KNOLL LEIBEL LLP
ATTORNEYS AT LAW

July 22, 2024

VIA U.S. MAIL & E-MAIL ONLY: ndpsc@nd.gov
Steve Kahl
Executive Secretary
North Dakota Public Service Commission
State Capitol
600 E Boulevard Ave, Dept 408
Bismarck, ND 58505-0480

RE: In the Matter of the Application of SCS Carbon Transport LLC for Certificate of Corridor Compatibility and Route Permit for the Midwest Carbon Express
Case No.: PU-22-391

Dear Mr. Kahl:

Enclosed for filing please find the following documents:

1. Landowners' Post-Rehearing Reply Brief with Attachment 1; and
2. Declaration of Service.

The enclosed Reply Brief is being filed with the North Dakota Public Service Commission (hereinafter "NDPSC") on behalf of the Intervenors represented by Knoll Leibel LLP. These Intervenors have a direct and substantial interest in these proceedings, as well as legal property rights which may be substantially affected by NDPCS' findings and conclusions.

Sincerely,

KNOLL LEIBEL LLP

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Enclosures

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STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

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 **LANDOWNERS' POST-REHEARING REPLY BRIEF**

Landowner Intervenors, herein "Landowners" and "Intervenors" represented by the undersigned counsel respectfully submit their Post-Rehearing Reply Brief.

ARGUMENT

1. All arguments in Landowners' Opening Brief are incorporated here but not restated.

2. The PSC's Conclusions of Law numbers 7, 8, and 9 as found on page 11 and 12 of the 2023 Denial Order specifically and categorically conclude Summit failed to meet its burden in every aspect of Summit's required proof.

3. Summit's post-hearing opening brief is premised on an incorrect presumption. Summit wants the PSC to conclude that certain issues were decided in the August 4, 2023, denial order, such that certain topics need not be revisited now. However, the 2023 denial order was specific to the applications before the PSC and can only be applied to the two applications and the specific route described in the 2022 applications. No issues were previously decided as to any reroute or route deviations

of any kind as presented in the Reconsideration portion of this process. It would be impossible to pre-decide on an unknown route. While Summit couched the second phase of these proceedings as "reconsideration" the reality remains – you cannot reconsider that which you never considered. To the extent Summit claims phase two evidence or cross-examination was irrelevant, look no further to the pre-filed testimony Summit submitted. Summit framed the issues for phase two proceedings and the issues raised and claims made by Summit were similar or identical to those raised initially. Summit opened the door for all the evidence, argument, and questioning that occurred during the 2024 proceedings. Clearly, Summit did not believe these issues were decided or they would have never offered new testimony on the same topics. See generally Summit's pre-filed testimony received in the 2024 proceedings, specifically James Powell and his attachments and Wade Boeshans. Additionally, no evidence was previously presented regarding any reroutes not previously presented to the PSC in 2023, therefore, there could be no redundant evidence as to those new reroutes.

I. Irrelevant, Insufficient, and Unreliable Evidence

4. Intervenors and public testifiers do not have a burden of proof. The burden of proof rests solely with Summit. Intervenors need not disprove Summit's claims. Only Summit must prove its claims and allegations, and it did not.

5. Per NDAC Section 69-02-05-01, the North Dakota Rules of Evidence apply to these proceedings. There was no waiver of evidentiary rules. Summit was long on

claims but short on proof. Summit's purported proof was largely speculative and lacking requisite foundational support.

a. Summit's economic claims.

6. Summit's economic claims, whether it be temporary out-of-state workers coming into North Dakota, personal property taxes, or alleged increase in Tharaldson ethanol's profits, are not relevant to the key elements framing this proceeding. A claim of economic benefit does nothing to prove if the proposed pipeline will have minimal adverse effects and impact on the environment or welfare of the citizens or whether the pipeline is compatible with the efficient use of resources. There is no place for economic claims as they don't address the elements of proof specific to these proceedings. Yes, industry always focuses on claimed economic benefits in its attempt to turn the regulatory body, here the PSC, into an economic development unit of the government. But the PSC is not an economic development unit, and it should not think or make decisions as if it is. While considering economic impacts may be something the PSC generally reviews, such impacts do not advance Summit's burden on its operative elements of proof.

b. No environmental benefits

7. Likewise, speculative environmental benefits also do not move the needle on questions of adverse impacts, for example, we could all hypothetically agree a particular project will improve a singular aspect of environmental concern but that doesn't prove the pipeline itself produces minimal impact upon the environment. In its Application summit claims a purpose and need for "the project" is to "mitigate[s]

ethanol's environmental impacts..."[1] However, Summit failed to prove what that impact is or why it matters to North Dakotans or others.

8. Summit is wonderful at clouding the issues and dancing dollars around to distract from the evidence it needed to present but did not. To the extent any economic impacts should be considered, those would only be to the proposed facility and here that is the pipeline only. The PSC has no jurisdiction over capture facilities or over storage facilities over "the Project." There are no proven net benefits of the proposed pipeline, and any claimed indirect benefits were not supported by competent or reliable evidence. Stripping out economic claims, including alleged economic benefits to the ethanol industry, and the unreliable environmental claims associated with CO2 sequestration, what evidence exists, in the face of all opposition testimony and opposition evidence, to approve these applications? Not enough.

c. Landowner concerns unaddressed.

9. Summit has not taken the steps to address legitimate impacts expressed by Landowners and by those during public comment nor did Summit justify why a reroute is not feasible.

II. Anthropogenic or Non-Biogenic CO2 vs. Biogenic CO2

10. CO2 emanating from ethanol plants is biogenic, that is it is natural. Biogenic carbon is absorbed and stored in the corn plant. Non-biogenic or anthropogenic carbon has not been absorbed by living matter and most commonly describes carbon stored in fossil fuels. It is this anthropogenic carbon that is produced from burning fossil fuels

[1] See Application Section 2.2.1 Purpose and Need

that is the environmental concern. The CO2 re-released from the processing of corn in ethanol facilities is biogenic and comes from the natural fermentation process. Hence, the release of CO2 from ethanol plants during the fermentation process is net-zero CO2 given the corn has already absorbed CO2 and the fermentation process simply re-releases CO2 that already existed. Summit's pipeline and project is a tax credit capture scam and nothing more.

III. Need versus Want

11. The reality is that Summit and its supporters salivating over money all "want" the hazardous pipeline constructed. But no one "needs" the hazardous pipeline to be constructed. When evaluating the legal elements of proof, the concept of Summit's "want" should not be substituted for North Dakota's "need." When analyzing the "efficient use of resources" (See burden of proof 2, pg. 11, 2023 denial order) the purported "need" of the project should be considered. It is impossible to efficiently use resources for an unneeded project.

12. Here there was no "need" evidence offered by Summit. The out-of-state workers who would work on this project are already working, the ethanol plants who want to use the project are already reporting record profits, and Summit's investors are plenty rich already. Sacrificing North Dakota's resources for that private gain is not justified. Summit repeatedly testified it will only transport CO2 for permanent sequestration, meaning it will never be used for enhanced oil recovery "EOR." Therefore, argument and supporting comments of how beneficial CO2 for EOR may be are also irrelevant and the PSC cannot attribute theoretical benefit to the oil

industry as justification for these applications. None of the landowners who are playing unwilling host or the so-called "voluntary" easement givers "need" a hazardous CO2 pipeline on their land. The communities through which the proposed pipeline would traverse don't "need" it for any purpose. The first responders and emergency response personnel don't "need" another ticking time bomb to plan and budget for or worry about. The pipeline does not transport energy.

13. Along the same line, the argument that over 2,000 miles of pipeline is superior as a transportation mode than other options is a red-herring. That argument assumes CO2 needs to be transported by pipeline at all. This hasn't been proven.

IV. Alternative Route Possibilities South of Bismarck

14. Instead of presenting evidence in conformance with PSC's directive, Summit set up a strawman in attempts to accomplish its goal of not presenting legitimate southern route options. The PSC did not say to intentionally select a single route south of Bismarck that can easily be foiled against the proposed reroute. But that is what Summit did. They failed to in good faith analyze alternative route possibilities, of which there are infinite, and thus they fail on that requirement. Summit instead cherry-picked a bad southern route so it could justify its bad proposed northern reroute. Summit did not want to go south of Bismarck, so it made no effort to do so.

15. Weighing against Summit is the fact its proposed route leaves North Dakota by exiting Dickey County into South Dakota. This begs the question, does re-entry in McIntosh County satisfy the burden of proof? Summit could have stayed in South Dakota from the Dickey County exit point and reentered North Dakota in Sioux or

Adams counties and then head north to Mercer and Oliver eliminating Burleigh, McIntosh, Emmons, and Oliver counties from route consideration. Now for the elephant in the room – Summit didn't want to deal with the Standing Rock Sioux. But that doesn't help Summit satisfy its burden of proof as to the citizens of North Dakota. Summit's willingness to force themselves upon unwilling North Dakota landowners should be weighed against all the non-North Dakota route possibilities Summit failed to consider or present to the PSC.

16. Landowner Intervenors suspect Burleigh County will more fully discuss the lack of Summit's evidence on the southern reroute and join here in those arguments.

V. Summit's Failure to Work with Landowners

17. To the extent the PSC cares if Summit is genuinely working with landowners, they have not. While Summit always talks a good game the reality is clear and shown by the lack of communications. Landowner Intervenors' counsel was careful to ask if Summit would be willing to work with Landowners' counsel to come to solutions. Wade Boeshans initially danced around the question but after being asked multiple times without answering, finally testified if the landowners want legal assistance with these issues, then yes, Summit would work with their counsel. However, that has been largely untrue. See Docket 754-010.

18. Other than supplying a proposed solution for the Dotzenrod drainage easement, Summit had not reached out to Landowners' counsel to work on a single concern presented during rehearing where landowner directed counsel to assist them. On July 17, 2024, Summit finally communicated regarding the Staroba's but did not

present a solution to any of their concerns. Summit claims they can't accommodate the Staroba's unless an adjacent landowner is in agreement, but again, it was Summit who intentionally failed to engage for over a year and Summit should not be rewarded for that failure. On July 18, 2024, Summit proposed a draft easement for the Lugerts.

19. Summit attempts to hide the fact that for over a year it had done literally nothing to address landowner concerns, other than for the few specifically named in the 2023 denial order. When Summit claims "... In addition, Summit continues to address landowners' concerns during its safety tour meetings, discussions with county emergency managers, first responders, county commissioners, and landowners along the pipeline route." (See Summit brief pg. 13) Notice the careful wording used. Nowhere is it identified what or whose concerns were addressed or how or specifically when. Just a general statement that proves nothing. Further, how are you addressing any specific Landowner Intervenor's concerns during a safety meeting with emergency responders that is confidential where Summit repeatedly fought throughout rehearing from describing specifically what was being discussed at these meetings? It doesn't and Summit has not satisfied their burden.

20. Contrary to their claims – they have not tried to work with Landowner Intervenors from 2022 up and until early June 2024, despite trying to convince the PSC they had. Summit has known about this opposition all along and the exact landowner property specific concerns so the excuse that now it is too late because easements have been granted on adjacent properties is solely Summit's mistake. Summit should not be rewarded for failing to address legitimate concerns for two

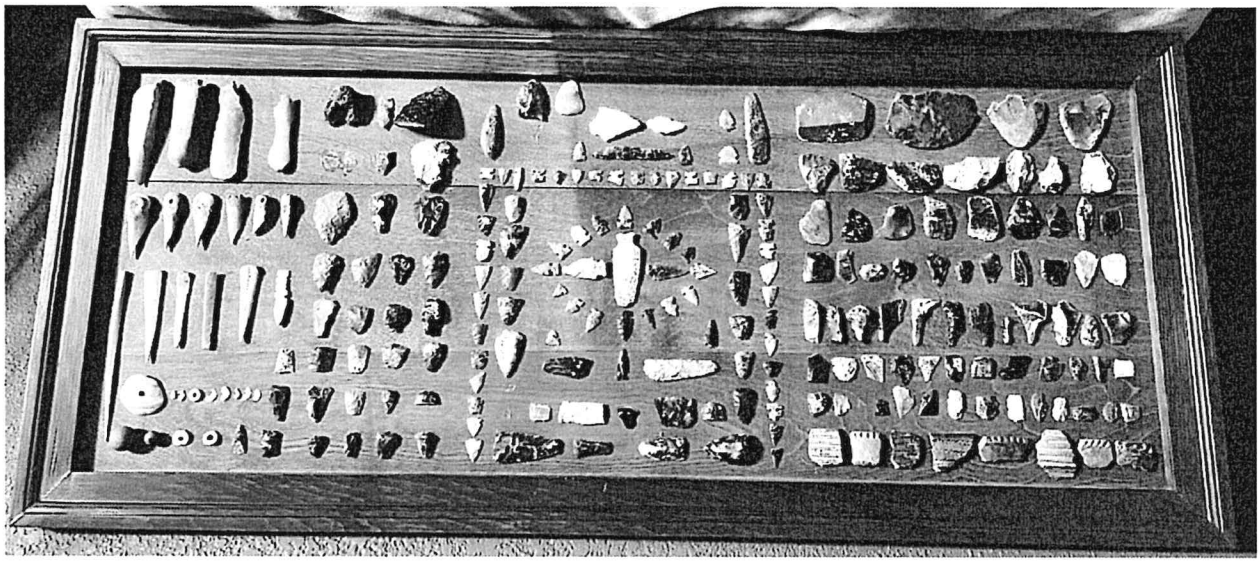
years and then act as if it is too late to modify the route when it was Summit's failure to engage and in Summit's sole control to pursue neighboring easements while fully aware of existing Landowner Intervenor concerns. Summit knowingly ignored concerns, negotiated adjacent easements, and now wants the PSC to reward its intentional rejection of landowner concerns under the guise it is too late to make modifications. Summit chose not to work with landowners during the critical times. While the applications should be denied in total, no route should be approved across the Landowner Intervenors' property. Summit claims it worked diligently to address these concerns, but landowner testimony and the facts prove otherwise.

21. Landowners testified they were aware their counsel had been repeatedly trying to engage with Summit to develop standard easement language, but those attempts led nowhere or were ignored by Summit. See also Docket 754-010 and see Attachment #1 to this Brief of the record of attempts over the past year by Landowners to engage and discuss potential standard easement terms – attempts that where ultimately ignored by Summit.

22. Regardless, it is Summit that has wanted the route proposed and it is Summit's duty to reach out and propose alternatives and solutions which they never did. Summit loves to state their "commitment" to working with landowners which sounds so nice, but unfortunately that "commitment" doesn't translate into solutions or actual effort. See all Landowner Intervenor testimony stating Summit presented no solutions or options and had not engaged for over a year despite knowing their concerns in spring of 2023 and earlier.

VI. Cultural Resource Surveys

23. Summit claims it has a sufficient handle on the location of cultural resources across and near their proposed route and a plan to deal with the unexpected discovery of such resources. During the June 4, 2024, hearing, Julia Stamer offered three photos of cultural artifacts found upon the land where Summit seeks to dig, trench, and cross. See Ex PT 7, pages 11-12. Summit did not present evidence sufficiently addressing cultural resources.



VII. Future Development and Property Values.

24. Wade Becker, Boulder Appraisal, LLC, never testified and he never substantiated or was put to cross-examination as to his unfounded statements in the letter Summit relies upon. Simply calling a new witness, Jeff Olson, to explain Mr. Becker's conclusions should not be given much weight if any. Mr. Olson, like Summit, wants to lump all pipelines together, but they are not the same. The fact Mr. Olson and Summit draw a conclusion on valuation of CO2 affected land everywhere based upon vague and incomplete data from a whopping one sale of CO2 encumbered land

is laughable and of no value to these proceedings. What is of value is every affected landowner who testified they would not even consider buying land with a CO2 pipeline and if they were forced to sell their land with a CO2 pipeline encumbrance, they would expect to receive significantly less than market price. Mr. Wachter testified that non-CO2 hazardous pipeline encumbered lots remain unsold longer or do not sell and those lots are subject to increased carrying costs as opposed to non-encumbered lots. No testimony was provided proving the development of CO2 affected lots or the effect on residential sales related to CO2 hazardous pipelines.

25. As to Mr. Malloy's development property, he testified he purchased the land for development purposes. Mr. Malloy was not required to have previously spent tens of thousands of dollars developing plats or site plans or similar for the PSC to understand the highest and best use of his land is for residential development. The route should not be permitted across Mr. Malloy's land.

VIII. Emergency Response Coordination.

26. Testimony made clear folks who would have liked to participate in the secret emergency response meetings were not aware of them and notice was not published. However, again Summit induces the PSC to conclude these secret meetings should satisfy PSC concerns because Summit discussed and presented dispersion modeling methodology, generic model outputs, relative toxicity, potential CO2 release scenarios, shelter in place studies and other emergency response plan guidelines. See Summit Brief at pg. 26. Sounds like the risk and safety related evidence is pretty important.

27. It is telling how much effort Summit goes to downplay the events of Satartia and CO2 concentrations and plume travel and safety and risk factors. (See Summit Brief pg. 11) Clearly the plume dispersion and risk analysis documents are critical to deciding upon these applications and to do so without such evidence would be clear reversible error.

IX. Alleged Benefit to Co-Ops due to increased energy consumption.

28. Is there any irony in the fact Summit's proposed pipeline, which it claims has environmental benefits, will demand more CO2 causing energy consumption and that is somehow a benefit for North Dakota? Which is it, are we trying to produce less CO2 or more? Burning more CO2 producing fossil fuels to generate electricity for a project that is supposed to reduce CO2 emissions makes little sense. There was no competent evidence that a Co-Op who sells more electricity to industrial users is a benefit to the non-industrial pre-established residential and small business customers of that Co-Op or to the citizens of North Dakota. None of Summit's new Co-Op electricity arguments are relevant to any factor before the PSC and they should not be considered.

X. No Aspect of the Proposed Pipeline Ensures that North Dakota's Energy Needs are Met and Fulfilled.

29. Construction, operation, and maintenance of the proposed hazardous CO2 pipeline at the exact locations proposed will not ensure that energy needs are met and fulfilled in an orderly and timely fashion. This burden of proof is impossible for Summit to satisfy. Summit failed to present evidence of a single energy need that is

not being met. Summit is not now and is not ever going to transport energy on its pipeline. Summit's low carbon fuel market tangential argument is not support for this element of proof. Summit claims there is an agreement in place with one ethanol plant in North Dakota and others in competing states, yet the PSC has not seen them, doesn't know what they say, how they are structured, or who has control over what actually occurs with these agreements.

30. Here is Summit's woefully strained argument trying to justify its "Project" – which is not before the PSC for approval – ensures that energy needs are met and fulfilled in an orderly and timely fashion:

a. An ethanol plant contracts with Summit to give its CO2 to a related Summit entity that captures and process it in a separate capture facility,
b. The CO2 is then transferred from the facility into the only thing at issue for the PSC, the hazardous pipeline,
c. Then the pipeline transports the CO2 to North Dakota where yet a different entity removes it and pumps it underground and the CO2 stays there forever,
d. Then because the CO2 is stored permanently, the Ethanol plant gets points taken of its carbon intensity (CI) score – which is a governmental creation subject to change,
e. Then that ethanol plant, because it has a lower CI score may become eligible to sell ethanol from say Iowa to California if it wants to and if

that is economical, and if California still wants it by the time this bad idea could come into existence.

f. To access the California market the Iowa ethanol plant would then need to transport, likely by truck, certainly not by pipeline, its ethanol thousands of miles to California, thus using more energy to do so for transport and creating more CO2 in the atmosphere,

g. Then once the Iowa ethanol would get to California, a Californian could theoretically purchase that ethanol and use it as fuel.

31. Unfortunately, for Summit, that Californian is already accessing fuel and their energy needs are already being met. Summit is in no way fulfilling any energy need that is not already being met – it's the same ethanol that is already being produced, the government just calls it low carbon so instead of being sold where it is produced it can now be trucked across the country to a different market. The irony then is, the Iowa farmer who used to purchase the Iowa ethanol for his F-150, would have less ethanol because it is going to California instead of remaining in Iowa. So, all that is being done is using more energy, creating more CO2, to move the same energy source from one state to another. Nothing about this proposed pipeline satisfies any energy need, certainly none of any North Dakotans, let alone anyone else. Summit cannot and has not met this burden and its applications must be denied on this basis alone.

XI. Water

32. Summit claims there is no shortage of supply for "steel, concrete, aggregate, water, and hydrocarbon fuels" and that the use of these "for the "Project" would not

have an adverse effect on the availability of these resources."[2] These are claims without evidence and to say water is not in short supply is irresponsible and untrue. Summit did an excellent job of not disclosing how many billions of gallons of water it would extract for use in their carbon capture and transport scheme each year – but to their detriment, because since the PSC has no idea about the water usage, the PSC is unable to find that Summit satisfied the elements that relate both to the environment and to the welfare of the citizens.

XII. PREEMPTION OF LOCAL ORDINANCES

33. Summit presented no evidence to prove Emmons and Burleigh County ordinances are unreasonably restrictive. Summit further seeks to impose a non-existent condition that setbacks can only be based upon science or other data-driven analysis. What science proves that 500 feet and not 501 feet is the correct distance to preclude hazardous pipeline construction from an inhabited residence? Summit failed to even attempt to obtain waivers or variances so they cannot argue unreasonably restrictively when there is a clear path to approval. Neither Burleigh nor Emmons County Ordinances are in clear direct conflict with Federal law.

34. On pages 31 to 33 of its brief, Summit presents three arguments related to preemption of the Burleigh and Emmons County hazardous liquid pipeline ordinances. First, it argues that N.D.C.C. § 49-22.1-13 operates so that Commission "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

[2] See Summit Opening Brief pg. 42

agreements." In support of this argument, it cites the Commission's February 7, 2024, Order on preemption (Doc. ID# 440 at p. 3) ("Preemption Order"). Second, as a fallback position in the event that local land use and zoning ordinance are not automatically preempted, it argues that the setbacks contained in the Burleigh and Emmons County ordinances are preempted under. N.D.C.C. § 49-22.1-13(c) because they are "unreasonably restrictive." Third, it argues that federal law preempts the Burleigh and Emmons County setback requirements and the Burleigh County emergency response plan requirements, because they are "safety standards" within the meaning of 49 U.S.C. § 60102, which "safety standards" are preempted under 49 U.S.C. § 60104(c). The Commission should reject these arguments for the reasons provided below.

A. N.D.C.C. § 49-22.1-13 Does Not Automatically Preempt County Land Use and Zoning Ordinances

35. State law twice makes clear that a Commission pipeline construction permit does not automatically preempt regulation by other North Dakota government. Subsection 49-22.1-13(1) states that a "route permit" "is, the sole . . . route approval required to be obtained by the utility," subject to the exceptions in subsections 2 and 3. Subsection 49-22.1-13(2)(b) states that "[e]xcept as provided in this section, a "permit for the construction of a gas or liquid transmission facility within a designated corridor supersedes and preempts any local land use or zoning regulations." Thus, the Commission may preempt only "local land use or zoning regulations." This statute does not grant the Commission authority to preempt county regulations on other matters, for example regulation of county emergency

planning under N.D.C.C. § 37-17.1-07(5). The exceptions to absolute Commission jurisdiction are contained in subsections (c), (d), and (e).

36. Subsection (c) contains two sentences. The first states that the Commission "shall require the applicant to comply with the road use agreements of the impacted political subdivision." This sentence was added to this subsection in 2017. The term "road use agreements" is defined by N.D.C.C. § 49-22.1-01(10) and limited to matters related to use of county roads. The second sentence establishes a process whereby the Commission may preempt "the requirements of a political subdivision if the applicant shows by a preponderance of the evidence the regulations or ordinances are unreasonably restrictive" in light of a number of broad policy factors, "or are in direct conflict with state or federal laws or rules." This Commission preemption process was initially established in the 1970s in N.D.C.C. § 49-22-16. S.L. 1975, ch. 436, § 16; S.L. 1979, ch. 504, § 11. Before 2017, § 49-22-16 regulated both electric and pipeline transmission facilities. This preemption process has been available to balance state and local regulation of pipelines for almost 50 years.

37. Summit acknowledges that before 2017, county land use and zoning requirements for liquid transmission facilities were undoubtedly subject to this preemption process. Summit Brief in Support of Motion to Declare Emmons County and Burleigh County Ordinances Superseded and Preempted (June 1, 2023) at 5 (Doc. ID# 282). In this brief, Summit first asserted that the addition of the "road use agreement" language in 2017 limited the scope of authorized county regulation of pipelines exclusively to such agreements, subject to Commission determination of

their reasonableness. *Id.* In its Preemption Order, the Commission agreed with Summit and held that the "plain language" of § 49-22.1-13 now automatically preempts all county land use and zoning regulation of liquid pipeline facilities, and instead limits local subdivision regulation of pipelines exclusively to the field of "road use agreements."

38. The Commission's finding that the language of § 49.22.1-13 is "plain" is clearly in error, because the statute contains a number of mismatched terms and inapplicable policy factors does not provide a clear indication of legislative intent to limit county regulation of liquid pipeline facilities exclusively to "road use agreements." Instead, for the following reasons, the road use agreement language in the first sentence of § 49-22.1-13(2)(c) does not act to automatically preempt all local subdivision land use and zoning regulation.

39. Section 49-22.1-13(2)(b) makes clear that a route permit supersedes and preempts only "local land use or zoning regulations." It does not extend Commission preemption authority to other area of county regulation. In this regard, "road use agreements" are not "land use or zoning regulations." County authority to own and regulate road arises under N.D.C.C. chapter 24-05, and specifically § 24-05-17. In contrast, county authority to issue land use and zoning regulations are authorized by N.D.C.C. chapter 11-33. Thus, under § 49-22.1-13(2)(b), the Commission has no authority to preempt county "road use agreements" and cannot apply the preemption process in § 49-22.1-13 to them. Summit's argument that the preemption process in subsection 2 regulates only "road use agreements" is, therefore, non-sensical. If the

Commission can preempt only "land use and zoning regulations" and "road use agreements" are not "land use or zoning regulations," then by definition the preemption process in § 49-22.1-13(2)(c) is inapplicable to "road use agreements." If county regulation of liquid transmission facilities is assumed to be limited exclusively to "road use agreements," but the Commission has no authority to preempt "road use agreements," then the preemption process in § 49-22.1-13(2)(c) would have no purpose and be entirely redundant. If the legislature desired to limit county authority strictly to regulation of "road use agreements," it should have authorized the Commission to preempt such agreements. But it didn't. Instead, it mandated that the Commission require applicants to comply with them, which mandate is fully consistent with the Commission's lack of authority to preempt "road use agreements."

40. The first sentence of § 49-22.1-13(c) refers to "road use agreements," which are defined as "permits" by § 49-22.1-01(10). In contrast, the second sentence of subsection (c) authorizes the Commission to preempt county "regulations or ordinances," not county road agreements. If the Legislature intended to limit the scope of county authority to "road use agreements," presumably it would have also amended the second sentence of subsection (c) to authorize the Commission to find that "road use agreements" or "road use permits" may be found unreasonably restrictive and therefore preempted. Instead, the second sentence directs evaluation of "regulations and ordinances." Assuming, arguendo, that the preemption process is applicable to "road use agreements," it would be entirely possible that a road use agreement itself may be unreasonably restrictive without having to also preempt its

underlying "regulations or ordinances." Given the mismatched objects of these sentences, the first sentence is best interpreted to be a new stand-alone provision unartfully inserted into a carefully crafted pre-existing statute. If the legislature wanted to limit county regulation exclusively to "road use agreements" it would have conformed the language in the second sentence of subdivision (c) to accurately relate back to the "road use agreements" referenced in the first sentence. But it didn't.

41. The policy factors identified in the second sentence of subsection (c) (consideration of "existing technology, factors of cost or economics, or needs of consumers regardless of their location") are very broad and were written for evaluation of land use and zoning ordinances and remained unchanged despite the addition of the "road use agreements" language. If the legislature intended the Commission to determine if road use agreements are preempted, considerations of technology, economics, and consumer need would seem to be irrelevant. One would think that "unreasonably restrictive" road use permit would have overly restrictive conditions related to use of particular roads, excessive repair standards, severe limitations on crossings, excessive setbacks from public rights-of-ways, etc. That the legislative left these very broad policy factors unchanged indicates that it intended them to continue to be used to evaluate the restrictiveness of land use and zoning "regulations and ordinances," rather than "road use agreements."

42. Commission consideration of whether land use and zoning ordinances "are in direct conflict with state or federal laws or rules" seems appropriate, because it is reasonably possible that such ordinances might. In contrast, consideration of

whether local road use agreements run afoul of federal law would seem unnecessary. It is highly unlikely that a county or township road use agreement would conflict with federal law. The fact that subsection (c) directs the Commission to consider whether local subdivision "regulations and ordinances" conflict with federal law indicates that it intended this analysis to apply to land use and zoning regulations and ordinances and not exclusively to "road use agreements."

43. Subsection (d) also contains language that indicates that county authority to regulate liquid transmission facilities is not limited to "road use agreements." The first sentence requires notification only to Townships with "retained zoning authority" presumably so that such township could provide "a listing to the commission of all local requirements" related to such zoning authority. If townships are limited to regulation of "road use agreements," all townships that have road authority should receive notice. Instead, this notice requirement is tied to zoning authority. If the legislature sought prohibit township zoning regulation of liquid pipeline facilities, it would not have made "retained zoning authority" a notice factor. The fact that it requires notice to townships with retained zoning authority indicates that the legislature intended such townships to provide the Commission with their list of zoning requirements.

44. Further, the fact that the legislature did not change the subsection (d) requirement that all "political subdivisions" provide a listing of "all local requirements" indicates that it did not limit subdivision regulation exclusively to "road use agreements." If the legislature had wanted subdivisions to provide only

requirements contained in "road use agreements," presumably the legislature would have simply required filing of these agreements, rather than "all local requirements." The retention of this broad language indicates that the legislature understood that counties continue to have authority to impose broad "local requirements" and not just "road use agreements."

45. The last sentence of subsection (d) states that local requirements must be filed with the Commission at least ten days before a hearing or they are superseded and preempted. Even if the Commission has authority to preempt road use agreements, which it does not, it would make no sense to impliedly authorize the Commission to supersede them, because the Commission has no expertise in road use and repair. Also, it would make sense to prohibit late-filed road use agreements as this would mean that a pipeline company could use and damage roads with impunity. The fact that the legislature did not modify the last sentence of subsection (d) so that it is expressly applicable to road use agreements indicates that it did not impliedly limit country regulation of liquid pipeline facility exclusively to the field of road use agreements.

46. Subsection (e) requires that applicants broadly comply with "all local requirements" not otherwise superseded indicates that the legislature did not limit county regulation to "road use agreements." If the legislature wanted to restrict county authority to road use agreements, it would have simply stricken "all local requirements" and replaced it with "road use agreements," but it didn't. Moreover, the fact that subsection (c) states that "the commission shall require the applicant to

comply with the road use agreements" would make the mandate in subsection (e) that applicant comply with "all local requirements" redundant if such requirement is limited exclusively to road use agreements.

47. The forgoing language demonstrates that the legislature's unartful insertion of the "road use agreement" language in subsection (c) at best creates ambiguity but ultimately is not "plain language" showing a clear legislative intent to limit county regulation exclusively to road use agreements. Instead, the legislature's retention of the pre-2017 language establishing a mechanism to balance power between county land use and zoning authority and Commission routing authority, together with the fact that local subdivision regulation of local roads is not based in land use and zoning authority and therefore outside of Commission preemption authority, indicates that the legislature intended the Commission to continue use of this reasonable and long-standing mechanism. If they sought to completely curtail local subdivision authority, it could have done so clearly, but it didn't. The better interpretation is that the legislature included the road use agreement language as an additional requirement intended to prevent the Commission from mucking about in the terms of road use agreements over which the Commission has no expertise or authority. In any case, the road use agreement language, taken in the context of the language of § 49-22.1-13, cannot be rationally interpreted to infer an amputation of county land use and zoning authority. The Commission should respect county authority rather than summarily toss it aside under cover of superficial statutory ambiguity.

B. The County Ordinances Are Not "Unreasonably Restrictive"

48. Summit also argues that the setbacks in the Burleigh and Emmons County ordinances are unreasonably restrictive under § 49-22.1-13. Rather than repeat the arguments of others, the arguments and facts related to the reasonableness of its setbacks in Bismarck Area Intervenors Response in Opposition to SCS Carbon Transport LLC's Motion to Declare Emmons County and Burleigh County Ordinances Superseded and Preempted (June 29, 2023) (Doc. ID# 348) are hereby incorporated by reference.

C. The Burleigh and Emmons County Setback Ordinances Are Not Preempted by the Pipeline Safety Act

49. Summit asserts that "[l]ocal ordinances requiring setbacks and emergency plans are 'safety standards'" within the meaning of the Pipeline Safety Act, 49 U.S.C. § 60101 *et seq.* ("PSA"), as specifically delimited in 49 U.S.C. § 60102, and are therefore preempted by 49 U.S.C. § 60104(c). To support its position, Summit relies entirely on *Couser v. Shelby County, Iowa*, 681 F. Supp. 3d 920, 935 (S.D. Iowa 2023) (order on preliminary injunction) and *Couser v. Story County., Iowa*, No. 4-22-CV-00383-SMR/SBJ, 2023 WL 8366208 (S.D. Iowa Dec. 4, 2023) (order on summary judgment). Summit's post-hearing brief fails to discuss the Iowa federal district court holdings in detail, nor does it discuss contrary precedent by the Fourth and Fifth Circuit Courts of Appeal or the federal district courts in Maine and the Western District of Wisconsin. *Washington Gas Light Co. v. Prince George's County Council*, 711 F.3d 412, 422 (4th Cir. 2013) (county denial based in part on safety of zoning permit for liquified natural gas facility subject to Pipeline Safety Act not preempted under 49 U.S.C. § 60104(c)); *Texas Midstream Gas Services, LLC v. City of Grand*

Prairie, 608 F.3d 200 (2010) (city setback not preempted by Pipeline Safety Act); *Portland Pipe Line Corporation v. City of South Portland*, 288 F. Supp. 3d 321, 433-34 (D. Me. 2017) (city consideration of safety in enacting ordinance restricting crude oil pipeline development not preempted by PSA); *Bad River Band v. Enbridge Energy Company, Inc.*, 626 F. Supp. 3d 1030, 1048-49 (W.D. Wisc. 2022) (tribe consideration of route safety in rejection of easement extension forcing pipeline removal not preempted by PSA). The *Couser* decision is a minority position currently on appeal to the Eighth Circuit Court of Appeals. The following discusses the *Couser* decision in light of the statutory scope of federal PSA preemption over setbacks and county emergency response planning and conflicting federal precedent.

1. The Scope of Pipeline Safety Act Preemption Does Not Encompass All Matters Related to Pipeline Safety.

50. The federal preemption analysis is guided by two cornerstones:

> First, "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) (internal quotation marks omitted); see *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103, 84 S.Ct. 219, 11 L.Ed.2d 179 (1963). Second, "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated ... in a field which the States have traditionally occupied,' ... we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Lohr*, 518 U.S., at 485, 116 S.Ct. 2240 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)).

Wyeth v. Levine, 555 U.S. 555, 565 (2009) (footnote omitted). An express preemption clause does not immediately end a preemption analysis because "the question of the

substance and scope of Congress' displacement of state law still remains." *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008); *Keller v. City of Fremont*, 719 F.3d 931, 942 (8th Cir. 2013). A court must precisely identify the scope of preemption, and construe express preemption provisions "in light of the presumption against the pre-emption of state police power regulations. This presumption reinforces the appropriateness of a narrow reading . . .." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992). Matters beyond that scope are not preempted. *Id.*

51. Although congressional intent is the "ultimate touchstone" of the statutory analysis, *Wyeth*, 555 U.S. at 565 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)), preemptive language must be interpreted in the context of:

> the structure and purpose of the statute as a whole, as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.

Medtronic, 518 U.S. at 486 (citations and internal quotation marks omitted).

52. If the express preemption language fails to provide a "reliable indicium" of congressional intent, a court may apply a conflict preemption analysis to particular circumstances. *See Freightliner Corp. v. Myrick*, 514 U.S. 280, 287-89 (1995) (*Cipollone* does not "obviate the need for analysis of an individual statute's pre-emptive effects"); *Washington Gas Light*, 711 F.3d at 422. Where Congress has not completely displaced state regulation in a specific area, state law is nullified only to the extent of an actual conflict. *ANR Pipeline Co. v. Iowa State Commerce Com'n*, 828 F.2d 465, 468 (8th Cir. 1987). Under conflict preemption, a state law may be

preempted only if it is impossible for regulated parties to comply with both sets of laws, *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963), or where a state law poses an obstacle to the "full purposes and objectives" of Congress. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

2. In Its *ANR* and *Kinley* Decisions, the Eighth Circuit Court of Appeals Held that Federal Jurisdiction Is Exclusive Within the Scope of the PSA, But It Did Not Determine the Precise Extent of this Scope

53. The *ANR* and *Kinley* decisions considered express preemption provisions contained in prior versions of the PSA. 828 F.2d at 468 (construing 49 U.S.C. § 1672(a) (1990)); *Kinley Corp. v. Iowa Utilities Bd.*, 999 F.2d 354, 358-59 (8th Cir. 1993) (construing 49 U.S.C. App. § 2002(d) (1990)). In 1994, Congress repealed and replaced these statutes with 49 U.S.C. § 60104(c), which contains similar language. Pub. L. 103–272, § 1(e), July 5, 1994, 108 Stat. 1308. The Courts held that federal law provides exclusive authority within the scope of federal PSA jurisdiction, but neither defined the precise scope of preemption. 828 F.2d at 472; 999 F.2d at 359. In both cases, Iowa subsumed the entire body of federal safety standards into state law by reference, such that state and federal safety standards were "identical" in scope. 828 F.2d at 467, 469; 999 F.2d at 358-59. Neither court had need to analyze the PSA's precise jurisdictional limits, because the infringement was absolute.

54. Yet, each decision contained broad statements that the PSA regulates all matters related to pipeline safety. For example, the *ANR* decision held that "state regulatory authority with respect to interstate pipeline safety is preempted." 828 F.2d at 473. The *Kinley* court stated: "Congress has expressly stated its intent to preempt

the states from regulating in the area of safety in connection with interstate hazardous liquid pipelines." 999 F.2d at 358. This *dictum* has the potential to cause confusion, because the plain language of 49 U.S.C. § 60104(c) does not use the term "pipeline safety" and the regulatory scope of the PSA does not extend preemption to all matters conceivably related to "pipeline safety."

3. The Plain Language of the PSA Preemption Clause and the Defined Terms Used Therein Craft Precise Limits on PSA Jurisdiction.

55. Where Congress has spoken "precisely and narrowly" in an express preemption clause, the courts must identify its preemptive scope with equal precision. *See Cipollone*, 505 U.S. at 517. Here, 49 U.S.C. § 60104(c) states: "[a] State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation." 49 U.S.C. § 60104(c). Importantly, the terms "safety standards," "pipeline facilities," and "pipeline transportation," are defined by 49 U.S.C. §§ 60102(a)(2), 60101(a)(18) and (19), respectively, and contain precise jurisdictional limits.

56. The term "safety standards" is delimited by 49 U.S.C. §60102(a)(2)(A) and (B). Under subsection (A), "safety standards" may be applied only to "the owners or operators of pipeline facilities." The PSA does not authorize regulation of persons or entities that do not own or operate "pipeline facilities." Under subsection (B), "safety standards" regulate only "the design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities." Congress did not provide a general authorization

to regulate all pipeline-related activities. Instead, it limited the scope of safety standards to a specified list of discrete activities related to the physical management "pipeline facilities." This list is not all-inclusive. For example, it does not include locating or routing a pipeline, because 49 U.S.C. § 60104(e) excludes this activity from federal regulation.

57. The PSA defines the term "pipeline facility" to mean "a gas pipeline facility and a hazardous liquid pipeline facility." 49 U.S.C. § 60101(a)(18). "Hazardous liquid pipeline facility" is defined to include "a pipeline, a right of way, a facility, a building, or equipment **used or intended to be used** in transporting hazardous liquid." 49 U.S.C. § 60101(a)(5) (emphasis added). "Transporting hazardous liquid" is defined, in relevant part, to mean "the movement of hazardous liquid by pipeline . . . in or affecting interstate or foreign commerce . . .." "Hazardous liquids" include petroleum and petroleum products; flammable, toxic, or corrosive nonpetroleum fuels; other substances that the Secretary of Transportation decides pose an unreasonable risk to life or property; and liquid carbon dioxide. 49 U.S.C. §§ 60101(a)(4); 60102(i). "Pipeline transportation" is defined as "transporting gas and transporting hazardous liquid." Combining these elements, PSA jurisdiction is limited to regulation of:

(a) only owners or operators of pipelines;

(b) only when their pipelines are actively used or intended to be used;

(c) to move only certain hazardous liquids;

(d) only with regard to the activities listed in 49 U.S.C. § 60102(a)(2(B).

Each of these elements is essential and limiting.

4. Congress Intended to Extend PSA Jurisdiction to Only a Portion of the Field of Pipeline Safety

58. Congress did not federalize all matters conceivably related to pipeline safety. It intended to create national uniform safety standards applicable to owners and operators of pipeline facilities. *Northern Border Pipeline Co. v. Jackson County*, Minn., 512 F. Supp. 1261, 1265 (D. Minn. 1981). Outside this scope, non-federal governments retain jurisdiction over other aspects of pipeline safety. *See Cipollone* at 517. The PSA's preemption language should be interpreted in this broader context to ensure that federal pipeline safety regulation dovetails seamlessly with state, tribal, and local regulation, and to avoid jurisdictional confusion and gaps.

59. PHMSA has acknowledged that the PSA does not regulate all matters related to pipeline safety. In a September 15, 2023, letter to Summit, PHMSA expressly states that it "continues to support and encourage all three levels of government – federal, state, and local – working collaboratively to ensure the nation's pipelines systems are constructed and operated in a manner that protects public safety and the environment." Bismarck Area Intervenors' Response to SCS Renewal of Its Motion to Declaire County Ordinances Preempted (October 12, 2023) at 5, Attachment A (Doc. ID# 406). The letter recognizes that pipeline safety is a "shared responsibility of federal and state regulators as well as all other stakeholders, including pipeline operators, excavators, property owners, and local governments." It acknowledges that state and local governments have authority to regulate "land use and development along pipeline rights-of-way through zoning, setbacks, and similar measures." PHMSA may not control local land use decisions, because under 49 U.S.C. § 60102 it

has no authority to impose safety standards on entities that do not own or operate pipelines, such as local governments and neighboring landowners. The letter also recognizes that local governments may regulate "local emergency response plans and training with regulators and operators."

60. While the broad-brush strokes of PSA preemption are clear, the substantive and jurisdictional complexity of this policy area suggest that, where federal and state jurisdiction abut, application of the impossibility and obstacle tests for conflict preemption may be helpful. *Fla. Lime*, 373 U.S. at 142-43; *Hines*, 312 U.S. at 67.

5. The *Couser* Decision Setback Analysis Is Poorly Reasoned and Deeply Flawed.

61. Relative to the case law in other jurisdictions, the *Couser* holdings are remarkably brief and shallow. Initially, the *Couser* court identified the express preemption language in 49 U.S.C. §60104(c) but it did not analyze this language or its embedded defined terms to determine the precise scope of PSA jurisdiction and therefore the precise scope of PSA preemption. Instead, it relied on the *ANR* and *Kinley* decisions for their broad dictum that the PSA regulates all matters related to pipeline safety. It also cited 49 U.S.C. § 60102(a)(2) to support its finding that the PSA "delegates sole authority to enact safety provisions," but it did not analyze any of the jurisdictional limits in 49 U.S.C. § 60102(a)(2) and the defined terms used therein.

62. Rather than conduct a close analysis of 49 U.S.C. § 60104(c) and 49 U.S.C. § 60102(a)(2) to determine Congressional intent, the court instead relied on evidence of preemption in the PSA regulations. The court cited 49 U.S.C. § 60102(a)(2)(B) as

a statutory foundation and noted that it authorizes federal safety standards for "construction" of pipeline facilities. It then cited 49 C.F.R. § 195.200, which describes the scope of federal construction safety standards in Subpart D, the subpart containing construction safety standards. Finally, it cited 49 C.F.R. § 195.210, which is within Subpart D and states in its entirety:

> **§ 195.210 Pipeline Location**
>
> (a) Pipeline right-of-way must be selected to avoid, as far as practicable, areas containing private dwellings,
>
> industrial buildings, and places of public assembly.
>
> (b) No 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.

The district court reasoning appears to be that because 49 U.S.C. § 60102(a)(2)(B) authorizes construction standards, and 49 C.F.R. § 195.210 falls within Subpart D, that therefore the "location" standards in 49 C.F.R. § 195.210 are construction standards authorized by the statute. Put another way, the district court found that "location" falls within the realm of "construction," and therefore location safety standards are authorized as a part of construction standards by 49 U.S.C. § 60102(a)(2)(B).

63. Next, the *Couser* court reasoned that because 49 C.F.R. § 195.210(a) regulates avoidance of structures and 49 C.F.R. § 195.210(b) is, it claims, a 50-foot setback, they conflict with and therefore preempt Story County's quarter-mile setback. Accordingly, it found that the Story County Ordinance "creates a dual

safety regulation that competes with the Secretary of Transportation's broad spectrum of duties" and "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress", and held that the PSA preempted the Ordinance.

64. The court also considered the impact of 49 U.S.C. § 60104(e), which states: "[t]his chapter does not authorize the Secretary of Transportation to prescribe the location or routing of a pipeline facility." It reconciled the tension between 49 U.S.C. § 60104(e) and 49 C.F.R. § 195.210 by reasoning that "while the Secretary cannot dictate where a pipeline should go through Story County or along a specific location within the area, once a location or routing of a pipeline is chosen, the PHMSA regulations dictate it cannot be within the setback requirements set forth in the regulation." The court essentially ruled that a state or county may determine the overall route, but 49 C.F.R. § 195.210(b) prohibits construction with 50 feet of a structure along this route. For the reasons provided below, the district court decision is in error.

a. The Plain Language of 49 U.S.C. § 60104(e) Bars Federal Location and Routing Safety Standards

65. 49 U.S.C. § 60104(e) states: "[t]his chapter does not authorize the Secretary of Transportation to prescribe the location or routing of a pipeline facility." This language unambiguously prohibits use of any part of the PSA – including the safety standard authority provided by 49 U.S.C. § 60102(a)(2) – to prescribe location or route. If PHMSA were to issue and then enforce location and route safety standards, it would "prescribe the location or routing of a pipeline facility" and violate 49 U.S.C.

§ 60104(e). Therefore, the PSA expressly bars federal safety standards for hazardous liquid pipeline location or route.

66. Moreover, the language in 49 U.S.C. § 60104(e) is unqualified. It does not contain even a suggestion that Congress intended to prohibit County consideration of safety while allowing routing based on any other relevant factor. If Congress intended this result, it would have expressly authorized location-based safety standards for hazardous liquid pipelines in 49 U.S.C. § 60102 as it did for liquified natural gas ("LNG") pipelines in 49 U.S.C. § 60103(a). The first sentence of 49 U.S.C. § 60103(a) states: "[t]he Secretary of Transportation shall prescribe minimum safety standards for deciding on the location of a new liquefied natural gas pipeline facility." No similar authorization exists in 49 U.S.C. § 60102. The comparative lack of express Congressional authorization for hazardous liquid pipeline location and route safety standards is strong evidence that Congress has not authorized them.

67. The plain language of 49 U.S.C. § 60104(e) makes clear that the entire field of hazardous liquid pipeline location and routing – without reservation – is outside of PSA jurisdiction. *See Washington Gas Light*, 711 F.3d at 422 (Congress did not intend to occupy the field of facility siting). Therefore, state, tribal, and local governments may consider safety when enacting pipeline facility setbacks, other land use controls, or state routing permitting statutes without fear of PSA preemption. *Portland Pipe Line Corporation v. City of South Portland,* 288 F. Supp. 3d 321, 433-34 (D. Me. 2017) (city consideration of safety in enacting ordinance restricting pipeline development not preempted by PSA); *Bad River Band v. Enbridge Energy Company, Inc.*, 626 F.

Supp. 3d 1030, 1048-49 (W.D. Wisc. 2022) (tribe consideration of route safety in rejection of easement extension not preempted by PSA).

b. 49 C.F.R. § 195.210 Does Not Provide a Basis for Preemption

68. Despite the clear language of 49 U.S.C. § 60104(e), the *Couser* court interpreted 49 C.F.R. § 195.210 as containing location-based safety standards and used this regulation as the basis for preemption. The language in 49 C.F.R. § 195.210 traces back to the very first hazardous liquid pipeline rulemaking initiated in 1968 and completed in 1969. *Notice of Proposed Rulemaking*, 33 Fed. Reg. 10,213, 10,220 (Jul. 17, 1968) (proposed codification at § 180.210); *Final Rule*, 34 Fed. Reg. 15,473, 75, 79 (Oct. 4, 1969) (codified at § 195.210). The language in the 1969 Final Rule is identical to the current regulation.

69. A decade later, Congress enacted the Hazardous Liquid Pipeline Safety Act of 1979 ("HLPSA"). Pub. L. 96-129, 93 Stat. 989 (Nov. 30, 1979). The HLPSA contained the following language prohibiting use of the HLPSA to locate or route pipelines:

> (4) "pipeline facilities" includes, without limitation, new and existing pipe, rights-of-way, and any equipment, facility, or building used or intended for use in the transportation of hazardous liquids **but "rights-of-way" as used in this chapter does not authorize the Secretary to prescribe the location or the routing of any pipeline facility**;

49 U.S.C. § 2001(4) (1990) (emphasis added). This language remained in the U.S. Code until 1994 when it was replaced by the broader and clearer language of 49 U.S.C. § 60104(e). Pub. L. 103–272, July 5, 1994, 108 Stat 745. Both of these statutory

prohibitions on federal routing were enacted after and supersede any contrary effect of 49 C.F.R. § 195.210.

70. The plain language of 49 U.S.C. § 60104(e) voids 49 C.F.R. § 195.210(a). If PHMSA attempted to enforce this regulation by ordering a pipeline developer to change the location or route of a proposed pipeline because it does not adequately avoid "areas containing private dwellings, industrial buildings, and places of public assembly," PHMSA would "prescribe the location or routing of a pipeline facility" and thereby violate 49 U.S.C. § 60104(e). If 49 C.F.R. § 195.210(a) were found to regulate pipeline route, it would conflict with and therefore preempt the undisputed right of state, tribal, and local governments to determine the route of hazardous liquid pipelines. Fortunately, Congress used 49 U.S.C. § 60104(e) to draw a bright line between the field of pipeline location and routing and the field of pipeline safety standards, making 49 C.F.R. § 195.210(a) a vestigial regulation without effect.

71. The *Couser* court also found that 49 C.F.R. § 195.210(b) establishes a setback and therefore regulates location. This finding is also in error. The regulation states:

> No 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.**

(Emphasis added.) The plain language of subsection (b) allows construction within 50 feet of a structure; it merely requires an additional foot of cover when a pipeline is closer than 50 feet, a requirement that can always be met. In contrast, the definition of "setback" is "[t]he minimum amount of space required between a lot line and a

building line." Setback Definition, *Black's Law Dictionary*, 11th edition, available at Westlaw. Within a setback, construction is prohibited. Subsection (b) does not establish a minimum distance between a pipeline and structure. Instead, it expressly allows construction within 50 feet, provided the pipeline is buried a foot deeper, making this regulation a depth of cover requirement that supplements the general depth of cover requirements in 49 C.F.R. § 195.248. Because 49 C.F.R. § 195.210(b) does not "prescribe the location or routing of a pipeline facility," it is not a location safety standard barred by 49 U.S.C. § 60104(e) and is not evidence that Congress intended to preempt county consideration of safety when enacting setback ordinances. No other regulations in 49 C.F.R. Part 195 purport to impose safety standards for the location or route of a pipeline. Therefore, PSA regulations do not control the location or routing of hazardous liquid pipeline facilities.

72. The *Couser* court's preemption analysis is in error because it did not correctly determine the scope of preemption intended by Congress based on the plain language of 49 U.S.C. §§ 60104(c), 60102(a)(2), and 60104(e). The field of pipeline location and routing lies entirely outside of PSA jurisdiction, regardless of the outdated language of 49 C.F.R. § 195.248(a). Further, the court grossly misinterpreted 49 C.F.R. § 195.248(b) as a "setback" when in fact it is a depth of cover regulation. The court's tortured reasoning that a state may determine the overall route of a pipeline, but within this route a pipeline may not be constructed within 50 feet of a structure, (a) ignores the fact that 49 C.F.R. § 195.248(b) imposes a depth-of-cover standard, not a setback, (b) ignores the clear language of 49 U.S.C. § 60104(e) that the PSA does not

authorize PHMSA to prescribe the location of a pipeline, including its precise location within a designated route; and (c) ignores the reality that some pipelines traverse urban and industrial areas where it is impossible to not pass within 50 feet of structures. Congress drew a bright line: federal law does not preempt state or county actions that impact the route or location of a pipeline, be they state routing decisions or county setbacks or other zoning restrictions.

6. Consideration of Safety in Locating and Routing Hazardous Liquid Pipelines Does Not Obstruct the Purposes and Objectives of the PSA.

73. Route permitting always precedes the application of PSA safety standards. Once route permitting is completed, PSA design and construction standards can be applied fully to a selected route, regardless of the reasons for its selection. The field of pipeline location and routing is entirely separate from the field of pipeline safety standards. Location and route permitting determine **if and where** a pipeline will be constructed. PSA safety standards regulate **how** an approved pipeline will be designed, constructed, operated, inspected, and maintained. These are separate regulatory analyses and fields of jurisdiction.

a. Location and Route Permitting Decisions Are a Prerequisite to Application of PSA Safety Standards

74. State, tribal, and local routing decisions are a prerequisite to application of PSA safety standards. Indeed, a non-federal routing authority could deny a construction permit, in which case the pipeline developer's intent to construct a hazardous liquid pipeline facility would be terminated and the pipeline would never be constructed. *See Washington Gas Light*, 711 F.3d at 421 (the power to preclude a

proposed pipeline facility is not a safety standard); *Portland Pipeline*, 288 F. Supp. 3d at 430 ("An outright ban on pipelines altogether . . . does not conflict with the goal of the PSA, which is imposing national standards to improve pipeline safety."). Application of federal design and construction standards is not possible until the location or route of a hazardous liquid pipeline facility is finally determined by a state, tribal, or local routing authority. While a pipeline developer may initiate design efforts before a route permit is approved, such design efforts are contingent. A route permit could dramatically change the location, route, and length of a proposed pipeline and require a complete re-design in accordance with PSA safety standards. Once a route is determined, all the PSA design, construction, inspection, operation, and maintenance standards can be applied in full to that route.

b. Federal Safety Standards Apply Fully to a New Pipeline Regardless of the Policy Factors Considered in Route Selection.

75. It is undisputed that non-federal agencies may select hazardous liquid pipeline routes based on multiple policy factors, such as economic, environmental, and aesthetic impacts. Because PSA safety standards apply in full to any route chosen by a non-federal routing agency, the policy factors used in route selection are irrelevant to the full application of federal safety standards. A route could be chosen solely for economic reasons, or the exact same route could be chosen solely for safety reasons, but in either case the federal safety standards would apply identically and fully. Assuming the State of Iowa selects a route for Summit's proposed pipeline, PSA safety standards will apply fully to that route regardless of whether the state considers the Story County setback.

7. Nothing in the PSA Indicates that Congress Intended to Prohibit Consideration of Safety in Location and Routing Decisions at All Levels of Government.

76. 49 U.S.C. § 60104(e) bars PHMSA from prescribing location or route. Therefore, PHMSA cannot consider safety in pipeline routing decisions. In Iowa, Summit argued that the County, and by extension states and tribes, also may not consider safety in routing. If Summit is correct then the practical result would be to bar all levels of government from considering safety when routing hazardous liquid and carbon dioxide pipelines, thereby leaving consideration of safety in route selection wholly to pipeline developer discretion. There is no evidence in the PSA that Congress intended this result. A prohibition on federal, state, and local consideration of safety in routing requires express congressional direction toward this end, because matters not regulated by federal law are reserved to the states. *Northern States Power Co. v. State of Minn.*, 447 F.2d 1143, 1146 (8th Cir. 1971).

8. The Pipeline Safety Act Does Not Preempt the Burleigh and Emmons County Setbacks.

77. The plain language of 49 U.S.C. § 60104(e) makes clear that the entire field of hazardous liquid pipeline location and routing – without reservation – is outside of PSA jurisdiction. PHMSA has no authority to "prescribe the location or routing of a pipeline facility" or to issue "safety standards" under 49 U.S.C. § 60102 that have the effect of prescribing the location or route. There is no exception to this limitation. As stated by the District Court in the *Washington Gas Light* case, "When the same statute simultaneously authorizes one entity to set safety standards and does not authorize that entity to make siting decisions, the only logical interpretation is that

location is not a safety standard." *Washington Gas Light Co. v. Prince George's County Council*, 2012 WL 832756, *8, Util. L. Rep. P 14,830, *aff'd* 711 F.3d at 421-22. Since the selection of location and route is not a "safety standard" within PSA jurisdiction, Burleigh and Emmons Counties, as well as other North Dakota state and local jurisdictions, may consider safety when enacting pipeline facility setbacks, other land use controls, or pipeline routing permitting statutes.

78. The factors used by Burleigh and Emmons Counties to choose a route matter not in the least to the full expression of PSA safety standards. Just as safety standards in building codes for home construction can fully apply to any chosen location, regardless of the reasons it was chosen, PSA safety standards apply fully to any chosen route regardless of the reasons for why that route was chosen. The Commission may apply North Dakota's 500-foot avoidance area, required by 49 N.D.C.C. § 49-22.1-03, or one or more landowners may waive this requirement, and the PSA would nonetheless apply fully to the resulting route. Moreover, the avoidance area could be based on an intent to minimize construction impacts, to minimize the potential impacts of future maintenance, or to minimize potential safety risks, or a combination of all these factors, and such policy intentions would have no impact on the full expression of the application of the PSA safety standards to the final route. Just so, the reasons why Burleigh and Emmons Counties chose their setbacks are irrelevant to full expression of PSA safety standards.

79. Any route chosen would result in a different application of federal safety standards given its length, topography, proximity to high consequence areas, water

crossings, etc., but such changes are true for all route choices regardless of the policy reasons for the choice. The PSA safety standards can apply different but fully to any route chosen by the Commission, regardless of the policy factors considered by the Commission. A Commission modification of an applicant-proposed route might result in modified pump station and valve locations, different water crossings, or constructions in different topographies, due to the application of safety standards to different locations, but the PSA's safety standards would apply fully within the chosen route. The same is true for county setbacks. If the Burleigh and Emmons County setbacks are applied and a modified route is required, the PSA safety standards would apply fully to that route.

80. If Summit is correct that the Counties may not consider safety in establishing setbacks because such consideration converts the setback into a "safety standard" under 49 U.S.C. § 60102, then it follows that the Commission also may not consider safety in routing the proposed pipeline. But it is also true that PHMSA may not prescribe a location or route of Summit's proposed pipeline. The result would be that no government agency could consider the safety of a route, leaving this decision solely to Summit. There is no evidence in the PSA or its legislative history that Congress intended to prohibit all levels of government from considering safety in route selection. Fortunately, Congress made absolutely clear that the PSA does not regulate the choice of location or route – for safety or any other reason.

81. Accordingly, the PSA does not preempt the Burleigh and Emmons County setbacks, even if the Counties considered the safety of neighboring landowners and businesses as part of their reasons for enacting the setbacks.

D. The County Emergency Planning Ordinances Are Not Preempted by the Pipeline Safety Act.

82. Emergency response to a large diameter carbon dioxide pipeline rupture requires coordinated action by many actors including pipeline company employees and contractors, and an array of first responders, including local, tribal, state, and federal law enforcement, firefighting, and emergency medical agencies. Such coordination requires information sharing. Yet, Summit asserts that emergency response plan disclosure requirement in Section XII of the Burleigh pipeline ordinance (Doc. ID# 206) is preempted by the PSA merely because it requires disclosure of the company's emergency response plan. Summit is incorrect because merely asking for information intended to keep county residents and first responders safe in the event of a pipeline rupture is a core police power function; there is no evidence that Congress intended to prohibit such action via the express preemption provision in the PSA; and disclosure of such plan would not to any degree interfere with federal pipeline safety law.

1. The Burleigh County Emergency Plan Ordinance

83. Section XII of the Burleigh County ordinance "requires Hazardous Liquid Pipelines Companies to provide information to assist in emergency response and hazard mitigation planning pursuant to this section." (Doc. ID# 206 at 11.) Although this information is required as a part of a zoning ordinance, the reason for the request

is to support the County's emergency planning efforts and the first responders that would implement it. Burleigh County Ordinance Section II(2). (Doc. ID# 206 at 4.

84. Section XII contains two subsections. The first subsection states that if PHMSA has adopted regulations requiring emergency preparedness, emergency response, and hazard mitigation planning for a pipeline, then the pipeline need only submit a copy of such plan directly to Burleigh County Emergency Management. (Doc. ID# 206 at 11). The second subsection states that if PHMSA has not adopted such regulations for "Hazardous Liquid Pipelines," then the pipeline must submit certain listed information.

85. It is not disputed that PHMSA's emergency planning requirements apply to the proposed Summit carbon dioxide pipeline, which requirements are provided by 49 C.F.R. § 195.401(e). Moreover, Summit provided a draft of its emergency response plan as Appendix 9 of its October 17, 2022 Application. Therefore, subsection 1 of Section XII applies to Summit and all it need do to comply with this section of the ordinance is to send this plan directly to Burleigh County Emergency Management.

86. Subsection (2) applies only to pipelines that are not regulated by PHMSA. Since PHMSA's emergency response planning regulations apply to Summit's proposed pipeline, the information requirements of subsection 2 are neither applicable nor at issue here. By definition, subsection (2) cannot interfere with PHMSA regulations, because it does not apply to any pipelines regulated by PHMSA.

2. Federal Pipeline Safety Act Jurisdiction Over Pipeline Emergency Planning and Response

87. Congress has extended federal authority over "minimum safety standards for pipeline transportation and for pipeline facilities." 49 U.S.C. § 60102(a)(2). With regard to emergency response to a pipeline rupture, these standards are not plenary, but rather are limited to those which apply to any or all of the "owners or operators of pipeline facilities" with regard to their "emergency plans and procedures." 49 U.S.C. § 60102(a)(2)(A), (B). Thus, the PSA does not regulate entities, such as local governments, that do not own or operate pipelines with regard to their emergency plans and procedures. Congress wisely and respectfully chose not to federal local and state emergency response to pipeline ruptures.

3. Burleigh County Jurisdiction Over Pipeline Emergency Planning and Response

88. North Dakota law requires that each county must either have its own emergency management organization or it must be a member of a multicounty organization or regional emergency management program. ND.C.C. § 37-17.1-07(2). Each emergency management organization must prepare and keep current a local disaster or emergency management plan for its area. N.D.C.C. § 37-17.1-07(5). The North Dakota Department of Emergency Services maintains standards and resources for local, tribal, and state Emergency Operations Plans.[3] In relevant part here, the purposes of Chapter 37-17.1 are to "[r]educe vulnerability of people and communities of this state to damage, injury, and loss of life and property resulting from . . . manmade disasters or emergencies . . .." N.D.C.C. § 37-17.1-02(1). The word "disaster" is defined in relevant part here as:

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[3] Department of Homeland Security planning website at https://www.des.nd.gov/planning.

> the occurrence of widespread or severe damage, injury, or loss of life or property resulting from any . . . manmade cause, including . . . chemical spill, or other water or air contamination, . . . explosion . . . determined by the governor to require state or state and federal assistance or actions to supplement the recovery efforts of local governments in alleviating the damage, loss, hardship, or suffering caused thereby.

"Emergency" is defined as:

> any situation that is determined by the governor to require state or state and federal response or mitigation actions to protect lives and property, to provide for public health and safety, or to avert or lessen the threat of a disaster. Emergencies require an immediate supplement to local governments or aid to critical industry sectors that provide essential lifeline services.

N.D.C.C. § 37-17.1-04(2). "Emergency management" is defined as:

> a comprehensive integrated system at all levels of government and in the private sector which provides for the development and maintenance of an effective capability to prevent, mitigate, prepare for, respond to, and recover from known and unforeseen hazards or situations, caused by an act of nature or man, which may threaten, injure, damage, or destroy lives, property, or our environment.

N.D.C.C. § 37-17.1-04(5). Local governments may declare a local disaster or emergency. N.D.C.C. § 37.17.1-10. In accordance with state law, Burleigh and Emmons Counties have established emergency management departments.[4]

[4] Burleigh County Emergency Management: https://www.burleigh.gov/departments/emergency-management/ ; Emmons County Emergency Management: https://www.emmonsnd.com/emergency-management.html.

4. Federal and State Law Require Coordination Between Pipeline Owner and Operator Emergency Planning and State and Local Emergency Planning

89. PHMSA regulates emergency planning and response to pipeline ruptures, but only with regard to the activities, personnel, and resources of pipeline owners and operators. 49 CFR 195.402(d). State, tribal, and local emergency planning and response agencies are regulated by their own laws. PHMSA cannot and should not impose emergency response safety standards on local law enforcement, firefighters, and medical services. Thus, pipeline owners and operators have company-specific emergency response plans, and North Dakota first responders have government emergency operations plans. Neither Burleigh nor Emmons Counites nor the State of North Dakota can dictate to a pipeline owner and operator the contents of its emergency response plan, but neither PHMSA nor a pipeline owner or operator can dictate the contents of a government emergency operations plan. Thus, two separate plans are applicable to a pipeline rupture: the pipeline company plan that will direct the response of its employees and contractors; and the dovetailed government plans that will direct the response of government first responders.

90. It is an express objective of both the PSA and North Dakota state law to ensure that the emergency plans of pipeline owners and operators and government response agencies be coordinated to ensure public safety. The following PSA sections expressly recognize that state, county, and local governments have an independent role in emergency response:

- 49 U.S.C. § 60102(d)(5)(B) requires that pipeline operator emergency response plans must include "liaison procedures with State and local authorities for emergency response;"
- 49 U.S.C. § 60102((h)(3) requires pipeline operators to submit safety reports to "any relevant emergency response or planning entity," upon request of a governor; and
- 49 U.S.C. § 60125(b)(1) authorizes the Pipeline and Hazardous Materials Safety Administration ("PHMSA") to make grants to state, county, and local governments for emergency management matters.

None of the foregoing statutory provisions would be necessary if the PSA preempted state, county, and local emergency response activities. PHMSA's regulations recognize this shared jurisdiction and expressly require that pipeline operators coordinate with and provide information to state, tribal, and local response agencies. 49 C.F.R. §§ 195.65, 195.402(c)(12), 195.402(e)(1), 195.414(d)(5), 195.417(a), 95.452(i)(1).

91. For its part, state law recognizes that emergency response authority is shared among state, local, interstate, federal, and foreign governments, 37-17.1-02(4). State law encourages North Dakota political subdivisions "to enter mutual aid agreements with other public and private agencies within the state for reciprocal aid and assistance in responding to and recovering from actual and potential disasters or emergencies." Thus, emergency management activities, including emergency

planning, are shared and dovetailed among the various local, state, and federal agencies, depending on the location, type, and extent of a disaster or emergency.

5. Under Either an Express Preemption or Conflict Preemption Analysis, Burleigh County's Requirement that Summit Disclose Its Emergency Response Plan Is Not Preempted by the PSA

92. As an initial observation, state and county emergency response is a core historic police power. Moreover, effective planning and execution of emergency response is a matter of life-or-death. Burleigh County's requirement to disclose Summit's emergency response plan is not a casual request. A lack of information about the risks of a rupture of Summit's pipeline could result in the death not only of innocent bystanders, but of the emergency response personnel who attempt to rescue them. As such, the U.S. Supreme Court's guidance that "the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress," *Wyeth v. Levine*, 555 U.S. at 565, stands as a significant hurdle to a finding that local emergency response agencies are preempted by the PSA from seeking information critical to public safety. A finding of preemption is appropriate if and only if the PSA states in "clear and manifest" terms that state and local governments have no jurisdiction to seek information from pipeline companies deemed necessary for state and local emergency planning and response activities.

93. In recognition of the fact that pipeline emergency response is shared among federal, state, and local jurisdictions, Congress did not fully occupy the field of pipeline rupture emergency response through the PSA. The PSA regulates pipeline company emergency planning and response; state law regulates state and county

emergency planning and response. It is axiomatic that local law enforcement, firefighters, and medical responders have jurisdiction to respond to and plan for a pipeline rupture and do not operate under the direction of either PHMSA or pipeline companies, particularly since local responders are almost always the first to arrive at the site of a rupture. Congress has expressly preempted the field of pipeline company emergency planning and response to carbon dioxide pipeline ruptures but has not preempted the field of state and local response to such ruptures.

94. Since Summit provided a draft of its emergency response plan to the Commission, the question here is whether Burleigh County preempted from requiring Summit to disclose its company emergency response plan. It is not. Northing in the PSA prohibits state and local governments from seeking critical information needed for governmental emergency planning efforts.

95. The PSA expressly prohibits Burleigh County from adopting "safety standards" for the proposed Summit pipeline. 49 U.S.C. § 60104(c). In turn, 49 U.S.C. § 60102(a)(2)(B) expressly authorizes "safety standards" for "emergency plans and procedures." The emergency plans and procedures required by federal regulation are contained in 49 C.F.R. § 195.402(e), which requires that pipeline operators include procedures "to provide safety when an emergency condition occurs" in the procedures manual required by 49 C.F.R. § 195.402(a). These emergency procedures are typically described as an emergency response plan (the Part 194 regulation do not contain the term "emergency response plan"). The procedures all relate to actions taken after a pipeline rupture occurs. None of these conditions address a pre-rupture

disclosure of the operator's emergency response plan to state and local officials. The procedures require communication with "fire, police, and other public officials . . . to coordinate and share information to determine the location of the release . . . and any additional precautions necessary for an emergency involving a pipeline transporting a highly volatile liquid (HVL)." This requirement to coordinate with local responders relates entirely to post-rupture procedures. It does not address disclosure of information with local governments before a rupture. Similarly, 49 C.F.R. § 195.65 requires pipeline operators to "provide safety data sheets on any spilled hazardous liquid to the . . . appropriate State and local emergency responders within 6 hours of a telephonic or electronic notice of the accident . . .," that is, after a release. In contrast, 49 C.F.R. § 195.402(c)(12) requires pipeline operators to "inform [federal, state, and local] officials about the operator's ability to respond to the pipeline emergency and means of communication during emergencies." However, the regulation does not provide further direction on what information must be disclosed.

96. Thus, neither the PSA nor its regulations establish a "safety standard" that regulates disclosure of operator emergency response plans to county governments. To the extent that 49 C.F.R. § 195.402(c)(12) requires disclosure of information about the operator's ability to respond, such ability would be described in its emergency response plan, in which case the regulation should be interpreted to require disclosure of emergency response plans to state and local officials. The PSA does not expressly preempt county governments from requiring disclosure of pipeline company emergency response plans.

97. When federal law has not occupied a field of regulation, and instead regulation is shared with non-federal governments, it is also appropriate to apply a conflict preemption analysis to determine the border between federal and state/local jurisdiction. Under conflict preemption, a state or local law may be preempted only if it is impossible for regulated parties to comply with both sets of laws, *Fla. Lime*, 373 U.S. at 142–43, or where a state law poses an obstacle to the "full purposes and objectives" of Congress. *Hines*, 312 U.S. at 67. Here, it is clear that a mere information disclosure requirement does not require Summit to take any emergency response actions; to include any particular activities or information in its emergency response plans; to acquire any emergency response resources; or otherwise control any of Summit's emergency planning or response activities. It is entirely possible for Summit to comply with the Burleigh County's disclosure requirement without the slightest impact to Summit's compliance with federal safety standards. Moreover, since the PSA and the PHMSA regulations require that Summit coordinate and provide information to local emergency response agencies, compliance with the Burleigh County requirement would in fact advance the full purposes and objectives of Congress. Thus, under a conflict preemption analysis, the PSA does not preempt Burleigh County from requiring that Summit disclose emergency response information.

98. Finally, the Commission should not assume that a private company understands all of the information needs of local emergency response agencies and first responders, particularly given the diversity of the entities in terms of location

and resources. The Pipeline Safety Act does not require that local emergency planning and response agencies blindly accept whatever information a pipeline operator voluntarily provides for them. It is contrary to public safety policy to hamstring response agencies with regard to their information needs. Also, the clear requirements within PHMSA regulations requiring coordination between pipeline owners and operators and local emergency response agencies demonstrates that Congress intended that pipeline companies not hinder local agency planning efforts. Ultimately, pipeline safety is best served by compliance with local agency information disclosure requirements, rather than blindly trusting that pipeline companies will provide all information needed by local emergency planning agencies and responders.

XIII. 500-foot Waiver.

99. Landowners covered the 500-foot waiver misnomer in its opening brief. Summit's statement that it is committed to not start construction on the pipeline anywhere that is within 500 feet of an inhabited rural residence, school, or business[5] is meaningless because the law already forbids this. Another statement of a "commitment" worded to seem as if Summit is going above and beyond when they simply could have said, we will follow the law.

100. Landowner Intervenors provided ample evidence to inform the PSC if the current proposed route before is reasonable in terms of distance from residences, business, schools, and other structures or visited areas. See Landowner Opening brief pages 17-30. The evidence proves it would be irresponsible to locate an 8-inch

[5] See Summit Brief at page 22 last paragraph

diameter CO2 hazardous pipeline closer than 1,855 feet from a residence or occupied structure, including, schools, nursing homes, hospitals, or businesses. The evidence proves a 20-inch CO2 hazardous pipeline should not be located less than 2,920 feet from the same structures. As recent as April 3, 2024, officials in Sulphur Louisiana instituted a shelter-in-place order for those withing 1,320 feet of the leaking Exxon CO2 pump station. See LO Ex 10.

101. The PSC has the great responsibility of being the agency for determining if Summit's proposed hazardous pipeline, with diameters up to 24-inches, will be intelligently located. The evidence is overwhelming Summit has not provided an intelligent route.

JOINDER

102. Landowner Intervenors join and adopt the arguments of Burleigh and Emmons County as found in their respective post-2024 hearing briefs not inconsistent with Landowner Intervenors' arguments.

CONDITIONS

103. Both of Summit's applications should be denied. However, if for some reason the PSC is considering granting both or either of Summit's applications, then the PSC must make any approval conditional upon Summit satisfying several criteria. This section is not a waiver of any or all of Landowners prior arguments. Landowners steadfastly believe Summit has simply not satisfied its specific and required burden of proof. These conditions and requirements are included here only

in case 2 or 3 of the PSC decision makers are considering one or more approvals of Summit's applications:

a. Summit shall not commence construction on any segment of the route or of the pipeline in North Dakota until 1) full and final agency approval in Iowa is obtained, 2) full and final agency approval in Minnesota is obtained, 3) full and final agency approval in Nebraska is obtained, and 4) full and final agency approval in South Dakota is obtained.

b. Summit shall not commence construction on any segment of the route or of the pipeline in North Dakota until the North Dakota Industrial Commission fully and finally approves of the sequestration sites Summit and or its affiliates currently have pending before the Industrial Commission.

c. No eminent domain proceedings can commence upon any affected parcels of land in North Dakota until Summit has filed with the PSC affirmation that Summit is unable to further alleviate the concerns of that specific landowner or landowners and/or that Summit believes any further negotiations with or attempts to resolve Landowner concerns will likely not lead to a negotiated easement.

d. No eminent domain proceedings can commence upon any affected parcels of land in North Dakota until Summit has obtained all necessary local, state, and federal permits and approvals.

e. If the above conditions all become satisfied, then Summit shall file notice with the PSC of its intent to commence construction. Such filing shall be made two weeks prior to any such construction commencing.

f. Summit shall file as-built maps and notice of completion of construction once construction is completed.

g. The applications approved shall expire if the regulatory markets for low carbon fuels are no longer economically accessible for ethanol.

h. The applications approved shall expire when the sequestration of carbon dioxide is no longer eligible for the 45Q tax credit.

i. Summit shall obtain and maintain throughout the life of the pipeline a general liability insurance policy in the amount of not less than $2,000,000 million per person/$200,000,000 per occurrence and provide proof of such insurance to the PSC prior to commencing any construction described in this Order. Each affected landowner shall be named an additional insured on the policy. This policy shall only provide coverage for injuries and damages arising from the accidental rupture of the Summit pipeline.

j. Summit shall annually file a copy of its insurance policy with the PSC.

k. Summit shall not engage in construction activities between December 1st and February 1st of each year.

l. Summit shall perform X-ray inspections of 100 percent of the welds, test the pipe coating, and hydrostatically test the pipeline to 150 percent of maximum operating pressure.

m. Summit shall use thicker walled pipe and fracture arrestors where appropriate, including anywhere the pipeline is located within 1,500 feet of a residence, school, place of worship, business, nursing home, or hospital.

n. Summit shall purchase and provide a carbon dioxide monitor for every emergency manager truck, fire truck, law enforcement vehicle, and ambulance in the communities through which the pipeline crosses.

o. Summit shall purchase and provide a carbon dioxide monitor for every residence, school, place of worship, business, nursing home, or hospital located within 2,000 feet of the pipeline or pump station.

p. Summit shall, in conjunction with the affected counties, establish a real-time alarm and notification system, similar to the Buxus system.

q. Summit shall make landowners and tenants whole if they are rendered ineligible for or have a claim asserted against them that they are out of compliance with any federal farm programs so long as such ineligibility or lack of compliance is due to construction of or existence of the hazardous pipeline upon their property.

r. Summit shall make landowners and tenants whole if they are rendered ineligible for or have a claim asserted against them that they are out of

compliance with any current Conservation Reserve Program contract in place as of the date of final PSC order in this matter.

s. Summit shall maintain landowner and tenant access to their properties during construction and any maintenance periods by installing appropriate fencing and or gates to ensure landowner and tenant access to all portions of their property outside of the easement areas.

t. Summit shall be required to submit revised pipeline and easement location maps and documentation for each of the following landowners' properties that indicates Summit has complied with that landowner's latest revised re-routes whether orally described or supplied in physical form to and received by the PSC during the PSC hearing process:

    i. Karla and Randall Waloch

    ii. Shirley Waloch

    iii. Loren and Diane Staroba for the Staroba Revocable Living Trust

    iv. Marvin and Jeanne Lugert for Lugert Land Limited Partnership

    v. Valera Hayen and Kari Curran

    vi. James Tiegs

    vii. Howard Malloy for the Howard L. Malloy Trust #2

    viii. Janel Olson, Jon Hagerott, and Arden Hagerott for APH Farms

    ix. Jim Rockstad

    x. Julia Stramer and Mitch Kertzman for the Kertzman Farm Trust

xi. Diane Zajac, to the extent any portion of her property is still impacted by the proposed or final route

xii. Rose and Ben Dotzenrod related to accommodations for their existing drainage easement and gravity flow drainage system

CONCLUSION

104. Summit presented the same arguments, claims, and unsupported conclusions as it did in 2023, particularly as to landowner concerns. Summit failed to adequately address the many deficiencies noted in the 2023 denial order and failed to refute evidence and testimony of Landowner Intervenors during the 2024 hearings. Not only did the PSC hear the same issues and argument from Summit but it heard from many of the same witnesses.

105. Summit's claim "Intervenors failed to demonstrate that Summit did not meet its burden..." is a pointless statement and underscores Summit's lack of understanding of the purposes of the PSC hearing process. The purpose of the 2024 hearings, which occurred only at Summit's request, was for Summit to definitively and finally prove each and every necessary element of their burdens, but they did not. The Intervenors don't have to prove a single thing for the PSC to again deny Summit's applications.

106. Summit failed to prove construction, operation, and maintenance of the proposed hazardous CO2 pipeline will produce minimal adverse effects upon the environment.

107. Summit failed to prove construction, operation, and maintenance of the proposed hazardous CO2 pipeline will produce minimal adverse effects upon the welfare of the citizens of North Dakota.

108. Summit failed to prove its proposed hazardous CO2 pipeline at each location it is proposed is compatible with environmental preservation.

109. Summit failed to prove its proposed hazardous CO2 pipeline at each location it is proposed is compatible with the efficient use of resources.

110. Summit failed to prove construction, operation, and maintenance its proposed hazardous CO2 pipeline at each location it is proposed will minimize adverse human and environmental impact while simultaneously ensuring continuing system reliability and integrity and ensuring that energy needs are met and fulfilled in an orderly and timely fashion.

111. Summit had the burden of proof and it failed.

112. Landowners respectfully request both of Summit's applications be denied by a vote of 3-0.

113. Like Governor Doug Burgum says "[J]ust say no and they'll move it to your neighbor and your neighbor can get the big check. Because that is what's happening in North Dakota."[6] If the PSC is not going to "say no" and this doomed pipeline is going to be approved, Landowner Intervenors want their neighbors to get the big check. The PSC can and should require Summit to reroute around Landowner Intervenors.

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[6] See Gov. Doug Burgum has heated exchange over CO2 pipelines (nbcnews.com) and Lo Ex 15

114. In the alternative only, should the PSC decide to approve Summit's applications or either of them, then the PSC should require Summit comply with each and every condition as stated above and any other more Landowner and environment protective conditions that may be proposed by other parties.

REQUEST FOR RELIEF

115. Based on the foregoing, Summit has not met its burden under the Siting Act for either of its two applications and Landowners Intervenors respectfully request the PSC:

a. Deny Summit's Application for Waiver or Reduction of Procedures and Time Schedules;

b. Deny Summit's application for certificate of corridor compatibility; and

c. Deny Summit's application for route permit.

d. Reverse the prior ruling on preemption of County ordinances.

Respectfully submitted this 22nd day of July 2024.

/s/ Steven Leibel
Steven Leibel (ID 07361)
David Knoll (ID 06167)
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P.O. Box 858
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steve@bismarck-attorneys.com
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Landowner/Intervenor Lawyers

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2425 S. 144th St.
Omaha, NE 68144
Ph: 402-493-4100
bjorde@dominalaw.com
NDCO2@dominalaw.com
Landowner/Intervenor Lawyers

Attachment #1

From: Brian Jorde
Sent: Monday, September 18, 2023 1:50 PM
To: mrorie@summitcarbon.com; Bender, Lawrence <LBender@fredlaw.com>
Cc: NDCO2 <NDCO2@dominalaw.com>
Subject: Easement Negotiations

Micah/Lawrence:

1. Apologies in the delay – I finally had a moment to devote to this project.
2. Attached are the updated versions of the Easement Agreement Template and Ex. C for your review.
3. Presuming we can come to agreement on this language I do have some folks who will discuss Easement resolution with you in ND and SD.
4. Now that I have this back at the top my to do list, please turn this around as soon as you can.

Respectfully,
Brian

Brian E. Jorde
Lawyer
DOMINALAW Group pc llo
www.dominalaw.com

From: Brian Jorde
Sent: Wednesday, October 4, 2023 4:06 PM
To: mrorie@summitcarbon.com; Bender, Lawrence <LBender@fredlaw.com>
Cc: NDCO2 <NDCO2@dominalaw.com>
Subject: RE: Easement Negotiations

Gentlemen:

1. This is my 17-day check in.
2. Any progress here?

Respectfully,
Brian

Brian E. Jorde
Lawyer
DOMINALAW Group pc llo
www.dominalaw.com

From: Brian Jorde
Sent: Monday, October 9, 2023 8:29 AM
To: mrorie@summitcarbon.com; Bender, Lawrence <LBender@fredlaw.com>
Cc: NDCO2 <NDCO2@dominalaw.com>; Brian Jorde <BJorde@dominalaw.com>
Subject: RE: Easement Negotiations

Gentlemen:

1. Clearly you are ignoring my attempts at some resolution.
2. If I don't hear from you by Tuesday October 10, 2023, at 4pm I will be sending out a press release that Summit refuses to negotiate with interested parties.

Respectfully,
Brian

Brian E. Jorde
Lawyer
DOMINALAW Group pc llo
www.dominalaw.com

From: Brian Jorde
Sent: Tuesday, October 24, 2023 2:11 PM
To: mrorie@summitcarbon.com; Bender, Lawrence <LBender@fredlaw.com>
Cc: NDCO2 <NDCO2@dominalaw.com>
Subject: RE: Easement Negotiations

Micah:

1. In my ongoing attempts to make progress here, attached find my proposals for standard Easement and Ex C language.
2. Given we have not made any headway let's just look at one at a time.
3. Presuming you agree to the attached, then I have a ND Dickey Co Client interested in talking price. The term for ND cannot be longer than 99 years as you know. We suggest 50.

Respectfully,
Brian

Brian E. Jorde
Lawyer
DOMINALAW Group pc llo
www.dominalaw.com

From: Brian Jorde
Sent: Tuesday, October 31, 2023 12:07 PM
To: mrorie@summitcarbon.com; Bender, Lawrence <LBender@fredlaw.com>
Cc: NDCO2 <NDCO2@dominalaw.com>; Jordan Custer <JCuster@dominalaw.com>; Brian Jorde <BJorde@dominalaw.com>
Subject: RE: Easement Negotiations

Folks:

1. It is getting a bit tiresome playing pat-a-cake with you and getting nowhere.
2. Tell me today if I will have a material response to what I have provided or simply confirm that none of my clients in ND and SD are targets for your proposed project.

Respectfully,
Brian

Brian E. Jorde
Lawyer
DOMINALAW Group pc llo
www.dominalaw.com

From: Micah Rorie <mrorie@summitcarbon.com>
Sent: Wednesday, November 8, 2023 3:30 PM
To: Brian Jorde <BJorde@dominalaw.com>; Bender, Lawrence <LBender@fredlaw.com>
Cc: SDCO2 <SDCO2@dominalaw.com>; Jordan Custer <JCuster@dominalaw.com>
Subject: RE: Easement Negotiations

Brian,

I've had some unexpected health issues, but plan to have a redline back to you with comments tomorrow a.m.

Thank you,

Micah Rorie

MICAH RORIE | M: 713-859-9532 | MRORIE@SUMMITCARBON.COM

From: Brian Jorde <BJorde@dominalaw.com>
Sent: Tuesday, November 14, 2023 7:39 AM
To: Micah Rorie <mrorie@summitcarbon.com>; Bender, Lawrence <LBender@fredlaw.com>
Cc: SDCO2 <SDCO2@dominalaw.com>; Jordan Custer <JCuster@dominalaw.com>
Subject: RE: Easement Negotiations

Kindly let me know the status here.

Respectfully,
Brian

Brian E. Jorde
Lawyer
DOMINALAW Group pc llo
https://cas5-0-urlprotect.trendmicro.com:443/wis/clicktime/v1/query?url=www.dominalaw.com&umid=b3edb74f-4b5b-4ff2-b654-ec11b64e1611&auth=eb93247e6f0bf441899f506750b82e22ac86cc81-d41535e6b43433c04cee62da861599b6a5769f6b

From: Micah Rorie <mrorie@summitcarbon.com>
Sent: Tuesday, November 14, 2023 3:36 PM
To: Brian Jorde <BJorde@dominalaw.com>; Bender, Lawrence <LBender@fredlaw.com>
Cc: SDCO2 <SDCO2@dominalaw.com>; Jordan Custer <JCuster@dominalaw.com>
Subject: RE: Easement Negotiations

Brian,

Please see attached edits related to the [redacted] I've included comments on most of the changes. You'll find that we've conceded to quite a few of your requests while having to modify or strike some. Please have your team try to ensure any edits moving forward are reflected instead of mixed in as accepted. This will help us circulate docs for review a bit faster.

I'm still needing confirmation that [redacted] is the only Domina client wishing to work out an agreement. Again, a full list of whom we're working with would be typical and very helpful for the speed of this process.

Regards,

Micah Rorie

MICAH RORIE | M: 713-859-9532 | MRORIE@SUMMITCARBON.COM

From: Brian Jorde
Sent: Tuesday, November 14, 2023 5:06 PM
To: Micah Rorie <mrorie@summitcarbon.com>; Bender, Lawrence <LBender@fredlaw.com>
Cc: SDCO2 <SDCO2@dominalaw.com>; Jordan Custer <JCuster@dominalaw.com>
Subject: RE: Easement Negotiations

All:

1. I am going to take the attached and accept any changes that I agree to or that are changes I had previously made that you agreed to in the versions you just sent me.
2. Then we will be left with the areas for discussion.
3. I will send that back to you this week.
4. [redacted]
5. Please advise.

Respectfully,
Brian

Brian E. Jorde
Lawyer
DOMINALAW Group pc llo
www.dominalaw.com

From: Brian Jorde
Sent: Tuesday, November 28, 2023 2:46 PM
To: Micah Rorie <mrorie@summitcarbon.com>; Bender, Lawrence <LBender@fredlaw.com>
Cc: SDCO2 <SDCO2@dominalaw.com>; Jordan Custer <JCuster@dominalaw.com>
Subject: RE: Easement Negotiations

Gentlemen:

1. It has been 13 days since I responded to your edits and I have not heard from you.

Respectfully,
Brian

Brian E. Jorde
Lawyer
DOMINALAW Group pc llo
www.dominalaw.com

From: Brian Jorde
Sent: Monday, January 22, 2024 11:04 AM
To: mrorie@summitcarbon.com; Bender, Lawrence <LBender@fredlaw.com>
Cc: SDCO2 <SDCO2@dominalaw.com>; Jordan Custer <JCuster@dominalaw.com>
Subject: RE: Easement Negotiations - CONFIDENTIAL

Gentlemen:

1. You have not responded to repeated good faith attempts on my and my various clients' behalf to reach agreement on easements.
2. If I do not hear from you this week by Thursday at 1pm as to my prior Draft Easements and offers, I am going to file notices to the ND PSC Docket that Summit refuses to negotiate despite our best efforts.

Jordan:

1. Pls calendar this so I don't forget to make a filing with the PSC.

Respectfully,
Brian

Brian E. Jorde
Lawyer
DOMINALAW Group pc llo
www.dominalaw.com

From: Micah Rorie <mrorie@summitcarbon.com>
Sent: Friday, February 9, 2024 1:25:50 AM
To: Brian Jorde <BJorde@dominalaw.com>; Bender, Lawrence <LBender@fredlaw.com>
Cc: SDCO2 <SDCO2@dominalaw.com>; Jordan Custer <JCuster@dominalaw.com>
Subject: RE: Easement Negotiations

Brian,

We've had some deliberation over tweaks to our option docs in the Dakotas. I expect to have the doc packages and redline of the easement to you by EOB Tuesday. In an effort to mitigate any unnecessary time spent by you or your clients on docs that may be adjusted I believe this is the best course of action. If there are any other folks in your client base that I ought to include in my submittal, please let both me and Lawrence know.

Thank you,
Micah

MICAH RORIE | **M: 713-859-9532** JMRORIE@SUMMITCARBON.COM

From: Brian Jorde <BJorde@dominalaw.com>
Sent: Friday, February 9, 2024 7:28 AM
To: Micah Rorie <mrorie@summitcarbon.com>; Bender, Lawrence <LBender@fredlaw.com>
Cc: SDCO2 <SDCO2@dominalaw.com>; Jordan Custer <JCuster@dominalaw.com>
Subject: Re: Easement Negotiations

We simply want to get a master set of all the contracting docs with a blank for any monetary terms. However, I don't know your current planned routes so it is hard to be exact as to who is affected and therefore interested.

Sent from my Verizon, Samsung Galaxy smartphone
Get Outlook for Android

From: Brian Jorde <BJorde@dominalaw.com>
Sent: Friday, February 9, 2024 7:43 AM
To: Micah Rorie <mrorie@summitcarbon.com>; Bender, Lawrence <LBender@fredlaw.com>
Cc: SDCO2 <SDCO2@dominalaw.com>; Jordan Custer <JCuster@dominalaw.com>
Subject: Re: Easement Negotiations

As a follow-up, if you would simply reroute around my clients your project would likely sail through. I can't understand why this is not your focus. Tweak your route and move on. You are making this so much more difficult and expensive for your investors than this needs to be.

Sent from my Verizon, Samsung Galaxy smartphone
Get Outlook for Android

From: Brian Jorde
Sent: Thursday, March 28, 2024 9:06 AM
To: Micah Rorie <mrorie@summitcarbon.com>; Bender, Lawrence <LBender@fredlaw.com>
Cc: SDCO2 <SDCO2@dominalaw.com>; Jordan Custer <JCuster@dominalaw.com>; NDCO2 <NDCO2@dominalaw.com>
Subject: RE: Easement Negotiations - CONFIDENTIAL

Micah:

1. As you know, we are still waiting (since November 15, 2023 – see below email thread), going on months now, for your WORD agreements so we can come to an understanding as to a template to use for negotiation purposes.
2. Given, you have been using these options agreements for some time I am not sure what the hold up is here unless your plan is to continue to go behind my back and reach out to my clients directly which brings up other issues we will deal with if we must in the future.
3. We can only conclude that you are no longer targeting either [redacted] or any of the others we have discussed in the past.
4. Kindly confirm.

Respectfully,
Brian

Brian E. Jorde
Lawyer
DOMINALAW Group pc llo
www.dominalaw.com

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

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 **DECLARATION OF SERVICE**

[1] Rosanne Ogden declares that I am of legal age and not a party to this action, and that I served the following document(s):

1. Landowners' Post-Rehearing Reply Brief with Attachment 1; and
2. Declaration of Service.

[2] On July 22, 2024, by sending a true and correct copy thereof by electronic means only to the following email addresses, to wit:

John Maurice Schuh Bar ID 08138
Special Assistant Attorney General
North Dakota Public Service Commission
600 E. Boulevard Ave, Dept. 408
Bismarck, ND 58505-0480
jschuh@nd.gov

Lawrence Bender Bar ID 03908
Fredrikson & Byron, P.A.
1133 College Dr., Ste. 1000
Bismarck, ND 58501-1215
lbender@fredlaw.com

Hope Lisa Hogan Bar ID 05982
Administrative Law Judge
Office Of Administrative Hearings
2911 N. 14th St., Ste. 303
Bismarck, ND 58503
hlhogan@nd.gov

Zachary Evan Pelham Bar ID 05904
Pearce Durick PLLC
314 E. Thayer Ave.
P.O. Box 400
Bismarck, ND 58502-0400
zep@pearce-durick.com

John Hamre
Public Service Commission
State Capitol
600 E Boulevard Ave., Dept. 408
Bismarck, ND 58505-0480
jghamre@nd.gov

Brian E. Jorde
Domina Law Group
2425 S 144th St
Omaha NE 68144
bjorde@dominalaw.com

Kevin Pranis
LIUNA Minnesota & North Dakota
81 E Little Canada Rd
St. Paul MN 55117
kpranis@liunagroc.com

Randall J. Bakke Bar ID 03898
Bradley N. Wiederholt Bar ID 06354
Bakke Grinolds Wiederholt
PO Box 4247
Bismarck, ND 58502-4247
rbakke@bgwattorneys.com
bwiederholt@bgwattorneys.com

North Dakota Public Service Commission
ndpsc@nd.gov

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Derrick Braaten
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Julie Lawyer
Burleigh County State's Attorney
bc08@nd.gov

Brant Leonard
Frederickson & Byron, P.A.
bleonard@fredlaw.com

Patrick T. Zomer
Attorney for the City of Bismarck
pat.zomer@lawmoss.com

Michael Joyner
michael@bismarck-attorneys.com

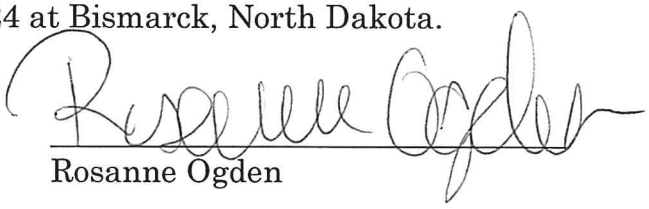
[3] and by sending the originals and seven (7) copies of said documents via U.S. Mail, at Bismarck, North Dakota with postage prepaid, to the following:

Steve Kahl
Executive Secretary
North Dakota Public Service Commission
State Capitol
600 E Boulevard Ave, Dept 408
Bismarck, ND 58505-0480

[5] The addresses of each party served are the last reasonably ascertainable e-mail address and post office address of such party.

[6] I declare, under penalty of perjury under the law of North Dakota, that the foregoing is true and correct.

Signed on the 22nd day of July, 2024 at Bismarck, North Dakota.



Rosanne Ogden