

June 12, 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:

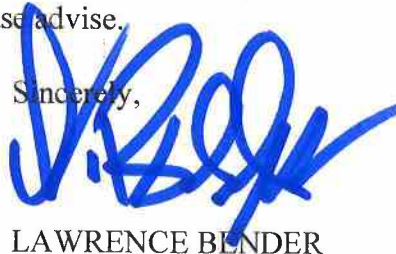
Please find enclosed herewith for filing with the North Dakota Public Service Commission, an original and five (5) copies of the following:

1. SCS Carbon Transport LLC's Response to 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
2. Certificate of Service.

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,



LAWRENCE BENDER

LB/cj  
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, DICKY,  
EMMONS, LOGAN, MCINTOSH,  
MORTON, OLIVER, RICHLAND AND  
SARGENT COUNTIES, NORTH DAKOTA

CASE NO. PU-22-391

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**SCS Carbon Transport LLC's Response to 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**

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Intervenor John Warford has filed a petition ("Warford's Petition") in which he requests that Administrative Law Judge Hope Hogan (the "ALJ") reconsider her decision denying his motion to compel SCS Carbon Transport LLC ("Summit") to produce written discovery and to attend a Rule 30(b)(6) deposition. For the reasons explained below, the ALJ should deny Warford's Petition.

**FACTS**

This case was commenced on October 17, 2022, when Summit filed its application. (Doc. No. 1). One hundred ninety-eight days after this action was commenced, Warford served Summit with a set of discovery requests. (Doc. No. 209). Similarly, 211 days after this action was commenced, Warford served Summit with a Rule 30(b)(6) deposition notice. (Doc. No. 225).

Summit objected to both Warford's discovery requests and his deposition notice. (Doc. No. 227). Summit explained that the requests and notice were untimely. Moreover, the requests and notice sought information that was not relevant to this case.

Warford then filed a motion to compel. (Doc. No. 236). But the ALJ denied the motion. (Doc. No. 285). In denying the motion, the ALJ explained that it would not compel Summit to attend a deposition because Warford had failed to give Summit reasonable notice as required by N.D.R.Civ.P. 30(b)(6). The ALJ also stated that it would not compel Summit to respond to Warford's discovery requests:

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.

Warford has now filed his Petition in which he requests that the ALJ reconsider her decision denying his motion to compel.

### **ARGUMENT**

The ALJ should deny Warford's Petition for two reasons. First, Warford has not provided a legally sufficient reason for the ALJ to reconsider her decision to deny his motion to compel, e.g., a change in the facts of this case or the law. Second, the ALJ was correct when she denied Warford's motion to compel.

#### **I. Warford is simply asking the ALJ change her mind, which is not a legally sufficient reason to reconsider a previous decision.**

Courts have explained that "[a]n agency ... may reconsider an action previously taken and come to a different conclusion upon a showing that the original action was the product of fraud, surprise, mistake, or inadvertence, or that some new or different factual situation exists

that justifies the different conclusion.” *Calvert Cnty. Planning Comm’n v. Howlin Realty Mgmt., Inc.*, 772 A.2d 1209, 1223 (Md. 2001). However, “[w]hat is not permitted is a ‘mere change of mind’ on the part of the agency.” *Id.*; see also *Maryland v. Exxon Mobil Corp.*, 569 F. Supp. 3d 273, 284 (D. Md. 2021) (explaining that an agency “may not revisit or reverse its prior determinations without good cause or justification”).

Here, Warford does not allege that the ALJ’s order denying his motion to compel was a product of fraud, surprise, mistake, or inadvertence. Nor does he allege that some new or different factual situation exists that justifies a different conclusion. Instead, Warford simply believes that the ALJ got it wrong when she denied his motion to compel and wants the ALJ to change her mind. But this is not a sufficient reason for the ALJ to reconsider a prior determination. Accordingly, the ALJ should deny Warford’s Petition.

## **II. The ALJ was correct when she denied Warford’s motion to compel.**

As just explained, Warford simply believing that the ALJ wrongly decided his motion to compel is not a sufficient reason for the ALJ to reconsider her decision. That said, the ALJ was not wrong when she denied Warford’s motion to compel.

The ALJ correctly refused to compel Summit to sit for a deposition because Warford failed to give Summit reasonable notice of the deposition. As explained by the ALJ, “[g]iven 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.” (Doc. No. 285). Thus, “[t]here are no grounds to compel an appearance for the requested deposition.”

In his Petition, Warford never attempts to argue that he actually gave Summit reasonable notice. Instead, he simply states that the May 23<sup>rd</sup> deposition date “was essentially a placeholder”

and for some unexplained reason Warford believes that this excuses his failure to give Summit reasonable notice.

The May 23<sup>rd</sup> deposition date in Warford's deposition notice was not a place holder. The North Dakota Rules of Civil Procedure do not allow for Warford to include a placeholder for time that the deposition will take place in his notice. Rather, those rules required Warford to include the actual time that the deposition would take place. And the time that Warford chose was May 23, 2023, at 9:00 AM.

The ALJ also correctly refused to compel Summit to respond to Warford's discovery requests. As explained by the ALJ, Warford "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. ... [Warford's] request for compelled discovery is untimely."

In his Petition, Warford claims that he did not delay in serving his discovery requests. He asserts that "the Commission requested information from Summit on each of the three (3) topics Warford seeks to compel here." However, "Summit was dilatory in providing the requested information or outright defiant in refusing to produce it." Thus, "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."

Summit disputes all of Warford's assertions. However, even assuming that they are true, they still do not negate the fact that Warford waited until the eleventh hour to serve his discovery requests. This case was commenced on October 17, 2022. Warford could have become a party to

this case on that same day and served Summit with his discovery requests. Instead, Warford decided to wait 198 days to serve Summit with his discovery requests. He made this decision himself. Summit being “dilatory in providing the requested information” as Warford alleges did not prevent Warford from serving his discovery requests earlier.<sup>1</sup>

### **III. No documents filed by Summit were untimely filed.**

Finally, Warford states in his Petition that “[t]o 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” certain documents filed by Summit. Warford claims that certain documents filed by Summit on June 1, 2023, “should not be considered under the standard that [they are] too late.”

All the documents that Warford claims were filed “too late” were actually filed on June 1, 2023. Accordingly, unlike any information that Warford seeks through his discovery requests, these documents were filed before the June 2<sup>nd</sup> hearing in Burleigh County. As a result, they were filed before the close of evidence in this case and the Commission can consider them.

### **CONCLUSION**

For the foregoing reasons, the Commission should deny Warford’s Petition.

Dated this 12th day of June, 2023.

FREDRIKSON & BYRON, P.A.

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<sup>1</sup> In his petition, Warford also includes arguments in support of why he believes that the information sought by his discovery requests is relevant. In her order denying Warford’s motion to compel, the ALJ never actually decided whether the information sought by Warford’s discovery requests is relevant because the ALJ had already decided that Warford’s motion to compel was untimely. However, the ALJ did note that “Summit raise[d] valid arguments about the relevance of the information sought concerning its investors and the pipeline utilizers.” If the ALJ reaches the issue of whether the information sought by Warford’s discovery requests is relevant, Summit refers the ALJ to the arguments made in Summit’s response to Warford’s motion to compel. (Doc. No. 275).



By:

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**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. SCS Carbon Transport LLC's Response to 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

were, on June 12, 2023, filed with the North Dakota Public Service Commission and served electronically to the following:

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Dated this 12th day of June, 2023.

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