

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 :  
GREENWAY LLC FOR A PERMIT UNDER :  
THE SOUTH DAKOTA ENERGY :  
CONVERSION AND TRANSMISSION :  
FACILITIES ACT TO CONSTRUCT THE :  
HEARTLAND GREENWAY PIPELINE IN :  
SOUTH DAKOTA :  
:  
:

**APPLICANT’S BRIEF  
IN SUPPORT OF MOTION TO  
PREEMPT COUNTY ORDINANCES  
UNDER SDCL § 49-41B-28**

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On September 27, 2022, Applicant Navigator Heartland Greenway LLC (“Navigator”) filed an application with the Commission for a siting permit under SDCL Ch. 49-41B. On June 6, 2023, Minnehaha County enacted Ordinance MC16-179-23 (Ex. N15, Ex. D), which applies to Navigator’s proposed Pipeline, absent landowner waivers or a conditional use permit, and would preclude the route in Minnehaha County on which Navigator’s Application is based. On June 26, 2023, Moody County enacted Ordinance No. 2023-01 (Ex. N15, Ex. E), which also applies to Navigator’s proposed Pipeline and would preclude the route in Moody County on which Navigator’s Application is based. Given the unreasonably restrictive nature of the timing of these ordinances, which were passed soon before the evidentiary hearing in this docket that started on July 25, 2023, Navigator moved that the Commission preempt the ordinances under SDCL § 49-41B-28 as unreasonably restrictive as applied to Navigator’s proposed route. The Commission heard evidence related to Navigator’s motion on August 24-25, 2023. As required by the Commission’s Order dated August 23, 2023, Navigator offers this brief in support of its motion. Because both ordinances are unreasonably restrictive as applied to the proposed route,

Navigator respectfully requests that its motion be granted, thereby preempting the ordinances in part as applied to Navigator’s proposed route.

**1. The Legislature made the Commission the primary pipeline regulator in South Dakota.**

The statute giving the Commission preemption authority effects a broad grant of power to the Commission. “The statute clearly designates the PUC as the fact finder before local land use regulations may be preempted or superseded.” *In re Nebraska Pub. Power Dist.*, 354 N.W.2d 713, 720 (S.D. 1984). “No other agency or court is empowered to make this initial determination . . . .” (*Id.*) The Commission’s preemption authority is not an aberration and it is not an affront to the counties. Counties are creatures of statute and have only the authority granted to them by the Legislature. “Counties are creatures of statute and have no inherent authority.” *Schafer v. Deuel County Board of Comm’rs*, 2006 S.D. 106, ¶ 15, 725 N.W.2d 241, 248. *See also Olesen v. Town of Hurley*, 2004 S.D. 136, ¶ 15, 691 N.W.2d 324, 328 (explaining that South Dakota is a Dillon’s Rule state, which means with respect to municipalities that they have only those powers conferred by the Legislature). Dillon’s Rule is a rule of statutory construction requiring that a court strictly construe the powers granted to a county or a municipality. *Olesen*, ¶ 15, 691 N.W.2d at 328-39.

Thus, a county may not pass an ordinance that conflicts with state law. S.D. Const. Art IX, § 2; *Rantapaa v. Black Hills Chair Lift Co.*, 2001 S.D. 111, ¶ 22, 633 N.W.2d 196, 203. Where a local ordinance conflicts with state law, state law prevails. *Rantapaa*, ¶ 22, 633 N.W.2d at 203. Moreover, the authority to preempt conflicting local regulation is entirely consistent with the Legislative findings stated in SDCL § 49-41B-1 that by assuming permit authority, the “state must also ensure that these facilities are constructed in an orderly and timely manner.” SDCL § 49-41B-1. The Legislature amended the definition of a “transmission facility” in SDCL § 49-

41B-2.1 to include a transmission line that transports carbon dioxide, *id.* § 49-41B-2.1, so there is no dispute that the Legislative findings apply to this proceeding and the Commission’s authority with respect to Navigator’s Application. The preemption statute is designed to ensure the Commission’s preeminent authority in this area and to address the classic preemption scenario, which occurs when an “ordinance forbids that which [a] statute expressly permits.” *City of Onida v. Brandt*, 2021 S.D. 27, ¶ 14, 959 N.W.2d 297, 301. If the Commission finds that Navigator has met its burden of proof under SDCL § 49-41B-22 and is entitled to a permit but for Navigator’s ability to comply with the ordinances at issue here, then the Counties will have trumped the Commission’s authority and frustrated the Legislature’s purpose in giving the Commission supremacy in this area.

In this context, Navigator’s motion is not unusual. When the Commission long ago thought that a similar preemption motion was extraordinary and refused to act on it, the South Dakota Supreme Court reversed with directions to apply the statute. *Nebraska Public Power*, 354 N.W.2d at 720. The Commission’s statutory authority and the Legislature’s wisdom in enacting the statute are not at issue here, only the application of the statute. The Commission’s statutory authority to preempt is not an issue here, only the application of the statute.

Thus, Navigator’s motion is not inappropriate, unreasonable, excessive, unusual, or unheard of. What is unusual is the fact that in the face of a proposed route that they knew of since September 27, 2022, Minnehaha and Moody County passed ordinances, without having considered the effect of their ordinances on the proposed route, that would preclude Navigator from constructing the Pipeline in their counties.

**2. The Commission must consider the effect of the ordinances on the proposed route.**

As previously argued, Navigator is not asking the Commission to invalidate the ordinances and strike them from the books so that they would not apply to any other transmission pipelines. Rather, Navigator is asking that its proposed route be exempted from the ordinances because as to that route, which was determined by an extensive, sophisticated, and complicated routing process, without any notice throughout the routing process of the separation distances finally included in the ordinances, the ordinances are unreasonably restrictive. The statutory directive is clear: “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.” SDCL § 49-41B-28 (emphasis added). The issue is whether the ordinances are unreasonably restrictive “as applied to the proposed route.” By their own testimony, the Counties did not consider this in adopting the ordinances. The Commission must consider it.

**3. The timing of their enactment makes the Ordinances unreasonably restrictive.**

Navigator started its routing process early in 2021. (Tr. at 3704:19 to 3705:7.) That process continued in 2022 when Navigator heard from affected landowners and local officials at open houses held in Flandreau and Garretson on January 18, 2022. (Tr. at 3424:8 to 3425:19.) It continued throughout the summer and into the early fall, when Navigator filed its Application, which is based on a defined route. One of the initial steps in the routing process is understanding “all of the regulatory requirements for that route,” including “ordinances and [extra territorial jurisdictions] and other regulatory boundaries and requirements.” (Tr. at 3420:

12-17; id. at 3420:18 to 3521:2.) Over the course of the year when Navigator developed its route as described in the Application and at the hearing, neither Minnehaha County nor Moody County had on the books any zoning ordinance that included separation distances or that would have affected the proposed route. (Tr. at 3897:5-15.)

In considering, vetting, and adopting a route, Navigator must account for many different factors and must adhere to the principles established by the National Environmental Policy Act of avoiding, minimizing, and mitigating impacts from the route, so that “all other factors being equal, the least impactful route is a straight line between two distances.” (Tr. at 3456:19-25.) Because all locations are not equal, the routing process “is an attempt to minimize that distance while minimizing the collective impact.” (Tr. at 3457:1-3.) By enacting ordinances after this process was done, the Counties frustrated this process and purpose. The after-the-fact adoption “asks us to, I guess, kind of throw out all of the efforts that were done in regard to the number of factors that are required in order to properly site a pipeline for the sole purpose of buffer distances from residences.” (Tr. at 3451:19 to 3452:4.)

Navigator’s Application was filed on September 27, 2022, and a copy was filed with each county auditor. Minnehaha County’s first official response to the filing was to file a letter in the docket from Commission Chair Jean Bender on March 22, 2023. The letter addressed the County’s concerns about emergency response, but did not challenge the route or indicate that the County was considering an ordinance that would impose separation distances. A standard reservation of rights to “regulate aspects of the pipeline consistent with state and federal law” is not notice to Navigator that the County intended to adopt an ordinance that would preclude it from constructing based on its proposed route. Moreover, Minnehaha County chose not to intervene and participate in this docket.

Moody County enacted a moratorium on March 24, 2022 and indicated that it was considering performance standards for pipelines. (Tr. at 3870:1-11.) After Navigator filed its Application, Moody County intervened in the docket. It formed a working group to consider performance standards. The working group met three times, twice in December 2022 and once in January 2023, for a total of approximately 90 minutes. (Tr. at 3901:14-18; *id.* at 3904:22-23; *id.* at 3904:18-19.) No recommendations or proposed ordinance were provided publicly until later, and Navigator was refused an opportunity to address the working group. Moody County extended its moratorium in March 2023, but did not publicize its proposed ordinance until May 23, 2023. (Tr. at 3875:6-20.) Between January 2022 and May 23, 2023, Navigator was allowed to make one presentation to the Moody County Commission on March 9, 2022, and it was given three minutes to address the proposed ordinance on May 23, 2023, and again on June 26, 2023. Navigator's other outreach to the County was refused.

The evidence establishes that Navigator communicated extensively with Minnehaha County, but an ordinance was not first disclosed publicly until April 2023. (Ex. M4, ¶6; Ex. M5C at p. 23.) The record also establishes that Moody County did not engage with Navigator throughout 2022 and 2023. Navigator could not and should not have been required to guess in early 2021 when it began its routing process that these ordinances would be enacted. Even if Navigator could have anticipated the ordinances, there was no way to predict their terms. Minnehaha County, for example, changed its proposed ordinance in the space of one month from a 750-foot separation distance from an occupied structure to a 330-foot separation distance, to a 330-foot separation distance measured not from the structure but from the property line. (Ex. M4, ¶¶ 9, 12, 14, 16.) Similarly, Moody County started with a separation distance of 1,320 feet, and increased it at the first reading of the Ordinance to 1,500 feet. (Tr. at 3880:13-17.)

Given this timeline, the adoption of the Ordinances after Navigator determined its route precluded Navigator from routing its Pipeline in compliance with the Ordinances. Navigator could not predict what the Ordinances would say until they were finally approved. As Commissioner Kippley testified several times, the ordinance in Minnehaha was the result of legislative compromise. (Tr. at 3642:4-20.) Navigator's route, by contrast, was the result of a months-long process guided by federal law, state law, environmental concerns, safety concerns, the concerns of landowners, and the concerns of local governments.

The two processes become incompatible when enacting an ordinance is allowed to occur after a route is vetted and chosen. This is especially so given the 12-month statutory deadline for the Commission to decide a permit application. SDCL § 49-41B-24. Once waived by an applicant, a new deadline is in the discretion of the Commission. SDCL § 49-41B-24.1. When a county enacts an ordinance after a route has been determined and an applicant needs to change the route to comply with the ordinance, forcing the applicant to ask the Commission to waive the statutory deadline so that it can determine a new route effectively moots the deadline.

Neither County considered the effect of its ordinance on Navigator's route. (Tr. at 3619:9-20.) Moreover, Navigator's evidence that its present route conflicts with both ordinances, as demonstrated through testimony and exhibits, is undisputed. (Exs. N70, N74.) The conflict between the proposed route on which Navigator seeks a permit under SDCL § 49-41B-22 and both ordinances is real.

If the County Ordinances stand, without landowner waivers (which the evidence establishes cannot be obtained as discussed below) or a conditional use permit, Navigator must start over with the routing process in those counties. It must vet an alternative route based on the same process it used to determine its current route, which would take months. (Tr. at 3469:23 to

3470:5.) The process would involve new landowners, who must be provided notice under SDCL § 49-41B-5.2 and engaged by Navigator. (Tr. at 3455:2-23; id. at 3542:1-6.) Additional survey work must be done. (*Id.*) Navigator's federal permitting processes with the U.S. Army Corps of Engineers and its engagement with the State Historic Preservation Office, United States Fish & Wildlife Service, the South Dakota Department of Agriculture and Natural Resources, and the South Dakota Department of Game, Fish, & Parks, must all start again. (Tr. at 3542:13-24.) The process is complicated, expensive, and time-consuming. There is no comparison between taking into account a county's separation distances as part of the initial routing process, and having those same separation distances imposed after the route has been determined.

State law provides that the Commission should assess whether the Ordinances are unreasonably restrictive based on factors of cost. SDCL § 49-41B-28. Here, Monica Howard testified to the obvious fact that Navigator would incur additional costs to comply with the Ordinances after the fact. (Tr. at 3482:1.) The costs are not only economic, but involve new landowners who have not previously been notified that the Project would be located on their land. The costs to comply with the Ordinances after the fact include lost money spent on initial routing and engineering that can no longer be used, as well as the acquisition of easement rights that become unnecessary. When an ordinance is enacted long after the route is determined, an applicant loses money spent based on the route, including the time value of money, and other constituents, including the counties, lose the economic benefits of the Project, including the payment of taxes, by delaying or precluding the Project.

If a county can impose routing criteria after a route has been determined and a permit application has been filed based on that route, but before the Commission makes a permit decision, no legal principle would prevent a county from adopting a new ordinance or revising an



existing one to impose new routing criteria *after* the Commission makes a permitting decision, which would lead to a never-ending process whereby counties could frustrate an applicant's ability to construct based on a route that had been approved by the Commission under SDCL § 49-41B-22. That is the logical and inevitable consequence of rejecting Navigator's argument that the ordinances are unreasonably restrictive in part simply because they were adopted after the Application was filed and the route was determined. The authority granted to the Commission by the Legislature in SDCL § 49-41B-28 is designed to prevent that.

**4. The Commission must consider the purpose of the ordinances, both of which are based at least in part on safety.**

In determining whether any part of an ordinance is unreasonably restrictive under SDCL § 49-41B-28, the Commission must consider the purpose or purposes served by the ordinance. If the purposes are invalid, insubstantial, or not in fact served by the ordinance, then the ordinance is unreasonably restrictive for that reason.

**a. The ordinances are based at least in part on safety.**

A county's authority to zone is granted by the Legislature. "For the purpose of promoting health, safety, or the general welfare of the county the board may adopt a zoning ordinance . . ." SDCL § 11-2-13. A county's zoning authority is expressly premised on promoting health, safety, or the general welfare of the county. This is reflected in the zoning ordinances of the Counties. The Minnehaha County 1990 Zoning Ordinance states that the regulations contained therein are intended, among others, "to promote health and the general welfare," and "to secure safety from fire, panic and other dangers." (Ex. M5A, ¶ 1.02). The Moody County Zoning Ordinance similarly provides that "[t]he Zoning Ordinance is adopted to protect and to promote the public health, safety, peace, comfort, convenience, prosperity, and general welfare." (Ex. M2 at p. 9, ¶ 1.01.03.) Thus, when Navigator served written discovery on Moody County, it asked how the

ordinance served those purposes. Moody County objected to the form of the question on the basis that its ordinance “is focused upon safeguarding land use within Moody County.” (Ex. N18, ¶ 4.) This reframing of the question cannot circumvent the statutory limitation on a county’s authority to zone: it must be for the purpose of promoting health, safety, or the general welfare.

Not surprisingly, then, both counties considered public safety in adopting their ordinances. Minnehaha County Zoning Administrator Scott Anderson wrote a report to the Planning Commission stating that “[t]he Zoning Ordinance also is intended to promote public safety. A transmission pipeline will potentially impact public safety. The siting and use should be evaluated and addressed. A proposed ordinance will accomplish promoting good land use and ensuring public safety.” (Ex. M5C, p. 23; Tr. at 3756:4 to 3757:1.) Commissioner Kippley testified that the 330-foot separation distance finally adopted in the Minnehaha County ordinance is based on the 2020 version of PHMSA’s Emergency Response Guidebook; more specifically, the distance came from the standard first responders would use for evacuation, namely 100 meters or 330 feet. (Tr. at 3612:10 to 3613:14.) While Kippley testified that he thought the evacuation standard was an acceptable separation distance because it was “an appropriate distance that wouldn’t be preempted by the federal government,” (*id.* at 3613:11-13), he also testified that “largely the only land use effect [the Project] would have would be an eruption of some kind.” (*Id.* at 3614:2-4.) Thus, “we said basically the only thing that could happen from this that would need to be regulated would be a potential eruption.” (*Id.* at 3614:6-8.) Kendra Eng similarly testified that Moody County’s pipeline ordinance is consistent with the general purpose of the County’s zoning ordinance to “protect and promote public health, safety, and general welfare.” (Tr. at 3896:16 to 3897:4.) She also testified that when the working group

met, they discussed “safety concern, setback concerns, depth of the pipe.” (Tr. at 3904:8-13.) And Moody County started with a moratorium adopted by resolution that, in the words of Moody County’s counsel, “used a lot of heavy language in regards to health, safety, and welfare.” (Tr. at 3870:1-15.) The record is clear that both counties were motivated by concerns about safety.

**b. The Counties may not regulate transmission pipelines based on safety.**

The law is clearly established that the Pipeline Safety Act preempts local regulation of safety concerns. “A state may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation.” 49 U.S.C. § 60104(c). The Pipeline Safety Act “leaves nothing to the States in terms of substantive safety regulation of interstate pipelines, regardless of whether the local regulation is more restrictive, less restrictive or identical to the federal standards.” *ANR Pipeline Co. v. Iowa State Commerce Comm’n*, 828 F.2d 465, 470 (8th Cir. 1987). *See also Northern Nat’l Gas Co. v. Iowa Utilities Board*, 377 F.3d 817, 824 (8th Cir. 2004) (land-restoration requirements and pipeline reporting and inspection requirements were preempted); *Kinley Corp. v. Iowa Utilities Board*, 999 F.2d 354 (8th Cir. 1993) (preempting provisions designed to protect farmland and topsoil from damage due to pipeline construction). Thus, for purposes of considering whether the ordinances are unreasonably restrictive, the Commission may not rely on any safety justification as their purpose.

**c. The facts do not establish that the ordinances are necessary to protect future land-use development.**

The Counties suggest that the Ordinances are simple land-use regulations necessary to protect existing and future land uses from the threat of transmission pipelines as defined in the Ordinances, which definition is broader than CO2 pipelines. This argument is belied by the fact that both counties have existing transmission pipelines in the county that were not regulated by

the county when they were built. Minnehaha County's new ordinance states that transmission pipelines are "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." (Ex. N15, Ex. D, p. 1.) This statement is not factually accurate, as shown by Ex. N71, which includes an overlay of existing transmission lines in Minnehaha County. As Commissioner Kipley testified, there are currently hazardous liquid pipelines located in Minnehaha County. (Tr. at 3630:2-4.) In his view, the reference in the ordinance is "to a new type of pipeline coming to our area." (Tr. at 3629:22 to 3630:1.) This contradicts both the definition in the Ordinance and his testimony that the Ordinance does not target carbon dioxide pipelines. (Tr. at 3618:3-7.) Thus, the evidence establishes that Minnehaha County's ordinance is focused on CO2 pipelines, the only reason Minnehaha County acted to regulate the proposed pipelines is out of concern over an eruption, and the separation distance is based on an evacuation zone from PHMSA's emergency response manual. Taken together, these facts establish without doubt that Minnehaha County's ordinance is based on safety, not protecting existing or future land use.

Even disregarding the safety concerns that are inextricably embedded in the commentary supporting the Ordinances, the evidence does not support the idea that the Ordinances protect land uses and land values. First, the record includes evidence that the presence of hazardous liquid transmission pipelines does not negatively affect property values. (Navigator's Proposed FF 254.) Staff agreed in its initial brief with this. (Staff's Initial Br. at 12-14.) Second, neither County identified any facts suggesting that existing hazardous liquid transmission lines within the counties had hindered development in the county. When asked about that, Kipley demurred and offered no facts. (Tr. at 3630:24 to 3631:17.) And it cannot be the case in Moody County that transmission lines have hindered development given that the County's focus is on

agricultural land uses, Kendra Eng testified that Navigator’s proposed Pipeline is not inconsistent with agricultural land uses, and the County’s land use plan does not identify any areas of future development with which the Pipeline would conflict. Third, the record contains evidence that refined products and natural gas transmission lines are statistically more dangerous than existing CO2 lines. (Navigator’s Proposed FF ¶ 59.) Fourth, the record contains evidence, including from County Commissioner Bender, that the transmission pipelines in Minnehaha County have not hindered development in the county. (Navigator’s Proposed FF 240; Ex. M4B at 26.)

**d. Protecting landowner rights to exclude pipelines is not a valid purpose.**

The Counties offered testimony that the Ordinances protect a landowner’s right to refuse permission for a pipeline to be sited on the landowner’s property. Kendra Eng testified that the Moody County ordinance “gives a lot of the power and responsibility to the landowners.” (Tr. at 3857:18-19.) Commissioner Kipley testified about giving the landowners “personal control.” (Tr. at 3627:6-11.) Landowners currently have the right to exclude pipelines by refusing to sign an easement, but would not have the same right if a pipeline company were able to legally exercise statutory eminent domain rights under SDCL Ch. 21-35. That is the current extent of any landowner’s right, and a pipeline that is a common carrier has a corresponding right to eminent domain. If the County’s purpose is to strengthen the landowner’s right through the affirmative requirement that a landowner grant a waiver if a separation distance is not met, then the County’s purpose would conflict with South Dakota law giving common carriers the right to exercise eminent domain under SDCL Ch. 21-35. Navigator introduced substantial evidence in this docket that it is a common carrier, and while that is not an issue for the Commission to decide under SDCL § 49-41B-22, it is relevant to Navigator’s motion to the extent that the

purpose served by the County Ordinances is to compromise a statutory right to eminent domain created by the Legislature.

Navigator cannot use eminent domain to force a landowner to sign a waiver. Thus, if the Ordinances are intended to strengthen a landowner's right to exclude a pipeline by limiting and effectively rendering null Navigator's right to legally exercise eminent domain, that attempt would be directly contrary to state law and should be preempted as unreasonably restrictive under SDCL § 49-41B-28 for that reason. Giving the landowner the authority to grant or not grant a waiver effectively nullifies the statutory right of eminent domain as it would be pointless for the party with the right of eminent domain to exercise its statutory rights only with the consent of the party whose land is the subject of eminent domain. That would allow the Counties to create a loophole overturning the Legislature's grant of eminent domain rights. That would also allow individual landowners to stop linear infrastructure projects that the Commission has determined under SDCL Ch. 49-41B are in the public interest.

**e. Any purpose served by the ordinances is subverted by landowner waivers.**

The Counties' presentation at the hearing suggests that they see the waiver provisions in their Ordinances as a silver bullet that insulates them from preemption. The opposite is true. To the extent that Navigator has a path forward by obtaining waivers from every affected landowner, the Ordinances logically serve no purpose at all.

With respect to Minnehaha County's Ordinance, for example, Commissioner Kippley and Scott Anderson repeatedly referred to Navigator's opportunity to get waivers from landowners in defense of the ordinance. (Tr. at 3624:2-8; *id.* at 3627:6-11; *id.* at 377:3-4; *id.* at 3825:4-6.) Logically, however, the waiver process subverts any purpose of the ordinance, including safety based on keeping structures out of an emergency evacuation buffer. (Tr. at 3787:23 to 3788:1.)

Navigator's proposed route intersects with the separation buffers 29 times in Minnehaha County. If all 29 landowners each grant a waiver, then any purpose would be entirely frustrated by allowing structures within the buffer. As drafted, the ordinance imposes a separation distance determined by the County to serve the goal of protecting people by preventing them from living within that proximity to the pipeline, but it allows individual landowners to defeat that goal by granting a waiver, meaning that structures can be located within the prohibited distance. If the purpose of the ordinance is to give landowners control over how far the pipeline must be from structures on their property, then that purpose would also be defeated by allowing the Commission to grant a conditional use permit in the face of landowners who have not granted waivers.

The goals of future land development and protecting landowner rights would similarly be frustrated by 100% of affected landowners granting waivers. If a pipeline's mere presence within the separation distance negatively affects future land use, which is a community-wide goal based on a comprehensive plan adopted by a county's governing body, then an individual landowner's waiver that allows the pipeline to be located within that distance is necessarily inconsistent with and frustrates the community's purpose. If the ordinance serves a landowner's right to exclude, this too is frustrated if landowners may make that decision for themselves (which is in fact the case without the ordinance).

The waiver provisions do not save the Ordinances. Rather, they undermine and frustrate the alleged purposes for which the Ordinances were enacted.

5. **Parts of the Minnehaha County ordinance are unreasonably restrictive as applied to the proposed route regardless of timing.**
  - a. **Measuring the 330-foot separation distance from the property boundary is unreasonably restrictive because it is arbitrary, serves no purpose, and ignores existing technology.**
    1. **It is unrelated to the basis for the 330-foot separation distance and produces arbitrary and inconsistent results.**

The basis for the 330-foot separation distance is the evacuation distance found in the PHMSA emergency response manual. Commissioner Kippley testified that it was important to the Commission that the distance not be arbitrary, and that there be some basis for it. He argued to the Commission that its consideration of a separation distance of 750 feet was a “recognition that 1,000 was too big. So I would try to defend it from a perception that it is completely arbitrary because it is less than 1,000, but I would argue that 330 has a basis in some guidelines.” (Ex. M4A at pp. 80-81.) In other words, he thought 750 feet was arbitrary because it had no basis in guidelines or research, but 330 feet was defensible because it did. As he argued to his fellow county commissioners, “I don’t think we can just pick a number out of the hat, and I don’t think we can -- 750, I think is already getting to the point of too high and I don’t know what basis we have. And so the 330 is me looking for a basis that is defensible and practical.” (Ex. M4B at pp. 22-23.)

By measuring from the property boundary, however, the 330-foot distance is not related to the structure, so it bears no relation to the evacuation distance for structures, and as Monica Howard testified, the average distance in the County between the pipeline based on Navigator’s proposed route and the structure on affected parcels is 1,400 feet. (Tr. at 3486:5-11.) The Commission rejected 750 feet in favor of 330 feet because it had some factual basis, but the consequences of measuring from the property line undercut that factual basis. The consequences



are: (1) the separation distance becomes arbitrary as it relates to structures (it will vary depending on where a structure is located on the property); (2) the separation distance on average greatly exceeds 330 feet, which is the only distance supported by any guideline or research; and (3) the resulting distances in excess of 1,000 feet are, in Commissioner Kippley's words, "too big" and "completely arbitrary." Commissioner Kippley testified that the result, which he finally supported but had argued against, is the result of legislative compromise. (Tr. at 3642:4-20) But legislative compromise is not evidence that measuring the separation distance from the property boundary makes sense or supports any valid purpose. In addition, the fact that any size parcel is considered the same under the Ordinance yields bizarre results. A property consisting of a single section with a single structure may result in a setback of one mile, while the setback for a smaller 40-acre parcel would be much closer. The result is simply arbitrary.

**2. While the intent of the ordinance is not to preclude transmission pipelines in the county, the effect of measuring the separation distance from the property line is to preclude Navigator from routing through the County.**

In considering the Ordinance, the Minnehaha County Commissioners recognized that it should not preclude transmission pipelines from being routed through the County. Commissioner Kippley testified that the intent of the ordinance is not to preclude pipelines from being routed through Minnehaha County. (Tr. at 3617:20 to 3618:7.) In voting in favor of the smaller separation distance, Commissioner Karsky also stated that the ordinance should not preclude pipelines in the County. (Ex. M4, ¶ 16.) Commissioner Bender agreed: "My goal was not to shut down pipelines." (Ex. M4B at 25.) Referring to the map showing the 750-foot buffers, she said: "It looks to me like it does away with the special permitted use. It – it would make it virtually impossible to thread through the county, and that was not my goal." (*Id.*) The fact that Minnehaha County is the most populous area in South Dakota was not a consideration

for the Commissioners in reaching their legislative compromise that they did not want to preclude all transmission pipelines.

Despite the County's intention to accommodate transmission pipelines, however, the effect of measuring the separation distance from the property boundary is to preclude Navigator from finding a route through the County. Monica Howard testified that there is no location within the proximity of the proposed route where the pipeline can cross Interstate 90. (Tr. at 3436:22 to 3437:1; *id.* at 3448:10-16.) Howard also testified that with respect to the proposed route Navigator needs waivers from 29 landowners, many of whom are represented by Brian Jorde and who testified at the hearing that they do not want the Pipeline on their property, period. (Tr. at 3510:19-21; *id.* at 3697:12 to 3698:15.) The County suspected this would be a concern, as Scott Anderson told the County Commissioners, referring to the 750-foot routing buffer, that he was skeptical given "the 17 to 25 miles that they're going to potentially travel through the county, will they be able to get – will they be able to meet that setback? I don't know. And it depends on how cooperative or willing property owners are to sign a waiver perhaps." (Ex. M4B at 17.) The record establishes that Navigator in fact will need waivers and that it will not be able to obtain all of them in Minnehaha County.

Not being able to route through the County is more than an unintended consequence of measuring the separation distance from the parcel boundary. An ordinance that prevents any pipeline from routing through the county is in effect a moratorium and is per se unreasonably restrictive. By statute, a county may adopt a pipeline moratorium for one year if it is done "to protect the public health, safety, and general welfare" and if the county "is conducting or in good faith intends to conduct studies within a reasonable time." SDCL § 11-2-10. Such an emergency measure "is limited to one year from the date it becomes effective and may be renewed for one

year. In no case may such a measure be in effect for more than two years.” *Id.* State law does not allow a county to preclude all pipelines through a zoning ordinance. It is no defense to say that Navigator can still get a conditional use permit under the ordinance because, as explained below, the ordinance allows the County to deny such a permit within its discretion for reasons that may be contrary to the Commission’s decision to grant a permit under SDCL § 49-41B-22.

**3. Measuring from the property boundary produces unintended consequences that are contrary to the purpose of the ordinance.**

In considering the effects of Minnehaha County’s ordinance on the proposed route, Navigator considered an alternative route in Minnehaha County that would satisfy the separation distances without requiring landowner waivers. (Tr. at 3451:11-21.) From this process, Monica Howard determined that in the majority of instances where an alternative route was required to avoid a separation buffer, “it brought us much closer to a number of additional residences.” (Tr. at 3452:13-21.) The possible avoidance route she considered “clearly shows that we would be forced to thread the needle through smaller parcels, avoiding very large tracts where we could, in fact, maintain a significant distance from those residences.” (Tr. at 3452:25 to 3453:3.) The result is that the separation “distances from residences are greater by not complying with the ordinance than they would be by complying with the ordinance.” (Tr. at 3453:4-9.) This fact is highly relevant and undisputed.<sup>1</sup>

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<sup>1</sup> Minnehaha County objected to this testimony as beyond the scope of prefiled testimony. While the objection was overruled, two Commissioners voted to sustain the objection. (Tr. at 3453:10-23.) If the effect of the ruling was to strike the testimony, it is prejudicial error. The evidence is highly relevant to the motion and no party was prejudiced by it being offered. The evidence was developed based on GIS data that Minnehaha County did not produce to Navigator until a few days before the hearing (Tr. at 3431:4-6), and it would clearly be proper rebuttal testimony, which would not require any disclosure.

**4. Measuring from the property boundaries ignores existing technology.**

Navigator produced substantial evidence during the hearing related to its plume modeling and the establishment of an initial routing buffer along the Pipeline route for occupied structures. That distance is justified by evidence that the Pipeline is safe based on many factors, including its design, engineering, integrity management program, and enhanced leak detection measures. The Counties did not participate in that part of the evidentiary hearing and did not consider any of this evidence in drafting and enacting their ordinances. Separation distances of 1,100 feet or more are not reasonably necessary based on existing technology. In not accounting for existing technology as implemented in the design of Navigator's Pipeline, the Ordinances are unreasonably restrictive as to the proposed route.

**b. Navigator's pipeline will not conflict with future development in Minnehaha County.**

It is undisputed that Navigator considered Minnehaha County's future land use map when it routed the pipeline, and that the proposed route avoids the areas designed by Minnehaha County for future development. (Ex. N71.) There are no conflicts. The only response to this is that Navigator should have considered not only the County's current plans for future development, but what might happen many years in the future. But admissible evidence cannot be based on speculation. *See Bison Electric Power Co-op v. Cutler*, 254 N.W.23 143, 146-148 (S.D. 1977) (holding that whether a parcel can be valued based on a prospective use for purposes of eminent domain depends on whether the use is remote, speculative or uncertain; if it is speculative, then admission of the evidence is error). The relevant standard is the County's published future development plan.

In addition to the evidence previously cited that transmission pipelines do not foreclose future development, Commissioner Bender stated that her vote was premised in part on evidence

from which she concluded that “I don’t think the pipelines hinder development.” (Ex. M4B at 26.) She continued: “I mean, Williams pipeline goes through the mall area. It’s the most heavily developed area in Minnehaha County. I’ve talked to real estate professionals and they don’t have -- they don’t see pipelines coming up as being generally – not that individual people might not have different ideas, but generally they do not affect the value of property, so I’m not – I’m not compelled by that argument either.” (*Id.*)

Thus, any argument that Navigator cannot route through Minnehaha County because of potential future development is contrary to the County’s intention in adopting the ordinance, is contradicted by the evidence, and would impose an unreasonable burden on Navigator to speculate not only what development might occur when and where, but also how it might be affected by the Pipeline.

**c. Because a special permitted use is within the discretion of the Planning & Zoning Director, that official may substitute his or her judgment for that of the Commission.**

Scott Anderson told the County in a written report (Ex. M5C at p. 23), and he later submitted prefiled testimony in this docket (Ex. M5 at ¶ 34), that if a pipeline applicant meets the criteria set forth in the ordinance the pipeline will be considered a special permitted use under the ordinance and not require any discretionary permitting. The Ordinance permits the Planning & Zoning Director “to verify Applicant’s conformance with the conditions prescribed in this Article.” (Ex. N15, Ex. D, p. 3, § 12.18(A)(1). Anderson’s testimony at the hearing established that such verification is broadly discretionary. He testified that the “conditions prescribed in this Article” referred to in section 12.18(A)(1) are all the application requirements listed in (B) as well as the separation criteria in (C). (Tr. at 3769:1-11.) Anderson testified that he would have discretion to consider the sufficiency of mapping provided under (B)(3) (Tr. at 3771:9-14); the sufficiency of plans and specifications provided under (B)(5) (Tr. at 3771:19 to 3772:23); and the

sufficiency of emergency response planning information, which he would review in conjunction with the County's emergency management director (Tr. at 3774:1 to 3776:1). With respect to plans and specifications, Anderson testified he would look at whether the Pipeline route "meets all our other zoning requirements," like whether it is built in the floodplain, and "all those things." (Tr. at 3776:16-22.) Whether an application is sufficient to qualify a project as a special permitted use therefore depends on an exercise of the Planning & Zoning Director's discretion and is not simply a required result of "checking the box." Thus, the Ordinance allows the County to deny a special permitted use to a pipeline that has been approved by the PUC.

**d. The ordinance allows the Commission to deny a conditional use permit in its discretion based on public health, safety, or welfare.**

If the application does not qualify as a special permitted use for whatever reason, then an applicant may apply for a conditional use permit, which must be decided based on the standard factors contained in Article 19.00 of the 1990 Zoning Ordinance. Anderson testified that the Commission would consider all of the factors with respect to not only operation of the pipeline, but also its construction. (Tr. at 3780:15-22; *id.* at 3781:10-13.) One of the factors is the effect upon normal and orderly development and improvement of surrounding vacant property for uses predominant in the area, which Anderson testified would give the County latitude. (Tr. at 3783:24 to 3784:2.) Anderson testified that in preparing a planning report to give to the Commissioners, he would look at proximity to residences, wetlands that might be impacted, flood plains, and "other areas it could impact." (Tr. at 3785:13-17.) He said he would "make a determination on what might be suitable to examine and explore." (Tr. at 3785:16-17.) The last conditional use factor is health, safety, and welfare. (Tr. at 3779:23 to 3780:5.) Ultimately, Anderson said that a conditional use permit application for a pipeline would be more complex and time intensive to decide than the types of conditional use permits the County currently

receives. (Tr. at 3786:7-11.) The Ordinance provides no time limit for the County to complete this process, and it could be extremely time consuming and expensive, as this Commission knows, especially if the County retains outside consultants to assist in its review process. The Ordinance requires the applicant to spend additional time and money on an uncertain and discretionary process with no time limit for its completion.

Anderson's testimony clarified that application of the Ordinance is partly in his discretion, and partly in the discretion of the County Commission. With respect to a conditional use permit, the Ordinance allows the County to deny a conditional use permit, and hence permission to construct in the County, for reasons that may be directly contrary to a permit that this Commission may grant. Even though the Commission might determine that Navigator has met its burden of proof under SDCL § 49-41B-22, the Ordinance allows the Minnehaha County Commission to deny a conditional use permit for any reason that it thinks the Pipeline may be contrary to public health, safety, or welfare. Based on Anderson's testimony, the County could deny a permit based on its conclusions about environmental factors, effects on surrounding land uses and orderly development, or construction issues that are different from the conclusions reached by the Commission on the same issues. Again, an ordinance may not forbid that which a statute expressly permits. *City of Onida*, ¶ 14, 959 N.W.2d at 301.

For all of these reasons, Minnehaha County's ordinance is unreasonably restrictive and Navigator asks that the Commission enter an order preempting its application to Navigator's proposed route for the reasons stated herein.

- 6. Moody County's ordinance is unreasonably restrictive as applied to the proposed route regardless of timing.**
  - a. The 1,500-foot separation distance is unreasonably restrictive.**

There is no factual basis for Moody County’s 1,500-foot setback. According to the County’s discovery answers, at the first reading of the ordinance the distance was increased from 1,320 feet to 1,500 feet because that is the separation distance used by Brown County and McPherson County in their ordinances. (Ex. N18, ¶ 6; Tr. at 3905:15-24.) There was no “fancy scientific reason” and the County’s working group did not do any research or rely on any documents to support the separation distance. (Ex. N18, ¶ 6; Tr. at 3905:22-24; *id.* at 3905:5 to 17.) The separation distance was initially determined by the County’s working group, which consisted of county employees who did not have any pipeline expertise and did not consult with any experts. (Tr. at 3902-3904.) The working group was formed in March 2022, but did not meet until December 22, when it met twice. It met a third time in January 2023. (Tr. at 3901:14-18; *id.* at 3904:22-23.) No minutes were kept of the meetings. (Tr. at 3904:14-15.) The meetings were about 30 minutes each. (Tr. at 3904:18-19.) The working group did not meet between January 2023 and the meeting on May 24, 2023, when the ordinance was made public. (Tr. at 3904:24 to 3905:5.)

Kendra Eng testified that the predominant land use in Moody County is agricultural use. The County’s comprehensive land use plan, enacted in 2002, states that agriculture is the major land use in the county, and that agricultural uses have been altered very little through urbanization. (Tr. at 3894:10-25.) Eng testified that in her opinion the construction and operation of a transmission pipeline in Moody County would not be inconsistent with Moody County’s comprehensive land use plan. (Tr. at 3895:17-24.) She testified that she couldn’t say whether there are any facts suggesting that construction and operation of a transmission pipeline in Moody County would limit agricultural property uses. (Tr. at 3896:7-11.) The County has no future growth plan. (Tr. at 3916:9-11.)



Moody County's failure to establish some reasonable basis for its separation distance means that it is arbitrary and therefore unreasonably restrictive based on existing technology related to design, engineering, and operations, including the results of Navigator's plume modeling, which establish that a 1,500-setback is not reasonably necessary for any purpose. Based on these facts, the separation distance is arbitrary and unrelated to any purpose served by the Ordinance.

**b. As applied to the proposed route, the Ordinance does not serve any purpose.**

Moody County did not consider the effect of its Ordinance on Navigator's proposed route. After the Ordinance was passed, Navigator evaluated the buffers created by the separation distance as applied to its proposed route, and determined that the route conflicts with numerous buffers, as shown in Exhibit N74. (Tr. at 3462:16 to 3464:17.) Navigator determined the average distance between an occupied structure and its current route to be just over 1,100 feet. (Tr. at 3486:5-11.) Thus, without the imposition of any separation distance, Navigator's routing kept the Pipeline through Moody County on average 1,100 feet from occupied structures. (*Id.*) The separation distances in the Ordinance increase that by 400 feet, but the record contains no evidence of any benefit from the additional 400 feet.

**c. The separation distances create unintended consequences.**

As shown in Exhibit 76 (Tr. at 3466-3469), developing an alternative route in Moody County that complies with the separation distances would require a months-long process to account for all of the necessary rerouting requirements, like soils, environmental resources, geology, cultural resources, etc. (*Id.* at 3469:18 to 3470:5.) Navigator's exhibit shows that an alternative route would leave "very little room for negotiation with landowners" for placement of the Pipeline on their property and limits the ability "for Navigator and the affected landowner to

negotiate placement of the route on their property.” (Tr. at 3470:10-18.) The effect is to force Navigator from a parcel where it is over 1,000 feet from a structure and require that it be located on adjacent property with very little discretion allowed for a landowner’s siting concerns, like drain tile or other specific concerns. (Tr. at 3471:6-12.)

**d. Moody County’s Ordinance does not allow for a conditional use permit without all separation distances being met, or all waivers being granted.**

According to its plain terms, the Moody County Ordinance requires that any facility requiring a PUC permit also obtain a conditional use permit from Moody County. (Ex. N15, Ex. E, Ch. 4.36(1).) To obtain a conditional use permit, an applicant must meet the separation requirements. (*Id.*) An applicant who is not able to meet all of the separation distances may obtain waivers from affected landowners, but a waiver does not guarantee compliance with the ordinance, which is in the discretion of the Board of Adjustment. (*Id.* Ch. 4.36(2)(b)(i); Tr. at 3910:24 to 3911:18.) A waiver from a landowner allows a separation distance less than the ordinance establishes only if the Board of Adjustment says so, and a conditional use permit is not a way to circumvent the separation distances, because it can be granted only if the separation distances are met. (Tr. at 3949:12-20.) Thus, in every case the Ordinance allows the County Commission to deny a conditional use permit for reasons directly contrary to the basis on which this Commission may grant a permit under SDCL Ch. 49-41B.

**e. The Ordinance’s easement requirement subverts statutory eminent domain authority and serves no purpose.**

The Moody County Ordinance requires that an applicant provide an affidavit attesting that necessary easement agreements with landowners have been obtained. (Ex. N15, Ex. E, Ch. 4.36(4)(e).) Eng testified that the purpose of this provision based on discussions with the working group is “to make sure that it was the landowners’ decision whether the pipeline goes on

there or not, as they own the land.” (Tr. at 3919:1-5.) But the Legislature granted the Commission the authority to site pipelines under SDCL Ch. 49-41B, and when a permit application has been approved, the Commission has determined that the Project meets the public interest standards in SDCL Ch. 49-41B. Assuming an entity is legally entitled to common-carrier status, the Legislature has determined that the costs associated with eminent domain are justified by the merits of the project. By requiring 100% voluntary landowner participation as a threshold requirement of a conditional use permit, Moody County’s ordinance overrides the Legislature’s grant to common carriers the right of eminent domain. The County may not lawfully restrict Navigator’s rights granted by the Legislature, so this provision serves no legitimate purpose.

**f. The requirement that a pipeline be bored under all drain tile is unsupported by any evidence and would produce substantial harmful consequences.**

The ordinance requires in Ch.4.36(4)(q) that “all pipelines shall be bored and shall not bisect or disrupt or damage any existing tile lines or utility lines.” This was added through a last-minute amendment and is required as a condition for being granted a conditional use permit. (Tr. at 3911:19-22.) Eng testified that it was based on landowner concerns about drain tile being severed during construction. (Tr. at 3911:22 to 3912:5.) Monica Howard testified to the multiple problems that this process would create, starting with situations where a landowner does not know the location of the tile, which would preclude Navigator from effectively planning to bore underneath the tile. (Tr. at 3545:8-13.) Boring requires a different pipe, so it would require redesign, including adding workspace to accommodate boring machines and equipment. (Tr. at 3545:14-21.) A bore must be level and is horizontal, so it would require digging to the installation level at the entry and exit points, which in an agricultural field might require an 8-foot ditch or a 20-foot ditch. (Tr. at 3545:22 to 3546:8.) A bore has a maximum distance. (Tr. at

3546:24 to 3547:5.) Compared to an open-trench installation, it would take longer to excavate “very large pits to accommodate that equipment down in the trench,” longer to construct, and longer to restore the area. (Tr. at 3547:5-16.) Howard testified that restoration is harder because bore pits tend to settle after construction, so additional postconstruction restoration work would be required. (Tr. at 3547:21 to 3548:3.) The process is much slower and more expensive. (Tr. at 3548:4-7.)

In the face of undisputed testimony that drain tile can be and is routinely successfully repaired when it is severed during construction (Navigator’s Proposed FF ¶ 176), the Ordinance’s requirement that all drain tile be bored is ill-advised and without question unreasonably restrictive. It serves no purpose and would have detrimental consequences to every landowner where it occurred.

### **Conclusion**

The Commission’s reluctance to interfere with local government is understandable, but consideration of a few principles may aid the Commission’s determination of Navigator’s motion.

First, the Commission’s statutory authority to preempt under SDCL § 49-41B-28 is clear. It is also essential to the effective administration and application of SDCL Ch. 49-41B, lest local governments frustrate the Legislature’s purpose in granting statewide permitting authority to the Commission. A decision that the Commission lacks the authority to preempt would create a roadmap for counties to impose further restrictions on the statutory process for permitting pipelines that has been established by the Legislature.

Second, in considering whether the Ordinances are unreasonably restrictive, the Commission must account for the purposes served by each Ordinance and determine not only

whether the purposes are valid, but the degree to which each ordinance serves those purposes. If a purpose is not legitimate under state or federal law or is not well-served by the terms of the ordinance, then the ordinance is unreasonably restrictive. Here, safety is not a valid purpose for county regulation; the Pipeline does not threaten or restrict future development; that purpose is entirely frustrated by the waiver processes allowed; and protecting landowner rights to refuse an easement would frustrate Navigator's legal rights granted by the Legislature.

Third, the Ordinances are unreasonably restrictive as applied to Navigator's proposed route simply because they were enacted long after Navigator determined its route and filed its Application based on that route. Because it is undisputed that the proposed route conflicts with both Ordinances, which would require Navigator to begin the routing process anew in Minnehaha and Moody Counties, the Ordinances are unreasonably restrictive.

Finally, each ordinance is unreasonably restrictive on its own terms. Minnehaha County's 330-foot separation distance loses all meaning when measured from the closest property boundary, which has the effect of precluding Navigator from locating the Pipeline on any parcel with an occupied structure, no matter how far the structure is from the closest boundary. The effect is to make the 330-foot setback more like a 1,400-foot setback, with arbitrary and unintended consequences, some of which are to force the Pipeline onto adjacent parcels owned by landowners outside the statutory notice corridor, and to locate the Pipeline closer to their residence than to the residence on the parcel triggering the separation distance. The Ordinance also allows the County to deny a conditional use permit for reasons that may be directly contrary to the Commission's determination of Navigator's permit under SDCL § 49-41B-22.

Moody County's Ordinance suffers from an arbitrary setback, which is not supported by any research, guideline, or evidence, and which does not serve any legitimate purpose by requiring that the pipeline, which is already on average 1,100 feet away from occupied structures, be located on average 400 feet farther away. The attempt to protect a landowner's right to say no to a pipeline is contrary to State law. The boring requirement is indefensible.

Navigator does not ask that the Commission declare that the Ordinances are unenforceable and must be taken off the books. The limited relief Navigator requests is that sanctioned by SDCL § 49-41B-28—a determination that as applied to Navigator's proposed route, the Ordinances are unreasonably restrictive and should not defeat the Commission's approval of Navigator's permit under SDCL § 49-41B-22. Navigator appreciates the Commissions' careful consideration of this motion, and respectfully requests that it be granted.

Dated this 4th day of September, 2023.

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