

SUPREME COURT OF NEBRASKA

In re Application No. OP-0003

303 Neb. 872 (2019) · No. No. S-17-1331 · Decided August 23, 2019

SUMMARY

The Nebraska Supreme Court affirmed the Nebraska Public Service Commission's approval of TransCanada Keystone Pipeline, LP's proposed Mainline Alternative Route under the Major Oil Pipeline Siting Act. The court held that the Commission had jurisdiction, that TransCanada met its burden of proof, that the Commission properly considered the alternative route, and that the intervenors received due process.

CASE DETAILS

COURT	Supreme Court of Nebraska
WRITING FOR THE COURT	Funke, J.; Heavican, C.J.; Miller-Lerman, J.; Cassel, J.; Stacy, J.; Papik, J.; Freudenberg, J.
JURISDICTION	Nebraska
DECIDED	August 23, 2019
DOCKET	No. S-17-1331
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal and cross-appeals from an order of the Nebraska Public Service Commission approving TransCanada's major oil pipeline route application under the Major Oil Pipeline Siting Act and authorizing the Mainline Alternative Route.
STANDARD OF REVIEW	Jurisdictional and statutory-interpretation questions are reviewed independently as questions of law. Constitutional procedural-due-process questions are reviewed as questions of law. Under Neb. Rev. Stat. § 75-136(2), a PSC order is reviewed de novo on the record; the appellate court independently reappraises the record but may give appropriate weight to an agency hearing examiner's credibility-based factual determinations when evidence conflicts.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Susan and William Dunavan et al., Yankton Sioux Tribe of South Dakota, Ponca Tribe of Nebraska v. TransCanada Keystone Pipeline, LP, et al., Nebraska Public Service Commission, Yankton Sioux Tribe

of South Dakota, Ponca Tribe of Nebraska, Sierra Club, Nebraska Chapter, et al.

TOPICS

judicial review of agency action

administrative law

statutory interpretation

procedural due process

appellate jurisdiction

PRACTICE AREAS

administrative law

environmental law

appellate procedure

constitutional law

energy and utilities

QUESTIONS PRESENTED

1. Whether the Nebraska Public Service Commission had jurisdiction to consider TransCanada's application without a prior gubernatorial denial of the proposed route.
2. Whether sufficient evidence supported the PSC's finding that TransCanada met its burden of proving that the Mainline Alternative Route was in the public interest.
3. Whether the PSC had authority to approve the Mainline Alternative Route even though TransCanada's application requested approval of the Preferred Route.
4. Whether the intervenors received adequate notice and procedural due process regarding the Mainline Alternative Route.
5. Whether the PSC properly limited the scope and manner of the tribes' participation in the administrative proceeding.
6. Whether the PSC improperly admitted public comments, agency reports, and consultant reports as hearsay.
7. Whether the intervenors could raise constitutional challenges to various statutes in the Major Oil Pipeline Siting Act proceeding.

HOLDINGS

1. The PSC had jurisdiction to consider TransCanada's application without a prior gubernatorial denial of the proposed route. The gubernatorial route-approval process and the MOPSA process are independent statutory avenues.
2. Sufficient evidence supported the PSC's determination that TransCanada proved by a preponderance of the evidence that the Mainline Alternative Route was in the public interest.
3. The PSC properly considered and approved the Mainline Alternative Route even though TransCanada's application requested approval of the Preferred Route.
4. The intervenors received constitutionally adequate notice and an opportunity for a full and fair hearing regarding the Mainline Alternative Route, and any notice objection was waived by participation without timely objection.

5. The PSC acted within its authority when it limited the tribes' participation to issues relevant to social and cultural impacts and imposed reasonable limits on witnesses, discovery, and cross-examination.
6. The PSC did not commit reversible error by admitting public comments, agency reports, and consultant reports; MOPSA authorized the evidence, and the intervenors failed to show unfair prejudice.
7. The intervenors could not properly litigate their constitutional challenges to various statutes in this MOPSA route-approval proceeding because those challenges were extraneous to the controlling issue of whether the route should be approved.

KEY QUOTATIONS

“Upon de novo review of the PSC’s decision, we find the matters in controversy are resolved based on the determination of four overarching issues: The first, whether the PSC had jurisdiction to consider TransCanada’s application; the second, whether TransCanada met its burden of proof; the third, whether the PSC properly considered the MAR; and the fourth, whether the intervenors were afforded due process. We answer each of these questions in the affirmative.” (at 875)

“The processes are independent of each other and should not be understood as the same thing.” (at 906)

“The parties effectively tried the matter as one seeking approval of the MAR.” (at 921)

“The intervenors presented evidence and argument, cross-examination, and redirect; had the opportunity for rebuttal; and filed briefs.” (at 927)

FACTUAL BACKGROUND

TransCanada sought approval under Nebraska's Major Oil Pipeline Siting Act for a 36-inch pipeline route running from the South Dakota border to Steele City, Nebraska. TransCanada proposed a Preferred Route, while the application also discussed the Mainline Alternative Route, which would co-locate for substantial distances with the existing Keystone I pipeline. After extensive public meetings, agency review, intervention, and a four-day evidentiary hearing, the Nebraska Public Service Commission approved the Mainline Alternative Route, concluding that it served the public interest based on environmental, economic, social, regulatory, and utility-corridor considerations.

PROCEDURAL HISTORY

TransCanada applied to the Nebraska Public Service Commission for approval of a major oil pipeline route and eminent-domain authority under the Major Oil Pipeline Siting Act. The PSC approved the Mainline Alternative Route and found it to be in the public interest. Landowners appealed, the Yankton Sioux Tribe and Ponca Tribe cross-appealed, and the Nebraska Supreme Court moved the case to its docket. The Supreme Court affirmed the PSC's order.

DISPOSITION

affirmed

CASES CITED

- Thompson v. Heineman, 289 Neb. 798, 857 N.W.2d 731 (2015)
- In re Grand Jury of Douglas Cty., 302 Neb. 128, 922 N.W.2d 226 (2019)
- In re Petition of Golden Plains Servs. Transp., 297 Neb. 105, 898 N.W.2d 670 (2017)
- Cain v. Custer Cty. Bd. of Equal., 298 Neb. 834, 906 N.W.2d 285 (2018)
- Telrite Corp. v. Nebraska Pub. Serv. Comm., 288 Neb. 866, 852 N.W.2d 910 (2014)
- Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370 (1987)
- In re Appeal of Bonnett, 216 Neb. 587, 344 N.W.2d 657 (1984)
- Stoneman v. United Neb. Bank, 254 Neb. 477, 577 N.W.2d 271 (1998)
- Streck, Inc. v. Ryan Family, 297 Neb. 773, 901 N.W.2d 284 (2017)
- Harleysville Ins. Group v. Omaha Gas Appliance Co., 278 Neb. 547, 772 N.W.2d 88 (2009)
- Betterman v. Department of Motor Vehicles, 273 Neb. 178, 728 N.W.2d 570 (2007)