

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application of TransCanada)	Application No. OP-0003
Keystone, L.P. for route approval of the Keystone)	
XL Pipeline Project pursuant to the Major Oil)	
Pipeline Siting Act)	

**BOLD ALLIANCE’S MOTION FOR CONTINUANCE OF PLANNING CONFERENCE
AND RECONSIDERATION OF HEARING OFFICER’S ORDER**

Bold Alliance (“**Bold**”), by and through its counsel of record, respectfully requests the Nebraska Public Service Commission (the “**Commission**”) to continue the Planning Conference scheduled for April 10, 2017 at 11:00 a.m., and to reconsider the Hearing Officer’s Order¹ Granting Petitions for Formal Intervention entered by Hearing Officer Tim Schram on March 31, 2017, (the “**Order**”), and requests a Briefing Schedule and Oral Argument on this Motion before the full Commission.

In support of the Motion, Bold states and alleges as follows:

1) The Order correctly recognizes that Bold is entitled to intervene in this proceeding pursuant to the Commission’s Rules of Procedure at Title 291, Ch.1, Section 015.01 (the “**Rules**”).

2) However, the Order incorrectly relies on the Nebraska Administrative Procedures Act (“**APA**”)² as authority for its “broad discretion” to impose conditions on a formal intervenor’s participation in the proceeding, because the Commission is not governed by the intervention provisions of the APA.

¹ *In the Matter of the Application of TransCanada Keystone, L.P. for route approval of the Keystone XL Pipeline Project pursuant to the Major Oil Pipeline Siting Act*, Docket No. OP-0003, Hearing Officer’s Order on Formal Intervention Petitions (March 31, 2017) (“**Order**”)

² *Neb. Rev. Stat.* §§ 84-901-84-920 (Reissue 2014), specifically § 94-912.02.

3) At the time Bold filed its Petition for Intervention (the “**Petition**”), the Application³ was not “contested”, as no opposition to the Application had previously been filed or granted by the Commission, therefore the terms of the APA relied upon by the Commission were not applicable and did not grant the Commission any authority not otherwise stated in the Rules or by applicable statutes relating specifically to the Commission.

4) The Nebraska Supreme Court has ruled that the underlying authority of the Commission derives from Neb. Rev. Stat. § 75-110, rather than the APA.⁴ The Commission is prohibited from taking any action affecting persons subject to the Commission’s jurisdiction unless such action is taken pursuant to a rule, regulation or statute (*See* Neb. Rev. Stat. § 75-110). Given that the Rules do not currently provide authority for the actions described by the Commission, and that the APA by its terms does not apply to “uncontested” cases, the Commission is without authority to act under the auspices of the APA in the manner articulated in the Order.

5) The Rule at Section 015.01C states: “A formal intervenor shall be entitled to participate in the proceeding **to the extent of his/her express interest in the matter** (emphasis added). Such participation shall include, without limitation, presentation of evidence and argument, cross-examination of witnesses and submission of rebuttal evidence.”

6) The Nebraska Supreme Court has stated that the Commission is bound by the rules set forth in Title 291, Ch. 1, Section 015.01.⁵ 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

³ TransCanada Keystone Pipeline, L.P., of Calgary Alberta, Seeking Approval of a Route for the Keystone XL Pipeline Project, Pursuant to the Major Oil Pipeline Siting Act, Docket No. OP-003, Filed February 16, 2017 (the “**Application**”)

⁴ *Chase 3000, Inc. v. Public Service Commission*, 273 Neb. 133, 728 N.W.2d 560 (Neb. 2007) and *In re Application No. C-1889 of GCC License Corporation*, 264 Neb. 167, 647 N.W.2d 45 (Neb. 2002).

⁵ *Jantzen v. Diller Telephone Co.*, 245 Neb. 81, 100, 511 N.W.2d 504, 517 (1994).

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.”

7) In an effort to confirm that the APA intervention rules do not apply or supersede the Commissions’ Rules, the Commission has supported recent legislation introduced at the Nebraska Legislature (LB483, amended into LB263), which would amend Chapter 75 of the Nebraska statutes to exempt the Commission from the terms of the APA intervention provisions and such legislation is now on Select File at the Nebraska Legislature.⁶

8) The Order improperly limits the scope of Bold’s participation in the proceedings authorized under the Rules.

9) The Petition of Bold provided an extensive statement of its interest in the proceedings and the grounds upon which the invention is made, including the facts and circumstances relied upon for such intervention, as required by the Rules.

10) The interests of Bold have been improperly limited and combined with the interests of other intervenors, which prevents Bold from participating in the proceedings “to the extent of its express interest in the matter” as required under the Rules and improperly restricts the presentation of relevant information concerning the issues which the Commission is required to consider under the Major Oil Pipeline Siting Act (“Siting Act”).⁷

11) The Order also improperly limits the rights of other intervenors to present their own unique evidence to the extent of their respective interests in the proceeding.

12) Bold believes that the interests of the Commission will be preserved and maintained by granting and administering Bold’s Petition on the basis of i) the Commission’s existing Rules, ii) the existing Nebraska statutes granting its authority to promulgate the Rules,

⁶ Exemption for Rules of Procedure relating to the Public Service Commission, LB483, 105 Legislature (2017)

⁷ *Neb. Rev. Stat.*, §§ 57-1401-57-1413 (“Siting Act”)

and ii) adherence with the Commission's historic procedural practices authorized and recognized by the Nebraska Supreme Court. To do so will not impede the prompt and orderly conduct of the Application, nor prejudice the interests of the Applicant or Bold.

13) In the absence of a revision to the Order altering the Commission's authority for its decision, as stated above, Bold's presence and participation at the Planning Conference would likely constitute a waiver of Bold's right to object to the jurisdiction of the Commission and to appeal the Order.

WHEREAS, Bold respectfully requests that this Motion for Continuance of Planning Conference and Reconsideration of the Hearing Officer's Order to the full Commission be granted and that Bold's request for a Briefing Schedule and Oral Argument also be granted. Bold recognizes the desire of the Commission to conduct the proceedings with reasonable efficiency and to avoid undue duplication of testimony and will cooperate with reasonable limitations to achieve such efficiency, however administrative efficiency cannot outweigh the due process rights of Bold to present relevant evidence concerning its legal interests as provided under the Rules.

Respectfully submitted the 10th of April, 2017.

BOLD ALLIANCE

By: 

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CERTIFICATE OF SERVICE

Pursuant to 291 Neb. Admin Code § 015.0 (b), a copy of the foregoing was served upon all Intervenors of record to this proceeding or their attorneys of record as follows (see attached list):

A handwritten signature in black ink, appearing to read 'K. C. Winston', written over a horizontal line.

Kenneth C. Winston

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