

filed testimony should be excluded because these paragraphs address the risks and impacts associated with a pipeline spill or leak, and the Major Oil Pipeline Siting Act (“MOPSA”) and the Hearing Officer’s *Order* excluded this type of testimony.

First, Applicant has misinterpreted the *Order* and MOPSA. The *Order* and MOPSA only state that the Public Service Commission (“Commission”) is prohibited “*from evaluating safety considerations, including the risk or impact of spills or leaks from the major oil pipeline.*” *Order on Formal Intervention*, at. 1; Neb. Rev. Stat. § 57-1407(4) (emphasis added). The Commission is thus prohibited from evaluating *safety considerations* related to potential pipeline spills or leaks, not from considering other problems (such as social and cultural impact) related to pipeline spills or leaks. Moreover, as plainly stated in the *Order* and MOPSA, the Commission can consider the social impacts of a major oil pipeline – and some of these impacts are likely to result from spills.

Although Mr. Cooke addressed the risk of pipeline spills in paragraphs 9(a), 9(b), and 20(a), he raised the issue in the context of damage to the Tribe’s cultural resources, sacred connection to the land, and usufructuary rights – not safety. These paragraphs focus on cultural, spiritual, and natural resource concerns, not safety concerns, and consideration of these issues is not precluded by the *Order* and MOPSA.

Second, even if Mr. Cooke’s and other Intervenors’ witnesses testimony regarding spills falls within the scope of what the *Order* and MOPSA purport to prohibit, this testimony should not be excluded because the provision of MOPSA forbidding the consideration of safety risks associated with pipeline spills, Nebraska Revised Statute § 57-1407(4), is unconstitutional. Nebraska Revised Statute § 57-1407(4) provides that:

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.

(Emphasis added.) Thus, MOPSA requires the Commission to approve a route that is “in the public interest” without allowing the Commission to evaluate safety considerations. It is impossible to determine what is in the interest of Nebraska citizens without considering their safety.

Article IV Section 20 of the Nebraska State Constitution states that the “powers and duties of [the 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.*” Under this provision, the Commission has the power to generally control common carriers, such as pipelines. Nebraska Revised Statute § 57-1407(4), is unconstitutional because it completely removes the Commission’s ability to consider safety when reviewing and approving the route of a pipeline under MOPSA. Although the Constitution does provide that the Legislature can enact “specific regulation” regarding the Commission, “[t]he conclusion is logical, if not inescapable, that the Legislature would not have proposed, and the people would not knowingly have approved, an addition to the Constitution creating a commission with power only to regulate and control common carriers to the extent and for the time provided or permitted by the Legislature.” *State ex rel. State Railway Com. v. Ramsey*, 151 Neb. 333, 343, 37 N.W.2d 502, 508 (Neb. 1949). The Legislature’s ability to enact “specific legislation” for the Commission was thus not intended to allow vital concerns such as safety to be stripped away from the Commission’s consideration. When Article IV Section 20 of the Nebraska State Constitution was enacted, the Commission was plainly given the authority to consider fundamental issues such as reviewing the

safety of common carriers. Nebraska Revised Statute § 57-1407(4), however, has stripped the Commission of the power to consider safety issues related to pipeline spills and leaks when considering the route of a pipeline. Article IV Section 20 of the Nebraska State Constitution was plainly not intended to allow the Legislature to easily strip the Commission of its authority. For this reason, Nebraska Revised Statute § 57-1407(4) is unconstitutional to the extent that it forbids the Commission from considering all safety issues, not just those preempted by federal law. Further, the Tribe hereby adopts Intervenor Landowners' argument addressing the unconstitutionality of § 57-1407(4) raised in their *First Amended Petition of Formal Intervention*.

Finally, even if the Hearing Officer decides to exclude all evidence related generally to pipeline spills and leaks, the Hearing Officer should not exclude all portions of Mr. Cooke's testimony which Applicant has requested to be excluded. Applicant has requested that five paragraphs of Mr. Cooke's testimony be excluded entirely. These paragraphs, however, do not only involve pipeline spills. The only language that generally discusses pipeline spills and leaks, and could therefore be excluded under a broad reading of the unconstitutional provision of § 57-1407(4) is:

- Paragraph 9(a): "or by potential spills that will inevitably occur from the pipeline."
- Paragraph 20(a): "through a spill or otherwise;" and "Our cultural resources and other interests in the Nemaha Reserve lands will be threatened by a potential spill because the South Platte River will carry toxins from a spill down river to where the Missouri River borders the Nemaha Reserve."
- Paragraph 25(c): "The effect on the water is another spiritual and cultural concern. Water is sacred. It is a necessity not only to live, but also for ceremony."

If there is oil leakage, will we ever be able to use that water for ceremony? One of our ceremonies is called *inipi*, commonly known as a ‘sweat.’ Part of this ceremony involves pouring water on heated rocks so that the lodge fills with hot water vapor. If the water used has been contaminated, you don’t know what will happen when you inhale the vapor during this ceremony but that oil contains serious toxins that I certainly would not want to breathe in;” and “Even if water contamination down-river from the Yankton Sioux Reservation might not directly impact those of us on our Reservation, we have family down there who would definitely be affected.”

- All of paragraph 25(d).

B. Mr. Cooke’s Testimony on Man Camps Should Not be Excluded.

Applicant also asserts that Mr. Cooke’s testimony regarding man camps should be excluded based on lack of foundation. Because Mr. Cooke’s testimony has a probative value it should not be excluded.

The Rules of Commission Procedure allow evidence to be admitted that is not necessarily allowed under Nebraska’s Rules of Evidence. Pursuant to Neb. Admin. Code Title 291, Chpt. 1, § 016.01, “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 probative value of evidence involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the fact from the ultimate issue of the case.” *State v. Oldson*, 293 Neb. 718, 722, 884 N.W.2d 10, 25 (Neb. 2016).

The Commission must consider evidence regarding the social impacts of major pipelines when determining whether the proposed route of a pipeline is in the public interest. Neb. Rev.

Stat. § 57-1407(4). Evidence regarding the effect of man camps on rural communities with limited law enforcement is certainly relevant to the social impacts of a major oil pipeline. Thus, such evidence is relevant to the ultimate issue of whether the pipeline route is in the public interest. This evidence is essential for the Commission to consider, as the effects of man camps during construction are not addressed in the U.S. Department of State's Final Supplemental Environmental Impact Statement or the Applicant's application for approval of its preferred route to the Commission.

As Mr. Cooke indicated in his pre-filed testimony, the social dangers man camps pose to nearby communities are commonly known. Additionally, this case will be heard by the Commission. It will not be decided by a jury. Thus, it is the Commission's prerogative to weigh the evidence and decide its probative value. Moreover, wholly excluding Mr. Cooke's testimony is not the appropriate way to address Applicant's concern. The concern that Mr. Cooke lacks the necessary foundation to testify regarding the man camps is best addressed during cross-examination, as is standard in judicial and quasi-judicial proceedings.

Furthermore, because the Tribe and the Ponca Tribe of Nebraska were limited to two witnesses by the May 10, 2017 *Order Granting Motion to Withdraw, and Modifying Case Management Plan and Intervention Order*, the Tribe was forced to make an impossible decision about who should represent all of its interests and concerns at the proceeding. As the Tribe explained in its *Motion for Reconsideration*, there is no one individual who could adequately testify from personal knowledge about all of the Tribe's concerns. The Tribe therefore has no choice but to present all of its concerns about social and cultural impacts through a single witness, notwithstanding the limitations on that witness's knowledge or expertise. It is no fault of the Tribe's that its due process rights have been unlawfully infringed on by the Hearing Officer's order

limiting it and the Ponca Tribe of Nebraska to two witnesses, and by law the Tribe must be permitted to present all of its relevant concerns.

Finally, should the Hearing Officer erroneously decide to exclude testimony on the basis of Applicant's concerns about foundation, it must only do so with respect to the testimony to which those concerns apply. All but the last sentence of paragraph 29(d) of Mr. Cooke's testimony is within Mr. Cooke's personal knowledge and does not constitute speculation as alleged by Applicant. Regardless of the Hearing Officer's ruling with respect to the other portions of Mr. Cooke's testimony, this portion should not be excluded.

II. APPLICANT'S MOTION IN LIMINE REGARDING CROSS-EXAMINATION MUST BE DENIED.

In its second *Motion in Limine*, Applicant requests that the Commission prohibit parties with aligned interests from cross-examining each other's witnesses, and that each Intervenor's cross-examination of witnesses be limited to its scope of intervention.

The Tribe is entitled to cross-examine witnesses brought by all parties to the proceeding, including other Intervenors. Pursuant to Neb. Admin. Code Title 291, Chpt. 1, § 015.01(C), a formal intervenor's participation rights include "without limitation" the right to cross-examination of witnesses. Likewise, the *Order* does not limit the Tribe's ability to cross-examine Intervenors, stating only that "petitioners shall be entitled to collaborate to cross-examine witnesses at the hearing, not to exceed one-hour of time per witness." *Order on Formal Intervention*, at. 6.

At the time Intervenors submitted pre-filed testimony, no rule or order prohibited parties with aligned interests from cross-examining one another's witnesses. Intervenors therefore had no reason to jointly prepare pre-filed testimony, and the Tribe did not have an opportunity to develop the testimony of other Intervenors' witnesses in such a way that no cross-examination would be necessary.

Furthermore, like Intervenor Ponca Tribe of Nebraska (“Ponca”), the Tribe did not receive 48,502 pages of its discovery (108 documents) until June 8 and 9, after the deadline for submitting Intervenor pre-filed testimony had passed. The Tribe adopts and incorporates herein Ponca’s arguments contained in Section II of its Response to Applicant’s Motion in Limine regarding cross-examination.

The Tribe has a right to cross-examine Intervenor’s witnesses if necessary. A blanket ban on cross-examination is improper and would violate the Tribe’s right to due process. The Hearing Officer should make context-specific determinations regarding the appropriateness of the Tribe’s cross-examination of Intervenor’s witnesses.

Applicant also requests that the Tribe’s cross-examination of witnesses be limited to its scope of intervention, but it fails to cite any support for this request. Cross-examination is a critical tool for a party to impeach witnesses on bases such as bias, prior inconsistent statements, and lack of character for truth and veracity character. Because all “[e]vidence which is admissible in civil actions under the Revised Statutes of Nebraska will be admissible before the Commission,” the Tribe must be allowed to cross-examine witnesses in accordance with Nebraska’s Rules of Evidence, Neb. Rev. Stat. §§ 27-101-27-1301, and its right to due process. Neb. Admin. Code Title 291, Chpt. 1, § 016.01.

III. APPLICANT’S MOTION IN LIMINE REGARDING TESTIMONY AND EVIDENCE MUST BE DENIED.

Applicant’s final *Motion in Limine* requests that the Hearing Officer exclude a broad array of testimony and evidence from consideration during the July 31, 2017 hearing. The Tribe respectfully requests that the Hearing Officer deny Applicant’s requests to exclude any exhibit not produced during the course of discovery, prevent all direct examination beyond the scope of the pre-filed testimony, prevent all witnesses from testifying who did not pre-file testimony, and

prevent all cross-examination related to specific issues as described below.

A. Applicant's Request to Exclude Any Exhibit Not Produced During the Course of Discovery and Identified on the Parties' Exhibit Lists Must Be Denied.

Applicant requests that the Commission exclude exhibits not disclosed on the parties' exhibit lists which were required by the Case Management Plan ("CMP") to be filed by June 7. The Tribe adopts and incorporates herein the arguments contained in Section 1 of Ponca's Response to Applicant's Motion in Limine regarding testimony and evidence, noting, as stated above, that the Tribe did not receive complete responses to its discovery requests until June 9, after the deadline to submit exhibit lists.

B. Applicant's Request to Exclude Any Testimony of Any Witness which was Not Contained in that Witness' Admissible Pre-filed Testimony Must Be Denied.

Applicant seeks to exclude any testimony of any witness which was not contained in that witness' admissible pre-filed testimony. Although the Case Management Plan requires parties to file pre-filed testimony for any witness they intend to have testify at the hearing, this requirement does not completely prohibit witnesses from testifying on matters outside the scope of their pre-filed testimony. In fact, Neb. Admin. Code Title 291, Chpt. 1, § 015.01(C) specifically states that formal intervenors can participate through "submission of rebuttal evidence." If another witness testifies to a matter that was not included in their pre-filed testimony (for example during cross-examination), the Tribe should be given the opportunity to have its witness rebut that statement.

The Commission has acknowledged the importance of rebuttal testimony. In a 1998 hearing before the Commission, "parties orally presented pre-filed testimony in an abbreviated form, *along with any rebuttal testimony.*" *In the Matter of the Nebraska Public Service Commission, on Its Own Motion, to Conduct an Investigation to Determine which Cost Study Model should be Recommended to the FCC for Determining Federal Universal Service Support,*

1998 Neb. PUC LEXIS 64, *3 (Neb. PSC 1998) (emphasis added). The Hearing Officer should follow the Commission's prior practice and allow rebuttal testimony.

Furthermore, as previously stated, Applicant failed to provide its complete response to the Tribe's discovery requests until after the deadline for the Tribe to submit its pre-filed testimony. Such pre-filed testimony therefore could not address or incorporate those portions of discovery that were not received prior to the June 7 pre-filed testimony deadline. The Tribe adopts and incorporates herein Ponca's argument contained in Section 2 of its Response to Applicant's Motion in Limine regarding testimony and evidence.

C. Applicant's Request to Prevent Any Person from Testifying who has Not Submitted Pre-Filed Testimony should be Denied.

Applicant asks the Commission to exclude any testimony by any person who has not submitted pre-filed testimony. If a previously unraised issue is addressed during cross-examination, and the Tribe finds it necessary to rebut that issue, however, the Tribe should have the opportunity to call a rebuttal witness, even if the witness has not submitted pre-filed testimony. This request must therefore be denied.

D. Applicant's Request to Exclude Cross Examination on Topics Relating to Pipeline Safety Must Be Denied.

Applicant asserts that cross-examination on topics relating to pipeline safety, including but not limited to the risk of pipeline leaks and spills, should not be permitted. As explained further in Section I(A) of this *Memorandum*, the MOPSA does not prevent the Commission from considering evidence regarding non-safety effects of pipeline spills, including damage to cultural resources and the Tribe's spiritual connection to the land, and in fact requires the Commission to consider these social impacts of a major pipeline. Neb. Rev. Stat. § 57-1407(4). Thus, the Commission should permit cross-examination on non-safety-related effects of pipeline spills.

Moreover, as also explained in Section I(A), the portion of MOPSA which forbids consideration of safety considerations related to pipeline spills is unconstitutional. MOPSA grants parties an opportunity to be heard with respect to all relevant social and cultural matters. Completely preventing the Tribe from presenting safety concerns regarding a potential Pipeline spill constitutes a denial of due process.

E. Applicant's Requests to Exclude Cross Examination on Topics Relating to (1) Identity or Nationality of the Individuals or Entities that Own Keystone; (2) Easement Terms, the Treatment of Land Owners by Land Agents or Eminent Domain; (3) Persons Associated with Keystone that Participated in the Siting Act's Legislative Process; and (4) the Necessity and Commercial Viability of the Pipeline Must Be Denied.

Applicant asserts that all cross-examination relating to identity or nationality of the individuals or entities that own Keystone, easement terms, the treatment of land owners by land agents, eminent domain, persons associated with Keystone that participated in the Siting Act's legislative process, and the necessity and commercial viability of the Pipeline should be prohibited because these topics are not relevant to the case. A broad prohibition on cross-examination on these topics is premature. Because all "[e]vidence which is admissible in civil actions under the Revised Statutes of Nebraska will be admissible before the Commission," the Tribe should be allowed to cross-examine witnesses in accordance with Nebraska's Rules of Evidence, including cross-examining witnesses to determine a witnesses' credibility or to impeach witnesses. Neb. Rev. Stat. § 27-702; Neb. Rev. Stat. § 27-405. The Hearing Officer should make context-specific determinations regarding the appropriateness of the Tribe's cross-examination of witnesses. Further, this case will be decided by the Commission, not a jury. Thus, it is the Commission's prerogative to weigh the evidence and decide its probative value. Neb. Admin. Code Title 291, Chpt. 1, § 016.01.

Moreover, to the extent that the Hearing Officer found that these topics were irrelevant and

should be excluded from discovery, the Hearing Officer's June 14, 2017 *Order Granting in Part, Denying in Part, Motions to Compel* was in error. Intervenors should have had the opportunity to obtain the evidence. This evidence could be relevant to the economic impacts of the pipeline, the Applicant's ability to minimize or mitigate the potential impacts of the Pipeline, and the impact of the pipeline on the orderly development of the area around the proposed route of the pipeline. Neb. Rev. Stat. § 57-1407(4). Intervenors were improperly prevented from obtaining this evidence during discovery. The Tribe requests that the Hearing Officer not prevent the Tribe from obtaining this information during cross-examination.

The *June 14, 2017 Order* was especially erroneous in holding that evidence on the need and necessity of the Pipeline was irrelevant to the case. Evidence on this topic could be relevant to whether the pipeline route is in the best interest of Nebraska citizens. MOPCA specifically mandates that the Commission shall consider the economic impacts of a major oil pipeline. Neb. Rev. Stat. § 57-1407(4)(d). The Commission therefore needs to weigh the economic costs and benefits of the pipeline in determining whether the pipeline route is in the public interest. If the construction of the pipeline is shown to economically harm nearby communities, it is relevant whether the pipeline will actually economically benefit Nebraskans long-term. Intervenors were improperly prevented from obtaining this evidence during discovery. The Tribe requests that the Hearing Officer not prevent the Tribe from obtaining this information during cross-examination.

For the foregoing reasons, the Tribe respectfully requests that the Commission deny Applicant's objection and motions in limine.

Dated July 28, 2017.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing *Yankton Sioux Tribe's Consolidated Response to Applicant's Motions in Limine and Objection To, and Motion in Limine to Exclude, Evidence Offered by the Ponca Tribe of Nebraska and the Yankton Sioux Tribe* was filed with the Nebraska Public Service Commission at psc.kxfilings@nebraska.gov and served by email transmission on this 28th day of July, 2017, upon the following:

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