



**Bakke
Grinolds
Wiederholt**

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 *Intervenor Warford's Petition for Reconsideration Requesting ALJ to Compel Summit Carbon to Produce Written Discovery and to Attend Rule 30(b)(6) Deposition & Request for Expedited Decision 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*

Randall J. Bakke

Randall J. Bakke*^{Δ+□v}
rbakke@bgwattorneys.com
Shawn A. Grinolds*[◊]
sgrinolds@bgwattorneys.com
Bradley N. Wiederholt*[◊]
bwiederholt@bgwattorneys.com
Grant T. Bakke*^x
gbakke@bgwattorneys.com
David R. Phillips*
dphillips@bgwattorneys.com

Encl.
RJB:lo
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Petition for Reconsideration Requesting ALJ to Compel Summit Carbon to Produce Discovery
Intervenor John H. Warford, Jr., as Trustee of Revocable Trust
Randall J. Bakke, Attorney

Bakke Grinolds Wiederholt, Attorneys

P.O. Box 4247 · Bismarck, ND 58502-4247

300 West Century Ave · Bismarck, ND 58503

p 701.751.8188 · f 701.751.7172

www.bgwattorneys.com

* Licensed in North Dakota

◊ Licensed in Minnesota

Δ Licensed in South Dakota

+ Board Certified Civil Trial
Specialist by National Board
of Trial Advocacy

□ Fellow-Litigation Counsel of America

v Board Certified Civil Practice
Advocacy by National Board
of Civil Pretrial Practice Advocacy

x MBA

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

**INTERVENOR WARFORD'S PETITION FOR RECONSIDERATION
REQUESTING ALJ TO COMPEL SUMMIT CARBON TO PRODUCE WRITTEN
DISCOVERY AND TO ATTEND RULE 30(B)(6) DEPOSITION & REQUEST FOR
EXPEDITED DECISION**

SCS Carbon Transport LLC ("Summit" or "Summit Carbon") should be compelled to answer and provide meaningful responses to Warford's written discovery requests, and, to produce a witness or witnesses for a Rule 30(b)(6) deposition to address issues of critical importance to these proceedings.¹ In its response, Summit offers up procedural technicalities and strawman arguments, all of which are more of the same effort by Summit to conduct in secret what should be open and public proceedings. All of the evidence and information Warford seeks from Summit is directly relevant to the factors the Commission is required to consider under North Dakota law and the applicable procedural rules allow Warford to discover it.

The ALJ ruled on the Warford's motion to compel via *Order* issued on June 1, 2023. (Docket # Not Yet Available). The ALJ essentially bought in to Summit's argument that Warford's discovery efforts are simply too late and that no party has requested an additional hearing date. Warford and Intervenors Wachter and Moldenhauer actually requested an additional hearing date via petition on today's date, June 1, 2023. (Docket # 283). As shown below and

¹ This petition is filed pursuant to N.D.A.C. § 69-02-06-02 in support of Warford's motion to compel (docket # 236), is offered to reply to the arguments raised in *SCS Carbon Transport LLC's Response to [Warford's] Motion to Compel* (docket # 275), and is offered in support of Warford's petition that the ALJ reconsider her Order denying the motion to compel.

based on a fair reading of the record, Summit's argument for delay is wrong. Summit's arguments about the relevancy for the information Warford seeks are also wrong; he seeks only information that is relevant to these proceedings. Warford respectfully requests the ALJ reconsider the aforementioned Order

A. Warford's Efforts to Conduct Discovery Are Not Too Late

One of the main themes in Summit's response is that Warford waited until essentially the 11th hour to conduct discovery, which is allegedly much too late in the process, and thus the motion to compel should be denied on that basis alone. This argument is without merit as there is no scheduling order in place or other administrative rule that would prevent Warford from conducting written and deposition discovery at any particular time. And of equal importance is that the timeline of events related to the specific documents and information Warford seeks shows there was no delay by Warford at all.

The timeline shows the Commission requested information from Summit on each of the three (3) topics Warford seeks to compel here. It shows Summit was dilatory in providing the requested information or outright defiant in refusing to produce it (even after the Commission had requested it). And the timeline shows that when it became obvious Summit would not be forthcoming with the requested information, Warford timely requested it himself through the discovery efforts Summit now challenges. The below timeline illustrates these points:

Summit's Investor Information

- April 11, 2023 – Summit's COO Powell ("Powell") is questioned by Intervenors 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 # 220).
- 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 to 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). **It is important to note Warford’s motion to compel was filed the first business day following the meet and confer with Attorney Bender.**
- 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.

The timeline shows Summit’s delay argument is not at all accurate. Warford only requested written discovery and depositions from Summit as soon as it became apparent that Summit was refusing to be forthcoming with providing information previously requested by the Commission itself. There is no prejudicial delay here.

In relation to Warford's written discovery requests, Summit argues the time to respond under North Dakota's Rules of Civil Procedure (30 days) has not yet expired, making the motion to compel premature. But this ignores the obvious fact that Summit responded with a blanket objection to Warford's written discovery requests on May 17, 2023. (Docket # 227). Because Summit has indeed responded to the written discovery served on May 4, 2023 (Docket # 209), Summit's argument about a premature motion to compel is unavailing. Summit's blanket withholding of documents through its Objection is ripe now for consideration in the motion to compel.

Summit raises a similar argument with respect to Warford's Rule 30(b)(6) Notice (Docket # 225) served on May 16, 2023. Summit argues the request for a corporate deposition just 7 days after service of the Rule 30(b)(6) notice is insufficient and unreasonable. But Summit ignores the fact counsel for Warford contemporaneously emailed (Docket # 236) counsel for Summit advising the deposition date was essentially a placeholder and requesting Summit simply file an objection to the Rule 30(b)(6) Notice so that the issue could be quickly raised and decided by the ALJ. During the meet and confer, Summit was unequivocal in its statement that no witness or witnesses would be provided (Wiederholt Aff. Docket # 236), but Summit has to date not formally responded to the Rule 30(b)(6) Notice.

Because the Commission may require Summit to provide some or all of its plume modeling, and because Warford has requested an additional hearing date, it would be premature to arbitrarily shut down discovery when Summit has not provided much of anything requested by the Commission or by Intervenors. Summit's delay argument is shown to be false when the timeline of events is carefully considered. To the extent the ALJ continues to give credence to Summit's delay argument, the same delay standard should be applied to the ALJ's or PSC's

consideration of Summit's *Motion to Declare Emmons and Burleigh County Ordinances Superseded and Preempted* (Docket # 282), filed with the PSC on today's date. The same standard should be applied to Summit's late filing today at 3:57 p.m. wherein it provided

- Direct Testimony of Micah Rorie;
- Direct Testimony of Jeffrey L. Skaare;
- Direct Testimony of James Powell;
- Direct Testimony of Rod Dillon;
- Letter from Farmer's Union Insurance;
- Response to Request for Additional Information and
- Market Data Research of Pipelines Impact on Residential Property in Bismarck, ND.

All of this was filed on June 1, 2023 at 3:57 p.m., late on the afternoon prior to the hearing commencing at 8:30 a.m. on June 2, 2023. None of this information should be considered under the standard that it is too late. Certainly, neither the Commission nor any party has the opportunity to scrutinize this late filed information or cross examine any witness about it.

B. Warford Seeks Discovery of Relevant Information Only Summit Possesses

In addition to the false argument that Warford's discovery efforts are too late, Summit also argues none of what he has requested is relevant to the factors the PSC considers. But a review of those factors suggests otherwise. The rules applicable to these proceedings provide a broad definition of relevant evidence that may be discovered.² The North Dakota statute that governs

² North Dakota's statute applicable to adjudicative proceedings provides the following broad definition of relevant evidence:

11. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the administrative action more probable or less probable than it would be without the evidence.

N.D.C.C. § 28-32-01(11). The Rules of Civil Procedure likewise provide a broad definition of relevant evidence that may be obtained via discovery:

[] Parties may obtain discovery regarding 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

the Commission's siting determination relevant to Summit's *Application*, also provides for broad areas of inquiry or "factors" to be considered:

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. The PSC's rules in relation to applications furthermore require the applicant to set forth the "factual basis demonstrating that the proposed facility is of such length,

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 [. . .]

N.D. R. Civ. P. 26(b)(1).

design, location or purpose that it will produce **minimal adverse effects.**” N.D.A.C. § 69-06-06-01(2)(m) (emphasis added).

Warford seeks information from Summit that is summarized as follows:

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 –
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 effect that will affect landowners and citizens generally.

Summit and Summit alone possesses all of this information that is highly relevant to the Commission’s decision on the pending *Application*.

In relation to the plume modeling, Warford can appreciate that the ALJ would defer ruling on that issue until after the Commission’s hearing in late June or July as to that particular issue. But the other information Warford seeks through discovery and depositions is not subject to later oral argument with the Commission. As set forth below, all of that information is relevant to the PSC’s siting determination under the above factors, and it should be produced.

Investor Information

Summit argues that providing information about its investors is unreasonably cumulative, and redundant. Such an argument is both lacking in merit and is directly contradicted by the record.

For example, the Commission requested investor information at the public meeting in Wahpeton on April 8, 2023 and Summit finally provided investor information on April 28, but rather than provide meaningful information and complete information about its investors, Summit simply filed a one-page document containing the names and websites of only five corporate entities. This occurred despite the fact Powell testified that there were quite literally hundreds of investors" in Summit". How could Warford's request for investor information be cumulative or redundant when Summit has only late exhibited its total unwillingness to provide the information?

As set forth above, the investor information is relevant to a pipeline that will be built after North Dakota law goes into effect this summer prohibiting foreign adversaries, governments and citizens from owning real property interests in the State. The Commission indeed must consider North Dakota law in its deliberations and in its final decision on Summit's *Application*, and the above statute, Section 49-22.1-09, does not foreclose the Commission from obtaining the information that would shed any meaningful light on this important topic. Summit's response brief does little to provide Intervenors, the public, or the Commission that its members and investors do not include foreign adversaries, governments, or citizens. Inquiring into this area is not beyond the purview of the Commission and is not the exclusive domain of North Dakota Attorney General. Again, the Commission should not allow Summit to serve the dual role of applicant and information gate-keeper in these proceedings. The ALJ / Commission should serve in that role, and Summit should be compelled to provide the information it alone possesses.

Facilities that will Utilize the Pipeline

Summit also argues that the ethanol plants and facilities that have signed on with it to carry carbon dioxide to be "permanently stored" underground in North Dakota is irrelevant to the factors the Commission is to consider in these proceedings. But this too is a false argument. The

agreements entered into between Summit and these facilities will illustrate “[t]he direct and indirect economic impacts of the proposed facility” to the State of North Dakota, which is the seventh factor under N.D.C.C. § 49-22.1-09.

Additionally, whether or not these facilities have entered into short or long term commitments with Summit greatly affects whether the pipeline will have adverse effects on the environment and other aspects of the State. Several of the statute’s factors deal with the environmental and other effects. If these facilities should stop utilizing the pipeline, for example when current federal tax credits run out, who will be left to ensure the pipeline is maintained and safe for North Dakota’s citizens, safe for the environment, and related concerns? Only those agreements can shed light on these critical factors the North Dakota Legislature has declared the PSC should consider, including when considering Summit’s *Application*.

C. Conclusion

Summit has taken it upon itself to shut down the flow of relevant evidence in these public proceedings. Intervenors and the public have the right to demand Summit’s Application is carefully scrutinized under North Dakota law. For the reasons discussed herein, the ALJ should reconsider her Order denying the motion to compel and should require Summit to provide the clearly relevant evidence requested.

Dated this 1st day of June, 2023.

BAKKE GRINOLDS WIEDERHOLT

By: /s/ Randall J. Bakke
Randall J. Bakke (#03898)
Bradley N. Wiederholt (#06354)
300 West Century Avenue
P.O. Box 4247
Bismarck, ND 58502-4247
(701) 751-8188

rbakke@bgwattorneys.com
bwiederholt@bgwattorneys.com

Attorneys for Intervenor

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. *Intervenor Warford's Petition for Reconsideration Requesting ALJ to Compel Summit Carbon to Produce Written Discovery and Attend Rule 30(b)(6) Deposition & Request for Expedited Decision; and*
2. *Certificate of Service.*

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

Hope L. Hogan
hlhogan@nd.gov

John Schuh
jschuh@nd.gov

Lawrence Bender
lbender@fredlaw.com

Steven Leibel
steve@bismarck-attorneys.com

Brian E. Jorde
bjorde@dominalaw.com

John Hamre
jghamre@nd.gov

Zachary Pelham
zep@pearce-durick.com

David Knoll
david@bismarck-attorneys.com

Kevin Pranis
kpranis@liunagroc.com

Brant Leonard
bleonard@fredlaw.com

Bret Dublinske
bdublinske@fredlaw.com

Dated this 1st day of June, 2023.

BAKKE GRINOLDS WIEDERHOLT

By: /s/ Randall J. Bakke
Randall J. Bakke (#03898)
Bradley N. Wiederholt (#06354)
300 West Century Avenue
P.O. Box 4247
Bismarck, ND 58502-4247
(701) 751-8188
rbakke@bgwattorneys.com
bwiederholt@bgwattorneys.com

Attorneys for Intervenor John H. Warford,
Jr. as Trustee of the John H. Warford, Jr.
Revocable Trust