

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE PUBLIC UTILITIES COMMISSION

In the Matter of the Further Investigation in
to Environmental and Socioeconomic
Costs Under Minnesota Statute
216B.2422, Subdivision 3

**ORDER ON MOTIONS BY
MINNESOTA LARGE INDUSTRIAL
GROUP AND PEABODY ENERGY
CORPORATION TO EXCLUDE AND
STRIKE TESTIMONY**

An evidentiary hearing is scheduled to be held in this matter on the issue of the cost of carbon dioxide before Administrative Law Judges LauraSue Schlatter and J. Jeffery Oxley on September 24-25 and 28-30, 2015, in the Large Hearing Room at the Public Utilities Commission, 350 Metro Square Building, 121 Seventh Place East, St. Paul, Minnesota.

Appearances:

Kevin Reuther, Leigh Currie and Hudson Kingston, Minnesota Center for Environmental Advocacy, represent The Izaak Walton League of America – Midwest Office, Fresh Energy and Sierra Club (Clean Energy Organizations or CEOs).

Tristan L. Duncan, Shook, Hardy & Bacon, LLP, Kansas City, Missouri, represents Peabody Energy Corporation (Peabody).

Linda Jensen, Assistant Attorney General, represents the Minnesota Department of Commerce, Division of Energy Resources and the Minnesota Pollution Control Agency (Agencies).

Eric F. Swanson, Winthrop & Weinstine, PA, represents the Lignite Energy Council.

B. Andrew Brown and Hugh Brown, Dorsey & Whitney, LLP, represents Great River Energy (GRE), Minnesota Power and Otter Tail Power Company (OTP).

David Moeller, Minnesota Power, represents Minnesota Power Company.

James R. Denniston, Assistant General Counsel, represents Northern States Power Company, d/b/a Xcel Energy (Xcel).

Marc Al and Andrew Moratzka, Stoel Rives, LLP, represent the Minnesota Large Industrial Group (MLIG).

Benjamin L. Gerber, Attorney at Law, represents the Minnesota Chamber of Commerce (Chamber).

Kevin P. Lee, Attorney at Law, represents Doctors for a Healthy Environment (Doctors).

Bradley Klein, Environmental Law & Policy Center, represents the Clean Energy Business Coalition (CEBC).

On Tuesday, September 15, 2015, the MLIG filed a Motion to strike Dr. Peter Reich's surrebuttal testimony.¹ On the same date, Peabody filed a Motion to exclude Dr. Reich's testimony in its entirety, and certain testimony of Drs. John Abraham, Andrew Dessler and Kevin Gurney.²

On Friday, September 18, 2015, the CEOs and the Agencies filed their Responses to MLIG's and Peabody's Motions.

Based upon the all of the records and the proceedings in this matter, and for the reasons discussed in the Memorandum that follows, the undersigned Administrative Law Judge makes the following:

ORDER:

1. The motions brought by **MLIG** and **Peabody** to exclude the testimony of Dr. Reich is **DENIED, except as follows:**

Dr. Reich's surrebuttal testimony at line 4:13 beginning with the word "Also" and continuing through the end of line 4:15 of will be stricken.
2. Peabody's motion to exclude certain testimony of Dr. Abraham is **DENIED.**
3. Peabody's motion to exclude certain testimony of Dr. Dessler is **DENIED.**

¹ MLIG's MOTION TO STRIKE SURREBUTTAL TESTIMONY OF DR. PETER REICH AS UNTIMELY (Sept. 15, 2015) (MLIG Motion to Strike #2).

² Peabody's MOTION TO EXCLUDE DR. PETER REICH AND CERTAIN TESTIMONY OF DRs. ABRAHAM, DESSLER, AND GURNEY (Sept. 15, 2015) (Peabody Motion #3).

4. Peabody's motion to exclude certain testimony of Dr. Gurney is DENIED.

Dated: September 21, 2015


LAURASUE SCHLATTER
Administrative Law Judge

MEMORANDUM

Introduction

In its October 15, 2014 Notice and Order for Hearing, the Commission ordered the parties to specifically and thoroughly address "whether the Federal Social Cost of Carbon is reasonable and the best available measure to determine the environmental cost of CO₂ under Minn. Stat. § 216B.2422 and, if not, what measure is better supported by the evidence."³ The Commission also directed the parties to address the appropriate values for particulate matter, sodium dioxide and nitrogen oxides (collectively, the Criteria Pollutants). The evidentiary hearing scheduled to start on September 24, 2015 will focus solely on questions relating to CO₂, with a separate evidentiary hearing to address the Criteria Pollutants.

MLIG and Peabody Arguments

MLIG argues that Dr. Reich's surrebuttal testimony should be excluded because it only responds to direct testimony and responses to information requests (IRs) served before rebuttal reports were filed.⁴ Dr. Reich's testimony was offered by the CEOs in response to certain testimony of Peabody witnesses Dr. Robert Mendelsohn and Dr. Roger Bezdek. MLIG claims that it was unfair for the CEOs to wait for surrebuttal rather than offering Dr. Reich's testimony on rebuttal. MLIG claims that this timing on the CEOs' part violates the pretrial orders entered in this matter and should not be permitted.⁵

Peabody makes the same arguments to exclude the entire surrebuttal testimony of Dr. Reich, and to exclude certain portions of the surrebuttal testimony of CEO witnesses Drs. Abraham, Dessler and Gurney.⁶

³ *In the Matter of the Further Investigation Into Environmental and Socioeconomic Costs Under Minn. Stat. § 216B.2422, Subd. 3*, Docket No. E-999/CI-14-643 (14-643 Docket), NOTICE AND ORDER FOR HEARING (October 15, 2014) (ORDER FOR HEARING).

⁴ MLIG's MOTION TO STRIKE SURREBUTTAL TESTIMONY OF DR. PETER REICH AS UNTIMELY (Sept. 15, 2015) (MLIG Motion to Strike #2), *citing* Ex. ___ at 2-3, and 11 (Reich Surrebuttal).

⁵ MLIG Motion to Strike #2 at 1.

⁶ Peabody seeks to exclude Dr. Abraham's surrebuttal at page 8, line 16 to page 13, line 21 and from page 14, line 1 to page 15, line 4. Peabody Motion to Exclude #2 at 6. With respect to Dr. Dessler, Peabody asks to exclude his surrebuttal at page 1, line 8 to page 10; page 2, line 5 to page 5, line 4; page 5, line 6 to page 7, line 14; and page 7, line 16 to page 10, line 10. Peabody Motion to Exclude #2 at 6-7. Peabody requests that Dr. Gurney's surrebuttal testimony beginning at page 1, line 17 through page 13, line 11 be excluded. Peabody Motion to #3 at 9.

As to Dr. Reich's testimony regarding Dr. Mendelsohn, Peabody points out that Dr. Reich notes Dr. Mendelsohn's statement on direct that "Ecological models suggest that Minnesota forests would become more productive and have more standing biomass as a result of near term climate change."⁷ Because Dr. Reich's testimony is about the same topic on which Dr. Mendelsohn testified on direct, Peabody asserts Dr. Reich may not address the topic for the first time on surrebuttal. In addition, Peabody argues, Dr. Reich's testimony responds to Dr. Mendelsohn's responses to IRs provided on July 16, 2015, almost a month before rebuttal testimony was due. Therefore, Peabody claims, Dr. Reich's testimony is untimely.⁸ Peabody makes the same argument in objection to Dr. Reich's testimony regarding Dr. Bezdek; and to portions of the surrebuttal testimony filed by Drs. Abraham, Dessler, and Gurney.⁹

Peabody also maintains that the surrebuttal testimony of Drs. Abraham and Dessler misstate the record. Dr. Dessler criticizes Dr. Lindzen's citation to sources in his rebuttal testimony Dr. Lindzen provided as support for statements he made in his direct testimony. Dr. Dessler states that the sources in question do not support Dr. Lindzen's point. Peabody asserts that Dr. Lindzen's conclusion does not need to "parrot" the conclusions of the sources he cites. Dr. Dessler's statement that Dr. Lindzen misquotes the papers he cites is, Peabody claims, wrong and unfair and should be stricken because Dr. Dessler fails to look "at the full context of how different pieces of evidence fit together [in] order to form an argument."¹⁰

Peabody criticizes the Agencies' witness Dr. Gurney for his "novel survey of the rhetoric of climate change argumentation (Gurney Surrebuttal 1:17-13:11) that is a new argument that should have been raised in direct"¹¹ Peabody maintains Dr. Gurney should not have "sandbag[ged] it for the end, where Peabody's witnesses would once again have no fair opportunity to respond." Peabody additionally accuses Dr. Gurney of testifying outside his area of expertise. Peabody contends that, as a professor with a doctorate in ecology, Dr. Gurney is not qualified to testify about patterns of argumentation in the climate science and popular science literature; instead a professor of rhetoric would be more qualified to address these issues. In addition, Peabody states this is a new argument which should have been raised on direct.

CEOs' Response to MLIG and Peabody

The CEOs respond that, while the Second Prehearing Order in this docket includes a schedule for the filing of testimony, there is no allegation that its surrebuttal testimony was filed late and that neither MLIG nor Peabody cites a legitimate basis for excluding

⁷ Ex. ____ at 2 (Reich Surrebuttal), *citing* Ex. ____ at 4 (Mendelsohn Direct).

⁸ Peabody Motion #3 at 3-4.

⁹ Peabody Motion #3 at 3-9.

¹⁰ Peabody Motion #3 at 7-8.

¹¹ Peabody Motion #3 at 9, *citing* Ex. ____ at 1-13 (Gurney Surrebuttal).

the challenged testimony.¹² MLIG and Peabody's arguments are essentially that to allow the challenged testimony would be unfair, but, the CEOs maintain, even as a matter of fair play, MLIG and Peabody's lateness arguments are meritless.

The CEOs point out that the First Prehearing Order in this docket specifically stated, "Information requests and responses shall not be e-filed or served on the ALJ or Court Reporter."¹³ Therefore, the CEOs maintain, Peabody's responses to IRs, served on the CEOs on July 16, 2015, were not part of the administrative record until Peabody chose to enter them into the record as part of Peabody's witnesses' rebuttal testimony. Furthermore, the CEOs contend that the Peabody witnesses offered their IR responses as credible evidence for the consideration of the Administrative Law Judge and the Commission, thus bringing the IR responses into play and inviting responses from other parties on surrebuttal.¹⁴ Until Peabody introduced the IR responses into the record on rebuttal, the CEOs claim they had no reason to address them.¹⁵

The CEOs oppose Peabody's request to strike Drs. Abraham and Dessler's statements about the citations to authority in the Peabody rebuttal testimony, arguing that Peabody itself acknowledges that the challenged statements "amount to a disagreement over whether cited sources support an argument."¹⁶ This kind of disagreement, say the CEOs, is not a basis to strike testimony but is a matter of the Administrative Law Judge determining its weight.

Agencies' Response to Peabody

The Agencies assert that Dr. Gurney's surrebuttal testimony builds on his rebuttal testimony regarding the credibility of Peabody witnesses Drs. Bezdek, Happer, Lindzen, and Spencer.¹⁷ The necessity for Dr. Gurney's surrebuttal, argue the Agencies, is to assist a lay fact-finder in understanding the inadequacy of the witnesses' analytic methods which might not otherwise be self-evident, particularly in a case such as this involving complex issues of environmental science and the academic literature review process.¹⁸

The Agencies contend that Dr. Gurney's surrebuttal testimony is not "rhetoric." In fact, they argue, a rhetoric professor "would not be able to identify the analytic errors in the Direct and Rebuttal Testimony of these Peabody witnesses if [the rhetoric professor] were not also trained in the climate science content at issue."¹⁹ The Agencies assert that

¹² CEO RESPONSE TO MLIG MOTION TO STRIKE SURREBUTTAL TESTIMONY OF DR. PETER REICH AND PEABODY ENERGY'S MOTION TO EXCLUDE DR. PETER REICH AND CERTAIN TESTIMONY OF DRs. ABRAHAM AND DESSLER at 1-2 (Sept. 18, 2015) (CEO Response #2).

¹³ 14-643 Docket, FIRST PREHEARING ORDER at 5 (Dec. 9, 2014).

¹⁴ CEOs Response #2 at 3.

¹⁵ CEOs Response #2 at 3.

¹⁶ CEOs Response #2 at 4, *citing* Peabody Motion #3 at 8.

¹⁷ RESPONSE OF AGENCIES TO PEABODY MOTION TO EXCLUDE EXPERT WITNESS SURREBUTTAL TESTIMONY at 1, 5 (September 18, 2015) (Agencies' Response #2).

¹⁸ Agencies' Response #2 at 2.

¹⁹ Agencies' Response #2 at 6.

Dr. Gurney's testimony is probative, reliable and helpful and that his scientific expertise is what will enable the Administrative Law Judge and the Commission to identify and understand the analytic reasoning issues the Agencies raise.²⁰

The Agencies also maintain that Dr. Gurney's surrebuttal testimony is timely.²¹ Dr. Gurney's surrebuttal is timely, the Agencies say, because it builds on his rebuttal.²²

Analysis

Legal Standard

An administrative law judge "may admit all evidence which possesses probative value . . . if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affair." The administrative law judge shall exclude "[e]vidence which is incompetent, irrelevant, immaterial, or unduly repetitious. . . ." ²³

Timing Argument

The Administrative Law Judge rejects the argument that any party has an obligation to rebut information it receives from another party in discovery in the next available round of prefiled testimony in a contested case proceeding. Neither MLIG nor Peabody cites any authority for such a proposition, and it makes no logical sense.

IRs and their responses are exchanged among the parties throughout the time period leading up to the evidentiary hearing. However, neither the IR nor the response to one becomes part of the record unless it is specifically filed as an exhibit, such as an attachment to a witness' prefiled testimony. Furthermore, the Administrative Law Judge does not see, and is unaware of, the content of the IRs and the responses to them unless and until they are filed and made a part of the record.²⁴

Simply providing the IR responses to other parties did not require the receiving parties to rebut the responses on the record. Peabody invited responses to its witnesses' IR responses once it filed them with their rebuttal testimony. Therefore, the argument that the challenged surrebuttal testimony must be excluded because the CEOs and the Agencies were late in offering it is rejected.

Dr. Reich's Testimony

Dr. Reich's testimony presents a closer call because his surrebuttal contains extensive discussion about the effects of climate change on Minnesota forests, a topic which was raised in Dr. Mendelsohn's direct testimony. Dr. Reich first cites a portion of

²⁰ Agencies' Response #2 at 8.

²¹ Agencies' Response #2 at 2.

²² Agencies' Response #2 at 9.

²³ Minn. R. 1400.7300 (2015).

²⁴ See FIRST PREHEARING ORDER at 5.

Dr. Mendelsohn's direct testimony concerning the impact of a warming climate on Minnesota's forests: "Ecological models suggest that Minnesota forests would become more productive and have more standing biomass as a result of near term climate change."²⁵ Following that testimony, the CEOs served Peabody with an IR on or about July 6, 2015, asking Dr. Mendelsohn "to provide the basis for his assertion regarding Minnesota's forests."²⁶ Dr. Mendelsohn's response to the IR stated that his "views on ecosystem productivity under climate change were formed as part of his research on forests with Professor Sohngen. This research indicates that global forests will increase the supply of timber as a result of climate change."²⁷ This statement is followed by a list of ten papers connected to that work authored by Drs. Sohngen, Mendelsohn, and others.²⁸

The response then goes on to state:

The economic analyses of forestry are in turn based on quantitative ecological models. These models of large scale ecosystems were at first comparative equilibrium studies trying to understand how these ecosystems would change in response to past climate changes as well as future ones.²⁹

A list of 15 additional citations to publications (not authored by Mendelsohn) follows.³⁰ Thus, while Dr. Mendelsohn's direct testimony is somewhat vague, and includes no authoritative citation, the testimony he provided on rebuttal made clear that it is his experience with global forests and climate change that led him to infer his conclusions about Minnesota forests.

This is information that the CEOs could not have known from reading Dr. Mendelsohn's direct testimony. The CEOs did not know that Dr. Mendelsohn would put his IR responses into the record with his rebuttal. The CEOs could reasonably have decided, as a matter of litigation strategy, that Dr. Mendelsohn's initial statement on direct could be challenged on cross-examination rather than rebuttal. But Peabody chose to file the IR responses as Dr. Mendelsohn's rebuttal testimony. Therefore, to the extent Dr. Reich's testimony describes why Minnesota forests must be analyzed separately rather than as part of the "global forests," Dr. Reich's testimony is responsive to Dr. Mendelsohn's rebuttal testimony rather than to his direct testimony.

Dr. Reich states that he disagrees with "Dr. Mendelsohn's view that Minnesota forests will benefit from near-term climate change."³¹ This statement appears to be a response to Dr. Mendelsohn's direct testimony. However, it is only a response to Dr. Mendelsohn's direct testimony in the sense that it is the logical conclusion of the rest

²⁵ Ex. ____ at 2 (Reich Surrebuttal), *citing* Ex. ____ at 4 (Mendelsohn Direct).

²⁶ Ex. ____ at 3 (Reich Surrebuttal).

²⁷ Ex. ____, ROM-2R at 2 (Mendelsohn Rebuttal).

²⁸ Ex. ____, ROM-2R at 2-3 (Mendelsohn Rebuttal).

²⁹ Ex. ____, ROM-2R at 3 (Mendelsohn Rebuttal).

³⁰ Ex. ____, ROM-2R at 3-4 (Mendelsohn Rebuttal).

³¹ Ex. ____ at 3 (Reich Surrebuttal).

of Dr. Reich's testimony in which he explains why it is incorrect to apply research on global forests to the specifics of Minnesota forests, as Dr. Mendelsohn appears to have done.

Dr. Reich first talks generally about climate change and its effects on forests.³² Then he turns to a discussion of "how these [effects of climate change] will likely influence Minnesota forests."³³ Because Dr. Reich's discussion of how climate change will influence Minnesota forests is in response to the new information on rebuttal that Dr. Mendelsohn's conclusions about Minnesota forests were drawn from his research about global forests, Dr. Reich's surrebuttal is admissible.

The one exception to this is Dr. Reich's statement at lines 4:13-4:15 of his surrebuttal regarding the effect he expects the changes in Minnesota tree components of forests to have on Minnesota wildlife. Neither Dr. Mendelsohn's direct testimony, nor his rebuttal testimony has to do with wildlife. Therefore, the sentence dealing with Minnesota wildlife at lines 4:13-4:15 of Dr. Reich's surrebuttal will be stricken.

Dr. Dessler and Dr. Abraham

The Administrative Law Judge views the arguments about the criticism of Dr. Lindzen's citation to authorities as a question that goes to the weight, rather than the admissibility of the testimony of Dr. Dessler and Dr. Abraham. Peabody may dislike the witnesses' characterization of Dr. Lindzen's testimony. That is a topic that is appropriate for cross-examination or briefing. It does not render the challenged testimony inadmissible. The disputes regarding this testimony are precisely the sort of disputes that an Administrative Law Judge is able to sort through. Therefore, Dr. Dessler's and Dr. Abraham's testimony will be admitted in their entirety.

Dr. Gurney

The Administrative Law Judge disagrees with Peabody's contention that Dr. Gurney is unqualified to provide testimony on patterns of argument used to support propositions in the field and body of literature in which he has expert knowledge. To claim, as Peabody does, that only a doctor of rhetoric is qualified to recognize patterns of argument is not persuasive. An expert should be expected to assess the validity of arguments made within his or her areas of expertise. Peabody is certainly free to attempt to demonstrate that Dr. Gurney's arguments are invalid. This is an argument that goes to the weight rather than the admissibility of Dr. Gurney's opinions.

Conclusion

The challenged testimony was timely filed. Allowing the testimony does not raise fairness concerns, because Peabody invited responses when it filed its rebuttal testimony. Furthermore, the surrebuttal witnesses present testimony that is probative, competent and relevant to the issues under consideration in this proceeding. Therefore, except as

³² Ex. ___ at 3 (Reich Surrebuttal).

³³ Ex. ___ at 3 (Reich Surrebuttal).

otherwise specified, the motions to strike and exclude the witnesses' surrebuttal testimony are denied.

L. S.



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September 21, 2015

See Attached Service List

Re: In the Matter of the Further Investigation in to Environmental and Socioeconomic Costs Under Minnesota Statute 216B.2422, Subdivision 3

**OAH 80-2500-31888
MPUC E-999/CI-14-643**

To All Persons on the Attached Service List:

Enclosed and served upon you is the Administrative Law Judge's **ORDER ON MOTIONS BY MINNESOTA LARGE INDUSTRIAL GROUP AND PEABODY ENERGY CORPORATION TO EXCLUDE AND STRIKE TESTIMONY** in the above-entitled matter.

If you have any questions, please contact my legal assistant Rachel Youness at (651) 361-7881 or rachel.youness@state.mn.us, or facsimile at (651) 539-0310.

Sincerely,

s/LauraSue Schlatter

LAURASUE SCHLATTER
Administrative Law Judge

LS:ry
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cc: Docket Coordinator

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CERTIFICATE OF SERVICE

In the Matter of the Further Investigation in to Environmental and Socioeconomic Costs Under Minnesota Statute 216B.2422, Subdivision 3	OAH Docket No.: 80-2500-31888
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Rachel Youness certifies that on September 21, 2015 she served the true and correct **ORDER ON MOTIONS BY MINNESOTA LARGE INDUSTRIAL GROUP AND PEABODY ENERGY CORPORATION TO EXCLUDE AND STRIKE TESTIMONY** by eService, and U.S. Mail, (in the manner indicated below) to the following individuals:

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