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	* * * * * * *	**HP22-001** **MOTION TO DENY APPLICATION PURSUANT TO SDCL 49-41B-13(1) AND SDCL 49-41B-13(2)**

Staff of the Public Utilities Commission (Commission) by and through its undersigned counsel hereby files this Motion to Deny Application Pursuant to SDCL 49-41B-13(1) and SDCL 49-41B-13(2). Staff requests the Commission issue an order denying the application, without prejudice for the reasons discussed below.

On August 14, 2023, the Commission issued an Order for and Notice of Evidentiary Hearing noticing the evidentiary hearing in this docket to commence on September 11, 2023. Pursuant to a prior Commission order, the deadline for a final decision has been set as November 15, 2023, as Applicant has waived the statutory twelve-month deadline. On August 21, 2023, SCS Carbon Transport LLC (Applicant or Summit) filed a Motion for Order Preempting County Ordinances (Motion to Preempt). On September 7, 2023, Applicant filed a Withdrawal of Motion for Order Preempting County Ordinances.

Assuming the request to withdraw the Motion to Preempt is granted, the Applicant's proposed route does not currently comply with all applicable laws. The proposed route violates four county ordinances:

1) Brown County
    a. Mr. Jimmy Powell states: "[t]he ordinance's 1,500 ft. setback requirement are not only unreasonably restrictive as applied to the proposed route, they prohibit SCS's proposed routes in Brown County." Exhibit A34, pg. 4, lines 203-204.
    b. Staff notes that Brown County has a wavier process. However, without evidence that Summit has obtained the waivers from landowners and received approval

from the Board of Adjustments, Summit's proposed route violates the county ordinance. Exhibit A34a.

c. Since Brown County requires the waiver *and* Board of Adjustment approval, if any intervening landowners in this docket are on, or adjacent to, the proposed route and have no interest in participating in the project at all, it would be impossible for the route to comply with Brown County's ordinance.

2) Minnehaha County
   a. Mr. Jimmy Powell states: "[t]he setback requirements of Minnehaha County Ordinance are not only unreasonably restrictive as applied to the proposed route, they prohibit the proposed route altogether." Exhibit A34, pg. 13, lines 281-282.
   b. Staff notes that Minnehaha County has a waiver process or Conditional Use Permit (CUP) process. However, without evidence demonstrating Summit has obtained a CUP or received waivers from landowners, the proposed route violates the county ordinance. Exhibit A34b.
3) Spink County
   a. Mr. Erik Schovanec states that SCS's proposed route does not comply with the setback distances in Spink County. Exhibit A46, pg. 7, lines 5-7.
   b. Staff notes that Spink County has a similar process as Minnehaha County. However, without evidence demonstrating that Summit has received a CUP from Spink County or obtained waivers from landowners, the proposed route violates the county ordinance. Exhibits A46j and A46k.
4) McPherson County
   a. Mr. Erik Schovanec states that SCS's proposed route does not comply with the setback distances in McPherson County. Exhibit A46, pg. 8, lines 13-15. McPherson County's ordinance is lengthy and detailed. However, Staff notes that there is a process in place at McPherson County to file for a variance from the strict compliance with the ordinances. Without evidence from Summit demonstrating that they received variances from McPherson County, the proposed route violates the county ordinance. Exhibits 46l and 46m.

Therefore, based on the Applicant's own admissions, the current route, without waivers from landowners or county permits, would violate local ordinances. Staff is not aware of any Summit exhibits that provide evidence that Summit has obtained the necessary waivers and/or county permits that allow the proposed route to violate setback distances in ordinance. While Staff welcomes a commitment from Summit to work with the counties and landowners, even if Summit were to make such commitment, their success in obtaining the waivers or permits in order to bring the Project into compliance with county ordinances would be merely speculative.

SDCL 49-41B-22(1) provides that Applicant must prove that the proposed facility will comply with all applicable laws and rules. Summit cannot satisfy this burden at this time.

Furthermore, regardless of whether an applicant is requesting preemption of county ordinances, the final sentence of SDCL 49-41B-28 precludes the Commission from "designating a route which violates local land-use zoning, or building rules, or regulations, or ordinances" unless the Commission issues a finding preempting the ordinances at issue. The fact that Applicant is no longer requesting such a finding does not negate the entirety of SDCL 49-41B-28. To the contrary, the fact that no such finding is requested makes it an impossibility for the proposed route to be designated in a lawful manner.

It is an undisputable fact is that the proposed route currently violates county ordinances in Brown, McPherson, Minnehaha, and Spink counties. Unless and until Summit can obtain waivers or conditional use permits where applicable in order to bring the route into compliance, a permit cannot be granted.

There are currently three weeks scheduled for the evidentiary hearing in this matter and potentially as many as 200 witnesses. The undertaking the Commission and Parties are facing is enormous. Therefore, judicial economy is not well-served by going forward with a proceeding on an application which cannot legally survive. It is an exercise in futility to the detriment of the Commission and all Parties, including Applicant.

Therefore, in light of Applicant's withdrawal of their Motion to Preempt and the undisputable fact that the proposed route currently violates county ordinances, the Application should be denied pursuant to SDCL 49-41B-13(1) which provides that "[a]n application may be

denied, returned, or amended at the discretion of the Public Utilities Commission for … [a]ny deliberate misstatement of a material fact in the application or in accompanying statements or studies required of the applicant."

In Section 5.5.4 of the Supplemental Application, filed on October 13, 2022, Applicant stated that it "will coordinate with county and municipal offices and comply with all applicable ordinances."[1] The Supplemental Application later states that "[t]he Project will comply with applicable local land use zoning ordinances, building rules, and regulations for above-ground Project facilities."[2]

Certainly, these statements are material facts as contemplated by SDCL 49-41B-13(1). These statements are so material that they go to the very heart of Applicant's burden of proof. The substance of these statements is of such significance that a permit cannot be granted if the content of the statements is not true. Because Applicant has a route that does not comply with the ordinances, and Summit cannot provide evidence that the route complies with those ordinances subject to waivers or county permits on the timeline in this docket, Summit has removed what was logically its only path forward in this docket by withdrawing its preemption request. Thus, the Application should be denied pursuant to SDCL 49-41B-13(1).

In addition to the grounds for denial of the Application under 49-41B-13(1) for a material misstatement of fact, there is also cause to deny the Application under 49-41B-13(2). This subsection provides that the Application may be denied for a "failure to file an application generally in the form and content required by this chapter and the rules promulgated

[1] Supplemental Application at page 90.
[2] Supplemental Application at page 92.

thereunder."[3] Because Applicant has withdrawn its preemption request, the Application fails to meet the contents required by ARSD 20:10:22:19. That rule provides:

> **Local land use controls.** The applicant shall provide a general description of local land use controls and the manner in which the proposed facility will comply with the local land use zoning or building rules, regulations or ordinances. If the proposed facility violates local land use controls, the applicant shall provide the commission with a detailed explanation of the reasons why the proposed facility should preempt the local controls. The explanation shall include a detailed description of the restrictiveness of the local controls in view of existing technology, factors of cost, economics, needs of parties, or any additional information to aid the commission in determining whether a permit may supersede or preempt a local control pursuant to SDCL 49-41B-28.

As noted earlier, the Applicant's own admissions identify that the proposed route does not comply with local ordinances. As such, the rule then requires the Applicant to provide the information necessary for the Commission to make its preemption findings. Since Summit no longer plans to preempt county ordinance one can reason that Summit no longer plans to present evidence on preemption and, therefore, the Application does not provide the content required by ARSD 20:10:22:19.

Further, if Summit argues that the "manner in which the proposed facility will comply" is through obtaining waivers or permits, it is Staff's opinion that those waivers or permits should be provided as evidence prior to the Commission making its decision on the permit. Without having that evidence in hand, Summit's history of litigation in South Dakota causes Staff to question the willingness of Summit to work with the counties. Even if Summit were to now argue that it will attempt to obtain waivers, it would be prejudicial to Staff and other Parties for the game to be changed at this late stage, depriving the Parties of the opportunity to ask

[3] SDCL 49-41B-13(2).

discovery of Applicant with respect to its plans to obtain waivers or other necessary permits at the county level.

Staff notes that Summit does have the right to challenge the county ordinances in the courts, however it is premature for the Commission to make a decision on the Application until evidence is provided the proposed route complies with county ordinances or a court has ruled that the ordinances are invalid. Unlike other siting dockets such as wind and solar, where permits can be granted condition on the applicant complying with local ordinances, transmission projects are subject to SDCL 49-41B-28, which through its final sentence, mandates the route be in compliance in order to be permitted.

Staff notes that a denial on these grounds is not, however, fatal to the project going forward. Rather, it provides Applicant with an opportunity to work with the counties and landowners and refile at such time as Applicant has determined a way to comply with county ordinances or has obtained necessary waivers or local permits such that the route would not be in violation. Further, if Applicant fails to obtain compliance at the county level and suffers a realized injury under that process, they can renew their preemption request under 49-41B-28 once they refile. SDCL 49-41B-13 provides that "[t]he commission shall, upon denying or returning an application, provide the applicant with reasons for such action and shall allow the applicant to make changes in the application in order to comply with the requirements of this chapter." Therefore, the necessary, logical, and judicially efficient thing to do is for the Application to be denied without prejudice at this time and afford Applicant the opportunity to cure the existing conflict with county ordinances and refile its Application.

Conclusion

Nothing in this Motion or the statements herein should be read to imply that had Summit proceeded with the Motion to Preempt Staff would have supported preemption. Nothing in the Motion establishes Staff's views and opinions on the Motion to Preempt or its legal sufficiency. The Motion to Preempt is no longer on the table and Staff offers no views on it at this time.

For the reasons stated above, Staff respectfully requests the Commission deny without prejudice the Application pursuant to SDCL 49-41B-13(1) and SDCL 49-41B-13(2) and allow Applicant to refile if and when it is able to comply with all local ordinances and is able to produce at route which does not violate local land-use zoning or ordinances.

Staff requests this Motion be heard at the beginning of the evidentiary hearing on September 11, 2023.

Respectfully submitted this 8th day of September 2023.

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