

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

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

* **STAFF’S POST-HEARING REPLY**
* **BRIEF AND RESPONSE TO**
* **APPLICANT’S MOTION TO PREEMPT**
* **COUNTY ORDINANCES UNDER SDCL**
* **49-41B-28**
* **HP22-002**

Staff, by and through its attorney of record, hereby files Staff’s Post-Hearing Reply Brief and Response to Applicant’s Motion to Preempt County Ordinances Under 49-41B-28 (Motion to Preempt) in the above-captioned siting proceeding. Acronyms, abbreviations, and party names will be as detailed in the Preliminary Statement included in Staff’s initial post-hearing brief. References to Applicant’s Post-Hearing Brief will be cited as “A Br.” followed by the appropriate page number.

STAFF’S REPLY REGARDING ORDERLY DEVELOPMENT

As discussed in Staff’s Initial Post-Hearing Brief, as well as the initial briefs submitted by other parties, Navigator must prove by a preponderance of the evidence that the Project “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). In its Post-Hearing Brief, Applicant asserts that it has satisfied this element of its burden of proof. In support of this assertion, Navigator notes that it “has engaged in extensive governmental outreach.” (A Br. At 39)

While Staff has no reason to disagree that Navigator has engaged in extensive outreach with local units of government, and in fact agrees that Minnehaha County witness Joseph

Kippley appears to support this statement,¹ Staff notes that the path Navigator chose to pursue for timing of its PUC permit application nonetheless could be argued to have put counties at a disadvantage and even put Navigator itself at a disadvantage. Navigator was solely at the helm when it came to deciding when to initiate county outreach and when to apply to the Commission for a permit. Ultimately, the PUC process and the drafting of county ordinances ran parallel paths.

In addition, an alternative route analysis is a factor that is helpful to consider in determining whether the Project will unduly interfere with the orderly development of the region. This analysis allows one to ascertain whether the Applicant fully vetted the route and chose a route that properly considers orderly development, as well as all other factors. ARSD 20:10:22:12 provides

Alternative sites. The applicant shall present information related to its selection of the proposed site for the facility, including the following:

- (1) The general criteria used to select alternative sites, how these criteria were measured and weighed, and reasons for selecting these criteria;
- (2) An evaluation of alternative sites considered by the applicant for the facility;
- (3) An evaluation of the proposed plant, wind energy, or transmission site and its advantages over the other alternative sites considered by the applicant, including a discussion of the extent to which reliance upon eminent domain powers could be reduced by use of an alternative site, alternative generation method, or alternative waste handling method.

This is not to say that an applicant for a siting permit must provide alternative routes from which the Commission may choose, as that would be prohibited by SDCL 49-41B-36. Rather,

¹ EH 3635:12-15, 3647:22-:3648:3.

the intent is to provide information in order to establish that careful thought and consideration were given to the route that was ultimately selected. The alternative route analysis provides a clear picture of what the Applicant did to ensure the least interference with the orderly development of the region in light of all other necessary considerations. This information was not provided within Applicant's case in chief. Applicant did not discuss or provide an alternative route analysis until the county preemption portion of the evidentiary hearing, and no information was provided as to the weighing of the routing factors per the administrative rule.

MOTION TO PREEMPT COUNTY ORDINANCES

On June 26, 2023, Navigator filed its Motion to Preempt. Navigator requests the Commission, pursuant to SDCL 49-41B-28, preempt Minnehaha County Ordinance MC16-179-23 and Moody County Ordinance 2023-01. In the Motion to Preempt, Navigator mentioned that preemption of a Lincoln County ordinance may be requested. However, Navigator confirmed at the evidentiary hearing that it is not requesting preemption with respect to Lincoln County at this time.

To Staff's knowledge, this Commission has never utilized SDCL 49-41B-28 to preempt a local rule or ordinance.² In addition, SDCL 49-41B-22(4) requires the Commission to give due consideration to the views of governing bodies of local units of government with respect to orderly development of the siting area. It is without question that a county commission is a local unit of government. Therefore, the two statutes must be considered in light of one another, and preemption used only when merited and supported

² While a request was made in docket F-3371, which involved the Mandan electric transmission line, the Commission declined to make such a ruling in that docket. Although the Commission's decision, including its refusal to rule on the preemption request was ultimately reversed by the Court and remanded to the Commission, the applicant ultimately withdrew the application.

by the record.

A. Preemption in General

It is very important to understand from the outset what SDCL 49-41B-28 is and what it is not. SDCL 49-41B-28 provides that

A permit for the construction of a transmission facility within a designated area 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.

What SDCL 49-41B-28 does not do is expand the Commission's subject matter jurisdiction or confer upon the Commission those judicial powers reserved for the circuit court. Therefore, by virtue of having the authority to supersede a routing ordinance, the Commission does not by default obtain jurisdiction over all other matters that may fall within a county's ordinance. Rather, if an applicant such as Navigator wishes to contend, for example, that an annual per mile fee is arbitrary or that barriers to the transfer of a permit are unconstitutional restraints on alienation, those are questions that are not within the jurisdiction of the Commission.

The text of SDCL 49-41B-28 specifies that the Commission is to consider the ordinances "as applied to the proposed route." It does not throw the door wide open for consideration of ordinances as applied to financial considerations or conditions upon a future sale or transfer of a conditional use permit, which would otherwise be beyond the Commission's jurisdiction. The plain language of the statute limits the preemption authority to routing considerations, which can reasonably include issues such as location, land use,

reclamation, and other issues that directly apply to the “proposed route.”

For this reason, regardless of the ultimate outcome of the preemption request, the following items which were raised in Ms. Howard’s prefiled testimony are not appropriate for consideration:

1. Minnehaha County’s \$25,000 filing fee;
2. Minnehaha County’s \$300 per mile annual fee;
3. Moody County’s requirements for transfer or sale of a permit

These and other portions of the county ordinances that are not within the subject matter jurisdiction of the Commission should be excluded from any preemption order. However, in her testimony at the preemption hearing, Ms. Howard clarified that there are certain portions of the two county ordinances that she believes are the main concerns for Navigator. EH 3716:6-3717:3. Any preemption should focus on those concerns rather than encroaching into areas outside the Commission’s regulatory jurisdiction, as opposed to treating this as an appeal and attempting to strike down ordinances as a whole.

Ms. Howard explained that regarding the Moody County ordinance, the areas of greatest concern are the setbacks along with the waivers related to those setbacks and the requirement to bore under all utilities and drain tile. EH 3716:9-13. For Minnehaha County, Ms. Howard stated that it is “really limited to the setbacks and the waivers.” EH 3716:17-25.

B. County Ordinances

SDCL 49-41B-28 is a permissive statute. It allows, but does not require, the Commission to preempt local ordinances. The statute provides that the Commission “*may* supersede or preempt”. *{emphasis added}*

A permit cannot be granted if the proposed pipeline route violates the ordinance in

question. The final sentence of the statute provides that “[w]ithout such a finding by the commission, no route shall be designated which violates local land-use zoning, or building rules, or regulations, or ordinances.” SDCL 49-41B-28. Whether Navigator’s proposed route violates Minnehaha or Moody County ordinances is a factual determination. If the Commission determines that the proposed route violates a county ordinance, a permit cannot be granted if it would endorse the violation without preemption. Therefore, the Commission has two options *if* it finds the proposed route violates a county ordinance:

1. Grant the Motion to Preempt; or
2. Deny the siting permit.

Analysis and consideration of preemption under SDCL 49-41B-28 requires a fact-based inquiry. The statute requires the Commission to determine whether an ordinance is “unduly restrictive”. In order to make this determination, it is necessary to look at what the county was trying to restrict or protect, meaning what were the county’s reasons for the ordinance, and then decide whether the county implemented an unduly restrictive mechanism to protect that interest. For example, while something like a setback may appear to speak for itself, one needs to look at the facts and reasoning to determine if the setback was targeting development, safety, or some other interest in order to ascertain whether the setback is unduly restrictive.

1) Does the proposed route violate Minnehaha County ordinance MC16-179-23?

Minnehaha County requires a transmission pipeline to be at least 330 feet from dwellings, churches, and businesses, as measured from the center line of the proposed pipeline to the closest parcel boundary. N15, page 42. There are several other facets to the ordinance; however, the requirement for a 330-foot setback was the crux of the preemption discussion.

Approximately 30 miles of the proposed route are in Minnehaha County. EH 368:17-19. Of that distance, 10.98 miles fall within the buffer established by the ordinance. N79, page 4. However, the fact that the route encroaches upon the 330-foot setback does not mean that the proposed route would violate MC16-179-23. Navigator has the ability to obtain waivers from the owners of the affected parcels or to apply for a conditional use permit (CUP). Exhibit M5, page 14. If Navigator was able to obtain waivers, the Project would be considered a special use, and Navigator would not need to apply to the county for a CUP. EH 3787:17-22. Navigator's witness, Monica Howard, testified that there are 29 landowners who would need to sign a waiver. EH 3510:19-21. Navigator has not made an effort to obtain the waivers nor has Navigator filed for a CUP. EH 3513:9-12; EH 3518:21-24.

Because avenues still exist for Navigator to comply with the Minnehaha County's ordinance, the proposed route does not violate MC16-179-23 at this time. Therefore, with respect to this ordinance, the final sentence of SDCL 49-41B-28 is inapplicable, and the Commission may exercise its preemption discretion accordingly, meaning the Commission may choose to preempt MC16-179-23, but is not obligated to deny the permit if the ordinance is not preempted.

2) Does the proposed route violate Moody County ordinance?

Unlike the Minnehaha County ordinance, Moody County does not allow for a landowner to waive the setback unless the waiver is approved by the county's Board of Adjustment. EH 3910-3911. Also, unlike Minnehaha County where Navigator need not apply for a CUP if it complies with setbacks or obtains landowner waivers, Navigator must obtain a CUP from Moody County even if it complies with the county setbacks. Exhibit N15, page 47; EH 3909:17-21. Therefore, where Navigator cannot comply, it is apparent

that the proposed route would in fact violate the county ordinance. Significant areas of contention regarding the Moody County ordinance are the “requirement that a pipeline must be bored under all existing tile lines and utility lines it crosses” and the 1,500-foot setback from occupied structures. Exhibit N15, pages 25-26. These areas of contention are irreconcilable with the proposed route.

While there was no testimony in the record as to the need for boring under all utility lines nor to establish that the owners and operators of those lines had advocated for such a requirement, there was discussion on the matter of boring under all tile lines. Kendra Eng, the Zoning Administrator for Moody County, and the sole witness for Moody County testified that the purpose of requiring all existing tile lines to be bored under was to protect tile lines. EH 3912:2-5. The reason for the protection of tile lines appears to be the County’s position that it must protect agriculture. Ms. Eng testified that the County’s primary focus in drafting the ordinance was “land use and preserving our agricultural district.” EH 3874:4-6. She also testified that the County’s policy is to “preserve and protect our agricultural land uses in Moody County.” EH 3855:22-23.

Based upon the stated concerns and policies of Moody County, it is apparent that the interest that the County is trying to protect with its ordinance is agriculture and preservation of farmland. Therefore, it is necessary to determine whether the ordinance is unduly burdensome in accomplishing that goal.

Of concern to Staff is the restriction the boring requirement places on the ability to properly condition the Project for safety purposes. There was testimony throughout the evidentiary hearing about fiber optic leak detection as well as warning tape. Staff witness William Byrd testified to the benefit of the fiber optic leak detection system, noting that it

provides state-of-the-art leak detection. Exhibit S2, pages 9-10. Staff included both fiber optic leak detection and installation of warning tape in its recommended permit conditions, attached hereto as Attachment 1. It is unlikely that either of these important safety measures would be available should the Project be required to bore under all tile and utility lines. EH 1004-1005; Exhibit N5, page 12.

The next facet of the Moody County ordinance which Ms. Howard raised as a primary concern for Navigator was the 1,500-foot setback. The ordinance specifies that the setback shall be measured from the wall line of the neighboring cautionary use to the centerline of the pipeline. Exhibit N15, page 47.

The difficulty in determining whether the 1,500-foot setback is unduly burdensome is that there is nothing in the record to clearly establish what interest Moody County was seeking to protect. Ms. Eng clearly stated that safety was not the focus of the ordinance and in fact Moody County was “[staying] away from safety”. EH 3874:3-4. When discussing the County’s decision to increase the setback distance originally contemplated from 1,320 feet to 1,500 feet, Ms. Eng stated that there wasn’t a “fancy scientific reason they chose 1,320 feet.” EH 3905:22-23. From the record, it appears that the distance was ultimately selected based off an existing Brown County ordinance. EH 3908:21-24. Ms. Eng stated that she did not know what support Brown County relied on for its setbacks. EH 3937:7-9. However, without having a clear understanding of the basis for the setback, Staff cannot opine as to whether the ordinance is unduly restrictive or whether it is reasonable and justified.

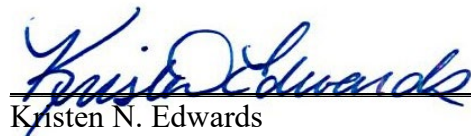
In conclusion, it appears without contention that the proposed route would not comply with Moody County Ordinance No. 2023-01. Therefore, absent a preemption

finding by this Commission, the proposed route may not be designated per SDCL 49-41B-28.

CONCLUSION

Staff appreciates the time and effort of our fellow parties and the Commission over the last several weeks. Staff has compiled a list of permit conditions which Staff requests be attached to a permit, if granted. Those proposed conditions are attached hereto as Attachment 1.

Dated this 1st day of September 2023.



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