

**STATE OF IOWA
DEPARTMENT OF COMMERCE
IOWA UTILITIES BOARD**

IN RE:

DOCKET NO. HLP-2021-0001

SUMMIT CARBON SOLUTIONS, LLC

**NOTICE OF APPEAL FROM DECISION OF PRESIDING OFFICER AND
REQUEST FOR STAY PENDING APPEAL**

Expedited Relief Requested

Under Board Rule 7.26, Summit Carbon Solutions, LLC submits this Notice of Appeal from Decision of Presiding Officer and Request for Stay Pending Appeal and in support states as follows. The Presiding Officer's ruling ignores both state and federal law and, most importantly, ignores the underlying public-safety reasons for protecting information that could give a roadmap to someone intent on harming the pipeline and—more importantly—Iowans. The North Dakota Public Service Commission ruled in Summit's favor for those reasons, and a contrary Board order would create a dangerous conflicting precedent.

I. STATEMENT OF FACTS AND RELEVANT HISTORY OF THE PROCEEDING

1. The Sierra Club Iowa Chapter issued a data request to Summit seeking a copy of Summit's dispersion modeling results. Because the dispersion modeling results are (a) not relevant to any issue before the Board (as federal law preempts the Board from considering them) and (b) constitute highly sensitive security information about critical infrastructure, Summit timely objected to Sierra Club's request.

2. On July 26, 2023, Sierra Club filed a Second Motion to Compel Discovery, seeking production of the dispersion modeling results. Sierra Club's Second Mot. to Compel Discovery at

1–4 (July 26, 2023) (“Mot. to Compel”).¹ Sierra Club argued that the dispersion modeling results should be made public without any confidentiality protection. *See id.* at 6. The Iowa Farm Bureau Federation (“IFBF”), the Whipple Counties,² and Hardin County filed joinders in Sierra Club’s motion.

3. On August 2, 2023, Summit filed its Resistance to Sierra Club’s Second Motion to Compel. *See Resistance to Sierra Club’s Second Mot. to Compel* (Aug. 2, 2023). On August 8, 2023, Summit filed a Notice of Supplemental Authority Supporting Summit’s Resistance, informing the Board of a recent order from the North Dakota Public Service Commission (“ND PSC”) that protects Summit’s dispersion modeling information from disclosure to the intervenors and the general public in Summit’s permitting proceedings in North Dakota. *See Notice of Suppl. Authority Supporting Summit’s Resistance to Sierra Club’s Second Mot. to Compel* (Aug. 8, 2023); Order on Protection of Information, *In re SCS Carbon Transp. LLC Midwest Carbon Express CO2 Pipeline Project Siting Application*, No. PU-22-391 (N.D. Pub. Serv. Comm’n Aug. 4, 2023) (“PSC Order”).³

4. On August 7, 2023, a hearing was held on Sierra Club’s Second Motion to Compel before Administrative Law Judge Toby J. Gordon, appointed by the Board as presiding officer under Board Rule 7.3 (“Presiding Officer”).

5. On August 14, 2023, the Presiding Officer issued an Order Concerning Sierra’s Second Motion to Compel (“Order”) granting Sierra Club’s motion to compel production of the

¹ In its motion, Sierra Club also sought to compel the production of an unspecified “environmental report.” Mot. to Compel at 1, 4–6. After Summit noted that Sierra Club never issued a data request for any such document and that no such document existed, Sierra Club withdrew that request.

² The “Whipple Counties” are Shelby County, Kossuth County, Floyd County, Emmet County, Dickinson County, Wright County, and Woodbury County.

³ A copy of the PSC Order was attached to Summit’s Notice of Supplemental Authority.

dispersion modeling results and ordering that “Summit shall provide the requested documents and data to the movant and joined parties within 2 business days of this order.” Order at 9.

6. Under Board Rule 7.26, Summit now appeals the Presiding Officer’s Order to the Board.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

7. The following issue is presented for review: Whether the Presiding Officer Erred in Requiring Summit to Produce its Dispersion Modeling Results.

III. DESCRIPTION OF ERRORS UPON WHICH APPEAL IS BASED

8. In ordering Summit to produce its dispersion modeling results, the Presiding Officer concluded that the results were possibly relevant to the pipeline’s location, routing, and siting. The Presiding Officer rejected Summit’s argument that because the Board is preempted under federal law from considering safety aspects of the pipeline, the modeling results are irrelevant to the Board’s decision criteria. *See* Order at 8.

9. The Presiding Officer also rejected the ND PSC’s recent decision extending protection to Summit’s dispersion modeling results. The ND PSC concluded that the dispersion modeling results are entitled to heightened protection and should not be disclosed to intervenors or to the general public because the results relate to the security of critical infrastructure and their disclosure could provide information on where damaging or vandalizing the pipeline by a bad actor could have the most impact on public health, safety, and security. *See* PSC Order ¶¶ 4–13. The Presiding Officer concluded that because “the North Dakota Order was issued pursuant to specific North Dakota statutes, not present here,” the dispersion modeling results should nevertheless be disclosed. Order at 9.

10. The Presiding Officer erred in determining that the dispersion modeling results are relevant to the Board’s decision criteria and that the Board’s consideration of the results is not

preempted by federal law. Contrary to the Presiding Officer’s characterizations, Sierra Club’s entire motion to compel focuses on obtaining the dispersion modeling results for safety purposes. The same is true of the joinders filed by IFBF, the Whipple Counties, and Hardin County.

11. Sierra Club argued that the dispersion modeling results should be disclosed because (a) they are allegedly relevant “to avoid[ing] adverse impacts in the event of a leak or rupture in the pipe” (Mot. to Compel at 1); (b) they are allegedly relevant to Summit’s claims “about how safe the pipeline allegedly is” (*id.* at 4); (c) “parties who would be impacted by a release of carbon dioxide from the pipeline need to know the extent of the risk” (*id.*); and (d) the counties “need to know the results of the dispersion modeling so they can prepare for emergency response” (*id.*). The Whipple Counties and Hardin County similarly focused on the results’ purported relevance to “county emergency management authorities and first responders.” *See* Whipple Counties’ Joinder in Mot. to Compel Discovery (Aug. 2, 2023); Hardin County’s Joinder in Sierra Club Mot. to Compel Discovery (Aug. 4, 2023). And IFBF argued that the Board should “consider the distance that harmful concentrations [of] carbon dioxide may potentially travel in the event of a release” and the “risk presented by the presence of the proposed hazardous liquid pipeline.” IFBF’s Partial Joinder to Sierra Club Iowa Chapter’s Second Motion to Compel Discovery ¶¶ 7, 9 (Aug. 2, 2023) (“IFBF Joinder”).

12. In short, *every one* of the articulated bases for obtaining the dispersion modeling is based on pipeline safety—a consideration that is expressly preempted by federal law for interstate pipelines like Summit’s. And while Sierra Club argued that “safety is not preempted by federal law” (Mot. to Compel at 3), that is just not true—as even the Presiding Officer recognized. *See* Order at 8 (“[F]ederal preemption likely applies related to safety regulation”); *see also, e.g.*, 49 U.S.C. § 60104(c) (“A State authority may not adopt or continue in force safety standards for

interstate pipeline facilities or interstate pipeline transportation.”); *Couser v. Shelby County*, No. 1:22-cv-00020, 2023 WL 4420442, at *15 (S.D. Iowa July 10, 2023) (“[E]xpress preemption invalidates the Ordinance’s emergency response and hazard mitigation provisions.”), *appeal docketed*, No. 23-2818 (8th Cir. Aug. 9, 2023); *ANR Pipeline Co. v. Iowa State Com. Comm’n*, 828 F.2d 465, 470 (8th Cir. 1987) (“Congress intended to preclude states from regulating in any manner whatsoever with respect to the safety of interstate transmission facilities. . . . [T]he NGPSA leaves nothing to the states in terms of substantive safety regulation of interstate pipelines, regardless of whether the local regulation is more restrictive, less restrictive, or identical to the federal standards.”); *Kinley Corp. v. Iowa Utils. Bd.*, 999 F.2d 354, 359 (8th Cir. 1993) (“Congress granted exclusive authority [through the HLPESA] to regulate the safety of construction and operation of interstate hazardous liquid pipelines to the Secretary of the Department of Transportation. This Congressional grant of exclusive federal regulatory authority precludes state decision-making in this area altogether and leaves no regulatory room for the state to either establish its own safety standards or supplement the federal safety standards.”); *Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872, 878 (9th Cir. 2006) (“Federal preemption of the regulation of interstate pipeline safety in any other manner is manifest in the language of the PSA provision entitled ‘Preemption.’”).

13. Accordingly, the Presiding Officer erred in concluding that the dispersion modeling results were relevant to the pipeline’s location, routing, and siting and that such consideration was not preempted by federal law. As Summit argued in its Resistance, consideration of the dispersion modeling results for location, routing, and siting purposes is “at best a proxy [for regulating safety] and at worst actual regulation of pipeline safety in contravention of federal authority.” Resistance at 4. Sierra Club admitted as much in its own brief, stating that the results’ relevance to location

and routing had to do with “*protect[ing]* persons and property.” Mot. to Compel. at 2 (emphasis added). IFBF argued the same. *See* IFBF Joinder ¶ 12 (“The dispersion model is relevant to the routing and location of the pipeline *because of the risk associated with a potential release* conflicting with nearby land uses.” (emphasis added)).

14. The Presiding Officer also erred in failing to recognize the acute security sensitivity surrounding the dispersion modeling results. As the ND PSC recently concluded, the dispersion modeling results are security system plans for critical infrastructure. *See* PSC Order at ¶¶ 4–13. The commission recognized that “[t]he disclosure of plume modeling could provide information on where damaging or vandalizing the pipeline by a bad actor would have a debilitating impact on security and state public health and safety” and that “[p]revention of receipt of the information by bad actors necessitates the PSC limiting access to the information.” *Id.* ¶ 7. In addition, “there has been growing vigilance for the protection of data and information related to the operations and locations of critical infrastructure.” *Id.* ¶ 9. For these reasons, the ND PSC concluded that while the commission had access to the dispersion modeling results, those results should not be disclosed to intervenors or the public.

15. Finally, the Presiding Officer erred in summarily discrediting the ND PSC’s order. The Presiding Officer’s sole reason for doing so was that Iowa does not have a law analogous to the North Dakota public records law invoked by the ND PSC. *See* Order at 9. That is incorrect. Like North Dakota, Iowa’s public records law similarly guards against the disclosure of “[i]nformation and records concerning physical infrastructure, cyber security, critical infrastructure, security procedures, or emergency preparedness developed, maintained, or held by a government body for the protection of life or property, if disclosure could reasonably be expected to jeopardize such life or property.” Iowa Code § 22.7(50). As the ND PSC found, disclosure of

dispersion modeling results could provide information to potential bad actors on where damaging or vandalizing the pipeline could have a significant impact on public health, safety, and security. *See* PSC Order ¶ 7. The Iowa Legislature clearly shared those concerns when it passed Iowa Code § 22.7(50). These concerns are especially acute considering recent instances of vandalism and intentional damage to pipelines in Iowa and neighboring states—even eliciting alerts from the FBI regarding potential terrorism acts against pipelines following the release of the book and movie entitled “How to Blow Up a Pipeline.”⁴

16. Federal law also strongly favors protection. Summit will submit the dispersion model results to the federal Pipeline and Hazardous Materials Safety Administration (“PHMSA”) as part of PHMSA’s review of the adequacy and completeness of Summit’s Emergency Response Plan, Integrity Management Plan, and other required programs. *See* 49 C.F.R. §§ 195.402(e), 195.408, 195.452. Summit will seek protections from PHMSA for the results. Specifically, the results will qualify for protection under the Freedom of Information Act Exemptions 4 and 7(F). *See* 5 U.S.C. § 552(b)(4) (protecting confidential commercial information that is customarily kept private), (b)(7)(F) (protecting information that could reasonably be expected to endanger the life or physical safety of any individual). The results are also protected by the U.S. Department of Homeland Security (“DHS”) program for protection of transportation-related Sensitive Security Information because the results constitute vulnerability assessments under DHS regulations that require confidential treatment and special handling. *See* 49 C.F.R. §§ 1520.5(b)(5), 1520.9.

⁴ *See* Jana Winter, *Law-Enforcement Agencies Have Sent 35 Warnings About This Movie*, Rolling Stone (Apr. 21, 2023), <https://www.rollingstone.com/politics/politics-news/pipeline-movie-fbi-terrorism-hollywood-1234717269/>; *The Latest: South Dakota, Iowa Confirm Pipeline Vandalism*, AP (Mar. 21, 2017), <https://apnews.com/general-news-65dd5cb6e6e84bfc977f54de5bfaa6e6>.

17. Besides, the very same security concerns are present here in Iowa whether or not a law expressly says so. There are serious implications for forcing Summit to disclose material that is essentially a map that someone with ill intentions could use to create severe disruption. What's more, ordering disclosure here would effectively nullify the ND PSC's order prohibiting disclosure along with any future PHMSA protections, undermining the federal government's and the State of North Dakota's strong interests in protecting this information.

18. Nor is it sufficient to require Summit to produce the dispersion modeling results under a protective order. Even requiring disclosure under a protective order creates a real risk of significant harm because some of the intervenors' counsel have a track record of failing to comply with the Board's orders. In fact, just two days ago—on Monday afternoon—the Whipple Counties' counsel uploaded several of Summit's attorneys'-eyes-only documents (including offtake agreements) to the Board's public docket in direct violation of the parties' protective agreement and the Presiding Officer's protective order. And Summit has already documented numerous instances of Brian Jorde's noncompliance with Board orders.⁵

IV. STATEMENT OF REQUESTED RELIEF

19. For the reasons discussed above and in its prior filings,⁶ Summit requests that the Board either: (a) reverse the Presiding Officer's decision in its entirety and hold that Summit need not disclose its dispersion modeling results; or (b) reverse the Presiding Officer's decision in part and hold that Summit should produce the dispersion modeling results to only the Board and its staff but not to intervenors or the general public. While Summit maintains that the Board is

⁵ See Summit's Notice of Appeal from Decision of Presiding Officer; Request for *In Camera* Review; and Request for Stay Pending Appeal ¶ 17 (Aug. 4, 2023).

⁶ See Summit's August 2, 2023 Resistance to Sierra Club's Second Motion to Compel; and Summit's August 8, 2023 Notice of Supplemental Authority Supporting Summit's Resistance to Sierra Club's Second Motion to Compel.

preempted from relying on safety-related information such as the dispersion modeling results to make a determination in this case, this will permit the Board to view the dispersion modeling results while mitigating the risk of public disclosure and maintaining their confidentiality under Iowa Code § 22.7(50), just like the ND PSC did under its analogous statute.⁷

V. STATEMENT AS TO BRIEFING AND ORAL ARGUMENT

20. Summit respectfully requests oral argument on this appeal. But being cognizant that the evidentiary hearing in this matter begins on August 22, 2023, Summit does not request further briefing.

VI. REQUEST FOR STAY

21. Under Board Rule 7.26(5)(g), if a party desires a stay or other temporary remedy pending review of the Presiding Officer’s decision, the party “shall state the reasons justifying a stay or other temporary remedy and shall address the factors listed in Iowa Code section 17A.19(5)(c).” Those factors include:

- (1) The extent to which the applicant is likely to prevail when the [Board] finally disposes of the matter.
- (2) The extent to which the applicant will suffer irreparable injury if relief is not granted.
- (3) The extent to which the grant of relief to the applicant will substantially harm other parties to the proceedings.
- (4) The extent to which the public interest relied on by the [Presiding Officer] is sufficient to justify the [Presiding Officer]’s action in the circumstances.

Iowa Code § 17A.19(5)(c).

⁷ Summit would provide the Board with the same material that has been provided to the ND PSC and the South Dakota Public Utilities Commission.

22. *First*, for the reasons discussed above and in its prior filings, Summit has demonstrated the likelihood of success on its appeal.

23. *Second*, there is no question that Summit would suffer irreparable injury in the absence of a stay. The action required by the Order—production of the dispersion modeling results—is the action from which Summit seeks relief through this appeal. If Summit is required to disclose the results while this appeal is pending, no appellate relief could put the genie back in the bottle. That disclosure would be irreversible and, by definition, irreparable. The risk of significant harm is even more heightened here because the dispersion modeling results constitute sensitive security information about critical infrastructure. *See, e.g.*, PSC Order ¶¶ 12–13.

24. *Third*, a short stay pending the Board’s consideration of this appeal will not cause substantial harm to any other party to the proceeding. Such a stay could last less than 10 days. The intervenors have already filed their pre-filed testimony, the evidentiary hearing does not start until August 22, 2023, and the hearing will begin with many days of testimony from non-intervenor Exhibit H landowners such that the Board will not hear testimony regarding the dispersion modeling results until much later than August 22, 2023.

25. Finally, the fourth factor is inapplicable to this appeal. The matter on appeal is a procedural, discovery issue between private litigants. The decision does not rest on any public interest. If anything, the public interest weighs in favor of protecting the dispersion modeling results given their status as sensitive security information about critical infrastructure and the risk of improper use of the results by bad actors.

26. A short stay pending resolution of this appeal is therefore appropriate.

27. Because of the nature of the requested stay, expedited relief is appropriate.

WHEREFORE, Summit respectfully requests that the Board either: (a) reverse the Presiding Officer's decision in its entirety and hold that Summit need not disclose its dispersion modeling results; or (b) reverse the Presiding Officer's decision in part and hold that Summit should produce the dispersion modeling results to only the Board and its staff but not to intervenors or the general public.

Respectfully submitted this 16th day of August, 2023.

By: /s/ Brant M. Leonard

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ATTORNEYS FOR SUMMIT CARBON
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 16th day of August 2023 he had the foregoing document electronically filed with the Iowa Utilities Board using the EFS system which will send notification of such filing (electronically) to the appropriate persons.

/s/ Brant M. Leonard

Brant M. Leonard