

**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 TO CONSTRUCT A CARBON  
DIOXIDE TRANSMISSION PIPELINE**

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**APPLICANT'S RESPONSE TO  
APPLICATIONS FOR PARTY  
STATUS**

**HP22-001**

Comes now the Applicant by and through its Attorneys of Record and hereby files this Response to Applications for Party Status. As of the date of this filing, the South Dakota Public Utilities Commission (Commission) has received a number of applications for party status. The applications for party status are categorized under statute and analyzed under statute and case law. Applicant objects to some but not all applications for party status as of the date of this filing.

**APPLICABLE LAW**

SDCL 49-41B-17 provides

The parties to a proceeding under this chapter unless otherwise provided include:

- (1) The commission staff;
- (2) The applicant;
- (3) Each municipality, county and governmental agency in the area where the facility is proposed to be sited, if timely application therefore is made as determined by the commission pursuant to rule; and
- (4) Any person residing in the area where the facility is proposed to be sited, or any directly interested person, if timely application therefore is made as determined by the commission pursuant to rule. An application for party status in a proceeding under this chapter must contain a detailed statement of the interests and reasons prompting the application.

“Area” as found in subsection (4) of Section 17 is not defined by the code.

SDCL 49-41B-2 (10) reads as follows:

(10) "Siting area," that area within ten miles in any direction of a proposed energy conversion facility, AC/DC conversion facility, or which is determined by the commission to be affected by a proposed energy conversion facility;

Pertinent current PUC rule uses the term "area" in the context of "affected area" thus:

**20:10:22:01. Definitions.** Terms defined in SDCL 49-41B-2 have the same meaning in this chapter. Other terms in this chapter mean:

(1) "Affected area," that area which may be affected environmentally, socially, or economically by the location of a facility at a proposed site;

(5) "Transmission site," that affected area on either side of and adjacent to a proposed transmission facility or associated facility;

And in chapter context:

**20:10:22:23. Community impact.** The applicant shall include an identification and analysis of the effects the construction, operation, and maintenance of the proposed facility will have on the anticipated affected area including the following:

- (1) A forecast of the impact on commercial and industrial sectors, housing, land values, labor market, health facilities, energy, sewage and water, solid waste management facilities, fire protection, law enforcement, recreational facilities, schools, transportation facilities, and other community and government facilities or services;
- (2) A forecast of the immediate and long-range impact of property and other taxes of the affected taxing jurisdictions;
- (3) A forecast of the impact on agricultural production and uses;
  - (4) A forecast of the impact on population, income, occupational distribution, and integration and cohesion of communities;
- (5) A forecast of the impact on transportation facilities;
  - (6) A forecast of the impact on landmarks and cultural resources of historic, religious, archaeological, scenic, natural, or other cultural significance. The information shall include the applicant's plans to coordinate with the local and state office of disaster services in the event of accidental release of contaminants from the proposed facility; and
  - (7) An indication of means of ameliorating negative social impact of the facility development.

**49-41B-5.2** provides as follows:

Within thirty days following the filing of an application for permit, the applicant shall notify, in writing, the owner of record of any land that is located within one-half mile of the proposed site where the facility is to be constructed. For purposes of this section, the owner of record is limited to the owner designated to receive the property tax bill sent by the county treasurer. The notice shall be mailed by certified mail. The notice shall contain a description of the nature and location of the facility. Any notification required by this section shall state the date, time, and location of the public input meeting. The applicant shall also file a copy of the application with the auditor of each county in which the proposed facility will be located.

#### ARGUMENT and ANALYSIS

Attached to this Response, Applicant has included Exhibits A-D, which list all applications for party status and taken together with this writing, depicts Applicant's objection, or not, to each.

It is important to note that objections by Applicant may be based on the limited understanding of a petitioner's interest gained by reading their petition. Many of the petitions contain a scant recitation with limited information. Those petitions filed by the Domina Law Firm seem to impermissibly shift the burden of proof of petitioners' interest or residency to others such as the Staff or Applicant. Applicant has used information known to it to analyze the various petitions. The burden of proof as to interest or residency is on the Petitioner and not on the Applicant. Each petitioner for intervention is the party in control and understanding of what those facts are and the burden is properly on each to demonstrate that interest or location. The petitioners are not yet parties to the docket and not subject to discovery under the rules; they would be subject to voir dire, but even then, the general rule is that the burden is on the petitioner to make his or her case, in this case for intervention, under the statutes.

It is also important to understand that not all routes depicted in the docket remain under active consideration. The Applicant's filing of April 8 abandoned some alternative routes which had previously been under consideration. Those abandoned alternative routes are not coming back into the docket for consideration. When a company files for a permit from the Commission, the company is required to provide "major alternatives as depicted on overhead photographs and land use culture maps." ARSD 20:10:22:35(3). Consistent with the Administrative Rule, Summit Carbon provided a map that depicted a major alternative route entering South Dakota east of Sioux Falls, continuing east of Brandon, through the southwest corner of Moody County, and through Lake County before connecting with the current route. As with the others, that alternative route has been abandoned and is not under consideration in this docket.

#### DIRECTLY INTERESTED

Applicant will argue that the interests of anyone from whom an easement is sought are clearly included under "direct interest." No objection is made to any intervention petition from someone who owns land and from whom Applicant wants an easement to construct the facility. Those names are found on Exhibit A.

Some operators of facilities presently in the project area have also petitioned for party status. They seem to be directly interested as well under the law. Applicant objects to the South Dakota Association of Rural Water Systems OR to the individual members of SDARWS who have applied dependent upon their direct interests, but not both. The interests of the rural water systems which the facility will cross are understood and accepted. Applicant simply asks the commission to allow intervention under one guise or the other. Similarly, FEM Electric and

South Dakota Rural Electric Association are both petitioners, and Applicant urges the commission to select one or the other, but not both. Applicant has no objection to South Dakota Telecommunications Association's petition.

“The Court has recognized an organization's standing “when: (a) [the association's] members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Sierra Club v. Clay County Board of Adjustment*, 2021 S.D. 28, para 18, quoting *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 2441, 53 L. Ed. 2d 383 (1977).

#### RESIDING IN THE AREA

Applicant further offers that “residing in the area” be defined by the Commission as residing within the notice corridor for routes currently under active consideration. Applicant also offers that those residing in or owning land in the notice corridor are in the “project area.” The Legislature has provided for notice of the application to people within ½ mile of the facility, and Applicant agrees that in doing so, the Legislature provided for those persons to become parties should they be inclined to petition. Applicant has no objection to those residing on or owning land within the notice corridor becoming parties as noted on Exhibit B.

Those petitioners residing or owning land outside the notice corridor for routes under active consideration, however, seem to have interests which are fully capable of being represented by commission staff and the units of government, whether or not those units have applied for party status. Applicant objects to their petitions as being unsupported in law or fact. Those petitions are found on Exhibit C.

Applicant notes that there might be a temptation to simply define “area” by measuring horizontal distance. Applicant argues that such a simplistic definition unless made by the Legislature is probably improper. For example, topography plays a large role in impacts and effects from abnormal operation. Population density plays a large role in impacts from construction. To simply say that ten miles or five miles from the centerline of the facility is the appropriate distance might cause a disservice to the others who seek to be heard in the docket proceedings. That is a position that requires the exercise of caution.

“More importantly, an administrative regulation cannot adopt requirements that "expand upon the statute that it purports to implement." *State Div. of Human Rights, ex rel. Ewing v. Prudential Ins. Co. of Am.*, 273 N.W.2d 111, 114 (S.D. 1978). "Furthermore, rules adopted in contravention of statutes are invalid." *Paul Nelson Farm v. S.D. Dep't of Revenue*, 2014 S.D. 31, ¶ 24, 847 N.W.2d 550, 558 (quoting *In re Yanni*, 2005 S.D. 59, ¶ 16, 697 N.W.2d 394, 400). *In re Luff Exploration Co.*, 864 N.W.2d 4, 9, 2015 S.D. LEXIS 61, \*12-13

#### GOVERNMENTAL ENTITIES


Applicant makes no broad objection to the petitions offered by governmental entities. Applicant does however object to Valley Springs Township’s petition. Given the filing made by Applicant abandoning some alternative routes, Valley Springs Township is not proximate to the proposed facility at all. Clark County made two apparent petitions. One seems to be sufficient. No objection is raised as to any other governmental entities who have petitioned as found on Exhibit D.

## OTHER CLAIMED INTERESTS

With respect to the interests of organized labor, Applicant objects to the filings of Tony Penn (on behalf of Great Plains' Laborers' District Council) and the International Union of Operating Engineers, Local 49 (Local 49). Applicant does not think that either is directly interested under the law. See Exhibit D.

Dated the 12<sup>th</sup> day of April, 2022.

MAY, ADAM, GERDES & THOMPSON LLP

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## CERTIFICATE OF SERVICE

12<sup>th</sup> Brett Koenecke of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 12<sup>th</sup> day of April, 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 following at their last known address, to-wit:

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