

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

SCS Carbon Transport LLC
Midwest Carbon Express CO2 Pipeline
Project Siting Application

Case No.
PU-22-391

TRANSCRIPT OF FORMAL HEARING

June 27, 2023

Bismarck, North Dakota

APPEARANCES

Commissioners Randy Christmann, Sheri Haugen-Hoffart, and
Substitute Decisionmaker Timothy J. Dawson

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of Applicant SCS Carbon Transport LLC

JAMES CURRY, Babst Calland, on behalf of Applicant
SCS Carbon Transport LLC

RANDALL J. BAKKE, Bakke Grinolds Wiederholt, on
behalf of Intervenors John H. Warford as Trustee of the
John H. Warford, Jr. Revocable Trust and Chad Moldenhauer
and Chad Wachter

STEVE J. LEIBEL, Knoll Leibel LLP, on behalf of
Intervenors/Landowners

ZACHARY PELHAM, Special Assistant Attorney General
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1 ALJ HOGAN: All right. Good morning. My watch
2 shows it's 8:30 so we are going to get started.

3 My name is Hope Hogan and I have been designated
4 as the administrative law judge at the request of the
5 Public Service Commission for this hearing. Let the
6 record reflect it's June 27th, 2023, at 8:30 a.m. This
7 is the time, date, and place set by the Notice of
8 Hearing issued by the North Dakota Public Service
9 Commission on June 15th, 2023, in Case No. PU-22-391.

10 UNIDENTIFIED SPEAKER: Can't hear back here.

11 ALJ HOGAN: All right. Is this better?

12 UNIDENTIFIED SPEAKER: Yes.

13 ALJ HOGAN: Sorry.

14 This hearing is being held today in the Pioneer
15 Room at the State Capitol in Bismarck, North Dakota. As
16 we begin, I would ask that everybody please check your
17 phones to make sure they're either silenced or turned
18 off.

19 On April 21st, 2023, SCS Carbon Transport LLC
20 filed model outputs and a risk assessment with the
21 Commission. SCS Carbon Transport also filed an
22 application for protection of that information. The
23 request is to protect the information from public
24 disclosure pursuant to North Dakota Century Code Section
25 44-04-24. On May 1st, 2023, Intervenor John H. Warford,

1 Jr. Revocable Trust filed an objection to the
2 application and request for hearing.

3 Today's hearing was scheduled to hear oral
4 arguments regarding SCS Carbon Transport's application.
5 The issue to be considered is whether the application to
6 protect information should be granted.

7 I'm now going to ask the parties to make their
8 appearance for the record.

9 On behalf of the Applicant we have Mr. Curry and
10 Mr. Gludt. Would you like to please state your
11 appearances for the record?

12 MR. GLUDT: Yes. Thank you, Judge. Tyler
13 Gludt, Fredrikson & Byron, PA, Bismarck, North Dakota,
14 on behalf of the Applicant, SCS Carbon Transport LLC.

15 MR. CURRY: Good morning, Judge. I'm Jim Curry.
16 I'm at the law firm of Babst Calland. My office is
17 located at 505 9th Street Northwest, Suite 602,
18 Washington, DC 20004. I appear today as counsel for SCS
19 Carbon Transport LLC.

20 ALJ HOGAN: And I'll note that a motion for pro
21 hac vice status was filed by -- Mr. Gludt, I believe,
22 filed the motion on behalf of Mr. Curry on Friday.

23 And, Mr. Gludt, can you just confirm that
24 required fees have been paid to the Bar Association?

25 MR. GLUDT: Yes, Judge. I believe Mr. Bender

1 may have actually signed off on there, but we included
2 both myself and Mr. Bender as potential local counsel
3 that may appear with him. And we did receive
4 acknowledgment from the State Board of Law Examiners of
5 receipt of Mr. Curry's fee.

6 ALJ HOGAN: All right. I have reviewed the
7 motion and it does appear to satisfy all the other
8 requirements of the rule. I have not yet issued a
9 written order, but I will do that after this hearing,
10 but for the record I will grant the motion to appear pro
11 hac vice in this matter.

12 Mr. Pelham, would you like to state your
13 appearance for the record?

14 MR. PELHAM: Good morning, Judge. Zachary
15 Pelham, special assistant attorney general on behalf of
16 the Public Service Commission. To my left is Victor
17 Schock, public utilities director. Thank you.

18 ALJ HOGAN: And on behalf of the intervenors,
19 Mr. Leibel, would you like to state your appearance for
20 the record?

21 MR. LEIBEL: Sure, Judge. Steve Leibel on
22 behalf of landowner intervenors.

23 ALJ HOGAN: And, Mr. Bakke, would you like to
24 make your appearance for the record?

25 MR. BAKKE: Yes, Your Honor. Good morning.

1 Randy Bakke on behalf of intervenors John Warford, Chad
2 Wachter, and Chad Moldenhauer.

3 ALJ HOGAN: And I will note we have one more
4 intervenor in this case, LIUNA, and they are -- their
5 representative is Mr. Pranis and he is not appearing for
6 this hearing. And for my recollection, LIUNA has not
7 taken a position on this particular motion.

8 As indicated in the notice, the Commission will
9 only be receiving oral argument on the motion this
10 morning. And as discussed prior to today's hearing,
11 each party will be given 20 minutes to present oral
12 arguments to the commissioners. The Applicant will go
13 first followed by the intervenors.

14 So, with that, I will turn to you, Mr. Curry, if
15 you want to begin your argument.

16 MR. CURRY: Thank you, Judge. Good morning,
17 Commissioners. Today I'll argue on behalf of Summit on
18 its application to protect certain confidential
19 information filed with the North Dakota PUC -- PSC,
20 excuse me, related to its application for a siting
21 certificate for the proposed Midwest Carbon Express
22 pipeline project. I and Summit welcome the opportunity
23 to be heard today.

24 Before getting into the specifics and the bases
25 of the application itself and the information

1 protections available for the materials that we've
2 submitted, I thought it would be helpful to provide a
3 bit of background information in terms of the relevance
4 and role of dispersion modeling and things like pipeline
5 safety and the federal pipeline safety oversight program
6 administered by the -- by the Federal Government through
7 the Pipeline and Hazardous Materials Safety
8 Administration.

9 As a former attorney at PHMSA, I'm familiar with
10 all of PHMSA's pipeline safety programs including the
11 regulations that apply to CO2 pipelines. And most of my
12 practice today relates to PHMSA's programs and how they
13 are implemented throughout the country including here in
14 North Dakota.

15 Summit seeks to construct and operate an
16 interstate CO2 pipeline system in several states
17 including approximately 320 miles here in North Dakota.
18 If constructed, the pipeline will join the existing
19 approximately 5,300 miles of liquid pipelines here in
20 the state of North Dakota and more than 12,000 miles of
21 gas pipelines already in operation here in the state,
22 all of which are subject to safety regulations.

23 The safety aspects of Summit's proposed pipeline
24 are regulated by PHMSA under the Pipeline Safety Act and
25 the pipeline safety regulations for hazardous liquid and

1 CO2 pipelines at 49 CFR Part 195. PHMSA has exclusive
2 jurisdiction to regulate the safety aspects of
3 interstate CO2 pipelines and has done so since 1991.
4 PHMSA administers an active pipeline inspection and
5 enforcement program under which it inspects operators,
6 including CO2 operators, frequently, and in those
7 inspections PHMSA provides guidance on how operators can
8 improve their safety performance.

9 As part of this oversight, the agency also
10 issues enforcement actions including orders directing
11 compliance and civil penalties. The agency safety
12 regulations provide detailed safety standards for
13 design, construction, really everything from kind of
14 cradle to grave, from before you even put a shovel in
15 the ground until the abandonment of the facility. So
16 things like emergency response, public awareness, a
17 program called "integrity management," which ends up
18 being pretty relevant to the materials that Summit has
19 filed, as well as other aspects of pipeline safety.

20 PHMSA's safety standards generally follow a
21 risk-based approach. And what does that mean? It means
22 that more stringent standards apply to pipelines the
23 closer they are to people and sensitive environmental
24 locations. Those locations under Part 195 are called
25 "high consequence areas." We call them "HCAs."

1 To determine what parts of a pipeline could
2 affect those sensitive areas, operators conduct detailed
3 analyses of several factors including location, land
4 terrain, topography, the nature and characteristics of
5 the material being transported, various operational
6 parameters, and physical pathways between the pipeline
7 and the HCA or the high consequence area.

8 And this is really kind of where dispersion
9 modeling plays its role, one of the few areas where it
10 plays its role in Part 195. And so these efforts to
11 figure out what happens to material when it gets out of
12 a pipeline are often called "spill modeling" or "release
13 modeling." And they take different forms depending on
14 the commodity. So for an oil pipeline, you'd do an
15 overland transport analysis. You'd look at things like
16 drain tiles in a farm field, dry creek beds to try to
17 figure out, if you did have a release, where would it
18 go.

19 And for CO2 we do slightly different modeling
20 called "dispersion modeling" because CO2 doesn't flow on
21 the ground like an oil does. It creates a vapor cloud.
22 As related to CO2 pipelines, PHMSA has stated in
23 guidance and in precedential enforcement cases its
24 expectations that operators perform vapor dispersion
25 modeling and do certain things and consider certain

1 factors when they do that modeling to figure out and
2 determine physical pathways for transporting of vapor,
3 CO2 vapor.

4 So we have some integrity management FAQs that
5 the agency has issued. They've been out for many years.
6 FAQ 3.4 gets into dispersion modeling.

7 And then we have a series of cases in which
8 PHMSA has specifically opined on the quality of
9 operators' dispersion modelings. There's actually a
10 case here in North Dakota, the west -- or excuse me, the
11 Dakota Gasification case from 2018 where PHMSA came in,
12 did a routine inspection here in North Dakota and cited
13 the operator of that CO2 pipeline for not evaluating
14 terrain effects when looking at its dispersion modeling.

15 So when you model a CO2 release, you can't just
16 assume the ground is flat, right? You have to look for
17 low spots where the CO2 might go. You have to look for
18 valleys, changes in elevation that can serve essentially
19 as a conduit for CO2.

20 There's also a series of Denbury cases that were
21 issued in response to an accident that Denbury had in
22 Mississippi a few years ago where the agencies also
23 cited Denbury for not doing adequate air dispersion or
24 vapor dispersion modeling.

25 These cases demonstrate that PHMSA is active on

1 dispersion modeling issues, including here in North
2 Dakota, and that it will step in and issue enforcement
3 actions, take other measures when it believes dispersion
4 modeling is inadequate.

5 And where CO2 -- let's talk more about the role
6 of dispersion modeling. Where a CO2 operator determines
7 through that model that a failure of a segment could
8 affect a high consequence area, it's required to
9 develop, among other things, an integrity management
10 plan for those parts of the pipeline.

11 Now, the integrity management plan is sort of an
12 overlay. You have the basic Part 195 regulations; you
13 know, design, construction, operation, maintenance,
14 corrosion control. And then over atop that you have the
15 integrity management requirements which are a set of
16 heightened, much more stringent requirements for
17 pipeline safety that apply specifically in areas where
18 people or sensitive environmental locations are located.

19 The heart of any integrity management plan is a
20 risk analysis. Sometimes it's also called a "risk
21 assessment," which is required under the integrity
22 management regulations. CO2 pipeline operators must use
23 the risk analysis to identify what are called
24 "preventive and mitigative measures" to further public
25 safety and environmental protection.

1 So what's preventative and what's mitigative?
2 Preventative is just like it sounds. You put additional
3 measures in to prevent an accident from ever occurring.

4 Mitigative is on the other side. If an accident
5 occurs, you put measures in place to reduce the
6 consequences of such an accident. Those actions might
7 include more frequent inspections of the pipeline,
8 enhanced training of pipeline personnel, additional
9 public outreach and education, additional installation
10 of valves, and a host of other measures. It's sort of a
11 performance-based part of the regulations and operators
12 have sort of -- are only limited by their own creativity
13 in terms of additional measures that they can apply, but
14 they have to be reasonable.

15 So to properly develop a risk analysis and
16 identify these measures, Summit must consider and apply
17 the information obtained from its dispersion modeling.

18 It's important to note that while Summit is only
19 required to apply this integrity management program to
20 the really quite limited areas along the pipeline that
21 could affect high consequence areas, it has,
22 nonetheless, decided to apply its integrity management
23 plan to the entire pipeline system, including the
24 entirety of the mileage in North Dakota.

25 In addition, Summit has met with PHMSA twice to

1 discuss its approach to pipeline safety. In those
2 meetings, Summit specifically sought and received
3 PHMSA's feedback on dispersion modeling. You know, we
4 went in and asked PHMSA, "What have you learned from
5 recent events? What have you learned over time? What
6 can you tell us here at Summit about how to do the best
7 dispersion model we can?" And the agency did provide
8 feedback on that.

9 Summit has also studied the available
10 information on past failures and PHMSA enforcement of
11 those cases that I mentioned earlier as well as others
12 related to dispersion model in an effort to incorporate
13 all the learnings it can, it could, into its current
14 model.

15 As noted in Summit's application to protect, the
16 dispersion modeling information is used for other
17 purposes as well, including development of our emergency
18 response plans, public awareness plans. And
19 specifically by understanding where CO2 may go in the
20 unlikely event of an incident, Summit can allocate
21 prevention and mitigation resources to areas that are
22 more sensitive.

23 I hope you found that background helpful. Now
24 I'll turn to a discussion of the application to protect
25 itself and the various bases for protection of the model

1 and risk assessment-related materials.

2 Summit's application to protect is based on the
3 sensitive nature of information contained in these
4 documents. Specifically, they contain confidential
5 business information that, if released, would pose
6 security risks. And these are not hypothetical risks.
7 I'll get to that later. As a result, these materials
8 would be protected from disclosure under both state and
9 federal law. Accordingly, Summit respectfully requests
10 that the Commission grant its April 21st, 2023,
11 application to protect these materials.

12 I thought it would be appropriate to start with
13 the state law protections available for these materials
14 and then talk a little bit about the federal protections
15 that may also be available.

16 The dispersion model and risk assessment
17 information is protected under the North Dakota open
18 records law. Much like PHMSA and other federal
19 agencies, North Dakota has recognized the need to keep
20 sensitive -- certain sensitive information relating to
21 pipelines confidential.

22 The modeling and risk assessment documentation
23 should be protected from disclosure under North Dakota
24 Century Code Section 44-4-24. Under that section,
25 so-called security system plans kept by a public entity

1 -- in this case the Commission -- and records regarding
2 disaster mitigation, preparation, response,
3 vulnerability, or recovery are exempt from disclosure.
4 A security system plan is broadly defined to include,
5 among other things, threat assessments, vulnerability
6 and capability assessments, threat response plans, and
7 emergency evacuation plans.

8 The information in the documents provided to the
9 Commission constitute a security system plan. The
10 dispersion modeling and risk assessment information
11 assesses threats to the pipeline, identifies sensitive
12 locations along the pipeline, the potential for failure,
13 preventative and mitigative measures, and consequence
14 modeling to inform emergency response activities, all
15 information that is squarely within the definition of
16 security system plan. This information relates directly
17 to the physical security of the pipeline as it could be
18 used to selectively target sensitive areas of the line.

19 Next we'll go through some of the federal
20 protections that could be applied. While both North
21 Dakota and the federal law, which is the Freedom of
22 Information Act, or we'll call it "FOIA" today, lean
23 towards providing government records, that's certainly
24 clear, you know, there's a tendency towards
25 transparency, however, there are important and

1 well-founded public policy limits on this tendency to
2 release. We face these limits here today, or
3 security-related limits.

4 The federal protections under the FOIA are
5 motivated by some of the same policy concerns as those
6 underpinning the North Dakota law. As such, it's
7 instructive to consider them in conjunction with any
8 evaluation of state law information protections.
9 Indeed, in a 1998 North Dakota Attorney General's
10 guidance document, the AG noted that North Dakota should
11 consider federal FOIA law and cases when evaluating
12 state-level exemptions to disclosure.

13 Although the FOIA generally allows for
14 disclosure of records kept by a federal agency, a range
15 of materials are exempt from those disclosure
16 requirements. Summit respectfully contends that the
17 dispersion modeling and risk analysis-related documents
18 it provided to the PSC would qualify for protection from
19 disclosure by PHMSA under FOIA pursuant to at least two
20 exemptions: FOIA Exemption 7(F) and Exemption 4.

21 7(F) is the more relevant exemption. It has to
22 deal with security-related information so we'll start
23 there. Under Exemption 7(F), information compiled for
24 law enforcement purposes that could reasonably be
25 expected to endanger the life or physical safety of any

1 individual is exempt from disclosure. Now, when we say
2 compiled for law enforcement purposes, that's basically
3 anything in PHMSA's possession that relates to
4 compliance and its oversight programs. So it's a pretty
5 broad construction of what that is.

6 And PHMSA has determined that documents
7 containing certain kinds of pipeline information, not
8 all but certain limited information that would allow
9 others to target and damage or destroy infrastructure,
10 would be protected from disclosure. PHMSA has
11 specifically noted that spill modeling data in the
12 context of oil pipelines, for example, that could be
13 used to rank desirable targets would be protected from
14 disclosure under Exemption 7(F).

15 Courts have actually weighed in on PHMSA's
16 determinations under 7(F) including in the context of
17 the Dakota Access Pipeline. There's a Federal District
18 Court case from 2017 that specifically looked at this
19 issue. There was a challenge to a federal records
20 protection claim by PHMSA over spill modeling
21 information related to the DAPL. And in that context,
22 the D.C. Federal District Court made a finding that
23 certain oil spill-related information including things
24 like maps of pipeline at certain crossings, the names of
25 segments, when you paired that with other information,

1 timelines for detecting and shutting down spills, for
2 example, risk scoring information, maps of spill
3 scenarios, predictions of volumes, all that would be
4 protected. Now, there's a whole lot of other
5 information that can sometimes be related to those
6 issues that isn't protected, but these really sensitive
7 pieces of information must be protected.

8 And this is the same kind of information that
9 Summit has sought to protect here. The dispersion
10 modeling documentation explains how the modeling was
11 performed. It explains release scenarios and types of
12 releases that could occur, locations where impacts could
13 result including high consequence areas, and other
14 sensitive information. If released to the public,
15 someone with nefarious purposes could identify which
16 specific pipeline segments to target. This information
17 is squarely prevented from disclosure under Exemption
18 7(F).

19 And this isn't a hypothetical risk. I mean,
20 there has been a number of attacks on pipeline
21 infrastructure over the years. I went through some
22 report outs by the FBI and other intelligence agencies
23 that are publicly available.

24 Just to provide a few examples: in Montana,
25 2021, two individuals were convicted of intentionally

1 targeting and shooting at a diesel pipeline resulting in
2 a spill into a waterway and a felony Clean Water Act
3 series of violations; in Ohio, in 2019, two individuals
4 pled guilty for plotting a terrorist attack against an
5 interstate pipeline; closer to home here, there were
6 obviously a number of attacks against DAPL in terms of
7 cutting holes in the pipeline and arson attacks of
8 construction equipment that caused millions of dollars
9 in damage. So targeting pipelines has happened,
10 unfortunately.

11 Obviously, there's been some recent media
12 coverage of this as well. A movie, "How to Blow Up a
13 Pipeline," recently -- recently was issued just in the
14 last few months and caused quite consternation at the
15 FBI, the Royal Canadian Mounted Police, and multiple
16 state agencies were concerned that that movie could
17 serve as inspiration for an attack on infrastructure.
18 So these risks are not hypothetical.

19 That's Exemption 7(F).

20 Next I'll briefly touch on Exemption 4.
21 Exemption 4 is a lot broader. It covers confidential
22 commercial information that's also exempt from
23 disclosure. And basically, in this instance, we would
24 ask for protection from PHMSA for the dispersion model
25 and risk analysis materials because they're

1 confidential, which under Exemption 4 means they're the
2 kinds of materials that are customarily treated as
3 private and not released to the public and because
4 they're commercial materials relating to technical
5 design and modeling information. That's just briefly on
6 Exemption 4.

7 I'll wrap up here with a third and final
8 potential sort of source of federal information
9 protection, and that's a program administered by the
10 Department of Homeland Security called the Security
11 Sensitive Information Program. That's under 49 CFR Part
12 1520. And that protects certain information that would
13 reveal confidential information or be detrimental to the
14 security of transportation. Specifically in this case,
15 the dispersion modeling and risk analysis, we believe,
16 would constitute a vulnerability assessment subject to
17 protection if submitted to the TSA, which is a subagency
18 of the Department of Homeland Security.

19 So that covers it. I see I have about two
20 minutes left. Judge, may I reserve my final two minutes
21 for rebuttal?

22 ALJ HOGAN: Yes.

23 MR. CURRY: Thank you.

24 ALJ HOGAN: I'll just ask before we move to the
25 intervenors, are there any questions from the

1 commissioners for Mr. Curry?

2 COMMISSIONER CHRISTMANN: I do not, Your Honor.

3 COMMISSIONER HAUGEN-HOFFART: I have no
4 questions.

5 SUBSTITUTE DECISIONMAKER DAWSON: No questions,
6 Your Honor.

7 ALJ HOGAN: All right. Thank you.

8 And now I will turn to intervenors, and it's my
9 understanding that, Mr. Leibel, you're going to go
10 first. All right. Go ahead.

11 MR. LEIBEL: Good morning, Commissioners. As
12 you know, my name is Steve Leibel. I represent the
13 landowner intervenors.

14 I wanted to begin first by discussing what we're
15 here about and kind of how this came about. As you
16 know, there was a lot of discussion during the hearings
17 about the dispersion modeling or the plume modeling. I
18 understand that their submission includes a number of
19 other documents, some specific safety response plans, an
20 integrity management plan. And as I'm going to discuss
21 a little bit later, I certainly would agree with some of
22 what Mr. Curry had said, that there is a legitimate
23 interest in keeping some of that confidential.

24 But I'm going to focus for the purpose of this
25 on the dispersion analysis which is important for three

1 reasons.

2 The first reason, of course, is risk avoidance.
3 One of the issues that have been discussed during these
4 hearings is the 500-foot setback. Is that reasonable?
5 Is it proper in the context of a CO2 pipeline? One of
6 the reasons for risk avoidance is we want to avoid
7 impact on existing structures, existing schools, but
8 also to allow people to make their own decisions.

9 We've heard a lot of testimony from some of the
10 Bismarck developers represented by Mr. Bakke that people
11 are going to -- and people are making decisions that
12 they don't want to be located next to this pipeline.
13 This information, especially the plume modeling, would
14 be helpful to that.

15 The second, of course, is risk management. For
16 those places within the danger zone, the idea of
17 figuring out what should be done, one of the discussions
18 with -- during one of the hearings was the safety
19 valves, the shut-off valves, whether they're properly
20 spaced at 20 miles or whether they should be spaced
21 closer. And one of the things I think is important is
22 for people to make their own understanding and their own
23 analysis based on what a cataclysmic failure looks like.

24 Finally, of course, is the issue of emergency
25 response. We've heard from both Emmons County and

1 Burleigh County talk about, you know, "We need this
2 information because we want to know what our first
3 responders need to be trained at."

4 And while I understand there are some
5 confidentiality, I have trouble believing that this
6 entire model is -- all the information including the
7 plume study should be kept confidential, especially when
8 we have -- you know, PHMSA obviously didn't believe that
9 it was necessary to keep the Satartia dispersion
10 modeling confidential.

11 The reason that's important is because, in order
12 to determine risk, you have to know the probability of
13 the event versus the consequence to the public. And at
14 this point, as members of the landowner intervenors, we
15 don't really know either of these variables except very
16 generally.

17 The other thing that we need to know is,
18 assuming the dispersion analysis would become public, is
19 we would need some information so we could investigate
20 it. You know, what is the weight? How much credibility
21 does this person have? What methodology did they
22 follow? Basically, the ordinary things that in any
23 courtroom would be relevant to any factfinder. And like
24 I said earlier, everyone understands generally that some
25 of this information absolutely should remain private for

1 some of the reasons that Mr. Curry discussed, but the
2 idea that all of it should can't be right.

3 One of the things I did in preparing for this,
4 my original discussion was I probably don't need to say
5 very much because I know Mr. Bakke will cover just about
6 everything. And as I was going through this, I just
7 wanted to look through the statutes enough so I
8 understood where the real conflict point is. Where is
9 the issue that the Commission is going to need to weigh
10 in on so I could add my comments and restrict just to
11 that issue? And so I started with --

12 Judge Hogan, if I could approach the Commission?
13 I've just printed out the statute so I can kind of walk
14 through the issues.

15 ALJ HOGAN: Sure. Yes.

16 MR. LEIBEL: And so what I've provided the
17 Commission is a printout of Chapter 44-04, and this, of
18 course, is our public records statute in North Dakota.

19 And I wanted to begin by first making clear that
20 our default in North Dakota is that information is
21 public and especially information that's determined by
22 any records of a public entity. And certainly we
23 believe that this default rule would apply to this
24 information that was provided to the PSC.

25 Now, the section, the exemption that was

1 discussed by Mr. Curry can be found on page 23. So it's
2 in the bottom -- you'll see the page numbers from this
3 printout. Page 23 is where 44-04-24, the security
4 system plan language, can be found.

5 And so I started by going through this because
6 this is our North Dakota statute, our North Dakota
7 exemption to whether or not this information is public.
8 And as I was going through this, the first thing is,
9 under Subsection 1, a security system plan kept by a
10 public entity, and records regarding disaster
11 mitigation, preparation, response, vulnerability, or
12 recovery, or for cybersecurity planning is exempt from
13 Section 18. So that's the general public records
14 production.

15 And as I read that, I mean it really comes down
16 to the issue of how broadly is it fair, in the context
17 of this statute generally, to read it broadly enough
18 that anything as part of a mitigation plan is absolutely
19 confidential. You know, especially because that really
20 for, I would say, the majority of the testimony that the
21 Commission heard, the response of the public was
22 concerns about safety. And where a -- you know, the
23 same information can be gathered from -- generally from
24 the Satartia, Mississippi, report that's already
25 admitted, so where is the security system plan? And I

1 would submit that there's a difference between a plan
2 and an event.

3 You know, Mr. Curry talked a great deal about
4 this is -- you know, "The importance of our plan. We
5 have to be able to not give a roadmap to someone that
6 intends to do a bad thing."

7 Well, that's very different than what the
8 consequence of the bad thing. Again, the public has no
9 way to weigh Summit's submission or even the decision
10 from the Commission without knowing what is the
11 consequence. What are you all weighing in deciding on
12 this application? What is the ultimate threat to the
13 public? And that information can only be found in that
14 dispersion analysis. And under the definition of a
15 security system plan, as I read this, it is much more
16 focused on the plan, the response.

17 Certainly I can see where there could be
18 specific pieces of information within a packet, within a
19 submission, like I'm assuming the PSC has received, but
20 the idea that it all, especially this issue of the
21 consequence, should remain confidential, to me, isn't
22 consistent with this reading of the statute.

23 So I next went to what I assumed would be the
24 federal FOIA, and I brought it with. I'm going to not
25 provide that copy because I felt like Mr. Curry gave a

1 pretty good summary, but the issue as I read that, it
2 talks about documents that a law enforcement agency.
3 Now, I understand their argument is that while PHMSA is
4 a law enforcement agency, PHMSA has made these, you
5 know, determinations and, in fact, a district court --
6 you know, they listed a 2017 district court case, some
7 examples in Montana in 2022, a 2019 violation in Ohio.
8 None of this stuff was in their brief. I don't know if
9 that's because the Washington DC guy knows stuff that
10 the rest of us don't. I mean, that's certainly
11 possible. But ordinarily that's not right to come and
12 for the first time at a hearing throw a bunch of
13 information out that we haven't had a chance to look at
14 or vet.

15 The next issue, of course, is -- so I next turn
16 to the information they cite in their brief about this
17 sensitive security information. And I assume that if
18 this is such a big deal, that PHMSA itself would have a
19 regulation that, hey, when you submit dispersion
20 modeling, it's confidential. It doesn't go to the
21 public. Again, when you look at 49 CFR 1520, and I
22 would be happy to give --

23 I brought copies for the Commission, if I may
24 approach?

25 ALJ HOGAN: Sure.

1 MR. LEIBEL: So this is the section of the
2 Statute 1520 that actually contains the sensitive
3 security information that Mr. Curry referenced. This is
4 the actual statute, or I guess it would be the
5 regulation.

6 And if you look to the second page, the second
7 page, that 1520.5, that's the sensitive security
8 information citation that they use in their brief.

9 And, first of all, I wanted to point out that
10 there is no -- apparently no regulation, no code
11 provision, nothing that says PHMSA requires a dispersion
12 plume model, it's confidential. Everything requires a
13 little bit of -- you know, some generous interpretation
14 from our perspective to encompass this document or at
15 least all of this document.

16 And, again, this sensitive security information
17 talks about "information obtained or developed in the
18 conduct of security activities, including research and
19 development, the disclosure of which the TSA has
20 determined would," and then they list three things that
21 are possible.

22 Well, first of all, we don't have a
23 determination from the TSA. At least that I'm aware of,
24 they haven't provided one to that.

25 If you look at the second one, part (b), it says

1 "Except as otherwise provided in writing by the TSA in
2 the interest of public safety or in furtherance of
3 transportation security, the following information
4 constitute SSI," and then they list a number of them.

5 Summit is taking the position, if you look on --
6 this would be page 3 of 10, Subsection 5, there's a
7 vulnerability assessment, and it says "Any vulnerability
8 assessment directed, created, held, funded, or approved
9 by the DOT, DHS, or that will be provided to DOT or DHS
10 in support of a Federal security program."

11 And so, again, I read this and, to me, this is
12 the legal equivalent of a round peg in a square hole. I
13 mean, I can see there's a possibility that a federal
14 judge somewhere could look at this and pull the
15 regulatory history, pull the information from these
16 appropriate agencies, and determine that, okay, that's
17 close enough, but it certainly is not conclusive.

18 And that's one of the things as I was going
19 through this document, this idea that something that's
20 so important, that really is the very heart of what the
21 public is wanting to know and wanting to understand,
22 that we're going to withhold that information based upon
23 kind of a flimflam of not -- nothing that's very clear
24 that would ever address all of this information when the
25 agency certainly -- or the Congress certainly could have

1 kept this confidential.

2 That's all I have.

3 ALJ HOGAN: All right. Mr. Leibel, I have you
4 at 14 and a half minutes. It's my understanding you
5 wanted to cede the rest of your time to Mr. Bakke?

6 MR. LEIBEL: Yes, that's correct.

7 ALJ HOGAN: So, Mr. Bakke, you would then have
8 24 and a half minutes. You may begin.

9 MR. BAKKE: Okay. Thank you, Your Honor.

10 Members of the Commission, I want to focus on
11 some things that haven't been covered by Mr. Leibel and
12 then also respond to some of the arguments by Mr. Curry.
13 And the first thing I want to point out, it is Summit's
14 burden here to show to the Commission that this
15 information does present a security concern or is
16 confidential as they assert so that the public and the
17 intervenors and the city and the county and the
18 emergency responders cannot see this information. And
19 they clearly have not met that burden under either state
20 law or federal law.

21 But one of the issues that has to be considered
22 here is any information that Summit provides needs to be
23 scrutinized. So the Commission needs to ask itself:
24 what opportunity has the Commission had? What
25 opportunity have the intervenors had? What opportunity

1 has the City of Bismarck, Burleigh County, the
2 intervenors had to scrutinize this information?

3 Because Summit has consistently, throughout this
4 proceeding, taken the position that this pipeline is, in
5 their words, entirely safe, but yet they want to, in
6 secret, provide this information to the PSC, not share
7 it with the public, not share it with the City and say,
8 "Just trust us, be willing to take that risk, citizens
9 of Burleigh County and Bismarck," with no opportunity to
10 question, no opportunity to scrutinize the information
11 they provided to the PSC only.

12 And, importantly, the PSC has not had an
13 opportunity to scrutinize this information. Have they
14 presented one witness to the PSC that the PSC could
15 question about this dispersion modeling to find out
16 important information such as who prepared it? What was
17 the level of experience of that individual or the
18 individuals involved in doing dispersion modeling? How
19 many pipelines have they built before that contain CO2?
20 What assumptions have they made? What was the pressure?
21 Where was the leak? You don't have any of that
22 information. All you have is an unchallenged report.

23 And one of the functions of the PSC is to
24 scrutinize all the information that's provided to you
25 and determine is it reliable. You had no opportunity to

1 do that nor have the intervenors had any opportunity to
2 question a witness or the author, the unknown author, of
3 this dispersion modeling. No opportunity at all. And
4 we've requested that opportunity at multiple hearings
5 and never has Summit presented a witness in that regard.
6 That's completely unlike other situations before
7 including Satartia, Mississippi.

8 And I'm glad Mr. Curry mentioned DGC. Because I
9 went back and I looked at what did the PSC receive from
10 DGC back with its application on May 11, 2007. And
11 that's still publicly available information on the PSC
12 document for that proceeding. Well, with the
13 application to the PSC, what did DGC provide to the PSC
14 in order to allow the PSC to assess that application and
15 what information did they provide publicly?

16 Because the reality is Summit is asking to be
17 held to a different standard than the PSC has required
18 before and a different and lower standard than DGC
19 complied with, a North Dakota company. They're asking
20 for an exemption. They're saying, "We shouldn't have to
21 do what others have had to do before us."

22 So what did DGC provide way back in 2007?
23 Because they keep holding out DGC as an example of a
24 safe pipeline for CO2 that's been in existence for many
25 years in North Dakota. Well, in their -- in the

1 application itself, in other words, it wasn't later in
2 the PSC hearing, in the application itself they provided
3 information on the dispersion modeling they had already
4 done, and it showed the extent to the area that would be
5 affected by a rupture or leak. They modeled a
6 catastrophic failure, a worst-case scenario. They did a
7 worst-case scenario of the highest concentration of CO2
8 at the greatest distances. It was a smaller pipeline,
9 12 inches, and they determined how far away that
10 concentration of CO2 would travel. They modeled at
11 multiple locations along the 167-mile pipeline in North
12 Dakota of that CO2 pipeline, much shorter. And they
13 considered weather conditions. Provided all of that on
14 the front end.

15 Well, what else did they do? In its
16 application, DGC had already developed an emergency
17 response plan. They had engaged in pre-emergency
18 planning and education. They had operational safety
19 precautions set up for the pipeline. They had emergency
20 response procedures in place. They had associated
21 agency coordination. They had addressed animal health
22 and safety and plant life effects. And they had --
23 importantly, they had already distributed emergency
24 preparedness information to local emergency responders
25 and law enforcement.

1 So they had already distributed all of that
2 information, engaged in all those efforts at the time
3 they submitted their application. I would suggest to
4 you DGC did what a responsible company building a CO2
5 pipeline would do. It was fully transparent with the
6 Commission, with the public, with emergency responders,
7 with law enforcement, and it was proactive in doing all
8 these things before it even submitted an application.

9 And I think the question the PSC has to ask
10 itself is: are we going to allow Summit to be held to a
11 lower standard, a different standard, than other CO2
12 pipelines in North Dakota have complied with previously?

13 And then in relation to the statutes, and I'm
14 not going to go over what Mr. Leibel already covered,
15 but they rely on the security system plan exemption
16 under NDCC 44-04-24, which Mr. Leibel provided a copy to
17 you. And subpart 2(a) defines critical infrastructure.
18 And they haven't explained how this Summit pipeline,
19 this CO2 pipeline, complies with the definition under
20 the statute of critical infrastructure. Because they
21 have to show "critical infrastructure" is defined as
22 something "so vital to the state that the incapacity or
23 destruction of these systems would have a debilitating
24 effect on security, state economic security, state
25 public health or safety, or any combination of those

1 matters."

2 Well, this is not vital to the state at all.
3 This is a private company bringing in waste, pollution,
4 from other states and asking to dump it in North Dakota.
5 It's their responsibility to show it's so vital to the
6 state and that it would affect the state economic
7 security and the other things that I mentioned. They
8 haven't done that. And so that's a required element
9 under that statute that they cannot meet.

10 It's also not a security system plan because it
11 doesn't relate directly to the physical or electronic
12 security of the system involved.

13 And bear in mind here that -- and, of course, we
14 haven't seen what they filed with the PSC, but what
15 their submission suggests is that they have filed only
16 the model outputs of the plume study with the PSC.
17 That's what they've represented in their filing, not the
18 entire plume study.

19 And they talk about DAPL and they request in
20 their brief that the PSC rely on some Associated Press
21 news articles. I can tell you that Mr. Curry is
22 incorrect in terms of what happened in DAPL. Our firm
23 has been involved since the summer of 2016 in
24 representing law enforcement on numerous legal matters
25 including all the lawsuits, the seven lawsuits,

1 currently on file in Federal Court in North Dakota
2 against law enforcement. So we have intimate knowledge
3 on that. And any damage on the DAPL pipeline occurred
4 before there was any product in that pipeline. And it
5 was not holes, as Mr. Curry suggested. And then he
6 points to a situation where someone shot a pipeline.
7 You don't need the security information to go out and
8 shoot at a pipeline or to figure out what the potential
9 damage could be. So the examples they're raising simply
10 aren't on point and aren't a basis to keep their
11 information confidential.

12 And all the arguments that they make about
13 Section 7(F) and Exemption 4, those all get the cart
14 before the horse because those are requirements once you
15 have obtained PHMSA approval. They concede they have
16 not obtained PHMSA approval for this pipeline.

17 And Mr. Curry talked about that there's been two
18 meetings by Summit with PHMSA and PHMSA is providing
19 some input. That's, once again, to my knowledge, not
20 evidence before the PSC. The only one who has said that
21 is Mr. Curry. There's been no witness who has come in
22 and testified at any hearing I was at where they said,
23 "Yes, we've gone to PHMSA, we've had two meetings, this
24 is the feedback they gave us." None of that is part of
25 the record in the case. So whether it's accurate or

1 not, but it's certainly not before the PSC. But they
2 concede they haven't provided their plume study to
3 PHMSA.

4 And in relation to the federal statutes, if you
5 look at 49 CFR 195.402(e) and 195.408 that they rely on
6 in their briefing in this case, those statutes have
7 nothing to do with dispersion modeling. They deal with
8 the procedures after the pipeline is built, after the
9 pipeline is approved by PHMSA, as to what local law
10 enforcement information is provided.

11 And we've conceded in our brief and we agree
12 with Mr. Leibel there are certain things that could be
13 confidential, that could be protected, that the public
14 doesn't need to know, such as, after the pipeline is
15 built, what a local law enforcement's plan might be
16 responding to emergencies. But what they're asking for
17 is not covered by these federal statutes and not
18 supported in any way their arguments.

19 And I thought it was interesting that Mr. Curry
20 indicated PHMSA has exclusive jurisdiction. So if PHMSA
21 has exclusive jurisdiction, shouldn't this Commission
22 wait until PHMSA weighs in on the new regulations that
23 are planned and in the works for 2024 before it
24 addresses their application overall? I mean, they're
25 essentially admitting today that their application is

1 premature if PHMSA has exclusive jurisdiction. But they
2 want to have it both ways. They want to say Burleigh
3 County with their ordinances, Emmons County with their
4 ordinance doesn't have jurisdiction because PHMSA does.
5 But they're saying PHMSA has exclusive jurisdiction so
6 the PSC should wait until PHMSA has weighed in.

7 And in relation to the federal statutes, when
8 you look at those, it also deals with a procedural
9 manual to be onsite and available in the event of a
10 leak. So all the statutes that they're relying on, the
11 federal statutes, are based upon what happens after the
12 pipeline is built and what information might be
13 confidential or a security concern. That's not what
14 we're dealing with here.

15 And they don't address the public health and
16 safety matters related to this. They don't talk about
17 allowing independent experts to review their plume
18 study. And they say, well, PHMSA has suggested to
19 Denbury -- Denbury and DGC that you have to do certain
20 things to improve your safety plan in the event of a
21 leak.

22 Isn't that the whole purpose of the PSC
23 scrutinizing and allowing the intervenors and the city
24 and the county and the citizens, is to scrutinize that
25 so that if there is some flaw, so that through

1 independent experts the questions can be asked so that
2 they can have an accurate dispersion modeling to present
3 to the PSC that may require some alterations or safety
4 changes?

5 Bear in mind here that we're talking about what
6 Mr. Curry defined as a high consequence area. That's
7 why my clients are involved in this matter, is because
8 the area where this pipeline is going through Burleigh
9 County, particularly in north and east Bismarck, is a
10 high consequence area as defined under the statutes and
11 under PHMSA. Under those circumstances, it's
12 particularly important to be allowed to vet this
13 information, to ask questions, to scrutinize that
14 information, to test it, to make sure it doesn't pose
15 any public safety risk.

16 And I'll simply close by saying I'm not as smart
17 as a Washington DC attorney and probably not near as
18 expensive, but my question is: what is Summit trying to
19 hide?

20 ALJ HOGAN: All right. Thank you.

21 Are there any Commission questions for either of
22 the intervenor attorneys?

23 COMMISSIONER CHRISTMANN: Not for me.

24 COMMISSIONER HAUGEN-HOFFART: I have no
25 questions.

1 SUBSTITUTE DECISIONMAKER DAWSON: No questions.

2 ALJ HOGAN: All right. Mr. Curry, you still
3 have two minutes so go ahead.

4 MR. CURRY: Okay. Thanks very much. A lot to
5 say in two minutes.

6 Summit's not trying to hide anything. Summit
7 has submitted a variety of sensitive security
8 information to the PSC for their review and we're happy
9 to continue conversations with the Commission on that
10 front. And if there is additional information, pieces
11 of information the Commission requires, we're happy to
12 have those conversations. So we're not trying to hide
13 anything.

14 A couple of other points I'll make. In terms of
15 Mr. Bakke's comment on why don't we just wait for
16 PHMSA's new rules. If you did that, no pipeline would
17 ever be built or operated in the United States. PHMSA's
18 constantly in the process of updating and changing its
19 rules. It has had CO2 pipeline regulations in place
20 with a good safety record since 1991. So I think
21 waiting for whatever PHMSA's going to do, which, you
22 know, could just be fine-tuning of those rules, I don't
23 think is in anybody's interests.

24 In terms of the arguments around FOIA issues,
25 that FOIA for some reason only attaches once PHMSA

1 approves a pipeline, PHMSA does not approve pipeline
2 facilities. It has a lot of jurisdiction, but it's not
3 a certificating agency in the way that, say, the Federal
4 Energy Regulatory Commission is for other types of
5 pipelines. PHMSA has a robust inspection and
6 enforcement program, but it doesn't approve facilities.

7 And the FOIA rules apply to any records in
8 PHMSA's possession. And we intend to apply these --
9 excuse me -- submit these dispersion model documentation
10 to PHMSA. So FOIA would apply to anything in the
11 agency's possession.

12 In terms of the comment that you could just
13 shoot -- you know where you could shoot a pipeline, you
14 know, you don't need any security sensitive information
15 to find that pipeline and shoot it, I think that
16 oversimplifies the point. The problem with broad public
17 release of the information that we're talking about is
18 that it allows you to selectively target an asset for
19 maximum destruction. So it's not just seeing a pipeline
20 and shooting at it. It's understanding kind of the
21 various places that, if you wanted to cause harm, you
22 could cause the most harm.

23 What else can I say? You know, in terms of the
24 44-04-24 arguments that this pipeline does not qualify
25 as critical infrastructure, I don't think the Commission

1 needs to reach that question. I think there are
2 independent bases for concluding that the materials
3 we've submitted are security system plans. You can find
4 those in 44-04-24 2(b)(3) through (6) which do not rely
5 on the designation of critical infrastructure.

6 Dakota Gasification, you know, we live in a
7 different world, unfortunately, than we did in 2007. I
8 can tell you just from my own experience with clients
9 all around the country, in 2007 people were a lot less
10 worried about pipeline security than they are today. A
11 lot has happened since then. So I have clients who, you
12 know, probably would have submitted things without
13 thinking about it. People don't do that now because of
14 incidents that have occurred on DAPL and other
15 pipelines. People are much more careful and PHMSA is
16 much more careful about the information. So there's
17 kind of an arc of history here that we need to take into
18 consideration. So whatever might be available in past
19 dockets, I think, reflected the context of that time and
20 we're in a different context now.

21 I'll also add that Summit has engaged in -- I
22 think there was an implication Summit has not engaged
23 with emergency responders. Summit has engaged with
24 emergency response agencies in all the affected
25 counties. It's been in contact with them and has had

1 conversations with them. There's more work to be done
2 there, but that outreach and effort has begun and has
3 been robust.

4 I think that brings me to the end of my time
5 here. I'm happy to provide any of the additional
6 information that was not included in our previous
7 briefing to you all in a subsequent filing if you wish
8 with citations to authority and documentation. Thank
9 you.

10 ALJ HOGAN: All right. Thank you.

11 Any Commission questions for Mr. Curry?

12 COMMISSIONER CHRISTMANN: None for me.

13 COMMISSIONER HAUGEN-HOFFART: No questions.

14 SUBSTITUTE DECISIONMAKER DAWSON: None.

15 ALJ HOGAN: All right. Well, the Commission
16 does not intend to decide this motion this morning. The
17 Commission will take this matter under advisement and
18 issue an order at a later date.

19 Is there anything else for the record before we
20 conclude?

21 All right. Seeing none, I will note for the
22 record that it is 9:29 a.m. and that will conclude our
23 hearing for today. Thank you.

24 -----

25

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Dated this date of October 3, 2025.

*Lisa A. Hulm*_____

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