

**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 PIPELINE	HP22-001 MOTION TO RECONSIDER PROCEDURAL SCHEDULE
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COMES NOW, the Applicant, by and through its counsel of record, and moves the Commission to reconsider its Scheduling Order in the above-captioned action and adopt the procedural schedule proposed by staff on December 9, 2022, which remains consistent with a June 15, 2023 permitting date. Applicant submits that without setting a different timeline, the current Scheduling Order exceeds the Commission's statutory authority and will create significant and unnecessary commercial risk for Applicant's business and its South Dakota partners, in addition to leaving open the possibility of calculated post-hearing delay by certain parties to the docket.

At its January 5, 2023 meeting, the Commission set a procedural schedule culminating in an evidentiary hearing September 11-22, 2023, with September 25-29, 2023 reserved for hearing overflow if needed. Applicant respectfully requests the Commission reconsider its Scheduling Order and adopt the timeline in Staff's Proposal for Procedural Schedule dated December 9, 2022, which fixes April 24-May 5, 2023 for the evidentiary hearing. Staff's proposed schedule provides sufficient time for a final Commission decision by June 15, 2023, the date requested by Applicant in its May 9, 2022, motion and thus the controlling date under statute. Applicant, in its January 3, 2023 letter from counsel and again at the Commission's January 5 meeting, has advised the Commission of the many practical and commercial difficulties any schedule that stretches beyond June 15, 2023 creates for its business, as well as for South Dakota communities. Unfortunately, the Commission's decision and Scheduling Order places on Applicant difficulties and risk that go well beyond those imposed in other Commission dockets, and in light of Commission action in the Heartland Navigator docket, now puts the Commission's thumb on the scales of the regional carbon dioxide transportation market in an unprecedented and unnecessary way. The negative impacts of the Commission's scheduling decision will unfortunately affect not only Applicant, but also extend to Applicant's partner ethanol plants and to corn producers throughout South Dakota.

Beyond the clear commercial and competitive issues with the Commission's Scheduling Order, the Commission's Order is also legally unsound, insofar as it fails to respect Applicant's ongoing legal right to control a definitive date for a Final Decision and Order, which right was not waived upon Applicant's Motion to Extend Deadline to June 15, 2023. As Applicant noted in its January 3, 2023 letter to Ms. Van Gerpen (also filed in the docket), SDCL § 49-41B-24 requires the Commission, within twelve months of receipt of Applicant's initial application, to "make complete findings in rendering a decision regarding whether a permit should be granted, denied, or granted upon such terms, conditions or modifications of the construction, operation, or

maintenance as the commission deems appropriate.” SDCL § 49-41B-24.1 permits the Commission, only upon Applicant’s request, to extend the deadline for commission action, which Applicant did – to a date certain – in its Motion to Extend Deadline to June 15, 2023. The Commission’s action in first extending the docket indefinitely, and then in issuing its current Scheduling Order, was not pursuant to Applicant’s motion and thus the Commission had no authority under statute to do so.

Under the Legislature’s statutory scheme applied to the Commission in SDCL §§ 49-41B-24 and -24.1, Applicant’s statutory rights in scheduling are paramount. Statutes must be construed according to their intent, and the whole of the statute, as well as related statutes, must be considered. *In re Estate of Ricard*, 2014 S.D. 54, ¶ 8. The South Dakota Supreme Court has been clear that in construing statutes such as SDCL §§ 49-41B-24 and -24.1 together, it is presumed the Legislature did not intend an absurd or unreasonable result. *Id.* SDCL § 49-41B-24 clearly gives Applicant a vested right to a Final Decision and Order from the Commission within one year of application. The Commission itself recognized such a right in setting the procedural schedule for the competing Heartland Navigator pipeline at its January 17, 2023 meeting.

Treating Applicant’s motion to extend under SDCL § 49-41B-24.1 as essentially a waiver of its scheduling rights in the ordinary course of Commission review creates an absurd and unreasonable result: by exercising a right (extending the deadline) granted by the Legislature, Applicant loses its prior right, also granted by the Legislature, to a time-bound process for final Commission action. It is a canon of statutory construction that where two statutes can be read together harmoniously, such an interpretation must prevail. Here, the most natural reading of statute is that Applicant’s right to a fixed end-date for its process under SDCL § 49-41B-24 is continued in any motion to extend the deadline brought under SDCL § 49B-41-24.1. Simply put, the Commission may be free to set a more aggressive schedule but cannot on its own initiative impose a timeline stretching beyond that proposed by Applicant. To hold otherwise makes the exercise of one right (extension) prejudicial to another right (end-date certainty) within the same statutory scheme. The prejudice to Applicant should be apparent: Heartland Navigator is now set to receive a hearing four months before Applicant, despite filing its permit application seven months after Applicant. The only procedural difference between the two companies’ posture before the Commission at this stage is Applicant attempted in good faith to exercise its rights under SDCL § 49-41B-24.1. Simply put, the present situation is a result neither required by law nor good policy in practice.

Applicant’s view of the Commission’s statutory powers is in fact supported by the Commission’s own staff. In their June 1, 2022, Response to Applicant’s Motion to Extend Deadline, staff noted that, “[T]he Commission lacks the authority to grant an extension beyond the twelve-month deadline upon its own motion or upon the request of any party other than SCS Carbon.” Staff cautioned the Commission’s own administrative rules “cannot be read to supersede [statutory] limitations placed on the commission itself [by SDCL §§ 49-41B-24 and -24.1]” and that none of the flexibility provided elsewhere to the Commission in SDCL § 49-1-11 or ARSD 20:10:01:14 in fact relates to those statutory deadlines for decision at all. Staff concluded the “only allowance” the Legislature gave to extend the twelve-month deadline is vested in the Applicant, not the Commission. Applicant could not agree more.

At the January 17, 2023, Commission meeting, there was some discussion about landowner notice and the current Scheduling Order providing opportunity for intervention. As the Commission noted and the docket reflects, Applicant advised landowners previously affected by minor route changes via letter on December 19, 2022. Applicant remains committed to provide similar advisory letters to landowners should minor route changes occur in the future. However, it is important to note that all of the 49 landowners who recently received letters from Applicant were previously provided constructive notice of the project and public meetings pursuant to SDCL § 49-41B-16. Each was free to join any of those public meetings. Each was also free to request intervenor status before the Commission at that time. In fact, Applicant would note the Commission approved a number of intervenors who in fact fell outside the one-half mile notice corridor for the project. As a practical matter, the Commission should acknowledge the likelihood of a landowner with unique concerns coming forward at this stage to seek intervenor status is slight. To Applicant's knowledge, none of the 49 landowners receiving advisories in December 2022 has subsequently pursued such status.

Applicant therefore submits that, to the extent the Commission imposed the current procedural schedule to promote a right of intervention for those landowners receiving Applicant's advisory, such a consideration is a misreading of the requirements in both SDCL § 49-41B-5.2's notice provision and SDCL § 49-41B-16's public meeting requirement. Further, nothing in SDCL §§ 49-41B-24 or -24.1 permits the Commission to exceed the timeline requested by Applicant in order to promote additional landowner intervention.

For the reasons outlined above, Applicant requests the Commission reconsider its Scheduling Order and adopt the timeline proposed by staff on December 9, 2022, which provides sufficient time for final action on the permit no later than June 15, 2023.

Dated this 20th day of January, 2023.

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