

IOWA UTILITIES BOARD

IN RE:

SUMMIT CARBON SOLUTIONS, LLC

DOCKET NO. HLP-2021-0001

ORDER ADDRESSING SECOND MOTION TO COMPEL

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 designating a presiding officer for this docket to hear and issue a proposed decision on discovery disputes.

On July 26, 2023, Sierra Club Iowa Chapter (Sierra Club) filed a second motion to compel, seeking discovery of Summit Carbon's dispersion modeling results. The Iowa Farm Bureau Federation (Farm Bureau); the Shelby, Kossuth, Floyd, Emmet, Dickinson, Wright, and Woodbury county boards of supervisors (collectively, the Counties); and the Hardin County Board of Supervisors (Hardin County BOS) filed joinders to Sierra Club's second motion to compel. On August 2 and 8, 2023, Summit Carbon filed its resistance and supplemental resistance, respectively, to Sierra Club's second motion to compel. On August 3, 2023, the presiding officer issued an order setting the oral argument for this matter for 1 p.m. August 7, 2023. On August 14, 2023, the presiding officer issued a proposed order regarding the discovery dispute, stating

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Summit Carbon will be required to provide the requested documents and data related to the dispersion modeling to Sierra Club, Farm Bureau, the Counties, and Hardin County within two business days of the order.

On August 16, 2023, Summit Carbon filed a notice of appeal and a request for stay of the decision during the pendency of the appeal. Summit Carbon has requested expedited treatment on this matter as well as an oral argument on the matter.

On August 17, 2023, the Board issued an order shortening the time to respond to Summit Carbon's notice of appeal.

On August 21, 2023, Sierra Club filed its response to Summit Carbon's notice of appeal.

On August 24, 2023, the Counties filed its response to Summit Carbon's notice of appeal.

On August 28, 2023, Farm Bureau filed its response to Summit Carbon's notice of appeal and Sierra Club filed a supplemental response to Summit Carbon's notice of appeal.

PARTIES' POSITIONS

A. Summit Carbon

In its notice of appeal, Summit Carbon states the issue on appeal is whether the presiding officer erred when ordering Summit Carbon to produce the dispersion modeling results. Summit Carbon asserts the presiding officer erred when determining the dispersion modeling results were relevant to the Board's decision criteria and that the Board's consideration of the results is not preempted by federal law. Summit Carbon states Sierra Club, Farm Bureau, the Counties, and Hardin County BOS'

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arguments in their motions to compel are based upon safety considerations. Summit Carbon asserts the Board is federally preempted from safety regulations of hazardous liquid pipelines. Summit Carbon's appeal states considering the dispersion modeling as part of the Board's decision relating to location, routing, and siting would be, at best, a proxy for safety regulation. *See Kinley Corp. v. Iowa Utils. Bd.*, 999 F.2d 354, 359 (8th Cir. 1993); *ANR Pipeline Co. v. Iowa State Com. Comm'n*, 828 F.2d 465, 470 (8th Cir. 1987).

Additionally, Summit Carbon argues the presiding officer erred by failing to recognize the need for security protections on the dispersion modeling results. Summit Carbon states the presiding officer erred when finding there was not a sufficiently similar provision of Iowa law that would justify applying the North Dakota Public Utility Commission's decision to hold the dispersion model confidential. Summit Carbon states Iowa does have a similar law to that of North Dakota, Iowa Code § 22.7(50), and the presiding officer's decision fails to take into account the serious safety concerns related to recent instances of vandalism and intentional damage to pipelines in Iowa and neighboring states. Additionally, Summit Carbon argues the federal government would hold this information confidential under two different exemptions under the Freedom of Information Act, exemptions 4 and 7(F). Summit Carbon states by disclosing the information in Iowa, the confidentiality afforded by North Dakota and the federal government would be eviscerated.

Finally, Summit Carbon asserts it is not sufficient to require Summit Carbon to produce the dispersion modeling results under a protective order. Summit Carbon

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states disclosure under a protective order creates a real risk of significant harm due to some of the intervenors' actions in this docket.

Summit Carbon requests the Board either reverse the presiding officer's August 14, 2023 proposed order in its entirety or reverse the presiding officer's August 14, 2023 proposed order in part and require Summit Carbon to only produce the results of the dispersion model to the Board, but not to intervenors or the general public.

B. Sierra Club

In its initial response, Sierra Club argues the Board should deny Summit Carbon's appeal and affirm the presiding officer's proposed decision. Sierra Club states Summit Carbon's appeal cites to isolated portions of Farm Bureau, the Counties, Hardin County BOS, and Sierra Club's motion to compel, while ignoring that the information is relevant to the parties and the Board as to where the hazardous liquid pipeline should be routed in order to protect persons and property. Sierra Club asserts the Board is not preempted by federal law as it relates to all safety considerations as the Pipeline Safety Act (PSA) only applies to pipeline facilities and not the route. Sierra Club states the Board is not prescribing safety standards on the proposed hazardous liquid pipeline, but is simply using the information to make an informed decision.

Sierra Club asserts Summit Carbon's reliance upon the *ANR Pipeline* and *Kinley Corp.* cases is misplaced as these cases actually attempted to impose safety standards. Sierra Club argues the Board should rely upon the decisions in *Texas Midstream Gas Services LLC v. City of Grand Prairie*, 608 F.3d 200 (5th Cir. 2010); *Washington Gas Light Co. v. Prince George's County Council*, 711 F.3d 412 (4th Cir. 2013); and *Portland Pipe Line Corp. v. City of South Portland*, 288 F. Supp.3d 321 (D. Me. 2017), where

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federal courts have held the PSA does not preempt state or local routing and siting criteria.

C. The Counties

The Counties' response states the presiding officer did not err in finding the dispersion model and its results are discoverable. The Counties argue that nothing in the dispersion modeling results would implicate safety standards, which are federally preempted. The Counties state that, instead, the dispersion modeling results would simply provide already-existing information to the Board that would help determine where a pipeline should be located and routed. The Counties state that the Board can use the dispersion modeling results to determine and evaluate the appropriate location and route for the proposed pipeline. The Counties contend that while the PSA contains an express preemption provision, the express statutory language preempts only the adoption or continuation of "safety standards." 49 U.S.C. § 60104(c). The Counties note that nowhere in the statute does it say that the entire general concept of safety must be ignored by state and local authorities when considering a pipeline route.

The Counties contend that the presiding officer did not fail to recognize the security sensitivities surrounding the dispersion modeling results. The Counties state that the dispersion models will show what happens if there is a rupture of the pipeline. The Counties state the results would not show information related to the vulnerabilities of the pipeline or security system information, only plume models of a leak. Additionally, the Counties note that there is already significant public information about the pipeline available, including the proposed location and route.

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The Counties state that Summit Carbon's citing of Iowa Code § 22.7(50) is inapplicable to the discoverability of Summit Carbon's dispersion modeling results. The Counties contend that Summit Carbon has not stated how dispersion modeling results would fit the definition outlined in Code. Additionally, the Counties state that arguing about the possibility of bad actors is premature and speculative, as the pipeline is not yet built or even approved. The Counties also argue Summit Carbon's reliance on North Dakota's PSC order and the need to protect the information is moot, as North Dakota recently denied Summit Carbon's permit application.

The Counties state that if the Board deems it necessary, a protective order could ensure confidentiality of the materials; however, the Counties state that in the event the Board orders disclosure pursuant to a protective order, interested parties in the proceedings should have access to the materials.

D. Farm Bureau

In its response, Farm Bureau states that the presiding officer's order concerning Sierra Club's second motion to compel was correctly decided. Farm Bureau points to the fact that Summit Carbon has submitted both direct and rebuttal testimony introducing evidence about the safety of its proposed hazardous liquid pipeline. Farm Bureau argues the safety testimony goes above mere discussion compliance with federal law but opines on the safety of the pipeline, including rebuttal testimony from Michael Lumpkin, who provides an opinion on the acceptable level of health risk of the proposed pipeline based on his review of the documents at issue here. Farm Bureau states that under 199 IAC 7.10(5), supporting workpapers and copies of any specific studies relied upon are to be filed. Additionally, Farm Bureau states that Summit

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Carbon witness Eric Schovanec testified that “Summit is committed to working with communities, individual landowners, Tribes, and other stakeholders along the route to minimize impacts and risk to public safety and the environment as well as land use conflicts.” Farm Bureau agrees that Summit Carbon should hold this commitment and that parties should have the opportunity to review the same information available to determine risk. The information, Farm Bureau argues, would better help inform requesting parties, and the Board’s decision on siting of the pipeline, especially related to inhabited homes or buildings close to the pipeline route.

Farm Bureau further states that Summit Carbon’s claims that the North Dakota ruling on the applicability of N.D. Cent. Code 44.04-24(2)(b) and Iowa Code § 22.7(50) justify withholding the information are misguided. Farm Bureau argues the issue is in the context of production of a document in the possession of Summit Carbon during discovery, not whether it should be confidential. Additionally, Farm Bureau explains the North Dakota statute was based on the premise that Summit Carbon’s proposed project is “critical infrastructure.” North Dakota defines “critical infrastructure” to include “hazardous liquid”; Iowa law does not.

Finally, Farm Bureau asks that the Board’s determination be consistent with both Summit Carbon and Intervenor testimony, regardless of whether the Board considers the information in these contexts. Farm Bureau requests that if discovery is denied and Intervenor testimony excluded, Summit Carbon’s extensive testimony regarding safety should also be excluded.

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BOARD DISCUSSION

The Board has reviewed the filings and will affirm the presiding officer's order with modification. Iowa Rules of Civil Procedure 1.503(1) states: "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action" The Board agrees with the presiding officer that Summit Carbon has failed to demonstrate that the dispersion modeling data requested is irrelevant to this proceeding. Order Concerning Sierra Club's Second Motion to Compel, August 14, 2023, p. 8. As discussed by Farm Bureau, this is reflected by Summit Carbon witnesses who rely on the information when providing their testimony.

As it relates to Summit Carbon's request to allow only the Board and its Staff to review the dispersion modeling, the Board will deny this request in part. The Board agrees that this information is highly sensitive. For that reason, the Board will allow the dispersion modeling data to be released as "Highly Confidential – Attorneys' Eyes Only" as defined in the protective agreement to only the parties subject to this discovery dispute.

As stated by the presiding officer, "It will ultimately be the Board's determination at hearing whether the dispersion modeling information is federally preempted. This ruling relates only to the question of whether it is discoverable." *Id.* The Board agrees that the information is discoverable.

Therefore, the Board will affirm the proposed order with modification and will require Summit Carbon to provide dispersion modeling documents and data to the parties subject to this discovery dispute.

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IT IS THEREFORE ORDERED:

1. The Proposed Order Concerning Sierra's Second Motion to Compel is affirmed as modified.

2. Summit Carbon Solutions, LLC, shall provide the dispersion modeling results to the parties subject to this discovery dispute under the category of "Highly Confidential – Attorneys' Eyes Only," consistent with the protective order issued by the presiding officer, within two days of this order.

3. Summit Carbon Solutions, LLC's, motion for oral argument is denied.

4. Summit Carbon Solutions, LLC's, motion for stay for the pendency of the Utility Board's review is denied as moot.

UTILITIES BOARD

Erik M. Helland Date: 2023.09.05
08:55:24 -05'00'

Joshua Byrnes Date: 2023.09.05
09:54:50 -05'00'

ATTEST:

Keetah Horras 2023.09.05
14:08:45 -05'00'

Sarah Martz Date: 2023.09.05
12:21:13 -05'00'

Dated at Des Moines, Iowa, this 5th day of September, 2023.