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July 21, 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. Letter to S. Kahl forwarding documents for filing;
2. SCS Carbon Transport LLC's Reply in Support of its Motion to Declare Burleigh and Emmons County Ordinances Superseded and Preempted; and
3. 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/caj
Enclosures

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**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 |

**SCS Carbon Transport LLC's Reply in Support of its Motion to Declare Burleigh and Emmons County Ordinances Superseded and Preempted**

## INTRODUCTION

The Emmons County and Burleigh County Ordinances are not ordinary zoning ordinances. They were enacted to target SCS's project, over a year after SCS announced the route and at a time when SCS had already purchased millions of dollars in easements based on existing local ordinances.[1] Local ordinances like these (*i.e.*, local vetoes) are the very reason the legislature has put this Commission, and not individual counties, in control of siting pipelines. If every individual North Dakota county has veto authority over an interstate pipeline project, if NIMBYism were to become the rule in North Dakota, then no interstate pipeline will ever be built here again. If counties can pull the rug out from under applicants who have invested millions based on state law that expressly encourages carbon capture and sequestration ("CCS"), then there will be no CCS industry in North Dakota. The State's policy of "promot[ing] the geologic storage of carbon dioxide" can be thwarted by two county commissions. N.D.C.C. § 38-22-01.

[1] *See* SCS Right of Way progress chart, Dkt. Nos. 98 and 99, filed Mar. 29, 2023 (showing almost 60% of the right-of-way miles acquired by voluntary easement as of March 2023).

In their oppositions, the intervenors do not address that fact—because they do not care. The Counties claim that they don't want to kill the project or to preclude the pipelines altogether, but their off-the-cuff statements prove otherwise. "I wish [SCS] would just go away and put the final spike in it," Burleigh County Commissioner Steve Schwab said at a recent meeting.[2] He does not like $CO_2$ pipelines, and he does not care about CCS. He just wants it to "go away."

He is entitled to that opinion, but he is not entitled to dictate this State's energy and infrastructure polices. Yet that is exactly what he and his fellow commissioners in Burleigh and Emmons Counties are trying to do. Their efforts and the effects of their Ordinances will not stay confined to their respective Counties; they will affect the entire State. Ordinances like this would be the end of the CCS industry in North Dakota and the job creation and economic development that comes with it.

Take this project: Even if there were a theoretical route that SCS could thread through these Counties, the Ordinances indisputably ban the current route. Commissioner Bitner proudly proclaimed that SCS's pipeline route does not come "even close" to complying with Burleigh County's extraordinary (and perhaps longest-in-the-nation) setback distance of 10 miles from any city limit. *Statements by Bitner* (Ex. D to Post-Hearing Brief at 53–56). Nor does the proposed route comply with the other lengthy setbacks in the Burleigh and Emmons County Ordinances. *Statements by Bitner* (Ex. D to Post-Hearing Brief at 97–98). Even if there were some theoretical route through Emmons and Burleigh Counties, the pipeline would have to enter and exit those Counties in a different place than where SCS has proposed, which means that the route in neighboring counties would change, probably becoming longer. Easements that have already been

[2] https://dakotamediaaccess.net/CablecastPublicSite/show/9550?channel=2, at 46:26.

purchased in those neighboring counties would be worthless, and dozens—if not hundreds—of new landowners in those neighboring counties would be affected by a law enacted by commissioners who did not represent those landowners. That is why statewide siting, based on the legislature's policies, is necessary.

As discussed further below and in SCS's opening brief, the North Dakota Century Code, as revised in 2017, provides that this Commission's permit will automatically preempt those Ordinances. But there is no need to have that legal debate. Everyone agrees that this Commission *can* preempt the Emmons County and Burleigh County Ordinances, and so the Commission should do so. It should find that the Emmons County Ordinance and the Burleigh County Ordinance "are unreasonably restrictive in view of existing technology, factors of cost or economics, or needs of consumers regardless of their location" because they are indeed unreasonably restrictive, and also find that they are preempted by the federal Pipeline Safety Act (the "PSA").

## ARGUMENT

### I. THE COMMISSION'S DECISION TO ISSUE A PERMIT WILL AUTOMATICALLY PREEMPT THE ORDINANCES, BUT THE COMMISSION NEED NOT RULE ON THAT QUESTION OF STATUTORY INTERPRETATION.

The Bismarck Intervenors, Emmons County, and the Landowner Intervenors all argue that the Emmons County and Burleigh County Ordinances will not be automatically preempted by this Commission's decision to issue a permit to SCS for the proposed route. Those arguments are based on a misreading of the statute—and by "misreading," we mean that the parties remove key words from the statute to obtain their preferred result. Reading the statute correctly and in its entirety, it's clear that a permit for SCS's proposed route will automatically supersede the Emmons and Burleigh County Ordinances.

Emmons County argues that its Ordinance cannot be automatically preempted under subparagraph (2)(b) of N.D.C.C. § 49-22.1-13 because subparagraph 2(a) states that a "certificate of site compatibility **may not** supersede or preempt any local land use; zoning; or building . . . ordinances." (Bismarck Intervenor Br. 9) (emphasis in original). But the Bismarck Intervenors misquote the statute, leaving out eight key words. Subparagraph 2(a) states that "a certificate of site compatibility *for a gas or liquid energy conversion facility* may not supersede or preempt" local ordinances. N.D.C.C. § 49-22.1-13(2)(a) (emphasis added). The proposed pipeline is not an "energy conversion facility"; it is a "transmission facility" governed by subparagraph b, which states that "a permit for the construction of a gas or liquid transmission facility within a designated corridor supersedes and preempts any local land use or zoning regulations." N.D.C.C. § 49-22.1-13(2)(b). Emmons County makes the same flawed argument. (Emmons County Br. 4–5).

Emmons County and the Landowner Intervenors also rely on legislative history. But as legislative history often is, this "history" is a mixed bag. Some participants in the process correctly believed that under the 2017 legislation, which is now the law, the PSC's permit would automatically preempt zoning ordinances for pipelines.[3] The intervenors quote selective passages from individuals who believed, or in one case "hoped," that the law was not changing. But most of those passages are about section 2(a), which (again) applies only to "conversion facilities," which are not at issue here. *See* Landowner Br. 5–6 (quoting Chairman Porter's discussion of subparagraph 2(a)).[4] Whatever Chairman Porter said or believed about the preemptive effect of

[3] https://ndlegis.gov/files/resource/65-2017/library/sb2286.pdf, p. 54 (ltr from Geoff Simon, stating the 2017 changes, which is current law, "would essentially strip county zoning boards of their authority"), pp. 55–56 (ltr. from Lisa Lee, P&Z Admin for Mountrail County, stating that the 2017 changes, which is current law, would "usurp local zoning commissions").

[4] Available at https://ndlegis.gov/files/resource/65-2017/library/sb2286.pdf, pp. 17–18.

the Commission's decision on an energy conversion facility, it does not apply at all to a transmission facility. That is the plain language of N.D.C.C. § 49-22.1-13(2). And in any event, those stray and sometimes confusing (or confused) comments cannot change the plain text.

Finally, the Bismarck Intervenors argue that it would be absurd to argue that the permit preempts all zoning because "no one would believe for example that land zoned Agricultural within a pipeline corridor would suddenly lose the ability to have crops grown there or cattle grazing there because the zoning had been automatically superseded by subdivision 2b." (Bismarck Intervenor Br. 9). That is indeed absurd, but it is not what the statute says or what SCS argued. By saying that the permit "supersedes and preempts" local land use or zoning regulations, N.D.C.C. § 49-22.1-13(2)(b) is making clear that, by law, this Commission's permit preempts those local ordinances to the extent they regulate or are otherwise inconsistent with the construction and operation of the pipeline. If this Commission issues a permit to SCS for the proposed route, then the setback requirements of the Burleigh and Emmons County Ordinances do not apply; nor does SCS have to obtain a separate permit from those Counties, because *this* body—not each individual county or township—is responsible for siting pipelines.

The rest of the intervenors' statutory interpretation arguments are not based on legal reasoning or statutory analysis; the intervenors simply deny that the statute says what it says. In their view, the legislature rewrote the law in 2017 not to change the law but simply to add paragraphs and words and make the statute more confusing. That cannot be. And it should not be how the Commission interprets the law.

But the Commission does not need to weigh in on this question of statutory interpretation. The intervenors and the County are mistaken about the permit's automatic preemptive effect. But

everyone agrees that the Commission *can* preempt these Ordinances, and—for the reasons below—it should do so.

### A. The Emmons County and Burleigh County Ordinances are unreasonably restrictive and undermine the State's CCS policies.

In their brief, the intervenors appear to argue that the Burleigh County ordinance is not unreasonably restrictive because SCS could have always applied for a variance:

> [SCS] has never even made an attempt to communicate with the County to determine the County's position on its proposed pipeline route … Had [SCS] done so, … it would have learned there are special use and variance procedures available where there may be an apparent conflict with one or more of the setback requirements in the Ordinance. …
>
> Neither the Ordinance itself nor the County have done anything to alter or prevent [SCS's] proposed pipeline.

Dkt. No. 348 at pp. 5–7.

The intervenors' argument borders on frivolous. The intervenors cannot possibly believe that there was ever a chance that the Burleigh County Board of County Commissioners would have granted SCS a variance to the setback requirements. The Board enacted those setback requirements for the sole purpose of preventing the construction of SCS's pipeline. The fact that Burleigh County has a procedure for SCS to apply for a variance that will undoubtedly be denied does not make those setback requirements any less unreasonably restrictive.

Other than their argument that SCS could have sought a variance, the intervenors' only argument as to why they believe that the Ordinances are not unreasonably restrictive is essentially that SCS has not proven that the Ordinances prohibit every single route through Emmons County and Burleigh County. But although the Ordinances *are* effectively prohibitive, that is not the standard; even under the Counties' reading of the statute, the Ordinances should be preempted if they are "unreasonably restrictive." And they are. Recently, the Chief Judge of the United States

District Court for the Southern District of Iowa struck down a rural county ordinance enacted by Shelby County, Iowa, holding that it was preempted by the Iowa Utilities Board's siting authority. This is the same Shelby County Ordinance that Burleigh County initially modeled its Ordinance after, but with much more modest setback requirements than Burleigh County's. Chief Judge Rose wrote that "common sense suggests that these [setback] restrictions would eliminate all or almost all land in Shelby County on which an [Iowa Utilities Board] approved pipeline could be built." *Couser v. Shelby Cnty. Iowa*, No. 122CV00020SMRSBJ, 2023 WL 4420442, at *12 (S.D. Iowa July 10, 2023).

Common sense requires the same result here. Even though Burleigh County does not have jurisdiction over every township *yet*, its Ordinance is prohibitive in every part of the County that the Ordinance touches. That effective prohibition, which the intervenors do not deny, is something that this Commission cannot and should not accept, especially when the Burleigh County Commission enacted the Ordinance well after SCS began acquiring right of way. The same goes for Emmons County. As noted in SCS's opening motion, carbon capture technology—and the necessary pipeline infrastructure that goes with it—have been at the forefront of North Dakota energy policy for years. Passing an ordinance that prohibits a proposed CCS project, a year after it was announced and months after the application is on file with this Commission, is "unreasonably restrictive."

That is especially true when there is no need for these setback requirements. The State has already set a policy of requiring a 500 foot setback, and the legislature voted down a bill this session to expand it to 1,000 feet.[5] There is no reason to allow Emmons County to enforce setback

[5] See Senate Bill No. 2212, available at https://ndlegis.gov/assembly/68-2023/regular/documents/23-0637-01005m.pdf (proposed bill); https://ndlegis.gov/assembly/68-2023/regular/bill-actions/ba2212.html?bill_year=2023&bill_number=2212 (showing the 1,000-foot amendment failed).

requirements that are three to four times that distance. Nor is there is any basis for Burleigh County to establish setback requirements that exceed the state requirement by as much as 20 times.

As SCS explained during the hearing and in its post-hearing brief, based on existing technology, the proposed route (which abides by the state setback) is safe, and development can continue around it. There is no purpose or need for greater setback requirements, aside from killing this project. The same goes for Burleigh County's competing permitting process and hearing. It would simply supplant this Commission's authority. And that, by definition, is unduly restrictive. SCS therefore respectfully requests that the Commission find that the Emmons County Ordinance enacted on February 7, 2023 and the Burleigh County Ordinances enacted on March 6, 2023, March 20, 2023, and April 17, 2023 are, for purposes of this project, unreasonably restrictive in view of existing technology, factors of cost or economics, and consumers' needs regardless of their location.

## II. THE FEDERAL PIPELINE SAFETY ACT ALSO PREEMPTS THE ORDINANCES.

### A. The Commission must enforce N.D.C.C. § 49-22.1-13 regardless of its constitutionality.

Before explaining how the PSA preempts the Ordinances, SCS must address an argument raised by Emmons County in its brief. Section 49-22.1-13, N.D.C.C., grants the Commission the power to preempt local ordinances if the Commission finds that the ordinances "are in direct conflict with state or federal laws or rules." N.D.C.C. § 49-22.1-13(2)(c). Emmons County argues that granting this power to the Commission is unconstitutional. According to Emmons County, "[t]he delegation of adjudicative power to the Commission to determine whether local ordinances 'are in direct conflict with state or federal laws or rules' is an unconstitutional usurpation of the judicial function . . ." Dkt. No. 350 at ¶ 16.

North Dakota Supreme Court precedent requires the Commission to ignore this argument. "[A]dministrative agencies have no authority to decide upon the constitutionality of the statutes under which they operate." *Johnson v. Elkin*, 263 N.W.2d 123, 126 (N.D. 1978). In order to "make the system of administrative agencies function the agencies must assume the law to be valid until judicial determination to the contrary has been made." *First Bank of Buffalo v. Conrad*, 350 N.W.2d 580, 585 (N.D. 1984). As a result, the Commission must assume that N.D.C.C. § 49-22.1-13 is valid and enforce it accordingly.

**B. The PSA preempts the Ordinances.**

The Ordinances are preempted because they purport to impose their own safety standards on federally regulated pipelines. The PSA's preemption clause explicitly states that a "State authority may not adopt or continue in force safety standards for interstate pipeline facilities . . ." 49 U.S.C.A. § 60104(c). This clause is "a sweeping exercise of express preemption." *Couser v. Shelby Cnty. Iowa*, No. 122CV00020SMRSBJ, 2023 WL 4420442, at *7 (S.D. Iowa July 10, 2023) (emphasis added). In the words of the Eighth Circuit, the clause "leaves nothing to the states in terms of substantive safety regulation of interstate pipelines, regardless of whether the local regulation is more restrictive, less restrictive, or identical to the federal standards." *ANR Pipeline Co. v. Iowa State Commerce Comm'n*, 828 F.2d 465, 470 (8th Cir. 1987) (emphasis added).[6]

Emmons County and the intervenors try to sidestep binding Eighth Circuit precedent by arguing that the challenged Ordinances do not impose safety standards on the pipeline. *See*

[6] *See also Kinley Corp. v. Iowa Utilities Bd., Utilities Div., Dep't of Commerce*, 999 F.2d 354, 359 (8th Cir. 1993) ("Congress granted exclusive authority to regulate the safety of construction and operation of interstate hazardous liquid pipelines to the Secretary of the Department of Transportation. This Congressional grant of exclusive federal regulatory authority precludes state decision-making in this area altogether . . .").

Bismarck Intervenors Resp. at 14; Intervenors' Resp. at ¶¶ 12, 13; Emmons County Resp. at ¶¶ 19, 21. That is wrong: The Ordinances do impose safety standards regardless of how they're labeled or how Emmons County and the intervenors try to spin them. *See, e.g.*, Intervenors' Resp. at ¶ 14 ("[T]hese local ordinances preserve the economic vitality and value of local property . . . ."). The United States District Court for the Southern District of Iowa recently rejected a similar argument.[7]

The Burleigh County Ordinance enacted on March 6, 2023 ("A Burleigh County Ordinance for *Safety* Regulations when Transporting Hazardous Liquid Through a Hazardous Liquid Pipeline") requires the following: (1) SCS must provide its safety procedures and protocols to any landowners within the pipeline's site boundaries and to any other interested persons; (2) SCS must provide a copy of its emergency action plan to Burleigh County Emergency Management; (3) if the Pipeline and Hazardous Materials Safety Administration of the U.S. Department of Transportation (PHMSA) has adopted regulations specifically related to emergency preparedness, emergency response, or hazard mitigation planning for hazardous liquid pipelines, then it requires SCS to submit a copy of the emergency response and hazard mitigation plan to Burleigh County Emergency Management; and (4) if PHMSA has not adopted regulations specifically related to emergency preparedness, emergency response, or hazard mitigation planning for hazard liquid

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[7] *See Couser*, 2023 WL 4420442, at *1. The *Couser* court correctly applied the Eighth Circuit precedent, and the Commission should follow suit. *See Kinley*, 999 F.2d at 358–59 ("Congress has expressly stated its intent to preempt the states from regulating in the area of safety in connection with interstate hazardous liquid pipelines. For that reason, the state cannot regulate in this area[.]"); *see also ANR Pipeline Co.*, 828 F.2d at 470 ("Congress intended to preclude states from regulating in any manner whatsoever with respect to the safety of interstate transmission facilities" and left "nothing to the states in terms of substantive safety . . . ."); *Exxon Corp. v. U.S. Sec'y of Transp.*, 978 F. Supp. 946, 950 (E.D. Wash. 1997); 49 C.F.R. § 195, App. A ("The [Act] leaves to exclusive Federal regulation and enforcement the 'interstate pipeline facilities,' those used for the pipeline transportation of hazardous liquids in interstate or foreign commerce.").

pipelines, then it requires SCS to submit a copy of any emergency response and hazard mitigation plan required under local zoning ordinances to Burleigh County Emergency Management. *See* Dkt. No. 161 at pp. 2–4.[8]

Under the PSA, "[a] [s]tate authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation." 49 U.S.C. § 60104(c). "The statute delegates sole authority to enact safety provisions to the PHMSA." *Couser*, 2023 WL 4420442, at *14 (citing 49 U.S.C. § 60102(a)(2)). The standards cover "the design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities." 49 U.S.C. § 60102(a)(2)(B). Using that authority, PHMSA requires companies to implement a manual describing its process for responding to "emergencies." 49 C.F.R. § 195.402; *Couser*, 2023 WL 4420442, at *14. The pipeline companies must have certain materials on hand, the ability to provide an effective response to different types of emergencies, and have an emergency shut-off valve. 49 C.F.R. § 195.402(e)(2–4). The safety procedures must include steps to control the release of materials during "an accident" and minimize "public exposure to injury." 49 C.F.R. § 195.402(e)(5–6).

Under that framework, the *Couser* court considered a Shelby County, Iowa ordinance that—like the March 6 Burleigh County Ordinance—imposed various obligations on pipeline companies to implement and submit emergency management and hazard response plans. *Couser*,

[8] The intervenors have admitted that these requirements are "essentially what PHMSA already requires." Dkt. No. 348 at p. 15. This admission is fatal to their argument that these requirements are not preempted. The Burleigh County Board of County Commissioners "is not free to regulate in th[e] area [of pipeline safety], even if it adopts standards identical to the federal standards." *ANR Pipeline Co.*, 828 F.2d at 472 (emphasis added). The PSA "leaves nothing to the states in terms of substantive safety regulation of interstate pipelines, regardless of whether the local regulation is . . . identical to the federal standards." *Id.* at 470 (emphasis added).

2023 WL 4420442, at *14–15. The court held that federal law preempted those provisions in the Ordinance:

> The statute provides the Secretary of Transportation with the authority to enact emergency response and hazard mitigation plans. 49 U.S.C. § 60102(a)(2)(B). This authority is limited solely by the statute, which provides a framework for the regulations. 49 U.S.C. § 60102(r). Courts have understood the statute to provide the Secretary with "exclusive authority to regulate the safety . . . of interstate hazardous liquid pipelines." *Kinley Corp.*, 999 F.2d at 359. This language precludes states and municipalities "from regulating in any manner whatsoever with respect to the safety of . . . facilities." *ANR Pipeline Co.*, 828 F.2d at 470. In light of this, the Court concludes that express preemption invalidates the Ordinance's emergency response and hazard mitigation provisions.

*Id.* at *15.

The same reasoning applies here to defeat the intervenors' argument that "[a]ll of the objectionable Ordinance 'safety' provisions referenced by [SCS] in its motion . . . relate to issues already required in the federal regulations. . . ." Bismarck Intervenors Resp. at 15. The statute delegates to PHMSA "*sole* authority to enact safety provisions." *Couser*, 2023 WL 4420442, at *14 (emphasis added). That sole authority answers the intervenors' rhetorical question: "Conversely, if PHMSA or another federal agency had not promulgated regulations . . . how could Burleigh County's Ordinance be said to conflict with what has *not* been promulgated?" Bismarck Intervenors Resp. at 16. PHMSA's authority to promulgate—or not promulgate—safety regulations is exclusive. *See Couser*, 2023 WL 4420442, at *14.

The Burleigh County Ordinance enacted March 20, 2023 and the Emmons County Ordinance enacted February 7, 2023 fare no better. They both impose burdensome separation or setback requirements that are intended as safety standards. *See* Dkt. No. 161 at p. 8 (March 20 Ordinance is designed to "(1) to secure safety from fire, flood, panic, and other dangers; (2) to protect health and the general welfare . . ."); Dkt. No. 41 (Emmons County Ordinance requires setback from cities, residences, buildings, surface water bodies, and highway rights-of-way).

Emmons County argues that its Ordinance's setback requirements only "ask[ ] the applicant to submit documents from the PSC siting and routing proceeding" and "regulat[e] location and routing." Emmons County Resp. ¶¶ 18, 21. And it notes that the PSA does not authorize the Secretary of Transportation to prescribe the location or routing of a pipeline facility. 49 U.S.C. § 60104.

The PSA itself shows that Emmons County's setback requirements are safety regulations rather than "location and routing" regulations. The PSA expressly disavows location and routing authority, but it provides that "[p]ipeline right-of-way must be selected to avoid, as far as practicable, areas containing private dwellings, industrial buildings, and places of public assembly" and "[n]o pipeline may be located within 50 feet (15 meters) of any private dwelling, or any industrial building or place of public assembly in which persons work, congregate, or assemble, unless it is provided with at least 12 inches (305 millimeters) of cover in addition to that prescribed in § 195.248." 49 C.F.R. § 195.210. Taken together, that shows that setback requirements—like those in the Ordinances—are safety regulations, not an exercise of location and routing authority. Otherwise, the PSA wouldn't promulgate setback requirements. *Cf.* 49 U.S.C. § 60104. The setbacks are safety standards preempted by the PSA.

In their brief, the intervenors point to the fact that SCS is not challenging the Commission's own setback requirements as preempted by federal law and appear to argue that this is some sort of concession by SCS that setback requirements are not safety standards:

> [SCS] has conceded since the beginning of this case that the State's own statutory 'exclusion and avoidance areas'—including those specified in N.D.C.C. § 49-22.1-03—are valid and must be followed by [SCS] and by the Commission. [SCS] does not explain why it believes the State's setbacks are not preempted but Burleigh County's setbacks suddenly are. Indeed, [SCS] fully concedes Chapter 49-22.1 must be applied by the Commission in making its determination on [SCS's] application. ... It is disingenuous for

> [SCS] to argue the State's own avoidance and siting statutes are not preempted by a federal regulation but Burleigh County's and Emmons County's ordinances are.

Dkt. No. 348 at pp. 17–18.

Despite the intervenors' contentions to the contrary, SCS has never "conceded" that the Commission's setbacks are valid. In fact, it is SCS's position that the Commission's setbacks—as applied to interstate pipelines—are likely preempted by the PSA. After all, that statute prohibits state authorities from adopting "safety standards" and the Department of Transportation has adopted a setback requirement as a safety standard. *See* 49 C.F.R. § 195.210(b).

But the Commission need not decide whether its setbacks are preempted because SCS is not challenging those setbacks. In SCS's view, the Commission's setbacks are reasonable, and SCS does not object to voluntarily complying with them.[9] If Burleigh and Emmons Counties had adopted setbacks as reasonable as the Commission's, SCS likely would also have voluntarily complied with them. But Burleigh and Emmons County failed do this. Instead, they adopted some of the most restrictive setbacks in the country in an attempt to make construction of SCS's pipeline all but impossible. By doing this, the Counties gave SCS no choice but to challenge their setbacks. The difference in the reasonableness of the Commission's setbacks and the Counties' setbacks explains why SCS challenged one but not the others. There is nothing inconsistent about SCS not

[9] SCS implementing reasonable standards that are more stringent than PSA standards is nothing new. For example, whereas federal law requires the cover between the top of a pipeline and the ground level to be anywhere between 30 and 48 inches, *see* 49 C.F.R. 195.248, SCS has voluntarily chosen to make the cover between the top of its entire pipeline and the ground level 48 inches. As another example, whereas federal law only requires at least 12 inches of clearance between a pipeline and any other underground structure, *see* 49 C.F.R. § 195.250, SCS has voluntarily chosen to include at least 24 inches of clearance between its pipeline and any other underground structure. As another example, whereas federal law only requires 10% of the girth welds of a pipeline to be nondestructively tested, *see* 49 C.F.R. § 195.250(d), SCS has voluntarily chosen to nondestructively test 100% of the girth welds of its pipeline. Finally, whereas federal law requires that every pipeline have a cathodic protection system that is operational not later than one year after the pipeline is constructed, *see* 49 C.F.R. § 195.563(a), SCS has voluntarily decided to make the cathodic protection system of its pipeline operational at the time that construction of the pipeline is completed. These four standards are just a few of the many examples of SCS voluntarily choosing to comply with standards that SCS is not legally required to comply with.

challenging certain setbacks that are reasonable at the same time that it challenges other setbacks that are unreasonable.

In sum, the Counties' supposed "location and routing" regulations are really a pipeline ban. *Compare Couser*, 2023 WL 4420442, at *12 (reasoning in the context of state law preemption that, "[c]ommon sense suggests these restrictions would eliminate all or almost all land in Shelby County on which an IUB approved pipeline could be built."). The Ordinances impermissibly implement "safety standards for interstate pipeline facilities or interstate pipeline transportation" (49 U.S.C. § 60104(c)), so they are void as a matter of federal law under the doctrines of express and field preemption.

## CONCLUSION

For the reasons set forth above and in SCS's opening brief, the Commission should declare the Emmons and Burleigh County Ordinances superseded and preempted.

Dated this 21st day of July, 2023.

FREDRIKSON & BYRON, P.A.

By: _____

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

**SCS Carbon Transport LLC** **CASE NO. PU-22-391**
**Midwest Carbon Express CO2 Project**
**Sitting Application**

## 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. SCS Carbon Transport LLC's Reply in Support of its Motion to Declare Burleigh and Emmons County Ordinances Superseded and Preempted.

were, on July 21, 2023, filed with the North Dakota Public Service Commission and served electronically to the following:

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