IN THE IOWA DISTRICT COURT FOR POLK COUNTY

ENVIRONMENTAL LAW AND POLICY CENTER, IOWA ENVIRONMENTAL COUNCIL, & SIERRA CLUB Petitioners, v. IOWA UTILITIES BOARD, STATE OF IOWA, Respondent.	No. CVCV061992 PETITIONERS' BRIEF

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Authorities:

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IOWA CODE § 17A.19(11)(a) and (b)
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IOWA CODE § 17A.19(11)(c)
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II. STATEMENT OF THE CASE

A. Statutory Background and Nature of the Case

The Iowa Utilities Board (IUB, or the Board) is an agency of the State of Iowa charged with regulating the rates and services of public utilities. The Board administers Iowa Code § 476.6(19), which requires each rate-regulated public utility that owns one or more coal-fired electric generation facilities to "develop a multiyear plan and budget for managing regulated emissions from its facilities in a cost-effective manner." IOWA CODE § 476.6(19)(a).

A utility must file the initial emissions plan and budget (EPB) to the Board, and updates to the EPB every twenty-four months. *Id.* The Board must assess every EPB in a fresh contested case proceeding, *id.*, and the Board may approve the EPB only upon an affirmative finding that it meets several statutory criteria. The EPB must be "reasonably expected to achieve cost-effective compliance with applicable state environmental requirements and federal ambient air quality standards." *Id.* § 476.6(19)(c). To determine whether the EPB update meets this standard, the Board must "consider whether the . . . update and the associated budget reasonably balance costs, environmental requirements, economic development potential, and the reliability of the electric generation and transmission system." *Id.* From the very first EPB proceedings in 2002, the Board has interpreted the statute to require that each EPB update must include "sufficient information . . . for the Board to be able to evaluate the plan and determine whether or not it meets the statutory requirements." *In Re: MidAmerican Energy Co.*, Docket No. EPB-02-0156, Order Requiring Additional Information, 2002 WL 31235705, at *1 (Iowa Utils. Bd., filed Aug. 27, 2002).

Petitioners have requested review of the Board's decision to approve MidAmerican Energy Company's (MidAmerican) 2020 EPB Update (EPB Update). MidAmerican is a rate-regulated public utility that owns and operates five coal-fired electric generation plants and is the majority owner but not the operator of a sixth. ELPC, IEC, and Sierra Club were intervening parties in the EPB docket. (CR[1] pp. 44-47, 82-84.) In addition, the Office of Consumer Advocate, Iowa Department of Natural Resources, Facebook, Inc., and Google, Inc. were all parties to MidAmerican's 2020 EPB.

B. MidAmerican's 2020 EPB Filing

MidAmerican's 2020 EPB filing requested approval for operations and maintenance (O&M) expenditures associated with emissions controls at the at the following coal-fueled facilities: Walter Scott, Jr. Energy Center Unit 3, George Neal Energy Center (Neal) Unit 3, Neal Unit 4 and Louisa Generating Station. MidAmerican also reported its share of the costs associated with emissions reduction measures at the Ottumwa Generating Station, which it co-owns with the Interstate Power and Light Company. (CR pp. 9, 11-14.) It described the O&M costs of pollution control equipment—such as "dry scrubber, baghouse, and mercury control operations . . . [and] Selective Non-Catalytic Reduction ("SNCR") systems"—that MidAmerican had already installed at coal-fueled facilities in previous years. (CR p. 9.)

MidAmerican's filing did not discuss alternative compliance options, including coal unit retirement. (*See* CR pp. 7-19.) The EPB Update also did not explain, in any detail, why the proposed compliance plan is "cost-effective" or why it "reasonably balance[s] costs, environmental requirements, economic development potential, and the reliability of the electric generation and transmission system," as required by § 476.6(19)(c) of the Iowa Code. (*Id.*) The

[1] "CR" stands for the Certified Record filed in this docket.

2020 EPB Update included just half a page to address both the economic development potential and the reliability of the generation and transmission systems. (CR p. 12.) As a witness for Google and Facebook put it, "the evidence relating to the need for and cost-effectiveness of the emissions plan and its impact on the reliability of the generation and transmission system is sparse." (CR p. 807.)

During discovery, MidAmerican actively resisted other parties' requests to fill in these gaps in the record. (CR pp. 505-08.) In contrast, ELPC, IEC, and Sierra Club submitted testimony from David B. Posner and Steven C. Guyer demonstrating that the retirement of Neal Unit 3 and Neal Unit 4 represented a more cost-effective strategy for managing emissions- from the facilities to meet the state and federal environmental requirements. (CR pp. 509-16, 518-710.)

Witness Posner analyzed the cost of continued operation of these coal plants and their emissions controls as proposed by MidAmerican, comparing it to the cost of retiring them and replacing them with renewable energy. Witness Posner's direct testimony showed that "Neal Unit 3 and Neal Unit 4 have been uneconomic to operate for several years." (CR p. 521.) Witness Posner cited to an analysis by Paul Chernick that showed that the Neal units cost customers an extra $17 million per year to keep operating, versus retiring and replacing with market energy purchases. (CR p. 554, tbl. R-3.) Further, the Posner testimony demonstrated that the cost of MidAmerican's proposed strategy for managing emissions exceeds the cost of reasonable alternatives. (CR pp. 521-23.) Witness Posner concluded that retiring the Neal units, refinancing the capital investment as debt, and replacing the energy and capacity with wind could reduce long-term costs to customers by 9.7% for Neal Unit 3 and 22.6% for Neal Unit 4. (CR p. 522.) Moreover, the testimony in the record shows that customers could see an immediate benefit: the first-year savings from retirement could be 15% for Neal Unit 3 and 19.3% for Neal Unit 4. (CR pp. 532-34.)

Witness Posner accounted for reliability concerns in his testimony by considering available generation capacity and providing excess capacity in his model. MidAmerican has excess capacity greater than the capacity of the Neal units such that that it could retire Neal Unit 4, not replace it with *any* new generation, and still have excess capacity in 2029-2030. (CR p. 535-36.) On top of the existing excess generation, Posner modeled a retirement and replacement scenario that provides excess wind generation capacity. This extra capacity provides several benefits that indicate reliability would not be a problem upon retirement of the Neal units. The replacement option proposed by Witness Posner would include 17% more wind capacity than necessary to replace the Neal units' energy production in 2019. (CR p. 535.) The revenue from the excess capacity could be used to purchase or otherwise accommodate other ancillary services needed to fully replace coal generation. (CR p. 524.) Finally, MidAmerican could use some of the savings to add battery storage to provide additional reliability benefits. (CR pp. 537-38.)

Witness Guyer explained that coal units that retire are in compliance with applicable state and federal air emission regulations. That is, coal plant retirement is an accepted emissions management strategy under state and federal law. (CR p. 511.) He further explained that it is cost-effective to retire Neal 3 and Neal 4 and stated that the Board should not approve costs associated with these units. (CR pp. 513-15.) He explained how retirement of the Neal units would eliminate their emissions regulated under the Clean Air Act, thereby increasing the air emissions available for other development. (CR p. 511.) Witness Guyer also provided evidence that additional wind generation brings economic development benefits that include additional tax base, direct payments to landowners, attracting new businesses, payroll and supply chain revenue, permanent local jobs, and increased local spending. (CR pp. 755-56.) The transition to wind relies on Iowa resources and local jobs, including supporting in-state manufacturing. (CR p. 756.)

Office of Consumer Advocate (OCA) witness Scott C. Bents stated that the 2020 EPB Update is not a cost-effective plan for managing emissions from MidAmerican's coal plants. (CR p. 91.) He criticized MidAmerican's "narrow focus on emissions controls equipment" and stated that the Update must consider "alternative compliance options." (CR p. 90.) He further explained that MidAmerican "has not shown that it made any attempt at all to balance [the four statutory] criteria." (CR p. 96.)

The only evidence on record shows that retirement is a strategy to manage regulated emissions from the facilities that meets the state and federal environmental requirements, increases economic development, and maintains reliability at least as well as status quo operation of pollution control equipment. (CR pp. 90-91, 513-15, 521-23.) Petitioners therefore asked the Board not to approve MidAmerican's EPB Update.

In its Reply Testimony, MidAmerican did not rebut the cost analysis presented by Petitioners' witnesses and did not contest the experts' conclusion that retirement of the Neal units would be more cost effective than continuing to operate them. Instead, MidAmerican contended that an EPB docket is not an appropriate venue to consider cost savings that result from coal plant retirements. (CR p. 714.) MidAmerican further claimed that retirement is not an emissions management strategy, and that the utility therefore does not need to consider retirement as an alternative to continued unit operation. (CR pp. 719-20.) MidAmerican also asserted that because the initial installation of the emissions controls had been approved in a prior docket, it was "unreasonable to withhold approval" for continued operation of those controls. (CR p. 721.)

In Reply Testimony, Witness Posner clarified that his testimony was not challenging the prudency of the initial capital expenditures on the emissions controls that the Board had previously approved. (CR pp. 743.) Instead, his analysis showed that the costs of continuing to operate and

maintain the coal plants with their existing emissions controls were higher than reasonable alternatives. Specifically, his analysis found that both of the Neal coal facilities could be retired, their capital (including capital spent on existing emissions controls) recovered, and their energy output and additional services replaced at a lower levelized cost than continued operation of the Neal units with the installed controls. (*Id.*)

Witness Guyer filed reply testimony that addressed economic development potential arguments. He specifically noted that, if (as MidAmerican agreed) economic development potential came from pollution reduction by simply controlling emissions, then there would be an even greater economic benefit from eliminating emissions entirely. (CR p. 757.) He also observed that, as MidAmerican itself has acknowledged, replacing retiring coal units with renewable energy has significant economic development potential. (CR pp. 755-56.)

On February 4, 2021, MidAmerican and the Office of Consumer Advocate filed a Joint Motion and Non-Unanimous Settlement Agreement (Proposed Settlement) pursuant to 199 Iowa Admin. Code § 7.18. (CR pp. 831-36.) The Proposed Settlement acknowledged that:

> actions by a rate-regulated public utility with respect to the operation of coal-fired power plants can and do have an impact on the amount of regulated emissions produced by those plants. Such actions include:
>
> a. Installation/adoption of environmental controls and techniques
> b. Fuel switching
> c. Modified dispatch (coupled with increased reliance on lower emission resources and/or energy storage)
> d. Generating unit retirement
> e. Reliance on emission allowances
> f. Addition of new generation sources, both renewable and fossil fuel, as well as energy storage
> g. Load growth management
> h. Wholesale market transactions and retail sales of electric energy.

(CR pp. 833-34.) The Proposed Settlement agreed to review coal unit retirement and other enumerated alternatives outside of the EPB proceeding. It stated that the purpose of the separate review would be "to demonstrate how MidAmerican is managing its current generation resources and how it is planning for new resources in a manner that are cost-effective . . . ." (CR p. 835.)

Petitioners ELPC, IEC and Sierra Club filed Comments objecting to the non-unanimous settlement and suggesting modifications to the proposed settlement that would allow it to meet the statutory requirements. (CR pp. 857-83.) Petitioners' comments explained that the Proposed Settlement was inconsistent with the EPB statute because it does not require MidAmerican to satisfy the requirements of the EPB statute within the EPB docket. (CR pp. 860, 868-69.) Instead, the settlement would address those requirements in a separate, non-contested docket lacking contested case procedures such as discovery. (CR p. 871.) Petitioners' comments further explained that the Proposed Settlement attempted to circumvent the requirements of the EPB statute altogether and shield MidAmerican from the cost-effectiveness analysis required in the EPB docket now and into the future. (CR p. 860.) Excluding the analysis from a contested case process prevents public scrutiny and the opportunity to contest the utility's assumptions, analysis, and actions. (CR p. 870-71.)

Petitioners' comments on the Proposed Settlement further noted that no party disputed that the Neal units currently operate in compliance with their air quality permits. Rather, the parties disputed whether compliance with air quality permits alone abdicates a utility from needing to evaluate whether other compliance options exist that would manage emissions more cost-effectively and better balance the statutory factors. (CR p. 862.) Petitioners also asserted that the fact that MidAmerican failed to meet its burden of proof to develop a record that demonstrates continuing to run Neal Unit 3 and Neal Unit 4 is a reasonably cost-effective emissions management

strategy meant that the record in the case did not support the non-unanimous settlement. (CR p. 866.)

C. The Board's Decision

The Board initially responded to these developments by establishing, by its Order dated March 16, 2021, a hearing and briefing schedule. (CR pp. 965-72.) The parties submitted a Joint Statement of Issues on March 19, 2021, which indicated that all parties agreed that the reasonableness of the settlement was at issue. (CR p. 974.) In addition, it stated that Petitioners disputed issues identified in the record regarding the retirement of the Neal plants and the adequacy of the MidAmerican's evidence. (CR pp. 975-76.)

However, on March 24, 2021—one week before the scheduled date of the hearing—the Board issued an Order approving the EPB update as originally proposed by MidAmerican, rejecting the proposed settlement, and canceling the hearing. (CR pp. 979-91.) The Board held that evaluation of alternative emissions management options is outside of the scope of the statute. The Board reasoned:

> 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). (CR p. 987.)

The Board order did not lay out any specific findings of fact or any citations to the record on this issue, and instead generally concluded that MidAmerican's EPB provided sufficient information and reasonably balanced the criteria in Iowa Code § 476.6(19)(c). (CR p. 988.)

Despite established practice in previous EPB proceedings of evaluating and adopting coal unit retirement as a compliance option, the Board declined to consider the ELPC, IEC, and Sierra Club testimony as well as the OCA testimony filed in opposition to the 2020 EPB Update because, in its view, "evidence addressing other options, filed by OCA and the intervenors, is outside the scope of an EPB proceeding." (CR p. 987.) Nevertheless, the Board admitted all parties' filings into the record. (CR p. 988.)

Because it found that the testimony presented by OCA and intervenors was outside of the statutory scope, the Board concluded that there were no material facts in dispute. (CR p. 987.) The only relevant evidence on the issues in controversy, according to the Board, was the "evidence provided by MidAmerican . . . ." (CR p. 987-88.) The Board summarily stated that MidAmerican's plan was cost-effective. (CR p. 988.) The Board did not specify any facts or evidence in the record to support this finding.

On April 13, 2021, Petitioners filed an Application for Reconsideration pursuant to Iowa Code § 17A.16(2) and 199 Iowa Admin. Code § 7.27(1). (CR p. 992-1012.) Petitioners noted that the Board was incorrect in finding that prior EPB proceedings had not raised coal plant retirements as an emissions compliance strategy. (CR p. 1000-1004.) ELPC, IEC and Sierra Club specifically highlighted the multiple examples of past EPB dockets where retirement or other compliance options had been considered as part the emission management strategy. (*Id.*) This included references to MidAmerican dockets EPB-2014-0156, EPB-2016-0156, and EPB-2018-0156, and Interstate Power & Light docket EPB-2016-0150. (*Id.*) In those dockets, the Board had approved coal plant retirements as compliance strategy and did not reject them as outside the scope of the EPB statute. OCA filed a separate Motion for Rehearing and Reconsideration. (CR pp. 1021-27.)

In its May 13 Order, the Board stood by its prior assertion that alternative compliance options such as retirement had not been considered in previous EPB dockets. (CR p. 1050 ("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.").) The Board did not directly address the other EPB dockets that ELPC, IEC, and Sierra Club specifically raised in its Motion for Reconsideration and previously in testimony in the docket. (CR pp. 1000-04; CR pp. 753-55.)

The Board correctly noted that there was no dispute about whether MidAmerican's proposed emissions compliance strategy of continuing to operate existing air pollution controls met the state and federal environmental requirements. (CR p. 1051.) The Board also correctly pointed out that no party disputed the accuracy of the costs for MidAmerican to operate and maintain the pollution controls included in MidAmerican's EPB update. (*Id.*) The Board also claimed that there was no disputed fact about whether MidAmerican's plan reasonably balanced environmental requirements, costs, economic development potential, and the reliability of the electric generation and transmission system. (CR p. 1052.) The Board was only able to make such a statement by erroneously excluding consideration of ELPC, IEC, and Sierra Club's testimony as outside of the scope of the docket. According to the Order, "[b]ecause there were no disputed material facts, the Board found substantial evidence in the record to approve MidAmerican's 2020 EPB filing." (*Id.*) The Board again did not provide specific findings of fact or other affirmative reasons explaining why the Update appropriately balances those statutory factors.

Following the Board's May 13 Order, Petitioners brought a petition for judicial review of the Board's Orders approving MidAmerican's 2020 EPB Update and denying Petitioners' motion for reconsideration.

III. ARGUMENT

A. Summary of the Argument

The Iowa Utilities Board erred as a matter of law in creating a novel interpretation of the Iowa Code section 476.6(19) that narrowly focused "managing regulated emissions" on pollution controls and excluded all other compliance options, including coal plant retirements, as outside of the scope of the statute.

Iowa Code requires rate regulated utilities to "develop a multiyear plan and budget for managing regulated emissions from its [coal] facilities in a cost-effective manner." IOWA CODE § 476.6(19)(a). The key issue in this case is the Board's interpretation of "managing regulated emissions" in Iowa Code section 476.6(19)(a). The Iowa Supreme Court has consistently held that the Board does not have vested authority to interpret Chapter 476 by virtue of its general authority. This applies to Iowa Code section 476.6(19). The statute does not clearly vest the Board with authority to interpret the statute. The court should not give any deference to the Board's narrow interpretation of section 476.6(19) and should review the Board's order de novo. IOWA CODE § 17A.19(11)(b).

In reviewing 476.6(19) de novo, the Court should look to the ordinary meaning of "managing regulated emissions," and this includes multiple strategies or actions that a utility could take that would impact the amount of emissions from coal plants. In the past, the Board has approved multiple EPB dockets covering both MidAmerican and Interstate Power and Light that implemented and/or evaluated strategies including but not limited to coal plant retirements, conversions to natural gas, and replacement with renewable generation. The Board's novel statutory interpretation that alternative compliance strategies other than pollution controls are outside of the scope of "managing regulated emissions" excluded strategies that would fall under

the ordinary meaning of the term and contradicted past practice of the Board in EPB dockets where those strategies were approved. The Court should reverse the Board's interpretation of law that compliance strategies other than pollution controls such as coal plant retirements are outside of the scope of section 476.6(19).

The Board compounded its erroneous interpretation of the law in applying the law to the evidence in this case. The Board incorrectly interpreted the law in order to conclude that that Petitioners' testimony was outside of the scope of the statute, and therefore, the Board did not consider that evidence in approving MidAmerican's EPB. The Board's order did not delineate findings of fact and conclusions of law and did not satisfy the requirements of Iowa Code section 17A.16 to separately state findings of fact and conclusions of law. The Board merely concluded that Petitioners' issues were beyond the scope of the statute and that the EPB update satisfied the statute.

The Board's decision did not have substantial evidence to support it. MidAmerican's filing was sparse, at best, and intervening parties provided more substantive evidence for alternative approaches. Petitioners submitted relevant and important information directly applicable to the statutory factors the Board was required to consider, but the Board excluded the information from consideration to reach its decision. The Board could not support its decision, which was reflected by the absence of justification or reference to the record with specific findings of fact in the Board's decision. Ultimately, the Board's conclusion that the EPB Update met the statutory criteria was unreasonable, arbitrary and capricious, and an abuse of discretion.

The Court should reverse the Board's decision and remand the case back to the Board.

B. The Board Based Its Conclusions on an Erroneous Interpretation of Provisions in Iowa Code § 476.6(19) Whose Interpretation Has Not Clearly Been Vested by a Provision of Law in the Discretion of the Board in Violation of Iowa Code Section 17A.19(10)(c).

The Iowa Utilities Board erred as a matter of law in creating a novel interpretation of the Iowa Code section 476.6(19) that narrowly focused "managing regulated emissions" on pollution controls and excluded all other compliance options including coal plant retirements as outside of the scope of the statute. This is reversible error under Iowa Code Section 17A.19(10)(c).

The degree of deference shown when reviewing an agency's interpretation of the law depends on "whether the legislature clearly vested the agency with the authority to interpret the statute at issue." *SZ Enterprises, LLC v. Iowa Utils. Bd.*, 850 N.W.2d 441, 449 (Iowa 2014) (quoting *NextEra Energy Resources, LLC v. Iowa Utils. Bd.*, 815 N.W.2d 30, 36 (Iowa 2012)). A reviewing court shall not give deference to the agency on whether particular matters have been vested in the agency's authority; when matters have not been vested in the agency's authority, the court should not give deference to the agency on those matters. *See* IOWA CODE § 17A.19(11)(a) and (b).

The Iowa Supreme Court has "generally not deferred to IUB interpretations of statutory terms." *Mathis v. Iowa Utils. Bd.*, 934 N.W.2d 423, 427 (Iowa 2019). For example, the Court did not defer to the Board's definition of "pubic utility" and "electric utility" in *SZ Enterprises, LLC,* 850 N.W.2d at 452. The Court did not defer to the Board's interpretation of "electric supply needs" in *NextEra Energy Resources, LLC v. Iowa Utils. Bd.*, 815 N.W.2d 30, 38 (Iowa 2012). The Court has also held that the Board does not have the vested authority to interpret terms such as "public utility." *Hawkeye Land Company v. Iowa Utils. Bd.*, 847 N.W.2d 199, 207-08 (Iowa 2014). Most recently, the Iowa Supreme Court held that the Board did not have authority to interpret a "single site" for purposes of siting wind farms. *Mathis*, 934 N.W.2d at 428.

When the interpretation of law is not vested with an agency, a court does not defer to the agency interpretation and evaluates the meaning of the law *de novo*. *Thoms v. Iowa Pub. Emples. Ret. Sys.*, 715 N.W.2d 7, 10 (Iowa 2006)*; see* Arthur Earl Bonfield, *Amendments to Iowa Administrative Procedure Act, Report on Selected Provisions to Iowa State Bar Association and Iowa State Government* 61-62 (1998). The Court interprets the statutory terms using their ordinary meaning must consider the context in the statute. Iowa Code § 4.1(38); *Commerce Bank v. McGowen*, 956 N.W.2d 128, 133 (Iowa 2021). The court's interpretation should give effect to the entire statute. IOWA CODE § 4.4.

In this case, the Emissions Plan and Budget statute specifically requires:

> a. … Each rate-regulated public utility that is an owner of one or more 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.
>
> . . . .
>
> c. The board shall review the plan or update and the associated budget, and shall approve the plan or update and the associated budget if the plan or update and the associated budget are reasonably expected to achieve cost-effective compliance with applicable state environmental requirements and federal ambient air quality standards. In reaching its decision, the board shall consider whether the plan or update and the associated budget reasonably balance costs, environmental requirements, economic development potential, and the reliability of the electric generation and transmission system.

IOWA CODE § 476.6(19). The Board's order in this case gave a novel interpretation to Iowa Code § 476.6(19):

> 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). (CR p. 987.)

The Board did not provide a detailed explanation of its interpretation of the statute beyond this general statement. Without such an explanation, it is unclear what specific statutory terms the

Board is relying on in making its determination. Several parts of the statute are implicated by the Board's general pronouncement. By stating the alternative compliance options are outside of the scope of the EPB, the Board is interpreting "managing regulated emissions" to exclude each and every one of those compliance options. In addition, the Board interpretation is essentially stating that no comparison between alternatives is necessary to "reasonably balance costs, environmental requirements, economic development potential, and the reliability of the electric generation and transmission system."

The EPB statute is part of Iowa Code Chapter 476, which does not clearly vest interpretive authority of the statute to the Iowa Utilities Board. The Iowa Supreme Court has repeatedly held that the Board does not have vested authority to interpret all terms in Iowa Code chapter 476. "Managing regulated emissions" is not specific to utilities. The term does not require a particular expertise to understand in context, and there is no evidence Board applied its subject matter expertise to determine the meaning. Instead, the Board applied a general understanding of the meaning, without specifically defining any term, and concluded that the EPB update met the statutory requirements. The Court should not give deference to the Board's interpretation of the law.

The statutory phrase at issue is whether the MidAmerican EPB Update demonstrates it is "managing regulated emissions from its facilities in a cost-effective manner." Iowa Code § 476.6(19)(a). Because the Board is not vested with the authority to interpret the language of the statute, the words should be given their ordinary meaning. *Mathis*, 934 N.W.2d at 428; *State v. Davis,* 922 N.W.2d 326, 330 (Iowa 2019). "Manage" means "to bring about or succeed in accomplishing, sometimes despite difficulty or hardship" or "to handle, direct, govern, or control

in action or use." *Manage*, *Webster's Third New International Dictionary* (unabr. ed. 2002).[2] Managing thus involves more than simply buying a replacement part or blindly continuing to operate existing pollution controls. Furthermore, the statutory context of reasonably balancing statutory criteria implies a comparison of different options.

OCA and MidAmerican's settlement in this case provides some context as to what managing emissions includes. The proposed settlement acknowledged that:

> actions by a rate-regulated public utility with respect to the operation of coal-fired power plants can and do have an impact on the amount of regulated emissions produced by those plants. Such actions include:
>
> A. Installation/adoption of environmental controls and techniques
> B. Fuel switching
> C. Modified dispatch (coupled with increased reliance on lower emission resources and/or energy storage)
> D. Generating unit retirement
> E. Reliance on emission allowances
> F. Addition of new generation sources, both renewable and fossil fuel, as well as energy storage
> G. Load growth management
> H. Wholesale market transactions and retail sales of electric energy.

(CR pp. 833-34.) There is a wide range of strategies to manage regulated emissions from coal plants, as acknowledged by the parties in this case and reflected by the past decisions and past practice of the Board. This expressly includes retirement of electric generating units.

The Board's decision to simply read many of those strategies out of the statute for this case is inconsistent with the ordinary meaning of the statute and is reversible error.

C. The Board's Conclusion that Consideration of Coal Retirements and Other Compliance Alternatives are Outside of the Scope of Iowa Code § 476.6(19) is Inconsistent with Past Board Practices and Precedent and Should Be Reversed.

[2] The Iowa Supreme Court has regularly cited to *Webster's Third New International Dictionary* to define terms. *See e.g.*, *State v. Zacarias*, 958 N.W.2d 573, 582 (Iowa 2021).

EPB updates and past Board orders have considered and approved coal plant retirements as a part of a cost-effective plan to manage regulated emissions. The Board incorrectly asserted that alternative compliance options, including retirement of coal-fired generation units, "have not been raised in previous EPB dockets, and . . . the evidence filed by OCA and the Environmental Intervenors addressing these other options was outside the scope of an EPB proceeding." (CR pp. 1050-51; CR p. 987.) The Board's interpretation of the scope of the statute is inconsistent with the Board's past practices and precedents and constitutes reversible error under the Iowa Administrative Procedure Act. IOWA CODE § 17A.19(10)(h).

The Iowa Administrative Procedure Act requires a court to reverse, modify, or grant other appropriate relief if an agency action is: "[a]ction other than a rule that is inconsistent with the agency's prior practice or precedents, unless the agency has justified that inconsistency by stating credible reasons sufficient to indicate a fair and rational basis for that inconsistency." *Id*. The Iowa Supreme Court has found that subsection (h) was "intended to amplify review under the unreasonable, arbitrary, capricious, and abuse of discretion standards." *Finch v. Schneider Specialized Carriers, Inc.*, 700 N.W.2d 328, 332 (Iowa 2005). In other words, inconsistency with prior agency practice or precedents is "a specific example 'of agency action that any reviewing court should overturn as unreasonable, arbitrary, capricious, or an abuse of discretion.'" *Id.* (quoting Arthur Earl Bonfield, *Amendments to Iowa Administrative Procedure Act, Report on Selected Provisions* 69 (1998)). While an agency may change its practice or procedures, "the rule 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 Order in this case violates subsection (h). The Board changed past practice in holding that consideration of alternative compliance options were outside of the scope of the statue, but it did not acknowledge that change. At the same time, the Board relied on the approvals in those dockets as a basis for its decision:

> 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).

(CR p.987.) The Board did not cite to any past dockets or the language of the statute to support its conclusion. (CR pp. 986-88.) In contrast, several parties specifically established that past Board precedents in EPB dockets have considered coal plant retirements and other options as emission management strategies. OCA's direct testimony specifically noted that MidAmerican has itself used coal retirements as a compliance option, stating that: "in previous EPBs as recently as 2018, MidAmerican touted its retirement of coal-fired generating units as being the 'least-cost alternative' for compliance with regulated emissions." (CR p. 92.) OCA also noted that MidAmerican had considered other compliance options such as conversion of a coal unit to natural gas. (*Id.*) The reply testimony of ELPC and IEC's witness Guyer also summarized MidAmerican's past use of coal plant retirements as a compliance option that it evaluated and then selected in multiple dockets. (CR pp. 753-55.) Finally, Petitioners' Application for Reconsideration provided

multiple examples of past EPB dockets where coal retirements had been considered and/or approved. (CR pp. 1000-1004.)

MidAmerican has explicitly touted coal plant retirement as a compliance option that it evaluated, compared to installation of pollution controls, and then selected as part of an EPB Update. (*See* CR pp. 753-55.) For example, in 2014, MidAmerican witness Jennifer McIvor stated:

> 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 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.

(CR pp. 754, 1000 (*quoting In Re: MidAmerican Energy Company*, Docket No. EPB-2014-0156, Direct Testimony of Jennifer A. McIvor, at 6 (filed Apr. 1, 2014).) The Board then approved a partial settlement accepting the 2014 EPB and specifically stated that MidAmerican's Plan Update, which included the retirements described in the McIvor testimony, "reasonably balances costs, environmental requirements, economic development potential, and reliability of the generation and transmission system." *In Re: MidAmerican Energy Company*, Docket No. EPB-2014-0156, Order Addressing Completeness of Emissions Filing and Approving Partial Settlement, at 5 (filed Mar. 12, 2015).

MidAmerican has also demonstrated that retirement can be a cost-effective compliance option for some coal units while gas conversion and installation of pollution controls can be a cost-effective compliance option for the same regulation for other units. MidAmerican explained its Mercury and Air Toxics Standards (MATS) compliance actions in its 2016 and 2018 EPB filings:

> MidAmerican is retiring certain coal-fueled generating units as the least-cost alternative to comply with the Mercury and Air Toxics Standards ("MATS"). Walter Scott Energy Center Units 1 and 2 were retired in 2015 and George Neal

> Energy Center Units 1 and 2 are to be retired by April 15, 2016. A fifth unit, Riverside Generating Station, was limited to natural gas combustion in March 2015. WSEC Unit 4 is fully compliant with the MATS requirements. With the installation of ACI at WSEC Unit 3, Louisa, Neal Unit 3 and Neal Unit 4, each of these units is also fully compliant with the MATS requirements.

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).

ELPC and IEC were parties to the 2016 docket. No party to that docket challenged MidAmerican's use of retirements as a MATS compliance option. ELPC and IEC raised an argument that MidAmerican needed to consider and analyze retirement of one coal-fired generation unit it partially owned, Ottumwa Generating Station (OGS), even though Interstate Power and Light (IPL) operated the unit:

> [T]he alternative of retiring OGS and meeting energy and capacity needs with low-cost renewables should be evaluated with updated assumptions on the cost and performance of renewable energy, including both utility-owned and customer-sited renewable generation. If the retirement option is better for customers of IPL and MidAmerican, the unit should be retired by 2019 instead of retrofitted with SCR [Selective Catalytic Reduction] technology and operated for years to come as a coal unit.

In Re: MidAmerican Energy Company, Docket No. EPB-2016-0156, Direct Testimony of Nathaniel Baer, at 4-5 (filed May 2, 2017). The Board did not take the position that the retirement of a coal unit was outside of the scope of the docket. Rather, in relation to the 2016 EPB Update, the Board relied on IPL's analysis of pollution controls at OGS in IPL's EPB docket, and MidAmerican's witness testimony agreeing with IPL's analysis. It stated:

> With respect to the use of SCR technology at the Ottumwa station, MidAmerican and OCA argue that the issue was already decided by the Board when it approved the settlement and IPL's 2016 EPB in Docket No. EPB-2016-0150. In its May 16, 2017, order in that docket, the Board discussed the evidence showing how the use of SCR technology at the Ottumwa Generating Station satisfied the four factors [listed in Iowa Code § 476.6(19)(c)]. The Board ultimately found the record

> supported approving IPL's 2016 EPB and the associated settlement agreement . . . . There is also evidence in the record that MidAmerican agrees with IPL's analysis on the use of SCR technology at the Ottumwa Generating Station.

In Re: MidAmerican Energy Company, Docket No. EPB-2016-0156, Order Granting Motion to Cancel Hearing and Approving Emissions Plan Update, at 5 (June 9, 2017) (internal citations omitted).

The 2016 IPL EPB update referenced in the Board's 2016 MidAmerican EPB Order considered retirement, gas conversion and other compliance options. IPL's EPB Update included retrofitting OGS with SCR, but like MidAmerican's filing in the instant case, its initial filing did not provide detail on the alternatives considered. *In re: Interstate Power & Light*, Docket No. EPB-2016-0150, Nathaniel Baer Direct Testimony, at 4 (filed Apr. 27, 2017) ("IPL filed virtually no analysis comparing the SCR with other options in its initial EPB filing."). Unlike MidAmerican in this case, IPL provided information in discovery to document its analysis comparing the selected compliance option to alternatives. *Id.* IPL also filed supplemental testimony to introduce some of this analysis into the record, including a specific comparison of the SCR to retirement and gas conversion options. *In re: Interstate Power & Light*, Docket No. EPB-2016-0150, Supplemental Testimony of Terry A. Kouba, at 4 (filed Apr. 11, 2017). ELPC and IEC provided testimony challenging the assumptions used in IPL's analysis by noting that more accurate assumptions related to the cost of solar, the capacity factor of wind, and the amount of distributed generation would likely alter the outcomes of the analysis. *See generally In re: Interstate Power & Light*, Docket No. EPB-2016-0150, Baer Direct Testimony (filed Apr. 27, 2017). However, ELPC and IEC were not able to conduct their own modeling runs, and IPL did not do so even though ELPC and IEC requested it in discovery. *Id.* at 18. The Parties ultimately agreed to a settlement. *In re: Interstate Power & Light*, Docket No. EPB-2016-0150, Joint Motion and Settlement Agreement

(filed May 11, 2017). 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 Cancelling Hearing, at 5 (filed May 16, 2017) (emphasis added).

As these examples show, EPB dockets have a history of considering alternative compliance options in order to cost-effectively manage emissions. In each of these past dockets, the Board either approved the non-pollution control compliance option or made note of the consideration of alternatives in its determination that the proposed emission management option was reasonable. The Board never found that consideration of a compliance option such as a coal plant retirement was outside of the scope of the EPB statute.

Petitioners presented this history to the Board in their testimony and Application for Reconsideration. (CR pp. 997-1004.) This gave the Board the opportunity to address the inconsistency between the past cases and the current case. However, the Board did not provide a fair and rational basis for the inconsistency. Instead, the Board repeated the unsupported conclusions in its original order:

> 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.

(CR pp. 1050-51.) The Board did not make any attempt to address the past EPB dockets and the emission management strategies considered or adopted in those dockets. The Board's decision is

therefore "inconsistent with the agency's prior practice or precedents," IOWA CODE § 17A.19(10)(h), and it has failed to "justif[y] that inconsistency by stating credible reasons sufficient to indicate a fair and rational basis for that inconsistency." *Id*. The statutory exception cannot apply when the agency decision "gave no explanation for straying from its precedents." *Swift Pork Co. v. Emp. Appeal Bd.*, No. 20 00-40, 2020 WL 7383497, at *4 (Iowa Ct. App. 2020) (unpublished) (holding that the exception did not apply when agency did not cite contrary precedents in its ruling "[i]n spite of having its attention called to [them]"). The Board's analysis did not acknowledge past EPB dockets despite having attention called to them. The Board did not distinguish those dockets. In stating that the issues had not been raised in previous dockets, the Board simply ignored facts that were inconvenient to its position rather than explain or reconcile them.

Furthermore, the Board's determination that alternative compliance options such as coal plant retirements and conversions to natural gas are outside of the scope of the statute does not appear to apply to all EPB dockets. In the only EPB proceeding that has concluded after the Board's ruling in the instant case, the Board approved an EPB Update that incoporated coal-unit retirement as a compliance strategy. *See In re: Interstate Power & Light*, Docket No. EPB-2020-0150, Order Approving Emissions Plan and Budget Update, Approving Settlement Agreement, and Granting Confidential Treatment (Iowa Utils. Bd., filed Aug. 5, 2021). In that docket, IPL shared a generating resource analysis, which showed that retirement of a unit and conversion of a coal unit to gas were reasonable options to manage emissions. The Board concluded "that the projects and associated budgets in IPL's 2020 EPB for the 2021 through 2022 period are reasonably expected to achieve cost-effective compliance with applicable state environmental requirements and federal ambient air quality standards." *Id.* at 6. The Board specifically found that

"the Settlement Agreement is reasonable in light of the whole record, consistent with law, and in the public interest." *Id.*

The Board's finding in EPB-2020-0156 that consideration of coal unit retirements as a compliance option is outside of the scope of the statute is inconsistent with past practice in both MidAmerican and IPL EPB dockets and the precedents that the Board set in approving multiple EPB updates that used coal plant retirements as an emissions management strategy. The Board's ruling should be reversed pursuant to Iowa Code § 17A.19(10)(h).

D. The Board's Approval of MidAmerican's EPB Update Was Not Supported by Substantial Evidence and Should Be Reversed.

The Board's approval of MidAmerican's EPB did not provide specific citations to the record and was not supported by substantial evidence. Iowa Code section 17A.19(10)(f) requires a court to reverse, modify, or grant other appropriate relief if an agency action is: "[b]ased upon a determination of fact clearly vested by a provision of law in the discretion of the agency that is not supported by substantial evidence in the record before the court when that record is viewed as a whole." IOWA CODE § 17A.19(10)(f). The code section further specifies that "'Substantial evidence' means the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance." *Id.*

The EPB statute tasks the Iowa Utilities Board with reviewing the EPB update and approving it if the EPB update is reasonably expected to achieve cost-effective compliance with state and federal environmental requirements. IOWA CODE § 476.6(19)(c). The statute defines the factors for Board consideration, requiring that "[i]n reaching its decision, the board shall consider whether the plan or update and the associated budget reasonably balance costs, environmental requirements, economic development potential, and the reliability of the electric generation and

transmission system." *Id*. This determination has been vested to the Board and accordingly, the court gives deference to the Board's view. IOWA CODE § 17A.19(11)(c).

The key issue in reviewing an agency determination on substantial evidence is whether the evidence in the record supports the findings actually made. *City of Hampton v. Iowa Civil Rights Com'n.*, 554 N.W.2d 532, 536 (Iowa 1996). While not identical to the EPB statute, the Board considers many of the same factors in an advanced ratemaking case. The Iowa Supreme Court has provided guidance on what constitutes substantial evidence in evaluating alternatives in an advanced ratemaking case in front of the Iowa Utilities Board. *Next Era Energy Resources LLC v. Iowa Utils. Bd.*, 815 N.W.2d 30 (Iowa 2012). In the *Next Era Energy Resources* case, the Court described the record noting:

> MidAmerican's application for advance ratemaking principles generally compares wind power to renewable energy alternatives, including biomass energy, hydroelectric energy, solar energy, and geothermal energy based on availability, economic practicality, and maturity. It also compares wind power to coal- and gas-fired power plants in terms of cost, cost robustness, environmental reasonableness, system reliability, economic value to the local area, political uncertainty, flexibility, and diversity.
>
> The testimony of MidAmerican's manager of market assessment further details MidAmerican's comparison of Wind VII to conventional and renewable generation alternatives. The record contains evidence as to MidAmerican's six-stage resource planning process, the different analytical models used during the process, and other criteria MidAmerican uses to further evaluate the attractiveness of other generation sources.

Id. at 43. The Court concluded that this type of record was substantial evidence to support the Board's factual finding. *Id.*

Further, the Courts have required an agency to provide detailed findings and conclusions. *City of Hampton v. Iowa Civil Rights Comm'n.*, 554 N.W.2d 532, 534 (Iowa 1996) ("Without any analysis of the facts or law, the commission merely stated that it rejected the proposed decision.

The district court was therefore correct when it remanded the case to the commission for detailed findings and conclusions . . . .”). Detailed findings and conclusions serve an important purpose:

> The obligation to give a reasoned decision is a substantial check upon misuse of power. A decision supported by specific findings is much less likely to be a product of caprice or careless consideration. Requiring articulation of the reasoning process evokes care on the part of the decider.

City of Hampton, 554 N.W.2d at 535 (quoting Bernard Schwartz, *Administrative Law* § 7.29, at 456 (3d ed.1991) (footnote omitted)).

Iowa Code section 17A.16 requires final decisions or orders to “include findings of fact and conclusions of law, separately stated.” IOWA CODE § 17A.16(1). The order must “include an explanation of why the relevant evidence in the record supports each material finding of fact.” *Id.* And “[e]ach conclusion of law shall be supported by cited authority or by a reasoned opinion.” *Id.* The Board’s order in this case did not delineate the findings of fact. The order stated the Board found requests for analysis of options and evidence supporting those options fell outside the scope of the statute, which is a conclusion of law. (CR pp. 986-988.) The Board summarily concluded that the EPB met the requirements of the statute. (CR p. 989.) It did not provide enough analysis in its order to “deduce what must have been the agency's legal conclusions and its findings of fact” on the disputed issues. *Norland v. Iowa Dep't of Job Serv.*, 412 N.W.2d 904, 909 (Iowa 1987) (citation omitted). The Board’s order denying reconsideration relied on the original order without providing further analysis. (CR p. 1050-1052.)

An agency decision “need not discuss *every* evidentiary fact and the basis for its acceptance or rejection so long as the [agency]'s analytical process can be followed on appeal.” *Bridgestone/Firestone v. Accordino*, 561 N.W.2d 60, 62 (Iowa 1997) (emphasis in original). But when an agency “lumps together findings of fact, conclusions of law, and applications of law to fact, we do not feel that section 17A.16(1) has been satisfied. Combining all three elements of

agency decision making in such a condensed, tangled manner makes for inefficient and ineffective judicial review of agency action." *Burton v. Hilltop Care Ctr.*, 813 N.W.2d 250, 260 (Iowa 2012). The Board's order approving the EPB update did not delineate findings of fact and conclusions of law. Nor did it cite to the record of the case to support the decision.

The record in this case addressed some requirements of the EPB statute, but did not address other requirements at all. For example, OCA, DNR and the Environmental Intervenors all agreed that MidAmerican's proposed plan met state and federal environmental requirements. (CR p. 985.) 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. (*See* CR p. 511 (referencing the O&M costs without dispute).) However, MidAmerican's filing did not provide information that would allow the Board or parties to balance cost, environmental compliance, economic development and reliability. The OCA testimony specifically noted that "[t]here is no way to tell if [the section 476.6(19)(c) statutory] criteria are reasonably balanced because MidAmerican has not shown that it made any attempt at all to balance these criteria." (CR p. 96.) MidAmerican refused to provide cost analysis to parties in discovery. (CR pp. 96, 524, 707-10.) OCA further specified that "MidAmerican has made it clear that it has not performed even a basic analysis of economic development potential." (CR pp. 96-97, 507-08.) Facebook and Google's witness filed reply testimony that "at this point in time [MidAmerican's] record is exclusively directed at environmental requirements and contains no consideration of possible more cost-effective alternatives to the status quo." (CR p. 809.) Witness Pollock went on to note that "[t]o date, the only evidence related to the cost effectiveness of supply alternatives has been presented by the Environmental Intervenors." (CR p. 810.) He concluded: "MidAmerican has not yet provided

sufficient information in the record to permit the Board to do its duty; that is, to consider all of the regulatory and legal requirements in determining whether the EPB is reasonable." (CR p. 812.)

The problem with the evidence in the record – the issue the Environmental Intervenors, OCA, and Facebook and Google all raised – was with what was missing. There is not any evidence, let alone substantial evidence, that MidAmerican's plan reasonably balances the criteria identified in Iowa Code § 476.6(19)(c). However, the Board focused only on what was filed by MidAmerican and not what the statue required. The Board stated that "The parties did not dispute any of the information or supporting documentation filed by MidAmerican, and the Board found that MidAmerican's 2020 EPB complied with applicable state environmental requirements and federal ambient air quality standards as outlined in Iowa Code § 476.6(19)(4)(b)." (CR p. 1051) The Board then used the fact that there was not a dispute about what MidAmerican filed to conclude MidAmerican must have met its burden of demonstrating its plan was reasonable. (CR p. 1052 ("The Board found that since there were no disputed material facts in the record, MidAmerican provided sufficient information in its EPB filing to assess whether the plan reasonably balances costs, environmental requirements, economic development potential, and the reliability of the electric generation and transmission system.").) The Board did not make detailed findings and conclusions or explain how it determined that MidAmerican's filing was cost-effective. The Board did not cite to anything in the record. This is because MidAmerican did not provide anything in the record on these factors. In other words, the lack of dispute on the information filed was used to bootstrap the lack of record on the statutory requirements of section 476.6(19)(c). There was not substantial evidence to support the Board's finding that MidAmerican's EPB update reasonably balanced costs, environmental requirements, economic development potential, and the reliability of the electric generation and transmission system.

The Court should reverse and remand the Board's decision based on the record. The Court should be clear that the Board needs to provide specific and detailed findings of fact and that the Board needs to consider evidence of alternative compliance options such as the evidence presented in the testimony of Petitioners.

E. The Board Failed to Consider Relevant and Important Information that Demonstrates that MidAmerican's Plan is Not Supported by Substantial Evidence.

The Board's decision that the alternative compliance options were outside the scope of the statute meant the Board did not consider witness testimony from the Petitioners even though it was part of the record. Consideration of Petitioners' testimony would have further demonstrated that the Board's approval of MidAmerican's EPB is not supported by substantial evidence in the record.

The Iowa Administrative Procedure Act requires courts to grant relief when the agency decision is "[t]he product of a decision-making process in which the agency did not consider a relevant and important matter relating to the propriety or desirability of the action in question that a rational decision maker in similar circumstances would have considered prior to taking that action." IOWA CODE § 17A.19(10)(j). A "relevant and important matter" can include both "error[s] of law," *see Baker v. City of Wellman*, No. 14-0541, 2015 WL 2393450, at *2 (Iowa Ct. App. May 20, 2015), and instances when the agency "simply ignored or overlooked record evidence," *JBS Swift & Co. v. Hedberg*, 873 N.W.2d 276, 280 (Iowa Ct. App. 2015).

As noted above, the Board's failure to consider Petitioners' testimony by concluding it was outside of the scope of the statute is a reversible error of law. The Board should have considered the testimony that the Petitioners provided. The Board's interpretation of the statute led it to make no findings about the relevance or importance of the testimony; there are no findings of fact on this issue to which the Court should defer. *See* IOWA CODE § 17A.19(11).

The testimony contained detailed analysis of factors the Board was required to consider in determining whether MidAmerican's plan would "manag[e] regulated emissions from its facilities in a cost-effective manner," including whether it would "reasonably balance costs, environmental requirements, economic development potential, and the reliability of the electric generation and transmission system." IOWA CODE § 476.6(19).

a. *Petitioners' testimony provided evidence that retirement of Neal Unit 3 and Neal Unit 4 is the least-cost compliance option in contrast to the Board's conclusion that MidAmerican's EPB was reasonable.*

In its original filing, MidAmerican estimated the costs for continued operations of its coal facilities, but did not provide any evidence that continued operations represent the most cost-effective compliance option compared to other compliance options, such as plant retirement. (CR pp. 14-17, 90-92, 808-09.) Environmental Intervenors filled in the gap that MidAmerican left in the record. (CR p. 810.) Witness Posner analyzed the cost of continued coal operation, comparing it to the cost of early retirement and replacement with renewable energy. As Witness Posner's direct testimony showed, "Neal Unit 3 and Neal Unit 4 have been uneconomic to operate for several years." (CR p. 521.) In practice, this means that MidAmerican's compliance strategy of continuing to operate the Neal units' controls is unnecessarily costing customers money. An analysis by Paul Chernick showed that the Neal units cost customers an extra $17 million per year to keep operating. (CR p. 554.) The operating costs of the Neal units exceed the cost of reasonable alternatives. (CR pp. 550-51.) Witness Posner concluded that retiring the Neal units, refinancing as debt, and replacing the energy and capacity with wind could reduce long-term costs to customers by 9.7% for Neal Unit 3 and 22.6% for Neal Unit 4. (CR p. 522.) Moreover, the testimony in the record shows that customers could see an immediate benefit: the first-year savings from retirement could be 15% for Neal Unit 3 and 19.3% for Neal Unit 4. (CR pp. 532-34.)

The emissions management strategy of retiring Neal Units 3 and 4 would further benefit customers because it would eliminate the risk of additional major capital costs, which is more likely for older coal-fired facilities than for new, replacement generation. (CR p. 530.) The cost estimates provided by MidAmerican showed zero future capital expenditures for future years, which is unlikely to be the case. (CR p. 530.)

MidAmerican did not rebut the cost-effectiveness analysis provided by the Petitioners, and did not contest the Petitioner experts' conclusion that retirement of the Neal units would be more cost-effective than continuing to operate them.

b. *Petitioners' testimony provided evidence retiring Neal Units 3 and 4 and replacing them with new renewable generation would maximize economic development potential.*

Retiring Neal Unit 3 and Unit 4 and replacing them with new renewable generation provides significant economic development potential beyond the limited opportunity that continued operation of those units provides. The Board order approving the EPB did not directly address this issue.

In describing the economic development benefits of its EPB, MidAmerican relied on the increment of air pollution available to other development:

> By reducing emissions, the air emission increment available for other industrial developments increased. More importantly, emission reductions maximize the opportunity for Iowa to avoid non-attainment status. Non-attainment status can be a significant economic development detriment. MidAmerican's implementation strategy occurred across the state, resulting in air quality benefits in all areas.

(CR p. 18.) MidAmerican's assessment relied on two components: the incremental pollution available to avoid non-attainment status and the improved air quality to benefit Iowans across the state. Neither of these factors supports a finding that continuing to operate the Neal units was reasonable when compared to the retirement alternative.

Retirement of the Neal units would increase the increment available for other development while maintaining non-attainment status by completely eliminating all emissions from the Neal units. (CR p. 511.) In 2020, in compliance with existing air permit requirements, Neal South emitted more than 628 tons of NOx, 1,200 tons of SO2, and 748,000 tons of CO2; Neal North emitted more than 1,040 tons of NOx, 1,660 tons of SO2, and 1,019,000 tons of CO2. (CR p. 865.) These emissions would be eliminated by retirement.

The overall air quality benefits under the retire-and-replace scenario are clearly greater than continued operation of the units. Not only that, the benefits would be greater than emissions from the Neal units themselves. Under the scenario proposed by Witness Posner, replacing the Neal units would include replacement renewable energy at more than a 1:1 basis and we would expect the turbines to operate at a higher capacity factor because they would more often be "in the money" in the MISO market. (*Cf.* CR pp. 525, 531 (describing capacity factors for wind and Neal units, respectively).) This would result in more wind energy production than what the Neal units produce, most likely displacing coal generation from other units. (CR p. 524.) Thus, not only does the replacement eliminate the direct Neal unit emissions, it provides even more emission-free energy. Any benefits that Iowans enjoy from having air better than the NAAQS would grow as a result of the retirement of the Neal units.

The economic development benefits of new renewable generation have long been touted by elected officials and MidAmerican itself. Additional wind generation brings economic development benefits that include additional tax base, direct payments to landowners, attracting new businesses, payroll and supply chain revenue, permanent local jobs, and increased local spending. (CR pp. 755-56 (citation omitted).) MidAmerican's estimates for these economic development benefits in the Wind XII case exceeded $500 million. (*Id.*) MidAmerican has

consistently touted the economic benefits of developing new wind generation and has failed to address the direct economic benefits of maintaining versus replacing its plants in this case. (*See* CR pp. 746-50.) The transition to wind relies on Iowa resources and local jobs, including supporting in-state manufacturing. (CR p. 756.) It also avoids the economic drain of Iowa ratepayer dollars going to purchased fuel from out of state.

The evidence on economic benefits from retiring the Neal units and replacing them with renewable generation in the Petitioners testimony does not support the Board's conclusion that MidAmerican's EPB update reasonably considered economic development potential.

c. *Petitioners' testimony provided evidence that MidAmerican does not need Neal 3 and Neal 4 for reliability purposes.*

The record provides evidence that MidAmerican can retire Neal Units 3 and 4 without jeopardizing reliability. Witness Posner accounted for reliability concerns in his testimony in multiple ways. First, MidAmerican has excess capacity greater than the capacity of the Neal units. (CR pp. 535-36.) MidAmerican has sufficient excess capacity that it could retire Neal Unit 4, not replace it with *any* new generation, and still have excess capacity in 2029-2030. (*Id.*) On top of the existing excess generation, Posner modeled a retirement and replacement scenario that provides excess wind generation capacity. This extra capacity provides several benefits that indicate reliability would not be a problem upon retirement of the Neal units. The replacement option proposed by Witness Posner would include 17% more wind capacity than necessary to replace the Neal units' energy production in 2019. (CR p. 535.) The revenue from the excess capacity could be used to purchase or otherwise accommodate other ancillary services needed to fully replace coal generation. (CR p. 524.) Finally, MidAmerican could use some of the savings to add battery storage to provide additional reliability benefits. (CR pp. 537-38.)

In response to this testimony, MidAmerican did not provide any independent analysis of the need for specific existing generating units from a reliability perspective, nor did it identify any reliability issues that would result from retirement of the Neal 3 and Neal 4 units. Any claim that reliability needs support MidAmerican's EPB and prevents retirement of a coal plant would require analysis that is not in the record that was before the Board.

Petitioners' testimony demonstrates that the retirement of Neal Unit 3 and Neal Unit 4 is a lower-cost alternative to MidAmerican's proposed EPB update that is capable of meeting environmental and reliability requirements while providing greater economic benefits. The record also shows that – despite the requirement that the Board consider whether the proposed budget will achieve cost-effective compliance and balance costs with other factors – MidAmerican provided no analysis to show that the cost of its proposed plan is reasonable compared to better alternatives, including retirement of the Neal Units. As such, the Board erred by failing to consider this evidence in approving MidAmerican's EPB.

F. The Board's Finding That the EPB Update Met the Statutory Criteria Was Unreasonable, Arbitrary, Capricious or an Abuse of Discretion.

Many cases have interpreted Iowa's Administrative Procedure Act, including the provisions of section 17A.19(10) adopted in 1998. These cases clarify the application of the statutory terms and support a finding that the Board's Order in this case was unreasonable, arbitrary, capricious, or an abuse of discretion.

"Unreasonable" means taking "action in the face of evidence as to which there is no room for difference of opinion among reasonable minds or not based on substantial evidence." *Churchill Truck Lines, Inc. v. Transportation Regulation Bd.*, 274 N.W.2d 295, 300 (Iowa 1979) (citations omitted). Unreasonable actions go "clearly against reason and evidence.'" *Dico, Inc. v. Iowa Emp't*

Appeal Bd., 576 N.W.2d 352, 355 (Iowa 1998) (*citing Soo Line R.R. v. Iowa Dep't of Transp.*, 521 N.W.2d 685, 688-89 (Iowa 1994).

In addition to making a decision not based on substantial evidence, as discussed in Section E above, the Board's misinterpretation of the statute led to an unreasonable result. MidAmerican's EPB update contained so little detail regarding the statutory criteria that one witness characterized it as "sparse." (CR p. 807.) The filing that the Board approved included cost estimates for the coming two years, but did not show that those costs were "cost-effective" in any way. (*See* CR pp. 14-17.) Although MidAmerican did not propose any substantial new capital investments for the coal facilities it operates, it sought approval for continued operational costs and maintenance of a range of pollution control equipment. (CR pp. 14-17, 56-57.) The filing contained generic paragraphs about several statutory criteria. (CR p. 18.) MidAmerican did not supplement these descriptions in response to the inadequacy highlighted by Petitioners' witnesses. (*See* CR p. 716.)

Had the Board properly interpreted the statute, the record would have required reaching a different result. Petitioners provided affirmative evidence that coal plant retirement is a strategy for managing emissions within the scope of the statute. MidAmerican had, in fact, used this strategy in the past. IPL had done the same. The Board had approved the use of the strategy for both utilities. Petitioners further provided evidence that the strategy should apply in the present case, where it would cost-effectively manage emissions by lowering customer costs and eliminating emissions. Petitioners rebutted assumptions to maintain generating capacity for the costs MidAmerican proposed to incur. (CR p. 514.) Petitioners provided specific information evaluating cost savings available if MidAmerican managed its regulated emissions differently. (CR pp. 521-523.) The Board's conclusion that the strategy was beyond the scope of the statute

did not address these facts. In ignoring the evidence in the record and its own precedent, the conclusions were unjustifiable.

MidAmerican's EPB update did not provide substantial evidence of satisfying the statutory criteria. Petitioners provided analysis of the statutory criteria and rebutted that of MidAmerican. Only by ignoring a substantial portion of the evidence before it could a reasonable fact-finder conclude that MidAmerican's proposed EPB update satisfied the statutory criteria.

A decision is arbitrary if it was made "without regard to the law or consideration of the facts of the case." *Norland v. Iowa Dep't of Job Serv.*, 412 N.W.2d 904, 912 (Iowa 1987) (citing *Burgess v. Great Plains Bag Corp.*, 409 N.W.2d 676, 678 (Iowa 1987); *accord Banilla Games, Inc. v. Iowa Dep't of Inspections & Appeals*, 919 N.W.2d 6, 19 (Iowa 2018). Capricious is "practically synonymous" for purposes of review. *Churchill Truck Lines, Inc. v. Transportation Regulation Bd.*, 274 N.W.2d 295, 299 (Iowa 1979).

In the same way the Board's decision was unreasonable for ignoring the evidence presented by Petitioners, it was arbitrary and capricious. The Board ignored its own precedent, as described in Section III.C, to evade the analysis otherwise necessitated by Petitioners' evidence. The facts of the case showed that MidAmerican shirked its obligation to provide a legitimate analysis of whether its EPB update was cost-effective. To avoid dealing with that inadequacy, the Board did not articulate its reasoning or cite to the record as a basis for its conclusions.

Discretion is abused when the decision is "clearly untenable or to an extent clearly unreasonable." *Banilla Games, Inc. v. Iowa Dep't of Inspections & Appeals*, 919 N.W.2d 6, 19 (Iowa 2018) (citations omitted). It is "is synonymous with unreasonableness, and involves lack of rationality." *Dico, Inc. v. Iowa Emp't Appeal Bd.*, 576 N.W.2d 352, 355 (Iowa 1998) (citation omitted). The Board abused its discretion in this case by rejecting the information in the record

despite its past precedent, subsequent practice in the concurrent EPB docket, and lack of justification for its decision. This decision does not fulfill the purpose of the statute, will harm customers, and is clearly unreasonable.

The Board's interpretation of law conflicted with precedent, its stated rationale is incorrect, and the evidence in the record does not support the Board's conclusion. Through this combination of deficiencies, the Board's approval of the EPB update was unreasonable, arbitrary, capricious and an abuse of the Board's discretion. Because the evidence in the record does not support the Board's conclusion, and because the Board did not provide legitimate rationale for approving the EPB update, the Court should find the Board's order inconsistent with the law.

IV. CONCLUSION

The Iowa Utilities Board erred as a matter of law in creating a novel interpretation of the Iowa Code section 476.6(19) that narrowly focused "managing regulated emissions" on pollution controls and excluded all other compliance options including coal plant retirements as outside of the scope of the statute.

The Court does not give the Board deference in reviewing its interpretation of 476.6(19) The ordinary meaning of "managing regulated emissions," and this includes multiple strategies or actions that a utility could take that would impact the amount of emissions from coal plants. The statute does not merely require meeting environmental requirements or installing pollution control equipment. In the Instead, the statute requires a plan to manage emissions. In the past, the Board has approved multiple EPB dockets that implemented and/or evaluated strategies including but not limited to coal plant retirements, conversions to natural gas, and replacement with renewable

generation. The Board's new statutory interpretation excluded these strategies that would fall under the ordinary meaning of the term and contradicted past practice of the Board. The Court should reverse the Board's interpretation of law that compliance strategies other than pollution controls such as coal plant retirements are outside of the scope of section 476.6(19) as an error of law.

The Board's decision did not acknowledge, much less provide justification for, its departure from prior practices and precedent. The decision misinterpreted the law, failed to consider important information, was not supported by substantial evidence, and was ultimately unreasonable, arbitrary, capricious, and an abuse of discretion. As a result, the Board erred in determining that MidAmerican's EPB reasonably balanced costs, environmental requirements, economic development potential, and reliability. In looking at the full record, the Board should have denied approval MidAmerican's EPB.

For the reasons set forth above, the Petitioners respectfully request that the Court hold the Board's statutory interpretation was reversible error and that term "managing regulated emissions" includes compliance alternatives other than installation of pollution controls; the Board should have considered Petitioners' evidence; the Board should have provide detailed findings of fact and conclusions of law pursuant to Iowa Code section 17A.16; and the Board's decision was not supported by substantial evidence. The Court should reverse the Board's decision and remand for further proceedings consistent with the Court's order.

Respectfully submitted,

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DATE: August 27, 2021

CERTIFICATE OF SERVICE

I hereby certify that August 27, 2021 the foregoing document was filed with the Clerk of Court using the EDMS system which will send electronic notice of the filing to the parties of record.

/s/ Joshua T. Mandelbaum