

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

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**IN THE MATTER OF THE APPLICATION  
OF NAVIGATOR HEARTLAND  
GREENWAY, LLC FOR A PERMIT TO  
CONSTRUCT THE HEARTLAND  
GREENWAY PIPELINE IN SOUTH  
DAKOTA**

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\* **STAFF’S RESPONSE TO MINNEHAHA  
\* COUNTY’S MOTION FOR  
\* INTERVENTION FOR LIMITED  
\* PURPOSE  
\* HP22-002  
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Commission Staff, by and through its attorney of record hereby files this Response to Minnehaha County’s Motion for Intervention for Limited Purpose.

Navigator filed its Application on September 27, 2022. In the Application, Applicant states that it “recognizes the existence of South Dakota Codified Law (SDCL) 49-41B-28, regarding local ordinances and their application to the project, and reserves the right to request the Commission invoke its provisions during the proceedings in this application should the need present itself.” At the time of the filing of the Applicant, Applicant did not request preemption. Subsequently, on June 26, 2023, Applicant filed a Motion to Preempt County Ordinances Under SDCL § 49-41B-28 (Motion to Preempt).

The timeline of filings as it relates to this issue is as follows:

- September 27, 2022 – Application filed with the Commission
- May 25, 2023 – Prefiled direct testimony due
- June 26, 2023 – Prefiled rebuttal testimony due
- June 26, 2023 – Motion to Preempt filed
- July 3, 2023 – Final discovery deadline
- July 11, 2023 – Prefiled surrebuttal due
- July 25, 2023 – Evidentiary hearing commences

In its Motion to Preempt, Applicant requests the Commission exercise its authority pursuant to SDCL 49-41B-28 to preempt certain county ordinances which Applicant argues are fatal to the Project. Specifically, Applicant requests preemption of ordinances passed by

Moody and Minnehaha Counties. Applicant further notes a proposed Lincoln County ordinance that it claims would be unreasonably restrictive.

The filing of the Motion to Preempt brought this issue to the forefront of the discussion in this docket. On July 21, 2023, Minnehaha County filed a Motion to Intervene for Limited Purpose. Staff supports Minnehaha County's limited intervention and welcomes their participation in this matter.

**A. Staff supports granting limited intervention as requested by Minnehaha County.**

While Minnehaha County's request for limited intervention was filed after the sixty-day intervention period provided by ARSD 20:10:22:40, the Commission has permitted late intervention in certain circumstances when good cause is shown. Minnehaha County asserted that it was not aware of the preemption request until recently and was not served with the Motion to Preempt when it was filed. In addition, no other party would be unfairly prejudiced by the late-filed limited intervention. On the contrary, Minnehaha County could be substantially prejudiced if limited intervention were not granted. Moreover, Applicant has consented to Minnehaha County's limited intervention.

**B. Staff supports Minnehaha County's request to bifurcate the preemption issue.**

In the brief filed with Minnehaha County's Motion to Intervene, Minnehaha County asserts that the Commission should consider county ordinance preemption as a separate matter, either through a separate proceeding within the pending docket or a separate docket altogether. This is consistent with Staff's original position, as detailed in the prefiled

testimony of Jon Thurber.<sup>1</sup> At the time Mr. Thurber’s testimony was filed, Applicant had not made a substantive Motion requesting the Commission Preempt Local Ordinances. At that point, Applicant had not included substantial evidence regarding alleged unreasonable local ordinances in pre-filed testimony for other parties to respond. The first substantive request and notice to the Commission and Parties that Applicant intended to seek Preemption of local ordinances in this proceeding came on May 26, 2023, when Applicant filed the Motion. This filing was a significant change from Applicant’s Application and initial testimony<sup>2</sup> and required further review regarding when the Commission should address the question of preemption of local ordinances.

However, having further reviewed this matter and the limited precedent upon which we can rely, Staff supports addressing Applicant’s Motion to Preempt as part of the Commission’s order granting or denying a permit in this docket. Such action is consistent with the wording of SDCL 49-41B-28, as well as the circuit court’s Memorandum Decision in *Nebraska Public Power District v. PUC*.<sup>3</sup> In that decision, which involved the permit application for the Mandan electric transmission line, the court on appeal addressed for the first time a request by an applicant for the Commission to preempt local ordinances pursuant to SDCL 49-41B-28. As part of its denial of the Mandan application, the Commission order contained a Conclusion of Law stating that “[t]he Commission declines to make a determination as to the effect of its decision on the [county ordinances] on the grounds that such a legal determination is beyond the authority of this Commission.”

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<sup>1</sup> See S1, page 11.

<sup>2</sup> See Section 6.8.6 “Local Land Use Controls” of Navigator’s Application: “[t]he Applicant will design, construct, operate, and maintain the pipeline and valve stations in compliance with applicable zoning and county permit requirements” and “[t]he Applicant may request variances and/or special use permits, as necessary.”

<sup>3</sup> Memorandum Decision of Circuit Judge Robert A. Miller, Civ. 82-34 (Circuit Court on appeal reversing PUC’s denial of a siting permit for the Mandan trans-state transmission facility). Attached hereto.

In a ruling that was affirmed by the Supreme Court, the circuit court reversed, finding that the Commission

erred as a matter of law in concluding that it did not possess this statutory authority. Likewise, PUC's refusal to exercise its statutory discretion was arbitrary and capricious and an abuse of discretion. ... On remand, the PUC shall exercise its statutory discretion under SDCL 49-41B-28 and shall decide, assuming it has made a proper finding, whether it will preempt or supersede the local land use regulations.

The Circuit Court explained that the word "may" in SDCL 49-41B-28 is permissive. Therefore, the Circuit Court was not finding that in all situations the Commission must exercise its authority and preempt local ordinances. Rather, the decision was fact-specific with the Circuit Court finding that the Commission had the authority to preempt and also noted that testimony in the record established that the Commission should have exercised its authority. For example, the Circuit Court noted that testimony in the record, including that of a Staff witness, supported preemption.<sup>4</sup>

There has been discussion in this docket regarding the timing of the Motion to Preempt and when it should be considered. The precedent from the *Mandan* case clearly supports the need to build a record as part of the evidentiary record in this docket and to make a finding based upon that record, rather than hearing the Motion to Preempt prior to or during the evidentiary hearing. This is not to say that the Commission could not bifurcate the testimony as to this specific issue and hear it separately prior to making its final decision on the permit application.

Though the Commission is not required to preempt local ordinances, the Court made clear in *Mandan* that the Commission does have the jurisdiction to do so. And, while preemption of local ordinances may not be an issue in every application for a transmission

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<sup>4</sup> See Attachment 1, page 26.

facility considered by the Commission, *Mandan* also made clear the Commission should make a finding one way or another based on evidence in the record.

The Motion to Preempt does add an additional question before the Commission that was not indicated in the initial Application or initial Applicant testimony. Additionally, this Motion entails a significant issue and specifically affects a County who is not a party to the docket at this point. Therefore, it is not unreasonable for the Commission to allow that County an opportunity for a meaningful opportunity to be heard on this limited matter.

ARSD 20:10:01:27.01 allows the Commission, on its own motion, or upon request of a party to reopen the record for good cause shown. Essentially, Minnehaha County's Motion is making a preemptive request to reopen the record for the Commission to hear evidence on this limited matter after the conclusion of the full evidentiary hearing scheduled for July 25-27, 2023, and July 31 through August 6, 2023. Given the timeline of Minnehaha's County Ordinance and the timing of Applicant's Motion to Preempt local ordinances, allowing an opportunity for additional testimony on the matter of the local ordinances would certainly ensure a more robust record on this issue and may be extremely helpful to the Commission's fact-finding duty. Granting this request would also provide Minnehaha County an opportunity to fully participate in the proceeding to address a significant fact-based issue.

However, Minnehaha's request may prejudice or be unduly burdensome to the Applicant. Minnehaha County indicates they are willing to address this matter in the current docket, but under state law, the Commission must issue a decision on the permit Application within one-year of filing. This Application was filed September 27, 2022, which requires the Commission issue a final decision by September 27, 2023. Only the Applicant can request an extension to the statutory deadline for a decision, and practically, granting an abeyance

and scheduling an additional hearing on the preemption issue may not be compatible with meeting that statutory deadline.

Significantly, Applicant's Motion to preempt places the burden on Applicant to show the ordinances at issue are unreasonable, and Applicant will therefore need to present evidence and a legal briefing to the Commission on that issue.

Because preemption is a fact specific question, requiring a finding that the local ordinance is unreasonably restrictive, Staff will reserve any opinion as to whether or not a specific ordinance should or should not be preempted until such time as all evidence has been heard.

With respect to the request for preemption, Staff's biggest concern is the due process rights of all involved. Applicant had nine months after the filing of the Application in which to raise arguments and formulate testimony regarding preemption. The affected counties, on the other hand, had one month from the time the Motion to Preempt was filed until the start of the evidentiary hearing. This leaves Staff with great concern as to how level the playing field is going into this discussion.

Minnehaha County offered a solution to level the playing field. Minnehaha County requested that the Motion for Preemption be held in abeyance and heard at a later date. This makes excellent sense and appears to be the best option in this matter. Holding the Motion for Preemption in abeyance until everyone has a fair opportunity to be heard protects due process rights and allows for the building of a more robust record.

In addition, as mentioned above, Lincoln County has pending ordinance which could be subject to this process. Lincoln County's proposed ordinance has not come before the full county commission for consideration. It may be that the ordinance does not ultimately

pass, and the question is moot with respect to Lincoln County, but in the event that the ordinance does pass, holding this matter in abeyance would be beneficial to the consideration of Lincoln County's ordinance, as well. As of the filing of this response, it is Staff's understanding that Lincoln County intends to vote on the ordinance within the next few weeks. Notably, Applicant did not address Lincoln County in its response to Minnehaha County's Motion.

### CONCLUSION

In order to create a more robust record and protect the due process rights of all involved, Staff requests the Commission grant Minnehaha County's request for limited intervention and schedule additional hearing dates at which time evidence can be presented regarding Applicant's Motion to Preempt. There is nothing in the record to indicate that a couple months' delay would materially impact the construction schedule should a permit ultimately granted. In addition, because Staff supports holding the Motion to Preempt in abeyance and hearing it at a later date, Staff would encourage Applicant to seriously consider making a limited request to extend the statutory deadline to allow for a hearing on the merits of the Motion to Preempt.

Dated this 24th day of July 2023.

  
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Kristen N. Edwards  
Staff Attorney  
South Dakota Public Utilities Commission  
500 East Capitol Avenue  
Pierre, SD 57501  
Phone (605)773-3201  
[Kristen.edwards@state.sd.us](mailto:Kristen.edwards@state.sd.us)

