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IN THE IOWA DISTRICT COURT FOR POLK COUNTY

SIERRA CLUB IOWA CHAPTER, DICKINSON COUNTY, SHELBY COUNTY, KOSSUTH COUNTY, FRANKLIN COUNTY, EMMET COUNTY, HARDIN COUNTY SHERIFF'S OFFICE, 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.**	**Case No. CVCV067849** **PROOF BRIEF OF JORDE LANDOWNERS AND NON-EXHIBIT H LANDONWERS, COLLECTIVELY, PETITIONERS**

Jorde Landowners and Non-Exhibit H Landowners, by and through their undersigned counsel, submit the above-captioned Proof Brief in support of their Petition for Judicial Review.

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STATEMENT OF THE CASE

This case is a petition for judicial review of final agency action pursuant to Iowa Code §17A.19. Petitioners include 128 landowners whose properties were approved for condemnation by the Iowa Utilities Commission, f/k/a Iowa Utilities Board, ("IUC") in its Docket No. HLP-2021-0001. The condemnation approval allows construction of a 688-mile-long carbon dioxide pipeline network ("Project") through 29 Iowa Counties by Summit Carbon Solutions, LLC ("Summit"). Petitioners also include the owners of five Iowa properties adjacent to but not crossed by the Project, who were denied intervenor status by the IUC despite the potential impacts and risks created by construction and operation of the project.

Petitioners, hereinafter referred to as "Jorde Landowners," seek reversal and remand of the Commission's June 25, 2024, Final Decision and Order ("Final Order"); its August 28, 2024, Order Issuing Permit; and its August 28, 2024, Hazardous Liquid Pipeline Permit No. N0071.

On January 28, 2022, Summit Carbon Solutions, LLC ("Summit"), pursuant to Iowa Code Chapter 479B, filed a petition with the IUC to construct, operate, and maintain the Project, although the IUC only has jurisdiction over the pipeline itself. The Project would capture carbon dioxide from 30 industrial facilities in Iowa, Minnesota, Nebraska, South Dakota, and North Dakota (primarily ethanol plants) and

transport it from these facilities to a "sequestration" site in North Dakota where the carbon dioxide would be stored by injection into underground strata.

The Commission conducted an evidentiary hearing on Summit's petition in Fort Dodge, Iowa from August 22 through November 8, 2023. On June 25, 2024, the Commission issued its Final Order, which (a) granted a hazardous liquid pipeline permit to Summit to construct the Project, subject to a number of conditions; (b) approved the location and route of the pipeline; and (c) granted Summit the right of eminent domain. The Final Order found that the service to be provided by Summit Carbon would promote the public convenience and necessity. It also found that Summit would operate the Proposed Hazardous Pipeline as a common carrier. Based on these findings the IUC vested Summit with the right of eminent domain to condemn easements on private properties. On August 28, 2024, the IUC issued its Order Issuing Permit and its Permit No. 0071, which had previously only been a conditional permit, after finding Summit satisfied the Final Order conditions.

On July 12, 2024, the Counties (except for Franklin County) filed a Motion to Reconsider the Final Order pursuant to Iowa Code § 476.12 and Iowa Admin. Code r. 199-7.27(1). The motion was timely because it was filed within twenty days of the date of the Final Decision and Order. On or about July 15, 2024, Jorde Landowners and other parties including Sierra Club Iowa Chapter, Republican Legislative Intervenors for Justice ("RLIJ") (an unincorporated association of 36 Members of the

Iowa General Assembly), Bold Iowa, and Gordon Garrison, also filed timely motions to reconsider.

On August 15, 2024, the Commission filed a Notice of Denial of Rehearing by Operation of Law and indicated that because it had not taken action on the motions to reconsider on or before August 14, 2024 (30 days after the last motion to reconsider was filed), the motions were deemed denied by operation of law. See Iowa Code § 476.12; Iowa Admin. Code r. 199-7.27(1); See *Christiansen v. Iowa Bd. of Educational Examiners*, 831 N.W.2d 179, 190 (Iowa 2013) (where multiple applications for rehearing are filed, the agency's decision on the last pending application constitutes the final decision of the agency). Jorde Landowners timely filed their Petition for Review.

Jorde Landowners comprise two categories of Iowans affected by the proposed project. The first category includes 128 owners of real property in Iowa, including individual, family farm corporations, and family trusts, from whom Summit seeks to take private property via eminent domain. Since Summit sought to take the properties of these Iowans, it filed an "Exhibit H" for each property pursuant to Iowa Admin. r. 199-13.3(1)(h). Each Exhibit H includes a legal description of the property and desired easement, a description of easement rights sought, parcel and overview maps, and a KMZ file showing the locations of the properties. Hereinafter, Petitioner

owners of real property subject to taking by eminent domain are referred to as "Exhibit H Landowners." See **Attachment A** for a list of Exhibit H Landowners.

The second category of Jorde Landowners includes William and Vickie Beck, Golden Oaks, Inc. (Meghan Sloma and Dorothy Sloma), Michael J. Main and Deborah D. Main, and RKR Farms, LLC (Elizabeth H. Richards and Jane P. Richards), all of whom own property immediately adjacent to targeted parcels. Since the properties of these petitioners are not threatened by eminent domain, Summit did not file an Exhibit H for their properties. Accordingly, this second category of petitioners is hereinafter referred to as "Non-Exhibit H Landowners." Each Non-Exhibit H Landowner filed a motion to intervene detailing their interests, but the Commission denied these motions. The Non-Exhibit H Petitioners allege that this denial was illegal under Iowa Admin. Code r. 199-7.13, and as a consequence the Commission conducted its hearing without providing them due process of law.

STATEMENT OF FACT

I. THE PROPOSED "PROJECT"

a) Summit proposes to construct and operate a network of carbon dioxide pipelines in 29 counties in Iowa to transport supercritical carbon dioxide through the State to its border with South Dakota, and from there through South Dakota to a sequestration site in North Dakota. Within Iowa, the Project would be comprised of 34.94 miles of 6-inch diameter pipe, 192.64 miles of 8-inch

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diameter pipe, 150.06 miles of 10-inch diameter pipe, 145.07 miles of 12-inch diameter pipe, 20.53 miles of 16-inch diameter pipe, 95.24 miles of 20-inch diameter pipe, and 49.53 miles of 24-inch diameter pipe.

b) The term "supercritical" refers to a phase of matter distinct from the commonly known gaseous, liquid, and solid phases. Carbon dioxide is a gas at ambient pressures and temperatures. Through compression, carbon dioxide may be converted into liquid. Supercritical carbon dioxide forms only at a combination of pressures above 1,070.0 pounds per square inch ("psi") and temperatures above 87.7604 °F. Solid carbon dioxide (commonly called "dry ice") is created by a combination of pressure and cooling below −109.2 °F. The properties of carbon dioxide in a supercritical state differ from those of carbon dioxide in a liquid state.

c) The Project would have a maximum operating pressure (MOP) of 2,183 pounds per square inch gauge ("psig") with normal operating pressures ranging from 1,200 to 2,150 psig. The requested maximum permitted pressure is 2,183 psig.

d) The Project would be capable of transporting up to 12 million metric tons of supercritical carbon dioxide per year through Iowa to the border with South Dakota.

e) The Project would be located in Boone, Cerro Gordo, Cherokee, Chickasaw, Clay, Crawford, Dickinson, Emmet, Floyd, Franklin, Fremont, Greene, Hancock, Hardin, Ida, Kossuth, Lyon, Montgomery, O'Brien, Page, Palo Alto,

Plymouth, Pottawattamie, Shelby, Sioux, Story, Webster, Woodbury, and Wright counties in Iowa.

f) The Project would harm Jorde Landowners property rights through condemnation of easements and future restrictions on property use; cause physical harm to their properties from construction and maintenance activities; result in a long-term reduction in productivity of crop lands due to soil damage; create health and safety risks should a pipeline rupture near their homes, farms, and businesses; and interfere with their rights to quiet enjoyment of their properties.

g) Should the Project rupture, the supercritical carbon dioxide would vaporize, expand dramatically in volume, and create a heavier than air plume of gaseous carbon dioxide that would spread far beyond the Project's right-of-way. A rupture of the Project could result in carbon dioxide concentrations high enough to asphyxiate nearby persons, including Exhibit H and Non-Exhibit H Landowners, their families, guests, livestock, and other animals. In addition, the explosive decompression resulting from a pipeline rupture has the potential cause physical harm to land at the site of a rupture and nearby structures, persons, and animals. In areas of moderate carbon dioxide concentrations, a rupture of the Project could cause nearby persons to become intoxicated to a degree that that could be hazardous to those working with dangerous equipment, driving, or located outside during hazardous weather conditions.

h) Evaluation and consideration of plume modeling, risk assessments, dispersion modeling, and similar data is critical in determining whether the Project is acceptable for routing within Iowa, and if so, where precisely such routing would cause the least potential for negative impacts in the event of a rupture.

II. SUMMIT'S OFFTAKE AND REVENUE SHARING AGREEMENTS

a) According to the testimony and deposition of James Pirolli, Chief Commercial Officer for Summit, the company has entered into long-term "Offtake Agreements" with its 13 ethanol facility "partners" in Iowa (JLO Ex. 548), and an additional 20 ethanol facility partners in other states. (Pirolli Direct Testimony at 9, lines 7-13, Pirolli Deposition at 13, lines 11-12, at 40 lines 22-25, and at 41 lines 1-8)

b) Summit executed Offtake Agreements with all but one of its ethanol plants on or before 2021. (*Id*. at 6 line 13 to 7 line 18)

c) Under the Offtake Agreements, Summit is a "full service" carbon dioxide management company that provides carbon capture, impurities removal, compression, transportation, and storage services. (*Id.* at 30 lines 6-19)

d) The Offtake Agreements provide that Summit and its ethanol plant partners will "share in the revenues and operating costs of the project." (*Id*. at 27 lines 8-11. According to Mr. Pirolli, "Generally speaking, the CO_2 Offtake Agreements are revenue-share agreements." (*Id*. at 30 lines 15-19)

e) The revenues shared under the Offtake Agreements will come from either the federal 45Q or 45Z tax credits, depending on which is more lucrative in a given year, as well as revenues from low carbon fuel standard carbon credit sales. (Tr. Broghammer Cross at 2019 lines 4-8) The right to a 45Q carbon sequestration tax credit may be claimed only by the owner of capture equipment, which under the Offtake Agreements is Summit. (Tr. Pirolli Cross at 1942 lines 4-5) The 45Z clean fuel tax credit may only be claimed by a producer of clean fuel, which under the Offtake Agreements are ethanol producers. (*Id*. at 1942 lines 5-6 and at 1943 lines 4-9) The 45Z tax credit will only be available from 2025 to 2027. (*Id*. at 1930 lines 8-13) The 45Q and 45Z tax credits cannot both be claimed in the same year for the same facility, such that the Offtake Agreement partners will determine on an annual basis which credit to claim so as to maximize financial returns. (*Id*. at 1942 lines 6-8 and at 1944 lines 11-17) If a claim by Summit of the 45Q tax credit is more lucrative, then Summit would share the value of the 45Q tax credits with its ethanol partners; and conversely if a claim by an ethanol partner of the 45Z tax credit is more lucrative, the ethanol partner would share the value of the 45Z tax credit with Summit. (*Id*. at 1944 lines 5-20)

f) Operating costs to be shared by the partners under the Offtake Agreements include "capture, compression, transportation, and sequestration" costs. (JLO Ex. 549, Pirolli Deposition at 98 lines 14-17)

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g) The Offtake Agreements are distinct from fee-for-service transportation agreements. (*Id*. at 49 lines 22-25)

h) The Offtake Agreements are structured specifically for Summit's ethanol partners and not for other types of carbon dioxide emitters. (*Id*. at 30 lines 6-8 and at 69 lines 8-13; Tr., Pirolli Cross at 1964 line 22 to 1965 line 19) Other types of carbon dioxide emitters are not eligible to use the Offtake Agreements. (Pirolli Deposition at 30 lines 8-11 and at 69 lines 14-19)

i) The ethanol partners will provide carbon dioxide to the project, and Summit will finance, design, construct, and own all of the carbon capture, pipeline (trunk and laterals), and sequestration infrastructure. (Pirolli Direct Testimony at 10-12; JLO Ex. 549, Pirolli Deposition at 13 lines 12-13 and at 36 lines 12-19)

j) Offtake Agreement Section 3.02 provides that Summit "agrees to take and accept title, ownership, and delivery of the contract volume" of carbon dioxide. (*Id*. at 35 line 12 to 36 line 5)

k) Offtake Agreement Section 8.01 defines the "title transfer point" for the title to the carbon dioxide as follows: "Supplier's physical delivery of the contract volume hereunder shall be at the intersection of the CO_2 facility and plant . . . ." (JLO Ex. 549, Pirolli Deposition at 62 lines 3-6; Powell cross at Tr. 1630 lines 18-20)

l) Offtake Agreement Section 8.1 also provides that: "Title to and ownership of the contract volume shall pass to and vest in offtaker at the time the contract volume passes through the title transfer point." (JLO Ex. 549, Pirolli Deposition at 62 lines 6-10)

m) The transfer point is located near the top of each ethanol plant's current emissions point (smoke stack). (JLO Ex, 549, Pirolli Deposition at 62 line 20 to 63 line 2)

n) Summit did not enter into these Offtake Agreements through an open season, but rather via individual marketing. (*Id*. at 14 lines 4-9) Summit has an ongoing effort to enter into new Offtake Agreements with additional ethanol partners. (*Id*. at 29 lines 15 to 25)

o) The term in years of the Offtake Agreements is not public information, but is more than ten years in length, and they automatically renew unless either party terminates the agreement. (*Id*. at 34 line 19 to 35 line 7; JLO Ex. 552, Broghammer Deposition at 66 lines 20-24)

III. SUMMIT'S PROPOSED COMMITTED SHIPPER TRANSPORTATION SERVICES.

a) Summit claims that any carbon dioxide emitter may enter into a transportation service agreement to transport carbon dioxide from the emitter to Summit's sequestration facility in North Dakota. (Pirolli Rebuttal at 5 lines 13-22)

b) Summit has provided into the record a draft unexecuted transportation service agreement. (Pirolli Deposition at 47 line 22 to 49 line 1)

c) Summit had not at the time of Mr. Pirolli's deposition entered into a transportation service agreement with any third-party shipper. (JLO 549, Pirolli Deposition at 52 lines 8 -18) Mr. Pirolli stated: "like I said, we don't have any of those signed or executed yet." (*Id*. at 53 lines 3-10) During cross examination, Mr. Pirolli stated: "Well, we don't have any transportation agreements signed yet." (Pirolli Cross at Tr. 1964 lines 20-21)

d) As Summit has yet to enter into a transportation services agreement with any shipper, the possible duration of such agreement is not known but they would be in terms of years. (*Id*. at Tr. 1971 line 21 to 1972 line 6)

e) Under a transportation services agreement the shipper would pay for transportation and storage services, but it would also be obligated to itself pay for construction of its own carbon capture facility. (JLO Ex. 549, Pirolli Deposition at 66 lines 22-25)

f) Under a transportation services agreement, the shipper would own title to the carbon dioxide, whereas under an Offtake Agreement the title to the carbon dioxide transfers to Summit. (*Id*. at 66 lines 1-9)

g) Under a transportation services agreement, the shipper would own the carbon capture equipment and so claim the 45Q tax credit and pay Summit a fee for its transportation services. (Pirolli Cross at Tr. 1965 lines 16-19)

h) At the time of the evidentiary hearing, no shippers had yet signed transportation services agreements because of uncertainty about total project costs and revenues and project complexity. (*Id*. at 1965 line 20 to 1966 at line 22) The cost of capturing carbon at ethanol plants is relatively lower than at most other industrial facilities, because the gas stream from ethanol plants is 97 percent pure carbon dioxide, whereas the stream from fertilizer plants is only 80 percent carbon dioxide, and the stream from combustion (heat and power) plants is 4 to 10 percent carbon dioxide. The cost of removing impurities (gases other than carbon dioxide) increases project costs, so the lower the percent carbon dioxide the higher the capture costs, which significantly impacts the financial viability of carbon capture projects that might be considered by regional non-ethanol plant emitters. (*Id*. at 1967 lines 3-23)

i) Summit intends to conduct an open season to sell capacity via long-term transportation agreements, but as of the evidentiary hearing it had not yet initiated an open season and Mr. Pirolli did not know when Summit might do so. (*Id*. at 1968 lines 9-13) Mr. Pirolli stated: "my understanding there's certain specific and more formal processes that go along with a formal open

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season that were going to conduct at some point in the future." (*Id*. at 1968 lines 7-10)

IV. SUMMIT'S PROPOSED UNCOMMITTED SHIPPER TRANSPORTATION SERVICES.

a) Summit intends to reserve 10 percent of the capacity of its pipeline system for uncommitted future "walk-up" shippers. (Pirolli Rebuttal at 6 lines 15-17; Pirolli Deposition at 55 lines 3-8; Pirolli Cross at 1971 lines 15-20)

b) Summit states that it would provide transportation services to uncommitted shippers "if we have an agreement in place . . . ." (JLO Ex. 549, Pirolli Deposition at 59 lines 6-16)

c) An uncommitted shipper would need to fund and install its own capture equipment. (*Id*. at 59 line 23 to 60 line 6)

d) An uncommitted shipper would retain ownership of the carbon dioxide they capture at their facilities. (*Id*. at 61 lines 3-9)

e) Summit would need to build a lateral pipeline to connect uncommitted shippers to its pipeline system and agree to terms whereby the shipper would pay for such pipeline. (*Id*. at 55 lines 19-25)

f) Summit has not planned for any receipt points on its pipeline system that would accept carbon dioxide transported from an emitter to the pipeline by truck. (*Id*. at 56 lines 1-19)

g) Summit did not produce as evidence an executed any contracts with uncommitted shippers.

STANDARD OF REVIEW

Iowa Code § 17A.19(10) governs judicial review of administrative agency proceedings. *City of Des Moines v. Iowa Dep't of Transp.*, 911 N.W.2d 431, 438 (Iowa 2018). It empowers the district court to "reverse, modify, or grant other appropriate relief" from an agency action if it prejudices the substantial rights of a person seeking judicial relief and is erroneous under one of fourteen enumerated grounds in Iowa Code § 17A.19(10)(a) to (n). *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006).

The standard of review differs depending on the error alleged, whether error of law, of fact, or mixed fact and law. *Jacobson Transp. Co. v. Harris*, 778 N.W.2d 192, 196 (Iowa 2010). A challenge to factual findings or the sufficiency of the evidence is subject to the substantial evidence test. *Id.* Because Iowa Code chapter 17A delegates fact finding to agencies, courts will defer to an agency's fact finding unless it is "not supported by substantial evidence in the record before the court . . . ." Iowa Code § 17A.19(10)(f). *Sahu v. Iowa Bd. of Med. Exam'rs*, 537 N.W.2d 674, 676 (Iowa 1995). "Evidence is substantial if a reasonable mind would find it adequate to reach a conclusion." *Quaker Oats Co. v. Ciha*, 552 N.W.2d 143, 150 (Iowa 1996); *Northwestern Bell Tel. Co. v. Iowa Utilis. Bd.*, 477 N.W.2d 678, 682 (Iowa 1991).

However, where factual findings and the sufficiency of evidence arise in the context of breaching constitutionally protected property rights via eminent domain, the district court should take care to confirm that the agency has gathered sufficient evidence to meet factual preconditions for use of eminent domain. The Supreme Court has held that evidence related to a permittee's common carrier status must be "competent and substantial." *Circle Exp. Co. v. Iowa State Commerce Commission*, 249 Iowa 51, 653, 86 N.W.2d 888, 890 (1957). Also, the legislature has determined that when a landowner brings an "action challenging the exercise of eminent domain authority or the condemnation proceedings," the courts must find by a "preponderance of the evidence that the finding of public use, public purpose, or public improvement meets the definition of those terms." Iowa Code § 6A.24(3). "A preponderance of the evidence is the evidence 'that is more convincing than opposing evidence' or 'more likely true than not true.'" *Interest of K.D.*, 975 N.W.2d 310, 320 (Iowa 2022); *Martinek v. Belmond–Klemme Cmty. Sch. Dist.*, 772 N.W.2d 758, 761 (Iowa 2009) (*quoting Holliday v. Rain & Hail L.L.C.*, 690 N.W.2d 59, 63–64 (Iowa 2004)). While Iowa Code § 6A.24(3) does not apply to the present appeal, it would apply in landowner challenges to any condemnation proceedings initiated by Summit and is evidence of legislative intent for a heightened standard of review in eminent domain matters.

Moreover, both the Iowa House of Representatives and Senate earlier this month voted to amend Iowa Code § 6A.21 by adding a new subsection (d) defining

the term "common carrier." This new subsection states in relevant part: "For a carrier engaged in the transportation of a hazardous liquid to qualify as a common carrier, the carrier must establish by clear and convincing evidence that it will transport a commodity for one or more shippers not affiliated with the carrier who will either retain ownership of the commodity or sell the commodity to a party other than the carrier." H.F. 639, 91st Gen. Assemb. Reg. Sess. (Iowa 2025). While this bill has not yet been signed or vetoed by the Governor, who has until approximately June 11 to act, it indicates legislative concern about the standard of review applicable to findings of fact in eminent domain proceedings. Should the Governor sign this bill into law, it would apply to future condemnation proceedings by Summit, should it reach that stage of development.

Iowa Code § 17A.19(10) also makes clear that this court may consider only facts contained in the "record before the court." Iowa Code § 17A.19(10)(f)(2) defines "record before the court" to mean "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." In turn, Iowa Code § 17A.12(6) defines the scope of agency records in contested cases as follows:

> The record in a contested case shall include:
> a. All pleadings, motions, and intermediate rulings.
> b. All evidence received or considered and all other submissions.
> c. A statement of all matters officially noticed.
> d. All questions and offers of proof, objections, and rulings thereon.

e. All proposed findings and exceptions.
f. Any decision, opinion, or report by the officer presiding at the hearing.

The court may not consider evidence not contained in the record transmitted to it by the Commission. "Agency findings of fact must be based solely on record evidence and matters officially noticed in the record." Iowa Code § 17A.12(8). With regard to contested case judicial review, Iowa Code § 17A.19(7) states: "[i]n proceedings for judicial review of agency action in a contested case, . . . a court shall not itself hear any further evidence with respect to those issues of fact whose determination was entrusted by the Constitution or a statute to the agency in that contested case proceeding." However, a court may order an agency to supplement its record, Iowa Code § 17A.19(10)(f)(2), upon an application "to the court for leave to present evidence in addition to that found in the record of the case." Iowa Code § 17A.19(7). The requesting party must prove "to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the contested case proceeding before the agency. *Id.* If the court finds cause to allow additional evidence into the record, the court may order the agency to reopen its contested case hearing, take additional evidence, and issue updated findings and decisions. *Id.* The court may not itself conduct a factual inquiry.

With regard to mixed questions of law and fact, the courts may reverse or modify an agency finding if the agency's decision was affected by irrational reasoning, failure to consider relevant facts, or irrational, illogical or wholly

unjustifiable application of law to the facts. *Grant v. Iowa Dept. of Human Services*, 722 N.W.2d 169 (Iowa 2006), *rehearing denied*. "The deference afforded an agency in its application of law to fact is predicated on the assumption the agency reviewed and considered all of the relevant evidence in reaching its decision." *Envtl. L. and Policy Ctr. v. Iowa Utilities Bd.*, 989 N.W.2d 775, 784 (Iowa 2023) (*citing JBS Swift & Co. v. Hedberg*, 873 N.W.2d 276, 280–81 (Iowa Ct. App. 2015). If the record shows that the agency did not consider relevant evidence, then no deference is afforded to the agency. *See Envtl. L. and Policy Ctr.*, 989 N.W.2d at 784.

The standard of review for interpretation of the Iowa Constitution is *de novo*. *Harms v. City of Sibley*, 702 N.W.2d 91, 96 (Iowa 2005); *Blumenthal Inv. Trusts v. City of West Des Moines*, 636 N.W.2d 255, 260 (Iowa 2001).

With regard to interpretation of statutes, unless the legislature has clearly vested an agency with authority to interpret a statute, the meaning and effect of a statute is a task delegated to the courts. *City of Des Moines v. Iowa Dept. of Transportation*, 911 N.W.2d 431, 438 (Iowa 2018); *Brakke v. Iowa Dept. of Nat. Res.*, 897 N.W.2d 522 530 (Iowa 2017); *NextEra Energy Res. LLC v Iowa Utilities Bd.*, 815 N.W.2d 30, 44 (Iowa 2012). If the legislature has clearly vested the agency with interpretive authority, the court will give deference and reverse only if the agency's interpretation is "[b]ased upon an irrational, illogical, or wholly unjustifiable

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interpretation of a provision of law." Iowa Code § 17A.19(10)(l); *Hawkeye Land Co. v. Iowa Utils. Bd.*, 847 N.W.2d 199, 207 (Iowa 2014).

The courts have identified three factors for determining when the legislature has vested interpretative authority in an agency:

- whether the statutory provision is within the special expertise of the agency;
- whether the term to be interpreted is found in other statutes; and
- whether a term has an independent legal definition not uniquely within the subject matter expertise of the agency.

Renda v Iowa Civil Rights Com'n, 784 N.W.2d 8, 14 (Iowa 2010).

If the legislature has not clearly vested interpretive authority with the agency, the court will give no deference to the agency's statutory interpretation and must reverse an erroneous interpretation. *Hawkeye Land Co.*, 847 N.W.2d at 207, *quoting Iowa Dental Ass'n v. Iowa Ins. Div.*, 831 N.W.2d 138, 142–43 (Iowa 2013); *Hill Concrete v. Dixson*, 858 N.W.2d 26 (Iowa Ct. App. 2014).

When interpreting a statute that delegates the power of eminent domain, a court should strictly construe the statute and restrict its interpretations to the legislature's expression of intent. *Hardy v. Grant Township Trustees, Adams County*, 357 N.W.2d 623, 626 (Iowa 1984); *see also State v. Johann*, 207 N.W.2d 21, 24 (Iowa 1973) ("We have consistently maintained, however, that statutes providing for the exercise of

eminent domain must be strictly complied with and restricted to their expression and intent.”). *Hawkeye Land Co. v. Iowa Utilities Bd*., 847 N.W.2d 199, 210 (Iowa 2014). A statute that delegates the state's power of eminent domain has constitutional implications and therefore cuts against granting an agency broad interpretative authority. *Id*. at 208.

This court must analyze the Commission’s interpretation of Iowa Constitution article I, Section 18 and Iowa Code §§ 6A.21 and 6A.22 without deference to the Commission’s interpretation. Constitutional interpretation is reserved to the courts. *Harms v. City of Sibley*, 702 N.W.2d 91, 96 (Iowa 2005). The Commission’s interpretation of Iowa Code §§ 6A.21 and 6A.22 is not subject to deference because all three *Renda* factors weigh against granting the Commission deference.

First, the Commission has no “special expertise” in determining the common carrier status of proposed pipelines. The common carrier requirement for eminent domain arises from Iowa Code § 6A.22(2)(a)(2), which section applies to condemnation of agricultural land for all types of common carrier and other uses. Unlike electric utilities, the legislature has not delegated authority to the Commission to regulate the commercial characteristics of operating pipelines such as their tariffs, carriage terms, and status as common carriers. This is due in part to the fact that federal law preempts state regulation of the common carrier status of interstate natural gas and interstate petroleum pipelines. The Natural Gas Act, 15 U.S.C. §§ 717-71(w),

authorizes FERC to regulate the commercial aspects of proposed or operating interstate natural gas pipelines. The Interstate Commerce Act, 49 App. U.S.C. § 1(3), (4), (5) (1988) [1], requires that oil pipelines operate as common carriers and authorizes FERC to regulate the commercial aspects of proposed and operating interstate oil pipelines. This limited jurisdiction is reflected in the fact that the term "common carrier" occurs nowhere in Iowa Code chapter 479B or its implementing regulations, Iowa Admin. Code chapter 199-13. Therefore, the Commission has no special expertise in applying the common carrier requirement in Iowa Code § 6A.22(2)(a)(2).

Second, the definition of "common carrier" has been used by the legislature in multiple statutes and applied to many types of carriers, not just pipelines subject to Commission jurisdiction. *E.g.*, *Wright v. Midwest Old Settlers and Threshers Ass'n*, 556 N.W.2d 808, 810 (1996) (common carrier status of an amusement ride); *Circle Exp. Co. v. Iowa State Commerce Commission*, 249 Iowa 651, 658-59, 86 N.W.2d 888, 893 (1957) (common carrier status of a trucking company); *United Suppliers*, 876 N.W.2d at 774-75 (common carrier status of an agricultural products supplier).

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[1] Regulation of oil pipeline rates began with the enactment of the Hepburn Act of 1906, which amended the Interstate Commerce Act to bring within its purview "common carriers engaged in…the transportation of oil…by pipe line." Pub. L. No. 59-337, 34 Stat. 584 (codified as amended in scattered sections of 49 U.S.C.). 49 U.S.C. app. § 1(1)(b) (1988). The Interstate Commerce Act as it applies to oil pipelines is the Act as it stood on the date of the enactment of the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (1977), which provided among other things for the transfer of jurisdiction over oil pipelines to the newly created Federal Energy Regulatory Commission ("FERC"). See Revised Interstate Commerce Act, Pub. L. No. 95-473 § 4(c), 92 Stat. 1337, 1470 (1978).

Third, the term "common carrier" has been independently defined by the Iowa courts as a common law definition since shortly after the State's founding. *See, e.g.*, *Wright*, 556 N.W.2d at 810; *Whitmore v. Bowman*, 4 Greene 148 (Iowa 1853).

Accordingly, the court owes the Commission no deference with regard to its interpretation of state eminent domain laws generally or the state's common carrier Constitutional and statutory requirements, in particular. Instead, the court should strictly construe Iowa Code §§ 6A.21 and 6A.22 and restrict its interpretations to the legislature's expression of intent. *Hardy*, 357 N.W.2d at 626.

Iowa Code § 17A.19(10)(f) states that the court must review Commission factual determinations under the substantial evidence test. However, when reviewing the Commission's factual determinations, the court should consider: (a) the Iowa Supreme Court's determination that that evidence in support of a common carrier determination must be "competent and substantial," *Circle,* 249 Iowa at 65, 86 N.W.2d at 890; (b) the Iowa Code § 6A.24(3) requirement that the standard of review for agency factual determinations in landowner actions challenging agency condemnation is the preponderance of the evidence test; and (c) the potential near-term enactment of adoption of H.F. 639, which requires use of the clear and convincing evidence standard for common carrier determinations, should this bill be signed by the Governor. State policy favors a rigorous analysis of Commission

factual determinations related to granting eminent domain powers to pipeline permit applicants.

ARGUMENT

I. THE COMMISSION'S DETERMINATION THAT SUMMIT WILL OPERATE AS A COMMON CARRIER IS IN VIOLATION OF THE IOWA CONSTITUTION AND IOWA CODE CHAPTER 6A

Iowa Code chapter 479B authorizes the Commission to grant pipeline developers "rights of eminent domain where necessary," Iowa Code § 479B.1; see also § 479B.16, subject to the limitations and protections in Iowa Constitution article I, section 18 and Iowa Code §§ 6A.21 and 6A.22. *Puntenney v. Iowa Utilities Board*, 928 N.W.2d 829, 842-53 (Iowa 2019); *Mid-America Pipeline Co. v. Iowa State Commerce Commission*, 253 Iowa 1143, 1147, 114 N.W.2d 622, 624 (1962) ("*Mid-America 1962*"). The eminent domain analysis and findings in the Commission's Final Order in Docket No. HLP-2021-0001 violate these constitutional and statutory protections, are not supported by substantial evidence, and are arbitrary, capricious and an abuse of discretion and must be reversed and remanded.

A. The Commission's Eminent Domain Analysis

The Commission's eminent domain analysis is contained in Final Order pages 252 through 297. After reviewing the parties' positions, the Commission, starting on page 287, provided its discussion and decision to grant Summit eminent domain authority. Initially, the Final Order cites the Iowa Supreme Court's *Puntenney*

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decision, 928 N.W.2d at 843, for the proposition that, because the U.S. Federal Energy Regulatory Commission ("FERC") "requires a 10 percent reservation of capacity for walk-up shippers to meet the requirement to be a common carrier," that therefore a statement of intent by Summit to make such reservation is all that is required to meet the Iowa common carrier standards. (Final Order at 288) The Final Order concluded: "Based upon this [ten percent] requirement in *Puntenney*, Summit Carbon meets the definition of common carrier and is eligible to be vested with the right of eminent domain."

The Final Order discussed whether Summit would comply with the Iowa common law definition of "common carrier" as described by the Iowa Supreme Court in *Circle Exp. Co. v. Iowa State Commerce Comm'n, 249 Iowa 651,* 658, *86 N.W.2d 888, 893 (1957).* (Final Order at 288-89) There, the court stated in relevant part: "the distinctive characteristic of a common carrier is that he holds himself out as ready to engage in the transportation of goods for hire . . . ." *Id*. The Final Order then found that because Summit witnesses stated the company "is holding itself out as a transportation business for hire from those who are seeking to have their carbon dioxide emissions captured, transported, and stored in North Dakota," that therefore Summit is a common carrier. (Final Order at 289)

The Final Order also relied on (a) executed "Offtake Agreements" between Summit and its ethanol plant "partners" and (b) unexecuted "draft transportation

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agreements" that could be provided in negotiations with possible committed and walk-up shippers. The Final Order made a conclusory finding that the Offtake Agreements were substantially similar. The Final Order also provided a conclusory finding that the draft transportation agreement for use in negotiations with possible long-term shippers did not treat such shippers differently from ethanol plants, such that Summit would not discriminate between classes of shippers. The Final Order did not discuss possible discriminatory differences between the draft uncommitted walkup transportation agreement and the Offtake Agreements or committed shipper transportation agreements.

The Final Order noted that FERC-regulated common carriers may reserve service via long-term contracts, but did not discuss the FERC approval declaratory order process, open season (capacity auction) requirements, transportation agreement standards, or the tariff approval process. (Final Order at 289) It also quoted the *Puntenney* decision's statement that, "[t]he key is whether spot shippers have access . . . ," 928 N.W.2d at 843. Final Order at 290. The Final Order did not describe or identify any possible "spot shippers."

The Final Order then cited *State ex rel. Bd. of R.R. Comm'rs v. Carlson*, 251 N.W. 160, 161 (1933), for the proposition that "[t]he key determination is whether the company has limited itself via the contracts." (Final Order at 290) The Final Order found that "Summit Carbon is not limiting its business via the contracts it enters into,

which would be a violation of this requirement from the long history of Iowa common law pertaining to common carrier law," thereby implying that as long as a pipeline company states an intention to serve all types of potential customers who might need its services, that such statement of intent is alone sufficient to make it a common carrier, regardless of a lack of evidence of actual interest by, or even the existence of various customer classes. (Final Order at 290)

The Final Order next admitted that, "[t]here is no question Summit Carbon will hold legal title to the liquefied carbon dioxide that will be transported through its proposed hazardous liquid pipeline from the participating ethanol plants." (Final Order at 291) It distinguished the present situation from that in *Mid-America 1962*, 253 Iowa at 1146, 114 N.W.2d at 623-24, which found that a proposed liquid hydrocarbon (petroleum product) pipeline was not a common carrier, because it would transport only petroleum products owned by it. (*Id*.) It claimed that the pipeline company intended to ship its own products that it had produced itself,[2] thereby creating a "closed loop," whereas here Summit "does not create the carbon dioxide that is then shipped on its proposed hazardous liquid pipeline." (*Id*.) It also found that the partner ethanol plants are "independent" of Summit, such that Summit is not

[2] The *Mid-America 1962* decision does not state that the pipeline developer there intended to transport only products it produced. Instead, the court stated the pipeline "intends to handle only its own products," 253 Iowa at 1146, 114 N.W.2d at 623-24; and that "the line will be for the purpose of the liquid hydrocarbons only of said company." 253 Iowa at 1147, 114 N.W.2d at 624. These statements do not say that developer produced (refined) its own products, but rather that the pipeline would handle products owned by its developer.

creating a "closed loop system where only Summit Carbon benefits." (*Id.*) The Final Order did not describe how Summit's ethanol plant partners are "independent."

The Final Order stated that Summit "is working with other companies on transportation service agreements and holding an open season for potential shippers where Summit Carbon will not own the carbon dioxide in the proposed hazardous liquid pipeline," thereby admitting that Summit has not yet successfully held an open season capacity auction, which is a prerequisite to execution of long-term transportation agreements. (*Id.*) The Final Order dismissed this lack of contractual certainty on the grounds that "Summit Carbon has stated its intention" to offer "three contractual options: Offtake Agreements, transportation service agreements, and walk-up shippers," and it is this "offering of the intended service to the public that assists in the common carrier analysis." (*Id.* at 292) The Final Order found that "benefits to the public cannot be obtained until Summit Carbon's proposed hazardous liquid pipeline is constructed. Everything is hypothetical . . . ."

Finally, the Final Order applied the twelve-factor "primary business test" adopted by the court in *United Suppliers, Inc.*, 876 N.W.2d at 775-76, which test is intended to help discern whether a business is providing "private carrier" transportation services as a part of its primary business or is providing common carrier transportation services for hire to all parties who might need transportation services. There, the court determined that an agricultural supply company using

leased equipment to deliver products purchased from it to its customers was a "private carrier" and not a "motor carrier" (common carrier) under Iowa Code § 325A.1. *Id.* This statute, in relevant part, defines "private carrier" as a person who "transports commodities of which the person is the owner, lessee, or bailee and the transportation is a furtherance of the person's primary business or occupation." Iowa Code § 325A.1(15). It defines "motor carrier" as "a person engaged in the transportation, for hire . . ." of various types of goods. Iowa Code § 325A.1(7), (9), (10), (11), and (12). The following table provides the Final Order's full analysis of each factor in this test.

Primary Business Test Factor	Commission Analysis
1. Whether the carrier is the owner of the property transported.	"Factor one, while Summit Carbon will own some of the property being transported, it is also offering service where it will not be the owner of the property. The Board finds this factor is neutral."
2. Whether orders for the property are received prior to its purchase by the carrier.	"Factor two, there are no preorders for the carbon dioxide as Summit Carbon will be transporting the carbon dioxide for the independent emitters to the sequestration site in North Dakota, where it will be stored. The Board finds this factor weighs in favor of Summit Carbon."
3. Whether the carrier utilizes warehousing facilities and the extent of this use as a storage place.	"Factor three, there is no warehousing prior to shipment. The Board finds this factor does not apply to Summit Carbon."
4. Whether the carrier undertakes any financial risks in the transportation-connected enterprise.	"Factor four, there is financial risk borne by Summit Carbon as it is providing transportation service to the public. The

	Board finds this factor weighs in favor of Summit Carbon.”
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.	“Factor five, Summit Carbon does not include any costs in the sale price of the product because it is not reselling anything, but Summit Carbon does recover its costs from the entities that are using Summit Carbon’s service. See Summit Carbon RB, p. 32. The Board finds this factor weighs in favor of Summit Carbon.”
6. Whether the carrier transports or holds out to transport for anyone other than itself.	“Factor six, Summit Carbon holds itself out for the transportation of carbon dioxide. The Board finds this factor to weigh in favor of Summit Carbon.”
7. Whether the carrier advertises itself as being in a noncarrier business.	“Factor seven, Summit Carbon has consistently testified to capturing, transporting, and storing carbon dioxide. E.g., HT, p. 1614. The Board finds this factor weighs against Summit Carbon.”
8. Whether its investment in transportation facilities and equipment is the principal part of its total business investment.	“Factor eight, Summit Carbon is proposing to build a $5 billion-dollar-plus pipeline, compared to the $15 million to $60 million per capture facility. The Board finds this factor weighs in favor of Summit Carbon.”
9. Whether the carrier performs any real service other than transportation from which it can profit.	“Factor nine, Summit Carbon does receive payments for sequestering the carbon dioxide in North Dakota, but only after transporting it there. The Board finds this factor is neutral as it relates to Summit Carbon.”
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.	“Factor ten is inapplicable to pipelines of any kind. The Board finds this factor is neutral as it relates to Summit Carbon.”

11. Whether the products are delivered directly from the shipper to the consignee (i.e., without intermediate warehousing).	"Factor 11, the ethanol plants provide their carbon dioxide to Summit Carbon, which transports the carbon dioxide to North Dakota to be sequestered, with no storage in between. The Board finds this factor weighs in favor of Summit Carbon."
12. Whether solicitation of the order is by the supplier rather than the truck owner.	"Factor 12, Summit Carbon is providing a service to independent ethanol plants as Summit Carbon has no carbon dioxide to move itself. The Board finds this factor weighs in favor of Summit Carbon."

(Final Order at 294-95) Based on this analysis, the Final Order found that "Summit Carbon is a 'for hire' company with its primary business being the transportation of carbon dioxide for the independent ethanol plants and those who will do business with Summit Carbon under the transportation service agreement or as a walk-up shipper." (*Id*. at 295)

In summary of its entire common carrier analysis, the Final Order found:

> Summit Carbon is providing a service to the public, indiscriminately, and will operate as a common carrier under Iowa common law. Therefore, the Board will vest Summit Carbon with the right of eminent domain over parcels as described below.

The Final Order did not impose any post-construction conditions on Summit with regard to ongoing compliance with Iowa common carrier requirements, such as: (a) terms for possible future long-term and walk-up transportation agreements; (b) limitations on changes to Offtake Agreements; or (c) the consequences of failing to

maintain common carrier status. (See Final Order Conditions at 248-51) It should also be noted that while the Final Order discussed Summit's purported role as a common carrier, which is the first element of the *Puntenney* court's two-part Constitutional analysis, the Final Order did not expressly discuss any facts or make any findings related to the second part of that analysis: whether a pipeline project would provide a public benefit that rises to the level of a public use under the Iowa Constitution, such as lower commodity prices or improved public safety, where public use does not include indirect trickle down economic benefits. *Puntenney* at 849.

B. Common Carrier Law

1. Iowa Constitutional Requirements for Grants of Eminent Domain to Pipeline Developers

In order to receive condemnation powers, a proposed pipeline must show that it will be put to a "public use." Iowa Constitution article I, section 18.[3] The Iowa Supreme Court in its *Puntenney* decision analyzed this constitutional standard as it relates to granting eminent domain authority to proposed hazardous liquid pipelines. *Puntenney* at 833. The court defined "public use" in accordance with Justice O'Connor's dissent in *Kelo v. City of New London*, 545 U.S. 469, 494, 125 S. Ct. 2655, 2671, 162 L.Ed.2d 439 (2005), which prohibited takings based solely on the

[3] Article I, section 18 states: "Private property shall not be taken for public use without just compensation first being made, or secured to be made to the owner thereof, as soon as the damages shall be assessed by a jury, who shall not take into consideration any advantages that may result to said owner on account of the improvement for which it is taken."

potential "secondary benefits" of a project, such as increased economic activity and taxes, because:

> 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 (emphasis in original). The *Puntenney* court also cited Justice O'Connor's recognition of three general categories of "public use":

> First, the sovereign may transfer private property to public ownership—such as for a road, a hospital, or a military base. Second, the sovereign may transfer private property to private parties, often common carriers, who make the property available for the public's use—such as with a railroad, a public utility, or a stadium. [Third] . . . in certain circumstances and to meet certain exigencies, takings that serve a public purpose also satisfy the Constitution even if the property is destined for subsequent private use.

Id. citing Kelo at 497–98, 125 S. Ct. at 2673 (citations omitted). The *Puntenney* decision expressly held that hazardous liquid pipelines "fall[] into the second category of traditionally valid public uses cited by Justice O'Connor: a common carrier akin to a railroad or a public utility." *Puntenney* at 848. Therefore, in order for a hazardous liquid pipeline company to be granted eminent domain authority under the Iowa Constitution, it must operate as a common carrier.

The *Puntenney* decision recognized that the purpose of "[t]he public-use requirement is to prevent abuse of the power for the benefit of private parties." *Puntenney* at 847-48, *citing Clarke County Reservoir Commission v. Robins*, 862

N.W.2d 166, 171–72 (Iowa 2015). While acknowledging that the courts should grant deference to legislative determinations of public use, it recognized that "[w]ere the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff." *Puntenney at 848, quoting Kelo*, 545 U.S. at 497, 125 S. Ct. at 2673). Therefore, legislative grants of eminent domain rights to private entities are subject to judicial review. *Accord*, *Mid-America 1962*, 253 Iowa at 1147, 114 N.W.2d at 624.

The *Puntenney* court summarized its holding as follows:

> In sum, because we do not follow the *Kelo* majority under the Iowa Constitution, we find that trickle-down benefits of economic development are not enough to constitute a public use. . . . But here there is more. . . . the record indicates that [the proposed pipeline] also provides public benefits in the form of cheaper and safer transportation of oil, which in a competitive marketplace results in lower prices for petroleum products. As already discussed, the pipeline is a common carrier with the potential to benefit all consumers of petroleum products, including three million Iowans.

Thus, the *Puntenney* decision identified two necessary elements in the Iowa constitutional standard for granting the right of eminent domain to a pipeline company: (a) it must operate as a common carrier, and (b) its operation must provide a substantial public benefit, such as "safer transportation" and "lower prices," to all Iowans. *Puntenney* at 849. Both of these elements are necessary, because a private carrier pipeline that transports only self-owned products and does not serve any other parties may nonetheless increase safety and/or reduce the prices of consumer

products. The *Puntenney* court required confirmation that a common carrier pipeline must be shown to provide public benefits to Iowans generally before being granted eminent domain rights. *Id.*

This holding is consistent with the Iowa Supreme Court's 1962 *Mid-America* decision, in which the court held that legislature could not grant eminent domain rights to a private pipeline for private purposes in abrogation of constitutional protections. 253 Iowa at 1146-47, 114 N.W.2d at 624. The court stated: "[A] any statute giving such a right is beyond the pale of constitutional authority. The power of eminent domain may be granted and exercised only where a public use is involved." *Id.* (citation omitted). The court held that to qualify as a "public use," a pipeline must operate as a common carrier. *Id.* The court denied the pipeline company the right to use eminent domain, because it found it would handle "only its own products," making it a private carrier. *Id.*

In Iowa, a pipeline may be granted the right to condemn property if and only if it is a common carrier <u>and</u> it also provides specific public use benefits to all Iowans, such as lower prices or improved safety, not including the sort of indirect economic benefits that accrue from all economic activity.

2. Iowa Statutory Limitations on Grants of Eminent Domain to Proposed Pipelines

The Iowa legislature requires that pipelines provide a "public use," "public purpose," or "public improvement" as a precondition to a grant of eminent domain

rights on agricultural lands. Iowa Code §§ 6A.21 and 6A.22. The legislature has made clear that a "private development," including "commercial or industrial enterprise development," generally is not a "public use," "public purpose," or "public improvement." Iowa Code § 6A.21(1)(c), (d). The legislature made an exception to this general rule for "utilities, persons, companies, or corporations under the jurisdiction of the Iowa utilities [commission]." Iowa Code § 6A.21(2). However, Commission-regulated entities must nonetheless fall within one of the categories of public use contained in Iowa Code § 6A.22(2)(a):

> (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, <u>or necessary to the function of a common carrier</u> 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.

(Emphasis added.) The only category that applies to proposed hazardous liquid pipelines is contained in subsection (2), which authorizes the use of eminent domain where "necessary to the function of a common carrier . . . ." Therefore, the Commission may grant the right of eminent domain over agricultural land to a hazardous liquid pipeline company if and only if the company proves that it will operate its pipeline as a "common carrier." Iowa Code § 6A.22(2)(a)(2).

3. Iowa Common Carrier Law

No Iowa statute defines the term "common carrier" for the purposes of § 6A.22(2)(a)(2).[4] Instead, it is defined by Iowa common law. *E.g.*, *Wright v. Midwest Old Settlers and Threshers Ass'n*, 556 N.W.2d 808, 810 (1996); *United Suppliers, Inc. v. Hanson*, 876 N.W.2d 765, 774-75 (Iowa 2016). The *Wright* court stated, "Iowa law adheres to a common law test for determining whether a particular conveyance is a common carrier or private carrier," and then provided the following definition:

> Iowa law has defined a common carrier as "one who undertakes to transport, indiscriminately, persons and property for hire." *Employers Mut. Cas. Co. v. Chicago & North Western Transp. Co.*, 521 N.W.2d 692, 693 (Iowa 1994). We have ruled that the distinctive characteristic of a common carrier is that it holds itself out as ready to engage in the transportation of goods or persons for hire, as public employment, and not as a casual occupation. *Kvalheim v. Horace Mann Life Ins. Co.*, 219 N.W.2d 533, 535 (Iowa 1974). A common carrier holds itself out to the public as a carrier of all goods and persons for hire. We, however, have also recognized that a common carrier need not serve all the public all the time. *Id*. A common carrier may combine its transportation function with other vocations and still be considered a common carrier. *Id*. at 538.

Wright at 811-12. An earlier Supreme Court decision, *Circle Exp. Co. v. Iowa State Commerce Commission,* cited 13 C.J.S. § 3, p. 26 for the following similar test:

[4] Iowa Code § 123.3 defines the term "air common carrier" to mean "a person engaged in transporting passengers for hire in interstate or foreign commerce by aircraft and operating regularly scheduled flights under a certificate of public convenience issued by the civil aeronautics board." Iowa Code § 452A.2 defines the terms "common carrier" and "contract carrier" to both mean "a person involved in the movement of motor fuel or special fuel from the terminal or movement of the motor fuel or special fuel imported into this state, who is not an owner of the motor fuel or special fuel."

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> The test by which it is determined whether a party is a common carrier of goods is: (1) He must be engaged in the business of carrying goods for others as a public employment, and must hold himself out as ready to engage in the transportation of goods for persons generally as a business, and not as a casual occupation. (2) He must undertake to carry goods of the kind to which his business is confined. (3) He must undertake to carry to the methods by which his business is conducted, and over his established roads. (4) The transportation must be for hire.

249 Iowa 651, 658-59, 86 N.W.2d 888, 893 (1957).

To further elucidate the "for hire" requirement, the Iowa Supreme Court adopted the federal "primary business test." *United Suppliers*, 876 N.W.2d at 775. The court applied this test to determine whether an agricultural supply company that leased trucks to deliver products sold by it to its customers was a "private carrier" or a "motor carrier" (common carrier) under Iowa Code § 325A.1. *Id*. This statute, in relevant part, defines "private carrier" as a person who "transports commodities of which the person is the owner, lessee, or bailee and the transportation is a furtherance of the person's primary business or occupation." Iowa Code § 325A.1(15). It defines "motor carrier" as "a person engaged in the transportation, for hire . . ." of various types of goods. Iowa Code § 325A.1(7), (9), (10), (11), and (12). The "primary business test" identifies twelve factors intended to aid in distinguishing common and private carriers. 876 N.W.2d at 776-77. These factors are listed in the table starting at page 28 and discussed further herein.

The *United Suppliers* court determined that eleven of the factors weighed against common carrier status, and particularly noted that the company transported only its own chemicals and generated only about five percent of its profits from its transportation services. It, therefore, held that United Suppliers' transportation services were not the company's "primary business," such that it was not a "for hire" common carrier and instead was a private carrier. *Id*. at 777-78.

The *United Suppliers* decision is consistent with the *Mid-America 1962* decision, in which the Iowa Supreme Court determined that a proposed pipeline would transport only petroleum liquids owned by the pipeline's owner, and accordingly held that the proposed pipeline was not a common carrier and instead was a private carrier ineligible to be granted eminent domain rights. 253 Iowa at 1146-47, 114 N.W.2d at 624. The *Mid-America 1962* court held:

> Taking the allegations of the petition, Northern is a private corporation intending to operate the proposed pipe line for private purposes. This may not be done; and any statute giving such a right is beyond the pale of constitutional authority. The power of eminent domain may be granted and exercised only where a public use is involved. *Abolt v. City of Fort Madison*, 252 Iowa 626, 108 N.W.2d 263, 267, and citations. We must agree that the grant of the power of eminent domain for a strictly private purpose and use, as Chapter 490 seems to authorize, is beyond legislative authority and when the commission attempts to follow the statute in granting such right it is acting illegally and beyond its jurisdiction. It has no right to put into effect unconstitutional provisions of a statute.

Id.; accord Mountain Valley Pipeline, LLC v. McCurdy, 238 W.Va. 200, 793 S.E.2d 850 (2016). (pipeline intended to carry natural gas almost exclusively produced by its own affiliates not a common carrier); *Progressive Northwestern Insurance Co. v. Martinez*, 125 N.M. 46, 956 P.2d 845, 846-47 (Ct.App.1998) (sand and gravel excavator that transported only its own products not a common carrier); *Gambino v. Jackson*, 150 W.Va. 305, 145 S.E.2d 124, 129 (1965) (lime distributor that transported only its own product not a common carrier). The fact that a carrier transported only its own products was a critical factor in determining that a carrier was a private and not a common carrier in both the *United Suppliers* and *Mid-America 1962* decisions.

The *Puntenney* court referenced Iowa common carrier precedent but did not methodically apply Iowa's common law definition of "common carrier." 928 N.W.2d at 843. Instead, the court relied on the fact that the pipeline had reserved ten percent of capacity for walk-up business. *Id*. at 843. This reservation is one of many federal common carrier requirements under the Interstate Commerce Act. 49 App. U.S.C. § 1(3), (4), (5)(a) (1988). Consequently, the *Puntenney* decision does not itself provide a detailed application of Iowa common carrier law to proposed pipelines.

With regard to judicial review of agency common carrier decisions, the Supreme Court has stated that "[i]t is a question of law for the court to determine what constitutes a common carrier, but it is a question of fact whether, under the evidence in a particular case, one charged as a common carrier comes within the definition of that term and is carrying on its business in that capacity." *Wright* at 810; *see also*

Circle, 249 Iowa at 653, 86 N.W.2d at 890 ("It is a question of law for the court to determine what constitutes a common carrier, and so we may examine the record here to see if the proper concept of this service was applied."). When reviewing agency common carrier decisions, the courts "should only examine the evidence submitted to determine whether there is any competent and substantial evidence to support the findings." *Circle,* 249 Iowa at 654; 86 N.W.2d at 890.

Typically, the courts have applied the Iowa common law common carrier definition where carriers' operations are ongoing, such that the courts could consider evidence of both actual carrier operations and executed contracts between a carrier and its third-party shippers. *E.g.*, *United Suppliers, Inc. v. Hanson*, 876 N.W.2d at 767-68 (operating agricultural supply company); *State ex rel. Bd. of R. R. Com'rs v. Rosenstein*, 252 N.W. 251, 252-53 (Iowa 1934) (operating movie distributor); *Cedar Rapids Steel Transp., Inc. v. Iowa State Commerce Commission*, 160 N.W.2d 825, 833-35 (1968) (operating steel transportation company). The *Puntenney* and *Mid-America 1962* decisions are notable exceptions where common carrier decisions were made before a carrier began operations. There are no Iowa cases on hazardous liquid pipeline compliance during operation with state common carrier requirements, because the legislature has not authorized the Commission or any other state agency to regulate the commercial aspects of hazardous liquid pipelines or enforce their common carrier status.

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This lack of ongoing state oversight of compliance with state common carrier standards is not a problem for oil pipelines, because the state can rely on FERC oversight and enforcement of the federal common carrier standards in 49 App. U.S.C. § 1 (1988). In contrast, it is a problem for carbon dioxide pipelines, because neither the State nor the federal government have implemented regulatory programs that oversee and enforce common carrier standards against them. This regulatory gap means that, before granting common carrier status and the right to eminent domain, the Commission and the courts must require substantial evidence showing that a pipeline has entered into irrevocable contracts that require it to operate indefinitely as a common carrier. Otherwise, there is a risk that a company's contractual intentions would not be fulfilled, and that a company could change its commercial relationships so that it no longer operates as a common carrier.

While it is possible that the Commission could include operation as a common carrier as a permit condition, the Commission's lack of expertise in pipeline commercial operations and tariffs, and the lack of any Commission regulatory program to track common carrier compliance and resolve common carrier disputes, also argue for requiring substantial evidence including executed irrevocable contracts requiring future common carrier operations.

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4. Federal Common Carrier Law

No federal law requires that carbon dioxide pipelines operate as common carriers. The Federal Energy Regulatory Commission ("FERC") regulates natural gas pipelines pursuant to the Natural Gas Act, 15 U.S.C. § 717 *et seq*. ("NGA"), but determined that the NGA's reach does not extend to carbon dioxide pipelines. *Cortez Pipeline Company*, 7 F.E.R.C. ¶ 61,024 (1979). The Interstate Commerce Commission ("ICC") expressly disclaimed jurisdiction over interstate carbon dioxide pipelines, *Cortez Pipeline Co.*, 46 Fed. Reg. 18,805 (Mar. 26, 1981), and its successor, the Surface Transportation Board ("STB"), has not reversed this determination.[5] FERC regulates oil pipelines before and during their operational lives to ensure continuing compliance with Interstate Commerce Act ("ICA") common carrier requirements, but this jurisdiction is limited to "oil." 49 U.S.C. § 60502; 49 App. U.S.C. § 1 (1988);[6] see also *Gulf Central Pipeline Company*, 50 FERC ¶ 61,381

[5] The STB is an independent federal administrative agency within the Department of Transportation and is responsible for economic regulation of certain common carrier interstate transportation. This responsibility primarily relates to railroad transportation, but also includes interstate transportation by pipeline of commodities "when transporting a commodity other than water, gas or oil, with the term "gas" undefined. 49 U.S.C. §15301(a).

[6] The ICA as applied to oil pipelines has a complicated history. J. Barr, *Unfinished Business: FERC's Evolving Standard for Capacity Rights on Oil Pipelines,* 32 Energy L.J., 563, 564 n. 5 (2011). Concurrent with the enactment of the ICA in 1887, the Interstate Commerce Commission (ICC) was created to regulate the interstate common carriers subject to the ICA, which were primarily railroads. The ICA was amended in 1906 by the Hepburn Act to include regulation of common carrier oil pipelines. The ICC regulated oil pipelines under the ICA between 1906 and 1977, when jurisdiction over oil pipelines was transferred to the newly-created FERC by the 1977 DOE Act. *See generally* Department of Energy Organization Act, 42 U.S.C. § 7101 (1977); 49 U.S.C. § 60502 (2006); Pub. L. No. 95-473, § 4(c); 92 Stat. 1466-1470 (1978) ("The Federal Energy Regulatory Commission has the duties and powers related to the establishment of a rate or charge for the transportation of oil by pipeline or the valuation of that

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(1990), *aff'd*, *CF Industries. Inc. v. Federal Energy Regulatory Commission*, 925 F.2d 476 (1991) (FERC pipeline jurisdiction limited to "oil" and other energy pipelines by 42 U.S.C. § 7155 (1988), recodified at 49 U.S. Code § 60502).

Consequently, neither the Commission nor the Iowa courts are able to rely on a federal agency determination of a proposed carbon dioxide pipeline's common carrier status, as happened in Iowa permitting and judicial review related to the Dakota Access Pipe Line ("DAPL"), which transports crude oil.[7] The State also cannot rely on ongoing federal oversight to ensure that a carbon dioxide pipeline will continue to be operated as a common carrier post-construction, as it can with oil pipelines.

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pipeline that were vested on October 1, 1977, in the Interstate Commerce Commission or an officer or component of the Interstate Commerce Commission."). This reorganization provided that those portions of the old ICA that were repealed and recodified in 1978, nevertheless remain in effect as they existed on October 1, 1977, to the extent that these laws relate to the movement of oil by pipeline and the rates and charges related thereto. However, the 1977 ICA language was not republished after 1988. Thus, the most recent U.S. Code version of the 1977 ICA language relating to oil pipeline regulation is found in the 1988 appendix to Title 49 of the United States Code and is cited as 49 App. U.S.C. § 1 *et seq*. (1988). FERC provides a PDF of the 1988 Appendix to the Title 49 U.S.C. § 1 scanned from a paper copy at https://www.ferc.gov/sites/default/files/2020-06/Interstate-Commerce-Act.pdf. A cleaner copy is also available from the Library of Congress website at https://tile.loc.gov/storage-services/service/ll/uscode/uscode1988-01904/uscode1988-019049a001/uscode1988-019049a001.pdf.

[7] DAPL status as a common carrier under federal law was confirmed by a FERC Declaratory Order issued on December 24, 2014, shortly after the DAPL project developer filed its October 2014 petition with the Iowa Utilities Board and almost a full year before its evidentiary hearing. *Dakota Access, LLC, Energy Transfer Crude Oil Company, LLC*, 149 FERC ¶ 61,275 (Dec. 24, 2014) (Declaratory Order in Docket No. OR14-42-000). At the time of the Board's decision, DAPL's status as a common carrier was established under federal law. Both the Iowa Utilities Board and the Iowa Supreme Court relied on this federal determination in their findings that DAPL was a common carrier pipeline. *Puntenney* at 843.

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Even though federal law does not regulate the common carrier status of carbon dioxide pipelines, the Iowa courts may find federal common carrier rules and practice to be instructive. Federal law requires that all interstate oil pipeline companies be common carriers. 49 App. U.S.C. § 1(1)(b) (1988) states: "The provisions of this chapter shall apply to common carriers engaged in . . . (b) The transportation of oil . . . . by pipe line . . . ."). "The term 'common carrier' as used in this chapter shall include all pipe-line companies . . . engaged in such transportation aforesaid as common carriers for hire." 49 App. U.S.C. § 1(3)(a) (1988). All interstate oil pipelines must "provide and furnish transportation upon reasonable request therefor." 49 App. U.S.C. 1(4) (1988). "By definition, [an oil] pipeline is a common carrier, and is bound by the ICA to ship product as long as a reasonable request for service is made by a shipper." *Magellan Midstream Partners, L.P.*, 161 FERC ¶ 61,219, at P 12 (2017). A common carrier oil pipeline must provide "for hire" transportation services to third-parties. 49 App. U.S.C. § 1(3)(a) (1988).[8] To comply with federal common carrier requirements, a pipeline operator's rates and practices – for all classes of shippers – must be just, reasonable, and not discriminatory. 49 App. U.S.C. §§ 1 (4), (5)(a) (1988). The forgoing common carrier standards apply to all operating interstate oil pipelines.

[8] FERC does allow limited transportation of product by pipeline affiliates, but recognizes the risk of approving pipelines that ship only product owned by affiliates. *Proposed Policy Statement on Oil Pipeline Affiliate Committed Service*, 87 Fed. Reg. 78670 (Dec. 22, 2022).

Interstate oil pipeline developers petition FERC for declaratory orders confirming their compliance with federal common carrier requirements as a matter of course long before the start of construction. To issue such an order, FERC requires that pipeline developers provide it with substantial evidence in the form of executed transportation service agreements, descriptions of open season (capacity auction) processes and results, proposed tariffs, and other commercial information. FERC reviews this evidence to determine if a pipeline will operate as a common carrier.

For example, on September 26, 2014, Dakota Access filed its Petition for Declaratory Order with FERC seeking approval of its proposed common carrier rate structure and terms of service. *Dakota Access, LLC,* 149 FERC ¶ 61,275 (Dec. 24, 2014) ("FERC DAPL Order"). The petition described DAPL's open season capacity auction and confirmed that all interested parties had an opportunity to participate. *Id*. at ¶¶ 5, 12-13. The petition stated that all committed shippers had executed firm commercially identical Transportation Service Agreements ("TSAs'), thereby reserving specific pipeline capacity for terms of seven or ten years (extendable by an additional three years), such that there was no discrimination among similarly-situated shippers. *Id*. at ¶¶ 5, 8, 13, 22, 28, 39. It confirmed that 90 percent of capacity would be reserved for committed shippers and ten percent for new shippers' uncommitted volumes. *Id*. at ¶¶ 6, 9. The Petition also described both the committed and uncommitted shipper tariff terms. *Id*. at ¶¶ 15-25.

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Before finding that DAPL would comply with federal common carriage requirements, FERC considered the following:

- evidence that DAPL allocated capacity via an open season capacity auction that resulted in execution of a number of commercially identical long-term ship-or-pay (firm) TSAs between DAPL and a number of shippers, thereby confirming that DAPL would operate as "for hire" pipeline;
- evidence that the executed TSAs contractually committed shippers to transport approximately 320,000 barrels of oil owned by them per day, thereby confirming that DAPL would transport oil owned by shippers and not just DAPL itself;
- evidence of proposed tariff terms for different classes of shippers to confirm just, reasonable, and not unduly discriminatory transportation services; and
- evidence that DAPL reserved 10 percent of capacity for "new shippers' uncommitted volumes," including a description of tariff terms needed to ensure that new, uncommitted shippers would also receive just, reasonable, and not unduly discriminatory transportation services, thereby confirming that DAPL would also provide ongoing open access to new and walk-up shippers.

On December 24, 2014 (approximately one year before the Iowa Utility Board's DAPL decision), FERC issued a Declaratory Order for DAPL confirming that it had

complied with federal common carrier requirements. *Id*. at ¶¶ 32, 33, 34. In its review, FERC required far, far more than a mere statements of intent to provide service to various classes of shippers and to reserve ten percent of capacity for walk-up shippers, supported only by unexecuted draft transportation agreements.

A review of the 2014 FERC DAPL Order makes clear that the *Puntenney* decision misapprehended federal common carrier requirements when it found that reservation of 10 percent capacity is "all the Federal Energy Regulatory Commission requires of a common carrier." *Puntenney* at 843. Federal law and FERC declaratory orders prove that FERC requires much more evidence. FERC would not have issued a declaratory order to DAPL if it had filed speculative commercial terms contained in draft unexecuted TSAs and an informal and undefined commitment to reserve 10 percent capacity for unidentified uncommitted shippers. Under federal law, such evidence would be wholly inadequate.

The *Puntenney* court description of FERC common carrier requirements is also contradicted by FERC's Proposed Policy Statement on Oil Pipeline Affiliate Contracts, 87 Fed. Reg. 78670, 78671 (Dec. 22, 2022), which summarizes the history of FERC's approval of the use of long-term firm contracts:

> Under the ICA, an oil pipeline is a common carrier that must provide transportation to shippers upon reasonable request. A pipeline has the burden to demonstrate that its proposed rates and services are just, reasonable, and not unduly discriminatory or preferential. Historically, pipelines have offered transportation service on a walk-up

> basis without having contracts with shippers. Since the mid-1990s, however, the Commission has also approved oil pipeline transportation rates and terms of service pursuant to long-term contracts with ship-or-pay obligations. Because committed contract shippers are not similarly situated to uncommitted shippers, they may receive service as defined by the contract (contractual committed service) that differs from uncommitted service.
>
> <u>Contractual committed service complies with the ICA's common- carriage and nondiscrimination requirements when the same rates and terms are offered in a public open season where all interested shippers have an equal opportunity to obtain the committed service. When the open season results in an arm's-length agreement, the Commission presumes the contractual committed service is just and reasonable and non-discriminatory.</u> In such cases, the presence of one or more nonaffiliated contracting shippers supports a presumption of reasonableness and nondiscrimination because the Commission assumes that nonaffiliated shippers are sophisticated parties that can be relied upon to protect their own interests from those of the pipeline, ensuring the agreement responds to competitive conditions.

(Emphasis added, footnotes omitted.)

Although this court is not bound by federal pipeline common carrier standards and procedures, it may consider this body of federal law and practice to be guidance. It makes clear that mere statements of a pipeline developer's intention to enter into transportation agreements and to reserve ten percent of capacity for walk-up shippers, in combination with unexecuted draft transportation agreements are not substantial evidence that a pipeline will operate as a common carrier throughout its operational life. The fact that neither the Commission nor any other Iowa agency nor any federal agency is authorized to regulate carbon dioxide pipelines to ensure ongoing operation

in compliance with common carrier standards indicates that substantial evidence of common carrier status must at a minimum include irrevocable long-term contractual commitments that require operation in accordance with Iowa common carrier standards.

C. The Final Order's Grant of Eminent Domain Must Be Reversed Because It Failed to Identify Any Project Benefits that Are Public Uses Under the Iowa Constitution

The *Puntenney* Court identified two factors that must be applied when determining the constitutionality of granting eminent domain powers to pipeline developers: (a) the pipeline must be a common carrier; and (b) it must provide some benefit to the public broadly, such as lower consumer costs and greater safety, and not just "trickle-down" economic benefits. 928 N.W.2d at 849. Despite this requirement, the Final Order fails to include any discussion or finding of the particular benefits that meet the second part of this constitutional test. The Final Order discussion of "public use" (pages 287-97), uses the word "benefit" exactly three times:

- on page 291 with regard to a claim that the Project would not benefit just Summit, but without distinguishing between economic development benefits and public use benefits;
- on page 292 with regard to a statement that "benefits to the public cannot be obtained until Summit Carbon's proposed hazardous liquid pipeline is constructed. Everything is hypothetical . . . ;" and

- on page 292 with regard to the benefits of insurance requirements.

Nowhere in its "public use" discussion or elsewhere in Final Order does it expressly identify the public benefits that make the Project a public use under the Iowa Constitution. The Final Order did consider the potential benefits of the Project in its discussion and findings related to public convenience and necessity, Final Order at 238, but this discussion did not identify any particular benefits that meet the second *Puntenney* factor.

The Final Order recognized that "economic development [is] not a public use for Iowa eminent domain proceedings," Final Order at 253-54, but did not take the next step and identify which, if any, of the Project's purported benefits make it a public use under the Iowa Constitution. This omission appears to be the result of a misapplication of law. Rather than complete the *Puntenney* two-factor test, the Final Order first relies on its finding that the Project would operate as a common carrier but then turns to its interpretation that Iowa Code §§ 6A.21(1)(d) and 6A.21(2) grant all entities within its jurisdiction the right to use eminent domain. Final Order at 254. It then reinforced this conclusion by citing *Stewart v. Bd. of Supervisors*, 30 Iowa 9, 21 (1870) for the proposition that "it must rest in the wisdom of the legislature, to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain . . . ." (Final Order at 254) The Final Order interpretation appears to be that as long as the legislature

determines that an activity is a public use, it is. This analysis is incorrect, because it fails to follow the core teaching of the *Puntenney* decision: that the judiciary would not wholly defer to legislative determinations of "public use" but rather would confirm that specific projects provide public benefits that rise to the level of a "public use" under the Iowa Constitution, which include broad public benefits such as lower consumer prices and improved safety, but do not include indirect trickle-down economic benefits of the type that all economic activity may create. *Puntenney* at 844-49.

The P*untenney* court expressly rejected the majority position in *Kelo v. City of New London* that "our public use jurisprudence has . . . favor[ed] affording legislatures broad latitude in determining what public needs justify the use of the takings power." *Puntenney* at 845, *quoting Kelo v. City of New London,* 545 U.S. 469, 483, 125 S. Ct. 2655, 2664; 162 L.Ed.2d 439 (2005). Next, the court adopted Justice O'Connor's dissent as the Iowa taking standard, which dissent rejected reliance on "positive side effects" of projects because justifying taking on such indirect benefits would not "realistically exclude any takings" needed by private entities for economic development.

Instead, the Puntenney Court adopted Justice O'Connor's more limited approach that recognized three traditional categories of "legitimate public use":

> First, the sovereign may transfer private property to public ownership—such as for a road, a hospital, or a military

> base. Second, the sovereign may transfer private property to private parties, often common carriers, who make the property available for the public's use —such as with a railroad, a public utility, or a stadium. But "public ownership" and "use-by-the-public" are sometimes too constricting and impractical ways to define the scope of the Public Use Clause. Thus we have allowed that, in certain circumstances and to meet certain exigencies, takings that serve a public purpose also satisfy the Constitution even if the property is destined for subsequent private use.

Puntenney at 845 *quoting Kelo*, 545 U.S. at 497–98, 125 S. Ct. at 2673 (citations omitted).

The *Puntenney* court next addressed the issue of granting deference to legislative determinations of "public use." 928 N.W. 2d at 847-48. It quoted its finding in *Clarke County Reservoir Commission v. Robins*, 862 N.W.2d 166, 171–72 (Iowa 2015), that "[t]he public use requirement is to prevent abuse of the power for the benefit of private parties." *Puntenney* at 847-48. That is, abuse of power by the legislature. It then quoted its decision in *Star Equipment, Ltd. v. State*, which in turn quoted the dissent in *Kelo*:

> We give considerable deference to legislatures' determinations about what governmental activities will advantage the public. But were the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff.

843 N.W.2d 446, 459 n.11 (Iowa 2014) (*quoting Kelo*, 545 U.S. at 497, 125 S. Ct. at 2673). Next, the *Puntenney* court quoted the *Stewart* decision from "[b]ack in 1870," which was cited in the Final Order:

> But if the public interest can be in any way promoted by the taking of private property, it must rest in the wisdom of the legislature, to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain . . . .

Puntenney at 848-49*, quoting Stewart v. Bd. of Supervisors*, 30 Iowa 9, 19–21 (1870), *quoting Beekman v. Saratoga & Schenectady R.R.*, 3 Paige Ch. 45, 73 (N.Y. Ch. 1831)). This reference should not be seen as an endorsement of this old precedent's support for legislative deference. It should be seen as an historical reference demonstrating that Iowa law has evolved since 1870. That it is included as an historical reference is made clear by the *Puntenney* court's summation:

> In sum, because we do not follow the *Kelo* majority under the Iowa Constitution, we find that trickledown benefits of economic development are not enough to constitute a public use.

928 N.W.2d at 849. That is, the Iowa courts do not automatically defer to legislative determinations of public use, as did the majority in *Kelo*. Instead, courts must find that a taking of property will provide public benefits that rise to the level of a public use, not including indirect economic benefits, before allowing use of eminent domain. The *Puntenney* court required a constitutional backstop analysis to protect private property rights from overreaching legislative and agency actions.

The Final Order also ignores the holding in *Mid-America 1962* that any statute giving a right of eminent domain to a private corporation intending to operate the proposed pipeline for private purposes "is beyond the pale of constitutional authority,"

even if such right is granted by the legislature. 253 Iowa 1143, 1147, 114 N.W.2d 622, 624 (1962). This 1962 decision established the need for a constitutional backstop to legislative grants of eminent domain authority to pipeline developers. The *Puntenney* decision stepped beyond this limitation on deference to clarify that indirect economic benefits of pipeline projects do not create a public use.

The Final Order relies on its finding that Summit is a common carrier and that Iowa Code § 6A.21(2) direction that "utilities, persons, companies, or corporations under the jurisdiction of the Iowa utilities board" have the right to use eminent domain. However, the Final Order fails to identify a public benefit that makes the Project a public use under the Iowa Constitution. As a consequence, the Final Order is unconstitutional as applied, fails to follow the analysis required by the *Puntenney* court, and fails to consider a relevant and important matter, and is, therefore, in violation of Iowa Code § 17A.19(10)(a), (d), and (j), respectively. As remedy, the court must remand to the Commission to correct this failure. The court should not substitute its judgment on this matter *ab initio* for that of the Commission.

D. The Offtake Agreements Do Not Make the Project a Common Carrier Pipeline

The Offtake Agreements do not form a carrier-shipper relationship, in which a carrier agrees to transport a shipper's property for a fee. Instead, the Offtake Agreements create a commercial relationship in which Summit agrees:

- to construct and operate: (a) carbon dioxide capture facilities at each of its ethanol partners' plants; (b) pipeline facilities to transport this captured carbon dioxide from the capture facilities to a sequestration facility in North Dakota; and (c) a sequestration facility in North Dakota; and
- Claim and share revenues with its ethanol partners from the 26 U.S.C. § 45Q carbon capture and sequestration tax credit, which only the owner of capture equipment, here Summit, may initially create.

(Pirolli Deposition at 27 lines 8-11, at 30 lines 8-19, at 98 lines 14-17; Hearing Transcript Pirolli Cross at 1944 lines 5-20; Hearing Transcript Broghammer Cross at 2019 lines 4-8) In exchange, Summit's ethanol plant "partners" agree to:

- transfer title to the raw carbon dioxide effluent stream at the moment it enters a capture facility;
- share the cost of operating the capture facilities, pipelines, and sequestration facilities; and
- claim and share the 26 U.S.C. § 45Z clean fuels production tax credit, which may be claimed only be a producer of clean fuels.

(Pirolli Deposition at 27 lines 8-11, at 30 lines 8-19, at 62 -63; at 98 lines 14-17; Hearing Transcript Pirolli Cross at 1944 lines 5-20; Hearing Transcript, Powell cross at 1630 lines 18-20; Hearing Transcript Broghammer Cross at 2019 lines 4-8) While Summit will own title to all of the capture, pipeline, and sequestration facilities, its

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ethanol plant partners would have an equitable interest in these facilities, because their revenue from this scheme would depend on its operation. The ethanol plants and Summit are not corporate affiliates, but they are also not independent of each other. They participate in a cost and profit-sharing scheme that is the nature of a joint venture.[9]

Given that the Offtake Agreements are nothing like conventional carrier-shipper transportation service agreements and are not subject to continuing oversight by any government agency, the court should examine them closely in determining whether Summit is acting as a private or common carrier. While what constitutes a public use may be "flexible and adaptable to changes in society and governmental duty," *Puntenney* at 851, the court should nonetheless apply the common law definition of "common carrier" as required by the *Puntenney* court and strictly construe the common carrier limitation in Iowa Code § 6A.22(2)(a)(2). *Hardy*, 357 N.W.2d at 626; *see also State v. Johann*, 207 N.W.2d at 24.

1. Summit Does Not Function as a Common Carrier Under the Offtake Agreements, Because Summit Will Transport Carbon Dioxide Exclusively Owned by Itself.

To be a common carrier, a carrier "must be engaged in the business of carrying goods <u>for others</u> . . . ." *Circle*, at 249 Iowa at 658, 86 N.W.2d at 893 (emphasis added).

[9] Under Iowa law, "[a] joint adventure is defined as an association of two or more persons to carry out a single business enterprise for profit; also as a common undertaking in which two or more combine their property, money, efforts, skill or knowledge." *Peoples Trust & Sav. Bank v. Security Sav. Bank*, 815 N.W.2d 744, 756 (Iowa 2012).

In its *Mid-America 1962* decision, the Iowa Supreme Court determined that the pipeline there would "handle only its own products" and so was "not a common carrier of such products" and instead was "a private corporation intending to operate the proposed pipe line for private purposes." 253 Iowa at 1147, 114 N.W.2d at 624. In response, the pipeline developer elected to withdraw its application and refile its permit application without a request for eminent domain authority. *Mid-America Pipeline Co. v. Iowa State Commerce Commission*, 255 Iowa 1304, 1306, 125 N.W.2d 801, 802 (1964) ("*Mid-America 1964*"). This voluntary easement approach succeeded. *Id.*

The Final Order stated: "[t]here is no question Summit Carbon will hold legal title to the liquefied carbon dioxide that will be transported through its proposed hazardous liquid pipeline from the participating ethanol plants." The Offtake Agreements specifically state the Summit will take title to all of the carbon dioxide when it passes into a capture facility. (Pirolli Deposition at 35 line 12 to 36 line 5 and at 62 lines 3-10; Hearing Transcript, Powell cross at 1630 lines 18-20) Thus, all of the carbon dioxide that would be transported through Summit's pipeline system acquired under the Offtake Agreements would be owned by Summit. As such, under the *Mid-America 1962* decision, Summit is a private carrier and not a common carrier, and it is not entitled to the right of eminent domain.

The Final Order attempts to distinguish Mid-America 1962 on the grounds that whereas "Northern Natural Gas Company was proposing to build a natural gas pipeline to ship its own natural gas to its customers or suppliers . . . [i]n the present case, Summit Carbon does not create the carbon dioxide that is then shipped on its proposed hazardous liquid pipeline." The Final Order misreports the *Mid-America 1962* case. This decision does not state that the pipeline developer there intended to transport only natural gas it "created." The court found that the pipeline "intends to handle only its own products," 253 Iowa at 1146, 114 N.W.2d at 623-24, and that "the line will be for the purpose of the liquid hydrocarbons only of said company." 253 Iowa at 1147, 114 N.W.2d at 624. The pipeline at issue was a relatively short extension of a longer system that delivered liquid hydrocarbons (petroleum products) from New Mexico and western Texas to Iowa, but there is no indication in the court's findings that the applicant refined its own petroleum products for shipment to Iowa. 253 Iowa at 1146, 114 N.W.2d at 623.

Here and in *Mid-America 1962*, both pipeline applicants owned the product they shipped, here from multiple carbon dioxide emitters in Iowa to a self-owned sequestration facility in North Dakota, and there from multiple refineries in Texas to a wholesale distribution hub in Des Moines. The sources of products and their direction of flow into or out of the state are irrelevant to the common carrier analysis.

The Final Order also asserts:

> The fact Summit Carbon is providing a service to the independent carbon dioxide emitters establishes the proposed hazardous liquid pipeline is not creating a closed-looped system where only Summit Carbon benefits. This is opposite of the private pipeline in *Mid-America*. Summit Carbon is providing a service, indiscriminately, to those who are carbon dioxide emitters. Summit Carbon is not proposing to build its project to transport the carbon dioxide it emits, creating the closed-looped system at issue in Mid-America.

The Final Order incorrectly states that Summit's ethanol plants are "independent," when in fact the Offtake Agreements show that they will share in Project costs, revenues, and profits, such that the ethanol plant "partners" have equitable interests in the Project and will not transport carbon dioxide via arm's length contracts, as is typical for common carrier pipelines. The Project is just a larger "closed-loop system" involving the combined private profit-generating interests of the ethanol plant partners and Summit.

Summit's ownership of all of the captured carbon dioxide is contrary to long-standing common carrier standards. Transportation of products for others is a necessary element in the definition of "common carrier," because a carrier that transports only its own products does not serve anyone else, much less the public, and does not offer "for-hire" services to others. The fact that the ethanol partners have equitable interests in Summit's infrastructure means that Summit will not operate on a "for-hire" basis. That a large number of ethanol plants have entered into long-term

contracts cost and revenue sharing contracts with Summit does not make its pipeline a public use common carrier.

Instead, Summit is similar to the company in *United Suppliers*, a wholesale distributor that purchased agricultural chemicals from petrochemical companies in bulk, then sold and transported these chemicals to its customers using its self-owned fleet of 95 semi-tractors. 876 N.W.2d at 766. The chemicals may have come from many manufacturers, but the source of the products was irrelevant to whether United Suppliers was functioning as a common carrier. It was serving only its own interests. Accordingly, the court found that it was not a common carrier. The Project is also similar to the pipeline in *Mountain Valley Pipeline, LLC v. McCurdy*, 238 W.Va. 200, 793 S.E.2d 850 (2016), where the developer sought to build a natural gas pipeline to carry almost exclusively natural gas produced by its own affiliates. *Id.* at 852. The West Virginia Supreme Court found that this self-service was not a public use. *Id*. at 855, 862–63. Here, Summit seeks to build a carbon dioxide pipeline based on Offtake Agreements granting Summit title to all of the carbon dioxide acquired to be transported on behalf of itself and its "partners" in a revenue and cost sharing scheme. The ethanol plants are not corporate affiliates of Summit, but they are business affiliates in a joint private venture, such that Summit is acting as a private carrier.

The Final Order's finding that Summit will own all of the carbon dioxide it ships under the Offtake Agreements and nonetheless be a for-hire common carrier is

an erroneous interpretation of Iowa's common law definition of common carrier and must be reversed under Iowa Code § 17A.19(10)(c).

2. Summit Does Not Function as a Common Carrier Under the Offtake Agreements, Because It's Primary Business Is Full-Service Carbon Management

The court in *United Suppliers* adopted a 12-factor "primary business test," which is intended to distinguish between common carriers and private carriers, and applied it to the definitions of "motor carrier" and "private carrier" in Iowa Code § 325A.1. 876 N.W.2d at 774. Under this statute, "Private carrier" means a person who provides transportation of property or passengers by motor vehicle or who transports commodities of which the person is the owner, lessee, or bailee and the transportation is a furtherance of the person's primary business or occupation, but is not a for-hire motor carrier . . . ." If a company (a) is an owner, lessee, or bailee of the property transported; (b) transports the property as part of a non-transportation business; and (c) is not a for-hire carrier, then it is a private carrier.

The *United Suppliers* court adopted this test from *Admiral Disposal Co. v. Department of Revenue*, an Illinois decision that used the test to determine that a garbage collection company was a private carrier rather than a carrier for hire. 302 Ill.App.3d 256, 235 Ill.Dec. 858, 706 N.E.2d 118, 121–23 (1999). The business of both the garbage hauler and Summit is to dispose of waste produced by other entities. Admiral Disposal collected the waste from homes, transported the waste to dumps,

and disposed of the waste. *Id*. Summit would collect waste carbon dioxide using capture facilities, transport the waste using pipelines, and dispose of the waste in underground sequestration sites. The predominate equipment owned by Admiral was its garbage trucks; the predominate equipment to be owned by Summit is its pipelines. The purpose of both companies was not limited to transporting waste; rather, their primary business purpose is to dispose of waste. This waste disposal purpose stands in marked contrast to the business of existing common carrier hazardous liquid pipelines, such as DAPL whose business is limited to transporting crude oil from North Dakota to Illinois on a fee per barrel basis, and what happens to the oil after that is of no concern to DAPL.

The primary business test was originally developed by the Interstate Commerce Commission ("ICC") to identify carriers who had been using sham "buy and sell" arrangements to avoid regulation as common carriers. *Admiral Disposal*, 706 N.E.2d at 121. In other words, the factors were originally developed to determine whether a company that claimed to be a private carrier was in fact a common carrier. Here, the test is used to determine whether a company that claims to be common carrier is in fact a private carrier. Many of the factors in this test make sense only in the context of rooting out sham ownership of the products transported. It should be noted that both the *United Suppliers* court and the *Admiral Disposal* courts recognized that not all of the factors would apply in all situations, so applied the test's factors to the extent they were useful. *United Suppliers* at 777; *Admiral Disposal* at 862. The court here may

also consider these factors to the extent they are useful in exploring whether Summit is a common or private carrier.

Factor 1: Whether the carrier is the owner of the property transported.

The Final Order states "while Summit Carbon will own some of the property being transported, it is also offering service where it will not be the owner of the property. The Board finds this factor is neutral."

Factor 1 recognizes that conventional common carriers, such as delivery companies and railroads, do not own the products they transport. In contrast, private carriers transport products owned by them. Accordingly, product ownership is an indicator of private carrier status. The Final Order considered this factor to be neutral, because Summit would own the carbon dioxide acquired via the Offtake Agreements, but is also offering to transport carbon dioxide owned by others. As discussed below, Summit's mere intent to transport carbon dioxide owned by others is not sufficient evidence that it will in fact do so, particularly when it had been attempting to enter into committed and uncommitted transportation agreements for over two years but has failed to secure any contracts. The court should disregard Summit's statements of intent to transport products owned by others and consider evidence of ownership in the executed Offtake Agreements, which show that Summit would be the owner of all of the carbon dioxide to be transported under the Offtake Agreements, and disregard

Summit's claims that it has offered to transport carbon dioxide owned by others. This factor weighs towards Summit being a private carrier.

Factor 2: Whether orders for the property are received prior to its purchase by the carrier.

The Final Order states "there are no preorders for the carbon dioxide as Summit Carbon will be transporting the carbon dioxide for the independent emitters to the sequestration site in North Dakota, where it will be stored. The Board finds this factor weighs in favor of Summit Carbon."

This factor appears to consider whether the carrier maintains an inventory of product as opposed to buying a product from a supplier in response to an order, because common carrier transportation businesses do not keep product in stock, whereas the owners of private carriers do. A common carrier pretending to be a private carrier would "buy" the items to be shipped on an ongoing as-ordered basis as a means to avoid ICC common carrier regulation. In contrast, an actual private carrier would keep product inventory. Here, the Offtake Agreements are firm supply contracts, in which Summit commits to acquire all of the carbon dioxide that can be produced by its ethanol partners. While it is physically impossible to keep large amounts of carbon dioxide in stock, it is possible to secure large amounts of carbon dioxide via firm supply contracts. Thus, Summit has in effect pre-ordered all of the product to be shipped. Summit is not transporting product owned by others on a per

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order basis as do conventional common carriers, but rather as part of its ongoing carbon dioxide disposal business. This factor weighs toward private carrier status.

Factor 3. Whether the carrier utilizes warehousing facilities and the extent of this use as a storage place.

The Final Order states "there is no warehousing prior to shipment. The Board finds this factor does not apply to Summit Carbon."

The intent of this factor appears to be that common carriers typically do not maintain warehousing in which to store product, whereas private carriers typically do. Here Summit does not warehouse carbon dioxide because doing so in large amounts is not physically possible. However, Summit acquires carbon dioxide via its Offtake Agreements that function as supply contracts. Further, Summit intends to store carbon dioxide in its disposal site. This business structure indicates that Summit's primary business includes continuously capturing and producing transportable carbon dioxide and then storing it. Therefore, Summit's primary business is not simply transporting carbon dioxide but also capturing and disposing it. Since Summit will own and use storage facilities, this factor weighs toward private carrier status.

Factor 4. Whether the carrier undertakes any financial risks in the transportation-connected enterprise.

The Final Order states "there is financial risk borne by Summit Carbon as it is providing transportation service to the public. The Board finds this factor weighs in favor of Summit Carbon."

This factor appears to be intended to determine whether a carrier's at-risk financial investments are primarily in transportation or non-transportation activities. After all, any investment may be said to be at risk. Here, Summit has proposed a unified scheme to invest in capture, transportation, and storage infrastructure, rather than in transportation infrastructure alone. While the Project pipelines represent the greatest share of capital expenditure, Summit will earn revenue if and only if the capture and storage facilities are also operational. The fact that Summit's transportation investment is not independent but tied to successful operation of its capture and storage infrastructure weighs toward private carrier status.

Factor 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 Final Order states: "Summit Carbon does not include any costs in the sale price of the product because it is not reselling anything, but Summit Carbon does recover its costs from the entities that are using Summit Carbon's service. (See Summit Carbon RB, p. 32) The Board finds this factor weighs in favor of Summit Carbon."

This factor makes sense in the context of identifying sham private carriers, because a sale price that includes the cost of delivery would be more common for a private carrier, whereas a common carrier masquerading as a private carrier would "buy" an ordered product and then include a delivery fee. This factor offers an examination of whether transportation fees are rolled into overall business activities, or are a standalone source of revenue. United Suppliers did charge for delivery that it added to the sale price of the products shipped, and was found to be a private carrier. In contrast, a common carrier typically would charge only the delivery fee and would not include in this charge the cost of the product delivered, because payment for the product would go to its supplier. Here, Summit is not paid directly for its transportation services, but rather these services are treated as a cost that is rolled into total project costs, including carbon dioxide capture and storage, and then these costs are allocated among Summit and its ethanol partners. The costs of Summit's transportation activities are integrated into overall Project expenses and compensated by overall Project revenue. Since Summit does not bill for its transportation services separately but rather recovers its transportation expenses together with its capture and sequestration expenses, this factor indicates that Summit is a private carrier.

Factor 6. Whether the carrier transports or holds out to transport for anyone other than itself.

The Final Order states "Summit Carbon holds itself out for the transportation of carbon dioxide. The Board finds this factor to weigh in favor of Summit Carbon."

Summit argues that it transports carbon dioxide for its ethanol partners. As discussed, under the Offtake Agreements, Summit would own the carbon dioxide and transport it exclusively for the benefit of its joint venture with its ethanol partners and not for the benefit of parties outside of this private scheme. Summit also argues that it holds itself out as being willing to transport carbon dioxide owned by other parties pursuant to its draft transportation agreements. In the absence of executed contracts with committed or uncommitted shippers after two years of marketing, such holding out is specious. An intent to transport for third-parties is not meaningful if none of them except the offer. Setting aside these apparently non-viable offers and based on the Offtake Agreements alone, Summit will not transport carbon dioxide for anyone other than its joint business venture. The failure of Summit's efforts to market to third-party shippers together with its ownership of all of the Offtake Agreement carbon dioxide indicates that Summit will operate as a private carrier.

Factor 7. Whether the carrier advertises itself as being in a noncarrier business.

The Final Order states "Summit Carbon has consistently testified to capturing, transporting, and storing carbon dioxide. (E.g., Tr. 1614) The Board finds this factor weighs against Summit Carbon." Jorde Landowners agree that this factor weighs for private carrier status.

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Factor 8. Whether its investment in transportation facilities and equipment is the principal part of its total business investment.

The Final Order states "Summit Carbon is proposing to build a $5 billion-dollar-plus pipeline, compared to the $15 million to $60 million per capture facility. The Board finds this factor weighs in favor of Summit Carbon."

The principal part of Summit's capital investment will indeed be in transportation facilities and equipment. However, this investment will return no revenue absent successful construction and operation of Summit's capture and disposal activities. The fact that pipelines cost more than capture and sequestration facilities does not mean that pipelines are the most important part of the Project. They are just the most expensive. All of the Project's infrastructure components are essential to its operation. This factor is neutral.

Factor 9. Whether the carrier performs any real service other than transportation from which it can profit.

The Final Order states "Summit Carbon does receive payments for sequestering the carbon dioxide in North Dakota, but only after transporting it there. The Board finds this factor is neutral as it relates to Summit Carbon."

Summit will profit based on the 45Q and 45Z tax credits. Rights to the 45Q tax credit are based (a) on owning and using equipment to capture carbon dioxide; and (b) contractually arranging for the carbon dioxide's disposal in secure geologic storage.

26 U.S.C. § 45Q. Rights to the 45Z tax credit are based on production of clean fuels, meaning those produced with lower carbon emissions, 26 U.S.C. § 45Z, which for the Project means producing ethanol using carbon capture and storage. Neither of these tax credits provide direct payments for transportation of carbon dioxide. Thus, all of Summit's income will come from providing services other than transportation. While transportation is a necessary component of Summit's larger scheme, the fact that all Project revenue will come from activities other than transportation means that this factor weighs in favor of Summit being a private carrier.

Factor 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 Final Order states "Factor ten is inapplicable to pipelines of any kind. The Board finds this factor is neutral as it relates to Summit Carbon." Jorde Landowners agree this factor is inapplicable.

Factor 11. Whether the products are delivered directly from the shipper to the consignee (i.e., without intermediate warehousing).

The Final Order states "the ethanol plants provide their carbon dioxide to Summit Carbon, which transports the carbon dioxide to North Dakota to be sequestered, with no storage in between. The Board finds this factor weighs in favor of Summit Carbon."

This factor appears to relate to whether a carrier uses intermediate warehousing, or just delivers straight from a shipper to the buyer. A private carrier is more likely to use intermediate warehousing, whereas a common carrier will tend to deliver directly from a shipper to the consignee (buyer). This factor does apply directly to the Project, because Summit owns the carbon dioxide shipped via the Offtake Agreements, such that it is its own shipper and consignee. Further, there is no reason to store and it is not physically possible to store substantial amounts of carbon dioxide between Iowa and North Dakota. Thus, this factor is inapplicable to the Project.

Factor 12. Whether solicitation of the order is by the supplier rather than the truck owner.

The Final Order states "Summit Carbon is providing a service to independent ethanol plants as Summit Carbon has no carbon dioxide to move itself. The Board finds this factor weighs in favor of Summit Carbon."

This factor is intended to help identify sham private carriers, because common carriers (the truck owner) typically do not solicit orders, whereas a private carrier's owner would solicit orders. Here, the solicitation of the "order" for the carbon dioxide was by Summit to the ethanol partners in the form of the Offtake Agreements. Also, the ethanol partners have an equity interest in operation of Summit's pipelines. In this situation, Summit is not merely the "truck owner" (common carrier), but rather

is operating a broader business together with its carbon dioxide suppliers. This factor indicates that Summit will operate as a private carrier.

Nine of the "primary business test" factors indicate that Summit's primary business through its Offtake Agreements is not transportation and instead is full-service carbon management, of which transportation is just one element. Summit bears closer resemblance to the agricultural chemical supplier in *United Suppliers* than it does to conventional common carriers, such as railroads, trucking companies, and delivery services. Through the Offtake Agreements, Summit acquires title to a chemical, carbon dioxide, dehydrates and compresses it, and then transports it using its own transportation equipment to its own sequestration facilities, where it injects the carbon dioxide via deep wells into subsurface pore space that it owns. Further, Summit's suppliers have an equitable interest in Project operation through cost and revenue sharing, such that they are business partners of Summit and not arms-length shippers. Accordingly, the primary business created by the Offtake Agreements is not a transportation business, but a carbon management business, making Summit a private carrier.

For the forgoing reasons, the Final Order failed to adequately apply the primary business test, such that the Final Order is based on an erroneous interpretation of a provision of law and must be reversed pursuant to Iowa Code § 17A.19(10)(c).

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E. The Final Order Finding that Summit Will Operate as a Common Carrier Is Not Supported by Substantial Evidence

In order to affirm the Final Order, the court must find there is substantial evidence to prove (a) all of the elements in Iowa's common law common carrier definition, and (b) that a pipeline will have a substantial direct public benefit that arises to the level of a public use under the Iowa Constitution. *Puntenney* at 849; *Mid-America 1962*, 253 Iowa at 1147, 114 N.W.2d at 624. Such evidence must be "competent and substantial," *Circle*, 249 Iowa at 653, 86 N.W.2d at 890.

The evidence relied on by the Final Order to support its finding that Summit will operate as a common carrier is limited and includes:

- an assertion by Summit that its Offtake Agreements create a shipper-common carrier relationship between it and its ethanol partners;
- statements by Summit asserting it has an intention to enter into long-term and walk-up shipper agreements;
- statements by Summit that it has an intention of setting aside 10 percent of capacity for walk-up shippers; and
- unexecuted draft long-term and walk-up transportation agreements.

All of the Final Order's eminent domain and common carrier findings are based on the foregoing evidence.

When evaluating the certainty of pipeline company commitments to future operation as a common carrier, substantial evidence must include the contents of executed legally binding contracts between a pipeline company and third-party shippers. The court should give little weight to company aspirations, expectations, and statements of intent, because such nonbinding statements are not "competent and substantial" evidence.

Summit claims that any non-ethanol carbon dioxide emitter may enter into either a committed or uncommitted shipper transportation service agreement, and that these shipping options prove that its proposed pipeline will function as a common carrier. Contrary to Summit's claim, the evidence related to these potential options proves only that they are both too commercially underdeveloped to rely on to prove common carrier status. Despite at least two years of marketing and efforts to enter into shipper contracts, Summit has not produced any executed contracts. Moreover, it has not even scheduled an open season through which it would sell committed capacity. Summit provided draft transportation service agreements, but the terms of these drafts may or may not be accepted by shippers, assuming such shippers even materialize. Even assuming that Summit finds potential shippers, the terms of any draft could be changed substantially by contract negotiations that would likely precede execution.

In the absence of executed contracts, Summit's evidence for its committed and uncommitted shipper programs is founded on management's aspirational statements. Such statements provide no assurance Summit will successfully enter into common carrier relationships. This evidence is neither competent nor substantial.

According to Summit witness Pirolli, its lack of success is due to the complexity of developing major carbon capture projects. Potential shippers would need to develop, design, and finance individual carbon capture facilities, as well as develop, design, and finance lateral connecting pipelines in cooperation with Summit, before negotiating committed or uncommitted shipper transportation service agreements. The economics of these projects would depend on a number of complex factors, including but not limited to emitter type, facility-specific design and engineering needs, the distance and size of a needed lateral connector pipeline, financing options, and other factors. These development challenges represent substantial hurdles to market entrance that may not be overcome for years by non-ethanol emitters for years, if at all.

Summit's evidence pales in comparison to the evidence provided by Dakota Access to FERC in its September 26, 2014, Petition for Declaratory Order, which FERC reviewed and approved in December 2014, approximately one year before the Commission evidentiary hearing for that pipeline. FERC and the Commission received evidence that Dakota Access had entered into a number of executed

committed shipper transportation service agreements following two open seasons that sold hundreds of thousands of barrels of capacity over long terms. They also received evidence about how DAPL's 10 percent uncommitted shipper set aside would operate, assuring that this program would not be discriminatory. At the time of the DAPL hearing, FERC had already reviewed DAPL's executed transportation service agreements, draft tariffs, and other descriptions of its committed shipper program, and confirmed that these terms complied with federal common carrier requirements. Therefore, the Commission there was able to rely on "competent and substantial" evidence that DAPL would function as a common carrier in accordance with federal law. The *Puntenney* court agreed that this evidence was sufficient to prove that DAPL was a common carrier and upheld the Commission's grant of eminent domain rights to Dakota Access.

Here, Summit has not provided record evidence of any executed transportation agreements with committed or uncommitted shippers. As such, there is no meaningful contractual evidence proving that Summit's pipeline system will function as a common carrier over its commercial life. Moreover, Summit's failure to enter into any such contracts after two years of effort casts substantial doubt on the timing and viability of Summit's committed and uncommitted shipper programs. Given the complexity of carbon capture developments, it is possible that years could pass before such agreements are executed. It is also possible that such agreements may never be executed. Even if shipper agreements are eventually executed, at present it is

impossible for the court to know what terms they might contain. This lack of evidence is especially critical, because unlike FERC, which has ongoing jurisdiction over oil pipeline commercial relationships, tariffs, and compliance with federal common carrier standards, the Commission has no jurisdiction to regulate the commercial operation of carbon dioxide pipelines, nor did the Commission include any permit conditions requiring continued operation as a common carrier. Therefore, the Commission cannot and will not conduct future administrative hearings in which to review future contractual arrangements to ensure that they comply with state common carrier standards.

The evidence provided by Summit about its committed and uncommitted shipper programs is not “competent and substantial.” The lack of executed transportation service agreements means that the Commission has no evidence of the number of shippers, the total committed capacity, or its terms of service. These aspirational offerings are too undeveloped to be substantial evidence. The speculative nature of these commercial arrangements provides a grossly inadequate foundation for determining whether or not the proposed pipeline system will function as a common carrier for the purposes of Iowa Code 6A.22(2)(a)(2). Therefore, the Final Order’s finding that the Project will operate as a common carrier is not based on substantial evidence.

In the absence of substantial evidence proving a company's common carrier status, the court should find that the Final Order illegal under Iowa Code 17A.19(10)(f), determine that a proposed pipeline is not a common carrier, and deny the company the right to eminent domain.

II. THE IUC ERRED IN FINIDNG SUMMIT PROVED ITS PROPOSED SERVICES WILL PROMOTE THE PUBLIC CONVENIENCE AND NECESSITY.

Summit failed to present substantial evidence that its specific and limited proposed service of CO2 transportation will in fact promote the public convenience and necessity of Iowans.

Iowa Code Chapter 479B.9 states:

> "The IUC **may** grant a permit in **whole or in part** upon **terms, conditions, and restrictions** as to location and route as it determines to be **just and proper**. A permit shall not be granted to a pipeline company unless the IUC determines that **<u>the proposed services</u>** **will promote** the public convenience and necessity." (emphasis added).

First, the IUC "may" grant a permit, but it does not have to. Second, a permit could be granted "in whole" or exactly as requested or "in part" meaning granting some portions and denying others, and/or the IUC can modify what is requested and grant instead what it believes is "just and proper" by utilizing "terms, conditions, and restrictions" all "as to location and route." Third, granting a permit is contingent on

whether "the proposed services" will "promote" the "public convenience and necessity." In other words, the "proposed services" must affirmatively be a promotion of that which is publicly convenient and that which is a public necessity – there cannot simply be an overall net neutral effect and there certainly can't be a net negative effect. And lastly, Summit must prove "public use" and that it is a "common carrier" in order for the IUC to even consider authorizing eminent domain.

A. Summit's "proposed services" are limited and the IUC erred when it considered more than transportation of CO2.

As a threshold matter, Summit's Petition for Hazardous Liquid Pipeline Permit is simply that. The stated proposal is to "construct approximately 681 miles of 4 to 24-inch diameter pipeline for the transportation of carbon dioxide" in 30 counties." (Petition Section II) So, we should not be looking at anything other than the proposed hazardous pipeline itself. The IUC has no jurisdiction over any non-existent carbon capture facilities, nor does it have jurisdiction over any proposed sequestration site in North Dakota. However, the IUC bought into Summit's pitch about an overall system or "project" it proposes to own and operate with affiliates, when in fact the Petition and this IUC's purview is limited to the proposed hazardous pipeline only. Thus the "proposed services" for review do not include carbon capture and do not include carbon sequestration. The "proposed services" for discussion are only the potential transportation of supercritical CO2 through Iowa – that is it. By including alleged

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benefits of carbon capture and carbon sequestration in its public convenience and necessity analysis, the IUC erred.

B. The IUC erred in finding Summit cleared the many hurdles required to prove its proposed transportation services are both publicly convenient and a public necessity.

Summit's proposed CO2 transportation service must be both publicly convenient and a public necessity. It is neither. The Iowa Supreme Court in *Puntenney* confirmed the obvious that the word "and" between the convenient and the necessity prongs mean that both must be proven. Although not found in the plain language of the statute, the *Puntenney* Court differentiated between an absolute and a reasonable necessity. See *Puntenney* at 928 N.W. 2d at 840-841.

Summit failed to prove the transportation of hazardous CO2 across nearly 700 miles of Iowa land and about 1300 miles of land in other states is a reasonable public necessity. There are certainly claims and allegations of necessity, but Summit failed to present sufficient evidence that CO2 transportation is a reasonable public necessity all things considered. Jorde Landowners agree that the transportation of hazardous CO2 could lead to an economic boon to start-up company Summit, but Summit's enrichment is not enough.

Iowa is not currently "crisscrossed" by a single foot of supercritical carbon dioxide pipeline. *Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829, 849 (Iowa 2019). Summit would not transport energy and its proposal is not that of energy infrastructure.

Puntenney, 928 N.W. 2d at 841. There is no evidence in the record of a single "market" for permanently sequestered CO2 and no evidence that a single person or entity who has contracted to "use" this waste CO2. Summit's witness testified communities cannot use liquified carbon dioxide. (Tr. 2247-48)

There is no evidence in the record that the proposed service of CO2 transportation for permanent sequestration will lead to long-term reduced prices on refined products and goods and service dependent on supercritical CO2 and refined products. *Puntenney*, 928 N.W. 2d at 850. Unlike oil intended for fuel to power our vehicles or natural gas transported for the purpose of to heat our homes, here, there is no such corollary.

In short, Summit's overall "Project" is not up for review in the context of public convenience and public necessity – it is instead only the proposed service of transporting CO2 that is to be analyzed, and that limited service fails the *Puntenney* test for public convenience and fails the test for public (reasonable) necessity. The evidence elicited at the hearing was that Summit wants to build the CO2 permanent sequestration pipeline and a single ethanol plant employee, James Broghammer, testified he too supported the proposed hazardous pipeline. But the desires of one company, Summit and one testifier, Broghammer, hardly rise to sufficient proof that CO2 transportation via Summit's proposed pipeline would in fact promote, or advance, public convenience.

The testimony of Iowans against the Petition versus the number of Iowans who testified in favor of the Petition was approximately 99% against and 1% in favor.

In fact, not a single person who allegedly "voluntarily" reached agreement with Summit testified to confirm that fact or if they signed because Summit threatened them with eminent domain, bullied them into it, or told them there was nothing they could do to stop the pipeline. Tina Marth's sad story of Summit's claimed "voluntary" easements is one of many:

> "I'm writing this letter to inform the IUC that we signed an easement with Summit Carbon Solutions for a parcel in Floyd Co. between Rockford and Charles City, Iowa but have now regretted this decision. We did agree to an easement with Summit Carbon Solutions only because they told us they would use eminent domain, and since we already have an easement on our property with a natural gas pipeline, they told us they would easily win the court case when filing a lawsuit against us."

(In re: Summit Carbon Solutions, LLC. Dkt. No. HLP-2021-0001. Tina Marth Comments filed September 28, 2023)

There was no testimony provided throughout the hearing by even a single person, not directly financially linked to the proposed pipeline, asserting that it would promote the overall public convenience or overall public necessity. The testimony and evidence on this point weighs overwhelmingly against Summit and the IUC's conclusion.

C. Ethanol Plants have existing on-site options to reduce carbon intensity (CI) scores and do not need a hazardous CO2 transportation pipeline.

The sole ethanol plant witness, Mr. Broghammer, testified his plant already has approved projects that will reduce its CI score – without any pipeline – and they are looking for other non-pipeline ways to further reduce their CI score which are available. They are building a combined heating power plant on site without the need for eminent domain. They also have other planned projects to reduce their CI score such as redesigning the distillation process so less steam per gallon of ethanol is used – essentially reducing the amount of natural gas consumed. (JLO Ex. 552 – Broghammer Deposition at p. 40 ln. 6 – p. 41 ln.14) So, Summit's own witness proved the proposed service of CO2 transportation via pipeline is not a public necessity but rather a private desire and only when we extend the analysis beyond the limited proposed service for IUC review – CO2 transportation – to the tangential service of carbon capture. To be clear, the ethanol plant testimony was focused on reduction of their individual CI score and transportation of CO2 does not reduce a CI score, emitting less CO2 reduces the CI score.

D. Summit's claimed demand for "the project" is not enough.

As discussed in the common carrier section, unlike in the Dakota Access docket, Summit failed to produce a single contract of a shipper that has agreed to utilize the proposed pipeline transportation services. Summit, over significant objection, finally

produced confidential Offtake Agreements between it and thirteen ethanol plants. As was testified to in public hearing, those revenue sharing agreements entail a Summit associated company, its carbon capture company, which is not an applicant on the Petition, connecting to various ethanol plants to capture CO2 that would otherwise safely vent into the atmosphere. However, the transporter in Summit's scheme is Summit and the shipper is also Summit. There are no contracts or proof of any arms-length transporter-shipper contracts. It is hard to have demand for a **service** when there is no ethanol plant shipping CO2 or paying for CO2 transportation services.

Summit makes the claim that thirteen ethanol plants "have signed long-term agreements to utilize the Project to transport ***their*** CO2 on Summit's System." (emphasis added) (See Summit IUC Opening Brief p. 11) But this is verifiably false. No Iowa ethanol plant is contracted to ship "their CO2" on Summit's proposed pipeline. There is no contractual agreement in the record where a single ethanol plant has contracted to transport CO2 it owns on Summit's proposed pipeline.

No ethanol plant in Iowa directly benefits from the proposed services at issue here – the transportation of CO2 – because no ethanol plant is in privity of contract with Summit for said transportation. Summit wants to speak about "the Project" generally but "the Project" is not up for approval by the IUC – only the pipeline portion is. Jorde Landowners concede some Iowa ethanol plants that were approached by Summit to be joint venturers in this carbon management scheme would like to lower their Carbon

Intensity (CI) scores as a path to potential increased profits. However, the potential private economic gains of Summit's investors and these few ethanol plant investors are not enough to tip the scales when balancing the question of public convenience and public necessity.

E. The IUC erred in finding Summit proved its proposed pipeline would have net benefits to Iowa's Agricultural Economy.

Summit's claim of economic opportunity rests on the shoulders of James Pirolli, an individual no longer employed by Summit, who simply repeats conclusory statements without reference or evidence to prove they are true. One of the key statements advanced by Summit is the claim by Pirolli that "[T]he Project is necessary for these ethanol plants because it provides a CO2 transportation solution, which otherwise would not exist, putting Iowa's ethanol plants at a significant long-term disadvantage to ethanol plants in states like North Dakota and Illinois, which contain proven subsurface geologic storage formations." (Pirolli Direct Testimony p. 4, ln 3-7) The IUC erroneously accepted this inducement and relied upon this speculation. (Final Order p. 241) There is no evidence in the record that the Summit-Iowa ethanol partner plants compete with those in North Dakota or Illinois nor is there evidence of any present disadvantage suffered by a single Iowa ethanol plant over any existing ethanol plants anywhere in the United States that are already sequestering CO2 emitted from the ethanol production processes. Without such evidence, the IUC erred in concluding there is such a claimed potential "disadvantage" should Summit's Petition be denied.

Summit's refence to Illinois is not applicable given the Navigator Heartland Greenway pipeline project ("Navigator"), not Summit, was looking at Illinois and has since abandoned the project. Summit is the only proposed CO2 pipeline in North Dakota, and it has exactly one (1) ethanol plant on there. (Jessica Wiskus Objection filed October 18, 2023; Project Footprint - Summit Carbon Solutions)

Given the evidence is that only 13 of Iowa's 42 ethanol plants are signed up with Summit, using Summit's logic as adopted by the IUC, approval of the Petition would be disastrous to every other ethanol plant in Iowa and by extension economically catastrophic to every other non-Summit partner ethanol plant in the United States. The only logical conclusion for the IUC, if weighing relative economic "opportunity" for Iowa's 42 ethanol plants is a legitimate factor in the pubic convenience and necessity balancing test, is to deny the Petition absent evidence that every ethanol plant in Iowa is committed to Summit. A single non-participating Iowa ethanol plant means the Petition must be denied, using the natural extension of the IUC's reasoning.

F. The IUC erred in finding the alleged safe transport of something not currently transported and that does not need to be transported, is a benefit.

The IUC erroneously relied upon Summit's unsupported claims that its pipeline would be either a safer or more efficient means to transport CO2. Summit did not provide a single fact or statistic to prove this claim. The transportation of CO2 in Iowa

by pipeline can only be more dangerous and less efficient than the status quo – which is no transportation at all.

G. The IUC ignored the fact price inflation is neither convenient nor necessary.

Another matter that must be dispelled is this notion that the greater good for all Iowans is somehow served if we cheer for inflation in the form of higher corn prices and that farmers will somehow get paid more money for their corn if the Summit pipeline is constructed. The IUC erroneously adopted Summit's notion that all 3.2 million Iowans' lives will somehow be better if this pipeline were constructed. But, Summit didn't provide evidence to support this notion. There is no evidence to support Summit's speculative and fanciful thought experiment as adopted by the IUC which is: no Summit pipeline = no way to reduce carbon intensity scores = no ethanol plant can reduce carbon intensity scores = no ethanol plant has a path to government credits = no new money for ethanol plants to pay farmers higher prices for a global commodity, corn, = Iowa farmers will suffer, have less money, and the Iowa economy will collapse.

Landowners, Iowa farmers predominantly, who overwhelmingly oppose Summit's Petition expressed not a single concern that without the Summit pipeline corn prices will collapse, markets will disappear, or that they will be unable to farm substantially as they do today.

The vague claims that higher corn prices are the foundation of higher farm prices is not a "benefit" to most Iowans, in fact it is only a potential short-term benefit to some corn sellers, which do not make up the majority of Iowans. But even if there was a temporary bump in corn prices – corn farmers will chase that price by growing more corn and more supply will neutralize any temporary price bump and the market will settle back to price equilibrium. In other words, even if Summit had evidence to support corn prices will go up, it would be a temporary blip and no long-term benefit. Higher prices would also be a detriment to corn buyer and cattle feeders. There is also no evidence that a given ethanol plant would pay more farmers more for their corn as opposed to simply passing the tax credit profit sharing to its owner(s) or shareholders in the form of dividends or distributions.

Summit's lone ethanol witness, Broghammer, testified his ethanol plant is already at maximum production capacity – without any pipeline – and that they will not purchase any more corn than they do already if Summit built its pipeline. (JLO Ex. 552, Broghammer Deposition at pp. 25-29, 86) So, the addition of Summit's pipeline will do nothing to increase the demand for corn at Pine Lake Corn Processors in Steamboat Rock, Iowa.

Additionally, there was no evidence tying corn price inflation and high land prices. Summit's best attempt at evidence on this point fell short, "…I would think [if the ethanol market stays robust and corn demand stays high] would contribute to

sustaining high land prices in Iowa." (Tr. Vol. 9 at 1621 – 22; Summit Opening Brief at p. 17.) In no universe, even in the relaxed evidentiary standards of the IUC, is "would think" equivalent to a fact. "Would thinking" isn't sufficient evidence and the IUC erred in relying upon such speculation.

H. Alleged economic development benefits are not enough and do not justify the IUC findings.

The IUC erroneously put stock in Summit's economic benefit claims. *Puntenney* instructs that to the degree Summit is "relying on the alleged economic development benefits of building and operating the pipeline, we are unmoved." *Id. at* 849. What the Iowa Supreme Court in *Puntenney* did put weight on was evidence that cheaper and safer transportation of oil results in lower prices for petroleum products. *Id*. The IUC erroneously accepted Summit's regurgitation of these factors in the form of allegations but fails to acknowledge the stark difference between the DAPL oil pipeline and Summit's proposed CO2 pipeline. It is disingenuous to find Summit satisfies the *Puntenney* test and that it represents a cheaper and safer mode of transporting CO2 – because CO2 is not being transported from Iowa ethanol plants at all. Further there is zero evidence Summit's proposed service of transporting CO2 for permanent sequestration will result in lower prices for CO2 products. Because Summit can't make this case for CO2 transportation, the *Puntenney* court instructs that to the extent there are any trickle-down benefits, such "trickle-down benefits of economic development are not enough to constitute a public use." *Puntenney* at 849.

In DAPL, the Iowa Supreme Court concluded there was substantial evidence that the oil pipeline would lead to longer-term reduced prices on refined oil products and goods and services dependent on such refined products that rose to the level of public benefits. *Puntenney* at 841. Summit did not even attempt to make the argument its proposed pipeline would lead to lower prices – instead Summit boasted its pipeline would lead to inflation and higher corn prices. (JLO Ex. 552, Broghammer Deposition pp. 19, 73) Under *Puntenney*, inflated prices and ethanol plants increased profits are not "public benefits" and they do nothing to "promote the public convenience and necessity."

The IUC failed to consider all the negative effects such as those summarized by Avangrid Renewables, LLC, "It takes little imagination to foresee potential catastrophes that could occur if a component (such as a blade) of Avangrid's turbines fell onto the ground where a pipeline carrying hazardous materials is located." (Avangrid Renewables, LLC's Request to Speak at Hearing filed August 18, 2023) And, "we would not have put our turbine there if a line was there first. […] The line is actually too close to our turbine here." (*Id.*)"Installation of the Pipeline within the Wind Farm area and across our lines we expect will require us to de-energize our generation – this will interfere with our ability to provide electricity to our customers during pipeline installation, and we want to make sure we will be compensated for lost production." (Avangrid Renewables Objection filed August 18, 2023) These are just some of the negative effects not sufficiently addressed or weighed by the IUC.

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I. The IUC erroneously relied upon Summit Witness Andrew Phillips and the Ernst & Young "report" that was thoroughly discounted and discarded.

The IUC stated intervenors were "required" to present contrary evidence critical of the Summit funded Ernst & Young (E&Y) report if we "wished to tip this factor [Economic Benefits] against the project." (Final Order p. 154) This is not true. Simply because Summit paid for the creation of a flawed document with even worse conclusions, the IUC is not compelled to accept that as true or even weigh it at all. The E&Y report and its author, Mr. Phillips, were discredited during cross-examination, such that the IUC erred in its reliance of the speculative conclusions of the report in weighing the question of net economic benefits. The IUC further erred by admitting this report into evidence over Jorde Landowner objections of hearsay, hearsay within hearsay, lack of foundation, and relevance. (Tr. 2354, ln. 1-15)

Summit's claimed economic benefits are indirect and inflated and the IUC should not have relied upon them. In order for Ernst & Young to deliver the final product Summit sought to use as its primary persuasion tool for public convenience and necessity, it had to utilize "trickle-down" effects from broader economic development, but *Puntenney* does not place weight on so-called "trickle-down" benefits, and they are not enough to constitute "pubic use." *Puntenney* at 849. which here are inflated and inaccurate as proven on cross-examination of Mr. Phillips.

Mr. Phillips employed software known as “IMPLAN” which develops estimates of impact and utilizes “indirect effects” and “induced effects.” (Phillips Direct Testimony p. 6) The IUC was wrong to rely upon the wild estimates in the Ernst & Young study which highlights speculative “ripple effects” from capital expenditures such as construction costs (Tr. 2370) generally but has no pipeline specific filters or variables. More importantly, alleged direct benefits were a tiny portion of the total speculated amount of benefits – at best 10 to 20 percent (Tr. 2372) of the total benefits Ernst & Young calculated.

Unfortunately, IMPLAN is a static model without a published known error rate or “magnitude of error” such that the IUC cannot rely on its outputs and the IUC is without ability to reasonably anticipate how the computer software’s result of alleged economic benefit translates into reality. (Tr. 2372-2374) Jorde Landowners further debunked reliance on the Ernst & Young study in their opening brief and incorporate those facts here (See Jorde Landowners’ Opening Brief p. 25-28) – notably that their analysis does not include negative impacts from Section 45Q. (Phillips Direct Ex. 1 at p. 17) The estimated cost of those credits in 2025 alone is $414 million (*Id.)* – thus Summit starts at a negative $414 million dollars and would have to prove $414 million in economic benefit just in 2025 to get back to zero, let alone the billions per year thereafter. Summit’s key witness admitted the federal tax subsidies to Summit are **costs to the public** – not benefits. (Tr. 3801, 3853) Had Summit been serious about a cost-benefit analysis they should have done one rather than presenting a paid-for propaganda

piece. Summit failed in its burden to prove net economic benefits and failed to clear both the public convenience and public necessity hurdles as well as the "public use" hurdle.

J. The IUC erred in relying upon Summit's inflated claims of environmental benefits.

Sierra Club expert witness Mark Jacobson testified that of the projected 9.5 MMTPA of carbon captured by Summit's non-applicant affiliate you would need to reduce this amount by 15.2% to offset the increased carbon emissions Summit will create in the dehydration, compression, and heating of carbon dioxide all prior to entering the pipeline. (Sierra Club Ex. 1, Jacobson Direct p. 6) This is in addition to the vast amounts of carbon Summit will put into the atmosphere during mobilization for and construction of the pipeline and associated facilities that Summit failed to calculate or report.

Jacobson went on to discuss that if Summit instead were to propose new wind generation facilities comparable to the cost estimates to build their proposed pipeline the carbon dioxide prevented from reaching the atmosphere would be 12.6 to 20.8 MMTPA – significantly a superior method of reducing carbon than building Summit's CO2 pipeline. (*Id.* p. 11) The tailpipe CO2 savings would be 8.42 – 14.0 MMTPA (*Id.* 11-12).

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Summit's financial witness, Mr. Pirolli, discussed the renewable fuel standard (RFS) relative to ethanol as if it was some environmentally friendly criteria when in fact "carbon intensity of corn ethanol produced under the RFS is no less than gasoline and likely at least 24% higher…" (*Id.* p. 13) Further, Jacobson provided expert opinion that it is not likely Summit could reach one of its "primary drivers" of reaching California's low carbon fuel market given the California Air Resources IUC has set new regulations that will likely preclude E85 or any fuel that produces tailpipe emissions. (*Id*. p. 19)

It is clear any claim or distant reference by Summit that approval of their Petition will somehow lead to climate or environmental benefits is debunked. No Summit witness provides any evidence or specifics as to what the climate outcome or pollution reduction or public health benefits would be should their Petition be approved. The IUC should place no weight and no merit on Summit's baseless environmental benefit insinuations – after all "Summit doesn't take a position on climate change." (Powell at Tr. 1624)

Landowners further adopt and incorporate here all the Sierra Club's arguments related to alleged environmental benefits of the Petition.

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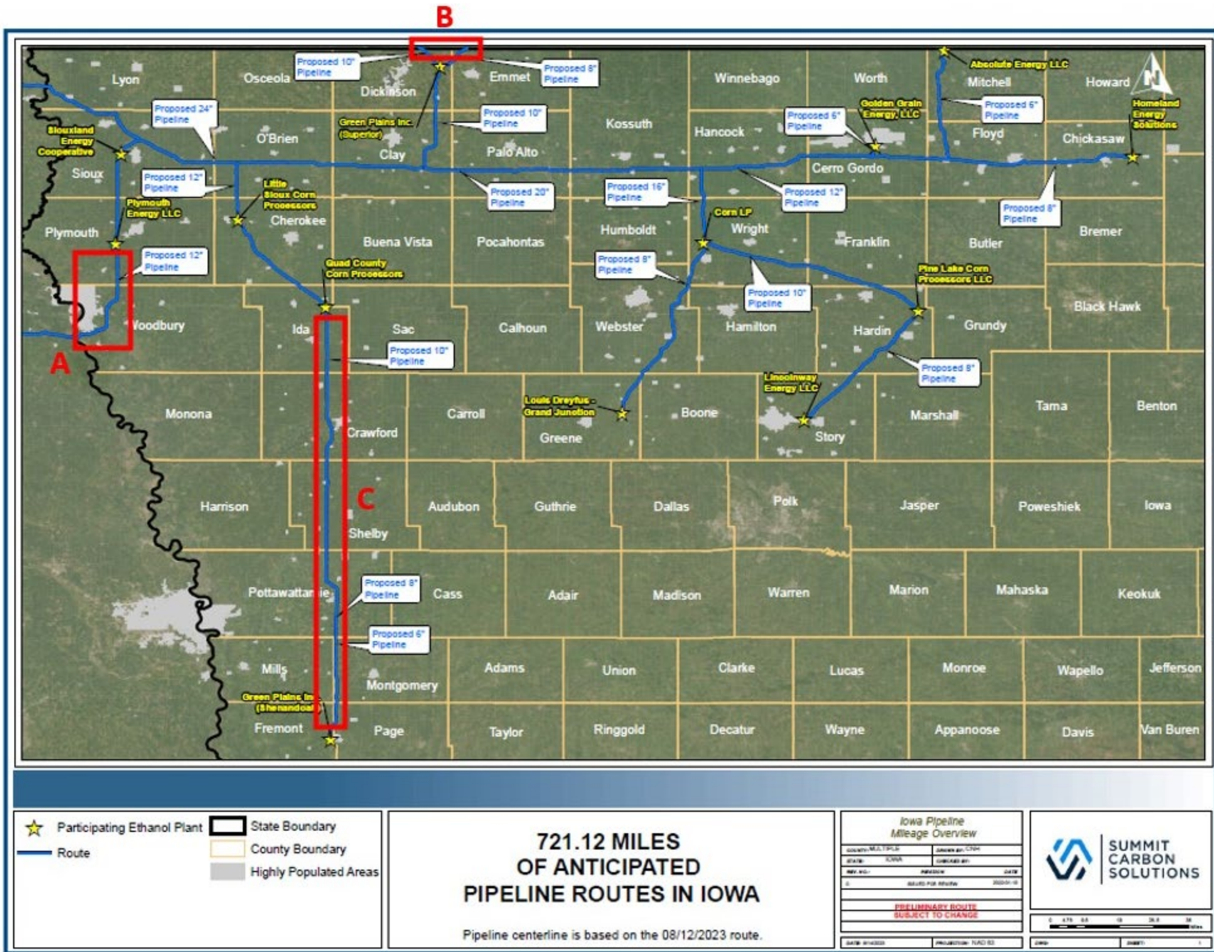
III. THE IUC ERRED IN FINDING SUMMIT'S PETITION COMPLIED WITH CHAPTER 479B.1 BECAUSE PROJECT IMPACTS ARE UNDULY BURDENSOME AND THE APPROVED ROUTE IS NOT THE LEAST INVASIVE

A. The IUC erred in approving three specific segments of the overall proposed route.

Summit's proposed Iowa Route map (JLO Ex. 644), include three proposed segment areas that are particularly objectionable and the IUC erred in approving them. These three areas as depicted as Area A, B, and C as shown below. Those route portions are *per se* unjust and improper.



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Summit's entire approved route is problematic at the macro and micro levels. From a big picture macro view, the segments in the areas indicated above as A, B, and C, are the most clearly problematic approved route segments. Area A depicts the entirety of the proposed route in Woodbury County and the portion of route south of Plymouth Energy LLC's ethanol plant. Summit failed to prove why it is either convenient or necessary to suffocate future growth of Sioux City and failed to prove any benefit this segment has to Woodbury County or southern Plymouth County residents. Summit testified this portion of their route would bring CO2 **into Iowa** from Nebraska exclusively. There was no evidence that bringing CO2 into Iowa from Nebraska was a benefit in any way to Iowans such to justify the intrusion and impact of the route shown in Area A. This portion of the route does nothing for any Iowa business or ethanol plant. Summit produced no evidence of why this Nebraska on-ramp into Iowa was necessary nor do they prove why they could not instead locate their Nebraska route entirely within Nebraska and connect to their pipeline in southeastern South Dakota. Absent persuasive justification as to why Woodbury and southern Plymouth counties should host this hazardous pipeline solely for a handful of possible CO2 emitters in Nebraska for the presently non-existent and un-approved Nebraska route, this issue should be remanded with directions to deny this portion of the route.

Area B includes two segments that should have been denied for the same reasoning as Area A. Area B highlights two routes originating in Minnesota and terminating at the northern boundary of the Green Plains Inc., Superior ethanol plant in

Dickinson County, Iowa. Summit offered no evidence why its non-existent and un-approved Minnesota route should impact northern Dickinson County as depicted. Summit could serve this Green Plains plant without impacting any land to the north toward the Minnesota border. Additionally, Summit already has a different planned route from Minnesota into North Dakota where it seeks to permanently store CO2, Iowa need not be further impacted with these additional miles that would only serve Minnesota ethanol plants. This is unlike an oil pipeline that often completely pass through entire states simply because they are in the way from the source of the product to the ultimate destination. Here, Summit's argument was the benefit to Iowa ethanol plants and to keep Iowa competitive against other plants in other states. The approved routes shown in Area B do not serve these purposes.

Lastly, Area C depicts a 123-mile expanse from Ida County to Fremont County of proposed pipeline which impacts 118 Exhibit H parcels to connect to a single ethanol plant, the Great Plains, Inc. plant, in Shenandoah. (Final Order p. 503) Summit presented no evidence why connecting to this single plant is either publicly convenient or necessary and no justification of eminent domain needs over land in between Quad County Corn Processors in Ida County and Green Plains in Fremont County. IUC member Byrnes issued a dissent, agreeing with Landowners, that approval of the route depicted in Area C could not be justified and was not proper after weighing the evidence. (Final Order pp. 501-507) IUC approval of the segment of pipeline in Area C should be remanded with directions to deny this segment.

B. The IUC disregarded overwhelming evidence proving Summit's proposed route places too much risk on Iowans and their communities.

1. CO2 is Hazardous and Toxic to Living Things

In addition to the problematic segments in Areas A, B, and C, above, there are several areas approved in Iowa that are simply too close to communities. Unlike crude oil or its derivatives currently moving across Iowa, compressed supercritical CO2 is heavier than air but rather than sinking and staying on the ground like crude oil would, released CO2 displaces oxygen and can travel at concentrated levels. (JLO Ex. 11 p. 4) The direction of travel is variable given the effects of weather, topography and other factors.

We know these facts about the kind of CO2 Summit proposed to transport:

- Concentrated CO2 is an asphyxiant and a toxicant. (JLO Ex. 11 – Iowa Chapter Physicians for Social Responsibility)
- Gaseous CO2 is 1.5 times heavier than air and when released in large quantities as gas or a liquid and displaces ambient air. (JLO Ex. 11 – Iowa Chapter Physicians for Social responsibility)
- Human exposure to 10,000 Parts per million (ppm) of CO2 to 30,000 PPM is "unhealthy." (JLO Ex. 568 and 11)
- Human exposure to 30,000 to 50,000 ppm of CO2 is a "serious health risk." (*Id.*)

- The National Institute for Occupational Safety and Health (NIOSH) defines IDLH as "the atmospheric concentration of any toxic, corrosive, or asphyxiant substance that poses an immediate threat to life, could cause irreversible or delayed adverse health effects, or could interfere with an individual's ability to escape from a dangerous atmosphere." (JLO Ex. 645 p. 9)
- Human exposure to 40,000 ppm of CO_2 is "immediately dangerous to life or health (IDLH)." (*Id.)*
- Symptoms of human CO_2 toxicity at 3% volume of CO_2 in the air (30,000 ppm) include reduced hearing, mild narcosis, increased heart rate and blood pressure, and respiratory stimulation. *(Id.)*
- CO_2 concentration of 4-5% (40,000 to 50,000 ppm) cause headaches, dizziness, increased blood pressure, and uncomfortable dyspnea (shortness of breath). (JLO Ex 645 p. 7)
- Symptoms of human CO_2 toxicity at 5% volume of CO_2 in the air (50,000 ppm) include confusion. *(Id.)*
- Symptoms of human CO_2 toxicity at 8% volume of CO_2 in the air (80,000 ppm) include dimmed sight, muscle tremors, unconsciousness, and possible death. *(Id.)*

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2. The IUC underappreciated CO2 Pipeline risks to communities such as occurred in Sataria, Mississippi, and blanketly approved Summit's proposed Iowa route in error.

Satartia Mississippi foreshadows Iowa's fate in many ways. Denbury Gulf Coast, LLC, the owner of the exploded Satartia pipeline and affiliate of a well-established and publicly traded multi-billion-dollar company, Denbury, Inc. – not a start-up like Summit, filed for bankruptcy on July 30, 2020, less than six months from when the CO2 rupture and release occurred on February 22, 2020. (JLO Ex. 14; *Id* p. 9) However, even before the Sataria disaster, this CO2 pipeline had other troubles. "On November 9, 2018, the Delhi Pipeline experienced a girth weld rupture at a valve location during pipeline reloading activities, and not attributed to natural force damage, which means despite following minimum federal standards in construction, this pipeline still failed. (JLO Ex. 565, p. 5) In this incident the pipe failed to perform as intended "due to chilling from the CO2, causing the girth weld connecting the pipeline to the valve body to rupture." (*Id.*)

JLO Ex. 565 is the Pipeline and Hazardous Materials Safety Administration ("PHMSA") Failure Investigation Report for the Denbury Gulf Coast Pipelines, LLC pipeline rupture, also known as the Satartia, Yazoo County, Mississippi rupture of February 2020. The failed portion of the Denbury CO2 pipeline, like portions of Summit's approved pipeline, was 24-inches in diameter. (JLO Ex. 565, p. 3) The maximum operating pressure (MOP) of the Denbury pipeline was 2,160 pounds per

square inch (psig) but at the time of the rupture was only operating at approximately 1,400 psig. (JLO Ex. 565, p. 4) There were approximately 9.55 miles of pipe between the two existing remotely operated main line block valves. (*Id.*) This means that all of the negative effects of the Denbury rupture were from carbon dioxide within a 9.55 mile by 24-inch diameter pipeline operating at 64.8% of MOP.

The soil at the failure site in Sataria is loess soil which is a "silty and clayey" soil which indicates the soil is prone to absorb water and can collapse or slump under the right conditions. (JLO Ex. 565, p. 13) "Loess soil has a relatively high porosity (typically around 50-55%) …" (*Id.* at Footnote 10) Many Landowners testified of either having this exact same soil here in Iowa or describe their soil with similar features. (JLO Ex. 629 p. 3) Alan Boeck testified about his loess soil confirming it is highly erodible, as Satartia found out, and that, "[I]t is unique in that it is wind deposited. When it comes to the Loess Hills in particular, which is the deepest portion of loess, there are only two places in the world it's found. One in China and along the Missouri River between Sioux City and Omaha." (JLO Ex. 655; Tr. 7244) The properties of loess soil make it susceptible to drainage issues once it has been disturbed. (Tr. 7278) Dennis Graham described his topsoil as Steinauer clay, which is a type of loess soil. He recalled that Ms. Ryon has asked a couple of Summit executives what that is, if they knew what it was, and they said they did not. (Tr. 5822) Loess soil is unique. "If it's dry, it blows in the wind. If it's wet, it flows with the water. And if it's semi-moist, you can do the ball test like the Iowa State professor, Mr. Liebman, was talking about. And it forms a hard

ball very quickly." (Tr. 5849) Sherri Webb added, "In fact, Shelby County, as a whole, is 95 percent no till because of the loess soils that we have in the entire county. Harrison County and Shelby County, you know, they share that fate of that glacier that came down and blew the soil over hundreds and hundreds of years into our areas. And you have to keep it -- you have to keep it intact. It will blow away." (Tr. 6125) Satartia taught the world it is unwise to locate a CO2 pipeline in loess soils or similar soils. The portions of Summit's proposed route where the IUC granted approval through loess and similar soils should be remanded with direction to find the route in those areas is denied. (JLO Ex. 655 p.2; Loess formation found in western portion of Iowa)

Like Summit, Denbury identified some geohazards but lacked specific and substantive geohazard identification across the entire proposed route such that approval of Summit's route without this information could prove fatal. (JLO Ex. 565, p. 14) Summit has not conducted necessary Phase II geohazard analysis in Iowa. (Tr. 1685, 1757) Despite the 24-inch Denbury CO2 pipeline being tunneled 30-feet under the highway, the explosion was so violent that it created a 40-foot crater exposing the pipeline as depicted below: (JLO Ex. 565, p. 9)

The failed 24-inch CO2 pipeline ruptured at 7:06 p.m. but it was not until 7:43 p.m. that Incident Command (IC) was able to confirm the pipeline had in fact ruptured; however, no one could get close to the release site due to the ongoing release of CO2. (JLO Ex. 565, p. 6) At least 21,873 barrels of liquid CO2 had been released from the pipeline rupture. (JLO Ex. 565, p. 7) For reference, there are 42 gallons in one barrel so the CO2 released was equivalent to 918,666 gallons of CO2.

Although the pipeline was shut down by 7:15 pm, and the main line block valves at both ends were closed, the remaining contents of the pipe continued to vent to the atmosphere for several hours. (JLO Ex. 565, p. 11) Because CO2 vapor is 1.53 times

heavier than air, and displaces oxygen, it can act as an asphyxiant to humans and animals. (JLO Ex. 565, p. 3) In Satartia, the CO2 followed a path downhill and as the discharged volume increased the CO2 plume moved over the crest of a hill and then into a valley reaching Satartia and its citizens. (JLO Ex. 565, p. 11) Hazardous CO2 continued out of the crater one mile over a hill and into the town, although pre-construction modeling showed Satartia would not be affected. (*Id.* p. 8)

Prior to this 2020 explosion, this CO2 pipeline had another earlier accident in 2011, and prior to that accident Denbury hired a third party to determine the affected radius area for a potential CO2 release from its pipeline.(JLO Ex. 565, p. 12) That model was used to develop "could affect" areas also referred to as high consequence areas or HCAs. (*Id.*) However, that analysis failed to show that the town of Sataria and its people could be adversely affected if a CO2 rupture were to occur. (JLO Ex. 565, p. 2) The pipeline owner's generated modeling and inputs failed to illustrate exactly how far as CO2 plume can travel. The rupture location was 1.24 miles, or 6,547.2 feet, from the center of Sataria, where the entire town was evacuated. (JLO Ex. 487 p. 8, Attach. No. 2) People otherwise enjoying the evening having a backyard barbecue had all collapsed and were lying on the ground. (JLO Ex. 487, p. 9) One of the first responders, Terry Gant, who had been going door to door searching for victims had to himself go to the hospital for medical care. (*Id.*)

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The National Institute for Occupational Safety and Health has established that **concentrations of 40,000 parts per million (ppm) are immediately dangerous to life and health**." (JLO Ex. 565, p. 3) (emphasis added). The Navigator Hazard Chart in evidence included "worst-case" data predicting a 40,000-ppm plume could travel at least 2,920 feet from a 20" diameter CO2 pipeline, but in Satartia, Mississippi, real-world facts show us a CO2 plume can travel at least 6,547.2 feet from a 24" diameter CO2 pipeline. (JLO Ex. 565, p. 13) Denbury's modeling underestimated the dispersion hazard distance more than three times what it was. (*See* Figure 6 p. 13 of JLO Ex. 565 – distance from redline to outskirts of Sataria.)

Underestimating the hazard distances as Denbury did, and as Summit has here, and what the IUC has ignored (Final Order, p. 244) leads to dangerous consequences. Chief Gerald "Jerry" Briggs, the Warren County Mississippi Fire EMS Chief and 911 Chief, observed "several people laying on the ground with shortness of breath and vomiting." (JLO Ex. 487 p. 9) This was after these people had been rescued from Sataria, transported five miles away from town to the checkpoint, had time to normalize their CO2/O2 exposure, and were waiting for ambulances to arrive. (*Id.* p. 12)

Chief Briggs, who assisted in the Sataria response and rescue efforts, testified fire trucks would not run and were unable to go the quickest route to respond to the disaster because the engines didn't have sufficient oxygen to operate due to CO2 displacing the oxygen.(JLO Ex. 487, pp. 1 and 5 – Testimony of Jerry Briggs) Chief

Briggs personally observed multiple vehicles stopped in the middle of the highway or in the middle of the road with their headlights on doors wide open. (*Id.* p. 6)

Chief Briggs observed a "small sedan in the middle of the road with headlights on doors closed with three victims inside of it." (*Id*. p. 10) Chief Briggs had been driving a UTV at the time, but it was not running well so they had to get out of the UTV and respond on foot, with their 60-75 pound SCBAs on their backs. (*Id*. pp. 8 and 10) **Chief Briggs then "observed a male slumped over the rear seat did not appear to be breathing and was foaming out of the mouth and then the front seats were the same - two individuals appeared not to be breathing with frothy stuff coming out of their nose and their mouth and their vehicle was still in drive and the radio was on."(*Id.* p. 10) These victims "absolutely unconscious – unresponsive. It did not appear that they were even alive so my first instinct was to break the glass to get gain access to the victims to verify that they were alive."** (*Id.* p. 10-11)

In checking to see if the CO2 exposure victims were alive or conscious, Chief Briggs and his crew "did the sternum rub just the knuckles in the chest to try to get some response out of them and we didn't get anything. If any of them had been semi-conscious you would expect them to make some groan or some noise once somebody rubs on their sternum" but they didn't move, "[t]here was nothing." (*Id.* p. 11-12) **"I didn't expect them to live through the night." (***Id.* p. 11)

In search of more victims, Chief Briggs and crew spread out their search and travelled 3 miles away from the rupture site and found victims experiencing shortness of breath. (*Id*. p. 14) A total of approximately 200 people had to be evacuated for safety and health concerns related to the pipeline rupture and CO2 plume that travelled towards the town of Satartia. (JLO Ex. 565, p. 7) Individuals driving on the roadway near the migrating CO2 vapor cloud experienced engine issues and failures due to the CO2 concentration displacing oxygen. (*Id*.) At least 45 people sought medical attention at local hospitals. (*Id.* pp. 7-8)

"Fortunately the entire area [of Satartia] of the where the plume traveled was very scattered rural communities. **I couldn't imagine this type of severity of an incident happening somewhere closely populated**. (emphasis added). I think they're fortunate that it happened on a Friday night at about seven o'clock, so most people went to the nearest town to eat or go out or whatever it was and not everybody being at home." (JLO Ex. 487 p. 15)

PHMSA's investigation revealed, like with Summit, Denbury failed to address the risks of geohazards appropriately and thoroughly, underestimated the potential affected areas that could be impacted by a release in its CO2 dispersion modeling, and failed to notify local responders of a potential failure and possible outcomes. (JLO Ex. 565, p. 3 and 15)

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Chief Briggs summed up the issue confronting large parts of Iowa that would be affected should the Board approve the Permit Petition when asked if he thought addition of a warning odorant would be helpful:

> "Certainly, yes as to I believe it is more likely faster reporting will occur and individuals would have a better chance of getting out of that area if there is an odorant they can detect. However, if you're not in a big city you have to wait on the big city to come to you. So that doesn't hold very well for the people that are trapped in their house or in their car or not breathing waiting on the City EMS or others to come with their response teams. So, to a degree it will definitely help but for those in more rural areas if they are in need of help you better hope the local first responders are fully trained and equipped with all the tools and techniques and technology to minimize victim impact and injury." (JLO Ex. 487 p. 20)

CO2 pipelines are more dangerous than natural gas pipelines:

> "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 affect 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**." (*Id.* p. 21)

The IUC failed to place appropriate weight upon Chief Briggs expert opinion regarding the safe CO2 siting distance to residents and the public at large:

> **Q:** Based on your experience, education, training and background how far away should these CO2 pipelines be placed, if they are going to be sited at all, in relation to populated areas.

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> **A:** Just in my experience for what I've seen in Yazoo County, a couple miles at least that's where we stopped seeing victims in that three to three and half mile range.

The IUC approved Summit's route in error and the IUC failed to heed the warnings and lessons of Satartia when considering routing factors.

3. CO2 Dispersion and risk modeling should have been considered by the IUC related to routing, public convenience and necessity determinations, and eminent domain considerations.

CO2 dispersion risk modeling predictive tools and past real-world experience should have been the critical part driving the routing and other analysis. The IUC, however, adopted an odd relationship with the Summit provided dispersion model data. One the one hand the IUC reviewed the data and relied upon it to determine Summit "…has used the models to assist it in limiting risk" (Final Order p. 244) yet on the other hand stated they would "…not use the dispersion modeling to assist with routing determinations…" (*Id*.)

It is critical this court understand the significant body or risk and dispersion related evidence in the record so it can find the IUC failed to consider the evidence or if it was considered, failed to appropriately weigh the evidence and utilize it in reaching their ultimate conclusions. Thus, a detailed review of the evidence is provided.

"There is one well known threat associated with supercritical state operation. A CO2 pipeline operating in a supercritical state can be more prone to pipe running ductile fractures than hazardous liquids or natural gas pipelines. Running ductile fractures are

unusual and particularly dangerous fractures that can "unzip" a CO_2 transmission pipeline for extended distances exposing great lengths of the buried pipeline. These extreme rupture forces throw tons of pipe, pipe shrapnel, and ground covering, generating large craters along the failed pipeline." (JLO Ex. 477-478 p. 17) Hazardous pipelines are dangerous generally but pipelines transporting supercritical CO_2 are more dangerous. Because of this reality the Board erred when approving the Petition because it failed to consider impacts not only existing structures but also likely future development.

Summit consistently refused to produce reliable risk analysis and plume modeling data and the IUC repeatedly protected Summit from making such disclosures including in August 2022 when the IUC denied OCA's request to require Summit to file its risk assessment, dispersion model, and emergency response plans. (The OCA's original filing was a Motion to Require Filing, filed April 19, 2022. The IUC approved it, but then reversed course and denied it in Order Addressing August 3, 2022 Motion for Reconsideration and Scheduling Status Conference filed September 2, 2022.)

It wasn't until mid-hearing on or about September 5, 2023, that the IUC finally ordered Summit to produce some dispersion data which they did, confidentially, on September 9, 2023. This was the first time (after over a year of requests by concerned parties) that dispersion risk modeling was presented. (JLO Confidential Exs. 562 and 583) This delayed disclosure prevented discovery on this issue and prevented Jorde

Landowners and others from developing expert witnesses to rebut Summit's presumptions and alleged findings.

4. The IUC willfully ignored reliable third-party dispersion and other risk data that should have been used to assess routing determinations and deny portions of the Petition.

JLO Ex. 645 is the Navigator Heartland Greenway pipeline ("Navigator") CO2 Air Dispersion Guidance as first produced in the Illinois Commerce Commission hearing. "This Document is intended to outline Navigator CO2 Ventures' ("NCO2V") Heartland Greenway System ("HGS") guidance and philosophy for carbon dioxide ("CO2") air dispersion modeling, as a tool for risk analysis." (JLO Ex. 645 p. 3) In developing this data, the highest level of risk was established to mimic the Potential Impact Radius ("PIR") calculation and method found at 49 CFR 192 (192.903). (*Id.*)

"The worst-case release scenario is defined as a guillotine rupture (e.g., failure of a girth weld) which has caused the pipe to separate and discharge the pipeline contents into the atmosphere." (*Id.* at p. 7)

Navigator's modeling for its proposed supercritical CO2 pipeline determined a 105,000 ppm CO2 concentration exposure to be Hazard Level 4, and **40,000 ppm CO2 concentration level is Hazard Level 2** with Hazard Level 1 equating to 30,000 ppm CO2 concentration exposure. They publicly released these hazard distance findings. (*Id.* at p. 10):

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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’

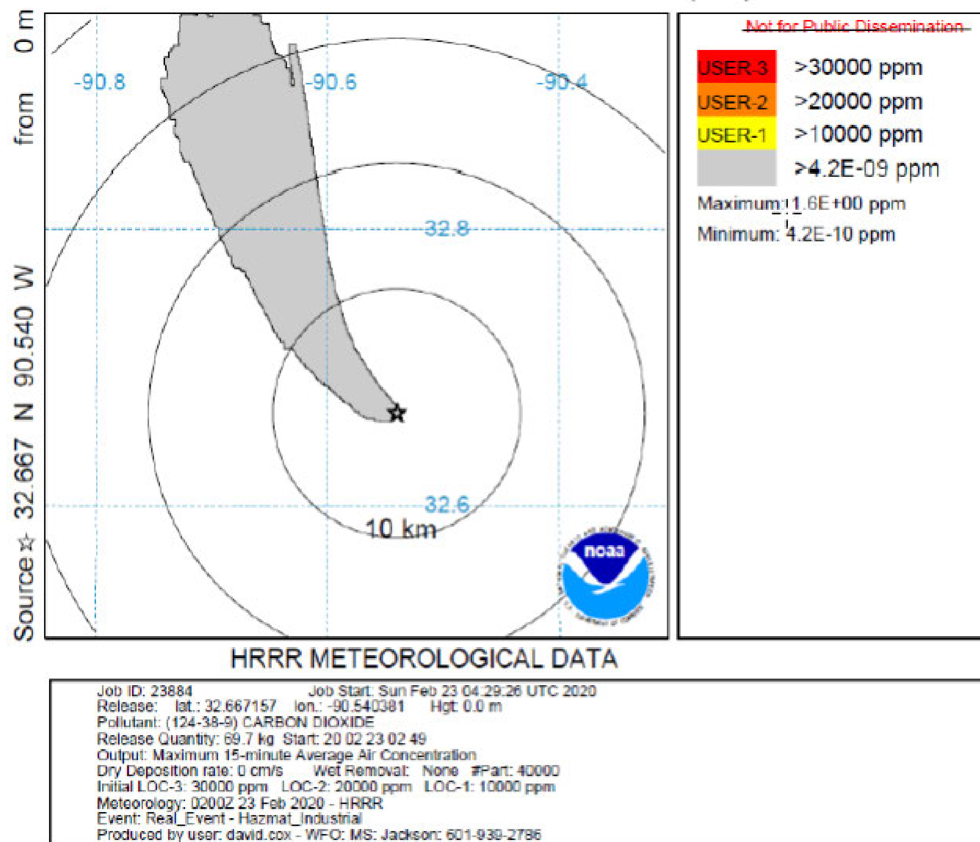
The input categories and values leading to each of these Hazard Level distances can be found at JLO Ex. 645 p. 14-18. Summit failed to produce a similar document for consideration and failed to provide their risk analysis inputs.

As is obvious from the Navigator Hazard Chart above, the hazard distance in feet increases as the diameter of the pipe increases because more volume of toxic CO2 is being transported. Mr. Bryan Louque testified for Summit and provided the formula to calculate volume – “[t]he volume of any cylinder is proportional to the radius squared times the length.” (Tr. 3009) It takes more than fifteen (15) 8” diameter pipelines to carry the same volume of one 24” pipeline. (JLO Attachment No. 14, p. 6) A twenty (20) mile long segment of 24” pipeline if full of CO2 could fill 1,880 Olympic size swimming pools. (*Id.*)

The hazard distance for Summit’s 24” diameter pipeline is significantly larger than the distances for a 20” pipeline across all Hazard Levels. Using Mr. Louque’s volume calculation we know that a 24” diameter pipeline will hold 44% more volume

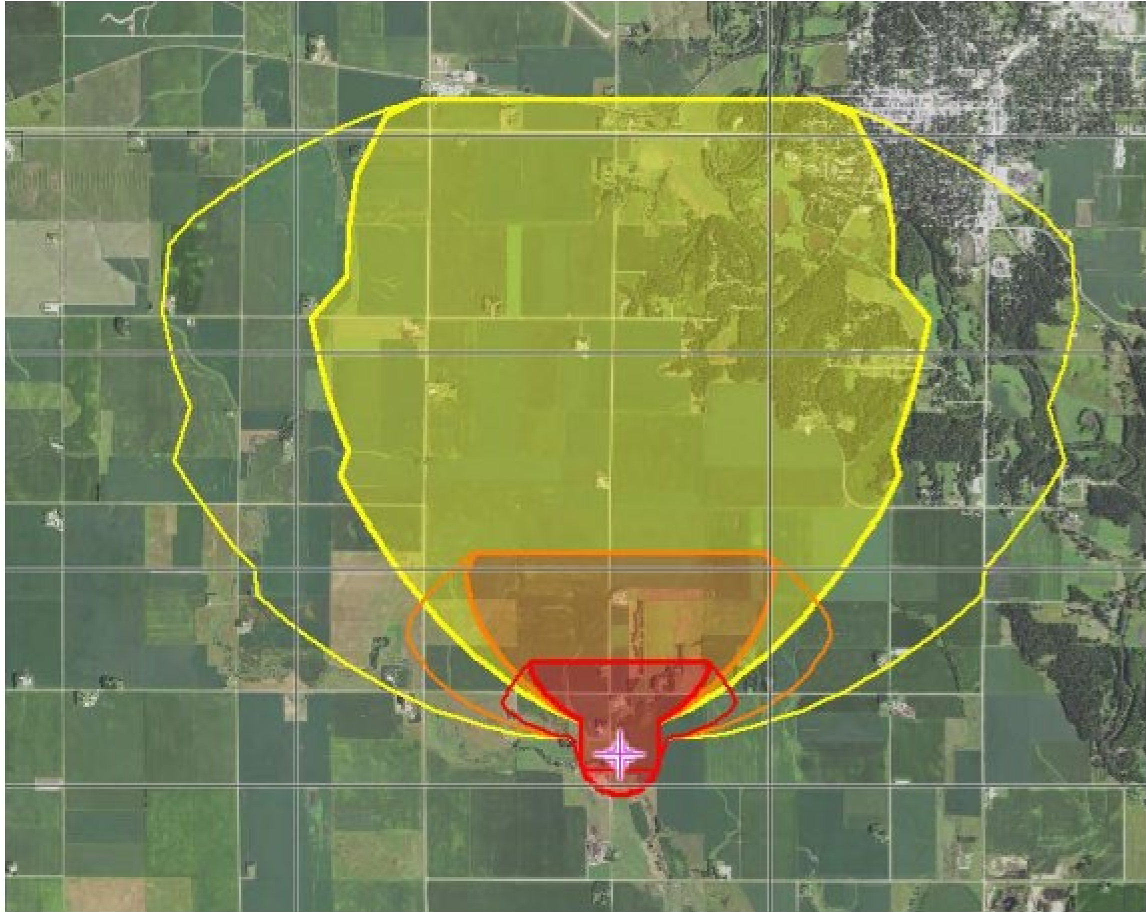
<u>of CO2</u> than a 20” diameter pipeline. If we were to apply that 44% more volume to the 2,920-foot hazard zone that would give be 4,204.8 feet.

Jorde Landowners presented evidence similar to the computer plume analysis ran after the Sataria, Mississippi explosion that modeled hazardous CO2 traveling nearly 40 kilometers (24.855 miles) from the rupture and release point (JLO 565, p. 12 – NOAA Modeling):



igure 5: This Chart Shows the Plume Model Data Generated by the National Weather Service/NOAA - The Model Indicates the irection a Plume or Cloud of CO_2 Would Have Followed from Ground Level While Dissipating, According to Atmospheric Data at the Time of the Release - Each Ring is 10 Kilometers (Satartia is Less Than Two Kilometers Northwest of Release Site, Indicated by the Star)[8]

Nancy Erickson provided her findings at JLO Ex. 298. The plume modeling software Summit said Landowners and First Responders could use and rely upon, showed CO2 concentration levels of 150,000 ppm as far as 1,795 feet away from the pipeline rupture site for a release from a 20-inch diameter CO2 pipeline. Here is one illustration of the modeling software's analysis:



Chemical Name: CARBON DIOXIDE
Wind: 6 miles/hour from S at 3 meters

THREAT ZONE

Red	888 yards	105000 ppm = Default LOC-3
Orange	1.1 miles	40000 ppm = Default LOC-2
Yellow	3.5 miles	5000 ppm = Default LOC-1

150,000 ppm exposure is certain death. Hazard Level 2 CO2 concentration levels of 40,000 ppm were detected at 1.1 miles, or 5,808 feet, from the rupture location.

It is important to note the above model is arguably conservative in that the wind-speed input amount was 6 miles per hour. The more wind, the more assistance to

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disperse and decrease the concentration levels. Had this been modeled at a lower wind speed the results could have been worse.

The above evidence should have informed the IUC that it is not appropriate to approve a location or route of this pipeline anywhere that an occupied structure, such as a residence, business, school, nursing home, place of worship, or similar, presently existing within at least 2,920 feet along every inch of the proposed Summit route. The IUC also failed to consider that in places near towns, cities, or areas with development potential, it is inappropriate to approve any route now that would act as a chilling effect on future economic development and growth of those particular communities.

5. The IUC erred by ignoring risk and dispersion data and erroneously granted routing in areas where the pipeline would be located within 400 feet or less of existing structures.

Summit admitted in response to a Farm Bureau discovery request there are 495 structures within 400 feet of the proposed route. (IFBF Johnson Direct Ex. 10) That is 495 too many. **A mere 6-inch CO2 pipeline is capable of Hazard Level 4 concentrations to 321 feet** or more from the pipeline. See Navigator Hazard Chart above. **Hazard Level 4, human exposure at 105,000 ppm, can be fatal to healthy persons within less than one (1) minute**. (JLO Pre-filed Testimony Attach. 11 p. 3)

IFBF Johnson Direct Exhibit 10
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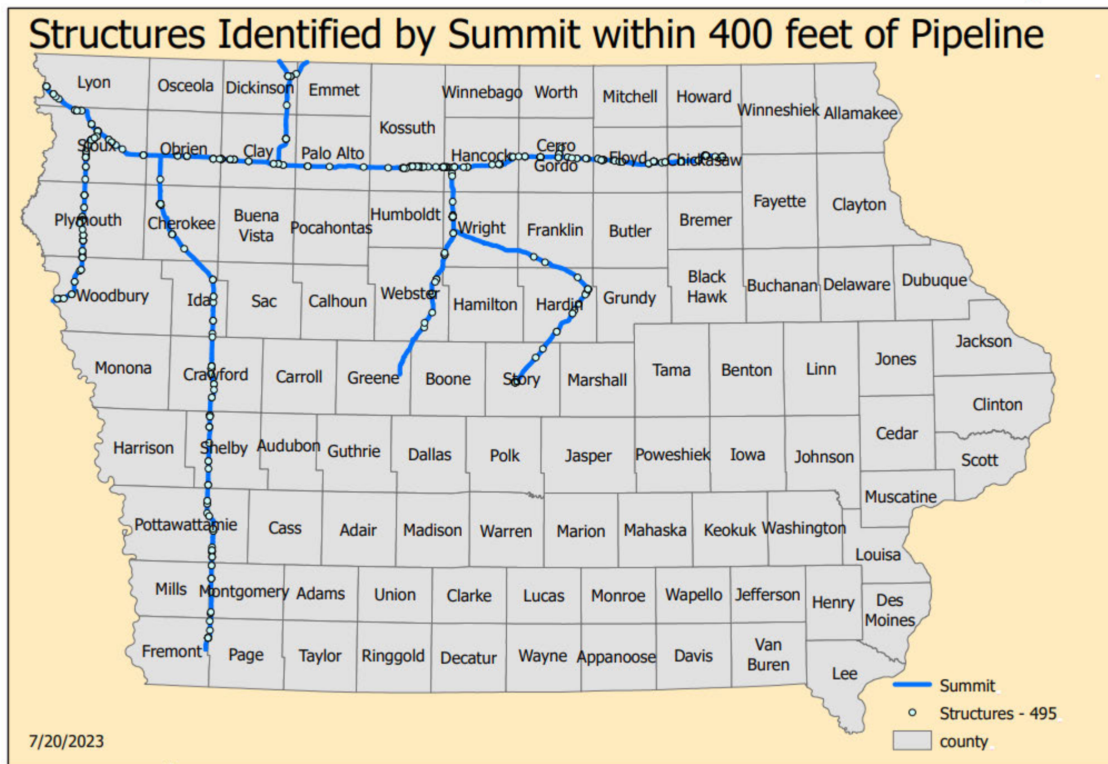

Summit witness, Erik Schovanec, testified Summit looked at all structures within 400 feet of Summit's proposed pipeline, considered all landowners, stakeholders and farms on the route. (Tr. 2224, ln 8-10; Tr. 2223, ln 3-5; Tr. 2224, ln 23-24; Tr. 2286, ln 14-15; Tr. 2071, ln 1-3; Tr. 6889, ln 17-25, and Tr. 6890, ln 1-5) Summit did not identify all above ground wells as "structures" withing 400 feet of its proposed pipeline. One example is the well of the Benita A. Schiltz Revocable Trust. The buffer distance from the pipeline to the well measures only 139 feet. (Tr. 6928, ln 10) The IUC failed to adequately evaluate potential damage to well and water contamination.

Recall that Summit failed to consider any dispersion and plume risk data before they determined their proposed route and instead used an oil pipeline's 400-foot

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screening distance (Tr. 2223). The Dakota Access oil pipeline is not comparable to what is proposed by Summit.

The Navigator generated CO2 hazard distances discussed herein are supported by the expert opinion of Dr. John Abraham, perhaps the world's leading expert on computational dynamic fluids modeling. (JLO Ex. 641 p. 24 and JLO Ex. 474) Dr. Abraham confirms that a plume from a 20-inch CO2 pipeline can travel more than 2,800 feet at 40,000 ppm concentration levels. But accurate plume modeling is not just important for people. A significant amount of Animal feeding operations exists in Iowa, unlike the Summit proposed pipeline, and there are many CAFOs within 1,000 feet of the proposed hazardous pipeline route. (IFBF Johnson Direct Exhibit 8) 1,000 feet is too close to these existing businesses.

6. The IUC erroneously relied upon Summit's cherry-picked dispersion inputs and resulting data to conclude Summit has limited the risk of a CO2 release.

"The Board has also reviewed the dispersion models provided by Summit Carbon and finds Summit Carbon has used the models to assist it in limiting risk." (Final Order p. 244)

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REDACTED REDACTED (JLO CONFIDENTIAL Ex. 583, p. 1) REDACTEDREDACTED REDACTEDREDACTEDREDACTEDREDACTEDREDACTED REDACTED (*Id.*) However, there is no supporting data to indicate this is true. In the Navigator Model, JLO Ex. 645, page 18, for a 20" CO2 pipeline, the inputs predict a 40,000 ppm concentration CO2 plume is likely to be experienced at 2,920 feet. However, the Navigator modeling inputs included Atmospheric Stability Class F, which is the most stable, i.e. the least windy or volatile weather. This input is one necessary to model "worst-case" because greater winds speed and turbulence assists in dispersing CO2 molecules and helps to reduce relative concentration levels. Also, the Navigator model used a relatively low wind speed of 3.3 mph, which, as an aside, the true "worst-case" would be measured at 0 mph for the reasoning stated above. Another input Navigator used was to model the rupture in a pipe with five (5) feet of cover on top – not a release REDACTEDREDACTED

On page 2 of JLO Ex. 583 REDACTEDREDACTED REDACTEDREDACTEDREDACTEDREDACTEDREDACTED REDACTEDREDACTEDREDACTEDREDACTEDREDACTED REDACTEDREDACTEDREDACTEDREDACTEDREDACTED REDACTEDREDACTED Regardless of which is more accurate – the IUC inexplicability failed to use either or even an average to help inform intelligent routing near homes, structures, communities, livestock and likely future economic development areas.

The IUC erred in failing to use the Summit dispersion modeling to assist with route determination (Final Order, p. 244) which led to the error of approving Summit's pipeline be located directly in (indicated by 0 feet from pipeline) or very near these communities (IFBF Johnson Direct Ex. 7):

Other Population Areas within 1000 feet of Proposed Pipeline Route

Jurisdiction	County	Feet from Pipeline
Mason City	Cerro Gordo	0
New Hampton	Chickasaw	0
Denison	Crawford	227
Superior	Dickinson	41
Charles City	Floyd	0
Roseville CDP	Floyd	947
Shenandoah	Fremont	0
Irvington CDP	Kossuth	0
Inwood	Lyon	788
Merrill	Plymouth	596
Earling	Shelby	131
Nevada	Story	0
Sioux City	Woodbury	953
Eagle Grove	Wright	428
Goldfield	Wright	0

The IUC erred in finding every foot of proposed pipeline route near and within the communities described in the above chart and discussed in more detail below was "just and proper" because even the Summit dispersion data and risk evidence in combination proves otherwise.

7. Even Summit's Dispersion Overlay Maps which do not forecast a worst case scenario, illustrate risks to Iowa Communities and Iowans that are neither just nor proper.

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Throughout the IUC pre-hearing process and in discovery, multiple parties sought Summit's CO2 dispersion analysis or modeling of how far and at what concentration CO2 could spread in the event of an unintended release, such as any negligent act or any intentional act, that could produce damage to or a rupture or break in the proposed hazardous pipeline. (Tr. 1592; Tr. 1724; Sierra Club's Second Motion to Compel Discovery filed July 26, 2023; The Counties' Joinder in Motion to Compel Discovery filed August 2, 2023; Office of Consumer Advocate, Motion to Require Filing filed April 19, 2022.) However, Summit repeatedly denied production or access to such critical evidence. (Tr. 1591; Tr. 1650; Resistance to Sierra Club's Second Motion to Compel filed August 2, 2023) Worse, Summit was aided and abetted by the IUC consistently denying such reasonable requests. (Order Addressing August 3, 2022 Motion for Reconsideration and Scheduling Status Conference filed September 2, 2023; Order Addressing Motion for Reconsideration and Petitions to Intervene filed February 10, 2023) Finally, although too late, the IUC, mid-hearing on September 5th, 2023, ordered Summit to provide dispersion modeling and data (Summit Carbon Solutions, LLC, shall provide the dispersion modeling results to the parties subject to this discovery dispute under the category of "Highly Confidential – Attorneys' Eyes Only," consistent with the protective order issued by the presiding officer, within two days of this order. (Order Addressing Second Motion to Compel filed September 5, 2023) which Summit did on September 7, 2023.

To set the stage for the following inappropriate approved route segments, these facts and the logical conclusion flowing therefrom are highlighted:

- Summit's initial screening distance was 400 feet from structures because that is what a completely different kind of pipeline, Dakota Access, used. (Tr. 1744-7; Tr. 2222-5)
- Summit did not utilize dispersion modeling to determine the IUC approved route. (Tr. 1598-9; Tr. 2065; JLO Ex. 551 – Powell Deposition at p. 23-24.)
- Only after over a year of pressure to release modeling data and visual depictions, these surfaced during the Evidentiary Hearing, and only "confidentially," once it was too late for any other party to develop counter evidence or conduct any discovery as to the veracity of the late produced documents. (Order Addressing Second Motion to Compel filed September 5, 2023)

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New Hamton, Iowa

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Charles City, Iowa

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Jorde Landowners argue REDACTED

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Irvington, Iowa

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Rodman, Iowa

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Inwood, Iowa

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Superior, Iowa

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Terril, Iowa

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Earling, Iowa

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REDACTEDREDACTED For instance, for the Benita A. Schiltz Trust land, Earling is their hometown, community and where first responders are located. (JLO Pre-filed Testimony, p. 18; Tr. 6914 ln. 1-17) Schiltz Trust intervenors own homes in

Earling, are first responders with the Earling Volunteer Fire Department and serve on Earling's City Council. (JLO Pre-filed Testimony, pp. 18 & 19) Despite Summit claiming transparency and stating safety is Summit's number one priority, (James Pirolli, May 25, 2023, Direct testimony, p. 7, ln. 14-15) not a single testifying landowner believed that to be true and none had experiences showing this was true. On the contrary, Summit had not contacted first responders or the Mayor of Earling about safety and pipeline proximity to Earling despite concerns being raised in October 2021. (JLO Pre-filed Testimony, p. 19; Tr. p. 6976, ln. 20-23) James Powell testified (Tr. 1736, ln 23-25 & p. 1737, ln. 1-8; Tr. 1737, ln. 14-19; Tr. 1760, ln. 22-25 & Tr. 1761, ln. 1-2) stating Earling was not a high-consequence area and not being aware of objections related to Earling. When asked about moving the pipeline away from Earling, James Powell testified (Tr. 1738; ln. 10-22) Summit has no intention of moving the pipeline route. (Tr. 1738, ln. 16-22; Tr. 6906, ln. 2-6) and IUC agreement was error.

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Quimby, Iowa

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Germantown, Iowa

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Sioux City and Sergeant Bluff, Iowa

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Summit agreed to re-route around the City of Bismarck, North Dakota after similar concerns were raised. (Powell Rebuttal Testimony at p. 6; Tr. 1689) For the residents and businesses of the disproportionately affected Iowa towns as illustrated above, the IUC erred because it did not deny the Petition outright and then, at a minimum, it failed to appropriately weight the evidence and require re-routing around these communities. Summit did not testify to any impossibility of relocating their non-existent pipeline to accommodate any such re-route, simply that the did not want to.

IV. THE IUC CAN AND MUST FACTOR IN SAFETY CONSIDERATIONS TO THEIR PUBLIC CONVENIENCE AND NECESSITY DETERMINATION AS WELL AS THEIR ROUTING AND EMINENT DOMAIN BASED DECISIONS.

The IUC was wrongly induced by Summit to believe anything even remotely related to or informed by the mere idea of "safety" should not and could not be considered in routing analysis. The Board stated it "…will not use the dispersion modeling to assist with routing determinations or routing modifications…" (Final Order p. 244)

The concept of safety in context of intelligent placement of a risky hazardous pipeline is not within the exclusive jurisdiction of PHMSA. Further there is not "a fine line between the Board's authority under Iowa Code chapter 479B and PHMSA's federal authority when it comes to safety." (*Id.*) Where to or where not to site or locate

hazardous infrastructure can be informed by safety concerns and considerations. There is no federal preemption in this regard.

According to the Pipeline Safety Act, PHMSA enacted a set of safety standards which are limited to the design, construction, operation, and maintenance of hazardous liquid pipelines and the limited area of these safety standards relate to items such as pipeline seams, pipe wall thickness, leak detection thresholds, qualification of welders and matters focused specifically on the integrity of the pipe itself and the uniform construction and operation of interstate pipelines. (49 U.S.C.§ 60102(a)(2) and 49 C.F.R. §§ 195.214, 195.106, 195.444, and 195.222) Nowhere in federal code will you find a law or any authority that states PHMSA has even the slightest bit of oversight or control over the particular route or of siting or locating a CO2 pipeline. Further, PHMSA does not preclude the consideration of plume modeling or risk analysis relative to siting CO2 pipelines. It does not exist because routing and siting of CO2 pipelines is a power exclusively with the State and local governments, such as the IUC.

PHMSA stated "…the responsibility for siting new carbon dioxide pipelines rests largely with the individual states and counties through which the pipeline will operate and is governed by state and local law." (JLO Exhibit 622, PHMSA Letter of September 15, 2023) And when siting is informed by safety concerns that is okay. Just as Iowa Northern filed objections against Summit in this docket and stated, "Summit seeks to come onto railroad property to undertake a construction activity which would

completely be at odds with Iowa Northern's need for safe track and safe rail operating conditions for its employees and the citizens in the area. To ignore or dismiss such concerns would be foolhardy and could lead to catastrophic results." (Iowa Northern Railway Objection filed August 10, 2023) Does Summit suggest the IUC can't consider the position of Iowa Northern Railway because they used the word "safe" in their objection? No rational person would believe "safe" triggers PHMSA involvement in whether or not the IUC can factor in the railway's concerns.

Iowa Northern Railway continued, "In the event that Summit's contractor attempts to construct a large pipeline under the railroad track structure as proposed by Summit, Iowa Northern, due to overwhelming safety concerns, will be required to shut down the train operations of Iowa Northern at the site of the proposed pipeline construction as a result of the danger presented by such construction. Such construction activities will directly lead to the stoppage of the free flow of interstate commerce by rail in the area." Again, because Iowa Northern shared "safety concerns" must the IUC ignore this data and these facts when considering intelligent siting and location of such a hazardous pipeline? Of course not.

There is absolutely no restriction on consideration of safety related concerns relative to determining intelligent and unintelligent locations for a hazardous pipeline in a given community. PHMSA can only impose safety standards on owners and

operators of pipelines – not on IUCs of supervisors, not on Iowa farmers, not on the IUC.

The IUC's treatment of safety-related evidence in this proceeding was the product of reasoning so illogical as to render it wholly irrational. Throughout the early stages of the proceeding, Summit argued that safety was not relevant to any criteria before the IUC and that any consideration of safety was preempted by the federal Pipeline Safety Act. Summit was successful in resisting Landowners' and other parties' attempt to obtain safety-related information. (Order Addressing August 3, 2022 Motion for Reconsideration and Scheduling Status Conference filed September 2, 2023; Order Addressing Motion for Reconsideration and Petitions to Intervene filed February 10, 2023) Landowners were repeatedly prevented from obtaining material discovery related to safety issues follow Summits position that such evidence was not relevant to the proceedings. (Initial Brief on Federal Preemption of Safety Regulations filed November 10, 2022; Notice of Appeal from Decision of Presiding Officer and Request for Stay Pending Appeal - Expedited Relief Requested filed August 8, 2023; Notice of Appeal from Decision of Presiding Officer and Request for Stay Pending Appeal - Expedited Relief Requested filed August 11, 2023; Notice of Appeal from Decision of Presiding Officer and Request for Stay Pending Appeal - Expedited Relief Requested filed August 16, 2023)

Nevertheless, on the eve of hearing, Summit filed direct and rebuttal testimony which included substantial discussion of safety. (Summit Dillon Rebuttal Testimony, p. 2-10; Summit Lumpkin Rebuttal Testimony p. 2-13; Summit Dillon Direct Testimony, p. 2-7; Sumit Muhlbauer Direct Testimony, p. 2-6) Intervenors moved to strike Summit's evidence on the grounds that it should be estopped from presenting safety-related evidence considering its unequivocal position through the proceeding that safety was irrelevant and preempted. (King Intervenors Motion to Strike filed July 25, 2023; The Counties Partial Joinder in Motion to Strike filed July 26, 2023; Sierra Club Partial Joinder in Motion to Strike filed July 26, 2023) The IUC denied the motions to strike without any legal analysis of the estoppel arguments. (Order Modifying Proposed Order, Denying Motion to Strike, and Taking Judicial Notice filed August 17, 2023.)

In its final decision and order, the IUC made several contradictory and inconsistent findings related to safety. For example, the IUC stated that "[w]hile the Board may consider safety as part of its analysis, the Board cannot impose safety criteria on Summit Carbon." (Final Order p. 222) However, the IUC proceeded to impose a number of safety-related conditions on Summit's permit which had been conceded to by Summit itself.

Additionally, the IUC reasoned that it could not use dispersion modeling to assist with routing determinations because any modifications done based upon

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dispersion modeling "would be done under the guise of safety." (*Id*. p. 244) However, the IUC proceeded to approve Summit's route based on Summit's consideration of dispersion modeling. The IUC's consideration of Summit's safety-related evidence, while disclaiming any ability to consider safety in response to other parties' arguments or evidence, was illogical and irrational and in violation of Iowa Code § 17A.19(10)(i) and (m).

Landowners request the issue of safety be remanded with direction to the IUC to deny the application and in the alternative, that the matter be remanded to reopen the record for discovery and further evidentiary proceedings as to the dispersion modeling and risk analysis.

V. THE IUC GRANTED EMINENT DOMAIN RIGHTS BEYOND THOSE NECESSARY FOR DEVELOPMENT OF THE PROPOSED HAZARDOUS PIPELINE IN VIOLATION OF IOWA CODE § 479B.16

The IUC has statutory authority to grant eminent domain rights to pipeline companies only "to the extent necessary." Iowa Code § 479B.16; see also § 479B.1 ("It is the purpose of the general assembly in enacting this law … to grant rights of eminent domain where necessary."). This necessity requirement is distinct from the "public convenience and necessity" requirement to obtain a permit, see Iowa Code § 479B.9, and instead refers to the scope of the taking. By requiring that the taking be only "to the extent necessary," the legislature seeks to protect Landowners by

ensuring that the grant of eminent domain is constitutional by going no farther than necessary for the public use. To be clear, Landowners are not conceding this project is for public use, but to the extent this court may find public use is established, which it should not, the IUC nonetheless failed to justify each specific Exhibit H parcel taking and the length and size and duration of land taken for each Exhibit H landowner such that the IUC failed to adequately consider the "to the extent necessary" requirement for each affected parcel. Broad general statements are not sufficient evidence for the requisite per parcel determination required of the IUC. There was simply no evidence as to each specific Exhibit H parcel presented by Summit to justify the IUC determination that "to the extent necessary" was satisfied for each distinct Exhibit H parcel.

A taking that exceeds that which is necessary for public use is unconstitutional and beyond the statutory authority of the IUC. See, e.g., *Race v. Iowa Elec. Light & Power Co.*, 257 Iowa 701, 704, 134 N.W.2d 335, 337 (1965) ("Only property necessary for the public use may be taken."); *Vittetoe v. Iowa S. Utilities Co.*, 255 Iowa 805, 812, 123 N.W.2d 878, 882 (1963) ("If the amount sought to be condemned is in excess of that necessary for the improvement, the appropriation of such excess is not for the public use.")

The takings granted by the IUC against each and every Landowner exceed that which is convenient or necessary for public use. (See live testimony of every Jorde Landowner who testified live and all their prefiled testimony, too numerous to

specifically cite each here.) As an example, for Dr. Neil Dahlquist (Tr. 7130-77, Jorde Landowners Initial Post-Hearing Brief Volume No. 17, p. 32-39) the pipeline runs almost parallel from an affected parcel until it suddenly juts north to cross into Dr. Dahlquist's parcel in the southwest corner. The obvious reason for this is that the owner of the land to the south is Summit Pork, owned by pipeline proponent Bruce Rastetter. (Tr. 7132:1-7133:22.) If Mr. Rastetter is such a proponent of the project, he should have zero problem with the disruption, dangers and economic costs applicant contends are outweighed by the economic benefit to the state of Iowa and keep the pipeline on his land. Instead, the pipeline route is deliberately drawn to avoid any inconvenience of the applicant's main promoter and key investor, Mr. Rastetter. This should have been a red flag to the IUC and weighed against the benefits advocated by the applicant. There is simply no justifiable reason for the detour of the pipeline route on to Dr. Dahlquist's land, especially considering that the route returns to its original path approximately 1 ½ miles west of his parcel.

1. The IUC erred when it failed to refrain from granting eminent domain rights greater than what were necessary.

The IUC has statutory authority to impose conditions to ensure that the grant of eminent domain is no greater than necessary for the purported public use and to ensure compliance with applicable statutes and regulations. See Iowa Code §§ 479B.9 ("The IUC may grant a permit in whole or in part upon terms, conditions, and restrictions as to location and route as it determines to be just and proper.");

479B.16(1) ("A pipeline company granted a pipeline permit shall be vested with the right of eminent domain, **to the extent necessary** and as prescribed and approved by the IUC….") (emphasis added).

The IUC did not impose conditions on its grant of eminent domain that would:

a. ensure that the taking is to an extent no longer than necessary by automatically terminating the easements upon termination of the federal tax credits underpinning the Proposed Hazardous Pipeline, which tax credits currently expire after twelve years of capture facility operation, and could expire early upon termination of the program by the federal government for budgetary reasons;

b. terminate the easement upon Summit's or a successor's failure to operate the Proposed Hazardous Pipeline as a common carrier, which condition is necessary given that, unlike interstate natural gas and oil pipelines, no federal or state agency currently has ongoing jurisdiction over Summit's commercial arrangements to ensure that Summit would continue to operate the Proposed Hazardous Pipeline as a common carrier, assuming that it is found to be one.

By failing to impose these conditions that limit the extent of time of the takings and for failing to limit the grant of eminent domain as reasonably requested by many Jorde Landowners who provided alternative routes (See Final Order p. 309-463), the IUC failed to limit its grant of eminent domain to that which is "necessary" to obtain

the purported public use in violation Iowa Code § 479B.16(1) and is therefore a violation of Iowa Code § 17A.19(10)(b). (See examples of suggested alternative routes: JLO Ex. 71, JLO Ex. 161; JLO Ex. 173; JLO Ex. 231; JLO Ex. 618)

2. Landowners presented personal economic impact evidence that should have triggered IUC ordered re-routes.

The grant of eminent domain rights to Summit does not automatically follow a finding of public convenience and necessity. The IUC must make eminent domain determinations on a parcel-by-parcel basis considering the unique facts and characteristics of each parcel. There is IUC precedent in prior dockets, such as the Dakota Access docket, HLP-2014-001, to deny a Petitioner's request for eminent domain over Exhibit H parcels. In Dakota Access, the IUC denied many eminent domain requests. (See *In Re: Dakota Access, LLC*, Final Order, pp. 131, 135, and 144). There the IUC weighed favorably a landowner's desire to potentially expand an existing turkey operation in the future (*Id*. at pp.130-132), a landowner's desire to be free from a route on one of three affected parcels (*Id*. at pp.134-135), and a landowner who wanted to be free from a above ground valve location near a "…immaculately-maintained residential acreage…" (*Id*. at pp.143-144). In terms of the turkey operation, the evidence was "if the company that owns the turkeys wants to expand operations, the Lenharts will need to be ready to expand their operations." (*Id*. at p.130) The IUC's denial of eminent domain rights because of the possibility it may interfere with a

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potential future expansion was sound and that same logic should have been applied to many landowners in the Summit docket but was not.

What follows is a factual summary of compelling economic and other reasons the IUC should have denied or modified eminent domain rights granted to Summit for exemplar landowners.

Lance Kleckner, Sandra Kleckner

The Kleckners property is dedicated to establishing woodlands, providing habitat for wildlife, propagating new seedlings from established trees and overall reverting previously farmed land back to its natural state. (Tr. 6581) The Kleckners have been planting and cultivating trees and woodland appropriate plants for over five decades. (JLO Ex. 106, pp. 2-3) The family's livelihood is dependent upon the existence of this woodland as they sell the trees and hope to expand into additional fields (Tr. 6584) The Kleckners have plans to move a hunting cabin in the area of the proposed hazardous pipeline. (*Id*.) The woodlands and wildlife habitat make this land ideal for hunting, enabling them to charge prime hunting rates. (*Id*.) The construction of a hazardous CO2 pipeline would negatively impact both the existing business and future opportunities. Mr. Kleckner requested Summit bore under the parcel to avoid harming the timber that provides their livelihood, but was told it was too expensive by a Summit land agent. (Tr. 6590) The IUC did order Summit to bore under one of the Kleckners' parcels. (Final Order, p. 340-1) However, the parcel the Commission

ordered to be bored is not the area of concern. The Commission erred in its Order and refused to remedy the mistake, claiming the concern was "meritless". (Order Issuing Permit filed August 28, 2024). The parcel that was requested to be bored, H-CR-013, is where the woodland is located, while the Order directs Summit to bore parcel H-CR-012, which is not where the area of concern is found.

Graham Ag LLC, Dennis Graham, Gloria Graham Dorr, Linda Graham

Summit's pipeline and subsequent easement will cause substantial financial harm to Graham Ag LLC. (Tr. 5813) The negative economic impact goes far beyond crop loss or yield reduction. Graham Ag LLC and its members were notified on August 23, 2023, that the parcels Summit placed on the Exhibit H list are ideal parcels for solar energy generation and storage. (JLO Ex. 619) The solar proposal presents Graham Ag LLC and its members with a potential for $4,000 per acres per year for 98 acres across these two parcels. (*Id.*) That would be $392,000 in rent per year. As stated in the solar letter offering, this solar project is offered for up to 40 years. (*Id.*)

As an example, a contract for wind turbines offered to Graham Ag LLC contains an eminent domain exclusion clause. (Tr. 5834) This exclusion includes damages that Graham Ag LLC and its members would have to pay if the granting of eminent domain resulted in removal of the wind turbines or related structures. Any solar contract would have the same eminent domain exclusion. Even the potential of having eminent domain rights over Graham Ag LLC property may prevent the solar company

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from wanting to develop the parcels in question into a full-fledged solar farm. This will be a huge financial loss to Graham Ag LLC and its members and a significant loss of clean electricity, jobs, and taxes to the community and state. (Tr. 5834-5835)

The parcels that are subject to eminent domain are ideal properties for solar generation, as stated by the solar company. Having a solar project on these two parcels of property would not only provide Graham Ag LLC and its members with a great business opportunity, but also provide low-cost zero carbon electricity for thousands or even hundreds of thousands of ratepayers in Iowa for decades into the future. Good paying jobs and tax review will be produced by this project for decades to come. Electricity generation is the definition of a public utility. The Summit CCS project does not meet the definition of a public utility. (JLO Ex. 510, pp. 12-13, 36)

Any economic benefit projected by Summit for its pipeline will be offset by the negative impact of increased electric rates. The large consumption of electricity for the compressors and pumps needed to capture, compress, and transport CO2 will likely require additional electric infrastructure and generation capacity. (*Id.*) The power companies will be back before the Board requesting rate increases to absorb these huge power demands. In addition, the parasitic emissions caused by the fossil fuel used to generate these power needs will increase the carbon intensity score of the ethanol produced by participating ethanol plants. Just the opposite effect Summit has professed to the IUC and public. Electricity costs for capture, dehydration, and

compression make up almost 50% of the projected operating costs of Summit's proposed project. (JLO Ex. 629)

Graham Ag LLC is asking for the economic freedom to flourish and make their own business decisions. Granting eminent domain on the affected Graham Ag LLC parcels will cause undue financial harm to Graham Ag LLC and its members. (Tr. 5848-5849) Graham Ag LLC requests that eminent domain not be granted on parcels H-CK-036 and H-CK-058. If eminent domain is granted on these two parcels, Landowners request that the Board support full compensation for the business damages valued at $15,680,000.00 (98 acres @ $4000 per acre for 40 years) as per the solar farm proposal. (JLO Ex. 619)

Summit's hazardous materials pipeline and associated easement, if approved by the Board, will put all the assets of Graham Ag LLC at risk. Graham Ag LLC carries property and umbrella liability insurance for normal farming operations. However, having a hazardous materials pipeline pass through Graham Ag LLC property is not considered a normal farming operation by their insurance companies and thus property damage and umbrella liability are not part of the insurance they can obtain at a reasonable cost for property damage or at any cost for umbrella liability. (JLO Ex. 512) (JLO Ex. 510, p. 27-29)

Graham Ag LLC's property insurer was able to obtain a rider policy at a cost of $20,000 per year for only an aggregate coverage of $1 million. Graham Ag LLC asked

the IUC require Summit to carry "All Perils" property insurance and Graham Ag LLC be named as additionally insured. (Tr. 5850-5852) The IUC did not include that as a condition, but should have for all affected landowners.

Maher Farms, Inc.

Mr. Maher testified a realtor based in Shenandoah, Iowa estimated the loss of desirability for the house and acreage at 50% or $60,000 should the proposed pipeline be installed. (Tr. 5016) Additionally, the lost value of the farm ground is 25% due to the hazardous nature of the product that would be shipped inside the pipeline. (*Id.)* This loss was estimated at $788,500 because not only are the three parcels Summit has requested eminent domain right over negatively affected, but all 332 contiguous acres will be affected. (*Id.*) Additionally, Mr. Maher, from his own pocket, spent $70,000 in 2023 to prepare the land in the event Summit granted eminent domain powers over the property since any future projects would be impossible due to Summit's Easement Terms. (Tr. 5037-5047)

Chen Beverly Chow

Ms. Chow would likely not make any further economic improvements to her land, and the existence of Summit pipeline if it is forced upon her "will hinder me from doing more development" and this would be an economic negative for Iowa and Dickinson county. (Tr. 6364) Ms. Chow had thoughts of new buildings and a small farmhouse for family retreats but "that would definitely be out of the question" if the pipeline is approved. (Tr. 6365)

Benita A. Schiltz Revocable Trust dated the 6th day of May 2009

The pipeline will negatively impact crop yields and land values as 7-8 acres would be removed from production to avoid liability risks, all harming the Schiltz Trust financially. (JLO Ex. 372, pp. 3-4, 30; Tr. 6908; Tr. 6910; Tr. 6970) Construction of the pipeline prevents future development of their land. (JLO Ex. 372, pp. 4, 11; Tr. 6915; Tr. 6964)

The CO_2 pipeline would cross the waterline that travels from their well to the homestead. (JLO Ex. 372, pp. 4, 6) Summit has not provided information on how/if they will repair damage to the well or water lines during construction or ensure the well water is safe. (JLO Ex. 372, p. 4, 17; Tr. 6912) The Schiltz Trusts fears the financial burden of repairing damage to their well, water lines or being forced to drill a new well and giving up an excellent water source at great financial expense. (JLO Ex. 372, p. 4) West Central Rural Water in Manning, IA stated they do not have water lines in the area of the Schiltz Trust and it would cost a minimum of $305,313 to get rural water to the homestead. (JLO Ex. 641, p. 76; Tr. 6893) Costs to dig a new well range from $50,000 to $75,000 or more. (JLO Ex. 652; Tr. 6894; Tr. 6895) There is no guarantee of hitting water or the quality of the water. (Tr. 6966)

Kathleen Hunt

Ms. Hunt's top focus on the farm is sustainability. (JLO Ex. 230, p. 4) Every decision is made based on the effect it would have to the ecosystems and wildlife found on the land. Among those decisions is a long-range plan to prevent erosion and

stabilize the stream banks of Beaver Creek due to the highly erodible land. (*Id.*) Ms. Hunt also recently installed two bioreactors to help reduce erosion. (*Id.*) She had intentions to install a grass waterway which could then be enrolled in CRP, but is uncertain about the feasibility now. (*Id.*) In addition to these multitude of concerns Summit has weighed Ms. Hunt down with, she is also nervous about the possibility of the pipeline being allowed to cross Beaver Creek and the impact it would have on the river bed, particularly given all of the investment they have put into protecting the waterway. (*Id.*) Ms. Hunt testified that she had explored a plan to turn the farm into a demonstration farm for conservation practices. (JLO Ex. 230, p. 5) She would no longer feel comfortable inviting the public to the land for field days if a carbon pipeline was present, so those plans have been put on hold. (*Id.*)

Weber Acres, Ltd, David Weber

Mr. Weber's Ex. H affected parcels are in a desirable area of Palo Alto County, being located approximately a mile from Silver Lake. (Tr. 6067) He has been approached by multiple people interested in buying part of the land for an acreage. (*Id.*) After speaking to two different realtors, however, Mr. Weber has decided to put any plans of selling the ground on hold. (*Id.*) He does not want to put the burden of the proposed pipeline on anybody else, and should the Petition be approved, which it should not, Landowner would forgo selling the property and the personal economic gain it would provide. (Tr. 6070)

Weber Acres, Ltd., David Weber, Jill Williamson

The IUC was in error granting Summit the right to move the proposed pipeline from the location presented during the hearing. Summit's reply brief stated requests were made by the landowners to shift the pipeline location:

"Jenifer J. Berge, Exhibits H-CL-078 (IA-CL-102-0364.000), H-CL-053 (IA-CL-102-0366.000)19 and Jill Williamson, Exhibit H-PA-[*sic*] (IA-PA-102-0361.000), Weber Acres, Ltd, Exhibit H-PA-[*sic*] (IA-PA-102-0357.000) and H-PA-[*sic*] (IA-PA-102-0355.000) – Each of these landowners requested that the pipeline be located closer to the southern boundary of their properties. To accommodate these requests, Summit will shift the route closer to the southern boundary of these properties."(Final Order p. 59)

Summit seemed confident that the IUC would believe their claims considering the technical drawings for H-PA-030, H-PA-031, and H-PA-032 (along with at least half a dozen others) were redrawn in February 2024, months before a ruling was issued. In Mrs. Williamson's testimony, she referenced Summit when stating, "We have no reason to trust them." (Tr. 1238.) Evidently Summit set out to prove her right because a review of the record will show that the alleged request to shift the pipeline south on H-PA-030 and H-PA-031 does not exist. On October 4th, 2023, Mr. Weber testified that he never suggested an alternative route to Summit claiming, "An alternate route would either go closer to my neighbors or closer to my acreage. So I

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figured it was a no choice for me." (Tr. 6064) Mr. Weber's Pre-filed Direct Testimony also notes that he did not have an alternative route to provide. (JLO Ex. 345, p. 15) This theme was once again repeated in Mr. Weber's parcel specific brief. (Initial Post-Hearing Briefs (2 of 19), p. 2) Recently, Mrs. Williamson was informed that her land is likely crossed by county tile in the same general area of Summit's modified route. This, in addition to the fact that the home the Williamsons intend to build within the next five years would be located just over 500 feet from the route, reaffirms Mrs. Williamson's belief that her property, H-PA-032, is unsuitable for a pipeline, and with the newly discovered presence of county tile as well as the unknown location of their own private tile, it is particularly unsuitable in the revised area. (Tr. 1229; KMZ; Tr. 1231; Tr. 1227) Although the Berge family has since sold their parcels as a result of the Commission vesting Summit with eminent domain powers, they also testified that they did not present an alternative route. (Tr. 5571) Given this clarification, the Commission should not have allowed Summit to move the easements.

Debra Lavalle

The proposed location of the Summit pipeline would cross the exact area where she has made plans to construct her retirement home. It is the only area on her property where the home can be located, and where access is available from the adjacent highway. (JLO Ex. 244, p. 5; Tr. 4434-5) The location of the retirement home is most important, as it allows Ms. Lavalle to live next to and help her disabled sister

remain in her home. Summit's proposed route, if approved, would chill Ms. Lavalle's future plans to improve the property, in addition to posing a severe threat to the economic condition, social condition, and health, safety, and general well-being of Ms. Lavalle and her sister.

Due to the issues noted above, information Ms. Lavalle learned from hundreds of hours of research, and having listened to the negative experiences fellow landowners have had in interactions with Summit, she believes it is not in her best interest to continue to have the land in agriculture production should the Summit pipeline be granted eminent domain rights. The resulting decrease in property value, coupled with the inability to build a retirement residence is a net-negative, direct economic impact to Landowner, Hardin County, and the region as a whole.

Kent Kasischke

The property is Highly Erodible Land (HEL). (JLO Ex. 227, p. 4) Mr. Kasischke asserted the Project could cause permanent or irreparable erosion on his property, which would be a great detriment to both the environment and Landowner's economic stability. This land is part of the family's legacy, having been protected and stewarded by the Kasischkes since 1881. (JLO Ex. 227, p. 2) It would be a devastating loss emotionally, financially, and environmentally for them to have their land taken for the private use and private benefit of a multi-billion-dollar corporation. As Mr. Kasischke commented in his pre-filed testimony, "It's a family farm by all definitions

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and the reason I've fought so hard to protect it from an outside corporation. We depend on the land for our livelihood, but it is also a source of family history and heritage to us. While Summit may think of it as just another patch of dirt, to my family and me, the land means much more." (JLO Ex. 227, p. 2)

Mr. Kasischke depends on the profitability of the farm ground for his retirement. Mr. Kasischke believes Summit's lack of experience poses a threat of significant harm. Summit has never built or operated a pipeline before and he is worried that the ramifications of allowing them to build the world's largest carbon pipeline right out of the gate will have a negative impact on him, his community, and the nation as a whole. (JLO Ex. 227, p. 4)

Mary J. Woodward Trust dated July 21, 2009, Craig Woodward

Mr. Woodward is quite worried about temporary and permanent damage to the tile if the Project were to be approved, which it should not. (Tr. 5719) The land is susceptible to drainage issues as it takes runoff water from over 200 acres. (Tr. 5718) As such, any type of disruption or damage to the tile would have undue impacts to typical farming operations. The tile is still quite new – mostly added only in 2016 (Tr. 5719) to improve the productivity and farmability of the land. At least nine (9) tile lines would likely be severed in the construction process. (Tr. 5730) Mr. Woodward does not believe that a private corporation that offers no public use should be allowed to damage his well-functioning tile, which he does not believe Summit

will be capable of repairing so it operates at the same standard it currently does, and would pose a severe threat to the productivity and profitability of the land which would unduly interfere with the orderly development of Landowner's farm and therefore the region.

They practice minimum till, disturbing the soil just enough to be able to plant and harvest. (Tr. 5729) Compaction of the soil would decrease yields, damage the health of the soil, and reduce natural drainage. (JLO Ex. 9) At the same time, Mr. Woodward has no faith that Summit could possibly separate the soil adequately to ensure that it is not mixed during the restoration process – further damaging the ecosystem they have invested money and labor into developing. (Tr. 5713) Currently, the parcels have good Iowa dirt. (Tr. 5708) The CSR2 for the parcels is in the 90s. (JLO Ex. 297) Landowner recognizes that the construction, operation, and maintenance of a hazardous liquid pipeline would result in land damages that could take years, if ever, to recover from, all the while decreasing the land value and land productivity. (JLO Ex. 9)

Mr. Woodward testified that the corn grown on his land does get sold for ethanol. (Tr. 5714) When questioned about it, Mr. Woodward noted, "Do I like ethanol plants? Indubitably." (*Id.*) One would imagine that as an individual who utilizes and supports the industry, he would support a project that claims to be in benefit of ethanol. Yet he does not support Summit. While Summit executives may

believe the economic gain of a few ethanol producers justifies granting their request for eminent domain rights, and with it forcing unwanted, forever easements upon hundreds of landowners across Iowa (Tr. 1618), Landowners recognize a hypothetical profit based upon a temporary federal tax credit is not a tenable approach to improving the longevity of ethanol, stabilizing agriculture markets, or increasing the prosperity of farmers when the entire premise ignores both the undeniable economic damages landowners would and already are experiencing as well as the irreversible, long-term environmental damages that come hand in hand with Summit's Project.

Raymond T. Stockdale Revocable Trust, Katherine A. Stockdale Revocable Trust, Raymond T. and Katherine A. Stockdale Revocable Trust, Raymond T. Stockdale, Katherine A. Stockdale

Summit's proposed pipeline route would restrict access to 83 acres, creating undue harm to their farming operation. This does not include the 14.86 acres Summit is requesting for temporary and permanent easements. In total, then, the Project would create a loss of 97.86 acres for the Stockdales. Summit has not offered to pay Mr. and Mrs. Stockdale for the 97.86 acres they would have to take out of production during the construction of the Project, not have they explained why these acres are necessary to the success of the Project. (Tr. 6030)

The Stockdales are also concerned for their tile. They have spent a great deal of money adding drainage tile in order to improve the productivity of their land. On H-HD-112 (IA-HD-301-0341.000) alone, 16 tile lines would be disrupted. (JLO Ex.

634) There is also county tile present. (*Id.*) They have no faith, no confidence that Summit, who has proven to be inexperienced, untruthful and incapable, will use and properly execute tile repair methods that would leave the land's drainage system in as good as or better condition than it currently is today.

James D. Fetrow Revocable Living Trust u/a/d February 27, 1996, as amended and restated June 4, 2002, Margaret A. Fetrow Revocable Living Trust u/a/d February 27, 1996 as amended and restated June 4, 2002, James Fetrow, Margaret Fetrow

When the Fentrows consider loss of land value, rerouting of tile lines, unreimbursed crop loss, loss of rental income, soil remediation and loss of tenant income, the amount comes to well over $400,000 in today's dollars. (JLO Ex. 31) Summit's proposed payment (JLO Ex. 28, p. 24) is less than 20% of this amount. Not accounted for is catastrophic loss all landowners could incur due to not being able to get liability insurance (JLO Ex. 28, p. 21; JLO Ex. 4; JLO Ex. 12) to protect them from a pipeline rupture that could be deemed their fault.

Gail R. Todd Revocable Trust dated February 9, 2009, Nancy A. Todd Revocable Trust, dated February 9, 2009, Gail R. Todd, Nancy A. Todd

They also have no faith that the land will be restored considering they've already experienced what Summit's restoration is like after they bored over 20 holes through their land while surveying. (Tr. 5583-4) Mr. Todd asserted that the holes were

poorly filled in, and despite the damage and inconvenience Mr. and Mrs. Todd were never compensated by Summit. (Tr. 5592-3)

Mr. and Mrs. Todd are retired and depend on the cash rent they receive for both the cropland and pasture. Their two sons actively farm part of the affected parcels and depend on the land's productivity for their livelihood, as well.

Simply taking the fertile land out of production for the pipeline construction process would hinder the livelihoods of Landowners and their children, lowering their economic output in the local community, and decreasing the crops they can provide to keep Iowa's agriculture economy functioning.

Donald "Don" Johannsen, Donald Johannsen Trust

Mr. Johannsen expressed concerns regarding a number of harmful impacts the pipeline is likely to have on his land. He has a CRP contract on a portion of the parcel which would be voided should the Petition be approved as requested. He would also be unable to enter into a future CRP contract as the land is not to be disturbed during nesting season (JLO Ex. 623)– an event that would be out of Landowner's control if Summit's Easement terms giving them 24/7/365 access is granted.

Construction of a hazardous CO2 pipeline on his farm would severely impact Mr. Johannsen's ability to maintain a profitable farming operation, in addition to the related decline in property value and increased difficulty of renting or selling such a property. (JLO 444, p. 40) Granting a permit for Summit's application would cause

Landowner undue stress and greatly chill any future plans he might have had to improve the property in a significantly negative way. (*Id.*, p. 4) Landowner committed to seeding over the pipeline route and taking the land out of production should the Petition be approved, which it should not. (*Id.,* p. 50)

Marjorie Swan, Ramona "Jean" Ritter

The IUC erred in granting eminent domain rights over the Swan/Ritter parcels, not only because Summit failed to offer evidence that the parcels were necessary to the project, but because of the topography of the land, which is unsuitable to pipelines. The topography here is known as "Karst Topography" and according to Summit's Petition, Exhibit L, Karst Rock Type and Karst Boundary have this Routing Data Classification, according so Summit "Avoid – Review Karst Area After Routing for Possible Adjustments- Review other pipelines in the same area for reference." There are no other pipelines in this immediate area.

Daniel Wahl

Mr. Wahl is under a CRP contract with his land enrolled in the Farmable Wetlands Program. These facts regarding CRP are common to many Landowners not specifically referenced here. This CRP agreement has been on the land for over 30 years and is under contract through 2031. (JLO Ex. 153, p. 4) Based on the route, Summit appears to have gone through great lengths to avoid IDNR ground to the southwest of Mr. Wahl's land. There are also prairie potholes designated as CP-27

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with the pipeline proposed to cut through the most sensitive wetlands of this parcel. (JLO Ex. 155) The proposed route would go through the wettest, murkiest ground in the whole tract, which is home to slough grass and native wetland plant life. If approved as is, the route would disrupt the hydrolysis of this native wetland, destroying the entire purpose of the CRP project - restoring the land to its natural state. (*Id.*)

Mr. Wahl depends on the profitability of the land for his main income source. (JLO Ex. 153, p. 3) His current CRP contract dates back to 2016. (JLO Ex. 155) Due to the requirements of the program, Landowner's CRP contract would be voided should the Petition be approved. The economic loss this would create would be devastating for Mr. Wahl.

Dr. Jeffrey Colvin, Julie Colvin

Landowners testified that the revenue from the farm is used to support a member of the family with a disability and that the family member depends on this revenue for her basic needs. (Tr. 5766; JLO Ex. 306, pp. 41-42) They provided evidence that the easement offers would not cover the expected negative financial impacts and would result in a direct and substantial net-negative impact to their family and the specific family member. Dr. Jeffrey Colvin shared that the compensation offered is less than two years of expected rent and that it is far lower than the potential loss of decades of rent if the pipeline is located on the parcel. (Tr. 5773)

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Landowners provided evidence that their current tenant is very concerned about the safety of the proposed carbon dioxide pipeline. They may not be able to find a tenant to farm the land or they would need to decrease the rent due to the risk to life. (Tr. 5766)

Kathy A. Johnson Revocable Trust, Kathy Carter

There is an existing hunting cabin on the property that is 271 feet from the proposed route. The likelihood of making any future improvement to this property would greatly decline should the pipeline be approved. Mrs. Carter had also intended to build a "shouse", a shophouse, on the property long before the pipeline Project was announced. (Tr. 5347-5348)

JCD Beyer Family Farm, LLC., Craig R. Beyer, Patricia A. Beyer

When the Cherokee County land was purchased, the farm was very unproductive and highly eroded and was considered a very poor farm. (JLO Ex. 38, p. 4) Mr. Beyer worked diligently over the years hauling manure to the farm to build soil fertility and investing in terracing and tiling to prevent soil erosion and he was able to successfully turn the land into the highly productive piece of ground that it is today. (*Id.*)

Mr. Beyer recently installed french drains to replace standpipes. (*Id.*, p. 6) He is concerned that adequate repair of any disruptions to the tile line will be difficult to make correctly, and they will not know if it is done correctly until there is another wet

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season which could be several years from now. Also, cutting through seven terraces and trying to rebuild them will create a weak spot in the system for a very long time. (Tr. 5615) Any repairs that would have to be made in the future would be more expensive and dangerous because of the pipeline. In addition to the above concerns, he testified the construction of a bore pit under Highway 59 will render that area unproductive for decades. (JLO Ex. 38, p. 6) Additionally, the vast hours of physical labor and financial commitment that has been put into restoring the productivity of the land will be undone, but not reimbursed, by Summit causing an economic loss to the Beyers. Mr. Beyer noted that compaction would be a major issue in the construction of the pipeline. (JLO Ex. 282, p. 4) Landowner concern about the economic loss to the land due to compaction is further exacerbated by testimony from Summit (Tr. 2042-2044) that showed there is no clear consensus between Summit and the county inspectors regarding criteria that would cause a shut down in construction during periods of wet conditions.

Mau Farm, Inc., Dr. Barbara Harre

Landowner expressed concern regarding a number of harmful impacts the Project is likely to have on their land, particularly to features that help ensure the profitability and productivity of the ground. The parcels are already not the most productive pieces of land due to the construction of older projects. Notably, Landowner still sees a 30% difference in yields on land that was disturbed by the

Dome pipeline nearly 50 years ago. (Tr. 4363) Under these circumstances, any further harm to the land, any further decrease in productivity, would pose a serious threat to the economic and social conditions of Dr. Harre, as well as the health and longevity of the land.

Dr. Harre planned to develop a riparian buffer strip, which as she described, "is a grass and tree combination that is put in place for about 150 feet on each side of a stream. It controls erosion, it leeches out nitrogen from -- you know, fertilizer runoff before it gets into your stream. So, looking at trying to decrease erosion and nitrogen spillage into water to decrease our -- to increase our water quality so we're not contributing as much downstream to the Gulf issues." (Tr. 4352) Such intentions to improve the land and provide an environmental benefit not only directly to their land, but to waters and communities that stretch down to the Gulf Coast would be out of the question should the proposed pipeline be installed.

John Hargens, Karen Hargens

Landowners' ability to raise cattle on the property in the future is in question if Summit feels the fence on the property is an obstruction. Landowners are concerned the pipeline would require them to build a secondary fence. (Tr. 5554) They are also worried that their son, who raises cattle, (JLO Ex 68, p. 3) would not be able to use the parcel for grazing in the future. (*Id*., p. 4) Summit seeks to cap damages to growing crops and yield loss for the three years following the initial construction of

the pipeline. Summit claims it will pay Landowners "a reasonable sum" for any "subsequent actual, proven damages to growing crops…" but there is no mechanism or metrics of how this would work that has been shared with landowners. (*Id.,* p. 14) In addition, the landowners would be prohibited from using the land for agricultural and pasturage purposes if they in anyway interfered with Summit's use of the easement. This would cause undue impact to their farming operations and result in reduced efficiency and reduced profitability for the Hargens and the region. (*Id*., p. 16) In addition to the negative financial impacts imposed upon them personally by the pipeline, Landowners noted that the Exhibit H language approved by the IUC is far too vague and wide ranging, and the rights given to Summit could prevent the landowners, and future landowners, from improving and developing the land. (*Id.,* p. 12) The Hargens are concerned that negative economic impacts will last into the future because any desired improvement would be subject to Summit's claims that land improvement could interfere with their legal rights. (*Id.,* p. 12) Summit also would only be required to restore the land "insofar as reasonably practicable" as determined by Summit, which would cause the landowners to incur more cost and expenses. (*Id*., p. 15) In total, the Hargens would carry all the risk, while Summit made off with the reward.

Gadsby Family Farm Company, LLC

Winston Gadsby, Lucy Gadsby, Alessandra Gadsby

The route goes diagonally through four of the five parcels, which would be very inconvenient, economically damaging, and a threat to the safety of the Gadsby's and their tenants. According to witness Micah Rorie, Summit will reimburse crop losses for the first three years following pipeline construction (Tr. 2620-2621), crop loss could persist for many years following construction. (JLO Ex. 9; JLO Ex. 10). This reduction in yield would translate into lower rent income for the Gadsbys over an indefinitely long period of time. Should this pipeline go through, Mr. Gadsby would have to check with Summit before doing anything substantially different with the parcels affected by the pipeline, other than using them to grow row crops and hay. (JLO Ex. 3) This could have a huge economic impact on the farm.

Alan Laubenthal, Sandra Laubenthal

The Laubenthals quit selling their grain to Valero for ethanol after learning of their support for carbon capture pipelines. (Tr. 6465) They recognize that not only is the ethanol industry in fine shape, should they be required to lower emissions, there are other viable technologies available that do not require granting a privately-owned company eminent domain rights to destroy thousands of miles of farmland in the name of benefiting Iowa's family farmers. The Laubenthals have themselves implemented practices to sequester carbon and benefit the environment including no till practices and planting cover crops. (JLO Ex. 295, p. 41) The Laubenthals' cattle, valued at $2 million worth of inventory, are housed in two buildings less than 850 feet

south of the proposed route. (Tr. 6456) Given a lethal plume could travel at least 2,920 feet from a 20" carbon dioxide pipeline at a concentration of level of 40,000 PPM in the event of a rupture, Landowners are justifiably concerned about the risk they would be forced to accept. (JLO Ex. 645; JLO Ex. 641) Without evidence that their property is necessary, the Laubenthal's property should not be subjected to eminent domain claims.

Nancy Erickson

Mrs. Erickson had an appraisal done on the land showing a value of $472,000. (JLO Ex. 590; JLO Ex. 607) In addition, the presence of a carbon pipeline has the ability to create up to a 25% loss on the value of her property which is $118,000. (Tr. 5210-11) Mrs. Erickson was only offered a little over $29,000 for the easement. (Tr. 5215)

Wilmer J. Hulstein Revocable Trust

Ms. Gray is an accountant and did some number crunching. As Sioux County has some of the most valuable land in the state, their family stands to lose between $5,000,000 and $7,320,000 in value. (Tr. 5370) All for a project that they didn't ask for and they don't want. All the while being in peril for their own safety. All the while seeing generations of their ancestors' work being harmed at the hands of Summit. This alone demonstrates Summit has failed to meet the burden of proof regarding public convenience and necessity as the Hulsteins are already enduring

negative impacts to their economic condition – circumstances that Summit is unable to remedy based on their failure to provide any evidence of a net-positive, direct economic benefit to the Hulsteins.

Kent R. Pickrell Revocable Trust, Greg Pickrell Separate Property Trust

The pipeline would cross an outlet for Lost Island Lake, compromise the functionality of Landowners' terraces, and restrict field access. (Tr. 7002, Tr. 7005. Tr. 7019) The Pickrells' know the score– they went through the eminent domain process when the Dakota Access pipeline (DAPL) was forced onto their land in Buena Vista County. (Tr. 7002) Their firsthand experience with the significant harm a hazardous liquid pipeline inflicts on farmland has only strengthened their resolve to not repeat the process again, particularly given their view that the proposed pipeline represents what they perceive as Summit's ploy to "make money off these farmers in a get-rich [quick] scheme." (Tr. 7033) Landowners have no faith in Summit's ability to protect the health of their soil. DAPL made that same commitment, and they learned that once something is destroyed, it's too little too late. As Mr. Kent Pickrell asserted, after DAPL went through, "that farm was seriously destroyed," later reiterating that the pipeline construction "devastated that land." Like Summit, DAPL promised they would keep the different layers of soil separate so it could be adequately restored after construction was done. It turned out not to be a promise, but a lie. Mr. Kent Pickrell testified that the soil compaction was unbelievable, completely destroying the land to

this day. It left ruts in the ground so deep that heavy farm equipment couldn't get across the field. 10 semi-trucks of new topsoil and 10 to 20 tons of manure didn't bring the soil health back to where it was before DAPL ripped through the land. Destruction like this will impede the productivity and profitability of a farm, unduly interfering with the orderly development of the natural land and therefore the region.

Mersch Farms

. Landowners had intended to install additional tile on the property in 2025 after their current CRP contract is over in an effort to further address water saturation. (JLO Ex. 339, p. 42) Summit's pipeline would greatly chill the future plans Mersch Farms, Inc. and its representatives had to improve the property in a significantly negative way. In 2017, Landowners began a tiling project to improve the land and increase productivity. (*Id.,* p 4) The half a million-dollar project is not yet complete, with Landowners intending to add further tile in 2025 so long as the Summit pipeline is not approved. (Tr. 5303) The impacted land is farmed 50/50 with Landowners' tenants. The loss of yield for the above-stated reasons is a loss to them, as well. (JLO Ex. 339, p. 22) The Project would create far too many harms without any benefit. Having not provided evidence that the Mersch properties are necessary, the Commission erred in granting eminent domain powers.

Carl S. Palmquist Testamentary Trust

Now that the IUC granted eminent domain over the Palmquist land, they will not tile certain portions of the farms they had planned to which will result in productivity and yield loss and decreased revenues that will go unreimbursed. (JLO Ex. 422, pp. 5-6) On the most southern boundary of our farm there is a 638-erosion control structure that it appears Summit intends to go directly through with the proposed pipeline. This 638 structure is there to help control highly erodible farmland and protect the soils and subsequently the sustainability of the farm. By digging through or near, trenching and constructing the proposed pipeline directly through or near this 638 structure there will be irreparable damage done which will lead to irreparable economic damage. (JLO Ex. 422, pp. 5-6) There is also extensive pattern tiling throughout the farms to the expense of hundreds of thousands of dollars. (JLO Ex. 422, pp. 5-6)

Debra Wheeler, Denise Smith, Daniel Gutschenritter

A local real estate business, Jim Hughes Real Estate, who has been in business for over 50 years in southwest Iowa, has reviewed this farm containing 220.66 Net Taxable Acres. Jim Hughes, states the farm has an excellent location eight miles north of Shenandoah with paved roads on the south and west side of the farm. He notes the farm is very highly tillable which boasts way above- with a corn suitable rating (CSR2) of 80.8. (JLO Ex. 627) He states comparable farms in the area have sold for over $12,500 per acre and has heard a value damage of 25% due to this project. (JLO

Ex. 627) The minute Summit steps foot on Landowners' property, they in turn will be negatively impacted with a 25% devaluation loss of approximately $690,625 in today's dollars.

Virgil W. Ewoldt and Bonnie L. Ewoldt Family Trust, Virgil W. Ewoldt, Bonnie L. Ewoldt

Landowners will experience a direct negative economic impact should these parcels be taken through eminent domain for a hazardous CO2 pipeline. Crop damage will extend further into the future than the three years of decreasing payments enumerated in the easement. The compaction scar from the natural gas pipeline existing on the property lasted for decades. (JLO Ex. 117, p. 6) North Dakota landowners Marvin Lugert and Loren Staroba found the future fertility of the land and compaction and yield loss and loss in productivity lasted not just in years one through three post-construction, but forever. (JLO Ex. 177, p. 39) Rev. and Mrs. Ewoldt are aware of this as they have experienced it on their land with the natural gas pipeline and expect the same result should the proposed hazardous CO2 pipeline be allowed. (Tr. 5132)

RMT Family Real Estate, LLC

Lastly, the IUC mistakenly claimed no evidence was submitted on behalf of the two Wright County parcels owned by RMT Family Real Estate. Pre-filed testimony from the landowner was received into evidence on November 8th. Tr. Vol 25 at 7459-

60. The parcels were also discussed in Jorde Landowners' Initial Post-Hearing Briefs (18 of 19). As this material was not considered by the IUC before issuing a decision, eminent domain rights should not have been granted over these properties.

3. The record is full of substantial evidence Landowners will not be covered by their own insurance policies should CO2 release and cause injury to persons or things and Summit's Indemnity Clause and Insurance Policy do nothing to satisfy liability burdens on Landowners and others.

The IUC failed to appreciate the insurance and indemnification issues presented during the hearing. In the Final Order, the IUC stated "[T]he $100 million insurance policy should cover any and all damages related to the construction, operation, and maintenance of Summit Carbon's hazardous liquid pipeline in Iowa." (Final Order, p. 74) There is no explanation of the extent of the coverage required and unless the IUC confirms on remand that "any and all damages related to the … operation … of Summit Carbon's hazardous liquid pipeline in Iowa" includes third party claims raised against any Exhibit H Landowner for alleged damages that occur upon all parcels directly affected by the pipeline as well as damages to adjacent and nearby land and to personal property and for personal injury of those persons or things located outside of directly affected land, the IUC erred in approving Summit's Petition notwithstanding the insurance policy condition. For instance, should a leak or unintended release occur on Farmer Smith's field, and the CO2 migrates across the road to Farmer Johnson's land killing his cattle and Farmer Johnson sues Farmer Smith, Farmer Smith must be both

indemnified by Summit and its successors for any and all of Farmer Johnson's damages and for cost of defense as well as be afforded coverage under Summit's insurance policy for Farmer Johnson's claimed damages. The lack of explicit indemnification protections and a clear explanation of what the required insurance policy does and does not cover is clear error by the IUC and approval of Summit's Petition without these explicit protections means every single landowner targeted by this hazardous pipeline will go to sleep each night wondering if tomorrow is the day they become embroiled in a lawsuit without means to defend themselves or cover potential damages claims. Perhaps the IUC intended to remedy this, but the Final Order is not clear. (See p. 74)

The risks are there whether a landowner is blissfully ignorant to them or acutely aware and worried about them as are the Jorde Landowners. The rubber hits the road after when a claim is made and given nearly every Jorde Landowners' pre-filed testimony included evidence about liability insurance shortcomings, the IUC erred in granting the Petition without a specific indemnification provision and clear language as to what Summit's policy must cover. Here is a sampling of Landowner evidence underappreciated or outright ignored by the IUC:

- Nancy Erickson testified that after diligently searching for liability insurance that would cover CO2 risks "[W]e absolutely cannot get liability insurance. We have exhausted all means." "…I do have a pollution exclusion in our

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[current] policy…so we have made the decision that we are going to sell those 40 acres." (Tr. 5208-5209)

- Craig Woodward testified as to living with the constant uncertainty of if his Grinnell Mutual Insurance policy would provide him coverage given, they refused to provide such information. (JLO Ex. 24, p. 2)
- Robert Soat testified he would not be provided any insurance coverage should if the pipeline ruptured and the CO2 release caused damage or injury because CO2 would be considered a "pollutant" under his policy. (JLO Ex. 143, p. 20)
- Dennis Graham for Graham Ag, LLC testified his property insurance policy does not cover damages caused by a pollutant or hazardous material such as CO2. Regarding his liability insurance and coverage for a CO2 related loss, his insurer said they didn't know if he would be covered. His insurance agent did find a property insurance policy that would cover Mr. Graham but the premium was $20,000.00 per year for a maximum of $1 million in total coverage. Mr. Graham can't afford to pay that kind of premium. (Tr. 5836-5839) Mr. Graham testified as to unlimited liability facing Graham Ag, LLC, if there were a serious injury or damage caused by CO2 and any lawsuit would include the entity or person owning the property as well as Summit and maybe others. Further Summit's indemnity clause – even if it addressed Mr. Graham's concerns which it does not – is only as good as the money

Summit has or doesn't have as the LLC's are stacked on top of one another as pass-through entities where the cash passes through and there is no reason Summit would keep any cash in the entity allegedly providing the indemnification. (Tr. 5837-5839)

- Debra Lavalle testified "I am not covered and cannot get coverage through my liability policy." Her insurance provider told her "'We cannot add a "rider" to the policy for broader protection nor do we have another resource for farm land.'" (JLO Ex. 248, p. 1)
- David Weber testified "My first question [to Summit] was will the easement holders assume all liability. And I was told no way. And my reply was if a guy is designing, building, and profiting from this company without assuming liability, why the hell should I." (Tr. 6063-6064)
- Debra Wheeler shared her perspective – a burden all Landowners will carry should the IUC approve this Petition and an incident occur. If there is an incident and CO2 releases who will be determined to be a fault? "And we all know that means hiring a lawyer, time off work, stress involved, trying to prove who did what, waiting for a settlement -- hiring a lawyer, waiting for a settlement. You might be many, many years down the road trying to get answers to that." (Tr. 6516)
- Joan Centlivre asked her insurance company if they would commit to providing her coverage in the case of CO2 related damage and they said she

would not be covered so she canceled her policy. She called another company to obtain insurance that would actually cover her, and they reported they would not be able to provide any such coverage. (Tr. 6540-6541)

- Don Johannsen testified the pollution exclusion in his policy would preclude coverage should there be a claim of damage or loss caused by CO2. If there is a rupture, there is going to be a lawsuit and that could bankrupt him. The liability is like "leaving a box of rattlesnakes…" for his kids and he can't in good conscious pass on the kind of unlimited liability. (Tr. 5669-5670) "The prospect of having a hazardous pipeline on my farm eliminates any desire to pass the farm on to my sons and grandson. If my sons inherited the farm, their inability to obtain liability insurance would place them in the same unacceptable position of bearing a huge financial liability risk with absolutely no financial gain." (JLO Ex. 444, p. 48)
- Daniel Tronchetti testified, "[A]s always, the devil is in the details. Mr. Leonard [Summit's attorney] read a part of the Iowa Code 479B that talked about that Summit is liable, but, in my research, the detail is what if there is a leak or a rupture and the CO2 moves off my farm onto a neighbor. If there is a loss of life or damages, I do not have liability protection from my insurance company. And I don't think Summit would step up." (Tr. 6096)

The Exhibit H indemnification language approved by the IUC (Final Order, p. 305; Summit Carbon Hearing Exhibit 1) does nothing to address landowners'

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concerns or real-world risks. Indemnification as to Summit's own use of the easement does not solve the problem. The indemnification language does not cover, for instance, a claim by a Jorde Landowner neighbor against a Jorde Landowner for death of their cattle due to a CO2 plume originating on a Jorde Landowners' property migrating into the adjacent feedyard or death of a person or other personal injuries under the same scenario. Avangrid Renewables, LLC understands this concern and burden objecting in this docket that, "Summit should also be required to indemnify land occupants along the Pipeline route for any damages resulting from an [sic] leakage or release situation." (Avangrid Renewables Objection filed August 18, 2023) So, not just limited to an event related to Summit's work in the easement, but indemnification for any and all claims of damage related to the easement and from any and all claims alleging damage or injury caused by CO2 released from the pipeline, excepting only such CO2 release event caused directly by the willful bad acts of Landowner.

Sure, the indemnification may provide limited protection to a Landowner if they damaged the pipeline within the easement area in the normal course of farming – assuming the waring lawyers on all sides agreed that the activity the Landowner or their Tenant or invited guest was in fact in the "normal course." But regardless of the ultimate outcome, the broader point is that if the proposed hazardous pollutant carrying pipeline exists, then every unwilling Landowner host is exposed to potential liability and legal entanglement 24 hours a day 365 days a year. See

specific example from Nebraska related to Magellan pipelines and Zurich insurance company at Jorde Landowners' pre-filed testimony Attachment No 4., p. 4 para 24-25 and p. 5, para 32-34. Summit does not provide sufficient indemnity to Landowners as to the rights of third parties who may have claims back against Landowners. This evidence supports Landowners' argument the IUC erred in both its public convenience and necessity analysis as well as its grant of eminent domain rights.

VI. THE IUC'S FAILURE TO PROVIDE A RULING UPON EACH PROPOSED FINDING OF FACT SUBMITTED BY LANDOWNERS IN THEIR POST-HEARING REPLY BRIEF VIOLATES THE PLAIN LANGUAGE OF IOWA CODE § 17A.16(1)

In Landowners' IUC Post-Hearing Reply Brief, Jorde Landowners filed 43 proposed findings of fact. (Landowners' IUC Post-Hearing Reply Brief, January 19, 2024, pp. 65-72). The IUC acknowledged these submitted findings of fact but did not address each one. (Final Order pp. 13-14) Iowa Code § 17A.16(1) contains the following mandatory requirement: "If, in accordance with agency rules, a party submitted proposed findings of fact, the decision ***shall*** include a ruling upon each proposed finding." (Emphasis added.)

The IUC's June 25, 2024, Final Decision and Order fails to respond to each of Landowners' proposed findings, such that it violates the plain language of Iowa Code § 17A.16(1). Landowners request a remand directing the IUC to follow the law and

comply with the mandatory requirement in Iowa Code § 17A.16(1) to respond to each of Landowners' proposed findings of fact.

VII. THE IUC'S FAILURE TO REQUIRE SUMMIT TO COMPLY WITH COUNTY PIPELINE ORDINANCES AND PERMIT REQUIREMENTS INFRINGES ON COUNTY AUTHORITY AND VIOLATES STATE LAW.

A number of counties through which the Proposed Hazardous Pipeline would pass have enacted permitting ordinances applicable to pipelines. (See Shelby as an example) One or more county ordinances benefit Landowners through setbacks, improved local emergency response planning, and abandoned pipeline mitigation. The IUC failed to require that Summit comply with these county ordinances and failed to require that Summit prepare a detailed assessment of the Proposed Project's effect on land development in each affected county. (See absence of any such requirement in the Final Order)

The IUC disregarded the county ordinances based on its determination that:

a. Iowa Code § 479B.5(7) requires that the IUC only consider "[t]he relationship of the proposed project to the present and future land use and zoning ordinances" as generally described in Summit's initial Petition for Hazardous Liquid Pipeline Permit; Final Order at 40;

b. Iowa Code Chapter 479B grants the IUC exclusive siting authority over hazardous liquid pipelines to ensure uniform distance and siting standards throughout the state, such that an analysis of compliance with county zoning ordinances is not required by Iowa Code § 479B.5(7); Final Order at 41-42; and

c. county ordinances "may run afoul of the preemption arguments" contained in *William Couser et al. v. Story County, Iowa et al.*, Civil No. 4:22-cv-00383-SMR-SBJ, 2023 WL 8366208 (S.D. Iowa Dec. 4, 2023).

Although the Final Order states that it takes no position on whether the county zoning ordinances are preempted, it also states that Summit's obligation to comply with the county ordinances depends on their validity. However, the IUC then determined that it need not require compliance with the ordinances, thereby implying that the county ordinances are not valid. Final Order at 41, 43. Also, the IUC noted that the *Couser* decision found that federal law preempted county setbacks. (Final Order p. 41) Based on these findings, the IUC entirely disregarded county setback requirements, emergency response, and pipeline abandonment requirements in its permit approval. The Final Order noted that the U.S. District Court's Couser decision is on appeal to the U.S. Eighth Circuit Court of Appeals. (Final Order at n. 14)

The IUC's failure to take county permitting and zoning into account in its route selection process violates Iowa Code § 479B.5(7) and authorizes a route in violation of

county ordinances in contravention of county authority under state law, and is therefore "[b]ased 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." Iowa Code § 17A.19(10(c).

Landowners further adopt and join arguments The Counties may make on this issue.

Because the IUC Final Order infringes on county authority and violates state law Landowners request the court remand this matter back to the IUC and direct the IUC to deny any portion of Summit's proposed route that is in conflict with any existing County ordinance.

VIII. THE IUC'S FAILURE TO GRANT INTERVENTION TO CERTAIN IMPACTED PERSONS OR ENTITIES IS A VIOLATION OF DUE PROCESS RIGHTS REQUIRING REHEARING.

On or about July 10, 2023, pursuant to 199 Iowa Administrative Rule 7.13, certain Non-Exhibit H landowners filed requests for intervention. (Intervention requests of William Beck, Vickie Beck, Golden Oaks, Inc., (Meghan Sloma and Dorothy Sloma), Michael J. Main, Deborah D. Main, and RKR Farms, LLC, (Elizabeth H. Richards and Jane P. Richards), Petition to Intervene Jorde Non-Exhibit H Landowners' Petition for Intervention Part One filed July 10, 2023), collectively the Non-Exhibit H Landowners.) As proven by the Intervention Petitions of each Non-Exhibit H Landowner, and pursuant to 7.13(3), each of these Non-Exhibit H Landowner owns or

has a possessory interest in land that is adjacent to or near Exhibit H land and/or have other concerns and has a significant interest in these proceedings and whether this proposed Hazardous Pipeline project is allowed to move forward. Further, the prospect of this hazardous pipeline being located near and or adjacent to their land and/or homes will negatively impact their property and their legal interests in ways they were not permitted to testify about but would have. Further they were not permitted to engage in discovery or ascertain what protections are afforded to adjacent landowners as opposed to directly targeted landowners.

In further support, the Iowa Legislature recently passed HF 639 which provides intervention as a matter of right for "[A]ny resident with a minimally plausible interest in the proceeding." (Iowa Legislature - BillBook) While not directly bearing on this matter, it embraces due process principles by allowing interested persons to participate in the proceedings.

The impact of an approved Petition upon these Non-Exhibit H landowners is unique to each of them and could not be and was not raised by other persons or entities that were granted intervenor status. Each Non-Exhibit H Landowner sought intervention but were denied intervenor status by the IUC, on or about July 19, 2023, and were therefore not allowed to participate in the IUC proceedings or hearing and were unable to defend and protect and advocate their specific legal interests. (IUC Order Denying Intervention to Non-Exhibit H Landowners entered July 19, 2023) On July 24,

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2023, each of these persons and entities sought reconsideration of their intervention request denial and their denial of due process rights. (Reconsideration Motions for Non-Exhibit H Landowners filed July 24, 2023) The IUC denied reconsideration. (IUC Order Denying Reconsideration Motions entered August 8, 2023)

Each Non-Exhibit H Landowner was denied due process of law. This was an egregious deprivation of procedural due process. In certain cases, the denied persons are located closer to and have more rights at stake than the nearest so-called "directly affected" landowner. Each Non-Exhibit H Landowner met the 7.13(3) factors for intervention because as immediately adjacent or nearby landowners to the proposed hazardous pipeline they each have interest in the subject matter of the hearing. The IUC granting of the permit and route affects legal interests and rights of these persons.

No party to the hearing or proceedings represented these denied persons specific interests. Interests unique to the Non-Exhibit H landowners include the water-related concerns of the Main family. They rely on a dam that supplies water for their livestock. Although the pipeline was relocated away from their property, a serious pipeline incident could still threaten their water supply. The dam sits at a lower elevation than the pipeline's proposed route, making it more likely that any escaped carbon dioxide would flow downhill and acidify the water source that enables their livelihood. (Motion For Reconsideration of Intervention Denials for Exhibit H Landowners and for Adjacent Landowners filed July 24, 2023)

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RKR Farms noted that they have spent years restoring a sedge meadow that has recently become the nesting ground for the first pair of Sandhill Cranes to nest in Hardin County in more than 100 years. RKR Farms is concerned that the construction process and ongoing noise of the valve proposed near the property could result in the cranes leaving the area for good. RKR Farms also voiced their worry that construction, maintenance and operating noises will decrease property value and detract from overall enjoyment of the area that they have spent countless resources to restore and protect. (Motion For Reconsideration of Intervention Denials for Exhibit H Landowners and for Adjacent Landowners filed July 24, 2023)

There are no other means to protect the interests of those who were not given voice to express such interests. (Iowa Admin. Code r. 199-7.13(3)) The participation of immediately adjacent and nearby landowners would have helped bring perspective to the fact that legal concerns and practical interests do not stop at the imaginary line we call a property border or boundary.

Given intervention is a far more lenient standard than those that have standing to sue in a civil context, the IUC erred by denying intervention. The only remedy is to reverse the IUC final order and reverse the order issuing the permit and remand for new proceedings with specific instructions to grant intervention of the above-named aggrieved persons and entities

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CONCLUSION

The IUC erred in concluding Summit is a common carrier and its proposed CO2 management business is a public use. The record lacks the preponderance of evidence necessary to justify the IUC's grant of eminent domain negatively effecting Jorde Landowners and Iowa communities per Iowa Code § 6A.24(3). The IUC erred in approving Summit's Petition and corresponding route and eminent domain demands. The approved route is not just nor proper. The IUC erred in excluding the Non-Exhibit H Landowners.

Landowners respectfully request the Court stay any action by Summit that it is taking or may take pursuant to the Final Order and Order granting permit, and specifically stay any attempt of or action by Summit to initiate or otherwise commence condemnation proceedings against any affected Exhibit H landowner, including but not limited to Landowners here. No such condemnation proceedings are appropriate until and unless the Court rules in favor of the IUC's determination that a) Summit's evidence satisfies the public use requirement, b) that Summit is a common carrier, c) that eminent domain as granted by the IUC is appropriate for this Proposed Hazardous Pipeline as to each and every Jorde Landowners' specific Exhibit H parcels, and if so, d) that such grant of eminent domain is limited to the extent necessary as to each specific Exhibit H parcel.

Landowners respectfully request the Court reverse the IUC's final decision and order and reverse its Order granting the permit on the basis the IUC denied due process of law to the Non-Exhibit H landowners, erred in determining Summit was a common carrier, failed to approve a route that is just or proper, and remand the matter to the IUC with instructions to dismiss Summit's Petition.

In the alternative to the prior request for dismissal, Landowners respectfully request the Court reverse the IUC's final decision and order and reverse the IUC order granting the permit and remand this matter back to the IUC:

- with direction to the IUC that the Proposed Hazardous Pipeline does not promote the public convenience and necessity;
- with direction to the IUC that Summit is not a common carrier;
- find that Summit failed to satisfy the requirement of Iowa Code § 479B.5(7),
- with direction to the IUC to rule on each proposed finding of fact submitted by all parties.

In the alternative to the above requests for relief, Landowners respectfully request the Court reverse the IUC's final decision and:

- find that tax credits are a cost of the project not a benefit and direct the IUC to re-weigh the costs and benefits of the project on that basis;
- direct the IUC to reconsider the proposed pipeline route by giving appropriate consideration to safety and dispersion modeling;

- direct that if the IUC still authorizes eminent domain rights after remand, then the IUC must impose conditions sufficient to ensure any grant of eminent domain is no greater than necessary for the purported public use;
- impose each and every route modification requested by Landowners; and
- direct the IUC to correct all factual errors in the Final Order like the errors adversely affecting the Kleckners.

Exhibit H and Non-Exhibit H Landowners further request that the Court grant such other and further relief as the Court deems just and proper.

Landowners request oral argument in this matter.

May 28, 2025

Jorde Landowners'/Exhibit H
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