January 2, 2025

Commissioner Kristie Fiegen
South Dakota Public Utilities Commission
500 East Capitol Avenue
Pierre, SD 57501

Re: *In the Matter of the Application by SCS Carbon Transport LLC* (HP24-001)

Dear Commissioner Fiegen:

This letter addresses your participation in Public Utilities Commission Docket HP24-001, which concerns the application submitted by SCS Carbon Transport LLC ("*Summit*"), for a permit to construct a carbon-dioxide transmission pipeline. In two different pipeline dockets, including a previous Summit docket, you determined that you had a conflict of interest requiring your recusal. Given that the material facts supporting your previous decisions have not changed, Summit respectfully requests that you recuse yourself in this matter under SDCL § 49-1-9 and that you ask the Governor to appoint an elected official to act in your place. As with your previous decisions, the facts and established South Dakota law support a decision that you should step aside.

In a letter dated February 9, 2022, and filed in Docket HP22-001, you informed the Governor that you would recuse yourself in that docket, which involved Summit's previous application to construct and operate a pipeline to transmit carbon dioxide. This letter is attached as **Exhibit A**. In this letter, you explained that Summit's proposed pipeline was set to "cross land owned by [your] sister-in-law ([your] husband's sister) and her husband." You noted further that the route contemplated by that project was "similar to the route in Docket HP14-002 in which [you] also disqualified [your]self due to the same conflict of interest." On those bases, you concluded you had no choice but to recuse yourself from considering Summit's application for a permit.

You were right to take this step. By statute, a commissioner may not "participate in any hearing or proceeding in which [s]he has any conflict of interest." SDCL § 49-1-9. This statute requires recusal if there is a conflict of interest. And close familial interests qualify as such a conflict. The route at issue in Summit's pending application still crosses land owned by your sister-in-law and her husband, and they have been paid a substantial sum of money by Summit for easement rights to construct and operate the pipeline on their property. Thus, the same concerns that supported your decision to recuse in HP22-001 and HP14-002 also require recusal here. Moreover, the fact that you previously declared that you had a conflict of interest in these two dockets itself supports recusal here because "the very appearance of complete fairness must be present." *Armstrong v. Turner Cnty. Bd. of Adjustment*, 772 N.W.2d 643, 651 (S.D. 2009).

Although there have been few occasions when an applicant and a commissioner disagreed about the existence of a conflict, established South Dakota law provides clear guidance on when a disqualifying conflict exists for someone in your position. In a case involving Commissioner

Stofferahn's refusal to recuse, the South Dakota Supreme Court considered his refusal. *Nw. Bell Tel. Co. v. Stofferahn*, 461 N.W.2d 129, 133 (S.D. 1990). While § 49-1-9 puts the onus on a commissioner to recuse herself, the South Dakota Constitution does not permit a commissioner to participate in a matter for which she should have rightfully recused: "[A] fair trial in a fair tribunal is a basic requirement of due process," and that right is paramount to the terms of any statute that would afford lesser protection. *Id.* at 132-33. In other words, while the duty to recuse is statutory, the existence of a conflict of interest presents a constitutional issue.

The standard for disqualification is a high one. *Miles v. Spink Cnty. Bd. of Adjustment*, 972 N.W.2d 136, 149 n.15 (S.D. 2022). But disqualification is warranted if the record establishes "either actual bias on the part of the [commissioner] or the existence of circumstances that [led] to . . . an unacceptable risk of actual bias." *Stofferahn*, 461 N.W.2d at 133. If the surrounding circumstances demonstrate a "capacity to tempt the official to depart from [her] duty, then the risk of actual bias is unacceptable and the conflict of interest is sufficient to disqualify the official." *In re Conditional Use Permit No. 13-08*, 855 N.W.2d 836, 842 (S.D. 2014) (internal quotation omitted); *see also* Code of Conduct and Conflict of Interest Policy (created by the State Board of Internal Control pursuant to SDCL § 1-56-6(3)) ("A Board member must abstain from participation in the discussion and vote on a quasi-judicial official action of the Board if a reasonably-minded person could conclude that there is an unacceptable risk . . . that the Board member's interest or relationship creates a potential to influence the member's impartiality.")

The South Dakota Supreme Court elaborated on this standard in *Hanig v. City of Winner*, 692 N.W.2d 202 (S.D. 2005). This case involved a prospective restaurant and bar owner who applied to his local city council for the renewal of his liquor license. *Id.* at 203-05. After a hearing, the application was denied. *Id.* at 204. In response, the applicant pointed out that one of the councilmembers who participated in the vote—a waitress at an establishment in competition with the applicant's business—had been pressured by her employer to deny the renewal application. *Id.* at 204, 206. The applicant also argued that the councilmember, whose income depended in large part on tips, stood to lose out if the applicant's business led to "reduced patronage" for her employer. *Id.* at 206. Ultimately, the court agreed with the applicant and concluded that the councilmember's interest was "of sufficient magnitude" to disqualify her. *Id.* at 209.

More important than the *Hanig* court's ultimate disposition is its reasoning. The court first identified a general principle "that public policy demands that officials normally disqualify themselves when they have a business or personal interest in the subject on which they must vote, regardless of whether this interest creates an actual bias." *Id.* Then, after surveying approaches adopted by other jurisdictions, it identified at least four cases in which an official's personal interests meant that the risk of bias was unacceptably high. These cases are: (i) circumstances in which the official herself has a "[d]irect pecuniary interest" in the outcome of the process; (ii) circumstances in which one possible outcome will financially benefit or harm "one closely tied to the official, such as an employer or family member"; (iii) circumstances in which an outcome will impact a "blood relative or close friend" in a way that, while of a nonfinancial character, is "of great importance"; and (iv) circumstances in which the official's "judgment may be affected

because of membership in some organization and a desire to help that organization further its policies." *Id.* at 208-09 (internal quotation omitted).

At the same time, the court also introduced two limiting principles: First, in any of these scenarios, the interest in question "must be different from that which the . . . officer holds in common with members of the public." *Id.* at 208 (quoting *Bluffs Dev. Co. v. Bd. of Adjustment*, 499 N.W.2d 12, 15 (Iowa 1993)). Second, "the interest must be direct, definite, capable of demonstration, not remote, uncertain, contingent, unsubstantial, or merely speculative or theoretical." *Id.* (internal quotation omitted). These limitations are designed to balance two competing interests. On the one hand, "the public is entitled to have their representatives perform their duties free from any personal or pecuniary interest that might affect their judgment." *Bluffs*, 499 N.W.2d at 15. On the other, courts must take care not to impose standards so restrictive that they "handicap[]" the operation of governing bodies by inadvertently discouraging service by "capable men and women." *Id.* (internal quotation omitted).

Although the South Dakota Supreme Court has recently addressed legislative conflicts of interest involving appropriations, *see In re Noem*, 2024 S.D. 11, 3 N.W.3d 465, that decision does not address conflicts of interest for a decisionmaker in a quasi-judicial proceeding and is therefore inapposite. The decisions in *Hanig*, *Stofferahn*, *Miles*, and *Conditional Use Permit No. 13-08* apply in this context. These decisions remain good law and establish the applicable standards.

Under this framework, your disqualification is warranted. As you have previously acknowledged, the pipeline for which Summit is seeking a permit would cross land that is owned by your close family members. They have a direct stake in the decision to grant or deny Summit's requested permit regardless of their support for or opposition to the pipeline: If, for example, they were practically or philosophically opposed to the pipeline, their natural preference would be for the permit to be denied so that its construction would not be permitted on their property. If, by contrast, they supported the project, they would have a financial interest in seeing the permit approved, as they stand to gain financially from the implementation of the project. The fact that your sister-in-law and her husband have been paid for the easement rights they granted to Summit does not change this analysis: They may hope that the permit is denied because then they would have been paid for easement rights that will not be used.

By extension, you have either a direct personal interest or an indirect pecuniary interest in the project. *See Hanig*, 692 N.W.2d at 209; *see also* Judith K. Meierhenry, *The Due Process Right to an Unbiased Adjudicator in Administrative Proceedings*, 36 S.D. L. Rev. 551, 563 (1991) (explaining that, to be disqualifying, "[t]he gain or loss from the outcome of the proceedings may directly benefit the adjudicator, or may benefit . . . family members . . . with whom the adjudicator is affiliated"). This interest is unique to you, rather than shared with the public at-large, and it is predicated on the planned impact of the project, rather than some "speculative or theoretical" connection. *See Hanig*, 692 N.W.2d at 208 (internal quotation omitted). In short, even if *you* have no direct financial or other stake in the decision to approve or deny the permit, your close family

members will be affected financially by the Commission's decision on Summit's pending application.

The law does not allow a public official faced with an indirect pecuniary interest of this sort to avoid disqualification based on her belief that she is capable of overcoming a close family interest. Again, actual bias is not required; an "unacceptable risk of actual bias" is sufficient. *Permit No. 13-08*, 855 N.W.2d at 842. To the extent there is good reason to think that a close family relationship would create "a possible temptation" for the average official "to depart from [her] duty, then the risk of actual bias is unacceptable" and disqualification is warranted. *Holborn v. Deuel Cnty. Bd. of Adjustment*, 955 N.W.2d 363, 376 (S.D. 2021) (internal quotation omitted); *Permit No. 13-08*, 855 N.W.2d at 842. Because your family has a direct interest in the approval or denial of the permit, and because you previously recused yourself in two dockets based on the same facts, a court almost certainly would find it inappropriate for you to participate in this docket.

Your decision to recuse yourself will have at least three benefits: First, voluntary recusal ensures that there will be no need for the issue to be litigated. Second, recusal will minimize the risk that the Commission's decision is overturned on appeal because of a conflict of interest, as well as the waste of resources that would entail. *See Hanig*, 692 N.W.2d at 209-10 (concluding the conflict of interest invalidated the city council's decision and remanding for a new hearing); *Estate of Paul O'Farrell v. Grand Valley Hutterian Brethren*, No. 30482, 2024 WL 5164820, at *1 (S.D. Dec. 18, 2024) (vacating all orders entered by a circuit judge and remanding for the appointment of a replacement judge based on circuit court judge's refusal to recuse). Third, and most importantly, recusing voluntarily will maintain the Commission's status as an impartial decisionmaker in the eyes of both the public and future applicants.

Summit respectfully requests that you voluntarily recuse yourself under SDCL § 49-1-9 from further participation in Docket HP24-001. We look forward to your reply. Thank you for your consideration.

Very truly yours,

Summit Carbon Solutions, LLC

By _____
Jess Vilsack, General Counsel

Attachment