BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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| IN THE MATTER OF THE APPLICATION OF NAVIGATOR HEARTLAND GREENWAY, LLC FOR A PERMIT UNDER THE SOUTH DAKOTA ENERGY CONVERSION AND TRANSMISSION FACILITIES ACT TO CONSTRUCT THE HEARTLAND GREENWAY PIPELINE IN SOUTH DAKOTA, | : | **HP 22-002** |
| | | **APPLICANT'S OBJECTION TO MOTION TO RETURN APPLICATION** |

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On January 24, 2023, the landowners who have intervened in this matter and are represented by Brian Jorde of Domina Law Group (collectively "Landowners"), filed a motion asking that under SDCL § 49-41B-13(2) the Commission return the application (essentially, dismiss it without prejudice) filed on September 27, 2022, by Applicant Navigator Heartland Greenway ("Navigator"). The statute allows the Commission discretion to return an application for "[f]ailure to file an application generally in the form and content required by this chapter and the rules promulgated thereunder." SDCL § 49-41B-13(2). The motion is based on the fact that not all landowners within the notice corridor specified in SDCL § 49-41B-5.2 received notice of the application from Navigator within 30 days after the application was filed. It is undisputed that all affected landowners have since received notice under § 49-41B-5.2.

There is a mismatch, however, between the grounds for return of an application under SDCL § 49-41B-13(2) and compliance with SDCL § 49-41B-5.2. In short, Navigator's *application* was not deficient in *form and content* as required by SDCL Ch. 49-41B, and the Commission lacks statutory authority to return an application for late notice under SDCL § 49-41B-13. Moreover, Landowners' motion takes great liberty with the facts and is not supported

by established South Dakota caselaw, statute, or regulation. Navigator therefore respectfully requests that Landowners' motion be denied.

**1. The plain language of SDCL § 49-41B-13(2) does not allow return of Navigator's application**.

When applying a statute, the Commission, like a court, must "begin with the plain language and structure of the statute." *Farm Bureau Life Ins. Co. v. Dolly*, 2018 S.D. 28, ¶ 9, 910 N.W.2d 196, 200 (citation omitted). When statutory language is clear, the Commission must simply apply the statute based on its plain meaning. *Id.* Here, the statute on which Landowners rely provides that "[a]n application may be denied, returned, or amended at the discretion of the Public Utilities Commission for . . . (2) Failure to file an application generally in the form and content required by this chapter and the rules promulgated thereunder." SDCL § 49-41B-13(2). Landowners' motion presumes that the statute says the Commission may order the return of an application for any failure to comply with any provision of SDCL Ch. 49-41B, but that is not what it says.

First, an application for a siting permit is required by statute, and the statute broadly outlines the content that must be included in an application. SDCL § 49-41B-11. Second, with respect to the application, the statute refers to the "form and content required by this chapter and the rules promulgated thereunder." Pursuant to its statutory authority, *see* SDCL § 49-41B-35, the Commission has adopted rules governing the application; the form of the application is addressed in ARSD 20:10:22:04, and its content is addressed in ARSD 20:10:22:05. Third, if the Legislature wanted to give the Commission authority to dismiss an application for failure to comply with any provision of SDCL Ch. 49-41B, rather than failure to comply with form and content requirements for the application, it could have said so. The grounds enumerated in

SDCL § 49-41B-13 include misstatements of fact in the application or other required materials, application deficiencies, and a failure to make the initial deposit required by § 49-41B-12. These statutory grounds for denial, return, or amendment are far more limited than any violation of SDCL Ch. 49-41B. Thus, nothing in § 49-41B-13 allows the Commission to dismiss Navigator's application for an issue related to its compliance with SDCL § 49-41B-5.2.

This issue is jurisdictional. "The general rule is that administrative agencies have only such adjudicatory jurisdiction as is conferred upon them by statute." *O'Toole v. Board of Trustees of South Dakota Retirement System*, 2002 S.D. 77, ¶ 15, 648 N.W.2d 342, 346. In *O'Toole*, the Supreme Court quoted with approval from a Florida decision that "[a]n agency has only such power as expressly or by necessary implication is granted by legislative enactment; agency may not increase its own jurisdiction and, as a creature of statute, has no common-law jurisdiction nor inherent power such as might reside in a court of general jurisdiction." *Id.* (citation omitted). More particularly, "[t]he determination of jurisdiction in administrative law involves three components: (1) personal jurisdiction, referring to the agency's authority over the parties and intervenors involved in the proceedings; (2) subject matter jurisdiction, referring to the agency's power to hear and determine the causes of a general class of cases to which a particular case belongs; and (3) the agency's scope of authority under statute." *Anderson v. Tri State Construction, LLC*, 2021 S.D. 50, ¶ 11, 964 N.W.2d 532, 536-57. The issue here concerns the scope of the PUC's authority under statute. Because the statute on which Landowners rely does not authorize the PUC to dismiss an application for failure to comply with SDCL § 49-41B-5.2, the Commission lacks jurisdiction to grant the relief Landowners request under SDCL § 49-41B-13(2).

**2. The Commission has previously rejected the same argument in HP22-001.**

In Docket HP22-001, landowners represented by the same lawyer as Landowners in this docket filed a motion to dismiss the application filed by Summit Carbon Transport, LLC. As in this docket, the landowners in that docket argued that Summit had failed to comply with SDCL § 49-41B-5.2. As in this docket, the landowners' motion was based on SDCL § 49-41B-13(2). On January 19, 2023, the Commission entered an order denying the motion because as of the date the motion to dismiss was heard, "SCS had sent notice to additional landowners within one-half mile of the route." The Commission also found that "the current procedural schedule provided adequate time to accommodate those receiving late notice." (Order, Docket HP22-001, January 19, 2023, at 2.)

The same is true here. As of the date of Landowners' motion, Navigator had sent notice of the application to the landowners it missed with its initial notice. This issue has been a matter of record since December 9, 2022, when Navigator filed in the docket a letter explaining what happened, and proof of notice to the additional landowners, who were sent notice by certified mail on December 28, 2022, was made on January 11, 2023. Moreover, as explained below, Landowners have made no factual showing or cited any legal authority that the schedule entered in this case does not allow any landowner receiving late notice enough time to intervene or otherwise participate in the docket. Thus, even if the Commission decides that it has jurisdiction to grant the relief requested, it should be denied for the same reasons the Commission denied the motion in Docket HP22-001.

**3. Landowners may not themselves obtain relief based on the rights of third parties.**

Landowners all received timely notice under SDCL § 49-41B-5.2. They argue that the landowners who received late notice do not have enough time to intervene and "build an

effective case opposing the application or otherwise exercise their legal rights." (Landowners' Motion ¶ 24.) Thus, they seek affirmative relief based on the rights of others. In general, a plaintiff in a lawsuit must establish standing to seek relief, which requires a personal injury in fact and a violation of the plaintiff's own, not a third party's, rights. *See In re Estate of Flaws*, 2016 S.D. 60, ¶ 29, 885 N.W.2d 336, 345. Although Landowners clearly have standing to intervene in this docket and to challenge whether Navigator's application should be granted, their claim for relief under SDCL § 49-41B-5.2 is not based on a violation of their own rights and should be denied for that reason.

Apparently recognizing this, Landowners argue that they "are also affected by the error" because they have a "vested interest in ensuring that this process is fair and complete," and they fear that landowners may appear late and cause delay, or not appear at all. (Landowners' Motion ¶¶25-28.) These arguments do not establish any specific injury to Landowners, and they are based on speculation, not evidence or facts. Landowners offer no affidavit from counsel or any of themselves addressing their concerns. Instead, they argue that "[o]ne could easily see how a landowner who would have otherwise participated could find the process too daunting at this junction and simply not participate." (*Id.* ¶ 28.) But in the next sentence they prove that this concern is based on speculation. "Unfortunately, t*here is no way to know* whether these landowners are out there other than returning the application and requiring Navigator to comply with the law on re-application and proceed as required by law." (*Id.* (emphasis added).) The Commission should not speculate about landowners who choose not to participate in the docket, for whatever reason. What is clear is that Landowners who have appeared and are represented by counsel are not prejudiced by notice that Navigator provided to other landowners in December 2022.

**4. It is not accurate that all late-noticed landowners lacked notice of the application.**

Landowners' argument assumes that all of the landowners who did not receive timely notice in October did not receive any notice or know anything about the Navigator Heartland Greenway project. This is inaccurate. As explained in the letter Navigator filed on December 9, 2022, every landowner on the right of way received notice in 2022, while some landowners in the one-half mile corridor did not. Some of these landowners within the one-half mile corridor previously received notice of the project from Navigator in 2021, when Navigator invited affected landowners to voluntary public-information sessions that it held in person and virtually. Other affected landowners attended the public-input meetings that were held by the PUC. And the Commission published notice of the project and the public-input meetings as shown in the proofs of notice filed in the docket on December 5 and 6, 2022. Navigator understands its obligation to comply with SDCL § 49-41B-5.2, but the record does not support an argument that every affected landowner did not have notice of the project before receiving the notice sent on December 28, 2022.

**5. Landowners make no showing that the procedural schedule is unworkable.**

Landowners argue "the twelve-month rule is not workable in this docket given the number of parties, complexity and novelty of the subject matter, and the fact that permitting this type of pipeline is a matter of first impression." (Landowners' Motion ¶ 19.) This argument is unsupported by any evidence and is contrary to statute. The Legislature set the one-year deadline in SDCL § 49-41B-24. The Commission has previously complied with the deadline in multiple siting dockets. While the Commission has not previously decided an application for a carbon-capture pipeline, at some point it had not previously considered applications for crude-oil pipelines, natural-gas pipelines, or wind farms. The statute does not contain an exception for the

first such siting permit, and Landowners offer no evidence why it should. The subject matter of this docket in fact involves many of the same factual issues as other pipeline dockets, as is evident from comparing the application to the applications filed in previous pipeline dockets. Moreover, Landowners are represented by sophisticated counsel with previous pipeline experience; in addition to Landowners, counsel represents landowners affected by the Navigator Heartland Greenway project in Iowa, and landowners affected by the pipeline proposed by Summit in both Iowa and South Dakota. There is no evidence that counsel is inexperienced, unfamiliar with the issues, or unable to effectively represent Landowners in this docket.

**6. Navigator's proceedings in Illinois do not support the requested relief.**

Landowners argue that "Navigator has voluntarily dismissed its Permit Application in Illinois due to Application failures," and that the withdrawal supports its request for dismissal of Navigator's application here because "there should be no rush to permit the pipeline project headed that direction." (Landowners' Motion ¶¶ 29-30.)

First, Exhibit B to the attachment to Landowners' motion, which is Navigator's motion to withdraw filed with the Illinois Commerce Commission, disproves the argument that the withdrawal was due to "application failures." Rather, as stated in the motion, Navigator will be seeking authorization to construct and operate an additional lateral pipeline to additional sequestration locations in Illinois, so instead of filing a separate application, resulting in two proceedings, Navigator chose to streamline the process and expects to file a new application in February 2023. (Landowners' Motion, Attachment A, Ex. B, ¶¶ 2-3.)

Second, Landowners' argument is not a basis for delay in South Dakota. Navigator must obtain siting permits in four states (Illinois, Iowa, Minnesota, and South Dakota), as well as many other federal, state, and local permits. If a delay in any permit proceeding could be

justified based on the fact that some other permit has not yet been granted by some other permitting authority, the result would be an infinite loop with each permitting authority pointing to some other yet-to-be-granted permit. This is not the law. The Commission has subject-matter jurisdiction over only Navigator's permit application in South Dakota. If a permit is granted, it will undoubtedly include a permit condition that Navigator obtain and comply with all applicable federal, state, and local permits, without which Navigator cannot construct and operate its proposed pipeline in South Dakota. To the extent that Navigator does not receive other permits necessary to construct and operate the proposed pipeline, the risk is on Navigator, but that risk does not support delay in proceeding with Navigator's application in South Dakota.

**7. Navigator would be prejudiced if required to start over.**

Landowners imply that Navigator would not be prejudiced if it were required to start over, but this is both unsupported and not the legal standard for dismissing Navigator's application. The standard is whether there are facts supporting dismissal that is authorized by statute. If required to start over, Navigator would indeed be prejudiced by the expense associated with re-filing the same application, serving notice of the application on affected landowners a second time, conducting additional public-input meetings, and dealing with confused landowners, who may themselves complain that starting over cost them time and money in addressing a second application. More fundamentally though, it is not Navigator's burden in responding to the motion to dismiss to prove that it would not be prejudiced. Even if there were no prejudice, its absence is not a basis on which the Commission could order dismissal of Navigator's application under SDCL § 49-41B-13(2).

**8. Landowners' argument that the one-year deadline for decision is unconstitutional is legally unsupported and procedurally improper.**

Landowners' last argument is that the scheduling process employed in this docket is unconstitutional, in part because of Navigator's "unilateral request to establish hearing dates and associated deadlines," and in part because Navigator has the "unilateral power to request scheduling extension pursuant to SDCL § 49-41B-24." (Landowners' Motion ¶ 31.) Recognizing that the Commission cannot address the alleged unconstitutionality of SDCL § 49-41B-24.1, Landowners nevertheless suggest that it can work around that by simply dismissing Navigator's application. (*Id.* ¶ 33.)

This argument is frivolous. The South Dakota Supreme Court has defined a frivolous lawsuit as "one in which 'the proponent can present no rational argument based on the evidence or law in support of the claim.'" *Gronau v. Wuebker*, 2003 S.D. 116, ¶ 6, 670 N.W.2d 380, 382. Landowners' argument, for which they cite no legal authority, satisfies this standard. First, it is factually unsupported because Navigator did not *unilaterally* request hearing dates and associated deadlines. Rather, Commission counsel set and conducted a scheduling conference under as ordered by the Commission on January 10, 2023. At the conference, Navigator was the only party to propose a procedural schedule based on the hearing dates that the Commission advised were available in this docket. There was nothing *unilateral* about Navigator's conduct. Second, every statute in South Dakota is presumed constitutional: "There is a strong presumption that the laws enacted by the legislature are constitutional and that presumption is rebutted only when it clearly, palpably and plainly appears that the statute violates a provision of the constitution." *Oien v. City of Sioux Falls*, 393 N.W.2d 286, 289 (S.D. 1986). Landowners offer no argument or authority that would overcome this presumption. Third, any litigant in an

action to which the State is not a party who challenges the constitutionality of a statute must give notice under SDCL § 15-6-24(c) to the Attorney General, who may appear and defend the constitutionality of the statute, and without such notice, a court may not adjudicate the challenge. *West Two Rivers Ranch v. Pennington County*, 1996 S.D. 70, ¶ 15, 549 N.W.2d 683, 687. While Landowners were not required to give notice under this statute, Staff's practice is to notify the Attorney General, which shows the contrast between the seriousness required by the procedure and the cavalier nature of the three-paragraph argument made by Landowners. Fourth, as Landowners recognize, the Commission lacks the authority to decide whether a statute is constitutional. Finally, Landowners' argument that this bare-bones and legally unsupported assertion of unconstitutionality is a basis for the Commission to dismiss Navigator's petition is no different than the oral argument counsel previously offered about how the Commission could avoid the one-year statutory deadline.

**9. Navigator would not object to a later hearing date.**

Although in no way required by or responsive to Landowners' pending motion, based on general concerns about the duration of the procedural schedule raised by landowners and discussed at the Commission meeting on January 17, 2023, Navigator asked Commission Staff whether there were any possible later hearing dates that would still allow the application to be decided within the one-year deadline under SDCL § 49-41B-24. Navigator was advised that an eight-day hearing could be held starting on July 25 and ending on August 3, 2023. A hearing ending on August 3 would allow 55 days for post-hearing briefs, proposed findings and conclusions, and a final decision before the one-year deadline. If the Commission were so inclined, and with the understanding that Navigator's application would still be decided within the one-year deadline under SDCL § 49-41B-24, Navigator would not object to the evidentiary

hearing being held starting July 25, 2023, and ending on August 3, 2023. If the hearing dates were so changed, the pre-hearing deadlines in the procedural schedule could be adjusted accordingly, recognizing that the parties have already started discovery. Navigator would willingly propose alternative deadlines as part of any scheduling conference or other proceeding at which a revised schedule would be considered.

**10. Conclusion**

Landowners' motion based on Navigator's compliance with SDCL § 49-41B-5.2 does not warrant return of Navigator's petition. The reasons for which the Commission may order denial, return, or amendment of an application are enumerated in SDCL § 49-41B-13 and do not include compliance with SDCL § 49-41B-5.2. Landowners' argument that landowner notice implicates a "failure to file an application generally in the form and content required by this chapter and the rules promulgated thereunder" is based on a misreading of the plain language of the statute. Because the motion is also legally and factually unsupported, Navigator respectfully requests that it be denied.

Dated this 3rd day of February, 2023.

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