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	* * * * * * * *	**STAFF RESPONSE TO LANDOWNERS' RENEWED MOTION TO DISMISS AND RETURN SUMMIT'S APPLICATION OR IN THE ALTERNATIVE MOTION FOR STAY**

Staff, through and by its attorney of record, hereby files Staff's Response to Landowners' Renewed Motion to Dismiss and Return Summit's Application or in the Alternative Motion for Stay, which was filed by Intervenors represented by Attorney Brian Jorde (hereafter Landowners) on December 19, 2022. In their Motion, Landowners argue that the failure of SCS Carbon Transport LLC (Applicant) to serve notice on all landowners pursuant to SDCL 49-41B-5.2 requires dismissal of the Application. For the following reasons, Staff finds the argument moot and does not support dismissal of the Application at this time.

Notice to all landowners within a half mile of a proposed project is something that Staff has considered highly important to the process set forth in SDCL Chapter 49-41B, and we have made note of that, as early on in the process as June 2022, at which time Staff made mention in a filing of options for remedying missed landowner notices.[1] Staff also noted this concern on the record at the November 18, 2022 Commission meeting.[2]

On January 3, 2023, Applicant filed proof of mailing of a letter sent to the landowners who had not previously received notice. The letter sent to these landowners and filed in the

[1] See Staff's Response to Applicant's Motion to Extend Deadline and Intervenors' Motion to Dismiss or Stay, filed June 1, 2022.
[2] See November 18, 2022 recording at 38:04, https://puc.sd.gov/commission/media/2022/puc11182022.mp3.

docket alleviates Staff's concerns, which were specifically that all landowners have notice of the proposed project, the application, and the ability to participate in the process before this Commission. It is important to note that the Commission recently established a procedural schedule that set the evidentiary hearing to begin on September 11, 2023. This should help to alleviate any concerns that might have arisen if newly-noticed landowners wished to intervene and participate, as they will have several months to do so. The expanded schedule will also help prevent against any prejudice existing parties might have otherwise encountered by the late addition of parties.

In addition, to provide context to the notice issue, Staff reviewed the filings to determine how many landowner notices were sent out by Applicant, both late and timely, in order to fully comprehend the issue. While the landowner notice lists were filed confidentially, Staff contacted attorneys for Applicant to confirm that the numbers Staff came up with by counting the names in those lists were not confidential. Applicant confirmed Staff's numbers and ability to share them. According to the information Staff gleaned from the various landowner lists filed by Applicant, approximately 2,750 landowner notices have been sent. Approximately 2,700 of those were sent in February and March of 2022, as shown in the Proof of Mailing filed by Applicant on March 22, 2022. An additional 49 landowner notices were sent out on December 19, 2022, all of which went to landowners affected by a rout change who had not been in the original notice corridor.

A. Adequacy of Notice Pursuant to SDCL 49-41B-5.2

SDCL 49-41B-5.2 provides

> 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.

This notice is not only a requirement but very important to protect the rights of property owners and residents in the siting area.

Landowners argue that because Applicant did not comply with the requirement that all landowners within one-half mile of the proposed route receive notice within thirty days following the filing of the Application, the Application should be dismissed or returned pursuant to SDCL 49-41B-13(2). That statute provides, in relevant part, that "[a]n application *may* be denied, returned, or amended *at the discretion* of the [Commission] for …[f]ailure to file an application generally in the form and content required by [SDCL Chapter 49-41B] and the rules promulgated thereunder." {*emphasis added*}. The statute goes on to provide that if an application is returned or denied, the Commission is required to provide reasons for doing so and allow the applicant to make the necessary corrections in order to comply. SDCL 49-41B-13.

Applicant has already made the corrections necessary to comply with the aforementioned notice requirements. It did so by sending letters to the remaining landowners on or about December 19, 2022, in a letter which was filed with the Commission on January 4, 2023. Therefore, returning the Application and directing Applicant to take corrective action by sending notice to landowners is a moot point and not in the interest of judicial economy. By making the statute permissive and affording the Commission discretion, the Legislature clearly signified that

it intended for the Commission to look subjectively at each circumstance and allow the opportunity to cure any errors if necessary.

Applicant did provide notice to the vast majority of landowners pursuant to SDCL 49-41B-5.2, and because notice was published in the newspaper pursuant to SDCL 49- 41B-16, Applicant substantially complied with the notice requirements, as long as Applicant takes steps to cure any notice defect. The Court has found through the years substantial compliance with a notice statute may be sufficient. The Court in *Myears v. Charles Mix County*, in discussing compliance with a notice statute, stated that "[a]s a matter of law, we conclude substantial compliance is sufficient to satisfy the notice requirements of SDCL 3-21-2 and -3." *Myears*, 1997 SD 89, ¶ 13, 566 NW2d 470. The *Myears* Court went on to hold that the question is whether the plaintiff had substantially complied with the notice statutes, explaining "[s]ubstantial compliance" with a statute means actual compliance in respect to the substance essential to every reasonable objective of the statute. It means that a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which it was adopted. Substantial compliance with a statute is not shown unless it is made to appear that the purpose of the statute is shown to have been served. What constitutes substantial compliance with a statute is a matter depending on the facts of each particular case. *Id*. quoting *Larson v. Hazeltine*, 1996 SD 100, ¶ 19, 552 NW2d 830, 835 (quoting *Rans v. State*, 390 NW2d 64, 66 (SD 1986)(other citations and quotations omitted)). Staff views the intent of the statute as affording an affected landowner in the siting area the ability advocate to for their interest in our proceeding by intervening. If the notice defect is cured early enough, the affected landowner would still be able to meaningfully participate should they choose to and, thus, they would not be prejudiced by the lack of receiving the original notice.

As we noted at the November 18, 2022 Commission meeting, the notice issue is one of high importance to Staff. However, since that meeting, Applicant took steps to address the concerns Staff discussed regarding notice, and the evidentiary hearing now being set for September 2023 further alleviates any concern that a landowner may not have adequate notice and opportunity to participate to protect their unique interest.

B. Potential Re-routes

Landowners further argue that this proceeding should not move forward because Applicant has stated that it could not commit to having no further major or minor re-routes. As Staff has stated in its June 1, 2022, Staff Response, any future route changes are purely speculative. Should the Applicant make a route change in the future, Staff will make a recommendation to the Commission for the proper path forward at that time, after analyzing the route change for materiality, notice issues, and any other applicable elements. In addition, Staff and other parties would then have the ability to review changes on a case-by-case basis for compliance and potential for prejudice. At this time it would be improper to dismiss or stay an application on speculation alone.

The Motion goes on to suggest that a threshold of 85%-90% right-of-way acquisition should be implemented before going forward with the proceeding in order to ensure the route is final. However, Landowners do not cite any law or precedent to support such an argument. Not only would such a standard run the risk of harming South Dakota landowners by driving applicants away from the negotiating table and straight to the courthouse in order to more quickly meet the benchmark, it is not a practice that has ever been supported by this Commission or even the Legislature.

By way of example and to provide context, one of the last pipeline siting dockets processed by the Commission was HP14-002, *In re Dakota Access Pipeline*. At the time Dakota Access responded to Staff's first set of data requests, which was approximately three months after it filed its application, Dakota Access stated that it had secured approximately 60% voluntary easements for its route in this state.[3] At the time of the evidentiary hearing in that docket, a witness for the applicant testified that Dakota Access had 88.14% of the route secured in South Dakota.

In addition, the Legislature has had occasion to discuss voluntary easement thresholds, albeit not in the context of PUC permitting. In 2016, a bill was brought that would require a public utility or carrier to obtain voluntary easements from at least 80% percent of landowners prior to exercising the power of eminent domain for a project. This bill, SB 145, would have established a threshold for land acquisition, not permit acquisition, however, the discussion that took place before the Senate Judiciary Committee is very relevant to this discussion.[4] When discussing and ultimately declining to pass that bill, the Senate Judiciary Committee noted its concern with having a percentage threshold in law in circumstances when only a few landowners were effected by an energy project, as well as the need for PUC permitting and land acquisition to be able to occur simultaneously. The concern discussed was due to the facet of the bill that would have required a PUC permit prior to eminent domain proceedings, and the Committee felt that making one legal process a prerequisite to the other could cause years of delay. Thus, the converse would be true here, as well, in that causing an applicant to go through all legal steps to

[3] See Attachment to Prefiled Testimony of Darren Kearney, available at https://puc.sd.gov/commission/dockets/HydrocarbonPipeline/2014/HP14-002/testimony/staff/exhibita.pdf, page 20 of 310.
[4] A recording of this Committee discussion can be accessed at: https://sdlegislature.gov/Session/Bill/7379.

acquire, whether voluntarily or otherwise, 85-90% of property access would similarly cause delay.

Finally, a threshold calculated by percentage would set an unclear standard. Is it one man, one vote? One acre, one vote? One landowner, one vote regardless of how divided your interest is in the parcel at issue?

CONCLUSION

Notice to landowners is incredibly important, both from a legal perspective and from a fairness perspective, just as Staff stated at the November 18, 2022 meeting. It is Staff's understanding that as of December 19, 2022, notice had been sent to all landowners within a half-mile of the proposed route, including re-routes. Considering the current procedural schedule, everyone who received the later notice should have adequate time to offer comments or get involved if they so choose. Any future re-routes are speculative and not ripe for consideration at this time.

Dated this 9th day of January 2023.

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