

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

CIVIL NO. 08-2024-CV-03622

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,

vs.

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,

Appellees.

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An 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

Before the North Dakota Public Service Commission

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**BRIEF OF APPELLANT BURLEIGH COUNTY  
(ORAL ARGUMENT REQUESTED)**

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Randall J. Bakke (#03898)  
Special Assistant State’s Attorneys for  
Burleigh County  
300 West Century Avenue  
P.O. Box 4247  
Bismarck, ND 58502-4247  
(701) 751-8188

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APPEAL - Brief of Appellant Burleigh County  
(Oral Argument Requested)

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rbakke@bgwattorneys.com  
*Attorney for Appellant Burleigh County*

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## I. INTRODUCTION

[¶1] Appellant Burleigh County submits this brief in support of its appeal from the November 15, 2024 *Findings of Fact, Conclusions of Law, and Order* (Index #2) (“Challenged Order”), issued by the North Dakota Public Service Commission (“PSC”) in Case No. Case No. PU-22-391. Burleigh County requests the Court enter an order reversing the Challenged Order, denying the certificate of corridor compatibility and route permit, and awarding costs and attorneys’ fees to Burleigh County pursuant to N.D.C.C. § 28-32-50.

## II. STATEMENT OF THE CASE

[¶2] This appeal challenges the PSC’s November 15, 2024 Findings of Fact, Conclusions of Law, and Order granting SCS Carbon Transport LLC (“Summit”) a certificate of corridor compatibility and route permit to allow the construction of the 320-mile North Dakota leg of the longest carbon dioxide pipeline in the United States, to be used to transport supercritical carbon dioxide across the state, including near the densely populated City of Bismarck and across other lands in Burleigh County and other North Dakota counties. The proposed pipeline would be a very large diameter, ranging between 4.5” and 24” in outside diameter, and would operate at extremely high pressures, between 1,200 and 2,150 psi, and carry up to 936,000,000 standard cubic feet of carbon dioxide per day. (Index # 132 at p. 3.) The entire proposed Summit pipeline route through multiple states is to travel 2,500 miles in total, making it the longest high pressure CO2 pipeline in the U.S. (Index #280 [W134]).<sup>1</sup>

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<sup>1</sup> Since Summit’s application for its pipeline in North Dakota, Summit has faced significant resistance to its CO2 pipeline from other states. South Dakota has rejected Summit’s application (SD House Bill 1052; <https://mylrc.sdlegislature.gov/api/Documents/284078.pdf#page=475>) and therefore Summit has reconfigured the pipeline in an alternative route to avoid South Dakota and North Dakota entirely, using a new route through Nebraska into Wyoming, with CO2 to be sequestered in eastern Wyoming. <https://www.desmoinesregister.com/story/money/agriculture/2025/10/11/summit-says-western->

[¶3] The Challenged Order represents a sharp departure from the PSC’s prior denial of the same project, rests on legal errors and untested evidence, and disregards statutory protections for local land use authority, public safety, and meaningful public participation.

[¶4] In its earlier August 4, 2023 order denying Summit’s application, the PSC found that Summit had failed to demonstrate the proposed project would produce minimum adverse impacts on the welfare of North Dakota citizens. The PSC specifically cited deficiencies in Summit’s route analysis around Bismarck, unresolved safety concerns, and an inadequate evidentiary record. Rather than requiring Summit to cure those deficiencies, the PSC reversed course on reconsideration without ensuring that the rehearing proceedings corrected the defects previously identified, and without sufficient evidence to support the PSC’s decisions on critical safety issues.

[¶5] Central to the PSC’s approval of the project was Summit’s supposed carbon dioxide dispersion modeling, which purportedly addressed public safety risks associated with a potential pipeline rupture. At Summit’s request, the PSC shielded the dispersion model from public disclosure, except for a few hand-selected public individuals, and prohibited any questioning of witnesses regarding the model’s assumptions, inputs, analysis, or results. Despite relying on Summit’s safety assurances, the PSC denied Burleigh County and the public any opportunity to examine, test, or challenge the model, even after evidence showed that Summit selectively disclosed the same modeling to private individuals and publicly released similar modeling in another jurisdiction where the pipeline is proposed to be constructed. The PSC’s reliance on undisclosed and untested evidence deprived Burleigh County of a fair hearing and violated basic principles of administrative due process.

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[states-are-destination-options-for-pipeline/86622880007/?utm\\_campaign=trueanthem&utm\\_medium=social&utm\\_source=facebook](https://www.regulations.gov/document/86622880007/?utm_campaign=trueanthem&utm_medium=social&utm_source=facebook)  
k).

[¶6] The PSC also erred as a matter of law by declaring Burleigh County’s zoning ordinances automatically superseded and preempted by state law. Burleigh County lawfully adopted setback requirements and other requirements for hazardous liquid pipelines pursuant to its statutory zoning authority. Nevertheless, the PSC concluded, without making the findings required by statute, that Burleigh County’s ordinance was unreasonably restrictive and in direct conflict with state law. In doing so, the PSC misinterpreted N.D.C.C. § 49-22.1-13, ignored mandatory statutory conditions governing preemption, and treated minimum state siting criteria as maximum allowable setbacks. The PSC’s approach renders multiple statutory provisions meaningless and unlawfully strips local governments of authority expressly preserved by the Legislature.

[¶7] The record further demonstrates that Summit failed to perform a legitimate analysis of alternative southern and eastern routes around Bismarck, despite the PSC’s express directive in its prior denial order. The purported reroutes approved by the PSC encroach upon Bismarck’s growth corridor, pass near or through existing residential developments and institutional uses, and in some instances move the pipeline closer to populated areas. Summit did not coordinate with affected political subdivisions, did not conduct meaningful geological or land-use analysis, and did not demonstrate that safer, more remote routing options were infeasible. The PSC nevertheless approved these routes without addressing substantial testimony regarding impacts on public safety, future development, and property values.

[¶8] Finally, the PSC approved the project without adequately considering emergency preparedness, public health impacts, insurance coverage gaps, or the significance of pending federal safety regulations governing carbon dioxide pipelines. Testimony from local emergency officials established that Summit had not provided sufficient information, training, or resources to prepare for a potential CO<sub>2</sub> leak/release, yet the PSC approved the project while deferring critical

safety considerations. Taken together, these errors reflect a decision that is unsupported by the record, contrary to law, and not the product of reasoned decision-making.

[¶9] Burleigh County seeks reversal of the Challenged Order, remand with instructions to deny Summit’s application, and an award of attorney’s fees and costs because the PSC acted without substantial justification.

### **III. PROCEDURAL HISTORY**

[¶10] On October 17, 2022, SCS Carbon Transport LLC (“Summit”) filed with the PSC a *Consolidated Application for a Certificate of Corridor Compatibility and Route Permit and Application for Waiver or Reduction of Procedures and Time Schedules* (Index #124-125, 132-135, 143-146, 149-156), seeking a certificate of corridor compatibility, route permit, and waiver of procedural and time schedules. After numerous public hearings, the PSC issued *Findings of Fact, Conclusions of Law, and Order* on August 4, 2023, denying Summit’s applications. (Index #375). Among other findings, as part of the denial of the applications, the PSC found that Summit “has not provided sufficient evidence to demonstrate that the location, construction, operation and maintenance of the Project will produce minimum adverse impacts upon the welfare of the citizens of North Dakota with the existing record.” (*Id.* at p. 11).

[¶11] On August 18, 2023, Summit filed a *Petition for Reconsideration, Notice of Route Adjustment and Request for Limited Rehearing*. (Index #531). The PSC granted Summit’s petition on September 15, 2023, granting reconsideration and a rehearing. (Index #549).

[¶12] Summit moved on June 1, 2023 for an order declaring Burleigh and Emmons County ordinances to be superseded and preempted by N.D.C.C. § 49-22.1-13 (Index #423), and renewed its motion on September 29, 2023 (Index #552). Burleigh County filed a *Petition to Intervene*

(Index #523) on July 31, 2023 and a second *Petition to Intervene* (Index #536) on August 30, 2023, which were granted by the PSC on September 5, 2023. (Index #542).

[¶13] Burleigh County opposed Summit's motion to declare Burleigh and Emmons County ordinances to be superseded and preempted, both in briefing and at the December 21, 2023 hearing before the PSC. (Index #568). The PSC issued an interlocutory order on February 7, 2024, finding that N.D.C.C. § 49-22.1-13 automatically supersedes and preempts any local land use or zoning regulations for a gas or liquid transmission facility route permit. (Index #586). The PSC made no factual findings in its order, concluding only:

The Commission concludes that, based on the plain language of N.D.C.C. § 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.

(*Id.* at p. 3).

[¶14] On November 15, 2024, the PSC issued the Challenged Order, finding with respect to the county ordinances:

Upon further review, the Commission finds the ordinances of Emmons County and Burleigh 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 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 N.D.C.C. Section 49-22.1-03.

(Index #2 at p. 11, ¶ 19).

[¶15] Ruling on an opposed *Application for Protection of Information*, on August 4, 2023, the PSC issued an order protecting from public disclosure all information relating to Summit's

dispersion/plume modeling in the event of a release of carbon dioxide from the pipeline (“Dispersion Model”), including information related to the preparation of an emergency response plan and integrity management plan required by Pipeline and Hazardous Materials Safety Administration (PHMSA) regulations. (Index #4). The PSC protected the Dispersion Model from public disclosure despite the fact that Summit had already voluntarily shared the Dispersion Model information with both government officials and private parties. On May 27, 2024, Burleigh County filed a *Motion for Reconsideration of Order on Protection of Information, or in the Alternative, for Leave to Question Re: Dispersion Model*, requesting the Dispersion Model be made available to the public at that time. (Index #695). Additionally, Burleigh County requested that, to the extent the PSC concludes any portion of the Dispersion Model actually constitutes protectable information, such limited information should be redacted with the remainder of the Dispersion Model to be disclosed to the public. *Id.* In the alternative, Burleigh County requested leave to question Summit and witnesses about the Dispersion Model results and criteria utilized in the Dispersion Model to assist the PSC and the public to gauge the reliability of the Dispersion Model results. *Id.*

[¶16] The PSC held various hearings on the merits of Summit’s petition, including hearings at the Heritage Center in Bismarck, North Dakota, and other locations, wherein Burleigh County and various other parties including other intervenors appeared through legal counsel, who made arguments and presented witnesses in opposition to Summit’s petition. (Index #s 209, 226, 325, 426-427, 496, 508, 568, 666-669, 679, 729, 740-753). Throughout the proceedings, counsel for Burleigh County and others were prohibited from discussing or questioning witnesses about the Dispersion Model. (Index #741 at p. 172, l. 14 – p. 176, l. 13; Index #743 at p. 98, l. 1 – p. 106, l. 8.) Thus, Summit’s claims about the Dispersion Model went completely untested at the hearings.

[¶17] In the Challenged Order, without any discussion or explanation, the PSC also denied Burleigh County’s motion for reconsideration of the order protecting the Dispersion Model from public disclosure. (Index# 2 at p. 18, ¶ 8). The PSC made various additional findings and conclusions, challenged in this appeal and discussed below, and granted Summit’s certificate of corridor compatibility, route permit, and application for waiver of procedural and time schedules. (See Index #2).

#### IV. LAW AND ARGUMENT

##### A. Standard of Review

[¶18] This appeal from a decision of the PSC is governed by the Administrative Agencies Practice Act, N.D.C.C. ch. 28-32. *Nodak Elec. Coop., Inc. v. N. Dakota Pub. Serv. Comm'n*, 2022 ND 225, ¶ 7, 982 N.W.2d 592 (citing *Cap. Elec. Coop., Inc. v. City of Bismarck*, 2007 ND 128, ¶ 30, 736 N.W.2d 788). Within that act, section 28-32-46 of the North Dakota Century Code sets the standard of review in this case, stating:

A judge of the district court must review an appeal from the determination of an administrative agency based only on the record filed with the court. After a hearing, the filing of briefs, or other disposition of the matter as the judge may reasonably require, the court must affirm the order of the agency unless it finds that **any of the following** are present:

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.

N.D.C.C. § 28-32-46 (emphasis added). “The PSC's decision on questions of law is fully reviewable.” *Nodak*, 2022 ND 225 at ¶ 7 (citing *Cap. Elec.*, 2007 ND 128 at ¶ 31). Importantly, this Court need not find that every factor weighs in Burleigh County’s favor to warrant reversal. The governing test is disjunctive. *See* N.D.C.C. § 28-32-46. Establishing any one of the factors is sufficient to demonstrate the error requires reversal. As discussed below, Burleigh County has done far more than that. Multiple independent factors weigh strongly in favor of relief, and each would justify reversal on its own.

**B. Release of carbon dioxide is extremely dangerous and Summit was required to perform appropriate dispersion modeling**

[¶19] Carbon dioxide is an asphyxiant that is toxic to both humans and animals. (Index #295 at p. 1). An accidental release of carbon dioxide from a pipeline as large as Summit’s proposed pipeline is extremely dangerous. In that regard, the Court’s attention is directed to the pipeline plume testing video from Norway in the record on appeal, which demonstrates the explosive power released when supercritical carbon dioxide in a pipeline is exposed to atmospheric pressure during a leak, resulting in an explosion and plume of deadly gas that disperses rapidly through the air, quickly covering a large area. (Index #364).

[¶20] In a well-known incident, a 24-inch carbon dioxide pipeline exploded about a mile from the town of Satartia, Mississippi in 2020, releasing 31,405 barrels of carbon dioxide. (Index #303 at p. 3). The 50 residents of Satartia were evacuated, along with 150 others from the neighboring

areas. *Id.* Forty-five people sought medical attention at local hospitals, including individuals who were caught in the vapor cloud while driving a vehicle. *Id.* Gerald Briggs, a fire chief for Warren County, Mississippi, testified at the PSC in this matter about his involvement in responding to the Satartia disaster and observing people who were rescued near Satartia, laying on the ground and vomiting. (Index #426 at p. 161, l. 15 - p. 163, l. 13). As Briggs approached Satartia the first thing he noticed was all the disabled vehicles sitting in the roadways. (*Id.* at p. 163, ll. 14-23). This is because CO<sub>2</sub> displaces oxygen shutting down all combustion power vehicles and equipment. (*Id.* at p. 156, l. 11 – p. 157, l. 11). Briggs testified that people attending an outdoor barbeque in Satartia were discovered having suddenly collapsed. (*Id.* at p. 163, ll. 14-23). Briggs testified that he found three unconscious individuals in a vehicle on Perry Creek Road. (*Id.* at p. 166, l. 10 – p. 168, l. 1). He testified he felt it necessary to break the glass windows of the vehicle, to remove the individuals from the vehicle and immediately get them to a location where they could receive medical treatment. (*Id.* at p. 168, ll. 2-24). Briggs and his staff made the decision to take all three individuals with them on their UTV, even though they barely all fit in the UVT, in order to save their lives. Briggs testified that if he left one of the individuals behind, he felt they would not be alive by the time he returned to get them. All three individuals were hospitalized as a result of the incident. (*Id.* at p. 169, l. 18 – p. 171, l. 25). Briggs testified regarding equipment used by first responders to safely respond to a CO<sub>2</sub> leak. He indicated the most important item required to respond is a self-contained breathing apparatus, known as a SCBA or “Air-Pack”. (*Id.* at p. 144, ll. 17-24). Briggs also testified along with the SCBA, he had about 20 spare breathing air (oxygen) tanks. (*Id.* at p. 152, l. 22 – p. 153, l. 2).

[¶21] The possibility of a leak from Summit’s proposed pipeline is exacerbated by harsh North Dakota weather. Expert witness Jeff Steinbronn testified before the PSC that a supercritical carbon

dioxide pipeline in North Dakota poses serious dangers due to extreme cold, material brittleness, and the behavior of carbon dioxide if released. (Index #746 at p. 60, l. 20 – p. 88, l. 8). He testified that carbon steel undergoes a brittle fracture transformation at temperatures between 0 degrees and -20 degrees Fahrenheit, which he stated are commonly reached in North Dakota winters, making above-ground valves and even buried pipe (if within or above the frost line) susceptible to sudden cracking. (*Id.* at p. 71, l. 8 – p. 75, l. 19). He testified that if a brittle fracture occurred, the high-pressure supercritical carbon dioxide would rapidly depressurize, flash into gas, super cool the pipe, and potentially propagate a rupture, releasing large volumes of carbon dioxide. (*Id.* at p. 67, ll. 12-20; p. 75, ll. 6-19; p. 85, l. 15 – p. 88, l. 5). Using a 15-mile pipeline segment as an example, he estimated that a rupture could release enough carbon dioxide to create hazardous concentrations across Bismarck, explaining that carbon dioxide, being heavier than air, would flow downhill, collect in low areas, displace oxygen, and pose an acute asphyxiation risk to humans. (*Id.* at p. 81, l. 4 – p. 88, l. 8). Overall, Steinbronn characterized the combination of cold-induced brittleness, stored pressure energy in supercritical carbon dioxide, and the gas's density and physiological effects as creating what he viewed as a significant threat to public safety. (*Id.* at p. 60, l. 20 – p. 88, l. 8).

[¶22] As part of the permitting process, carbon dioxide pipeline operators are required to evaluate how released carbon dioxide would disperse in the atmosphere by estimating the resulting plume using air dispersion modeling. (Index #393 at p. 7). Air dispersion modeling is a process that predicts the movement of a gas or vapor following a release. *Id.* Carbon dioxide travels away from the release point as a plume and gradually dissipates with distance. *Id.* Air dispersion models use computer algorithms to forecast the plume's direction, speed, and concentration until it disperses into the surrounding air. *Id.* Dispersion models also incorporate the effects of topographical

features and are used by pipeline operators to assess potential risks to people and the environment along the pipeline. *Id.* Dispersion models consider variables such as release rate, leak profile, wind speed and direction, atmosphere stability, humidity, and land use. *Id.*

[¶23] In light of the extreme danger posed by Summit's proposed pipeline, numerous individuals testified before the PSC in opposition to Summit's proposed pipeline in this case, citing safety concerns, particularly near the City of Bismarck, and concerns about the impact on real estate values. (Testimony by Brian Bitner [Index #494 at p. 316, ll. 10-21; p. 317, ll. 7-20; p. 319 at l. 12 – p. 320 at l. 5]; Testimony by Chad Moldenhauer [Index #495 at p. 551, l. 24 – p. 554, l. 17]; Testimony by Chad Wachter [Index #746 at p. 54, l. 12 – p. 55, l. 2]). Nevertheless, the parties and the public-at-large were not permitted by the PSC to view Summit's Dispersion Model at all, discuss it at the hearings, or question Summit witnesses about the Dispersion Model at the hearings in this matter.

**C. The PSC erred by protecting Summit's Dispersion Model from release to the public.**

[¶24] The Board of Commissioners of Burleigh County specifically requested that the PSC make Summit's Dispersion Model available to the public and/or to the governing bodies of the political subdivisions which encompass the requested route of the pipeline (Index #695), which the PSC denied, choosing instead to block all public access to the Dispersion Model and to prohibit questioning witnesses about the Dispersion Model at the PSC hearings (Index #4; Index #741 at p. 172, l. 14 – p. 176, l. 13; Index #743 at p. 98, l. 1 – p. 106, l. 8). Query how Burleigh County could have possibly been afforded a fair hearing (*see* N.D.C.C. § 28-32-46(4)) when it could not even see key evidence nor question witnesses to test the veracity of the evidence? Burleigh County, and other opponents of Summit's application, never got to see the Dispersion Model nor have the opportunity to probe the results of the Dispersion Model. Thus, Burleigh County had no

meaningful opportunity at the PSC hearings to address public safety in the event of a carbon dioxide leak.

[¶25] The Dispersion Model at issue included information related to dispersion modeling in the event of a release of carbon dioxide from the proposed pipeline. However, it should be noted that no proof was ever provided by Summit that it had in fact completed a real-time, video Dispersion Model of the type that would simulate actual conditions, including topography, wind speed and direction, appropriate criteria related to pipe dimension specifications, CO2 volume and pressure, and other salient criteria for Burleigh County or anywhere else on the proposed pipeline route in North Dakota. As the parties and the public were not been permitted to view the Dispersion Model, discuss it at the hearings, or question Summit witnesses about the Dispersion Model (Index #741 at p. 172, l. 14 – p. 176, l. 13; Index #743 at p. 98, l. 1 – p. 106, l. 8), they had no ability to identify or question what criteria were used for the Dispersion Model or whether it is representative of normal expected conditions in Burleigh County.

[¶26] Summit argued to the PSC the Dispersion Model was related to the preparation of an emergency response plan and integrity management plan in accordance with the Pipeline and Hazardous Materials Safety Administration (PHMSA) (49 CFR Part 1520), and requested the PSC protect the information from public disclosure pursuant to N.D.C.C. § 44-04-24 as a security system plan on critical infrastructure. (Index #4 at ¶1). Essentially, Summit argued the information should be protected from disclosure to prevent its use by bad actors, which the PSC erroneously agreed with. The PSC concluded the Dispersion Model constituted a “security system plan” pertaining to “critical infrastructure” under North Dakota’s open records laws (N.D.C.C. § 44-04-24(2)), and therefore should be protected from public disclosure. (Index #4 at ¶¶ 5, 6). The PSC based its decision upon the following rationale:

The disclosure of plume modeling could provide information on where damaging or vandalizing the pipeline by a bad actor would have a debilitating impact on security and state public health and safety. Prevention of receipt of the information by bad actors necessitates the PSC limiting access to the information.

*Id.* at ¶ 7; *see also id.* at ¶ 12 (“The Commission concludes that the information is a security system plan for critical infrastructure that may be exempt from public disclosure.”) Dispersion modeling had nothing to do with a “security system plan”. Instead, it was supposed to address what would happen in the event of a CO2 leak, i.e. where the CO2 plume would travel, which direction, how far, etc. The PSC also incorrectly noted in its order:

The 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 who need to know the information to fulfill their responsibilities in connection with the subject matter of the information.

*Id.* at ¶ 10.

i. **The Dispersion Model was already selectively disclosed by Summit to the public**

[¶27] The record in this case is clear that Summit selectively disclosed the Dispersion Model to a few select members of the public, but the PSC nevertheless protected the Dispersion Model from disclosure to the public at large, and protected it from any scrutiny whatsoever at the PSC hearings. Counsel for Appellants were precluded by the PSC rulings from asking any questions whatsoever at any PSC hearing regarding the details of the purported Summit plume modeling. It was inappropriate for the PSC to consider the Dispersion Model without affording the parties and the public at large an opportunity to challenge its reliability.

[¶28] Chad Wachter (“Wacher”) is a private land developer in Burleigh County and elsewhere in North Dakota<sup>2</sup>, who testified at the PSC hearing. (Index #494 at p. 376, l. 25 – p. 378, l. 17).

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<sup>2</sup> Wachter was previously a party to this action but withdrew from the case on March 7, 2024. (Index #598).

Wachter testified he was contacted by Ron Ness (“Ness”) of the North Dakota Petroleum Council<sup>3</sup> to attend a meeting with Summit representatives on January 24, 2024. (Index #746 at p. 10, l. 17 – p. 11, l. 7). Ness told Wachter he has negotiated with Summit to take a look at the Dispersion Model. (*Id.* at p. 10, ll. 22-25). In attendance at the meeting were Justin Kringstad (Director of the North Dakota Pipeline Authority), Wade Boeshans of Summit, Ness (President of the North Dakota Petroleum Council), Brady Pelton (Vice President and General Counsel of the North Dakota Petroleum Council), and Wachter. (*Id.* at p. 11, ll. 13-17). Wachter testified that Ness is not employed by Summit. (*Id.* at p. 11, ll. 20-23). At the meeting, a Summit representative showed Wachter Summit’s Dispersion Model. Wachter was not told that the information he received was national security information. (*Id.* at p. 17, ll. 2-8). Summit representatives did not tell Wachter that he had to maintain the confidentiality of the Dispersion Model information. (*Id.* at p. 17, ll. 9-20). Wachter was asked at the PSC hearing whether he was concerned with what he saw in the presentation of the Dispersion Model. (*Id.* at p. 17, l. 21 – p. 18, l. 2). He testified it would depend on if the information he saw was accurate and he wants it tested, verified, and studied. (*Id.* at p. 18, ll. 3-7). He indicated he expressed this concern many times in many conversations with Summit representatives. (*Id.* at p. 18, ll. 8-13).

[¶29] Wachter further testified there was another meeting with Summit representatives on February 21, 2024 at the University of Mary. (Index #746 at p. 18, l. 16 – p. 19, l. 14). In attendance were Bruce Rastetter (founder and executive of Summit Agricultural Group), Wade Boeshans of Summit, Andrew Feist (Assistant to the Executive Vice President of the University of Mary), Jerome Richter (Executive Vice President and Chief of Staff at the University of Mary), and Scott

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<sup>3</sup> The North Dakota Petroleum Council is a governmental relations support group for the oil and gas industry and represents private companies.

Hennen (radio talk show host from Fargo). (*Id.* at p. 19, ll. 15-18). Rastetter gave a history of himself and the project from his point of view, discussed dispersion modeling, and worst case scenarios. (*Id.* at p. 20, ll. 4-10). Wachter testified it is important for information relating to the Dispersion Model to be shared with the public. (*Id.* at p. 21, ll.22-25 and p.22, ll. 1-6). Wachter testified it would be nice to have someone more qualified than him to take a look at the model. (*Id.* at p. 22, ll.10-15). Wachter testified the proposed re-route of the pipeline is within the growth corridor of the City of Bismarck. (*Id.* at p.26, ll.19-22). He has significant concerns about the Summit pipeline route negatively affecting future development in and around the City of Bismarck. (*Id.* at p.26, ll.17-22).

[¶30] Summit apparently had no problem showing the Dispersion Model to certain private citizens, including Wachter, Ness, and others, but would not share it at public meetings of the PSC, and the PSC inappropriately protected the Dispersion Model from scrutiny at the hearings. Further, Summit failed to share important details about its Dispersion Model with Burleigh County emergency responders. Mary Senger (“Senger”), the Emergency Manger for Burleigh County and Emmons County. Senger testified regarding a meeting between Summit representatives and Burleigh County first responders on November 27, 2023. Senger testified that many of the slides presented by Summit contained narratives that she was unable to read. (Index #743 at p. 97, ll. 9-11). The PowerPoint slides were all two-dimensional images. (*Id.* at p. 97, ll. 14-15). Alex Lange of Summit was the primary presenter at the meeting. However, whenever questions were asked of him, he would defer to other Summit representatives. (*Id.* at p. 97, ll. 20-22). There was no real time modeling, no video, and no simulation to show what would happen if the CO2 pipeline failed. (*Id.* at p. 98, ll. 1-8). Senger testified the information provided by Summit at the meeting was not sufficient for either Burleigh County or Emmons County. (*Id.* at p. 106, ll. 12-19). For example,

no handouts were provided, no written materials supplied, and the final route was not provided. (*Id.* at p. 106, ll. 22-25 and p. 107, l. 1). Burleigh County requested a copy of the slideshow that was shown at the meeting, but Summit refused. (*Id.* at p. 107, ll. 16-21). Senger testified that it is important that the public be prepared in the event of a CO2 leak from the proposed pipeline. (*Id.* at p. 118, ll. 17-21).

[¶31] Senger wanted to provide preparedness knowledge to the public. (Index #743 at p. 118, ll. 22-25 and p. 119, ll. 1). However, no training, equipment, or sufficient information was provided by Summit. (*Id.* at p. 119, ll. 2-6). Senger testified it is her understanding that only Summit representatives could shut off the mainline valves in the event of an emergency, and she was concerned about the proximity and sufficiency of Summit's staff in relation to the mainline valves. (*Id.* at p. 122, ll. 12-25 and p. 123, ll. 1-2). Senger testified she was initially told the mainline valves were twenty miles apart, but she received no additional information in that regard. (*Id.* at p. 131, ll. 13-16). Senger testified her experience interacting with representatives of Summit were less frequent and less helpful than her prior interactions with representatives of the Dakota Access Pipeline/DAPL representatives. (Index #743 at p. 130, l. 5 – p. 131, l. 7). While Summit presented some information about its Dispersion Model at the November 27, 2023, meeting, it did not provide the model to Burleigh County representatives for evaluation, nor did it make information from its Dispersion Model available to the public, other than a few individuals, Chad Wachter, Ron Ness, Scott Hennen, Jerome Richter, Brady Pelton, and Andrew Feist.

[¶32] Brian Bitner (“Bitner”) has been a Burleigh County Commissioner for the last seventeen years. Bitner testified on behalf of and with the authorization of the entire Burleigh County Commission. Bitner testified he was also present at the November 27, 2023 meeting Summit representatives held with first responders. (Index #744 at p. 185, ll. 18-21). Bitner testified he was

concerned that the Dispersion Model created by Summit has not been provided to Burleigh County representatives for evaluation. Bitner's testimony underscores a fundamental procedural defect in the PSC's handling of the Dispersion Model. Burleigh County is not a peripheral stakeholder; it is a directly affected local government with statutory responsibilities for land use planning, emergency management, and public safety. By denying Burleigh County access to the Dispersion Model, the PSC deprived Burleigh County of any meaningful opportunity to evaluate the risks posed by the proposed pipeline or to determine whether Summit's modeling assumptions and conclusions were reasonable, complete, or reliable. This exclusion is particularly troubling given that Bitner testified on behalf of the entire Burleigh County Commission, reflecting institutional, not merely personal, concern regarding the absence of critical safety information relating to the proposed Summit CO2 pipeline.

[¶33] The PSC's refusal to allow Burleigh County to review the Dispersion Model effectively required Burleigh County to accept Summit's safety assurances on blind faith. Administrative agencies may not rely on undisclosed evidence while simultaneously denying affected parties the ability to test, challenge, or rebut that evidence. Doing so violates basic principles of due process and undermines the integrity of the PSC's decision-making process. The procedures of the PSC relating to Summit's Dispersion Model prevented Burleigh County from receiving a fair hearing. Burleigh County's inability to evaluate the Dispersion Model also prevented it from determining whether additional conditions, route modifications, or safety measures were necessary to protect existing and future residents in and around Bismarck.

- ii. **The very limited testimony allowed by the PSC about the Dispersion Model raises serious concerns about the model, but the PSC did not allow Burleigh County or others to review the Dispersion Model or to probe the details with witnesses**

[¶34] Summit presented testimony at the PSC hearing from Alex Lange (“Lange”), the Director of Engineering for Summit, who gave the presentation to Burleigh County emergency responders on November 27, 2023. (Index #749 at p. 152, ll. 8-12). Lange admitted during his testimony that he had no dispersion modeling experience prior to working on the dispersion model for the subject pipeline. (*Id.* at p. 129, l. 10 – p. 130, l. 1). As with other Summit witnesses, Lange testified that he was confident in Summit’s dispersion model, but failed to provide any details in order for that claim to be evaluated or tested, and he does not have the prior experience to be able to make such a confident claim. During his testimony, Lange was questioned regarding Exhibit BC119 (Index #865), which is a guide developed by the American Petroleum Institute and Liquid Energy Pipeline Association with input from the National Association of State Fire Marshals, which Summit provided to Burleigh County as a best practices document. Exhibit BC119 (Index #865) was published in August 2023 and specifically addresses CO2 pipelines, so it is a recent and relevant publication. Despite describing Exhibit BC119 (Index # 865) as a best practices guideline, Lange admitted Summit did not always follow the best practices guideline in this matter. (Index #749 at p. 154, ll. 5-15). Summit provided this document to Burleigh County first responders without indicating Summit did not intend to fully comply.

[¶35] On page 10 of Exhibit BC119 (Index #865), the best practices guide indicates “Similar to wind, it is particularly problematic when the direction of the terrain relief is in the direction of a populated area or HCA (High Consequence Area).” Further, it indicates that, to truly understand whether a nearby HCA could be affected by a CO2 release, computational fluid dynamics (“CFD”) modeling should be added in order to determine the additional dispersion distance. However, despite admitting that north and east of Bismarck the terrain slopes significantly toward the populated center of Bismarck, Lange admitted Summit did not make use of any CFD modeling

software to evaluate this issue. (Index #749 at p. 160, l. 5 – p. 162, l. 9). Summit chose not to purchase or utilize the additional software package to allow it to do the proper CFD modeling under its own best practices document provided to Burleigh County. Further, Summit did not inform Burleigh County that Summit failed to follow these best practices guidelines with respect to the use of CFD to analyze the significant topographic relief in the direction of a populated city center. (*Id.* at p. 162, ll. 15-19). Lange agreed in his testimony that CFD may be necessary, but Summit did not do it in this case. (*Id.* at p. 162, l. 20-25).

[¶36] Lange indicated Summit was comfortable with the Dispersion Model that it created, despite the fact that Lange admitted to not conducting all the analysis and testing required under the best practices document provided to Burleigh County. (Index #749 at p. 163, ll. 1-9). Lange and the other Summit representatives projected a sense of confidence in their dispersion model, despite a lack of any prior experience creating dispersion models for CO2 pipelines, and without providing any relevant details to the public or to Burleigh County to evaluate their claims.

[¶37] Summit also presented testimony from David Daum (“Daum”), the Senior Director of Health, Safety, Security, and Environmental for Summit. (Index #209 at p. 209, l. 24 – p. 210, l. 2). Daum admitted in his testimony he has never previously worked on any CO2 pipeline project personally. (Index #749 at p. 224, l. 24 – p. 225, l. 3). Daum is the individual at Summit who provided the best practices document (Index #865, BC119) to Senger of Burleigh County. (Index #749 at p. 225, ll. 9-25). Daum admitted Summit has no public awareness program to inform the public regarding safety and the dangers associated with the proposed pipeline. (*Id.* at p. 227, ll. 13-20). In his testimony, Daum acknowledged provisions in the best practices document (Index #865, BC119) require plans with respect to schools, hospitals, etc., response drills and exercises,

emergency response training. Daum indicated these best practices have not been followed by Summit. (Index #749 at p. 231, l. 8 – p. 232, l. 22).

[¶38] Summit also presented testimony from Wade Boeshans (“Boeshans”), who testified regarding the November 27, 2023 meeting with Burleigh County first responders and emergency managers. (Index #740 at p. 129, l. 4 – p. 130, l. 4). He testified a PowerPoint slide presentation was used during the meeting, but it was two-dimensional, no videos were shown, slides were projected on the screen, but no simulations on dispersion modeling were shown. No videos were shown nor any other visual media to depict a dispersion plume. (Index #740 at p. 131, l. 25 – p. 132, l. 13). The slides shown at that meeting did not account for changes in topography. (Index #741 at p. 165, l. 7 – p. 166, l. 9). It accounted for speed, but not direction. (*Id.* at p. 167, l. 24 – p. 168, l. 3). There was no variable for humidity. (*Id.* at p. 167, ll. 4-6). Summit provided an unusable map of the pipeline route with its Petition for Reconsideration. (Index #153 at p. 153, l. 18 – p. 154, l. 13 and p. 155, ll. 1-16; Index #847 [BC-100]). Further, Summit failed to provide usable shapefiles to Burleigh County or any other parties to this action to allow them to evaluate the route and its safety or any other concerns. (Index #745, p. 50, ll. 16-20; p. 61, ll. 7-11).

[¶39] It should be noted, while Summit was unwilling to release its Dispersion Model to the public in North Dakota, the PSC enabled that unwillingness, Summit has made its dispersion modeling for a smaller pipeline (4-inch feeder pipeline) in Minnesota available to the public, which demonstrates that Summit’s sensitive security excuse for not disclosing it is a false narrative, which the PSC should not have accepted. (Index #856 [BC109]). Summit’s decision to publicly disclose dispersion modeling for its Minnesota pipeline fatally undermines its claim that disclosure of similar modeling in North Dakota would pose a genuine security risk. If plume modeling truly constituted sensitive security information capable of being exploited by bad actors, Summit would

not have released substantially similar modeling materials to the public in another jurisdiction. The selective invocation of “security” in North Dakota, while abandoning that rationale in Minnesota, reveals that Summit’s confidentiality claim was driven by its desire to hide any meaningful dispersion modeling information from Burleigh County Emergency Management personnel and the public, rather than legitimate safety concerns.

[¶40] This inconsistent treatment also exposes the arbitrariness of the PSC’s decision. An agency may not accept a regulated entity’s assertion of confidentiality at face value when the entity’s own conduct demonstrates that the information can be safely disclosed. The PSC’s acceptance of Summit’s position, despite clear evidence that Summit itself does not treat dispersion modeling as inherently sensitive, constitutes an abuse of discretion. It further suggests that the PSC failed to independently evaluate whether the statutory exemption under N.D.C.C. § 44-04-24 actually applied, instead deferring to Summit’s unsupported narrative.

**iii. North Dakota law does not protect the Dispersion Model.**

[¶41] The concept of public notice and open access to public proceedings and information is enshrined in North Dakota's open records statutes, N.D.C.C. § 44-04-18, in the statutes applicable to the PSC's proceedings, N.D.C.C. § 49-01-07 (requiring the PSC's "proceedings shall be public upon the request of any person interested."), as well as in the PSC's procedural and evidentiary rules. N.D.A.C. § 69-02-04-01 (specifying advanced notice of hearings, including notice to parties and the general public); N.D.A.C. § 69-02-05-06 (allowing "[a]ll parties ... to examine the entire book, paper, or document"); N.D.A.C. § 69-02-02-04 (requiring applications be filed with the PSC publicly); N.D.A.C. § 69-02-02-08 (requiring motions be filed publicly and "served on the other parties to the proceeding"); N.D.A.C. § 69-02-05-11 (prohibiting ex-parte communications to the PSC and the public filing of all such communications).

[¶42] There can be no doubt there is a presumptive right held by the public and the parties to see and to test all of the evidence that was to be considered by the PSC in its determination. And what could be more critical to this determination than the Dispersion Model that allegedly would reveal what might occur if there is a leak or other pipeline failure in the high-pressure carbon dioxide pipeline that is proposed to be sited within two (2) miles of Bismarck's Extra-Territorial Area (ETA)? If there were actual parts of the Dispersion Model that truly implicate Summit' security system plans, those provisions in the Dispersion Model could have been redacted as allowed for by the PSC's procedures. N.D.A.C. § 69-02-09-01(5).

[¶43] The PSC's rationale for keeping the Dispersion Model secret relies on the North Dakota open records exemption statute, N.D.C.C. § 44-04-24. However, the open records exemption statute on its face does not have any application to this case. Section 44-04-24 states as follows:

1. A security system plan kept by a public entity, and records regarding disaster mitigation, preparation, response, vulnerability, or recovery, or for cybersecurity planning, mitigation, or threat, are exempt from the provisions of section 44-04-18 and section 6 of article XI of the Constitution of North Dakota.

2. As used in this section:

a. "Critical infrastructure" means public buildings, systems, including telecommunications centers and computers, power generation plants, dams, bridges, and similar key resources, and systems related to utility services, fuel supply, energy, hazardous liquid, natural gas, or coal, whether physical or virtual, so vital to the state that the incapacity or destruction of these systems would have a debilitating impact on security, state economic security, state public health or safety, or any combination of those matters.

**b. "Security system plan" includes:**

**(1) Records, information, photographs, audio and visual presentations, schematic diagrams, surveys, recommendations, communications, or consultations relating directly to the physical or electronic security of a public facility, or any critical infrastructure,** whether owned by or leased to the state or any of its political subdivisions, or any privately owned or leased critical

**infrastructure if the plan or a portion of the plan is in the possession of a public entity;**

(2) Information relating to cybersecurity defenses, or threats, attacks, attempted attacks, and vulnerabilities of cyber system operations relating directly to the physical or electronic security of a public facility, or any critical infrastructure, whether owned by or leased to the state or any of its political subdivisions, or any privately owned or leased critical infrastructure if the information is in the possession of a public entity;

(3) Threat assessments;

(4) Vulnerability and capability assessments conducted by a public entity, or any private entity;

(5) Threat response plans; and

(6) Emergency evacuation plans.

3. This exemption applies to security system plans received by a public entity before, on, or after March 20, 2003.

4. Nothing in this section may be construed to limit disclosure required for necessary construction, renovation, or remodeling work on a public building. Disclosure under this subsection does not constitute public disclosure.

5. Records deemed exempt under this section and disclosed to another entity continue to be exempt in the possession of the receiving entity.

N.D.C.C. § 44-04-24 (emphasis added).

[¶44] Assuming without agreeing Section 44-04-24 has any application to these proceedings (it does not), Summit would need to overcome at least a few hurdles to prove the North Dakota open records exemption statute applies to keep its Dispersion Model secret. The first hurdle is to prove a Dispersion Model is a "security system plan" as that term is used in the statute. The above statute makes clear the Dispersion Model would need to "relat[e] directly to the physical or electronic security" of the proposed carbon dioxide pipeline to be exempt from an open records request, but no showing was made to the PSC how the Dispersion Model would so relate. Other than making

self-serving statements about protections for Emergency Response and Integrity Management plans, Summit did not make any attempt to prove that a Dispersion Model is even analogous to a "security system plan". It simply asked the PSC to assume so, which the PSC improperly did.

In support of its request to protect the Dispersion Model, and to create the appearance there was a bona fide security concern, Summit directed the PSC's attention to an old AP news article from 2017 about pipeline vandalism and threatened vandalism against the Dakota Access Pipeline in North Dakota, South Dakota and Iowa. (Index #340 at footnote 1 on p. 3). It further cited another Los Angeles AP news story about a movie made by global warming, anti-oil activists entitled, "How to Blow Up a Pipeline". *Id.* News stories such as these did not raise actual security concerns for this carbon dioxide pipeline. Nor did it make a Dispersion Model into a "security system plan" by any stretch of the imagination. The PSC should have required Summit to demonstrate precisely how its Dispersion Model which was highly relevant to the proposed pipeline within 2 miles of Bismarck's ETA, was directly related to pipeline security. It never did so.

[¶45] Further, the PSC reasoned the Dispersion Model should be protected from public disclosure on the basis information contained therein could be used by bad actors to identify where to damage or vandalize the pipeline. (Index #4 at ¶7). This concern deals with the physical location of various components of the pipeline system which could be damaged, such as valve locations and security measures implemented.

[¶46] The physical security concern does not implicate either the results of the Dispersion Model, or the underlying variables necessarily utilized in the Dispersion Model, variables critical to understanding the relevance and accuracy of the Dispersion Model results. Relevant variables are explained in the similar analysis conducted in Minnesota, provided in the Aerial and Thermal

Dispersion Analysis: Ottertail to Wilkin CO2 Pipeline Project dated January 11, 2024 prepared by Allied Solutions, at Appendix A (Index #856), and include the following:

- Wind speed (mph)
- Product temperature before rupture
- Wind speed measurement height (ft)
- Wind stability class
- Relative humidity
- Air temperature
- Surrounding surface roughness
- CO2 pressure (psi)
- Release duration
- Rupture release point (ft)
- Angle of CO2 release from horizontal
- Dispersion coefficient averaging time (min) (must be the same as rupture release time or results cannot be trusted)
- Impoundment
- Max flow rate (lbs/sec)
- Pipe diameter (in)
- Rupture diameter
- Valve segment length (ft)
- Rupture replacement along the valve segment
- Isolation valve closure time (min)

[¶47] The disclosure of the above underlying variables, which should have been considered in the Dispersion Model, would be unrelated to sensitive information concerning where bad actors may seek to damage the pipeline, including security measures implemented to assure its physical safety. Absent scrutiny of the results of the Dispersion Model and underlying variables utilized to achieve the Dispersion Model results, (whatever those undisclosed results may be) how can the results be relied upon? At the very least, portions of the Dispersion Model unrelated to the locations of valves and security measures designed to protect the physical safety of the pipeline, and disclosing the modeling results and the above data could be disclosed to the public without jeopardizing the security concerns identified in NDCC § 44-04-24.

[¶48] The public has a right to know about the potential risks associated with the Summit pipeline, and access to this information which would have facilitated informed decision-making and public dialogue. Disclosing the Dispersion Model would also have allowed independent experts to review the Dispersion Model in order to verify its accuracy or identify any potential flaws, and these issues could have been addressed on cross-examination of Summit representatives at the PSC hearings, or by presentation of evidence by Burleigh County and other parties. This probing, which never took place due to the PSC order, was essential to ensure that the model accurately predicts the behavior of the liquefied high-pressure carbon dioxide in the event of a leak or other incident. Public scrutiny would have ensured that the data is scientifically sound, but was never allowed by the PSC.

**D. The PSC erred in finding that Burleigh County ordinances are superseded and preempted by state law, and that they are unreasonably restrictive on their face.**

[¶49] The PSC’s finding that Burleigh County ordinances are superseded and preempted by state law, and that they are unreasonably restrictive on their face, was wrong as a matter of law. The PSC’s decision on this question of law is fully reviewable by the District Court. *Nodak*, 2022 ND 225 at ¶ 7 (citing *Cap. Elec.*, 2007 ND 128 at ¶ 31).

[¶50] The board of county commissioners of any county in North Dakota has the authority to regulate and restrict within the county “the location and the use of buildings and structures and the use, condition of use, or occupancy of lands for residence, recreation and other purposes.” N.D.C.C. § 11-33-01. Under that authority, on March 20, 2023, the Board of Commissioners of Burleigh County adopted zoning ordinance Article 8, Section 27 as it relates to Hazardous Liquid Pipelines. (Index #314; Index #351). Burleigh County’s ordinances are not superseded or preempted by state law, and are not unreasonably restrictive on their face.

i. **N.D.C.C. § 49-22.1-13(2) Does Not Contemplate Automatic Supersession and Preemption of Local Land Use and Zoning Regulations**

[¶51] N.D.C.C. § 49-22.1-13(2) is the key statute to analyze supersession and preemption of local land use and zoning regulations. For the Court's reference, that statute states in its entirety:

2. a. A certificate of site compatibility for a gas or liquid energy conversion facility may not supersede or preempt any local land use; zoning; or building rules, regulations, or ordinances, and a site may not be designated which violates local land use; zoning; or building rules, regulations, or ordinances.
- 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.
- 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.
- d. When an application for a certificate 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.
- 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.

[¶52] None of the applicable statutory subdivisions can be interpreted in the manner found by the PSC without ignoring other statutory language.

**1. Subdivision (b) Required the PSC to Analyze and Make Findings in Compliance With All of the Other Provisions of Section 49-22.1-13**

[¶53] In its Order, the PSC found that “local land use and zoning regulations are automatically superseded and preempted in the present case.” (Index #586 at p. 3). While there is a supersession and preemption provision in subdivision (b), the PSC ignored that the provision contains a very significant caveat. Specifically, the provision states, “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) (emphasis added). By the plain language of subdivision (b), the PSC was required to consider all of section 49-22.1-13 when determining whether local land use and zoning regulations are superseded or preempted. The PSC cannot simply declare that local land use and zoning regulations are automatically superseded and preempted under subdivision (b), without analyzing or making findings in compliance with the rest of section 49-22.1-13, including all the applicable subdivisions (b through e) in subsection 2. Failure to do so ignored the plain meaning of the caveat at the very beginning of subdivision (b), stating, “Except as provided in this section. . . .” N.D.C.C. § 49-22.1-13(2)(b). As discussed below, analysis of the other subdivisions (c through e) reveals the PSC’s determination of automatic supersession and preemption is incompatible with the statutory language.

**2. Subdivision (c) is Not Limited to Road Use Agreements**

[¶54] In its Order, the PSC concluded that, “based on the plain language of NDCC 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 ordinances, except for road use agreements. . . .” (Index #586 at p. 3). (emphasis added). Thus, according to the PSC’s Order, the sole exception to automatic

supersession and preemption of local land use and zoning regulations is road use agreements. However, the sole reference to “road use agreements” in N.D.C.C. § 49-22.1-13 is in one single sentence in subdivision (c) of subsection 2, which states, “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.” The only other sentence in subdivision (c) makes no reference to road use agreements at all, instead focusing on “regulations” and “ordinances,” stating, “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.” There is no statutory language to suggest the second sentence in subdivision (c) is limited to road use agreements. The PSC’s failure to address the provisions of N.D.C.C. § 49-22.1-13(2)(c) was clear error.

[¶55] Regardless, even if the Court disagrees with the foregoing analysis and finds that all of subdivision (c) is limited to road use agreements, the analysis does not end there. As discussed above, the PSC was required to address all of section 49-22.1-13, including subdivisions (d) and (e) of subsection 2, which are not limited to road use agreements.

### **3. Subdivision (d) Addresses Supersession and Preemption**

[¶56] In its Order, the PSC found that “local ordinances may be filed for Commission review and consideration.” (Index# 586 at p. 3). However, by the plain language of subdivision (d) of subsection 2 of N.D.C.C. § 49-22.1-13, the submission of local ordinances and other requirements by political subdivisions is for the purpose of the PSC analyzing them to determine supersession

and preemption. They are not submitted so that the PSC can simply blanketly find that they are automatically superseded and preempted. N.D.C.C. § 49-22.1-13(2)(d) states in its entirety:

When an application for a certificate 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) (emphasis added).

[¶57] This provision expressly requires townships with retained zoning authority, cities, and counties in which any part the proposed corridor is located to submit to the PSC a listing of “all local requirements identified under this subsection” (i.e. subsection 2). *Id.* Burleigh County complied with this requirement by providing a copy of its ordinances to the PSC. (Index #314; Index #351; Index #510 at footnote 6 on p. 12).

[¶58] Importantly, the local requirements identified in subsection 2 of N.D.C.C. § 49-22.1-13 are not limited to road use agreements. Referenced within subsection 2 are “local land use or zoning regulations,” “road use agreements,” and “regulations or ordinances.” N.D.C.C. § 49-22.1-13(2)(b),(c). The PSC appears to agree that local requirements other than road use agreements are to be submitted by political subdivisions, but suggests the only purpose of submitting them is so the PSC may review and consider them (and they are automatically superseded and preempted in any event). (Index #586 at p. 3). However, this interpretation is not compatible with the last sentence of subdivision (d), which states, “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) (emphasis added). This statutory provision contemplates that the consequence for failure to file the local requirements in a timely fashion is automatic supersession and preemption. This statutory

provision does not contemplate that there is automatic supersession and preemption regardless of timeliness of submission. Such an interpretation would render the last sentence of subdivision (d) superfluous, which is contrary to canons of statutory construction. *See* N.D.C.C. § 1-02-38(2). Any doubt about the correct interpretation of subdivision (d) is cleared up by examining the next subdivision (e), discussed below.

**4. Subdivision (e) Requires Applicants to Comply With Local Requirements Unless the Commission Makes Findings That They Were Superseded**

[¶59] Subdivision (e) of subsection 2 of N.D.C.C. § 49-22.1-13 states, “An applicant shall comply with all local requirements provided to the commission pursuant to subdivision d, which are not otherwise superseded by the commission.” As discussed above, the “local requirements provided to the commission pursuant to subdivision d” are not limited to road use agreements. The term “road use agreement” does not even appear in subdivision (d). Therefore, the local requirements submitted by political subdivisions, including “local land use or zoning regulations,” “road use agreements,” and “regulations or ordinances” must be complied with by an applicant unless they are expressly superseded by the PSC. In this case, the PSC made no actual findings as to the supersession of the local requirements, including whether a preponderance of the evidence established they are unreasonably restrictive in view of existing technology, factors of cost or economics, or needs of consumers regardless of their location. Instead, the PSC merely made erroneous assertions that Burleigh County ordinances are automatically superseded and preempted (Index #586, at p. 3). and are unreasonably restrictive on their face and are in direct conflict with state law. (Index #2 at p. 11, ¶ 19).

**5. Burleigh County’s Setback Requirements are Not Unreasonably Restrictive or in Conflict with State Law**

[¶60] The PSC found that Burleigh County Ordinance number 23-003 Section 27(VI)(4) mandates a setback distance of two miles (10,560 feet) from any occupied structure from a hazardous liquid pipeline, which the PSC found to be unreasonably restrictive on its face under NDCC 49-22.1-13(2)(c), and found it to be in direct conflict with state law under N.D.C.C. § 49-22.1-03.

[¶61] North Dakota Century Code Section 49-22.1-13(2)(c) states, “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.” The PSC did not make any findings regarding “technology, factors of cost or economics, or needs of consumers regardless of their location.” Rather, the PSC claims the Burleigh County setback is in direct conflict with North Dakota Century Code Section 49-22.1-03, which states as follows:

Exclusion and avoidance areas - Criteria. 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.

[¶62] The PSC’s conclusion that Burleigh County Ordinance No. 23-003 is in “direct conflict” with N.D.C.C. § 49-22.1-03 is legally erroneous. Section 49-22.1-03 does not establish a maximum or exclusive setback distance, nor does it prohibit political subdivisions from adopting more protective setbacks. Rather, it directs the PSC to develop *minimum* criteria for identifying

exclusion and avoidance areas for purposes of the Commission’s siting evaluation. The statute expressly requires only that areas within 500 feet of an inhabited rural residence be designated as avoidance areas; it does not state that setbacks greater than 500 feet are impermissible or preempted.

[¶63] Because the statute sets a floor, not a ceiling, there is no direct conflict between state law and the County’s two-mile setback. A direct conflict exists only when compliance with both provisions is impossible or when the local ordinance permits what state law forbids or forbids what state law permits. *See* N.D.C.C. § 49-22.1-13. Here, compliance with both the Burleigh County ordinance and N.D.C.C. § 49-22.1-03 is entirely possible.

[¶64] Further, the PSC failed to make the findings required by N.D.C.C. § 49-22.1-13(2)(c) to support preemption. The Commission made no findings that the ordinance is unreasonably restrictive in view of existing technology, cost or economics, or the needs of consumers. Absent such findings, and absent a true conflict with state law, the PSC lacked statutory authority to preempt or supersede Burleigh County’s ordinance.

[¶65] Accordingly, the PSC’s determination that Ordinance No. 23-003 is superseded and preempted by state law, and unreasonably restrictive on its face, should be reversed.

**E. Summit failed at the hearings to identify a viable southern route and eastern route around Bismarck**

[¶66] As part of the denial of the application on August 4, 2023, the PSC found that Summit “has not provided sufficient evidence to demonstrate that the location, construction, operation and maintenance of the Project will produce minimum adverse impacts upon the welfare of the citizens of North Dakota with the existing record.” (Index #528 at ¶42). Specifically, the PSC referenced needing an analysis of the south Bismarck alternate route. *Id.* At the rehearing, Summit provided no evidence that it adequately attempted to find a southern route to avoid Bismarck to any extent

at all. In relation to the rehearing, Mitch Flanagan (“Flanagan”), Building Official/Director of Burleigh County prepared a map showing the location of Summit’s proposed southern route. (Index# 849; BC102; Index #743 at p. 62, l. 23 - p. 63, l. 11). Flanagan testified the proposed southern route by Summit would go through hundreds of people’s homes. He testified he could not imagine the logistics of running a pipeline through all that property and those subdivisions that had been there for over twenty years. (Index #743 at p. 63, l. 18 – p. 64, l. 2). He further testified that the southern route proposed by Summit was .7 miles away from the University of Mary. (*Id.* at p. 34, ll. 3-6). However, in the rehearing proceedings, the southern route encroached on the extraterritorial limits of Bismarck and even went right through numerous existing housing subdivisions. (Index #849; BC102). This was not a real or reasonable attempt by Summit to identify a viable southern route. Similarly, in the rehearing proceedings following the prior denial, Summit ostensibly moved the route further east, however, in reality it did not move in all places and actually moved further west in some locations, closer to Bismarck and other existing rural subdivisions to the east of Bismarck and closer to the Silver Ranch development. (Index #848, BC101). In addition, the reroute by Summit moved the Summit pipeline to the west closer to Bismarck and it is now to run under a rest area on I-94, a location that is nearly always occupied by people. (Index #743 at p. 52 at ll. 13 – p. 59, l. 1 and Index #848, BC101).

[¶67] Both with its original application and its reapplication Summit failed to provide a map of the proposed Summit route around Bismarck that was discernible in any way. The maps Summit provided had no landmarks included, such as street addresses, section or township names or numbers, legal descriptions or identifying information. (Index #847, BC100 and Index #853, BC106).

[¶68] The alternative southern route selected by Summit alone shows that Summit did not perform any legitimate southern analysis because:

- The Summit southern route was selected in a location within the existing Bismarck extra-territorial limits.
- The southern route runs through and is in close proximity to sixteen existing residential developments.
- The southern route would be 0.74 of a mile from the University of Mary. (Index #849; BC102).

[¶69] The southern route "analysis" was no analysis at all but rather an affront to the PSC's prior Order (Index #528), requiring a legitimate analysis of a southern route further away from Bismarck. There is no dispute that a pathway clearly exists further away from Bismarck where there are more rural townships where no zoning restrictions are in place which would be problematical to the proposed Summit pipeline. (*See* Index #851).

[¶70] James Powell, the COO of Summit, testified regarding certain route adjustments made or considered following the PSC's initial denial of Summit's permit request. (Index #666 at p. 89, ll. 14-21). Powell testified regarding route adjustments made to accommodate landowners who testified at prior hearings, the reduction in width of the proposed corridor, the areas of geologic instability and coordination with the North Dakota Geological Survey, the southern route analysis conducted by Summit, and emergency response coordination with first local responders. (*Id.* at p. 89, l. 22 and p. 92, l. 20). Powell testified that Summit never reached out to the City of Bismarck or Burleigh County to discuss where an appropriate southern re-route should go. (Index #741 at p.238, ll. 11-24). With respect to the southern route, Summit did not contact any township boards, Emmons County, the North Dakota State Water Commission, the City of Mandan, landowners,

the Standing Rock Sioux Tribe, Army Corps of Engineers, or Energy Transfer Partners/DAPL. (Index #741 at p.242, ll. 10-25 and p.243, ll. 1-2). Summit did not conduct any geological surveys on the south side of Bismarck. (Index #741 at p.248, ll. 3-5). Summit clearly did not make a good faith effort to explore a southern route, which would have protected Bismarck, including the prevailing winds from the north and east, as well as more favorable topography.

[¶71] Brian Bitner testified that the southern route ostensibly considered would never be viable in light of its close proximity to the University of Mary and many existing housing developments. (Index #744 at p. 189, ll. 21-25 and p. 190, ll. 1-17). Bitner testified Summit could not have picked a worse route if it tried. (Index #744 at p. 190, ll. 16-17). Bitner testified when Summit representative Jeff Skare was asked why Summit did not choose a southern route further from the City of Bismarck, Skare said “we don’t want another DAPL”. (Index #744 at p. 197, ll. 1-4). Summit was worried about the optics. (Index# 744 at p. 197, ll. 5-10). Bitner testified the re-route is worse than the original route. (*Id.* at p. 189, l. 21-25 and p. 190, ll. 13-17; p. 221 at ll. 4-14).

[¶72] Chad Wachter (“Wacher”) is a land developer in Burleigh County and elsewhere in North Dakota. Wachter testified he spoke with Wade Boeshans, a representative of Summit. They talked about moving the eastern proposed route. (Index #746 at p. 6, ll. 11-22). Wachter believes the pipeline route should be further east. (*Id.* at p. 7, ll. 5-10). Wachter testified he was surprised and upset about the proposed re-route due to its negative impact on development. (*Id.* at p. 9, ll. 4-15). Wachter believes the pipeline should be twenty miles away from Bismarck based on the incident in Satartia, Mississippi. (*Id.* at p. 9, ll. 16-25 and p. 10, ll. 1-2). The most recent CO2 pipeline leak in Sulphur, Louisiana on April 3, 2024 (Index #741 at p. 261, l. 5 – p. 262, l. 6) verifies that CO2 leaks are deadly and that CO2 pipelines, if installed at all, need to be located far away from populated areas. (Index #746 at p. 10, ll. 3-10). Wachter testified the proposed re-route of the

pipeline is within the growth corridor of the City of Bismarck. (Index #746 at p. 26, ll. 17-22). He has significant concerns about the Summit pipeline route negatively affecting future development in and around the City of Bismarck. *Id.*

[¶73] Summit asserts that natural gas pipelines (and ostensibly CO2 pipelines, which present much greater health and safety risks than a natural gas pipeline) are not a deterrent to sales and development of residential lots. However, Wachter indicated CO2 pipelines pose greater health and safety risks than a natural gas pipeline. Wachter testified regarding the impact of a natural gas pipeline on his Promontory Point property development in Bismarck. He testified that he still has vacant lots and inventory which are encumbered by a natural gas pipeline. (Index# 746 at p. 30, ll. 4-14). They have been available for sale for 5-7 years, and he continues to pay taxes and special assessments on these lots. (*Id.* at p. 30, ll. 15-24). Wachter testified it is costing him \$2,000 per year to hold each lot. (*Id.* at p. 31, ll. 12-13). Wachter also testified about the adverse impact on these lots' development due to setback requirements in relation to a natural gas pipeline. (*Id.* at p. 31, ll. 16-24). Wachter testified that he has been told by potential buyers that they will not purchase the lots due to the existence of a natural gas pipeline. Wachter testified he has had five potential buyers tell him this. (*Id.* at p. 36, ll. 10-19). Wachter testified that 80% of the properties that have a natural gas pipeline require him to accept a lower price. (*Id.* at p. 37, ll. 23-25 - p. 35, ll. 1). Wachter testified there are seven unsold lots in Promontory Point that are encumbered by a natural gas pipeline. (*Id.* at p. 44, ll. 10-15). At his Silver Ranch Development, Wachter testified that he anticipates there will be 4,500 new dwellings constructed in the next 22-25 years. (*Id.* at p. 52, ll. 3-5). Wachter is concerned about whether development will move forward in light of the pipeline. He also testified he donated 10 acres to Bismarck Public Schools for a new Career Academy and recently closed on 25 acres purchased by the Diocese of Bismarck for a Catholic campus. (*Id.* at

p. 51, ll. 14-19). He explained that commercial development is driven by rooftops. (*Id.* at p. 52, ll. 23-25 - p. 53, ll. 1). Wachter also testified he anticipates the development of a hospice facility in the Silver Ranch Development, which could be impacted by the pipeline. (*Id.* 6 at p. 57, ll. 16-23).

[¶74] Jon Lee “Lee” is the president of the Bismarck Public School Board. Lee stated that he was testifying on his own behalf, not on behalf of the Board. (Index #495 at p. 456, ll. 2-4). Lee testified that he has been involved extensively through looking at the demographics, looking at how the city is growing and where the schools are going. (*Id.* at p. 456, ll. 5-8). Lee testified that when he saw the proposed pipeline and how close it was to the northeast, he had some concerns about the growth of Bismarck, what that may mean in the future, where Bismarck plans to put schools, and where people decide to live. (*Id.* at p. 456, ll. 8-13). He testified that he has concerns in relation to the safety of the citizens of Bismarck and at a minimum, the kids of Bismarck. (*Id.* at p. 456, ll. 17-21).

[¶75] Howard Malloy (“Malloy”) is a real estate developer in the Bismarck/Mandan area. Malloy testified he has a potential development to be located in Morton County. The potential development is ten miles north of Mandan on Highway 1806, with some lots having views of the Missouri River. (Index# 743 at p. 22, ll. 16-25 and p. 23, ll. 1-3). Malloy testified the proposed Summit pipeline would eliminate his development project. It is prime real estate and loss of this development will result in unrealized tax money for the county. (*Id.* at p. 31, ll. 24-25 and p. 32, ll. 1-7). Malloy testified that he had a conversation with James Powell of Summit on July 25, 2023, regarding the potential lost development and lost revenues that would result from the Summit pipeline. (*Id.* at p. 32, ll. 11-21). Despite promises, Powell never got back to Malloy regarding his concerns. (*Id.* at p. 33, ll. 12-19). Malloy has been planning this development project for years. The proposed pipeline route would cut the development property in half. (*Id.* at p. 35, ll. 6-8). The

proposed property development is only a mile from the Missouri River with lots of views of the river and a view of a large rolling valley. (*Id.* at p. 41, ll. 14-23). Thus, it is highly valuable property to develop, which cannot be done due to the proposed Summit pipeline.

[¶76] Summit failed to meet its burden of proof required by the PSC’s prior Order. (Index #528 at ¶ 17). (The effects of the proposed pipeline on future property values and development have not been adequately minimized for the welfare of the people and the environment of the state); ¶ 32 (Summit has not taken the steps to address legitimate impacts expressed by landowners during the public comment or demonstrated why a reroute is not feasible); ¶ 42 (Summit did not adequately address the PSC’s requests, or failed to tender a witness to answer the Commissioners’ questions as required by N.D.A.C. § 69-02-05-02, regarding an analysis of the south and east Bismarck routes).

**F. The PSC erred by refusing to consider public health and welfare, and other relevant considerations, which are not preempted by the Pipeline and Hazardous Materials Safety Administration (“PHMSA”).**

[¶77] As explained by Administrative Law Judge Hogan on August 4, 2023 at the conclusion of the initial hearings on Summit’s original application, the application was rejected due to numerous issues, including safety issues which had not been addressed.<sup>4</sup> Summit did not address any of these issues in the later hearings on its petition for reconsideration. Release of carbon dioxide is extremely dangerous, as the residents of Sartaria unfortunately learned. Yet this danger was not addressed at all in the hearings on the petition for reconsideration, and Burleigh County was prohibited from exploring these issues and was not granted access to Summit’s Dispersion Model.

**G. The PSC issued the Challenged Order without waiting for expected new regulations to be issued by PHMSA.**

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<sup>4</sup> The transcript of this special meeting is not yet included in the record on appeal. Counsel for the PSC has indicated the PSC will supplement the record with the district court as to this special meeting. An unofficial transcribed audio of PSC’s Special Meeting on August 4, 2023 was transcribed by the undersigned’s office (Index #541).

[¶78] The PSC should have postponed its decision in this matter until after PHMSA released expected new federal regulations on pipeline safety. James Powell, chief operating officer for Summit, was questioned at a PSC hearing about PHMSA pipeline safety regulations, which have been in place for many years, since the early 1990s, which long predate recent CO<sub>2</sub> pipeline disasters such as occurred in Satartia. (Index #209 at p. 98, l. 25 – p. 104, l. 9). It is notable that at the time of the PSC hearings on this matter, these old PHMSA regulations were expected to be updated soon. As indicated in a PHMSA publication introduced at the hearing (Index # 294), PHMSA announced on May 26, 2022 it was “taking steps to implement new measures to strengthen its safety oversight of carbon dioxide pipelines around the country and protect communities from dangerous pipeline failures. The new measures as well as an enforcement action taken today are the result of PHMSA's investigation into a CO<sub>2</sub> pipeline failure in Satartia, Mississippi, in 2020 that resulted in local evacuations and caused almost 50 people to seek medical attention.” Summits request for an expedited decision from the PSC in relation to its application is suspect coming on the heels of soon-expected regulatory changes. Those regulatory changes have since actually been established as new final PHMSA rules.<sup>5</sup>

**H. The Challenged Order fails to address issues with Summit’s liability insurance, which fails to adequately protect affected landowners.**

[¶79] The Challenged Order references the liability insurance coverage that Summit claims it will maintain, stating, “SCS asserted that it will have not less than \$100 million of liability insurance for the Project and that it will have not less than an additional \$25 million of general liability insurance for the North Dakota portion of the Project.” (Index #2 at ¶ 47). However, the PSC failed to consider that CO<sub>2</sub>, as a pollutant, is not covered by insurance in the event of an

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<sup>5</sup> <https://www.phmsa.dot.gov/regulations/federal-register-documents?title=&type%5B%5D=RULE&topics=All&abstract=All>

unexpected release caused by anyone other than Summit. Summit has also not provided an agreement for the landowners naming them as additional insureds under Summit's insurance policy and agreeing to appropriately defend and indemnify the landowners. The easements prepared and provided by Summit to affected landowners only insure and protect landowners from CO2 leaks which landowner can prove Summit caused. (Index #306).

[¶80] The record contains letters from landowners' insurance companies, which were introduced at the PSC hearings, establishing their own insurance policies would not cover a pollutant release incident from Summit's pipeline because CO2 is a pollutant as defined by insurers in their policies. (Index #s 377, 378, and 843).

[¶81] Further, a representative easement agreement between Summit and a landowner is in the record on appeal at (Index #306). Section 7 of the agreement states:

**Indemnification.** Company agrees to indemnify and hold Landowner harmless from and against any claim or liability or loss from personal injury or property damage **resulting from or arising out of the use of the Easements by Company, its servants, agents or invitees**, excepting, however, such claims, liabilities or damages as may be due to or caused by the acts of Landowner, or its servants, agents or invitees.

*Id.* (emphasis added). Under this provision, the only way landowners in Burleigh County would be indemnified and held harmless would be if an incident resulted from or arose out of the use of the easement by Summit or its agents. In other words, landowners would be required to prove a release was Summit's fault, which Summit would be sure to oppose, and Summit would have sole access to all relevant facts and data. Individual landowners may or may not be able to prove the necessary connection in specific situations and would surely incur substantial attorney's fees and other expenses, including pipeline expert fees, trying to do so.

**I. The Court should award Burleigh County its reasonable attorney's fees and costs pursuant to N.D.C.C. § 28-32-50.**

[¶82] For the reasons discussed above, the decision of the PSC was not substantially justified (and the Court should so find) and should be reversed, and thus Burleigh County must be awarded its reasonable attorney’s fees and costs pursuant to North Dakota Century Code section 28-32-50, which states in relevant part:

1. In any civil judicial proceeding involving as adverse parties an administrative agency and a party not an administrative agency or an agent of an administrative agency, **the court must award the party not an administrative agency reasonable attorney's fees and costs if the court finds in favor of that party and, in the case of a final agency order, determines that the administrative agency acted without substantial justification.**
2. This section applies to an administrative or civil judicial proceeding brought by a party not an administrative agency against an administrative agency for judicial review of a final agency order....
3. Any attorney's fees and costs awarded pursuant to this section must be paid from funds available to the administrative agency the final order, rulemaking action, or rule of which was reviewed by the court. The court may withhold all or part of the attorney's fees from any award if the court finds the administrative agency's action, in the case of a final agency order, was substantially justified or that special circumstances exist which make the award of all or a portion of the attorney's fees unjust.
4. This section does not alter the rights of a party to collect any fees under other applicable law.

\* \* \*

N.D.C.C. § 28-32-50 (emphasis added). The North Dakota Supreme Court has explained, “A nonagency party must meet a two-part test under the statute: 1) the non-administrative agency party must prevail, and 2) the agency must have acted without substantial justification.” *State by & through Workforce Safety & Ins. v. Badger Roustabouts, LLC*, 2021 ND 166, ¶ 20, 964 N.W.2d 514 (citations omitted). “Substantial justification means, justified in substance or in the main—that is, justified to a degree that could satisfy a reasonable person. A position is substantially justified if a reasonable person could think the position is correct, and the position has a reasonable

basis in law and fact. [W]hether the agency acted with substantial justification is discretionary with the district court. . . .” *Id.* at ¶ 21 (internal citations and quotations omitted).

[¶83] The PSC’s decision in this matter was not substantially justified within the meaning of N.D.C.C. § 28-32-50. As demonstrated throughout this brief, the PSC repeatedly departed from clear statutory directives, failed to make findings required by law, relied on undisclosed and untested evidence, and adopted legal conclusions that lack any reasonable basis in fact or law. Under these circumstances, an award of attorney’s fees and costs is mandatory.

[¶84] First, the PSC acted without substantial justification by protecting Summit’s Dispersion Model from disclosure and insulating it from any meaningful scrutiny, while simultaneously relying on Summit’s untested safety assertions in granting the route permit. The PSC accepted Summit’s claim that the Dispersion Model constituted a “security system plan” under N.D.C.C. § 44-04-24 without requiring any evidentiary showing that the statute applied. This interpretation was not merely debatable; it was legally untenable. The statute does not exempt risk modeling, dispersion results, or underlying modeling assumptions from public disclosure, particularly where, as here, the information was selectively disclosed to private parties and disclosed publicly by Summit in another jurisdiction. No reasonable person could conclude that a model used to assess public safety impacts is exempt from scrutiny while at the same time forming a central basis for agency approval.

[¶85] Second, the PSC lacked substantial justification in its determination that Burleigh County’s zoning ordinances were automatically superseded and preempted. The PSC ignored the plain language of N.D.C.C. § 49-22.1-13, including subdivisions (c), (d), and (e), and declared automatic preemption without making the findings required by statute. The Commission did not analyze whether Burleigh County’s ordinance was unreasonably restrictive in view of technology, cost, or

consumer need, nor did it identify a true conflict with state law. The PSC's conclusion that the County's two-mile setback applicable to hazardous liquid pipelines conflicted with N.D.C.C. § 49-22.1-03 reflects a fundamental misreading of that statute, which establishes minimum avoidance criteria rather than maximum setbacks. An agency decision that disregards statutory text and renders multiple provisions superfluous cannot be substantially justified.

[¶86] Third, the PSC acted without substantial justification by approving the route permit despite Summit's failure to comply with the PSC's own prior order requiring a legitimate analysis of southern and eastern routes around Bismarck. The record demonstrates that Summit's purported reroutes brought the pipeline closer to populated areas, encroached on the City of Bismarck's growth corridor, and failed to meaningfully reduce risks to public safety or future development. The PSC's acceptance of these routes, without addressing the overwhelming testimony regarding land use impacts, property values, and public safety, lacks a reasonable factual basis.

[¶87] Fourth, the PSC's refusal to meaningfully consider public health, emergency response readiness, and future regulatory developments further underscores the absence of substantial justification. The Commission disregarded unrebutted testimony from Burleigh County officials and emergency managers regarding the inadequacy of Summit's preparedness efforts and approved the project without waiting for anticipated PHMSA regulations directly relevant to carbon dioxide pipeline safety. An agency does not act reasonably when it rushes approval of a high-risk project while critical safety standards are actively under development.

[¶88] Taken together, these errors reflect not close legal judgment calls, but a pattern of arbitrary decision-making and statutory noncompliance. The PSC's positions were not "justified to a degree that could satisfy a reasonable person," nor did they have a reasonable basis in law or fact. *Badger Roustabouts*, 2021 ND 166, ¶ 21. Because Burleigh County should prevail in this appeal and

because the PSC acted without substantial justification, the Court must award Burleigh County its reasonable attorney's fees and costs pursuant to N.D.C.C. § 28-32-50. Should the Court agree to do so, Burleigh County will provide a detailed summary of its attorney's fees and other costs following the Court's decision on this issue.

## V. CONCLUSION

[¶89] This Court must reverse the order of the PSC if it finds **any one** of the following:

1. The order is not in accordance with the law.
- \* \* \*
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.
- \* \* \*

N.D.C.C. § 28-32-46. In this case, all of the foregoing reasons to reverse are established. The order is not in accordance with the law (N.D.C.C. § 28-32-46(1)) because the PSC misinterpreted and misapplied N.D.C.C. §§ 44-04-24 and 49-22.1-13, unlawfully preempted Burleigh County's zoning ordinances without making the findings required by statute, and relied upon undisclosed evidence in violation of governing law and due process principles. Further, the provisions of the Administrative Agencies Practice Act have not been complied with in the proceedings before the agency (N.D.C.C. § 28-32-46(3)) because the PSC failed to follow statutory requirements for

public proceedings, meaningful review of local ordinances, and reasoned decision-making supported by articulated findings. The rules or procedure of the PSC have also not afforded Burleigh County a fair hearing (N.D.C.C. § 28-32-46(4)) because the PSC protected Summit's Dispersion Model from disclosure, prohibited questioning of witnesses regarding the model, and thereby denied Burleigh County any meaningful opportunity to test or rebut critical safety evidence relied upon by the PSC. Additionally, the findings of fact made by the PSC are not supported by a preponderance of the evidence (N.D.C.C. § 28-32-46(5)) because Summit failed to demonstrate that the proposed route would produce minimum adverse impacts, failed to conduct a legitimate southern and eastern route analysis, failed to adequately address emergency preparedness and public safety concerns, and failed to establish that Burleigh County's ordinance is unreasonably restrictive under the statutory standard. The conclusions of law and order of the agency are not supported by its findings of fact (N.D.C.C. § 28-32-46(6)) because the PSC's legal determinations regarding preemption, public safety, and compliance with statutory requirements are disconnected from and unsupported by the evidentiary record. Lastly, the findings of fact made by the PSC do not sufficiently address the evidence presented to the PSC by Burleigh County (N.D.C.C. § 28-32-46(7)) because the Challenged Order fails to meaningfully analyze or reconcile the testimony of emergency management officials, land developers, county commissioners, and other witnesses regarding dispersion modeling deficiencies, route impacts, property values, insurance gaps, and public safety risks.

[¶90] For the foregoing reasons, Burleigh County respectfully requests the Court enter an order reversing the Challenged Order, denying Summit's certificate of corridor compatibility and route permit, and awarding costs and attorneys' fees to Burleigh County pursuant to N.D.C.C. § 28-32-50.

[¶91] Burleigh County reserves the right to further address all other appealable errors.

Dated this 20<sup>th</sup> day of February, 2026.

BAKKE GRINOLDS WIEDERHOLT

By: *s/ Randall J. Bakke*

Randall J. Bakke (#03898)

Special Assistant State's Attorneys for  
Burleigh County

300 West Century Avenue

P.O. Box 4247

Bismarck, ND 58502-4247

(701) 751-8188

[rbakke@bgwattorneys.com](mailto:rbakke@bgwattorneys.com)

*Attorney for Appellant Burleigh County*