PUBLIC

STATE OF IOWA
BEFORE THE IOWA UTILITIES BOARD

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

INITIAL POST-HEARING BRIEF OF KERRY MULVANIA HIRTH

COMES NOW Kerry Mulvania Hirth and hereby submits this Initial Post-Hearing Brief in accordance with the procedural schedule established by the Iowa Utilities Board ("Board").

INTRODUCTION

On August 4, 2021, Summit Carbon Solutions, LLC ("Summit" or "Summit Carbon") filed a Request for Public Informational Meeting Dates with the Board opening this docket and beginning proceedings to request a permit for the construction and operation of a hazardous liquid pipeline to transport carbon dioxide pursuant to Iowa Code chapter 479B. Summit ultimately filed its petition for a hazardous liquid pipeline on January 18, 2022, claiming that the pipeline "strengthens the economic prosperity and long-term viability of ethanol, and as a result, benefits Iowa's family farms, and ultimately the entire state."[1] Despite having over two years between Summit's initial filing in this docket and the beginning of the evidentiary hearing, Summit's evidence falls woefully short of supporting its claims.

Despite its complete lack of experience in the pipeline industry, Summit contends that it should be allowed to construct what it boasts will be the largest project of its kind in the world, singlehandedly increasing the total miles of carbon dioxide pipeline in the United States by

[1] Petition for Hazardous Liquid Pipeline, Ex. F section 1.0.

approximately forty percent.[2] In order to complete the project, Summit expects the Board to allow an unknown, inexperienced, incompetent, and untrustworthy company to seize hundreds of miles of agricultural land against the owners' will so that Summit can profit from the use of that land and puts control of the ethanol industry in the hands of an anticompetitive vertically-integrated monopsonistic enterprise.

Summit has been unable to obtain voluntary easements to cross the hundreds of miles of land needed to construct its pipeline across Iowa. Rather than do what capitalism would normally require and change its route or economic model, Summit expects the Board to use the heavy hand of government to allow Summit to force landowners to sacrifice their property so that Summit can reap windfall profits. The Iowa legislature gave the Iowa Utilities Board authority over hazardous liquid pipelines "to protect landowners and tenants from environmental or economic damages which may result from the construction, operation, or maintenance of a hazardous liquid pipeline." Iowa Code § 479B.1. The Board should exercise that authority and protect Iowa's landowners and tenants from economic and environmental damages by denying Summit's petition for a permit to construct and operate a carbon dioxide pipeline.

ARGUMENT

I. SUMMIT'S PROPOSED CARBON DIOXIDE PIPELINE IS PART OF AN VERTICALLY INTEGRATED ANTICOMPETITIVE MONOPSONY

The concept for Summit's proposed carbon dioxide pipeline was developed by the CEO of Summit Agricultural Group ("Summit Ag"), Bruce Rastetter, beginning in 2020.[3] Testimony by additional Summit Carbon witnesses affirms the importance of Summit Ag's role in the development of Summit Carbon's business. James Pirolli testified at hearing that the early

[2] *Compare* Revised Petition F section 2.1 with Summit witness Powell's hearing testimony (Tr. 1779:11-13).
[3] Powell hearing testimony, Tr. 1579:13-14, 18; 1743:9-12.

offtake agreements with ethanol plants were negotiated by Summit Ag.[4] James Broghammer testified at hearing that Pine Lake Corn Processors negotiated its offtake agreement with a team that included Bruce Rastetter.[5] According to Mr. Powell's hearing testimony, Mr. Rastetter continues to be a shareholder and member of the Board of Directors of Summit Carbon.[6] While Summit Carbon argued at hearing that lacks significant control over Summit Carbon,[7] the conduct of the Summit Carbon and Mr. Rastetter in this proceeding demonstrate otherwise. Notably, when the Board gave Summit Carbon two days to respond to a motion to subpoena Mr. Rastetter, Summit Carbon did not respond at all. Rather, Summit Ag and Mr. Rastetter, who are not parties to this proceeding, responded in their own capacity through their own attorneys.[8] Mr. Rastetter's substitution of his personal response for the response of Summit Carbon clearly demonstrates his ability to control Summit Carbon's actions when he chooses.

At hearing, Mr. Pirolli testified that the sustainable aviation fuel ("SAF") market is a "significant opportunity going forward" for low carbon ethanol.[9] Mr. Pirolli also testified that ethanol producers in other countries could sell their product into the U.S. SAF market and that Iowa's ethanol plants would still have to compete on price.[10]

Summit Ag boasts that Summit Brazil Renewables produces the "lowest cost, most sustainable gallon of ethanol in the world."[11] Summit Ag also boasts that Summit Next Gen is

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[4] Tr. 1903:23-25.
[5] Tr. 2011: 9-14.
[6] Tr. 1579:10.
[7] Tr. 1988:16-21.
[8] "Summit Agricultural Group, LLC andn Bruce Rastetter's Resistance to Motion to Subpoena," September 12, 2023.
[9] Tr. 1980:19-24.
[10] Tr. 1983:3-7, 15-17.
[11] https://www.summitag.com/brazil-renewables (last accessed December 29, 2023); *see also* "Motion to Subpoena Bruce Rastetter", Attachment A.

developing "the world's largest ethanol to jet sustainable aviation fuel facility."[12] Summit Ag has even bragged about the anticompetitive nature of its overall corporate enterprise, posting an article on its website that explains: "Summit Ag and its related entities are building what could be described as a closed loop low carbon fuel supply chain. They own farmland, grow the corn, turn it into ethanol, reduce the ethanol carbon score through CO2 sequestration, and then turn that fuel into sustainable aviation fuel. There is a big stage here that has been set up that requires vision for people to see."[13]

Summit Carbon's creation of a "closed loop low carbon fuel supply chain" results in a vertically integrated anticompetitive monopsony in violation of Iowa Code section 553.5 which states, "A person shall not attempt to establish or establish, maintain, or use a monopoly of trade or commerce in a relevant market for the purpose of excluding competition or of controlling, fixing, or maintaining prices." Iowa Code does not require actual establishment of market control, but merely an "attempt to establish" market control. The Iowa Supreme Court has explained that manipulating a supply market to obtain input prices below competitive levels is a violation of competition laws, stating "The antitrust laws are as concerned about abuse of monopsony power to pay prices below a competitive level as they are about abuse of monopoly power to charge prices above a competitive level. The seller to the monopsony has been harmed as much as the buyer from the monopoly." *Mueller v. Wellmark, Inc.*, 818 N.W.2d 244, 265 (Iowa 2012) (citations omitted). The creation of a "closed loop system" in which Bruce Rastetter and various Summit entities "own farmland, grow the corn, turn it into ethanol, reduce the ethanol carbon score through CO2 sequestration, and then turn that fuel into sustainable

[12] https://www.summitag.com/news/summitnextgen (last accessed December 29, 2023); *see also* "Motion to Subpoena Bruce Rastetter", Attachment B.
[13] https://www.summitag.com/news/co2-pipeline-state-of-development-and-beyond (last accessed December 29, 2023); *see also*, *see also* "Motion to Subpoena Bruce Rastetter", Attachment C.

aviation fuel" is a blatant attempt to control the market for inputs at every stage of SAF production.

The potential for Summit Ag to manipulate the market and suppress the price of ethanol is made even clearer in Summit Carbon's offtake agreements with ethanol plants. Rather than increase the competitiveness of the ethanol plants that have contracted with Summit, the offtake agreements actually put the ethanol plants at Summit's mercy with the potential for decreased ability to compete and lower profits.

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The provisions of the offtake agreements make clear the anticompetitive nature of the "closed-loop low carbon fuel supply chain" being created by Bruce Rastetter and various Summit entities. As the Iowa Supreme Court recognized in *Mueller*, this type of vertically integrated monopsony can cause economic harm to sellers in violation of Iowa's anticompetition

laws. In this case, the sellers who may be subject to harm are the very ethanol plants Summit claims to be supporting.

II. SUMMIT'S PROPOSED CARBON DIOXIDE PIPELINE DOES NOT MEET THE LEGAL REQUIREMENTS FOR EMINENT DOMAIN

In order to use eminent domain to condemn private property for constructing a pipeline, Summit must meet the legal standards imposed by multiple authorities, including the Iowa Code, the Iowa Constitution, and the United States Constitutions. Two of these standards are outside the Board's jurisdiction, and the Board should defer to the judgment of the courts by narrowly interpreting the relevant case law when applying it to the facts of this case.

A. Summit's Proposed Pipeline Does Not Satisfy the Requirements of Iowa Code Chapter 479B

Iowa Code section 479B.9 states that "A permit shall not be granted to a pipeline company unless the board determines that the proposed services will promote the public convenience and necessity." The Board has held that the test for public convenance and necessity is a balancing test "weighing the public benefits of the proposed project against the public and private costs or other detriments as established by the evidence in the record." *In re: Dakota Access*, *LLC*, Docket No. HLP-2014-0001, "Final Decision and Order," at 16 (Iowa Util. Bd. Mar. 10, 2016). The Iowa Supreme Court upheld the Board's use of a balancing test in *Puntenny v. Iowa Utilities Board*, 928 N.W.2d 829, 841 (2019). In this case, the evidence in the record tips the scales heavily against Summit's petition for a hazardous liquid pipeline permit.

Summit's hysterics about the collapse of Iowa's ethanol industry if Summit's pipeline isn't approved resemble Chicken Little's panicked claims that the sky is falling. In reality, Summit has failed to present any evidence that its pipeline will save Iowa's ethanol industry. Summit relied heavily on two reports to prove that the pipeline will benefit Iowa's ethanol

industry, but neither report actually supports Summit's claims. Additionally, Summit's own witnesses admitted at hearing that a connection cannot be made between Summit's proposed pipeline and the alleged economic benefits.

Andrew Phillips explained that inputs for the Ernst & Young report that Summit relies on (and paid for) came from Summit and that Ernst & Young did not independently verify those inputs.[14] Mr. Phillips also testified that the Ernst & Young report did not take economic costs into account.[15] An economic report in which all the inputs came from the party paying for the report and that does not consider economic costs is far too biased to serve as reliable evidence that Summit's pipeline will have any meaningful economic impact. The Iowa Renewable Fuels Association ("IRFA") report cited by Summit suffers from different, but equally debilitating flaws. Aside from being produced by a biased entity rather than an objective analyst, Summit witness Pirolli admitted at hearing that IRFA's report doesn't speak specifically to the impacts of Summit's proposed pipeline or to the specific ethanol plants on Summit's line.[16]

The lack of evidence connecting Summit's proposed pipeline to the alleged economic benefits combined with the availability of alternative options for carbon capture entirely negates any public necessity for the project. Specifically, the Board heard testimony from Jeffrey Bonar, CEO of CapCO2, who testified to the availability of technology that would allow ethanol plants to capture their carbon dioxide emissions and convert the carbon dioxide to green methanol, resulting in a comparable reduction in the ethanol's carbon index as Summit alleges its pipeline will produce.[17] That process would allow ethanol plants to receive federal carbon capture tax

[14] Tr. 2355:16-2356:5.
[15] Tr: 2355:13-15.
[16] Tr. 1940:16-25.
[17] Tr. 4297:3-18, 4305:7-12.

credits while simultaneously manufacturing a second marketable product.[18] Most importantly, production of green methanol would not require the construction of a pipeline or the condemnation of private land for private profit. The availability of alternative carbon capture options for ethanol plants obviates any claim of necessity for construction of a carbon dioxide pipeline.

B. Summit's Proposed Pipeline Does Not Meet the Requirements of the Iowa Constitution

Article I section 18 of the Iowa Constitution states, "Private property shall not be taken for public use without just compensation first being made." The Iowa Constitution thus limits the taking of private property for projects that serve a public use. While the Iowa Supreme Court has found that privately-owned pipelines can satisfy the public use requirement, an analysis of the case law demonstrates clear distinctions between the facts in those cases and the facts in this case, making the Court's reasoning in those cases inapplicable to Summit's carbon dioxide pipeline.

In *Puntenney*, The Iowa Supreme Court held that a crude oil hazardous liquid pipeline served a public use and satisfied the Iowa Constitution's requirements for eminent domain despite the fact that the pipeline was owned by a private company and had no "on ramps" or "off ramps" in the state of Iowa. In reaching that determination, the Court made crucial distinctions about which anticipated benefits of the pipeline were sufficient to grant the right to eminent domain and which potential benefits were insufficient.

The critical component of the Courts *Puntenney* decision was its holding that "trickle-down benefits of economic development are not enough to constitute a public use." *Id.* at 849. The Court further explained that "To the extent that Dakota Access is relying on the alleged

[18] Tr. 4299:8-17.

economic development benefits of building and operating the pipeline, we are unmoved." *Id.* The Court thus determined that the benefits of employment and property taxes resulting from the construction and operation of the pipeline were insufficient benefits to satisfy the Iowa Constitution's restriction on the use of eminent domain. However, Summit COO James Powell admitted at hearing that the anticipated economic benefits from Summit's proposed pipeline are specifically the type of benefits the Iowa Supreme Court found unmoving, explaining that the jobs associated with the project would be "the jobs associated with the capture facilities and the pipeline. So direct hires. And then indirect hires."[19]

The Court's reliance on the evidence that the Dakota Access pipeline would contribute to lower consumer prices for petroleum products when finding a public use provides several contrasts to Summit's proposed carbon dioxide pipeline. First, crude oil is a product used in manufacturing a variety consumer goods. The Supreme Court noted that Iowa's agricultural economy depends on other states to produce crude oil and refine it into consumable products. *Id.* at 850. Accordingly, the Court found that the Dakota Access pipeline would benefit "all consumers of petroleum products, including three million Iowans." *Id.* In contrast, Summit's pipeline would carry carbon dioxide waste that will not be used in the production of any consumable goods. Summit's proposed carbon dioxide pipeline is more akin to a sewer line than a crude oil pipeline. Additionally, the Court noted that the record in the Dakota Access case included substantial evidence showing a link between the construction of the pipeline and consumer prices. *Id.* As described above, however, Summit's evidence does not support Summit's claims of economic benefits. Finally, as described above, the terms of Summit's contracts with ethanol plants make Summit Carbon a component of a vertically-integrated

[19] Tr. 1766: 4-6.

monopsony that could actually put participating ethanol plants at an economic disadvantage in the market. The record in this case is void of any evidence of economic benefit at a market-wide level that would satisfy the Iowa Constitution's requirement that the pipeline serve a public use.

In *Puntenney*, the Iowa Supreme Court also observed that the Dakota Access pipeline would provide safety benefits. *Id.* at 842. The safety benefits from the Dakota Access pipeline were well-documented in the evidentiary record and stemmed from the fact that crude oil was already being transported across Iowa via rail. *Id.* The weight of the evidence in that case showed that transporting crude oil by pipeline is safer than transporting crude oil by rail, and the pipeline's increased safety over the status quo provided a benefit to Iowans. *Id.* In this case, there is evidence that carbon dioxide pipelines are simply not safe.[20] Additionally, carbon dioxide is not currently being transported through Iowa in large quantities via any method. Thus, *any* risk of a pipeline rupture makes a carbon dioxide pipeline *less safe* than the status quo. With respect to safety, the facts of Summit's case are the opposite of the facts of Dakota Access.

C. Summit's Proposed Pipeline Does Not Meet the Requirements of the United States Constitution

The United States Constitution also imposes strict limits on the use of eminent domain. The Fifth Amendment of the U.S. Constitution states, "nor shall private property be taken for public use, without just compensation." The U.S. Supreme Court applied an expansive interpretation of the Fifth Amendment in *Kelo v. City of New London*, 545 U.S. 469 (2005). In *Kelo*, the Supreme Court considered "whether a city's decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment." *Id.* at 477. In that case, the economic development wasn't simply an economic benefit, but was part of a comprehensive development plan developed by the City of New London, which had been

[20] *See, e.g.,* Direct Testimony of Richard Kuprewicz.

designated as a "distressed municipality" because of long-term economic decline. *Id.* at 473-75. The Supreme Court allowed the City of New London to seize private property and turn it over to a private company for development because the city's development plan was held to serve a public purpose. *Id.* at 484.

In *Puntenny*, the Iowa Supreme Court chose not to apply the expansive interpretation of eminent domain established in *Kelo*, and instead followed the dissent in *Kelo.* *Puntenney*, at 928 N.W.2d at 849. However, even under the broad interpretation of eminent domain authority in the majority opinion in *Kelo,* Summit's proposed pipeline does not satisfy the requirements for eminent domain. In fact, the use of eminent domain for Summit's pipeline is in complete contradiction to the Supreme Court's holding in *Kelo*.

While *Kelo* ultimately allowed a private company to obtain property for private development, that development was part of a comprehensive governmental plan. *Kelo*, 545 U.S. at 484. In contrast, Summit's proposed pipeline is only part Summit's plan to make a private profit. In fact, Summit's proposed pipeline directly interferes with comprehensive governmental development plans, resulting in the frustration of those plans instead of the implementation of those plans. The fact that Summit's pipeline accomplishes the opposite of a public purpose like that found in *Kelo* is exemplified by the development plans for Charles City.

Summit seeks to use eminent domain to construct its pipeline on land owned by the Charles City Area Development Corporation for the Avenue of the Saints Development Park.[21] The land was certified as and industrial site through Iowa Certified Sites in 2020 and is one of only 29 such sites in the state of Iowa.[22] The land is zoned M-2, general manufacturing, and is

[21] Tr. 228:25-229:3.
[22] Tr. 231:18-20.

essentially shovel-ready.[23] Timothy Fox, the CEO of the Charles City Area Development Corporation testified that the Charles City Area Development Corporation is concerned that the presence of a carbon dioxide pipeline will cause corporations evaluating potential sites to choose other sites.[24] Charles City has already invested $2.1 million in the site in preparation for marketing it for industrial use.[25] With respect to future industrial development in Charles City, Mr. Fox testified that "this is really our only shot" because there is no other land available for industrial use.[26]

Construction of Summit's pipeline would prevent Charles City from implementing its long-term development plans. This is the antithesis of the Supreme Court's holding in *Kelo.* There is no local, county, or state government plan involving carbon dioxide pipelines to establish a public purpose for Summit's pipeline. Nor do the 45Q or 45Z tax credits establish a public purpose, because they relate to carbon capture and renewable fuel production, both of which can be accomplished without a pipeline.

CONCLUSION

Summit has fallen far short of meeting the burden of proof required to obtain a permit to construct and operate a hazardous carbon dioxide pipeline. The scant evidence Summit produced is unreliable, insufficient, and inadequate to meet the requirements for eminent domain under Iowa statute and the Iowa Constitution. Additionally, the record evidence establishes that Summit's pipeline project is actually antithetical to the U.S. Supreme Court's interpretation of eminent domain authority under the U.S. Constitution. For these reasons, the Iowa Utilities

[23] Tr. 232:9-15.
[24] Tr. 233:3-7.
[25] Tr. 241:21-24.
[26] Tr. 250:21-251:1.

Board should deny Summit's petition for a permit to construct and operate a hazardous liquid pipeline.

Respectfully submitted,
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