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

APPELLANTS' REPLY BRIEF

WALLACE L. TAYLOR AT0007714
Law Offices of Wallace L. Taylor
4403 1st Ave. S.E., Suite 402
Cedar Rapids, Iowa 52402
319-366-2428
e-mail: wtaylorlaw@aol.com

JOHN M. MURRAY AT000555
Murray and Murray
530 Erie St.
Storm Lake, Iowa 50588
712-732-8181
e-mail: john@murraylawsl.com

ATTORNEYS FOR PETITIONERS-APPELLANTS

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ARGUMENT

I. THE DISTRICT COURT SHOULD NOT HAVE DEFERRED TO THE AGENCY'S INTERPRETATION OF THE STATUTORY TERMS AT ISSUE IN THIS CASE.

For the most part, the Petitioners' opening Brief has already addressed the Appellees' arguments in their Briefs on this issue. But a few additional comments are necessary.

The Appellees rely on the court's citation to City of Marion v. Ia. Dept. of Rev. & Finance, 643 N.W.2d 205 (Iowa 2002), in Renda v. Ia. Civil Rights Comm., 784 N.W.2d 8, 12 (Iowa 2010), for the proposition that the legislature's failure to define a term means that the legislature clearly delegated interpretive authority to the agency. But that is not what the City of Marion case said, and the facts in City of Marion are distinguishable from this case.

In City of Marion the issue was not the agency's authority to interpret a statutory provision, but rather, the agency's authority to interpret its own previously adopted agency rule that had been in place for some time. In City of Marion the agency had used its rulemaking authority to create a rule which included the term "sport" long before the dispute arose. When resolving the issue of what "sport" meant, the court deferred to the agency's interpretation of its own rule. The word "sport" was never a word created by the legislature in that case. The situation in this appeal is the exact opposite. The word "facility" was created by the legislature. The fact that the IUB has misinterpreted this term over the

years is of no effect, and the City of Marion case offers the Appellees no help.

Furthermore, in the case under review here, the issue is not an agency rule adopted through the formal rulemaking process, but the agency's interpretation of a statutory term. It is also significant that Iowa Code 17A.10(c) was not considered or discussed in City of Marion, so the case is not relevant to the requirement that interpretive authority must be clearly granted to the agency.

The fact that an agency rule is not at issue in this case also renders irrelevant the Appellees' argument that the narrow rulemaking authority given to the IUB in Iowa Code § 476A.12 accords it deference. An agency's rulemaking authority would only be relevant where the issue is a rule adopted through the formal rulemaking process that interprets a statutory provision. In contrast, this case is not about a formal rule as to the definition of a facility, but rather a decision rendered by the agency as limited to the parties in that action, namely In Re Zond Development Corp, "Declaratory Ruling," Docket Nos. DRU-97-5, 97-6, Iowa Utils. Bd., Nov. 6, 1997 (App. Vol. I, p. 13). The whole purpose of the formal rulemaking process is to place future players on notice of such a proposed rule. But we are not considering the definition of "facility" in that context.

Nor does Iowa Code § 476A.15, allowing the IUB to grant a waiver from the requirement for a certificate of public convenience, use and necessity "if it determines that the public interest would not be adversely affected" mean that the agency was clearly granted authority to interpret the terms of § 476A.1(5). The IUB's discretion to grant a waiver obviously has nothing to do with the definition of "facility." In fact, the issue of a waiver would not even apply unless the project under IUB review is a facility. In other words, a wind energy project would have to qualify as a facility and be subject to the requirement for a certificate before the IUB would be in a position to waive the requirement. To further clarify, by using the gathering line concept, the IUB is not waiving the certificate requirement. It is saying there was no requirement for a certificate in the first place. And a waiver can only be granted if the IUB "determines that the public interest would not be adversely affected" by a waiver. So a waiver is not automatic. It requires a finding based on evidence. With respect to wind energy, the IUB makes no such finding for a waiver.

The Appellees cite to some cases purporting to stand for the proposition that the court grants considerable deference to the IUB in public utility regulation (Palo Alto Wind Energy and MidAmerican Brief, p. 17-18). However, all of those cases

were decided on the law prior to the 1998 passage of § 17A.10(c), so they are irrelevant to the Court's decision in this case.

The only case cited by Palo Alto Wind and MidAmerican in that section of their Brief that actually addressed § 17A.19(10)(c) was Neal v. Annett Holdings, Inc., 814 N.W.2d 512 (Iowa 2012). Neal was a workers compensation case in which the Industrial Commissioner interpreted the term "suitable work." The Supreme Court did not give deference to the Commissioner's interpretation.

One important point in Neal was that even though the legislature imposed on the Industrial Commissioner the duty to "[a]dopt and enforce rules necessary to implement" the workers compensation statutes, the court, citing Renda, supra, noted that "the mere grant of rulemaking authority does not give an agency authority to interpret all statutory language." Neal, 814 N.W.2d at 519. So, even though the IUB was given some rulemaking authority in § 476A.12, that does not mean that the agency was vested with authority to determine the definition of "facility," especially when the legislature had already defined the term.

Finally, a passing comment should be made about the law review article Petitioners cited in their opening brief. Melissa H. Weresh and Aaron W. Ahrendsen, Rectifying Renda:

Amending the Iowa Administrative Procedure Act to Remove the Legal Fiction of Legislative Delegation of Interpretive Authority, 63 Drake Law Rev. 591 (2015). Palo Alto Wind and MidAmerican take issue with the substance of the article and claim that the article's conclusions undercut the Petitioners' argument. However, the Appellees "doth protest too much." Hamlet, Act III, Scene II. It should be clear from the Petitioners' opening Brief that the article was cited only as authority for the statement in the brief that all but one of the Iowa Supreme Court cases since Renda considering § 17A.19(10)(c) have found that interpretive authority was not vested in the agency. Renda is the polestar in describing how courts should apply § 17A.19(1)(c).

The Petitioners are not adopting the analysis or conclusions of the law review article.

The district court erred in granting deference to the IUB in this case.

II. WITH RESPECT TO WIND ENERGY PROJECTS, A FACILITY AS DEFINED IN IOWA CODE § 476a.1(5) IS THE ENTIRE PROJECT AS PLANNED AND PROPOSED BY THE DEVELOPER.

Petitioners have cited to the IUB's own rules as an indication that the agency has interpreted the terms facility and site in a way that contradicts the interpretation in Zond. Although these rules relate to the contents of an application

for a certificate of public convenience, use and necessity, they do provide support for the Petitioners' position.

The IUB attacks the Petitioners' reference to these rules with an absolutely literal reading of the rules. However, if the rules were to be read literally, they would be inconsistent with statutory provisions and IUB practice regarding wind projects.

199 I.A.C. § 24.2, for example, defines a site as the land containing a generating unit and any accompanying components of the operation. While the rule, if read literally, would mean that a site can have only one wind turbine, § 476A.1(5) clearly states that a site can contain a combination of generating plants, i.e., turbines, on a site. So the regulation should not be read as applying to just one generating plant, but that the "generating unit" means all of the generating plants at the site. In fact, the Zond decision recognizes that more than one turbine would be a site since it considered all of the turbines on a gathering line as a site.

199 I.A.C. § 24.4(1)(e) requires the application for a certificate of public convenience, use and necessity to state the capacity of the project available to each participant in the project. This applies whether there is only one participant, or several. A participant owns all or part of a

facility. 199 I.A.C. § 24.2. In a wind energy project the participants own the entire project, not just the turbines on a single gathering line. That is why § 24.4(1)(e) indicates that the facility is the entire wind energy project.

199 I.A.C. § 24.4(1)(e) also states that a group of generating units for which segregated output records are not available are treated as a single generating unit. If, as the IUB contends, there are output records for each wind turbine, then an individual turbine, not the turbines on a gathering line, is the facility. That is clearly not a reasonable interpretation of the rule.

199 I.A.C. § 24.4(4) requires a discussion of alternative sites. It specifically refers to "the proposed site for the facility." This language clearly refers to one site for the entire facility. If, as the IUB suggests, "alternative sites" in the rule means alternative sites for each individual turbine, that means each individual turbine would be a facility. That interpretation would even fly in the face of the IUB's own definition of facility in the Zond case.

Finally, § 476A.1(5) includes as part of the facility the transmission lines connecting the generating plant to the transmission system. Pursuant to Iowa Code § 478.2(3)(a)(2), a transmission line is an electric line carrying 69 kV or more. So, the gathering lines are not transmission lines. And

the gathering line does not connect with the transmission system. The gathering line runs to a transformer substation where the power is upgraded to transmission line level and then placed on the transmission system. Therefore, the statutory definition of facility does create an expansive definition of facility that goes beyond the turbines on a single gathering line.

The IUB argues that no court has held that a large area that would be encompassed by a wind energy project is a site, but on the other hand, no court has held to the contrary, either. The fact is that this issue has not been addressed by any court in Iowa until this case.

The Appellees cite the IUB decision in Northern Iowa Windpower LLC, Docket No. DRU-01-0001, in support of the gathering line concept. But, as set forth by the Appellees, Northern Iowa Windpower simply noted that the output from the turbines are collected through a network of gathering lines. That is just a statement of how a wind energy project works. It does not give any reason why a facility, as legislatively defined in § 476A.1(5), would be the turbines on a single gathering line. So the decision in North Iowa Windpower adds nothing to the Zond decision.

Nor do the legislative changes to Chapter 476A since the Zond decision provide the Appellees any support. The 2001

legislation eliminated three of the factors the IUB was to use in deciding whether to grant a certificate. Those three eliminated factors were related to considerations of energy use and alternatives to the proposed facility. But the legislature kept the requirement that the project must be consistent with reasonable environmental and land use considerations. So it is clear that the legislature had no intent to allow wind energy developers to evade a review of the environmental and land use impacts of their projects.

In 2011, in what has been codified as Iowa Code § 476.53A, the legislature simply reaffirmed its policy to encourage renewable energy. But, again, that has nothing to do with whether a single gathering line in a wind energy project, or the single entire project, is a facility requiring a certificate of public convenience, use and necessity.

If the legislature had wanted the policy encouraging renewable energy to effectively neuter the IUB's authority regarding wind energy projects, it would not have kept in place the requirement for a certificate and the obligation of the IUB to ensure that a wind energy project will be consistent with environmental and land use impacts.

The Appellees place great weight on the provision in Iowa Code § 476A.15, allowing the IUB to grant a waiver from the certificate requirement. But this is a non sequitur. A waiver

would not be granted unless a wind energy project is required to obtain a certificate. The IUB is using the waivers provision as an excuse for effectively not requiring a wind energy project to even apply for a certificate. Furthermore, a waiver is not automatic (or at least should not be). A waiver is granted only if "the public interest would not be adversely affected." That is a finding the IUB would make after a determination that a certificate would otherwise be required. In other words, the IUB cannot waive something that is not required.

In fact, a case cited by Palo Alto Wind and MidAmerican in their Brief (p. 27), makes this point. In In Re Endeavor Power Partners LLC, Docket No. WRU-06-0010, the project at issue had exactly 25 MW on a gathering line. So even under the gathering line standard, the project was a facility requiring a certificate. Only then was the IUB in a position to grant a waiver.

By any reasonable interpretation, for wind energy projects the facility requiring a certificate of public convenience, use and necessity is the entire project, not just the turbines on a single gathering line.

III. THE DECLARATORY ORDER ISSUED BY THE IOWA UTILITIES BOARD IN THIS CASE WAS ARBITRARY, CAPRICIOUS, UNREASONABLE, AND AN ERRONEOUS INTERPRETATION OF THE LAW.

Palo Alto Wind and MidAmerican incorrectly claim that this case is an improper collateral attack. But this is not an improper collateral attack on the Zond decision. The IUB order which was presented to the district court in this case relied exclusively on the Zond decision. Therefore, the only way the Petitioners could properly challenge the IUB order in this case was to challenge the basis for that order, i.e., the Zond decision. If the Petitioners cannot challenge the Zond decision, that would effectively deny them their right of judicial review of the IUB order in this case granted in Iowa Code § 17A.19.

The only authority cited by the Appellees in support of their collateral attack argument is an unpublished Iowa Court of Appeals decision in Merivic, Inc. v. Gutierrez, 2012 WL 5539442 (Ia. App. 2012). The Merivic court relied on two prior Iowa Supreme Court decisions, Walker v. Ia. Dept. of Job Serv., 351 N.W.2d 802 (Iowa 1984) and Toomer v. Ia. Dept. of Job Serv., 340 N.W.2d 594 (Iowa 1983). The Merivic court correctly stated that Walker and Toomer stood for the proposition that a party cannot collaterally attack an "unappealed agency decision." That statement, of course, assumes that the party attacking the decision had the opportunity to appeal. The Petitioners in this case obviously had no opportunity to appeal the Zond decision 20 years ago.

In fact, Walker and Toomer were cases where the court applied the doctrine of res judicata. "Res judicata, or claim preclusion, applies only when a party has had a 'full and fair opportunity' to litigate in the first trial." George v. D.W. Zinzer Co., 762 N.W.2d 865, 868 (Iowa 2009). Res judicata applies to an agency determination "[w]hen an administrative agency is acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate." Id. (emphasis added).

Twenty years ago there is no way these Petitioners could have known that 20 years later they would be impacted by the Zond decision. They would have received no notice of Zond's application for a declaratory order. Therefore, this is not an improper collateral attack on the Zond decision.

In attempting to justify the argument that the prior IUB decisions relying on Zond support the IUB's decision in this case, the Appellees' reliance on Iowa Code § 17A.19(10)(h) is misplaced. That section states that a court must reverse an agency action that is inconsistent with the agency's prior practice or precedents. Using an agency's deviation from prior decisions to reverse agency action does not mean that an agency cannot or should not reconsider its prior decisions. This was made clear in Office of Consumer Advocate v. IUB, 770 N.W.2d 334, 342 (Iowa 2009), where the court said:

> Iowa Code section 17A.19(10)(h) is intended to address inconsistencies in agency decisions for individual cases; it does not provide a vehicle to challenge changes in agency procedure that are applicable in all cases that come before the agency.

In this case the issue is the definition of facility that would apply in all cases, not just to an individual case. Therefore, § 17A.19(10)(h) does not apply.

It is clear from reading the Zond decision that the IUB in that case had no basis for determining that a facility is the turbines on a single gathering line. The IUB simply said that a facility could not be a single turbine (without saying why not), but that a facility is the turbines on a single gathering line (without saying why). As shown by the Petitioners' arguments herein and in their opening brief, the IUB's attempt in the Zond decision to justify that decision was either incorrect or irrelevant. The IUB, in its order denying the Petitioners' Petition for Declaratory Order presented nothing to justify the Zond decision. Nor have the Appellees in this appeal presented any arguments to further justify or explain the basis of the Zond decision.

Therefore, the Zond decision, and the IUB decision in this case, was arbitrary, capricious, unreasonable, and an erroneous interpretation of law. The district court erred in upholding the IUB order in this case.

CONCLUSION

Based on the foregoing, the district court's ruling in this case should be reversed and remanded.

/s/ *Wallace L. Taylor*
WALLACE L. TAYLOR AT0007714
Law Offices of Wallace L. Taylor
4403 1st Ave. S.E., Suite 402
Cedar Rapids, Iowa 52402
319-366-2428; (Fax)319-366-3886
e-mail: wtaylorlaw@aol.com

/s/ *John M. Murray*
JOHN M. MURRAY AT0005555
Murray and Murray
530 Erie St.
Storm Lake, Iowa 50588
712-732-8181; (Fax)712-749-5089
e-mail: john@murraylawsl.com

ATTORNEYS FOR PETITIONERS-APPELLANTS

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R.App.P.6.903(1)(g)(1) or (2) because this brief contains 324 lines, 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 monospaced typeface using Microsoft Word 2000 in Courier New font, size 12.

___ October 29, 2018_____ /s/ *Wallace L. Taylor*

DATE WALLACE L. TAYLOR

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of October, 2018, I electronically filed the Appellant's Reply Brief with the Supreme Court of Iowa, and that a copy was served electronically on:

Cecil I. Wright and. Andrew L. Magner
Iowa Utilities Board
1375 East Court Ave
Des Moines, Iowa 50319-0069

ATTORNEYS FOR THE IOWA UTILITIES BOARD

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

ATTORNEYS FOR PALO ALTO COUNTY BOARD OF SUPERVISORS

Bret A. Dublinske and Brant M. Leonard
Fredrickson & Byron
505 East Grant Ave, Suite 200
Des Moines, Iowa 50309

ATTORNEYS FOR PALO ALTO WIND ENERGY AND MIDAMERICAN ENERGY COMPANY

/s/ *Wallace L. Taylor*
WALLACE L. TAYLOR