

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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HP 22-002

IN THE MATTER OF THE APPLICATION :
OF NAVIGATOR HEARTLAND GREEN- :
WAY LLC FOR A PERMIT UNDER THE :
SOUTH DAKOTA ENERGY CONVERSION :
AND TRANSMISSION FACILITIES ACT TO :
CONSTRUCT THE HEARTLAND GREEN- :
WAY PIPELINE IN SOUTH DAKOTA, :
 :
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**APPLICANT’S RESPONSE
TO MINNEHAHA COUNTY’S
MOTION FOR INTERVENTION
FOR LIMITED PURPOSE**

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Applicant Navigator Heartland Greenway LLC (“Navigator”) submits this brief in partial opposition to Minnehaha County’s (“Minnehaha” or the “County”) motion to intervene for a limited purpose in this docket. Navigator does not oppose Minnehaha’s intervention, and indeed welcomes it. However, Navigator opposes Minnehaha’s second request for relief: delaying resolution of Navigator’s pending motion for the Commission to exempt Navigator from application of a county ordinance until a date uncertain *after* the Commission’s permit decision is issued.

Introduction and Relevant Background

The County’s motion arises from the conflict between Navigator’s ongoing permit application with the PUC and a newly-adopted County ordinance which—if left undisturbed—would block Navigator’s project, render the PUC’s hearing a nullity, and chill large-scale infrastructure projects in the state moving forward.

On September 27, 2022, Navigator submitted its permit application to the PUC. Since then, numerous parties have been extensively engaged in the permit process, as contemplated by

the South Dakota Legislature when it adopted SDCL Chapter 49-41B. Commission Staff has extensively examined Navigator's permit by retaining consultants and serving written discovery. Other interested parties, *including counties*, have submitted comments to the PUC or sought intervention in the docket, which would allow them to issue discovery requests, participate in the PUC's upcoming hearing, and generally have their views on Navigator's project (good or bad) heard. Navigator has not opposed intervention by any party in this docket, and rather has encouraged it.

When Navigator designed and submitted its proposed route for approval to the PUC, its route did not conflict with any local county zoning ordinances in the state (including Minnehaha County's zoning laws). Navigator's route thus not only complied with the stringent requirements provided by the federal Pipeline Safety Act ("PSA") but also with the zoning ordinances of counties Navigator's pipeline would cross.

Months after Navigator designated a non-offending route and sought a permit from the PUC based on that route, two counties, including Minnehaha County, adopted ordinances which purported to establish, for the first time, setback distance and permit requirements.

At the time Minnehaha County was deliberating passage of its ordinance, Navigator extensively engaged with the County, communicating its extensive efforts to safely route and design the project, explaining its concerns about the ordinance, including that its provisions would render Navigator's permit application a nullity, that the ordinance was ambiguous and impossible to comply with, and that South Dakota law provided Minnehaha County with a mechanism by which it could express its concerns regarding the pipeline to the PUC.

The County chose not to opt-in to the democratic process envisioned by Chapter 49-41B—by which interested parties present their objections to a neutral decision maker (*i.e.*, the

PUC), who balances those competing views to render a decision best for the state—and adopted its ordinance on June 6, 2023, which went into effect on July 13, 2023.

On June 26, 2013, Navigator submitted a motion asking the Commission to preempt the ordinance’s application as applied to Navigator’s permit route, pursuant to its power under SDCL § 49-41B-28. Navigator also asked that the Commission preempt application of a newly adopted ordinance enacted by Moody County.

Since then, Minnehaha County did not oppose Navigator’s motion or seek intervention. Rather, on July 21, 2023, with the PUC’s hearing on Navigator’s application scheduled to commence on July 25, 2023, the County sought intervention in the hearing for the limited purpose of requesting that the PUC *not* consider Navigator’s preemption motion at the hearing (despite it being submitted a month prior and within the motions deadline) and instead decide the merits of the motion in a separate docket or proceeding *after* the PUC reaches a decision on Navigator’s permit. To justify this outcome, the County claims Navigator’s motion is untimely and resolution during the current permit process would violate the county’s due process rights. In making its motion, the County also made a number of incorrect representations regarding Navigator’s project, South Dakota law, and its own Ordinance.

The County’s motion should be denied for a number of reasons.

First, Navigator’s motion was timely. The County criticizes Navigator for not seeking preemption in its initial permit application *despite the fact* the County’s Ordinance was adopted over eight months *after* the initial permit was sought. Navigator raised its motion two weeks after the Ordinance went into effect, with a month of time remaining between the motion submission date and the PUC’s hearing date, and within the PUC’s motions deadline. Moreover, Navigator

first raised the possibility of preemption in its Application, reserving the right to argue preemption later if it became necessary. The County does not suggest anything more Navigator could have done. Navigator's motion is timely.

Second, the PUC's consideration of Navigator's motion at the scheduled hearing would not impair any of the County's due process rights. Navigator's permit application was filed in September 2022 and sent to the County Auditor as required by statute. At that time, the County knew Navigator's pipeline would be located within the County. While other counties intervened, Minnehaha County did not. Likewise, during the County's deliberation on the Ordinance, Navigator extensively engaged with the County and encouraged it to voice its objections through the PUC process. The County did not. Even focusing on Navigator's motion, it was submitted on June 26, 2023. The County could have opposed Navigator's motion or prepared to present evidence at the hearing. Again, Navigator does not oppose the County's intervention, only its request for separate handling of the preemption motion.

Moody County, whose ordinance was also challenged in the *same* motion as Minnehaha's, *has not sought* bifurcation of the hearing and the preemption motion, nor has it raised flawed arguments regarding timeliness and due process. Rather, on July 20, 2023, Moody County sought leave to present witnesses at the hearing to address Navigator's motion. Navigator consented the next day. Minnehaha County could have followed the same approach.

Navigator thus requests (a) that the PUC grant Minnehaha County's request to intervene in the proceeding; and (b) deny Minnehaha's request to hold the preemption motion in abeyance or condition the grant of a permit on findings made in a separate docket or proceeding at a later date.

Argument

The County's motion, despite seeking procedural relief, mixes in substantive argument about the merits of Navigator's underlying motion, which should be presented at the hearing. None of the County's arguments merits a delay.

I. Navigator's motion was timely.

The County first argues that Navigator's preemption motion is untimely because Navigator's application for a permit did not request that the PUC preempt the Ordinance. While the Ordinance had not been passed when Navigator submitted its permit application, Navigator did state in section 6.8.6 of the Application that it "reserves the right to request the Commission to invoke [the provisions of SDCL § 49-41B-28] during the proceedings in this application should the need present itself." This issue was also addressed in Brandi Naughton's prefiled testimony. Every affected county considering an ordinance was on notice of the possibility that Navigator could invoke SDCL § 49-41B-28 in response to an ordinance passed after the Application was filed.

The County supports its argument by citing ARSD 20:10:22:19, which requires that an applicant must include in the permit application a detailed explanation of any local land use controls which conflict with the pipeline operator's plans and reasons why the proposed facility should preempt the local controls. Navigator complied with this provision because there were no local land use controls that conflicted with its proposed route. The Ordinance was adopted over eight months after Navigator's application was filed. Navigator promptly addressed its concerns through prefiled testimony and filed a motion within the motions deadline.

II. Consideration of Navigator’s motion would not implicate due process concerns.

The County next argues that consideration of Navigator’s motion at the PUC’s hearing would impair the County’s due process rights. The County’s argument fails for a number of a reasons.

First, despite being statutorily entitled to participate, Minnehaha County chose not to intervene in the docket after being provided with notice of the Application. It submitted a letter as public comment, but otherwise chose not to participate. Even after Navigator submitted its motion on June 26, 2023, the County waited until the Friday before the hearing scheduled to start on Tuesday to appear.

Second, the County has had sufficient time to adequately prepare for the hearing. Navigator’s motion was submitted on June 26, 2023, soon after the County adopted its Ordinance and essentially a month before the PUC’s hearing was scheduled to begin. While the County repeatedly asserts that continuing with the hearing as scheduled would deprive it of due process, it does not explain how. Navigator submitted prefiled rebuttal testimony on June 26, 2023, the same day that it submitted its motion. In the interim, the County could have sought intervention and submitted testimony responding to Navigator’s evidence. Even now, the County has time to appear, cross-examine Navigator’s witness on this issue, and present its own witness or witnesses if it chooses.

The County does not state when it learned about the instant motion, but it chose to retain outside counsel, who drafted the instant motion.¹ The County had time to intervene and prepare.

¹ Minnehaha County’s deputy state’s attorney, who is a party, was served with the motion when it was filed.

Third, the County may still participate in the permit proceedings and present its view at the hearing. As indicated above, Navigator does not oppose the County’s intervention and participation in the hearing. At the hearing, the County may present its views on Navigator’s testimony supporting preemption (which it already does in its motion), cross-examine Navigator’s witnesses, and present its position to the PUC. Moreover, in post-hearing briefing, the County may supplement its arguments at the hearing.

This opportunity to participate in the PUC process is more than sufficient to satisfy due process. The touchstone of due process is the opportunity to be heard. “So long as one hearing will provide the affected individual with a meaningful opportunity to be heard, due process does not require two hearings on the same issue.” *Crum v. Vincent*, 493 F.3d 988, 993 (8th Cir. 2007); *see also Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (noting that “[t]he fundamental requisite of due process of law is the opportunity to be heard” and finding seven-day notice period was not *per se* constitutionally infirm). In addition, “plaintiffs [will be] found to have waived their due process claims because they were aware of the available administrative procedures, yet they did not pursue relief thereunder.” *Krentz v. Robertson Fire Prot. Dist.*, 228 F.3d 897, 907 (8th Cir. 2000).

The commission issued the procedural schedule for this docket in March 2023. The schedule provided multiple opportunities to submit prefiled testimony. The County was provided an opportunity to intervene at the outset, and later had time in which it could have submitted pre-hearing testimony. The County also has the opportunity to participate in the scheduled hearing. Due process requires nothing more.

Fourth, and finally, the County’s due process arguments are unconvincing in light of Moody County’s response to Navigator’s motion. Through its motion, Minnehaha County focuses its claims not only on its own rights but also the rights of other “affected counties”—*i.e.*, Moody County. As the motion argues, “*affected counties* have not had the opportunity to engage in discovery regarding issues that may be raised . . .” (Motion at 9.) This is incorrect, since Moody County is a party and answered discovery served by Navigator.

Navigator’s motion seeks suppression of not only Minnehaha County’s ordinance but also Moody County’s ordinance. On July 20, 2023, Moody County submitted a motion asking for a time certain for two county witnesses to testify at the hearing in opposition to Navigator’s suppression motion. On July 21, 2023, Navigator consented to that request, making clear that it “d[id] not object to the motion and agree[d] that it would be helpful for it to be considered at the outset of the hearing.”

Moody County, similarly situated as Minnehaha County, identified witnesses to testify at the PUC hearing and is prepared to proceed. In so doing, it availed itself of the “opportunity to be heard” that Chapter 49-41B and the PUC’s process permits. Considering Navigator’s motion at the hearing will not violate due process.

III. The County’s merits arguments, which should be presented at the hearing, are without merit.

While the County presents substantive arguments for why preemption should not be granted, its motion is not styled as an opposition but instead as a limited request for a very specific type of relief: that the PUC “enter an Order holding that Navigator’s Motion will be held in abeyance and set a separate, duly-noticed hearing for all appropriate parties to be heard.” To justify this extraordinary relief, the County points to SDCL § 49-41B-24 for the supposed proposition that bifurcation may occur, which provides that the Commission may either grant, deny, or

grant with conditions a pipeline proposal. The County's argument fails because it does not mention the preemption statute, which inextricably ties the permitting decision to a finding on preemption.

SDCL § 49-41B-28 states in full:

A permit for the construction of a transmission facility within a designated area may supersede or preempt any county or municipal land use, zoning, or building rules, regulations, or ordinances upon a finding by the Public Utilities Commission that such rules, or regulation, or ordinances, as applied to the proposed route, are unreasonably restrictive in view of existing technology, factors of cost, or economics, or needs of parties where located in or out of the county or municipality. **Without such a finding by the commission, no route shall be designated which violates local land-use zoning, or building rules, or regulations, or ordinances.**

The provision's last sentence makes clear that the PUC may not issue *any* decision on the proposed route (condition or not) without first issuing a ruling on Navigator's preemption motion.

As the provision makes plainly clear, “**no route shall be designated**” without a preemption finding. Notably, the provision does not say that “no route shall be finally designated” or indicate the provision applies only to non-conditional PUC grants. Rather, the language of the provision is explicit and clear: no route shall be designated, either conditionally or finally, unless the PUC finds preemption is warranted.

Thus, the County's reference to SDCL § 49-41B-24 is non-responsive. Put differently, the County argues that SDCL § 49-41B-24 permits the PUC to designate a route with conditions. SDCL § 49-41B-28, however, does not permit the PUC to designate a route, at all, unless a preemption finding is made. The PUC must first satisfy SDCL § 49-41B-28 before it may proceed to exercising its powers under SDCL § 49-41B-24.

IV. The County’s substantive arguments are improperly raised in the motion and, either way, are unavailing.

At the same time the County argues it has not had the opportunity to develop arguments to raise against Navigator’s motion at the hearing, it includes in its procedural motion substantive arguments against preemption. These are arguments that the County should present at or after the hearing. Regardless, to avoid any prejudice from the County’s substantive argument in its motion, Navigator addresses a few significant legal errors in the County’s brief.

First, the County misconstrues the relief Navigator is requesting in its motion. The County claims that Navigator is requesting the Commission “invalidat[e] [a] duly-enacted ordinance”. But Navigator is asking the PUC to exercise its statutory authority to find that Navigator’s route is *exempted* from application of the Ordinance. Upon such a finding, the Ordinance would still remain on the books and would apply to any other transmission facility proposed to be built within the County. Any other affected pipeline companies which wish to construct in Minnehaha would need, like Navigator, to seek preemption based on a showing that the Ordinance is unreasonably restrictive with respect to that project. Contrary to the County’s rhetoric, the PUC would not be invalidating the Ordinance, but would merely be issuing a one-off exception to it.

Second, the County’s characterization of the PUC’s power to preempt as limited or highly-conditioned is wholly incorrect. Rather, it is well understood that SDCL § 49-41B-28 effects a broad grant of power to the PUC in determining whether preemption should occur. As the South Dakota Supreme Court has made clear, “[t]he statute clearly designates the PUC as the fact finder before local land use regulations may be preempted or superseded.” *In re Neb. Pub. Power Dist. etc.*, 354 N.W.2d 713, 720 (S.D. 1984). “[N]o other agency or court is empowered to make this initial determination . . .” *Id.*

This delegation of power is entirely consistent with general principles governing the balance of county and state rulemaking. As a modified Dillon’s Rule state, South Dakota limits the authority of counties to only those powers incidental to or necessary to implement the delegated power. See *Olesen v. Town of Hurley*, 2004 SD 136, 691 N.W.2d 324. Thus, while SDCL § 7-18A-2 authorizes a county to adopt ordinances “as may be proper and necessary to carry into effect the powers granted to it by law. . . ,” and SDCL Ch. 11-2 grants counties authority to adopt zoning ordinances that include conditional uses, a county may not pass an ordinance which conflicts with state law. SD Const art IX § 2. *Rantapaa v. Black Hills Chair Lift Co.*, 2001 S.D. 111, ¶ 21, 633 N.W.2d 196, 203.

As the South Dakota Supreme Court has explained:

Aside from [the] statutory grant of legislative power, a [city or] county may not pass an ordinance which conflicts with state law.” *Rantapaa v. Black Hills Chair Lift Co.*, 2001 S.D. 111, ¶ 22, 633 N.W.2d 196, 203 (citing S.D. Const. art. IX, § 2). A conflict arises between an ordinance and a statute only when their express or implied terms are irreconcilable, where the ordinance permits that which the statute forbids, or where the ordinance forbids that which the statute expressly permits. *Snow Land, Inc. v. City of Brookings*, 282 N.W.2d 607, 608 (S.D. 1979).

City of Onida v Brandt, 2021 S.D. 27, ¶ 14, 959 N.W.2d 297, 301. The Court later concludes “Where conflict exists between an ordinance and state law, state law prevails. See *Rantapaa*, 2001 S.D. 11. . .”.

SDCL § 49-41B-28 clearly empowers the PUC alone to determine whether a local county ordinance should apply to a transmission facility project. As the County’s powers emanate *from* powers delegated from the state, there is no basis to claim the PUC’s authority is somehow limited or must be deferential to the County.

Third, the County's suggestion that the Ordinance will not prohibit Navigator's project is misplaced. Notably, the County does not dispute Navigator's contention that, as applied, the Ordinance's setback limitations would make it impossible to route a pipeline through Minnehaha County. That allegation was supported by Navigator witness Monica Howard in prefiled testimony. Ms. Howard's testimony not only explained why the setback limitations would constitute a *de facto* ban on pipeline development in Minnehaha, but also included a map visually showing the impossibility of constructing a pipeline. As the map makes clear, the number of conflicts posed by the setback ordinance preclude compliance.

In response, the County argues that the Ordinance does not, in fact, constitute a *de facto* ban on pipeline development in the County because it allows setback limitations to be ignored when a landowner provides a waiver to Navigator. In making this argument, the County entirely misses the point. In establishing Chapter 41B, the South Dakota legislature intended to establish a process by which the state reviews, in detail, the merits of a pipeline project to ensure it is in furtherance of the welfare of the state's citizens. Upon such a showing, however, Chapter 49-41B provides a pipeline operating as a common carrier with the extraordinary power of eminent domain.

In enacting this framework, the South Dakota legislature made clear that upon a showing that a pipeline would further the welfare and interests of the State, the benefits of the pipeline would outweigh the objections of specific landowners, thus warranting the grant of eminent domain. And yet, the Ordinance would make a precondition of construction in the County complete assent by landowners of the pipeline project. This establishes an irreconcilable conflict. Chapter 41B and 21-35 expressly permits a pipeline operator the right to construct a pipeline *despite* individual landowner objections upon a sufficient showing of its merits in the context of the State.

The Ordinance would forbid this, and render the State’s eminent domain provisions surplus. *See, e.g., City of Onida v Brandt*, 2021 S.D. 27, ¶ 14 (a conflict arises “where the ordinance forbids that which the statute expressly permits.”).

Fourth, the County argues that Navigator has failed to present a “detailed explanation” regarding why preemption would be warranted. In so doing, it argues that Monica Howard’s testimony, which included exhibits and analysis of the preemption issue, is “conclusory.” Despite the inaccurate characterization, the County fails to explain why it *cannot* rebut this testimony, especially given its broad proclamations that Navigator’s motion is palpably insufficient.

While Navigator objects to a number of other statements raised in the County’s motion, it need not address them here. Indeed, the County does not address Navigator’s arguments regarding the Ordinance’s ambiguity, or that the conditional use permit process is wholly discretionary and vests in the County a power exclusively reserved for the PUC. As stated above, Navigator *consents* to the County’s intervention and welcomes its presentation of these arguments at the hearing, as will already occur with Moody County’s ordinance. In post-hearing briefing, these items can once again be explored. At the end of this process, however, Navigator is entitled, and state law requires, a final decision from the PUC addressing suppression and the fate of Navigator’s permit.

Conclusion

Navigator raised the issue of preemption with the PUC in its Application, in prefiled testimony, and again in prefiled testimony and by motion after Minnehaha County passed its ordinance. Navigator’s motion is timely, and Minnehaha County should be granted leave to participate in the scheduled hearing, which affords it due process. More substantively, the last sentence of the preemption statute, SDCL § 49-41B-28, precludes the County’s argument that preemption can be considered and decided later. As Navigator has previously argued, evidence related to

whether the ordinance is unreasonably restrictive as applied to Navigator’s proposed route will permeate the hearing, so the County’s requested relief would frustrate the Commission’s interest in efficiency and economy. Navigator respectfully requests that the County be granted leave to intervene, and that its motion otherwise be denied.

Dated this 24th day of July, 2023.

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