

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:

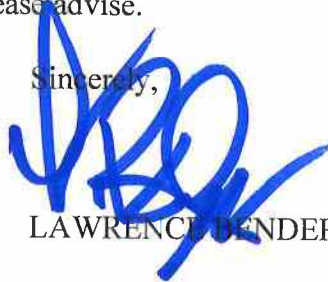
Please find enclosed herewith for filing with the North Dakota Public Service Commission, an original and five (5) copies of the following:

1. SCS Carbon Transport LLC's Response to Bismarck Area Intervenors' Petition to Reopen the Proceedings to Schedule Additional Public Hearing Date; 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, DICKEY,
EMMONS, LOGAN, MCINTOSH,
MORTON, OLIVER, RICHLAND AND
SARGENT COUNTIES, NORTH DAKOTA

CASE NO. PU-22-391

**SCS Carbon Transport LLC's Response to Bismarck Area Intervenors' Petition to Reopen
the Proceedings to Schedule Additional Public Hearing Date**

Intervenors John Warford, Chad Wachter, and Chad Moldenhauer ("Warford") have filed a petition to reopen the proceedings in this case ("Warford's Petition"). Warford's Petition requests that the North Dakota Public Service Commission (the "Commission") hold a sixth public hearing for the purpose of taking additional evidence. For the reasons explained below, the Commission should deny Warford's Petition.

FACTS

Intervenor John Warford became a party to this case on March 6, 2023. (Doc. No. 65). Fifty-eight days later, on May 3, 2023, Warford served SCS Carbon Transport LLC ("Summit") with a set of discovery requests. (Doc. No. 209). Nowhere in his discovery requests did Warford explain why he waited 58 days after becoming a party to this action to serve Summit with these requests. Nor did he explain why he served these requests on Summit less than 30 days before the final hearing in this case (the "June 2nd Hearing") even though the North Dakota Rules of Civil Procedure give Summit 30 days with which to respond.

Thirteen days later, on May 16, 2023, Warford served Summit with a deposition notice. (Doc. No. 225). In effect, the notice stated that Summit had four business days to designate and

prepare a witness or witnesses that would travel from Iowa to North Dakota in order to testify on 38 complex topics and subtopics. Nowhere in the notice did Warford explain why he waited 71 days after becoming a party to this action to serve Summit with the notice.

Summit objected to both Warford's discovery requests and his deposition notice. (Doc. No. 227). As a result, Warford filed a motion to compel. (Doc. No. 236). But Administrative Law Judge Hope Hogan (the "ALJ") denied the motion. (Doc. No. 285). In denying the motion, the ALJ noted that Warford "waited until the eve of the final hearing and close of the evidence to serve discovery requests" and that Summit "raise[d] valid arguments about the relevance of the information sought [by Warford]."

Warford has now filed his Petition in which he requests that the Commission hold a sixth public hearing for the purpose of taking additional evidence. (Doc. No. 283). He claims that a sixth public hearing is necessary so that he can obtain the information that he sought from Summit through his discovery requests and deposition notice and then present that information to the Commission. Nowhere in his Petition does Warford acknowledge that had he not waited until the close of evidence to serve his discovery requests and deposition notice, he could have already obtained this information (assuming that the information sought is not objectionable) and presented it at the June 2nd Hearing.

ARGUMENT

Warford's Petition was filed pursuant to N.D.A.C. § 69-02-06-01. That regulation states that "[a]t any time after the conclusion of a hearing, ... any party may file a petition to reopen the proceeding for the purpose of taking additional evidence." "The petition must set forth clearly the facts claimed to constitute the grounds requiring reopening of the proceeding, including any material changes of fact or law alleged to have occurred since the conclusion of the hearing." *Id.*

The Commission may grant the petition only if “the conditions of fact or law have so changed as to require, or that public interest requires, the reopening of a proceeding.” *Id.*¹

As explained below, the Commission should deny Warford’s Petition for three reasons. First, the Petition is untimely. Second, the Petition does not contain the information that N.D.A.C. § 69-02-06-01(1) requires it to contain. Finally, neither a change in the conditions of fact or law nor the public interest requires the proceedings in this case to be reopened.

I. Intervenors’ Petition is untimely.

The most obvious reason the Commission should deny Warford’s Petition is that the Petition is untimely. Section 69-02-06-01 allows a party to file a petition to reopen “[a]t any time after the conclusion of a hearing.” N.D.A.C. § 69-02-06-01 (emphasis added). Here, Warford filed his Petition a day before the June 2nd Hearing had even concluded. Accordingly, the Petition was filed in violation of the Commission’s regulations and the Commission should deny it.

II. Intervenors’ Petition lacks information that is required by N.D.A.C. § 69-02-06-01.

A second reason the Commission should deny Warford’s Petition is that the Petition lacks essential information. Section 69-02-06-01 states that Warford’s Petition “must set forth clearly the facts claimed to constitute the grounds requiring reopening of the proceeding, including any material changes of fact or law alleged to have occurred since the conclusion of the hearing.” N.D.A.C. § 69-02-06-01(1) (emphasis added). Warford’s Petition does not comply with this mandate. Nowhere in his Petition does Warford explain what material changes of fact or law he believes have occurred since the conclusion of the June 2nd Hearing. Because the Petition is missing this essential information, it must be denied.

¹ See also *Rodriguez v. Barr*, 952 F.3d 984, 991 (8th Cir. 2020) (explaining that petitions to reopen proceedings “are disfavored because of the strong public interest in bringing litigation to a close and because granting them can allow endless prolongation of proceedings”).

III. Warford has not provided a legally sufficient reason to reopen the proceedings.

Finally, the Commission should deny Warford's Petition because Warford has not provided a legally sufficient reason for reopening the proceedings. There are only two legally sufficient reasons to reopen the proceedings. The first is if "the conditions of fact or law have so changed as to require" the reopening of the proceedings. N.D.A.C. § 69-02-06-01(4). The second is if "the public interest requires" the reopening of the proceedings. *Id.*

As noted in the previous section, Warford does not even attempt to argue that any material changes in fact or law have occurred since the conclusion of the June 2nd Hearing. Nor could he. The facts and law of this case are the same today as they were on June 2nd.

Instead, Warford argues that the public interest requires the proceedings in this case to be reopened. According to Warford, the "public interest requires a fair hearing and due consideration of the information Summit refuses to disclose in these proceedings." (Doc. No. 283).

Summit agrees with Warford that the public interest requires a fair hearing. However, this case has already had five fair hearings.² Accordingly, the public's interest in a fair hearing has been more than satisfied.

² Warford presumably believes that these hearings unfair because he was unable to introduce the information sought by his discovery requests at them. But Warford has only himself to blame. Had Warford timely served Summit with any non-objectional discovery requests, he could have presented the information produced by those requests at any one of the hearings. But Warford decided to take a different approach. In the words of the ALJ, Warford "waited until the eve of the final hearing and close of the evidence to serve discovery requests." (Doc. No. 285).

Simply put, Warford cannot serve irrelevant, untimely discovery requests on Summit and then claim Summit's refusal to respond to these irrelevant, untimely discovery requests somehow made all five hearings in this case unfair. *See* N.D.C.C. § 31-11-05(8) ("A person cannot take advantage of that person's own wrong."); N.D.C.C. § 31-11-05(18) ("The law helps the vigilant before those who sleep on their rights.").

In contrast, Summit disagrees with Warford that the public interest requires due consideration of the information that Summit—in Warford’s words—“refuses to disclose.” Warford claims that Summit has refused to disclose the following three categories of information: (1) Dispersion Analysis / Plume Modeling Information; (2) Summit Carbon Investor / Member Agreements and Payment Information; and (3) Summit Carbon Pipeline Utilizers (Ethanol Plants, etc.), Summit disagrees.

As to the first category of information, it is simply not true that Summit has refused to disclose its dispersion analysis and plume modeling information. Summit has already disclosed this information to the Commission. Accordingly, the public’s interest in having the Commission consider this information is satisfied.

As to the second and third categories of information, Summit has already explained that this information is irrelevant. And the ALJ has agreed with Summit. (Doc. No. 285) (“Summit raises valid arguments about the relevance of the information sought concerning its investors and the pipeline utilizers.”). The public certainly has an interest in the Commission considering all information that is relevant to its decision. But Warford cannot possibly believe that the public has an interest in the Commission considering irrelevant information. At bottom, the public interest does not require the reopening of the proceedings in this case just so that the Commission can consider information that is not relevant to its decision.

CONCLUSION

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

Dated this 12th day of June, 2023.

FREDRIKSON & BYRON, P.A.

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 Bismarck Area Intervenors' Petition to Reopen the Proceedings to Schedule Additional Public Hearing Date

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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