

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

**ORDER ON INTERVENOR WARFORD'S
MOTION TO COMPEL DISCOVERY**

[1] On May 3, 2023, Intervenor John H. Warford, Jr. as Trustee of the John H. Warford, Jr. Revocable Trust (Warford) served Applicant SCS Carbon Transport LLC (Summit) with Interrogatories and Request for Production of Documents. Warford's request contained four interrogatories and eight requests for production of documents. The general nature of the requests are dispersion analysis/plume modeling information; Summit investors/member agreement and payment information; and Summit pipeline utilizers (ethanol plants, etc.).

[2] Summit responded to the Interrogatories on May 17, 2023. Summit's response provided no information and only listed multiple objections to the requests for information including objections that the requests were untimely, unduly burdensome, and that the requested information was irrelevant or confidential.

[3] On May 16, 2023, Warford served a notice of deposition of Summit pursuant to N.D.R.Civ.P. 30(b)(6). The scheduled date for deposition was May 23, 2023. The notice listed 38 topics and subtopics for the deposition regarding Summit investors, the plume studies, and information regarding the ethanol plants who plan to utilize the pipeline. Summit objected to the deposition and did not produce a representative to be deposed.

[4] On May 22, 2023, Warford filed a motion to compel requesting an order compelling Summit to provide the requested information.

[5] On May 26, 2023, Summit filed a response to Warford's motion to compel. Summit requests the motion be denied. Regarding the deposition, Summit argues that the PSC administrative procedure does not allow depositions and reasonable notice for the deposition was not given considering the scope of the topics and location of potential witnesses. Regarding the interrogatories, Summit argues the motion to compel is premature, the discovery requests are untimely, and the information sought is irrelevant or unreasonably duplicative.

[6] This action is subject to the provisions of the Administrative Agency Practice Act (AAPA). Under the AAPA, the parties are permitted to conduct discovery in accordance with the North Dakota Rules of Civil Procedure. N.D.C.C. § 28-32-33. The Rules 33 and 37 are applicable to the pending motion. Under Rule 37:

(1) In General. On notice to other parties and all affected persons, a party may move for an order compelling discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make discovery in an effort to obtain it without court action.

N.D. R. Civ. P. 37(a)(1). Warford attempted to confer in good faith regarding discovery.

[7] Under Rule 26, the scope of discovery is:

(1) In General.

(A) Scope. any nonprivileged matter that is relevant to any party's claim or defense, including the existence, description, nature, custody, condition, and location of any documents, electronically stored information, or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order the discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(1)(B)(i).

(B) Limitations on Frequency and Extent.

(i) When Required. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules if it determines that:

- discovery sought is unreasonably cumulative or duplicative, or it can be obtained from some other source that is more convenient, less burdensome, or less expensive;

- the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
- the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

N.D. R. Civ. P. 26(b)(1)(A) – (B).

[8] Regarding depositions, a deposition notice of a person must be given “reasonable” written notice to every other party. N.D. R. Civ P. 30(b)(1). When deposing a corporation or entity, the rules provide:

In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination. A subpoena must advise a nonparty organization of its duty to confer with the serving party and to designate each person who will testify. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

N.D. R. Civ. P. 30(b)(6).

[9] Given the scope of the deposition and the current stage of this proceeding, a May 16, 2023 notice for a deposition scheduled on May 23, 2023 is not reasonable. There are no grounds to compel an appearance for the requested deposition.

[10] Warford summarizes the topics of the interrogatories as (1) dispersion analysis/plume modeling information, (2) Summit Carbon Investor/Member Agreement and Payment Information, and (3) Summit Carbon Pipeline Utilizers (Ethanol Plants, etc.).

[11] On April 21, 2023, Summit filed an Application to Protect Information. Summit requested certain security system plans be protected as confidential information. The information Summit seeks protection for includes its plume study/analysis. The Intervenor filed an objection to the Application and requested a hearing. The Commission has not yet issued an order on the Application and indicated it plans to schedule a hearing on the Application. Because the dispersion analysis and plume modeling is currently subject to a pending application for confidential status, any order to compel disclosure of that information is premature.

[12] Warford's motion to compel is not premature since Summit served answers to the discovery requests.

[13] The ALJ is not aware of any finding by the Commission that depositions are not allowed under its rules. The rule that specifies the duties of a hearing officer lists "taking depositions or cause depositions to be taken" as an authority delegated to the hearing officer. *See* N.D.A.C. § 69-02-04-07.

[14] While the scope of discovery and the issues specified for hearing are broad, Summit raises valid arguments about the relevance of the information sought concerning its investors and the pipeline utilizers. Summit has been questioned regarding these topics at previous hearings. It's unclear why Intervenor Warford has waited until the eve of the final hearing and close of the evidence to serve discovery requests. Even if discovery was compelled at this late stage of the proceeding, it's unknown how Intervenor Warford intends to provide any new evidence to the Commission. The Commission has not, to date, indicated any intention of scheduling further hearings for this case and no such formal request is pending with the Commission. Regardless of whether the evidence is relevant, or likely to lead to relevant evidence, the request for compelled discovery is untimely.

IT IS HEREBY ORDERED:

[15] Intervenor Warford's Motion to Compel is **DENIED**.

Dated at Bismarck, North Dakota this 1 day of June 2023.

State of North Dakota
Public Service Commission



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