

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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HP 22-002

IN THE MATTER OF THE APPLICATION
OF NAVIGATOR HEARTLAND
GREENWAY LLC FOR A PERMIT UNDER
THE SOUTH DAKOTA ENERGY
CONVERSION AND TRANSMISSION
FACILITIES ACT TO CONSTRUCT THE
HEARTLAND GREENWAY PIPELINE IN
SOUTH DAKOTA,

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**APPLICANT’S OPPOSITION TO
LANDOWNERS’ MOTION FOR
REMOTE TESTIMONY**

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Intervening Landowners represented by Brian Jorde filed a motion on July 14, 2023 asking that two experts be allowed to testify virtually and all landowners who have submitted prefiled testimony, but “who are not subject to cross examination,” be allowed to swear to their testimony virtually or by affidavit. Applicant Navigator Heartland Greenway LLC respectfully opposes the motion.

1. John Abraham and Richard Kuprewicz

The Landowners seek leave for Dr. John Abraham and Mr. Richard Kuprewicz to testify virtually. The motion states that both have a scheduling conflict, although the motion offers no detail about the nature of their conflicts or when they arose. The nine hearing days were scheduled on March 2, 2023, more than four months ago. If the experts knew when they agreed to testify that they had irreconcilable scheduling conflicts that would prevent them from traveling to South Dakota to testify on any scheduled day, that issue should have been raised long before now. Instead, the Landowners waited until after the motions deadline, after the PUC meeting

held on July 11, 2023, and after the prehearing conference to raise the issue. If the scheduling conflicts arose after the hearing dates were set, then the experts necessarily contend that other matters are more important and take precedence over their testimony in this docket. No explanation having been offered, the Commission can only speculate about the basis and need for the requested relief.

Regardless, it is not the case that “no other party will be prejudiced by Mr. Abraham [and Mr. Kuprewicz] appearing virtually.” (Motion at 1.) To the contrary, virtual testimony is inferior in almost every way to in-person testimony. It requires the use of technology in the hearing room, which is invariably subject to interruptions, procedural glitches, and someone not being able to see or hear. It makes the use of exhibits more difficult. It deprives the Commission and opposing parties the opportunity to observe the demeanor and body language of a witness. It makes cross examination much more difficult and less effective, which is especially important given that because of prefiled testimony, most of the testimony presented at the hearing will be by cross-examination. And it makes it harder for the Commissioners to ask questions. In-person testimony is standard before the Commission and allowing virtual testimony based on the mere assertion of a “scheduling conflict” will set a new precedent for any witness to seek leave to appear virtually merely for the sake of convenience. Like trials, contested-case hearings under SDCL Ch. 1-26 are not convenient. Witnesses should plan accordingly.

Thus, the motion is late, there is no factual basis for it, and virtual testimony is inferior to live testimony in every way. The motion should be denied.

With respect to the request that Dr. Abraham be allowed to testify sometime on July 27, Navigator does not object assuming that Dr. Abraham will testify in person.

2. Landowners “not subject to cross examination”

In paragraph 3, the motion asks that “Intervening Landowners who are not subject to cross examination” be allowed to swear to their testimony virtually or submit it by affidavit. Again, this is contrary to the Commission’s standard operating procedure. Prefiled testimony is not sworn, so a witness who wants to offer testimony that constitutes evidence must appear, take an oath, and be subject to cross examination. The motion suggests that this procedure is unnecessary if there will be no cross examination, but the motion’s logic is faulty. First, the motion ignores the fact that the Commissioners may and usually do ask questions. Second, the motion requires opposing parties to determine before the hearing starts whether each witness who testifies will be cross examined. Hearings are dynamic and fluid proceedings. Whether counsel decides to cross examine a witness depends in part on what happens during the hearing before the witness testifies. Effective cross examination is sometimes carefully planned, sometimes impromptu, and always subject to change based on timing and the hearing schedule, who has testified, whether certain evidence is more or less important based on the testimony of other witnesses, and whether the testimony is cumulative. Here, the Landowners have offered over 50 pieces of their own prefiled testimony, almost all of which is cumulative. In response to Navigator’s motion to exclude such cumulative testimony, counsel did not identify who among the more than 50 witnesses will be testifying, nor does the pending motion identify any witnesses who are seeking to testify remotely or offer affidavit testimony in lieu of appearing personally. It would be unreasonable and unfair to require opposing parties to determine in advance of the hearing whether they will waive cross-examination with respect to some or all of the many Landowners who have submitted prefiled testimony.

As with the motion to allow virtual expert testimony, the motion does not include any factual basis for more than 50 landowners being unable to make plans to attend the hearing.

As with the motion to allow virtual expert testimony, requiring opposing parties to determine whether they will waive cross-examination in advance of the hearing, thereby allowing intervening parties the opportunity to testify without appearing, would establish new precedent for the conduct of evidentiary hearings before the Commission.

Finally, to the extent that the Landowners request a date certain for their testimony if this motion is denied, the motion again asks opposing parties to respond without knowing the facts. Counsel for the Landowners has not disclosed which or how many of the landowners who offered testimony have conflicts or difficulty attending the hearing, which of the many landowners will testify, or what days are at issue. Navigator has cooperated with other requests for a date certain for testimony, but they have been specific requests for a few witnesses and on certain dates. If information is provided indicating which individual landowners are seeking relief as part of this motion, Navigator may be able to work with counsel for the landowners to resolve this issue. However, the relief requested in the motion is currently not specific enough for Navigator to be able to make any pre-hearing agreement. Therefore, for the reasons stated above, Navigator opposes the motion.

Conclusion

Since Navigator's permit application was filed, the Commission has heard from many landowners about their concerns and fears related to Navigator's proposed pipeline. The Commission denied Navigator's motion addressing cumulative landowner testimony because each intervenor is entitled to appear and testify. This motion goes the other direction, with the Landowners suggesting not only that they should be allowed to participate without appearing,

but that it is unreasonable to expect that they would take time away from their jobs and families to participate. That sort of qualified intervention is consistent with neither Landowners' publicly stated concerns, nor the statutory and regulatory process by which they have been granted party status. Navigator respectfully requests that the motion be denied.

Dated this 17th day of July, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of July, 2023, a true and correct copy of the foregoing Applicant's Opposition to Landowners' Motion for Remote Testimony was served via e-mail upon the following:

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