

STATE OF NORTH DAKOTA

DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

APH FARMS, ARDEN HAGEROTT,
JONATHAN HAGEROTT, JANEL
OLSON, VALERA HAYEN, KARI
CURRAN, SCOTT IRMEN, MARY JO
IRMEN, LEON MALLBERG,
STAROBA REVOCABLE LIVING
TRUST, LOREN STAROBA, DIANE
STAROBA, JAMES TIEGS,

Appellants,

v.

NORTH DAKOTA PUBLIC SERVICE
COMMISSION, SCS CARBON
TRANSPORT, LLC, JOHN H.
WARFORD, JR. REVOCABLE TRUST,
CHAD WACHTER, CHAD
MOLDENHAUER, CITY OF
BISMARCK, LABORERS DISTRICT
COUNCIL OF MINNESOTA AND
NORTH DAKOTA, EMMONS
COUNTY, and BURLEIGH COUNTY,

Respondents/Appellants.

APPELLANTS' BRIEF

Case No. 08-2024-CV-03622

**ORAL ARGUMENT
REQUESTED**

An administrative appeal from the decisions of the North Dakota Public Service Commission as reflected in a November 15, 2024 *Findings of Fact, Conclusions of Law, and Order*, a February 7, 2024 *Order*, and an August 4, 2023 *Order* on Protection of Information

Consolidated with *Burleigh County v. North Dakota Public Service Commission, et al.*, Case No. 08-2024-CV-03614

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STATEMENT OF ISSUES

1. Does N.D.C.C. § 49-22.1-13 provide for the automatic preemption of local land use and zoning regulations?
2. Does the finding of fact made by the Public Service Commission sufficiently explain the basis of its decision to allow for appellate review?
3. Is the finding of fact made by the Public Service Commission supported by a preponderance of the evidence?

INTRODUCTION

4. This administrative appeal seeks review of the North Dakota Public Service Commission's interpretation of the law. However, there is an elephant in the room. The pipeline that is the subject of this appeal is not a crude oil or natural gas pipeline. The pipeline that is the subject of this case transports highly pressurized supercritical carbon dioxide (CO₂). Carbon dioxide is invisible and has no odor. It is heavier than air and moves with the wind but will fill low lying areas just like water. It can instantly disable any machine or person or animal that inhales a sufficient amount, and this pipeline will carry 936,000,000 standard cubic feet of it per day. Appellees want to characterize the people who oppose this pipeline as a bunch of selfish and ignorant Chicken Littles. However, Appellants have seen what a partnership between government and foreign venture capitalists can look like. They simply want to avoid becoming the latest chicken nuggets.

5. This unease was created by the Public Service Commission. In

the underlying administrative action, the Public Service Commission received a plume study that predicts how a plume of toxic CO₂ would behave if it was released a half mile from the City of Bismarck, or 1,000 feet from Jon Hagerott's feedlot, or in James Tieg's cornfield. Instead of disclosing the plume study for public review and scrutiny as required by the Administrative Agency Practices Act and placing it into the record, the Public Service Commission kept it a secret. When concerned local governments such as the Burleigh County Commission and the Emmons County Commission took affirmative steps to protect the property and safety of their constituents, Summit convinced the Public Service Commission to ignore the concerns of local governments. For the reasons stated, the final order of the Commission should be reversed and remanded to the Commission to disclose the secrets and to perform the analysis required by the Administrative Agency Practices Act and the applicable pipeline siting statute.

STATEMENT OF FACTS

6. This appeal arises from the North Dakota Public Service Commission's approval of the North Dakota leg of the longest proposed carbon dioxide ("CO₂") pipeline in the United States. The CO₂ pipeline proposed by SCS Carbon Transport, LLC ("Summit") in North Dakota involves 320 miles of pipeline that will transport CO₂ to a site in Oliver County where it will be

sequestered deep underground. [Doc. 132]¹, pg. 3-4. The proposed pipeline is between 4.5” and 24” in outside diameter and is designed to operate at high pressures—between 1,200 and 2,150 psig—to carry up to 936,000,000 standard cubic feet of CO₂ per day. [Doc. 132], pg. 5.

7. It is well known that CO₂ is a toxic asphyxiant. [Doc. 295], Congressional Research Service, report of June 3, 2022, pg. 1. A 24” CO₂ pipeline operated by Denbury Gulf Coast Pipelines LLC (“Denbury”) famously exploded around a mile from the small town of Satartia, Mississippi in 2020, releasing 31,405 barrels of CO₂. *See* [Doc. 303], PHMSA² Investigation Report, pg. 3. The 50 residents of Satartia were evacuated, along with 150 others from the neighboring areas. *See id.* Forty-five people sought medical attention at local hospitals, including individuals who were caught in the vapor cloud while driving a vehicle. *Id.* The Public Service Commission heard testimony from Gerald Briggs, a Fire Chief for Warren County, Mississippi. [Doc. 376](Briggs resume). Chief Briggs talked about responding to this disaster and observing people who were rescued near Satartia, laying on the ground and vomiting. [Doc. 426], TR 161:15 to 163:13. As Chief Briggs approached Satartia the first thing he noticed was all the disabled vehicles sitting in the roadways. [Doc.

¹ Many entries in the record include cover letters and/or service documents that precede the material document or item. For consistency, and unless otherwise stated, Appellants cite the document number from the register of actions followed by the page number of the appropriate pdf file, regardless of any internal pagination or numbering.

² PHMSA stands for “Pipeline and Hazardous Materials Safety Administration,” an agency within the U.S. Department of Transportation.

426], TR 163:14-23. Briggs testified that people attending an outdoor barbeque in Satartia were discovered having suddenly collapsed. [Doc. 426], TR 164:16-24.

8. As part of the permitting process, CO₂ pipeline operators must identify the consequences of a pipeline failure. *E.g.* [Doc. 393], pg. 7 (Testimony of Summit engineer John Godfrey). When a CO₂ release occurs, a cloud of toxic gas (a “plume”) moves away from the point of release. *Id.* How a plume moves through the environment is predicted using a process called air dispersion modeling. *Id.* An air dispersion model—also referred to as a dispersion model or plume study—involves predicting the direction, speed, and concentration of a CO₂ plume using a computer algorithm. *Id.* A proper³ plume study considers variables like topography, release rate, leak profile, wind speed and direction, atmosphere stability, humidity, and land use. *Id.*

9. Summit’s plume study, the safety of its pipeline, and the resulting effect on property values were the primary focus of the hearings at the Public Service Commission. Over 390 individual North Dakota farmers, politicians, businesspeople, grandmothers, renters, landowners, and other citizens,

³ Plume studies are not infallible. In evaluating the Satartia incident, the PHMSA investigator noted that the plume study commissioned by Denbury erroneously failed to place Satartia—a mile from the rupture—within the zone of risk that could be affected by a release. [Doc. 303], pg. 12; Findings on pg. 15 (“Denbury’s CO₂ dispersion model underestimated the potential affected area that could be impacted by a release. As a result, the pipeline segment was not identified as a “could affect” HCA, and Satartia was not included in Denbury’s [Public Awareness Program].”)

appeared before the PSC over weeks of public hearings to voice their opposition to Summit's pipeline. *See* [Doc. 211, 223, 322, 385, 497, 653, 720, 754](hearing attendance sheets); *see also, e.g.*, [Doc. 493](June 2, 2023 hearing), 197:5-23 (Joe Hillerson, President of Board for Home Builders, testifying that the proposed pipeline will have a "huge negative economic impact" on people trying to develop real estate); [Doc. 495], 456:2 to 457:20 (John Lee, President of Bismarck School Board, testifying pipeline is too close); [Doc. 669](April 22, 2024 hearing), 269:11-12 (Ken Huber: "We're talking thousands and thousands of people. And yet we're willing to jeopardize their safety."), 221:18 to 222:8 (Bailey Elkins testifying she bought property in Cromwell Township because she thought the zoning regulations would protect her from development like Summit's pipeline); [Doc. 272](written statement Chad Wachter); [Doc. 414](prefiled testimony of James Rockstad).

10. A main concern was the safety of people and animals located close to the proposed pipeline and the resulting effects on development and real estate values. This was especially true for property near the City of Bismarck, where the proposed pipeline is located a few miles from the North and East of the City's extra-territorial jurisdiction. *See, e.g.*, [Doc. 253](statement of Burleigh County Board of Health warning of a mass casualty event in the event of the pipeline's rupture); [Doc. 266](statement of former Bismarck mayors Steve Bakken, John Warford, and Marlon Hankinson noting "[u]nlike other pipelines already in place in Bismarck, the Summit pipeline will transport

dangerous carbon dioxide.”); [Doc. 392](City of Bismarck resolution supporting the zoning efforts of Burleigh County and that the pipeline adopt a route farther from the City as demanded by Burleigh County); [Doc. 446](Bis-Man Home Builder’s Association resolution opposing the Summit pipeline due to proximity to the City of Bismarck); [Doc. 448](Resolution of Bismarck Public School Board supporting Burleigh County’s efforts to protect expansion); [Docs. 453-54](1,652 signatures of people opposing Summit’s pipeline as too close to Bismarck).

STATEMENT OF THE CASE

11. On October 17, 2022, SCS Carbon Transport LLC (“Summit”) filed a consolidated application for a certificate of corridor compatibility and route permit with the North Dakota Public Service Commission (“PSC” or “Commission”). [Docs. 124, 125, 132-135, and 143-156]. On February 17, 2023⁴, Emmons County provided to the PSC a copy of its pertinent zoning ordinances that governed setbacks for all hazardous pipelines. [Doc. 179]. On March 29, 2023, Burleigh County filed with the PSC proposed ordinances regarding the transport of hazardous liquids, including crude oil, anhydrous ammonia, fertilizers, and liquified CO₂. [Doc. 271]. On March 29, 2023, Riverdale Township in Dickey County filed its zoning ordinances. [Doc. 219] On May 8, 2023, Telfer-Missouri-Boyd Townships filed their zoning

⁴ It is understood the date February 17, 2022 is a typographic error, as this date would predate the application.

ordinances. [Doc. 353]

12. Appellant landowners were granted intervention by the PSC. [Doc. 214](Scott Irmén and Mary Jo Irmén); [Doc. 312](Kari Curran, Staroba Revocable Living Trust and Loren and Diane Staroba, Valera Hayen, Leon Mallberg, APH Farms, Arden Hagerott, Jonathan Hagerott, Janel Olson); [Doc. 316](James Tiegs).

13. On April 5, 2023, Summit's attorney sent a letter to the Commission stating that the PSC had requested information about Summit's dispersion modeling. Summit stated it would file an application to protect information and requested that it be allowed to provide the plume study to the PSC without filing a redacted version due to "highly confidential and sensitive nature of the Information and the potential negative consequences which may result from the public disclosure of any part or portion thereof." [Doc. 292]. On April 21, 2023, Summit filed an "Application to Protect Information." [Doc. 340] In this application, Summit argued that the information in the plume study was confidential pursuant to federal law, and that it would provide this information to the PSC only if the information is given the same protections. [Doc. 340], pg. 4. Summit stated that the only people who should review it are the ALJ, the Commission, the Commission's counsel, and the Commission's siting analysts. *Id.* at pg. 5. Summit also requested that the Commission waive the requirement that a redacted version be filed.

14. On May 1, 2023, various intervenors objected to Summit's

application to keep its plume study confidential, arguing that the plume study does not conform to state law and that State law requires that Summit review the study and file a redacted version. [Doc. 346]. These objections were joined the same day by Appellants. [Doc. 348]. Summit responded to the objections on May 5, 2023. [Doc. 352]. On May 8, 2023, certain intervenors filed discovery requests to Summit seeking the plume study. [Doc. 354]. On May 12, 2023, counsel for the PSC filed a response recommending that the ALJ grant Summit the relief requested in its application. [Doc. 391]. On June 27, 2023, Summit's application was heard. [Doc. 508](transcript of June 27, 2023 hearing).

15. Around this same time, on May 17, 2023, Summit responded to interrogatories and requests for production by refusing to provide information about its dispersion modeling or risk assessment. [Doc. 398] Intervenors subsequently moved to compel this discovery and requested that someone from Summit sit for a deposition. [Doc. 406]. Summit responded, objecting to disclosing dispersion modeling because “the Commission already has the information” and that providing it to the intervenor “would serve no useful purpose.” [Doc. 417], pg. 13. These Appellants joined the request for this information to be provided before an upcoming hearing. [Doc. 418]. The ALJ denied the motion to compel. [Doc. 428].

16. The intervenors subsequently moved for reconsideration [Doc. 440] which was joined by Appellants [Doc. 500] and opposed by Summit. [Doc. 498]. Burleigh County also requested the plume model from the PSC in a

letter on July 20, 2023. [Doc. 522]. It explained that the Burleigh County setbacks were enacted because Summit refused to release the plume model. *Id.*

As stated by the Burleigh County Commission:

Without plume modeling or sharing of other information necessary to enable the Commissions to consider the dangers of a pipeline failure, we enacted an ordinance we believed would promote the safety of our citizens.

[Doc. 522]. Unpersuaded, the PSC granted Summit's application to protect the plume model from public disclosure on August 4, 2023, finding that the pipeline met the definition of "critical infrastructure" under N.D.C.C. § 44-04-24(2)(a), and was therefore immune from production under North Dakota's public records act. [Doc. 526]. At a later hearing, Victor Schock, the Director of the Public Utilities for the North Dakota Public Service Commission, admitted the Commission had received Summit's plume study and that the Commission did not release that modeling to any of the parties. [Doc. 747], Transcript of May 30, 2024 Hearing (Part II), 157:13 to 158:1.

17. At around this same time Summit was seeking to keep the plume study secret, on June 1, 2023, it filed a motion to have the PSC declare that the Emmons County and Burleigh County ordinances be superseded and preempted pursuant to N.D.C.C. § 49-22.1-13. [Doc. 423] In this motion, Summit argued that recent amendments to N.D.C.C. § 49-22.1-13 automatically preempted all local land use, zoning, or building rules, regulations, or ordinances. [Doc. 423], pg. 8. Summit argued in the alternative that Emmons County and Burleigh County ordinances are unreasonably

restrictive. [Doc. 423], pg. 11. In support of its argument that the ordinances were unreasonably restrictive, Summit cut and pasted a map into its brief. [Doc. 423], pg. 5, 7; *see also* [Doc. 501](Summit’s supplemental brief).

18. Appellants opposed the motion. [Doc. 507] Appellants pointed out that the factual basis for the motion was two (2) drawings in Summit’s brief. Appellants argued there was zero foundation for the diagrams—which lacked a scale or any information as to who created them—and that the Administrative Code required the PSC to generally apply the rules of evidence and that findings of fact must be based on substantial evidence. [Doc. 507], pg. 3-4. Appellants also argued that the statute distinguishes between a certificate of corridor compatibility and a route permit and that automatic preemption was inconsistent with the statute. [Doc. 507], pg. 7. Finally, Appellants attached the legislative history of N.D.C.C. § 49-22.1-13, including statements where the North Dakota legislators made clear that the intent was not to permit the PSC to “overstep the authority of our local entities.” [Doc. 507], pg. 6.

19. Other parties to this appeal similarly opposed Summit’s interpretation of N.D.C.C. § 49-22.1-13. [Doc. 510](Bismarck area intervenors); [Doc. 512](Emmons County). Summit filed a reply on July 21, 2023. [Doc. 521]

20. On August 4, 2023, the Public Service Commission denied Summit’s application for a certificate of corridor compatibility and a route permit. *See* [Doc. 530] In the Findings of Fact, Conclusions of Law, and Order,

the PSC noted that Summit's motion to preempt the local ordinances was moot. [Doc. 530], pg. 12. Summit subsequently moved for reconsideration after shifting the route slightly farther North of Bismarck but leaving the Eastern route as proposed. [Doc. 531] The Commission granted reconsideration, [Doc. 549], and Summit renewed its motion to preempt the local ordinances. [Doc. 552]; *see also* [Doc. 554](LiUNA's response to renewed motion); [Doc. 555](Summit's objection to any further responses); [Doc. 556](Bismarck area intervenors' response); [Doc. 557](Emmons County response); [Doc. 558](Appellants' response). This motion was heard on December 21, 2023. [Doc. 568](transcript of hearing).

21. On February 7, 2024, the PSC granted Summit's motion to automatically preempt all local ordinances. [Doc. 586]. It explained its reasoning as follows:

The issue before the Commission is not whether it may preempt local land use or zoning regulations, but whether preemption is automatic. N.D.C.C. § 49-22.1-08 provides that a utility may combine an application for a certificate or permit. SCS's Application is a consolidated application for a certificate of corridor compatibility and for a route permit. The Commission concludes that, based on the plain language of § 49-22.1-13, the approval of a route permit for a gas or liquid transmission facility automatically supersedes and preempts local land use or zoning regulations, except for road use agreements, even though local ordinances may be filed for Commission review and consideration. By function of the consolidated application, local land use and zoning regulations are automatically superseded and preempted in the present case.

[Doc. 586], pg. 3 (emphasis added). Burleigh County subsequently moved for reconsideration, [Doc. 590], which was joined by Appellants. [Doc. 589]; *see*

also [Doc. 592](Summit's response), [Doc. 596](Appellants' response to Burleigh County's motion), [Doc. 599](Burleigh County's reply). The PSC denied reconsideration. [Doc. 601].

22. On May 30, 2024, Burleigh County offered expert testimony in support of its ordinance from Jeff Steinbronn. Mr. Steinbronn testified without objection regarding the chemistry and physics of supercritical carbon dioxide. *See* [Doc. 746] Transcript of May 30, 2024 Formal Hearing, 60:20, *et seq.* He testified that in the event of a catastrophic failure of a main line valve, the volume of gas released would cover the entire 35.18 square miles comprising the City of Bismarck with a lethal dose of carbon dioxide to a depth of eight feet. *Id.* at 76:23 to 77:16; 80:22 to 87:19 (Steinbronn explaining that the closest main line valve is approximately 15 miles North of Bismarck, and that a rupture of that valve could lead to a toxic plume that would reach the bottom of the hill in South Bismarck, depending on the wind).

23. During this same May 30, 2024 hearing, Appellants made an offer of proof in support of this appeal. The first witness was John Abraham. Mr. Abraham is a professional engineer with degrees in the field of mechanical engineering with an emphasis on thermal sciences which deal with material flow. [Doc. 746], 126:4 to 127:19; [Doc. 842] (Abraham CV). Mr. Abraham testified that he was retained by Appellants to review and analyze Summit's data related to its dispersion modeling and risk analysis. [Doc. 746], 128:1-22. He testified that he could not perform an analysis because the data and other

information in Summit's plume study was not disclosed by the Commission. *Id.* 128:23 to 129:25. Appellants also offered Jason Howard. Mr. Howard testified that he is a GIS mapping expert, and that he had reviewed Summit's proposed pipeline. *Id.* at 136:4 to 137:24. He determined that there were 163 dwellings within one mile of the pipeline. *Id.* at 140:2-17; *see also* [Doc. 761](Howard's written testimony with data results). He testified that he estimated 992 people in Burleigh County were within one mile of the pipeline. [Doc. 747], 145:14-24.

24. On June 4, 2024, Emmons County called Erin Magrum, the Chair of the Emmons County Commission to testify regarding the Emmons County ordinance. Summit objected to his testimony, arguing that the Commission had already ruled that preemption was automatic and Emmons County was trying to relitigate this issue. [Doc. 751], Transcript of June 4, 2024 hearing, 14:6-23. The attorney for the PSC noted that the Commission had already made the decision to automatically preempt the Emmons County ordinances, but that he believed it was appropriate to allow Emmons County to make its record, and the ALJ agreed. [Doc. 751], 16:8-20. Commissioner Magrum testified that the amendments made CO₂ pipelines subject to the same rules as other pipelines and adjusted all setbacks. [Doc. 730](prefiled testimony of Commission Magrum). The new setbacks set pipelines 2 miles from any organized city, a mile and a half from any residence, 500' from any other building, and 100' from a highway unless perpendicular. [Doc. 878](Emmons

County Ordinance No. 23-01-01). It also allowed for a variance to the established residence setback if permitted by the affected resident. *Id.* Commissioner Magrum testified the purpose was to allow individual landowners to make individual decisions regarding the use of the land and the risk to the landowner. [Doc. 751], 20:3 to 27:8. He testified that Summit has never applied for a conditional use permit or a variance. *Id.* at 27:9-11, 37:21 to 39:10.

25. During the final set of hearings, new information came out about the plume study. Specifically, Appellants learned from Bismarck businessman Chad Wachter that he had received a call from Ron Ness, the President of the North Dakota Petroleum Council. [Doc. 746], Transcript of May 30, 2024 Formal Hearing, 10:11-25. Mr. Ness told Mr. Wachter he had “negotiated” with Summit to allow Wachter to view Summit’s plume study. *Id.* Wachter said he went to Ness’s office in Bismarck on January 24, 2024 where he met Mr. Ness, Wade Boeshans from Summit, and two others. *Id.*, 11:3-14. Wachter was shown a PowerPoint presentation regarding the plume study. *Id.*, 40:15 to 41:7. He was not told that he could not talk to anyone about the presentation. *Id.* at 17:2-20. Wachter expressed that he wanted to have the conclusions in that report verified by someone independent. *Id.*, 18:3-15. Wachter testified he had a follow up meeting almost a month later with representatives of Summit where they discussed the plume study, although he was cautioned by the ALJ at the hearing that he could not disclose specifics due to the protective

order⁵. *Id.*, 19:11 to 22:15; *compare with* [Doc. 526], pg. 3 (PSC finding “[t]he confidentiality of this information has been maintained by SCS. No party has demonstrated that the information has been disclosed to the public or to persons other than employees or authorized agents...”).

26. However, this evidence did not change anything. In its final order approving the pipeline, the PSC held—in addition to its legal conclusion of February 7, 2024 [Doc. 586]—that the ordinances of Burleigh County and Emmons County are “unreasonably restrictive on their face under N.D.C.C. § 49-22.1-13(2)(c).” [Doc. 908], pg. 11. Specifically, the Commission found that Emmons County Ordinance number 23-01-01 subsection B(2)(b)(i) of Article VI mandates a setback distance of 7,920 feet from an established residence and Burleigh County Ordinance number 23-003 Section 27(VI)(4) mandates a setback of two miles (10,560 feet) from any occupied structure. The Commission found that these ordinances were “unreasonably restrictive on their face” and “are in direct conflict with state law under N.D.C.C. 49-22.1.03.” [Doc. 908], pg. 11.

27. This appeal followed.

ARGUMENTS AND AUTHORITIES

28. Appellants have not seen the plume study. Burleigh County has not seen the plume study. Emmons County has not seen the plume study. The

⁵ Appellants do not know what is being referenced here by the ALJ—the order of protection issued by the Commission exempted the plume study from production as a public record.

hundreds of individual North Dakotans who voiced their concerns with the project have not seen the plume study. No one has been cross-examined on the plume study. No expert witness has evaluated the plume study. The newspaper reporters who have followed this case have not seen the plume study. The plume study is not in the record.

29. However, the Commission made determinations of fact and conclusions of law based upon a secret plume study shared only with the Commission and a handful of influential Bismarck businesspeople—information that has never been disclosed, scrutinized, or publicly analyzed. It compounded the prejudice by elbowing out local government. This Court should not hesitate to protect Appellants’ fundamental right to due process and the public’s right to open government.

A. Standard of review.

30. The Administrative Agencies Practice Act (“AAPA”), N.D.C.C. ch. 28-32, governs an appeal from a Commission decision. *Envtl. Law & Policy Ctr. v. N.D. Public Serv. Comm’n*, 2020 ND 192, ¶ 8, 948 N.W.2d 838. The Supreme Court reviews a Commission decision in the same manner as this Court, although the “district court’s analysis is entitled to respect if its reasoning is sound.” *Id.* A decision by the Commission must be affirmed unless:

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.

3. The provisions of this chapter have not been complied with in the proceedings before the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by its findings of fact.
7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

Id. citing N.D.C.C. § 28-32-46. In reviewing the Commission's findings of fact, a court of review does not substitute its judgment for the Commission and does not make independent findings. *Id.* Instead, the court can decide "only whether a reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record." *Id.* However, the Commission's decision on questions of law is fully reviewable. *Id.* Furthermore, statutory interpretation is a question of law that is fully reviewable on appeal. *Id.*

B. The statute does not allow for "automatic preemption" of local ordinances or regulations.

31. The Commission decided that N.D.C.C. § 49-22.1-13 provides the Commission with the power to automatically preempt any local zoning or building regulations or ordinances. This conclusion is not consistent with the

plain language of N.D.C.C. § 49-22.1-13. This Court should find that the Commission's unilateral expansion of its power exceeds its statutory authority, reverse the final order regarding automatic preemption, and remand this matter to the Commission with required disclosure and an opportunity for discovery to allow for a transparent proceeding as required by the AAPA.

- I. Both a certificate of corridor compatibility and a route permit are required before a new pipeline can be built.

32. By way of background, the construction of a new pipeline in North Dakota requires two separate approvals by the Commission. The first approval is a "certificate of corridor compatibility," which identifies the corridor of land that satisfies the statutory prerequisites. As used in Chapter 49-22.1, a "certificate" is defined as a "certificate of site compatibility or the certificate of corridor compatibility issued under this chapter." N.D.C.C. § 49-22.1-01(1). A "corridor" means "the area of land where a designated route may be established for a gas or liquid transmission facility." N.D.C.C. § 49-22.1-01(4). A certificate is granted based upon the statutory criteria of § 49-22.1-06. Statutory criteria include the "[e]xisting plans of the state, local government, and private entities for other developments" as well as "[p]roblems raised by federal agencies, other state agencies, and local entities." N.D.C.C. § 49-22.1-09(8), (11).

33. Before starting construction, a person must also obtain a route permit. A route "permit" is a "permit for the construction of a gas or liquid transmission facility within a designated corridor issued under this chapter." N.D.C.C. § 49-22.1-01(8)(emphasis added). A "route" is "the location of a gas

or liquid transmission facility within a designated corridor.” N.D.C.C. § 49-22.1-01(12)(emphasis added). An application for a route permit is evaluated based upon the statutory criteria of § 49-22.1-07.

34. This statutory scheme provides important context. A certificate of corridor compatibility and a route permit are different approvals that address different issues. A certificate designates the area of land within which a specific route may be placed. *Compare* N.D.C.C. § 49-22.1-06(1)(requirements for corridor application), *with* N.D.C.C. § 49-22.1-07(1)(requirements for permit application). A route permit is placed “within a designated corridor.” *E.g.* N.D.C.C. § 49-22.1-01(12)(a “route” is “the location of a gas or liquid transmission facility within a designated corridor.”). Allowing an applicant to file a consolidated application for both a route permit and a certificate of corridor compatibility was one of the original purposes of the 2017 amendments that are at issue in this case. However, a permit and a certificate are not the same thing.

II. A certificate of corridor compatibility does not automatically preempt local ordinances and regulations.

35. In N.D.C.C. § 49-22.1-13(2)(d), the procedure outlined makes clear that a certificate of corridor compatibility does not automatically supersede or preempt local zoning ordinances or building regulations:

d. When an application for a certificate⁶ for a gas or liquid transmission facility is filed, the commission shall notify the townships with retained zoning authority, cities, and counties in which any part of the proposed corridor is located. The commission may not schedule a public hearing sooner than forty-five days from the date notification is sent by mail or electronic mail. Upon notification, a political subdivision shall provide a listing to the commission of all local requirements identified under this subsection. The requirements must be filed at least ten days before the hearing or the requirements are superseded and preempted.

N.D.C.C. § 49-22.1-13(2)(d). Instead, a certificate of corridor compatibility requires compliance with all local land use or zoning regulations unless the local political subdivision fails to timely file them with the Commission. In fact, the very next subpart of N.D.C.C. § 49-22.1-13 doubles-down on this interpretation:

e. An applicant shall comply with all local requirements provided to the commission pursuant to subdivision d, which are not otherwise superseded by the commission.

N.D.C.C. § 49-22.1-13(e). As a certificate of corridor compatibility is the prerequisite for a route permit, the default is that an applicant is required to comply with all local requirements timely submitted to the Commission. This basic threshold fact is important context.

III. A route permit may only preempt local ordinances upon limited findings of fact.

36. The language that the Commission relies upon for automatic

⁶ As used here, a “certificate” is defined as a “certificate of site compatibility or the certificate of corridor compatibility issued under this chapter.” N.D.C.C. § 49-22.1-01(1).

preemption reads as follows:

b. Except as provided in this section, a permit for the construction of a gas or liquid transmission facility within a designated corridor supersedes and preempts any local land use or zoning regulations.

N.D.C.C. § 49-22.1-13(2)(b). The Commission's interprets this subsection as a grant of absolute power over local political subdivisions. This interpretation is unreasonable. The language in 2(b) is expressly qualified by "[e]xcept as provided in this section." A qualification is not consistent with automatic preemption. *E.g. Wheeler, supra*; N.D.C.C. § 1-02-38(2)(rule of interpretation that presumes that an entire statute is intended to be effective). This is especially true where the meaning of "except as provided in this section," can be gleaned from the very next subsection.

37. The very next subsection, N.D.C.C. § 49-22.1-13(2)(c), reads as follows:

c. Before a gas or liquid transmission facility is approved, the commission shall require the applicant to comply with the road use agreements of the impacted political subdivision. A permit may supersede and preempt the requirements of a political subdivision if the applicant shows by a preponderance of the evidence the regulations or ordinances are unreasonably restrictive in view of existing technology, factors of cost or economics, or needs of consumers regardless of their location, or are in direct conflict with state or federal laws or rules.

(emphasis added). This subsection has two sentences which address two distinct types of limitations. The first sentence of this subsection mandates that the Commission must require an applicant to comply with road use agreements of a political subdivision. N.D.C.C. § 49-22.1-13(2)(c); *Jorgenson*

v. Agway, inc., 2001 ND 104, ¶ 5, 627 N.W.2d 391 (“When a statute is clear and unambiguous on its face, we will not disregard the letter of the statute under the pretext of pursuing its spirit, because legislative intent is presumed clear from the face of the statute.”).

38. However, if § 49-22.1-13(2)(b) was interpreted to provide automatic preemption for a route permit, Subsection (c) has no effect. This grates against basic rules of construction. The Court’s job in construing this statute is to ascertain the intent of the legislature, which initially must be sought from the statutory language itself, giving it its plain, ordinary, and commonly understood meaning. *Wheeler v. Gardner*, 2006 ND 24, ¶ 10, 708 N.W.2d 908 *citing* N.D.C.C. § 1-02-02. If the wording is clear and unambiguous, the legislative intent is presumed clear from the face of the statute and the letter of the statute is not to be disregarded under the pretext of pursuing its spirit. *Id. citing* N.D.C.C. § 1-02-05. The language of a statute must be interpreted in context and according to the rules of grammar, giving meaning and effect to every word, phrase, and sentence. *Id. at* ¶ 11 *citing* N.D.C.C. §§ 1-02-03 and 1-02-38(2). It is presumed that the legislature did not intend any unreasonable result or unjust circumstances, and statutes must be construed to give effect to all of their provisions, so that no part of the statute is rendered inoperative or superfluous. *Id. citing* N.D.C.C. § 1-02-38(2) and (4).

39. In this context, the legislative compromise inherent in N.D.C.C. § 49-22.1-13(c) should become clear. First, the legislature qualified Subsection

(b) with the “[e]xcept as provided in this section.” Second, the first sentence of § 49-22.1-13(c) mandates that neither a certificate nor a permit can supersede or preempt local road use agreements under any circumstance. Forcing a pipeline operator to comply with the same rules as everyone else regarding public roads is a rational objective. Third, the second sentence of § 49-22.1-13(c) states that an applicant for a permit must comply with all local political subdivision regulations or ordinances unless the applicant can prove one of the exceptions of N.D.C.C. § 49-22.1-13(2)(c). This again makes sense—a measured balancing test between conflicting interests is both appropriate and necessary. However, there is simply no reasonable interpretation of N.D.C.C. § 49-22.1-13 that allows for automatic preemption.

40. Because automatic preemption was a basis for the decision and was used to thwart discovery and drive the remainder of the proceeding, the Court should determine reversal is required by this error of law. This is especially true here, where the record fails to demonstrate that the Commission’s backfilled finding of fact is supported by a preponderance of the evidence as required by N.D.C.C. § 28-32-46.

C. The Commission’s finding of fact is impermissibly vague.

41. In an apparent acknowledgment of legal thin ice, the Commission’s final order tacked on a purported additional basis to supersede the local ordinances of Burleigh and Emmons County. Specifically, the Commission made the following finding of fact:

Further testimony and evidence on this issue was received by the Commission. Upon further review, the Commission finds the ordinances of Emmons County contain setbacks that are more restrictive than state law setback requirements. Emmons County Ordinance number 23-01-01 subsection B(2)(b)(i) of Article VI mandates a setback of distance of 7,920 feet from an established residence. Burleigh County Ordinance number 23-003 Section 27(VI)(4) mandates a setback distance of two miles (10,560 feet) from any occupied structure. The Commission finds the ordinances of Emmons County and Burleigh County are unreasonably restrictive on their face under NDCC 49-22.1-13(2)(c) and are in direct conflict with state law under NDCC 49-22.1-03.

[Doc. 908]. Based on this finding, the Commission issued a “conclusion of law” in its final order of November 15, 2024:

Based on the above Findings of Fact, and its February 7, 2024, Order in this proceeding, the Commission concludes that NDCC Section 49-22.1-13 automatically supersedes and preempts any local land use or zoning regulations for a gas or liquid transmission facility route permit except for road use agreements. The Commission further concludes that the Ordinances of Burleigh County and Emmons County are unreasonably restrictive on their face under NDCC Section 49-22.1-13(2)(c).

[Doc. 908]. This finding of fact does not cure the Commission’s error.

42. As previously stated, a reversal of the Commission’s findings is appropriate under N.D.C.C. § 28-32-46 when the provisions of the AAPA are not followed. The AAPA requires that the agency “shall make and state concisely and explicitly its findings of fact.” N.D.C.C. § 28-32-39(1). An agency’s findings are adequate “when they enable a reviewing court to understand the agency’s decision.” *State v. Sandberg*, 2021 ND 39, ¶ 11, 956 N.W.2d 342; *Aggie Inv. GP v. Public Serv. Comm’n*, 470 N.W.2d 805, 813 (N.D. 1991)(“An administrative agency’s findings of fact must be adequate for a

reviewing court to understand the factual basis upon which the agency reached its decision.”).

43. In this case, the Commission may only supersede and preempt the requirements of a local political subdivision if the applicant proves by a preponderance of the evidence that the regulations or ordinances are unreasonably restrictive “in view of existing technology, factors of cost or economics, or needs of consumers regardless of their location, or are in direct conflict with state or federal laws or rules.” N.D.C.C. § 49-22.1-13(2)(c). This express limitation is very different from a broad and general limitation of being “unreasonably restrictive.” However the Commission’s express finding does not explain which statutory elements are triggered by these local ordinances or identify any evidence that would support its finding. Instead, the only specific reference is to “setbacks more restrictive than state law setback requirements” and findings that the ordinances of Emmons County and Burleigh County “are in direct conflict with state law under NDCC 49-22.1-03.” [Doc. 908].

44. To the extent the Commission is concluding a setback in excess of 500 feet conflicts with N.D.C.C. § 49-22.1-03, this conclusion is a mistake of law. The referenced section of the Century Code reads as follows:

The commission shall develop criteria to be used in identifying exclusion and avoidance areas and to guide the site, corridor, and route suitability evaluation and designation process. Except for oil and gas transmission lines in existence before July 1, 1983, areas within five hundred feet [152.4 meters] of an inhabited rural residence must be designated avoidance areas. This

criterion does not apply to a water pipeline. The five hundred foot [152.4 meter] avoidance area criteria for an inhabited rural residence may be waived by the owner of the inhabited rural residence in writing. The criteria also may include an identification of impacts and policies or practices which may be considered in the evaluation and designation process.

N.D.C.C. § 49-22.1-03(emphasis added). On its face, this statute does not state that the Commission or a local political subdivision is prohibited from designating setbacks of more than 500 feet. In fact, it says the opposite. It states the Commission “shall...develop criteria to be used in identifying exclusion and avoidance areas.” *Id.* The only discussion of a setback in this section is the requirement of a mandatory avoidance area of 500 feet from an “inhabited rural residence.” Surely the Commission does not take the position that 500 foot setback of “inhabited rural residences” is the only possible exclusion or avoidance permitted—elementary schools and hospitals and coal mines and inhabited town or city residences surely deserve setback considerations. In fact, the Commission has promulgated its own selection criteria for the siting of transmission facilities, which include the impact upon things like “family farms and ranches,” “human health and safety,” and “animal health and safety,” among other things. N.D.A.C. § 69-06-08-02(3) (PSC’s regulations regarding transmission facility corridor and route criteria). In this context, the Commission’s conclusion that N.D.C.C. § 49-22.1-03 sets a maximum 500 foot setback around all inhabited residences in Burleigh and Emmons County is a clear error of law.

D. The Commission's finding of "unreasonable restrictions" lacks evidentiary support.

45. A reversal of the Commission's findings is appropriate under N.D.C.C. § 28-32-46 when the provisions of the AAPA are not complied with, when the rules and procedures have not "afforded the appellant a fair hearing," when the "findings of fact made by an agency are not supported by a preponderance of the evidence," and when "conclusions of law are not supported by its findings of fact." N.D.C.C. §§ 28-32-46 (3), (4), (5), and (6). A trial court reviewing the fact findings of an administrative agency applies a deferential standard. As articulated by the Supreme Court:

We exercise restraint in deciding whether the agency's findings of fact are supported by a preponderance of the evidence, and we do not make independent findings or substitute our judgment for that of the agency. In reviewing an agency's findings of fact, we determine only whether a reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record.

Frokjer v. N. D. Bd. of Dental Exam'rs, 2009 ND 79, ¶ 22, *citing Bruder v. North Dakota Workforce Safety & Ins. Fund*, 2009 ND 23, ¶7, 761 N.W.2d 588.

46. At its most basic level, the determination of whether the ordinances of Burleigh County and Emmons County are "unreasonably restrictive" necessarily requires competent evidence on two issues: (1) how the specific ordinances restrict development, and (2) whether this restriction is reasonable "in view of existing technology, factors of cost or economics, or needs of consumers regardless of their location." N.D.C.C. § 49-22.1-13(2)(c). Regarding the first question, "admissibility of evidence in any adjudicative

proceeding before an administrative agency shall be determined in accordance with the North Dakota Rules of Evidence.” N.D.C.C. § 28-32-24(1); N.D.A.C. § 69-02-05-01 (Public Service Commission Administrative Code Chapter on evidence). The application of the Rules of Evidence may only be waived upon specific findings of the Commission. *Id.*; *Madison v. North Dakota Dept. of Transp.*, 503 N.W.2d 243, 246 (N.D. 1993)(noting “the Rules of Evidence are to be the norm in administrative practice, and that any deviation from that norm must be carefully considered and explained.”).

47. As previously stated, Appellants have no way of knowing which elements of N.D.C.C. § 49-22.1-13(2)(c) the Commission was concerned about, much less the evidence it relied upon. However, there is plenty of evidence in the record that there is a risk of death in the event of a rupture for any people within miles of the pipeline. *E.g.* [Doc. 303](PHMSA’s Satartia report); [Doc. 426], TR 163:14 to 164:24 (Testimony of Chief Briggs regarding Satartia CO₂ incident); [Doc. 746], 76:23 to 77:16; 80:22 to 87:19 (Steinbronn explaining that the closest main line valve is approximately 15 miles North of Bismarck, and that a rupture of that valve would lead to a plume that would reach the bottom of the hill in South Bismarck, depending on the wind); [Doc. 746], 136:4 to 137:24, [Doc. 747], 145:14-24 (Jason Howard GIS study).

48. Instead, the “evidence” that Summit relied on in support of the restrictive effect of the ordinances of Burleigh County and Emmons County appears to be two diagrams in a brief. [Doc. 423], pg. 5, 7. Summit’s lawyers

argued these diagrams—which are too small to even see clearly—show that the regulations of both Burleigh County and Emmons County completely restrict construction. [Doc. 423], pg. 5, 7; *see also* [Doc. 501](supplemental brief filed by Summit that includes a revised map to correct a “slightly inaccurate” map on page 4 of its original brief).

49. Appellants objected to Summit’s diagrams in its brief as lacking foundation, including identification of the author, when they were created, how they were created, the scale of the diagrams, and the lack of a supporting witness to testify to the truthfulness of the information and the methodology behind the creation of the diagrams. [Doc. 507], ¶ 3. Appellants also objected that they had no opportunity to conduct discovery or cross-examine any witnesses about the pictures. *Id.* Appellants pointed out to the Commission that findings of fact had to be supported by a preponderance of the evidence—citing N.D.C.C. § 28-31-46—and that the Rules of Evidence do not allow a picture in a brief and the lawyer’s argument to be admitted and considered as evidence. [Doc. 507], ¶ 3 (objecting based on Rules of Evidence 602 (personal knowledge required), 701 and 702 (requirements of opinion testimony), 801 (hearsay), 901 (authentication)). Other intervenors also objected to Summit’s pictures as factually inaccurate. [Doc. 510] (Bismarck intervenors arguing the picture was seriously misleading because Burleigh County only had zoning jurisdiction over 13 of 47 Townships). The Commission ignored Appellants’

objections⁷. A citation should not be necessary to establish that an argument based upon a picture pasted into a brief is not admissible evidence. However, this is not the most glaring omission from the Commission’s finding of “unreasonable restrictions”

50. Instead, the most glaring omission is the fact that Summit’s plume study—which is the only evidence reflecting upon the reasonableness of the restriction—is not part of the record. The importance of this information cannot be overstated. Jimmy Powell, the Chief Operating Officer for Summit, testified at a public hearing that Summit had performed plume study modeling that demonstrates how CO₂ would react in the event of an accidental release—including around Bismarck. [Doc. 210], Transcript of March 14, 2023 hearing, 67:8 to 68:19. However, Mr. Powell was unwilling to discuss specifics of how the plume would migrate and what the concentrations would be at various distances. [Doc. 210], 75:11 to 78:18.

Q. Okay. And would you agree with me that all of the following would not be minimal adverse effects on the citizens of Burleigh County and the state of North Dakota: a leak of the CO₂ at any location in North Dakota?

A. Again, Mr. Bakke, you’re asking me to speculate about any location, a type of leak, the volume released. And, again, it’s a low probability that we would have a leak. You’re asking me to speculate.

Q. Okay. What I’m asking you to do is assume a leak occurs,

⁷ Intervenors attempted to obtain an identification of this data through written discovery, including requesting the specific structures within certain distances of its proposed pipeline. [Doc. 617], Interrogatories 11-18. Summit did not provide the requested information. [Doc. 636]

and let's assume that leak occurs in Burleigh County. Do you agree that the likelihood would be, given the location Summit is proposing to route this pipeline, it would not have a minimal adverse effect?

- A. Again, you're asking me to speculate again. What I did commit to is that we'll share with the Commission our dispersement modeling results and our risk assessment that's associated with those. So that will clearly define what we perceive to be the risk.

[Doc. 210], 105:14-25, 106:1-7. Regarding the specific issue of setbacks, Mr. Powell testified that North Dakota statute requires a 500 foot setback. [Doc. 210], 145:4-7. Mr. Powell refused to provide specific testimony on whether 500 feet is an adequate setback for a CO₂ pipeline.

- Q. ...What did Summit's dispersement model say about a 500-foot setback?

- A. Again, I'm not going to speak to the specifics of the dispersement model, but we will share the results obviously with the PSC.

- Q. Could you at least say whether 500 feet of the rupture is bad for a human?

- A. I will say this, that the risk and the potential risks to the environment and equally or more importantly to humans and animals in the area of the pipeline is very important. **And so where we are—where we are routing our pipeline, we're comfortable with the risk associated with that. And then it's obviously to the PSC to determine if they agree.**

- Q. Now you said that a little bit earlier too and I was going to ask you about that. You said that you're comfortable with the risk. And essentially what you are saying is you're comfortable with the risk to us; right?

- A. That's fair.

[Doc. 210], 146:16-25, 147:1-10(emphasis added). This testimony frames the gaping hole in the record. If Summit’s plume study demonstrates that a failure of the pipeline could cause a mass casualty event in Bismarck for all people within three (3) miles of the failure, this information is critical to the reasonableness of the ordinance. A reasonable local government would be required to consider factors including the effect on property values, building plans, residential development, school placements, roadways, emergency services planning and costs, and the effect on anticipated future growth and development. If, on the other hand, the plume study shows that the only danger was limited to people within 100 feet of the pipeline and only for a brief period of time, that information might lead to a different conclusion. Neither Emmons County nor Burleigh County had a chance to craft a restriction based upon the plume study.

51. This is a critical distinction because the Commission is not empowered to supersede a local government’s reasonable restriction. N.D.C.C. § 49-22.1-13(2)(c). Stated another way, the key analysis under N.D.C.C. § 49-22.1-13(2)(c) is not whether the setback blocks part of the project. Instead, the legislature limited the Commission’s authority under N.D.C.C. § 49-22.1-13(2)(c) to a finding of whether the restriction is “unreasonably restrictive in view of existing technology, factors of cost or economics, or needs of consumers regardless of their location.” N.D.C.C. § 49-22.1-13(2)(c).

52. Finally, the fact that the plume study was found not subject to

disclosure under North Dakota's public records statute does not insulate the Commission's ruling from scrutiny. Specifically, the Commission determined that the plume study qualified as a "security system plan" under N.D.C.C. § 44-04-24(2)(b) pertaining to "critical infrastructure" under N.D.C.C. § 44-04-24(2)(a). [Doc. 526], pg. 2. As a result, the Commission ordered that the plume study was exempt from production under N.D.C.C. § 44-04-18, which generally identifies all records of public entity as public records "open and accessible for inspection." However, whether or not the plume study is exempt from disclosure as a public record under N.D.C.C. § 44-04-18 is a red herring because a government agency in North Dakota is not allowed to rely upon secret evidence.

53. Under the AAPA, "[n]o information or evidence except that which has been offered, admitted, and made a part of the official record of the proceeding shall be considered by the administrative agency, except as otherwise provided in this chapter." N.D.C.C. § 28-32-24(2)(emphasis added); *Wright v. N. D. Workers Comp. Bureau*, 2001 ND 72, ¶ 17, 625 N.W.2d 256, ("Under the Administrative Agencies Practices Act, N.D.C.C. ch. 28-32, information or evidence that has not been offered, admitted, and made a part of the official record of the proceeding generally may not be considered by the administrative agency."); *Insurance Servs. Office v. Knutson*, 283 N.W.2d 395, 399 (N.D. 1979))(Supreme Court determining the insurance commissioner exceeded his authority by relying upon letters not made a part of the

administrative agency record); *compare with* [Doc. 747], 157:13 to 158:1 (sworn testimony of Victor Schock, Director of Public Utilities, admitting the Commission had received the plume study in response to a request and that the Commission had refused to provide it to the parties); [Doc. 627] (Summit providing GIS data to the Commission as protected information).

54. There are two exceptions to the general rule of N.D.C.C. § 28-32-24(2) that allow an agency to supplement the record with evidence that was not admitted at the hearing. *See* N.D.C.C. § 28-32-44(4)(describing agency record on appeal to include among other things, evidence admitted at trial, offers of proof, information considered pursuant to N.D.C.C. § 28-32-25, and information received *ex parte*). The first procedural vehicle for getting non-admitted evidence into the record deals with *ex parte* communications under N.D.C.C. § 28-32-37. Although generally prohibited, the AAPA allows for *ex parte* communications to be considered by the agency provided there is a disclosure of the nature of the communication and the information provided, that all parties are provided an opportunity to view and rebut the *ex parte* information, and that the information is placed into the record. *See* N.D.C.C. § 28-32-37(6). This is probably the exception that most closely addresses Summit providing its plume study only to the Commission. However, the procedure in this statute was not followed. The second alternate procedural vehicle for an agency to consider evidence that is not admitted as part of the hearing deals with general information not presented at a hearing. As stated

in relevant part:

In any adjudicative proceeding, an administrative agency may avail itself of competent and relevant information or evidence in its possession or furnished by members of its staff, or secured from any person in the course of an independent investigation conducted by the agency, in addition to the evidence presented at the hearing. It may do so after first transmitting a copy of the information or evidence or an abstract thereof to each party of record in the proceeding. The agency must afford each party, upon written request, an opportunity to examine the information or evidence and to present its own information or evidence and to cross-examine the person furnishing the information or evidence. Any further testimony that is necessary shall be taken at a hearing to be called and held, giving at least ten days' notice...

N.D.C.C. § 28-32-25. Neither the *ex parte* procedure nor the additional evidence procedure in the AAPA was followed here. This should be dispositive. *Aggie Inv. GP*, 470 N.W.2d at 811 (“The powers and duties of the PSC must be exercised in accordance with the statutory provisions granting those powers.”).

CONCLUSION

55. Transparency is a foundational principle of good government. In this case, the Commission made an error of law that pushed local government from the table. It then compounded the resulting public anger and distrust by relying on secret information. This naked noncompliance with the requirements of the AAPA is error, and this Court should reverse the November 15, 2024 *Findings of Fact, Conclusions of Law, and Order*, remand this matter back to the Commission to allow for appropriate disclosure, discovery, and a hearing that creates a record as mandated by the AAPA, and for such other and further relief deemed just and proper.

Dated this 20th day of February, 2026.

Respectfully submitted,

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