STATE OF IOWA
DEPARTMENT OF COMMERCE
IOWA UTILITIES BOARD

IN RE: **SUMMIT CARBON SOLUTIONS LLC**	**DOCKET NO. HLP-2021-0001**

RESPONSE TO CUMMINS' MOTION FOR STAY AND FOR CLARIFICATION

On April 28, 2022, George Cummins filed a motion in response to the Board's April 19 Order[1] clarifying the procedures for providing notice of survey under Iowa Code § 479B.15. Cummins seeks an interpretation of the survey notice requirement that is both contrary to law and which would create an absurd result that would turn the entire purpose of Section 479B.15 on its head. The Board should clearly, promptly and emphatically reject the requested interpretation, which would only encourage lawless actions. Indeed, the theory Cummins is espousing – and which Summit Carbon Solutions, LLC ("Summit Carbon") understands to have been widely advocated by Cummins' attorney among opponents of the project – that individuals can willfully refuse notice under Section 479B.15 and by doing so make survey access a trespass is legally wrong, but more important is a dangerous theory being recklessly advocated. The Board should put a stop to it before a survey crew suffers serious physical harm.

The Framework for the Statutory Survey Right

To be able to properly plan and route a pipeline, whether over land obtained by voluntary easement or easements obtained through eminent domain, requires that surveys be conducted on potential host parcels. The legislature, in enacting Iowa Code chapter 479B, which authorizes

[1] *In re Summit Carbon Solutions LLC*, Docket No. HLP-2021-0001, "Order Addressing Motion for Clarification" (IUB, April 19, 2022) ("Clarification Order").

certain pipelines including carbon dioxide pipelines in Iowa, understood this and included Section 479B.15.

As a result, there are two ways a pipeline project can lawfully access land for survey activities. ***First***, the landowner can grant permission. This is simply a right of the landowner, and applies well beyond surveying for a pipeline: if Person A *voluntarily permits* Person B to be on their land for a particular purpose, Person B's presence there for such purpose is not a trespass – whether to visit socially, to play baseball, to pick apples from Person A's tree, or to survey the land. In that case, no special statutory provision and no further actions, including a notice letter, are required to make entry lawful and not a trespass. *See also Clarification Order* at 7 ("The Board considers it more reasonable and consistent with the statute to provide specific notice to those landowners and persons in possession of or residing on the land who are not willing to allow the hazardous liquid pipeline company on the property to survey. . .")

The issue, however, is what happens when an otherwise lawful and authorized project requires access to the land and that access is not voluntarily provided. The legislature has provided a ***second*** way to obtain survey access where that access is *involuntary*. Where no voluntary permission has been provided, a pipeline project has a statutory right to access the land for survey by following the statutory prerequisites:

> **479B.15 Entry for land surveys.**
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> After the informational meeting or after the filing of a petition if no informational meeting is required, a pipeline company may enter upon private land for the purpose of surveying and examining the land to determine direction or depth of pipelines by giving ten days' written notice by restricted certified mail to the landowner as defined in section 479B.4 and to any person residing on or in possession of the land. The entry for land surveys shall not be deemed a trespass and may be aided by injunction. The pipeline company shall pay the actual damages caused by the entry, survey, and examination.

Iowa Code § 479B.15.

To fully understand the notice obligation in Section 479B.15 also requires looking at the language of Section 479B.4, from which the definition of "landowner" is incorporated by reference. That paragraph, in relevant part, provides: "*landowner*" means a person listed on the tax assessment rolls as responsible for the payment of real estate taxes imposed on the property" (italics in original.)

Cummins is Wrong on the Law in Iowa Regarding Actual Receipt

Cummins argues that

> unless the pipeline company. . . can prove all persons required to be served with notice *have signed for* the restricted certified mailing. . . then they are not entitled entry [sic] on privately owned land and any such unauthorized entry would be a trespass. . . any entry without permission or proof of the 10-day notice *being accepted*. . . is by definition a trespass.

Motion at 1 (emphasis added). This is not what Iowa law requires, however, and is not even what the cases cited by Cummins require. The interpretation requested by Cummins – and indeed the "fighting issue" (unfortunately far too literally) is whether a landowner can willfully refuse to accept a restricted certified mailing from Summit Carbon or its agents and through such interference defeat the purpose of Iowa Code § 479B.15. Common sense would suggest that such an outcome cannot be acceptable in the law, as it would undermine the anticipated service of all manner of legal documents and throw a wrench into the workings of many legal processes. In this case, Iowa law, as set forth in a thorough order of the Iowa Supreme Court (and one much more recent than the cases relied on by Cummins), aligns with common sense.

> The designations "Attempted—Not Known" and "Unable to Forward" differ from "Unclaimed" or "Refused." An "Unclaimed" designation means that the addressee "abandoned or failed to call for mail." *Id*. If mail is listed as "Refused," it means the addressee "refused to accept mail or pay postage charges on it." Id. . . . . When mail is returned "Attempted—Not Known" and "Unable to Forward," Iowa Code section 617.3 requires the party to take additional steps to achieve service, namely, resend the notice to a valid address where the defendant may effectively be served by registered or certified mail or achieve

> personal service pursuant to the Iowa Rules of Civil Procedure. *See* Iowa R. Civ. P. 1.305.
>
> We would come to a different view if the defendant refused service or left it unclaimed. Under our caselaw, we have held that actual receipt is not required and that refusal to accept or to claim registered or certified mail at a valid address will not defeat service. *Barrett*, 290 N.W.2d at 922.

L.F. Noll v. Eviglo, 816 N.W.2d 391, 396-97 (Iowa 2012). Board Staff recently resolved an informal complaint on a similar issue regarding notice, and while the Staff Proposed Resolution did not cite *Eviglo*, it correctly reached the same result, citing another Iowa Supreme Court case:

> In *Long v. Crum*, the Iowa Supreme Court held
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> > (W)here plaintiff is able to establish absence of a return receipt showing actual delivery is attributable to the nonresident's refusal to accept delivery of notification addressed to him when he had opportunity to do so the statute is satisfied since a defendant cannot by his own willful act, or refusal to act, prevent plaintiff from maintaining his action.
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> 267 N.W.2d 407, 411 (Iowa 1978) (citing *Emery Transportation Co. v. Baker*, 119 N.W.2d 272, 277 (Iowa 1963)). Applying this to your situation, the mailed notices show they were refused and returned to Summit. By refusing the Iowa Code § 479B.15 notice, you were still notified of the surveying even though you did not accept and open the letters. "A party may not escape the effect of the giving of a written notice by refusing to receive it when it is presented in person as a notice." 58 Am. Jur. 2d *Notice* § 28 (2022). Because the mailings indicate refusal to accept delivery, Staff concludes Summit has complied with Iowa Code § 479B.15 notice requirements despite that the mailings were not received by you. Thus, Staff does not find a violation of Iowa Code § 479B.15.

Palmquist, Docket GI-2021-0147, Proposed Resolution (Apr. 13, 2022). Further, this same result – and the *Long v. Crum* case it is based on – is even supported by one of the cases relied on by Cummins, which acknowledged "This court recently held that the refusal to accept delivery of a notice mailed pursuant to section 562.7(3) will not defeat a landlord's attempt to give notice of termination." *Escher v. Morrison*, 278 N.W.2d 9, 11 (Iowa 1979).[2] The court

[2] While *Escher* does not support Cummins motion in any event, and is superseded by the additional clarity in the more recent *Eviglo* decision, one additional aspect of *Escher* is noteworthy and relevant. In his dissent, Justice

reached a contrary conclusion on the specific facts in the case because of "the absence of such a refusal." *Id*.

The case for firmly disallowing intentional rejection or abandonment of the notice is even stronger under Section 479B.15 because of the purpose of the statute and the way intentional non-cooperation with proper service defeats that purpose. The statute notes that access under Section 479B.15 "shall not be deemed a trespass" – reaffirming the relationship between Section 479B.15 and trespass law. That is, as outlined above, the entire point of Section 479B.15's inclusion in the permitting statute is to ensure a way to obtain survey permission *even where such permission has been denied by the landowner*. Under Cummins' interpretation, however, Section 479B.15 merely amounts to a chance for a recalcitrant landowner to say, by refusing to accept or claim notice, "I double-deny permission!" and by doing so eviscerate the primary tool provided by the statute. The legislative purpose of allowing for involuntary access should not be able to be defeated simply by a landowner taking a second act to show the access would be involuntary. That the access is involuntary is a given – it is the entire premise of Section 479B.15, and what the notice regime allows a pipeline project to overcome. The motion seeks to render the statutory survey permission a mere shadow of its obvious intent.

Cummins' position, presumably, is that the legislature provided injunction for this purpose. But it is clear from the statute that use of notice is to be the primary approach to involuntary access, and injunction secondary – a mere aid to the primary means of access.

McCormick points out that in most cases where the legislature seeks to require *actual* receipt, the statute makes that clear. Here, however, §479B.15 only discusses *giving* notice. There is nothing about receipt of notice, proof of notice, or any similar terms. Also, while not dispositive, it is worth noting the context that the legislature is over time moving away from requiring restricted certified mail. Section 479B.15 was adopted in 1995. In 2009, the legislature adopted the general survey access provisions in Iowa Code 354.4A, which require notice by *regular* mail for substantially similar survey access. And in 2018, the legislature changed the mailing requirement for the informational meeting in Iowa Code § 479B.4 – which notably is referenced in §479B.15 – from restricted certified to just certified. *See* 2018 Iowa Acts, Ch. 1160, HF 2446.

Cummins' argument turns this on its head and makes it almost frivolous for the landowner to defeat the notice, requiring injunction in nearly all cases, which has adverse policy implications for both raising costs and complexity for both parties, but also clogging up the courts. Injunction is important as a backstop in the event a landowner who has received notice still takes steps to impede survey – refusal to unlock a fence, for example. But it is intended as additional teeth with which to enforce the access right, not a pre-requisite to obtaining that right. The right to access without it being a trespass is established by undertaking the 10-day notice regime. This is the only way to read the structure of the statute, which defines the notice regime, and then states that such access based on notice shall not be a trespass – and only after that adds that such access may be *aided* – not made lawful in the first instance – by injunction. The Board should act, and should expect Mr. Cummins's legal counsel to act, to uphold and facilitate the operation and intent of the law.[3]

Conclusion and Proposed Resolution

The Board should take this opportunity to clarify and put an end to the practice, encouraged by some opposition organizers and counsel who should know better, of encouraging individuals to willfully reject or ignore efforts to deliver proper notice. The idea that by rejecting notice an individual can unilaterally turn statutorily-provided survey access rights into a trespass is both legally wrong and is dangerous for survey crews in the field who are entering properties where notices have been lawfully provided.

[3] Summit Carbon has obtained the literature in **Attachment A**. Summit Carbon has reason to believe that this poorly-researched and legally erroneous document has been distributed by Cummins' counsel, including to non-clients. Summit Carbon also represents that at least one of its surveyors has been physically assaulted (attacked from behind while walking away), and that surveyors for Summit have also been confronted by landowners carrying firearms. Taking a statute expressly designed to ensure surveying is *not* a trespass and stirring up opponents with an overly aggressive interpretation that leads them to believe they can make the survey a trespass through the bad act of refusing official notice is reckless, inflammatory, and, unless stopped, is far too likely to get someone shot.

The Board should find, consistent with *Eviglo*, that where a pipeline permit applicant has physical or electronic receipts or tracking from the Postal Service showing either a signature or that the delivery was refused or unclaimed by the landowner(s) shown on the county tax rolls and all reasonably ascertainable tenants or persons in possession that the survey is, was or will be proper, lawful and valid.

By doing so, the Board will effectuate the language and the purpose of the statute: to facilitate lawful access to conduct those surveys necessary to plan a pipeline project, even where the landowner objects and refuses voluntary permission. The legislature understood that pipelines often serve a useful purpose; it made certain that individuals could not exercise a veto over an entire project simply by refusing to cooperate with technical aspects of the process. If such behavior were legitimized, large investments and development in Iowa of many kinds would become impossible. The Board should reject such an absurd and legally unsupportable result.

Respectfully submitted this 12th day of May, 2022.

By: */s/ Bret A. Dublinske*

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ATTORNEYS FOR SUMMIT CARBON SOLUTIONS LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 12th day of May, 2022, he had the foregoing documents electronically filed with the Iowa Utilities Board using the EFS system which will send notifications of such filing (electronically) to the appropriate persons.

/s/Bret A. Dublinske
Bret A. Dublinske