

**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
OAH FILE NO. 20230002

**PETITION FOR RECONSIDERATION, NOTICE OF ROUTE ADJUSTMENT AND
REQUEST FOR LIMITED REHEARING**

SCS Carbon Transport LLC (“Summit”), by and through its undersigned counsel, hereby submits to the North Dakota Public Service Commission (the “Commission”) this Petition for Reconsideration, Notice of Route Adjustment and Request for Limited Rehearing in response to the Findings of Fact, Conclusions of Law and Order entered in the above-referenced matter on August 4, 2023 (the “Order”).

It is evident that certain concerns raised in the Order are related, directly or indirectly, to the proposed route of Summit’s carbon dioxide pipeline project (“Project”) in Burleigh County, North Dakota. As further detailed herein, Summit has identified an alternative route along the areas to the east and north of the city of Bismarck that avoids existing and planned housing developments. The proposed alternative route is located in an area where proximity to Bismarck’s northern extraterritorial area boundary is approximately 5 miles at its nearest point. *See **Figure 1***, below.

In addition to the concerns related to the proposed route of the Project as presented in the hearings, the Order identifies issues which pertain to information (i) the Commission deems

necessary that is already in the record and/or which can be presented at an additional one-day rehearing, or (ii) that was submitted by Summit in written form at the request of the Administrative Law Judge, but because of time constraints, neither the Commission nor the Intervenors (as defined below) had an opportunity to question a witness in connection therewith.

Accordingly, Summit is requesting that the Commission: (i) consider the evidence set forth in this petition, including, without limitation, the proposed route adjustments, (ii) set a one-day rehearing for the limited purpose of presenting witness testimony in support of this petition and an amended Order, and (iii) amend the Order with findings of fact and conclusions of law consistent with the evidence set forth in this petition, the evidence already part of the record, and any evidence submitted at the rehearing, and (iv) amend the Order granting Summit its request for a certificate of corridor compatibility and route permit for the Project. Summit will confirm with the Commission and Commission staff the location of all route adjustments (including the alternative route to the east and north of Bismarck) prior to the issuance of the notice of rehearing so that an accurate map thereof may be included within said notice.

I. BACKGROUND

On October 17, 2022, Summit filed its Consolidated Application for a Certificate of Corridor Compatibility and Route Permit (“Application”) for the Project. *See* Docket No. 1. On February 1, 2023, the Commission deemed Summit’s Application complete and filed a Notice of Filings and Public Hearings in the above-captioned matter (the “First Notice”). *See* Docket No. 35. The Commission set forth the issues to be considered on Summit’s Application in its First Notice. *See* Docket No. 35. Specifically, the issues to be considered in the Application are:

1. Will construction, operation, and maintenance of [the Project] at the proposed location produce minimal adverse effects on the environment and upon the welfare of the citizens of North Dakota?

2. Is [the Project] compatible with environmental preservation and the efficient use of resources?
3. Will construction, operation, and maintenance of [the Project] at the proposed location minimize adverse human and environmental impact while ensuring continuing system reliability and integrity and ensuring that energy needs are met and fulfilled in an orderly and timely fashion?

Id. On March 30, 2023, the Commission issued a second Notice of Public Hearings, scheduling an additional hearing for June 2, 2023 (the “Second Notice,” and collectively with the First Notice, the “Notice”). *See* Docket No. 162. The Second Notice sets forth the same issues to be considered in the Application as the Notice.

The hearings set forth in the Notice were conducted as scheduled. Summit, the Bismarck Area Intervenors¹ and the Landowner Intervenors² (collectively, the “Intervenors”) each filed post hearing briefs on July 17, 2023 (Landowner Intervenors) and July 19, 2023 (Summit and Bismarck Area Intervenors). *See* Docket Nos. 356, 357 and 358. On August 4, 2023, the Commission issued its Order denying Summit’s Application. The Order sets forth certain matters upon which the Commission made a finding that Summit did not meet its burden of proof with respect to the issues to be considered in the Notice. Specifically, the Commission found that:

1. The cultural resource impacts have not been appropriately addressed because the State Historic Preservation Office (“SHPO”) of the State Historical Society of North Dakota advised that the Class III cultural resources inventory report did not meet SHPO’s standards and Summit did not submit a revised report to SHPO or address the

¹ Intervenors represented by Mr. Randall Bakke.

² Intervenors represented by Mr. Brian Jorde, Steven Leibel and David Knoll.

SHPO's concerns during the proceedings. *See* Order, Findings of Fact ¶ 11.

2. The effects of the Project 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.
3. The impacts on Game Management Areas in North Dakota are not at an acceptable minimum. *Id.*, at ¶ 27.
4. 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.
5. The Project's 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.
6. 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:
 - a. rerouting of the Project on Vculek's, Doolittle's, Barnhardt's [sic], and Dotzenrod's properties;
 - b. confirmation on the number of 500-foot setback waivers required and obtained;

- c. plume modeling;³
- d. follow up with the NDGS;
- e. BNI coal permit status;
- f. SHPO concurrence status; and
- g. an analysis of an alternative route south of the city of Bismarck.

Id., at ¶ 42.

In addition to the foregoing, Summit has expressed a willingness to narrow the width of its requested corridor from three hundred (300) feet to two hundred (200) feet if the Commission preferred.⁴ *Id.*, at ¶ 40. Based on the foregoing, and the concerns raised by the Intervenors and members of the public throughout the course of the hearings in this case, Summit respectfully submits this petition in support of Summit's request for an amended Order.

II. STANDARD OF REVIEW AND ANALYSIS.

This petition is allowed under the Commission's rules (N.D.A.C. § 69-02-06-02) and the Administrative Agencies Practice Act (N.D.C.C. § 28-32-40). Summit's request for a rehearing is allowed under the Siting Act (N.D.C.C. § 49-22.1-18), Commission's rules (N.D.A.C. § 69-02-06-02) and the Administrative Agencies Practice Act (N.D.C.C. § 28-32-40).

The Siting Act (N.D.C.C. § 49-22.1-01, et seq.) provides that "[a]ny party aggrieved by the ... promulgation of a final order by the commission, may request a rehearing by the commission,"

³ At the special meeting of the Commission on August 4, 2023, the Order was amended to remove the words "plume modeling" from paragraph 42 of the Findings of Fact, however, the Order was issued without said amendment.

⁴ For the avoidance of doubt, Summit first indicated that it would not be opposed to narrowing the corridor from 300 feet to 200 feet to at the March 14, 2023 hearing in Bismarck, North Dakota. *See* Docket No. 78 (Testimony of James Powell in response to question posed by Commissioner Christmann).

and that “[t]he hearing must be conducted pursuant to chapter 28-32.” N.D.C.C. § 49-22.1-18 (emphasis added).

The Administrative Agencies Practice Act (N.D.C.C. § 28-32-01, et seq.), provides that “[a]ny party ... who is aggrieved by the final order of [an] agency, ... may file a petition for reconsideration with the agency.” N.D.C.C. § 28-32-40(1). The petition must include “a statement of the specific grounds upon which relief is requested or a statement of any further showing to be made in the proceeding.” N.D.C.C. § 28-32-40(2), *see also* N.D.A.C. § 69-02-06-02(2). “The petition must also state if a rehearing or oral argument is requested.” N.D.A.C. § 69-02-06-02(3).

The Commission “may grant the petition on such terms as it may prescribe.” N.D.C.C. § 28-32-40(4) (emphasis added). If the Commission grants this petition, this petition and the testimony provided at the limited rehearing shall be considered a part of the record in this proceeding. N.D.C.C. § 28-32-40(3). The Commission may “dissolve or amend the final order and set the matter for further hearing” and may “limit the hearing as appropriate” N.D.C.C. § 28-32-40(4). “Any rehearing must be presided over by the same person or persons presiding previously at the hearing, if available.” *Id.* “Any amended findings, conclusions, and orders must be issued by the same person or persons who issued the previous recommended or final orders, if available.” *Id.*

Both the Administrative Agencies Practice Act and Commission’s rules require a petition for reconsideration to be filed within fifteen days after notice of the decision has been given. *See* N.D.C.C. § 28-32-40(1), *see also* N.D.A.C. § 69-02-06-02(1). The petition must be served by the petitioner upon all parties.” N.D.A.C. § 69-02-06-02(3). Any party to the proceeding may file a response “[w]ithin ten days after the service of the petition.” N.D.A.C. § 69-02-06-02(4). A

party's failure to file such a response "is a waiver of any objection to the granting of the petition."

Id.

The Commission's Order is a final order under the Administrative Agencies Practice Act. See N.D.C.C. § 28-32-01(2) and (8). Summit, being a party to the above-captioned matter and aggrieved by the Order of the Commission, is allowed to file this petition and request for a limited hearing in accordance with the Commission's rules, the Administrative Agencies Practice Act and the Siting Act. With this petition and the testimony to be provided at a limited rehearing, Summit intends to make a further showing that it has met its burden by meeting the requirements under the Siting Act and the rules and regulations of the Commission. Summit's request for relief is set forth in the conclusion of this petition.

III. ROUTE ADJUSTMENTS.

A. Burleigh County Route Adjustments.

In response to the concerns raised by the Commission, Intervenors and the public during the hearings in this case, Summit proposes to adjust the route of the Project in the areas immediately to the east and north of Bismarck as set forth in **Figure 1**, below.

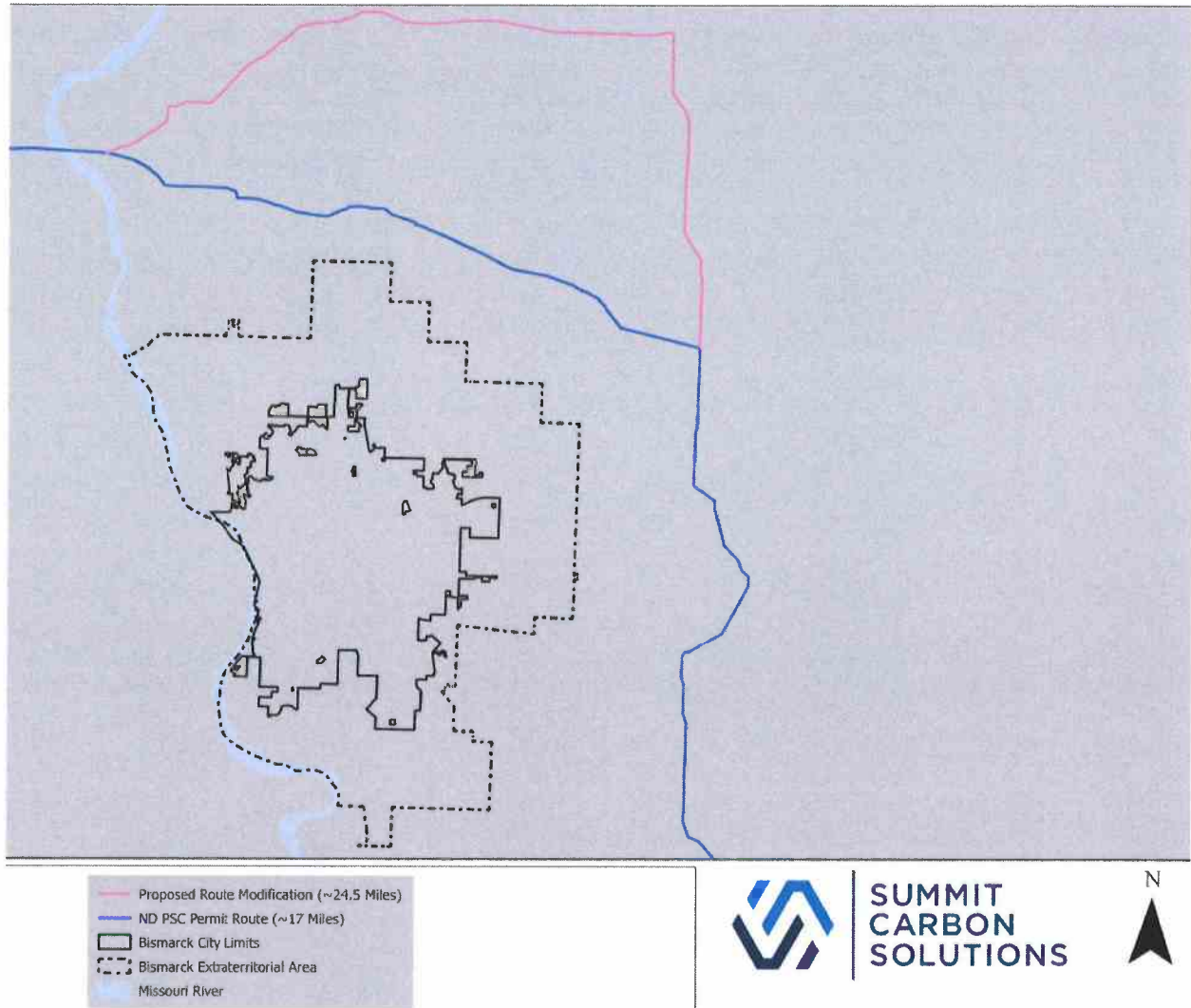


Figure 1.

The original route, at the nearest points, was located approximately 4.5 miles north of the city limits of Bismarck and approximately 2 miles north of Bismarck’s extraterritorial area boundary. As depicted in **Figure 1**, the adjusted route, at the nearest points, is now located approximately 9 miles north of the city limits of Bismarck and approximately 5 miles north of Bismarck’s extraterritorial area boundary. The adjusted route is not located in the vicinity of existing or known planned developments. Further, as discussed below, the corridor depicted on **Exhibit A** has been reduced from 300-foot-wide to 200-foot-wide, centered on the Project route. The map book attached as **Exhibit A** is

intended to amend and replace Appendix 1 (ND PSC Aerial Map Book) of Summit's Application. Finally, as indicated above, Summit will confirm with the Commission and Commission staff the location of the alternative route depicted in **Figure 1** prior to the issuance of the notice of rehearing so that an accurate map thereof may be included within said notice.

B. Landowner Route Adjustments.

In response to the concerns raised by certain Landowner Intervenors and certain non-intervening landowners who offered testimony at the hearings in this case, Summit has adjusted the route such that it no longer crosses any property owned by the Doolittles, Bernhardtts, or Dotzenrods. *See* **Exhibit B**. Summit also adjusted the route around one of the two tracts owned by the Vculeks. *Id.* Summit remains engaged in discussions with the Vculeks regarding the second tract and believes it will have an agreement with the Vculeks prior to the rehearing. In addition to these specific reroutes, Summit has, to date, implemented an additional 570 minor reroutes which were predominantly made to accommodate landowner preferences and to avoid restrictive features discovered during survey activity.

C. Game Management Route Adjustments.

The Order provides that "Game Management Areas are designated avoidance areas under NDAC Section 69-06-08-02(2)(b)," and then proceeds to identify six (6) waterfowl production areas located in Richland, Sargent, Dickey, McIntosh, Emmons and Burleigh Counties, North Dakota. *See* Order, Findings of Fact ¶ 27. However, N.D.A.C. § 69-06-08-02(2)(b) pertains to designated or registered **state** game management areas. As set forth in Section 8.2.2 of Summit's Application, "no designated or registered **state** . . . game

refuges, game management areas, management areas, . . . were identified.” (emphasis added).

It is possible that the Commission intended to cite to N.D.A.C. § 69-06-08-02(2)(a) pertaining to designated or registered **national** wildlife areas or wildlife refuges. Even assuming this was the Commission’s intent, Section 8.2.1 of Summit’s Application specifically provides that “[n]o federal wildlife refuges will be crossed by the Project route centerline.” However, Summit, intending to disclose as much information as possible to the Commission and in line with past practices, then goes on to identify six (6) “waterfowl production areas” which are located within the originally proposed 300-foot survey corridor. These waterfowl production areas are not national wildlife areas or wildlife refuges designated as avoidance areas under N.D.A.C. § 69-06-08-02(2)(a). Rather, the six waterfowl production areas identified in Section 8.2.1 and Table 8.2.1 of the Application are federal easements between the United States Fish and Wildlife Service (“USFWS”) and private landowners which are in place to protect wetlands for wildlife use. These areas are not wildlife refuge areas owned in fee by the United States of America. Summit specifically addressed these areas with the USFWS and the USFWS agreed that if the Project route avoided the wetland features on the easements, the Project would not impact the purpose and intent of the easements.

Notwithstanding the foregoing, Summit will avoid all six “waterfowl production areas” identified in Section 8.2.1 and Table 8.2.1 of the Application and all other game management areas along the Project route by utilizing horizontal direction drilling (“HDD”) methods or by adjusting the route near these areas. *See **Exhibit A***.

Mr. Jon Schmidt will be available to provide testimony regarding this issue during the limited rehearing.

D. Certifications, Studies, Surveys and Landowners.

In connection with the aforementioned route adjustments, Summit agrees to comply with the Commission's certification requirements set forth in N.D.C.C. § 49-22.1-15 (Route adjustment before or during construction for gas or liquid transmission line) and understands that, in some situations, additional notice and opportunity for hearing may be required in connection therewith. The determination on what type of certification is required will be based upon a 200-foot-wide corridor generally centered on the adjusted route. Furthermore, Summit will, to the extent not already completed, use its best efforts to expeditiously conduct and complete environmental and cultural resource studies and surveys along the adjusted route. All environmental and cultural resource reports prepared in connection with said studies and surveys will be filed with the Commission. As discussed below, Summit will submit all cultural resource reports concerning the route, as adjusted, to SHPO and is committed to working with SHPO through this process. Finally, Summit is committed to working with the landowners located along the adjusted route in an effort to inform each of them about the Project and to reach voluntary easement agreements.

Mr. James Powell will be available to provide testimony regarding the route adjustments at the limited rehearing.

IV. WIDTH OF CORRIDOR AND ROUTE DEVIATION BUFFER.

As set forth above, Summit has already indicated its willingness to reduce its proposed corridor from 300-feet-wide to 200-feet-wide. Accordingly, Summit hereby confirms that it is

agreeable to a 200-foot-wide corridor generally centered on the Project route as depicted on Exhibit A attached hereto, except in the select areas identified on Exhibit A where additional temporary workspace is required outside of said 200-foot corridor. All environmental and cultural resource field surveys not yet completed will be conducted across a generally 200-foot-wide area centered on the Project route as depicted on Exhibit A attached hereto. In its Application (Section 2.2.10), Summit also requested a route deviation buffer of up to 150 feet directly adjacent to each side of the proposed route in order to provide flexibility during construction to accommodate landowner requests and environmental and culturally sensitive areas. Taking into consideration a 200-foot-wide corridor, Summit is agreeable to, and the amended Order may provide for, a route deviation buffer of up to 100 feet directly adjacent to each side of the proposed route as depicted on Exhibit A attached hereto, or such other buffer width as determined by the Commission.

Mr. James Powell will be available to testify on this issue at the limited rehearing.

V. SOUTHERN ROUTE ANALYSIS.

Based on the foregoing route adjustments, Summit believes that additional information pertaining to a potential route to the south of Bismarck is unnecessary and moot. However, if the Commission desires additional information concerning the issues presented by a southern route, Summit is prepared to tender a witness at the limited rehearing.

VI. AREAS OF GEOLOGIC INSTABILITY AND NDGS.

In its March 3, 2023 letter to the Commission, the North Dakota Department of Mineral Resources, Geological Survey (NDGS), identified fourteen (14) “possible landslide pipeline route intercepts and three nearby landslides,” and recommended that “each of these 17 localities should be evaluated to determine whether or not they pose a potential future risk to the pipeline.” *See* Docket No. 64. On March 28, 2023, representatives of Summit met with the NDGS to discuss the

Project and the issues raised by the NDGS in its March 3, 2023 letter. *See* Docket No. 165. This meeting was memorialized in a letter from Summit to the NDGS dated March 31, 2023 and filed with the Commission on April 3, 2023. *Id.* It is Summit's understanding that the NDGS did not require any additional follow up subsequent to the March 28, 2023 meeting, however, Summit took immediate steps to conduct the evaluation recommended by the NDGS in its March 3, 2023 letter.

After meeting with the NDGS and confirming the areas of potential geologic instability along the proposed route, Summit retained Geosyntec Consultants ("Geosyntec") to conduct non-invasive ground reconnaissance at the possible landslide sites, otherwise known as a Phase II Landslide Assessment. Geosyntec recently completed its evaluation of the 17 sites identified by the NDGS and the results are set forth in the Phase II Landslide Assessment are attached hereto as **Exhibit C**. To summarize, Summit provided Geosyntec with the locations of the 17 mapped landslides identified by the NDGS. *See* **Exhibit C**. Upon review, Geosyntec determined that 6 of the 17 sites were located sufficiently far (360 to greater than 1,400 feet) from the proposed centerline of the Project route. *Id.* The remaining 11 sites were either crossed by or located within 100 feet of the proposed centerline and were thus included in the Phase II Landslide Assessment. *Id.* In addition to the sites identified by the NDGS, Terracon Consultants, Inc. ("Terracon") identified 6 areas of possible landslide disturbance along the proposed route. *Id.* One of the sites identified by Terracon coincided with a landslide site identified by the NDGS. *Id.* Therefore, 16 total locations were selected by Geosyntec for the Phase II Landslide Assessment. *Id.*

Upon further on-site evaluation, Geosyntec determined that 8 of the 16 possible landslide sites did not exhibit sufficient evidence of landslide morphology. *Id.* The remaining 8 sites exhibited features that appeared consistent with landslide morphology ranging from inactive

(greater than 10 years) to dormant (greater than 100 years). *Id.* Ultimately, the Phase II Landslide Assessment finds that the potential for existing landslides to affect Summit's proposed pipeline is low and recommends that Summit follow best management practices (BMPs) when crossing slopes and drainage areas.

In conjunction with the Phase II Landslide Assessment, Summit has consulted with geologists and engineers from Terracon and Geosyntec to identify, assess, and mitigate other geologic and hydrotechnical areas of concern along the proposed pipeline. The results of these evaluations are documented in the following reports, each of which will be made available for the Commission's review upon request: (i) Phase I Geological Hazard Assessment Report, (ii) Phase I Hydrotechnical Assessment Report, (iii) Sheyenne River Hydrotechnical Assessment Report, (iv) Missouri River Hydrotechnical Assessment Report, (v) James River Hydrotechnical Assessment Report, and (vi) Bois de Sioux River Hydrotechnical Assessment Report.

Summit is committed to working with the NDGS, Geosyntec and Terracon throughout the entirety of the Project and will submit to the NDGS and the Commission any new information pertaining to areas of geologic instability along the Project route, as adjusted herein.

Mr. James Powell will be available to testify on this issue at the limited rehearing.

VII. CULTURAL RESOURCE SURVEYS AND SHPO.

On October 3, 2022, Summit submitted its Class III Cultural Resources Inventory Report for the Project ("Class III Report") to SHPO. *See Exhibit D*, Affidavit of Jason Zoller ("Zoller Aff.") ¶ 4. By letter dated March 1, 2023, SHPO informed the Commission that it was unable to assess the Project's effect on historic and archaeological sites because Summit's Class III Report did not meet SHPO standards. *Id.* ¶ 5. On March 27, 2023, representatives of Summit and EXP, Summit's environmental and cultural resource consultant, met with SHPO representatives,

including Director Bill Peterson, to discuss the concerns raised by SHPO in its March 1, 2023 letter to the Commission. *Id.* ¶ 6. On May 25, 2023, Summit submitted its revised Class III Report to SHPO for review. *Id.* ¶ 7. SHPO indicated that Summit’s revised Class III Report was a “great improvement” from the original draft. *Id.* ¶ 9. On June 20, 2023, EXP informed Summit that SHPO would like to meet and discuss Summit’s revised Class III Report. *Id.* ¶ 8. On June 23, 2023, representatives of Summit and EXP met with SHPO to discuss certain matters pertaining to Summit’s revised Class III Report. *Id.* ¶ 10. At the June 23, 2023 meeting, Summit was instructed by SHPO to submit a comprehensive, amended Class III Report instead of supplementing its original Class III Report with information obtained subsequent to the submission of the original Class III Report. *Id.* ¶ 11. Subsequent to the June 23, 2023 meeting, Summit and EXP worked diligently to complete the amended Class III Report and said amended report was finalized by EXP on August 7, 2023, three days after the Commission issued its Order denying Summit’s request for a certificate of corridor compatibility and route permit. *Id.* ¶ 12.

In its Order, the Commission states that “SHPO concurrence is commonly required by the Commission for the issuance of a site certificate or route permit.” *See* Order, Findings of Fact ¶ 11 (emphasis added). Although this is true, the Commission has previously issued orders granting corridor certificates and route permits without SHPO concurrence when those orders were conditioned upon the applicant completing Class III Cultural Resource Surveys for un-surveyed areas within a project corridor and further conditioned upon the applicant submitting a concurrence letter from SHPO prior to beginning construction in those areas.⁵ This approach is compatible with the recommendation in the March 1, 2023 letter from SHPO recommending that “no permit

⁵ *See, e.g.*, Findings of Fact, Conclusions of Law and Order issued on May 1, 2019 in Case No. PU-18-399 (orders requiring ONEOK to (i) complete field surveys, (ii) complete Class III Cultural Resource Surveys and submit to SHPO, (iii) file SHPO concurrence with Commission, (iv) obtain remaining easements, (v) reroute if setback waivers cannot be obtained, and (vi) comply with route adjustment filing requirements under the Siting Act).

be issued until the effects of this proposed project on historic and archaeological sites can be considered.” *See* Docket No. 61. This approach is also appropriate because Summit is, and will be, unable to provide SHPO with all of the information it needs to issue a concurrence until such time as Summit is able gain survey access to the remaining tracts along the Project route. Zoller Aff. ¶ 15.

As the Commission may be aware, Summit has been denied survey access to many parcels of land along the Project route, forcing Summit to petition state district courts to grant survey access to said parcels.⁶ *Id.* ¶ 14. On April 20, 2023, Summit received a favorable ruling from the district court, granting Summit the right to survey the parcels of land identified in its petitions.⁷ However, some landowners continue to resist Summit’s efforts to access their property in order to conduct benign surveys, including cultural resource surveys. After Summit is granted access (voluntarily or through the courts) for surveys on the remaining parcels along the route, as adjusted, Summit will complete all remaining surveys and submit a comprehensive, amended Class III Report to SHPO. As of the date of this petition, Summit has conducted surveys on 849 of 929 tracts along the proposed route, as adjusted, or approximately 91% of the tracts. *Id.* ¶ 16.

Accordingly, Summit respectfully requests that the Commission amend its Order granting Summit a corridor certificate and route permit for the Project, but to have construction of the Project conditioned upon completion of Class III cultural resource surveys on un-surveyed areas along the Project route, as adjusted herein, and receipt of SHPO’s concurrence.

Mr. Jason Zoller will be available to testify on this issue at the limited rehearing.

⁶ Summit has filed over 50 separate lawsuits in order to have the court compel certain landowners to recognize Summit’s right to survey their properties pursuant to N.D.C.C. § 32-15-06. *See, e.g., SCS Carbon Transport, LLC v. Malloy*, Case No. 30-2022-CV-00665 (Doc. ID# 216). As of the date this brief was filed, Summit has received favorable rulings in 16 of these lawsuits and has yet to receive an unfavorable ruling in any lawsuit.

⁷ Order, *SCS Carbon Transport, LLC v. Malloy*, Case No. 30-2022-CV-00665 (Doc. ID# 216).

VIII. FUTURE DEVELOPMENT AND PROPERTY VALUES.

Pursuant to § 49-22.1-09(8) of the North Dakota Century Code, the Commission is guided by “[e]xisting plans of the state, local government, and private entities for other developments at or in the vicinity of the proposed site, corridor, or route” when evaluating and designating corridors and routes. The Bismarck Area Intervenors presented testimony concerning the potential negative impacts the Project may have on certain developments located near the vicinity of the proposed route. Summit tendered a report from Boulder Appraisal concluding that market data indicates there is little to no difference in marketability or price of lots encumbered by existing hazardous liquid or natural gas transmission pipeline as compared to lots not encumbered by said pipelines. However, the issues raised by the Bismarck Area Intervenors are moot now that Summit’s new proposed route is not located in the vicinity of any existing or planned developments or subdivisions. See **Figure 1**, above, and **Exhibit A** attached hereto. Specifically, the effects of the Project will be adequately minimized because the adjusted route is not located in the vicinity of any existing or know planned developments.

If the Commission desires additional evidence concerning the development around hazardous liquid or natural gas transmission lines, Summit is prepared to tender a witness at the limited rehearing.

IX. AREAS WITHIN 500 FEET OF AN INHABITED RURAL RESIDENCE.

Areas within five hundred feet of an inhabited rural residence are designated as avoidance areas. See N.D.C.C. § 49-22.1-03. However, the five-hundred-foot setback avoidance area criteria may be waived by the owner of the inhabited rural residence. *Id.* In its Order, the Commission alleges that it did not receive confirmation of the number of 500-foot setback waivers required and obtain. See Order, Findings of Fact ¶ 42.

In relation to the 500-foot setback requirement, Summit has conducted several detailed analyses of the Project route by reviewing aerial photos and identifying all buildings and other structures near or in the vicinity of the pipeline (“Setback Analysis”). In its January 17, 2023 response to requests from Commission staff, Summit’s Setback Analysis originally identified ten (10) residences or businesses located within five hundred feet of the proposed route. *See* Docket No. 28. Summit subsequently testified at the March 14, 2023 hearing that minor re-routes had been made, resulting in only one (1) residence being located within five hundred feet of the Project route and that a waiver had been obtained from the owner of said residence. *See* Docket No. 78. In its May 1, 2023 response to additional requests from the Commission, Summit explained that the five-hundred-foot setback is measured from the centerline of the pipeline to the nearest point on the structure. *See* Docket No. 199 (North Dakota Mahler Structure Report). In its June 1, 2023 response to additional requests from the Commission, Summit confirmed, by conducting another Setback Analysis, that only one (1) five-hundred-foot setback waiver was required on the Project route and that said waiver had been obtained. *See* Docket No. 294.

As of the date of this petition, and taking into consideration the route adjustments described herein, Summit’s Setback Analysis identified only one (1) rural inhabited residence located within five hundred feet of the Project route. This is the same residence for which a waiver has already been obtained. *See* Docket No. 294. A copy of the setback waiver was filed with the Commission on March 28, 2023. *See* Docket No. 85. This residence is not occupied full-time, but is utilized occasionally as a hunting cabin.

Summit further certifies to the Commission, and the amended Order may provide that, Summit will not commence construction on any portion of the Project located within five hundred feet of an inhabited rural residence without first obtaining a waiver as required by N.D.C.C. § 49-

22.1-03, or, if a waiver is not attainable, Summit will adjust the route and submit to the Commission the required certifications under N.D.C.C. § 49-22.1-15.

Mr. James Powell will be available to testify on the issue of setbacks and waivers at the limited rehearing.

X. BNI COAL PERMIT STATUS.

Summit and BNI Coal, Ltd. (“BNI”) have come to an agreement whereby the Project route will cross approximately three thousand (3,000) feet of the E/2NE/4 of Section 9, Township 141 North, Range 83 West, which is currently within BNI’s coal mining permit (BNCR-1101) on land owned by Minnkota Power Cooperative, Inc. As detailed in the letter from BNI attached hereto as **Exhibit E**, the permit area crossed by the Project route is located to the east of the mineable coal and outside of BNI’s disturbance plans associated with the development of the BNCR-1101 mining permit. Furthermore, Summit has received confirmation from Mr. Guy Welch at the Reclamation Division of the North Dakota Public Service Commission that the Office of Surface Mining Reclamation and Enforcement is not involved with third-party entities installing pipelines on lands permitted for surface coal mining activities. See **Exhibit F** attached hereto. As indicated in Mr. Welch’s March 21, 2023 e-mail, it is the mining company’s responsibility to update its permit to show where pipeline easements have been obtained and to take measures to avoid adverse impacts to pipelines. This is consistent with N.D.A.C. § 69-05.2-24-09 of the North Dakota Administrative Code, which provides that:

[a]ll surface mining activities must be conducted in a manner which minimizes damage, destruction, or disruption of services provided by . . . oil, gas, and coal-slurry pipelines . . . which pass over, under, or through the permit area, unless otherwise approved by the owner of those facilities and the commission.

Summit is committed to working with BNI through construction and operation of the Project to ensure surface mining activities do not interfere with or damage the pipeline.

In the event the Commission requires additional information concerning the portion of the Project route on lands subject to BNI's coal mining permit, Summit is prepared to tender witnesses to discuss such information at the limited rehearing.

XI. CONCLUSION.

It is likely that the Intervenors and others opposed to Summit's Project will argue that this petition is not appropriate and that Summit should be required to reapply and proceed through another lengthy, multiple-hearing process. However, this argument is unreasonable under the circumstances. Specifically, the Commission's Order was not a wholesale rejection of Summit's Application. Rather, the Commission issued an order that, in Summit's view, clearly identifies specific areas where Summit failed to meet its burden under the Siting Act and the Commission's siting criteria. It is therefore unnecessary to relitigate an entire application when the Siting Act and the Commission's rules provide a more reasonable alternative, *i.e.*, this petition for reconsideration and a rehearing. Section 69-02-01-10 of the North Dakota Administrative Code provides that the Commission's rules shall be "liberally construed to secure just, speedy, and inexpensive determination of the issues presented." N.D.A.C. § 69-02-01-10. Requiring Summit to reapply when the Commission's rules provide an opportunity for a rehearing runs contrary to this stated objective.

Based on the further showing set forth herein and the evidence to be presented at the limited rehearing, Summit believes that it has met its burden of proof by complying with the statutory requirements of the Siting Act and rules and regulations of the Commission. In doing so, Summit has demonstrated that the policy considerations set forth in the Notice have been satisfied.

Accordingly, Summit respectfully requests that the Commission:

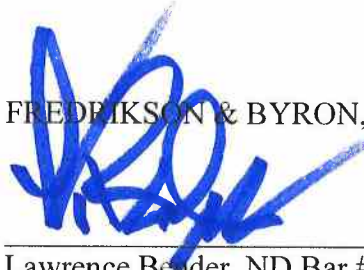
1. Allow this petition to supplement the record before the Commission;

2. Grant Summit's request for a rehearing, limited to the specific issues set forth in this petition;
3. Amend the Order with findings of fact and conclusions of law consistent with the evidence presented herein and at the limited rehearing;
4. Amend the Order granting Summit a certificate of corridor compatibility and route permit for the route set forth on Exhibit A, with construction of the Project conditioned upon:
 - a. Summit completing all field surveys for the un-surveyed areas within the 200-foot-wide Project corridor as identified on Exhibit A;
 - b. Summit completing its Class III cultural resource surveys for un-surveyed areas within the 200-foot-wide Project corridor as identified on Exhibit A;
 - c. Summit submitting its amended cultural resource report to SHPO and filing a copy of SHPO's concurrence with the Commission;
 - d. Rerouting the Project in the areas to the north and east of Bismarck consistent with the route depicted in **Figure 1** and as described herein; and
 - e. Any other reasonable requirements of the Commission which are consistent with the further showing made in this petition;
5. Grant's Summit's Application for Waiver or Reduction of Procedures and Time Schedules;

6. Grant Summit's Motion to Declare Emmons County and Burleigh County Ordinances Superseded and Preempted⁸; and
7. Amend the Order finding the Emmons County and Burleigh County ordinances superseded and preempted under North Dakota law.

DATED this 18th day of August, 2023.

FREDEKSON & BYRON, P.A.



By: _____

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⁸ See Docket No. 282.