IN THE IOWA DISTRICT COURT FOR POLK COUNTY

NO. CVCV067849

SIERRA CLUB IOWA CHAPTER, DICKINSON COUNTY, SHELBY COUNTY, KOSSUTH COUNTY, FRANKLIN COUNTY, EMMET COUNTY, HARDIN COUNTY SHERIFF, WRIGHT COUNTY, FLOYD COUNTY, WOODBURY COUNTY TREASURER, DAPEMA LLC, GREG & ERICA KRACHT LIVING TRUST, JORDE LANDOWNERS, and NON-EXHIBIT H LANDOWNERS COLLECTIVELY,

Petitioners,

vs.

IOWA UTILITIES COMMISSION,

Respondent.

BRIEF AND ARGUMENT OF SIERRA CLUB IOWA CHAPTER
(Proof Copy)

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ATTORNEY FOR SIERRA CLUB IOWA CHAPTER

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STATEMENT OF THE CASE

1. Nature of the Case and Proceedings in the Agency

The Iowa Utilities Commission (IUC) was presented with a proposal by Summit Carbon Solutions LLC (Summit) to construct and operate a pipeline to carry carbon dioxide from ethanol plants in Iowa to a sequestration site in North Dakota. The pipeline would slice through 29 Iowa counties, impacting prime farmland, being constructed within several hundred feet of numerous occupied structures, and entering or coming close to the corporate limits of several cities. The scope of this project and the issues it presents are unprecedented.

This was a contested case proceeding in the IUC, pursuant to 199 I.A.C. Chapters 7 and 13, initiated by Summit filing a petition for a permit pursuant to 199 I.A.C. § 13.3 (Summit petition)(App. p.).

After more than two years of trying, Summit only obtained contracts with 12 ethanol plants in Iowa and only for the carbon dioxide from the fermentation process (Summit petition, Ex. F)(App. p.). There was no evidence that the carbon emissions from the natural gas combustion that powers the ethanol plants will be captured. Nor, again after more than two years, has Summit been able to sign up any other industries that emit much more carbon dioxide than the fermentation process at ethanol plants. So Summit is just after the low hanging fruit of the fermentation process in order to get the 45Q federal tax credit. Likewise, the ethanol plants will qualify for the 45Z tax credit, allegedly by selling the ethanol after carbon capture to states with a low carbon fuel standard. It is those tax credits that are driving this project.

The 45Q tax credit, 26 U.S.C. § 45Q, grants a tax credit of $85/ton of carbon dioxide captured and sequestered. The credit is available only to the entity that owns the capture equipment. So Summit can claim the 45Q credit because, according to its contracts with the ethanol plants, it will own the capture equipment, not because it is building and owning a pipeline. In any other arrangement where Summit would not own the capture equipment, Summit would not receive the tax credit. It is therefore questionable whether any arrangement, other than with the ethanol plants, would be economically viable for Summit.

The 45Z tax credit, 26 U.S.C. § 45Z, is available to any entity producing low carbon fuel. As a practical matter at the present time, that means ethanol plants. Other industrial emitters of carbon dioxide would not be eligible. So industries that contribute significant amounts of carbon dioxide to the atmosphere would not have any incentive through the 45Z credit to reduce their carbon emissions. And even the ethanol plants are just relying on capturing the carbon dioxide from the fermentation process, and ignoring the carbon emissions from the natural gas combustion for the plant's power source, which are much more difficult to capture as pure carbon dioxide.

A contested case hearing, pursuant to Iowa Code § 479B.6 and 199 I.A.C. § 7.23, was held in August, September, and November of 2023. At the time of the hearing in this case, Summit was requesting eminent domain authority over 892 parcels of property. The Commission heard from many of those Exhibit H landowners. Sierra Club asserts that the interests of those landowners are paramount.

On June 25, 2024, the IUC issued an order granting Summit a permit to construct and operate the pipeline. The Petitioners herein now seek judicial review of the IUC decision.

ARGUMENT

I. LEGAL STANDARDS FOR PERMITTING HAZARDOUS LIQUID PIPELINES

The IUC's actions in this case are governed by the Iowa Administrative Procedure Act, Iowa Code Chapter 17A. The IUC's actions will be overturned on judicial review if the actions are any of the following:

> *a.* Unconstitutional on its face or as applied or is based upon a provision of law that is unconstitutional on its face or as applied.

b. Beyond the authority delegated to the agency by any provision of law or in violation of any provision of law.

c. Based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency.

d. Based upon a procedure or decision-making process prohibited by law or was taken without following the prescribed procedure or decision-making process.

e. The product of decision making undertaken by persons who were improperly constituted as a decision-making body, were motivated by an improper purpose, or were subject to disqualification.

f. Based upon a determination of fact clearly vested by a provision of law in the discretion of the agency that is not supported by substantial evidence in the record before the court when that record is viewed as a whole. For purposes of this paragraph, the following terms have the following meanings:

(1) *"Substantial evidence"* means the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance.

(2) *"Record before the court"* means the agency record for judicial review, as defined by this chapter, supplemented by any additional evidence received by the court under the provisions of this chapter.

(3) *"When that record is viewed as a whole"* means that the adequacy of the evidence in the record before the court to support a particular finding of fact must be judged in light of all the relevant evidence in the record cited by any party that detracts from that finding as well as all of the relevant evidence in the record cited by any party that supports it, including any determinations of veracity by the presiding officer who personally observed the demeanor of the witnesses and the agency's explanation of why the relevant evidence in the record supports its material findings of fact.

g. Action other than a rule that is inconsistent with a rule of the agency.

h. Action other than a rule that is inconsistent with the agency's prior practice or precedents, unless the agency has justified that inconsistency by stating credible reasons sufficient to indicate a fair and rational basis for the inconsistency.

i. The product of reasoning that is so illogical as to render it wholly irrational.

j. The product of a decision-making process in which the agency did not consider a relevant and important matter relating to the propriety or desirability of the action in question that a rational decision maker in similar circumstances would have considered prior to taking that action.

k. Not required by law and its negative impact on the private rights affected is so grossly disproportionate to the benefits accruing to the public interest from that

> action that it must necessarily be deemed to lack any foundation in rational agency policy.
> *l.* Based upon an irrational, illogical, or wholly unjustifiable interpretation of a provision of law whose interpretation has clearly been vested by a provision of law in the discretion of the agency.
> *m.* Based upon an irrational, illogical, or wholly unjustifiable application of law to fact that has clearly been vested by a provision of law in the discretion of the agency.
> *n.* Otherwise unreasonable, arbitrary, capricious, or an abuse of discretion.

Iowa Code § 17A.19(10).

Also, § 17A.19(11) further defines the standard of review:

> 11. In making the determination required by subsection 10, paragraphs "a" through "n", the court shall do all of the following:
>
> a. Shall not give any deference to the view of the agency with respect to whether particular matters have been vested by a provision of law in the discretion of the agency.
> b. Should not give any deference to the view of the agency with respect to particular matters that have not been vested by a provision of law in the discretion of the agency.
> c. Shall give appropriate deference to the view of the agency with respect to particular matters that have been vested by a provision of law in the discretion of the agency.

Action is arbitrary and capricious when it is taken without regard to the law or facts of the case. *Soo Line R.R. v. Ia. Dept. of Transp.,* 521 N.W.2d 685 (Iowa 1994). An action is unreasonable when it is clearly against reason and evidence. *Id.*

The Commission's authority in this case is governed by Chapter 479B of the Iowa Code and the Commission's rules in Part 199 of the Iowa Administrative Code. Pursuant to Iowa Code § 479B.1, the Commission's primary responsibility is to "protect landowners and tenants from environmental or economic damages which may result from the construction, operation, or maintenance of a hazardous liquid pipeline." The IUC also has the responsibility to approve the location and route of the pipeline. *Id*.

To carry out this authority, the IUC can grant a permit to the pipeline company, but only if the company proves that the pipeline "will promote the public convenience and necessity." Iowa Code § 479B.9. The Iowa Supreme Court addressed the concept of public convenience and necessity in the context of a crude oil pipeline in *Puntenney v. IUB*, 928 N.W.2d 829 (Iowa 2019). The court held that a balancing of costs and benefits by the Board in that case was not irrational, illogical, or wholly unjustifiable. *Id*. at 842. But every case is different and must be judged on its own facts.

Unfortunately, the *Puntenney* court did not provide a clear definition of public convenience and necessity. But the court did focus on certain aspects of the Dakota Access project whereby the IUB was not "irrational, illogical, or wholly unjustifi[ed] in finding public convenience and necessity." *Puntenney*, 928 N.W.2d at 841-842. First, the court noted that the oil being transported in the pipeline would result in lower gasoline prices for members of the public. Second, the court found that there was a demand for the oil by the public which inured to the public benefit. Finally, the court found that there was evidence on which the Board could rely that transporting oil by pipeline was safer than transporting the oil by rail, and that the oil would be transported one way or the other. These factors will be discussed later in this brief in the context of the Summit pipeline.

A lack of a legislative definition of public convenience and necessity does not mean that the IUC can decide for itself what the term means. *Doe v. Ia. Bd. of Med. Examiners*, 733 N.W.2d 705 (Iowa 2007); *NextEra Energy Res. LLC v. IUB*, 815 N.W.2d 30 (Iowa 2012). The court defers interpretation of a term to an agency only if the legislature clearly vested authority in the agency to interpret the term. *Doe, supra.*

The Iowa Supreme Court has said:

> In sum, in order for us to find the legislature clearly vested the [Commission] with authority to interpret [a statutory provision], we
>
> > must have a **firm conviction** from reviewing the precise language of the statute, its context, the purpose of the statute, and the practical considerations involved, that the legislature actually intended (or would have intended had it thought about the question) to delegate to the agency interpretive power with the binding force of law over the elaboration of the provision in question.

NextEra, supra., at 37. (emphasis added). In other words, "agencies are not given deference by this court to an interpretation of law without some clear indication that the general assembly intended this result." *SZ Enterprises v. IUB*, 850 N.W.2d 441, 450 (Iowa 2014).

The *Puntenney* court also addressed the issue of eminent domain. The court first addressed the statutory limits on eminent domain contained in Iowa Code §§ 6A.21 and 6A.22. The court noted that § 6A.21 prohibits eminent domain authority to private entities, except those under the jurisdiction of the IUC. The court held, in that case, that Dakota Access was a company under the jurisdiction of the IUC. The *Puntenney* court also observed that § 6A.22 granted the right of eminent domain to common carriers. As will be explained below, Summit is not a common carrier. Finally, based on the finding that Dakota Access was a common carrier, the *Puntenney* court held that there was a constitutional basis for eminent domain in that case. So, even if there was a statutory basis for eminent domain pursuant to §§ 6A.21 and 6A.22, there might still not be a constitutional basis for finding that the pipeline was a public use. But there is no constitutional basis in this case since Summit is not a common carrier.

II. EMINENT DOMAIN

Based on the Iowa Supreme Court decision in *Puntenney*, Summit can be granted eminent domain authority under the Iowa and United States Constitutions only if it is a common carrier. The *Puntenney* court's position was based on Justice O'Connor's dissenting opinion in *Kelo v. City of New London*, 545 U.S. 469, 125 S.Ct. 2655 (2005). As the *Puntenney* court described Justice O'Connor's dissent:

> In her view, a secondary benefit alone was not enough for a governmental transfer of property from one private entity to another to qualify as a taking for a public purpose. . . . She reasoned that almost any lawful use of private property will generate some secondary benefit and, thus, if "positive side effects" are sufficient to classify a transfer from one private party to another as "for public use," those constitutional words would not "realistically exclude *any* takings."

Puntenney, 928 N.W.2d at 845. The *Puntenney* court went on to explain that it was accepting Justice O'Connor's position that one circumstance when eminent domain to benefit a private entity is justified is when that entity is a common carrier. But Summit has not proven that it is a common carrier. This is confirmed by a review of the Iowa cases.

In *State ex rel. Bd. of R.R. Comm'rs v. Carlson*, 251 N.W. 160 (Iowa 1933), the court said that in determining whether a company is a common carrier, the question is whether the company is engaged in the public transportation of freight. The court went on to say:

> [In determining common carrier status], the vital consideration is whether the [carrier] has so provided and used his facilities as to give others, than those under contract with him, the right to command the use of his transportation services. If under all facts and circumstances the situation is such that *others* have the right to use [the carrier's] transportation facilities, he is a common carrier. If, on the other hand, [the carrier] is under no duty to perform his services, except for those with whom *he* elects to contract, then he is not a common carrier.

****

> The courts of last resort of practically every state have recognized that a right on the part of the public to demand service must exist before one engaged in transporting freight becomes a common carrier.

The *Carlson* court further emphasized that Carlson was not a common carrier because the delivery service was performed for the merchants who made the original sales, not for the persons to whom the delivery was made. In addition, the court noted that Carlson never held himself out as being willing to perform his services for all merchants who might ask for it, but clearly reserved to himself the right to contract with whoever he chose. The Iowa Supreme Court has also made clear that if a carrier is carrying its own product, it is not a common carrier. *Mid-America Pipeline Co. v. ICC,* 114 N.W.2d 622 (Iowa 1962); *United Suppliers, Inc. v. Hanson*, 876 N.W.2d 765 (Iowa 2016). Since Summit will be owning the carbon dioxide from the ethanol plants, Summit is not a common carrier, irrespective of any other facts.

The *Puntenney* court relied on *Carlson*, noting that, unlike Carlson, Dakota Access was not limiting its service to only shippers under contract. Summit, on the other hand, relies entirely on shippers under contract, even allegedly uncommitted shippers (Pirolli Rebuttal Testimony, p. 6; Pirolli Depo. p. 53-57) (App. p.).

The *Puntenney* court also referred to the decision in *Wright v. Midwest Old Settlers & Threshers Ass'n.*, 556 N.W.2d 808, 810 (Iowa 1996), for the statement that a common carrier need not serve all the public all the time. Puntenney, 928 N.W.2d at 843. The court used the example of airlines taking advanced bookings. The court was apparently trying to support its determination that a common carrier need not completely

rely on walk up business. But advanced bookings on an airline do not require individualized negotiated contracts, unlike Summit's business model.

These precedents describe Summit's status exactly. James Pirolli has testified that Summit has long-term offtake agreements with the participating ethanol plants in the five states where the pipeline would be constructed (Pirolli Direct Testimony p. 3) (App. p.). Mr. Pirolli also testified that industries other than ethanol could use the pipeline, but only if they could satisfy Summit's requirements (Pirolli Rebuttal Testimony p. 5; Hrg. Tr. p. 1995) (App. p.). This latter statement corresponds to the language in *Carlson*, *supra*, that if the carrier reserves the right to choose its customers, it is not a common carrier. It is also significant, with respect to the offtake agreements Summit has with the ethanol plants, as described by Mr. Pirolli in his public testimony at the hearing, that the ethanol plants are not hiring Summit to transport the carbon dioxide. The ethanol plants are transferring title to the carbon dioxide to Summit, so Summit is carrying its own product and is not a common carrier (Hrg. Tr. p. 1999) (App. p.). See, *Mid-America Pipeline Co. a*nd *United Suppliers, Inc., supra.* Sierra Club also refers the Court to Mr. Pirolli's confidential hearing testimony on this point.

Even if Summit were able to contract for carbon dioxide transport with entities other than ethanol plants, Summit would still require what Mr. Pirolli described as a transportation service agreement (Hrg. Tr. p. 1964-1965) (App. p.). But those would still be negotiated contracts that would have to comply with Summit's requirements (Hrg. Tr. p. 1965-1966) (App. p.). The Court should also review Mr. Pirolli's confidential hearing

testimony to further substantiate this argument. So, pursuant to the *Carlson* decision, Summit would still not be a common carrier in that circumstance.

Faced with all of this evidence that it is not a common carrier, Summit made a feeble attempt to come within the language in *Puntenney* regarding decisions by the Federal Energy Regulatory Commission (FERC) describing common carriers. Specifically, the *Puntenney* court determined that Dakota Access, was a common carrier and "10% [of capacity] is required to be made available for walk-up business. That is all the Federal Energy Regulatory Commission requires of a common carrier." *Id*. at 843. It is significant to note, first of all, that Dakota Access was a crude oil pipeline governed by FERC under the Interstate Commerce Act. 49 U.S.C. app. 1. The Interstate Commerce Act defines oil pipelines as common carriers. 49 U.S.C. app. 1(4). So the initial observation is that Dakota Access was a common carrier by definition under the Interstate Commerce Act. It was not the 10% reservation of capacity for walk-up shippers that made Dakota Access a common carrier.

The 10% reservation concept is a requirement imposed by FERC on common carriers, and oil pipelines, as explained above, are common carriers. *Navigator BSG Transp. & Storage*, 152 FERC ¶ 61,026, at 61,127 (July 10, 2015). The *Puntenney* court stated the matter correctly, that FERC requires common carriers to reserve 10% of capacity for walk-up, or uncommitted, shippers. So, Summit's claim that it is a common carrier because it claims it will reserve 10% of capacity for uncommitted shippers has it backwards. The 10% reservation of capacity is not what makes a pipeline a common carrier. The 10% reservation is a requirement on a pipeline that is already, by definition, a

common carrier. And since Summit is not an oil pipeline or otherwise regulated by FERC, it is not a common carrier by definition.

But even if the *Puntenney* decision could somehow be interpreted as making the 10% reservation provision a criterion for common carrier status, Summit has not carried its burden of proof. Mr. Pirolli testified that Summit would hold an open season for potential shippers to bid on access to the pipeline and that 10% of capacity would be reserved for uncommitted shippers (Pirolli Rebuttal Testimony, p. 6) (App. p.). But the open season would only be for committed shippers (Hrg. Tr. p. 1915) (App. p.). So the open season has nothing to do with the 10% reservation concept regarding uncommitted shippers. Furthermore, Mr. Pirolli stated that a prospective shipper making a bid during the open season would have to qualify by meeting Summit's requirements (Hrg. Tr. p. 1912-1913) (App. p.). Pursuant to the *Carlson* decision, *supra*, since Summit would be reserving to itself the choice of whom to contract with, it is not a common carrier. With respect to uncommitted shippers, for whom 10% of capacity would be reserved, Mr. Pirolli was vague in trying to explain why an uncommitted shipper would spend millions of dollars for capture equipment and lateral pipelines to its facility for a short-term contract of uncertain volume (Hrg. Tr. p. 1972-1974) (App. p.). The discussion with Mr. Pirolli was as follows:

> Q. In your rebuttal testimony on page 6 starting at line 14, you say "Moreover, we will be conducting what is known as an open season to solicit interested shippers and that we will be reserving 10 percent of the pipeline capacity for walk-up shippers, those who are not shipping pursuant to a long-term commitment."
>
> Define more specifically what you mean by "walk-up shippers."

A. I'd consider a walk-up shipper or an uncommitted shipper, we hear some of those terms used interchangeably, as a shipper that does not have a long-term commitment on the pipeline. So they haven't committed to consistently shipping and we have not, therefore, reserved capacity for that shipper.

Q. And you say that those would not be long-term contracts. What do you mean by "long-term"?

A. Well, some length of time that we deem is reasonable to reserve capacity for that shipper. And it could be a range of different things, but, as we discussed earlier, there's going to be -- there could be different classes of shippers. Those could generally be related to the amount of volume and the type of commitment that they're willing to make.

But the answer, Mr. Taylor, is years, not days or weeks or months.

Q. So what shipper is going to spend millions of dollars for capture equipment, for a pipeline lateral up to their industrial facility, for a week or a month or even a year contract?

A. What -- sorry, can I try and repeat that?

You asked me what shipper is going to spend the money to make the investment to ship CO2 on our line?

Q. To be a walk-up shipper like you've described. That it would be very short-term, no particular commitment on volume.

A. Well, I think, you know, there's trade-offs either way. So, generally, a committed shipper is very interested in securing volume capacity on the pipeline so that they know that we've reserved that for them and we also know that we're going to have – or any pipeline would know that they're going to have consistent revenue coming in from that shipper and there's requirements along with that.

There could be -- in the other case of an uncommitted shipper, it doesn't mean that it's not a -- that they're not going to be shipping for months or years into the future, it just means that they have not made that commitment and we have not reserved pipeline capacity for them. So as long as there is capacity on the pipeline that's not being used and they wish to ship, they can do so.

And there's uncommitted shipping arrangements that go on for years and years into the future perpetually. It depends on whether or not a shipper wishes to make that firm take-or-pay commitment.

> So there's trade-offs either way.
>
> Q. But my question was why would a walk-up shipper, as you've described it, very short-term, no commitment in volume, spend the millions of dollars it would take to buy the capture equipment, to build a lateral to their industrial facility?
>
> A. Well, maybe they -- maybe they feel that in their analysis that they're comfortable with that – whatever is the uncommitted capacity that's made available on the pipeline, whatever pipeline it is, natural gas or CO2 or anything else, that that capacity is going to be there and they don't wish to take the risk of a take-or-pay agreement. Which means that if their facility is not operating, they still have to pay the committed fees.
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> The commitments are bilateral. If they want the capacity on the pipeline, they have to pay whether they use it or not.

(Hrg. Tr. p. 1972-1974) (App. p.).

So let's unpack that testimony. First, Mr. Pirolli says that an uncommitted shipper has no long-term contract and no commitment to consistently ship product. Mr. Pirolli then confirmed that what he meant by a contract being long-term is a term of years, not weeks or months. So he was saying that an uncommitted shipper would have a contract for weeks or months not years. Then he says that an uncommitted shipper could still be shipping for years, but just not making the commitment to ship for years. Following that, Mr. Pirolli says that Summit has not reserved capacity on its pipeline for uncommitted shippers. But that contradicts Summit's mantra that it will reserve 10% of capacity for uncommitted shippers. Then, contradicting all of that testimony, Mr. Pirolli changes the distinction between committed and uncommitted shippers to the claim that committed shippers have take or pay contracts, but uncommitted shippers don't. Finally, when asked why an uncommitted shipper would spend millions of dollars for capture equipment and a

lateral pipeline, Mr. Pirolli was not able to give an answer beyond a series of "maybe's." In other words, he could not give a sensible answer, because there is none.

In his confidential testimony Mr. Pirolli confirmed that the open season Summit claims it will conduct is for committed shippers (Hrg. Tr. p. 2172-2173) (App. p.). So the open season has nothing to do with reserving 10% of capacity for uncommitted shippers. The transportation service agreement (Pirolli Depo. Ex. 9) (App. p.) is for uncommitted shippers (Hrg. Tr. p. 2173) (App. p.). But Mr. Pirolli contradicted that by saying that generally an uncommitted shipper would not even have a contract, but would just be subject to a tariff (Hrg. Tr. p. 2165) (App. p.). And even though Exhibit 9 is supposed to be for an uncommitted shipper, the shipper in that agreement is agreeing to exclusively put all of its carbon dioxide output on Summit's pipeline (Hrg. Tr. p. 2176) (App. p.). Furthermore, again contradicting himself, Mr. Pirolli said that the transportation service agreement would automatically renew unless specifically terminated, thus making the agreement a long-term contract (Hrg. Tr. p. 2180) (App. p.). Finally, Mr. Pirolli stated that the agreement with an uncommitted shipper has been under negotiation for two years (Hrg. Tr. p. 2164, 2181) (App. p.). Although Mr. Pirolli's testimony is muddled, contradictory and confusing, the only conclusion to be drawn from it is that Summit will not have any uncommitted shippers. Summit's pipeline is not like an oil or gas pipeline and the definitions and practices for those kinds of pipelines cannot be applied to Summit.

It is obvious that Summit has no intention of reserving 10% of capacity for uncommitted shippers. That is just not a realistic scenario for this project. Summit just

hopes the Court will blindly accept this attempt by Summit to claim it is a common carrier.

It must also be emphasized that the *Puntenney* court's reference to reserving capacity for uncommitted shippers is a FERC standard for oil pipelines. Dakota Access is an oil pipeline governed by FERC policy, so it made sense for the *Puntenny* court to refer to the FERC requirement. It is also important to understand that the designations of committed and uncommitted shippers is purely a construct of FERC regulations. It is not a feature of common carrier cases in general. The Summit pipeline is not an oil pipeline and is not subject to FERC regulations. Therefore, in this case, the Commission must look to Iowa common law on common carriers. As explained above, the *Carlson* case provides a clear explanation of what is a common carrier. A review of subsequent cases follows.

Following *Carlson*, the Iowa Supreme Court decided *State v. Rosenstein*, 252 N.W.2d 251 (Iowa 1934). In that case, Rosenstein was delivering films to movie theaters. Rosenstein claimed he was not a common carrier subject to registration requirements applicable to common carriers. The question was whether Rosenstein was engaged in public transportation. The court concluded that he was because he was carrying films for customers who had not signed a contract. The court cited to a Pennsylvania case, *Bingaman v. Public Service Comm.*, 161 A. 892 (Pa. 1933), where the Pennsylvania court found that because the carrier made its service available to everyone who sought its services, it was a common carrier. Summit, to the contrary, will provide its pipeline only to entities that can satisfy Summit's requirements and with whom it negotiates specific individualized contracts, so it is not a common carrier.

In *Circle Express Co. v. ICC*, 86 N.W.2d 888 (Iowa 1957), the carrier hauled freight primarily throughout the northeast quadrant of Iowa. The Iowa Commerce Commission (ICC) found that:

> Circle Express, Inc. . . . is holding itself out to the public, or a substantial segment of the public, as ready, willing and able to transport property offered to it with but few insignificant and immaterial limitations and qualifications; that such transportation has been and is of the 'public' character contemplated by Chapter 325; that by greatly expanding the number of transportation contracts and the ease with which such contracts have been and are entered into, Circle Express, Inc. is, in fact, operating as a common carrier under the guise of a contract carrier.

Id. at 891. The court further found the following:

> There were no negotiations between the parties as to terms of the general contract used, the terms were the same for substantially all parties, and changes when made were effectuated without consultation or negotiation with the shippers. Charges were not negotiated or based on time and effort to render the service, but were the same for all regardless of distance depending on the weight alone. These were at least not the usual special contract cases of a private or contract carrier, ...

Id. at 892. The court finally concluded:

> We are satisfied there was in this record competent and substantial evidence of a holding out to the general public. Statements as well as the manner in which this business is conducted, including inferential invitations to the public to apply for service, indicate that the company will transport for hire the goods of all persons indifferently so long as it has room and the goods are of the type it assumes to carry. There is substantial evidence of much more than a mere undertaking by a special individual agreement in each particular instance to carry goods of another party.
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> **********
>
> [T]he distinctive characteristic of a common carrier is that he holds himself out as ready to engage in the transportation of goods for hire, as a public employment, and not as a casual occupation, and that he undertakes to carry for all persons indifferently, within limits of his capacity and the sphere of the business required of him. The dominant and controlling factor in determining the status of one as a common carrier is his public profession or holding out, by words or by course of conduct, as to the service offered or performed.

Id. at 893.

In contrast to the facts in *Circle*, Summit will transport only carbon dioxide and only for shippers who sign contracts and who satisfy Summit's conditions (Hrg. Tr. p. 1912-1913) (App. p.). And it is clear from James Pirolli's testimony that the contracts would be negotiated with the shippers, unlike the contracts in *Circle* (Hrg. Tr. p. 2164, 2181) (App. p.). Summit's services are very specialized and directed at a unique class of shippers, not, as in the *Circle* case, a broad range of shippers who may be shipping various types of cargo.

The facts in *Kvalheim v. Horace Mann Life Ins. Co.*, 219 N.W.2d 533 (Iowa 1974), were somewhat unique in the line of Iowa common carrier cases. The plaintiff's parents were killed in an automobile accident while vacationing in Mexico on a tour arranged by a travel company. The insurance company refused to pay benefits, alleging that benefits only applied to injury while on a common carrier. The insurance company claimed that the travel company was not a common carrier. The court relied extensively on the decision in *Circle Express, supra*, to support a finding that the travel company was a common carrier. The court further stated that if the carrier holds itself out as serving all indifferently, then the carrier must perform its duty to serve all contracting with them on demand. Again, this is not what Summit would do. It claims it will only contract with shippers of its choosing.

The cases confirm that Summit, even if it actually does what it claims it will do, is not a common carrier under Iowa law. But the fact is that Summit's claimed status as a common carrier is all hypothetical and speculative. The Iowa cases all deal with carriers who had already undertaken to provide services, so the facts were not hypothetical or

speculative. At this point, there is no evidence on which the Court can rely that Summit will conduct its business as a common carrier. It certainly has not so far, as explained above. It is clear that Summit is grasping for straws to claim it is a common carrier so, pursuant to the decision in *Puntenney*, it can exercise eminent domain. When the extreme and oppressive constitutional power of eminent domain is demanded, the Court must place a heavy burden on Summit to prove that it is entitled to such power.

Although the *Puntenney* court relied on Justice O'Connor's dissent in *Kelo*, it is also worth considering Justice Thomas' *Kelo* dissent. Justice Thomas agreed with Justice O'Connor's dissent in full, but explained in more detail the constitutional concept of public use versus the concept of public benefit. He emphasized that public use means that the public has a legal right to **use** the property sought to be taken by eminent domain. As Justice Thomas put it:

> When the government takes property and gives it to a private individual, and the public has no right to use the property, it strains language to say that the public is " employing" the property, regardless of the incidental benefits that might accrue to the public from the private use. The term "public use," then, means that either the government or its citizens as a whole must actually "employ" the taken property.

Kelo, 545 U.S. at 508-509. Justice Thomas further examined the concept of public use in the historical context of eminent domain law:

> States employed the eminent domain power to provide quintessentially public goods, such as public roads, toll roads, ferries, canals, railroads, and public parks. Though use of the eminent domain power was sparse at the time of the founding, many States did have so-called Mill Acts, which authorized the owners of grist mills operated by water power to flood upstream lands with the payment of compensation to the upstream landowner. Those early grist mills "were regulated by law and compelled to serve the public for a stipulated toll and in regular order," and therefore were actually used by the public. They were common carriers – quasi-public entities. These were "public uses" in the fullest sense of the word,

> because the public could legally use and benefit from them equally. (Citations omitted).

Id. at 512.

Applying Justice Thomas' observations to the Summit project, it is clear that the public generally would not be using or employing the land sought to be condemned by Summit, either directly or indirectly, nor will the public be using the pipeline. With respect to Dakota Access, on the other hand, for example, the public would be using the oil being transmitted by the pipeline.

Summit is not a common carrier in the sense of public use as Justice Thomas explains it that would justify eminent domain. In fact, Justice Thomas described the Summit project perfectly in his dissent:

> The consequences of today's decision [the *Kelo* majority] are not difficult to predict, and promise to he harmful. . . . Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful. If ever there were justification for intrusive judicial review of constitutional provisions that protect "discrete and insular minorities," surely that principle would apply with great force to the powerless groups and individuals the Public Use Clause protects. The deferential standard this Court has adopted for the Public Use Clause is therefore deeply perverse. It encourages "those citizens with disproportionate influence and power in the political process, including large corporations and development firms." to victimize the weak. (quoting from Justice O'Connor's *Kelo* dissent and omitting citations).

Id. at 521-522.

In spite of the law and evidence to the contrary, the IUC held that Summit is a common carrier and that Summit was granted the power of eminent domain. The IUC

began the discussion of eminent domain by purportedly stating the legal requirements for granting eminent domain, resulting in two misstatements of the law.

First, the IUC mischaracterized the Iowa Supreme Court's decision in *Puntenney.* The IUC said that, under *Puntenney,* if a company was under the jurisdiction of the IUC, pursuant to Iowa Code § 6A.21, it would automatically be vested with the right of eminent domain (IUC Order, p. 254-255)(App. p.). But that is not what the *Puntenney* court said. The Supreme Court said that even if a company has a statutory right of eminent domain pursuant to § 6A.21, there is still a constitutional hurdle for a private company to obtain eminent domain. That is the constitutional requirement for public use, which can be satisfied if the company is a common carrier.

The second misstatement of the law by the IUC was that "Summit Carbon, prior to requesting the right of eminent domain, must make a good faith effort to negotiate the purchase of an easement. Iowa Code § 6B.2B." The condemnation procedure under Chapter 6B of the Iowa Code has nothing to do with whether the IUC grants Summit the power of eminent domain. The Chapter 6B procedure is the condemnation procedure that occurs after the IUC grants Summit condemnation authority. The IUC Order conflates the negotiation of the condemnation award under Chapter 6B with the negotiation for a voluntary easement pursuant to Chapter 479B. Furthermore, it is not even clear what point the IUC was trying to make with that statement.

The foregoing statements and conclusions of the IUC violate Iowa Code § 17A.19(10)(c) because it is based on an erroneous interpretation of the law whose

interpretation has not clearly been vested by a provision of law in the discretion of the agency.

The IUC's discussion of whether Summit is a common carrier is also replete with misstatements of fact and law. The IUC Order begins by mischaracterizing the *Puntenney* court's reference to the FERC requirement for common carriers to reserve 10% of capacity in the pipeline for uncommitted, or walkup, shippers. The IUC determined that because Summit claimed it would reserve 10% of capacity for uncommitted shippers, it is therefore a common carrier (IUC Order, p. 288)(App. p.). As explained above, that is not what the *Puntenney* court said and it is not what FERC requires to be a common carrier. Under FERC rules an oil pipeline, like Dakota Access in that case, is by definition a common carrier. Reserving 10% of capacity is a requirement for pipelines that are already common carriers, not a fact that makes a pipeline a common carrier.

The foregoing statements and conclusions of the IUC violate Iowa Code § 17A.19(10)(c) because it is based on an erroneous interpretation of the law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency.

The Commission went on in its Order, purporting to follow the common law definition of common carrier, based on Iowa Supreme Court decisions (IUC Order p. 288-296)(App. p.). But the Commission did not review the long line of cases Sierra Club has presented above. The Commission cited to only one paragraph in *Circle Express, supra.* Based on that limited reference, the IUC relied on Summit's claim that it would allegedly sometime in the future somehow offer transportation services to any entity seeking to

have carbon dioxide transported. As explained above, the Commission cannot base its decision on unsupported self-serving statements and speculation. Therefore, the decision in this regard was arbitrary, capricious, unreasonable, and an abuse of discretion.

The IUC decision then asserts that Summit is treating all the ethanol plants equally and therefore, Summit is a common carrier. But that is not the point. The evidence, as described above, was that other carbon dioxide shippers would be treated differently than the ethanol plants. So all carbon dioxide shippers would not be treated equally. By that measure, Summit is not a common carrier. Again, the Commission's decision on that point is arbitrary, capricious, unreasonable, and an abuse of discretion.

Also, as explained previously, the *Carlson* case holds that a carrier who limits or places requirements on who can use the carrier's services is not a common carrier. The IUC decision claims that the *Wright* decision is to the contrary. But it is not. The *Wright* case involved a train at the Old Threshers' Reunion that transported attendees around the grounds of the event. The issue was whether the train was a common carrier, even though it was not the sole undertaking of the promoters of the event. In the end, based on the specific facts of that case, the court held that the train was not a common carrier. So the Commission misapplied the *Wright* decision to the facts of this case. Therefore, the decision in this regard was based on an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency, and was arbitrary, capricious, unreasonable, and an abuse of discretion.

Sierra Club and others pointed out to the IUC that since Summit would own the carbon dioxide from the ethanol plants, it cannot be a common carrier, citing *Mid-*

America Pipeline Co. v. ICC, 114 N.W.2d 622 (Iowa 1962) and *United Suppliers, Inc. v. Hanson*, 876 N.W.2d 765 (Iowa 2016). The IUC focused only on *Mid-America*, contending that that case is distinguishable from the facts in this case because, according to the IUC, Northern Gas Company would be transporting natural gas that it created. The IUC's interpretation of the facts in *Mid-America* is wrong for two reasons. First, it does not matter who creates the product. The important point is who owns the product when it is being shipped. For example, a Walmart truck picks up inventory from numerous sources. Walmart did not create those products, but when they are placed in the Walmart truck, they become the property of Walmart. At that point, no one would contend that the Walmart truck is a common carrier. Furthermore, the facts in *United Suppliers*, which the IUC ignored on this point, were that the company obtained products from various suppliers which United Suppliers then sold and transported to its customers. Likewise, Summit is not a common carrier.

Second, the IUC was in error again in relying on Summit's unsupported assertion that sometime in the future it might transport carbon dioxide without owning the product. Summit has the burden of proving that it is a common carrier. Unsupported speculation does not carry that burden.

Finally, the IUC Order makes an attempt to bring Summit within the 12-factor test set out in *United Suppliers* for determining if the transportation at issue is the carrier's primary business (IUC Order p. 293-295)(App. p.). Before reviewing the 12 factors in this case, it must be noted that the primary business question is only one aspect of determining if a carrier is a common carrier. In other words, a carrier could have

transportation of a certain commodity as its primary business and still not be a common carrier if it does not satisfy the other vestiges of common carrier status.

A review of the IUC's discussion of the 12-factor test yields the following:

1. Whether the carrier is the owner of the property transported – Summit will clearly own the carbon dioxide from the ethanol plants. The IUC again relies on the claim by Summit that it might someday transport product that it does not own. The IUC considers this factor neutral, but it actually weighs against Summit.

2. Whether orders for the property are received prior to its purchase by the carrier – It is not clear how this factor is to be applied. If the carrier is purchasing the product, the carrier is not a common carrier. Perhaps the point is that if there are preorders, that indicates that this is the carrier's primary business. This certainly doesn't weigh in favor of Summit, as the IUC contended, since Summit would be carrying a product it has purchased.

3. Whether the carrier utilizes warehousing facilities and the extent of this use as a storage place – The IUC determined that this factor does not apply to Summit.

4. Whether the carrier undertakes any financial risks in the transportation-connected enterprise - The IUC claimed that Summit is taking a financial risk but does not identify or explain the alleged risk. In fact, Summit will receive the 45Q tax credit, so there is no financial risk at all.

5. Whether the carrier includes in the sale price an amount to cover transportation costs and its relation to the distance the goods are transported - The IUC incorrectly claimed that Summit would recover its costs from the entities using Summit's services. In

fact, no entity is using Summit's services. Summit itself, through an affiliate, will capture the carbon dioxide and receive the 45Q tax credit. Nor do any of the contracts with the ethanol plants consider transportation costs or the distance over which the carbon dioxide is transported.

6. Whether the carrier transports or holds out to transport for anyone other than itself - This issue has been discussed extensively above. There is no credible evidence that Summit will ever transport carbon dioxide that it does not own. Ownership through an affiliate is how Summit qualifies for the 45Q tax credit.

7. Whether the carrier advertises itself as being in a noncarrier business - The IUC correctly found that this factor weighs against Summit.

8. Whether its investment in transportation facilities and equipment is the principal part of its total business investment – The IUC took Summit's word that the pipeline is an $8 billion investment vs. a $720 million investment in the 12 carbon capture facilities in Iowa. But how much of that $8 billion for the pipeline will be reimbursed by the 45Q tax credit? A simple calculation is that the 12 million tons of carbon dioxide transported per year times $85 per ton tax credit (from the carbon capture facilities) times the 12 years the credit will be available equals $12 billion, which is more invested in carbon capture than in the pipeline.

9. Whether the carrier performs any real service other than transportation from which it can profit - The fact is that Summit does not perform any real service. The IUC found this factor to be neutral as to Summit. But it should have weighed against Summit.

10. Whether the [carrier] at any time engages for-hire carriers to effect delivery of the products, as might be expected, for example, when it is called upon to fill an order and its own equipment is otherwise engaged – The IUC determined that this factor did not apply to Summit. As will be discussed in more detail below, Sierra Club does not believe that any of these 12 factors apply to Summit.

11. Whether the products are delivered directly from the shipper to the consignee (i.e., without intermediate warehousing) – The IUC found that this factor weighed in Summit's favor, but it is not at all clear the it even applies to summit. In fact, the IUC's finding on Factor 3, was that warehousing did not apply to Summit, so there is no reason it should apply here.

12. Whether solicitation of the order is by the supplier rather than the truck owner – The evidence shows that Summit has solicited the ethanol plants for their carbon dioxide. A common carrier would not be soliciting the order. The IUC was incorrect in finding that this factor weighs in favor of Summit.

As mentioned above, this 12-factor test was referred to in the *United Suppliers* decision. *United Suppliers* cited to an Illinois case, *Admiral Disposal Co. v. Dep't. of Revenue*, 706 N.E.2d 118 (Ill. App. 1999). *Admiral*, in turn, cited to another case, *Russell v. Jim Russell Supply, Inc.,* 558 N.E.2d 115 (Ill. App. 1990). It is important to note that all three cases, *United Suppliers, Admiral,* and *Russell*, all involved carriers that were trucking companies. Knowing this, it becomes clear that the 12-factor test does not rationally apply to a pipeline company like Summit. In fact, the IUC admitted that some

of the factors did not apply to Summit. The IUC was grasping for a reason to find that Summit is a common carrier.

Based on the foregoing, the IUC"s misapplication of the Iowa cases on common carriers was based upon an irrational, illogical, or wholly unjustifiable application of law to fact that has clearly been vested by a provision of law in the discretion of the agency, and is arbitrary, capricious, unreasonable, and an abuse of discretion.

In conclusion, the evidence shows that Summit is not a common carrier, and the IUC erred in finding that it is. Therefore, the IUC should not have granted Summit the power of eminent domain.

But even if Summit were a common carrier, the Commission can statutorily grant eminent domain only "where necessary," and "to the extent necessary." Iowa Code §§ 479B.1, 479B.16(1). This use of the word "necessary" is obviously distinct from the term "necessity" in public convenience and necessity in Iowa Code § 479B.9. A pipeline company cannot even have eminent domain authority unless it establishes public convenience and necessity. So the company can establish public convenience and necessity, but still not have eminent domain authority unless it proves that eminent domain is necessary. If public convenience and necessity were the same as necessary, there would be no reason to include the term necessary in §§ 479B.1 and 479B.16(1). It is also obvious from this analysis that the term "necessary" related to eminent domain is a higher standard of need than the term "necessity." In fact, the *Puntenney* court said that the term "necessity" connotes something less than necessary. *Puntenney*, 928 N.W.2d at 841. Furthermore, necessity in public convenience and necessity relates to the public.

Necessary as used with respect to eminent domain refers to the individual right of the landowner to his or her property rights.

Iowa Code § 6A.4 authorizes eminent domain to take property for "public use." The term "public use" means any of the following:

> (1) The possession, occupation, and enjoyment of property by the general public or governmental entities.
> (2) The acquisition of any interest in property necessary to the function of a public or private utility to the extent such purpose does not include construction of aboveground merchant lines, or necessary to the function of a common carrier or airport or airport system.
> (3) Private use that is incidental to the public use of the property, provided that no property shall be condemned solely for the purpose of facilitating such incidental private use.
> (4) The acquisition of property pursuant to chapter 455H.
> (5) The acquisition of property for redevelopment purposes and to eliminate slum or blighted conditions . . . .

Iowa Code § 6A.22(2)(a). So, assuming Summit is not a common carrier, none of the definitions of public use apply to the Summit project. But even if Summit were a common carrier, the use must still be necessary, pursuant to the above definition. And even as a general statement, only property necessary for public use may be taken by eminent domain. *Race v. Ia. Elec. Light & Power Co.*, 134 N.W.2d 335 (Iowa 1965).

The record in this case shows that Summit has not proven that eminent domain is necessary. First of all, as explained above, Summit has not proven that its project provides any public benefit or public use. So the pipeline is not necessary for a public use. In addition, the pipeline route was chosen without any input from landowners or adjacent property owners (Hrg. Tr. p. 2071) (App. p.). Nor was any dispersion modeling used to determine the route (Hrg. Tr. p. 2065) (App. p.). Now Summit claims that the route cannot be changed (Hrg. Tr. p. 2077) (App. p.), but if Summit had consulted with

stakeholders early in the routing process, it may have avoided having to use eminent domain. In fact, Erik Schovanec, Summit's Director of Pipelines and Facilities, testified that some Exhibit H landowners were between landowners who had signed easements, so the route could not be changed (Hrg. Tr. p. 2075) (App. p.). What that means is that Summit had prejudiced the choice of the route. And even though Mr. Schovanec said that the route could not be changed, he contradicted himself and said that if the Commission ordered the route to be changed, Summit could do that (Hrg. Tr. p. 2077, 2104) (App. p.). The conclusion to be drawn is that if Summit had considered the stakeholders impacted by the pipeline, eminent domain might not be necessary.

The Iowa Supreme Court has been consistently clear that a taking by eminent domain must be necessary. The court said in *DePenning v. Iowa Power & Light Co.*, 33 N.W.2d 503, 507 (Iowa 1948):

> Under Iowa Code section 489.14, defendant is 'vested with the right of eminent domain to such extent as may be necessary . . . .' The principle upon which such companies are allowed to condemn is not that they may do what they please but that they may do what is reasonably necessary to carry out the public purpose for which the land is taken. Anything beyond this is not the taking of private property for public use but for private use.
>
> **********
>
> The law does not favor the taking of property for public use beyond the necessities of the case.

Iowa law imposes two requirements before the powers of eminent domain may be used: (1) the property must be taken for a public use; and (2) the taking must be reasonable and necessary. *Combs v. City of Atlantic*, 601 N.W.2d 93, 95-96 (Iowa 1999).

The burden is on Summit to prove that eminent domain is necessary, and Summit has not carried that burden. Significantly, the Commission did not even discuss the implications of the requirement in Iowa Code § 479B.16(1) that the right of eminent domain is only granted to the extent necessary. Therefore, the IUC's decision on this point was the product of a decision-making process in which the agency did not consider a relevant and important matter relating to the propriety or desirability of the action in question that a rational decision maker in similar circumstances would have considered prior to taking that action, and was arbitrary, capricious, unreasonable, and an abuse of discretion.

III THE SUMMIT PIPELINE WOULD NOT PROMOTE PUBLIC CONVENIENCE AND NECESSITY.

1. Definition of Public Convenience and Necessity

In order for the Commission to issue a permit to Summit to construct and operate its proposed pipeline Summit must prove that the pipeline will promote public convenience and necessity. Iowa Code § 479B.9. The *Puntenney* court briefly discussed the meaning of public convenience and necessity. *Puntenney,* 928 N.W.2d at 841. Focusing primarily on the term "necessity" the court referred with apparent approval to the Commission's reliance in that case to the discussion in *Wabash, Chester & W. Ry. v. Commerce Comm'n.*, 141 N.E. 212, 215 (Ill. 1923), where the Illinois court said, "The meaning [of necessity] must be ascertained by reference to the context, and to the objects and purposes of the statute in which it is found."

Because the Dakota Access pipeline that was at issue in *Puntenney* was an oil pipeline that arguably provided a necessary service to the public, it was not unreasonable

for the court to find that, in turn, the Commission was not unreasonable in finding public convenience and necessity. But Summit's pipeline, which will not transport any product that the public will use, directly or indirectly, presents a different context, in the words of the *Wabash* case. A further review of Iowa cases reveals that the Summit project does not fit with how public convenience and necessity has been interpreted.

In *Thomson v. Ia. State Commerce Comm.*, 235 Iowa 469, 15 N.W.2d 603 (1944), a railroad that had been in existence long before trucks were available to haul freight wanted to compete with the trucks offering coordinated rail and truck service. The Commerce Commission (predecessor to the IUC) applied the requirement of public convenience and necessity and denied the railroad's application on the basis that the railroad's proposal would simply duplicate service already provided. The district court and the Supreme Court reversed the Commission decision on the basis that the additional service proposed by the railroad would promote public convenience and necessity.

Even though the court in *Thomson* said that the terms "public convenience" and "necessity" were not absolute, the decision of the Commission was still reversed. The court quoted with approval the following language from *Application of Thomson*, 143 Neb. 52, 53, 8 N.W.2d 552, 554 (1943):

> The prime object and real purpose of Nebraska state railway commission control is to secure adequate, sustained service for the public at minimum cost and to protect and conserve investments already made for this purpose. In doing this, primary consideration must be given to the public rather than to individuals.

Thus, it is clear that the focus of public convenience and necessity is on service to the public.

The case of *Application of National Freight Lines*, 241 Iowa 179, 40 N.W.2d 612 (1950), was a dispute between two trucking companies regarding whether one or both would have authority from the Iowa Commerce Commission to haul freight between Dubuque and Des Moines. The application for a certificate of public convenience and necessity was granted by the Commission and that decision was upheld by the court. Public convenience and necessity was determined on the basis of service to the public, just as in the *Thomson* case.

In *Appeal of Beasley Bros.*, 206 Iowa 229, 220 N.W. 306 (1928), a railroad company applied for a permit to operate a bus line between Newton and Des Moines, in addition to its existing railroad operation between those two cities. Beasley Brothers operated an existing bus line in the same area and objected to the railroad company's application. The Board of Railroad Commissioners granted the permit to the railroad company. On appeal, the Iowa Supreme Court discussed public convenience and necessity as follows:

> Public convenience and necessity are concerned in the operation and maintenance of existing electric railroads and in their ability to furnish the service for which they were constructed. Capital is invested in them, as well as in the equipment of motor carriers; valuable properties, such as warehouses, are built on the line of the electric railroad, in reliance upon its permanent operation.

Id., 206 Iowa at 237, 220 N.W. at 309-310. So, just as in the other cases, the court made it clear that public convenience and necessity focuses on the service to be provided to the public by the proposed project.

The foregoing Iowa court decisions are also consistent with the history of the concept of public convenience and necessity. This history gives public convenience and

necessity an independent legal definition. A certificate of public convenience and necessity came into existence in the nineteenth century to ensure that public service companies provided reliable service to the public at fair prices. W. K. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920*, 79 Columbia L. Rev. 426 (1979)(Jones).

The primary focus was on preventing competition that would dilute the services offered to the public. So even if a public service company fulfilled all the requirements for a license or permit, the application could be denied if the proposed additional service was already available in the market. The essence of the certificate of public convenience and necessity, therefore, was the exclusion of otherwise qualified applicants from a market because, in the judgment of the regulatory commission, the addition of new or expanded services would have no beneficial consequences, or might actually have harmful consequences.

Jones describes five rationales that have been used to justify the purpose of a certificate of public convenience and necessity:

1. Prevention of "wasteful duplication" of physical facilities;
2. Prevention of "ruinous competition" among public service enterprises;
3. Preservation of service to marginal customers, so a new company entering the field would not skim off the most profitable customers;
4. Protection of investments and a favorable investment climate in public service industries;

5. Protection of the community against social costs (externalities), e.g., environmental damage or misuse of eminent domain.

Id. at 428.

Therefore, the history of public convenience and necessity is consistent with the application of the concept by the Iowa Supreme Court in the cases described above. It is certainly in the context of this history and precedent that the Iowa Legislature used the term in § 479B.9. Because Summit does not provide any service to the public, it does not promote public convenience and necessity.

It is also significant that 199 I.A.C. § 13.3(1)(f) requires Exhibit F in the petition for a permit to include a statement of the purpose of the project and a description of how the services rendered by the pipeline will promote the public convenience and necessity. This requirement fits in exactly with the judicial interpretation of public convenience and necessity as relating to the service to be provided by the carrier. But Summit's Exhibit F (App. p.) uses the word "service (or services)" only once, and then only in terms of the alleged service to industrial facility owners, not to the public.

In its application to the Commission, Exhibit F, Summit primarily asserts three alleged benefits that it contends promote public convenience and necessity: benefits to the ethanol industry, economic benefits to Iowa, and greenhouse gas reductions. Summit has not carried its burden of proof on any of these claims. Furthermore, the Commission must balance any alleged benefits against the costs and adverse impacts of the proposed pipeline. *Puntenney*, 928 N.W.2d at 841.

It is also worth noting that Summit is not claiming that its pipeline would reduce prices for anything or satisfy public demand for a product, as Dakota Access did. In fact, the public will not use, either directly or indirectly, the carbon dioxide carried in Summit's pipeline. Summit does make the claim that pipelines are safer than rail transport, but there was no evidence that carbon dioxide would ever be transported by rail in any event. So the pipeline v. rail argument is not even relevant.

The IUC Order engages in essentially no discussion of the definition of public convenience and necessity. So it was flying blind. Therefore, the IUC did not consider a relevant and important matter relating to the propriety or desirability of the action in question that a rational decision maker in similar circumstances would have considered prior to taking the action.

In its argument to the Commission in the agency proceedings, Summit claimed that several prior cases and Commission decisions supported its claim that its project comes within the definition of public convenience and necessity. But a review of those decisions does not support Summit's argument.

First, Summit cites the decision in *Puntenney v. IUB*, 928 N.W.2d 829 (Iowa 2019), for the claim that public convenience and necessity is not a high bar. An honest reading of the *Puntenney* decision does not support that claim. Although the *Puntenney* court said that the term "necessity" does not mean an absolute necessity, it does mean a reasonable necessity. *Id*. at 840-841. It is clear from the thorough analysis the *Puntenney* court made of the Dakota Access project that public convenience and necessity is not the low bar Summit claims it to be. The court found, after reviewing the evidence, that the

pipeline transporting oil from North Dakota would reduce prices for crude oil derivatives used by members of the public. More specifically, the court found that Iowans are heavy users of petroleum products and the oil transported from North Dakota and refined into other products would benefit Iowa consumers. Next, the court found that oil was still being produced in North Dakota and probably would be for the foreseeable future, so the pipeline was a way to transport that oil for the benefit of consumers. The court also found from reviewing the evidence that transporting the oil by pipeline would be safer than transport by rail. Finally, the court found that the pipeline created some jobs and secondary economic benefits. So it is clear that the *Puntenney* court held Dakota Access to its burden of proof and did not consider public convenience and necessity a low bar.

Nor does the Dakota Access project approval by the Commission give any support to Summit's request for a permit in this case. As stated previously, Dakota Access at least arguably benefited the consumers in the availability of oil products at lower prices and was allegedly a safer mode of transporting oil than transporting by rail, but Summit cannot credibly make those claims. The only actual benefit from the Summit project is the benefit to Summit and the ethanol plants from the 45Q and 45Z tax credits, but those payments deplete public money without providing justifiable health or environmental benefits in this case. There is no public benefit from those tax credits. In fact, they are a cost to the public in terms of decreased revenue.

Even with an arguably valid basis for public convenience and necessity, the Commission's decision in *Dakota Access*, Docket No. HLP-2014-0001, at p. 108, stated "If the terms and conditions adopted above were not in place, the evidence in this record would be insufficient to establish that the proposed pipeline will promote public convenience and

necessity." The Commission also found in *Dakota Access*, p. 109, that the two factors weighing in favor of granting a permit were the claims that the pipeline was a safer way to transport the oil when compared to rail transport, and the alleged economic benefits from the construction expenditures and tax revenues. However, the *Puntenney* court regarded the alleged economic benefit to consumers, rather than jobs or safe transportation, as the most important factor. *Puntenney*, 928 N.W.2d at 841. So the court disagreed with the Commission as to the primary basis for finding public convenience and necessity.

As explained previously, the safety of rail transport as compared to pipelines is not an issue in this case. No one has suggested that rail transport of carbon dioxide is even being considered. So the Commission's *Dakota Access* decision is not helpful in that regard.

With respect to the alleged economic benefits, there is a major distinction between the evidence in *Dakota Access* and this case. Dakota Access presented the testimony of an economist who used the same IMPLAN model that Summit's witness used in this case, which would have been subject to the same criticisms as it was in this case. Unfortunately, the intervenors' experts also used the IMPLAN model, and as the Commission's decision agreed, those experts' opinions "only managed to tinker at the margins of the projected benefits." *Dakota Access*, p. 45. Having learned from that experience, the intervenors in this case proved that the IMPLAN model itself is inadequate to fully evaluate the costs and benefits of a project. Furthermore, the IMPLAN model depends on information provided by Summit, which, even in the most positive light, are projections and speculation. Viewed in another way, that information may be factually incorrect. So, with respect to the alleged economic benefits, the Commission's *Dakota Access* decision does not provide Summit any support.

On the other side of the balancing test in *Dakota Access*, the Board found that the safety risks to landowners and communities from an oil spill were a negative factor that carried significant weight in the balancing test. *Dakota Access*, p. 58. In this case the record is replete with evidence of safety issues regarding the route of the Summit pipeline. Sierra Club and other parties pointed to numerous occupied structures within the zone of risk if the pipeline ruptures. The evidence also established that the safety impacts from a carbon dioxide pipeline are greater than for an oil pipeline like Dakota Access. An oil spill would impact land and water. The *Dakota Access* decision noted "disastrous discharges of oil" that had impacted land and water, and that these discharges occurred even though the pipelines in those cases were subject to PHMSA's safety regulations. *Dakota Access*, p. 55. But the Commission determined that because the Dakota Access pipeline was subject to PHMSA standards and Dakota Access had committed to exceeding PHMSA standards, the safety risk was somewhat mitigated. But the safety risks were still a factor in the balancing test for public convenience and necessity.

A carbon dioxide release, unlike an oil release, would expose people and animals to immediate risk from an odorless, colorless gas that can cause fatal asphyxiation. Counties' witness, Jack Willingham, and Jorde witness, Gerald Briggs, who were emergency responders to the incident in Satartia, Mississippi, testified as to the health impacts suffered by people exposed to the pipeline rupture in Satartia. Sierra Club witness, Dr. Ted Schettler, testified to the health impacts from exposure to carbon dioxide, as well. These facts merit concern, even more than the impacts from an oil spill were a concern for the Commission in *Dakota Access.*

In summary, there are significant distinctions between the Dakota Access pipeline and the Summit pipeline that do not justify Summit's reliance on the decision in *Puntenney.*

Another case cited by Summit, *In re Williams Pipe Line Co.*, Docket No. P-667, involved a natural gas pipeline. And, as Summit admitted to the Commission, the gas was going to be sent to Iowa and other states as refined products for use by consumers. So, as the *Puntenney* court emphasized, delivery of a product for use by consumers is an important factor in finding public convenience and necessity.

Summit also cited *In re Quantum Pipeline Co.*, Docket No. HLP-1997-0002. That case involved a 6 inch ethylene pipeline between Clinton, Iowa and Morris Illinois. The pipeline was 114 miles long, with only 3 miles in Iowa. The ethylene would be used to process polyethylene, a plastic used for many applications by consumers. No objections or interventions were filed opposing the project. The evidence showed that the pipeline route was selected after carefully considering the impact on land use and the environment, although the decision had very little discussion of the evidence. The only witnesses were two pipeline company employees. The ultimate decision was that the pipeline services to the public promoted public convenience and necessity.

So, again, this was a much different pipeline than the one Summit proposes. It was a very small short pipeline, carrying a substance for ultimate use by consumers. There were no objections and it appears that the route was carefully planned, although for such a short route, not much planning was necessary.

Another case, *In re: Manning Mun. Utilities*, Docket No. P-0901, involved a 24 mile natural gas pipeline. The pipe was of varying diameters, 6 inch, 8 inch and 10 inch, with an operating pressure of only 102 psi. There were no objections to the project. The purpose of the pipeline was to provide gas needed for customers of the municipal utility. The route was primarily on public right of way, and alternative routes would have

impacted agricultural land. The Commission's decision contained no discussion of public convenience and necessity. The difference between that project and Summit's project is obvious.

Two other cases cited by Summit, *Ag Processing, Inc.*, Docket No, P-835, and *Sioux City Brick and Tile Co*, Docket P-834, are almost identical. *Sioux City Brick* involved a 1 mile natural gas lateral pipeline from a main pipeline to the Sioux City Brick facility, which used the gas to power its operation. The pipeline route was along a gravel road using only voluntary easements. The pipeline was 4 inches in diameter and operated at 100 psi. The only objection was filed by MidAmerican Energy, which would lose Sioux City Brick as a customer if the pipeline were permitted. The decision was written by an ALJ who noted that the Commission has long considered that the transport of natural gas promotes public convenience and necessity. The only relevant issue to the Summit pipeline is whether the fact that Sioux City Brick owned the pipeline going to its facility constituted public convenience and necessity. The Commission determined that it did.

Ag Processing involved a 3 mile natural gas lateral pipeline from a main pipeline to the Ag Processing facility, which processed soybeans. The pipeline was 4 inches in diameter and operated at 125 psi. The route was along a highway and a railroad right-of-way, with all easements being voluntary. There were no objectors. The ALJ in this case held that Ag Processing presented the same issues as were addressed in *Sioux City Brick*, and the Commission therefore approved a permit.

Finally, the Commission's most recent pipeline decision cited by Summit, was *NuStar Pipeline Operating Partnership L.P.*, Docket No. HLP-2021-0002. That case

involved a 13.74 mile, 6 inch diameter, pipeline that would transport anhydrous ammonia from NuStar's main pipeline to the Iowa Fertilizer Company (IFCo) plant in Lee County. IFCo would then use the anhydrous ammonia to produce fertilizer of various types for use by farmers. So this was a product that clearly benefited users of the product that was being shipped. The NuStar ammonia pipeline system, of which the extension to IFCo was a part, was the only pipeline delivering anhydrous ammonia in Iowa. So it was necessary to expand that pipeline system in order to serve Iowa farmers. NuStar also presented testimony that:

> Iowa is the second largest consumer of anhydrous ammonia in the United States. Due to a high demand for agricultural purposes, low delivered cost is important to agricultural and industrial users of anhydrous ammonia in Iowa and the Midwest. . . . Increasing the quantity and reliability of ammonia supply to a major fertilizer manufacturer close to Iowa farms on a short supply chain provides significant benefits to Iowa and its farmers.

NuStar Acker Direct Testimony, p. 12.

> NuStar presented further testimony in that regard:
>
> A secondary economic benefit is that the Wever Lateral is a critical element to the expansion of the OCI [IFCo] facility. Iowa farmers will benefit directly by having a local source of ammonia and other products thereby avoiding supply chain issues. They may also benefit from lower ammonia cost due to lower freight costs compared to other modes of transportation.

NuStar Potts Direct Testimony, p. 17. It is also worth noting that IFCo approached NuStar about expanding the pipeline (*NuStar* decision, p. 41), demonstrating the need for the project. Summit, on the other hand has had to solicit contracts from the ethanol plants (Pirolli Depo. p. 14-15) (App. p.).

The Commission's decision in *NuStar* was based on exactly the kind of evidence that was important to the *Puntenney* court in determining public convenience and

necessity - benefits to the consuming public. With respect to Summit, on the other hand, the carbon dioxide to be transported in the pipeline would not be used by consumers in Iowa or anywhere else, either directly or indirectly. Summit's only argument seems to be that capturing the carbon dioxide and piping it to North Dakota will allegedly benefit the ethanol industry. But benefiting one industry is not promoting public convenience and necessity. The *Puntenney* court did not consider any benefit to the oil industry from the Dakota Access pipeline. The alleged benefit was to consumers of the oil, public safety, and the local economy from jobs and tax revenues.

Another distinction between Summit and NuStar is the method of route selection. As described by NuStar witness Brian Potts:

> The most direct route was discarded due to the close proximity the pipeline would be to the City of Fort Madison. The route following the railroad was discarded due to a portion of the railroad being built into the Mississippi River, causing an inability to construct a pipeline along the route as well as being in close proximity to the City of Fort Madison. The Hwy 61 route was discarded due to large elevation changes in terrain near the highway, posing constructability and access concerns. Additionally, unlike the chosen route, none of [the others] followed existing pipeline infrastructure for a portion of the route. Following an existing pipeline route is generally desirable because it impacts an already impacted area.

NuStar Potts Direct Testimony, p. 5. Mr. Potts further described the route selection process as follows:

> The proposed approximately 14 mile, 6 inch diameter pipeline traverses Lee County, Iowa from a point on the existing Ammonia Pipeline System to the Iowa Fertilizer Company ammonia facility in Wever, Iowa. The route begins north away from the Mississippi River and the City of Fort Madison in a more sparsely populated portion of the County to increase public safety, pipeline integrity and reduce environmental impact. It then parallels four TransCanada Energy natural gas pipelines for approximately 2.5 miles, staying in the sparsely populated portion of the County along a route that has already been disturbed by a similar type of construction. The pipeline then diverges from the other pipelines to take as direct a route as possible through the sparsely populated portion of the County to

> the destination. This portion of the pipeline is through mostly cultivated areas where care was taken to stay on high portions of the land increasing constructability, access and reducing the possible impact of drain tiles throughout the properties.

NuStar Potts Direct Testimony, p. 4-5. Comparing the care and consideration NuStar took in selecting a route with the evidence in the record in this case regarding how Summit chose its route shows a stark difference in attitude. So the careful routing was a factor in favor of NuStar in the Commission's balancing test, but it should be a negative factor in considering Summit's project.

It is clear, therefore, that *NuStar* was exactly the kind of case the *Puntenney* court had in mind as promoting public convenience and necessity. Summit is not.

These cases were relied on by Summit to allegedly support its argument that if a project supports Iowa's agricultural economy, it therefore promotes public convenience and necessity. But, as shown above, the cases relied on by Summit were cases where the product being transported in the pipeline was being used by farmers, either directly or indirectly. Summit cannot justifiably argue that a scheme to give ethanol plants a big tax credit to make more money supports Iowa agriculture, or more specifically the farmers who are the backbone of Iowa agriculture.

The testimony of James Broghammer, Summit's witness on the ethanol industry, confirmed that the Summit project would not benefit farmers:

● Mr. Broghammer said in his direct testimony, p. 3-4 (App. p.), that without the pipeline, corn producers would see lower prices for corn. But in his deposition, Mr. Broghammer admitted that lower corn prices are a function of the market and would have

nothing to do with the presence or absence of a pipeline – Broghammer Depo. p. 16-17 (App. p.).

● Mr. Broghammer further testified in his deposition that his ethanol plant is already operating at maximum capacity and that even with a pipeline, he would not be buying any more corn – Broghammer Depo. p. 25-26 (App. p.). So the pipeline would not benefit Iowa corn producers.

● When asked whether Iowa corn producers would grow more corn as a result of the pipeline, Mr. Broghammer confirmed that the corn producers would not grow more corn as a result of the pipeline – Broghammer Depo. p. 73-74 (App. p.).

It is worth considering that virtually all of Summit's citations to the record were to the prepared written testimony of its witnesses. These testimonies are prepared by the witnesses with the assistance of legal counsel so they can be worded to say just as much as the witness wants to say in a way that does not give a complete and accurate statement of the facts. Furthermore, the written testimonies contain evidence that would not be admissible if it were presented in live testimony, such as hearsay and statements for which the witness has no foundation. It is significant that Summit cited very little hearing testimony and no deposition testimony of its witnesses. The Commission placed far too much reliance on this prepared testimony.

Summit's claim of economic benefits was also not supported by the evidence. The main point to be made is that the *Puntenney* court did not give the alleged economic benefits as much weight as the benefits to the consuming public. The *Puntenney* court cites with approval Justice O'Connor's observation that:

> almost any lawful use of private property will generate some secondary benefit and, thus, if "positive side effects" are sufficient to classify a transfer from one private party to another as 'for public use," those constitutional words would not "realistically exclude *any* takings."

Id. at 845. Although Justice O'Connor was writing in the context of the eminent domain issue, the *Puntenney* court's reference to her observation demonstrates the court's opinion that economic benefits do not weigh as heavily as other considerations in the balancing test for public convenience and necessity.

The service to be provided to the public by the project is, after all, the essence of public convenience and necessity. *Thomson v. Ia. State Commerce Comm.*, 235 Iowa 469, 15 N.W.2d 603 (1944); *Application of Thomson*, 143 Neb. 52, 53, 8 N.W.2d 552, 554 (1943); *Application of National Freight Lines*, 241 Iowa 179, 40 N.W.2d 612 (1950); *Appeal of Beasley Bros.*, 206 Iowa 229, 220 N.W. 306 (1928).

Based on the foregoing, the Commission's interpretation of public convenience and necessity was based on an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency; based on an irrational, illogical, or wholly unjustifiable application of law to fact that has clearly been vested by a provision of law in the discretion of the agency; and was arbitrary, capricious, unreasonable, and an abuse of discretion.

2. Alleged Benefits to the Ethanol Industry.

Summit claims that by capturing carbon dioxide from the fermentation process at ethanol plants in Iowa, those plants reduce their carbon intensity score and can sell their ethanol in states that have low carbon fuel standards (Summit application, Exhibit F) (App. p.). Summit further claims that without Summit's pipeline, Iowa ethanol plants

would be at a disadvantage to ethanol plants in other states. *Id*. The direct testimony of James Powell and the direct and rebuttal testimony of James Pirolli make those same general allegations with no supporting evidence. Summit's only witness on the alleged impact on the ethanol industry was James Broghammer.

Mr. Broghammer is the CEO of Pine Lakes Corn Processors in Steamboat Rock. Mr. Broghammer's direct testimony was quite brief and, like Mr. Powell's and Mr. Pirolli's written testimony, light on supporting evidence. But Mr. Broghammer's deposition testimony did confirm several points:

● Iowa ethanol is currently being sold to low carbon fuel markets (Broghammer Depo. p. 12) (App. p.). So carbon capture and the Summit pipeline are not necessary for Iowa's ethanol industry to participate in the low carbon fuel market.

● Mr. Broghammer did not know of anything preventing Iowa ethanol from being sold to low carbon fuel markets (Broghammer Depo. p. 13-14) (App. p.). So, again, carbon capture and the Summit pipeline are not needed.

● When Mr. Broghammer was asked in his deposition if he had any evidence that without carbon pipelines ethanol plants in other states would expand at the expense of ethanol plants in Iowa, he admitted that he had no evidence of that (Broghammer Depo. p. 15-16) (App. p.).

● In a followup question, when Mr. Broghammer was asked why ethanol plants in South Dakota, one of the states that would allegedly benefit from Summit not having a pipeline in Iowa, were supporting the Summit pipeline, Mr. Broghammer did not know

(Broghammer Depo. p. 16) (App. p.). Obviously, if South Dakota ethanol plants would benefit from no pipeline in Iowa, they would not be supporting the entire Summit project.

● Mr. Broghammer also said in his direct testimony, p. 3-4 (App. p.), that without the pipeline, corn producers would see lower prices for corn. But in his deposition, Mr. Broghammer admitted that lower corn prices are a function of the market and would have nothing to do with the presence or absence of a pipeline (Broghammer Depo. p. 16-17) (App. p.).

● Mr. Broghammer further testified in his deposition that his ethanol plant is already operating at maximum capacity and that even with a pipeline, he would not be buying any more corn (Broghammer Depo. p. 25-26) (App. p.). So the pipeline would not benefit Iowa corn producers.

● Mr. Broghammer also confirmed that his ethanol plant has already undertaken projects that would qualify the ethanol from the plant for low carbon fuel markets and his plant is planning for further actions to lower its carbon intensity score (Broghammer Depo. p. 40-41) (App. p.). So carbon capture and Summit's pipeline are not needed to qualify for low carbon fuel markets. The only reason for carbon capture and the pipeline is to garner the federal 45Q and 45Z tax credits, which benefit no entity except Summit and the ethanol plants that have contracted with Summit.

● When asked whether Iowa corn producers would grow more corn as a result of the pipeline, Mr. Broghammer confirmed that the corn producers would not grow more corn as a result of the pipeline (Broghammer Depo. p. 73-74) (App. p.).

● Ultimately, Mr. Broghammer's claim that without the pipeline, Iowa ethanol producers would leave the state assumes that there would be carbon capture and pipelines in surrounding states, without evidence to support that speculation (Broghammer Depo. p. 88) (App. p.).

In summary, Mr. Broghammer, Summit's only witness on the Summit project's impact on Iowa's ethanol industry, did not support Summit's argument.

In his rebuttal testimony James Pirolli refers to a report from Decision Innovation Solutions (DIS), commissioned by the Iowa Renewable Fuels Association (Pirolli Rebuttal Ex. 1) (App. p.). That report purports to show that the ethanol industry would leave Iowa if carbon dioxide pipelines are not constructed in Iowa. A review of this report seriously challenges its reliability.

To begin with, the report presents at the outset a disclaimer, warning against reliance on the report. The disclaimer says:

> Decision Innovation Solutions LLC ("DIS") has prepared this analysis (the "Project") for review and use. The Project consists of analysis of the comparative economics of ethanol plants that are expected to have access to carbon capture and sequestration via pipelines to those that are at risk of not having access to carbon capture sequestration via pipeline.
>
> While DIS has made every attempt to obtain the most accurate data and include the most critical factors in preparing the Project, DIS makes no representation as to the accuracy or completeness of the data and factors used or in the interpretation of such data and factors included in the Project. The responsibility for the decisions made by you based on the Project, and the risk resulting from such responsibility remains solely with you; therefore, you should review and use the Project with that in mind.
>
> While the Project does include certain estimates and possible explanations for ethanol plant operating margins and the impacts of tax credit changes on ethanol plant operating margins, it cannot be ascertained with certainty the extent to which these estimates are entirely accurate. The following factors, among others,

> may prevent complete accuracy of the estimation of ethanol plant operating margins and the impacts of tax credit changes on ethanol plant operating margins, estimates of potential dislocations of future ethanol production and explanations for the same: Inadvertent errors and omissions related to data collection, data summarization, and visual display of data.

(Pirolli Rebuttal Ex. 1, p. v) (App. p.). So the Commission was forewarned about relying on the report.

Caution is also advised about relying on the report because it was commissioned by the Iowa Renewable Fuels Association, which has vigorously and vocally supported the carbon dioxide pipelines. That fact alone is not sufficient cause by itself to reject the report, but it does add another note of caution concerning the Commission's reliance on the report.

Regarding the contents of the report, it does not support its ultimate conclusion that if the pipelines are not constructed, Iowa' ethanol plants will lose out to ethanol plants in other states where pipelines would be built. First of all, it assumes that pipelines will be built in other states. But it provided absolutely no evidence that pipelines will be built in other states.

The report appears to rely on the assumption that the 45Q and 45Z tax credits will incentivize ethanol plants in other states. But that does not mean that ethanol plants will be built in other states and lead to the closure of ethanol plants in Iowa. As pointed out above, even if the ethanol industry wants to expand in other states to get the tax credits, that does not mean that pipelines will be built in other states. Nor is there any evidence that even without pipelines in Iowa, the Iowa ethanol industry would leave the state. James Broghammer, Summit's ethanol witness, in his deposition, p. 15-16 (App. p.),

admitted that he had no evidence to support the speculation that if there were no pipeline in Iowa that the ethanol industry would expand in other states.

Most of the report discusses the alleged economics of ethanol production and the impact of the 45Z tax credit. There is no doubt that the 45Z tax credit would be a temporary economic benefit to the ethanol industry. But that does not substantiate the report's ultimate conclusion that Iowa's ethanol industry would cease if pipelines are not built in Iowa. The 45Z tax credit is temporary, only available for three years. So what happens to the ethanol industry after the tax credit expires? The report does not answer that question. Nor does the report address the fact that California, where the report assumes the ethanol would be sold, is phasing out combustion engines, eliminating the market for the ethanol.

The report contains the following statement:

> If states neighboring Iowa facilitate the construction of CO2 pipelines, but Iowa regulations are considered sufficiently burdensome that CO2 pipelines are not built in Iowa, the incentives created by 45Z and 45Q tax credits **could** result in expansion of ethanol production in locations with pipeline access through new construction or expansion of existing ethanol plants with access and abandonment of plants without access. If that occurs, then it is **likely** that production of ethanol at some existing plants that do not achieve CCUS capabilities **may** operate at a disadvantage and **may** ultimately become uncompetitive. (emphasis added).

(Pirolli Rebuttal Ex. 1, p. 8) (App. p.). The words "could," "likely," and "may" in the above passage from the report, show how shakey the entire report, and especially its conclusion, is.

Furthermore, the ethanol industry is unlikely to leave Iowa in any event. The abundance and availability of the corn crop in Iowa makes it economically beneficial for the ethanol industry to be in Iowa (Hrg Tr. p. 2022) (App. p.). In addition, support from

the State of Iowa and the demand for ethanol byproducts by the Iowa livestock industry also creates an economically beneficial situation for the ethanol industry (Hrg. Tr. p. 2022-2023) (App. p.). The DIS report does not address this fact.

On page 14 of the DIS report (App. p.), it states that carbon capture at ethanol plants **has the potential** to reduce the carbon intensity of ethanol production by **upwards** of 55 percent. Aside from the obvious speculative language in the previous sentence, the report cites absolutely no authority for the statement. The report's argument seems to be that the 45Z tax credit will make ethanol production so profitable by lowering an ethanol plant's carbon intensity score, that the plant would leave Iowa absent a pipeline. But the report admits, on page 18 (App. p.), that the IRS has not yet issued guidance on how the credit will be allocated. So the report assumes the allocation will be calculated on a sliding scale. So this is another unsupported assumption.

The report next says, on page 20 (App. p.), that "Ethanol plants that do not have access to either direct injection of CO2 or carbon capture and sequestration via a pipeline may have an opportunity to participate in the 45Q tax credits for carbon capture and utilization." But the 45Q tax credit can only be claimed by the entity that owns the capture equipment. But if the ethanol plant has no access to direct injection or CCS, why would it have any capture equipment? It would be capturing carbon dioxide but could not do anything with it. So the report has made an absurd statement. Furthermore, Summit's business model is that Summit will own the carbon capture equipment, so it would get the 45Q credit, not the ethanol plant. Then, based only on the 45Q and 45Z tax credits, the report claims that the estimated amount of the credits, without considering any other

factors that would keep ethanol plants in Iowa, would incentivize the Iowa plants to close and for the ethanol industry to move to states that would have carbon capture opportunities. It is clear that the DIS report and the assertion that without the pipelines, ethanol production in Iowa would move to other states, is based on speculation and unsupported assumptions, rather than relevant data or real-world experience.

Finally, the DIS report was offered into evidence as an exhibit to James Pirolli's rebuttal testimony. Mr. Pirolli did not participate in preparing the report or contributing any information that was used in the report. As to Mr. Pirolli, the report was hearsay without any foundation to admit it through his testimony. Summit should have had the author of the report as a witness so he could have been cross-examined about it. This is another reason the Commission should have given this report no weight. Iowa Code § 17A.14(1) states that an administrative agency must base its decision on the kind of evidence on which a reasonably prudent person would rely for the conduct of serious affairs. The DIS report does not meet that standard.

Apart from the DIS report, the only evidence Summit presented regarding ethanol was the testimony of James Broghammer. But Mr. Broghammer's testimony does not establish that the public will benefit from the Summit pipeline as it pertains to the ethanol industry. Mr. Broghammer admitted in his deposition that Iowa ethanol producers are already selling ethanol to low carbon fuel markets and there is nothing to prevent Iowa ethanol producers from selling all of their ethanol in the low carbon fuel market (Broghammer Depo. p. 13-14) (App. p.). And when Mr. Broghammer was confronted in his deposition with statements he made in his written testimony, he could not support

those statements (Broghammer Depo. p. 16-19) (App. p.). In addition, when Mr. Broghammer was asked in his deposition if he thought the Summit project would move forward in other states if the IUC does not grant a permit, he said he was not sure (Broghammer Depo. p. 22) (App. p.). Mr. Broghammer also confirmed that his ethanol plant would not be producing any more ethanol if the Summit pipeline were built (Broghammer Depo. p. 25-26) (App. p.). And Mr. Broghammer also said that his ethanol plant already has projects that will reduce its carbon intensity score (Broghammer Depo. p. 40-41) (App. p.). In other words, a pipeline is not needed for Iowa ethanol plants to take advantage of low carbon fuel markets. The carbon capture and 45Z tax credit is just a way for ethanol plants to make more money with no benefit to the public. Mr. Broghammer did not claim that Iowa farmers would grow more corn if the pipeline were built (Broghammer Depo. p. 74) (App. p.). So the pipeline would not produce any benefit to Iowa corn farmers.

Therefore, the DIS report is just a puff piece to justify carbon pipelines which, as stated above, only benefit the ethanol industry and the pipeline companies.

Sierra Club witness, Dr. Silvia Secchi, testified that she has studied the ethanol industry for years (Secchi Direct Testimony, p. 7) (App. p.). Dr. Secchi described the various negative aspects of ethanol production (Secchi Direct Testimony, p. 6-7) (App. p.). Dr. Secchi concludes that the ethanol market is shrinking and carbon capture and the Summit pipeline will not keep the ethanol industry viable (Secchi Direct Testimony p. 7-8) (App. p.). Dr. Secchi also noted that the national Renewable Fuels Association

determined that carbon capture and storage ranks fifth in reducing greenhouse gases from ethanol production (Hrg Tr., p. 3672) (App. p.).

Sierra Club witness Mark Jacobson also explained why Iowa ethanol may not meet low carbon fuel standards. Using California as the primary example, Dr Jacobson pointed out that California's low carbon fuel standards continuously make the thresholds for meeting the standards more strict (Jacobson Direct Testimony, p. 18-19) (App. p.). Therefore, he concludes that "E85 with carbon capture may still not meet the standard." (Jacobson Direct Testimony, p. 19) (App. p.). Beyond that, California has set new regulations requiring all new passenger vehicles to be zero emission by 2035 (Jacobson Direct Testimony, p. 19) (App. p.). That will preclude the use of ethanol. So even if there were some advantage to the ethanol industry from the low carbon fuel standard, it would be extremely short lived. What will happen to Summit's carbon capture equipment and pipeline after that? Summit has not answered that question. The obvious conclusion is that Summit is simply after quick money from the 45Q tax credit, and then when there is no market for the ethanol from the carbon capture process, the ethanol plants and Summit will walk away and Iowans will be left with the remains. And the IUC will have issued a permit for a project that provides no long term benefits to Iowans.

In addition, landowners who are corn farmers also questioned the public benefit of the pipeline project increasing ethanol industry profits. One statement made by landowners was that the Summit project would only benefit Summit and the ethanol plants, not farmers (Hrg. Tr. p. 329, 374, 402, 4446, 4534, 5673, 6487) (App. p.). Landowners also recognized that the future of ethanol is limited due to the advent of

electric vehicles (Hrg. Tr. p. 294, 951, 1306, 4668, 4673, 4848, 5672, 5714, 6371-72) (App. p.). Landowners further observed that Iowa farmers were farming before there was ethanol and are farming now without carbon capture and pipelines (Hrg. Tr. p. 951, 6150, 6916) (App. p.).

Furthermore, Summit has presented no evidence that the ethanol industry benefits the public generally. The only economist presented as a witness by Summit was Andrew Phillips from Ernst and Young. His testimony will be discussed in more detail later, but he said nothing about the ethanol industry and its alleged benefit to the public. As noted above, even the landowners who are corn farmers recognize that ethanol does not even benefit them to the extent that Summit contends and that the Summit project is just for the benefit of the ethanol industry, not the public. And Summit did not present any farmers as witnesses in support of the project to claim how it would benefit farmers or the public.

James Pirolli, in his direct testimony, was asked how the pipeline would support the ethanol industry (Pirolli Direct Testimony, p. 3) (App. p.). He was not asked how the pipeline would benefit the public. He goes on to claim that the pipeline will support Iowa's agriculture industry and farmers (Pirolli Direct Testimony, p. 4) (App. p.). But that still does not mean there is a benefit to the general public. And, as mentioned above, the farmer landowners who testified recognize that there is no benefit to farmers from this project. Also, Mr. Pirolli presented no authority for his statements. Mr. Pirolli claims that the pipeline's alleged benefit to the ethanol industry will benefit farmers because it will allegedly keep the ethanol industry in Iowa. But, as explained above, that is a baseless argument. And, again, Mr. Pirolli offers no supporting evidence for that statement.

Finally, Mr. Pirolli claims that Summit will somehow "play a crucial role in decarbonizing the agricultural supply chain" (Pirolli Direct Testimony, p. 5) (App. p.). But he does not explain how the pipeline project would do that. It is just more corporate PR.

Even if it is assumed that carbon capture at ethanol plants would increase the price of corn (Pirolli Rebuttal Testimony, p. 5) (App. p.) (which has not been proven), that would increase the price of feed for livestock producers. And livestock production is an important part of Iowa's farm economy. Also, if the Summit project would lead to higher prices for farmland (Pirolli Rebuttal Testimony, p. 5) (App. p.), that would make it harder for young farmers to buy land and get started in the farming business. So there is no clear public benefit.

In summary, Summit has not shown that ethanol must have carbon capture and the Summit pipeline to survive, nor that the ethanol industry provides a public benefit to Iowa. Without that showing, Summit cannot claim that its pipeline's impact on the Iowa ethanol industry promotes public convenience and necessity.

Despite all of this evidence, the IUC decision makes conclusory statements about how supporting ethanol is a public benefit (IUC Order, p. 139-142)(App. p.). But the Commission makes absolutely no mention of James Broghammer's testimony. He was Summit's ethanol witness. The Commission concluded by saying, "Reinforcing the viability of an industry that employs approximately 44,000 Iowans and consumes approximately 53 percent of Iowa's corn crop weighs in favor of Summit Carbon's petition." (IUC Order, p. 142)(App. p.). This statement completely ignores that public

convenience and necessity requires a finding that the project will perform a service to the public. So the Commission decision was based on an irrational, illogical, or wholly unjustifiable application of law to fact that has clearly been vested by a provision of law in the discretion of the agency; and is arbitrary, capricious, unreasonable, and an abuse of discretion.

3. Impact on Climate Change

Summit's application, Exhibit F (App. p.), states that the project will "play an important role in reducing greenhouse gas emissions in the effort to combat climate change. . . . Once operational, the Project will provide the largest and single most meaningful technology-based reduction of carbon emissions in the world." This is nothing but corporate public relations language. In fact, Summit presented no evidence to support those grandiose statements.

It is significant that Summit presented no expert witness to support its claims regarding the pipeline's impact on climate change. The direct testimony of James Powell and James Pirolli reiterated the unsupported claims made in Exhibit F, with no supporting evidence. James Powell's direct testimony, p. 4 (App. p.), mentions that carbon dioxide will be captured and prevented from going into the atmosphere, but he mentions this only in the context of reducing the carbon intensity score of ethanol, not in the context of mitigating climate change. James Pirolli's direct testimony, p. 6 (App. p.), claims that the Summit project is capable of capturing "up to" 18 million metric tons of carbon dioxide per year, which he claims is the equivalent of removing emissions from approximately 3.9 million cars. But he offered no evidence to support that statement. In fact, even if Mr.

Pirolli's statement were correct, 18 million metric tons of carbon dioxide captured per year is not nearly enough of a reduction in greenhouse gases to justify the many negative aspects of the project.

Then, in contrast to the hype in Exhibit F, Mr. Powell testified at the hearing:

> Q. That begs the question then let's leave the alleged benefit to maybe a handful of ethanol companies in Iowa. Is one of your also -- I guess the pitch here, one of the purposes of the project, is to help with global warming and climate change?
>
> A. Summit doesn't take a position on climate change. Our primary drivers are to help the ethanol plants reduce their carbon intensity and help them be competitive in low-carbon fuel markets. Which, in turn, as you just said, drives demand for corn and keeps land values high. And the fact that those emissions are being removed from the process before they're being emitted into the atmosphere. And so, peak capacity, if you have 18 million tons of greenhouse gas emissions that aren't emitted, that's probably a benefit.
>
> Q. And so I need to pin you down, sir. Are you or are you not proposing to this Board that an environmental benefit is one of the reasons you think they should approve this project? That you're somehow affecting for the better climate change or global warming on this planet.
>
> A. As I just stated, there is an environmental benefit.
>
> Q. Okay. And are you wanting this Board in their decision-making process to include that in one of the factors that they consider? That you believe your project will produce an environmental benefit.
>
> A. I'm not going to recommend what the Board does or does not consider. As I said, there is an environmental benefit, in my opinion, of removing those greenhouse gases from the process before they're emitted into the atmosphere.

(Hrg Tr. p. 1624-1625) (App. p.). So Mr. Powell was significantly downplaying the allegation that the Summit project will "play an important role in reducing greenhouse gas emissions in the effort to combat climate change," as claimed in Exhibit F. It is clear that his focus is on the alleged benefit of the project to the ethanol industry.

In contrast to Summit's failure to present any expert testimony or other credible or authoritative evidence to support its claims about mitigating climate change, Sierra Club presented the testimony of Dr. Mark Jacobson, a recognized expert in the field of energy solutions and climate change. Dr. Jacobson considered and calculated the total net benefit of Summit's carbon capture proposal, both by itself and in comparison with alternative methods of reducing carbon dioxide in the atmosphere.

Dr. Jacobson first notes that electricity is needed to capture and prepare the carbon dioxide for transport in the pipeline (Jacobson Direct Testimony, p. 6) (App. p.). The production of this electricity will result in carbon dioxide emissions that offset about 15% of the captured carbon dioxide (Jacobson Direct Testimony, p. 6) (App. p.). That is because about 25% of Iowa's electricity is produced by coal (Jacobson Direct Testimony, p. 6) (App. p.). There are additional factors that reduce the net carbon dioxide captured by the ethanol plants, such as air pollution, land use, and jobs (Jacobson Direct Testimony, p. 5) (App. p.). A full and accurate picture of the actual net reduction of carbon dioxide from the carbon capture process must be considered in order to determine if the Summit project actually does mitigate climate change.

Dr. Jacobson further evaluates the Summit project as an opportunity cost (Jacobson Direct Testimony, p. 7) (App. p.). An opportunity cost is the cost of choosing one alternative over another alternative that would provide more and better benefits. In this case, the same money spent on the Summit project instead spent on renewable energy would produce more financial benefit. Dr. Jacobson analyzed various alternatives and

reached the same result – carbon capture and storage is not a credible strategy for mitigating climate change.

Dr. Jacobson concludes that using renewable energy to produce electricity for electric vehicles (EVs) would cost less and have a greater impact on mitigating climate change than Summit's carbon capture and storage project. This scenario is not speculation. Automobile manufacturers are promising to build more EVs, and California, and certainly other states, have or will have requirements that all vehicles will be EVs. On the other end, renewable energy keeps growing. As the IUC surely knows from cases on its docket, wind and solar energy projects are increasing rapidly. What that means for Summit is that its project has a very short and uncertain future. The Commission should not hwve granted a permit for a project that is doomed from the start, especially in light of all of the negative aspects, as discussed below.

In the face of Dr. Jacobson's evidence, Summit did not present any rebuttal testimony. So his testimony and analysis stand unchallenged. And based on the facts of the Summit project, Dr. Jacobson performed further analysis, published in the peer-reviewed journal, Environmental Science and Technology. M.Z. Jacobson, *Should Transportation Be Transitioned to Ethanol with Carbon Capture and Pipelines or Electricity? A Case Study*, Environmental Science and Technology (October 2023), found at https://pubs.acs.org/doi/abs/10.1021/acs.est.3c05054. Dr. Jacobson noted that a previous study he had done, which is also cited in his direct testimony, found that electric vehicles powered by all sources reduced carbon dioxide significantly more than using either corn or cellulosic ethanol for E85 fuel. M.Z. Jacobson, *Review of Solutions to*

Global Warming, Air Pollution, and Energy Security, Energy and Environmental Science (2009). That study also found that electric vehicles reduced air pollution mortality, land requirements, and water needs versus E85.

So, to follow up on that study and put a finer point on the impact of Summit's project, Dr. Jacobson performed a new study based on Summit's proposed project. He compared the opportunity cost of Summit's project, which relies on the production of ethanol for flex-fuel vehicles, to investing the same funds in wind turbines for powering electric vehicles or for replacing coal plants directly. Dr. Jacobson calculated the electricity needed to dehydrate and compress the carbon dioxide to a supercritical state to be placed in the pipeline. This electricity will be provided by coal or natural gas. Even if renewable energy were used to provide the electricity to dehydrate and compress the carbon dioxide, that would require coal or gas to provide other electricity needs. And the pipeline itself, in the construction, installation and decommissioning of the pipeline, emits carbon dioxide. Although wind energy, in its life cycle, emits some carbon dioxide, Dr. Jacobson found that it is much less than the overall net emissions from Summit's carbon capture and pipeline project.

The point of Dr. Jacobson's testimony and his considerable research and study of energy issues is that in order to accurately and completely assess a certain technology's impact on climate change, it is necessary to examine the net reduction, if any, on the amount of greenhouse gases emitted during the life cycle of the process and the opportunity costs of using that technology rather than an alternative technology. Summit has not presented any such evidence.

The IUC was also presented with Jorde Landowner Hrg. Ex. 654 (App. p.), which was admitted into evidence. That document reviews the experience of other carbon capture and pipeline projects. The results show that the net reductions in carbon dioxide that were promised did not materialize. As the report concludes, "Findings include a litany of missed carbon capture targets, cost overruns, and billions of dollars of costs to taxpayers in the form of subsidies." Although there are some differences between the projects described in the exhibit and Summit's project, the findings do not bode well for Summit.

While most of the projects highlighted in the report used the carbon dioxide for enhanced oil recovery, and Summit claims its carbon dioxide will simply be sequestered, two of the projects were not used for enhanced oil recovery.

- The Sleipner and Snohvit projects were Norwegian projects to capture carbon dioxide from natural gas production for sequestration in the North Sea. As the report says, "Studies suggest the project's CO2 storage modeling is faulty, underscoring concerns that CO2 behavior remains highly unpredictable."

- The Gorgon project was another offshore gas drilling project where carbon dioxide would be sequestered under the ocean. The report states that the project was "plagued by technical problems that meant it captured less than a quarter of what was promised."

Even the projects that were used for enhanced oil recovery may be relevant. James Powell, in his deposition, when asked about enhanced oil recovery gave the following testimony:

> Q. So can you say unequivocally that the CO2 that Summit will be storing or sequestering will never be used for enhanced oil recovery?
>
> A. I can say that currently there is no plan to use the CO2 that we will transport for enhanced oil recovery?
>
> Q. That's not unequivocally, is it?
>
> A. That's my response.

(Powell Depo. p. 15) (App. p.). Mr. Powell's hedging on the point speaks volumes. And as the projects profiled in Exhibit 654 show, using the carbon dioxide for enhanced oil recovery does nothing meaningful to reduce greenhouse gases and address climate change.

Summit claimed that bipartisan Congressional support for the 45Z and 45Q tax credits demonstrates that carbon capture mitigates climate change and is in the public interest. And the IUC regarded this claim as the most significant in its finding of public convenience and necessity (IUC Order, p. 109-111)(App. p.). At first blush, that may seem like a valid point. But when you think about how the political system works, it is not a valid argument. What the passage of the tax credits means is that the special interests that would profit from the tax credits were able to hire lobbyists and make political contributions that encouraged Senators and Representatives to pass the tax credits. And it was a win-win-win for the politicians. They could satisfy their financial supporters, ensure the continuation of business as usual in the energy economy, but also claim that they were addressing climate change. This scenario does not describe a public policy that actually mitigates climate change.

So Summit's claims of mitigating climate change fail, especially when balanced against the adverse impacts of the Summit project.

The IUC Order presents conflicting and irrelevant arguments in an attempt to discount the challenge to Summit's claims about climate change. First, the Commission misconstrued the point that it would better address climate change for more renewable energy to be constructed than to build Summit's pipeline. The Commission claimed that Sierra Club was arguing that Summit should construct the renewable energy projects (IUC Order, p. 124)(App. p.). But Sierra Club never argued that Summit should build the renewable energy projects. The Commission simply created a straw man to knock down.

Next, the IUC Order claims that there is no requirement for Summit to show that the pipeline establishes a net climate benefit or that it is the least costly method to address climate change (IUC Order, p. 124) (App. p.). But then the IUC contradicts itself and states that it is taking a "holistic approach" in assessing Summit's impact on climate change. But having said that, the IUC Order never does discuss its alleged "holistic approach."

Finally, the IUC Order discounts the argument that because Summit's project will only capture a miniscule amount of carbon dioxide, it will not have sufficient benefit to promote public convenience and necessity (IUC Order, p. 124-125) (App. p.). But the point to be made is that balancing the very small amount of carbon dioxide captured with the adverse impacts of the project leads to the conclusion that the project does not promote public convenience and necessity.

Based on the foregoing, The IUC decision in the issue of climate change was the product of reasoning so illogical as to render it wholly irrational; was based on an irrational, illogical, or wholly unjustifiable application of law to fact that has clearly been vested by a provision of law in the discretion of the agency; and was arbitrary, capricious, unreasonable, and an abuse of discretion.

4. Jobs and Economic Benefit

The third alleged benefit claimed by Summit in Exhibit F is jobs and the economic benefits allegedly created by those jobs. Summit's attempt to support this claim is a report by Ernst and Young and the testimony of Ernst and Young employee Andrew Phillips. The Ernst and Young report is based on an economic modeling tool called IMPLAN. Mr. Phillips, in his hearing testimony, admitted that IMPLAN only considers economic contributions from the Summit project, but not the costs and adverse impacts (Hrg Tr. p. 2355, 2359-2360) (App. p.). So this type of economic model does not give a full and accurate picture of the economic implications of the Summit project.

Mr. Phillips also admitted that he relied for much of the inputs on information provided by Summit, and he did not verify the accuracy of that information (Hrg. Tr. p. 2355-2356) (App. p.). Because of this, Mr. Phillips admitted that this report would not provide a basis for an investment decision (Hrg. Tr. p. 2356) (App. p.). In fact, the report contains a disclaimer which says (emphasis added):

> The services performed by Ernst & Young LLP (EY US) in preparing this report for the Summit Carbon Solutions were advisory in nature. Neither the report nor any of our work constitutes a legal opinion or advice. No representation is made relating to matters of a legal nature. Our scope of work was determined by Summit and agreed to by EY US pursuant to the terms of our engagement agreement. **Certain analyses and findings in this report are based on estimates**

> **and/or assumptions about the cost of construction and operation of the Summit Carbon Solutions' pipeline project.** The findings and analyses contained in the report are based on data and information made available to EY US through date hereof. Should additional relevant data or information become available after the date of the report, such data or information may have a material impact on the findings in the report. EY US has no future obligation to update the report.
>
> The report is intended solely for use by Summit Carbon Solutions. While we believe the work performed is responsive to Summit's request pursuant to the scope of work in the SOW, **we make no representation as to the sufficiency of the report and our work for any other purposes. Any third parties reading the report should be aware that the report is subject to limitations, and the scope of the report as not designed for use or reliance by third parties for investment purposes or any other purpose, We assume no duty, obligation, or responsibility whatsoever to any third parties that may obtain access to the report.**

(Ernst & Young Report)(App. p.)

And Mr. Phillips admitted that the report was not designed for use or reliance by third parties for any purpose (Hrg. Tr. p. 2359) (App. p.). Those third parties would certainly include the IUC. So, just as with the DIS ethanol report discussed above, the Commission should have been cautious about relying on this report.

The IMPLAN model does not consider environmental benefits or adverse impacts (Hrg. Tr. p. 2360) (App. p.). Nor is the IMPLAN model a cost-benefit analysis (Hrg Tr. p. 2360) (App. p.). Mr. Phillips also acknowledged that the report was merely a prediction, and that instead of saying that things "will" happen if the pipeline is built, it might be more accurate to say those things are "expected to" or are "projected to" or are "estimated to" happen (Hrg. Tr. p. 2361) (App. p.). Also, the report did not look at the impact of the price of corn as a result of the project, which might benefit corn producers but increase the price of feed for livestock producers (Hrg. Tr. p. 2361) (App. p.). Nor does the report

factor in the 45Q and 45Z tax credits, which Summit's other evidence cite as important economic factors related to the pipeline project (Hrg. Tr. p. 2362). Mr. Phillips also explained that indirect and induced jobs were part of his analysis, but he did not distinguish full-time jobs from part-time jobs (Hrg. Tr. p. 2363) (App. p.). He admitted that full-time jobs would be more economically beneficial than part-time jobs if there are the same number of them (Hrg. Tr. p. 2363) (App. p.). The report also does not analyze the impact of the project on the ethanol industry, so the Commission did not have the benefit of an analysis regarding the ethanol industry (Hrg. Tr. p. 2364). Given Summit's reliance on the alleged impact of the pipeline on the ethanol industry, the failure to consider that in this report is a serious omission. Nor does the report consider the economic impact to landowners due to damage to their farmland and reduced crop yield (Hrg. Tr. p. 2365) (App. p.).

Mr. Phillips also said that due to the increased time period for the project, average annual jobs have decreased 42 percent (Hrg. Tr. p. 2365) (App. p.). Mr. Phillips admitted that 42% of the workers would therefore be out of a job, but that was apparently acceptable as long as the employment income, and thus the economic impact, remained the same (Hrg. Tr. p. 2365-2366) (App. p.). Mr. Phillips expressed no consideration for the workers who would lose their jobs. Furthermore, Mr. Phillips confirmed that the jobs predicted by the IMPLAN model are gross new jobs, not net new jobs (Hrg. Tr. p. 2377) (App. p.). So the Commission was not being given an accurate estimate of the actual employment benefit of the Summit project. And in terms of the largest economic

contribution from Summit's capital expenditures, Iowa is third, behind North Dakota and South Dakota (Hrg. Tr. p. 2367) (App. p.).

In response to Mr. Phillips and the Ernst and Young report, Sierra Club presented the testimony of Dr. Silvia Secchi. Dr. Secchi stated that the Ernst and Young report overestimates the economic benefits of the Summit project because the alleged benefits are transitory and limited to the construction period, and also depend heavily on out-of-state inputs and labor (Secchi Direct Testimony, p. 4) (App. p.). Instead of the benefits assumed by the Ernst and Young report for labor and materials, the materials for constructing the pipeline and most of the labor will not come from Iowa (Secchi Direct Testimony, p. 4) (App. p.). Dr. Secchi also pointed out that the Ernst and Young report used the concept of worker years to determine the impact of the Summit project on employment instead of assessing the employment effect every year. Using the annual employment would show how little long-term effects the project would have on employment in Iowa (Secchi Direct Testimony, p. 4) (App. p.). Dr. Secchi also explained that the use of a national model by Ernst and Young inflates the indirect and induced economic activity effects (Secchi Direct Testimony, p. 5). And, as admitted by Mr. Phillips in his hearing testimony, the IMPLAN model failed to consider the economic costs of the Summit project in relation to its alleged benefits (Secchi Direct Testimony, p. 6) (App. p.). And the IUC is required in its balancing test to consider the costs and adverse impacts.

In that regard, it is significant that the Ernst & Young report did not consider the impact of the 45Q and 45Z tax credits. Those are a cost to the public. The total amount of

carbon dioxide presently signed up on the pipeline in the 5 states through which it would traverse is 9.5 million metric tons (Powell Direct Testimony, p. 4) (App. p.). About a third of that amount, or approximately 3 million metric tons, would come from Iowa ethanol plants (Powell Depo. p. 48-49) (App. p.). With the 45Q tax credit at $85 per metric ton of carbon dioxide, the cost to Iowa taxpayers for the 3 million metric tons placed on Summit's pipeline would be $95 million. A cost that massive must surely be considered in the economic analysis.

Although the *Puntenney* court said in that case that the Commission could factor in economic benefits in its balancing test for public convenience and necessity, it was not the only factor. Obviously, those alleged benefits have to be evaluated on their own merits and in consideration of other elements of the balancing test. In this case, it is clear that there are many other considerations that outweigh any alleged economic benefits. The *Puntenney* court made clear that economic benefits are only one small consideration in the public convenience and necessity analysis. *Puntenney v. IUB*, 928 N.W.2d at 841. In fact, the court's mention of the economic benefits was almost an afterthought. The primary basis for public convenience and necessity in that case was the claim that the product being transported in the pipeline, crude oil, was a product that was a benefit to the consuming public. In this case, the public will not use the carbon dioxide.

Apart from the impact of jobs and their alleged ripple effect, Summit presented no evidence that the public would benefit from the product being transported by the pipeline. Regarding the Dakota Access pipeline, as considered in *Puntenney v. IUB*, 928 N.W.2d at 841, the public benefit from allegedly lower prices and availability of products used by

the public derived from the oil carried in the pipeline constituted public convenience and necessity. In this case, members of the public will not use the carbon dioxide or any derivative of it.

So, in summary, Summit's evidence of alleged economic benefits falls flat.

While the IUC Order claims that it is not shifting the burden of proof to the intervenors on this issue, it is clear that it was (IUC Order, p. 154-156) (App. p.). First, the IUC states that in order to tip the balance against Summit on this issue, the intervenors were required to present contrary evidence, rather than proving that the Ernst and Young report and Mr. Phillips' testimony was incorrect, incomplete and unreliable. But the IUC offered no legal support for that position.

Furthermore, the record shows that Sierra Club did present evidence. As described above, Dr. Silvia Secchi testified as to how and why the Ernst and Young report must not be relied upon. The IUC Order, p. 154, (App. p.) even acknowledges that the evidence weighs against Summit's evidence. That is what the burden of proof is all about. It makes no sense for the IUC to say that the evidence weighs against Summit in this issue and then say that it does not weigh against a finding of public convenience and necessity.

Next, the IUC Order, p. 154-156, (App. p.) rejects the argument that the disclaimer in the Ernst and Young report makes the report unreliable. The IUC's justification for that rejection is the argument that all such report contain a similar disclaimer. The fallacy of the Commission's argument is obvious. The fact that all consultants are not willing to stand behind their work does not make the reports credible. The disclaimer is absolutely clear that Ernst & Young:

> make no representation as to the sufficiency of the report and our work for any other purposes. Any third parties reading the report should be aware that the report is subject to limitations, and the scope of the report as not designed for use or reliance by third parties for investment purposes or any other purpose, We assume no duty, obligation, or responsibility whatsoever to any third parties that may obtain access to the report.

The report could not have made the point any clearer. The IUC was absolutely wrong in dismissing the significance of the disclaimer.

Finally, the IUC Order, p. 156, (App. p.) discounts the fact that the Ernst & Young report does not take into account the costs associated with the Summit project. The Commission makes the completely unsupported statement that even if the costs were included, they would not outweigh the alleged economic benefits. But the IUC offered no evidence to support that conclusion, and indeed, there is none.

Based on the foregoing, the IUC decision on this issue was based on an irrational, illogical, or wholly unjustifiable application of law to fact that has clearly been vested by a provision of law in the discretion of the agency, and was arbitrary, capricious, unreasonable, and an abuse of discretion.

5. Safety

Although Summit has argued throughout these proceedings that safety is preempted by federal law, most of its evidence was about safety. And safety was certainly a primary concern of the landowners impacted by the pipeline.

Summit's first witness at the hearing was James Powell. In his direct testimony he briefly discussed how the pipeline route was chosen (Powell Direct Testimony, p. 6) (App. p.). But he did not mention safety as one of the factors used in determining a route. Mr. Powell did discuss monitoring of the pipeline by the operations control center. It is

clear that the operations control center will be relying on remote automated equipment to detect leaks and other safety issues with the pipeline (Powell Direct Testimony, p. 10) (App. p.). Although there will be personnel at the control center, they will be dependent on the remote equipment. The personnel will simply respond after being made aware of an incident. There is no indication in Mr. Powell's testimony how long it would take for first responders and other personnel to reach the scene of an incident.

In his rebuttal testimony Mr. Powell refers to Summit's dispersion modeling (Powell Rebuttal Testimony, p. 4) (App. p.). But he does not indicate that that dispersion modeling informed the route of the pipeline. In fact, other Summit witnesses make it clear that the dispersion modeling had no impact on route selection (Hrg. Tr. p. 2065-2066) (App. p.). So a pipeline carrying a substance that is an asphyxiant and is toxic (Schettler Direct Testimony, p. 4) (App. p.) is routed by Summit with no consideration for the distance over which the carbon dioxide would disperse in the event of a rupture and the proximity of occupied structures. Mr. Powell said in his deposition that the pipeline route had not been changed based on the dispersion modeling (Powell Depo. p. 23) (App. p.). He further testified as follows:

> Q. If the dispersion modeling says your pipeline will disperse significant concentration of CO_2 in an area where people or livestock are, why wouldn't you want to change the route?
>
> A. Generally, as Mr. Louque testified, you use this information to inform where you need to mitigate the risk, and there are many, many things you can do to mitigate the risk.
>
> You can put your pipeline deeper. You can add valves. You can add other measures. You can put in a robust leak detection system like we planned to do.

> It's very important that you integrate the risk associated with your pipeline with your integrity management program. So that's what we will do.
>
> Q. Is it fair to say, though, that before the pipeline is actually in the ground, you could change the route?
>
> A. We have limited opportunity to change the route in this state within the current application.
>
> Q. But you could change the route?
>
> A. We can change the route.

(Powell Depo. p. 24-25) (App. p.).

Erik Schovanec testified in his deposition that Summit used an initial setback distance from occupied structures of 400 feet in determining a preliminary route for the pipeline (Schovanec Depo. p. 14) (App. p.). He further testified that the 400-foot distance was just a baseline distance that was used on previous projects in Iowa. But none of those previous projects were carbon dioxide pipelines (Schovanec Depo. p. 14-15) (App. p.). Using that preliminary 400-foot distance, Summit identified 112 houses, 4 trailers, 7 businesses, 18 industrial buildings, 36 animal feeding operations, 119 barns, 131 sheds, 3 greenhouses, 19 garages, and 33 ethanol plants within that area (Iowa Farm Bureau Hrg. Ex. 4) (App. p.). Sierra Club directs the Court to Bryan Louque's confidential testimony to determine whether the 400-foot distance is an adequate measure for determining the safety of the pipeline.

Landowner testimony revealed many occupied structures near enough to the pipeline to be concerned about safety in the event of a pipeline rupture. The testimony is summarized as follows:

● Marcia Langner – Hrg. Tr. p. 118 (App. p.) – calving barn is within 500 feet of the pipeline

● Marcia Langner – Hrg. Tr. p. 170 (App. p.) – son lives 1,320 feet from the pipeline, and Ms. Langner lives 2,640 feet from the pipeline

● Timothy Fox – Hrg. Tr. p. 238 (App. p.) – entrance to Avenue of the Saints Park in Charles City in 600 feet from the pipeline

● Timothy Fox – Hrg. Tr. p. 243 (App. p.) – Cedar Valley Transportation Center is 354 feet from the pipeline

● Hollis Oelmann – Hrg. Tr. p. 366 (App. p.) – hog building 908 feet from the pipeline

● Tamera Snyder – Hrg. Tr. p. 417 (App. p.) – residence is 1,500 feet from the pipeline

● David Wildin – Hrg. Tr. p. 450 (App. p.) – residence is 600 feet from the pipeline- neighbor's residence is 1,000 feet from the pipeline- two businesses are 100-150 feet from the pipeline

● Kathryn Byars – Hrg. Tr. p. 688 (App. p.) – neighbors' residence is 1,000 feet from pipeline

● Kathryn Byars – Hrg. Tr. p. 700 (App. p.) – playground in Earling is 200 feet from the pipeline

● Tom Konz – Hrg. Tr. p. 838 (App. p.) – shop is 1,100 feet from the pipeline

● Ladonna Hoffmann – Hrg. Tr. p. 881 (App. p.) – residence is 2,297 feet from the pipeline

- Merle Shay – Hrg. Tr. p. 958 (App. p.) – residence is 363 feet from the pipeline
- Elizabeth Ellis – Hrg. Tr. p. 993 (App. p.) – son's residence is 2,000 feet from the pipeline – neighbor's residence is 600 feet from the pipeline
- Verle Tate – Hrg. Tr. p. 1022 (App. p.) – son's house is 800 feet from the pipeline
- Robert Ritter – Hrg. Tr. p. 1112 (App. p.) - livestock barn is 487 feet from the pipelines
- Joan Wirtz – Hrg. Tr. p. 1401 (App. p.) - two residences are 2,059 feet from the pipeline
- David Skilling – Hrg. Tr. p. 3720 (App. p.) – tenant lives 1,500 feet from the pipeline
- Gregory Kracht – Hrg. Tr. p. 3737 (App. p.) – residence is 500-750 feet from the pipeline
- Kerry Hirth – Hrg. Tr. p. 4058 (App. p.) – residence and barn is 1,000 feet from the pipeline
- Jean Kohles – Hrg. Tr. p. 4075 (App. p.) – neighbor's residence is a few hundred feet from the pipeline
- Rick Chipman – Hrg. Tr. p. 4118 (App. p.) – neighbor's residence is 550 feet from the pipeline – son lives 1,550 feet from the pipeline
- Rick Chipman - Hrg. Tr. p. 4127 (App. p.) – hog buildings are 800 hundred feet from the pipeline

- Rick Chipman – Hrg. Tr. p. 4134 (App. p.) - residence is 501 feet from the pipeline
- Julie Glade – Hrg. Tr. p. 4243 (App. p.) – residence is 650 feet from the pipeline
- Julie Glade – Hrg. Tr. p. 4256 (App. p.) – neighbor's residence is 1,000 feet from the pipeline
- Barbara Harre – Hrg. Tr. p. 4333 (App. p.) – neighbor's residence is 450 feet from the pipeline
- Dennis King – Hrg Tr. p. 4384 (App. p.) – residence is 2,194 feet from the pipeline
- Debra LaValle – Hrg. Tr. p. 4413 (App. p.) – residence is 400 feet from the pipeline
- Timothy Baughman – Hrg. Tr. p. 4533 (App. p.) – neighbor's residence is 600 feet from the pipeline
- John Taecker – Hrg. Tr. p. 4564 (App. p.) – residence is 1,723 feet from the pipeline
- Robert Van Diest – Hrg. Tr. p. 4722 (App. p.) – neighbor's residence is 502 feet from the pipeline
- Robert Van Diest – Hrg. Tr. p. 4730 (App. p.) – neighbor's residence is 547 feet from the pipeline
- Robert Van Diest – Hrg. Tr. p. 4731 (App. p.) – neighbors' residences are 1146 feet and 1164 feet from the pipeline

● Henry Schnakenberg – Hrg. Tr. p. 4765 (App. p.) – neighbor's residence is 309 feet from the pipeline

● Henry Schnakenberg – Hrg. Tr. p. 4770 (App. p.) – hog building is 307 feet from the pipeline

● Teresa Thoms – Hrg. Tr. p. 4861 (App. p.) – residence is 1,113 feet from the pipeline

● Dennis Jackson – Hrg. Tr. p. 4915 (App. p.) – residence is 937 feet from the pipeline

● Lori Goth – Hrg. Tr. p. 4970 (App. p.) – neighbor's residence is 1,120 feet from the pipeline

● Martin Maher – Hrg. Tr. p. 4999 (App. p.) – residence is 300 feet from the pipeline

● Thomas McDonald – Hrg. Tr. p. 5110 (App. p.) – neighbor's residence is 300 feet from the pipeline

● Cornelius Schelling – Hrg. Tr. p. 5189 (App. p.) – neighbor's residence is 697 feet from the pipeline

● Nancy Erickson – Hrg. Tr. p. 5205 (App. p.) – residence is 1,500 feet from the pipeline – neighbor's residence is 750 feet from the pipeline

● Nancy Erickson – Hrg. Tr. p. 5216 (App. p.) – neighbor's residence is 1,325 feet from the pipeline – hog building is 190 feet from the pipeline

● David Gerber – Hrg. Tr. p. 5242 (App. p.) – neighbors' residences are 612 feet and 432 feet from the pipeline

● Casey Schomaker – Hrg. Tr. p. 5257 (App. p.) – residence is 303 feet from the pipeline – neighbor's residence is 400 feet from the pipeline

● Casey Schomaker – Hrg. Tr. p. 5269 (App. p.) - neighbor's residence is 718 feet from the pipeline

● Kathy Carter – Hrg. Tr. p. 5333 (App. p.) – neighbor's residence is 550 feet from the pipeline

● Anne Gray – Hrg. Tr. p. 5389 (App. p.) – neighbor's residence is 354 feet from the pipeline

● Dana Arndorfer – Hrg. Tr. p. 5408 (App. p.) – residence is 290 feet from the pipeline

● Sandra Laubenthal – Hrg. Tr. p. 5533 (App. p.) – residence is 514 feet from the pipeline

● Patricia Beyer – Hrg. Tr. p. 5601 (App. p.) – neighbors' residences are 473 feet and 700 feet from the pipeline

● Donald Johannsen – Hrg. Tr. p. 5665 (App. p.) – neighbor's residence is 500 feet from the pipeline

● Jody Wilson – Hrg. Tr. p. 5743 (App. p.) – neighbor's residence is 410 feet from the pipeline

● Jody Wilson – Hrg. Tr. p. 5747 (App. p.) – neighbor's residence is 980 feet from the pipeline

● Jeffrey Colvin – Hrg. Tr. p. 5765 (App. p.) – neighbor's residence is 1,300 feet from the pipeline

- Vicki Koeppe – Hrg. Tr. p. 5909 (App. p.) – neighbor's residence is 351 feet from the pipeline
- Katherine Stockdale – Hrg. Tr. p. 6010 (App. p.) – residence is 707 feet from the pipeline
- David Weber – Hrg. Tr. p. 6065 (App. p.) – neighbor's residence is 600 feet from the pipeline
- Daniel Tranchetti – Hrg. Tr. p. 6086 (App. p.) – residence is 1,151 feet from the pipeline
- Bonnie Peters – Hrg. Tr. p. 6243 (App. p.) – hog building is 350 feet from the pipeline
- Bonnie Peters – Hrg. Tr. p. 6273 (App. p.) – hog building is 687 feet from the pipeline
- Winston Gadsby – Hrg. Tr. p. 6384 (App. p.) – neighbor's residence is 550 feet from the pipeline
- Alan Laubenthal – Hrg. Tr. p. 6456 (App. p.) – residence is 450 feet from the pipeline
- Debra Wheeler – Hrg. Tr. p. 6527 (App. p.) – neighbor's residence is 787 feet from the pipeline
- Lance Kleckner – Hrg. Tr. p. 6580 (App. p.) – neighbor's residence is 100 feet from the pipeline
- Sue Carter – Hrg. Tr. p. 6610 (App. p.) – neighbor's residence is 1,200 feet from the pipeline

● Dwight Doughan – Hrg. Tr. p. 6718 (App. p.) – hog building is a few hundred feet from the pipeline

● Craig Byer – Hrg. Tr. p. 6749 (App. p.) – neighbor's residence is 500 feet from the pipeline

● Craig Byer – Hrg. Tr. p. 6756 (App. p.) – neighbors' residences are 473 feet, 699 feet and 485 feet from the pipeline

● Bradley Franken – Hrg. Tr. p. 6791 (App. p.) – neighbor's residence is 300 feet from the pipeline

● Alvin Sandbulte – Hrg. Tr. p. 6821 (App. p.) – residence is 330 feet from the pipeline

● Vicki Sonne – Hrg. Tr. p. 6860 (App. p.) – neighbor's residence is 514 feet from the pipeline

● Larry Christensen – Hrg. Tr. p. 6860 (App. p.) – neighbor's residence is 514 feet from the pipeline

● Neil Dahlquist – Hrg. Tr. p. 7162 (App. p.) – hog building is 200 feet from the pipeline

● Eric Sidner – Hrg. Tr. p. 7227 (App. p.) – neighbors' residences are 342 feet and 673 feet from the pipeline

● Brenda Jairell – Hrg. Tr. p. 7295 (App. p.) – residence is 750 feet from the pipeline and cattle lot is 500 feet from the pipeline

● Eric Palmquist – Hrg. Tr. p. 7392 (App. p.) – residence is a few hundred feet from the pipeline

Summit's own dispersion modeling proves that the above landowners are in jeopardy. In addition, dispersion modeling placed in evidence in South Dakota by the Navigator pipeline established that property owned within 1,825 feet of an 8" pipeline and 1,240 feet of a 6" pipeline may be impacted in the event of a rupture (Jorde Landowner Hrg. Ex. 645) (App. p.). Navigator's dispersion modeling is set out in the following table:

Nominal Pipe Diameter	Hazard Level 4	Hazard Level 3	Hazard Level 2	Hazard Level 1
6"	321'	[redacted]	1,240'	1,971'
8"	417'	[redacted]	1,855'	2,753'
12"	[redacted]	[redacted]	[redacted]	3,291'
16"	[redacted]	[redacted]	[redacted]	3,644'
20"	1,029'	[redacted]	2,920'	4,250'

To interpret this table the Navigator dispersion modeling report explains Hazard Level 1 is a carbon dioxide concentration of 30,000 ppm; Hazard Level 2 is a concentration of 40,000 ppm; Hazard Level 3 is a concentration of 63,000 ppm; and Hazard Level 4 is a concentration of 105,000 ppm.

Sierra Club witness Dr. Ted Schettler explained that a 4% (40,000 ppm or Level 2) carbon dioxide concentration is immediately dangerous to life and health (Schettler Direct Testimony, p. 4) (App. p.). Based on the Navigator table above, the dispersion of carbon dioxide to that level would range from 1,240 feet for a 6" pipeline to 2,920 feet for a 20" pipeline. So the landowner testimony listed above clearly shows that a significant number of occupied structures will be well within the hazard zone.

Summit's dispersion modeling contained similar results as the Navigator modeling. The Court is directed to the confidential testimony of Bryan Louque.

In addition, Dr. John Abraham, a recognized expert in dispersion modeling, testified in the Summit proceeding in South Dakota before the Public Utility Commission regarding two scenarios for a carbon dioxide pipeline rupture (Jorde Landowner Ex. 641, p. 28-30) (App. p.). He said that in the first scenario, if it were an 8 inch diameter pipe, buried 5 feet deep, the dispersion distance at 30,000 ppm would be 2,600 feet, and the dispersion distance at 40,000 ppm would be 1,850 feet. For a 20 inch diameter pipe buried 5 feet, the dispersion distance at 30,000 ppm would be 4,000 feet, and the dispersion distance at 40,000 ppm would be 2,800 feet.

In the face of this overwhelming evidence that the pipeline would be in precarious proximity to numerous occupied structures, Summit has presented several witnesses who claim that the pipeline will be perfectly safe. The testimony is not reassuring. James Powell and James Pirolli talked in generalities and platitudes, but did not provide any specific facts to explain exactly why the pipeline would be safe. Erik Schovanec mentioned PHMSA regulations regarding high consequence areas (HCAs) and how Summit would be complying with PHMSA regulations regarding HCAs. But HCAs are populated areas. The occupied structures described above by the landowner witnesses are not in high consequence areas. So the PHMSA regulations would not necessarily protect them.

Kent Muhlbauer offered very brief testimony about risk assessment and risk management. Although he says that Summit will utilize a quantitative risk assessment, no

such risk assessment was provided to the Commission or the parties. So the parties, and more importantly, the Commission, did not know the results of that risk assessment. Mr. Muhlbauer's direct testimony (Muhlbauer Direct Testimony, p. 6) (App. p.) claims that Summit's preliminary risk assessment shows a failure rate lower than 0.0003 failures per mile. But we do not know what inputs went into that assessment, how the calculations were made, or any other pertinent information to determine if the assessment is accurate. Without that information, Mr. Muhlbauer's testimony is unhelpful in determining the risk of damage to people and structures along the pipeline route. It is also worth pointing out that Mr. Muhlbauer's hearing testimony focused on the risk to the pipeline itself and the amount of economic damage to Summit of a pipeline failure event, not the risk to people and structures.

John Godfrey primarily testified about PHMSA regulations. But PHMSA regulations don't prevent pipeline failures. In fact, Mr. Godfrey's direct testimony (Godfrey Direct Testimony, p. 8) (App. p.) states that in 22 years over only 5,339 miles of CO_2 pipelines, there have been 39 leaks on pipeline rights-of-way, and 103 leaks or releases over all CO_2 pipeline facilities in that time period. That demonstrates a much more significant risk than Mr. Muhlbauer claimed. The following table summarizes the implications of Mr. Godfrey's numbers. These results are based on the number of miles of pipeline in Iowa – 685 miles. For the pipeline itself, there would be between 2 and 3 releases in the first 10 years of operation; between 4 and 5 releases in the first 20 years of operation; and almost 7 releases in the first 30 years of operation. For all pipeline facilities, there would be about 6 releases during the first 10 years of operation; about 12

releases during the first 20 years of operation; and about 18 releases during the first 30 years of operation.

In 22 years in the US, there were 39 leaks on pipeline right of ways, with 5339 miles of pipe			
In Iowa, there will be 685 miles of pipe			
Over 22 years, the expected number of accidents/leaks in Iowa will be	5.00		
the number of years between accidents/leaks in Iowa will be	4.40		
There were 103 leaks or releases over all CO2 facilities over the 22 year time frame			
the expected number of leaks/releases in Iowa over 22 years from all pipeline facilities will be	13.22		
the number of years between leaks/releases in Iowa will be	1.66		
Life of the pipeline in years	10	20	30
number of expected accidents/leaks in Iowa	2.27	4.55	6.82
expected number of releases in Iowa	6.01	12.01	18.02

Further, regarding Mr. Godfrey's testimony, his opinions are based on what Summit has told him it intends to do. Neither he, nor the Commission, had any way to verify those statements or to rely on them.

Brigham McCown, like Mr. Godfrey, simply described PHMSA's regulatory regime. His testimony contained no specific reference to how Summit will construct and operate its pipeline, only the general statement that Summit will be subject to the limited regulation by PHMSA. In his direct testimony at footnotes 5 and 6 (McCown Direct Testimony, p. 6) (App. p.), Mr. McCown refers to two internet sites. Footnote 5 is a cite to the PHMSA website, but it does not appear that the data presented there has any data

specific to carbon dioxide pipelines. And Footnote 6 refers to oil pipelines, not carbon dioxide pipelines. So Mr. McCown's testimony does nothing to support Summit's case.

An important aspect of safety regarding the pipeline is emergency response. Many, or most, of the landowners who testified stated that the closest emergency response personnel to their property were from small towns with volunteer organizations with no training to confront a carbon dioxide release. Moreover, Rod Dillon, Summit's emergency response witness, stated that:

> The primary activity of first responders in such a hypothetical situation will include isolating roads around the breach site to protect the public from entry and notifying residents downwind of the breach that may be affected. If necessary, first responders and/or Summit contractors will also conduct air monitoring for public safety.

(Dillon Direct Testimony, p. 6) (App. p.). It is significant that Mr. Dillon did not attribute to the local first responders any effort to rescue any persons in the impacted area. Even Summit's Emergency Response Plan (Dillon Rebuttal Ex. 2)(App. p.) does not mention any role for local first responders. It only addresses activities of Summit employees, but gives no indication as to how long after the pipeline breach it would take for the Summit employees to arrive on the scene. A prompt response is crucial. Exposure to a carbon dioxide concentration of 40,000 ppm is "immediately dangerous to life and health." (Schettler Direct Testimony, p. 4) (App. p.).

The hearing testimony of Thomas Craighton, Hardin County Emergency Response Coordinator, was extremely illuminating. He explained the problems with volunteer emergency departments (Hrg. Tr. p. 3622-3625) (App. p.). In a volunteer department not everyone can show up for an emergency on a moment's notice. Mr. Craighton even

described an event where no one from the New Providence department was able to respond and personnel from cities farther away were called, obviously creating a delay in responding. And if responders cannot get to the scene quickly, some victims may be what Mr. Craighton termed "unsalvageable." (Hrg. Tr. p. 3624) (App. p.). He also talked about evacuating victims, but was not sure how that would be done in responding to a carbon dioxide pipeline rupture. And Mr. Dillon said rescuing or evacuating victims would not be the responsibility of local first responders. So the evidence reveals a very distressing scenario in responding to a pipeline rupture.

Summit has made the inference that carbon dioxide pipelines are no more dangerous than other pipelines, e.g., natural gas. The inference further is that because other types of pipelines are in close proximity to people and property, people who will be near Summit's pipeline are being hysterical about the carbon dioxide pipeline. That inference is rebutted by the testimony of Jack Willingham. Mr. Willingham is the Emergency Management Director for Yazoo County, Mississippi. He and his team responded to the carbon dioxide pipeline rupture in Satartia, Mississippi in 2020. Mr. Willingham described the symptoms of the victims as follows:

> Q. Were you able to determine what sort of symptoms these people had who were exposed?
>
> A. Shortness of breath, couldn't breathe, disoriented, altered states of consciousness. We had people that evacuated their bowels all the way to the brink of death.
>
> Q. By "brink of death," what do you mean?
>
> A. I mean, like, they were going to die. Their respirations had dropped down to nothing. If it wasn't for my responders throwing them on a UTV and getting them out of the area, they would have died in their car. That's correct.

(Hrg. Tr. p. 3557-3558) (App. p.). Summit has not presented any evidence that natural gas or any other substance that is transported in pipelines will cause that kind of injury. In fact, Jorde Landowner witness Gerald Briggs testified that he was an emergency responder to the incident in Satartia, Mississippi, and that he is familiar with ruptures of oil and natural gas pipelines. Mr. Briggs testified as follows:

> All hazardous pipelines are dangerous but the one difference is the weight of the product with CO2 that is not going to go straight up in the atmosphere it's going to sink. And it's going to sink in your lower line areas and remain invisible and odorless. You can smell natural gas and it will dissipate faster. Oil is obvious when you see it and it is more localized and predicable once out of the pipeline as it is not affected by the changing air streams like CO2 is. I am not aware of a natural gas rupture directly affecting persons three or more miles away from the leak or rupture site as the CO2 did in Satartia.

(Briggs Direct Testimony, p. 21) (App. p.). So Summit is creating a distraction in trying to equate the danger of a carbon dioxide rupture with a rupture of a natural gas or oil pipeline.

Because of the unique features of carbon dioxide, consideration of safety is critical to evaluating Summit's proposal. But the discussion of safety in the IUC Order, p. 218-223, (App. p.) avoids directly addressing the issue of safety as it affects the routing decision and public convenience and necessity. The Commission said that the issue of safety weighs against Summit, but that Summit allegedly promises to undertake efforts to minimize the danger, (IUC Order p. 223) (App. p.).However, these claimed mitigation efforts are directed to responses to a pipeline rupture, not addressing the route in order to reduce the impact of a rupture. Curiously, the IUC said that it could impose route changes to place the route farther away from residences and other critical areas (IUC Order p. 221)

(App. p.). But it did not do so. The IUC Order did not move even one section of the proposed pipeline route to move the pipeline route farther away from the zone of danger.

Based on the foregoing, the Commission's decision on this issue was the product of a decision-making process in which the agency did not consider a relevant and important matter relating to the propriety or desirability of the action in question that a rational decision maker in similar circumstances would have considered prior to taking that action; based on an irrational, illogical, or wholly unjustifiable application of law to fact that has clearly been vested by a provision of law in the discretion of the agency; and was arbitrary, capricious, unreasonable, and an abuse of discretion.

It is also clear that Summit's argument throughout these proceedings that any discussion of safety is preempted has no merit. The Pipeline Safety Act, 49 U.S.C. §§ 60101 et seq., is intended to "provide adequate protection against risks of life and property posed by pipeline transportation and pipeline facilities." 49 U.S.C. § 60101(a)(1). The Act intends to accomplish this goal by "presrib[ing] minimum safety standards for pipeline transportation and for pipeline facilities. 49 U.S.C. § 60101(2). The standards "apply to any or all of the owners or operators of pipeline facilities" and "apply to the design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities." 49 U.S.C. § 60101(a)(2). Under the doctrine of *expression unius est exclusio alterius,* when a statute enumerates specific terms or conditions covered by the statute, all others are excluded. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007); *Staff Mgmt. & New Hampshire Ins. Co. v. Jimenez*, 839 N.W.2d 640 (Iowa 2013). Thus, it is clear that

PHMSA preemption applies only to to the standards enumerated in § 60101(a)(2) and only to owners and operators of pipelines. State and local decisions as to location and routing of pipelines made by entities not owners or operators of a pipeline, even if safety is a consideration in those decisions, are not preempted. Put another way, only standards related to the pipeline itself are preempted, not requirements or conditions related to other considerations, even if those are based to some extent on safety.

Following this same theme, it is important to consider that the Pipeline Safety Act does not authorize the Pipeline and Hazardous Materials Safety Administration (PHMSA) to promulgate route or location selection standards for hazardous liquid pipelines. So the PHMSA regulations in 49 C.F.R. Part 195 cannot and do not contain route selection standards.

PHMSA is tasked with adopting rules and enforcing the provisions of the Pipeline Safety Act. The PHMSA regulations, at 49 C.F.R. Part 195, cover the following areas: accident and safety-related condition reporting, design requirements, construction, pressure testing, operation and maintenance, qualifications of pipeline personnel, and corrosion control. All of these regulations relate to the construction and operation of the pipeline itself and impose obligations on the pipeline owner and operator. None of these regulations cover the location or siting of the pipeline or actions by entities other than the owner or operator of a pipeline.

In fact, the Pipeline Safety Act, 49 U.S.C. § 60104(e) specifically states, “This chapter does not authorize the Secretary of Transportation [through PHMSA] to prescribe the location or routing of a pipeline facility.” The only preemption created by the Pipeline

Safety Act states that "a State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation. 49 U.S.C. § 60104(c). Obviously, location and routing of a pipeline does not relate to safety standards, even if the location and routing decision is based to some extent on safety considerations.

Federal law can preempt state law or regulation because Article VI of the United States Constitution states that any federal law or act pursuant to federal law is the "supreme law of the land." Preemption exists under the Supremacy Clause where:

- Congress expressly intended to preempt state law, see *Jones v. Rath Packing Co.*, 430 U.S. 519, 97 S.Ct. 1305 (1977);
- there is actual conflict between federal and state law, see *Free v. Bland*, 369 U.S. 663, 82 S.Ct. 1089 (1962);
- compliance with both federal and state law is impossible, see *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 83 S.Ct. 1210 (1963);
- there is implicit in federal law a barrier to state regulation, see *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 103 S.Ct. 2890 (1983);
- Congress has "occupied the field" of the regulation, leaving no room for a state to supplement the federal law, see *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 67 S.Ct. 1146 (1947); or
- the state statute forms an obstacle to the realization of Congressional objectives, see *Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399 (1941).

Several rules of interpretation inform this analysis.

First, although there is a presumption against federal preemption when Congress legislates in a field traditionally occupied by the states, the presumption is inapplicable in fields where the federal government has had a longstanding regulatory presence. See, *United Parcel Service, Inc. v. Flores-Galarza,* 318 F.3d 323 (1st Cir. 2003).

Second, "[a] preemption question requires an examination of congressional intent." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299, 108 S.Ct. 1145 (1988). The best indication of intent is the text of the statute itself. *South Port Marine, LLC v. Gulf Oil Ltd. P'ship*, 234 F.3d 58, 65 (1st Cir. 2000). Congress explicitly may define the extent to which its enactments preempt state law. See, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95-96 , 103 S.Ct. 2890, 2898-2900 (1983). In the absence of explicit statutory language, however, Congress implicitly may indicate an intent to occupy a given field to the exclusion of state law. Field preemption may be inferred where the pervasiveness of the federal regulation precludes supplementation by the States, where the federal interest in the field is sufficiently dominant, or where "the object sought to be obtained by the federal law and the character of the obligations imposed by it . . . reveal the same purpose." *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146 (1947). To determine intent, the Court must consider the statute itself and any federal regulations implementing and explaining it. See, *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699, 104 S.Ct. 2694 (1984).

Third, where Congress has not entirely displaced state regulation in a particular field, state law is preempted when it actually conflicts with federal law. A conflict will be found when it is impossible to comply with both state and federal law, *Florida Lime and*

Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143, 83 S.Ct. 1210 (1963). or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, *Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399 (1941). See also, *California Coastal Comm. v. Granite Rock Co.*, 480 U.S. 572, 581, 107 S.Ct. 1419 (1987).

Summit has claimed that any discussion of safety is preempted, relying on three cases from the United States Court of Appeals for the Eighth Circuit: *ANR Pipeline Co. v. Ia. State Commerce Comm.*, 828 F.2d 465 (8th Cir. 1987); *Kinley Corp. v. IUB*, 999 F.2d 354 (8th Cir. 1993); and *Northern Natural Gas Co. v. IUB*, 377 F.3d 817 (8th Cir. 2004). However, none of these cases support Summit's argument for preemption.

Summit also relied on a case from the Illinois Court of Appeals, *Save Our Illinois Land (SOIL) v. Illinois Commerce Commission*, 2022 Il. App. (4th), 210008 (Jan. 12, 2022). That decision does not provide any support for Summit, either.

The *ANR* decision can readily be distinguished because its preemption analysis considered a remarkably comprehensive and direct conflict between state and federal law. The state statute at issue, Iowa Code Chapter 479, incorporated by reference and sought to enforce the entire body of federal pipeline safety standards. The extensive nature of the conflict between federal and state law meant that the court had no need to evaluate the jurisdictional boundaries of the field of pipeline safety. In particular, the *ANR* court did not consider the scope of state jurisdiction over routing or emergency response to pipeline ruptures, both of which are preserved to states by the plain language of the Pipeline

Safety Act itself. As such, the *ANR* decision offers no substantial guidance here and is not controlling precedent.

The ANR Pipeline Company sought to construct an interstate natural gas pipeline subject to federal jurisdiction under the Natural Gas Pipeline Safety Act (the precursor to the Pipeline Safety Act) and the Natural Gas Act, 15 U.S.C. § 717 et seq., which grants the Federal Energy Regulatory Commission (FERC) authority to route interstate natural gas pipelines. *ANR*, 828 F.2d at 466. FERC authorized construction and the company began to construct the pipeline 10 days before the Commerce Commission's permit hearing. So the Commission fined ANR for beginning construction before obtaining a state permit, based on state regulations. In response, ANR sought a declaratory judgment in federal court.

The state law at issue, Iowa Code Chapter 479, purported to give the state supervisory authority over construction, operation, inspection, and maintenance of intrastate and interstate gas pipelines. Section 479.4 authorized the Commission to:

> inspect and examine the construction, maintenance and the condition of said pipelines . . . and whenever said board shall determine that any pipeline , , , or any apparatus, device or equipment used in connection therewith is unsafe and dangerous . . . it shall immediately in writing notify said pipeline company, constructing or operating said pipeline . . . , device, apparatus or other equipment to repair or replace any defective or unsafe part or portion of said pipeline . . . .

Section 479.5 required that pipeline companies obtain a permit to "construct, maintain and operate" a pipeline. Pursuant to § 479.17, the Commission "adopted as its own regulations the construction, operation, maintenance, and safety standards promulgated by the U.S. Department of Transportation . . . ." *ANR*, 828 F.2d at 467, 469. Section 479.12 authorized the state to issue a permit "upon such terms, conditions and restrictions **as to**

safety requirements and as to location and route as may be determined by it to be just and proper." (emphasis added). Section 479.28 authorized the state to "commence an equitable action . . . where said defective, unsafe, or dangerous portion of said pipeline, device, apparatus or equipment is located to compel compliance . . . ." Thus, Iowa had adopted the full scope of federal pipeline safety standards into state law and claimed jurisdiction to enforce those standards. The statute also asserted state jurisdiction over routing of interstate natural gas pipelines, which is preempted by the Natural Gas Act and the authority assigned to FERC, but that issue was not raised in the *ANR* case. Due to the incorporation by reference of express federal safety standards, a more direct and comprehensive conflict with federal authority cannot be imagined.

Due to the direct and comprehensive conflict between federal and state law, the *ANR* court preempted Chapter 479 in its entirety, including both its safety-related and non-safety provisions as the court ruled that these could not be severed. The nature of the conflict was such that the court had no need to consider the precise boundary between safety and non-safety regulation. Instead, the court acknowledged that the issue of state regulation of non-safety matters was not before it and that state regulation of pipelines might be allowed "as long as the state regulations do not conflict with existing federal standards." *ANR*, 828 F.2d at 473.

The pipeline at issue in the *ANR* decision was an interstate natural gas pipeline, such that it was subject to FERC routing jurisdiction under the Natural Gas Act, 15 U.S.C. § 717f. Therefore, the court had no occasion to analyze the scope of state routing

authority over hazardous liquid pipelines recognized in the Pipeline Safety Act, 49 U.S.C. § 60104(e).

The *ANR Pipeline* decision, as an interstate natural gas pipeline case, could not and did not consider the impact of § 60104(e) and its precursor language on the scope of federal preemption under the Pipeline Safety Act. Since Congress first enacted pipeline safety legislation in 1968 as the Natural Gas Pipeline Safety Act, it has made clear that the Pipeline Safety Act is not a routing statute. The 1968 Act defined the term "pipeline facilities" to include:

> without limitation, new and existing pipe rights-of-way and any equipment facility, or building used in the transportation of gas or the treatment of gas during the course of transportation **but "rights of way" as used in this chapter does not authorize the Secretary to prescribe the location or routing of any pipeline facility**.

49 U.S.C. § 1671(4) (1968)(since transferred to the Pipeline Safety Act) (emphasis added). Since the only use of the term "rights-of-way" in the 1968 law is in this jurisdictional definition, it should be understood to mean that while federal pipeline safety law applied within new rights-of-way for "pipeline facilities," it left decisions on the choice of "location or routing" for such rights-of-way to other entities, which for interstate natural gas pipelines was then the Federal Power Commission (now FERC), and for petroleum pipelines was the states. This language was subsequently adopted into the Hazardous Liquid Pipeline Safety Act of 1979, Pub. L. No. 96-129, 98 Stat. 989, 1003-16, the first application of federal pipeline safety law to hazardous liquid pipelines, and codified at 49 U.S.C. § 2001(4) (1979). In its 1994 re-authorization of the Pipeline Safety

Act, Congress moved the "location and routing" savings clause from this definition, and instead adopted 49 U.S.C. § 60104(e), which more broadly states:

> This chapter does not authorize the Secretary of Transportation to prescribe the location or routing of a pipeline facility.

Both the earlier and current versions of the savings clause make clear that the Pipeline Safety Act does not grant the federal government jurisdiction over routing decisions, nor do these provisions contain any express limitations on state routing discretion, with regard to the policy factors that a state may consider when choosing a route or for any other reason. Therefore, the Pipeline Safety Act recognizes that states retain jurisdiction and unlimited discretion over the field of hazardous liquid pipeline routing. Further, Pipeline Safety Act safety standards "apply . . . exclusively to owners and operators of pipeline facilities," 49 U.S.C. § 60102(a)(1)(A), such that the Department of Transportation has no jurisdiction to impose routing safety standards on state or local governments. Thus, the Pipeline Safety Act recognizes that states retain their full original jurisdiction to route interstate hazardous liquid pipelines based on any policy factors they deem relevant.

The *ANR Pipeline* decision can be distinguished from the present situation because the court did not discuss or analyze the impact of the Pipeline Safety Act's "location or routing" savings clause on the scope of state routing discretion. This being said, the court recognized that a state may regulate within a "field" preserved for state regulation by Congress. *ANR,* 828 F.2d at 471, *citing Cardiff Acquisitions, Inc. v. Hatch*, 751 F.2d 906, 913–16 (8th Cir. 1984). Since the field of pipeline routing is retained

within state jurisdiction, a finding that states may consider safety as a policy factor in their routing decisions is consistent with the *ANR* decision.

The issue of state jurisdiction over emergency response was not before the court, because Iowa Code Chapter 479 did not authorize or otherwise regulate state emergency response to pipeline ruptures, and because the direct and comprehensive conflict between Chapter 479 and the Pipeline Safety Act meant that the *ANR Pipeline* decision had no need to analyze the precise boundaries of the field of "pipeline safety."

Therefore, the *ANR Pipeline* decision can be distinguished from the situation here, because the court considered a clear-cut case of conflict preemption and did not analyze the boundary between federal and state jurisdiction on routing; regulation of entities other than pipeline owners and operators on safety matters; or regulation of pipeline owners and operators on non-safety matters. Thus, the ANR Pipeline decision is neither controlling nor does it provide substantial guidance on the scope of state jurisdiction to regulate pipelines not subject to Pipeline Safety Act preemption.

The *Kinley* decision contains no binding precedent because it merely extended the holding of the *ANR* decision to hazardous liquid pipelines and did not consider the scope of state jurisdiction over routing or emergency response. The court restated federal preemption law, briefly discussed the Pipeline Safety Act's legislative history, noted that the version of Chapter 479 at issue was "virtually identical" to that analyzed by the *ANR* court, and therefore found the *ANR* decision to be controlling. Kinley, 999 F.2d at 359-60 and n. 4. Consequently, the *Kinley* decision contains far less analysis than the *ANR* decision. Iowa argued that its enforcement action was allowed because it was based solely

on a non-safety financial responsibility requirement, but the court rejected this argument because: (1) of evidence in a letter from the state that it was concerned for safety; (2) of the timing of enforcement; and (3) it found, as did the *ANR* court, that the non-safety provisions were not severable from the preempted portions of the statute. *Id*. at 359.

Summit has cited the *Kinley* decision for the proposition that mere consideration by a state of safety concerns may taint a state action. Such interpretation is excessively broad. While the court acknowledged that the state was concerned about safety, this fact was not necessary to or an element in the court's holding, which states:

> We agree with the district court that this issue was resolved by the *ANR* decision. In *ANR* we held that the hearing, permit and inspection provisions of Chapter 479 as it existed in 1987, which are essentially identical to the hearing, permit and inspection provisions in the current Chapter 479 were preempted by the NGPSA, . . . Because the former Chapter 479, which was at issue in ANR, is virtually identical to the current Chapter 479, we think ANR is controlling here. Accordingly, we hold that the hearing, permit and inspection provisions of Chapter 479 are so related to federal safety regulations that they are preempted by the HLPSA with respect to interstate hazardous liquid pipelines. We also hold that the environmental and damage remedies provisions are not severable from the preempted hearing, permit and inspection provisions and thus are preempted as well.

Id. at 360. While the federal courts may take evidence of the purpose of a state action into account, federal preemption law focuses on the effect of state regulation, not its purpose. *See Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963) ("The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives."); see also, *United States v. Board of County Commissioners of County of Otero*, 843 F.3d 1208, 1214-15 (10th Cir. 2016). As the *ANR*

decision before it, the *Kinley* decision is based on a direct and comprehensive conflict between federal and state law, and the *Kinley* decision also did not analyze the scope of state jurisdiction over pipeline routing or emergency response.

The *Northern Natural Gas* decision, like the *ANR* decision, was based on the Natural Gas Act and FERC's authority under the Act to make the decision on location and routing of natural gas pipelines, and FERC's regulations carrying out that authority. The Pipeline Safety Act was not even mentioned in the opinion. So, just as in the prior cases, the preemption by federal law was clear, but irrelevant to carbon dioxide pipelines.

Northern Natural Gas sought to upgrade its pipeline near DeWitt, Iowa. The company was authorized to do this by a "blanket certificate" that was issued by FERC. This authorization also required Northern Natural Gas to abide by FERC's environmental standards. But the IUB also had regulations on land restoration, so Northern Natural Gas asked the Board to waive those requirements because the company had to abide by the FERC rules. The Board refused to grant a waiver. The company then filed suit in federal court for a declaratory judgment.

The Eighth Circuit held that the Iowa statutes and IUB regulations regulated a field that was occupied by federal law. The court cited a then-recent U.S. Supreme Court case, *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 108 S.Ct. 1145 (1988), as controlling authority. In *Schneidewind* the state required the pipeline company to obtain state approval to issue securities to finance the project. The *Schneidewind* court held that FERC had authority to determine the financial requirements for a pipeline permit and had therefore occupied the field. State regulation was therefore preempted.

The *Northern Natural Gas* court summed up as follows:

> We believe it follows from *Schneidewind* that the Iowa provisions regulate in an occupied field, and are thus preempted by the Natural Gas Act. The NGA confers on the FERC authority over the issues addressed by the Iowa statutory and regulatory provisions. The NGA specifically provides that the FERC will oversee the construction and maintenance of natural gas pipelines through the issuance of certificates of public convenience and necessity. See, 15 U.S.C. § 717f(c). The FERC has authority to regulate the construction, extension, operation, and acquisition of natural gas facilities, see *id.* § 717f(e)(1)(A), and does so through its extensive and detailed regulations concerning applications for certificates. See generally 18 C.F.R. Part 157, Subpart A.
>
> Many of the FERC's regulations relate to environmental concerns.
>
> **********
>
> We think it is undeniable that Congress delegated authority to the FERC to regulate a wide range of environmental issues relating to pipeline facilities, and we agree with the conclusion of the Second Circuit that "[b]ecause FERC has authority to consider environmental issues, states may not engage in concurrent site-specific environmental review."

So the *Northern Natural Gas* case involved a natural gas pipeline that was governed by the Natural Gas Act which gave FERC broad authority over permitting and regulating all aspects of the pipeline. So preemption was clear. None of those factors are present in this case.

The *SOIL* decision highlights the fact that the Pipeline Safety Act imposes safety standards on the pipeline operator for the construction and operation of the pipeline itself. The Act does not regulate location and routing decisions, even if safety is a consideration in the location and routing decision.

Dakota Access sought to increase the volume of crude oil that would flow through its existing pipeline in Illinois. Citizens who opposed the increased volume on the pipeline were concerned about the leak detection system on the pipeline. The Illinois

court noted that the Pipeline Safety Act provides that "[a] State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation," citing 49 U.S.C. § 60104(c). *SOIL* at ¶ 88. The court held that a leak detection system is a safety standard, so the issue raised by the citizens was preempted by federal regulation. Location and routing decisions were not at issue in this case.

It is important to distinguish what constitutes a safety standard as referred to in the Pipeline Safety Act. This point was discussed in some detail in *Texas Midstream Gas Services LLC v. City of Grand Prairie*, 608 F.3d 200 (5th Cir. 2010). In that case the pipeline company proposed to construct a natural gas pipeline and compressor station in the City of Grand Prairie. The City then amended its local ordinance to impose a setback distance for the compressor station. The pipeline company argued that the City's action was preempted by federal law.

The *Grand Prairie* court began its analysis by noting that the Pipeline Safety Act was passed in 1994 to consolidate the provisions of the Natural Gas Pipeline Safety Act and the Hazardous Liquids Pipeline Safety Act. The court noted that the Pipeline Safety Act is intended to "provide adequate protection against risks to life and property posed by pipeline transportation and pipeline facilities.," citing 49 U.S.C. § 60102(a)(1). The court went on to state that the Act expressly preempts state "safety standards for interstate pipeline facilities or interstate pipeline transportation," citing 49 U.S.C. § 60104(c). Finally, the Court explained that the Act requires PHMSA to set minimum safety standards for pipeline installation, operation, and maintenance. One of those PHMSA safety standards dealt specifically with compressor stations. 49 C.F.R. § 192.163(a),

including a requirement that the compressor building must be far enough away from adjacent property to minimize the spread of fire and to allow space for fire-fighting equipment.

The court forcefully held that the setback requirement was not a safety standard. The court said:

> A local rule may incidentally affect safety, so long as the effect is not "direct and substantial," [citing *Schneidewind v. Paul*].
>
> **********
>
> However, the PSA [Pipeline Safety Act] itself only preempts *safety* standards. Section 192.163, and administrative regulation, touches on compressor station location as a means of effectuating this legislative directive. . . . But TMGS has not shown that the setback requirement hinders Congress's intent by reducing safety, nor that it is "physically impossible" to comply with Section 10 and § 192.163(a). . . . TMGS raises the prospect that an operator of a compressor station may have to acquire more land to comply with both requirements. This may cost TMGS money, but it does not twart "the full purposes and objectives of Congress."

So it is clear that location and routing decisions by state or local authorities are not safety standards that are preempted by federal law.

Washington Gas Light v. Prince George's County Council, 711 F.3d 412 (4th Cir. 2013), affirming *Washington Gas Light C. v. Prince George's County Council,* 2012 WL 832756 (D. Md.), involved the denial of a county zoning permit to site a proposed intrastate liquified natural gas ("LNG") facility at an existing natural gas terminal. The project developer argued that the county zoning action was preempted by both the Natural Gas Act, 15 U.S.C. § 717 *et seq*. ("NGA") and the Pipeline Safety Act. The court held that the proposed LNG terminal was an intrastate facility subject to state and local siting rules, such that the NGA did not apply. As such, both the district court and court of

appeals considered whether the county land use decision was preempted by the Pipeline Safety Act.

The first Pipeline Safety Act issue considered was whether the proposed terminal's status as an intrastate facility allowed the county to avoid preemption. The district court recognized that Section 60104(c) does not preempt state safety standards for intrastate pipelines, provided they are no less stringent than federal standards, 49 U.S.C. § 60104(c), and therefore held that express preemption did not apply. However, the court then analyzed whether field and conflict preemption nonetheless barred the county permit denial as an interference with minimum federal safety standards, such that the issue of Pipeline Safety Act preemption need be addressed.

The case was also complicated by the fact that the facility at issue was a LNG terminal, subject to the Pipeline Safety Act LNG-specific location and safety standards in § 60103(a), (b), and (d) and 49 C.F.R. Part 193, and by the fact that PHMSA had delegated pipeline safety authority over intrastate pipelines to the State of Maryland pursuant to Section 60105(a). Pursuant to this authority, Maryland adopted the federal Pipeline Safety Act LNG location and safety standards in their entirety by reference as minimum safety standards. This included the location standards authorized by 49 U.S.C. § 60103(a) and promulgated in 49 C.F.R. §§ 193.2057, 193.2059, and 193.2067, 193.2155(b), and 193.2187. Maryland assigned responsibility for implementation of these federal safety and location standards to the Maryland Public Service Commission ("MDPSC"), which stepped into PHMSA's shoes in accordance with 49 U.S.C. § 60105(a). Therefore, federal pipeline safety and location standards applied in Maryland to

intrastate natural gas facilities to the same extent as they applied to interstate facilities. Further, the county that denied a siting permit had no authority to implement or enforce the Pipeline Safety Act. Therefore, the issue of whether a county zoning decision based in part on safety interfered with application of federal pipeline safety standards was squarely before the court.

The district court held, "to the extent the MDPSC stands in place of the Secretary of Transportation under the PSA, the Secretary too lacks authority to make siting or locating decisions for storage facilities," thus recognizing that the Pipeline Safety Act granted neither the MDPSC nor the U.S. Secretary of Transportation authority to regulate routing. *Washington Gas Light*, 1012 WL 832756 at 6.

Since state law did not grant the MDPSC authority to make location or siting decisions for intrastate natural gas facilities, jurisdiction to determine the location of the proposed LNG facility was a matter of local land use regulation. In considering whether the Pipeline Safety Act's LNG "location standards" preempted consideration of other factors, the district court held, "it is not accurate to characterize the PSA's treatment of [LNG facility] location as comprehensive. To the contrary, the PSA and its accompanying federal and state regulations address location and land use only as one of many factors to consider when adopting safety standards." *Id.* at 8.

Further, the district court rejected the argument that the Pipeline Safety Act considers location a safety standard, because:

> The PSA recognizes that safety considerations should affect location decisions for LNG facilities and provides that the safety standards established pursuant to the PSA should guide the relevant decision-maker as he makes siting decisions. The PSA does not conflate the two. Moreover, the language of the PSA indicates that

> some entity other than the Secretary of Transportation (or the MDPSC when it stands in the secretary's place) shall make decisions regarding siting and location of facilities. **When the same statute simultaneously authorizes one entity to set safety standards and does not authorize that entity to make siting decisions, the only logical interpretation is that location is not a safety standard.** It is also noteworthy that for interstate gas facilities, the PSA operates alongside the NGA, and under the NGA, FERC makes siting decisions for interstate LNG facilities. This is further evidence that the PSA does not govern the location of LNG facilities.

Id. (emphasis added). Thus, the district court recognized that siting decisions and safety standards are distinct fields of law, such that "location is not a safety standard." *Id*.

The district court also rejected the argument that, "the structure of the applicable federal and state laws allows the utility to choose the location for a natural gas facility in the first instance and then requires that federal (or certified state) authorities approve or disapprove that location on safety and other grounds," meaning under Pipeline Safety Act jurisdiction. *Id*. The court rejected this argument because:

> PSA approval is not the only approval that is applicable to an LNG facility and that the PSA's structure does not foreclose the applicability of local land use laws. For interstate facilities subject to FERC jurisdiction, FERC takes local land use laws into consideration when issuing its certificates for convenience and necessity and often directs utilities to work with state and local governments to obtain other applicable permits. Where FERC does not have jurisdiction, it follows that state or local entities apply their own land use laws directly.

Id. Since the Pipeline Safety Act expressly withholds jurisdiction to determine the location or route of a LNG facility, state or local governments may "apply their own land use laws directly." *Id*.

Finally, the district court reasoned that, "the only plausible way in which Prince George's County's land use laws could be preempted by the PSA is if the land use regulations could be properly classified as safety standards." *Id*. at 9. The court reviewed

the purpose of the county ordinance and found that "[c]ertainly safety considerations play a role in all zoning decisions, but in this case they clearly were not the primary motivator for the County in establishing the [local land use plan]. In sum, the [local land use plan] is not a safety standard." *Id*. While it could be argued that the incidental nature of consideration of safety by the county preserved its ordinance, this is not the case, because the court also found that the local zoning action did not in practical effect conflict with the Pipeline Safety Act:

> There is also no conflict between the [land use plan] and the PSA. Washington Gas can comply with both statutes simultaneously because adhering to the local land use requirements will not force Washington Gas to place its LNG storage facility in a location deemed unsafe according to the [LNG location] safety standards in place pursuant to the PSA.

Id. at 10. Therefore, even though the Pipeline Safety Act expressly authorizes PHMSA to issue "location standards" for LNG facilities as part of its pipeline safety jurisdiction, the existence of these "location standards" does not preempt county siting jurisdiction where there is no direct conflict between the Pipeline Safety Act and a county ordinance. *Id*. That is, if a facility operator can fully comply with both the Pipeline Safety Act and a county siting ordinance, there is no federal preemption.

It follows that for hazardous liquid pipelines, for which there are no Pipeline Safety Act "location standards," that a hazardous liquid pipeline operator can always comply with both the Pipeline Safety Act and a state or county siting law, because there are no PHMSA "location standards" with which a state or county law could conflict.

In upholding the district court, the circuit court also evaluated the county's right to control local land use in light of § 60104(c) and § 60104(e). 711 F.3d at 422; *see also* 784

F.Supp.2d at 576. The Court of Appeals held that, "the PSA does not preempt the County Zoning Plans because the PSA only preempts safety regulations and the County Zoning Plans are not safety regulations . . . ." *Id*. at 414. More specifically, it stated:

> Even if we were to find that the PSA has preemptive effect beyond the express preemption provision discussed in 49 U.S.C. § 60104(c), we would not conclude that Congress intended the PSA to occupy the field of natural gas facility siting. Specifically, the PSA expressly circumscribes the Secretary of Transportation's role in this area, indicating, "[t]his chapter does not authorize the Secretary of Transportation to prescribe the location or routing of a pipeline facility." 49 U.S.C. § 60104(e) (2006).

Id. at 422. Thus, § 60104(e) draws a bright line between the field of facility siting and the field of pipeline safety. *Id*. at 422.

The LNG company also argued that the zoning plan was "safety regulations in disguise" because the City denied the permit based on safety grounds. *Id*. at 421. The court rejected this argument, saying:

> At their core, the County Zoning Plans are local land use provisions designed to foster residential and recreational development. Even assuming safety concerns played some part in the enactment of the County Zoning Plans, those concerns would have been merely incidental to the overall purpose of the County Zoning Plans.

Id. at 421-22. Because the County Zoning Plan was not an attempt to impact application of Pipeline Safety Act safety standards, it was not a safety standard even if safety considerations played some role in the adoption of the plan.

In considering whether the County Zoning Plan was subject to conflict preemption, the court held:

> the County Zoning Plans do not stand as an obstacle to the accomplishment of the full purposes of Congress, because, as noted above, Congress' purpose in enacting the PSA was to create federal minimum safety standards on all natural gas pipeline facilities. See 49 U.S.C. § 60102(a). Because the County Zoning

> Plans are not safety standards, they do not stand as an obstacle to the accomplishment of this purpose.

Id. at 422. Although the Court of Appeals did not expressly consider whether safety may be considered as part of a state siting decision, it nonetheless rejected the proposition that zoning decisions are "safety standards" within the meaning of the Pipeline Safety Act. It also made clear that mere consideration of safety issues in a local land use decision does not convert such decision into a Pipeline Safety Act safety standard.

In *Portland Pipe Line v. City of South Portland*, 288 F.Supp.3d 321 (D. Me. 2017), a pipeline developer proposed to construct a new crude oil loading terminal in South Portland, Maine. This terminal would be supplied with crude oil via reversal of the Portland-Montreal Pipe Line ("PMPL"), an interstate hazardous liquid pipeline facility subject to the Pipeline Safety Act. In response, the city enacted an ordinance prohibiting new crude oil loading infrastructure including modifications to the PMPL necessary for such loading. The city based its decision in part on the increased risk of oil spills that would result from such modification.

In response, the pipeline company sued the city on a number of grounds, including whether the facility siting ordinance was preempted by the Pipeline Safety Act. The company presented three arguments:

- "the true purpose of the Ordinance is actually to stop the transportation of crude oil into the United States through the Harbor because the City 'deemed Canadian 'tar sands' an unsafe product . . . ;'" *id*. at 408;
- the ordinance was preempted "because of the "impact on pipeline operations and related safety measures . . . ;" *id*. at 408-09; and

- the goal of uniform regulatory standards will be obstructed if a locality may "dictat[e] in which direction oil may flow, based on its own conclusions as to what regulation makes sense to it for an international pipeline . . .;" *id*. at 409.

The court provided a detailed review of the scope of safety standards authorized in the Pipeline Safety Act, as well as the hazardous liquid safety standards promulgated in 49 C.F.R. Part 195. It concluded that the city ordinance is not a preempted "safety standard" for the following reasons.

First, the court found that a "prohibition" is not a "standard" as these words are defined by Black's Law Dictionary. 288 F.Supp.3d at 429-30.

Second, it found that it was not impossible for the pipeline company to comply with the ordinance, because the ordinance regulated an activity at one end of the pipeline but did not set any additional safety requirements for modification or operation of the pipeline itself. 288 F.Supp.3d at 430. It reasoned that the pipeline company could operate the pipeline in compliance with both the Pipeline Safety Act and the ordinance, in that no provision in the Pipeline Safety Act required the pipeline operator to load crude oil or to transport oil in any particular direction. *Id*. That is, the Pipeline Safety Act regulates how a pipeline is operated; it does not require that it operate in a particular direction or at all.

Third, the court found that "[a] ban on one form of subsequent transportation at the end of the pipeline is not in conflict with the goal of promoting the safety of pipelines and preventing spills . . ." and "does not set competing levels, quantities, or technical specifications that make complying with both the Pipeline Safety Act and the Ordinance

more difficult." *Id*. The Pipeline Safety Act regulates how a pipeline is operated; it does not regulate what happens to a product transported after it leaves a pipeline.

Fourth, the court found that, "perhaps most importantly, the preemptive scope of the PSA, as expressed in § 60104(c), is explicitly limited by § 60104(e). Congress did not intend the PSA to preempt state and local authority 'to prescribe the location or routing of a pipeline facility.'" *Id*. *citing* 49 U.S.C. § 60104(e). The court reasoned that under their police powers state and local governments retain authority to prohibit pipelines altogether, and this authority can be displaced only by clear congressional intent, yet § 60104(e) demonstrates an explicit intent that this power is retained by the states. *Id*. Congress enacted safety standards that apply whenever a pipeline is permitted, but the issue of whether and where a pipeline should operate is left entirely to state and local discretion.

The *Portland Pipe Line* court discussed the *Washington Gas Light* decision, and while it cited with approval the Fourth Circuit Court of Appeals finding that the county zoning plan there was not a safety regulation, it rejected the utility of investigating the motivation behind a state or local law based on First Circuit precedent:

> The purpose or intent of the local law may be relevant in some limited circumstances where the federal statutes themselves appear particularly focused on local legislative purpose, like nuclear power and occupational health and safety. But in general, preemption doctrine and First Circuit precedent focus on the intent of the federal law and the effect of the local law on that federal law's goals.

Id. at 433-44. It found that the inquiry should focus objectively on whether a state or local law is "facially proper under state and local police power." *Id*. at 434. Accordingly, the court held that "any overlapping concern about "safety" that the City Council may have

had when it enacted the Ordinance is not sufficient to convert a ban on loading crude oil into a competing "safety standard" preempted under the PSA." *Id*.

Although the *Portland Pipe Line* decision did not consider the scope of state and local discretion over the policy factors used to determine where a pipeline should be constructed, it did find that state and local agencies have discretion to determine whether or not a pipeline should operate at all or in a particular direction. Moreover, it rejected the proposition that a concern about "safety" is sufficient to turn an action within state and local jurisdiction into a "safety standard" preempted by the Pipeline Safety Act.

Bad River Band of the Lake Superior Tribe of Chippewa Indians v. Enbridge Energy Co., Inc., 2022 WL 4094073 (W. D. Wisc. 2022), involved a decision by the Bad River Band of the Lake Superior Tribe of Chippewa Indians to not renew a right-or-way agreement, thereby forcing a re-route of Enbridge Energy Company's ("Enbridge") Line 5 pipeline. The Band based its decision on a finding that "an oil spill on the Reservation 'would be catastrophic' and would 'nullify our long years of effort to preserve our health, subsistence, culture and ecosystems.'" *Id*. at 3. In response, Enbridge refused to remove its pipeline, and the Band filed suit. Enbridge defended its refusal on a number of grounds, including that the Band's trespass claim was barred by the Pipeline Safety Act. Specifically, it argued that "because the Band is withholding its consent to renewed easements on the allotment parcels based on safety concerns, the Band's actions are preempted by the Act." *Id*. at 11. Essentially, Enbridge argued that a siting decision based on safety is preempted.

The court rejected Enbridge's preemption argument, stating:

> The glaring problem with this argument is that while the Band's refusal to consent to easements may be based in part on safety concerns (at least environmental in nature), it is **not** based on any imposition of safety **standards**. Nor has Enbridge been able to cite **any** legal authority supporting its argument that the Pipeline Safety Act would **require** a tribe (or any other landowner for that matter) to grant or renew an easement for a pipeline across its land simply because it has concerns about the safety of doing so.

Id. (emphasis in original). Although the *Bad River* court relied on a somewhat different analysis than the *South Portland* court in finding that a refusal to site a facility is not a safety standard, the result was the same: both courts found that siting decisions based on safety are not safety standards.

Enbridge also argued that Congress via the Pipeline Safety Act intended to displace the Band's siting decision based on safety grounds. *Id*. at 20. According to the court, "[t]he doctrine of displacement rests on the premise that federal common law is subject to the paramount authority of Congress," and that "it is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest." *Id*. That is, where "Congress has provided a sufficient legislative solution," it displaces federal common law. *Id*.

According to the court, Enbridge argued "the very purpose of the Pipeline Safety Act is to protect against risks of damage posed by interstate pipelines" using safety standards, such that the Band's safety-related siting decision is displaced by the Pipeline Safety Act. *Id*. at 20. Essentially, Enbridge argued that the Band had no authority to not renew the right-of-way based on safety concerns because the Pipeline Safety Act provided sufficient protection against safety risks. The court rejected this argument on three grounds, two of which are relevant here.

First, it found that "the Band is not seeking an injunction that would impose safety regulations addressed already by the Pipeline Safety Act or federal regulation." *Id*. at 21. That is, it found that the Pipeline Safety Act's generally applicable safety standards did not address the Band's route-related safety concerns, and that the Pipeline Safety Act's safety standards were related to non-route matters. *Id*. Given that the Pipeline Safety Act does not authorize route-related safety remedies, it did not and could not address the Band's route-related concerns.

Second, the court found that § 60104(c) preempts only state law safety standards, and that the Band's ejectment claim "is not seeking to impose specific pipeline safety standards on Enbridge," such that the Pipeline Safety Act did not displace the Band's action. *Id*. That is, the court again found that a decision on siting is not a safety standard under the Pipeline Safety Act.

Thus, the *Bad River* decision joined with the *Washington Gas Light* and *South Portland* decisions in rejecting the proposition that consideration of safety in a siting decision for a facility subject to Pipeline Safety Act jurisdiction is preempted by action of § 60104(c). All three courts found that a rejection of a facility location application for safety reasons is not a "safety standard" under the Pipeline Safety Act. The *Washington Gas Light* court provided the most detailed analysis and found that the field of facility siting is distinct from the field of pipeline safety, such that state routing decisions are not subject to regulation under the Pipeline Safety Act and are not pipeline safety standards even if partially based on safety concerns.

The Pipeline Safety Act states that it provides no jurisdiction to PHMSA to determine the location or route of a pipeline facility. 49 U.S.C. § 60104(e). Accordingly, the Pipeline Safety Act itself establishes no federal route permitting process for hazardous liquid pipelines, nor does it contain any standards for routing hazardous liquid pipelines, safety-related or otherwise. Accordingly, PHMSA has no jurisdiction to determine route, and it has not promulgated route permitting regulations or safety standards applicable to routing. *See* 49 C.F.R. Parts 192 (natural gas Pipeline Safety Act regulations) and 195 (hazardous liquid regulations). Since Congress has not extended federal jurisdiction to routing hazardous liquid pipelines, under the Tenth Amendment to the U.S. Constitution, such authority remains with the states or the people. U.S. Const. Amend. X.

This prohibition on federal routing of hazardous liquid pipelines is consistent with the scope of safety standards defined by the Pipeline Safety Act. Section 60102(a)(2)(B) limits the scope of safety standards to regulation of "owners or operators" of pipeline facilities with regard to the "design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities." Safety standards related to location and route are not listed as a matter within this scope, which is consistent with Section 60104(e).

The plain language of the Pipeline Safety Act does not define the term "safety standard" to include every conceivable governmental action that touches on safety. Instead, "safety standards" are limited to the regulation of owners and operators with regard to the specific list of activities contained in § 60102(a)(2)(B). Under this plain language, PHMSA has no jurisdiction to direct pipeline safety actions by state or local

governments or parties that do not own or operate pipelines. The Pipeline Safety Act does not authorize PHMSA to issue regulations mandating state or local government action on routing or for any other reasons, and it also does not grant PHMSA jurisdiction over landowners adjacent to a hazardous liquid pipeline right-of-way to prohibit activities that could endanger a pipeline. All of PHMSA's safety standards are directed exclusively at pipeline owners and operators.

If Congress had wanted to prescribe standards for hazardous liquid route selection, it could have done so, but it did not. In comparison, in § 60103(a) Congress expressly authorized PHMSA to prescribe "location standards" for liquified natural gas ("LNG") pipelines. These LNG location standards are **in addition to** the LNG pipeline safety standards in Section 60103(b) for "designing, installing, constructing, initially inspecting, and initially testing" and in Section 60103(d) for operation and maintenance The fact that Congress expressly authorized PHMSA to prescribe "location standards" for LNG pipelines but has not authorized them for hazardous liquid and CO_2 pipelines is a clear indication that it does not want to limit or condition state and local discretion over pipeline routing.

The fields of pipeline routing and pipeline safety are distinct. The pipeline route selection process is a complex, multifaceted regulatory effort that may consider a wide variety of potential economic, environmental, and community welfare impacts that would result from different alternative routes. State routing decisions may impact landowners subject to easements, adjacent landowners, business owners, and public and private natural resources, may direct action by the pipeline developer as well as state agency

staff, and may provide mitigation benefits to a wide variety of impacted entities. Many states, including Iowa, Minnesota, Illinois, and North Dakota, have enacted hazardous liquid pipeline route legislation that authorize consideration of a wide variety of policy factors. Iowa Code § 479B.9; *Puntenney v. IUB*, 928 N.W.2d 829 (Iowa 2019). The Pipeline Safety Act is written to respect state control over the field of pipeline routing and to apply fully to any selected route, regardless of the policy factors used to select it.

In contrast, the field of pipeline safety is circumscribed to regulate pipeline owners and operators with regard to the "design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance" of their pipelines, **and nothing else**. 49 U.S.C. § 60102(a)(2)(B). This includes matters such as pump and compressor design, pipe steel strength, corrosion control, maintenance standards, etc., all of which are within the direct control of pipeline owners and operators. The field of pipeline safety is legally and practically distinct from the field of pipeline routing.

Congress has preempted the field of pipeline safety standards, but it has not preempted the field of pipeline routing, which for hazardous liquid pipelines remains within state and local jurisdiction. Within this exclusive jurisdiction, state and local governments have complete discretion to consider safety and any other routing policy factor. Once a state or local government chooses a route, regardless of the reasons for the choice, the Pipeline Safety Act safety standards defined in Section 60102(a)(2) can apply fully to that route. As such, state consideration of safety as a "location standard" does not interfere with full expression of federal pipeline "safety standards," such that state and

local consideration of safety in routing decisions is not preempted by the Pipeline Safety Act.

Nothing in the Pipeline Safety Act expressly or impliedly limits the scope of policy factors that a state or local government may consider in routing, safety or otherwise. The Pipeline Safety Act entirely leaves responsibility for routing pipelines entirely to state jurisdiction and discretion. Absent a clear congressional mandate, either express or implied, to limit state jurisdiction and discretion, the federal courts will not give a federal statute preemptive effect. *Head v. New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424, 83 S.Ct. 1759, 10 L.Ed.2d 983 (1963). Here, Congress has not expressly stated that states may not consider safety issues in routing determinations. If it wanted to limited state discretion over routing, it certainly could have included language in § 60104(e) limiting state authority, but it did not. Therefore, a federal prohibition on state consideration of safety in routing can only arise by clear implication. Yet, nothing in the Pipeline Safety Act indicates such congressional intent. The Pipeline Safety Act is otherwise silent on the routing of hazardous liquid pipelines.

While it could be argued that the overall structure and purpose of the Pipeline Safety Act indicates that Congress intended the Act to be the only means to improve pipeline safety, such argument does not rise to the level of a clear mandate. Instead, the plain language of the Pipeline Safety Act leaves the entire field of pipeline routing to the states without reservation. Therefore, any limitation on state discretion in routing determinations would be disfavored by the courts, and the Pipeline Safety Act would not have preemptive effect over state routing decisions.

It could also be argued that Congress intended to preempt all state action that has as its purpose improving pipeline safety, but "[w]hether or not federal legislation preempts state and local regulation rests on the effect rather than the stated purposes of the legislation." *Northern Border Pipeline Co. v. Jackson County, Minn.*, 512 F. Supp. 1261 (1981); *citing Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963). As stated in *United States v. Board of County Commissioners of County of Otero*, 843 F.3d 1208, 1215 (10th Cir. 2016):

> the purpose of the laws, whether parallel or divergent, is not relevant to the preemption inquiry." Dist. Ct. Op. at 46. As the Supreme Court said in *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963), it "has, on the one hand, sustained state statutes having objectives virtually identical to those of federal regulations and has, on the other hand, struck down state statutes where the respective purposes were quite dissimilar," *id*. at 142, 83 S.Ct. 1210 (citations omitted). "The test," it said, "of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives." Id.

Thus, a state objective to improve pipeline safety by consideration of safety risks in routing is not dispositive of preemption. Instead, preemption is based on whether such consideration would conflict with the full application of federal pipeline safety standards. Since such standards can apply fully to any route, a state purpose to improve safety via route selection does not provide grounds for preemption.

No language in the Pipeline Safety Act expressly states or implies that compliance with PHMSA standards reduces safety risks to the point that a state or local government may not consider such remaining risk in pipeline routing decisions. The long history in the U.S. of catastrophic pipeline ruptures that kill citizens and devastate environments

demonstrates that the Pipeline Safety Act's safety standards have not and cannot eliminate the serious risks posed by hazardous liquid pipelines. There is no indication in the Pipeline Safety Act or its legislative history that Congress intended for state and local governments to have no power during their routing decisions to consider the risk of pipelines ruptures to vulnerable populations in facilities such as schools, nursing homes, and hospital, or to vulnerable environments including drinking water supplies, lakes and rivers, wildlife sanctuaries, or public parks, and then choose routes that avoid them. Since Congress has not expressly restricted the scope of discretion remaining with state and local government in their routing decisions, they may consider safety in routing.

Federal pipeline safety standards apply only to "pipeline transportation" and "pipeline facilities." 49 U.S.C. § 60102(a)(2). In turn, the Pipeline Safety Act § 60101(a)(18) defines "pipeline facility" to mean, "gas pipeline facility and a hazardous liquid pipeline facility," and defines "hazardous liquid pipeline facility" to "include[] a pipeline, a right of way, a facility, a building, or equipment used or intended to be used in transporting hazardous liquid." Thus, federal pipeline safety standards apply only to pipelines that physically exist or that are intended to exist.

Until a state approves construction of a hazardous liquid pipeline and determines its route, a company proposal to construct a pipeline is not a "hazardous liquid pipeline facility." Before state approval of construction and route, no hazardous liquid pipeline facility physically exists. While at the time of a construction and route permit application a pipeline proposer intends to construct a pipeline, a state may nullify these intentions, voiding such intentions and making application of federal pipeline safety standards

unnecessary. Federal pipeline safety jurisdiction does not extend over a mere proposal that may be rejected by a state. Since Pipeline Safety Act jurisdiction does not begin until after state approval of construction and route, state decisions on routing cannot conflict with the Act.

A state route selection must be completed before final application of PHMSA safety standards, which apply exclusively to post-routing activities, including the "design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities." 49 U.S.C. § 60102(a)(2)(B). The only element of the foregoing list of activities that may occur before approval of construction and a route is pipeline design, but conclusive application of design standards is dependent on approval of a construction permit and route. A state could deny a construction permit application, making application of federal design standards irrelevant, or reject a proposed route and select one that is tens or even hundreds of miles longer in an entirely different geographic location, thereby requiring a redesign of the entire pipeline. States such as Iowa may approve pipelines with a smaller or larger capacity, and such determination also could impact pipeline design, including potentially pipe diameter, pipe wall thickness, pump capacity, etc. Until a pipeline and its route are approved by a state, it is impossible to conclusively apply federal pipeline safety design standards, much less operational and maintenance standards, to it. Consideration of safety as a policy factor in routing cannot logically conflict with federal safety standards applicable to phases of pipeline development that must follow the route selection process. Once a route is determined, federal safety standards can apply fully to such route.

While a pipeline proposer is certainly free to prepare a preliminary design based on its intentions and apply federal safety standards to its preliminary work, it bears the risk that its intentions will be changed or even voided by the state. To the extent that a pipeline proposer could design some pipeline components without knowing a route, the reasons for route selection would have no impact on the design of such components. The fact that a pipeline developer may conduct preliminary design efforts in compliance with pipeline safety standards does not mean that federal safety standards apply to mere proposals.

Pipeline route decisions have incidental effects on design, construction, operation, and maintenance of pipelines, but this is true regardless of the policy factors used by a state to select a route. A state could select a route based entirely on non-safety factors, such as economics, or it could select the exact same route based on consideration of safety, and in either case the Pipeline Safety Act safety standards would apply in **exactly** the same way. Since the routes would be physically identical, application of the Pipeline Safety Act safety standards would also be identical. For example, the high consequence areas along the route would be the same, the length of the pipeline would be the same, and the pump station and valve locations and designs would be the same. Congress intended for the Pipeline Safety Act safety standards to apply to any route chosen by a state or local government, regardless of the factors used to select the route. The policy factors used to select a route do not restrict or prevent the full application of PHMSA's safety standards to such route.

Since the Pipeline Safety Act does not authorize PHMSA to promulgate route or location selection standards for hazardous liquid pipelines, its hazardous liquid pipeline safety regulations in 49 C.F.R. Part 195 also cannot and do not contain route selection standards. The only PHMSA regulation that appears to regulate route selection, 49 C.F.R. § 195.210, which states in full:

> **§ 195.210 Pipeline location**.
>
> (a) Pipeline right-of-way must be selected to avoid, as far as practicable, areas containing private dwellings, industrial buildings, and places of public assembly.
>
> (b) No pipeline may be located within 50 feet (15 meters) of any private dwelling, or any industrial building or place of public assembly in which persons work, congregate, or assemble, unless it is provided with at least 12 inches (305 millimeters) of cover in addition to that prescribed in § 195.248.

Subpart (a) directs pipeline operators to avoid certain facilities, but since PHMSA has no jurisdiction to determine route or route selection process, this regulation is non-enforceable and must be viewed as advisory and not prescriptive. To the extent this regulation conflicts with 49 U.S.C. § 60104(e), it would be in violation of law and so must be interpreted in accordance with § 60104(e).

Subpart (b) has no practical impact on route, because it allows construction within 50 feet or further away from facilities, the difference being that pipelines closer than 50 feet must be provided with an additional foot of cover, making this a depth of cover requirement and not a location requirement. Thus, in accordance with section 60104(e), Part 195 contains no regulations prescribing route or location.

Otherwise, the Pipeline Safety Act regulation contain no route selection process in which federal location standards could apply, no alternative route selection process, and

no standards, safety or otherwise, for route selection. Thus, no federal safety standards exist with which state consideration of safety in routing could conflict.

As an initial observation, it should be noted that emergency response is a core function of state and local governments. See, Iowa Code Chapter 29C. To accomplish this function, the Iowa legislature has authorized state and local jurisdictions to establish law enforcement, firefighting, and emergency medical service agencies. Throughout the U.S., emergency response is based on shared federal and state jurisdiction through a network of cooperating agencies. Pipeline emergency response exists within this network.

In Iowa, emergency response planning is mandated by Iowa Code Chapter 29C, a fundamental purpose of which is to coordinate state and local agency efforts. It creates a structure in which state and county agencies share responsibility for emergency planning, preparation, and response based on agency mission and geographic jurisdiction. Iowa Code §§ 29C.5, 29C.8, 29C.9. It requires that agencies prepare for and respond to "disasters" which are defined, in relevant part, as "man-made and natural occurrences, such as fire, flood, drought, earthquake, tornado, windstorm, hazardous substance or nuclear power plant accident or incident, which threaten the public peace, health, and safety of the people or which damage and destroy public or private property." Iowa Code § 29C.2(4). To support disaster planning, Chapter 29C provides a number of planning tools, including but not limited to:

- preparation of "studies and surveys of the industries, resources, and facilities in this state as may be necessary to ascertain . . . the capabilities of the state for disaster recovery, disaster planning and operations, and

emergency resource management, and to plan for the most efficient emergency use thereof;" Iowa Code § 29C.8(3)(b); and

- state provision of technical assistance, planning assistance, and training for emergency response teams. Iowa Code § 29C(3)(c), (d).

Since most disasters are not state-wide but rather are confined to one or possibly a few counties, Chapter 29C delegates local emergency response duties to local "emergency management commissions" comprised of county supervisors, the Sheriff, and City mayors. These local commissions are responsible for "delivery of the emergency management services of planning, administration, coordination, training, and support for local governments and their departments," and coordination of emergency services in the event of a disaster. Iowa Code § 29C.9(2), (6). Each local commission is required to "develop, adopt, and submit for approval by local governments within the commission's jurisdiction, a comprehensive emergency plan . . . ." Iowa Code § 29C.9(8).

Iowa law recognizes that emergency response is a cooperative and coordinated effort among federal, state, and local agencies. Chapter 29C includes a number of provisions that require state and local agency coordination with federal emergency response agencies. It requires:

- state agency cooperation with "other appropriate federal officers and agencies . . . in matters pertaining to emergency management of the state . . . ; I.C.A. § 29C.6(9);

- integration of Iowa's emergency response plan and program "into and coordinated with the homeland security and emergency plans of the federal government . . . to the fullest possible extent;" I.C.A. § 29C.3(a);
- local emergency planning commission cooperation with "other appropriate federal . . . officers and agencies . . . in matters pertaining to comprehensive emergency management for political subdivisions comprising the commission; I.C.A. § 29C.10(3); and
- adoption of an interstate emergency management assistance compact that requires "frequent consultation between state officials . . . and the United States government, with free exchange of information, plans, and resource records relating to emergency capabilities. I.C.A. § 29C.21(3)(c).

Such state-federal cooperation is necessary, because the federal government's emergency response efforts do not nationalize local emergency response, much less the actions of local police, firefighters, and emergency medical personnel. Instead, in the event of a disaster, federal emergency planning policy recognizes that state and local agencies retain control over their own personnel. It anticipates that state and local agencies will develop and implement their own emergency response plans.

Since a rupture of a large carbon dioxide pipeline could significantly threaten public health and safety and damage and destroy public or private property, it would be a "disaster," as defined by I.C.A. § 29C.2(4). Therefore, Iowa's state and local agencies have jurisdiction to plan and prepare for them. Moreover, carbon dioxide pipeline ruptures represent a novel threat about which relatively little is known, such that there is

an acute need for investigation pursuant to C.A. § 29C.8(3)(b), and for state support for local emergency response teams under I.C.A. § 29C(3)(c), (d). Fortunately, Iowa law grants state and local agencies jurisdiction to prepare emergency response plans for carbon dioxide pipelines and to conduct such investigations as deemed necessary to support this planning effort. State law provides the investigation tools needed to ensure that first responders do not walk into dangerous pipeline ruptures blind.

The IUC is charged with "protect[ing] 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. Further, the IUC may not grant a permit "unless the [Commission] determines that the proposed services will promote the public convenience and necessity." Iowa Code § 479B.9. Since the rupture of a carbon dioxide pipeline would be a "disaster" under Iowa Code § 29C.2(4), carbon dioxide pipelines pose both a statutorily defined environmental and economic threat to landowners and tenants resulting from operation and an inconvenience to the public. Therefore, under Iowa law the Commission has jurisdiction to consider pipeline risk and emergency response information.

In addition, the IUC is charged with considering present and future county land use and zoning ordinances. Iowa Code § 479B.5. One of the fundamental purposes of county land use regulation is to protect the safety and wellbeing of county residents, including from potentially dangerous land uses, such as hazardous industrial activities. Iowa Code § 335.5 (County land use regulations shall be designed to "secure the safety from fire, flood, panic, and other dangers" and to "protect health and general welfare.").

Although county emergency response planning authority vests under Chapter 29C, the information provided by such emergency planning is nonetheless critical to effective implementation of county efforts to ensure citizen safety by land use and zoning regulation. Therefore, the Commission may investigate and consider the safety impacts of pipeline projects on county land use and zoning efforts.

A number of Iowa's county governments, individual Iowans, nonprofit organizations, and the OCA presented comments to the IUC containing substantial evidence indicating that carbon dioxide pipeline ruptures may create a risk of harm and death to both humans, livestock, and other private and public property. Therefore, the risks and impacts of carbon dioxide pipeline ruptures were before the IUC and within its jurisdiction, such that it had the legal right and policy justification to reasonably investigate these safety risks and resulting emergency response planning needs.

Congress has granted PHMSA jurisdiction over "minimum safety standards for pipeline transportation and for pipeline facilities." 49 U.S.C. § 60102(a)(2). These standards are not plenary, but rather are limited to those which:

> (A) apply to any or all of the owners or operators of pipeline facilities;
>
> (B) may apply to the design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities; and
>
> (C) shall include a requirement that all individuals who operate and maintain pipeline facilities shall be qualified to operate and maintain the pipeline facilities.

49 U.S.C. § 60102(a)(2). Thus, the Pipeline Safety Act regulates only pipeline "owners and operators" with regard to the "design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of

pipeline facilities." 49 U.S.C. § 60102(a). The Pipeline Safety Act does not say that it regulates all safety matters related to pipelines. It regulates only the actions of owners and operators of pipelines with regard to their implementation of safety standards.

An example of a pipeline safety matter that PHMSA clearly cannot regulate is imposing restrictions on land development by non-pipeline owners and operators (third-parties) for facilities such as nursing homes, schools, and hospitals, on properties adjacent to existing hazardous liquid pipelines for the purpose of preventing possible future disasters. Although PHMSA has long recognized that new uses adjacent to existing pipelines can create safety risks, it cannot regulate these uses because the Pipeline Safety Act does not grant it authority over third-party landowners. More generally, Congress has not extended federal pipeline safety jurisdiction to regulate local land use and planning activities. Since PHMSA cannot directly control such risks, it has instead voluntarily encouraged appropriate land use regulation of adjacent land use by local land use authorities. See, https://pstrust.org/trust-initiatives-programs/planning-near-pipelines/pipa-page/?doing_wp_cron=1666897250.0030241012573242187500 and https://pstrust.org/wp-content/uploads/2014/05/PHMSA-Letter-to-TransCanada-on-Role-of-Local-Governments-in-Pipeline-Safety.pdf.

Another example of pipeline safety activities not subject to Pipeline Safety Act regulation is development of state and local agency emergency response plans for use by agency personnel who are tasked with responding to pipeline ruptures. State and local agency emergency plans for pipeline ruptures that exclusively direct action by agency personnel and do not attempt to control pipeline operators are not preempted by the

Pipeline Safety Act. The Pipeline Safety Act grants PHMSA jurisdiction only over pipeline operator emergency response plans and operator response to emergencies; it does not grant PHMSA jurisdiction to regulate state or local emergency response plans or agency response to emergencies. Accordingly, the Pipeline Safety Act regulations do not contain any provisions regulating state and local emergency response plan development or response activities. The Pipeline Safety Act does not federalize state and local emergency response to pipeline ruptures, much less attempt to regulate how local police and firefighters respond to pipeline emergencies.

Instead, the Pipeline Safety Act regulations dictate how pipeline owners and operators handle emergencies. For example, with regard to emergency response training, 49 C.F.R. § 195.403(b) requires that operators at least once each year review the performance of their personnel in meeting training objectives, and 49 C.F.R. § 195.403(c) requires that an operator's "supervisors maintain a thorough knowledge of that portion of the emergency response procedures established under 195.402 for which they are responsible to ensure compliance." The Pipeline Safety Act regulations exclusively regulate operator emergency response activities.

Even though state and local emergency response clearly falls within the general rubric of pipeline safety, nowhere does the Pipeline Safety Act extend federal jurisdiction over state and local governments with regard to emergency response. Instead, the following Pipeline Safety Act provisions expressly recognize that state, county, and local governments have an independent role in emergency response:

- 49 U.S.C. § 60102(d)(5)(B) requires that pipeline operator emergency response plans must include "liaison procedures with State and local authorities for emergency response;"
- 49 U.S.C. § 60102((h)(3) requires pipeline operators to submit safety reports to "any relevant emergency response or planning entity," upon request of a governor; and
- 49 U.S.C. § 60125(b)(1) authorizes the Pipeline and Hazardous Materials Safety Administration ("PHMSA") to make grants to state, county, and local governments for emergency management matters.

None of the foregoing statutory provisions would be necessary if the Pipeline Safety Act preempted state, county, and local emergency response activities.

PHMSA's Pipeline Safety Act regulations also require pipeline operator cooperation with state and local emergency response agencies. Specifically, 49 C.F.R. § 195.402(c)(12) requires operators to includes procedures in their procedural manuals:

> establishing and maintaining liaison with fire, police, and other appropriate public officials to learn the responsibility and resources of each government organization that may respond to a hazardous liquid or carbon dioxide pipeline emergency and acquaint the officials with the operator's ability in responding to a hazardous liquid or carbon dioxide pipeline emergency and means of communication.

Similarly, 49 C.F.R. § 195.402(e)(7) requires that operators include procedures for:

> notifying fire, police, and other appropriate public officials of hazardous liquid or carbon dioxide pipeline emergencies and coordinating with them preplanned and actual responses during an emergency, including additional precautions necessary for an emergency involving a pipeline system transporting a highly volatile liquid.

With regard to communications, 49 C.F.R. § 195.408(b)(4) requires that pipeline operators have a system:

> providing communication with fire, police, and other appropriate public officials during emergency conditions, including a natural disaster.

None of the foregoing regulations would be necessary if the Pipeline Safety Act preempted local emergency response. Thus, the Act and its regulations expressly recognize state and local jurisdiction over emergency planning and response for their own agencies and personnel.

The foregoing state and federal statutes and regulations make clear that our federal, state, and local governments share jurisdiction over pipeline emergency response. Federal law regulates **operator** emergency response, but does not regulate state and local planning, preparation, and response. State law regulates agency emergency response, but does not regulate operator response. In recognition of this shared jurisdiction, both federal and state law require interagency coordination. Federal law recognizes state and local jurisdiction, and therefore does not restrict or limit the scope of state and county authority, except to preempt agency regulation of an operator's internal emergency response, planning, and preparation. Since the federal government does not regulate state emergency response, the fact that PHMSA allows a pipeline company to finalize its Emergency Response Plan at the time "initial operations of a pipeline system commence," 49 C.F.R. 195.402(a), does not restrict the timing of state and county emergency response plan completion.

Accordingly, the State of Iowa may not specify the contents of Summit's Pipeline Safety Act-required emergency response plan, regulate the finalization date of its Emergency Response Plan, or direct how Summit's personnel and contractors respond. However, the state has plenary jurisdiction to develop its own response plans for a rupture

of a Summit pipeline, including county-level plans, for use by state and local emergency personnel. This jurisdiction includes the authority to conduct investigations necessary for state and local emergency response planning, including via requirements that Summit disclose safety-related information needed for such planning. Such requirement does not violate federal law, because mere disclosure of information does not impose standards on the contents of Summit's Emergency Response Plan or direct how Summit responds. Summit's discretion to comply with federal Emergency Response Plan requirements is not impacted by a requirement to disclose critical safety information to state and local emergency response agencies.

This division of jurisdiction is consistent with the scope of federal preemption related to emergency response "safety standards," because the Pipeline Safety Act makes clear that it regulates pipeline safety only with regard to the actions of the "owners and operators of pipeline facilities," and not with regard to all matters that could conceivably fall within the realm of pipeline safety.

On February 22, 2020, a 24-inch diameter carbon dioxide pipeline ruptured one mile from the town of Satartia, Mississippi, sending 48 persons to the hospital and requiring the evacuation of at least 200 more. PHMSA describes this incident in its May 26, 2022, report entitled, "Failure Investigation Report - Denbury Gulf Coast Pipelines, LLC – Pipeline Rupture/ Natural Force Damage," found at www.phmsa.dot.gov/sites/phmsa.dot/files/2022-05. One of the "key points" identified on page 2 of this report states:

> Local emergency responders were not informed by Denbury of the rupture and the nature of the unique safety risks of the CO2 pipeline. As a result, responders had

> to guess the nature of the risk, in part making assumptions based on reports of a "green gas" and "rotten egg smell" and had to contemplate appropriate mitigative actions.

Page 5 of the report found that even though local county first responders had trained for a railroad accident, Denbury did not participate in this drill, nor had it conducted any drills with local responders because its plume dispersion modeling was deficient and had not identified that Satartia could be impacted by a rupture of its pipeline. In other words, the pipeline operator underestimated the danger of its pipeline and therefore failed to coordinate with emergency response personnel.

What the PHMSA report does not discuss is the fact that the first police officer on the scene drove into the toxic plume and was nearly overcome by it while attempting to rescue victims. The personal accounts of the first responders to this incident were reported in the press. Ultimately, state and local agencies have a duty to protect their first responders and may require disclosure of information necessary to do so.

This rupture demonstrates the need for proactive emergency response planning by state and local emergency response agencies. While the agencies should coordinate with Summit, they should not blindly trust that Summit will correctly estimate the risk of its carbon dioxide pipelines to first responders, citizens, and animals. It is in Summit's interest to downplay the risk of its pipelines and minimize its emergency response costs.

The issue of preemption was not addressed in the IUC Order. Based on the foregoing, the Commission's failure to discuss preemption was the product of a decision-making process in which the agency did not consider a relevant and important matter relating to the propriety or desirability of the action in question that a rational decision

maker in similar circumstances would have considered prior to taking that action, and was arbitrary, capricious, unreasonable, and an abuse of discretion.

IV. VIOLATION OF DUE PROCESS

"A fair trial in a fair tribunal is a basic requirement of constitutional due process. It follows a presiding judge should not only be fair and impartial, he must conduct himself in the trial to constantly manifest those qualities." *State v.* King, 256 N.W.2d 1, 11 (Iowa 1977), citing *Wilson v. Ceretti*, 210 N.W.2d 643, 645 (Iowa 1973); *In the Interest of C.L.C, Jr.*, 798 N.W.2d 329, 335 (Ia. App. 2011) ("A fair trial in a fair tribunal is a basic requirement of due process."); *C. Line, Inc. v. City of Davenport*, 957 F. Supp.2d 1012, 1040 (S.D. Iowa 2013) ("It is fundamental that due process requires a fair and unbiased tribunal, regardless of whether that tribunal is in the context of a court hearing or some other administrative hearing.").

Based on the conduct of the hearing and other proceedings in this case, the dismissive and discriminatory treatment of parties opposed to Summit by the Commission in comparison to the treatment of Summit and its supporting parties, and the dismissive tone and substance of the Commission's decision, all as detailed below, it is clear that the Commission was not a fair and unbiased tribunal, and Sierra Club and other Summit opponents were denied due process.

The first point to understand is that in April of 2023 the membership of the Iowa Utilities Commission changed. The new membership of the Commission arbitrarily changed various schedules and procedures that had been established by the prior Commission. The contested case hearing was initially scheduled to begin on October 23,

2023 (schedule)(App. p.). Additionally, the former IUC members scheduled 6 public hearings at locations along the pipeline route during September and October of 2023 (schedule) (App. p.). Then, when the newly appointed Commissioners took office a new schedule was issued, arbitrarily scheduling the contested case hearing to begin on August 22, 2023, and abandoning any public hearings (new schedule) (App. p.). Moreover, the hearing began on August 22 with testimony from impacted landowners who were not represented by counsel, rather than beginning with witnesses for Summit, which had the burden of proof.

199 I.A.C. § 7.23(3) states that:

> The [Commission] or presiding officer shall determine the order of the presentation of evidence based on applicable law and the interests of efficiency and justice, taking into account the preferences of the parties. Normally, the petitioner shall open the presentation of evidence.

So, the procedure imposed by the Commission without consultation with the parties, violated § 7.23(3). The Commission claimed that the landowner testimony was shifted to August to avoid harvest season (Hrg. Tr. p. 38) (App. p.), but most of the impacted landowners were represented by counsel and they were not scheduled to testify in August or early September. The following excerpts from the hearing transcript highlight this issue.

> MS. RYON: I would like to suggest that this giant loophole that Mr. Dublinske is claiming exists is because of the change of order of presentation of evidence in this testimony.
>
> Other attorneys have no opportunity other than to make assumptions about what's going to be happening because Summit has not yet testified as to the facts that attorneys want to ask questions about.

I'll remind the Board that Board Rule 7.23, which is titled "Order of Presenting Evidence," states that normally the Petitioner shall open the presentation of evidence.

When determining the order of the evidence, Rule 7.23, Subsection 3, states that the Board shall take into account the preferences of the parties.

There is not a single party to this proceeding who indicated a preference for having the non-intervening Exhibit H landowners testify first.

We can resolve all of these problems very easily by having the party who filed the petition, who has the burden of proof, who has the information that landowners need in order to understand the impacts of the pipeline on their property and to be able to answer questions in an informed manner about their property by simply having Summit present its testimony first as is normally done.

(Applause.)

BOARD CHAIR HELLAND: Mr. Taylor.

MR. TAYLOR: Thank you. It seems to me that, first of all, the Board correctly wants to hear from the landowners. Your duty under 479B.1 is protect the landowners. These landowners who have not intervened and are not represented by counsel, you can argue, well, they should have hired attorneys, but, you know, that takes money. And they're not required to hire an attorney.

And, from what we've heard and what we understand, the landowners were not given real clear directive as to what they were supposed to do, how they were supposed to present their information.

And I honestly don't think that any of the questions the attorneys have asked are beyond the scope of what the Board envisioned. We're talking about the impact on the landowners, their land, and I think it's very important for the Board to hear what the landowners have to say. And that's what we're trying to bring out.

(Hrg Tr. p. 335-337) (App. p.).

MS. RYON: Based on Ms. Krogh's testimony, I would like to object to the Board's procedure in scheduling Exhibit H landowners who are not intervenors at the end of August. That inadequate notice was provided to the landowners.

I would also like to have the objection noted that it's a violation of Ms. Krogh's due process rights by forcing her to testify before Summit.

Summit being the party with the burden of proof. That denied Ms. Krogh the opportunity to have a meaningful opportunity to be heard because she did not have full facts from the party who has the burden of proof.

I would also like to object that the Board's change in the procedural schedule that was issued on June 16, 2023, is inconsistent with Iowa Code Section 17A because it prejudices the substantial rights of landowners. In this case, those substantial rights are the landowners' property rights under both the Iowa and U.S. Constitutions as well as their due process rights.

That schedule change is specifically inconsistent with respect to subsection 17A.10(k) because the schedule change is not required by law, and its negative impact on landowners' constitutional property and due process rights is so grossly disproportionate to the benefits accruing to any potential public interest from the schedule change that it necessarily lacks any foundation in rational agency policy.

And that concludes the objections I would like noted.

BOARD CHAIR HELLAND: Okay. Thank you.

(Hrg. Tr. p. 771-772) (App. p.).

MS. RYON: Thank you, Your Honor. I'd like to make several objections on behalf of the Hoffmanns.

First, I'd like to object that the scheduling of the hearing and moving the landowner testimony to the week beginning August 22nd in the Board's June 16th scheduling order provided inadequate notice and violated the due process rights of the Hoffmanns.

I'd also like to object that their due process rights were violated by the Board's changing of the schedule and having them testify before Summit testified given that Summit has the burden of proof and has the information necessary for the Hoffmanns to understand and have a meaningful opportunity to express themselves with respect to the facts.

I'd also like to note that the Board's change of the hearing schedule that was previously – the standard practice that has previously been used of having the petitioner testify first is inconsistent with Iowa Code Section 17A.10 because it prejudices the substantial rights of the landowners.

In this case, those substantial rights are the landowners' property rights under both the Iowa and the U.S. Constitution as well as their due process rights.

> The schedule change is specifically inconsistent with respect to Subsection 17A.10(k). Because the schedule change is not required by law and its negative impact on landowners' constitutional property and due process rights is so grossly disproportionate to the benefits accruing to any potential public interest from the scheduled change that it necessarily lacks any foundation in rational agency policy.
>
> That's all my objections. Thank you.
>
> BOARD CHAIR HELLAND: Thank you.

(Hrg. Tr. p. 896-897) (App. p.).

As attorney Anna Ryon said in the transcript excerpt above, arbitrarily changing the hearing schedule on short notice without consultation with the parties, and changing the schedule to allegedly accommodate some landowners without doing so for most of the landowners, and taking landowner testimony before Summit's testimony, violated the Commission's own rule. It also violated Iowa Code 17A.19(1)(k), an action not required by law having a negative impact on the private rights affected and so grossly disproportionate to the public benefits that is must be deemed to lack any foundation in rational agency policy.

The Commission's bias against parties opposing Summit is demonstrated by the disparate treatment those parties and their supporters were treated to compared to how Summit's representatives and supporters were treated during the hearing. Landowner Julie Glade described the situation in her hearing testimony:

> BY MR. JORDE:
>
> Q. Do you have anything else to add?
>
> A. Well, I would really like to speak to how I feel the landowners have been silenced in these whole hearings.

Q. Well, is this a good example right now?

A. And this would be a good example right now. Point proven.

People who -- landowners who are unable to virtually testify is wrong. People whose lives are impacted, their land is threatened to be taken away from them. People who live closer to the pipeline than I live are unable to make public comments here and go on the record because no public comments were taken.

The whole hearing seemed totally biased to me. From the very first day. We stand in line waiting to get in. No one sees anyone from Summit standing in line. They all get to come in the back door.

We're told we can't stand in the back of the room. But, on that first day, there were Summit people marching back and forth back there going behind the black curtain to meet.

Landowners were asked for a room to meet with their attorneys here. And they were denied. They said there was no room. But Summit has a room.

Summit's security team is working the event. OverWatch.

It doesn't take a rocket scientist to see that the optics are not good for landowners in these hearings. They're one-sided. And it's wrong. It's just -- I'm being silenced today.

I can't say the things that I want to say. I can't say that this whole project is wrong. It's morally wrong. There's no public use. The public is not going to use the carbon dioxide. Summit wants it. They want it to make billions of dollars at our expense and our loss. And the whole -- this whole process, the whole project, is wrong.

(Hrg. Tr. p. 4282-4283)(App. p.).

The affidavits of Jean Kohles, Katherine Stockdale, and Jessica Mazour (App. p.) further describe the disparate treatment between Summit and its supporters and those opposing Summit. At first blush, these complaints may seem petty, but taken in context, they clearly show that the IUC and the entire proceeding was skewed in Summit's favor. After all, why would the IUC think it was necessary to impose intimidating security

measures on members of the public who opposed Summit, but no security measures on Summit and its supporters? The only answer can be that the IUC knew the public would not like how the hearing was conducted favoring Summit.

The record also shows that the IUC Chair restricted the questioning of witnesses by the attorneys for the intervenors opposing Summit. At the outset of the hearing the Chair announced that "friendly" cross examination would not be allowed (Hrg. Tr. p. 21) (App. p.). The Chair defined friendly cross examination as:

> Friendly cross-examination occurs when two or more parties have substantially the same position and seek to include repetitive information into the record.

Sierra Club counsel then sought to clarify the point:

> MR. TAYLOR: Thank you. I just wanted to clarify the friendly cross-examination.
>
> I think you're exactly correct, that Chapter 17A allows cross-examination of any party by any party as long as it's not repetitive or cumulative. But friendly cross-examination, as I understand previous applications, means any cross-examination of a witness who is purportedly on the same side as the questioner.
>
> But I think that violates the Iowa Code and that your description was correct, and I just wanted to clarify that.

(Hrg Tr. p. 24)(App. p.). Specifically, Iowa Code § 17A.14(3), states that witnesses at a hearing shall be subject to cross examination by **any** party. There is no reference in the Administrative Procedure Act to the concept of friendly cross examination.

Summit's counsel explained how he viewed friendly cross examination, essentially describing it as preventing one party from cross examining another party's witness:

> MR. DUBLINSKE: Thank you. We disagree with that position. I think it's a bit of a misnomer based on a long history of using the simple but I think inaccurate phrase "friendly cross' that I think we've all used for years.
>
> The problem there is that if it's friendly, it's not cross. So, to the extent that any party may be able to cross-examine a witness, it's not a cross-examination. And, in fact, for example, it we had a landowner and parties that are aligned with that landowner were to ask them questions to try and elicit favorable testimony for the same side, that, in fact, is direct examination, not cross-examination.
>
> So we do not agree that there is any problem with limiting or barring what has colloquially been called friendly cross because, at heart, it's not cross-examination at all. And it really should not be permitted.

(Hrg. Tr. p. 24-25)(App. p.). The issue of friendly cross examination was discussed in more detail later in the hearing (Hrg. Tr. p. 3711-3720)(App. p.). The point was made that even though a party may be generally aligned with another party, a witness called by one of the parties may not emphasize or address a specific point that the other party would like to bring out through questioning that witness. As long as the testimony is not **unduly** repetitious, it must be permitted. Iowa Code § 17A.14(3).

Later on in the hearing Sierra Club counsel made it clear that the reason Summit wanted to limit so-called friendly cross examination was to limit questioning of landowner witnesses so that only Summit could cross examine those witnesses (Hrg. Tr. p. 6575)(App. p.). It was further made clear that Summit did not want to cross examine those witnesses because Summit knew that it would get its permit so it didn't need to cross examine the witnesses. Summit just wanted to get the hearing over with as quickly as possible.

Another revealing aspect of the hearing is the number of times the phrase, "move on" was uttered. It was most often used by the Commission Chair to admonish the

intervenors' attorneys that they were delaying the proceedings by asking questions. There were also a few times that the attorneys themselves said they would move on, knowing that the Chair would tell them to do so. In total, the phrase was said 48 times during the 25 days of the hearing. That clearly shows that the Commission was not serious about hearing the evidence. Its goal was to finish the hearing as quickly as possible and give Summit its permit.

On that same note, the Commission Chair repeatedly admonished the attorneys for the intervenors asking too many questions and taking too much time and delaying the proceedings (Hrg. Tr. p. 339, 493, 558, 601-602, 670, 734, 735, 3917, 4931-4933, 5287, 622). But the reason we were not able to keep up with the Chair's schedule was because the Chair was trying to conclude the hearing as quickly as possible and requiring too many witnesses to be scheduled in a day. The Chair's admonishments to the attorneys was simply additional proof that the goal was to complete the hearing quickly and issue a permit, rather than to hear the evidence.

The goal of the Commission to finish the hearing quickly and issue a permit was made clear in a comment by the Chair to a legislative committee and a statement in the IUC's 2024 Annual Report. Earlier this year the Commission Chair told the Iowa House Commerce Committee that what kept him up at night was trying to issue permits as quickly and efficiently as possible, with no indication that a permit would ever be denied. See, affidavit of Jessica Mazour (App. p.). Likewise, the 2024 IUC Annual Report at p. 40 (App. p.) states:

> PETITIONS APPROVED FOR DOCKETS: Targeted goal of 100% of petitions **approved** in a timely manner for electric and pipeline (E & P) dockets by monitoring progress on petition reviews and reassigning staff resources as needed.
>
> Actual: 100%

(emphasis added). With that attitude clearly demonstrated by the Commission and its Chair, the opponents of the Summit project never had a chance of a fair hearing.

CONCLUSION

This is a pipeline case like no other. Even Dakota Access, the closest project in scope and impact to Summit's project to come before the IUC, cannot be compared. Even though intervenors, including Sierra Club, challenged Dakota Access because it would maintain the status quo and delay the transition away from fossil fuels, the project at least arguably transported a product that would be used by the public. There was also concern about the impacts of an oil spill from the Dakota Access pipeline, but as the evidence has shown in this case, the impact of a release of carbon dioxide from the Summit pipeline would be even more devastating. An oil spill would damage the land over which it spread, but the damage would be contained and there is less danger to human lives or health. A carbon dioxide release, however, cannot be effectively contained because it disperses through the air and stays close to the ground. And it is hazardous to humans and animals. So any attempt by Summit to equate its project with Dakota Access should not be taken seriously by the Court. It should not be assumed that because the Commission issued a permit to Dakota Access, that a permit should be issued to Summit.

There is one point on which the Dakota Access experience should inform the decision in this case. That is the impact of pipeline construction on farmland. There is

evidence in the record that construction of the Dakota Access pipeline resulted on long-term damage to the soil and the fertility of the land. There is also evidence that drainage tile was damaged during construction of the Dakota Access pipeline that was not repaired properly. Although Summit will undoubtedly say it will undertake construction properly, Dakota Access said the same thing. Two county inspectors, Cole Kruizinga and Lee Gallentine, testified that it is very difficult for county inspectors, no matter how hard they try, to control the construction crews. The Commission should have protected the landowners by denying a permit.

Sierra Club's interest in this case is based on challenging Summit's claim that its project will mitigate climate change. Climate change is clearly the existential issue of our time. Addressing that challenge primarily means phasing out the use of fossil fuels and transitioning to renewable energy. Iowa is already a leader in constructing wind energy projects and is fast becoming a leader in solar energy. So we don't need to approve a project that delays that transition. With renewable energy, there is no need to capture carbon dioxide. Thus, any argument for the Summit project is based on a claim of alleged benefits, that, even if true, would be short-lived. The Commission should not have issued a permit based on such a slim reed.

Instead of addressing climate change and promoting renewable energy sources, the Summit project's primary focus is on supporting the ethanol industry, which would continue the use of fossil fuels and delay critical action to address climate change. Ethanol is not a fuel by itself. It is mixed with gasoline, which is a fossil fuel. And as Dr. Mark Jacobson testified, the climate change benefits of ethanol are vastly overstated. And

with increasingly stricter low carbon fuel standards and the imminent deployment of electric vehicles, ethanol's days are numbered anyway. Ethanol has been subsidized since its beginning. It has also been generous with political contributions to Iowa politicians of both parties. It is time for the free market to control ethanol's future.

That last statement brings us to the real motive behind the Summit project – the 45Q and 45Z tax credits. Summit has stated publicly that without those credits, it would not be doing this project. This is a significant cost to taxpayers. Summit may argue that the tax credits were passed by Congress with bipartisan support, and that this shows that the tax credits support a public benefit. What it actually means is that the special interests that benefit from the tax credits had enough lobbying power and made enough political contributions to convince Congress that this was the only way to address climate change. But the actual result was to ensure the continuation of business as usual. The evidence in this case shows that the tax credits benefit only Summit and the ethanol plants.

Summit claims it is supporting Iowa agriculture. If it actually were supporting agriculture – and addressing climate change – it would support sustainable agriculture practice. It was encouraging to hear so many of the landowner witnesses say that they are undertaking sustainable practices like no-till farming and planting cover crops, as well as other practices that keep carbon in the ground. These landowners need to be encouraged and supported, not placed in danger of having their land impacted and threatened with eminent domain. Summit claims it will repair damage to soil, to drainage tile, to terraces, etc., but those are empty promises, as proven by the experience with Dakota Access.

Those kinds of damages simply cannot be repaired, at least in the lifetimes of anyone living now. Landowners should not be forced to endure this damage to their land.

The issue that weighs over this entire proceeding is eminent domain. That is the most devastating and consequential power a government can use against its citizens. It has certainly been the most significant concern about this project expressed by landowners, members of the public, and public officials. Every landowner who testified mentioned eminent domain. Many local governments submitted objections to the docket in this case, with the eminent domain issue as a thread running through all of those objections. The Iowa House of Representatives voted overwhelmingly for a bill that would have severely restricted the use of eminent domain for carbon dioxide pipelines. The Republican legislators who intervened in this proceeding clearly stated that the use of eminent domain was their primary objection to Summit's project.

As explained extensively in previous sections of this brief, Summit is not entitled to eminent domain. This is true even though the Commission granted Summit a permit. If Summit is not granted eminent domain authority and that prevents Summit from building its pipeline, Summit has no complaint. Summit is not entitled to build a pipeline.

It may be that the Commission has never denied a permit for a pipeline. But that does not mean that Summit is automatically entitled to a permit. The other pipelines that were granted a permit were probably transporting a product to be used by members of the public nor had all of the negative impacts discussed above regarding the Summit project. Even the Dakota Access pipeline, although it obtained a permit, garnered this statement on page 108 of the IUB's Final Decision and Order, "If the terms and conditions adopted

above were not in place, the evidence in this record would be insufficient to establish that the proposed pipeline will promote the public convenience and necessity." So that was a close call, even for a pipeline that arguably had a better basis for public convenience and necessity than Summit has.

As stated at the outset of this Conclusion, this is a pipeline case like no other. There is a perception, as stated by some of the landowners, that the Commission was under political pressure to grant Summit a permit. Summit seems to think that is the case. Sierra Club requests that this Court undertake a thorough review of the Commission decision pursuant to the Administrative Procedure Act and reverse the Commission decision granting Summit a permit and the power of eminent domain.

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