

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

<p>ENTERPRISE PRODUCTS OPERATING, LLC</p> <p><i>Petitioner,</i></p> <p>v.</p> <p>IOWA UTILITIES BOARD,</p> <p><i>Respondent.</i></p>	<p>CASE NO. CVCV065780</p> <p>PETITIONER'S RESPONSE TO IOWA UTILITIES BOARD'S PRE-ANSWER MOTION TO STRIKE OR RECAST AND MOTION TO ENLARGE TIME TO TRANSMIT CERTIFIED RECORD</p>
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COMES NOW, Petitioner Enterprise Products Operating LLC (hereinafter "Enterprise" or "Petitioner") with this Response to Iowa Utilities Board's Pre-Answer Motion to Strike or Recast and Motion to Enlarge Time to Transmit Certified Record (this "Response"), stating the following:

INTRODUCTION

1. Enterprise operates a hazardous liquid pipeline in Iowa and is regulated by the Board.

2. Enterprise is currently engaging in this judicial review proceeding to overturn all of the Board's determinations in the underlying administrative docket. *See In re Enterprise Products Operating, LLC*, Dkt. No. SPU-2023-0002, 2023 WL 3093945 (Iowa U.B. Apr. 21, 2023) (the "Docket"). This includes the findings regarding an excessively oppressive and unlawful civil penalty, as well as a threat to remove the veil of confidentiality of certain information provided by Enterprise to the Board. *See* Pet. for Judicial Review, at ¶¶ 3, 4, 10, and Prayer for Relief at (g).

3. The Board issued its original Order on the Docket on April 21, 2023. *See In re Enterprise Products Operating, LLC*, Dkt. No. SPU-2023-0002, 2023 WL 3093945 (Iowa U.B. Apr. 21, 2023).

4. Enterprise timely filed a Motion for Rehearing and Reconsideration on May 11, 2023. That Motion for Rehearing and Reconsideration expressly requested that the Board's civil penalty against Enterprise be eliminated or reduced, and that any documents/records in question subject to potential public disclosure be kept confidential under governing law.

5. The Office of Consumer Advocate ("OCA") supported Enterprise's Motion to Reconsider in a filing submitted on May 25, 2023, concurring with Enterprise that evidentiary development was warranted, and that the Board violated Enterprise's due process rights.

6. Nevertheless, on June 9, 2023, the Board denied Enterprise's Motion for Rehearing and Reconsideration. In that denial order, the Board stated that it would only keep the documents/records in question confidential for fourteen (14) more days pursuant to IOWA ADMIN. CODE r. 199–1.9(6)(d). *See* Order Denying Rehr'g and Reconsideration, at p. 13 (Iowa U.B. Jun. 9, 2023).

7. In response, Enterprise filed a Petition for Judicial Review of Agency Action (the "Petition") with this Court on July 7, 2023 — 28 days later.

8. On July 31, 2023, the Board filed a response to the Petition claiming:

a) *First*, the Petition was untimely, therefore the request for preservation of confidentiality was unavailable as a remedy. The rationale for this argument by the Board was that any plea for confidentiality of the subject documents/records needed to be filed within fourteen (14) days per IOWA ADMIN. CODE r. 199–1.9(6)(d), notwithstanding the fact that IOWA CODE § 17A.19(3) provides, *by law not mere rule*, that a party has thirty (30) days to seek judicial review of any issue decided by an administrative body.

b) *Second*, that a delay of time should be granted for the transmission of the certified record to the Court under IOWA CODE § 17A.19(6).

9. The Board is incorrect on the timeliness issue; it is miscounting statutorily provided days for filing for judicial review of certain claims regarding Enterprise's request to keep certain information confidential.

ARGUMENT

ENTERPRISE'S PETITION WAS TIMELY FILED AND ENTERPRISE IS ENTITLED TO THE CONFIDENTIALITY OF THE RECORDS IN QUESTION. THE BOARD'S ADMINISTRATIVE RULES CANNOT OVERRIDE THE PLAIN LANGUAGE OF THE IOWA CODE.

10. It is axiomatic that "the plain provisions of a statute cannot be altered by an administrative rule or regulation, no matter how long it has existed or been exercised by administrative authority." *State v. Jennie Coulter Day Nursery*, 218 N.W.2d 579, 582 (Iowa 1974) (quoting *Consolid. Freightways Corp. v. Nicholas*, 137 N.W.2d 900, 905 (Iowa 1965)). *See also Clarion Ready Mixed Concrete v. IA Tax Comm'n*, 107 N.W.2d 558 (Iowa 1961) (same).

11. The Board relies almost exclusively on its administrative rules to make its untimeliness argument. That is, they point to IOWA ADMIN CODE r. 199–1.9(6)(d)'s purported 14-day grace period in order to challenge the release of otherwise contested confidential records. The problem with this argument is that the Iowa Code supersedes any authoritative basis for reliance on this inferior administrative regulation.

12. IOWA CODE § 17A.19(3) explicitly says if "a party files an application [with an administrative agency] for rehearing...[a] petition for judicial review must be filed within thirty days after that application has been denied or deemed denied."

13. Here, Petitioner did in fact file a timely motion for rehearing and reconsideration with the Board on May 11, 2023 in response to the Board's original Order issued on April 21, 2023 pursuant to IOWA CODE § 17A.16(2).

14. Here, the Petitioner did comply with *the law* that afforded it thirty (30) days to seek judicial review of the Board's denial of Petitioner's request for a rehearing and reconsideration. *See* IOWA CODE § 17A.19(3). In other words, Petitioner complied with legal authority superior to the Board's *administrative order and agency regulation*. *Compare* IOWA ADMIN CODE r. 199–1.9(6)(d), *with*, IOWA CODE § 17A.19(3).

15. The function of a government agency "is an administrative one, it may enact reasonable rules and regulations necessary in carrying out legislative enactments. But it may not make law, or by rule change the legal meaning of the common law or the statutes." *Clarion Ready Mixed Concrete*, 107 N.W.2d at 507-08 (quoting *City of Ames v. State Tax Comm'n*, 71 N.W.2d 15, 19 (Iowa 1955)).

16. "To permit a commission or board to change the law by giving to the statute or act an interpretation or construction of which its words are not susceptible would be a departure from the meaning expressed by the words of the statute." *IA Dept. of Revenue v. IA Merit Employ. Comm'n*, 243 N.W.2d 610, 615 (Iowa 1976) (citing *Hindman v. Reaser*, 72 N.W.2d 559, 562 (Iowa 1955)).

17. "Phrased differently, administrative rules must be reasonable and consistent with legislative enactments." *IA Dept. of Revenue*, 243 N.W.2d at 615. *See also Bruce Motor Freight, Inc. v. Lauterbach*, 77 N.W.2d 613, 616 (Iowa 1956) ("Rules cannot be adopted that are at variance with statutory provisions, or that amend or nullify legislative intent.").

18. There is nothing in Chapter 22, Iowa's Open Records Act, which imposes a fourteen (14) day deadline to seek relief to halt the potential release of documents/records in the custody of a public entity to an interested person. *See* IOWA CODE § 22.8. There is, however, established statutory code language giving an interested party thirty (30) days to seek judicial relief from an

agency action after filing a motion for a rehearing where such motion was denied. *See* IOWA CODE § 17A.19(3).

19. Further, there is no evidence at this point that anyone has actually requested the documents/records in question. Without a request for those documents/records, Enterprise cannot even make an IOWA CODE § 22.8 preemptive injunction claim, all Enterprise can do is make the same claims to the Board it has already made to date under IOWA CODE §§ 22.7(3); 22.7(6); 22.7(50); 22.7(71); and 49 C.F.R. § 190.343. This is all documented in the record and it was unnecessary to repeat with precise particularity in a petition for judicial review in order to address those exact questions of which the Board was already aware.

20. Enterprise availed itself of its statutory right of judicial review in a timely manner. When doing so, it expressly requested that the Board's original Order be struck down *in its entirety*, including the language regarding the potential release of confidential information. *See* Petition, at ¶¶ 7-10; and Prayer for Relief ¶¶ (a)-(h). This Court should grant Enterprise's request to that effect.¹

¹ As to the statement in the Board's Response about the alleged insufficiencies in pleading with particularity Enterprise's claims for wanting to keep confidential information shielded from disclosure, Enterprise respectfully disagrees. It is true that judicial review situations are not treated as liberally with respect to pleading as a standard civil matter, *see Kohorst v. IA State Commerce Comm'n*, 348 N.W.2d 619, 621 (Iowa 1984), but that argument only goes so far under the facts of this case — and even then, it does not go very far. Once the Board actually transmits the certified record for the Court's consideration in this case, the Court will see that Enterprise filed an explicit Motion for Confidential Treatment with the Board on March 6, 2023, filed a separate Motion to Stay addressing the confidentiality issue on May 2, 2023, filed a 31-page Motion to Reconsider addressing the confidentiality issue comprising of 113 enumerated paragraphs on May 11, 2023, and finally a 20-page Petition for Judicial Review comprising of 103 enumerated paragraphs on July 7, 2023, also addressing the confidentiality issue. To suggest that Enterprise has not made its case for confidentiality with particularity based upon the record at this point strains credibility. The Board is more than well aware of the basis for Enterprise's request for confidentiality. It was adequately pled below and before this Court in the Petition for Judicial Review. *Cf. Welniak v. Alcantra*, 300 N.W.2d 323, 325 (Mich. Ct. App. 1980) ("It is ironic that defendants claim that they would have to begin trial preparation 'from ground zero' in the same breath that they label the {00790135.DOCX }

CONCLUSION

21. The Board's original Order and denial of Enterprise's Motion for Rehearing and Reconsideration was in error and should be reversed by this Court in its entirety, this includes the imposition of the civil penalty amount as well as the prospect of any otherwise protected documents/records being subject to public release.

22. Enterprise sufficiently and timely pled its desire to have the documents/records in question to be kept confidential pursuant to law. This is evident by the language of the Petition for Judicial Review, as well as the filings between Enterprise and the Board below that will eventually become part of the certified record required to be provided pursuant to IOWA CODE § 17A.19(6).

23. Enterprise sufficiently and timely pled its desire to have the civil penalty lifted entirely or, at the very least, reduced to the proper statutory limitation(s). *See* IOWA CODE § 479B.21. This is evident by the language of the Petition for Judicial Review, as well as the filings between Enterprise and the Board below that will eventually become part of the certified record required to be provided pursuant to IOWA CODE § 17A.19(6).

24. Enterprise stands by its previous legal arguments made below, as well as its Petition for Judicial Review in full, and waives no arguments contained therein in this Response.

25. Enterprise does not object to any extension of time for the transmittal of the certified record in this matter.

26. The Board's Pre-Answer Motion to Strike or Recast Enterprise's Petition should be denied.

pleadings too vague to have permitted preparation in the first place... We cannot approve of such a tactic.").

27. Enterprise requests any and all such other further relief as the law, equity, and the nature of this case may require or allow.

DATED: August 9, 2023

Respectfully submitted,

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