



measured “from the center line of the proposed pipeline to the closest parcel boundary of a use.” The Ordinance provides that a property owner may grant a waiver of the minimum setback distance. If the County requires the applicant to seek a conditional use permit, the applicant must submit a fee of \$25,000. If a conditional use is granted, the applicant must pay an annual fee to the county of \$300 per linear mile of pipeline within the County. The Ordinance further requires, among other things, that any person who has filed an application with the Public Utilities Commission must submit written notice to Minnehaha County of the PUC filing; must provide certain information to Minnehaha County, including route information, a copy of the permit application filed with the PUC, a map identifying entry into the County’s right of way and affected county road crossings, a map and list of all affected property owners in the County, a set of plans and specifications for the pipeline, and copies of the emergency response and hazard mitigation plans as required by PHMSA. The Ordinance provides that the applicant will be notified of a determination of its project as a special permitted use or the need to apply for a conditional use permit as soon as practicable, but in no event more than 30 days after receiving approval of its permit by the PUC.

2. At its meeting on June 12, 2023, the Moody County Commission had a first reading of Ordinance No. 2023-01. A copy of the Ordinance is attached to the Rebuttal Testimony of Monica Howard as Exhibit E. The Ordinance was amended for further consideration by the County Commission at its meeting on June 26, 2023. At its meeting on June 26, 2023, the Commission amended the Ordinance on one issue, and then adopted the Ordinance as amended. The Ordinance requires any pipeline facility requiring a permit from the Public Utilities Commission to obtain a conditional use permit from Moody County. A conditional use permit cannot be granted unless the pipeline meets a number of standards,

including a minimum setback of 1,500 feet from cautionary uses, including schools, daycares, churches, dwellings, manufactured homes, and all permitted Concentrated Animal Feeding Operations. The separation distance is the minimum horizontal distance measured from the wall line of the neighboring cautionary use to the centerline of the proposed pipeline. Affected property owners may grant a waiver, which provides the County Board of Adjustment discretion to allow the separation distance to be less than that established by the Ordinance, but no criteria guides the Board's exercise of this discretion. The Ordinance also requires that an applicant provide information to the Board of Adjustment before it can act on an application for a conditional use permit, including an affidavit attesting that necessary easement agreements with landowners have been obtained, proof of notice by certified mail to all landowners within one mile of the proposed pipeline, and a set of plans and specification for the pipeline. The Ordinance requires that a pipeline must be bored under all existing tile line or utility lines it crosses. The Ordinance prohibits a county permit from being transferred to a new pipeline owner without Board approval. And the Ordinance requires that a pipeline in the county may be abandoned in place.

3. At its meeting on June 20, 2023, the Lincoln County Planning and Zoning Commission passed a transmission pipeline ordinance, on a vote of 3-2, that if passed by the County Commission would require any entity that submits a permit application to the PUC for a siting permit for a transmission pipeline to apply to the Office of Planning and Zoning to verify conformance with the conditions stated in the ordinance, including: (1) submitting information about the pipeline to the county, including a route map, a copy of the application filed with the PUC, a set of plans and specifications, and copies of emergency response and hazard mitigation plans; and (2) maintaining a minimum separation distance between the pipeline and dwellings,

churches, and businesses of 750 feet, measured from the centerline of the proposed pipeline to the closest parcel boundary of a use. The ordinance provides that a property owner may waive the minimum setback distance. It further provides that a county permit may not be transferred without approval of the County. An applicant must pay an initial fee of \$25,000 to pay for the estimated cost of investigating, reviewing, processing, and serving notice of an application. Under the ordinance, a “transmission pipeline” as defined by the ordinance, which includes any hazardous liquid pipeline, would be a permitted special use in the A-1 Agricultural District and the RC Recreation/Conservation District under the County’s zoning ordinance. As a permitted special use, if the pipeline did not meet the ordinance requirements, the operator could seek a conditional use permit. The Planning and Zoning staff memo recommended that the ordinance be denied as not consistent with the County’s comprehensive plan because the initial proposed setback of 2,000 feet from dwellings churches, and businesses “would more than likely make it impossible to construct a transmission pipeline in the county as a permitted special use,” and because a “non-standard conditional use permit could lead to arbitrary decisions by the county.”

4. The Minnehaha County ordinance is unreasonably restrictive for the following reasons: (1) the proscription that separation distances must be “measured from the centerline of the proposed pipeline to the closest parcel boundary of a use” is unclear and ambiguous and cannot be reasonably followed; (2) the property line setbacks—if applied—would require Navigator to abandon its pipeline plans in the County altogether as it is not feasible to route a pipeline through Minnehaha County at those setback limits; (3) the setback distances were determined in an arbitrary and capricious manner and were developed without consideration of any of the factors operators reasonably rely upon to develop a pipeline route, including but not limited to Navigator’s pipeline design, plume dispersion modeling, analysis of weather and

terrain along the route, consideration of high consequence areas, the integrity management plan, emergency response planning, and a myriad of other factors; (4) it is unnecessary for Navigator to duplicate part of the PUC application process at the county level, given the public nature of filings with the PUC and the fact that affected counties are statutorily entitled to party status; (5) the ordinance would vest sole discretion regarding whether a pipeline should be built anywhere in Minnehaha County to the zoning board, as the ordinance prescribe no criteria for determining when a conditional use permit is required or when it should be granted; (6) the requirement that Navigator pay a \$25,000 filing fee is arbitrary and not reasonably related to any costs that Minnehaha County would incur in connection with an application, and would threaten the economic feasibility of Navigator's project goals in South Dakota; and (7) the annual fee based on mileage is arbitrary as other linear infrastructure in the County is not subject to a similar requirement and the pipeline will pay taxes to the State, some of which will be remitted back to local taxing authorities.

5. The Moody County ordinance is unreasonably restrictive for the following reasons: (1) the 1,500-foot separation distance would make it impossible for Navigator to route the pipeline through Moody County; (2) as stated at the meeting on June 12, 2023, when the 1,500-setback distance was determined in an arbitrary and capricious manner, and the County's prior setback distance of 1,320 feet was amended to 1,500 feet the amendment was made only because Brown County adopted a 1,500-foot setback; (3) the 1,500 foot setback is not warranted because it is an arbitrary number that was developed without consideration of any of the factors operators reasonably rely upon to develop a pipeline route, including but not limited to Navigator's pipeline design, plume dispersion modeling, analysis of weather and terrain along the route, consideration of high consequence areas, the integrity management plan, emergency

response planning, and a myriad of other factors, and instead was solely based on what Brown County believed was the appropriate setback distance for Brown County, not Moody County; (4) it is unnecessary for Navigator to duplicate part of the PUC application process at the county level, given the public nature of filings with the PUC and the fact that affected counties are statutorily entitled to party status; Moody County has party status before the PUC; (5) the requirement that a conditional use permit can be issued only after Navigator has filed an affidavit attesting that necessary easement agreements with landowner have been obtained is not reasonably related to public health, safety, and welfare, and is inconsistent with South Dakota law on eminent domain; (6) the requirement that a pipeline must be bored under all existing tile lines or utility lines it crosses is not reasonably related to public health, safety, and welfare, and is not based on sound engineering or construction practice; (7) the \$25,000 application fee is arbitrary and not reasonably related to any costs that Moody County may incur in connection with an application, and would threaten the economic feasibility of Navigator's project goals in South Dakota; and (8) the requirement that a pipeline be abandoned in place may be contrary to federal regulation on abandonment at the time and is not reasonably related to public health, safety, or welfare.

6. If adopted as passed by the Planning and Zoning Board, the proposed Lincoln County ordinance would be unreasonably restrictive for the following reasons: (1) the minimum separation distance of 750 feet would make it impossible for Navigator to route the pipeline through Lincoln County; (2) the separation distance of 750 feet is not warranted because it is an arbitrary number that was developed without consideration of any of the factors operators reasonably rely upon to develop a pipeline route, including but not limited to Navigator's pipeline design, plume dispersion modeling, analysis of weather and terrain along the route,

consideration of high consequence areas, the integrity management plan, emergency response planning, and a myriad of other factors; (3) it is not necessary for Navigator to duplicate part of the PUC process at the county level, given the public nature of filings with the PUC and the fact that affected counties are statutorily entitled to party status; (4) the \$25,000 application fee is arbitrary and not reasonably related to any costs that Lincoln County may occur in connection with an application, and would threaten the economic feasibility of Navigator's project goals in South Dakota. and (5) there are no criteria for granting a conditional use permit.

7. Under SDCL § 49-41B-28, the Commission has statutory authority to preempt local regulation that is unreasonably restrictive. This is necessarily a fact-based inquiry.

8. The Commission's authority is consistent with the legislative findings supporting SDCL Ch. 49-41B. In enacting the statutes governing permitting transmission facilities, including pipelines transporting carbon dioxide, the Legislature found "that energy development in South Dakota and the Northern Great Plains significantly affects the welfare of the population, the environmental quality, the location and growth of industry, and the use of the natural resources of the state." SDCL § 49-41B-1. The Legislature also found "that by assuming permit authority, that the state must also ensure that these facilities are constructed in an orderly and timely manner so that the energy requirements of the people of the state are fulfilled." *Id.* By enacting ordinances whose effect, if not intention, is to prohibit routing a pipeline through a county, the counties whose ordinances are at issue here frustrate the Legislature's purpose. Determining whether a transmission facility should be permitted in South Dakota should depend on whether a permit applicant can meet the burden of proof stated in SDCL § 49-41B-22 based on evidence, much of which is highly technical in nature and requires experience and expertise to evaluate. The PUC's processes, including discovery, prefiled testimony, and a lengthy

evidentiary hearing, are consistent with this burden of proof and the technical nature of the evidence; the hasty adoption of ordinances, long after Navigator's route was determined, at the behest of project opponents interested in stopping the project is not.

9. When counties adopt ordinances that address infrastructure projects that have already filed a petition for a siting permit based on a route previously determined, they change the rules in the middle, or near the end of, the game. This presents obvious challenges for any pipeline company trying to route its line and could require significant changes to a route while the permit application is pending before the PUC. Regardless of the timing, however, SDCL Ch. 49-41B allows all counties affected by an application for a siting permit a seat at the table before the PUC, which provides an appropriate forum for determining whether local zoning regulation is unreasonably restrictive in light of not only the enumerated statutory factors, but also the State's broader interest in whether statewide infrastructure projects should proceed.

10. This is not a motion that can be decided before the evidentiary hearing. Navigator will present evidence at the hearing in support of this motion and requests the opportunity to submit additional briefing in support of the motion, in light of the evidence presented at the hearing, as part of the post-hearing briefing.

Dated this 26th day of June, 2023.

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## CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of June, 2023, a true and correct copy of the foregoing Applicant's Motion to Preempt County Ordinances Under SDCL § 49-41B-28 was served via e-mail upon the following:

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