STATE OF NORTH DAKOTA | DISTRICT COURT

COUNTY OF BURLEIGH | SOUTH CENTRAL JUDICIAL DISTRICT

APH FARMS, et al., Appellants, v. NORTH DAKOTA PUBLIC SERVICE COMMISSION, et al, Appellees.	**REPLY BRIEF** Case No. 08-2024-CV-03622

COMES NOW the Landowner Appellants, by and through their counsel of record KNOLL LEIBEL LLP (Steven J. Leibel), and respectfully submit this, Appellants' Reply Brief.

A. <u>The holding of *Williams Elec. Co-op* does not apply to these facts</u>.

1. Summit argues that this Court "must" presume that the Commission did not consider the Dispersion Model because the Commission did not comply with the North Dakota Administrative Agency Practices Act ("AAPA"). Summit Response, ¶ 25. In support of this contention, it cites *Williams Elec. Co-op., Inc. v. Montana-Dakota Utilities Co.*, 79 N.W.2d 508 (N.D. 1956). This is an incorrect citation.

2. In *Williams Elec. Co-op.*, the appellant demanded that an agency produce a certain file. The agency remarked during the ensuing argument that it would "take notice" of the file at issue. *Williams Elec. Co-op.*, 79 N.W.2d at 525. However, the file at issue was not found in the record. *Id.* The Supreme

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Court noted that the agency was barred from considering any evidence that was not reviewed by the parties and made a part of the record. *Id.* However, the Supreme Court presumed that because the file was not in the record, the agency must not have possession of the record:

> We must presume that if 'extra record' evidence or information was in the **possession** of the Commission bearing on a the [sic] issue, that the Commission would have complied with the terms of the statute and thus have given opportunity to the appellant to cross-examine, answer or refute concerning such evidence or information or to meet it in some other way. Since this was not done, the presumption prevails that no 'extra record' evidence or information entered into the decision of this proceeding by the Public Service Commission.

Id. (emphasis added).

3. Unlike *Williams Elec. Co-op.*, there is no dispute that the Commission had possession of Summit's Dispersion Model. *E.g.* [Doc. 292], [Doc. 417], pg. 13. In fact, the record reflects that the Commission requested the Dispersion Model from Summit and Summit provided it to the Commission. *E.g.* [Doc. 292](Summit's counsel stating in a letter to the Commission that it had received the Commission's request for the dispersion model and that it was providing the dispersion model under the condition it be kept confidential), [Doc. 747], Transcript of May 30, 2024 Hearing (Part II), 157:13 to 158:1 (Victor Schock, the Director of the Public Utilities for the North Dakota Public Service Commission, admitted the Commission had received Summit's plume study and that the Commission did not release that modeling to any of the parties). As such, the presumption of *Williams Elec. Co-op.* is inapplicable.

B. The Pipeline Safety Act does not excuse the Commission's violation of the Administrative Agencies Practices Act.

4. Appellees next argue that the Commission's violation of the AAPA is excused because the Commission did not expressly rely on the Dispersion Model in its order, and even if it did rely on the Dispersion Model, its reliance was not prejudicial because issues pertaining to safety have been preempted by the Pipeline Safety Act. Regarding the first argument, the whole point of the siting act is to ensure that the "location, construction, and operation of energy conversion facilities and transmission facilities will produce minimal adverse effects on the environment and the welfare of the citizens of this state…" N.D.C.C. § 49-22.1-02; *cf.* [Docs. 315, 605](Commission notices of hearings); PSC Brief, ¶ 3. In this context, it is hardly a defense on appeal that the Commission ignored relevant evidence. N.D.C.C. § 28-32-46(7)(AAPA stating reversal of agency decision is appropriate when "[t]he findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.").

5. Appellees' second argument is similarly misplaced. When deciding the scope of federal preemption, a cornerstone of the analysis is that trial courts should presume that Congress does not intend to displace state law, especially where the state law concerns traditional areas that come within police power, such as health and safety laws. *See, e.g., Maryland v. Louisiana,* 451 U.S. 725, 746 (1981)("[c]onsideration under the Supremacy clause starts with the basic assumption that congress did not intend to displace state law.");

Wyeth v. Levine, 555 U.S. 555, 565 (2009)(quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

6. This presumption against preemption applies regardless of whether the court is evaluating express or implied preemption. *Altria Grp. v. Good*, 555 U.S. 70, 77 (2008)("When addressing questions of express or implied pre-emption, we begin our analysis with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.")(internal citations omitted). When the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption. *Altria Group, Inc.*, 555 U.S. at 77 (internal citations omitted).

7. In passing the federal Pipeline Safety Act ("PSA"), Congress expressly preempted state and local "safety standards for interstate pipeline facilities." 49 U.S.C. § 60104(c). When Congress listed the subjects that federal safety rules may cover—"design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities"—it focused on technical matters of engineering and operation. 49 U.S.C. § 60102(a)(2). The PSA expressly withheld from the federal government the ability to "**prescribe the location or routing of a pipeline facility**." 49 U.S.C. § 60104(e)(emphasis added).

8. In this context, Appellee's attempt to rely on PSA preemption to excuse its violation of the AAPA should be rejected for three reasons. First,

application of federal preemption under the PSA is a misdirection at best—the Commission did not determine that it was precluded from considering the Dispersion Model. *See* [Doc. 526](order granting protection of the plume study); [Doc. 908](final order). Furthermore, there is no fact finding by the Commission that the regulations at issue focused on issues like "design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities" or how Emmons County or Burleigh County ordinances directly conflict with the PSA.

9. Second, even the main case relied upon by Appellees makes explicit that its holding does not prohibit local governments from considering safety when determining the placement or routing of a pipeline. *Couser v. Shelby Cnty.*, 139 F.4th 664, 671 (8th Cir. 2025)("This holding does not prohibit local governments from considering safety, nor prevent them from enacting all zoning ordinances, as the Counties suggest. This court emphasizes the distinction between safety *standards*—which the PSA preempts—and safety *considerations*—which the PSA does not preempt.")(emphasis in the original). *Couser* found that the specific ordinances of two discrete counties—including setbacks—were preempted by the PSA. However, it did not provide much analysis and its value as a guidepost is limited for that reason.

10. There is other guidance. As explained by PHMSA in a 2023 letter to Lee Blank, the CEO of Summit Carbon Solutions, PHMSA does not

determine the siting of a carbon dioxide pipeline. Instead, this authority "rests largely with the individual states and counties through which the pipelines will operate and is governed by state and local law." [Doc. 834]. As summarized by Associate Administrator for Pipeline Safety Alan K. Mayberry:

> PHMSA cannot prescribe the location or routing of a pipeline and cannot prohibit the construction of non-pipeline buildings in proximity to a pipeline. 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 upon these traditional prerogatives of local—or state—government[1], so long as officials do not attempt to regulate the field of pipeline safety preempted by federal law.

[Doc. 834]. Stated another way, the PSA does not preclude the Commission from considering safety in the placement and routing of the pipeline and does not limit the probative value of the Dispersion Model. In fact, PHMSA suggests that the disclosure of dispersion models is necessary for local decision makers to make informed decisions based upon the risk presented by the pipeline. [Doc. 834](PHMSA advising Mr. Blank that "[e]ach community affected by an existing or proposed pipeline faces unique risks….Sharing

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[1] Summit cites 49 CFR § 195.210 for the proposition that PHMSA has enacted setback regulations. This citation is technically correct but leads to a false conclusion. 49 CFR § 195.210(a) states: "[p]ipeline right-of-way must be selected to avoid, as far as practicable, areas containing private dwellings, industrial buildings, and places of public assembly." 49 CFR § 195.210(b) states "[n]o pipeline may be located within 50 feet (15 meters) of any private dwelling, or any industrial building or place of public assembly in which persons work, congregate, or assemble, unless it is provided with at least 12 inches (305 millimeters) of cover in addition to that prescribed in § 195.248." It is worth mentioning here that this vague reference is the best Summit can do regarding a federal setback.

appropriate information with state or local governments and emergency planners, which may include dispersion models or emergency response plans, may help stakeholders make risk-informed decisions.").

11. Finally, Appellees' argument entirely avoids North Dakota's procedure for conducting a pre-emption analysis. Under the applicable statute, the Commission may find that the ordinances of Emmons County and Burleigh County are preempted "if the applicant shows <u>by a preponderance of the evidence</u> the regulations or ordinances are unreasonably restrictive in view of existing technology, factors of cost or economics, or needs of consumers regardless of their location, or are in direct conflict with state or federal laws or rules." N.D.C.C. § 49-22.1-13(2)(c)(emphasis added). This means that findings of fact are required regarding whether the ordinances are "unreasonably restrictive" and/or in "direct conflict with state or federal laws or rules." The Commission did not find that the Emmons County or Burleigh County ordinances are in direct conflict with the PSA as required by N.D.C.C. § 49-22.1-13(2)(c). In fact, even if the Court were to apply *Couser* instead of the procedure mandated by N.D.C.C. § 49-22.1-13(2)(c), the Commission similarly failed to make the findings of fact that would support preemption under *Couser*. *See Counser*, 139 F.4th at 671 (8th Circuit distinguishing setbacks at issue by finding the "primary motivation" was safety).

C. <u>The Commission is not entitled to deference on fact-finding where it has not disclosed material evidence in violation of the AAPA</u>.

12. There is no dispute that the Commission failed to comply with

AAPA's statutory obligation to make the Dispersion Model part of the record and to permit Appellants the opportunity to review the Dispersion Model and test its probative effect. In this context, the Commission's argument that the trial court should still defer to its findings of fact—much less findings that the county ordinances were "unreasonably restrictive"—should be rejected. The record of the underlying proceeding provides the foundation of appellate review. As a result, there is no dispute that the record does not contain material and relevant evidence received by the Commission. To uphold fact findings based on an incomplete record would be fundamentally unfair.

D. Incorrect statements of law remain incorrect no matter how many times they are repeated.

13. Finally, both Appellees assert that North Dakota law mandates a 500' setback. They both cite N.D.C.C. § 49-22.1-03—the same statute the Commission cited in its final order. The statute reads as follows:

> The commission shall develop criteria to be used in identifying exclusion and avoidance areas and to guide the site, corridor, and route suitability evaluation and designation process. Except for oil and gas transmission lines in existence before July 1, 1983, areas within five hundred feet [152.4 meters] of an inhabited rural residence must be designated avoidance areas. This criterion does not apply to a water pipeline. The five hundred foot [152.4 meter] avoidance area criteria for an inhabited rural residence may be waived by the owner of the inhabited rural residence in writing. The criteria also may include an identification of impacts and policies or practices which may be considered in the evaluation and designation process.

As a threshold issue, this statute states that the commission shall develop criteria to use in "identifying exclusion and avoidance areas." This express

language does not support a conclusion that the legislature intended the 500 foot setback for inhabited rural residences to be the only setback in North Dakota.

14. Second, although an "inhabited rural residence" is not defined in Chapter 49-22.1, the plain language is not a mystery. "Inhabited" generally means occupied or lived in. "Rural" generally means located outside the boundaries or limits of a city or town. A "residence" is a common legal term. While the application of this limitation could be ambiguous in certain cases, the words "inhabited rural residences" is not a blanket term under any circumstance. In this context, it is wrong to conclude that N.D.C.C. § 49-22.1-03 mandates a 500 foot setback for anything other than inhabited rural residences[2]. *See* N.D.C.C. § 28-32-46(6)(providing for reversal of agency decision where "[t]he conclusions of law and order of the agency are not supported by the findings of fact.").

15. For these reasons, this matter should be remanded to the Commission for disclosure of the dispersion model as required by the

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[2] The Commission's brief appears willing to surrender all setback authority under the PSA. Brief, ¶ 32. This is neither the majority position nor an accurate statement of the law in the 8th Circuit under the *Couser* opinion. *Couser*, 139 F.4th at 670-71 (discussing 4th Circuit and 5th Circuit have determined that local setbacks can incidentally consider and effect safety considerations, and *Couser* court relying on unique findings of fact to distinguish these opinions). Appellees do not cite any specific findings of fact that distinguish the 500 foot setback for inhabited rural residences in N.D.C.C. § 49-22.1-03 from Emmons County or Burleigh County ordinances because the Commission never made any.

Administrative Agencies Practices Act and a consideration of those facts required by N.D.C.C. § 49-22.1-03, with appropriate findings of fact as supported by the evidence and required by law.

Dated this 6th day of April, 2026.

Respectfully submitted,

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