

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE APPLICATION
BY SCS CARBON TRANSPORT, LLC FOR
A PERMIT UNDER THE SOUTH
DAKOTA ENERGY CONVERSION AND
TRANSMISSION FACILITIES ACT TO
CONSTRUCT A CARBON DIOXIDE
TRANSMISSION PIPELINE

DOCKET HP 22-001

**BRIEF IN SUPPORT OF MOTION TO
RETURN APPLICATION**

FACTS

SCS Carbon Transport, LLC (hereinafter “Summit”) filed an application for a permit to site a carbon dioxide transmission pipeline through South Dakota on February 07, 2022. Notice of filing was provided on February 10, 2022. The deadline to intervene was April 08, 2022.

According to the Application, the proposed hazardous liquid pipeline would transport carbon dioxide in a supercritical state from ethanol plants in Iowa, Minnesota, Nebraska, South Dakota and North Dakota to three carbon sequestration sites in North Dakota “where the CO₂ will be safely and permanently stored.” Application ¶ 1.1. The South Dakota Application does not specifically address the injection and sequestration facilities because those facilities “will be located in North Dakota.” Application ¶ 1.2.

Summit filed for a similar permit to site a carbon dioxide transmission pipeline through North Dakota on October 17, 2022. In Summit’s North Dakota Application, the pipeline will enter North Dakota along the South Dakota border southwest of Ashley, North Dakota. SCS Carbon Transport, LLC, Consolidated Application for a Certificate of Corridor Compatibility and Route Permit (“ND Application”), ¶ 1, 1, (October 17, 2022) (available at:

<https://www.psc.nd.gov/database/documents/22-0391/001-050.pdf>; last visited: August 18, 2023)

The North Dakota application further provides that the carbon dioxide that is either captured in or moves through South Dakota via the pipeline will be deposited in “saline formations utilizing separately permitted Class Vi injection wells.” ND Application ¶ 1, 1, (October 17, 2022). The saline formations are later described as “permanent geologic sequestration sites in North Dakota[.]. ND Application ¶ 2, 1, (October 17, 2022). In order for the project to work as a whole, all carbon captured, regardless of location, must be stored in North Dakota because it is a proven

subsurface geologic formation, which most states do not have. ND Application ¶ 2.2.1, 10, (October 17, 2022). In other words, the Summit pipeline can only work if there is a viable plan to go through North Dakota.

There is not. The North Dakota Public Service Commission denied Summit's application for a permit through North Dakota on August 04, 2023. North Dakota Public Service Commission, Order, August 08, 2023. One of the reasons for denial was because the siting location of the pipeline did not meet North Dakota's siting criteria. As a result, the pipeline must be re-routed through North Dakota. During the North Dakota hearings, Summit indicated the creation and establishment of a new route in North Dakota could take up to two years. See Ex. B.

STANDARD OF REVIEW

“An application must be denied, returned or amended at the discretion of the Public Utilities Commission for: (1) Any deliberate misstatement of a material fact in the application or in accompanying statements or studies required of the applicant[.]” SDCL § 49-41B-13. A denial under these circumstances is mandatory and not discretionary. If the application contains misstatements of a material fact, the Commission has discretion to determine if it should be denied, returned, or amended, but one of those three results must occur upon a finding of a deliberate misstatement of a material fact in the application or in the accompanying statements or studies.

ARGUMENT

1. An Application is a “continuing application” and change of circumstances can result in subsequent misstatements of material facts.

An application is a “continuing application” requiring Summit to “immediately notify the commission of any changes of facts or applicable law materially affecting the application. This duty continues up to and includes the date on which the permit is issued or denied.” S.D. Admin. R. 20:10:22:04(5). To date, as of the filing of this motion, Summit has not notified the commission of the serious change of fact that this is now a pipeline to nowhere with an unknown future.

However, the facts and circumstances have undeniably changed that make the application littered with false statements. These misstatements cannot be corrected or amended. The misstatements are deliberate. A risk of attempting to build a transmission pipeline across multiple states is that any one state's permit denial may make the applications in other states false. For the Summit project, this would be especially true of North Dakota's denial, since North Dakota is the endpoint of the project and contains a geological formation capable of storing CO₂ that is apparently only present in North Dakota and Illinois in the Midwest. The Application presently contains 16 material misstatements that simply cannot be true as a result of the state permit denial in North Dakota.

The purpose of SDCL 49-41B-13 is to prevent long, unnecessary hearings on applications that are incomplete. An application should put the Commission in a position to evaluate the application's merits, not its completeness. However, the Commission must first determine that the application is complete under the statute, and if not, it must return the application. This is done for judicial economy reasons discussed below but also because an incomplete application by definition cannot meet the criteria under SDCL § 49-41B-22.

A permit shall only be issued by the Commission upon a finding that:

- (1) The proposed facility will comply with all applicable laws and rules;
- (2) The facility will not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area. An applicant for an electric transmission line, a solar energy facility, or a wind energy facility that holds a conditional use permit from the applicable local units of government is determined not to threaten the social and economic condition of inhabitants or expected inhabitants in the siting area;
- (3) The facility will not substantially impair the health, safety or welfare of the inhabitants;
and
- (4) The facility will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government.

SDCL § 49-41B-22. The Commission must find these facts by a preponderance of the evidence, colloquially understood to mean "more likely than not."

Even after a three week hearing, the Applicant will never be able to meet this burden because the North Dakota route and location of the carbon sequestration site has been denied in North Dakota with no actual pending re-application in North Dakota and no timetable to submit one. Summit will not be able to prove subsection (2) because an empty pipeline that ends at North Dakota border poses a serious injury to the environment, social, and economic condition of the inhabitants and expected inhabitants in the siting area, such inhabitants being forced to accept an empty pipeline across their land. Similarly, for subsection (3), a pipeline to nowhere with an easement that limits development in the easement area will obviously affect the health, safety, and welfare of the inhabitants. Summit will not be able to prove the alleged economic benefits of the project because they are entirely dependent on sequestering carbon in North Dakota. With no alleged economic benefit of the delivery of carbon dioxide to North Dakota to weigh against this cost, the Applicant will not meet its burden. Finally, for subsections (1) and (4), a pipeline with no end point and carrying nothing of utility under a permanent easement will unduly interfere with the orderly development of the region. While landowners would disagree, for purposes of argument, if the pipeline at least delivered something, the Commission could find that the pipeline “duly” interferes.

The above demonstrates why SDCL § 49-41B-13 is so important. An application containing material misstatements cannot meet the subsequent burden of proof of a hearing, and therefore, the application should be returned. Summit can re-apply after it removes the material misstatements.

2. The consideration of Summit’s Application now does not ensure the orderly and timely development of the facility.

While a utility with a permit may proceed “at any time” and is only required to certify that the facility continues to meet the conditions of a permit if construction has not commenced within four years under SDCL § 49-41B-27, an applicant does not have carte blanche to receive a permit at any time. The Applicant must demonstrate that it will complete the project in an orderly and timely manner. In fact, this requirement is a primary purpose of the Commission to ensure that the “energy requirements of the people of the state are fulfilled.” SDCL § 49-41B-1.

But whatever Summit timeline existed before August 04, 2023 no longer exists, and frankly, Summit has not provided any further update on the project after this substantial change

of fact. The Summit carbon pipeline is now in an indefinite nature, and there is too much uncertainty surrounding the ability of Summit to deliver the carbon dioxide to a North Dakota sequestration site that the North Dakota regulators rejected that the approval of a South Dakota permit now is not orderly or timely.

An approval with no sequestration site creates several orderly and timely problems. For example, an approval now with no construction timetable forces landowners, counties, and communities to essentially pause land development or improvements around the pipeline corridor even though the pipeline may never come. This indefinite delay gives Summit the benefit of constructing the pipeline whenever it wants while the farmer who wants to tile his land must accept lower yields of a soggy field because the farmer will not know where the carbon pipeline is exactly going until construction workers put it in the ground, which may be never.

Approval now could also prevent the development of township and county roads. It is a given that the construction of this pipeline would cause negative impacts on some roads due to the heavy equipment involved. This is why Summit has pledged to restore to at or above previous quality, if the project happens. If a county or a township wanted to improve a public road along the route in the next year, the indefiniteness of the Summit pipeline could chill those plans. Townships have extremely limited budgets. Will the Township Board improve a road this year that Summit may ruin in four years once construction begins? If so, this would be a waste of the Township's limited resources and the direct result of the indefiniteness of the Summit pipeline.

These are just two examples. It is not difficult to think of a hundred more. The same analysis could be used for energy development. A permit issued for the indefinite Summit project could prevent a future wind farm that has not even been developed yet. For purposes of this motion, the moving party's obligation is not to prove that these things will happen, especially since Summit cannot prove that it has a plan to reach its carbon sequestration site, but to prove that a premature approval of the Summit pipeline is not in line with the Commission's obligation to ensure the orderly and timely development of energy projects.

- 3. Judicial economy and efficiency dictate that the Application be returned until the material misstatements can be corrected. This can only happen after a new North Dakota route is viable.**

South Dakota is a small state that prides itself on its ability to efficiently use limited resources. This is true of its state government and administrative agencies. It is also true of landowners. A critical component of this efficiency is to be productive or prioritize timely matters. However, consideration of the Summit Application at this time is not efficient, wastes limited resources, perhaps most importantly, everyone's time, and fails to produce any tangible benefit to South Dakotans' energy needs under SDCL § 49-41B-1.

It would be one thing if the North Dakota application was still pending, but the material fact is that it was fully adjudicated and denied. Summit is not challenging or appealing the decision. Summit is going to re-apply at some unknown point in the future. If Summit was denied in Iowa, an argument could be made that the South Dakota application should move forward since the Iowa portion of the pipeline is not critical to the ability of South Dakota ethanol plants to sequester carbon dioxide in North Dakota. None of the statements in the application become untrue because the project does not route through Iowa. But North Dakota is critical to the South Dakota application. While the carbon sequestration site in North Dakota is obviously beyond the borders of South Dakota and not a location that the Commission can approve or deny, the ability of the Applicant to get to that site is critical for the Application to be true. The entire purpose of the project is to get carbon dioxide to sites in North Dakota.

South Dakotans should not use its limited resources to consider an application that contains material misstatements. Certainly, the Commission and Commission Staff have more immediate matters that warrant timely attention. Landowners will miss work, time in the fields, children's sporting events, time with family among so much more to attend and assert their rights in this hearing. At this time, with so much in the air, the Commission should ask if this is a good use of everyone's time and resources when the most critical component of the project, albeit not in the application, has no timeline and frankly may not even happen.

CONCLUSION

The motion outlines 16 material misstatements in Summit's application. Summit has failed to notify the Commission to these material changes of fact surroundings its project. With misstatements about the viability and economic output of the project unable to be corrected until the North Dakota portion of the route is more certain, the Commission should return the application.

Dated this 18th day of August 2023.

/s/ Brian E. Jorde

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing objection was served via email, or via mail, if so identified, on August 18, 2023 upon the persons identified on Exhibit A:

/s/ Ryan D. Cwach

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