

**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 LIMIT OR
EXCLUDE CERTAIN TESTIMONY

HP22-002**

Staff of the Public Utilities Commission (Commission) by and through its undersigned counsel hereby files this Response to Applicant’s Motion to Limit or Exclude Certain Testimony.

1. Applicant’s Motion to Exclude Redundant and Duplicative Verbatim Testimony

Staff certainly had the same concerns as Applicant when reading the testimony at issue in this portion of Applicant’s Motion. Staff read each and every filing, and upon doing a side-by-side comparison came to the same conclusion as Applicant. This is not something that has happened before this Commission previously, and Staff would concur that it frustrates the intent of prefiled testimony, which general serves to make the process more efficient and, more importantly, give everyone a better understanding of others’ unique positions and concerns.

“Cumulative testimony is evidence of the same character as evidence previously produced and which supports the same point.” *Hayes v. Northern Hills General Hospital*, 2001 SD 69, ¶ 17, 628 NW2d 739, 745, citing *Stormo v. Strong*, 469 N.W.2d 816 (S.D.1991). The prefiled testimony at issue is not merely of the same character, it is in fact largely verbatim. Such testimony is highly improper and does not further the goal of better understanding landowners’ individual concerns, identifying issues, or vetting the elements of SDCL 49-41B-22.

Staff supports the notion put forth in Applicant’s Motion of limiting the duplicative testimony. Navigator suggest that not more than one landowner be allowed to adopt the duplicative testimony and that counsel for the landowners who offered the testimony identify who that witness will be in advance of the evidentiary hearing. Staff suggest the identification be made pursuant to the procedural schedule, which requires filing of witness lists.

In addition, Navigator requests the Commission restrict testimony at the evidentiary hearing to the scope of what the witness has offered in pre-filed testimony. This is customary practice in proceedings where prefiled testimony is required, and Staff supports this notion.

2. Applicant’s Motions regarding specific witnesses (addressed below individually)

The Rules of Evidence followed by circuit courts apply to contested cases before administrative bodies. See SDCL 1-26-19. The Rules of Evidence Provide that “[e]vidence which is not relevant is not admissible.” SDCL 19-19-402. “Relevant evidence is defined as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *State v. Bowker*, 2008 SD 61, ¶ 39, 754 NW2d 56, 68.

The Court has held that

The law favors admitting relevant evidence no matter how slight its probative value. It is sufficient that the evidence has a tendency to make a consequential fact *even the least bit* more probable or less probable than it would be without the evidence. However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.

Id. (internal citations omitted).

Although the Court holds a low bar for relevance, it does not mean that there is no bar at all. SDCL1-26-19(1) provides that “[i]rrelevant, incompetent, immaterial, or unduly repetitious evidence *shall be excluded.*” {*emphasis added*}. Therefore, if testimony does not relate to the matters at issue in this docket and under the Commission’s jurisdiction, it should be excluded.

a. Applicant’s Motion to Exclude Testimony of Curtis Jundt

Applicant moves to exclude the testimony of Landowner Intervenor witness Curtis Jundt. In support of its Motion, Applicant argues that Mr. Jundt’s proffered testimony lacks foundation and is irrelevant. Staff disagrees.

Navigator argues that Mr. Jundt is a North Dakota landowner affected by the proposed Summit Carbon Solutions pipeline. While that may be true, it is not clear from Mr. Jundt’s testimony and, even if it is the case, it does not automatically disqualify him as a witness. If all of Mr. Jundt’s testimony is based off observations from a different pipeline, that is certainly a fair subject for cross-examination and would go to weight and credibility of the testimony.

Navigator further argues that “although he has training and experience as an engineer, Mr. Jundt’s current qualifications are unknown and he has not been qualified as an expert witness.” Navigator’s determination that Mr. Jundt has not been qualified as an expert witness is premature and misses the mark as to what qualifies one as an expert witness. SDCL 19-19-702 identifies certain factors that may qualify one as an expert witness, including “knowledge, skill, experience, training, or education.” Mr. Jundt, through his pre-filed testimony, explains his engineering degree (i.e. education) and past employment with MDU and WBI gas services (i.e. experience and training). This background appears to Staff as Mr. Jundt holding himself out as

expert and, thus, he should be afforded the ability to defend his expert qualifications before the Commission.

Should it be demonstrated through witness voir dire or cross-examination that Mr. Jundt lacks sufficient knowledge and expertise with respect to Navigator's project, pipeline construction practices, and other matters he opines on, Navigator can make a motion to strike at the hearing. As such, at this time, Staff does not support a motion to exclude Mr. Jundt's testimony and believes he should be afforded the opportunity to lay foundation for his testimony and defend himself as an expert.

b. Applicant's Motion to Exclude Testimony of Loren Staroba

Navigator moves to exclude Mr. Staroba's testimony as irrelevant and lacking foundation. Staff agrees.

Unlike Mr. Jundt, Mr. Staroba did not provide any information leading one to conclude that he is to be proffered as an expert. Mr. Staroba's testimony is lay person testimony describing difficulties he encountered with damage to his land and loss of crop yield due to construction of existing pipelines on his land. There is nothing to suggest that there is any correlation between the issues he experienced and the Navigator project. If the pipelines on his land were owned or constructed by the same company, that might make it more or less likely that the Navigator pipeline would be properly constructed and that land would be adequately reclaimed.

A search of PHMSA's public viewer pipeline maps shows that the pipelines on Mr. Staroba's land are a natural gas and crude oil pipeline, owned and operated by Alliance Pipeline

LP, a subsidiary of Enbridge, and Pembina Cochin LLC, respectively. Neither of these companies has ever received a permit from this Commission for a pipeline or any other project.

Loren Staroba's testimony is not relevant and should be excluded.

c. Applicant's Motion to Exclude Testimony of Marvin Lugert

Navigator next argues that the Commission should exclude the testimony of Marvin Lugert as irrelevant and lacking foundation. Navigator makes this motion for the same reasons as its motion regarding Loren Staroba. Like Mr. Staroba, Marvin Lugert is a landowner in North Dakota who offered testimony to share his experience with an existing pipeline. In his testimony, he identifies the pipeline on his land as being owned by Alliance.

For those reasons discussed regarding Mr. Staroba's testimony, Mr. Lugert's testimony is not relevant and should be excluded.

d. Applicant's Motion to Exclude Testimony of Marvin Abraham

Applicant moves to exclude Marvin Abraham's testimony as irrelevant and cumulative to others. Staff disagrees as to the grounds for exclusion but concurs in part with Applicant that the testimony should be excluded.

Marvin Abraham's testimony consist of a single page in which he identifies himself as a North Dakota landowner and states that he has contacted his insurance company regarding his coverage. The letter Mr. Abraham received from his insurer is attached to his testimony. However, Mr. Abraham was not the author of that letter, he was the recipient. In his testimony, he does not purport to be an insurance agent or an expert on insurability. Therefore, the letter attached to Mr. Abraham's testimony is inadmissible hearsay.

“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). It is without question that the witness did not make the statements which he seeks to offer.

Because the attachment to Mr. Abraham’s testimony is inadmissible hearsay, it should be excluded, along with the portion of his written testimony that mentions the letter. However, as to any portion in which the witness is testifying to his own experience of having difficulties obtaining insurance, Staff believes that issue to be relevant.

Therefore, with respect to Applicant’s request to exclude Mr. Abraham’s testimony, Staff recommends it be granted in part and denied in part.

3. Applicant’s Motion to Exclude Testimony of Landowners Who Have Not Established that They are Impacted by the Project

Finally, Applicant moves to exclude the testimony of fourteen landowners who filed prefiled testimony that failed to include any information to identify their land. Like Navigator, Staff encountered difficulties with this testimony. In an effort to better understand each landowner’s concerns, Staff attempted to locate their affected parcel. Unfortunately, that proved nearly impossible to accomplish for certain witnesses. However, Staff intends to utilize the cross-examination process to rectify the issue where necessary and does not agree that the omission rises to the level of meriting exclusion.

In addition, Staff obtained from Applicant through discovery copies of Landowners' responses to Applicant's discovery. It appears the only witnesses included in this request who did not provide a legal description in response to discovery are Berton Risty and Scott Nelson.

CONCLUSION

For the reasons discussed in this Response, Staff recommends the Commission grant in part and deny in part Navigator's Motion.

Specifically, Staff recommends the Motion be granted with respect to:

- Verbatim testimony;
- The testimony of Loren Staroba;
- The testimony of Marvin Lugert;
- Attachment 1 to the prefiled testimony of Marvin Abraham and the sentence in Mr. Abraham's prefiled testimony referencing the attachment;

Staff recommends the Motion be denied with respect to:

- The testimony of Curtis Jundt;
- The testimony of Marvin Abraham, with the exception of Attachment 1, discussed above;
- Landowners who have not established that they are impacted by the Project.

In addition, by way of this Response, Staff does not waive any evidentiary objections it may have at the hearing with respect to any of the aforementioned testimony. For the testimony to which Staff did not support the Motion to Exclude, this Response should not be viewed as a stipulation to the admissibility of the written testimony or its attachments.

Dated this 6th day of July 2023.

A handwritten signature in blue ink that reads "Kristen Edwards". The signature is written in a cursive style and is positioned above a horizontal line.

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