

April 1, 2024

VIA U.S. MAIL

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

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

Dear Mr. Kahl:

Enclosed herewith, please find the following documents for filing with the North Dakota Public Service Commission ("Commission") in the above-referenced case:

1. SCS Carbon Transport LLC's Response in Opposition to Burleigh County's Motion for Continuance and the Joinder of Landowner Intervenors; and
2. Certificate of Service.

An original and seven (7) copies of the foregoing are enclosed herewith. This letter and the above-described documents have been electronically filed with the Commission by e-mailing copies of the same to ndpsc@nd.gov.

Should you have any questions, please advise.

Sincerely,


LAWRENCE BENDER

LB/tjg
Enclosures
#82062503v1

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

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

OAH FILE NO. 20230002

**SCS Carbon Transport LLC's Response in Opposition to Burleigh County's Motion for
Continuance and the Joinder of Landowner Intervenors**

SCS Carbon Transport LLC ("Summit"), by and through its attorneys of record, hereby submits this response in opposition to Burleigh County's Motion for Continuance (Docket No. 474) filed with the North Dakota Public Service Commission ("Commission") in the above-referenced matter. The intervenors represented by Brian Jorde, Steven Leibel and David Knoll (the "Landowner Intervenors") joined in Burleigh County's Motion for Continuance (the "Joinder"). *See* Docket No. 478.

As more particularly detailed herein, Summit objects to a continuance and further intentional delay of the public hearings set forth in the Commission's March 21, 2024 Notice of Public Hearing (Docket No. 465) on the following grounds:

- (1) Burleigh County's motion to continue, as joined by the Landowner Intervenor's (collectively, the "Motion to Continue") is nothing more than a delay tactic, one that counsel for Landowner Intervenors, Mr. Jorde, has publicly admitted as being his primary strategy in contested matters such as this proceeding;

- (2) Burleigh County and the Landowner Intervenors “sat on their hands” without justification for nine days after the Commission publicly announced the intended hearing dates;
- (3) Neither Burleigh County nor the Landowner Intervenors have offered a reasonable (or even believable) justification for their inability to either adjust their respective schedules or to utilize one of the many lawyers at their disposal; and
- (4) Burleigh County does not have standing to move the Commission for a continuance because the issues for which Burleigh County was granted intervenor status to address, namely preemption of local ordinances, have been decided by the Commission.

Accordingly, Summit respectfully requests that the Commission deny the Motion for Continuance and proceed with the hearings as scheduled in the Notice of Public Hearing.

ARGUMENT

North Dakota Administrative Code (N.D.A.C.) § 69-02-04-03 provides that continuances may be granted by the Commission (not a procedural hearing officer) for good cause and that a motion for continuance “must be made as far in advance of the date fixed for hearing as possible.”¹ N.D.A.C. § 69-02-04-03 generally follows Rule 6.1 of the North Dakota Rules of Court, which provides that motions for continuances “must be promptly filed as soon as the grounds are known and will be granted only for good cause shown.” As detailed below, neither Burleigh County nor the Landowner Intervenors have met their burden for a continuance of the upcoming hearings in this case.

¹ N.D.A.C. § 69-02-04-03 provides that only the Commission and a “substantive hearing officer” have the authority to rule on a motion for a continuance. The Administrative Law Judge in this case is a procedural hearing officer.

I. The Motions to Continue Are Yet Another Attempt by the Intervenor to Delay, Delay, Delay.

Burleigh County and the Landowner Intervenor are seeking a continuance of the April 22, 2024 hearings in Mandan until after June 4, 2024 hearings. This is not unintentional. The Commission put all parties on notice at its March 18, 2024 special meeting that the initial hearings in Burleigh County were going to address all of the deficiencies identified in the Commission's August 4, 2023 Order (Docket No. 375) denying Summit's application. The Commission further directed that the initial hearing to be held in Bismarck (now Mandan) was each parties sole opportunity to present witnesses for direct and cross-examination. In essence, the hearings commencing on April 22, 2024 were to "set the stage" for the remote hearings so that the Commission could focus its attention on the specific concerns of landowners and other stakeholders at the hearings to be held in Wahpeton and Linton. Burleigh County and the Landowner Intervenor are well aware that a continuance of the April 22, 2024 hearings will disrupt the procedural order of the scheduled hearings and likely necessitate a continuance of the May 24 and June 4 hearings in Wahpeton and Linton. This is precisely their objective despite their claims to the contrary.

Mr. Jorde, lead counsel for the Landowner Intervenor, makes clear in his presentations and frequent media interviews² that he is not simply acting in his capacity as an attorney for particular clients and that his goals in litigation are not limited to resolving specific issues for his

² See, e.g., *This is Winnable*, Manchester Press (Sept. 21, 2022) https://www.manchesterpress.com/news/this-is-winnable/article_c2ad7e88-efb3-5eaf-9865-79bf43f6b1e4.html; *Iowa's CO2 Pipeline Fight, One Year In*, Northwest Iowa Times (Nov. 1, 2022), https://www.nwestiowa.com/news/iowas-co2-pipeline-fight-one-year-in/article_842349be-57e1-11ed-9409-2f89a8a384f5.html; *Carbon Storage Plans Prompt Concerns in Tribal Areas*, Public News Service (Jan. 3, 2022), <https://www.publicnewsservice.org/2022-01-03/energy-policy/carbon-storage-plans-prompt-concerns-in-tribal-areas/a77220-1>; *Iowa Landowners United Against Use of Eminent Domain*, Iowa Public Radio (Feb. 24, 2022), <https://www.iowapublicradio.org/ipr-news/2022-02-24/iowa-landowners-unite-against-use-of-eminent-domain>; *Landowners Lawyer Fights Eminent Domain: Pipeline Hearings to Start in South Dakota*, AG Week (Mar. 17, 2022), <https://www.agweek.com/news/policy/landowner-lawyer-fights-against-eminent-domain-pipeline-hearings-to-start-in-south-dakota>.

clients. In a video posted to YouTube, Mr. Jorde told one group of potential clients, **“I pretty much spend all day talking to landowners in different states and then strategizing and then filing lawsuits and coming up with different ideas of how we can slow down the works. Um, get to the politicians, influence them, work on legislation. . .”**³ Mr. Jorde boasted that “every piece” of his litigation related to the Keystone pipeline “played a part to *delay, delay, delay* so other dominos can fall,” suggesting that this delay strategy can also work against CO₂ pipelines.⁴

Furthermore, Mr. Jorde, who last year appeared in only two of the Commission’s five hearings on Summit’s application, states that he has not before asked for a continuance before this Commission. Mr. Jorde has, however, tried to delay proceedings in other state’s where Summit’s project is located. Right before the Iowa Utilities Board (“Board”) was set to begin its hearing last summer, Mr. Jorde complained that the Board was starting too soon. The Board proceeded with its schedule. When Mr. Jorde requested that a district court enjoin the Board from further proceeding—which is to say, when Mr. Jorde and his clients wanted quick action—Mr. Jorde sent a colleague to argue the motion to the Iowa district court.

Based on the foregoing, Summit respectfully requests that the Commission recognize the Motion to Continue for what it is, yet another delay tactic of the intervenors in this case.

II. The Intervenors’ Delay in Requesting a Continuance is Not Excusable and Not Supported by Good Cause.

On March 18, 2024, the Commission held a special meeting to address Burleigh County’s Petition for Reconsideration (Docket No. 449), requesting that the Commission reconsider its February 7, 2024 Order (Docket No. 440) ruling that North Dakota Century Code (N.D.C.C.) § 49-

³ *Defending Property Rights and Easements*, at 33:25, <https://www.youtube.com/watch?v=jCLs1i792wA>.

⁴ *Id.* at 40:09 (emphasis added).

22.1-13 automatically supersedes and preempts any local land use or zoning regulations for a gas or liquid transmission facility permit.

The Commission denied Burleigh County's Petition for Reconsideration at the March 18, 2024 special meeting and then continued to discuss potential hearing dates on Summit's Petition for Reconsideration.

Specifically, the Commission identified April 22 – 26 for an initial hearing in the Bismarck area, a May 24, 2024 hearing to be held in the eastern portion of North Dakota, possibly Gwinner or Wahpeton, and a June 4, 2024 hearing to be held in Emmons County. The Commission instructed staff members to secure hearing locations and the Executive Secretary to issue a notice of public hearing, subject to venue availability, for the dates set forth above.

Summit representatives and Summit's counsel were present at the March 18, 2024 special meeting of the Commission. Burleigh County and the Landowner Intervenor's counsel were not physically present at that meeting, but were on notice of it (indeed, the purpose was to address Burleigh County's petition) and may have—or could have—listened online.

On March 21, 2024, the Commission, through its Executive Secretary, issued its Notice of Public Hearing (Docket No. 465) which provides for a public hearing schedule that is exactly aligned with the dates and locations discussed at the March 18, 2024 special meeting of the Commission. *See* Docket No. 465.

Not until March 27, 2024—nine days after the Commission discussed its available hearing dates—did Burleigh County and Landowner Intervenor's file their Motion to Continue. Burleigh County first raised the issue with counsel for Summit the day before, on March 26. By that time, Summit, and counsel for Summit, had already expended great effort in rearranging their respective schedules to accommodate the hearing schedule set forth in the Notice of Public Hearing and

declined to agree to any such continuance. In fact, Summit's lead counsel in these hearings, Mr. Bender, had already moved to continue other proceedings for other clients in order to accommodate the Commission's hearing schedule.

Burleigh County and the Landowner Intervenors had the obligation, and opportunity, to promptly notify the Commission and/or Commission staff of its "unmovable conflicts" and "unavailability" upon learning of the potential hearing dates discussed at the March 18, 2024 special meeting of the Commission. The nine-day delay does not meet the requirements of N.D.A.C. § 69-02-04-03 which requires a motion to continue to be filed "as far in advance of the date fixed for hearing as possible."

Summit assumes that Commission staff undertook considerable time and effort to secure hearing locations in days immediately following the March 18, 2024 special meeting of the Commission. Time was of the essence to secure said locations so that the Notice of Public Hearing could be published as required by law. On the other hand, neither Burleigh County nor the Landowner Intervenors offer an explanation as to why they did not immediately notify Commission staff of their alleged conflicts during the week of April 22, 2024. Rather, the Landowner Intervenors complain that the hearing dates were set "without input or comment from counsel." *See* Docket No. 478. This is true and equally applicable to Summit. However, as noted above, Summit and Summit's counsel expended great effort in rescheduling other important and previously scheduled matters, all within the nine days it took Burleigh County and the Landowner Intervenors to move for a continuance once it learned of the Commission's limited schedule.

Burleigh County and the Landowner Intervenors did not request a continuance as soon as possible and the delay in moving the Commission for a continuance is inexcusable and unsupported by any meaningful proffer of good cause.

III. Burleigh County and the Landowner Intervenor Have Competent and Available Counsel at Their Disposal for the Hearings Commencing on April 22, 2024.

The stated reasons for Burleigh County's request for a continuance are that Julie Lawyer and Mr. Bakke have "unmovable conflicts". See Docket No. 474. However, Mr. Bakke's "unmovable conflict" is preparation time for a trial that occurs the week beginning April 29, 2024. *Id.* "Prep time" is not a conflict for which the Commission need account for. Even if it were, there are approximately eleven Assistant State's Attorneys working at the office of the Burleigh County State's Attorney, and there are at least three attorneys, other than Mr. Bakke and Mr. Wiederholt, working at the law office of Bakke Grinolds Wiederholt.

The Landowner Intervenor claim that they have "no counsel" available for the hearings commencing on April 22, 2024. See Docket No. 478. This statement is simply untrue by the Landowner Intervenor's own admission. *Id.*

Mr. Jorde, Mr. Leibel and Mr. Knoll are, among the three of them, available for four of the five days of week beginning on April 22, 2023. *Id.* According to the Landowner Intervenor's Joinder, Mr. Jorde appears to be available on April 24, 25 and 26.⁵ Mr. Leibel is available on April 25 and April 26. *Id.* Mr. Knoll is available April 23, 24, 25 and 26. *Id.* This leaves one day, April 22, for which counsel for the Landowner Intervenor would need to either reschedule an existing engagement or find alternative counsel. It should be noted that there are at least two other attorneys at Mr. Jorde's law firm (Domina Law), one of which has been directly involved in the various Summit proceedings, and there is one other attorney working at the law firm of Knoll

⁵ The Landowner Intervenor's Joinder recites that "Mr. Jorde is unavailable on April 22, 2024 due to in person hearings. . .," and that he is also "unavailable on April 23, 2024, to attend a hearing in North Dakota due to depositions in a multi-party case out of state that are set for April 24, 2024 and April 25, 2026." The Joinder does not allege that Mr. Jorde is unavailable on April 24 and 25.

Leibel. Furthermore, neither Mr. Jorde nor Mr. Liebel attended all five of the prior hearings on Summit's application.⁶

But, rather than providing the Commission with any reasonable justification for why this cannot be accomplished, Burleigh County and the Landowner Intervenor suggest alternative dates for the primary hearings in Bismarck. Burleigh County and the Landowner Intervenor either offered these dates knowing that the Commission only had three days of availability in June (4th, 20th, 27th) or they did not attend or listen to the special meeting on March 18, 2024. In either event, neither Summit nor the Commission should have to go through additional time, effort and expense to find alternative dates for these proceedings on the account of a supposed one day conflict for Landowner Intervenor's counsel.

Accordingly, good cause does not exist to continue the April 22, 2024 on the basis that either Burleigh County or the Landowner Intervenor will not be adequately represented at such hearings.

IV. The ALJ's Order Limits the Scope of Burleigh County's Intervention.

The September 5, 2023 Order of the Administrative Law Judge ("ALJ") provides that Burleigh County may appear as an intervenor in this case "to respond to Summit's Petition for Reconsideration and the issue of superseding and preemption of county ordinances." *See* Docket No. 384. This issue of preemption has already been decided by the Commission and should not be considered at the upcoming hearings on Summit's Petition for Reconsideration. *See* Docket No. 440. Furthermore, Burleigh County has been afforded the opportunity to respond to Summit's Petition for Reconsideration and did so— twice. *See* Docket Nos. 361, 378. Of course, Burleigh

⁶ Mr. Jorde only attended the April 11 (Wahpeton) and June 2 (Bismarck) hearings, and Mr. Liebel attended the March 14 (Bismarck), May 9 (Linton) and June 2 (Bismarck) hearings. Neither Mr. Jorde nor Mr. Liebel were present for the March 28 hearing in Gwinner.

County will argue that responding to Summit's Petition for Reconsideration includes participation at the upcoming hearings. However, Burleigh County's response to Summit's Petition for Reconsideration was solely focused on the issue of its ordinances and preemption. *Id.*

Accordingly, Burleigh County does not have good cause to unnecessarily delay the upcoming hearings when the scope of its intervention, the defense of its ordinances, is not before the Commission at the upcoming hearings.

V. Conclusion.

Based on the foregoing, Summit respectfully requests that the Commission:

- (1) summarily deny Burleigh County's Motion to Continue;
- (2) summarily deny Landowner Intervenors' Joinder to Burleigh County's Motion to Continue; and
- (3) proceed with the hearings as noticed in the Commission's March 21, 2024 Notice of Hearing.

Dated this 1st day of April, 2024.


FREDRIKSON & BYRON, P.A.

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**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

**SCS Carbon Transport LLC
Midwest Carbon Express CO2 Project
Sitting Application**

CASE NO. PU-22-391

CERTIFICATE OF SERVICE

I, the undersigned, being of legal age, hereby certify that a true and correct copy of the following:

1. Letter to S. Kahl forwarding documents for filing; and
2. SCS Carbon Transport LLC's Response in Opposition to Burleigh County's Motion for Continuance and the Joinder of Landowner Intervenors.

was, on April 1, 2024, filed with the North Dakota Public Service Commission and served electronically to the following:

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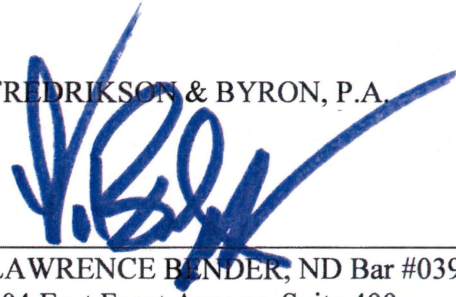
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Dated this 1st day of April, 2024.

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By: _____

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