



August 31, 2023

VIA U.S. MAIL & E-MAIL

Steve Kahl
Executive Secretary
North Dakota Public Service Commission
State Capitol
600 E. Boulevard Avenue, Dept. 408
Bismarck, ND 58505-0480
ndpsc@nd.gov

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

Mr. Kahl:

Enclosed for filing please find the following original documents:

1. Emmons County's Response in Opposition to SCS Carbon Transport LLC's Petition for Reconsideration (and seven copies); and
2. Certificate of Service.

Please do not hesitate to contact me if you have any questions about this filing.

Sincerely,

A handwritten signature in blue ink, appearing to read "Derrick Braaten", is written over a light blue rectangular background.

Derrick Braaten

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

SCS CARBON TRANSPORT LLC
APPLICATION FOR CERTIFICATE OF
CORRIDOR COMPATIBILITY AND
ROUTE PERMIT FOR THE MIDWEST
CARBON EXPRESS

Case No. PU-22-391

OAH FILE No. 20230002

**EMMONS COUNTY’S RESPONSE IN OPPOSITION TO SCS CARBON TRANSPORT
LLC’S PETITION FOR RECONSIDERATION**

[¶1] On June 1st, 2023, SCS Carbon Transport LLC (“Summit”) filed its Motion to Declare Emmons County and Burleigh County Ordinances Superseded and Preempted. *See* Docket #282.

[¶2] On June 30th, 2023, Emmons County Board of County Commissioners (“Emmons County”), through undersigned counsel, filed a Petition to Intervene and Response to SCS Carbon Transport LLC’s Motion to Declare Emmons County and Burleigh County Ordinances Superseded and Preempted. *See* Docket #350.

[¶3] On July 10th, 2023, this Commission granted Emmons County’s Petition to Intervene. *See* Docket #354.

[¶4] On July 21, 2023, Summit filed a reply brief. *See* Docket #359.

[¶5] On August 4th, 2023, this Commission filed its Findings of Fact, Conclusions of Law, and Order (“Order”). *See* Docket #366. The Commission found that while Summit had requested the ordinances of Emmons and Burleigh County be superseded and preempted, it had not filed an application with either county seeking a variance or waiver of those ordinances. *Id.* at p.19. The Commission ultimately denied Summit’s applications for a Certificate of Corridor Compatibility

and Route Permit. *Id.* at p.12. Consequently, Summit’s motion asking the Commission to deem the Emmons County ordinance to be superseded was moot. *Id.* at p.11.

[¶6] On August 18th, 2023, Summit filed a Petition for Reconsideration, Notice of Route Adjustment and Request for Limited Rehearing (“Petition”). *See* Docket #371-03. In this Petition, Summit failed to address the Commission’s finding of fact regarding the county ordinances beyond baseless speculation. During the two weeks from the date of the Commission’s Order to the filing of the Petition, Summit did not attempt to contact any representative of Emmons County to seek a variance or waiver. Now, in this Petition, Summit attempts to surreptitiously slip in the same request for relief without commentary. *Id.* at p.22.

[¶7] Summit argued previously, however, that even if the Commission’s order did not automatically supersede local government ordinances, the Commission should order this relief regardless. *See* Docket #359, p.6. Although Summit had earlier claimed such supersession was automatic, despite the fact that Summit’s own motion requesting this relief belies that very argument.

[¶8] As to actual language of the statute, Summit quotes the language from N.D.C.C. § 49-22.1-13(2)(c)¹ allowing the Commission to supersede an “unreasonably restrictive” ordinance, but leaves out the remaining effective language which states:

A permit may supersede and preempt the requirements of a political subdivision if the applicant shows by a preponderance of the evidence the regulations or ordinances are unreasonably restrictive in view of existing technology, factors of cost or economics, or needs of consumers regardless of their location, or are in direct conflict with state or federal laws or rules.

¹ The undersigned concedes that N.D.C.C. § 49-22.1-13(2)(a) does not apply to transmission facilities as pointed out by Summit, but this changes nothing because the language of subsection 2c clearly requires the Commission to adjudicate the issue based on facts presented by Summit, of which there are none.

[¶9] “The preeminent canon of statutory interpretation requires that courts presume that [the] legislature says in a statute what it means and means in a statute what it says there.” *State ex rel. Stenehjem v. FreeEats.com, Inc.*, 2006 ND 84, ¶ 11, 712 N.W.2d 828. “The court's inquiry begins with the statutory text, and ends there as well if the text is unambiguous ... and administrative agencies must give effect to the unambiguously expressed intent of [the Legislature]. *Id.*”

[¶10] Summit makes a number of statements about what the legislators must have intended with certain amendments to the statute, but then argues that the PSC should not look behind the curtain at what those same legislators actually said. Docket #359, p.5. Emmons County agrees with Summit on one thing, however: “...in any event, those stray and sometimes confusing (or confused) comments cannot change the plain text.” *Id.* The plain text quoted above clearly requires the applicant to present competent evidence sufficient to establish by “a preponderance of the evidence the regulations or ordinances are unreasonably restrictive in view of existing technology, factors of cost or economics, or needs of consumers regardless of their location, or are in direct conflict with state or federal laws or rules.” Summit did not even attempt to do this.

[¶11] But it is not only the plain language of the statute that compels Summit to make a factual showing that is absent from the record before the Commission here. The North Dakota Supreme Court “deem[s] a legislative grant of power to the executive to be proper when the executive’s policy-making discretion is constrained by “reasonably clear guidelines” and a “sufficiently objective standard.” *N.D. Legislative Assembly v. Burgum*, 2018 ND 189, ¶ 45, 916 N.W.2d 83, 101 (citing *County of Stutsman v. State Hist. Soc. of ND*, 371 N.W.2d 321, 329 (N.D. 1985)).

[¶12] The North Dakota Legislative Assembly has delegated land use and zoning authority to the counties through N.D.C.C. ch. 11-33. It also provided:

The board of county commissioners is authorized to adjust the application or enforcement of any provision of a resolution hereunder in any specific case when a

literal enforcement of such provision would result in great practical difficulties, unnecessary hardship, or injustice, so as to avoid such consequences, provided such action shall not be contrary to the public interest or the general purposes hereof.

N.D.C.C. § 11-33-11.

[¶13] Summit argues that despite having clearly delegated this authority to local governments, that somehow a reference to road agreements belies the plain language of N.D.C.C. § 49-22.1-13(2)(c). According to Summit, the next sentence that begins with “A permit may supersede and preempt the *requirements* of a political subdivision...” somehow only refers to the road agreements, rather than the “requirements” or ordinances of the local government that are referenced throughout the rest of that statute. Indeed, subsection d explicitly states: “The *requirements* must be filed at least ten days before the hearing or the *requirements* are superseded and preempted.” N.D.C.C. § 49-22.1-13(2)(d). If the requirements of the county must be filed ten days before the hearing or they are superseded, it is absurd to argue as Summit does that the requirements are somehow also superseded automatically without any decision by the Commission. And subdivision e goes on: “An applicant shall comply with all local *requirements* provided to the commission pursuant to subdivision d, *which are not otherwise superseded by the commission.*” N.D.C.C. § 49-22.1-13(2)(e) (emphasis added). It is confusing indeed to discern which requirements the applicant must comply with given Summit’s interpretation that all requirements are superseded automatically if the Commission issues a siting permit after reviewing the local laws that must be submitted (for no reason, apparently). The reality is that Summit’s proclamations that intervenors’ arguments are absurd is projection.

[¶14] Summit ignored the Commission’s requests for information. It ignored its *burden of proof* to submit evidence that the Emmons County ordinance is “unreasonably restrictive.” To the extent it now argues no such burden or criterion exists for this determination, and to the extent this

Commission accepts that argument and reconsiders its decision, Summit has interposed an interpretation that results in an unconstitutional delegation of power to the Commission and the statute should be struck down as an improper delegation of the legislative function, and as violative of the principled separation of powers set forth by the North Dakota Constitution. *See, generally N.D. Legislative Assembly v. Burgum*, 2018 ND 189, 916 N.W.2d 83 and *County of Stutsman v. State Hist. Soc. of ND*, 371 N.W.2d 321 (N.D. 1985). Should the Commission grant Summit's request to reconsider and then grant the permit, Emmons County hereby submits this response as notice to the Attorney General of North Dakota that it will bring this constitutional challenge to the judiciary.

Dated: August 31, 2023

BRAATEN LAW FIRM

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PUBLIC SERVICE COMMISSION

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APPLICATION FOR CERTIFICATE OF
CORRIDOR COMPATIBILITY AND
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Case No. PU-22-391

OAH FILE No. 20230002

CERTIFICATE OF SERVICE

[¶1] The undersigned hereby certifies that the following documents:

- 1) Filing Letter to Steve Kahl from Derrick Braaten dated August 31, 2023;
- 2) Emmons County's Response to SCS Carbon Transport LLC's Petition for Reconsideration;
and
- 3) Certificate of Service

were, on August 31, 2023, filed with the North Dakota Public Service Commission by mailing, by USPS Priority mail, postage prepaid, the originals and seven copies of the Response, and by e-mailing copies of the same, to:

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

[¶2] I further certify that true and correct copies of the same were, on August 31, 2023, sent by electronic mail to the following:

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

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