

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

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**IN THE MATTER OF THE  
APPLICATION OF NAVIGATOR  
HEARTLAND GREENWAY, LLC FOR  
A PERMIT TO CONSTRUCT THE  
HEARTLAND GREENWAY PIPELINE  
IN SOUTH DAKOTA**

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**STAFF’S MOTION TO STRIKE  
TESTIMONY OF DANA BOSMA**

**HP22-002**

Staff of the Public Utilities Commission (Commission) by and through its undersigned counsel hereby files this Motion to Strike Testimony of Dana Bosma with Jon Thurber’s Affidavit and Exhibit 1 to Thurber Affidavit.

**Background**

The Commission opened an Evidentiary Hearing (Hearing) in the above captioned matter on July 31, 2023. This Hearing continues to date. On August 3, 2023, Ms. Dana Bosma was sworn-in and provided testimony to this Commission under oath at the Hearing in the above captioned matter. At that time, Ms. Bosma provided the following testimony:

1 A. Well, I do have a picture that was not in my  
2 original testimony of our tractor that got stuck in the  
3 upper part of the field on wet -- with the drainage  
4 problems that are up there. The wheel is 9 feet 9  
5 inches, which is taller than me, and it's stuck way up to  
6 the belly of the tractor.  
7 Q. And is that something that you would like to be made  
8 an exhibit in these proceedings?  
9 A. Yes, I would.  
10 MR. JORDE: All right. I would move to mark the  
11 photograph of that tractor.  
12 THE WITNESS: Uh-huh.  
13 MR. JORDE: From your land as landowner Exhibit  
14 134.  
15 MR. DE HUECK: Any objection to 134?  
16 MS. CARPENTER: No. But we would like to see  
17 it.

18 MR. DE HUECK: And you may approach. Or,  
19 Mr. Jorde, can hand it to you.  
20 MR. JORDE: If they'd like to see it I have no  
21 problem about it.  
22 THE WITNESS: I'll do it. I'll do it.  
23 (Witness hands document to Commissioner Nelson.)  
24 MR. DE HUECK: So we had no objection and that  
25 will be admitted.  
1 (Exhibit LO 134 is marked for identification.)

See Rough Condensed Transcript 080323 pages 196-197.

21 CROSS-EXAMINATION  
22 BY MS. REISS:  
23 Q. Good afternoon. I just have a couple of quick  
24 questions for you. Can I first turn your attention to  
25 the picture you provided. It would be LO 134. And if  
1 you recall you don't need to pull it up?  
2 A. Which one is that?  
3 Q. It was the last picture you provided.  
4 A. Okay.  
5 CHAIRPERSON FIEGEN: Commissioner Hanson is  
6 holding it up.  
7 THE WITNESS: Yeah.  
8 Q. All right. Do you recall when that photograph was  
9 taken?  
10 A. It was a couple years ago.  
11 Q. Okay. And what were the weather conditions when it  
12 was -- when that occurred?  
13 A. Well, obviously it was a year when we had some rain.  
14 Q. Sure. And do you recall, was -- I guess, can you  
15 just explain how that tractor got in that condition,  
16 unless there's an objection.  
17 A. Well, it was out in the field and somebody was  
18 driving it and they were trying to get across the field  
19 and it got stuck.  
20 Q. Okay. All right. Thank you

See Rough Condensed Transcript 080323 pages 199-200.

for stopping here and chatting with us. Appreciate  
14 it. I know it's been a lot of work for you. At least  
15 that's what it sounds like.  
16 The tractor, I'm glad Ms. Reiss asked the  
17 questions before I did. I was going to ask the same  
18 ones.

19 It looks like those tires are about, oh, I'd say  
20 6 feet. If it's 9 foot, those are close to seven feet  
21 down?  
22 THE WITNESS: The wheel itself is 5-9 in  
23 diameter.  
24 COMMISSIONER HANSON: Okay.  
25 THE WITNESS: I'm 5-6. It's 5-9. So about up  
1 to there.  
2 COMMISSIONER HANSON: Okay. Thank you for  
3 clarifying that. I assume one of the reasons why it was  
4 buried like that is because it's a John Deere and not an  
5 international.  
6 THE WITNESS: I wasn't driving it.  
7 COMMISSIONER HANSON: My grandpa got us on  
8 internationals all the time so -- I just torqued off half  
9 the people.  
10 Okay. So I think I have all my answers. Your  
11 photographs say a thousand words each. And appreciate  
12 very much. Thank you.  
13 THE WITNESS: Thank you.  
14 COMMISSIONER HANSON: Have a safe journey.  
15 COMMISSIONER NELSON: Thanks for being here.  
16 And I'm glad Commissioner Hanson asked that question  
17 because I had thought I heard you say the diameter on the  
18 tire was 9 feet 4 inches and I'm thinking, man that's a  
19 bigger tractor than I've got.  
20 THE WITNESS: No.  
21 COMMISSIONER NELSON: So I appreciate that  
22 clarification.  
23 Only other one, the two pictures of the ditch  
24 erosion you testified that you took those pictures;  
25 correct.  
1 THE WITNESS: Yes.  
2 COMMISSIONER NELSON: On the pictures themselves  
3 there was a notation they were taken by Alfred Slauthaag  
4 so that is not correct then.  
5 THE WITNESS: Okay. He's my brother he's my  
6 brother.  
7 COMMISSIONER NELSON: Okay. So who took the  
8 pictures.  
9 THE WITNESS: It was on his phone.  
10 COMMISSIONER NELSON: So he took the pictures.  
11 THE WITNESS: On his phone, yes.  
12 COMMISSIONER NELSON: That is all the questions  
13 I've got. Thank you.

See Rough Condensed Transcript 080323 pages 203-205.

LO134 was offered and admitted by Landowner Intervenors with representations by Ms. Bosma that the picture was taken on her property a couple of years ago.

### **Legal Standard**

The Rules of Evidence followed by circuit courts apply to contested cases before administrative bodies. See SDCL 1-26-19. SDCL19-19-403 provides “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”

”As a general rule, if a court excludes improperly admitted evidence and directs the jury to disregard it, the error is cured.” *Young v. Oury*, 2013 SD 7 ¶ 18, 827 NW2d 561, 567.

“Hearsay is a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) [a] party offers in evidence to prove the truth of the matter asserted in the statement.” *State v. Little Long*, 2021 SD 38, ¶ 30, 962 NW2d 237, 249.

“Evidence is hearsay when its probative force depends, in whole or in part, on the competency and credibility of some person other than the witness by whom it is sought to produce it.” *Johnson v. Chicago & N.W. R. Co.*, 72 SD 580, 38 NW2d 348, 350 (SD 1949).

### **Analysis**

LO134 was not prefiled and was presented to the parties for the first time during Ms. Bosma’s live testimony at the evidentiary hearing on August 3, 2023. As a result, Staff had no

opportunity to vet LO134 prior to this point. Ms. Bosma's provided the following foundation for LO134:

- 1 I do have a picture that was not in my
- 2 original testimony of our tractor that got stuck in the
- 3 upper part of the field on wet -- with the drainage
- 4 problems that are up there.

See Rough Condensed Transcript 080323 pages 196.

Relying on Ms. Bosma's testimony, Staff did not object to the foundation for admission of LO134 because at the time of admission, Staff understood the picture presented as LO134 was taken at Ms. Bosma's property and visualized a scene Ms. Bosma witnessed. Staff did seek additional information from Ms. Bosma as to when the picture was taken, what the conditions were, and how the tractor came to the pictured situation. Ms. Bosma represented the picture was taken a "couple of years ago," "obviously it was a year when we had some rain" and that the tractor was driven into the field and got stuck.

Staff has since uncovered evidence that the exact same picture Ms. Bosma presented to this Commission as LO134, a picture taken on her property of her tractor a couple of years ago, is readily available online, and has been available online since the year 2000. See Jon Thurber's Affidavit and Exhibit 1 to Thurber Affidavit. The scene pictured in LO134 seems significant enough that a person who witnessed the scene first-hand would know whether the incident occurred a "couple of years ago" or more than 20 years ago. Additionally, Ms Bosma's testimony in Exhibit LO39 that "[f]arm equipment has been stuck in tile breaks here that sunk the machine up to its belly" seemingly conflicts with Ms. Bosma's answers to questioning from Ms. Reiss about the incident. See LO39 page 154. While LO39 indicates a tractor sank to its belly due to a tile break, Ms. Bosma's response to the question posed by Ms. Reiss seemingly

indicated there was a lot of rain that year, and she made no mention of broken drain tile. This testimony also conflicts with Ms. Bosma's general claim that there are drainage problems in the field in response to Mr. Jorde's questioning to provide foundation for admission of LO134. See Rough Condensed Transcript 080323 pages 196.

Clearly this conflicting testimony is misleading to the finder of fact and confusing the issues before the Commission. This testimony is unfairly prejudicial because Ms. Bosma's testimony indicates the ground conditions on her property are such that a tractor has sunk more than five feet down into the ground, to the depth the proposed pipeline would be buried. This could be a significant issue and factor for the Commission to consider in determining whether Applicant has met its burden of proof and should be granted a permit to construct and operate an underground CO2 pipeline.

Ms. Bosma's misrepresentations of when the tractor incident occurred and the cause, coupled with Staff's findings outlined in Jon Thurber's Affidavit and Exhibit 1 to Thurber Affidavit, and that LO134 is a picture that is printed on a regular piece of paper with no identifying characteristics indicating by whom, where, or when the picture was taken, calls the credibility of all Ms. Bosma's testimony into question. If this picture was not taken by Ms. Bosma nor was it taken on her property, as Ms. Bosma led this Commission to believe, then LO134 is hearsay and any probative value rests on the credibility and competence of the witness presenting it. LO134 is offered to show the truth of the scene depicted in the picture, but without the ability to question the person who took the picture, or witnessed the scene first-hand, about the actual conditions present at the time taken, there is no probative value to LO134 and there is no foundation to admit this exhibit into evidence.

Since LO134 has already been improperly admitted based on Ms. Bosma's misleading testimony, the proper course of action to cure under *Young v. Oury* is to strike Exhibit LO134 from the record along with the entirety of Ms. Bosma's testimony as it relates to LO134. Furthermore, Ms Bosma's misleading testimony regarding LO134 calls into question the truthfulness of Ms. Bosma's testimony to this Commission and the credibility of the witness. In *State v. Delehoy*, the entire testimony of a witness was at issue after the witness offered a partial recording as evidence, and the jury was ordered to disregard the recording and the witnesses testimony. 2019 S.D. 30 ¶30, 929 NW2d 103, 110. Allowing LO134, or any part of Ms. Bosma's testimony to remain in the record challenges the integrity of this proceeding and is prejudicial to the Applicant.

### **CONCLUSION**

LO134 is hearsay, lacks foundation, and is prejudicial, Staff objects to its admission in the record and respectfully requests the Commission strike LO134 and all testimony referencing exhibit LO134 from the record. Additionally, because of Ms. Bosma's misrepresentations to this Commission, Staff respectfully requests the Commission strike Ms. Bosma's entire testimony from the record, including LO39 and LO41.

Dated this 8th day of August 2023.



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