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	* * * * * *	STAFF'S FIRST SUPPLEMENTAL RESPONSE TO APPLICATIONS FOR PARTY STATUS HP24-001

Staff by and through its undersigned attorney, hereby files this Supplemental Response to Applications for Party Status. Staff filed a Memorandum on December 13, 2024, in advance of the December 17 commission meeting, at which time the Public Utilities Commission (Commission) considered the first applications for party status. In consideration of questions and concerns raised by the Commission at the December 17 meeting, Staff files this Supplemental Response.

A. Direct Interest

There was a significant amount of discussion at the December 17 meeting regarding the definition of "direct interest" for purposes of obtaining party status pursuant to SDCL 49-41B-17. Direct interest is a legal term of art, distinct from the dictionary concept of an "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 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).

Determining direct interest 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. Each person applying for party status pursuant to SDCL 49-41B-17(4) has the burden of proof to demonstrate that they are directly interested. As discussed in Staff's December 13 Memorandum, Staff is comfortable with and recommends a determination that for persons residing or owning land within two miles of the project, the burden to show direct interest has been *per se* met. However, for those party status applicants outside of two miles, the burden to demonstrate a direct interest remains, and Staff will review and provide recommendations, if any, on a case-by-case basis. Staff's position advocating for two miles should in no way be taken as a predetermined recommendation of denial for any party status applicant, rather it is a call for more information.

B. Affect of Alternate Routes

At the December 17 meeting, there was also discussion regarding whether a person could be directly interested based on alternate routes included in the Application.[1] Specifically, Applicant filed route alternatives as Appendix 11 to its Application.

The inclusion of route alternatives should not be taken as an indication that an applicant for a siting permit could move its proposed project or choose a significantly different route at a later time. Rather, ARSD 20:10:22:12 requires an applicant to provide information on alternative sites, not to demonstrate a choice, but to demonstrate the thought process and evaluation that went into determining the final route for which the applicant has applied. This is not a mechanism to put separate routes on the table. This is further demonstrated by the requirement in ARSD 20:10:22:11 that an application contain a general site description.

It is Staff's interpretation that the route depicted in Appendix 5 is the route for which SCS Carbon Transport LLC (Applicant) has applied for a permit in this docket. Therefore, any evaluation of direct interest should be conducted with respect to that route.

Staff's two-mile recommendation takes into account the occasional need for slight in-parcel shifts to account for landowner accommodations or survey results. This is one reason why the proposed distance is materially larger than what the dispersion model might otherwise support. However, Staff would not be supportive of any material reroute of the pipeline route in this docket and has historically recommended the opportunity for newly impacted landowners to intervene when an applicant has shifted a route closer to a non-party landowner. This is consistent with the process followed in Docket No. HP22-001. In that docket, a reroute was filed

[1] See Application of SCS Carbon Transport LLC filed on November 19, 2024.

after the intervention deadline. As discussed in Staff's April 22, 2022 filing in that docket, the Commission's position was to grant late intervention to those affected by the reroute.[2]

Because the alternative routes depicted in Appendix 11 are no longer under consideration and are not before this Commission, Staff opposes using the alternative routes in determining a direct interest.

C. Systematic and Continuous Presence in Project Area as a Means of Determining Direct Interest

One method for determining a direct interest for those outside of the two-mile recommendation which Staff considers can be summarized as systematic and continuous presence in the project area. For example, Staff relied upon this analysis when recommending party status be granted to a person who resides outside the two miles but rents land that would host the pipeline.[3] After confirming the location of the rented land, Staff believed that Mr. Fauth had systematically, continuous, and non-speculative presence in the area such that he would be as likely as anyone within the two miles to be exposed to construction and operation activities.

Staff does not, however, recommend party status be granted to those whose presence in the siting area is merely speculative. Therefore, we are not supportive of granting party status to one who has potential but not known employment in the area.

D. Applicants Affected by Portions of Route Outside the Boundaries of South Dakota

The Commission has received multiple applications for party status from individuals who do not reside or own land in South Dakota but may be affected by portions of the proposed route

[2] See Staff Response at p. 2, accessible at: https://puc.sd.gov/commission/dockets/HydrocarbonPipeline/2022/HP22-001/Staff042222.pdf.
[3] See Jason Fauth Application for Party Status.

not located in South Dakota. While these Applicants may have a direct interest in the multi-state project, Staff does not believe their interests qualify for party status in a South Dakota proceeding. The Commission's siting authority is guided by the following legislative findings:

> The Legislature finds that energy development in South Dakota and the Northern Great Plains significantly affects the welfare of the population, the environmental quality, the location and growth of industry, and the use of the natural resources *of the state*. The Legislature also finds that by assuming permit authority, that the state must also ensure that these facilities are constructed in an orderly and timely manner so that the energy requirements *of the people of the state* are fulfilled. Therefore, it is necessary to ensure that the location, construction, and operation of facilities will produce minimal adverse effects on the environment *and upon the citizens of this state* by providing that a facility may not be constructed or operated in this state without first obtaining a permit from the commission.

SDCL 49-41B-1 (emphasis added).

With this guidance, it is evident that the Commission must assess the impact of the project as it relates to the state of South Dakota. In the Commission's determination of whether the Application has met its burden of proof pursuant to SDCL 49-41B-22, the Commission only has jurisdiction to consider those four requirements[4] as they relate to matters within the boundaries of South Dakota. A contrary decision would present a host of legal issues as the Commission would seem to be reaching beyond its jurisdictional authority and into the jurisdictions of the neighboring states.

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[4] SDCL 49-41B-22 requires the applicant to prove that:

> (1) The proposed facility will comply with all applicable laws and rules;
> (2) The facility will not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area. . . ;
> (3) The facility will not substantially impair the health, safety or welfare of the inhabitants; and
> (4) The facility will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government . . . .

For those Applicants whose interest lies not in South Dakota but on a portion of the project located in a different state, Staff does not believe a sufficient interest exists according to South Dakota law. Staff's position should not be interpreted to mean that a non-resident cannot be granted party status for any reason as it is possible and likely for a non-resident to have a direct interest in the South Dakota portion of the project.

CONCLUSION

For the reasons stated above, as well as those discussed in Staff's December 13 Memorandum, Staff recommends that party status be granted as contained in Attachment A, attached hereto. Staff has not evaluated those applications for party status filed after January 9 and requests all applications filed after that date be deferred to the January 28 or February 11, 2025 Commission meeting.[5]

Dated this 10th day of January 2025.

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[5] Pursuant to ARSD 20:10:01:15.04, a party may file an answer to a petition to intervene on or before the hearing date or within fifteen days of service of the petition, whichever is earlier. However, Staff is comfortable that we have had adequate time to review the party status applications received through January 9.