

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,:

**Susan and William Dunavan,
Et al., Landowner Formal Intervenors.**

Appellants,

Appellees

**TransCanada Keystone Pipeline, LP,
Applicant,
And
Nebraska Sierra Club
Ponca Tribe of Nebraska
Yankton Sioux Tribe of South Dakota
And
Nebraska Public
Service Commission, A Party,
et al.,**

Appellees

Appellants Landowner Intervenors' Reply Brief

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Jurisdictional Statement; Statement of Case; Standard of Review

1. Appellate jurisdiction lies under *Neb Rev Stat* § 75-136. This timely appeal is from a Final Order of the PSC. The PSC's subject matter jurisdiction is challenged. Prerequisites for action under *Neb Rev Stat* § 57-1405 were not met; the PSC lacked jurisdiction.

Statement of the Case

2. Applicant, TransCanada (also "KXL"), seeks perpetual authorization under the Major Oil Pipeline Siting Act, *Neb Rev Stat* §§ 57-1401 to 1413 ("*MOPSA*"), to take land to build a major crude oil pipeline under, across, and through the breadth of Nebraska. (T54-466). No product is loaded or off-loaded here. (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 the soil until Nebraskans left with the mess must remove it. (T1726; 131:13-20; 133:16-21; 145:15-146:9).

3. KXL seeks "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). The Governor never *denied* the Application; *denial* is a prerequisite to PSC jurisdiction.

4. Three PSC Commissioners voted to grant (T6140-6210) a pipeline route, but not the one TransCanada applied for permission to use. (T54-484) Application, KXL1, 1:53-58). Two Commissioners voted to deny the Application in all respects. (T6196; T6199-6210). No one voted to approve the "Preferred Route"; it is the only Route for which TransCanada applied.

5. TransCanada filed one Application for one route. It was not authorized to apply for two. The PSC majority erred by granting authority for which no one applied.

Standard of Review

6. Under *Neb Rev Stat* § 75–136(2) an appellate court reviews an order of the PSC de novo on the record. The court reappraises the evidence in the record and reaches its own independent conclusions. The appellate court does not redesign the Application or redefine the Applicant’s requested relief. *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).

7. Whether an agency hearing process comports with constitutional procedural due process requirements is a question of law. *Cain v. Custer Cty Bd of Equal*, 298 Neb 834 (2018).

Assignments of Errors

Error 1. The PSC erred when it acted on the Application because the *Neb Rev Stat* §§ 57-1405 and 57-1503 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 from “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 & 7. The PSC erred by receiving unsworn hearsay evidence from “Consultants” (PSC6,1-112: 48-52, VIII) 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 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 & 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 of PSC authority contrary to *Neb Const art IV*, § 20 and 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* found at *Neb Rev Stat* §§ 57-1101 *et seq.*, and §§ 57-1401 *et seq.*, 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: See Opening Brief.

Statement of the Facts

9. See Appellants-Landowners’ Opening Brief. The PSC suggests that its Order Granting Intervention expanded TransCanada’s Application but it did not do so and could not. The governing statute permits one application for one route at a time, not a smorgasbord from which the PSC can choose. The accuracy of Appellants’ Statement of Facts is affirmed by Appellees, Sierra Club (Br 3), Ponca Tribe (Br 6-9) and Yankton Tribe (Br 6-8).

10. The State’s Brief recites facts witness-by-witness, but leaves out the admissions and nearly entirely leaves out examination at trial, relying instead on the pre-filed “direct testimony”. Each TransCanada witness merely adopted part of the Application in his / her direct testimony. And each recanted expertise or parts of written direct testimony during cross-examination. KXL Economist Goss collapsed on cross-examination, unable to defend figures or methods and unable to respond to Economist Michael O’Hara, PhD. The State’s summation of O’Hara (Br 14-15) plumbs none of his report and none of his substantive testimony. In fact, it does not really offer even a windshield view of O’Hara in-depth, and unassailed work.

11. No fact is cited by the PSC to support its core position that the TransCanada Application could, and did, submit three routes, not just one, for the PSC hearing process. The Application, the governing statute, the notifications of the proceedings, the discovery, the proceedings at trial are all at odds with the PSC and TransCanada positions. Finally, there is no proof the Governor denied the Application; this never happened.

Argument

12. **Error 1.** 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. Error 1 has merit.** “[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).

13. The PSC's jurisdiction arguments are flawed. First, this is a jurisdictional argument and jurisdiction is never waived. Second, the PSC's arguments are inconsistent. It contends gubernatorial approval was not a condition because of prior action on the applied-for route, but that the PSC could act on any of the three (3) routes mentioned in the Application. Neither the "Mainline Alternative" nor the "Sandhills Alternative" routes were ever considered by the Governor, studied by the NDEQ, or subjected to the hearing process. Neither landowners along the secondary routes nor and those on the applied-for route were notified three Routes would be tried before the PSC. The State's position is simply wrong. Characterizing this argument as "jurisdictional" is no "talisman" (PSC Br 19). Prerequisites to agency action are always viewed as jurisdictional. *NPPD v. Huebner*, 202 Neb 587 (1979); *In re Application of LES*, 207 Neb 289, 291 (1980). The PSC's brief fails to come to grips with these decisions and this elementary rule of administrative law.

14. Instead, the PSC argues that *Thompson v. Heinemann*, 289 Neb 798 (2015) "squarely foreclosed" the landowners' arguments. Well, *Thompson v. Heinemann* was a "no decision" because it presented constitutional issues upon which the court did not pass. It was decided on standing, i.e., jurisdictional grounds. The PSC argument misses the boat.

15. The boat was missed twice. Statutory language quoted by the PSC about the Legislature having enacted "a regulatory choice for major oil pipeline carriers" does authorize a Common Carrier to submit a smorgasbord of Applications. The Legislature was clear: Two pathways are available for a pipeline. An Applicant first, can apply to the Governor. If the Governor denies, then second, the Applicant can go to the PSC. It is not "either/or". The PSC is the second alternative under the statute. *Neb Rev Stat* § 57-1503 and § 57-1405(1) cannot be read differently with intellectual integrity. The statutory language is plain. The PSC's position is

as starkly incorrect as reading “Jesus wept” (John 11:35) as “Jesus shouted Hosannah!” TransCanada’s arguments add nothing to the decisional mix. The Gubernatorial prerequisite to PSC jurisdiction was plainly not met. Assigned Error 1 has merit.

16. **Error 2.** 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. Error 2 has merit.** The PSC’s purported approval of a route not applied for is no more legally sound than would be: giving an I-80 long haul carrier applicant a taxi service in Nenzel instead of the truck route sought; 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.

17. The PSC argues (Br 24) that TransCanada applied for more than one route. TransCanada’s Brief adds no verve to the argument. But, it finds no authority for this in the Application which is quoted specifically in Appellant’s Opening Brief. This position is debunked by the Application. (KXL 1:1, 8, 9, 65, 70).

18. The landowners did not invite the error in question. Their Intervention was allowed by a PSC Order granting participation in a limited proceeding confined to an Application for singular route for consideration. (T702, 743 [“...an application for a route...”]). The PSC itself was clear in letters to towns and counties that the “Mainline Alternative” was not the Route applied for. See, e.g., T1005, ¶4). The Landowners did not invite error. They tried to

expand issues, but not to other routes (T1715). TransCanada opposed the Amended Intervention Petition asserting resistance about the Preferred Route only. (T177). The Amendment was disallowed. (T1792). The Landowners did not seek approval of one of the alternate routes. They did argue twinning the existing route is a superior placement if there must be one. Twinning the existing pipeline would require entry into Nebraska in Cedar County, about 120 miles east of the proposed Keya Paha County site. This route is not described in the TransCanada Application.

19. Finally, in this segment of its brief, the PSC does address the Power Review Board cases and attempts a distinction without a statutory basis or difference. The language cited by the state (Br 28) and quoted from 281 Neb at 356, supports the landowners. “*Agency authority is limited to that specifically conferred upon it by statute*”. *Id.* TransCanada’s Brief adds nothing to the discourse on this issue.

20. The PSC suggests the landowners’ arguments “foist a restrictive, wooden, and binary set of options upon the PSC...”. (Br 27). No, it is not the landowners who do so. The Legislature gave the law. The landowners are simply applying it literally, and the PSC is attempting to ignore its mandate. The PSC’s position on assigned Error 2 is without merit.

21. **Error 3.** 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. Error 3 has merit.** 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 280 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. It will leave for millions of years an open surface mining pit in Canada nearly as large as all of Nebraska, and will retard the essential national move to renewable fuels.

22. The pipeline is an idea like a drinking binge at a party: seems like fun for just a little while, but the hostile repercussions are forever. Neither the PSC nor TransCanada can overcome the facts.

23. **Error 4.** 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. Error 4 has merit.**

24. The PSC also misses the mark, by failing altogether to come to grips with Error 4. There, appellants argue that Taking fee simple title and perpetual ownership for a finite project in public purpose exceeds the Constitution's limits in *Neb Const art I, § 20*, and *US Const Amend V*. Neither the PSC nor TransCanada offer a justification for eternal ownership of land into which it wants to place a machine with a finite life. The Takings provisions of the two Constitutions do not permit a condemning authority that needs an inch to take a mile.

25. **Errors 5 – 8.** Does receipt of hearsay, and consideration of remedies outside the Application, deny due process? **Answer: Yes. Statutes providing for evidence from unsworn, unfronted sources with no hearing attributes are unconstitutional as applied. Errors 5 – 8 have merit**, but see ¶ 30 below. 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). 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).

26. The PSC complains that the assigned errors are not specific enough. The assigned errors are specific about the evidence received and leave no doubt about what is intended. Yet, the PSC knows precisely what error was assigned in dealing with massive records from public hearings where people talked without being sworn, cross-examined, or constrained to direct examination testimony by the PSC as were the Appellants at trial, etc.

27. The objection is hearsay. The speakers at these meetings did not show up at trial, were not sworn, were not subject to cross-examination, and were not constrained to issues by rulings of the PSC’s hearing officer. They were apparently offered to prove the truth of the matter asserted. That is hearsay. *Neb R Evi* §§ 27-801 *et seq.* The fact that a statute tries to give the PSC authority to receive evidence that is not within the protections of procedural due process, including a hearing procedure at which the rules of evidence are invoked, does not save the challenged evidence in these assigned errors from exclusion.

28. Sensing how much trouble the PSC is in on these issues, it argues that the exhibits were “Harmless Error”. The expert evidence included testimony from unions, TransCanada officials, engineers, and persons making political statements.

29. Many of the statements were supportive of the idea that jobs would be created by the project. Three PSC Commissioners believed this was true from some source other than Dr. Ernie Goss, the economist for TransCanada, whose testimony was debunked.

30. It cannot be presumed that evidence received in violation of procedural due process requirements and constitutional guarantees is harmless. Compare, *Tennessee Valley Secondary School Athletic Ass'n v. Brentwood Academy*, 551 U.S. 291, 301 (2007) (finding harmless error in much different circumstances). However, since this Court's review is de novo it may be possible that these errors may be overcome if this Court does not consider the objected to evidence. Charles H. Koch, Administrative Law & Prac § 9:29 (3rd Ed Westlaw Updated Feb 2018). Cf., *Appeal of Levos*, 214 Neb 507 (1983).

31. **Errors 9 – 10.** Is *Neb Rev Stat* § 57-1403(3)'s "public interest" finding violation Nebraska's Constitution? **Answer: Yes. To the extent this statute attempts to preempt either PSC authority under *Neb Const* art II, §1 or *Neb Const* art I, § 13, is unconstitutional. Errors 9 and 10 have merit.** In a 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.

32. The PSC misunderstands why *Neb Rev Stat* § 57-1407(2), requiring off the record, unsworn, public listening sessions violates constitutional guarantees of due process of law. (PSC Br 43) Well, the reason is this: when people give evidence before a trial starts to a juror who is to decide the case, and the juror uses that evidence received outside the courtroom to make a decision, the trial participant's constitutional guarantees of due process at trial are thwarted. Few, if any, constructs of law are more foundational. *Universal Decl of Human Rights*, General Assembly Resol. 217A (III) UN GAOR 3d Sess 1948.

33. **Error 11.** Do *Neb Rev Stat* §§ 57-1403 and 1408 violate *Neb Const* art I, §13 because they purport to deprive property owners of access to the courts to determine legal issues about eminent domain by a private corporation? **Answer: Yes. See Error 12 below.**

34. **Error 12.** Do provisions of MOPSA at *Neb Rev Stat* §§ 57-1101 *et seq.*, and §§ 57-1401 *et seq.*, violate *Neb Const* art I, 21 because they failed to restrict authorized takings to those within the public need or purpose? **Answer: Yes. As written these statutes permit a private company like the Applicant to acquire perpetual title to an easement even though the intended use of the property is not perpetual and there is no need for a perpetual Taking of title based upon the merits of the project.** The Taking cannot exceed the need. *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.”

35. The PSC’s contends the issue raised by Assigned Error 12 is not ripe (Br 46-50) apparently because it is thought they can come up later. But, there is no future proceeding at which the *scope* of Taking is to be considered or limited. The eminent domain procedure of *Neb Rev Stat* §§ 76-703 *et seq.* do not include such provisions; they are a damages ascertainment procedure only. They do not include a judicial review and constraint of the Taking authority’s scope of taking. In other words, the statutes governing compensation determinations do not permit the courts to decide whether a condemning authority wants to take too much, or for too long. The time for that to be done must occur *before* the Taking is accomplished or it is too late.

Conclusion

36. 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.

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