

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

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

Case No. PU-22-391

ORDER

February 7, 2024

08-2024-CV-03622

Preliminary Statement

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

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

Discussion

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the proceeding, SCS filed a motion requesting the Commission to declare Emmons County and Burleigh County ordinances superseded and preempted pursuant to N.D.C.C. § 49-22.1-13(2)(b).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

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 On September 29, 2023, SCS renewed its motion to declare Burleigh and Emmons County ordinances superseded and preempted, specifically requesting the Commission determine whether N.D.C.C. § 49-22.1-13(2)(b) automatically preempts all local ordinances.

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Exhibit 2

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Knoll Leibel, LLP, on behalf of the Intervenors
Steven Leibel, Attorney

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

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

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

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

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

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

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

Order

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


PUBLIC SERVICE COMMISSION



Sheri Haugen-Hoffart
Commissioner



Randy Christmann
Chair



Timothy J. Dawson
Substitute decisionmaker