

STATE OF NORTH DAKOTA

DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Emmons County,

Case No.

Appellant,

vs.

**NOTICE OF APPEAL AND
SPECIFICATIONS OF ERROR**

North Dakota Public Service Commission
and SCS Carbon Transport LLC,

Appellees.

**TO: NORTH DAKOTA PUBLIC SERVICE COMMISSION, NORTH DAKOTA
ATTORNEY GENERAL DREW WRIGLEY, AND SCS CARBON TRANSPORT
LLC:**

[¶ 1] PLEASE TAKE NOTICE that Appellant Emmons County, pursuant to N.D.C.C. § 28-32-42, hereby give notice of its appeal from the February 7, 2024 Order by the North Dakota Public Service Commission (“PSC” or “Commission”) in PSC Docket PU-22-391 (OAH File No. 20230002). A copy of the order is attached hereto as Exhibit A.

[¶ 2] Pursuant to the challenged order, the PSC ordered “North Dakota Century Code Section 49-22.1-13 automatically supersedes and preempts any local land use or zoning regulations for a gas or liquid transmission facility route permit.” PSC Docket Number 440.

[¶ 3] SCS Carbon Transport LLC (“Summit”) filed an Application for Certificate of Corridor Compatibility and Route Permit and Waiver on October 17, 2022. PSC Docket Number 1. Emmons County filed a Petition to Intervene and Response in Opposition to Superseded and Preempted Motion on June 30, 2023. PSC Docket Number 350. An Order Granting Emmons County’s Petition for Intervention was entered on July 11, 2023. PSC Docket Number 354.

[¶ 4] The PSC issued an Order on August 4, 2023 denying Summit's application for waiver of procedures and time schedules, application for a certificate of corridor compatibility and application for a route permit. PSC Docket Number 366.

[¶ 5] On August 18, 2023, Summit filed a Petition for Reconsideration, Notice of Route Adjustment and Request for Limited Rehearing. PSC Docket Number 371. The PSC issued an Order on Petition for Reconsideration dated September 15, 2023 granting Summit's petition for reconsideration and granting a rehearing. PSC Docket Number 396. On December 21, 2023 a formal hearing was held regarding the application of N.D.C.C. § 49-22.1-13 to local land use or zoning regulations. PSC Docket Number 427. The PSC issued an order on February 7, 2024 that N.D.C.C. § 49-22.1-13 that preemption is automatic and it need not make any factual findings. PSC Docket Number 440.

[¶ 6] Venue lies with this court pursuant to N.D.C.C. § 28-32-42(3)(a), which provides that the appeal of an agency determination "may be taken to the district court designated by law, and if none is designated, then to the district court of the county in which the hearing or a part thereof was held." No other district court is designated by law for this appeal, and the hearing on the order challenged was held in the Pioneer Room at the State Capitol in Bismarck, Burleigh County, North Dakota. Therefore this appeal is appropriately venued in Burleigh County.

[¶ 7] Emmons County appeals the Order dated February 7, 2024 as the PSC erred as a matter of law by interpreting N.D.C.C. § 49-22.1-13 and applying it as it did in its Order. The Order is not in accordance with the law and does not comply with the requirements of N.D.C.C. § 49-22.1-13, and the rules by which the PSC applied that statute did not afford Emmons County a fair hearing. The PSC failed to make factual findings that support its conclusions of law and there is no factual support for any findings of fact that would support the PSC's legal conclusions.

[¶ 8] WHEREFORE, Emmons County requests that this Court enter an order reversing the decision below and remanding to the Public Service Commission for further proceedings consistent with this Court's order, awarding costs and attorneys' fees to Emmons County pursuant to N.D.C.C. § 28-32-50, and granting any and all other relief to which Emmons County may be entitled.

DATED this 7th day of March, 2024.

BRAATEN LAW FIRM

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STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

**SCS Carbon Transport LLC
Midwest Carbon Express CO2 Pipeline Project
Siting Application**

Case No. PU-22-391

ORDER

February 7, 2024

Preliminary Statement

On November 28, 2023, the Commission issued a Notice of Hearing on Motion, scheduling a hearing for December 21, 2023, at 2:00 p.m. central time in the Pioneer Room, State Capitol Judicial Wing, Ground Floor, Bismarck, North Dakota 58505 (Hearing). The Notice identified the issue to be considered and argued is the application of North Dakota Century Code Section 49-22.1-13 to local land use or zoning regulations.

On December 21, 2023, the Hearing was held as scheduled. SCS Carbon Transport LLC (SCS), Emmons County, Burleigh County, Bismarck Area Intervenors (BAI), Landowner Intervenors, and the Laborers District Council Minnesota and North Dakota (Laborers) provided oral argument.

Discussion

On October 17, 2022, SCS filed applications for a certificate of corridor compatibility and for a route permit concerning approximately 320 miles of carbon dioxide pipeline ranging from 4.5 to 24-inch diameter and associated facilities in Burleigh, Cass, Dickey, Emmons, Logan, McIntosh, Morton, Oliver, Richland and Sargent Counties, North Dakota (Application). During the proceeding, SCS filed a motion requesting the Commission to declare Emmons County and Burleigh County ordinances superseded and preempted pursuant to N.D.C.C. § 49-22.1-13(2)(b). On August 4, 2023, due to the Commission's denial of the applications, the issue of superseding and preemption was declared moot.

On August 18, 2023, SCS filed a petition for reconsideration, requesting an opportunity to present relevant evidence at a hearing to address deficiencies noted in the Commission's August 4, 2023, Order. On September 15, 2023, the Commission issued an Order granting the SCS petition for reconsideration. On September 29, 2023, SCS renewed its motion to declare Burleigh and Emmons County ordinances superseded and preempted, specifically requesting the Commission determine whether N.D.C.C. § 49-22.1-13(2)(b) automatically preempts all local ordinances.

SCS argued that a permit from the Commission automatically preempts local land use or zoning regulations under N.D.C.C. § 49-22.1-13(2)(b). During oral argument, SCS suggested that subdivisions a, b, and c of N.D.C.C. § 49-22.1-13(2) provide substantive categories and distinctions in treatment as never, always, and sometimes preempted. SCS further discussed that subdivisions d and e are implementation rather than substantive categories. SCS submitted that the plain language of N.D.C.C. § 49-22.1-13(2)(b) is clear that automatic preemption is applied to local land use or zoning regulations. SCS argued that having a determination will help steer the hearing and evidentiary issues to be considered upon reconsideration.

SCS also argued that even if the Commission is required to apply the unreasonably restrictive factors, the conflict with federal law and unreasonableness is clear on the face of the ordinances. For example, SCS pointed to excessive setbacks in Emmons and Burleigh counties, arguing that they create a cumulative impact blocking out extensive areas, especially considering they were adopted after the project started.

Emmons County disputed SCS's interpretation of N.D.C.C. § 49-22.1-13(2). Emmons County argued that a permit supersedes and preempts local land use or zoning regulations, except as provided in 49-22.1-13(2), requiring further examination of the section. Emmons County argued that "requirements" under subdivision c are synonymous with zoning ordinances and regulations. As a result, Emmons County argues that SCS must demonstrate by the preponderance of the evidence that the local land use or zoning regulations are unreasonably restrictive.

Burleigh County argued that N.D.C.C. § 49-22.1-13(2)(b) specifies the permit to construct supersedes and preempts local land use or zoning regulations, but that a permit to construct is not in front of the Commission. BAI joined this argument, emphasizing that SCS has applied for a certificate of site compatibility — not a permit to construct. BAI argued that SCS must first apply for a special use permit from Burleigh County with a first right of appeal to the Public Service Commission, and that a reading otherwise contradicts N.D.C.C. § 11-33-01.

The Landowner Intervenor briefed that siting is a two-step process of first granting a certificate of site compatibility which may not supersede and preempt local land use or zoning regulations, and then the permit for construction. Landowner Intervenor argued that only the route permit automatically supersedes and preempts local land use or zoning regulations, and N.D.C.C. § 49-22.1-13(2)(d) applies to a certificate of corridor compatibility.

Laborers argued that local government does not have authority to establish requirements inconsistent with state law, rules, and Commission orders. They emphasized that routing infrastructure through a "regulatory patchwork" will hinder orderly development.

The issue before the Commission is not whether it may preempt local land use or zoning regulations, but whether preemption is automatic. N.D.C.C. § 49-22.1-08 provides that a utility may combine an application for a certificate or permit. SCS's Application is a consolidated application for a certificate of corridor compatibility and for a route permit. The Commission concludes that, based on the plain language of N.D.C.C. § 49-22.1-13, the approval of a route permit for a gas or liquid transmission facility automatically supersedes and preempts local land use or zoning regulations, except for road use agreements, even though local ordinances may be filed for Commission review and consideration. By function of the consolidated application, local land use and zoning regulations are automatically superseded and preempted in the present case.

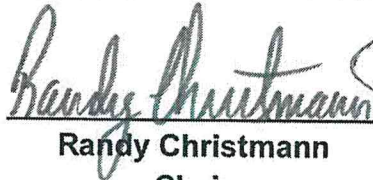
Order

The Commission Orders North Dakota Century Code Section 49-22.1-13 automatically supersedes and preempts any local land use or zoning regulations for a gas or liquid transmission facility route permit.

PUBLIC SERVICE COMMISSION



Sheri Haugen-Hoffart
Commissioner



Randy Christmann
Chair



Timothy J. Dawson
Substitute decisionmaker