

STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION

SCS Carbon Transport LLC  
Midwest Carbon Express CO2 Pipeline  
Project Siting Application

Case No.  
PU-22-391

**TRANSCRIPT OF FORMAL HEARING**

**December 21, 2023**

**Bismarck, North Dakota**

APPEARANCES

Commissioners Randy Christmann, Sheri Haugen-Hoffart, and  
Substitute Decisionmaker Timothy J. Dawson

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LLC

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John H. Warford, Jr. Revocable Trust and Chad Moldenhauer  
and Chad Wachter

STEVE J. LEIBEL, Knoll Leibel LLP, on behalf of  
Intervenors/Landowners

KEVIN PRANIS, on behalf of Intervenor Laborers  
District Council of Minnesota and North Dakota (LIUNA)

JULIE LAWYER, Burleigh County State's Attorney, on  
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DERRICK BRAATEN, Braaten Law Firm, on behalf of  
Emmons County

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1           COMMISSIONER CHRISTMANN: Good afternoon,  
2 everyone. This is a formal hearing on the Summit Carbon  
3 pipeline case. And I'm Randy Christmann, chair of the  
4 Commission, joined by Commissioner Sheri Haugen-Hoffart  
5 and independent decisionmaker and judge Tim Dawson.

6           Just a couple comments I want to make before we  
7 get started because there are some distinctions between  
8 what you've seen in the past in this case and today.  
9 But even before that I want to point out, as I have in  
10 some past cases, that this Commission has a proud  
11 history of running our hearings and meetings in an  
12 orderly manner. And I know the era in which we live, a  
13 lot of meetings are marked by hissing and booing or  
14 clapping and yelling and waving signs and stuff. We've  
15 never done that. And I would ask respectfully for you  
16 all to help us to maintain that tradition of having a  
17 respectful debate and allowing everyone to speak in  
18 their turn. Everyone will be allotted equal time by the  
19 judge and run a mature, responsible hearing here.

20           The other thing that I wanted to point out that  
21 is a distinction, the previous cases that I see some  
22 familiar faces and I know some of you have attended have  
23 been evidentiary hearings. And while people speak to us  
24 and they're under oath, there's a mix of, like, legal  
25 facts as well as opinions in there. You know, you can

1 give your opinion about the value of this area versus  
2 the value of that area.

3 This is different. This is not an evidentiary  
4 hearing but a formal hearing to take legal oral  
5 arguments on one specific topic. We are here today to  
6 talk about whether permits issued by this Commission for  
7 liquid or gas transmission facilities, whether those  
8 permits supersede and preempt local land use or zoning  
9 regulations or do they not supersede. That is the  
10 question before us.

11 And so opinions, like even our own opinions of  
12 whether it should or not, are really beside the point.  
13 It's what does the law say. And so that's what we're  
14 going to have, oral arguments. All sides will get a  
15 fair chance to speak and deliver their legal arguments  
16 and we will take them under advisement and make a  
17 decision.

18 With that, I have no other comments.

19 Commissioner Haugen-Hoffart, do you?

20 COMMISSIONER HAUGEN-HOFFART: No, I do not.

21 Thank you.

22 COMMISSIONER CHRISTMANN: And Judge Dawson.

23 SUBSTITUTE DECISIONMAKER DAWSON: No comment.

24 COMMISSIONER CHRISTMANN: Thank you.

25 Our administrative law judge, Hope Hogan, will

1 be running the hearing.

2 I thank you for being here, Judge Hogan, and  
3 I'll turn it over to you.

4 ALJ HOGAN: Thank you, Commissioner.

5 For our record, let it reflect that it's  
6 December 21st, 2023, at 2 p.m. This is the time and  
7 date and place set by the notice of hearing on a motion  
8 issued by the North Dakota Public Service Commission in  
9 Case No. PU-22-391. This hearing is being held today at  
10 the Pioneer Room at the State Capitol in Bismarck, North  
11 Dakota.

12 As Commissioner Christmann indicated, my name is  
13 Hope Hogan and I am the administrative law judge that's  
14 been designated at the request of the Public Service  
15 Commission to serve as a procedural hearing officer in  
16 this matter, which means I'm not a decisionmaker, but  
17 I'm merely directing these proceedings in an orderly  
18 manner.

19 I'd ask everybody at this time to check their  
20 cell phones to make sure your cell phone is either  
21 silenced or turned off so that we don't have cell phone  
22 interruptions during our hearing today.

23 SCS Carbon Transport LLC has filed a renewed  
24 motion to declare Burleigh and Emmons County ordinances  
25 superseded and preempted in this proceeding. On October

1 5th, 2023, the group of intervenors represented by the  
2 Knoll Leibel LLC law firm filed a request for hearing.  
3 And on November 28th, 2023, the Public Service  
4 Commission issued a notice of hearing on the motion  
5 setting the hearing for today's date to hear oral  
6 arguments on the motion.

7 I'm now going to ask the parties to state their  
8 appearance for the record.

9 Mr. Bender or Mr. Dublinske, can you please  
10 state your appearance for the record today and indicate  
11 who you represent in this matter?

12 MR. BENDER: Thank you, Your Honor and  
13 commissioners. Lawrence Bender, PO Box 1855, Bismarck,  
14 appearing on behalf of the Applicant.

15 MR. DUBLINSKE: Thank you, Your Honor. Bret  
16 Dublinske, also with Fredrikson & Byron, on behalf of  
17 the Applicant.

18 ALJ HOGAN: And it's my understanding, Mr.  
19 Dublinske, you're going to be arguing today?

20 MR. DUBLINSKE: That is correct, Your Honor.

21 ALJ HOGAN: All right. Thank you.

22 Mr. Pelham, would you like to state your  
23 appearance for the record?

24 MR. PELHAM: Good afternoon. Special Assistant  
25 Attorney General Zachary Pelham on behalf of the

1 Commission. To my left is Public Utilities Director  
2 Victor Schock. Thank you.

3 ALJ HOGAN: Mr. Bakke.

4 MR. BAKKE: Good afternoon. Randall Bakke on  
5 behalf of what we're referring to as the Bismarck  
6 intervenors, which is Chad Wachter, John Warford, and  
7 Chad Moldenhauer.

8 ALJ HOGAN: Thank you.

9 Mr. Leibel.

10 MR. LEIBEL: Steve Leibel of the Bismarck law  
11 firm of Knoll Leibel, and I'm here on behalf of the  
12 landowner intervenors, which, as the Commission knows,  
13 they're throughout the state.

14 ALJ HOGAN: Ms. Lawyer.

15 MS. LAWYER: Julie Lawyer on behalf of Burleigh  
16 County.

17 ALJ HOGAN: And Mr. Braaten.

18 MR. BRAATEN: Derrick Braaten with Braaten Law  
19 Firm on behalf of Emmons County. And I have sitting  
20 next to me Erin Magrum, chair of the Emmons County  
21 Commission.

22 ALJ HOGAN: All right. Thank you.

23 A procedure for this hearing was set and  
24 provided to the parties prior to today's hearing. And  
25 just to summarize, each party will be given 20 minutes

1 to present oral argument with SCS Carbon Transport going  
2 first, followed by Emmons County, Burleigh County, the  
3 Bismarck intervenors, landowner intervenors, and  
4 Laborers Union.

5 And I apologize, Mr. Pranis, I didn't mean to  
6 diminish your appearance. You weren't on my list for  
7 some reason. So you will go last, but can you please  
8 state your appearance for the record?

9 MR. PRANIS: Thank you, Your Honor,  
10 Commissioners. Kevin Pranis on behalf of LIUNA  
11 Minnesota, North Dakota, otherwise known as Laborers  
12 District Council.

13 ALJ HOGAN: Thank you.

14 Following the 20-minute arguments by each party,  
15 I will allow Summit to provide a 10-minute reply  
16 argument if they wish to do that. I will be keeping  
17 time during each party's argument and I'll let you know  
18 when you've reached your allotted time and ask that you  
19 please wrap up your presentations. I will allow the  
20 commissioners to ask questions after each party's  
21 presentation and I will not count those questions or  
22 replies against your allotted time.

23 Are there any other preliminary matters we need  
24 to discuss before we get started?

25 Go ahead.



1           COMMISSIONER CHRISTMANN: Just a message I  
2 received from upstairs was that some of the attorneys  
3 were hard to hear in this room. These mics, you have to  
4 be pretty close to the mic so...

5           ALJ HOGAN: All right. Thank you.

6           So then I'll turn to you, Mr. Dublinske, you can  
7 start us off.

8           MR. DUBLINSKE: Thank you, Your Honor, and good  
9 afternoon. May it please the Commission, colleagues.  
10 As I mentioned, I'm Bret Dublinske of Fredrikson & Byron  
11 for SCS Carbon Transport who I'll refer to as "Summit"  
12 this afternoon for short. Good to see you all again.

13           North Dakota as a matter of state policy is a  
14 leader in the promotion of carbon capture and  
15 sequestration. The State has invested significant  
16 resources in being the first state to establish primacy  
17 over Class VI carbon dioxide injection and storage  
18 systems, but that policy is for naught if transmission  
19 systems cannot be built to get the CO2 to where it will  
20 be sequestered.

21           As in many other states, the responsibilities  
22 for decisions regarding pipeline permitting are granted  
23 first and foremost to the expert administrative agency,  
24 the Public Service Commission. The Commission is in the  
25 best position to take a statewide view to apply its

1 unique and specific expertise regarding pipelines and  
2 pipeline law and to render a decision.

3 As the Commission is aware, two counties have,  
4 in the last year, passed ordinances that they seek to  
5 apply to the Summit pipeline project. These counties  
6 have adopted standards and procedures that are different  
7 from the State, different from the Federal Government,  
8 and even different from each other, creating a  
9 burdensome patchwork of various and overlapping  
10 standards. This is not an efficient or an effective way  
11 to promote state policy.

12 Summit, however, believes that the plain  
13 language of the North Dakota Century Code provides a  
14 clear solution. Summit brought this renewed motion  
15 regarding preemption because we believe that addressing,  
16 and hopefully resolving, this issue upfront will make  
17 the remainder of the proceeding more efficient as it  
18 will either remove an evidentiary issue that would  
19 otherwise require additional materials in the record or  
20 it will guide what needs to be presented. But either  
21 way, a ruling now helps avoid wasted efforts.

22 That said, as I will explain momentarily, while  
23 Summit does seek a ruling confirming its understanding  
24 of this issue, Summit actually believes that the statute  
25 makes preemption automatic. Overwhelmingly, the

1 briefing back and forth on this issue has appropriately  
2 been a debate about the statutory interpretation of the  
3 words of 49-22.1-13(2). Some of that debate has  
4 involved questions of intent by taking isolated comments  
5 from a handful of legislators and committee witnesses,  
6 but at the end of the day, the best indicator of  
7 legislative intent and what binds the Commission is the  
8 language that was actually passed by majority vote and  
9 signed into law.

10           Looked at carefully, 49-22.1-13(2) is actually  
11 pretty clear. Indeed it reads very much like a  
12 flowchart for a decision. Summit would suggest that the  
13 first three paragraphs, (a), (b), and (c), provide  
14 substantive categories in how those are treated. And if  
15 you look carefully at the language, they all have  
16 important distinctions.

17           So section 2, paragraph -- or subsection 2,  
18 paragraph (a) pertains specifically to conversion  
19 facilities, and it says that the commission's  
20 certificate may not preempt a wide list of local  
21 regulations including zoning. Paragraph (b), on the  
22 other hand, pertains only to transmission facilities and  
23 says that the commission's permit automatically preempts  
24 a narrower list that includes land use and zoning  
25 ordinances. Then there's a middle category in (c) where

1 the commission has discretion. It applies to  
2 transmission facilities and it says that a commission  
3 permit may preempt or may require the applicant to  
4 comply with, and I'll quote paragraph (c) here, "the  
5 road use agreements" subject to certain showings in that  
6 paragraph.

7 After those three categories, paragraphs (d) and  
8 (e) are simply implementation, not new, substantive  
9 categories. (D), again regarding transmission  
10 facilities, requires that localities have to file local  
11 requirements -- doesn't use the term "ordinance" -- ten  
12 days in advance or they are preempted. And then  
13 paragraph (e) says that the applicant must abide by the  
14 local requirements that are not otherwise superseded by  
15 the steps above. That is, they aren't automatically  
16 superseded by paragraph (b) or they aren't  
17 discretionarily superseded by a decision in  
18 paragraph (c).

19 This, as near as I can tell, is the only way to  
20 read the statute that gives effect to all of the  
21 separate paragraphs.

22 Arguments from some of the parties appear to  
23 start at the bottom of the list and work backwards and  
24 say that paragraph (e) says that a transmission facility  
25 must abide by local requirements, but that would read

1 paragraph (b), the transmission permits preempt, out of  
2 the statute entirely, which is an impermissible  
3 interpretation. Similarly, arguments that all  
4 preemption requires an affirmative decision of the  
5 Commission based on the factors in paragraph (c) not  
6 only reads paragraph (b) out but also ignores the  
7 express limitation in paragraph (c) to road use  
8 agreements.

9 Summit's approach that paragraphs (a), (b), and  
10 (c) set forth three substantive categories and their  
11 status, not preempted, always preempted, sometimes  
12 preempted, and that (d) and (e) are about implementation  
13 makes logical sense of the whole of section --  
14 subsection 2 read together.

15 And that structure makes logical sense as well  
16 because conversion facilities, a gas plant, for example,  
17 is at a single site that is usually in one county where  
18 it has impacts, but linear infrastructure like a  
19 pipeline is often in multiple counties and it needs to  
20 be viewed as a whole across the entire route. They are  
21 different projects of a different nature, and it makes  
22 sense that the Legislature would treat them differently  
23 as the language of paragraphs (a) and (b) do.

24 Because the words on the page are clear and  
25 there is no ambiguity, diving into the legislative

1 history is not needed or appropriate. And in any event,  
2 you can find isolated snippets on either side. But the  
3 one thing that I would say about legislative history  
4 that I think is clear is that the legislators were told  
5 most bluntly by then Representative Keiser that the  
6 amendments could be interpreted just as Summit suggests  
7 and the Legislature passed that language knowing it.  
8 Read into that what you will.

9 In the alternative, however, even the parties  
10 that disagree with the automatic preemption  
11 interpretation all appear to argue that, at worst for  
12 Summit, the Commission may preempt by applying the  
13 factors in paragraph (c). And we disagree with that.

14 Let me run through that analysis as well. The  
15 standards in paragraph (c) include whether the  
16 regulations are, quote, "unreasonably restrictive" and  
17 whether they, quote, "conflict with state or federal  
18 law." Much of the resistance here is boiled down to a  
19 claim that Summit hadn't entered enough evidence on  
20 those factors.

21 Summit has two responses to that. First,  
22 Summit's primary position remains that the plain  
23 legislative language makes the preemption automatic with  
24 regard to transmission facilities and zoning ordinances,  
25 but the point of filing the motion now is that if the

1 Commission disagrees, that helps steer the hearing and  
2 the evidentiary issue can be wrapped into the rest of  
3 the case and the evidence presented on reconsideration.  
4 Second, that said, even applying the factors, Summit  
5 believes the board can rule now on that basis.

6           The unreasonableness is clear on the face of the  
7 ordinances as is the conflict with federal law. In  
8 Emmons County, for example, they adopted a nearly  
9 8,000-foot setback from occupied structures compared to  
10 500 feet as a state standard, 16 times larger. Summit  
11 believes that the Commission can find that unreasonably  
12 restrictive on its face.

13           Burleigh County is even more extreme; two miles  
14 from an occupied structure, approximately 20 times the  
15 state standard. And Burleigh also has a setback,  
16 interestingly enough, of 10 miles from any electric  
17 transmission line. Setbacks of that length are, on  
18 their face, an unreasonable restriction and obviously  
19 block out huge amounts of the county.

20           And there are other setbacks beyond just those  
21 one or two that are equally excessive and they all  
22 combine to have a cumulative impact. The maps in our  
23 briefs merely demonstrate that fact. And the fact that  
24 those ordinances were adopted well after Summit's  
25 project was underway, changing the rules well into

1 design and engineering, only adds to the unreasonable  
2 burden.

3 Paragraph 49-22.1-13(2)(c) also makes clear that  
4 conflict with other laws is a basis for preemption.  
5 Burleigh County's ordinance, for example, repeatedly and  
6 several times in the Purposes section alone states its  
7 purpose as being safety. It talks about blast zones or  
8 fatality zones which, again, makes clear its purpose is  
9 to engage in safety regulation which, by express  
10 language in federal law and also controlling Eighth  
11 Circuit precedent, is preempted. The Burleigh ordinance  
12 establishes its own definition of "high consequence  
13 area," a term of art in federal PHMSA regulations that  
14 has a different definition there. At Section 7.2 it  
15 even purports to regulate the spacing on shut-off valves  
16 and fracture arresters which are subjects of specific  
17 and explicit PHMSA regulations.

18 But the setbacks, especially ones the unusual  
19 length of those in Emmons and Burleigh ordinances, also  
20 serve no purpose other than to regulate safety and/or to  
21 block the project. In the supplemental authority case  
22 that Summit filed from a federal court in Iowa, that  
23 judge, implementing a series of Eighth Circuit  
24 precedence, found that setbacks much smaller than those  
25 at issue here were a proxy for safety regulations and



1 found them preempted by federal law.

2 Moreover, to the extent those setbacks serve, or  
3 as the quotes from local officials that we included in  
4 our reply brief show, are intended to prevent the  
5 project, that also conflicts with state law and state  
6 policy which is designed to balance the interests the  
7 State has in infrastructure investments with other  
8 concerns. That is, the state law is intended to allow,  
9 subject to reasonable regulations, not to prohibit,  
10 pipelines, including carbon dioxide pipelines. To the  
11 extent that local ordinance have the intent or the  
12 effect of prohibiting carbon dioxide pipelines in that  
13 county, that also is conflict with state law.

14 Your Honor, Summit has a good route in North  
15 Dakota that has now reached 80 percent voluntary  
16 easements and climbing. Summit has heard and responded  
17 to concerns about the proximity to Bismarck. And this  
18 Commission should not allow a handful of opponents in  
19 local governments to undermine the state policy or to  
20 serve as a veto on a project that landowners on the  
21 route, agricultural interests and others, support and  
22 which will provide investment and jobs for the state.

23 Century Code 49-22.1-13(2) provides a clear path  
24 for the expert Public Service Commission to manage  
25 siting of transmission projects like pipelines and to

1     avoid the kind of jigsaw puzzle approach of different  
2     rules and processes for different parts of the single  
3     pipeline.

4             Again, the recent federal decision from Iowa,  
5     the court discusses the policy reasons for statewide  
6     rather than county-by-county siting. And while it's not  
7     directly applying North Dakota law, it does support the  
8     sort of distinction that the language in the legislation  
9     used, language that clearly provides that a permit for a  
10    liquid transmission facility preempts local land use  
11    regulations.

12            Summit respectfully asks the Commission to find  
13    the Burleigh and Emmons County ordinances preempted or  
14    that they will be preempted by a permit if this  
15    Commission grants one as the -- to the extent that they  
16    purport to apply to this project and to treat this  
17    multi-county pipeline as a unified, uniform state issue.

18            Thank you. I'd be happy to answer any  
19    questions.

20            ALJ HOGAN: All right. Thank you.

21            Are there any questions from commissioners or  
22    Mr. Dawson?

23            All right. No questions.

24            All right. Then the next party on my list is  
25    Emmons County. So you may proceed, Mr. Braaten.

1 MR. BRAATEN: Thank you, Judge Hogan.

2 I'd like to start by talking a little bit about  
3 the Emmons County ordinance specifically, and I also  
4 intend to spend some time discussing this issue of  
5 statutory interpretation and spending a little time with  
6 the statute itself.

7 But I want to first talk about the Emmons County  
8 ordinance, because when we're talking about supersession  
9 and preemption, and specifically if we're going to talk  
10 about conflict of laws, that is something that can only  
11 be analyzed with respect to the actual language of the  
12 actual local ordinance at issue. And a lot of the  
13 arguments that have been made by Summit tend to attempt  
14 to sweep up the Emmons County ordinance along with  
15 numerous comments about other ordinances.

16 And so I want to take a little time to point out  
17 the unique nature of the Emmons County ordinance as well  
18 as the fact that it's an ordinance that's been on the  
19 books in Emmons County since the 1980s. And this is  
20 particularly important because, as the Commission saw,  
21 Summit filed a federal court decision out of Iowa and  
22 that decision relates to conflict of laws.

23 And I want to talk a little bit about the PHMSA  
24 guidance letter that was sent out that contradicts some  
25 of what was in that opinion, but, more importantly, that

1 opinion is really specific to and the analysis is based  
2 upon what happened in that particular county in Iowa.  
3 And that is a different analysis than what happened in  
4 Emmons County, North Dakota.

5 So the Emmons County ordinance regulates land  
6 uses in the county and it was amended after the siting  
7 application, but one of the things that I handed out to  
8 folks is just a couple pages out of the prior Emmons  
9 County ordinance. And this is Article VI, subdivision  
10 B, and you can look down to (2)(a) and (2)(b) and that  
11 governs. And the amendment that was made in the Emmons  
12 County ordinance was made to specifically an existing  
13 provision at B(2)(b)(i). And there were setbacks.

14 And what I want to point out specifically and  
15 importantly is that at the top of this page, prior to  
16 Emmons County amending its ordinance to bring CO2  
17 companies within its purview, it already regulated  
18 pipelines. And it regulated electric transmission  
19 facilities as well as transmission pipelines for water,  
20 gas, oil, or coal slurry.

21 And so this wasn't a situation where Emmons  
22 County developed a new ordinance specifically related to  
23 pipelines as a land use in their county. They simply,  
24 for the first time ever, saw a pipeline coming through  
25 that was going to ship CO2. That's not something that

1 we had seen before. Just like at some point in this  
2 country no one had heard about the idea of a coal slurry  
3 pipeline, but once we heard about the idea of coal  
4 slurry pipelines, local governments added those to the  
5 other pipelines they regulate.

6 Similarly, when Emmons County found out that  
7 there was going to be a CO2 pipeline coming through,  
8 they thought it prudent to regulate that the way they  
9 regulate other pipelines. They didn't know the route.  
10 What they did is look at their ordinance, what already  
11 existed on the books there to regulate that land use,  
12 and they added a new land use being developed into the  
13 existing land uses being regulated for that purpose.

14 Significantly, what they amended is in  
15 Article VI. Article VI regulates four different land  
16 uses. One of them is the pipelines and transmission  
17 facilities I mentioned. And you don't have this in  
18 front of you, but the other land uses regulated in  
19 Article VI are commercial recreation parks, tourist and  
20 trailer camps, salvage and junkyards, and subsurface  
21 mining and surface extraction.

22 And my point with that is simply that this is  
23 merely one of four different land uses being regulated  
24 under the Emmons County ordinance since the 1980s. And  
25 so the idea that this was some sort of a safety

1 regulation passed and targeted at Summit is simply  
2 wrong. This has been on the books. And they are still  
3 regulating oil and gas lines and transmission lines the  
4 same way Summit's being regulated.

5 The other thing I want to say about the Emmons  
6 County ordinance is that they have a process set up  
7 where you can get waivers. And so Summit could go to  
8 anyone who is within that -- that established residence  
9 setback and ask for a waiver. And if they have setbacks  
10 that are preventing them from going down the current  
11 route, they could simply ask for setbacks to that.

12 And Commissioner Magrum is here and he can  
13 testify. He obviously doesn't know everything that  
14 happens in his county, but he hasn't heard of Summit  
15 asking for any setbacks in that county -- or setback  
16 waivers.

17 But my point is that there is a process even if  
18 one of these setbacks poses a problem for the current  
19 route. There's actually a process where they can go out  
20 and attempt to work with those landowners to get  
21 through. And we're not aware of them having even  
22 attempted to do that.

23 The other thing I want to point out is that it  
24 was filed with the Commission that there was a letter  
25 that was sent out by PHMSA that talked about local

1 government and local control, and it specifically  
2 referred to local governments have implemented  
3 authorities and they've seen localities consider various  
4 measures. One of them is restricting land use and  
5 development along pipeline rights of way through zoning  
6 setbacks and similar measures. That's PHMSA saying that  
7 they recognize that local governments exercise that  
8 jurisdiction. And that's precisely what Emmons County  
9 did here.

10 PHMSA's letter to Summit also states "Local  
11 governments have traditionally exercised broad powers to  
12 regulate land use, including setback distances and  
13 property development that includes development in the  
14 vicinity of pipelines. Nothing in the federal pipeline  
15 safety law impinges on these traditional prerogatives of  
16 local or state government, so long as officials do not  
17 attempt to regulate the field of pipeline safety  
18 preempted by federal law."

19 There's nothing about regulating pipeline safety  
20 in the Emmons County ordinance. And if you go through  
21 the briefing, what you'll see is all the comments about  
22 that refer to Burleigh County and then attempt to simply  
23 sweep up Emmons County with it. The Emmons County  
24 ordinance doesn't regulate safety. It is a land use  
25 regulation which even PHMSA has recognized is

1 specifically the prerogative of local governments.

2           The other issue I want to talk a little bit  
3 about is the statutory interpretation. And I think you  
4 probably have several copies at this point, but because  
5 we are talking about a fairly wordy and verbose statute,  
6 I thought it would be helpful to have the language in  
7 front of you as I refer to it. But what I want to do is  
8 walk briefly through some of that language and explain  
9 why we disagree with the statutory interpretation and a  
10 plain language reading of the statute itself.

11           And so there was an argument from Summit in  
12 which it said that the word "requirements" in subsection  
13 2(c) of 49-22.1-13 is a reference to the road use  
14 agreements and that's the argument they're making.

15           And so if you look at the language in  
16 subdivision 2(c), in the second sentence it says "A  
17 permit may supersede and preempt the requirements of a  
18 political subdivision." And their claim is that that  
19 refers to the prior sentence where it says "road use  
20 agreements." That's wrong.

21           If you read the rest of that sentence, it says  
22 "A permit may supersede and preempt the requirements of  
23 a political subdivision if the applicant shows by a  
24 preponderance of the evidence the regulations and  
25 ordinances are unreasonably restrictive."



1           My point is that "requirements" is synonymous  
2 with regulations and ordinances. They are in the same  
3 sentence and they are referring to the same thing.  
4 "Requirements" does not refer to road use agreements.  
5 It refers to regulations and ordinances. What  
6 regulations? The zoning regulations referred to in  
7 subdivision b.

8           Summit says that if there is no automatic  
9 preemption, then subdivision b is superfluous. Again,  
10 that's wrong by its plain language.

11           When you look at subdivision b, it starts with  
12 the words "Except as provided in this section."  
13 "Section" refers to 49-22.1-13 of the Century Code.  
14 That subdivision b is literally referring to the  
15 remainder of the section, indicating that you have to  
16 look elsewhere in that section to fully understand what  
17 that subdivision means because it's saying it may be  
18 superseded except as provided in this section.

19           "As provided in this section" refers to the  
20 language in subdivision c that then explains how, why,  
21 and when a local regulation or ordinance can be  
22 superseded. Again, regulation or ordinance does not  
23 refer to a road use agreement. That very clearly refers  
24 to local zoning regulations and ordinances. And so they  
25 do need to make a showing by a preponderance of the

1 evidence.

2 Now, moving on, the other language in (d) and  
3 (d) -- (d) and (e) further supports this. And  
4 specifically if you look at subdivision (d), the last  
5 two sentences, it says "Upon notification, a political  
6 subdivision shall provide a listing to the commission of  
7 all local requirements identified under this  
8 subsection."

9 Again, requirements are the local zoning  
10 ordinance, not the road use agreement. So they provide  
11 their local requirements.

12 And it states "The requirements must be filed at  
13 least ten days before the hearing or the requirements  
14 are superseded and preempted." Well, if they're  
15 automatically superseded and preempted under  
16 subdivision b, then why are they being automatically  
17 superseded and preempted if you don't file them ten days  
18 before the hearing? That, again, would be superfluous.

19 The answer is that subdivision b doesn't create  
20 an automatic preemption, because that would make  
21 subdivision d absurd. That would mean the only reason  
22 these local governments are filing their ordinances is  
23 to make sure we all know exactly what's being  
24 superseded. What possible incentive would they have to  
25 be filing them if the only effect of filing them is to

1 make explicit that they're having their ordinance  
2 superseded? That doesn't make any sense. It doesn't  
3 make sense that you would say that they are  
4 automatically superseded and preempted if you don't get  
5 them filed if they're automatically superseded and  
6 preempted anyway. That's not how statutory  
7 interpretation works.

8           So the arguments made by Summit with respect to  
9 the plain language, I do agree that the legislative  
10 history is, at best, ambiguous and supports what both  
11 sides are saying depending on which part of it you want  
12 to quote. And that is often the case with legislative  
13 history. But we don't need to look at the legislative  
14 history. We have the language of the statute and we can  
15 interpret. And the canons' interpretation say that we  
16 give the words their plain and ordinary meaning. We  
17 have to interpret these provisions together so that they  
18 make sense together.

19           And we have to interpret them to avoid an  
20 absurdity. It would be indeed absurd to require local  
21 governments to file ordinances that are automatically  
22 superseded by a permit. And it would also be absurd to  
23 say that if you don't get them filed by ten days before  
24 the hearing, we're going to automatically supersede them  
25 even though we already automatically supersede them.

1 That simply doesn't make sense.

2 The bottom line here as well is that, thus far,  
3 Summit has not produced or proffered or submitted the  
4 evidence required for the PSC to make a finding on this  
5 issue. They have an evidentiary burden of proof. They  
6 have to prove by a preponderance of the evidence that  
7 it's unreasonably restrictive. They have to show  
8 there's a conflict. They have to show one of these  
9 things and that has to be in the findings of the  
10 Commission. And if it's not, then the Commission's  
11 order would be reversible.

12 Without an evidentiary hearing and without a  
13 significant amount of evidence that is right now lacking  
14 in the record, the Commission simply doesn't have the  
15 evidence necessary in order to make a finding to  
16 supersede a local ordinance. And it specifically  
17 doesn't have any evidence in the record to supersede the  
18 Emmons County ordinance.

19 And as I have shown and explained, there's no  
20 conflict between the Emmons County ordinance and any  
21 state or federal law. So, with that, we would ask for  
22 the Commission to require Summit, in any event, to put  
23 on evidence first if it wants ordinance superseded.

24 Now we're not going to agree that our ordinance  
25 is unreasonably restrictive. Summit has submitted a map

1 with no foundation indicating that it can't get through.  
2 Number one, we don't agree with everything that appears  
3 to be on that map and there's no foundation as to how  
4 that map was created and that's not competent evidence.  
5 Even if that map were accurate, which, again, we don't  
6 agree it is, even if it were, they haven't attempted to  
7 get any waivers to get through, which is a way they can  
8 get through. So, again, it's not stopping them.  
9 They're simply not trying to get through.

10 So, with that, the Emmons County ordinance is a  
11 unique ordinance that has not been analyzed. Summit has  
12 not proffered evidence. There's not evidence in the  
13 record sufficient for the finding required in order to  
14 supersede the local ordinance. And so we would ask you  
15 to deny Summit's motion on this issue.

16 With that, I would stand for any questions.  
17 Thank you.

18 ALJ HOGAN: Thank you.

19 Are there any questions from the commissioners  
20 or Mr. Dawson?

21 COMMISSIONER CHRISTMANN: Yes, Your Honor.

22 I've seen this one page before that you handed  
23 out just earlier. So am I understanding you right, the  
24 previous ordinance from the '80s having to do with  
25 pipelines had a 200-foot setback from occupied

1 structures and then was the -- the previous attorney  
2 correct when he said that it's currently gone from 200  
3 feet to 8,000 feet?

4 MR. BRAATEN: It went from 200 feet for a  
5 building -- and the current actually splits that out.  
6 So there are established residences that have a setback,  
7 corporate boundaries of organized city, and then it's  
8 500 feet for any other building or surface water body.

9 So that 200 for any building was split up  
10 further and the more significant setback is for an  
11 established residence, but then for simply a building,  
12 which is what the prior ordinance said was 200 feet,  
13 that was increased to 500 feet.

14 COMMISSIONER CHRISTMANN: Okay. And then -- I'm  
15 not quoting you, but I understood you to say that the  
16 way Summit is arguing, there would be no logic to the  
17 requirement that the local government turn in their  
18 ordinances ten days in advance if things are  
19 automatically superseded.

20 But would it be illogical to read that to mean  
21 that they need to be turned in ten days in advance so  
22 that the commission could determine if, among those  
23 ordinances, there are road use agreements and then  
24 whether those are or not unreasonably restrictive  
25 because of section c?

1           MR. BRAATEN: I won't say that I think that  
2 would be illogical. I think that it would be contrary  
3 to the plain language of the statute if you read it  
4 together, and particularly when they use "requirements,"  
5 they use that synonymously with words like "regulations  
6 or ordinances."

7           There's only one place in this entire statute  
8 that refers to road use agreements. And what I would  
9 say is that that makes it clear that the Legislature  
10 knows very well how to refer to road use agreements, and  
11 if that's what they meant, they would have just said  
12 road use agreements. When they're talking about  
13 ordinances and regulations, I think it's clear from the  
14 language what they're referring to is zoning ordinances  
15 and zoning regulations.

16           And, therefore, I don't -- again, I'm not saying  
17 what you stated, Commissioner Christmann, was illogical,  
18 but I don't think it complies with the canons of  
19 interpretation and I don't think that it's a fair  
20 reading of the plain language of this statute.

21           COMMISSIONER CHRISTMANN: Okay. And my last  
22 question, how do you explain -- and correct me if I'm  
23 wrong here, but my understanding of this whole section  
24 of law is that sections b and c, until, I think, 2019,  
25 give or take one session, were actually one section with

1 some language that's been removed, some new language  
2 added in, but previously the whole thing was combined  
3 and it said that the commission's permit may supersede  
4 or preempt.

5 What's your theory on why did the Legislature  
6 change that to say that we preempt and supersede on part  
7 of it and then create another section about road use  
8 agreements and there say that we may if they're  
9 unreasonably restrictive?

10 MR. BRAATEN: Thank you, Commissioner  
11 Christmann.

12 And what I would say is I don't think that  
13 subsection c is a subsection just on road agreements. I  
14 think it refers to road agreements.

15 With respect to the fact that the Legislature  
16 went through a legislative process and made those  
17 changes, I have two answers. The short, flippant answer  
18 is that it's a sausage factory.

19 Putting that aside, my serious answer about it,  
20 however, is that if you look at that legislative  
21 history, what you see is that there was an intent to try  
22 and change the statute and there were also a lot of  
23 legislators who said that "We believe local control is  
24 critical and extremely important." And this is the  
25 language we ended up with when those two forces met and



1     when those different sides started arguing at the  
2     Legislature.

3             And as attorneys and as a body here, our  
4     obligation is not to speculate about why they would have  
5     done that or didn't do it. Our obligation is to look at  
6     the language in the statute and interpret it.

7             And so my argument and my point is that, putting  
8     aside why the Legislature did what they did, I think  
9     that's the danger in looking at legislative history when  
10    the language itself is not ambiguous. And so that's why  
11    I agree with Summit that we don't want to be looking at  
12    that legislative history because I think that both sides  
13    can make some pretty good arguments from various  
14    comments they find in that legislative history, but,  
15    ultimately, what a court is going to do and what our  
16    obligation is, is to interpret the language in front of  
17    us.

18            COMMISSIONER CHRISTMANN: Thank you. No other  
19    questions.

20            COMMISSIONER HAUGEN-HOFFART: No questions.

21            ALJ HOGAN: All right. Thank you.

22            The next party on my list is Burleigh County so  
23    you can proceed, Ms. Lawyer.

24            MS. LAWYER: Thank you, Judge Hogan,  
25    Commissioners. I'm Julie Lawyer, representing Burleigh

1 County.

2 We're talking about two different ordinances in  
3 Burleigh County that were brought up in the original  
4 motion by Summit when they talked about superseding the  
5 Burleigh County ordinances. The first ordinance, which  
6 they identify as the March 6th ordinance, was a  
7 countywide ordinance adopted under the county's Home  
8 Rule Charter, and that ordinance dealt with basically  
9 sharing of information from a pipeline company to  
10 provide safety information to the county so that the  
11 county would be able to train and have first responders  
12 able to take care of any emergency that arose.

13 That ordinance, again, doesn't regulate the  
14 safety of the pipeline or the company, but what it does  
15 is it actually puts forth for them to share with the  
16 county an emergency action plan, an emergency response  
17 and hazard mitigation plan, and safety procedures and  
18 protocol of the pipeline company so that our first  
19 responders would have that information, our emergency  
20 management department would have that information, so if  
21 an emergency did occur, again, we would have the proper  
22 training and planning to be able to handle that  
23 emergency. That is a countywide ordinance, again, under  
24 the Home Rule Charter and would apply throughout the  
25 entire county.

1           The second ordinance that they reference would  
2     be the one that they designate, I believe, as the  
3     March 30th ordinance. That one is a zoning ordinance  
4     within Burleigh County.

5           Burleigh County does not have zoning authority  
6     through every township within the county. Some  
7     townships retain their own zoning ordinance authority.  
8     And so there was a map that was attached to our petition  
9     to intervene as Exhibit 2 which shows which townships  
10    are subject to the Burleigh County zoning authority.

11          So with that zoning ordinance that was passed in  
12    Burleigh County, there are multiple townships where that  
13    zoning ordinance does not apply. They would have to  
14    adopt their own. So there is still a pathway through  
15    Burleigh County outside of the Burleigh County zoning  
16    ordinance where Summit could reroute their pipeline.

17          When we're talking about 49-22.1-13 of the North  
18    Dakota Century Code and talking about superseding and  
19    preempting local zoning ordinances, it's important to  
20    note that that statute talks about issuance of a  
21    certificate and issuance of a permit. Those are two  
22    different things. And those are defined in the  
23    beginning of the statute as well under 49-22.1-01.

24          A "certificate" means a certificate of site  
25    compatibility or the certificate of corridor

1 compatibility issued under this chapter. A permit is  
2 different. The permit, under subsection 8, is a permit  
3 for construction of the gas or liquid transmission  
4 facility within the designated corridor.

5 So we're talking about two things. The  
6 certificate basically approves of the location of the  
7 pipeline. The permit allows them to build then the  
8 pipeline at that location that was approved.

9 So when you're looking, again, at 49-22.1-13,  
10 under subsection 2, 2(b) indicates "Except as provided  
11 in this section, a permit for the construction of a gas  
12 or liquid transmission facility within a designated  
13 corridor supersedes and preempts any local land use or  
14 zoning regulations."

15 We're getting ahead of ourselves there because  
16 we're not talking about a permit to construct the  
17 pipeline at this point. We're talking about designating  
18 that corridor or giving that site compatibility  
19 certificate to give them the location that they can  
20 build it.

21 So we have to look at where we're issuing a  
22 certificate, and that would be under 2(d). "When the  
23 application for a certificate for a gas or liquid  
24 transmission facility is filed, the commission shall  
25 notify the townships with retained zoning authority,

1 cities, and counties in which part of the proposed  
2 corridor is located."

3 And it's at that point that those governmental  
4 agencies are required to file, ten days before the  
5 hearing, their requirements, which are their ordinances  
6 or their zoning regulations. And it's at that point  
7 that, if they don't file it within the timeline, then  
8 those zoning regulations are superseded or preempted  
9 automatically for the certificate for site  
10 compatibility, or the corridor in this case.

11 We're not -- then when we look at subsection e,  
12 "An applicant shall comply with the local requirements  
13 provided to the commission pursuant to subdivision d,  
14 which are not otherwise superseded by the commission."

15 That seems to imply that once those regulations  
16 or ordinances are submitted to the commission when  
17 considering that corridor, then the commission can  
18 determine whether or not those -- those ordinances can  
19 be superseded. There isn't really a guideline as to how  
20 or when they can be superseded.

21 2(c) deals again where it does talk about that  
22 the applicant has to show by a preponderance of the  
23 evidence how the regulations and ordinances are  
24 unreasonably restrictive. But, again, 2(c) is talking  
25 about, before the facility is approved, the commission

1 shall require the applicant to comply with the road use  
2 agreements of the impacted political subdivision. And  
3 then a permit may supersede and permit the requirements  
4 of the political subdivision if the applicant shows by  
5 the preponderance of the evidence that the regulations  
6 are unreasonably restrictive, the cost factors, and all  
7 those other things.

8 Again, we're talking about the permit for  
9 construction there. We're not talking about site  
10 compatibility.

11 In this situation, too, the county -- when we  
12 adopted our zoning ordinance, that was after the  
13 application was submitted to the Commission. However,  
14 the zoning ordinance that we have applies to all  
15 hazardous liquid pipelines. There's nothing specific  
16 regarding carbon dioxide pipelines within that zoning  
17 ordinance. So that zoning ordinance is not meant to  
18 restrict just carbon dioxide pipelines. It's all  
19 hazardous liquid pipelines.

20 There's nothing in the first ordinance regarding  
21 the sharing of information so that the county has those  
22 hazard mitigation plans, the safety procedures and  
23 protocols, and the emergency action plan that actually  
24 regulates the safety of a pipeline.

25 I know that Summit has been arguing that the

1 setbacks that are imposed by the Burleigh County zoning  
2 ordinance relates to the safety of the pipeline, but  
3 that's not the case.

4 If you look at the -- especially the letter that  
5 was sent out by PHMSA, the Pipeline and Hazardous  
6 Materials Safety Administration, they specifically  
7 indicate that their authority, their federal  
8 regulations, their authority, is for the safety and  
9 construction of the pipeline. They don't deal with  
10 zoning regulations. They don't deal with setbacks.  
11 That's left up to the individual local authorities.

12 The only thing within the Burleigh County zoning  
13 ordinance that could be -- that could maybe be construed  
14 as being or falling within the parameters of PHMSA would  
15 be on the March 30th -- or March 30th ordinance, which  
16 is the zoning ordinance, under section 8 subsection 5,  
17 where it talks about the valves and the placement of the  
18 valves and the spacing in between those. That may fall  
19 or may be deemed to fall within the parameters of PHMSA,  
20 but the remaining ordinance is all within the zoning  
21 authority of the Burleigh County Commission.

22 And even if this Commission would deem that that  
23 subsection does fall within the federal regulations and  
24 it's incompatible with the federal regulations of PHMSA,  
25 the remaining portions of the ordinance are still within

1 the zoning authority of the Burleigh County Commission  
2 and don't need to be superseded.

3 Because we're talking about a site compatibility  
4 application at this time and not a permit to build,  
5 there is no automatic superseding of the land use or  
6 zoning regulations of the local entities until we get to  
7 that point.

8 It's Burleigh County's position that this  
9 Commission needs to be looking at the local ordinances  
10 and the zoning ordinances and issuing a permit for site  
11 compatibility or site corridor based upon those local  
12 zoning regulations and take those into consideration  
13 when deciding whether or not this site is the  
14 appropriate site for this pipeline.

15 And that's my argument, unless there are any  
16 questions.

17 ALJ HOGAN: All right. Thank you.

18 Are there any questions from the commissioners  
19 or Mr. Dawson?

20 Go ahead.

21 COMMISSIONER CHRISTMANN: Ms. Lawyer, the  
22 ordinance that I have -- I don't know which of the two  
23 it is -- is as you referred to them. It says Ordinance  
24 23-003. It was -- it was in our Docket No. 206.

25 But I thought you just said that it is not about



1 safety, but I see safety mentioned in here several  
2 times. So how do you bring that together?

3 MS. LAWYER: It doesn't regulate the safety of  
4 the pipeline. It doesn't say how they have to build the  
5 pipeline to keep it safe. It does deal with the safety  
6 of the community. We want to be able to respond to any  
7 emergency that happens. And so we want to know what  
8 their safety plan is, their protocol, so that we can  
9 prepare for that. That's all that that ordinance is.

10 And that's the one that's referred to by Summit  
11 as the March 6th ordinance. And so that would be the  
12 countywide ordinance under Home Rule Charter. And that  
13 is regarding the safety of the community, but just so  
14 that we can respond to any emergency requirements. It  
15 doesn't require Summit to do anything with their  
16 pipeline or build it in any particular place. It just  
17 requires them to share that information with the county  
18 so that we can be prepared in the event of an emergency.

19 COMMISSIONER CHRISTMANN: Okay. And did you get  
20 a chance to see the Summit -- the Story County judge's  
21 decision that was docketed in this case a couple days  
22 ago?

23 MS. LAWYER: I did, Your Honor.

24 COMMISSIONER CHRISTMANN: Okay. And I think I  
25 just heard you say that PHMSA said that they don't deal

1 with setbacks, but how do I merge that with the judge's  
2 statement that state authority may not adopt safety  
3 standards for pipeline facilities?

4 MS. LAWYER: The setbacks, I don't believe those  
5 are safety standards for the actual facility. There are  
6 two different things we're talking about here. One is  
7 how the building is built to make sure that it is safe  
8 and the operation of whatever facility it is is  
9 operating safely. The setbacks are basically for the  
10 community to make sure that, if anything does happen  
11 with the safety of that building, which is what PHMSA is  
12 responsible for, doesn't affect the community.

13 COMMISSIONER CHRISTMANN: And then same  
14 question. Because two pages later the judge said that  
15 setbacks are unenforceable as they create dual safety  
16 regulations and compete with the Secretary of  
17 Transportation's spectrum of duties.

18 MS. LAWYER: That's what that judge said in that  
19 opinion.

20 COMMISSIONER CHRISTMANN: Okay. Now in your  
21 ordinance specifically, one thing that I've been wanting  
22 to ask for a long time. So there's some townships that  
23 you said are covered and some are not. And so like on  
24 the -- what's your setback from residences, the  
25 distance? I can't remember.

1 MS. LAWYER: I believe it's ten miles -- no.

2 COMMISSIONER CHRISTMANN: That's from cities.

3 MS. LAWYER: Ten miles from transmission -- let  
4 me look real quick.

5 COMMISSIONER CHRISTMANN: I have it here too  
6 somewhere. Two miles.

7 So if a resident that is opposed to this  
8 project, let's say they live right inside the section  
9 line of one of the townships that are covered and this  
10 pipeline is proposed to be just in the next township.  
11 Does that mean that your ordinance does not cover it  
12 because the pipeline is out? Or do you cover two miles  
13 from everyone in one of your townships that your  
14 ordinance covers?

15 MS. LAWYER: So the ordinance would cover up to  
16 that township line. That would be the border for it.  
17 So in a case like that where it's just over the township  
18 section, it would cover the two miles that are within  
19 the township that's covered by the zoning ordinance, but  
20 it would only cover to the township boundary for the  
21 next township that it does not apply to.

22 COMMISSIONER CHRISTMANN: If you live near the  
23 edge of that township, you might have two miles of  
24 coverage on one side and 50 feet on the other?

25 MS. LAWYER: Correct.

1 COMMISSIONER CHRISTMANN: Okay. And you made a  
2 filing at one point in late August that was Docket 380.  
3 Do you happen to have that with you?

4 MS. LAWYER: I'll pull it up.

5 COMMISSIONER CHRISTMANN: No. I gave you the  
6 wrong number. That was Emmons County's. Yours was 378.

7 MS. LAWYER: And what was the number again? I  
8 apologize.

9 COMMISSIONER CHRISTMANN: The docket number?

10 MS. LAWYER: Yes.

11 | COMMISSIONER CHRISTMANN: 378.

12 MS. LAWYER: Thank you.

13 (Pause)

14 MS. LAWYER: Okay, I apologize for the delay. I  
15 have that up now.

16 COMMISSIONER CHRISTMANN: Okay. Would you go to  
17 the second page please and then to paragraph 3?

18 MS. LAWYER: Yes.

19 COMMISSIONER CHRISTMANN: So you start out, the  
20 first little over four lines and -- is legal language  
21 and you cite the section. It's subsection a. And then  
22 starting from there, the next several lines, you have  
23 cited as 49-22.1-01(7)(a) and it doesn't read the way my  
24 copy of that section reads.

25 MS. LAWYER: Yes. I cited the wrong number. It

1     should have been -- let's see. I put "Gas or liquid  
2     energy conversion facility" and it should have been "Gas  
3     or liquid transmission facility."

4             COMMISSIONER CHRISTMANN: Correct. And that was  
5     my concern. This is out there that -- a quote from the  
6     law that a gas or liquid energy conversion facility  
7     includes, and on the way through it. And that's an  
8     error; correct?

9             MS. LAWYER: Does not. It's transmission  
10    facility. That was an error, yes.

11            COMMISSIONER CHRISTMANN: Okay. Thank you. I  
12    have no other questions.

13            MS. LAWYER: Thank you.

14            ALJ HOGAN: Mr. Dawson? I can't see you way  
15    down there. No questions?

16            SUBSTITUTE DECISIONMAKER DAWSON: No questions.

17            ALJ HOGAN: All right.

18            MS. LAWYER: Thank you.

19            ALJ HOGAN: All right. Thank you, Ms. Lawyer.

20            All right. The next party on my list is

21    Bismarck intervenors so Mr. Bakke.

22            MR. BAKKE: Thank you, Judge.

23            Good afternoon, Commissioners.

24            I think Emmons County and Burleigh County's  
25    attorneys have done a good job of establishing the first

1 point that we raised in our arguments which is that this  
2 request is premature. It's not timely. And I'll  
3 explain in a moment the reasons, but I think one of the  
4 primary reasons that Ms. Lawyer just hit on is that, to  
5 our knowledge, there is no request for a construction  
6 permit by Summit at this point for a pipeline. They  
7 have simply applied for a certificate of site  
8 compatibility.

9 So the whole provision that they rely on in  
10 trying to argue to the Commission that there should be  
11 no local ordinances or requirements is not on point.  
12 They rely on subsection 2(b) only and they say -- which  
13 clearly provides that it deals with, quote, "a permit  
14 for the construction," unquote. And that's not what is  
15 before this Commission at this point. This is a request  
16 at this point for a site compatibility certificate and  
17 nothing more. And so Mr. Braaten and Ms. Lawyer are  
18 absolutely correct that for a number of reasons those  
19 local requirements are in place and very much alive in  
20 the other provisions of subsection 2 of 49-22.1-13.

21 So there's a number of threshold issues before  
22 this Commission that the Commission articulated at its  
23 August 4 decision in this case that it said Summit had  
24 not met. And just to briefly review, the commissioners  
25 said that Summit failed to meet its burden of proof to

1 show the location will produce minimal adverse impacts  
2 and effects on the environment and the welfare of the  
3 citizens of North Dakota and they failed to meet their  
4 burden to show the project will minimize adverse human  
5 and environmental impact.

6 And since that decision they have brought  
7 forward nothing to this Commission to address those  
8 issues. And that's really the first step. And that's  
9 why all of this is premature. So that's the issue  
10 which, of course, the Commission is going to have to  
11 address, is: Is the proposed pipeline reroute which  
12 they have now submitted to the Commission in a location  
13 that will produce minimal adverse impacts on the  
14 environment and the welfare of the citizens?

15 Now we've provided to the Commission today two  
16 maps, and that is Exhibits 200 and 201, Warford 200 and  
17 Warford 201. And Warford 200 shows the reroute that  
18 they have provided. And it's kind of interesting to  
19 note that all they have presented this Commission with  
20 in terms of the reroute is what's in Docket 386  
21 submitted in September, which really provides little  
22 meaning -- little meaningful information to the  
23 Commission about their reroute and in some respects is  
24 inaccurate.

25 So if we look at the earlier version of what

1     they submitted on their original application, that's  
2     Warford 201. And what you can see is that on the  
3     eastern side of the pipeline reroute, contrary to what  
4     Summit has been publicizing in the media and elsewhere,  
5     is they did not move that eastern route that they  
6     previously requested to any extent to the east. They  
7     kept it in the same footprint. In fact, you'll see --  
8     and these are based on GIS data by Burleigh County  
9     showing the reroute location and also showing the  
10    original route location. In some small areas they  
11    actually are proposing on their reroute to move the  
12    pipeline closer to the city of Bismarck. That's what  
13    the GIS data shows, is that they're trying to move it.  
14    And that's in particular in relation to Silver Ranch, is  
15    the area that would be impacted.

16           Now there's some other law that has to be read  
17    in conjunction with North Dakota Century Code 22-13.1,  
18    and that is 49-22.1-02, which is the statement of  
19    policies that also applies. And what that policy said  
20    -- because all these statutes have to be read together.  
21    What NDCC 49-22.1-02 says is "The policy of this state  
22    is to site energy conversion facilities and to route  
23    transmission facilities in an orderly manner compatible  
24    with environmental preservation and the efficient use of  
25    resources. Sites and routes must be selected to



1 minimize adverse human and environmental impact."

2 So regardless of the application of 49-22.1-13,  
3 they would still have to meet that criteria. And so  
4 until they select a route that meets that statement of  
5 policy and meets that criteria, it would be premature to  
6 issue a certificate.

7 The other thing -- and Ms. Lawyer talked about  
8 the statute and that's the March 6th statute that they  
9 -- that Burleigh County adopted and what that statute  
10 dealt with -- and that is previously Warford 114. What  
11 that statute dealt with was dealing with the issue of  
12 providing safety procedures and protocols upon request  
13 to landowners within the site boundaries and to  
14 interested persons.

15 And we've marked as Exhibits Warford 202 and  
16 Warford 203 what Summit has done since the PSC's initial  
17 decision on August 4. You can see Exhibit 202 is dated  
18 August 28, 2023, from Summit. And it's a draft  
19 emergency response plan, which clearly says on it  
20 "draft" and just contains generic information. Nothing  
21 specific to Burleigh County at all.

22 And Warford Exhibit 203 is their initial  
23 response tactic provided to Burleigh County, and that's  
24 blank. It's just a template with no information on it.  
25 Where it says "Response Strategy," it doesn't even have

1 the latitude or longitude, the location, distance from  
2 release sources. It's empty. They've done nothing to  
3 comply with that aspect which the Commission said was  
4 deficient.

5 And if we look back at the ordinance from  
6 Burleigh County, they're supposed to provide safety  
7 procedures and protocols upon request, not only to  
8 Burleigh County but to landowners within the site  
9 boundaries and to interested persons. That has not been  
10 done.

11 And then another factor that needs to be  
12 considered here, because they talk about -- Summit talks  
13 about state statutes from Iowa and other locations, but  
14 it's important to recognize that in North Dakota, under  
15 the Century Code, North Dakota Century Code 11-33-01  
16 gives statutory power to the counties to regulate  
17 properties.

18 And that's why the reading that Ms. Lawyer gave  
19 and Mr. Braaten gave, 49-22.1-13, is directly on point.  
20 Because if this was interpreted in the way that Summit  
21 says it should be interpreted, it would contradict North  
22 Dakota Century Code 11-33-01 giving statutory power to  
23 the counties to regulate properties.

24 And, in fact, there's a Supreme Court decision  
25 directly on point, which is the *Shaw v. Burleigh County*

1 case, and the citation for that is 286 N.W.2d 792, and  
2 not coincidentally, it involves Burleigh County and what  
3 it did in that case involving a special use permit.

4 And that's another thing that Summit has failed  
5 to comply. That's why this is premature. They have the  
6 -- they have the cart before the horse. And this is  
7 another reason why, is because they've never applied for  
8 a special use permit with Burleigh County. What the  
9 special use permit says is they should apply for that  
10 first, and then their first right of appeal is to this  
11 commission. They've never applied for a special use  
12 permit. That is the first thing they must do. And then  
13 there's also a variance procedure available to them  
14 under the Burleigh County ordinance.

15 And that's exactly what the *Shaw v. Burleigh*  
16 *County* case addressed, is a special use permit, in that  
17 case for a mobile home that someone wanted to place in a  
18 residential area, and if Burleigh County does not allow  
19 that, it's a standard of arbitrary and capricious. In  
20 other words, it has to be determined that the county's  
21 actions were not justifiable. And they haven't applied  
22 for that special use permit, and that would be step one  
23 that they would have to do.

24 And so the statute -- or the ordinances by  
25 Burleigh County, both the one -- both of which deal with

1 safety and both of which deal, to some extent, with land  
2 use, cover both bases. They cover not only the zoning  
3 requirements and the land use requirements. They also  
4 address the public safety issues.

5 So let's take an example of zoning. Nobody is  
6 telling in a traditional sense to Summit "You can't put  
7 your pipeline in a certain location in Burleigh County."  
8 You know, zoning is for commercial land. What can you  
9 do in a commercial area, what can you put in a  
10 residential area.

11 They can put this in many locations throughout  
12 Burleigh County. And the current map, Exhibit 200,  
13 shows, when you look at the white townships there, there  
14 are many routes through different townships, both to the  
15 east of Bismarck and to the north of Bismarck, where  
16 they could go where these Burleigh County ordinances do  
17 not apply. There are no ordinances, to our knowledge,  
18 in those townships that say you can't put a pipeline, a  
19 CO2 pipeline, in a more remote location further away  
20 from the city of Bismarck for the safety of the  
21 citizens. Burleigh County has not taken the position  
22 that it can't go anywhere in Burleigh County. Clearly,  
23 there is a route.

24 So when they say there is no route in Burleigh  
25 County, that's clearly wrong. There are only

1 approximately 25 percent of the townships which are  
2 governed by or who are part of what have been adopted  
3 under these two ordinances. So there's many locations  
4 where they can go.

5 And they also claim, well, this is contrary to  
6 state law, which they say -- they say the Burleigh  
7 County and Emmons County ordinances conflict with state  
8 law promoting a policy of carbon sequestration. That's  
9 false.

10 If you look at North Dakota Century Code  
11 38-22-01, that statute merely makes a broad policy  
12 statement that says, quote, "It is in the public  
13 interest to promote the geological storage of carbon  
14 dioxide." Doesn't say anything about where the  
15 transmission lines can go. Doesn't say anything about  
16 they can be put within a certain distance of a city. It  
17 doesn't say anything to suggest that the state  
18 supercedes or preempts the county in regulating land  
19 use, as Summit is arguing. The statute says nothing  
20 about CO2 pipelines or where they can be located. So  
21 these county ordinances do not contradict state law.

22 And then the other thing is the PHMSA. And,  
23 Commissioner Christmann, I agree with you that federal  
24 court decision in Iowa says what it says. However, what  
25 it doesn't say is that this federal court judge in Iowa,

1 applying Iowa law, Iowa setbacks, can preempt what PHMSA  
2 says on pipelines.

3 And that's why we attached Attachment A to our  
4 brief, which is the PHMSA letter to Mr. Blank, the CEO  
5 of Summit, dated September 15, 2023. And Mr. Braaten  
6 read to you part of that. He read part of what PHMSA  
7 said in that regard saying that it's up to the counties  
8 and the local jurisdictions and the state to determine  
9 where CO2 pipelines can go.

10 That judge has no basis to say PHMSA can't  
11 decide. In fact, she did say PHMSA can decide where  
12 pipelines are to be sited. And they have said that is  
13 up to the state, that is up to the county, that is up to  
14 the local jurisdiction, not the Federal Government.

15 In fact, on the first page of that letter to  
16 Mr. Blank, the CEO of Summit, Mr. Mayberry, who is the  
17 associate administrator for safety, says, in the third  
18 paragraph, "While the Federal Energy Regulatory  
19 Commission has exclusive authority to regulate the  
20 siting of interstate gas transmission pipelines, there  
21 is no equivalent federal agency that determines siting  
22 of all other pipelines, such as carbon dioxide  
23 pipelines. Therefore, the responsibility for siting new  
24 carbon dioxide pipelines rests largely with the  
25 individual states and counties through which the

1 pipelines will operate and is governed by state and  
2 local law."

3 And what a federal judge says or how a judge  
4 interprets what PHMSA -- what that judge thinks PHMSA  
5 can do does not trump or overrule what PHMSA itself has  
6 recently said.

7 This letter was provided to Summit just 12 days  
8 before they filed this motion for preemption. They knew  
9 that PHMSA had said specifically that it was up to the  
10 state governments, it was up to the counties, to  
11 determine where these pipeline -- where CO2 pipelines go  
12 and that PHMSA doesn't have jurisdiction over that issue  
13 and, in fact, said it's specifically left with the  
14 counties.

15 And so for all those reasons, this is premature  
16 and what we're requesting to happen here is that the  
17 Commission proceed with an additional hearing date or  
18 dates and determine that subsection 49-22.1-13 subpart b  
19 has no application at this point because it's a request  
20 for a permit for construction, which is not before the  
21 Commission.

22 So unless the commissioners have any questions  
23 for me which I'd be happy to respond to, I appreciate  
24 your -- the opportunity to speak.

25 ALJ HOGAN: All right. Thank you.

1           Are there any questions from commissioners or  
2       Mr. Dawson?

3           UNIDENTIFIED SPEAKER: I do not.

4           ALJ HOGAN: All right. Well, thank you,  
5       Mr. Bakke.

6           All right. Next on my list is the landowners --  
7       landowner intervenors. So, Mr. Leibel, you can go  
8       ahead.

9           MR. LEIBEL: May it please the Commission. I  
10       provided to you, each of the commissioners with copies  
11       to all the counsel, a little blue packet that includes  
12       where I printed out the statutes that are at issue  
13       because I'm a visual. That's kind of how I work.

14           And I would direct the Commission to the first  
15       tab, which is the statute we're talking about here  
16       today. And one of the things that I think that I wanted  
17       to share with the Commission and help the Commission, at  
18       least from my perspective, how I see this, I think  
19       beginning with the first sentence of the statute, it  
20       talks about "The issuance of a certificate of site  
21       compatibility or a route permit is," and, you know, it's  
22       the sole site or route approval.

23           Now, in determining what -- how to interpret the  
24       statute, I've included under tab 2 which is another  
25       statute. This is in the -- also from the Century Code



1 and it talks about how the Legislature wants their  
2 statute construed. And in the second sentence from that  
3 very brief statute it says "Technical words and phrases  
4 and such others as have acquired a peculiar and  
5 appropriate meaning in law, or as are defined by  
6 statute, must be construed according to such peculiar  
7 and appropriate meaning or definition."

8 And I point that out because in this case we do  
9 have definitions, a definition section. Under the third  
10 tab of this packet I've included a printout of  
11 49-22.1-01, and that's our definitions section that  
12 governs this area.

13 And as you can see, the very first entry under  
14 the definitions section is for a "certificate." And  
15 that means a certificate of site compatibility or a  
16 certificate of corridor compatibility. Both of those  
17 words are also defined. A "corridor" means an area of  
18 land where a designated route may be established. A  
19 "site" means the location of a gas or energy conversion  
20 facility.

21 I also printed -- under tab 4 is a printout of  
22 49-22.1-06. And this is the specific statute in North  
23 Dakota that governs certificates. And, you know, the --  
24 if you can skip down to the very bottom of this statute,  
25 No. 5, as a certificate and when a certificate is

1 applied for, "The commission may designate a site or  
2 corridor for a proposed facility following the study and  
3 hearings provided for in this chapter."

4 And I'm going to skip to the very last sentence  
5 of this subpart 5. "Upon designation of a site or  
6 corridor, the commission shall issue a certificate of  
7 site compatibility." So a certificate is -- the  
8 intention is to designate a site or corridor.

9 If you flip to tab 5, I've printed out for you  
10 the very next statute. This is an application for a  
11 permit. And "An application for a permit for a gas or  
12 liquid transmission facility within a designated  
13 corridor --" there's the magic language from the prior  
14 statute "-- must be filed no later than two years after  
15 the issuance of the certificate."

16 And, you know, again, the last subpart, subpart  
17 5, talks about a permit includes the commission  
18 designating a specific route.

19 One of the things, there's been a lot of  
20 discussion of legislative history. And I share -- the  
21 same warnings you've heard before is that it's difficult  
22 to read too much into specific words or terms that are  
23 used, but there are a couple things I think that are  
24 established clearly. One of those things is that the  
25 Legislature, when they were evaluating this -- and I

1 would say there's two things, I guess, to be specific.

2 The first is the amendments we're looking at is  
3 a response to DAPL, what happened with DAPL. This is a  
4 2017 statute. The other thing that the legislative  
5 history is very clear about is that this is a two-step  
6 process. It was envisioned to be a two-step process and  
7 under the statute it's a two-step process.

8 Now the statute was also amended at this exact  
9 same time to allow parties to apply for both at the same  
10 time. And so Mr. Bakke had said earlier a certificate  
11 was applied to. My understanding is it was a joint  
12 application for both a certificate and a permit, but  
13 this is a two-step process even if it's only  
14 accomplished with one hearing.

15 And what I would point the Court -- or the  
16 Commission to is under subpart 6 is the legislative  
17 history that I previously filed with the Commission, but  
18 if you will jump to page 23 of that legislative history,  
19 there's a discussion between the energy industry's  
20 lobbyist where they are talking about this two-step  
21 process, how it works.

22 And about midpoint through the testimony of  
23 Mr. Kranda, which is the third paragraph from the bottom  
24 on page 23, he's talking about what he gets as a handout  
25 from the PSC. And it says "If you look at my handout is

1 a certification by the PSC, deals with DAPL corridor  
2 findings and certification letter. The certification  
3 letter says, and the PSC has this for each applicant,  
4 says, 'Company agrees to comply with all rules and  
5 regulations of other agencies having jurisdiction,  
6 including all city, township, and county zoning  
7 regulations.'" And the lobbyist says, "So the PSC is  
8 the one telling us you must comply and the locals aren't  
9 losing any control. We're not trying to take away from  
10 what they do and what we have to comply with."

11 Now, the following paragraph, the  
12 representative, Mr. Heinert, says, Well, wait a minute.  
13 "It says that they must preempt any local land use or  
14 zoning regulations. So if a local county or local city  
15 has a zoning ordinance, the pipeline is going through  
16 there, they have to change their zoning ordinance."

17 And this is the part where Chairman Porter  
18 brings up the issue that I'm taking away from this and I  
19 think is supported by all the statutes. It's a two-step  
20 process. And he says, "Mr. Kranda, I think it would be  
21 helpful, because this sub 2 is broken into two things, I  
22 think it would be helpful if you broke it down into step  
23 one, certificate of site capability which may not  
24 supersede or preempt, and then step two, the permit for  
25 construction which has to because all the other stuff

1 has been looked at during the certification process. I  
2 think, so we keep it straight, what we're performing in  
3 each of the processes, even inside of this amendment may  
4 not be correct. Each of these need to be broken down  
5 into A, B, C."

6 And then Mr. Kranda says, "I think that helps.  
7 I didn't see that. Yeah, the first sentence, you don't  
8 because site compatibility, the certificate for site  
9 compatibility may not supersede."

10 And I provided that so you can see it. But  
11 flipping back to tab 1, which is our statute, that  
12 provides -- Chairman Christmann had asked a question  
13 about not knowing how to read subpart 2(b); it didn't  
14 seem to make sense. They were not consistent unless you  
15 read it the way Summit had suggested.

16 And the response to that, and I'm going to skip  
17 over subpart 2(a) because, you know, as the Commission  
18 pointed out, that deals with a conversion facility,  
19 which is also a defined term that wouldn't include this  
20 pipeline. But jumping to subpart b, it says "Except as  
21 provided in this section, a permit for the construction  
22 of a gas or liquid transmission facility within a  
23 designated corridor supersedes and preempts any local  
24 land use or zoning regulations."

25 My understanding from reading the legislative

1 history is that one of the big concerns with DAPL, and  
2 some of you may have been on the Commission at that  
3 time, is a permit had been issued and subsequently there  
4 were all kinds of problems where there was a conflict  
5 and local jurisdictions were refusing to allow this.  
6 And my understanding of subpart b is that once a permit  
7 is issued, so we already have gone through and got the  
8 certificate, once the permit is issued, that is the law  
9 of the land. There is no more local -- the locals don't  
10 have the ability at that time to influence or affect or  
11 otherwise interfere with the authority that's been  
12 granted by a permit.

13 And so when I read that, that's all I see, is  
14 that's just saying that once you have a permit, you --  
15 any local ordinance or regulation is superseded and  
16 preempted. And my understanding is that's a direct  
17 response to what happened with DAPL.

18 So moving to subpart 2(c), I agree with Summit's  
19 attorney in evaluating this. I believe that that first  
20 sentence deals with road use agreements, which, again,  
21 if you flip to your handy-dandy definition section under  
22 tab 3, we have a definition for "road use agreement" and  
23 that road use agreement includes permits required for  
24 extraordinary road use, road access points, approach or  
25 road crossings, public right of way setbacks, building

1 rules, physical addressing, dust control measures, or  
2 road maintenance. And my reading of that section of the  
3 statute is that language that follows, again consistent  
4 with this two-step process, the language that follows  
5 modifies road use agreements.

6 Finally, when we get to (d), this is the first  
7 place we talk about a certificate, is under (d). In (a)  
8 we have a certificate for a conversion facility. In (d)  
9 we talk about, finally, a certificate for a gas or  
10 liquid transmission facility. Under subpart (d), it's  
11 superseded if it's not provided within the appropriate  
12 time by the local counties. And so my interpretation of  
13 this statute is that the certificate process requires  
14 the locals to have their say, at least the way this is  
15 written.

16 And I understand that Summit -- you know,  
17 frankly, Summit does make a policy argument for why that  
18 should be expanded, but it's not in the statute, at  
19 least as I see it. The statute is very clear, once you  
20 -- once you accept that there are two parts to the  
21 process, I don't think that you can use a permit to  
22 preempt a certificate when a permit is expressly said  
23 it's subject to a designated corridor. And in that  
24 designated corridor, the local ordinances and rules are  
25 part of the deal.

1           And if anyone has any questions for me, I'd be  
2 happy to answer them.

3           ALJ HOGAN: All right. Thank you.

4           Are there any questions for Mr. Leibel?

5           COMMISSIONER CHRISTMANN: I do not.

6           COMMISSIONER HAUGEN-HOFFART: I do not.

7           ALJ HOGAN: No questions. All right. Thank  
8 you, Mr. Leibel.

9           All right. Next party is Laborers Union,  
10 Mr. Pranis.

11           MR. PRANIS: Thank you, Judge Hogan and  
12 Commissioners. I'm a member of the Laborers Union.

13           We like to keep things simple so I'll try to  
14 keep this simple and brief. The question that we  
15 understand is before us today is who has the authority  
16 to decide where a pipeline can or can't be located in  
17 the state of North Dakota.

18           We're not here today because we necessarily  
19 support Summit's project. As the commissioners are  
20 aware, we've expressed support for the goals but have  
21 also expressed concerns and are still evaluating changes  
22 that Summit has made to its application.

23           What we are here for today is to support the  
24 consistent application of state law and rule regarding  
25 the routing of linear infrastructure which is



1     foundational for the development of the critical  
2     infrastructure in North Dakota and across the country.

3             We believe the question that will be decided  
4     here, hopefully today and certainly in this proceeding,  
5     is more important than the question of whether to issue  
6     Summit a permit to build the proposed project. In our  
7     view as someone who represents workers who build this  
8     kind of infrastructure, preserving the integrity of the  
9     state-permitting process for linear infrastructure,  
10    specifically pipelines and transmission lines, is  
11    absolutely vital to maintaining reliable systems and  
12    orderly development of energy resources, and we believe  
13    that's why that responsibility is vested solely with the  
14    Public Service Commission and not with local governments  
15    in the case of linear infrastructure.

16            Our reading of the law is clear. The  
17    Legislature distinguishes very clearly between  
18    non-linear or point facilities such as a gas processing  
19    plant and a linear facility such as a pipeline. The  
20    Commission, according to the law, may not issue a  
21    certificate of site compatibility or designate a site  
22    that is contrary to the local rules when we're talking  
23    about a fixed point facility. On the other hand, the  
24    law makes clear that the Commission may issue a permit  
25    that supersedes and preempts local land use and zoning

1 regulations provided that the Commission makes a finding  
2 that those regulations are unduly burdensome.

3 The Legislature makes a similar distinction with  
4 respect to electric power infrastructure in almost  
5 identical language. The siting of a conversion facility  
6 such as a wind farm must conform to local land use  
7 requirements. The routing of a transmission line does  
8 not if the Commission finds the local land use  
9 requirement is unduly restrictive.

10 It's pretty clear here there's only two  
11 possibilities. One is that local jurisdictions have the  
12 ability to veto a proposed location and the other is  
13 that the Commission ultimately decides with input from  
14 local governments, with consideration to local concerns  
15 and to the local land use ordinances, but ultimately  
16 it's a decision by the Commission.

17 So why the difference? The North Dakota Code  
18 recognizes that to advance the purposes of the State,  
19 the Commission needs the clear authority to establish  
20 corridors and routes for linear infrastructure. There  
21 are many potentially suitable sites for point  
22 infrastructure like a wind farm or a gas processing  
23 plant. There are very few to get between point A and  
24 point B.

25 We know this because we've spent years with this

1 commission, with the commission in Minnesota, trying to  
2 find routes for critical pipeline projects, right, that,  
3 frankly, have turned into political footballs in many  
4 cases because of local opposition, some of that local  
5 opposition that we sympathize with and understand but,  
6 fundamentally, makes it very, very difficult to site  
7 linear infrastructure. We believe that's why there's a  
8 very clear difference in the law that directs the  
9 Commission to take responsibility for this siting and  
10 that ultimately puts local governments in an advisory  
11 role.

12           So what does the law provide for with respect to  
13 transmission? When the law requires that or permits,  
14 rather, local governments to file their local zoning  
15 ordinances and requirements, that's an opportunity to  
16 inform the Commission, like any other facts that are  
17 part of the process, that's information that should be  
18 weighed by the Commission in designating, first, a  
19 corridor and, second, designating the final route for a  
20 route permit.

21           And so it is appropriate for the Commission to  
22 consider those ordinances, the reasons behind them, what  
23 those local priorities are, what those concerns are, no  
24 different than considering testimony that might be  
25 provided by local governments or letters or testimony by

1 others or other evidence in the proceeding.

2 It is evidence that does not make it binding law  
3 on the Commission. And, in fact, it's clear that the --  
4 it's stated differently in the two different sections,  
5 but within the pipeline statute it's simply a  
6 preponderance of the evidence, which is a very low  
7 threshold. In other words, there is not a burden on the  
8 applicant to prove beyond a reasonable doubt or beyond  
9 any particular measure that there's a burden. All they  
10 have to do is show that there's more evidence that it's  
11 unduly burdensome than not. And that's enough for the  
12 Commission to decide. Effectively, this is putting it  
13 clearly within the Commission's purview to make that  
14 decision.

15 And what does that mean in terms of protecting  
16 the concerns of local residents? It means that the  
17 Commission has to take those concerns on. And that's  
18 what the criteria that are laid out allow the Commission  
19 and instruct the Commission to do, is to consider all of  
20 those local impacts: Environmental impacts, human  
21 impacts, socioeconomic impacts, impacts on the shippers.  
22 Those are the things the Commission is asked to balance.

23 And we would like to point out that we think the  
24 Commission -- this Commission has a track record not  
25 only of clearly considering even the smallest local

1 concerns that are brought to them by landowners in  
2 multiple cases, in both a siting case and a routing  
3 case, and local governments, but actively, you know,  
4 being willing to require -- to encourage applicants to  
5 address those issues.

6 And, finally, the Commission has not been a  
7 rubber stamp on infrastructure. While most projects are  
8 eventually approved because the applicants do the things  
9 needed to conform, right, not every project is approved.  
10 And so we think the Commission has not only the  
11 authority but has shown that it has the interest of  
12 local -- of local residents at heart and is the best way  
13 to do this.

14 The concern that we have, if we go a different  
15 direction -- I actually think that the map that  
16 Mr. Bakke provides, W201, is a great example of the  
17 slippery slope that we go down when we move from a  
18 state-based permitting system to allowing local  
19 governments to effectively veto routing for not only  
20 pipelines but potentially transmission lines because  
21 it's not clear what the legal distinction would be in a  
22 transmission line case.

23 Now if we look at the map here, there's one  
24 potential path that's not -- that's marked in white  
25 through Trygg Township. Now if Trygg were to implement

1 -- were to suddenly adopt prior to the next hearing  
2 their own ordinance similar to the Burleigh County  
3 ordinance, it's possible that there would be no pathway  
4 anymore through Burleigh County, right. If we accept  
5 the idea that each township and each county should be  
6 able to establish any of its own ordinances at any time  
7 within ten days prior to the hearing, then effectively  
8 we've created something where it's impossible to  
9 engineer any route with any certainty that that route  
10 can get through. So now we're looking at -- we're going  
11 into Kidder County because we can't get through Burleigh  
12 County potentially.

13 And so I think when we're thinking about what's  
14 unduly -- what's unduly burdensome, we believe that the  
15 evidence already in the record shows it's unduly  
16 burdensome and that the test is, if this same policy  
17 were applied to each jurisdiction, would it be  
18 reasonable to site a pipeline? Because it's not  
19 reasonable to say that Burleigh County should be allowed  
20 to have extremely restrictive policies and Emmons  
21 County, but the county next door isn't allowed to have  
22 similarly restrictive policies or that those individual  
23 townships that set their own rules, or cities, can have  
24 those same restrictive policies.

25 And you can imagine that, with the kinds of

1 miles-long setbacks that are established, you start  
2 applying that and assume that every local jurisdiction  
3 should at least be allowed to implement equally rigorous  
4 requirements, and there's nowhere left to site a  
5 pipeline. And then we end up in a place where siting's  
6 a political football.

7 I live and work primarily in Minnesota. We have  
8 a nightmare process of trying to get one single pipeline  
9 through even with state permitting. We're seeing these  
10 sorts of policies being weaponized all over the country  
11 in order to prevent development of critical  
12 infrastructure.

13 And so we have confidence in the North Dakota  
14 Commission to take local concerns seriously. We think  
15 that it's not clear how you put the sort of like -- how  
16 you put the worms back in the can if we're going to  
17 allow any jurisdiction to set, you know, extremely broad  
18 policies and then force companies to try to work around  
19 or risk having their pipeline route invalidated at the  
20 end.

21 Thank you for your time.

22 ALJ HOGAN: All right. Thank you, Mr. Pranis.  
23 Any questions from commissioners or Mr. Dawson?

24 COMMISSIONER CHRISTMANN: None.

25 COMMISSIONER HAUGEN-HOFFART: I have a question

1 just for clarification.

2 When you were giving the scenario about the  
3 counties, like Trygg County, the map you referred to --

4 MR. PRANIS: The township?

5 COMMISSIONER HAUGEN-HOFFART: Yep.

6 -- all of a sudden doing an ordinance and then  
7 they would be prohibited, wasn't Burleigh County or  
8 Emmons County saying that the company can go before them  
9 and ask for a waiver? So what's prohibiting the company  
10 to go before and ask for it?

11 I mean, I think it -- I understand your intent.  
12 I absolutely do. We want to make this simple. And I  
13 thank you for the compliments on the Commission in  
14 listening to it. But explain yourself a little bit more  
15 on why that would be burdensome if we want some  
16 collaboration.

17 MR. PRANIS: Thank you, Commissioner.

18 I think the concern -- our concern is twofold.  
19 One, it's fairly clear that in this case these  
20 ordinances were established as poison pills; in other  
21 words, the timing of the ordinances and the extreme  
22 setbacks. And I think if you look at the changes to  
23 Emmons County, it's fairly clear that it went from a  
24 pretty flexible and permissive policy for looking at all  
25 types of pipelines to an extraordinarily restrictive



1 policy that would make it very difficult to site  
2 pipelines.

3 And it is certainly possible that the company  
4 would be able to obtain a waiver. I think our big  
5 concern is that is the kind of thing that chills  
6 development. Because when any developer looks at this  
7 and says, "I think I can build this project, I have to  
8 get all of these easements, I have to deal with all of  
9 these environmental considerations and a route that is  
10 appropriate and that the Commission will find  
11 appropriate," if -- if you then say, "Look, I can go and  
12 secure all these easements, but at any time before the  
13 hearing any local jurisdiction could, out of nowhere,  
14 propose a new policy that they might or might not waive  
15 for us," I think it makes it incredibly difficult to  
16 develop.

17 And to some degree if -- if basically the only  
18 way the policy works is if the company has to be granted  
19 a waiver, then it doesn't mean much to begin with. Then  
20 I think you've effectively preempted anyway.

21 So I think it's better for the public to know  
22 that they need to go to the Commission and that the  
23 Commission is who they need to -- who needs to hear from  
24 them rather than believing they could go to a local  
25 jurisdiction that has authority.

1 COMMISSIONER HAUGEN-HOFFART: Thank you.

2 ALJ HOGAN: All right. Thank you, Mr. Pranis.

3 All right. I will return to you, Mr. Dublinske.  
4 Would you like to make a reply argument?

5 MR. DUBLINSKE: I would, Your Honor, and I will  
6 try and do this in order and try not to repeat some of  
7 the arguments that obviously came up from multiple  
8 intervenors and try not to repeat Mr. Pranis either and,  
9 hopefully, can get through this promptly.

10 I would respond to Emmons County's argument by  
11 noting that while they talk about the unique ordinance  
12 having been in place since 1980, notably, they really  
13 try to sweep under the rug and not even directly answer  
14 a question about the change from 200 feet to 8,000 feet  
15 for residences, which I think is telling for some of the  
16 reasons that Mr. Pranis just discussed.

17 The statutory interpretation argument that  
18 Emmons County advanced essentially is that paragraph (c)  
19 does all the heavy lifting. And as we mentioned in our  
20 initial argument, that renders paragraph (b) largely  
21 superfluous. At that point, there's no reason why they  
22 would be separate paragraphs if (b) simply says, you  
23 know, find everything you need to know about how this  
24 works in (c). That also ignores sort of this unique use  
25 of the term "road use agreements" in (c). If, indeed,

1     it's covering a broad spectrum of things, that broad  
2     spectrum would include road use agreements.

3             So there are some issues with that statutory  
4     interpretation that just don't work well with the actual  
5     language and structure of the statute.

6             Emmons County raised the issue of, well, then  
7     why would we be required to submit the ordinances? You  
8     know, doesn't that provision get rendered superfluous if  
9     preemption is automatic? Chair Christmann noted, "Well,  
10    you know, it says 'road use agreements.' Maybe you give  
11    them to us so we look for road use agreements."

12            Obviously, that's logical, but there are other  
13    reasons too, right. Seeing what those concerns were  
14    that are embodied in local regulations may spur certain  
15    questions that the Commission has in making its own  
16    determinations that it has to make on the ultimate  
17    decision. And sometimes, frankly, it's just good to  
18    know what's out there that the law regarding the  
19    Commission is, in fact, preempting.

20            And while it may sound to some like that is not  
21    enough left to be reasonable, I will tell you, and I  
22    hate to keep bringing Iowa up, but in the Iowa  
23    generating certificate statute, it basically does the  
24    exact same thing. Counties come forward -- and actually  
25    in that case even the applicant has to discuss here are

1 the local ordinances. And the statute is absolutely  
2 crystal clear that once the generating certificate is  
3 issued by the state board, that all of those local  
4 ordinances are expressly preempted, that those counties  
5 and cities have to come to the board, participate in  
6 that process, and that is their opportunity. But it's  
7 still information that the utilities would want.

8 So I don't think it's at all unreasonable or  
9 even unusual, knowing that there are other states that  
10 do the same thing, for your legislation to be structured  
11 the same way.

12 I'm glad that Emmons County brought up the PHMSA  
13 letter. I had neglected to address that. But I would  
14 encourage you to read that very closely. PHMSA clearly  
15 is trying to be as political as possible and offend  
16 absolutely nobody, but Summit actually believes that  
17 letter is supportive of our position. It is extremely  
18 similar, almost verbatim, to a letter that was written  
19 to TC Energy that was in front of the federal court  
20 judge in Iowa when she made her decision.

21 And, notably, it says repeatedly that, look,  
22 PHMSA still has sole authority over safety and still has  
23 -- and states and counties still can't conflict with  
24 federal law, but this part that the intervenors hang  
25 their hats on about, well, local governments have

1 traditionally exercised broad powers to regulate land  
2 use, and it goes on to say including setback distances  
3 and property development in the vicinity of pipelines.  
4 It doesn't say anything about counties having  
5 traditional authority to regulate land use for  
6 pipelines. It says in the vicinity of pipelines.

7 And it talks about the county also having a role  
8 in protecting safety and how everyone from individuals  
9 all the way up has a role. And it gives a list of  
10 things that it recognizes local governments have done.  
11 And if you look at that list, none of them involve  
12 regulating pipelines. All of them involve regulating  
13 potential encroachments or potential damages to  
14 pipelines.

15 Finally, and this is an issue that I know  
16 Commissioner Haugen-Hoffart just talked about with  
17 Mr. Pranis, but want to briefly reiterate Summit  
18 believes that waivers and variances can't be the answer,  
19 that a system that relies on additional waivers and  
20 variances is inherently unreasonably restrictive. There  
21 is no way you can plan a long lead time, long-planning  
22 project based on a series of waivers and variances.

23 Regulatory law has to be knowable and  
24 predictable and stable, and we need to be able to go  
25 when we start a project and look at what the law is.

1 And if what we're being told is "Well, you can't rely on  
2 what we're putting out there in writing, just come ask  
3 us for a variance, ask us for a waiver" -- and by the  
4 way, because there's exceptions from ordinances, they  
5 are inherently more stringent and harder to get than  
6 just your run-of-the-mill permit under the ordinance.  
7 So we have a real concern about that being the alleged  
8 solution.

9 Burleigh County, I think, fundamentally sees  
10 safety as much narrower than the federal courts and  
11 Federal Government. The comment was made, well, it  
12 regulates the safety of the community, not the safety of  
13 the pipeline.

14 And I would suggest that PHMSA and federal  
15 caselaw clearly suggest that federal law is intended to  
16 do both. The *Kinley* court case at the Eighth Circuit,  
17 which I believe is cited in our materials and certainly  
18 cited in the Judge Rose decision, broadly looks at  
19 preemption and safety. And there it was a financial  
20 security, not a specific safety standard. And the court  
21 says we see this simply as a proxy for safety and found  
22 that it was preempted.

23 The certificate of compatibility issue has come  
24 up a couple of times, and let me just sort of address  
25 that quickly here. First of all, and I want to jump

1 ahead to the Bismarck landowners, the suggestion that  
2 we've only requested a certificate and not a route  
3 permit is just simply incorrect. If you look at the  
4 introduction to Docket No. 1, it very clearly says that  
5 we are applying for both in a combined hearing as  
6 permitted by Section 1-08.

7 But I think, you know, if you go back and look  
8 at 1-06, which is what has to go on an application for a  
9 certificate, 1-07, application for a permit, 1-09,  
10 criteria that the Commission is to look at for a  
11 certificate, those lists are extensive. And it's  
12 telling that nowhere in those extensive lists does it  
13 list county ordinances as being relevant, does it  
14 mention anything in either direction about preemption.

15 So the only time you find out about the  
16 preemptive power or not of a certificate and/or a permit  
17 is in 1-13. And for (a) it says on a conversion  
18 facility a certificate doesn't preempt and for (b) it  
19 says on a transmission facility a permit does. And  
20 there is literally nothing anywhere that prohibits a  
21 certificate from preempting in any other situation.  
22 There's nothing in 1-06, nothing in 1-09. That all  
23 comes strictly from 1-13, which we obviously analyzed at  
24 length.

25 You know, I would follow up on Chair

1 Christmann's questions about so you could have a route  
2 where you have two miles clearance on one side and  
3 50 feet on the other. The answer to that, I think,  
4 shows just how arbitrary some of these restrictions  
5 actually are.

6 The Bismarck landowners, I've talked a little  
7 bit about the combined application, but the prematurity  
8 argument I have to admit I just don't understand. The  
9 notion that a motion to preempt county processes is  
10 premature until we've already gone through those county  
11 processes seems fundamentally flawed.

12 And while it may be true that there's a general  
13 allowance in the Century Code for county control of land  
14 use, the general rule of statutory construction is that  
15 the newer and more specific prevails. Obviously,  
16 pipeline regulation is a specific carveout for this  
17 Commission and the amendments to the relevant statute  
18 are quite specific and quite recent.

19 With regard to --

20 ALJ HOGAN: I'll just note, Mr. Dublinske,  
21 you're almost at ten minutes.

22 MR. DUBLINSKE: All right. Let me just make  
23 sure there's nothing else in here.

24 Yeah, just -- the only other thing I wanted to  
25 point out is that the argument that the Leibel



1 intervenors made that section (b) somehow applies  
2 post-granting of the permit and section (c) or paragraph  
3 (c) applies to the preceding seems an unnatural reading,  
4 to sort of flip the time order around. (C) appears, a  
5 better reading, to be a specialized subset of (b).

6 Your Honor, the most natural reading here is  
7 Summit's reading. The reading that best supports state  
8 public policy is Summit's reading. This is a legal  
9 issue. The Commission can and should address it here  
10 and now at the outset of the reconsideration. And we  
11 would ask you to preempt the unreasonably restrictive  
12 ordinances of Emmons and Burleigh County.

13 Thank you.

14 ALJ HOGAN: Thank you.

15 Are there any other questions from commissioners  
16 or Mr. Dawson for Mr. Dublinske?

17 COMMISSIONER CHRISTMANN: I do not.

18 COMMISSIONER HAUGEN-HOFFART: I do not.

19 SUBSTITUTE DECISIONMAKER DAWSON: No.

20 ALJ HOGAN: All right. Well, thank you all.

21 That will conclude our oral arguments for our hearing  
22 today.

23 Are there any closing remarks or comments that  
24 the commissioners want to make or Mr. Dawson?

25 COMMISSIONER CHRISTMANN: I think only that -- I

1     don't know about the other decisionmakers here, but my  
2     preference is to take this under advisement and we'll  
3     release a decision once we've reached one.

4             ALJ HOGAN: All right. Well, then I will note  
5     for the record that it's 3:51 p.m. and that will  
6     conclude our hearing for today. Thank you.

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Dated this date of October 13, 2025.

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