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, and OFFICE OF CONSUMER ADVOCATE, MIDAMERICAN ENERGY COMPANY, Intervenors.	No. CVCV061992 PETITIONERS' REPLY BRIEF

TABLE OF CONTENTS

I. STATEMENT OF THE ISSUES

A. The Statute Does Not Clearly Vest the Board with the Authority to Interpret What Constitutes "Managing Regulated Emissions."

Authorities:

Statutes

IOWA CODE § 17A.19(10)(c)
IOWA CODE § 476.6(19)

Case Law

Puntenney v. Iowa Utils. Bd., 928 N.W.2d 829 (Iowa 2019)
Mathis v. Iowa Utils. Bd., 934 N.W.2d 423 (Iowa 2019)
SZ Enterprises, LLC v. Iowa Utils. Bd., 850 N.W.2d 441 (Iowa 2014)
Hawkeye Land Co. v. Iowa Utils. Bd., 847 N.W.2d 199 (Iowa 2014).
NextEra Energy Resources, LLC v. Iowa Utils. Bd., 815 N.W.2d 30 (Iowa 2012)
Burton v. Hilltop Care Ctr., 813 N.W.2d 250 (Iowa 2012)
Evercom Sys., Inc. v. Iowa Utils. Bd., 805 N.W.2d 758 (Iowa 2011)
Renda v. Iowa C.R. Comm'n, 784 N.W.2d 8 (Iowa 2010)

B. The Board and MidAmerican Acknowledged Coal Plant Retirements Are Within the Scope of the Statute.

Authorities:

Statutes

IOWA CODE § 17A.19(10)(h)
IOWA CODE § 476.6(19)

C. "Balancing" Statutory Factors Requires More Than One Option.

Authorities:

Statutes

IOWA CODE § 476.6(19)

D. The Alternative Docket Does Not Substitute for the EPB Update.

Authorities:

Statutes

IOWA CODE § 476.6(19)

Agency Documents

In re: MidAmerican Energy Company, SPU-2021-0003, MidAmerican Resistance to Motions to Compel (filed Sept. 13, 2021)
In re: MidAmerican Energy Company, SPU-2021-0003, Order Addressing Long-Term Resource Plans and Scheduling Oral Arguments on Confidentiality Issues (filed Sept. 24, 2021)

II. INTRODUCTION

The Emissions Plan and Budget (EPB) statute requires utilities to submit plans for "managing regulated emissions" at reasonable costs to their customers. In Respondent's Brief in Resistance to the Petition for Judicial Review (Respondent's Brief), the Iowa Utilities Board (Board) claims it has been vested broad authority to interpret the statute, despite precedent to the contrary. The Board makes an error of law in claiming that evidence of emissions management options such as coal plant retirements are outside of the scope of the statute. The Board incorrectly asserts it cannot consider information about the cost-effectiveness of coal plant retirements presented by Petitioners in this case, even though it considered the same type of information in the past. The Board and MidAmerican Energy Company (MidAmerican) go so far as to claim that the Board cannot consider anything beyond the single proposal filed by the utility, even if other parties in the case present evidence that alternative options better balance the EPB statutory requirements. The Board's view should not receive deference and is inconsistent with the law. The Board attempts to defer consideration of issues in the EPB statute to a different docket, but cannot legally

do so. The Court must remand the case to the Board with instructions to apply the correct interpretation of law and to consider the information presented by Petitioners in the case.

III. ARGUMENT

A. The Statute Does Not Clearly Vest the Board with the Authority to Interpret What Constitutes "Managing Regulated Emissions."

The Board erred as a matter of law in interpreting the statutory phrase "managing regulated emissions" in Iowa Code section 476.6(19)(a) to exclude coal plant retirements and other compliance options. 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, which necessarily applies to Iowa Code section 476.6(19). The Board attempts to argue that the statute does vest it with the authority to interpret the statute. The Board's argument relies on a selective reading of the statute that attempts to broaden the interpretative question and ignores the Department of Natural Resources' role in EPB proceedings. The review of "managing regulated emissions" is shared by the DNR and is not uniquely within the subject matter expertise of the Board. Therefore, the statute does not clearly vest the Board with authority to interpret the statute. The Court should not give the Board's interpretation deference and should reverse the Board's decision pursuant to 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)). As noted in Petitioners' Initial Brief, 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). Instead, the Court defers to the Board only when the statutory term is "uniquely within the subject

matter expertise of the agency." *See id. at* 428 (Iowa 2019) (quoting *Renda v. Iowa C.R. Comm'n*, 784 N.W.2d 8, 14 (Iowa 2010)).

The Board argues for deference by making a very broad claim that the statute "clearly vested the IUB with the authority to interpret Iowa Code § 476.6, as well as Iowa Code § 476.6(19)." (Respondent's Br. at 27.) The Board's broad claim of authority to interpret the entire statute must be denied. "When determining whether an agency has been clearly vested with the authority to interpret a provision of law, [w]e do not focus our inquiry on whether the agency does or does not have the broad authority to interpret the act as a whole." *Burton v. Hilltop Care Ctr.*, 813 N.W.2d 250, 257 (Iowa 2012). Instead, "the focus of [a court's] inquiry is narrow—[it] must decide only if IUB has been vested with the authority to define the disputed terms . . . ." *Hawkeye Land Co. v. Iowa Utils. Bd.*, 847 N.W.2d 199, 207 (Iowa 2014). The Board is entitled to deference only where the term is "uniquely" within the Board's subject matter expertise. *See Mathis*, 934 N.W.2d at 428. This narrow focus is appropriate because "[i]t is conceivable that the legislature intends an agency to interpret certain phrases or provisions of a statute, but not others." *Renda v. Iowa C.R. Comm'n*, 784 N.W.2d 8, 12 (Iowa 2010); *see also NextEra Energy*, 815 N.W.2d at 37 ("[B]road articulations of an agency's authority, or lack of authority, should be avoided in the absence of an express grant of broad interpretive authority." (quoting *Renda*, 784 N.W.2d at 14)); *Evercom Sys., Inc. v. Iowa Utils. Bd.*, 805 N.W.2d 758, 762 (Iowa 2011) ("[T]he fact that an agency has been granted rule making authority does not 'give[] an agency the authority to interpret *all* statutory language.'") (quoting *Renda*, 784 N.W.2d at 13)) (emphasis in original).

A narrow focus for interpretation is especially appropriate in the context of interpretation of terms in Chapter 476, where the Court has held that "simply because the general assembly granted the Board broad general powers to carry out the purposes of chapter 476 and granted it

rulemaking authority does not necessarily indicate the legislature clearly vested authority in the Board to interpret all of chapter 476." *NextEra Energy*, 815 N.W.2d at 38.

Nonetheless, the Board asks for blanket deference while relying on cases with a much narrower scope. For example, the Court did not defer to the Board's definition of "public 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.

To counter this precedent, the Board attempts to argue that the legislature provided an indication that it vested authority in the Board through the Iowa Code itself because the Board must carry out duties under the law. (Respondent's Br. at 24-25.) But the fact that a statute imposes a duty on an agency does not amount to a grant of interpretive discretion. The Supreme Court has repeatedly held that even a broad grant of rulemaking authority is insufficient reason to accord deference. *See, e.g.*, *NextEra Energy*, 815 N.W.2d at 38 (addressing Chapter 476).

The Board further argues that "cost-effective manner" requires the specific expertise of the Board to interpret. (Respondent's Br. at 24-25.) The Board's argument that it is vested with interpretative authority of what constitutes a "cost-effective manner," even if accepted, would not address the Board's legal error. The Board's interpretation to exclude coal plant retirement as outside of the scope of the statute is not a question of cost-effectiveness. Instead, it is based on the language "managing regulated emissions," which encompasses more than cost-effectiveness

alone. That difference is critical because the Board decisions that followed relied on that error of law.

Managing regulated emissions is not an area uniquely within the subject matter expertise of the Board, and the statute recognizes that. The statute specifically requires the Department of Natural Resources (DNR) to participate in the EPB Updates. IOWA CODE § 476.6(19)(a)(4). Not only must the DNR "state whether the plan or update meets applicable state environmental requirements for regulated emissions," for any deficient plan it must also "recommend amendments that outline actions necessary to bring the plan or update into compliance." *Id.* The DNR's statutory role to evaluate the plans and remedy deficiencies exposes the Board's claim of "expertise" on this issue as hollow. (Respondent's Br. at 25.)

Hypothetically, a future environmental statute could require retirement of a coal plant to ensure compliance. Under the Board's interpretation of the EPB statute, the Board could prevent the utility from taking the actions necessary to ensure compliance, because it would only consider and approve actions proposed by the utility in the utility's plan. This is why DNR has a statutory role in the process. The Board's request for blanket discretion to interpret the EPB law would frustrate the implementation of this regulatory framework. This is yet another reason why the interpretation of the law is not simply delegated to the Board.

The *Puntenney* case cited by the Board found that the legislature clearly vested the IUB with the authority to interpret the phrase "public convenience and necessity" as used in Iowa Code § 479B.9. *Puntenney v. Iowa Utils. Bd.*, 928 N.W.2d 829, 836 (Iowa 2019). That term is the substantive term for a certificate that the Board grants under statute. *Id.* It does not invoke the unique expertise of another agency to interpret the law like the DNR's role here. It does not have meaning in a general business context, in contrast to "managing" a process like the EPB statute

here. The meaning of "public convenience and necessity" is uniquely specific to utilities regulation and the Board's own authority. The *Pentenney* Court was also constrained by a prior holding that "it is not a judicial function to determine whether a service will promote the public convenience and necessity." *Id.* (citing *Application of Nat'l Freight Lines*, 40 N.W.2d 612, 616 (1950)). The Board has not identified any such precedent applicable to section 476.6(19). Thus, the *Puntenney* case is less applicable here than the Board claims. Instead, the term "managing regulated emissions" at issue here is more like the term "single site" that the Court interpreted in *Mathis*: while the term has application in a utility context, it does not require the special expertise of the Board to interpret. *See Mathis*, 934 N.W.2d at 427.

The legislature did not clearly vest the Board with authority to interpret the meaning of "managing regulated emissions," and the Court should not grant the Board's interpretation deference. The Court should reverse the Board's erroneous interpretation of the EPB statute pursuant to 17A.19(10)(c).

B. The Board and MidAmerican Acknowledged Coal Plant Retirements Are Within the Scope of the Statute.

Despite the Board's assertions that the issues raised by Petitioner and OCA in testimony were beyond the scope of the statute, the Board has simultaneously acknowledged that those issues are, in fact, within the scope. Both the Board and MidAmerican have acknowledged that the retirement of coal units was appropriately raised by MidAmerican and considered by the Board in past cases. (Respondent's Br. at 19; MidAmerican Br. at 14.) The Board's attempt to exclude consideration of coal retirements and other compliance options as outside of the scope of the statute is inconsistent with past Board practice, arbitrary, and abuse of discretion and constitutes reversible error under Iowa Code section 17A.19(10)(h).

a. The Board Did Not Explain Deviation from Past Practices and Precedent.

For the first time during the course of the EPB proceeding and judicial review, the Board acknowledged that "prior IUB orders have approved EPB plans in which a utility has included a coal plant retirement or alternative compliance options as a cost-effective business decision reflected in its EPB filing." (Respondent's Br. at 19.) In those cases, the Board did not exclude evidence about the coal plant retirements as outside of the scope of the statute as it did in this case. The Board considered coal plant retirements as part of the past dockets and the Board approved a plan that retired the coal plants and proposed to spend zero on future costs for those plants. The Board cannot now argue that the statute excludes coal plant retirements when that compliance option was in multiple previous plans the Board approved. (*See*, *e.g.*, Petitioners' Initial Brief at 23-26 (citing docket numbers EPB-2014-0156, EPB-2016-0156, EPB-2018-0156, EPB-2020-0150).) Doing so exemplifies inconsistency with past precedent and an arbitrary and capricious decision.

The Administrative Procedure Act allows for an inconsistency with past practices if "the agency has justified that inconsistency by stating credible reasons sufficient to indicate a fair and rational basis for that inconsistency." Iowa Code § 17A.19(10)(h). The Board did not provide any such justification during the EPB docket, but it attempts to do so during the judicial review. The Board makes a confusing claim that it must only "review the plan which has been submitted and is before the IUB" and nothing more. (Respondent's Br. at 19.) MidAmerican makes a similar argument: "The EPB Update proceeding looks at the *utility's* proposal and renders an up or down verdict on that specific proposal." (MidAmerican Br. at 84 (emphasis in original).) MidAmerican is a regulated utility. The IUB is its regulator. Defining the scope of the statute based on what the *utility* chooses to include in its plan from update to update reverses the relationship of the regulator and utility and is arbitrary and capricious. The scope of a statute cannot vary from case to case

depending on whether the utility chooses to include a particular compliance option for managing regulated emissions in its filing. It is within the scope of the statute if it effectively manages regulated emissions in compliance with the environmental requirements in the law. That is the case regardless of whether a utility includes it in its plan.

The Board's rationalization for allowing MidAmerican to dictate whether coal plant retirements are considered in each case eviscerates the contested case process created in the EPB statute. *See* IOWA CODE § 476.6(19)(a)(3) (requiring an EPB "shall be considered in a contested case proceeding pursuant to chapter 17A"). Under the Administrative Procedure Act and the Board's own procedural rules, other interested parties submit testimony containing additional information. The Board's view that MidAmerican, alone, determines the scope of alternatives considered in the EPB process is inconsistent with the due process protections provided by the Administrative Procedure Act and the statute. It violates the due process rights of interested parties, including OCA – a statutorily required party—for the IUB to rule out alternatives suggested by those parties simply because MidAmerican chose not to propose them. Moreover, if the Board ignores all other testimony, it cannot consider the testimony submitted by the DNR regarding compliance with emission requirements, and there could very well be instances in the future where DNR could provide that environmental statutes require the retirement of a coal plant. The statute expressly allows DNR to recommend amendments to the plan – alternatives not proposed by the utility. IOWA CODE § 476.6(19)(a)(4). The Board's constrained view is limiting, inconsistent with the law, and arbitrary and capricious.

b. Past Dockets Support Petitioners' Interpretation of the Statute to Include Consideration of Alternative Compliance Options.

The Board spends a significant portion of its brief addressing past dockets cited by Petitioners. It argues that the records were similar to the current docket and the Petitioners did not

object then and, therefore, Petitioners cannot object or raise new issues now. (Respondent's Br. at 12-17.) The Board's view is flawed because the EPB Updates are to consider *new* information and circumstances have changed. The inconsistency with its own past practice is reversible error under Iowa Code section 17A.19(10)(h).

EPB Updates are required by law every two years. IOWA CODE § 476.6(19)(a)(1). The updates allow the Board to consider new information. The utility's update cannot ignore changes in circumstances and simply reiterate actions approved in a previous plan. Similarly, the Board must consider current information, not rely exclusively on its past decisions. MidAmerican notes that "[t]he 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." (MidAmerican Br. at 6.) MidAmerican conveniently omits any updated information on the cost-effectiveness of the operation of its coal plants or the cost-effectiveness of alternatives to its coal plants. That information would also change from plan to plan, but MidAmerican attempts to exclude that from consideration even though it had evaluated cost-effectiveness of coal plants in past dockets.

Past EPB updates introduced coal plant retirements when new information showed the coal plants were no longer economically viable. MidAmerican proposed to manage emissions by retiring coal plants, did not seek further operations and maintenance costs for them, and included that information in EPB updates. (*See* Petitioners' Brief at 23-25 (quoting past EPB updates); CR at pp. 753-55.) Those decisions were based on changes in circumstances and new information.

The Board seems to argue that because Petitioners did not object or introduce evidence in past dockets it is inappropriate for them to do so in this docket. (Respondent's Br. at 12-17.) The

burden to comply with the EPB statute falls on MidAmerican, not Petitioners. Petitioners' participation in EPB cases is voluntary. Whether Petitioners introduced evidence in prior dockets has no bearing on whether MidAmerican satisfied its burden in *this* docket.

Petitioners' degree of involvement in EPB cases has reflected the new information and changed circumstances over time. There were six EPB dockets before MidAmerican utilized a coal plant retirement as an emissions management strategy. MidAmerican's inclusion of coal plant retirements as a cost-effective emission management strategy was appropriate in 2014 and subsequent dockets and reflected the type of changed circumstances that should be considered and addressed in EPB plan updates. In several dockets, Petitioners agreed with the retirement decision and entered settlement agreements supporting those plans. Petitioners did not file testimony arguing for the retirement of additional units beyond what the utility had proposed in those dockets, but that does not preclude Petitioners from doing so based on new analysis and updated information in a later docket. Petitioners acknowledge that, as the Board pointed out, past Board orders have also been thin on findings of fact and conclusions of law much like the 2020 EPB Order is. (Respondent's Br. at 12-17, 22.) Petitioners did not object on that basis in prior years because Petitioners did not object to the Board's approval of the plan in those years. Instead, Petitioners *agreed* with MidAmerican's proposals to retire coal plants as a cost-effective emissions management strategy. In the 2020 EPB Update, however, MidAmerican did not propose to retire any coal plants. Petitioners, aware of the changing circumstances of renewable energy and coal, had an outside expert conduct the type of analysis MidAmerican had likely conducted in the past to reach the same conclusion MidAmerican had in the past: coal plants should retire as the most cost-effective emissions management strategy. (CR at pp. 522, 625.)

The Board and MidAmerican also claim that the Petitioners are attempting to turn the EPB docket into an integrated resource plan. (Respondent's Br. at 19-20; MidAmerican Br. at 7-8.) Petitioners addressed this issue specifically when commenting on the proposed settlement in the docket:

> In its Reply Testimony, MidAmerican asserted that Environmental Intervenors, OCA, and the Tech Customers are all attempting to convert the EPB process into an integrated resource planning process, which Iowa law does not require. This is simply not the case. In an integrated resource plan, a utility sets forth its forecasted load and supply, and examines whether its entire generation portfolio offers the least cost option for meeting that load. But Environmental Intervenors are not asserting that MidAmerican must evaluate the cost effectiveness of its entire generation portfolio. Environmental Intervenors are only arguing that MidAmerican must demonstrate the cost effectiveness of its emissions compliance strategies at its coal units, as specified in Iowa Code 476.6(19). (CR at 869.)

Consideration of coal plant retirements would not convert the EPB into an integrated resource plan, rather it would follow the EPB statutory requirements and past practices in EPB dockets.

The relief requested would correct the Board's misinterpretation of law that consideration of coal plant retirement information is beyond the scope of the EPB statute. Contrary to the Board and MidAmerican's characterization, consideration of coal plant retirements as an emissions management strategy is not a new and expansive approach to the docket. Rather, the Board should consider the new information Petitioners filed in this case, just as it considered new information about coal plant retirements in many previous EPB updates. Refusing to consider new information that includes analysis of the cost-effectiveness of coal plant retirement, similar to information considered in previous dockets when presented by a utility, frustrates the purpose of conducting a biennial EPB process. In other words, refusing to consider new information is not consistent with past precedent. The Court should recognize the Board's inconsistency with prior practice in this case and reverse the Board's decision.

C. "Balancing" Statutory Factors Requires More Than One Option.

The Board made a second error of law in its Response Brief as an attempt to rationalize its exclusion of coal plant retirements and other compliance options as outside of the scope of the statute. The Board interprets the statute to prohibit consideration of multiple compliance options. Iowa Code section 476.6(19)(c) states 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." The Board's interpretation effectively reads "reasonably balance" out of the statute and is an error of law.

As discussed above and in Petitioners' initial brief, the Iowa Supreme Court generally does not defer to IUB interpretations of statutory terms. The term at issue here, "reasonably balance," does not require special expertise to interpret, and the Court should not give any deference to the Board's interpretation of reasonably balance to avoid requiring analysis of multiple options before approving a plan.

The Board's Response Brief explains its position:

> [P]rior IUB orders have approved EPB plans in which a utility has included a coal plant retirement or alternative compliance options as a cost-effective business decision reflected in its EPB filing. This is consistent with the IUB's statutory duty to review the plan which has been submitted and is before the IUB. However, Environmental Petitioners and OCA's positions argue the IUB should require a new component in addition to the utility's required filings beyond this type of business decision to consider multiple options suggested by various stakeholders and to choose from among those options prior to the IUB concluding that an EPB satisfies the statute. (Response Brief at 19.)

In evaluating the strategy to manage emissions in the EPB update, the Board must "reasonably balance" factors listed in statute. IOWA CODE § 476.6(19)(c). The Board's interpretation is that it cannot require additional evidence from the utility related to other potential

compliance options – the utility gets to decide the scope of review. The other implication of the Board's interpretation is if another party presents evidence of an alternative, the Board cannot consider it. If the Board can only consider one option, as its proposed interpretation would require, there is inherently no way to "balance" anything. The only option before the Board would be the utility's proposal, amounting to a rubber stamp and a superfluous contested case process that violates the parties' due process rights.

In past dockets, utilities have actually considered more than one alternative and provided an evidentiary basis for reasonably balancing the statutory factors. (*See* CR at 754 (citing the testimony of Jennifer McIvor comparing coal retirements to installing pollution controls: "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").) The Board now maintains that balancing is only necessary if the utility presents it.

Limiting the scope of the law to what utilities provide and nothing more, and excluding consideration of alternatives entirely, reads the "reasonably balance" language out of the statute. It also reads the DNR's review out of the statute because DNR has the ability to recommend compliance alternatives that the utility did not initially present. *See* IOWA CODE § 476.6(19)(a)(4) ("If the plan does not meet these requirements, the department shall recommend amendments that outline actions necessary to bring the plan or update into compliance with the environmental requirements."). The statute provides for a contested case and explicitly allows a mandated party in the contested case to propose additional actions to the plan. An interpretation of the statute to exclude the Board or participating parties from considering alternative compliance options is

inconsistent with the plain meaning and context of the statute. The explicit intent of the law is to "provide for compatible statewide environmental and electric energy policies." IOWA CODE § 476.6(19)(a). Considering alternatives that advance environmental and energy statutory policies furthers this intent. The Board argued that it does not have to "give equal weight to all components" in the balancing framework. (Respondent's Br. at 30.) Its approach refuses to allow anyone else to approach the scale. Instead, the Board's interpretation of the law results in a blank check to utilities to comply with emissions requirements and renders the statutory procedures meaningless.

Petitioners in this case provided affirmative evidence that there was an alternative, and further provided evidence on the statutory factors the Board must consider. (*See* CR pp. 518-41.) This evidence was within the scope of information provided by utilities in the past that the Board had considered and included in approved EPB updates, as discussed above. It allows the Board to evaluate whether there is a reasonable balance of the statutory factors by providing an option to compare against. Petitioners are not dictating an outcome based on the evidence, but Petitioners do argue that the statute does not permit the Board to eliminate the evidence presented as outside the scope of the statute.

D. The Alternative Docket Does Not Substitute for the EPB Update.

The Board has attempted to deflect claims for relief in this case by pointing to a new docket it created. (Respondent's Br. at 29.) While the Special Investigatory Docket is within the Board's authority and will address issues related to those raised by Petitioners in the EPB, the Special Investigatory Docket is not a substitute for the EPB updates or the requirements under Iowa statute.

There is clearly overlap in the scope of the EPB and the new docket. The Board's order creating the new docket noted that it could be used to evaluate options for "least-cost generation, environmental requirements, reliability, baseload generation, and economic development

potential." (CR p. 1044.) The EPB statute requires the Board to consider "costs, environmental requirements, economic development potential, and the reliability of the electric generation and transmission system." IOWA CODE § 476.6(19)(c). But the new docket relies on other statutory authority and lacks the statutory procedures of the EPB updates.

The EPB statute requires the Board to evaluate the management of regulated emissions from coal plants. IOWA CODE § 476.6(19)(a). It has a prescriptive timeline and end point. *Id.* at (a), (d). It provides a contested case proceeding, in which parties to the case have procedural rights. *Id.* at (a). In contrast, it is not clear exactly what the new Special Investigatory Docket created by the Board is.

The Special Investigatory Docket has not preserved the same rights Petitioners would have under an EPB docket. For example, MidAmerican has refused to provide Petitioners and certain other parties any confidential information filed in the new docket and maintains they are not entitled to that information. *In re: MidAmerican Energy Company*, SPU-2021-0003, MidAmerican Resistance to Motions to Compel (filed Sept. 13, 2021). Petitioners and other parties have been forced to file a motion for the confidential information, which they would have had access to in an EPB docket, in order to obtain the information necessary to simply participate in the docket, and the outcome of those requests are uncertain. *In re: MidAmerican Energy Company*, SPU-2021-0003, Order Addressing Long-Term Resource Plans and Scheduling Oral Arguments on Confidentiality Issues (filed Sept. 24, 2021). The Special Investigatory Docket is not subject to biennial updates. Instead, it is a one-time docket with no clear procedural requirements addressing issues the Board chose to include, such as implications of a polar vortex. Because it is a self-initiated investigation, the Board is not required to follow any timeline, reach any conclusion, or

take any action. At this time, the Board has not even made clear whether or not it is a contested case. *Id.*

While Petitioners welcome the Board's efforts to provide additional scrutiny of MidAmerican's generation fleet in the Special Investigatory Docket, such action does not change the requirements in Iowa Code section 476.6(19). The Board cannot claim it as a substitute for the EPB or push off the statutorily-required evaluation of managing regulated emissions to the new docket.

IV. CONCLUSION

The EPB statute does not clearly vest the Board with authority to interpret it, and Iowa Supreme Court precedent confirms that fact. The statutory terms at issue do not require unique subject matter expertise of the Board to interpret, as evidenced by the role of the DNR. As a result, the Board's interpretation should receive no deference from the Court.

The Board made an error of law in concluding that Petitioners' evidence was beyond the scope of the statute. The Board conceded that in past cases it considered the same type of information Petitioners provided, but it cannot reconcile that fact with its Order in this case. Moreover, the Board's interpretation eviscerates the purpose of the statute and leads to absurd results.

The Board's misinterpretation of the law is reversible error under the Administrative Procedure Act. The Court must correct the Board's misinterpretation and remand the case.

Respectfully submitted,

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DATE: October 1, 2021

CERTIFICATE OF SERVICE

I hereby certify that October 1, 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