



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

June 10, 2024

**VIA U.S. MAIL & 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

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. Reply Brief in Support of Motion to Compel;
2. Exhibit 1 – May 21, 2024 letter from Steven Leibel to Lawrence Bender;
3. Exhibit 2 – May 23, 2024 letter from Lawrence Bender to Administrative Law Judge Hope Hogan; and
4. Declaration of Service.

This Reply Brief in Support of Motion to Compel with Exhibits 1 and 2 are being filed with the North Dakota Public Service Commission (hereinafter “NDPSC”) on behalf of the Intervenor represented by Knoll Leibel LLP. These 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

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**Steven J. Leibel, Partner**

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648 PU-22-391 Filed 06/10/2024 Pages: 17  
Reply Brief in Support of Motion to Compel, Exhibit 1 - 05/21/24 Letter and Exhibit 2 - 05/23/24 Letter  
Knoll Leibel, LLP, on behalf of the Intervenor  
Steven Leibel, Attorney

**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

**REPLY BRIEF IN SUPPORT  
OF MOTION TO COMPEL**

[1] COMES NOW Landowner Intervenor<sup>1</sup>, represented by their attorneys of record KNOLL LEIBEL LLP (Steven J. Leibel) and DOMINA LAW GROUP (Brian E. Jorde), and hereby submits this Reply Brief to Response to Motion to Compel in the above-entitled action. In support of this reply, Landowner Intervenor (hereinafter “Landowners”) state:

[2] While basic fairness is important to any process, strict adherence to the North Dakota Rules of Civil Procedure is not required before the Commission. *See* (Doc. 379, ¶ 13)(“Intervenor<sup>1</sup>s are not suggesting that the Commission is bound by the rules of Civil Procedure—it is not.”); (Doc. 385, pg. 2)(Summit pointing out “[t]he Landowner Intervenor<sup>1</sup>s also argue that a similar standard set forth in the North Dakota Rules of Civil Procedure should apply while at the same time conceding that the Commission is not bound by the Rules of Civil Procedure.”). For Summit to urge

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<sup>1</sup> See Order Granting Petition to Intervene (Doc. 82, 83, 159, 168, 204, 511, and 512).

the application of a technical interpretation of a subpart of a Rule of Civil Procedure that does not apply is patently unreasonable.

[3] As a beginning point, Summit contends that the Landowners' motion is untimely. This argument is misplaced for a few reasons. First, this proceeding is very different from a lawsuit, where the parties are provided a deadline for discovery or a trial date early in the process. Instead, in this case, basic threshold issues were all subject to pending motions until very recently, including SCS's motion for reconsideration of its prior motion to pre-empt local control. That pre-emption motion was not granted until February 7, 2024, and Burleigh County's petition for reconsideration was not ruled upon until March 18, 2024. Three days later, on March 21, 2024, the Commission noticed a series of final public hearings to begin on April 22, 2024. (Doc. 440).

[4] Second, the suggestion by Summit that the motion is untimely because the last hearing occurred on June 4, 2024 is brazen. The closing briefing is not due until 30 days from this filing. Furthermore, there is currently a pending motion (joined by these intervenors) asking the Commission to revisit its decision on the dispersion model and to permit a follow-up hearing. (Doc. 582) The Commission has not yet decided all these matters<sup>2</sup>. Summit's brief assumes that the Commission is going to rule in its favor on all remaining issues. This is inappropriate.

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<sup>2</sup> The lack of any potential upcoming hearing was a material factor in the ALJ's previous order on Warford's motion to compel. (Doc. 285)(ALJ pointing out at the time of the ALJ's order "[t]he 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."), *compare with* Motion for Reconsideration of Order on Protection of

[5] Finally, Summit argues that the Commission should strictly apply Rule of Civil Procedure 37 as interpreted by the Supreme Court on March 7, 2024. Specifically, Rule 37(a)(1) of the North Dakota Rules of Civil Procedure requires that the parties confer prior to filing a motion to compel. *See Meuchal v. Red Trail Energy, LLC*, 2024 ND 44, 4 N.W.3d 203 (N.D. 2024). Imposing this hurdle on intervenors in the absence of any rule or statute that would provide advance notice would be arbitrary and unfair.

[6] This is particularly true where Summit admits that the Landowner Intervenors provided Summit's counsel with a substantially similar version of the motion to compel, and specifically asked "if your client is willing to discuss further production of additional documents without the filing of this motion." *See* May 21, 2024 Letter, attached as Ex. 1. This request was not a "take it or leave it" or intended as mere pretense—these parties have lots of history, and counsel is simply asking whether Summit will reconsider its position. Ex. 1. The only thing Landowner Intervenors requested a quick answer was whether Summit was willing to talk. Summit's counsel understood this to be the case. *See also* May 23, 2024 Letter to Hon. Hope Hogan ("Counsel for Landowner Intervenors emailed the undersigned at 12:56 p.m. on Tuesday, May 21, 2024 requesting to meet and confer regarding its Motion to

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Information (Doc. 364), or In the Alternative, for Leave to Question Re: Dispersion Model (Doc. 582)(Burleigh County requesting reconsideration of the confidentiality of the dispersion modeling and a second series of technical hearings); (Doc. 605)(these intervenors joining in Burleigh County's request).

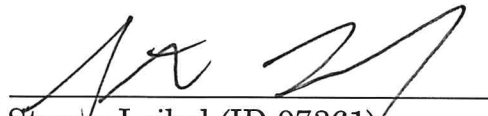
Compel by the end of the same day '[d]ue to pending hearing dates.'"), attached as Ex. 2.

[7] Most importantly, Summit does not say that waiting for Summit to schedule a meet and confer would have made any difference, or that it would consider voluntarily disclosing one iota of additional information. This fact distinguishes the *Meuchal* case relied upon by Summit.

[8] It would be arbitrary to impose a requirement that does not exist to a case where the complaining party cannot even pretend to be prejudiced. As previously pointed out, Landowner Intervenor acknowledges in their brief that much of the information sought is already subject to the protective order. Landowners filed this motion in an abundance of caution to avoid Summit trying to argue on appeal that Landowner Intervenor somehow waived their right to challenge the confidentiality order or that Landowner Intervenor never challenged the confidentiality order.

[9] For these reasons and the reasons stated in Intervenor's initial brief in support, Intervenor respectfully request Summit be compelled to provide substantive and meaningful responses to Intervenor's reasonable discovery requests for evidence.

Dated this 10<sup>th</sup> day of June, 2024.



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David Knoll (ID 06167)  
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*Landowner/Intervenor Lawyers*



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

May 21, 2024

VIA E-MAIL ONLY: [lbender@fredlaw.com](mailto:lbender@fredlaw.com)

Lawrence Bender

Frederickson & Byron, P.A.

1133 College Drive, Ste. 1000

Bismarck, ND 58501-1215

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

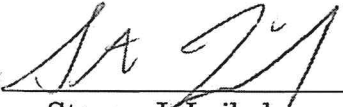
Dear Mr. Bender:

Attached please find a draft motion to compel. 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 end of the day today.

Thank you for your attention to this letter.

Respectfully yours,

KNOLL LEIBEL LLP

By:   
Steven J. Leibel

SJL:rmo

cc: Brian Jorde (via e-mail with encl.)

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Steven J. Leibel, Partner

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Exhibit 1  
PU-22-391

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

MOTION TO COMPEL

[1] COMES NOW Landowner Intervenor<sup>1</sup>, represented by their attorneys of record KNOLL LEIBEL LLP (Steven J. Leibel) and DOMINA LAW GROUP (Brian E. Jorde), and hereby submits this *Motion to Compel* in the above-entitled action.

[2] The undersigned hereby moves this Commission to compel SCS Carbon Transport LLC (hereinafter "Summit") to provide complete supplemental answers and responses to *Intervenors' Interrogatories, Request for Admissions, and Requests for Production to SCS Carbon Transport LLC (Set 3)* (Doc. #481), which were served on March 28, 2024, pursuant to N.D.C.C. § 28-32-33. Summit has failed to provide substantive and meaningful responses to reasonable discovery requests for evidence; instead, Summit offers blanket objections and refuses to divulge any information.

[3] [Undersigned counsel hereby certifies that the movant has in good faith attempted to confer with Summit's counsel about obtaining Summit's complete

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<sup>1</sup> See Order Granting Petition to Intervene (Doc. 82, 83, 159, 168, 204, 511, and 512).



answers and responses to Intervenor's Interrogatories and Request for Production of Documents to Summit prior to filing this motion and without the Commission's action.]

[4] Pursuant to N.D.C.C. § 28-32-33(1), discovery may be permitted in accordance with the North Dakota Rules of Civil Procedure. Further, "upon the request or motion of any party to the proceeding... a hearing officer may issue... discovery orders" in accordance with the North Dakota Rules of Civil Procedure. N.D.C.C. § 28-32-33(2). The Commission should exercise this authority to compel a response from Summit to the following discovery requests:

- A. Intervenor's Request No. 1 requests copies of GIS shapefiles for the currently proposed North Dakota pipeline. Summit objects to providing these shapefiles on grounds that it is protected from public disclosure; however, Summit should be compelled produce this information because it provides Intervenor's with descriptive and detailed aerial color map files which are relevant to the survey and examination of the locations subject to the construction of hazardous carbon dioxide pipelines on, under, across and/or through said locations. Further, there is no undue hardship on Summit to produce these documents, copies of the GIS shapefiles are readily available and accessible to Summit as they are often used within their regular course of business.
- B. Intervenor's Requests No. 2 through 7 seek for Summit to provide copies of contracts, agreements, correspondence, understandings,

letters, memoranda, etc., for any affiliated entity or person that is in any way related to the capture and sequestration of carbon dioxide in North Dakota. This information will show the pipeline construction effects on the landowners of North Dakota, potential affiliations with foreign citizens/within foreign nations, and/or other relevant adversarial ownerships of real property interests in North Dakota. Further, Intervenor's deserve to know which facilities and/or entities in North Dakota are affiliated with Summit or in contractual relationships with Summit, along with the substance of the aforementioned agreements, especially with regard to the safety procedures concerning carbon dioxide sequestration, capture, containment, or transportation, the amount of carbon dioxide contributed into the pipeline, and any other information relevant to the procedures and agreements that Summit is engaged in.

- C. Intervenor's Request No. 14, seeks communications between Summit and its employees or agents with any non-Summit employee(s) who previously testified or offered pre-filed testimony in this matter and for anyone Summit anticipates testifying in the future. Summit objects to this request to the extent it seeks communications with the Intervenor's, who have equal access to such communications. However, this request is not intended to seek attorney/client communications with which the Intervenor's have complete access to; rather, it seeks to

discover relevant communications between Summit and any separate entity regarding the testimony in this proceeding. This request is standard in regular civil discovery.

D. Intervenor's Request No. 15, seeks communications of any kind between Summit and any third-party as to how it prepared reports relevant to the inquiry of this proceeding. Similar to Request No. 14, this request is standard in regular civil discovery and the Intervenor's have the right to discover the valuable data within such documentation, along with the facts known and opinions held by any third parties in anticipation of litigation or trial. Further, it is vital for Intervenor's to effectively address the protected documents that Summit has provided this Commission and even more importantly, without a response from Summit, this Commission has no way of discovering the accuracy and candor of the documents Summit has provided them.

E. Intervenor's Request No. 16 seeks correspondence and communications between Summit and Ethanol Plants (i.e., employee(s) of any carbon dioxide emitter located in North Dakota). Similar to Request No. 14, this request is standard in regular civil discovery and the Intervenor's have the right to discover the facts known and opinions held by any parties engaged in carbon dioxide emission in anticipation of litigation or trial.

[5] These Requests for Production of Documents are reasonably specific and relevant to the inquiry of this administrative proceeding, are not unduly broad or burdensome, and are not made for purposes of delay.

#### PRAYER FOR RELIEF

Intervenors' respectfully request that this Commission exercise its authority under N.D.C.C. § 28-32-33 and grant this motion to compel, requiring Summit to produce complete documentation responsive to the aforementioned discovery requests.

Dated this \_\_\_\_ day of May, 2024.

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Steven Leibel (ID 07361)  
David Knoll (ID 06167)  
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1915 N. Kavaney Drive, Ste. 3  
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*Landowner/Intervenor Lawyers*

May 23, 2024

**VIA E-MAIL**

Hope L. Hogan  
Administrative Law Judge  
Office of Administrative Hearings  
2911 North 14<sup>th</sup> Street – Suite 303  
Bismarck, ND 58503

**RE: SCS Carbon Transport LLC  
Midwest Carbon Express Project  
Case No. PU-22-391  
Landowner Intervenor's Motion to  
Compel**

Dear Judge Hogan:

As you may be aware, the Landowner Intervenor has filed a Motion to Compel relating to certain requests for production set forth in the Interrogatories, Request for Admissions, and Request for Production (Set 3) ("Set 3") served upon SCS Carbon Transport LLC ("Summit") on March 28, 2024 and filed with the North Dakota Public Service Commission ("Commission") at Docket No. 481. Summit timely responded to Set 3 on April 11, 2024, providing substantive responses to certain requests and objecting to others. *See* Docket No. 514.

Counsel for Landowner Intervenor emailed the undersigned at 12:56 p.m. on Tuesday, May 21, 2024 requesting to meet and confer regarding its Motion to Compel by the end of that same day "[d]ue to the pending hearing dates." The Landowner Intervenor filed their Motion to Compel this morning without having provided Summit any additional time or opportunity to respond to their meet and confer request. Nevertheless, Summit intends to file a response to the Motion to Compel within ten (10) days of the date of service of the Motion to Compel. *See* N.D.A.C. § 98-02-02-08.

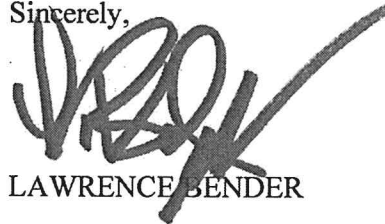
The Uniform Rules of Administrative Procedure for Adjudicative Proceedings provides that Your Honor "may not sustain or grant a written motion prior to expiration of the time for filing responses, but may deny the motion without awaiting response." *See* N.D.A.C. § 98-02-02-08. Since Summit's response to the Motion to Compel is not due until the end of the day of the last day of the technical hearings (June 3), Your Honor has sufficient grounds to deny the Motion to Compel as untimely prior to receiving Summit's response. However, should Your Honor decline to do so, Summit intends to address the irrelevant and privileged nature of the information being requested by Landowner Intervenor in its response.

**Exhibit 2  
PU-22-391**

Judge Hope Hogan  
May 23, 2024  
Page 2

Should you have any questions, please advise.

Sincerely,

A handwritten signature in dark ink, appearing to read 'LB', with a long, sweeping horizontal stroke extending to the right.

LAWRENCE BENDER

LB/tjg  
#82573057v1

cc: SCS Carbon Transport LLC

**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. Reply Brief in Support of Motion to Compel;
2. Exhibit 1 – May 21, 2024 letter from Steven Leibel to Lawrence Bender;
3. Exhibit 2 – May 23, 2024 letter from Lawrence Bender to Administrative Law Judge Hope Hogan; and
4. Declaration of Service.

[2] On June 10, 2024, by sending a true and correct copy thereof by electronic means only to the following email addresses, to wit:

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Michael Joyner  
[michael@bismarck-attorneys.com](mailto:michael@bismarck-attorneys.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

[5] The addresses of each party served are the last reasonably ascertainable e-mail address and post office address of such party.

[6] I declare, under penalty of perjury under the law of North Dakota, that the foregoing is true and correct.



Signed on the 10th day of June, 2024 at Bismarck, North Dakota.

  
\_\_\_\_\_  
Rosanne Ogden