

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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**REPLY BRIEF OF APPELLANT BURLEIGH COUNTY**

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## I. INTRODUCTION

[¶1] Appellant Burleigh County submits this brief in reply to the *Response Brief of SCS Carbon Transport LLC* (Index # 928) (“Summit Brief”) and in reply to the *Brief of Appellee North Dakota Public Service Commission* (Index # 930) (“PSC Brief”).

## II. ARGUMENT

### A. The PSC and Summit Mischaracterize the Record, Issues on Appeal, and Applicable Law

[¶2] The response briefs filed by SCS Carbon Transport LLC (“Summit”) and the North Dakota Public Service Commission (“PSC”) attempt to recast the record, issues on appeal, and applicable law in a manner that obscures fundamental defects in the PSC’s decision. This is nothing more than smoke and mirrors.

[¶3] For example, both Summit and the PSC emphasize the length and scope of the administrative proceedings as though volume could substitute for lawful decision-making. *See* Summit Brief, Index # 928 at ¶ 2; PSC Brief, Index # 930 at ¶ 11. It cannot. Even a lengthy administrative process does not cure violations of law, procedural defects, or reliance on undisclosed evidence. *See* N.D.C.C. § 28-32-46. The dispositive question remains whether the PSC complied with governing law and whether its findings are supported by the record, not how extensive the record may be.

[¶4] Summit mischaracterizes Burleigh County’s arguments as generalized policy objections. Summit Brief, Index # 928 at ¶ 3. That is incorrect. Burleigh County raises specific statutory errors, including denial of a fair hearing, failure to comply with required procedures, and conclusions unsupported by findings, all independent grounds for reversal under N.D.C.C. § 28-32-46.

[¶5] Summit claims the Burleigh County ordinances which the PSC found to be preempted “were enacted for the express purpose of regulating pipeline safety through setbacks, emergency

response obligations, and abandonment requirements, a subject matter that is [allegedly] preempted in this context after a route permit is granted.” Summit Brief, Index # 928 at p. 3. But Summit does not explain the basis of its claim that the ordinances are preempted after a route permit is granted, and Summit’s citations do not stand for the proposition stated; they are just citations to portions of the record. *Id.*

[¶6] Throughout their briefing, both the PSC and Summit conflate safety issues involving the pipeline, which may be preempted, with considerations of minimal adverse impacts upon the welfare of the citizens of North Dakota, which the PSC itself stated it must consider in its November 15, 2024, *Findings of Fact, Conclusions of Law, and Order* (Index #2) (“Challenged Order”) at pp. 2-3. They further conflate safety issues involving the pipeline itself, which might include such things as required pipeline thickness, maximum pressure, etc., with routing considerations (where to locate the pipeline), which again the PSC was expressly considering in this route permit application. These are not the same things, and the PSC should not be allowed to avoid its own errors by claiming evidence and arguments relate to safety without explanation or basis in the record on appeal. When faced with clear reversible errors, both the PSC and Summit fall back on the argument that issues of “safety” are preempted by federal law and therefore cannot be considered by the PSC. Their absolutist position on this, without any detailed analysis or factual support in the record, begs the question, what was the point of the PSC hearings if the PSC was not allowed to consider matters relating to minimal adverse impacts upon the welfare of the citizens of North Dakota as it relates to the routing location of the proposed pipeline?

[¶7] The PSC argues its “‘expertise’ is ‘entitled to appreciable deference’” because “the subject matter here is [allegedly] of a ‘highly technical nature.’” PSC Brief, Index # 930 at ¶ 10. However, none of the issues Burleigh County raises in this appeal involve an analysis of “highly technical”

matters. To the extent the issues are technical, they are legal issues involving interpretation of statutes, which are well within the province of the Court. “Questions of law, including the interpretation of a statute, are fully reviewable on appeal from an administrative decision.” *HIT, Inc. v. N. Dakota Dep't of Hum. Servs.*, 2013 ND 51, ¶ 7, 828 N.W.2d 792 (citations omitted). Further, courts give no deference to an administrative agency’s construction of a statute in administering the law when that interpretation contradicts clear and unambiguous statutory language. *Id.*

**B. The PSC’s Withholding of the Dispersion Model Violated the Administrative Agencies Practices Act and Denied Burleigh County a Fair Hearing**

**1. The PSC Possessed and Considered, But Improperly Withheld the Dispersion Model**

[¶8] Summit fully acknowledges that, “the [PSC] is prohibited from considering evidence or information without first affording each party the opportunity to examine the information and to cross-examine the person furnishing it.” Summit Brief (Index # 928) at p. 13 (citing *Williams Elec. Co-op., Inc. v. Montana-Dakota Utilities Co.*, 79 N.W.2d 508 (N.D. 1956); N.D.C.C. § 28-32-25). There is no dispute the Dispersion Model was not provided to Burleigh County or any other parties challenging Summit’s application at the PSC hearings (Index # 930 at ¶ 19), and there is no dispute the PSC prohibited Burleigh County and others from discussing or questioning witnesses about the Dispersion Model at the hearings (Index #741 at p. 172, l. 14 – p. 176, l. 13; Index #743 at p. 98, l. 1 – p. 106, l. 8). These are clear reversible errors. *See* N.D.C.C. § 28-32-25 (stating, “The agency must afford each party, upon written request<sup>1</sup>, an opportunity to examine the information

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<sup>1</sup> Burleigh County submitted multiple express written requests to the PSC for the Dispersion Model. *See* Letter from Burleigh County to the PSC (Doc. 522) and *Motion for Reconsideration of Order on Protection of Info* (Doc. 364), or *In The Alternative, For Leave To Question Re: Dispersion Model* (Doc. 695).

or evidence and to present its own information or evidence and to cross-examine the person furnishing the information or evidence.”)

[¶9] Summit tries to overcome these reversible errors by arguing “there is no evidence the Dispersion Model was a consideration in the Commission’s ultimate decision to grant Summit’s application.” Summit Brief, Index # 928 at ¶ 25. In that regard, Summit claims, “[t]he Commission’s final order does not mention the Dispersion Model,” which is not true. The Dispersion Model is in fact specifically mentioned in the final order, and the Court should not assume the PSC failed to consider it. The Challenged Order specifically recites that the PSC issued an order granting protection to the “plume modeling information”, also known as the Dispersion Model. Index #2 at p. 4.

[¶10] Further, in making its specific findings in the Challenged Order, the PSC does not break down the specific Summit evidence that supports each PSC finding. Summit’s assumption that the PSC did not consider the Dispersion Model because the model is not expressly referenced in each finding is absurd. In the Challenged Order, the PSC explains, “[t]he issues to be considered in the applications for a certificate of corridor compatibility and a route permit are: 1. Will construction, operation, and maintenance of the facility at the proposed location produce minimal adverse effects on the environment and upon the welfare of the citizens of North Dakota?... 3. Will construction, operation, and maintenance of the facility at the proposed location minimize adverse human and environmental impact....” *Id.* at pp. 2-3. The Challenged Order goes on to make findings on these issues based on the PSC’s acceptance of Summit’s “analysis” of the impacts of the proposed pipeline, for example finding:

34. In accordance with the Commission's Selection Criteria set forth in NDAC Section 69-06-08-02(3), a transmission facility corridor or route shall be approved only if it is determined that any **significant adverse effects** that will result from the location, construction, and maintenance of the transmission facility will be at an

**acceptable minimum**, or that those effects will be managed and maintained at an acceptable minimum. **SCS provided an analysis of the impacts of the Project in relation to all relevant Selection Criteria.**

**35. The Commission finds that the Project's impact upon the criteria listed in NDAC Section 69-06-08-02(3) will be at an acceptable minimum.**

Challenged Order, Index #2 at p. 14 (emphasis added). The foregoing finding does not list any specific evidence the PSC relied upon, other than “analysis” provided by Summit. If the Court were to assume the PSC did not consider the Dispersion Model (which consists of analysis of adverse impacts provided to the PSC by Summit), the Court must also make the same assumption as to all other evidence not specifically mentioned in this finding. This is an absurd result, which would essentially mean the PSC did not consider any evidence at all in support of this finding.

[¶11] On the issue of whether the PSC actually considered the Dispersion Model, the *Williams* case cited by Summit is notable for the critical ways in which it differs from the current case. In *Williams*, appellant Williams Electric Cooperative, Inc. argued the PSC denied it a fair hearing because the PSC indicated during a hearing that it would take notice of the file from a different administrative proceeding involving respondent Montana-Dakota Utilities Co., but copies of the file were never produced to Williams Electric Cooperative. 79 N.W.2d at 522, 524-25. Williams Electric Cooperative insisted that the file, which was from an entirely different proceeding, was itself “in evidence on the theory that the Commission had indicated that it would take notice thereof.” *Id.* at 525. The Supreme Court rejected Williams Electric Cooperative’s argument, finding there was no evidence the PSC actually examined or considered the materials from the other file. *Id.* The North Dakota Supreme Court went on to explain at length that, even if the PSC did examine or consider the materials from the other file, those other materials could not possibly be relevant to the issues at hand in the case between Williams Electric Cooperative and Montana-Dakota Utilities Co., which merely involved statutory interpretation. *Id.* at 525-27.

¶12] In contrast to the file at issue in *Williams*, where the PSC simply stated at a hearing that notice would be taken of the file, with no evidence in the record that it ever actually obtained the file, in the present case Summit actually filed the Dispersion Model with the PSC. In other words, in the present case, the evidence is clear the PSC actually received the information. Why would Summit file the Dispersion Model in this case at all if not for the purpose of the PSC actually considering it? Further, while in *Williams* the file at issue was necessarily irrelevant to the issues in the case (only statutory interpretation), the Dispersion Model in the present case contains plume modeling of the expected dispersion of CO<sub>2</sub> in the event of an accidental release, which is directly related to adverse effects of the proposed pipeline on the welfare of the citizens of North Dakota and the human impact, which the PSC specifically held these hearings to address. *See* Challenged Order (Index #2) at pp. 2-3. Unlike *Williams*, where the file at issue was from another proceeding and contained irrelevant information, the Dispersion Model at issue in the present case was created by Summit specifically to address the facts of this case, and was submitted to the PSC for consideration in this case when evaluating adverse effects of the proposed pipeline on the welfare of the citizens of North Dakota and the human impact.

¶13] While Summit attempts to characterize Burleigh County's intended purpose for wanting to examine the Dispersion Model and cross-examine witnesses about it as solely focused on safety (Summit Brief, Index # 928 at ¶¶ 19-20), that is not true. The purpose of the Siting Act is to ensure that transmission facilities produce minimal adverse effects on the welfare of North Dakota citizens. N.D.C.C. § 49-22.1-02. The Dispersion Model is directly relevant to that inquiry. The Dispersion Model presumably shows the areas that would be impacted by an accidental leak of CO<sub>2</sub> and the rate of dispersion. These facts are necessarily relevant to the issue of minimal adverse effects, regardless of safety.

[¶14] Even assuming *arguendo* the PSC did not consider the Dispersion Model at all, as suggested by Summit, the failure to do so would itself be reversible error. If the PSC ignored the Dispersion Model, then its findings fail to address material evidence on the issue of minimal adverse impacts. Further, how could it be established that the Commission’s findings meet the preponderance of the evidence standard (*see* N.D.C.C. § 28-32-46(5)) when not all of the relevant evidence submitted to the PSC was even considered? The PSC cannot simply ignore relevant evidence submitted to it, and then claim that the preponderance of the other evidence it happened to consider supports its findings.

[¶15] In summary, the PSC committed reversible error whether it considered the Dispersion Model or not. If the PSC actually considered the Dispersion Model, then withholding it from Burleigh County violated the Administrative Agencies Practice Act and must be reversed under N.D.C.C. § 28-32-46(3) (“[t]he provisions of this chapter [specifically § 28-32-25 regarding the right to examine the information and evidence and to cross-examine] have not been complied with in the proceedings before the agency.”) and under N.D.C.C. § 28-32-46(4) (“[t]he rules or procedure of the agency have not afforded the appellant a fair hearing.”). If the PSC ignored the Dispersion Model, then the PSC violated N.D.C.C. § 28-32-46(5) (requiring the findings to be supported by a preponderance of the evidence) and N.D.C.C. § 28-32-46(7) (requiring the findings to sufficiently address the evidence presented to the agency). Either scenario requires reversal.

## **2. The Error Was Prejudicial**

[¶16] The PSC’s refusal to disclose the Dispersion Model, allow questioning, or permit independent evaluation deprived Burleigh County of any meaningful opportunity to test critical evidence. This is not a minor evidentiary issue; it is a fundamental due process violation.

[¶17] Summit’s argument that Burleigh County should have simply created its own independent dispersion model (Summit Brief, Index # 928 at ¶ 26) misses the point. Burleigh County was under no obligation to incur the substantial expense of commissioning its own full dispersion model. As the applicant, Summit (not Burleigh County) was the party with a burden of proof to establish minimal adverse impacts. In any event, it should be noted, Burleigh County certainly did not sit on its hands on this issue, as Summit suggests. While Burleigh County did not create its own expensive dispersion model to compete with the undisclosed Dispersion Model Summit submitted, Burleigh County did submit expert evidence of what happens in a CO<sub>2</sub> leak, and used as evidence a dispersion model from Norway. Index # 364; Index # 746 at p. 86, l. 22 – p. 88, l. 5.

[¶18] Further, if Burleigh County had commissioned its own independent dispersion model, and that model was submitted to the PSC for consideration, it strains credulity to suggest that Summit would not have demanded to review Burleigh County’s model, cross-examine its expert about the model, and otherwise defend against the contents of the model. Summit is only arguing in favor of this patently unfair hearing procedure because it is the beneficiary of having had its Dispersion Model submitted to the PSC for consideration with no opposing parties having any opportunity to challenge it. If the shoe was on the other foot, Summit would not accept, without questioning, the introduction of detailed scientific analyses about adverse impacts with no right for an opposing party to view the submission and no right to cross-examination.

**3. The PSC Incorrectly Found that the Confidentiality of the Dispersion Model was Maintained by Summit**

[¶19] As Summit admits, the PSC found that “[t]he confidentiality of [the Dispersion Model] has been maintained by [Summit].” Summit Brief, Index # 928 at ¶ 27 (citing Order on Protection of Information, Index # 526 at ¶ 10). The PSC went on to find, “[n]o 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.” Order on Protection of Information, Index # 526 at ¶ 10. However, these findings are clearly in error in light of the testimony of multiple witnesses that Summit shared the Dispersion Model with various private citizens who were not employees or authorized agents, including: Chad Wachter (private land developer in Burleigh County and elsewhere in North Dakota), Ron Ness (president of the North Dakota Petroleum Council, a governmental relations support group for the oil and gas industry and represents private companies), Brady Pelton (vice president and general counsel of the North Dakota Petroleum Council), 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 Hennen (radio talk show host from Fargo). *See* Index # 918 at ¶¶ 28-29.

[¶20] Summit acknowledges that at the time it shared the Dispersion Model with Chad Wachter, Wachter was a party to the PSC proceeding<sup>2</sup> and Summit shared it with him specifically to address Wachter’s objections to Summit’s application. Summit Brief, Index # 928 at ¶ 30. Summit essentially seeks the right to pick and choose which parties to show the Dispersion Model to (including opposing parties, but not their legal counsel), while selectively depriving Burleigh County of access to it altogether.

[¶21] Summit argues the Dispersion Model was nevertheless properly protected by the PSC because it claims the Dispersion Model is a “security system plan”, pursuant to N.D.C.C. § 44-04-24, which it is not. Under N.D.C.C. § 44-04-24(2)(b)(1), to qualify as a “security system plan,” the Dispersion Model would need to “relat[e] directly to the physical or electronic security” of the

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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). Summit does not dispute the alleged dispersion model shown to Wachter, was never, however, shared with Wachter’s legal counsel.

proposed CO<sub>2</sub> pipeline, of which no showing was ever made to the PSC. Summit and the PSC claim the Dispersion Model is a security system plan because the Dispersion Model “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.” Summit Brief, Index # 928 at ¶ 32 (citing Order on Protection of Information, Index # 526 at ¶10). This concern deals with the physical location of various components of the pipeline system that could be damaged, such as valve locations and security measures implemented, which are not relevant to the reasons Burleigh County wanted to review the model. Burleigh County wanted the model to determine if it was an appropriate comprehensive plume study to show that a leak would only result in minimal impacts on the public welfare. That issue never got tested, nor was Burleigh County allowed to even see the information that would have allowed it to do so. Summit’s focus on “consequence zones and high-impact locations” (Summit Brief, Index # 928 at ¶ 32) is misplaced. The different variables that would have been included in the Dispersion Model (*see* Index # 856), including such things as wind speed, max flow rate, dispersion coefficient averaging time, etc., are unrelated to sensitive information concerning where bad actors may seek to damage the pipeline. 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.

[¶22] Summit never made a showing, and the PSC’s findings do not explain, how the Dispersion Model meets the definition of “security system plan” under N.D.C.C. § 44-04-24, in order to allow statutory protection. If the PSC felt the Dispersion Model was nevertheless entitled to some protection, it could have ordered just the portions of the Dispersion Model unrelated to the locations of valves and security measures designed to protect the physical safety of the pipeline,

to be disclosed. Summit argues, without providing any citation to anything in the record, that “the highly confidential and sensitive nature of the Dispersion Model makes redaction impractical.” Summit Brief, Index # 928 at ¶ 33. Summit provides no explanation or evidence of this claim whatsoever.

**C. Neither State nor Federal Preemption Excuses the PSC’s Errors**

**1. Burleigh County’s Ordinances are Not Superseded or Preempted by State Law (N.D.C.C. § 49-22.1-13)**

[¶23] The PSC’s interpretation of N.D.C.C. § 49-22.1-13 improperly treats preemption as automatic, which is contrary to the plain language of the statute. The statute requires a structured analysis and preserves local authority unless specific findings are made and supported, which they were not in this case.

[¶24] Burleigh County has provided a detailed breakdown of the plain language of N.D.C.C. § 49-22.1-13(2) and its subdivisions in Burleigh County’s initial brief. Index # 918 at ¶¶ 51-65. The PSC and Summit misread the plain language of the statute to suggest that a route permit categorically supersedes and preempts local land use and zoning regulations, which it does not. Summit Brief, Index # 928 at ¶ 38. The PSC’s and Summit’s interpretation renders portions of the statute superfluous, including provisions requiring evaluation of local ordinances. Courts must avoid interpretations that render statutory language meaningless. *See* N.D.C.C. § 1-02-38(2).

[¶25] Furthermore, the PSC’s incorrect interpretation of N.D.C.C. § 49-22.1-13 is not entitled to deference by the Court. Neither the PSC nor Summit have cited cases establishing that courts defer to administrative agencies on the legal issues of supersession and preemption. “Questions of law, including the interpretation of a statute, are fully reviewable on appeal from an administrative decision.” *HIT, Inc. v. N. Dakota Dep’t of Hum. Servs.*, 2013 ND 51, ¶ 7, 828 N.W.2d 792 (citations omitted). Courts give no deference to an administrative agency’s construction of a statute

when that interpretation contradicts clear and unambiguous statutory language, which the PSC's interpretation does. *Id.*

[¶26] Summit admits Burleigh County has statutory general zoning authority under N.D.C.C. § 11-33-01. Summit Brief, Index # 928 at ¶ 41. However, it claims, “[t]he question is not whether counties possess general zoning authority. The question is what the Legislature directed should occur when the Commission issues a route permit for a gas or liquid transmission facility within a designated corridor. N.D.C.C. § 49-22.1-13(2)(b) answers that question directly.” *Id.* However, N.D.C.C. § 49-22.1-13(2)(b) does not answer that question. While there is a supersession and preemption provision in subdivision (b), the PSC and Summit ignore 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, which the PSC failed to do. As discussed in Burleigh County's initial brief, analysis of the other subdivisions (c through e) reveals the PSC's determination of automatic supersession and preemption is incompatible with the statutory language. Index # 918 at ¶¶ 54-59.

[¶27] Summit argues N.D.C.C. § 49-22.1-13(2)(c) is limited to road use agreements because the subdivision starts with the sentence: “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.” Summit Brief, Index # 928 at ¶45. This language in no way limits the remainder of subdivision (c) to road use agreements. Summit simply tries to read that limitation into a statute where such limiting language does not exist. The remaining portion of subdivision

(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.” There is no statutory language to suggest the remainder of subdivision (c) is limited to road use agreements. The PSC and Summit simply misread N.D.C.C. § 49-22.1-13(2)(c), which was clear error.

[¶28] Summit argues Burleigh County’s interpretation of subdivision (c) would render subdivision (b) surplusage. Summit Brief, Index # 928 at ¶46. This is not true. Subdivision (b) and (c) are intended to be read together (*see* subdivision (b), which states, “[e]xcept as provided in this section...”). Read together, these subdivisions make clear that local land use and zoning regulations are superseded and preempted only upon a showing by the applicant 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.

[¶29] The PSC and Summit also misread subdivision (d), which provides a notice requirement for the PSC to notify local governments, and upon notice, the local governments must provide a listing of local requirements. N.D.C.C. § 49-22.1-13(2)(d). The subdivision goes on to state, “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.” *Id.* Summit argues this subdivision is not “a limitation on subdivision (b)’s supersession rule after a permit is granted.” Summit Brief, Index # 928 at ¶ 47. Rather, it claims subdivision (d) is merely a procedural backstop that prevents late-asserted local conditions from disrupting the orderly siting process. *Id.* However,

Summit wholly fails to address Burleigh County’s argument that subdivision (d) specifically 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).

[¶30] Similarly, the PSC and Summit misread subdivision (e), which states, “[a]n applicant shall comply with all local requirements provided to the commission pursuant to subdivision d, which are not otherwise superseded by the commission.” 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. Summit incorrectly argues that this interpretation of the plain language of subdivision (e) creates an internal inconsistency, but wholly fails to explain it. Summit Brief, Index # 928 at ¶ 49. All of the subdivisions of N.D.C.C. § 49-22.1-13(2), read together, hold that supersession and preemption are not automatic, contrary to the PSC’s findings. N.D.C.C. § 49-22.1-13(2) requires findings that local ordinances are either “unreasonably restrictive” or in “direct conflict” with state or federal law. The PSC made no such supported findings. Instead, it declared automatic preemption and labeled the ordinances unreasonably restrictive without evidentiary analysis. That failure requires reversal.

2. **Burleigh County’s Ordinances Do Not Conflict with State Law (N.D.C.C. § 49-22.1-03) and Are Not Unreasonably Restrictive**

[¶31] 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 PSC’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. Because the statute sets a floor, not a ceiling, there is no direct conflict between state law and Burleigh County’s two-mile setback. Summit argues this provision creates a statewide framework that cannot be replaced with local ordinances. Summit Brief, Index # 928 at ¶55. There is nothing in the language of the statute suggesting it was intended to preempt local ordinances or that the creation of avoidance areas was intended to be the sole framework of setbacks.

[¶32] Summit also argues “a local ordinance that functionally forbids the Commission-approved route in large swaths of the state is incompatible with that statutory design.” Summit Brief, Index # 928 at ¶ 56. However, while the PSC may designate the route of the pipeline, it is still subject to the minimal adverse impact requirement, which is where local authorities come into play. There is no legal authority supporting the proposition that the PSC has sole authority over all matters relating to the location of a pipeline, as Summit argues. *Id.* If it did, the PSC could approve absurd routes for high pressure CO<sub>2</sub> pipelines, for example running a high pressure CO<sub>2</sub> pipeline between the two downtown hospitals in Bismarck, with the local government having no say in the matter at all.

[¶33] Summit cites *Environmental Driven Solutions, LLC v. Dunn Cnty.*, arguing that a direct conflict exists where local regulation stands as an obstacle to the accomplishment and execution

of the full purposes and objectives of the governing statutory scheme or where it seeks to regulate a field reserved to another sovereign. Summit Brief, Index # 928 at ¶ 57 (citing 2017 ND 45, 890 N.W.2d 841). However, Summit’s reliance on that case, is misplaced because that case involved field preemption under a statutory scheme granting the Industrial Commission “continuous” and “exclusive” authority over oil and gas operations, leaving no room for local regulation. Unlike the comprehensive and exclusive framework in that case, the Siting Act (N.D.C.C. ch. 49-22.1) expressly preserves a role for local land-use regulation and requires the PSC to evaluate such regulations, superseding them only upon specific findings. *See* N.D.C.C. § 49-22.1-13(2)(c). Further, *Environmental Driven Solutions* involved a direct conflict where the county attempted to halt a state-approved project entirely, making compliance with both regimes impossible. 2017 ND 45, ¶ 3. Here, by contrast, Burleigh County’s ordinances do not veto the project.

[¶34] Nor are the Burleigh County Ordinances unreasonably restrictive. In fact, Burleigh County introduced evidence 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; Index #744 at p. 196, l. 2 – p. 197, l. 10; p. 209, l. 16 – p. 211, l. 8). In his testimony, Bitner referred to implementation of the Burleigh County setbacks as allowing the citizens of Burleigh County a fighting chance to be further away from a CO<sub>2</sub> leak involving the Summit pipeline. (Index # 744 at p. 220, l. 8 – p. 221, l. 3 and p. 222, l. 10 – p. 224, l. 15.) While Summit claims, “A regulation can be unreasonably restrictive on its face when it imposes conditions that, given existing technology and real-world routing constraints, are impossible or nearly impossible to satisfy and would defeat the statewide siting process” (Summit Brief, Index # 928 at ¶59), it introduced no evidence on the impossibility of a viable southern route nor did it make such arguments. Summit cannot raise this issue for the first time on appeal.

3. **Federal Preemption Was Not and Cannot be a Basis for Preemption of Burleigh County Ordinances**

[¶35] While both Summit and the PSC now argue on appeal that Burleigh County ordinances are preempted by federal law, the PSC’s orders at issue did not address federal preemption at all. Instead, the PSC merely concluded that local ordinances were automatically preempted under N.D.C.C. § 49-22.1-13. While N.D.C.C. § 49-22.1-13(2)(c) does state in relevant part, “[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 in direct conflict with state or federal laws or rules.” Summit never made such a showing, and the PSC never made a finding of a direct conflict with federal laws or rules. (Underline Added)

[¶36] The PSC itself explained the limits of its own inquiry as follows in a February 7, 2024, order:

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.

Index # 586 at p. 3 (emphasis added). The order then states, “[t]he 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.* In the PSC’s final order, it similarly stated:

Based on the above Findings of Fact, and its February 7, 2024, Order in this proceeding, the Commission concludes that NDCC Section 49-22.1-13 automatically supersedes and preempts any local land use or zoning regulations for

a gas or liquid transmission facility route permit except for road use agreements. The Commission further concludes that the Ordinances of Burleigh County and Emmons County are unreasonably restrictive on their face under NDCC Section 49-22.1-13(2)(c).

Index # 908 at p.16 (emphasis added). Again, there is no mention of federal preemption as a basis to ignore Burleigh County ordinances. The PSC and Summit cannot now introduce this basis on appeal for the first time, which was not previously addressed by the PSC in the proceedings below.

[¶37] Even if the PSC had analyzed alleged federal preemption of Burleigh County ordinances, which it did not, federal law does not support preemption, as the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) itself has explained. In a letter from PHMSA to Summit CEO Lee Blank, directly addressing this issue, PHMSA explained:

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 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...Restricting land use and development along pipeline rights-of-way through zoning, setbacks, and similar measures.

Index # 834 at p. 3 (emphasis added).

[¶38] Additionally, the cases cited by the PSC and Summit allegedly establishing federal preemption are distinguishable. Summit cites dicta from *Couser v. Shelby Cnty., Iowa*, 139 F.4th 664, 669 (8th Cir. 2025) in support of the proposition that federal law prohibits state regulation of safety for interstate transmission facilities. But *Couser* analyzed whether the county ordinance at issue could require trenchless construction, and enhanced permitting, setback, emergency response, and abandonment requirements. *Id.* at 673-676. *Couser* has nothing to do with plume

modeling whatsoever. Summit similarly cites *Save Our Illinois Land v. Illinois Commerce Comm'n*, 2022 IL App (4th) 210008, ¶ 90, 200 N.E.3d 870 and *Kinley Corp. v. Iowa Utilities Bd., Utilities Div., Dep't of Commerce*, 999 F.2d 354, 359 (8th Cir. 1993) for the same proposition. But *Save Our Illinois Land* concerned whether the owners of an oil pipeline would be permitted to add more pumping stations to their pipeline in Illinois, and *Kinley Corp.* similarly concerned whether state regulation of a pipeline which carried aviation jet fuel—neither of which present concerns analogous to a pipeline carrying carbon dioxide. 2022 IL App (4th) 210008, ¶ 1, 200 N.E.3d; 870 999 F.2d at 356.

[¶39] Further, the PSC improperly attempts to selectively apply federal preemption only to local ordinances. The PSC specifically applied the setback requirement from state law, finding, “NDCC Section 49-22.1-03 specifies that areas within 500 feet of an inhabited rural residence must be an avoidance area unless waived in writing by the owner of the inhabited rural residence. The company testified that it met this requirement by either avoiding the location or obtaining a waiver.” Challenged Order (Index #2) at p. 10, ¶ 14. Why does the PSC not argue the setback requirement in N.D.C.C. § 49-22.1-03 is preempted by federal law, when it purportedly now believes setback requirements in county ordinances are preempted by federal law? In fact, neither are preempted, and fall within traditional state and local powers to regulate land use, including setback distances and property development.

[¶40] While Summit claims the Burleigh County ordinances were primarily directed toward public safety because of the use of the word “safety” by county witnesses (Summit Brief, Index # 928 at ¶ 50), the word “safety” is not a swear word never to be uttered at a hearing. PHMSA itself recognizes local measures:

1. Controlling dangerous excavation activity near pipelines.
2. Limiting certain land use activities along pipeline rights-of-way.

3. Restricting land use and development along pipeline rights-of-way through zoning, setbacks, and similar measures.
4. Requiring the consideration of pipeline facilities in proposed local development plans.
5. Designing local emergency response plans and training with regulators and operators.
6. Requiring specific building code design or construction standards near pipelines.
7. Improving emergency response and evacuation plans in the event of a pipeline release.
8. Participating in federal environmental studies conducted under the National Environmental Policy Act (NEPA) and similar state laws for new pipeline construction projects.

Index # 834 at p. 3. While state and local governments cannot create safety standards, they can regulate the location of a pipeline and can address the welfare of citizens (which the PSC itself was charged with doing). At issue in this matter is where the pipeline should be located, and how that location impacts the welfare of citizens of North Dakota. Neither the state nor the counties are federally preempted from addressing these issues.

**D. Summit's Failure to Conduct a Meaningful Southern Route Analysis Requires Reversal**

[¶41] Summit argues an alternative southern route is not required by the Siting Act, and on rehearing the PSC did not condition approval on analysis of the southern route. Summit Brief, Index # 928 at ¶63. This argument ignores that the PSC was required to consider minimum adverse impacts, and to evaluate the evidence presented, including evidence from Burleigh County that the pipeline could have been routed further away from Bismarck and through more rural townships. The evidence presented by Summit on the alternate southern route south of Bismarck is non-existent. Summit does not even attempt in briefing to explain its southern route analysis or to provide citations to the record. It was Summit's burden to show there was no less burdensome southern route, and they failed, not presenting any evidence to meet that burden, other than simple maps for which no testimony was offered. The maps Summit provided did not even have

landmarks included, such as street addresses, section or township names or numbers, legal descriptions or identifying information. (Index #847, BC100 and Index #853, BC106). Burleigh County had to submit its own maps because Summit's were not intelligible. Ultimately, Summit did not offer evidence to establish minimum adverse impacts with respect to the southern route.

[¶42] In contrast, there was substantial evidence presented by Burleigh County and other parties establishing that minimum adverse impacts were not achieved. 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). The southern route encroached on the extraterritorial limits of Bismarck and even went right through numerous existing housing subdivisions. (Index #849; BC102).

[¶43] 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). Doing so would have helped establish minimal adverse impacts on public welfare, but Summit did not do so. Likewise, 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 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.

[¶44] 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).

[¶45] 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).

[¶46] Other significant testimony about the negative impacts of the pipeline route, including from developers Chad Wachter and Howard Malloy, are discussed in Burleigh County's initial brief. Index # 918 at ¶¶ 72-75. All of this testimony went unrefuted by Summit at the hearings.

[¶47] Summit failed to meet its burden of proof required by the PSC's prior Order. (Index #528 at ¶ 17), and also failed to show the minimum adverse impacts standard was met. Contrary to Summit's assertion (Summit Brief, Index # 928 at ¶73), Burleigh County is not requesting this Court to reweigh evidence relating to the southern route. The point is that Summit wholly failed to meet its burden to show a less harmful route, and to show that it conducted the necessary analysis. Burleigh County's evidence was unrefuted at the PSC hearings. The PSC and Summit's lack of citations to the record in this regard in their briefs is telling. Summit claims it submitted "substantial supplemental materials" on this issue (Summit Brief, Index # 928 at ¶ 67), but does not cite to any, with the exception of a Response to Supplemental Filing Request (Index # 781), which merely compares Summit's preferred route to the north with a single southern route hand selected by Summit to show its northern route is preferable. Witnesses universally testified Summits' proposed southern route was unacceptable. Summit put the one proposed southern route too close to residences, and in a location that caused other concerns, but never reached out to local officials or others to attempt to identify a legitimate southern route. Likewise, Summit never reached out to the Corp. of Engineers to determine if there was an alternative southern crossing of the Missouri River. Summit basically submitted a map of one unacceptable southern route and nothing else. In contrast, the uncontradicted testimony presented by Burleigh County established

it would cause major negative impacts on welfare. Summit's failure to show minimal adverse impacts with respect to the southern route is established through uncontradicted testimony. The PSC's original denial of Summit's application indicated Summit failed to meet its burden, and Summit still did not produce evidence on rehearing to meet its burden.

**E. Summit Provided No Evidence to Support its Claims there were No Adverse Impacts on Property, Including Value, Due to the Presence of CO<sub>2</sub> Pipelines**

[¶48] Summit asserts in its brief that any landowner assertions about adverse effects on property value and development were “unsupported by evidence” and that “Summit presented evidence showing little to no buyer preference differences and no significant sales-price differences for comparable parcels with and without pipeline easements. (Findings of Fact, Conclusions of Law and Order, R908:¶¶16-17)” (Summit Brief, Index # 928 at ¶71). Summit's assertion that purported evidence in this regard exists is highly misleading. The witness called on this land values by Summit was a paid out of state witness appraiser from Tomahawk, Wisconsin, Jeff Olson. However, the testimony by Olson established he had no basis for his opinions regarding the impacts of pipelines on property values in Burleigh County and he candidly admitted as much. For instance, he admitted he performed no appraisal to support any opinions he offered as to the value of properties in Burleigh County or Bismarck. Index # 740 at pg. 23, ll. 1-13. He offered no opinions as to value of any of the properties discussed in his written testimony because he had failed to do an appraisal of any of those properties. *Id.* at pg. 24, ll. 12-20. He admitted he did no analysis of values for any residences and any rural subdivisions in Burleigh County, or any other county in North Dakota. *Id.* at pg. 25, ll. 13-21. None of the properties he was offering opinions on were encumbered by a CO<sub>2</sub> pipeline and he has never conducted an appraisal or valuation of any residential or agricultural land in any state, including North Dakota, where it was encumbered by a CO<sub>2</sub> pipeline or a nearby CO<sub>2</sub> pipeline. *Id.* at pg. 26, ll. 13-25 and pg. 27, ll. 1-9.

Disingenuously, the properties that Olson was testifying about, also without foundation, were the properties where there was a natural gas pipeline or an oil pipeline, not a CO<sub>2</sub> pipeline. *Id.* at pg. 27, ll. 19-25. Olson admitted that the only properties he considered were properties where oil and natural gas pipelines were located on the property or nearby. *Id.* at pg. 30, ll. 22-25 and pg. 31, ll. 1-5. Olson admitted he never talked to any real estate developers, any county representatives, or any landowners regarding how the presence of a CO<sub>2</sub> pipeline might affect the value of property in Burleigh County. *Id.* at pg. 31, ll. 13-23 and pg. 32, ll. 14-25, and pg. 33, l. 1. Olson relied on oil and gas pipelines in “northwest Bismarck”, but could not even identify where in “northwest Bismarck” he was referring to, nor any nearby landmarks. *Id.* at pg. 33, ll. 23-25 and pg. 34, ll. 1-5. And although Olson was presented to offer an opinion that “there is no market evidence uncovered that suggests that pipelines impact the market value of residential properties”, Olson agreed that his opinions in this regard were for non- CO<sub>2</sub> pipelines. *Id.* at pg. 34, ll. 16-25 and pg. 35, ll. 1-14. Olson was also offered by Summit to offer opinions on the CO<sub>2</sub> pipelines impact on agricultural land but considered no CO<sub>2</sub> pipelines in offering any opinions in that regard, but rather talked about oil and gas pipelines, which is apples and oranges. *Id.* at pg. 35, ll. 15-25 At the end of the day, Olson’s testimony proved to be useless in relation to the effect of a CO<sub>2</sub> pipeline on the value of either residential or agricultural property, yet, Summit asserts incorrectly “it presented evidence showing little to no buyer preference differences and no significant sales-prices differences for comparable parcels with and without pipeline easements”.

[¶49] Summit also submitted a letter from Wade Becker (Index # 436), but Becker never appeared at a hearing to be cross-examined, and the letter he provided had no details to establish values or to be useful for any other purposes.

#### **F. The Court May Remand for Further Proceedings**

[¶50] Summit takes issue with Burleigh County’s contention that the PSC should have postponed its decision until PHMSA issued expected new regulations following *Satartia*. Summit Brief, Index # 928 at ¶ 78. Summit argues the Siting Act requires the PSC to process and decide applications within the statutory framework and time limits the Legislature established. *Id.* While that may be true, now that new PHMSA regulations are in place, the Court may remand for further proceedings. The pipeline at issue is the longest proposed CO<sub>2</sub> pipeline in the United States and is under extremely high pressure, making these issues of paramount public concern. Summit notes that PHMSA retains its enforcement authority (Summit Brief, Index # 928 at ¶80), but that is only if PHMSA chooses to involve itself in this matter.

**G. Burleigh County’s Concern Regarding Insurance is Even More Apparent in Light of Recent Caselaw**

[¶51] 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. In its initial briefing, Burleigh County pointed out that the PSC failed to consider that CO<sub>2</sub>, as a pollutant, is not covered by insurance in the event of an unexpected release caused by anyone other than Summit. Index # 918 at ¶¶ 79-81. Summit never provided its insurance policy, but its policy no doubt has this standard pollution exclusion. Further, 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 CO<sub>2</sub> is a pollutant as defined by insurers in their policies. Index #s 377, 378, and 843.

[¶52] These concerns are even more poignant in light of the recent court case *N. Star Mut. Ins. Co. v. Rodin*, wherein the Eighth Circuit, applying North Dakota law, held that a standard pollution

exclusion barred insurance coverage for bodily injury caused by CO<sub>2</sub>, concluding that CO<sub>2</sub> constitutes a “pollutant” under unambiguous policy language. No. 24-1180, 2026 WL 934925, at \*4-6 (8th Cir. Apr. 7, 2026). The court interpreted the insurance policy according to its plain language, rejecting the assertion that such exclusions are limited to traditional environmental pollution. *Id.* This holding is directly relevant here because it confirms that CO<sub>2</sub>, a gaseous contaminant that renders air unsafe, falls squarely within standard pollution exclusions, meaning damages from a release may not be covered by typical liability insurance. As a result, the PSC’s reliance on Summit’s asserted insurance coverage, without addressing the scope of pollution exclusions under North Dakota law, fails to ensure that affected landowners and the public would be adequately protected in the event of a release.

[¶53] Summit argues, “[e]ven if some landowners’ private policies treat CO<sub>2</sub> as a pollutant, that does not mean landowners are left without protection. Liability for pipeline releases is not determined by the presence or absence of a landowner’s private insurance policy; it is determined by applicable liability rules and the pipeline operator’s obligations, including the operator’s own insurance and responsibility for damages.” Summit Brief, Index # 928 at ¶ 86. Summit admits here that a landowner would need to sue Summit to have any chance of reimbursement, which is not a minimal adverse impact.

[¶54] Summit argues “[t]he Siting Act does not transform the Commission into a regulator of private insurance, nor does it authorize the Commission to require applicants to negotiate bespoke insurance endorsements for each landowner as a condition of siting approval.” Summit Brief, Index # 928 at ¶83. Summit claims, “[i]nsurance disputes about how third-party insurers define “pollutants” or allocate coverage are not a siting criterion and are not a contemplated basis for

denial.” However, these matters are part of the PSC’s duty to ensure there are only minimum adverse impact on public welfare.

[¶55] Apparently the PSC agreed, because it did make a finding addressing insurance related concerns, albeit inadequate. Index #2 at ¶ 47. Summit argues, “[t]he Commission acknowledged landowner assertions about difficulty obtaining insurance and determined that additional conditions were not necessary given Summit’s commitments, including maintaining substantial liability coverage for the project and committing to bear liability for a rupture absent a third-party line strike.” Summit Brief, Index # 928 at ¶84. But the evidence established these other commitments were useless. Summit did not provide 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 CO<sub>2</sub> leaks which landowner can prove Summit caused. Index #306.

[¶56] 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. Summit argues the indemnification provision is a private contract term and the PSC's role is not to rewrite easements. Summit Brief, Index # 928 at ¶85. While the PSC does not rewrite easements, it must consider whether there are minimal adverse impacts, which there are not as Summit never committed to unequivocal indemnity.

[¶57] The only evidence produced to the PSC established that Summit did not in fact protect landowners from potential liability, and minimal adverse impacts were not established.

#### **H. The PSC's Findings Are Not Supported by the Record**

[¶58] The PSC's findings regarding routing, adverse impacts, insurance, and other issues are not supported by a preponderance of the evidence. The PSC relied heavily on Summit's bald assertions while discounting overwhelming contrary testimony from landowners, experts, and local officials.

[¶59] Under N.D.C.C. § 28-32-46(5), findings must be supported by the preponderance of the evidence. A reasoning mind could not reach the PSC's conclusions based on the full record.

### **III. CONCLUSION**

[¶60] This case presents multiple independent grounds for reversal under N.D.C.C. § 28-32-46, including denial of a fair hearing, failure to comply with statutory procedures, misinterpretation of governing law, unsupported findings of fact, and improper preemption of local authority. Any one of these errors requires reversal. Taken together, they compel it.

[¶61] For the foregoing reasons, and the reasons discussed in *Brief Of Appellant Burleigh County* (Index # 918), 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.

Dated this 13th day of April, 2026.

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