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ATTORNEYS AT LAW

July 17, 2023

VIA U.S. & E-MAIL ONLY: ndpsc@nd.gov

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

RE: In the Matter of the Application of SCS Carbon Transport LLC for
Certificate of Corridor Compatibility and Route Permit for the Midwest
Carbon Express
Case No.: PU-22-391

Dear Mr. Kahl:

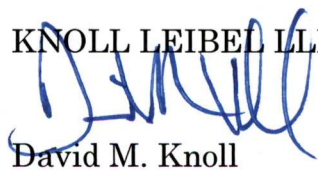
Enclosed for filing please find the following documents:

1. Post-Hearing Brief;
2. Declaration of Service.

This Brief is being filed with the North Dakota Public Service Commission (hereinafter "NDPSC") on behalf of the Intervenors represented by Knoll Leibel LLP. Intervenors have a direct and substantial interest in these proceedings, as well as legal property rights which may be substantially affected by NDPCS' findings and conclusions.

Sincerely,

KNOLL LEIBEL LLP


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SJL: rmo

Enclosures

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Post-Hearing Brief

Knoll Leibel, LLP, on behalf and at the request of Intervenors
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**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

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

POST-HEARING BRIEF

Intervenors¹ represented by the undersigned counsel (hereinafter “Intervenors”), hereby respectfully submit this Post-Hearing Brief.

A. Background.

1. SCS Carbon Transport LLC (“SCS”) seeks permission to build the largest CO₂ pipeline ever. SCS surely did not rely upon public support at the hearings—the pipeline was opposed by farmers, ranchers, grandmothers, first responders, law enforcement groups, county commissions, school boards, realtors, surveyors, real estate developers, state and county legislators, professional groups, construction contractors, and others. Instead, SCS is relying upon force of law. This is probably to be expected from foreign venture capitalists, who have made very clear that North Dakotans with their prairie pictures and passionate pleas and cowboy boots were obstacles to its multi-billion dollar payday.

¹ See Order Granting Petition for Intervention (Doc. 82, 83, 168, 204) and Amended Order Granting Petition for Intervention (Doc. 159).

2. However, North Dakota law regarding a certificate of corridor compatibility is not a blunt club. Instead, the Commission has the duty to minimize adverse effects to North Dakotans except where SCS has demonstrated by competent evidence that the effects cannot be reasonably minimized. In this context, SCS has failed to make its case. For these reasons, its application should be denied.

B. Statement of applicable law.

3. In evaluating an application for a pipeline corridor, the factors to be considered by the Commission include the following:

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. Additional criteria apply in the context of siting pipelines. *See also* N.D.C.C. § 49-22.1-03 (requiring the promulgation of siting criteria to guide the site, corridor, and route suitability evaluation and designation process).

4. Pursuant to N.D.A.C. § 69-06-08-02, “[a] corridor or route shall be designated *only* when it is demonstrated to the commission by the applicant that any significant adverse effects which will result from the location, construction, and maintenance of the facility as they relate to the following, will be at an acceptable minimum, or those effects will be managed and maintained at an acceptable minimum.”

N.D.A.C. § 69-06-08-02(3)(emphasis added). The effects to be considered include:

- a. The impact upon agriculture:
 - (1) Agricultural production.
 - (2) Family farms and ranches.
 - (3) Land which the owner can demonstrate has soil, topography, drainage, and an available water supply that cause the land to be economically suitable for irrigation.
 - (4) Surface drainage patterns and ground water flow patterns.
- b. The impact upon:
 - (1) Sound-sensitive land uses.
 - (2) The visual effect on the adjacent area.
 - (3) Extractive and storage resources.
 - (4) Wetlands, woodlands, and wooded areas.
 - (5) Radio and television reception, and other communication or electronic control facilities.
 - (6) Human health and safety.
 - (7) Animal health and safety.
 - (8) Plant life.

Id.; *see also In re Application of Nebraska Pub. Power Dist.*, 330 N.W.2d 143, 147 (N.D. 1983)(“The North Dakota Legislature has determined that transmission facilities affect the environment and welfare of North Dakota citizens. The PSC has the duty to minimize these adverse effects.”)(internal citations omitted).

C. Summary of relevant evidence and proposed findings.

5. No one—including SCS—has ever done anything remotely similar on scale to the carbon dioxide pipeline proposed in the Application. It is as if Orville and Wilbur Wright had decided, for their inaugural flight, to construct the 1903 version of a 747, complete with a pilot in a bowler hat, 224' muslin wings, and a propeller powered by a gas engine and pulleys. While this kind of bold scientific innovation is fundamentally American, the only people at risk at Kitty Hawk were the Wright brothers.

6. Here, the risk is not borne by SCS's venture capitalists. It is borne by North Dakotans. Because SCS is "comfortable" with the risk to North Dakota, it asks the PSC to utilize the force of law to march everyone else onto SCS's experiment based upon naked assurances, and to do so before federal regulators have completed their study and promulgated new rules, before the failure rates are known, before the effective life cycle is understood, before its plume study has been publicly scrutinized, and before insurance companies are even willing to insure the liability risk. The PSC should not force North Dakotans onto this experimental 747 based on this evidence.

i. Adverse effects on safety (N.D.C.C. § 49-22.1-09(1)).

7. As the Commission is aware, safety is expressly enumerated as a factor in the PSC's approval of a pipeline under both the Century Code mandatory considerations and the Administrative Code's criteria for placement. *See* N.D.C.C. § 49-22.1-09; N.D.A.C. § 69-06-08-02. The primary objection, which was stated over the course of the hearings in countless different ways, is that this novel pipeline is not safe. This might be due to the fact that the existing regulatory schemes at the state and federal level were

not designed to ensure the safety of CO₂ pipelines—the overwhelming majority of pipelines in the United States pertain to transmission of natural gas or petroleum.

8. However, SCS's pipeline differs greatly from an ordinary petroleum or natural gas pipeline. First, the proposed pipeline will transport dense or supercritical CO₂ in a highly pressurized state (1,200 psig to 2,150 psig)². Application, 2.1.1. The combination of a 24" pipe under high pressure provides for a mind-boggling flow rate—936,000,000 standard cubic feet (MMSCF) of CO₂ per day. Application, 2.1.1. Second, the resulting risk in the event of a failure of SCS's proposed pipeline is *dramatically* different. As Warren County fire coordinator Jerry Briggs testified, when the pipeline ruptured in Satartia, everything from the muddy road to the leaves on the trees within 1,000 feet of the rupture was frozen due to the CO₂, and people and vehicles over a mile away in Satartia were immobilized due to lack of oxygen. *See also* Satartia report, [Doc. 152].

9. The Denbury pipeline responsible for the Satartia incident was manufactured in 2007 of carbon steel to an API 5L X80 grade with an ERW weld seam and external fusion bonded epoxy to protect against corrosion. [Doc. 152], at 4-5. This is the same pipeline specifications that SCS proposes here. Application, 2.1.1 [Doc. 4]. Although the Satartia pipeline rupture released CO₂ for somewhere between 5-7 hours, [Doc. 152], pg. 6-7, the mainline block valves at the location of the Satartia failure were only 9.55 miles apart. [Doc. 152], pg. 4. In this case, SCS Chief Operating Officer Jimmy

² SCS referenced a few times that there are over 5,000 miles of CO₂ pipeline in the United States. *See also* Ex. W152, pg. 1 of 14 [Doc. 149]. However, there are almost 2,500,000 miles of natural gas and ordinary hazardous liquid pipelines. This means that CO₂ pipelines currently represent 0.2% of the existing pipelines.

Powell is “comfortable with the risk” of locating the block valves between 15-20 miles apart in North Dakota. Application, 2.1.2.1. However, Mr. Powell should not be surprised that the people actually living near SCS’s pipeline are less excited. *See, e.g.* [Doc. 280](Burleigh County Board of Commissioners requesting PSC to postpone any final determination relating to a permit until PHMSA updates its standards for CO₂ pipelines); [Doc. 152], pg. 13, Figure 6 (PHMSA noting that the plume study submitted by Denbury placed Satartia outside any potential risk area); Round Table of May 31, 2023 CO₂ Safety Public Meeting, Des Moines, IA (available through PHMSA’s official record at <https://www.onlinevideoservice.com/clients/PHMSA/053123/>, beginning at 1:53:00)(PHMSA representative stating in response to a question that PHMSA is very aware of the failure of the Satartia dispersion modeling).

10. This is because the current safety regulations are not specific to CO₂ pipelines, which historically make up less than 0.2% of natural gas and hazardous liquid pipelines. [Doc. 149], pg. 3-4. A number of SCS witnesses, including Mr. Powell and others, tried to minimize the significance of PHMSA’s current review and testified that PHMSA’s current project was ordinary rulemaking and unrelated to the Satartia incident. These statements are untrue.

PHMSA is currently drafting rulemaking to significantly strengthen safety and environmental protections for CO₂ transportation via pipeline. While not specifically mandated by Congress to do this rulemaking, given passage of the bipartisan infrastructure law and the Inflation Reduction Act over the last two years—which both include major incentives for CO₂ related infrastructure—we believe it is vitally important that we establish stronger safety and environmental protections in anticipation of a potential build out of carbon dioxide pipeline facilities connected to other CO₂ related infrastructure.

Tristan Brown, Deputy Administrator of Pipeline and Hazardous Materials Safety Administration, Office of the Administrator, Welcoming Remarks at May 31, 2023 CO₂ Safety Public Meeting, Des Moines, IA (available through PHMSA's official record at <https://www.onlinevideoservice.com/clients/PHMSA/053123/>, beginning at 8:50) (emphasis added); *see also* May 26, 2022 PHMSA press release, Ex. W147 [Doc. 144] ("The U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) today announced it is taking steps to implement new measures to strengthen its safety oversight of carbon dioxide (CO₂) pipelines around the country and protect communities from dangerous pipeline failures.").

11. On this issue, SCS witnesses, including Mr. Powell and the former PHMSA representative that SCS brought in, also testified that it was impractical for the PSC to wait for PHMSA to promulgate its new safety regulations because it will probably take years. Even if one accepts the underlying premise that SCS should not have to ensure public safety if it means delaying construction, Powell's testimony is self-serving, at best:

PHMSA has already started working on updates to our current CO₂ regulations as Tristan [Brown][ed.] referred and we expect to have a proposal to publish in the months ahead that will be informed by this two day meeting and we recently began posting monthly updates on our progress and we will continue to do so until we complete the rule.

Alan Mayberry, Associate Administrator, Office of Pipeline Safety, PHMSA, Welcoming remarks, May 31, 2023 CO₂ Safety Public Meeting, Des Moines, IA (available through PHMSA's official record at <https://www.onlinevideoservice.com/clients/PHMSA/053123/>, beginning at 19:15) (emphasis added). A five-hundred-foot setback is completely arbitrary when it comes to a 24" CO₂ pipeline—notwithstanding Mr. Powell's comfort

with the risk—and the PSC heard testimony from a number of people who expressed concerns about themselves and their family and children and grandchildren. Clearly, SCS wants to start construction before PHMSA has a chance to regulate this new industry—safety is only delay and expense to a venture capitalist. However, allowing SCS to elevate profit and speed over safety is bad policy³. *Compare* [Doc. 280](Burleigh County Board of Commissioners requesting PSC to postpone any final determination relating to a permit until PHMSA updates its standards for CO₂ pipelines).

12. In this context, the PSC should make the following findings of fact:

PHMSA is currently amending its regulations to address CO₂ transmission lines and has stated it is vitally important to strengthen federal safety protections and regulations governing the transportation of CO₂. The Applicant has failed to demonstrate that it is in the best interest of public safety to permit its Application to proceed before these regulations are promulgated.

The Commission has received evidence and testimony from members of the public as well as local planning and zoning boards and elected officials requesting that the Commission delay approval of the Application until PHMSA has published revised rules and regulations governing the transmission of CO₂. The Applicant has failed to demonstrate that it is in the best interest of public safety to permit its Application to proceed before these regulations are promulgated.

ii. Adverse economic impact and problems raised by local entities (N.D.C.C. § 49-22.1-09(7, 11)).

13. The Commission has heard from a laundry list of elected officials from Burleigh County and the City of Bismarck opposing the routing of this proposed pipeline,

³ SCS has suggested that it will comply with PHMSA's new regulations as required by law. However, PHMSA lacks the ability to make its regulations retroactive to certain parts of pipeline design and construction, such as valves, when the pipeline is already under construction. *See* Round table discussion, May 31, 2023 CO₂ Safety Public Meeting, Des Moines, IA (available through PHMSA's official record at <https://www.onlinevideospace.com/clients/PHMSA/053123/>, beginning at 1:11:25).

received thousands of petitions opposing the pipeline, and heard many hours of angry residents voicing their objections. This is probably why there was not a single state or local elected official who testified it was a good idea for SCS to wrap Bismarck in 936,000,000 cubic feet of asphyxiant every day the pipeline operates.

14. Even if SCS's foreign investors are comfortable with the risk to Bismarck schools, North Dakota law is not a place where SCS gets to unilaterally decide the route and the public can eat cake. *See* N.D.C.C. § 49-22.1-09(11)(Legislature stating the Commission is to be guided by "[p]roblems raised by...local entities" in the evaluating and designation of sites, corridors, and routes). In this case, every public organization, business group, governmental entity, and elected official representing Burleigh County or the City of Bismarck who spoke up has vigorously objected to SCS's Bismarck route. These landowner intervenors agree with the positions of Commissioner Bitner, the City of Bismarck, [Doc. 311], the Burleigh County Commission [Doc. 280], the Bismarck Public School Board, [Doc. 312], the Bis-Man Home Builders Association, [310], Burleigh County Planning and Zoning, [Doc. 313], citizens of Burleigh County [Doc. 317], and Intervenors Wachter, Moldenhauer, and Warford.

15. The PSC should find as follows regarding SCS's proposed pipeline in Burleigh County:

The Commission is required to consider the direct and indirect economic impacts of the proposed facility, as well as the existing plans of the local government and private entities for other developments within the proposed corridor. The evidence pertaining to the harmful direct and indirect economic impact of the proposed corridor on Bismarck's current and future development and expansion has been overwhelming. The Applicant has not offered sufficient competent evidence that it has taken all reasonable steps to minimize or avoid the prejudicial economic impact to

Burleigh County and the City of Bismarck as anticipated by the current route.

The Commission is required to consider problems raised by local entities in evaluating and designating corridors and routes. A number of local governmental entities, including the Burleigh County Commission, City of Bismarck, Bismarck School Board, Burleigh County Planning and Zoning, and others, have expressed objections to the proximity of the proposed pipeline to schools, residential developments, and anticipated future expansion. The Applicant has not offered sufficient competent evidence that it has addressed the objections of these local governmental authorities or shown the objections to be without merit.

The Commission is required to consider problems raised by local entities in evaluating and designating corridors and routes. A number of local governmental entities and officials have requested that the Applicant's pipeline should not be approved until federal regulators have an opportunity to issue revised and updated standards for CO₂. The Applicant has not offered sufficient competent evidence to assure the Commission that these widespread concerns are without merit.

16. The Commission also received evidence from Burleigh County Landowner/Intervenors SPLJ LLP (Susan Doppler and Pam Schonert), 8N2E Properties, LLP (Marilyn Bryan, Roberta Klusmann, Teresa Yarlott, and Lon Klusmann), MaryJo Irmen, Connie Erickson, Rachelle Herbel, and others regarding how the proposed pipeline is poised to slice through the most valuable real estate West of the Red River Valley and how it will cripple development of their property. *See* [Docs. 302 and 328-334]. Intervenors Wachter, Moldenhauer, and Warford have also provided compelling evidence and testimony regarding the economic impact of this pipeline on North and East Bismarck. In a nutshell, SCS's response has been "the route is the route."

17. To respond to the mountain of evidence admitted into the record, SCS filed a report from its paid expert witness appraiser, Wade Becker. In this report, Becker concluded that pipelines do not affect property values. [Doc. 293]. Intervenors object to

the Commission receiving this report. As a beginning point, Becker's letter was filed with the PSC on June 1, 2023, the day before the final hearing in Bismarck. Intervenors did not have a meaningful opportunity to review the report before the close of the evidence, much less to present any contrary evidence. Furthermore, Becker's letter was not signed under oath and was not offered at a hearing. As such, it is improper hearsay. As stated in Title 69 of the Administrative Code,

Witnesses will be orally examined under oath unless their testimony is taken by deposition as provided in section 69-02-05-04. Written testimony of any witness may be received when properly supported by the oral testimony of its author on direct examination subject to cross-examination and motion to strike.

See N.D.A.C. § 69-02-05-02; *see also* N.D.A.C. § 69-02-05-01 (Rules of Evidence apply to proceedings).

18. Finally, even if his unsworn letter was somehow admissible, it is not persuasive. Becker's report states that the purpose of his research is to determine what impact "pipelines" have on the marketability of residential property in Bismarck. However, the impact of a sewer line or a natural gas pipeline is not the issue. Instead, the issue is the impact on marketability that a 24" highly-pressurized pipeline transporting 936,000,000 standard cubic feet per day of a toxic asphyxiant will have on residential property. Even assuming the Commission thinks Becker is smarter than some of the most successful and experienced real estate developers and builders in Bismarck, the City of Bismarck, the Bismarck County Commission, the Bismarck Public School Board, the Bis-Man Home Builders Association, and Burleigh County Planning

and Zoning, Becker's opinion is not supported by any "market research" on carbon dioxide pipelines—because there is none.

19. In this context, the Commission should find:

The Commission is required to consider the adverse economic impact imposed by the proposed corridor and route. SPLJ LLP (Susan Doppler and Pam Schonert) has offered testimony regarding the depressed financial value caused by placing the pipeline on potential residential development property in Burleigh County. The Applicant has not offered sufficient competent evidence that demonstrates that it is unable to accommodate the concerns of the SPLJ LLP or shown their objections to be without merit.

The Commission is required to consider the adverse economic impact imposed by the proposed corridor and route. 8N2E Properties, LLP Marilyn Bryan, Roberta Klusmann, Teresa Yarlott, and Lon Klusmann) offered testimony, plats, and other evidence regarding their plans to develop their property in Burleigh County North of Bismarck and the impact of the proposed pipeline on this property. The Applicant has not offered sufficient competent evidence that demonstrates that it is unable to accommodate the concerns of the 8N2E Properties, LLP or shown their objections to be without merit.

The Commission is required to consider the adverse economic impact imposed by the proposed corridor and route. MaryJo Irmen has testified regarding the impact on her property in Burleigh County. The Applicant has not offered sufficient competent evidence that demonstrates that it is unable to accommodate the concerns of the MaryJo Irmen or shown her objections to be without merit.

The Commission is required to consider the adverse economic impact imposed by the proposed corridor and route. Connie Erickson has testified regarding the impact on her property in Burleigh County and her reliance on this rental income. The Applicant has not offered sufficient competent evidence that demonstrates that it is unable to accommodate the concerns of Connie Erickson or shown her objections to be without merit.

The Commission is required to consider the adverse economic impact imposed by the proposed corridor and route. Rachelle Herbel has testified regarding the impact on her property in Burleigh County and her family's intention to build a residence on the property that would be frustrated by the current route and her safety concerns. The Applicant has not offered sufficient competent evidence that demonstrates that it is unable to

accommodate the concerns of Dr. Brent and Rachelle Herbel or shown their objections to be without merit.

20. Local entities other than those in Burleigh County have also raised objections. During public hearing, the Commission heard from Emmons County local and State elected representatives who also voiced objections to the proposed pipeline because Emmons County lacked the resources to respond to adverse events, because of economic injury raised by constituents, and because they believed the proximity of the pipeline to residences and livestock presented an unacceptable risk. *See also* [Doc. 350](response by Emmons County to SCS's motion to have Emmons County ordinances preempted). As such, the Commission should find:

The Commission is required to consider problems raised by local entities in evaluating and designating corridors and routes. Emmons County elected officials, including members of the Emmons County Commission, have voiced objections to the proposed route due to its proximity to residences, livestock, and agricultural operations. The Applicant has not offered sufficient competent evidence that it has addressed the objections of these local governmental authorities or shown the objections to be without merit.

iii. Adverse economic impact on agriculture and family farms and ranches (N.D.C.C. § 49-22.1-09(7) and N.D.A.C. § 69-06-08-02(3)(a)(1-2)).

21. Another theme of both Intervenor and the general public was a recurring surprise and anger that SCS did not seem to recognize that putting a pipeline across the middle of a piece of property maximizes the injury, the interruption to agricultural operations, and the impact on future residential development. While foreign venture capitalists would not know about things like crop yield or drain tile or the economics of a family farm, the Commission has adopted "agricultural production" and the impact on

“family farms and ranches” as one of its expressly enumerated criteria. N.D.A.C. § 69-06-08-02(3)(a)(1-2)

22. On this issue, the Commission heard testimony from many farmers and ranchers that suggests wherever SCS was presented with the option of accommodating a landowner’s request or saving SCS money, it apparently chose the latter. This is not a very productive approach with a North Dakota farmer or rancher accustomed to helping neighbors. For example:

- Ben Dotzenrod and his mother Rose Dotzenrod testified that the proposed routing of SCS’s pipeline on their Richland County property will affect the underground drain tile and destroy the profitability of the land that supports Ben’s family. They indicated that they had reached a compromise with SCS that was not honored. *See* [Doc. 157, 182-185] (Ben Dotzenrod Exhibits) *See also* [Doc. 186] (Rose Dotzenrod Exhibit) and [Doc. 211] (Affidavit of Rose Dotzenrod).
- James Tiegs testified about the effects of the proposed pipeline on his cropland in Dickey County. Mr. Tiegs expressed concerns regarding his future ability to add drain tiling with an existing pipeline, and the added costs and expense if he would do so. Mr. Tiegs stated his concerns about the pipeline being sited four feet underground and testified that machinery sitting on wet/soggy land will sink below four feet. Mr. Tiegs testified regarding the decline of soil quality if the pipeline is placed on his cropland. [Doc. 54, 187].
- Steve Laine testified about his land located in Emmons County and the dramatic losses in rental income due to the loss of forage and crop yield caused by the fact the pipeline is diagonal through his land. [Docs. 249-250]
- Linda Gayman testified about her land located in Dickey County. She expressed concerns about her wells and confined and unconfined aquifers and resulting interruptions. She testified that any interruption in her water supply would affect her cattle. She also testified that her insurance company⁴ will not cover her in the

⁴ SCS’s response to insurance concerns is “don’t worry—we are willing to agree to indemnify landowners.” [Doc. 289](statement of Micah Rorie). However, SCS does not offer any evidence that this language is present in all voluntary easements. [Doc. 289] Furthermore, SCS also does not mention how it will indemnify landowners who do not sign voluntary easement agreements or who is going to indemnify landowners when SCS cashes out. [Doc. 289] Another example of consent—or else.

event of any injury to person or property as the result of a pipeline failure. [Docs. 51, 245].

- Diann Zajac provided statements regarding her property in Richland County, which has 34 acres of drain tiles. She testified about the loss of rent to her and her personal connection to the property. [Doc. 296]
- James O. Rockstad filed a letter explaining that he has put in hundreds of trees into his property in Richland County and that he had intended to install drain tile because this land is prone to frequent flooding. Mr. Rockstad also stated that his insurance company will not provide coverage to him if the pipeline is routed through his land. [Doc. 272]
- Loren Staroba and his wife testified about their land in Richland County and the impact upon his rental income that will result from the pipeline. Mr. Staroba also provided academic studies discussing how soil degradation and crop yield declines persist for 5 years after pipeline installation. [Doc. 188]
- Kevin and Ann Bernhardt testified about their land located in Emmons County. Kevin said the pipeline route goes through the middle of sections 6, 7, and 36 of his land. Kevin expressed that he feeds cattle on Section 7, and that a leak could involve a catastrophic and uninsurable loss. Kevin also testified about the Bernhardt family's plan to develop an additional cattle feedlot on Section 6 of their property. Kevin explained that it would be costly for him to build an additional feed lot where there is a pipeline underground because he may have to bore under the pipeline to put in fence posts. He testified that corner fence posts are dug six feet under the ground and the pipeline is only four feet under the ground. Kevin further testified that Section 36 is mainly cropland and is concerned about the soil being disturbed and losing production for many years to come. He also expressed his concerns about the danger of having a pipeline only four feet under the ground because of the heavy machinery used to farm the land. Kevin provided a picture of section 36 and circled the ten acres of wetlands that the soil conservation will not allow him to touch. If the pipeline is allowed to go through this section, it will disrupt the wetland. Kevin also testified that the pipeline is too close to his home and that his son Eric has plans to build a home on the land. He said that his son will not build a home that close to the pipeline. [Doc. 247-248]
- Pamela Schonert from SPLJ LLP testified about her cropland located in Burleigh County. Ms. Schonert testified that she would not be able to rent her cropland if the pipeline is placed on her property because her insurance company may not cover damages due to leak or explosion.
- Randall Waloch testified about his land located in Sargent County and the impact the pipeline will have on his soil. Mr. Waloch's cropland does not have a lot of

topsoil and he has worked hard for many years to preserve the land. He testified that disturbing the soil would greatly affect the soil quality. The proposed pipeline route would cross through his cropland and come very close to his pastureland which contains approximately \$600,000 worth of cattle/calves. He testified that his insurance company informed him that they would not cover any damages due to a pipeline leak.

- Valera Hayen testified about her land located in Sargent County. Ms. Hayen's land is mostly pastureland and contains virgin prairie grass. Ms. Hayen testified that her livelihood depends on the income she receives from renting her pastureland. She is concerned that she may be unable to rent the land if the pipeline is on her land. She also expressed her concerns regarding the virgin prairie grass being disturbed. She said that the pipeline would be too close to her home and would violate the Jackson Township Zoning regulations.

23. Many of the angry landowners had similar maps showing the same thing—a proposed pipeline path that ran diagonally through the property in a way that affected the maximum amount of acreage. Most of the time, the landowner voiced a plea that the pipeline be run along one of the property lines and thereby minimize the impact, or placed on the property of a neighbor who signed an easement already, or some other suggestion to avoid existing drain tiles or other features. SCS's only response was "thank you for your testimony" and a vague statement that its goal was to obtain 100% voluntary consent. [Doc. 291]

24. However, the Commission did not receive any actual facts from SCS as to why it could not alter its routing to accommodate the Dotzenrod family's drain tiling, or Mr. Tiegs concerns about depth on his property, or Mrs. Gayman's concerns about her water supply, or the complaints from others. Instead, the Commission received a cookie-cutter response. *See* [Doc. 294]. This approach should not be good enough. Eminent domain constitutes the exercise of the power of the sovereign against an otherwise blameless citizen. It is an anomaly in the law. There is only one forum in the entire

process of involuntarily imposing a pipeline on a North Dakota landowner's property where a landowner can explain the problem and ask an impartial third party to move the pipeline. That opportunity is before the Public Service Commission, and the PSC should hold SCS to its burden of proof. *See* N.D.C.C. § 49-22.1-09(7) and N.D.A.C. § 69-06-08-02(3)(a)(1-2).

25. In this context, the PSC should find as follows:

In siting a pipeline corridor, the Commission is required to consider the adverse impact upon family farms and ranches. The Commission heard testimony and received evidence from Ben Dotzenrod and his mother Rose Dotzenrod regarding real property in Richland County. The Applicant has not offered sufficient competent evidence that demonstrates that it is unable to accommodate the concerns of the Dotzenrod's or proven their objections to be without merit.

In siting a pipeline corridor, the Commission is required to consider the adverse impact upon family farms and ranches. The Commission heard testimony and received evidence from James Tiegs regarding real property in Dickey County. The Applicant has not offered sufficient competent evidence that demonstrates that it is unable to accommodate the concerns of Mr. Tiegs or proven his objections to be without merit.

In siting a pipeline corridor, the Commission is required to consider the adverse impact upon family farms and ranches. The Commission heard testimony and received evidence from Steve Laine regarding real property in Emmons County. The Applicant has not offered sufficient competent evidence that demonstrates that it is unable to accommodate the concerns of Mr. Laine or proven his objections to be without merit.

In siting a pipeline corridor, the Commission is required to consider the adverse impact upon family farms and ranches. The Commission heard testimony and received evidence from Linda Gayman regarding real property in Dickey County. The Applicant has not offered sufficient competent evidence that demonstrates that it is unable to accommodate the concerns of Ms. Gayman or proven her objections to be without merit.

In siting a pipeline corridor, the Commission is required to consider the adverse impact upon family farms and ranches. The Commission received statements from Diann Zajac regarding real property in Richland County.

The Applicant has not offered sufficient competent evidence that demonstrates that it is unable to accommodate the concerns of Ms. Zajac or proven her objections to be without merit.

In siting a pipeline corridor, the Commission is required to consider the adverse impact upon family farms and ranches. The Commission received a written statement from James O. Rockstad regarding real property in Richland County. The Applicant has not offered sufficient competent evidence that demonstrates that it is unable to accommodate the concerns of Mr. Rockstad or proven his objections to be without merit.

In siting a pipeline corridor, the Commission is required to consider the adverse impact upon family farms and ranches. The Commission heard testimony and received evidence from Loren Staroba and his wife regarding real property in Richland County. The Applicant has not offered sufficient competent evidence that demonstrates that it is unable to accommodate the concerns of the Starobas or proven their objections to be without merit.

In siting a pipeline corridor, the Commission is required to consider the adverse impact upon family farms and ranches. The Commission heard testimony and received evidence from Kevin and Ann Bernhardt regarding real property in Emmons County. The Applicant has not offered sufficient competent evidence that demonstrates that it is unable to accommodate the concerns of the Bernhardts or proven their objections to be without merit.

In siting a pipeline corridor, the Commission is required to consider the adverse impact upon family farms and ranches. The Commission received testimony from Pamela Schonert at SPLJ LLP regarding real property in Burleigh County. The Applicant has not offered sufficient competent evidence that demonstrates that it is unable to accommodate the concerns of SPLJ LLP or proven its objections to be without merit.

In siting a pipeline corridor, the Commission is required to consider the adverse impact upon family farms and ranches. The Commission heard testimony from Randall Waloch regarding real property in Sargent County. The Applicant has not offered sufficient competent evidence that demonstrates that it is unable to accommodate the concerns of Mr. Waloch or proven his objections to be without merit.

In siting a pipeline corridor, the Commission is required to consider the adverse impact upon family farms and ranches. The Commission received testimony from Valera Hayen regarding real property in Sargent County. The Applicant has not offered sufficient competent evidence that

demonstrates that it is unable to accommodate the concerns of Ms. Hayen or proven her objections to be without merit.

26. SCS is probably going to argue that the PSC should ignore landowner objections because the landowners will get to complain about damages when SCS sues them for eminent domain. This argument promotes a false equivalency. The Commission is required by statute to consider the impacts to farms and ranches when deciding on a route—if the Legislature’s *only* concern was ensuring a landowner received adequate money damages, these factors would be meaningless. However, North Dakota’s Legislature is not made up of venture capitalists. Instead, the Legislature is full of farmers and ranchers. This is probably why the statute reads like it does.

27. These legislators would understand that money is no substitute for family control over family land. For example, if the PSC approves the pipeline’s route on the Bernhardt family property, it means that the Bernhardts’ son can’t live at the home place where he was going to build his home, and that Kevin cannot expand their feedlot operation to feed two families because the pipeline will be directly under where Kevin needs to dig 6’ holes for corner and gate posts. The Legislature would understand this, and this record is full of stories like Kevin and Ann. The PSC should force SCS to prove its case and demonstrate why there is no alternative to adversely impacting people like the Bernhardts. SCS has failed to do so.

iv. Summit’s failure to consider alternative routes (N.D.C.C. § 49-22.1-09(5))

28. The Commission is also required to consider alternatives to the proposed corridor or route developed during the hearing process which minimize adverse effects.

N.D.C.C. § 49-22.1-09(5). In this case, the only “alternative route” publicly discussed by SCS was a Southern route around Bismarck. This was first testified to by COO Jimmy Powell at the Linton hearing. However, on May 30, 2023, SCS submitted a “Bismarck Route Analysis” [Doc. 275] In this document, SCS provides a number of reasons why it thinks a Southern route is impracticable. [Doc. 275].

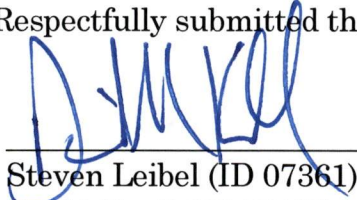
29. Much like the Becker report, this document has no evidentiary weight and should be disregarded. First of all, this document is not evidence—it is an unsigned and unverified brochure. This is classic hearsay and is not admissible as evidence. N.D.A.C. § 69-02-05-01 (Rules of Evidence apply to PSC proceedings). Second, it appears to have only slightly more persuasive weight than Wikipedia—most of the citations are to press releases or the New York Times. If this is the type of information that SCS is relying upon to make critical business decisions, it has bigger problems than Intervenors. Finally, SCS’s reroute analysis is an effort to create such a large problem that fixing the problem is an unwieldy impossibility. Many of these Intervenors are rural farm and ranch families. There is no evidence in this record why SCS could not move off the land of objecting landowners and onto a consenting neighbor. In light of this record, the Commission should find:

In siting a pipeline corridor, the Commission is required to consider alternative routes that would mitigate or avoid adverse impacts. There has been a great deal of evidence and testimony regarding the proposed route located near the edge of the City of Bismarck territorial limits. The current proposed route presents actual and potential substantial adverse impacts to the City of Bismarck and those landowners located in the proposed corridor. The Applicant has not offered sufficient competent evidence that demonstrates alternative routes are unavailable.

In siting a pipeline corridor, the Commission is required to consider alternative routes that would mitigate or avoid adverse impacts. The Applicant has not offered sufficient competent evidence that proves it has considered alternative routes or that alternative routes are unavailable or not feasible.

30. For these reasons, the Application should be denied.

Respectfully submitted this 17th day of July, 2023.



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**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

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

DECLARATION OF SERVICE

[1] Rosanne Ogden declares that I am of legal age and not a party to this action, and that I served the following document(s):

- 1. Post-Hearing Brief; and**
- 2. Declaration of Service.**

[2] On July 17, 2023, by sending a true and correct copy thereof by electronic means only to the following email addresses, to wit:

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[3] and by sending the originals and seven (7) copies of said documents via U.S. Mail, at Bismarck, North Dakota with postage prepaid, to the following:

Steve Kahl
Executive Secretary
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State Capitol
600 E Boulevard Ave, Dept 408
Bismarck, ND 58505-0480

[4] The addresses of each party served are the last reasonably ascertainable e-mail address and post office address of such party.

[5] I declare, under penalty of perjury under the law of North Dakota, that the foregoing is true and correct.

Signed on the 17th day of July 2023 at Bismarck, North Dakota.


Rosanne Ogden