

May 5, 2023

HAND DELIVERED

Mr. Steve Kahl
Executive Secretary Director
North Dakota Public Service Commission
600 E. Boulevard, Dept. 408
Bismarck, ND 58505-0480

**RE: SCS Carbon Transport LLC
Midwest Carbon Express Project
Case No. PU-22-391**

Dear Mr. Kahl:

Please find enclosed herewith for filing with the North Dakota Public Service Commission, an original and five (5) copies of the following:

1. Response to Intervenors' Objections and Request for Hearing.

Also enclosed herewith, please find a Compact Disc (CD) containing this letter and the above-referenced documents in PDF format.

Should you have any questions, please advise.

Sincerely,

/s/Lawrence Bender

LAWRENCE BENDER

LB/tjg
Enclosures

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**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF NORTH DAKOTA**

IN THE MATTER OF THE APPLICATION
OF SCS CARBON TRANSPORT LLC FOR
A CERTIFICATE OF CORRIDOR
COMPATIBILITY AND ROUTE PERMIT
FOR THE MIDWEST CARBON EXPRESS
PROJECT IN BURLEIGH, CASS, DICKEY,
EMMONS, LOGAN, MCINTOSH,
MORTON, OLIVER, RICHLAND AND
SARGENT COUNTIES, NORTH DAKOTA

CASE NO. PU-22-391

OAH FILE NO. 20230002

Response to Intervenor's Objections and Request for Hearing

On May 1, 2023, Intervenor John H. Warford, Jr., as Trustee of the John H. Warford, Jr. Revocable Trust ("Warford") filed an Objection to the Application of SCS Carbon Transport LLC ("Summit") to Protect Information (the "Objection"). *See* Docket No. 201, Case No. PU-22-391. Also on May 1, 2023, Intervenor Warford filed a Request for Hearing pursuant to § 69-02-09-05 and § 69-02-09-06 of the North Dakota Administrative Code (the "Request for Hearing"). *See* Docket No. 202, Case No. PU-22-391. The Intervenor's represented by Steven Leibel, David Knoll and Brian E. Jorde (the "Landowner Intervenor's") filed a Joinder to the Objection on May 1, 2023 (the "Joinder"). *See* Docket No. 203, Case No. PU-22-391. The Joinder did not purport to join in Intervenor Warford's Request for Hearing.

Summit, by and through its attorneys of record, responds to the Objection, Request for Hearing and Joinder as follows:

1. The North Dakota Public Service Commission ("Commission") has specific procedures for the protection of information from public disclosure. *See* Chapter 69-02-09 of the North Dakota Administrative Code (NDAC).

2. On April 21, 2023, Summit filed an Application to Protect Information pursuant to NDAC §§ 69-02-09-01 and 69-02-09-01 (the “Application to Protect Information”). *See* Docket No. 194, Case No. PU-22-391.

3. The Application to Protect Information seeks to prevent from public disclosure certain information relating to the dispersion modeling and risk analysis conducted in connection with Summit’s carbon dioxide pipeline which is the subject of this proceeding.

4. The Application to Protect Information sets forth the general description of the nature of the information sought to be protected, the laws and rules upon which protection is based, and the specific bases upon which the information qualifies for protection, thus meeting the requirements of NDAC § 69-02-09-01.

5. The Application to Protect Information also requests that the Commission waive the requirement to file a redacted, public version of the information sought to be protected pursuant to NDAC § 69-02-09-01(5).

6. The Application to Protect Information was filed with the Commission precisely as required by NDAC § 69-02-09-02.

7. Intervenor Warford and the Landowner Intervenors have failed or refused to follow the provisions of NDAC Chapter 69-02-09 with respect to their response to Summit’s Application to Protect Information.

8. Specifically, NDAC § 69-02-09-03 provides that when “an application for protection of information is filed, the commission staff shall examine the information and application, *and file and serve a response that includes a recommendation on whether the information qualifies for protection,*” and that “[t]he commission will make a determination on the

application from the application, the recommendation, and any response received from those served.”

9. Unless Intervenor Warford and the Landowner Intervenor are privy to information not available to Summit, Commission staff have not yet made a recommendation to the Commission and the Commission has not yet rendered a decision on Summit’s Application.

10. Accordingly, Intervenor Warford’s Objection and the Landowner Intervenor’s Joinder to the Objection are premature because Commission staff has not yet made a recommendation to the Commission and served said recommendation upon the parties to this proceeding.

11. Indeed, Intervenor Warford and the Landowner Intervenor presumably would not object to a recommendation by Commission staff that the information sought to be protected by Summit does not qualify for such protection.

12. Furthermore, Intervenor Warford’s Request for Hearing is also premature.

13. Section 69-02-09-05 of the NDAC sets forth the procedure to request a hearing *upon a determination by the Commission* on Summit’s Application.

14. For the benefit of Intervenor Warford and the Landowner Intervenor, NDAC § 69-02-09-05 provides, in its entirety, as follows:

1. Upon a determination that the information does not qualify for protection, the applicant will be notified and has seven days to request a hearing before the commission, or obtain appropriate injunctive relief from the courts. If no hearing is requested or the commission is not otherwise restrained, the information will become part of the public record without protection. The burden of proof in such a hearing is on the party seeking to prevent disclosure.
2. If any person disagrees with the designation of information as protected or with its nondisclosure, the person shall first attempt to informally dispose of the dispute with the party seeking to prevent disclosure. If the dispute cannot be resolved, any person may request a hearing before the commission to determine the protected status.

15. The plain language of NDAC § 69-02-09-05 leaves little room for interpretation, i.e. the Commission must have rendered a decision on Summit's Application to Protect Information before a request for a hearing before the Commission may be made.

16. Furthermore, NDAC § 69-02-09-05(2) states that if "any person disagrees with the designation of information as protection or with its nondisclosure, the person shall first attempt to informally dispose of the dispute with the party seeking to prevent disclosure," and if the dispute cannot be resolved, "any person may request a hearing before the Commission."

17. Accordingly, any supposed attempts by Intervenor Warford to informally dispose of the dispute are also premature for the same reasons that the Request for Hearing is premature, namely, that the Commission has not yet rendered a decision on the Application to Protect Information.

18. For the reasons set forth herein, Summit respectfully requests that the Commission **DENY** Intervenor Warford's Objection and Request for Hearing, and the Landowner Intervenor's Joinder therein, on the basis that such matters are premature.

19. Summit also requests that no further consideration be given to the Objection, Request for Hearing or Joinder until such time as Intervenor Warford and Landowner Intervenor have re-submitted any such objections, requests or joinders in accordance with the rules and procedures set forth in Chapter 69-02-09 of the North Dakota Administrative Code.

20. If the Commission has reviewed Intervenor Warford's Objection, Request for Hearing and the Landowner Intervenor's Joinder prior to receiving a recommendation from Commission staff, Summit requests that the Administrative Law Judge in this proceeding recommend that the Commission disregard such filings and to further advise the Commission that

such filings should not be taken into consideration prior to receiving a recommendation from Commission staff and the service of such recommendation on the parties to this proceeding.

Dated this 5th day of May, 2023.

FREDRIKSON & BYRON, P.A.

By: 

LAWRENCE BENDER, ND Bar #03908
1133 College Drive, Suite 1000
Bismarck, ND 58501
(701) 221-8700
lbender@fredlaw.com

Attorneys for SCS Carbon Transport LLC

**‘STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

**SCS Carbon Transport LLC
Midwest Carbon Express CO2 Project
Sitting Application**

CASE NO. PU-22-391

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the following:

1. Letter to S. Kahl forwarding documents for filing; and
2. Response to Intervenor’s Objections and Request for Hearing.

were, on May 5, 2023, filed with the North Dakota Public Service Commission and served electronically to the following:

Hope L. Hogan
hlhogan@nd.gov

John Hamre
jghamre@nd.gov

John Schuh
jschuh@nd.gov

Zachary Pelham
zep@pearce-durick.com

Randall J. Bakke
rbakke@bgwattorneys.com

Bradley N. Wiederholt
bwiederholt@bgwattorneys.com

Steven Leibel
steve@bismarck-attorneys.com

David Knoll
david@bismarck-attorneys.com

Brian E. Jorde
bjorde@dominalaw.com

Kevin Pranis
kpranis@liunagroc.com

Dated this 5th day of May, 2023.

FREDRIKSON & BYRON, P.A.

By: /s/Lawrence Bender

Lawrence Bender, ND Bar #03908
1133 College Drive, Suite 1000
Bismarck, ND 58501
lbender@fredlaw.com
(701) 221-8700