

**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**

HP24-001

**APPLICANT'S RESPONSE
TO SPINK COUNTY'S MOTION FOR
ATTORNEY FEES**

Spink County asks that the Commission award it attorney fees because it was required to answer written discovery, a routine aspect of being a party in the docket. The request is unprecedented and unwarranted because no statute gives the Commission authority to award fees under this circumstance.

Procedural background

Spink County filed an application for party status on December 31, 2024. The Commission granted it party status on January 23, 2025. Based on the procedural order entered by the Commission, discovery must be completed by July 30, 2025, and the last day to serve discovery is July 21, 2025. Summit served written discovery on four counties on February 12, 2025. (Moore Aff. ¶ 2, Ex. A.) Spink County had 15 calendar days to answer under the Commission's scheduling order. Counsel entered an appearance for Spink County on February 26, 2025. Spink County sought a one-week extension, which was granted. (Moore Aff. ¶ 3.) Spink County served its responses and answers on March 12, 2025. (*Id.* ¶ 4, Ex. B.)

The Legislature passed House Bill 1052 on March 4, 2025, and it was signed by the Governor on March 6, 2025. It becomes law on July 1, 2025. Because of its effects on this docket, Summit filed a motion to suspend the procedural schedule the same day that Spink

County served its discovery answers, March 12, 2025. Spink County has not objected to the motion.

Argument

Spink County cites no authority for its motion. South Dakota follows the American Rule with respect to the award of attorney fees in litigation, under which “each party in an action bears its own attorney fees.” *Rupert v. City of Rapid City*, 2013 S.D. 13, ¶ 32, 827 N.W.2d 55, 67. The two exceptions are when the parties enter into an agreement allowing the prevailing party in a dispute to recovery attorney fees, and when an award of fees is allowed by statute. *Id.* The rule is strict. The South Dakota Supreme Court “has rigorously followed the rule that authority to assess attorney fees may not be implied but must rest upon a clear legislative grant of power.” *Id.* (quoting *In re Estate of O'Keefe*, 1998 S.D. 92, ¶ 17, 583 N.W.2d 138, 142).

Here, there is no agreement between Spink County and Summit that would allow Spink County to recover attorney fees related to its participation in this docket. And there is no South Dakota statute that gives the Commission authority to award fees to Spink County. Summit filed its application under SDCL Ch. 49-41B. Unlike SDCL Ch. 49-31, addressing telecommunications services (and more specifically SDCL § 49-31-57), SDCL Ch. 49-41B contains no attorney-fee provision. By regulation, the Commission has provided that South Dakota's rules of civil procedure apply to contested-case dockets, like this one. ARSD 20:10:10:01.02. Under SDCL § 15-6-37, a party may recover attorney fees as a sanction if a party fails to answer or otherwise respond to written discovery. A motion for an order compelling discovery in these circumstances, which would be a necessary predicate for a court to award fees, can be made only after the moving party has in good faith conferred or attempted to confer with the party failing to provide discovery. SDCL § 15-6-37(a). The South Dakota Supreme

Court has held that an award of fees under this statute is discretionary, especially when a party has not satisfied the statutory requirement that the parties meet and confer in an effort to resolve the dispute before bringing it to the court for determination. *Krueger v. Grinnell Mutual Reinsurance Co.*, 2018 S.D. 87, ¶ , 921 N.W.2d 689, 695-96 (“Courts may also decline to award sanctions or attorney fees when the [meet-and-confer] requirement has not been met, yet grant the motion to compel.”). Spink County’s request for fees is not based on SDCL § 15-6-37. Spink County does not claim that Summit failed to provide discovery and Spink County did not ask Summit to meet and confer about any discovery dispute before filing its motion for fees with the Commission. (Moore Aff. ¶ 5.)

The only other statutory basis for an award of fees related to procedure is under SDCL § 15-6-11, which requires that all pleadings, written motions, and other papers in litigation be signed by an attorney of record for a represented party, and that an attorney who signs a pleading, motion, or other paper certifies that it is not being presented for any improper purpose; that any claims, defenses, or legal contentions are warranted by existing law or by a nonfrivolous argument for the extension or modification of existing law; that the allegations or other factual contentions have evidentiary support; and that the denials of factual contentions are warranted by the evidence or reasonably based on a lack of information. SDCL § 15-6-11(b). A violation of this statute may result in sanctions, including reasonable attorney fees. SDCL § 15-6-11(c). Before a motion for sanctions under this statute may be filed, the moving party must serve the motion at least 21 days earlier, which allows the opposing party an opportunity to withdraw or correct the challenged conduct. SDCL § 15-6-11(c)(1)(A). Spink County’s request for fees is not based on this statute. Spink County’s motion does not cite this statute, Spink County did not address any alleged violation of this statute with Summit, and Summit’s routine service of

written discovery consistent with the Commission's procedural order is not conduct that implicates any possible violation of SDCL § 15-6-11. (Moore Aff. ¶ 6.) Ironically, although represented by counsel, Spink County initially filed its motion without counsel, which is a violation of this statute (as reflected in Jennie Fuerst's letter to Brian Johnson dated March 31, 2025 and filed in the docket). As additional irony and as indicated in this response, the motion is without any legal or factual basis.

Conclusion

Spink County seeks "all attorney fees associated with the response to the applicant's interrogatory, document production, and admission." (Spink County's Motion, Ex. A.) Yet Summit's service of discovery on Spink County was routine, contemplated by the Commission's procedural order, and within South Dakota's rules of civil procedure. Spink County asked for and received an extension of time to answer the discovery, after which it served answers and objections. There is no statutory authority for the Commission to award attorney fees as a discovery-related sanction in this docket.

The only extraordinary occurrence is that the South Dakota Legislature changed the rules governing Summit's project in the middle of the game, long after Summit determined an appropriate route and filed its application. Based on that extraordinary occurrence, Summit filed a timely motion to suspend the procedural schedule, to which Spink County does not object. Spink County's motion is entirely without merit. Summit respectfully requests that it be denied.

[SIGNATURE PAGE TO FOLLOW]

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