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 RESPONSE AND RECOMMENDATION** **HP24-001**

Commission staff (Staff) by and through its undersigned attorneys, hereby submits this Response and Recommendation for matters under consideration at the April 22, 2025, Commission meeting. For reasons set forth below, as well as those outlined in Staff's April 8 filing, should the Commission grant Landowner's Motion to Deny, Staff recommends that the Commission deny the Application pursuant to SDCL § 49-41B-13(2), without prejudice, based upon a finding that the Application fails to comply with ARSD § 20:10:22:11.

SDCL § 49-41B-24 provides the Commission with the authority to grant, deny, or grant upon conditions a permit for a transmission facility, based upon a record of evidence created through an evidentiary hearing, as evidenced by the statute's requirement that the Commission "make complete findings" in rendering its ultimate decision.[1] Conversely, the Legislature also created a process through which the Commission could exercise its discretion to deny, return, or amend an application in certain circumstances, as found in SDCL § 49-41B-13. Semantics matter here, because while SDCL § 49-41B-24 provides for denial of a *permit*, SDCL § 49-41B-13 provides for denial of an *application*. The former is based upon evidentiary shortcomings

[1] The full text of the statute reads:

> Within twelve months of receipt of the initial application for a permit for the construction of energy conversion facilities, AC/DC conversion facilities, or transmission facilities, the commission shall make complete findings in rendering a decision regarding whether a permit should be granted, denied, or granted upon such terms, conditions or modifications of the construction, operation, or maintenance as the commission deems appropriate.

SDCL § 49-41B-24.

regarding the applicant's burden of proof under SDCL § 49-41B-22,[2] while the latter is based upon flaws relating to the application itself. *See* SDCL § 49-41B-13 (providing "[a]n application may be denied, returned, or amended . . . for: (1) Any deliberate misstatement of a material fact in the application . . . (2) Failure to file an application generally in the form and content required . . . or (3) Failure to deposit the initial amount with the application . . .").

By including both of these statutes in SDCL Chapter 49-41B, it is clear that the Legislature intended to create a means by which, among other things, denial of an application could occur without the need for a full evidentiary hearing.

In its recommendation for the April 10 Commission meeting, Staff stated that "whether the Commission may properly deny the Application under SDCL § 49-41B-13(2) at this time depends on whether the route on file remains a possibility, and Staff hopes that further information will be provided by the Applicant on this point."[3] The information Staff was anticipating would have clarified whether the route as filed in the Application and under consideration in this docket was still being pursued by the Applicant.

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[2] 49-41B-22**. Applicant's burden of proof.**
The applicant has the burden of proof to establish by a preponderance of the evidence 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. An applicant for an electric transmission line, a solar energy facility, or a wind energy facility that holds a conditional use permit from the applicable local units of government is determined not to threaten 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. An applicant for an electric transmission line, a solar energy facility, or a wind energy facility that holds a conditional use permit from the applicable local units of government is in compliance with this subdivision.

[3] See Staff's Supplemental Response, p. 7.

SDCL § 49-41B-13(2) clearly contemplates the Commission having the discretion to act in furtherance of fairness, efficiency, and judicial economy when the form and content of an application are lacking.

As discussed in our previous filing, SDCL Chapter 49-41B requires applications to include, among other things, "(2) Description of the nature and location of the facility; (3) Estimated date of commencement of construction and duration of construction;" "(6) A statement of the reasons for the selection of the proposed location;" and "(11) Environmental studies prepared relative to the facility." SDCL § 49-41B-11. Additionally, South Dakota Administrative Rules require:

> **General site description.** The ***application shall contain a general site description of the proposed facility including a description of the specific site*** and its location with respect to state, county, and other political subdivisions; a map showing prominent features such as cities, lakes and rivers; and maps showing cemeteries, places of historical significance, transportation facilities, or other public facilities adjacent to or abutting the plant or transmission site.

ARSD § 20:10:22:11 (emphasis added).

The criteria for denial under SDCL § 49-41B-13 is different than the criteria on which the Commission grants or denies a permit request pursuant to SDCL § 49-41B-24. SDCL § 49-41B-13 essentially asks a threshold question – is the matter even able to proceed to the evidentiary hearing, or is it so flawed as to require the application be returned, denied, or amended? Denial of an application pursuant to SDCL § 49-41B-13, unlike SDCL § 49-41B-24, does not address the applicant's burden of proof as to the criteria of SDCL § 49-41B-22.

Staff awaits the Applicant's plan for moving forward which will be provided by the April 22, 2025, Commission meeting. Without a clear plan, the Application may be denied pursuant to SDCL § 49-41B-13(2) because without a route that does not have the legal potential to be

constructed, the Application fails to contain a general site description as required by SDCL § 49-41B-11(2) and ARSD § 20:10:22:11. In other words, the location requirements in statute and rule would not be met by Summit's initial application due to the extent of the route that could change as a result of HB 1052 and the need to acquire new easements. HB 1052, by all available information, will become law on July 1, 2025. HB 1052 has been cited by the Applicant as the reason it is stopping its survey efforts. *See* Staff's Response to Applicant's Motion to Suspend Current Scheduling Order and Extend Current Deadline Indefinitely, p. 4, footnote 1. How the Applicant plans to move forward with the route on file, despite the impending law and Landowner Declarations, remains an open question.

Staff has not previously taken a position that all siting applications must be perfectly complete and accurate at the time of filing. Rather, Staff has argued in the past that an application initially filed generally in the form and content required by SDCL Chapter 49-41B and ARSD Chapter 20:10:22 can be reasonably amended throughout the discovery process and through prefiled testimony. However, it seems the size and scope of the changes that would be needed to this application would set it apart from application amendments the Commission has seen in the past.

If major segments of the project are rerouted, that will require a material rewrite to the application rather than a simple amendment to a specific section of the application. The Commission has discretion under SDCL § 49-41B-13 to determine whether the change in content within the application rises to the level of denial rather than amendment. It is Staff's opinion that, if Summit does not present a plan to move forward with the route on file, substantive changes will be needed to the content of the application and, therefore, denial of the current application may be the cleanest path forward. Of course, such a denial would not prevent

Summit from filing a new permit application for a route they are able to move forward with at some point in the future.

This recommendation should not be interpreted to mean that denial pursuant to SDCL § 49-41B-24 is not available to the Commission. However, from Staff's perspective, it is a more complicated option and requires the Commission to look at the facts in a certain light. The rules of civil procedure as used in the circuit courts of South Dakota apply to these contested case proceedings. ARSD § 20:10:01:01.02. Because the parties have not yet undergone an evidentiary hearing in this docket, a motion to deny pursuant to SDCL § 49-41B-24 is akin to a motion for summary judgment pursuant to SDCL § 15-6-56(c). Such motions require notice of a summary judgment motion and an opportunity for response. For the Commission to determine that summary judgment is appropriate at this juncture, the Commission must view the facts in the light most favorable to the Applicant and determine that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law[]" as it relates to whether the Applicant can meet its burden of proof according to SDCL § 49-41B-22. Additionally, pursuant to SDCL § 49-41B-24, the Commission would need to make "complete findings" in rendering its decision to deny pursuant to SDCL § 49-41B-22(1).

CONCLUSION

For these reasons, as well as those concerns articulated in Staff's April 8th filing, if the Commission wishes to grant Landowners' Motion to Deny, Staff recommends the permit be denied, without prejudice, pursuant to SDCL § 49-41B-13(2) based upon a finding that the Application fails to meet the form and content required by SDCL § 49-41B-11 and ARSD § 20:10:22:11.

In the alternative, if the Commission does not deny the Application, Staff requests the Commission grant the Motion to Reconsider Applicant's Motion to Extend Deadline (filed April 16, 2025) in accordance with ARSD § 20:10:01:29.

Dated this 17th day of April, 2025

Logan D. Schaefbauer
Staff Attorney
South Dakota Public Utilities Commission
500 East Capitol Avenue
Pierre, SD 57501
Phone (605) 773-3201
Logan.Schaefbauer@state.sd.us