IN THE SUPREME COURT OF IOWA

RICHARD R. LAMB, trustee of the RICHARD R. LAMB REVOCABLE TRUST, MARIAN D. JOHNSON by her agent VERDELL JOHNSON, NORTHWEST IOWA LANDOWNERS ASSOC., IOWA FARMLAND OWNER ASSOC.; SIERRA CLUB IOWA CHAPTER; KEITH PUNTENNEY; AND LAVERNE JOHNSON, Petitioners/Appellants, vs. IOWA UTILITIES BOARD, Respondent-Appellee, and DAKOTA ACCESS, LLC, Indispensable Party/Appellee.	No. 17-0423 (Appeal of the Order of the Polk County District Court Case Nos. CVCV051987, CVCV051990, CVCV051997, and CVCV051999, The Honorable Jeffrey Farrell)

FINAL BRIEF OF APPELLEE IOWA UTILITIES BOARD

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ROUTING STATEMENT

This case satisfies the criteria for retention by the Supreme Court of Iowa. Iowa R. App. P. 6.1101(2). This case presents questions concerning fundamental issues of broad public importance requiring ultimate determination by the Supreme Court. Iowa R. App. P. 6.1101(2)(d).

STATEMENT OF THE CASE

This matter is a judicial review proceeding brought pursuant to Iowa Code § 17A.19 to review the decision of the Iowa Utilities Board (Board or IUB) to grant to Dakota Access, LLC (Dakota Access), a permit for the construction, operation, and maintenance of a hazardous liquid pipeline, pursuant to Iowa Code chapter 479B and the Board's rules at 199 IAC chapters 9 and 13. Chapter 479B charges the Board with the duty and authority to review and approve the route of a proposed pipeline, protect landowners and tenants from undue damages, and to grant the power of eminent domain where necessary and appropriate.

On October 29, 2014, the Board opened Docket No. HLP-2014-0001 so that Dakota Access could hold public informational meetings in each county affected by the proposed route as required by Iowa Code § 479B.4 and 199 IAC 13.3. Following the meetings, on January 20, 2015, Dakota Access filed with the Board a petition for a permit to construct approximately 346 miles of 30-inch diameter crude oil pipeline through Iowa as part of a 1,168 mile project to transport crude oil from the Bakken region near Stanley, North Dakota, to an oil transfer station near Patoka, Illinois. (App. 973-74; March 10, 2016, "Final Decision and Order," Docket No. HLP-2014-0001, pp. 4-5) (hereinafter "FD&O".)

After reviewing the petition, on June 8, 2015, the Board established a procedural schedule for the agency proceedings. (App. 43; June 8, 2015, "Order Setting Procedural Schedule," Docket No. HLP-2014-0001.) Thirty-eight persons or entities filed timely petitions for intervention and five filed late petitions; all were granted intervention by the Board. Pursuant to the Board's usual practice, all direct testimony and exhibits were prefiled

with the agency according to the established procedural schedule. See 199 Iowa Admin. Code § 7.10 for a description of the prefiling process. (App. 975-79; FD&O at 6-10.)

The evidentiary hearing, scheduled for cross-examination of over 80 witnesses who had pre-filed direct testimony, commenced on November 16, 2015, and continued for eleven days. Sixty-nine witnesses actually took the stand. The transcript of that hearing (not including the prefiled testimony) runs to just over 3,500 pages. (*Id.*)

Following briefing by the parties, on March 10, 2016, the Board issued its "Final Decision and Order" (FD&O) granting Dakota Access's petition for a permit. (App. 970; FD&O at 1.) However, the permit was not actually issued until Dakota Access filed, and the Board accepted, certain compliance documents. That process was completed on April 8, 2016.

Some parties filed applications for rehearing or reconsideration of the Board's decision. The Board issued an order denying those applications on April 28, 2016, and on May 26 and 27, 2016, the petitioners herein filed petitions for judicial

review in Polk County District Court. On June 22, 2016, the cases were consolidated. On February 15, 2017, the District Court issued a "Ruling on Judicial Review" denying the petitions for judicial review and affirming the Board's order. (App. 1515.)

Further facts from the procedural history will be addressed below, as they are relevant to particular issues.

ARGUMENT

Summary of Argument

The Board's decision to issue a permit to Dakota Access is consistent with the law and supported by substantial evidence in the record. The Board properly applied a balancing test to determine that the benefits of the project would outweigh the costs. The Board then correctly determined that the project qualified for the power of eminent domain under all applicable laws, including the Iowa Constitution and Iowa Code chapter 479B.

Standard of Review

In reviewing the Board's interpretations of the law, the Court gives appropriate deference to the views of the agency with

respect to matters that have been vested by a provision of law in the discretion of the agency. Iowa Code § 17A.19(11)(c). However, the Court is not required to give such deference to the Board's views regarding other matters. Iowa Code §§ 17A.19(11)(a) and (b).

Agency action may be challenged as arbitrary or capricious, but only when the decision was made "without regard to the law or facts." *Doe v. Iowa Bd. of Med. Examiners,* 733 N.W.2d 705, 707 (Iowa 2007) (quoting *Greenwood Manor v. Iowa Dep't of Public Health*, 641 N.W.2d 823, 831 (Iowa 2002)). Agency action is unreasonable if the agency acted "in the face of evidence as to which there is no room for difference of opinion among reasonable minds[.]" *Id.*; see also *Citizen's Aide/Ombudsman v. Rolfes*, 454 N.W.2d 815, 819 (Iowa 1990). The Court typically defers to an agency's informed decision as long as it falls within a "zone of reasonableness." *S. E. Iowa Co-Op. Elec. Ass'n v. Iowa Utils. Bd.*, 633 N.W.2d 814, 818 (Iowa 2001) (citation omitted). When considering claims under the unreasonableness standard, the courts generally affirm the informed decision of the agency and

refrain from substituting a less-informed judgment. *Al-Khattat v. Eng'g & Land Surveying Examining Bd.*, 644 N.W.2d 18, 23 (Iowa 2002).

Factual findings by the agency must be accepted if supported by substantial evidence in the record. *Burton v. Hilltop Care Cntr.*, 813 N.W.2d 250, 256 (Iowa 2012) (quoting Iowa Code § 17A.19(10)(f)). "'Substantial evidence' means the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance." Iowa Code § 17A.19(10)(f)(l).

When reviewing a finding of fact for substantial evidence, the Court judges the finding in light of all of the relevant evidence in the record cited by any party, including that evidence which supports the finding and that evidence which detracts from it. *Cedar Rapids Cmty. Sch. Dist. v. Pease*, 807 N.W.2d 839, 845 (Iowa 2011). Evidence is not insubstantial merely because different conclusions may be drawn from it; in fact, evidence may

be substantial and support the agency's decision even if the court would have drawn a different conclusion than the agency did. The reviewing court's "task is to determine whether substantial evidence, viewing the record as a whole, supports the findings actually made." *Id.*

Response to Sierra Club

a. The District Court did not apply an incorrect standard of review

The Board agrees that Sierra Club has preserved this issue for review and that the standard of review for this issue is for legal error pursuant to Iowa Code § 17A.19(10).

b. The "public convenience and necessity" does not require service to the public

Sierra Club argues that the District Court committed error because in order for the Board to make a finding that a proposed pipeline will "promote the public convenience and necessity" (as required by Iowa Code § 479B.9 before a permit may be issued), the pipeline must provide "service to the public." (Sierra Club Br.

at 14, 22, 24-26.)[1] Sierra Club made the same argument to the Board, where it was considered and rejected. (App. 979-86; FD&O at 10-17.)

The term "public convenience and necessity" is not defined in § 479B.9; the indefiniteness of the term is intentional and reflects a delegation of authority to the Board to decide in the first instance what factors and circumstances should bear on its determination (subject to judicial review). *Application of Nat'l Freight Lines*, 241 Iowa 179, 185-86, 40 N.W.2d 612, 616 (1950); *S.E. Iowa Co-Op.*, 633 N.W.2d at 819-20. When considering the Board's application of these terms, the courts have confirmed the Board's prior decisions that (a) "convenience" is much broader and more inclusive than "necessity" and (b) in this context, "necessity" means "reasonable necessity," not absolute necessity. *Thomson v. Iowa State Commerce Comm'n*, 235 Iowa 469, 475, 15 N.W.2d 603, 606 (1944). The District Court agreed. (App.1531-33; Ruling at pp. 16-18.)

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[1] This is the combined brief of Appellants Sierra Club, Keith Puntenney, and LaVerne Johnson. For ease of reference, the brief will be cited as "Sierra Club Br." throughout.

In each of those cases, the finding of public convenience and necessity was supported, at least in part, by a finding of service to the public. From this, Sierra Club concludes that service to the public is the focus of the inquiry but cites no such holding from any of the decisions. The Board agrees that a finding of service to the general public can be ***sufficient*** to support a finding of public convenience and necessity, but there is no authority for the proposition that it is ***required*** in order to make such a finding; instead, the Board applied the public convenience and necessity test as a balancing test, weighing the public benefits of the proposed project against the public and private costs as established by the evidence in the record. (App. 986; FD&O at 16; see also *S. E. Iowa Co-Op.*, 633 N.W.2d at 821, approving the Board's use of a balancing test to determine whether "the substantial benefits [of a proposed project] outweighed the costs….").

Sierra Club has not always been opposed to the use of a balancing test in this case. In its brief filed with the Board, Sierra Club supported a balancing test, arguing that when

considering the "public convenience and necessity, social losses involving externalities, such as environmental damage and eminent domain, should be considered." Sierra Club even argued the phrase is essentially a "symbol" that represents a determination of whether the public benefit to be derived from a proposed project justifies granting the requested permit, citing *Prof'l Motor Home Transp. v. R.R. Comm'n of Texas*, 733 S.W.2d 892 (Tex. App. 1987). (App. 903-05; "Post-Hearing Brief of Sierra Club Iowa Chapter" at 6-8.) Thus, Sierra Club's present opposition to a balancing test is inconsistent with its earlier position.

The Board did not commit error by applying the described balancing test to the question of whether the proposed pipeline will promote the public convenience and necessity, and the District Court did not commit error by affirming the Board's action.

c. Demand for Bakken oil

Sierra Club argues that oil production from the Bakken region is diminishing, that some oil producers are leaving the

region, and that in the absence of demand for Bakken oil the pipeline will not promote the public convenience and necessity. (Sierra Club Br. at 26-30.) The Board addressed these same arguments at pages 37-39 of the Final Decision and Order and made appropriate findings. As previously noted, the fact findings of the agency must be accepted if supported by substantial evidence in the record. *Burton*, 813 N.W.2d at 256; Iowa Code § 17A.19(10)(f).

Before the agency, Sierra Club said that oil production in the Bakken area was declining and claimed that was evidence the area would be depleted of oil in the near future. However, Sierra Club's own Exhibit 26 showed that the recent dip in production was minimal compared to the historic production increases shown on the same exhibit. (App.825.) More specifically, Sierra Club Exhibit 26 shows that from January 2007 to October 2014, Bakken oil production increased from 0 barrels per day (BPD) to approximately 1.2 million BPD; then, from October 2014 to September 2015 it dipped about 10 percent, from 1.2 million BPD to 1.1 million BPD. (*Id.*)

The Board found that this relatively small, short-term reduction was not convincing evidence of a long-term trend of reduced production from the region. (App.1008; FD&O at 39.)[2]

The Board also found it significant that certain shippers have executed long-term take or pay contracts with Dakota Access to utilize the proposed pipeline to transport Bakken crude. (App. 1007; *Id.* at 38.) Under these contracts, the shippers must pay for the pipeline capacity whether they use it or not, a substantial financial commitment that only makes sense if the shippers are confident they will have oil to ship. The Board found these substantial monetary commitments by sophisticated shippers to be persuasive evidence that the alleged possible depletion of oil

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[2] Sierra Club now relies on "updated information presented to the district court" to claim that "the drop in production has continued through October 2016" (Sierra Club Br. at 29). Of course, the District Court was prohibited from hearing that new evidence pursuant to Iowa Code § 17A.19(7); if Sierra Club really thought the information was material, then it should have filed an application with the District Court for a remand to the Board to receive and consider it. Sierra Club filed no such motion, so there has been no opportunity for the parties to test, or for the Board to consider, Sierra Club's interpretation of the information.

reserves in the Bakken region was a factor that merited little weight in the Board's decision. (*Id.*)

There is simply no reason on this record to believe that Bakken oil production has been permanently diminished. Rather, it appears production is responsive to market prices for petroleum and its products, as would be expected, and Bakken oil will be produced whenever the market price is right.

d. Safety issues

Sierra Club argues that the Board should not have considered safety issues in determining whether the proposed pipeline will promote the public convenience and necessity because "this issue does not pertain to service to the public." (Sierra Club Br. at 30.) Sierra Club also argues that the Board erred when it concluded that compared to railroads, pipelines are a safer way to transport oil. (Sierra Club Br. at 30-38.)

The Board found, based upon the evidence in the record, that "the increased safety associated with pipeline transport of crude oil is significant." (App. 1000; FD&O at 31.) The Board considered the safety-related evidence presented by Sierra Club

and other pipeline opponents and found it simplistic and inaccurate. For example, Sierra Club offered a comparison of the total amount of oil leaked by pipelines and railcars during 2013. However, Sierra Club actually compared only crude oil shipments by rail against ***all*** hazardous liquid shipments by pipeline, giving rail transportation an unfair advantage. Moreover, Sierra Club's comparison failed to consider the relative volumes of crude oil transported or the distance over which it was carried, further disadvantaging pipeline transportation, which carries greater volumes over greater distances. (*Id.*)

On brief to this Court, Sierra Club quotes at length from the testimony of Rebecca Wehrman-Andersen, a witness called by the Iowa Farmland Owners Association. (Sierra Club Br. at 39-40.) This issue was addressed at pages 31-32 of the Board's FD&O. (App. 1000-01.) Ms. Wehrman-Andersen's analysis failed to account for the amount of oil being shipped by rail or by pipeline or for the distance the oil is being shipped in each case. Further, her calculations, which compared total miles of railroad track to pipeline (see App.322; Wehrman-Andersen Exh. 1 at p. 2),

overstate the safety of railroad transport by including miles of railway over which crude oil is never shipped. Accordingly, the Board relied on safety analysis that was based on comparable data, accounting for both the volume of the oil transported and the distance it as transported. (App. 1001; FD&O 32.)

Sierra Club argues that new safety regulations for rail transport should make that option safer. (Sierra Club Br. at 32-33.) An examination of those new rules from the Pipeline and Hazardous Materials Safety Administration (PHMSA) shows that they are intended to improve the safety of oil transportation by rail over time. However, PHMSA's final rules were not published until August 15, 2016, long after the record closed in these proceedings and a full five months after the Board issued its Final Decision and Order. *See* PHMSA-2016-0011, *Hazardous Materials: FAST Act Requirements for Flammable Liquids*, "Final Rule," 81 Fed. Reg. 53935-01 (Aug. 15, 2016).

Further, the new PHMSA rules establish an upgrade or phase-out process for certain older tank cars that will take place over the next 12 years, that is, between 2017 and 2029. *Id.* While

the new rules may be expected to make oil transport by rail safer in the future, there is no evidence in the record that rail transport will become as safe as, let alone safer than, modern pipeline transport, or that the safety improvements will be achieved in the near future.

In the end, the Board considered all of the evidence concerning the relative safety of pipeline vs. rail transport and concluded as follows:

> The most valid comparison in this record of the relative safety of rail transport versus pipeline transport considers the shipping method, the amount of crude oil shipped, and the distance it is shipped. It is clear from the USDOT data in Exhibit GC-1 that significantly more oil is shipped more miles by pipeline than by rail, so it is not surprising that the total amount of oil leaked by pipelines is higher. However, on a more equal comparison basis (accounting for both volume of oil carried and the distance it was carried) pipelines are shown to have between one-third and one-fourth the incident rate of railway transport of petroleum products. (*Id.*) As one report stated, "[b]y any measure – number of incidents, fatalities and spilled fluids recovered, pipelines are the safest and most effective form of energy transportation." (Exh. GC Direct at 8, quoting Vern Grimshaw & Dr. John Rafuse, *Assessing America's Pipeline Infrastructure: Delivering on Energy Opportunities*.)

(App. 1001; FD&O at 32.) Sierra Club claims the studies the Board relied upon are "conclusory… with no discussion" (Sierra Club Br. at 31), but the studies are based upon data from the U.S. Energy Information Administration and the Association of American Railroads, among other sources. If Sierra Club had doubts about the validity of these studies or these information sources, it should have raised them during the agency proceedings, either in the direct testimony of its own witnesses or through cross-examination of the Dakota Access witness who testified about the studies, but Sierra Club did not do that.

Sierra Club accuses the Board of ignoring Sierra Club's preferred evidence (Sierra Club Br. at 36), but the fact is the Board fully considered all of the evidence on this point and explained at some length why it found certain evidence to be more persuasive. (App.997-1002; FD&O at 28-33.) The Board did not commit error in doing so.

The Board considered all of the evidence presented on these safety issues and made findings that are supported by substantial evidence in the record. Again, the fact findings of the agency

must be accepted if supported by substantial evidence in the record. *Burton*, 813 N.W.2d at 256; Iowa Code § 17A.19(10)(f).

e. Jobs and economic impact

Sierra Club argues the Board should not have considered the economic impact of the proposed project. Sierra Club argues economic impacts are irrelevant and should not be considered; Sierra Club also argues, once again, that the Board "completely ignored" the evidence that Sierra Club favors. (Sierra Club Br. at 39.) Sierra Club's arguments are incorrect and without evidentiary basis in the record. Further, it should be remembered that economic benefits were not the only factor the Board considered; public safety and the services to be provided to shippers were also significant considerations. At a minimum, it was appropriate for the Board to consider the economic benefits to Iowa as one factor in its analysis, along with all of the other factors the Board considered.

The Iowa Supreme Court has made it very clear that the economic benefits of a project can be relevant in Board proceedings like this one. In *S. E. Iowa Co-Op.*, 633 N.W.2d at

820, the Court reviewed a Board decision to grant an electric transmission line franchise based solely upon economic considerations. The statutory standard for electric lines (the Board must find that the proposed line "is necessary to serve a public use") is very similar to the HLP standard (requiring a finding that the pipeline "will promote the public convenience and necessity"). *Id.*; Iowa Code § 479B.9. The Court found "considering the broad standard of 'public use' prescribed by the legislature," the Legislature must have "contemplated the Board would consider economic factors" when making that determination. *S.E. Iowa Co-Op,* 633 N.W. 2d at 820. Just like the Court's analysis in *S.E. Iowa Co-Op*, there is no indication in Iowa Code § 479B.9 that the Legislature intended to preclude economic factors from the Board's consideration; instead, the broad standard of "public convenience and necessity" indicates the Board can and should consider such factors in appropriate cases.

The Board did not "completely ignore[] the externalized costs of the pipeline project, such as environmental harm, landowner impacts, and damages from pipeline spills," as alleged

by Sierra Club. (Sierra Club Br. at 39.) The Board's Final Decision and Order includes lengthy and substantive discussion of environmental issues, oil spill remediation, and the impact of the project on affected landowners. See (App. 1016-31, 1043-52, and 1060-69; FD&O at 47-62, 74-83, and 91-100.) The Board will not detail those discussions here; clearly, the issues were not "completely ignored."

f. Conclusion of response to Sierra Club

In the end, Sierra Club's brief depends on its argument that a finding that the line will "promote the public convenience and necessity" requires a showing that the line will provide service to the general public. As shown above, that is not a correct statement of Iowa law; the *S.E. Iowa Co-Op* Court described the "public use" standard as a "broad" standard that contemplates the Board will consider and balance a variety of factors, including (in this case) safety considerations, economic benefits, environmental impacts, financial resources for any future remediation that may be required, the burdens imposed on the affected landowners, and other relevant factors. The Board balanced the evidence and

arguments for and against the pipeline, considered all of the evidence in the record, and found that the proposed pipeline will promote the public convenience and necessity. (App. 1083; FD&O at 114.) The District Court correctly found that there was no error in the Board's decision.

Response to Keith Puntenney

The Board agrees that Mr. Puntenney has preserved error on the issue of whether the power of eminent domain over his property was properly granted. The standard of review is set out in Iowa Code § 17A.19(10).

Mr. Puntenney challenges the reasonableness of the Board's factual findings with respect to the manner in which the proposed pipeline crosses his property. Of course, on judicial review of agency action in a contested case, factual findings by the agency must be accepted if supported by substantial evidence in the record. *Burton*, 813 N.W.2d at 256 (quoting Iowa Code § 17A.19(10)(f)). The Court's review "is limited to the findings that were actually made by the agency and not other findings that

the agency could have made." *Id.* (Citations omitted.) Here, substantial evidence in the record supports the Board's decision.

Mr. Puntenney makes a number of statements in his brief that require clarification. When those statements are corrected, it is clear that the Board's decision with respect to his property is reasonable, consistent with the law, and supported by substantial evidence in the record.

Initially, Mr. Puntenney asserts that "the pipeline makes a deliberate diversion from a straight line route in order to cross a corner of Mr. Puntenney's property." (Sierra Club Br. at 41.) In support of that statement, Mr. Puntenney relies upon a map with a line that he drew on it and attached to his November 5, 2015, objection filed in the Board proceedings. (App. 810; "Objection" at p. 11.) The map shows that the proposed pipeline route runs in a straight line on the two adjoining parcels to the northwest of Mr. Puntenney's and the adjoining parcel to the southeast. In other words, the pipeline is not deliberately diverted across a corner of his property; it follows straight lines as much as is reasonably

possible while avoiding houses and other incompatible land uses. The pipeline route was chosen with this balancing in mind.

The evidence in the record shows that Dakota Access used a geographic information system (GIS) software program to evaluate potential alternative routes using datasets that included engineering, environmental, and land use considerations. Engineering considerations include such things as the location of existing pipelines, karst landforms, and powerlines. Environmental considerations include critical habitat areas, fault lines, state parks, national forests, and sites on the national register of historic places. Land use considerations include residences, other buildings, dams, airports, cemeteries, schools, mining, and military installations. (App. 1021-22, 1034-35; FD&O at 52-53, 65-66.)

Each of the factors in the datasets was weighted as low, moderate, or high risk based upon the perceived risks associated with routing the pipeline close to, or away from, the factor in question. The software analyzed the alternative routes; the preferred route uses locations identified as low risk, or where

necessary moderate risk, but avoids high risk locations as much as possible. The software also considers use of the shortest route in order to cause the least overall impact to land use. The resulting proposed route was then modified to avoid high consequence areas, wetlands and water bodies, cultural resource sites, home and farm sites, buildings, irrigation systems, power poles and towers, other structures, and property corners, to the extent possible. Route modifications were also made based upon aerial imagery, site visits, and helicopter reconnaissance. (App.1034-35; FD&O at 65-66.)

In the end, Mr. Puntenney's argument about re-routing the pipeline to avoid his property amounts to a statement that the pipeline could have been routed across someone else's property. That is an argument that could be made by every affected landowner about every affected property. The pipeline has to have a proposed route in order to proceed to hearing; Dakota Access explained how it settled on the route that it proposed and the Board found the resulting route selection process to be reasonable. (App. 1037-38; FD&O at 68-69.)

Mr. Puntenney complains that the Board required Dakota Access to re-route the pipeline across another property, the Lenhart parcel, and argues it was arbitrary, capricious, unreasonable, and discriminatory to accommodate Mr. Lenhart and not Mr. Puntenney. (Sierra Club Br. at 42, 44-45.) However, the two situations are not the same. Mr. Puntenney's argument ignores the significant factual differences between these landowners' situations; Puntenney's plans for future use were undeveloped and hypothetical, while the plans for the Lenhart property were based upon already-existing development and relatively firm.

At hearing, Mr. Puntenney sought accommodation for potential future wind turbines on his property. (App. 754-56; Tr. 3488-90.) However, the extent of his plans for those turbines is that he and his tiler, Dan Rasmussen, "have been talking about this for quite a number of years. We actually would like to put together an investor group of landowners to bring turbines further south." (*Id.*) He also said that "Dan and I and some of the other landowners who were talking about this are trying to put

together a proposal to approach MidAmerican to use our land." (*Id.*) Thus, Mr. Puntenney's plans have not advanced beyond talking about trying to put together a proposal; he does not have any wind turbines on his property; he has not actually approached MidAmerican about future wind turbines; he has no specific proposal to use as a basis for any such conversation; and he has not assembled an investor group. The Board found that his plan "is not a sufficiently developed plan to justify denial of eminent domain on this parcel, particularly when it has not been shown that the pipeline would necessarily interfere with the possible future installation of wind-driven turbine generators." (App. 1118; FD&O at 149.)

Mr. Lenhart, in contrast, has four existing turkey barns on his property, the result of at least two past expansions of his operation. (App. 584-85, 604, 612-13; Tr. 3165-6, 3182, 3190-91.) He has had "serious discussions" with the company that owns the birds about the next expansion of the facility of up to three more buildings. (App. 587, 613; Tr. 3169, 3191.) He knows where the new buildings would be, the overall space they would require, and

the size of each building. (App. 587-88; Tr. 3169-70.) The Board found it reasonable to require Dakota Access to re-route the pipeline, still on Mr. Lenhart's property, to accommodate Mr. Lenhart's plans. (App. 1099-1101; FD&O at 130-32.) His plans are much more developed than Mr. Puntenney's, who has been talking to his tiler "for quite a number of years" but has not advanced any further.

Mr. Puntenney also argues that the impact of the proposed pipeline on his drainage tile was not considered by the Board. (Sierra Club Br. at 10-12.) He says he was not allowed to testify about the impact on his drainage tile at the hearing, but the fact is that the Board specifically asked Mr. Puntenney about the drainage tile on his property (App.752; Tr. 3486: 9-18.), providing him with the opportunity to testify on the issue if he had wanted to.

Moreover, Mr. Puntenney, like any other party, was permitted to pre-file any direct testimony he wanted the Board to consider, in advance of the hearing. (App. 45; Scheduling Order at p. 3.) By that order, Mr. Puntenney was fully aware of the

requirement for prefiled testimony; his decision not to avail himself of that opportunity is not error on the part of the Board.

Then, Mr. Puntenney was allowed to adopt his objection January 13, 2015, as his testimony, and all of his supporting exhibits were admitted into the record. (App. 749-51; Tr. 3483-85.) In the objection, Mr. Puntenney testified to his concerns about his drainage tile. (App. 802-04; "Objection" at pp. "1-2," "1-3," and "1-4.") He claimed that the proposed pipeline would function as a "dam" of some sort, causing him additional damages, but Dakota Access witness Blood made it clear that underground water will flow over and under the pipeline without difficulty. (App. 521-25; Tr. 1911-15.)

As for Mr. Puntenney's more general claim that the Board failed to consider the possible impact of the pipeline on his plans for future installation of drainage tile, once again the record shows his plans were not so firm as to justify action by the Board. His November 5, 2015, objection included an undated tile map described as "Proposed Tile" with no indication of any construction timeline. His testimony at the hearing was that "I've

been doing tiling on this property off and on as necessary, and I did quite a bit of it last year." (App. 752; Tr. 3486.) He offered no schedule, identified no work areas, and offered no time projections for any future tiling projects. Again, on this record, his plans are not sufficiently developed to require any particular action by the Board. If and when he installs additional tile in the future, Dakota Access will be required to compensate Mr. Puntenney for any increased costs caused by the presence of the pipeline, pursuant to Iowa Code § 479B.20(1)(g).

Mr. Puntenney also claimed in his November 5, 2015, objection that having the pipeline running across the corner of his property would preclude installation of wind turbines anywhere on his entire 80 acres, but other than conclusory language about "safety reasons" and "distance requirements" he provided no basis for his claim. (App. 800; "Objection" at p. 1.) As noted above, Mr. Puntenney's plans for future wind turbine installations are, at best, in the very early stages and may never come to fruition. They do not provide a basis for any action by the Board.

In the end, Mr. Puntenney, as a full party to the Board proceedings, had full opportunity to present his case to the Board, and he did, in fact, present his evidence and argument. As the District Court said, "Mr. Puntenney was provided notice and given an opportunity to present his case. He filed an objection, was added as an intervening party, presented filed testimony, cross-examined witnesses, admitted thirty exhibits into the record, and testified live at hearing. Mr. Puntenney was granted due process." (App. 1547; Ruling at p. 33.) The Board gave full and fair consideration to his case, made a decision, and explained the basis for that decision, based upon the substantial evidence in the record. Mr. Puntenney may disagree with the Board's decision, but that does not establish any reason for reversing the Board's decision.

Response to LaVerne Johnson

The Board agrees that Mr. Johnson has preserved error on the issue of whether the power of eminent domain over his property was properly granted. The standard of review is set out in Iowa Code § 17A.19(10).

Like Mr. Puntenney, Mr. Johnson challenges the reasonableness of the Board's factual findings with respect to the manner in which the proposed pipeline crosses his property. As previously indicated, on judicial review of agency action in a contested case, factual findings by the agency must be accepted if supported by substantial evidence in the record. *Burton*, 813 N.W.2d at 256 (quoting Iowa Code § 17A.19(10)(f).) The Court's review "is limited to the findings that were actually made by the agency and not other findings that the agency could have made." *Id.* (citations omitted.) Here, substantial evidence in the record supports the Board's decision.

In his brief to this Court, Mr. Johnson also claims that the Board "ignored" his testimony and evidence regarding his drainage tile and asks that Dakota Access be required to re-route the pipeline around his property, onto the property of other landowners. (Sierra Club Br. at 4.) In fact, the Board gave every consideration to Mr. Johnson's evidence and argument and imposed special conditions on the pipeline as it crossed his property to address his concerns, requiring Dakota Access to bore

the pipeline under his deepest drainage tile. (App. 1095-97; FD&O at 126-28.)

As the Board acknowledged in the Final Decision and Order, Mr. Johnson has installed layers of drainage tile on one of his parcels because it holds water. One of the tile lines, a 24-inch concrete main, is buried up to 22 feet deep. (App. 236; LaVerne Johnson Direct Testimony at 1.) In his direct testimony, he expressed his concern that the pipeline would cut through those lines and cause them to fail to discharge water. (App. 239; *Id.* at 4.) He specifically testified that "[u]nless the pipeline goes under all of these stacked tile lines, it will have to go through them." (App. 240; *Id.* at 5.)

Relying on this testimony, the Board granted Dakota Access the right of eminent domain over Mr. Johnson's parcel "upon the condition that the pipeline will be bored under the 24-inch concrete main." (App. 1096; FD&O at 127.) This addressed the concerns Mr. Johnson expressed.

At hearing, Mr. Johnson took a somewhat different position than he did in his direct testimony; he indicated that the soil

under the main was potentially unsuitable; specifically, he testified that "[i]t's a really difficult spot to get through, and I think boring, if you hit that, I think it would just -- I don't think it would be successful." (App. 556; Tr. 3027.) The Board acknowledged Mr. Johnson's concerns in its order, saying "Johnson suggests that this will not be successful because of the type of soil under the 24-inch main; however, there appears to be no reasonable alternative to granting eminent domain along the route proposed by Dakota Access and boring under the 24-inch main appears to be the least intrusive alternative." (App. 1096; FD&O at 127.)

The Board's decision is reasonable and supported by substantial evidence in the record and should be affirmed. As the District Court said when analyzing Mr. Johnson's claims, "the board's consideration of multiple lay and expert witnesses, company representatives, professional engineers, agronomists, and its own staff engineers, shows substantial evidence to support [the Board's] conclusion." (App. 1002; Ruling at p. 33.)

Response to Initial Brief of the Lamb Group

a. The definition of "public use" and the Constitution

The Board agrees that the Lamb Group[3] has preserved error on the issue of the definition of "public use." The standard of review is set out in Iowa Code § 17A.19(10).

The Lamb Group argues that the Court should develop a definition of "public use" for purposes of the Iowa Constitution that would be different from the definition of the same term when used in the United States Constitution, as explained in *Kelo v. City of New London*, 545 U.S. 469 (2005). (Lamb Group Br. at 26-27.) In doing so, they fail to address relevant Iowa law that has already determined that the "public use and convenience" standard the Board applied in this case is sufficient to establish a "public use."

The Iowa Supreme Court has long held that in the context of permit proceedings under the jurisdiction of the Board (or its

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[3] Petitioners Richard R. Lamb, trustee of the Richard R. Lamb Revocable Trust; Marian D. Johnson by her agent Verdell Johnson, Northwest Iowa Landowners Association, and Iowa Farmland Owners Association, Inc., are referred to as "the Lamb Group."

predecessor, the Iowa State Commerce Commission), eminent domain may be granted for a project that is shown to be "necessary," and "an absolute necessity for taking the particular land need not exist. A reasonable necessity is sufficient." *Vittetoe v. Iowa Southern Utils. Co.*, 123 N.W.2d 878, 881 (Iowa 1963) (citations omitted.) Thus, the *Vittetoe* Court considered that a showing of "reasonable necessity" was sufficient to establish a "public use" for Constitutional purposes. *Id.*

The Supreme Court of the United States agrees. The Fifth Amendment of the Constitution of the United States limits the power of eminent domain such that private property may only be taken for "public use," but that does not mean that the property can only be taken for actual, literal use by the general public. *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 244 (1984); *Kelo v. City of New London*, 545 U.S. 469 (2005). There are three types of "public use" for which the government can take private property: (1) public ownership, like national parks, interstate highways, and military bases; (2) private ownership devoted to a public use, such as typical railroad lines, electric transmission

lines, and natural gas pipelines; and (3) private ownership for a public purpose, such as the removal of urban blight or the construction of low-income housing. *Kelo*, 545 U.S. at 497-98 (O'Connor, dissenting.) Under *Kelo,* the concept of public use is broadly defined, representing a policy of deference to legislative judgments in this field.

The Iowa Constitution, Article I, Section 18, similarly provides that private property shall not be taken for public use without just compensation. The Iowa courts have long recognized that "public use," in this context, does not necessarily require that the property will be directly used by a large portion of the general public. "The test of public character is not in the number of persons or corporations [that will be served], but in the character of the use to which the [facility] will be put." *Reter v. Davenport, R.I. & N.W. Rwy. Co.,* 54 N.W.2d 863, 867 (Iowa 1952). Thus, the fact that a proposed facility will be used "by only a few of the public having the prescribed qualifications is legally insignificant." *Simpson v. Low-Rent Housing Agency of Mount Ayr*, 224 N.W.2d 624, 630 (Iowa 1974). "It is not essential that

the entire community or even any considerable portion of it should enjoy or participate in an improvement in order to make it a public one." *Id.* (quoting *Dornan v. Philadelphia Housing Auth.*, 200 A. 834, 840 (Pa. 1948).)

Here, Dakota Access has been granted the power of eminent domain for private ownership for a public use. The public in question consists of shippers of crude oil from the Bakken fields. Those shippers were chosen using an "open season" process pursuant to the policies of the Federal Energy Regulatory Commission (FERC). FERC's policy is to allocate available interstate pipeline capacity to the shipper that values it the most, up to a maximum rate, using the open season process.[4] The process is an open and transparent procedure by which a notice of available capacity is posted on the pipeline company's website or electronic bulletin board. The pipeline company receives bids, evaluates them, and negotiates contracts with the successful bidders. A portion of the capacity is reserved for walk-up

[4] See, for example, "Bidding by Affiliates in Open Seasons for Pipeline Capacity," 137 FERC ¶ 61,126 (Nov. 17, 2011), at p.2.

shippers, as well. As a result of this process, the capacity of the Dakota Access pipeline is dedicated to the service of that portion of the public that can use it, consistent with the standard recognized in *Simpson*: the fact that only a few members of the public are qualified to use it is "legally insignificant." 224 N.W.2d at 630.

Moreover, even the authorities relied upon by the Lamb Group do not really support their arguments. For example, the Illinois case, *Southwestern Illinois Development Auth. v. Nat'l City Environmental, L.L.C.,* 768 N.E.2d 1 (Ill. 2002), merely holds that "public purpose" and "public use" are terms that are "somewhat loosely defined" and

> The term "'[p]ublic purpose' is not a static concept. It is flexible, and is capable of expansion to meet conditions of a complex society that were not within the contemplation of the framers of our constitution."

Id. at 8-9. (citation omitted.) This notion of flexibility and capability for expansion undercuts the restrictive definitions that the Lamb Group asserts and reflects the broader view that the reviewing authority (here, the Board) may consider and balance a variety of factors when making the determination of whether a

proposed project will serve the public. *S.E. Iowa Co-Op*, 633 N.W. 2d at 821.

The Lamb Group also cites *County of Wayne v. Hathcock, et al.*, 471 Mich. 445, 684 N.W.2d 765 (2004), but close examination of that decision reveals it supports the Board's interpretation of "public use." *Hathcock* recognizes, for example, that the "public use" requirement is not a bar against the transfer of condemned property to private entities so long as it is for a public use. 684 N.W.2d at 781. *Hathcock* also describes the appropriateness of granting eminent domain for "enterprises generating public benefits whose very *existence* depends on the use of land that can only be assembled by the coordination central government alone is capable of achieving," citing highways, railroads, and gas pipelines as examples. *Id.* at 781-82. (emphasis in original.) Interstate crude oil pipelines have those same characteristics and the same reasoning applies.

Hathcock also recognizes that the transfer of condemned property to a private entity is consistent with the public use requirement when the private entity remains accountable to the

public in its use of that property. *Id.* Because it is subject to regulation by the FERC and PHMSA, Dakota Access remains accountable to the public.

The Lamb Group cites *Square Butte Elec. Co-Op v. Hilken*, 244 N.W.2d 519 (N.D. 1976) for the proposition that property in one state cannot be condemned for the sole purpose of serving a public use in another state. (Lamb Group Br. at 44.) Of course, that is not what the Board did; the Board granted the power of eminent domain based upon public benefits in Iowa, including economic benefits specific to Iowa and safety benefits to Iowans and to others. The *Square Butte* Court recognized that while there must be benefit for the public in the state which authorizes the taking, other states may also benefit. 244 N.W.2d at 525.

Similarly, the Lamb Group cites *Adams v. Greenwich Water Co.,* 83 A.2d 177 (Conn. 1951), for the proposition that a state can only authorize eminent domain for a public use within its own borders. (Lamb Group Br. at 44.) However, the *Adams* Court goes on to say:

> It is apparently universally held, however, that if a taking is for a public use within the state

> authorizing it, such a taking is not to be prevented because it will also serve a public use in another jurisdiction. [Eight citations omitted.] This principle applies even though the major portion of the public use will benefit nonresidents. [Six citations omitted.] If the taking is for a public use which will provide a substantial and direct benefit to the people of the state which authorizes it, it is a proper exercise of the power of eminent domain even though it also benefits the residents of another state.

83 A.2d at 182.

In the end, "public use" simply is not so restrictive a term as the Lamb Group argues it is. It "is a legal term of art every bit as complex as 'just compensation.'" *Hathcock*, 684 N.W.2d at 780. It is a flexible term, not a strict concept. *SWIDA*, 768 N.E.2d at 8-9. The Board correctly determined that when deciding whether a proposed project will serve the public, a variety of factors must be considered and balanced, consistent with *S.E. Iowa Co-Op*, 633 N.W.2d at 821.

Iowa Code § 6A.22 also supports this analysis. The statute equates the phrase "public use" with "public purpose" and "public improvement," defining them identically. This demonstrates that these different phrases are intended to have the same meaning,

and to be interchangeable, under Iowa eminent domain law. Similarly, the Lamb Group's claimed distinction between "public use" and "public convenience and necessity" is without merit.

b. The Board correctly determined that it has jurisdiction over Dakota Access for purposes of Iowa Code § 6A.21

The Board agrees that the Lamb Group has preserved error on this issue. The standard of review is set out in Iowa Code § 17A.19(10).

The Lamb Group argues that Iowa Code § 6A.21(1)(c) bars Dakota Access from exercising eminent domain over agricultural lands. However, Iowa Code § 6A.21(2) provides, in relevant part, that the bar in Iowa Code § 6A.21(1)(c) does not apply to "utilities, persons, companies, or corporations under the jurisdiction of the Iowa utilities board in the department of commerce…." The Board determined that Dakota Access is a company under the jurisdiction of the Board such that the exception applies and Dakota Access can be permitted to condemn agricultural land pursuant to the terms and conditions of its 479B permit. (App. 1089-90; FD&O at 120-21.)

The Board's jurisdiction over Dakota Access is extensive and continuing. First, the company must have a chapter 479B permit from the Board before it can begin to even construct, let alone operate, its proposed pipeline. In that permit proceeding, the Board could have denied a permit and prevented the project entirely, a powerful demonstration of jurisdiction. The Board also had the authority to make the permit subject to a variety of terms and conditions and the Board exercised that authority in many areas to require Dakota Access to grant the affected landowners increased rights and protections, further demonstrating that the Board has jurisdiction over Dakota Access.

The Board has continuing jurisdiction to hear complaints against Dakota Access and, in appropriate cases, to assess civil penalties pursuant to Iowa Code § 479B.21. The Board also has the authority to review and approve or deny any future sale or transfer of the permit pursuant to Iowa Code § 479B.14. That jurisdiction continues for the life of the pipeline. There is no denying that the Board has jurisdiction over Dakota Access in the plain meaning of the word; the language of the statute requires

that the exception in Iowa Code § 6A.21(2) apply to Dakota Access.

The Lamb Group next argues that under the principle of *ejusdem generis*, the list of entities entitled to rely upon the exception in Iowa Code § 6A.21(2) must be limited to any "persons, companies, or corporations" that are related to or affiliated with a utility, such as a subsidiary or affiliate, because those words follow the word "utilities." (Lamb Group Br. at 72.) In order to make that argument, they propose to add the words "and related" to the statute to try to make it support their preferred interpretation. (*Id.*) The fact that they have to add words to the statute to make it consistent with their argument is, by itself, evidence that the unadorned statute does not have the meaning they prefer.

Even with the Lamb Group's added words, the statute does not really support their preferred interpretation. *Ejusdem generis* is a principle of construction that provides that in some circumstances, when general words follow specific words in a statute, the general words are read to include only objects similar

to the objects of the specific words. *Teamsters Local Union No. 421 v. City of Dubuque*, 706 N.W.2d 709, 715 (Iowa 2005). However, in using this doctrine, "it is important to keep in mind that it is not applied in a vacuum, and disputes cannot be resolved by merely tying the issue 'to the procrustean bed of *ejusdem generis*.'" *Id.* (citing *U. S. v. Weadon*, 145 F.3d 158, 162 (3d Cir. 1998).) There are several conditions that must be met before the doctrine is applied, and the most important is identification of the class based upon the purpose or aim of the statute. *Teamsters Local*, 706 N.W. 2d at 715-16.

Here, the Lamb Group's proposal would leave the list of entities in Iowa Code § 6A.21(2) without meaning. The Lamb Group offers a "natural reading" of the statute that requires adding words to it (Lamb Group Br. at 72), trying to impose an additional requirement that is not in the statute. Thus, the Lamb Group tries to add the words "[*and related*]" to the statute and then argues, on that basis, that the statute should only be applied to utilities and their subsidiaries. (*Id.*) If the remainder of the list is limited to entities that are related to a utility, as the Lamb

Group argues, then the list becomes meaningless, as the Board has very limited or no jurisdiction over most utility affiliates. (See Iowa Code § 476.71 *et seq.*, giving the Board specific authority to review the records of public utility affiliates and transactions between utilities and their affiliates.) If the Lamb Group's interpretation was adopted, then the list of other entities would have no force and effect because no related entity would satisfy the jurisdictional requirement of the statute. Thus, application of the doctrine would leave the list without any meaning at all, which cannot accomplish the purpose or aim of the statute within the meaning of *Teamsters Local*.

Rather than add words to try to force new meaning on the statute, the words in the list should be given their ordinary meanings and the exception to Iowa Code § 6A.21 should be read to include only the words that are already in the statute. The limitation does not apply to "…companies, or corporations under the jurisdiction of the Iowa utilities board." As shown above, the Board found Dakota Access is a company that is subject to the

Board's jurisdiction, so the exception in Iowa Code § 6A.21(2) applies to Dakota Access.

Finally, the Lamb Group's reliance on *Kinley Corp. v. Iowa Utils. Bd.*, 999 F.2d 354 (8th Cir. 1993), is misplaced. That case holds only that the Board's jurisdiction to inspect the safety of an existing interstate hazardous liquids pipeline is preempted by federal law. The *Kinley* decision did not affect any other area of the Board's jurisdiction, as discussed above.

c. Iowa Code § 6A.22 does not prevent the Board from considering economic factors in a chapter 479B proceeding

The Board agrees that the Lamb Group has preserved error on this issue. The standard of review is set out in Iowa Code § 17A.19(10).

Iowa Code § 6A.22 does not prohibit the Board from considering the economic benefits to Iowans that would result from the construction and operation of the pipeline. As previously noted, the definitions of "public use," "public purpose", and "public improvement" under that section include "the acquisition of any interest in property necessary to the function of a public or private utility …, ***common carrier,*** or airport or airport system."

Iowa Code § 6A.22(2)(a)(2). (emphasis added.) Dakota Access is a common carrier as defined by federal law (Interstate Commerce Act, § 1(3).) As such, Dakota Access was required to offer services to Bakken crude oil shippers on a non-discriminatory basis. That process, overseen by the Federal Energy Regulatory Commission, included an "open season" allowing all interested shippers to bid for pipeline capacity in a public, nondiscriminatory process. Dakota Access is also required to reserve 10 percent of the pipeline's capacity for "walk up" shippers who will pay regulated rates. This dedication to public service makes Dakota Access a "common carrier" and the federal definition reflects that fact. That means that the economic development activities associated with the proposed pipeline can be considered in connection with determining whether the project will serve a public use. Iowa Code § 6A.22(2)(b).

Those economic benefits are substantial. Even the pipeline opponents admit the Iowa-only economic benefits of the project are at least $787,000,000 during the construction period alone (App. 154, 1010; Gannon Exh. MI-11, FD&O at 41-47), while

Dakota Access and its supporters argued the benefits would be in excess of $1 billion. (App. 242, 307-09; Lipsman Exh. 1, "Exhibit MAL-1" at 49-51.) The project will continue to offer economic benefit specific to Iowa throughout its life in the form of approximately $27 million per year in property taxes in Iowa and 25 long-term direct, indirect, and induced permanent jobs in Iowa. (App. 760-61; Dakota Access Cross Exh. 7 at 3-4.)

d. The Board properly considered safety matters

The Board agrees that the Lamb Group has preserved error on this issue. The standard of review is set out in Iowa Code § 17A.19(10).

The Lamb Group tries to limit the Board's consideration of the relative safety of pipeline transportation to Iowans. However, the Board expressly determined that it can consider out-of-state benefits when determining whether a proposed project will promote the public convenience and necessity (App. 987-90; FD&O at 18-21) and the Lamb Group has not directly challenged that ruling. The record made before the agency establishes that it is safer to ship crude oil by pipeline than by rail tanker. (App.

1001; FD&O at 32.) At the hearing before the Board, the opponents of the pipeline offered flawed analyses that compared apples to oranges or failed to account for shipping volumes and distances (*Id.* at 31-32); the Board found that US Department of Transportation data shows that pipelines have one-third to one-fourth the incident rate of rail tankers (measured on the basis of incidents per ton-mile transported). (App. 63, 76; Caruso Exh. 1, "Exhibit GC-1".) Or, as one witness testified, "[b]y any measure – number of incidents, fatalities and spilled fluids recovered, pipelines are the safest and most effective form of energy transportation." (App. 70; Guy Caruso Direct Testimony at 8, quoting Grimshaw and Rafuse, *Assessing America's Pipeline Infrastructure: Delivering on Energy Opportunities*.)

As the Board explained in the Final Decision and Order, the total amount of Bakken oil produced will be driven by the marketplace demand for crude oil, not by the shipping method. The amount may be greater than current production levels or it may be less, but once that oil is produced, it must be shipped to the refineries, primarily by rail or by pipeline. If production is

increased from current levels in response to market conditions, the pipeline may not reduce the absolute number of rail shipments of crude oil, but oil that is shipped by pipeline is significantly less likely to be spilled than oil shipped by rail. Therefore, this pipeline will reduce the overall risk of crude oil spills, both in Iowa and elsewhere, because every barrel shipped by pipeline is not shipped by rail. (App. 1001-02; FD&O at 32-33.) The Board found this public benefit was entitled to significant weight in the agency's analysis of whether the proposed pipeline would promote the public convenience and necessity. (*Id.*)

As previously noted, the fact findings of the agency must be accepted if supported by substantial evidence in the record. *Burton*, 813 N.W.2d at 256; Iowa Code § 17A.19(10)(f).

e. Conclusion of response to the Lamb Group

Because, as shown in the preceding sections of this brief, the Board properly issued the permit to Dakota Access, including the authority to condemn easements to the extent necessary and only as prescribed and approved by the Board, the Board's decision

should be affirmed. The District Court did not commit error by doing so.

Response to Brief of Amicus Curiae Niskanen Center

Because Niskanen Center (Niskanen) enters this case on appeal, it has not had opportunity to preserve its issue below. However, the broad issue of the constitutionality of the Board's decision to grant the right of eminent domain for this project was presented to the Board and to the District Court. The standard of review is set out in Iowa Code § 17A.19(10).

However, Niskanen challenges a decision the Board did not make. Niskanen analyzes the case as though the Board's decision were based solely on the ability of Dakota Access to make profitable use of other people's property. For example, at page 17 of its brief Niskanen says the Board interpreted a case "as carte blanche to seize private property when someone else shows that doing so will yield greater economic benefits…." At page 23, Niskanen argues that states have recognized that "their state constitutions do not allow the government to seize private property on the grounds that someone else can put it to a 'more

profitable use.'" And at page 31 Niskanen argues the Court should not "make it easier to tear those homes down, just because someone else has a 'better' use for the property."

However, the record shows that Dakota Access's potential profits were never a factor in the Board's decision. The Board's decision is based on the safety of pipeline transportation of oil when compared to the alternatives; the undisputed economic benefits to Iowa of at least $787,000,000; and the public benefit associated with serving the market demand for oil transportation; and the measures taken to reduce the environmental concerns associated with the pipeline. (App. 1078-79; FD&O at 109-10.) The Board did not compare the profitability of Dakota Access's proposed use to the profits the landowners were realizing; Niskanen is attacking the wrong target.

The cases cited by Niskanen in support of its position are also addressed to a non-issue in this case. Thus, in *Hogue v. Port of Seattle*, 341 P.2d 171 (Wash. 1959), the port district sought to condemn 900 to 1,000 acres to be sold or leased to "private industrial concerns." *Id.* at 176. Condemnation was rejected

because it was being done for the benefit of those other private interests, i.e., for purely private purposes. *Id.*

In *Phillips v. Foster*, 211 S.E.2d 93 (Va. 1975), condemnation for a drainage easement for the draining of private land was rejected because the "establishment of prosperous private enterprise" is "of no importance." *Id.* at 96. In *Opinion of the Justices*, 126 N.E.2d 795 (Mass. 1955), the holding is that condemning land for the primary purpose of selling it to other private owners is unconstitutional. *Id.* at 802.

Board of County Commissioners v. Lowery, 136 P.3d 639 (Okla. 2006) is no different. The case reverses condemnation of easements for water pipelines intended only to serve a privately-owned electric power plant. *Id.* at 650-51. Finally, in *Rhode Island Econ. Dev. Corp. v. The Parking Co., L.P.,* 892 A.2d 87 (R.I. 2006), an attempt to condemn a temporary easement over a private parking garage was rejected because it was "motivated by a desire for increased revenue and was not undertaken for a legitimate public purpose." *Id.* at 104.

In each of these cases, the condemning authority attempted to justify its exercise of the power of eminent domain based on the conclusion that the new use would have higher value (and higher profits resulting from the new use) than the existing use. That is not what the Board did in this case. The Board focused on the benefits to the public, including public safety, economic benefits to the public (as distinguished from the profits of a private entity), and service to the oil transportation market, combined with measures taken to minimize the adverse impacts. In sum, the cases relied upon by Niskanen are addressed to an action the Board did not take.

Two other points raised by Niskanen require comment. First, at pages 12 and 16 of its brief, Niskanen says that the grant of the power of eminent domain "automatically" comes with a permit issued pursuant to Iowa Code chapter 479B. The Board disagrees; Iowa Code § 479B.16 says that a pipeline company that is granted a permit "shall be vested with the right of eminent domain, ***to the extent necessary and as prescribed and approved by the board....***" (Emphasis added.) This language gives the

Board the authority to limit, or even deny, the power of eminent domain if the Board determines it is not necessary.

Second, Niskanen cites *Mid-America Pipeline Co. v. Iowa State Commerce Comm'n*, 114 N.W.2d 622 (Iowa 1962) and constructs a hypothetical for the Court to consider. (Niskanen Br. at 37-40.) However, the hypothetical assumes away the very holding of *Mid-America*, which was that a pipeline company was not entitled to exercise the power of eminent domain for a proposed pipeline to carry only its own products, i.e., the pipeline would not be a common carrier. *Id.* at 624. That is not the case here; as previously described, Dakota Access is a common carrier that carries oil belonging to other entities pursuant to an open season public bidding process consistent with FERC requirements. The Board relied on this distinction, giving explicit weight to the need to serve the oil transportation market. (App. 1079; FD&O at 110.) Niskanen disregards this significant distinction between *Mid-America* and this case.

CONCLUSION

The Board's decision to issue a permit to Dakota Access pursuant to Iowa Code chapter 479B is consistent with law and supported by substantial evidence in the record. As such, it should be affirmed.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

The Respondent-Appellee Iowa Utilities Board requests that it be granted oral argument on all the issues presented herein.

/s/ David J. Lynch
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CERTIFICATE OF COMPLIANCE

The brief complies with the type-volume limitations of Iowa R. App. P. 6.903(1)(g)(1) because the brief contains 10,205 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief complies with typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2007 in 14-point Century.

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COST CERTIFICATE

The cost of producing the necessary copies of this brief, exclusive of stenographic expense, was $ 0.00.

/s/ David J. Lynch
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CERTIFICATE OF SERVICE AND FILING

I, David J. Lynch, being one of the attorneys for the Iowa Utilities Board, certify that the attached "FINAL BRIEF OF APPELLEE IOWA UTILITIES BOARD" was served upon all of the parties to this appeal on November 8, 2017, through the Court's EDMS as follows:

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I further certify that on November 8, 2017, I filed this document with the Clerk of the Supreme Court, 1111 Court Avenue, Des Moines, IA 50319, by electronically filing it through EDMS.

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