the claims of the opposing party and to meet them in order that an administrative hearing be fair, there must be adequate notice of the issues, then the issues must be clearly defined."

Block v, Lincoln Telephone and Telegraph Company, 170 Neb. 531, 540, 103 N.W.2d 312, 317 (1960).

Bold and Sierra Club submitted Petitions for Formal Intervention in these proceedings. In its Order dated March 31, 2017, the Commission granted their request for formal intervention status, but with significant limitations that unlawfully impinged upon their due process rights. *Order*, at 6-7. The Commission ruled that Bold's and Sierra Club's formal intervenor status would be restricted to examining "concerns for the environment and natural resources of Nebraska as potentially impacted by the Keystone XL Pipeline (KXL) route." *Order*, at 7. The Order also required that Bold and Sierra Club be lumped together with thirty nine other formal intervenors, described by the Commission as "Natural Resource Petitioners", and that all thirty-nine intervenors would jointly be limited to present testimony of only one witness at the public hearing, submit one joint brief, and be restricted with respect to cross-examination of TransCanada's witnesses at the hearing. *Order*, at 7. The issues surrounding siting of the proposed KXL pipeline are complex, involving significant environmental, engineering, and other scientific questions. The limitations placed on citizen and intervenor participation in these proceedings by the Commission precluded meaningful participation – thereby violating the due process rights of Bold, Sierra Club, and other intervenors are entitled to under law.

The Commission made a significant error when imposing limitations on Bold and Sierra Club's status as formal intervenors. The Nebraska Supreme Court explicitly states that the Commission's underlying authority lies in Neb. Rev. Stat. § 75-110, which requires that the Commission promulgate rules of procedure, and instructs 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". *Chase 3000, Inc. v. Public Service Commission*, 273

Neb. 133, 278 N.W.2d 560 (Neb. 2007); *In re Application No. C-1889 of GCC License Corporation*, 264 Neb. 167, 647 N.W.2d 45 (Neb. 2002). Instead of relying on its own rule, 291 Neb. Admin. Code 1 § 015.01, the Commission improperly defaulted to Nebraska Administrative Procedures Act, Neb. Rev. Stat. § 84-312.02, *et seq.*, in setting the ground rules for these proceedings.

The underlying basis for the Commission's Order in these proceedings is thus contrary to directions given by the Nebraska Supreme Court, which unequivocally states the Commission is bound by the rules set forth in Title 291, Chapter 1, § 015.01 of the Nebraska Administrative Code. 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). This is significant is because Section 015.01C of the Commission's Rules sets forth the way 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 interests 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). The Commission's own rules reinforce these precepts – specifically as to MOPSA – by stating that “filing petitions for intervention...and the conduct of the hearing **shall be governed by the Rules of Commission Procedure.**” 291 Neb. Admin. Code 9, § 023.06 (emphasis added). Further reinforcing this principle, the Nebraska Supreme Court explicitly ruled that an agency must follow its own rules:

“[P]rocedural 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 (1979) (emphasis added).

While the APA rule that the Commission improperly relied on to restrict intervenors’ participation in the proceedings does allow agencies to “impose conditions upon the intervenor’s participation in the proceedings,” Neb. Rev. Stat. § 84-912.02, this is contradicted by the Commission’s own rules. Neb. Rev. Stat. § 84-916 states that the intent of the APA is to establish “minimum administrative procedure for all agencies.” Appropriately rising above the bare minimum, the Commission explicitly adopted its own rules that mandate broader and more meaningful procedural rights for formal intervenors. Under law, the Commission must follow its own rules. In restricting Bold’s and Sierra Club’s ability to meaningfully participate in the proceedings, the Commission failed to follow its own rules. This is a *per se* violation of the intervenors’ due process rights.

In their Petitions, Bold and Sierra Club demonstrated their legal rights and privileges were affected and that they have a direct and legal interest that cannot adequately be represented by another party. The routing decision to be made by the Commission is a matter of significant public concern, which was recognized by the Nebraska Supreme Court in *Thompson v. Heineman*, 289 Neb. 798, 815, 857 N.W.2d 731, 747 (2015). Beyond representing its own organizational interests, Bold and Sierra Club have been leading voices in opposition to the KXL pipeline in Nebraska. *Bold’s Petition*, at 2. Both Bold and the Sierra Club sought to formally intervene in these proceedings not only to protect their organizational interests, but to advocate for their stakeholders whose interests would be impaired by construction of the KXL pipeline.

The Commission's March 31, 2017 Order states that limitations on the participation of formal intervenors are to "[balance] the requirement to adhere to the strict and aggressive timeline imposed by the Siting Act, with the need to ensure creation [of] a complete and robust record ... that includes the opportunity for all interested parties to be fully and fairly heard." *Order*, at 3. Unfortunately, the intervenor limitations and the procedural schedule adopted by the Commission did not allow Bold, Sierra Club or other intervenors the ability to be fully and fairly heard. While Bold and the Sierra Club recognize the need for efficiency and the arbitrary deadline imposed on the Commission by Neb. Rev. Stat. § 57-1408(2), those concerns do not justify the Commission's failure to provide for procedural due process rights guaranteed to formal intervenors under its own rules, and its failure to permit a full and fair hearing of all the issues.

For example, the procedural schedule adopted by the Commission in its April 5, 2017 Order required intervenors to serve discovery requests on TransCanada by May 5, 2017, allowing only a ten-day response period, followed by a requirement that motions to compel discovery be filed by May 19, 2017. In a complex case involving significant issues and substantial documentation, such an accelerated schedule denies the intervenors the opportunity to engage in meaningful discovery to ensure that all issues are fully vetted and understood. This was further compounded by subsequent impossibly short deadlines to file formal written testimony, witness lists, work papers, and exhibits. The contested administrative process is supposed to provide a mechanism for parties to fully explore all issues in a meaningful way. Because of unreasonable and unlawful limitations placed on intervenors, combined with the unrealistic schedule—there was no opportunity for a full and fair hearing of the issues in any meaningful way.

Bold raised these issues in a Motion to Reconsider the Intervention Order filed with the Commission. However, in its Order issued on April 13, 2017, the Commission merely repeated its desire to conduct an “orderly and prompt proceeding” and the need to meet the “aggressive timeline imposed by the Siting Act.” *Order*, at 2. Bold and Sierra Club’s due process rights to participate in this matter in a meaningful manner, and to be fully and fairly heard, which includes the ability to present their evidence and arguments, were denied. The Fourteenth Amendment to the U.S. Constitution and Neb. Const. Art. I, § 3, prohibit the State from depriving any person of rights without due process of law. Such core constitutional rights trump the provisions of MOPSA. The Nebraska Supreme Court held that “the central meaning of procedural due process [is] clear: ‘Parties whose rights are to be affected are entitled to be heard...’” *State v. Patricia B. (In re Levanta S.)*, 295 Neb. 151, 165, 887 N.W.2d 502, 512 (2016). The restrictions on Bold’s and Sierra Club’s ability to present witnesses, to engage in full and meaningful cross-examination of witnesses, and the imposition of a patently absurd scheduling order constituted a clear denial of due process rights afforded by the both the U.S. and Nebraska Constitutions. On this basis alone, TransCanada’s application should be denied.

VII. AUTHORIZING TRANSCANADA TO EXERCISE EMINENT DOMAIN WOULD VIOLATE PROPERTY RIGHTS PROTECTED BY THE US AND NEBRASKA CONSTITUTIONS

A. The Nebraska Constitution Limits The Exercise of Eminent Domain to a Public Use

The Nebraska Constitution limits the exercise of eminent domain by providing that private property can only be taken for a *public* use and upon payment of just compensation. Nebraska Constitution Article I, Section 21. Thus, the Legislature can authorize the power of eminent domain, but not for *private* use, as it is prohibited by the Nebraska Constitution. *Id.*

The Nebraska Supreme Court has set out the constitutional limits for a pipeline company to exercise the power of eminent domain. *Thompson, v. Heineman*, 289 Neb. 798 at 841–45, 847 N.W.2d at 763–65. *See also City of Bayard v. North Central Gas Co.*, 164 Neb. 819, 83 N.W.2d 861 (1957).

TransCanada has not held itself out “to the public as ready to act for all who desire [its] services, undertakes, by special agreement in a particular instance only, to transport property from one place to another either gratuitously or for hire.” 164 Neb. at 827, 83 N.W.2d at 866. TransCanada is a private company that has indicated it plans to use the pipeline for *private* transfer of oil. *See* Application, LB 1, Robert Jones testimony, November 7, 2011 Legislative hearing. Therefore, under Nebraska law, TransCanada is not entitled to exercise the right of eminent domain.

B. MOPSA is Unconstitutionally Vague

When considering if a statute is unconstitutionally vague, two procedural due process requirements must be met: first, there must be adequate notice to citizens, and second, there must be adequate standards to prevent arbitrary enforcement. *Kwik Shop, Inc. v. Lincoln*, 243 Neb. 183, 498 N.W.2d 102, 106 (1993). “In other words, due process requires that an enactment supply (1) a ‘person of ordinary intelligence a reasonable opportunity to know what is prohibited’ and (2) ‘explicit standards for those who apply [it].’” *Id.*

In *Kwik Shop Inc.*, the Court considered whether the enactment promulgated by L.B. 781 provided local governing bodies with “adequate, sufficient, and definite standards” enabling them to exercise discretion and provide potential applicants a reasonable opportunity to know what is required to obtain a license. 243 Neb. at 184–85, 498 N.W.2d at 107.

In making this determination, the Court considered whether a person of ordinary intelligence would have been able to understand the statute in question. *Id.* at 185, 498 N.W.2d at 108. The Court looked to the text of the statute and found that vague statutory criteria by itself did not provide sufficient guidance to meet procedural due process requirements. *Id.*

Here, as in *Kwik Shop, Inc.*, the legislative enactment in question, MOPSA, is unconstitutionally vague. In making a determination whether to approve the application, the Commission “shall not evaluate safety considerations, including the risk or impact of spills or leaks from the major oil pipeline.” Neb. Rev. Stat. 57-1407(4). The statute indicates various considerations that the Commission can make, including any evidence of impact from the intrusion upon natural resources or evidence indicating minimization or mitigation of the potential impacts on natural resources. NEB. REV. STAT. ANN. § 57-1407(4)(b)–(c)

The prohibition of safety considerations contradicts the issue of impacts on natural resources. In considering the impacts upon natural resources or attempted mitigation of these impacts, the risk of spills and leaks, and the effect of those spills and leaks on the environment and public health and safety would clearly have a bearing on such impacts. The contradictory nature of the provisions of MOPSA means that a person of ordinary intelligence would be unable to understand the necessary standards to be considered by the Commission. As a result, MOPSA is unconstitutional because of the vagueness of the legislative enactment that created it.

VIII. THE APPLICATION SHOULD BE DENIED BECAUSE THE PREFERRED ROUTE IS INFERIOR TO ITS PROPOSED ALTERNATIVES

A. The PSC has the Authority to Determine the Route Used by TransCanada

Under MOPSA, Nebraska, through the PSC, has the authority to regulate pipelines by approving or disapproving of major pipeline siting as well as the location of the routes. Neb.

Rev. Stat. 57-1403. Furthermore, the PSC has the ability to consider and evaluate “whether any other utility corridor exists that could feasibly and beneficially be used for the route of the major oil pipeline.” Neb. Rev. Stat. Ann. 57-1407(4)(e). Because these two statutes *in pari materia*, or upon the same subject, they should be construed together so as to harmonize and give effect to their provisions. *State ex rel. Randall v. Hall*, 125 Neb. 236, 241, 249 N.W. 756, 759 (1933). Construing Neb. Rev. Stat. 57-1403 and 57-1407(4)(e) together, PSC has the authority to approve or disapprove of each route location by considering the benefits and feasibility of each of the proposed routes.

B. The Application Indicates the Preferred Route has More Negative Natural Resources Impacts than the Keystone Mainline Alternative Route; Therefore, Approval of the Preferred Route Would be Arbitrary and Capricious

1. Table 2-1 of the Application Discloses More Miles of Highly Erodible Soils and More Miles of Endangered Species Impact on the Preferred Route than their Proposed Mainline Alternative

On its face Table 2-1 shows 47.1 miles of soils highly erodible by wind on the Preferred Route compared to 43.5 miles on the Mainline Alternative and 57.4 miles of soils highly erodible by water on the preferred route compared to 33.0 miles on the Mainline Alternative. It also shows considerably greater ranges of endangered species impacted. In particular, the whooping crane would have 84.6 more miles impacted by the Preferred Route than on the Mainline Alternative. (250.9 miles on the preferred route to 166.3 on the Mainline Alternative) In addition, the Keystone Mainline Alternative Route will impact 18.4 miles of interior least tern habitat, while the Preferred Route will impact 9.1 more miles. *Id.* (Preferred Route will impact 27.5 miles of interior least tern habitat). Overall, the Keystone Mainline Alternative Route would impact significantly fewer total miles of habitat for federal- and state-listed endangered and threatened species. *See* Table 2-1, p. 9 (Preferred Route impacts a total of 901.1 miles within the

ranges of threatened and endangered species while the Keystone Mainline Alternative Route impacts a total of 843.1 miles).

Evidence of the impact of the Preferred Route on the whooping crane deserves particular weight. Since there was substantial testimony from Dr. Johnsgard, a world-renowned expert, described in more detail herein, as well as peer-reviewed documentation, on the threat that building new transmission lines in documented roosting and feeding areas would pose to the whooping crane, this additional 84.6 miles proposed in the range of the whooping crane is significant. Since the whooping crane was the only species for which expert testimony was provided in this proceeding, special weight should be given to this fact. Considering the investment which has been made in preserving the whooping crane, as noted previously, and given the purpose of the Nebraska Endangered Species Act to protect and preserve such species, the PSC should give additional deference to the potential impact on whooping cranes in evaluating the proposed route.

Even if we consider TransCanada's claim that "ranges" mean numbers of species, the species whose range allegedly is within the route of the Mainline Alternative have ranges impacted of the additional species are 3.2 miles each for the pallid sturgeon, lake sturgeon and sturgeon chub, and 7.7 miles for the Topeka shiner. Avoidance or mitigation of such small range encroachment for all four of these species is far easier than the 84.6 miles of additional encroachment on the range of the whooping crane. Additionally, there was no expert testimony specifically indicating the proposed route posed a threat to the continued existence of any of these species as there was with the whooping crane.

In his direct testimony, Thomas Hayes provided several examples of inaccurate information in the Application intended to make the Preferred Route appear more preferable than

the Keystone Mainline Alternative Route, specifically pinpointing the issues of erodible soils previously discussed and impacts on ranges of threatened and endangered species. Pages 3-5, NR-3, Testimony of Thomas David Hayes, Ph. D. Although TransCanada tries to claim the numbers in the Application were “incomplete” due to partially downloaded data, no documentation is provided and the attempt to amend the application has both contradictory and misleading statements and is therefore unreliable, as set forth in more detail in the Burden of Proof section.

Dr. Hayes also points out several discrepancies between figures provided in the Final Supplemental Environmental Impact Statement (“FSEIS”) and the application. FSEIS Table 5.3-1. This is significant because TransCanada relies on the FSEIS as authority for many of its conclusions. Although there may be a rational explanation for some of the discrepancies between the FSEIS and the Application, one discrepancy is particularly revealing, and that is the lack of any data related to the Northern High Plains Aquifer or the Ogallala Aquifer in the Application. Since MOPSA has specific findings regarding the value of water (Neb. Rev. Stat. section 57-1403(2) and its benefit to the agricultural economy in Nebraska, (Neb. Rev. Stat. section 57-1403(4) this omission is glaring. The fact that the Application provides facial evidence that their Preferred Route is inferior to their proposed mainline alternative and contradicts the rationale for the Preferred Route leads to the inevitable conclusion that TransCanada’s support for the Preferred Route is irrational and approval of such a route would be arbitrary and capricious. The PSC should deny the application inaccuracies in light of contradictory and irrational evidence in TransCanada’s application.

2. *Using the Already Established Keystone 1 Route Would Have Fewer Negative Environmental Impacts Than the Other Routes Proposed by TransCanada.*

The established Keystone 1 route falls within the definition of a “utility corridor exists that could feasibly and beneficially be used for the route of the major oil pipeline” as defined in Neb. Reb. Stat. 57-1407(4)(e), since it already has a major oil pipeline located on it. TransCanada could easily have provided data related to the established Keystone 1 route, since there is data and analysis related to that route in the FSEIS, which TransCanada repeatedly cites as a reliable source of information. FSEIS Chapter 5, see also Beaver testimony. P. 439, lines 20-21. The FSEIS refers to the Keystone 1 route as the I-90 Alternative.

The FSEIS details several aspects of the Keystone 1 route that are superior in terms of natural resources impact, including the following: it does not cross any area defined as the Sandhills (nor any areas commonly understood to be the Sandhills); it would disturb far fewer miles of highly erodible soils; has far fewer miles crossing the Northern High Plains Aquifer, fewer perennial water body crossings, and fewer wetlands. Even more significant, the route within the State of Nebraska is much shorter, approximately 210 miles in comparison to approximately 274 miles of the preferred route. TransCanada has repeatedly admitted that fewer miles of construction has a reduced natural resources impact, something which is also a matter of common sense. The fact that TransCanada failed to provide data on this route because of considerations outside the state of Nebraska is irrelevant, since the PSC’s job is only to consider the impacts of the proposed route within the state.

The Proposed Route impacts more areas of areas of shallow water depth than the Keystone 1 route. NR-4, Testimony of Joseph F. Trungale, Jr., p. 8–9. Shallow water is defined as having groundwater table is ten feet or less from the surface. *Id.* The Preferred Route would

impact 358 wells within one mile of the route, while only 117 wells had been impacted by the Keystone I route. *Id.* at p. 8–9; NR-8, Well Data Map; Depth to Water Table Comparison. The Keystone 1 route also intersected fewer stream flowline segments. NR-4, p. 10. The Preferred route intersects such segments 172 times as compared the Keystone I’s 142 intersections. This is likely to cause irreversible and irretrievable impact on natural resources. *Id.* Furthermore, fewer rivers and shallow aquifers would be depleted based on Keystone I than with the Proposed Route. *Id.* at p. 11. This is important because the rivers and shallow aquifers support springs, provide many uses such as water supply, and provide instream habitats for species and recreation for Nebraskans. *Id.*

The available data indicates that the Keystone 1 route would have far fewer negative natural resources impacts than the TransCanada’s preferred route. The Keystone 1 route also meets the definition of a utility corridor that could be used for such a pipeline. TransCanada’s failure to provide information related to the potential impact of this route in comparison to their Preferred Route is at best a failure to provide relevant information and at worst an attempt to bias the application by creating artificial comparisons. Similar to the comparison with the Mainline Alternative, the fact there is reliable, unrebutted evidence that their Preferred Route has greater negative natural resources impacts contradicts the rationale for the preferred route and leads to the conclusion that TransCanada’s support for the Preferred Route is irrational and approval of such a route would be arbitrary and capricious.

CONCLUSION

For these reasons, the PSC should deny TransCanada's Application.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to 291 Neb. Admin Code § 015.0 (b), and the hearing officer's ruling on service, the above Trial Brief was served upon all parties or their respective attorneys of record using the service list provided by the Commission electronically on this 15th day of September 2017.

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