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IN THE IOWA SUPREME COURT

Supreme Court No. No. 22–0385

District Court No. CVCV061992

ENVIRONMENTAL LAW AND POLICY CENTER, IOWA ENVIRONMENTAL COUNCIL and SIERRA CLUB,
Petitioners-Appellants,

vs.

IOWA UTILITIES BOARD,
Respondent-Appellee,

and

OFFICE OF CONSUMER ADVOCATE and MIDAMERICAN ENERGY COMPANY,
Intervenors-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
THE HONORABLE SAMANTHA GRONEWALD

PROOF BRIEF OF INTERVENOR-APPELLEE MIDAMERICAN ENERGY COMPANY

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STATEMENT OF THE ISSUES

I. THE IOWA UTILITIES BOARD CORRECTLY APPROVED, AND THE DISTRICT COURT CORRECTLY AFFIRMED THE APPROVAL OF, MIDAMERICAN ENERGY'S 2020 EMISSIONS PLAN AND BUDGET UNDER A PROPER INTERPRETATION OF IOWA CODE § 476.6(19).

Case Law

Brakke v. Iowa Department of Natural Resources, 897 N.W.2d 522 (Iowa 2017)
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Equal Access Corp. v. Utils. Bd., 510 N.W.2d 147 (Iowa 1993)
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ROUTING STATEMENT

This case is appropriate for transfer to the court of appeals as it can be resolved based on the plain language of the statute and on a straightforward application of this Court's prior precedents and does not otherwise meet the criteria for retention in Iowa R. App. P. 6.1101(2).

Nonetheless, because the Emissions Plan and Budget update must be filed every two years prompt clarity as to the requirements would be beneficial. Accordingly, Intervenor-Appellee MidAmerican Energy Company has no objection to the Supreme Court retaining the case as requested by the Appellants.

STATEMENT OF THE CASE

While this case arises in the context of environmental regulation, the case is fundamentally about the sizeable gaps between the Iowa emissions plan and budget ("EPB") statute the legislature has *actually* passed, Iowa Code § 476.6(19), and the emissions statute the Appellants, three special interest groups, *wish* Iowa had. Through litigation, the Appellants have sought to force the Iowa Utilities Board ("Board") to fill those gaps in accordance with Appellants' policy agenda, despite the fact that the Board's ability to do so is explicitly (and properly) constrained by this Court's prior decisions in *Brakke*[1] and the traffic camera cases[2], and that the issues in this case are further guided by *NextEra Energy*[3] and the U.S. Supreme Court's recent, on-point decision in *West Virginia v. EPA*.[4]

MidAmerican Energy Company ("MidAmerican") provides electricity as a public utility to more Iowans than any other provider. MidAmerican is a leader in renewables – in 2021, 88.5% of the electricity used by its Iowa retail

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1 *Brakke v. Iowa Department of Natural Resources*, 897 N.W.2d 522 (Iowa 2017).

2 *See*, *e.g.*, *City of Des Moines v. Iowa Dept. of Transportation*, 911 N.W.2d 431 (Iowa 2018).

3 *NextEra Energy Resources LLC v. Iowa Utils. Bd.*, 815 N.W.2d 30 (Iowa 2012).

4 *West Virginia v. EPA*, 597 U.S. ---, 2022 WL 2347278 (June 30, 2022).

customers was generated from renewable sources.[5] At the end of 2021, MidAmerican had over 7,300 megawatts ("MW") of wind and 144 MW of solar energy either operational or under development in its portfolio, and has invested over $14 billion on its wind and solar assets. Still, it is prudent for MidAmerican to maintain a well-rounded and diverse portfolio including dispatchable baseload generating assets like coal and natural gas-fired plants to back up intermittent resources like wind and solar and to best ensure reliable, affordable service for its customers. Accordingly, MidAmerican operates a few coal-fueled generating facilities that are still within their useful life and which have reliably provided baseload generation for MidAmerican's customers. As a result, MidAmerican is subject to coal plant emissions regulation, including the requirement to submit an EPB to the Board.

On April 1, 2020, MidAmerican, pursuant to the requirements of Iowa Code §476.6(19), filed with the Board its 2020 Emissions Plan and Budget Update ("2020 EPB Update"). App. ___.[6] This update is required by statute

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[5] *See In re MidAmerican Energy Company*, Docket No. SPU-2022-0001, "Order Verifying 2021 Renewable Energy Percentage" (Iowa Utils. Bd. June 3, 2022) available at: https://wcc.efs.iowa.gov/cs/idcplg?IdcService=GET_FILE&allowInterrupt=1&RevisionSelectionMethod=latest&dDocName=2091737&noSaveAs=1

[6] The full filing, which initiated Board docket EPB-2020-0156, also included (in the public portion) an Emissions Plan, direct testimony of two supporting

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. §476.6(19)(a)(1) *Id.*

MidAmerican's 2020 EPB Update was much like those filed in previous years, providing similar information and relying on similar support. In prior years, Appellants Environmental Law and Policy Center ("ELPC"), Iowa Environmental Council ("IEC"), and Sierra Club, as well as Intervenor Office of Consumer Advocate ("OCA") have participated in the Board dockets and have generally 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 updates. Because each EPB update is, as the name suggests, just an incremental update of prior plans and budgets, much of what Appellants now complain of automatically follows from decisions they previously accepted.

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witnesses (Joshua Mohr and William Whitney.) App. ___.

In this year's docket, OCA was even willing to join in a settlement that would have approved the 2020 EPB Update with no substantive changes to the plan itself. Appellants, however, 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 (App.___), and denied reconsideration on May 13, 2021 (App.___) .

As MidAmerican explains below, Appellants' challenge to the 2020 EPB Update and the Board's approval of that update – that MidAmerican did not include in its update 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. Appellants ask the Court to legislate, to insert words and requirements into the statute that simply are not there today. More broadly, Appellants misconstrue the structure and nature of the process established by Iowa Code §476.6(19). Ultimately, there is no question that the Board's Order was correct: the record 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. Appellants' attempts to require additional showings or to add details to the EPB statute where they do not exist are improper and must be rejected.

STATEMENT OF THE FACTS

MidAmerican accepts the facts as stated by Appellee Iowa Utilities Board in its Statement of the Case and Statement of the Facts except for its characterization of the basis for and nature of separate Board docket SPU-2021-0003 which is not on appeal.

ARGUMENT

I. THE IOWA UTILITIES BOARD CORRECTLY APPROVED, AND THE DISTRICT COURT CORRECTLY AFFIRMED THE APPROVAL OF, MIDAMERICAN ENERGY'S 2020 EMISSIONS PLAN AND BUDGET UNDER A PROPER INTERPRETATION OF IOWA CODE § 476.6(19).

Preservation of Error: MidAmerican agrees that Appellants have preserved error on the asserted issues of statutory interpretation.

Standard of Review: On appeal of a judicial review decision under Iowa Code § 17A.19, the Court determines whether it agrees with the district court's review, evaluating challenges to the agency order using the criteria in Iowa Code § 17A.19(10). *See City of Des Moines v. Iowa Dept. of Transportation*, 911 N.W.2d 431 (Iowa 2018) *City of Des Moines*, 911 N.W.2d at 438. While the Court has held that it does not broadly defer to the Board, see *NextEra Energy Resources LLC v. Iowa Utils. Bd.*, 815 N.W.2d 30 (Iowa 2012) *NextEra Energy*, 815 N.W.2d at 38, even in instances where there is no deference the Court's review is for correction of errors of law. *Id.* Moreover, where specific issues are within the Board's expertise and experience, the Court has been mindful of and given considerable consideration to the Board's judgment on such issues. *See Mathis v. Iowa Utils. Bd.*, 934 N.W.2d 423, 432-33 (Iowa 2019)(finding deference was not required, but nonetheless concluding "As a court of generalists, not energy specialists, we are unable to say with confidence that the common-

gathering line standard is superior to all other tests for when a wind project should be deemed a single site or facility" but then upholding the gathering line standard in part because "it is supported by a longstanding IUB administrative interpretation."); *see also NextEra Energy Resources LLC v. Iowa Utils. Bd.*, 815 N.W.2d 30 (Iowa 2012) *NextEra Energy*, 815 N.W.2d at 50-53 (Mansfield, J., concurring)(noting Board's technical expertise and collecting cases where the Court showed solicitude for that expertise in technical areas of utilities law.)

A. It is Important to Appreciate the Role of § 476.6(19), and What it Does and Does Not do – as the Board Correctly Understood.

Iowa Code § 476.6 broadly pertains to rates and charge of rate-regulated utilities in Iowa, and the filings and proceedings required to establish authorization for and level of those rates. Several of Iowa Code § 476.6's 21-subsections pertain to special, narrow situations: changes in the cost of natural gas supply (subsection 11) or fuels for electric supply (section 12), for example, or water costs for fire protection (section 14), energy efficiency programs (section 15), treatment of replacement tax costs (section 17) -- and the emissions plan and budget (section 19) that is the subject of this case.

Subsection 476.6(19) (hereafter "the EPB statute") starts from the premise that some rate-regulated utilities in Iowa are using coal-fueled generation facilities, and that those facilities are subject to state and federal air quality regulations on their emissions with which the utility must comply. In

2002, each such utility was required to submit a plan to manage such emissions in compliance with regulatory requirements, and to submit a budget reflecting the cost of the plan. Every two years, the utility must submit an *update* to its plan and budget. On Board review and approval, the costs can be recovered in customer rates. The nature of the Board's review is set forth in the statute; there are only three requirements for the biennial update:

(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) (emphasis added); 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." Iowa Code § 476.6(19)(c) *Id.* (emphasis added).

Two other aspects of the statute provide important context. First, it is clear that the legislature intended the Board's review to be limited because the legislation sets a 180-day deadline for the entire proceeding. *See* Iowa Code § 476.6(19)(d)(while there are provisions for extension, there are constraints that indicate the legislature's intent for the Board to meet the 180-day target.)

Second, and more relevant to this appeal, it is explicit that the legislature was not looking to maximize environmental benefits to the exclusion of all other considerations. Subsection 476.6(19)(f) 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.

Just as important as what the EPB statute says, however, is what it does not say -- which is ultimately what this appeal is all about. The Appellants asked the Board, and now ask this Court, to read into the statute a least-cost requirement, a least-emissions requirement, a requirement to consider alternative plans, and a mechanism to require evaluation of the retirement of coal-fired generation of electricity in Iowa. Not *one* of those concepts appears anywhere in the statute, however. Rather, as MidAmerican explains below, the express language of the statute and this Court's prior cases are directly contrary to Appellants' erroneous statutory construction.

B. With a Proper Understanding of § 476.6(19), Appellants' Contorted Statutory Construction Arguments All Fail.

In their brief Appellants raise five specific claims of error by the Board. Appellants claim that the Board:

(1) Failed to interpret "Managing Regulated Emissions" consistent with its ordinary meaning;

(2) Failed to give effect to the "entire statute" when the Board allegedly excluded alternative compliance options from consideration;

(3) Excluded alternative compliance options in a manner that rendered parts of the EPB statute meaningless;

(4) Improperly allowed MidAmerican's filing to establish the scope of the statute; and

(5) Changed its prior interpretation of the statute without proper explanation.

It is clear from Appellants' broader rhetoric, however, that its argument – its real objective – in this case is to force the Board to consider, and ultimately to order MidAmerican, to retire its coal-fired generating facilities sooner than MidAmerican believes is prudent. None of Appellants' specific claims of error withstands scrutiny – and as the Board correctly determined, Appellants' ultimate objective cannot be supported by the EPB statute. As there is significant overlap in the alleged errors, MidAmerican explains below why the arguments, collectively, are without merit.

1. <u>Arguments based on Appellants' "alternative compliance options" fail, as the Board correctly held that retiring coal facilities were outside of the scope of the proceeding.</u>

Several of the Appellants' assertions of error all raise the same core issue: Appellants contend that the Board failed to consider their witness testimony that there were "alternative compliance options" – a euphemism for requiring the early retirement of coal-fueled generating plants – that were "better"

options than those in MidAmerican's filed plan.[7] This argument misunderstands the nature of the EPB proceeding as established by the EPB statute, and seeks to have the Board act well beyond its authority.

As an initial matter, while the EPB statute admittedly requires a contested case, it is important to consider what is being "contested." Iowa Code §476.6(19)(a)(3) provides that "***The*** initial multiyear plan and budget and any subsequent updates shall be considered in a contested case proceeding pursuant to chapter 17A." Paragraph Iowa Code §476.6(19)(c) then instructs the Board:

> The board shall review ***the plan*** or update and the associated budget, and shall approve ***the plan*** or update and the associated budget if ***the plan*** or update and the associated budget are reasonably expected to achieve cost-effective compliance with applicable state environmental requirements and federal ambient air quality standards. In reaching its decision, the board shall consider whether ***the plan*** or update and the associated budget reasonably balance costs, environmental requirements, economic development potential, and the reliability of the electric generation and transmission system.

Iowa Code §476.6(19)(a)(3). *Id.* (emphasis added.)

The Board is not tasked with considering multiple competing plans. To the contrary, the utility – in this case MidAmerican – is to submit an update, which

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[7] This is the gist of all of Appellants specific claims of error except for (1) regarding the interpretation of the phrase "managing regulated emissions."

the Board then reviews for compliance with the statutory standard. The EPB statute provides for an up-or-down decision on what the utility chooses to propose, not a battle of competing proposals, some by the utility and some from interest groups.

The Appellants complain, however, that this interpretation "allows a utility to determine the scope of the statute based on what the utility includes in its filing," and asserts such a result is "absurd." Appellants Br. at 47 et seq. Appellants have nothing to support this argument and it is simply incorrect. The utility isn't setting the scope of the statute – rather, *the statute is setting the proper, limited scope of the EPB proceeding.*

In any event, letting an applicant set the scope of a proceeding is neither absurd, nor even uncommon. By analogy, the petition in a lawsuit generally establishes the scope of the lawsuit. Similarly in the regulatory sphere, there are countless instances in Iowa law where a regulated person or industry makes a filing which is approved or denied by the regulator by measuring that filing against fixed criteria, not against counterproposals from others. This is true of almost all licensures, for example.[8]

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[8] Appellants similarly point to the reference in Iowa Code § 476.6(19)(c) to "reasonably balancing" and argues this balancing cannot be undertaken without balancing MidAmerican's update against alternative plans. That misreads the statute and frankly doesn't make sense; the balancing here refers to whether the updated plan strikes a balance between the four statutory factors. In this

On the other hand, when the legislature wants to establish a process where alternatives to the applicants' filing are to be considered, it has shown that it knows how to do so explicitly. In Iowa Code §476.53, pertaining to advance ratemaking principles for new generating facilities, the legislature expressly requires utilities to have

> demonstrated to the board that the public utility has considered other sources for long-term electric supply and that the facility is reasonable when compared to other feasible alternative sources of supply.

Iowa Code §476.53(3)(c)(2). *See also*, *e.g.*, Iowa Code §478.3(2)(a)(6)(requiring applications for electric transmission franchise to include the "possible use of alternative routes and methods of supply"); Iowa Code §479.6(8)(requiring applications for natural gas pipeline permits to discuss the "possible use of alternative routes").[9] Here, where there is no requirement in the statutory criteria for either the utility or the Board to provide, consider, or compare the EPB to alternatives, the Court should be loathe to read in such a requirement –

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regard, it is like other "balancing tests" in the law, like the well-known test for a preliminary injunction. In that context, the court is to balance the likelihood of success on the merits, the imminent harm to the movant if the injunction doesn't issue, the harm to non-movants if the injunction does issue, and the public interest. It does *not* require a court to choose among competing versions of a potential injunction.

[9] The same is true when the legislature wants to require the "least cost." *See*, *e.g.*, Iowa Code §26.10.

it is clear that the legislature provides that instruction when it wants a proceeding to include competing choices. When the legislature chooses *not* to include such a requirement, that choice should be honored as well. *See* A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 93-94 (2012)("Yet some authorities assert the judicial power. . . to supply words or even whole provisions that have been omitted. . . . The traditional view, and the one we support, is to the contrary. . . . What the legislature "would have wanted" it did not provide, and that is an end of the matter.")[10] In this case, the legislature has instead provided a balancing test for the Board to use in evaluating "***the plan***" that the utility submitted. There is no error by the Board in rejecting alternatives that the statute does not require the Board to consider. As the district court correctly noted,

> It is the sole purview of the legislature to add statutory requirement, neither the IUB nor this Court can do so. *See Rinicker v. Wilson*, 623 N.W.2d 220, 227 (Iowa Ct. App. 2000)

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[10] This also addresses Appellants' argument that the Board deviated from its precedent without adequate explanation. The argument is that the Board declared Appellants' efforts to force consideration of coal plant retirements to be outside of the scope of the EPB proceeding, but had considered such retirements in prior years when they were part of the plan proposed by the utility. There is no deviation from precedent; Appellants are merely comparing apples and oranges. The plan submitted by the utility – including the voluntary choice to retire coal facilities -- is what the Board must evaluate. On the other hand, Appellants cannot *force* the utility or the Board to consider such requirements using the EPB statute as leverage. The effort to do so is beyond the scope of the EPB statute.

> (stating court will "leave it up to the legislature and/or our supreme court to establish" new statutory requirements; *see also State v. Wedelstedt*, 213 N.W.2d 652, 656-57 (Iowa 1973) ("If changes in the law are desirable from a policy, administrative, or practical standpoint, it is for the legislature to enact them, not for the court. . . . ")

App. ____ (Dist. Ct at 10.)

Appellants misunderstanding of the nature of the proceeding and what is being reviewed undermines their claims, but the substance of their proposed alternatives is even more problematic. For several years now, and in a variety of types of dockets, the Appellants have tried to shoehorn the issue of coal plant retirements into Board proceedings, 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). Again in the present case, in the Petition for Judicial Review at ¶ 61, Appellants requested 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). Appellants argue that such retirements are a ***more*** cost-effective means of complying with state and federal environmental regulations than the choices in MidAmerican's filed plan.

While MidAmerican does not concede that its plan was not the most cost-effective way to comply with emissions regulations[11], fatal to Appellants' argument is that MidAmerican's plan doesn't *have* to be the lowest-cost or most cost-effective – nor can it be rejected because there is a plan that is more cost-effective. If the plan submitted accomplishes regulatory compliance in a "***reasonably*** cost-effective" manner, the plan must be approved. Here, Appellants essentially ask the Court to modify the statute to better match their own agenda, rather than the policy the legislature chose. This is directly contrary to the Court's approach in *Brakke v. Iowa Department of Natural Resources*, 897 N.W.2d 522 (Iowa 2017) *Brakke*, 897 N.W.2d at 541-42 ("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.")[12]

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[11] This simply was not determined on the record below because the test is whether the submitted EPB is "reasonably cost-effective" in accomplishing regulatory compliance.

[12] Notably, some states have a specific process to periodically review the forward looking generation capacity and generator fuel mix for regulated utilities. In utilities parlance, this is called an Integrated Resource Plan, or IRP. The OCA in particular expressly stated below that was what it was seeking. (App. ___). States that have an IRP requirement generally do so by statute. *See*, *e.g.*, Minn. Stat. 216B.2422 Minn. Stat. 216B.2422; N.D. Century Code §§ 49-05-04.4, 49-05-17. Iowa, instead of a resource-intensive IRP process chose

Further, there is good reason for the legislature (and this Court) to not require the Board to order the most cost-effective means of compliance with air quality regulations. Although the Appellant interest groups can focus on a single issue, the responsibility of MidAmerican and of the Board are much broader. This Court has rightly shown an understanding of the myriad complex factors that must be considered in making electric generation choices – the EPB statute discusses cost, environmental benefits, economic development potential, and reliability of the generation and transmission systems. But the list of relevant considerations is even longer. In that regard, this case bears significant similarities with *NextEra Energy*, where the Court found that in determining whether there was a "need" (as that term is used in the statute) for new generation, the Board and MidAmerican could look at more than just keeping the lights on. Also relevant were fuel diversity, managing fluctuating costs, anticipating future regulations, economic development, and Iowa's energy policies. *NextEra Energy Resources LLC v. Iowa Utils. Bd.*, 815 N.W.2d 30 (Iowa 2012) *NextEra Energy*, 815 N.W.2d at 38.

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to use the "carrot" of advance ratemaking principles to encourage additional investment in generation, including renewable generation. *See* Iowa Code §476.53; *see also* §§ 476.41-43. Iowa's approach also allows utilities to be more nimble and flexible than utilities constrained by an IRP in adapting to changing market conditions and opportunities, which has proven to provide high reliability and low costs for Iowa customers.

MidAmerican also considers jobs and the communities it is in, as well as reliability in all manner of weather and demand conditions, in conservatively managing its generation resources to best serve its customers. MidAmerican and the Board should be provided ample leeway to do so within the structure provided by the legislature, not by requirements created by the narrower agendas of groups like Appellants.[13] At the end of the day, as the district court correctly held, Appellants' arguments entirely rely on terms like "comparison to reasonable alternatives," "more cost-effective," and "coal plant retirements" – none of those terms and none of those concepts are anywhere on the face of the EPB statute as written. The Board properly attended to the limits of its authority and refused to rewrite the law to suit Appellants' wishes; the Court should affirm the Board's correct decision.

In this regard, the present case is similar to the U.S. Supreme Court's recent case, *West Virginia v. EPA*, 597 U.S. ---, 2022 WL 2347278 (June 30,

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[13] Recent headline-making predictions from planning agencies about the potential for rolling blackouts in the Midwest this summer would suggest now is a time to be very cautious about considering retirements of any generating capacity that is not at the end of its useful life. *See*, *e.g.*, https://www.powermag.com/ercot-miso-warn-of-potential-power-supply-shortfalls/; https://www.desmoinesregister.com/story/news/2022/06/01/iowans-warned-they-may-see-rolling-blackouts-temps-climb-summer-weather-noaa-midamerican-alliant/7456079001/ .

2022). While the present case does not arise under federal law and federal cases therefore are not binding on this Court, *West Virginia* is nonetheless instructive. Like this Court's rulings in *Brakke* and in *City of Des Moines*, which both construed agency authority narrowly (and *City of Des Moines* collected cases for the proposition that where an agency has specific authority in certain areas, it lacks any other specific authority)[14], *West Virginia* also addresses the limits of administrative agency authority. In *West Virginia*, the U.S. Supreme Court overturned EPA emission rules known as the Clean Power Plan, which applied certain requirements to existing and new fossil fuel-based generating facilities. The EPA purported to derive its authority for the Clean Power Plan from a narrow provision of the Clean Air Act that served as a kind of "catch-all" for emissions not governed by other sections of the Act.

As is true of Appellants here, the EPA was candid about its intent to shift electricity generation away from coal and to other fuel sources. In the federal case, however, the facts were more favorable than those faced by

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[14] 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." *NextEra Energy Resources LLC v. Iowa Utils. Bd.*, 815 N.W.2d 30 (Iowa 2012) *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).

Appellants here. The Clean Air Act's mandate was stronger and more clear than anything in Iowa's EPB statute. *See West Virginia*, 2022 WL 2347278 (June 30, 2022) at *4 ("The Clean Air Act authorizes the [EPA] to regulate power plants by setting a 'standard of performance' for their emission of certain pollutants into the air.") Further, the outcome Appellants seek here – to force consideration of actual *retirement* of coal plants – goes further than the Clean Power Plan, which "included a requirement that such facilities *reduce* their own production of electricity, *or* subsidize increased generation by natural gas, wind, or solar sources." *West Virginia v. EPA*, 597 U.S. ---, 2022 WL 2347278 (June 30, 2022) *Id.* (emphasis added). The U.S. Supreme Court nonetheless rejected EPA's reading of the statute finding it "would empower EPA 'to order the wholesale restructuring of any industrial section' based only on its discretionary assessment of 'such factors as 'cost' and 'feasibility.'" *West Virginia*, at *9 (internal citations omitted).

Appellants' efforts to use a narrow, specific EPB provision here to press the Board for major statewide energy policy should be viewed with the same skepticism. As the U.S. Supreme Court elaborated,

> Extraordinary grants of regulatory authority are rarely accomplished through "modest words," "vague terms," or "subtle device[s]." *Whitman*, 531 U.S. at 468, 121 S.Ct. 903. Nor does Congress typically use oblique or elliptical language to empower an agency to make a "radical or fundamental change" to a statutory scheme. *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 229, 114 S.Ct. 2223, 129 L.Ed.2d

> 182 (1994). Agencies have only those powers given to them by Congress, and "enabling legislation" is generally not an "open book to which the agency [may] add pages and change the plot line." E. Gellhorn & P. Verkuil, *Controlling Chevron Based Delegations*, 20 Cardozo L. Rev. 989, 1011 (1999). We presume that "Congress intends to make major policy decisions itself, not leave those decisions to agencies." *United States Telecom Assn. v. FCC*, 855 F.3d 381, 419 (CADC 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

United States Telecom Assn. v. FCC, 855 F.3d 381 (CADC 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc. *Id.* at *12. The U.S. Supreme Court went on to question this allegedly broad power:

> Under its newly "discover[ed] authority, [citation omitted], however, EPA can demand much greater reductions in emissions based on a very different kind of policy judgment: that it would be "best" if coal made up a much smaller share of national electricity generation. And on this view of EPA's authority, it could go further, perhaps forcing coal plants to "shift" away virtually all of their generation—i.e., to cease making power altogether.

But this is precisely the ultimate outcome Appellants seek, and seek to force the Board to accept evidence on, in the present case. In the end, the U.S. Supreme Court found that such a sweeping and substantial policy change could not be found in the "ancillary provisions" of the Clean Air Act and that "the last place one would expect to find" the power to substantially impact economic policy is "in the. . . backwater of Section 111(d)." *West Virginia*, at *16. While MidAmerican would certainly not suggest the EPB statute is a "backwater," it is similarly unlikely that the Iowa Legislature would provide the power to require the shutdown of coal-fueled generating plants in the brief provisions of the 19th

of 21 subsections of a statutory section aimed specifically at rates -- particularly when the subsection never once discusses retirements of coal facilities or even curtailing emissions below what is legally required by state and federal law. To the extent that the evidence Appellants wanted the Board to consider called for actions beyond the scope of the Board's authority, the Board rightly considered it outside the scope of the proceeding. There was no error.

2. "Managing Regulated Emissions" does not mean eliminating them altogether, and does not provide a basis to retire useful coal plants.

In light of the discussion above, this point seems obvious. Because it is conceptually a separate argument, however, MidAmerican addresses it separately.

Appellants argue that "this case is about what the term 'managing regulated emissions' means. . ." Appellants Br. at 31. To the extent that is true, it is a dispute Appellants must lose. Appellants argue that the requirement in § 476.6(19)(a) that a utility "shall develop a multiyear plan and budget for *managing regulated emissions* from its facilities in a cost-effective manner" means the Board must accept and consider evidence supporting the retirement of coal plants as an alternative element of a plan. That contention is wrong as a matter of the structure of the EPB statute, wrong as to what "managing regulated emissions" means in the context of the EPB statute, and wrong as to the scope of authority delegated to the Board as an administrative agency.

Appellants' specific argument is that it provided evidence allegedly "on how utilities could manage regulated emissions more cost-effectively by retiring coal plants, but the Board refused to consider that evidence." Appellants Br. at 31. The Appellants then argue that in finding the evidence outside of the scope of the Board's review, the Board failed to follow the "ordinary meaning" of the term "manage." *See* Appellants Br. at 33-34. But even the dictionary definition cited by Appellants states that "Manage" means "to handle, direct, govern or control in action or in use." Notably, even according to Appellant's chosen dictionary definition "manage" does not mean to eliminate, or even reduce or minimize. Moreover, in the specific context of the EPB statute, "manage" clearly means to remain in compliance with state and federal requirements in ways that balance those requirements with cost of emissions controls, economic development, and the reliability of the generation and transmission systems. It does not require the Board or MidAmerican to take steps that go beyond actual legal requirements to satisfy the preferences or policy demands of third-parties. *See* Iowa Code § 476.6(19)(f)(calling for Board to limit expenditures prior to the time the benefit is required by law.) Again, this argument provides no basis to overturn the Board's order below.

C. The Board Correctly Found that MidAmerican Submitted a Compliant Emissions Plan and Budget.

While none of the Appellants' specific claims of error have merit, it is also the case that MidAmerican's 2020 EPB Update was compliant with Iowa Code § 476.6(19) and was correctly approved by the Board. That approval should be affirmed by the Court.

The initial threshold for a biennial update under the EPB statute is that it achieve compliance with state and federal environmental regulations. The statute provides a specific role for the Iowa Department of Natural Resources ("IDNR") to provide an independent, expert voice on that question. The statute requires the 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 (App. ___). 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 (App. ___) (agreeing that the Update complied with the specified state and federal emissions regulations).

With respect to whether MidAmerican's 2020 EPB Update accomplished such compliance in a reasonably 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.

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. App. ___. There has never been a dispute that use of emissions control technologies at MidAmerican's coal plants provides an economic development benefit.[15] Similarly, the Board has expertise in reliability and should be given a

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[15] 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 (App. ___) (the Environmental Intervenors joined in the settlement approving that plan) and compare with 2020 EPB Plan Update at 12 (App. ___). 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. In any event, the Appellants' argument now is that it would provide *more* economic development to build new renewables projects than to continue to run the emissions control equipment on existing coal plants. Building new facilities will always create more economic activity, but it doesn't necessarily follow that such activity is beneficial: building a wind farm, immediately tearing it down and rebuilding it would also create "more" economic development activity – but also an unwise amount of economic waste. The same problem arises in comparing building new renewables with operating coal plants that remain within their useful lives and are contributing to reliability and fuel diversity. Appellants also ignore the negative impact on economic development if reliability isn't maintained – which is why consistent baseload generation like coal is an important adjunct in a portfolio with intermittent renewables.

fair amount of leeway in applying that expertise to the facts provided.[16]

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" section of the Budget Update.

That MidAmerican relied on the same kind of explanation for the balancing factors it has provided in the past is particularly relevant given the

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16 *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)).

nature of the EPB proceeding. First and foremost, the biennial filing 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 and the ongoing mitigation approaches in each EPB update have a relationship to previously approved plans. It would make no sense, would be unrealistic, and would be 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.

More broadly, with respect to the balancing factors, the statute does not require any specific showing, and in particular (as is discussed above) 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 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. 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 Iowa Code § 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 Appellants seek to expand the alleged requirements of the statute far beyond its clear and unambiguous terms.

CONCLUSION

Despite MidAmerican's 2020 EPB Update satisfying the criteria that are actually in the EPB statute (and despite MidAmerican's extraordinary track record of investing in and generating electricity from renewable fuels), Appellants challenge the Board's approval because they want more – they want MidAmerican to do more than the statute requires, they want the Board (or this Court) to require more than the statute allows, they want a different process than the legislature contemplated. Looking to their Petition to see what Appellants 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 (Iowa 2017) *Brakke*, 897 N.W.2d at 541-42 (" 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 Court should affirm the district court and the Board in approving MidAmerican's 2020 EPB Update.

Respectfully submitted this 8th day of July, 2022.

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CERTIFICATE OF COST

The undersigned certifies that the cost for printing and duplicating necessary copies of this Appellee Proof Brief was $0.00.

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This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(*d*) and 6.903(1)(*g*)(1) or (2) because:

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 8th day of July, 2022, a copy of this Intervenor-Appellee Proof Brief was served upon the parties and upon the Clerk of the Supreme Court through the electronic filing of the same with the Iowa Judicial Branch Appellant Courts' EDMS system.

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