

**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**

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**STAFF’S RESPONSE TO
LANDOWNERS’ MOTION TO
RETURN APPLICATION

HP22-001**

Staff of the Public Utilities Commission (Commission) by and through its undersigned counsel hereby files this Response to Landowners’ August 18, 2023, Motion to Return Application.

Background

On February 7, 2022, the Commission received an Application for a Permit to Construct a Carbon Dioxide Transmission Pipeline (Application) from SCS Carbon Transport LLC (Applicant or Summit). Applicant proposes to construct and operate a carbon dioxide transmission pipeline (Project). The Project is approximately 2,000 miles of pipelines for the transportation of CO2 from more than 30 ethanol plants across five states, including seven ethanol plants in South Dakota, to underground injection control facilities in North Dakota. Five public input meetings were held between March 22 and March 25, 2022. Party status has been granted to numerous persons. The Commission established a procedural schedule with an evidentiary hearing to commence September 11, 2023, and has established November 15, 2023, as the deadline for a final decision in this docket. Parties have filed prefiled testimony pursuant to the procedural schedule.

On August 18, 2023, Landowners filed a Motion to Return Application. In the Motion, Landowners allege the August 8, 2023, denial of Summit’s permit application by the North

Dakota Public Service Commission (North Dakota) has a significant impact on Summit's South Dakota permit application and causing misstatements in Summit's Application. Landowners further allege that these misstatements cannot be corrected or amended so the Application must be returned to Summit.

Legal Standard

SDCL 49-41B-13 provides that an application *MAY* be denied, returned, or amended at the discretion of the Public Utilities Commission for a deliberate misstatement of a material fact, failure to file an application generally in the form required, or failure to deposit the initial amount as required by SDCL 49-41B-13.

Significantly, Landowners' Motion includes a blatant misrepresentation of the language of SDCL 49-41B-13. This statute does NOT require the Commission to return an application for any reason. Instead, the statute is permissive. By using the word "may," the Commission has discretion to deny, return, or amend an application if there is a deliberate misstatement of a material fact, but the Commission is not required to do so, as Landowners would have this Commission believe.

ARSD 20:10:22:04 (5) specifies that each application is considered a continuing application, and the applicant must notify the Commission of any changes of facts or applicable law affecting the application.

Analysis

In this case, it does not appear Summit has made a deliberate misstatement of a material fact in the application or in accompanying statements. Landowners do not allege Summit made a

false or inaccurate statement in the initial application, or even in accompanying statements or studies, or in supplemental information. Summit has not represented to this Commission that North Dakota granted a permit to construct the pipeline at issue in this case. Landowners have not made such an allegation, nor have Landowners asserted that Summit's representations at the time of the Application, or filing of additional information were inaccurate.

Instead, the Landowners claim North Dakota's decision effectively changes many of Summit's statements in the application and other information presented to the Commission and therefor return of the Application is appropriate because Summit failed to immediately notify the Commission of North Dakota's decision. ARSD 20:10:22:04 (5) requires an Applicant to immediately notify the Commission of changes of facts or applicable law affecting the application. In this case, North Dakota issued a denial on August 8, 2023, Landowners filed this Motion on August 18, 2023, and claimed the North Dakota application was fully adjudicated because Summit is not challenging or appealing the decision and would instead re-apply.

However, Landowners' Motion does not show that North Dakota's August 8, 2023, denial is actually a change of facts or applicable law that would necessarily affect the Application, nor does it explain how any "misstatement" created by the denial could not be corrected or amended. South Dakota law does not require an Applicant to have secured all other permits necessary before applying for, or obtaining, a permit in South Dakota. Additionally, based on Landowners own statements in the Motion, Summit can re-apply for a permit in North Dakota, and public information shows Summit did in fact submit an updated application with request for limited rehearing to North Dakota on August 22, 2023. Though Landowners' Motion indicates Summit would not challenge or appeal the North Dakota decision, there is also no evidence that Summit has waived any right they have to take such legal action. Although

Landowners do make arguments in the Motion that show North Dakota's denial could have an impact on Summit's Application or the proposed project in South Dakota, it is not certain that North Dakota's denial will in fact change the facts presented in Summit's Application, and therefore it would be premature to return the Application on this basis.

Even if the North Dakota denial did change the facts presented in Summit's Application, and even Summit failed to immediately notify the Commission of that change, and even if that failure were determined to rise to a deliberate misstatement of a material fact, SDCL 49-41B-13 gives the Commission discretion whether to return, deny or amend the application and in this case, it does not seem prudent to return the Application.

Summit filed this Application on February 7, 2022. For over a year, the parties have engaged in fact finding and investigated this Application. An evidentiary hearing is set to begin in a matter of weeks, on September 11, 2023. At this point, based on Staff's opinion that Landowners' allegations are not material in nature and of Summit's filing of an updated application in North Dakota, Staff fails to see any benefit in returning the Application to Summit. This is particularly true because SDCL 49-41B-13 requires that 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." This mandate that the Commission shall allow an applicant to make the necessary changes to the application suggests that even if the Commission granted Landowners Motion the Commission is required to allow Summit to change the Application, and the proceeding would begin again, just with a delay and the necessity to reschedule the evidentiary hearing.

Landowners suggest the “misstatements” caused by the denial cannot be corrected or amended, but it is certainly not clear why this would be the case. Returning the application at this juncture seems to be an undue administrative burden that would serve no actual purpose, especially when Landowners could certainly enter the North Dakota decision into the record at the evidentiary hearing if Landowners believe it is significant.

Conclusion

While the North Dakota decision could potentially affect Summit’s permit Application, the viability of the proposed project, and the proposed route, this is not a basis for the Commission to return the Application under SDCL 49-41B-13. The mere fact that the North Dakota Commission denied the permit is not necessarily fatal to the project, nor to Summit’s South Dakota Application. Although the North Dakota decision could have an impact on Summit’s Application, it is just as possible that the decision may have no impact. For these reasons, instead of returning the application at this juncture, it is more appropriate to hear all the facts at the evidentiary hearing scheduled to begin September 11, 2023, and the Commission can then make a fact and evidence-based decision about whether to grant or deny Summit a permit in South Dakota.

Dated this 23rd day of August 2023.



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