IN THE IOWA SUPREME COURT

NO. 22-0385

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

v.

IOWA UTILITIES BOARD,
Respondent-Appellee,

and

MIDAMERICAN ENERGY COMPANY,
Intervenor-Appellee

and

OFFICE OF CONSUMER ADVOCATE
Intervenor.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
THE HON. SAMANTHA GRONEWALD, Judge

APPELLANT'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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ROUTING STATEMENT

The Supreme Court should retain this case as it presents an issue of first impression as to the scope and meaning of Iowa Code § 476.6(19). IOWA R. APP. P. 6.1101(2)(c). Further, the Iowa Utilities Board approves Emission Plan and Budget updates every two years and continued delay in resolution of this matter will impact multiple plan updates making this a matter requiring prompt resolution by the Supreme Court. IOWA R. APP. P. 6.1101(2)(d).

STATEMENT OF THE CASE

Coal-fired power plants must comply with stringent federal ambient air quality standards and state environmental regulations. To ensure that public utilities cost-effectively manage compliance with these standards and do not incur unnecessary or imprudent compliance costs paid by customers, the Iowa legislature requires rate-regulated public utilities who own one or more coal-fired power plants to "develop a multiyear plan and budget for managing regulated emissions from its facilities in a cost-effective manner" and submit that plan and regular updates for the Iowa Utilities Board (Board) to review in contested case proceedings. IOWA CODE § 476.6(19)(a). Iowa's rate-regulated utilities have filed these Emission Plan and Budget (EPB) dockets every two years since 2002. *Id*. at § 476.6(19)(a)(1).

In MidAmerican Energy Company's (MidAmerican) 2020 EPB update, the Environmental Law and Policy Center (ELPC), Iowa Environmental Council (IEC), and Sierra Club (collectively Environmental Parties) presented extensive evidence that the most cost-effective way to comply with ongoing environmental compliance obligations was to retire (that is, cease operating) two of MidAmerican's existing coal units. (Appendix (App.) 90-290.) The Office of Consumer Advocate (OCA) similarly filed testimony disputing that MidAmerican's plan was reasonably expected to achieve cost-effective

compliance and that alternatives such as facility retirements and fuel switching should be considered. (App. 73-84.)

The Board never considered Environmental Parties' and OCA's evidence during the EPB proceeding. (App. 472-84.) Instead, the Board interpreted the scope of the EPB statute narrowly to exclude Environmental Parties' evidence from consideration, thereby approving MidAmerican's EPB as originally filed. (App. 480.) Environmental Parties filed a petition for judicial review (App. 540-557), and the District Court affirmed the Board's new statutory interpretation. (App. 717-31.) The Board's new interpretation did not apply principles of statutory construction, ignored the plain meaning of the statute, did not give effect to important parts of the statute, undermined the purpose of the statute, and was inconsistent with the Board's past interpretation of the statute. This Court should reverse the Board's novel erroneous interpretation of law that narrowed the scope of the statute and the District Court's affirmation of that order and remand to the Board.

STATEMENT OF FACTS

A. MidAmerican's 2020 EPB Filing

MidAmerican filed its 2020 EPB with the Board on April 1, 2020. MidAmerican's 2020 EPB filing requested approval for operations and maintenance (O&M) expenditures associated with air emissions controls at the following coal-fueled power plants: Walter Scott, Jr. Energy Center Unit 3, George Neal Energy Center (Neal) Unit 3, Neal Unit 4 and Louisa Generating Station. MidAmerican also reported its share of the costs associated with emissions reduction measures at the Ottumwa Generating Station, which it co-owns with the Interstate Power and Light Company. (App. 10, 12-15.)

MidAmerican's EPB described the O&M costs of pollution control equipment. (App. 10.) MidAmerican's filing did not discuss any alternative compliance options that would be equally or more effective at complying with emissions limitations, such as coal unit retirement. (*See* App. 8-20.) The EPB also did not explain, in any detail, why the proposed compliance plan was "cost-effective" or why it "reasonably balance[d] costs, environmental requirements, economic development potential, and the reliability of the electric generation and transmission system," as required by § 476.6(19)(c) of the Iowa Code. (*Id.*) The 2020 EPB Update included just half a page to address

both the economic development potential and the reliability of the generation and transmission systems. (App. 13.)

Environmental Parties, Google, and Facebook intervened in the proceeding, and the OCA was a party of right. During discovery, MidAmerican actively resisted other parties' requests to understand how it may have assessed or balanced the statutory factors. (App. 86-89; 287-90.) OCA specifically requested information related to the potential to pause operation of coal plants. OCA also requested information about the economic development potential related to emissions reduction efforts, comparing economic benefits from installing emissions controls to building alternative sources of generation, and economic impacts from retiring coal plants. (App. 86-89.) Environmental Parties requested information regarding the cost-effectiveness of and need for the coal plants. (App. 287-90.) MidAmerican objected in whole or in part to all of these requests.

Environmental Parties submitted testimony from David B. Posner and Steven C. Guyer demonstrating that the retirement of Neal Unit 3 and Neal Unit 4 represented a more cost-effective strategy for managing emissions from the facilities to meet the state and federal environmental requirements. (App. 90-290.)

Witness Posner, an energy finance expert, analyzed the cost of continued operation of MidAmerican's coal plants and the emissions controls as proposed by MidAmerican. He compared the cost of operating the coal plants with their controls to the cost of retiring them and replacing them with renewable energy. He showed that "Neal Unit 3 and Neal Unit 4 have been uneconomic to operate for several years." (App. 101.) Further, his testimony demonstrated that the cost of MidAmerican's proposed strategy for managing emissions exceeds the cost of reasonable alternatives – customers could save money in the long-term and in the short-term if MidAmerican retired Neal Unit 3 and Neal Unit 4. (App. pp. 101-03, 112-14.)

Witness Posner also addressed the implications of the coal plant retirement compliance option for grid reliability, a statutory factor, and concluded that MidAmerican has enough excess capacity to retire Neal Unit 4 without having to replace it with any new generation. (App. 115-16.) He modeled a retire-and-replace scenario with replacement wind generation, concluding that this extra capacity indicates that reliability would not be a problem.

Witness Guyer, an energy and climate policy specialist, explained that the coal plant retirement option is cost-effective while also in compliance with applicable state and federal air emission regulations. Echoing MidAmerican's

testimony in the 2014 EPB proceeding that supported retirements of different coal plants, Guyer noted that eliminating emissions from the Neal units is an accepted emissions management strategy under state and federal law. (App. 92.) He explained how retirement of the Neal units would eliminate their emissions regulated under the Clean Air Act, thereby increasing the air emissions available for other economic development. (*Id*.) He further explained that it is cost-effective to retire Neal 3 and Neal 4 and urged the Board not to approve costs associated with these units. (App. 94-96.)

Witness Guyer also provided evidence that additional wind generation – which could replace retiring coal plants – brings economic development benefits that include additional tax base, direct payments to landowners, attracting new businesses, payroll and supply chain revenue, permanent local jobs, and increased local spending. (App. 325-26.)

The Office of Consumer Advocate (OCA) witness Scott C. Bents criticized MidAmerican's "narrow focus on emissions controls equipment" and stated that the EPB should consider "alternative compliance options." (App. 75.) Mr. Bents pointed out that in past EPB dockets MidAmerican had selected coal-plant retirements and natural gas fuel source conversion as least cost compliance options. (App. 77.) He further explained that MidAmerican "has not shown that it made any attempt at all to balance [the four statutory]

criteria." (App. 81.) A witness for Google and Facebook added that MidAmerican's "evidence relating to the need for and cost-effectiveness of the emissions plan and its impact on the reliability of the generation and transmission system is sparse." (App. 376.)

MidAmerican did not rebut the cost analysis presented by Environmental Parties' witnesses and did not contest the experts' conclusion that retirement of the Neal units would be more cost effective than continuing to operate them. As a result, unrebutted evidence demonstrated that retirement is the more cost-effective strategy to manage regulated emissions from the facilities in compliance with state and federal environmental requirements, while also providing stronger economic development opportunities and maintaining reliability at least as well as status quo operation of pollution control equipment. (App. 75-76, 94-96, 101-03.)

In its Reply Testimony, MidAmerican argued the evidence presented by the Environmental Parties and OCA should not be considered, claiming that retirement—an option that was an important part of MidAmerican's EPB plan in previous years—is not an emissions management strategy within the meaning of section 476.6(19). (App. 299-300.) MidAmerican contended – in direct contravention of its position in prior dockets – that consideration of coal plant retirements is not appropriate in an EPB docket. (App. 294.)

MidAmerican also asserted that it would be "unreasonable to withhold approval" for continued operation of existing pollution control equipment because the initial installation of those controls had been approved in a prior docket. (App. 301.)

Responding to MidAmerican's objections, Witness Posner clarified that his testimony was not challenging the prudency of the *initial* capital expenditures that the Board had previously approved. (App. 313.) Instead, his analysis showed that the costs of *continuing* to operate and maintain the coal plants with their existing emissions controls were higher than the costs of reasonable alternatives. (*Id.*) Witnesses Posner and Guyer then presented further evidence that future operation of pre-existing controls is not cost-effective. Witness Guyer further noted that, if (as MidAmerican stated in its update) economic development potential came from simply reducing emissions, then there would be an even greater economic benefit from eliminating emissions entirely. (App. 327.) He also pointed out that MidAmerican itself has repeatedly acknowledged that renewable energy, the replacement option for retiring coal units under the analysis, has significant economic development potential. (App. 325-26.)

On February 4, 2021, MidAmerican and the Office of Consumer Advocate filed a Joint Motion and Non-Unanimous Settlement Agreement

(Proposed Settlement) pursuant to 199 Iowa Admin. Code § 7.18. (App. 396-401.) The Proposed Settlement agreed to review coal unit retirement and other enumerated alternatives outside of the EPB proceeding. It stated that the purpose of the separate review would be "to demonstrate how MidAmerican is managing its current generation resources and how it is planning for new resources in a manner that are cost-effective . . . ." (App. 400.)

Environmental Parties objected to the non-unanimous settlement on the grounds that it did not meet minimum statutory requirements, and suggested modifications. (App. 402-28.) They explained that the Proposed Settlement was inconsistent with Iowa Code § 476.6(19) because it did not require MidAmerican to satisfy the requirements of the EPB statute within a contested-case docket. (App. 405, 413-14.) Instead, the settlement would address those requirements in a separate, non-contested docket lacking procedures such as discovery. (App. 416.) This would frustrate the statutory purpose of opening emissions planning to public scrutiny, and giving parties the opportunity to contest the utility's assumptions, analysis, and actions. (App. 415-16.) Environmental Parties' comments further explained that the proposed settlement would effectively exempt MidAmerican from the cost-effectiveness analysis in all future EPB dockets. (App. 405.)

B. The Board's Decision

On March 16, 2021, the Board initially responded to the Proposed Settlement by establishing a hearing and briefing schedule. (App. 459-66.) The parties submitted a Joint Statement of Issues on March 19, 2021, which indicated that all parties agreed that the reasonableness of the settlement was at issue. (App. 468.) In addition, it stated that Environmental Parties disputed issues identified in the record regarding the retirement of the Neal plants and the adequacy of the MidAmerican's evidence. (App. 469-70.)

However, on March 24, 2021—one week before the scheduled date of the hearing—the Board rejected the proposed settlement and approved the *original* EPB update proposed by MidAmerican in its entirety. (App. 472-84.) The Board held that any evaluation of alternative emissions management options is outside of the scope of the statute. (App. 480.)

The Board declined to consider the Environmental Parties' testimony as well as the OCA testimony filed in opposition to the 2020 EPB Update despite established practice in previous EPB proceedings of evaluating and adopting coal unit retirement as a compliance option within the statute. (App. 480.) Nevertheless, the Board admitted all parties' filings into the record. (App. 481.) Because the Board refused to consider the testimony presented by Environmental Parties and OCA, the Board concluded that there were no

material facts in dispute and summarily approved MidAmerican's update. (App. 480-81.)

On April 13, 2021, Environmental Parties filed an Application for Reconsideration pursuant to Iowa Code § 17A.16(2) and 199 Iowa Admin. Code § 7.27(1). (App. 485-505.) Environmental Parties noted that the Board was incorrect in finding that prior EPB proceedings had not raised coal plant retirements as an emissions compliance strategy. (App. 493-97.) Environmental Parties specifically highlighted the multiple examples of past EPB dockets where coal unit retirement or other compliance options had been considered as part the emission management strategy. (*Id.*) This included MidAmerican dockets EPB-2014-0156, EPB-2016-0156, and EPB-2018-0156, and Interstate Power & Light docket EPB-2016-0150. (*Id.*) In those dockets, the Board had approved coal plant retirements as compliance strategy and did not reject them as outside the scope of the EPB statute.

OCA filed a separate Motion for Rehearing and Reconsideration. (App. 506-512.)In its May 13, 2021 Order, the Board stood by its prior assertion that alternative compliance options such as retirement had not been considered in previous EPB dockets. (App. 535 ("The Board stated in its March 24, 2021 Order Approving 2020 EPB that these issues have not been raised in previous EPB dockets, and the EPBs in those dockets were found to comply with the

statute.").) The Board did not provide a basis for this assertion or explain how the assertion could be squared with the fact multiple other EPB dockets in which the Board approved or considered coal plant retirements as appropriate compliance options. (App. 323-25, 493-97.) The Board also claimed that there was no disputed fact about whether MidAmerican's plan reasonably balanced environmental requirements, costs, economic development potential, and the reliability of the electric generation and transmission system. (App. 537.) The Board was only able to make such a statement by erroneously excluding consideration of Environmental Parties' testimony as outside of the scope of the docket.

C. The District Court Decision Below

Following the Board's May 13, 2021 Order, Environmental Parties brought a petition for judicial review of the Board's Orders approving MidAmerican's 2020 EPB Update and denying Environmental Parties' motion for reconsideration. (App. 540-57.) Before the district court, Environmental Parties argued that the Board's novel interpretation of Iowa Code § 476.6(19), which reduced the scope of the statute to only the question of whether the existing pollution controls complied with environmental law and excluded consideration of all other alternative compliance options, including coal retirement, was incorrect as a matter of law.

Environmental Parties argued that the Board erred in interpreting the term "managing regulated emissions" to exclude coal plant retirements, because it contradicts the ordinary meaning of the text and the Board's past practice in EPB proceedings. (App. 589-97.) Environmental Parties further argued that the Board failed to give meaning to the words "cost effective." *Id.*

The District Court agreed with Environmental Parties that MidAmerican had discussed alternative methods of complying with emissions regulations including selecting coal-unit retirement as the cost-effective compliance strategy in prior dockets. (App. 725.) The District Court held, however, that "nothing in the plain text of the statute required MidAmerican to do so." (*Id.*) The District Court concluded that "the IUB did not err in determining it was not required to address evidence regarding least-cost options for emissions controls and thus the evidence of such filed by Petitioners and OCA was outside the scope of an EPB proceeding." (*Id.* at 726.) The District Court found that because the Board had excluded evidence presented by the parties, the Board was correct in finding there was no issue of material fact. (*Id.*)

Following the District Court's decision, on December 7, 2021, OCA filed a motion for reconsideration. (App. 732-35.) On February 21, 2022, the

District Court denied OCA's motion. (App. 757-60.) Environmental Parties brought this appeal on February 28, 2022.

ARGUMENT

The District Court erred as a matter of law in affirming the Iowa Utilities Board's novel and erroneous interpretation of the Iowa Code section 476.6(19) that narrowly focused "managing regulated emissions" to exclude all compliance options beyond operation of existing pollution controls. The Board's narrow interpretation of the law effectively ruled out consideration of coal plant retirements and other compliance options as outside of the scope of the statute. The Board's interpretation of law is an error because it is inconsistent with principles of statutory construction. The Board's new interpretation contradicts the Board's past interpretation of the statute, which the Board relied on when it approved EPB dockets that included and considered multiple strategies to manage emissions such as coal plant retirements. This Court should reverse the District Court's affirmation of the Board's erroneous interpretation of law that consideration of compliance strategies other than pollution controls such as coal plant retirements are outside of the scope of section 476.6(19) and remand the case back to the Board.

I. The District Court Erred by Failing to Interpret Iowa Code § 476.6(19) Consistent with the Principles of Statutory Construction.

A. Preservation of Error

Environmental Parties raised issues disputed herein on appeal to the Board and on Judicial Review to the District Court. (App. pp. 485-505; 540-57; App. 570-612; App. 650-69.) Environmental Parties timely filed this appeal.

B. Scope and Standard of Review

A district court reviews a petition for judicial review in an appellate capacity, and in turn, the appellate court "review[s] the district court's decision to determine whether it correctly applied the law." *Hawkeye Land Co. v. Iowa Utilities Bd.*, 847 N.W.2d 199, 207 (Iowa 2014). The Court applies the standards set forth in section 17A.19(10) to determine whether its conclusions are the same as those of the district court. *Id*.

A reviewing court shall reverse, modify, or grant other relief if an agency action is "[b]ased upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency." IOWA CODE § 17A.19(10)(c). A reviewing court shall not give deference to the agency on whether particular matters have been vested in the agency's authority, and when matters have not been vested in

the agency's authority, the court should not give deference to the agency on those matters. See IOWA CODE § 17A.19(11)(a), (b). When the interpretation of law is not vested with an agency, a court does not defer to the agency interpretation and evaluates the meaning of the law *de novo*. *Thoms v. Iowa Pub. Emples. Ret. Sys.*, 715 N.W.2d 7, 10 (Iowa 2006)*; see* Arthur Earl Bonfield, *Amendments to Iowa Administrative Procedure Act, Report on Selected Provisions to Iowa State Bar Association and Iowa State Government* 61-62 (1998).

The Board is entitled to deference only where the term is "uniquely" within the Board's subject matter expertise. *See Mathis v. Iowa Utils. Bd.*, 934 N.W.2d 423, 428 (Iowa 2019). 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 Resources, LLC v. Iowa Utils. Bd.*, 815 N.W.2d 30, 37 (Iowa 2012) ("[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).

The EPB statute is part of Iowa Code Chapter 476, and the Iowa Supreme Court has previously concluded that the Board does not have broad general powers to interpret the language of Chapter 476. *NextEra Energy*, 815 N.W.2d at 38 ("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."). The Iowa Supreme Court has repeatedly held that the Board does not have vested authority to interpret all terms in Iowa Code chapter 476. *See e.g.*, *SZ Enterprises, LLC v. Iowa Utils. Bd.*, 850 N.W.2d 441, 452 (Iowa 2014) (declining to defer to the Board's interpretation of the definition of "public utility" and "electric utility"); *NextEra Energy*, 815 N.W.2d at 38 (declining to defer to the Board's interpretation of "electric supply needs"); *Mathis*, 934 N.W.2d at 428 (holding that the Board did not have authority to interpret a "single site" for purposes of siting wind farms).

The legislature did not clearly vest the Board with the authority to interpret Iowa Code section 476.6(19) and specifically the statutory term "managing regulated emissions" at issue in this case. 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 statute does not clearly vest the Board with authority to interpret the phrase "managing regulated emissions" in the EPB statute. The court should not give any deference to the Board's interpretation of section 476.6(19) and should review the Board's order and the District Court's interpretation of law de novo.

C. Argument

The District Court erred as a matter of law in affirming the Iowa Utilities Board's novel interpretation of the Iowa Code section 476.6(19) that narrowly focused "managing regulated emissions" on whether existing pollution controls complied with environmental law, and forbade consideration of whether other compliance options – including coal plant retirements – would be more cost effective as beyond the scope of the statute.

The District Court did not defer to the Board's interpretation of the statute; nevertheless, it repeated the Board's error in interpreting the statute.

> The Emissions Plan and Budget statute specifically requires:
>
> a. … Each rate-regulated public utility that is an owner of one or more electric power generating facilities fueled by coal and located in this state on July 1, 2001, shall develop a multiyear plan and budget for *managing regulated emissions* from its facilities in a cost-effective manner.

IOWA CODE § 476.6(19) (emphasis added). The dispute in this case is about what the term "managing regulated emissions" means and whether it can include evidence regarding the cost effectiveness and feasibility of emission management strategies beyond operating of existing pollution control technologies. Environmental Parties provided evidence on how utilities could manage regulated emissions more cost effectively by retiring coal plants, but the Board refused to consider that evidence. Instead, the Board's order created an erroneous new interpretation to Iowa Code § 476.6(19):

> Based upon the specific requirements in the statute which address compliance with state and federal emissions regulations and the approval of EPBs in previous dockets, the Board finds that the evidence addressing other options, filed by OCA and the intervenors, is outside the scope of an EPB proceeding under Iowa Code § 476.6(19). (App. 480)

The Board did not provide a rationale for its interpretation of the statute beyond this conclusory statement. The District Court affirmed the Board

decision and concluded that "the IUB did not err in finding the statute does not require MidAmerican to provide *or consider* evidence of other options, including retiring of coal units." (App. 727 (emphasis added).) By holding the evidence of alternative compliance options is outside of the scope of the EPB, the District Court and Board erroneously interpreted "managing regulated emissions" to exclude each and every one of those alternative compliance options.

A court applies principles of statutory construction to interpret the meaning of the statute. The Court interprets the statutory terms using their ordinary meaning must consider the statutory context. IOWA CODE § 4.1(38) ("Words and phrases shall be construed according to the context and the approved usage of the language"); *see State v. Doe*, 903 N.W.2d 347, 351 (Iowa 2017) ("we first consider the plain meaning of the relevant language, read in the context of the entire statute"). The court's interpretation should give effect to the entire statute and lead to a just and reasonable result. IOWA CODE § 4.4(2) and (3). If there is ambiguity in the statute, the Court may consider factors such as the object sought to be attained, consequences of a particular construction, and the administrative construction of the statute. *Id.* at § 4.6.

The District Court and Board failed to apply these principles of statutory construction to the term "managing regulated emissions" and instead interpreted the statute to exclude consideration of alternative compliance strategies. The District Court and Board erred, and this Court should reverse and remand the decision.

1. The Board Erred by Failing to Interpret the Term "Managing Regulated Emissions" in Iowa Code § 476.6(19) Consistent with Its Ordinary Meaning.

In concluding that evidence presented by Environmental Parties and OCA was outside the scope of the statute, the Board interpreted the phrase "managing regulated emissions" in Iowa Code § 476.6(19). The Board referenced the requirement to comply with state and federal emissions regulations and past EPB approvals, but did not provide any further explanation of its statutory interpretation. (App. 480.) The Board erred by failing to interpret "managing regulated emissions" consistent with its ordinary meaning.

In interpreting the statute, the words should be given their ordinary meaning. *Mathis*, 934 N.W.2d at 428; *State v. Davis*, 922 N.W.2d 326, 330 (Iowa 2019). "Manage" means "to bring about or succeed in accomplishing, sometimes despite difficulty or hardship" or "to handle, direct, govern, or control in action or use." *Manage, Webster's Third New International*

Dictionary (unabr. ed. 2002). Managing thus involves more than simply buying a replacement part or blindly continuing to operate existing pollution controls.

"Managing regulated emissions" is not specific to utilities regulated by the Board. The term "managing" does not require a particular expertise to understand in context, and there is no evidence the Board applied its subject matter expertise to determine the meaning. The statute gives the Iowa Department of Natural Resources (IDNR) a specific role in the EPB plan by requiring it to "state whether a plan or update meets applicable state environmental requirements for regulated emissions," and for any deficient plan it must also "recommend amendments that outline actions necessary to bring the plan or update into compliance." IOWA CODE § 476.6(19)(a)(4). A recent news article provides a good example of the IDNR applying the ordinary meaning of "managing regulated emissions" to include the range of strategies that brought about a significant reduction of sulfur dioxide and nitrogen dioxide emissions over the last 20 years. The IDNR Acting Air Quality Bureau Chief explained: "The largest source of pollutants back in 2002 was electricity generating facilities and manufacturing facilities that

burned coal. A lot of those have either shutdown, converted to natural gas, or are relying on renewable energy now."[1]

Consistent with this common understanding of strategies to manage emissions, OCA and MidAmerican's publicly filed settlement in this case provides additional context as to what managing emissions includes. The proposed settlement acknowledged that:

> actions by a rate-regulated public utility with respect to the operation of coal-fired power plants can and do have an impact on the amount of regulated emissions produced by those plants. Such actions include:
>
> A. Installation/adoption of environmental controls and techniques
> B. Fuel switching
> C. Modified dispatch (coupled with increased reliance on lower emission resources and/or energy storage)
> D. Generating unit retirement
> E. Reliance on emission allowances
> F. Addition of new generation sources, both renewable and fossil fuel, as well as energy storage
> G. Load growth management
> H. Wholesale market transactions and retail sales of electric energy.

(App. 398-99.) There is a wide range of strategies that fit within the ordinary meaning of managing regulated emissions from coal plants, as acknowledged

[1] Radio Iowa, "Report finds Iowa's air quality has improved," (May 24, 2022) *available at* www.radioiowa.com/2022/05/24/report-finds-iowas-air-quality-has-improved/ (last visited May 25, 2022).

by the parties in this case and reflected by the past decisions and past practice of the Board. This includes coal plant retirement and other alternatives.

The District Court's decision to affirm the Board's interpretation to simply read most of those compliance strategies out of the statute is inconsistent with the ordinary meaning of the statute and is reversible error.

2. The District Court Erred by Failing to Give Effect to the Entire Statute When Its Interpretation Excluded Compliance Options that Would Meet State and Federal Environmental Regulations.

The District Court erred by affirming the Board's interpretation of the statute without properly considering the broader statutory context. The Board's new interpretation of the statutory scope limited the existing statutory scope embedded in the requirement to "meet applicable state environmental requirements and federal ambient air quality standards."

The court's interpretation should give effect to the entire statute. IOWA CODE § 4.4(2); *Iowa Ins. Inst. v. Core Grp. Of the Iowa Ass'n for Justice*, 867 N.W.2d 58, 72 (Iowa 2015) ("[W]e read statutes as a whole."). When interpreting a law, a court should "assess the statute in its entirety rather than isolated words or phrases to ensure [the] interpretation is harmonious with the statutes as a whole." *Ramirez-Trujillo v. Quality Egg, LLC*, 878 N.W.2d 759 (Iowa 2016) (citing *Schadendorf v. Snap-On Tools Corp.*, 757 N.W.2d 330, 337 (Iowa 2008)). This means a court must "avoid construing a statutory

provision in a manner that would make any portion thereof redundant or irrelevant." *Id.* (citing *Rojas v. Pine Ridge Farms, LLC*, 779 N.W.2d 223, 231 (Iowa 2010)).

The statute states that "[t]he board shall not approve a plan or update that does not meet applicable state environmental requirements and federal ambient air quality standards for regulated emissions from electric power generating facilities located in the state." IOWA CODE § 476.6(19)(b). Similarly, approval of a plan is conditioned on an expectation to comply with "the state environmental requirements and federal ambient air quality standards." *Id.* at 476.6(19)(c). When considering the statute as a whole, the statutory requirement to comply with state and federal environmental requirements provides important context for the range of compliance options included within the scope of managing regulated emissions.

Multiple strategies can ensure compliance with state and federal environmental regulations as required by the statute. Witness Guyer testified that retiring a coal plant is a method for complying with emissions regulations, and he noted that MidAmerican acknowledged the fact. (App. 322.) Other common strategies include but are not limited to installing and operating pollution controls at a facility, switching the fuel source at a facility, modifying the amount of time a facility runs, and participating in a pollution

trading program. A requirement to comply with state environmental requirements and federal ambient air quality standards includes the possible application of all of these strategies. Furthermore, such a requirement provides flexibility for the EPB statute to ensure compliance with changes in state or federal law if those changes require new or different strategies not currently required under today's state and federal laws.

The U.S. Department of Justice has used coal plant retirement and refueling as methods of achieving compliance with federal ambient air quality standards. The Department of Justice alleged that Interstate Power and Light Company (IPL) violated the Clean Air Act due to its coal plant emissions. The resulting consent decree required permanent retirement of certain coal units and the retirement or repowering of others. *United States v. Interstate Power and Light Co.*, Case no. C15-0061, Consent Decree at 16-19 (N.D. Iowa 2015).[2]

The District Court and Board orders unnecessarily narrow the scope of the statute and limit what compliance with state environmental requirements and federal ambient air quality standards mean by interpreting the statute to eliminate alternative compliance options. The statute lists no compliance

[2] The Consent Decree is available on EPA's website at https://www.epa.gov/sites/default/files/2015-07/documents/interstatepowerandlight-cd.pdf.

options at all as either within or outside the scope of the statute. The District Court's interpretation of the EPB statute treats silence as exclusion – in other words, because the statute does not expressly require consideration of reasonable alternatives, least cost options, or coal plant retirements, those options are outside the scope of the statute and cannot be considered:

> nowhere in section 476.6(19) has the legislature seen fit to include any language in the statutes regarding "reasonable alternatives," "least cost options," a "cost benefit analysis," or requiring the shutdown of coal plants. The statute does expressly require the IUB and IDNR to ensure the EPB complies with state and federal environmental regulations.

(App. 726.) But the statute already included its own limiting principle: state environmental requirements and federal ambient air quality standards. A range of compliance options fit within the requirement to comply with state environmental requirements and federal ambient air quality standards without having to be specifically mentioned in the statute. Alternatives that meet the applicable state and federal environmental regulations are consistent with the statute. If an emissions management strategy is unable to meet state environmental requirements and federal ambient air quality standards, then it would be outside of the scope of the statute as the legislature has written it. By using the statute's silence related to specific compliance options as a limiting principle, the District Court failed to give effect to the entire statute

and its existing limiting principle that required compliance with state and federal standards.

The statute expressly includes a requirement for compliance with state and federal environmental regulations. The Court should interpret any strategy that complies with those state and federal regulations as within the scope of the EPB statute unless the statute expressly prohibits those strategies. To do otherwise would be to impermissibly narrow the statute and fail to give effect to the entire statute. IOWA CODE § 4.4(2).

3. The Board Erred by Interpreting the Statute to Exclude Consideration of Alternative Compliance Options Rendering Parts of the EPB Statute Meaningless.

The District Court's interpretation of the statute narrowed the Board's review to a point that the "cost-effective" language in the statute has no meaning. The interpretation negates the Board's statutory role in reviewing utility expenditures and the requirement to "reasonably balance" the criteria in the statute. It has further implications that are inconsistent with the contested case procedures required by law. Only an interpretation allowing the Board to consider evidence on multiple compliance options gives full effect to all language in the statute.

The court's interpretation should give effect to the entire statute. IOWA CODE § 4.4(2); *Iowa Ins. Inst. v. Core Grp. Of the Iowa Ass'n for Justice*, 867

N.W.2d 58, 72 (Iowa 2015) ("[W]e read statutes as a whole."). When interpreting a law, a court should "assess the statute in its entirety rather than isolated words or phrases to ensure [the] interpretation is harmonious with the statutes as a whole." *Ramirez-Trujillo v. Quality Egg, LLC*, 878 N.W.2d 759 (Iowa 2016) (citing *Schadendorf v. Snap-On Tools Corp.*, 757 N.W.2d 330, 337 (Iowa 2008)). This means a court must "avoid construing a statutory provision in a manner that would make any portion thereof redundant or irrelevant. *Id.* (citing *Rojas v. Pine Ridge Farms, LLC*, 779 N.W.2d 223, 231 (Iowa 2010)).

The statutory purpose of the EPB is to "provide for compatible statewide environmental and electric energy policies" and that the owners of coal facilities shall develop a plan for "managing regulated emission from its facilities in a cost-effective manner." IOWA CODE § 476.6(19)(a). The context of the statute is important to consider when trying to understand this purpose:

> 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)(c).

The statute is meant to achieve "cost-effective compliance with applicable state environmental requirements and federal ambient air quality standards." An interpretation of the statute that eliminates compliance strategies that comply with state and federal standards does not give effect to the "cost-effective" language in the statute and is also at odds with "[t]he object sought to be attained" by the statute. IOWA CODE § 4.4(2) and 4.6(1). If there are multiple compliance strategies that can meet the state and federal requirements, the way to achieve "cost-effective compliance" is to compare those strategies, or at a minimum to have the ability to consider a reasonable range of strategies if parties present evidence on those strategies. This is consistent with the definition of cost-effective: "producing optimum results for the expenditure." *Cost-effective*, *Webster's Third New International Dictionary* (unabr. ed. 2002). If compliance strategies that can save costs without compromising other statutory objectives exist, the inability to consider those strategies would prevent a plan from achieving cost-effective compliance with state and federal standards. An interpretation that eliminates consideration of alternative compliance strategies from the scope of the statute frustrates the statutory requirement of "cost-effective compliance."

The statute further provides that the utility's plan must be "cost-effective" and must "reasonably balance" cost, environmental requirements, economic development, and reliability. IOWA CODE § 476.6(19)(c). Environmental Parties provided unrebutted evidence on these statutory criteria demonstrating that the management strategies included by MidAmerican in its EPB Update are not cost-effective, and that coal unit retirements would provide a better balance of these factors. If the Board cannot consider any option except the one proposed by the utility, there is no opportunity to "reasonably balance" the criteria. By refusing to consider Environmental Parties' evidence on cost-effectiveness and the statutory criteria, the Board rendered the statutory language to "reasonably balance" the criteria irrelevant.

The District Court and Board's interpretation of the statute also fails to give any meaning to the Board's role in evaluating the prudence of emissions control strategies. The Iowa DNR retains authority to evaluate whether an emissions compliance strategy complies with environmental laws, and conducts such evaluations in its air permitting processes. IOWA CODE § 476.6(19)(a)(4). The Board has a separate role in ensuring that costs that a utility incurs and seeks to recover from its captured customer base are reasonable and prudent. IOWA CODE §§ 476.6, 476.8(1). Rate cases, which set

the rates a utility may charge customers for electricity, regularly involve questions of what types of expenses are reasonable, and, like past EPB Updates, the analysis of "reasonableness" often involves a comparison to reasonable alternatives. *See, e.g.*, *In re Interstate Power and Light Company*, docket no. RPU-2019-0001, Final Order and Decision at 16 (addressing alternative accounting methods), 41 (discussing alternative rate structures); *In re MidAmerican Energy Company*, RPU-2013-0004, Order Approving Settlement, with Modifications, and Requiring Additional Information (filed Mar. 17, 2014) at 35, 41, 47 (discussing alternative methods for allocating transmission costs). Assessing reasonableness of utility actions by comparing alternatives is used in other jurisdictions. *See e.g.*, *Gulf States Utils. Co. v. Louisiana Pub. Serv. Comm'n,* 578 So. 2d 71, 107 n.39 (La. 1991) ("[A] reasonable planner, employing known economic assumptions and performing an appropriate economic analysis, would have been aware that [the utility's proposal] would cost significantly more than other available options, and was therefore an uneconomic and costly choice, one which was in fact unreasonable."). EPB updates are like a miniature rate case: a method of approving specific types of utility expenses for recovery through customer rates. In short, the Board's role in evaluating an environmental compliance strategy is to determine whether a utility's management plan is "cost

effective" and otherwise in the interest of customers based on the criteria listed in the statute. The Board could not fairly determine whether recovery by the utility was "just and reasonable" after it excluded Environmental Parties' evidence showing the insufficiency of the utility proposal to meet the statutory criteria. The Board's interpretation undermines a foundational principle for utility rate-setting by allowing the utility to exclusively provide evidence for the Board to evaluate for cost-effectiveness.

The fact that the EPB statute sets up a contested case proceeding lends further weight to the correctness of a broader interpretation than the one the Board now seeks to adopt. If the Board's interpretation of the statute is correct, there is little purpose to the legislature requiring the Board to use a contested case proceeding. A contested case is one in which parties can submit evidence and question the accuracy of other parties' evidence. IOWA CODE § 476.6(19)(a)(3) (citing chapter 17A). This process is designed to allow parties to provide their own witnesses and probe the validity of evidence submitted by other parties. *See* IOWA CODE §§ 17A.13, 17A.14. A contested case proceeding allows parties, including intervenors, to probe whether the utility's management strategy is in fact cost effective, reasonable and prudent in light of the statutory factors, and to offer other reasonable alternatives for the Board's consideration. If the only issue before the Board is whether the utility

proposal will meet emissions requirements, and the statute makes DNR responsible for that determination, there is no need for a contested case.

In addition, the District Court and Board limitation on the scope of the statute would effectively render meaningless the statutory requirement to "reasonably balance costs, environmental requirements, economic development potential, and the reliability of the electric generation and transmission system." With only one option to consider, there is no opportunity to "balance" anything. Such a balancing is only possible when comparing alternative strategies that have a range of values or outcomes for each factor than simply looking at how one strategy incorporates all of the factors. The Board's narrow reading ignored the broader context of its statutory mandate to ensure the reasonableness of costs recovered from utility customers.

The purpose of the EPB statute is to facilitate cost-effective compliance with environmental requirements in order to protect the utility's captive customer base from unreasonable or unnecessary costs. Cost-effective compliance cannot be achieved without considering a range of compliance options. The Court should interpret the scope of the EPB statute to allow for the consideration of a range of compliance options.

4. An Interpretation of the Statute that Allows a Utility to Determine the Scope of the Statute Based on What the Utility Includes in Its Filing is An Absurd Result that the Court Should Avoid.

As discussed in more detail below, the EPB dockets have a long history of considering a range of compliance options including coal plant retirements and fuel switching. The District Court acknowledged the history in past EPB dockets, but in reconciling that history with the exclusion of the Environmental Parties evidence, the District Court gave the utility the ability to determine the statutory scope from docket to docket. This is an absurd result that this Court should reject.

The Iowa Supreme Court has "long recognized that statutes should not be interpreted in a manner that leads to absurd results." *Iowa Ins. Inst. v. Core Group of Iowa Ass'n for Justice*, 867 N.W.2d 58, 75 (Iowa 2015) (citing IOWA CODE § 4.4(3) (setting forth a presumption that "[i]n enacting a statute ... [a] just and reasonable result is intended"); *id.* § 4.6(5) (noting that when a statute is ambiguous, we should consider "[t]he consequences of a particular construction")).

In briefing the case at the District Court, the Board and MidAmerican both took the position the utility's EPB proposal determined the scope of the statute. The Board claimed that it must only "review the plan which has been submitted and is before the IUB" and nothing more. (App. 631.)

MidAmerican made a similar argument: "The EPB Update proceeding looks at the *utility's* proposal and renders an up or down verdict on that specific proposal." (App. 658.) The District Court order accepted these arguments:

> The Court has reviewed these prior dockets and agree MidAmerican did offer such evidence therein. However, the Court finds nothing in the plain text of the statute that required MidAmerican to do so. The fact MidAmerican voluntarily provided such information in the past does not in any way make it a statutory requirement or a compulsory practice in all EPB reviews.
> . . .
> Accordingly, the Court concludes the IUB did not err in determining it was not required to address evidence regarding least-cost options for emissions controls and thus the evidence of such filed by Petitioners and OCA was outside the scope of an EPB proceeding." (App. 725-26.)

The District Court's construction of including compliance options within the scope of the statute when the utility voluntarily provides information on that compliance option has the practical effect of creating a statutory scope that the utilities would define with each filing. For example, if coal plant retirements are only within the scope of the statute when included in the utility filing, the utility will set the scope of the statute not the legislature.

To put it differently, the District Court erred as a matter of law in allowing for coal-unit retirement and other alternative compliance options to be within the scope of "managing regulated emissions" when MidAmerican or IPL decide to discuss alternative compliance options in an EPB, but outside

the scope when other parties seek to do the same. The scope of "managing regulated emissions" does not change depending on what party submits evidence or what plan update the Board considers. 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 a compliance option in its plan. A statutory interpretation that allows the utility to set the scope of the statute on a case by case basis is an absurd result that this Court should reverse.

II. The District Court Erred in Affirming the Board's New Statutory Interpretation Because the Board Failed to Indicate a Fair and Rational Basis for Departing From the Board's Prior Interpretation of the Statute.

A. Preservation of Error

Environmental Parties raised issues disputed herein on appeal to the Board and on Judicial Review to the District Court. (App. 485-505; App. 540-57; App. 570-612; App. 650-69) Environmental Parties timely filed this appeal.

B. Scope and Standard of Review

A district court reviews a petition for judicial review in an appellate capacity, and in turn, the appellate court "review[s] the district court's decision to determine whether it correctly applied the law." *Hawkeye Land Co. v. Iowa Utilities Bd.*, 847 N.W.2d 199, 207 (Iowa 2014). The Court applies the standards set forth in section 17A.19(10) to determine whether its conclusions are the same as those of the district court. *Id*.

The Iowa Administrative Procedure Act requires a court to reverse, modify, or grant other appropriate relief if an agency action is: an "[a]ction other than a rule that is inconsistent with the agency's prior practice or precedents, unless 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 Iowa Supreme Court has found that subsection (h) was "intended to amplify review under the unreasonable, arbitrary, capricious, and abuse of discretion standards." *Finch v. Schneider Specialized Carriers, Inc.*, 700 N.W.2d 328, 332 (Iowa 2005). In other words, inconsistency with prior agency practice or precedents is "a specific example 'of agency action that any reviewing court should overturn as unreasonable, arbitrary, capricious, or an abuse of discretion.'" *Id.* (quoting Arthur Earl Bonfield, *Amendments to Iowa Administrative Procedure Act*,

Report on Selected Provisions 69 (1998)). While an agency may change its practice or procedures, "the rule requires consistency in reasoning and weighing of factors leading to a decision tailored to fit the particular facts of the case." *Off. of Consumer Advoc. v. Iowa Utils. Bd.*, 770 N.W.2d 334, 342 (Iowa 2009) (quoting *Anthon–Oto Cmty. Sch. Dist. v. Pub. Employment Relations Bd.*, 404 N.W.2d 140, 144 (Iowa 1987)). An agency may make changes to agency policy and procedure that are generally applicable to all cases that come before the agency or conclude that its past interpretation of a statute was in error and needs correction. *Id.*

C. Argument

EPB updates and past Board orders have considered and approved coal plant retirements as a part of a cost-effective plan to manage regulated emissions. The Board was factually incorrect in asserting that alternative compliance options, including retirement of coal-fired generation units, "have not been raised in previous EPB dockets." (App. 480, 535-36.) The Board's interpretation of the scope of the statute and the District Court order upholding it are not only erroneous interpretation of law as discussed in more detail above, but also are inconsistent with the Board's past practices and precedents. The Board's failure to state credible reasons to justify this

inconsistency constitutes reversible error under the Iowa Administrative Procedure Act. IOWA CODE § 17A.19(10)(c) and (h).

The Board's Order in the MidAmerican 2020 EPB Update was an unjustified change in the Board's statutory interpretation that requires reversal under Iowa Code section 17A.19(10)(h). The Board changed its interpretation of the statute by holding that consideration of alternative compliance options such as coal plant retirements were outside of the scope of the statue. The Board did not attempt to justify its change in position. In fact, it did not even acknowledge that it had explicitly *considered* evidence of alternative compliance options in prior EPB dockets. The Board's order concludes, erroneously, that "[t]hese issues" (i.e. evidence of alternative compliance options) "have not been raised in previous EPB dockets":

> OCA and the other intervenors argued that MidAmerican should be required to look at multiple options, including retirement of coal facilities, as part of the analysis of the balancing factors outlined in Iowa Code § 476.6(19)(c). ***These issues have not been raised in previous EPB dockets***, and the EPBs in those dockets were found to be in compliance with the statute. Based upon the specific requirements in the statute which address compliance with state and federal emissions regulations and the approval of EPBs in previous dockets, the Board finds that the evidence addressing other options, filed by OCA and the intervenors, is outside the scope of an EPB proceeding under Iowa Code § 476.6(19).

(App. 480 (emphasis added).) The Board did not cite to any past dockets or the language of the statute to support its erroneous conclusion that alternative

compliance options "have not been raised in previous EPB dockets." (App. 479-81.) In contrast, several parties specifically established that numerous past Board precedents in EPB dockets have considered coal plant retirements and other options as emission management strategies. OCA's direct testimony specifically noted that MidAmerican has itself used coal retirements as a compliance option, stating that: "in previous EPBs as recently as 2018, MidAmerican touted its retirement of coal-fired generating units as being the 'least-cost alternative' for compliance with regulated emissions." (App. 77.) OCA also noted that MidAmerican had considered other compliance options such as conversion of a coal unit to natural gas. (*Id.*) The reply testimony of ELPC and IEC's witness Guyer also summarized MidAmerican's past use of coal plant retirements as a compliance option that it evaluated and then selected in multiple dockets. (App. 323-25.) Finally, Environmental Parties' Application for Reconsideration provided multiple examples of past EPB dockets where coal retirements had been considered and/or approved. (App. 493-97.)

MidAmerican has explicitly touted coal plant retirement as a compliance option that it evaluated, compared to installation of pollution controls, and then selected as part of an EPB Update. (*See* App. 323-25.) For example, in 2014, MidAmerican witness Jennifer McIvor stated:

> MidAmerican assessed the costs of its compliance options for units not currently scheduled to have controls installed. 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. Therefore, by April 16, 2016, MidAmerican ***will cease burning coal*** at Neal Energy Center Units 1 and 2, Walter Scott Jr. Energy Center Units 1 and 2, and Riverside Generating Station.

(App. 324, 493 (*quoting In Re: MidAmerican Energy Company*, Docket No. EPB-2014-0156, Direct Testimony of Jennifer A. McIvor, at 6 (filed Apr. 1, 2014)[3] (emphasis added).) The Board then approved a partial settlement accepting the 2014 EPB and specifically stated that MidAmerican's Plan Update, which included the retirements described in the McIvor testimony, "reasonably balances costs, environmental requirements, economic development potential, and reliability of the generation and transmission system." *In Re: MidAmerican Energy Company*, Docket No. EPB-2014-0156, Order Addressing Completeness of Emissions Filing and Approving Partial Settlement, at 5 (filed Mar. 12, 2015). In other words, the Board previously *approved* MidAmerican's proposal to "cease burning coal" as a compliance strategy in an EPB case but rejected Environmental Parties and the other

[3] The past Emission Plan and Budget filings referenced in this section are publicly available on the Iowa Utilities Board Electronic Filing System website at www.efs.iowa.gov/efs/.

intervenors' evidence regarding the exact same compliance strategy in *this* case as "outside the outside the scope of an EPB proceeding." (App. 480.) The Board's failure to explain or justify this change in position is reversible error.

MidAmerican has also demonstrated that retirement can be a cost-effective compliance option for some coal units while gas conversion and installation of pollution controls can be a cost-effective compliance option for other units. MidAmerican explained its Mercury and Air Toxics Standards (MATS) compliance actions in its 2016 and 2018 EPB filings:

> MidAmerican is retiring certain coal-fueled generating units as the least-cost alternative to comply with the Mercury and Air Toxics Standards ("MATS"). Walter Scott Energy Center Units 1 and 2 were retired in 2015 and George Neal Energy Center Units 1 and 2 are to be retired by April 15, 2016. A fifth unit, Riverside Generating Station, was limited to natural gas combustion in March 2015. WSEC Unit 4 is fully compliant with the MATS requirements. With the installation of ACI at WSEC Unit 3, Louisa, Neal Unit 3 and Neal Unit 4, each of these units is also fully compliant with the MATS requirements.

In Re: MidAmerican Energy Company, Docket No. EPB-2016-0156, Direct Testimony of Jennifer A. McIvor, at 5 (filed Apr. 1, 2016); *see also In Re: MidAmerican Energy Company*, Docket No. EPB-2018-0156, Direct Testimony of Jennifer A. McIvor, at 4 (filed Apr. 2, 2018).

ELPC and IEC were parties to the 2016 docket. No party to that docket challenged MidAmerican's use of retirements as a MATS compliance option. Nor did the Board reject MidAmerican's proposal as "outside the scope of an

EPB proceeding" as it has done here. ELPC and IEC raised an argument that MidAmerican needed to consider and analyze retirement of one coal-fired generation unit it partially owned, Ottumwa Generating Station (OGS), even though Interstate Power and Light (IPL) operated the unit:

> [T]he alternative of retiring OGS and meeting energy and capacity needs with low-cost renewables should be evaluated with updated assumptions on the cost and performance of renewable energy, including both utility-owned and customer-sited renewable generation. If the retirement option is better for customers of IPL and MidAmerican, the unit should be retired by 2019 instead of retrofitted with SCR [Selective Catalytic Reduction] technology and operated for years to come as a coal unit.

In Re: MidAmerican Energy Company, Docket No. EPB-2016-0156, Direct Testimony of Nathaniel Baer, at 4-5 (filed May 2, 2017). Again, the Board did not take the position that the retirement of a coal unit was outside of the scope of an EPB proceeding in that docket. Rather, the Board approved MidAmerican's 2016 EPB update and relied on IPL's analysis of pollution controls at OGS in IPL's separate EPB docket, which did include consideration of alternative compliance options as discussed in more detail below. The Board approval in the MidAmerican EPB docket stated:

> With respect to the use of SCR technology at the Ottumwa station, MidAmerican and OCA argue that the issue was already decided by the Board when it approved the settlement and IPL's 2016 EPB in Docket No. EPB-2016-0150. In its May 16, 2017, order in that docket, the Board discussed the evidence showing how the use of SCR technology at the Ottumwa Generating

> Station satisfied the four factors [listed in Iowa Code § 476.6(19)(c)]. The Board ultimately found the record supported approving IPL's 2016 EPB and the associated settlement agreement . . . . There is also evidence in the record that MidAmerican agrees with IPL's analysis on the use of SCR technology at the Ottumwa Generating Station.

In Re: MidAmerican Energy Company, Docket No. EPB-2016-0156, Order Granting Motion to Cancel Hearing and Approving Emissions Plan Update, at 5 (June 9, 2017) (internal citations omitted).

The 2016 IPL EPB update referenced in the Board's 2016 MidAmerican EPB Order considered retirement, gas conversion and other compliance options. IPL's EPB Update included retrofitting OGS with SCR pollution control technology but, like MidAmerican's filing in the instant case, its initial filing did not provide detail on the alternatives considered. *In re: Interstate Power & Light*, Docket No. EPB-2016-0150, Nathaniel Baer Direct Testimony, at 4 (filed Apr. 27, 2017) ("IPL filed virtually no analysis comparing the SCR with other options in its initial EPB filing."). Unlike MidAmerican in this case, IPL provided information in discovery to document its analysis comparing the selected compliance option to alternatives. *Id.* IPL also filed supplemental testimony to introduce some of this analysis into the record, including a specific comparison of the SCR pollution control technology to retirement and gas conversion options. *In re: Interstate Power & Light*, Docket No. EPB-2016-0150, Supplemental Testimony of Terry A.

Kouba, at 4 (filed Apr. 11, 2017). ELPC and IEC provided testimony challenging the assumptions used in IPL's analysis by noting that more accurate assumptions related to the cost of solar, the capacity factor of wind, and the amount of distributed generation would likely alter the outcomes of the analysis. *See generally In re: Interstate Power & Light*, Docket No. EPB-2016-0150, Baer Direct Testimony (filed Apr. 27, 2017). However, ELPC and IEC were not able to conduct their own technical modeling analysis, and IPL did not do so even though ELPC and IEC requested it in discovery. *Id.* at 18. The Parties ultimately agreed to a settlement. *In re: Interstate Power & Light*, Docket No. EPB-2016-0150, Joint Motion and Settlement Agreement (filed May 11, 2017). The Board did not conclude, as it did here, that retirement was "outside the scope of an EPB proceeding." The Board in approving the settlement noted that "the record shows that IPL ***considered other alternatives*** but determined that utilization of the SCR would be more cost effective than either retiring the plant or converting it to an alternate fuel such as natural gas." *In re: Interstate Power & Light*, Docket No. EPB-2016-0150, Order Approving Joint Motion, Settlement Agreement and Emissions Plan Update and Cancelling Hearing, at 5 (filed May 16, 2017) (emphasis added).

As these examples show, the Board has a long history of considering alternative compliance options such as coal plant retirements in EPB dockets.

In each of these past dockets, the Board either approved the non-pollution control compliance option (e.g. coal plant retirement or fuel source conversion) or made note of the consideration of alternatives in its determination that the utilities' proposed emission management option was reasonable. The Board never found that consideration of a compliance option such as a coal plant retirement was "outside the scope of an EPB proceeding" as it did for the first time here.

Environmental Parties presented this history to the Board in their testimony and Application for Reconsideration. (App. 490-97.) This gave the Board the opportunity to address the inconsistency between the past cases and the current case. However, the Board did not provide a fair and rational basis for the inconsistency. Instead, the Board repeated the unsupported and factually incorrect conclusion that "these issues have not been raised in previous EPB dockets":

> The Board stated in its March 24, 2021 Order Approving 2020 EPB that these issues have not been raised in previous EPB dockets, and the EPBs in those dockets were found to comply with the statute. Based upon the specific requirements in the statute that address compliance with state and federal emissions regulations and the approval of EPBs in previous dockets, the Board found that the evidence filed by OCA and the Environmental Intervenors addressing these other options was outside the scope of an EPB proceeding.

(App. 535-36.)

As described above, both MidAmerican and other parties have repeatedly raised the option of coal retirement in previous EPB dockets, and each time the Board considered the parties' evidence of the pros and cons of coal retirement on the merits. On no prior occasion has the Board concluded, as it did here, that coal retirement was "outside the scope of an EPB proceeding." The Board did not make any attempt to address its changed position in this case. The Board's statutory interpretation of the EPB statute is therefore "inconsistent with the agency's prior practice or precedents," IOWA CODE § 17A.19(10)(h), and it has failed to "justif[y] that inconsistency by stating credible reasons sufficient to indicate a fair and rational basis for that inconsistency." *Id*. In this case, the Board cannot be said to have justified the inconsistency, when the Board's decision "gave no explanation for straying from its precedents." *Swift Pork Co. v. Emp. Appeal Bd.*, No. 20 00-40, 2020 WL 7383497, at *4 (Iowa Ct. App. 2020) (unpublished) (holding that the exception did not apply when agency did not cite contrary precedents in its ruling "[i]n spite of having its attention called to [them]"). The Board's analysis did not acknowledge past EPB dockets despite having attention called to them. The Board did not distinguish those dockets. In stating that the issues had not been raised in previous dockets, the Board simply ignored facts

that were inconvenient to its new position on the scope of the statute rather than explain or reconcile them.

Furthermore, the Board is not applying its new interpretation of the EPB scope to all EPB dockets. In the only EPB proceeding that has concluded after the Board's ruling in the instant case, the Board approved an EPB Update that incorporated coal-unit retirement as a compliance strategy. *See In re: Interstate Power & Light*, Docket No. EPB-2020-0150, Order Approving Emissions Plan and Budget Update, Approving Settlement Agreement, and Granting Confidential Treatment (filed Aug. 5, 2021). In that docket, IPL provided an analysis showing that retirement of a coal plant and conversion of another coal plant to gas combustion were reasonable options to manage emissions. The parties reached a settlement on actions that implemented the utility's proposal, which included the coal retirement and gas conversion, and agreed to discuss future planning before filing of the next EPB update. *In re: Interstate Power and Light Company*, Docket No. EPB-2020-0150, Joint Motion and Settlement, at 5-6 (filed June 17, 2021). The Board concluded "that the projects and associated budgets in IPL's 2020 EPB for the 2021 through 2022 period are reasonably expected to achieve cost-effective compliance with applicable state environmental requirements and federal ambient air quality standards." EPB-2020-0150, Order Approving Emissions

Plan and Budget Update at 6. The Board specifically found that "the Settlement Agreement is reasonable in light of the whole record, consistent with law, and in the public interest." *Id.* It did not conclude, as it did here, that consideration of coal retirement was "outside the scope of an EPB proceeding."

The extensive past and current practice of the Board to include alternative compliance options like coal plant retirements in EPBs indicates that the Board has an ongoing interpretation of the scope of the EPB statute that differs from the narrow interpretation it applied in this case. Statutes should not have a different meaning in different cases. That is the definition of arbitrary and capricious. The District Court acknowledged that the Board considered evidence of coal plant retirements and other alternative compliance options in past EPB dockets, but concluded that nothing "required" MidAmerican to offer such evidence "in all EPB reviews." It stated:

> The Court has reviewed these prior dockets and agrees MidAmerican did offer such evidence therein. However, the Court finds nothing in the plain text of the statute that required MidAmerican to do so. The fact MidAmerican voluntarily provided such information in the past does not in any way make it a statutory requirement or a compulsory practice in all EPB reviews.

(App. 725.) The District Court's finding did not address the key issue of statutory interpretation in this case, which is about the scope of the statute or more specifically what the term "managing regulated emissions" includes. The District Court correctly found that in past Board-approved dockets, MidAmerican had included coal plant retirements and other alternative compliance options as strategies to manage its regulated emissions. But the District Court misinterpreted the key legal question here. The issue is not whether the statute *requires* MidAmerican to offer evidence of coal retirements "in all EPB reviews." The legal issue is whether coal retirements and other alternative compliance options can be considered as a means for "managing regulated emissions" as that term is used in the EPB statute. IOWA CODE § 476.6(19). The Board has a pattern and practice of allowing coal retirement to be evaluated as a compliance option in a long string of EPB cases. Only in this case did it conclude that such options are "outside the scope of an EPB proceeding." The Board's failure to explain why the statute changes its meaning in different cases is arbitrary and capricious and must be reversed.

Furthermore, the meaning and scope of the EPB statute should not change based on whether a utility chooses to include coal retirement as one of its compliance options in a case. The District Court appeared to be influenced

by the fact that MidAmerican "voluntarily" chose to include coal retirements in prior EPB cases but did not choose to do so here. That should not matter. The District Court's attempt to justify the Board's inconsistency with past statutory interpretation creates a statutory construct that gives the utility control over the scope of the statute. This is an absurd result that is not a fair or rational basis or consistent with due process. The scope of the statute should remain the same regardless of whether the utility, the OCA, or another intervening party "voluntarily" chooses to present evidence of an emissions management strategy in the docket.

Stated another way, a lack of a requirement that a utility specifically address a compliance option is not equivalent to a limit on the scope of the statute or a prohibition on another party introducing relevant evidence about compliance options that the utility does not include in its EPB Plan. The District Court erred because it interpreted a lack of a requirement as equivalent to a limitation on the scope of the statute in an effort to reconcile the Board's new statutory interpretation with past interpretations. The Court should reverse the Board's decision to interpret the scope of the EPB statute more narrowly in this case than it has in any other case, without any explanation or justification for why it changed its position here.

CONCLUSION

For the reasons set forth above, and in the record, the Court should rule that the District Court erred as a matter of law in concluding that consideration of emission management strategies other than on-site pollution control equipment, such as coal plant retirements, are outside of the scope of Iowa Code § 476.6(19) and should remand with directions to reconsider the case based on a proper interpretation of the statute.

REQUEST FOR ORAL SUBMISSION

Appellants ask to be heard on oral argument.

Dated: August 12, 2022

Respectfully submitted,

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/s/ Joshua T. Mandelbaum August 12, 2022

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The undersigned hereby certifies that the foregoing Petitioners-Appellants' Final Brief was served upon the attorneys of record listed below by electronic filing and electronic delivery to the parties via the EDMS system on August 12, 2022, pursuant to Iowa R. App. P. 6.902(2) and Iowa R. Elec. P. 16.101(1).

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