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ATTORNEYS AT LAW

June 1, 2023

Via Hand-Delivery

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

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

Dear Mr. Kahl:

Enclosed for filing in Case No. PU-22-391, please find *Bismarck Area Intervenors' Petition to Reopen the Proceedings to Schedule Additional Public Hearing Date*, and *Certificate of Service*, with seven copies of same.

Please do not hesitate to contact the undersigned if you have any questions about this filing.

Very Truly Yours,

/s/ Randall J. Bakke

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Petition to Reopen Proceedings and to Schedule Additional Public Hearing Date
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STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

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

Case No: PU-22-391
OAH File No: 20230002

**BISMARCK AREA INTERVENORS' PETITION TO REOPEN THE
PROCEEDINGS TO SCHEDULE ADDITIONAL PUBLIC HEARING DATE**

Intervenors Warford, Wachter and Moldenhauer¹ hereby petition the Commission to add an additional public hearing date to the PSC's calendar in order to allow for additional evidence and public comment to be provided in relation to SCS Carbon Transport LLC's ("Summit") *Application*. Summit has essentially waged a campaign of intentional non-disclosure of evidence and other information that is directly relevant to the PSC's siting determination under North Dakota law. That relevant evidence is in the sole possession of Summit, but Summit refuses to disclose it or is simply raising objections apparently in the hopes of "running out the clock" on the evidentiary phase of these proceedings. The additional public hearing date is necessary to allow for the resolution of these discovery and hearing related disputes, and to address intervenor's request that Summit's withheld evidence be ordered to be produced in these proceedings as the withheld evidence is critical to the factors North Dakota law has mandated the Commission must consider. The public interest requires a fair hearing and due consideration of the information Summit refuses to disclose in these proceedings.

¹ This petition is filed by Intervenors John H. Warford, Jr. as Trustee of the John H. Warford, Jr. Revocable Trust ("Warford"), Chad Wachter, and Chad Moldenhauer (collectively, "Bismarck Area Intervenors"). This petition is filed pursuant to N.D.A.C. § 69-02-06-01 which allows a party to "petition to reopen the proceeding for the purpose of taking additional evidence". While the last public hearing has not been completed yet, and to the extent the ALJ or the Commission deems this petition to be premature, Bismarck Area Intervenors will re-file this petition upon completion of the June 2nd Bismarck public hearing.

The below timeline of some of the subject matter of the pending disputes demonstrates why more hearing time is necessary and advisable:

Summit's Investor Information

- April 11, 2023 – Summit's COO Powell ("Powell") is questioned by Intervenor's about the identity of Summit's investors at public hearing in Wahpeton, ND.
- April 28, 2023 – Summit provides an incomplete investor list to the PSC containing names and websites of only five (5) corporate entities. (Docket # 199)
- May 3, 2023 – Warford serves discovery requests on Summit, seeking Summit's investor and member information. (Docket # 209).
- May 9, 2023 – At the PSC hearing in Linton, Powell testifies under oath that "hundreds of investors is a fair assumption" to a question about the number of total investors in the Summit pipeline. Summit's counsel objects that investor questions should be asked of Powell at the June 2nd hearing in Bismarck. Counsel for Warford ceases questioning Powell on the topic of investors.
- May 16, 2023 – Warford serves Rule 30(b)(6) deposition notice on Summit seeking investor and member information.
- May 17, 2023 – Summit serves blanket objections to Warford's discovery requests and produces no responsive or substantive information at all.
- May 19, 2023 – Summit advises it does not intend to call any witnesses at the continued PSC hearing in Bismarck, ND on June 2, 2023, which would necessarily preclude anyone asking Summit questions about its investors. *See* ALJ Order on Motion to Set Testimony Time Limits (Docket # 240).
- May 19, 2023 – Summit's counsel attends meet and confer with Warford's counsel and states categorically Summit stands on its objections and will not produce any substantive discovery, and, will not produce a witness or witnesses to respond to Warford's request for Rule 30(b)(6) deposition, including information about its investors.

Summit's Plume Modeling

- March 14, 2023 – At the Bismarck public hearing, the Commission requested Summit to provide it with a copy of its plume modeling, and Summit informed the PSC it would provide a copy but that its plume modeling is protected as a "national security" interest or words to that effect.
- PHMSA regulations mandate Summit develop a program "to educate the public, appropriate government organizations, and persons engaged in excavation related activities on: [] (2) Possible hazards associated with unintended releases from [] carbon dioxide pipeline facility" and "(4) Steps that should be taken for public safety in the event of a [] carbon dioxide release[.]" 49 CFR § 195.440. No such program has been communicated to the City of Bismarck, Burleigh County, or any of their first responders.

- April 21, 2023 – Summit files its Application to protect its plume modeling from disclosure to anyone but the PSC, arguing the plume modeling is part and parcel of security system planning. (Doc. No. 194).
- May 3, 2023 – Warford serves discovery requests on Summit, seeking Summit’s plume modeling information. (Docket # 209).
- May 12, 2023 – PSC staff counsel Pelham recommends the administrative law judge (“ALJ”) grant Summit’s petition to seal its plume modeling. (Docket # ___).
- May 16, 2023 – Warford serves Rule 30(b)(6) deposition notice on Summit seeking plume modeling information
- May 17, 2023 – Summit serves blanket objections to Warford’s discovery requests and produces no responsive or substantive information concerning its plume modeling.
- May 24, 2023 – ALJ Hogan emails the parties advising the Commission would like to set a hearing date in late June or July of 2023 to consider Summit’s application to seal its plume modeling. No hearing has been set to date.

Summit’s Bismarck Route Analysis

- April 11, 2023 – At one or more public hearings prior the April 11th public hearing, the Commission asks Summit if it has considered moving the pipeline route away from Bismarck, specifically to the south of Bismarck.
- May 9, 2023 – At the public hearing in Linton, Powell testifies, “We are developing an analysis of a southern crossing on the south side of Bismarck versus the current route on the north side of Bismarck and the final draft of that analysis should be ready mid-May.”
- May 30, 2023 – Summit files with the PSC its Bismarck Route Analysis, with no indication of the person or persons who prepared it or other sufficient indicia of reliability.

Warford’s Motion to Compel & Request to ALJ to Issue Subpoena to Summit

- May 22, 2023 – Warford files his motion seeking to compel Summit to provide its investor information, information concerning its plume modeling, and information about ethanol plants that have signed up to utilize the pipeline, and a witness or witnesses to testify on those topics. Warford provides his legal basis for requesting such information. (Docket # 236).
- May 30, 2023 – Summit responds to Warford’s motion to compel raising procedural technicalities and doubling down on its refusal to provide any substantive information concerning investors, its plume modeling, and information about ethanol plants that have signed up to utilize the pipeline, as such evidence is allegedly irrelevant to the PSC’s determination. (Docket # 275).
- No hearing has yet been set by the ALJ to consider Warford’s motion to compel.

- June 1, 2023 – Warford files a motion to ALJ Hogan requesting the issuance of a hearing subpoena (and alternatively a Rule 30(b)(6) deposition notice) to Summit requiring it to produce a witness or witnesses to testify about investor information, information concerning its plume modeling, information about ethanol plants that have signed up to utilize the pipeline, and the Bismarck Route Analysis.

The North Dakota statute that governs the Commission’s siting determination relevant to Summit’s *Application* provides as follows:

The commission is guided by, but is not limited to, the following considerations, when applicable, to aid the evaluation and designation of sites, corridors, and routes:

1. Available research and investigations relating to the effects of the location, construction, and operation of the proposed facility on public health and welfare, natural resources, and the environment.
2. The effects of new gas or liquid energy conversion and gas or liquid transmission technologies and systems designed to minimize adverse environmental effects.
3. The potential for beneficial uses of waste energy from a proposed gas or liquid energy conversion facility.
4. Adverse direct and indirect environmental effects that cannot be avoided should the proposed site or route be designated.
5. Alternatives to the proposed site, corridor, or route that are developed during the hearing process and which minimize adverse effects.
6. Irreversible and irretrievable commitments of natural resources should the proposed site, corridor, or route be designated.
7. The direct and indirect economic impacts of the proposed facility.
8. Existing plans of the state, local government, and private entities for other developments at or in the vicinity of the proposed site, corridor, or route.
9. The effect of the proposed site or route on existing scenic areas, historic sites and structures, and paleontological or archaeological sites.
10. The effect of the proposed site or route on areas that are unique because of biological wealth or because the site or route is a habitat for rare and endangered species.
11. Problems raised by federal agencies, other state agencies, and local entities.

N.D.C.C. § 49-22.1-09. Additionally, the PSC’s own administrative code provision relevant to applications like Summit’s requires applicants to set forth the “factual basis demonstrating that the proposed facility is of such length, design, location or purpose that it will produce **minimal**

adverse effects.” N.D.A.C. § 69-06-06-01(2)(m) (emphasis added). As shown below, the information the Bismarck area Intervenors seek from Summit is relevant to many of the above statutory factors and relevant to Summit’s factual basis to show its carbon dioxide pipeline in close proximity to Bismarck will have “minimal adverse effects”.

The pending disputes that require the reopening of these proceedings to allow for additional evidence concern the following categories of information Summit refuses to divulge:

1. **Dispersion Analysis / Plume Modeling Information** – Directly relevant to several of the above statutory factors, especially the “available research and investigations relating to the effects of the location, construction, and operation of the proposed facility on public health and welfare, natural resources, and the environment”, effect on the “public health and welfare, environment and natural resources”, as well as on its effect on the “existing plans of the [] local government, and private entities for other developments at or in the vicinity of the proposed site, corridor, or route.”
2. **Summit Carbon Investor / Member Agreements and Payment Information** – Directly relevant to “problems raised by . . . other state agencies” through the prohibition against foreign land ownership pursuant to legislation effective in August of 2023 including S.B. 2371, Development by a Foreign Adversary – Prohibition and H.B. 1135 Relating to Exceptions to the Acquisition of Agriculture Land by Foreign Governments. Irrespective of these statutes, the PSC and intervenors are entitled to Summit’s complete investor information to address the factors described in N.D.C.C. 49-22.1-09.
3. **Summit Carbon Pipeline Utilizers (Ethanol Plants, etc.)** – Directly relevant to the direct and indirect economic impacts of the proposed facility, the potential for beneficial uses of waste energy, as well as the several factors above implicating adverse environmental effects that will or may affect landowners and citizens generally.
4. **Bismarck Route Analysis** – Directly relevant to the “alternatives to the proposed site, corridor, or route that are developed during the hearing process and which minimize adverse effects.”

Summit and Summit alone possesses all of this information, and all of it is highly relevant to the Commission’s decision on the pending *Application*. Regardless of the relevancy to its *Application*, Summit refuses to provide any of this information, and thus must be compelled to provide it. Summit’s hide the ball tactics, blatant “gate-keeping” of relevant evidence, and lack of

transparency with the PSC and the public should not be allowed to continue. The Commission should grant additional hearing time in order to allow for these disputes to be resolved and to allow for additional evidence to be provided on these topics before the Commission and before the public. The public interest requires additional hearing time in order that such important information can come to light. The PSC cannot and should not address Summit's *Application* until all of the requested information and testimony is provided by Summit and is fully vetted by the PSC at an additional hearing date.

Dated this 1st day of June, 2023.

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By: 

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STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

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

Case No: PU-22-391
OAH File No: 20230002

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the following documents:

1. *Bismarck Area Intervenors' Petition to Reopen the Proceedings to Schedule Additional Public Hearing Date; and*
2. *Certificate of Service.*

were on June 1, 2023, filed with the North Dakota Public Service Commission and served electronically to the following:

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Dated this 1st day of June, 2023.

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