

**Bakke  
Grinolds  
Wiederholt**

ATTORNEYS AT LAW

April 2, 2024

**Via Hand-Delivery**

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

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

Dear Mr. Kahl:

Enclosed for filing in Case No. PU-22-391, please find the following documents:

1. *Reply Brief in Support of Burleigh County's Motion for Continuance;*
2. *Declaration of Randall J. Bakke; and*
3. *Certificate of Service, with seven copies of same.*

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

Very Truly Yours,

/s/ *Randall J. Bakke*

Randall J. Bakke

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486 PU-22-391 Filed 04/02/2024 Pages: 16  
Reply Brief in Support of Burleigh County's  
Motion for Continuance & Declaration

Burleigh County  
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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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**REPLY BRIEF IN SUPPORT OF BURLEIGH COUNTY’S MOTION FOR  
CONTINUANCE**

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**I. Background**

Burleigh County filed a Motion for Continuance (Docket No. 474), requesting pursuant to N.D.A.C. § 69-02-04-03 that the Commission continue the Mandan hearing (focused primarily on portions of the project in Burleigh, Morton, and Oliver Counties) until after June 4, 2024, due to the unavailability of legal counsel. The Landowner Intervenors joined Burleigh County’s motion for continuance (Docket No. 478). SCS Carbon Transport LLC (“SCS”) filed a response brief (“SCS’ Opposition”) in opposition to Burleigh County’s Motion for Continuance and in opposition to the Landowner Intervenors’ joinder. Burleigh County submits this brief in reply to SCS’ Opposition and in support of Burleigh County’s Motion for Continuance.

**II. Argument**

**A. Burleigh County’s Motion to Continue is Not for the Purpose of Delay**

Citing only statements allegedly made by the Landowner Intervenors’ counsel to the media (not any statements from Burleigh County’s counsel), SCS argues that Burleigh County’s continuance request is made for the improper purpose of delay. SCS’ Opposition at pp. 3-4. Burleigh County State’s Attorney Julie Lawyer did not schedule her murder trial, and the undersigned did not schedule his civil jury trial, with the goal of delaying this unrelated proceeding. In fact, the

trials in those matters were set by the Court prior to the scheduling of the Mandan hearing in this case. SCS' suggestion that Burleigh County's request is made in bad faith and for the improper goal of delay, is without any basis in fact whatsoever. It should be noted that Burleigh County has never previously asked for a continuance in this case. The request is not part of any established pattern or practice of delay. The request is simply the result of counsel for Burleigh County having conflicting trials in other matters.

SCS also argues, "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." SCS' Opposition at p. 3. Again, SCS expressly accuses Burleigh County of improper motives without any evidence. The trials in the conflicting criminal and civil cases were previously scheduled and had nothing to do with this case. Further, SCS has failed to explain why the scheduled hearings in Wahpeton and Linton will "likely" need to be continued as well. Burleigh County's requested continuance does not apply to those other hearings. All evidence that is expected to be gathered at the Wahpeton and Linton hearings can still be gathered at those scheduled hearings, regardless of whether the Mandan hearing is held later.

**B. Burleigh County's Motion for Continuance was Prompt**

SCS argues Burleigh County did not promptly request a continuance. SCS' Opposition at pp. 4-6. However, the Notice of Public Hearing (Docket No. 465) setting the hearing dates was issued on Thursday, March 21, 2024. The undersigned counsel for Burleigh County made a written request for continuance to ALJ Hope Hogan on Tuesday, March 26, 2024, just three business days later. *See* email to ALJ Hogan, attached to the *Declaration of Randall J. Bakke* as ***Exhibit A***. In the written request to ALJ Hogan, the undersigned asked if a more formal submission would need to be made.

*Id.* Counsel for the Commission, Zachary Pelham advised by email (attached to the *Declaration of Randall J. Bakke* as **Exhibit B**) that a motion for continuance should be filed, and Burleigh County filed its motion the next day.

Under N.D.A.C. § 69-02-04-03, a motion for continuance should be made as far in advance of the date fixed for hearing as possible. In this case, as indicated in its initial motion, Burleigh County's counsel was behind the scenes communicating with other intervenors' counsel about conflicts and availability, and attempting to identify other available dates of other counsel, who also had conflicts. Burleigh County made its request as soon as it could prepare and file a formal request, after gathering the necessary information to include in the motion.

SCS makes much of the fact that the Commission discussed available dates at a meeting on March 18, 2024, a few days prior to noticing the Mandan hearing. However, even that earlier date of March 18, 2024 only adds three days to the timeline. Burleigh County did not delay its request for a continuance. Further, N.D.A.C. § 69-02-04-03 only permits a continuance request after a hearing is scheduled, not before. Burleigh County's motion would not have been proper any time prior to the issuance of Notice of Public Hearing (Docket No. 465) on March 21, 2024. Burleigh County's written request to ALJ Hogan on March 26, 2024, and formal motion on March 27, 2024 was not an unreasonable delay. Additionally, the applicable rule discusses making the continuance request "as far in advance of the date fixed for hearing as possible." N.D.A.C. § 69-02-04-03. In this case, the formal continuance request was made almost four weeks prior to the scheduled hearing.

**C. Burleigh County's Lead Counsel Should Be Present at the Hearing, the Same as SCS' Lead Counsel**

Burleigh County seeks to have its lead counsel present to handle the Mandan hearing. Presence of lead counsel is important not only to Burleigh County, but will also serve the interests

of the Commission, which will be presented with information and evidence from the most knowledgeable legal advocate on behalf of Burleigh County.

SCS acknowledges the importance of having lead counsel personally attend the hearing, stating, “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.” SCS’ Opposition at p. 6. SCS’s counsel is aware of the fact that jury trials, particularly serious criminal jury trials, and retrial following appeal in a civil case, are not like other typical “proceedings” that can simply be rescheduled by the Court. SCS’ counsel knows that these conflicts would prevent Burleigh County’s lead counsel from being able to attend the Mandan hearing at all, and seeks to use that to its advantage by opposing this continuance request. SCS intends to have its lead counsel present, but seeks to use scheduling issues as a way to deprive Burleigh County of having its lead counsel present.

SCS argues Burleigh County can make do with having an assistant state’s attorney from the office of the Burleigh County State’s Attorney handle the Mandan hearing. SCS’ Opposition at p. 7. However, the assistant state’s attorneys primarily handle criminal matters, which is why Burleigh County retained outside counsel to handle this specialized matter before the Commission. Further, none of the other attorneys in the office of the undersigned have had any significant involvement in this matter to date. As noted above, SCS concedes the importance of having lead counsel present to represent their respective clients, and to ensure a smooth proceeding. SCS should not be allowed to leverage the immovability of imminent jury trials of lead counsel to its advantage.

**D. The ALJ's Order Does Not Limit the Scope of Burleigh County's Intervention at the Upcoming Hearing**

SCS also argues that Burleigh County’s intervention in this case is limited "to respond to Summit's Petition for Reconsideration and the issue of superseding and preemption of county

ordinances." SCS' Opposition at pp. 8-9. SCS argues Burleigh County has already been afforded the opportunity to respond to SCS' Petition for Reconsideration and argue the preemption issue. *Id.* citing Docket Nos. 361 and 378 (Burleigh County's two petitions to intervene and response briefs).

ALJ Hogan's order granting Burleigh County's petition to intervene (Docket No. 384) does not limit Burleigh County's involvement to only the submission of written briefs, or restrict its ability to appear at hearings. Burleigh County is expressly permitted by ALJ Hogan to intervene to respond to SCS' petition for reconsideration, which necessarily involves issues to be addressed at the upcoming hearing in Mandan, including issues relating to an altered route of the proposed pipeline. Burleigh County has addressed additional issues beyond preemption issues in its prior filings (*see e.g.* Docket Nos. 361 and 378) and intends to do so at the upcoming hearing. Burleigh County is a party to this case now that it has been permitted to intervene. SCS' attempt to exclude Burleigh County or limit the issues it may address at hearings is improper, without any order placing such limits on Burleigh County.

### **III. Conclusion**

For the foregoing reasons and the reasons discussed in Burleigh County's Motion for Continuance (Docket No. 474), Burleigh County respectfully requests pursuant to N.D.A.C. § 69-02-04-03 that the Commission continue the hearing in Mandan until after June 4, 2024.

Dated this 2<sup>nd</sup> day of April, 2024.

BAKKE GRINOLDS WIEDERHOLT

By: /s/ Randall J. Bakke

Randall J. Bakke (#03989)

Bradley N. Wiederholt (#06354)

Special Assistant State's Attorneys for  
Burleigh County

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Attorneys for Intervenor Burleigh County

**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 RANDALL J. BAKKE**

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I, Randall J. Bakke, declare as follows:

1. I am an attorney duly licensed to practice law in the State of North Dakota and am admitted to practice before this Court.
2. I am a member of the firm Bakke Grinolds Wiederholt, attorney for Intervenor Burleigh County.
3. This affidavit is submitted in support of *Reply Brief in Support of Burleigh County's Motion for Continuance*, filed herewith.
4. Attached hereto as **Exhibit A** is a true and correct copy of email to ALJ Hope Hogan from Randall Bakke dated March 26, 2024.
5. Attached hereto as **Exhibit B** is a true and correct copy of email from Counsel for the Commission Zachery Pelham to Randall Bakke dated March 26, 2024.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 2nd day of April, 2024.

BAKKE GRINOLDS WIEDERHOLT

By:   
Randall J. Bakke (#03989)  
Special Assistant State's Attorneys for



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Attorneys for Intervenor Burleigh County

**From:** [Randall Bakke](#)  
**To:** [Hogan, Hope L.](#)  
**Cc:** [ndpsc@nd.gov](#); [John Schuh \(jschuh@nd.gov\)](#); [Lawrence Bender \(lbender@fredlaw.com\)](#); [Steve Leibel](#); [Brian Jorde](#); [Hamre, John G.](#); [Zachary E. Pelham](#); [david@bismarck-attorneys.com](#); [Kevin Pranis](#); [bleonard@fredlaw.com](#); [bdublinkske@fredlaw.com](#); [jcurry@babstcalland.com](#); [derrick@braatenlawfirm.com](#); [bc08@nd.gov](#); [Patrick Zomer](#); [Lori Steckler](#); [Sarah Martin](#)  
**Subject:** PU-22-391 / SCS Summit Carbon LLC  
**Date:** Tuesday, March 26, 2024 9:04:38 AM  
**Attachments:** [Outlook-BGW Logo C.png](#)  
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Judge Hogan,

In relation to the April 22-26, 2024, PSC hearing dates, please be advised that both Ms. Lawyer and I have unmovable conflicts. Ms. Lawyer will be handling a major trial during that time period, and I will be on the eve of a two-week jury trial in Burleigh County commencing April 29. That case was appealed to the North Dakota Supreme Court and reversed for a second jury trial. Thus, there is virtually no possibility the trial will moved again, or that the case will settle. It has already been moved at least once. Further, it is my understanding that one or more of the other attorneys, including Mr. Jorde, has a conflict with the proposed hearings date on April 22-26. We are requesting that the hearings involving Burleigh County, Morton County and Oliver County be postponed until sometime after June 4, 2024. In case it is helpful, I have reached out to most of the other intervenor attorneys, and no intervenor has indicated any opposition to this delay. We have also communicated with some of the other intervenor attorneys and asked them to discuss available dates for most all the intervenors and their attorneys after the April dates.

Kindly please let me know if something more formal needs to be submitted for the PSC's consideration to memorialize our request to move the April hearing dates. We are only requesting that the hearing dates for the matters involving Burleigh, Morton and Oliver counties be moved, but of course cannot speak for Mr. Jorde, or the other intervenor attorneys. Both Mr. Jorde and I are available for hearings during the week of June 17-21, if that might work.

In the event the PSC agrees to postpone the hearing dates in Mandan, ND, please let us know whether this affects your email from March 25, 2024 regarding a pre-hearing telephone conference with the attorneys. My available dates of the dates you provided are as follows: April 5, April 8, April 9, and April 10 (afternoon only).

Thank you for your consideration.

**Exhibit A**

*Randall J. Bakke*

*Certified Civil Trial Specialist – National Board of Trial Advocacy*

*Fellow-Litigation Counsel of America*

*Board Certified Civil Practice Advocacy*



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**From:** [Zachary E. Pelham](#)  
**To:** [Randall Bakke](#)  
**Cc:** [ndpsc@nd.gov](#); [John Schuh \(jschuh@nd.gov\)](#); [Lawrence Bender \(lbender@fredlaw.com\)](#); [Steve Leibel](#); [Brian Jorde](#); [Hamre, John G.](#); [david@bismarck-attorneys.com](#); [Kevin Pranis](#); [bleonard@fredlaw.com](#); [bdublinkske@fredlaw.com](#); [jcurry@babstcalland.com](#); [Hogan, Hope L.](#); [derrick@braatenlawfirm.com](#); [bc08@nd.gov](#); [Patrick Zomer](#); [Lori Steckler](#); [Sarah Martin](#); [Brad Wiederholt](#); [Schock, Victor F.](#)  
**Subject:** RE: PU-22-391 / SCS Summit Carbon LLC  
**Date:** Tuesday, March 26, 2024 11:07:31 AM  
**Attachments:** [image001.png](#)  
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[image003.png](#)

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Good morning Randy:

The Commission's rules provide a procedure for requesting a continuance of a hearing. N.D.A.C. 69-02-04-03.

If a motion for a continuance is made by any party, then the Commission will review the motion and issue an order. If your client plans on moving to continue the hearing, it should make a motion sooner rather than later.

Thank you.

Sincerely,  
Zack

**Zachary Pelham | Attorney**

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---

**From:** Randall Bakke <[rbakke@bgwattorneys.com](mailto:rbakke@bgwattorneys.com)>

**Sent:** Tuesday, March 26, 2024 9:05 AM

**To:** Hogan, Hope L. <[hlhogan@nd.gov](mailto:hlhogan@nd.gov)>

**Cc:** [ndpsc@nd.gov](#); [John Schuh \(jschuh@nd.gov\)](#) <[jschuh@nd.gov](mailto:jschuh@nd.gov)>; [Lawrence Bender](#)

**Exhibit B**

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**PUBLIC SERVICE COMMISSION**

SCS Carbon Transport LLC  
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Siting Application

Case No: PU-22-391  
OAH File No: 20230002

**CERTIFICATE OF SERVICE**

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

1. *Filing Letter to Steve Kahl from Randall Bakke dated April 2, 2024;*
2. *Reply in Support of Burleigh County's Motion for Continuance; and*
3. *Declaration of Randall J. Bakke.*

were on April 2, 2024, filed with the North Dakota Public Service Commission and served electronically to the following:

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Dated this 2nd day of April, 2024.

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