

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE	)	HP 22-002
APPLICATION OF NAVIGATOR	)	
HEARTLAND GREENWAY LLC FOR	)	BRIEF IN SUPPORT OF
A PERMIT UNDER THE SOUTH	)	MINNEHAHA COUNTY’S
DAKOTA ENERGY CONVERSION	)	MOTION TO HOLD IN
AND TRANSMISSION FACILITIES	)	ABEYANCE APPLICANT’S
ACT TO CONSTRUCT THE	)	MOTION TO PREEMPT
HEARTLAND GREENWAY PIPELINE	)	COUNTY ORDINANCES
IN SOUTH DAKOTA	)	UNDER SDCL § 49-41B-28
	)	
	)	

Minnehaha County,<sup>1</sup> by and through the undersigned counsel of record, submits the following as its Brief in Support of Minnehaha County’s Motion to Hold in Abeyance the Applicant’s Motion to Preempt County Ordinances under SDCL § 49-41B-28, which was filed in the above-captioned docket on June 26, 2023.

**INTRODUCTION**

The undersigned counsel makes a special appearance to respond to the Motion filed by Applicant Navigator Heartway Greenway LLC (“Navigator”) on June 26, 2023, which asks that the Public Utilities Commission (“PUC”) pre-empt or supersede an ordinance enacted by the Minnehaha County Commission on June 6, 2023 and effective July 13, 2023. Until this time,

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<sup>1</sup> Minnehaha County and the Minnehaha County Commissioners have moved to intervene in Applicant’s Docket for the limited purpose of objecting to Applicant’s Motion to Preempt County Ordinances and to provide responsive written testimony on the preemption issue as it relates to Minnehaha County. Minnehaha County takes no position on Applicant’s permit application.

Minnehaha County has taken no position with respect to the application pending before the PUC and thus did not previously participate in this proceeding.

Minnehaha County opposes any effort to pre-empt Ordinance MC 16-179-23 (the “Ordinance”), particularly under the auspices of an untimely motion that was filed in a proceeding to which it is not a party and for which it has not been given adequate time to respond. Navigator’s attempt to pre-empt the Ordinance is procedurally defective and substantively flawed. Considering the Motion on the merits at this juncture would deprive Minnehaha County and other affected counties of due process.

The PUC need not – and should not – rush to make a determination on an issue this significant, which goes beyond the merits of Navigator’s individual application and touches on the bedrock principles of the democratic process and local self-governance. The PUC should 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.

### **BACKGROUND**

During its February 21, 2023 meeting, the Minnehaha County Commission first considered submitting a letter to the PUC to place on its official record in the Applicant’s (Navigator) docket. The Commission deferred consideration until March 21, 2023 so additional revisions to the letter could be made.

During its March 21, 2023 meeting, the Minnehaha County Commission considered the revised draft letter to the PUC related to the Navigator Pipeline.<sup>2</sup> The spirit of the Commission’s discussion in considering the letter was to recognize the different roles and responsibilities of the

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<sup>2</sup> The Commission submitted a nearly identical letter with respect to another company’s proposed pipeline.

various governmental entities involved, including both Minnehaha County and the PUC. It expressly noted that it reserved all rights to regulate aspects of the project in accordance with state and federal law.

PUC Chairperson Fiegen provided a response letter to the Minnehaha County Commission, acknowledging Minnehaha County's concerns. She further noted: "We respect your rights as a county to regulate aspects of the project's route in concert with state and federal law."

In April 2023, the Minnehaha County Planning Department began considering and drafting a new ordinance to address anticipated transmission pipelines that may route through portions of Minnehaha County. Before the Ordinance's adoption, there was no Minnehaha County ordinance in place to address land use with respect to transmission pipelines. During this process, the Planning and Zoning Commission held a lengthy public hearing and ultimately voted 6-0 to approve the draft ordinance and submit it to the Minnehaha County Commission for its consideration and possible adoption. The original draft ordinance included a 750-foot setback requirement for dwellings, churches, and businesses, and different setback requirements for public parks, schools, and population boundaries.

The second reading and public hearing to consider the proposed Ordinance took place during the May 23, 2023 Minnehaha County Commissioner meeting. Following extensive public comment and Commissioner deliberation, three amendments to the proposed ordinance were offered. Specifically, Commissioner Kippley moved to amend procedural language related to the application process, the setback requirement for dwellings, churches, and businesses from 750 feet to 330 feet, and an element of the fee structure on the conditional use permit process. The first amendment passed.

The second amendment, related to the setback requirements, did not pass as the Minnehaha County Commission voted 2-2 on the amendment. Commissioner Bender was not in attendance at this meeting. By statute, the Minnehaha County Commissioners' consideration of the proposed ordinance moved to its next meeting on June 6, 2023 following the tie vote. The third proposed amendment was not voted on during the May 23 meeting.

Following further public comment and Commissioner consideration at the June 6, 2023 Minnehaha County Commission meeting, the Commission voted 3-2 to adopt the Ordinance, which included the amended 330-foot setback requirement. The Ordinance went into effect on July 13, 2023. As of today, no transmission pipeline applicant has yet filed for a conditional use permit with respect to the Ordinance. Minnehaha County is not aware of whether any transmission pipeline applicant has approached landowners to seek a waiver under the Ordinance.

The Ordinance seeks to regulate land use in Minnehaha County, and it does so in a uniform manner that does not target any specific applicant but instead integrates regulation of transmission pipelines within the existing land-use public policy framework. Under the Ordinance, as written and adopted, a transmission pipeline is categorized as a permitted special use if all criteria set forth in the Ordinance are met. The Ordinance includes two additional avenues for a transmission pipeline applicant's proposed route if such criteria are not met: (1) obtain a waiver on setback requirements from the property owner directly, or (2) seek a conditional use permit from Minnehaha County's Planning Department. The conditional use permit procedure in Minnehaha County, of course, grants a right to a public hearing, gives the Planning Commission the ability to add conditions, and provides the right to appeal an adverse outcome.

## APPLICABLE LAW

County Commissions have inherent authority to regulate land use and development within their respective territories. Nothing in the South Dakota Energy Facility Permit Act suggests otherwise. Indeed, in order to obtain a permit, an applicant such as Navigator has the burden in establishing, among other things, that the “facility will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government.” SDCL § 49-41B-22(4).

The Legislature has recognized a narrow exception to land-use regulation enacted by local governmental bodies, including county ordinances. Under SDCL § 49-41B-28, a permit for the construction of a transmission facility

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.

*Id.* As noted in the July 11 hearing, the Motion to Preempt County Ordinances is “an incredibly substantive motion asking [the PUC] to overrule county commission findings” (Commissioner Hansen, Audio Recording, at 149:17-26) and constitutes an “unprecedented” incursion on the autonomy of local governmental units. In other words, Navigator has a heavy burden to meet this narrow exception.

The preemption request is not merely unprecedented as to its substance, but also comes at a stage in the proceedings that is contrary to governing rules. Under ARSD 20:10:22:19, “if the proposed facility violates local land use controls, the applicant shall provide the commission with a detailed explanation of the reasons why the proposed facility should preempt the local

controls.” This “detailed explanation” is to be set forth at the outset of the proceeding, not at its conclusion. Further, such detailed explanation “shall include a detailed description of the restrictiveness of the local controls in view of existing technology, factors of cost, economics, needs of parties, or any additional information to aid the commission in determining whether a permit may supersede or preempt a local control pursuant to SDCL 49-41B-28.” *Id.*

To date, Navigator has submitted testimony from a single witness, Executive Vice President Monica Howard, whose rebuttal testimony addressing Minnehaha County’s policy consists of approximately two double-spaced pages.

### **ARGUMENT**

The preemption motion, made at the eleventh hour and without notice to Minnehaha County, seeks to invalidate the Ordinance in the course of determining whether the application should be granted. Whether the Ordinance is “unreasonably restrictive” under SDCL § 49-41B-28 is a separate issue from whether Navigator has met its burden under SDCL § 49-41B-22. In conflating those two issues, Navigator’s Motion rests on a faulty legal foundation and a misreading of relevant statutory law.

#### **A. The PUC need not adjudicate Navigator’s untimely preemption Motion in deciding whether to grant its permit.**

Navigator has suggested that, because a decision on the merits of its application must be made within 12 months after filing its application, the PUC may not reserve ruling on the untimely motion to pre-empt or otherwise address local county ordinances under a separate docket or proceeding. Under SDCL § 49-41B-24, the PUC has twelve months to “make complete findings in rendering a decision regarding whether a permit should be granted, denied, or granted upon such terms, conditions, or modifications of the construction, operation, and maintenance as the commission may deem appropriate.” The final clause of this statute

contemplates that an application for a permit may be granted “upon such terms, conditions, and modifications . . . as the commission may deem appropriate.”

That language clearly grants the PUC authority to determine that a permit application will be granted if, and only if, it meets conditions imposed by the PUC, including a condition that the route and other aspects of the facility proposal comply with state and local law. Such a finding is entirely consistent with the final sentence of SDCL § 49-41B-28, the preemption statute. Accordingly, Navigator errs in suggesting that “by granting the application, the commission, in effect, has approved the route because the application is based on a particular route that is in evidence before the commission.” Hearing Tr., July 11, at 8:8-11.

Stated differently, if the PUC is inclined to render a decision to grant the permit, it may do so on the condition that Navigator make good on the promise in its application, i.e., that it “will design, construct, operate and maintain the pipeline in compliance with applicable zoning and county permit requirements” and “may request variances and/or special use permits, as necessary.” Indeed, it is hard to envision that Navigator could meet its burden of proof under SDCL 49-41B-22 to the extent that its application depends on violating local ordinances. This is necessarily the case because Navigator must establish that its facility “will not unduly interfere with the orderly development of the region with due consideration having been given the views of the governing bodies of affected local units of government.” *Id.* at 49-41B-22(4). If an applicant’s proposed facility cannot be routed without violating existing local laws, then it follows that the applicant is unlikely to make the necessary showing to show that it is entitled to a permit under governing South Dakota law.

A third alternative exists: the PUC could issue a decision on the condition that the question of preemption would be decided in a separate proceeding or under a separate docket.

This approach would also ensure that Minnehaha County and other affected counties are provided with a meaningful opportunity to respond to Navigator's contentions regarding its ability to meet local ordinance requirements, many of which are self-serving, tenuous, conclusory, and question-begging, at best.

Obviously, none of these alternatives are implicated if Navigator fails to meet its burden of proof. If that is the outcome, then the question of preemption need not ever be addressed, and neither the PUC nor any other affected party need devote resources to Applicant's Motion. Judicial economy counsels against deciding an issue that need even be addressed. This is yet another reason why a sequential decision-making process makes sense.

In short, Navigator has applied pressure on this body to address the preemption issue based on a false sense of urgency and a misreading of the governing statutes. Nothing in statutory law absolutely requires that the PUC adjudicate the preemption issue in the context of deciding whether to grant Navigator's Application. Just as importantly, nothing in the governing statutes suggests that the County must take a position regarding the merits of the application as a pre-condition to exercising its right to mount a defense of its ordinance against a claim of preemption that was not timely made.

**B. A rush to decide Navigator's preemption motion runs contrary to the procedure contemplated under South Dakota law and offends basic notions of due process.**

Navigator asks the PUC to rush to action and take an unprecedented step of invalidating duly-enacted ordinance without giving the responsible governmental actor even a modicum of due process. The bedrock principle of due process is not merely an opportunity to be heard, but an opportunity to be heard at a meaningful time and in a meaningful manner. *See, e.g., Daily v. City of Sioux Falls*, 802 N.W.2d 905 (S.D. 2011). As PUC Commissioners appear to have



already recognized based on comments made during the July 11, 2023 hearing, considering the Motion as part of the Navigator's application would deprive Minnehaha County of due process.

Furthermore, Navigator is asking for relief, despite having failed to fulfil its own obligations. It has not yet provided a "detailed explanation" of the basis behind its preemption claim. The sole evidentiary offering on that point is rebuttal testimony from Monica Howard, which is conclusory and spanning no more than a few paragraphs. Minnehaha County has not had an opportunity to present pre-hearing testimony relating to its Ordinance or to respond to the self-serving written testimony that Navigator has offered. It was not even aware that the Ordinance was being challenged until some time after the Motion was filed because it was not served with the Motion.

Navigator indicates that it may offer additional testimony during the evidentiary hearing. That is still more prejudicial, as it gives the affected counties no advanced notice as to what new evidence or additional bases Navigator might conjure up. Furthermore, the affected counties have not had the opportunity to engage in discovery regarding issues that may be raised via live witness testimony under the unduly compressed timeline for which Navigator advocates.

Navigator seeks to excuse the fundamental unfairness of its position by shifting the blame for its untimely actions to Minnehaha County. According to Navigator, counties that pass ordinances to address new issues squarely within their jurisdiction, such as land use, or to fill gaps in their administrative regulations "change the rules in the middle, or near the end of, the game." Nonsense. Navigator appears to maintain that democratically-elected bodies should be denied the opportunity to respond to new developments and emergent issues of pressing public concern by enacting ordinances and other regulations. Such a view is inherently anti-democratic and assumes that locally-elected bodies must stand silent and passive in the face of new or

emergent issues that will have meaningful impact on the lives of their constituents. Navigator's position is likewise not supported by SDCL Chapter 49-41B, which expressly recognizes local authorities' role in regulating aspects of a transmission facility.

The possible construction and operation of a pipeline is just such an emergent issue. As the Ordinance expressly acknowledges:

The proposed establishment of the bulk transportation of toxic, hazardous and regulated substances and gases by transmission Pipeline (as defined below) through the County would constitute a new land use, which has never been a traditional land use within the County, and which will significantly impact future development of the County's land use-planning vision.

Ordinance, at ¶ 4, at 1. Nothing in the Act suggests that the Legislature intended to tie the hands of governmental actors as soon as a well-funded, out-of-state corporation filed a permit application. The PUC has limited authority to pre-empt local laws. Until and unless the applicant establishes that such laws are so unreasonably restrictive as to justify the extraordinary step of preemption, local bodies remain free to do what they are elected to do: respond to emergent issues and craft public policy to address such issues.

Navigator's position is also fatally undercut because it has thus far made a deliberate choice not to avail itself of procedures that the Ordinance provides. Any claimed injury by Navigator is premature, as it has not yet attempted to comply with the Ordinance. The PUC should not consider its untimely preemption Motion as a means of circumventing existing legal avenues that Navigator itself has recognized exist, but has strategically decided not to pursue.

### **CONCLUSION**

Rather than embark on the unprecedented path that Navigator invites the PUC to walk down, the PUC should abide by the recommendation of its staff and address any argument for preemption or supersession under SDCL § 49-41B-28 in a separate proceeding or docket. If the

PUC denies the application, then the challenge to the Ordinance on preemption grounds is moot. Accordingly, the question of preemption is only ripe for determination if the PUC determines that Navigator has met its burden under SDCL § 49-41B-22, which necessarily entails consideration of whether Navigator has proven that its intended plans comply with subsection 4 of that statute.

Principles of judicial economy and fundamental fairness compel the conclusion that Motion to Pre-Empt County Ordinances should be held in abeyance and addressed in a separate proceeding or separate docket. Minnehaha County and other affected counties should be given the opportunity to submit written evidence in response to testimony submitted in support of the Motion. In addition, the Commission should set a scheduling order in this proceeding or a separate docket to address the Motion for Preemption. That scheduling order should give due consideration to the complexity of the issues and the gravity of the extraordinary and unprecedented relief that Navigator is asking this Commission to grant it.

Date: July 21, 2023.

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The undersigned attorney hereby certifies that the foregoing was served on those listed below on July 21, 2023:

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