

**Before the Nebraska Public Service Commission**

**In the Matter of the Application**

**of**

**TransCanada Keystone Pipeline LP  
For Route Approval of Keystone XL  
Pipeline Project, Pursuant to *MOPSA***

**Intervenors:**

**Susan Dunavan and William Dunavan,  
Bartels Farms, Inc.  
Johnnie Bialas and Maxine Bialas,  
Bonnie Brauer,  
James Carlson and Christine Carlson,  
Timothy Choat, Gary Choat Farms LLC,  
and Shirley Choat Farms, LLC,  
CRC, Inc.,  
Daniel A. Graves and Joyce K. Graves,  
Patricia A. Grosserode a/k/a Patricia A.  
Knust,  
Terri Harrington,  
Donald C. Loseke and Wanda G. Loseke,  
Arla Naber and Bryce Naber,  
Mary Jane Nyberg,  
Kenneth Prosocki and Karen Prosocki,  
Edythe Sayer,  
Dan Shotkoski and Clifford Shotkoski,  
Leonard Skoglund and Joyce Skoglund,  
John F. Small and Ginette M. Small,  
Deborah Ann Stieren and Mary Lou Robak,  
Jim Tarnick,  
Terry J. Van Housen and Rebecca Lynn  
Van Housen,  
Donald D. Widga,**

**Byron Terry “Stix” Steskal and Diana  
Steskal,  
Allpress Brothers, LLC,  
Germaine G. Berry,  
Karen G. Berry,**

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

**Domina Group’s Motions  
for  
Specific Findings  
On Identified  
Issues of Fact and Law**

**Cheri G. Blocher and Michael J. Blocher,  
L.A. Breiner and Sandra K. Breiner,  
Jerry Carpenter and Charlayne Carpenter,  
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Jeanne Crumly and Ronald C. Crumly,  
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Carol Manganaro,  
Frankie Maughan and Sandra Maughan,  
Beverly Miller and Earl Miller,  
Edna Miller and Glen Miller,  
Milliron Ranch, LLC,  
Frank C. Morrison and Lynn H. Morrison,  
Larry D. Mudloff, J.D. Mudloff, and Lori  
Mudloff,  
Constance Myers a/k/a Constance Ramold,  
Nicholas Family Limited Partnership,  
Ann A. Pongratz and Richard J. Pongratz,  
Donald Rech,  
Schultz Brothers Farms, Inc.,  
Connie Smith and Verdon Smith,  
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Richard Stelling and Darlene Stelling,  
Todd Stelling and Lisa Stelling,  
Arthur R. Tanderup and Helen J.  
Tanderup,  
TMAG Ranch, LLC,  
Tree Corners Farm, LLC,  
Dave Troester and Sharyn Troester,  
and  
Gregory Walmer and Joanne Walmer,**

**Intervenors (Domina  
Group)**

The Intervenor identified above, referred to by the previous Orders of the Nebraska Public Service Commission (“PSC”) as the “Domina Group,” make the following requests for specific findings on issues identified below.

### **Basis for Requests**

1. This is a “contested case” with respect to which “matter[s] of fact or law [are] at issue”, as anticipated by *Neb Rev Stat* § 75-130.01 and in which the right of appeal is governed by *Neb Rev Stat* § 84-917. The decision of the PSC is required to “be in writing or stated on the record and shall be accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact.” *Neb Rev Stat* § 84-915. These requirements are applicable to the PSC. *Application of Yellow Cab Co.*, 175 Neb 150, 120 NW2d 922 (1963).

2. *Neb Rev Stat* §75-134 requires that:

“(1) A commission order entered after a hearing shall be written and shall recite (a) a discussion of the facts of a basic or underlying nature, (b) the ultimate facts, and (c) the commission’s reasoning or other authority relied upon by the commission.”

3. The jurisdiction of the PSC includes “(1) Common carriers, generally pursuant to sections 75-101 to 75-158” and:

“(6) Pipeline carriers and rights-of-way pursuant to the Major Oil Pipeline Siting Act, the State Natural Gas Regulation Act, and sections 75-501 to 75-503. If the provisions of Chapter 75 are inconsistent with the provisions of the Major Oil Pipeline Siting Act, the provisions of the Major Oil Pipeline Siting Act control.”

4. There is no jurisdictional provision governing the PSC that modifies or eliminates its obligation to decide issues of questions of fact and law presented to it and described below.

### **Issues With Respect To Which Specific Findings Are Requested**

The Domina Group requests specific findings and full compliance with the requirements of *Neb Rev Stat* §§ 84-915 and 75-134, with respect to each of these contested issues of fact, or mixed fact and law, or law:

1. **Owner v. Operator.** Is the Applicant the proposed operator of the proposed pipeline?

2. **Absent Party.** If the Applicant is not the proposed operator of the proposed pipeline, is the Application deficient because the proposed operator is an absent the necessary party, without which the PSC lacks jurisdiction to proceed?

3. **Parties.** Are all necessary parties present so jurisdiction to proceed is present?

4. **Public Use.** Will the proposed Route and its use serve a public use within the meaning of *Neb Const* Art 1 §21, and within the meaning of *U.S. Const* Amend V?

5. **What Public Uses.** To what specific “public use” will the proposed Route be put for the benefit of the people of Nebraska?

6. **Public Uses - Common Carriage.** What specific “public use” constituting common carriage of goods shipped to Nebraska for Nebraskans, or shipped from Nebraska by Nebraskans, will be transported over the proposed Route in the proposed pipeline?

7. **Determination of Owner Fitness.** Is the Applicant fit to have a Route approved for ownership of a Major Oil Pipeline like the one described in the Application across Nebraska?

8. **Determination of Operator Fitness.** Is the Applicant fit to operate a Major Oil Pipeline like the one described in the Application across Nebraska?

9. **Assuring Continuing Owner Fitness.** What conditions, restrictions or limitations should be imposed upon the Applicant to assure continuing fitness to have the Route approved and to use it if the Applicant is determined to be fit presently?

10. **Assuring Continuing Operator Fitness.** What conditions, restrictions or limitations should be imposed upon the Operator to assure present and continuing fitness to operate the pipeline along the Route, if approved?

11. **Prior Approval Required.** What conditions, restrictions or limitations should be imposed upon the Applicant to require advance notice, an opportunity for the public to be heard in connection with an application process to the PSC requiring advance approval of any sale, lease, or direct or indirect transfer of legal or equitable ownership, dominion over, control or operation of, the Route, if approved, and/or the proposed pipeline?

12. **Defined Terms.** What terms, conditions or restrictions should be permitted to be included in any ownership interest entitled to Nebraska real estate taken by eminent domain from any Nebraska landowner or tenant in proceedings by the Applicant if the Route is approved?

13. **Greatest Economic Benefit to Nebraskans.** If a Route is approved, should approval be conditioned upon

- a. the requirement that the Applicant or its successors in interest, and the parties in actual control of the Applicant or their successors in interest, acquire from each affected Nebraska landowners the least restrictive, most economically beneficial to the landowner, form of ownership or leasehold interests to permit construction of the proposed pipeline along the Route; and
- b. terms of ownership or leasehold interests that provide the maximum level of annual economic benefit and legal protection for the landowners whose property is contiguous with the land into which the pipeline is placed?

14. **Leases; Not Easements.** Should the Route be permitted to consist of easements taken or acquired from Nebraska landowners, or should the Applicant be required to acquire leases and to make reasonable annual payments for the use of the land leased during the life of the pipeline?

15. **Limitations on Takings; Reversion.** If a Route is approved, should approval be conditioned upon a requirement that the Applicant or its successors in

interest, and the parties in actual control of the Applicant or its successors in interest, acquire from landowners interests in title to real estate only for a term of years equal to no more than 60 years, or such number as represents the established anticipated life of the pipeline, +5 years? **And**, should be legal instruments defining what is to be acquired from the landowners require that title to the real estate taken by the Applicant shall revert to the adjoining property owners equally if more than one, or to their successors as of the time when the easement, lease or other interest acquired expires?

16. **Removal & Remediation.** If a Route is approved, should approval be conditioned upon a requirement that the Applicant or its successors in interest, and the parties in actual control of the Applicant or its successors in interest, have joint and several responsibility to remove the pipeline from the Route, and fully remediate all soil, groundwater, surface and other environmental conditions upon removing the pipeline at the conclusion of its approved use?

17. **Financial Responsibility.** If Route approval is conditioned on removal of the pipeline at the conclusion of its approved use, what initial, and periodic, financial responsibility, bond, or pool of reserved funds must be set aside, over what period of time and on what terms, to assure that sufficient funds exist to remove the pipeline and achieve all requisite environmental remediation?

18. **Limited Cargo.** Should the permissible uses of the pipeline to be operated in the proposed Route be limited to crude oil? If not, what cargo should be permissible to transport along the Route in the proposed pipeline?

19. **Conditioned on Committed Volume.** Should Route approval be conditioned upon affirmative proof, by clear and convincing evidence, that the Applicant possesses written contractual commitments, made public to the PSC confirming that no less than 70% of the proposed pipeline's capacity is committed to be consumed by contracts for the common carriage of products qualifying for transportation in the pipeline, which contracts exist and are executed with cargo owners approved for the ownership of crude oil of the type permitted to be transported?

20. **No Inimical Owners / Operators.** Should Route approval be conditioned on the requirement that the persons with ultimate control of the Route and proposed pipeline be approved by the United States Department of State, and are not identified on any list of enemies of the United States, presently or formerly known as the “inimical list”?

21. **Made in USA.** Should Route approval be conditioned on the requirement that all component parts for the proposed pipeline to be constructed along the Route, including all pumping stations, or other tangible or intangible related property be manufactured in the United States of America?

22. **Liability.** Should Route approval be conditioned on the requirement that throughout the life of the pipeline, the Applicant or its successors in interest, and the Operator and its successors in interest, the Applicant shall be liable for any and all costs and damages of any kind incurred from any use of the Route except for damages caused by intentional wrongful acts?

23. **Fees and Costs.** Should Route approval be conditioned on the requirement that throughout the life of the pipeline, the Applicant or its successors in interest, and the Operator and its successors in interest, shall pay or reimburse all necessary and reasonable attorneys’ fees and litigation costs incurred in judicial, arbitration or mediation proceedings in which a landowner is sued or proceeded against by the Applicant, Operator or anyone acting in concert with either of them or on behalf of either of them, and the landowner prevails in whole or in part?

24. **Nebraska Headquarters.** Should Route approval be conditioned on the requirement that throughout the life of the pipeline, the Applicant or its successors in interest, and the Operator and its successors in interest, maintain their United States headquarters in Nebraska where they are readily subject to jurisdiction and service of process in the event of a dispute with Nebraska, or with one of its political subdivisions, or with any Nebraskan?

25. **Nebraska Tax Advantage Act Waiver.** In view of the Applicant’s representations in its Application concerning tax payments in Nebraska, should Route

approval be conditioned on a requirement that the Applicant must waive any right to election or benefits under the *Nebraska Tax Advantage Act, Neb Rev Stat § 77-5701 et seq?*

26. **No Tax Avoidance.** In view of the Applicant's representations in its Application concerning tax payments in Nebraska from the pipeline, should Route approval be conditioned on a requirement that the Applicant must waive any right to election or benefits that would entitle the Applicant or any other party to any tax credit, rebate, refund, or exemption under Nebraska law?

27. **Jurisdiction for Disputes.** Should Route approval be conditioned on the requirement that throughout the life of the pipeline, the Applicant or its successors in interest, and the Operator and its successors in interest shall resolve all disputes involving Nebraska or Nebraskans solely in Nebraska state court and in proceedings at which the rights guaranteed by the Constitutions of the United States, and Nebraska, are observed?

28. **No Sovereign Immunity.** Should Route approval be conditioned on the requirement that throughout the life of the pipeline, the Applicant or its successors in interest, and the Operator and its successors in interest shall have no right or basis to claim any benefit of the doctrine of sovereign immunity from any legal or equitable duty, obligation, or liability?

29. **Severance Damages.** Should Route approval be conditioned on the requirement that throughout the life of the pipeline, the Applicant or its successors in interest, and the Operator and its successors in interest shall be required to pay severance damages if proven in eminent domain proceedings to acquire any interest in Nebraska real estate regardless of the interest sought?

30. **Property Rights.** What limitations or conditions upon the applicant or approval of the application are required for protection of the welfare of Nebraskans including protection of

- a. Property rights?
- b. Aesthetic values?
- c. Economic interests?



d. The natural resources of Nebraska?

31. **Art I §16.** What conditions should be imposed to prevent granting of special privileges or immunities to the Applicant contrary to *Neb Const* Art I, §16?

32. **Art I, §3.** What conditions should be imposed to prevent denial of due process of law or equal protection of law contrary to *Neb Const* Art I, §3, or *U.S. Const* Amend XIV?

33. **Terrorism.** What conditions on Application approval should be imposed to protect the public from acts of terrorism against the pipeline?

34. **Art IV §20.** Is the finding of the Legislature set forth at *Neb Rev Stat* §57-1403 (3) purporting to constitute a declaration that the "construction of major oil pipelines in Nebraska is in the public interest of Nebraska" an unconstitutional invasion of the authority of the Nebraska Public Service Commission, and a violation of the doctrine of separation of power contrary to *Neb Const* Art IV §20 as the determination of public interest as it relates to common carriers is within the express constitutional responsibility of the Commission to regulate "general control of common carriers"?

35. **Art II §1.** Is the question of whether the proposed pipeline and Route are for "public use" reserved for determination by the judicial branch of government only, as required by *Neb Const* Art II, §1?

36. **Art I §6.** Is the question of whether the proposed pipeline and Route are for public use reserved for determination in a trial to a jury before the judicial branch of government only, as required by *Neb Const* Art I §6?

37. **Art I §6 Pt 2.** Does the attempt to legislatively determine that the proposed Route and proposed pipeline are for public use violate the right to trial by jury contrary to *Neb Const* Art I §6?

38. **Art I §13.** Is the Major Oil Pipeline Siting Act unconstitutional because it purports to deprive property owners of access to the courts contrary to *Neb Const* Art I, §13?


39. **Constitutionality.** Is the Major Oil Pipeline Siting Act unconstitutional in any respect? If parts of the Act unconstitutional is the entire Act unconstitutional?

40. **Mitigating Conditions.** Should mitigating conditions be required as conditions to approval of the Application? If so, what mitigation restrictions should be imposed?

### **Notice of Hearing**

Notice is hereby given that the above Motion will be called for hearing before the Hon. Karen Flowers, Hearing Officer, on July 31, 2017 at 9:00 a.m. The hearing shall be by telephone by Order of the PSC. The moving party respectfully requests that the official court reporter be present and make a verbatim record of the hearing or the proceedings.

Susan Dunavan, *et al.*, Intervenors,

By: 

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## Certificate of Service

Pursuant to 291 *Neb Admin Code* § 015.01(b), a copy of the foregoing is served upon all Intervenor of record to this proceeding or their attorneys of record as follows:

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