IN THE SUPREME COURT OF IOWA

NO: 18-1184

BERTHA MATHIS and
STEPHEN MATHIS,
Petitioners-Appellants,
vs.

IOWA UTILITIES BOARD,
Respondent-Appellee,
and

PALO ALTO WIND ENERGY LLC and
MIDAMERICAN ENERGY COMPANY,
Indispensable Parties-Appellees,
and

PALO ALTO COUNTY BOARD OF SUPERVISORS,
Intervenor-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT FOR
PALO ALTO COUNTY
HONORABLE NANCY L. WHITTENBURG, JUDGE

APPELLEE'S FINAL BRIEF

CECIL I. WRIGHT AT0008710
ANDREW L. MAGNER AT0012739
Iowa Utilities Board
1375 E. Court Avenue
Des Moines, IA 50319
PH: 515-725-7367
FAX: 515-725-7398
EMAIL: cecil.wright@iub.iowa.gov
EMAIL: andrew.magner@iub.iowa.gov

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IV. ROUTING STATEMENT

This case satisfies the criteria for retention by the Supreme Court of Iowa pursuant to Iowa R. App. P. 6.101(2). This case presents a question concerning fundamental issues of broad public importance requiring ultimate determination by the Supreme Court. Iowa R. App. P. 6.101(2)(d).

V. STATEMENT OF THE CASE

This case involves a question about the Board's interpretation of provisions of Iowa Code chapter 476A, which governs generation certificates for electric generation facilities in Iowa. Appellant Mathises appealed from a ruling issued by the

Iowa District Court for Palo Alto County on July 3, 2018. The Mathises filed a notice of appeal on July 20, 2018.

Agency Proceedings

In its Declaratory Order, the Board answered the one question posed by Appellants Bertha and Stephen Mathis (Petitioners) in their Petition for a Declaratory Order filed with the Utilities Board (Board) on December 5, 2017. (App. 29). The question posed was how the Board would interpret "facility," as defined in Iowa Code section 476A.1(5), with regard to wind turbine projects. (App. 31).

In their Petition, the Petitioners stated that Palo Alto Wind Energy LLC (PAWE) and MidAmerican Energy Company (MidAmerican) are developing a wind project in Palo Alto County that would include at least 170 wind turbines, with an aggregate generating capacity of approximately 340 megawatts (MW). (App. 29). Petitioners state that PAWE and MidAmerican did not seek a certificate of public convenience, use and necessity (Certificate) from the Board pursuant to Iowa Code chapter 476A. (App. 29-30). Petitioners note that the companies rely on prior Board decisions

indicating that for wind turbine generation, in which the Board determined that the generating capacity for wind turbines is based on the wind turbines connected to a single gathering line. (App. 29-31). If the generating capacity of those turbines is less than 25 MW, the project would not require a Certificate pursuant to Iowa Code section 476A.1(5). (App. 30). In this context, a gathering line refers to a small line that collects the energy from the connected wind turbines and connects them to a collection point or electric substation.

Petitioners contended that PAWE and MidAmerican should be required to seek a Certificate from the Board because the aggregate nameplate generating capacity of the project exceeds the 25 MW threshold to be considered a "facility." (App. 31). Petitioners requested that the Board define a "facility" to include all of the turbines within a wind project that is submitted to a county board of supervisors on a site plan. (App. 31).

Petitioners assert that the Board's prior declaratory decisions, starting with *In re Zond Development Corp.*, IUB Docket No. DRU-97-5, et al. (issued Nov. 5, 1997), are arbitrary,

capricious, and unreasonable for not determining a 15-20 mile square area could be considered a "single site" for the purpose of defining a facility. (App. 31-32). Petitioners also noted that they were currently the plaintiffs in a civil suit in the District Court for Palo Alto County that raised similar issues; Petitioners stated they filed their Petition with the Board in response to a defense raised in that case. (App. 32).

On December 8, 2017, the Board issued an Order Giving Notice of Petition for Declaratory Order and Setting Procedural Schedule, giving notice to interested parties about the declaratory order request and setting intervention and briefing schedule. (App. 102). The Palo Alto County Board of Supervisors (PABS), PAWE, MidAmerican, and the Environmental Law and Policy Center and Iowa Environmental Council (collectively, the Environmental Intervenors) filed petitions to intervene. Interstate Power and Light Company (IPL) filed a request for a late intervention. (App. 124-25). All groups also filed briefs regarding the question before the Board.

The Board issued its Declaratory Order (Order) on February 2, 2018. (App. 124). In its Order, the Board noted that it had ruled on the very question presented by Petitioners on several prior occasions. (App. 126). The Board stated that the Petitioners had presented "no compelling justification to overturn this well-established Board precedent, nor have Petitioners distinguished the facts and circumstances" in their Petition from prior cases. (App. 127). Further, the Board noted that that its interpretation in *Zond* has existed for more than 20 years, during which time the Iowa Legislature has not taken any action to modify the statutory regime or otherwise address the Board's interpretation of the statute. (App. 127). The Board concluded by reaffirming its determination that with regard to wind turbines, the generating capacity of a facility is measured by the nameplate generating capacity of wind turbines connected to a single gathering line. (App. 128).

District Court Proceedings

On February 5, 2018, Petitioners filed a Petition for Judicial Review of the Board's Declaratory Order in the District Court for

Palo Alto County. (App. 129). Petitioners filed a motion on February 15, 2018, to request that the case be assigned to the Hon. Judge Nancy Whittenburg, stating that the issues in question on appeal were based on the same facts as the civil suit already before Judge Whittenburg.

On March 6, 2018, Petitioners filed a Motion for Procedural Order requesting the District Court to set deadlines for transmission of the agency record, briefs, and a date for oral argument. The District Court issued a Notification of Individual Assignment of Judge Whittenburg to the proceeding on March 6, 2018. On March 7, 2018, the District Court issued an Order Establishing Schedule for Conduct of the Proceeding setting a briefing schedule and an oral argument date. PABS filed a Motion to Intervene on March 6, 2018; the District Court granted the motion on April 19, 2018.

Petitioners, the Board, and PAWE (along with MidAmerican) submitted briefs. PABS submitted a joinder in briefs filed by the Board and jointly by PAWE and MidAmerican. The District Court heard oral argument on April 27, 2018.

On July 3, 2018, the District Court issued its ruling affirming the Board's declaratory order. (App. 140). On July 10, 2018, Petitioners filed a notice of appeal from the District Court's Order. (App. 149).

VI. STATEMENT OF FACTS

Iowa Code section 17A.9(1) allows any person to "petition an agency for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order, within the primary jurisdiction of the agency." The statute further directs administrative agencies to adopt rules that address the form, contents, and filing of petitions for declaratory orders, the procedural rights of persons regarding the petitions, and the disposition of the petitions.

The Board's rules governing requests for declaratory orders are found at 199 Iowa Administrative Code (IAC) chapter 4. The Board may issue a declaratory order pursuant to Iowa Code section 17A.9 when a person asks the Board to determine the applicability of a statute, rule, or order within the primary jurisdiction of the Board to a specified set of circumstances.

The Mathises filed a Petition for Declaratory Order with the Board on December 5, 2017. (Petition) (App. 29). The Petition asked the Board to determine that a wind energy project proposed by PAWE and MidAmerican is a "facility" as defined by Iowa Code section 476A.1(5) because it is an electric power generating plant or combination of plants at a single site with a total generating capacity of at least 25 megawatts (MW) of electricity, and, as such, requires a certificate of public convenience, use and necessity from the Board. (District Court Decision Finding of Facts, App. 141).

In the Petition, Petitioners stated the project would include approximately 170 separate turbines with an aggregate generating capacity of at least 340 MW. (App. 29). These wind turbines would be placed across approximately 90 square miles. (App. 109 (PAWE Br. p. 2 n.1)). On average, this results in approximately one wind turbine for every 340 square acres. (App. 11 (referring to IUB District Court Br. p. 1).

The Mathises asserted in their Petition that MidAmerican and PAWE require a certificate of public convenience, use and necessity from the Board because the total generating capacity of

the wind project would exceed 25 MW. (Petition p. 2, App. 30). The Mathises noted in their Petition that the Board's standard, established in *Zond*, interprets the term "facility" in Iowa Code section 476A.1(5) refers to the generating capacity of wind turbines connected to a common gathering line. (*Id.*). The Mathises requested the Board to determine the definition of a facility under Iowa Code section 476A.1(5) with respect to wind turbines; specifically, they requested that "facility" be defined to include all turbines in the entire wind energy project presented in a site plan, as the one proposed to the Palo Alto County Board of Supervisors in this case. (*Id.* at 3; App. 31).

VII. STANDARD OF REVIEW

"Iowa Code section 17A.19(10) governs judicial review of an agency ruling." *Hawkeye Land Co. v. Iowa Utils. Bd.*, 847 N.W.2d 199, 207 (Iowa 2014). Iowa Code section 17A.19(10) provides that the district court may affirm the agency action or remand to the agency for further proceedings and the court shall reverse, modify, or grant other appropriate relief from agency action, equitable or legal and including declaratory relief, if it determines that

substantial rights of the person seeking judicial relief have been prejudiced because of the agency action. The statute sets out the standards that the court is to apply in determining what the standard of review is for an agency action.

In reviewing the district court's decision, the appellate court applies the standards set forth in Iowa Code section 17A.19(10) and determines whether the application of those standards produces the same result as reached by the district court. *Hawkeye*, 847 N.W.2d at 207 (*quoting Auen v. Alcoholic Beverages Div.*, 679 N.W.2d 586, 589 (Iowa 2004)). Pursuant to Iowa Code section 17A.19(8), the burden of demonstrating the invalidity of agency action is on the party asserting invalidity.

The court must also determine what level of deference should be afforded to the agency's interpretation. If the court determines the legislature has not granted the agency with the authority to interpret the statute, the court reviews the agency action for errors at law. *Hawkeye*, 847 N.W.2d at 207 (*quoting Iowa Dental Ass'n v. Iowa Ins. Div.*, 831 N.W.2d 138, 142-43 (Iowa 2013)). However, "[i]f the legislature has clearly vested the agency

with the authority to interpret the relevant statute," the court shall only reverse the agency's decision if the interpretation is "irrational, illogical, or wholly unjustifiable." *Hawkeye*, 847 N.W.2d at 207 (citing Iowa Code § 17A.19(10)(l)).

VIII. ARGUMENT

A. THE BOARD'S INTERPRETATION OF "FACILITY" AS THE WIND TURBINES CONNECTED TO A COMMON GATHERING LINE IS REASONABLE AND CONSISTENT WITH LEGISLATIVE INTENT

Preservation of Issue

The Board has no issue with Petitioners' statement regarding the preservation of the issue.

Standard of Review

The Board has no issue with Petitioners' stated standard of review.

Argument

The definition of 'facility" in Iowa Code section 476A.1(5) is as follows;

> "Facility" means any electric power generating plant or combination of plants at a single site, owned by any person, with a total capacity of twenty-five megawatts of electricity or more and

> those associated transmission lines connecting the generating plant to either a power transmission system or an interconnected primary transmission system or both. Transmission lines subject to the provisions of this subchapter shall not require a franchise under chapter 478.

Iowa Code section 476A.2 provides that a person shall not commence construction of a facility unless a certificate has been issued by the Board. Iowa Code section 476A.1(3) defines "certificate" as a certificate of public convenience, use and necessity issued pursuant to Iowa Code section 476A.6 (2017). Iowa Code section 476A.6 provides that a certificate shall be issued if the Board finds all of the following:

> 1. The services and operations resulting from the construction of the facility are consistent with legislative intent as expressed in section 476.53 and the economic development policy of the state as expressed in Title I, subtitle 5, and will not be detrimental to the provision of adequate and reliable electric service.
> 2. The applicant is willing to construct, maintain, and operate the facility pursuant to provisions of the certificate and this subchapter.
> 3. The construction, maintenance, and operation of the facility will be consistent with reasonable land use and environmental policies and consonant with reasonable utilization of air, land, and water resources, considering available technology and the economics of available alternatives.

Petitioners contend that Board's rules, found in volume 199 of the Iowa Administrative Code, are generally supportive of their claim that all of the wind turbines in a wind farm should be considered a single facility for the purposes of Iowa Code section 476A.1(5). However, these claims are misguided; the Petitioners' arguments rely on terms taken in isolation from the rest of the rules, make broad claims unsupported by the record, and are generally inapplicable to the issue presented to the Board in Petitioners' request for a declaratory order.

Petitioners first claim that the definition of "site," as included at 199 IAC 24.2, is meant to be an "expansive definition" because it encompasses components of a facility beyond the generating unit at the heart of the facility, including "the land on which the generating unit of the facility, and any cooling facilities, cooling water reservoirs, security extension areas, and other necessary components of the facility, are proposed to be located." Appellant Br. at p. 26. Contrary to Petitioners' claims, the definition of "site" appears to be related to the traditional methods of generating electricity (such as coal, natural gas, nuclear, or

hydroelectric facilities) as it refers to "*the generating unit* of the facility." 199 IAC 24.2 (emphasis added). In a wind project, each individual wind turbine is a generating unit. As written, the definition of "site" in 199 IAC 24.2 would evaluate each turbine against the 25 MW definition of a "facility" in section 476A.1(5). In this scenario, no wind project yet constructed would possibly quality as a "facility," as opposed to the more expansive gathering line interpretation currently utilized by the Board.

Further, Petitioner's interpretation of this standard is not readily applicable to a wind farm in which 170+ wind turbines spread over as much as 100 square miles. In *Reid v. Iowa State Commerce Comm'n*, 357 N.W.2d 588 (1984), the Supreme Court rejected the idea that a "site" requires contiguity when a solid waste disposal site was located more than six miles from the generating unit when defining a facility for the purpose of section 476A.1(5). However, no court has ever held that a "single site" can be construed to be a 100 square mile area in which 100 or more wind turbines are dispersed.

The Mathises claim that the an application for a certificate pursuant to 199 IAC 24.4(1)(e) must identify the design capacity of a facility available to each "participant," or owner, of the facility, which would require all generating units operated by one owner to be considered a single facility. Appellant Br. at p. 27. This argument is absurd for two reasons. First, tying the ownership of a generating unit to its status as a facility implies that a single facility, if operated by two participants, would no longer be considered one facility. Second, Petitioners' reading of the application requirements ignores the actual purpose of said rule, which is to provide the Board with information regarding the ownership of a proposed facility and nothing more.

Next, Petitioners assert that 199 IAC 24.4(1)(e) requires the entire project be considered a single facility because there is no way to segregate the energy output on a single unit. Appellant Br. at pp. 27-28. Again, the Mathises' attempt to expand the scope of a "single site" undermines their position. Specifically, Petitioners' reading confirms that a gathering line with segregated energy output records would be considered a single "facility;" provided

that gathering line did not include more than 25 MW of generation, it would not need a certificate. Further, the Mathises' argument indicates that any individual generating unit that can provide segregated energy output records would qualify as a facility itself; most wind turbines are individually metered. Again, attempting to read the application requirements at 199 IAC 24.4(1)(e) in isolation produces phrases divorced from all meaning.

As part of the generating certificate process, an applicant must provide "information related to its selection of the proposed site for the facility," including "the general criteria used to select alternative sites and how these criteria were used to select a proposed site." 199 IAC 24.4(4), 24.4(4)(a). Petitioners contend that the use of site and facility in this context could not accommodate the Board's gathering line interpretation. Appellant Br. at pp. 28-29 (stating that "If the site and the facility were just the few turbines on a single gathering line, there would be no alternative sites to be considered. This is because turbines on a gathering line could not be moved to an alternative site and still

be part of the entire project."). This assertion is not only factually incorrect, but also fundamentally flawed. First, wind farm developers frequently include multiple "alternative sites" for the placement of each individual turbine. For a project the size of this, the developer may have identified dozens of potential wind turbine sites. Further, a gathering line is not a fixed item with a fixed reach. A gathering line can be arranged to accommodate generating units installed in a variety of configurations, and any number of turbines could be sited to connect to that gathering line. There is no reason why the gathering line or any generating unit connected to it could not have an alternative site.

Finally, Petitioners contend that Iowa Code section 476A.1(5), which defines "facility" to include "those associated transmission lines connecting the generating plant to either a power transmission system or an interconnection primary transmission system or both," implies that a facility is defined by its point of electrical connection with the utility grid. Appellant Br. at pp. 29-30. This assertion is not only unsupported, but incorrect. While a transmission line does function as a pathway

from a generating unit to the electrical grid, the Mathises' argument ignores the statute's use of transmission lines as a necessary component of a facility. Practically speaking, a generating unit divorced from the utility grid would be useless. The legislature includes the transmission lines as part of the facility in furtherance of its intent that an application for a generating certificate should include all necessary elements of the facility. *See Reid*, 357 N.W.2d at 590 (explaining the legislature's intent to consolidate all generation-facility authority under the Board). Indeed, the next sentence of the Code confirms just that reading by exempting those transmission lines from the Board's traditional franchising process. Iowa Code § 476A.1(5) ("Transmission lines subject to the provision of this subchapter shall not require a franchise under chapter 478.").

Considering the issues and facts presented to the Board in *Zond* and its progeny, including this case, the Board's interpretation of a facility that a "single site" is constrained by the capacity of wind turbines on a gathering line is a reasonable and practical approach to address this question.

B. THE BOARD'S INTERPRETATION OF LAW IS NOT ARBITRARY, CAPRICIOUS, UNREASONABLE, OR AN ERRONEOUS INTERPRETATION OF LAW AND IS SUPPORTED BY LEGISLATIVE ACTION SINCE THE *ZOND* DECISION

Preservation of Issue

The Board does not take issue with Petitioners' statement regarding the preservation of this issue.

Standard of Review

The Board does not take issue with Petitioners' stated standard of review.

Argument

The Board's declaratory orders in both this case and *Zond* are reasonable and consistent with legislative intent. The Board's determination that wind projects should be evaluated based on the nameplate generation capacity on a single gathering or collection line offers a practical, relevant, and consistent policy to encourage the development of alternative energy production (AEP) facilities pursuant to legislative intent.

"An agency's action is 'arbitrary' or 'capricious' when it is taken without regard to the law or facts of the case. Agency action

is 'unreasonable' when it is 'clearly against reason and evidence.'" *Soo Line R. Co. v. Iowa Dept. Transp.*, 521 N.W.2d 685, 688-89 (Iowa 1994) (internal citations omitted). While Petitioners allege that *Zond* and its progeny, including this case, are "arbitrary, capricious, and unreasonable," this argument is fundamentally flawed in a number of ways. Primarily, Petitioners' allegation is undermined by the text of *Zond* itself, where the Board examined and analyzed a number of factors before issuing its finding.

Petitioners first allege that the Board's "gathering line" standard is not based in either fact or law. This is patently incorrect. The question before the Board in *Zond* was how the statute would apply to large-scale wind farm projects and included a discussion of the relevance of the nameplate capacity located on a single gathering line. The Board began its examination in *Zond* by stating that the petitioners sought guidance regarding a 150-tubine wind farm that would be spread over 20 square miles and a 100-turbine wind farm that would be spread over 15 square miles. *Zond* at 2-3 (App. 14-15). The Board noted specifically that "[b]ecause the units are dispersed, the output of each unit will be

collected through a network of 24 kV lines" and that "No more than eight individual wind generators, totaling 6 MW nameplate capacity, will be located on any single gathering line." *Id.* at 3 (App. 15). From the outset, the Board explained how the gathering line capacity was relevant to the Board's determination of the ultimate issue.

The Board then examined the interplay of Iowa Code chapter 476A and Iowa's legislative policy favoring the development of AEP facilities. The Board specifically stated that the Board's eventual determination with respect to gathering line capacity is "based, in part, on the interplay between Chapter 476A and the AEP statutes." *Zond* at 8 (App. 20). The Board noted that a generating certificate proceeding, required for a facility with a nameplate generating capacity of 25 MW or more, adds a significant regulatory burden, which the Board implied is inconsistent with the state's stated intention to encourage the development of AEP facilities. *Id.* at 3 (App. 15); *see* Iowa Code § 476.41 ("It is the policy of this state to encourage the development of alternate energy production facilities . . . in order to conserve

our finite and expensive energy resources and to provide for their most efficient use.").

The Board also examined the decision criteria for granting a generating certificate, as described in Iowa Code section 476A.6 (1997). The Board noted that three of the six criteria were only applicable to public utilities, as defined in Iowa Code section 476.1, and were inapplicable to the petitioners in *Zond*. The Board then proceeded to analyze the final three criteria, finding that the three factors were "of little relevance in cases involving AEP facilities which are built, and the power sold, to an investor-owned utility to satisfy its statutory AEP purchase obligation" then-required at Iowa Code section 476.44(2). *Zond* at 4-5 (App. 16-17). The Board's discussion of these criteria indicates that these criteria were largely outside the Board's control and implied that there was no public purpose to requiring a certificate. *Id.* at 5, 8 (App. 17, 20) ("Because of the legislative policy encompassed in the AEP statutes, any Board determinations required under Chapter 476A have already been made.").

After reviewing the applicable statutory provisions, the Board addressed the question of whether the wind farm projects, as proposed, were subject to the certificate requirement of Iowa Code chapter 476A. The petitioners had argued that the projects were not "at a single site" so as to be classified as a facility, that the Iowa Code chapter 476A criteria were not applicable to the projects, and that the legislature had defined an AEP facility to include the singular "wind turbine" such that a series of wind turbines could not be considered a single facility "unless they are all located at a single site." *Zond* at 5-6 (App. 17-18).

Only at this point, after extensive review of the facts of the case, review of the applicable statutory requirements, and discussion of the petitioner's arguments did the Board make a determination that the term "facility" applies "to the wind turbines connected to a common gathering line." *Id.* at 6 (App. 18). In making this determination, the Board reasoned that the term "site" does not contemplate a "15 or 20 square mile area," and that the term "facility" does not include each individual wind turbine. *Id.*

In support of its interpretation, the Board analyzed the Iowa Supreme Court's decision in *Reid*, as well as the Federal Energy Regulatory Commission's (FERC) rules regarding qualifying small production facilities (as defined as a facility of no more than 80 MW at one site). *Zond* at 6-7 (App. 18-19) (citing 18 C.F.R. § 292.204(a)(2)). The Board noted that the *Reid* court did not directly analyze the term "single site" but implied that a landfill located 6 miles away from the facility would not be considered at a single site but for the landfill's status as a necessary component of the facility. *Zond* at 7 (App. 19); *see Reid*, 357 N.W.2d, at 589-90 (finding that "the landfill is an essential component of a generating plant" and indicating that the landfill is part of the facility under Iowa Code chapter 476A as consistent with the legislative intent to provide exclusive generating certificate authority to the Board). The Board also found that the FERC rule, which defined a single site as anything within a one-mile radius, would lead to the same result in the case and evidences an agency rule to provide practical limitations on the term "site". *Zond* at 7 (App. 19).

It is clear from reading *Zond* that the Board examined the facts presented in the case, analyzed the facts pursuant to the applicable law, and made a decision based on those factors that would further the legislative intent. To that end, *Zond* and its progeny have been cited in at least 25 separate Board dockets in the last 20 years for its interpretation of "facility" in Iowa Code section 476A.1(5). These dockets include petitioners seeking declaratory rulings on the same issue as *Zond*;[1] waiver requests pursuant to Iowa Code section 476A.15 for projects with at least one gathering line with at least 25 MW of attached nameplate generation capacity;[2] and requests for advance ratemaking principles for wind farms to be owned by rate-regulated public utilities.[3]

The Board's decision in *Zond* has provided a rational, reasonable bright-line interpretation of the statue that provides

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[1] *See, e.g.*, DRU-01-01, DRU-02-03, DRU-03-02, and DRU-03-03.
[2] *See, e.g.*, WRU-03-59, WRU-06-10, WRU-07-43, WRU-08-23, WRU-08-34, WRU-2008-0041, WRU-2008-0045, WRU-2009-0016, WRU-2009-0025, WRU-2010-0009, and WRU-2015-0001.
[3] *See, e.g.*, RPU-03-01, RPU-04-03, RPU-05-04, RPU-07-02, RPU-08-02, RPU-08-04, RPU-2009-0003, RPU-2014-0002, and RPU-2015-0002.

guidance and to wind energy developers over the last 21 years. Based on this interpretation, Iowa has become a national leader in both the total amount of wind energy installed and the percentage of total load met with wind energy. Reversing *Zond* could cast uncertainty on billions of dollars in existing and planned wind energy development projects.

In the years following *Zond*, the General Assembly made significant changes to the statutory regime that affirmed and supported the Board's interpretation of a facility. Almost uniformly, these changes have evidenced increased support for the development of AEP facilities like wind farms.

In 2001, the General Assembly made a series of sweeping changes to Iowa Code chapter 476A to encourage additional development of AEP facilities, including the removal of three of the six certificate criteria, eliminating a requirement that the project minimize adverse impact on land use and environmental policies, and changing the primary criteria to show that the project complies with Iowa Code section 476.53 and economic development policy instead of showing a need for public

convenience, use and necessity. Iowa Code § 476A.6 (2017); *see* Iowa Code § 476.53(1)-(2) (setting forth the legislature's intent to "attract the development of electric power generating and transmitting facilities," that are "cost-effective and compatible with the environmental policies of the state" and consider "the diversity of the types of fuel used" . . . and "the impact of the volatility of fuel costs"). The significant number of changes are strong evidence that despite Petitioners' claims, the Legislature is fully aware of the role of chapter 476A in promoting AEP facilities and has taken deliberate steps since *Zond* to encourage additional development. Further, the 2001 amendments suggest that despite wholesale changes to chapter 476A, the General Assembly has accepted the Board's interpretation in *Zond*.

When combined with the Board's decision in *Zond*, the current regulatory regime evidences a strong legislative intent to encourage wind development across the state. Further, it reflects a General Assembly which has had significant opportunity to review the Board's gathering line standard but has chosen not to do so. Contrary to Petitioners' claims, the Board's decision in this

case, as follows from *Zond*, is rational, reasonable, and consistent with legislative intent. With *Zond*, the Board determined after extensive review and discussion that defining a facility based on the nameplate generating capacity on a single gathering line provided a reasonable, clear, and practical standard that developers could rely on as they sought to install wind farms. The decision in *Zond*, as in this case, is based on a thorough evaluation of the facts and applicable law, and the court should affirm the Board's decision.

C. THE DISTRICT COURT WAS CORRECT IN GRANTING DEFERENCE TO THE BOARD'S INTERPRETATION OF IOWA CODE CHAPTER 476A AND AFFIRMING THE BOARD'S DECISION

Preservation of Issue

Appellee Board agrees with the Petitioners that the issue has been preserved for review.

Standard of Review

The Board agrees with Petitioners' standard of review.

Argument

A final issue in this proceeding is the level of deference owed to the Board's interpretation of Iowa Code section 476A.1(5). In

reviewing the Board's interpretations of law, the Court must give deference to the Board's actions with respect to particular matters that have vested by a provision of the law in the discretion of the agency. Iowa Code § 17A.19(11)(c). If the Court finds the interpretation of law has been vested within the Board, the Court defers to the Board's interpretation and may reverse the Board's interpretation only if it is irrational, illogical, or wholly unjustifiable. *NextEra Energy Res. LLC v. Iowa Utils. Bd.*, 815 N.W.2d 30, 37 (Iowa 2012); Iowa Code § 17A.19(10)(l).

The determination whether the Board has been vested with authority to interpret the statute begins by looking at the statute. *See Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 11 (Iowa 2010) (stating that the question is easily answered if the agency's enabling statute explicitly addresses the issue). An express grant or recognition of agency discretion is not required; other relevant factors include the language, context, and purpose of the statute; the functions and duties imposed on the agency; and practical considerations. *Id.* at 11-12.

Here, the General Assembly has clearly vested the Board with the authority to interpret Iowa Code section 476A.1(5). Certificates for new, large electric power generating stations are granted pursuant to Iowa Code chapter 476A. Iowa Code section 476A.12 states "[t]he board shall adopt rules . . . necessary to implement the provisions of this subchapter" including, but not limited to, certain specified elements.

Iowa Code chapter 476A also includes an additional and uncommon feature; pursuant to Iowa Code section 476A.15, the Board may waive any of the requirements of the chapter if the Board "determines that the public interest would not be adversely affected." Thus, the General Assembly has granted the Board express authority to determine when chapter 476A will, and will not apply.

This is exactly what the Board did in the *Zond* declaratory order. The Board interpreted section 476A.1(5) to determine when a wind farm does, and does not, have to apply for a generating certificate, an action well within the scope of the General

Assembly's explicit grant of waiver authority under section 476A.15.

"[W]here the General Assembly clearly delegates discretionary authority to an agency to interpret or elaborate a statutory term based on the agency's own special expertness, the court may not simply substitute its view as to the meaning or elaboration of the term for that of the agency but, instead, may reverse the agency interpretation or elaboration only if it is arbitrary, capricious, unreasonable, or an abuse of discretion—a deferential standard of review." *Renda*, 784 N.W.2d at 11, *quoting* Arthur E. Bonfield, *Amendments to Iowa Administrative Procedure Act, Report on Select Provisions to Iowa State Bar Association and Iowa State Government* 62 (1998) (emphasis in the original). Here, through Iowa Code sections 476A.12 and .15, the General Assembly has clearly delegated authority to the Board to determine when chapter 476A should be applied, and the Court should affirm the District Court's deference to that determination.

The Mathises contend that the Court should not give deference to the Board's interpretation, noting that "facility" is defined in the statute and that the term "site" appears frequently in the Iowa Code and the Board's rules. Appellant Br. at pp. 21-23. However, these arguments are misplaced. The Board's interpretation of "facility" is not a change to the definition in section 476A.1(5), but a necessary question about how the term "single site" should be used as part of the statute. Contrary to Petitioners' assertion, Iowa Code does not define the term "single site," the actual term in question, and "single site" is only used in one other unrelated code section. *See* Iowa Code §§ 84C.2(2), (10) (defining a "single site of employment" as a single location or a group of contiguous locations).

Petitioners contend in their brief that the weight of cases before this Court since *Renda* support finding that deference should not be granted to the Board. Specifically, Petitioners site to this Court's decisions in *Evercom Systems, Inc. v. Iowa Utils. Bd.*, 805 N.W.2d 758 (Iowa 2011), *NextEra*, and *SZ Enters. v. Iowa Utils. Bd.*, 850 N.W.2d 441 (Iowa 2014). The Board notes that

while these cases are illustrative of the Court's analysis, they are clearly distinguishable from this case. Even within the Petitioners' cited cases, the authority granted to the Board by the General Assembly varies by the specific regulatory scheme to be evaluated. *Compare Evercom*, 805 N.W.2d at 762-63 (finding the Board has been granted authority to interpret Iowa Code § 476.103 regarding unauthorized telecommunications charges, based on that statute's language) *with NextEra*, 815 N.W.2d at 37-38 (finding the Board does not have interpretive authority for Iowa Code § 476.53 based on the broad language of Iowa Code § 476.2(1)) *and SZ Enters.*, 850 N.W.2d at 450-52 (finding the Board does not have interpretive authority for Iowa Code § 476.22 based on the broad language of Iowa Code § 476.1).

In this case, Iowa Code chapter 476A acts as an independent regulatory scheme. The Board's authority in this case, unlike *NextEra* and *SZ Enters.*, is not based on the broad grant of rulemaking authority provided by Iowa Code sections 476.1 and .2. Chapter 476A exists as a self-contained scheme with its own definitions, grant of rulemaking authority, and, importantly, a

nearly unbridled waiver provision granting the Board the unique authority to waive any piece of the chapter based on the Board's own determination. These provisions are clearly indicative of a specific grant of interpretive authority for chapter 476A to the Board by the General Assembly.

Even if the Court does not grant deference to the Board, the Board's interpretation of section 476A.1(5) should be affirmed. If a reviewing court determines that an agency has not been delegated interpretive power with respect to a statute, then the court reviews the agency's interpretation for correction of errors of law. Iowa Code § 17A.19(10)(c); *NextEra*, 815 N.W.2d at 38. As previously discussed in this brief, the Board's interpretation is reasonable and practical and represents a decision necessary to conduct the Board's routine business. Accordingly, the Board contends it has properly interpreted section 476A.1(5) as applied to wind farms and did not commit an error of law.

IX. CONCLUSION

The Board respectfully requests that this Court affirm the Palo Alto County District Court's decision affirming the Board's "Declaratory Order" issued February 2, 2018, in IUB Docket No. DRU-2017-0003. The Board further respectfully requests any other order that may be appropriate under the circumstances.

X. REQUEST FOR ORAL ARGUMENT

The Appellee Board respectfully requests oral argument on all of the issues in this appeal.

XI. CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitations of Iowa R. App. P. 6.903(1)(g)(1) because this briefs contains 6,086 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).
2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this

brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in Century Schoolbook 14 pt.

/s/ Andrew L. Magner
Andrew L. Magner

XII. CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of November, 2018, I electronically filed the Appellee's Final Brief with the Supreme Court of Iowa, and that a copy was served electronically on:

Wallace L. Taylor
Law Offices of Wallace L. Taylor
4403 1st Ave., S.E., Suite 402
Cedar Rapids, IA 52402

ATTORNEY FOR APPELLANT

John M. Murray
Murray and Murray
530 Erie Street
Storm Lake, IA 50588

ATTORNEY FOR APPELLANT

Sheila K. Tipton and Haley R. Van Loon
Brown, Winick, Graves, Gross, Baskerville & Schoenebaum
666 Grand Avenue, Suite 2000
Des Moines, IA 50309-2510

ATTORNEYS FOR PALO ALTO COUNTY BOARD OF SUPERVISORS

Bret A. Dublinske and Brant M. Leonard
Fredrickson & Byron
505 East Grand Avenue, Suite 200
Des Moines, IA 50309

ATTORNEYS FOR PALO ALTO WIND ENERGY AND MIDAMERICAN ENERGY COMPANY

By: */s/ Andrew L. Magner*
CECIL I. WRIGHT AT0008710
ANDREW L. MAGNER AT0012739

ATTORNEYS FOR APPELLEE IOWA UTILITIES BOARD

Iowa Utilities Board
1375 E. Court Avenue
Des Moines, IA 50319
PH: 515-725-7367
FAX: 515-725-7398
EMAIL: cecil.wright@iub.iowa.gov
EMAIL: andrew.magner@iub.iowa.gov