

BURLEIGH COUNTY STATE'S ATTORNEY

JULIE LAWYER
STATE'S ATTORNEY

February 27, 2024

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

**RE: In the Matter of SCS Carbon Transport LLC
Midwest Carbon Express CO₂ Pipeline Project
Siting Application
Case No: PU-22-391**

Dear Mr. Kahl:

Enclosed for filing in Case No. PU-22-391, please find the original and seven copies of the following:

1. Burleigh County's Petition for Reconsideration.

A digital copy will also be sent via e-mail.

Sincerely,



Julie Lawyer
State's Attorney

Enclosures

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Burleigh County's Petition for Reconsideration

Burleigh County Board of Commissioners

Julie Lawyer, State's Attorney

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

SCS Carbon Transport LLC
Midwest Carbon Express CO₂ Pipeline Project
Certificate of Corridor Compatibility and Route Permit

Case No: PU-22-391

BURLEIGH COUNTY'S PETITION FOR RECONSIDERATION

Pursuant to N.D.C.C. § 28-32-40(1), Burleigh County, by and through its Board of County Commissioners, hereby submits this Petition for Reconsideration of the Order issued on February 7, 2024, filed as docket entry 440 and served on the parties on February 12, 2024.

The Order declares any local land use or zoning regulations for a gas or liquid transmission facility route permit are automatically superseded and preempted pursuant to N.D.C.C. § 49-22.1-13. In its Discussion, the North Dakota Public Service Commission (hereinafter "Commission") concluded since SCS Carbon Transport LLC (hereinafter "SCS") filed a consolidated application for corridor compatibility and a route permit, that N.D.C.C. § 49-22.1-13(2)(b), which governs the permit for construction, is controlling. It appears the Commission believes it does not have to consider the provisions of N.D.C.C. § 49-22.1-13(2)(c), (d), and (e) which govern corridor compatibility. Because there is no statute or case law which allows the Commission to disregard the laws governing corridor compatibility on a consolidated application for corridor compatibility and a route permit, Burleigh County argues all laws governing both applications are applicable to each portion of the application and must be followed.

As a permit for construction can only be granted within a "designated corridor", the corridor compatibility must first be considered before the Commission can grant a permit for construction. N.D.C.C. § 49-22.1-13(2)(c), (d), and (e) govern corridor compatibility and, therefore, the Commission must consider and follow those statutes before it can approve a "designated corridor". N.D.C.C. § 49-22.1-13(2)(c) requires the applicant to show by a preponderance of the evidence that applicable local 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 before those regulations or ordinances may be superseded.

Burleigh County petitions for reconsideration for the Commission to determine whether SCS has shown by a preponderance of the evidence that the local land use or zoning ordinances should be superseded and preempted. As no evidence has been presented regarding this issue, SCS should be required to comply with local land use, regulations, and ordinances. No further hearing is requested.

Background

On October 17, 2022, SCS filed a consolidated Application for Certificate of Corridor Compatibility and Route Permit concerning a carbon dioxide pipeline through Burleigh, Cass, Dickey, Emmons, Logan, McIntosh, Morton, Oliver, Richland, and Sargent Counties. On March 30, 2023, Burleigh County filed all local requirements related to the application, to include the Burleigh County Board of Health statement, Burleigh County ordinance on Hazardous Liquid Pipelines, Burleigh County zoning ordinance for the regulation of land use when transporting hazardous liquid through a hazardous liquid pipeline, and a resolution of the Board of County Commissions opposing the use of eminent domain to acquire property for the Summit Carbon Solutions Pipeline Project. Docket 161. On June 1, 2023, SCS filed a motion to declare Emmons County and Burleigh County ordinances superseded and preempted. Burleigh County petitioned to intervene and oppose the motion on July 31, 2023. The Commission issued findings of fact, conclusions of law, and order filed on August 4, 2023 denying SCS's application for a certificate of corridor compatibility and denying SCS's application for a route permit. The motion to supersede Burleigh County's zoning ordinance was not considered as the certificate had been denied.

On August 18, 2023, SCS filed a Petition for Reconsideration which was granted on September 15, 2023. Docket 371. On September 29, 2023, SCS renewed its motion to declare

Emmons County and Burleigh County ordinances superseded and preempted. Burleigh County filed its renewed petition to intervene on August 30, 2023. The petition was granted on September 6, 2023. A hearing was held on December 21, 2023 and the Commission issued its Order on February 7, 2023.

Law and Argument

A petition for reconsideration of an adverse ruling is authorized under N.D.C.C. § 28-32-40 and N.D.A.C. § 69-02-06-02.

SCS filed a consolidated or combined application for both a certificate of corridor compatibility and a route permit as provided by N.D.C.C. § 49-22.1-08. The application is for the routing and construction of a carbon dioxide pipeline which falls under the definition of “gas or liquid transmission facility”. N.D.C.C. § 49-22.1-01(7). The requirements for an application for a certificate of corridor compatibility for a gas or liquid energy transmission facility are outlined in N.D.C.C. § 49-22.1-06. The requirements for an application for a route permit for a gas or liquid energy transmission facility are outlined in N.D.C.C. § 49-22.1-07. There is no statute that alleviates these requirements or provides different requirements if a combined application is filed. Therefore, the combined application must meet the minimum requirements of both N.D.C.C. §§ 49-22.1-06 and 49-22.1-07. Once the Commission determines that an application is complete, there are similar requirements of the Commission under both statutes, such as serving notice of the application, publishing notice of the filing of the application, providing copies to of the application upon request. See N.D.C.C. § 49-22.1-06(2)-(4) and N.D.C.C. § 49-22.1-07(2)-(4).

Under N.D.C.C. § 49-22.1-06 which governs applications for a certificate of corridor compatibility, “[t]he commission may designate a site or corridor for a proposed facility following the study and hearings provided for in this chapter. Any designation must be made in accordance with the evidence presented at the hearings, an evaluation of the information provided in the application, the criteria established pursuant to section 49-22.1-03, and the considerations set out in section 49-02.1-09 in a finding with reasons for the designation ... Upon designation of a site

or corridor, the commission shall issue ... a certificate of corridor compatibility with the terms, conditions, or modifications deemed necessary.” N.D.C.C. § 49-22.1-06(5).

“An application for a route permit for a gas or liquid transmission facility within a designated corridor must be filed no later than two years after the issuance of the certificate...” N.D.C.C. § 49-22.1-07. Even though the law allows for a combined application under N.D.C.C. § 49-22.1-08, it is still clear that a route permit, which means “the permit for the construction of a gas or liquid transmission facility within a designated corridor...” can only be issued to construct the pipeline within the “designated corridor” approved by the Commission. N.D.C.C. §§ 49-22.1-01(8) and 49-22.1-07. Whether the applications for certificate of corridor compatibility and a route permit are filed individually or as a combined application, the Commission must first establish the “designated corridor” before it can issue a permit for construction of that pipeline through the corridor.

The Commission has already acknowledged that each portion of the application must be considered individually. In its order of August 4, 2023, the Commission specifically ordered that SCS’s application for 1) waiver of procedures and time schedules was denied; 2) certificate of corridor compatibility was denied; 3) route permit was denied; and 4) petition to reopen proceedings, schedule a public hearing, and outstanding procedure motions were all denied. The Commission, by individually denying both parts of the consolidated or combined application, is aware that each part must be reviewed separately. The relevant statutes for a certificate of corridor compatibility must be followed for determination of the appropriateness of issuing a certificate of corridor compatibility. Only after the Commission has determined the appropriateness of issuing a certificate of corridor compatibility, then the relevant statutes for a route permit must be followed for determination of the appropriateness of issuing a route permit.

When it comes to local land use, zoning, or building rules, regulations, or ordinances, the laws are different depending on the application and the type of facility, whether it’s a conversion

facility or transmission facility, to be constructed. N.D.C.C. § 49-22.1-13 governs local use, zoning, rules, regulations, or ordinances and reads as follows:

49-22.1-13. Effect of issuance of certificate or permit - Local land use, zoning, or building rules, regulations, or ordinances - State agency rules.

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.

When an application for a certificate for corridor compatibility is filed, the Commission is required to notify all cities, counties, and townships which have retained zoning authority through

which any portion of the proposed corridor is located. N.D.C.C. § 49-22.1-13(2)(d). The political subdivision then has to provide a listing of all local land use, zoning, building rules, regulations, or ordinances. *Id.* Applicants are required to comply with all local requirements provided to the Commission which are not otherwise superseded by the Commission. N.D.C.C. § 49-22.1-13(e). Any local requirements are superseded and preempted if nothing is filed when required. *Id.* Burleigh County filed its local land use, zoning, ordinances, and resolutions related to the project as required. Docket 161. Therefore, SCS is required to comply with all Burleigh County requirements unless otherwise superseded by the Commission.

The Commission can only supersede Burleigh County's filed local requirements as allowed by the statute. 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." N.D.C.C. § 49-22.1-13(b). However, in order to issue a permit for the construction of a transmission facility, the Commission must first approve the designated corridor, which it does by issuing a certificate of corridor compatibility under N.D.C.C. § 49-22.1-06(5). "Before a gas or liquid transmission facility is approved..." under N.D.C.C. § 49-22.1-13(c), the Commission shall require the applicant to comply with the road use agreements. "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..." *Id.*

When a statute is enacted, it is presumed that the entire statute is intended to be effective and that a just and reasonable result is intended. N.D.C.C. § 1-02-38. Words in a statute are to be understood in their ordinary sense unless otherwise defined or a contrary intention plainly appears. N.D.C.C. § 1-02-02. Furthermore, the North Dakota Supreme Court has given guidance on the interpretation of statutes as follows:

Our primary goal in statutory construction is to ascertain the intent of the legislature, and we first look to the plain language of the statute and give each word of the statute its ordinary meaning. When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext

of pursuing its spirit. If, however, the statute is ambiguous or if adherence to the strict letter of the statute would lead to an absurd or ludicrous result, a court may resort to extrinsic aids, such as legislative history, to interpret the statute. A statute is ambiguous if it is susceptible to meanings that are different, but rational. We presume the legislature did not intend an absurd or ludicrous result or unjust consequences, and we construe statutes in a practical manner, giving consideration to the context of the statutes and the purpose for which they were enacted.

State v. Fasteen, 2007 ND 162, ¶ 8, 740 N.W.2d 60 (internal citations omitted).

In reading the provisions of N.D.C.C. § 49-22.1-13 as it relates to local requirements, it is clear if a political subdivision files its requirements with the Commission, those requirements must be followed unless superseded by the Commission. The only provision that allows for local requirements to be automatically superseded is upon the issuance of a “permit for construction” of a gas or liquid transmission facility. *Id.* Before a permit for construction can be issued, a certificate of corridor compatibility has to be issued. N.D.C.C. § 49-22.1-07. The applicant has to comply with road use agreements but local regulations or ordinances can be superseded only if the applicant proves by a preponderance of the evidence that the regulations or ordinances are unreasonably restrictive. The only mechanism that allows the Commission to supersede Burleigh County’s regulations or ordinances is to find that SCS proved, by a preponderance of the evidence, that each regulation or ordinance filed with the Commission is unreasonably restrictive under the law. The Commission should then make findings that 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.

Conclusion

Despite the fact that SCS filed a combined application for a certificate for corridor compatibility and a route permit, the laws regarding the issuance of a certificate of corridor

compatibility and a route permit must still be followed. The Commission must approve a certificate for corridor compatibility before it can issue a route permit as the “designated route” must be approved prior to the issuance of a permit for construction. The applicant has the burden of proof by a preponderance of the evidence to show a political subdivision’s regulations or ordinances are unreasonably restrictive in view of existing technology, factor of cost or economics, or needs of consumers regardless of their location, or are in direct conflict with state or federal laws or rules.

If the Commission finds the applicant has met its burden, the regulations or ordinances are superseded and preempted. Once the Commission has issued a certificate of corridor compatibility, the law does not requires the Commission to revisit local regulations or ordinances as they have been presumably superseded as unreasonably restrictive and are automatically superseded with the issuance of a construction permit.

Based on the above reasons, Burleigh County petitions the Commission to reconsider in light of the presumption that entire statutes are effective and are to be understood in their ordinary sense and the Commission is required to follow the specific provisions of law when determining the appropriateness of a certificate of corridor compatibility before it issues a permit for construction of a route within the designated corridor.

Dated this 27th day of February, 2024.

/s/ Julie Lawyer
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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

CERTIFICATE OF SERVICE

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

1. Burleigh County's Petition for Reconsideration

were on February 27, 2024, filed with the North Dakota Public Service Commission and served electronically to the following:

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Dated this 27th day of February, 2024.

/s/ Julie Lawyer
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