STATE OF IOWA
IOWA UTILITIES COMMISSION

IN RE: SUMMIT CARBON SOLUTIONS, LLC PETITION FOR HAZARDOUS LIQUID PIPELINE PERMIT	DOCKET NO. HLP-2021-0001

COME NOW, the Supervisors of Shelby County, Kossuth County, Floyd County, Emmet County, Dickinson County, Wright County, and Woodbury County ("the Counties"), by and through the undersigned counsel, and in support of their Motion to Reconsider Final Decision and Order ("Motion") in this docket state as follows.

MOTION TO RECONSIDER FINAL DECISION AND ORDER

On June 25, 2024, the Iowa Utilities Board issued a Final Decision and Order in this docket approving a permit for Summit Carbon Solutions ("the Order"). On July 1, 2024, pursuant to recently enacted legislation, the Iowa Utilities Board was renamed the Iowa Utilities Commission ("Commission").[1] While the agency uses the term Board in the Order when referring to itself, the Counties in this Motion will adopt the new name, which took effect on July 1, 2024.

Under the Commission's rules, "Any party to a contested case may file an application for rehearing or reconsideration of the final decision." *See* 199 Iowa Administrative Code rule 7.27(1). *See also* Iowa Code §§ 17A.16 and 476.12. The Counties were parties to this proceeding. *See* Final Decision and Order at 8. Under Iowa Code §§ 17A.16 and 476.12 and Iowa Administrative Code

[1] See 2024 Iowa Acts, Senate File 2385. https://iuc.iowa.gov/press-release/2024-07-02/iowa-utilities-board-now-iowa-utilities-commission.

rule 199 – 7.27(1), for the reasons described below, the Counties hereby move the Commission to reconsider the Order.

BRIEF STATEMENT OF THE GROUNDS FOR ERROR

As the Commission explained in the Order, the parties to this proceeding are numerous and the record is voluminous. *See* Final Decision and Order at 7-8. The Order itself is 507 pages long. The Commission elected to discuss in the Order only certain arguments and evidence, and issued a blanket rejection for other arguments and evidence. The Order states, "The entire record and legal arguments of the parties has been considered by the Board. *If an argument or piece of evidence is not discussed in this order, the Board has found that argument or piece of evidence to be irrelevant or lacking in sufficient argument to warrant specific discussion*." *See* Final Decision and Order at 13 (emphasis supplied). The Ordering Clauses section of the Order includes a general rejection of anything not specifically addressed and states, "Arguments presented in written filings or made orally at the hearing that are *not addressed specifically in this final decision and order are rejected, either as not supported by the evidence or as not being of sufficient persuasiveness to warrant detailed discussion*." *See* Final Decision and Order at 477 (emphasis supplied). The Counties interpret this as a catch-all rejection of arguments made during the proceeding but not discussed in the Order, including certain arguments the Counties made.

The Commission has a rule setting forth the form for requesting rehearing or reconsideration. "Applications for rehearing or reconsideration shall specify the findings of fact and conclusions of law claimed to be erroneous, with a brief statement of the alleged grounds of error." *See* Iowa Administrative Code rule 199 – 7.27(2). The Counties argue that the Order contains errors of both fact and law such that the Commission should reconsider the Order.

The Counties recognize that significant effort was required to consider the record and render a 507-page decision in this matter and trust that the Commission recognizes that a brief statement of the grounds for error is also challenging. Just as the Commission elected to limit its discussion in the Order to the arguments it deemed most significant, the Counties also will not attempt to discuss in detail every individual finding, conclusion or ground for error in this Motion. However, to the extent that the Counties raised other legal or factual matters during the proceeding, proposed other findings or conclusions, or made other arguments that are documented elsewhere in the record but not specifically discussed in this Motion, any and all errors in the Commission's consideration or rejection of those matters, findings, conclusions or arguments, whether in the Order or in other orders or rulings, are hereby incorporated in this Motion by reference and preserved for purposes of judicial review under Iowa Code chapter 17A.

In this Motion, to keep the statement of errors as brief as possible, the Counties have organized their discussion of certain specific grounds of error into two primary sections: (1) arguments, findings or conclusions for which the Counties seek additional findings or clarifications; and (2) arguments, findings or conclusions the Commission made that the Counties ask the Commission to reconsider.

1. Arguments, findings, and conclusions for which clarification is sought.

To the extent the Counties made certain arguments, proposed findings or conclusions that the Commission intentionally or inadvertently rejected without specific discussion (or with minimal discussion), the Counties now seek clarification or supplemental findings. These issues are briefly stated below.

a. Proposed findings of fact.

The Iowa Administrative Procedure Act specifically provides for proposed findings of fact in a contested case proceeding: "If, in accordance with agency rules, a party submitted proposed findings of fact, the decision *shall* include a ruling upon each proposed finding." *See* Iowa Code § 17A.16(1) (emphasis supplied). As the Order notes, the Commission has not adopted any rules regarding proposed findings of fact. Because the Commission's rules do not restrict the submission of proposed findings and because none of the Commission's orders in this proceeding disallowed proposed findings, the Counties maintain that the submission of proposed findings is "in accordance" with the Commission's rules. For this reason, the Commission "shall include a ruling upon each proposed finding." *Id.*

As the Commission notes in the Order, the Counties and some other parties submitted proposed findings of fact. The Counties submitted a total of 24 proposed findings of fact in their Reply Brief. *See* Counties RB at page 37. The Commission declined to specifically address the Counties' proposed findings of fact. *See* Final Decision and Order at 14. The Counties recognize that many (but not all) of the general matters touched on by the Counties' specific proposed findings are discussed in various places in the Order, sometimes with rulings related to the general matter, but sometimes with only limited discussion or without a specific finding. The Counties urge the Commission to reconsider its interpretation of the requirements of Iowa Code § 17A.16(1) and respectfully ask that it provide a specific ruling on each of the Counties' proposed findings.

In particular, the Counties restate here several proposed findings for which they seek clarification as to the Commission's findings:

- Does the Commission find that the express purposes of the project include: (1) increasing profits to ethanol plants; (2) selling ethanol at premium prices; and (3) increasing corn prices? (*See* Counties proposed finding #2).
- Does the Commission find that the project will likely increase the price at which Summit's partner ethanol plants sell ethanol? (*See* Counties proposed finding #3).
- Does the Commission find that the project will likely increase corn prices? (See Counties proposed finding #4).
- Does the Commission find that the project will likely not increase ethanol production levels? (*See* Counties proposed finding #5).
- Does the Commission find that the amount of federal tax credits that Summit will *receive* is substantially more than the amount of tax contributions Summit will *make* to government revenues? (*See* Counties proposed finding #6).
- Does the Commission find that Summit used the same 400-foot screening distance that Dakota Access used? (*See* Counties proposed finding #15).
- Does the Commission find that Summit has agreed to amend the pipeline route in the vicinity of the city of Bismarck, ND based on economic development concerns, but refuses to do the same for similarly situated Iowa cities? (*See* Counties proposed finding #22).

b. Proposed permit conditions.

Under Iowa Code § 479B.16, the Commission is only authorized to grant eminent domain rights "to the extent necessary." As the Counties explained in their initial brief, the necessity requirement in Iowa Code § 479B.16 relates to the scope of the taking and requires that any taking must be necessary *for the uses proposed. See* the Counties' IB at 17-19. A taking beyond the uses

proposed is unlawful. *See Draker v. Iowa Electric Co.*, 191 Iowa 1376, 1382, 182 N.W. 896, 899 (1921); *Vittetoe v. Iowa S. Utilities Co.*, 123 N.W.2d 878, 881 (Iowa 1963); *SMB Investments v. Iowa-Illinois Gas and Elec. Co.*, 329 N.W.2d 635, 640 (Iowa 1983). The proposed uses must have a public purpose or benefit. *See Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829 (Iowa 2019).

The Commission has the authority to prescribe and limit the scope of eminent domain to only what is necessary for the uses proposed through the imposition of permit conditions. *See* Iowa Code § 479B.16. Summit's stated "purpose and need" for the project are that it will "(1) support the longevity and competitiveness of the ethanol and agricultural industries; (2) create and preserve jobs and economic productivity; and (3) benefit the environment by removing CO2 from the atmosphere. These three aspects present a clear purpose and need for the Project to support key industries, jobs, and the climate." *See* Pirolli Direct Testimony at p. 3. In this proceeding, these are the public purposes or benefits for which the taking is purportedly justified. The Commission should impose permit conditions to ensure the grant of eminent domain is tailored appropriately to secure such public purposes or benefits.

The Counties proposed several permit conditions, including six specific conditions that would ensure the taking is permanently linked to what constitutes the public necessity. *See* generally Counties IB at 82-86. The Counties now briefly restate those conditions and move the Commission to reconsider them.

First, the Counties asked the Commission to impose a condition that Summit obtain all necessary permits before exercising rights of eminent domain. The Commission did not impose this condition. The Counties ask the Commission to reconsider its rejection of this condition.

Second, the Counties asked the Commission to impose a condition requiring expiration and reversion if the regulatory markets for low carbon fuels are no longer accessible to ethanol. The

Commission did not impose this condition. The Counties ask the Commission to reconsider its rejection of this condition. In its consideration of public convenience and necessity and discussion of the balancing test, the Commission clearly found that the ability to sell ethanol into low carbon fuel markets is one of "three significant national issues" that weigh in favor of the project. *See* Final Decision and Order at 105, 114-16. The Commission also found that "already being able to sell into the market reduces the overall positive to Summit Carbon's petition, but does not weigh against it." If, as the Commission has found, the ability to access low carbon fuel markets is a factor weighing in favor of the necessity of the proposed use, then it is appropriate that the Commission should impose a condition guarding against the loss of access to these markets.

Third, the Counties asked the Commission to impose a condition requiring expiration and reversion if the sequestration of carbon dioxide is no longer eligible for the 45Q or 45Z tax credits. The Commission did not impose this condition. The Counties ask the Commission to reconsider its rejection of this condition. In its consideration of public convenience and necessity and discussion of the balancing test, the Commission clearly found that federal sequestration tax credit policy is one of "three significant national issues" and that this factor "weighs heavily in favor of granting Summit Carbon's petition for hazardous liquid pipeline permit." *See* Final Decision and Order at 105, 109-11. If, as the Commission has found, federal sequestration tax credit policy is a factor weighing "heavily" in favor of the necessity of the proposed use, then it is appropriate that the Commission should impose a condition guarding against a change in that policy.

Fourth, the Counties asked the Commission to impose three conditions related to the climate benefits of the proposed use. The first was a condition requiring expiration and reversion if the pipeline owner or operator ever proposes to convert it to another use or to carry another commodity. The second was a condition requiring the sequestration of all carbon dioxide

transported by the project and prohibiting any offtake of the carbon dioxide prior to the sequestration site. The third was a condition prohibiting the use of any of the transported carbon dioxide for enhanced oil recovery. The Commission did not impose any of these conditions. The Counties ask the Commission to reconsider its rejection of these conditions. In its consideration of public convenience and necessity and discussion of the balancing test, the Commission clearly found that climate change is one of "three significant national issues" and that Summit's proposed use "will contribute to the reduction in 'atmospheric contamination,' thus providing an overall benefit to Iowans." *See* Final Decision and Order at 105, 125. If, as the Commission found, the possible reduction in "atmospheric contamination" is a "significant benefit to Iowans," then it is appropriate that the Commission should impose conditions securing that benefit against a change in the company's use of the pipeline from what has been proposed and from what has been found to have "public convenience and necessity." Without these conditions, the company could change the use of, or affect the benefits accruing from, the property taken by eminent domain, in which case what has been found to be a public benefit could one day be converted to a private use or benefit, if the permit is not appropriately prescribed.

Finally, the Counties observe that while five of the six conditions restated in this section of the Motion relate directly to the Commission's "three significant national issues," none of the conditions are discussed in the public convenience and necessity section of the Order. For that reason, the Counties now ask the Commission to reconsider the conditions proposed on pages 82-86 of the Counties' Initial Brief and to use its authority to ensure that: (1) Summit's project will actually deliver public rather than private benefits; and (2) the taking approved by the Commission is tailored to secure the public benefits of the proposed use.

2. Arguments, findings, and conclusions that were discussed but are erroneous.

The Order is 507 pages long and contains findings and conclusions throughout. The Counties' primary arguments on the statutory requirements, findings of fact, public convenience and necessity, public use, and routing were made in their Initial Brief and in their Reply Brief. To the extent that the Commission rejected those arguments, such rejection constitutes grounds for error, unless reconsidered pursuant to this Motion. For purposes of this Motion, some of those arguments are briefly restated below.

a. Erroneous findings of fact: Petition Requirements.

The Counties maintain that the Commission clearly erred in its findings regarding compliance with the petition requirements. In particular, Iowa Code § 479B.5(7) requires that Summit's petition must state the "relationship of the proposed project to the present and future land use and zoning ordinances." (emphasis supplied). Note that the statute unambiguously requires the petition to discuss "ordinances."

Zoning ordinances are regulations, not land use plans. In the county zoning chapter, the statute granting counties the authority to zone provides "the board of supervisors may *by ordinance regulate and restrict*" various land uses. Iowa Code § 335.3(1). The statutory requirement to discuss "zoning ordinances" is, therefore, a requirement to discuss the content of the regulations and restrictions in those ordinances.

In the Order, the Commission makes the following finding regarding Summit's compliance with the petition requirements: "Having reviewed the information, the Board finds Summit Carbon has complied with the requirements of Iowa Code § 479B.5(7) and 199 IAC 13.3(1)(f)(2)(3). A plain reading of these requirements provides that a hazardous liquid pipeline company need only state the relationship its proposed project has to present and future land use, which Summit Carbon

has done." *See* Final Decision and Order at 40 (emphasis supplied). However, the Commission's finding has omitted the phrase "and zoning ordinances", which is present in the statute. By omitting this phrase from the discussion, the Commission's finding has plainly failed to address one of the statutory requirements.

The Counties' Witness Prof. Neil Hamilton submitted testimony clearly showing that Summit's petition exhibits and expert witness testimony did not discuss a single ordinance or comprehensive plan. *See* generally, Counties IB at 34-40. Hamilton's testimony also clearly showed that the use of the phrase "present and future land uses" in the statute refers to comprehensive plans. The Commission's staff appears to have agreed with Hamilton's assessment of the sufficiency of the petition. On June 26, 2023, after completing a review of the petition, the staff filed a Petition Staff Report (Excluding Exhibit H) ("the Staff Report"). The Staff Report found that the information Summit filed in its petition "regarding 199 IAC 13.3(1)(f)(2)(3) does not appear to address the future land use and zoning ordinances." The Commission Staff Report directed Summit to provide additional information. *See* Petition Staff Report (Excluding Exhibit H) at pp. 8 and 12. Even after this report, Summit did not describe or refer to any zoning ordinance or comprehensive plan.

The Order's interpretation of the petition requirements on zoning ordinances is clearly erroneous. The Order states in one sentence: "Therefore, the requirement of Iowa Code § 479B.5(7) is to provide the Board with information as it relates to how the proposed project will interact with present and future land use and zoning, not necessarily how it complies." *See* Final Decision and Order at 41-42 (emphasis supplied). But then it states in the very next sentence: "If and to what extent it complies is a decision for the Board to make as it examines the routing of the pipeline." *Id.* (emphasis supplied).

As explained above, zoning ordinances are regulations. If a pipeline company is not required to at least summarize and review the *content* of the regulations in each county, the petition will not provide sufficient information for the Commission to make a decision on the *extent* of compliance. The Commission has ordered this to be done for other permitting authorities, but refuses to do so for county regulations. This is clear error. Regardless of whether Summit is in compliance with the ordinances, the burden to include this information in the permit, or in testimony, is Summit's. The effect of the Commission's interpretation is to inappropriately shift the burden to other parties.

For all of the reasons already argued in the Counties' Initial Brief, in its Reply Brief, and briefly restated here, Summit's petition failed to meet a threshold statutory requirement. Nonetheless, the Commission finds that Summit carried its burden on the requirement to state "the relationship…to zoning ordinances" when, as the record clearly shows, at no time did Summit describe, summarize or even mention a *single* ordinance in *any* county. The Commission's finding on this statutory requirement is clearly erroneous, and the Commission should reverse this finding.

Additionally, the Order refuses to impose the Counties' proposed condition requiring Summit to comply with all other applicable permit requirements. *See* Counties IB at 80. The Order characterizes the Counties' request as "additional conditions." *See* Final Decision and Order at 43. The Counties dispute this characterization. As the Counties clearly argued in their Initial Brief, the Commission has a prior practice and precedent of expressly conditioning a pipeline permit on the obtaining of other necessary permits. *Id.* In fact, the Order itself conditions the commencing of construction on obtaining permits in North and South Dakota. The Counties again point out that the Commission included the proposed language in the Final Decision and Order in Iowa Utilities Board Docket No. HLP-2014-0001. If the Counties do not prevail in the zoning litigation, then the

permits will not be necessary. If they do prevail, then obtaining them will be necessary. The proposed condition would appropriately address either outcome. The permit language should expressly reflect all other required permits, as the Commission has done in other dockets and even in the Order for state and federal permits. There is no basis to treat county zoning permits differently than county road permits, state routing permits or federal environmental permits. The Counties request the Commission reconsider its rejection of this proposed condition.

Finally, the Commission rejected the Counties' proposed condition that would have prevented pipeline construction from commencing until the conclusion of all pending zoning litigation. *See* Final Decision and Order at 43. If the counties prevail in the zoning litigation, then zoning permits will be applicable to the project and necessary to be obtained. If construction has already begun at that time, a ruling in favor of the counties would create turmoil. It is reasonable for the Commission to avoid that outcome now by imposing the Counties' proposed condition. Therefore, the Commission should reconsider its refusal to expressly condition the commencement of construction upon the resolution of all pending zoning litigation, in order to preserve the jurisdictional interest of counties in local zoning permits.

b. Erroneous findings of fact: Route Determination.

The Commission rejected the Counties' proposed separation requirements, both the two-mile setback from cities and the uniform 1,000-foot setback from occupied structures, finding Summit's "macro route to be just and proper." *See* Final Decision and Order at 64. However, the weight of evidence in the record regarding (1) the economic development impacts of a carbon dioxide pipeline; and (2) the setback distances necessary to protect human health clearly support the use of reasonable setbacks throughout the "macro route." The Commission's finding on these

setbacks clearly is not supported by substantial evidence in the record. For all of the reasons stated in the Counties' Initial Brief and Reply Brief, the Commission should reconsider this finding.

The Commission also rejected the Counties' proposed denial of the trunk line from Ida County to Fremont County. For all of the reasons stated in the Counties' Initial Brief and in Commissioner Byrnes' dissent to the Order, the Counties ask the Commission to reconsider the approval of Lateral 4.

c. Erroneous findings of fact (and Conclusions): Determination of Public Convenience and Necessity.

In general, the Counties argue that Summit's project lacks public convenience and necessity for all of the reasons already stated in their Initial Brief and Reply Brief. To the extent the Commission has rejected those arguments, the Order's findings are erroneous and should be reconsidered. The Counties refer the Commission to pages 29-70 of their Initial Brief and to the proposed findings of fact in their Reply Brief.

d. Erroneous findings of fact: Safety.

As the Counties argued during the hearing and in their Reply Brief, the Commission has made errors of law in the treatment of Summit's safety evidence by not excluding it on the basis of judicial estoppel. *See* Counties RB at 18-20. The Commission should reconsider this ruling, strike Summit's safety evidence, and revise the determination of public convenience and necessity accordingly.

e. Erroneous findings of fact: Transportation Methods.

As the Counties argued in their Initial Brief, the transportation of carbon dioxide by rail or truck is a red herring. *See* Counties IB at 64-67. Unlike Dakota Access, Summit's hazardous

pipeline is *not safer than the status quo* because, unlike oil, at present carbon dioxide at ethanol plants is released into the atmosphere and not transported by truck or rail. Based only on the hearing testimony of Mr. Leaders, a landowner, the Order finds that there is "at least one ethanol plant currently capturing and transporting their ethanol by truck." But the Counties do not argue that there is no transportation of carbon dioxide by truck and rail. They argue that Summit has not demonstrated with substantial evidence in the record that, without the pipeline, the participating ethanol plants intend to use trucks and rail for transportation. The Order nonetheless compares the safety of pipelines to the safety of trucks and rail. For these reasons and the reasons explained by the Counties in their Initial Brief, the finding on transportation methods is clearly erroneous under the reasoning in *Puntenney* and the Commission should reconsider it.

f. Erroneous findings of fact: Conditions.

The Counties argued for several conditions in their Initial Brief and Reply Brief. Many of those conditions are also discussed in this Motion, including the grounds for error. The Counties will not repeat those reasons here, but merely restate their request that the Commission reconsider all the conditions requested by the Counties that are rejected in the Order.

g. Erroneous findings of fact: Public Use.

The Order finds Summit's pipeline to be a common carrier and grants rights of eminent domain on that basis. *See* Final Decision and Order at 288. The Counties maintain that Summit has not produced enough evidence in the record to establish that it is a common carrier. For all of the reasons articulated in the Initial Briefs of the Counties, the Sierra Club, and the Jorde Landowners, the Commission should reconsider this finding.

h. Erroneous Conclusions of Law.

In a separate section titled, "Conclusions of Law", the Order makes six conclusions of law. *See* Final Decision and Order at 476. There is some overlap between the discussion of the parties' arguments in the factual findings and the conclusions of law stated in the separate section. For the sake of completeness, the Counties briefly discuss these conclusions separately in this section of the Motion and ask the Commission to reconsider the following conclusions for the following reasons.

First, the Commission concludes that "The requirements of Iowa Code § 479B.5 have been met by Summit Carbon." For the reasons already discussed in their Initial Brief and Reply Brief, and as briefly restated above, the Counties maintain that Summit has not met the requirements of Iowa Code § 479B.5. In particular, the Counties argue that the requirement to state the relationship to "zoning ordinances" has not been met.

Second, the Commission concludes that "Summit Carbon has established its hazardous liquid pipeline will promote the public convenience and necessity as required by Iowa Code § 479B.9." For the reasons already discussed in their Initial Brief and Reply Brief, and as briefly restated above, the Counties maintain the Commission's Order makes legal and factual errors in its determination of public convenience and necessity.

Third, the Commission concludes that "Summit Carbon will be vested with the right of eminent domain as described in this order, once a permit is issued, in accordance with Iowa Code § 479B.16." For the reasons already discussed in their Initial Brief and Reply Brief, and as briefly restated in this Motion, the Counties maintain that Summit is not a common carrier, is not proposing a public use or benefit, and should not be granted rights of eminent domain.

CONCLUSION

For all the reasons discussed above, the Counties respectfully request that the Commission reconsider the Final Decision and Order approving a permit for Summit Carbon Solutions, particularly including the erroneous findings of fact and conclusions of law briefly restated here.

Respectfully submitted,

By: /s/ *Timothy J. Whipple*

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