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ATTORNEYS AT LAW

July 22, 2024

Via Hand Delivery

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

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

Dear Mr. Kahl:

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

1. *Post-Hearing Reply Brief of Burleigh County;*
2. *Affidavit of Randall J. Bakke (with Exhibit A); and*
3. *Certificate of Service, with seven copies of same.*

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

Very Truly Yours,

/s/ Randall J. Bakke

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Post-Hearing Reply Brief of Burleigh County and Affidavit of Randall J. Bakke (with Exhibit A)
Burleigh County Board of Commissioners
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STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

SCS Carbon Transport LLC
Midwest Carbon Express CO2 Pipeline Project
Siting Application

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

POST-HEARING REPLY BRIEF OF BURLEIGH COUNTY

I. Introduction

Burleigh County submits this post-hearing brief in reply to the *Post-Hearing Brief of SCS Carbon Transport LLC (Reconsideration)* (“Summit’s Brief”) (Docket No. 753). SCS Carbon Transport LLC ("Summit") has failed to meet its burden of proof in relation to the deficiencies described by the North Dakota Public Service Commission (“Commission”) in its August 4, 2023 Findings of Fact, Conclusions of Law, and Order (“Order”) (doc. 375). Summit also failed to address the serious concerns Burleigh County raised at the hearings on Summit’s petition for reconsideration, and the petition should be denied. In particular, Summit has failed to meet its burden of proof and to address the following deficiencies identified by the Commission in its Order (doc.375):

- The effects of the proposed pipeline on future property values and development have not been adequately minimized for the welfare of the people and the environment of the state. Id., at ¶17.
- Summit has not properly addressed the areas of potential geological instability identified in the March 3, 2023 letter from the North Dakota Geological Survey ("NDGS"). Id., at ¶ 28.

- The proposed pipeline’ impact upon agriculture and livestock will be at an acceptable minimum. However, Summit has not taken the steps to address legitimate impacts expressed by landowners during the public comment or demonstrated why a reroute is not feasible. Id., at ¶32.
- Summit did not adequately address the Commissioners' requests, or failed to tender a witness to answer the Commissioners' questions as required by N.D.A.C. § 69-02-05-02, regarding plume modeling and an analysis of the south Bismarck alternate route. Id., at ¶ 42.

II. Argument

Summit claims it has addressed Burleigh County’s concerns, but Summit’s response is wholly inadequate. Summit’s Brief at pp. 26-31.

A. Summit’s Emergency Response Communications And Coordination Was Inadequate

Mary Senger (“Senger”), the Emergency Manger for Burleigh County and Emmons County, testified regarding the meeting between Summit representatives and Burleigh County first responders on November 27, 2023. Senger testified that many of the slides presented by Summit contained narratives that she was unable to read. (5:29:24 at 2:08:04-2:08:22) The PowerPoint slides were all two-dimensional images. (2:08:25-2:08:42) Alex Lange was the primary presenter at the meeting. However, whenever questions were asked of him, he would defer to other Summit representatives. (2:09:06-2:09:15) There was no real time modeling, no video, and no simulation to show what would happen if the CO2 pipeline failed. (2:09:25-2:10:07) Senger testified the information provided by Summit at the meeting was not sufficient for either Burleigh County or Emmons County. (2:20:57-2:21:23) For example, no handouts were provided, no written materials supplied, and the final route was not provided. (2:21:30-2:21:50) Burleigh County requested a

copy of the slideshow that was shown at the meeting, but Summit refused. (2:22:48-2:23:09) Senger testified that it is important that the public be prepared in the event of a CO2 leak from the proposed pipeline. (2:40:09-2:40:48) While Summit is unwilling to release its dispersion model to the public in North Dakota, it has made its dispersion modeling for the smaller pipeline (4-inch feeder pipeline) in Minnesota available to the public, which demonstrates that Summit's sensitive security excuse for not disclosing it is a false narrative. [BC109 (Doc. 725)] She wanted to provide preparedness knowledge to the public. (2:40:48-2:41:22) However, no training, equipment, or sufficient information was provided by Summit. (2:41:41-2:42:20) Senger testified it is her understanding that only Summit representatives could shut off the mainline valves in the event of an emergency, and she was concerned about the proximity and sufficiency of Summit's staff in relation to the mainline valves. (2:47:32-2:48:40) Senger testified she was initially told the mainline valves were twenty miles apart, but she received no additional information in that regard.(3:00:16-3:00:36) Senger testified her experience interacting with representatives of Summit were less frequent and less helpful than her prior interactions with representatives of the Dakota Access Pipeline/DAPL representatives. (2:59:11-3:00:10) While Summit presented some information about its dispersion model at the November 27, 2023, meeting, it has not provided the model to Burleigh County representatives for evaluation, nor did it make information from its dispersion model available to the public, other than two individuals, Ron Ness of the North Dakota Petroleum Council and Chad Wachter, a prominent local developer and former intervenor.

Brian Bitner ("Bitner") has been a Burleigh County Commissioner for the last sixteen years. Bitner testified on behalf of and with the authorization of the entire Burleigh County Commission. Bitner testified he had concerns regarding the pipeline proximity being too close to Burleigh County residents, the schools around the re-route including rural schools like Menoken

and Apple Creek, the water supply and how close the re-route is to South Central Water Resource District which serves all of Burleigh County, and how the re-route is running into developers and how that could limit development for Burleigh County in the future. (5.29.24 at 4:00:00-4:01:00; 4:01:54-4:02:14) Bitner testified the pipeline route should be fourteen miles away from the City limits of Bismarck. (4:11:11-4:11:20) Bitner testified he was present at the November 27, 2023 meeting Summit representatives held with first responders. (4:14:03-4:14:16) Bitner testified he was concerned that the dispersion model created by Summit has not been provided to Burleigh County representatives for evaluation.

Summit presented testimony from Alex Lange (“Lange”), the Director of Engineering for Summit, who gave the presentation to Burleigh County emergency responders on November 27, 2023. (6.3.24 at 3:40:27-3:40:45). Lange admitted during his testimony that he had no dispersion modeling experience prior to working on the dispersion model for the subject pipeline. As with other Summit witnesses, Lange testified that he was confident in Summit’s dispersion model, but failed to provide any details in order for that claim to be evaluated or tested, and he does not have the prior experience to be able to make such a confident claim. During his testimony, Lange was questioned regarding Exhibit BC119 (Doc. 734), which is a guide developed by the American Petroleum Institute and Liquid Energy Pipeline Association with input from the National Association of State Fire Marshals, which Summit provided to Burleigh County as a best practices document. Exhibit BC119 (Doc. 734) was published in August 2023 and specifically addresses CO2 pipelines, so it is a recent and relevant publication. Despite describing Exhibit BC119 (Doc. 734) as a best practices guideline, Lange admitted Summit did not always follow the best practices guideline. (6.3.24 at 3:43:00-3:44:06) Summit provided this document to Burleigh County first responders without indicating Summit did not intend to fully comply.

On page 10 of Exhibit BC119 (Doc. 734), the best practices guide indicates “Similar to wind, it is particularly problematic when the direction of the terrain relief is in the direction of a populated area or HCA.” Further, it indicates that, to truly understand whether a nearby high consequence area could be affected by a CO2 release, computational fluid dynamics (“CFD”) modeling should be added in order to determine the additional dispersion distance. However, despite admitting that north and east of Bismarck the terrain slopes significantly toward the populated center of Bismarck, Lange admitted Summit did not make use of any CFD modeling software to evaluate this issue. (3:55:49-3:56:03) Summit chose not to purchase or utilize the additional software package to allow it to do the proper CFD modeling under its own best practices document provided to Burleigh County. Further, Summit did not inform Burleigh County that Summit failed to follow these best practices guidelines with respect to the use of CFD to analyze the significant topographic relief in the direction of a populated city center. Lange agreed in his testimony that CFD may be necessary, but Summit did not do it in this case. (3:57:10-3:57:15)

Lange indicated Summit was comfortable with the dispersion model that it created, despite the fact that Lange admitted to not conducting all the analysis and testing required under the best practices document provided to Burleigh County. (6.3.24 at 3:57:19-3:57:39) Lange and the other Summit representatives projected a sense of confidence in their dispersion model, despite a lack of any prior experience creating dispersion models for CO2 pipelines, and without providing any relevant details to the public or to Burleigh County to evaluate their claims.

Summit also presented testimony from David Daum (“Daum”), the Senior Director of Health, Safety, Security, and Environmental for Summit. Daum admitted in his testimony he has never previously worked on any CO2 pipeline project personally. (6.3.24 at 5:27:04-5:27:18) Daum is the individual at Summit who provided the best practices document (BC119, Doc. 743)

to Senger of Burleigh County. (6.3.24 at 5:28:33-5:28:40) Daum admitted Summit has no public awareness program to inform the public regarding safety and the dangers associated with the proposed pipeline. (6.3.24 at 5:31:35- 5:31:44) In his testimony, Daum acknowledged provisions in the best practices document (BC119, Doc. 743) regarding plans with respect to schools, hospitals, etc., response drills and exercises, emergency response training. Daum indicated these best practices have not been followed. (6.3.24 at 5:40:31-5:40:52)

Summit also presented testimony from Wade Boeshans (“Boeshans”), who testified regarding the November 27, 2023 meeting with Burleigh County first responders and emergency managers. (5.28.24 at 3:05:58-3:06:24) He testified a PowerPoint slide presentation was used during the meeting, but it was two-dimensional, no videos were shown, slides were projected on the screen, but no simulations on dispersion modeling were shown. No videos were shown nor any other visual media to depict a dispersion plume. (5.28.24 at 3:11:12-3:13:50) The slides shown at that meeting did not account for changes in topography. (4:05:22-4:05:34) It accounted for speed, but not direction. (4:02:14-4:02:46) There was no variable for humidity. Summit provided an unusable map of the pipeline route with its Petition for Reconsideration (BC-100). (3:44:50-3:47:00) Further, Summit failed to provide usable shapefiles to Burleigh County or any other parties to this action to allow them to evaluate the route and its safety or any other concerns.

Mitch Flanagan (“Flanagan”), the Planning Director for Burleigh County, testified that the map provided by Summit as part of its Petition for Reconsideration (BC-100) had no meaningful information, including street addresses, 911 call locations, etc. (5.29.24 at 57:50-58:29) Flanagan testified that no shapefiles were provided by Summit, which would have allowed Burleigh County to create its own maps of the proposed pipeline route to analyze the issues in this matter. (59:30-59:43) Flanagan testified regarding the Bismarck ETA boundary. This boundary will be used for

development purposes and will eventually be within the City limits. (1:02:41-1:04:08) Flanagan had concerns regarding the close proximity of the proposed pipeline route to the east of Bismarck, near McDowell Dam (a busy recreational area), Country Meadows Development, Apple Creek Ridge, Mees Country Home Estates, and Apple Valley Development. (1:13:10-1:14:54) Flanagan also testified regarding the close proximity of the southern route of the proposed pipeline to the University of Mary and various housing developments. (1:19:18-1:20:53)

Summit's inadequate emergency response communications and coordination establishes it continues to fail to meet its burden of proof required by the Commission's Order. Doc. 375 at ¶ 17 (The effects of the proposed pipeline on future property values and development have not been adequately minimized for the welfare of the people and the environment of the state); and ¶ 42 (Summit did not adequately address the Commissioners' requests, or failed to tender a witness to answer the Commissioners' questions as required by N.D.A.C. § 69-02-05-02, regarding plume modeling).

B. Summit Has Not Addressed Source Water / Drinking Water Issues Relating To Its Proposed CO2 Pipeline

Bailey Elkins also expressed significant concerns regarding a danger to drinking water in Burleigh County, as CO₂ has been identified as a pollutant, which is heavier than air and may impact the water bodies in the Missouri River valley. (6.3.24 at 22:39-23:10). From her work with North Dakota Rural Water Systems Association, Elkins is familiar with the City of Bismarck and the locations in Burleigh County where drinking water is obtained. (6.3.24 at 25:03-25:20). She testified the South Central Water Treatment Plant is a little over 2 ½ miles south of the proposed pipeline crossing. *See* Exhibit BC107 (Doc.723). The South Central Water Treatment Plant provides water to the City of Wilton, numerous rural developments and homeowners associations, portions of north Bismarck, and also extending out towards homes near the City of Wing (6.3.24

at 25:37-25:47). Elkins expressed significant concern regarding the effect on drinking water if there was a CO₂ leak from the proposed pipeline. Despite her efforts to obtain a distribution map of water pipelines in Burleigh County, Elkins was unable to obtain one. (6.3.24 at 27:07-27:50). Elkins testified that CO₂ dissolves in water, displacing oxygen, which can lower the PH (acidifies). This can have a significant impact on wildlife, including killing fish. (6.3.24 at 28:23-28:50) Elkins expressed concerns about the proposed pipeline crossing watermains and other water lines to residences. (6.3.24 at 29:26-29:43) Elkins also testified about the proposed pipeline being too close to the City of Baldwin. (6.3.24 at 31:50-32:10).

Summit's failure to address source water / drinking water issues relating to its proposed CO₂ pipeline further establishes it continues to fail to meet its burden of proof required by the Commission's Order. Doc. 375 at ¶ 17 (The effects of the proposed pipeline on future property values and development have not been adequately minimized for the welfare of the people and the environment of the state); and ¶ 42 (Summit did not adequately address the Commissioners' requests, or failed to tender a witness to answer the Commissioners' questions as required by N.D.A.C. § 69-02-05-02, regarding plume modeling).

C. Summit Has Not Considered Or Addressed Brittle Fracture And Other Pipeline Integrity Concerns

Jeff Steinbronn is an expert witness presented by Burleigh County. He has a degree in chemistry and a masters in chemistry and physics. Steinbronn testified that the CO₂ pipeline could be significantly affected by weather and atmospheric conditions. Steinbronn testified the pipeline can become brittle and lose its structure in the cold North Dakota weather at the anticipated depth within the frost line. Due to the cold temperatures, there is a risk of brittle fracture of the mainline valves. If the valves are wide open, Steinbronn does not believe they can be kept safe without a heating apparatus. Valves must be heated because brittle valves will release CO₂. Steinbronn

testified the most dangerous valve on the proposed pipeline is the valve on 201st Avenue NE. Due to the topography of the land north of Bismarck, a leak at this location would cause CO2 to flow downhill towards the populated center of Bismarck. He also testified the topography would cause the CO2 to settle in a bowl in the City of Bismarck. The cascade of the gas coming down is extremely dangerous as the citizens cannot see, smell, or taste the gas.

Summit's failure to consider or address brittle fracture and other pipeline integrity concerns shows it failed to meet its burden of proof required by the Commission's Order. Doc. 375 at ¶ 17 (The effects of the proposed pipeline on future property values and development have not been adequately minimized for the welfare of the people and the environment of the state); and ¶ 42 (Summit did not adequately address the Commissioners' requests, or failed to tender a witness to answer the Commissioners' questions as required by N.D.A.C. § 69-02-05-02, regarding plume modeling).

D. Power Loss

Brian Bitner testified he had concerns about potential power outages caused by the pipeline, which could have a catastrophic result in Burleigh County. He testified if a compressor went out, it could result in operational failures of the pipeline. Bitner testified there have already been numerous power outages in Bismarck. Bitner questioned whether residential or industrial uses of electricity would be cut first in the event of a power outage. (4:21:27-4:25:52)

Wade Boeshans, Executive Vice President of Summit Carbon Solutions, LLC, testified he communicated with Capital Electric and others in an effort to determine if there was sufficient electrical supply for the pipeline. Based on Boeshans' testimony it is not clear whether there is sufficient electrical power available to meet the needs of the community in addition to the proposed pipeline. (5.28.24 at 4:43:54-5:45:55)

Summit's fails to address what happens in the event of a power outage that affects the pipeline, which shows it failed to meet its burden of proof required by the Commission's Order. Doc. 375 at ¶ 17 (The effects of the proposed pipeline on future property values and development have not been adequately minimized for the welfare of the people and the environment of the state).

E. Summit Has Failed To Address The Negative Impact Of The Summit Pipeline On Future Development and Property Values

Chad Wachter ("Wacher") is a land developer in Burleigh County and elsewhere in North Dakota. Wachter testified he spoke with Wade Boeshans, a representative of Summit. They talked about moving the eastern proposed route. Boeshans told Wachter it was not possible to move the proposed pipeline further to the east. (5:30-24 at 4:27-5:27) Wachter believes the pipeline route should be further east. (5:48-6:15) Wachter testified he was surprised and upset about the proposed re-route due to its negative impact on development. (8:49-9:42) Wachter believes the pipeline should be twenty miles away from Bismarck based on the incident in Sartoria, Mississippi. (9:45-10:37) The most recent CO2 pipeline leak in Sulphur, Louisiana on April 3, 2024 (BC134) verifies that CO2 leaks are deadly and that CO2 pipelines, if installed at all, need to be located far away from populated areas. (10:38-10:56) Wachter also testified he was contacted by Ron Ness of the North Dakota Petroleum Council to attend a meeting with Summit representatives on January 24, 2024. Ness told Wachter he has negotiated with Summit to take a look at the dispersion modeling. (11:07-12:31) In attendance at the meeting were Justin Kringstad (Director of the North Dakota Pipeline Authority), Wade Boeshans of Summit, Ron Ness (President of the North Dakota Petroleum Council), Brady Pelton (Vice President and General Counsel of the North Dakota Petroleum Council), and Chad Wachter. (13:00-13:30) Wachter testified that Ness is not employed by Summit. (13:31-14:04) At the meeting, a Summit representative showed Wachter Summit's dispersion model. Wachter was not told that the information he received was national security

information. (20:25-20:53) Summit representatives did not tell Wachter that he had to maintain the confidentiality of the dispersion model information. Wachter was asked at the hearing whether he was concerned with what he saw in the presentation of the dispersion model. He testified it would depend on if the information he saw was accurate and he wants it tested, verified, and studied. He indicated he expressed this concern many times in many conversations with Summit representatives. (22:02-23:11)

Wachter testified there was another meeting with Summit representatives on February 21, 2024 at the University of Mary. (23:13-23:51) In attendance were Bruce Rastetter (founder and executive of Summit Agricultural Group), Wade Boeshans of Summit, Andrew Feist (Assistant to the Executive Vice President of the University of Mary), Jerome Richter (Executive Vice President and Chief of Staff at the University of Mary), and Scott Hennan. (25:00-25:25) Rastetter gave a history of himself and the project from his point of view, discussed dispersion modeling, and worst case scenarios. (26:09-28:20) Wachter testified it is important for information relating to the dispersion model to be shared with the public. (29:35-30:35) Summit apparently had no problem showing the dispersion model to certain private citizens, including Wachter and Ness, but would not share it at public meetings of the Commission. Wachter testified it would be nice to have someone more qualified than him to take a look at the model. (30:58-31:18) Wachter testified the proposed re-route of the pipeline is within the growth corridor of the City of Bismarck. He has significant concerns about the Summit pipeline route negatively affecting future development in and around the City of Bismarck. (38:18-39:00)

Summit asserts that natural gas pipelines (and ostensibly CO₂ pipelines, which present much greater health and safety risks than a natural gas pipeline) are not a deterrent to sales and development of residential lots. However, Wachter indicated CO₂ pipelines pose greater health

and safety risks than a natural gas pipeline. Wachter testified regarding the impact of a natural gas pipeline on his Promontory Point property development. He testified that he still has vacant lots and inventory which are encumbered by a natural gas pipeline. (43:57-44:40) They have been available for sale for 5-7 years, and he continues to pay taxes and special assessments on these lots. (44:37-45:30) Wachter testified it is costing him \$2,000 per year to hold each lot. (45:57-46:00) Wachter also testified about the adverse impact on these lots' development due to setback requirements in relation to a natural gas pipeline. (46:20-46:44) Wachter testified that he has been told by potential buyers that they will not purchase the lots due to the existence of a natural gas pipeline. Wachter testified he has had five potential buyers tell him this. (52:48-53:31) Wachter testified that 80% of the properties that have a natural gas pipeline require him to accept a lower price. (54:20-55:58) Wachter testified there are seven unsold lots in Promontory Point that are encumbered by a natural gas pipeline. (1:04:52-1:05:16) At his Silver Ranch Development, Wachter testified that he anticipates there will be 4,500 new dwellings constructed in the next 22-25 years. (1:18:02-1:18:14) Wachter is concerned about whether development will move forward in light of the pipeline. He also testified he donated 10 acres to Bismarck Public Schools for a new Career Academy and recently closed on 25 acres purchased by the Diocese of Bismarck for a Catholic campus. He explained that commercial development is driven by rooftops. (1:19:24-1:19:28) Wachter also testified he anticipates the development of a hospice facility in the Silver Ranch Development, which could be impacted by the pipeline. (1:26:50-1:27:26)

Howard Malloy ("Malloy") is a real estate developer in the Bismarck/Mandan area. Malloy testified he has a potential development to be located in Morton County. The potential development is ten miles north of Mandan on Highway 1806, with some lots having views of the Missouri River. (5.29.24 at 25:22-25:36) Malloy testified the proposed Summit pipeline would

eliminate his development project. It is prime real estate and loss of this development will result in unrealized tax money for the county. (5:29:24 at 37:00-37:09) Malloy testified that he had a conversation with James Powell of Summit on July 25, 2023, regarding the potential lost development and lost revenues that would result from the Summit pipeline. (37:10-37:50) Despite promises, Powell never got back to Malloy regarding his concerns. (38:50-38:56) Malloy has been planning this development project for years. The proposed pipeline route would cut the development property in half. (40:53-40:59) The proposed property development is only a mile from the Missouri River with lots of views of the river and a view of a large rolling valley. (47:55-48:34) Thus, it is highly valuable property to develop, which cannot be done due to the proposed Summit pipeline.

Summit presented testimony of Jeff Olson, a senior appraiser with LandVest. (5:28:24 at 8:18-8:23) Olson testified regarding whether the presence of a pipeline easement crossing a residential development would have an impact on property values, in light of the Uniform Standards of Professional Appraisal Practice. Olson did not do any analysis of values in Burleigh County at all in relation to this matter. (29:20-29:40) Olson does very little appraisal work in Burleigh County and none of it relates to pipelines. This is Olson's first time working on a matter relating to the encumbrance of residential and farmland property by a pipeline. (31:03-31:55) During his testimony, Olson displayed little to no knowledge regarding the dangers of a CO2 pipeline leak. (31:56-33:29) Olson made no attempt to speak with representatives of Burleigh County regarding development, including rural residential properties and subdevelopments. (35:30-36:02) Olson did not speak with any real estate developers who would be impacted. (37:17-38:20) The only market evidence Olson had related to values was derived from comparisons of properties in Iowa, not North Dakota, much less Burleigh County. (38:24-39:22) Olson conducted

a market analysis of agricultural land sales comparing land with and without a pipeline encumbrance, however, none of Olson's comparables involved a CO2 pipeline. (43:27-44:01) Olson was unable during his testimony to name any residential developments in the northwest of Bismarck. (40:34-40:45) Olson was unable to recall the existence of a nearby school and landmarks in relation to the proposed pipeline route. (5.28.24 at 40:52-41:30) Olson did not speak with any landowners regarding their concerns in relation to the pipeline. Olson did not have any conversations whatsoever with landowners regarding later potential sale of their land or the impact of the pipeline on the value of their land. (44:03-45:37) Olson was unable to tell the Commission about any sales near a CO2 pipeline at any time in the past. (45:00-45:37) He did agree that a sale near a CO2 pipeline would lower the potential pool of buyers for any given piece of property. (57:50-58:06)

Wade Boeshans of Summit agreed in his testimony that Burleigh County represents the smallest percentage of landowners who have voluntarily entered into easements with Summit of all the North Dakota counties. (5.28.24 at 2:56:09-2:57:36) As of May 9, 2024, Burleigh County had the lowest percentage of voluntary easements provided (57.34%) of all the affected counties in North Dakota (BC113, Doc. 728). Boeshans was unwilling to commit to Summit abstaining from the use of eminent domain in the future in relation to the proposed pipeline. (5.28.24 at 3:00:33-3:02:46)¹ Similarly, James Powell also testified Summit would use eminent domain to

¹ Bakke: Are you able to commit on behalf of Summit, today, that if landowners in Burleigh County refuse to voluntarily provide easements to Summit, Summit will not initiate eminent domain or condemnation actions against holdout landowners?

Boeshans: I cannot make that commitment.

...

Bakke: Yeah, by your testimony do you mean to say that Summit is indicating that it reserves the right to pursue eminent domain or condemnation actions against holdout landowners who will not voluntarily provide easements to Summit?

Boeshans: What I said was I cannot make that commitment.

obtain easements². This means that Summit will need to attempt to obtain easements from 43% of Burleigh County landowners by eminent domain, making it the first time in North Dakota's history where a private company will be allowed to use eminent domain strictly for personal profit (including for investor TPG Rise Climate, owned by the Chinese government and Hassana Investment Co., the Kingdom of Saudi Arabia's national pension and social insurance fund. W164, Doc. 256) This should not be allowed.

Again, Summit failed to meet its burden of proof required by the Commission's Order. Doc. 375 at ¶ 17 (The effects of the proposed pipeline on future property values and development have not been adequately minimized for the welfare of the people and the environment of the state); ¶ 32 (Summit has not taken the steps to address legitimate impacts expressed by landowners during the public comment or demonstrated why a reroute is not feasible); ¶ 42 (Summit did not adequately address the Commissioners' requests, or failed to tender a witness to answer the Commissioners' questions as required by N.D.A.C. § 69-02-05-02, regarding plume modeling and an analysis of the south Bismarck alternate route).

F. Summit Has Failed To Establish It Will Properly Address Areas of Geologic Instability

Bakke: Right. And I am asking you by saying that do you mean Summit is reserving the right to pursue eminent domain or condemnation actions against holdout landowners?

Boeshans: Yeah, that would be fair.

(Doc. 625 at 3:00:03-3:02:46)

² Bakke: And as the Chief Operating Officer of Summit, can you commit that Summit will not use eminent domain or condemnation proceedings against landowners who will not provide an easement to Summit pipeline?

Powell: I cannot.

Bakke: In North Dakota?

Powell: I cannot.

(Doc. 624 at 6:11:06-6:11:30)

Bailey Elkins (“Elkins”) is an expert witness presented by Burleigh County. She works as a project manager and is trained as a geologist. (6.3.24 at 3:53-3:58). She has a Bachelor of Science in geoscience, with course work emphasis on geochemistry, hydrogeology, and geophysics. (6.3.24 at 4:08-4:19). She has worked as an environmental geologist in pipeline remediation and environmental permitting, as well as a source water protection specialist for North Dakota Rural Water Systems Association for over five years working with communities to understand their drinking water sources and helping them develop solutions to protect their drinking water. (6.3.24 at 4:30-5:03).

Elkins raised significant concerns regarding slope stability. She indicated that Summit should add field geologists to review the route in person to address slope stability concerns. (6.3.24 at 9:19-9:38). It appeared to Elkins that Summit had followed some of its best practice policies, but not all. (6.3.24 at 6:50-7:02). Elkins conducted independent research and provided to the Commission a paper entitled “Improving Steep-Slope Pipeline Construction To Reduce Impact To Natural Resources” (BC131, Doc. 743). Elkins indicated this document would be helpful to ensure that Summit follows best practices regarding steep slope pipeline construction. Additionally, Elkins identified in her research a paper prepared by Dominion Transmission, Inc., regarding slope stability. (BC132, Doc. 744). This is a procedure document for construction of structural pipelines, and Elkins indicated it would be helpful if Summit followed the guidelines in the document. Elkins has not seen anything to suggest Summit has prepared a similar policy and procedure in writing for pipeline construction. (6.3.24 at 18:22-18:42). Elkins testified slope stability issues are very important to address, as there is the potential for landslides to occur. (6.3.24 at 19:07-19:16). Brian Bitner also testified that on the original route, there were eleven potential landslide areas, and on the re-route there are eighteen potential landslide areas. (Bitner testified Summit did not investigate

a route further away from the City of Bismarck. James Powell of Summit testified there are eighteen locations with geological risks, but he did not know how many in Burleigh County specifically. (5.28.24 at 6:07:58-6:08:29)

Summit failed to meet its burden of proof required by the Commission's Order with respect to the areas of potential geological instability identified in the March 3, 2023 letter from the North Dakota Geological Survey. Doc. 375 at ¶ 28.

G. Summit's Efforts To Hide Its Re-Route Location From The Commission And The Public

Summit has been disingenuous with the Commission, and the public, in relation to its proposed re-route in proximity to Bismarck. In its Petition for Reconsideration (Doc. 371), Summit failed to provide the Commission with any pertinent details regarding the precise location of the re-route near Bismarck. It provided no GIS or other details regarding the re-route, no identification of the Townships, roads, or other pertinent details regarding the re-route. (See page 8 of Summit's Petition for Reconsideration - BC100, Doc. 716) This is typical of Summit's lack of transparency throughout the PSC application process. In fact, Summit failed to disclose to the Commission or to the public that it plans to move the pipeline re-route location closer to Bismarck on the east side, to a location that would go through two public rest stop areas just east of Bismarck that are frequently used by the public. (See BC101 GIS map prepared by Burleigh County showing re-route location closer to Bismarck on the east side). The re-route location Summit requests is closer to Bismarck and would move the pipeline closer to existing housing developments at Apple Valley, Apple Creek Ridge, Country Meadows, and Mees Country Home Estates, further endangering populated areas.

The Commission in denying Summit's application determined that Summit failed to adequately conduct "an analysis of an alternative route south of the City of Bismarck". (August 4,

2024 Order, Doc. 375). Despite this determination by the Commission, Summit has failed to provide the Commission with any detailed information showing it analyzed an alternative southern route [BC102, Doc. 718]. Instead, Burleigh County was required to use GIS data to identify the southern route location Summit considered (BC102, Doc. 718). The alternative southern route selected by Summit alone shows that Summit did not perform any legitimate southern analysis because:

- The Summit southern route was selected in a location within the existing Bismarck extra-territorial limits.
- The southern route runs through and is in close proximity to sixteen existing residential developments.
- The southern route would be 0.74 of a mile from the University of Mary. (BC102).

The southern route "analysis" was no analysis at all but rather an affront to the Commission's Order (Doc. 375) requiring a legitimate analysis of a southern route further away from Bismarck. There is no dispute that a pathway clearly exists further away from Bismarck where there are more rural townships where no zoning restrictions are in place which would be problematical to the proposed Summit pipeline. (See BC104, Doc. 720). Summit has also further attempted to disguise the location of its proposed re-route by no longer identifying the location on a landowner's property in Burleigh County where it has secured voluntary easements since the Commission's August 4, 2023 Order (Doc. 375) (BC112, Doc. 727). This conduct further verifies Summit's lack of transparency with the Commission, the public, and adjacent landowners who have no ability to voice any possible objection to the pipeline location in relation to their own property, as Summit no longer identifies the location.

Summit failed to meet its burden of proof required by the Commission's Order. Doc. 375 at ¶ 17 (The effects of the proposed pipeline on future property values and development have not been adequately minimized for the welfare of the people and the environment of the state); ¶ 32 (Summit has not taken the steps to address legitimate impacts expressed by landowners during the public comment or demonstrated why a reroute is not feasible); ¶ 42 (Summit did not adequately address the Commissioners' requests, or failed to tender a witness to answer the Commissioners' questions as required by N.D.A.C. § 69-02-05-02, regarding plume modeling and an analysis of the south Bismarck alternate route).

H. Summit Did Not Demonstrate Why A Re-Route Is Not Feasible, Most Particularly To The East And South Of Bismarck

James Powell, the COO of Summit, testified regarding certain route adjustments made or considered following the Commission's initial denial of Summit's permit request. Powell testified regarding route adjustments made to accommodate landowners who testified at prior hearings, the reduction in width of the proposed corridor, the areas of geologic instability and coordination with the North Dakota geological survey, the southern route analysis conducted by Summit, and emergency response coordination with first local responders. Powell testified that Summit never reached out to the City of Bismarck or Burleigh County to discuss where an appropriate southern re-route should go. (5.28.24 at 5:51:02-5:51:35) With respect the southern route, Summit did not contact any township boards, Emmons County, the North Dakota State Water Commission, the City of Mandan, landowners, the Standing Rock Sioux Tribe, Army Corps of Engineers, or Energy Transfer Partners/DAPL. (5.28.24 at 5:52:42-5:57:23) Summit did not conduct any geological surveys on the south side of Bismarck. (6:05:10-6:05:17) Summit clearly did not make a good faith effort to explore a southern route, which would have protected Bismarck, including the prevailing winds from the north and east, as well as more favorable topography. Brian Bitner testified that

the southern route ostensibly considered would never be viable in light of its close proximity to the University of Mary and many existing housing developments. Bitner testified Summit could not have picked a worse route if it tried. (4:19:15-4:20:31) Bitner testified when Summit representative Jeff Skare was asked why Summit did not choose a southern route further from the City of Bismarck, Skare said “we don’t want another DAPL”. Summit was worried about the optics. (4:30:08-4:30:41) Bitner testified the re-route is worse than the original route.

Summit failed to meet its burden of proof required by the Commission’s Order. Doc. 375 at ¶ 42 (Summit did not adequately address the Commissioners' requests, or failed to tender a witness to answer the Commissioners' questions as required by N.D.A.C. § 69-02-05-02, regarding... an analysis of the south Bismarck alternate route).

I. Additional Grounds For Denying Summit's Application

In addition to the reasons already articulated for denying Summit's Petition for Reconsideration (Doc. 371), the Commission should deny Summit's Petition for the following reasons:

- Summit is involved in litigation with the Summit pipeline carbon steel pipe supplier Wellspun, which establishes Summit has no pipe supplier in place who could provide the required pipe. (BC110, Doc. 726 and BC111). As it appears highly probable Summit will need to secure pipe from another supplier, Summit, the Commission, and the public will need to evaluate the standards to be met, and the procedures to be followed by a new pipe supplier.
- Since the May/June hearings in this matter, the State of Illinois has passed a law providing a moratorium for two years on any CO2 pipelines in Illinois. (See news article entitled

"Illinois Legislature puts the brakes on a carbon capture boom" dated June 10, 2024, attached to *Affidavit of Randall J. Bakke* as **Exhibit A**).

J. The Commission Should Not Agree Ordinances Are Preempted For Additional Reasons Asserted By Summit

Summit notes the Commission has already held that the ordinances filed by Burleigh County and Emmons County are preempted by the approval of a route permit for a gas or liquid transmission facility. Summits' Brief at p. 31. While Summit indicates it agrees with that holding, it "believes that the ordinances are preempted for additional reasons" and requests the Commission incorporate those additional reasons in its final order. *Id.* at pp. 31-32. Summit is raising new issues for the first time in its post-hearing brief, without affording Burleigh County an opportunity to present any witnesses or other evidence as to these "additional reasons". Summit has not filed any new motion in this regard, nor has it amended its request to the Commission. The issue of preemption of county ordinances has already been briefed by the parties and addressed by the Commission multiple times, including in relation to an initial Order (Docket No. 440) and Order on Burleigh County's petition for reconsideration (Docket No. 461). Preemption was not addressed at the recent hearings which are the subject of these post-hearing briefs. Summit is inappropriately attempting to supplement its prior briefing on an issue that has already been argued and decided multiple times. The Commission should not entertain Summit's attempts to supplement the record on this issue in an unrelated post-hearing brief. To the extent the Commission elects to re-open the issue of preemption, Burleigh County requests the opportunity to separately brief the issue at a later time.

However, to respond to these "additional reasons" briefly, Summit first claims the Burleigh County and Emmons County ordinances contain setback provisions that are unreasonably restrictive on their face. North Dakota Century Code Section 49-22.1-13(2)(c) states, "A permit may supersede and preempt the requirements of a political subdivision if the applicant shows by a preponderance

of the evidence the regulations or ordinances are unreasonably restrictive in view of existing technology, factors of cost or economics, or needs of consumers regardless of their location, or are in direct conflict with state or federal laws or rules.” However, Summit fails to cite any relevant requirements or testimony establishing the setbacks are unreasonably restrictive on their face. It is merely a bald assertion by Summit, unsupported by evidence, and which Burleigh County has not had the opportunity to present counterevidence.

Further, Summit argues Burleigh County and Emmons County ordinances are in direct conflict with federal law, namely 49 U.S.C. § 60104(c) relating to preemption of safety standards. Summit has not established that the county ordinances are “safety standards”, nor has it shown that the ordinances should be disregarded, particularly in light of the multiple areas relating to safety that the Commission found Summit did not meet its burden of proof in its Order (doc. 375 at ¶¶ 17, 28, 42).

Summit’s “additional reasons” relating to preemption should be ignored as an untimely attempt to raise new issues for the first time, and it’s “additional reasons” are without merit in any event.

III. Conclusion

Summit has failed to meet its burden of proof to address the serious concerns Burleigh County raised at the hearings on Summit’s petition for reconsideration, and the petition should be denied. Burleigh County requests the Commission adopt the proposed Findings of Fact, Conclusions of Law, and Order submitted by the Landowner Intervenors on July 8, 2024 (Docket No. 755).

Dated this 22nd day of July, 2024.

BAKKE GRINOLDS WIEDERHOLT

By: /s/ Randall J. Bakke

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STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

SCS Carbon Transport LLC
Midwest Carbon Express CO2 Pipeline Project
Siting Application

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

AFFIDAVIT OF RANDALL J. BAKKE

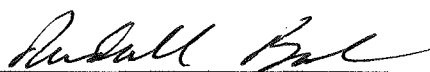
STATE OF NORTH DAKOTA)
) SS.
COUNTY OF BURLEIGH)

Being duly sworn, Randall J. Bakke, testifies:

1. I am an attorney duly licensed to practice law in the State of North Dakota and am admitted to practice before this Court.
2. I am a member of the firm Bakke Grinolds Wiederholt, attorney for Intervenor Burleigh County.
3. This affidavit is submitted in support of *Post-Hearing Reply Brief of Burleigh County* filed herewith.
4. Attached hereto as ***Exhibit A*** is a true and correct copy of the referenced news article entitled "Illinois Legislature puts the brakes on a carbon capture boom" dated June 10, 2024.

Dated this 22nd day of July, 2024.

BAKKE GRINOLDS WIEDERHOLT

By: 
Randall J. Bakke (#03989)
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[illegible]

On this 2nd day of July, 2024 before me personally appeared Randall J. Bakke, known to me to be the person described in the within and foregoing instrument, and acknowledged to me that he executed the same.

SARAH MARTIN
Notary Public
State of North Dakota
My Commission Expires October 28, 2025

and foregoing instrument, and acknowledged to me



Notary Public

Illinois Legislature puts the brakes on a carbon capture boom

A two-year moratorium on pipelines would be a first in the Midwest. Already, more than 20 capture wells have been proposed.

By Juanpablo Ramirez-Franco | Jun 10, 2024, 6:00am CDT

This coverage is made possible through a partnership between WBEZ and Grist, a nonprofit, independent media organization dedicated to telling stories of climate solutions and a just future. Sign up for WBEZ newsletters to get local news you can trust.

The Midwest's largest potential reservoir to store carbon is buried deep under the farmland of Illinois and the state's lawmakers just hit the brakes on any plans for a carbon capture and storage boom there.

Exhibit A

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

SCS Carbon Transport LLC
Midwest Carbon Express CO2 Pipeline Project
Siting Application

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

CERTIFICATE OF SERVICE

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

1. *Filing Letter to Steve Kahl from Randall Bakke dated July 22, 2024;*
2. *Post-Hearing Reply Brief of Burleigh County; and*
3. *Affidavit of Randall J. Bakke (with Exhibit A).*

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

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Dated this 22nd day of July, 2024.

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