

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

<p>ENVIRONMENTAL LAW AND POLICY CENTER, IOWA ENVIRONMENTAL COUNCIL, & SIERRA CLUB,</p> <p>Petitioners,</p> <p>vs.</p> <p>IOWA UTILITIES BOARD,</p> <p>Respondent,</p> <p>and</p> <p>OFFICE OF CONSUMER ADVOCATE, MIDAMERICAN ENERGY COMPANY,</p> <p>Intervenors.</p>	<p>Case No. CVCV061992</p> <p>INTERVENOR OFFICE OF CONSUMER ADVOCATE'S BRIEF IN SUPPORT OF PETITION FOR JUDICIAL REVIEW</p>
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The Office of Consumer Advocate, a division of the Iowa Department of Justice, submits the following Brief in Support of Petition for Judicial Review:

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

- I. The IUB's Ruling Approving MidAmerican's EPB Relies on an Erroneous Application of the Relevant Law and is Not Supported by Substantial Evidence**
 - A. Scope and Standard of Review**

Authorities:

S. E. Iowa Co-op. Elec. Ass'n v. Iowa Utilities Bd., 633 N.W.2d 814 (Iowa 2001).
Matter of Prop. Seized from McIntyre, 550 N.W.2d 457 (Iowa 1996)
Broadlawns Medical Ctr. v. Sanders, 792 N.W.2d 302 (Iowa 2010).
NextEra Energy Res. LLC v. Iowa Utilities Bd., 815 N.W.2d 30 (Iowa 2012)
Renda v. Iowa Civil Rights Comm'n, 784 N.W.2d 8 (Iowa 2010)
Hawkeye Land Co. v. Iowa Utilities Bd., 847 N.W.2d 199 (Iowa 2014)
SZ Enterprises, LLC v. Iowa Utilities Bd., 850 N.W.2d 441 (Iowa 2014)
Iowa Code § 17A.19(10)
Iowa Code § 476.6(19)

Iowa Code § 23.1
Iowa Code § 256.56

B. The IUB Relied on an Erroneous Interpretation of Iowa Code section 476.6(19)(c) When it Determined MidAmerican Should not be Required “to Look at Multiple Options” as Part of the Analysis of the Balancing Factors in section 476.6(19)(c).

Authorities:

Iowa Code § 476.6(19)

1. The phrase “cost-effective compliance” necessarily requires a consideration of alternative options for compliance.

Authorities:

Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759 (Iowa 2016)
Banilla Games, Inc. v. Iowa Dep’t of Inspections & Appeals, 919 N.W.2d 6 (Iowa 2018)
Iowa Code § 476.6(19)
Iowa Code § 17A.19(10)
Cost-Effective, Cambridge Dictionary,
<https://dictionary.cambridge.org/us/dictionary/english/cost-effective>, (last visited Aug. 25, 2021).

2. The IUB’s Reliance on “Past Precedent” to Justify its Interpretation of Section 476.6(19)(c) is Erroneous.

Authorities:

Iowa Code § 476.6(19)
Iowa Code § 17A.19(10)
Iowa Utilities Board Docket Nos.
EPB-2016-0156
EPB-2018-0156
EPB-2016-0150

C. The Board’s Order Approving MidAmerican’s EPB is not Supported by Substantial Evidence due to the Lack of Evidence, Viewing the Record as a Whole From the Perspective of a Reasonable Person, for the Findings Required by Iowa Code Section 476.6(19).

Authorities:

Iowa Code § 476.6(19)
Iowa Code § 17A.16
Iowa Code § 17A.19(10)

INTRODUCTION

While this matter involves complex legal and factual issues stemming from energy and environmental law, Petitioners and the Office of Consumer Advocate (OCA) only request this court perform its well-practiced function in determining whether the Iowa Utilities Board's (IUB) interpretation of a statute constituted an abuse of discretion and whether substantial evidence in the record supports the IUB's final agency action. Specifically, Petitioners and OCA request this court review the language of Iowa Code section 476.6(19)(c) to determine whether alternative methods for emissions compliance are allowable as part the IUB's statutorily required finding that MidAmerican Energy Company's (MidAmerican) emissions plan and budget (EPB) is "reasonably expected to achieve cost-effective compliance with" the applicable emissions standards. Petitioners and OCA also request this court to review the IUB's final agency action to determine if substantial evidence supports the IUB's approval of MidAmerican's EPB. As OCA will demonstrate, the plain language of section 476.6(19), coupled with the IUB's past precedent, requires the consideration of reasonable alternative emissions compliance methods to determine that MidAmerican's EPB achieved "cost-effective compliance, and the IUB erred and abused its discretion in finding to the contrary. Further, OCA will demonstrate there is not substantial evidence in the record to support the IUB's approval of MidAmerican's EPB. Due to the IUB's errors and abuse of discretion, OCA requests this court reverse the IUB's final agency action and remand.

STATEMENT OF THE CASE

A. Nature of the Case and Parties in the Agency Proceeding

This judicial review arises from final agency action taken by the IUB in a contested case proceeding. The underlying agency action involves MidAmerican's update to its multiyear

emissions plan and budget or EPB. Iowa Code § 476.6(19) (2021). Pursuant to Iowa Code section 476.6(19)(a)(3), OCA and the Iowa Department of Natural Resources (DNR) were required to participate as parties in this EPB proceeding.¹ Petitioners, the Environmental Law and Policy Center, the Iowa Environmental Council, and Sierra Club, (hereinafter “Petitioners” or “Environmental Intervenors”) became parties to this proceeding through intervention. *Certified Record (CR)*, pgs. 44; 82–84. Facebook, Inc. and Google, LLC (Tech Customers) also became parties through intervention. *CR.*, pgs. 82–84.

B. Course of Proceedings and IUB Order

On April 1, 2020, MidAmerican filed its 2020 EPB update, which included the prefiled direct testimony of MidAmerican’s witnesses Joshua Mohr and William Whitney with supporting exhibits.² *See CR.* pgs. 1–39. The 2020 EPB covers the period from January 1, 2020, through December 31, 2022. MidAmerican’s EPB filing is organized into two documents. First, the Electric Power Generation Facility Budget Update (Budget Update) provides a budget update for the two-year period and includes future plans through year-end 2029 with updates to environmental investments in the coal-fueled power plants operated by MidAmerican. *CR.* pg. 9. The Electric Power Generation Facility Emissions Plan provides an update on the relevant federal and state regulations concerning emissions and MidAmerican’s efforts to comply with the relevant regulations. *CR.* pg. 22.

¹ Pursuant to Iowa Code § 475A.2(2), the Office of Consumer Advocate (“OCA”), a division of the Iowa Department of Justice, acts as “attorney for . . . all consumers generally and the public generally” and is a necessary party to all proceedings before the Iowa Utilities Board.

² In proceedings before the IUB, parties submit prefiled written direct testimony and supporting exhibits. *See* 199 IAC 7.10(1). Generally, only cross-examination of witnesses is conducted at hearings. 199 IAC 7.23(2). The IUB may allow very limited direct-examination of witnesses. *Id.* No hearing occurred in this matter.

On April 10, Environmental Law & Policy Center and Iowa Environmental Council filed a petition to intervene in the EPB proceeding, which the IUB granted on May 20. *CR.* pgs. 40–42; 44–45.

On May 22, the IUB sent MidAmerican a letter requiring MidAmerican to update the EPB filing to reflect its share of the costs for the Ottumwa Generating Station, a coal-fired power plant jointly owned by MidAmerican and Interstate Power and Light Company (IPL). *CR.* pg. 48. On June 11, MidAmerican complied with the IUB’s request and filed updated Exhibits 1 and 2 that now included its proportionate share of the costs related to the Ottumwa Generating Station. *CR.* pgs. 54–57. MidAmerican also noted, since IPL operates and directly supervises the Ottumwa Generating Station, “IPL has the best and most information regarding the plans and costs for [Ottumwa Generating Station]; therefore, MidAmerican defers to IPL’s filing for the detail and description of those items.”³ *CR.* pg. 54. On July 14, to correct an error, MidAmerican filed a revision to its Exhibit 2. *CR.* pgs. 59–60.

On October 16, MidAmerican witness Mohr filed supplemental testimony to provide an update to his previously filed direct testimony regarding the federal regional haze rule. *CR.* pgs. 64–66.

On October 26, DNR witness Sarah Pizali filed direct testimony generally stating MidAmerican’s EPB met the applicable state environmental requirements for regulated emissions. *CR.* pgs. 67–69.

On October 27, the IUB entered an order deeming MidAmerican’s EPB application complete, establishing a procedural schedule, and providing notice of hearing. *CR.* pgs. 71–75.

³ IPL, as Iowa’s other rate-regulated public utility that owns electric power generating facilities fueled by coal, also filed its EPB update in the Spring of 2020. MidAmerican’s response to the IUB’s request refers to IPL’s filing, which is IPL’s EPB filing in IUB Docket No. EPB-2020-0150.

On November 4, Sierra Club, Facebook, Inc., and Google LLC filed petitions to intervene in the EPB proceeding, which the IUB granted on November 24. *CR.* pgs. 77–80; 82–84.

On December 17, OCA witness Scott Bents filed direct testimony and exhibits. *CR.* pgs. 86–508. Mr. Bents agreed MidAmerican’s EPB met the applicable state environmental benefits and the applicable federal air quality standards. *CR.* pg. 91. Mr. Bents disagreed MidAmerican’s EPB was “reasonably expected to achieve cost-effective compliance” with the applicable environmental standards due to MidAmerican’s narrow focus on installing emissions control equipment on coal-fired generators. *CR.* pgs. 92–93. Mr. Bents provided citations to MidAmerican’s 2016 and 2018 EPB dockets, where MidAmerican touted the benefits of retiring coal-fired generating units as a “least-cost alternative” for compliance with regulated emissions. *CR.* pg. 92. MidAmerican also touted limiting a generating station’s fuel source to only natural gas as a means of complying with emissions regulations. *Id.*

Mr. Bents also testified it was impossible to tell if MidAmerican’s EPB “reasonably balance[s] costs, environmental requirements, economic development potential, and the reliability of the electric generation and transmission system” due to the lack of any attempt by MidAmerican to make a showing it balanced these criteria. *CR.* pgs. 95–96. Mr. Bents detailed OCA’s fruitless efforts to obtain information from MidAmerican concerning the cost and economic potential criteria. *CR.* pgs. 96–97; 505–508. To remedy the lack of evidence, Mr. Bents recommended the IUB order MidAmerican to conduct an integrated resource plan (IRP) for its entire generating fleet. *CR.* pg. 95. An IRP is a collaborative process for evaluating a utility’s resource needs over the long-term taking into consideration factors like additions to the generation mix, generation unit retirement, and environmental standards. *Id.* Absent a full IRP, Mr. Bents recommended the IUB require MidAmerican to provide a cost-benefit analysis of its

coal-fleet with a consideration of alternative emissions control options and require MidAmerican to perform an analysis to satisfy the “economic development potential” criteria, as required by Iowa Code section 476.6(19)(c). *CR.* pgs. 97–98.

On December 17, Environmental Law & Policy Center and Iowa Environmental Council submitted the direct testimony of Steven Guyer and David Posner. Mr. Guyer testified MidAmerican’s EPB would comply with the applicable air emission regulations if its coal generating units (Neal 3 and 4) were not operated. *CR.* pg. 511. Mr. Guyer noted IPL conducted an integrated resource planning process in 2020 where it concluded closure of a coal generating unit would be more cost-effective than continued operation of the unit. *CR.* pg. 512. Mr. Guyer recommended the closure of Neal 3 and 4 or, in the alternative, the IUB ordered MidAmerican to evaluate retiring coal-fueled units and replacing them with renewable energy. *CR.* pg. 515. Mr. Posner testified MidAmerican’s Neal 3 and 4 are uneconomic to operate and recommended an accelerated schedule for retiring these assets. *CR.* pgs. 521–523. Mr. Posner proposed replacing Neal 3 and 4 with renewable energy generating sources. *CR.* pg. 523.

On January 7, 2021, MidAmerican submitted the reply testimonies of Michael Fehr, Joshua Mohr, and William Whitney. Mr. Fehr responded to the testimony filed by Environmental Law & Policy Center, Iowa Environmental Council, and OCA by highlighting commonalities in the arguments raised by these parties in a prior proceeding concerning approval of MidAmerican wind generation projects to the current EPB proceeding. *CR.* pgs. 714–15. Mr. Fehr noted the EPB proceeding was designed to facilitate the management of emissions from coal-fueled generation and not a process for eliminating coal-fueled generation or for initiating an IRP process. *Id.* Mr. Mohr responded to testimony by the same parties by first noting that retirement of coal-fueled generating facilities would not constitute compliance with regulations that apply to

the generating units subject to the EPB. *CR.* pg. 719–20. He also noted the EPB statute does not require a resource planning process as a means to manage regulated emissions at coal-fueled units. *CR.* pg. 721. Mr. Mohr argued MidAmerican’s EPB demonstrated cost-effective compliance with the applicable requirements because no new capital expenditures are included in the proposed EPB and all operations and management (O&M) expenses included in the plan stem from previously approved EPB filings, which are required to maintain compliance with the applicable regulations and permit requirements. *Id.* Mr. Mohr then provided details for his interpretation of “cost-effective,” by reference to the Environmental Protection Agency’s Control Cost Manual that only focuses on the cost-effectiveness of emissions controls. *CR.* pg. 722–23. Finally, Mr. Whitney reaffirmed that the current EPB did not include any new capital projects and all of the emissions control devices currently in use were approved in prior EPB proceedings. *CR.* pgs. 726–730. Mr. Whitney noted Environmental Law & Policy Center and Iowa Environmental Council did not object to capital expenses related to Neal 3 and 4 in the 2014 EPB proceeding (when then expenses were approved in a settlement that also included OCA) and should not be allowed to argue for the disallowance of the O&M expenses for these units in the current EPB. *CR.* pg. 730. Mr. Whitney also noted the 2020 O&M costs are not new or unknown to OCA since OCA has participated in each EPB proceeding and, in the 2018 EPB, testified the O&M cost estimates were acceptable. *Id.* MidAmerican and OCA have reached a settlement on all issues in all prior EPB proceedings save for the first proceeding in 2002. *CR.* pgs. 730–31.

On January 21, Environmental Law & Policy Center and Iowa Environmental Council submitted the reply testimony of David Posner and Steven Guyer. Mr. Posner confirmed his analysis did not focus on emission control technology already installed at MidAmerican’s

generating units or that could be feasibly installed at the units. *CR.* pg. 742. Mr. Posner stated his financial analysis focused on the capital and operating expenses of Neal 3 and 4, including the impacts of existing emissions control technology. *Id.* Mr. Posner compared the ratepayer costs of the units to alternative emissions free technology, and found that retirement of Neal 3 and 4 would result in lower levelized cost to ratepayers than continued operation of these units. *CR.* pgs. 742–43. He noted his analysis did not challenge the prudence of previously approved capital expenditures. *CR.* pg. 743. Mr. Guyer’s reply testimony generally restated his claim that early retirement of coal-fueled units would comply with air emission regulations since a retired facility would no longer need to comply with the applicable regulations. *CR.* pgs. 752–53. He noted that MidAmerican has retired coal-fueled units in the past as the “least-cost alternative” to comply with applicable emissions regulations. *CR.* pgs. 753–55. He also highlighted the lack of economic development potential analysis by MidAmerican. *CR.* pgs. 755–57.

On January 21, OCA submitted the reply testimony of Scott Bents, which provided further support for the appropriateness of an IRP and addressed the means of compliance and cost-effectiveness. *CR.* pg. 761. Mr. Bents clarified that he did not recommend the outright retirement of MidAmerican’s coal-fueled units, but advocated for an open, transparent, and stake-holder engaged IRP that could result in the retirement of these units or not. *CR.* pg. 762. Mr. Bents noted MidAmerican erroneously conflated his arguments with those made by the Environmental Intervenors that argued for outright retirement of the coal-fueled units and noted MidAmerican provided no response to his testimony concerning fuel switching as a means of emissions compliance. *CR.* pg. 762. Mr. Bents disagreed with Mr. Mohr’s narrow definition of “cost-effective,” based on the EPA’s definition of the phrase, versus its use in Iowa Code section 476.6(19). Mr. Bents also provided further support for his recommendation that MidAmerican

should consider broader emissions compliance options. *CR.* pgs. 763–64. According to Mr. Bents’s review of recent publications, “resource mix for electricity is changing rapidly” (which MidAmerican has contributed to by heavily investing in the construction of wind energy generation) due to the evidence that coal-plants are increasingly becoming less economical. *CR.* pgs. 765–66. Due to these rapid changes, Mr. Bents testified that it could no longer be assumed the status-quo is the most cost-effective option for Iowa ratepayers, who are ultimately responsible for payment of the costs incurred by MidAmerican in the EPB. *CR.* pg. 766. He concluded that the IUB should require MidAmerican to perform an IRP as part of its future EPBs. *CR.* pg. 767.

Also on January 21, the Tech Customers submitted the reply testimony of Jeffrey Pollock. Mr. Pollock opined that while MidAmerican had presented evidence relating to the environmental requirements of Iowa Code section 476.6(19), evidence related to the need for and the cost-effectiveness of the plan and its impact was “sparse” and “insufficient.” *CR.* pgs. 807, 811–12. He recommended the IUB require MidAmerican to submit additional evidence to ensure the costs proposed in the EPB are reasonable since costs associated with implementing the plan, update, or budget are included in regulated retail rates. *CR.* pgs. 808, 812–13. He also recommended the IUB open a new docket to conduct a broader review of MidAmerican’s electric supply plans for the future. *CR.* pg. 813.

On February 4, OCA and MidAmerican filed a non-unanimous settlement agreement with the IUB that resolved all outstanding issues between OCA and MidAmerican. *CR.* pgs. 830–36. The intervening parties declined to join the settlement agreement. In the settlement, MidAmerican generally agreed to submit an electric generating needs forecast and to update said forecast if certain conditions were met. *CR.* pgs. 833–35. The electric generating needs forecast

would include an analysis of actions that could be taken by MidAmerican to impact the amount of regulated emissions produced by coal-fired power plants and an analysis on how MidAmerican considers economic development benefits in long-term planning. *Id.*

Also on February 4, MidAmerican filed a motion to suspend the procedural schedule and cancel the hearing on this matter. *CR.* pgs. 838–840. On February 5, the Environmental Intervenors filed a response to MidAmerican’s motion stating they did not object to suspending the procedural schedule, but objected to cancelling the hearing. *CR.* pgs. 841–44. On February 10, the Tech Customers also filed a motion agreeing to suspend the procedural schedule but objecting to cancelling the hearing. *CR.* pg. 845–46.

On February 10, the IUB issued an order granting the request to suspend the procedural schedule but declining to cancel the hearing. *CR.* pgs. 847–50. The IUB required the DNR to file a statement of position in regards to the non-unanimous settlement agreement, and required OCA and MidAmerican to file an update on the status of outstanding issues. *Id.*

On February 16, OCA and MidAmerican filed a settlement conference update stating a settlement conference had occurred and issues raised by intervenors were being considered, but might not be accepted as the proposed issues were beyond the terms and intent of the original settlement agreement. *CR.* pgs. 853–54. On February 17, the DNR filed a statement of position stating it previously found the EPB met the applicable state requirements for regulated emissions and declined to take a position on other matters *CR.* pg. 855.

On February 18, the Environmental Intervenors filed comments concerning OCA and MidAmerican’s non-unanimous settlement agreement. *CR.* 857–83. The comments generally objected to the settlement agreement and presented language the Environmental Intervenors deemed necessary to bring the settlement into compliance with the EPB statute. *CR.* pg. 859.

Also on February 18, the Tech Customers filed their comments concerning the non-unanimous settlement agreement. *CR.* pgs. 884–88. The Tech Customers stated that while they agreed with the requirement that MidAmerican file a forecast of electric generating needs, they believed this forecast should be provided every two-years, pursuant to Iowa Code section 476.6(16). *Id.* The Tech Customers requested that any information submitted as part of the electric generating needs forecast be made part of the EPB docket and contain consideration of reasonable alternative sources of supply to satisfy the cost-effectiveness requirement of section 476.6(19). *Id.*

On February 25, OCA filed a reply to the intervenors' comments. *CR.* pgs. 889–96. OCA responded to the Environmental Intervenor's comments by stating the generation needs forecast filing would generally achieve some of the same results as the proposals highlighted in their comments. *CR.* pgs. 890–94. OCA responded to the Tech Customers by noting OCA had no objection to more frequent updates for the electric generating needs forecast and also noted that some updates of resource plans would occur independent of the settlement agreement in other dockets. *Id.* at 895–96. OCA reaffirmed its belief the settlement agreement appropriately resolved the issues pending in the EPB docket and should be approved by the IUB as consistent with the public interest. *Id.* at 896.

Also on February 25, MidAmerican submitted a reply to the comments on the proposed non-unanimous settlement agreement and generally reaffirmed its belief the settlement was reasonable and in the public interest. *CR.* pgs. 924–39. MidAmerican requested the IUB reject the Tech Customers requested modifications to the settlement and reject the Environmental Intervenor's arguments against the settlement because as they were outside the scope of the EPB statute. *CR.* pgs. 929–34. MidAmerican also requested the IUB find the Environmental Intervenor's arguments concerning the economics of Neal 3 and 4 barred under the doctrine of

judicial estoppel since the arguments are inconsistent with the Environmental Intervenors' previous position in a prior EPB dockets. *CR.* pg. 934–39. MidAmerican also included a confidential attachment with its response that contained operation and maintenance projections for the current EPB and the past three EPB proceedings. *CR.* 940.

On March 4, the Environmental Intervenors submitted a motion to strike the attachment to MidAmerican's February 25 reply to comments on the proposed settlement. *CR.* pgs. 941–56. The Environmental Intervenors argued the attachment contained new evidence and they were not given an opportunity to conduct discovery on the new evidence nor an opportunity to rebut the evidence; they requested the IUB strike the attachment. *CR.* pg. 946. They also generally responded to MidAmerican's estoppel argument. *CR.* 949–50. MidAmerican responded to the motion to strike on March, 11. *CR.* pgs. 957–64.

On March 16, the IUB issued an order establishing deadlines, requiring the filing of a joint statement of issues, and addressing outstanding motions. *CR.* pgs. 965–72. The IUB denied MidAmerican's estoppel argument and reserved the motion to strike for the hearing. *CR.* pg. 968–69.

The parties submitted a joint statement of the issues on March 19. *CR.* pgs. 973–77.

On March 24, the IUB entered a thirteen-page order approving MidAmerican's EPB as filed, denying the non-unanimous settlement agreement, and cancelled the hearing. *CR.* 979–91. The IUB found MidAmerican's EPB was consistent with the Iowa Code section 476.6(19) requirements. *CR.* pgs. 984–86. The IUB found the evidence submitted by OCA and the intervenors concerning other options for cost-effective compliance were outside the scope of the EPB statute and, therefore, no material facts were in dispute. *CR.* pgs. 986–88. The IUB rejected the non-unanimous settlement agreement because it also contained details the IUB determined

were outside the scope of the EPB statute. *CR.* pgs. 988–89. The IUB stated it would open a new docket, 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, and pursuant to Iowa Code § 476.6(16) to address a forecast of future gas requirements or electric generating needs.” *CR.* pg. 990. The IUB denied all other outstanding motions. *Id.*

OCA and the Environmental Intervenors timely filed motions for rehearing and reconsideration. *CR.* 992–1027. The Tech Customers and MidAmerican filed responses to the motions. *CR.* 1028–42. On May 13, the IUB denied the motions. *CR.* pgs. 1043–54.

Further facts will be discussed as relevant to the arguments stated below.

ARGUMENT

I. The IUB’s Ruling Approving MidAmerican’s EPB is Relies on an Erroneous Application of the Relevant Law and is Not Supported by Substantial Evidence

A. Scope and Standard of Review

The scope of review encompasses the entire record before the agency and is not limited to the agency’s findings. Iowa Code § 17A.19(10)(f)(3). Judicial review of final agency action is governed by the standards set forth in Iowa Code § 17A.19. The applicable standard of review depends upon the nature of the error claimed. If the alleged error is with the agency’s findings of fact, the proper question on review is whether there is substantial evidence in the record when it is viewed as a whole to support the agency’s findings of fact. Substantial evidence is defined in Iowa Code section 17A.19(10)(f)(1) as 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.” *S. E. Iowa Co-op. Elec. Ass'n v. Iowa Utilities Bd.*, 633 N.W.2d 814,

818 (Iowa 2001). “Substantial evidence is more than a scintilla of evidence, but it need not be a preponderance of evidence.” *Matter of Prop. Seized from McIntyre*, 550 N.W.2d 457, 460 (Iowa 1996). The ultimate question is not whether there is evidence that supports a different finding, but whether the evidence supports the findings actually made. *Broadlawns Medical Ctr. v. Sanders*, 792 N.W.2d 302, 306 (Iowa 2010).

If the legislature vested an agency with the authority to interpret a statute, this court defers to the agency’s interpretation of the statute and will only reverse the agency if its interpretation is “irrational, illogical, or wholly unjustifiable.” Iowa Code § 17A.19(10)(l); *NextEra Energy Res. LLC v. Iowa Utilities Bd.*, 815 N.W.2d 30, 37 (Iowa 2012); *Renda v. Iowa Civil Rights Comm’n*, 784 N.W.2d 8, 10 (Iowa 2010). “[W]hen the statutory provision being interpreted is a substantive term within the special expertise of the agency,” the Iowa Supreme Court concluded the agency was vested with interpretative power. *Renda*, 784 N.W.2d at 14. Conversely, if the relevant statute is not within the statutes the agency is tasked with enforcing or the “term has an independent legal definition that is not uniquely within the subject matter expertise of the agency,” the agency has not been vested with interpretive authority. *Id.* Where the legislature has not vested the agency with the authority to interpret the provisions of the relevant law, this court reviews for correction of errors at law. Iowa Code § 17A.19(10)(c); *NextEra*, 815 N.W.2d at 37–38.

Here, the IUB’s findings of fact will be reviewed to determine if they are supported by substantial evidence. Iowa Code § 17A.19(10)(f)(1). Concerning the IUB’s interpretation of Iowa Code chapter 476, the Iowa Supreme Court has found “the general assembly did not delegate to the [IUB] interpretive power with the binding force of law” over the provisions in chapter 476. *NextEra*, 815 N.W.2d at 38. In recent years, the Iowa Supreme Court has declined

to find various terms and phrases used in chapter 476 “substantive term[s] within the special expertise of the” IUB. *See id.* (finding the IUB’s interpretation of the phrase “electric supply needs,” as used in Iowa Code § 476.53(4)(c)(2) (2009) should be examined for correction of errors at law); *see also Hawkeye Land Co. v. Iowa Utilities Bd.*, 847 N.W.2d 199, 209 (Iowa 2014) (finding the IUB did not have interpretative authority over the terms “public utility” and “railroad corporation” as used in Iowa Code § 476.27); *see also SZ Enterprises, LLC v. Iowa Utilities Bd.*, 850 N.W.2d 441 (Iowa 2014) (finding the IUB did not have interpretative authority over the terms “public utility” and “railroad corporation” as used in Iowa Code § 476.27). At issue in this judicial review is the phrase “cost-effective” as used in Iowa Code section 476.6(19)(c). “Cost-effective” is likely not a substantive phrase within the special expertise of the IUB. While “cost-effective” is used in multiple instances in chapter 478, it is also found throughout the Iowa Code in chapters the IUB is not tasked with enforcing. *See, e.g.*, Iowa Code § 23.1 (creating a “cost-effective” process for resolving disputes); *see also, e.g.*, Iowa Code § 256.56 (allowing “cost-effective” alternatives for electronic access to documents). This court should give the IUB’s interpretation of Iowa Code section 476.6(19)(c) no deference and review the IUB’s legal conclusions for corrections of errors at law.

B. The IUB Relied on an Erroneous Interpretation of Iowa Code section 476.6(19)(c) When it Determined MidAmerican Should not be Required “to Look at Multiple Options” as Part of the Analysis of the Balancing Factors in section 476.6(19)(c).

Iowa Code section 476.6(19) requires a rate-regulated public utility that operates a coal-fueled electric generating facility in Iowa 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). The Iowa Legislature envisioned the EPB process as a “collaborative effort involving state agencies and affected generation owners.” *Id.* Pursuant to section 476.6(19)(a)(1), MidAmerican

filed its first plan in 2002 and has since filed updates to the plan at least every two-years. *CR.* pg. 9. The DNR is tasked with evaluating whether the plan or update meets the applicable state environmental requirements for regulated emissions. Iowa Code § 476.6(19)(a)(4). If the plan does not meet the requirements, the DNR must recommend amendments to the plan or budget to resolve compliance issues. *Id.* The IUB is tasked with reviewing the plan and the subsequent updates and associated budget. 476.6(19)(b), (c). In reaching its decision on whether to approve the EPB, the IUB must consider the following: First, pursuant to Iowa Code section 476.6(19)(b) the plan or update must “meet applicable state environmental requirements and federal ambient air quality standards for regulated emissions from electric power generating facilities located in the state;” Second, pursuant to Iowa Code section 476.6(19)(c),

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.

Concerning the first consideration, no party contested whether MidAmerican’s EPB met the applicable state and federal standards for regulated emissions from coal-fueled electric generating facilities. *CR.* pg. 985. Concerning the second consideration, OCA’s witness Scott Bents argued it was impossible to tell if MidAmerican’s 2020 EPB update “achieved cost-effect compliance” due to the lack of any consideration by MidAmerican to balancing the four required factors in section 476.6(19)(c). *CR.* pgs. 95–96. He also argued the plan and associated budget could not be “reasonably expected to achieve-cost effective compliance” due to the lack of any consideration given to alternative methods for managing regulated emissions. *CR.* pgs. 93–94. Changes in dispatch or operation of coal-fired generating units will likely play an important role in meeting emissions standards, and should be considered as an emission compliance strategy

within an emission plan and budget. CR. 763–64. Petitioners and the Tech Customers echoed Mr. Bents’s sentiments that MidAmerican should consider alternatives for managing regulated emissions in order to comply with Iowa Code section 476.6(19). CR. pgs. 807–09, 997–1000.

In its Order, the IUB rejected OCA’s, the Environmental Intervenors’, and the Tech Customers’ recommendations that MidAmerican consider alternative methods of managing regulated emissions to comply with section 476.6(19). The IUB provided the following reasoning:

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).

Based upon the evidence in the record, the Board finds that there are no material facts about the EPB filed by MidAmerican that are in dispute. The Board finds that the evidence provided by MidAmerican and IDNR shows that the 2020 EPB meets applicable state environmental requirements and federal ambient air quality standards.

The Board finds that MidAmerican has 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 Board finds that MidAmerican’s plan reasonably balances the criteria identified in Iowa Code § 476.6(19)(c). The Board also finds that MidAmerican’s plan, which contains capital expenditure information as well as O&M expense information, is cost effective and complies with the requirements in Iowa Code § 476.6(19).

CR. pgs. 987–88. After OCA and Petitioners requested rehearing and reconsideration of the IUB’s Order, the IUB doubled down on its erroneous reasoning, stating:

Both Environmental Intervenors 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.

CR. pgs. 1050–51.

The IUB erred in its interpretation of the “cost-effective compliance” language in section 476.6(19)(c) and in its erroneous interpretation of its past precedent. In fact, as OCA pointed out, MidAmerican has previously used both retirement and fuel switching as least cost solutions for emissions compliance. CR. pgs. 92–93, 762. OCA will address each issue in turn.

1. The phrase “cost-effective compliance” necessarily requires a consideration of alternative options for compliance.

This court is tasked with interpreting Iowa Code section 476.6(19)(c). Concerning statutory interpretation, the Iowa Supreme has provided the following guidance:

Our goal in interpreting a statute is to determine the legislative intent by looking at the language the legislature chose to use, not the language they might have used. *Ramirez-Trujillo v. Quality Egg, L.L.C.*, 878 N.W.2d 759, 770 (Iowa 2016). In other words, legislative intent cannot change the meaning of a statute if the words used by the legislature will not allow such a meaning. *Marcus v. Young*, 538 N.W.2d 285, 289 (Iowa 1995). . . .

When there is no statutory definition to guide us, we interpret terms “in the context in which they appear and give each [word] its plain and common meaning.” *Ramirez-Trujillo*, 878 N.W.2d at 770. If there is more than one interpretation of the plain meaning that is reasonable, we will employ traditional tools of statutory interpretation. *Irving[v. Employment Appeal Bd.]*, 883 N.W.2d [179,] 191 [(Iowa 2016)].

Banilla Games, Inc. v. Iowa Dep’t of Inspections & Appeals, 919 N.W.2d 6, 14 (Iowa 2018).

Because we presume the legislature included every part of the statute for a purpose, we avoid construing a statutory provision in a manner that would make any portion thereof redundant or irrelevant. *Rojas [v. Pine Ridge Farms, LLC.]*, 779 N.W.2d [223,] 231 [(Iowa 2010)]; see Iowa Code § 4.4(2). We also avoid construing statutory provisions in a manner that will lead to absurd results. *Iowa Ins. Inst.[v. Core Group of Iowa Ass’n for Justice]*, 867 N.W.2d [58,] 75 [(Iowa 2015)]; see Iowa Code §§ 4.4(3), .6(5).

Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 770 (Iowa 2016)

The IUB's cursory interpretation and application of section 476.6(19)(c) is conclusory (at best) and runs counter to the clear legislative intent of that section. The IUB's order lacks an interpretation of section 476.6(19)(c) and only presents a conclusion from which to parse an interpretation. Comparing the IUB's conclusion that section 476.6(19)(c) does not allow alternatives to the plain language of the statute leads to an absurd result: how can the cost-effectiveness compliance of MidAmerican's EPB update be shown without a consideration of other potentially more cost-effective alternative compliance options? By definition, "cost-effective" means "providing good value for the amount paid." *Cost-Effective*, Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/cost-effective>, (last visited Aug. 25, 2021). Based on MidAmerican's 2020 EPB filing, the amount MidAmerican proposes spending for the emissions compliance from January 1, 2020, through December 31, 2022, is known, but we do not know if that amount is "good value." The alternatives suggested by OCA would provide a means by which to measure the value of the measures contained in MidAmerican's 2020 EPB update. Without a comparison to alternatives, the IUB's interpretation of "cost-effective compliance" essentially ignores the phrase entirely—contrary to statutory interpretation precedent that assumes the legislature included each word in a statute for an express purpose. *See Ramirez-Trujillo*, 878 N.W.2d at 770. The IUB's interpretation, absent a comparison to alternatives, only makes logical sense if the factors governing coal plant operations and EPB plans are static and not subject to change. However, a utility's plans and obligations for meeting emissions regulations are necessarily impacted by a utility's ongoing plans for operating a coal-fired power plant, which in turn are impacted by the addition of new low-emission energy resources and other factors. Emission planning is not a static process. The EPB statute recognizes this and requires MidAmerican to review and update its plans at least

every twenty-four months. The IUB's interpretation is erroneous by ignoring this fact and by ignoring the clear language in the statute.

Further, the IUB's interpretation ignores the legislature's stated intent that the EPB plan and subsequent updates be the result of a "collaborative effort." Iowa Code § 476.6(19)(a). The legislature specifically required OCA to participate in the initial plan and any subsequent updates. *Id.* at (19)(a)(3). It is unclear how OCA could participate and collaborate in the EPB update approval process without the ability, according to the IUB's interpretation, to present reasonable cost-effective alternative compliance options. As noted by OCA's witness Scott Bents, OCA's attempts to collaborate with MidAmerican by inquiring about reasonable alternative methods of compliance for regulated emissions were met by stonewalling from MidAmerican through the refusal to respond to discovery requests and to the suggestions made in Mr. Bents's testimony. *CR.* The Environmental Intervenors encountered the same resistance when they conducted discovery and made recommendations in testimony. *CR.*

Based on the errors highlighted above, the IUB's interpretation of Iowa Code section 476.6(19)(c) is erroneous and should be reversed by this court pursuant to Iowa Code section 17A.19(10)(c).

2. The IUB's Reliance on "Past Precedent" to Justify its Interpretation of Section 476.6(19)(c) is Erroneous.

In both the IUB's initial order and its order on rehearing it states that reasonable alternatives for emissions compliance were not raised in previous EPB dockets and it found those EPB's in compliance with the statute—past precedent demonstrates this finding is erroneous. *CR.* pgs. 979–991, 1050–51.

Mr. Bents's testimony and reply testimony cites MidAmerican's 2016 and 2018 EPB filings that tout alternative methods of complying with emissions regulations, which constitutes

past precedent justifying the consideration of alternatives in this matter. In 2016, MidAmerican witness Jennifer McIvor testified “MidAmerican is retiring certain coal-fueled generating units as the least-cost alternative to company” with emissions standards. *Direct Testimony of Jennifer McIvor*, EPB-2016-0156, pg. 5 (IUB Apr. 1, 2016). MidAmerican also limited a generating station “to natural gas combustion” to comply with emissions standards. *Id.* MidAmerican’s 2016 Electric Power Generation Facility Emissions Plan contains the same language stating that retirement of coal-fueled units and limiting to natural gas combustion is a least-cost means to comply with emissions requirements. *MidAmerican Electric Power Generation Facility Emissions Plan*, EPB-2016-0156, pgs. 4–8 (IUB Apr. 1, 2016). No parties contested MidAmerican’s early retirement of coal plants and use of natural gas combustion as a least-cost means to comply with emissions standards, and the IUB approved the 2016 including these issues. *See Order Granting Motion to Cancel Hearing and Approving Emissions Plan Update* (IUB June 9, 2017).⁴ Similarly, in 2018 MidAmerican touted early retirement of coal-fueled generation as an alternative method for complying with emissions standards. *Direct Testimony of Jennifer McIvor*, EPB-2018-0156, pg. 4 (IUB Apr. 2, 2018); *MidAmerican Electric Power Generation Facility Emissions Plan*, pgs. 2, 5.

IUB precedent from IPL’s EPB filings in past years also supports the conclusion that the consideration of alternative methods of emissions compliance is valid. As noted in Petitioner’s Application for Reconsideration, in 2016 IPL performed a cost-benefit analysis, including a consideration of alternative compliance options. *CR.* pg. 1002. The 2016 IPL EPB eventually

⁴ The only outstanding issue in the 2016 EPB related to the installation of emissions control technology at a coal plant jointly owned by Interstate Power and Light (IPL) and MidAmerican, but operated by IPL. *Id.* The IUB found this issue had been resolved in IPL’s 2016 EPB. *Id.* pgs. 4–5. In the Order approving IPL’s 2016 EPB, the IUB made specific findings regarding the emissions control technology and found it achieve cost-effective compliance. Specifically, it found IPL had considered alternative emissions control measures, but selected the one presented in the EPB due to evidence it was the most cost-effective solution. *See Order Approving Joint Motion, Settlement Agreement, and Emissions Plan Update, and Cancelling Hearing*, EPB-2016-0150 (IUB May 16, 2017).

settled through a collaborative process with IPL, OCA, and Petitioners, where IPL agreed to install battery storage and develop renewable energy generation. *CR. 1003; Joint Motion and Settlement Agreement*, EPB-2016-0150, pg. 4 (IUB May 11, 2017). The IUB approved the settlement including the alternative methods of compliance. *Order Approving Joint Motion, Settlement Agreement, and Emissions Plan Update, and Cancelling Hearing*, EPB-2016-0150, pgs. 6–7 (IUB May 16, 2017) (“[T]he settlement agreement itself states that the parties stipulate that IPL’s EPB update complies with the requirements of Iowa Code § 476.6(20). Therefore, the record weighs in favor of a finding approving IPL’s 2016 EPB update. The Board will approve the April 1, 2016, filing as amended.”)

Based on the errors highlighted above, the IUB’s interpretation of section 476.6(19)(c) is “is inconsistent with the [IUB’s] prior practice or precedents and should be reversed by this court,” pursuant to Iowa Code section 17A.19(10)(h).

C. The Board’s Order Approving MidAmerican’s EPB is not Supported by Substantial Evidence due to the Lack of Evidence, Viewing the Record as a Whole From the Perspective of a Reasonable Person, for the Findings Required by Iowa Code Section 476.6(19).

Even assuming, *arguendo*, the IUB’s conclusory interpretation of Iowa Code section 476.6(19)(C) is correct, this finding is not supported by substantial evidence as the record lacks evidence to support the cost and economic potential analysis required by this section. Further, the IUB abused its discretion by not clearly making the findings required by this section.

Iowa Code section 17A.16 requires an agency’s final decision of a contested case proceeding to include “[f]indings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, *shall be accompanied by a concise and explicit statement of underlying facts supporting the findings*. The decision shall include an explanation of why the

relevant evidence in the record supports each material finding of fact. . . . Each conclusion of law shall be supported by cited authority or by a reasoned opinion.” (emphasis added).

The initial Order and the Order Denying Motion for Reconsideration, lack analysis of how the evidence in the record supports its finding that MidAmerican’s EPB complies with Iowa Code section 476.6(19). *CR.* pgs. 979–91; 1043–54). While section 476.6(19)(C) requires the IUB to make specific findings (balance costs, environmental requirements, economic development potential, and reliability) in reaching its decision to whether to approve the EPB, the IUB did not make these findings nor provide “a concise and explicit statement of underlying facts supporting” these findings.

OCA, Petitioners, and the Tech Customers highlighted the lack of evidentiary support for MidAmerican’s EPB in the record. *See CR.* pgs. 95–96, 755–57, 807, 811–12. In the Order, with little reasoning, citation to the record or to legal precedent, the Board rejected OCA’s and intervenor’s arguments as outside the scope of the EPB, but failed to provide an analysis of how the evidence in the record supported its finding that MidAmerican’s EPB complied with section 476.6(19).

Pursuant to Iowa Code section 17A.19(10)(f), viewing the record as a whole, substantial evidence does not exist to support the IUB’s conclusion that MidAmerican’s 2020 EPB satisfied the requirements of Iowa Code section 476.6(19)(c). Additionally, the IUB’s lack of findings required by section 476.6(19)(c) is “[o]therwise unreasonable, arbitrary, capricious, or an abuse of discretion,” pursuant to Iowa 17A.19(10)(n).

CONCLUSION

WHEREFORE, OCA respectfully asks this Court to find the IUB’s agency action was based on an erroneous interpretation of Iowa Code section 476.6(19)(c) and is not supported by

substantial evidence when viewing the record as a whole, pursuant to Iowa Code section 17A.19(10)(c), (h), (f), and (n). OCA believes the relief requested by Petitioners in their Petition for Judicial Review is appropriate and adopts Petitioner's relief requested by reference. *See* Petition for Judicial Review, ¶¶ 60–63.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was automatically served electronically to the parties of record via EDMS on August 27, 2021.

/s/ Jeffrey J. Cook
Jeffrey J. Cook