

**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**

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**STAFF’S SUPPLEMENTAL
RESPONSE TO APPLICANT’S
MOTION TO SUSPEND,
RESPONSE TO JORDE
LANDOWNERS’ MOTION TO
DENY, AND RESPONSE TO SPINK
COUNTY’S MOTION FOR
ATTORNEY FEES**

Commission staff (Staff) by and through its undersigned attorney, hereby submits this Supplemental Response to Applicant’s Motion to Suspend and Replies to Responses and to Motions, Jorde Landowners’ Motion to Deny Application, and Spink County’s Motion for Attorney Fees.

INTRODUCTION

In the following paragraph, Staff provides a condensed procedural history pertaining to this Response. All information regarding docket HP24-001 can be found on puc.sd.gov.

On March 12, 2025, SCS Carbon Transport LLC (“Summit” or “Applicant”) filed a Motion to Suspend Current Scheduling Order and Extend Current Deadline Indefinitely. The South Dakota Public Utilities Commission (Commission) then issued a Notice of Hearing (March 13, 2025) scheduling the matter to be heard at the April 10, 2025, Commission meeting. On March 27, 2025, attorney Brian Jorde, on behalf of several intervening landowners, filed a Landowners’ Motion to Deny Application. On March 27, 2025, the Commission issued a Notice of Hearing stating that this matter would also be heard at the April 10, 2025, Commission meeting. On March 27, 2025, Staff filed a Response to Applicant’s Motion to Suspend Current Scheduling Order and Extend Current Deadline Indefinitely. On March 31, 2025, attorney Ryan S. Vogel, on behalf of the Spink County Commission, filed a Motion for Attorney’s Fees. On

April 1, 2025, the Commission issued a Notice of Hearing which stated that the Motion for Attorney's Fees will also be heard at the April 10, 2025, Commission Meeting. On April 4, 2025, Summit filed Replies to Responses and to Motions.

This Supplemental Response will address the Motion to Suspend, the Motion to Deny, Spink County's Motion for Attorney Fees, and all associated responses filed thus far.

At this juncture, the Commission must decide whether to grant Summit's Motion to Suspend or grant the Landowners' Motion to Deny. Regardless of the Commission's decision on the prior question, the Commission must decide whether or not to grant Spink County's Motion for Attorney's Fees.

1. MOTION TO SUSPEND

Summit has requested the Commission suspend the procedural schedule and to extend the deadline indefinitely. The stated reason for this request is that the Applicant's ability to obtain survey permission has changed, which will delay matters to such an extent that the timeline set forth by the procedural schedule and SDCL § 49-41B-24 are no longer realistic. In its previous response, Staff explained that it supports suspending the procedural schedule because it would be imprudent to continue with the timelines set out therein. Staff also stated that it would be more supportive of a suspension request if Summit provides a plan to proceed with the route as filed and a rough timeline for the plan to be executed. Nonetheless, Staff provided a recommendation to the Commission to put in place guardrails in case the Commission wishes to grant the Motion to Suspend. To reiterate, the proposal states: (1) Applicant must notify the Commission of its intent to resume the process at least 1 month in advance; (2) Applicant must provide monthly status updates via letters filed into the docket and attend quarterly status hearings before the

Commission; and (3) The Commission should have twelve months to process the docket and issue a decision once the Applicant resumes the process.

In Summit's Replies to Responses and to Motions (Summit's Reply), Summit provided a helpful explanation as to why it finds itself in a different position with the passage of HB 1052 than it previously was considering the South Dakota Supreme Court's decision regarding Summit's eminent domain authority in *Betty Jean Strom Tr. v. SCS Carbon Transp., LLC*, 2024 SD 48, 11 N.W.3d 71. Summit explained that that it had entered shipping agreements which it believed would "cement the Applicant's position as a common carrier" at the evidentiary hearing scheduled for September 2025. Summit's Reply, page 3. However, considering HB 1052 would be codified and in effect by the hearing date, Summit asked to dismiss those civil cases because it will no longer be able to qualify for eminent domain.

Summit's Reply did not explain its plan to pursue the route as filed. Therefore, it remains unclear what the goal is for a suspension of this docket. From Staff's perspective, a path forward for the proposed route would require voluntary landowner easements, a judicial challenge to the validity of HB 1052, or a change in law by the Legislature which would allow for eminent domain to be used. We cannot predict how long any of these options will take. Nonetheless, the Commission may grant the request pursuant to South Dakota law and, if it so chooses, Staff respectfully requests the Commission adopt Staff's guardrails mentioned above. Additionally, if the Commission votes to suspend the docket, Staff requests the Commission suspend the matter until no later than July of 2025, at which point the parties can gather at a Commission meeting and reassess how the docket will proceed.

2. MOTION TO DENY

On March 27, 2025, Intervening Landowners filed a Motion to Deny Application which argues that the Commission should deny the application pursuant to SDCL § 49-41B-13(1) and (2). Staff will address the statute and the arguments made in the following paragraphs.

A. SDCL § 49-41B-13(1)

SDCL § 49-41B-13(1) states “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[.]”

Staff acknowledges that the passage of HB 1052 may render a significant amount of Summit’s application, pre-filed testimony, and answers to discovery to now be inaccurate or incomplete. However, Staff does not believe Summit provided deliberate misstatements in its application or other communications that would bring this particular statute into play. For a misstatement to be deliberate, it must be known to be a misstatement at the time it is made. Staff does not believe that is the case here.

B. SDCL § 49-41B-13(2)

SDCL § 49-41B-13(2) provides that “An application may be denied, returned, or amended at the discretion of the [Commission] for: . . . (2) Failure to file an application generally in the form and content required by this chapter and the rules promulgated thereunder[.]” Landowners’ Motion to Deny mentions a statute and administrative rule that pertain to SDCL § 49-41B-13(2). Page 8. 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:

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.

In its application, Summit filed for a particular route through South Dakota in compliance with these aforementioned statutes and administrative rules. The passage of HB 1052, however, presents serious questions as to Summit’s ability to survey and construct the very specific route that is on file. By statute, eminent domain will not be available to the Applicant after HB 1052 becomes effective on July 1, 2025. Additionally, Landowners’ Motion to Deny included seventy-nine (79) declarations from landowners along the proposed route stating they will not agree to survey access or easement agreements of any kind. These facts raise serious doubt about whether the proposed route in this Application meets the application requirements regarding the proposed location of a project. Without the ability to exercise eminent domain, and with unequivocal statements from landowners saying they will not voluntarily participate in the project, it seems the proposed route is a legal impossibility come July 1, 2025. A valid legal question exists as to whether a proposed route that is a legal impossibility meets the description requirements of SDCL § 49-41B-11 and ARSD § 20:10:22:11.

We find ourselves in a difficult situation with no clear guidance in the law. Summit intended to prove to a trial court in September of 2025 that it was a common carrier entitled to exercise eminent domain pursuant to SDCL § 49-7-11. HB 1052, effective July 1, 2025, takes

away the possibility for Summit to be considered a common carrier. The Commission must know if there is a plan to challenge HB 1052 in court or if there is some sort of plan to change the laws to allow for eminent domain once again. As Summit wrote in its Reply, the route needs to be “buildable.” Page 1. If the Landowner Declarations are to be believed, the route would need to rely on the use of eminent domain. Considering the Landowner Declarations, it appears to Staff that any route changes Summit may undertake to achieve voluntary easements would result in a material change to the route that would require new notice under SDCL § 49-41B-5.2, and the potential for additional public input meetings. If there is no plan to change or reverse the applicable laws, and considering the statements from landowners, the route as filed cannot be surveyed or built.

In conclusion on this point, Summit states that the route on file remains possible. Summit Reply, pg. 1. Additionally, Summit has stated in press releases that all legal options are on the table (<https://summitcarbonsolutions.com/sumit-carbon-solutions-responds-to-signing-of-south-dakotas-hb-1052-into-law/>). Staff interprets these legal options as potential lawsuits regarding the validity of HB 1052. If there is such a plan, the route on file would remain a possibility, meaning denial under SDCL § 49-41B-13(2) may not be appropriate at this time. However, such a plan should be divulged to the Commission so that all involved can determine whether a suspension, rather than a denial, is the most prudent option.

3. SPINK COUNTY’S MOTION FOR ATTORNEY FEES

On March 31, 2025, Spink County attorney Ryan S. Vogel filed a motion requesting the Commission grant the award of attorneys fees to Spink County from Summit. The basis for Spink County’s request is that, according to Spink County, Summit required Spink County to undergo a significant amount of time responding to discovery only for Summit to ask to pause

the permit proceedings on March 12, 2025. Staff notes that Summit first served this discovery on Spink County on February 12, 2025. The basis for Summit's request to suspend this docket was the signing into law of HB 1052, which occurred on March 6, 2025.

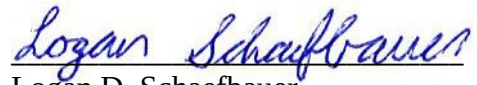
Spink County did not provide the amount that it is requesting; however, it stated it would provide a bill of the costs it underwent to respond to discovery. Spink County did not cite to a statute, case, or other provision of law in support of its request.

Staff agrees with Summit's response to this request. Summit provided an accurate representation of South Dakota's laws regarding the granting of attorney fees. Under the "American Rule", for attorney fees to be awarded, there must be "an agreement entitling the prevailing party to an award of attorney's fees" or an authorization of attorney fees by statute. *Rupert v. City of Rapid City*, 2013 SD 13, ¶ 32, 827 N.W.2d 55, 67. Spink County has provided neither an agreement nor a statute authorizing attorney fees. Accordingly, this request should be denied.

CONCLUSION

Both statutes regarding the Motion to Suspend and the Motion to Deny state the Commission "may" grant the requests. This provides the Commission with the discretion to make the most prudent decision about the future of this docket. In Staff's opinion, 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. Alternatively, if the Commission wishes to suspend, Staff requests the Commission implement its suggested guardrails and suspend the matter until a status hearing to occur in July of 2025. Finally, Staff believes Spink County's request for attorney's fees is without legal basis and should be denied.

Dated this 8th day of April, 2025



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