

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Case 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, and
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.

**ORDER AFFIRMING IN PART,
REVERSING IN PART, AND
REMANDING**

INTRODUCTION

[¶1] This matter came before the Court pursuant to a *Notice of Appeal and Specifications of Error* filed by the Appellants, 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, and James Tiegs (collectively the “Landowners”), on December 13, 2024. (R:1-11). The Landowners appeal from the November 15, 2024, *Findings of Fact, Conclusions of Law, and Order* by the North Dakota Public Service Commission (the “PSC”), the February 7, 2024, Order, and the August 4, 2023, *Order on Protection of Information*. (R:1:2).

[¶2] The Landowners assert the PSC incorrectly determined N.D.C.C. § 49-22.1-13(2)(b) automatically superseded and preempted any local land use or zoning regulations for a gas or liquid

transmission facility route permit in its February 7, 2024, Order. *Id.* They also assert the PSC incorrectly determined that ordinances of Emmons County and Burleigh County (the “Counties”) requiring a setback that may exceed N.D.C.C. § 49-22.1-03 are unreasonably restrictive because they conflict with state law. *Id.* The Landowners assert the PSC made determinations of fact and conclusions of law based on a secret plume study that SCS Carbon Transport LLC (“Summit”) shared only with the PSC and a handful of private individuals, and that neither the Landowners nor the Counties have seen, cross-examined, or had evaluated by an expert. (R:915:20-21:28-29). The Landowners contend neither the ex parte communication procedure under N.D.C.C. § 28-32-37 nor the additional-evidence procedure under N.D.C.C. § 28-32-25 was followed before the PSC considered Summit’s carbon dioxide dispersion model (the “Dispersion Model”), and that this noncompliance should be dispositive. (R:915:39-40:54). The Landowners ask this Court to reverse the orders issued by the PSC, remand for further proceedings, and award them costs and attorney’s fees under N.D.C.C. § 28-32-50(1). (R:1:5).

[¶3] Emmons County initiated an administrative appeal arising out of the PSC’s above-mentioned orders, identified as *Emmons County vs. North Dakota Public Service Commission and SCS Carbon Transport LLC* (Case No. 08-2024-CV-00624). On January 31, 2025, counsel for Emmons County filed a *Notice of Appearance* on behalf of Emmons County, as the County was named an appellee in this action. (R:28). The same day, Emmons County voluntarily dismissed its administrative appeal. (R:19) (08-2024-CV-00624).

[¶4] On June 25, 2025, the PSC filed a *Motion to Consolidate* the administrative appeal identified as *Burleigh County vs. North Dakota Public Service Commission and SCS Carbon Transport LLC* (Case No. 08-2024-CV-03614) with the present case. (R:97-101). Burleigh County joined the PSC’s *Motion to Consolidate*. (R:102). The Honorable Pamela Nesvig granted the PSC’s *Motion*

to *Consolidate* the two administrative appeals into the present case. (R:114).

[¶5] On November 20, 2025, the PSC filed a *Certificate of Record* along with the record from the administrative proceeding. (R:122-123); (R:124-146, 149-476, 493-912).

[¶6] On February 19, 2026, Emmons County filed its *Brief*. (R:913). Emmons County argues the PSC erred because N.D.C.C. § 49-22.1-13(2)(c) requires factual findings and a conclusion of law that a local ordinance is unreasonably restrictive before the PSC can supersede or preempt local land use laws. (R:913:4:10-27). Emmons County further contends its ordinance cannot be superseded under N.D.C.C. § 49-22.1-13(2)(c) because the record contains no evidence to support the required findings. (R:913:12:28-30). Finally, Emmons County maintains the PSC's decision to reconsider Summit's Application after denial was illegal because the "reconsideration" was in fact an amendment to the Application. (R:913:13:31-37). Accordingly, Emmons County asks the Court to reverse the PSC because it misinterpreted the applicable law, failed to make findings before attempting to preempt or supersede the Emmons County Ordinance, and allowed Summit to amend its application under the guise of requesting "reconsideration." (R:913:15:38-39).

[¶7] The Landowners submitted their *Appellants' Brief* on February 20, 2026. (R:915). The Landowners argue that N.D.C.C. § 49-22.1-13(2) does not allow for "automatic preemption" of local ordinances or regulations. (R:915:22:31-40). The Landowners maintain a certificate of corridor compatibility is a prerequisite for a route permit, and an applicant must comply with all local requirements timely submitted to the PSC. (R:915:23:32-35). In contrast, they argue, a route permit may only preempt local ordinances upon limited findings of fact by the PSC under N.D.C.C. § 49-22.1-13(2)(c). (R:915:25:36-40). The Landowners contend the PSC's finding of fact is impermissibly vague. (R:915:28:41-44). The Landowners assert the PSC's finding does not explain which statutory elements the local ordinances trigger or identify any evidence supporting its

finding. (R:915:30:43). Regarding the PSC's conclusion that a setback in excess of 500 feet conflicts with N.D.C.C. § 49-22.1-03, the Landowners claim that conclusion is a mistake of law. (R:915:30:44). The Landowners argue the PSC's finding of "unreasonable restrictions" lacks evidentiary support. (R:915:32:45-54). Accordingly, the Landowners ask the Court to reverse and remand for further proceedings to allow appropriate disclosure, discovery, and a hearing that creates a record as the Administrative Agencies Practice Act ("AAPA") requires. (R:915:40:55).

[¶8] On February 23, 2026, Burleigh County filed its *Brief*. (R:918). Burleigh County argues Summit was required to perform appropriate dispersion modeling of the release of carbon dioxide because carbon dioxide is an asphyxiant. (R:918:14:19-23). Burleigh County contends the PSC erred by protecting Summit's Dispersion Model from release to the public. (R:918:17:24-48). Burleigh County asserts it was inappropriate for the PSC to consider the Dispersion Model without giving the parties and the public an opportunity to challenge its reliability. (R:918:19:27). Burleigh County claims that while Summit advanced its sensitive-security argument for concealing the Dispersion Model, it abandoned that argument in Minnesota, and thus advanced a false narrative before the PSC. (R:918:26:39). Burleigh County maintains the PSC's decision to protect the Dispersion Model was an abuse of discretion. (R:918:27:40). Further, Burleigh County argues North Dakota law does not protect the Dispersion Model. (R:918:27:41-48).

[¶9] Burleigh County contends the PSC erred in finding that Burleigh County ordinances are superseded and preempted by state law, and that they are unreasonably restrictive on their face. (R:918:32:49-65). Burleigh County asserts Summit failed at the hearings to identify a viable southern route or eastern route around Bismarck, North Dakota. (R:918:39:66-76). It claims the southern-route "analysis" presented at the rehearing was no analysis at all, but rather an affront to the PSC's prior order. (R:918:41:68-69).

[¶10] Further, Burleigh County argues the PSC erred by refusing to consider public health and welfare and other relevant considerations that are not preempted by the Pipeline and Hazardous Materials Safety Administration (“PHMSA”). (R:918:45:77). Burleigh County also contends the PSC erred by issuing its November 15, 2024, Order without waiting for expected new PHMSA regulations. (R:918:46:78). Burleigh County asserts the November 15, 2024, Order fails to address issues with Summit’s liability insurance, which fails to adequately protect affected landowners. (R:918:46:79-81). Finally, Burleigh County maintains it should be awarded its reasonable attorney’s fees and costs under N.D.C.C. § 28-32-50(1). (R:918:48:82-88). Accordingly, Burleigh County asks the Court to reverse the PSC. (R:918:51:89-91).

[¶11] On March 20, 2026, Summit filed its *Response Brief*. (R:928). Summit argues the PSC’s treatment of its Dispersion Model did not deprive Burleigh County of a fair hearing and that the PSC correctly maintained confidentiality under North Dakota law. (R:928:11:17-35). Summit contends the PSC did not rely on the Dispersion Model as a basis for its decision, and that any use of the Dispersion Model to litigate safety would have been futile because the PSC expressly disclaimed jurisdiction over pipeline safety. (R:928:11-12:18-19). Summit maintains the North Dakota Supreme Court’s decision in *Williams Elec. Co-op., Inc. v. Montana-Dakota Utilities Co.*, 79 N.W.2d 508 (N.D. 1956), controls and forecloses the fair-hearing claim. (R:928:13:22-25). It also asserts Burleigh County cannot show prejudice. (R:928:14:26).

[¶12] Further, Summit contends the PSC correctly concluded that the Burleigh and Emmons County ordinances are superseded and preempted. (R:928:18:36-62). Summit argues N.D.C.C. § 49-22.1-13(2)(b) provides the general rule, while subdivisions (c) through (e) address distinct subjects and do not convert the categorical supersession and preemption in subdivision (b) into a discretionary, ordinance-by-ordinance mechanism. (R:928:19:38). Summit maintains the PSC’s

interpretation of N.D.C.C. § 49-22.1-13(2) is reasonable and entitled to deference. (R:928:19:39-48). It asserts both Counties read the statute in a manner that disregards the structure of the subsection, ignores the Legislature's use of mandatory language, and attempts to preserve local safety regulation in an area where federal law and the statute do not permit it. (R:928:19:40-47). Next, Summit claims the distinction between a certificate of corridor compatibility and a route permit, raised by the Landowners, is moot because the PSC issued a route permit. (R:928:22:48). It contends the county ordinances are independently preempted because they regulate interstate pipeline safety and federal law prohibits state and local entities from adopting safety standards for interstate pipeline facilities. (R:928:23:50-53). It argues the ordinances directly conflict with N.D.C.C. § 49-22.1-03 and state law. (R:928:25:54-57). Summit maintains the ordinances are unreasonably restrictive and operate as an effective ban. (R:928:27:58-62).

[¶13] Next, Summit asserts Burleigh County's argument regarding "no viable southern or eastern route" misstates Summit's legal obligations, the record, the standard of review, and the PSC's findings. (R:928:29:63-73). Summit contends Burleigh County's routing and development claims ask the Court to reweigh evidence. *Id.* Summit maintains the Appellants' other arguments have no merit. (R:928:36:74-99). Specifically, Summit argues the PSC did not err by declining to adjudicate interstate pipeline safety, and that Burleigh County's attempt to repackage safety objections as "public welfare" considerations is legally untenable because such considerations are reserved to PHMSA under the Pipeline Safety Act ("PSA"). (R:928:36-37:74-77). Summit contends the PSC was not required to delay its decision in anticipation of future PHMSA regulations, and that Burleigh County's "wait for rulemaking" theory is contrary to N.D.C.C. ch. 49-22.1 and administrative finality. (R:928:37:78-81). Summit asserts the PSC adequately addressed the insurance issue before it. (R:928:38:82-86). Summit maintains its application and petition for

reconsideration complied with N.D.C.C. ch. 49-22.1. (R:928:40:87-92). Finally, Summit argues Burleigh County's request for attorney's fees should be denied because the PSC's decision was substantially justified. (R:928:42:93-99). Accordingly, Summit asks the Court to affirm the PSC's order and deny the request for attorney's fees. (R:928:47:108).

[¶14] The PSC also filed its *Response Brief* on March 20, 2026. (R:930). The PSC contends its November 15, 2024, Order is supported by the weight of the evidence. (R:930:8:12-16). Like Summit, the PSC argues the questions regarding safety and the Dispersion Model are preempted by federal regulation under PHMSA and the PSA. (R:930:10:17-32). The PSC maintains reconsideration was appropriate and that the PSC's decision granting reconsideration should be affirmed. (R:930:17:33-39). Finally, the PSC argues its decision that the Burleigh and Emmons County ordinances are superseded and preempted was correct. (R:930:20:40-49). The PSC asserts it interpreted N.D.C.C. § 49-22.1-13(2)(c) as creating only an exception for road use agreements, not a conditional preemption that requires findings. (R:930:21:42). The PSC further contends its order contains additional, independent findings on whether the setbacks of both counties were unreasonably restrictive on their face, supporting its conclusions of law. (R:930:21:44-46). Accordingly, the PSC asks the Court to affirm its November 15, 2024, Order. (R:930:23:50).

[¶15] On April 6, 2026, Emmons County filed its *Reply*. (R:950). Emmons County argues its ordinance is unique and its arguments should not be merged with those of other parties. (R:950:3:1-4). Emmons County contends Summit has created confusion rather than clarity by merging Emmons County's and Burleigh County's arguments into one. *Id.* Emmons County asserts its ordinance is not "tailored" to hazardous liquid pipelines but rather 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.* Thus, it maintains, merging the

two counties' arguments into one creates a misleading picture. *Id.* Emmons County asserts the PSC's and Summit's arguments about Summit's late-filed amendment to its application are nonresponsive because they do not address the primary issue raised – whether the PSC can consider a new application under the guise of reconsidering an application. (R:950:5:5). Further, Emmons County contends federal preemption was not a basis for preempting the Emmons County Ordinance and cannot become one on appeal. (R:950:6:6-16). Alternatively, Emmons County argues its ordinance does not conflict with federal law. *Id.* Finally, Emmons County asserts the issue it raised before the Court is purely one of statutory interpretation, so the “appreciable deference” standard does not apply. (R:950:9-10:17). Emmons County maintains the PSC's and Summit's interpretations of N.D.C.C. § 49-22.1-13(2) contradict clear and unambiguous statutory language, while Emmons County's interpretation harmonizes all the provisions. (R:950:10:18-19). Accordingly, Emmons County argues the PSC committed legal error by accepting Summit's position that the statute automatically supersedes local ordinances, rather than requiring Summit to first prove the ordinances unreasonably restrictive. (R:950:11:20).

[¶16] The Landowners also filed their *Reply* on April 6, 2026. (R:953). The Landowners contend the holding of *Williams Elec. Co-op.* is distinguishable because the PSC has possession of Summit's Dispersion Model. (R:953:1-2:1-3). The Landowners argue the PSA does not excuse the PSC's violation of the AAPA. (R:953:3:4-11). The Landowners distinguish between the PSC's ability to consider technical safety standards and its ability to consider safety generally. (R:953:4:7-9). The Landowners claim the Appellees' argument ignores the preemption analysis in N.D.C.C. § 49-22.1-13(2)(c), which required the PSC to make findings supported by a preponderance of the evidence. (R:953:7:11). The Landowners assert the PSC is not entitled to deference on fact-finding where it has not disclosed material evidence in violation of the AAPA. (R:953:7:12). Finally, the

Landowners assert the Appellees incorrectly treat the 500-foot avoidance area in N.D.C.C. § 49-22.1-03 as the only permissible setback. (R:953:8:13-14). Accordingly, they ask the Court to remand the matter for further proceedings. (R:953:9:15).

[¶17] Burleigh County filed its *Reply* on April 13, 2026. (R:955). Burleigh County asserts the PSC and Summit mischaracterize the record, the issues on appeal, and the applicable law. (R:955:5:2-7). Burleigh County contends the PSC's withholding of the Dispersion Model violated the AAPA and denied it a fair hearing. (R:955:7:8-22). Burleigh County maintains the PSC's error was prejudicial. (R:955:11:16-18). It argues neither state nor federal preemption excuses the errors; specifically, it contends its ordinances were not superseded by state law and were not unreasonably restrictive. (R:955:15:23-34). Additionally, Burleigh County argues federal preemption was not, and cannot be, a basis for preempting its ordinances. (R:955:21:35-40). Burleigh County contends Summit's failure to conduct a meaningful southern-route analysis requires reversal. (R:955:24:41-47). It asserts Summit provided no evidence to support its claims that the carbon dioxide pipeline would cause no adverse impacts on property, including property value. (R:955:28-29:48-49). Burleigh County asserts the Court may remand for further proceedings now that new PHMSA regulations are in place. (R:955:30:50). Regarding insurance, Burleigh County asserts its concerns are even more important in light of the recent Eighth Circuit case *North Star Mut. Ins. Co. v. Rodin*, 171 F.4th 1136 (8th Cir. 2026). (R:955:30:51-57). It argues 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. (R:955:30-31:52). It also maintains the PSC's finding addressing insurance concerns is inadequate and not supported by the evidence. (R:955:32:55). Finally, Burleigh County argues the PSC's findings are not supported by the record. (R:955:33:58-59). Accordingly, Burleigh

County asks the Court to reverse the PSC, deny Summit's certificate of corridor compatibility and route permit, and award costs and attorney's fees. (R:955:33:61).

[¶18] The Court held a hearing on the issues on July 14, 2026, and heard oral argument from the parties. (R:957, 967, 969). The Court then took the matter under advisement.

FACTUAL BACKGROUND

[¶19] On October 17, 2022, Summit filed with the PSC a *Consolidated Application for a Certificate of Corridor Compatibility and Route Permit and Application for Waiver or Reduction of Procedures and Time Schedules*, seeking a certificate of corridor compatibility, a route permit, and a waiver of procedures and time schedules. (R:124-125, 132-135, 143-146, 149-156). The Application was for an approximately 320-mile carbon dioxide pipeline ranging from 4.5 to 24 inches in diameter and associated facilities (the "Project") in Burleigh, Cass, Dickey, Emmons, Logan, McIntosh, Morton, Oliver, Richland, and Sargent counties, North Dakota. (R:908:1).

[¶20] The PSC deemed Summit's Application complete on February 1, 2023, issued a *Notice of Filings and Public Hearings*, and identified the issues to be considered, including whether the Project would produce minimal adverse effects on the environment and public welfare, remain compatible with environmental preservation and efficient resource use, and minimize adverse impacts while ensuring reliability and orderly fulfillment of energy needs. (R:168).

[¶21] On February 17, 2023, Emmons County provided the PSC a copy of its zoning ordinances governing setbacks for all hazardous pipelines. (R:179). On March 6, 2023, Burleigh County adopted an ordinance requiring hazardous liquid pipeline companies to share their safety protocols and emergency plans. (R:423:5-6). The PSC held five hearings from March 14, 2023, to June 2, 2023, on the merits of Summit's Application, at which intervenors appeared through counsel, made arguments, and presented witnesses in opposition to Summit's Application. Burleigh County was

not yet a party. (R:209-210, 226, 325-326, 426-427, 493-496). At the March 14, 2023, hearing, counsel for John H. Warford, Jr. questioned Summit's witness about a proposed Burleigh County zoning ordinance that was then pending before the Burleigh County Commission. (R:209:97). On March 20, 2023, the Burleigh County Board of Commissioners adopted the ordinance. (R:523:2:1). On March 29, 2023, the proposed version was filed with the PSC. (R:271). It regulates the transport of hazardous liquids, including crude oil, anhydrous ammonia, liquid fertilizers, and liquefied carbon dioxide. *Id.* Burleigh County filed its adopted ordinances with the PSC on March 30, 2023. (R:423:7); (R:536:6). It later attached the adopted zoning ordinance to its July 31, 2023, petition to intervene. (R:523:5-17).

[¶22] On June 1, 2023, Summit moved for an order declaring the Burleigh and Emmons County ordinances superseded and preempted by N.D.C.C. § 49-22.1-13(2). (R:423). On June 30, 2023, Emmons County filed a *Petition to Intervene and Response in Opposition to Summit's Motion to Declare the Emmons County and Burleigh County Ordinances Superseded and Preempted*. (R:512). Administrative Law Judge ("ALJ") Hope L. Hogan granted Emmons County's *Petition to Intervene* on July 10, 2023. (R:516). The order permitted Emmons County to appear "to respond to Summit's *Motion to Declare Emmons County and Burleigh County Ordinances Superseded and Preempted*." (R:516:3:8). On July 31, 2023, Burleigh County filed a *Petition to Intervene*, which was later denied as moot. (R:523); (R:542:1:1).

[¶23] After the merits hearings, the PSC issued *Findings of Fact, Conclusions of Law, and Order* on August 4, 2023, denying Summit's applications. (R:530). Among other findings, the PSC found that Summit "has not provided sufficient evidence to demonstrate that the location, construction, operation and maintenance of the Project will produce minimum adverse impacts upon the welfare of the citizens of North Dakota with the existing record." (R:530:11-12:42).

[¶24] On August 18, 2023, Summit filed a *Petition for Reconsideration, Notice of Route Adjustment, and Request for Limited Rehearing*. (R:531).

[¶25] On August 30, 2023, Burleigh County filed a second *Petition to Intervene*, which ALJ Hogan granted in an order filed September 6, 2023. (R:536); (R:542).

[¶26] On September 15, 2023, the PSC issued its *Order on Petition for Reconsideration*, granting Summit's petition for reconsideration and a rehearing. (R:549). Commissioner Sheri Haugen-Hoffart dissented from the PSC's order granting reconsideration. (R:549:3).

[¶27] On September 29, 2023, Summit renewed its motion to declare the Burleigh and Emmons County ordinances superseded and preempted. (R:552). Burleigh County opposed the original motion in briefing and opposed the renewed motion at the December 21, 2023, hearing before the PSC. (R:523:19); (R:536:6-8); (R:568:33-45).

[¶28] On February 7, 2024, the PSC issued an interlocutory order concluding that N.D.C.C. § 49-22.1-13(2)(b) automatically supersedes and preempts any local land use or zoning regulations for a gas or liquid transmission facility route permit. (R:586:3). The PSC stated:

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

[¶29] The PSC then held three public hearings on the route adjustments and four days of technical hearings. The first public hearing was on April 22, 2024, in Mandan, and focused on adjustments

in Oliver, Morton, and Burleigh counties. (R:666-669). On May 16, 2024, ALJ Hogan held a telephonic prehearing conference to discuss the upcoming technical hearing. (R:679:2). At the conference, ALJ Hogan stated the PSC intended to limit evidence to the deficiencies noted in its original order and to siting issues related to the supplemental reroute filings. (R:679:6). The second public hearing was on May 24, 2024, in Wahpeton, and focused on adjustments in Dickey, Sargent, Cass, and Richland counties. (R:726-729). The PSC held technical hearings in Bismarck on May 28, 29, and 30, and June 3, 2024. (R:740-750); (R:908:7). The technical hearings gave intervenors who could not attend the April 22, 2024, public hearing an opportunity to participate in a technical hearing. (R:908:7). The third public hearing was on June 4, 2024, in Linton, and focused on adjustments in Emmons, Logan, and McIntosh counties. (R:751-753); (R:908:6).

[¶30] On November 15, 2024, the PSC issued its final order, finding with respect to the county ordinances:

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

(R:908:11:19).

[¶31] Further, in its Findings of Fact, the PSC stated the following regarding liability insurance:

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.

(R:908:15:47).

Order on Protection of Information

[¶32] On April 21, 2023, Summit filed an *Application to Protect Information* seeking to protect

certain security system plans from disclosure under N.D.C.C. § 44-04-24(1). (R:340). Summit stated it would also seek protection from PHMSA under the Freedom of Information Act. (R:340:3). Specifically, Summit sought to protect from disclosure its Dispersion Model and the risk assessment associated with the release of carbon dioxide from the pipeline. (R:340:4). Summit requested that the information be available only to the ALJ, the PSC, the PSC's counsel, and the PSC's siting analysts. (R:340:5). John H. Warford, Jr. objected to the Application and requested a hearing, and the Landowners joined the objection. (R:346, 348). Summit responded to the objections on May 5, 2023. (R:352).

[¶33] The PSC held a hearing on the *Application to Protect Information* on June 27, 2023. (R:508). On August 4, 2023, the PSC issued an *Order on Protection of Information* granting Summit's application in full. (R:526:4). The order protected from public disclosure, as a security system plan for critical infrastructure under N.D.C.C. § 44-04-24(1) and (2)(b), the outputs of Summit's Dispersion Model, the associated risk assessment, and other information prepared for the emergency response plan and integrity management plan PHMSA requires. (R:340:3-5); (R:526:1, 3).

[¶34] On May 27, 2024, Burleigh County filed a *Motion for Reconsideration of the Order on Protection of Information, or in the Alternative, for Leave to Question Re: Dispersion Model*, requesting that the Dispersion Model be made available to the public. (R:695). Burleigh County requested that, to the extent the PSC concluded any portion of the Dispersion Model actually constituted protectable information, that limited information be redacted and the remainder of the Dispersion Model disclosed to the public. (R:695:2). In the alternative, Burleigh County requested leave to question Summit and its witnesses about the Dispersion Model's results and the criteria it used, to help the PSC and the public gauge the reliability of those results. (R:695:3).

[¶35] At the May 30, 2024, technical hearing, Chad Wachter testified about two meetings at which Summit's dispersion modeling was presented or discussed. (R:746). He testified that on January 24, 2024, he attended a meeting at the North Dakota Petroleum Council office in Bismarck, where he was shown a PowerPoint presentation of the dispersion modeling. (R:746:10-11, 40-41). Wachter identified Ron Ness, Justin Kringstad, Brady Peyton (phonetic), and Summit representative Wade Boeshans as also attending. (R:746:11). He later described those present as Ness, "somebody who works for him," Boeshans, and "the person who was presenting the information." (R:746:43). Wachter testified that on February 21, 2024, he met with Bruce Rastetter and Boeshans at the University of Mary, where they discussed the dispersion modeling. (R:746:19-20). He testified he was greeted there by Andrew Feist and Jerome Richter and saw Scott Hennen in the entryway. (R:746:19).

[¶36] Throughout the proceedings, counsel for Burleigh County and others questioned witnesses about the Dispersion Model; however, the ALJ sustained objections to questions about its specific contents. On May 28, 2024, the ALJ ruled that coordination with local emergency management was not an issue for which the matter was reopened, that the subject had been generally covered, and that the PSC had stated safety compliance with PHMSA was outside its jurisdiction. (R:741:22-26). On May 29, 2024, the ALJ limited testimony about Summit's presentation to emergency managers because of the *Order on Protection of Information*, the pending motion for reconsideration, and the PSC's lack of jurisdiction over safety standards. (R:743:98-106). On May 30, 2024, the ALJ ruled that the PSC had to decide Burleigh County's pending motion before that questioning could go further. (R:746:12-16). On June 3, 2024, the ALJ again sustained objections to questions about the specifics of Summit's presentations, because "there's a pending motion to revisit that protective order, and until that analysis has been made, that order does stand and protect

that information.” (R:748:123). She allowed witnesses to answer in general terms. *Id.* At the June 4, 2024, public hearing in Linton, she sustained Summit’s objection to questions about the plume modeling Summit showed Morton County officials. (R:752:56-57). The same day, the Landowners moved for a “mishearing” because they had been denied access to the Dispersion Model. The PSC denied the motion. (R:752:130-137).

[¶37] In its November 15, 2024, Order, the PSC denied Burleigh County’s *Motion for Reconsideration* of the order protecting the Dispersion Model from public disclosure. (R:908:18). The PSC made various additional findings and conclusions and granted Summit’s certificate of corridor compatibility, route permit, and application for a waiver of procedures and time schedules. (R:908).

STANDARD OF REVIEW

[¶38] A party aggrieved by a decision or final order of the PSC has the right to appeal under N.D.C.C. § 49-05-12. A party must bring the appeal in the manner prescribed in N.D.C.C. ch. 28-32, the AAPA. N.D.C.C. § 49-05-12. Section 28-32-46, N.D.C.C., governs the Court’s review and instructs:

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

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.
3. The provisions of this chapter have not been complied with in the proceedings before the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by its findings of fact.
7. The findings of fact made by the agency do not sufficiently address the evidence

presented to the agency by the appellant.

8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

If the order of the agency is not affirmed by the court, it must be modified or reversed, and the case shall be remanded to the agency for disposition in accordance with the order of the court.

[¶39] The Court must affirm the PSC's decision unless one of these grounds for reversal exists under N.D.C.C. § 28-32-46(1)-(8). *Wano Twp. v. North Dakota Pub. Serv. Comm'n*, 2026 ND 146, ¶ 13, 38 N.W.3d 280. The North Dakota Supreme Court has described the standard of review as follows:

The [PSC's] decision on questions of law is fully reviewable. In reviewing the [PSC's] findings of fact, however, we do not substitute our judgment for that of the [PSC] or make independent findings. Rather, in reviewing the [PSC's] findings of fact, "[w]e determine only whether a reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record." "Agency expertise is entitled to appreciable deference if the subject matter is highly technical."

Capital Elec. Coop., Inc. v. North Dakota Pub. Serv. Comm'n, 2016 ND 73, ¶ 6, 877 N.W.2d 304 (cleaned up).

LAW AND ANALYSIS

Whether the PSC's Order Granting Reconsideration Was an Improper Amendment to Summit's Application?

[¶40] Emmons County argues Summit's *Petition for Reconsideration* was, in substance, an improper amendment to an already denied application. Emmons County argues the PSC's August 4, 2023, Order denying Summit's application was a final decision that closed the proceeding. (R:913:13:31). Summit's *Petition for Reconsideration*, filed August 18, 2023, proposed extensive route adjustments and an entirely new route map, which Summit's own petition described as intended to "amend and replace" the map book filed with the original application. (R:913:13:33); (R:531:11-12). Emmons County argues wholesale amendments of this kind are not permitted in a

petition for reconsideration under N.D.C.C. § 28-32-40, and that Summit was instead required to file a new application. (R:913:13-14:33-34). By analogy, Emmons County relies on the PSC's rule for energy conversion facility siting. (R:913:14:34-36). That rule allows an applicant to amend its application "at any time during the pendency of an application." N.D.A.C. § 69-06-04-01(5). If a certificate is denied and the PSC specifies an acceptable modification, the applicant may reapply. N.D.A.C. § 69-06-04-01(6). Emmons County argues these provisions show that once an application is denied, the applicant's remedy is reapplication. (R:913:14:36). Commissioner Sheri Haugen-Hoffart dissented from the order granting reconsideration on this basis, reasoning that Summit's evidence and route adjustments could have been presented "during the multiple hearings held over six months" on the original application, and that "[d]ue to the breadth of changes provided in its petition, a new application was appropriate to address the material changes to the project." (R:549:3). The PSC's order granting reconsideration gave one sentence of reasoning. It stated the PSC believed a "...just, speedy, and inexpensive determination of the issues presented" required granting Summit's petition, citing N.D.A.C. § 69-02-01-10, a general rule directing liberal construction of the PSC's own procedural rules. (R:549:1). Commissioner Haugen-Hoffart's dissent addressed that same provision directly. She wrote that "[p]er N.D. Admin. Code § 69-02-01-10, there still needs to be reasonable justification to grant reconsideration," and that Summit had not met that burden. (R:549:3).

[¶41] The PSC responds that N.D.C.C. § 28-32-40 is itself sufficient authority for what occurred. (R:930:17:33). The statute allows a petition for reconsideration to rest on "a statement of any further showing to be made in the proceeding," not only a claim of legal error. N.D.C.C. § 28-32-40(3). Once the agency grants the petition, it "may dissolve or amend the final order and set the matter for further hearing." N.D.C.C. § 28-32-40(4). The PSC argues the question is not whether the petition

resembles an amendment, but whether it fits the statute's authorized mechanism, and that it does. (R:930:18:36). Treating the petition as unlawful, it argues, would only require Summit to re-file and recreate a record already before the PSC. (R:930:19:38). Summit also argues that offering an alternative route under N.D.C.C. § 49-22.1-09(5) is not an amendment, and that the PSC may grant reconsideration "on such terms as it may prescribe" under N.D.C.C. § 28-32-40(4). (R:928:41:90-91).

[¶42] Summit raises two threshold arguments. First, it argues Emmons County cannot raise this issue because the ALJ allowed Emmons County to intervene only to address whether its ordinance is preempted under N.D.C.C. § 49-22.1-13(2). (R:928:40:88). Second, it argues the issue is outside the scope of this appeal because no appellant listed it in the specifications of error. (R:928:40-41:89).

[¶43] The Court addresses the threshold arguments first. A party appeals an agency order by serving and filing "a notice of appeal and specifications of error specifying the grounds on which the appeal is taken[.]" N.D.C.C. § 28-32-42(4). The specifications of error must be "reasonably specific" so they alert the agency, the other parties, and the court to the particular errors claimed. *Beam v. N.D. Workforce Safety & Ins. Fund*, 2020 ND 168, ¶ 7, 946 N.W.2d 486. Boilerplate specifications "general enough to apply to any administrative agency appeal" are not tolerated. *Id.* The North Dakota Supreme Court has stated "[w]hen a party does not enumerate an issue in their specifications of error, we will not consider the issue on appeal." *Id.*

[¶44] No appellant's specifications of error raise this issue. The Landowners' specifications challenge the PSC's preemption rulings, its finding that the county ordinances are unreasonably restrictive, and the protection of the Dispersion Model. (R:1:2-5). Burleigh County's specifications challenge the ordinance finding, the protection of the Dispersion Model, the southern and eastern

routes, public welfare, the timing of new PHMSA rules, and liability insurance. (R:1:3-5:12(a)-(g)) (08-2024-CV-03614). Neither appellant claims the PSC erred by granting Summit's petition for reconsideration or by letting Summit amend its application through that petition. Burleigh County's last specification lists "[o]ther issues identified upon review of the record and hearing transcript once prepared." (R:1:5:12(h)) (08-2024-CV-03614). That language could apply to any agency appeal. It does not alert the agency or the parties to this issue.

[¶45] Emmons County raised the issue, but Emmons County is technically not an appellant. It voluntarily dismissed its own appeal. (R:19) (08-2024-CV-00624). It participates in this appeal as an appellee. (R:28). Its intervention before the PSC was also limited. The ALJ allowed Emmons County to intervene "to respond to Summit's *Motion to Declare Emmons County and Burleigh County Ordinances Superseded and Preempted*." (R:516:3:8). An agency may impose conditions and limitations on intervention. N.D.C.C. § 28-32-28. Because no appellant specified this issue as error, it is not properly before the Court.

[¶46] However, even if the Court reached the merits, it would not find reconsideration improper. Section 28-32-46(1), N.D.C.C., makes an order that is not in accordance with the law a ground for reversal. If the Court does not affirm the order, it must modify or reverse the order and remand the case. N.D.C.C. § 28-32-46. Under the AAPA, "[a]n adjudicative proceeding includes reconsideration, rehearing, or reopening." N.D.C.C. § 28-32-01(1). Any party aggrieved by a final order may petition for reconsideration within fifteen days. N.D.C.C. § 28-32-40(1). The petition must state its grounds for relief or any further showing to be made, and whether rehearing is requested. N.D.C.C. § 28-32-40(3). The agency may grant the petition on such terms as it prescribes, allow a new or limited hearing, and dissolve or amend the final order. N.D.C.C. § 28-32-40(4). The PSC's own rule governing petitions for reconsideration tracks this framework and

does not limit the subject matter of a further showing. N.D.A.C. § 69-02-06-02. The PSC's general procedural rules direct that they be liberally construed to secure a just, speedy, and inexpensive determination of the issues presented. N.D.A.C. § 69-02-01-10.

[¶47] Emmons County's argument assumes reconsideration and a new application are mutually exclusive, so that once the PSC denied Summit's application, only a fresh application could bring the route adjustments back before the PSC. The statute does not support that assumption. Section 28-32-01(1), N.D.C.C., treats reconsideration, rehearing, and reopening as part of the same adjudicative proceeding. Section 28-32-40(4), N.D.C.C., goes further, expressly allowing the PSC, once it grants a petition for reconsideration, to dissolve the final order and set the matter for further hearing, which is what happened in this matter.

[¶48] The rule Emmons County invokes by analogy, N.D.A.C. § 69-06-04-01(5)-(6), does not govern this application. That rule is adopted under the PSC's authority over energy conversion facilities found in N.D.C.C. ch. 49-22. Emmons County's own brief acknowledges the PSC has adopted no comparable rule for amendments to route permits or corridor certificates under N.D.C.C. ch. 49-22.1, the chapter that actually governs this application. (R:913:14:34). Absent such a rule, the general reconsideration mechanism in N.D.C.C. § 28-32-40(3)-(4) controls, and its terms are broad enough to reach a petition proposing route adjustments as a further showing.

[¶49] The PSC's own stated reason for granting reconsideration was brief. It cited only the general liberal-construction rule in N.D.A.C. § 69-02-01-10, without addressing Emmons County's amendment concern directly. Elsewhere in this order, the Court finds the PSC's one-sentence denial of Burleigh County's motion to reconsider the protection of the Dispersion Model inadequate, because that denial stood by the PSC's own earlier finding that the Dispersion Model had not been disclosed to unauthorized persons, without addressing new contradictory evidence. The order

granting Summit's petition for reconsideration is different. It did not stand by any finding the record had since undercut. It opened the case to a further hearing where the parties could test Summit's proposed route adjustments, which is what the reconsideration process exists to do. The PSC's citation to N.D.A.C. § 69-02-01-10 is thin, and Commissioner Haugen-Hoffart's dissent says so directly. But thin reasoning for opening a hearing is not the same defect as thin reasoning for standing by a finding the record no longer supports. Under N.D.C.C. § 28-32-46(1), the question is whether granting reconsideration was in accordance with the law, and for the reasons already given, it was.

[¶50] Commissioner Haugen-Hoffart's dissent raises a separate fair point. Summit could have sought to present its route adjustments before the PSC ruled the first time. But the question under N.D.C.C. § 28-32-46(1) is not whether the PSC could have required a stricter process. It is whether the process actually used was in accordance with the law. The Legislature committed the decision to grant or deny a petition for reconsideration to the PSC's discretion, subject to the statute's own limits on timing, content, and procedure. Those limits were met here. Summit's petition was timely, stated the further showing it intended to make, and requested a rehearing.

[¶51] That process was also not a formality. After granting reconsideration, the PSC held three public hearings, beginning April 22, 2024, addressing the route adjustments and supplemental filings, and technical hearings on May 28, 29, and 30, and June 3, 2024, held to give intervenors who could not attend the April hearing an opportunity to participate, cross-examine witnesses, and present their own testimony. (R:666-669); (R:740-750). Emmons County intervened before the PSC denied Summit's application, for the purpose of responding to Summit's preemption motion, and has remained a party throughout. (R:512); (R:516). Whatever additional process a formal reapplication might have supplied, Emmons County received notice of Summit's petition for

reconsideration and filed a written response opposing it. (R:908:5).

[¶52] The issue is not properly before the Court because no appellant specified it as error. Even if it were, the Court finds the PSC’s order granting Summit’s petition for reconsideration was in accordance with N.D.C.C. § 28-32-40(1), (3)-(4) and was not an unlawful amendment requiring a new application. This ground for reversal is rejected.

Whether the PSC’s Orders Satisfied the Requirements of N.D.C.C. § 49-22.1-13(2)?

[¶53] “A judge of the district court must review an appeal from the determination of an administrative agency based only on the record filed with the court.” N.D.C.C. § 28-32-46. “[T]he court must affirm the order of the agency unless it finds that... [t]he order is not in accordance with the law.” N.D.C.C. § 28-32-46(1). “If the order of the agency is not affirmed by the court, it must be modified or reversed, and the case shall be remanded to the agency for disposition in accordance with the order of the court.” N.D.C.C. § 28-32-46.

[¶54] In its February 7, 2024, Order, the PSC held a route permit automatically “supersedes and preempts” local land use and zoning regulations, subject only to a carve-out for road use agreements. (R:586:3). The PSC made no finding that any ordinance was “unreasonably restrictive” or “in direct conflict with state or federal laws or rules.” It treated preemption as automatic under the statute. In its November 15, 2024, Order, the PSC found the Burleigh County and Emmons County setback ordinances were “unreasonably restrictive” on their face under N.D.C.C. § 49-22.1-13(2)(c), and directly conflicted with state law. (R:908:11:19).

[¶55] Burleigh County, Emmons County, and the Landowners all challenge these orders as legal error under N.D.C.C. § 28-32-46(1). They argue the PSC’s automatic-preemption reading ignores the qualifying “[e]xcept as provided in this section” language in N.D.C.C. § 49-22.1-13(2)(b) and skips over subdivisions (c) through (e) entirely. (R:913:4:10-27); (R:915:22:31-40); (R:918:32:49-65). They argue that when the PSC later addressed the county ordinances directly, it still failed to

make the finding the statute requires – specifically, a finding, by a preponderance of the evidence, that the ordinances are unreasonably restrictive under one of three specific factors, or that they directly conflict with state or federal law. (R:915:28:41-44); (R:915:32:45-54). The PSC and Summit defend both orders on the merits. They argue the statute’s plain language supports their reading. (R:930:21:42); (R:928:19:39-48).

[¶56] Burleigh County, Emmons County, and the Landowners argue a review of the PSC’s interpretation of section 49-22.1-13(2), N.D.C.C., is a pure question of law that is fully reviewable. (R:918:32:49); (R:915:21:30); (R:950:9-10:17). The PSC acknowledges the Court fully reviews its direct-conflict conclusion as a question of law. (R:930:23:49). Otherwise, the PSC urges deference to its decision. (R:930:6-7:10); (R:930:22:47). Summit argues “North Dakota courts ‘generally defer to an administrative agency’s reasonable interpretation of its governing statutes,’” quoting *Black Hills Trucking, Inc. v. N.D. Industrial Comm’n*, 2017 ND 284, ¶ 19, 904 N.W.2d 326. (R:928:19:39-48).

[¶57] “Questions of law, including the interpretation of a statute, are fully reviewable on appeal from an administrative decision.” *Industrial Contractors, Inc. v. Workforce Safety & Ins.*, 2009 ND 157, ¶ 6, 772 N.W.2d 582 (quoting *Stein v. Workforce Safety & Ins.*, 2006 ND 34, ¶ 6, 710 N.W.2d 364). “No deference is called for when the regulating language is clear.” *Martin v. Stutsman Co. Social Services*, 2005 ND 117, ¶ 13, 698 N.W.2d 278. However, deference is given “...to an administrative agency’s construction of a statute in administering the law when that interpretation does not contradict clear and unambiguous statutory language.” *Industrial Contractors*, 2009 ND 157, ¶ 6. “In technical matters involving agency expertise, an agency decision is entitled to appreciable deference.” *North Dakota State Bd. of Medical Examiners–Investigative Panel B v. Hsu*, 2007 ND 9, ¶ 42, 726 N.W.2d 216. “A statute is ambiguous when it is subject to different, but

rational meanings.” *Northern Excavating Co., Inc. v. Sisters of Mary of the Presentation Long Term Care*, 2012 ND 78, ¶ 4, 815 N.W.2d 280.

[¶58] The North Dakota Supreme Court has stated, “[o]ur primary goal in interpreting statutes is to ascertain the Legislature’s intentions.” *State v. Laib*, 2002 ND 95, ¶ 13, 644 N.W.2d 878 (citing *State v. Brossart*, 1997 ND 119, ¶ 14, 565 N.W.2d 752). Courts must give the words used in the statute their plain, ordinary, and commonly understood meaning, unless the terms are specifically defined or a contrary intention plainly appears. *State v. Ness*, 2009 ND 182, ¶ 8, 774 N.W.2d 254. “Statutes relating to the same subject matter shall be construed together and should be harmonized, if possible, to give meaningful effect to each, without rendering one or the other useless.” *Public Serv. Comm’n v. Minnesota Grain, Inc.*, 2008 ND 184, ¶ 20, 756 N.W.2d 763. “When engaging in statutory interpretation...it must be presumed the legislature intended all that it said, said all that it intended to say, and meant what it has plainly expressed.” *Estate of Christeson v. Gilstad*, 2013 ND 50, ¶ 12, 829 N.W.2d 453. Section 49-22.1-13(2), N.D.C.C., reads, in relevant part:

- a. A certificate of site compatibility for a gas or liquid energy conversion facility may not supersede or preempt any local land use; zoning; or building rules, regulations, or ordinances, and a site may not be designated which violates local land use; zoning; or building rules, regulations, or ordinances.
- b. Except as provided in this section, a permit for the construction of a gas or liquid transmission facility within a designated corridor supersedes and preempts any local land use or zoning regulations.
- c. Before a gas or liquid transmission facility is approved, the commission shall require the applicant to comply with the road use agreements of the impacted political subdivision. A permit may supersede and preempt the requirements of a political subdivision if the applicant shows by a preponderance of the evidence the regulations or ordinances are unreasonably restrictive in view of existing technology, factors of cost or economics, or needs of consumers regardless of their location, or are in direct conflict with state or federal laws or rules.
- d. When an application for a certificate for a gas or liquid transmission facility is filed, the commission shall notify the townships with retained zoning authority, cities, and counties in which any part of the proposed corridor is located. The commission may not schedule a public hearing sooner than forty-five days from the date notification is sent by mail or electronic mail. Upon notification, a

political subdivision shall provide a listing to the commission of all local requirements identified under this subsection. The requirements must be filed at least ten days before the hearing or the requirements are superseded and preempted.

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

[¶59] The PSC's February 7, 2024, Order held "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." (R:586:3).

[¶60] All parties agree that subdivision (c) has two sentences. The first requires the applicant "to comply with the road use agreements of the impacted political subdivision." The second says a permit "may supersede and preempt the requirements of a political subdivision" if the applicant proves, by a preponderance of the evidence, that its regulations or ordinances are "unreasonably restrictive" or "in direct conflict with state or federal laws or rules." The dispute is about what the second sentence covers.

[¶61] The PSC and Summit argue the second sentence is still talking about road use agreements because it immediately follows the road-use-agreement sentence and is within the same lettered subdivision. Under this reading, subdivision (b)'s "except as provided in this section" is fully satisfied by this one carve-out for road use agreements. Zoning ordinances are not covered by the exception at all. Rather, they are superseded automatically the moment a route permit issues, with no finding required. (R:930:21:42); (R:928:21:45).

[¶62] Burleigh County, Emmons County, and the Landowners argue the second sentence is doing something different from the first. They suggest the first sentence is narrow and mandatory. It forces compliance with road use agreements with impacted political subdivisions. The term "road use

agreement” is separately defined, in the same chapter, at N.D.C.C. § 49-22.1-01(11), to mean “...permits required for extraordinary road use, road access points, approach or road crossings, public right-of-way setbacks, building rules, physical addressing, dust control measures, or road maintenance and any repair mitigation plans.” The Counties and Landowners argue the second sentence is broader and conditional. They assert it sets the evidentiary standard for superseding any “requirements of a political subdivision,” a phrase the statute never limits to road use agreements and that naturally includes zoning and land-use regulations. (R:915:25:36-40); (R:913:6-10:14-24); (R:918:32:49-65).

[¶63] Read as a whole, the statute does not support the PSC’s interpretation. The PSC read the statute to mean that 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. First, subdivision (b) states “[e]xcept 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.” The “except as provided in this section” language signals that the Legislature contemplated real situations in which a permit would not supersede local zoning, and pointed the reader to the rest of the section to find them. Further, if the Legislature had intended every permit for the construction of a gas or liquid transmission facility to automatically supersede and preempt “any local land use or zoning regulations,” the “except as provided in this section” language would be surplusage.

[¶64] Second, the Legislature made different word choices within subdivision (c) itself. The Legislature used the words “road use agreements” in the first sentence and the words “requirements of a political subdivision” and “regulations or ordinances” in the second. Courts presume the Legislature said all that it intended to say and meant what it has plainly expressed. *Estate of*

Christeson, 2013 ND 50, ¶ 12. If the Legislature intended to keep talking about road use agreements in the second sentence, it had the vocabulary to do so. It did not. The Legislature also chose different verbs. The first sentence says the PSC “shall require” the applicant to comply with road use agreements. The second says a permit “may supersede and preempt the requirements of a political subdivision,” and only if the applicant makes the required showing. The word “may” shows the Legislature did not intend every permit to supersede every local requirement. If supersession were automatic, the Legislature would have had no reason to say a permit “may” supersede local requirements upon proof.

[¶65] Third, subdivisions (d) and (e) confirm the second sentence in subdivision (c) is not limited to road use agreements. Subdivision (d) obligates the PSC to notify local governments and requires those governments to file “a listing ... of all local requirements” at least ten days before the hearing, on pain of automatic supersession for lateness. The words “road use agreement” never appear in subdivision (d). Subdivision (e) then requires the applicant to comply with everything on that list that the PSC has not otherwise superseded. Both subdivisions are written around the broad term “local requirements,” which parallels the “requirements of a political subdivision” language in the second sentence of subdivision (c).

[¶66] If granting a permit automatically superseded and preempted “any local land use or zoning regulations,” both subdivisions (d) and (e) would be meaningless. A political subdivision’s “local requirements” would be automatically superseded and preempted regardless of whether it timely filed them with the PSC. Similarly, the language of subdivision (e) stating an applicant “shall comply with all local requirements ... which are not otherwise superseded” shows that not all local requirements are automatically superseded when a permit is issued.

[¶67] Summit argues this reading turns subdivision (b) into surplusage. It argues that if timely

filed ordinances survive until the PSC makes findings under subdivision (c), subdivision (b) merely restates a power already found in subdivision (c). (R:928:21-22:46). Summit also argues subdivision (d) is only a procedural backstop for late filings. (R:928:22:47). The Court is not persuaded. Subdivision (b) states the general rule: a route permit supersedes local land use and zoning regulations. Subdivisions (c), (d), and (e) explain how that rule applies. A general rule does not become surplusage because the Legislature made it subject to exceptions. The Legislature itself made subdivision (b) subject to the rest of the section. Summit's reading, by contrast, would give no effect to the second sentence of subdivision (c), the listing requirement in subdivision (d), or the compliance requirement in subdivision (e) when a political subdivision files a zoning ordinance. Subdivision (d) would require political subdivisions to list requirements that are superseded whether or not they are listed. Subdivision (e) requires compliance with listed requirements "not otherwise superseded by *the commission*." (emphasis added). That language describes action by the PSC, not supersession by operation of law. The Court must harmonize the subdivisions to give meaningful effect to each. *Minnesota Grain*, 2008 ND 184, ¶ 20. The Court's reading does so. Summit's does not.

[¶68] The Court finds N.D.C.C. § 49-22.1-13(2) is not subject to different rational meanings and is not ambiguous. Interpreting the statute is a pure question of law, and the PSC's construction is not entitled to deference. The Court finds the PSC incorrectly interpreted N.D.C.C. § 49-22.1-13(2) in its February 7, 2024, Order, and again in Conclusion of Law 4 of its November 15, 2024, Order.

[¶69] The PSC made additional findings in its November 15, 2024, Order. Specifically, the PSC found:

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. The request was opposed by

Intervenor Burleigh County, Intervenor Emmons County, and Landowner Intervenor. The Commission issued an Order dated February 7, 2024, finding that, except for road use agreements, ordinances of both Emmons and Burleigh Counties are preempted and superseded. Further testimony and evidence on this issue was received by the Commission. Upon further review, the Commission finds the ordinances of Emmons County and Burleigh County contain setbacks that are more restrictive than state law setback requirements. Emmons County Ordinance number 23-01-01 subsection B(2)(b)(i) of Article VI mandates a setback distance of 7,920 feet from an established residence. Burleigh County Ordinance number 23-003 Section 27(VI)(4) mandates a setback distance of two miles (10,560 feet) from any occupied structure. The Commission finds the ordinances of Emmons County and Burleigh County are unreasonably restrictive on their face under NDCC 49-22.1-13(2)(c) and are in direct conflict with state law under NDCC Section 49-22.1-03.

(R:908:11:19).

[¶70] In its Conclusions of Law, the PSC restated its automatic-preemption holding and carried forward only the “unreasonably restrictive” part of this finding:

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).

(R:908:16:4).

[¶71] “In an adjudicative proceeding an administrative agency shall make and state concisely and explicitly its findings of fact and its separate conclusions of law and the order of the agency based upon its findings and conclusions.” N.D.C.C. § 28-32-39(1). “A finding of fact is necessary to dispose of a factual issue.” *Evans v. Backes*, 437 N.W.2d 848, 850 (N.D. 1989). “The need for a finding is particularly pressing where the disputed issue is material, indeed, dispositive of the case.” *Id.*

[¶72] The North Dakota Supreme Court has stated “[a]n administrative agency’s findings of fact must be adequate for a reviewing court to understand the factual basis upon which the agency reached its conclusion.” *Aggie Invs. GP v. Pub. Serv. Comm’n of N. Dakota*, 470 N.W.2d 805, 813

(N.D. 1991) (citing *Walter v. North Dakota State Highway Commissioner*, 391 N.W.2d 155 (N.D. 1986)). “An agency’s findings are adequate when they enable a reviewing court to understand the agency’s decision.” *WSI v. Sandberg*, 2021 ND 39, ¶ 11, 956 N.W.2d 342. The North Dakota Supreme Court has stated “[w]hen an agency fails to prepare an essential finding of fact, the appeal process is seriously impeded and we may remand to the agency with instructions to prepare proper findings.” *Evans*, 437 N.W.2d at 851. “An administrative agency must adequately explain the basis for the agency’s decision to facilitate appellate review.” *Schoch v. N. Dakota Workforce Safety & Ins.*, 2010 ND 25, ¶ 19, 778 N.W.2d 542 (citing *Singha v. North Dakota State Bd. of Medical Exam’rs*, 1998 ND 42, ¶ 23, 574 N.W.2d 838; *Evans*, 437 N.W.2d at 850-51). “An agency’s findings must sufficiently address the evidence presented by the appellant and must correctly apply the law.” *Id.* (citing N.D.C.C. § 28-32-46(1) and (7)).

[¶73] “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.*” N.D.C.C. § 49-22.1-13(2)(c) (emphasis added). Those factors are the yardstick. The PSC’s finding must show which of them it found satisfied and the reason for the finding.

[¶74] Here, in a single sentence, the PSC found the Emmons County and Burleigh County ordinances were “...unreasonably restrictive on their face.” (R:908:11:19). There was a heightened need for adequacy on this finding, as it was dispositive of the supersession issue. Nevertheless, the PSC’s finding does not address “existing technology, factors of cost or economics, or needs of consumers” as section 49-22.1-13(2)(c) requires. It is a conclusion with no analysis. At the December 21, 2023, hearing on Summit’s motion, the parties presented argument but no testimony.

Summit argued the unreasonableness was “clear on the face of the ordinances” and relied on maps in its briefs. (R:568:15). The PSC did receive evidence on the ordinances at the June 4, 2024, hearing in Linton. Emmons County presented testimony from Erin Magrum, the chair of its county commission. (R:751:11-56). Magrum testified the ordinance includes a variance that allows a landowner and a company to reach their own agreement on setbacks. (R:751:22). Magrum also testified that Summit had not applied to Emmons County for any zoning approval, and that no one had requested a variance. (R:751:27, 36). Summit’s brief cross-examination did not address existing technology, cost or economics, or the needs of consumers. (R:751:28-29, 48). The PSC’s finding does not mention this evidence. The PSC argues testimony from Magrum and from Brian Bitner, a Burleigh County Commissioner, supports its finding, and that the setback distances themselves show the ordinances are unreasonable. It asks the Court to decide only whether a reasoning mind could reach that finding. (R:930:21-22:45-47). The reasoning-mind standard applies to findings the PSC actually made. It does not supply a finding the PSC did not make. The PSC’s finding cites none of this testimony. It does not tie the testimony, or the setback distances, to existing technology, cost or economics, or the needs of consumers. The PSC’s finding is inadequate for a reviewing court to understand the factual basis for the decision.

[¶75] Additionally, the PSC found the county zoning ordinances were “...in direct conflict with state law under NDCC Section 49-22.1-03.” (R:908:11:19). Unlike the “unreasonably restrictive” finding, the PSC did not restate the direct-conflict finding in its legal conclusions. The state law the PSC relied on for the direct-conflict finding, N.D.C.C. § 49-22.1-03, reads, in relevant part:

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.

N.D.C.C. § 49-22.1-03. Both county setbacks significantly exceed the five-hundred-foot figure in this statute.

[¶76] Burleigh County and the Landowners argue the PSC's direct-conflict finding is legally wrong. They argue N.D.C.C. § 49-22.1-03 sets a floor, not a ceiling. They assert the statute requires the PSC to treat land within five hundred feet of an inhabited rural residence as an avoidance area but says nothing about capping what a county may require in its own zoning ordinance. Burleigh County argues a direct conflict exists only when a party cannot comply with both the state statute and the local ordinance at the same time, and that compliance with both the County's setback and the State's five-hundred-foot figure is entirely possible here. (R:955:19-20:31-33); (R:953:8:13-14).

[¶77] The PSC argues the five-hundred-foot figure the Legislature set is itself evidence that a longer county setback is unreasonable. (R:930:22:46). On direct conflict, the PSC argues the county setbacks conflict with the state siting framework the PSC is charged to apply, and that the setbacks rest on safety, which federal law preempts. (R:930:22-23:48-49). Summit acknowledges Burleigh County's and the Landowners' floor-versus-ceiling argument but responds that the ordinances conflict with the broader allocation of authority to the PSC in N.D.C.C. ch. 49-22.1 (the "Siting Act"). Summit argues an ordinance that forecloses the PSC's approved route across large areas of the state undermines the statutory scheme, regardless of whether N.D.C.C. § 49-22.1-03 itself sets an explicit ceiling. (R:928:25-27:55-57). Summit also argues the ordinances directly conflict with federal law, because the PSA preempts local safety standards for interstate pipelines. (R:928:23-25:50-53). The Court addresses federal preemption below.

[¶78] "[North Dakota] caselaw addressing preemption in the context of state and local laws and

ordinances mirrors federal preemption analysis.” *Env’t Driven Sols., LLC v. Dunn Cnty.*, 2017 ND 45, ¶ 7, 890 N.W.2d 841. “The three forms of federal preemption are express preemption, field preemption, and conflict preemption.” *Id.* (quoting *State ex rel. Stenehjem v. FreeEats.com, Inc.*, 2006 ND 84, ¶ 23, 712 N.W.2d 828). Express preemption exists “when there is an explicit state law or rule restraining the county’s authority...” *Id.* (quoting *State v. Brown*, 2009 ND 150, ¶ 21, 771 N.W.2d 267). Here, N.D.C.C. § 49-22.1-03 contains no language restraining county zoning authority. It speaks only to the PSC’s own siting criteria. Express preemption does not exist.

[¶79] Field preemption exists “when the industry or activity involved is already subject to substantial state control through broad, encompassing statutes or rules.” *Id.* The North Dakota Supreme Court has explained:

Field preemption occurs when [the Legislature] intends [state] law to occupy the entire field covered by the [state] statute, to the exclusion of [local] regulation of the same subject matter. Such an intent may be inferred when the scheme of [state] regulation is so pervasive as to create an inference that [the Legislature] left no room for the [local governing bodies] to supplement it, or when the [state] interest in the field is so dominant that it will be assumed to preclude enforcement of [local] laws on the same subject.

Id. ¶ 14 (quoting *FreeEats*, 2006 ND 84, ¶ 25).

[¶80] Counties have general authority to enact zoning ordinances. *See* N.D.C.C. § 11-33-01; *Shaw v. Burleigh County*, 286 N.W.2d 792, 795 (N.D. 1979). The Legislature built section 49-22.1-13(2), N.D.C.C., around a conditional, case-by-case preemption standard, not a blanket one. It requires the PSC to make a specific finding before an ordinance yields, rather than displacing local zoning outright. That structure shows the Legislature did not intend to occupy this field the way it occupied the field of oil and gas waste-treatment siting under a comprehensive statutory scheme. *See Env’t Driven Sols.*, 2017 ND 45, ¶ 15 (agreeing with the district court’s conclusion that the North Dakota Legislature intended that the North Dakota Industrial Commission would “occupy the field” of the

regulation of oil and gas waste treatment plants). Field preemption does not exist in this case.

[¶81] That leaves conflict preemption, which appears to be the basis of the PSC’s finding – specifically, that the county zoning ordinances conflict with the five-hundred-foot avoidance area limitation in N.D.C.C. § 49-22.1-03. Conflict preemption comes in two forms. *Zyla Life Scis., L.L.C. v. Wells Pharma of Houston, L.L.C.*, 134 F.4th 326, 328–29 (5th Cir. 2025). “The first is impossibility preemption.” *Id.* “It arises when it is impossible to obey both [local and state] requirements.” *Id.* (citing *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43, 83 S. Ct. 1210 (1963)). “The second is obstacles-and-purposes preemption...” *Id.* “It arises when [local] law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of [the Legislature].’” *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399 (1941)). “‘What is a sufficient obstacle is a matter of judgment, to be informed by examining the [state statute] as a whole and identifying its purpose and intended effects....’” *MD Mall Assocs., LLC v. CSX Transp., Inc.*, 715 F.3d 479, 495 (3d Cir. 2013) (quoting *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372–73, 120 S. Ct. 2288 (2000)). “‘The mere fact of “tension” between [state] and [local] law is generally not enough to establish an obstacle supporting preemption....’” *Id.* (quoting *Madeira v. Affordable Housing Found., Inc.*, 469 F.3d 219, 241 (2d Cir. 2006)). “In all these types of preemption, however, ‘[e]vidence of pre-emptive purpose [must be] sought in the text and structure of the [state provision] at issue.’” *Zyla*, 134 F.4th at 329 (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664, 113 S. Ct. 1732 (1993)).

[¶82] Section 49-22.1-03, N.D.C.C., directs the PSC to “develop criteria to be used in identifying exclusion and avoidance areas and to guide the site, corridor, and route suitability evaluation and designation process.” It directs that “areas within five hundred feet [152.4 meters] of an inhabited rural residence must be designated avoidance areas.” Emmons County Ordinance number 23-01-

01 subsection B(2)(b)(i) of Article VI requires a setback distance of 7,920 feet from an established residence, subject to a variance. (R:751:22). Burleigh County Ordinance number 23-003 Section 27(VI)(4) mandates a setback distance of two miles (10,560 feet) from any occupied structure. Both distances exceed five hundred feet. Any pipeline route that satisfies either county's setback automatically satisfies the five-hundred-foot minimum under N.D.C.C. § 49-22.1-03. It is possible to comply simultaneously with both the county ordinances and the statute. There is no impossibility preemption.

[¶83] Regarding obstacles-and-purposes preemption, had the Legislature intended to make five hundred feet the maximum “avoidance area,” it could have included language such as “no more than” or “not exceeding.” It did not do so. The statute does not prevent the PSC from adopting a greater distance as an avoidance area. The statute does not set a maximum. The purpose and intended effect of the limiting language was to prevent a transmission facility from being placed closer than five hundred feet to an “inhabited rural residence.” The county zoning ordinances do not create an obstacle to accomplishing this objective. Nor do they stand in the way of the Siting Act’s allocation of routing authority to the PSC. The Legislature provided that a permit supersedes “local requirements” only when the applicant makes the showing required by N.D.C.C. § 49-22.1-13(2)(c). A local requirement that the Legislature expected to remain in force unless that showing is made is not an obstacle to the Legislature’s purpose. Notably, the PSC did not reference the direct-conflict finding in its Conclusions of Law. Nevertheless, the Court finds the PSC’s determination that the county zoning ordinances directly conflict with N.D.C.C. § 49-22.1-03, as set out in its November 15, 2024, Order, is incorrect as a matter of law.

[¶84] Emmons County argues the record contains no evidence that its ordinance is unreasonably restrictive in view of existing technology, factors of cost or economics, or needs of consumers.

(R:913:12:28-30). It asks the Court to reverse the PSC's decision or remand it for the PSC to apply the correct interpretation of the law. (R:913:15:38). It argues Summit's only submission on that point was a map in Summit's brief to the PSC, which Emmons County objected to as lacking foundation. (R:913:12:30). Summit responds that the ordinances are unreasonably restrictive on their face, and that the record contains testimony about their purpose and their effect on the route. (R:928:27:58-59).

[¶85] The PSC never weighed the evidence on those statutory factors. It first treated supersession as automatic, and it later found the ordinances unreasonably restrictive on their face. Weighing the evidence is the PSC's job, not this Court's. The Court does not make independent findings of fact. *Evans*, 437 N.W.2d at 850. When an agency fails to make an essential finding, the usual remedy is to remand for that finding. *Id.* at 851. The statute also directs that a reversed order be remanded to the agency. N.D.C.C. § 28-32-46. The Court therefore does not decide whether the existing record could support a finding that either ordinance is "unreasonably restrictive." Summit bears the burden of proving that by a preponderance of the evidence. N.D.C.C. § 49-22.1-13(2)(c). The PSC must answer that question on remand with sufficient findings for a court to review.

[¶86] In summary, the Court finds the PSC incorrectly found in its February 7, 2024, Order, and again in its November 15, 2024, Order, that a route permit automatically "supersedes and preempts" local land use and zoning regulations. The Court further finds the PSC failed to make sufficient findings in its November 15, 2024, Order to establish that the Emmons County and Burleigh County zoning ordinances were "...unreasonably restrictive on their face." Finally, the PSC's finding that the county zoning ordinances directly conflict with N.D.C.C. § 49-22.1-03 is incorrect as a matter of law. The appropriate remedy is to remand the matter to the PSC with instructions to decide, for each county, whether its zoning ordinance is unreasonably restrictive under N.D.C.C. § 49-22.1-

13(2)(c), and to prepare proper findings on that question. *See Evans*, 437 N.W.2d at 851 (stating “[w]hen an agency fails to prepare an essential finding of fact, the appeal process is seriously impeded and we may remand to the agency with instructions to prepare proper findings”).

Whether Conflict with Federal Law Supports Superseding the County Ordinances?

[¶87] Summit argues that even under the Counties’ reading of N.D.C.C. § 49-22.1-13(2), the ordinances are superseded because they conflict with federal law. (R:928:23-25:50-53). It argues the ordinances impose safety standards on hazardous liquid pipelines, including two-mile setbacks, emergency response obligations, and abandonment requirements. (R:928:23-24:50). Summit points to testimony at the March 14, 2023, hearing by Mitchell Flanagan, Burleigh County’s planning director. (R:928:23-24:50). Flanagan testified that the County’s first ordinance, the safety ordinance adopted on March 6, 2023, “is based on -- primarily on life safety,” and that it was “directed towards public safety and public life’s -- the protection of life safety.” (R:209:416-17). That ordinance addresses safety protocols and emergency plans, not setbacks. (R:423:5-6). Summit also attributes the phrase “specifically related to safety” to that testimony, but the phrase does not appear on the cited pages. (R:209:416-17). Summit notes PHMSA has adopted regulations on setbacks, emergency response, and abandonment. (R:928:24-25:52) (citing 49 C.F.R. §§ 195.210, 195.402(c)(10), (e)). The PSC argues the county setbacks are premised on safety, which federal law preempts. (R:930:23:49).

[¶88] Emmons County and Burleigh County respond that the PSC never found or concluded that federal law preempts their ordinances, so Summit and the PSC cannot rely on that ground for the first time on appeal. (R:950:6-7:6-11); (R:955:21-22:35-36). Both Counties point to a September 15, 2023, letter from PHMSA to the chief executive officer of Summit Carbon Solutions stating that “[l]ocal governments have traditionally exercised broad powers to regulate land use, including setback distances and property development that includes development in the vicinity of pipelines.”

(R:834:3); (R:950:7-8:12); (R:955:22:37). Emmons County argues its ordinance does not purport to regulate pipeline safety and differs from the PSC's own five-hundred-foot criterion in N.D.C.C. § 49-22.1-03 only in distance. (R:950:6:6); (R:950:8:13). Burleigh County also argues the PSC applies the five-hundred-foot setback in state law without treating it as preempted. (R:955:23:39).

[¶89] Under the PSA, “[a] State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation.” 49 U.S.C. § 60104(c). At the same time, the PSA does not authorize the Secretary of Transportation “to prescribe the location or routing of a pipeline facility.” 49 U.S.C. § 60104(e). In *Couser v. Shelby Cnty.*, 139 F.4th 664 (8th Cir. 2025), the Eighth Circuit applied these provisions to county ordinances that imposed setbacks and other requirements on a carbon dioxide pipeline. The court explained that Congress intended “to preclude states from regulating in any manner whatsoever with respect to the safety of interstate transmission facilities.” *Id.* at 669 (quoting *ANR Pipeline Co. v. Iowa State Com. Comm’n*, 828 F.2d 465, 470 (8th Cir. 1987)). To decide whether a setback is a safety standard, the court “looks beyond the rationale offered to evidence of the law’s purpose” and asks whether safety is the law’s primary motivation. *Id.* at 670-71.

[¶90] The Eighth Circuit held: “This court holds that the Counties’ setbacks are safety standards.” *Id.* at 671. It relied on three features of the ordinances. First, the setbacks applied “alike to economically developed and remote areas,” and “[t]his blanket application undercuts aesthetic, land-use, and development rationales.” *Id.* Second, one ordinance required larger setbacks from buildings with vulnerable populations, such as “a church, school, nursing home, long-term care facility, or hospital.” *Id.* Third, one ordinance’s preamble stated that “there are several factors that would influence human safety in the event of a rupture of such a pipeline.” *Id.* at 670. The court also held the ordinances’ emergency response and abandonment provisions were preempted. *Id.* at

672-73. But the Eighth Circuit cautioned that its holding “does not prohibit local governments from considering safety, nor prevent them from enacting all zoning ordinances.” *Id.* at 671. It emphasized “the distinction between safety standards—which the PSA preempts—and safety considerations—which the PSA does not preempt.” *Id.*

[¶91] Burleigh County argues *Couser* is distinguishable. It notes *Couser* addressed trenchless construction, enhanced permitting, setback, emergency response, and abandonment requirements, and that it “has nothing to do with plume modeling.” (R:955:22-23:38). But the setback, emergency response, and abandonment provisions in *Couser* are the same kinds of provisions found in Burleigh County’s ordinance. The adopted ordinance defines a “Blast Zone,” a “Fatality Zone” in which residents “would face a significant risk of loss of life due to a rupture,” and a “Hazard Zone” in which residents would likely suffer “significant adverse health impacts.” (R:523:5-6). It states that it is designed “to secure safety from fire, flood, panic, and other dangers.” (R:523:8). It applies to land “regardless of the zone or area.” (R:523:8). It requires a pipeline to be at least two miles from any occupied structure, ten miles from a city’s extraterritorial line, and four miles from “a church, school, nursing home, long-term care facility, or hospital,” the same list of vulnerable buildings the Eighth Circuit noted. (R:523:9). It requires an emergency response and hazard mitigation plan, a public safety plan, and abandonment and removal measures. (R:523:14-17). A landowner’s agreement cannot reduce its separation distances. (R:523:14-15). The ordinance also states that it is meant to protect agricultural productivity, property values, and future development. (R:523:8-9). But *Couser* looked past stated rationales to the ordinance’s purpose and effect. 139 F.4th at 670-71.

[¶92] Emmons County’s ordinance shares fewer of those features. The amendment revises one subsection of a general conditional-use ordinance first adopted in 1982. (R:179:2); (R:751:16-18,

30). It covers “[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.” (R:179:2). It contains no statement of purpose, no blast or fatality zones, no emergency response or abandonment provisions, and no larger setbacks for schools, hospitals, or similar buildings. *Id.* It requires a pipeline to be two miles from the corporate boundaries of a city, a mile and a half from an established residence, and five hundred feet from any other building or surface water body. *Id.* The residence setback may be waived by “a signed and notarized waiver of setback from each established residence.” *Id.* Emmons County’s commission chair testified the residence setback is not “a safety issue,” and that safety did not drive the distances “because none of us are safety experts.” (R:751:43, 49). Other evidence points the other way. The same witness testified that public input focused on “property rights and safety concerns.” (R:751:49). The ordinance exempts potable water pipelines from the residence setback, and its other setbacks cannot be waived. (R:179:2).

[¶93] Conflict with federal law is a basis for supersession under state law. Under N.D.C.C. § 49-22.1-13(2)(c), 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.” But the PSC never addressed or relied on that ground. Its February 7, 2024, Order noted Summit’s federal-law argument but rested on automatic supersession. (R:586:2-3). Its November 15, 2024, Order recited Summit’s request, then found the ordinances unreasonably restrictive and in direct conflict with state law under N.D.C.C. § 49-22.1-03. (R:908:11:19). Its conclusions of law do not mention federal law. (R:908:16:4). The PSC made no finding that either ordinance, or any part of either ordinance, is a safety standard preempted by 49 U.S.C. § 60104(c).

[¶94] Whether a county requirement is a preempted safety standard turns on its purpose and effect, which must be determined from the evidence. *Couser*, 139 F.4th at 670-71. The PSC must make findings on that question. N.D.C.C. § 28-32-39(1). It did not. The Court cannot make those findings for the PSC on appeal. *See Evans*, 437 N.W.2d at 850-51. The Court therefore does not decide whether federal law preempts either ordinance. On remand, the PSC may address whether Summit has shown that any requirement in either ordinance is “in direct conflict with ... federal laws or rules” under N.D.C.C. § 49-22.1-13(2)(c). If the PSC addresses that question, it must consider each county’s ordinance separately and state findings that explain its decision.

Whether the PSC Improperly Restricted Access to the Dispersion Model and Denied a Fair Hearing?

[¶95] Burleigh County argues the PSC erred by protecting Summit’s Dispersion Model from disclosure to the public. (R:918:17:24-48). It argues the PSC should not have considered the Dispersion Model without giving the parties and the public an opportunity to challenge its reliability. (R:918:19:27). Burleigh County argues that while Summit relied on a sensitive-security rationale to justify concealing the Dispersion Model before the PSC, Summit abandoned that same rationale in Minnesota, advancing what Burleigh County calls a false narrative. (R:918:26:39). Burleigh County argues the PSC’s decision to protect the Dispersion Model was an abuse of discretion, and that North Dakota law does not protect it in any event. (R:918:27:40-48).

[¶96] The Landowners argue the PSC made determinations of fact and conclusions of law based on a secret plume study that Summit shared only with the PSC and a handful of private individuals, and that neither the Landowners nor the Counties have seen, cross-examined, or had evaluated by an expert. (R:915:20-21:28-29). They argue neither the ex parte communication procedure under N.D.C.C. § 28-32-37 nor the additional-evidence procedure under N.D.C.C. § 28-32-25 was

followed before the PSC considered the Dispersion Model, and that this noncompliance should be dispositive. (R:915:39-40:54).

[¶97] The PSC responds that the questions Burleigh County and the Landowners raise about safety and the Dispersion Model are preempted by federal regulation under PHMSA and the PSA. (R:930:10:17-32). The PSC also asserts, without extensive elaboration, that its confidentiality ruling was properly made under N.D.A.C. § 69-02-09-01. (R:930:16-17:31).

[¶98] Summit responds that the PSC's treatment of the Dispersion Model did not deprive Burleigh County of a fair hearing, and that the PSC properly maintained its confidentiality under North Dakota law. (R:928:11:17-35). Summit argues the PSC did not rely on the Dispersion Model in reaching its decision, and that any use of the Dispersion Model to litigate safety would have been futile in any event, because the PSC expressly disclaimed jurisdiction over pipeline safety. (R:928:11-12:18-19). Summit argues *Williams Elec. Co-op.* controls and forecloses the fair-hearing claim. (R:928:13:22-25). Summit argues Burleigh County cannot show prejudice. (R:928:14:26).

[¶99] In its *Reply*, Burleigh County argues the PSC's withholding of the Dispersion Model violated the AAPA and denied it a fair hearing, and that the error was prejudicial. (R:955:7:8-22); (R:955:11:16-18). In their *Reply*, the Landowners argue *Williams Elec. Co-op.* is distinguishable, because the PSC has actual possession of Summit's Dispersion Model. (R:953:1-2:1-3). They argue the PSA does not excuse the PSC's violation of the AAPA, and distinguish between the PSC's authority to consider technical safety standards and its authority to consider safety generally. (R:953:3-4:4-9). The Landowners argue the PSC is not entitled to deference on its fact-finding where it has not disclosed material evidence in violation of the AAPA. (R:953:7:12).

[¶100] Emmons County does not join this argument. In its *Reply*, Emmons County expressly disclaims any request that the PSC or this Court consider the Dispersion Model or assess issues

within PHMSA's purview, stating that its own challenge is limited to whether its ordinance is unreasonably restrictive. (R:950:3:2).

[¶101] "A security system plan kept by a public entity, and records regarding disaster mitigation, preparation, response, vulnerability, or recovery, or for cybersecurity planning, mitigation, or threat, are exempt from [public disclosure]." N.D.C.C. § 44-04-24(1). A "[s]ecurity system plan" includes "[r]ecords, information, photographs, audio and visual presentations, schematic diagrams, surveys, recommendations, communications, or consultations relating directly to the physical or electronic security of ... any privately owned or leased critical infrastructure if the plan or a portion of the plan is in the possession of a public entity." N.D.C.C. § 44-04-24(2)(b)(1). "Critical infrastructure" includes "systems related to ... hazardous liquid, natural gas, ... so vital to the state that the incapacity or destruction of these systems would have a debilitating impact on security, state economic security, state public health or safety, or any combination of those matters." N.D.C.C. § 44-04-24(2)(a).

[¶102] On August 4, 2023, the PSC granted Summit's *Application to Protect Information* after notice, a contested hearing, and briefing from objecting parties. (R:526:1). Burleigh County had not yet intervened, although it had asked the PSC to make the plume modeling public. (R:908:4). Emmons County intervened in July 2023, after the June 27, 2023, hearing. (R:516). Landowner intervenors appeared and were represented by counsel. (R:526:1).

[¶103] In its *Order on Protection of Information*, the PSC found that refrigerated carbon dioxide is a hazardous material under PHMSA's regulations, that Summit's pipeline meets the definition of "critical infrastructure" under N.D.C.C. § 44-04-24(2)(a), and that disclosing the Dispersion Model could show where an attack on the pipeline would have a debilitating impact on security and public health. (R:526:2-3:6-7). Those findings apply the statutory security-system-plan definition directly

to the Dispersion Model. (R:526:2-3). Burleigh County argues the Dispersion Model had nothing to do with a security system plan, and that the concern about bad actors relates to the location of valves, not to the model's results. (R:918:18-19:26); (R:918:30-31:45-47); (R:955:13-14:21-22). The statute defines a security system plan broadly. It includes "surveys, recommendations, communications, or consultations relating directly to the physical or electronic security of" critical infrastructure, as well as "[v]ulnerability and capability assessments" and "[t]hreat response plans." N.D.C.C. § 44-04-24(2)(b)(1), (4), (5). The PSC found that disclosing the plume modeling could show a bad actor where damaging the pipeline would have a debilitating impact on security and public health. (R:526:2-3:7). The order does not support Burleigh County's argument that no showing was made connecting the Dispersion Model to the security of critical infrastructure. (R:918:28-29:43-44). The Court finds the PSC's classification of the Dispersion Model as a security system plan was supported by the evidence and in accordance with N.D.C.C. § 44-04-24(1), (2)(b). [¶104] Burleigh County separately argues the PSC should have ordered a redacted public version of the Dispersion Model rather than withholding it entirely. (R:918:28:42). The PSC's own rule allows an applicant to request a waiver of the redacted-version requirement if it is not possible to file a redacted version. N.D.A.C. § 69-02-09-01(5). Summit made that request in its *Application to Protect Information*. (R:340:5). PSC staff counsel recommended granting Summit's application "for the reasons outlined in the petition." (R:391:1). The recommendation does not separately address the waiver or the redaction requirement. *Id.* The intervenors who objected to Summit's application argued that state law required Summit to file a redacted version, and acknowledged that some of the information likely should be protected. (R:346:2, 4-5); (R:348:2); (R:526:2:3). At the June 27, 2023, hearing, counsel for the Landowners agreed there was "a legitimate interest in keeping some of that confidential," but argued the entire model should not be kept confidential.

(R:508:21, 23). The PSC's order granted Summit's application in full. (R:526:4). But the order contains no finding on the redaction requirement or on Summit's request for a waiver. It does not decide whether a redacted public version was possible. It does not explain why a waiver was appropriate. It does not respond to the objectors' argument that only the protected portions should be withheld. Finding 3 notes the objectors' position that some, but not all, of the information should be protected. (R:526:2:3). No other part of the order returns to that point. The rule requires a redacted public version unless the PSC waives the requirement, and "[t]he amount redacted must be as minimal as possible." N.D.A.C. § 69-02-09-01(5). An applicant who claims a redacted version is not possible must file "a specific written request for waiver of the requirement and the reasons for requesting a waiver." *Id.* Burleigh County raised redaction again in its May 27, 2024, motion. (R:695:2). The PSC denied that motion in a single sentence. (R:908:18). The Court cannot tell from the PSC's orders whether the PSC decided a redacted version was not possible, or never reached the question. The PSC's findings do not sufficiently address this issue. N.D.C.C. § 28-32-46(7). The Court does not decide whether a redacted version is possible. That question is for the PSC to decide. The Court includes the redaction issue in the remand ordered below.

[¶105] The PSC also found that "[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." (R:526:3:10). That finding no longer matched the record by the time the PSC ruled on Burleigh County's motion. At the May 30, 2024, hearing, Burleigh County called Chad Wachter as a witness. (R:746:4). Wachter testified that Ron Ness of the North Dakota Petroleum Council invited him to Ness's office after Ness "negotiated with Carbon Summit Solutions so we could take a look at the dispersion modeling." (R:746:10). Wachter testified that at the January 24, 2024,

meeting, he was shown a PowerPoint presentation of the dispersion modeling. (R:746:10-11, 40-41). Wachter identified Ness, Justin Kringstad, Brady Peyton (phonetic), and Summit representative Wade Boeshans as also attending. (R:746:11). Ness is not employed by Summit. (R:746:12). Wachter further testified that at a follow-up meeting on February 21, 2024, at the University of Mary, he discussed the dispersion modeling with Boeshans and Bruce Rastetter, whom Wachter agreed was a major investor in the Project. (R:746:19-20). At the June 4, 2024, hearing, Patrick Martin, the Morton County emergency manager, testified that Summit presented plume modeling at a meeting attended by the mayor of Mandan, the chairman of the Morton County Commission, and the Morton County sheriff. (R:752:52). Some of these officials may fall within the emergency-planning audience the order allowed. But the PSC did not address this testimony either. Burleigh County moved for reconsideration of the *Order on Protection of Information* on May 27, 2024, before this testimony was given, so its motion does not address it. (R:695). The motion did argue that Summit had already shared its dispersion modeling methodology and generic model outputs with emergency responders and county officials, and that Summit's disclosure "was not limited to emergency personnel." (R:695:8). Summit and the Landowners filed their responses to the motion after Wachter's testimony. (R:908:7). The PSC did not rule on the motion until it issued its November 15, 2024, Order, more than five months after Wachter's testimony became part of the record. It denied the motion in a single sentence without addressing whether the finding it was defending still held up against that testimony. (R:908:18).

[¶106] An agency's findings must sufficiently address the evidence before it, and the agency must adequately explain the basis for its decision. N.D.C.C. § 28-32-46(7); *Schoch*, 2010 ND 25, ¶ 19. By the time the PSC denied Burleigh County's motion, the record contained direct testimony that the Dispersion Model had been shown to or discussed with persons not shown to be Summit

employees or authorized agents, including Wachter and Ness. This testimony showed that the PSC's earlier finding that no such disclosure had occurred no longer reflected the record. The PSC's single-sentence denial does not acknowledge that testimony, does not explain why its earlier finding still stood despite it, and does not explain why continued full protection remained consistent with the record actually before the PSC. The Court does not disturb the PSC's classification of the Dispersion Model as the kind of information N.D.C.C. § 44-04-24(1) protects. But this matter should be remanded to the PSC to reconcile its finding with the evidence in the record and to state findings that sufficiently address that evidence. N.D.C.C. § 28-32-46(7). On remand, the PSC must also address the redaction requirement in N.D.A.C. § 69-02-09-01(5). It must decide whether a redacted public version of the Dispersion Model is possible. If it is not, the PSC must explain why a waiver is warranted.

[¶107] Burleigh County and the Landowners argue suppression of the Dispersion Model denied them a fair hearing. If the rules or procedures of an administrative agency do not afford a fair hearing, the order of the agency must be modified or reversed, and the case remanded. N.D.C.C. § 28-32-46(4). "A person is denied due process or a fair hearing when the defects in the hearing process might lead to a denial of justice." *Erovick v. Job Serv. N. Dakota*, 409 N.W.2d 629, 631 (N.D. 1987) (citing *Schadler v. Job Service North Dakota*, 361 N.W.2d 254 (N.D. 1985)). "[The North Dakota Supreme Court has] stated that the minimal due process that must be afforded participants before an administrative board is not synonymous with the minimal requirement of due process in a court of law." *First Am. Bank & Tr. Co. v. Ellwein*, 221 N.W.2d 509, 517 (N.D. 1974). "The fundamental requirement of due process is the opportunity to be heard." *Id.* (citing *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011 (1970)).

[¶108] Summit cites *Williams Elec. Co-op.* in opposition to the fair-hearing claim. In *Williams*

Elec. Co-op., the North Dakota Supreme Court summarized:

As applied to administrative officials, agencies, and bodies, due process of law is not a term of fixed and invariable content, and greater flexibility has been given to the term when applied to administrative agencies than when applied to a judicial tribunal. No particular form of proceeding is required to constitute due process in administrative proceedings; all that is required is that the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. Its requirements include the revelation of the evidence on which a disputed order is based, an opportunity to explore that evidence, and a conclusion based on reason; and its essential requirements are met where the administrative body is required to determine the existence or nonexistence of the necessary facts before any decision is made.

Whether a person or party has been deprived of due process of law by the action of an administrative agency or body depends on whether it acted contrary to the statutes and rules and with arbitrary and unreasonable discrimination. A study of the evidence and the applicable statutes involved in this proceeding indicates that all the evidence and the applicable statutes were thoroughly considered by the Public Service Commission. The trial court, after comprehensive study of the record reached the same result as the Commission. The appellant has had a fair hearing.

Williams Elec. Co-op., 79 N.W.2d at 523 (citations omitted).

[¶109] Here, Burleigh County and the Landowners had notice of the proceedings, the general nature of the issues, and the ability to be heard. Fair play requires the opportunity to explore evidence that was relied upon by the PSC in reaching its decision. The appellants were denied access to Summit's Dispersion Model and could not question Summit's witnesses about its contents. The record establishes the PSC had access to the Dispersion Model but does not establish it relied upon the Dispersion Model to reach its conclusions. It is not mentioned in the February 7, 2024, Order. The November 15, 2024, Order mentions it only in the recitation of the procedural history and in the one-sentence denial of Burleigh County's motion for reconsideration. (R:908:4, 7, 18). None of the PSC's findings of fact refer to it. The PSC also removed plume-modeling language from Finding 42 of its August 4, 2023, Order before approving that order. (R:530:1). The Court recognizes that Summit's witness wanted the PSC to rely on the Dispersion Model. At the June 3, 2024, hearing,

Alex Lange testified it was his intent as a Summit employee that the PSC rely on the data Summit provided in confidence. (R:749:7). On June 4, 2024, when the PSC denied the Landowners' motion for a "mishearing," Commissioner Christmann stated that "[t]he dispersion modeling was presented to the Commission. It's subject to a protective order." (R:752:136). This testimony and statement show that Summit wanted the PSC to rely on the model and that the PSC received it. They do not show the PSC used it to reach its results. A witness's wish that the decision maker rely on evidence does not prove the decision maker did so. The PSC's findings do not cite the Dispersion Model, and its stated reasons do not rely on it. The PSC's decision on the county ordinances rested on its reading that a route permit automatically superseded local zoning ordinances, a finding that the county zoning ordinances were unreasonably restrictive on their face, and a perceived conflict with state law. The Court cannot find the appellants were deprived of a fair hearing because the record does not establish the PSC used the Dispersion Model in reaching its decision.

[¶110] In summary, the Court does not find the PSC erred in classifying the Dispersion Model as a security system plan under N.D.C.C. § 44-04-24(1), (2)(b). The Court does not find the appellants were denied a fair hearing by the failure to provide access to the Dispersion Model. However, remand is appropriate as the PSC's findings regarding the denial of Burleigh County's request for reconsideration do not adequately explain the rationale for the decision, particularly in light of the information that came to light regarding disclosure of the Dispersion Model and that the PSC's earlier finding was no longer consistent with the evidence in the record. On remand, the PSC must also decide whether a redacted public version of the Dispersion Model is possible under N.D.A.C. § 69-02-09-01(5), and explain its decision.

Whether the PSC Violated N.D.C.C. §§ 28-32-37 or 28-32-25 by Considering the Dispersion Model?

[¶111] Beyond the fair-hearing claim addressed above, the Landowners argue the PSC based its

decision on the Dispersion Model that Summit shared only with the PSC and a handful of private individuals, and that neither the Landowners nor the Counties have seen, cross-examined, or had evaluated by an expert. (R:915:20-21:28-29). They argue neither the ex parte communication procedure under N.D.C.C. § 28-32-37 nor the additional-evidence procedure under N.D.C.C. § 28-32-25 was followed before the PSC considered the Dispersion Model, and that this noncompliance should be dispositive. (R:915:39-40:54).

[¶112] Section 28-32-37, N.D.C.C., bars an agency head or hearing officer from communicating, directly or indirectly, about any issue in a pending proceeding with a party or an interested person, without notice and an opportunity for all parties to participate. N.D.C.C. § 28-32-37(1). It places the same limit on parties and interested persons. N.D.C.C. § 28-32-37(3). Section 28-32-25, N.D.C.C., provides that an agency “may avail itself of competent and relevant information or evidence in its possession or furnished by members of its staff, or secured from any person in the course of an independent investigation conducted by the agency, in addition to the evidence presented at the hearing.” N.D.C.C. § 28-32-25. The agency may do so only after it first sends a copy or an abstract of the information to each party. *Id.* On written request, each party must have an opportunity to examine the information, present its own information, and cross-examine the person who furnished it. *Id.*

[¶113] Section 28-32-37, N.D.C.C., does not apply. It addresses communications made without notice to the other parties. The Dispersion Model did not reach the PSC that way. The PSC requested it, and Summit submitted it with an *Application to Protect Information* filed April 21, 2023. (R:292:1); (R:340:4). The parties had notice of the application. Warford objected, the Landowners joined the objection, and the PSC granted the application after a contested hearing and briefing. (R:346); (R:348); (R:526:1). The parties could not see the model’s contents, but they knew

the PSC had it. Commissioner Christmann's statement that "[t]he dispersion modeling was presented to the Commission" acknowledges possession. He stated in the same breath that "[i]t's subject to a protective order." (R:752:136). Whether the PSC properly protected the model is the question the Court addressed above. It is not an ex parte communication.

[¶114] Section 28-32-25, N.D.C.C., presents a closer question. The Landowners assert the Dispersion Model is not part of the evidentiary record. (R:915:20-21:28). If so, it is information in the PSC's possession outside the hearing evidence, which is the kind of information the statute covers. But the statute's requirements apply when an agency "avail[s] itself" of that information "in addition to the evidence presented at the hearing." N.D.C.C. § 28-32-25. The statute does not bar an agency from having information in its possession. It controls the agency's use of that information to decide the case.

[¶115] The same gap that defeats the fair-hearing claim defeats this argument. Nothing in the PSC's findings shows it used the Dispersion Model to reach its decision. The February 7, 2024, Order does not mention it. The November 15, 2024, Order mentions it only in the procedural history and in the denial of Burleigh County's motion. (R:908:4, 7, 18). Lange's testimony and Commissioner Christmann's statement show the PSC had the model. (R:749:7); (R:752:136). They do not show the PSC used it to decide the case. Because the record does not show the PSC availed itself of the Dispersion Model in deciding the case, N.D.C.C. § 28-32-25 did not require the PSC to send it to the parties.

[¶116] The Court rejects the Landowners' argument that the PSC's handling of the Dispersion Model violated N.D.C.C. § 28-32-37(1), (3) or § 28-32-25. This conclusion is separate from, and does not disturb, the Court's holding above that remand is required regarding the adequacy of the PSC's finding on Burleigh County's motion to reconsider the protection of the Dispersion Model.

Whether Federal Law Preempts the PSC's Consideration of Public Welfare?

[¶117] Burleigh County argues the PSC erred by refusing to consider public health and welfare because it treated the PSA as preempting that entire topic. (R:918:45:77). Burleigh County points to ALJ Hogan's remarks at the PSC's August 4, 2023, special meeting, at the conclusion of the initial hearings on Summit's original application, where the PSC rejected that application for several unaddressed issues, including safety issues. *Id.* It argues Summit never addressed those issues at the later hearing on its petition for reconsideration, that a carbon dioxide release is extremely dangerous, and that the PSC did not address that danger at the reconsideration hearing. *Id.* It also argues the PSC denied Burleigh County access to Summit's Dispersion Model and prevented it from exploring these issues. *Id.*

[¶118] Summit and the PSC respond that these are safety considerations, not public-welfare considerations, and that the PSA gives PHMSA exclusive control over safety standards for an interstate pipeline. Summit argues Burleigh County cannot relabel safety objections as "public welfare" to avoid that preemption. (R:928:36-37:74-77). The PSC takes the same position. It argues it may consider welfare impacts that are not safety standards, but it cannot adjudicate or impose safety requirements for an interstate facility, because Congress reserved that role to PHMSA. (R:930:15-16:29).

[¶119] In their reply briefs, Emmons County and Burleigh County raise a related but separate point: they argue federal preemption was never the PSC's actual basis for its decision, so Summit and the PSC cannot rely on it for the first time on appeal. Emmons County argues the PSC's orders refer to federal law only in recounting Summit's argument, and rely instead on N.D.C.C. § 49-22.1-13(2) to supersede the county ordinances. (R:950:6-7:6-11). Burleigh County makes the same argument: the PSC's orders never address federal preemption, so Summit and the PSC cannot introduce that basis for the first time in this Court. (R:955:21-22:35-36). The Court addresses that argument above,

in its discussion of the county ordinances.

[¶120] As the Court has already explained, “[t]he three forms of federal preemption are express preemption, field preemption, and conflict preemption.” *Env’t Driven Sols.*, 2017 ND 45, ¶ 7 (quoting *FreeEats*, 2006 ND 84, ¶ 23).

[¶121] The PSC argues Congress has clearly spoken and created a complete scheme for regulating the safety of interstate pipelines, so state and local safety regulation violates the PSA’s express preemption. (R:930:10:17-32). The PSC argues it followed the correct procedure because safety considerations were outside its control. *Id.*

[¶122] Under 49 U.S.C. § 60102(a), the PSA governs hazardous liquid pipelines. Its purpose is “to provide adequate protection against risks to life and property posed by pipeline transportation and pipeline facilities.” 49 U.S.C. § 60102(a)(1). Section 60102(a)(2) gives the Secretary of Transportation, acting through PHMSA, the power to “prescribe minimum safety standards for pipeline transportation and for pipeline facilities.” Those standards “may apply to the design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities.” 49 U.S.C. § 60102(a)(2)(B).

[¶123] “A State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation.” 49 U.S.C. § 60104(c). This is an express preemption clause. The Eighth Circuit has recognized how broad it is. Congress gave the federal government exclusive authority over the safety of interstate pipelines, a state cannot regulate that safety in any manner, and a state cannot even interpret PHMSA’s own safety standards on its own account. *ANR Pipeline*, 828 F.2d at 470, 472; *Kinley Corp. v. Iowa Utilities Bd., Utilities Div., Dep’t of Commerce*, 999 F.2d 354, 358-59 (8th Cir. 1993). As the Eighth Circuit put it, this grant of exclusive federal authority “precludes state decision-making in this area altogether and leaves no regulatory

room for the state to either establish its own safety standards or supplement the federal safety standards.” *Couser*, 139 F.4th at 669 (quoting *Kinley*, 999 F.2d at 359).

[¶124] That preemption, though, has an important limit. Although the PSA expressly precludes state regulation of interstate pipeline safety, it limits federal authority over the location and routing of a pipeline. The PSA explicitly states that it “does not authorize the Secretary of Transportation to prescribe the location or routing of a pipeline facility.” 49 U.S.C. §. 60104(e). This limit on the federal government’s authority has led several courts to conclude that Congress reserved to the States the power to determine the “location or routing of [pipeline] facilities.” *Enbridge Energy, Ltd. P’ship v. Whitmer*, 813 F. Supp. 3d 777, 795-96 (W.D. Mich. 2025) (citing *Portland Pipe Line Corp. v. City of S. Portland*, 288 F. Supp. 3d 321, 430-31 (D. Me. 2017); *Olympic Pipe Line Co. v. City of Seattle*, No. C03-2343L, 2003 WL 27392855, at *4 (W.D. Wash. 2003)). As the Court explained above, the Eighth Circuit drew a line between safety standards, which the PSA preempts, and safety considerations, which it does not. *Couser*, 139 F.4th at 671. A state can weigh safety-related facts in deciding where a pipeline goes or whether a project serves the public welfare, because that is a consideration folded into a routing or welfare judgment. What it cannot do is adopt, interpret, or enforce its own rule governing how safe the pipeline must be, and framing that rule in terms of location or distance does not save it. *Id.* at 671-72.

[¶125] The PSC’s position tracks the first half of that line correctly. The PSC found the Project will be designed, constructed, and operated in accordance with PHMSA regulations, and that PHMSA regulates the safety of this interstate pipeline. (R:908:14-15:39, 41). The PSC did not go further and independently evaluate whether the dispersion modeling study, which the PSC says PHMSA will review, satisfies PHMSA’s requirements. (R:930:10-11:17). Because the PSC cannot lawfully adjudicate or interpret PHMSA’s own safety standards, it correctly declined to referee the technical

adequacy of safety measures subject to PHMSA review.

[¶126] That still leaves the rest of public welfare for the PSC to weigh. Black's Law Dictionary defines public welfare as "a society's well-being in matters of health, safety, order, morality, economics, and politics." Black's Law Dictionary 1625 (8th ed. 2004). Safety is part of that definition, but only the standard-setting piece of safety is preempted. The PSC remains free to weigh the other parts of public welfare, along with the safety-related facts already before it that do not require the PSC to set or referee a safety standard of its own. In evaluating a route, the PSC is guided by "[a]vailable research and investigations" on the effects of the facility "on public health and welfare." N.D.C.C. § 49-22.1-09(1).

[¶127] The PSC made findings on several specific welfare issues, including drain tile, property values, and liability insurance. (R:908:10-11:15-18). But its findings do not show it weighed public welfare as a whole, apart from the safety standards reserved to PHMSA. Its conclusion states: "Based on the above Findings of Fact, the Commission concludes the location, construction, operation, and maintenance of the Project will produce minimal adverse effects on the environment and upon the welfare of the citizens of North Dakota." (R:908:16:7). That conclusory statement does not inform the Court whether the PSC separated two different things: correctly declining to relitigate the safety standards the PSA reserves to PHMSA, and actually weighing the parts of public welfare that were never preempted at all. The Court cannot tell whether the PSC weighed the evidence on the parts of public welfare that are not preempted. The Court remands this issue to the PSC for express findings on whether public welfare, apart from the safety standards reserved to PHMSA, supports its decision to grant the certificate and route permit.

Whether the PSC Was Required to Wait for New PHMSA Regulations?

[¶128] Burleigh County argues the PSC should have postponed its decision until PHMSA issued new safety regulations for carbon dioxide pipelines. (R:918:46:78). It points to the testimony of

James Powell, Summit's Chief Operating Officer, that the PHMSA regulations in place date to the early 1990s, and to PHMSA's May 26, 2022, announcement that it was "initiating a new rulemaking to update standards for CO2 pipelines." (R:918:46:78); (R:209:99, 101-102); (R:294:1). Burleigh County asserts the new rules have since become final. (R:918:46:78 n.5). In its *Reply*, it argues the Court may remand now that the new rules are in place. (R:955:30:50). Summit responds that the Siting Act requires the PSC to decide applications within the time the Legislature set, that PHMSA's rulemaking is continuous, and that Summit must comply with PHMSA's rules as they exist now and as they are later amended. (R:928:37-38:78-81).

[¶129] The Siting Act sets the time for the PSC's decision. A route designation "must be made in a timely manner no later than six months after the filing of a completed application." N.D.C.C. § 49-22.1-07(5). The PSC may extend that time "for just cause." *Id.* In evaluating a route, the PSC is guided by "[a]vailable research and investigations relating to the effects of the location, construction, and operation of the proposed facility on public health and welfare, natural resources, and the environment." N.D.C.C. § 49-22.1-09(1). The PSC's authority is limited to the authority the Legislature gave it. *Env'tl. L. & Policy Ctr. v. N.D. Pub. Serv. Comm'n*, 2020 ND 192, ¶ 11, 948 N.W.2d 838. A state authority "may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation." 49 U.S.C. § 60104(c).

[¶130] Burleigh County cites no statute, rule, or case that required the PSC to postpone its decision for federal rulemaking. The Siting Act points the other way. It directs the PSC to act "in a timely manner." Missing the six-month deadline does not divest the PSC of jurisdiction, but the direction to act promptly remains. N.D.C.C. § 49-22.1-07(5). It guides the PSC by "available" research, meaning the information that exists when the PSC decides, not rules a federal agency might adopt later. Nothing in N.D.C.C. ch. 49-22.1 directs the PSC to hold a siting decision open until PHMSA

completes a rulemaking.

[¶131] Waiting also would not have given the PSC any role in those rules. As the Court explained above, the PSA reserves safety standards for interstate pipelines to PHMSA. 49 U.S.C. § 60104(c). The PSC cannot adopt, change, or enforce those standards. The PSC found the Project will be designed, constructed, and operated in accordance with PHMSA regulations. (R:908:14-15:39, 41). A state route permit does not freeze the federal safety standards in place on the day the PSC acts. If PHMSA adopts new safety requirements for carbon dioxide pipelines, those requirements would apply to Summit according to their own terms, regardless of when the PSC acted. Burleigh County does not explain how it was harmed by the PSC deciding first.

[¶132] Burleigh County's request for a remand because new rules are now in place fares no better. The Court reviews the PSC's order "based only on the record filed with the court." N.D.C.C. § 28-32-46. Whether PHMSA has since finalized new rules is not part of that record. Even if the Court took notice of a rule PHMSA has since finalized, a federal rule adopted after the PSC acted would not make the PSC's order "not in accordance with the law" under N.D.C.C. § 28-32-46(1), and it would not be one of the other grounds for reversal in that section. In its *Reply*, Burleigh County acknowledges that Summit's point about the Siting Act's time limits "may be true." (R:955:30:50).

[¶133] The Court finds the PSC was not required to postpone its decision until PHMSA issued new regulations. This ground for reversal is rejected.

Whether Summit Failed to Identify a Viable Southern or Eastern Route Around Bismarck?

[¶134] On August 4, 2023, the PSC denied Summit's original application, finding Summit "has not provided sufficient evidence to demonstrate that the location, construction, operation and maintenance of the Project will produce minimum adverse impacts upon the welfare of the citizens of North Dakota with the existing record." (R:530:11-12:42). The denial specifically identified the absence of an analysis of a southern alternate route around Bismarck as part of that deficiency. *Id.*

At the rehearing that followed, Burleigh County elicited testimony that Summit still had not made a genuine attempt to find a viable southern or eastern route. Powell testified that Summit never reached out to the City of Bismarck or Burleigh County to discuss where an appropriate southern reroute should go. (R:741:88). He testified that Summit did not contact any township boards, Emmons County, the North Dakota State Water Commission, the City of Mandan, the Standing Rock Sioux Tribe, the Army Corps of Engineers, Energy Transfer Partners, or landowners about a southern alignment. He also testified that Summit conducted no independent geological survey on the south side of Bismarck. (R:918:41-42:70); (R:741:88-98). Commissioner Bitner testified that Summit could not have picked a worse route if it tried. (R:918:42:71); (R:744:40). He further testified that when a Summit representative was asked why Summit did not choose a southern route farther from Bismarck, he answered, “We don’t want to have another DAPL.” (R:918:42:71); (R:744:47). Burleigh County argues this record shows Summit’s southern-route work was, in its words, “no analysis at all” but rather an affront to the PSC’s own prior order. (R:918:41:69).

[¶135] Summit responds that Burleigh County’s argument misstates the record and asks the Court to reweigh the evidence. (R:928:29:63-73). In support, Summit points to a document titled “Bismarck Route Analysis,” filed with the PSC on January 24, 2024, in response to the PSC’s October 17, 2023, request for “a comprehensive analysis of a southern route around Bismarck” that would “compare relative adverse effects to the proposed route.” (R:572:1). The document compares a single southern alignment Summit developed (the “Southern Alternative”) against Summit’s preferred route, across categories it labels geohazard and constructability risk, environmental risk, tribal risk, encroachment risk, and permitting risk, supported by a detailed data table. (R:572:2-18). Summit designed that alignment, by its own account, to be sited “in a location that avoided crossing federal lands, maximized the distance from the Dakota Access Pipeline crossing, and maximized

the distance from the City of Bismarck.” (R:572:13). The PSC’s November 15, 2024, Order states, in one sentence of a paragraph that also addresses five other Commission requests, that Summit “adequately addressed the specified Commission requests, including the south Bismarck route impacts.” (R:908:15:45).

[¶136] In its *Reply*, Burleigh County disputes that this document cures the deficiency the PSC identified in 2023. It argues the Bismarck Route Analysis is “a single southern route hand selected by Summit to show its northern route is preferable,” not a genuine comparison of the southern route options actually available. (R:955:24-27:41-47).

[¶137] An agency must state findings of fact and conclusions of law adequate for a reviewing court to understand the factual basis for its decision, and the need for an adequate finding is greatest where the disputed issue is material or dispositive. N.D.C.C. § 28-32-39(1); N.D.C.C. § 28-32-46(1), (7); *Evans*, 437 N.W.2d at 850; *Aggie Invs. GP*, 470 N.W.2d at 813; *Sandberg*, 2021 ND 39, ¶ 11.

[¶138] The Bismarck Route Analysis is not a token filing. It is an eighteen-page analysis with two exhibits, supported by a data table with more than fifty rows drawn from state geographic information system records, federal land-cover data, soil surveys, and cultural resource records, comparing floodplain width at the Missouri River crossings, wetland and waterbody crossings, residential encroachments, and permitting risk at Lake Oahe. (R:572:7-19). On its face, it is the kind of detailed comparison the PSC requested. Summit’s own data table shows what was at stake: the Southern Alternative would put 26 residences or places of business within 500 feet, compared to 3 on the preferred route, and 190 structures of any kind within 1,000 feet, compared to 100. (R:572:15).

[¶139] But it compares only one southern alignment. Summit developed that alignment itself. Its

filing evaluates the Southern Alternative through desktop datasets and states that “no field-collected data was utilized.” (R:572:15). By contrast, the preferred route was shaped by field surveys and stakeholder input. (R:572:4-5, 18, 22). The filing also acknowledges that none of the landowners south of Bismarck had been approached or contacted. (R:572:22). The record contains testimony, unanswered by anything in the Bismarck Route Analysis, that Summit never consulted the City of Bismarck, Burleigh County, the affected township boards, Emmons County, the State Water Commission, the City of Mandan, the Standing Rock Sioux Tribe, the Army Corps of Engineers, Energy Transfer Partners, or landowners about a southern alignment, and conducted no independent geological survey of one. (R:918:41-42:70); (R:741:88-98). That testimony goes to the same question the PSC’s October 2023 data request asked: whether Summit had genuinely explored a southern route. The PSC’s finding does not mention this testimony. It does not explain why an alignment Summit designed on its own, without the outreach the record shows was missing, answers the deficiency the PSC identified in its August 4, 2023, Order. It does not address Burleigh County’s argument that the Bismarck Route Analysis reflects one route selected to make the preferred route look better, rather than a genuine survey of alternatives. The PSC’s finding states a conclusion without the requisite analysis.

[¶140] Burleigh County also argues Summit did not identify a viable eastern route. It asserts the reroute actually moved the pipeline west in some places, closer to Bismarck and the Silver Ranch development, and under an Interstate 94 rest area. (R:918:40:66). Burleigh County offered evidence that the reroute moved the line about 0.15 miles west just north of Interstate 94 and placed the crossing near the rest areas. (R:743:55-58). Summit rebutted that evidence. Wade Boeshans testified that Burleigh County’s map used preliminary routing information and was not accurate. (R:749:56). He testified the current route is about four miles from the eastern edge of Silver Ranch.

Id. He also testified the change near Interstate 94 did not move the route any closer to Bismarck. (R:749:57-58). Commissioner Christmann agreed the distance on Summit's map appeared to be "just short of four miles." (R:749:75). Wachter testified Summit told him the eastern portion of the route would not move. (R:746:6-9). Summit responds that it had no duty to prove an eastern route that eliminated every proximity concern, and that Burleigh County simply disagrees with where the route was placed. (R:928:33-34:70). Burleigh County did not return to this argument in its *Reply*.

[¶141] Neither the PSC's August 4, 2023, Order nor its October 17, 2023, request asked Summit to analyze an eastern alternative. The August 4, 2023, Order faulted Summit for not addressing the request for an analysis of a southern route around Bismarck, and the October 17, 2023, request asked for that analysis. (R:530:11-12:42); (R:572:1). The eastern-route argument therefore does not rest on an unanswered request from the PSC, as the southern-route argument does. The competing evidence on where the reroute lies goes to the weight of the evidence on where the route should be placed. The Court does not reweigh that evidence. *Capital Elec. Coop.*, 2016 ND 73, ¶ 6. Burleigh County's eastern-route argument does not provide a separate ground for reversal. On remand, the PSC may consider this evidence along with the southern-route evidence when it states its findings. [¶142] The PSC's finding that Summit adequately addressed the request for a southern route analysis does not sufficiently address the evidence Burleigh County presented, and does not explain why the single southern alignment provided by Summit answers that evidence. This matter should be remanded to the PSC to state findings that account for this testimony and explain its conclusion in a way a reviewing court can evaluate. N.D.C.C. § 28-32-46(1), (7).

Whether the PSC's Finding on Property Value Requires Reversal?

[¶143] Burleigh County argues Summit provided no evidence to support its claim that the carbon dioxide pipeline would cause no adverse impacts on property, including property value. (R:955:28-29:48-49). It argues Jeff Olson performed no appraisals and did not consider any carbon dioxide

pipeline, and that Wade Becker submitted only a letter and never appeared for cross-examination. *Id.* Burleigh County makes this argument as a separate challenge to the PSC's property value finding for the first time in its *Reply*. In its opening brief, Burleigh County raised property value only as part of its southern-route and eastern-route argument. It argued the PSC approved the reroutes "without addressing substantial testimony regarding impacts on public safety, future development, and property values." (R:918:9:7); (R:918:45:76). Summit responded to that argument by pointing to the PSC's property value finding. (R:928:34:71). No other appellant challenges the property value finding.

[¶144] A party appealing an agency order must file specifications of error that are "reasonably specific" and detail which matters are at issue. *Beam*, 2020 ND 168, ¶ 7. "When a party does not enumerate an issue in their specifications of error, we will not consider the issue on appeal." *Id.* The North Dakota Supreme Court also "will not address issues raised for the first time in a reply brief, because the reply brief is limited to issues raised in the appellee's brief." *Koehly v. Levi*, 2016 ND 202, ¶ 9, 886 N.W.2d 689.

[¶145] Burleigh County's specifications of error do not list the PSC's property value finding. Items (a) through (g) challenge the ordinance finding, the protection of the Dispersion Model, the southern and eastern routes, public welfare, the timing of new PHMSA rules, and liability insurance. (R:1:3-5:12(a)-(g)) (08-2024-CV-03614). None of them mention property value or Findings 16 and 17. The only language that could reach the finding is general. Paragraph 12 recites several grounds from N.D.C.C. § 28-32-46, "including but not limited to" the items that follow, and item (h) lists "[o]ther issues identified upon review of the record and hearing transcript once prepared." (R:1:3-5:12, 12(h)) (08-2024-CV-03614). That language could apply to any agency appeal. It does not alert the agency or the parties to a challenge to the property value finding. Burleigh County's *Reply*

does respond in part to Summit's reliance on the property value finding. But a reply brief cannot supply an issue the specifications of error did not raise. A separate challenge to the PSC's property value finding is not properly before the Court.

[¶146] The property value testimony still matters to an issue Burleigh County did specify. Burleigh County's specifications challenge the southern and eastern routes, and its opening brief relies on the developers' testimony about future development and property values to support that challenge. (R:918:9:7); (R:918:45:76). The PSC found that intervenors and developers had not sufficiently demonstrated the Project would cause significant adverse impacts on future property values and development. (R:908:10:16-17). In reaching that finding, it relied on Wade Becker's market research letter and Jeff Olson's testimony. (R:908:10:16). At the May 30, 2024, hearing, Chad Wachter testified that lots encumbered by pipelines are usually the last lots to sell, that five buyers declined his lots because of a pipeline, and that in 80 percent of his sales of encumbered property he had to accept a lower price. (R:746:27-28, 36-37). On cross-examination, Olson testified he had not appraised any of the properties he discussed, had never appraised property near a carbon dioxide pipeline, and that Becker's report is not an appraisal. (R:740:23-24, 26, 30). On remand, the PSC may consider this testimony when it states its findings on the southern route.

[¶147] Burleigh County's separate challenge to the PSC's property value finding is not properly before the Court, and the Court does not disturb that finding. This ground for reversal is rejected.

Whether the PSC's Finding on Liability Insurance Requires Reversal?

[¶148] Burleigh County argues the PSC's November 15, 2024, Order fails to address problems with Summit's liability insurance. (R:918:46-47:79-81). It argues the PSC did not consider that insurers treat carbon dioxide as a pollutant, so a landowner's own policy may not cover a release caused by someone other than Summit. *Id.* It argues Summit's easements protect landowners only from leaks a landowner can prove Summit caused, and that Summit has not agreed to name landowners as

additional insureds on its own policy. *Id.*

[¶149] Summit responds that the PSC adequately addressed the insurance issue before it. (R:928:38-40:82-86). Summit argues the Siting Act does not make the PSC a regulator of private insurance and does not authorize the PSC to require Summit to negotiate a separate insurance endorsement for each landowner as a condition of approval. (R:928:39:83). Summit argues the PSC did address the insurance concerns in the record: the PSC acknowledged landowners' difficulty obtaining insurance and found no additional requirements necessary, given Summit's commitment to maintain substantial liability coverage and to bear liability for a rupture unless a third party struck the line. (R:928:39:84). Summit argues the easement's indemnity language is a private contract term the PSC has no role in rewriting, and that Burleigh County's concern about future litigation is speculative. (R:928:39-40:85). Summit argues a landowner's protection against a pipeline release comes from liability rules and Summit's own obligations, not from the landowner's private insurance policy. (R:928:40:86).

[¶150] In reply, Burleigh County cites a recent Eighth Circuit Court of Appeals case, which it describes as holding that a standard pollution exclusion bars coverage for a carbon dioxide release. (R:955:30-31:52) (citing *North Star Mut. Ins. Co. v. Rodin*, 171 F.4th 1136 (8th Cir. 2026)). That description does not match. *Rodin* involved carbon monoxide emitted from a portable heater in a farm shop, not carbon dioxide, and did not involve a pipeline. 171 F.4th at 1137-38. The Eighth Circuit held that carbon monoxide is a "pollutant" under the policy's definition and predicted North Dakota would treat the exclusion as absolute. *Id.* at 1141-43. Burleigh County argues this authority confirms that a release from the pipeline may fall outside ordinary liability coverage, and that the PSC's finding does not address that gap. (R:955:31:52). It argues Summit's commitments do not protect landowners, because Summit has not named them as additional insureds and has not agreed

to unqualified indemnity. (R:955:32-33:55-56). Burleigh County argues the PSC's finding on insurance is not supported by the evidence. (R:955:33:57-58).

[¶151] Commenters raised the liability insurance issue at the hearing. (R:908:10:18). The PSC's November 15, 2024, Order addressed it directly:

A number of commenters provided that the Project will make them unable to purchase liability insurance due to the risk of a release. In the pre-filed testimony of Micah Rorie on June 1, 2023, SCS testified that it would hold the liability for a rupture of the Project unless the rupture was caused by a third-party line strike. Based upon this testimony, the Commission finds that no additional requirements are needed to ensure the Project will have minimal adverse impacts on the liability insurance requirements of the landowners.

(R:908:10-11:18). Rorie's pre-filed testimony appears in the record. (R:432). The PSC's findings of fact also state:

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.

(R:908:15:47).

[¶152] The PSC's finding does not quote Rorie's testimony exactly. His June 1, 2023, pre-filed testimony does not use the words "rupture" or "third-party line strike." It addresses the indemnification clause in Summit's easements. Under that clause, Summit 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." (R:432:3). The indemnity reaches only claims arising out of Summit's use of the easements. It provides no coverage for a release caused by anyone other than Summit or those acting for it. It also expressly excludes claims caused by the landowner or the landowner's servants, agents, or invitees. *Id.* Rorie testified that "use" of the easement includes any entry onto the land for survey, construction, or operation. *Id.* He also testified that, after meeting with Farmers

Union Insurance, Summit was confident landowners would still be able to secure farm policies and that the indemnification language would provide adequate coverage. (R:432:4). He attached a letter from Farmers Union Insurance. The letter warns Farmers Union policyholders that their liability policies contain exclusions for losses caused by pollutants, and that “there may be no coverage from your policy in the event that there is a release of pollutants.” (R:432:6).

[¶153] The PSC also heard evidence that landowners may have difficulty obtaining coverage. At the June 2, 2023, hearing, Marilyn Bryan testified that her insurer told her carbon dioxide from the pipeline would be treated as a pollutant. She testified her policy would provide no liability coverage or legal defense for a release, and that no endorsement or rider was available to provide that coverage. (R:493:101-104, 110-112). At the May 29, 2024, hearing, Howard Malloy testified that his insurer told him his farm policy provides no coverage for carbon dioxide as a pollutant. (R:743:24-25). Other landowners gave similar testimony. They testified their insurers told them their policies would not cover a release, in most cases because carbon dioxide would be treated as a pollutant. (R:226:91); (R:325:287-288, 351-352); (R:426:131-132); (R:748:75); (R:751:63-64). The PSC acknowledged these concerns in its findings. (R:908:9:12); (R:908:10-11:18).

[¶154] The Court must modify or reverse a PSC order, and remand the case, if its findings of fact are not supported by a preponderance of the evidence. N.D.C.C. § 28-32-46(5). In reviewing whether a finding is supported by a preponderance of the evidence, the Court does not make independent findings or substitute its own judgment for the PSC’s judgment. The Court determines only whether a reasoning mind reasonably could have determined that the finding was proved by the weight of the evidence in the record. *Capital Elec. Coop.*, 2016 ND 73, ¶ 6. Rorie did not use the words the PSC attributed to him. But a reasoning mind could draw the same meaning from his testimony. The indemnity covers claims arising out of Summit’s use of the easements, and Rorie

testified that use includes operating the pipeline. A claim for a release from the pipeline during its operation could reasonably be read as a claim arising out of Summit's use of the easement. The indemnity provides no coverage for a release caused by anyone other than Summit or those acting for it. The PSC's summary is not a precise quotation, but a reasoning mind could read the testimony the same way: Summit bears the liability for a release from its pipeline unless someone other than Summit, or those acting for it, causes the release. Other testimony supports the same reading. At the April 11, 2023, hearing, James Powell testified for Summit about his understanding of the indemnity. He answered from his own understanding, not as a legal opinion. He testified that landowners are indemnified "unless the landowner intentionally damages the pipeline." He testified that landowners remain indemnified when "a piece of equipment sinks and sits on the pipeline and damages it" and when they "accidentally strike the pipeline." (R:325:191-192). At the May 9, 2023, hearing, Doug Goehring testified he was once president of the state's largest domestic insurance company. He testified that "Summit's responsible and liable for their pipeline." (R:426:93). He also testified that his own insurer has not denied him liability coverage because pipelines cross his land. *Id.* At the June 3, 2024, hearing, Wade Boeshans testified that Summit was working on an agreement to give one landowner family indemnification "for any loss related to our use of our easement and installation of our pipeline." (R:749:59). Rorie also testified that landowners would still be able to secure farm policies. (R:432:4).

[¶155] The PSC weighed that testimony against the landowners' concerns about insurance and found no additional requirements were needed. (R:908:10-11:18). It also found that Summit asserted it will carry at least \$100 million in liability insurance for the Project, plus another \$25 million for the North Dakota portion. (R:908:15:47). Summit's counsel provided those figures after the hearing, in letters answering a PSC staff request that followed a September 9, 2024, work

session. (R:899:2); (R:902:2-3). That finding reports what Summit asserted. The Court does not treat counsel's letters as evidence of Summit's coverage. The PSC's finding that no additional requirements were needed rests on the testimony discussed above. Burleigh County argues the indemnity still requires a landowner to show Summit caused a release, and that ordinary policies exclude pollution losses. Those arguments go to the weight of the evidence, not to whether evidence supports the finding. Weighing conflicting evidence is the PSC's role. The Court does not reweigh it. *Capital Elec. Coop.*, 2016 ND 73, ¶ 6.

[¶156] Nor does the Siting Act require the PSC to demand that Summit file its insurance policy, or name landowners as additional insureds, as a condition of approval. The PSC's authority to regulate is limited to the authority the Legislature gave it. *Env'tl. L. & Policy Ctr.*, 2020 ND 192, ¶ 11. The Legislature did not give the PSC that authority. The PSC's finding on liability insurance was reasonable on this record.

[¶157] Burleigh County also argues the PSC's finding on insurance is inadequate and does not address the evidence. (R:918:46-47:79-81); (R:955:32:55). The PSC's findings must sufficiently address the evidence presented to it by the appellant. N.D.C.C. § 28-32-46(7). Much of the insurance evidence came from the Landowners and the witnesses they called. Two of the Landowners, Loren Staroba and Jonathan Hagerott, testified that their insurers treat carbon dioxide as a pollutant excluded from coverage. (R:325:351-352); (R:748:75). The PSC's findings address that evidence. They acknowledge the concern that landowners may be unable to obtain liability insurance because of the risk of a release. (R:908:9:12); (R:908:10-11:18). They also explain why the PSC imposed no additional requirements: relying on Rorie's testimony, the PSC found that Summit would hold the liability for a release unless a third party caused it. (R:908:10-11:18). The findings need not discuss each witness's testimony. They show what evidence the PSC considered

and why it decided as it did. That sets this finding apart from the PSC's finding on the southern route, which did not address Burleigh County's evidence or explain why the PSC rejected it. The PSC's finding on liability insurance sufficiently addresses the evidence.

[¶158] The Court finds the PSC's finding on liability insurance is supported by a preponderance of the evidence. This ground for reversal is rejected.

Whether the Landowners and Burleigh County Are Entitled to Attorney's Fees and Costs?

[¶159] The Landowners ask for costs and attorney's fees under N.D.C.C. § 28-32-50(1) in their *Notice of Appeal*. (R:1:5). They do not address the request in their briefs. Burleigh County asks for its costs and attorney's fees under the same statute. (R:918:48-51:82-88); (R:955:33:61). It argues the PSC acted without substantial justification because it misread N.D.C.C. §§ 44-04-24 and 49-22.1-13, accepted Summit's route analysis, and approved the Project without waiting for new PHMSA rules. (R:918:49-50:84-87). Burleigh County states it will provide a summary of its fees and costs if the Court grants its request. (R:918:50-51:88). Summit responds that fees depend on Burleigh County prevailing, and that the PSC's positions had a reasonable basis in law and fact even where Burleigh County disagrees with them. (R:928:42-44:93-99). The PSC did not separately respond to the requests.

[¶160] Section 28-32-50(1), N.D.C.C., provides:

In any civil judicial proceeding involving as adverse parties an administrative agency and a party not an administrative agency or an agent of an administrative agency, the court must award the party not an administrative agency reasonable attorney's fees and costs if the court finds in favor of that party and, in the case of a final agency order, determines that the administrative agency acted without substantial justification.

Any award must be paid from funds available to the agency whose order the court reviewed.

N.D.C.C. § 28-32-50(3).

[¶161] "This statute sets forth a two-part test which must be met in order to properly award attorney

fees: first, the nonadministrative party must prevail, and second, the agency must have acted without ‘substantial justification.’” *Lamplighter Lounge, Inc. v. State ex rel. Heitkamp*, 523 N.W.2d 73, 75 (N.D. 1994).

[¶162] The first part of the test asks whether the party prevailed. The North Dakota Supreme Court has explained, in the context of costs and disbursements, that a prevailing party is the one who prevails “on the merits of the main issue.” *LAWC Holdings, LLC v. Vincent Watford, L.L.C.*, 2024 ND 16, ¶ 13, 2 N.W.3d 672 (quoting *Dowhan v. Brockman*, 2001 ND 70, ¶ 11, 624 N.W.2d 690). “If opposing litigants each prevail on some issues, there may not be a single prevailing party for whom disbursements may be taxed.” *Id.*; see also *Harris v. Oasis Petroleum, Inc.*, 2024 ND 85, ¶ 11, 6 N.W.3d 611. The Supreme Court applies the same idea of prevailing under N.D.C.C. § 28-32-50(1). See *Voigt v. N.D. Pub. Serv. Comm’n*, 2017 ND 76, ¶ 44, 892 N.W.2d 149 (declining fees because the appellant “is not the prevailing party”).

[¶163] Here, each side prevailed on some issues. Emmons County’s challenge to the order granting reconsideration is not properly before the Court, and even if the Court reached the merits, it would find the order was in accordance with N.D.C.C. § 28-32-40. The Court upholds the PSC’s classification of the Dispersion Model as a security system plan, its handling of the fair-hearing and N.D.C.C. §§ 28-32-37 and 28-32-25 issues, its finding on liability insurance, and its decision not to wait for new PHMSA rules. The Court also rejects Burleigh County’s eastern-route argument and its separate challenge to the property value finding, which is not properly before the Court. The Court reverses the PSC’s conclusion that a route permit automatically supersedes local zoning ordinances and its finding that the ordinances directly conflict with N.D.C.C. § 49-22.1-03. The Court reverses and remands the PSC’s finding under N.D.C.C. § 49-22.1-13(2)(c), its denial of Burleigh County’s motion to reconsider the protection of the Dispersion Model, its findings on

public welfare, its finding on the southern route, and the August 4, 2023, Order's grant, without findings, of Summit's request to waive the redacted-version requirement. Neither appellant obtained all the relief it asked for. Burleigh County asked the Court to deny Summit's certificate and route permit. (R:955:33:61). The Landowners asked for a remand to allow disclosure of the Dispersion Model, discovery, and a new hearing. (R:915:40:55). No party prevailed on the main issue. Summit's certificate of corridor compatibility and route permit remain in effect, and the Dispersion Model remains protected. The Court reversed the PSC's supersession rulings, but it did not decide whether the county ordinances could be superseded. It remanded that question and the other remanded issues to the PSC for further findings. Because neither the Landowners nor Burleigh County is a prevailing party, neither is entitled to attorney's fees and costs under N.D.C.C. § 28-32-50(1).

[¶164] The requests for attorney's fees and costs are denied.

CONCLUSION

[¶165] For the reasons stated above, the Court AFFIRMS IN PART, REVERSES IN PART, and REMANDS to the PSC for further proceedings consistent with this order. N.D.C.C. § 28-32-46.

[¶166] **August 4, 2023, Order on Protection of Information.** The Court affirms the PSC's classification of the Dispersion Model as a security system plan under N.D.C.C. § 44-04-24(1), (2)(b). The Court reverses the order to the extent it granted, without findings, Summit's request to waive the redacted-version requirement of N.D.A.C. § 69-02-09-01(5). (R:526:4). The Court remands for findings on that request.

[¶167] **February 7, 2024, Order.** The Court reverses the PSC's conclusion that a route permit automatically supersedes and preempts local land use and zoning regulations under N.D.C.C. § 49-22.1-13(2)(b). (R:586:3).

[¶168] **November 15, 2024, Findings of Fact, Conclusions of Law, and Order.** The Court reverses the following parts of the order: (a) the PSC’s findings and conclusions that the Emmons County and Burleigh County ordinances are superseded and preempted, including its findings that the ordinances are unreasonably restrictive on their face and directly conflict with N.D.C.C. § 49-22.1-03 (R:908:11:19); (b) the PSC’s denial of Burleigh County’s motion to reconsider the protection of the Dispersion Model (R:908:18); (c) the PSC’s finding that Summit adequately addressed the request for an analysis of a southern route around Bismarck (R:908:15:45); and (d) the PSC’s conclusion that the Project will produce minimal adverse effects upon the welfare of the citizens of North Dakota (R:908:16:7). The Court affirms the November 15, 2024, Findings of Fact, Conclusions of Law, and Order in all other respects. This includes its finding on liability insurance and its decision not to wait for new PHMSA rules. The Court rejects the fair-hearing, N.D.C.C. § 28-32-37(1) and (3), N.D.C.C. § 28-32-25, and eastern-route arguments. Emmons County’s challenge to the September 15, 2023, Order on Petition for Reconsideration is not properly before the Court. Even if the Court reached the merits, it would find the order granting reconsideration was in accordance with N.D.C.C. § 28-32-40. Burleigh County’s separate challenge to the property value finding (R:908:10:16-17) is also not properly before the Court.

[¶169] The certificate of corridor compatibility and route permit remain in effect while the PSC proceeds on remand. *See Shark v. N. States Power Co.*, 477 N.W.2d 251, 255 (N.D. 1991) (remanding to the PSC and stating that, “in the interim, the determination made by the PSC on the merits remains in effect”). The Dispersion Model remains protected until the PSC decides the remanded issues. The Court expresses no opinion on how the PSC should decide those issues.

[¶170] On remand, the PSC must: (a) decide separately, for each county, whether Summit has shown by a preponderance of the evidence that the county’s ordinance is “unreasonably restrictive

in view of existing technology, factors of cost or economics, or needs of consumers regardless of their location” under N.D.C.C. § 49-22.1-13(2)(c), and state findings of fact and conclusions of law that explain its decision; (b) rule again on Burleigh County’s motion to reconsider the protection of the Dispersion Model, address the evidence that the Dispersion Model was shown to persons not shown to be Summit employees or authorized agents, and decide whether a redacted public version is possible under N.D.A.C. § 69-02-09-01(5), and, if it is not, explain why a waiver is warranted; (c) state findings on the southern route that address the evidence Burleigh County presented and explain why the single southern alignment Summit provided answers that evidence; and (d) state express findings on whether public welfare, apart from the safety standards reserved to PHMSA, supports granting the certificate and route permit.

[¶171] The PSC may also address whether Summit has shown that any requirement in either county’s ordinance is “in direct conflict with ... federal laws or rules” under N.D.C.C. § 49-22.1-13(2)(c). If the PSC addresses that question, it must consider each county’s ordinance separately and state findings that explain its decision. When the PSC states its southern-route findings, it may consider the eastern-route evidence and the property value testimony discussed above. The PSC may decide the remanded issues on the existing record or may take additional evidence. If it takes additional evidence, it must comply with N.D.C.C. § 28-32-35 and, if it relies on information in its own possession, N.D.C.C. § 28-32-25.

[¶172] The requests of the Landowners and Burleigh County for attorney’s fees and costs under N.D.C.C. § 28-32-50(1) are denied.

[¶173] Any party aggrieved by the PSC’s decision on remand may appeal that decision as provided in N.D.C.C. § 28-32-42(1).

[¶174] Judgment shall be entered accordingly.

Dated October 9, 2026.

BY THE COURT:



Jackson J. Lofgren, District Judge
South Central Judicial District