BEFORE THE IOWA UTILITIES BOARD

IN RE:	)	
	)	Docket No. HLP-2021-0001
SUMMIT CARBON SOLUTIONS LLC	)	

SIERRA CLUB'S AMENDED AND SUBSTITUTED RESPONSE TO SUMMIT'S NOTICE OF APPEAL

Comes now Sierra Club Iowa Chapter and in support of this Amended and Substituted Response to Summit's Notice of Appeal, responds to each numbered paragraph of Summit's Notice of Appeal as follows:

I. STATEMENT OF FACTS AND RELEVANT HISTORY OF THE PROCEEDING

1. Sierra Club agrees that it issued a data request on April 1, 2022, requesting "contracts or agreements, letters of intent, or similar documents Summit has with ethanol plants in Iowa." Sierra Club also agrees that Summit objected to Sierra Club's data request. Sierra Club denies Summit's allegation that the requested documents are not relevant to any issue before the Board. Sierra Club questioned whether the documents contain trade secrets or other highly confidential information, but nonetheless, Sierra Club signed a protective agreement in order to obtain the documents without Board intervention.

2. Sierra Club agrees that it filed a Motion to Compel Discovery and stated that it would not oppose a protective order.

3. Sierra Club cannot respond to Summit's allegation that the protective agreement presented to Sierra Club is substantially similar to protective orders used in South Dakota

and North Dakota, because Sierra Club has not seen the protective orders issued in South Dakota and North Dakota.

4. Sierra Club agrees that it joined Farm Bureau in agreeing to proposed revisions to the protective agreement presented by Summit.

5. Sierra Club agrees that Summit filed a reply to Sierra Club's and Farm Bureau's proposal.

6. Sierra Club agrees that it signed a protective agreement and received redacted versions of the offtake agreements between Summit and the ethanol plants.

7. Sierra Club agrees that Summit objected to Farm Bureaus' Motion to Compel Discovery.

8. Sierra Club agrees that Sierra Club, Farm Bureau, and several counties filed motions requesting unredacted versions of the offtake agreements.

9. Sierra Club agrees that Summit responded to the requests for unredacted versions of the offtake agreements.

10. Sierra Club agrees that on July 31, 2023, a hearing on the Motions to Compel Discovery was held before ALJ Toby Gordon.

11. Sierra Club agrees that ALJ Gordon issued an order as described in Paragraph 11 of Summit's Notice of Appeal.

12. Sierra Club agrees that Summit is appealing ALJ Gordon's Order.

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

13. For the purpose of responding to Summit's Notice of Appeal, Sierra Club will accept Summit's Statement of the Issues.

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III. DESCRIPTION OF ERRORS UPON WHICH APPEAL IS BASED

14. Sierra Club agrees with Summit's description of ALJ Gordon's Order.

15. Sierra Club agrees with Summit's description of ALJ Gordon's Order.

16. The parties seeking discovery made it clear to the ALJ in their pleadings and at oral argument that the information in the offtake agreements is relevant and important because Summit is basing its petition for a permit from the Board on the basis of the economic arrangements with the ethanol plants. Exhibit F, filed with Summit's petition for a permit, presents its arrangements with the ethanol plants as a significant basis for the permit. Exhibit F makes the following claims: "Utilizing the [Summit] Project to capture and permanently store their CO2 emissions enables participating ethanol plants to reduce their carbon footprint by as much as fifty percent (50%) putting them on the path towards producing a net-zero carbon fuel."; "The project is necessary for these ethanol plants because it provides a CO2 transportation solution, which otherwise would not exist, and without which Iowa's ethanol plants would be at a significant long-term disadvantage to ethanol plants [in other states]."

And, as Farm Bureau described it its Motion to Compel:

> Summit's witnesses provided direct testimony about the secondary economic benefits of its hazardous liquid pipeline to the ethanol industry and agriculture generally as evidence of the project promoting the public convenience and necessity. The redacted portions of the Offtake Agreements provide the basis and specifics for the representations made by Summit's witnesses. For example, the following statements were included in Summit's Direct Testimony:
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> a. "Summit's 12 Iowa ethanol partners would earn more for producing lowcarbon renewable fuel, strengthening the economic competitiveness and long-term viability of ethanol. As a result, this benefits Iowa's family farms by supporting a key market for their crop production as the demand for lower carbon solutions

increases." Summit Pirolli Direct Testimony, pp. 4- 5 Filed with the Iowa Utilities Board on July 25, 2023, HLP-2021-0001.

b. "Approximately 3.28 million metric tons of CO2 per year is currently anticipated from the 12 partnering ethanol facilities in Iowa, which is expected to grow over time." Summit Pirolli Direct Testimony, p. 6.

c. "In addition to the environmental attributes, the Project is eligible to receive federal 45Q tax credits. This credit has traditionally received bi-partisan support and was enhanced within the Inflation Reduction Act to $85 per qualifying metric ton of carbon oxides permanently sequestered. Additional opportunities to maximize the value of carbon removals through the Inflation Reduction Act (e.g., Section 45Z – Clean Fuels Production Credit, Section 40B – Sustainable Aviation Fuel Credit), clean hydrogen credits, are currently under evaluation, as are the strict requirements that must be met. Summit's business model was developed to align incentives with our partners through a sharing mechanism of the available revenue streams." Summit Pirolli Direct Testimony, pp. 8-9.

d. "We estimate that participating ethanol facilities will earn, on a net basis, 10-35 cents more per gallon." Summit Pirolli Direct Testimony, p. 9.

e. "The ethanol partners and Summit share the revenues and operating costs." Summit Pirolli Direct Testimony, p. 9.

f. "The recently passed Inflation Reduction Act is providing further incentives to lower the "carbon footprint" for ethanol producers in United States. This incentive is equivalent to 2 cents per gallon for each carbon intensity score below 50. The average score that is gained by sequestering CO2 that originates in Iowa and transported to North Dakota through the SCS pipeline is 30 points. Therefore, the total benefit for sequestering CO2 through SCS is nearly $0.60/gallon of ethanol and that in turn calculates to $1.8[0] per bushel." Summit Broghammer Direct Testimony, pp. 2-3

g. "The returns for Iowa ethanol plants will vary from location to location, but it cannot be denied that the benefit to the Iowa corn producers is several times that of the return per bushel that Iowa ethanol plant have made." Summit Broghammer Direct Testimony, p. 3.

h. "Sequestering carbon dioxide from these participating ethanol plants significantly lowers the ethanol plants' carbon intensity ("CI") scores providing access to higher margin markets, and ultimately improves the economic return to the ethanol plants." Summit Powell Direct Testimony, p. 5

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Sierra Club also explained to the ALJ that it is important to determine if Summit is a common carrier, because only a common carrier can exercise eminent domain. *Puntenney v. IUB*, 928 N.W.2d 829 (Iowa 2019). Under Iowa common law a common carrier is a business that holds itself out as ready to engage in the transportation of goods for hire and undertakes to carry for all persons indifferently and for all persons who choose to hire it. *Kvalheim v. Horace Mann Life Ins. Co.*, 219 N.W.2d 533 (Iowa 1974). The Iowa Supreme Court has also discussed the requirements for a common carrier in relation to oil pipelines in the *Puntenney* case. In that case, involving the Dakota Access pipeline, the court cited decisions of the Federal Energy Regulatory Commission (FERC) stating that for oil pipelines, if a pipeline company reserves 10% of its capacity for all shippers that are termed uncommitted, or walk-up, shippers, the pipeline company is a common carrier. It is therefore necessary to see all of the terms of the offtake agreements to determine if Summit is a common carrier.

Summit has no right to make those claims about its relationship with the ethanol industry and then deny the parties, and the Board, the information to justify the claim. Summit wants to have it both ways.

Summit relies on the decisions of courts in South Dakota and North Dakota. That reliance is misplaced. There is really only one South Dakota case. *Deeg v. SCS Carbon Transp.* The other South Dakota cases simply adopt the decision in *Deeg*. But the *Deeg* court does not cite any South Dakota statute, rule or caselaw to support its decision. In the North Dakota case, *SCS Carbon Transp. v. Malloy*, the court provided absolutely no discussion of the basis for its decision. Those decisions certainly are not persuasive in the

face of the Iowa Supreme Court decision in *Sioux Pharm, Inc. v. Eagle Lab., Inc.*, 865 N.W.2d 528 (Iowa 2025). In *Sioux Pharm*, the court held that unredacted contracts that contained trade secrets must be provided to the opposing party if the documents are designated for "Attorneys' Eyes Only." That is the exact designation given to the offtake agreements in this case. Documents designated for "Attorneys' Eyes Only" cannot be disseminated beyond the attorneys, not even to the attorneys' clients. Furthermore, the Board's past practice with documents subject to protective agreement is that when a witness at the evidentiary hearing is going to be questioned about those documents, the Board will clear the hearing room of all persons who have not signed the protective agreement. So, with all of those protections, there is no way that Summit's trade secrets would not be protected.

17. In its previous briefing and argument to the ALJ, Summit alleged that Sierra Club and Brian Jorde, representing various landowners, would likely violate the protective agreement. The ALJ correctly determined that that *ad hominem* argument had no basis. Now, in this appeal to the Board, Summit has apparently dropped its allegation against Sierra Club. And Summit's criticisms of Mr. Jorde' filings does not rise to the level of showing that he would violate a protective agreement.

18. Sierra Club states that the ALJ did not err in requiring Summit to produce unredacted versions of the offtake agreements.

19. Summit complains that there are allegedly time-sensitive terms in the offtake agreements that should be redacted. Summit has made no showing as to why those terms

would be trade secrets or would give advantage to a competitor. For that matter, Summit has not shown that any other pipeline company is actually a competitor.

20. Summit complains that the ALJ did not conduct an *in camera* review of the unredacted documents. But Summit did not submit unredacted copies to the ALJ. The Board has now ordered Summit to provide unredacted documents to the Board *in camera*. In any event, a review of the unredacted versions will not make any difference. The *Sioux Pharm* case makes it clear that when parties have signed a protective agreement for documents designated, for "Attorneys' Eyes Only," unredacted copies of the documents must be provided.

21. Sierra Club states that the ALJ did not err in requiring disclosure of the unredacted documents.

IV. STATEMENT OF REQUESTED RELIEF

22. Sierra Club requests that the Board affirm the ALJ's decision.

V. STATEMENT AS TO BRIEFING AND ORAL ARGUMENT

23. Sierra Club agrees that further briefing and oral argument are unnecessary.

VI. REQUEST FOR STAY

24. The Board has not issued a stay. So it is not clear what the status of Summit's compliance with the ALJ's order is.

VII. CONCLUSION

The Board assigned discovery disputes to an ALJ to expedite discovery matters. That is especially crucial when the Board moved the start of the evidentiary hearing from October to August. Summit should not be allowed to delay production of discovery under

these circumstances, absent a compelling argument. The Board should defer to the ALJ in making discovery decisions. That was the purpose of using and ALJ.

Sierra Club requests that the Board deny Summit's appeal and affirm the decision of the ALJ.

/s/ *Wallace L. Taylor*
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