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, et, al. Nebraska Landowners on Route, ("Domina Group")** **Intervenors,**	**Application No: OP-003** **(Filed by Applicant on 2/16/17)** **Domina Group Intervenors Brief Re Motions In Limine And Brief On Certain Formal Hearing Trial Considerations & Issues**

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And
Brief On Certain Trial Considerations & Issues

I. Overview of Domina Group's Position on Pre-Hearing Matters.

1. The "Domina Group" of Landowner/Intervenors address a series of issues. They include Motions In Limine, issues concerning the Formal Hearing and Hearing considerations. The Landowners urge that:

1.1. Constitutional due process considerations, the *Administrative Procedures Act's* provisions concerning the role of parties in a contested case, the *Nebraska Rules of Evidence*, all require full participation by each Formal Intervenor, direct, cross and redirect examination, appropriate evidentiary foundation for exhibits, and the disinterested objective factfinder. Notice and the opportunity to present the case are essentials. All prior rulings, and all filings by the applicant to the contrary, should be overruled.

1.2. TransCanada's Motions in Limine be overruled.

- Cross examination should not be limited.
- Landowner testimony is directly related to the proposed Pipeline *Route*, and questions concerning the *Route* differ from questions related to *siting* the pipeline.
- The governing statute is not constrained to *siting issues*
- The Landowners evidence and witnesses are timely in view of the manner in which pretrial proceedings were conducted. TransCanada's Motion in Limine on this issue should be overruled.

1.3. Hearing Considerations are suggested and their adoption is urged concerning:

- Evidence presentation by electronic technology.
- Opening Statement limitations.
- Exclusion of participation or submissions by "Informal Intervenors".

- Compliance with the Rules of Evidence.
- Direct, Cross (not limited by topic), Redirect.
- No undisclosed witnesses.
- No witnesses from the public.
- Timing of trial days.
- Ingress, Egress and Security.

II. Overview of the Law Germane to Pending Motions

2. The Applicant, TransCanada, seeks authority to use a proposed Route across Nebraska for the construction and operation of a Major Oil Pipeline. Accordingly, the provisions of *Neb Rev Stat* §57-1501 et seq., generally applicable to oil pipeline projects, do not apply to this Application by TransCanada Keystone XL Pipeline, LLC. Instead, the governing statutes here are found principally at *Neb Rev Stat* §§ 57-1101 & 57-1503. Section 57-1101 requires an applicant to comply with § 57-1503 "and receive the approval of the Gov. for the route of the pipeline under such section. Or apply for and receive an order approving the application under the *Major Oil Pipeline Siting Act* prior to having the rights provided under [§ 57-1101 (including the power in any domain)].

3. Four members of the Nebraska Supreme Court, and the District Court of Lancaster County, concluded that § 57-1101 is unconstitutional. Because of a quirk in Nebraska law, a super majority was not present, but the law was not upheld. Instead, a ruling was avoided on the standing issue. *Thompson v. Heineman*, 289 Neb 798 (2015).

4. The procedure to condemn property for a pipeline is to "be exercised in the manner set forth in sections 76-704 to 76-724." *Neb Rev Stat* §57-1101.

5. The *Major Oil Pipeline Siting Act* is found at *Neb Rev Stat* § 57-1401 et seq. The *Major Oil Pipeline Siting Act* does not constrain the PSC from performing its other responsibilities. And, *MOPSA* does not excuse the obligation of the PSC to make relevant decisions or to make regulatory decisions as necessary under the Commission's responsibilities for common carriers in general.

III. Constitutional Due Process, and Statutory Procedures. A Contested Case Must Provide Due Process of Law. *MOPSA* Does Not Do So.

Due Process Elements. Essential Decisions.

6. The PSC and its Commissioners are obligated to decide "contested cases". In contested cases, no member, staff or agent of the PSC is authorized to "have any ex parte communication with any party having an interest in the outcome of the contested case." *Neb Rev Stat* § 75-130.01.

7. *MOPSA* directs the PSC schedule a public hearing within 60 days of a *MOPSA* application being filed. One or more public hearings are to be held. *Neb Rev Stat* § 57-1407 (1). The "public hearings" called for by this statute are not evidentiary, and the Commission does not sit as a judicial or quasi judicial body; it just meets and listens. The statute directs that the Commission shall make the public input part of the record." § 57-1407 (2). These hearings are not "contested cases". However, to prevail on an application like the one before the PSC, Compliance must be achieved with the law. This includes all aspects of the law; not just *MOPSA.* This aspect of *MOPSA* flagrantly deprives interested parties, including the landowners in the Domina Group, of essential elements of due process of law. It does so because it compromises the objectivity of the factfinders, i.e., the Commissioners of the PSC.

8. A judgment upon an application is required—will it be approved or rejected? Additional judgments are also required: does the proposed use, and the right to take land by eminent domain to fulfill it, constitute a permissible "public use" of the property to be taken? Answering these questions is the unique responsibility of the court. But the statutes place the PSC in a decision-making role for legal disputes. It mismixes and mismatches decisions properly made by agencies from decisions necessarily made by courts. The difference is driven by the Doctrine of Separation of Powers. *Neb Const* Art II, § 1.

> In Nebraska, the distribution of powers clause prohibits one branch of government from exercising the duties of another branch. The separation of powers principle "prevents us from hearing a matter the determination of which the Constitution entrusts to another coordinate department, or branch, of

> government." And, "[t]his court does not sit as a superlegislature to review the wisdom of legislative acts." That restraint reflects the reluctance of the judiciary to set policy in areas constitutionally reserved to the Legislature's plenary power.

Nebraska Coal. for Educ. Equity & Adequacy (Coal.) v. Heineman, 273 Neb. 531, 545–46 (2007).

9. *MOPSA* has confused the roles. The only way to reconcile them is for the PSC to act as a regulator of a common carrier and conduct itself this hearing as it would in any proceeding governing the entire subject of whether an applicant should be granted authority to provide common carriage over a rout in any such case, the PSC would be concerned with the fitness of the applicant, the physicality and circumstances of the proposed route, the need to be met by the applicant, the manner in which the need identified will be fulfilled, the duration of the route of the proposed activity, the impingement on others, objections by citizens or the public, etc. all these are proper considerations here. *MOPSA* does not negate these considerations.

10. And, *MOPSA also* denies due process of law. The PSC must provide the core elements of procedural due process of law when hearing a contested case like this proceeding. Due process requires objective officials to hear and decide the case, not persons who purposely set out to gather hearsay statements and information.

11. The Supreme Court has held:

> Procedural due process limits the ability of the government to deprive people of interests which constitute " 'liberty' " or " 'property' " interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 901, 47 L.Ed.2d 18 (1976).

Friehe v. Schaad, 249 Neb 825, 835–36 (1996).

12. The Court has further held:

> In *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), the U.S. Supreme Court set forth **three factors** to be considered in resolving an inquiry into the specific dictates of due process: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of

> additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Chase v Neth, 269 Neb 882, 893-94 (2005).

13. Due process procedural criteria apply to things like administrative proceedings for revocation of driver's licenses, or termination of professional licenses, and student or teacher suspension, expulsion or termination. In this case, **first,** the interest involved is the private ownership of land. If the Application is approved TransCanada contends it will have the power of eminent domain. As a private entity, TransCanada claims it could then interfere with the livelihoods of many Nebraska residents while acquiring for itself income producing capacity at their expense. Private interest at issue here is very great.

14. **Second,** in this case there is grave risk that, without due process of law, TransCanada will take property rights, and impose property burdens that significantly exceed the scope and proposed use of the KXL pipeline project. First, the pipeline has a finite life of about 50 years. But, TransCanada wants to take perpetual easements, IP or period, permanent ownership rights that will outlast the pipeline project to perpetuity. TransCanada has announced its intention to abandon the pipeline in place when it no longer wants the machine. This will leave a 36 inch diameter 275 mile buried pipeline a few feet beneath the soil's surface across the entire State.

15. **Third,** the scope and magnitude of the environmental risks, cleanup costs, and risks and dangers yet to be learned, is hard to fathom our government interests that dramatically overwhelm any "economic development" benefit of the pipeline, today. The Government has no interest in abridging due process.

16. It is relatively easy to appreciate the importance of this matter to government and the people of Nebraska in financial terms. These figures are for illustration, not to forecast proof. If TransCanada spends $2 billion to construct the project across the State, [and it projects less] and if the inflation rate continues for the next 50 years at the rate of the last 50, this will produce at least five doublings of the $2

billion cost to match the same number of dollars to take the pipeline out of the ground. This would make the cost 2x2=4x2=8x2=16x2=32x2 = **$64 Billion**. If Nebraska's population change over the next 50 years is like it has been for the past 50 years, there will be about 1.7 million Nebraskans to pay the $64 billion price tag equivalent of the cost of *installing* the pipeline.

17. The cost of *removing* the pipeline will greatly exceed the cost of *installing* it with the machine that moves along at a nicely to install clean pipe in a clean trench with new bolts and new nuts in a piece by piece alignment, putting the pipeline together. Removal, however, will require digging out the pipe, by digging around and under it, taking its components apart though they are weathered, rusted, worn, brittle, potentially broken or leaking, and generally hard to deal with. Assuming modestly and for illustration that the cost to take out the pipeline would be double the cost of installing, this would mean $4 billion in current terms and $128 billion in future terms to take out the pipeline. If 1.7 million Nebraskans were paying for this, the installation cost would be $1,175 per Nebraskan. The removal cost would be $75,290 per Nebraskan.

18. *It is up to the PSC today, and to decide on evidence presented at the contested hearing, whether to impose this burden on unborn Nebraskans or to require TransCanada clean up its own mess.* Indeed, the decision here, if it is wrong, will cripple the government of Nebraska down the road a few short decades. There is no provision elsewhere in the law, now or at a future date, for this decision to be made. Why would any agency of State Government make the public cleanup TransCanada's mess?

19. The PSC's decision on this issue will either allow Nebraskans of the future to live out their lives without an abnormal massive tax to be imposed upon them for cleanup, or to bear the burden of that cleanup. It will not be the landowner who bears this burden. The landowners can't afford it. TransCanada will default on its taxes. The property will become public through a default process because taxes are paid, and the

public will be stuck with the cleanup. This is an essential part of TransCanada's business plan. And it should be policed by the PSC now and rejected soundly.[1]

20. *It is also up to the PSC today, and to decide on evidence presented at the contested hearing, whether to make TransCanada pay a part of the profit it earns by using the land of Nebraska landowners on an annual basis, to the landowners as rent.* No other user gets to keep 100% of the income derived from using someone else's asset. Neither should TransCanada. There is no other proceeding in which to make these decisions. Only the PSC, as a regulator, appears to have the authority to do so under Nebraska law.

21. All due process rights must be observed as the three-part *Mathews v Eldridge* analysis requires that this occur without abridgment.

IV. MOPSA Unconstitutionally Invades the Judicial Role

22. The decisions required of the PSC demand that the law be applied to facts and analyzed in jurisprudentially scientific ways. The *Act* requires:

> (4) An application under the Major Oil Pipeline Siting Act shall be approved if the 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. In determining whether the pipeline carrier has met its burden, the commission shall not evaluate safety considerations, including the risk or impact of spills or leaks from the major oil pipeline, but the commission shall evaluate:
>
> (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;

[1] This argument is not made to ignore sound arguments about environmental concerns of the project. But they are not briefed in this submission.

> (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;
>
> (f) The impact of the major oil pipeline on the orderly development of the area around the proposed route of the major oil pipeline;
>
> (g) The reports of the agencies filed pursuant to subsection (3) of this section; and
>
> (h) The views of the governing bodies of the counties and municipalities in the area around the proposed route of the major oil pipeline.

Neb Rev Stat § 57-1407. These are uniquely judicial roles. *MOPSA* infringes on the judicial role. As held recently: "the line between what is a legislative function and what is a judicial one has not been drawn with precision; we make that decision on a case-by-case basis. In defining that line, we look at the function's purpose—not merely its statutory origin—to decide whether a governmental function is legislative or judicial. *In re Nebraska Cmty. Corr. Council to Adopt Voluntary Sentencing Guidelines for Felony Drug Offenses*, 274 Neb. 225, 229 (2007).

23. Only courts draw this line. "It is for the judiciary to say when the Legislature has gone beyond its constitutional powers by enacting a law that invades the province of the judiciary." *State ex rel. Veskrna v. Steel*, 296 Neb. 581, 599 (2017). The PSC cannot function as a court:

> State agencies may perform functions of a judicial, quasi-judicial, or fact finding character; however, such agencies are extrajudicial bodies, not courts, judges, judicial bodies, or officers. …. The proceedings of such agencies are not judicial and are without judicial effect.

State ex rel Stenberg v. Murphy, 247 Neb 358, 367 (1995).

24. Though the PSC cannot function as a court, it must make decisions about regulatory issues the bear on authorizing, or withholding authority, to engage in common carriage.

25. Rendering these decisions requires that the PSC Commissioners the objective decision makers. In 2012, the Nebraska Supreme Court held:

> Due process requires that parties at risk of the deprivation of liberty interests be provided adequate notice and an opportunity to be heard appropriate to the nature of the proceeding and the character of the rights which may be affected by it. … The U.S. Supreme Court has stated that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Consideration should be given to "the risk of an erroneous deprivation of such [liberty] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." *Id.* at 335, 96 S.Ct. 893.

State v. Norman, 282 Neb 990, 1003 (2012).

26. The extensive Public Hearing regimen used by the PSC under the authority of §57-1407 exposed the Commissioners to information not under oath, not authenticated by the rules of evidence, not subjected to cross-examination. The statute requiring Republic hearing process is unconstitutional because it is designed, structurally, to make the members of the Commission lose their independence and objectivity as potential factfinders when an application for approval of a Route is made by a Major Oil Pipeline Company. Art. II §1, and the Due Process clauses of Ne*b Const* Art I § 3 and U.S. Const Amend V and XIV are offended. The PSC is clothed by *MOPSA* with judicial power which the Constitution does not permit it to exercise.

V. TransCanada's Motion in Limine Concerning Cross Examination is Without Merit

27. TransCanada seeks to limit cross examination by Intervenors. This is impermissible. The impermissibility is present for two (2) distinct reasons:

27.1. It is important to assure that the PSC's Commissioners, who have been impacted in ways that judges are not by the hearing process of § 57-1407, are objective and have appropriately vetted information for a decision; and

27.2. Cross examination is a right of every Intervenor or party to every contested case under the *Nebraska Administrative Procedures Act.*

28. The hearing process of § 57-1407, if taken literally, appears to be designed to subvert the independent fact finder. It allows no notice in advance of claims to be made, no opportunity to present, confront or cross-examine the speaker, and the results and no decision by an objective factfinder. The statute, by design, appears to intend to undermine due process of law. And in this case it does so to the disadvantage of each member of the Domina Group of Intervenors.

29. This problem is acute here because the statute also attempts to restrict the role of formal intervenors by limiting the right of cross-examination as they see fit in accord with the Rules of Evidence. TransCanada contends cross-examination should be restricted. Early orders of the Commission suggested the same. But, a party to a contested administrative law case has a right of cross-examination. The *Nebraska Administrative Procedures Act* expressly provides: **"(4) Every party shall have the right of cross-examination of witnesses who testify and shall have the right to submit rebuttal evidence…."** *Neb Rev Stat* § 84-914 (4) (Emphasis added.)

30. Rules governing procedural due process and the express language of the governing administrative procedures act make it necessary that the TransCanada motion in limine seeking to restrict cross-examination must be overruled.

25. The APA's guarantee of the right of cross examination is consistent with the *Nebraska Rules of Evidence*. The purpose of the Rules requires that they:

> . . .be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promo[te]. . . growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Neb R Evi § 27-102.

26. The *Rules of Evidence* provide for cross examination. *Neb R Evi* § 27-611(2)&(3) provide:

(2) Cross examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The judge may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(3) . . .ordinarily leading questions should be permitted on cross examination.

27. *Neb R Evi* § 27-614(1) provides:

(1) The judge may, on his own motion or at the suggestion of a party, call witnesses, *and all parties are entitled to cross examine the witness thus called.*

28. Minimum requirements for a due process hearing have been defined by the Nebraska Supreme Court as follows:

(1) written notice of the time and place of the hearing; (2) disclosure of evidence; (3) a neutral fact-finding body or person, who should not be the officer directly involved in making recommendations; (4) opportunity to be heard in person and to present witnesses and documentary evidence; (5) the right to cross-examine adverse witnesses, …and (6) a written statement by the fact finder as to the evidence relied on and the reasons for [the decision].

State v. Johnson, 287 Neb 190, 199–200 (2014).

29. Limitations on cross examination as proposed by TransCanada are without merit. Its Motion in Limine concerning this subject should be overruled.

VI. TransCanada's Motion in Limine to Narrow the Testimony of Landowners, Experts, and Issues is Without Merit

30. One of TransCanada's filings is entitled "Objection to, and Motion in Limine to Exclude, Testimony and Exhibits Submitted by Intervening Landowners". This Motion lacks merit. It urges the Commission to treat its work so narrow as to circumvent all responsibility of all kinds involved in determining what, when and how the Route must be obtained, in order for there to be a route of any kind.

31. Reduced to its essence, TransCanada argues that the only question is the *siting* of the Route, i.e., can TransCanada put the pipeline where it wants to? But, there is much more to the Route than its site. These are additional considerations:

31.1. If a particular site for a Route is approved, what are the limitations that should be imposed on the dimensions of the Route?

31.2. Specifically, how wide should the Route be? Would it be permissible for the Route to be 110 feet if only 60 feet are needed, or 60 feet if only 20 feet are needed, or two miles if only 60 feet are needed?

31.3. Is it permissible for the Route to be perpetual, even though the proposed project is not perpetual?

31.4. What is the purpose of the Route, and how will it be used? If it is used for private financial gain, is it appropriate that the party using the Route acquire a leasehold interest and not an easement, requiring annual payments and not one payment up front?

31.5. Should the Route be approved only if sufficient pump stations are included to assure that common carriage across the State can be achieved?

31.6. Should the Route be approved only if built to accommodate connections that would, at a future time, permit on-loading or off-loading of product within Nebraska?

31.7. Should the Route be approved if, but only if, the Applicant is required to restore Nebraska's water and land to its preconstruction condition after the pipeline is exhausted, and the Route is no longer used? Specifically, should TransCanada be required to clean up its mess rather than leaving it in the ground for Nebraskans to deal with at a future date?

32. Nothing in *MOPSA* suggests that TransCanada's narrow and restrictive view of the statute is consistent with the Legislature's intention. As noted above, the precise language of the statute is to the contrary. *MOPSA* limits the Commission's ability to consider pipeline safety, that subject having been preempted by the federal government, but it contains no limitations on factors that affect the decision to approve or disapprove a Route.

33. *MOPSA*'s terms must be read as a whole. It is not appropriate for a court, or an administrative agency, "to read a meaning into a statute that is not warranted by the

language; neither is it [appropriate] to read anything plain, direct, or unambiguous out of a statute". *Interiano-Lopez v. Tyson Fresh Meats, Inc*., 294 Neb 586, 600 (2016). It is equally inappropriate to resort to interpretation to ascertain the meaning of a statute, the words of which are plain, direct, and unambiguous. And, components of a series or collection of statutes pertaining to a certain subject must be read together, or *in pari materia* and must be conjunctively considered and construed to determine the intention of the Legislature "so that different provisions are consistent, harmonious, and sensible". *State v. Aguallo*, 294 Neb 177, 182 (2016).

34. In a case involving the Public Service Commission, *AT&T Communications of the Midwest v. Nebraska Public Services Commission*, 283 Neb 204 (2012), the Supreme Court observed these rules when construing *Neb Rev Stat* § 86-140 governing "access charges". There, the Supreme Court agreed with the PSC and rural independent companies that rules of statutory construction required the Court "to give affect to the entire language of a statute and to reconcile different provisions. . . so they are consistent, harmonious, and sensible". The Court also agreed with the PSC about the duty to read statutes concerning a singular subject matter *in pari materia* and to consider them conjunctively. *Id*., 283 Neb at 211. Obviously, the PSC is governed by the same rules of statutory construction. *Id.*

35. Of course, statutory interpretation poses a question of law. *Mathews v. Mathews*, 267 Neb 604, 611 (2004).

"Route" Says a Mouthful; It Does Not Say "Site"

36. In this case, the term "Route" is not so narrow or shallow as TransCanada would claim. Indeed, the "Route" under consideration is for use in common carriage. "Routes in cases involving common carriage require broad consideration of many subjects. There is danger in reading too narrowly the Rules of the Commission or particular words or phrases". *In re Golden Plains Services Transportation, Inc.* 297 Neb 105*5 (June 30, 2017)(reversing the PSC because of an unduly restrictive interpretation of its own regulations on an issue concerning routes).

37. What is more, TransCanada's reading of the term "Route" and the role of *MOPSA* was expressly rejected by four (4) members of the Supreme Court, without disagreement by three (3) others, in *Thompson v. Heineman*, 289 Neb 798 (2015). There, the Court noted:

> In determining whether to approve a proposed route, *MOPSA* required the PSC to consider several economic, environment, and social factors, including whether another corridor could be feasibly and beneficially used. Two (2) of *MOPSA*'s stated purposes were to insure the protection of Nebraskans' property rights and the State's national resources.

289 Neb at 804.

38. The statutory factors identified in the Act and recognized by the Court's majority in *Thompson v. Heineman* must be considered by the Commission at the hearing. TransCanada's attempt to constrain the landowners, and their exhibits in evidence, is without merit. A few specifics may assist in applying the foregoing rules to the evidence to be presented at the hearing:

38.1. While safety may not be considered, risks and impacts of spills or leaks during construction may be. The materials and safety of operations are regulated by federal law, but those associated with the process of construction are not.

38.2. Eminent domain is an entirely legitimate topic. To obtain a Route requires the use of eminent domain. The circumstances that define the Route impact the scope of eminent domain. If a permit is issued to construct a pipeline, but not to own real estate to perpetuity, and if the pipeline's useful life is not perpetual, then it is not appropriate to grain a perpetual Route. Indeed, permits to engage in perpetual common carriage across Nebraska have never been allowed. So, the chronological scope of the rights to be taken from Nebraskans is a part of the Route.

38.3. The physical dimensions of the Route, and the restrictions on use of adjoining property, or the surface of the property in question, are

component parts of the "Route" involved. For example, if the Route dissects Nebraska and prohibits that it be crossed by any subject:

38.4. Should the eminent domain proceedings and the taking of rights be constrained to a requirement that at the end of the pipeline company's right to retain the property or use it, it must remediate all environmental matters? The landowners think so, and there appears to be nowhere in the law to limit, condition, or constrain the eminent domain authority of TransCanada, except before the PSC.

39. TransCanada wants to eliminate testimony about "necessity or commercial viability" of the pipeline. This is principally a matter of economics, but it is certainly a matter of regulatory policy. If there is no need for the pipeline, there is no need for Nebraska to be dissected by it and no need for a Route. Commercial viability issues are absolutely critical, or the project will fail. *Neb R Evi* 27-402.

40. If the pipeline cannot be operated with commercial viability that is demonstrable, it will fail financially, and if it fails financially, Nebraska will be left with a pipe full of crude oil dissecting the State a distance of 275 miles, and posing a dramatic cleanup risk. The costs of that remediation could be thousands and thousands of dollars per Nebraskan. *Neb R Evi* 27-402. The costs to comply with many existing, and more probable future, laws must be considered. Among those are: *Federal Water Pollution Control Act*, 33 U.S.C. §§ 1151 et seq.; 43 U.S.C. § 3906; *Clean Water Act*, 33 U.S.C. §§1251 et seq.; *Pesticide Regulatory Acts*, including 7 U.S.C. §§ 136 et seq.; *Toxic Substance Control Act*, 15 U.S.C. §2601; *Resource Conservation & Recovery Act*, 42 U.S.C. §6901 et seq.; *CERCLA*, 42 U.S.C. §§9601 et seq.; *Nat'l Environment Policy Act* , 42 U.S.C. §§4321 et seq. ; and others.

41. One of TransCanada's motions uses color coding to Index's arguments. The motion urges rejection of landowner testimony and exhibits.

42. TransCanada marks as "green" what it calls testimony regarding participation in the legislative process. The landowners disagree. There is testimony from the legislative process identified in the landowners' evidence, but that evidence consists of

admissions of TransCanada personnel, or testimony given constituting declarations made in TransCanada's presence. These are admissible and are not hearsay. *Neb R Evi* §§ 27-402 & 27-802.

43. In red, TransCanada identifies what it calls "legal conclusions within the purview of the Commission. These are also close calls, but the landowners disagree. It is true that some of the subjects the Commission is instructed to consider are expressed in conclusory statutory terms, and it is difficult to talk about the subject matter without using the same terms and even opine on the subject matter while using those terms. But, there is a distinction between opinions and conclusions that can be readily observed by rulings made by the hearing officer at the hearing.

44. TransCanada marks in "gray" testimony about the nationality of individuals or entities with an interest in the pipeline. It says these subjects are not permitted. Certainly, there should not be discrimination based upon national origin. But, regulatory law consistently requires that the present citizenship, not the nationality, of companies seeking authority to own and operate assets in the United States, and particularly assets which operate in the public interest must be disclosed. For example:

44.1. Banks cannot be foreign owned without clear disclosures and approval of the Federal Reserve System.

44.2. Munitions manufacturers must get ATF permits that require these disclosures.

44.3. Physicians must disclose their citizenship to become licensed to practice medicine.

44.4. Lawyers must disclose their citizenship to be admitted to the Bar.

44.5. Pharmacists, veterinarians, and nurses must all do the same thing.

44.6. A commercial driver's license application form, available at dmv.nebraska.gov/cdl/cdl requires (1) valid US citizenship or Proof of Lawful Status and US based identity containing Name and Date of Birth. dmv.nebraska.gov/cdl/cdl-documentation-requirements.

See, *Neb R Evi* §§ 27-402 & 27-802.

45. The applicant for a commercial driver's license must also disclose a principal residence. This is for the simple reason of permitting regulatory authorities to find them.

46. The same need exists for TransCanada. If it is a US shell company and it cannot be served with process in the United States, or has no significant interests here, or has the immediate and present capacity to withdraw its assets here and put them beyond the reach of Nebraskans who obtain judgments against the company, or Nebraska regulators who must enforce the law, including imposing fines, or collecting environmental clean-up costs, then it is entirely appropriate and necessary that nationality be a consideration.

47. Finally, with the exception of the vigilance of the PSC, there is no organization at the state or federal level that can prevent the current applicant's sale of the pipeline, or the permit, to a third party with interests entirely inimical to those of the United States and the State of Nebraska. This is a serious national security problem when the asset involved is one like the proposed pipeline. TransCanada argues that discussion of easement terms and advance releases of claims have already been excluded by prior rulings. The landowners respectfully disagree and, to the extent any such prior ruling may be deemed to exist, it must be vacated because it is plainly erroneous.

VII. Formal Hearing Trial Considerations

A. Consequences of the Rules of Evidence

48. The Nebraska Rules of Evidence are applicable to this proceeding. *Neb Rev Stat* § 27-1101; 291 *Neb Admin C* § 1-016.01. The PSC is acting in a quasi-judicial adjudicative capacity and has recognized its responsibility to apply the Rules. Since the Rules of Evidence are Statutes, the Commission does not have authority, as agency, to modify or alter the manner in which the Rules apply by issuing an agency regulation. Statutes trump regulations.

49. For evidence to be received, it must qualify for admission under the Rules of Evidence. Evidence must be relevant, *Neb R Evi* § 27-402, material to the extent that

its relevancy and probative § 27-403, given by a competent witness, § 27-601 et seq, or an expert § 27-701 et seq, and it must be authentic, § 27-901 et seq.

50. For evidence to be authentic, it cannot be hearsay. And for evidence to avoid exclusion as hearsay, it must presented by a qualified witness with first hand knowledge of the facts about which the testimony is offered. Otherwise it is hearsay. § 27-801 et seq.

51. This means that, contrary to situations in which the Rules of Evidence are not invoked, there are some important evidentiary standards to be observed:

51.1. Written testimony cannot simply be tossed at the record with an exhibit number on it, without being authenticated.

51.2. TransCanada's application is not evidence. The application is like a Complaint and it must be proven.

51.3. Cross-examination is allowed as a right as noted above. *Neb Rev Stat* § 84-914 (4).

51.4. Only formal parties are entitled to participate. "Informal Intervenors" are not entitled to present evidence, or engage in the evidentiary process. That process is restricted to parties. APA, *Neb Rev Stat* §84-912.02 provides:

(1) A hearing officer or designee shall grant a petition for intervention if:

(a) The petition is submitted in writing to the hearing officer or designee, with copies mailed to all parties named in the hearing officer's notice of the hearing, at least five days before the hearing;
(b) The petition states facts demonstrating that the petitioner's legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding or that the petitioner qualifies as an intervenor under any provision of law; and
(c) The hearing officer or designee determines that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention.

(2) The hearing officer or designee may grant a petition for intervention at any time upon determining that the intervention sought is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings.

(3) If a petitioner qualifies for intervention, the hearing officer or designee may impose conditions upon the intervenor's participation in the proceedings, either at the time that intervention is granted or at any subsequent time. Conditions may include:

(a) Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition;
(b) Limiting the intervenor's use of discovery, cross-examination, and other procedures so as to promote the orderly and prompt conduct of the proceedings; and
(c) Requiring two or more intervenors to combine their presentation of evidence and argument, cross-examination, discovery, and other participation in the proceedings.

(4) The hearing officer or designee, at least twenty-four hours before the hearing, shall issue an order granting or denying each pending petition for intervention, specifying any conditions and briefly stating the reasons for the order. The hearing officer or designee may modify the order at any time, stating the reasons for the modification. The hearing officer or designee shall promptly give notice of an order granting, denying, or modifying intervention to the petitioner for intervention and to all parties.

Neb Rev Stat § 84-912.02.

B. Practical Consideration and Concerns about the Hearing Process

52. The Commission has directed that the hearing be held in the ballroom of hotel in downtown Lincoln.[2] This poses challenges. The Landowners are Nebraska farmers, ranchers and landowners. They never sought the spotlight, and they don't seek it now. They want to protect their land, and the environment they enjoy. So, the setting for the hearing itself, and matters related to it, raised some concerns, they are addressed in this section of this submission.

[2] To the best of counsel's knowledge, this represents the first time in Nebraska history that a quasi-judicial, or judicial trial of a contested case has been conducted in the ballroom of a hotel, with seating potential for perhaps a 1000 or more, with press passes and credentials required, and with intensive international media scrutiny and interest. What is more, the event is scheduled to be broadcast by the Nebraska's Public Television Network.

53. **Handling Exhibits.** *The Commission is urged to use electronic exhibits and documents at the hearing.*

54. The exhibits are voluminous. It is not practical to make paper copies-1 set for each of 5 Commissioners, another for the hearing officer, yet another for the witness, and copies for all counsel. Doing so would involve, perhaps, as many as 25-30 three ring binders per person, with a virtual impossible task of moving back and forth between and among them.

55. The hearing site is, or can easily be, equipped with electronic equipment that would allow spectators and the public to see parts of the exhibits under consideration while simultaneously permitting each Commissioner who wants a set to have access to all the exhibits electronically, and to allow display of the exhibits before the witness, with Counsel, following along on individual computers using electronic sets of the exhibits.

56. The venue selection strongly suggests the need for this approach. Commissioners probably need 3 monitors. The hearing officer needs one; so does the witness. Counsel probably does not. Counsel can follow along on individual computers by exhibit number and page number.

57. The record on appeal will be simplified if this approach is used. Instead of unwieldy, voluminous exhibits comprising a bill of exceptions, etc., an electronic appellate record can easily be made. Nebraska's Appellate Judiciary is increasingly committed to electronic records. They are not yet completely mandatory but the Court is certainly moving in that direction.

58. Limiting Witnesses. TransCanada identified 8 witnesses. No more. It is limited to those witnesses. Indeed, each formal party must be limited to the witnesses it identified. Only improbable surprise rebuttal would permit a new witness.

59. As noted previously, the informal intervenors have no role in hearings at which the Rules of Evidence apply.

60. Redundancy in direct or cross-examination must also be avoided. The Landowners disclose the testimony of 67 witnesses. They will not call half of these persons, and perhaps far fewer.

61. Commission Publication; Commissioner Influences.

62. The legal authorities noted above include descriptions of the necessity for objectivity and independence on the part of each Commissioner participating in the decision of the PSC. Three distinct subjects of concern must be addressed:

62.1. The Commissioners have participated in for public meetings dealing with the Application and Applicant and its project. MOPSA suggests the record of these hearings is to be included in these proceedings. The Domina Group objects. The hearings did not comport with the rules of evidence and the information is not evidence.

If the hearings influenced the decisions or objectivity of any Commissioner, that Commissioner should disqualify himself or herself. No juror would be permitted to sit, and no jurist would be permitted to preside, at a judicial proceeding after such exposure. The right to procedural due process is a constitutional right. It trumps *MOPSA*. Brief examination of the Commissioners, either by the Hearing Officer or the lawyer should be permitted to assure the right to an objective fact-finding body is present and intact.

62.2. The Public Information Official for the PSC has distributed a "blue sheet". It is believed to be biased, and frankly legally incorrect. The parties are entitled to know this document does not reflect the view of any Commissioner.

63. Ingress, Egress; Security.

64. A reasonable way for the lawyers and parties to enter and exit in the event of a mass crowd, is respectfully requested. This may involve carefully monitored credentials, a separate entrance or exit, or some other method. It should involve an approved list, required identification, and movement that will assure that the parties and lawyers do not hold things up because they can't get through security.

65. Security is an issue at the hearing. The premises be kept secure, but *without* armed law enforcement personnel on the premises. The presence of firearms of

any kind in this setting will jeopardize safety for everyone. This is no where more true then in the Court systems. Annually jurists, lawyers, witnesses, law enforcement personnel, or combinations thereof, are killed by the firearms of officers. Instances in which an officer uses a firearm to protect others and prevent additional carnage are extremely rare.

66. Here, if persons entering the hotel are vetted through a security system, that excludes weapons from reaching the hearing venue, there is no reason for law enforcement personnel inside the premises to be armed.

67. The Commission is urged to inform all persons that the same laws will apply to the hearing room and premises as would be applicable if the hearing were held in a government building. This includes restrictions on weapons, etc.

68. Hearing Hours.

69. The Landowners have serious doubt about the ability of the parties to represent the evidence in complete the hearing in allotted 5 days. They suggest extended hours, commencing at 8:30 a.m. starting with second day, and continuing until **no later than 7:00 p.m., with a break at 12:30 p.m. for lunch for 1 hour, and a midmorning and midafternoon recess, with more recesses if necessary under the circumstances.**

70. They suggest that the lawyers and parties be given permission, in their discretion, to leave the hearing room while proceedings in process where they believe it is appropriate for them to do so temporarily, for personal comfort breaks, provided their departure does not delay the proceedings.

71. The Landowners recognize that the hearing Officer and Commissioners will have to be present throughout the proceedings.

72. **Opening Statements, Closing Arguments.**

73. The Domina Group of Landowners suggest that Opening Statements be allowed but limited to:

TransCanada & Landowers: 10 Minutes Each.

Each Other Formal Intervenor: 5 Minutes Each.

74. The Domina Group of Landowners suggest that Closing Arguments either be limited to the same time periods as Opening, or be disallowed in favor of solely written Closings.

Susan Dunavan, et al., Intervenors, Landowners (Domina Group),

By: *David A. Domina*

David A. Domina, #11043
Brian E. Jorde, #23613
Domina Law Group pc llo
2425 S. 144th Street
Omaha, NE 68144
(402) 493-4100
ddomina@dominalaw.com
bjorde@dominalaw.com

Certificate of Service

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

Jacques	Tallichet	2821 S. 79th St	Lincoln	NE	68506	jacques.tallichet@gmail.com
Leverne A	Barrett	1909 Co Rd E	Ceresco	NE	68017	Vernbarrett@fururetk.com
Becky	Hohnstein	PO Box 272	Minatare	NE	69356	jim.hohnstein@gmail.com
Taylor R M	Keen	5022 Hamilton St	Omaha	NE	68132	taylorkeen7@gmail.com
John	Jarecki	6112 Bedford Ave	Omaha	NE	68104	johnjarecki110@gmail.com
Karen	Jarecki	6112 Bedford Ave	Omaha	NE	68104	tenbuckstwo@yahoo.com
Julie	Shaffer	5405 Northern Hills Dr	Omaha	NE	68152	ksjaffer59@gmail.com
Michelle C	LaMere	PO Box 514	Winnebago	NE	68071	iamere@rocketmail.com
Jonathan H	Thomas	960 S Cotner Blvd	Lincoln	NE	68510	thewild_things@yahoo.com
Jayne	Antony	16064 Sprint St	Omaha	NE	68130	jayneeevan@yahoo.com
Joseph	Pomponio	551B Sand Creek Rd	Albany	NY	12205	lukaz@msn.com
Christine	Polson	4923 Valley St	Omaha	NE	68106	snpolson@cox.net
Wrexie	Bardaglio	9748 Arden Road	Trumansburg	NY	14886	wrexie.bardaglio@gmail.com
Mia	Bergman	86424 514 Ave.	Orchard	NE	68764	mbergman85@hotmail.com
Kimberly E	Craven	33 King Canyon Road	Chadron	NE	69337	kimecraven@gmail.com
Kimberlee A	Frauendorfer	50092 - 520 Ave	Newman Grove	NE	68758	
Randall L	Frauendorfer	50092-520 Ave	Newman Grove	NE	68758	
Troy R	Frauendorfer	Box 493	Newman Grove	NE	68758	
Cathie (Kathryn)	Genung	902 East 7th St	Hastings	NE	68901	tg64152@windstream.net
Louis (Tom)	Genung	902 East 7th St	Hastings	NE	68901	tg64152@windstream.net
Andy	Grier	916 S. 181st St.	Elkhorn	NE	68022	griea01@cox.net
Christy J	Hargesheimer	620 S 30th St	Lincoln	NE	68510	chrispaz@neb.rr.com
Richard S	Hargesheimer	620 South 30th St	Lincoln	NE	68510	rshargy@gmail.com
Marvin E	Hughes	714 W 5th St Ste 120	Hastings	NE	68901	bhughes@gtmc.net
Judy	King	1261 Fall Creek Rd	Lincoln	NE	68510	kingjud@gmail.com
Paul M	Latenser	2271 S 135 Circle	Omaha	NE	68144	pmlatenser@cox.net
Pamela	Luger	8732 Granville Pkwy	LaVista	NE	68128	pam1181@yahoo.com
350.org	Kendall Maxey	20 Jay Street	Brooklyn	NY	11201	kendall@350.org
Elizabeth (Liz)	Mensinger	6509 Wirt St.	Omaha	NE	68104	lizmensinger@gmail.com
Janece	Mollhoff	2354 Euclid Street	Ashland	NE	68003	wjmollhoff@windstream.net
Crystal	Miller	7794 Greenleaf Drive	LaVista	NE	68128	neccmiller@juno.com
Greg	Nelson	3700 Sumner St	Lincoln	NE	68506	gnelson@inetnebr.com
Julie	Nichols	1995 Park Ave	Lincoln	NE	68502	willpower2@earthlink.net
James Douglas	Osborn	43110 879th Rd	Ainsworth	NE	69210	jdosborn30@yahoo.com
Jana	Osborn	1112 Meadowlark	Alliance	NE	69301	janajearyb@gmail.com
Dave	Polson	4923 Valley Street	Omaha	NE	68106	honk@cox.net
Collin A	Rees	4721 Heather Lane	Kearney	NE	68845	collin@priceofoil.org
Donna	Roller	2000 Twin Ridge Rd.	Lincoln	NE	68506	rollerski@gmail.com
Corey	Runmann	2718 S. 12th St.	Lincoln	NE	68502	rumannc@gmail.com
Cecilia	Rossiter	949 N 30th St	Lincoln	NE	68503	punion@gmail.com

Sandra	Slaymaker	102 E 3rd St., #2	Atkinson	NE	68713	sandyslaymaker@gmail.com
Lois	Schreur	2544 N. 61st Street PO Box 4376	Omaha	NE	68104	leschreur@centurylink.net
Susan	Soriente	1110 Rockhurst Drive	Lincoln	NE	68510	ssoriente@gmail.com
Susan	Straka-Heyden	46581 875th Rd	Stuart	NE	68780	suzie_sl@hotmail.com
Oil Change International		714 G St., SE Suite 202	Washington	DC		lorne@priceofoil.org
Tristan	Lorne Stockman Scorpio	208 S Burlington Ave Ste 103 Box 325	Hasting	NE	20003 68901	linda@boldnebraska.org
Kimberly L	Stuhr	19303 Buffalo Rd	Springfield	NE	68059	kimberlystuhr13@yahoo.com
Paul	Theobald	85718 544th Avenue	Foster	NE	68765	ptheobald36@gmail.com
Christine	Troshynski	101 S. 1st St.	Emmet	NE	68734	ctroshynski@gmail.com
Elizabeth L	Troshynski	87769 484th Ave	Atkinson	NE	68713	btroshyn@hotmail.com
Julie	Walker	2570 West Luther St.	Martell	NE	68404	jw9095@yahoo.com
Susan C	Watson	2035 N 28th St Apt 213	Lincoln	NE	68503	scwatson1965@gmail.com
Susan J	Weber	2425 Folkways Blvd Apt 329	Lincoln	NE	68521	susanjweber4@yahoo.com
Douglas	Whitmore	8856 N 83rd Ave	Omaha	NE	68122	douglas@whitmore4congress.com
Sandy	Zdan	4817 Douglas	Omaha	NE	68132	sandywz@cox.net
Sarah	Zuekerman	1729 K St #7	Lincoln	NE	68508	sarahj1182@gmail.com
Blake & Uhlig,PA	Robert J Henry Michael E Stapp	753 State Avenue Ste 475	Kansas City	KS	66101	rjh@blake-uhlig.com
Blake & Uhlig,PA		753 State Avenue Ste 475	Kansas City	KS	66101	rjh@blake-uhlig.com
O'Donoghue & O'Donoghue LLP	Robert J Henry Nuchael E Amash Ellen O. Boardman	4748 Wisconsin Avenue, NW	Washington	DC	20016	eboardman@odonoghuelaw.com
Robert	O'Connor, Jr.	PO Box 45116	Omaha	NE	68154	reolaw@aol.com
Kenneth C	Winston	1327 H St Ste 300	Lincoln	NE	68508	kwinston@inebraska.com
Cavanaugh Law Firm, PC LLO	James P Cavanaugh	6035 Binney Street Ste 100	Omaha	NE	68104	cavanaughlawfirm@aol.com
Brad S Jolly & Associates	Brad S Jolly	15355 Gadsen Dr	Brighton	CO	80603	bsj@bsjlawfirm.com
Fredericks Peebles and Morgan LLP	Jennifer S Baker	1900 Plaza Drive	Louisville	CO	80027	jbaker@ndnlaw.com
McGrath North Mullin & Kratz, PC LLO	James G. Powers	First National Tower Ste 3700 1601 Doddge Street	Omaha	NE	68102	jpowers@mcgrathnorth.com
McGrath North Mullin & Kratz, PC LLO	Patrick D. Pepper	First National Tower Ste 3700 1601 Doddge Street	Omaha	NE	68102	ppepper@mcgrathnorth.com

David A. Domina