

**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 RESPONSE TO
APPLICANT’S MOTION TO ADDRESS
PROCEDURAL ISSUES**

Staff of the Public Utilities Commission (Commission) by and through its undersigned counsel hereby files this Response to Applicant’s Motion to Address Procedural Issues. In its Motion, Applicant laid out five procedural requests, which Staff addresses below.

1. If a party is represented by counsel, only counsel should be permitted to conduct cross-examination. Staff agrees with this request and recommends it be granted.

This request is consistent with the rules of civil procedure and has been standard practice before this Commission. Staff supports this request and has also reached out to Mr. Jorde, as the attorney representing the majority of landowner intervenors, and understands he is in agreement, as well.

While this has not historically been an issue in this docket, granting this request will provide clarity going forward.

2. Cross-examination should be limited to the scope of direct. Staff agrees with this request and recommends it be granted.

SDCL 19-19-611(b) provides that “[c]ross examination should not go beyond the subject matter of the direct examination and matters affecting the witness’s credibility.” The South Dakota Supreme Court has held that “[c]ross-examination extends by right only to the subjects

covered by the direct examination[.]” *Enos v. St. Paul Fire & Marine Ins. Co.*, 4 SD 639, 57 NW 919 (SD 1894).

Therefore, Staff agrees that cross-examination should be limited to the scope of direct, which includes matters discussed in prefiled testimony and direct oral testimony.

3. Cross-examination and re-direct should be limited to one round. Staff defers to the Commission’s judgment on this request but provides the below discussion for information.

As Applicant stated in its Motion, the Commission has the discretion to exercise reasonable control over the mode of witness examination. Therefore, Staff defers to the Commission as to this request. In recent contested dockets, it has generally been the practice of the Commission to allow cross-examination by each party, followed by Commissioner questions, re-cross limited to new issues or issues arising from Commissioner questions or within the scope of Commissioner questions, and then re-direct.

Staff is supportive of the above-described process, but ultimately defers to the Commission to determine what method is best in this docket.

4. The hearing must be completed by August 5. Staff again defers to the Commission but provides the below information for consideration.

Staff notes that assuming the Commission orders a simultaneous post-hearing briefing schedule, a *minimum* of three weeks would be necessary for the parties to submit briefs, followed by an appropriate amount of time for the Commission to read and consider the briefs and render a decision.

5. If necessary to ensure timely completion of the hearing, the Commission should limit the time allowed for cross-examination.

Staff concurs with Applicant that the Commission had discretion in this area, as well. However, it is unknown at this time whether a time limit restriction is necessary.

If the intent is to prevent delay or limit cross-examination that serves no purpose other than to delay, there are safeguards built into the Rules of Civil Procedure, Rules of Evidence, and the Rules of Professional Conduct for attorneys which serve such a purpose. Rule 3.2 of the Rules of Professional Conduct requires a lawyer to “make reasonable efforts to expedite litigation consistent with the interests of the client.” The comments to that Rule explain that it is improper for a lawyer to delay “for the purpose of frustrating an opposing party’s attempt to obtain rightful redress or repose. [...] The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay.”

In addition, repetitive or cumulative questioning is generally objectionable. As previously discussed, cross-examination that exceeds the scope of direct is impermissible, absent specific leave being granted. Therefore, the law has inherent guardrails to encourage an efficient process.

It may be most prudent to defer action on this particular request until such time as it is determined whether the request is necessary and, if so, what the specific limitation should be. Therefore, Staff recommends this portion of Applicant’s Motion be denied without prejudice, and, if necessary, the Motion may be brought during the evidentiary hearing.

CONCLUSION

The Commission, like a court, has considerable discretion in what it will allow by way of repetitive testimony, cross-examination beyond the scope of direct, and general conduct of

hearings. Laying out the ground rules in advance helps to assure that everyone knows the expectations and that the hearing runs as efficiently and smoothly as possible. Therefore, while some of the issues in Applicant's Motion might already be addressed by the Rules of Civil Procedure, Staff nonetheless supports a discussion and ruling that proactively clarifies the process for everyone.

Dated this 5th day of July 2023.



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