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 APPLICANT'S MOTION TO EXTEND DEADLINE AND INTERVENORS' MOTION TO DISMISS OR STAY** **HP22-001**

Staff, through and by its attorney of record, hereby files Staff's Response to the Motions[1] filed by SCS Carbon Transport LLC (SCS Carbon or Applicant) and Intervenors represented by Domina Law Group (Intervenors). Applicant's Motion was filed with the Public Utilities Commission (Commission) on May 9, 2002, and Intervenors' was filed on May 17, 2022.

The following are the issues to be addressed per the two[2] motions, listed in order of the way Staff recommends addressing them, followed by the page on which the issue can be found in this brief:

1. Whether the Application should be dismissed for failure to provide specific route information. (Page 2)
2. Whether the Application Should be dismissed for inadequate notice. (Page 7)
3. Whether Intervenors' Motion for a Stay should be granted. (Page 11)
4. Whether Applicant's Motion to Extend the deadline should be granted. (Page 14)
5. Whether a Scheduling Order should be established. (Page 14)
6. Whether Applicant's Motion for Pre-Filed Testimony should be granted. (Page 14)

[1] Motion to Extend Deadline to June 15, 2023, for a Scheduling Order and for Pre-Filed Testimony; and Landowners' Motion to Dismiss and in the Alternative Motion for Stay and Objection to Summit's Motion to Extend Deadlines and for Scheduling Order and Motion to Extend Deadlines and Certificate of Service

[2] Staff notes that on April 28, 2022, attorney Brian Jorde filed a Motion for Extension of Intervention Deadline or in the Alternative Motion for Stay of All Proceedings. Staff interprets that motion to be mooted or superseded by Intervenors' Motion filed on May 17, 2022.

ARGUMENT

1. Whether the Application should be dismissed for failure to provide specific route information.

In paragraphs 5 and 6 of Intervenors' Motion, Intervenors argue that the February 2022 Application should be dismissed pursuant to SDCL 49-41B-13(2)[3] because the Application did not provide a "description of the specific site and its location" of the pipeline as required by ARSD 20:10:22:11.[4] Intervenors point to the Applicant's April 8 filing that identified the adoption of certain route changes as evidence that the February 2022 Application did not include a complete "description of the specific site." Intervenors also point to the Applicant's Motion as evidence that the route is still uncertain. This causes future uncertainty in the "specific site" of the route and may change information contained in the February 2022 Application used by the Applicant to demonstrate its burden of proof under SDCL 49-41B-22. Finally, Intervenors note that the Applicant has not filed an amended application that incorporates the April 8 route changes as required by ARSD 20:10:22:04(7).

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[3]SDCL 49-41B-13: Denial, return, or amendment of application--Grounds--Applicant permitted to make changes.

An application may be denied, returned, or amended at the discretion of the Public Utilities Commission for:

(1) Any deliberate misstatement of a material fact in the application or in accompanying statements or studies required of the applicant;

(2) Failure to file an application generally in the form and content required by this chapter and the rules promulgated thereunder; or

(3) Failure to deposit the initial amount with the application as required by § 49-41B-12.

The 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.

[4]ARSD 20:10:22:11. General site description. The application shall contain a general site description of the proposed facility including a description of the specific site and its location with respect to state, county, and other political subdivisions; a map showing prominent features such as cities, lakes and rivers; and maps showing cemeteries, places of historical significance, transportation facilities, or other public facilities adjacent to or abutting the plant or transmission site.

However, Intervenors failed to mention relevant language of the laws and rules. First, relating to SDCL 49-41B-13, the legislature gave the Commission the ability to deny, return, or amend the Application *at the Commission's discretion*. The legislature did not mandate that the Commission must deny an application if one of the grounds for such was met. Intervenors only point to denial should the Commission find that the Applicant failed to file an application generally in the form and content required by law and rule; however, the Commission can also use its discretion to allow the Applicant to amend the Application. An example of an applicant filing an amended application can be found in Docket HP09-001, *In re Keystone XL Pipeline*, accessible on the Commission's website.

Second, relating to ARSD 20:10:22:04(5), that rule states that "[e]ach application shall be considered to be a *continuing application*, and the applicant must immediately notify the commission of any changes of facts or applicable law materially affecting the application." {*emphasis added*}. Staff interprets a "continuing application" to be an application that can be updated by the Applicant throughout the Commission's processing of the docket. However, Staff notes that any update would need to undergo a materiality analysis as it relates to the potential for prejudicing any party, as well as a review to determine if the change prevents meaningful participation in the Commission's process for individuals with a direct interest.

Third, also relating to SDCL 49-41B-13, subpart 2 provides one ground for denial, return, or amending as: "[f]ailure to file an application *generally* in the form and content required by this chapter and the rules promulgated thereunder." {*emphasis added*}. The Merriam-Webster dictionary defines *general* as "relating to, determined by, or concerned with main elements rather than limited details." As such, the legislature gave the Commission the ability to deny, return, or

amend the application if, in the Commission's discretion, the application doesn't address the main elements of the statutes and rules.

1a. Staff disagrees with Intervenors' argument that the February 2022 Application was not filed generally in the form and content required by law and rule because the route remains uncertain

a) Potential route changes due to county ordinances are speculative.

Intervenors' main argument for the Application not generally meeting the form and content required by law and rule is that the route may change in the future. This argument does have some merit, especially since certain counties are working to enact new ordinances, or amend existing ordinances, applicable to carbon dioxide pipelines. A few of those counties have even enacted moratoriums on new pipeline construction until the ordinances are revised. [5] Based on these county actions, it is logical to conclude that the route could change in the future.

While there is the potential for the route to change, Staff believes it is speculative at this time to find that those changes will be of a material nature that prejudices an existing party or prevents meaningful participation by a directly interested person. Further, the Applicant could ask the Commission to make a finding under SDCL 49-41B-28[6] to permit the route as currently proposed should the Applicant find the county ordinances either too restrictive or would cause the route to materially change. Staff notes that the Applicant has made no such request to date

[5] January 18, 2022, Comments of McPherson County Commissioners in Docket HP22-001 and April 7, 2022 Comments of Carla Bruning, Moody County Commission Chair in Docket HP22-001;

[6] SDCL 49-41B-28. Supersession of local land use controls by facility permit upon finding by commission.

A permit for the construction of a transmission facility within a designated area may supersede or preempt any county or municipal land use, zoning, or building rules, regulations, or ordinances upon a finding by the Public Utilities Commission that such rules, or regulation, or ordinances, as applied to the proposed route, are unreasonably restrictive in view of existing technology, factors of cost, or economics, or needs of parties where located in or out of the county or municipality. Without such a finding by the commission, no route shall be designated which violates local land-use zoning, or building rules, or regulations, or ordinances.

and, thus, at this time the route must comply with local ordinances and Staff will review the proposed route accordingly.

At this time, Staff cannot support the Intervenors' argument that the Applicant failed to provide the content required by ARSD 20:10:22:11, or more specifically, failed to include a description of the "specific cite and its location" for the pipeline. Information filed to date does provide a specific route, and Staff will make our recommendation to the Commission based on that route. Any future route changes are purely speculative. However, if they do occur, Staff will reassess our position and make a recommendation to the Commission for the proper path forward at that time. 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.

b) Staff finds the Application was filed generally in the form and content required by law/rule.

Based on the information filed in the docket to date, Staff finds that the Application was filed *generally* in the form and content required by the rule where the main elements of such were addressed within the Application, appendices, testimony, and updates. To support this, Staff notes that the Applicant identifies they addressed each section of ARSD Chapter 20:10:22 in the Application.[7] Upon initial review of the Application, Staff agrees with Applicant's assessment that the main elements of the siting rules were addressed.

Staff has, however, requested the Applicant provide additional information through data requests. The purpose of these data requests is 1) to have the Applicant provide information required by either statute or rule that is missing from, or unclear within, the Application and 2) to

[7] See SCS Transport LLC's Application at pages x-xii.

allow staff to review additional facts/evidence that the Applicant may use to support its burden of proof. It is not uncommon for Staff to round-out a siting permit application through data requests, which has been Staff's standard practice for every siting permit application filed in recent history. Support for this is found ARSD 20:10:22:04(5)[8] and ARSD 20:10:22:04(7).[9] Based on those rules, ARSD Chapter 20:10:22 contemplates that an application may need to be amended during the Commission's review. This is further evidenced by the fact that the legislature provided for a year-long review process.

Presently Staff is aware of, and awaiting, additional supportive material that the Applicant needs to provide for Staff to fully develop our position on the permit application. One first outstanding item, and likely the most important, is the worst-case event modeling and incident risk analysis.[10] Another outstanding item is final environmental/cultural survey reports.

Pursuant to 49-41B-22(3), the Applicant has the burden of proof to show that the facility will not substantially impair the health, safety, or welfare of the inhabitants. The worst-case event modeling and incident risk analysis is critical for the Applicant to provide to meet its burden of proof. Staff understands that pipeline safety falls under the jurisdiction of the Pipeline and Hazardous Materials Safety Administration (PHMSA) and that the project will be designed and constructed pursuant to PHMSA rules. However, the Commission must still make a finding as to whether the project will substantially impair the health, safety, or welfare of the inhabitants. Thus, the modeling and risk assessment will allow one to better understand the risk of the project

[8] ARSD 20:10:22:04(5): "Each application shall be considered a continuing application…"
[9] ARSD 20:10:22:04(7): "Any amendments to the application shall be filed in the same format required of the applications."
[10] Staff requested this modeling in Data Request 1-17. Applicant responded the modeling will be provide once completed.

to health and safety, as well as the potential impact to the inhabitants in the event of a worst-case event.

The other outstanding item is the final environmental and cultural resource survey reports. The Applicant has noted that surveys are ongoing and final reports have yet to be prepared.[11] Staff expects that our environmental expert witnesses will need to see the final survey reports to form an opinion on the project's expected impacts and the Applicant's burden of proof under SDCL 49-41B-22(2).[12] It should be noted that Staff has not verified this with our subject matter experts. Due to the uncertainty surrounding the procedural schedule with the motions before the Commission, Staff has not yet retained an expert witness to review the environmental data.

It is Staff's position that the outstanding information is not fatal to the Application at this time. As noted earlier, the Application is considered a continuing application pursuant to administrative rule. Further, if the Applicant provides the outstanding material (and responses to future data requests) within a reasonable amount of time prior to Staff's prefiled testimony due date, then Staff will not be prejudiced in presenting our case to the Commission. As far as whether or not other parties are prejudiced by the outstanding information, Staff cannot substitute our judgement for theirs. However, if the Applicant provides the information a reasonable amount of time before the testimony is due, any prejudice can be mitigated or avoided.

[11] See Application page 100; Pre-filed Direct Testimony of Jon Schmidt pages 4 of 18, 10 of 18, and 17 of 18; and Appendix 9, Wetland Report page 2.
[12] SDCL 49-41B-22(2) states that the applicant has the burden of proof to establish by the preponderance of the evidence that the facility will not pose a threat of serious injury to the environment.

2. Whether the Application should be dismissed for inadequate notice.

Intervenors allege SCS Carbon failed to notify 156 landowners to whom notice was required, which SCS Carbon acknowledged in a March 11, 2022, Letter to the Commission. Intervenors request the Commission return or deny the Application for failure to abide by the form and content required by SDCL chapter 49-41B and Commission Rules.

The letter filed by Applicant's attorney on March 11, 2022, notes that 156 landowners did not receive notice when Applicant mailed it to over 2,500 landowners, pursuant to SDCL 49-41B-5.2.[13] However, in the March 11 letter, Applicant goes on to state that notice was sent to those 156 landowners on March 10, 2022. March 10, 2022, would have been the thirtieth day after the Application was filed and ultimately in compliance with the statute. Therefore, Staff has no reason to believe that notice was deficient with respect to the 156 landowners.

Through the discovery process, Staff learned that there are five landowners who did not receive the required notice. These five were all affected by the Edmonds County reroute. All five own land within a half mile of the route but are not directly on the reroute. Therefore, Staff has analyzed the notice issue with respect to these five landowners, rather than the 156 mentioned earlier.

[13] SDCL 49-41B-5.2. Notification of area landowners by mail--Time for notification--Copy of application filed with county auditor.
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.

Because 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)).

a. Staff recommends an opportunity to cure rather than dismissal.

Should an extension be granted, as discussed below, Applicant will have ample time to reach out to those five landowners who did not receive notice and cure any defective notice. The following is a summary of similar situations in past dockets[14] and the manner in which they were

[14] All dockets can be found on the Commission's website by going to Commission Actions and then Commission Dockets.

resolved. Staff does not represent that this list accounts for every route change in all past siting dockets, rather the list encompasses all scenarios of which Staff is currently aware.

i. In HP09-001, an alternate route was ultimately permitted for the Keystone XL Pipeline. However, the alternate was under consideration at the time the application was filed. Therefore, it appears that all parties were given notice from the outset of the docket.

ii. In dockets HP09-002 and EL09-015, which were two dockets related to the same project, the Commission voted to extend the intervention and public input hearing deadlines after it was discovered that notice was not sent to all landowners within a half mile of the proposed pipeline route and site of the proposed energy conversion facility.

iii. In EL13-028, route changes were made to the proposed electric transmission line approximately five months after the original permit application was filed. Due to the route changes, the Commission issued a Second Notice of Application; Order for and Notice of Public Input Hearing; Notice of Opportunity to Apply for Party Status. An additional public input meeting was then held.

iv. In EL14-061, Black Hills Power, the applicant for a transmission line siting permit, made a route adjustment to accommodate a landowner concern after the permit had been granted. Black Hills Power obtained a waiver from the effected landowners of two parcels located within a half mile of the new route. The landowners waived notice pursuant to SDCL 49-41B-5.2 and consented to the route.

v. In EL17-042, Otter Tail Power Company (Otter Tail), an applicant for pipeline transmission and energy conversion facility permits, made arrangements for a newspaper to publish notice in accordance with the statutory requirements. As per the statutory requirement at the time, the Commission was also required to publish notice in the newspaper. The notice dates lined up so both Otter Tail's notice and the Commission's notice would be published on the same date, and in the same newspaper. This resulted in the newspaper only publishing the Commission's notice. Once this became known, the newspaper published Otter Tail's notice in the next edition of the newspaper. When this occurred, Otter Tail reached out to the Commission and requested a finding of substantial compliance to avoid needing to withdraw and refile the docket. The Commission found substantial compliance was achieved.

vi. In EL19-016, a newspaper failed to publish a required notice. Though the fault was not attributable to the applicant, Crowned Ridge II, the applicant chose to withdraw the permit application and refile out of an abundance of caution. However, it is important to

> note that EL19-016 was filed prior to legislative changes that increase the time for processing a wind energy permit from six to nine months and also provided a mechanism for an applicant to request an extension of the decision deadline. Therefore, the applicant in that docket had less options available to cure any defect.

Based upon precedent from both caselaw and prior Commission dockets, compliance with SDCL 49-41B-5.2 should be reviewed for substantial compliance. The Applicant can achieve substantial compliance by promptly sending notice to those who were missed and/or obtaining waivers from those landowners. Staff notes that the sooner the deficiency is remedied, the less likelihood there will be for any of those landowners to be prejudiced.

Intervenors also allege the notice provided was deficient because the Applicant has requested a reroute on April 8, 2022, and additional reroutes may be proposed in October of 2022. As far as a potential reroute beyond that filed on April 8, this argument is entirely speculative. Neither Intervenors, nor the Commission, have any way of knowing whether an additional reroute will be proposed, nor the extent or facts surrounding the hypothetical reroute. Therefore, such an issue is not ripe for a Commission decision today. If Applicant does propose a reroute in October of 2022, the Commission may consider this issue and whether notice was sufficient based on the facts available at that time.

3. Whether Intervenors' Motion for a Stay should be granted.

SDCL 49-41B-24 and 49-41B-24.1[15] place limitations on the Commission, rather than the parties to a proceeding. 49-41B-24 states that the Commission "shall make complete findings" within twelve months.

[15] 49-41B-24. Within twelve months of receipt of the initial application for a permit for the construction of energy conversion facilities, AC/DC conversion facilities, or transmission facilities, the commission shall make complete

ARSD 20:10:01:14[16] allows the Commission to grant extensions of time upon request of a party. However, the rule cannot be read to supersede limitations placed on the commission itself. Such an interpretation would cause the exception to swallow the rule. It would render moot all statutory timelines founder in Title 49, from siting permits to rate cases. The rules of statutory interpretation require one to "assume that the legislature, in enacting a provision, had in mind previously enacted statutes relating to the same subject." *Meyerink v. Northwestern Public Service Co.*, 391 NW2d 180, 183-84 (SD 1986).

An administrative "rule must be interpreted within the scope of 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).

The statute that ARSD 20:10:01:14 purports to implement is SDCL 49-1-11, which provides

> The Public Utilities Commission may promulgate rules pursuant to chapter 1-26 concerning:
> (1) Procedures for filing and cancelling tariffs, and information required to be included in tariffs;
> (2) Procedures and requirements for filing and acting upon complaints;
> (3) Procedures and requirements for filing applications for new or revised rates or tariff changes;
> (4) Regulation of proceedings before the commission, including forms, notices, applications, pleadings, orders to show cause and the service thereof, all of which shall conform to those used in South Dakota courts;
> (5) Procedures for obtaining a declaratory ruling and action on petitions for a declaratory ruling;

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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. 49-41B-24.1. Upon request of the applicant, the commission may extend the deadlines for commission action established in §§ 49-41B-24 and 49-41B-25.

[16] 20:10:01:14. Adjournments and extensions of time may be granted upon application of a party, in the discretion of the commission.

> (6) Procedures and requirements for handling confidential information and determining whether information should be protected as confidential; and
> (7) Procedures for communicating with the commissioners.

Remaining within the confines of this statute, nothing in SDCL 49-1-11 relates to statutory deadlines place on the Commission. Therefore, ARSD 20:10:01:14 cannot be expanded to allow the Commission to waive other statutory deadlines.

The only allowance the legislature has created to extend the twelve-month deadline is SDCL 49-41B-24.1, which provides that the Commission may grant a request from the applicant to extend the deadline. "The first rule [of statutory construction] is that the language in the statute is the paramount consideration." *Olson v. Butte County Commission*, 2019 SD 13, ¶ 5, 925 NW2d 463. It must be assumed that "the legislature meant what the statute says." *Nilson v. Clay County*, 534 NW2d 598, 601 (SD 1995). When it enacted SDCL 49-41B-24.1, the legislature expressly limited who could request an extension of SDCL 49-41B-24 to the applicant for a siting permit.

The Court has held that an agency's interpretation of the statutes and its administrative rules cannot "grant it more authority than the plain language of the statutes." *In re Adoption of AAB*, 2016 SD 22, ¶ 8, 877 NW2d 355, 361. Thus, the Commission lacks the authority to grant an extension beyond the twelve-month deadline upon the request of any party other than SCS Carbon.

4. Whether Applicant's Motion to Extend the deadline should be granted.

Applicant has requested that the deadline for a final decision in this docket be extended to June 15, 2023. The request was made pursuant to SDCL 49-41B-24.1, which, as previously discussed, allows an applicant to make such a motion. An extension in this docket is prudent and Staff supports this request.

5. Whether a Scheduling Order should be established.

In the motions, Applicant and Intervenors both propose procedural schedules. Staff proposes the that the Commission order a deadline for responses to discovery of ten business days after service of the discovery. However, Staff requests that establishing the balance of the procedural schedule be deferred, because the parties will not know until after the other portions of the two motions are ruled upon what the deadline for the final decision in this docket will be. It makes sense to allow all parties to weigh in once they have that information. In addition, that will allow time to contemplate dates for an evidentiary hearing and consider those dates when establishing the schedule.

6. Whether Applicant's Motion for Pre-Filed Testimony should be granted.

Staff intends to support this request but recommends deferring it along with the scheduling order.

CONCLUSION

Staff supports granting Applicant's Motion to Extend Deadline to June 15, 2023. Regarding a procedural schedule, Staff requests the Commission order responses to discovery requests to be due within ten business days of receipt, but that establishing the balance of the procedural schedule be deferred to another date. Staff also recommends Applicant's request for an order requiring prefiled testimony be deferred and taken up at the same time as the procedural schedule.

Next, Intervenors' request to dismiss the Application due to notice deficiencies should be denied without prejudice and the Applicant given the opportunity to timely cure any notice deficiency.

Finally, Intervenors' request for a stay should be denied in light of Applicant's request for an extension.

Dated this 1st day of June 2022.

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