

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 REPLY BRIEF</p>
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The Office of Consumer Advocate (OCA), a division of the Iowa Department of Justice, for its Reply Brief in Support of Petition for Judicial Review, states:

REPLY ARGUMENT

I. IOWA CODE SECTION 476.6(19) CONTEMPLATES THE CONSIDERATION OF ALTERNATIVE METHODS FOR MANAGING REGULATED EMISSIONS

The Iowa Utilities Board (IUB) argues for an interpretation of Iowa Code section 476.6(19) (2021), which either ignores language in the statute or substitutes new language, to impermissibly exclude the consideration of OCA's alternative methods for managing coal plant emissions. For example, the IUB asserts:

[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.

Respondent's Brief in Resistance to Petition for Judicial Review (IUB Brief), pg. 19.

The IUB's claim that OCA's position has created a "new component" in the EPB process wholly ignores OCA's role in the EPB process contrary to the statutory language. The IUB's interpretation of section 476.6(19) ignores the fact the Legislature required the emissions planning and budget (EPB) process to be a "collaborative effort involving state agencies and affected generation owners." Iowa Code § 476.6(19)(a). The Legislature required the initial EPB and any updates to be "considered in a contested case proceeding pursuant to chapter 17A." *Id.* at (a)(3). The OCA is required to participate as a party in the contested case proceeding. *Id.* A contested case proceeding, by definition, allows parties to submit evidence. *See* Iowa Code § 17A.12(4). The IUB fails to reconcile in its Brief how OCA could perform its statutorily required duty to participate in the EPB update process if the IUB believes OCA cannot submit evidence concerning the utility's EPB—including evidence concerning alternative methods for managing regulated emissions. The IUB's interpretation of section 476.6(19) simply ignores OCA's role and the fact the EPB update process is a "contested case proceeding."

Further, the IUB and MidAmerican Energy Company (MidAmerican) erroneously envision the EPB process as a narrow one where a utility submits "a business decision for meeting federal and state emissions requirements" every two years, which the IUB then approves after review and with minimal input from OCA and stakeholders. *IUB Brief*, pgs. 19–21; *see also Brief of Intervenor MidAmerican Energy Company*, pg. 8 ("The EPB Update proceeding looks at the utility's proposal and renders an up or down verdict on that specific proposal . . ."). The IUB contends OCA's and stakeholders' roles are limited to filing comments, participating in a

potential settlement, and partaking in “discussions and negotiations between interested stakeholders both inside and outside the docket.” *IUB Brief*, pg. 30. The IUB’s and MidAmerican’s interpretations create a limitation on the scope of the EPB process that is not contained in the statute. Section 476.6(19)(c) sets forth a collaborative process where a utility’s EPB is evaluated every two-years to ensure the EPB is “reasonably expected to achieve cost-effective compliance with applicable state environmental requirements and federal ambient air quality standards.” The EPB is evaluated every two-years because emissions planning is not a static process—rapid changes in both the emissions regulatory scheme and technology mean approaches to managing emissions that were not cost-effective in 2018 could be cost-effective in 2020. *Certified Record (CR.)* pgs. 765–66. The plain language of the statute makes clear the Legislature envisioned the EPB as a review of a utility’s emissions plan every two-years, which invites the consideration of other methods for cost-effective compliance with emissions regulations submitted by OCA and other stakeholders. *See Ramirez-Trujillo v. Quality Egg, L.L.C.*, 878 N.W.2d 759, 770 (Iowa 2016) (“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.”).

Here, OCA performed its statutorily required duty in the EPB process by first attempting to collaborate with MidAmerican and then by submitting evidence and comments concerning OCA’s conclusions. OCA Witness Scott Bents detailed OCA’s efforts in trying to remedy evidentiary problems OCA identified in the EPB update filing. *CR.* pgs. 504–08 (including MidAmerican’s objections to OCA discovery requesting information concerning cost-effective alternatives and economic development potential). Mr. Bents concluded while MidAmerican’s 2020 EPB update met the applicable state and federal emissions requirements, it was impossible

to tell if the 2020 EPB update “reasonably balance[s] costs, environmental requirements, economic development potential, and the reliability of the electric generation and transmission system” due to the lack of substantial evidence submitted by MidAmerican. *CR.* pgs. 95–96. Mr. Bents recommended the IUB order MidAmerican to conduct an integrated resource plan (IRP) for its coal generation fleet. *CR.* pg. 95. In the alternative, Mr. Bents recommended the IUB require MidAmerican to perform the bare minimum required by 476.6(19): provide a cost-benefit analysis of its coal-fueled power plants, including a consideration of alternative emissions controls suggested by OCA,¹ and provide an analysis to satisfy the economic development potential criteria required by statute. *CR.* pgs. 97–98. Mr. Bents stated his recommendations were largely based on the fact MidAmerican completed several large wind-generation projects since the conclusion of the 2018 EPB update, which should reduce MidAmerican’s reliance on coal-fueled generation subject to new and potentially costly emissions regulations. *CR.* pg. 765. Also due to the addition of new wind-generation, the status-quo from the 2018 EPB could no longer be assumed as the most cost-effective option. *CR.* pg. 765. OCA did not raise concerns about alternative emissions controls in the prior EPB dockets because the new large wind projects had not been completed. The fact OCA did not have issues in the prior EPB dockets does not excuse the IUB from considering this issue in the instant proceeding.

OCA requests this court find the IUB’s committed reversible error in its interpretation of section 476.6(19), pursuant to Iowa Code section 17A.19(10)(c), as it ignores the clear language

¹ Alternative emissions control included: fuel switching from coal to natural gas or renewable sources, retirements of coal generation, seasonal operation of coal generation, capacity purchases, plus building new wind, solar, or natural gas generation. *CR.* 93.

of the statute by diminishing OCA's role in the EPB process and disallowing the consideration of alternative methods for managing emissions.

II. THE IUB'S OPENING OF A SEPARATE DOCKET TO ADDRESS LEAST-COST ALTERNATIVES FOR MIDAMERICAN'S GENERATING FLEET DOES NOT REMEDY THE PREJUDICE CLAIMED BY OCA AND PETITIONERS IN THIS MATTER

The IUB claims since it "opened a separate docket in order to adequately explore Environmental Petitioners and OCA's concerns, and since it is an ongoing, active docket at this time, the creation and continued use of a separate docket adequately addresses any prejudice to Environmental Petitioners and OCA's rights that they rely on as the statutory basis of this judicial review petition." *IUB Brief*, pg. 29. The IUB's assertion that the parties cannot demonstrate prejudice is erroneous.

While the IUB has clear authority to open a separate docket to address the stated issues, pursuant to Iowa Code sections 476.2(4), 476.6(12), and 476.6(16), this authority does not displace the Legislative mandate of section 476.6(19), requiring a collaborative evaluation of a utility's plan for managing regulated emissions through a contested case proceeding every two-years. Troublingly, the new docket is not set to recur every two-years, or periodically as would be needed to inform future EPB and rate cases, and it features limited or no collaboration between the utility and stakeholders. Pursuant to Iowa Code section 475A.2, OCA is tasked with representing all consumers generally and the public generally. Any costs approved in the EPB will eventually be borne by the consumers OCA represents. *CR*. pg. 766. The IUB's narrow interpretation of Iowa Code section 476.6(19) forecloses OCA's ability to suggest alternative cost-effective methods for managing regulated emissions which, if considered, could result in cost savings for Iowa consumers. OCA appreciates the IUB's efforts in opening a new docket to address matters related to Iowa Code sections 476.2(4), 476.6(12), and 476.6(16), but this docket

is not an adequate replacement for the biennial EPB. The IUB's rejection of the consideration of alternative methods for managing regulated emissions in the EPB case is prejudicial to OCA because it denies OCA the ability to represent its constituents in the EPB process and to suggest alternative emissions management methods that could reduce costs for consumers.

III. OCA DID NOT ARGUE FOR THE DISALLOWANCE OF O&M COSTS IN THE CURRENT EPB

MidAmerican asserts in its Brief that OCA argued “[operations and management] expenses for emission controls at Neal Units 3 and 4 are unreasonable and should not be recovered going forward.” *MidAmerican Brief*, pg. 10. MidAmerican has misstated OCA's position as OCA has never made this argument. Since OCA filed its direct testimony in this matter, OCA has claimed alternative methods for emissions management should be considered in conjunction with the methods currently employed by MidAmerican, if proven cost-effective as required by statute. On this point, OCA's witness Bents testified:

MidAmerican's 2020 EPB appears to be operating on the assumption that installation and maintenance of emissions control equipment is the only way to manage regulated emissions on its coal-fired units. In response to a data request from OCA, MidAmerican stated “Coal-fired units and the emission controls and budgets for those units are the focus of the EPB process.”

MidAmerican is correct in saying that coal-fired units are the major focus of the EPB process. However, *an EPB is not just about* installing and maintaining dry scrubbers, low nitrogen oxide burners, baghouses, and other traditional emissions control equipment. MidAmerican would have the Board believe that the entirety of 476.6(19) is dedicated to installing equipment on coal-fired generators. Iowa Code describes “managing regulated emissions,” but does not stipulate how those regulated emissions must be managed.

CR. pgs. 91–92 (emphasis added) (footnote omitted). OCA also argued MidAmerican had submitted inadequate evidence to allow OCA to determine if the EPB update “reasonably balance[d] costs, environmental requirements, economic development potential, and the reliability of the electric generation and transmission system.” *CR.* pgs. 95–96.

OCA has acknowledged the “EPB process generally prohibits OCA and other parties from challenging capital expenditures for emissions controls that were approved in an EPB proceeding and proposed for recovery in rates in a rate case proceeding.” *CR. 956*. However, and as previously stated, the EPB is updated on a biennial basis to ensure the EPB continues to be cost-effective and takes account of changes that may impact the management of regulated emissions. The approval of certain expenditures in a prior EPB does not foreclose parties from asserting evidence demonstrating new cost-effective compliance options in the current EPB.

Here, OCA requested the IUB order MidAmerican engage in an IRP or, at a minimum, perform a cost-benefit analysis of its coal-fueled generating units. OCA’s recommendations were designed to remedy the lack of evidence submitted by MidAmerican in support of its EPB update and to satisfy the clear requirements of Iowa Code section 476.6(19). If the results of the cost-benefit analysis showed the O&M expenses included in the EPB update were prudent, then OCA would have no issue with this finding. Similarly, if the analysis showed the continued status quo operation of coal-fueled generation was cost-effective, OCA would have no issue with this finding. Ultimately, MidAmerican’s lack of evidence to support its EPB update and the IUB’s subsequent denial of reasonable alternatives and approval of the EPB violates the clear language of section 476.6(19). OCA contends this is reversible error for the reasons stated above and in OCA’s initial Brief. OCA asks this Court to reverse and remand this matter to the IUB.

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 sections 17A.19(10)(c), (h), (f), and (n). OCA requests this court remand this matter to the IUB consistent

with the relief requested by Petitioners in their Petition for Judicial Review. *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 October 1, 2021.

/s/ Jeffrey J. Cook
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