**BEFORE THE PUBLIC UTILITIES COMMISSION**
**OF THE STATE OF SOUTH DAKOTA**

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| **IN THE MATTER OF THE APPLICATION BY SCS CARBON TRANSPORT LLC FOR A PERMIT TO CONSTRUCT A CARBON DIOXIDE TRANSMISSION PIPELINE** | **HP24-001**<br><br>**REPLIES TO RESPONSES AND TO MOTIONS** |

As detailed nicely in Staff's Response to Applicant's Motion to Suspend Scheduling Order and Extend Current Deadline Indefinitely, the filing of Applicant's Application in this Docket has prompted action and responses including further motions filed for consideration by the Commission on April 10, 2025. Applicant replies to those Responses and Motions in this Reply.

1. The Staff has filed a response to Applicant's Motion which is measured and thoughtful. While Staff's suggested guardrails are not perfect, the Applicant can see its way clear to agree to the suggestions which Staff has made therein. As is noted, the suspension of this docket prejudices no one, other than perhaps the Applicant. The Staff has recognized that it makes little sense for the Commission and the Parties to proceed as if nothing has changed. The Project is very sizeable in scope and crosses a number of jurisdictions. The need to ensure that the parcels can be connected and built under, causes significant delays, which delays Applicant seeks to address here in the underlying motion.

Furthermore, the route designated in the permit needs to be "buildable". The regulatory or practical pathway to achieving a route permit with conditions which is buildable must be found and analyzed and communicated, which is possible but not likely in the timeframes under which we exist at present.

Staff spent significant time analyzing Applicant's position with respect to surveys. Applicant must survey the entirety of the route at some point prior to construction. While there may or may not be a statute or rule on point, nonetheless, the entire route must be surveyed for constructability in addition to any surveys which may be required either for evidentiary reasons prior to hearing or for compliance with commission conditions after a permit has been issued. Which surveys have been completed and which are outstanding is always an issue in pipeline permitting dockets.

The second sentence of the survey statute, crafted previously and still in effect, called out having a grant of authority from the legislature to obtain right of way through eminent domain as a condition precedent to entering private property for surveys:

**21-35-31. Entry on private property--Survey--Project permitted by Public Utilities Commission--Requirements--Challenge permitted--Applicability--"Examination" and "survey" defined.**

The provisions of this section only apply to a project that requires a siting permit pursuant to chapter 49-41B. Each person vested with authority to take private property for public use may cause an examination and survey to be made as necessary for its proposed facilities. The person or the person's agents and officers may enter the private property for the purpose of the examination and survey. Any person seeking to cause an examination or survey, where permission for examination or survey has been denied, must:

(1) Have a pending or approved siting permit application with the Public Utilities Commission pursuant to § 49-41B-11;

(2) Provide to the owner of the private property, thirty days' written notice served in accordance with § 15-6-4 or sent by certified mail with return receipt requested that contains:
   (a) A description of the specific portions of property to be examined and surveyed;
   (b) The anticipated date and time of entry;
   (c) The anticipated duration of presence on the property;
   (d) A description of the types of surveys and examinations that may be conducted; and
   (e) The name and contact information of the person, or the person's manager or officer, who will enter the property for the purpose of causing the examination and survey; and

(3) Make a payment to the owner, or provide sufficient security for the payment, for any actual damage done to the property by the entry. If the project is for construction of a common carrier, as described in § 49-7-11, in addition to the foregoing, the person must

make a one-time payment to the owner, prior to entry, in the amount of five hundred dollars as compensation for entering the owner's property.

A landowner may challenge the right to survey or examine by commencing an action in circuit court in the county where the survey or examination is proposed within thirty days of service of the written notice in circuit court. Upon the written request of the owner, the results of a survey or examination of the owner's private property conducted pursuant to this section must be provided to the owner. This section does not apply to the state or its political subdivisions. This section is in addition to and not in derogation of other existing law.

For the purpose of this section, the term "examination" means an inspection of a property to obtain general information which is not a matter of public record. For the purpose of this section, the term "survey" means a more detailed, comprehensive, or invasive investigation of a property.
**Source:** SL 2016, ch 118, § 1; SL 2024, ch 77, § 1

The statute contains three numbered conditions, namely, to have a facility permit application on file, provide notice and provide a payment. But those are reached only once the Applicant has demonstrated its grant of eminent domain authority, in this case that for a common carrier pipeline, pursuant to SDCL § 49-7-11.

Applicant had no doubt in its ability meeting the letter of the law on common carrier status when that was to be fully considered by the courts at evidentiary hearings which were previously scheduled for September 2025. The Applicant has the fortunate position of being a party to the shipping agreements which were drafted to cement the Applicant's position as a common carrier. Tailoring a business relationship and its documentation to meet those requirements isn't uncommonly tricky; it simply hadn't been fully litigated at the trial court level previously. However, because HB 1052 will be codified and in effect prior to those evidentiary hearings taking place, there was little to be gained in maintaining that schedule and those proceedings. The condition precedent to analyzing the three factors in the survey statute won't be met.

With respect to the Motion to Deny the Permit offered by a group of intervenors, the Applicant resists that approach to this proceeding. It is important to point out that there are, in

fact, no deliberate misstatements of fact found in the Application. Any suggestion of the same by that group of intervenors is simply wishful thinking. The route offered in the Application was viable at the time the Application was submitted. That's a specious argument at best.

Furthermore, as supported by Kylie Lange's pre-filed testimony, Summit has good faith arguments in law and fact with respect to county preemption under existing statute which is and foreseeably will be the law into the future.

> 49-41B-28. **Supersession of local land use controls--Exception.**
> 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.
> **Source:** SL 1977, ch 390, § 31; SL 2024, ch 189, § 6, rejected Nov. 5, 2024.

Summit, in fact, has attempted to comply with a number of county ordinances including, most notably, Sanborn County's existing requirement for a conditional use permit. Summit has also engaged Minnehaha County by submitting a required notice and working with the planning and zoning director. Moreover, the arguments that preemption under SDCL § 49-41B-28 is unprecedented are of no legal consequence. The statute is the law in South Dakota and the South Dakota Supreme Court has said that the Commission must consider preemption under this statute when the issue is raised by a party. *Application of Nebraska Public Power Distr.*, 354 N.W.2d 713, 720 (S.D. 1984) (remanding case to the Commission to consider application of statute after Commission determined it was without authority to preempt certain local land use regulations). By remanding the Supreme Court affirmed the circuit court's determination that the Commission's "refusal to exercise its statutory discretion was arbitrary and capricious and

constituted an abuse of discretion." *Id.* In any case, compliance with the entirety of the County ordinances is not driving the initial motion made by the Applicant.

Statutory grounds to deny the Application are found in SDCL § 49-41B-13. None of those grounds to deny the Application exist.

**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.

**Source:** SL 1977, ch 390, § 28.

The Landowners' motion to deny the application is opportunistic at best. No statutory grounds exist for denial and no party will be prejudiced if the schedule is suspended within the stipulations proposed by Staff.

**Conclusion**

It is important to note that this docket is in its relative infancy. The Applicant has put forth a tremendous amount of expense and effort to produce an Application, supporting appendices, maps, and supporting testimony. That effort is replicable and likely necessary for a jumpstarting of this docket in the future.

Conversely, the intervening parties have produced a minimal amount of discovery requests and responses. There's no testimony filed as of yet, nor witness lists.

The Commission has, however, expended a significant amount of effort in the areas of (1) public meetings and (2) determining intervenors. Applicant would see no practical reason for the

Commission to undergo yet another round of public meetings in South Dakota on the topic. The objections noted by project opponents have been clearly stated on a number of occasions. The Commission would not benefit from further public input meetings on this topic. With respect to intervenors for a renewed proceeding, the Commission can easily adopt a new deadline for intervenors into the docket should one become necessary in the future. The reasons stated to deny and return the Application simply do not stand up to scrutiny.

Dated this 4th day of April, 2025.

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**CERTIFICATE OF SERVICE**

Brett Koenecke, of May, Adam, Gerdes & Thompson LLP, certifies that on the 4th day of April, 2025, he electronically filed and served through the PUC filing system a true and correct copy of the foregoing in the above-captioned action to the service list of docket HP24-001.

BRETT KOENECKE