

June 3, 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:

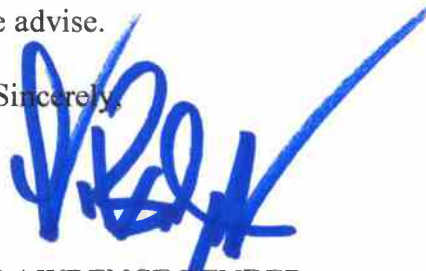
Enclosed herewith, please find the following documents for filing with the North Dakota Public Service Commission ("Commission") in the above-referenced case:

1. SCS Carbon Transport LLC's Response to Landowner Intervenor's Motion to Compel;
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

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Response to Landowner Intervenor's Motion to Compel
SCS Carbon Transport LLC
Lawrence Bender, Fredrikson&Byron, P.A.

**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

SCS Carbon Transport LLC's Response to Landowner Intervenor's Motion to Compel

SCS Carbon Transport LLC ("SCS") submits this brief in response to the motion to compel filed by Landowner Intervenor. *See* (Doc. ID# 573). For the reasons explained below, Administrative Law Judge Hope Hogan (the "ALJ") should deny the motion.

FACTS

On March 28, 2024, Landowner Intervenor served SCS with a set of requests for document production. (Doc. ID# 481).¹ Landowner Intervenor's requests were highly improper. For example, the first request for production states "[p]roduce the GIS shapefiles with all metadata for [SCS's] currently proposed North Dakota hazardous pipeline route," *id.*, even though the ALJ has already issued an order that expressly states "[t]he GIS data ... is protected from public disclosure and shall be available only to the undersigned Administrative Law Judge, the PSC, PSC legal counsel, and PSC siting analysts." (Doc. ID# 59) (emphasis added).

¹ Landowner Intervenor also served SCS with 72 interrogatories. *See* (Doc. ID# 466); (Doc. ID# 480); (Doc. ID# 481); (Doc. ID# 559). SCS notes that serving 72 interrogatories is not consistent with the North Dakota Rules of Civil Procedure, which limit parties to "50 written interrogatories." N.D.R.Civ.P. 33(a)(3).

Despite the impropriety of these requests, SCS provided timely responses and objections on April 11, 2024. (Doc. ID# 514). Forty days later, on May 21, 2024, Landowner Intervenor's counsel sent SCS's counsel a letter with a draft motion to compel attached to it.

Just a day and a half after SCS's counsel received this letter (and before SCS's counsel could even draft a response to it), Landowner Intervenor's filed their motion to compel. (Doc. ID# 573). Nowhere in their motion to compel do Landowner Intervenor's certify that they conferred or attempted to confer with SCS in good faith in an effort to obtain the responses they desire without ALJ intervention.

ARGUMENT

There are a number of reasons why the ALJ should deny Landowner Intervenor's motion to compel but this brief will only discuss two. First, Landowner Intervenor's motion is untimely. Second, Landowner Intervenor's did not comply with N.D.R.Civ.P. 37(a)(1)'s good-faith conferral requirement.

I. Landowner Intervenor's motion is untimely.

The first reason the ALJ should deny Landowner Intervenor's motion to compel is that the motion is untimely.

The ALJ has already denied a motion to compel that was filed in this case by former intervenor John Warford for being untimely. Warford's motion requested the ALJ to compel SCS to respond to discovery requests that Warford had previously served. *See* (Doc. ID# 236). In its response to the motion, SCS argued that the ALJ should deny Warford's motion because the motion was untimely:

SCS's deadline to respond to the discovery requests is June 2, 2023. By then, all hearings in this case will have been completed. Under the Commission's regulations, evidence can be submitted after a hearing only if a party has filed a petition to reopen the proceeding

for the purpose of taking additional evidence. And Warford has not submitted such a petition.

Accordingly, by the time that SCS's responses to Warford's discovery requests are due, the taking of evidence in these proceedings will have concluded and no further additions to the evidentiary record will be allowed. Discovery of evidence at that point can no longer serve any legitimate purpose.

(Doc. ID# 275). The ALJ agreed with SCS, explaining:

Even if discovery was compelled at this late stage of the proceeding, it's unknown how Intervenor Warford intends to provide any new evidence to the Commission. The Commission has not, to date, indicated any intention of scheduling further hearings for this case and no such formal request is pending with the Commission. Regardless of whether the evidence [sought by Warford] is relevant, or likely to lead to relevant evidence, the request for compelled discovery is untimely.

(Doc. ID# 285).

The ALJ should deny Landowner Intervenor's motion to compel for the same reason that it denied Warford's motion to compel. The final hearing in this matter is scheduled for June 4, 2024 at 9:00 A.M., and SCS's response is not due until June 3, 2024. "Even if discovery was compelled at this late stage of the proceeding, it's unknown how [Landowner Intervenor] intend[] to provide any new evidence to the Commission." (Doc. ID# 285). "The Commission has not, to date, indicated any intention of scheduling further hearings for this case and no such formal request is pending with the Commission." *Id.* Regardless of whether the evidence [sought by Landowner Intervenor] is relevant, or likely to lead to relevant evidence, the request for compelled discovery is untimely." *Id.* Accordingly, the ALJ should deny Landowner Intervenor's motion to compel because it is untimely.

II. Landowner Intervenor did not comply with N.D.R.Civ.P. 37(a)(1)'s good-faith conferral requirement.

The second reason the ALJ should deny Landowner Intervenor's motion to compel is that Landowner Intervenor did not comply with N.D.R.Civ.P. 37(a)(1)'s good-faith conferral requirement.²

This is an adjudicative proceeding. "In an adjudicative proceeding, discovery may be obtained in accordance with the North Dakota Rules of Civil Procedure." N.D.C.C. § 28-32-33(1). Rule 37(a)(1) of those Rules authorizes a party to file a motion to compel. However, "[t]he motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make discovery in an effort to obtain it without court action." N.D.R.Civ.P. 37(a)(1). When interpreting this rule, the North Dakota Supreme Court has explained that "a facially valid motion to compel requires two components, an actual certification document and performance." *Meuchel v. Red Trail Energy, LLC*, 2024 ND 44, ¶ 24, 4 N.W.3d 203.

As explained more fully below, Landowner Intervenor and their motion to compel did not satisfy either of these requirements. The ALJ should therefore deny their motion.

A. Landowner Intervenor's motion did not contain an actual certification document.

To be valid, Landowner Intervenor's motion to compel needed to include "an actual certification document." *Meuchel*, 2024 ND 44, ¶ 24. Among other information, this document needed to include "the names of the parties who conferred or attempted to confer, the manner by which they communicated, the dispute at issue, as well as the dates, times, and results of their discussions, if any." *Id.* at ¶ 26.

² The ALJ has previously denied a motion to compel in this very case because the movant failed to comply with N.D.R.Civ.P. 37(a)(1)'s good-faith conferral requirement. *See* (Doc. ID# 284) ("[The ALJ] has reviewed LIUNA's motion [to compel] and finds there is no certification that a good faith attempt to confer with [SCS] was made ... The Rule requires such certification to be filed. Thus, the motion is not ripe for consideration on the merits.").

Landowner Intervenor's motion to compel clearly did not include a separate certification document. And the motion itself cannot constitute the necessary certification document. Nowhere in their motion do Landowner Intervenor's "certify" that they attempted to confer with SCS in good faith. Nor does the motion include "the names of the parties who conferred or attempted to confer, the manner by which they communicated, the dispute at issue, as well as the dates, times, and results of their discussions, if any. *See Meuchel*, 2024 ND 44, ¶ 24.

Because Landowner's failed to include an actual certification document with their motion to compel, the motion is invalid.

B. Landowner Intervenor's did not confer or attempt to confer with SCS in good faith.

In addition to submitting a document that certifies they conferred or attempted to confer with SCS in good faith, Landowner Intervenor's needed to actually confer or attempt to confer with SCS in good faith. *See Meuchel*, 2024 ND 44, ¶ 24.

The North Dakota Supreme Court has explained that "[g]ood faith conferral or attempts to confer generally require more than mere demand letters or emails." *Id.* at ¶ 27. "Conferring requires a party actually communicate by phone or in person, or at least sincerely attempt to do so." *Id.* "[A] moving party must personally engage in two-way communication with the nonresponding party to meaningfully discuss each contested discovery dispute in a genuine effort to avoid judicial intervention." *Id.* at ¶ 28. A party that merely "sen[ds] a demand and d[oes] not attempt to communicate by phone or in person regarding the discovery disputes" does not satisfy the good-faith conferral requirement. *Id.* at ¶ 29.

Landowner Intervenor's attempts to confer with SCS can be summarized by the following timeline:

- **April 11, 2024:** SCS serves Landowner Intervenor with responses and objections to their requests for document production.
- **May 21, 2024:** Landowner Intervenor's counsel sends SCS's counsel a one-paragraph letter with a draft motion to compel attached to it. The letter stated: "Please let me know if your client is willing to discuss further the production of additional documents without the filing of this motion. Due to the pending hearing dates, I would appreciate if you can expedite your review of this motion and provide a response by the end of the day today."
- **May 23, 2024:** Landowner Intervenor files their motion to compel.

To summarize, Landowner Intervenor sat silent for forty days after receiving SCS's responses to their discovery requests. Their counsel then sent SCS's counsel a letter and a draft motion to compel via e-mail at 12:56 p.m. In their letter, counsel for Landowner Intervenor effectively threatened to file it unless SCS's counsel agreed—by the end of the day—to provide supplemental responses. Counsel for SCS therefore had approximately four hours to comply with the Landowner Intervenor's demand for a response to their letter. This does not constitute a good-faith attempt to confer with SCS. For this additional reason, the Landowner Intervenor's motion to compel is improper and should be denied.


CONCLUSION

For the foregoing reasons, the ALJ should deny Landowner Intervenor's motion to compel.

Dated this 3rd day of June, 2024.

FREDRIKSON & BYRON, P.A.

By:


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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 to Landowner Intervenor's Motion to Compel.

were, on June 3, 2024, filed with the North Dakota Public Service Commission and served electronically to the following:

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Dated this 3rd day of June, 2024.

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By: _____

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