

IOWA UTILITIES BOARD

IN RE:

SUMMIT CARBON SOLUTIONS, LLC

DOCKET NO. HLP-2021-0001

ORDER DENYING MOTION TO SUBPOENA BRUCE RASTETTER

PROCEDURAL BACKGROUND

On January 28, 2022, Summit Carbon Solutions, LLC (Summit Carbon), filed a petition for a hazardous liquid pipeline permit with the Utilities Board (Board) to construct, operate, and maintain approximately 687 miles of 6- to 24-inch diameter pipeline for the transportation of liquefied carbon dioxide within the state of Iowa.

On June 16, 2023, the Board issued an order that set the procedural schedule. In the order, the Board required all Parties' witness and exhibit lists be filed by August 14, 2023. The evidentiary hearing in this matter began on August 22, 2023, with nonintervening Exhibit H landowners providing direct testimony.

On September 6, 2023, Anna Ryon, attorney for Kerry Mulvania Hirth, made an oral request for the Board to have Bruce Rastetter appear to testify. The Board asked Ms. Ryon to request the subpoena in writing, and granted parties, including Summit Carbon, two days to respond to the request for subpoena.

On September 7, 2023, Ms. Hirth, by and through her attorney Ms. Ryon, filed a Motion to Subpoena Bruce Rastetter (Motion) to testify in the above captioned proceeding.

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On September 11, 2023, the Sierra Club Iowa Chapter (Sierra Club) filed a Joinder in Motion to Subpoena Bruce Rastetter.

On September 12, 2023, the Republican Legislator Intervenors for Justice (RLIJ) filed a Joinder to the Motion to Subpoena Bruce Rastetter.

On September 12, 2023, Summit Agricultural Group, LLC (Summit Ag), and its member, Bruce Rastetter, filed a resistance to the motion.

PARTIES' POSITIONS

A. Kerry Mulvania Hirth

In her motion for subpoena, Ms. Hirth states the Board should issue the subpoena to Mr. Rastetter, requiring him to appear in person to testify, as a member, about the corporate structure of Summit Ag and its business ventures. Additionally, Ms. Hirth states Mr. Rastetter should have to testify as to how Summit Carbon fits into the overall scheme of Summit Ag's business ventures. Ms. Hirth states the Board has the authority to subpoena Mr. Rastetter under Iowa Code § 17A.13.

Ms. Hirth argues that based on testimony presented by James Pirolli, it appears Summit Carbon's proposed pipeline may be part of a larger corporate enterprise that violates Iowa Code § 553.5, Iowa's anti-competition law. Ms. Hirth states that based on both prefiled testimony and live cross-examination, it has been shown that Summit Ag has ownership of an ethanol plant in Brazil and an interest in sustainable aviation fuel production. Ms. Hirth states Summit Carbon has made competitiveness of Iowa ethanol plants a central component of the argument that the proposed project will promote the public convenience and necessity. Ms. Hirth states that Summit Carbon, along with

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Summit Ag, may be part of a larger corporate enterprise that may give rise to a vertically integrated monopoly in violation of Iowa law involving the ethanol industry. Ms. Hirth states that it is then necessary for the IUB to understand Summit Ag's overall business model and how the various subsidiaries — including Summit Carbon — fit into said business model. Ms. Hirth argues that the information is highly relevant to whether Summit's proposed pipeline promotes public convenience and necessity.

Ms. Hirth states that her motion is timely as the “magnitude of the potential anticompetitive impacts of Summit Carbon's proposed pipeline could not be obtained during discovery and only started becoming evident through live cross-examination of witnesses.” Ms. Hirth states this is particularly true with respect to the anticompetitive provisions of Summit Carbon's offtake agreements. Additionally, because Summit Ag is not a party to this proceeding, Ms. Hirth states that intervening parties do not have the ability to obtain information from Mr. Rastetter or Summit Ag through discovery procedures. Therefore, Ms. Hirth states, the Board's subpoena power is both appropriate and necessary in this instance.

B. Sierra Club

Sierra Club argues the Board should grant Ms. Hirth's Motion and require Bruce Rastetter to testify at this hearing. Sierra Club joins Ms. Hirth's motion in its entirety. Sierra Club states that in addition to the arguments made by Ms. Hirth, Board rules give the Board subpoena power under 199 Iowa Administrative Code (IAC) 7.16. Sierra Club states that under Board rule 7.16, in the absence of good cause for permitting later action, a request for a subpoena must be received by the Board no less than seven days prior to the scheduled hearing. Sierra Club argues that in this instance there is

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good cause for the request not being made at least seven days before the hearing as required by Board rules. Sierra Club states that the less-redacted offtake agreements, which provide the initial basis for the subpoena to be issued, were not received until August 19, 2023, which was only three days prior to the start of the hearing.

Furthermore, Sierra Club states the full picture of the involvement of Mr. Rastetter and Summit Ag was not apparent until James Pirolli was cross-examined during the hearing. Additionally, Sierra Club argues that the fact that Mr. Pirolli's deposition was taken does not diminish the good cause for moving for a subpoena. Sierra Club states that when Mr. Pirolli's deposition was taken, the parties did not have the less-redacted versions of the offtake agreements and the less-redacted versions are what form the basis for Ms. Hirth's Motion.

C. RLIJ

The RLIJ also joins Ms. Hirth's Motion in its entirety. The RLIJ states that the identity of the ultimate owners of all the Summit entities has not been publicly disclosed. The RLIJ states that the general public has a right to know the identity of the persons who are to be in control of the proposed pipeline, especially if it is ever approved by the Board. The RLIJ says that the potential risks to public safety involved for the proposed pipeline merits careful public scrutiny of the pipeline's ownership. Additionally, RLIJ argues the possibility that the proposed pipeline project may be part of a "larger effort to manipulate various agricultural markets and/or restrain free competition in various areas of Iowa's economy, make the sworn examination of Mr. Rastetter imperative."

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D. Summit Ag and its member, Bruce Rastetter

In its resistance, Summit Ag and its member, Bruce Rastetter, request that the Motion be summarily denied. Summit Ag states that Ms. Hirth's Motion to subpoena Mr. Rastetter, who is not an employee of Summit Carbon Solutions, to testify in this hearing to discuss the corporate structure of a non-party is part of an improper strategy by Ms. Hirth to grandstand on irrelevant and unsupported theories in opposition to the proposed project.

Summit Ag states the Motion should be denied as it is untimely. Summit Ag states that under 199 IAC 7.16, absent a showing of good cause, a request by a party for a subpoena must be received by the agency at least seven days prior to the beginning of the hearing. Summit Ag states that the hearing began August 22, 2023, and Ms. Hirth's motion was not filed until September 9, 2023, which means she missed the August 15, 2023 filing deadline.

Additionally, Summit Ag states Ms. Hirth cannot show good cause for not complying with the rule. Summit Ag states that any party had ample opportunity to obtain relevant information regarding any connection between Summit Carbon and Summit Ag during the discovery period. Summit Ag states that no party chose to do so. Summit Ag also notes that no party requested the deposition of Mr. Rastetter or any board member, executive officer, or employee of Summit Ag prior to the hearing. Summit Ag says no party, including Ms. Hirth, listed Mr. Rastetter on its witness list for the hearing, for which the deadline was August 14, 2023. Further, Summit Ag states that no party added Mr. Rastetter to its witness list when the Board required updated witness lists from parties by August 25, 2023. Summit Ag states there is nothing

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contained in the sealed versions of the offtake agreements, produced on August 19, 2023, that provides justification to now conduct discovery into any connection between Summit Carbon and Summit Ag, or into any of Summit Ag's corporate structure, that could not have been done before the hearing began.

Summit Ag also argues that Ms. Hirth's Motion is unsupported and lacks merit. Summit Ag states Ms. Hirth's Motion relies on the false assertion that Summit Ag is Summit Carbon Solutions' parent company. Summit Ag states Ms. Hirth relies on the parent/subsidiary relationship to support her theory of a vertically integrated monopoly, even though Mr. Pirolli testified that Summit Ag is not the parent company of Summit Carbon. (See 9/6/2023 Rough Tr. 108:3-13). Summit Ag states that it and Summit Carbon are separate and distinct business entities. Summit Ag adds that while Mr. Rastetter is an investor in Summit Carbon and serves on the board of Summit Carbon, he is one of eight board members and is unable to control the corporate strategy of Summit Carbon. Summit Ag argues that, therefore, the business strategy and investments of Mr. Rastetter and Summit Ag are not relevant to the public convenience or necessity of the pipeline proposed by Summit Carbon.

BOARD DISCUSSION

Iowa Administrative Code rule 199—7.16 states that an "agency subpoena shall be issued to a party on request"; the request for subpoena must occur at least seven days before the commencement of the evidentiary hearing. Given that the hearing in the above-captioned proceeding commenced on August 22, 2023, and that the Board did not receive Intervenor Hirth's subpoena request until September 7, 2023, the

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subpoena request was not made “at least seven days before the hearing.” Therefore, Ms. Hirth’s untimely request for a subpoena may only be excused by her establishing good cause, and the Board finds she failed to do so.

By their own assertions, Ms. Hirth and the joining parties’ belief as to the relevance is based on information available to them well before the first September 7 request was filed, more than two weeks after the hearing began. Parties had the opportunity to depose Mr. Pirolli about Summit Carbon and its relationship to other Summit entities and, in fact, did so. Parties could have also obtained information regarding the connection between Summit Carbon and Summit Ag during the discovery period, through other means and individuals. Parties had time to collect information about Summit entities and how they are organized. Under Iowa Code 17A.13, the Board could have administered subpoenas any time after January 28, 2022. Parties could have asked at any time, prior to seven days before hearing, for the Board to subpoena Mr. Rastetter. Further, the parties claim they became aware of the relevance of Mr. Rastetter through offtake agreements. Those less-redacted offtake agreements were available August 19, and the first party to file waited 18 additional days to request a subpoena, and others waited even longer.

While the failure to establish good cause for the delay is sufficient ground to deny the request, based on Summit Ag’s resistance even if a subpoena was issued, grounds may exist to quash and Mr. Rastetter’s testimony does not appear relevant. There has been no showing as to why Mr. Rastetter, who is not an employee of Summit Carbon, is the best person to testify in this proceeding regarding the corporate structure of a non-party.

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The Board also notes that Ms.Hirth's Motion relies on the notion that Summit Carbon and Summit Ag may be violating Iowa Code § 553.5. The Board has no jurisdiction to decide whether an entity is or is not violating this provision. Additionally, Summit Carbon has provided testimony, through its witness Mr. Pirolli, that Summit Carbon and Summit Ag are wholly separate and distinct entities. Specifically, Summit Ag states, and is supported through testimony and cross-examination of Summit Carbon witnesses, that it is not the parent company nor the holding company for Summit Carbon.

The Board will deny Ms. Hirth's Motion for Subpoena of Bruce Rastetter as untimely filed.

IT IS THEREFORE ORDERED:

Kerry Mulvania Hirth's Motion to Subpoena Bruce Rastetter filed on September 7, 2023, is denied.

UTILITIES BOARD

Erik M. Helland 2023.09.26
07:57:27 -05'00'

Sarah Martz Date: 2023.09.26
08:40:00 -05'00'

ATTEST:

Keetah A Horras Date: 2023.09.26
08:56:23 -05'00'

Joshua Byrnes Date: 2023.09.26
07:55:59 -05'00'

Dated at Des Moines, Iowa, this 26th day of September, 2023.