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IN THE IOWA SUPREME COURT

NO. 22-0385

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

vs.

IOWA UTILITIES BOARD,
Respondent-Appellee,

and

MIDAMERICAN ENERGY COMPANY,
Intervenor-Appellees,

and

OFFICE OF CONSUMER ADVOCATE
Intervenor.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
HONORABLE SAMANTHA GRONEWALD, JUDGE

APPELLEE'S BRIEF AND ARGUMENT

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ROUTING STATEMENT

Because this appeal involves application of existing legal principles and interpretation of the Iowa Code, this case can and should be transferred to the Iowa Court of Appeals pursuant to Iowa Rule of Appellate Procedure 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

This is an appeal by Petitioners-Appellants, the Environmental Law and Policy Center, Iowa Environmental Council, and Sierra Club (collectively "Environmental Parties") from the district court's February 21, 2022 ruling denying Intervenor Office of Consumer Advocate's ("OCA"), a division of the Iowa Department of Justice, Motion to Reconsider, Amend, and Enlarge, and affirming Respondent-Appellee Iowa Utilities Board's ("Board"), a division of the Iowa Department of Commerce, order approving MidAmerican Energy Company's ("MidAmerican") 2020 Emissions Plan and Budget ("EPB") (App. pp. 761-762; Notice of Appeal).

Iowa law requires each Iowa rate-regulated utility that owns an electric power generating facility fueled by coal to bi-annually file a multiyear EPB for managing regulated emissions from its facilities in a cost-effective

manner. Iowa Code § 476.6(19)(a).[1] Utilities with coal-fueled generating facilities file evidence that includes an Electric Power Generation Facility Budget, Electric Power Generation Facility Emission Plan, witness testimony, and supporting exhibits for the Board's consideration in a contested case proceeding. *Id.* OCA and other entities that have intervened in the proceeding may also file evidence. The Board then determines whether the utility's proposed EPB will achieve cost-effective compliance with applicable state environmental requirements and federal ambient air quality standards by considering if the plan and budget reasonably balance costs, environmental requirements, economic development potential, and reliability of the electric generation and transmission system. *Id.* at § 476.6(19)(c). The Board must either approve or reject the EPB within 180 days after the public utility's filing is deemed complete. *Id.* at § 476.6(19)(d).

The primary issue presented in this appeal is whether the district court erred in affirming the Board's order approving MidAmerican's EPB pursuant to Iowa Code § 476.6(19).

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1. All citations to the Iowa Code are to the 2022 edition unless otherwise indicated.

Course of Proceeding and Disposition in the District Court

On June 11, 2021, the Environmental Parties filed a Petition for Judicial Review. (App. pp. 540-557; 6/11/21 Pet.). The Environmental Parties sought appellate review of the March 24, 2021 Board order approving MidAmerican's EPB and denying the Environmental Parties' application for reconsideration. *Id.* On July 2, 2021, the Board filed an Answer. (App. pp. 558-564; IUB 7/2/21 Answer).

On July 23, 2021, the district court issued an order granting MidAmerican's motion to intervene. (App. pp. 565-567; 7/23/21 Order). On August 25, 2021, the district court issued an order granting OCA's motion to intervene. (App. pp. 568-569; 8/25/21 Order). On December 7, 2021, the district court issued a Ruling on Judicial Review, affirming the Board's March 24, 2021 Order in full and denying the Environmental Parties and OCA's motions for reconsideration before the Board. (App. pp. 729-730; 12/7/21 Ruling pp. 13-14). The district court concluded that: (1) the Board's actions were consistent with past precedent and practice, (2) the Board did not err in interpreting Iowa Code, (3) the Board considered relevant and important information in the record adequately, and (4) the record contained substantial evidence to support the Board's findings that MidAmerican's emissions plans

fulfilled every necessary statutory requirement and were lawful as well as effective. (App. p. 730; 12/7/21 Ruling p. 14).

OCA filed a Motion for Reconsideration on December 21, 2021, arguing that the district court erred in its December 7, 2021 ruling by failing to consider the Legislature's intent for the EPB process to be a collaborative process. (App. pp. 732-735; 12/21/2021 Motion to Reconsider). Following oral arguments on January 28, 2022, the district court issued an order on February 21, 2022, rejecting OCA's arguments and affirming its December 7, 2021 order. (App. pp. 757-760; 2/21/22 Ruling). On February 28, 2022, the Environmental Parties filed its Notice of Appeal, commencing this present action. (App. pp. 761-763; Notice of Appeal).

STATEMENT OF THE FACTS

On April 1, 2020, MidAmerican filed with the Board, in Docket No. EPB-2020-0156, its proposed 2020 EPB, which included an Electric Power Generation Facility Budget Update and an Electric Power Generation Facility Emissions Plan, along with supporting testimony and exhibits and subsequent updated information and amended filings, covering the period from January 1, 2020, through December 31, 2022. (App. pp. 8-40, 48-57; CR pp. 7-39, 54-60, 64-66). The Environmental Parties filed a petition for intervention on April 10, 2020, and the Board granted intervention on May 20, 2020. (App.

pp. 41-47; CR pp. 40-42; 44-47). The Iowa Department of Natural Resources ("IDNR") filed initial testimony indicating that MidAmerican's Emissions Plan met all applicable state environmental requirements for regulated emissions on October 26, 2020. (App. pp. 58-60; CR pp. 67-69).

On October 27, 2020, the Board issued an order deeming MidAmerican's EPB application complete, establishing a procedural schedule, and providing notice of hearing. (App. pp. 61-65; CR pp. 71-75). On November 4, 2020, Petitioner-Appellant Sierra Club and Intervenors Facebook, Inc. and Google LLC ("Tech Intervenors") filed petitions to intervene in the EPB proceeding, which the Board granted on November 24, 2020. (App. pp. 66-72; CR pp. 77-80; 82-84). OCA, the Environmental Parties, and the Tech Intervenors also made filings including statements, initial testimony, and exhibits on December 17, 2020. (App. pp. 73-291; CR pp. 88-99, 504-516, 518-711). All parties filed various supplemental testimony and exhibits throughout the pendency of the case which will be identified with the Appendix citation as specifically referenced herein as necessary. Comments were filed in the docket by Iowa Association of Municipal Utilities, Corn Belt Power Cooperative, and Northwest Iowa Power Cooperative on January 7, 2021. (App. pp. 306-310; CR pp. 734-738).

On February 4, 2021, MidAmerican and OCA filed a joint motion and proposed a non-unanimous settlement agreement of the issues in the EPB docket. (App. pp. 396-401; CR pp. 831-836). The Environmental Parties filed comments addressing the settlement on February 18, 2021, with revised comments filed on February 28, 2021, and the Tech Intervenors filed comments on February 18, 2021. (App. pp. 402-433; CR pp. 857-888). OCA and MidAmerican replied to these comments on February 25, 2021. (App. pp. 434-458; CR pp. 889-896; 924-940). The parties' other filings will be identified herein as necessary.

On March 16, 2021, the Board issued an order establishing deadlines, requiring the filing of a joint statement of issues, and addressing outstanding motions and hearing protocols. (App. pp. 459-466; CR pp. 965-972). The parties filed a joint statement of issues on March 19, 2021. (App. pp. 467-471; CR pp. 973-977). On March 24, 2021, the Board issued an order approving MidAmerican's 2020 EPB, denying MidAmerican and OCA's joint motion and non-unanimous settlement agreement, opening a separate docket to address issues found not to be within the scope of the EPB docket, and canceling hearing. (App. pp. 472-484; CR pp. 979-991). On April 13, 2021, pursuant to 199 Iowa Administrative Code rule 7.27, the Environmental Parties filed an application for reconsideration. (App. pp. 485-505; CR pp.

992-1012). Also, on April 13, 2021, and as amended on April 14, 2021, OCA filed a motion for rehearing and reconsideration. (App. pp. 506-512; CR pp. 1021-1027). On April 27, 2021, the Tech Intervenors filed a response to motions for reconsideration, (App. pp. 513-515; CR pp. 1028-1030), and MidAmerican filed a response to the applications for reconsideration and to the motion for reconsideration and rehearing. (App. pp. 516-527; CR pp. 1031-1042). On May 13, 2021, the Board issued an order denying reconsideration. (App. pp. 528-539; CR pp. 1043-1054).

In its March 24, 2021 order, the Board found MidAmerican's costs associated with its electric power generating facilities fueled by coal were reasonable and MidAmerican's EPB met federal and state emission requirements. (App. pp. 480-481; CR pp. 987-988). The Board also found that the requests for further analysis regarding least-cost options for emissions controls, including retirement of coal facilities, fell outside the scope of an EPB docket and Iowa Code § 476.6(19). (App. pp. 479-481; CR pp. 986-988). Although the Board concluded that least-cost options for emissions controls should not be analyzed in EPB dockets, the Board did agree with the Environmental Parties that those matters, as well as reliability and baseload generation, warranted further review given the rapid changes occurring to the national generation fleet and the February 2021 polar vortex. (App. pp. 482-

483; CR pp. 989-990). As such, the Board opened Docket No. SPU-2021-0003 to explore alternatives for MidAmerican's generating fleet, including the potential retirement of coal plants. (App. pp. 482-484; CR pp. 989-991). Additionally, the Board did not approve MidAmerican's and OCA's proposed settlement agreement as the agreement addressed several items that the Board concluded were beyond the scope of an EPB docket. (App. pp. 481-482; CR pp. 988-989).

ARGUMENT

I. The Iowa Utilities Board's Interpretation of Iowa Code § 476.6(19), When It Approved MidAmerican's 2020 Emissions Plan and Budget, was an Appropriate Interpretation of the Law that has been Clearly Vested with the Iowa Utilities Board.

A. Issue Preservation

Before the agency and the district court, the Environmental Parties argued that the Board improperly interpreted Iowa Code § 476.6(19). Therefore, this issue appears to have been preserved. *See Strand v. Rasmussen*, 648 N.W.2d 95, 100 (Iowa 2002) (stating issues must be presented and decided by the agency and the district court to satisfy preservation requirements).

B. Standard of Review

The "standard of review [on appeal] depends on the aspect of the agency's decision that forms the basis of the petition for judicial review," i.e. if it involves an issue of: 1) findings of fact, 2) interpretation of law, or 3) an application of law to fact. *Burton v. Hilltop Care Ctr., 813* N.W.2d 250, 256 (Iowa 2012). Here, the Board's interpretation of Iowa Code § 476.6(19) is at issue.

Where the Legislature "clearly vested the agency with the authority to interpret specific terms of a statute, then [the Court] defer[s] to the agency's interpretation of the statute and may only reverse if the interpretation is 'irrational, illogical, or wholly unjustifiable.' If, however, the Legislature did not clearly vest the agency with the authority to interpret the statute, then our review is for correction of errors at law." *NextEra Energy Res. LLC v. Iowa Utils. Bd.*, 815 N.W.2d 30, 37 (Iowa 2012) (quoting *Doe v. Iowa Dep't of Hum. Servs*., 786 N.W.2d 853, 857 (Iowa 2010)); see also Iowa Code §§ 17A.19(10)(c), (l) (internal citations omitted).

The *NextEra* Court identified that courts must determine whether the general assembly explicitly vested the Board with the authority to interpret specific terms in chapter 476. *NextEra*, 815 N.W.2d at 37-39. In *Mathis v. Iowa Utils. Bd.*, 934 N.W.2d 423, 427-428 (Iowa 2019), the Court identified

several cases that required a continued exploration of explicit provisions that may still require deference to an agency's statutory interpretation,[2] or at least an analysis to determine if deference is appropriate. Additionally, in the absence of an express grant of interpretive authority, a court must determine whether the Legislature has nonetheless clearly vested the agency with authority to interpret the statutes at issue. *See Baker v. Bridgestone/Firestone*, 872 N.W.2d 672, 675 (Iowa 2015) (citing *Xenia Rural Water Dist. v. Vegors*, 786 N.W.2d 250, 253 (Iowa 2010)).

To conclude that an agency was "clearly vested" with the authority to interpret a statute, a court must have a firm conviction from reviewing the precise language of the statute, its context, the purpose of the statute, the practical considerations involved, and that the Legislature actually intended (or would have intended, had it thought about the question) to delegate to the agency interpretive power with the binding force of law over the elaboration of the provision in question. *See Renda v. Iowa Civ. Rts. Commission*, 784 N.W.2d 8, 11 (Iowa 2010) (quoting Arthur E. Bonfield, *Amendments to Iowa*

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[2]. See *Irving v. Emp't Appeal Bd.*, 883 N.W.2d 179, 184–85 (Iowa 2016); *Iowa Dental Ass'n v. Iowa Ins. Div.,* 831 N.W.2d 138, 144 (Iowa 2013); *Hawkeye Land Company v. Iowa Utils. Bd.,* 847 N.W.2d 199, 207-208 (Iowa 2014); *SZ Enter., LLC v. Iowa Utils. Bd.,* 850 N.W.2d 441, 451–52 (Iowa 2014).

Administrative Procedure Act, Report on Selected Provisions to Iowa State Bar Association and Iowa State Government 62, 63 (1998)).

The Court considers two characteristics when determining whether it should afford an agency deference to interpret a law: an absence of a clear indication that the general assembly intended deference, and if the general assembly provides an agency with a definition of legal terms in a statutory provision. *SZ Enter., LLC v. Iowa Utils. Bd.*, 850 N.W.2d 441, 450 (Iowa 2014) (citing *Renda*, 784 N.W.2d at 11-12). Additionally, when a term is not defined in a statute, but the agency must necessarily interpret the term in order to carry out its duties, courts are more likely to conclude the power to interpret the term was clearly vested in the agency. *Renda*, 784 N.W.2d at 12.

In *Puntenney v. Iowa Utils. Bd.*, 928 N.W.2d 829, 836 (Iowa 2019), the Court concluded that deference was appropriate for the Board's "public convenience and necessity" finding for the issuance of a pipeline permit. The *Puntenney* Court found that the Legislature clearly vested the Board with the authority to interpret the phrase "public convenience and necessity" as used in Iowa Code § 479B.9. 928 N.W.2d at 836. The *Puntenney* Court identified two factors to evaluate what deference to give an agency's statutory interpretation: (1) if an agency's interpretation will be respected when the statute involves a term of art within the expertise of the agency; and (2) if the

Legislature intended to provide leeway to the agency for statutory interpretation, potentially with other language found in the Iowa Code signaling that the Legislature wanted the Board to have leeway in determining phrases.[3] *Id.*

As for the appropriate standard of deference to be accorded to the Board's decision interpreting Iowa Code § 476.6(19) pursuant to Iowa Code § 17A.19(11), the Court should defer to the Board's interpretation of the EPB statute. The Board provides a detailed argument below in support of the conclusion that the Legislature clearly vested the Board with the authority to interpret Iowa Code § 476.6, including Iowa Code § 476.6(19), and that this Court should defer to the Board's interpretation unless the Court finds the interpretation irrational, illogical, or wholly unjustifiable. Iowa Code § 17A.19(10)(c).

C. Argument

In its March 24, 2021 ruling, the Board concluded that alternative emissions management options, including any analysis of coal plant retirements, were outside the scope of Iowa Code § 476.6(19). (App. p. 480;

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[3]. With regard to the phrase "public convenience and necessity," the *Puntenney* Court wrote that the nearby, "phrase 'unless the Board determines' seemingly affords the Board deference." *Punteney*, 928 N.W.2d at 836 (citing Iowa Code § 478B.9).

CR p. 987). The district court agreed with the Board's conclusion when it stated, "the IUB did not err in determining it was not required to address evidence regarding least-cost options for emissions controls and thus the evidence of such filed by Petitioners and OCA was outside the scope of an EPB proceeding." (App. pp. 725-726; 12/7/21 Ruling pp. 9-10).

The Environmental Parties claim error with the Board's interpretation of various phrases found in Iowa Code § 476.6(19) and the Court's affirmation of the Board's order. It is the Board's position that the Iowa Legislature has vested the Board with the authority to interpret Iowa Code § 476.6(19). However, if the Court concludes that deference is not appropriate and finds that the Legislature did not vest the Board with the authority to interpret Iowa Code § 476.6(19), the Court should still affirm the Board's decision and Court's ruling based on a review of correction of errors at law since the Board properly applied the statutory requirements. *NextEra,* 815 N.W.2d at 37 (quoting *Doe v. Iowa Dep't of Hum. Servs*., 786 N.W.2d 853, 857 (Iowa 2010)).

In its December 7, 2021 ruling, the district court wrote:

> The Iowa Supreme Court has determined, "**simply because the general assembly granted the Board broad general powers to carry out the purposes of chapter 476 and granted it rulemaking authority does not necessarily indicate the legislature clearly vested authority in the Board to interpret**

> **all of chapter 476**." *NextEra,* 815 N.W.2d at 38. The court then concluded, based on this and previous case law, that the "general assembly did not delegate to the Board interpretive power with the binding force of law" with regard to interpreting chapter 476. *Id.* Accordingly, here this Court will examine the IUB's interpretation of the relevant sections of chapter 476 for correction of errors at law and will not give deference to its interpretation. *Id.; see also* Iowa Code § 17A.19(11)(b) (stating the court, "Should not give any deference to the view of the agency with respect to particular matters that have not been vested by a provision of law in the discretion of the agency.").

(App. p. 724; 12/7/21 Ruling p. 8.) (emphasis added). Although the district court did not give the Board's interpretation deference, the district court still affirmed the Board's ruling pursuant to a correction of errors at law standard.

Like the district court, the Environmental Parties argue that the EPB statute is part of Iowa Code Chapter 476, and the Iowa Supreme Court has concluded that the Board does not have broad general powers to interpret the language of Chapter 476, citing the above-bolded *NextEra* language. *NextEra*, 815 N.W.2d at 38; Env. Brief p. 29. The Board posits that the district court's conclusion was incorrect with regard to the deference of the Board's interpretation authority for Iowa Code § 476.6(19). Iowa Code chapter 476 contains numberings of 104 sections (although some sections have been repealed). Within Iowa Code § 476.6, there are 21 subsections. The language in *NextEra* does not state that the Board's interpretations for each particular section in Iowa Code chapter 476 should not be afforded deference or that the

Legislature did not clearly vest the Board with interpretation authority for specific provisions in chapter 476. *NextEra*, 815 N.W.2d at 38. Although the Court has concluded the Board was not granted interpretation authority by the Legislature in some chapter 476 subsections,[4] the Court, in its thorough discussion of deference in *SZ Enterprises*, identified a list of cases when the Court has deferred to the Board in Iowa Code chapter 476, including interpretations of rates and services and certain phrases.[5] 850 N.W.2d at 450.

Iowa Code § 476.6(19) satisfies the *Puntenney* Court's identified two factors or tests, to wit an agency's interpretation will be respected when the statute involves a term of art within the expertise of the agency and if the agency was intended by the Legislature to have leeway in interpretation of the statute. *See Puntenney*, 928 N.W.2d at 836. The first test is to determine

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[4]. See e.g., *SZ Enter.*, 850 N.W.2d at 452 (declining to defer to the Board's interpretation of the definition of "public utility" and "electric utility"); *NextEra Energy*, 815 N.W.2d at 38 (declining to defer to the Board's interpretation of "electric supply needs"); *Mathis*, 934 N.W.2d at 428 (holding that the Board did not have authority to interpret a "single site" for purposes of siting wind farms).

[5]. See, e.g., *City of Coralville v. Iowa Utils. Bd.*, 750 N.W.2d 523, 527 (Iowa 2008) (holding the IUB's interpretation of "rates and services" in § 476.1(1) was entitled to deference); *Office of Consumer Advocate v. Iowa Utils. Bd.*, 744 N.W.2d 640, 643 (Iowa 2008) (interpreting the "unauthorized-change-in-service" provisions in § 476.103); *AT&T Commc'ns of the Midwest, Inc. v. Iowa Utils. Bd.*, 687 N.W.2d 554, 561 (Iowa 2004) (per curiam) (holding the IUB's interpretation of § 476.101(9) was entitled to deference).

whether the key phrases at issue here are terms of art within the Board's expertise. The key phrases found in Iowa Code § 476.6(19) and, in whole or in part,[6] identified by the Environmental Parties include: "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." Env. Brief pp. 33-34, 41-43, 45-46; Iowa Code §§ 476.6(19)(a)-(c). These phrases require the expertise of the Board to make the determination of whether the EPB plan meets the statutory requirements. Iowa Code § 476.6(19).

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[6]. The Environmental Parties deconstruct single, complex phrases into two separate phrases in order to support their arguments that the phrases are general terms that do not require the Board's specific expertise for appropriate interpretation. For example, the Environmental Parties argue that definitions of "managing regulated emissions" and "cost-effective" were erroneously interpreted by the district court and the Board to not include evidence of alternative compliance options which the Board found were outside of the scope of the EPB Docket. Env. Brief p. 32. The Board requests that the Court reject this deconstruction approach as the creation of two more general phrases from one specific, complex phrase is not appropriate.

The Board is the regulatory agency that reviews the costs of providing utility service and the reasonableness of rates for rate-regulated utilities. The review required by Iowa Code § 476.33 for setting rates is the same review required by Iowa Code § 476.6(19). Reasonably balancing costs, considering the reliability of the generation facilities, the reliability of the electric system, and the cost-effectiveness of proposed compliance with state and federal regulations are issues that require the specific expertise of the Board that is not found in the general public. The 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. This is even more true when the costs associated with approved EPBs of rate regulated electric generating companies that own and operate coal plants are to be included in the rates paid by ratepayers. These are not general terms, but terms requiring the specific expertise of the Board to determine and manage the proceedings. These terms also are not subject to an independent legal definition not within the subject matter of the Board because they all require the Board, with its special knowledge and expertise, to weigh factors (the statute identifies "balance") relating to the terms of art in electric generation regulation for coal facilities. *See NextEra*, 815 N.W.2d at 37; Iowa Code § 476.6(19)(c).

Even if the Court finds that these key phrases are not terms of art within the special expertise of the Board and the Board has not been vested with interpretive authority by the Legislature, the Board should still be given some degree of deference. The United States Supreme Court has explained that "an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency." *U.S. v. Mead Corp.*, 533 U.S. 218, 234 (2001) (quoting *Skidmore v. Swift & Co*., 323 U.S. 134, 139 (1944)). In *Renda*, the dissent focuses on the perceived error of the majority, stating "[t]he majority may not be required to give the commission's interpretation deference, but courts may nevertheless utilize all agency interpretations as a helpful tool in conducting independent analysis." 784 N.W.2d at 22 (Cady, J., dissenting); *See PanDa Eng'g v. Eng'g & Land Surveying Examining Bd.*, 621 N.W.2d 196, 198 (Iowa 2001). The Court should assign weight to the Board's statutory interpretation even if full deference is not allocated to it to support the district court's affirmance of the Board's conclusions.

The second test is to assess if the Legislature intended the agency to have leeway in interpretation of the statute. The Legislature drafted Iowa Code § 476.6 to govern various utility rate-setting functions that necessarily require the expertise of Iowa's regulatory body, i.e. the Board: temporary and

permanent rates and corresponding hearings; refunds; natural gas and electric supply and cost review; energy efficiency plans and implementation; water costs for fire protection; forecast filings; allocation of replacement tax costs; recovery of management costs; electric power generating facility emissions; pre-approval of cost recovery for natural gas extensions; and federal tax reduction and corresponding customer benefits. *See* Iowa Code § 476.6. Given that this section contains numerous, critical utility obligations that require specific oversight and expertise of the Board for the utility to recover the costs of these activities in rates, Iowa Code § 476.6 is starkly different from other portions of Chapter 476 that appear to include a variety of more generalized utility functions. The Board's required expertise for determining a utility's obligations contained within Iowa Code § 476.6 vests the Board with authority to interpret the corresponding statutory terms and phrases.

The legislative intent also should be examined, taking in the whole of Iowa Code § 476.6(19), the EPB statute. In analyzing whether the Environmental Parties' identified contested key phrase of "managing regulated emissions from its facilities in a cost-effective manner" clearly vests interpretive authority of the statute with the Board, Iowa Code § 479.6(19)(a) provides that each Iowa rate-regulated public utility that owns any electric

power generating facilities fueled by coal and located in this state on July 1, 2001, shall develop a multiyear plan and budget for "managing regulated emissions from its facilities in a cost-effective manner." Env. Brief p. 33.

The next three sections, §§ 476.6(19)(b-d), all begin with, "[t]he Board shall…". In the final section, § 476.6(19)(f), the language even includes the words, "It is the intent of the general assembly" that in an EPB update, the Board "may limit investments or expenditures that are proposed to be undertaken prior to the time that the environmental benefit to be produced by the investment or expenditure would be required by state or federal law." These legislative directives all require or defer discretion to the Board when reviewing whether a utility's plan and budget manage the cost of regulated emissions effectively. Just as the Legislature's directive was found in the phrase "unless the Board determines" in *Puntenney*, the Legislature's language choice in Iowa Code § 476.6(19) grants the Board wide discretion to rule on and oversee the procedures in the EPB statutory provisions. *Puntenney*, 928 N.W.2d at 836 (citing Iowa Code § 478B.9).

The Board must interpret Iowa Code § 476.6(19) to carry out its duties to review MidAmerican's EPB filing as a practical matter and to fulfill the Board's statutory responsibilities. The Board suggests that the Legislature clearly vested the Board with the authority to interpret Iowa Code § 476.6, as

well as Iowa Code § 476.6(19), and that this Court should defer to the Board's ruling unless the Court finds the ruling irrational, illogical, or wholly unjustifiable. Iowa Code §§ 17A.19(10)(c), (n). Alternatively, if the Court finds that the Legislature did not vest the Board with the authority to interpret phrases in Iowa Code § 476.6(19), the Court should still affirm the Board's decision on a review of correction of errors at law as the Board properly applied the statutory requirements.

The Board concludes this argument by emphasizing that the phrase "reasonably expected to achieve cost-effective compliance with applicable state environmental requirements and federal ambient air quality standards" found in Iowa Code § 476.6(19) requires the Board to consider whether the update "reasonably balance(s) costs, environmental requirements, economic development potential, and the reliability of the electric generation and transmission system." Iowa Code § 476.6(19)(c). The statute does not require the Board to give equal weight to all components. The Board is to balance the required statutory components of the plan to ensure the plan complies with state environmental requirements and federal ambient air quality standards. *Id.*

The Environmental Parties assert in their brief that the Board cannot make a reasonable determination of cost effectiveness without considering

other strategies submitted by the parties in an EPB docket and the "reasonably balance" language would be irrelevant. Env. Brief pp. 41-43; (App. pp. 675-676; 10/8/21 Transcript pp. 6-7). The Board found, and the district court affirmed, that MidAmerican's EPB was cost effective when the Board "determined that the capital expenditure and O&M [Operating and Maintenance] expenses information contained in MidAmerican's EPB was cost effective and complied with the requirements of the statute." (App. pp. 727; 12/7/21 Ruling p. 11).

The Environmental Parties' argument should be rejected. The Board adequately and reasonably balanced the statutory components in its March 24, 2021 order approving MidAmerican's 2020 EPB.

II. The Iowa Utilities Board's Conclusion that Consideration of Coal Requirements and Other Compliance Alternatives are Outside the Scope of Iowa Code § 476.6(19) is Consistent with Past Board Practice and Precedent.

A. Issue Preservation

Before the agency and the district court, the Environmental Parties raised their claims that the Board erred in approving MidAmerican's EPB and finding that other issues were beyond the scope of the statutorily defined

docket. Therefore, this issue appears to have been preserved. *See Strand*, 648 N.W.2d at 100 (stating issues must be presented and decided by the agency and the district court to satisfy preservation requirements).

B. Standard of Review

Allegations that an agency's actions should be reversed pursuant to Iowa Code § 17A.19(10)(h) because the agency failed to follow its prior practice or precedent are reviewed under the unreasonable, arbitrary, capricious, or abuse of discretion standard. *Off. of Consumer Advocate v. Iowa Utils. Bd.*, 770 N.W.2d 334, 341 (Iowa 2009) (citing *Finch v. Schneider Specialized Carriers, Inc.*, 700 N.W.2d 328, 332 (Iowa 2005)) (quoting Arthur Earl Bonfield, *Amendments to Iowa Administrative Procedure Act, Report on Selected Provisions* at 69 (1998)).

C. Argument

The Board's March 24, 2021 Order Approving 2020 EPB determined that the Environmental Parties and OCA's requests for further analysis of other items, including retirement of coal plants and least-cost options for emissions controls, fell outside the scope of the EPB proceeding and Iowa Code § 476.6(19). (App. pp. 479-481; CR pp. 986-988). Because the Board found the Environmental Parties and OCA's concerns appropriate for further consideration even if not relevant to the review of the EPB, the Board opened

Docket No. SPU-2021-0003 to evaluate the reasonableness and prudence of MidAmerican's procurement and contracting practices related to the acquisition of fuel for use in generating electricity pursuant to Iowa Code § 476.6(12), to address a forecast of future gas requirements or electric generating needs pursuant to Iowa Code § 476.6(16), and other resource adequacy issues of MidAmerican. *Id.*

This order also identified that the Board would use SPU-2021-0003 to consider all issues raised by the Environmental Parties and OCA that were found to be outside the scope of the EPB statute, which included a review of MidAmerican's plan for meeting its generation requirements, and the retirement of coal generating facilities. The Board's order recognized that Iowa Code § 476.6(19) was intended to provide for consideration of an electric utility's generation compliance with state and federal emissions and clean air regulations, not the utility's generation resource plan. The Board's order stated that Docket No. SPU-2021-0003 would allow interested parties to present plans and would include discussion of least-cost options for generation, environmental requirements, reliability, baseload generation, and economic development potential. (App. pp. 482-484; CR pp. 989-991).

In its December 7, 2021 Ruling, the district court agreed with the Board that evidence of least-cost options for emissions controls was not appropriate

for the EPB proceeding, no remaining material facts were in dispute and thus no hearing was required, and MidAmerican was not required to provide or consider other parties' least cost alternatives assessing the retirement of coal facilities, as part of the analysis of balancing the factors outlined in Iowa Code § 476.6(10)(c). (App. pp. 725-726; 12/7/21 Ruling pp. 9-10). Additionally, with regard to the Board's statements that it had not previously analyzed the retirement of coal facilities when balancing the factors outlined in section 476.6(10)(c) issues (See footnotes 7 and 8 below), the district court did "agree MidAmerican did offer such evidence" in its previous EPB dockets and elaborated that "nothing in the plain text of the statute that required MidAmerican to do so. The fact that MidAmerican voluntarily provided such information in the past does not in any way make it a statutory requirement or a compulsory practice in all EPB reviews." (App. p. 725; 12/7/21 Ruling p. 9).

In its Appellee Brief for Petition for Judicial Review ("district court brief"), the Board extensively detailed several previous MidAmerican EPB dockets and the Environmental Parties (if they were intervenors) and OCA's participation in those dockets. (App. pp. 623-629; IUB Brief Judicial Review pp. 11-17). The Environmental Parties agreed that MidAmerican's 2014, 2016, and 2018 EPB Plans, including MidAmerican's Electric Power

Generation Facility Budget Update, were satisfactory with these plans ultimately being approved by the Board. Env. Brief pp. 53-62; (App. pp. 623-629; IUB Brief Judicial Review pp. 11-17). The plans contained undisputed language that the proposed Economic Development, Transmission System Reliability, and Generation System Reliability were appropriate. See also additional arguments above that no parties disputed the accuracy of MidAmerican's capital expenditure and O&M information for continuing to operate existing pollution controls at its coal plants in the 2020 EPB docket. (App. pp. 481, 645-646, 727; CR pg. 988; IUB Brief Upon Judicial Review pp. 33-34; 12/7/21 Ruling p. 11).

In its district court brief, the Board addressed the Environmental Parties' argument that the Board erred when it stated that reasonable alternatives for emissions compliance "were not raised" in previous EPB dockets and the evidence filed by the Environmental Parties and OCA addressing these other options were outside the scope of an EPB proceeding.

Env. Brief, p. 14; (App. pp. 480, 535-536; CR pp. 987[7], 1050-51[8]). The Board replied that its precedent demonstrates the Board has not required Interstate Power and Light Company (IPL) nor MidAmerican to review multiple options in its EPB dockets, either presented by the utility itself or provided by other parties, before the Board determined if the plan's filings, including testimony, meet statutory requirements. (App. pp. 623-629; IUB Brief Judicial Review pp. 11-17). It is true that prior Board orders have approved EPB plans in which a utility has included a coal plant retirement or alternative compliance

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[7]. "OCA and the other intervenors argued that MidAmerican should be required to look at multiple options, including retirement of coal facilities, as part of the analysis of the balancing factors outlined in Iowa Code § 476.6(19)(c). These issues have not been raised in previous EPB dockets, and the EPBs in those dockets were found to be in compliance with the statute. 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. p. 480; CR p. 987).

[8]. "Both the Environmental Parties and OCA identified valid concerns, and the Board agreed that these concerns deserve further attention. The Board stated in its March 24, 2021 Order Approving 2020 EPB that these issues have not been raised in previous EPB dockets, and the EPBs in those dockets were found to comply with the statute. Based upon the specific requirements in the statute that address compliance with state and federal emissions regulations and the approval of EPBs in previous dockets, the Board found that the evidence filed by OCA and the Environmental Intervenors addressing these other options was outside the scope of an EPB proceeding." (App. pp. 535-536; CR pp. 1050-51).

options as a cost-effective business decision reflected in its EPB filing. (App. p. 624; IUB Brief Judicial Review p. 12).

The Environmental Parties argue that "the Board's Order in the MidAmerican 2020 EPB Update was an unjustifiable change in the Board's statutory interpretation that requires reversal under Iowa Code § 17A.19(10)(h)." Env. Brief p. 52. The Board has addressed many of the previous dockets in its district court brief. (App. pp. 625-629; IUB Brief Judicial Review pp. 13-17). However, the Board will briefly address some arguments made before this Court.

The Environmental Parties state that as part of an EPB update in 2014, a MidAmerican witness testified that MidAmerican would transition away from coal burning in select electric generating stations. Env. Brief pp. 53-54; (App. pp. 324, 493-496; CR pp. 754, 1000-1003). The Board approved this plan as part of a partial settlement with this testimony contained within an exhibit attached to the settlement. Env. Brief pp. 53-54; *In Re: MidAmerican Energy Company*, Docket No. EPB-2014-0156, 2015 WL 1155934, at *5 (Iowa U.B. Mar. 12, 2015). In 2016 and 2018, MidAmerican also filed, as part of its EPB plan, an explanation that it was choosing to retire select coal burning electric generating units as stated in part of its witness testimony. Env. Brief p. 55; *In Re: MidAmerican Energy Company*, Docket No. EPB-

2016-0156, Direct Testimony of Jennifer A. McIvor, at *5 (Iowa U.B. Apr. 1, 2016); *see also In Re: MidAmerican Energy Company*, Docket No. EPB-2018-0156, Direct Testimony of Jennifer A. McIvor, at *4 (Iowa U.B. Apr. 2, 2018).

Note that these past dockets all involve one witness providing testimony about MidAmerican's EPB. The Environmental Parties transform this inclusion of information into a required discussion about alternative compliance options (either produced by the utility or other parties) in every EPB docket. This does not reflect the Board's precedent or align with the statute's requirements as Iowa Code does not require an investor-owned utility to produce multiple compliance options. Iowa Code § 476.6(19).

The Environmental Parties cite to Docket No. EPB-2016-0150 regarding a settlement involving IPL. The Environmental Parties state:

> The Board did not conclude, as it did here, that retirement was "outside the scope of an EPB proceeding." The Board in approving the settlement noted that "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." *In re: Interstate Power & Light*, Docket No. EPB-2016-0150, Order Approving Joint Motion, Settlement Agreement and Emissions Plan Update and Canceling Hearing, at 5 (filed May 16, 2017).

(Env. Brief p. 58) (emphasis original).

However, the Environmental Parties take this quotation out of context. IPL filed testimony about one contested issue in that case: the installation of a selective catalytic reduction system (SCR) in an electric generating unit, and some parties objected. *In re: Interstate Power & Light Co.*, Docket No. EPB-2016-0150, 2017 WL 2214550 at *3 (Iowa U.B. May 16, 2017). IPL submitted testimony that it considered alternatives but concluded the installation of the SCR was the most cost-efficient option while allowing for environmental compliance. *Id.* The Board ultimately approved IPL's unanimous settlement upon being provided details that the settlement included the SCR plan which furthered compliance with Iowa Code § 476.6(20). *Id.* at *3-4.

In the 2016 IPL case, the Board never asked for information about alternative options. *Id.* at *3. Alternative options were offered by IPL. The Board never determined that other parties could submit alternative plans that IPL had to consider; IPL made the decision to consider the alternative options and submit them to the Board. *Id.* The utility's initiative to work with other parties to resolve a disputed issue does not translate to a statutory mandate that the Board requires a utility to consider alternative options upon demand from one party. Parties may settle disputes and the Board will review to ensure that settlement is reasonable and follows the law.

There is nothing "new" or "novel" with the Board's interpretation of the EPB statute as suggested by the Environmental Parties. Env. Brief p. 30. The Board reviews the filing and assesses the parties' arguments. The Board has not required alternatives to be considered before settlement or approval. Board precedent reflects the Board has never required IPL nor MidAmerican to review multiple options in its EPB dockets before the Board determines whether the plan's filings meet statutory requirements.

As discussed above, 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. The district court rightly held that "[a]ccordingly, the Court concludes the IUB did not err in determining it was not required to address evidence regarding least-cost options for emissions controls and thus the evidence of such filed by Petitioners and OCA was outside the scope of an EPB proceeding." (App. p. 726; 12/7/21 Ruling p. 10).

The Board followed its precedent in MidAmerican's 2020 EPB docket when it did not require alternative compliance options to be made in an EPB docket. The Court should reject the Environmental Parties' arguments.

III. The District Court did not Err When It Found the Iowa Utilities Board's Ruling Approving MidAmerican's 2020 Emissions Plan and Budget is Supported by Substantial Evidence in the Record.

A. Issue Preservation

Before the agency and the district court, the Environmental Parties raised their claims that the Board erred in approving MidAmerican's EPB and finding that there was substantial evidence in the record to support the Board's approval of MidAmerican's EPB filing. However, no substantial evidence argument is made and there is no reference to Iowa Code § 17A.19(10)(f) regarding substantial evidence in their initial brief. This issue has not been preserved and the Board details its argument below.

B. Standard of Review

Pursuant to Iowa Code § 17A.19(10)(f), the question is whether the Board's determination is supported by substantial evidence when the record is viewed as a whole. *See S.E. Iowa Coop. Elec. Ass'n v. Iowa Utils. Bd.*, 633 N.W.2d 814, 818 (Iowa 2001) (applying a substantial evidence standard). "Evidence is not insubstantial merely because different conclusions may be drawn from the evidence;" 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. *Id.* The reviewing court's "task is to

determine whether substantial evidence, viewing the record as a whole, supports the findings actually made." *Id.*

"'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 establishment of that fact are understood to be serious and of great importance." Iowa Code §§ 17A.19(10)(f), (1). A district court's review "is limited to the findings that were actually made by the agency and not other findings the agency could have made." *Burton*, 813 N.W.2d at 256. "The agency's decision does not lack substantial evidence merely because the interpretation of the evidence is open to a fair difference of opinion." *ABC Disposal Sys., Inc. v. Dep't of Nat. Res.*, 681 N.W.2d 596, 603 (Iowa 2004).

C. Argument

The Environmental Parties made strategic decisions to abandon the substantial evidence argument.[9] Iowa Code § 17A.19(f). The Environmental Parties argued in their district court brief and during oral argument that the Board's conclusions were not supported by substantial evidence. The

[9]. The Environmental Parties also did not include arguments for Iowa Code § 17A.19 (j) and (l). Consequently, they should not be allowed to utilize these code sections to support any future written or oral arguments.

Environmental Parties' brief has no substantial evidence argument and does not ask the Court to perform an assessment of substantial evidence.

The undersigned respectfully posits that a substantial evidence argument cannot be an issue considered in this appeal. See *Iowa Ass'n of Bus. and Indust. v. City of Waterloo*, 961 N.W.2d 465, 480 (Iowa 2021) (McDonald, J., concurring in part and dissenting in part) (stating a party's "failure to raise the issue in its briefing constitutes a waiver or forfeiture of the issue"). Further, the undersigned respectfully posits that the Environmental Parties should not be allowed to resurrect the substantial evidence argument by discussing, for the first time, in their reply briefs. *See Villa Magana v. Stat*e, 908 N.W.2d 255, 260 (Iowa 2018) (holding that the Court will not normally "consider issues raised for the first time in a reply brief").

The district court wrote:

> Petitioners allege there is not substantial evidence in the record to support the IUB's conclusions, it did not consider all relevant matters, and it did not give sufficient findings with regard to this requirement. As concluded above, the IUB did not err in finding the statute does not require MidAmerican to provide or consider evidence of other options, including retiring of coal units. Thus, there were no material facts about the EPB in dispute. The IUB concluded that MidAmerican,
>
> provided sufficient information in its EPB to assess whether the plan reasonably balances costs, environmental

> requirements, economic development potential, and the reliability of the electric generation and transmission system. The [IUB] finds that MidAmerican's plan reasonably balances the criteria identified in Iowa Code [section] 476.6(19)(c). . . .
>
> Therefore, the IUB made sufficient findings to support its conclusion that MidAmerican's plan reasonably balances the criteria required in Iowa Code section 476.6(19)(c), and such determination was not arbitrary, capricious, or unsupported by the evidentiary record.

(App. pp. 727-729; 12/7/21 Ruling pp. 11-13) (citation omitted).

The Board found that the evidence provided by MidAmerican and IDNR shows that MidAmerican's 2020 EPB met applicable state environmental requirements and federal air quality standards. (App. pp. 480-481; CR pp. 987-988). This information, along with other filed testimony, allowed the Board to find that MidAmerican provided sufficient capital expenditure information and O&M expense information to assess whether the plan reasonably balances costs, environmental requirements, economic development potential, and the reliability of the electric generation and transmission system as required by Iowa Code § 476.6(19)(c). *Id.*

Because the Environmental Parties did not preserve this issue for the Court and since this is not a viable argument for this appeal, the Board refers the Court to its district court brief for additional detail of its arguments which

should sufficiently address this issue. (App. pp. 643-648; IUB Judicial Review Brief, pp. 31-36).

CONCLUSION

Based on the authority, argument, and analysis contained herein, Appellee Iowa Utilities Board respectfully requests this Court affirm the district court's February 21, 2022 order rejecting the Office of Consumer Advocate's December 21, 2021 Motion for Reconsideration and affirming its December 7, 2021 Order Denying and Dismissing Petition for Judicial Review.

NONORAL SUBMISSION

The undersigned believes this matter may be properly submitted based on the parties' briefs. In the event this matter is set for argument, the undersigned requests to be heard.

ATTORNEY COST CERTIFICATE

Undersigned counsel certifies there was no cost paid by the Iowa Utilities Board as contemplated by Iowa R. App. P. 6.903(2)(j).

/s/ Kim Snitker August 24, 2022
Kim Snitker

CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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/s/ Kim Snitker
Kim Snitker

August 24, 2022
Date

CERTIFICATE OF SERVICE

I, Kim Snitker, hereby certify that on August 24, 2022, I electronically filed the Appellee Brief with the Clerk of Court by using the Iowa Electronic Document Management System which will send a notice of electronic filing to the following:

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