

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

CIVIL NO. 08-2024-CV-03614

Burleigh County,

Appellant,

vs.

North Dakota Public Service Commission
and SCS Carbon Transport LLC,

Appellees.

**NOTICE OF APPEAL AND
SPECIFICATIONS OF ERROR**

**TO: NORTH DAKOTA PUBLIC SERVICE COMMISSION, NORTH DAKOTA
ATTORNEY GENERAL DREW WRIGLEY, AND SCS CARBON TRANSPORT
LLC**

[¶1] PLEASE TAKE NOTICE that Appellant Burleigh County, pursuant to N.D.C.C. § 28-32-42, hereby gives notice of its appeal from the November 15, 2024 *Findings of Fact, Conclusions of Law, and Order* (PSC Docket No. 778) (“Challenged Order”), issued by the North Dakota Public Service Commission (“PSC”) in Case No. Case No. PU-22-391.

[¶2] On October 17, 2022, SCS Carbon Transport LLC (“Summit”) filed with the PSC a *Consolidated Application for a Certificate of Corridor Compatibility and Route Permit* and *Application for Waiver or Reduction of Procedures and Time Schedules* (PSC Docket No. 1).

[¶3] The PSC issued *Findings of Fact, Conclusions of Law, and Order* on August 4, 2023, denying Summit’s application for waiver of procedural and time schedules, certificate of corridor compatibility, and route permit (PSC Docket No. 366).

[¶4] On August 18, 2023, Summit filed a *Petition for Reconsideration, Notice of Route Adjustment and Request for Limited Rehearing* (PSC Docket No. 371). The PSC granted Summit’s

petition on September 15, 2023, granting reconsideration and a rehearing (PSC Docket No. 396).

[¶5] Summit moved on June 1, 2023 for an order declaring Burleigh and Emmons County ordinances to be superseded and preempted by N.D.C.C. § 49-22.1-13 (PSC Docket No. 282), and renewed its motion on September 29, 2023 (PSC Docket No. 401).

[¶6] Burleigh County filed a *Petition to Intervene* (PSC Docket No. 361) on July 31, 2023 and a second *Petition to Intervene* (PSC Docket No. 378) on August 30, 2023, which were granted by the PSC on September 5, 2023 (PSC Docket No. 384).

[¶7] Burleigh County opposed Summit's motion to declare Burleigh and Emmons County ordinances to be superseded and preempted, both in briefing and at the December 21, 2023 hearing before the PSC (PSC Docket No. 427). The PSC issued an interlocutory order on February 7, 2024, finding that N.D.C.C. § 49-22.1-13 automatically supersedes and preempts any local land use or zoning regulations for a gas or liquid transmission facility route permit (PSC Docket No. 440). The PSC made no factual findings in its order (PSC Docket No. 440).

[¶8] On August 4, 2023, the PSC issued an order protecting from public disclosure information relating to Summit's dispersion/plume model in the event of a release of carbon dioxide from the pipeline (PSC Docket No. 364), denying the request of the Burleigh County Board of Commissioners that the dispersion/plume model be made available to the public (PSC Docket No. 364).

[¶9] The PSC held various hearings on Summit's rehearing of its petition, including hearings at the State Capital Building in Bismarck, North Dakota, wherein Burleigh County and various other parties including other intervenors appeared through legal counsel, who made arguments and presented witnesses in opposition to Summit's petition.

[¶10] On November 15, 2024, the PSC issued the Challenged Order (PSC Docket No. 778),

concluding again that N.D.C.C. § 49-22.1-13 automatically supersedes and preempts any local land use or zoning regulations for a gas or liquid transmission facility route permit, except for road use agreements, and concluding the ordinances of Burleigh County and Emmons County are unreasonably restrictive on their face under N.D.C.C. § 49-22.1-13(2)(c) and conflict with state law. In the Challenged Order, the PSC also denied a motion for reconsideration of the order protecting from public disclosure the dispersion/plume model. The PSC made various additional findings and conclusions, challenged in this appeal and discussed in the specifications of error below, and granted Summit's application for waiver of procedural and time schedules, certificate of corridor compatibility, and route permit.

[¶11] Venue in this Court is proper pursuant to N.D.C.C. § 28-32-42(3)(a), which provides that the appeal of an agency determination "may be taken to the district court designated by law, and if none is designated, then to the district court of the country in which the hearing or a part thereof was held." No other district court is designated by law for this appeal, and many of the hearings relating to the Challenged Order were held at the State Capital Building in Bismarck, Burleigh County, North Dakota. Therefore, this appeal is appropriately venued in Burleigh County.

Specifications of Error

[¶12] The Challenged Order and proceedings before the PSC were not in accordance with law, Burleigh County has not been afforded a fair hearing, the findings of fact made by the PSC are not supported by a preponderance of the evidence, the conclusions of law and order of the PSC are not supported by its findings of fact, and the findings of fact made by the PSC do not sufficiently address the evidence presented to the PSC, including but not limited to in the following respects:

- a. The PSC erred in finding that Burleigh County ordinances are unreasonably restrictive on their face and preempted by state law. The PSC has incorrectly interpreted North Dakota law and failed to support its conclusions with sufficient findings of fact. Burleigh County has statutory power to regulate property for the purpose of promoting health, morals, public

convenience, general prosperity, and public welfare in accordance with N.D.C.C. Ch. 11-33 and other applicable law, and its ordinances are not superseded or preempted.

- b. The PSC erred by protecting Summit's dispersion/plume model from release to the public. The dispersion/plume model was shared by Summit with some individual members of the public, including Chad Wachter and Ron Ness, but not the public at large. Summit should not be permitted to pick and choose individual members of the public to share the dispersion/plume model with, and deny that information to the public at large. Burleigh County was not given the opportunity to provide lay testimony about the dispersion/plume model, nor to retain an expert to analyze and testify about the plume model. Further, Burleigh County was not given the opportunity to cross-examine Summits' representatives about the details of the dispersion/plume model. Burleigh County was not afforded a fair hearing on this and other issues.
- c. As part of the denial of the application on August 4, 2023 (PSC Docket No. 366), the PSC found that Summit "has not provided sufficient evidence to demonstrate that the location, construction, operation and maintenance of the Project will produce minimum adverse impacts upon the welfare of the citizens of North Dakota with the existing record." Specifically, the PSC referenced needing an analysis of the south Bismarck alternate route. However, in the rehearing proceedings, the southern route encroached on the extraterritorial limits of Bismarck and even went right through numerous existing housing subdivisions. This was not a real or reasonable attempt by Summit to identify a viable southern route.
- d. Similarly, in the rehearing proceedings following the prior denial, Summit ostensibly moved the route further east, however, in reality it did not move in all places and actually moved further west in some locations, closer to Bismarck and other existing rural subdivisions to the east of Bismarck and closer to Silver Ranch. Further, it runs under a rest area on I-94, a location that is nearly always occupied by people.
- e. The PSC erred by refusing to consider public health and welfare, and other relevant considerations, which are not preempted by the Pipeline and Hazardous Materials Safety Administration ("PHMSA").
- f. The PSC issued the Challenged Order without waiting for expected new regulations to be issued by PHMSA.
- g. The Challenged Order references the liability insurance coverage that Summit claims it will maintain, stating, "SCS asserted that it will have not less than \$100 million of liability insurance for the Project and that it will have not less than an additional \$25 million of

general liability insurance for the North Dakota portion of the Project.” However, the PSC failed to consider that CO2, as a pollutant, is not covered by insurance in the event of an unexpected release caused by anyone other than Summit. Summit has also not provided an agreement for the landowners naming them as additional insureds under Summit’s insurance policy and agreeing to defend and indemnify the landowners.

h. Other issues identified upon review of the record and hearing transcript once prepared.

[¶13] WHEREFORE, Burleigh County respectfully requests the Court enter an order reversing the Challenged Order and remanding to the PSC for disposition in accordance with the order of the Court, awarding costs and attorneys’ fees to Burleigh County pursuant to N.D.C.C. § 28-32-50 and other applicable law, and granting such other relief as the Court may deem just and proper.

Dated this 12th day of December, 2024.

BAKKE GRINOLDS WIEDERHOLT

By: /s/ Randall J. Bakke

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