STATE OF NORTH DAKOTA	DISTRICT COURT
COUNTY OF BURLEIGH	SOUTH CENTRAL JUDICIAL DISTRICT

APH Farms, Arden Hagerott, Jonathan Hagerott, Janel Olson, Valera Hayen, Kari Curran, Scott Irmen, Mary Jo Irmen, Leon Mallberg, Staroba Revocable Living Trust, Loren Staroba, Diane Staroba, James Tiegs, Appellants, v. North Dakota Public Service Commission, SCS Carbon Transport, LLC, John H. Warford, Jr. Revocable Trust, Chad Wachter, Chad Moldenhauer, City of Bismarck, Laborers District Council of Minnesota and North Dakota, Emmons County, and Burleigh County, Appellees.	Case No.: 08-2024-CV-03622

REPLY BRIEF OF EMMONS COUNTY

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APPEAL - Reply Brief of Emmons County

Intervenors Emmons County Board of County Commissioners
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I. The Emmons County Ordinance is unique and Emmons County makes discrete arguments that should not be generalized and merged with those of other parties.

[¶1] The Commission and Summit attempt to merge the arguments of the counties challenging the PSC's decision. While it may be convenient to do so at times, it also results in an unfair blurring of the discrete arguments made by Emmons County.

[¶2] For example, the Commission claims "Appellants continually asked the Commission, and ask this Court, to consider the safety of the proposed carbon dioxide pipeline." Index #930, ¶17. This is simply untrue. Emmons County has not asked and is not asking the Commission or this Court to consider the so-called dispersion modeling or assess issues under the purview of PHMSA. Emmons County is asking that the PSC only invalidate its duly-adopted land use ordinance if the PSC finds the ordinance is unreasonable restrictive in the context of the present siting proceeding. And on appeal, Emmons County asks that this Court assess its ordinance and arguments on their discrete merits rather than on the basis of generalized and abstract claims about arguments of "the Appellants."

[¶3] Summit also attempts to obscure the independent validity of the Emmons County Ordinance with generalized arguments, and even more blatantly. It states that "[t]o avoid any confusion caused by the overlap in their respective arguments, and for the sake of convenience, this Part II.B will simply refer to Burleigh County and/or Emmons County as the "County" and addresses each argument raised without separately crediting its proponent." Index #928, ¶39. This practice did not avoid confusion; it created confusion. It served to bury the discrete arguments made by Emmons County in the remainder of Summit's brief. For example, in Part II.C, Summit continues to refer to "the County" and makes claims about "the County's ordinances" claiming "[t]hey impose safety standards tailored to hazardous liquid pipelines, including two-mile setbacks, emergency response obligations, and abandonment requirements." Index #928, ¶50. This

statement is simply untrue of the Emmons County Ordinance. Index ##877-878. The reference to a two-mile setback is misleading, because in the Emmons County Ordinance this is not a setback from residences, but from "corporate boundaries of any organized city." *Id.* The Emmons County Ordinance is not "tailored" to hazardous liquid pipelines; rather, it broadly applies to "[e]lectric transmission facilities and non-potable water, gas, oil, coal slurry, CO2, or any other substance deemed to be hazardous by PHMSA transmission pipelines." *Id.* It says nothing of emergency response obligations, and it says nothing of abandonment requirements. *Id.* The subterfuge of folding the "Counties" into one party allows this misleading representation. The Emmons County Ordinance and the arguments made by Emmons County should be considered in their own right and the "convenience" of referencing the "County" only serves to confuse and mislead.

[¶4] County Commissioner Erin Magrum explained the nature of the unique provision in the Emmons County ordinance:

> Q. Where in the Emmons County Zoning Ordinance does the relevant provision appear?
> A. In Article VI we address a number of conditional uses, and the requirements for obtaining a conditional use permit for these uses. They include commercial recreational parks, liquid transmission pipelines, salvage and junkyards, and subsurface mining and surface extraction.
> Q. And how does Emmons County generally define a conditional use in its land use ordinance?
> A. As stated in Article VI, "Conditional uses are uses which may be permitted in a district, but because of their specific needs or because there may be a potential for conflict with other permitted uses, special requirements may need to be met to alleviate any concerns that the specific conditional use will not conflict with the intent of the district."
> Q. Prior to Summit's proposed project, had anyone ever proposed locating a pipeline for transmission of carbon dioxide across Emmons County, to your knowledge?
> A. I have never heard of a proposal for a carbon dioxide pipeline to be routed across Emmons County until we heard about the Summit project.
> Q. Did the Emmons County Zoning Ordinance address CO2 pipelines prior to recent amendments in 2023?
> A. The intent of our ordinance was to address all electric transmission facilities and transmission pipelines, but previously we believed that "water,

> gas, oil, or coal slurry" covered all of the possible substances that might be transported via pipeline. While we believe that our prior ordinance language would have covered transmission pipelines for carbon dioxide as well, we felt it was important to be specific and to provide certainty and clarity in our land use ordinance. We also adopted new language to include only non potable water lines, added CO2 lines, and added "any other substance deemed to be hazardous by PHMSA" so that we do not need to address each new substance that is transported by transmission pipelines.
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> ***
>
> Q. Did the amendments in February of 2023 address anything other than adding CO2 and other substances to the list of substances covered for transmission pipelines?
> A. Yes, we updated the setback distances, and also provided a variance process to allow pipeline developers the ability to negotiate with our landowners for variances to locate the pipeline within those setbacks if it chooses.
> Q. Do these amendments apply to all transmission pipelines, or just to CO2 pipelines?
> A. These amendments apply to all transmission pipelines.

Index #730, Exh. 531 (prefiled testimony of Comm. Erin Magrum), pp.2-4.

II. The arguments made by the PSC and Summit regarding Summit's late-filed amendment to its application are nonresponsive.

[¶5] Both the PSC and Summit argue that the PSC has authority to amend its orders or consider alternatives during the siting process. But neither of these arguments address the issue raised by Emmons County. Summit attempted to make material amendments to its application *after* a final decision, and on reconsideration. The issue is simple. The PSC can "**re**consider" an application – it cannot consider a **new** application under the guise of **re**considering an application. The insistence on procedure by Emmons County may well be inefficient, but procedural rules often are inefficient – no process at all may be the most efficient way to get things done, but efficiency is not always the goal of procedural rules.

III. Federal preemption was not and is not a basis for preemption of the Emmons County Ordinance.

A. Federal preemption was not a basis for the Commission's decision and cannot be utilized to justify the decision on appeal.

[¶6] The Commission and Summit improperly argue that federal laws preempt the local government ordinances at issue. While this argument is inapplicable to the Emmons County Ordinance which does not purport to regulate pipeline safety, it is also improper to rely upon legal arguments to support the Commission's orders that were not relied upon by the Commission itself. In other words, the orders of the Commission that are the subject of this appeal do not themselves purport to rule upon or use as a legal basis the federal laws cited by the Commission's appellate counsel or by Summit.

[¶7] The orders only referenced federal law once. In the February 7, 2024 order on automatic supersession of the ordinances, the Commission merely acknowledged an argument made by Summit, noting: "SCS also argued that even if the Commission is required to apply the unreasonably restrictive factors, the conflict with federal law and unreasonableness is clear on the face of the ordinances." Index #586, p.2. The Commission later concisely stated the issue it was deciding:

> The issue before the Commission not whether it may preempt local land use or zoning regulations, but whether preemption is automatic. N.D.C.C. § 49-22.1-08 provides that a utility may combine an application for a certificate or permit SCS's Application is a consolidated application for a certificate of corridor compatibility and for a route permit. The Commission concludes that, based on the plain language of 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., p.3 (emphasis added).

[¶8] The order then reiterates: "The Commission Orders North Dakota Century Code Section 49-22.1-13 automatically supersedes and preempts any local land use or zoning regulations for a gas or liquid transmission facility route permit." *Id.* (emphasis added).

[¶9] In the Findings of Fact in its final order, the Commission states: "SCS requested the Commission find that a permit automatically supersedes and preempts zoning ordinances, and even if they do not, that the Emmons and Burleigh County ordinances are superseded and preempted because they are unreasonably restrictive and conflict with state and federal law." Index #908, p.11.

[¶10] In the Conclusions of Law that are part of the Commission's final order, it states:

> Based on the above Findings of Fact, and its February 7, 2024, Order in this proceeding, the Commission concludes that NDCC Section 49-22.1-13 automatically supersedes and preempts any local land use or zoning regulations for a gas or liquid transmission facility route permit except for road use agreements. The Commission further concludes that the Ordinances of Burleigh County and Emmons County are unreasonably restrictive on their face[1] under NDCC Section 49-22.1-13(2)(c).

Index #908, p.16 (emphasis added).

[¶11] The Commission did not find or conclude that federal law preempts local land use ordinances.

B. The Emmons County Ordinance does not conflict with federal law even if the Commission could utilize this as a basis on appeal.

[¶12] In a letter from PHMSA to Lee Blank, Summit's CEO, on this precise issue, PHMSA itself said:

[1] As already argued and as to the Commission's claim that the ordinances are "unreasonably restrictive on their face," it is required to have evidence and make factual findings and did neither. Even the Commission itself concedes this is required. *See* Index #930 (Commission brief), ¶10 (conceding that it must be reversed if the "findings of fact made by the agency are not supported by a preponderance of the evidence" and that the "findings of fact made by the agency do not sufficiently address the evidence [or lack thereof] presented to the agency.").

> **Local governments have traditionally exercised broad powers to regulate land use, including setback distances** and property development that includes development in the vicinity of pipelines. Nothing in the federal pipeline safety law impinges on these traditional prerogatives of local-or state government, so long as officials do not attempt to regulate the field of pipeline safety preempted by federal law. PHMSA recognizes local governments have implemented authorities under state law that contribute in many ways to the safety of their citizens. We have seen localities consider measures, such as … [r]estricting land use and development along pipeline rights-of-way through zoning, **setbacks**, and similar measures.

Index #834, p.3.

[¶13] Indeed, the Commission's own arguments prove too much. It claims that "Congress's grant of authority as exclusive in the safety domain for interstate hazardous liquid pipelines, precludes state decision-making 'in any manner whatsoever' with respect to safety of transmission facilities." Index #930, ¶ 24. Yet the Commission's statutory authority being administered here states that "areas within five hundred feet … of an inhabited rural residence must be designated avoidance areas. This criterion does not apply to a water pipeline. The five hundred foot … avoidance area criteria for an inhabited rural residence may be waived by the owner of the inhabited rural residence in writing." N.D.C.C. § 49-22.1-03. The only difference on the face of this law and the Emmons County law is the distance. The Commission claims its own setback law is valid and does not contradict federal law, but somehow claims that the Emmons County law does. On their face, they are no different except for the distance.

[¶14] The Commission attempts to shore up its decision by claiming that "[t]estimony from an Emmons County Commissioner confirmed safety was a consideration when the county amended their 1982 ordinances in 2023." Index #930, ¶26. It cites to Index #751, a transcript of testimony from Emmons County Commissioner Erin Magrum. *Id.* The Commission relies on the following exchange:

> **Q.** Was there anything else that was specifically stated when you received input; when you, being the commission, as a commissioner, received input at the hearing as to whether or not to adopt the ordinance amendment.
>
> **A.** I would say property rights and safety concerns were the primary issue as well as probably a lack of trust in Summit themselves.

Index #751, p.49.

[¶15] The Commission fails to acknowledge the very next question, and its use of this citation to claim that Emmons County utilized "safety" as a "consideration" is surprisingly misleading. The very next question and answer illustrate:

> **Q.** As far as the safety aspect, did that play into the determination as to the setback amounts that were determined by the commission?
>
> **A.** I would say no because none of us are safety experts.

Id.

[¶16] The Commission's and Summit's attempts to paint the Emmons County Ordinance with broad brush strokes is merely an attempt to hide from the details. The reality is that Emmons County passed a valid zoning ordinance and had full authority to do so, and federal law has nothing to do with it.

IV. The Commission's and Summit's interpretations of N.D.C.C. § 49-22.1-13 contradict clear and unambiguous language in the statute and the interpretation by Emmons County harmonizes all provisions.

[¶17] The PSC claims that "the subject matter here is of a 'highly technical nature….'" *See* Index #930, ¶10 (citing *Montana-Dakota Utilities Co. v. N.D. Pub. Serv. Comm'n*, 413 N.W.2d 308, 312 (N.D. 1987)). The issue in the MDU case cited by the PSC was actually technical, as the Court there explained: "Projecting residential gas use to set gas rates is highly technical and involves

several complex interrelated variables." *Mont.-Dakota Utils. Co. v. Pub. Serv. Comm'n*, 413 N.W.2d 308, 309 (N.D. 1987). But the issue raised on appeal by Emmons County is purely one of statutory interpretation. Therefore the "appreciable deference" authority cited by the PSC does not apply. It is applicable, however, that in "enacting a statute, it is presumed that … [t]he entire statute is intended to be effective." N.D.C.C. § 1-02-38.

[¶18] While Summit argues that the interpretation of Emmons County makes subdivision (b) surplusage, this is incorrect. Summit claims:

> If every local land use or zoning regulation remained fully enforceable unless and until the Commission made ordinance-by-ordinance findings of unreasonable restrictiveness or direct conflict, then subdivision (b)'s broad supersession clause becomes largely surplusage. Subdivision (b) would no longer operate as the default rule; it would merely restate a discretionary power already described in subdivision (c). The Legislature's decision to include a categorical supersession rule in subdivision (b) cannot be reconciled with the County's attempt to tum that rule into a discretionary, case-by-case mechanism duplicating subdivision (c).

Index #928, ¶46.

[¶19] Summit's argument fails to recognize that subdivision (b) does have effect under Emmons County's interpretation, which requires the applicant to show by a preponderance of evidence that a specific ordinance is unreasonably restrictive. This only applies to those ordinances filed with the PSC under subdivision (d). If a local government simply never files any ordinances with the PSC, as is the case with many local governments, then the permit "supersedes and preempts any local land use or zoning regulations" as indicated in subdivision (b). If a local government files its requirements but does not do so "at least ten days before the hearing," then its ordinance is also superseded. The interpretation offered by Emmons County is the only one that gives effect to *all* of the provisions of N.D.C.C. § 49-22.1-13 and harmonizes all of the provisions. The interpretation offered by Emmons County also aligns with what legislators themselves said about the statutory

language, such as that "the local zoning ordinance will apply and be adhered to by the permit application unless they are unnecessarily burdensome [as] determined by the Public Service Commission. It does not do away with the local ordinances." *See* Index #913, ¶26 (quoting and citing legislative history).

CONCLUSION

[¶20] The PSC does have authority to supersede local land use and zoning regulations. But first the applicant has the burden of proof to offer a preponderance of the evidence that the regulations are unreasonable restrictive. Rather than attempt to make such a showing, Summit filed a motion asking the PSC to rule that the statute *automatically* supersedes all local land use and zoning regulations, and thereby sidestepped the legislatively mandated process for doing so. This was legal error and the PSC should have declined Summit's attempted end run around statute.

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Respectfully submitted,

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