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CASE NO. S-14-000158

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NEBRASKA SUPREME COURT  
COURT OF APPEALS

IN THE NEBRASKA SUPREME COURT

RANDY THOMPSON, SUSAN LUEBBE, AND SUSAN DUNAVAN,

PLAINTIFFS-APPELLEES

VS.

DAVE HEINEMAN, GOVERNOR OF THE STATE OF NEBRASKA; PATRICK W. RICE,  
ACTING DIRECTOR OF THE NEBRASKA DEPARTMENT OF ENVIRONMENTAL  
QUALITY; AND DON STENBERG, STATE TREASURER OF NEBRASKA

DEFENDANTS-APPELLANTS

APPEAL FROM THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA  
The Honorable Stephanie Stacy

BRIEF OF *AMICUS CURIAE* TRANSCANADA KEYSTONE PIPELINE, LP

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## INTRODUCTION AND STATEMENT OF FACTS

*Amicus Curiae* TransCanada Keystone Pipeline, LP (“TransCanada”) is the sponsor and developer of the Keystone XL Pipeline Project (“Keystone XL”). Keystone XL is a proposed 1,204-mile, 36-inch, 830,000 barrel-per-day pipeline extending from Hardisty, Alberta to Steele City, Nebraska, where it will connect with TransCanada’s existing Keystone pipeline systems which will continue the delivery of oil to Gulf Coast and Midwest refineries. (E18, 2-1:2, Vol. II). Keystone XL will neither deliver oil to nor receive oil from points within Nebraska, and provides no services within the state. *Id.*

When TransCanada originally proposed to build Keystone XL in 2008, it was in the process of constructing the original Keystone Pipeline System. The state law governing interstate pipelines was clear. Nebraska had no laws that required interstate pipelines that traversed the state to obtain route approval, nor did state agencies, including the Nebraska Public Service Commission (“PSC”), exercise authority over the routing of interstate oil pipelines or interstate pipelines’ exercise of eminent domain authority. *See infra* pp. 7-8. For the original Keystone Pipeline System, an interstate pipeline that currently runs through Nebraska, TransCanada selected its route and exercised its eminent domain authority in 22 cases in Nebraska without challenge to its authority. The PSC played no role in that pipeline’s approval or development. TransCanada completed the commissioning of the Keystone Pipeline System in 2011 and has safely operated it thereafter.

The brief of Appellants and the decision below extensively describe the enactment of state legislation bearing on this dispute. In short, in 2011 the Nebraska Legislature enacted two related statutes, LB 1, 102nd Leg., 1st Spec. Sess. (Neb. 2011), and LB 4, 102nd Leg., 1st Spec. Sess. (Neb. 2011). (E44, 3:2, Vol. II). Those statutes responded to environmental concerns

surrounding Keystone XL and the absence of any regulatory process for reviewing pipeline routes, and they provided a mechanism for Nebraska's participation in an extensive federal process for evaluating environmental and other effects of the pipeline. *See infra* pp. 10-11. LB 1161, 102nd Leg., 2nd Sess. (Neb. 2012), amended those statutes to expand the ability of major pipelines subject to federal environmental law to elect to proceed through a state review process initially undertaken by the Nebraska Department of Environmental Quality ("NDEQ"), culminating in a gubernatorial recommendation that contributes to the federal environmental review process. (E3, 1-5:2, Vol. II); *see infra* pp. 10-11. TransCanada elected to use that process for Keystone XL, and, following assessment by the NDEQ, the Governor advised the United States of Nebraska's approval of the pipeline route. The Governor's approval of the Keystone XL route had the collateral effect of satisfying a condition that LB 1161 imposed on the exercise of eminent domain powers needed for the pipeline's construction – powers which could be exercised without an *additional* review of the route by the PSC. *See infra* p. 11.

Plaintiffs claimed standing as taxpayers and asserted a series of legal arguments to support their facial challenge to LB 1161. (T2-15). The District Court dismissed nearly all these arguments as unfounded but upheld plaintiffs' argument that LB 1161 substantially divested the PSC of powers that Article IV, § 20 of the Nebraska Constitution commits to the PSC as part of the PSC's authority over the rates, services, and general operations of common carriers. (T21-70). Specifically, the court concluded that the authority to approve oil pipeline routes was constitutionally committed to the PSC, and that LB 1161 violated Section 20 by "totally divest[ing] the PSC of control over pipeline routes" by permitting the Governor to review the routes of pipelines such as Keystone XL. (T51, 58-68).

This conclusion fundamentally mistakes the scope of powers that Section 20 commits exclusively to the PSC and the type of “divestment” of any such powers that amounts to a constitutional violation. In fact, Section 20 addresses and protects only the PSC’s authority over the rates, services, and operation of *intrastate* pipelines, not interstate pipelines such as Keystone XL, and it does not vest the PSC with constitutionally protected authority to review oil pipeline routes, especially independently of its regulation of pipeline rates and services in Nebraska. *See infra* Part I. Even if all that is wrong, LB 1161 would still be specific legislation discretely conditioning the eminent domain power, while preserving all the PSC’s otherwise existing powers over rates, services, and general operations of oil pipelines. It would not “absolutely and totally abandon or abolish” the PSC’s general regulatory powers – and thus would not violate Section 20. *See infra* Part II. And, in any event, only the PSC can challenge a supposed divestment of its authority – and its failure to do so confirms that no core PSC powers are implicated here and precludes plaintiffs’ challenge on this point. *See infra* Part III.

This appeal presents the opportunity for this Court to reestablish the legal certainty that had surrounded the regulation of interstate oil pipelines in Nebraska and to confirm the validity of the Legislature’s limited regulation in this area.

## ARGUMENT

### **I. LB 1161 DOES NOT DIVEST THE PSC OF ANY CONSTITUTIONALLY PROTECTED POWER.**

The Nebraska Constitution provides that “[t]he powers and duties of such [Public Service Commission] shall include the regulation of rates, service and general control of common carriers as the Legislature may provide by law,” and that “in the absence of specific legislation, the commission shall exercise the powers and perform [those] duties . . .” Art. IV, § 20.

Contrary to the District Court’s conclusion, and fatal to plaintiffs’ facial challenge, LB 1161 does not divest the PSC of *any* constitutionally protected powers for two separate reasons: those powers over “common carriers” do not extend to interstate pipelines, *see infra* Part I.A, and Section 20 does not reserve the power to approve pipeline routes to the PSC, *see infra* Part I.B.

**A. Art. IV, Section 20 of the Nebraska Constitution Does Not Address or Protect the PSC’s Powers Over Interstate Pipelines.**

LB 1161 applies to *interstate* pipelines, such as Keystone XL, which cross Nebraska but do not deliver oil to or receive oil from points in Nebraska. In contrast, Section 20 addresses and protects only the PSC’s powers over *intrastate* common carriers, including oil pipelines, that deliver services from points within Nebraska to points within Nebraska. As addressed below, this conclusion is supported by the division between state and federal powers that provides the context for Section 20, the Legislature’s definitions of the “common carriers” that fall within Section 20’s scope, this Court’s decisions, and the practices of the PSC. Plaintiffs assert a facial challenge to LB 1161, which they must show to be “unconstitutional in all of its applications.” *Lindner v. Kindig*, 285 Neb. 386, 391 (2013). Because LB 1161 applies in this instance and in others to interstate pipelines that do not implicate the PSC’s constitutionally protected powers, plaintiffs’ facial challenge to LB 1161 based on the alleged divestment of those powers must fail.

Section 20 was enacted as a component of a regulatory regime that sharply divided the regulation of interstate common carrier services from regulation of intrastate common carrier services. Section 20 initially focused on rail common carriers (the State Railway Commission preceded the PSC). Congress had earlier provided the Interstate Commerce Commission with exclusive authority over interstate common carrier rates, services, and practices, leaving states with control over such matters for certain services provided wholly within each state. *See*

Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887); *see Mo. Pac. R.R. in Neb. v. Neb. State Ry. Comm'n*, 65 F.2d 557, 558, 561 (8th Cir. 1933) (Commission empowered to regulate intrastate services, to the extent the power does not interfere with interstate service). In 1906, Congress extended the Act to encompass oil pipelines. Ch. 3591, § 1, 34 Stat. 584 (1906) (Hepburn Act). Today, the Federal Energy Regulatory Commission discharges the federal role for regulating interstate oil pipeline common carriers' rates, terms, and services, *see* 49 U.S.C. app. § 1(1)(b) (1988), and states regulate intrastate services.

The Legislature has confirmed that Section 20 is consistent with this regime and addresses regulation of intrastate, but not interstate, common carriers. Neb. Rev. Stat. § 75-501 defines a “common carrier subject to [PSC] regulation” as “[a]ny person who transports, transmits, conveys, or stores liquid or gas by pipeline for hire in Nebraska *intrastate* commerce.” (Reissue 2009) (emphasis added); *see* Neb. Rev. Stat. § 75-109 (Reissue 2009) (PSC regulation of freight common carriage “in Nebraska intrastate commerce”). This limitation of the PSC’s power over common carriers is long-standing. *See* Neb. Rev. Stat. § 75-601 (R.R.S.1943) (only companies “conveying crude oil . . . from one point in the State of Nebraska to another point in the State of Nebraska” “declared to be common carriers”); *City of Bayard v. N. Cent. Gas Co.*, 164 Neb. 819, 828-29 (1957) (tracing statutes limiting Commission power to intrastate matters).

To similar effect, this Court’s decisions have also confirmed that Section 20’s scope is limited to the protection of powers over intrastate – but not interstate – common carriers: “The power to fix *intrastate* freight rates for common carriers was committed by the Constitution and statute to the commission, Const. art. 4, § 20.” *Fred F. Shields Co. v. Chi., B&Q R.R.*, 133 Neb. 722, 276 N.W. 925, 926 (1938) (emphasis added); *see Erickson v. Metro. Utils. Dist.*, 171 Neb. 654, 660 (1961) (Commission “clothed with power, among others, to hold hearings and establish

rates for common carriers in *intrastate commerce*. Art. IV, § 20.”) (emphasis added); *State Ry. Comm’n v. Ramsey*, 151 Neb. 333, 336 (1949) (Commission is authorized by the Constitution “to regulate the rates and services of, and to exercise a general control over . . . common carriers . . . within this state . . .”) (emphasis added).

This Court in *Bayard*, 164 Neb. at 827-28, directly held that Section 20 and its regulation of common carriers by the PSC do not extend to interstate oil pipelines. There, the Court noted that the legislature had provided that companies “transporting or conveying crude oil, petroleum or other products thereof in *interstate commerce* through or across the State of Nebraska” could exercise eminent domain powers “in the manner” of intrastate oil pipelines. *Id.* at 827-29 (addressing Neb. Rev. Stat. § 75-609 (R.R.S.1943)). Unlike the statute providing for the intrastate oil pipelines’ exercise of eminent domain authority, the statute providing eminent domain authority for interstate pipelines contained no “provision that such interstate pipe line companies were common carriers and thereby ‘placed under the control and subject to regulation by the State Railway Commission . . . as common carriers.’” *Id.* at 830 (omission in original); *see* Neb. Rev. Stat. § 75-601 (R.R.S.1943) (deeming intrastate oil pipeline companies to be common carriers and providing eminent domain authority). The interstate character of the oil pipeline at issue formed one of two grounds for the Court’s conclusion that the Commission lacked power over the pipeline. *Bayard*, 164 Neb. at 829-30. *Bayard’s* reasoning also requires rejecting the District Court’s conclusion (T61) that the PSC’s power can be inferred from Keystone XL’s exercise of eminent domain powers – as do the statutes granting statutory eminent domain authority separately to intrastate pipelines, which were deemed common carriers, and to interstate oil pipelines, which were not. *See* Neb. Rev. Stat. §§ 75-601, 75-609 (R.R.S.1943).

Finally, the PSC's own history shows the limits of its constitutionally protected powers. Until LB 1's passage, the PSC had no role over the regulation of interstate pipelines, including for route approval. *See, e.g.,* Neb. State Ry. Comm'n, *First Annual Report* 156 (Nov. 30, 1908) (General Order No. 1). For example, TransCanada constructed and today operates the Keystone Pipeline, completed in 2011 and crossing Nebraska, after exercising eminent domain powers and without any proceedings before or approval from the PSC. *See supra* p. 1. Even today, the PSC does not regulate the rates, services, and terms of operation of interstate pipelines. *See, e.g.,* State Natural Gas Regulation Act, Neb. Rev. Stat. §§ 66-1801 to -1868 (Reissue 2009 & Supp. 2012) (PSC provided with authority over only intrastate services and pipelines). That is consistent with the legislation and decisions of this Court noted above: the PSC's constitutionally protected powers are limited to regulation of intrastate pipelines and services, and Section 20 does not extend the PSC's constitutionally protected powers to interstate pipelines such as Keystone XL.

**B. Art. IV, Section 20 of the Nebraska Constitution Does Not Address or Protect the PSC's Powers Over Pipeline Route Selection.**

Section 20 addresses "the regulation of rates, service and general control of common carriers as the Legislature may provide by law." Art. IV, § 20. Wholly apart from misconstruing Section 20 as providing constitutional protection for the PSC's regulation of interstate pipelines, the District Court further erred in misconstruing Section 20 as extending constitutional protections for the PSC's role in reviewing pipeline routing decisions. (T64-65).

This Court addressed the limits of the PSC's powers over routing decisions in *Lincoln Electric System v. Terpsma*, 207 Neb. 289 (1980). The immediate issue was whether the Nebraska Power Review Board was empowered to review the particular route an electric utility

selected for a power line. This Court answered that question in the negative by drawing upon the “analogous” context of the PSC, which lacked powers more appropriately determined by the “owner” of the regulated entity because the PSC “was not clothed with the general power of management incident to ownership.” *Id.* at 292. Route selection, the Court concluded, was just such a decision reserved to the “owner of the line” and excluded from the power of regulators such as the Review Board or the PSC. *Id.* That holding forecloses a conclusion that route selection is a constitutionally mandated component of the PSC’s power.

The Legislature’s and this Court’s treatment of the eminent domain power provides additional support for excluding route review from the PSC’s constitutionally protected powers. “The power of eminent domain includes the discretion to determine the necessity of exercising the power *and the location* of the site to be taken.” *Father Flanagan’s Boys’ Home v. Millard Sch. Dist.*, 196 Neb. 299, 303 (1976) (emphasis added) (citing *Hammer v. Dep’t of Roads*, 175 Neb. 178 (1963), and *May v. City of Kearney*, 145 Neb. 475 (1945)). As the District Court acknowledged (T22), oil pipelines and specifically interstate oil pipelines had long been authorized to exercise the power of eminent domain, which includes the selection of land subject to the power, without any involvement of the PSC. *See* Neb. Rev. Stat. § 57-1101 (Reissue 2010) (authorization); *Bayard*, 164 Neb. at 827-29 (implication of authorization); *supra* pp. 6-7; *cf. Toronto Pipe Line Co. v. Camberland Pipelines Co.*, 167 Neb. 201, 207-08 (1958) (also no PSC power to review or issue certificates of public necessity for oil pipelines). That alone establishes that oil pipeline routing decisions were not, and are not now, constitutionally required to be subject to the PSC’s power. Indeed, the District Court elsewhere concluded that “[u]nder the provisions of [LB 1] and LB 1161, the Legislature simply postponed the authorization to exercise eminent domain until a pipeline carrier first had its proposed route reviewed and

approved by NDEQ and the Governor.” (T57); *cf. Duerfeldt v. State Games & Parks Comm’n*, 184 Neb. 242, 246-47 (1969) (discussing other delegations of the eminent domain power conditioned on the Governor’s approval). That is, for pipelines that had secured the Governor’s approval, LB 1161 simply declined to condition the eminent domain power for pipelines on PSC review, as was the case before LB 1 was enacted and entirely consistently with the Legislature’s authority over eminent domain. *See infra* pp. 13-14. Nothing in that delegation and conditioning of the eminent domain power in the absence of PSC review impermissibly limited any PSC power historically protected by Section 20.

This conclusion is supported rather than undermined by *Rivett Lumber & Coal Co. of Benson v. Chicago & Northwestern Railway*, 102 Neb. 492 (1918), which the District Court invoked on this point. (T64). *Rivett* involved a plaintiff that sought to compel a railroad to build a new track and station extending from an existing rail line. This Court held that the matter was to be addressed by the PSC’s predecessor rather than the courts, because “when the question is whether a community or locality is properly served by the railroad company, the question of *rates* is involved,” as are questions “that affect generally all the *service* afforded by [a] railroad company . . . and such questions are peculiarly within the province of the State Railway Commission.” *Rivett*, 102 Neb. at 492 (emphases added). Furthermore, the issue whether to expand the track was not a function of route review: it arose from the distinct carrier obligation to “afford reasonable and equal terms, service, facilities and accommodations” to their customers. *Id.* Thus the Commission was empowered to address the issue only because it involved “rates” and “service” to a Nebraska community, which are directly addressed by Section 20, and not because the Commission has any general power to review route selection. The error in the District Court’s application of *Rivett* is especially clear because even the court

below recognized that the PSC’s power must be tied to regulation of carrier “services,” (T64) (“decisions involving *where* a common carrier locates its services”), and of course Keystone XL offers no services, much less common carrier services, to anyone in Nebraska.

**II. EVEN IF LB 1161 DID LIMIT CERTAIN OF THE PSC’S CORE POWERS, LB 1161 WOULD STILL BE CONSISTENT WITH SECTION 20.**

Even if the PSC did have constitutionally protected powers over interstate pipelines, and had such protected powers to review pipeline routes, the exclusion of the PSC from route review of a limited class of carriers would still not violate Section 20 unless the limitation on PSC authority – and conferral of authority in the Governor – were so extensive as to be beyond the Legislature’s power to achieve through the specific legislation authorized by Section 20, as this Court has repeatedly held. *See infra* pp. 11-13. LB 1161 is not legislation of this type. In fact, any limitation of authority is extremely narrow, preserving nearly all the PSC’s otherwise existing powers (indeed, the PSC retains *all* the powers it exercised prior to the enactment of LB 1 and LB 1161). For this additional reason, LB 1161 does not violate Section 20.

The particular features of LB 1161 show its limited effect on any protected powers of the PSC, and its intended purpose of facilitating a state-federal environmental review shows how unrelated the NDEQ and Governor’s actions are to the general powers to regulate rates, services, and general operations of common carriers. LB 1161 directed NDEQ and the Governor to address environmental issues as part of a state-federal review process. The Legislature enacted LB 4, and then LB 1161, to authorize NDEQ to “[e]valuate any route for an oil pipeline” through Nebraska “for the stated purpose of being included in a federal agency’s . . . National Environmental Policy Act review process” and “[c]ollaborate with a federal agency . . . under the National Environmental Policy Act.” Neb. Rev. Stat. § 57-1503(1)(a)(i)-(ii) (Cum. Supp. 2012).

The statute also directs the Governor to indicate to federal officials whether he approves “any of the routes reviewed” by NDEQ. *Id.* § 57-1503(4). This responded to a federal regulatory process and request for assessments of the environmental impact of Keystone XL, specifically including the routing of the pipeline through Nebraska. *See* Press Release, U.S. Dep’t of State (Nov. 10, 2011), <http://www.state.gov/r/pa/prs/ps/2011/11/176964.htm>. At the conclusion of the process created by LB 1161, the Governor submitted NDEQ’s Final Evaluation Report for inclusion in the Department of State’s environmental report and advised the President and Secretary of State that he approved the route reviewed by NDEQ.

The resulting effects on the PSC’s role were quite limited. The Governor’s determination had the collateral consequence of qualifying Keystone XL to exercise eminent domain powers. *See* Neb. Rev. Stat. § 57-1101 (Cum. Supp. 2012). As a result, Keystone XL fell within one of the exceptions to the concurrently enacted condition on certain pipelines’ ability to exercise eminent domain powers only after completing a PSC review process. *Id.* That requirement was of very recent vintage: no PSC review had been necessary for *any* oil pipeline prior to the passage of LB 1 and LB 4 in 2011, as modified by LB 1161 thereafter. *See id.* § 57-1101 (Reissue 2010). The legislation created two exceptions to this recently created PSC review process: for smaller pipelines and those securing the Governor’s approval. *Id.* §§ 57-1404(2), -1405(1) (Cum. Supp. 2012). Pipelines that fell within those exceptions remained subject to whatever powers the PSC otherwise had over the pipelines’ rates, services, and general operations.

This limited effect on the PSC’s powers, for limited classes of pipelines, does not remotely amount to the curtailment of PSC powers that constitutes a constitutional violation. Section 20 provides that “in the absence of specific legislation, the commission shall exercise the

powers and perform the duties enumerated in this provision.” Art. IV, § 20. This Court has long interpreted this provision to mean that “the Legislature may properly enact specific legislation limiting the scope of the commission’s power,” *Spire v. Nw. Bell Tel. Co.*, 233 Neb. 262, 275 (1989); *Ramsey*, 151 Neb. at 336-37, including by making exceptions to the PSC’s authority. *Spire*, 233 Neb. at 274-77; *Rodgers v. Neb. State Ry. Comm’n*, 134 Neb. 832 (1938). In contrast, to violate Section 20, legislation must “absolutely and totally abandon or abolish constitutionally conferred regulatory control over common carriers.” *Spire*, 233 Neb. at 277. In other words, the Legislature cannot “legislate completely and generally with reference to [an] entire class of carriers,” including by “confer[ring] the general power to regulate rates, service, or control generally of common carriers upon some other body or jurisdiction.” *Ramsey*, 151 Neb. at 344, 346; see *Ritums v. Howell*, 190 Neb. 503, 507-08 (1973) (violation only when statutes “attempt[] . . . to exclude,” “prohibit[] the Public Service Commission from regulating,” or “delegate the Commission’s ‘general control’ or rate making jurisdiction” over class of common carriers). Through LB 1161, the Legislature did not “legislate completely or generally” with regard to oil pipelines, nor did it permit the NDEQ or Governor to exercise any type of such “general control” or confer “general powers” upon them. Instead, it at most permitted other entities – those with the environmental expertise needed for the relevant federal-state process – to make a determination that also satisfied a condition for the exercise of the distinct, eminent domain power. Far from “absolutely” or “totally abandon[ing] or abolish[ing]” the PSC’s constitutionally protected powers, LB 1161 carefully preserved whatever powers the PSC otherwise had over the pipelines’ rates, services, and general operations. *Spire*, 233 Neb. at 277.

The details of this Court’s decisions confirm the constitutionality of LB 1161. *Ramsey*, the only decision finding a transfer of PSC powers to another governmental body to be

unconstitutional, addressed the legislature's transfer of *all* regulatory powers from the PSC to a new agency, the Nebraska Aeronautics Commission, with respect to all air transport services, as well as its prohibition on the PSC's regulation of air common carriers. *Ramsey*, 151 Neb. at 346-48. The scope of the general powers transferred rendered that statute unconstitutional, *id.*, as did the prohibition on the PSC's exercise of the entire class of its powers. *See Ritums*, 190 Neb. at 507-08; *Spire*, 233 Neb. at 278-79. In *Spire*, this Court considered the Legislature's total exemption of intrastate toll calls from the PSC's jurisdiction, and found that exception to be lawful because "[t]he Legislature has not abandoned or abolished all PSC regulation of telecommunications companies." *Spire*, 233 Neb. at 278-79. Instead, the statute "preserves the PSC's regulatory jurisdiction regarding quality of service and entry . . . and, therefore, does not divest the PSC of its regulatory power over telephone companies." *Id.*; *see Rodgers*, 134 Neb. 832 (upholding "exemption" to PSC regulation for common carriers transporting agricultural products, as a function of "the right of the legislature to make a reasonable and fair classification").

Here, not only were the exceptions to the PSC's powers only for a specific and minor aspect of the PSC's concurrently expanded powers, they were specific applications of the Legislature's clear powers over eminent domain. Those powers are broad, constitutionally grounded, and independent of any particular regulatory authority. *See Father Flanagan Boys' Home*, 196 Neb. at 302-03; *Duerfeldt*, 184 Neb. at 245 ("the Legislature has [the] authority to confer the power of eminent domain on any governmental or political subdivision or legal entity thereof"). Through LB 1, LB 4, and LB 1161, the Legislature simply amended the prior eminent domain regime (whereby no oil pipeline required any PSC action prior to exercising eminent domain authorities) to create three types of conditions on that authority: no conditions for

smaller, non-“major” pipelines; a condition that could be met by Gubernatorial approval for certain “major” pipelines; and a condition that could be met by completion of the PSC’s new review process for “major” pipelines. The legislation otherwise did not abandon or abolish any PSC power, confer any “general” regulatory power on the Governor or NDEQ, or interfere with any pre-existing PSC power to regulate the rates, services, and operations of oil pipeline common carriers. LB 1161 is clearly constitutional.

**III. EVEN IF LB 1161 MATERIALLY IMPLICATED THE PSC’S CORE POWERS, STANDING DOCTRINE WOULD REQUIRE REVERSAL OF THE DISTRICT COURT’S DECISION.**

Even if the District Court’s decision were not reversed for any of the reasons set out in Parts I and II, that would only mean that there is yet another ground that requires reversal of the District Court’s ruling. *Ritums v. Howell*, addressed a limit on standing that applies only to claims – like the one upheld by the District Court – that legislation has divested the PSC of its core powers in violation of Section 20. Simply put: “it is for the Commission to act, and not a taxpayer,” who lacks standing to assert that legislation has diminished the PSC’s powers. *Ritums*, 190 Neb. at 507.

In *Ritums*, a taxpayer objected to a tax levied to support a municipal transport authority, which was allegedly exercising powers that Section 20 reserved to the PSC. The Court held that the taxpayer lacked standing. Standing required a “direct” “nexus” between the plaintiff and the alleged unlawfulness, which is lacking where a taxpayer alleged an infringement of the PSC’s powers. *Id.* at 506. Payment of the tax “does not give [the plaintiff] the power to vindicate any rights which the Public Service Commission may have.” *Id.* at 507. The PSC, and only the PSC, could do so.

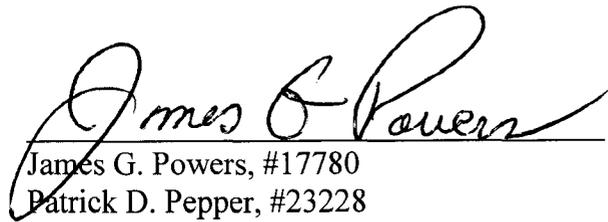
Here, the District Court upheld a claim asserting, as in *Ritums*, that a statute had divested the PSC of its authority. The nexus between the claim and harm to the plaintiffs here is even less direct, because plaintiffs assert standing based not on taxation by an authority allegedly exercising powers unlawfully, but on their general status as taxpayers (and even in that capacity have had any loss mooted because the State has been reimbursed for its expenditures made pursuant to LB 1161, *see* Appellants' Brief at 12-15). So even if plaintiffs could establish that constitutionally protected PSC powers are at issue and have been materially limited by LB 1161, that only establishes another basis to reverse the District Court.

### **CONCLUSION**

For the foregoing reasons, LB 1161 should be found to be constitutional, and the District Court's decision to the contrary should be reversed.

Dated: May 30, 2014

Respectfully submitted,



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IN THE NEBRASKA SUPREME COURT

RANDY THOMPSON, SUSAN LUEBBE,  
AND SUSAN DUNAVAN, )

Case No. S-14-000158

Plaintiffs-Appellees, )

v. )

**AFFIDAVIT OF SERVICE**

DAVE HEINEMAN, GOVERNOR OF THE  
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RICE, ACTING DIRECTOR OF THE  
NEBRASKA DEPARTMENT OF  
ENVIRONMENTAL QUALITY; AND DON  
STENBERG, STATE TREASURER OF  
NEBRASKA, )

Defendants-Appellants. )

STATE OF NEBRASKA )  
 )ss.  
COUNTY OF DOUGLAS )

The undersigned, attorney for TransCanada Keystone Pipeline, LP, being first duly sworn on oath, deposes and states as follows:

That on May 30, 2014, he caused to be filed one (1) original and one (1) copy of the Brief of *Amicus Curiae* TransCanada Keystone Pipeline, LP with the Clerk of the Court of the Supreme Court for the State of Nebraska, by hand delivery at 2413 Capitol Building, Lincoln, Nebraska.

That on May 30, 2014, he served two (2) copies of the Brief of *Amicus Curiae* TransCanada Keystone Pipeline, LP on the following counsel by United States mail, postage prepaid.

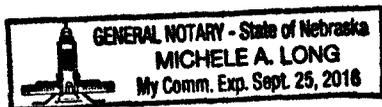
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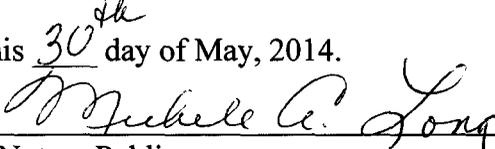
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FURTHER AFFIANT SAYETH NOT.

  
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Subscribed and sworn to before me this 30<sup>th</sup> day of May, 2014.



  
Notary Public

My commission expires:

September 25, 2016