

October 27, 2014

REGARDING DOCKET HP 14-001

BOLD NEBRASKA'S RESPONSE TO KEYSTONE AND TRANSCANADA'S CHALLENGE OF APPLICATIONS OF PARTY STATUS OF BOLD NEBRASKA AND OTHER NEBRASKANS

To members of the South Dakota Public Utilities Commission:

This letter is in regards to Case Number HP 14-001 and is in response to the document titled "Keystone's Response to Applications of Party Status of Out-of-state Residents," submitted on October 22, 2014 and signed by William Taylor, an attorney for TransCanada. That letter challenged the party status filing of Cindy Myers, R.N., Jane Kleeb, Diana L. Steskal, Byron T. Steskal, Benjamin D. Gotschall, Amy Schaffer, Robert G. Allpress, Carolyn P. Smith, Arthur R. Tanderup, Terry and Cheryl Frisch, Louis T. (Tom) Genung, Bruce Boettcher, Wrexie Lainson Bardaglio, Roxann Boettcher, and Bonny Kilmurry, a list that includes two representatives of Bold Nebraska, a non-profit entity. Bold Nebraska, represented by Jane Kleeb and Benjamin D. Gotschall in this matter, as well as the additional individuals named as signatories below, respectfully request that those applications be allowed.

According to Keystone's response, "to be allowed party status, an applicant must be either (1) a person residing in the area where the facility is proposed to be sited; (2) a nonprofit organization promoting certain interests enumerated in the statute; or (3) an interested person." The letter contends that because the individuals discussed in the letter do not live in South Dakota, that we do not meet either of the first two criteria; however, the statute does not define geographic or state boundaries as limiting factors in determining the area where the facility is proposed to be sited. To limit the definition of that area to within the state boundaries of South Dakota is to arbitrarily assign a boundary to an area that, in the language of the statute, has none.

Keystone's response indicates that only two individuals, Byron Steskal and Arthur Tanderup, "identify themselves as living on or near the Nebraska right of way." This statement would lead one to believe that there is an existing right of way within the state of Nebraska, which is not the case. Keystone currently has no legal route within the state of Nebraska, due to Lancaster District Court Judge Stephanie Stacy's ruling on February 19, 2014 that LB 1161, the law which established a process for determining a pipeline route in the state of Nebraska, was unconstitutional. As such, any statements made about a pipeline route in Nebraska are speculative. In short, because there is no legal route of a pipeline in Nebraska, any Nebraska landowner could potentially be affected by some future right of way, should one ever be proposed and be legally determined. Of note, several of the Nebraska residents whose party status has been challenged by TransCanada have been or are currently residing on or near one of the former two proposed Keystone pipeline routes that have since been either changed or unlawfully determined.

Two of the individuals named in Keystone's letter, Jane Kleeb and Benjamin Gotschall, are representatives of Bold Nebraska. Kleeb is the Executive Director and Gotschall is the Energy Director. Bold Nebraska is a 501c4 nonprofit organization whose charter was filed in the state of Nebraska. Since 2010, Bold has been dealing exclusively with the Keystone pipeline issue, emerging as a state and national leader on the issue. Representatives of Bold Nebraska, including Kleeb and Gotschall, have testified in matters regarding Keystone and TransCanada in the Nebraska Public Power District, in Nebraska Department of Environmental Quality hearings, in the

Nebraska Legislature, in the Nebraska Public Service Commission, in the State Department public hearings on the Keystone Environmental Impact Statement, and in U.S. Congressional hearings, including in front of the House Energy and Commerce Committee. Bold Nebraska is a power provider within the state of Nebraska, generating electricity for Perennial Public Power District through a net-metered wind/solar hybrid barn configuration that was constructed in a former proposed right of way of the Keystone pipeline.

TransCanada's letter argues that, under the South Dakota Administrative Procedures Act, a person must have a "pecuniary interest" in order to be considered as having "more than a general interest as a precursor to intervention." This is a misinterpretation of the statute, which was only partially quoted by TransCanada's letter. The particular part of the code referred to by TransCanada, in its entirety, reads:

1-26-17.1. Intervention in contested case by person with pecuniary interests. A person who is not an original party to a contested case and whose pecuniary interests would be directly and immediately affected by an agency's order made upon the hearing may become a party to the hearing by intervention, if timely application therefor is made.

Source: SL 1978, ch 13, § 5.

Nowhere does the code read that *only* persons whose pecuniary interests would be affected may be intervening parties, nor does it outline or define that intervening parties have more than a general interest. As TransCanada's letter states, "interested person" is also not defined in Chapter 49-41B. TransCanada's assertion that "'interested person" must mean more than a person simply curious about or attentive to the project," has no basis in statute, cites a nonexistent definition, and uses language that does not appear in codified law. TransCanada's statement is a false construction of statutory language.

In the Keystone response letter, TransCanada claims that "courts generally avoid defining statutory terms in a way that makes other terms meaningless," and also that "there is no reason for area residents and non-profits to be mentioned in the statute if any curious person can become a party for the asking." To support this, TransCanada cites a court case, *Shnelke [sp.] v. Belle Fourche Irrigation Dist.*, 840 N.W.2d 669, 675 (S.D. 2013). TransCanada's interpretation here does not follow the reasoning in the statement made by the court in the cited case ruling. The full quote from the *Schuelke [spelling corrected here] v. Belle Fourche Irrigation* case, regarding the interpretation of statutes, is as follows:

In interpreting statutes, we have consistently stated that the "[w]ords and phrases in a statute must be given their plain meaning and effect. When the language of a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed." *State v. Moss*, 2008 S.D. 64, ¶ 15, 754 N.W.2d 626, 631 (citations omitted).

Using the actual language from the court ruling, and not constructing our own meaning of the statute as TransCanada has done, we take the term "any interested person" to mean "any interested person." We find no statutory requirement that persons must have a pecuniary interest in the project in order to obtain party status. There exists no statutory requirement that "any interested person" must have more than a general interest or curiosity in the project, provided that they meet the requirement that, according to the statute, "timely application therefore is made as determined

by the commission pursuant to rule,” which all of the parties named in the Keystone letter have done in submitting their applications before the Commission’s prescribed deadline.

The nonprofit organization Bold Nebraska and its representatives Jane Kleeb and Benjamin Gotschall, as well as the individuals named in Keystone’s response letter, have more than just a general interest or a curiosity in the project. In fact, our interest is quite vested. We have spent much time and may resources researching this project and its effects not only in Nebraska, but also in South Dakota and other states. We have participated in the Nebraska Public Service Commission’s rulemaking process on pipelines. We have held several outreach and education events with tribal members and landowners in South Dakota and other states as well as in Canada. We have sacrificed time. We have incurred legal expenses. We have defended our property rights from threats of eminent domain. We have been targeted and misrepresented by TransCanada in the media. We have watched our elected officials act against the best interests of the people of our state on behalf of TransCanada, a foreign corporation that spends millions of dollars lobbying our lawmakers.

We have also done our homework. Because this project would directly affect our land, our families, our water, and our communities, we have learned as much as possible about this pipeline and the company that wants to build it. We have been asked, invited, and encouraged by citizens of South Dakota to participate in the PUC process, and we have met the basic requirements and deadlines required by the PUC in order to do so. We respectfully ask for you to grant us party status, and we thank you for allowing us to be heard on this matter.

Sincerely,

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