



**KNOLL LEIBEL** <sup>LLP</sup>  
ATTORNEYS AT LAW

March 7, 2024

VIA U.S. & E-MAIL ONLY: [ndpsc@nd.gov](mailto:ndpsc@nd.gov)

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



**ORIGINAL**

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 Burleigh County's Petition for Reconsideration; and
2. Declaration of Service.

This Response to Burleigh County's Petition for Reconsideration is being filed with the North Dakota Public Service Commission (hereinafter "NDPSC") on behalf of the Intervenor represented by Knoll Leibel LLP. Intervenor have 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](mailto:steve@bismarck-attorneys.com)

SJL: rmo

Enclosures

455 PU-22-391 Filed 03/07/2024 Pages: 8  
Response to Burleigh County's Petition for Reconsideration

Knoll Leibel, LLP, on behalf and at the request of Intervenor  
Steven Leibel, Attorney

---

Steven J. Leibel, Partner

PO Box 858 · 1915 N. Kavaney Drive, Suite 3 · Bismarck, ND 58502-0858  
Phone 701-255-2010 · Fax 701-255-1980 · Email [steve@bismarck-attorneys.com](mailto:steve@bismarck-attorneys.com) · [www.bismarck-attorneys.com](http://www.bismarck-attorneys.com)

**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 BURLEIGH  
COUNTY'S PETITION FOR  
RECONSIDERATION**

Intervenors<sup>1</sup>, represented by the undersigned counsel, respectfully submit this response in support of Burleigh County's Petition for Reconsideration.

1. As the Commission is aware, these landowner intervenors opposed the relief sought by SCS Carbon Transport LLC ("Summit"). As stated by Burleigh County, the Century Code requires that the Commission grant two distinct items to a party seeking to build a pipeline: (1) a certificate of corridor compatibility under § 49-22.1-06, and (2) a route permit under § 49-22.1-07. The language of N.D.C.C. § 49-22.1-13(2)(b) states that local county authority is superseded only with respect to the latter. This interpretation is consistent with the statute as a whole and preserves local control because local control is still required for a certificate of compatibility.

2. This interpretation was rejected by the Commission. These intervenors join Burleigh County's petition for reconsideration—and submit this brief—to request that the Commission reconsider its decision. The Commission should grant reconsideration

---

<sup>1</sup> See Order Granting Petition to Intervene (Doc. 82, 83, 159, 168) and pending Petition to Intervene (Doc. 197).

for three reasons. First, the statute only allows for an “automatic” preemption of local rules for (i) a “permit,” (ii) within a designated “corridor.” These are all defined terms. A “permit” is defined as “the permit for construction of a gas or liquid transmission facility within a designated corridor issued under this chapter.” N.D.C.C. § 49-22.1-01(8)(emphasis added). A “corridor” means “the area of land where a designated route may be established for a gas or liquid transmission facility.” N.D.C.C. § 49-22.1-01(4). A “certificate” refers to a “certificate of site compatibility or the certificate of corridor compatibility issued under this chapter.” N.D.C.C. § 49-22.1-01(1).

3. Intervenor will argue on appeal that the Commission’s interpretation substitutes two defined words—“corridor” and “permit”—for the word “permit” in § 49-22.1-13(2)(b). This is error. *See* N.D.C.C. § 1-02-02 (“Words used in any statute are to be understood in their ordinary sense, unless a contrary intention plainly appears, but any words explained in this code are to be understood as thus explained.”)(emphasis added); *Jorgenson v. Agway, inc.*, 2001 ND 104, ¶ 5, 627 N.W.2d 391 (“When a statute is clear and unambiguous on its face, we will not disregard the letter of the statute under the pretext of pursuing its spirit, because legislative intent is presumed clear from the face of the statute.”).

4. Second, Intervenor will argue that the Commission’s error is inconsistent with the rest of the statute. For example, “[w]hen an application for a certificate...is filed,” N.D.C.C. § 49-22.1-13(d) states that all townships and counties must provide a listing of all local requirements at least 10 days prior to any public hearing. If a township or county fails to do so, “the requirements are superseded and preempted.” N.D.C.C. §



49-22.1-13(d). Similarly, Subsection (e) of § 49-22.1-13 states that “[a]n applicant shall comply with all local requirements provided to the commission pursuant to subdivision d, which are not otherwise superseded by the commission.”

5. Intervenor will argue to the court of review that if the Commission’s interpretation was correct, both subsections (d) and subsections (e) of § 49-22.1-13 have no effect. These intervenors will argue on appeal that if the Legislature intended to grant the PSC the power to supersede and preempt all local authority in subsection (b), it would not have said the exact opposite in subsections (d) and (e). Intervenor will cite the legislative history that is already in the record as well as the Supreme Court’s opinion in *Narum v. Faxx Foods, Inc.*, 1999 ND 45, 590 N.W.2d 454 in support of this argument. *Narum*, 1999 ND 45 at ¶ 18 (“Statutes must be construed as a whole to determine the legislative intent and the intent must be derived from the whole statute.”)(internal citations omitted).

6. Finally, Intervenor will argue on appeal that the consequences of the Commission’s order further illustrate why the Commission’s interpretation is error. The Commission’s order cloaks a developer in absolute immunity from all state or county officials seeking to enforce any land use or zoning regulation. *Compare* Order (“The Commission Orders North Dakota Century Code Section 49-22.1-13 automatically supersedes and preempts any local land use or zoning regulations for a gas or liquid transmission facility route permit.”), *with* N.D.C.C. § 11-33-17 (providing counties with the right to enforce building and zoning regulations within its jurisdiction). This is an absurd result. As just one example, Summit intends to build a total of 34 above-ground



facilities, including four (4) above-ground pump stations, 4 launcher-receivers, and 25 access roads. See Application, pg. 6, Table 2.1.2. Not only has the Commission's interpretation voided all local rules and regulations that deal with mundane things like the depth of footings on the pump house, the necessary snow load capacity of a roof, and the types of materials to be used on a road, it has "preempted" the enforcement process. Can the Commission order code compliance for the above-ground pump houses in its final permit? If so, which code? And who will have jurisdiction to enforce this code where the local investigator lacks authority and the local process for hearing and resolving code issues has been preempted? Even placing aside the conflict with the words of § 49-22.1-13, the Commission's interpretation seems to reach a particular result without any thought as to the consequences. *Narum*, 1999 ND 45 at ¶ 18 ("We interpret statutes to avoid absurd or ludicrous results.")(citation omitted).

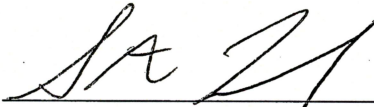
7. If the Commission decides to reject reconsideration, Intervenor respectfully request that the Commission certify that the decision is final. Pursuant to North Dakota's Administrative Agencies Practices Act, only final orders are appealable. See N.D.C.C. § 28-32-42(3)(a). The Commission heard the preemption issue at Summit's request because Summit says this threshold issue is critical to Summit's application. See SCS Carbon Transport LLC's Renewal of its Motion to Declare Burleigh and Emmons County Ordinances Superseded and Preempted [Doc. 401]. This rationale should still be true. For this reason, Intervenor respectfully request that the Commission find that its decision regarding the construction of § 49-22.1-13 is intended by the Commission as a

final order under N.D.C.C. § 28-32-42 because it conclusively determines the rights of the parties under § 49-22.1-13.

### CONCLUSION

The Commission has substituted the words “permit and certificate” for the word “permit” in § 49-22.1-13(2)(b). It did not have the authority to do so. Intervenor contend that a “permit” and a “certificate” are not the same thing, and that reconsideration is appropriate. In the alternative, Intervenor respectfully request that the Commission certify that its decision is a final order under N.D.C.C. § 28-32-42 because it conclusively determines the rights of the parties under § 49-22.1-13 so any aggrieved party can seek relief from a court of review.

Dated this 7<sup>th</sup> day of March, 2024.



Steven Leibel (ID 07361)  
David Knoll (ID 06167)  
Knoll Leibel LLP  
P.O. Box 858  
1915 N. Kavaney Drive, Ste. 3  
Bismarck, ND 58501  
Ph: (701) 255-2010  
[steve@bismarck-attorneys.com](mailto:steve@bismarck-attorneys.com)  
[david@bismarck-attorneys.com](mailto:david@bismarck-attorneys.com)

*Landowner/Intervenor Lawyers*

Brian E. Jorde  
Pro Hac Vice Pending  
Domina Law Group  
2425 S. 144th St.  
Omaha, NE 68144  
Ph: 402-493-4100  
[bjorde@dominalaw.com](mailto:bjorde@dominalaw.com)  
[NDCO2@dominalaw.com](mailto:NDCO2@dominalaw.com)

*Landowner/Intervenor Lawyers*

**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

**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 Burleigh County's Petition for Reconsideration; and**
- 2. Declaration of Service.**

[2] On March 7, 2024, by sending a true and correct copy thereof by electronic means only to the following email addresses, to wit:

John Maurice Schuh Bar ID 08138  
Special Assistant Attorney General  
North Dakota Public Service Commission  
600 E. Boulevard Ave, Dept. 408  
Bismarck, ND 58505-0480  
[jschuh@nd.gov](mailto:jschuh@nd.gov)

Lawrence Bender Bar ID 03908  
Fredrikson & Byron, P.A.  
1133 College Dr., Ste. 1000  
Bismarck, ND 58501-1215  
[lbender@fredlaw.com](mailto:lbender@fredlaw.com)

Hope Lisa Hogan Bar ID 05982  
Administrative Law Judge  
Office Of Administrative Hearings  
2911 N. 14th St., Ste. 303  
Bismarck, ND 58503  
[hlhogan@nd.gov](mailto:hlhogan@nd.gov)

Zachary Evan Pelham Bar ID 05904  
Pearce Durick PLLC  
314 E. Thayer Ave.  
P.O. Box 400  
Bismarck, ND 58502-0400  
[zep@pearce-durick.com](mailto:zep@pearce-durick.com)

John Hamre  
Public Service Commission  
State Capitol  
600 E Boulevard Ave., Dept. 408  
Bismarck, ND 58505-0480  
[jghamre@nd.gov](mailto:jghamre@nd.gov)

Brian E. Jorde  
Domina Law Group  
2425 S 144<sup>th</sup> St  
Omaha NE 68144  
[bjorde@dominalaw.com](mailto:bjorde@dominalaw.com)



Kevin Pranis  
LIUNA Minnesota & North Dakota  
81 E Little Canada Rd  
St. Paul MN 55117  
[kpranis@liunagroc.com](mailto:kpranis@liunagroc.com)

Randall J. Bakke Bar ID 03898  
Bradley N. Wiederholt Bar ID 06354  
Bakke Grinolds Wiederholt  
PO Box 4247  
Bismarck, ND 58502-4247  
[rbakke@bgwattorneys.com](mailto:rbakke@bgwattorneys.com)  
[bwiederholt@bgwattorneys.com](mailto:bwiederholt@bgwattorneys.com)

North Dakota Public Service Commission  
[ndpsc@nd.gov](mailto:ndpsc@nd.gov)

Bret A. Dublinske  
Fredrickson & Bryon, P.A.  
111 E. Grand Ave., Ste. 301  
Des Moines, IA 50309-1884  
[bdublinske@fredlaw.com](mailto:bdublinske@fredlaw.com)

James Curry  
Babst, Calland, Clements and Zomnir P.C.  
[jcurry@babstcalland.com](mailto:jcurry@babstcalland.com)

Derrick Braaten  
[derrick@braatenlawfirm.com](mailto:derrick@braatenlawfirm.com)

Julie Lawyer  
Burleigh County State's Attorney  
[bc08@nd.gov](mailto:bc08@nd.gov)

Brant Leonard  
Frederickson & Byron, P.A.  
[bleonard@fredlaw.com](mailto:bleonard@fredlaw.com)

Patrick T. Zomer  
Attorney for the City of Bismarck  
[pat.zomer@lawmoss.com](mailto:pat.zomer@lawmoss.com)

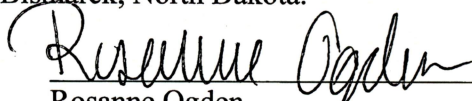
[3] and by sending the originals and seven (7) copies of said documents via U.S. Mail, at Bismarck, North Dakota with postage prepaid, to the following:

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 7th day of March, 2024 at Bismarck, North Dakota.

  
Rosanne Ogden