Fredrikson

Fredrikson & Byron, P.A.
Attorneys and Advisors

304 East Front Avenue, Suite 400
Bismarck, ND 58504-5639
Main: 701.221.8700
fredlaw.com

July 22, 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 Intervenors' Post-Hearing Briefs; 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
#83192999v1

cc: SCS Carbon Transport LLC

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 Intervenors' Post-Hearing Briefs

---

SCS Carbon Transport LLC ("Summit") submits this brief in response to the post-hearing briefs filed by Emmons County (Doc. ID# 752) and Landowner Intervenors[1] (Doc. ID# 755). Summit acknowledges the brief filed by intervenor LiUNA and appreciates LiUNA's support of Summit's project. Intervenor Burleigh County did not file a post-hearing brief on or prior to the July 8, 2024, deadline imposed by the Administrative Law Judge ("ALJ") at the conclusion of the June 4, 2024, public hearing in Linton. The post-hearing brief and proposed order filed by Emmons County are entirely focused on preemption of Emmons County's local zoning ordinances, an issue that has already been decided by the North Dakota Public Service Commission ("Commission") (Doc. ID# 440) and the subject of an appeal filed by Emmons County in district court. Accordingly, Summit will not entertain the arguments put forth by Emmons County in its post-hearing brief and will instead focus its attention on the matters raised in the post-hearing brief filed by Landowner Intervenors.

[1] Intervenors represented by Mr. Brian Jorde, Steven Leibel, and David Knoll.

INTRODUCTION

All of the arguments in Landowner Intervenors' 43-page brief can effectively be summarized in three sentences. First, the pipeline that Summit proposes to construct (the "Project") would be the most dangerous pipeline to ever exist. *See id.* at ¶¶ 28-50. Second, the Project will not benefit a single person or business other than Summit. *See id.* at ¶¶ 8-21. Third, other than a few landowners that the Commission identified in its August 4, 2023, Order, Summit has been unwilling to address the concerns of any landowners. *See id.* at ¶¶ 53-55.

Clearly, none of this is true. First, pipelines like the one Summit proposes to construct are objectively safe. Carbon dioxide ("CO_2") pipelines have existed in the United States for over 60 years. During that time, 500 million metric tons of CO_2 have been moved through over 5,000 miles of pipeline. Zero fatalities and only one injury requiring in-patient hospitalization have occurred.[2]

Second, people and businesses other than Summit will undoubtedly benefit from the Project. The Project will benefit North Dakota and its citizens by creating jobs and by allowing ethanol plants to access new low-carbon fuel markets. Furthermore, it will benefit North Dakota farmers by bolstering demand for ethanol and corn, thereby enhancing corn prices. Finally, landowners along the route and who own pore space at the injection locations will benefit from payments made to them by Summit under their respective easement and lease agreements.

Third, Summit has addressed the concerns of many landowners not specifically identified in the Commission's August 4, 2023 Order (Doc. ID# 375). Indeed, Summit has adjusted the route of the Project hundreds, if not thousands, of times to accommodate specific concerns of

---

[2] *New Source Performance Standards for Greenhouse Gas Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions From Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule*, 89 FR 39798-01.

landowners regardless of whether the same were specifically identified by the Commission in an order, at the hearings, or otherwise. As testified to numerous times, Summit will continue to work to address the concerns of all landowners and to reach its goal of 100% voluntary easements along the route.

For these reasons, as well as the ones explained below, Summits requests that the Commission reject Landowner Intervenors' arguments and grant Summit's consolidated application for a certificate of corridor compatibility and route permit (Doc. ID# 1), as amended through its Petition for Reconsideration (Doc. ID# 371) and subsequent responses to the Commission's data and supplemental filing requests (Doc. ID# 409) (collectively, the "Application").

ARGUMENT

The argument section of this brief proceeds in three parts. Part I briefly summarizes the factors that the Commission is charged by law to consider when deciding whether to grant Summit's Application. Part II then addresses each argument that Landowner Intervenors raise in their brief. Part III then explains why the Commission should consider Mr. Jorde's conduct in these proceedings and related proceedings while considering Landowner Intervenors' post-hearing brief.

I. The factors that the Commission is charged to consider are set forth in N.D.C.C. § 49-22.1-02, N.D.C.C. § 49-22.1-09, and N.D.A.C. § 69-06-08-02.

There are three legal provisions that list the issues the Commission is charged to consider when deciding whether to grant Summit's Application. Those provision are N.D.C.C. § 49-22.1-02, N.D.C.C. § 49-22.1-09, and N.D.A.C. § 69-06-08-02. The Commission is very familiar with these provisions and therefore restatement of these provisions' contents is unnecessary.

However, as they have done throughout the entirety of this case, Landowner Intervenors raise several issues in their brief that are not relevant to the Commission's decision to either grant or deny Summit's Application. Thus, Summit believes it would be prudent to briefly summarize what issues are not relevant to the Commission's decision.

The following list of issues are not set forth in the criteria the Commission is to consider when deciding whether to grant Summit's Application, but Landowner Intervenors nevertheless focus on in their brief:

- Whether the applicant might use eminent domain. (Doc. ID# 755) at ¶ 12.[3]
- Whether the applicant will receive tax credits for the proposed facility. *Id.* at ¶ 13.
- Whether the applicant's proposed facility will save an entire industry. *Id.* at ¶ 22.
- How long the applicant's proposed facility will remain in operation. *Id.* at ¶ 23.
- Whether the applicant's proposed facility will result in a net-carbon emissions reduction. *Id.* at ¶¶ 24-25.
- Whether an insurance company will sue a landowner. *Id.* at ¶¶ 26-27.

See N.D.C.C. § 49-22.1-02; N.D.C.C. § 49-22.1-09; N.D.A.C. § 49-06-08-02. None of these issues are relevant in the current case. Accordingly, the Commission should ignore any arguments in Landowner Intervenors' brief that rely on them.

II. Landowner Intervenors arguments are meritless.

Part II of the argument section of this brief will address the arguments made in Landowner Intervenors' post-hearing brief. *See* (Doc. ID# 755). The argument portion of their brief is divided into 10 sections, each of which are addressed in the subsections that follow.

---

[3] Each citation refers to the part of Landowner Intervenors' brief where they mention the particular irrelevant issue. For example, in paragraph 12 of their brief, Landowner Intervenors mention the fact that the Project might require the use of eminent domain. *See* (Doc. ID# 755) at ¶ 12 ("Summit's business model requires the use of eminent domain.").

A. The Project will have beneficial economic impacts and these impacts are relevant to the Commission's decision.

In Section A of their brief, Landowner Intervenors begin in typical fashion by misrepresenting to the Commission what factors the Commission may consider in deciding to approve Summit's Application. (Doc. ID# 755) at ¶ 8. Landowner Intervenors state that "[n]owhere in the legal factors or questions presented does North Dakota law allow the PSC to give a nod towards an Applicant because of claimed or proved economic benefits." *Id.* "The entire concept of economic benefits as justification for corridor and route approval is an industry fallacy." *Id.*

As the Commission is aware, one of the factors North Dakota law explicitly requires the Commission to consider is "[t]he direct and indirect economic impacts of the proposed facility." N.D.C.C. § 49-22.1-09(7) (emphasis added). It is beyond comprehension how Landowner Intervenors can look at this statute and then indicate to the Commission that nothing in North Dakota law allows the Commission to consider economic benefits.

Ironically, after stating that the Commission should not consider any economic benefits of the Project, Landowner Intervenors devote seven full pages of their brief to arguing that the Project does not actually provide any economic benefits. *See* (Doc. ID# 755) ¶¶ 9-21. Landowner Intervenors cannot have it both ways.

The arguments made by Landowner Intervenors can be grouped into two categories. The first category of arguments relates to a report issued by Ernst & Young in April 2022 (the "E&Y report")—as well testimony from Dan Pickering that was partially based on the E&Y report. *See id.* ¶¶ 9-11. The E&Y report predicts that the Project will create between 1,500 and 2,000 jobs and will have an estimated $1.1 billion economic impact on North Dakota. Landowner Intervenors argue that the Commission should not rely on the E&Y report because the report contains a

disclaimer that states "[a]ny third parties reading the report should be aware that the report is subject to limitations, and the scope of the report was not designed for use or reliance by third parties for investment purposes or any other purposes."

Landowner Intervenors' argument lacks merit. The E&Y report's disclaimer should not deter the Commission from considering the E&Y report. Counsel for Landowner Intervenors, Mr. Jorde, made this exact same argument to the Iowa Utility Board ("IUB"). The IUB rejected this argument just as the Commission should:

> [T]he Board gives little weight to any of the arguments that tried to discredit the E&Y Report due to the inclusion of the disclaimer at the beginning of the report. … [T]hese disclaimers are standard. The disclaimer does not detract from the information contained within the report. The Board understands the report, like most reports, is subject to change once a project actually begins; however, the report is designed to provide information to the Board, and others, on the potential economic impacts Summit Carbon's project could have on the state of Iowa and beyond.[4]

The second category of Landowner Intervenors' arguments relates to the 45Q tax credits that the Project is expected to produce. *See* (Doc. ID# 755) at ¶¶ 11-14. According to Landowner Intervenors, "[o]ver $18 billions in subsidies via tax credits and further county tax subsidies are costs, not benefits, of the [Project]." *Id.* at ¶ 11. "Not only does this $18+ billion go to Summit … because it is in the form of tax credits, the public gets to pay for this making up the tax revenue deficit." *Id.* at ¶ 13. "Thus, the foundation of any honest analysis is that SCS starts in a $18,360,000,000 hole." *Id.* ¶ 14.

There are at least two flaws with Landowner Intervenors' argument. First, their argument is based on a misunderstanding of how tax credits actually work. Summit receiving a tax credit

---

[4] *See* https://wcc.efs.iowa.gov/cs/idcplg?IdcService=GET_FILE&RevisionSelectionMethod=latest&allowInterrupt=1&dDocName=2147516&noSaveAs=1&utm_medium=email&utm_source=govdelivery at p. 154-55.

will not result in any member of the public paying more taxes to make up for the tax revenue deficit. The only way a person's tax liability could increase is if Congress subsequently passed a law increasing taxes, an issue that is well outside of the Commission's jurisdiction in this case.

Second, Landowner Intervenors believe that the 45Q tax credit is bad policy and is a cost on the public. Again, this is an issue that is well outside the Commission's jurisdiction and is more appropriately addressed through advocating a change in the federal laws that allow Summit the opportunity to take advantage of the credit.

In sum, (1) the economic impacts of the Project are a relevant factor that the Commission must consider, (2) the Project will provide economic benefits to North Dakota and its citizens, and (3) Summit receiving 45Q tax credits is not an "economic cost" that offsets these benefits, nor an issue that is relevant to the Commission's decision in this case.

B. There is an abundance of evidence in the record showing that the Project will have a beneficial impact on the ethanol industry.

In Section B of their brief, Landowner Intervenors argue that the Commission should deny Summit's Application because Summit has not shown that the ethanol industry will cease to exist unless the Project is implemented. *See* (Doc. ID# 755) ¶ 22 ("After all this time … for SCS to prove its wild claims that placing this proposed pipeline in the ground will save the ethanol industry there has been no proof to support this claim.").

Landowner Intervenors' argument is a strawman argument. Summit is not claiming that the ethanol industry will literally cease to exist but for the Project.[5] Rather, Summit is claiming

[5] That said, there was testimony presented in this matter to that effect. For example, State Senator Terry Wanzek was asked whether he "believe[s] that ethanol plants not connected to the proposed Summit pipeline will go out of business?" *See* (Doc. ID# 629). Senator Wanzek responded: "Ultimately, probably so, yes. Because they can't meet their market demands." *Id.*

that the Project will have a beneficial economic impact on the ethanol industry by allowing ethanol plants to access low-carbon fuel markets.

When deciding whether to grant an application for a proposed transmission facility like Summit's, neither the Siting Act (N.D.C.C. § 49-22.1-01, et seq.) nor the Commission's rule instruct the Commission to consider whether a proposed transmission facility will prevent an entire industry from ceasing to exist. *See* N.D.C.C. § 49-22.1-09. Rather, the Commission is instructed to consider whether the proposed facility will have any "direct and indirect economic impacts." N.D.C.C. § 49-22.1-09(7).

Here, there is an abundance of testimony in the record that the Project will have a beneficial economic impact on North Dakota's ethanol industry. For example, Ryan Carter (the chief operating officer of Tharaldson Ethanol) testified about "how important the Summit project is to North Dakota ethanol and ag industries." *See* (Doc. ID# 607). In Mr. Carter's words, "we potentially face negative impacts on our company which could also impact our economic growth in communities and schools." *Id.*

Furthermore, Andrew Mauch (the president of the North Dakota Corn Growers Association) testified to the following:

> Because it is becoming increasingly evident that to be able to market to existing and growing markets, our state ethanol plants must significantly reduce the carbon intensity of the ethanol produced to sell into low-carbon fuel markets. [The North Dakota Corn Growers Association] support[s] the state's ethanol plants business decisions to develop their own carbon pipelines when feasible, or their ability to partner on a joint carbon pipeline to lower its carbon intensity score. ... Therefore, we support carbon capture, transportation technology and sequestration that increases the profitability and financial sustainability of North Dakota corn producers.

(Doc. ID# 611) at p. 6. State Representative Michael Brandenburg and State Senator Terry Wanzek testified to the following:

> [I]f Summit's pipeline is not built in the near future ... [e]thanol sales will drastically decrease because ethanol produced to industry standards will be purchased from other ethanol-producing countries, such as Brazil. That means our largest customer, Canada, will have to go elsewhere for the quality of ethanol they require. The result will be the loss of ethanol plants in North Dakota and other ethanol-producing states. ...
>
> National and international buyers want the Carbon Intensity of ethanol lowered which means reducing carbon emissions. That is exactly what the Summit pipeline would enable the plants it serves to do.

(Doc. ID# 557). State Representative Jared Hagert also testified that the Project "will enable our ethanol to be decarbonized to access greater low-carbon fuel markets." (Doc. ID# 611) at p. 7.

Finally, Dan Pickering (the chief investment officer of Pickering Energy Partners) testified that "carbon sequestration enhances the economics of ethanol production through the generation of tax credits and incremental revenue. By enhancing ethanol profitability, the Summit project helps bolster demand for ethanol production." (Doc. ID# 528) at p. 5. And Wade Boeshans (the executive vice president of Summit) testified that the Project will allow 57 ethanol plants "to access new low-carbon fuel markets, [and] continue to operate in a carbon constrained world." (Doc. ID# 529) at p. 6.

In sum, Landowner Intervenors' argument in Section B of their brief is a red herring. *See* (Doc. ID# 755) at ¶ 22. Summit is not claiming that the ethanol industry will literally cease to exist but for the Project. Rather, Summit is claiming that the Project will have a beneficial economic impact on the ethanol industry. And there is an abundance of evidence in the record showing that the Project will have such an impact.

C. The amount of time that the Project will be in operation is irrelevant.

In Section C of their brief, Landowner Intervenors claim Summit had a "burden" to prove that the Project would be in operation for more than 12 years and that "Summit failed to meet its

burden." (Doc. ID# 755) ¶ 23. Specifically, Landowner Intervenors claim that "Summit failed to produce any … evidence" that the Project "has an operations life cycle greater than the 12-year 45Q tax payment scheme." *Id.*

First, Landowner Intervenors' statement that Summit failed to produce "any" evidence is categorically false. Mr. Powell specifically testified that the Project "will be in service well beyond the 12-year tax credit" and that "the cashflow forecast supports the business and the operating expense beyond the 12-year period and the potential expiration of [the] tax credit." *See* (Doc. ID# 179).

That said, Summit does not have a "burden" to produce any evidence that the Project will be in operation for more than 12 years. Again, the factors that Summit is expected to prove, and the Commission is expected to consider, are listed in N.D.C.C. §§ 49-22.1-02 and 49-22.1-09, and N.D.A.C. § 69-06-08-02. None of those provisions provide anything about a proposed transmission facility needing to be in operation for longer than 12 years. How long an applicant's proposed transmission facility will be in operation is irrelevant to the Commission's decision.

Finally, it should be noted that counsel for Landowner Intervenors, Mr. Jorde, made this same argument to the IUB. The IUB rejected it:

> [W]hile the current 45Q tax credits are only collectible for 12 years, the Board finds this does not impact the Board's decision. The federal government has made a decision about the length of the tax credit, and the Board cannot conjecture as to what the thinking was for the time frame. It is possible the 12 years could be extended, reduced, or modified by the federal government. The federal government could have also selected the 12-year time frame to allow these types of projects to begin operation before becoming a self-sustaining industry. The only part the Board is considering is the 12-year time frame itself, and the Board finds this to not impact the Board's decision.[6]

---

[6] *See* https://wcc.efs.iowa.gov/cs/idcplg?IdcService=GET_FILE&RevisionSelectionMethod=latest&allowIn

D. Whether the Project will result in a net reduction of carbon emissions is irrelevant.

In Section D of their brief, Landowner Intervenors claim that Summit had a burden to prove the Project would result in a net reduction of carbon emissions in the world's atmosphere. *See* (Doc. ID# 755) at ¶¶ 24-25. According to Landowner Intervenors, Summit failed to meet this burden. *See id.* at ¶ 25 ("[I]t is impossible for the PSC to find that Summit has offered sufficient proof that there would be any net reduction of carbon emissions in the world's atmosphere simply if this project were to be approved. Summit has the burden of proof and it failed.").

Landowner Intervenors are attempting to distract the Commission once again. Summit does not have a "burden" to prove that the Project will result in a net reduction of carbon emissions. Again, the factors that Summit is expected to prove, and the Commission is expected to consider, are listed in N.D.C.C. §§ 49-22.1-02 and 49-22.1-09, and N.D.A.C. § 69-06-08-02. None of those provisions provide anything about an applicant like Summit showing, or the Commission considering, whether a proposed transmission facility will result in a net reduction of carbon emissions. Whether the proposed transmission facility will result in a net reduction of carbon emissions is simply not relevant to the Commission's decision to grant or deny Summit's Application.

E. Landowner Intervenors' arguments regarding liability insurance are irrelevant and are also foreclosed by the Commission's August 4, 2023 Order.

In Section E of their brief, Landowner Intervenors make various arguments regarding liability insurance. *See* (Doc. ID# 755) at ¶¶ 26-27. The Commission should disregard these arguments because the Commission has determined that Summit has sufficiently addressed the issue of liability insurance in its August 4, 2023 Order (Doc. ID# 375) ("no additional requirements

---

terrupt=1&dDocName=2147516&noSaveAs=1&utm_medium=email&utm_source=govdelivery at p. 110.

are needed to ensure the Project will have minimal adverse impacts on the liability insurance requirements of the landowners"). Based on this finding, the Commission determined that issues regarding liability insurance were settled and therefore did not allow any evidence relating to liability insurance to be introduced at any of the re-hearings. In the words of the ALJ, "the Commission made a specific finding regarding liability insurance requirements" and so "we don't need to cover that with any further testimony." *See* (Doc. ID# 607). "The Commission has already addressed [issues of liability insurance] in their order." *Id.*

Consequently, Landowner Intervenors' arguments regarding liability insurance are foreclosed from further argument or consideration by the Commission. Summit must, however, address one argument that is another misrepresentation made by the Landowner Intervenors. Specifically, Landowner Intervenors' brief contains the following statements:

> The PSC relied on the testimony that SCS would hold liability for a rupture unless the rupture or release was caused by a third-party line strike. As established in the testimony, this indemnity provision only applies to those landowners who signed a contract with SCS.

(Doc. ID# 755) at ¶ 26 (emphasis added). However, at a previous hearing, counsel for Landowner Intervenors, Mr. Jorde, asked Mr. Powell the following question about the "indemnity provision" referenced in Landowner Intervenors' brief: "how would that term be provided to a landowner if there is no written easement and you have to obtain the easement via condemnation?" *See* (Doc. ID# 625). Mr. Powell responded by stating that Summit "would offer that landowner the same terms and conditions of any other landowner that signed a voluntary easement." *Id.* (emphasis added). Accordingly, the same indemnity provision would apply to all landowners along the route regardless of whether the easement was obtained voluntarily or through condemnation proceedings.

F. State authorities cannot impose setback requirements on interstate pipelines.

In Section F of their brief, Landowner Intervenors make an argument related to setbacks and safety. (Doc. ID# 755) at ¶¶ 28-44. Specifically, Landowner Intervenors rely on a document that was created by another company that was contemplating constructing a CO_2 pipeline ("Navigator"). *See* (Doc. ID# 635). According to Navigator's document, a "Hazard Level 2" occurs when the concentration of CO2 in the air is 40,000 ppm, *i.e.*, 4%. *Id.* at p. 9. At this concentration, a person is at risk of suffering headaches, dizziness, increased blood pressure, and uncomfortable dyspnea. *Id.* at p. 8.

Navigator's document predicts the Hazard Level 2 "dispersion buffer distance" for different sizes of CO_2 pipelines:

Nominal Pipe Diameter	**Hazard Level 2**
6"	1,240'
8"	1,855'
20"	2,920'

Accordingly, if the CO_2 within a 20" pipeline was released, Navigator's document predicts that any person standing within 2,920 feet of the pipeline would be at risk of suffering a headache or becoming dizzy.

Landowner Intervenors argue that the Commission should impose these dispersion buffer distances as setback requirements on Summit's Project. In Landowner Intervenors' words, "[i]t is not appropriate to approve a location or route of [Summit's Pipeline] anywhere that an occupied structure … presently exists within at least 1,855 feet of an 8" diameter CO2 pipeline, 2.920 feet

along any portion of a proposed 20-inch diameter CO2 pipeline, and at [a] greater distance for locations of a 24-inch diameter pipeline." (Doc. ID# 755) at ¶ 38.

There are at least three flaws with Landowner Intervenors' argument. First, the Commission already determined that Summit's Project is an adequate distance away from occupied structures in its August 4, 2023 Order. *See* (Doc. ID# 375) at ¶ 14 ("Commenters asserted that greater setback distances … should be considered for a CO2 pipeline. … No testimony was presented that provided a sufficient basis to depart from the avoidance requirements set forth in the statute.").

Second, it is inappropriate to use data applicable to Navigator's pipeline as a basis for setback requirements that will apply to Summit's Pipeline. Each pipeline is unique and data for one cannot be used to determine the proper setback distances for another.

Finally, what Landowner Intervenors are requesting the Commission to do is preempted by federal law. Federal law explicitly states that a "State authority may not adopt or continue in force safety standards for interstate pipeline facilities." 49 U.S.C.A. § 60104(c) (emphasis added). Federal courts have determined that "setbacks are safety standards." *Couser v. Story Cnty., Iowa*, No. 422CV00383SMRSBJ, 2023 WL 8366208, at *15 (S.D. Iowa Dec. 4, 2023) (emphasis added). Accordingly, state authorities may not adopt setback requirements for interstate pipelines. Landowner Intervenors know this and yet they are still requesting that the Commission ignore federal law by imposing setback requirements on Summit's Project.

In sum, the Commission should not and cannot impose the setback requirements on Summit's Project that Landowner Intervenors are requesting that the Commission impose.

G. The CO_2 pipeline rupture that occurred near Satartia, Mississippi was an anomaly and is not representative of the safety of CO_2 pipelines.

In Section G of their brief, Landowner Intervenors again discuss the incident of a CO_2 pipeline rupturing near Satartia, Mississippi. *See* (Doc. ID# 755) ¶¶ 45-50. Landowner Intervenors essentially argue that this rupture proves CO_2 pipelines are unsafe and the Commission should therefore deny Summit's Application. *See id.*

Summit acknowledges the seriousness of the incident that happened in Satartia, but emphasizes that it is not representative of the historically safe operating record of CO_2 pipelines. CO_2 pipelines have been operating in this Country for the past 60 years. Over that time, 500 million metric tons of CO_2 have moved through over 5,000 miles of pipelines. Zero fatalities and only one injury requiring in-patient hospitalization have occurred.[7] One incident resulting in one injury over 60 years is not a reason for the Commission to deny Summit's Application.

In addition, Summit has studied the PHMSA report on the Satartia incident and has taken specific steps to address each of the root causes cited by PHMSA regarding that incident. This includes, among other things, development of a more advanced dispersion model better characterizing atmospheric and topographic conditions, including overland flow of CO_2 in low areas like valleys and stream beds that would identify more accurately the extent of affected areas. Furthermore, Summit will conduct dispersion modeling on 100% of the pipeline route, exceeding PHMSA's requirement to model only at HCA's (High Consequence Areas), which comprise less than 3% of the route.

---

[7] *New Source Performance Standards for Greenhouse Gas Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions From Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule*, 89 FR 39798-01 ("CO2 pipelines have been operating safely for more than 60 years. In the past 20 years, 500 million metric tons of CO2 moved through over 5,000 miles of CO2 pipelines with zero incidents involving fatalities.").

Utilizing this advanced modeling allows Summit to implement and facilitate more effective emergency response planning. As testified to by multiple witnesses, Summit has engaged with emergency managers and response personnel early and often and intends to continue its engagements and education of such personnel throughout the life of the Project.

With all that said, while incidents like Satartia should be prevented—and Summit has taken and will continue to take steps to do so—it is nonetheless noteworthy that Satartia was a worst-case scenario with a full guillotine break and still the PHMSA report reflects that not a single person was admitted to the hospital or received medical treatment categorized as a recordable injury by PHMSA.

H. The Project is justifiable.

In Section H of their brief, Landowner Intervenors argue that the proposed route of the Project "is not justifiable." *See* (Doc. ID# 755) at ¶¶ 51-53. Their argument is based on their belief that the Project only "benefits a single North Dakota business," *i.e.*, the Tharaldson Ethanol Plant. *Id.* at ¶ 53. Landowners argue that the Project benefiting a single North Dakota business is not enough to justify the Project. However, on the other hand, Landowner Intervenors argue to the contrary that economic benefits should not be considered by the Commission at all.

In any event, Landowner Intervenors' argument is flawed. In addition to the Tharaldson Ethanol Plant, the Project will also benefit other North Dakota citizens and businesses. For example, the Project will generally benefit the entire population of North Dakota by injecting $1.1 billion into the State's economy. *See* (Doc. ID# 528) at p. 3. The Project will likely benefit thousands of North Dakota citizens by creating between 1,500 and 2,000 jobs. *Id.* The Project will benefit North Dakota farmers by bolstering the demand for ethanol production and thereby driving demand for corn. *Id.* The Project will benefit local governments by increasing tax revenue through property taxes. And the Project will benefit North Dakota power generators who supply electricity

to the Project. *See* (Doc. ID# 666). Finally, as set forth above, landowners along the route and who own pore space at the injection locations will benefit from payments made to them by Summit under their respective easement and lease agreements.

Accordingly, the Project will benefit far more North Dakota citizens and businesses than just the Tharaldson Ethanol Plant.

I. Summit has addressed the concerns of hundreds of landowners.

In Section I of their brief, Landowners argue that the Commission should deny Summit's Application because Summit has not adequately addressed the concerns of landowners. *See* (Doc. ID# 755) at ¶¶ 54-55. According to Landowner Intervenors, "[t]he only addressing of Landowner concerns SCS bothered considering were the specifically named Landowners as identified by the PSC in its first denial order. Unless the PSC specifically calls out Landowners by name …, no meaningful accommodation efforts will occur." *Id.* at ¶ 54.

Landowner Intervenors' statements are simply not true. In addition to the four landowners that the Commission specifically named in its August 4, 2023 Order, Summit has adjusted the route of the Project hundreds, if not thousands, of times to accommodate specific concerns of landowners along the Project's route. *See* (Doc. ID# 452) at p. 4. In reality, the only landowners that Summit has not been able to accommodate are landowners represented by Mr. Jorde. And the only reason that Summit has not been able to accommodate them is because Mr. Jorde has specifically instructed them to not cooperate with Summit under any conditions.

Loren Staroba is a prime example that Summit and Landowner Intervenors could likely reach some sort of compromise acceptable to all parties if Mr. Jorde would facilitate negotiations rather than stifling them. As Mr. Staroba testified at the May 24, 2024 public hearing in Wahpeton, the Starobas had retained separate counsel, Mr. David Piper out of West Fargo, North Dakota, to

assist with a portion of their property that the Project was routed across. Within months of retaining Mr. Piper, Summit and the Starobas were able to successfully negotiate a re-route off that portion of their property. Mr. Staroba's experience makes clear that when Mr. Jorde is removed from the picture, Summit and landowners are more likely come to voluntary agreements that are acceptable to all parties involved.

Furthermore, Summit has repeatedly requested, through Mr. Jorde, that survey access be granted so that Summit may evaluate the re-routes proposed by his clients. *See*, *e.g.*, (Doc. ID# 623). To date, Mr. Jorde has not responded to any of Summit's requests for survey access. Subsequent to the re-hearings in this case, Summit representatives have heard first-hand from Mr. Jorde's clients that Mr. Jorde continues to instruct them to deny all survey access to Summit. Notwithstanding Mr. Jorde's instructions to the contrary, several of Mr. Jorde's clients have recently granted survey access to Summit and, in those situations, the surveys have been completed and negotiations surrounding potential re-routes are progressing.

Summit has also submitted an agreement to Mr. Jorde which would obligate Summit to repair, or pay to repair, any damage caused to the Dotzenrod's drain tile system as a result of the construction of Summit's pipeline across the Dotzenrod drainage easement. It is unknown if Mr. Jorde has shared the agreement with his clients, the Dotzenrods, but what is known is while weeks have passed since the agreement was presented to Mr. Jorde, counsel for Summit has heard nothing from Mr. Jorde regarding the same.

Nevertheless, Summit's goal is still to reach voluntary agreements with 100% of the landowners along the Project's route, including those still represented by Mr. Jorde. *See* (Doc. ID# 530) at p. 3. Summit will continue to engage with Landowner Intervenors to reach its goal but

with the understanding that it is impossible to re-route the Project off of every property whose owner does not want it. *Id.* As testified to by James Powell:

> Pipelines are linear infrastructure and routing the pipeline off of or around a specific parcel of property results in locating the pipeline onto an adjacent or nearby parcel of property. Generally, pipelines are routed to account for a number of important factors, including the impact on landowners, environmental and cultural constraints, minimizing construction risk, minimizing maintenance and integrity risk, minimizing the impact to Native American tribes, and complying with regulatory requirements (state and federal). In many cases, a re-route around a parcel owned by a single landowner will result in the pipeline, crossing parcels owned by multiple owners. In other cases, a re-route is not possible to due to the aforementioned factors and constraints involved in routing a linear pipeline.

Id. at p. 4.

J. Landowner Intervenors have failed to identify any problems raised by local entities.

Finally, in Section J of their brief, Landowner Intervenors correctly note that N.D.C.C. § 49-22.1-09(11) requires the Commission to consider "[p]roblems raised by ... local entities." *See* (Doc. ID# 755) at ¶ 56. However, Landowner Intervenors fail to actually identify any problems that have been raised by local entities. Instead of identifying said problems, Landowner Intervenors simply accuse Summit of "provid[ing] no evidence regarding any efforts to comply with the requirements of Burleigh or Emmons County." *Id.* Landowner Intervenors then claim that the Commission would be "ignor[ing] the mandate of § 49-22.1-09(11)" if it granted Summit's Application without first requiring Summit to comply with the requirements of Burleigh and Emmons County.

Although it is true that Burleigh County and Emmons County have raised concerns regarding Summit's compliance with certain ordinances the Counties passed to effectively shut down the Project, those concerns do not constitute "problems" raised by local entities. Those ordinances have been "automatically superseded and preempted in the present case." (Doc.

ID# 440) at p. 3. The Commission's determination that Summit need not comply with preempted ordinances can hardly be considered a "problem." And because Summit not complying with preempted ordinances is not a "problem," the Commission would not be ignoring the mandates of N.D.C.C. § 49-22.1-09(11) by granting Summit's Application without first requiring Summit to comply with those ordinances.

III. The Commission should consider Mr. Jorde's conduct in these proceedings and related proceedings while considering Landowner Intervenors' post-hearing brief.

The Landowner Intervenors' post-hearing brief is replete with assertions lacking citation to supporting evidence or pertinent legal, scientific, or other authority. By making these assertions, Mr. Jorde implicitly asks the Commission to 'take his word' for much of what is alleged. His actions in this case, as well as in related proceedings, thus cannot be overlooked when weighing the arguments presented by the Landowner Intervenors in this case.

Mr. Jorde is a self-described "pipeline fighter."[8] His career is marked by a consistent opposition to pipeline projects, including Summit's. His approach is not grounded in substantive legal or policy arguments but rather in a strategy of delay and obstruction. This pattern is evident in his litigation tactics, which are designed to hinder progress and ultimately derail projects through frivolous and ethically questionable methods.

In a revealing video posted on YouTube, Mr. Jorde explicitly stated that his objective is to delay projects to the point of failure.[9] He openly discusses his tactics, which include filing lawsuits and working to influence legislation and politicians. This admission highlights that his actions are not just about representing clients but about a broader agenda to obstruct pipeline projects at any cost.

---

[8] *See* https://pipelinefighters.org/?s=brian+jorde

[9] *Defending Property Rights and Easements, https://www.youtube.com/watch?v=jCLs1i792wA*

A clear example of Mr. Jorde's tactics is his handling of Summit attempting to survey his clients' properties. Section 32-15-06, N.D.C.C., unequivocally grants Summit the right to survey properties. Despite the longstanding and universal acceptance of survey statutes like N.D.C.C. § 32-15-06 across the United States, Mr. Jorde instructed his clients to deny Summit access, forcing Summit to bring a multitude of lawsuits to gain survey access.[10] Once these lawsuits were commenced, Mr. Jorde then argued that N.D.C.C. § 32-15-06 was unconstitutional. His argument had no precedent or legal foundation,[11] serving only to delay the proceedings. Both the district court and the North Dakota Supreme Court ultimately rejected his frivolous argument. *SCS Carbon Transp. LLC v. Malloy*, 2024 ND 109, 7 N.W.3d 268.

Moreover, Mr. Jorde's conduct extends beyond questionable legal arguments. He has violated procedural rules by serving an excessive number of interrogatories, exceeding the limit set by the North Dakota Rules of Civil Procedure. *See* N.D.R.Civ.P. 33(a)(3). Such behavior would typically result in sanctions, including the imposition of attorneys' fees. *See* N.D.R.Civ.P. 26(g)(1)(A); N.D.R.Civ.P. 26(g)(3)

Additionally, Mr. Jorde's ethical conduct is suspect. In North Dakota, he engaged in potentially unethical solicitation practices and has a history of questionable behavior in other states. In South Dakota, he attempted to coerce a court clerk into backdating a notice of appeal.[12] In Iowa, Mr. Jorde was caught submitting signed written testimony to the IUB without the

---

[10] This is consistent with Mr. Jorde's general advice to landowners. *See* https://www.youtube.com/watch?v=5D2UDo-aoJw&t=3401s at 54:40 ("[J]ust bluff them the best you can. 'I would never sign an easement. Over my dead body.' You will get paid more if that's your ultimate goal.... [S]o people say 'I just want to negotiate. I don't want to be part of any legal action to stop this.' The legal action designed to stop and slow this down is your best negotiating tool....").

[11] Not a single appellate court in the history of the United States has ever declared a survey statute like N.D.C.C. § 32-15-06 unconstitutional. *See Klemic v. Dominion Transmission, Inc.*, 138 F. Supp. 3d 673, 690 (W.D. Va. 2015).

[12] *Braun Family Trust, et al v. SCS Carbon Transp. LLC*, Nos. 71CIV22-000047, letter from attorney Justin L. Bell to Judge Richard Sommers (Spink Co. Cir. Ct., December 8, 2023).

witness's knowledge.[13] Mr. Jorde also submitted duplicative written testimony to the IUB on behalf of his clients.[14] As the IUB points out in its order approving Summit's pipeline, Mr. Jorde's conduct likely violates Iowa's Rules of Professional Conduct.[15] Even worse, this conduct subjected his own clients to allegations of perjury.[16]

These instances collectively paint a picture of an attorney whose primary goal is to obstruct and delay rather than to engage in fair and honest legal advocacy. His clients, the landowners, are being used as instruments in his broader agenda against pipeline projects.

The Commission should consider the foregoing carefully when reviewing Landowner Intervenors' brief. This case should be decided on the merits, not upon the unfounded editorializing of the parties' counsel. The outcome of proceedings before the Commission should be the just result of sound decision-making by the Commissioners, not the arbitrary result of inappropriate litigation tactics intended to delay and obstruct.

In conclusion, considering the admonitions of the ALJ and the Commission for civility amongst the parties, Summit does not take pointing out Mr. Jorde's conduct lightly; however, it is crucial for the Commission to be fully informed about the context and conduct surrounding these proceedings. Summit urges the Commission to consider the full scope of Mr. Jorde's behavior as it assesses the merits of the Landowner Intervenors' arguments. With all these things in mind, Summit concludes this post-hearing briefing trusting the Commissions ability to make a fair and informed decision based upon the merits of the case.

---

[13] *See* https://wcc.efs.iowa.gov/cs/idcplg?IdcService=GET_FILE&allowInterrupt=1&RevisionSelectionMethod=latest&noSaveAs=1&dDocName=2143321 at p. 10.

[14] *Id.*

[15] *Id.*

[16] *Id.*

CONCLUSION

Based on the foregoing, the Commission should grant Summit's Application.

Dated this 22nd day of July, 2024.

FREDRIKSON & BYRON, P.A.

By: _____

LAWRENCE BENDER, ND Bar #03908
TYLER J. GLUDT, ND BAR #06587
304 East Front Avenue, Suite 400
Bismarck, ND 58504
(701) 221-8700
lbender@fredlaw.com
tgludt@fredlaw.com

Attorneys for SCS Carbon Transport LLC

#83183436v1

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

SCS Carbon Transport LLC **CASE NO. PU-22-391**
Midwest Carbon Express CO2 Project
Sitting Application

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 Intervenors' Post-Hearing Briefs.

were, on July 22, 2024, filed with the North Dakota Public Service Commission and served electronically to the following:

Hope L. Hogan
hlhogan@nd.gov

John Schuh
jschuh@nd.gov

Zachary Pelham
zep@pearce-durick.com

Randall J. Bakke
rbakke@bgwattorneys.com

Bradley N. Wiederholt
bwiederholt@bgwattorneys.com

David Phillips
dphillips@bgwattorneys.com

Steven Leibel
steve@bismarck-attorneys.com

David Knoll
david@bismarck-attorneys.com

Brian E. Jorde
bjorde@dominalaw.com

Kevin Pranis
kpranis@liunagroc.com

Derrick Braaten
derrick@braatenlawfirm.com

Julie Lawyer
bc08@nd.gov

Patrick Zomer
Pat.Zomer@lawmoss.com

Dated this 22nd day of July, 2024.

FREDRIKSON & BYRON, P.A.

By: _____

LAWRENCE BENDER, ND Bar #03908
304 East Front Avenue, Suite 400
Bismarck, ND 58504
(701) 221-8700
lbender@fredlaw.com

#83193027v1