

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

08-2024-CV-03622

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

Case No. PU-22-391

ORDER ON PROTECTION OF INFORMATION

August 4, 2023

Preliminary Statement

On April 21, 2023, SCS Carbon Transport LLC (SCS) filed an Application for Protection of Information to protect certain information in the captioned case.

On May 1, 2023, John H. Warford Jr. (Warford) filed an objection to the Application for Protection of Information, and also a Request for Hearing. Counsel for Knoll and Leibel filed a Joinder Objection on behalf of the Intervenors represented by their law firm.

On May 5, 2023, SCS filed a response to Intervenors' Objections and Request for Hearing.

On May 12, 2023, a Response to Application of SCS Carbon Transport LLC to Protect information was filed by Advisory Counsel for the North Dakota Public Service Commission (PSC).

On June 6, 2023, a Notice of Hearing was Issued for June 27, 2023.

On June 27, 2023, a hearing was held in the Pioneer Room at the State Capitol.

Findings of Fact

1. The information for which SCS seeks protection is related to dispersion modeling in the event of a release of carbon dioxide from the pipeline (Dispersion Model). In its application, SCS discusses that the information was related to the preparation of an emergency response plan and integrity management plan in accordance with Pipeline and Hazardous Materials Safety Administration (PHMSA). Given the sensitive nature of the information, SCS stated that it will request that PHMSA protect these materials from public release and is requesting the Public Service Commission protect the information from public disclosure pursuant to North Dakota Century Code (NDCC) Section 44-04-24 as a security system plan of critical infrastructure.

2. During the hearing, SCS provided an explanation of vapor dispersion modeling and requirements of PHMSA for integrity management plans and risk assessments in reference to PHMSA guidance and enforcement. SCS argued that under state and

federal laws, the information should be protected. It argued that PHMSA has previously determined similar information such as spill modeling information should be protected to prevent its use by bad actors. SCS has also stated that this determination has been affirmed by the courts. SCS provided examples demonstrating that the risk of the use of this information by bad actors is not hypothetical.

3. Counsel for the Intervenors both acknowledged that some information likely should be subject to protection but argued that all information being protected cannot be correct. Counsel argued that the information should be publicly available to permit the public and businesses to provide their own risk assessment based on the data. They also argued that this information should be available to emergency personnel for the purpose of emergency planning and training. Mr. Bakke argued that the intervenors and PSC had not had the opportunity to scrutinize the information. Both intervenors disputed the federal protection cited as it relates to the information (See 49 CFR Part 1520). They also provided that the past-sited projects provided similar information without protection.

4. The purpose of the hearing was to determine whether the application to protect the information from public disclosure should be granted. A security system plan for critical infrastructure may be exempt from public disclosure.

5. A security system plan is defined broadly and includes: Records, photographs, schematic diagrams, surveys, recommendations, communications, or consultations relating directly to the physical or electronic security of the critical infrastructure. It also includes vulnerability and capability assessments, threat response plans, and emergency evacuation plans. See NDCC Section 44-04-24(2)(b). Security plans according to SCS include "records, information, photographs, audio and visual presentations, schematic Diagrams, surveys, recommendations, communications or consultations" relating to critical infrastructure. NDCC Section 44-04-24(2)(a) defines critical infrastructure as:

[P]ublic buildings, systems, including telecommunication centers and computers, power generation plants, dams, bridges, and similar key resources, and systems related to utility services, fuel supply, energy, hazardous liquid, natural gas, or coal, whether physical or virtual, so vital to the state that the incapacity or destruction of these systems would have a debilitating impact on security, state economic security, state public health or safety, or any combination of those matters.

6. Refrigerated CO<sub>2</sub> is defined by PHMSA as a hazardous material in the Hazardous Materials Table. See 49 C.F.R. 172.101. SCS's pipeline is an infrastructure designed to transport Refrigerated CO<sub>2</sub>. The Commission finds that the SCS pipeline meets the definition of critical infrastructure under NDCC Section 44-04-24(2)(a).

7. The disclosure of plume modeling could provide information on where damaging or vandalizing the pipeline by a bad actor would have a debilitating impact on security

and state public health and safety. Prevention of receipt of the information by bad actors necessitates the PSC limiting access to the information.

8. The intervenors argue that they have been unable to scrutinize the information due to an inability to access the information. They further argue that emergency personnel must have access to the information for planning purposes and organizing response plans. If SCS does not provide the information to the entities or the intervenors, per North Dakota Administrative Code (NDAC) Section 69-02-09-07(2) the Commission may authorize receipt of the protected information upon a showing of good cause for why the information is needed and require the execution of a protection agreement.

9. The Commission finds the argument that entities previously filed similar information, including plume studies, without requesting protection unpersuasive. The PSC acknowledges that there has been growing vigilance for the protection of data and information related to the operations and locations of critical infrastructure. This is reflected in the legislative history from the 66<sup>th</sup> Legislative Assembly, SB 2209 broadening the language of NDCC Section 44-04-24.

10. The confidentiality of this information has been maintained by SCS. No party has demonstrated that the information has been disclosed to the public or to persons other than employees or authorized agents who need to know the information to fulfill their responsibilities in connection with the subject matter of the information.

11. NDAC Section 69-02-09-03 provides "the commission staff shall examine the information and application, and file and serve a response that includes a recommendation on whether the information qualifies for protection." Staff response provided its opinion that the application satisfies the requirements of the law.

From the foregoing Findings of Fact, the Commission makes the following:

#### **Conclusions of Law**

12. The Commission concludes that the information is a security system plan for critical infrastructure that may be exempt from public disclosure.

13. The Commission concludes that SCS's application satisfies the requirements of the North Dakota Century Code for protection of information.

From the foregoing Findings of Fact and Conclusions of Law, the Commission makes the following:


**Order**

The Commission orders the April 21, 2023, application of SCS Carbon Transport LLC for protection of information is GRANTED.

**PUBLIC SERVICE COMMISSION**

  
Sheri Haugen-Hoffart  
Commissioner

  
Randy Christmann  
Chair

  
Timothy J. Dawson  
Substitute decisionmaker