

STATE OF NORTH DAKOTA

DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

APH FARMS, ARDEN HAGEROTT,
JONATHAN HAGEROTT, JANEL
OLSON, VALERA HAYEN, KARI
CURRAN, SCOTT IRMEN, MARY JO
IRMEN, LEON MALLBERG, STAROBA
REVOCABLE LIVING TRUST, LOREN
STAROBA, DIANE STAROBA, JAMES
TIEGS,

Appellants,

v.

NORTH DAKOTA PUBLIC SERVICE
COMMISSION, SCS CARBON
TRANSPORT, LLC, JOHN H. WARFORD,
JR. REVOCABLE TRUST, CHAD
WACHTER, CHAD MOLDENHAUER,
CITY OF BISMARCK, LABORERS
DISTRICT COUNCIL OF MINNESOTA
AND NORTH DAKOTA, EMMONS
COUNTY, and BURLEIGH COUNTY,

Appellees.

**NOTICE OF APPEAL AND
SPECIFICATIONS OF ERROR**

Case No. 08-2024-CV-03622

PLEASE TAKE NOTICE Appellants APH Farms, Arden Hagerott, Jonathan Hagerott, Janel Olson, Valera Hayen, Kari Curran, Scott Irmen, Mary Jo Irmen, Leon Mallberg, Staroba Revocable Living Trust, Loren Staroba, Diane Staroba, James Tiegs, by and through their attorneys of record KNOLL LEIBEL LLP (Steven J. Leibel, David M. Knoll) and DOMINA LAW GROUP (Brian Jorde), and respectfully

submits this Notice of Appeal and Specifications of Error. In support of this Notice, Appellants respectfully state:

1. Appellants hereby provides notice of appeal from the November 15, 2024 Findings of Fact, Conclusions of Law, and Order by the North Dakota Public Service Commission (the “PSC”) [PSC Doc. No. 778], the February 7, 2024 Order [PSC Doc. No. 440], and the August 4, 2023 Order on Protection of Information [PSC Doc. No. 364]. Copies of these filings are attached as Ex. 1, 2, and 3, respectively. Appellants understand that Emmons County previously appealed, *see Emmons Co. v. N.D. Public Serv. Comm’n*, Case No. 08-2024-CV-00624, and that Burleigh County has also filed a notice of appeal [PSC Doc. No. 786].

2. In the challenged February 7, 2024 Order, the PSC determined 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 Doc. No. 440] In the challenged November 15, 2024 Findings of Fact, Conclusions of Law, and Order [PSC Doc. 778], the PSC additionally determined that because the Emmons County and Burleigh County ordinances require a setback that may exceed N.D.C.C. § 49-22.1-03, the ordinances are unreasonably restrictive because they conflict with state law.

3. The PSC’s decision on this issue is error for a number of reasons. [PSC Doc. No. 455] First, the PSC’s interpretation of N.D.C.C. § 49-22.1-13 is not consistent with either the plain language of the statute or the legislative history and unlawfully diminishes local control. Appellants previously raised this issue with the

PSC and opposed preemption. *See, e.g.* [PSC Doc. Nos. 345, 408, 448 (appellants' joinder in Burleigh County's reconsideration), 455 (appellants' response in support of reconsideration stating that appellants will appeal this issue making these same arguments)]. Second, the PSC's recent interpretation of N.D.C.C. § 49-22.1-03 concludes that N.D.C.C. § 49-22.1-03 prohibits any setbacks greater than 500 feet. This is not what the statute says.

4. In addition, the PSC's finding that the setbacks of Emmons County and Burleigh County are "unreasonably restrictive" is arbitrary and capricious. As a beginning point, the PSC based this finding upon its incorrect interpretation of N.D.C.C. § 49-22.1-03. *See* [PSC Doc. No. 778] However, even if this Court would *sua sponte* consider the record, with a few notable exceptions¹, the only people who have seen the SCS Carbon Transport LLC ("Summit") secret plume study that could shed light upon a safe setback distance were Summit, who proposed the project, and the PSC, who approved the project. Appellants and the public have never seen the plume study, never tested the conclusions of the plume study, and never questioned SCS about the plume study because it was kept hidden. *See, e.g.*, [PSC Doc. Nos. 364]; *see also* Ex. 1 (denying reconsideration). As a result, families who live near the pipeline and communities such as Bismarck with thousands of residents within a few miles of the pipeline do not know the safety risk is presented by this pipeline. For the PSC to decide this critical issue based upon secret information is capricious.

¹ As reflected in the record, SCS also shared its secret with third parties it deemed sufficiently important.


5. Finally, the PSC's decision to keep the plume modeling secret deprived Appellants of their statutory right to confront the evidence provided by Summit to the PSC in support of Summit's Application [PSC Doc. No. 203 (appellants' objection to Summit's motion to keep the plume study secret)]. The plume study is relevant not only on issues of preemption, but also on those other issues pertaining to the PSC's statutory obligation to consider those factors listed in N.D.C.C. § 49-22.1-09, including:

1. Available research and investigations relating to the effects of the location, construction, and operation of the proposed facility on public health and welfare, natural resources, and the environment.
2. The effects of new gas or liquid energy conversion and gas or liquid transmission technologies and systems designed to minimize adverse environmental effects.
3. The potential for beneficial uses of waste energy from a proposed gas or liquid energy conversion facility.
4. Adverse direct and indirect environmental effects that cannot be avoided should the proposed site or route be designated.
5. Alternatives to the proposed site, corridor, or route that are developed during the hearing process and which minimize adverse effects.
6. Irreversible and irretrievable commitments of natural resources should the proposed site, corridor, or route be designated.
7. The direct and indirect economic impacts of the proposed facility.
8. Existing plans of the state, local government, and private entities for other developments at or in the vicinity of the proposed site, corridor, or route.
9. The effect of the proposed site or route on existing scenic areas, historic sites and structures, and paleontological or archaeological sites.
10. The effect of the proposed site or route on areas that are unique because of biological wealth or because the site or route is a habitat for rare and endangered species.
11. Problems raised by federal agencies, other state agencies, and local entities.

See also N.D.A.C. § 69-06-08-02. As such, excluding landowners and the public from accessing critical evidence shared between Summit and the PSC (and some select businesspeople chosen by Summit), should be reversible error.

WHEREFORE, Appellant respectfully requests that this Court enter an order reversing the orders issued by the PSC and remanding to the PSC for further proceedings consistent with the Court's order, awarding costs and attorneys' fees to Appellant pursuant to N.D.C.C. § 28-32-50, and for such other and further relief deemed just and proper under the circumstances.

Dated this 13th day of December, 2024.



Steven Leibel (ID 07361)
David Knoll (ID 06167)
Knoll Leibel LLP
P.O. Box 858
1915 N. Kavaney Drive, Ste. 3
Bismarck, ND 58501
Ph: (701) 255-2010
steve@bismarck-attorneys.com
david@bismarck-attorneys.com

Landowner/Intervenor Lawyers

Brian E. Jorde
Pro Hac Vice to be filed
Domina Law Group
2425 S. 144th St.
Omaha, NE 68144
Ph: 402-493-4100
bjorde@dominalaw.com
NDCO2@dominalaw.com

Landowner/Intervenor Lawyers