

July 19, 2023

HAND DELIVERED

Mr. Steve Kahl
Executive Secretary Director
North Dakota Public Service Commission
600 E. Boulevard, Dept. 408
Bismarck, ND 58505-0480

**RE: SCS Carbon Transport LLC
Midwest Carbon Express Project
Case No. PU-22-391**

Dear Mr. Kahl:

Please find enclosed herewith for filing with the North Dakota Public Service Commission, an original and five (5) copies of the following:

1. Post-Hearing Brief of SCS Carbon Transport LLC; and
2. Certificate of Service.

Also enclosed herewith, please find a Compact Disc (CD) containing this letter and the above-referenced documents in PDF format.

Should you have any questions, please advise.

Sincerely,



LAWRENCE BENDER

LB/cj
Enclosures

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF NORTH DAKOTA**

IN THE MATTER OF THE APPLICATION
OF SCS CARBON TRANSPORT LLC FOR
A CERTIFICATE OF CORRIDOR
COMPATIBILITY AND ROUTE PERMIT
FOR THE MIDWEST CARBON EXPRESS
PROJECT IN BURLEIGH, CASS, DICKEY,
EMMONS, LOGAN, MCINTOSH,
MORTON, OLIVER, RICHLAND AND
SARGENT COUNTIES, NORTH DAKOTA

CASE NO. PU-22-391

OAH FILE NO. 20230002

POST-HEARING BRIEF OF SCS CARBON TRANSPORT LLC

TABLE OF CONTENTS

	Page
I. <u>Introduction</u>	1
II. <u>Summit Has Met All of the Requirements of the Siting Act.</u>	3
A. <u>The Project will produce minimal adverse effects on the environment and upon the welfare of the citizens of North Dakota</u>	5
B. <u>The Project is compatible with environmental preservation and the efficient use of resources</u>	6
C. <u>The Project will minimize adverse human and environmental impact while ensuring continuing system reliability and integrity and ensuring that energy needs are met and fulfilled in an orderly timely fashion</u>	7
D. <u>Several of the factors listed in N.D.C.C. § 49-22.1-09 weigh in favor of the Commission approving Summit’s Application</u>	8
III. <u>Most of the Intervenor’s Arguments Concern Matters Beyond the Scope of the Commission’s Jurisdiction</u>	11
A. <u>Intervenor’s arguments regarding safety concerns are misplaced because federal law preempts state regulation of interstate pipeline safety, and in any event are unfounded</u>	11
1. <i>PHMSA has exclusive authority to regulate interstate pipeline safety</i>	12
2. <i>States are broadly preempted from regulating interstate pipeline safety</i> ..	13
3. <i>The Intervenor’s safety concerns are otherwise unfounded</i>	19
B. <u>Private Easements</u>	24
C. <u>Private Insurance</u>	26
D. <u>Investors and Foreign Ownership</u>	28
E. <u>Contractor Qualifications</u>	30
IV. <u>Summit Has Refuted Each of the Relevant Arguments Made by the Intervenor</u>	32
A. <u>Development Around Pipelines and Property Values</u>	32
B. <u>Drain Tile Repair</u>	43
V. <u>The Commission Should Supersede and Preempt Local Ordinances</u>	46
VI. <u>Conclusion</u>	47

SCS Carbon Transport LLC (“Summit”), by and through its undersigned counsel, hereby submits to the North Dakota Public Service Commission (the “Commission”) its Post-Hearing Brief.

I. Introduction.

On October 17, 2022, Summit filed its Consolidated Application for a Certificate of Corridor Compatibility and Route Permit (“Application”) concerning the portion of Summit’s proposed Midwest Carbon Express carbon dioxide (CO₂) pipeline project to be located in North Dakota (the “Project”). On February 1, 2023, the Commission deemed Summit’s Application complete and filed a Notice of Filings and Public Hearings in the above-captioned matter (the “Notice”). *See* Docket No. 35. As set forth in the Notice, the Commission initially set four (4) public hearings on Summits Application. *Id.* The first public hearing was held on March 14, 2023 in Bismarck, North Dakota. At the first Bismarck hearing, Summit presented five (5) witnesses in support of its Application. *See* Docket No. 76. Summit presented an additional three (3) witnesses (excluding James Powell) at the public hearings in Wahpeton and Linton, North Dakota. *See* Docket Nos. 177 and 215. In accordance with the order of Administrative Law Judge Hope Hogan (the “ALJ”), Summit submitted written testimony of Micah Rorie (Docket No. 289), Jeffrey Skaare (Docket No. 290), James Powell (Docket No. 291) and Rod Dillon (Docket No. 292). *See* Docket No. 240. Over the course of the five (5) public hearings, Summit responded to over thirty (30) requests from the Commission and its staff for additional information concerning the Project. *See* Docket Nos. 28, 190, 199, 223, 237, 275 and 294.

Despite the extensive testimony and information provided by Summit to the Commission, the Bismarck Intervenors¹ and the Landowner Intervenors² (collectively, the “Intervenors”) would have the Commission believe that Summit is still withholding information. *See, e.g.*, Docket Nos. 78, 94, 179, 212 and 299. Not only is this accusation inaccurate, but it is also one of many attempts by the Intervenors to distract the Commission from the fact that Summit has met its burden under Chapter 49-22.1 of the North Dakota Century Code (the “Siting Act”) and the rules and regulations of the Commission. It is particularly difficult to understand the Intervenors’ complaints concerning access to information when the Intervenors waited two months from being granted intervenor status and until the eve of the final public hearing to submit discovery requests to Summit. *See, e.g.*, Docket Nos. 209, 225 and 279. At worst, the delay is attributable to the Intervenors’ disregard of the Commission’s procedural rules. At best, the Intervenors did not take the time to familiarize themselves with the rules.

The Commission set forth the issues to be considered on Summit’s Application in its Notice. *See* Docket No. 35. Specifically, the issues to be considered in the Application are:

1. Will construction, operation, and maintenance of [the Project] at the proposed location produce minimal adverse effects on the environment and upon the welfare of the citizens of North Dakota?
2. Is [the Project] compatible with environmental preservation and the efficient use of resources?
3. Will construction, operation, and maintenance of [the Project] at the proposed location minimize adverse human and environmental impact while ensuring continuing system reliability and integrity and ensuring that energy needs are met and fulfilled in an orderly and timely fashion?

¹ Intervenors represented by Mr. Randall Bakke.

² Intervenors represented by Mr. Brian Jorde, Mr. Stephen Leibel and Mr. David Knoll.

Id. The Intervenors, and a small, but vocal group of public commentators (the “Public Commentators”), would have the Commission believe—without evidence—that Summit’s state of the art pipeline is unsafe despite it complying with, and frequently exceeding, the Pipeline and Hazardous Materials Safety Administration’s (“PHMSA”) strict safety, design, construction, and operational regulations.

In addition to the safety, design, construction and operational issues which are under the exclusive jurisdiction of PHMSA, Intervenors and the Public Commentators have focused on several other matters which are outside of the Commission’s jurisdiction and the requirements of the Siting Act. Specifically, they expended great efforts in trying to convince, or at least suggest that, the Commission has the authority to render a decision on Summit’s Application over private easement and insurance matters, and even challenged the Commission to investigate Summit’s investors and contractors. This brief will address these matters, as well as the only two other issues raised by Intervenors—future development and drain tile—which are appropriate for the Commission to consider regarding the construction, operation and maintenance of the Project. Last, this brief will briefly address Summit’s request for the Commission to preempt and supersede the Burleigh and Emmons County ordinances, understanding that this issue will be more fully briefed by the parties via Summit’s separate motion. *See* Docket No. 282.

For the reasons set forth herein, the Application, the hearing testimony, and the additional information provided by Summit in response to the Commission’s requests, the Commission should issue the certificate of corridor compatibility and route permit for the Project as requested in the Application.

II. Summit Has Met All of the Requirements of the Siting Act.

As stated in the Commission’s Notice, there are three issues to be considered in this matter:

1. Will construction, operation, and maintenance of [the Project] at the proposed location produce minimal adverse effects on the environment and upon the welfare of the citizens of North Dakota?
2. Is [the Project] compatible with environmental preservation and the efficient use of resources?
3. Will construction, operation, and maintenance of [the Project] at the proposed location minimize adverse human and environmental impact while ensuring continuing system reliability and integrity and ensuring that energy needs are met and fulfilled in an orderly timely fashion?

Docket No. 35; *see also* N.D.C.C. § 49-22.1-02.

In addition, N.D.C.C. § 49-22.1-09 instructs the Commission to consider 11 factors when considering these issues:

1. Available 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.
2. The effects of new gas or liquid energy conversion and gas or liquid transmission technologies and systems designed to minimize adverse environmental effects.
3. The potential for beneficial uses of waste energy from a proposed gas or liquid energy conversion facility.
4. Adverse direct and indirect environmental effects that cannot be avoided should the proposed site or route be designated.
5. Alternatives to the proposed site, corridor, or route that are developed during the hearing process and which minimize adverse effects.
6. Irreversible and irretrievable commitments of natural resources should the proposed site, corridor, or route be designated.
7. The direct and indirect economic impacts of the proposed facility.
8. Existing plans of the state, local government, and private entities for other developments at or in the vicinity of the proposed site, corridor, or route.
9. The effect of the proposed site or route on existing scenic areas, historic sites and structures, and paleontological or archaeological sites.

10. The effect of the proposed site or route on areas that are unique because of biological wealth or because the site or route is a habitat for rare and endangered species.

11. Problems raised by federal agencies, other state agencies, and local entities.

N.D.C.C. § 49-22.1-09.

As explained more fully below, the evidence presented in this case establishes that the Project (1) will produce minimal adverse effects on the environment and upon the welfare of the citizens of North Dakota; (2) is compatible with environmental preservation and the efficient use of resources; and (3) will minimize adverse human and environmental impact while ensuring continuing system reliability and integrity and ensuring that energy needs are met and fulfilled in an orderly timely fashion. In addition, a vast majority of the 11 factors listed N.D.C.C. § 49-22.1-09 weigh in favor of the Commission approving Summit's Application.

A. The Project will produce minimal adverse effects on the environment and upon the welfare of the citizens of North Dakota.

The evidence presented in this case makes clear that the construction, operation, and maintenance of the Project at the proposed location will produce minimal adverse effects on the environment and upon the welfare of the citizens of North Dakota. As for effects on the environment, Summit has drafted an Environmental Construction Plan ("ECP"). The ECP will implement generally recognized best management practices ("BMPs") to minimize and mitigate impacts to wetlands, waterbodies, and agricultural areas. The ECP also contains countless mitigation measures, including measures for identification of avoidance areas, undesirable species management, topsoil management, permanent stabilization, dust control, noise control, and cultural resources. In addition to the ECP, Summit will continue working with landowners and agencies to further refine and limit potential environmental impacts through reasonable and feasible facility and/or route variations and modifications.

As for effects upon the welfare of the citizens of North Dakota, Summit will continue discussions with landowners regarding placement of the pipeline in order to maximize benefits to both parties. In addition, Summit does not anticipate impacts to the health and safety of the citizens of North Dakota resulting from construction or operation of the Project. Summit will supply proper signage and warnings at road and highway crossings, railroad crossings, navigable rivers, and other locations to alert the public to the presence of underground lines and will provide information, contact numbers, and emergency data as well. The Project will be maintained and operated in accordance with applicable safety rules and laws. Construction contractors for the Project will work with local and county emergency management to develop procedures for response to emergencies, natural hazards, hazardous materials incidents, manmade problems, and potential incidents concerning Project construction. Construction contractors for the Project will also maintain a current list of local emergency response providers and methods of contact/communication in all construction and operations vehicles. Designated construction and operations personnel will be trained in first aid.³

B. The Project is compatible with environmental preservation and the efficient use of resources.

The evidence presented in this case also demonstrates that the Project is compatible with environmental preservation and the efficient use of resources. As for environmental preservation, subsection II.A of this brief just explained how the Project is compatible with environmental preservation.

³ A more thorough discussion on why the Project will produce minimal adverse effects on the environment and upon the welfare of the citizens of North Dakota can be found in Sections 5, 7.1, 7.3, 7.7, 7.8, 7.9, 8.1, 8.2, 8.3, 9.1, 10.4, and Appendices 3, 11, 12, and 13 of Summit's Application. See Docket No. 1.

As for efficient use of resources, only three types of actively extractive resources were identified at various locations within the Project's proposed corridor and route: sand, gravel, and lignite. Future development of these resources will not be substantially impacted by the Project because of the narrow, linear nature of the pipeline ROW relative to the expansive nature of areas with resource potential. In general, Summit made sure that the Project avoided active mine sites and any future development will be coordinated between Applicant and the landowner to minimize impacts to the mining operation as well as the operating pipeline.⁴

- C. The Project will minimize adverse human and environmental impact while ensuring continuing system reliability and integrity and ensuring that energy needs are met and fulfilled in an orderly timely fashion.

The evidence presented in this case also demonstrates that the construction, operation, and maintenance of the Project at the proposed location will minimize adverse human and environmental impact while ensuring continuing system reliability and integrity and ensuring that energy needs are met and fulfilled in an orderly timely fashion. As for minimizing adverse human and environmental impact, subsection II.A of this brief already explained why the construction, operation, and maintenance of the Project at the proposed location will minimize adverse human and environmental impact.

As for ensuring continuing system reliability and integrity, the Project will utilize the most reliable system currently available for transporting carbon dioxide, i.e., pipelines. Compared to rail and truck transportation, pipelines are the safest, most efficient, and most reliable means to transport liquids and gases according to statistics compiled by the United States Department of

⁴ A more thorough discussion on why the Project is compatible with environmental preservation and the efficient use of resources can be found in Sections 5, 8.1, 8.2, 8.3, 9.2, 9.4, 9.6, 9.8, and Appendix 3 of Summit's Application. See Docket No. 1.

Transportation. By using a pipeline to transport carbon dioxide, the Project will ensure continuing system reliability and integrity.

As for ensuring that energy needs are met and fulfilled in an orderly and timely fashion, Summit has long-term offtake agreements in place with 32 participating ethanol plants. Utilizing the Project enables these ethanol plants to reduce their carbon footprint. Doing so mitigates these plants' environmental impacts and improves their ability to compete in low carbon fuel markets, which have increasingly stringent carbon reduction goals. Improving these plants' ability to compete in low carbon fuel markets will ensure that consumers' ethanol needs are better met and fulfilled in an orderly and timely fashion.⁵

D. Several of the factors listed in N.D.C.C. § 49-22.1-09 weigh in favor of the Commission approving Summit's Application.

Finally, several of the factors that N.D.C.C. § 49-22.1-09 instructs the Commission to consider weigh in favor of the Commission approving Summit's Application. For example, the first factor—i.e., available 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—weighs in favor of the Commission approving Summit's Application. Summit and/or its agents have already conducted several environmental studies in connection with the Project. These studies show that the Project will have little (if any) effect on public health and welfare, natural resources, and the environment.

The second factor—i.e., the effects of new gas or liquid energy conversion and gas or liquid transmission technologies and systems designed to minimize adverse environmental effects—also

⁵ A more thorough discussion on why the Project will minimize adverse human and environmental impact while ensuring continuing system reliability and integrity and ensuring that energy needs are met and fulfilled in an orderly timely fashion can be found in Sections 5, 7.1, 7.3, 7.8, 9.1, 9.2, 10.4, 10.10, and 10.11 of Summit's Application. *See* Docket No. 1.

weighs in favor of the Commission approving Summit's Application. The Project design is consistent with current pipeline technology. Various measures will be used to avoid, minimize, or mitigate impacts to sensitive resources, including implementing trenchless construction (HDD, bores), narrowing ROW widths, rerouting, and route deviations, and timing/scheduling considerations. Best management practices as identified in Summit's ECP will be implemented to minimize impacts from clearing, trenching, and reclamation of the construction ROW. Potential impacts to environmentally sensitive areas and cultural resources will be avoided by rerouting or HDD/bore or by delineating and protecting sites during construction.

The fourth factor—i.e., adverse direct and indirect environmental effects that cannot be avoided should the proposed site or route be designated—also weighs in favor of the Commission approving Summit's Application. Unavoidable adverse direct and indirect environmental effects for construction of the Project are minimal and were described throughout Summit's Application. Impacts to agricultural operations are anticipated to be minimal and impacts to transportation are anticipated to be short-term. Impacts on vegetation and wildlife will also be minimal. Vegetation will be removed from the ROW prior to construction, and the area will be restored and re-seeded following construction. Wildlife may temporarily avoid the ROW during construction, but no long-term impacts are anticipated. Noise level increases are associated only with construction.

The fifth factor—i.e., alternatives to the proposed site, corridor, or route that are developed during the hearing process and which minimize adverse effects—also weighs in favor of the Commission approving Summit's Application. In the case at hand, no alternatives to the proposed corridor and route for the Project were developed during the hearing process, much less alternatives that would better minimize adverse effects.

The sixth factor—i.e., irreversible and irretrievable commitments of natural resources should the proposed site, corridor, or route be designated—also weighs in favor of the Commission approving Summit’s Application. There are few commitments of natural resources associated with the Project that are irreversible and irretrievable. Natural resources such as steel, concrete, aggregate, and hydrocarbon fuels are committed to the construction phase of the project. But none of these resources are in short supply, and their use for the Project would not have an adverse effect on the availability of these resources.

The seventh factor—i.e., the direct and indirect economic impacts of the proposed facility—also weigh in favor of the Commission approving Summit’s Application. The Project is estimated to have a \$4.5 billion capital investment with an estimated \$898 million investment in North Dakota. Construction outputs in North Dakota resulting from the Project will include employment, labor income, and support services spending. In addition, North Dakota has sales and use tax, gross receipts and lodging tax, and income tax. Thus, the Project will contribute directly and indirectly to tax bases at the state and local level.

The ninth factor—i.e., the effect of the proposed site or route on existing scenic areas, historic sites and structures, and paleontological or archaeological site—also weighs in favor of the Commission approving Summit’s Application. The Project’s route is not within one mile of any historic sites. Moreover, the Project is not anticipated to cause an adverse impact to paleontological resources.

The tenth factor—i.e., the effect of the proposed site or route on areas that are unique because of biological wealth or because the site or route is a habitat for rare and endangered species—also weighs in favor of the Commission approving Summit’s Application. Based on field surveys and review of available sources, it has been determined that the Project will either

have no effect or is not likely to adversely affect any federally listed endangered or threatened species.

Finally, the eleventh factor—i.e., problems raised by federal agencies, other state agencies, and local entities—also weighs in favor of the Commission approving Summit’s Application. To date, no federal or state agencies have raised any problems related to the Project. In addition, most local governments of the cities and counties that the Project will pass through have not raised any problems. Indeed, the Board of County Commissioners for Burleigh and Emmons Counties are effectively the only local government entities that have voiced objections to the Project.

III. Most of the Intervenors’ Arguments Concern Matters Beyond the Scope of the Commission’s Jurisdiction.

- A. Intervenors’ arguments regarding safety concerns are misplaced because federal law preempts state regulation of interstate pipeline safety, and in any event are unfounded.

On numerous occasions throughout these proceedings and in other venues, Intervenors have expressed that the Commission should deny the Certificate and Permit requested by Summit on the basis of alleged safety concerns. As discussed further below, these concerns are unfounded. Even more fundamentally, however, the Commission does not have jurisdiction to regulate interstate pipeline safety, and these proceedings before the Commission are not the appropriate place to raise such concerns. While the Commission has authority and expertise over matters such as pipeline siting, assessing and promoting local economic benefits from the pipeline project and aesthetics, as well as pipeline safety matters regarding certain intrastate pipelines, PHMSA has been vested with exclusive primacy over interstate pipeline safety matters. Federal courts have consistently concluded that attempts by state or local agencies to directly or indirectly regulate the

safety aspects of interstate pipelines such as the Midwest Carbon Express Project⁶ are preempted and are committed to PHMSA's authority under the federal Pipeline Safety Act (the "PSA").⁷ Consequently, the Commission should reject the safety-related contentions raised by Intervenors when considering the application.

1. *PHMSA has exclusive authority to regulate interstate pipeline safety.*

The PSA provides the U.S. Department of Transportation (the "USDOT") with the authority to prescribe and enforce safety standards for, among other things, carbon dioxide pipelines. 49 U.S.C. § 60102(a) and (i). PHMSA is the Operating Administration within USDOT that exercises that authority on behalf of the Secretary of Transportation. 49 C.F.R. §§ 1.96-1.97. PHMSA has promulgated comprehensive safety standards for carbon dioxide pipelines under 49 C.F.R. Part 195. 49 C.F.R. § 195.1(a) ("[T]his Part applies to pipeline facilities and the transportation of hazardous liquids or carbon dioxide associated with those facilities in or affecting interstate or foreign commerce") (emphasis added). The safety regulations in 49 C.F.R. Part 195 contain detailed standards on the design, construction, testing, operation, maintenance, corrosion control, and integrity management aspects of carbon dioxide pipelines, in addition to hazardous liquid pipelines.⁸ They also prescribe requirements for reporting of accidents, safety-related conditions, and periodic reporting of normal operations. 49 C.F.R. Part 195 Subpart B. Moreover, several Part 195 regulations are specific only to carbon dioxide pipelines.⁹

⁶ The Project pipeline will travel through Iowa, Nebraska, Minnesota, South Dakota and North Dakota. Docket No. 1, File No. 50 at p. 1, 20.

⁷ 49 U.S.C. § 60101 *et seq.*

⁸ 49 C.F.R. 192 Subparts C, D, E, F, and H; Ex. B at 218-221 (B. McCown).

⁹ *See, e.g.*, 49 C.F.R. §§ 195.1(b)(10) (demarcating jurisdictional points for carbon dioxide pipelines); 195.102(b) (requiring components of carbon dioxide pipelines to be made of materials suitable for low temperatures when subject to such temperatures during normal operations) 195.111 (requiring carbon dioxide pipelines to be designed to mitigate effects of

2. *States are broadly preempted from regulating interstate pipeline safety.*

In addition to its grant of broad regulatory authority to PHMSA over pipeline safety, Congress added an express preemption provision for interstate pipeline facilities under the PSA, 49 U.S.C. § 60104(c). This provision states that a “State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation[,]”, with limited exception only for “one-call” notification programs. Congress’ authority to preempt state law is derived from the Supremacy Clause of the U.S. Constitution, U.S. Const., art. VI (stating, in relevant part, that “the Laws of the United States . . . shall be the supreme Law of the land . . . any Thing in the Constitution or Laws of any State to the contrary notwithstanding”).

The express preemption provision in 49 U.S.C. § 60104(c) for interstate pipeline facilities has been broadly construed by federal courts. For example, in *ANR Pipeline Co. v. Iowa State Commerce Comm’n*, 828 F.2d 465 (8th Cir. 1987), an Iowa agency established regulations administering a hearing, inspection, and permit program for pipelines, designed in part to “protect the safety and welfare of the public.” As part of the permitting program, the agency required pipeline companies to submit detailed plans regarding the proposed construction of the pipelines, to undergo an evidentiary hearing procedure, to apply for and obtain a permit before beginning construction, and to submit to an inspection program intended to ensure compliance with the regulations. *Id.* at 467. The permits issued by the agency were subject to “such terms, conditions and restrictions as to safety requirements and as to location and route as may be determined . . . to be just and proper.” *Id.*

fracture propagation); 195.306(c) (specifying circumstances carbon dioxide pipelines may use inert gases or carbon dioxide as pressure testing medium); Appendix B to 49 C.F.R. Part 195, Table 4 (specifying specific considerations and indicators for carbon dioxide in the context of risk-based alternatives to pressure testing for older pipelines).

A company began construction of an interstate gas pipeline before obtaining a permit, prompting the agency to seek maximum penalties against the company. *Id.* at 468. However, the Eighth Circuit determined that Iowa’s regulatory framework as applied specifically to regulate safety aspects of the pipeline was preempted under the PSA and could not be enforced. The court held that the language of the statute was “universally” held to “indicate an express intent by Congress to preempt state regulation of safety issues” for interstate pipelines and that “there is no room for any state [safety] regulation be it consistent with, or more or less stringent than the federal legislation.” *Id.* at 469.

Similarly, in *Olympic Pipeline Line Co. v. City of Seattle*, 437 F.3d 872 (9th Cir. 2006), the City of Seattle denied renewal of the operator’s franchise to authorize operation of a section of the pipeline within city limits unless the operator complied with a list of pipeline safety and inspection conditions. *Id.* at 874. The operator filed for injunctive relief restraining Seattle from imposing such safety requirements as a condition of its franchise renewal. *Id.* at 876. The district court ruled in favor of the operator on the basis that the city was preempted in all respects from regulating safety of the pipeline under the PSA, and the Ninth Circuit affirmed the decision. *Id.* at 880 (“We conclude, therefore, that the PSA expressly preempts the City’s attempt to impose safety regulations on the Seattle lateral”).

Most recently, in *Couser v. Shelby Cnty. Iowa*, the federal district court for the Southern District of Iowa granted Summit’s request for a preliminary injunction enjoining enforcement of a county zoning ordinance designed to “address community concerns about the impact and safety” of a proposed interstate carbon dioxide pipeline, No. 122CV00020SMRSBJ, 2023 WL 4420442 (S.D. Iowa July 10, 2023). The ordinance stated in its introductory section how Summit’s proposed pipeline “would influence human safety in the event of a rupture” and that it concludes “the

pipeline is a safety risk that should be regulated.” *Id.* at *2. The ordinance went on to require, among other things, the operator to apply for and receive a conditional use permit. *Id.* The application for such a permit would need to include information on, among other things, emergency response and hazard mitigation plans and a showing that the pipeline would comply with applicable PHMSA regulations. *Id.* These plans are required under the ordinance to list health and safety risks to animals and humans, the time it would take for injuries to occur, calculations and models about worst-case scenarios, and a list of facilities and structures that could be harmed. *Id.* at *3. Upon receipt of an application, the county board would hold public hearings on the question of whether to grant the permit and ultimately make a decision on issuance of the permit. *Id.* at *2.

In granting the injunction, the court determined that 49 U.S.C. § 60104(c) expressly preempted the ordinance’s requirements on hazard mitigation and emergency response. *Id.* at *14. It found that the PSA “provides the Secretary of Transportation with the authority to enact emergency response and hazard mitigation plans”, and that “Courts have understood the statute to provide the Secretary with ‘exclusive authority to regulate the safety of interstate hazardous liquid pipelines’ [and] precludes states and municipalities from regulating in any manner whatsoever with respect to the safety of [pipeline] facilities.” *Id.* at *15. And, the court noted that under PHMSA’s regulations, operators are already required to develop and implement a manual detailing how they will respond to emergencies or release incidents, and implement requirements for controlling the release of materials such as installation of shut-off valves. *Id.* at *14. As a result, the court found

the express preemption provision of the PSA invalidated the ordinance's emergency response and hazard mitigation provisions and enjoined enforcement of it. *Id.* at *15.¹⁰

This is not to say that the Commission is without *any* authority to regulate interstate pipelines. As the cases above and others point out, state regulations that do not have a “direct and substantial effect” on the safety of an interstate pipeline would not be preempted under 49 U.S.C. § 60104(c). *See, e.g., ANR Pipeline Co.*, 828 F.2d at 471 (drawing parallels to the authority of a public service commission to deny a state permit to construct a nuclear power plant notwithstanding potential for preemption by the regulations of the Nuclear Regulatory Commission where the “denial turned on lack of need for the ... plant, economic disbenefits, and superiority of alternative means of generation”); *Washington Gas Light Co. v. Prince George's County Council*, 711 F.3d 412, 419-420 (4th Cir. 2013) (ruling that a county zoning plan that is designed to promote transit-oriented development is not a safety standard and can be applied to an intrastate liquefied natural gas facility). Accordingly, Summit acknowledges that the Commission has authority to regulate, among other things, the siting and economic aspects of the pipeline project.

But these aspects are not the focus of the Intervenor's contentions. Repeatedly, Intervenor's have made safety concerns the centerpiece of their opposition to the grant of the Certificate and Permit. Several examples of this are provided below:

Testimony of Warford (Ex. E at 9, 27):

Q. And the school's within 1.5 miles of the pipeline?

A. That's correct.

¹⁰ *See also Natural Gas Pipeline Co. of America v. R.R. Comm'n of Tex.*, 679 F.2d 51 (5th Cir. 1982) (ruling that state authority's safety rules for pipelines containing hydrogen sulfide could not be applied to an interstate gas pipeline facility); *Colo. Interstate Gas Co. v. Wright*, 707 F.Supp.2d 1169 (D. Kan. 2010) (ruling that state authority could not apply its safety standards for underground natural gas storage fields to an interstate gas pipeline facility).

Q. Okay. Is -- is that concerning to you from a safety standpoint?

A: Absolutely. We've heard, you know, quite extensively today about the safety and all the other concerns, and I share all those concerns

...

This -- this is from the bottom of my heart. My community is being affected by this. This is my community. And I -- I -- I -- I want this pipeline moved so that our community is safe ...

Testimony of C. Moldenhauer (Ex. E at 56):

So I fear right now, if someone would ask me if it's safe to build a home close to this pipeline, within 2,000 feet, I don't feel like I'd be comfortable telling them that -- that they could be safe. And that's a -- that's a real concern for me --

Statements by Bitner (Ex. D at 37, 40-43):

A: Based on the -- based on the series of meetings that we've had, public sentiment from the citizens is very clear to us as a commission that this is not a route that the citizens of Burleigh County approve of. And my responsibility as a county commissioner is to respond to the citizens of Burleigh County. And so citizens came to us asking for an ordinance related to pipelines, and this safety ordinance was the soonest that we could do based on the Home Rule Charter change that was at our last election in Burleigh County.

Q: And so there's this -- and I'm jumping ahead a bit, but there's this -- this hazardous liquid pipeline ordinance from Burleigh County, W114, and then there's the one dated April 17, 2023, which is W186, and it's also called hazardous liquid pipelines. What's the difference between those two ordinances?

A: That's a good question. The first one, the Home Rule Charter ordinance, is specifically related to safety and safety expectations of the County. In there, I think we're clear that we're asking for your -- pipeline companies' safety plans, mitigation plans, and things like that so that we can prepare our county emergency management for what you would expect is a hazard or how you would respond to a situation with a pipeline.

...

Our -- our concerns as a county is for the citizens. You know, we put this in here so that we have some way to know what -- what's going on with this thing. And if you can't provide me with any sort of safety plan, am I supposed to task our staff with creating a safety plan? And we don't know the hazards. We don't know the things. We're learning those hazards now. But I'm actually -- I'm very stunned that anybody would have an issue and

protest providing a safety plan. I'm a general contractor. We're -- we're -- on many jobs, we're required to have a safety plan and have that available on a jobsite. This is nothing new. So I can't imagine why you wouldn't want to have a safety plan.

...

We -- we developed ordinances based on public input, not knee-jerk reactions to anything, but these guys are acting like we don't have any reason to be concerned about safety. And I got news flash for you: We are concerned about the safety for the citizens in Burleigh County. I have to be able to, at the best, protect the interest of the citizens, and I need to be able to evacuate. How do I evacuate people when they won't even tell me what the hazard is? They don't have any kind of odorant or colorant in this stuff, and we're supposed to just do what? Sit on our heels?

Statements by Curtis Jundt¹¹:

So my concern here is all about safety. And for 40 years, I've been involved in pipelines and gathering systems, and safety is paramount, and natural gas is far safer. I would rather this pipeline be flammable because you get an explosion; it's isolated right there

...

When this thing ruptures, you will have a cryogenic event happen, and that's another danger that doesn't happen with -- with natural gas pipelines. It'll be cryogenic. The temperature at the supercritical, escaping the 14.73 psi, will -- will be an endothermic reaction that will drop the temperature right there of that pipe to minus 100 degrees more. That is a huge risk because that pipe, then, it becomes brittle.

It is clear from the above excerpts that safety is the primary concern raised by the Intervenors, and that they are attempting to have the Commission chiefly consider safety aspects in rendering its decision on the Certificate and Permit. But federal courts' consistent interpretation of the express preemption provision in 49 U.S.C. § 60104(c) to broadly preclude states from regulating the safety aspects of interstate pipelines means that the Commission cannot make its

¹¹ <https://dakotamediaaccess.net/CablecastPublicSite/show/8939?channel=2>.

decision on the present Application for Certificate and Permit on the grounds of safety concerns, nor can it impose safety-related standards as conditions within a Permit.

3. *The Intervenors' safety concerns are otherwise unfounded.*

Setting aside the issue of federal preemption over state regulation of interstate pipeline safety, Summit has nonetheless demonstrated that the project is designed to achieve a very high degree of safety and that the Intervenors' concerns are misplaced.

First, unlike with gas or hazardous liquid pipelines, there is no record of any fatalities associated with a carbon dioxide pipeline. Ex. A at 63; Regional Carbon Capture Deployment Initiative: Carbon Dioxide Pipeline Safety, Great Plains Institute, January 30, 2023.¹² This is so even though carbon dioxide pipelines have been in operation for decades. *Id.* There are currently around 50 carbon dioxide pipelines operating in the US, transporting some 68 million tons per year. Global CCS Institute, Fact Sheet: Transporting CO₂.¹³ On a per-mile-year basis, carbon dioxide pipelines are arguably among the safest types. "Carbon Dioxide Transport 101," Great Plains Institute, February 14, 2023.¹⁴

Moreover, transportation by pipelines has a substantially safer track record than transportation by other modes such as via truck or rail. *See, e.g.*, Fraser Institute, August 2015 Research Bulletin, "Safety in the Transportation of Oil and Gas: Pipelines or Rail?" (noting that "when the safety of transporting oil and gas by pipelines and rail is compared, taking into consideration the amount of product moved, pipelines are found to be the much safer transportation

¹² Available at https://carbonactionalliance.org/wp-content/uploads/CO2-Pipeline-Safety-Factsheet_1_30_2023.pdf.

¹³ Available at https://www.globalccsinstitute.com/wp-content/uploads/2018/12/Global-CCS-Institute-Fact-Sheet_Transporting-CO2-1.pdf

¹⁴ Available at <https://betterenergy.org/blog/carbon-dioxide-transport-101/>.

method”);¹⁵ C. Ingraham, “It’s a lot riskier to move oil by train instead of pipeline”, Washington Post, February 20, 2015;¹⁶ and American Fuel and Petrochemical Manufacturers, “Are Pipelines Safe? They are the safest way to transport oil and natural gas”.¹⁷ Simply put, the Intervenor focus on perceived, not actual, safety risks associated with carbon dioxide pipelines, while ignoring more significant risks associated with transport of hazardous materials via existing railroads in heavily populated areas in Burleigh County.¹⁸

Even beyond the excellent safety track record of carbon dioxide pipelines in general, the Midwest Carbon Express Project pipeline will implement several safety measures that will further minimize already low risks. The Project pipeline will be constructed to the highest safety standards in compliance with (or surpassing) all applicable PHMSA standards under 49 C.F.R. Part 195, including (but not limited to):

- Construction of high-strength carbon steel pipe, stronger than the API 5L specification that is the standard for seamless and welded steel line pipes most often used in the energy industry for new pipelines (Docket No. 1, File 50 at p. 20);
- A design factor of 0.5 for pipe installed at road crossings, railroad crossings, and horizontal directional drills, which is more conservative than the standard 0.72 design factor prescribed for pipe in general under Part 195 (*Id.*);
- Application of external fusion bonded epoxy (FBE) coating and impressed current cathodic protection system used to protect against corrosion (*Id.*);

¹⁵ Available at <https://www.fraserinstitute.org/sites/default/files/safety-in-the-transportation-of-oil-and-gas-pipelines-or-rail-rev2.pdf>.

¹⁶ Available at <https://www.washingtonpost.com/news/wonk/wp/2015/02/20/its-a-lot-riskier-to-move-oil-by-train-instead-of-pipeline/>

¹⁷ Available at <https://empower.afpm.org/safety/are-pipelines-safe>

¹⁸ See Testimony of Bitner, Ex. D at 79 (“It’s never been my concern what’s on -- that I can recall. It never occurred to me to wonder what’s in those railcars”).

- Accommodation of internal inspection devices to detect internal and external anomalies in the pipe, such as corrosion, dents, and cracks (*Id.* at 21);
- Installation with a depth of cover of four feet, which exceeds standard burial depths for line pipe among Part 195-regulated facilities;
- Installation of remote controlled sectionalizing block valves to isolate segments of the pipeline during normal and abnormal operations, spaced in accordance with PHMSA's newly updated and more stringent standards for valve placement and performance under 49 C.F.R. § 195.260 (Docket No. 1, File 50 at p. 22);
- Design and construction of pump stations in accordance with ASME B31.4 (Pipeline Transportation Systems for Liquids and Slurries) and other relevant industry standards (*Id.* at 24);
- Monitoring and control of the pipeline through a supervisory control and data acquisition (SCADA) system (*Id.* at 27);
- Installation of a Real Time Transient Model (RTTM) leak detection system that integrates with the SCADA system to alert controllers of operating conditions not matching the expected hydraulic profile for the pipeline (*Id.*);
- Development of a comprehensive operating and maintenance manual and emergency response program (in consultation with local response agencies) in accordance with the requirements of 49 C.F.R. § 195.402 (Docket No. 1, File 150);
- Development of a public awareness program in accordance with 49 C.F.R. § 195.440 (Ex. A at 29-30);
- Frequent right-of-way patrols to check for abnormal conditions or activities (Docket No. 1, File 50 at p. 27);
- Hydrostatic testing of the pipeline pursuant to 49 C.F.R. Subpart E prior to placement into service (*Id.* at 31);
- Performance of dispersion modeling to assess the worst-case release scenario impacts, assist in development of an integrity management program pursuant to 49 C.F.R. § 195.452 to provide for initial and periodic assessments of the pipeline for anomalies and defects, establish criteria for repair of such conditions, implementation of preventive and mitigative measures to protect high consequence areas, and to inform emergency response and public awareness programs (*Id.* at 22; Ex. A at 142-147);

- Voluntary extension of the Integrity Management Program for the entirety of the Project pipeline, not just within High Consequence Areas as required under 49 C.F.R. § 195.452.

The Intervenor's characterization of the Project pipeline as "novel" is erroneous. Although in some respects as outlined above the Project pipeline will be built to especially stringent specifications that are more conservative than the minimum requirements of Part 195 or what many carbon dioxide pipelines implement, the pipeline will not deviate from Part 195, nor does the pipeline implement untested or experimental technologies for transporting carbon dioxide. Given the comprehensiveness of the PHMSA safety standards for hazardous liquid and carbon dioxide pipelines, and the fact that the Midwest Carbon Express Project pipeline will comply with or exceed each of these standards, the Intervenor fails to raise credible safety concerns.

While Intervenor on several occasions expressed concerns about the project's safety in part due to the carbon dioxide release incident from a pipeline operated by Denbury Gulf Coast Pipelines in Satartia, Mississippi,¹⁹ these concerns are not applicable here. Summit has carefully analyzed the causes of the Satartia incident and the design, construction, and operating and maintenance attributes of the Midwest Carbon Express Project pipeline have been developed to prevent the recurrence of a Satartia-type incident. These include, among other things, development of a more advanced dispersion model better characterizing atmospheric and topographic conditions, including overland flow of CO₂ in low areas like valleys and stream beds, that would identify more accurately the extent of affected areas and facilitate more effective emergency response planning, as well as the lack of any hydrogen sulfide in the carbon dioxide to be transported. Ex A at 67; 234 – 235.

¹⁹ See, e.g., Ex. D at 83; Ex. E at 35.

Intervenors also raised the prospect of updates to PHMSA's regulations applicable to carbon dioxide pipelines at 49 C.F.R. Part 195 as a reason to withhold granting the Certificate and Permit. However, this argument fails to appreciate that most of the applicable standards in Part 195 apply equally to carbon dioxide and hazardous liquid pipelines, and that PHMSA is constantly updating these regulations. Within the last five years alone, PHMSA has issued over 10 rulemakings to revise the Part 195 standards, many of which are significant and impact some of the issues raised by petitioners (e.g., valve spacing, improvements in the Integrity Management Program, etc.). To delay granting an application based on the prospect of some upcoming revision to a provision affecting carbon dioxide pipelines would be tantamount to a dog chasing its tail. Given that PHMSA continuously reviews and updates its pipeline safety regulations as necessary, there will always be some regulatory update on the horizon that impacts carbon dioxide pipelines. Under the Intervenors' theory, new carbon dioxide pipelines would remain in a state of perpetual waiting. Ex. A at 236. Moreover, delaying the Project in anticipation of the upcoming regulatory updates in response to the Satartia incident is unnecessary because, as noted above, the Project pipeline has been designed and will be operated to prevent recurrence of the shortcomings that gave rise to the Satartia incident.

Moreover, the Intervenors also fail to appreciate that the grant of the Certificate and Permit by the Commission for this Project does not in any way exempt Summit from having to comply with subsequent PHMSA rules. The Project will be subject to whatever Part 195 amendments PHMSA makes in the future, and the Commission's approval of the Project Application at this time does not affect that. Any non-compliance with future standards promulgated by PHMSA would be subject to PHMSA's enforcement authority, which includes potential penalties and injunctive measures. *See* 49 U.S.C. §§ 60117, 60120. Accordingly, delaying approval is

meaningless considering that the Commission cannot itself impose safety standards on the Project pipeline.

In short, the Midwest Carbon Express Project pipeline, as currently routed, is not only safe, but, considering the extra measures implemented by Summit, reflects arguably the safest manner of transporting carbon dioxide. The Intervenor do not raise any specific examples where the proposed design, construction, operation and maintenance or emergency response procedures would not comply with applicable PHMSA standards. Rather, Intervenor seek to impose additional safety standards that the PHMSA regulations do not. Federal law does not allow for this. In any event, the safety concerns alleged by the Intervenor are unfounded and do not support denial of the Application for Certificate and Permit.

B. Private Easements.

The Bismarck Intervenor, first raised allegations that Summit was obtaining invalid easements at the March 14, 2023 hearing in Bismarck, North Dakota.²⁰ The basis of the allegation was that the initial exhibit to the easement depicting the proposed route across the landowner's property was not stamped by a professional land surveyor.²¹ The Bismarck Intervenor also alleged that Summit was taking "blanket easements" that would allow Summit access to the entirety of a landowner's property.²² Presumably, the Bismarck Intervenor pursued this line of questioning based on the letter submitted to the Commission by the North Dakota Society of Professional Land

²⁰ See Hearing Transcript ("Hrg. Tr.") attached hereto as **Exhibit B** at 95:22-25. To facilitate use of the hearing record, Summit has obtained transcripts from a professional third-party transcriptionist for certain portions of the March 14, 2023 hearing (attached as **Exhibits A and B**), the April 11, 2023 hearing (attached as **Exhibit C**), and the June 2, 2023 hearing (attached as **Exhibits D, E and F**).

²¹ *Id.*

²² *Id.* at 98:1-4.

Surveyors (“NDSPLS”). *See* Docket No. 156. Later in the hearing, Mr. Larry Smith, a professional land surveyor in North Dakota, provided public testimony on behalf of the NDSPLS and read the letter submitted by the NDSPLS, which requested that the Commission “review all aspects of all utility easements to ensure that all current laws and rules for easements in North Dakota are followed as part of the review and permit process.” *Id.*

Advisory counsel for the Commission initially objected to the Bismarck Intervenors’ line of questioning stating “[t]he commission doesn’t have jurisdiction over easements,” and requested that the Bismarck Intervenors “move on to questions related to this siting application.”²³ When the Bismarck Intervenors again tried to raise the same allegations with Mr. Smith, counsel for Summit objected and the ALJ sustained the objection.²⁴ Furthermore, Commissioner Haugen-Hoffart advised Mr. Smith that the Commission is “not going to get involved in the easements here,” and “[t]hat’s not under a jurisdiction,” referring to the request in the NDSPLS letter.²⁵ Accordingly, the ALJ and the Commission have acknowledged that the Commission does not have jurisdiction over private easement matters.

Notwithstanding the Commission’s lack of jurisdiction over private easement matters, it is important for the Commission to understand that Summit is complying with North Dakota law. Specifically, Summit will provide each landowner with an as-built survey of the portion of the pipeline located on their property which will be certified and stamped by a registered North Dakota land surveyor and recorded in the real property records for the entirety of the Project.²⁶ Furthermore, Mr. Micah Rorie testified that Summit is not taking “blanket easements” and that

²³ *See* Hrg. Tr. 96:22-24 (Ex. B).

²⁴ *Id.* at 228:10-16.

²⁵ *Id.* at 230:19-22.

²⁶ *Id.* at 12:25-13:2 and 42:6-8.

“the landowner’s provided in every instance, zero exceptions, every time, an easement agreement with an exhibit that has a proposed footprint on it.”²⁷ Mr. Erik Schovanec, Senior Director of Pipeline and Facilities for Summit, testified that Summit will be seeking a fifty (50) foot wide permanent easement for the Project.²⁸ Accordingly, the Commission should be reassured that Summit is acquiring “strip easements” that will ultimately be accompanied by an as-built survey, certified and stamped by a registered North Dakota land surveyor as encouraged by the NDSPLS in its letter. *See* Docket No. 156.

C. Private Insurance.

Throughout these proceedings, the Landowner Intervenors and various other landowners have argued that their insurance policies would not cover damage caused by CO₂ released from Summit’s pipeline and that the Commission should consider this fact when deciding whether to approve Summit’s Application. According to these landowners, CO₂ is a “pollutant,” and their policies do not cover damage caused by pollutants. *See* Docket Nos. 265, 329 and 332.

The Commission should not consider whether a landowner may or may not be able to obtain insurance when deciding whether to approve Summit’s Application. Insurance (type, amounts or availability) is not one of the factors the Commission is explicitly instructed to consider under the Siting Act. *See* N.D.C.C. § 49-22.1-09. In addition, it is not entirely clear that a CO₂ pipeline would be excluded under such policies. The only insurance company to offer evidence in these proceedings—i.e., Farmers Union Insurance—explained that whether CO₂ would be considered a “pollutant” has not yet been determined and that the issue is still being researched. *See* Docket No. 295.

²⁷ *See* Hrg. Tr. 96:13-15 (Ex. B).

²⁸ *Id.* at 5:16-17.

Furthermore, even assuming that certain insurance policies may not cover damage caused by a CO₂ pipeline, the landowners will still be protected from liability. Every easement that Summit has entered into with a landowner contains a broad indemnity provision under which Summit agrees to protect landowner from financial liability—even for liability caused by a landowner’s own negligence; with the only exception being if a landowner acts with a reckless disregard for the safety of others or willfully damages the pipeline. These indemnity provisions provide that Summit shall “indemnify and hold Landowner harmless for any loss, damage, claim, or action resulting from [Summit’s] use of the Easement, except to the extent such loss, damage, claim, or action results from the gross negligence or willful misconduct of Landowner or its agents.” *See* Docket No. 185. The indemnity offered by Summit is much broader than would typically be granted by an easement holder, but Summit offers it to all landowners in order to alleviate the concern that a landowner’s insurance company would deny a claim. Thus, regardless of their insurance policies, the landowners are still protected from liability for damage caused by Summit’s pipeline.

Moreover, the Commission would set a dangerous precedent should it take into consideration whether particular private insurance policies would cover damage caused by substances carried by a pipeline. As explained by Farmers Union Insurance, insurance companies consider salt water, oil, and natural gas to be “pollutants.” *See* Docket No. 295. North Dakota has thousands of miles of transmission and gathering lines which carry salt water, oil and natural gas, many of which fall under the Commission’s jurisdiction. If the Commission were to deny Summit’s Application simply because some insurance policies do not cover damage caused by the CO₂ carried by Summit’s pipeline, then the Commission would be bound to deny future applications for pipelines carrying oil and natural gas on that same basis.

Finally, some landowners claimed that they will be unable to rent out their land because their liability insurance would not cover their tenants in the event of a strike or release from the pipeline. At the request of the Commission, North Dakota Agricultural Commissioner, Doug Goehring, testified at the May 9, 2023, hearing in Linton. Commissioner Goehring testified that he is not aware of any complaints by landowners regarding inability to obtain liability insurance for their tenants. *See* Docket No. 212. On this issue, Commissioner Goehring correctly noted that no landowner will be able to obtain liability insurance covering their tenants and that it is the responsibility of the tenant to obtain such insurance. *Id.* Mr. Goehring also testified that he has pipelines going across his own property and that he has not been denied liability insurance due to said pipelines. *Id.*

For these reasons, the Commission should not consider whether landowner insurance policies would cover damage caused by Summit, its pipeline or its contents, when deciding whether to approve Summit's Application.

D. Investors and Foreign Ownership.

The North Dakota Legislative Assembly recently enacted two bills: House Bill 1135 ("HB 1135") and Senate Bill 2371 ("SB 2371"). HB 1135 prohibits a business entity from acquiring an interest in agricultural land in North Dakota "unless the beneficial interest of the entity is held directly by citizens of the United States or permanent resident aliens of the United States." *See* Docket No. 308. Similarly, SB 2371 prohibits a business entity in which a foreign adversary owns an interest from acquiring real property in North Dakota. *See* Docket No. 309.

Intervenors and some of the Public Commentators have argued that the Commission must consider Summit's compliance with these two bills when deciding whether to approve Summit's Application. Specifically, Intervenors and the Public Commentators believe "Summit should be

required to demonstrate that the construction and ownership of [its] pipeline in ND would not be expressly prohibited by [HB 1135 an SB 2371].” See Docket No. 236.

Simply put, Summit’s compliance with HB 1135 and SB 2371 is not relevant to this case.²⁹ Both bills do not even become effective until August 1, 2023. See N.D. Const. art. IV, § 13. But even if they were in effect, the Legislature tasked the Attorney General with their enforcement, not the Commission. If the Commission were to consider Summit’s compliance with these two bills when deciding whether to approve Summit’s Application, then the Commission would effectively be usurping powers that the Legislature entrusted with the Attorney General.

HB 1135 amended and reenacted Chapter 47-10.1 of the North Dakota Century Code. Section 4 of that chapter explicitly states that “[i]f the attorney general has reason to believe that any person is violating section [HB 1135], the attorney general shall commence an action in the district court ...” N.D.C.C. § 47-10.1-04 (emphasis added). Similarly, SB 2371 states that “[w]hen requested ..., the attorney general shall complete a civil review ...” See Docket No. 309 (emphasis added). Neither HB 1135 nor SB 2371 makes any mention of the Commission.

Courts have recognized that “[w]here the Legislature simultaneously empowers one agency to act and declines similarly to empower another, there is a strong inference of a legislative intent to withhold the authority from the nonempowered agency.” *Costa Mesa City Employees’ Assn. v. City of Costa Mesa*, 146 Cal. Rptr. 3d 677, 690 (Ct. App. 2012).³⁰ Thus, it follows that

²⁹ Indeed, Summit’s compliance with HB 1135 and SB 2371 (or any other law for that matter) is not one of the factors the Legislature has instructed the Commission to consider when deciding whether to approve Summit’s Application. See N.D.C.C. § 49-22.1-09.

³⁰ See also *Capital Elec. Co-op., Inc. v. Public Serv. Comm’n of State of N.D.*, 534 N.W.2d 587, 589 (N.D. 1995) (“The PSC has only the powers and duties conferred upon it by the Legislature.”).

“an administrative agency does not have the power to make decisions properly committed to another agency.” *LTV Steel Co. v. Griffin*, 730 N.E.2d 1251, 1257 (Ind. 2000).

Here, the Legislature empowered the Attorney General to enforce Summit’s compliance with HB 1135 and SB 2371. Recently, thirty one (31) members of the Legislature requested that the Attorney General to exercise this power by investigating Summit’s investors. But the Attorney General denied their request. Blake Nicholson & David Velázquez, *Wrigley Won’t Look Into Summit Pipeline Investors for Now; Burleigh Takes Aim at Recording Easements*, Bismarck Trib., June 19, 2023, at 1.³¹ If the Commission were to consider Summit’s compliance with these two bills when deciding whether to approve Summit’s Application, then the Commission would effectively be overturning the Attorney General’s decision and making that decision for itself. This is something the Commission cannot do. *LTV Steel*, 730 N.E.2d at 1257 (“[A]gency does not have the power to make decisions properly committed to another agency.”).

In sum, the Legislature intended for the Attorney General to enforce HB 1135 and SB 2371. Accordingly, Summit’s compliance should not play any part in the Commission’s decision in this case.

E. Contractor Qualifications.

Intervenor The Laborers District Council of Minnesota and North Dakota (“LIUNA”) has consistently argued that the Commission should consider the qualifications of one of Summit’s

³¹ https://bismarcktribune.com/news/state-regional/business/wrigley-wont-look-into-summit-pipeline-investors-for-now-burleigh-takes-aim-at-recording-easements/article_74147e9e-0ee3-11ee-9be1-1763144b54b4.html

contractors—Pumpco Inc. (“Pumpco”)—when deciding whether to approve Summit’s Application. According to LIUNA, Pumpco’s qualifications are relevant because they have an impact on public safety. *See* Docket No. 232. However, one can assume that LIUNA, as an advocate and representative of union labor, opposes Summit’s selection of Pumpco because Pumpco does not utilize union labor.

Regardless, Pumpco’s qualifications are not relevant to the Commission’s decision in this case. First, the qualifications of Summit’s contractors are not a factor the Legislature explicitly instructed the Commission to consider. *See* N.D.C.C. § 49-22.1-09. Second, Pumpco’s qualifications do not actually impact public safety. Who constructs Summit’s pipeline does not matter. What matters is how Summit’s pipeline is constructed. Regardless of its qualifications, Pumpco will have to comply with hundreds of federal regulations while constructing the pipeline. These regulations include requirements for: the selection and qualification of pipe and components for use in the pipeline, *see* 49 C.F.R. §§ 192.51-192.69; the design of the pipeline, *see* 49 C.F.R. §§ 192.101-127; the design and installation of the components and facilities of the pipeline, as well as protection against accidental over-pressuring, *see* 49 C.F.R. §§ 192.141-192.205; the welding of steel materials of the pipeline, *see* 49 C.F.R. §§ 192.221-192.245; the joining of materials in the pipeline, other than welding, *see* 49 C.F.R. §§ 192.271-192.287; constructing the pipeline; *see* 49 C.F.R. §§ 192.301-192.329; the protection of the pipeline from external, internal, and atmospheric corrosion, *see* 49 C.F.R. §§ 192.451-192.493; and leak-test and strength-test requirements for the pipeline, *see* 49 C.F.R. §§ 192.501-192.517. Pumpco will need to comply with every single one of these regulations when constructing the pipeline or else the pipeline will never become operational.

As a result, Pumpco's qualifications have no impact on public safety. Regardless of its qualifications, Pumpco will either (1) construct a pipeline that complies with all federal safety regulations or (2) construct a pipeline that does not comply with all federal safety regulations and therefore never becomes operational. In either case, the public is not put in any danger. Thus, Pumpco's qualifications should play no role in the Commission's decision on whether to approve Summit's Application.

IV. Summit Has Refuted Each of the Relevant Arguments Made by the Intervenors.

A. Development Around Pipelines and Property Values.

Summit reiterates that it has chosen the safest, most prudent route for the Project based on a multitude of factors and to re-route the Project to the south of Bismarck at this stage of development would add unnecessary cost, schedule delay, and offset many of the impact mitigation measures that have been implemented thus far.³² The current pipeline route at its nearest location is 4.5-5 miles north of the city limits of Bismarck,³³ 1.1-3 miles north of the City of Bismarck's extra-territorial jurisdiction,³⁴ and 1.17 miles away from the Bismarck Future Development Boundary area.³⁵ A change to the proposed pipeline route would create a significant delay to the Project, potentially up to two years. It would also not guarantee a different outcome, but possibly a worse outcome with respect to survey permissions and easement acquisition.³⁶

Summit, at the request of the Commission, prepared an analysis to detail the route selection process for the Project ("Bismarck Route Analysis"). The analysis considered multiple potential

³² See Docket No. 275 (Bismarck Route Analysis, p. 8).

³³ See Hrg. Tr. at 26 (Ex. B).

³⁴ *Id.* at 28.

³⁵ See Docket No. 275 (Bismarck Route Analysis, p. A-1).

³⁶ *Id.* at p. A-6.

routes, including the areas to the north and south of Bismarck. The Bismarck Route Analysis provided detail as to the selection on the northern route for a variety of reasons, but decided to exclude the southern route because it presented significant unknowns and risks – including potential impacts to resources for which there may not be viable mitigation options, including the historically negative impact to Tribal lands in the area south of Bismarck.³⁷

In Exhibit A of the Bismarck Route Analysis, Summit used two methodologies to consider whether there was any evidence that pipelines hinder the future development of tracts which they traverse. One methodology for evaluating impact of development in Burleigh County is the density of structures around existing pipelines vs. the proposed Project. Based on the existing NuStar Pipeline, WBI Pipeline, and MDU Pipeline, homeowners in Bismarck have not shown a tendency to avoid living or developing adjacent to existing pipelines. Rather, Bismarck has grown around those pipelines with no demonstrable impacts upon development. The historical images clearly demonstrate this fact:

³⁷ *Id.* at p. 8.



Figure 4: Existing Pipelines in Bismarck 1960s



Figure 5: Existing Pipelines in Bismarck 2022

The numbers also convincingly show that development in the areas around pipelines has not been adversely affected. There are nearly 1,600 structures constructed within 500 feet, and

more than 16,000 structures within one mile, of the existing transmission pipelines.³⁸ By comparison, there are only 11 structures within 500 feet of the Project route, only two of which meet the exclusion and avoidance criteria, and waivers are anticipated for those two structures.³⁹

Summit also presented evidence relating to the growth of Bismarck and where growth has occurred relative to the existing transmission pipelines. That evidence demonstrated yet again that Bismarck and the surrounding area's growth has not been hindered by pipelines. For example, approximately half of 4,114 acres subdivided and developed into residential neighborhoods from 2015 to 2023 was closely proximate to those pipelines:

³⁸ See Docket No. 275 (Bismarck Route Analysis, pp. A-1, A-2, Table 2).

³⁹ *Id.* at A-2.

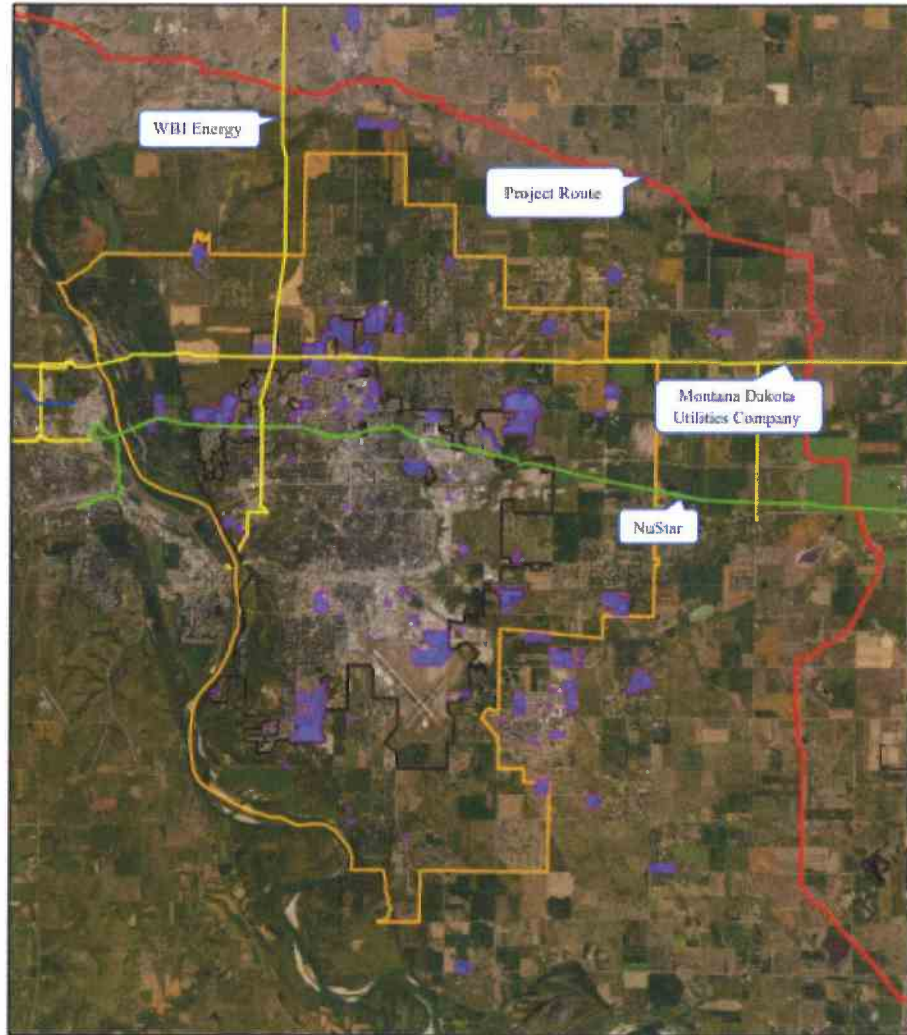


Figure 6: Bismarck 2015-2023 Development

The evidence demonstrates that growth in and around Bismarck has not been adversely affected by the existence of hazardous liquids or natural gas pipelines. The Project (a hazardous liquid pipeline) will be no different.⁴⁰ It is a state-of-the art, federally regulated pipeline that will be constructed, operated, and maintained according to the stringent PHMSA standards.⁴¹

⁴⁰ Moreover, there are no credible arguments that construction of the Project along the proposed route will limit the choices that developers or residents have, as there remain more than 95,000 acres between the existing Bismarck developments and the Project route, which is many decades-worth of supply for available lands.

⁴¹ See Docket No. 275 (Bismarck Route Analysis, p. A-3).

Summit also presented additional evidence demonstrating that the Project will not hinder the future development of the properties on and around the route. The written testimony from Mr. Jeffrey L. Skaare, Director of Land, Legal and Regulatory Affairs for Summit Carbon Solutions, provided information on existing transmission pipelines located within Bismarck and their location in approximation to existing residential and commercial developments. Mr. Skaare's testimony further detailed what the Bismarck Route Analysis demonstrated with regard to the non-impact upon growth that transmission pipelines have had (or will have) on development. As part of his testimony, Mr. Skaare identified that there has been substantial development all around the pipelines over the course of the past 60 plus years.⁴² Mr. Skaare also found that there are well established and currently developing residential and commercial areas around the pipelines.⁴³ This testimony demonstrates the fact that there is no factual basis to conclude that hazardous liquids pipelines negatively affect development in this area or along the Project's proposed route.

The submission of Mr. Wade Becker, a Certified General Real Property Appraiser for Boulder Appraisal, LLC, focused on the impact pipelines have on the marketability and value of residential property in the Bismarck market. Mr. Becker is an independent fee appraiser with no stake in or bias as to the outcome of this proceeding. Mr. Becker's work was prepared in conformance with the Appraisal Institute's Code of Professional Ethics and Standards of Professional Appraisal Practice and the most recent edition of the Uniform Standards of Professional Appraisal Practice (USPAP) adopted by the Appraisal Standards Board of the Appraisal Foundation. Mr. Becker reviewed residential lots (improved and unimproved) located in proximity to the above-mentioned natural gas transmission pipeline and refined products

⁴² *Id.*

⁴³ *See* Docket No. 290 (Direct Testimony of Jeffrey L. Skaare).

hazardous liquid transmission pipelines in Bismarck. After conducting a comprehensive analysis of the market data collectively, Mr. Becker concluded that potential buyers of residential property exhibit little to no preference in choosing between lots encumbered and non-encumbered by the noted pipelines.⁴⁴ He went on to say that “careful subdivision planning and factors such as lot size, expanded yard and/or adjoining greenspace, price, and developable area play a more influential role in guiding their decision-making process thereby rendering pipeline encumbrances less impactful.”⁴⁵

Some of the Bismarck Intervenors offered a different approach to the impacts that the Project, along its proposed route, might have on development. The Bismarck Intervenors proffered testimony, without any credible evidence, that natural gas pipelines lines or refined product pipelines are safer than a CO₂ pipeline. The Bismarck Intervenors’ offered testimony that a CO₂ pipeline constructed and operated under PHMSA’s rigorous regulatory regime would introduce behaviors that were altogether different than the past decades of development around pipelines. The testimony did not present a fact-based rationale for such a conclusion nor is it consistent with the credible testimony presented by Summit to the Commission about the Project’s safety and potential impacts. Further, these positions are undercut by the witnesses’ necessary concessions that transmission pipelines—both hazardous liquids and natural gas—have not hindered growth in this area. The Bismarck Intervenors’ testimony is further undermined by the contradiction in their concerns about potential negative economic impacts and threats to human life caused by the proposed pipeline, while overlooking the existing risks to residents within their own housing

⁴⁴ See Docket No. 293 (Boulder Appraisal Letter).

⁴⁵ Id.

developments caused by a variety of other factors. While convenient for their argument against the Project, simply, the more credible facts support the Project's route.

A primary example of this is the testimony offered by Mr. Chad Moldenhauer, a resident of Bismarck, North Dakota and owner of Heritage Reserve housing development, who recounted his communications with Summit from Fall 2021 to Summer 2023, expressed his concerns about the pipeline's safety, and communicated his perception of the negative impact the Project would have on the housing market in Burleigh County, including his own development. Mr. Moldenhauer offered these concerns without presenting any proof. He began his testimony by saying that he declined to allow Summit's surveyors to survey his property and that he was not contacted by Summit again.⁴⁶ He went on to say that he later contacted Summit expressing his concerns about the pipeline's proximity to Heritage Reserve after speaking with a county commissioner. Mr. Moldenhauer went on to testify that he received a response from Summit relaying the information that the pipeline would not be located on his property and instead would be located a "half-mile to the north of the subdivision."⁴⁷ Mr. Moldenhauer testified that he understood the most current location of the pipeline to be less than 2,000 feet from the north end of Heritage Reserve.⁴⁸

Mr. Moldenhauer also testified, without supporting evidence, that the proposed pipeline would affect the sales of the "high-end" homes in his development because people would be concerned about their health and peace-of-mind.⁴⁹ There was no evidence presented to support this statement. He went on to say that he is uncomfortable selling homes to people where they

⁴⁶ See Hrg. Tr. at 50-54 (Ex. E).

⁴⁷ See Hrg. Tr. at 54 (Ex. E).

⁴⁸ *Id.*

⁴⁹ See Hrg. Tr. At 55-56 (Ex. E).

would live in close proximity to a dangerous pipeline.⁵⁰ However, Mr. Moldenhauer also testified that he was comfortable entering into agreements with WBI Energy Transmission, Inc. and Montana Dakota Utilities to place natural gas pipelines on the border of the Heritage Park property in 2015 despite the ability of natural gas pipelines to rupture, because the community is “very used to natural gas pipelines.”⁵¹

Mr. Moldenhauer expressed concerns about the safety of placing a hazardous pipeline close to a residential area,⁵² however, he also testified that a railroad abuts the Heritage Reserve property, and that he did not investigate the risks associated with placing a residential subdivision next to a railway that might transport hazardous materials.⁵³ If exposure to risk from adjacent infrastructure was, in fact, a concern held by Mr. Moldenhauer, then surely he would have investigated whether the nearby railroad was a safety risk. That he did not is telling.

However, some credit is owed to Mr. Moldenhauer for his candidness on the subject. Mr. Brian Bitner, who has lived in Bismarck most of his life and has served on the Burleigh County Board of Commissioners for fifteen (15) years, denied any knowledge of the hazardous products being moved by rail through Bismarck, stating “[n]o, I’m not aware of that.”⁵⁴ While Mr. Moldenhauer expressed his concerns about the impacts that the Project would have if built on the Proposed route, the undeniable, substantial growth of developments around existing PHMSA-regulated pipelines in the area undermines those claims.

⁵⁰ *Id.* at 56-57.

⁵¹ *Id.* at 65-66.

⁵² *Id.* at 56-57.

⁵³ *See* Hrg. Tr. at 68-69 (Ex. E).

⁵⁴ *See* Hrg. Tr. at 94-95 (Ex. D).

Another example of development-related testimony from a Bismarck Intervenor is the testimony of Mr. Chad Wachter, a resident of Burleigh County, who testified about his communications with Summit representatives, his Silver Ranch development, the existence of pipelines on other housing developments he owns, and his opinion on the safety of the proposed pipeline and the potential impact of the proposed pipeline on housing value. Mr. Wachter offered his concerns about safety and market value without presenting any proof that credibly supports a conclusion that construction of the Project along the proposed route would impact development differently than the existing transmission pipelines in Bismarck.

Mr. Wachter's testimony seems to contradict itself in certain points. Mr. Wachter testified that it is unacceptable to put the pipeline close to such a highly populated area due to safety concerns and then immediately followed up that statement by suggesting the pipeline be "pushed out" to make it "somebody else's problem."⁵⁵ This, again, largely ignores the fact that existing pipelines and their related safety concerns have not hindered development.

Another point of contradiction in Mr. Wachter's testimony, is that he believes that there is potential for the proposed pipeline to negatively affect the growth in Burleigh County outside of the extraterritorial limits of Bismarck.⁵⁶ Mr. Wachter testified that he disagreed with the appraisal provided by Mr. Becker that the proposed pipeline will not make any difference in the value of homes.⁵⁷ However, Mr. Wachter also testified that he purchased the Promontory Point development knowing that the NuStar hazardous liquids pipeline (refined product line) was running through it. He continued testifying that he purchased the Promontory Point property

⁵⁵ See Hrg. Tr. at 22 (Ex. F).

⁵⁶ *Id.* at 19.

⁵⁷ *Id.* at 24.

knowing that parts of the property may experience diminution in market value and that this practice is consistent with the other developments he has worked on that are crossed by similar infrastructure in Bismarck.⁵⁸ Mr. Wachter testified that he currently has sold 75-80 percent of the properties in the Promontory Point development.⁵⁹ Mr. Wachter also testified that people typically do not want to build on properties that contain pipelines, however, he acknowledges that people still would opt to add them as additional property to their homes.⁶⁰ Indeed, Mr. Wachter's testimony on this point largely supports Mr. Becker's unbiased, well-studied, and *data-driven* opinion that development is not negatively affected by pipelines.

As an aside, it should be noted that Mr. Wachter attended the May 22, 2023 meeting of the Bismarck Public School Board ("Board") where he spoke against the proposed location of the Project and requested the Board adopt a resolution supporting Burleigh County in its efforts to oppose, or at least delay, the Project.⁶¹ Not surprisingly, Mr. John Lee, the president of the Board, provided public testimony at the June 2, 2023 hearing in Bismarck.⁶² Mr. Lee echoed Mr. Wachter's concerns regarding the location of the Project in his public testimony and confirmed that the Board passed a resolution indicating the Board supports the City of Bismarck and Burleigh County in their efforts to oppose the Project.⁶³ However, Mr. Lee indicated that he has only

⁵⁸ *Id.* at 34.

⁵⁹ *Id.* at 25.

⁶⁰ *Id.*

⁶¹ See <https://dakotamediaaccess.net/CablecastPublicSite/show/9099?channel=2>

⁶² See Docket No. 299.

⁶³ *Id.*

received one (1) phone call and engaged in a few other interactions with parents who are concerned about the Project, indicating that there was “not overwhelming” concerns.⁶⁴

Overall, the evidence offered by the Bismarck Intervenors and the Public Commentators does not establish any property value loss or any fact-based evidence of diminution. Additionally, the argument that natural gas and hazardous liquids pipelines are universally accepted by developers and home purchasers, but CO₂ pipelines are not, was offered without any supporting evidence. Accordingly, the evidence firmly supports a finding that the Project will not adversely affect the future development of Bismarck.⁶⁵

B. Drain Tile Repair.

Summit—with its agricultural roots—recognizes the importance of drain tile on agricultural production.⁶⁶ Drain tile and its owners along the Project footprint are a priority for Summit. As set forth in Summit’s Application, “[d]rain tiles disturbed or damaged by pipeline construction will be repaired to its original or better condition.”⁶⁷

Summit’s Application also details the many steps that Summit will take to ensure the appropriate treatment of all drain tile, including:

- Summit will work with landowners to locate drain tile systems within the ROW prior to construction;⁶⁸
- Drain tile that is damaged, cut, or removed during construction will be appropriately marked, which marker(s) will remain in place until the

⁶⁴ *Id.*

⁶⁵ See N.D.C.C. § 49-22.1-09(8).

⁶⁶ See Hrg. Tr. 7:13-8:6 (Ex. C).

⁶⁷ SCS Ex. 1 (Application), p. 16, § 2.2.12.3; see *id.*, Appendix 3 – Environmental Construction Plan, p. 9, § 3.6 – Drain Tiles.

⁶⁸ SCS Ex. 1 (Application), Appendix 3 – Environmental Construction Plan, p. 9, § 3.6 – Drain Tiles.

permanent repairs “have been approved and accepted by the county inspector or landowner”,⁶⁹

- Any necessary temporary repairs, including those in which water is found to be flowing during or in which water subsequently begins to flow, will be temporarily repaired as soon as practicable, and “the repair will be maintained as necessary to allow for its proper function during construction of the pipeline”,⁷⁰ and
- Permanent repairs, which will account for proper clearances, will be timely completed.⁷¹

As set out in the Application, Summit will ensure that drain tile is appropriately accounted for and made to function “to its original or better condition” after the Project is completed.⁷² In this way, Summit will ensure that the welfare of North Dakota’s citizens who rely upon drain tile to remain competitive in the agricultural marketplace and the lands they use to do so will not be adversely affected by the Project.

The testimony and evidence set forth in the public hearings further established that Summit’s commitment to drain tile along the Project footprint will be setting a high standard for pipeline companies when dealing with drain tile, including:

1. Summit has directly engaged Ellingson Companies—an industry leader in the upper Midwest with decades of experience and millions of miles of drain tile installation—to provide the best possible outcomes for farmers both during and after construction;
2. Summit (with Ellingson) have been proactively engaging landowners along the route to identify existing and future drain tile and terrace locations and make plans for how systems will be repaired and/or modified before, during, and/or after pipeline construction is complete to ensure they work as good as, if not better, after the pipeline is constructed versus before construction;

⁶⁹ *Id.*

⁷⁰ SCS Ex. 1 (Application), Appendix 3 – Environmental Construction Plan, p. 9, § 3.6 – Drain Tiles.

⁷¹ *Id.*

⁷² *Id.*; see also SCS Ex. 5 (Drain Tile FAQs).

3. Ellingson will provide substantial coordination and detail about the location, repair, and function of the systems crossed by the pipeline, all available on an electronic dashboard available to the landowners, including photographic evidence of every single connection or repair that's made;⁷³ and
4. Summit is providing landowners a *lifetime* warranty for drain tile and terrace repair.⁷⁴

The testimony from Summit demonstrated this commitment and the testimony from Ellingson Companies' Chief Operating Officer, Jeremy Ellingson, was compelling. Mr. Ellingson explained the substantial history that Ellingson Companies has working with landowners, including the fact that, in the Red River Valley alone, Ellingson Companies installs in excess of 30,000,000 feet of drain tile per year.

Mr. Ellingson went on to explain why drainage systems are important, how drainage systems are designed and how they function, and how they can be appropriately handled during pipeline construction projects. Mr. Ellingson went on to explain in detail how Ellingson Companies' role in the Summit Project demonstrates Summit's landowner-first approach. He explained that Summit has engaged Ellingson Companies directly (rather than through a subcontract with a general pipeline construction contractor) and earlier in the process than normal (approximately 18 months as of the April 11 hearing in Wahpeton). This approach has allowed Ellingson Companies to do significant reconnaissance work with landowners and drainage authorities, learning substantial amounts of information about the drain tile that exists along the Project's footprint, and to best address every landowner's unique needs.

Mr. Ellingson further testified that by knowing where the tile is, and how the pipeline route will traverse a field, Ellingson Companies can assess and mitigate impacts on the system, including

⁷³ See Hrg. Tr. 24:8-24 (Ex. C); *see id.* at p. 73:.

⁷⁴ See Hrg. Tr. 7:13-8:6 (Ex. C); *see id.* at p. 9:15-10:17; SCS Exs. 5 and 6.

through design of header systems. Mr. Ellingson explained in some detail the multi-step process that Ellingson Companies will follow before, during, and after construction. He explained that Ellingson Companies will have personnel with every spread during construction to locate and mark tiles, oversee any temporary repairs, and to make final repairs. He further explained the details of how the repairs are made, including the use of tools to inspect for damage, and installation of a heavier-grade drain tile encased within a steel culvert to ensure the system's integrity. Mr. Ellingson also explained that the company will employ a GPS-based tracking/mapping system, a live dashboard with all relevant information to which the landowners will have access, and the completion of as-builts, which will be given to landowners. Finally, Mr. Ellingson explained that landowners will also be able to successfully tile fields in the future even after the Project is completed, which is a common practice.

Notably, the testimony from North Dakota State University's Dr. Thomas Scherer (in Wahpeton) and North Dakota Agriculture Commissioner Doug Goehring (in Linton) largely confirmed that the Project could be built in such a way that would not be a detriment to drain tile systems in North Dakota. No testimony was offered on behalf of any landowners that credibly presented the Summit approach would not alleviate concerns that landowners do hold. Accordingly, the evidence firmly supports a finding that, when it comes to drain tile, the Project will not adversely affect the welfare of North Dakota land or the North Dakotans who own it. In fact, the drainage systems are likely even to improve because of the Project.

V. The Commission Should Supersede and Preempt Local Ordinances.

Shortly after this brief is filed with the Commission, Summit will be filing its consolidated reply ("Reply") to each of the responses submitted to the Commission in opposition to Summit's Motion to Declare Emmons County and Burleigh County Ordinances Superseded and Preempted

(the “Preemption Motion”). *See* Docket No. 282. Summit’s Reply will set forth all of the reasons for the Commission to supersede and preempt the Burleigh and Emmons County Ordinances, however, the Commission should be advised of and take particular attention to the recent ruling in the United States District Court for the Southern District of Iowa, Western Division. Specifically, Chief Judge Stephanie M. Rose issued an order granting Summit’s Motion for a Preliminary Injunction, which prohibits and enjoins the supervisors of Shelby County, Iowa from enforcing the county’s recently enacted hazardous liquid pipeline ordinance.⁷⁵

In her Order, Chief Judge Rose found that the ordinance is preempted under both state and federal law, noting that the setback requirements in Shelby County’s ordinance would “eliminate all or almost all land in Shelby County on which an [Iowa Utilities Board] approved pipeline could be built,” and that the Pipeline Safety Act preempts state and local agencies from regulating safety matters.⁷⁶ The order is thorough, well written and directly on point since, as the Commission may recall, the hazardous liquid pipeline ordinance adopted by Burleigh County was based on the ordinance adopted by Shelby County, Iowa.⁷⁷

Based on the foregoing and the arguments set forth in Summit’s Preemption Motion and its forthcoming Reply, the Commission should supersede and preempt the Burleigh and Emmons County ordinances.

VI. Conclusion.

This case has become unnecessarily complex and convoluted due to the multitude of Intervenors and Public Commentators and their attempts to distract the Commission from the legal

⁷⁵ *See Couser v. Shelby Cnty. Iowa*, No. 122CV00020SMRSBJ, 2023 WL 4420442 (S.D. Iowa July 10, 2023).

⁷⁶ *Id.* at 12 and 15.

⁷⁷ *See* Hrg. Tr. 84:21-22 (Ex. D).

requirements set forth in the Siting Act and the rules and regulations of the Commission. The evidence, however, firmly supports a finding that the construction, operation and maintenance of the Project will have minimal adverse effects on the environment and welfare of the citizens of North Dakota.

On February 1, 2023, the Commission deemed Summit's Application complete. *See* Docket No. 34. This means that the Commission had all of the information it needed in order to render a decision on Summit's Application on February 1, 2023. Since that time, a small, but vocal group, comprised of Public Commentators, county, township and city boards and officials, state legislators, members of the media, and their attorneys, have created an illusion that the proposed Project is somehow different than the hundreds, if not thousands, of miles of hazardous liquid pipeline currently operating in the State of North Dakota. In reality, the Project will be designed, constructed, operated and maintained like every other hazardous liquid pipeline in operation today.

In that regard, Summit has offered testimony from multiple experts with direct, first-hand experience in the design, construction, operation and maintenance of hazardous liquid pipelines.⁷⁸ The Intervenors, on the other hand, called only one.⁷⁹ As detailed herein, the majority of the arguments raised by Intervenors were either irrelevant or pertained to matters outside of the Commission's jurisdiction, i.e. safety, easements, insurance, etc. To the extent Intervenors and the public addressed matters relevant to the Commission's decision, the information offered to the Commission was largely based on conjecture, unfounded rumors and internet research, or, as Mr.

⁷⁸ James Powell, Erik Schovanec, Brigham McCown and John Godfrey

⁷⁹ Curtis Jundt

Bitner qualified it (in the context of drafting Burleigh County's hazardous liquid pipeline ordinance), "seriously educated research" conducted by citizens of Burleigh County.⁸⁰

Instead of focusing on issues relevant to the Summit's Application and the Siting Act, the Intervenors, Public Commentators and others engaged in a campaign of rhetoric and hyperbole that became so repetitive that one can no longer remember who said it and when. Statements such as "we'll have to go get, like, scuba tanks"⁸¹ and that North Dakota will become the "dumping grounds for projects that don't give us anything in return,"⁸² are not only untrue, they contribute nothing of value for the Commission to consider. Even worse, the testimony offered by Intervenors and the Public Commentators was often conflicting, i.e. we heard that the prevailing winds in Bismarck are "normally . . . north/northwest,"⁸³ then "north and northeast,"⁸⁴ and also "north to northeast."⁸⁵

Nevertheless, Summit is confident that the Commission will disregard all of these outrageous claims and rely on the undisputed evidence in this case. As set forth herein, Summit will be constructing the Project in accordance with all PHMSA requirements, and even exceeding such requirements to ensure the Project will be one of the safest pipelines in operation today. Summit has presented evidence that it has complied with all of the siting requirements, including, but not limited to matters relating to avoidance areas, exclusion areas, and its continuing coordination and cooperation with the North Dakota Geological Survey and the North Dakota

⁸⁰ See Hrg. Tr. 99:21-23 (Ex. D).

⁸¹ See Hrg. Tr. 172:4-5 (Ex. B) (statement by Karl Rockow).

⁸² *Id.* at 219:8-9 (statement by Kandi White).

⁸³ *Id.* at 173:3 (statement by Karl Rockow).

⁸⁴ See Hrg. Tr. 5:14-15 (Ex. E) (statement by John Warford).

⁸⁵ See Hrg. Tr. 23:1-2 (Ex. F) (statement by Chad Wachter).

State Historical Preservation Office. The Intervenors chose not to focus on these relevant issues and have thus failed to demonstrate otherwise.

Based on the foregoing, and because Summit has met all of the requirements under the Siting Act in its Application, the Commission should grant the certificate of corridor compatibility and route permit as requested in the Application.

DATED this 19th day of July, 2023.

FREDRIKSON & BYRON, P.A.

By: 

Lawrence Bender, ND Bar #03908
1133 College Drive, Suite 1000
Bismarck, ND 58501-1215
701.221.8700
lbender@fredlaw.com

Counsel for SCS Carbon Transport LLC

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

**SCS Carbon Transport LLC
Midwest Carbon Express CO2 Project
Sitting Application**

CASE NO. PU-22-391

CERTIFICATE OF SERVICE

I, the undersigned, being of legal age, hereby certify that a true and correct copy of the following:

1. Letter to S. Kahl forwarding documents for filing; and
2. Post Hearing Brief of SCS Carbon Transport LLC.

were, on July 19, 2023, filed with the North Dakota Public Service Commission and served electronically to the following:

Hope L. Hogan
hlhogan@nd.gov

John Hamre
jghamre@nd.gov

John Schuh
jschuh@nd.gov

Zachary Pelham
zep@pearce-durick.com

Randall J. Bakke
rbakke@bgwattorneys.com

Bradley N. Wiederholt
bwiederholt@bgwattorneys.com

Steven Leibel
steve@bismarck-attorneys.com

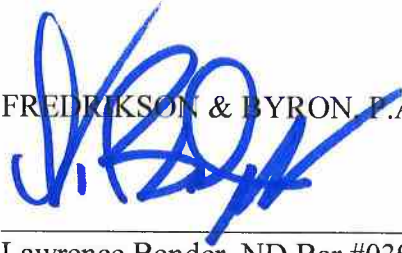
David Knoll
david@bismarck-attorneys.com

Brian E. Jorde
bjorde@dominalaw.com

Kevin Pranis
kpranis@liunagroc.com

Dated this 19th day of July, 2023.

FREDRIKSON & BYRON, P.A.

A handwritten signature in blue ink, appearing to be 'L. Bender', is written over the firm name.

By: _____

Lawrence Bender, ND Bar #03908
1133 College Drive, Suite 1000
Bismarck, ND 58501
lbender@fredlaw.com
(701) 221-8700

79685419 v1