



KNOLL LEIBEL ^{LLP}
ATTORNEYS AT LAW

October 13, 2023

VIA U.S. & E-MAIL ONLY: ndpsc@nd.gov

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

RE: In the Matter of the Application of SCS Carbon Transport LLC for
Certificate of Corridor Compatibility and Route Permit for the Midwest
Carbon Express
Case No.: PU-22-391

Dear Mr. Kahl:

Enclosed for filing please find the following documents:

1. Response to SCS Carbon Transport LLC's Renewal of its Motion to Declare Burleigh and Emmons County Ordinances Superseded and Preempted; and
2. Declaration of Service.

This Response is being filed with the North Dakota Public Service Commission (hereinafter "NDPSC") on behalf of the Intervenor represented by Knoll Leibel LLP. Intervenor has a direct and substantial interest in these proceedings, as well as legal property rights which may be substantially affected by NDPSC's findings and conclusions.

Sincerely,

KNOLL LEIBEL LLP

Steven J. Leibel
steve@bismarck-attorneys.com

SJL: rmo
Enclosures

Steven J. Leibel, Partner

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**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

IN THE MATTER OF THE
APPLICATION OF SCS CARBON
TRANSPORT LLC FOR A
CERTIFICATE OF CORRIDOR
COMPATIBILITY AND ROUTE
PERMIT FOR THE MIDWEST
CARBON EXPRESS PROJECT IN
BURLEIGH, CASS, DICKEY,
EMMONS, LOGAN, MCINTOSH,
MORTON, OLIVER, RICHLAND AND
SARGENT COUNTIES, NORTH
DAKOTA

Case No. PU-22-391

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SUPERSEDED AND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

Intervenors represented by the undersigned counsel (hereinafter "Intervenors"), hereby respectfully submit this *Response to SCS Carbon Transport LLC's Renewal of its Motion to Declare Burleigh and Emmons County Ordinances Superseded and Preempted (Doc. # 401)* dated September 29, 2023.

1. These intervenors previously filed a response to SCS Carbon Transport LLC's motion to preempt the local ordinances on June 23, 2023. Intervenors incorporate by reference their prior brief [Doc. 345] because the statute at issue, N.D.C.C. § 49-22.1-13, still reads as follows:

1. The issuance of a **certificate of site compatibility** or a **route permit** is, subject to subsections 2 and 3, the sole site or route approval required to be obtained by the utility.
2.
 - a. A **certificate of site compatibility** for a gas or liquid energy conversion facility may not supersede or preempt any local land use; zoning; or building rules, regulations, or ordinances, and a **site** may not be designated which violates local land use; zoning; or building rules, regulations, or ordinances.
 - b. Except as provided in this section, a **permit** for the construction of a gas or liquid transmission facility **within a designated corridor** supersedes and preempts any local land use or zoning regulations.
 - c. Before a gas or liquid transmission facility is approved, the commission shall require the applicant to comply with the road use agreements of the impacted political subdivision. 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.
 - d. 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.

- e. An applicant shall comply with all local requirements provided to the commission pursuant to subdivision d, which are not otherwise superseded by the commission.
- 3. Utilities subject to this chapter shall obtain state permits that may be required to construct and operate gas or liquid energy conversion facilities and gas or liquid transmission facilities. A state agency in processing a utility's facility permit application is bound to the decisions of the commission with respect to the site designation for the gas or liquid energy conversion facility or the corridor or route designation for the gas or liquid transmission facility and with respect to other matters for which authority has been granted to the commission by this chapter.
- 4. A site or route may not be designated which violates the rules of any state agency. A state agency with jurisdiction over any aspect of a proposed facility shall present the position of the agency at the public hearing on an application for a certificate, a permit, or a waiver, which position must clearly state whether the site, corridor, or route being considered for designation will be in compliance with the agency's rules. For purposes of this chapter it is presumed a proposed facility will be in compliance with a state agency's rules if that agency fails to present its position on the proposed site, corridor, or route at the appropriate public hearing.

N.D.C.C. § 49-22.1-13 (emphasis added).

2. Summit's renewed motion still ignores the distinction between a **certificate of corridor compatibility** and a **route permit**. However, Section 49-22.1-13 does not ignore the distinction. N.D.C.C. § 49-22.1-13. Chairman Todd Porter of the House Energy and Natural Resources Council, who sponsored SB 2286 did not ignore the distinction. [Doc. 345] (March 9,

2017 Committee minutes)("I think it would be helpful if you broke it down into Step 1, certificate of site compatibility which may not supersede or preempt, and then Step 2 the permit for construction which has to because all the other stuff has been looked at during the certification process."). Other sponsors, including Donald Schaible on the Senate Committee for Energy & Natural Resources, local officials, and even representatives of the North Dakota Petroleum Council, when debating amendments to Section 49-22.1-13 in 2017, similarly did not ignore the distinction. *Id.*

3. The PSC should not ignore this distinction.

Respectfully submitted this 13th day of October, 2023.



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MORTON, OLIVER, RICHLAND AND
SARGENT COUNTIES, NORTH DAKOTA

Case No. PU-22-391

DECLARATION OF SERVICE

[1] Rosanne Ogden declares that I am of legal age and not a party to this action, and that I served the following document(s):

- 1. Response to SCS Carbon Transport LLC's Renewal of its Motion to Declare Burleigh and Emmons County Ordinances Superseded and Preempted; and**
- 2. Declaration of Service.**

[2] On October 13, 2023, by sending a true and correct copy thereof by electronic means only to the following email addresses, to wit:

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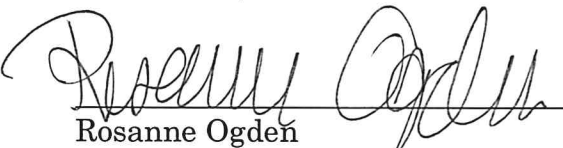
[3] and by sending the originals and seven (7) copies of said documents via U.S. Mail, at Bismarck, North Dakota with postage prepaid, to the following:

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

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

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

Signed on the 13th day of October 2023 at Bismarck, North Dakota.


Rosanne Ogden