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December 17, 2025

Via Electronic Mail & Hand Delivery

Mr. Steve Kahl
North Dakota Public Service Commission
600 E. Boulevard, Dept. 408
Bismarck, ND 58505-0480
ndpsc@nd.gov

In re: Otter Tail Power Company & Montana-Dakota Utilities Co.
345kV JETx Transmission Line
Siting Application - Stutsman, LaMoure, and Dickey Counties
Case No. PU-25-236
OAH File No. 20250300
Our File No. 072879-000001

Dear Mr. Kahl:

Enclosed for filing in the above-referenced matter, please find eight copies of Otter Tail Power Company and Montana-Dakota Utilities Co.'s Memorandum in Support of Request to Declare Local Land Use and Zoning Ordinances and Regulations Superseded and Preempted.

Please feel free to contact me if you have any questions. Thank you.

Sincerely,


Casey A. Furey

CAF/lh
Enc.

- cc: ALJ Hope Hogan (via email)
- Zach Pelham (via email)
- Robert M. Endris (via email)
- Otter Tail Power Co. Regulatory (via email)
- Allison Waldon (via email)
- Travis R. Jacobson (via email)
- Erik Edison (via email)

82 PU-25-236 Filed 01/21/2026 Pages: 23
Exhibit 18 - Memorandum in Support of Preemption Request (Dkt #33)

Otter Tail Power Company/Montana-Dakota Utilities Co.

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

Otter Tail Power Company/Montana-Dakota Utilities Co.
345kV JETx Transmission Line
Siting Application

Case No. PU-25-236

**OTTER TAIL POWER COMPANY AND MONTANA-DAKOTA UTILITIES CO.'S
MEMORANDUM IN SUPPORT OF REQUEST TO DECLARE LOCAL LAND USE AND
ZONING ORDINANCES AND REGULATIONS SUPERSEDED AND PREEMPTED**

I. INTRODUCTION

On August 8, 2025, Otter Tail Power Company and Montana-Dakota Utilities Co. (collectively, “Applicants”) filed a Joint Consolidated Application for Certificate of Corridor Compatibility and Route Permit (the “Application”) for the 345kV Jamestown to Ellendale electric transmission line (“JETx” or the “Project”). Case No. PU-25-236, Dkt. No. 1. The Application requests the North Dakota Public Service Commission (the “Commission”) order that all local land use and zoning regulations, restrictions, and corresponding permitting requirements of political subdivisions purporting to regulate the Project are automatically superseded and preempted upon the Commission’s issuance of a permit pursuant to N.D.C.C. § 49-22-16(2)(b), as amended by House Bill 1258 (2025) (“HB 1258”). The Commission previously interpreted language identical to that in N.D.C.C. § 49-22-16(2)(b) and held that local land use and zoning regulations were automatically superseded and preempted by the issuance of a route permit. *SCS Carbon Transport LLC*, N.D. P.S.C. Case No. PU-22-391, Dkt. No. 440 (interpreting N.D.C.C. § 49-22.1-13).¹ Applicants request a consistent finding in this case, as the current version of N.D.C.C. § 49-22-16 now mirrors N.D.C.C. § 49-22.1-13. To provide regulatory certainty, Applicants request the Commission enter an additional finding that certain local land use and/or zoning regulations, ordinances, and/or requirements are unreasonably restrictive and are therefore also superseded and preempted on those grounds.

II. BACKGROUND

A. History of the Commission’s Preemption Authority and Recent Legislation.

In 1975, the North Dakota Legislative Assembly (the “Legislature”) passed Senate Bill 2050, which created and enacted N.D.C.C. ch. 49-22, the “Siting Act,” and granted the Commission siting authority over electric, gas, and liquid energy conversion and transmission

¹ The Commission’s preemption decision in PU-22-391 is the subject of a pending appeal in *APH Farms, et al. v. N.D. Pub. Serv. Comm’n, et al.*, Burleigh County District Court Case No. 08-2024-CV-03622.

facilities. 1975 N.D. Sess. Laws ch. 436. Since its inception, the Siting Act has included a provision allowing the Commission to supersede and preempt land use codes, zoning, or building rules, regulations, or ordinances if the Commission finds that, as applied to an electric transmission facility's proposed route, the rule, regulation, or ordinance is "unreasonably restrictive in view of existing technology, factors of cost or economics, or needs of consumers." *Id.* § 16(2). In 2017, the Legislature created separate chapters for the siting of electric energy conversion and transmission facilities (N.D.C.C. ch. 49-22, the "Electric Siting Act") versus gas and liquid energy conversion and transmission facilities (N.D.C.C. ch. 49-22.1, the "Oil and Gas Siting Act"). *See* N.D.C.C. ch. 49-22.1; H.B. 1144, 65th Gen. Assembly., Reg. Sess. (N.D. 2017). Also in 2017, the Legislature modified the preemption language in the Oil and Gas Siting Act to include a provision that local land use and zoning regulations are superseded and preempted by the Commission's issuance of a route permit. *See* S.B. 2286(2017), 2017 N.D. Sess. Laws ch. 328 § 24 (codified as N.D.C.C. § 49-22.1-13(2)(b)). The 2017 preemption amendment applied to the Oil and Gas Siting Act, but not the Electric Siting Act. S.L. 2017, ch. 328, § 24.

In 2025, the Legislature enacted HB 1258, which amended the preemption language in the Electric Siting Act to mirror the preemption language added to the Oil and Gas Siting Act in 2017. *See* 2025 N.D. Sess. Laws ch. 438, § 1 (amending subsection 2 of N.D.C.C. § 49-22-16 relating to when Commission siting determinations preempt local rules, regulations, and ordinances) (the "2025 Amendment"). The 2025 Amendment became effective August 1, 2025, with retroactive effect to January 1, 2025, and revised the Electric Siting Act to provide that, "[e]xcept as provided in this section, a permit for the construction of an electric transmission facility within a designated corridor supersedes and preempts any local land use or zoning regulations." *Id.* (codified as N.D.C.C. § 49-22-16(2)(b)) (emphasis added). As a result, the Electric Siting Act no longer requires the Commission to make a specific finding that a local land use or zoning regulation is "unreasonably restrictive" for preemption to occur. N.D.C.C. § 49-22-16(2)(b).

In a recent siting proceeding, the Commission applied the preemption provision in the Oil and Gas Siting Act (which the Electric Siting Act's preemption provision now mirrors). In that proceeding, the Commission concluded that the preemption provision "automatically supersedes and preempts any local land use or zoning regulations for a gas or liquid transmission facility route permit." *SCS Carbon Transport LLC*, N.D. P.S.C. Case No. PU-22-391, Dkt. No. 440, at 3. Specifically, the Commission held:

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.

Id. (emphasis added). The Commission issued its Order in *SCS Carbon Transport LLC* in February of 2024, the year before the Legislature passed HB 1258. The timing of the 2025 Amendment suggests the Legislature was aware of the Commission's interpretation of the preemption language

under the Oil and Gas Siting Act and intended the same result for proceedings under the Electric Siting Act.²

B. Project and Development History.

In Spring 2023, the Applicants began initial Project outreach to political subdivisions and Project stakeholders. On March 22, 2023, and again on September 6, 2023, Applicants mailed letters to all the counties and townships along the Project's anticipated corridor, requesting information, input, and/or a meeting to help inform routing. Dkt. No. 1, § 7.1. Of the fifty counties and townships that received these letters, only four responded. *Id.* Table 7.1-1. While refining the Project's route, Applicants met directly with local stakeholders and landowners potentially impacted by the anticipated corridor to solicit feedback on the Project's proposed route. *Id.* Applicants' outreach efforts included open houses in Edgeley, Ellendale, and Jamestown, North Dakota from June 2023 through September 2023. *Id.* § 7.2.1.

The Project's initial development and local permitting efforts occurred well before the 2025 Amendment became effective. Before the 2025 Amendment, the Electric Siting Act required a utility to comply with the local land use and zoning ordinances and regulations of political subdivisions unless the Commission found that the regulations and/or ordinances were unreasonably restrictive as applied to a project. Thus, before the 2025 Amendment's August 1, 2025, effective date, the Applicants applied for and obtained a number of local land use and zoning permits. The 2025 Amendment negated the need for the Project to obtain these local permits. The Project's proposed route crosses sixteen townships. Before the August 1, 2025, effective date of the 2025 Amendment, 11 of the 16 townships crossed by the Project required conditional use permits ("CUP"). Of these 11 townships, the Applicants obtained 7 CUPs for the Project, one of which was subsequently revoked. Accordingly, before the effective date of the 2025 Amendment, Applicants had obtained CUP approvals from more than half of the political subdivisions along the Project route that required a CUP. On August 19, 2025, Stutsman County amended its ordinance to require a CUP for high-voltage transmission lines. The Applicants did not apply for a CUP from Stutsman County because Stutsman County's CUP requirement was adopted after the 2025 Amendment became effective.

² See *Effertz v. N.D. Workers Comp. Bureau*, 525 N.W.2d 691, 693 (N.D. 1994) ("The legislature is presumed to know the construction of its statutes by the executive departments of the State and the failure to amend the statute indicates legislative acquiescence in that construction."). Here, the 2025 Legislature is presumed to have known the Commission's interpretation of N.D.C.C. § 49-22.1-13 in *SCS Carbon Transport LLC*. Not only did the Legislature acquiesce to the Commission's construction of § 49-22.1-13 by failing to amend that statute, it included the same preemption provision in the Electric Siting Act to conform to § 49-22.1-13.

C. Unreasonably Restrictive Local Zoning Actions.³

In late 2024, the Project obtained CUPs from Fried, Rose, Bloom, Spiritwood, Adrian, Russell,⁴ and Elden Townships along the proposed route in Stutsman, LaMoure, and Dickey Counties, North Dakota. *See* Application, § 7.4. Beginning in late 2024, other political subdivisions along the Project’s route imposed moratoriums on high-voltage transmission lines, enacted ordinances containing unreasonably restrictive setbacks, and/or denied CUP applications for the Project. *See id.* Appendix M.

<u>Political Subdivision</u>	<u>County</u>	<u>Date of Action</u>	<u>Description of Action⁵</u>
Willowbank Township	LaMoure	4/9/2025	Denial of CUP Application
		6/11/2025	Moratorium (JETx Project itself)
		6/11/2025	2,640-foot Setback
		10/8/2025	Moratorium (high-voltage transmission lines, substations and numerous other types of infrastructure projects)
Wano Township	LaMoure	4/2/2025	Denial of CUP Application
		7/29/2025	Moratorium (high-voltage transmission lines)
Russell Township	LaMoure	10/24/2024	Approval of CUP Application
		6/17/2025	Moratorium (high-voltage transmission lines)
		6/17/2025	Revocation of previously approved CUP

³ *See* Section III below for full analysis and discussion addressing why the Local Zoning Actions are “unreasonably restrictive.”

⁴ Russell Township initially approved a CUP for the Project on October 24, 2024. Later, via a letter dated June 25, 2025, from Joel Leppert, Chairman of Russell Township, Russell Township notified Applicants that on June 17, 2025, the Township voted to revoke the Project’s CUP. *Id.* at JETx 02337.

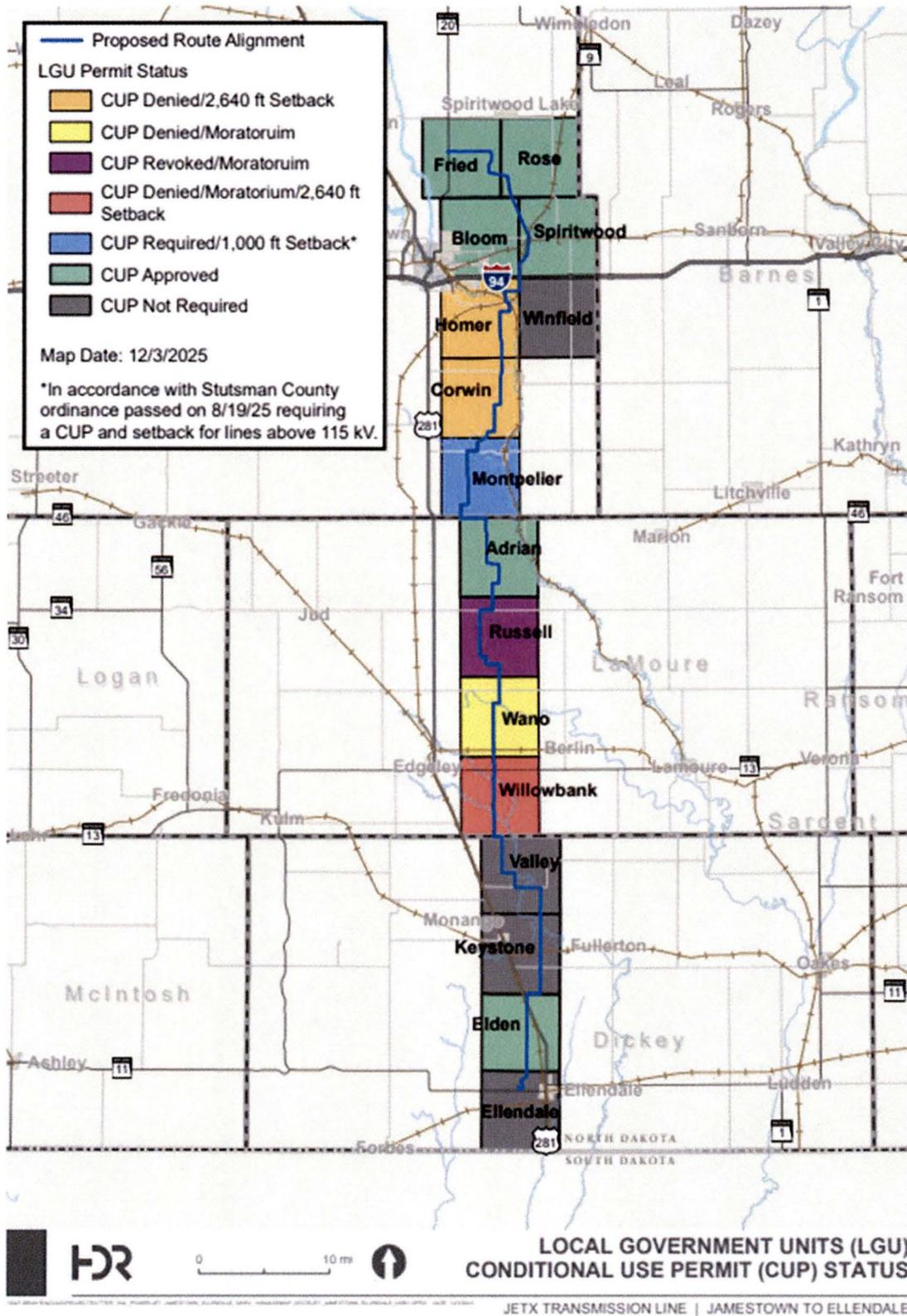
⁵ Wano Township’s Moratorium, Willowbank Township’s 2,640-foot Setback, and Willowbank Township’s second Moratorium were not noted in the Application due to the timing of their recording. Wano Township’s Resolution for Moratorium was recorded on July 30, 2025, as LaMoure County Recorder’s Document No. 183753. Willowbank Township’s Amendment adopting the 2,640-foot Setback was recorded on June 25, 2025 as Document No. 183605. Willowbank Township’s Resolution for Moratoriums involving high-voltage power lines, substations, etc. was recorded on October 14, 2025 as Document No. 183943.

Corwin Township	Stutsman		
		10/2024	2,640-foot Setback
		6/10/2025	Denial of CUP Application
Homer Township	Stutsman		
		11/2024	2,640-foot Setback
		6/17/2025	Denial of CUP Application
Stutsman County	---		
		8/19/2025	1,000-foot Setback ⁶

(Hereinafter collectively referred to as the “Local Zoning Actions”). The impact of the Local Zoning Actions is illustrated by the following figure.

⁶ The Stutsman County setback is not noted in the Application. Stutsman County adopted the 1,000-foot setback after the 2025 Amendment became effective, and after the Application was filed with the Commission. Along the Project’s route, the Stutsman County CUP requirement only implicates Montpelier Township.

Figure 1: Local Government Units CUP Status.



The Local Zoning Actions directly impact the Project and were taken after the Applicants spent considerable time and effort refining the Project's route and securing agreements with landowners. The Local Zoning Actions consist of unreasonably restrictive setback ordinances, unreasonable and unsupported CUP denials, and unreasonably restrictive moratoriums on high voltage transmission lines (or the JETx Project itself), each of which are detailed below.

1. Unreasonably Restrictive Setback Ordinances.

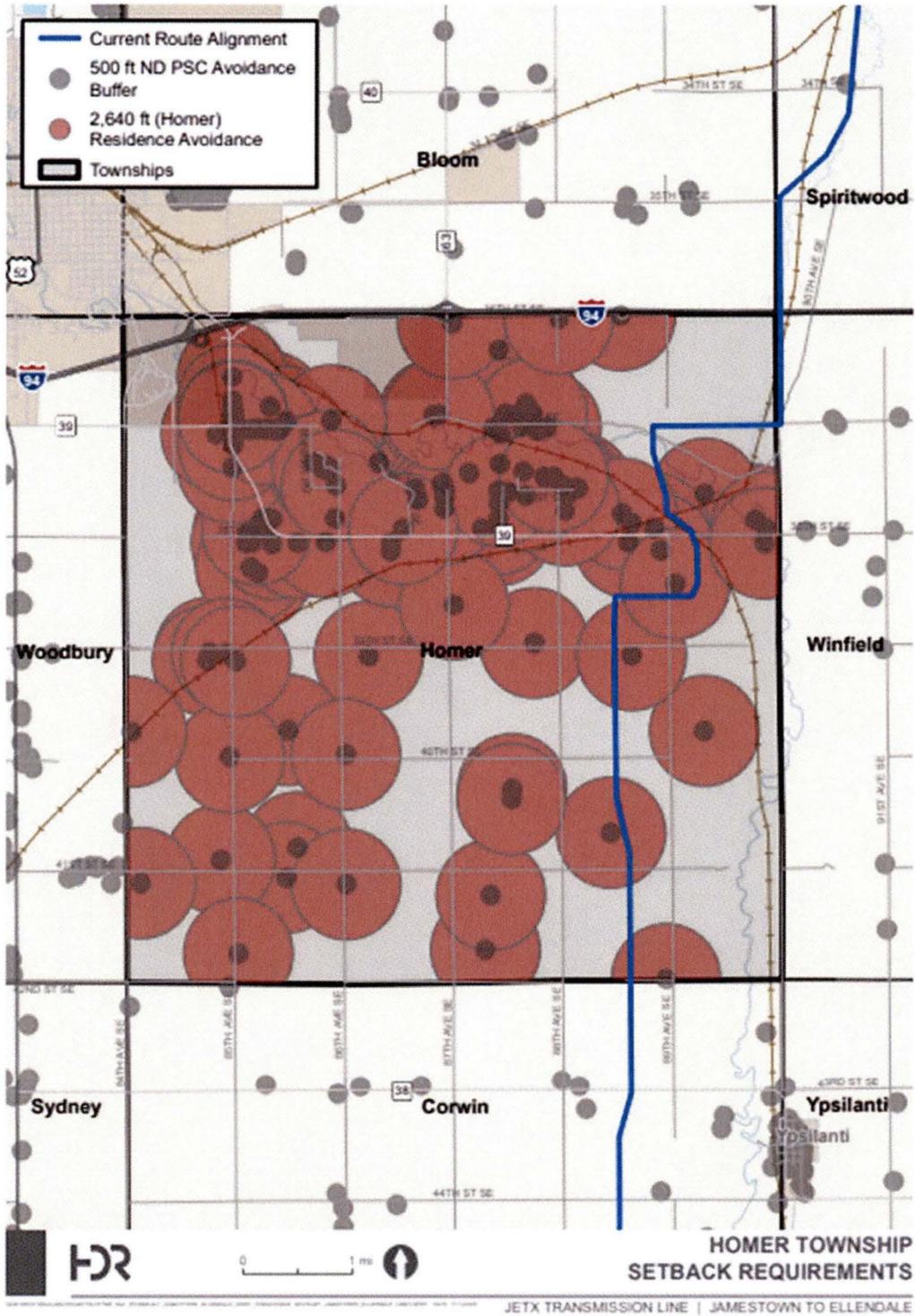
In October 2024, Corwin Township adopted a 2,640-foot setback from inhabited residences to electric transmission lines rated at 115 kV and above unless waivers are obtained from landowners. Application, Appendix M1 at JETx 02325. In November 2024, Homer Township also adopted a 2,640-foot setback from occupied residences, mirroring the setback adopted by Corwin Township. *Id.* at JETx 02329. The amendments adopting Homer and Corwin's 2,640-foot setbacks include a setback of 500 feet from an inhabited rural residence for "[b]elow ground" electric transmission lines. *Id.* at JETx 02325, 02329. In June 2025, Willowbank Township adopted a 2,640-foot setback on "overhead powerlines over 120KV" from residences. Dkt. No. 22 at 4 (Corwin, Homer, and Willowbank setbacks hereinafter collectively referred to as the "2,640-foot Setbacks"). On August 19, 2025, Stutsman County adopted a 1,000-foot setback from occupied residences. *See supra*, note 5.

The Project's route is within 2,640 feet of seven residences in Corwin Township, eleven residences in Homer Township, and four residences in Willowbank Township. Application, § 7.5.4. *See also* Figures 2–4, below. Given the insurmountable difficulty of accommodating the 2,640-foot Setbacks, the Applicants sought a variance of the setback requirement in their CUP applications with Homer and Corwin Townships. *Id.* In both Homer and Corwin Townships, the Applicants also requested waivers from the landowners in Corwin and Homer Townships that have occupied residences within 2,640 feet of the Project's route. No landowners were willing to grant a waiver.⁷ *See* Application at §§ 7.5.4, 7.5.5. Ultimately, Homer and Corwin Townships denied the Applicants' CUP applications and variance requests. *Id.* The 2,640-foot Setbacks adopted by Homer, Corwin, and Willowbank Townships are more than five times greater than the setback for electric transmission lines under North Dakota state law. *See* N.D.C.C. § 49-22-05.1(3) (designating areas within 500 feet of an inhabited residence as avoidance areas). The magnitude by which the local setbacks exceed the reasonable setback requirements in the Siting Act illustrates that the 2,640-foot Setbacks are unreasonably restrictive.

In fact, applying the 2,640-foot Setbacks would render the development of transmission lines nearly impossible. As the figures below illustrate, applying the 2,640-foot Setbacks to the Project's route makes it impossible to cross Homer Township from North to South or East to West and severely obstructs the Project's potential routes in Corwin and Willowbank Townships.

⁷ Corwin and Homer Townships' setback ordinances contain a landowner waiver provision. A land use regulation that can only be complied with by obtaining numerous waivers is unreasonably restrictive because such a regulation allows the refusal to grant a waiver by a single landowner to severely impede or entirely prevent the development of a project.

Figure 2: Homer Township Setback Map⁸



⁸ The maps shown in Figures 2-4 show the constraints imposed by the 2,640-foot Setbacks alone. Additional siting constraints are further imposed when factoring the Commission’s siting criteria under N.D. Admin. Code § 69-06-08-02.

Figure 3: Corwin Township Setback Map

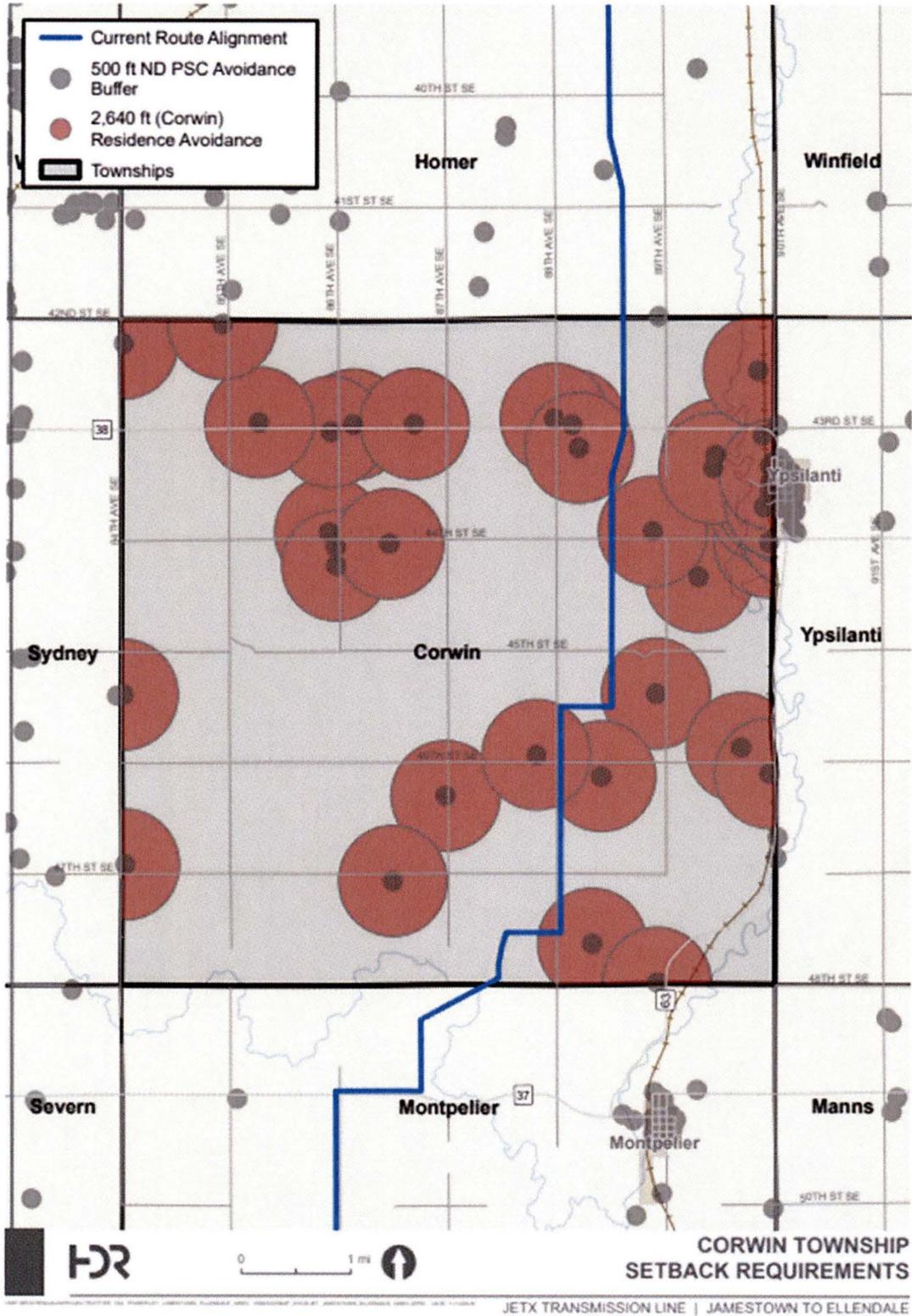
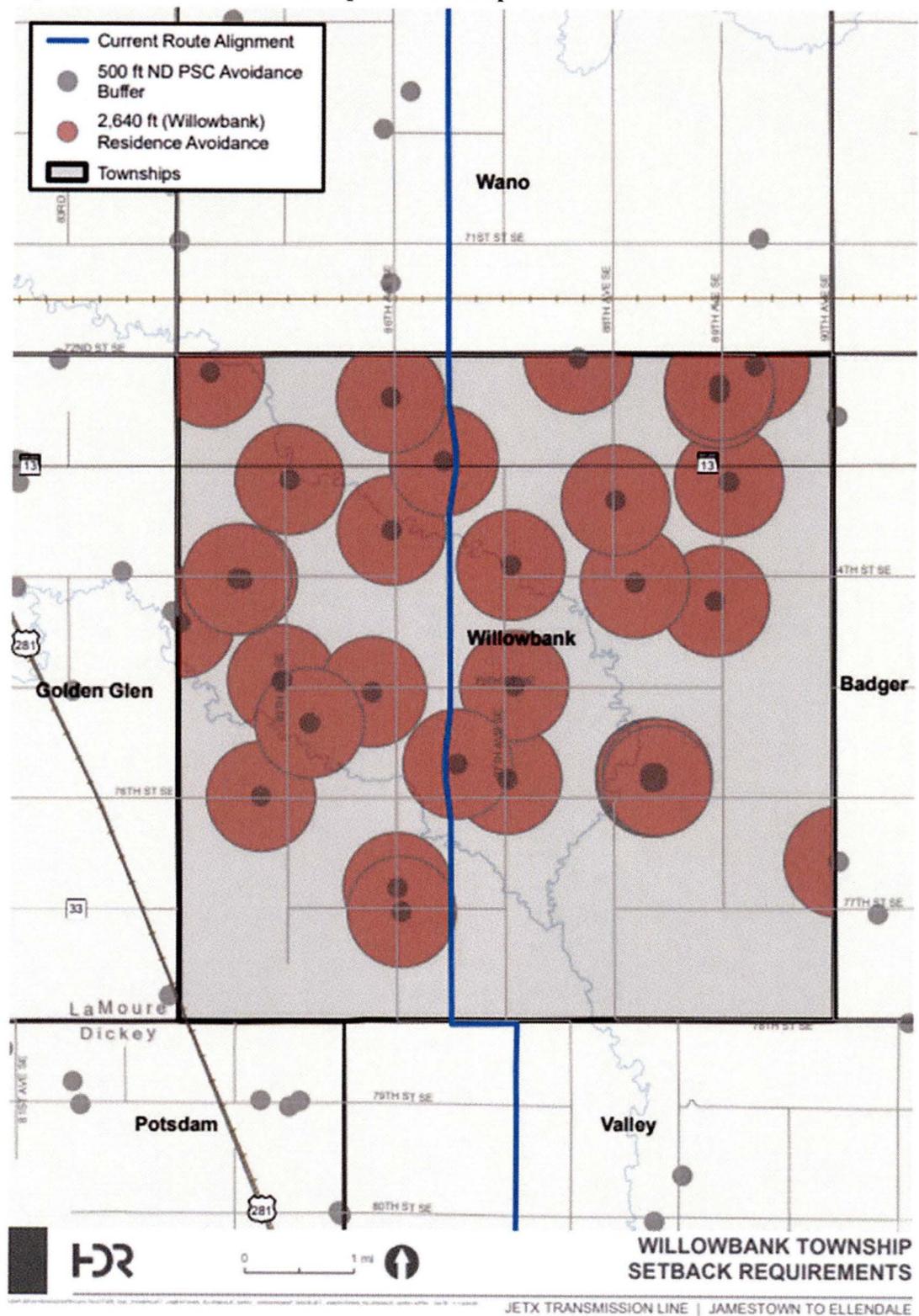


Figure 4: Willowbank Township Setback Map



2. Unreasonably Restrictive and Unsupported CUP Denials and Revocations.

On October 24, 2024, Russell Township approved a CUP for the Project. Application, Appendix M1 at JETx 02336. Without notifying the Applicants, on June 25, 2025, Russell Township also sent a letter to the Applicants indicating that it had revoked the Project's CUP. *Id.* at JETx 02337. Attached to this letter as support for Russell Township's revocation of the previously approved CUP was a filing from Russell Township's own attorney in the Project's Certificate of Public Convenience and Necessity ("CPCN") proceeding. *Id. See also* N.D. P.S.C. Case No. PU-24-091, Dkt. No. 37.

On January 22, 2025, Willowbank Township held a hearing on the Project's CUP application. By letter dated February 25, 2025, Willowbank Township informed the Applicants that it had denied the Project's CUP application and listed numerous reasons for the denial, including, (1) concerns regarding contractual provisions of easement agreements; (2) items related to the Project's need, including an unfounded belief that the electrical grid is not congested, and the dissenting opinion of one Commissioner in the North Dakota Public Service Commission's November 20, 2024 Order in the Project's CPCN proceeding (Case No. PU-24-091 at Dkt. No. 23); (3) concerns about future projects unrelated to the CUP application; (4) an unfounded belief that the Project will require a new substation and associated costs be burdened upon ratepayers; (5) impacts to bridges and roads; and (6) alleged impacts to tree rows, among other reasons. Application, Appendix M1 at JETx 02360–02361. Due to apparent procedural deficiencies, Willowbank Township held an additional meeting on April 9, 2025, during which the Board of Supervisors voted to deny the Project's CUP application. *Id.* § 7.5.4. Applicants requested a copy of the meeting minutes for the April 9, 2025, meeting, but Willowbank Township has not provided the minutes. *See Id.* Appendix M1 at JETx 02364.

On January 29, 2025, Wano Township held a hearing on the Applicants' CUP application for the Project but no action was taken by the Township. In a letter dated February 26, 2025, Wano Township stated that it had denied the Applicant's CUP for the Project citing (1) concerns regarding contractual provisions of easement agreements; (2) the dissenting opinion of one Commissioner in the North Dakota Public Service Commission's November 20, 2024, Order in the Project's CPCN proceeding (Case No. PU-24-091, Dkt. No. 23); (3) the opinion that the Project will not benefit local electric cooperatives; (4) an unreasonable demand to have MISO contact the Township officials directly or meet with them in person; and (5) concerns about unknown potential future projects unrelated to the CUP application for the Project. *Id.* JETx 02348–02350. Due to apparent procedural deficiencies, Wano Township held additional meetings on March 20, 2025, and April 2, 2025. *Id.* § 7.5.2. During the April 2, 2025, meeting, the Board of Supervisors voted to deny the Applicants' CUP for the Project. *Id.* § 7.5.2. Wano Township provided meeting minutes from its April 2, 2025 meeting, but the minutes fail to specify any basis for the Township's denial of the Project's CUP application. *Id.*

On June 10, 2025, Corwin Township voted to deny both the Project's CUP and request for variance from its 2,640-foot setback. Corwin Township provided meeting minutes from the June

10, 2025, meeting on June 12, 2025, which do not identify any basis for their CUP denial. *Id.* at JETx 02326–02327. Similarly, on June 17, 2025, Homer Township denied both the Applicants’ CUP and request for variance from its 2,640-foot setback. Homer Township provided meeting minutes from the June 17, 2025, meeting, but the minutes fail to identify any reason for the CUP denial. *Id.* at JETx 02330.

3. Unreasonably Restrictive Moratoriums on Transmission Lines.

On June 11, 2025, Willowbank Township adopted a moratorium directly targeted at “the JETx transmission line project” itself. *Id.* at JETx 02362–02363. Willowbank Township’s moratorium is for a period of two years, and its stated purpose is to “allow the Township adequate time to update zoning ordinances and obtain more information about the route and safety of the Project.” *Id.* On October 8, 2025, Willowbank Township also approved an additional moratorium on all high voltage transmission lines over 120 kV and several other types of development. Dkt. No. 22.

On June 17, 2025, Russell Township imposed a moratorium on electric transmission lines and a variety of other types of development projects. Application, Appendix M1 at JETx 02345–02347. Russell Township’s moratorium is for a period of two years and its stated purpose is “to allow the Township adequate time to update zoning ordinances and obtain more information about the route and safety of the project.” *Id.* at JETx 02345. Russell Township’s reference to “the project” suggests that its moratorium is specifically directed at the Project. Again, Russell Township had already held a public hearing and approved (but later purported to revoke) a CUP for the Project. *Id.* at JETx 02336.

On July 29, 2025, Wano Township imposed a moratorium on high voltage transmission lines for a period of two years. Dkt. No. 20. This moratorium also appears to be directed at the Project specifically, as “[t]he purpose of the moratorium is to allow the Township adequate time to update zoning ordinances and obtain more information about the route and safety of the project.” *Id.*, Wano Township Resolution for Moratorium (emphasis added).

III. LAW AND ARGUMENT

The Local Zoning Actions discussed in Section II, C, above, are automatically superseded and preempted by state law upon the Commission’s issuance of a route permit. “[P]reemption analysis is largely a matter of statutory interpretation” and generally involves questions of law. *Env’t Driven Sols., LLC v. Dunn Cnty.*, 2017 ND 45, ¶¶ 6, 16, 890 N.W.2d 841 (concluding that “[Dunn] County’s zoning requirements [for oil and gas waste treating plants] are preempted by state law and the [North Dakota Industrial] Commission’s order”). North Dakota’s “caselaw addressing preemption in the context of state and local laws and ordinances mirrors federal preemption analysis.” *Id.* ¶ 7. “The three forms of federal preemption are ‘express preemption, field preemption, and conflict preemption.’” *Id.* (quoting *State ex rel. Stenehjem v. FreeEats.com, Inc.*, 2006 ND 84, ¶ 23, 712 N.W.2d 828).

The North Dakota Supreme Court has described “express preemption” as existing “when there is an explicit state law or rule restraining the county’s authority.” *Id.* (quoting *State v. Brown*, 2009 ND 150, ¶ 21, 771 N.W.2d 267). “Field preemption” exists “when the industry or activity involved is already subject to substantial state control through broad, encompassing statutes or rules.” *Id.* ¶¶ 7, 15 (affirming district court’s conclusion that “the North Dakota legislature intended that the North Dakota Industrial Commission would ‘occupy the field’ of the regulation of oil and gas waste treatment plants and, therefore, has exclusive jurisdiction”). “Conflict preemption” occurs where a local governing body’s zoning ordinance is preempted because it “contravenes federal or state law.” *Id.* ¶ 7 (quoting *Mountrail Cnty. v. Hoffman*, 2000 ND 49, ¶ 7, 607 N.W.2d 901). Though judicial decisions are often not clear which type of preemption they are applying, “those decisions are clear that a local governing body’s actions and decisions may be preempted by state or federal law, or by the actions and decisions of state or federal agencies.” *Id.* ¶ 8.

A. The Local Ordinances are Expressly Preempted by State Law.

State law expressly preempts the Local Zoning Actions. Because the plain language of N.D.C.C. § 49-22-16(2)(b) states “a permit for the construction of an electric transmission facility . . . supersedes and preempts any local land use or zoning regulations,” it is without question that the Legislature intended to expressly preempt local land use and zoning requirements for electric transmission facilities. N.D.C.C. § 49-22-16(2)(b). As a result of the 2025 Amendment, state law now explicitly constrains the authority of counties and townships to regulate “electric transmission facilities,” and therefore, the Local Zoning Actions do not apply to the Project. *See* N.D.C.C. §49-22-03(6).

The prior version of § 49-22-16(2) allowed the Commission to preempt local ordinances upon finding that, as applied to an electric transmission facility’s proposed route, the rule, regulation, or ordinance is “unreasonably restrictive in view of existing technology, factors of cost or economics, or needs of consumers regardless of location.” N.D.C.C. § 49-22-16(2) (2024). The 2025 Amendment removed the need for such a finding, and indicates the Legislature intended that the Commission would be the sole regulator of the siting and construction of high voltage transmission lines.⁹ As noted above, this conclusion is consistent with how the Commission has

⁹ In addition to the express preemption under N.D.C.C. § 49-22-16, field preemption doctrine also precludes townships’ and counties’ attempts to regulate high-voltage transmission lines. In *Env’t Driven Sols., LLC v. Dunn Cnty.*, 2017 ND 45, the North Dakota Supreme Court held that counties lack the power to veto the North Dakota Industrial Commission’s (“NDIC”) approval of the location for an oil and gas waste treating plant. In that case, Dunn County argued that the NDIC lacks the power to permit facilities that are barred by a county’s “properly-enacted zoning ordinance and land use comprehensive plan.” *Id.* ¶ 5. The Court held the zoning ordinance at issue was preempted, reasoning that “the North Dakota legislature intended that the North Dakota Industrial Commission would ‘occupy the field’ of the regulation of oil and gas waste treatment plants and, therefore, has exclusive jurisdiction of the issue of the location of oil and gas waste treating plants.” *Id.* ¶¶ 8, 15. Here, the Legislature has granted the Commission comprehensive

interpreted the identical preemption language in the Oil and Gas Siting Act. *SCS Carbon Transport LLC*, N.D. P.S.C. Case No. PU-22-391, Dkt. No. 440 (interpreting N.D.C.C. § 49-22.1-13) (“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 and zoning regulations, except for road use agreements, even though local ordinances may be filed for Commission review and consideration.”).

The subsections of N.D.C.C. § 49-22-16 clearly describe when preemption occurs, and what is subject to preemption under different circumstances. Subsection 1 states: “The issuance of a certificate of site compatibility or a route permit shall, subject to subsections 2 and 3, be the sole site or route approval required to be obtained by the utility.” N.D.C.C. § 49-22-16(1) (emphasis added). Each subpart of subsection 2 applies under different circumstances, and these subsections dictate when local land use regulations and zoning ordinances, road use requirements, and/or corresponding permitting requirements are: (1) not preempted (Subsection 2(a)); (2) automatically preempted (Subsection 2(b)); or (3) preempted upon a showing they are unreasonably restrictive (Subsection 2(c)).

- Subsection 2(a) applies only to electric energy conversion facilities, not electric transmission facilities. N.D.C.C. § 49-22-16(2)(a). This subsection provides that “[a] certificate of site compatibility for an electric energy conversion facility may not supersede or preempt any local land use, zoning, or building rules, regulations, or ordinances and a site may not be designated which violates local land use, zoning, or building rules, regulations, or ordinances.” *Id.*
- Subsection 2(b) establishes preemption of “any local land use or zoning regulations” when a permit is issued for electric transmission facilities. N.D.C.C. § 49-22-16(2)(b).
- Subsection 2(c) provides that “the commission shall require the applicant to comply with the road use agreements of the impacted political subdivision.” N.D.C.C. § 49-22-16(2)(c) (emphasis added). Subsection 2(c) further provides: “A permit may supersede and preempt the requirements of a political subdivision if the applicant shows by a preponderance of the evidence the regulations or ordinances are unreasonably restrictive.” *Id.*
- Subsection 2(d) requires the Commission to notify local political subdivisions when a siting application for an electric transmission facility is filed and requires local political subdivisions to “provide a listing to the commission of all local

powers to site the development of high-voltage transmission lines under N.D.C.C. ch. 49-22, and the siting factors cover the waterfront of land use considerations. Taken together with the Legislature’s enactment of HB 1258, it is clear that the Legislature intended that state law would “occupy the field” of high-voltage transmission line siting and land use regulation, to the exclusion of counties’ and townships’ zoning and land use regulations.

requirements identified under this subsection . . . or the requirements are superseded or preempted.” N.D.C.C. § 49-22-16(2)(d).

- Subsection 2(e) requires an applicant to “comply with all local requirements provided to the commission under subdivision d, which are not otherwise superseded by the commission.” N.D.C.C. § 49-22-16(2)(e).

North Dakota’s rules of interpretation require that “[w]ords and phrases must be construed according to their context.” N.D.C.C. § 1-02-03. Different provisions of a statute, “must be construed . . . so that effect may be given to both provisions.” N.D.C.C. § 1-02-07. Here, the context surrounding Subsections 2(b) and 2(c) is telling. Subsection 2(b) refers to preemption of “local land use [and] zoning regulations,” which are automatically superseded and preempted. Section 2(c) expressly refers to “road use agreements” and provides that the requirements of road use agreements may be preempted if the Commission finds the regulations and ordinances imposed by the road use requirements are shown to be unreasonably restrictive.

Subsections 2(d) and 2(e) relate to implementation of N.D.C.C. § 49-22-16 as a whole and do not create new substantive requirements for preemption to occur. The Commission has interpreted the requirement that political subdivisions “provide a listing . . . of all local requirements” under N.D.C.C. § 49-22.1-13(2)(d) as informational for transmission facilities (as opposed to energy conversion facilities). *See SCS Carbon Transport LLC*, N.D. P.S.C. Case No. PU-22-391, Dkt. No. 440 (interpreting N.D.C.C. § 49-22.1-13 and holding “local ordinances may be filed for Commission review and consideration.”). Finally, the requirement in Subsection 2(e) that an applicant must “comply with all local requirements provided to the commission under subdivision d, which are not otherwise superseded by the commission” does not negate the automatic preemption of local ordinances upon the Commission’s issuance of a permit set forth in Subsection 2(b). N.D.C.C. § 49-22-16(2)(e). An applicant for an electric transmission facility must only comply with the road use regulations or ordinances (that are not otherwise preempted by a showing “by a preponderance of the evidence” to be “unreasonably restrictive in view of existing technology, factors of cost or economics, or needs of consumers regardless of location, or are in direct conflict with state or federal laws or rules.”). N.D.C.C. § 49-22-16(2)(c). This is because “a permit for the construction of an electric transmission facility . . . supersedes and preempts any local land use or zoning regulations.” N.D.C.C. § 49-22-16(2)(b). Thus, all local requirements purporting to regulate electric transmission facilities, other than those related to road use requirements, are “otherwise superseded by the commission.” N.D.C.C. § 49-22-16(2)(e).

Notably, the 2025 Amendment was enacted after the Commission’s decision on preemption in *SCS Carbon Transport*. It follows that the Legislature presumably intended to adopt that construction and for local land use and zoning regulations to be automatically superseded and preempted by electric transmission line siting, just as they are for pipelines. *See Effertz*, 525 N.W.2d at 693 (N.D. 1994) (“The legislature is presumed to know the construction of its statutes by the executive departments of the State and the failure to amend the statute indicates legislative acquiescence in that construction.”). *See also Olson v. Job Serv. N.D.*, 2013 ND 14, ¶ 50, 826 N.W.2d 36. To find otherwise would be inconsistent with the Commission’s ruling on preemption

in *SCS Carbon Transport* and would render the 2025 Amendment meaningless. Again, the prior version of the law already allowed for preemption upon an “unreasonably restrictive” finding by the Commission. N.D.C.C. § 49-22-16(2) (2024).

The language and context of the subsections of N.D.C.C. § 49-22-16, the Commission’s decision in *SCS Carbon*, and the timing of the Legislature’s passage of the 2025 Amendment all support a conclusion that all local land use and zoning regulations purporting to regulate high-voltage transmission lines are automatically superseded and preempted by the Commission’s approval of an applicant’s permit, except for those governing road use agreements.

B. The Local Zoning Actions are Unreasonably Restrictive.

As stated above, the Commission’s interpretation of N.D.C.C. § 49-22.1-13 in *SCS Carbon*, (which mirrors N.D.C.C. § 49-22-16) is the correct interpretation of the statutory preemption language. Nevertheless, the Commission’s decision in *SCS Carbon* is the subject of a pending appeal to the district court. See *APH Farms, et al. v. N.D. Pub. Serv. Comm’n, et al.*, Burleigh County District Court Case No. 08-2024-CV-03622. Given the possibility that local governments may similarly challenge the preemptive effect of the Commission’s permit in this case, Applicants request that the Commission also enter an additional finding that the Local Zoning Actions are unreasonably restrictive. Such a finding is warranted and will provide certainty for the Commission’s siting determinations in this case regardless of the outcome in the *APH Farms* appeal.

In North Dakota, there are 53 county governments, 1,314 township governments, and 357 city governments.¹⁰ Allowing a single local political subdivision to veto the Commission’s approval of an electric transmission line, thereby obstructing a linear project traversing numerous counties and townships, would abdicate the Commission’s comprehensive siting authority over electric transmission facilities granted by the Legislature.

Here, the Local Zoning Actions were taken in direct response to the Project and appear to be intended to block the Project entirely. The unreasonably restrictive 2,640-foot Setbacks adopted by Homer, Corwin, and Willowbank Townships likely prevent the line from crossing the townships altogether. At best, the 2,640-foot Setbacks will push the Project into other townships, result in a longer line with greater impacts to land and landowners, and result in significantly higher costs for the Project.

The moratoriums adopted by several townships do not maintain the status quo but instead amount to a blanket prohibition on the development of electric transmission lines. For example, in Wano, Russell, and Willowbank Townships, transmission lines were already a conditionally permitted use under their ordinances. Dkt. No. 20, Wano Township Zoning Regulation (2010) § 5.1.3.6; Dkt. No. 21, Russell Township Zoning Ordinance (2011) § 5.1.3.18; Dkt. No. 22,

¹⁰ State of North Dakota, *Local Government*, <https://www.nd.gov/government/local-government> (last visited Dec. 10, 2025).

Willowbank Township Zoning Regulation (2002) § 5.1.3.5. As such, these townships' concerns with the Project could have been addressed by imposing conditions on the Project's CUPs. Transmission lines are not a new technology, and the moratoriums are not intended to maintain the status quo. Here, the moratoriums are intended to block the Project. *See* Application, Appendix M1 at JETx 02362–02363. For example, Willowbank Township enacted a moratorium directed at the Project itself.

Finally, outright denials of the CUPs mentioned are unreasonably restrictive, because they fail to give the Project reasonable conditions for a conditionally permitted use and instead act as a veto prohibiting development. Similarly, denials of CUPs based on issues wholly unrelated to local zoning are unreasonably restrictive as these issues are beyond a township's zoning authority. The CUP denials at issue function as *de facto* and *ad hoc* moratoriums, as opposed to a genuine CUP process that objectively reviews the Project.

Here, the Local Zoning Actions amount to blanket bans on high-voltage transmission lines (or at least the Project itself) and are unreasonably restrictive in view of: (1) existing technology, factors of cost or economics; and (2) needs of consumers regardless of location.

1. Existing Technology and Factors of Cost or Economics.

i. Unreasonably Restrictive Setbacks.

When the Applicants began development of the Project, the only setback applicable to the Project was the 500-foot setback under N.D.C.C. § 49-22-05.1(3) (the “State Setback”). Setbacks that far exceed the 500-foot setback codified in state law are unreasonably restrictive. For example, in the context of wind facility setbacks, North Dakota law provides that a “local zoning authority may require setback distances greater than” those required in statute under N.D.C.C. § 49-22-05.1(4). No such provision exists for electric transmission lines. Since the Legislature has not adopted a similar express provision permitting local political subdivisions to create greater setbacks for electric transmission lines indicates that the Legislature intended the 500-foot setback under N.D.C.C. § 49-22-05.1(3) to be a reasonable setback for electric transmission lines throughout the state.

Homer, Corwin, and Willowbank Townships' 2,640-foot Setbacks are five times greater than the State Setback. Because Homer Township's 2,640-foot setback, in effect, prohibits electric transmission lines from crossing Homer Township, it is a *de facto* ban for all electric transmission lines. A setback is unreasonably restrictive if the result is that an infrastructure project must avoid a local political subdivision entirely and, if possible, reroute into neighboring townships (which could also enact similar setbacks). The 2,640-foot Setbacks in Corwin and Willowbank Townships leave only a constrained path through these townships that make it nearly impossible to align a linear route for the Project across the townships. Furthermore, applying the 2,640-foot Setbacks would unnecessarily lengthen the route and increase the acres and number of landowners crossed by the Project route. The maps shown in Figures 2-4 above show the constraints imposed by the 2,640-foot Setbacks; however, these maps do not show the additional siting constraints imposed

by the exclusion areas, avoidance areas, selection criteria, and policy criteria set forth in state law and the Commission's administrative rules. These additional constraints further reduce the areas where a high-voltage transmission line can be sited and compound the limitations imposed by the 2,640-foot Setbacks.

As a linear Project, all segments must connect to form a continuous line, which means the application of the 2,640-foot Setbacks impacts landowners beyond the township. Further, to comply with the 2,640-foot Setbacks, the Project may have to be routed through the center of valuable farmland, which would place an undue hardship on landowners. The 2,640-foot Setbacks do not minimize impacts from the Project but rather increase the impacts and shift them to different areas and landowners.

Homer and Corwin Townships' 2,640-foot setbacks do not apply to underground lines. Requiring the Applicants to underground portions of the Project to comply with these setbacks is also unreasonably restrictive. *See* Application, § 2.3.1. Underground transmission is substantially more costly to construct than overhead transmission. *Id.* Based on the Applicants' estimates, the initial construction cost for undergrounding high voltage transmission lines, such as the Project, are estimated to be between five to ten times higher than overhead transmission lines. *Id.* This higher construction cost is related to several factors, including, but not limited to, specialized equipment and labor to bury the transmission line, the type and number of cables, installation of separate conduits within a concrete duct bank, constructing large underground splice boxes (i.e., vaults) approximately every 1,200 feet to complete cable splices, and the need for riser stations along the route to transition from overhead to underground or from underground to overhead. *Id.*

Moreover, the life expectancy of underground transmission is less than overhead transmission, resulting in a need to replace underground transmission facilities sooner than overhead transmission facilities. *Id.* Underground transmission results in greater environmental and land use impacts than overhead transmission during construction due to the need to excavate significantly more earth along the route to install the underground cable. *Id.* As a result, complying with the exclusion and avoidance areas defined under Commission rules would be extremely difficult, because underground transmission lines require a continuous trench along the route whereas an overhead transmission line can span over sensitive areas and adjust structure locations. *Id.* For these same reasons, the Commission previously rejected a request to require a transmission line to be constructed underground. *See Matter of Neb. Pub. Power Dist.*, 330 N.W.2d 143, 148 (N.D. 1983) (citing Commission conclusion "that even if the line could be built underground, it was not feasible in this case because of the adverse impact on the land and the excessive cost."). Requiring the Applicants to underground sections of the Project to bypass the 2,640-foot Setbacks is unreasonably restrictive in view of existing technology and factors of cost or economics.

Stutsman County has also adopted a 1,000-foot setback that is two times greater than the State Setback. With respect to the Project's route, this setback only applies to Montpelier

Township. Stutsman County's basis for adopting the 1,000 setback is unclear.¹¹ The Stutsman County setback is also unreasonably restrictive because it is twice as restrictive as the State Setback.

The setbacks discussed above are unreasonably restrictive in view of existing technology, factors of cost or economics, and needs of consumers regardless of location. The impact of the 2,640-foot Setbacks for the Project would be shifted to other townships and/or landowners, voluntary agreements previously secured by the Project would be rendered useless, and reroutes adding additional costs and impacts would be necessary. *See* Application, § 7.5.6. Furthermore, the 2,640-foot Setbacks conflict with other siting goals and criteria at the state and local levels, because applying them would push infrastructure into fields and pastures and prevent the Project from minimizing impacts to landowners by routing along existing roads, section/quarter lines, or other utility rights of way. *Id.* The setbacks adopted by Stutsman County and Corwin, Homer, and Willowbank Townships are unreasonably restrictive because they render vast swaths of land off-limits for transmission line development and jeopardize utilities' ability to serve the needs of consumers.

ii. Unreasonable CUP denials.

Applicants further request that the Commission make an additional finding that the CUP denials (and revocation) are an unreasonably restrictive application of local ordinances as they effectively ban development of the Project. Conditional use permits are creatures of local zoning, and local CUP requirements arise out of a political subdivision's local land use and zoning regulations. As such, the CUP requirements set forth in township ordinances are subject to preemption. The preemption of a CUP requirement is not a novel concept. For example, in *SCS Carbon*, the intervenors argued that *SCS* must first apply for county permits and seek setback waivers and a variance from the county before preemption could occur, but the Commission nonetheless found the county ordinances and permitting process/requirements preempted. *SCS Carbon Transport LLC*, Case No. PU-22-391, Dkt. Nos. 348, 407, 440; *see also Minnkota Power Coop., Inc. Pillsbury-Fargo 230-kV Transmission Line Siting Application*, N.D. P.S.C. Case No. PU-08-48, Dkt. No. 42 at 9 (finding Reed Township's condition to its Conditional Use Permit requiring double circuiting is unreasonably restrictive and ordering the CUP condition superseded.)

The ordinances of Wano, Russell, and Willowbank Townships provide that electric transmission lines are a conditionally permitted use. As such, if these townships had concerns about the Project, the correct approach to applying their ordinances to the Project would have been to place reasonable conditions on the CUP to address legitimate concerns within the scope of the applicable zoning ordinance. The denial of a CUP without offering reasonable conditions tied to bona fide zoning considerations renders the denials the equivalent of a moratorium or project-level ban on development rather than a genuine CUP process based on an objective review of the Project.

¹¹ Stutsman County Commission, Meeting Minutes - August 19, 2025, <https://www.stutsmancounty.gov/minutes/08.19.2025.pdf> (last visited December 17, 2025).

Here, Corwin and Homer Townships failed to provide any reasons for their denials of the Applicants' CUP applications. Russell Township attempted to support its revocation of the Project's CUP with only a filing by its attorney in the Project's CPCN proceeding, which is divorced from any genuine CUP consideration. Case No. PU-24-091, Dkt. No. 37. Corwin, Homer, and Russell Townships' CUP denials (or revocation) lack any rational basis or reason behind the denial or revocation. These CUP denials and Russell Township's revocation also equate to a moratorium or project-level ban on development rather than a genuine and objective CUP process. Although Wano and Willowbank Townships provided reasons for denial of the Project's CUP applications, the reasons for the denials are outside of the purview of their zoning authority and appear to be no more than a pretense to block the Project entirely.

Wano Township's denial appears to be based on several issues that are outside the scope of the township's jurisdiction and do not relate to a CUP proceeding and zoning considerations. Likewise, Willowbank Township's stated reasons for its denial of the Project's CUP relate to subject matters unrelated to the Project and/or falling outside of the Township's jurisdiction. The laundry list of reasons cited by Wano and Willowbank Townships for their CUP denials relate to issues outside the scope of their zoning authority and are not based on any reliable evidence or information. Willowbank Township's intent to block the Project is further evidenced by its June 2025 adoption of a moratorium on the JETx Project itself (and a separate moratorium on high-voltage transmission lines generally). Dkt. No. 22. Therefore, Wano and Willowbank Townships' denials of the Projects' CUP applications (and Russell Township's CUP revocation) are unreasonably restrictive applications of their ordinances.

To reroute around Willowbank, Wano, Russell, Corwin, and Homer Townships and into adjacent townships would add approximately 12 additional miles to the Project's route and result in an incremental cost of approximately \$24 million more than the cost of the proposed route, making it unreasonably restrictive on the basis of economics and greater impacts associated with a longer route. Application, § 7.5.6. Furthermore, the result of reroutes to avoid townships that have denied a CUP application is a longer line that is simply pushed into neighboring townships that may also adopt similar unreasonably restrictive ordinances or moratoriums.

iii. Unreasonably Restrictive Moratoriums.

No land use regulation is more restrictive than a moratorium. The moratoriums enacted by Wano, Russell, and Willowbank Townships are unreasonably restrictive because they completely ban development of the Project. Moratoriums are typically warranted only when "special land use problems arise unexpectedly from time to time, which demand an immediate and particularized response by the responsible officials." 32 Am. Jur. *Proof of Facts* 3d 485, § 1 (1995). Here, there is no emergency or unexpected problem that would justify these moratoriums. Electric transmission lines are not a novel technology that justifies a moratorium to allow local zoning authorities to react to unexpected problems. Transmission lines have been around for over a century and are a proven technology. For example, the first long distance electric transmission

line in the United States was constructed in 1889.¹² Moreover, the Applicants currently collectively own and operate more than 5,000 miles of electric transmission in the State of North Dakota, 918 of which are rated above 115 kV. In Wano, Russell, and Willowbank Townships, transmission lines are a conditionally permitted use. Again, Russell Township actually approved a CUP for the Project before later purporting to revoke it. Therefore, the Project's CUP applications in these townships are not unexpected and do not warrant a moratorium.

The moratoriums adopted by townships along the Project route are unreasonably restrictive because they totally prohibit a tried-and-true technology. To allow these moratoriums to stand would force the Project to reroute around these townships (and all other areas where a moratorium may also be adopted). Allowing such extreme regulation would greatly increase project costs and create an uncertain and risky regulatory environment for linear infrastructure projects across all of North Dakota. The inevitable result would be longer lines, greater impacts to land/people, and increased infrastructure costs. Transmission line infrastructure has been a fixture on the American landscape for over 100 years. A moratorium across an entire township is patently unreasonable.

2. Needs of Consumers Regardless of Location.

The above-referenced setbacks, CUP denials, and moratoriums are unreasonably restrictive given the needs of consumers regardless of location. The Commission already considered the Project's need in Case No. PU-24-091. Specifically, the Commission found that "public convenience and necessity will be served by the construction and operation of the [Project] facilities." Case No. PU-24-091, Dkt. No. 23. As such, the Commission has already determined that consumers need the Project. Thus, any land use or zoning regulation, determination, or ordinance that prevents development of the Project is unreasonably restrictive in view of needs of consumers regardless of location.

IV. CONCLUSION

For the reasons stated herein, the Applicants respectfully request that the Commission:

- a. Declare the Local Zoning Actions automatically superseded and preempted under N.D.C.C. § 49-22-16 upon the issuance of siting approval for the Project; and
- b. Enter an additional finding that the Local Zoning Actions are unreasonably restrictive in view of existing technology, factors of cost or economics, needs of consumers regardless of location, and/or are in direct conflict with state or federal laws or rules.

¹² Rebecca J. Rosen, *On this Day: The First Long-Distance Transmission of Electricity*, The Atlantic, June 4, 2012, <https://www.theatlantic.com/technology/archive/2012/06/on-this-day-the-first-long-distance-transmission-of-electricity/258015/>.

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