

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

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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

**JOINDER IN STAFF MOTION TO  
DISMISS**

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COMES NOW, Intervening Landowners, by and through their counsel of record, Brian Jorde, Domina Law Group, pc llo, and Ryan D. Cwach, Birmingham & Cwach Law Offices, PLLC, and hereby submits their joinder in Staff’s Motion to Deny Application and hereby submit the following supplemental reasons in support of the Motion:

1. Landowners attach a September 7, 2023, email from Brett Koenecke, counsel for Summit to various counsel of other parties as Exhibit LO187. In this email, Mr. Koenecke notes that Summit will not seek preemption as part of its case in chief, but instead will seek to work through the issues “directly with the counties.” Ex. LO187.
  - a. The fact that Summit has to “work through the various issues presented by the several ordinances directly with the counties” is an admission that the present Project and Application is not in compliance with those local ordinances. If Summit was in compliance, there would be no issues to work through with the various local governments. This statement further supports Staff’s showing that the Application and accompanying statements made by Summit, notably in James Powell’s pre-filed testimony, contain deliberate misstatements of material fact.
  - b. There is no reasonable certainty that Summit *will* (1) even work through these issues or (2) work through these issues within a timeframe to provide the Commission with reasonable certainty that Summit actually *will* comply with local ordinances at any reasonable point in time in the near future. In fact, Mr. Powell admitted there is no possible route for them in Brown County. This could take months, or it could take years.
  - c. The alleged “issues” are substantial in nature. Mr. Powell’s pre-filed rebuttal testimony demonstrates that both the counties and Summit have a lot of work ahead

of them. This work could include any one of the following: (1) a County amending its ordinance, (2) granting conditional use permits, (3) obtaining landowner waivers, and/or (4) make route adjustments.

2. Mr. Koenecke states that he does not anticipate that his client will want to renew its motion during the hearing. Ex. LO187. However, if Summit does decide to renew its motion, which the email presumes it can do at any time, during the next three (3) weeks of hearings, he acknowledges that this would require additional evidentiary hearings on the issue of preemption. Ex. LO187. In other words, Summit could potentially still present its case for preemption during the hearing, renew its motion after the presentation of such evidence, and force South Dakota counties to scramble to defend their ordinances at some unknown future date before the Commission's decision deadline in November 2023.
  - a. This is unfair to all other parties who must continue to prepare as if Summit may change its mind at any time to litigate against them on this issue.
  - b. All of this is further evidence that the Application is not complete and should be denied until Summit can prove that it will actually work and obtain necessary local government approvals.
  - c. As Staff demonstrates, there is no evidence that Summit has, can, or will comply with local government units. In fact, Mr. Powell's rebuttal testimony demonstrates the opposite.
3. Mr. Koenecke's email further notes that if, for some reason, Summit wanted to renew its motion, this would somehow have to be handled with a full evidentiary hearing, presumably after the hearing and PUC decision given that the hearing is in three (3) days. Ex. LO187.
4. On July 10, 2023, Mr. Powell submitted pre-filed testimony stating that it cannot comply with several local ordinances. On September 6, 2023, the Commission denied Navigator's motion for preemption in HP 22-002. Thereafter, Mr. Koenecke sent Ex. LO187 to all parties and filed Summit's notice that it withdrew the motion for preemption because Summit wants an opportunity to work with the counties. So, either Mr. Powell's statement was false and intended to induce the Board that there is no available route in, for example, Brown County, or the statement was true, and therefore there is no path for its current route in Brown County. In either circumstance, the Application and Project should be denied as

it is an impossibility at this time and judicial economy dictates that we should not invest resources and time upon an Application for a route that cannot, according to Summit, be constructed.

5. Staff notes that Summit's history of litigation in South Dakota causes Staff to question Summit's statements that Summit will work with counties, but notes that the evidence is not in hand.
  - a. Landowners do have evidence on hand of Summit's use of the legal process to circumvent good faith negotiations with Landowners. Summit presently has at least 107 active condemnation proceedings against South Dakota landowners. To support the motion, Landowners are willing and able to provide testimony about Summit's litigious behavior towards South Dakotans. Landowners have experienced and are able to present Summit's long history of not negotiating in good faith. In further support of this motion, Landowners request the PUC take judicial notice of the over 107 condemnation lawsuits against landowners that Summit filed months before now.

### **REQUEST FOR RELIEF**

WHEREFORE, Landowners join in Staff's Motion and respectfully request the Commission deny Summit's Application for the grounds stated herein and because Summit itself has admitted the very route it seeks approval of could not be constructed in the State of South Dakota.

Dated this 8th day of September 2023.

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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 September 8, 2023 upon the persons identified on Exhibit A:

/s/ Brian E. Jorde

Brian E. Jorde

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## Exhibit A

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