

**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 RESPONSE TO
APPLICATIONS FOR PARTY
STATUS

HP22-001**

Staff, by and through its undersigned attorney, 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 over 370 applications for party status.

A. Legal Authority

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.

In addition to commission staff (Staff) and the applicant, SCS Carbon Transport, LLC (Summit Carbon), SDCL 49-41B-17 provides a list of others who may become parties to this proceeding if timely application is made. The statute essentially provides two categories for intervention: 1) intervention granted to parties of right upon timely application and 2) potential for intervention granted upon timely application and a showing that the applicant is a directly

interested person. These two categories provided for in SDCL 49-41B-17 mirror those set forth in the Rules of Civil Procedure as provided in SDCL 15-6-24(a).

The first is not subjective and merely requires a determination that the applicant for party status is either a municipality, county or governmental agency in the project area or is a person¹ residing in the project area. If an applicant for party status demonstrates they fall into one of those categories, they should be given party status. No additional showing of interest is necessary. Rather, these persons are parties of right. See, SDCL 15-6-24(a)(1).

The second is subjective, because it requires an evaluation of whether the person has a direct interest in the outcome of the Commission's decision. For this reason, it is incredibly important the sufficient information be provided in the application for party status, because Staff cannot speculate on another's direct interest.

The South Dakota Supreme Court has held that "the interest which entitles a party to intervene must be a direct interest, by which the intervening party is to obtain immediate gain or suffer loss by the judgment which may be rendered between the original parties." *Jackson v. Board of County Commissioners for Pennington County*, 76 S.D. 495, 500, 81 N.W.2d 686, 689 (1957).

While the intervention statutes of the states differ, there is a general concurrence in the decisions that the interest which entitles a person to intervene in a suit between other parties must be in the matter in litigation and of such direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment. The interest must be one arising from a claim to the subject matter of the action or some part thereof, or a

¹ SDCL 49-41B-2(9) defines a person as "an individual, partnership, limited liability company, joint venture, private or public corporation, association, firm, public service company, cooperative, political subdivision, municipal corporation, government agency, public utility district, or any other public or private entity, however organized."

lien upon the property or some part thereof; one whose interest in the matter of litigation is not a direct or substantial interest, but is an indirect, inconsequential, or contingent one, cannot intervene.

Id. (quoting 39 Am.Jur. Parties § 61). “Intervention is strictly procedural and ‘intervention standards are flexible, allowing for some tailoring of decisions to the facts of each case.’” *In re Estate of Olson*, 2008 S.D. 126, ¶ 5, 759 N.W.2d at 318 (quoting *In re D.M.*, 2006 S.D. 15, ¶ 4, 710 N.W.2d 441, 443).

B. Analysis

Attached to this Response is Exhibit A, which lists all applications for party status received by the time of filing this Response and represents Staff’s position on those applications. Staff’s analysis of each party status application that fell into the “direct interest” category included, but was not limited to, such considerations as the following:

- If not located on or within a half mile of the proposed route or alternative route under consideration, does the applicant reside, work, or otherwise physically frequent the area near the proposed project? Due to the lack of a developed record establishing the area that could be affected by a rupture, Staff must err on the side of being reasonable and inclusive with this determination. Therefore, if no other information was provided in the application for party status to explain the direct interest, Staff does not recommend party status be granted if the applicant listed an address more than ten miles from the proposed pipeline. This distance is commensurate with the notice distance to municipalities. Therefore, Staff presumed any applicant within ten miles to have a direct interest. For applicants residing greater than ten miles away, Staff looked to the individual party status application for more information.

- If not residing in the area, is the applicant a landowner reasonable near to the proposed project or associated facilities, such as work camps, so as to have a substantial interest in protecting the land or the value of their land?²
- Did the applicant claim a business interest that would be directly impacted by the project? This might be anything from being directly affected by increased revenue to directly impacted by competition for labor.

This list of considerations is certainly not exhaustive, merely illustrative. Should the Commission have questions on how Staff analyzed a specific application for party status, Staff will be available at the Commission meeting to respond.

In addition, when reviewing an application for party status by an organization, non-profit, or other entity, Staff looked to the South Dakota Supreme Court's guidance on standing. 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).

It is also important to understand that not all routes depicted in the docket are under active 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

² This should not be taken as a statement that Staff assumes there to be an effect on land value. Rather, we recognize a person's right to appear and make that argument if they so choose.

maps.” ARSD 20:10:22:35(3). This information, while required, may have led to some confusion. Consistent with the Administrative Rule, Summit Carbon provided a map that depicted an 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. That alternative route is not under consideration in this docket. By contrast, Summit Carbon provided a number of other alternatives designated on map pages by purple lines. These are identified as “Alternative Under Active Consideration.” In considering proximity of applicants for party status to the project area, Staff did not consider the alternative routes that are no longer under consideration, but did consider all alternatives under active consideration as though they are part of the route.

Staff provides the following analysis regarding those applications for party status for which Staff does not recommend approval, as well as an explanation of those applicants which fell outside Staff’s ten-mile direct interest presumption. Staff reserves the right to change its position should additional information be provided demonstrating a direct interest.

1. Individuals in Column 2 of Staff’s Exhibit A

- a. Based upon the information provided in the party status application, these applicants reside over ten miles from the project at its nearest point to the address provided on the application for party status, or insufficient information was provided to determine the direct interest of the applicant for party status.
- b. Every application for party status received was cross-referenced with the notice list filed confidentially by Summit Carbon, listing those individuals owning land within a half mile of the proposed route.

None of the applicants for party status listed in Column 2 appeared on the notice list.

- c. Staff believes additional information needs to be provided by the individual seeking party status in order to make a determination if they qualify for party status.

2. Tony Penn (on behalf of Great Plains' Laborers' District Council)

- a. In the Motion to Intervene attached to the application for party status, this applicant notes a number of impacts to the community that may be felt by union members and their families. However, those appear to be indirect impacts, and this applicant fails to state a direct impact on itself. It is generally allowable for an organization or entity to obtain party status if the organization satisfies the criteria described above.

While it appears that Great Plains' Laborers' District Council (District Council) does seek to protect issues germane to the organization's purpose, it is unclear whether any of its members would have standing in their own right. Rather, it appears from the application that District Council may have member organizations who may have members who may have standing.

- b. Should the Commission choose to grant party status, Staff requests the party be listed as Great Plains' Laborers' District Council, rather than Mr. Penn. This appears to be consistent with the filing.

3. International Union of Operating Engineers, Local 49 (Local 49)

- a. Staff applied the same analysis to the Local 49 as the District Council. However, Local 49 stated that it does have hundreds of members in South Dakota. Thus, Local 49 has satisfied the second prong of the test for standing. Staff recommends party status be granted to Local 49.

4. Daniel Hoey

- a. The application for party status was filled out by Daniel Hoey and listed his name on the party line. Mr. Hoey is the superintendent of West Central School District, and it appears the school district is the intended party. Therefore, Staff recommends granting party status to West Central School District, with Mr. Hoey added to the service list.

5. Mahmud Fitol (Great Plains Action Society)

- a. This application appears to be for the Great Plains Action Society. However, the application makes no mention of having members in South Dakota who would have standing of their own right. Mahmud Fitol as an individual is a resident of Omaha, Nebraska and would, therefore, also lack a direct interest. Staff recommends denial.

6. Party status applications received after the April 8 deadline

- a. Staff will review party status applications received after the April 8 deadline on a case-by-case basis. As of the filing of this Response, Staff has not found any to be prejudicial and is not objecting based on timeliness.

CONCLUSION

Staff recommends party status be granted to those individuals and entities listed in Column 1 of Staff's Exhibit A, attached to this filing. For those governmental entities that filed duplicate applications for party status, with one coming from the state's attorney, Staff has listed the entity only once in Exhibit A and would recommend that, if granted, the state's attorney be the party added to the service list.

If an applicant for party status does not see their name anywhere in Staff's Exhibit A, we would ask that they contact us as soon as possible to let us know that they were missed. Every applicant should be listed.

Dated this 12th day of April 2022.



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