
**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 TO CONSTRUCT
A CARBON DIOXIDE
TRANSMISSION PIPELINE**

DOCKET HP 22-001

**LANDOWNERS' REPLY TO PUC
STAFF AND APPLICANT'S
RESPONSES TO MOTION TO
DISMISS AND IN THE
ALTERNATIVE MOTION FOR
STAY AND OBJECTION TO
SUMMIT'S MOTION TO EXTEND
DEADLINES AND FOR
SCHEDULING ORDER AND
MOTION TO EXTEND
DEADLINES**

Movants, reply to the PUC Staff and Applicant's Responses to Landowner's Motion to Dismiss as follows:

I. Applicant has not amended its application as required; therefore, the currently pending Application does not contain the siting content required by statute and administrative rule.

1. On February 7, 2022, SCS Carbon Transport, LLC, filed its application to construct a carbon dioxide transmission pipeline across South Dakota. That application contained siting information required by statute as well as administrative rules. Pursuant to ARSD 20:10:22:11 the application contained "a general site description of the proposed facility including a description of the **specific site...**" *Emphasis added*. Section 5 of the application also contained some required information as to how the project effects the physical environment including several environmental factors at the original transmission site (ARSD 20:10:22:14). ARSD 22:10:22:01(5) defines "transmission site" as "that affected area on either side of and adjacent to a proposed transmission facility or associated facility." Appendix 7 of the application contains the list of soil types within the project footprint identifying *site specific* soil types based on the original route. Several other factors were analyzed at the original transmission site including hydrology (ARSD 20:10:22:15), effect on

terrestrial ecosystems (ARSD 20:10:22:16), effect on aquatic ecosystems (ARSD 20:10:22:17). None of this analysis has been submitted for the currently proposed pipeline route. The Application is deficient.

2. On April 8, 2022, Applicant filed a new project overview map generally depicting six (6) deviations from the original route. Route changes occurred in Lincoln, Minnehaha, Lake, Miner, Beadle, Edmunds, and McPherson Counties. Changes in three (3) of those counties (Lake, McPherson, and Edmunds) had not been previously identified as alternative routes. Within its cover letter accompanying the application, Applicant states that its “PUC application and exhibits will be updated to reflect these changes in the near future.”¹ On May 10, 2022, Applicant filed three (3) site maps of the re-routes in Lake, McPherson, and Edmunds Counties but no updated mapping for the other route changes.

3. Amendments to an application are contemplated by ARSD 20:10:22:04(7) and are required to be filed in the same format required of the applications. To date, no amended or updated application or addendum addressing how the new transmission site impacts the siting requirements has been filed. No amendment to Appendices 6A- Topo Map Book or 6B- Soil Map Units Map Book have been submitted. Application Appendix 6C – Land Use Land Cover Map Book, which contains a site-specific map of the original route was replaced with a version oriented to the North on March 11, 2022. Neither the original Appendix 6C nor the March 11th replacement contain the currently proposed route. The maps filed on May 10, 2022, for Lake, McPherson, and Edmunds Counties do not indicate which pages in the application they replace. Site maps for the route-change areas in Lincoln, Minnehaha, and Beadle still only appear in the Route Alternatives section of the Application and are not identified in the Application as the currently proposed route. The existing Application does not contain the siting content required by statute and administrative rule.

4. When an application is deficient, the PUC has discretion to deny, return, or require an amendment pursuant to SDCL § 49-41B-13. Given the scope of the deviation from the original route, the missing information as noted above, the culmination of the public input hearings, and the stage of this proceeding we are in, dismissal or return is the proper course. Nothing precludes Applicant from reapplying when it is prepared to proceed with a

¹ See April 8, 2022, Letter from Applicant to PUC

complete application and certain route. Applicant suffers no prejudice. This would also give Applicant an opportunity to cure other defects related to its Application and its Notice requirements.

5. A material route deviation during a pending proceeding is rare. Within its Response, PUC Staff provided a list of all prior dockets with route changes of which staff is currently aware.² A review of those dockets shows that only two (2) proceedings, EL 09-015 and EL 13-028, encountered material route changes during the pendency of the proceeding which were not previously identified as alternative routes.³ In EL 09-015, the applicant submitted an Addendum with complete updated siting information. A Commission order returning the Application will allow Applicant to comply with appropriate updated information per prior precedent.

6. In EL 13-028, the applicant submitted a formal Amendment to its application clearly illustrating its proposed changes. In reaction to the amendment in EL 13-028, the PUC issued a new Notice of Application, Order for and Notice of Public Input Hearing, Notice of Application to Apply for Party Status. A similar action may be appropriate here; however, no amendment or amended application has been submitted. Summit's incomplete Application currently before the Commission supports returning the Application.

7. The other dockets cited by Staff are not applicable or not similar to the current docket. EL 14-061 deals with a single landowner concern and a slight modification of the route relative to a single concern and that landowner waived notice pursuant to SDCL 49-41B-5.2. EL 17-042 does not deal with route changes and no newly affected landowners existed. EL 19-016 deals with notice publication issues that were not the fault of Applicant – different from our current docket were Applicant's failures caused lack of notice to numerous landowners.

8. Landowners understand that the Application is "continuing" and there is potential for additional route change. ARSD 20:10:22:04(5). However, the fact that certain counties have existing moratoriums effecting this project and may enact ordinances fatal to the project is not a reason to allow this docket to linger. Uncertainty is prejudicial to

² See Staff Response to Applicant's Motion to Extend Deadline and Intervenor's Motion to Dismiss or Stay. Pgs. 10-11.

³ Staff clarifies that the list is not intended to be comprehensive, only the dockets which Staff is currently aware.

currently effected landowners, potentially effected landowners, and the public. The Application should be re-submitted, and the process started over once there is a certain route and a complete application, opportunity for and actual notice made to all affected persons, and public meetings held.

II. Applicant has failed to provide the notice required by law.

9. PUC Staff's Response indicates that there are five (5) landowners who are now within the statutorily required distance from the transmission site to receive written notice of the project. While the Staff recommends an opportunity to cure rather than dismissal, Applicant's Resistance to Landowner's Motion to Dismiss neither addresses the five (5) unserved owners nor does it propose to cure. Rather, Applicant contends that it has substantially complied and anyone who did not receive notice did so constructively by publication.

10. Landowners agree with Staff that at a minimum, substantial compliance requires curing the defect. Whether these individuals have been prejudiced is for them to decide and argue; however, without proper notice they may not have an opportunity to make that case. At a minimum, these five (5) owners are entitled to written notice of the project and a renewed opportunity to involve themselves. Constructive notice is not a tenable argument. Even if the Commission were to find that effected landowner's received constructive notice of the public input hearings by publication, the location of the hazardous pipeline and its proximity to the effected owner's property was not published. Such knowledge would have been obtained by the written notices which were not made.

11. Applicant's material re-route also impedes the public's ability to be aware of the permit being sought and to provide feedback. The PUC has previously recognized this concept in EL 13-028. In its second Notice of Application; Order for and Notice of Public Input Hearing, Notice of Opportunity to Apply for Party Status, the PUC stated:

Due to Applicants having made some route changes in certain areas of the Project which will result in some additional landowners coming within the half-mile Project corridor, Applicants will be required to serve notice on such landowners **and the Commission deems it proper to hold an additional public input hearing.** Pursuant to SDCL 49-41B-15 and 49-41B-16 the Commission will hold in additional public input hearing on the application...

The purpose of this public input hearing will be to hear public comment regarding the transmission line permit Application, the Amendment, and the Project. At the hearing, Applicants will present a brief description of the Project, following which interested persons may appear and present their views, comments and questions regarding the Application. *Emphasis Added.*

12. Staff recommends that as between the two (2) choices before the Commission, dismissal or granting opportunity to cure, that opportunity to cure should be the path. As covered above, the Staff's prior docket examples cited in favor of their recommendation here either do not apply to our factual scenario or assist Landowners position. Staff relies heavily on their supposition that future route alterations as described by Landowners are "speculative." Recollect, however, that it is Applicant in their May 9, 2022, motion who proposed October 13, 2022 as the date it would finally file an "updated application, supporting testimony, and route." This is an admission, not Landowner speculation. Applicant's request that new routes and re-routes can be filed on October 13, 2022 – for the first time – months after the intervention deadline expired – and given all the above-described other material defects is unacceptable and prejudicial to Landowners, Staff, the Commission, and all South Dakotans. If the current status of our docket is, as Applicant would suggest, a no harm no foul situation then why are they proposing over four (4) more months of material changes? Further, as Staff states at page 6 of their response, they are still waiting for necessary supportive material from Applicant.

13. A new route has been proposed with material changes; not simply few foot modifications, but changes deviating 1.5 miles or more from the prior route, but no Amended Application has been filed. If the PUC does not elect to return this Application, Applicant should be required to submit an Amended Application and present at additional public input meetings as the PUC deems appropriate. Additionally, the opportunity to apply for party status should be reopened. This will ensure that the public is properly informed and involved in this important process.

III. Scheduling Order not appropriate at this time

14. It is not appropriate at this time to set any deadlines as the current deficient Application must be returned. But even if the Commission provided Applicant with the ability to cure their numerous deficiencies, until those cures occur no deadlines should be established. If Applicant is granted the opportunity to cure, then Applicant should do the

right thing and agree that if October 13, 2022, is the date they can file in their “updated application, supporting testimony, and route” then the twelve (12) months per statute to the PUC decision should commence from that date and end on October 13, 2023. This is a reasonable suggestion that is no prejudice at all to Applicant as all they have to do to qualify for the government and taxpayer 45Q tax credit giveaway is to have commenced construction on this project by January 1, 2026.

15. Landowners object to the discovery response deadline of ten (10) business days. That is an insufficient amount of time. Thirty (30) calendar days is appropriate and requested. Additionally, Summit recently served discovery and the Landowners specifically request that the response timeframe as determined by the Commission, whatever that may be, does not start to run on the recently served discovery requests until the date the Commission enters an order establishing the discovery response timeframe.

CONCLUSION

The pending Application is incomplete and insufficient notice has been given. The Application fails to address how the re-route effects applicable siting requirements and does not contain a site-specific map showing the current proposed route. Those statutorily entitled to written notice must receive it and the public should have an opportunity to be informed on the project being proposed and this has not occurred. The proper course is for the PUC to exercise its discretion and return the Application. Given the unsettled matters in this docket, it is not appropriate to enact a Scheduling Order at this time.

Respectfully Submitted,

By: /s/ Brian E. Jorde

Brian E. Jorde, Esq., *Pro Hac Vice*
Domina Law Group
2425 S. 144th St.
Omaha, NE 68144
Phone: 402-493-4100
bjorde@dominalaw.com

By: /s/ Ryan Cwach

Ryan Cwach, Esq.
Birmingham & Cwach Law Office
124 Walnut Ave., Ste. 201
Yankton, SD 57078
Phone: 605 260 4747
ryan@birmcwachlaw.com

Lawyers for Landowners/Movants

CERTIFICATE OF SERVICE

Brian Jorde of Domina Law Group PC LLO hereby certifies that on June 7, 2022, he filed and served via the South Dakota Public Utilities Commission website and electronic mail a true and correct copy of the foregoing in the above-captioned matter to the service list.

/s/ Brian E. Jorde

Brian E. Jorde