



October 13, 2023

**VIA U.S. MAIL & E-MAIL**

North Dakota Public Service Commission  
Steve Kahl, Executive Secretary  
State Capitol  
600 E. Boulevard Avenue, Dept. 408  
Bismarck, ND 58505-0480  
[ndpsc@nd.gov](mailto: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 and seven copies of each:

1. Emmons County's Response to SCS Carbon Transport LLC's Renewal of Motion to Declare Burleigh and Emmons County Ordinances Superseded and Preempted,
2. Declaration of Erin Magrum in Support of Response to SCS Carbon Transport LLC's Renewal of Motion to Declare Burleigh and Emmons County Ordinances Superseded and Preempted, and
3. Certificate of Service.

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

Sincerely,



Derrick Braaten

407 PU-22-391 Filed 10/13/2023 Pages: 8  
Response to Renewal of Motion to Declare Burleigh & Emmons County Ordinances  
Superseded and Preempted & Declaration of Erin Magrum in Support of Emmons Cty  
Intervenors Emmons County Board of County Commissioners  
Derrick Braaten, Braaten Law Firm

**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

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**Response to SCS Carbon Transport LLC's Renewal of Motion to Declare Burleigh and  
Emmons County Ordinances Superseded and Preempted**

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**INTRODUCTION**

[¶1] On September 29, 2023, SCS Carbon Transport LLC ("Summit") filed a Renewal of Motion to Declare Burleigh and Emmons County Ordinances Superseded and Preempted ("Renewal"). *See* Docket #401. Emmons County, represented by undersigned counsel, hereby submits this Response in opposition. Although Summit has objected to responses to its "Renewal" filing, it made additional arguments in that filing and proposes to avoid its evidentiary burden with respect to its attempt to preempt local government and local control.

**ARGUMENT**

[¶2] In its Renewal, Summit argues that "all local ordinances are automatically preempted under N.D.C.C. § 49-22.1-13(2)(b)" and therefore the Commission need not consider any evidence at Summit's requested additional hearing. Docket 401, p.2. Summit also claims that a decision now will "affect the evidence presented in the upcoming hearing by both SCS and intervenors." *Id.* Summit has objected to additional responses to its Renewal despite the fact that it makes reference to its intent to offer additional evidence itself, and also ignores that new facts have come to light, such as its about-face in South Dakota from arguing it cannot comply with local laws to working with local governments on compliance, and the guidance from PHMSA that squarely refutes its

federal preemption argument. *See* Docket 406 and Exhibits thereto. Emmons County hereby adopts and incorporates the arguments made by other intervenors in Docket 406 and the supporting documents thereto.

[¶3] Given that Summit has taken the position that nothing has changed, and no evidence is necessary to support its attempt to preempt local law, it should not be allowed to proffer or submit any additional evidence on this issue at the additional hearing in this matter. It should be estopped from any attempt to supplement the record given the position it has taken in its Renewal and Objection. Docket Nos. 401 and 405.

[¶4] And to be clear, Summit has not met its burden of proof and an order finding that the Emmons County ordinance has been superseded will be reversible. The Commission's order on this issue must be "supported by a preponderance of the evidence" and the "conclusions of law and order of the agency [must be] supported by its finding of fact." N.D.C.C. § 28-32-46. "The findings of fact made by the agency [must also] sufficiently address the evidence presented to the agency...." *Id.*

[¶5] Summit has made no attempt to proffer any evidence that it cannot comply with the Emmons County ordinance. It can. *See* Declaration of Erin Magrum. Its prior "map" included with its brief, as has been argued, is inadmissible, incompetent evidence that should be struck from the record and in any case cannot be considered as evidence by the Commission. There is no factual basis to grant Summit's preemption motion. Summit also ignores the fact that it could simply seek a variance from the setbacks by obtaining waivers from any residence within the setback: "A variance for the setback from an established residence (7,920') may be allowed if the application for permit includes a signed and notarized waiver of setback from each established residence,

signed by an owner of each such residence located within the setback from the proposed pipeline right-of-way.” See Emmons County Ordinance, Docket No. 49.

[¶6] Summit also once again ignores the plain meaning of the law:

When an application for a certificate for a gas or liquid transmission facility is filed, the commission shall notify the townships with retained zoning authority, cities, and counties in which any part of the proposed corridor is located. The commission may not schedule a public hearing sooner than forty-five days from the date notification is sent by mail or electronic mail. Upon notification, a political subdivision shall provide a listing to the commission of all local requirements identified under this subsection. 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) (emphasis added).

[¶7] Summit’s argument ignores that the local governments must file their requirements **or** they will be superseded. This conflicts with its argument that they are *automatically* superseded. Apparently, Summit’s position is that the local governments are all filing their ordinances to ensure there is a record of laws that are superseded by the Commission’s order. That is ludicrous and conflicts with the plain language.

### **CONCLUSION**

[¶8] Summit’s arguments in its Renewal ignore its legal obligations and it has failed to submit evidence necessary to support its argument that the local laws should be superseded. Because it has taken the position that no such evidence is necessary, it should also be estopped from any attempt to supplement the record at any future hearings.

Dated: October 13, 2023

**BRAATEN LAW FIRM**

*/s/ Derrick Braaten*

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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

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**Declaration of Erin Magrum in Support of Response to SCS Carbon Transport LLC's  
Renewal of Motion to Declare Burleigh and Emmons County Ordinances Superseded  
and Preempted**

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- [¶1] I, Erin Magrum, declare as follows:
- [¶2] I am a resident of the State of North Dakota. I make the following statements based on personal knowledge.
- [¶3] I am Chair of the Emmons County Commission.
- [¶4] There are routes that SCS Carbon Transport LLC can take through Emmons County that comply with our zoning and setback ordinance.

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

Signed on the 13<sup>th</sup> day of October, 2023 at Linton, North Dakota, United States of America.

  
Erin Magrum (Oct 13, 2023 12:07 CDT)

Commissioner Erin Magrum

**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

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**CERTIFICATE OF SERVICE**

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

1. Emmons County's Response to SCS Carbon Transport LLC's Renewal of Motion to Declare Burleigh and Emmons County Ordinances Superseded and Preempted, and
2. Declaration of Erin Magrum in Support of Response to SCS Carbon Transport LLC's Renewal of Motion to Declare Burleigh and Emmons County Ordinances Superseded and Preempted

were, on October 13, 2023, filed with the North Dakota Public Service Commission by mailing, by USPS First Class mail, postage prepaid, the originals and seven copies, and by e-mailing copies of the same, to:

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

[¶2] I further certify that true and correct copies of the same were, on October 13, 2023, sent by electronic mail to the following:

John Hamre  
[jghamre@nd.gov](mailto:jghamre@nd.gov)

Zachary Pelham  
[zep@pearce-durick.com](mailto:zep@pearce-durick.com)

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[bdublinske@fredlaw.com](mailto:bdublinske@fredlaw.com)

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

**BRAATEN LAW FIRM**

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