

June 6, 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 Burleigh County's Motion for Reconsideration of Order on Protection of Information (Doc. 364), or in the Alternative, for Leave to Question re: Dispersion Model; 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

#82714357v1

**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 Burleigh County's Motion for Reconsideration
of Order on Protection of Information (Doc. 364), or in the Alternative, for Leave to
Question re: Dispersion Model**

SCS Carbon Transport LLC ("SCS") submits this brief in response to Burleigh County's ("County") Motion for Reconsideration of Order on Protection of Information (Doc. 364), or in the Alternative, for Leave to Question re: Dispersion Model. (Doc. ID# 582). For the reasons explained below, the North Dakota Public Service Commission ("Commission") should deny the motion.

FACTS

On April 21, 2023, SCS filed an Application for Protection of Information ("Application") to protect the security of system plans pursuant to N.D.C.C. § 44-04-24. (Doc. ID# 194). On May 1, 2023, John H. Warford Jr. ("Warford"), then represented by Mr. Bakke, the current legal counsel for the County, objected to the Application. (Doc. ID# 201). Warford argued, among other things, that the documents and information for which SCS sought protection did not qualify as security system plans pursuant to N.D.C.C. § 44-04-24.

On June 27, 2023, the Commission held a hearing on the Application and Warford's objection. On August 4, 2023, the Commission issued findings of fact, conclusions of law, and an order ("Order") granting the Application. (Doc. ID# 364).

On May 27, 2024, more than nine months after the Commission issued the Order, the County made a motion for the Commission to reconsider the Order. The County argues, in effect, the Commission should modify the Order so as to withdraw the protection granted thereby. The County argues that the documents and information currently protected by the Order do not qualify as security system plans pursuant to N.D.C.C. § 44-04-24. The County also asserts that the security system plans are no longer confidential. For the reasons set forth below, neither point warrants modification of the Order. The County's motion should therefore be denied.¹

LEGAL STANDARD

Petitions to the Commission for reconsideration are governed by N.D.A.C. § 69-02-06-02. "A petition for reconsideration must be filed within fifteen days after notice of the decision has been given under North Dakota Century Code section 28-32-13 [now codified at N.D.C.C. § 28-32-39]." The petition must state the specific grounds upon which the petition rests, or a statement of any further showing to be made. *Id.* § 69-02-06-02(2). The petition must also state if a rehearing or oral argument is requested. *Id.*

ARGUMENT

The Commission should deny the County's motion for several reasons. First, the County's request for reconsideration was made more than nine months after the Order was issued, and as such it is untimely. The Commission should deny the motion on this basis alone.

¹ Intervenor represented by Mr. Jorde ("Landowner Intervenor") filed a response in support of the County's motion on June 3, 2024. (Doc. ID# 605). The Landowner Intervenor indicates that they agree with the County but add nothing of substance to the position taken by the County. Accordingly, this brief focuses on the points raised in the County's motion.

In addition to being untimely, the County's motion is unpersuasive. The County's argument that the documents and information protected by the Order are not security system plans was already raised by Warford and rejected by the Commission when it issued the Order. And the County offers no evidence that the security system plans have been disclosed to the public or explanation for why this warrants reconsideration of the Order. For these additional reasons, the County's motion should be denied.

I. The County's motion is untimely.

The Commission should deny the County's motion because it is untimely. A request for reconsideration must be filed within fifteen days after notice of the decision is served on the parties. *See* N.D.A.C. § 69-02-06-02(1); N.D.C.C. § 28-32-39. The Commission served notice of the Order on August 4, 2023. *See* (Doc. ID# 367). Counsel for the County (then representing Warford) was included on the list of service contacts. (*Id.*). There can be no dispute the County's motion was not filed within fifteen days after the Commission served notice of the Order. Accordingly, the County's motion does not comply with N.D.A.C. § 69-02-06-02 and must be denied.

II. The Commission has already rejected the County's arguments.

The County asserts the security systems plans should not be used as both a sword and shield. Aside from offering this idiom, the County provides no reasoning or authority in support of its assertion. *See, e.g., State v. McLaughlin*, 2023 ND 34, ¶ 1, 987 N.W.2d 378 (“[W]ithout supportive reasoning or citations to relevant authorities, an argument is without merit.”). Moreover, the County acknowledges that this assertion was already made by Warford and rejected when the Commission issued the Order. (Doc. ID# 582, p. 3) (noting the point was “discussed in the Warford Objection”). As indicated by the Commission in its last order denying a reconsideration request made by the County and joined by the Landowner Intervenor, arguments

that have already been rejected by the Commission do not warrant reconsideration. *See* (Doc. ID# 461).

The County also argues that not all the documents and information protected by the Order qualify as security system plans. The County acknowledges this argument was already presented to and rejected by the Commission when it issued the Order. (Doc. ID# 582, p. 3) (“PSC essentially rejected the following arguments against the Protective Order: Not all information can possibly be protected”). Again, arguments that have previously been rejected do not warrant reconsideration. *See* (Doc. ID# 461).

III. The security system plans remain confidential.

The County asserts that paragraph 10 of the Order is no longer accurate. Paragraph 10 of the Order states as follows:

The confidentiality of [the security system plans] has been maintained by SCS. No party has demonstrated that the information has been disclosed to the public or to persons other than employees or authorized agents who need to know the information to fulfill their responsibilities in connection with the subject matter of the information.

(Doc. ID# 364). Once again, the County offers no authority, supporting argument, or even explanation for why its assertion warrants reconsideration of the Order. As such, the Commission may ignore the County’s assertions on this point entirely. *See, e.g., Somerset Court, LLC v. Burgum*, 2021 ND 58, ¶ 14, 956 N.W.2d 392 (noting that the North Dakota Supreme Court declines to review issues when a party relies on bare assertions and fails to provide any supportive reasoning or citations to legal authority, and concluding that the appellant’s failure to sufficiently develop an argument results in abandonment of the appellant’s opposition to the decision in question).

As the Commission is aware, SCS has shared information related to the security system plans with emergency responders in Burleigh, Dickey, Emmons, Mercer, Morton, Oliver, Cass, Richland, McIntosh, Logan, and Sargent Counties, as well as the City of Bismarck. (Doc. ID# 530,

p. 8). This occurred at meetings that took place between November 7, 2023 and May 16, 2024, including a meeting with the County itself on November 27, 2023. (*Id.* at 8–9; *see also* Written Rebuttal Testimony of Alex Lange). In attendance at these meetings were first responders, including Sheriffs, Sheriff Deputies and members of the Sheriffs’ departments, Police chiefs and members of the police departments, Fire Chiefs and members of city and rural fire departments, Emergency Managers, representatives of city and county ambulance services, and certain elected officials charged with oversight of each of the foregoing. (*Id.* at 9). These meetings were not open to the general public because the topics covered involved information protected under the federal Freedom of Information Act, as well as information that would be considered Sensitive Security Information under the Transportation Security Administration’s regulations. (*Id.*). The information was shared in a manner that was intended to maintain the confidentiality thereof, including the use of verbal and written warnings presented at the meetings regarding the confidential nature of the information shared. (*Id.*). The information shared consisted of a “slide deck,” which was displayed but not copied or distributed. The slide deck has been referenced at recent hearings and has been submitted to the Commission under seal pursuant to the Order. The slide deck itself was clearly marked as confidential.

SCS has also shared limited portions of the slide deck with Chad Wachter. This was done to resolve objections raised by Mr. Wachter, then an active intervenor in these proceedings. The same precautions employed by SCS to maintain confidentiality during the meetings with first responders were used during the meeting with Mr. Wachter. As Mr. Wachter testified, the meeting in which SCS allowed him to view the slide deck took place in January 2024 and was a closed meeting. The portions of the slide deck shown to Mr. Wachter contained labeling indicating it was confidential in nature and Mr. Wachter was informed by SCS that the information contained in the

slide deck was sensitive and confidential. Mr. Wachter acknowledged the confidential nature of this meeting and information shared in his testimony at the May 29, 2024 technical hearing. Furthermore, Mr. Wachter was not provided or allowed to make copies of the limited portions of the slide deck provided.

Paragraph 10 of the Order remains accurate because SCS's security systems plans remain confidential and have not been disclosed to the public. At the time of the Order, Summit had not yet shared the security system plans outside of its organization and authorized third-party contractors. The fact that Summit has since shared the information with additional persons who "need to know the information to fulfill their responsibilities in connection with the subject matter of the information" does not alter their confidential nature. (Doc. ID# 364, ¶ 10). The meeting with Mr. Wachter was held in response to the Commission's August 4, 2023 Order.² At this meeting, SCS employed the same precautionary measures taken at its first responder meetings to ensure the confidentiality of the information shared was preserved.

Sharing security system plan information in this manner was necessitated by the same safety and security concerns that motivated SCS to request the Order in the first place. The protection afforded SCS by the Order is not an evidentiary privilege that may be lost upon sharing information with a third party; instead, it is a protection afforded by the Commission based on its determination that the information would pose a threat to public safety and security if disclosed without SCS's consent. (*Id.* at ¶ 7). That determination remains valid, the Order does not merit reconsideration, and neither the County nor the Landowner Intervenors offer any persuasive argument to the contrary.

² Because the meeting was an effort to resolve Mr. Wachter's concerns and resolve his intervention, the discussions were settlement communications and the content of such settlement discussions is not properly evidence for the Commission to consider – it should not be able to be used to advance the County's motion in the first place. *See* N.D.R.Ev. 408.

IV. The materials should not be discoverable because the content is not relevant to any issue before the Commission.

As the Commission and the Administrative Law Judge (“ALJ”) have repeatedly, and correctly held, that safety is not an issue within the Commission’s jurisdiction. The only use of the confidential materials that intervenors in this proceeding have advanced, however, is to argue over what it shows about the safety of the pipeline at varying distances and conditions. However, in its August 4, 2023 denial order, the Commission found that “the Project’s impact on the criteria listed in NDAC Section 69-06-08-02(3)(b) will be at an acceptable minimum.” (Doc. ID# 375)(emphasis added). The criteria in N.D.A.C. § 69-06-08-02(3)(b) includes “[h]uman health and safety” and “[a]nimal health and safety.” N.D.A.C. § 69-06-08-02(3)(b)(6) and (7).

As the Commissioners and the ALJ have stated about emergency management meetings, what is important for the Commission to know is that they are happening, not the precise content. The same is true of the protected safety system materials: their existence shows that SCS is taking steps to comply with PHMSA’s federal safety rules; the specific content is within PHMSA’s safety jurisdiction. Here, no party has denied the *existence* of the modeling and other related content in the slide deck in question. It has been testified to under oath without contradiction. The protected content, however, is not relevant and therefore there is no need for or basis for the County or any other intervenor to obtain it for these siting proceedings.³

V. The Commission should not hold any additional hearing.

A petition for reconsideration must state if a rehearing or oral argument is requested. N.D.A.C. § 69-02-06-02(2). The County’s motion does not state that a rehearing or oral argument

³ Burleigh County does have a legitimate basis to know the contents for emergency management purposes; as both SCS witness Alex Lange and Burleigh County witness Mary Senger testified, there is no dispute that emergency management personnel from Burleigh County have seen the materials and had opportunity to discuss them on a confidential basis in their “need to know” role.

on the petition is requested. SCS likewise does not believe one is necessary, as the County's cursory arguments may easily be disposed of based on the parties' briefing. Indeed, a substantially similar motion was raised by Mr. Jorde, counsel for Landowner Intervenor, at the conclusion of the Linton public hearing on June 4, 2024 when he moved for a "mishearing" because he had not had access to the protected materials. After argument from the parties, deliberation, and advice of counsel, the Commission by roll call vote held unanimously that the motion should be denied.

The County and the Landowner Intervenor request a second technical hearing in the event the motion for reconsideration is granted. The motion should be denied for the reasons set forth above, and therefore the request for a second technical hearing should likewise be denied.

CONCLUSION

For the foregoing reasons, the Commission should deny the County's Motion for Reconsideration of Order on Protection of Information (Doc. 364), or in the Alternative, for Leave to Question re: Dispersion Model.

Dated this 6th 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 Burleigh County's Motion for Reconsideration of Order on Protection of Information (Doc. 364), or in the Alternative, for Leave to Question re: Dispersion Model.

were, on June 6, 2024, filed with the North Dakota Public Service Commission and served electronically to the following:

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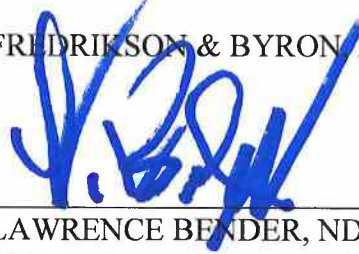
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Dated this 6th day of June, 2024.

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