IN THE IOWA DISTRICT COURT FOR POLK COUNTY

SIERRA CLUB IOWA CHAPTER,	)	
	)	
Petitioner,	)	No. CVCV051999
	)	
vs.	)	
	)	PETITIONER'S BRIEF
IOWA UTILITIES BOARD and DAKOTA ACCESS LLC,	)	
	)	
Respondents.	)	

Comes now the Petitioner and hereby submits the following Brief:

INTRODUCTION

On January 20, 2015, Dakota Access LLC filed with the Iowa Utilities Board (IUB) a petition for a permit to construct a hazardous liquid pipeline through Iowa, pursuant to Chapter 479B of the Iowa Code. The proposed pipeline would carry crude oil from the Bakken Region of North Dakota to a terminal in Patoka, Illinois, and then on to refineries in Nederland, Texas, according to public announcements made by Dakota Access in 2014 (Sierra Club Hrg. Ex. 24, 25).

Section 479B.1 of the Iowa Code states:

> It is the purpose of the general assembly in enacting this law to grant the utilities 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. (emphasis added).

Section 479B.9 then says, "a permit shall not be granted to a pipeline company unless the board determines that the proposed pipeline will promote public convenience and necessity." (emphasis added).

The Dakota Access pipeline, now under construction, will slice through 18 counties in Iowa (Petition for permit, Ex. B). It will cross through or under numerous rivers and streams (Petition for Permit, Ex. B). It will require easements, either negotiated with landowners or through eminent domain, through private property, mostly farmland.

The IUB held an evidentiary hearing from November 16, 2015 to December 7, 2016. After the filing of post-hearing briefs the IUB issued a Final Decision and Order on March 10, 2016, granting the permit to construct the pipeline, subject to certain conditions, and granting eminent domain to most of the requested parcels of land.

STANDARD OF REVIEW

Pursuant to Iowa Code § 17A.19(10), a court must reverse, modify, or grant other relief from agency action if the agency action was:

a. Unconstitutional on its face or as applied or is based upon a provision of law that is unconstitutional on its face or as applied.
b. Beyond the authority delegated to the agency by any provision of law or in violation of any provision of law.
c. Based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency.
d. Based upon a procedure or decision-making process prohibited by law or was taken without following the prescribed procedure or decision-making process.
e. The product of decision making undertaken by persons who were improperly constituted as a decision-making body, were motivated by an improper purpose, or were subject to disqualification.
f. Based upon a determination of fact clearly vested by a provision of law in the discretion of the agency that is not supported by substantial evidence in the record before the court when that record is viewed as a whole.

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

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

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

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

k. Not required by law and its negative impact on the private rights affected is so grossly disproportionate to the benefits accruing to the public interest from that action that it must necessarily be deemed to lack any foundation in rational agency policy.

l. Based upon an irrational, illogical, or wholly unjustifiable interpretation of a provision of law

whose interpretation has clearly been vested by a provision of law in the discretion of the agency.

m. Based upon an irrational, illogical, or wholly unjustifiable application of law to fact that has clearly been vested by a provision of law in the discretion of the agency.

n. Otherwise unreasonable, arbitrary, capricious or an abuse of discretion.

In review of agency action constitutional issues are reviewed de novo. Gartner v. Ia. Dep't. of Pub. Health, 830 N.W.2d 335 (Iowa 2013). The court gives the agency no deference regarding constitutional issues. Id.

Statutory interpretation is normally a judicial function. Doe v. Ia. Bd. of Med. Examiners, 733 N.W.2d 705 (Iowa 2007). However, Iowa Code § 17A.19(10)(c) states that the court should defer to an agency's interpretation of a statute only if the legislature has clearly vested the agency with the authority to interpret the statute. The fact that an agency has been given rule-making authority does not give the agency authority to interpret all statutory language. NextEra Energy Res. LLC v. IUB, 815 N.W.2d 30 (Iowa 2012). Broad articulations of an agency's authority, or lack of authority, should be avoided in the

absence of an express grant of broad interpretive authority. Id.

The Iowa Supreme Court has further said:

> Certain guidelines have emerged to help us determine whether the legislature clearly vested interpretive authority in the agency, two of which are relevant here. . . . First, "when the statutory provision being interpreted is a substantive term within the special expertise of the agency, . . . the agency has been vested with the authority to interpret the provisions." . . . Second, "[w]hen a term has an independent legal definition that is not uniquely within the subject matter expertise of the agency, we generally conclude the agency has not been vested with interpretive authority." . . . In sum, in order for us to find the legislature clearly vested the Board with authority to interpret [the statute], we
>
> > must have a firm conviction from reviewing the precise language of the statute, its context, the purpose of the statute, and the practical considerations involved, that the legislature actually intended (or would have intended had it thought about the question) to delegate to the agency interpretive power with the binding force of law over the elaboration of the provision in question.

Id. at 37.

Nor does the fact that the legislature vested an agency with broad general powers to carry out the purposes of a chapter of the Iowa Code mean that the agency was clearly vested with the authority to interpret any provision in that chapter. Id.

In summary, it is only in rare instances that an agency has the authority to interpret the provisions of a statute.

VIOLATION OF DUE PROCESS

A contested case proceeding before an administrative agency involves an adversarial hearing with the presentation of evidence and cross-examination of witnesses. Lunde v. Iowa Bd. of Regents, 487 N.W.2d 357 (Iowa App. 1992); Koelling v. Bd. of Trustees, 259 Iowa 1185, 146 N.W.2d 284 (1967).

More specifically, Iowa Code § 17A.12(4) grants all parties to a contested case proceeding the right to present evidence on all issues involved in the proceeding, and Iowa Code § 17A.14(3) states that in a contested case all witnesses "shall be subject to cross-examination by any party as necessary for a full and true disclosure of the facts." (emphasis added).

At the hearing before the IUB in this case, the Chair of the IUB prohibited parties from cross-examining witnesses of other parties who were nominally on the "same side" of the case and prohibited parties from questioning adverse witnesses more than once. At the beginning of the hearing the IUB Chair announced:

> Friendly cross-examination of a witness will not be allowed. If a party has a specific issue presented by a witness that the party considers adverse, that party should address the Board and request to cross on that issue, explaining how the testimony is adverse to that party's interest.
>
> Normally, there will be only one round of cross and redirect. This is a change from normal procedures for the Iowa Utilities Board, so we want to make that clear.
>
> If a party feels that subsequent questioning has opened up new subject matter, the party may move for an additional round of cross and redirect.

(Hrg. Tr. p. 12-13).

The only reason for limiting cross-examination, even to the extent of violating past practice, was to shorten the hearing (Hrg. Tr. p. 1126). That is not a valid reason for denying due process.

Pursuant to Iowa Code § 17A.19(10)(a) and (d), the Court must reverse or modify the agency action if the agency action is unconstitutional as applied or based upon a procedure or decision-making process prohibited by law or contrary to prescribed procedure.

In this case, when parties were precluded from questioning the witnesses of other parties, they were prevented from presenting evidence. There was no valid reason to require a party to obtain its own witness when the information could be obtained from the witness of another party. That requirement would increase the costs to

the parties and further increase the already voluminous number of witnesses and extend the length of the hearing.

The record shows that the Sierra Club raised this due process issue prior to the hearing. The Sierra Club's Motion for Clarification of Cross Examination of Witnesses stated as follows:

> 1. In an order specifying hearing procedures issued by the Board on September 16, 2015, the Board stated:
>
> > Friendly cross-examination, such as cross-examination of witnesses taking the same side as the cross-examiner, shall not be allowed.
> >
> > The hearing will be conducted in conformance with these procedures; however, if inflexible adherence to these procedures will result in injustice, counsel may petition the Board for relief.
>
> 2. Furthermore, in a recent e-mail to the parties, David Lynch, reemphasized the Board's Order, stating:
>
> > As stated in the scheduling order, there will be no "friendly" cross-examination. For most witnesses, we can draw that line according to the identity of the parties; for example, counsel for a supporting intervenor will not be permitted to cross-examine witnesses for another supporting intervenor (absent unusual, adversarial circumstances).
>
> 3. Sierra Club respectfully suggests that a prohibition on any questioning of another party's witness is unfair and violates due process. A witness for another party, even a party that is generally on the same side as the questioner, is not the questioner's witness. So the party questioning the witness has no control over the witness's pre-filed testimony, nor the extent and emphasis of the witness's testimony. Therefore, the witness may have information that is important to the questioner, but

is not as important to the party calling the witness, so the witness would not provide the information important to the questioning party, if the information was not important to the party calling the witness.

4. We believe the Board can on an ad hoc basis determine if a questioner is asking repetitive questions or asking questions that add nothing of substance to the record. But we believe it unfairly and unjustifiably prevents a party from presenting relevant information to the Board and prevents a party from making an adequate record. As stated above, there may be issues that the direct testimony did not cover adequately because that information was not as important to the party calling the witness, or there may be issues that are raised by the rebuttal testimony that must be addressed.

5. Counsel for the Sierra Club has participated in previous Board hearings where the parties were allowed to cross examine witnesses for other parties supporting the same side of the issues.

6. The Sierra Club appreciates that the Board is trying to conduct the hearing in an efficient manner, but with all due respect, we believe that efficiency should not preempt the parties' right to present evidence and make an adequate record.

In its Reply regarding that Motion, the Sierra Club stated the following:

1. The Sierra Club's Motion for Clarification of Cross Examination of Witnesses attempted to make clear that it was only asking for the opportunity to ask substantive, non-repetitive questions of witnesses appearing for other parties.

2. Dakota Access' Resistance first contends that prohibition of cross-examination is not a violation of due process. In making this argument Dakota Access was forced to cite federal court cases. The Iowa courts have been clear that in contested administrative hearings, cross examination is a due process right. In Greenwood Manor v. Ia. Dept. of Pub. Health, 641 N.W.2d 823 (Iowa 2002), the Iowa Supreme Court said

that due process in a contested case proceeding entitles parties to an adversarial hearing with the presentation of evidence and the opportunity to cross examine witnesses. See also, Brunner v. Ia. Dept. of Corrections, 661 N.W.2d 167 (Iowa 2003).

Also, in In Re Estate of Hern, 284 N.W.2d 191 (Iowa 1979), the court held that a friendly witness can be cross examined, but leading questions may be restricted. A more thorough discussion was made by the court in Eno v. Adair Co. Mut. Ins. Assoc., 229 Iowa 249, 258, 294 N.W. 323, 328 (1940). In Eno the court said:

> Cross examination affords one of the most effective means of detecting falsehood and discovering truth, and the rules governing it should be applied in a broad and liberal spirit, with a view to effectuating substantial justice.
>
> While we have rightly held that the extent of cross examination is left largely to the sound discretion of the trial court, who may broaden it where the witness is hostile to the cross-examiner, or restrict it where the witness appears too friendly and eager to agree with the cross examiner, . . . , we have also held that cross examination is a right to be jealously guarded.
>
> [I]t has been said in some of the cases that it is only after the right of cross examination has been substantially and fairly exercised that its allowance becomes discretionary.
>
> The right to pertinently cross-examine a witness is not a matter of the trial court's discretion. It is a valuable right, essential to a fair trial upon any issue of fact, and prejudice will be presumed from its arbitrary denial.

Thus, the Iowa Supreme Court has made it abundantly clear that cross-examination cannot be arbitrarily restricted, and that even restriction of cross examination of a friendly witness should be restricted only when the questioning becomes repetitive or

leading. That is exactly what the Sierra Club is requesting in its motion.

Dakota Access sets out several aspects of the IUB procedure that it claims provided Sierra Club with the opportunity to present evidence. The only one that even merits a response is the reference to discovery. The fact is that Dakota Access refused discovery, then resisted a motion to compel, and now seeks to overturn the Board's Order granting one aspect of discovery and has failed to provide the other aspect of discovery as ordered by the Board.

Finally, Dakota Access argues that allowing proper cross examination would unduly lengthen the hearing. On the contrary, cross examination would not unduly lengthen the hearing. It would allow for a full and fair presentation of the evidence.

3. Dakota Access also argues that in any event, cross examination of witnesses as requested by Sierra Club is not appropriate. Dakota Access first cites 199 IAC 7.23(2), that the Board may limit questioning in any manner consistent with law. As demonstrated by the legal authority cited above, arbitrarily limiting cross examination as the Board has indicated in its September 16, 2015, Order would not be consistent with law.

Dakota Access argues that Sierra Club could have called additional witnesses to allegedly accomplish the purpose of cross examination of existing witnesses. Calling additional witnesses would certainly lengthen the proceedings. And additional witnesses would be unnecessary if cross examination of existing witnesses is allowed. Dakota Access' argument is especially ironic when it commented in the first division of its Resistance that there are already over 50 witnesses. Requiring even more witnesses in lieu of cross examination would only add to that.

Finally, Sierra Club emphasizes that it does not intend to ask witnesses repetitive questions. It does not intend to ask the so-called "friendly" witnesses leading or softball questions. It may not even need to question many of the "friendly" witnesses.

> Dakota Access seems to be operating on the assumption that all the Board cares about is controlling the length of the hearing in this case. The Sierra Club is confident that the Board wants to grant the parties a full and fair hearing so the Board can make a fully informed decision.
>
> 4. Sierra Club explained in its original Motion why it may be necessary to cross examine witnesses for other parties who oppose the pipeline.
>
> - They are not our witnesses and since all intervenor testimony opposing the pipeline was due on the same day, there was no opportunity to draft our direct testimony accordingly.
>
> - There was no opportunity for intervenors opposing the pipeline to respond to the rebuttal testimony of Dakota Access and its allies.
>
> - The opposition intervenors were not allowed to respond to each other's direct testimony, so the only way to respond is through cross examination.
>
> - Allowing cross examination will provide a full and fair hearing, and rather than complicate the proceedings as alleged by Dakota Access, cross examination of witnesses will clarify the evidence.

Following up on those pre-hearing documents, the decisions in In Re Estate of Hern and Eno v. Adair Co. Mut. Ins. Assoc. make it clear that friendly cross examination should not be restricted unless abused. It was definitely a violation of due process and contrary to law and prior procedure for the IUB to preemptively prohibit friendly cross examination. Iowa Code § 17A.19(10)(a) and (d). It was also a violation of due process and contrary to law and prior procedure for the IUB to preemptively prohibit more

that one round of questioning of a witness. Iowa Code § 17A.19(10)(a) and (d).

Because this is a constitutional issue, the Court can give no deference to the IUB. Gartner v. Ia. Dep't. of Pub. Health, 830 N.W.2d 335 (Iowa 2013).

PUBLIC CONVENIENCE AND NECESSITY REQUIRES SERVICE TO THE PUBLIC

As noted above, the IUB can grant a permit for a hazardous liquid pipeline only if the pipeline promotes public convenience and necessity. However, Chapter 479B of the Iowa Code does not define public convenience and necessity. The IUB relied on three cases to conclude that the term means whatever the IUB says it means (Final Decision and Order, p. 11-16). That is not a correct interpretation of the cases.

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

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

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

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

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

The third case relied upon by the IUB to define public convenience and necessity was S.E. Iowa Coop. Elec. Assn.

v. IUB, 633 N.W.2d 814 (Iowa 2001). In that case the City of Mt. Pleasant decided to discontinue buying power through the coop and to instead buy power directly from an investor-owned utility. The Iowa Supreme Court held that in determining public convenience and necessity for the transmission of electricity the issues were whether the new arrangement for power to Mt. Pleasant was necessary to serve a public use and whether it resulted in cost savings to the public served. So, just as in the previous two cases, public convenience and necessity involves directly serving the general public.

So the Iowa Supreme Court has defined what public convenience and necessity means. As explained above, regarding the standard of review, the agency can interpret the meaning of the term only if the legislature has clearly vested the agency with authority to do so. Based on the precedents cited above, the legislature has not clearly vested the IUB with authority to interpret what public convenience and necessity is. The criteria set forth in NextEra, supra, are not present here.

First, public convenience and necessity is not a substantive term within the special expertise of the agency. The term appears in several Iowa statutes, Iowa Code §§ 469A.6, 476.29, 476.103, 477A.3, and 479.12. It is

significant that the term as used in § 469A.6 is to be applied by the Iowa Executive Council, not the IUB. So the term is not within the special expertise of the IUB.

Nor does the term public convenience and necessity in the permitting of a pipeline involve the usual technical details of public utility regulation. There is no evaluation of cost of service studies, ratemaking principles, return on investment, calculating avoided costs, or similar issues for which the courts typically defer to the IUB's expertise. Frankly, the Iowa Department of Transportation or the Iowa Department of Natural Resources could just as easily address the issues in permitting a hazardous liquid pipeline. In fact, in Georgia the Commissioner of the Georgia Department of Transportation has the responsibility and authority to grant or deny an oil pipeline permit on the basis of public convenience and necessity. As an example, Exhibit A attached hereto is the decision of the Commissioner of the Georgia DOT denying a permit for the Palmetto oil pipeline.

Second, public convenience and necessity has an independent legal definition, as shown in the Thomson, National Freight Lines, and S.E. Iowa Coop. cases, supra. In addition, it is important to understand that public convenience and necessity has a long history that gives it

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

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

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

1. Prevention of “wasteful duplication” of physical facilities;

2. Prevention of “ruinous competition” among public service enterprises;
3. Preservation of service to marginal customers, so a new company entering the field would not skim off the most profitable customers;
4. Protection of investments and a favorable investment climate in public service industries;
5. Protection of the community against social costs (externalities), e.g., environmental damage or misuse of eminent domain.

Id. at 428.

It is clear, therefore, that the purpose of a certificate of public convenience and necessity has always been to ensure that public service companies provide a needed service to the public on fair terms and that the proposed service does not impose social costs not justified by the proposed service.

In this case, the IUB did not discuss public convenience and necessity in the context of service to the public. On the contrary, the IUB claimed that the Iowa Legislature delegated to the IUB the “authority to . . . identify for itself what factors and circumstances should bear on its determination in any specific situation.” (Final Decision and Order, p. 14). The IUB cited

Application of National Freight Lines, 241 Iowa 179, 40 N.W.2d 612, 616 (1950), in support of that statement. However, one would search in vain on the cited page of National Freight Lines to find even a hint that the IUB can decide for itself what is public convenience and necessity. In fact, that cited page emphasizes that the evidence presented went to the need for the proposed service to the public. Furthermore, the Iowa Supreme Court has explicitly said "the agency's own belief that the legislature vested it with interpretive authority is irrelevant." Gartner v. Ia. Dep't. of Pub. Health, 830 N.W.2d 335, 343 (Iowa 2013).

The IUB also cited S.E. Iowa Coop. Elec. Assn. v. IUB, 633 N.W.2d 814 (Iowa 2001), claiming that case allowed the IUB to balance all factors (Final Decision and Order, p. 16). But as noted previously, the issue in that case was service to the public. Furthermore, as the IUB admitted, the S.E. Iowa Coop. case considered a different standard with respect to electric transmission lines, not the standard of public convenience and necessity (Final Decision and Order, p. 16). In any event, the focus in the S.E. Iowa Coop. case was on service to the consumers of the electricity. The issue was whether economic benefits to the consumers of a change in electric power providers could be considered, even though the consumers were already being

adequately served by the coop. The court agreed with the IUB in that case that economic benefits to the consumers were relevant to the service provided.

It is also important to note that § 479B.9 provides that a pipeline, to be permitted, must "promote" public convenience and necessity. It is not enough, then, for a pipeline company to merely show that the proposed pipeline is in accordance with public convenience and necessity, but must show clearly that the operation will materially promote public convenience and necessity. The Iowa Legislature used that term to express its intent that a hazardous liquid pipeline should not be permitted as a matter of course.

The IUB's analysis of public convenience and necessity is therefore contrary to law and decisions of the Iowa Supreme Court. Iowa Code § 17A.19(10)(b) and (c). A hazardous liquid pipeline must promote service to the public.

ABSENCE OF SERVICE TO THE PUBLIC

Based on the record in this case, Dakota Access did not show that its project will promote public convenience and necessity. At most, it provides convenience for Dakota Access and its shippers.

In his direct testimony (Dakota Access Ex. DRD Direct, p. 6-7), Dakota Access employee Damon Rahbar-Daniels testified:

> I want to emphasize that the single most important fact supporting the need for the Project is that we know the decision of the market: as a result of the open seasons that have been conducted, shippers have committed to long-term transportation and deficiency contracts for committed transportation service on the Dakota Access Pipeline. Basically, a transportation and deficiency contract is one under which the shipper agrees to pay the carrier for the availability of transportation service, even during periods when that transportation service is not actually utilized by the shipper. Thus, these shippers have made substantial financial commitments on a long-term basis, to receive transportation service on Dakota Access' system at the current system capacity of approximately 450,000 bpd.

This testimony makes clear that the pipeline is for the benefit of the shippers.

To further clarify that the pipeline is for the benefit of the shippers, not the public, the following testimony was given at the IUB hearing by Charles Frey, a Dakota Access employee:

> Q. The customers of the pipeline are the shippers, correct?
>
> A. Yes.
>
> Q. And the pipeline provides a service to those customers, correct?
>
> A. Yes.
>
> Q. And it's your position that it's those customers who are creating the demand for the pipeline, correct?

A. No. The demand for the pipeline is created by the demand for consumers in the State of Iowa, as well as the rest of the United States, for their use of petroleum products.

Q. Do you recall testifying before the South Dakota Public Utilities Commission I think back in September.

A. I don’t remember the date, but yes, I have testified in South Dakota.

Q. And do you recall being asked in that proceeding by Attorney Jennifer Baker representing the Yankton Sioux tribe, “Who are the consumers when you speak about the demand for the facility?” Do you recall that question?

A. I do not recall that specific question, no.

Q. Would it refresh your recollection if we pulled that up on the screen?

A. Yes.

MR. TAYLOR: This is Volume 2, page 263 of the South Dakota testimony.

Q. Can you read that?

A. Which line?

Q. Starting at line 18

A. “Question: Okay. I’m asking who are the consumers when you speak about demand for the facility?

“Answer: The consumers of the services we’ll provide are the shippers on our pipeline system.”

Q. And that was in response to a question asking you about the basis for the demand for the pipeline, correct?

A. It was the question that I just read.

(Hrg. Tr. p. 1320-1321).

In addition, Dakota Access witness Guy Caruso indicated that the purpose of the pipeline was to provide alternate shipping options for the owners of the oil (Hrg. Tr. p. 201). And Joey Mahmoud, Dakota Access vice-president, testified that the pipeline would not make the oil less expensive for the public (Hrg. Tr. p. 2421).

So it is clear from the evidence that the primary motivation for the pipeline is not service to the public, but to benefit oil shippers, and of course, to benefit Dakota Access.

Since public convenience and necessity focuses on service to the public, the evidence shows that the Dakota Access pipeline does not provide a needed service to the public, and does not therefore promote public convenience and necessity.

LACK OF DEMAND FOR OIL

As a further indication that the Dakota Access pipeline would not provide a service that would promote public convenience and necessity, the evidence presented to the IUB was that the oil extraction from the Bakken region is rapidly diminishing and that the demand for oil in this country is dropping.

Sierra Club Hearing Exhibits 22 and 26 and Puntenney Hearing Exhibits 5 and 6-1 show that Bakken oil production

was in sharp decline over the several months prior to the hearing. Sierra Club Hearing Exhibit 17 shows that the number of active drilling rigs in the Bakken region dropped during the year ending November 8, 2015, from 193 rigs to 64. That is a breathtaking figure and surely indicates a long-term trend. And more current data from the State of North Dakota show that the number of active drilling rigs as of September 12, 2016, is 37. See Exhibit B hereto attached. So the reduction in oil drilling in the Bakken region is a continuing trend. If there were really a need and demand for the oil, drilling would be increasing or at least steady, not drastically decreasing.

Just as dramatic is the number of oil companies abandoning the Bakken region. Occidental Petroleum is leaving North Dakota altogether (Sierra Club Hrg. Ex. 15). Two other Bakken oil companies, Samson Resources and American Eagle Energy, have declared bankruptcy (Sierra Club Hrg. Ex. 16). In addition, Koch Pipeline Company has abandoned plans to build a 250,000 barrels/day pipeline from the Bakken region to Illinois (Puntenney Hrg. Ex. 1). In November of 2012, lacking shipper interest, OKEOK Partners cancelled plans for a 200,000 barrels/day pipeline from the Bakken area to Cushing, Oklahoma (Puntenney Hrg. Ex. 1. Another Bakken-to-Cushing pipeline project, by

Enterprise Products Partners, was cancelled in late 2014 (Puntenney Hrg. Ex. 2). Again, if there were really a need and demand for Bakken oil, these companies would not be going out of business or abandoning projects.

The Dakota Access pipeline would be necessary to serve the public only if Bakken oil is not otherwise reaching refineries. But the oil is reaching refineries (Hrg Tr. p. 191-192). Commentators have noted that there already exists more transportation capacity for the crude oil produced in the Bakken region of North Dakota than is required to transport current production (Gannon Ex. MI-6, p. 1-2).

The foregoing evidence shows that the demand for oil and oil products has declined. The IUB commented that because the shippers signed “take or pay” contracts with Dakota Access, there must be a demand for the oil (Final Decision and Order, p. 110). That comment ignores the fact that the contracts were signed when oil was selling for more than $100/barrel. It is now below $50/barrel because of the drop in demand. Given those economic realities, the shippers undoubtedly would like to rescind their contracts with Dakota Access.

Thus, there is no demand for the oil that would support a finding that the pipeline will promote public convenience and necessity. And the IUB did not in its Final

Decision and Order ever really address this issue, especially in terms of service to the public. The IUB failed to consider relevant and important evidence and gave this issue little weight in making its decision. Iowa Code § 17A.19(10)(j).

SAFETY ISSUES

There were three aspects of safety risks regarding the pipeline that the IUB considered: the safety of pipelines as compared to transporting oil by rail, the risks of a spill from the pipeline after it is in operation, and the financial responsibility of Dakota Access and its parent companies for damages from a spill from the pipeline.

a. Safety of Pipelines vs. Rail

In terms of public convenience and necessity, i.e., service to the public, this issue is irrelevant. But because the IUB placed significant weight on it, it will be discussed.

With respect to the substance of the issue, the IUB relied heavily on a Dakota Access exhibit (Ex. GC-1) and a quote from a report relied upon by Dakota Access witness Guy Caruso (Final Decision and Order, p. 32). That report, Assessing America's Pipeline Infrastructure: Delivering on Energy Opportunities, used data provided by the U.S. Energy Information Administration, Association of Oil Pipe Lines,

and the Interstate Natural Gas Association of America. Other data is from background papers prepared by the Association of American Railroads and a recent Issues Brief by Diana Furchtgott-Roth of the Manhattan Institute for Policy Research (#23, June 2013). These are obviously industry lobbying groups and an industry-friendly "think tank."

The IUB completely rejected information that did not support the argument of the safety of pipelines. The evidence regarding the relative safety of pipelines and rail is inconclusive at best. It appears that they are both equally unsafe. Another report upon which Mr. Caruso relied, Delivering the Goods (Sierra Club Hrg. Ex. 27), states in footnote 1:

> There is an ongoing debate about the relative safety merits of shipping crude by rail versus pipeline. Over the past two decades, both modes have demonstrated improved safety records even as greater volumes of hazardous materials are carried. Both modes deliver more than 99 percent of their crude product safely. Comparisons between the two modes are difficult because of different reporting requirements. All sides agree, however, that safety is paramount.

That report goes on to say, at p. 25:

> Recent significant crude oil pipeline incidents (most prominently in Arkansas in March 2013 and an October 2013 spill in North Dakota) demonstrate the continued need for vigilance by industry and regulators. . . . The National Transportation Safety Board (NTSB), an investigative body with no regulatory authority,

> listed enhancing pipeline safety on its annual top ten "most wanted" list in both 2013 and 2014. . . .

In the economic assessment submitted by Strategic Economics Group (Dakota Access Ex. MAL Direct), at p. 49, it is stated that during 2013 more than 800,000 gallons of oil was spilled from railroad cars. In that same year 119,290 barrels, or slightly over 5,000,000 gallons, of hazardous liquids were spilled from pipelines. While this may not be a completely apples-to-apples comparison because it refers to pipeline spills of hazardous liquids, not just oil, it certainly shows that there is no substantial evidence that pipelines are safer than rail for transporting oil. It is also significant that Mr. Caruso, on whose testimony the IUB exclusively relied, also did not separate oil from hazardous liquids in general in evaluating pipeline spills (Ex. GC-1). So the IUB's dismissal of Sierra Club's reference to Dakota Access Ex. MAL Direct as not being an "apples-to-apples" comparison was arbitrary and unreasonable in light of its blind reliance on Mr. Caruso's use of the same method of comparison. Iowa Code § 17A.19(10)(n).

The evidence also showed that new stronger regulations were adopted in 2015 to make rail transport safer (Sierra Club Hrg. Ex. 27, p. 28):

> PHMSA and FRA's draft rule attempts to address nearly all outstanding safety issues. It does so by creating a new regulatory category: the high-hazard flammable train (HHFT), defined as a train comprised of 20 or more carloads of flammable liquids. When the rule becomes effective, HHFT's will have additional regulatory requirements related to operations. In addition, the rule requires enhanced tank cars for carrying crude, expands requirements around testing and classification for crude before it is shipped, and codifies standards for information sharing between railroads and state emergency planning committees.

See, www.transportation.gov/sites/dot.gov/files/docs/final-rule-flammable-liquids-by-rail_0.pdf.

Furthermore, safety regulations for pipelines have been an issue of concern (Sierra Club Hrg. Ex. 27, p. 25): "The National Transportation Safety Board (NTSB) an investigative body with no regulatory authority, listed enhancing pipeline safety on its annual top ten "most wanted" list in both 2013 and 2014."

The Iowa Farmland Owners Association called as an expert witness Rebecca Wehrman-Andersen, an expert in risk management and safety with hazardous materials. She was not cross-examined by Dakota Access or any of the intervenors supporting Dakota Access, so her prepared testimony was unchallenged. Ms. Wehrman-Andersen testified as follows (Rebecca Wehrman-Anderson Prepared Direct Testimony, p. 3-4):

> The Dakota Access experts argue that Iowa has a choice between either sending Bakken crude by rail or by

pipeline through Iowa. That argument relies on the logical fallacy of the false dichotomy or false choice and is not borne out by the facts. The Iowa Department of Transportation estimates that approximately 40,000 rail cars of crude oil flow through Iowa annually. Divided into 100-car unit trains, this amounts to little more than one train per day traveling through Iowa. Yet, these figures were generated during the height of the Bakken crude production. If the choice demanded by Dakota Access' witnesses was real, then Iowa would already be flooded with rail cars carrying crude oil. Also, the testimony of Dakota Access confuses conjectural relative risk with absolute risk. The installation of the Dakota Access pipeline will create a new risk that is not currently present in Iowa. A new, large-diameter pipeline in Iowa will create an absolute risk based on the presence of that pipeline. As shown on Chart 1 on Iowa Exhibit Iowa Farmland Owners Association – Wehrman-Andersen – 1, the gross number of hazardous liquid pipeline incidents has been increasing every year since 2004 according to the U.S. DOT's Pipeline and Hazardous Materials Safety Administration. Even if that number is broken down by incidents per mile in order to account for the increasing number of miles of pipelines being built in the U.S., the increase in incidents continues to increase over 2004 figures. Chart 2 on Exhibit Farmland Owners Association – Wehrman-Andersen – 1 shows the increase in graphical form.

Chart 3 on Exhibit Iowa Farmland Owners Association – Wehrman-Andersen – 1 addresses claims made in Caruso's testimony and his Exhibit GC-1, that attempt to argue that pipelines are safer than railroads and trucks. Mr. Caruso uses ton-miles in lieu of miles of pipeline, highway, or railroad to support his position. He has to try this argument because based on the "average incidents per year," without any reference to mileage or tons, pipelines create more incidents per year than trucking, rail, or even natural gas pipelines. In fact, pipelines are even more dangerous when comparing incidents <u>per mile</u>. According to Mr. Caruso, there are 190,000 miles of hazardous materials pipelines in the U.S. According to the Federal Rail Administration, there are 140,000 miles of Class I railroad in the U.S. Therefore, if we

> take the number of incidents per 10,000 miles, then railroads generate 3.543 incidents per 10,000 miles and hazardous liquid pipelines generate 17.874 incidents per 10,000 miles. Therefore, based on an absolute risk analysis, pipelines are 5.3 times more likely to spill over a given distance than are railroads. Again, the only thing that matters to an Iowan living in close proximity to the railroad or a pipeline is the chances that the pipeline or railroad whether there is a risk of a spill from the mile next to that Iowan. How much of any given commodity actually traverses the line is not relevant. While there may be a lower relative risk of one compares railroad ton-miles with pipeline ton-miles, the absolute risk posed by a pipeline is much greater.

So, based on Ms. Wehrman-Andersen's testimony, let's evaluate Mr. Caruso's testimony, on which the IUB completely relied. The IUB gave great weight to the volume of material carried by pipelines (Final Decision and Order, p. 32). But the volume would have nothing to do with the number or frequency of spills. The only relevant factor in assessing the risk from pipeline spills vs. rail would be the number of miles traveled. As shown by Ms. Wehrman-Andersen's Chart 3, using Mr. Caruso's numbers, there are 3.543 railway incidents/10,000 miles and 17.874 pipeline incidents/10,000 miles. That is a dramatic difference that the IUB completely ignored. Iowa Code § 17A.19(10)(j).

Moreover, the rail v. pipeline debate is a red herring because the evidence was that the Dakota Access pipeline would not necessarily reduce the number of shipments of oil by rail in any event. Dakota Access vice-president Joey

Mahmoud testified to that (Hrg Tr. p. 2201). Also, MAIN Coalition witness Michael Ralston testified that rail shipments of oil may not be reduced even if the pipeline is built (Hrg. Tr. p. 3075). So, if the number of rail shipments will not be reduced, the risk from oil shipments by rail will not be reduced, and as Ms. Wehrman-Andersen said, all Dakota Access is doing is adding another risk to Iowa. The IUB ignored this evidence. Iowa Code § 17A.19(10)(j).

Based on the foregoing, it is clear that the IUB relied solely on part of the testimony of Guy Caruso, even when that testimony was contradicted by his own reference material. And the IUB ignored the unchallenged testimony of Rebecca Wehrman-Andersen that directly contradicted Mr. Caruso's testimony. This was arbitrary, capricious and unreasonable. Iowa Code § 17A.19(10)(n).

b. Risks of a Pipeline Spill

Crude oil pipelines in recent years have experienced discharges of oil that have had disastrous consequences. In his direct testimony No Bakken Here witness Jonas Magram referred to several pipeline spills (Exhibit No Bakken Here-JM-1, p. 3-5). In 2010, an Enbridge pipeline in Michigan spilled 850,000 gallons of oil into the Kalamazoo River (Puntenney Hrg. Ex. 27). In Montana, in early 2015,

the Bridger Pipeline spilled 40,000-50,000 gallons of oil into the Yellowstone River. That same pipeline had spilled 63,000 gallons of oil into the same river in 2011. In May of 2015, the Plains All American pipeline spilled over 100,000 gallons of crude oil that affected 100 miles of California beaches. In 2013, ExxonMobil's Pegasus pipeline ruptured in Mayflower, Arkansas. By the time the pipeline was shut down nearly two hours later, over 250,000 gallons of crude oil had spilled.

Although this issue does not directly relate to service to the public, it does relate to the externalities referred to in Jones, supra, justifying the purpose of a certificate of public convenience and necessity. Furthermore, Iowa Code § 479B.1 says that the IUB has authority to permit hazardous liquid pipelines to protect landowners from environmental or economic damages.

Even though the IUB said this issue carries significant weight in its decision, it gave the evidence only cursory consideration. First, the IUB said the pipeline would have to meet Pipeline and Hazardous Materials Safety Administration (PHMSA) standards (Final Decision and Order, p. 57), but the IUB had earlier noted the Sierra Club's evidence that oil pipelines have experienced disastrous spills in spite of PHMSA safety

regulations (Final Decision and Order, p. 55). The IUB goes on to rely on Dakota Access' unsupported claim that it will exceed PHMSA standards (Final Decision and Order, p. 58). This reference was to the testimony of Dakota Access witness, Stacey Gerard (Ex. SG Direct, p. 8). However, it is clear that Ms. Gerard was simply relying on Dakota Access' unsubstantiated assurances. Ms. Gerard's testimony was based on faith, rather than fact.

Dakota Access witness, Todd Stamm, explained that there will allegedly be periodic inspections of the pipeline after it is constructed. This will consist of remote monitoring (Hrg. Tr. p. 660), periodic flyovers (Hrg. Tr. p. 740), and inspections inside the pipe once every five years (Hrg. Tr. p. 642). The evidence showed, however, that many times a pipeline spill is first detected by local residents, not through any inspection program undertaken by the pipeline company (IFLOA Ex. 14).

Once a spill is detected, Mr. Stamm testified that the first responders are only to secure the perimeter. The closest Dakota Access employee will be summoned to respond.

Dakota Access plans to have only 12 permanent employees in Iowa. Ten of those employees would be stationed at the pumping station in Cambridge, and another in northwest Iowa and one in southeast Iowa (Hrg. Tr. p.

660). It would take them awhile to get to the location of a spill, up to an hour according to Mr. Stamm (Hrg. Tr. p. 713).

Mr. Stamm said that the actual cleanup crews would be as much as 12 hours away (Hrg. Tr. p. 637). Local first responders would be used only to establish a perimeter around the spill; they would not take any action to contain or abate the spill (Hrg. Tr. p. 639). In the twelve hours for Dakota Access cleanup crews to begin on-site activities, the spilled oil can lodge in the pores of soil, move into ditches and waterways, and spread across the land.

In this regard, it is important to remember that in the Mayflower, Arkansas spill described above, in less than two hours before a cleanup crew arrived, the pipeline rupture had discharged over 250,000 gallons of crude oil.

Unfortunately, the IUB does not have any authority over the safety of the Dakota Access pipeline once a construction permit is granted. Allowing such a risk certainly does not promote public convenience and necessity. Based on the evidence presented by Dakota Access, the IUB's decision on this issue was arbitrary, capricious and unreasonable. Iowa Code § 17A.19(10)(n).

c. Financial Responsibility

The IUB considered the financial responsibility of Dakota Access and its parent companies a significant issue in its decision to grant a permit. It does fit with the IUB's duty, pursuant to Iowa Code 479B.1 to "protect landowners and tenants from environmental or economic damages." In particular, the IUB required Dakota Access to file unconditional and irrevocable guarantees from Dakota Access' parent companies for oil spill remediation.

Although Energy Transfer Partners and Phillips 66 filed parental guarantees, Sunoco Logistics did not. This was in spite of Dakota Access vice-president Joey Mahmoud testifying that Sunoco Logistics would be issuing a guarantee (Hrg Tr. p. 2177-2178). Even though the parental guarantees were a sine qua non for issuing the permit (Final Decision and Order, p. 154), the IUB ignored its own conditions and issued the permit anyway. Iowa Code § 17A.19(10)(j) and (n).

Now, after Energy Transfer Partners has sold part of its interest in the pipeline to Marathon Oil and Enbridge Partners, there are two more parental entities that have not filed guarantees. This is a material violation of the conditions the IUB placed on the issuance of the permit.

ENVIRONMENTAL AND CULTURAL ISSUES

These are issues the IUB considered to be significant, but the IUB did not consider relevant and important information, in violation of Iowa Code § 17A.19(10)(j). The most egregious failure by the IUB was to rely on Dakota Access obtaining permits from the Iowa DNR and the Corps of Engineers. The IUB was consistently and repeatedly told that those permits covered only a very small percentage of the pipeline route in Iowa (Hrg. Tr. p. 1582-1583). So by relying only on the environmental permit process, the IUB completely ignored the environmental impact of the pipeline on most of the land impacted by the pipeline.

And Dakota Access witnesses repeatedly made it clear that Dakota Access would do only the minimum it had to do to obtain the state and federal permits. That, of course, leaves most of the natural areas and wildlife along the pipeline route unprotected. However, the IUB only required Dakota Access to obtain the state and federal permits (Final Decision and Order, p. 154, 69-70).

In only requiring the state and federal permits, the IUB violated its own pretrial order. The Sierra Club had filed a motion asking the IUB to require Dakota Access to prepare an environmental impact statement or its equivalent. In response the IUB entered an order denying the motion, but the IUB said in that order:

> The Board will not address in this order the sufficiency of the testimony Dakota Access has filed, as that is something for the Board to decide after the hearing. Nor will the Board address the alleged due process issues; if after hearing the Board decides that Dakota Access has failed to meet its burden of showing that it has addressed the environmental issues associated with the project, then the Board can deny the petition for permit and explain the basis for that decision.

In fact, "Dakota Access has failed to meet its burden of showing that it has addressed the environmental issues associated with the project."

OCA witness Jeff Thommes, in his written testimony (OCA Ex. Thommes Direct, p. 4-5), testified:

> I would note that no documentation of agency consultations or survey reports were available for review and that the Application did not include a complete accounting of anticipated impacts on sensitive species as is typically seen in a state routing permit application.
>
> **********
>
> Wildlife Management Areas, wetlands, waterbodies, riparian areas, and forested areas were listed as being crossed by the project, however, there was no discussion of specific activities within these habitats, nor was there any analysis of potential impacts on these habitats or listed species.
>
> **********
>
> Typically a desktop review would be conducted for federal and state-listed species that have potential to be present in the project area. Those desktop reviews would include reviewing publicly available data, such as the U.S. Fish and Wildlife Service Information for Planning and Conservation tool and available state species and habitat data. Using recent aerial imagery, survey data (if available), National

> Wetlands Inventory data, and National Hydrology Dataset data, a review for potential habitat would be conducted for the listed species identified through the U.S. Fish and Wildlife Service and the state agency. Once a determination is made for the potential of a species or habitat to occur within the project area, an impacts analysis would be conducted and agency consultations completed as required. Surveys would be conducted, if warranted, and minimization and/or mitigation measures would be developed to avoid or minimize impacts on sensitive habitats and listed species as possible.

Mr. Thommes identified 49 state-protected animal species and 54 state-protected plant species that could be impacted by the pipeline project (OCA Ex. Thommes Direct, p. 8-13). Mr. Thommes also said Dakota Access should "analyze potential impacts on sensitive species and habitats and develop measures to avoid, minimize, or mitigate for impacts on listed species." (OCA Ex. Thommes Direct, p. 14).

The IUB claimed that Mr. Thommes testified that all of his concerns would be addressed by the Corps of Engineers and Iowa DNR and he would not recommend any conditions beyond what those agencies would impose (Final Decision and Order, p. 51). That testimony came in the context of the following questions by Dakota Access on cross-examination:

> Q. Turning to threatened and endangered species, you would agree that the U.S. Fish & Wildlife and Iowa DNR have responsibility and regulatory oversight for threatened and endangered species; correct?
>
> A. At the federal and state level, yes, ma'am.

> Q. Have you reviewed the testimony of Ms. Howard, both her direct and her reply?
> A. I have.
>
> Q. And do you understand that Dakota Access has been in coordination with the IDNR and U.S. Fish & Wildlife regarding threatened and endangered species with respect to the project?
>
> A. I do understand that.
>
> Q. And if that continued and the agencies concurred with the analysis and conclusions of Dakota Access, would there be any basis to approve proposed additional conditions as a part of this process?
>
> A. I'm not going to recommend any beyond what the U.S. Fish & Wildlife and Army Corps require, no.

(Hrg. Tr. p. 1611).

It is clear that these questions and answers were limited to the jurisdiction of the federal and state agencies, which the record clearly shows was severely limited to only a small portion of the pipeline route, rather than the entire route that Mr. Thommes was considering in his prepared testimony. And, of course, because of the IUB's arbitrary, unreasonable and unconstitutional prohibition on subsequent cross-examination, Sierra Club was not allowed to ask Mr. Thommes further questions to clarify his previous answer.

Likewise, only the cultural and archaeological resources implicated in the state and federal permitting procedures were considered by Dakota Access. And, as

preciously noted, the jurisdiction of the state and federal permits was a very limited portion of the pipeline route. Although Dakota Access claimed that it had surveyed the entire pipeline route for cultural resources, no documentation was presented and there would be no review to ensure compliance, other than the limited state and federal jurisdiction.

The IUB ignored the limited jurisdiction of the state and federal agencies to ensure protection of cultural resources and gave this issue little weight. That was arbitrary, capricious, unreasonable and a failure to consider relevant and important information. Iowa Code § 17A.19(10)(j) and (n).

JOBS AND ECONOMIC IMPACT

According to the IUB, this was one of the two primary factors weighing in favor of granting the permit (Final Decision and Order, p. 109). However, in terms of public convenience and necessity, it is irrelevant. It has nothing to do with service of the pipeline to the public. Whatever short-term jobs and economic impact there might be from the construction and operation of the pipeline are irrelevant to the alleged purpose of the pipeline.

The IUB was wrong in using jobs and economic benefit as a factor in determining public convenience and

necessity. It must be remembered that the IUB cannot determine for itself the definition of public convenience and necessity. Gartner v. Ia. Dep't. of Pub. Health, 830 N.W.2d 335, 343 (Iowa 2013). So the IUB's reliance on jobs and economic benefit was beyond the authority delegated to the agency and based upon an erroneous interpretation of the law. Iowa Code § 17A.19(10)(b) and (c).

Furthermore, the IUB completely ignored the externalized costs of the pipeline project, such as environmental harm, landowner impacts, and damages from pipeline spills. Those costs are not ever mentioned in the IUB's description of the economic issues or the IUB's analysis of those issues (Final Decision and Order, p. 41-47). This omission was in spite of Dakota Access witness Michael Lipsman admitting in cross-examination that it is important to consider the costs, but that his IMPLAN model does not do that (Hrg. Tr. p. 1096-1098). Mr. Lipsman also said that "[s]omebody else, you know, may want to look at that or probably should look at that." (Hrg. Tr. p. 1098).

The environmental and economic costs of the pipeline would be some of the externalities mentioned as relevant to public convenience and necessity in Jones, supra.

So, aside from placing great weight on an issue that was irrelevant to public convenience and necessity, the IUB

completely ignored the costs that must be considered in any valid economic analysis. Iowa Code § 17A.19(10)(j).

CONCLUSION

Section 17A.19 of the Iowa Code requires that the Court make an independent review of the IUB decision in this case. Although the Court found in its Ruling on Petitioners' Motion for Stay in CVCV051997 that the Petitioners in that case were not likely to succeed on the merits, the Court correctly said that it would take a more diligent review when actually considering the merits. Sierra Club is confident the Court will do so, since Sierra Club did not take part in the Motion for Stay and consequently did not have the opportunity to brief or argue the merits of the challenge to the IUB's decision.

In a judicial review pursuant to § 17A.19, the Court is to give deference to an agency's decision only if the agency's decision involves the agency's expertise, "especially when the decision involves the highly technical area of public utility regulation." S.E. Iowa Coop. v. IUB, 633 N.W.2d 814, 818 (Iowa 2001). As noted previously in this Brief, the decision in this case did not involve "the highly technical area of public utility regulation." In fact, it did not involve public utility regulation at all. The technical regulation of an interstate oil pipeline is

under the jurisdiction of the Federal Energy Regulatory Commission. Therefore, the Court does not need to give any deference to the IUB's decision.

Furthermore, the Court should not be seduced by the length of the IUB's Final Decision and Order. The Court alluded to this in its Ruling on the Motion for Stay, but quantity does not mean quality. The IUB clearly misinterpreted the meaning of public convenience and necessity. This misinterpretation poisoned the IUB's analysis and conclusions. The Court must apply the correct definition of public convenience and necessity and review the IUB's decision in that light.

As shown by the evidence, the Dakota Access pipeline would not provide any service to the public that is not already being provided. Oil is getting to where it needs to go in sufficient quantities to satisfy demand. And that demand is declining. Nor will consumers see a decrease in the price of petroleum products.

It must also be remembered that Dakota Access had the burden of proof in the IUB proceeding. The Court must evaluate the evidence and the IUB's decision with that burden of proof in mind.

Finally, the Court owes absolutely no deference to the IUB's decision to limit or prohibit cross examination at

the hearing in this case. It is the Court's duty to ensure that the parties are accorded due process, in order to provide a full and fair presentation of the evidence.

Based on the foregoing, the Court should reverse the IUB decision to issue a permit for the construction of the Dakota Access pipeline.

/s/ *Wallace L. Taylor*

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