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ATTORNEYS AT LAW

October 12, 2023

Via Hand-Delivery

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

**Re: SCS Carbon Transport LLC  
Midwest Carbon Express Project  
Case No: PU-22-391**

Dear Mr. Kahl:

Enclosed for filing in Case No. PU-22-391, please find the following documents:

1. *Bismarck Area Intervenors' Response in Opposition to SCS Carbon Transport LLC's Renewal of its Motion to Declare Burleigh County and Emmons County Ordinances Superseded and Preempted;*
2. *Exhibit A – September 15, 2023 PHMSA letter addressed to Summit Carbon Solutions;*
3. *Exhibit B - South Dakota PUC Order Granting Motion To Deny Application Of SCS Carbon Transport LLC, dated September 13, 2023;*
4. *Exhibit C - Summit's Motion For Order Preempting County Ordinances, dated August 21, 2023;*
5. *Exhibit D – Summit's Withdrawal Of Motion For Order Preempting County Ordinances, dated September 7, 2023;*
6. *Bismarck Area Intervenors' Response to Summits Objection to the Filing of Additional Responses to SCS Carbon Transport LLC's Renewal of its Motion to Declare Burleigh and Emmons County Ordinances Superseded and Preempted; and*
7. *Certificate of Service, with seven copies of same.*

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

Very Truly Yours,

/s/ Randall J. Bakke

Randall J. Bakke

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**406**

**PU-22-391** Filed: 10/12/2023 Pages: 46  
**Response in Opposition to Delcare Burleigh & Emmons County Ordinances Superseded & Preempted w/Exhibits & Response to Objection to**  
Bismarck Area Intervenors  
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**PUBLIC SERVICE COMMISSION**

SCS Carbon Transport LLC  
Midwest Carbon Express CO2 Pipeline Project  
Siting Application

Case No: PU-22-391  
OAH File No: 20230002

**BISMARCK AREA INTERVENORS' RESPONSE IN OPPOSITION TO SCS  
CARBON TRANSPORT LLC'S RENEWAL OF ITS MOTION TO DECLARE  
BURLEIGH COUNTY AND EMMONS COUNTY ORDINANCES SUPERSEDED  
AND PREEMPTED**

As set forth herein below and in the previously filed opposition briefing, Summit's renewed motion to declare Burleigh County and Emmons County ordinances superseded and preempted should be denied.<sup>1</sup>

***A. Summit's Renewed Motion is Premature and A Waste of Party and Commission Resources.***

Summit's latest motion attempts to put the proverbial "cart before the horse" in that Summit acts as though its request for reconsideration, which was previously granted by the Commission, is a complete reversal of the Commission's *Order* denying Summit's Application. But the Commission has not reversed itself, and has at most granted Summit an additional opportunity at one or more public hearings to attempt to cure the many defects already pointed out by the Commission. Contrary to Summit's latest argument, the Commission's mootness determination should stand as decided in the interests of conserving the Commission's and the parties' valuable time and resources. *If and only if* Summit is able to cure its many evidentiary defects – which remains to be seen – should the Commission disturb the finality of its mootness

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<sup>1</sup> Bismarck Area Intervenors, by and through their attorneys, object to and oppose SCS Carbon Transport LLC's ("Summit") *Renewal of its Motion to Declare Burleigh and Emmons County Ordinances Superseded and Preempted* (doc. 401) ("Renewed Preemption Motion").

decision. And assuming for the sake of argument, without conceding, that Summit's "automatic preemption" argument is correct, the alleged "automatic preemption" would only be triggered upon the Commission first approving Summit's Application. Summit's motion gets it precisely backwards. As is obvious, Summit's request does not preserve resources, as the parties are now forced to conduct additional briefing and the Commission is forced to provide another ruling on this issue, prematurely. Summit's latest effort to waste the Commission's and the parties' resources should not be rewarded, and the motion can and should be denied on this basis alone.

***B. Summit's "Automatic Preemption" Interpretation is Legally Incorrect.***

Alternatively, to the extent the Commission decides to disturb the finality of its previous mootness determination in order to once again decide Summit's motion on its merits (which is unnecessary), the Commission should still deny the motion because Summit's interpretation of N.D.C.C. 49-22.1-13 for "automatic preemption" is flawed and legally incorrect. Section 49-22.1-13(2)(b) does not provide for automatic preemption per the express language used in the statute. The alleged "automatic" preemption is not actually located anywhere in the Statute but is a creature of Summit's imagination. In fact, Summit's argument entirely ignores the exception clause in Subsection 2(b) ("Except as provided in this section, . . .") which limits the application of what follows in that Subsection 2(b) to the rest of the Statute, which is the *entire Section* 49-22.1-13. The rest of the Statute includes Subsection 2(c), which provides in part, "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." N.D.C.C. § 49-22.1-13(2)(c).

***C. Summit Should Not Be Allowed a "Do-over" on the Subsection 49-22.1-13(2)(c) Factors.***

It is telling that Summit's original motion conceded the factual showing required in Subsection 2(c) applies to its Application, as the very first numbered request in its original supersession motion and brief was for the Commission make findings of fact and conclusions of law that track the factual finding language of Subsection 2(c) verbatim. The original motion stated in part:

“[Summit] respectfully requests that, as part of its final order, the [] Commission [] make the following findings of fact and legal conclusions:

1. **The Emmons County Ordinance and the March 20 Burleigh County Ordinance are unreasonably restrictive in view of existing technology, factors of cost or economics, or needs of consumers regardless of their location.**
2. The Emmons County Ordinance and the March 20 Burleigh County Ordinance conflict with state law, namely the State's policy of promoting carbon sequestration.
3. The Emmons County Ordinance and the March 6 and March 20 Burleigh County Ordinances conflict with federal law, namely Pipeline Safety Act (49 U.S.C. §§ 60101 et seq.).
4. The Emmons County Ordinance (see Dkt. No. 49) and the March 6 and March 20 Burleigh County Ordinances (see Dkt. No. 161) are superseded and preempted under N.D.C.C. § 49-22.1-13(2)(b).

*SCS Carbon Transport LLC's Motion to Declare Emmons County and Burleigh County Ordinances Superseded and Preempted*, dated June 1, 2023 (Docket # 282). As set forth in Bismarck Area Intervenors' previously filed response,<sup>2</sup> and as conceded by Summit in its original motion and brief, the Commission must apply the entire Statute, which requires the factual findings Summit requested the Commission to make under Subsection 2(c). While Summit is now asking the Commission to make these findings, Summit never introduced any witnesses or presented any

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<sup>2</sup> *Bismarck Area Intervenors' Response In Opposition To SCS Carbon Transport LLC's Motion To Declare Emmons County And Burleigh County Ordinances Superseded And Preempted & Request For Oral Argument*, dated June 29, 2023 (Docket # 348) is incorporated herein by reference.



other evidence at any of the public hearings that would even begin to satisfy its statutory burden. Summit has waived its ability to now essentially start over when it knowingly and voluntarily squandered those previous opportunities to make the required evidentiary showing.<sup>3</sup>

***D. Summit is Being Disingenuous about the Ordinances' Effects on its Proposed Route – The Ordinances do Not Make Any Route through the Counties Impossible.***

And Summit is also guilty of begging the preemption question, asking the Commission to assume without any evidence presented to it that the disputed ordinances, if applied, would entirely prevent Summit's pipeline route. As pointed out in Bismarck Area Intervenors' prior briefing, the Burleigh County ordinance does not make Summit's "updated"<sup>4</sup> pipeline route an impossibility as Summit has deceptively argued. The "map" allegedly showing no route through the County is entirely false. The burden of proof is on Summit to prove it cannot find a route through Burleigh County that will work for the pipeline, and there has been no evidentiary effort to date by Summit to meet that burden. Certainly, Summit has not made any effort either to request a variance from the County (which is available to it as provided in the ordinance) and has not worked with the

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<sup>3</sup> The North Dakota Supreme Court recognizes the doctrine of waiver:

"[] For a waiver to be effective, the waiver must be a voluntary and intentional relinquishment of a known existing advantage, right, privilege, claim, or benefit. The right, claim, privilege, or benefit must be one the party could have enjoyed, but for the waiver. Once the right is waived, the right or privilege is gone forever and cannot be recalled. A waiver cannot be extracted, recalled or expunged. A waiver can be made expressly or by conduct. Furthermore, when parties engage in an activity which clearly constitutes a waiver, they cannot later claim they did not know their actions amounted to a voluntary and intentional waiver of their rights, because, "he who consents to an act is not wronged by it."

*Tormaschy v. Tormaschy*, 1997 ND 2, ¶ 19, 559 N.W.2d 813, 817 (internal citations and quotations omitted).

<sup>4</sup> Although the "updated" route apparently moves the pipeline further to the north of Bismarck to an as-yet undisclosed location, Summit refuses to move the route any further to the east of Bismarck, where it would still pass in dangerously close proximity to schools, residential developments, and other County population centers.

County to identify a workable route that would satisfy the valid ordinance, which is the expression of the County's legitimate authority under North Dakota law. Summit simply has not met its burden to show alleged "automatic" preemption applies, and has failed to prove any of the evidentiary factors required under N.D.C.C. § 49-13.1-22(2)(c).

***E. Summit's Federal Preemption Arguments are Seriously Misleading.***

As the Commission is aware, Summit argues federal law preempts the county ordinances, specifically the Pipeline Safety Act (PSA). But Summit has not been candid with the Commission or the Intervenors in this regard, as it knows full well PHMSA and FERC have disclaimed any federal preemption in relation to the siting of interstate carbon dioxide pipelines. Attached as ***Exhibit A*** is a September 15, 2023 PHMSA letter addressed to Summit Carbon Solutions (filed with the Iowa Utilities Board) addressing these very issues. The letter states in part:

“[] While the Federal Energy Regulatory Commission has exclusive authority to regulate the siting of interstate gas transmission pipelines, there is no equivalent federal agency that determines siting of all other pipelines, such as carbon dioxide pipelines. Therefore, the responsibility for siting a new carbon dioxide pipelines rests largely with the individual states and counties through which the pipelines will operate and is governed by state and local law.”

*Id.* at Page 1 of 4. The same letter goes on to describe the broad powers that local governments have traditionally exercised in relation to regulating land use, property development, and setbacks, to name a few such powers described in the letter. *Id.* at Page 3 of 4. Despite all of this, Summit has argued the ordinances are preempted by federal law. The Commission should require Summit to explain why it has never attempted to clarify or correct its previous misstatements on this issue that goes to the heart of its supersession/preemption motion, and Summit should explain why it never filed this letter with the North Dakota PSC.

***F. Summit's Actions Before the South Dakota PUC are Relevant to These Proceedings and the Commission Can Take Notice Of What Occurred in Those Proceedings.***

In addition to the foregoing, the Commission is aware the South Dakota Public Utility Commission (PUC) has denied Summit's South Dakota Carbon Dioxide pipeline permit application as pointed out by Intervenor in their *Notice of Additional Evidence* (Docket #393). Attached hereto as **Exhibit B** is a copy of the South Dakota PUC *Order Granting Motion To Deny Application Of SCS Carbon Transport LLC*, dated September 13, 2023. Prior to the denial of Summit's South Dakota application, Summit had moved the PUC to preempt certain County ordinances making essentially the same arguments it makes here in North Dakota, but then later withdrew that motion without explanation. Attached hereto as **Exhibits C** and **D** are copies of Summit's *Motion For Order Preempting County Ordinances*, dated August 21, 2023 and *Withdrawal Of Motion For Order Preempting County Ordinances*, dated September 7, 2023.

Before discussing the relevance of these materials to Summit's North Dakota PSC application, it is necessary to dispel some false assertions made by Summit concerning these materials. Summit argued previously that the Commission may not take "official notice" of what occurs in other states, including in South Dakota, argues the South Dakota PUC materials were provided only to improperly "influence" the PSC's decision here, and moreover were provided "without context". (Docket #394). Summit's position is incorrect and moreover is a red herring. No one is requesting the South Dakota PUC to improperly influence this Commission's decision. All parties agree Summit's Application is to be decided by the Commission on the merits and on the facts and evidence presented pursuant to the laws of North Dakota and the regulations applicable to the PSC. However, Summit's argument that the Commission may not take any notice of these materials is absolutely false. It should be noted that Summit simply makes that claim but fails to back it up with any statutory or other legal authority.

In relation to the Commission’s authority, the North Dakota “official notice” regulation allows the Commission to “[ ] take notice of any fact in its records and files, to which reference is made on the record at the hearing and any fact judicially noticed by the courts of this state. [ . . . ]” N.D.A.C. § 69-02-05-08. The North Dakota judicial notice rule provides in part:

- (a) Scope.** This rule governs judicial notice of an adjudicative fact only, not a legislative fact.
- (b) Kinds of Facts That May Be Judicially Noticed.** The court may judicially notice a fact that is not subject to reasonable dispute because it:
  - (1) is generally known within the trial court's territorial jurisdiction; or
  - (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.
- (c) Taking Notice.** The court:
  - (1) may take judicial notice on its own; or
  - (2) must take judicial notice if a party requests it and the court is supplied with the necessary information.
- (d) Timing.** The court may take judicial notice at any stage of the proceeding.  
[ . . . ]

N.D. R. Evid. 201 (bold in original). As can be seen from the foregoing Rule, notice can be taken “at any stage of the proceedings” and there is discretion in what materials a court may judicially notice. This is the same level of discretion given to the Commission. Even Summit is aware the Commission has deference to officially notice other states’ proceedings. In this regard, Summit previously discussed at length and cited to an Iowa Federal District Court lawsuit that had struck down a county ordinance. *SCS Carbon Transport LLC's Reply In Support Of Its Motion To Declare Burleigh And Emmons County Ordinances Superseded And Preempted*, dated July 21, 2023 (Docket #359) at pages 5-6. Additionally, the Commission’s regulation concerning “Evidence” states in part, “Evidence is admissible in accordance with the North Dakota Rules of Evidence.” N.D.A.C. § 69-02-05-01. Those Rules of Evidence allow prior statements of a party in other proceedings to be used as evidence in the instant proceedings. N.D. R. Evid. 801(c)(2).

The foregoing regulations and evidentiary rules absolutely supply the Commission with sufficient latitude and discretion to receive and consider matters and statements by Summit before the South Dakota PUC, and the Commission can and should give those materials the weight and consideration it deems appropriate.

Setting aside Summit's invalid objections, the Commission should consider the South Dakota PUC materials because they give the Commission the "context" Summit argued had been lacking, and more importantly show inconsistencies and discrepancies in Summit's supersession and preemption position. First, it is important to note Summit made essentially identical preemption arguments to the South Dakota PUC as it has made in these proceedings. In its South Dakota preemption motion, Summit argued:

The [challenged SD counties'] ordinances are unreasonably restrictive as applied to SCS's proposed route (or any route, for that matter). That is already apparent from prefiled testimony and will be borne out further by evidence at the hearing, but it is also clear from the face of the ordinances. These counties have established setback requirements and permitting schemes that make the counties, not this Commission, the primary siting authority for the State of South Dakota. And they've done that by effectively banning hazardous liquid pipelines. That is unreasonably restrictive. And it goes against the policy set by the Legislature.

The Legislature has found that "energy development in South Dakota and the Northern Great Plains significantly affects the welfare of the population, the environmental quality, the location and growth of industry, and the use of the natural resources of the state." SDCL § 49-41B-1. To that end, the Legislature has given this Commission the full authority to be the sole permitting body for this project and, in doing so, has declared that "the state must also ensure that these facilities are constructed in an orderly and timely manner." *Id.*

*Motion For Order Preempting County Ordinances*, dated August 21, 2023 (**Exhibit C**). Summit's arguments to the PSC included the same kind of alleged unfairness in complying with county ordinances that were adopted by the counties after Summit's PSC application was filed. In fact, Summit characterized the North Dakota counties' actions in adopting ordinances as essentially malicious, and accused the counties of seeking to prevent the pipeline from being constructed at

all. All of this is of course untrue, and the counties had and have full legal authority to adopt the ordinances Summit now contests. More importantly, after Summit filed its motion seeking to preempt and supersede South Dakota county ordinances for essentially the same reasons it challenges the county ordinances in these proceedings, Summit withdrew the motion without any explanation. *Withdrawal Of Motion For Order Preempting County Ordinances*, dated September 7, 2023 (**Exhibit D**). The Commission should consider this withdrawal by Summit to be a concession that Summit does not believe its own preemption and supersession arguments. In South Dakota, it is reported that Summit is now working with the four counties to obtain their input on the proposed Summit route and has indicated it is moving the pipeline path further away from people who oppose the project. Summit should do the same thing in North Dakota.

For the reasons set forth herein, the Commission should deny Summit's latest request that the Commission supersede and preempt county ordinances.

Dated this 12th day of October, 2023.

BAKKE GRINOLDS WIEDERHOLT

By: /s/ Randall J. Bakke  
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U.S. Department  
of Transportation  
**Pipeline and Hazardous  
Materials Safety  
Administration**

1200 New Jersey Avenue, SE  
Washington, DC 20590

9/15/2023

Mr. Lee Blank  
CEO  
Summit Carbon Solutions  
2321 N Loop Dr. Suite 221  
Ames, Iowa 50010

Dear Mr. Blank:

The Pipeline and Hazardous Materials Safety Administration (PHMSA) has received several inquiries regarding the ability of federal, state, and local governments to affect the siting, design, construction, operation, and maintenance of carbon dioxide pipelines. The widespread interest in understanding PHMSA's authorities underscores a need to reiterate the message we shared in 2014 with a company proposing a high-visibility interstate pipeline, a message directly related to current pipeline projects proposed by your companies.

As was the case in 2014, PHMSA continues to support and encourage all three levels of government—federal, state, and local—working collaboratively to ensure the nation's pipeline systems are constructed and operated in a manner that protects public safety and the environment.

Congress has vested PHMSA with authority to regulate the design, construction, operation, and maintenance of pipeline systems, including carbon dioxide pipelines, and to protect life, property, and the environment from hazards associated with pipeline operations. While the Federal Energy Regulatory Commission has exclusive authority to regulate the siting of interstate gas transmission pipelines, there is no equivalent federal agency that determines siting of all other pipelines, such as carbon dioxide pipelines. Therefore, the responsibility for siting new carbon dioxide pipelines rests largely with the individual states and counties through which the pipelines will operate and is governed by state and local law.

### **The Role of PHMSA**

Under the federal pipeline safety laws (49 U.S.C. § 60101 *et seq.*), PHMSA is charged with carrying out a nationwide program for regulating the country's pipelines that transport gas, hazardous liquids, and carbon dioxide. With passage of the federal pipeline safety laws, Congress determined pipeline safety is best promoted through PHMSA's development of nationwide safety standards.

PHMSA takes this responsibility seriously and has promulgated comprehensive safety regulations at 49 C.F.R. Parts 190-199. Dozens of current federal requirements regulate the safety of carbon dioxide pipelines' design,<sup>1</sup> construction,<sup>2</sup> testing,<sup>3</sup> operation and maintenance,<sup>4</sup> operator qualification,<sup>5</sup> corrosion control,<sup>6</sup> and emergency response planning.<sup>7</sup> PHMSA inspects compliance with these requirements and enforces these standards through administrative and judicial enforcement processes.

Recently, PHMSA promulgated new, more stringent standards for automatic and remote shut off valves that affect carbon dioxide pipelines (Additional information: "New rule will help improve public safety and reduce greenhouse gas emissions following pipeline failures").<sup>8</sup> PHMSA also announced a number of additional actions to strengthen current pipeline safety requirements for carbon dioxide pipelines (Additional information: "PHMSA announces new safety measures to protect Americans from carbon dioxide pipeline failures"),<sup>9</sup> including a new rulemaking which is currently under way.

While rulemakings like this involve meticulous crafting of highly technical updates, PHMSA also retains broad authority to address imminent risks to the public posed by a pipeline—even if not specifically delineated in a rule or standard. To this extent, PHMSA will engage with all carbon dioxide pipeline project developers to ensure any unique and imminent risks from such projects are adequately mitigated pursuant to PHMSA's statutory safety authority.

### **The Role of State Pipeline Regulators**

Federal safety standards apply to both interstate and intrastate pipeline facilities. Only PHMSA can regulate the safety of interstate pipelines, and federal pipeline safety laws expressly prohibit states from enacting or enforcing pipeline safety standards with respect to interstate pipelines (except one-call notification program regulations). However, through an agreement with PHMSA, a state authority may be authorized to inspect interstate pipelines as an agent of PHMSA, and to refer violations to PHMSA for enforcement. Thus, PHMSA's state partners play an important role in assisting to oversee the safety of the nation's interstate pipelines.

PHMSA's state partners also play a critical role in regulating the safety of intrastate pipelines. A state authority that submits a certification to PHMSA may assume exclusive regulatory authority for the safety of its intrastate pipelines. The certification must document, among other things,

<sup>1</sup> 49 CFR part 195, subpart C (<https://www.ecfr.gov/current/title-49/subtitle-B/chapter-I/subchapter-D/part-195/subpart-C>).

<sup>2</sup> Subpart D (<https://www.ecfr.gov/current/title-49/subtitle-B/chapter-I/subchapter-D/part-195/subpart-D>).

<sup>3</sup> Subpart E (<https://www.ecfr.gov/current/title-49/subtitle-B/chapter-I/subchapter-D/part-195/subpart-E>).

<sup>4</sup> Subpart F (<https://www.ecfr.gov/current/title-49/subtitle-B/chapter-I/subchapter-D/part-195/subpart-F>).

<sup>5</sup> Subpart G (<https://www.ecfr.gov/current/title-49/subtitle-B/chapter-I/subchapter-D/part-195/subpart-G>).

<sup>6</sup> Subpart H (<https://www.ecfr.gov/current/title-49/subtitle-B/chapter-I/subchapter-D/part-195/subpart-H>).

<sup>7</sup> E.g., Subpart F, §§ 195.402, 195.403, 195.408.

<sup>8</sup> <https://www.phmsa.dot.gov/news/phmsa-announces-requirements-pipeline-shut-valves-strengthen-safety-improve-response-efforts>

<sup>9</sup> <https://www.phmsa.dot.gov/news/phmsa-announces-new-safety-measures-protect-americans-carbon-dioxide-pipeline-failures>



**Attachment A**

**Page 3 of 4**

that the state has appropriate jurisdiction under state law; has adopted the federal safety standards to which the certification applies; inspects operators for compliance with those standards; and enforces the standards to address noncompliance.

PHMSA's national regulatory program relies heavily on the efforts of these state partners, who employ roughly 70 percent of all pipeline inspectors and whose jurisdiction covers more than 80 percent of regulated pipelines. As noted above, federal law requires certified state authorities to adopt safety standards at least as stringent as, and compatible with, the federal standards. The state authorities will also inspect, regulate, and take enforcement action against operators of intrastate pipelines within their borders.

### **The Role of Local Governments**

Federal preemption of pipeline safety means that states do not have independent authority to regulate pipeline safety but derive that authority from federal law through a certification to PHMSA.

In the case of local governments that are not subject to federal certification of pipeline safety authority, they may still exercise other powers granted to them under state law but none that adopt or enforce pipeline safety standards or contradict federal law.

However, PHMSA cannot prescribe the location or routing of a pipeline and cannot prohibit the construction of non-pipeline buildings in proximity to a pipeline. Local governments have traditionally exercised broad powers to regulate land use, including setback distances and property development that includes development in the vicinity of pipelines. Nothing in the federal pipeline safety law impinges on these traditional prerogatives of local—or state—government, so long as officials do not attempt to regulate the field of pipeline safety preempted by federal law.

PHMSA recognizes local governments have implemented authorities under state law that contribute in many ways to the safety of their citizens. We have seen localities consider measures, such as:

1. Controlling dangerous excavation activity near pipelines.
2. Limiting certain land use activities along pipeline rights-of-way.
3. Restricting land use and development along pipeline rights-of-way through zoning, setbacks, and similar measures.
4. Requiring the consideration of pipeline facilities in proposed local development plans.
5. Designing local emergency response plans and training with regulators and operators.
6. Requiring specific building code design or construction standards near pipelines.
7. Improving emergency response and evacuation plans in the event of a pipeline release.
8. Participating in federal environmental studies conducted under the National Environmental Policy Act (NEPA) and similar state laws for new pipeline construction projects.

Each state treats these issues differently, so pipeline operators should be prepared to deal directly with each locality and state body interested in the siting and construction process.

### **Collaboration Among Stakeholders**

PHMSA believes pipeline safety is the shared responsibility of federal and state regulators as well as all other stakeholders, including pipeline operators, excavators, property owners, and local governments. In 2010, PHMSA launched the Pipelines and Informed Planning Alliance (PIPA)—available at <https://primis.phmsa.dot.gov/comm/pipa/LandUsePlanning.html>—to help pipeline safety stakeholders define their respective roles related to land use practices near pipelines and to develop best practices.

The PIPA documents are 13 years old, but they remain of value today. PHMSA looks forward to you, along with other private and public stakeholders, engaging with PHMSA in updating these documents to focus on the unique circumstances of new pipeline construction. I encourage all pipeline operators to carefully consider and adopt, as appropriate, these best practices to protect their existing and proposed rights-of-way, and to engage all stakeholders in promoting the safety of interstate pipelines.

Each community affected by an existing or proposed pipeline faces unique risks. The effective control and mitigation of such risks involves a combination of measures employed by facility operators, regulatory bodies, community groups, and individual members of the community. As a pipeline release can impact individuals, businesses, property owners, and the environment, it is important that all stakeholders carefully consider land use and development plans to make risk-informed choices that protect the best interests of the public and the individual parties involved. Sharing appropriate information with state or local governments and emergency planners, which may include dispersion models or emergency response plans, may help stakeholders make risk-informed decisions.

Bringing a pipeline into a community is often a complicated endeavor that requires tremendous coordination and open communication among stakeholders to be successful. We greatly value the efforts of pipeline operators who spend the time and energy to make sure the process goes smoothly and are responsive to all parties involved. Thank you for your cooperation in this effort.

Sincerely,

Alan K. Mayberry  
Associate Administrator for Pipeline Safety

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

<b>IN THE MATTER OF THE APPLICATION BY</b>	)	<b>ORDER GRANTING MOTION</b>
<b>SCS CARBON TRANSPORT LLC FOR A</b>	)	<b>TO DENY APPLICATION OF</b>
<b>PERMIT TO CONSTRUCT A CARBON</b>	)	<b>SCS CARBON TRANSPORT</b>
<b>DIOXIDE TRANSMISSION PIPELINE</b>	)	<b>LLC</b>
	)	
	)	<b>HP22-001</b>

On February 7, 2022, the South Dakota Public Utilities Commission (Commission) received an Application for a Permit to Construct a Carbon Dioxide Transmission Pipeline (Application) from SCS Carbon Transport LLC (Applicant or SCS), a limited liability company owned by Summit Carbon Solutions, LLC. Applicant proposes to construct and operate a carbon dioxide (CO<sub>2</sub>) transmission pipeline (Project). The Project is approximately 2,000 miles of pipelines for the transportation of CO<sub>2</sub> from more than 30 ethanol plants across five states, including seven ethanol plants in South Dakota, to underground injection control facilities in North Dakota. The proposed route of the main line enters South Dakota in Lincoln County at the Iowa/South Dakota border and extends in a northwesterly direction, exiting the state at the South Dakota/North Dakota border in McPherson County. In addition to the main line, the proposed Project includes lateral and trunk lines connecting ethanol plants to the main line. The proposed length of pipelines through South Dakota is approximately 477 miles and would cross the counties of Beadle, Brown, Clark, Codington, Edmunds, Hamlin, Hand, Hyde, Kingsbury, Lake, Lincoln, McCook, McPherson, Minnehaha, Miner, Spink, Sully, and Turner.

On February 9, 2022, Vice Chairperson Kristie Fiegen filed a letter delivered to Governor Kristi Noem advising of a conflict of interest under SDCL 49-1-9 after learning of family ownership of land on the proposed Project route. On February 10, 2022, the Commission issued a Notice of Application; Order for and Notice of Public Input Meetings; Notice of Opportunity to Apply for Party Status. Pursuant to ARSD 20:10:22:40, the deadline for persons to file an application for party status was April 8, 2022. On February 16, 2022, Josh Haeder, State Treasurer, was appointed by Governor Noem to serve as an Acting Commissioner in this docket. On February 24, 2022, the Commission issued an Order Assessing Filing Fee; Order Authorizing Executive Director to Enter into Consulting Contracts. Public input meetings were held March 22 through March 25, 2022, at various locations in the Project's footprint. Party status has been granted to numerous individuals and entities.

On August 14, 2023, the Commission issued an Order for and Notice of Evidentiary Hearing, noticing the evidentiary hearing in this docket to commence on September 11, 2023.

On August 18, 2023, intervenors represented by attorney Brian Jorde (Landowners) filed Landowners' Motion to Return Application. In the Motion to Return Application, Landowners request the Commission return the Application pursuant to SDCL 49-41B-13(1). Following a hearing on the motion, the Landowners' Motion to Return Application was denied.

On August 21, 2023, SCS filed a Motion for Order Preempting County Ordinances. By a filing made on September 7, 2023, SCS withdrew its Motion for Order Preempting County Ordinances. In response to the withdrawal of SCS's, Commission Staff filed a Motion to Deny Application on September 8, 2023. In its Motion to Deny Application, Commission Staff argued

**Exhibit B**

that because SCS was no longer requesting preemption and the proposed route violated county ordinances in four South Dakota counties, SCS's permit must be denied as a matter of law based on the applicant's burden of proof set forth in SDCL 49-41B-22(1) and the requirement that no route shall be designated that violates local ordinances without preemption pursuant to SDCL 49-41B-28. Commission Staff cited to material misstatements contained within the Application regarding SCS's ability to comply with local ordinances and requested the Application be denied without prejudice pursuant to SDCL 49-41B-13(1) and (2). The Motion was joined by Intervenor Landowners represented by Attorney Brian Jorde. On September 8, 2023, SCS filed a Response to Staff Motion to Deny Application. In its response, SCS argued that SDCL 49-41B-22(1) is forward looking, such that the applicant does not necessarily need to have each county permit in hand or be in compliance with local ordinances at the time of the evidentiary hearing.

The Commission has jurisdiction over this matter pursuant to SDCL Chapters 1-26 and 49-41B. As part of the evidentiary hearing in this docket on September 11, 2023, the Commission took up Staff's Motion to Deny Application. After hearing from the parties, the Commission unanimously voted to grant the Motion and Deny the Application pursuant to 49-41B-13. The Commission specifically found that the proposed route violated county ordinances and could not be permitted pursuant to SDCL 49-41B-28, making any representations within the Application that the Applicant would comply with all laws and regulations, including local ordinances, material misstatements of fact.

It is therefore

ORDERED, that the Motion to Deny Application is granted and SCS's Application is denied without prejudice pursuant to SDCL 41-41B-13.

Dated at Pierre, South Dakota, this 13<sup>th</sup> day of September 2023.

CERTIFICATE OF SERVICE	
The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, electronically.	
By:	<u>Adam C. Hueck</u>
Date:	<u>9/13/23</u>
(OFFICIAL SEAL)	

BY ORDER OF THE COMMISSION:

Gary Hanson  
GARY HANSON, Commissioner

Chris Nelson  
CHRIS NELSON, Commissioner

Josh Haeder  
JOSH HAEDER, Acting Commissioner



**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

<b>IN THE MATTER OF THE APPLICATION BY SCS CARBON TRANSPORT, LLC FOR A PERMIT TO CONSTRUCT A CARBON DIOXIDE PIPELINE</b>	<b>HP22-001  MOTION FOR ORDER PREEMPTING COUNTY ORDINANCES</b>
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**Introduction**

Local zoning and land-use regulations have their place, but when it comes to routing interstate pipeline projects—those that stretch across multiple counties or even the entire state—the South Dakota Legislature has given siting permit authority to this Commission. Under South Dakota law, the Legislature has granted to this Commission the authority to supersede or preempt county regulations that, “as applied to the proposed route, are unreasonably restrictive in view of existing technology, factors of cost, or economics, or needs of parties where located in or out of the county.” SDCL § 49-41B-28.

Placing that responsibility in this Commission makes practical sense. Interstate projects, including this one, bolster economic development throughout the entire state, so decisions about siting and permitting should come from a body that represents the entire state. It also makes sense to give this Commission the option to have final say on pipeline projects because its members and staff have the expertise, experience, and resources to evaluate the evidence and make a decision based on evidence and the rule of law, and not on political reasons or purposes, or to meet a personal agenda. That is how it should be, and that is what the citizens of South Dakota have come to expect.

To that end, SCS Carbon Transport asks that the Commission supersede and preempt ordinances in Brown, Minnehaha, Spink, and McPherson counties.

Brown, Minnehaha, Spink, and McPherson counties have each enacted an ordinance that, among other things, establishes “setback” requirements banning SCS’s proposed route. And those counties enacted their ordinances more than a year after SCS submitted its route and application to this Commission, engaged and made commitments to landowners and other participants in South Dakota’s leading economic sector and spent millions of dollars acquiring right-of-away and preparing for its permit hearing based on preexisting county regulations. McPherson County also enacted a temporary moratorium on pipelines while the county commission purported to decide how and whether to regulate hazardous liquid pipelines. But that “temporary” moratorium appears to be a permanent one because the McPherson County Commission continues to extend that outright ban into perpetuity.

These are not ordinary county ordinances. Each one was enacted as a reaction and to expressly target (and likely stop) carbon dioxide (CO<sub>2</sub>) pipelines. The several counties are now taking it upon themselves to set a Balkanized energy and transmission policy for the State, a task that has been, is supposed to be (and should be) left to this Commission. The question before this Commission is not whether local governments should have some limited role in enacting neutral ordinances that affect pipelines. The question seems to be whether this Commission or sets of county commissioners are really going to be the siting and routing authority for projects within and through the State.

The land-use and zoning restrictions in Brown, Minnehaha, Spink, and McPherson counties are clearly unreasonably restrictive as applied to the proposed route. They don’t make the facility safer or more efficient; in fact, the reverse is true. For example, routing farther away from a property line can expose a pipeline to a greater risk of third-party damage or to slopes with a higher potential for erosion or a host of other factors which are routinely taken into account in the

routing process. SCS therefore respectfully requests that the Commission, as part of its order granting SCS's permit, supersede and preempt these and any other such ordinances. If section 49-41B-28 means anything, it means that these and perhaps other county ordinances if any more are adopted must be set aside for this Commission's state-wide siting decision.

### **Background**

#### **Brown County Ordinance**

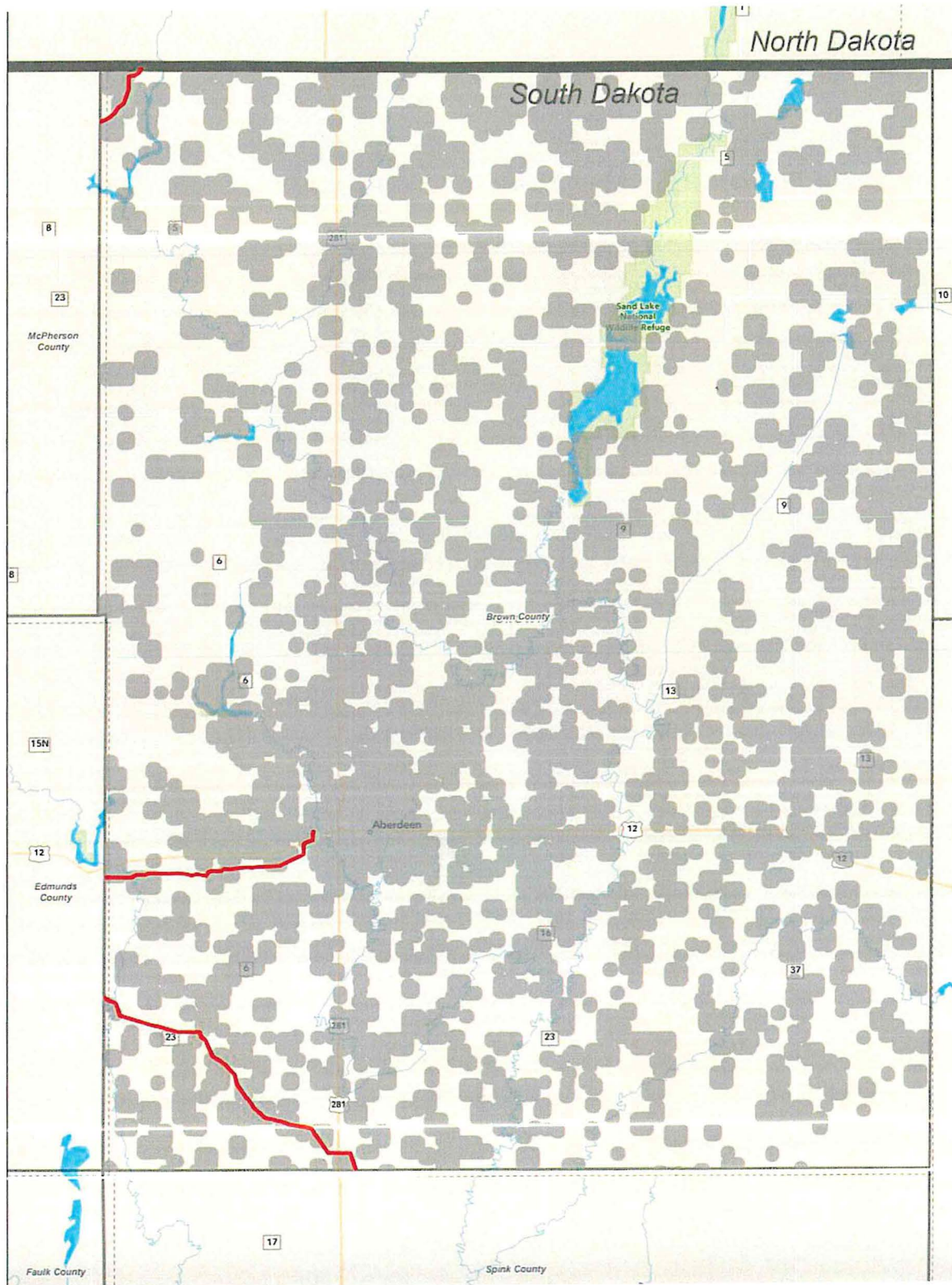
On April 25, 2023—more than fourteen months after SCS filed its application for permit and formally announced its initial plant partners and route—the Brown County Commission enacted ordinance #243.<sup>1</sup> The ordinance requires that hazardous liquid pipelines, including pipelines that transport CO<sub>2</sub>, be at least 1,500 feet from the property line of all “cautionary uses,” which are defined as residential dwellings, any structure with a living quarters, schools, daycares, or churches.

The setback requirement blocks SCS's proposed mainline route through Brown County and two proposed trunklines, one of which connects the Glacial Lakes Energy plant in Aberdeen to the mainline. SCS's proposed route is shown in red in the map below; the gray areas are those within the ordinance's new setback areas.

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<sup>1</sup> The ordinance is attached as Exhibit 1 to James Powell's rebuttal testimony filed on July 10, 2023. <https://puc.sd.gov/commission/dockets/hydrocarbonpipeline/2022/hp22-001/testimony/summit/JPowellExh1.pdf>







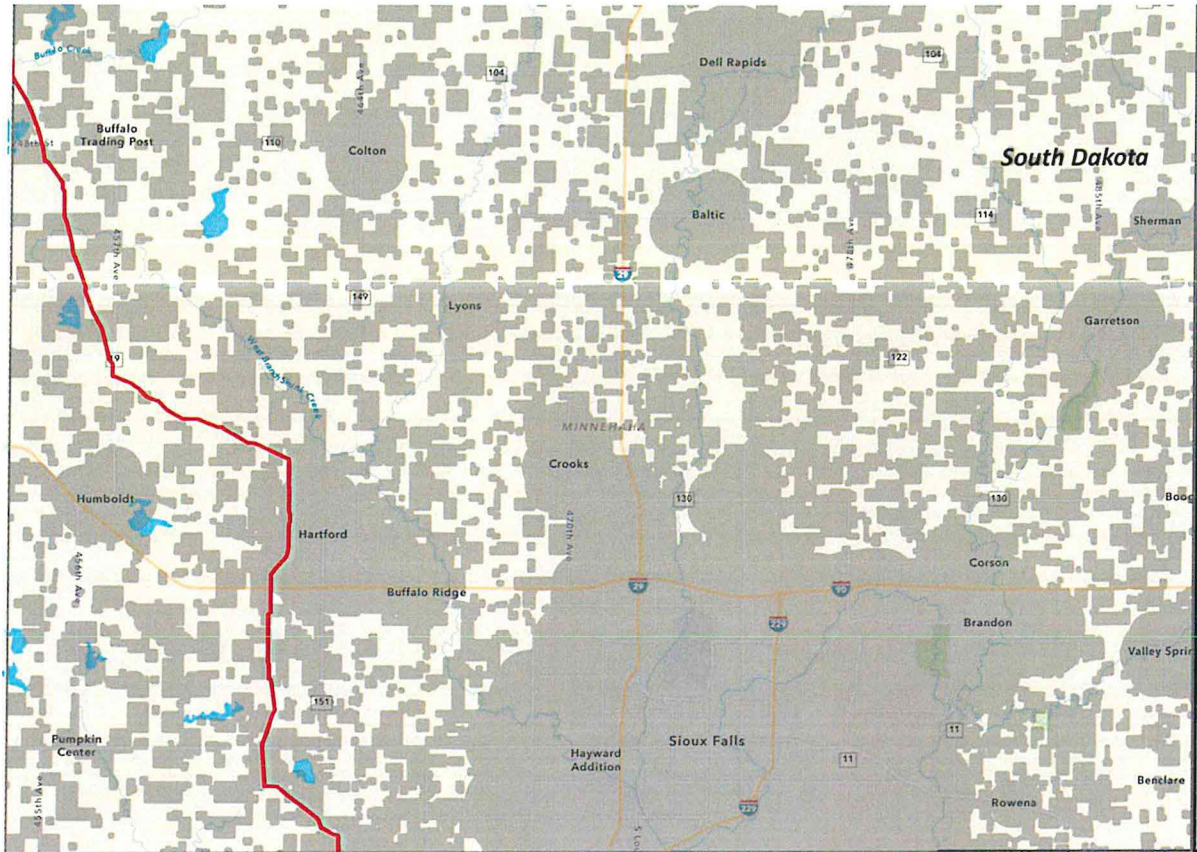
### Minnehaha County Ordinance

On June 6, 2023—sixteen months after SCS filed its application for permit and formally announced its route—the Minnehaha County Commission enacted ordinance MC16-179-23.<sup>2</sup> The ordinance sets the following “separation criteria” (i.e., setbacks): (1) 330 feet between the parcel boundary of any dwelling, church, or business, (2) 1,000 feet from the parcel boundary of any public park or school, (3) 5,280 feet (1 mile) from any municipality with a population of 5,000 or more, 3,960 feet (3/4 mile) from any municipality with a population between 500 and 5,000, and 2,640 feet (1/2 mile) from any municipality with a population of less than 500.

Those setback requirements also block SCS’s proposed route through the county. The red lines on the map below represent SCS’s proposed route; the gray areas are those that are within the setback areas. It’s important to note that on all attached maps, the darkened areas denoting setbacks don’t indicate that a pipeline can actually be routed and constructed and operated in the lighter areas. All of those areas continue to have other routing criteria which apply to them. In many, many cases, those areas have other reasons not depicted here which make routing there impractical or impossible. The darker areas are only one of those criteria; one imposed by county commissions acting outside their authority.

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<sup>2</sup> The ordinance is attached as Exhibit 2 to James Powell’s rebuttal testimony filed on July 10, 2023. <https://puc.sd.gov/commission/dockets/hydrocarbonpipeline/2022/hp22-001/testimony/summit/JPowellExh2.pdf>



The Minnehaha Ordinance also establishes a county permitting scheme that is designed to potentially trump this Commission’s permitting process. The ordinance requires, among other things, that an applicant submit detailed plans and specifications, an emergency response plan as required by PHMSA, and all other “required forms prescribed by the Planning Director.” (Minnehaha Ordinance § 12.18(B)). The ordinance allows the Planning Director to make a county permit decision after the PUC grants a statewide permit, so applicants could receive approval from this Commission only to have their project shut down based on a single county’s zoning official. The ordinance also establishes a \$25,000 application fee and a tax of \$300 per linear mile of pipeline, per year. (Minnehaha Ordinance § 24.05).

### Spink County

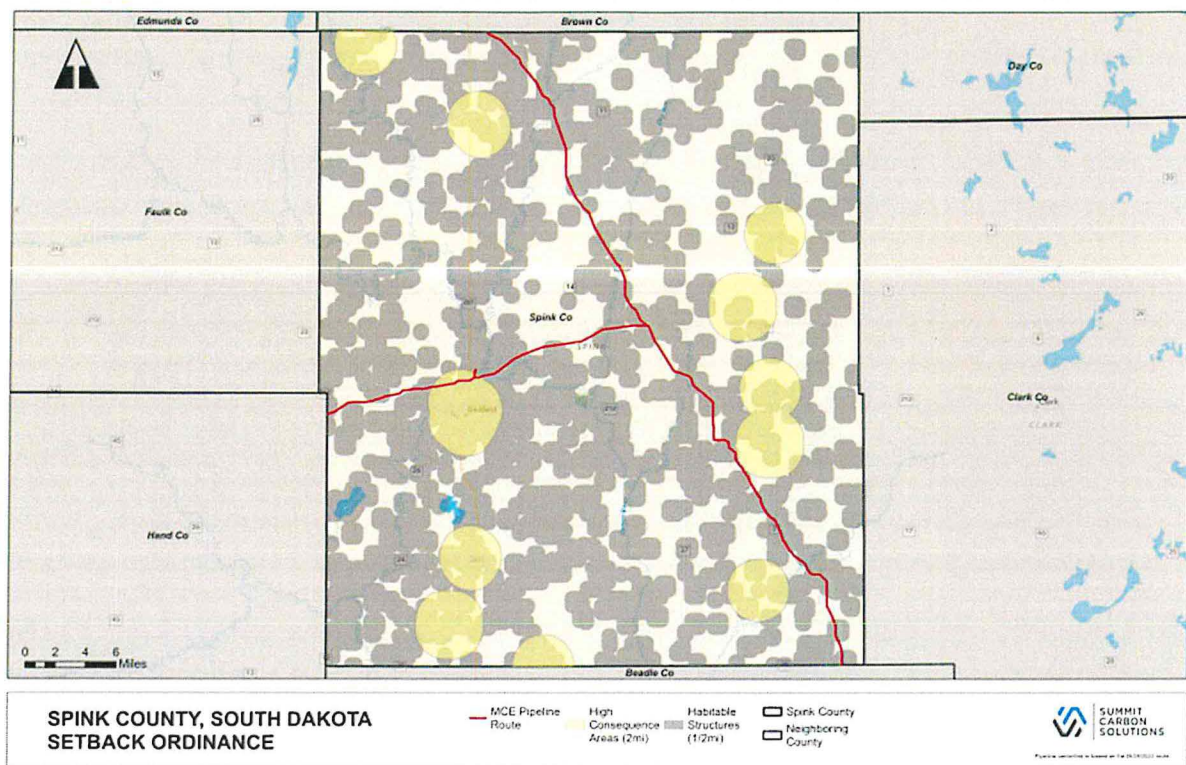
Just last week, on August 8, 2023, the Spink County Commissioners enacted Ordinance Title 17.29, which regulates hazardous liquid pipelines.<sup>3</sup> The ordinance, which acknowledges that its standards may be “more stringent” than those set by this Commission, establishes a half-mile (2,640-foot) setback from the property line of “schools, daycares, churches, residential dwelling, livestock facilities, or any structure that has residential living quarters within.” The Spink Ordinance also establishes a setback of two miles for “High Consequences Areas,” which are “structures containing 10 or more persons with limited mobility, such as nursing homes and hospitals, and for structures with permitted occupancies of 100 or more persons, such as schools, churches, shipping, and entertainment facilities.”

The red lines on the map below represent SCS’s proposed routes; the gray areas are those that are within the Spink County setback areas.

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<sup>3</sup> The Spink County ordinance is attached as Exhibit 1.





Like the Minnehaha County Ordinance, the Spink County Ordinance also establishes a new county permitting scheme for hazardous liquid pipelines, giving the County Zoning Administrator the ability to deny a county permit, even if this Commission has granted one.

### McPherson County

On Tuesday, August 15, 2023, McPherson County commissioners enacted Ordinance 23-1, which purports to regulate hazardous liquid pipelines. Ordinance 23-1, the most onerous South Dakota ordinance passed to date, includes—among other unreasonably burdensome requirements—the following setbacks: one mile from any occupied dwelling, mobile home, or manufactured home; 500 feet from any adjoining property line of a non-participating landowner; and 1,000 feet from a water well that is documented and/or mapped with the South Dakota Department of Natural Resources Water Well Completion Reports. In practice, those setback

requirements effect an outright ban on hazardous liquid pipelines.<sup>4</sup> The ordinance also establishes a new permitting scheme for hazardous liquid pipelines (and an application fee, to be established by resolution). Under the ordinance, after the applicant submits an extraordinary amount of required information, McPherson County would hold its own public hearings, and the Board of Adjustment has the authority to approve, deny, or modify the permit application.

Also on August 15, McPherson County enacted Ordinance 23-2, which purports to set a new “level of cultivation” in McPherson County. The new level of cultivation in McPherson County under the ordinance is, “[n]ot less than two (2) feet below all tile lines and drainage pipes and equipment on any cultivated agricultural land; [n]ot less than six (6) feet below the surface of all cultivated and non-cultivated agricultural land and the lowest point of any ditch in a public right of way; [and] [n]ot less than six (8) feet below the surface of any right of way of any public drainage facility and any maintained or non-maintained drivable surface of any county, town or municipal street/highway and/or right of way.” The ordinance also places restrictions on an easement grantor’s ability to waive the level of cultivation requirements.

### **Argument**

The Brown, Minnehaha, Spink, and McPherson ordinances are unreasonably restrictive as applied to SCS’s proposed route (or any route, for that matter). That is already apparent from pre-filed testimony and will be borne out further by evidence at the hearing, but it is also clear from the face of the ordinances. These counties have established setback requirements and permitting schemes that make the counties, not this Commission, the primary siting authority for the State of

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<sup>4</sup> The McPherson County ordinances, which were passed just days ago, are attached as Exhibits 2 and 3. SCS will supplement the record with maps showing the setback requirements against the pipeline route and provide additional evidence at the hearing.

South Dakota. And they've done that by effectively banning hazardous liquid pipelines. That is unreasonably restrictive. And it goes against the policy set by the Legislature.

The Legislature has found that "energy development in South Dakota and the Northern Great Plains significantly affects the welfare of the population, the environmental quality, the location and growth of industry, and the use of the natural resources of the state." SDCL § 49-41B-1. To that end, the Legislature has given this Commission the full authority to be the sole permitting body for this project and, in doing so, has declared that "the state must also ensure that these facilities are constructed in an orderly and timely manner." *Id.*

There is nothing "orderly" about what these county commissions have done. SCS filed its application with the PUC over eighteen months ago, on February 7, 2022. The Brown County Commission passed its ordinance fourteen months later; Minnehaha's Commission waited sixteen months to pass its ordinance; and the Spink and McPherson Commissions didn't act until eighteen months after SCS file its application. Over that time, and based upon existing county zoning rules, SCS made commitments to South Dakota ethanol plants and landowners and has expended more than \$100 million to meet landowner expectations and acquire ROW in South Dakota. Just a few county-specific statistics:

- In the fourteen months before Brown County enacted its ordinance, SCS paid \$1.5 million to landowners for ROW and expended an additional \$3.5 million for engineering, surveys, and other ROW services related to the tracts along the proposed routes in Brown County. 7/10/23 Powell Rebuttal Testimony.
- In the sixteen months before Minnehaha County enacted its ordinance, SCS paid over \$3.8 million to landowners for ROW and expended an additional \$8 million for



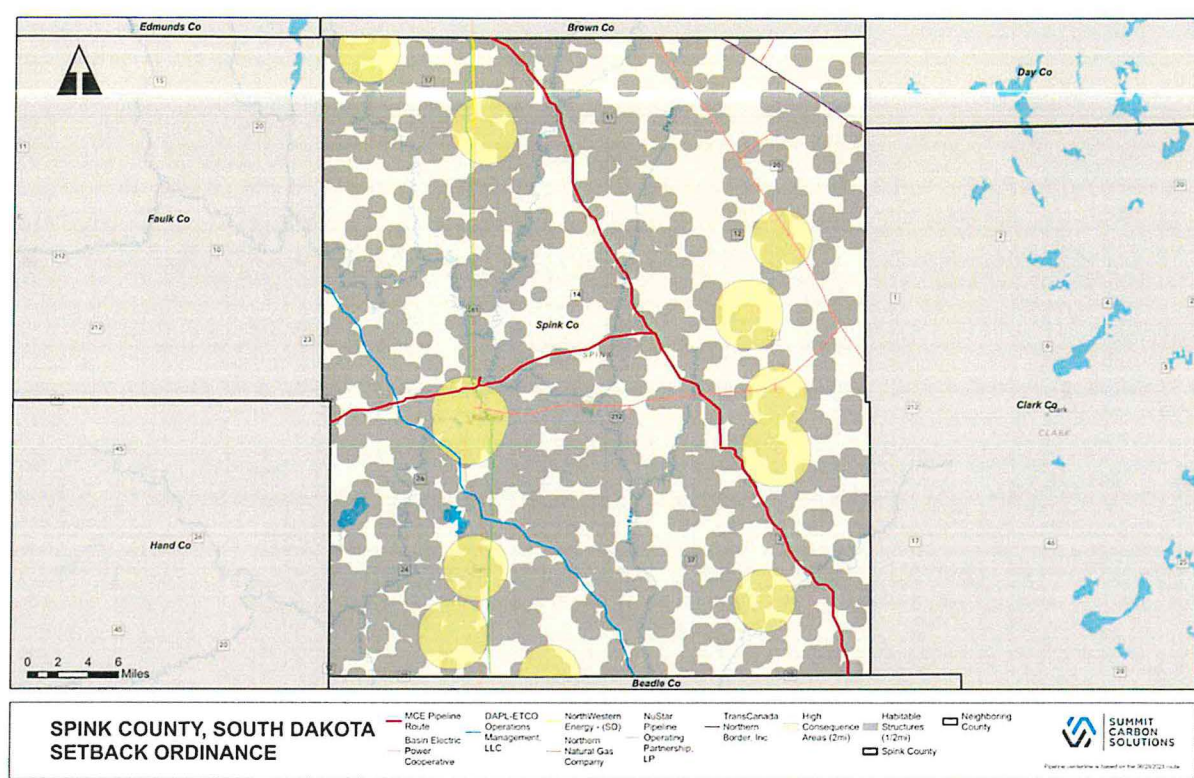
engineering, surveys, and other ROW services related to the tracts along the proposed routes in Minnehaha County. *Id.*

- In the eighteen months before Spink County enacted its ordinance, SCS paid over \$14.5 million to landowners for ROW and expended an additional \$6 million for engineering, surveys, and other ROW services related to the tracts along the proposed routes in Spink County. *Id.*
- In the eighteen months before McPherson County enacted its ordinances, SCS spent \$5.2 million on easements and \$5 million on, among other services, ROW services, surveys, and engineering efforts.

That is only an estimate of what SCS has spent in those counties, which is a small fraction of the total lost investment if the Commission does not preempt these ordinances. The practical effect of the ordinances is that, if any one of them is allowed to stand, SCS's project would necessarily fail because it cannot comply with the unnecessary setbacks. That would represent incalculable losses to South Dakota's ethanol industry, not to mention a loss of \$77.5 million in ROW purchased in South Dakota, over \$35 million on other ROW services in the State, and millions more spent across the pipeline's footprint in Iowa, Minnesota, Nebraska, and North Dakota. That means hundreds of millions of dollars in sunk costs, without any meaningful justification from the counties for these setback requirements.

In Spink County, for example, there are already 154 miles of PHMSA-regulated hazardous liquid pipelines that would violate the county's new setback requirements if those pipelines were constructed today. Yet in the past 25 years, there have only been two incidents involving those pipelines, neither of which caused any injuries. Below is a map of Spink County, showing the new

setback requirements, SCS's proposed route in red, and the other PHMSA-regulated pipelines that already flow through the county.



As SCS will show at the hearing, SCS's proposed route meets all the requirements of South Dakota law. So the cost of these ordinances—which prohibit the project—is clearly unreasonable.

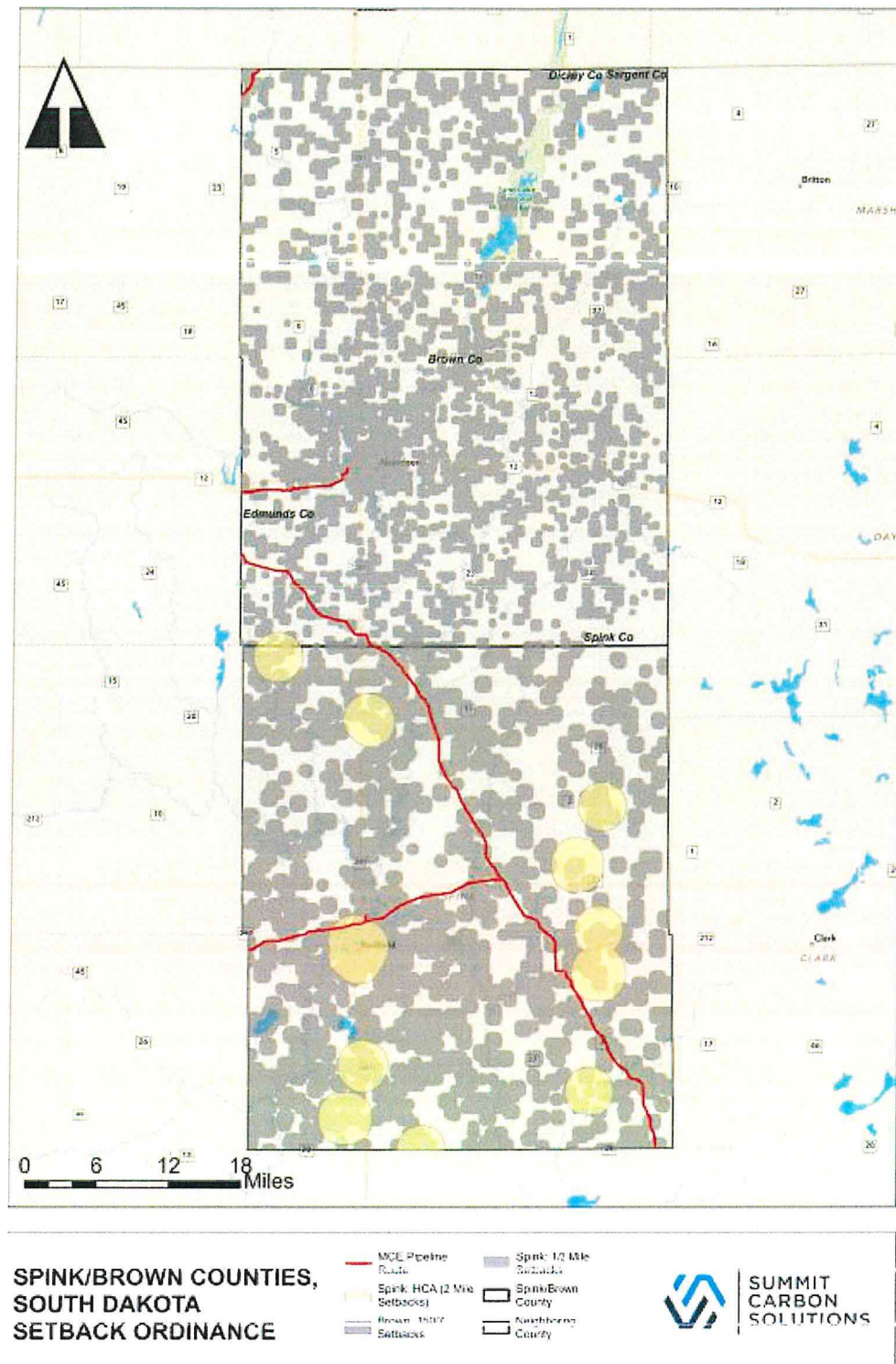
That is all that matters, because SDCL § 49-41B-28 provides the Commission can preempt local ordinances if they are unreasonably restrictive “*as applied to the proposed route.*” But even if the Commission were to evaluate whether these county ordinances allow for some other theoretical route, the new regulations would still be unreasonably restrictive. For starters, there is no theoretical route in Spink County that could comply with the new half-mile setback requirements. All pipelines—not just SCS's—have been zoned out of Spink County altogether.



There would be a theoretical route through Brown County, but, if possible, it would be impractical. A theoretical mainline route for SCS's pipeline would increase the route by an additional 2.6 miles in the county, affecting 33 additional landowners and requiring 9,000-foot 24" horizontal directional drill to avoid protected conservation easements. *See* 7/10/23 Powell Rebuttal Testimony at 12. That is likely impossible. There is also no theoretical route that SCS could use to connect the Glacial Lakes Energy Plant in Aberdeen, and a new route through Brown County to connect the Tharaldson ethanol plant would be similarly impractical. 7/10/23 Powell Rebuttal Testimony at 11–12.

The same goes for Minnehaha. There is a theoretical route that could snake through the county in compliance with the new setback requirements. But the route is impractical, would increase the route by 5.55 miles in the county, and would affect 90 landowners in Minnehaha County.

These are just a few examples of the in-county effects of these new ordinances. But even more problematic is the reality that these county ordinances would also cause downstream and upstream effects to neighboring counties. The restrictive setback requirements in Minnehaha County, for example, would require SCS to reroute and lengthen its pipeline in Turner County, meaning that Turner County landowners would be affected by the political decisions of Minnehaha County Commissioners. The same is true for Brown County's ordinance: It would theoretically change any future route for any proposed hazardous liquid pipeline in neighboring Hand County, affecting landowners there. These ordinances are problematic by themselves, but the cumulative effect is even worse. The following map, showing the setback requirements of Brown and Spink counties, demonstrates what happens when county-by-county siting becomes the rule. It creates a patchwork of zones through which no pipeline can flow through South Dakota.



These inter-county effects are one of the many reasons the Legislature has placed siting authority within this Commission, and one of the many reasons that the Commission should

supersede these ordinances. Indeed, if the Commission does not do so, then maps like these will be the norm, NIMBYism will reign in South Dakota, and South Dakotans will be locked out of markets—because no one can construct a pipeline in South Dakota under ordinances like these. And development of any type of energy infrastructure project which crosses the state and more than one county within it, if counties can pull the rug out from under them at the last minute through their own zoning ordinances.

These local laws are unreasonably restrictive and should be preempted.

### **Conclusion**

Under South Dakota law, this Commission cannot designate a route that “violates local land-use zoning, or building rules, or regulations, or ordinances” *unless* the Commission preempts those laws in issuing a permit. If the Commission finds that SCS has complied with all other statutory requirements, then as a matter of law and logic it should preempt these ordinances. Doing otherwise would devastate investment and development, and cede this Commission’s siting authority to the counties, which is clearly what the Legislature foresaw and sought to avoid by enacting SDCL § 49-41B-28.

Dated this 21 day of August, 2023.

MAY, ADAM, GERDES & THOMPSON LLP

BY: \_\_\_\_\_

  
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## CERTIFICATE OF SERVICE

21 Brett Koenecke, of May, Adam, Gerdes & Thompson LLP hereby certifies that on this day of August, 2023, he served a true and correct copy of the foregoing in the above-captioned matter via the South Dakota Public Utilities Commission filing system and via electronic and/or United States mail, first class postage thereon prepaid, to the service list of PUC Docket HP22-001, at their last known addresses, to-wit:



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BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE APPLICATION BY  
SCS CARBON TRANSPORT LLC FOR A  
PERMIT TO CONSTRUCT A CARBON  
DIOXIDE PIPELINE

HP22-001

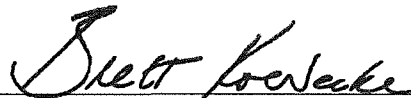
**WITHDRAWAL OF MOTION FOR ORDER  
PREEMPTING COUNTY ORDINANCES**

COMES NOW, the Applicant, by and through its counsel of record, and withdraws its Motion for Order Preempting County Ordinances.

Dated this 7th day of September, 2023.

MAY, ADAM, GERDES & THOMPSON LLP

BY:



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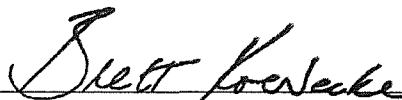
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**CERTIFICATE OF SERVICE**

Brett Koenecke, of May, Adam, Gerdes & Thompson LLP hereby certifies that on this 7th day of September, 2023, he served a true and correct copy of the foregoing in the above-captioned matter via the South Dakota Public Utilities Commission filing system and via electronic and/or United States mail, first class postage thereon prepaid, to the service list of PUC Docket HP22-001, at their last known addresses, to-wit:



BRETT KOENECKE

**Exhibit D**

**STATE OF NORTH DAKOTA**  
**PUBLIC SERVICE COMMISSION**

SCS Carbon Transport LLC  
Midwest Carbon Express CO2 Pipeline Project  
Siting Application

Case No: PU-22-391  
OAH File No: 20230002

**BISMARCK AREA INTERVENORS' RESPONSE TO SUMMIT'S OBJECTION TO  
THE FILING OF ADDITIONAL RESPONSES TO SCS CARBON TRANSPORT  
LLC'S RENEWAL OF ITS MOTION TO DECLARE BURLEIGH AND EMMONS  
COUNTY ORDINANCES SUPERSEDED AND PREEMPTED**

Summit's latest filing (Docket #405), which it styles an "objection", seeks to gag the Intervenor and prevent them from responding to its latest motion (Docket #401) in which it requests the Commission to rule on its previously filed request to preempt and supersede Burleigh and Emmons County Ordinances. Summit's latest filing contradicts the Commission's procedural regulations that allow parties (including Intervenor) to respond to motions, and is moreover in direct conflict with the procedure followed in these proceedings to date. Summit has indeed raised new arguments in its latest motion and the Intervenor should be allowed to respond, which Bismarck Area Intervenor have done with their contemporaneously filed response brief.

The Commission should deny Summit's latest effort to prevent the Intervenor from having a voice in these proceedings.

Dated this 12th day of October, 2023.

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**STATE OF NORTH DAKOTA**  
**PUBLIC SERVICE COMMISSION**

SCS Carbon Transport LLC  
Midwest Carbon Express CO2 Pipeline Project  
Siting Application

Case No: PU-22-391  
OAH File No: 20230002

**CERTIFICATE OF SERVICE**

I hereby certify that true and correct copies of the following documents:

1. *Filing Letter to Steve Kahl from Randall Bakke dated October 12, 2023;*
2. *Bismarck Area Intervenors' Response in Opposition to SCS Carbon Transport LLC's Renewal of its Motion to Declare Burleigh County and Emmons County Ordinances Superseded and Preempted;*
3. *Exhibit A – September 15, 2023 PHMSA letter addressed to Summit Carbon Solutions;*
4. *Exhibit B - South Dakota PUC Order Granting Motion To Deny Application Of SCS Carbon Transport LLC, dated September 13, 2023;*
5. *Exhibit C - Summit's Motion For Order Preempting County Ordinances, dated August 21, 2023; and*
6. *Exhibit D – Summit's Withdrawal Of Motion For Order Preempting County Ordinances, dated September 7, 2023; and*
7. *Bismarck Area Intervenors' Response to Summit's Objection to the Filing of Additional Responses to SCS Carbon Transportation LLC's Renewal of Its Motion to Declare Burleigh and Emmons County Ordinances Superseded and Preempted.*

were on October 12, 2023, filed with the North Dakota Public Service Commission and served electronically to the following:

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Dated this 12th day of October, 2023.

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