

September 7, 2023

HAND DELIVERED

Mr. Steve Kahl
Executive Secretary Director
North Dakota Public Service Commission
600 E. Boulevard, Dept. 408
Bismarck, ND 58505-0480

**RE: Reply in Support of Petition for
Reconsideration
SCS Carbon Transport LLC
Midwest Carbon Express Project
Case No. PU-22-391**

Dear Mr. Kahl:

Enclosed herewith, please find the following documents for filing with the North Dakota Public Service Commission ("Commission") in the above-referenced case:

1. Reply in Support of Petition for Reconsideration, Notice of Route Adjustment and Request for Limited Rehearing

An original and seven (7) copies of the foregoing are enclosed herewith. Also enclosed is a Compact Disc (CD) containing this letter and the above-referenced documents in PDF format.

Please be advised that SCS Carbon Transport LLC ("Summit") intends to file a more detailed map of the proposed reroute to the east and north of Bismarck prior to 5:00 p.m. today. If Summit's Petition for Reconsideration and request for a rehearing is granted, Summit will file a complete map book (Exhibit A to Summit's Petition for Reconsideration) which details the proposed reroute around Bismarck and a black and white map for publication prior to the Commission issuing its notice of the rehearing.

Should you have any questions, please advise.

Sincerely,


LAWRENCE BENDER

LB/tjg
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
OAH FILE NO. 20230002

**REPLY IN SUPPORT OF PETITION FOR RECONSIDERATION, NOTICE OF
ROUTE ADJUSTMENT AND REQUEST FOR LIMITED REHEARING**

SCS Carbon Transport LLC (“Summit”), by and through its undersigned counsel, hereby submits to the North Dakota Public Service Commission (the “Commission”) this Reply in Support of Petition for Reconsideration, Notice of Route Adjustment and Request for Limited Rehearing. For the reasons set forth herein and in Summit’s Petition for Reconsideration, Notice of Route Adjustment and Request for Limited Rehearing (“Petition”), the Commission should grant Summit’s Petition and request for a limited rehearing.

I. LEGAL STANDARD.

Whether the Commission should grant Summit’s Petition is governed by N.D.C.C. § 28-32-40(4). That statute provides that the Commission “may deny the petition for reconsideration or may grant the petition on such terms as it may prescribe.” The statute does not provide a standard for the Commission to apply when deciding whether to grant Summit’s Petition. Whether to grant or deny the Petition is at the sole discretion of the Commission. The Commission may grant Summit’s Petition for any reason or no reason at all.

The Bismarck Area Intervenors¹ acknowledge in their response that this statute does not contain a standard. *See* Docket No. 382 at p. 3. Nevertheless, they request that the Commission apply the following standard when deciding whether to grant Summit's Petition:

An 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. However, what is not permitted is a 'mere change of mind' on the part of the agency.

Id. According to the Bismarck Area Intervenors, Summit's Petition does not meet this standard because the Petition is simply "a request for the Commission to change its mind." *Id.* at p. 4. The Landowner Intervenors² also argue that a similar standard set forth in the North Dakota Rules of Civil Procedure should apply³ while at the same time conceding that the Commission is not bound by the Rules of Civil Procedure. *See* Docket No. 379 ¶¶ 11-13. Conveniently, both the Bismarck Area Intervenors and the Landowner Intervenors ignore the language set forth in the above-referenced standard which states that an agency may reconsider an action when "some new or different factual situation exists that justifies [a] different conclusion." *Calvert Cnty. Planning Comm'n v. Howlin Realty Mgmt., Inc.*, 772 A.2d 1209, 1223 (Md. 2001), *see also*, Docket No. 382 at p. 3.

Assuming, *arguendo*, that the foregoing standard does apply, Summit's Petition is not a request for the Commission to change its mind. If Summit desired for the Commission to simply

¹ Intervenors represented by Mr. Randall Bakke.

² Intervenors represented by Mr. Brian Jorde, Steven Leibel and David Knoll.

³ Landowner Intervenors cite to N.D.R.Civ.P. 60(b) (Grounds for Relief from a Final Judgment or Order) which provides that a court may relieve a party from a final order for the following reasons (1) mistake, inadvertence, surprise, or excusable neglect; (2) new discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (5) any other reason that justifies relief.

change its mind, Summit's Petition would have requested that the Commission consider the same evidence that the Commission considered when it denied Summit's Application,⁴ but then reach the opposite conclusion. Summit's Petition, however, does not make such a request. Instead, Summit's Petition indicates that the factual situation that existed at the time the Commission denied Summit's Application has changed and that this change justifies the Commission reaching a different conclusion.

Intervenors⁵ cannot deny that the factual situation of this case has changed since the Commission issued its August 4, 2023 Findings of Fact, Conclusions of Law and Order ("Order").⁶ These changes include, but are not limited to the following:

- The proposed route of the Summit's proposed carbon dioxide pipeline project ("Project") is now more than twice as far from the city limits of Bismarck than it previously was.
- The proposed Project corridor width has been reduced from 300 feet to 200 feet.
- The proposed Project route no longer crosses property owned by the Doolittles, the Bernhards, or the Dotzenrods.
- Phase II Landslide Assessments have been performed on the areas of potential geologic instability along the proposed route.
- Summit has confirmed that only one (1) five-hundred-foot setback waiver is required and has been obtained.
- Summit has clarified that the Project route does not cross any state or federal wildlife refuges.
- Summit has provided additional information concerning its interactions with the State Historic Preservation Office ("SHPO") and the status of its cultural resource surveys and amended cultural resource report.
- Summit has provided additional information regarding the BNI coal permit and Summit's obligations with respect thereto.

⁴ See Docket No. 1 (Consolidated Application for Certificate of Corridor Compatibility and Route Permit).

⁵ The Bismarck Area Intervenors and Landowner Intervenors.

⁶ See Docket No. 375.

See Docket No. 371. Accordingly, Summit is not requesting that the Commission simply change its mind on its decision to deny Summit's Application. Rather, Summit is requesting that the Commission reconsider its decision in light of the different factual situation that now exists. Indeed, a different factual situation implies that there is new or additional evidence for the Commission to consider.

II. ADDITIONAL EVIDENCE.

Throughout their responses, the Intervenors mistakenly claim that the Commission's rule regarding petitions for reconsideration (N.D.A.C. § 69-02-06-02) does not allow Summit to introduce new evidence.⁷ Not only does N.D.A.C. § 69-02-06-02 allow Summit to do so, but multiple statutes do as well.

Section 69-02-06-02 states that a petition for reconsideration "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) (emphasis added). "The petition must also state if a rehearing or oral argument is requested." *Id.* (emphasis added). Accordingly, the rule contemplates a "rehearing" where Summit will be able to make a "further showing." And making a further showing necessarily requires introducing further evidence, *i.e.*, new evidence. *Showing*, Black's Law Dictionary (11th ed. 2019) ("The act or an instance of establishing through evidence and argument; proof").

Like N.D.A.C. § 69-02-06-02, section 28-32-40 of the North Dakota Century Code also states that a petitioner must submit with their petition "a statement of any further showing to be made" and that the "petition must also state whether a rehearing is requested." N.D.C.C. § 28-32-

⁷ See, e.g., Docket No. 379 at ¶ 9 ("[A] petition for reconsideration does not provide for the offering of additional evidence."); *id.* at ¶ 13 ("The rules promulgated by the Commission clearly do not anticipate taking new evidence post-decision.").

40(3). Thus, N.D.C.C. § 28-32-40 contemplates Summit introducing new evidence for the same reasons that N.D.A.C. § 69-02-06-02 does.

Finally, N.D.C.C. § 49-22.1-18 states that “[a]ny party aggrieved by the ... promulgation of a final order by the commission, may request a rehearing” and that the “hearing must be conducted pursuant to chapter 28-32.” Chapter 28-32 states that at “any hearing in an adjudicative proceeding, the parties shall be afforded opportunity to present evidence ... as is permitted under sections 28-32-24 and 28-32-35.” N.D.C.C. § 28-32-21(2). Thus, N.D.C.C. § 49-22.1-18 also contemplates Summit being able to introduce new evidence.

Based on the foregoing, the Intervenor’s claim that a petition for reconsideration does not provide for the offering of additional evidence is simply not true.

III. REROUTES, NEW LANDOWNERS AND DUE PROCESS.

The Intervenor and Burleigh County argue that the Commission should deny Summit’s Petition because the Petition did not identify the exact location of the proposed reroute near the City of Bismarck. Specifically, the Bismarck Area Intervenor alleges:

Summit fails to provide the actual re-route but rather requests to provide the Commission a more detailed re-route at some [undetermined] time in the future, and further requests a rehearing on this issue ...

Summit is playing fast and loose with local governments’ and landowners’ Due Process rights where it fails to identify in its publicly filed materials the precise route it requests the PSC to approve ...

Docket No. 382 at pp. 7-9.⁸

That is simply not the case. The reason that Summit did not provide the exact location of its proposed reroute with its Petition is that it was not possible for Summit to do so within the

⁸ See also Docket No. 378 at p. 7 (“Burleigh County has no information or details describing the new proposed route.”); Docket No. 379 at ¶ 20 (“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.”).

timeframe required to submit its Petition. Specifically, Summit had only fifteen days to prepare its Petition. *See* N.D.A.C. § 69-02-06-02(1). Summit could have chosen a new route in fifteen days if it ignored landowner sentiment towards the Project; however, that is not the approach Summit is taking. Summit is looking to route the Project on property whose owners are receptive to the Project and are willing to sign voluntary easement agreements. It may not be possible for Summit to get 100% voluntary easement agreements for the new route, but, as testified to previously, that is always Summit's goal.

Even if it was theoretically possible for Summit to determine the exact location of its proposed reroute and submit it with its Petition, the Commission's regulations do not require Summit to do so. The Commission's regulations only require a statement of "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) (emphasis added). Accordingly, the Commission's regulations contemplate Summit not showing the exact location of its proposed reroute until sometime after the submission of its Petition.

As indicated above, Summit is currently in the process of identifying a new route at locations to the east and north of Bismarck where landowners are receptive to the Project. After these locations and landowners are identified, Summit will submit final, detailed maps of the reroute to the Commission. This will include the missing portions of Exhibit A to Summit's Petition (Map Book) and a black and white map to be included in the notice publication of the rehearing. After this information is on file with the Commission, and the Commission issues its hearing notice with a more detailed map, landowners, local governments and other stakeholders will have been provided with sufficient notice for each of them to participate in the rehearing and proceedings moving forward.

The Bismarck Area Intervenors also raised concerns about the 570 minor reroutes Summit referred to in its Petition. The majority of these reroutes were made to accommodate landowner preferences and resulted in the Project moving onto property owned by only sixteen new landowners. Summit is already engaged in discussions with each of the sixteen new landowners and therefore each new landowner is well aware of the Project.

Accordingly, there is no need for Summit to re-apply solely for the purpose of providing proper notice to these landowners. Rather, Summit's Petition allows the Commission to focus its attention on the few factual situations which have been identified by the Commission as being problematic. The alternative, requiring Summit to submit a new application, would require the Commission to review an entire application and hear evidence that it has previously heard, even though there may not be any dispute as to that evidence. This is not an efficient use of the Commission's resources.

IV. PREEMPTION OF COUNTY ORDINANCES.

The Commission was fully briefed on the issues raised in Summit's Motion to Declare Emmons County and Burleigh County Ordinances Superseded and Preempted (the "Preemption Motion"). *See* Docket Nos. 282, 345, 348, 350 and 359 (Responses and reply filed by Landowner Intervenors, Bismarck Area Intervenors, Emmons County and Summit). On July 31, 2023, Burleigh County filed a petition to intervene and response in opposition to Summit's Preemption Motion. *See* Docket No. 361. In its response to Summit's Preemption Motion, Burleigh County indicated that it takes the same position as the Bismarck Area Intervenors. *Id.* On August 18, 2023, the Administrative Law Judge denied Burleigh County's petition to intervene because the Commission had determined the issue of preemption moot. *See* Docket No. 372. Subsequent to Summit filing its Petition, Burleigh County filed another petition to intervene and response in

opposition to Summit's Petition. *See* Docket No. 378. On September 5, 2023, the Administrative Law Judge granted Burleigh County's petition to intervene. *See* Docket No. 384. Now that Burleigh County has been granted intervenor status and its response to Summit's Preemption Motion and Petition are part of the official record, the Commission has all of the information it needs to render a decision on Summit's Preemption Motion.

V. TIME CONSTRAINTS.

The Intervenors suggest that it is "too little too late," arguing that Summit had its chance to present the evidence at the hearings in this case and now that chance has passed. *See, e.g.*, Docket No. 382 at p. 14. The Bismarck Area Intervenors go so far as to allege that Summit made the decision to close the evidentiary phase of this case. *Id.* at 6. This is a gross mischaracterization of the facts and the history of the proceedings in this case.

The Commission need not be reminded that the Intervenors consumed the overwhelming majority of the time at the five scheduled public hearings in this case, much of it wasted on issues that were either not relevant to the Commission's decision or outside of the scope of the Commission's jurisdiction. On the other hand, Summit made every effort to allow sufficient time for public testimony and Intervenor witnesses at each of the hearings. In fact, Summit submitted written testimony at the final June 2, 2023 hearing in Bismarck at the encouragement of the Administrative Law Judge only to be later criticized for not having witnesses available to take questions from the Commission and Intervenors. Certainly, if Summit would have called witnesses at the final hearing in Bismarck, the Intervenors would have proceeded to conduct lengthy (and mostly irrelevant) cross-examinations of Summit's witnesses, thus eliminating the opportunity for the Intervenors to present their case or the public to offer testimony. Unfortunately,

it was deliberate tactics like these employed by the Intervenors that forced Summit to limit the amount of live testimony presented at the hearings.

Furthermore, the proceedings in this case ended abruptly and to the surprise of many (including Summit) with the issuance of the Commission's Order on August 4, 2023. It is not uncommon for the Commission to hold one or more work sessions and to request additional information from the parties subsequent to the public hearings. Summit is not suggesting that the Commission acted outside of the scope of its authority in issuing its Order, only that the Commission has historically afforded applicants an opportunity to supplement the record subsequent to the public hearing(s).

Regardless of the foregoing circumstances, the Commission's Order speaks for itself and Summit, through its Petition and a rehearing, stands ready to provide the Commission with all the additional information it needs to grant Summit's request for a certificate of corridor compatibility and route permit for the Project.

VI. CONCLUSION.

The Intervenors argue that Summit should not be allowed a "do-over" that will prejudice the Intervenors who have "already incurred substantial costs in opposing Summit's application." *See, e.g.*, Docket No. 282 at pgs. 1-2, *see also* Docket No. 379, at ¶ 9. At the same time, the Intervenors insist that Summit should be required to start the application process over. *See* Docket No. 379, at ¶ 19. Clearly, the re-application process will be more costly and time consuming for all parties involved. This demonstrates that the Intervenors' objective is to require the resubmission of evidence that is not in dispute and to unnecessarily delay these proceedings.

Summit, through its Petition, is utilizing a process set forth in the Commission's own rules that allows Summit to address the limited issues raised in the Commission's Order. As correctly

pointed out in Intervenor's responses, the Commission has already disposed of the great majority of the issues set forth in Summit's Application and subsequent motions. However, if Summit is forced to re-apply, it is the Intervenor's that will get "another bite at the apple" or a "do-over" with respect to matters such as PHMSA rules, safety, eminent domain, private easements, insurance, etc. The Landowner Intervenor's even argue that a rehearing on Summit's Petition should "be reopened as to all issues." See Docket No. 379 at ¶ 21 (emphasis added). These tactics are part of the Intervenor's larger goal to delay the Project to the point where construction of the Project is no longer economically viable. The Intervenor's have made it clear that they will not support any application put forth by Summit. If Summit is forced to re-apply, the Intervenor's will argue against Summit's new application with the same "scorched earth" approach as they did in the previous five hearings, attempting to distract the Commission and members of the public from the requirements set forth in the Siting Act and the Commission's regulations. Therefore, the Commission should reject Intervenor's own attempt for a "do-over," reject the Intervenor's delay tactics, and proceed in accordance with Section 69-02-01-10 of the North Dakota Administrative Code which provides that the Commission's rules shall be "liberally construed to secure just, speedy, and inexpensive determination of the issues presented."

Based on the further showing set forth in its Petition, this reply and the evidence to be presented at the limited rehearing, Summit believes that it has met its burden of proof by complying with the statutory requirements of the Siting Act and rules and regulations of the Commission. In doing so, Summit has demonstrated that the Commission's policy considerations have been satisfied.

Accordingly, Summit respectfully requests that the Commission:

1. Grant Summit's request for a rehearing, limited to the specific issues set forth in its Petition;
2. Allow its Petition to supplement the record before the Commission;
3. Amend the Order with findings of fact and conclusions of law consistent with the evidence presented in the Petition, this reply, and at the limited rehearing;
4. Amend the Order granting Summit a certificate of corridor compatibility and route permit for the route set forth on **Exhibit A** to Summit's Petition, with construction of the Project conditioned upon:
 - a. Summit completing all field surveys for the un-surveyed areas within the 200-foot-wide Project corridor as identified on **Exhibit A** to Summit's Petition;
 - b. Summit completing its Class III cultural resource surveys for un-surveyed areas within the 200-foot-wide Project corridor as identified on **Exhibit A** to Summit's Petition;
 - c. Summit submitting its amended cultural resource report to SHPO and filing a copy of SHPO's concurrence with the Commission;
 - d. Rerouting the Project in the areas to the north and east of Bismarck consistent with the route depicted in **Figure 1** of Summit's Petition and the more detailed maps to be provided to the Commission prior to the rehearing; and
 - e. Any other reasonable requirements of the Commission which are consistent with the further showing made in Summit's Petition;

5. Grant's Summit's Application for Waiver or Reduction of Procedures and Time Schedules;
6. Grant Summit's Motion to Declare Emmons County and Burleigh County Ordinances Superseded and Preempted⁹; and
7. Amend the Order finding the Emmons County and Burleigh County ordinances superseded and preempted under North Dakota law.

DATED this 7th day of September, 2023.

FREDRIKSON & BYRON, P.A.

By: 

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⁹ See Docket No. 282.

**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, being of legal age, hereby certify that a true and correct copy of the following:

1. Letter to S. Kahl forwarding documents for filing; and
2. Reply in Support of Petition for Reconsideration, Notice of Route Adjustment and Request for Limited Rehearing.

were, on September 7, 2023, filed with the North Dakota Public Service Commission and served electronically to the following:

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Dated this 7th day of September, 2023.

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By: 

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