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	**DOCKET HP 24-001** **INTERVENING LANDOWNERS' MEMORANDUM REPLY BRIEF**

INTRODUCTION

Summit failed to provide good cause to suspend the PUC proceeding and failed to provide reasonable argument for their request for an indefinite extension, let alone allow its application to remain pending, which requests approval of specific pipeline siting that is an impossibility. Summit does not contest this fact because it cannot.

The Commission is without legal authority to "suspend" deadlines. Even a delay of the evidentiary hearing in this matter to the end of time would not be long enough to cure the reality looming large over this Application. Extension of deadlines will not lead to a different conclusion because the Application requests a route which cannot and, therefore, will not be built. It is difficult to imagine any utility of an indefinite extension of time or even a definite extension of time with newly established deadlines. Both approaches get to the same place. No amount of monthly status reports can change the facts. The Commission must deny both of Summit's requests, suspension of current deadlines and indefinite extension of current deadlines. This matter then turns to whether it is appropriate to deny Summit's pending application – and it is.

Each sentence within Summit's pending application was deliberately made. Summit carefully crafted each word in each sentence intending the Commission rely upon all of it. The applied for route has become an impossibility and the deliberately chosen route is itself a misstatement of material fact. The rules do not limit deliberate misstatements of fact to the date the application was filed, in fact Summit has the duty to continually update the application and correct errors and modify as necessary. They have

not done this. For the reasons stated in our motion and briefing on this issue and those stated below, Summit's application must be denied.

ARGUMENT

SDCL § 49-41B-24.1 does not grant the Commission authority to "suspend" deadlines. Summit's motion can be denied on that basis alone. Instead, the Commission may only "extend" deadlines. The word suspend is defined as "to cause to stop temporarily" or "to defer to a later time on specified conditions," such as a suspended criminal sentence. MERRIAM-WEBSTER ONLINE DICTIONARY, SUSPEND, available at https://www.merriam-webster.com/dictionary/suspend (last accessed on April 08, 2025). That is, a suspension would mean that the docket is frozen. In contrast, the word "extend" is defined as "to cause to be longer" or "to stretch out in distance, space, or time." MERRIAM-WEBSTER ONLINE DICTIONARY, EXTEND, available at https://www.merriam-webster.com/dictionary/extend (last accessed on April 08, 2025). Thus, the Commission may extend the twelve-month statutory deadline, meaning by providing a specific longer deadline, but a grant of authority to extend the statutory deadline does not include the authority to "suspend" all activities in a docket for a specific period of time, much less indefinitely.

SDCL § 49-41B-24.1 does not grant the Commission authority to suspend a docket wholesale. If the legislature had intended to grant the Commission authority to "suspend" a docket, it would have expressly done so. A suspension is materially different from an extension. During an extension, activity would continue on a modified schedule. Discovery would be stretched out, preparation of testimony would continue based on a new filing deadline, and the hearing would be rescheduled so that the Commission would comply with a new overall deadline. In contrast, during a suspension, presumably all activity would cease and no new deadline would be established for the docket or any of its specific activities. There is no indication that the legislature intended to allow the Commission to freeze a docket indefinitely. Instead, SDCL § 49-41B-24.1 should be read as a requirement that the Commission keep dockets moving, just with a different

deadline. Accordingly, Summit's Motion to Suspend does not comply with the plain language of SDCL § 49-41B-24.1.

The legislature's specific designation of a twelve-month deadline in SDCL § 49-41B-24, indicates that the Commission should grant an extension to a specific date, yet Summit has failed to offer any such date. Further, the docket should not be extended far beyond the legislative deadline. A deadline far in excess of the statutory deadline would not be in accordance with the prompt resolution desired by the legislature and often argued by Summit and its allies throughout the past four years.

Likewise, Summit has failed to provide the Commission with good reason for an extension. In particular, Summit must provide the Commission with an explanation for how a grant of an additional period of time would allow it to accomplish steps prerequisite to recommencement and ultimate approval of its Application. Summit has provided no list of activities that it intends to take during its requested "suspension," nor has it explained how additional time might allow it to accomplish such activities. Summit states that its inability to finish surveys is a cause, but it does not explain why more time will allow it to redress the delay caused by its lack of surveys nor does it address the approximately 100 affected parcels found in Landowner Declarations where new or additional surveys cannot and will not take place. Moreover, Summit has failed to address how HB 1052 will impact the project schedule or describe how more time will allow it to overcome the impact of HB 1052 on Summit's determination of a viable route that may be considered by the Commission.

An outside event may provide a trigger for an extension, but good cause should be found only when an applicant can explain how more time will allow it to overcome the impact of such event. Where more time will not change the circumstances, good cause for an extension does not exist. Staff expressly stated that they do "not support the idea of an indefinite suspension of the matter with no explanation provided as to what the goal of the suspension is." Staff's Resp. to Applicant's Mot. To Suspend Current Scheduling Order and Extend Current Deadline Indefinitely, Pgs. 3-4. They also state, "Staff may be more supportive of a suspension if Applicant provides a plan to proceed with the route as

filed and a rough timeline for this plan to be executed." Id. at 4. Yet, Summit's reply entirely fails to provide a list of its goals or a schedule in which it would accomplish its goals.

An indefinite "suspension" would be prejudicial to other parties, especially landowners because the fate and legal status of their properties would be put into indefinite limbo, pending some unknown efforts by Summit that may or may not come to fruition. For example, any sale or lease of any landowner's property would be impacted by a suspension, because the value of their property and the potential timing of construction impacts would be in doubt for an indefinite period. This proceeding becomes an indefinite cloud on a landowner's title. Further, a suspension of the docket would mean that all of the landowners would continue to be parties and would continue to retain and pay for counsel, because at any time Summit could move to re-initiate the docket. The Commission should not leave Landowners or any other intervenors indefinitely on pins and needles as to when Summit may decide it is ready to commence a futile exercise.

Summit has failed to specifically state whether all activity under the docket would be suspended or only certain activities. For example, Summit has not stated whether it intends to continue its discovery activities. While Landowners strongly oppose "suspension" of the docket, either definite or indefinite, should the Commission grant a "suspension," it should make clear that all docket activity will be frozen except for monthly status reports by Summit and any intervenor responses to such reports. Stopping discovery is important to landowners and should be at least argued. Moreover, asking the question about whether all activities are suspended or just some demonstrates that the statute does not allow suspensions of all activities, but rather extensions of deadlines. Further, the activity of surveying pursuant to the docketed route is arguably activity related to the docket Summit seeks to suspend. In any event, because the Commission cannot legally suspend the docket, Summit's motion must be denied.

Moving to Landowners request to deny the application outright, Summit's meandering reasoning in support of its suspension motion argue more in favor of

Landowners' denial motion. Summit will not say it explicitly in its motion or reply brief, but the evidence is there: Summit needs to submit a new route. Summit admits that it needs to find a "regulatory or practical pathway" to a permit for a "buildable" pipeline. Summit Reply Br. Pg. 1. This route has not yet been "found," "analyzed," or "communicated." Id. Summit is not able to find and propose this new route "in the timeframes under which we exist at present." Id. Summit presents no practical timeline to provide any assurances to the Commission or the other interested parties that it will be able to timely find this route.

If Summit, today, knows it cannot meet its burden of proof in August for its proposed route, Summit should pull its Application, or the Commission should dismiss it as Summit's reply brief further evidences that the Application contains deliberate misstatements of material fact and is not in the form and content required by law.

SDCL § 49-41B-13 authorizes denial when there is a "deliberate misstatement of material fact." Summit provides limited analysis against Landowner's motion to deny and even Summit's limited analysis is contingent on the Commissions adopting a very narrow and tortured definition of the word "deliberate."

Summit's brief argument can best be summarized as "Summit believed the information to be true at the time it submitted the application." However, SDCL § 49-41B-13 does not limit the Commission's discretion to review or scrutiny only at the time of submission of the application. The decision to deny for any of the reasons under SDCL § 49-41B-13 is entirely within the Commission's discretion at any time.

Deliberate as an adjective has a plain, common, and understood meaning. Merriam-Webster defines it as "resulting from careful and thorough consideration" or as an "awareness of the consequences." MERRIAM-WEBSTER DICTIONARY ONLINE, DELIBERATE, available at https://www.merriam-webster.com/dictionary/deliberate (Last accessed April 08, 2025). It is a fact that Summit alone was responsible for the contents of its application, which includes every statement made therein. Even statements carefully and thoroughly considered at a prior date can become misstatements in the future. Summit is under a duty to seasonably supplement its application and correct errors or misstatements and it has not done so.

S.D. ADMIN. R. § 20:10:22:04(5) (*stating each application is a continuing application that requires applicant to immediately notify the commission of any changes of fact or law*). Summit, however, appears to argue that "deliberate misstatement" requires the Commission interrupt Summit's propose route as "lying." This is not so. Summit made each and every statement in its application intentionally and deliberately. Summit does not claim an unknown person added content to its Application. Summit's difficulty is that it is asking the Commission to approve the Application without revision, and that cannot be done. This is akin to the Commission's denial of Summit's 2023 application – material facts changed that made the Application an impossibility. The same is true now. HB 1052 and the longstanding statements and current evidence show the 2024 route is an impossibility such that continuing on in these proceedings, whether to simply come to this obvious conclusion in twelve months or more, benefits no one.

While Landowners do not know if Summit's application and the chosen route it that is in conflict with over 30 county rules and regulations and the will of landowners of more than 100 parcels of targeted land was honest when submitted to the Commission, it was most certainly deliberate. Such deliberate statements are now not true – Summit cannot survey and cannot condemn land upon which it asks the Commission to site its proposed hazardous pipeline. So, whether the applied for route was recklessly determined and placed in Summit's 2024 application or whether Summit genuinely believed it could supersede all existing laws, rules, regulations and force said route upon unwilling counties and landowners does not matter. The Application, today, contains deliberately misstated facts.

Finally, by the end of its reply, Summit acknowledges the real reason it does not want to withdraw or see its infeasible application denied. Summit's Project is deeply unpopular in South Dakota. Summit does not want to have to reapply because it does not want to go through "another round of public meetings in South Dakota on the *topic*." Summit's Reply Br., Pgs. 5-6. Summit has concluded that the "objections [...] have been clearly stated." Id. Summit assumes that the Commission has heard it all and "would not benefit from further public input meetings." Id.

Summit is making another assumption that is not supported in fact or by law. We have no idea what a new proposed route may look like or what counties may be affected, what landowners may be affected or who may require new legal notice, to name a few unknowns incurable by kicking the current can down the road, indefinitely or otherwise. Any future route that changes the "proposed facility" locations require the Commission to hold public input meetings "as close as practical to the proposed facility." SDCL § 49-41B-16. If it goes into a new county or new a new municipality, another notice is required. SDCL § 49-41B-15.

Summit's logic is dangerous. Any applicant could propose a facility in one location and then request it be moved to the actual location without facing public examination and scrutiny in the actual location. We know this Commission would never entertain this logic. Throughout, the Commission has been open, transparent, and welcomed the public as part of this public proceeding, and in fact, has even been understanding when emotions get the better of individuals. Summit's argument that this proceeding should continue indefinitely with no actual viable route to avoid further public scrutiny is objectionable and such subterfuge is not legally allowed.

CONCLUSION

We find ourselves at the end of a long arduous road not due to the fault of any party but rather because the laws are the laws and the facts are the facts and no suspension and no creative calendaring can change the reality that Humpty Dumpty cannot be put together again. Its time. Summit's application must be denied.

Dated April 8, 2025.

By: */s/ Brian E. Jorde*
Brian E. Jorde, Esq., *Pro Hac Vice*
Domina Law Group pc llo
2425 S. 144th Street
Omaha, NE 68114
(402) 493-4100
bjorde@dominalaw.com

By: */s/ Ryan Cwach*

Ryan Cwach, Esq.
Birmingham & Cwach Law Offices, PLLC
202 W. 2nd St.
Yankton, SD 57078
Telephone: 605-260-4747
ryan@birmcwachlaw.com
Lawyers for Landowners/Movants

CERTIFICATE OF SERVICE

On April 8, 2025, a true and correct copy of the foregoing was served electronically to persons on the PUC Service List for this Docket if an email is indicated or via mail if no email is indicated.

By: */s/ Ryan Cwach*
Ryan Cwach, Esq.
Birmingham & Cwach Law Offices, PLLC
202 W. 2nd St.
Yankton, SD 57078
Telephone: 605-260-4747
ryan@birmcwachlaw.com