

IOWA UTILITIES BOARD

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IN RE:

SUMMIT CARBON SOLUTIONS, LLC

DOCKET NO. HLP-2021-0001

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**OFFICE OF CONSUMER ADVOCATE INITIAL BRIEF**

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OFFICE OF CONSUMER ADVOCATE

**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES .....	iii
I. OVERVIEW .....	1
II. PROCEDURAL HISTORY .....	3
III. LEGAL STANDARDS .....	4
A. Public Convenience And Necessity .....	4
B. Route .....	6
C. Conditions .....	6
IV. DISCUSSION OF EVIDENCE .....	8
A. Public Convenience And Necessity .....	8
B. Route .....	11
V. RECOMMENDATIONS AND CONDITIONS.....	12
A. The Board Should Require Summit To File Proof Of All Necessary Regulatory Approvals, Including Approvals From North And South Dakota, Prior To Granting A Permit.....	12
B. The Board Should Require Summit To Obtain And File For Board Approval Liability Insurance Prior To Beginning Construction And To Maintain The Liability Insurance For As Long As The Pipeline Operates .....	13
C. The Board Should Establish A Test For Wet Conditions That Is Objective And Repeatable To Protect Soils During Construction .....	14
D. The Board Should Require Summit To Provide Landowners Of Eminent Domain Parcels The Last Best Offer Of Compensation, Indemnification, And A Process To Accommodate Landowner Preferences Regarding Depth, Tile Avoidance, Field Access And Other Matters .....	14

	<b><u>Page</u></b>
E. The Board Should Carefully Consider Landowner Testimony And Impose Appropriate Modifications Or Conditions.....	15
CONCLUSION.....	16

**TABLE OF AUTHORITIES**

<b><u>Case Law and Administrative Decisions</u></b>	<b><u>Page(s)</u></b>
<i>Application of National Freight Lines</i> , 241 Iowa 179, 40 N.W.2d 612 (1950).....	5
<i>Dakota Access, LLC</i> , Docket No. HLP-2014-0001 (IUB, Mar. 10, 2016).....	5, 6, 7, 13, 14, 15
<i>Puntenney v. Iowa Utilities Board</i> , 928 N.W.2d 829 (Iowa 2019).....	5
<i>In the Matter of the Application by SCS Carbon Transport, LLC for a Permit to Construct a Carbon Dioxide Pipeline, Order Granting Motion to Deny Application of SCS Carbon Transport LLC</i> , 2023 WL 6059815 (S.D.P.U.C.) .....	3
 <b><u>Statutory Law</u></b>	
Iowa Code Section 475A.2(2) (2023).....	2
Iowa Code chapter 479B (2023).....	2, 4, 7
Iowa Code Section 479B.1 (2023).....	2, 4, 6
Iowa Code Section 479B.5(1–9) (2023).....	6
Iowa Code Section 479B.5(6) (2023).....	6
Iowa Code Section 479B.5(8) (2023).....	6
Iowa Code Section 479B.9 (2023).....	4, 5, 6
 <b><u>Rules and Regulations</u></b>	
199 Iowa Administrative Code 9.1(2) .....	14
199 Iowa Administrative Code 9.5 .....	14
 <b><u>Other Authorities</u></b>	
Fletcher Cyclopedia of the Law of Corporations, Chapter 59, Regulated Industries, 6701 (September 2023).....	4, 5

## **I. OVERVIEW**

On January 28, 2022 Summit Carbon Solutions, LLC (Summit) filed with the Iowa Utilities Board (Board) a Petition For Hazardous Liquid Pipeline Permit (Petition) to construct approximately 681 miles of 4 to 24-inch nominal diameter pipeline to transport carbon dioxide (CO<sub>2</sub>) in Iowa. (Petition, Exhibit C). The proposed pipeline through Iowa is part of an approximately 2,000-mile long pipeline to connect 34 ethanol plants in Iowa, Minnesota, Nebraska, South Dakota, and North Dakota to a newly constructed sequestration site in North Dakota. (Summit Powell Direct at 4). Summit estimates the cost of constructing the entire 2,000-mile pipeline network, 34 carbon capture and compression facilities, and the sequestration facilities to be \$5.6 billion. Summit estimates the cost of constructing the pipeline and facilities in Iowa to be \$990 million. (Summit Powell Direct at 6).

Summit states that the purpose of the project is to provide Iowa ethanol plants with access to low carbon fuel supply (LCFS) markets by capturing CO<sub>2</sub> from the fermentation process at each participating ethanol plant, compressing the CO<sub>2</sub> to a supercritical (dense phase) state, dehydrating the CO<sub>2</sub>, and transporting the CO<sub>2</sub> to a sequestration site in North Dakota for permanent sequestration. (Summit Powell Direct at 4; Tr. 1624).

Summit's current expectations for the timeline of the project are unclear. In its direct testimony, Summit testified that if the proposed pipeline is approved, Summit intends to commence construction of the project in Iowa in 2024 and intends to place the pipeline in service by the second quarter of 2025. (Summit Schovanec Direct at 3). It is unclear whether this timeline remains viable in light of the regulatory challenges Summit faces in North and South Dakota, which are discussed below.

As a part of its Petition, Summit seeks the right of eminent domain on property not acquired through voluntary easements. As of September 11, 2023, Summit had obtained voluntary easements for parcels representing 73.5% of the miles of the proposed route and was seeking eminent domain authority for the remaining parcels. (Iowa Farm Bureau Federation (IFBF) Johnson Direct Exhibit 2, Second Revision).

The Office of Consumer Advocate (OCA), a division of the Iowa Department of Justice, has a limited role in hazardous liquid pipeline (HLP) cases under Iowa Code chapter 479B like this one. Pursuant to Iowa Code § 475A.2(2), OCA is to represent the public interest generally. Iowa Code § 479B.1 provides that the legislature enacted Iowa Code chapter 479B to protect Iowans “from environmental or economic damages which may result from the construction, operation, or maintenance of a hazardous liquid pipeline or underground storage facility within the state . . . .” OCA has focused its efforts in this case on addressing environmental or economic harm which could result from construction and operation of the pipeline.

In this Initial Brief, OCA summarizes the procedural history of this case, explains relevant legal standards, considers the application of the legal standards to the record evidence regarding matters relevant to OCA’s recommendations, and recommends that if the Board approves the permit, the Board impose conditions related to regulatory approvals in other states, financial ability to pay damage claims in Iowa, construction in wet conditions, and easement terms. OCA reserves the right to address other issues discussed in initial briefs filed by other parties in OCA’s reply brief.

## II. PROCEDURAL HISTORY

Public informational meetings were scheduled and held in each of the 29 affected Iowa counties in September and October of 2021. In addition, a virtual public informational meeting was held on October 12, 2021.

Summit filed its Petition with the Board on January 28, 2021. On May 25, 2023, Summit submitted its direct testimony. On June 26, 2023 Board staff filed the Petition Staff Report (excluding Exhibit H). On July 10, 2023 Summit submitted its Petition Staff Report Testimony. Also, on July 10, 2023, Board staff filed the Eminent Domain Staff Report. On July 21, 2023, Summit filed its Eminent Domain Staff Report Response Testimony. OCA and other intervenors submitted direct testimony on or about July 24, 2023. Intervenor Rebuttal to Summit's Eminent Domain Staff Report Testimony was due on August 14, 2023. Summit submitted its Rebuttal Testimony on August 21, 2023.

The hearing began on August 22, 2023 in Fort Dodge, Iowa. The hearing continued over the course of 26 days, concluding on November 8, 2023. At the hearing the Board heard from dozens of scheduled witnesses and more than 100 landowners who chose to testify.

Concurrently with the proceeding in Iowa, Summit pursued regulatory approvals in North and South Dakota. On or about August 4, 2023, the North Dakota Public Service Commission denied Summit's application for a pipeline permit in North Dakota. (Motion to take Judicial Notice, Attachment A). On or about September 11, 2023, the South Dakota Public Utilities Commission denied Summit's application for a siting permit in South Dakota. (South Dakota Public Service Commission, *In the Matter of the Application by SCS Carbon Transport, LLC for a Permit to Construct a Carbon Dioxide Pipeline*, Order Granting Motion to Deny Application of SCS Carbon Transport LLC, 2023 WL 6059815 (S.D.P.U.C.)). Summit indicated that it

intends to resubmit its applications in North and South Dakota and hopes to obtain regulatory approvals in those states. (Summit Powell Rebuttal at 5-6).

### **III. LEGAL STANDARDS**

The Petition for the proposed pipeline is governed by Iowa Code chapter 479B (2023).

Section 479B.1 provides that the purpose of chapter 479B:

[i]s to grant the [Board] the authority to implement certain controls over hazardous liquid pipelines to protect landowners and tenants from environmental or economic damages which may result from the construction, operation, or maintenance of a hazardous liquid pipeline or underground storage facility within the state, to approve the location and route of hazardous liquid pipelines, and to grant rights of eminent domain where necessary.

Iowa Code Section 479B.9 provides that a permit shall not be granted to a pipeline company unless the Board determines that the proposed services will promote the public convenience and necessity. The burden of proving that the proposed services will promote the public convenience and necessity rests solely with Summit. Neither OCA nor any intervenor bears the burden of proof on this matter. (Iowa Code § 479B.9 (providing that “[a] permit shall not be granted to a pipeline company unless the [B]oard determines that the proposed services will promote the public convenience and necessity.”))

OCA discusses legal standards as they relate to the recommendations and conditions discussed by OCA below. These are the public convenience and necessity standard, route, and the Board’s authority to impose conditions on the permit.

#### **A. Public Convenience And Necessity.**

The public convenience and necessity standard has historically been applied to cases involving a variety of public utility and transportation projects, both in Iowa and in other jurisdictions. (Fletcher Cyclopedia of the Law of Corporations, Chapter 59. Regulated



Industries, 6701 (September 2023)). What constitutes public convenience and necessity is not specifically set forth in Iowa statutes. In *Dakota Access* case, the Board explained that “the indefiniteness of the term is intentional and reflects a delegation of authority to the Board of the power to identify for itself what factors and circumstances should bear on its determination in any specific situation.” (*Dakota Access, LLC*, Docket No. HLP-2014-0001, Final Decision and Order at 14 (IUB, Mar. 10, 2016) (citing *Application of National Freight Lines*, 241 Iowa 179, 40 N.W.2d 612, 616 (1950))).

The Board has applied the public convenience and necessity test as a balancing test. In its *Dakota Access* decision, the Board explained that:

Pursuant to Iowa Code § 479B.9, the Board is applying the “public convenience and necessity” test as a balancing test, weighing the public benefits of the proposed project against the public and private costs or other detriments as established by the evidence in the record. If that evidence shows that the proposed project has public benefits that outweigh the costs, the Board will find that the project “promotes the public convenience and necessity.” If the evidence does not support such a finding, then the petition for permit will be denied.

(*Dakota Access, LLC*, Docket No. HLP-2014-0001, Final Decision and Order at 16-17 (IUB, Mar. 10, 2016)).

The Iowa Supreme Court upheld the Board’s application of the balancing test in the *Dakota Access* case. (See generally, Docket No. HLP-2014-0001, *Dakota Access, LLC*, Docket No. HLP-2014-0001 (IUB, Mar. 10, 2016)). In *Puntenney v. Iowa Utilities Board*, the court agreed that the legislature granted the Board significant leeway in interpreting and applying the public convenience and necessity test. (*Puntenney v. Iowa Utilities Board*, 928 N.W.2d 829, 837). The court upheld the Board’s application of the balancing approach to the public convenience and necessity standard. (*Id.* at 842 (upholding the Board’s approach “because it is not ‘irrational, illogical, or wholly unjustifiable.’”)).

**B. Route.**

Iowa Code § 479B.1 vests the Board with authority to approve the location and route of the pipeline. Iowa Code § 479B.9 grants the Board the authority to impose restrictions as to location and route as the Board determines to be just and proper.

Iowa Code § 479B.5(1–9) lists petition requirements that must be met when a petition is filed with the Board. OCA discusses Iowa Code §§ 479B.5(6) and (8) as they relate to route.

Subsection 479B.5(6) requires that the petition address the possible use of alternative routes. In *Dakota Access*, the Board has interpreted this statutory provision to require that the Board consider whether the overall process to route the pipeline complies with legal requirements, is reasonable, and is consistent with Board precedent. (*See Dakota Access, LLC*, Docket No. HLP-2014-0001, Final Decision and Order at 64-69 (concluding that the routing process used by Dakota Access was reasonable)).

Subsection § 479B.5(8) requires that the petition address the inconvenience or undue injury which may result to property owners resulting from the pipeline project. The Board has considered inconvenience and undue injury specifically on a case-by-case basis and generally as part of its consideration of modifications, and restrictions as to location and route. (*See Dakota Access, LLC*, Docket No. HLP-2014-0001, Final Decision and Order at 69, 132 (IUB, Mar. 10, 2016)).

**C. Conditions.**

Iowa Code § 479B.9 provides, in relevant part, that “the [Board] 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 . . . .” It is important to note that the Board has construed its authority regarding “terms” and “conditions” to be general and distinct from its authority regarding route.

In *Dakota Access*, the Board imposed a number of conditions not directly related to route, including conditions related to regulatory approvals, easements, construction, insurance, and financial guarantees. (*Dakota Access, LLC*, Docket No. HLP-2014-0001, Final Decision and Order at 62-63, 69-102 (IUB, Mar. 10, 2016)). The Board's authority to impose terms and conditions is based on the stated purpose of chapter 479B and the other legal issues previously discussed.

When considering conditions, the Board must first consider the purpose of chapter 479B to protect Iowans from environmental and economic damages resulting from construction or operation of the pipeline. If the Board approves the permit, the Board has an obligation to consider and impose conditions which will protect Iowans from environmental and economic harms resulting from the project. The Board used this basis to impose conditions related to construction, insurance and financial guarantees in the *Dakota Access* case. (*See Dakota Access, LLC*, Docket No. HLP-2014-0001, Final Decision and Order at 62-63, 69-102 (IUB, Mar. 10, 2016)).

The Board's decision regarding conditions is also impacted by the other legal issues discussed above, including the public convenience and necessity analysis. When conducting the public convenience and necessity analysis, the Board must weigh evidence regarding public benefits of the project against evidence regarding public and private costs and other detriments imposed by the project. The Board must consider whether the costs and detriments of the project can reasonably be reduced by imposing conditions. If the Board concludes that a condition can reasonably reduce these costs and detriments of the project, the Board should impose the condition.

In addition, the Board should consider benefits it relies upon to justify the line in the context of conditions. Many of the benefits claimed for the project are contingent in nature. For example, as discussed below, no benefit can be provided by the pipeline in Iowa if the pipeline cannot cross other states to deliver CO<sub>2</sub> to the sequestration site in North Dakota. The Board should consider contingencies inherent in any benefits it relies upon to justify the line and impose conditions necessary to ensure that those benefits are actually delivered. If the Board fails to impose conditions of this sort, the Board risks basing its decision on purported public benefits that do not accrue.

The Board should also consider conditions relevant to routing. If the Board concludes that a route will impose a burden on landowners or tenants, the Board should consider whether route modifications can remove or reduce these harmful impacts. Even if no viable route modifications can be found, the Board should consider whether other reasonable conditions, including conditions related to construction or depth, could lessen the negative impacts of the pipeline on landowners and tenants and Iowa's agricultural lands generally.

#### **IV. DISCUSSION OF EVIDENCE**

##### **A. Public Convenience And Necessity.**

When applying the public convenience and necessity test, the Board should weigh evidence regarding the public benefits of the project against evidence regarding the public and private costs and other detriments imposed by the project. OCA first discusses the evidence regarding benefits of the project.

Summit relies on economic benefits related to the low carbon fuel supply (LCFS) markets to support the project. At the hearing, Summit witness James Powell downplayed non-economic benefits of the project when he testified that “[o]ur primary drivers are to help the

ethanol plants reduce their carbon intensity and help them be competitive in low-carbon fuel markets.” (Tr. 1624).

Summit explained that certain states and Canadian provinces have adopted legislation creating markets for LCFS and that the capture and sequestration of CO<sub>2</sub> will enable participating ethanol plants to sell ethanol into LCFS markets at premium prices. Summit has offered evidence that this will provide economic benefits to Iowa’s agricultural industry, and provided a study estimating these benefits. (Summit Powell Direct at 4-6; Summit Pirolli Rebuttal Exhibit 1).

Summit also submitted evidence that the pipeline will provide other economic benefits to Iowa, including a study of the economic benefits of the pipeline by Ernst & Young. The Ernst & Young study concluded that the pipeline would provide significant economic benefits to the state including increased employment and tax revenues. (Summit Phillips Direct Exhibit 1). While OCA did not conduct an analysis regarding the magnitude of the benefits or attempt to net the benefits against costs, testimony offered by OCA indicates that the project will include positive benefits the Board should weigh in its analysis. (OCA Bents Direct at 21).

The Board must weigh evidence of benefits against evidence regarding the public and private costs and other detriments imposed by the project. As would be expected for a project of this scope, the record provides evidence regarding the public and private harms that could result from the project. The Board heard testimony from dozens of witnesses and more than 100 affected landowners. Much of this testimony was emotional as the witnesses and landowners described the harms they could face if the pipeline is approved.

OCA thanks all of the witnesses and landowners for their testimony. OCA discusses some examples from this testimony and evidence that OCA believes illustrate important

categories of harm the project could impose, including harm to agricultural operations and development of land. The potential for these economic harms is relevant to conditions and recommendations proposed below by OCA. OCA may discuss other examples in its reply brief.

The proposed pipeline imposes financial risks on affected landowners and tenants. For example, on the first day of the hearing, Marcia Langner testified about her farming and livestock operation. She explained that she has a cow-calf and replacement heifer operation of more than 400 animals. (Tr. 151). She explained that she uses a 240-foot cattle building in her livestock operation that is approximately 500 feet from the proposed line. (Tr. 134). When asked if she had concerns about recovering financial damages in the event of a pipeline incident that damaged or destroyed her livestock, Ms. Langner replied that “[i]t would be devastating.” (Tr. 151). On the same day, Nelva Huitink testified about the risks the pipeline would impose on her dairy operation. Ms. Huitink explained that her dairy cows would be within 300 or 400 feet of the proposed pipeline. She explained that in the event the animals were killed by a pipeline incident, her income would be “gone.” (Tr. 183-185). This testimony demonstrates the importance of ensuring Summit’s ability to pay damage claims. This is relevant to OCA’s proposed condition regarding insurance, discussed below.

Throughout the hearing, farmers also testified about the risk of damage to drainage tile and compaction of soil resulting from construction of the pipeline and the financial harm these could cause. For example, on August 29, 2023 Elizabeth Ellis testified about the potential impact of the pipeline on her farmland. Ms. Ellis explained that her farmland is tiled and explained that any disruptions to the tile could lead to reduced productivity. (Tr. 988-991). In addition, Ms. Ellis explained her concerns about damage to soil that could be caused by construction activity in wet conditions. She expressed hope that the Board would adopt

standards that would provide an objective method to define wet conditions to prevent soil compaction during construction. (Tr. 1014-1016). The potential for damage to farmland described in Ms. Huitink's testimony is relevant to OCA's proposed conditions regarding construction in wet conditions, discussed below.

Other landowners expressed concerns about how the pipeline could disrupt development or other uses of their land. For example, Timothy Fox testified about the impact of the pipeline on land near Charles City, known as the Avenue of the Saints Development Park. Mr. Fox explained that the land is zoned and certified as an industrial development site. Mr. Fox explained the presence of the pipeline could make the site unsuitable for potential users. Mr. Fox testified that this could cause economic loss to the economy of the Charles City area by depriving it of potential employment from lost industrial development. (Tr. 227-233; 236-241). The Board should consider possible alternate route modifications, where appropriate, to lessen the impact of the pipeline.

**B. Route.**

As explained above, Summit is required to demonstrate that it has considered the possible use of alternative routes. OCA witness Scott Bents testified that "Summit's overall routing methodology appears consistent with the requirements of the Board . . . ." As OCA witness Bents explained, OCA's analysis indicates only that Summit's overall routing process appears sound and that this "does not mean that OCA agrees the proposed route is correct and proper at all locations." (OCA Bents Direct at 8). OCA notes that other parties and landowners presented evidence regarding route changes near their parcels and urges the Board to carefully consider evidence regarding inconvenience or undue injury and impose appropriate modifications and conditions.

## V. RECOMMENDATIONS AND CONDITIONS

Here, OCA discusses conditions and other recommendations. These conditions and recommendations are offered for consideration by the Board if the Board decides to grant the permit. If the Board does, OCA recommends that the Board adopt each of the following recommendations and conditions.

### A. **The Board Should Require Summit To Obtain And File Proof Of All Necessary Regulatory Approvals, Including Approvals From North And South Dakota, Prior To Granting A Permit.**

The Board should condition the permit on Summit's filing of proof that it has obtained all necessary regulatory permits and approvals in North and South Dakota. Before approving the permit, the Board must find that the pipeline will deliver significant public benefit. At the hearing, Summit witness James Powell acknowledged that no benefits from the pipeline in Iowa can be provided if Summit is unable to deliver the CO<sub>2</sub> to the sequestration site in North Dakota. (Tr. 1707). Therefore, any benefits from the entire pipeline in Iowa depend on Summit's ability to cross North and South Dakota and sequester the CO<sub>2</sub> at the sequestration site in North Dakota.

Certain segments of the pipeline in Iowa cross into Minnesota and Nebraska in order to connect ethanol plants in those states but are not required to connect any ethanol plants in Iowa. (Petition, Exhibit B). These segments could provide no benefit without a connection to the plants in Minnesota and Nebraska. Therefore, the Board should also require Summit to file proof of necessary regulatory approval in Nebraska and Minnesota, respectively, before it begins construction of those segments in Iowa.



**B. The Board Should Require Summit To Obtain And File For Board Approval Liability Insurance Prior To Beginning Construction And To Maintain The Liability Insurance For As Long As The Pipeline Operates.**

Testimony demonstrates that the pipeline will impose risk of financial harm on Iowans. (*Supra*, Section IV.A). OCA appreciates that Summit readily accepts its responsibility to pay damage claims to anyone harmed by the pipeline. (Tr. 1703-1706). In order to ensure that Summit is able to fulfill this responsibility, the Board should require Summit to obtain and file for Board approval general liability insurance and require Summit to maintain this insurance at all times while the pipeline is in operation.

Summit witness James Powell testified that Summit would obtain and maintain at least \$35 million in general liability insurance and does not object to providing the Board with proof of insurance. (Summit Powell Rebuttal at 2; Tr. 1706). Mr. Powell explained that Summit does not yet know the terms of the insurance it will obtain. (Tr. 1704-1705). Without seeing the insurance terms, it is unclear whether \$35 million would be adequate. After Summit files the terms of its insurance, the Board can fully consider the adequacy of the insurance, including coverage limits. The Board used a similar process related to insurance in the *Dakota Access* case. (*Dakota Access, LLC*, Docket No. HLP-2014-0001, Final Decision and Order at 112 (IUB, Mar. 10, 2016)).

The record in this case reflects the importance of insurance. In *Dakota Access*, the record reflected the availability of the Oil Spill Liability Trust Fund to provide backstop funding for costs related to a crude oil spill. (*Dakota Access, LLC*, Docket No. HLP-2014-0001, Final Decision and Order at 60-63 (IUB, Mar. 10, 2016)). The record in the present case provides no evidence regarding the existence of a corresponding backstop fund applicable to CO2 pipelines.

**C. The Board Should Establish A Test For Wet Conditions That Is Objective And Repeatable To Protect Soils During Construction.**

Construction during wet conditions risks damaging soil. (OCA Bents Direct at 17-20; OCA Hearing Exhibit 5; Counties Liebman Direct; Counties Liebman Sur-Rebuttal; IFBF Roquet Direct). Board rule 199 IAC 9.5 accounts for this risk by restricting construction activities during “wet conditions”, which is defined in 199 IAC 9.1(2). As OCA witness Scott Bents explained, the definition of wet conditions leaves room for subjectivity. (OCA Bents Direct at 20; Tr. 3297). OCA witness Bents explained that the Board should establish a field test for wet conditions that is “objective and repeatable”. This will protect agricultural soils and prevent unnecessary confusion or controversy during the construction process. (Tr. 3297).

Summit witness Aaron DeJoia recommended that the Board adopt a 30% standing water test. (Summit DeJoia Rebuttal at 9-10). The Counties’ witness Dr. Matt Liebman proposed a ball test. (Counties Liebman Direct at 8-9; Counties Liebman Sur-Rebuttal). OCA witness Bents suggested a compromise whereby the ball test proposed by Dr. Liebman would be used to determine whether construction could begin on a parcel but the 30% standing water test proposed by Mr. DeJoia would be used to determine whether construction on a parcel on which soil had already been removed could continue. (Tr. 3298). OCA recommends that the Board to adopt one of these testing standards.

**D. The Board Should Require Summit To Provide Landowners Of Eminent Domain Parcels The Last Best Offer Of Compensation, Indemnification, And A Process To Accommodate Landowner Preferences Regarding Depth, Tile Avoidance, Field Access, And Other Matters.**

In *Dakota Access*, the Board required the company to offer to purchase voluntary easements from eminent domain landowners “with the same terms and conditions already offered to the landowners, for the best prices that have already been offered by Dakota Access, at

least until the county compensation commission meets to assess the damages for each taking.”  
(*Dakota Access, LLC*, HLP-2014-0001, Final Decision and Order at 155 (IUB, Mar. 10, 2016)).

The Board should require the same of Summit.

This condition would address some of the concerns regarding potential liability for eminent domain landowners raised in this case. (*See, e.g.*, Tr. at 3960). Summit provided indemnification to landowners who signed voluntary easements. (Summit Rorie Direct Exhibit 1 at 4.) Eminent domain landowners should be provided the same indemnification protections.

**E. The Board Should Carefully Consider Landowner Testimony And Impose Appropriate Modifications Or Conditions.**

The Board has received testimony from landowners and other witnesses regarding the risk of economic or financial harm which may be imposed as a result of the proposed project. OCA has discussed examples from landowners and other witnesses to illustrate the types of economic harm the project could impose to agricultural operations and development in Iowa. OCA asks the Board to consider other terms, conditions and restrictions as to location and route that could avoid or mitigate these potential harms.

**CONCLUSION**

The Office of Consumer Advocate respectfully requests that if the Board approves Summit's Petition, the Board adopt the recommendations and conditions described in this brief.

Respectfully submitted,

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