

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission, on its own motion,) Application No. NG-0051/
to investigate jurisdictional issues pertaining to) PI-130
construction and operation of a natural gas pipeline)
within the state of Nebraska by Nebraska Resources)
Company, LLC, or any other entity.)

**COMMENTS OF NEBRASKA RESOURCES COMPANY, LLC
ON JURISDICTIONAL ISSUES**

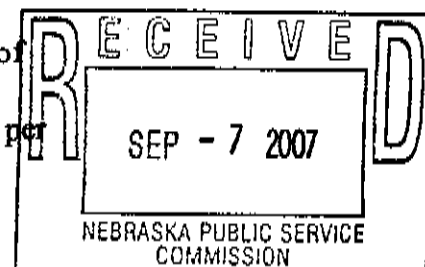
Nebraska Resources Company LLC ("NRC") hereby submits its Comments pursuant to the Commission's July 24, 2007, Order in the captioned docket inviting interested parties to comment on four issues that are the subject of investigation in this proceeding.

A. PROCEDURAL BACKGROUND

On July 16, 2007, NRC filed a letter request with the Nebraska Public Service Commission (the "Commission") to conduct an Investigation pursuant to Neb. Admin. Reg. Title 291, Chapter 1, Section 012.01 respecting three threshold "jurisdictional" questions on which NRC sought guidance preliminary to a determination whether to file with the Commission an Application under the State Natural Gas Regulation Act ("SNGRA"), NEB. REV. STAT. § 66-1801, *et seq.* (2006), for a Certificate of Public Convenience ("Certificate") as a "jurisdictional utility" to operate a new natural gas pipeline wholly within the state of Nebraska (the "NRC Pipeline") to deliver natural gas to local distribution companies ("LDCs") and other customers in central Nebraska.

On July 24, 2007, in response to NRC's request, the Commission opened the captioned docket to investigate issues related to NRC's proposed Application. The three issues which NRC requested the Commission to Investigate were:

1. Does the definition of "high-volume ratepayer" in section 2(7) of the Nebraska SNGRA, NEB. REV. STAT. § 66-1802(7) (2006), include LDCs with volumetric demand in excess of 500 therms per



day?¹

2. Does Nebraska's "double piping" prohibition under SNGRA section 52, NEB. REV. STAT. § 66-1852 (2006), apply to a pipeline providing a new interconnect to an LCD?
3. Does the Commission have jurisdiction over an Application under SNGRA section 53(1), NEB. REV. STAT. § 66-1853(1) (2006), for a Certificate of Public Convenience to operate as a "jurisdictional utility" a pipeline located wholly within the state of Nebraska to deliver natural gas to LDCs and other customers?

In addition, the Commission added a fourth issue to be investigated in this docket:

4. What other regulatory authorities, including state, federal and local governing bodies of any kind, would have jurisdiction over the NRC Pipeline, and what is the scope of their review?

B. THE NRC PIPELINE PROJECT -- OVERVIEW

NRC proposes to construct a new pipeline to serve growing demand for natural gas service in central Nebraska, including burgeoning demand from new and expanding ethanol plants. The NRC Pipeline project is directly responsive to the state of Nebraska's policies promoting development of improved infrastructure to support the growing ethanol industry in Nebraska. The NRC Pipeline would also provide the local distribution company serving the cities of Aurora, Bradshaw, Hampton, York, Columbus, David City, Osceola, Rising City, Schuyler, Shelby and Garrison, Nebraska, access to competitively priced natural gas supplies and improved reliability of service associated with an additional source of gas supplies.

Attached as Exhibit A to these Comments is a map illustrating the tentative route of the NRC Pipeline. As currently configured, the NRC Pipeline would originate at an interconnect with the mainline facilities of Trailblazer Pipeline Company ("Trailblazer") in Edgar County, Nebraska. From that interconnect, the NRC Pipeline will proceed in a Northerly direction,

¹ The SNGRA defines a "high-volume ratepayer" as "a ratepayer whose natural gas requirements equal or exceed five hundred therms per day as determined by average daily consumption." SNGRA § 2(7), NEB. REV. STAT. § 66-1802(7) (2006).

paralleling Route 14, toward Aurora and Hamilton, Nebraska, where Town Border Stations will serve each city.

From South of Aurora, Nebraska, a spur line will proceed West toward Grand Island, Nebraska, to a second Receipt Point at an interconnect with the interstate pipeline facilities of Kinder Morgan Interstate Gas Transmission Co., LLC ("KMIGT").

From the vicinity of Aurora, Nebraska, the NRC Pipeline mainline will proceed in a series of Northerly and Easterly stair steps East toward the North side of the City of York, Nebraska, serving the cities of Hamilton and Bradshaw, Nebraska, along the way. Two Town Border Stations will serve York, Nebraska, one located North of the city and one Southwest of the city.

From the vicinity of York, Nebraska, the NRC Pipeline will proceed in another series of stair steps North and East to Shelby, Nebraska. From Shelby, Nebraska, a spur line will proceed West to Osceola, Nebraska, while the mainline proceeds East to Rising City, Nebraska.

From the vicinity of Rising City, Nebraska, a spur line will head East to Garrison, Nebraska, while the NRC Pipeline mainline will continue North to serve David City, Nebraska (through a spur line), and Richland, Columbus and Schuyler, Nebraska, where two Town Border Stations are planned. A Receipt Point in Schuyler, Nebraska, at an interconnect with the interstate pipeline facilities of Northern Natural Gas Company ("Northern") is not planned at this time but is a possibility as a part of the initial construction or at some point in the future. Also under active consideration is an extension of the NRC Pipeline ("Phase II") North from Columbus, Nebraska, to serve the City of Norfolk, Nebraska, if satisfactory commitments can be obtained to support the extension of the NRC Pipeline.

The Receipt Point with KMIGT, and the potential Receipt Point with Northern, will enhance the reliability of the NRC Pipeline's service by providing additional points from which

gas could be sourced in the event of a constraint related to Trailblazer or its upstream supply. It should be noted that the design parameters of the NRC Pipeline call for flow control devices to be located at or downstream from each Receipt Point to prevent the flow of gas from the NRC Pipeline into KMIGT, Northern or Trailblazer. These devices will be installed to prevent the NRC Pipeline from being used to transport gas between interstate pipelines. Such transportation would be inconsistent with the concept of the NRC Pipeline as an interstate delivery system located wholly within the State of Nebraska serving local demand for natural gas transportation capacity within Nebraska.

In addition to the signed Precedent Agreements NRC has already obtained from prospective Shippers on the NRC Pipeline, NRC is currently negotiating Precedent Agreements with additional potential Shippers with a view toward obtaining the aggregate commitments necessary to enable the project to go forward as described. Although NRC has not yet obtained the minimum volume commitment NRC believes is essential to an economically viable pipeline, NRC is optimistic that such commitments will be obtained in the near future. Indeed, timely affirmative action by the Commission could act as the catalyst to bring about additional Shipper commitments based upon enhanced perception of the viability of the NRC Pipeline project as proposed.

C. FEDERAL AND STATE JURISDICTIONAL ISSUES

The interplay between federal and state regulation over the proposed NRC Pipeline is complex and lies at the heart of this proceeding. It is that complex interplay that gives rise to both the regulatory alternatives for federal or state regulation of the NRC Pipeline and the need for resolution of the three threshold questions raised by NRC in its letter requesting this Investigation. For that reason, before addressing the specific questions on which the Commission has requested comment, NRC believes it helpful to summarize the regulatory

principles involved, including the scope of federal preemption of state regulation of "interstate" pipelines under the Natural Gas Act ("NGA"), 15 U.S.C. § 717, *et seq.*

1. Natural Gas Act Jurisdiction And The "Hinshaw" Exemption

Because 100% of the gas supplies transported by the NRC Pipeline will be received from an interstate pipeline, the transportation service provided by the NRC Pipeline will be transportation "in interstate commerce" notwithstanding that all of the gas is transported solely within the state of Nebraska. *Federal Power Commission v. East Ohio Gas Co.*, 338 U.S. 464 (1950). The potential reach of exclusive federal regulation of interstate commerce is very broad, impinging on activities commonly viewed as "intrastate" in character. In *East Ohio Gas Co.*, the Supreme Court was confronted with a high-pressure pipeline located wholly in a single State that received natural gas produced in another State and transported through an interstate pipeline to the point of delivery in the state where, following transportation through East Ohio's high pressure pipeline, the gas was distributed and consumed. In a series of previous cases, the Supreme Court had held that even though gas was transported wholly within a single state, the gas was "in interstate commerce." *East Ohio Gas Co.*, 338 U.S. at 467, citing *Colorado-Wyoming Gas Co. v. Federal Power Commission*, 324 U.S. 626 (1945); *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 314 U.S. 498, 503-04 (1942). Indeed, the Supreme Court noted, "Respondents do not and cannot claim their gas is not in interstate commerce." *East Ohio Gas Co.*, 338 U.S. at 467. Rather, the issue in *East Ohio Gas Co.* was whether the gas was "transported" and therefore subject to regulation by the Federal Power Commission ("FPC") under the NGA. The Supreme Court concluded that East Ohio's movement of gas through a high pressure pipeline, albeit solely within the state in which the gas was consumed, was "transportation of natural gas in interstate commerce" subject to regulation by the FPC under the NGA. *East Ohio Gas Co.*, 338 U.S. at 473 ("East Ohio comes directly within the express

provision granting power to the [FPC] to regulate 'transportation of natural gas in interstate commerce,' . . .").

Under the principles established in *East Ohio Gas Co.*, NRC Pipeline would be an "interstate pipeline" subject exclusively to federal regulation. Accordingly, the NRC Pipeline *could* be constructed under certificate authority issued by the Federal Energy Regulatory Commission ("FERC")² under the NGA.

In response to *East Ohio Gas Co.*, Congress amended the NGA by creating the so-called "Hinshaw exemption," 15 U.S.C. §717(c), for pipelines that move gas in interstate commerce but which receive all of their gas supplies at or inside the state border and whose supplies are consumed totally within the state. Under the Hinshaw exemption, a pipeline that would otherwise be subject to federal regulation is exempt from regulation under the NGA if (but only to the extent that) the pipeline's rates are "subject to" state regulation. 15 U.S.C. § 717(c). Accordingly, if the rates charged by the NRC Pipeline are subject to regulation by the Nebraska Public Service Commission, the NRC Pipeline would be exempt from federal regulation with respect to the services that are subject to rate regulation by the Commission.

NRC believes that due to the essentially local nature of the service NRC proposes to provide to customers in Nebraska, the NRC Pipeline **should** be regulated primarily by the Commission rather than by the FERC. To that end, NRC proposes to file an Application for a Certificate pursuant to section 53(1) of the SNGRA, NEB. REV. STAT. § 66-1853(1) (2006), to operate the NRC Pipeline as a jurisdictional utility subject to regulation by the Commission.

2. Nebraska State Natural Gas Act Jurisdictional Issues.

The SNGRA excludes "interstate pipelines" from regulation by the Commission, defining "interstate pipelines" by reference to whether the pipeline is subject to FERC jurisdiction.

² The FERC is the successor to the FPC.

SNGRA § 2(8), NEB. REV. STAT. § 66-1802(8) (2006). Therefore, exemption of a "Hinshaw" pipeline from federal regulation creates no "regulatory gap" because the pipeline is regulated at the state level. Likewise, regulation of Hinshaw pipelines in Nebraska by the Commission presents no potential for conflict between federal and state regulation. A Hinshaw pipeline should therefore be deemed to be an "intrastate" pipeline for purposes of the SNGRA and thus a "natural gas public utility."

Coming full circle, however, whether the NRC Pipeline qualifies in the first instance as a Hinshaw pipeline turns on whether the Commission has regulatory jurisdiction over the NRC Pipeline's rates. Therefore, before considering the scope of the Commission's **certificate jurisdiction**, the scope of the Commission's **rate jurisdiction** must be examined.

Under the SNGRA, the Commission lacks rate jurisdiction over "intrastate" natural gas pipeline service to "high-volume ratepayers." SNGRA §§ 6 and 10, NEB. REV. STAT. §§ 66-1806 and 66-1810 (2006). Because the SNGRA authorizes the Commission to regulate the NRC Pipeline's rates to customers other than high-volume ratepayers, *e.g.*, municipalities and LDCs, the NRC Pipeline would qualify as Hinshaw pipeline with respect to service to those customers whose rates are subject to regulation by the Commission. However, to the extent that the NRC Pipeline serves high-volume ratepayers, the pipeline would **not** be classified as a Hinshaw pipeline **with respect to service to such high-volume ratepayers.**³ Thus, due to the limited

³ If the Commission grants NRC a Certificate to operate the NRC Pipeline as a jurisdictional utility whose rates for service to customers (other than high-volume ratepayers) are subject to regulation by the Commission, NRC proposes to seek a "limited jurisdiction certificate" from the FERC under 18 C.F.R. § 284.224 (2007) to transport natural gas "in interstate commerce" on behalf of high-volume ratepayers whose rates are not subject to regulation by the Commission. This limited jurisdiction certificate would be required by the fact that NRC's rates for service to high-volume ratepayers would not be subject to regulation by the Commission and, therefore, the NRC Pipeline would not qualify as a Hinshaw pipeline **with respect to service for those shippers.** Under 18 C.F.R. §§ 284.224(e) and 284.123(b)(1) (2007), NRC's rates for service to high-volume rate payers will be regulated by FERC by reference to NRC's state-regulated rates for

scope of the Commission's rate jurisdiction under the SNGRA and manner in which the Hinshaw exemption is crafted under the NGA, the NRC Pipeline would be a hybrid, part of the services of which will be regulated at the state level (that to LDCs and other customers that are not high-volume ratepayers) and part of the services of which will be regulated at the federal level (that to high-volume ratepayers).⁴

It should be noted that many states have a long history of regulating both intrastate pipelines operating within the state, and pipelines which qualify as Hinshaw pipelines by reason of being subject to rate regulation by the state. Producing states, such as Texas, Louisiana, and Oklahoma, have intrastate pipelines subject to state-specific regulatory regimes. A number of states which lack "intrastate pipelines," due to the absence of local producing natural gas supplies within the state – a prerequisite to "intrastate pipeline" status, nevertheless have regulated Hinshaw pipelines.

A useful comparison is to the regulatory regime of the State of Kansas, whose state regulatory statute was in some respects a model for the Nebraska legislature in enacting the SNGRA. The General Counsel for the Kansas Corporation Commission ("KCC") even testified before the Nebraska legislature regarding Kansas' regulatory statute. Kansas regulates pipelines such as the NRC Pipeline under a public convenience standard and regulates the rates of such pipelines under a just and reasonable rate standard. *See* K.S.A. § 66-104 (jurisdiction over intrastate pipelines as "public utility"); K.S.A. § 66-131 (requirement for certificate of public

"comparable service" to state-regulated customers.

⁴ To complete the analysis, if the NRC Pipeline served **only** customers whose rates were regulated by the Commission, the Pipeline would be solely subject to regulation by the Commission and completely exempt from federal regulation as a Hinshaw pipeline. On the other hand, if the NRC pipeline served **only** high-volume ratepayers whose rates are statutorily exempt from regulation by the Commission, the NRC Pipeline would be exclusively subject to regulation by the FERC as an "interstate pipeline" under *East Ohio Gas Co.*

convenience and necessity from the KCC required in order to operate as a public utility); K.S.A. § 66-128a (requirement that public utility's rates be "fair and reasonable"); and K.S.A. § 66-154a (prohibition against "unreasonable, unfair, unjust or unjustly discriminatory or unduly preferential" rates or charges).

However, the conclusions that may be drawn from parallels between the SNGRA and other states' regulatory regimes are limited by the fact that the Nebraska SNGRA contains two provisions unique to Nebraska: (1) the exemption from regulation of rates charged to high-volume ratepayers (in most other states there is no statutory exemption for a particular class of customers); and (2) the "double piping" prohibition. It is not coincidental that two of the three threshold jurisdictional issues on which NRC sought rulings from the Commission involve those unique aspects of Nebraska state law.

D. NEED FOR TIMELY AND DEFINITIVE DETERMINATION BY THE NEBRASKA PUBLIC SERVICE COMMISSION.

Before addressing the specific jurisdictional issues on which the Commission has requested comment, NRC believes it appropriate to explain the reasons why NRC has requested both timely and definitive determinations of the jurisdictional issues by the Commission.

Recent growth in demand for natural gas throughout the areas of central Nebraska which the NRC Pipeline proposes to serve has been driven by the explosive growth of ethanol demand and the siting of numerous new ethanol production facilities in that region. This growth is part of a shift in national energy policy toward greater utilization of renewable fuels generally and ethanol in particular.

Despite state and federal policies promoting greater utilization of ethanol, the lack of adequate natural gas transportation infrastructure in this part of Nebraska has become a limiting factor on economic growth in general and growth of the ethanol industry in particular. Existing pipeline capacity to the region is fully subscribed. Expansion of existing interstate pipeline

capacity is hampered by the fact that most of the newly developed and planned ethanol plants are project financed, with little in the way of unsecured assets to provide financial assurances to incumbent pipelines should the project-financed ethanol plant cease operations or otherwise fail to pay the demand charges associated with the expansion of the pipeline's capacity. In short, many of the prospective customers for new gas transportation capacity in this region of Nebraska are not "creditworthy" in the sense demanded by financial markets to which the incumbent interstate pipelines look to finance any substantial addition of capacity. NRC has developed a strategy to overcome this constraint by developing commercial relationships with creditworthy shippers to anchor the NRC Pipeline project and by a willingness to accept greater risk than its competitors.

Recently, the lack of adequate firm natural gas transportation capacity to the City of Norfolk, Nebraska, became painfully apparent when a major soy bean processing facility that had planned to locate in Norfolk was forced to relocate to Sioux City, Iowa, due to the inability of the plant to obtain firm natural gas service. The City of Norfolk suffered a loss of an estimated 150 new jobs as a result. This example draws into sharp relief the need for a pipeline, such as that proposed by NRC, to serve central northwest Nebraska.

In order for the NRC Pipeline project to go forward under regulation by the Commission, the three preliminary jurisdictional questions raised by NRC in its Request for Investigation that lead to the institution of this docket must be resolved. As explained in these Comments, if any one of the three threshold jurisdictional issues is decided adversely, the only option available to NRC would be to seek a Certificate of Public Convenience and Necessity from the FERC under Section 7(c) of the NGA, 15 U.S.C. § 717f(c). Obviously, if the Commission's determination of any one of the threshold jurisdictional issues is negative, the sooner that determination is made, the more viable the federal certificate option remains. Regrettably, the longer a determination by

the Commission is delayed, the less viable the federal certificate option becomes. Based upon recent experience and the number of major pipeline certificate cases already in the queue for regulatory review before FERC, unless the Certificate Application were filed with FERC almost immediately, it is likely that FERC's review of a Certificate Application filed by NRC would take too long to enable NRC to commence construction of the NRC Pipeline in time to meet a March 2009 in-service date.

NRC's proposed in-service dates are driven by the needs of NRC's prospective customers, including Aquila, Inc. (D/B/A Aquila Networks). These customers need assurances that the NRC Pipeline will be in service at the time these customers existing gas transportation arrangements with other transportation service providers expire or when the ethanol plants become operational.

Finally, it should be self-evident that for NRC to proceed under Commission jurisdiction, the threshold determinations on the issues requested by NRC need to be more than merely a preliminary or tentative assessment by the Commission. NRC has already invested more than \$700,000 in preliminary engineering, environmental review, legal and regulatory costs merely to bring the project to this tentative stage. NRC anticipates that it will invest an additional \$5.6-\$7.8 million (depending on whether the Pipeline is extended to Norfolk, Nebraska) to obtain all the approvals necessary before a single construction dollar is ever spent. In addition, NRC plans to commit \$65-70 million to construct and test the NRC Pipeline before it is placed into service. NRC cannot commit to such substantial investments without assurance that the decisions of the Commission on the threshold issues is determinative and final, rather than preliminary or advisory and subject to further modification or change.

For all these reasons, NRC urges the Commission to make a timely final determination of the threshold issues.

E. COMMENTS ON JURISDICTIONAL ISSUES.

- 1. Does The Definition Of "High-Volume Ratepayer" Include LDCs With Volumetric Demand In Excess Of 500 Therms Per Day?**

ANSWER: NO.

If the NRC Pipeline's rates to LDCs are subject to regulation by the Commission, the NRC Pipeline will qualify as a Hinshaw pipeline subject to regulation by the Commission under the SNGRA and exempt from federal regulation under the NGA. Therefore, the answer to the threshold question whether LDCs are "high-volume ratepayers" as defined in the SNGRA is central to resolution of the jurisdictional issues posed in this Investigation.

The term "high-volume ratepayer" is defined in the SNGRA as a ratepayer whose daily "requirements" exceed 500 therms per day. SNGRA § 2(7), NEB. REV. STAT. § 66-1802(7) (2006). Under the SNGRA, the ratepayer's "requirements" are in turn determined by reference to the ratepayer's average daily "consumption," *i.e.*, the average daily quantity of gas "consumed" by the ratepayer. *Id.* Consumption is "the use of a thing in a way that thereby exhausts it." Black's Law Dictionary 312 (Bryan A. Garner, *et al.* eds., 7th ed. 1999). An LDC does not "consume" the gas it purchases or transports (except, perhaps, some incidental consumption to fuel compressors used in the operation of the LDC's system). Rather, LDCs resell the gas to retail end-users for consumption by them. Because an LDC does not consume the gas, it has no daily "requirement" **within the meaning of the statutory definition** of high-volume ratepayers set forth in the SNGRA which ties "requirements" to "consumption." **Therefore, LDCs are not high-volume ratepayers under the SNGRA.**

Supporting this conclusion is the fact that the Commission has consistently considered LDCs to be jurisdictional utilities under SNGRA and not high-volume ratepayers. *See, e.g.*, Application No. NG-0007, Order Accepting Aquila, Inc. d/b/a Aquila – Lincoln's Tariff, *Aquila*,

Inc. d/b/a Aquila – Lincoln, (2003); Application No. NG-0004.1, Order Granting Application, *Aquila, Inc. d/b/a Aquila Networks (Aquila), Omaha*, (2005). Indeed, if LDCs were deemed to be high-volume ratepayers, the rates charged by LDCs to retail consumers would be exempt from the Commission's jurisdiction due to the statutory exemption from regulation by the Commission of high-volume ratepayers themselves, SNGRA § 10(1), NEB. REV. STAT. § 66-1810(1) (2006), and not merely the rates charged to them. See Application No. NG-0019, Order (2004). Such a result would undermine the ability of the Commission to achieve its statutory mandate of protecting retail customers from unreasonable rates and charges for natural gas service provided by LDCs, and is fundamentally inconsistent with the structure and purposes of the SNGRA.

The legislative intent behind section 10 of the SNGRA, SNGRA § 10, NEB. REV. STAT. § 66-1810(1) (2006), is that the term high-volume ratepayer will apply to end users of gas. The logic behind the high-volume ratepayer exception is that large end users purchase enough gas and are sophisticated enough to reach their own bargain with natural gas public utility companies, and therefore, these users do not need state protection in the form of natural gas regulation. Floor Debate for 2003 Leg. Sess. 7602 (Ne. 2003) (During the legislative debate on LB 790, Senator Landis describes high-volume ratepayers as “really, really big, big users, who are very adroit—let’s say Nucor Steel, at covering their costs.”). This intention, that the term “high-volume ratepayers” refers to end users and not to LDCs, is seen throughout the legislative debate on LB 790. On March 27, 2003 when discussing the high-volume ratepayer exception, Senator Landis refers to “large customers, like ethanol plants” as being the high-volume ratepayer this provision is meant to exempt. Floor Debate for 2003 Leg. Sess. 3047-3048 (Ne. 2003). Consequently, the legislative history of the SNGRA supports the conclusion that LDCs do not qualify as high-volume ratepayers.

Based upon the foregoing, NRC requests the Commission to affirm that LDCs are not "high-volume ratepayers" within the meaning given such term under section 2(7) of the SNGRA, NEB. REV. STAT. § 66-1802(7) (2006).

2. Does Nebraska's "Double Piping" Prohibition Apply To A Pipeline Providing A New Interconnect To An LDC?

ANSWER: NO.

(a) The State's "double piping" prohibition does not apply to new pipeline delivery facilities serving LDCs.

In its orders under other double piping statutes, the Commission has described the double piping prohibitions as applicable to "redundant" facilities and, in doing so, has applied the common dictionary definition of "redundant" to mean "exceeding what is necessary or normal: superfluous." *In the Matter of the Application of Peoples Natural Gas of Omaha, Nebraska, Seeking Resolution of a Dispute Under Nebraska Revised Statute Section 57-1306*, Application No. P-0003, at p. 8 (May 1, 2001). It is not at all abnormal for LDCs to have multiple interconnects with two or more different pipeline suppliers in order to adequately serve the needs of the LDC's customers and to provide competitive supply options and enhanced reliability of service. Significantly, none of the Commission orders addressing redundant piping, under section 52 of the SNGRA, Neb. Rev. Stat. § 66-1852 (2006), or related statutes, indicates that the legislature intended for the "double piping" prohibition to apply to pipeline facilities for delivery of gas supplies to LDCs from an alternative provider.

With respect to safety, the Commission has expressed concern that duplicative piping in an area poses the potential to slow the response to a natural gas leak or emergency and increases the investigative time to determine the cause or location of such a leak. While that concern may be valid where a network of small diameter local mains serves multiple small users, largely residential and small commercial customers, similar concerns do not apply to comparatively large

diameter, high-pressure lines flowing to a Town Border Station. Among other reasons, the pressure in such mainline facilities is constantly monitored and safety devices that are not practical for application to multiple small diameter mains can be utilized to rapidly detect leaks and automatically shut-off gas flow if a leak is detected.

The Commission has also acknowledged that limiting competition may not provide the consumer with the most cost-efficient choice. *In the Matter of the Application of Metropolitan Utilities District*, 2001 Neb. PUC LEXIS 163 (2001). Nevertheless, the Commission has expressed the desire to protect ratepayers from duplicative piping because the incumbent utility's costs must be spread over a smaller customer base if duplicate pipeline facilities are permitted to lure away existing customers of the incumbent utility. *In the Matter of the Application of Metropolitan Utilities District*, Application No. P-0005 (2002). However, these concerns do not apply to a newly constructed pipeline, such as the NRC Pipeline, serving LDCs in Nebraska because the entities losing their historic customers are interstate pipelines which the Commission has no regulatory responsibility to protect from competition benefiting Nebraska LDCs and their customers.⁵

The conclusion that the State's double piping prohibition does not apply to construction of new pipeline delivery points to LDCs is also consistent with the Commission's recent decision applying Neb. Rev. Stat. §§ 57-1301 *et seq.* (2006). In *In the Matter of the Application of Aquila, Inc.*, 2006 Neb. PUC LEXIS 242 (2006), the Commission examined the root of the prohibition on "double piping." In that case, both the complainant, Aquila, and the Metropolitan Utility District ("MUD") had significant infrastructure in place near the service area in dispute. The Commission found that MUD would have to traverse Aquila's main to serve the disputed

⁵ If interstate pipelines wish to seek protection from the competition provided by the NRC Pipeline, the forum in which they should seek such protection is the FERC, not this Commission.

area, which was immediately adjacent to Aquila's mains. The Commission found that MUD's potential service would not contribute to orderly development. By comparison, construction of a limited number of geographically dispersed end-user owned delivery lines to connect the end-users' plants to the NRC Pipeline would not "create a potential labyrinth of natural gas infrastructure" that would "render the requirement of orderly development meaningless." *Id.* at 246.

Thus, neither the considerations previously relied upon by the Commission in applying Nebraska statutory double piping prohibitions under section 52 of the SNGRA, Neb. Rev. Stat. § 66-1852 (2006), or related statutes, nor the apparent legislative purpose of the double piping prohibition in section 52 of the SNGRA, supports application of the prohibition to *new* pipeline delivery points to an LDC. None of the Commission orders addressing redundant piping under section 52 of the SNGRA, Neb. Rev. Stat. § 66-1852 (2006), or related statutes, indicates that the legislature intended for the "double piping" prohibition to apply to pipeline facilities for delivery of gas supplies to LDCs from an alternative provider. Similarly, no public policy interest of the State of Nebraska supports applying the double piping prohibition to pipeline facilities for delivering gas supplies to LDCs in Nebraska from an alternative supply source.

The LDCs who will comprise a significant portion of NRC's customer base will receive competitively priced natural gas transportation service under negotiated rates that protect them and their customers. The incumbent transportation service providers who would be affected by construction of the NRC Pipeline's new delivery points to LDCs in Nebraska are interstate pipelines (*e.g.*, KMIGT and Northern) whose contractual arrangements with the LDC customers of NRC are limited or have expired. Clearly the State of Nebraska has little public policy interest in protecting interstate pipelines, who are regulated by the FERC and over which the Commission has no jurisdiction, from by-pass that ultimately benefits LDCs and their customers

in Nebraska. While the State of Nebraska has an interest in protecting incumbent, state-regulated LDCs in Nebraska from loss of retail customers in the LDC's service territory, and in preventing economically wasteful competition among LDCs and other intrastate suppliers in the state, the State of Nebraska has no public policy interest:

(i) in preventing Nebraska LDCs from improving the reliability of the LDC's gas supplies (and thereby enhancing the reliability of the LDC's service to high-priority retail customers) through an interconnect with another pipeline supplier;

(ii) in preventing Nebraska LDCs from accessing competitive gas supplies (for the benefit of the LDC's retail customers) by connecting to a different interstate pipeline; or

(iii) in protecting the interstate pipeline currently serving the LDC from competition from other interstate suppliers.

Accordingly, the double piping prohibition should **not** preclude the Commission from granting NRC a Certificate under section 53(1) of the SNGRA, Neb. Rev. Stat. § 66-1853(1) (2006), to serve LDCs in Nebraska.

(b) Federal preemption principles would ultimately foreclose application of the state's "double piping" prohibition to NRC's delivery lines serving LDCs.

If the state's double piping prohibition were construed by the Commission as applicable to a new pipeline delivery point to an LDC, that determination could ultimately be rendered ineffective. If the Commission construed the state's double piping prohibition as applicable to the NRC Pipeline facilities delivering natural gas to LDCs, NRC would be compelled to abandon its effort to obtain a certificate from the Commission under the SNGRA. As explained above, depending on timing, NRC could instead seek a certificate from the FERC under the NGA. Because as explained below, federal preemption principles would preclude application of the state double piping prohibition to federally certificated NRC Pipeline facilities, under such circumstances any determination of this issue by the Commission would be rendered moot.

Federal preemption ultimately turns on Congressional intent, either express or implied. Congress often explicitly states how and by what means “its enactments pre-empt state law.” See, e.g. *Shaw v. Delta Air Lines, Inc.* 463 U.S. 85, 95-96 (1983). Congress may also intend to occupy a certain field to the exclusion of state law without expressly stating so. This intent may reasonably be inferred where the “pervasiveness of federal regulation precludes supplementation by the States, where the federal interest in the field is sufficiently dominant, or where ‘the object sought to be obtained by the federal law and the character of the obligations imposed by it . . . reveal the same purpose.’” *Schneidewind v. ANR Pipeline Company*, 485 U.S. 293, 299-300 (1988) (“ANR”), citing *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). In addition, state law is preempted when it is impossible to comply with both federal and state law, or the state law impedes compliance with the federal law. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963); *Hines v. Davidowitz*, 312 U.S. 572, 581 (1941).

The NGA was enacted by Congress in order to fill a “regulatory gap” created by Supreme Court decisions finding the States without power to regulate aspects of interstate commerce under the so-called “dormant” Commerce Clause, U.S. Const. Art. I, § 8, cl. 3.⁶ See H.Rep. No. 709, 75th Cong., 1st Sess., 1-2 (1937) (citing *Missouri v. Kansas Natural Gas Co.*, 265 U.S. 298 (1924), and *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927) (“*Attleboro Steam*”).⁷ The NGA conferred exclusive jurisdiction upon the FPC, and later, FERC, over the transportation of natural gas in interstate commerce. *Northern Natural Gas Co. v. State Corporation Commission of Kansas*, 372 U.S. 84, 91 (1963), quoting *Phillips Petroleum*

⁶ The dormant Commerce Clause prevents the States from imposing direct burdens on interstate commerce even where the Congress has not chosen to impose federal regulation. See, e.g., *Attleboro Steam*, 273 U.S. at 89; *New York v. FERC*, 535 U.S. 1, 5-6 (2002); *The Minnesota Rate Cases*, 230 U.S. 352, 396-7 (1913).

⁷ This regulatory gap is frequently described as the “*Attleboro gap*” after the case giving rise to it.

Co. v. Wisconsin, 347 U.S. 672, 682 (1954). "Congress intended for the field of . . . interstate transportation to be regulated exclusively at the federal level . . ." *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 514-516 (1947); *ANR*, 485 U.S. at 305-06. It is therefore well settled that the NGA occupies the field of interstate transportation to the exclusion of state regulation. *ANR*, 485 U.S. at 306.

In *ANR*, the Michigan Public Service Commission ("Mich. P.S.C.") sought review by the Supreme Court of the Sixth Circuit's holding that the NGA preempts Michigan Act 144, which required a public utility to obtain Mich. P.S.C. approval before issuing long-term securities. The Supreme Court explained that when a form of state action is not expressly pre-empted by the NGA, in order to determine whether the action is nevertheless preempted, the Court evaluates whether the state's action "amounts to a regulation in the field of gas transportation . . . that Congress intended FERC to occupy." *ANR*, 485 U.S. at 304.

The Mich. P.S.C. maintained that the purposes of Michigan Act 144 were to: (i) prevent overcapitalization, which could threaten reasonable rates; (ii) prevent a company from taking on so much debt that it is unable to maintain its Michigan facilities properly; and (iii) prevent a utility from raising its equity to a level that will result in higher rates. *Id.* at 307. The Supreme Court concluded that "the things Act 144 regulation is directed at, the control of rates and facilities of natural gas companies, are precisely the things over which FERC has comprehensive authority." *ANR*, 485 U.S. at 308. The Supreme Court held that the NGA preempts Michigan Act 144. *Id.* at 310. The Supreme Court added, "Our conclusion that Act 144 seeks to regulate a field that the NGA has occupied also is supported by the imminent possibility of collision between Act 144 and the NGA." *Id.* at 309.

Similarly in *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co.*, Panhandle Eastern Pipe Line Co. ("Panhandle") received a certificate of public convenience and

necessity under the NGA to by-pass Michigan Consolidated Gas Company ("MichCon") in order to provide natural gas directly to National Steel Corporation ("National Steel"), a customer of MichCon. *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co.*, 887 F.2d 1295 (6th Cir. 1989) ("*Michigan*"). MichCon argued that Panhandle should be enjoined from by-passing MichCon because Panhandle could not deliver gas to National Steel without the Mich. P.S.C.'s approval.

The Sixth Circuit held that Panhandle's delivery of natural gas to National Steel involved interstate transportation of natural gas and not local distribution. *Michigan*, 887 F.2d at 1300. Relying on *ANR*, the Sixth Circuit held that "this case involves the imminent possibility of a 'collision' between state and federal regulatory power that would disrupt [the NGA's] comprehensive scheme." *Michigan*, 887 F.2d at 1301. If the Mich. P.S.C. denied Panhandle's by-pass, then state and federal regulations would be in conflict. Consequently, the Sixth Circuit held that the NGA pre-empted regulation of Panhandle's bypass by the Mich. P.S.C. *Id.* at 1302.

Because the jurisdiction of the Commission does not extend to the rates charged by NRC to high-volume rate payers, NRC Pipeline's Hinshaw exemption is limited to transportation of natural gas to LDCs and other ratepayers over which the Commission exercises ratemaking authority. In order to transport natural gas in interstate commerce for delivery to high-volume rate payers, NRC will be required to obtain federal certificate authorization. NRC intends to do so by seeking a "limited jurisdiction certificate" from the FERC under 18 C.F.R. § 284.224 (2007). This regulatory provision is specifically designed to deal with situations such as this where federal authorization is required under the NGA but the federal interest in regulation is small. In connection with that limited jurisdiction certificate, NRC will also request a limited "blanket" certificate from the FERC under 18 C.F.R. §§ 157.203(b), 157.208 and 157.211(a) (2007) authorizing NRC to construct and operate the delivery taps, meters and related facilities

needed to deliver natural gas to high-volume ratepayers, subject to regulatory conditions and limitations the details of which are not pertinent to this discussion.

Because the construction and operation of NRC's facilities to serve high-volume ratepayers, *i.e.*, large end-users, will be authorized under a certificate issued under the NGA (albeit one in which the FERC asserts only "limited" regulatory jurisdiction), the NGA will preempt application of the state's double piping prohibition to NRC's facilities and activities covered by the federal certificate. *Board of Water, Light and Sinking Fund Commissioners v. FERC*, 294 F.3d 1317, 1327 (D.C. Cir. 2002); *Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412, 1419 (10th Cir. 1992); *Michigan Consolidated Gas Co. v. FERC*, 883 F.2d 117, 121-22 (D.C. Cir. 1989); *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co.*, 887 F.2d 1295, 1300 (6th Cir. 1989). In *P.U.C. of California v. FERC*, 900 F.2d 269 (D.C. Cir. 1990), the D.C. Circuit addressed a modern application of *East Ohio Gas* to the situation where the end-user owns the gas and uses the pipeline solely for transportation. The D.C. Circuit held that the NGA preempts the State's authority while the gas is flowing in the high-pressure delivery line to the end-user's plant. *Id.*, 900 F.2d at 277.

Thus, it is beyond dispute that if the NRC Pipeline were certificated as an interstate pipeline subject to regulation by the FERC under the NGA, the "imminent possibility of a collision" between the state's double piping prohibition and the FERC's certificate of public convenience and necessity would result in federal preemption of Nebraska's double piping prohibition. However, the potential conflict between federal and state law (and preemption of Nebraska's double piping prohibition) will be avoided if Nebraska's double piping prohibition is construed, as NRC believes it should be, as inapplicable to service by a pipeline to an LDC. In any event, fealty to a supposed state legislative policy embodied in the double piping prohibition contained in the SNGRA should not influence the Commission to reject NRC's proposed

construction of the SNGRA's double piping prohibition because such action could ultimately be unavailing (if NRC obtained a certificate under the NGA from FERC), or in a worst case, prevent the NRC Pipeline project from being constructed – a consequence that most certainly is not in the public interest of Nebraska.

- (c) **Whether the state's "double piping" prohibition applies to NRC's proposed service to end users is not relevant to this proceeding. Nevertheless, it is also clear that the prohibition does not apply to NRC's proposed service to high-volume ratepayers.**

Whether the state's double piping prohibition applies to end-user owned delivery lines is not a determination the Commission needs to make in addressing the separate question of whether the double piping prohibition applies to LDCs. Nor is it necessary for the Commission to consider whether the state's double piping prohibition applies to end-user owned delivery lines in ultimately deciding whether to issue a Certificate for the NRC Pipeline project. Indeed, whether the state's double piping prohibition applies to end-user owned delivery lines is not a consideration the Commission should take into account in this proceeding because the only service NRC proposes to conduct as a "jurisdictional utility" subject to regulation by the Commission is service to LDCs.

NRC's service to high-volume ratepayers will be exempt from Commission regulation, SNGRA §§ 6 and 10, NEB. REV. STAT. §§ 66-1806 and 66-1810 (2006). Rather, that service will be performed under a Limited Jurisdiction Certificate of Public Convenience and Necessity issued by FERC. For the reasons previously given, the FERC Certificate will preempt Nebraska's double piping prohibition as applied to NRC's service to end users in any event. See discussion, *supra*, of federal preemption principles.⁸

⁸ Nevertheless, the Commission may take comfort from the fact that, without regard to federal preemption principles, the State's double piping prohibition does not apply to the

It makes no sense, and could be counterproductive, for the Commission to be concerned about an issue (*i.e.*, application of the double piping prohibition to facilities serving high-volume ratepayers) that is not relevant to the jurisdictional issues posed in this Investigation. Based upon the foregoing, NRC requests the Commission to affirm that Nebraska's prohibition against "double piping" under SNGRA section 52, NEB. REV. STAT. § 66-1852 (2006), **does not apply** to a new pipeline interconnect to an LDC already served by an interstate pipeline.

3. Does The Commission Have Jurisdiction Over An Application For A Certificate Of Public Convenience To Operate As A "Jurisdictional Utility" A Pipeline Located Wholly Within The State Of Nebraska To Deliver Natural Gas To LDCs And Other Customers?

ANSWER: YES.

To determine the scope of the Commission's certificate jurisdiction, the SNGRA must be construed as a whole. Specifically, the certification provisions of section 53(1) of the SNGRA, NEB. REV. STAT. § 66-1853(1) (2006), must be evaluated in light of section 56 of the SNGRA, NEB. REV. STAT. § 66-1856 (2006), and the definitions set forth in section 2 of the SNGRA, NEB. REV. STAT. § 66-1802 (2006).

service NRC proposes to provide to high-volume rate payers who are currently unable to satisfy their existing and future gas supply needs. The legislative history of the double piping prohibition makes clear that the double piping prohibition was not intended to prevent large end users from constructing their own delivery lines to access a new source of gas supplies:

What it doesn't mean is that if there's a large volume user who is capable of running their own pipe to somebody else's pipe, that in fact they can create a pipeline for themselves. Example of that would be NPPD, who wants a redundant line from where they are to a natural gas supply. They would be the only user. They wouldn't turn around and sell it. They wouldn't be in the marketplace. They would be, essentially, a high volume user, using it only for themselves. Fine. No problem. They're not in the marketplace and they're not subject to the double piping. It's not what we're after with that public policy.

Floor Debate for 2003 Leg. Sess. 8080 (Ne. 2003).

Under section 53(1) of the SNGRA, “no jurisdictional utility shall transact business in Nebraska until it has obtained a certificate from the commission that public convenience will be promoted by the transaction of the business and permitting the applicants to transact the business of a jurisdictional utility in this state.” SNGRA § 53(1), NEB. REV. STAT. § 66-1853(1) (2006). On the other hand, section 56 allows “jurisdictional utilities” to construct new facilities without obtaining prior certification. SNGRA § 56, NEB. REV. STAT. § 66-1856 (2006). Giving meaning to section 53(1) requires that that section be read as granting the Commission certificate authority over new “natural gas public utilities,” while section 56 gives “jurisdictional utilities,” (*i.e.*, those that have already been certified as serving the public convenience or that were “grandfathered” under section 53(2) of the SNGRA, NEB. REV. STAT. § 66-1853(2) (2006), as jurisdictional utilities in operation on enactment of the SNGRA,) the right to construct new facilities without being required to obtain certification of the new facilities from the Commission.

The interplay between sections 53(1) and 56 leads to the conclusion that as a Hinshaw pipeline and, therefore, an “intrastate” pipeline for purposes of the SNGRA, the NRC Pipeline would be initially classified as a “natural gas public utility” under the SNGRA, until certified as a “jurisdictional utility” by the Commission under section 53(1). Accordingly, NRC must apply for a certificate of public convenience under section 53(1) of SNGRA to be classified as a jurisdictional utility prior to “transact[ing] . . . business of a jurisdictional utility” in Nebraska. NEB. REV. STAT. § 66-1853(1) (2006).

In keeping with this analysis, NRC would not be a “jurisdictional utility” prior to receiving certification as such under section 53(1). Implicitly, and notwithstanding section 56, NRC would not be permitted to commence construction of the NRC Pipeline prior to obtaining such certification from the Commission. Indeed, even without consideration of the interplay

between section 53(1) and section 56, the "transaction of business as a jurisdictional utility" logically encompasses construction of pipeline transportation facilities, an activity in which NRC may not engage prior to receiving a certificate of public convenience from the Commission as a "jurisdictional utility" under section 53(1) of the SNGRA.

Based upon the foregoing, NRC requests the Commission to affirm that the Commission possesses jurisdiction to consider an Application from NRC for a Certificate of Public Convenience to operate, as a "jurisdictional utility," a pipeline located wholly within the state of Nebraska to deliver natural gas to LDCs and other customers.

4. What Other Regulatory Authorities, Including State, Federal And Local Governing Bodies Of Any Kind, Would Have Jurisdiction Over The NRC Pipeline, And What Is The Scope Of Their Review?

Attached hereto as Exhibit B is a Table summarizing the State, Federal and local governing bodies with jurisdiction over the NRC Pipeline. In most cases, the applicable governing body has responsibility for reviewing and permitting the NRC Pipeline project for compliance with specific regulatory requirements, often environmental in character. In many instances the jurisdiction of the agency is limited to the permitting and construction stage and does not extend into operation. Frequently there is substantive subject matter overlap between the federal and state agencies. Many of the significant permitting processes are described in detail below.

(a) Non-utility regulatory bodies.

The Army Corp. of Engineers must grant NRC a Section 404 permit under the Clean Water Act ("CWA") before NRC may construct across jurisdictional waters of the United States, including traditional navigable waters or streams, relatively permanent waters, and adjacent wetlands with a significant nexus to navigable waters. The most substantial such crossing is that proposed for the Platte River located on the border between Colfax and Butler Counties,

Nebraska (approximately 2 miles east of Columbus, Nebraska). NRC will be required to submit for review by the Corp. of Engineers detailed engineering plans for precisely how NRC will construct each jurisdictional crossing and what mitigation measures NRC will take to minimize the potential environmental consequences of the crossings prior to receiving a Section 404 permit.

The Nebraska Department of Environmental Quality ("NDEQ") also has regulatory roles to play under the CWA. The NDEQ administers the Section 401 Water Quality Certification Program in accordance with Section 401 of the Clean Water Act. This program evaluates applications for federal permits and licenses that involve a discharge to waters of the state and determines whether the proposed activity complies with Title 117 – Nebraska Surface Water Quality Standards. If the activity is likely to violate the standards, certification may be denied or, alternatively, conditions for complying with the standards may be imposed on the certification. The U.S. Army Corps of Engineers Section 404 Dredge and Fill Permits and FERC certificates under the Natural Gas Act are examples of federal regulatory programs that require State Water Quality Certification before the federal permits or licenses can be issued.

Pursuant to the U.S. Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), the Corp of Engineers' regulatory jurisdiction does not extend to isolated, non-navigable intrastate waters where the only link to interstate commerce is the use of the waters by migratory birds. Therefore no permit or other authorization by the Corps of Engineers is required for projects that might impact such isolated, non-navigable intrastate waters.

However, all waters of the State of Nebraska, including isolated waters, are still under the authority of the NDEQ and projects impacting those waters must meet the anti-degradation requirements of Title 117 – Nebraska Surface Water Quality Standards. For example, many

traditional rainwater basins important to migratory waterfowl would be considered isolated waters of the State and would not require a Section 404 permit. However, a project may not degrade those waters if it is to meet Title 117 requirements.

The NDEQ also administers the National Pollution Discharge Elimination System ("NPDES") program and issues permits under the CWA for storm water discharge associated with construction activities. The NDEQ will also review NRC's Substitute Water Supply Plan in connection with hydrostatic testing of the NRC Pipeline and is responsible for issuance of an Industrial Wastewater Discharge Permit for disposal of the hydrostatic test water. Furthermore, as with any facility, permits will be required from the NDEQ prior to beginning construction or operation. These include Air Quality Construction, Open Burning, Integrated Solid Waste Management, and Dust Emission permits (Title 129, chapter 32).

A number of other state and federal agencies are also involved in consultative processes related to the pipeline construction projects generally. The U.S. Fish & Wildlife Service ("F&WS") provides consultative clearance under Section 7 (a)(2) of the Endangered Species Act ("ESA") to threatened or endangered species or critical habitat which may be adversely affected by pipeline construction, as well as suggesting avoidance, minimization, or mitigation measures where critical habitat is threatened. Pursuant to Section 7 of the ESA, every federal agency, in consultation or conference with the F&WS, is required to ensure that any action the federal agency authorizes, funds, or carries out is not likely to jeopardize the continued existence of any federally listed or proposed species and/or result in the destruction or adverse modification of designated and/or proposed critical habitat.

Paralleling F&WS' review, the Nebraska Game and Parks Commission will also review NRC's proposed construction plans to determine whether the proposed construction will have any adverse impact on any state listed threatened or endangered species or critical habitat.

The Nebraska State Historical Preservation Office ("SHPO") will play a consultative role under Section 106 of the National Historic Preservation Act. NRC will be required to implement procedures for identifying objects of potentially historic or archaeological significance discovered during construction and for preservation of such objects and notification of the SHPO whenever any such object is encountered. Similarly, the Natural Resources Conservation Service of the U.S. Department of Agriculture will be consulted regarding the potential impact of the project on farmland.

Another specialized or focused review will be performed by the Nebraska State Fire Marshall who will review NRC's plans for compliance with State and Federal fire safety standards and requirements.

A separate set of approvals must be obtained, both at the state and local levels, for road and highway crossings. Thus, the Nebraska Department of Roads ("NDOR") will issue permits authorizing the pipeline's right-of-way to encroach upon the highway right-of-way, as well as permits for crossing state highways and Interstate 80. County permits to cross county road(s) will be required to be issued by Clay, Hamilton, York, Polk, Platte, Butler and Colfax Counties. These same counties will also be responsible for issuance of any County Floodplain Construction Permits authorizing construction of the NRC Pipeline in floodplains.

(b) Public utility regulatory bodies – FERC and Nebraska Public Service Commission.

Perhaps the broadest regulatory review is that conducted by the Commission and/or by FERC, depending on how the jurisdictional status of the NRC Pipeline is structured.

(i) Federal Energy Regulatory Commission.

The FERC reviews applications for approval to construct and operate interstate pipeline facilities under Section 7(c) of the NGA, 15 U.S.C. § 717(f). Under NGA Section 7(c), the FERC applies a broad "public interest" standard to determine whether the "public convenience

and necessity” will be served by the proposed facilities and/or service. *Cascade Natural Gas Corp. v. FERC*, 995 F.2d 1412, 1421 (10th Cir. 1992) (In making the determination whether a proposed project “is or will be required by the . . . public convenience and necessity,” the FERC “must consider **all factors bearing on the public interest**, not simply those immediately relating to the objects of its jurisdiction.” (emphasis added)), citing *Atlantic Refining Co. v. Public Service Comm. of N.Y.*, 360 U.S. 378, 391 (1959).

In connection with its review under NGA Section 7(c), the FERC examines a wide range of information and data pertinent to the public interest standard. This information relates to the applicant and its ability to perform the services for which a certificate is requested, as well as to the engineering and economic aspects of the proposed facilities and services.

Of particular significance, under the National Environmental Policy Act of 1969 (“NEPA”), 42 U.S.C. § 4321, *et seq.* (2000), the FERC conducts an environmental review of proposed projects to determine whether the issuance of a federal certificate for the project constitutes a “major federal action affecting the environment.” In most instances this review includes consideration of a range of environmental factors, including the potential effect of the project on wetlands and endangered species and their habitat, the effect of the project on air and water quality, the effect of the project on land use and public health and safety, and consideration of potential mitigation measures to moderate or reduce any adverse effects identified.

In the majority of cases, FERC’s environmental review culminates in preparation of a written Environmental Assessment (“EA”). Where the EA concludes that FERC’s action would constitute a major federal action affecting the environment, FERC proceeds to conduct a more thorough analysis of the environmental costs, mitigation measures and countervailing non-environmental benefits from the regulatory action, culminating in publication of a detailed Environmental Impact Statement (“EIS”). The EA or the EIS, whichever may be the case, is

taken into account by the FERC in deciding whether to approve the proposed project or service under the public convenience and necessity standard of the NGA.

If NRC were to file an Application for a Certificate of Public Convenience and Necessity from the FERC, it is anticipated that FERC would conduct an environmental review of the proposed NRC Pipeline that would culminate in production of an EA (but not an EIS).

FERC would also regulate the rates and charges and the terms and conditions of service of the NRC Pipeline through the Tariff approval process under Section 4 of the NGA. If the NRC Pipeline were certificated as an interstate pipeline under the NGA, Section 4 of the NGA would require that the rates and charges collected by, and the terms and conditions of service of, NRC be "just and reasonable" and not "unduly preferential" or "unduly discriminatory." While the just and reasonable rate standard of the NGA commonly refers to "cost-based rates," the FERC has also approved "negotiated rates" for grass roots pipeline such as the NRC Pipeline. *E.g., Rockies Express Pipeline LLC*, 116 FERC ¶ 61,272, P 68-73 (2006); *see also Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines and Regulation of Negotiated Transportation Services of Natural Gas Pipelines*, 74 FERC ¶ 61,076 (1996), *reh'g and clarification denied*, 75 FERC ¶ 61,024, *reh'g denied*, 75 FERC ¶ 61,066 (1996).

(ii) Nebraska Public Service Commission

The scope of the Commission's regulatory jurisdiction and the issues to be considered by the Commission in certificating a new pipeline as a "jurisdictional utility" under Section 53(1) of the SNGRA, NEB. REV. STAT. § 66-1853(1) (2006), are not as well developed as that of the FERC. However, NRC believes that the applicable "public convenience" standard of Section 53(1) of the SNGRA is no less broad than the "public convenience and necessity" test applied by the FERC under the NGA, *i.e.*, it is a broad "public interest" standard, *Cascade Natural Gas Corp. v. FERC*, 995 F.2d 1412, 1421 (10th Cir. 1992); *Atlantic Refining Co. v. Public Service*

Comm. of N.Y., 360 U.S. 378, 391 (1959), calling for consideration of all factors affecting the public interest.

That being the case, NRC proposes to submit to the Commission in support of NRC's Application for certification of the NRC Pipeline, detailed information pertaining to NRC and its parent, Seminole Energy Services, LLC, demonstrating both the financial and technical capability of NRC to finance, construct and operate the NRC Pipeline consistent with the public interest. NRC also contemplates submitting detailed pipeline specifications, engineering details, right-of-way information, construction plans and procedures, and other technical data to demonstrate that the NRC Pipeline will be constructed in accordance with industry standards and sound engineering practices, and will meet or exceed all applicable federal and state safety and reliability standards.

NRC also plans to submit to the Commission detailed environmental data comparable to that which would be supplied to the FERC in support for a certificate under Section 7(c) of the NGA. Although the State of Nebraska lacks a state-law counterpart to NEPA (the federal statute which requires FERC to perform its detailed environmental assessment), NRC believes that the "public convenience" standard of Section 53(2) of the SNGRA is broad enough to encompass environmental considerations. NRC believes that it would be difficult to argue that a pipeline which presents unacceptable environmental risks nevertheless satisfies the broad public interest standard embedded in the SNGRA. **Accordingly, whether NRC proceeds through a state or federal certification process will not diminish the environmental review process or the environmental safeguards that will apply to the NRC Pipeline.⁹**

⁹ If the environmental review were performed by FERC, FERC could retain an environmental consultant to assist in FERC's review. FERC would assess the cost of such a consultant to NRC. Likewise, in view of the Commission's limited staff resources, NRC contemplates that the Commission will retain an environmental consultant to assist the Commission in discharging its environmental review

If certificated as a jurisdictional utility, NRC's rates to LDCs, and the terms and conditions of NRC's services to LDCs, will be subject to review and approval of the Commission under Section 6 of the SNGRA, NEB. REV. STAT. § 66-1806 (2006). Again, the specific details of the Commission's ratemaking methodology are not as well developed as those of the FERC. However, NRC proposes to submit for Commission approval a Tariff, cost-of-service based rates with the economic justification therefore, and a request for approval of negotiated rates, in much the same manner as NRC would submit its Tariff and rates for approval by the FERC under Section 4 of the NGA if the NRC Pipeline were certificated by FERC as an interstate pipeline.

Under the terms of the SNGRA, NRC's Commission-regulated rates would not apply to the NRC Pipeline's service to high-volume ratepayers, whose rates are exempt from regulation by the Commission. However, that does not mean that the interests of such high-volume ratepayers will enjoy any less protection by reason of certification of the NRC Pipeline under the SNGRA rather than the NGA. As previously indicated, if the Commission grants NRC a Certificate to operate the NRC Pipeline as a jurisdictional utility, NRC will seek a "limited jurisdiction certificate" from the FERC under 18 C.F.R. § 284.224 (2007) to transport natural gas "in interstate commerce" on behalf of the high-volume ratepayers whose rates are exempt from Commission regulation. NRC's rates for service to those shippers will thereby become subject to regulation by the FERC under Section 4 of the NGA. Under sections 284.224(e) and 284.123(b)(1) of FERC's regulations, 18 C.F.R. §§ 284.224(e) and 284.123(b)(1) (2007), NRC's

responsibilities and that the Commission will bill NRC for the reasonable costs of the consultant's services. Therefore, NRC is confident that the Commission's environmental review will be no less rigorous than that of the FERC, although hopefully more expeditious.

rates for service to high-volume rate payers will be regulated by the FERC by reference to NRC's state-regulated rates for "comparable service" to state-regulated customers.

F. CONCLUSION.

For the reasons set forth above, the Commission should expeditiously grant the jurisdictional rulings requested by NRC, to wit:

1. Local distribution companies are **not** "high-volume ratepayers" within the meaning given such term under section 2(7) of the SNGRA, NEB. REV. STAT. § 66-1802(7) (2006).

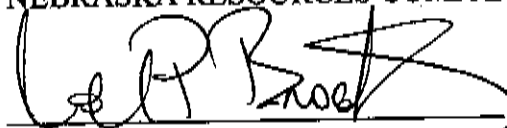
2. Nebraska's prohibition against "double piping" under SNGRA section 52, NEB. REV. STAT. § 66-1852 (2006), **does not apply** to a new pipeline interconnect to an LDC already served by an interstate pipeline.

3. The Commission has jurisdiction over an Application for a Certificate under section 53(1) of the SNGRA, NEB. REV. STAT. § 66-1853(1) (2006), to operate, as a "jurisdictional utility," a pipeline located wholly within the state of Nebraska to deliver natural gas to local distribution companies and other customers.

Furthermore, in view of the public interest in expeditious regulatory approval of a pipeline to deliver natural gas to customers in central northeast Nebraska within the time constraints imposed by expiring natural gas transportation contracts and plant construction schedules over which NRC has no control, the Commission should issue its determinations of these jurisdictional issues as promptly as possible as final decisions.

Respectfully Submitted,

NEBRASKA RESOURCES COMPANY, LLC

A handwritten signature in black ink, appearing to read "Loel P. Brooks", written over a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Comments of Nebrasksa Resources Company, LLC on Jurisdictional Issues was served by hand delivery and electronic mail on this 7th day of September, 2007 on:

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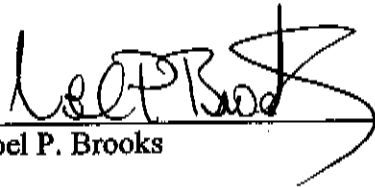
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EXHIBIT A

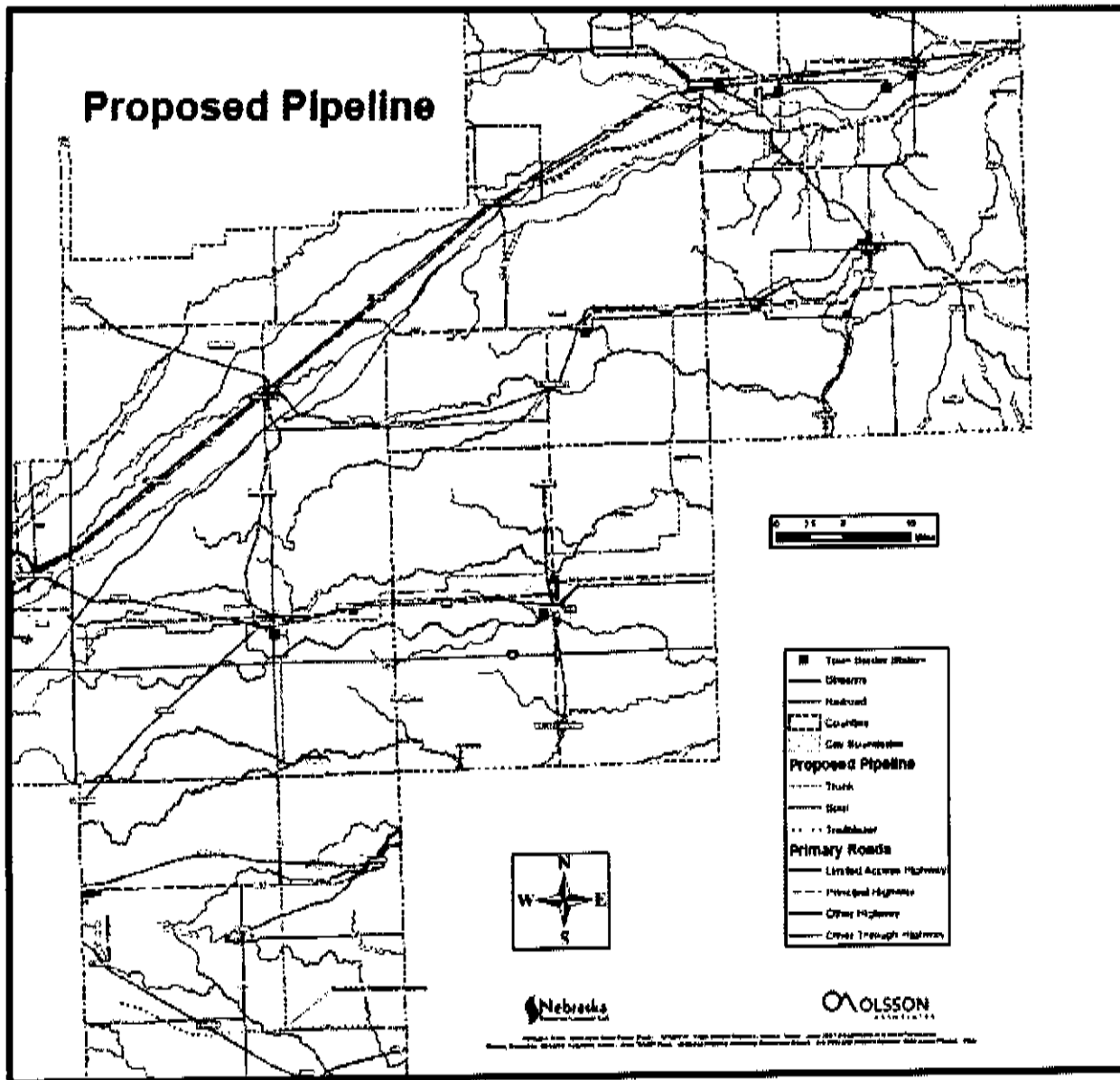


EXHIBIT B

PERMITS AND AUTHORIZATIONS

AGENCY	PERMIT/AUTHORIZATION	STATUS
FEDERAL		
U.S. Corps of Engineers (COE)	Clean Water Act- Section 404 Permits Authorization for impacts to Waters of the United States	Agency Site Visit Conducted 7/12/07. Guidance Received 7/27/07
Fish & Wildlife Service (F&WS)	Endangered Species Act – Section 7 Consultation for Clearance Authorization and Biological Opinion	Agency Site Visit Conducted 7/12/07. Guidance Received 8/28/07
Environmental Protection Agency (EPA)	Clean Water Act Section 404- Jurisdictional Waters Significant Nexus Review	Coordination ongoing
United States Department of the Interior- Bureau of Reclamation	Comment on Project and effect on Reclamation facilities, lands or resources	Clearance letter received 8/26/07
Federal Energy Regulatory Commission (FERC)	Natural Gas Act certificate.	Coordination initiated
USDA Natural Resources Conservation Service	Consultation to determine if proposed project would have any impact on farmland	Clearance letter received July 2, 2007
STATE		
State Historical Preservation Office (SHPO)	Consultation Under Section 106 of the National Historic Preservation Act	Coordination ongoing.
Nebraska Department of Roads (NDOR)	Encroachment/Road Crossing Permit	Coordination initiated
	State Highway Crossing Permits	Coordination initiated
	Interstate 80 Crossing Permit	Coordination initiated
Nebraska Department of Environmental Quality (NDEQ)	NPDES General Permit for storm water discharge associated with construction	Agency project meeting 8/3/07. Coordination ongoing.
	Clean Water Act Section 401 Certification for impacts to Waters of the State.	Agency Site Visit Conducted 7/12/07. Coordination concurrent with COE Section 404 permits
	Substitute Water Supply Plan (hydrostatic test water supply)	Agency project meeting 8/3/07. Coordination ongoing.
	Industrial Wastewater Discharge Permit (NPDES for hydrostatic test water supply)	Agency project meeting 8/3/07. Coordination ongoing.
	Title 117 anti-degradation compliance	Coordination ongoing

AGENCY	PERMIT/AUTHORIZATION	STATUS
Nebraska Game and Parks Commission	Consultation to determine if proposed project would have any impact on State listed threatened or Endangered Species or Critical Habitat.	Agency Site Visit Conducted 7/12/07. Coordination ongoing
	Natural Heritage Program- Database review of "At-risk" species and communities.	Received 6/26/07
Nebraska State Fire Marshall	Construction Plans Approval	Coordination initiated
Nebraska Public Service Commission (NPSC)	Nebraska State Natural Gas Regulation Act	Coordination initiated
LOCAL		
Clay County	County permit allowing construction across county road	Coordination initiated
	County floodplain construction permits	Coordination initiated
Hamilton County	County permit allowing construction across county road	Coordination initiated
	County floodplain construction permits	Coordination initiated
York County	County permit allowing construction across county road	Coordination initiated
	County floodplain construction permits	Coordination initiated
Polk County	County permit allowing construction across county road	Coordination initiated
	County floodplain construction permits	Coordination initiated
Butler County	County permit allowing construction across county road	Coordination initiated
	County floodplain construction permits	Coordination initiated
Colfax County	County permit allowing construction across county road	Coordination initiated
	County floodplain construction permits	Coordination initiated
CITY		
Pending final design and TBS connection points		