

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

**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 WRITTEN OBJECTIONS

HP22-002

Staff of the South Dakota Public Utilities Commission hereby submits Staff’s Written Objections (Objections) and request these Objections be heard as part of the evidentiary hearing and be taken up upon commencement of that hearing on July 25, 2023. The reason for the Objections is fact that Landowner Intervenors who are collectively represented (Landowners) filed approximately 130 exhibits, the majority of which are prefiled testimony, followed by a late-filed witness list that includes approximately 110 named witnesses, as well as many unnamed potential witnesses.

Because of the large number of witnesses and the number of evidentiary objections that Staff has, it is in the interest of judicial efficiency to address more significant objections at the start of the hearing rather than waiting for the exhibit to be offered and, in some cases, gone through line by line. Therefore, Staff now makes files these Objections in order to provide everyone a clear understanding of our evidentiary objections and to address late disclosed witnesses.

Staff respectfully requests the Commission preclude the following items detailed herein.

A. Objection to testimony from those witnesses who did not prefile testimony pursuant to the procedural schedule.

On January 10, 2023, the Commission issued an order which, among other items, required the filing of prefiled testimony for any witness. On January 19, 2023, the Commission

issued a procedural schedule, later amended by Order dated March 3, 2023, establishing deadlines for the filing of prefiled direct, rebuttal, and surrebuttal testimony.

Also required by the procedural schedule was the filing of a Witness and Exhibit List on or before July 18, 2023. In addition, the Commission's Order dated July 14, 2023, states that "testimony at the evidentiary hearing [is] limited to the scope of what was offered in prefiled testimony." Therefore, it is inconsistent with Commission directives to include witnesses who failed to file prefiled testimony.

In addition to those newly disclosed named witnesses include within Landowners' witness list, the list included several unspecified witnesses including "[a]ny person or party who submitted any comments or objections to the PUC in this docket". Such an inclusion suggests that in spite of all of the procedural requirements, such as prefiled testimony and witness disclosure, the number of witnesses who could be called is nearly limitless, making it impossible for parties to adequately prepare for the evidentiary hearing. This inclusion is grossly prejudicial and violates the procedural safeguards upon which we all rely in order to prepare for an orderly evidentiary hearing. These unnamed persons did not file prefiled testimony and should be precluded from testifying.

B. Objection to any exhibits and witnesses who have been previously precluded by Commission order.

Following a motions hearing held on July 11, 2023, the Commission issued an order excluding the following:

1. Testimony of Loren Staroba (See Exhibit LO88).
2. Testimony of Marvin Lugert (See Exhibit LO89).
3. Testimony of Berton Risty (See Exhibit LO30).
4. Testimony of Becky Poss (See Exhibit LO33).
5. Attachment 1 to Prefiled Testimony of Marvin Abraham (See Exhibit LO25, pages 2-4).

In spite of this Order, the testimony was submitted as an exhibit and those witnesses included on the witness list. Therefore, for clarity on the matter and in order to identify which witnesses Staff and others should be preparing to cross-examine, Staff requests an order excluding those exhibits and any testimony contrary to the Commission's prior ruling.

C. Objection to the below statements from the verbatim portions of lay witness testimony.

Because of the size of the witness list and number of evidentiary objections that would have to be made each time verbatim testimony is offered, it is necessary to detail the objections in advance, rather than repeating the same objection to the same statement dozens of times. Furthermore, laying out the objections in writing ahead of time affords each party the opportunity to understand and identify the specific language to which Staff objects.

Staff objects to the following excerpts from the verbatim lay witness testimony and requests the Commission make a ruling striking the specific statement and reserves the right to include additional objections as necessary.

In identifying the location of the verbatim language for the purposes of this Motion, Staff will refer to the prefiled testimony of Denis Andersen and Janet Andersen, filed as proffered exhibit LO13.

1. **Page 16, first question and answer:** Staff objects on the grounds that it is irrelevant, lacks foundation, and is misleadingly dissimilar to the proceeding at hand. It is misleadingly dissimilar because nothing in the record indicates that the defendants in that lawsuit were landowners as the testimony suggests and, in fact, a full review of that case indicates that, in fact, they were not, nor was Magellan itself ever a party. Therefore, the proffered testimony is misleading and irrelevant.

2. **Page 21 beginning with “Are you familiar with the Fifth Amendment...”** through first question and answer on page 22. This discussion calls for legal conclusion and is improper lay witness testimony
3. **Page 22, last question through page 29, ending with and including “Attachment 8.”** This testimony violates the lay witness opinion rule, lacks foundation, and includes hearsay.
4. **Page 30, paragraph discussing testimony of Marvin Lugert and Loren Staroba.** This references testimony that was excluded by the July 14 Order.
5. **Page 30, last question and answer.** This is hearsay and violates the lay witness opinion rule.
6. **Attachment 4** (Nebraska case involving Magellan pipeline), irrelevant, lacks foundation, and is misleading as discussed in paragraph 1 of this section of this Motion.
7. **Attachment 5** (Climate Change article). Hearsay, lacks foundation.
8. **Attachment 6** (article calling on US and Canadian policymakers). Hearsay, lacks foundation.
9. **Attachment 7** (letter from Indigenous Environmental Network). Hearsay, lacks foundation.
10. **Attachment 8** (New York Times article). Hearsay, lacks foundation.
11. **Attachment 11** (article on Carbon Capture and Public Health). Hearsay, lacks foundation, improper lay witness testimony.
12. **Attachment 12**, first page and pages 147 through 157. Hearsay.

CONCLUSION

WHEREFORE, in the interest of judicial efficiency and providing clarity to the parties, Staff requests the Commission take up these Objections as part of the evidentiary hearing and rule on those items listed herein.

Staff greatly respects the concerns of all and people's desire to have their concerns shared. However, this is a formal contested case proceeding pursuant to SDCL 1-26, and we must adhere to the rules of evidence and existing Commission orders. The matter has reached the point where Staff has suffered or will suffer prejudice as a party.

This Written Objection is not intended to be exhaustive of all objections Staff might have. Staff reserves the right to make additional objections at the evidentiary hearing.

Dated this 20th day of July 2023.



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