IN THE IOWA DISTRICT COURT FOR POLK COUNTY

ENVIRONMENTAL LAW AND POLICY CENTER, IOWA ENVIRONMENTAL COUNCIL, & SIERRA CLUB, Petitioners, vs. IOWA UTILITIES BOARD, Respondent, and OFFICE OF CONSUMER ADVOCATE, MIDAMERICAN ENERGY COMPANY, Intervenors.	Case No. CVCV061992 **BRIEF OF INTERVENOR MIDAMERICAN ENERGY COMPANY**

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STATEMENT OF THE CASE

On April 1, 2020, MidAmerican Energy Company ("MidAmerican"), pursuant to the requirements of Iowa Code §476.6(19), filed with the Iowa Utilities Board ("Board" or "IUB") its 2020 Emissions Plan and Budget Update ("2020 EPB Update")[1]. This update is required by statute to be filed by any "rate-regulated public utility that is an owner of one or more electric power generating facilities fueled by coal and located in this state. . ." Iowa Code §476.6(19). The purpose of the plan and budget is to "manag[e] regulated emissions from [the utility's] facilities in a cost-effective manner." *Id*. The initial plan was required by April 1, 2002, see §476.6(19)(a)(1), and must be updated at least every 24 months. *Id*.

MidAmerican's 2020 EPB Update was substantially similar to those filed in previous years, providing similar information and relying on similar support. In prior years, Petitioners Environmental Law and Policy Center ("ELPC"), Iowa Environmental Council ("IEC"), and Sierra Club have often participated in the Board dockets, as well as Intervenor Office of Consumer Advocate ("OCA") which is a mandatory party – and they frequently either joined in settlements resulting in approval of the EPB Update, or have chosen not to raise any objections. MidAmerican's annual EPB Updates have been approved continuously since 2002, and no review has been sought of those prior EPB Updates. Because each new EPB Update is, as the name suggests, just an incremental update of prior plans and budgets, much of what Petitioners now complain of automatically follows from decisions they previously accepted.

In this year's docket, OCA was willing to join in a settlement that would have approved the 2020 EPB Update with no substantive changes to the plan itself. Petitioners, however,

[1] The 2020 EPB Update at the center of this matter is in the Certified Record ("CR") at pp. 7-26.

objected because MidAmerican had not proposed, nor shown that it considered, the retirement of any of its coal-fired power plants. The Board issued an "Order Approving Emission Plan Budget Update, Denying Joint Motion and Non-Unanimous Settlement, and Canceling Hearing" on March 24, 2021 (CR 979-991), and denied reconsideration on May 13, 2021 (CR 1043-1054) .

As MidAmerican explains below, Petitioner's substantive challenge to the 2020 EPB Update and the Board's final action approving that Update – that MidAmerican did not consider or adopt the retirement of coal plants and the Board did not require MidAmerican to do so – is not a valid challenge and cannot provide a basis to reject the Board's Order. Petitioner's Petition and Brief in this case ask the Court to legislate, to insert words and requirements into the statute that simply are not there today. More broadly, Petitioners misconstrue the structure and nature of the process established by Iowa Code §476.6(19), and the history of prior dockets. At the end of the day, there is no real question that the Board's Order was correct: the record firmly establishes that MidAmerican's 2020 EPB Update "meet[s] applicable state environmental requirements and federal ambient air quality standards for regulated emissions", it does so in a "reasonably. . . cost-effective" way, and it "reasonably balances costs, environmental requirements, economic development potential, and the reliability of the electric generation and transmission system." *See* Iowa Code §476.6(19)(b) and (c). Those are the only requirements set forth in the statute that a plan must meet. Petitioners' attempts to require additional showings or to add specific details where they don't exist are improper and must be rejected.

ARGUMENT

I. THE BOARD ORDER APPROVING MIDAMERICAN'S 2020 EMISSIONS PLAN AND BUDGET UPDATE SHOULD BE UPHELD AS THE UPDATE FULLY COMPLIES WITH ALL REQUIREMENTS OF IOWA CODE 476.6(19).

A. Petitioners' Challenges to the Board Order Approving the 2020 EPB Update Reflect a Misunderstanding of the Statute – or an Attempt to Have the Court Re-Write It.

1. It is Important at the Outset to Understand What Iowa Code §476.6(19) Does and Does Not Say or Require.

To understand why Petitioners' claims are invalid, it is important to understand the statutory framework for the 2020 EPB Update. First and foremost is that it is, specifically, an "update." The statute contemplates an iterative and incremental undertaking. What is filed each year is an update regarding changes: changes in regulations in effect or foreseen; changes in the coal-fueled facilities covered by the statutes; changes in emissions control technologies in use or available; changes in costs to operate those technologies. While the statute undeniably provides that the approval of each update is a contested case and is therefore on the record before the Board, the structure also means that a new update does not start from a blank slate. "Update," by its nature, implies a relationship to something that came before. As a result, the Board as the expert agency cannot be expected to leave the knowledge it has from prior proceedings at the door when it evaluates each new update. Even more important is that the costs in each EPB Update have a relationship to historically-approved plans. It would make no sense, would be unrealistic, and would be extraordinarily unfair to MidAmerican if, for example, the capital costs of certain emissions control equipment were approved in one plan, but recovery of those same costs, or recovery of the operations and maintenance costs that inherently accompany that equipment, were rejected in subsequent years.

The second aspect of the statute that it is important to understand is how exceedingly narrow it is. The statute starts from an assumption that some rate-regulated utilities operate coal-fueled plants in Iowa. No language in the statute seeks to eliminate such coal plants; the statute takes no position on fuel choice or fuel mix in a utility's fleet at all. That statute also recognizes that there are state and federal environmental rules that apply to the emissions from such operating coal plants. The only thing §476.6(19) actually does, however, is require a utility with an operating coal plant to show the Board that it will meet its emissions requirements in a "reasonably cost-effective" manner that "reasonably balances" costs, environmental *requirements* (not goals or third-party policy objectives – actual requirements), economic development, and reliability of the electrical system. To see just how narrow the scope and intended impact of the statute really is, MidAmerican points the Court to §476.6(19)(f), in which the legislature instructs the Board that it may limit investments by a utility until such time they are required by state or federal law, even if those investments would provide environmental benefits at present:

> f. It is the intent of the general assembly that the board, in an environmental plan, update, or associated budget filed under this section by a rate-regulated public utility, may limit investments or expenditures that are proposed to be undertaken prior to the time that the environmental benefit to be produced by the investment or expenditure would be required by state or federal law.

Iowa Code §476.6(19)(f). That the legislature intended the breadth and depth of the proceeding to be limited to a very narrow and specific scope and task is also suggested by the statutory time limit that generally requires an order to be issued within 180 days of when an EPB Update filing is deemed complete. *See* Iowa Code §476.6(19)(d).

Finally, and perhaps most importantly, the Court should consider what the relevant statute *does not* include and *does not* do. Some other states have a process called "Integrated

Resource Planning" ("IRP") that requires a public utility to file a plan for what mix of generation facilities, fuels and purchases it will use to meet its projected future demand; that plan is subject to review and debate among parties. Although Petitioners apparently want to use this case to reach some of those issues, that is not what Iowa Code §476.6(19) provides; Iowa does not have an IRP requirement or process in §476.6 or anywhere else. Additionally, the entire EPB program as outlined in §476.6(19) is premised on existing plants and how those operating coal plants will comply with regulations on the allowable level of emissions. The EPB statute also does not require a utility to use the lowest-cost compliance; only that the plan be "reasonably cost-effective." And it certainly doesn't require the lowest resulting emissions; subparagraph (f) expressly says the Board should consider disallowing those emission-reduction expenditures not actually required to meet existing regulatory requirements. There is no state or federal regulatory requirement that MidAmerican retire its coal plants.

With respect to process, the statute does not require any specific showing, and in particular does not require a utility to compare its proposed plan to other possible options, alternatives or plans (much less any specific alternative, like retirement of coal plants). The EPB Update proceeding looks at the *utility's* proposal and renders an up or down verdict on that specific proposal – whether it is a reasonable and reasonably cost-effective way to keep coal plant emissions within existing emissions regulations. It is not a choice among competing proposals from various parties. Ultimately, the statute leaves to the Board's discretion and expertise whether a reasonable balance has been struck among and between the relevant considerations in § 476.6(19)(c). The Court should be wary of substituting its evaluation for that of the expert agency to whom the legislature assigned that task, particularly here where the

Petitioners seek to expand the alleged requirements of the statute far beyond its clear and unambiguous terms.

2. The Board Properly Approved MidAmerican's 2020 EPB Update Because the 2020 EPB Update Fully Complies with the Requirements of the Statute.

As is explained above, the update required by Iowa Code § 476.6(19) has only three requirements:

(1) that the update shall "meet applicable state environmental requirements and federal ambient air quality standards," see Iowa Code § 476.6(19)(b);

(2) that the Board finds the update and associated budget is "reasonably expected to achieve cost-effective compliance with" the environmental requirements, see Iowa Code § 476.6(19)(c); and

(3) that the update and associated budget "reasonably balance costs, environmental requirements, economic development potential, and the reliability of the electric generation and transmission system." *Id*.

The statute requires the Iowa Department of Natural Resources ("IDNR") to review the update and state whether the update will meet the first element – compliance with environmental requirements on coal plant emissions. Iowa Code §476.6(19)(a)(4). The IDNR confirmed that MidAmerican's 2020 EPB Update would comply with such requirements. *See* IDNR Testimony of Piziali at 2:4-14 (CR 68). No party before the Board disputed the IDNR's evaluation or claimed the 2020 EPB Update would fail to comply with state and federal requirements. *See*, *e.g.*, OCA Witness Bents' Direct Testimony at 3:17-4:7 (CR 90-91) (agreeing that the Update complied with the specified state and federal emissions regulations).

With respect to whether the Update did so in a cost-effective manner, MidAmerican's position is simple. MidAmerican's 2020 EPB Update and associated budget included no new capital costs, so there are no capital costs that could be deemed unreasonable or not cost-effective. That leaves only Operations and Maintenance ("O&M") costs. Two key things are

true about the O&M costs in the budget. ***First***, they are all associated with capital expenditures (emissions control equipment) that have *already been approved in prior years* and those capital expenditures are no longer subject to challenge. The Court should not allow what amounts to a collateral attack on prior approvals that were not appealed. ***Second***, the O&M costs for two key plants, Neal Units 3 and 4, were the subject of a settlement in the 2014 EPB Update wherein the ELPC, IEC, and OCA stipulated that the proposed capital investments in emission control technologies in that docket and the associated O&M expenses were prudent and reasonable. *See In re MidAmerican Energy Company*, Docket No. EPB-2014-0156, "Joint Motion and Partial Settlement Agreement" (filed Jan. 8, 2015) at 3. Now, in this docket, they are arguing that the O&M expenses for emission controls at Neal Units 3 and 4 are unreasonable and should not be recovered going forward. Those parties should not now be heard to argue a position that undermines their prior settlement. Similarly, as MidAmerican witness Whitney explained in his reply testimony (CR 726-731), MidAmerican traditionally forecasts O&M expenses for more years than are covered by a specific Update. OCA has seen all of those projections for ongoing O&M costs (for the Neal Units and other coal-fueled facilities) and as recently as the last (2018) Update, the OCA reached a settlement allowing those costs with OCA's witness testifying that "MidAmerican's O&M cost estimates in the budgets are acceptable." *See* MidAmerican Witness Whitney Reply at 5:92-6:104 (CR 730-731).

Finally, with respect to whether the plan reasonably balances the various factors, MidAmerican provided very similar information to what it has provided in past years that the Board, OCA and various environmental intervenors have routinely found sufficient and acceptable. The Budget Update, in Section F "Other Plan Considerations," as it has done for many years' worth of biennial filings, lists a short description demonstrating how it took each

relevant factor into account, and some key information about that factor. (CR 18) There has never been a dispute that use of emissions control technologies at MidAmerican's coal plants provides an economic development benefit.[2] Similarly, the Board has expertise in reliability and should be given a fair amount of leeway in applying that expertise to the facts provided.[3] The remaining factors, cost and environmental benefits, are the core analysis of the Update discussed in detail above.

In sum, MidAmerican has presented the same kind of support and the same framework for analysis that it has provided for over a decade's worth of prior EPB Updates. The Board has approved every one of those updates, the OCA has concurred in the result by settlement or agreement to MidAmerican's request to cancel the hearing in all of the prior EPB Updates, and ELPC and IEC have either settled or opted not to challenge the results in each prior EPB Update. The reason is simple: MidAmerican's biennial plans carefully satisfy each of the three narrow, limited requirements of Iowa Code § 476.6(19). The 2020 EPB Update fully complies as well. In fact, no one has challenged, below or in this case, the validity of the numbers MidAmerican has presented for costs or for emission levels, no one has challenged the prudency of any of the emission control technologies installed to date, no one has challenged the validity or veracity of the statements MidAmerican has made about the other factors in the "Other Plan Considerations"

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[2] The Board has approved every prior EPB Update filed by MidAmerican, generally approving a partial settlement that includes the OCA, and what was said about economic development in those prior plans is both similar to the 2020 EPB Update and remains true of each future update. *See*, *e.g.*, MidAmerican's 2014 EPB Plan Update at 19 (the Environmental Intervenors joined in the settlement approving that plan) and compare with 2020 EPB Plan Update at 12 (CR 18). It is disingenuous for the Petitioners to now claim the economic development description is insufficient when they have previously agreed that similar language *was* sufficient.

[3] *See S. E. Iowa Co-op. Elec. Ass'n v. Iowa Utils. Bd.*, 633 N.W.2d 814, 818 (Iowa 2001)("we typically defer to the agency's informed decision as long as it falls within a 'zone of reasonableness'," citing *Equal Access Corp. v. Utils. Bd.,* 510 N.W.2d 147, 151-52 (Iowa 1993)).

section of the Budget Update. As a result, the Court should find that the 2020 EPB Update provides what the legislature intended and should uphold the Board's approval of the 2020 EPB Update.

3. The Errors Asserted by Petitioners Reflect a Misunderstanding of the Statute, and the Relief Sought by Petitioners is Not Supported by the Statute.

Despite MidAmerican's 2020 EPB Update satisfying the narrow statutory criteria, Petitioners challenge the Board's approval because they want more – they want MidAmerican to do more than the statute requires, they want the Board to require more than the statute allows, they want a different process than the legislature contemplated. Looking to the Petition to see what Petitioners are actually seeking makes abundantly clear that they are not looking to the actual statute as it reads today but are instead asking the Court to add requirements that don't exist. Their proper forum is the legislature, not the Court. *See Brakke v. Iowa Department of Natural Resources*, 897 N.W.2d 522, 541-42 (Iowa 2017)(" The fact that more might have been done does not make the grant of limited authority the legislature gave to the DNR absurd. . . If the legislature wishes to expand quarantine powers as suggested by the DNR rule, it is, of course, free to do so.")

The Petition gets to the actual remedies sought only in the last three paragraphs, 60-63. Paragraph 60 requests "that the Court rule that Iowa Code §476.6(19)(c). . . require a utility to show that its emissions management strategy is cost-effective ***in comparison to reasonable alternatives***. . ." (emphasis added). Paragraph 61 asks the Court to "rule that the Board erred as a matter of law when it concluded that consideration of. . . ***coal plant retirements*** are outside the scope of Iowa Code §476.6(19)." (emphasis added). The fundamental problem is that "comparison to reasonable alternatives" does not appear anywhere in the statute itself. Similarly, discussion of retirement of coal plants is nowhere to be found. In their testimony below and their

briefs here, those seeking to overturn the Board's order argue the avenues they suggest are required because they are the "least-cost" option, but again, the legislature provides utilities and the Board more leeway than that, opting for a "reasonable cost" standard and nowhere requiring the least-cost option. All of the substantive relief the Petitioners and OCA seek requires the Court to read requirements into the statute that are not there today. Such a reading would be contrary to the Iowa Supreme Court's command that the scope of an agency's authority is to be read narrowly. *See City of Des Moines v. Iowa Department of Transportation*, 911 N.W.2d 431, 441-49 (Iowa 2018)(collecting cases for the proposition that where an agency had broad authority, but also specific authority in certain areas, it lacks any other specific authority.)[4]

At its core, the efforts of Petitioners and OCA here are just one part of a larger, see-what-sticks approach to trying to find a way to force an exploration of MidAmerican's (and other utilities') plans for their medium- and long-term generation mix – as OCA's testimony below (at CR 90, 94, 95, 97) openly and expressly admits, they want Iowa to adopt an IRP requirement that it simply doesn't have, a requirement that would require new legislation.[5] For its part,

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[4] In *City of Des Moines*, the narrow holding was that "the IDOT's general mission to preserve

motorist safety is not enough to allow it to deviate from its specific statutory authority, by treating an [traffic camera] as a right-of-way obstruction." *Id*. at 449. Similarly, in the present case the Board cannot force consideration of coal plant retirements or least-cost alternatives where the statute not only doesn't support such authority but actually says the opposite. *See* Iowa Code §476.6(19)(f).

[5] Recall that OCA was willing to settle the 2020 EPB Update ***with no substantive changes to the plan or budget*** themselves; the settlement required as a compromise that OCA would be provided a mechanism ***outside of the EPB docket*** to further inquire as to MidAmerican's broader generation portfolio and future plans for that portfolio. *See* Joint Motion and Non-Unanimous Settlement Agreement (filed Feb. 4, 2021) (CR 831-836). The Board rejected the settlement believing that the creation of that mechanism was outside of the scope of the proceeding. MidAmerican agrees with OCA that the Board could have, and should have, approved the Non-Unanimous Settlement – settlements can include terms that could not be granted in relief by the tribunal, and settlement are traditionally favored. Having chosen to not

ELPC and IEC have been trying to raise the issue of coal plant retirements in all manner of unrelated IUB dockets – for example MidAmerican's advance ratemaking principles for Wind XII (RPU-2018-0003), Interstate Power and Light's Advanced Ratemaking Principles for its New Wind 2 projects (RPU-2017-0002) and Interstate Power and Light's general rate case (RPU-2019-0001) -- for some time. As MidAmerican witness Fehr explained,

> Iowa has intentionally chosen not to require an IRP process for the selection of generation resources. Instead, Iowa has chosen to: (i) conduct its energy efficiency/demand-side management efforts in a sphere separate from its supply-side resource selection process; (ii) eliminate the "least cost" planning requirement in its law governing the siting of new supply-side resources; and (iii) adopt "reasonable" as the standard by which to measure a utility's selection of supply side resources in the ratemaking principles context. This is a policy decision, appropriate for the Iowa legislature.

MidAmerican Witness Fehr Reply at 4:69-75 (CR 715).[6]

Petitioners argue that MidAmerican has cited coal plant retirements in prior Updates, and has noted its use of least-cost options in some prior years, and assert that the Board must therefore have erred when it said those are outside the scope of the EPB docket. Petitioners miss a critical distinction. While a utility can *choose* a least-cost option and argue the option is therefore reasonable under the statute, nothing in the statute requires such a choice. The point of the Board's holding is that neither intervenors nor the Board can *require* a utility to retire a coal

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approve the settlement, however, the Board was still correct to affirm the 2020 EPB Update as filed.

[6] Petitioners have the advantage of being able to focus on a sole issue – their view on climate change – without having to answer to customers, regulators, employees and investors for reliability, fuel diversity, long-term rate stability, jobs and job growth, hedging against regulatory and technological changes, efficient use of deployed capital, etc. MidAmerican, however, must take all of those factors as well as operational factors into account. Fortunately, the Iowa Supreme Court has wisely given MidAmerican and the Board a zone of reasonableness to do so. *See NextEra Energy Resources L.L.C. v. Iowa Utils. Bd.*, 815 N.W.2d 30, 38-40 (Iowa 2012)(finding that even term "electric supply *needs*" could correctly by read by the Board to include other "needs" including fuel diversity, supply of less-expensive energy, and promotion of economic development.)

plant or choose the least-cost option under a statute aimed solely at the reasonable cost effectiveness of emissions control technologies used at *operating* coal plants. As a result, intervenors' argument that the Board should insist on such an outcome in fact raises claims for which no relief can be granted under the law. Where the relief being sought is, as is the case here, beyond what the statute will support, it would be an inefficient waste of resources to require the Board to hold a hearing. *See generally OCA v. IUB*, 770 N.W.2d 334, 340-344 (allowing Board to apply a "no reasonable grounds for further investigation" test for reviewing claimed violations of unauthorized change of telephone service statute and finding the denial of hearings for certain cases did not violate constitutional rights or the Iowa Administrative Procedures Act.)

CONCLUSION

The EPB statute serves a very narrow and particular purpose, and does so in a very constrained manner. In Iowa Code §476.6(19) the legislature recognized that utilities are operating coal plants, and those plants are subject to certain regulatory limitations on air emissions. The legislature wanted to make sure emissions from those plants were at compliant levels, and that the approach to such compliance was reasonably cost-efficient. The legislature wasn't highly proscriptive – it gave utilities a zone of reasonableness to work in. Just as important, the legislature made clear that factors other than emissions reduction mattered: so much so that the Board cannot require expenditures to lower emissions until that level of emissions reduction is required by law. *See* Iowa Code §476.6(19)(f). It is clear that the statute is not intended as a back door to create an IRP; the short timeline provided suggests something much more focused in scope. The statute requires three specific showings which MidAmerican has made. Nowhere does it require or even contemplate retirements of coal plants, least-cost options, or comparisons to a range of alternative plans. The Court should not accept Petitioners'

invitation to write a different law than the one the Legislature has passed. The Board properly found that MidAmerican's 2020 EPB Update once again meets the requirements of the law as it actually *is*, even if that is not the law Petitioners would prefer. This Court should affirm the decision below.

Dated this 24th day of September, 2021.

By: */s/ Bret A Dublinske*
Bret A. Dublinske, AT0002232
FREDRIKSON & BYRON, P.A.
111 East Grand Avenue, Suite 301
Des Moines, IA 50309-1977
Telephone: (515) 242-8900
Facsimile: (515) 242-8950
Email: bdublinske@fredlaw.com

ATTORNEYS FOR INTERVENOR
MIDAMERICAN ENERGY COMPANY

CERTIFICATE OF SERVICE

The undersigned certifies that on the 24th day of September, 2021, the foregoing document was electronically filed with the Clerk of Court using the EDMS system which will send a notice of electronic filing to all counsel of record registered with the EDMS system.

/s/ Sarah McCray