IN THE IOWA SUPREME COURT

NO. 22-0385

ENVIRONMENTAL LAW AND POLICY CENTER, IOWA ENVIRONMENTAL COUNCIL and SIERRA CLUB,
Petitioners-Appellants

v.

IOWA UTILITIES BOARD,
Respondent-Appellee,

and

MIDAMERICAN ENERGY COMPANY,
Intervenor-Appellee,

and

OFFICE OF CONSUMER ADVOCATE,
Intervenor.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
THE HON. SAMANTHA GRONEWALD, Judge

APPELLANTS' REPLY BRIEF

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. **Whether the Legislature Clearly Vested the Board with Authority to Interpret Iowa Code Section 476.6(19)**

   Cases
   Cf. Puntenney v. Iowa Utils. Bd., 928 N.W.2d 829 (Iowa 2019)
   Hawkeye Land Co. v. Iowa Utilities Bd., 847 N.W.2d 199 (Iowa 2014)
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   IOWA CODE § 4.1(30)
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   IOWA CODE § 476.6(19)(a)(4)
   IOWA CODE § 476.6(19)(b)
   IOWA CODE § 476.6(19)(c)

2. **Whether District Court Erred by Failing to Interpret Iowa Code § 476.6(19) Consistent with the Principles of Statutory Construction.**
   Cases
   Evercom Sys. v. Iowa Utils. Bd., 805 N.W.2d 758 (Iowa 2011)
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   Statutes
   IOWA CODE § 17A.19(10)(l)
   IOWA CODE § 476.6(19)(a)(4)
   IOWA CODE § 476.8

3. **Whether the District Court Erred in Affirming the Iowa Utilities Board's New Statutory Interpretation Because the Board Failed to Indicate a Fair and Rational Basis for Departing From Its Prior Interpretation of the Statute.**

Cases

Off. of Consumer Advoc. v. Iowa Utils. Bd., 770 N.W.2d 334 (Iowa 2009)

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In re: Interstate Power and Light Co., EPB-2016-0150, Order Approving Joint Motion, Settlement Agreement, and Emissions Plan Update, and Cancelling Hearing (filed May 6, 2017)

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In Re: MidAmerican Energy Company, Docket No. EPB-2018-0156, Direct Testimony of Jennifer A. McIvor (filed Apr. 2, 2018)

ARGUMENT

The District Court erred as a matter of law in affirming the Iowa Utilities Board's novel and erroneous interpretation of the Iowa Code section 476.6(19). This section requires utilities to develop and file "a multiyear plan and budget for managing regulated emissions from its facilities in a cost-effective manner." The key legal issue is whether the Board erred as a matter of law when it interpreted the EPB statute, including the statutory phrase "managing regulated emissions" so narrowly as to *exclude evidence* presented by the Appellants showing that the utility's management strategy would not be reasonably cost-effective because the emissions controls are not economic to operate. MidAmerican's plan focused narrowly on the costs of running existing pollution controls and the Board excluded evidence from other parties of options such as coal plant retirements. The Board's interpretation of law, that the EPB statute does not allow it to consider evidence regarding coal plant retirement as a strategy for managing emissions, is an error because it violates principles of statutory construction. Importantly, the Board's new interpretation contradicts its own past interpretation of the statute, which the Board relied on when it approved past Emissions Plan and Budget dockets that included and considered multiple strategies to manage emissions such as coal plant retirements. The Board's brief attempts to narrowly interpret those

rulings in previous cases, and to limit itself to consideration of alternative compliance options only when the utility introduces it, while excluding the same type of evidence when other parties propose it. As set forth below, this Court should reverse the District Court's affirmation of the Board's new and erroneous interpretation of law that consideration of compliance strategies other than pollution controls such as coal plant retirements are outside of the scope of section 476.6(19) and remand the case to the Board.

I. The Legislature Did Not Clearly Vest the Board with Authority to Interpret Iowa Code Section 476.6(19), and the Court Should not Defer to the Board's Statutory Interpretation.

The Board's primary argument is that the law clearly vests the Board with authority to interpret Iowa Code section 476.6(19) and therefore, the Court should use a deferential standard of review for its interpretation of the statute. (IUB Br. 16-30.) The Board is wrong. Iowa Code section 476.6(19) contains no express or implied intent to vest the Board with interpretative authority over the scope of the statute. Furthermore, the specific statutory term at issue — "managing regulated emissions" — is not a "term of art" that requires the unique subject matter expertise of the Board to understand. *Cf. Puntenney v. Iowa Utils. Bd.*, 928 N.W.2d 829, 836 (Iowa 2019). The Board fails to overcome the high bar necessary to demonstrate clear legislative intent

to delegate interpretative authority, and the Court should therefore interpret the scope of section 476.6(19) *de novo* without deference to the Board.

The Iowa Supreme Court has repeatedly addressed the "threshold question" of deference in cases like *Hawkeye Land Co. v. Iowa Utilities Bd.*, 847 N.W.2d 199 (Iowa 2014) and *Renda v. Iowa C.R. Comm'n*, 784 N.W.2d 8, 11 (Iowa 2010). Those cases make clear that Courts normally interpret statutes independently, *without* any deference to the agency's interpretation, as a question of law:

> Normally, the interpretation of a statute is a pure question of law over which agencies are not delegated any special powers by the General Assembly so, a court is free to, and usually does, substitute its judgment *de novo* for that of the agency and determine if the agency interpretation of the statute is correct.

Renda, 784 N.W.2d at 11. It is only where the legislature has "clearly vested the agency with authority to interpret the relevant statute," that the reviewing court will "give deference and reverse only if the agency's interpretation is 'irrational, illogical, or wholly unjustifiable.'" *Hawkeye Land Co.*, 847 N.W.2d at 207 (citing Iowa Code § 17A.19(10)(l)).

This rule is rooted in important principles of separation of powers. Legislatures make laws, courts interpret them, and agencies must faithfully implement them. Thus, the Board's argument for deference must satisfy a high bar. Agencies are entitled to deference only where the statute in question

provides a "clear indication" that the legislature intended to vest the agency with interpretative authority. *Hawkeye Land Co.*, 847 N.W.2d at 208. Without a "firm conviction" based on the language and context of the statute, the Court must *not* defer to the IUB and instead should interpret Iowa Code section 476.6(19) *de novo* using traditional tools of statutory interpretation. *Id.* (quoting *Renda*, 784 N.W.2d at 11).

In this case, the District Court correctly found that the "'general assembly did not delegate to the Board interpretive power with the binding force of law' with regard to interpreting chapter 476," and that it "will examine the IUB's interpretation of the relevant section of chapter 476 for correction of errors at law and will not give deference to its interpretation. (App. 723 (quoting *NextEra Energy Res. LLC v. Iowa Utils. Bd.*, 815 N.W.2d 30, 38 (Iowa 2012).) The Board disagrees with the District Court, and argues that the legislature has clearly vested it with authority to interpret all of Iowa Code 476.6(19), and that the Court must defer to the Board's interpretation of the statute. (IUB Br. 22-26.)

The Board's argument confuses two distinct issues: the scope of the statute and the factual determinations in weighing evidence. The Board's brief lists every statutory phrase referenced by the Environmental Parties:

> 'managing regulated emissions from its facilities in a cost-effective manner;' 'considered in a contested case proceeding

> pursuant to chapter 17A;' 'reasonably balance costs, environmental requirements, economic development potential, and the reliability of the electric generation and transmission potential, and the reliability of the electric generation and transmission system;' and 'reasonably expected to achieve cost-effective compliance with applicable state and environmental requirements and federal ambient air quality standards.' (IUB Br. 24.)

The Board argues that "[t]he above-referenced statutory phrases are all terms that necessitate a decision by an agency with expertise in setting rates and evaluating the cost of providing electric service for rate-regulated utilities." (IUB Br. at 25.) The Board's initial order identified the statutory language at issue as "the specific requirements in the statute which address compliance with state and federal emissions regulations" (App. 480), but its brief now focuses on language related the setting of rates and cost of service. The former is about which compliance options (and therefore evidence) fall within the scope of the statute, and the latter is about how the Board uses its expertise to weigh and evaluate the evidence.

The actual issue in this case involves the scope of the statute and the parties' right to introduce evidence. The Board does not identify any terms of art that require the Board's special expertise to understand regarding the scope of the statute or in other words, the compliance options that meet state and federal environmental requirements. Instead, the Board's arguments in its brief about its expertise go to the other issue: how the Board gives weight to

the evidence. The Board uses the fact that it requires expertise to weigh the evidence related to utility rates and costs to argue that the Court should also defer to the Board on interpreting the scope of the statute.

The Board did not identify any express grant of legislative authority in the statute. The Board relies on the test in *Puntenney* to argue the legislature clearly vested the Board with the ability to interpret the statute. (IUB Br. at 23-24.) Under that test, courts defer to agency interpretations when the statute includes terms of art within the expertise of the agency or where the language of the statute indicates specific leeway for the Board to interpret compliance. *Puntenney v. Iowa Utils. Bd.*, 928 N.W.2d 829, 836 (Iowa 2019).

Puntenney involved the Board's approval of a pipeline and the use of eminent domain to condemn easements along the pipeline route. *Puntenney*, 928 N.W.2d at 832. The Court found the phrase "public convenience and necessity" was a term of art within the express expertise of the Board, and the accompanying phrase "'unless the board determines' seemingly affords the IUB deference." *Id.* at 836. The Board's reliance on *Puntenney* is misplaced here because the Board has not identified "terms of art" that require the Board's expertise to interpret. In addition, the statutory phrases the Board claims provide it with "leeway" to interpret the statute actually undermine its position.

Unlike the phrase "public convenience and necessity," at issue in *Puntenney*, the phrase "managing regulated emissions" is not about the technicalities of a utility project or an arcane legal expression. It does not require the unique subject matter expertise of the Board to understand whether a compliance option meets environmental emissions standards, and the legislature assigned DNR the responsibility to make that determination. IOWA CODE § 476.6(19)(a)(4). After the DNR's determination about whether the utility plan complies with the environmental standards, the Board considers whether the utility's specific plan will "reasonably balance costs, environmental requirements, economic development potential, and the reliability of the electric generation and transmission system." IOWA CODE § 476.6(19)(c).

The Board errs because it conflates the Board's *fact-finding* discretion to weigh and balance the evidence introduced in the case (which Appellants do not dispute) with the Board's *legal* discretion to interpret the scope of Iowa Code section 476.6(19). Environmental Parties do not dispute that the Board has subject-matter expertise related to the reasonableness of utilities' costs and rates or the balancing of the evidence under the statutory factors set forth in the EPB statute. That is why the Board receives deference to its fact-finding expertise in evaluating and weighing the evidence parties present to the Board

related to compliance options. However, the Board does *not* have specialized or unique subject matter expertise to determine the methods of "managing regulated emissions" that meet environmental emissions standards. That is DNR's job. In other words, this Court's standard of judicial review provides appropriate deference to the Board's fact-finding function under the "substantial evidence" standard at Iowa Code section 17A.19(10)(f), but the Board does not receive deference to entirely *exclude* potentially relevant evidence based on its erroneous interpretation of law. By excluding Environmental Parties' evidence as outside the scope of the statute, the Board pre-determined the range of strategies that could comply with state and federal emissions requirements without analyzing all the options. It precluded the balancing assessment entirely, avoiding the need to apply its expertise to evaluating whether Environmental Parties evidence showed that the utility's proposed plan to incur costs to run its controls was not a reasonably cost effective management strategy. The Court should not defer to the Board's legal interpretation about which emissions management strategies fall within the scope of Iowa Code section 476.6(19).

The Board also argued the legislature intended the Board to have leeway in interpretation of the statute. (IUB Br. at 26-28.) The *Puntenney* Court examined the statutory phrase "A permit shall not be granted to a

pipeline company *unless the board determines* that the proposed services will promote the public convenience and necessity." *Puntenney*, 928 N.W.2d at 836 (citing Iowa Code § 479B.9 (emphasis added by the Court)). The Court explained: "[t]he phrase 'unless the board determines' seemingly affords the IUB deference. Otherwise, if the matter were to be left to judicial determination, the statute would say something like, 'unless the proposed services will promote the public convenience and necessity.'" *Id*. The language the Board cites here is different from the discretionary language the Court evaluated in *Puntenney* and does not provide such leeway or deference.

For example, Iowa Code section 476.6(19)(b) in its entirety reads "[t]he Board shall not approve a plan or update that does not meet applicable state environmental requirements and federal ambient air quality standards for regulated emissions from electric power generating facilities located in the state." IOWA CODE § 476.6(19)(b). The Board cites this section as one example of several related legislative directives that it claims "all require or defer discretion to the Board." (IUB Br. at 28.) But the statute does not support the Board's argument. This code section, like the others cited by the Board, begins with the words "the Board shall." The word "shall" imposes a duty, not discretion. IOWA CODE § 4.1(30). The remainder of that section also works against deference to the Board. Rather than deference to the Board, the statute

requires the Board comply with "applicable state environmental requirements and federal ambient air quality standards" that the Board has no authority or expertise to determine. In fact, DNR makes the determination of compliance with environmental requirements. IOWA CODE § 476.6(19)(a)(4). Read in context, the statute is a limit on the Board's authority. It does not clearly vest the Board with interpretative powers or leeway. It instead "indicates IUB does not have the exclusive authority to administer" the statute and was not vested with interpretive authority. *Hawkeye Land Co. v. Iowa Utils. Bd.*, 847 N.W.2d 199, 209 (Iowa 2014).

The Court should reject the Board's arguments that the legislature clearly vested authority to interpret the scope of the statute and should not apply a more deferential standard of review.

II. The Board's Exclusion of Compliance Options from the Scope of Iowa Code § 476.6(19) Violates the Principles of Statutory Construction Even Under a Deferential Standard.

Section I describes why the legislature did not clearly vest the IUB with authority to interpret Section 476.6(19). However, even if the Court determines otherwise, and decides to review the Board's interpretation under a deferential standard, the Court should still reverse the Board's interpretation of Section 476.6(19) because it fails to follow principles of statutory construction.

The Iowa Administrative Procedure Act provides that in cases where a court determines that a statutory provision has been "clearly vested by a provision of law in the discretion of the agency," the agency's action is still subject to reversal if it is "[b]ased upon an irrational, illogical, or wholly unjustifiable interpretation" of that statute. IOWA CODE § 17A.19(10)(l). Under this standard a court reviews an agency decision for abuse of discretion. *Thoms v. Iowa Pub. Emples. Ret. Sys.*, 715 N.W.2d 7, 11 (Iowa 2006) (citing Arthur Earl Bonfield, *Amendments to Iowa Administrative Procedure Act, Report on Selected Provisions to Iowa State Bar Association and Iowa State Government*, 62 (1998)); *see also Evercom Sys. v. Iowa Utils. Bd.*, 805 N.W.2d 758, 766-67 (Iowa 2011) (reversing the Board for abuse of discretion); *Office of Consumer Advocate v. Iowa Utils. Bd.*, 744 N.W.2d 640, 646 (Iowa 2008) (same). Even under this deferential standard, the agency's interpretation is not "conclusive." *Thoms*, 715 N.W.2d at 12. Instead, the Court engages in traditional methods of statutory construction to determine if the agency's interpretation of law is correct. *See id.*

A. The Board Has Never Provided a Logical Definition for Managing Regulated Emissions.

The Board has yet to provide a statutory analysis that supports its conclusion that coal plant retirements and other compliance options are outside the scope of Iowa Code section 476.6(19). In its Order, the Board did

not offer any statutory interpretation to explain why it determined Environmental Parties evidence of cost-effective emissions management strategies such as coal plant retirements are outside the scope of Iowa Code section 476.6(19). The Board merely stated:

> Based upon ***the specific requirements in the statute which address compliance with state and federal emissions regulations*** and the approval of EPBs in previous dockets, the Board finds that the evidence addressing other options, filed by OCA and the intervenors, is outside the scope of an EPB proceeding under Iowa Code § 476.6(19). (App. 480 (emphasis added).)

This is not a statutory analysis. It is simply a conclusory statement without explanation. The Board never explained how "the specific requirements in the statute which address compliance with state and federal emissions regulations," excluded compliance options that indisputably met state and federal regulations.[1] The Board's brief does not provide a statutory analysis but rather provides arguments for why the Board has deference in how it weighs the evidence. (IUB Br. at 29 ("The Board is to balance the required statutory components of the plan.").) As discussed in Section I, above, the Board's arguments about why it is entitled to deference are not persuasive.

[1] As noted above, the Board is not even entrusted with making that determination. IOWA CODE § 476.6(19)(a)(4).

Environmental Parties provided a statutory analysis grounded in the principles of statutory construction that gives effect to all provisions of the law and is consistent with the plain meaning of the terms at issue. (Env. Parties Br. at 30-49.) Environmental Parties demonstrated how the ordinary meaning of "managing regulated emissions" involves a range of possible actions to control or impact emissions, including coal retirements. This approach to the ordinary meaning of the provision gave effect to the entire statute and squares with the balancing factors the Board must consider: the statute plainly allows for consideration of any strategies that ensure compliance with the state and federal environmental requirements.

The Board did not provide an alternative plain meaning analysis of what "managing regulated emissions" means. MidAmerican did attempt to interpret "manage" claiming that it "does not mean to eliminate, or even reduce or minimize." (MidAmerican Br. at 30) But it then contradicts itself by stating that "in the specific context of the EPB statute, 'manage' clearly means to remain in compliance with state and federal requirements . . . ." (*Id*.) This definition would include options that reduce or eliminate emissions, such as coal plant retirements, so long as the option complies with state and federal environmental requirements. MidAmerican's application of its statutory interpretation of managing regulated emissions is different in this case than

previous EPB dockets. For example in a 2014 case MidAmerican stated in testimony that "MidAmerican determined that, based on economic and other considerations, it is in the best interest of its customers to comply with the MATS and other environmental requirements by ***discontinuing the utilization of coal as a fuel*** . . . ." (App. 324, 493 (*quoting In Re: MidAmerican Energy Company*, Docket No. EPB-2014-0156, Direct Testimony of Jennifer A. McIvor, at 6 (filed Apr. 1, 2014)).)

The meaning of the statute should not change from case to case, and the Board has not put forward a persuasive explanation to justify its narrower interpretation in this case.

B. MidAmerican's Argument that the Statutory Context Requires Treating Utility Evidence Differently than Evidence From Other Parties is Irrational.

MidAmerican argues that the statute requires the Board to put a thumb on the utility side of the scale when weighing evidence in an EPB case. It frames the EPB as "an up-or-down decision on what the *utility* chooses to propose, not a battle of competing proposals . . . ." (MidAmerican Br. at 19 (emphasis added).)

MidAmerican does not reconcile its arguments with the fact that the legislature created EPB dockets as contested cases that provide an opportunity

for evidence from other parties.[2] These statutory provisions demonstrate that a party in the case may present evidence about the utility's proposed plan to meet environmental requirements, and MidAmerican's "up-or-down decision" framework is inconsistent with the statute. Even if MidAmerican were correct that a plan requires an up-or-down decision, it would not prohibit a party from presenting evidence that the utility's proposed emissions management strategy is not cost effective, or that the Board should reject the utility plan because a different plan would strike a better balance between the statutory factors that it must weigh.

MidAmerican argues that it is appropriate to let an applicant set the scope of a proceeding through its submitted plan. (MidAmerican Br. at 19.) The Board has implicitly agreed. (IUB Br. at 38-39.) Allowing a utility to modify the scope of the statute from one update to the next gives the regulated party control over the evidence the Board considers. This is an illogical interpretation of the statute. The Board cannot determine reasonableness of a

[2] The statute plainly contradicts MidAmerican's argument that the utility gets to "choose" which compliance options will be reviewed in an EPB case. The statute places DNR in the driver's seat to ensure consideration of a range of options that meet all environmental requirements: "[i]f the plan does not meet these [environmental] requirements, the department shall recommend *amendments* that outline actions necessary to bring the plan or update into compliance with the environmental requirements." IOWA CODE § 476.6(19)(a)(4) (emphasis added).

proposal and apply the criteria for decision-making if the only evidence allowed is the utility's own plan. The interpretation flips the regulatory relationship on its head, negates the procedural steps required in contested case hearings and renders the repeated nature of EPB updates unnecessary. The utility plan is necessarily a starting point for the EPB process, but a contested case allows critical examination of evidence and introduction of additional evidence by other parties. If other evidence is not within the scope of the statute, there is no need for a contested case proceeding – the Board would just approve whatever the utility submits. But that is not what the statute requires.

MidAmerican appears to have forgotten the relationship it has to the Board when claiming that the EPB is like a license or permit. (MidAmerican Br. at 19.) A utility's relationship with the Board is different than that of a permit applicant to the permitting agency. States grant public utilities a monopoly over electric service and are regulated by the state to ensure their rates are just and reasonable and consistent with the public interest. IOWA CODE § 476.8. EPB updates are a subset of this obligation to provide service at just and reasonable rates. This is why the Board is directed to assess the *reasonableness* of the costs associated with the utility's proposed plan. It is not just a box-checking exercise to confirm that the utility is in compliance

with a permit. If the issue were merely compliance with a permit, the DNR determination required by section 476.6(19)(a)(4) would render the Board's role and the whole EPB statute unnecessary. Instead, the Board must judge the utility's decision-making by considering substantive factors beyond whether its proposal achieves regulatory compliance. Additional evidence from outside parties serves as a check on the utility's evidence and allows the Board to make a more informed decision. In this case, for example, Environmental Parties' testimony addressed all of the statutory factors the Board must consider in its evaluation of the EPB Update. (Env. Parties Br. at17-18.) This evidence would have informed the Board's evaluation of whether MidAmerican's proposed actions were reasonable, had the Board not refused to consider it. If MidAmerican defines the scope of information within the statute, it can exclude the information showing its actions are unreasonable. This is an absurd result and an irrational interpretation of the statute.

The Board's exclusion of alternative compliance options presented by the parties undermines the contested case process, prevents parties from providing information useful for the Board's decision, and as a result prevents the Board from ensuring just and reasonable rates. These deficiencies result from the utility deciding the scope of the statute from case to case, thereby

letting the regulated party dictate what evidence the regulator considers. This absurd result is justification to reverse the District Court's decision.

III. The Board Failed to Indicate a Fair and Rational Basis for Departing From the Board's Prior Interpretation of the Statute.

The Board admits that it has approved prior EPB plans that have included coal plant retirements and considered alternative compliance options as a means of "managing regulated emissions" under Iowa Code section 476.6(19). (IUB Br. at 35-36 ("It is true that prior Board orders have approved EPB plans in which a utility has included a coal plant retirement or alternative compliance options as a cost-effective business decision reflected in its EPB filing.")) Despite that admission, the Board's brief attempts to provide several different justifications to treat this case differently. The Board's explanations attempt to minimize the prior proceedings, create a rule that would not apply generally to all EPB proceedings, and fail to state credible reasons to justify the new and different approach in its interpretation of the scope of the EPB statute. That is reversible error under Iowa Code Section 17A.19(10)(h).

A change to agency practice or procedures "requires consistency in reasoning and weighing of factors leading to a decision tailored to fit the particular facts of the case." *Off. of Consumer Advoc. v. Iowa Utils. Bd.*, 770 N.W.2d 334, 342 (Iowa 2009) (quoting *Anthon–Oto Cmty. Sch. Dist. v. Pub.*

Employment Relations Bd., 404 N.W.2d 140, 144 (Iowa 1987)). An agency may make changes to agency policy and procedure that are generally applicable to all cases that come before the agency or conclude that its past interpretation of a statute was in error and needs correction. *Id.*

The Board's past cases have considered evidence of coal plant retirements as within the scope of the statute. The Board tries to minimize the past precedent by noting that MidAmerican used the same witness to provide testimony related to coal plant retirements in three of the dockets referenced. (IUB Br. at 37 ("Note that these past dockets all involve one witness providing testimony about MidAmerican's EPB.").) That does not change the fact that the Board repeatedly allowed and considered the testimony.

The Board and MidAmerican also attempt to create a new interpretation of the statute that would only allow evidence of coal plant retirements and other alternative compliance options in cases where the utility voluntarily presents evidence. (IUB Br. 39.) ("the Board has approved EPB plans in which a utility has voluntarily included information pertaining to a coal plant retirement or alternative compliance options as a cost-effective business decision. The Board has never required this testimony or allowed others to submit testimony about alternative options."); MidAmerican Br. at 21 FN 10 ("The plan submitted by the utility – including the voluntary choice to retire

coal facilities – is what the Board must evaluate.").) The Board's new interpretation limiting review to evidence the utility "voluntarily" provides is illogical and inconsistent with its approach in prior EPB cases.

For example, the Board's brief notes that in, IPL's 2016 EPB docket, IPL included evidence regarding coal plant retirements. (IUB Br. at 38.) The Board describes this evidence as information voluntarily provided by the utility in an effort to work towards settlement. (IUB Br. at 38.) But, this mischaracterizes why IPL introduced that evidence.

In IPL's 2016 EPB, a witness for the environmental parties challenged IPL's planning assumptions and the reasonableness of IPL's plan. Docket No. EPB-2016-0150, Direct Testimony of Nathaniel Baer at 5 (filed Apr. 27, 2017) ("IPL's analysis is an inadequate comparison of the option of adding the SCR to OGS to the option of retiring the unit").[3] In response, IPL provided testimony that its selected pollution control was a better option than other alternatives it considered:

> IPL concluded that the installation of the SCR was the best option for our customers relative to ***the other options of refueling Ottumwa or retiring it***. . . . IPL also concluded that the installation of the SCR on the Unit was in the best interest of IPL's customers from the perspective of reliability, compliance

[3] The Baer testimony also demonstrates the Board is wrong when it states that it has not "allowed others to submit testimony about alternative options." (IUB Br. at 39.)

> and cost. The ***retirement or refueling on natural gas*** of Ottumwa would be more expensive than installing an SCR.

In re: Interstate Power and Light Co., EPB-2016-150, IPL Supplemental Testimony of Terry L. Kouba, at 4-5 (filed April 11, 2017) (emphasis added). IPL provided evidence about coal retirement and gas conversion options for managing emissions in an effort to create a record that demonstrated its chosen alternative, SCR, reasonably balanced cost, compliance, economic development, and reliability.

The Board did not exclude that evidence as outside the scope of the statute at that time, but instead, the Board used information in the record that compared the SCR system to the retirement compliance option to support the settlement from both a cost and an economic development perspective:

> the record shows that IPL considered other alternatives but determined that utilization of the SCR would be more cost effective than either retiring the plant or converting it to an alternate fuel such as natural gas.
> …
> The installation of an SCR system will also provide economic benefits to the Ottumwa area. In addition to the 96 permanent employees who would lose their jobs if the plant were to be retired, IPL estimates that it will employ up to 150 construction workers during the construction of the SCR system at the OGS.

In re: Interstate Power and Light Co., EPB-2016-0150, Order Approving Joint Motion, Settlement Agreement, and Emissions Plan Update, and Cancelling Hearing, at 5-6 (filed May 6, 2017). Ultimately, the Board found

the "settlement agreement is supported by the record as a whole and consistent with the law." *Id.*

The Board's approach in the 2016 IPL case is the proper procedure. The utility offers a proposed plan for managing emissions, and intervenors may offer testimony in an attempt to persuade the Board that the utility's plan is not a reasonably cost effective control strategy, showing that the utility has not reasonably balanced environmental compliance, cost, reliability and economic development. The Board does not need to request information for a party to file it in a docket or for that information to be within the scope of the docket. Further, the utility does not have to respond to analysis that another party puts forward; it can ignore it because it believes the Board will find it unpersuasive.

MidAmerican's brief is even more brazen in its approach to the past cases where MidAmerican specifically chose to retire coal plants to comply with environmental statutes. MidAmerican's only acknowledgement of the past precedent is in a footnote. (MidAmerican Br. at 21.) Despite its *own use* of coal retirements to manage emissions in prior EPB dockets,[4] MidAmerican

[4] MidAmerican uses the settlement in the 2014 EPB, which included both coal plant retirements and capital expenditures for new pollution controls to argue that Environmental Parties should not be allowed to challenge those plants with pollution controls in the future. Environmental Parties are not challenging the capital costs associated with the pollution control equipment.

now sweepingly asserts that Environmental Parties' attempt to offer evidence regarding the cost-effectiveness of coal plant retirements as an emissions management strategy in an EPB is novel and inappropriate; MidAmerican even goes so far as to attempt to distract the Court with an inapposite comparison to *West Virginia v. EPA*.[5] (*Id.* at 22; 27 (citing and discussing *West Virginia v. EPA*); 28-29.) Never once does MidAmerican try to reconcile these assertions with its own witness testimony evaluating coal plant retirement as a compliance option in past dockets, such as this statement:

> MidAmerican assessed the costs of its compliance options for units not currently scheduled to have controls installed. MidAmerican determined that, based on economic and other considerations, it is in the best interest of its customers to comply with the MATS and other environmental requirements by

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(App. 313.) A claim that a utility does not need to demonstrate the reasonableness of operations and maintenance costs of existing pollution controls is inconsistent with the biennial EPB review and is meritless.

[5] MidAmerican attempts to frame Environmental Parties position as "efforts to use a narrow, specific EPB provision here to press the Board for major statewide energy policy." (MidAmerican Br. at 27) Environmental Parties ability to introduce evidence would not be nearly as consequential and far reaching as MidAmerican implies.

If Environmental Parties can submit evidence, the utility would have an opportunity to rebut the evidence, and the Board would then weigh the persuasiveness of the arguments. If the Board finds Environmental Parties' evidence persuasive, the outcome would not be to order MidAmerican to retire its coal plants. It would simply mean that the utility could not pass the costs associated with its strategy (in this case, emissions control O&M costs) on to ratepayers.

> ***discontinuing the utilization of coal as a fuel*** and not installing environmental controls on five operating units. Therefore, by April 16, 2016, MidAmerican ***will cease burning coal*** at Neal Energy Center Units 1 and 2, Walter Scott Jr. Energy Center Units 1 and 2, and Riverside Generating Station.

(App. 324, 493 (*quoting In Re: MidAmerican Energy Company*, Docket No. EPB-2014-0156, Direct Testimony of Jennifer A. McIvor, at 6 (filed Apr. 1, 2014) (emphasis added); *see also In Re: MidAmerican Energy Company*, Docket No. EPB-2016-0156, Direct Testimony of Jennifer A. McIvor, at 5 (filed Apr. 1, 2016); *see also In Re: MidAmerican Energy Company*, Docket No. EPB-2018-0156, Direct Testimony of Jennifer A. McIvor, at 4 (filed Apr. 2, 2018).) MidAmerican does not try to reconcile its past testimony and position in EPB dockets with its arguments in this case because there simply is no good way to reconcile them. MidAmerican's solution to its own testimony and approach in prior EPB dockets is to ignore it, claim Environmental Parties are trying to rewrite the statute, and hope that nobody notices.

If the utility can present evidence about coal plant retirements to demonstrate its plan for managing regulated emissions reasonably balances costs, environmental requirements, economic development potential, and the reliability of the electric generation and transmission system, then an intervening party should be able to provide evidence about coal plant

retirements to demonstrate that a utility plan does not reasonably balance those factors. The Board attempts to justify the prohibition of non-utility parties presenting evidence on the fact the statute does not explicitly require the utilities to submit evidence on coal plant retirements and other compliance options. If the Board allows inclusion of the evidence when the utility presents it, but excludes the same type of evidence when other parties present it, that is unreasonable, arbitrary and an abuse of discretion.

CONCLUSION

For the reasons set forth above, and in the record, the Court should rule that the District Court erred as a matter of law in concluding that consideration of emission management strategies other than those voluntarily included in a utility's filed plan are outside of the scope of Iowa Code section 476.6(19) and should remand with directions to reconsider the case based on a proper interpretation of the statute.

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Respectfully submitted,

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/s/ Joshua T. Mandelbaum August 22, 2022

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The undersigned hereby certifies that the foregoing Petitioners-Appellants' Final Reply Brief was served upon the attorneys of record listed below by electronic filing and electronic delivery to the parties via the EDMS system on August 22, 2022, pursuant to Iowa R. App. P. 6.902(2) and Iowa R. Elec. P. 16.101(1).

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