

Reply to SCS Carbon Transport LLC re: LIUNA Interrogatories and Motion to Compel Discovery

May 19, 2023

Hope Hogan, Administrative Law Judge
Office of Administrative Hearings
2911 North 4th Street, Suite 303
Bismarck, ND 58503

Dear Judge Hogan:

Please find, attached, a Reply and Motion to Compel Discovery in reference to Interrogatories from Laborers District Council of Minnesota and North Dakota ("LIUNA") to Applicant SCS Carbon Transport LLC in the above-referenced docket. If you have any questions, please feel free to contact me at 612.224.6464 or kpranis@liunagrocc.com.

Sincerely,



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NORTH DAKOTA PUBLIC SERVICE COMMISSION

<p>In the Matter of the Application by SCS Carbon Transport LLC for the Midwest Carbon Express CO2 Pipeline Project Siting Application</p> <p>ND PSC Docket No. PU-22-391 OAH File No. 20230002</p>	<p>Laborers District Council of Minnesota and North Dakota Reply to SCS Carbon Transport LLC and Motion to Compel Discovery</p>
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The Laborers District Council of Minnesota and North Dakota (“LIUNA”) hereby replies to the response filed by SCS Carbon Transport LLC (“Applicant”) on May 15, 2023 to Interrogatories filed by LIUNA on May 1, 2023. We respectfully requests that the Administrative Law Judge (“ALJ”), issue an order compelling Applicant to provide requested information pursuant to North Dakota Rules of Civil Procedure 33 and 37

LIUNA was disappointed to receive the Applicant’s reply to our limited request for information on the past experience of one of the pipeline contractors selected to build the proposed Midwest Carbon Express pipeline in North Dakota. Applicant not only failed to provide any of the requested information, but apparently could not be bothered to make fully-formed arguments, much less provide evidence, to support any of its purported objections.

Applicant seems to believe it sufficient to declare the track record of the contractor that will build the largest, riskiest, and most sensitive portion of their project in North Dakota to be irrelevant, while throwing out a spray of thinly-supported and often inconsistent supplementary objections. But it is Applicant’s chief witness who introduced a contractor’s past experience as a relevant consideration – first during the initial hearing in Bismarck and again during the second hearing in Gwinner. Having opened the contractor qualification door to advance its case, Applicant cannot now pull the door shut to keep inconvenient facts out of the record.

At the conclusion of the current proceeding, the North Dakota Public Service Commission must decide how and whether to weigh evidence provided by Applicant, LIUNA, and other participants concerning the capabilities of Applicant’s chosen contractors and their relevance to the decisions at hand. Until then, however, LIUNA should be permitted to build its case and help to develop the record as a full and equal party to these proceedings as set out in the North Dakota Rules of Civil Procedure.

We respectfully request that Your Honor compel Applicant to produce the requested information, which is directly relevant to evaluating Applicant’s own claims regarding the project, and potentially relevant to the Commission’s ultimate decisions in this case. To the degree that Applicant asserts that meeting certain portions of the request would be impossible or unreasonable, we ask that Applicant be required to specify the information

that Applicant cannot provide or seek to withhold and provide evidence in support of such claims.

We respond below to specific objections raised by Applicant in the order in which they were presented.

Objections to the relevance of requested information

SCS objects to the Interrogatories because they are unduly burdensome and disproportionate to the needs of this proceeding because they seek irrelevant information.

SCS objects inasmuch as the Interrogatories seek information relating to anything other than SCS's pipeline facilities in North Dakota. Only SCS's North Dakota pipeline facilities are covered by its permit application in this proceeding.

SCS has not provided any explanation or evidence to support the claim that production of the requested information would create an undue burden. In fact, it can reasonably be inferred from the sworn testimony of Applicant's chief witness, Mr. James Powell, that Applicant is already in possession of substantial information about past pipeline projects completed by Pumpco.

For example, during the April 14 hearing, Mr. Powell stated that pipeline contractors Precision and Pumpco "both have constructed hundreds of miles of pipeline in this part of the country," and that "Pumpco has installed pipelines in North Dakota as well." Mr. Powell continued by asserting that Applicant had "chosen contractors with very strong safety records, demonstrated performance that they can effectively and efficiently install the pipelines."

Mr. Powell's sworn testimony appears to indicate that Applicant has gathered extensive information on past projects completed by Pumpco as part of the company's contractor selection process. If this were not the case, it would raise troubling questions about Applicant's contractor selection process, not to mention the reliability of Mr. Powell's testimony concerning Pumpco's demonstrated capabilities and track record.

LIUNA agrees with Applicant's second claim that only its North Dakota pipeline facilities are covered by its permit application in this proceeding, but we contend that contractor qualifications are potentially relevant to this proceeding given the scale of the proposed project and the serious concerns expressed by local residents regarding potential safety hazards and impacts to working lands.

The potential relevance of pipeline contractors' capabilities and experience to the Commission's ultimate determination in this proceeding has been established by the testimony of multiple witnesses, including Mr. Powell. In addition to LIUNA witness Evan Whiteford, the relevance of the capability and reliability of contractors selected to build the project was underscored by intervenor expert witness Curtis Jundt, who spent much of his career developing, building and maintaining pipelines in North Dakota; Summit witness John Godfrey, who was presented by Applicant as a pipeline safety expert; and North Dakota Agriculture Commissioner Doug Goehring who spoke about the risks associated with improper construction practices based both on his experience in his current role and his personal experience building water pipelines.

Most important, however, is the fact that Applicant clearly believes the past experience of pipeline contractors selected to build the project is relevant to the Commission's

deliberations. It was Applicant's chief witness who first raised the topic when he identified the contractors Applicant intends to employ and touted their past experience building pipelines in response to a general question about construction plans in which Mr. Pelham made no reference to contractor qualifications.

The second such discussion of contractor qualifications in these proceedings was likewise initiated by Mr. Powell on March 28 in Gwinner. Once again, Mr. Powell introduced this topic in response to a general question from Mr. Pelham about construction and safety. Mr. Powell answered the question, in part, by summarizing the extensive experience of the contractor responsible for construction in Sargent County – Precision Pipeline – on past projects built in the upper midwest. According to Mr. Powell:

When it comes to construction, especially in Sargent and Dickey Counties and along this lateral, we're gonna employ a contractor that's a very, what I would consider a top tier contractor in the pipeline industry. They're based out of Wisconsin. They have constructed extensive miles – a lot of miles of pipeline in the Midwest in this part of the country where it's cold and the conditions are not similar to other parts of the country where a lot of pipeline activity is going on. So that contractor is very qualified, experienced in the area. (Emphasis added.)

Applicant cannot have it both ways, selectively sharing information about contractor experience when they believe it suits their case, while declaring the topic irrelevant when the facts are unhelpful. Applicant should be required to back up the claims that Pumpco has “built hundreds of miles of pipeline in this part of the country,” has “installed pipeline in North Dakota”, and has “demonstrated performance” with “very strong safety records” by providing a list of relevant projects that Applicant presumably already possesses.

Objections based on the ability of or need for Applicant to provide requested information

SCS objects inasmuch as the Interrogatories seek information protected by the attorney-client privilege, the attorney work-product doctrine, or any other applicable privilege, rule, doctrine, or immunity, whether created by statute or common law.

SCS objects inasmuch as the Interrogatories seek information that contains proprietary or confidential business information or is subject to trade-secret protections or that contains information for which SCS owes a third party an obligation of confidentiality or privacy, whether contractual or under any federal or state laws or regulations.

SCS objects to all Interrogatories that seek, and disclaims any obligation to identify or furnish, documents or information that LiUNA actually or constructively possesses or to which LiUNA has access through alternative means.

SCS objects inasmuch as the Interrogatories seek information from third parties and information that is not within SCS's possession, custody, control, or personal knowledge of SCS.

Applicant fails in its reply to specifically identify to which elements of the interrogatory the stated objections might apply, as required by Rule 33. Further, Applicant provides no explanation or evidence to support the claims upon which the objections are founded.

The objections as stated are not merely unsupported but often inconsistent. For example, the requested information cannot be Applicant's confidential or property yet also already in

LIUNA's possession. Nor is it credible that relevant third-party information is unavailable to Applicant yet easily accessible to LIUNA.

Inasmuch as Applicant believes portions of the requested information to be in LIUNA's possession or easily accessible (e.g. listed on the contractor's website), Applicant should identify that information and substantiate the argument. On the other hand, where Applicant contends that requested information is confidential, Applicant bears the burden of identifying the specific information merits confidential treatment and demonstrating that such a designation is appropriate.

To date, Applicant has provided no explanation of why a list of construction projects, at least some of which likely required the contractor to obtain public permits, should be treated as a trade secret. Even if trade secret protections were appropriate, Applicant could protect confidential information by sharing it pursuant to a binding non-disclosure agreement of the type commonly used in similar regulatory proceedings.

With respect to third-party information, the testimony of Mr. Powell strongly suggests that much, if not all, of the information requested is already in Applicant's possession and should therefore be shared with LIUNA. Further, Applicant provides no indication that any effort has been made to ascertain what relevant information not already in Applicant's possession could be voluntarily obtained from the contractor in question with minimal effort by either party.

Where Applicant cannot provide requested information because it purportedly does not exist, cannot reasonably be obtained, or cannot be shared, Applicant is responsible for identifying the specific information and elements of the request to which these objections apply, substantiating such claims, and making reasonable efforts to work around obstacles (e.g. voluntarily requesting information from the contractor or sharing confidential information under a non-disclosure agreement). Further, barriers to meeting portions of the requested information should not prevent Applicant from immediately sharing relevant information already in its possession that are not provably subject to trade secret or similar protections.

Dated: May 19, 2023

Respectfully Submitted,

LIUNA Minnesota and North Dakota



By: Kevin Pranis, Marketing Manager
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In the Matter of the Application by SCS
Carbon Transport LLC for the Midwest
Carbon Express CO2 Pipeline Project
Siting Application

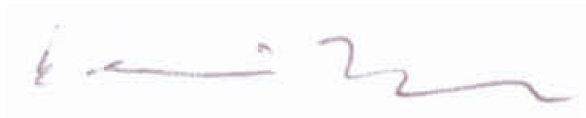
ND PSC Docket No. PU-22-391

OAH File No. 20230002

CERTIFICATE OF SERVICE

I, Kevin Pranis, hereby certify that I have this day filed the foregoing reply and motion with the North Dakota Public Service Commission and served the enclosed list of persons by electronic correspondence to the addresses listed below

Dated this 19th day of May, 2023



Kevin Pranis

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