S-17-1331

NEBRASKA SUPREME COURT

In the Matter of the Application

of

TransCanada Keystone Pipeline, LP

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

Appeal From Nebraska Public Service Commission
(Application No. OP-003)

Appellants Landowner Intervenors' Opening Brief

Appellants, Landowner Formal Intervenors:

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

Appellees

TransCanada Keystone Pipeline, LP,
Applicant,

And

Other Parties:
Andy Grier
Bold Alliance
Cathy and Louis Genung
Cecilia Rossiter
Christine Troshynski
Christy J and Richard S Hargesheimer
Corey Runmann
Crystal C Miller
Dave Polson
Donna Roller
Douglas Whitmore
Elizabeth L Troshynski
Elizabeth Mensinger
Greg Nelson
International Br'hd of Electrical Workers
James Douglas Osborn
Jane Osborn
Janece Mollhoff
Judy King
Julie Nichols

Allpress Brothers, LLC,
Germaine G. Berry,
Karen G. Berry,
Cheri G. and Michael J. Blocher,
L.A. and Sandra K. Breiner,
Jerry and Charlayne Carpenter,
CHP 4 Farms, LLC,
Larry D. Cleary,
Jeanne and Ronald C. Crumly,
Lloyd Z. and Vencille M. Hipke.
R. Wynn and Jill Hipke,
Richard and Bonnie Kilmurry,
Rosemary Kilmurry,
Beverly and Robert Krutz,
LJM Farm, LLC,
Carol Manganaro,
Ken Dittrich,
Frankie and Sandra Maughan,
Beverly and Earl Miller,
Edna and Glen Miller,
Milliron Ranch, LLC,
Frank C. and Lynn H. Morrison,
Larry D., J.D., and Lori Mudloff,
Constance Myers,
Nicholas Family Limited Partnership,
Ann A. and Richard J. Pongratz,
Donald Rech,
Schultz Brothers Farms, Inc.,
Connie and Verdon Smith,
Joshua R. Stelling,
Richard and Darlene Stelling,
Todd and Lisa Stelling,
Arthur R. and Helen J. Tanderup,
TMAG Ranch, LLC,
Tree Corners Farm, LLC,
Dave and Sharyn Troester,
and
Gregory and Joanne Walmer,

Appellants,

Kendall Maxey
Kimberly E Craven
Kimberly L Stuhr
Laborers International Union of America
Los Schreur
Lorne Stockman
Marvin E Hughes
Mia Bergman
Nebraska Sierra Club
Pamela Luger
Paul Theobald
Ponca Tribe of Nebraska
Sandra Slaymaker
Sandy Zdan
Sarah Zuekerman
Susan C Watson
Susan J Weber
Susan Soriente
Susan Straka-Heyden
Tristan Scorpio
United Association
Journeymen/Apprentices, And
Yankton Sioux Tribe of South Dakota

And
Nebraska Public
Service Commission, A Party,

All Additional Parties

Landowner Formal Intervenors - Appellants

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Jurisdictional Basis

1. Appellate jurisdiction lies with this Court under *Neb Rev Stat* § 75-136. The Order appealed decided a contested case before the Nebraska Public Service Com'n ("PSC") over a crude oil pipeline siting application ("Application"). (T54-484). The date of the PSC Order sought to be reviewed is November 29, 2017. (T6140-6210). A Motion was filed by the Applicant on November 24, 2017 (T6212); it tolled the time for appeal. So did other Motions for Reconsideration. (T6223, withdrawn T6245; T6228, T6236). All post Order Motions were disposed of on December 19, 2017. (T6248). The Order and the ruling on Motions fully, finally disposed of all claims and all rights and interests of all parties. An Order assessed costs to the Applicant on January 17, 2018. (T6257).

2. This timely appeal was filed, and the docket fee was paid by the Appellant Landowners on December 27, 2017. The appeal is from a Final Order of the PSC.

3. This Appeal of the PSC order was perfected by filing notice of appeal with the executive director of the PSC within 30 days after the effective date of the order as determined under *Neb Rev Stat* § 75-134. The PSC's subject matter jurisdiction is challenged. Prerequisites for action under *Neb Rev Stat* § 57-1405 were not met; the PSC lacked jurisdiction.

The Record

4. The Transcript is cited as this Court's Rules direct, T__. The Exhibits are not in accord with this Court's rules because doing so is impossible. The PSC's pretrial orders directed each party to mark exhibits with a party designation first followed by a number rather than with a number only. Applicant/Appellee's exhibits are KXL__; Appellants (Landowners) are LO__; Tribes (Cultural) are CU__; and Sierra Club and BOLD (Natural Resources) are NR__.

Statement of the Case

A. Nature of the Case

6. Applicant, TransCanada (sometimes called "KXL"), seeks perpetual authorization under the Major Oil Pipeline Siting Act, *Neb Rev Stat* §§ 57-1401 to 1413 (herein "*MOPSA*"), to take land to build and operate a major crude oil pipeline under, across, and through the breadth of Nebraska. (T54-466). Product is transferred from Canada across the United States stopping at Gulf Coast refineries. No product is loaded or off-loaded in Nebraska. (KXL19,117:53,58, X-XIII [KXL19 is 3 volumes]). The pipeline's useful life is 20 years, and with adaptations it may last 50. (121:14-25). If TransCanada has its way, the pipeline with its sludge inside, will waste in Nebraska's soil until landowners and taxpayers left with the mess must remove it. (T1726; 131:13-20; 133:16-21; 145:15-146:9). TransCanada will be long gone. But, its authority over and legal interest in the abandoned route, and land dividing farms and ranches is perpetual and would remain – in perpetuity. (120:8-15; 124:6-12; LO243, 17, 33-39:937, XVII).

7. No Nebraska trucker, farmer, or fuel seller could bury a fuel tank or pipe without a duty to clean up after it. *Neb Rev Stat* § 66-1515.

8. The Application asks for "approval of the Preferred Route as defined in this Application." (T54; T61) The Application identifies two alternative paths for comparison as required by law *but does not contain any application or request for approval of either*. (T62-67; KXL1, 9-14:53-58, X).

B. Issues Actually Tried

9. Should TransCanada's Application for approval of its Preferred Route as defined within the Application (KXL1, 1:53-58) be granted, and if so, subject to what conditions?

C. How the Issue Was Decided

10. Three PSC Commissioners voted to grant (T6140-6210) a pipeline route, but not the one TransCanada applied for (T54-484). Two Commissioners voted to deny the Application in all respects. (T6196; T6199-6210). No Commissioner voted to approve the "Preferred Route"; it is the only Route for which TransCanada applied.

11. The appealed Order, and the Record, contains no vote for the route TransCanada sought in its Application. The PSC purports to have granted authority to build a pipeline on a route never applied for by TransCanada. The PSC, invited to err by TransCanada's deceptive nomenclature, called the route it approved the "Mainline Alternative Route". But, a) this was simply a theoretical path included descriptively in KXL's Application because the statutes governing the Application required TransCanada to demonstrate that it considered alternatives; b) this route was not applied for either directly or as an "alternative" for PSC consideration; c) no pleadings, no discovery, no notice, and no hearing, ever occurred about this "alternative". Yet, by a 3-2 vote, the PSC Commissioners "approved" an unapplied for alternative path.

12. TransCanada filed one Application for one route. It was not authorized to apply for two, and it did not do so. The PSC majority erred by granting authority for which no one applied. The PSC's majority's error is like disposing of an Application to provide telephone service between Seward and Aurora, by granting authority -- never applied for -- to instead operate a telephone service between Ainsworth and O'Neill.

Standard of Review

13. Under *Neb Rev Stat* § 75–136(2) an appellate court reviews an order of the PSC de novo on the record. An appellate court reappraises the evidence in the record and reaches its own independent conclusions. *In Re Application No. B-1829,* 293 Neb 485, 488 (2016). The

case below purportedly reached the PSC under *Neb Rev Stat* § 57-1405(1). The appellate court does not redesign the Application or redefine the Applicant's requested relief.

14. Whether an agency hearing process comports with constitutional requirements for procedural due process is a question of law. *Cain v. Custer Cty Bd of Equal,* 298 Neb 834 (2018); *Landrum v. City of Omaha Planning Board*, 297 Neb 165, 186–87 (2017).

Assignments of Errors

Error 1. The PSC erred when it acted on the Application because *Neb Rev Stat* §§ 57-1405 and 57-1503. The jurisdictional prerequisite of gubernatorial denial was not met and the PSC lacked jurisdiction to consider, hear, or decide the Application.

Error 2. The PSC erred when it granted Applicant a Route for which no Application was made, and did so without notice to Appellants.

Error 3. The PSC erred when it granted Applicant a Route for which no Application was made because this action is contrary to the public interest. *Neb Rev Stat* § 57-1407(4).

Error 4. The PSC erred when it granted Applicant a Route for which no Application was made because TransCanada did not sustain its burden of proof. *Id*.

Error 5. The PSC erred when it received unsworn, hearsay evidence "public meetings" under *Neb Rev Stat* § 57-1407(2) and public comment directing it to hear unsworn pretrial statements in a forum allowing no confrontation, cross-examination, or procedural due process safeguards, and erred by denying a timely mistrial motion.

Error 6. The PSC erred by receiving unsworn hearsay evidence from "Consultants" of the PSC or other agencies and erred by construing *Neb Rev Stat* § 57-1407(3) as authorizing it to do so and erred by denying a timely mistrial motion.

Error 7. The PSC erred when it received evidence from "Consultants" (PSC6,1-112: 48-52, VIII) who were not sworn, or subject to cross-examination, and thereby denied Appellants' procedural due process of law, (PSC6) and erred by denying a mistrial motion.

Error 8. The PSC erred in following *Neb Rev Stat* § 57-1407(2) by holding "public meetings" prior to the contested case trial, and by receiving unsworn statements from those meetings, and by receiving unsworn evidence from "Consultants" because the statutes and PSC actions deny procedural due process of law and are unconstitutional as applied.

Error 9. *Neb Rev Stat* §57-1403(3) purporting to declare that the "construction of major oil pipelines … is in the public interest of Nebraska" is an unconstitutional invasion of PSC authority contrary to *Neb Const art* IV, § 20.

Error 10. *Neb Rev Stat* §57-1403(3) purporting to declare that the "construction of major oil pipelines…is in the public interest of Nebraska" is an unconstitutional invasion and violation of the judicial power contrary to *Neb Const art* II, § 1.

Error 11. *Neb Rev Stat* §§ 57-1403 & 1408 are unconstitutional because they each purport to deprive property owners of access to the courts to determine legal issues about eminent domain by a private corporation, contrary to *Neb Const art* I, § 13.

Error 12. The provisions of *MOPSA Neb Rev Stat* §§ 57-1101 et seq., and §§ 57-1401 *et seq*., found at are unconstitutional contrary to *Neb Const art* I, § 21 because they fail to restrict takings to those within the public need or purpose.

Propositions of Law

15. "If a pipeline carrier proposes to construct a major oil pipeline to be placed in operation in Nebraska after November 23, 2011, and the pipeline carrier has submitted a route for an oil pipeline within, through or across Nebraska, but the route is not approved by the

Governor pursuant to section 57-1503, the pipeline carrier shall file an application with the Commission and receive approval pursuant to section 57-1408 prior to beginning construction…" *Neb Rev Stat* § 57-1405.

16. Where the court or body appealed from lacked jurisdiction, the appellate tribunal also lacks it. *Kozal v. Nebraska Liquor Control Com'n,* 297 Neb 938, 952 (2017).

17. An agency "did not have the authority to substitute its selection of a route in lieu of [the Applicant's] route described in its application". *In Re Application of NPPD,* 281 Neb 350, 359 (2011); *Lincoln Elec Sys v. Terpsma,* 207 Neb 289 (1980).

18. The PSC's role in passing on an Application like this one is adjudicative and subject to procedural due process requirements. *State ex rel Spire v. Northwestern Bell Tel Co*, 233 Neb 262 (1989).

Statement of the Facts

19. TransCanada seeks perpetual authorization to take land, build, operate, maintain, and repair a major crude oil pipeline across the breadth of Nebraska. (KXL1,29:53, 58, X). The pipeline will neither load nor unload products within Nebraska for Nebraskans. (LO244,24:937, XVII). Its expected utility is 20 years, and with adaptations it may last 50. (121:14-25). If TransCanada has its way, the pipeline with its sludge inside, will then waste in Nebraska's soil until landowners and taxpayers are left with the mess and required to remove it. (131:21-132:6; 145:15-146:9). TransCanada will be long gone by then. But, its authority over the abandoned pipe and route, and ownership of land dividing farms and ranches is perpetual and would remain – in perpetuity. (120:8-15; 124:6-12; 130:3-15; LO243, 17, 33).

20. At the PSC Appellants invoked the rules of evidence (T1783), requested Specific Findings of Fact (T5218) and gave Notice of Constitutional Issues. (T1736-1743).

21. TransCanada's single Application (T54; KXL1:53, 58, X) seeking approval of only one route also depicts two comparison routes, but does not apply for PSC approval of those routes. (KXL1, 31-36: 53, 58; T62-67). Comparison routes are identified because alternative routes that are not sought for approval are called for by *Neb Rev Stat* § 57-1507. TransCanada admits it only applied for the "Preferred Route." (LO243, 4-5:937)

22. TransCanada's application discloses that the Governor never denied or disapproved the "Preferred Route". (KXL1; T54-T456); in fact the Governor approved the "Preferred Route" on January 23, 2013. (T125-127). TransCanada allowed the two-year limitation for action to obtain rights in Nebraska land to expire. The Application with the PSC was filed February 16, 2017. The PSC Order on the Application was issued November 20, 2017. (T6215). The PSC took up the Application and conducted proceedings despite the fact that *Neb Rev Stat* §§ 57-1405(1) & 1503(4) both require gubernatorial denial before the PSC has jurisdiction. Absent gubernatorial action, PSC jurisdiction does not lie.

23. Suspending and setting aside the obvious jurisdictional flaw for discussion purposes, the facts disclosed that TransCanada did not sustain its burden of proof under *Neb Rev Stat* § 57-1407(4). These are statutory factors TransCanada had to prove but failed to establish.

24. TransCanada failed to meet its burden of proof that it's applied for Preferred Route would serve the public interest. § 57-1407(4). No portion of any KXL tar sands is contracted to be allocated or delivered to Nebraska or used within Nebraska. (LO244, 24; LO243, 22:937, XVII). Economist Goss exposed as concluding without foundation. (316:7-330:10). The applied for Preferred Route would only create 6-10 permanent jobs. (LO187, 2:937, XVII). No labor agreement contracts exist with any NE labor union or contractor. (1092:11-13). KXL failed to prove no net adverse impact to existing common carriers. (333:2-13). Short-term

property tax increase is not enough to overcome long-term government costs that go on after depreciation ends tax revenues. (LO189, 22-35:940, XVII; 838:5-839:10, V; 849:7-853:14, V).

25. KXL does not even plan to comply with all laws. § 57-1407(4)(a) and 023.07A. TransCanada admits non-compliance with local zoning, land use and building permit ordinances, construction permit requirements, and has no plans to comply with these laws. (LO189,26:824, XVII; O'Hara 853:24-855:9; 840:1-841:623; KXL1, 38). It proved no exemption from them.

26. The only Route KXL applied for would have net negative impacts on Nebraska's natural resources. § 57-1407(4)(b), § 57-1407(4)(c), and Reg 023.07B. Closely paralleling the existing Keystone I corridor poses fewer risks and disruptions. (553:17-554:4; 547:5-21; LO4:538, 539, XV). TransCanada admits the Route applied for has adverse environmental impacts. (342:1-15, 363:1-8, 368:3-370:9, 371:24-372:12, 373:6-374:16, 376:9-376:24; 657:12-658:3). No studies of this Application's requested Route was made by State Agencies. (LO243, 6-7). The fact an Agency study occurred early is meaningless, since there was no expressly defined route identified as this Court observed in *Thompson v Heineman.*

27. Applicant failed to prove no net negative economic impact on Nebraska. § 57-1407(4)(d) and Reg 023.07D. Impacts are negative even without the State bearing the cost to remove the future abandoned pipeline. (LO189,22:824, XVII; LO244, 14-15). Goss economic & social impacts study discredited; O'Hara not rebutted. The removal costs likely exceed even TransCanada's wildest dreams of profits. Only abandonment of the pipe makes the job feasible.

28. There would be net negative social impacts on Nebraska. § 57-1407(4)(d). TransCanada failed to prove any positive social benefit at all. The applied for route disrupts and dissects farms across Nebraska. (LO1,28:23-31:13: 879, XV; LO44,2:6-20: 763, XV; LO52,2:8-23:782, XV; LO100,2:3-10: 911, 912, XVI; LO141,1:15-2:6: 936, XVII; 724:22-726:6; 775:13-

776:8; 790:25-792:25; 882:22-885:1; 914:19-917:3). KXL failed to speak with Nebraska Native Tribes (1178:4-24). Dissection plus cultural disruption outweighs no proven benefit.

29. There is another feasible route available but it was not sought. § 57-1407(4)(e). KXL admitted a route closely paralleling its existing pipeline would work and is feasible. It failed the fact that twinning the current pipeline would avoid most fragile soils, cross fewer major rivers, avoid shallow water depth areas, avoid dangerous proximity to thousands of existing water wells, completely avoid the Sandhills, and reduce impacts to endangered species. (541:8-543:7; 544:2-545:12; 546:1-547:21-21; 519:12-520:13; 522:2-8; 566:1-10) (LO243,10-11:937; LO206; LO3, 2 "Existing Keystone Oil Pipeline").

30. KXL misrepresented an alleged "fixed entry point" for a route from South Dakota into Nebraska attempting to lull the PSC into thinking Nebraska was stuck with a South Dakota decision – but we are not. (632:17-636:25; LO235,23-38:683, XVII). South Dakota's grant of a permit to construct KXL in its state "**shall not be construed as** a delegation to the Public Utilities Commission of the **authority to route a facility**." (LO235, 23-24 ¶13: 683, XVII).

31. There will be net negative impacts on orderly development of the area around the applied for route. § 57-1407(4)(f). TransCanada's Kothari admitted no study was done of negative impact on development. Admitted electricity demands would hurt irrigators. KXL admits it would be best to build on a noncontroversial route closely paralleling the existing pipeline, but no application for this path was made. (642:15-646:14, III). Economist O'Hara proved negative impact on development. (LO189:824, XVII; 849:24-852:15 & 857:16-858:1, VIII). "The Easement…shall create a…burden upon the Property…" (LO243, 21). No Landowner development can occur within the Preferred Route including irrigation equipment or other structures that would interfere with KXL's easement. (LO243, 21, 33-39; 377:5-16).

32. TransCanada's own witnesses could not deliver proof in areas promised by its lawyers and Application. These TransCanada witnesses were identified as subject matter experts in the Application, and direct testimony Affidavits (KXL2-9) but denied expertise on designated sections when cross-examined: **KXL Executive Palmer:** (KXL2) was designated to speak on Application section 12.0 regarding compliance with all laws, ordinances and statutes. (KXL2, 3). Palmer admits US Army Corps 404 Permits are needed but Applicant does not have them and Palmer defers to Ms. Kothari to discuss them. (175:15-176:11) **Engineer Kothari:** When Kothari is asked about 404 Permits she stated that is not her area. (656:6-10). **Palmer** was identified to speak to Section 5.0 regarding products to be shipped through pipeline (KXL2, 2), but did not know federal requirements when shipped products change. (181:22-182:4). Although identified as the products expert, Palmer conceded no knowledge on product material safety data sheets, and admitted KXL had no witness on proposed pipeline cargo or its risks. (174:10-20).

33. KXL admitted no agencies studied this Application. (639:1-641:25 III). KXL claimed no alternative route would work because it has a fixed point of entry from South Dakota to Nebraska. (T54-456; 539:22-540:23). But its engineer admitted South Dakota did not require that the pipeline be built to compel entry to Nebraska in Keya Paha County. (632:17-636:25; LO235, 23-38:683, XVII). The South Dakota Order grants a building permit, not route approval. (LO235:683, XVII). The PUC there has no authority over routes; TransCanada could have closely paralleled its existing Keystone I pipeline route, and entered Nebraska in Cedar County. (LO3, 2:534, XV: LO235, 23-38). This would have bypassed nearly all the fragile soils of concern, and allowed twinning an existing pipeline that was built without resistance. (644:16-646:14; LO208:367, XVII; LO3; LO4). TransCanada admits no law prevents closely paralleling

their existing Keystone I. KXL has 100% of all Keystone I corridor easements, and all the infrastructure needed for the Keystone I corridor operations. (LO243,10).

34. TransCanada's witnesses were unable to defend the Application. The Applicant did not produce an officer to testify. (61:8-62:11; 96:5-96:15). Feeble attempts were made to clean this up on redirect examination, but not convincingly. (186:21-187:9). The witness admitted that if built, the KXL Pipeline will be abandoned when exhausted – left for future Nebraskans to clean-up. (131:21-132:6).

35. TransCanada's economist witness testified that property taxes would increase in the States crossed by the pipeline. (318:19-21). But on cross examination he admitted the pipeline will depreciate out in fifteen (15) years. (316:25-319:6). Thereafter, there will be no property tax contribution. But, for at least ten (10) more years and probably forty (40), the pipeline will demand government services. (300:24-301:3). The unrebutted testimony of economist O'Hara, Appellants expert, was that the cost to Nebraska tax payers would be at least $24,042,846.00 in income taxes and $2,769,546 in the value of services over property tax contributions. (LO189, 9-10: 824, XVII).

36. At trial, and in interrogatory answers, KXL admitted only 6-10 Nebraska jobs would be created. (LO187, 2:937, XVII). The number of extra Government employees needed to supply KXL's required services was not established.

37. TransCanada conceded its project is controversial at best. The President of the United States determined it is not in the national interest. (Application, T60-61). This followed extensive studies. Shortly after January 20, 2017, a new President, with no studies and no examination of previous studies, reversed his predecessor and granted a border crossing permit. (T61; KXL17:53, 58, X). TransCanada offered no justification for this anomaly.

38. Hearsay and unsworn evidence was offered by the PSC from consultants to other agencies and public listening sessions involving unsworn evidence. (PSC6-11; 49:8-50:14). These were objected to by the Appellants. A mistrial motion was made after the objections were overruled. (52:14-53:14).

Summary of Argument

39. Were jurisdictional prerequisites to PSC action fulfilled? **Answer: No. The Application shows gubernatorial approval, not denial as required by § 57-1503 and § 57-1405(1). (T60-61). Without gubernatorial denial, the PSC lacked jurisdiction.**

40. Did Applicant TransCanada apply for the alternative route approved by the 3-2 majority, or did the PSC purport to approve a route that was never the subject of an Application, notice to the public, hearings, or procedural due process? **Answer: TransCanada's Application was only for its "Preferred Route". But, the PSC majority approved a route never applied for or heard. There is no statute authorizing applications for alternative routes, or a smorgasbord of options. *MOPSA* specifies applications for "a route" -- singular.**

41. Did TransCanada meet its burden of proof that its proposed Preferred Route would serve the public interest of Nebraska? *Neb Rev Stat* § 57-1407(4). **Answer: No. TransCanada adduced no (or, on some nearly no) evidence on six of eight § 57-1407 public interests factors. It flatly lost those elements. TransCanada limped to small success on one point (mitigation), and did slightly better than breaking even on reports from agencies and support from local governing bodies.**

42. Do statutes purporting to give a crude oil pipeline company authority to take whatever they want, including fee simple title or perpetual ownership for projects of finite terms unconstitutionally exceed *US Const amend* V and *Neb Const art* I § 20? **Answer: Yes. The**

Takings clauses do not permit more to be taken than the public need justifies. The judiciary must decide how much can be taken.

43. Does receipt of hearsay, and consideration of remedies outside the Application, deny due process? **Answer: Yes. Statutes providing for evidence from unsworn, unconfronted sources with no hearing attributes are unconstitutional as applied.**

Argument

Error 1: The PSC Lacked Jurisdiction Because The Governor Approved, and Did Not Disapprove, The Preferred Route as Required by §§ 57-1503 & 1405(1).

44. The PSC can act when the Legislature empowers action, unless the Statue Constitution clearly confers power. Like the Judiciary, where the PSC imposes and prerequisite to jurisdiction, the prerequisite must be fulfilled or jurisdiction is absent. Here, gubernatorial *denial* of the KXL Application was a prerequisite for the PSC. This never occurred. So the PSC never acquired jurisdiction.

45. *Neb Const art* IV, § 20 provides "[t]he powers and duties [of the PSC] shall include…general control of common carriers as the Legislature may provide by law." For major oil pipelines, the Legislature conferred authority in two ways: a) specific authority is provided by the *Major Oil Pipeline Siting Act*, *Neb Rev Stat* § 57-1401 *et seq*. ("*MOPSA*") and, b) general responsibilities over all common carriers is granted under *Neb Rev Stat* § 75-109 *et seq*. ("…the commission shall regulate and exercise general control…over all common … carriers engaged in transportation … for hire…"). *MOPSA* does not restrict PSC regulatory authority except where *MOPSA* is inconsistent with the general authority. *Neb Rev Stat* §75-109.01. Here, no inconsistency exists**.**

46. The Nebraska Legislature may define the circumstances under which PSC jurisdiction can be exercised. It did so in the case of major crude oil pipelines in *Neb Rev Stat* § 57-1405 & § 57-1407. In each instance, the PSC may consider an application for a route if, *but only if*, the Governor of Nebraska first considered, and declined to grant, the proposed pipeline route within or across the State. *Neb Rev Stat* § 57-1405 (emphasis added) provides:

> "(1) If a pipeline carrier proposes to construct a major oil pipeline to be placed in operation in Nebraska after November 23, 2011, and the pipeline carrier has submitted a route for an oil pipeline within, through or across Nebraska *but the route is not approved by the Governor* pursuant to section 57-1503, the pipeline carrier shall file an application with the commission and receive approval pursuant to § 57-1408 prior to beginning construction…"
>
> "If a pipeline carrier proposes a substantive change to the route...and the carrier has submitted a route…*but the route is not approved by the Governor*…, the pipeline carrier shall file an application for the proposed change with the commission and receive approval pursuant to section 57-1408…"

47. The Applicant filed an Application with the Governor of Nebraska more than two years before commencing its proceedings before the PSC in this case; and the Governor *approved* that route. (T125-127). There is no exception or exclusion for filings made with the PSC after an elapse of time following gubernatorial *approval* of a route. If the Governor has approved, there is no mechanism for the PSC to exercise jurisdiction. There is no evidence of a rescission of gubernatorial approval. This is not an application for eminent domain authority under *Neb Rev Stat* § 57-1101. It is an Application for a siting route under § 57-1408 and if approved it would, TransCanada contends, authorize eminent domain under § 57-1101. (T54;

KXL1,1). The Governor must say "No" first; then comes the PSC. TransCanada missed the jurisdictional first step.

48. The PSC erred when it acted on the Application because prerequisites for action under *Neb Rev Stat* §§ 57-1503 and 57-1405 were not met and the PSC lacked jurisdiction to consider, hear, or decide the Application. Since the PSC lacked jurisdiction to act, this Court also lacks it. Where the court or body appealed from lacked jurisdiction, the appellate tribunal also lacks it. *Kozal v. Nebraska Liquor Control Com'n,* 297 Neb 938, 952 (2017). "If the court [or agency] from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction. *McDougle v. State ex rel Bruning,* 289 Neb 19, 24 (2014).

49. The PSC authority to regulate a common carrier or any entity over which the legislature confers any control is governed by *Neb Const art* IV § 20 and the specific terms of the Legislature's grant of authority to the PSC. *In Re Claims Against Pierce Elevator,* 291 Neb 798, 813 (2015). "It is clear that the jurisdiction of the [PSC] is based on the constitution insofar as common jurisdiction over common carriers." *In Re Complaint of Fecht,* 216 Neb 535, 539 (1984). The Legislature cannot *divest* the PSC of jurisdiction over common carriers except by entirely occupying a regulatory field dealing with specific common carriers itself. *State ex rel Spire v. NW Bell Tel Co,* 233 Neb 262, 277 (1989). The Legislature can "restrict[] the situations and manner in which the PSC may exercise its regulatory power…." *Id*. at 278. Accord, *Schumacher v. Johanns,* 272 Neb 346, 365 (2006) (citing *Myers v. Blair Tel Co,* 194 Neb 55 (1975) (constitutionally prescribed powers and duties of PSC are plenary and self-executing in absence of any specific legislation on subject.))

50. The Legislature passed specific legislation on crude oil pipelines, giving the PSC authority to act after gubernatorial denial of a pipeline route request. *Neb Rev Stat* § 57-1405.

51. There is no proof of a gubernatorial denial. KXL went to the PSC prematurely, without the gubernatorial equivalent of a final order before appealing to this Court.

52. This Court recognized and dealt with the previous Nebraska Governor's approval of the challenged route and the constitutionality of the statute conferring gubernatorial authority in *Thompson v. Heinemann*, 289 Neb 798 (2015). There, this Court recounted the PSC's history, its creation by voter adoption in 1906, and the independence of the PSC. *Id.* at 831. The Court noted that: "Unless the legislature enacts legislation to specifically restrict the PSC's authority and retains control over that class of common carriers, it cannot constitutionally deprive the PSC of its regulatory powers." The Court also noted that: "The State's eminent domain power resides in the Legislature and exists independently of the Nebraska Constitution." *Id*. at 843, citing *Burnett v. Central Neb Pub Power & Irr Dist,* 147 Neb 458 (1946).

53. In *Thompson v. Heinemann*, 289 Neb 765-66 (2015), the State argued that routing decisions are not part of the PSC's constitutional powers. But the Court's four Justice plurality rejected this argument, concluding the Legislature could validly authorize, conditions precedent or other steps before PSC jurisdiction could be exercised.

54. The Legislature did constrain the PSC's jurisdiction over crude oil pipeline route applications. It held that PSC jurisdiction may be exercised when, but only when, "the pipeline carrier has submitted a route for an oil pipeline within, through, or across Nebraska but the route is not approved by the Governor pursuant to section 57-1503…" Then, but only then, "the pipeline carrier shall file an application with the commission [PSC]." *Neb Rev Stat* § 57-1405. Only upon denial of the Governor and after application for a specific pipeline route to the PSC can the PSC act. Then, only, can it act on the specific route applied for in the Application.

55. There is no evidence the Governor disapproved the applied-for Route. Disapproval is a prerequisite to PSC jurisdiction under § 57-1405(1). Since this requirement was not fulfilled, the PSC lacked jurisdiction. Reversal and remand, with directions for the PSC to vacate its appealed orders and dismiss the Application, are requested.

Error 2: The PSC Can Only Grant Authority Requested in A Filed Application. It Cannot Rewrite the Application and Grant Something Not Requested.

56. An agency, like a court, is limited to what is requested and cannot fashion a remedy that transcends the pleadings that invoke jurisdiction. *Davio v. Neb DHHS,* 280 Neb 263, 272 (2010) (relief available only insofar as it was sought). *Frederick v City of Falls City,* 295 Neb 795, 800 (2017) (remedy limited to relief requested). *In Re Anonymous 5,* 286 Neb 640, 653 (2013) (court may not expand issues beyond what is authorized).

57. This Court expressly held that an agency "did not have the authority to substitute its selection of a route in lieu of [the Applicant's route described in its application]". *In Re Application of NPPD,* 281 Neb 350, 359 (2011) (Power Review Board action on powerline Application). This rule applies to the PSC, too. Even if it had jurisdiction, the PSC could not approve a pipeline route without an Application for it.

58. "[A]n administrative board has no power or authority other than that specifically conferred upon it by statute or by construction necessary to accomplish the purpose of the act. *NPPD v. Huebner,* 202 Neb 587 (1979)." *In Re Application of Lincoln Elec Sys,* 207 Neb 289, 291 (1980). This Court expressly held that an agency "did not have the authority to substitute its selection of a route in lieu of [the Applicant's route described in its application]". *In Re App of NPPD,* 281 Neb 350, 359 (2011) (Power Review Board action on powerline Application). In *Lincoln Elec Sys,* 207 Neb 289, 291-2 (1980), another Power Review Board case, this Court held

that the agency had "no authority to select a particular route other than that selected by the utility."

59. The Power Review Board decisions turned on *Neb Rev Stat* § 70-1014 ("After hearing, the Board shall have authority to approve or deny the application.") In this case, the statute is § 57-1408(1). In analogous language, it provides "Within seven months after the receipt of the application under section 57-1405, the commission shall enter an order approving the application or denying the application."

60. Under *Neb Rev Stat* § 75-136(2) an appellate court reviews an order of the PSC *de novo* on the record. After there has been Gubernatorial denial of route application, the steps involved in crude oil pipeline siting approval are:

a. An Application stating What Is Sought	d. A Decision on the Application
b. Notice to Interested Parties & Public	e. Appellate Review
c. A Hearing with Due Process	

Neb Rev Stat §§ 57-1403 and 57-1408. *Application of Red Carpet Limo Servs, Inc.,* 221 Neb 340 (1985) denying application as two of three statutory criteria were not met; 13 CJS *Carriers* § 314 (2018). *Schmer v. Abler,* 187 Neb 245 (1971) (Com'n jurisdiction limited to application before it). *Schmer* and the Power Review Board cases resolve Error 2 in Appellants' favor. *Neb Rev Stat* § 57-1408 provides (with emphasis added):

> (4) **If the commission denies the application**, **the pipeline carrier may amend the denied application** in accordance with the findings of the commission and submit the amended application **within sixty days after the issuance of the order denying the application…**

No provision in *MOPSA* authorizes the PSC to approve a route not applied for, or to allow and Applicant to amend an approved Application except for minor adjustments, and even they require due process. § 57-1408(4).

61. TransCanada's Application's first page begins: "TransCanada… **Submits this application for approval of the Preferred Route as defined in this application.**" (emphasis added)(T54; KXL1,1) The "Preferred Route" is defined at (KXL1, 9:53, 58, X) then described discussed, and defended for hundreds of pages. (KXL1, 19-372). For illustration of its consideration of unapplied for optional pipeline paths across the State, the Application describes but does not apply for approval for two paths which TransCanada called "The Mainline Alternative", (briefly described and discounted at KXL1, 14:53, 58, X), and the Sandhills Alternative (briefly described and discounted at KXL1, 9:53, 58, X). Application makes clear these two illustrations are merely to show compliance with *MOPSA* as evidenced in the Table of Contents "2.0 **DESCRIPTION OF NATURE AND PROPOSED ROUTE** OF THE MAJOR OIL PIPELINE INCLUDING A MAP OF THE PROPOSED ROUTE **AND EVIDENCE OF CONSIDERATION OF ALTERNATIVE ROUTES** (SUBSECTION 023.02A2)" (emphasis added) (KXL1, 3).

62. TransCanada's Application concludes with this (KXL1,70: 53, 58, X):

> WHEREFORE, TransCanada… requests an order from the PSC that the **Preferred Route** is in the public interest and that TransCanada… is authorized to act pursuant to *Neb Rev Stat* § 57-1101.

63. The Nebraska PSC may not grant authority to engage in common carriage unless an Application for such authority is filed and proceeds through the due process protocol of notification, opportunity to object, a hearing at which procedural due process is observed, and a

decision is made on the Application. The Appellant landowners are targets of TransCanada's proposed Route and future eminent domain proceedings to take their land. (717:20-25, Tanderup) The PSC's role in passing on the Application is adjudicative and subject to procedural due process requirements. *State ex rel Spire*, 233 Neb 262.

64. "The central meaning of procedural due process is that parties whose rights are to be affected are entitled to be heard, and, in order that they may enjoy that right, they must first be notified." *JCB Enter, Inc. v. Nebraska Liquor Control Com'n,* 275 Neb 797, 806 (2008). Here, no one was given advance notice through the filing of an Application or any notification protocol, or at trial, that the PSC might grant a pipeline route for which TransCanada had not applied. (T6199). Many examples exist in the record proving the Application and authority sought is for the single "Preferred Route". In the Application, for example, Section 21.0 (KXL1, 69) only discusses the "Preferred Route" as the proposed route and the reference to "proposed route" is singular not plural. There is no reference to or mention of any "alternative routes."

65. Two paths not applied for by KXL are mentioned in the Application. One crosses much of the Sandhills; the other lies further east of the applied for route. These other two are mentioned in the Application to try to satisfy statutory requirement that an Applicant must demonstrate inquiry about, and consideration of, alternatives by including with the Application for the route sought "**a description of the nature of the proposed route**…**and evidence of consideration of alternative routes**". (Emphasis added) (*Neb Rev Stat* § 57-1405(2)(b)). KXL did only this. Its Application ends by specifically requesting the PSC issue an order approving the applied for Route and finding "that the Preferred Route is in the public interest." (KXL1, 70).

66. Throughout *MOPSA's* statutory matrix for crude oil pipeline route approval (§§ 57-1405 to 57-1407) there are at least 18 references to the applied for "route" -- singular. There

is no statute suggesting an Applicant can serve up a smorgasbord so the PSC can pick and choose. Within *MOPSA:* "If the pipeline carrier…has submitted a route…but the route is not approved…" "…change to the route…." § 57-1405(1). "A description and nature and proposed route…." § 57-1405(2)(b). "A statement of the reasons for the selection of the proposed route…." § 57-1405(2)(c). "A list of…counties…through which the proposed route…would be located." § 57-1405(2)(d). "Serve notice…of the…municipalities through which the proposed route…would be located…." § 57-1407(1)(d). "If requested by the commission…agencies shall file a report…regarding…the proposed route.…" § 57-1407)(3). "An application…shall be approved if the proposed route…." "The pipeline carrier shall have the burden to establish that the proposed route…would serve the public interest." § 57-1407)(4). "The impact of the…pipeline…on the…area around the proposed route.…" § 57-1407(4)(f).

67. No amount of rooting around in the statutes produces authority for an Applicant to root, root, root for a smorgasbord of routes. An Applicant who gives a hoot must submit to one Route, or get the boot.

68. No trial was held concerning the Mainline Alternative Route approved by the PSC, but never sought by the Applicant. TransCanada ballyhooed its "route approval" when the PSC ruled, but sometimes "[t]hings sweet to taste prove in digestion sour." William Shakespeare, *Richard II,* act 1, sc. 3, quoted in *May v. Penn T.V. & Furniture Co., Inc.,* 686 A2d 95, 100 (RI 1996). TransCanada cannot keep what it did not seek. The indigestion set in for TransCanada immediately after the PSC decision of November 20. KXL asked for leave to amend its Application after the decision. (T6212-6217). The request was denied. (T6248-6254).

69. An "application" like those authorized by *MOPSA* is a pleading that serves to inform interested persons like Appellants of what is at stake. *In Re Estate of Radford*, 297 Neb

748, 759 (2017). Applications are not proof. But without an Application to identify what is sought, there can be no notice, and no procedural due process of law. The PSC simply cannot grant authority to an Applicant for common carrier privileges that exceed the application filed. This is what occurred when a majority of the Commissioners authorized TransCanada to use a route for which it did not apply.

70. The PSC's purported approval of a route not applied for is no more legally sound than would be an giving an intrastate long haul carrier applicant taxi service authority in Nenzel; or giving a fiber optics cable connector between Google computer "farms" a party line between Coleridge and Belden; or giving a statewide telephone rate increase applicant a license to operate a grain warehouse in Venango.

71. In the unlikely event jurisdiction is found, reversal is clearly appropriate for the error committed by granting a route never applied for or subjected to the hearing process.

Errors 3 & 4: The Route Approved Was Not Proven To Be In

The Public Interest and TransCanada Did Not Sustain Its Burden of Proof

72. The pipeline is a bad, bad idea. It will a) cost far more in government services than it generates in taxes, b) produce nearly no jobs, but dissect farms and ranches, and permanently scar them for 275 miles across the State, c) challenge natural resources and threaten others, d) and neither deliver, nor ship, a single drop of product in the State. In addition, it will leave for millions of years an open surface mining pit in Canada nearly as large as our entire State, and will retard, if only slightly, the essential move to renewable fuels. The pipeline is an idea sort of like a drinking binge at a party: seems like fun for just a little while, but the hostile repercussions are forever. What is more, TransCanada did not prove otherwise.

73. The PSC erred when it granted TransCanada a route for which they did not apply and also because TransCanada failed to prove the route that got three votes will serve the public interest. *Neb Rev Stat* §57-1407(4). TransCanada did not put in an application, or put on a case, for the "Mainline Alternative Route". It submitted no evidence in favor of this Route at all. Accordingly, there is an obvious failure of proof. It's not that the proof is deficient; simply, there isn't any because this alternate route was not subjected to trial.

74. The burden is always on the Applicant to apply for what it seeks, and establish its right, or earn the privilege, of having its application granted. *Neb Rev Stat* § 57-1407(4) provides, "The pipeline carrier shall have the burden to establish that the proposed route of the major oil pipeline would serve the public interest." This burden is reiterated for cases involving applications before the PSC by 291 *Neb Admin Code* § 9-023.07. The burden is high because the impact of common carrier status, and empowering eminent domain, is great. *Application of Simmerman*, 179 Neb 481 (1965).

75. *Neb Rev Stat* § 57-1407(4) directs the PSC to scrutinize the evidence for satisfaction of the Applicant's "burden to establish that the proposed route… would serve the public interest." The statute provides a list of subjects to be considered including a) demonstrated compliance with applicable State and local laws and regulations; b) impact due to intrusion on state natural resources including evidence about irreversible and irretrievable land area commitments, connected natural resources, and depletion of beneficial uses; c) mitigation impacts to benefit natural resources; economic and social impact of the pipeline; d) economic and social impacts of the pipeline; e) identification of any other utility Court or that could feasibly and beneficially be used; f) pipeline impact on orderly area development; g) agency

reports, and h) views of local governing bodies along the route. See also, PSC's 291 *Neb Admin Code* § 9-023.07.

76. As to the approved, but not applied for, route TransCanada put on no evidence on any of these factors. It did not prove what was never tried.

77. As to route TransCanada applied for, which was never approved, it admitted:
Factor a) it will *not comply* with local zoning laws (840:1-841:623, III; KXL1,38:53, 58, X);
Factor b) Its project would have adverse impacts on the Route area (citations above);
Factor d) KXL could not sustain its tenuous claim about tax revenues as its figures were completely debunked. (LO189, 21-25:824, XVII). Its job creation claims were grossly exaggerated. (LO187, 2:937, XVII). Its own expert could not defend his report on taxes or labor. (311:19-323:1)
Factor e) An alternative corridor exists and was not foreclosed by South Dakota (632:17-636:25; LO235, 23-38:683, XVII);
Factor f) Its pipeline would adversely impact orderly development (LO243, 33-39; 377:5-16);
Factor g) No agency reports were done in connection with this application; (LO243, 6-7:937).
Factor h) County and municipal governing body views were mixed. (PSC5, VIII).

78. A few words about TransCanada jobs and taxes evidence are offered. Applicant's economist Goss *admitted* he disregarded years 16-50 of the pipeline's use when it will produce *no taxes* because it is depreciated out, but will require government services. He also made no calculation of revenue losses for diminished income, increased operating costs, and lowered land values for dissected farms. (316:7-330:10). His jobs admissions were nearly as stark. (311:19-323:1). The Goss tax and jobs analysis was as superficial as the naïve art of a sweet child when compared to the career work of a masterful artist.

79. TransCanada's senior employee at the trial admitted the Applicant will abandon the pipeline for future generations of Nebraskans to clean up. (131:13-20; LO244,14-15:937, XVII). This cost will substantially dwarf construction costs with new pipe, new machines, and no corrosion. It will wipe out any benefit to Nebraska. The project will disrupt electricity availability for irrigation farmers with standby electrical supply contracts. (LO25,20:694, 695, XV; LO29,20:695, XV; LO56,28:699, XV; 214:12-215:11; 642:22-644:3).

80. The Applicant adduced no evidence whatsoever of the cargo to be transported by its pipeline. (174:11-20; 652:11-20). It conceded no part of its product will be used within Nebraska and none is required to be used in the United States. There are no contracts to ship any to the U.S., except to refine it, leave the filthy petcoke behind, and ship the refined oil. (LO244, 22-24:937, XVII). TransCanada could sell out to anybody, unchecked by any government constraint requiring approval of the purchaser exposing Nebraska to an unwanted pipeline owner and potentially exposing the United States to a tremendous danger. (LO244,13; LO243, 17, 30, 33-39:937, XVII). How is that in the public interest?

81. In this country, we do not allow the smallest bank, (12 USC § 1817(j)), the least significant gun dealer, (26 CFR pt 478), grain trader or food exporter, (31 CFR § 538.523), or even a USDA color standard device, (7 CFR § 51.52), to be sold to a purchaser without prior approval. Why would we allow this with a major oil pipeline? TransCanada can sell or otherwise assign all of its rights in the Nebraska route and pipeline to anyone it chooses. Neither Nebraska, nor the United States, nor any landowner has any power over this decision. (LO243, 30). We have regulations about pipelines controlled by the Government of South Sudan, (32 CFR § 538.536), but none for pipelines within the United States. *TransCanada has never responded to*

this argument to identify a single federal law or regulation to the contrary. Nebraska must not bury its head in the sand and ignore this point. There is no other government left to face it.

82. At best for TransCanada, it conceded or deduced no evidence on six of eight §57-1407 best interests test factors. It flatly lost those six factors. Its evidence was debunked in connection with its principle arguments: jobs and taxes. TransCanada did a little better than breaking even on reports from agencies and support from local governing bodies. Those marks (2 of 8) would not get a student out of any class in any public school along the applied for route with a passing grade.

83. Reduced to its essence, the Application was TransCanada's entire case.

> "We have previously held that the pleadings alone are not proof but mere allegations of what the parties expect the evidence to show. *Wilson v. Wilson*, 238 Neb 219 (1991). We have further held that pleadings and their attachments which were not properly admitted into evidence could not be considered by the trial court. An application is a form of pleading. *Richards v. McClure*, 290 Neb 124, 132 (2015). Therefore, an application and its attachments are not evidence, and the allegations therein remain controverted facts until proved by evidence incorporated in the bill of exceptions."

In re Estate of Radford at 759 (emphasis added).

84. TransCanada lacks facts to prove its case. Proving a fact requires evidence. Evidence is not a matter of personal preference, popularity, or politics. "Facts are stubborn things; and whatever may be our wishes, inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence." John Adams (Defense of Soldiers at Boston Massacre, 1770). Massive gaps in TransCanada's evidence confirm its failure to carry the burden of proof for route approval.

"Burden of proof" means the obligation of a party to introduce evidence that persuades the factfinder, to a requisite degree of belief, that a particular proposition of fact is true.

1 Jones on Evidence § 3.5 (Westlaw 7th Ed, Dec 2016). The Applicant must prove it meets all legal requirements, or fail. *In Re Application of Overland Armored Exp*., 229 Neb 524 (1988). TransCanada did not do so. Comparison of the statutory factors against the evidence proves the Applicant failed to adduce evidence on several points, conceded others did not meet its burden.

85. It is impossible to discern any advantage - even a superficial one - for Nebraska in this pipeline project. TransCanada did not prove one; the "advantages" it alleges would all flow to KXL's hedge fund owners at the expense of Nebraska and its citizens. Reversal and dismissal of the Application are sought.

Errors 5 & 8 "Listening Sessions" & Public Comment; Unsworn Testimony; Due Process; Hearsay. No Procedural Due Process.

86. The PSC was called upon to "judge" TransCanada's application. Its responsibility was adjudicatory. The Rules of Evidence were invoked (T1782-1787) and applied at trial. (T1836). Procedural due process was required. *Cain v Custer Cty Bd of Equal,* 298 Neb 834 (2018); *State ex re Spire v. Northwestern Bell Tel Co*, 233 Neb 262 (1989).

87. PSC rules, 291 *Neb Admin Code* § 1-015 permitted Appellants to be Formal Intervenors and their Complaint in Intervention (T543-559) was granted "formal" status. (T699-708). Appellants were full-fledged parties. *Id.* The Commission ordered that the Rules of Evidence would, and did apply to the trial. (T1836).

88. Before trial, the PSC held a public "hearings" or listening sessions (PSC7-10) that were not governed by the rules of evidence, presided over by a hearing officer, or conducted with any notice to the Intervenors in accord with PSC rules. These listening sessions were recorded.

When PSC 7-10 were offered at trial by the PSC (49:8-50:17), Appellants objected but the objections were overruled. Appellants' moved for a mistrial on the basis the PSC had now become a party in its own proceeding and that receipt of thousands of pages of unverified, unsworn, hearsay evidence without foundation and without the ability for Appellants to confront or cross-examine was a fundamental denial of Appellants due process rights. (52:14-53:4). After the motion for mistrial was overruled, Appellants were granted a continuing objection and motion for mistrial to apply. (53:5-14). Additional unverified hearsay comments lacking foundation including emails, postcards, and letters sent to the PSC by any persons from anywhere in the world were offered. (PSC11, 50:7-17; PSC12, 1224:2-6). Appellants again objected. (1224:13-19). Mistrial motion was continuing as to PSC hearsay evidence. (53:5-14).

89. Introduction of PSC7-10 alone account for 1329 pages of unsworn and non-confrontable hearsay evidence into the record. *Neb Rev Stat* §§ 27-801 & 802. "Evidence which is admissible in civil actions under the Revised Statutes of Nebraska will be admissible before the Commission." 291 *Neb Admin Code* § 1-016. Hearsay is not admissible. *Neb Rev Stat* §§ 27-801 & 802. PSC11 is thousands of pages of hearsay and statements lacking foundation.

90. Admission of PSC7-12, and each of them, were errors of law because the evidence was hearsay; its receipt denied any opportunity to confront or rebut it. Receipt of this mass of evidence violated the hearsay rule, and it also destroyed procedural due process by admitting into evidence more than 1000 declarations made outside the hearing without an oath, and offered to prove the truth of each statement's assertions. *TransCanada v. Nicholas Family LP*, 299 Neb 276 (2018) (defining hearsay). Agency decisions cannot be made on hearsay where the rules of evidence apply. *Marshall v. Wimes,* 261 Neb 846 (2001) (license revocation).

91. Procedural due process limits the ability of the government to deprive people of interests which constitute "liberty" or "property" and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard. *Hass v. Neth,* 265 Neb 321 (2003). *Mathews v. Eldridge,* 424 US 319 (1976). *Neb Rev Stat* § 57-1407(2) provides:

> (2) The commission may hold additional public meetings for the purpose of receiving input from the public at locations as close as practicable to the proposed route of the major oil pipeline. The commission shall make the public input part of the record.

92. This statute calls for a process that injects inadmissible evidence into a record without declaring its status, value, or purpose. By doing so it deprives parties, including the Appellants, of fundamental due process components: notice of the previous listening sessions, the protection of an oath for each person speaking there, and cross-examination. The PSC followed § 57-1407(2) and held hearings; they were discretionary, not mandatory. The Ralston listening session on July 26, 2017 also occurred after the rules of evidence were invoked, and when a contested hearing had been scheduled for trial. (PSC7-10:49, 52, IX; T1782-1787, T1837-1839, T839-840, T1325-1326, T1672-1673 & T1767-1768).

93. As applied here, the listening sessions, and the records they produced, and their introduction into the record in this proceeding, each and all denied the Appellants due process of law contrary to *Neb Const art* I, § 3 (due process) and *US Const amend* XIV (due process). Whether an agency hearing process comports with constitutional requirements for procedural due process is a question of law. *Cain* 298 Neb 834. *Fetherkile v. Fetherkile*, 299 Neb 76, 93 (2018). "A court reviewing an order of an administrative agency must determine whether there has been due process of law; and this includes an inquiry into the jurisdiction of the agency, whether there was reasonable notice and an opportunity for fair hearing, and whether the finding

was supported by evidence." *Landrum v. City of Omaha Planning Bd*, 297 Neb 165, 186–87 (2017).

94. Since the PSC chose to hear matters outside the presence of the Appellants while a contested case was ongoing, and decided, over objection, to include the records of its listening sessions with the public in the record of this proceeding, the due process rights of the Appellants were violated. The results of these proceedings are tainted. By inability to participate in "hearings" at which hundreds of witnesses gave thousands of pages of unsworn, unchallenged statements, the Appellants' due process rights were violated.

95. As applied in this case, the Court is asked to declare *Neb Rev Stat* §57-1407(2) unconstitutional and void, and to vacate the PSC orders. If the Application is not dismissed on other grounds Appellants seek remand for a trial with due process requirements met.

Errors 6, 7 & 8: Consultant Reports; Unsworn Testimony; Due Process; Hearsay

96. At commencement of the hearing, over the objections of Appellants, the PSC itself offered in evidence certain written reports of consultants. (PSC6:48, 52, VIII; 48:6-49:7). The consultants were not sworn. The reports were not authenticated and each constitutes overt hearsay and lacked competence that was improperly admitted. *Neb Rev Stat* §§ 27-801, 802; § 27-602. The apparent authority for the use of consultants is:

> The agencies may submit a request for reimbursement of reasonable and necessary expenses incurred for any consultants hired pursuant to this subsection.

Neb Rev Stat § 57-1407(3) (final sentence).

97. Arguments concerning Error 5 above apply and are incorporated here. Appellants' continuing motion for mistrial (52:14-53:14) applies to the PSC's receipt of its own exhibits

including these consultant's reports (PSC6) consisting of opinions and data of those not presented for trial.

Errors 9, 10, 11 & 12: *MOPSA* Is Unconstitutional.

98. Courts do not decide questions of a constitutional nature unless absolutely necessary to the decision in a case. *Clinton v. Jones,* 520 U.S. 681 (1997); *Howarth v. Becker,* 131 Neb 233 (1936). Recognizing this point, the final four Assigned Errors are discussed in this section under two basic categories: **Errors 9 & 10** deal with an effort by the Legislature to invade the Judicial role. **Errors 11 & 12** concern the unbridled bounds of the MOPSA eminent domain authority…including the impropriety of a perpetual Taking for a temporary use.

Errors 9 & 10: The Legislature & "Public Interest". Art IV § 20 and Art II § 1

99. The PSC erred when acted on the Application because *Neb Rev Stat* §57-1403(3) purporting to declare that "The construction of major oil pipelines … is in the public interest of Nebraska" is an unconstitutional invasion of PSC authority and a violation of the judicial power contrary to *Neb Const* art IV § 20 and Art II § 1. "The determination of public interest is the Commission's task…" (T1665).

100. Appellants raised and preserved constitutional issues. (T1736-1743). They also requested special findings. (T5218). The PSC acted on neither request and it could not as determinations of constitutionality of statutes may be made only by the judiciary and not an agency. *Golden Five Inc. v. Nebraska DSS*, 229 Neb 148, 155 (1988).

101. In a broad, policy making sense only, the Legislature can declare that a particular activity is in the public interest. For example, the Legislature can decide that it is in the public interest to build roads, but it cannot decide whether a particular road in a particular spot is for a public use or justifies eminent domain. This is a judicial function.

102. The Legislative declaration at *Neb Rev Stat* § 57-1403(3) purporting to find that the "construction of major oil pipelines in Nebraska is in the public interest of Nebraska" is an unconstitutional invasion of the authority of the Nebraska PSC, and a violation of the doctrine of separation of powers contrary to *Neb Const art* IV § 20 and *art* II § 1. The determination of public interest as it relates to common carriers and specific applications for authority is within the responsibility of the PSC to regulate "general control of common carriers" It also violates the doctrine of separation of powers and unconstitutionally restricts judicial authority. *Thompson v. Heineman,* 289 Neb 798, 836 (2015) (Opinion of four Justices).

103. A citizen's right to determination of the physical and legal scope of permissible condemnation in a court is a basic due process and constitutional right. *May v. City of Kearney,* 145 Neb 475 (1945). *City of Mitchell v. Western Pub Serv Co.,* 124 Neb 248 (1933); *In re Application of City of Sidney*, 144 Neb. 6 (1943); *In re Appraisement of Omaha Gas Plant*, 102 Neb 782 (1918). The statutes restrict the right of a condemnation victim to challenge necessity and scope of the private condemnor's taking. By doing so, § 57-1101 and §§ 57-1403 & 1408 violate the Doctrine of Separation of Powers, and Access to Open Courts.

> Every citizen has the constitutional right to acquire, own, possess, and enjoy property. See *Neb Const* art I, § 25. A citizen's property may not be taken against his or her will, except through the sovereign powers of taxation and eminent domain, both of which must be for a public purpose. *Thompson v. Heineman*, 289 Neb 798 (2015). See, also, *Burlington Northern Santa Fe Ry. Co. v. Chaulk*, 262 Neb 235 (2001); *Burger v. City of Beatrice*, 181 Neb 213 (1967). Eminent domain is the State's inherent power to take private property for a public use….

> The State's eminent domain power resides in the Legislature and exists independently of the Nebraska Constitution. But the constitution has limited the power of eminent domain, and the Legislature can limit its use further through statutory enactments. *Id.* Under *Neb Const art I,* § 21, the State can take private property only for a public use and only if it pays just compensation.

Estermann v. Bose, 296 Neb 228, 240-44 (2017). See also discussion of Errors 11 & 12, below.

Errors 11 & 12: Art I, § 13 and Art. I, § 6

104. *Neb Rev Stat* §§ 57-1403 & 1408 are unconstitutional because they purport to deprive property owners of access to the courts to determine legal issues about eminent domain by a private corporation, contrary to *Neb Const art* I, § 13. This section of the State Constitution provides: "All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay."

105. In eminent domain proceedings, the public use determination is a judicial, not a legislative, function. The Legislature can find a public purpose for a new statute, but when it involves eminent domain, the Courts must decide if a particular Taking is for a public use. *Estermann v Bose*, 296 Neb 228, 240 (2017). Whether an act of eminent domain is lawful is a judicial question. *Monarch Chemical Works, Inc. v. City of Omaha,* 203 Neb 33, 35 (1979).

> [W]here a statute confers the power of eminent domain but does not specifically provide for the extent of the taking, such as a fee or a lesser interest, then, when the power is sought to be exercised by the taking of the fee or an interest therein, it becomes a question for the courts to determine what part of the freehold is reasonably necessary to satisfy the public purpose for which the power has been granted.

Burnett at 458.

106. *MOPSA* is unconstitutional because it deprives property owners of access to the courts contrary to *Neb Const art* I, § 13. Appellants argue that the right to jury trial is compromised and violated by *MOPSA* too.

> "The right of trial by jury shall remain inviolate, but the Legislature may authorize trial by a jury of a less number than twelve in courts inferior to the District Court, and may by general law authorize a verdict in civil cases … by not less than five-sixths of the jury.

Neb Const art I, § 6.

107. *Neb Rev Stat* §§ 57-1403 & 1408 purport to make a decision about general public purpose as affecting common carriers and take it away from the PSC. This violates *Neb Const art* IV § 20 and *art* II § 1 defining the separate departments of government and the doctrine of separation of powers. It also denies access to the courts contrary to *Neb Const art* I § 13, and the right to trial by jury contrary to *art* I, § 6.

108. *Neb Rev Stat* § 57-1101 incorporates the procedure to condemn property found at §§ 76-704 to 724. But, § 57-1101 defines these as circumstances where the parties:

> "…being unable to agree with the owner or lessee of any land, lot, right-of-way, or other property for the amount of compensation for the use and occupancy of so much of any lot, land, real estate, right-of-way, or other property as may be reasonably necessary for the laying, relaying, operation, and maintenance of any such pipeline or the location of any plant or equipment necessary to operate such pipeline, [the pipeline company] shall have the right to acquire the same for such purpose through the exercise of the power of eminent domain…. The procedure to condemn property shall be exercised in the manner set forth in sections 76-704 to 76-724."

Neb Rev Stat § 57-1101. There is no provision for resolving questions about the character of the legal interest to be Taken, based on the actual necessary and intended use or duration, and whether the Taking is more appropriately a leasehold interest, an easement interest, or a fee simple title interest, with rights of reverter when the pipeline company no longer uses the land.

109. A scope of Taking question is of mixed law and fact, parcel by parcel. How much land is a question of fact. What legal interest is truly needed to be Taken is a question of law. These questions are reserved for the judiciary and Appellants contend the jury trial right applies. Cf., *Iske v. OPPD,* 185 Neb 724 (1970) (questions about mineral interests for the jury). *City of Mitchell*, 124 Neb 248 was incorrectly decided to the contrary in 1933. Appellants urge that *City of Mitchell* be overruled.

110. Here, the offending statutes found at *Neb Rev Stat* § 57-1101 et seq place no bounds on the pipeline company. The procedures for determination of value in *Neb Rev Stat* §§ 76-701 *et seq.* include no protections against excess Takings. "[T]he amount of property needed and the estate or interest in such property are questions of fact for the court." *Engelhaupt v. Village of Butte*, 248 Neb 827, 829 (1995). *Estermann* at 240-44.

111. *Neb Rev Stat* § 57-1101 *et seq*. are unconstitutional contrary to *Neb Const art* I § 21 because they fail to restrict Takings to those within the public use. In the case of crude oil pipelines taken for private enterprise, and to be abandoned, the question is not just how much land will be Taken? Will the Taking be for an easement, or fee title? A perpetual easement? Or for a term of years matching the project? And "what is the true legal interest Taken" – an easement? Or a lease? The Constitution permits only Takings for "public use". *Neb Const art* I, § 21. How can the Taking's duration transcend the life of the privately owned project?

112. *MOPSA* does not provide a mechanism for reaching these issues. These are judicial issues. *Burnett*, 147 Neb 458.

113. **Severability Issue.** These constitutional infirmities raise a question about severability. *MOPSA* is a multi-section statute. Appellants attack specific parts. If parts of the Act are unconstitutional is the entire Act unconstitutional? Appellants contend the correct answer is "Yes**."** "Where valid and invalid parts of a legislative act are so intermingled that they cannot be separated, no part of the enactment can be enforced." *Smithberger v. Banning*, 129 Neb 651 (1935); *State v. Junkin*, 85 Neb 1 (1909).

Conclusion

114. Appellants respectfully request reversal of the PSC decision and an outright denial of TransCanada's Application for route approval, and in all respects. They also seek costs.

Landowner Formal Intervenors, Appellants,

By: _____

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