



KNOLL LEIBEL ^{LLP}
ATTORNEYS AT LAW

August 31, 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. Response in Opposition to Petition for Reconsideration, Notice of Route Adjustment, and Request for Limited Rehearing; and
2. Declaration of Service.

This Response 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 NDPSC's findings and conclusions.

Sincerely,

KNOLL LEIBEL LLP

David M. Knoll

david@bismarck-attorneys.com

DMK: rmo

Enclosures

David M. Knoll, Partner

PO Box 858 · 1915 N. Kavaney Drive, Suite 3 · Bismarck, ND 58502-0858
Phone 701-255-2010 · Fax 701-255-1980 · Email david@bismarck-attorneys.com · www.bismarck-attorneys.com

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Response in Opposition to Petition for Reconsideration, Notice of Route Adjustment, and Request for Limited Rehearing
Knoll Leibel, LLP, on behalf and at the request of Intervenors
David Knoll, Knoll Leibel, LLP

**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

**RESPONSE IN
OPPOSITION TO
PETITION FOR
RECONSIDERATION,
NOTICE OF ROUTE
ADJUSTMENT AND
REQUEST FOR LIMITED
REHEARING**

Intervenors represented by the undersigned counsel (hereinafter “Intervenors”), hereby respectfully submit this response in opposition to SCS Carbon Transport LLC’s *Petition for Reconsideration, Notice of Route Adjustment and Request for Limited Rehearing* dated August 18, 2023.

1. In its petition for reconsideration, SCS Carbon Transport LLC (“SCS”) does not ask the Public Service Commission (the “Commission”) to reconsider the Commission’s final decision. Instead, SCS has reconsidered SCS’s decisions. This includes its decision to ignore the concerns of the Commission, elected officials, the public, and state agencies like the State Historical Society of North Dakota and the North Dakota Geological Survey.

In fact, SCS has now even reconsidered its “the route is the route” mandate. However, the rules do not save a party from its own bad decisions.

5. This is the point here. SCS is not asking the Commission to reconsider the findings, conclusions, and decision based upon the evidence in the record—its petition is a tacit admission that the Commission got it right. Instead, SCS is asking for truly extraordinary relief: a “do over.” The Commission should not reopen the proceeding to accept *new* evidence because SCS has reconsidered.

ARGUMENT AND AUTHORITIES

6. SCS had almost nine (9) months, multiple hearings, and a full opportunity to put on evidence supporting its application. However, it failed to answer basic questions, much less make a persuasive case regarding the appropriate criteria. In fact, even now the best SCS can do is challenge a single finding from the Commission’s 12 page final decision regarding its interpretation of “Game Management Areas.” For many reasons, including those identified below, reconsideration should be denied.

A. SCS fails to provide adequate justification or excuse for reconsideration.

7. The Administrative Agencies Act permits “any aggrieved party” to move for reconsideration. N.D.C.C. § 28-32-40. The Commission,

consistent with its rulemaking authority granted by N.D.C.C. § 28-32-02(1), has promulgated rules governing a motion for reconsideration. *See* N.D.A.C. § 69-02-01-01 (“This article applies to all proceedings before the public service commission unless inconsistent with a specific statute or rule, in which case the more specific statute or rule applies.”). Specifically, the Commission has created two procedural vehicles that are available to a party practicing before the Public Service Commission after the hearings have closed.

8. The first procedural vehicle is called a petition to reopen. Pursuant to this procedural vehicle, “[a]t any time after the conclusion of a hearing, but before the final order is issued or a rule is adopted, any party may file a petition to reopen the proceeding for the purpose of taking additional evidence.” N.D.A.C. 69-02-06-01. The petition to reopen must clearly identify the facts that provide grounds for reopening and “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). The Commission may grant a petition to reopen if the Commission has “reason to believe that conditions of fact or law have so changed as to require, or that public interest requires, the reopening of a proceeding.” N.D.A.C. 69-02-06-01(4).

9. The second procedural vehicle is called a petition for reconsideration. N.D.A.C. § 69-02-06-02. This petition must be filed within fifteen days after notice of the decision has been given. N.D.A.C. § 69-02-06-02(1). Unlike a petition to reopen, a petition for reconsideration does not provide for the offering of additional evidence. Instead, this rule simply states that this petition “must state the specific grounds upon which the petition rests or a statement of any further showing to be made.” N.D.A.C. § 69-02-06-02(2).

10. In this case, SCS decided to file a petition for reconsideration. In reading these two rules together, there are some obvious conclusions. First, a petition for reconsideration under N.D.A.C. § 69-02-06-02 is different than a petition to reopen under N.D.A.C. § 69-02-06-01. Otherwise, there would not be two rules. Second, a petition for reconsideration is backward-looking instead of forward-looking—one cannot reconsider something that has not previously been considered.

11. In applying these two rules, the Commission should look to the procedures used by the judiciary in evaluating post-decision challenges. For example, in the judicial system, “reconsideration” means just that: courts do not entertain arguments or evidence that could have been, but were not,

raised before the decision is entered. *See generally Banister v. Davis*, 140 S. Ct. 1698, 1708 (2020)(U.S. Supreme Court explaining in the context of a criminal case “...’reconsideration’ means just that: Courts will not entertain arguments that could have been but were not raised before the just-issued decision.”).

12. In North Dakota, courts do not formally recognize motions for reconsideration, and instead apply the standards of Rules of Civil Procedure 59(j) or 60(b). This means that a party has the obligation to provide a compelling reason for reconsideration. For example, Rule 60(b) states that in order to seek relief from a final judgment or order, a movant must show (1) mistake, inadvertence, surprise, or excusable neglect, (2) newly discovered evidence that, with reasonable diligence, could not have been discovered sooner, (3) fraud, (4) the judgment is void, (5) the judgment has been satisfied, released, or discharged, or (6) any other reason justifying relief. However, these factors are not broadly applied. The catch-all of Rule 60(b)(6), which allows a person to seek relief from a final judgment for “any other reason justifying relief,” is interpreted as follows:

[T]he use of the rule is limited by many considerations. It is not to be used as a substitute for appeal. It is not to be used to relieve a party from free, calculated, and deliberate choices he has made. It is not to be used in cases where subdivisions (1) to

(5) of Rule 60(b) might be employed—it and they are mutually exclusive...

E.g. Valer v. Bartelson, 2019 ND 107, ¶ 13, *citing Hildebrand v. Stolz*, 2016 ND 225, ¶ 16, 888 N.W.2d 197 (citations omitted). The moving party bears the burden of establishing sufficient grounds for disturbing the finality of the judgment, and relief should be granted only in exceptional circumstances. *Id.* If a North Dakota trial court grants relief under this rule without a sufficient showing of cause, it abuses its discretion. *Gajewski v. Bratcher*, 240 N.W.2d 871 (N.D. 1976).

13. Intervenors are not suggesting that the Commission is bound by the Rules of Civil Procedure—it is not. However, the Commission has the same obligation to balance the finality of decisions following adjudication against the need to consider challenges when justice requires. For this reason, the Commission should not hesitate to lean on these well-established principles.

13. In this context, it should be clear that SCS's filing is actually a petition to reopen. Offering new evidence is expressly permitted by N.D.A.C. § 69-02-06-01, not § 69-02-06-02. A petition to reopen must be filed before a final decision is rendered under N.D.A.C. § 69-02-06-01. While the Commission has discretion to grant a petition for reconsideration on "...

such terms as it may prescribe,” N.D.C.C. § 28-32-40(4), the Commission should not exercise this discretion under these circumstances. The rules promulgated by the Commission clearly do not anticipate taking new evidence post-decision.

14. However, placing aside the untimeliness, SCS’s petition does not identify any “conditions of fact or law that have changed since the final hearing as to require a reopening, or that public interest requires a reopening,” as is required by N.D.A.C. § 69-02-06-01(4). At best, SCS’s petition reflects a belated acknowledgement of the lack of necessary evidence presented at the hearings. However, SCS provides no justification as to why it was prevented from performing necessary work or obtaining necessary information for submission as evidence prior to the Commission’s final decision.

15. This conclusion does not change if the petition is interpreted as a petition for reconsideration. SCS does not ask for reconsideration of the facts in the record. Instead, it wants a do-over. However, SCS never provides any justifications or reasonable excuses as to why it could not provide the necessary evidence before the Commission’s final decision. This is because the holes in the record are the results of SCS’s strategic disregard

for the questions of the Commission, state and county agencies and elected officials, and the public¹.

16. For example, the proposed route adjustments A, B, and C, as well as the “trust me” in subpart D, are new proposed adjustments and promises of future compliance that have not been previously considered by the Commission. Regarding these proposed adjustments, SCS provides no explanation as to why it did not propose these adjustments prior to the final decision.

17. As another example, in Section VI of its petition for reconsideration, SCS recites a number of tasks it has performed regarding the areas of possible geologic instability identified by the North Dakota Department of Mineral Resources. This includes additional consultant reports dated August 15, 2023, after the final decision. However, SCS provides no compelling justification as to why it could not complete these tasks prior to the final hearing or timely file a petition to reopen to submit this information.

¹ This strategic disregard has not changed. Burleigh County has filed a response to SCS’s petition that included as an Exhibit 1 an affidavit of Mitch Flanagan, the Director of the Burleigh County Building/Planning/Zoning Department. As indicated by Mr. Flanagan, SCS has not coordinated its half-baked reroute with local officials.

18. As another example, in Section VII of its petition for reconsideration, SCS recites additional cultural resource studies that have been performed since the final hearing. SCS states that it submitted a revised Class III Report to SHPO on May 25, 2023, and that SCS and its consultant “worked diligently to complete the amended Class III Report and said amended report was finalized by EXP on August 7, 2023, three days after the Commission issued its Order denying Summit’s request for a certificate of corridor compatibility and route permit.” This is absurd. SCS does not provide any specific explanation as to why this report was not completed in a timely fashion. Furthermore, SCS did not file a petition to reopen to advise the PSC that the report was forthcoming and to request supplementation of the record of this report. These facts do not present an exceptional circumstance or justifiable excuse to reopen the proceeding for additional evidence.

B. A new application is the proper solution.

19. In this context, the answer for SCS is to refile its new application once it has completed the work required and has identified its reroute so the Commission has something concrete to consider. This will allow the newly affected landowners an opportunity to weigh in on their property. It will

allow State and County stakeholders to review the new route and state their objections, if any. It will provide all the regulatory and statutory protections to the public that they are afforded by law. Most importantly, a new proceeding will allow the largest proposed carbon dioxide hazardous pipeline in the world to be properly vetted. The alternative is unacceptable for three reasons.

20. First, the process requested by SCS's extraordinary relief will complicate this matter excessively. This is because most of the petition for reconsideration is based upon proposed reroutes around various landowners and the City of Bismarck. This proposed "reroute" is nothing more than a vague computer model at this point, and SCS is not going to provide the particulars until the Commission issues a notice. SCS's "trust me" plan is what got it into this position in the first place. Furthermore, SCS seeks reconsideration of the findings that were unfavorable to SCS. However, implicit in the "limited" hearing requested by SCS is that the Commission retains all the findings that were favorable to SCS. Dragging new landowners into this matter *after* the PSC has already made adverse findings of fact violates due process.

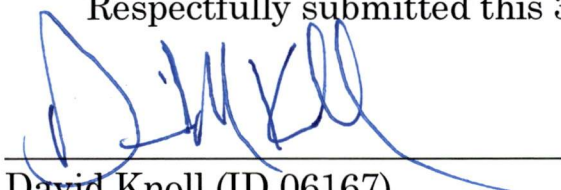
21. Second, large swaths of contested issues were decided against the Intervenor based upon the timing of the final hearing and the final decision. For example, Burleigh County was denied an opportunity to intervene based upon the PSC's final decision, LIUNA was denied discovery at least partially based on mootness, and the Intervenor was denied discovery, including depositions, based upon the timing of the decision and mootness. The decision on preemption of local ordinances was determined to be moot. If this matter is reopened, it should be reopened as to all issues or SCS will be allowed to profit from a denial of its application, based upon its naked and unexcused failure to make a sufficient showing. This would be an unprecedented and unfair result.

22. Finally, to grant a reconsideration in the absence of a compelling excuse or justification sets a dangerous precedent. Compliance with siting requirements is costly and time-consuming. If an applicant is allowed a "do-over," applicants will have incentive not to perform expensive testing and thorough studies until after the application is denied. This places the public at risk and is an insult to the process. Second, a party opposing a siting has no incentive to seriously contest a permit until after the permit is granted—due process for the public means being treated the same as a pipeline

company. Finally, if the Commission does not ensure the finality of its decisions absent a compelling excuse or justification, it cannot expect that the public or those who practice before the Commission will respect the process.

23. For these reasons, the *Petition for Reconsideration, Notice of Route Adjustment and Request for Limited Rehearing* should be denied.

Respectfully submitted this 31st day of August, 2023.



David Knoll (ID 06167)
Steven Leibel (ID 07361)
Knoll Leibel LLP
P.O. Box 858
1915 N. Kavaney Drive, Ste. 3
Bismarck, ND 58501
Ph: (701) 255-2010
steve@bismarck-attorneys.com
david@bismarck-attorneys.com
Landowner/Intervenor Lawyers

Brian E. Jorde
Pro Hac Vice Pending
Domina Law Group
2425 S. 144th St.
Omaha, NE 68144
Ph: 402-493-4100
bjorde@dominalaw.com
NDCO2@dominalaw.com
Landowner/Intervenor Lawyers

**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. Response in Opposition to Petition for Reconsideration, Notice of Route Adjustment, and Request for Limited Rehearing; and**
- 2. Declaration of Service.**

[2] On August 31, 2023, by sending a true and correct copy thereof by electronic means only to the following email addresses, to wit:

John Maurice Schuh Bar ID 08138
Special Assistant Attorney General
North Dakota Public Service Commission
600 E. Boulevard Ave, Dept. 408
Bismarck, ND 58505-0480
jschuh@nd.gov

Lawrence Bender Bar ID 03908
Fredrikson & Byron, P.A.
1133 College Dr., Ste. 1000
Bismarck, ND 58501-1215
lbender@fredlaw.com

Hope Lisa Hogan Bar ID 05982
Administrative Law Judge
Office Of Administrative Hearings
2911 N. 14th St., Ste. 303
Bismarck, ND 58503
hlhogan@nd.gov

Zachary Evan Pelham Bar ID 05904
Pearce Durick PLLC
314 E. Thayer Ave.
P.O. Box 400
Bismarck, ND 58502-0400
zep@pearce-durick.com

John Hamre
Public Service Commission
State Capitol
600 E Boulevard Ave., Dept. 408
Bismarck, ND 58505-0480
jghamre@nd.gov

Brian E. Jorde
Domina Law Group
2425 S 144th St
Omaha NE 68144
bjorde@dominalaw.com

Kevin Pranis
LIUNA Minnesota & North Dakota
81 E Little Canada Rd
St. Paul MN 55117
kpranis@liunagrocc.com

Randall J. Bakke Bar ID 03898
Bradley N. Wiederholt Bar ID 06354
Bakke Grinolds Wiederholt
PO Box 4247
Bismarck, ND 58502-4247
rbakke@bgwattorneys.com
bwiederholt@bgwattorneys.com

North Dakota Public Service Commission
ndpsc@nd.gov

Bret A. Dublinske
Fredrickson & Bryon, P.A.
111 E. Grand Ave., Ste. 301
Des Moines, IA 50309-1884
bdublinske@fredlaw.com

James Curry
Babst, Calland, Clements and Zomnir
P.C.
jcurry@babstcalland.com

Derrick Braaten
derrick@braatenlawfirm.com

Julie Lawyer
Burleigh County State's Attorney
bc08@nd.gov

Brant Leonard
Frederickson & Byron, P.A.
bleonard@fredlaw.com

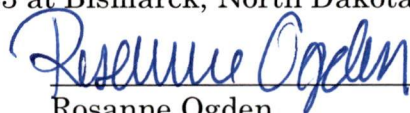
[3] and by sending the originals and seven (7) copies of said documents via U.S. Mail, at Bismarck, North Dakota with postage prepaid, to the following:

Steve Kahl
Executive Secretary
North Dakota Public Service Commission
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 31st day of August 2023 at Bismarck, North Dakota.



Rosanne Ogden