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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

APPELLANT'S BRIEF AND ARGUMENT

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

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

Brakke v. IDNR, 897 N.W.2d 522 (Iowa 2017)

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199 I.A.C. § 24.4(4)

Iowa Code Chapter 476A

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

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STATEMENT OF THE CASE

1. Nature of the Case.

Bertha Mathis and Stephen Mathis are residents and landowners in Palo Alto County, Iowa, who would be impacted by the development and operation of a large wind energy project proposed by Palo Alto Wind Energy and MidAmerican Energy.

The Mathis's filed a Petition for Declaratory Order with the Iowa Utilities Board (IUB) on December 5, 2017 (Petition for Declaratory Order)(App. Vol. I, p. 29). The Petition asked the IUB to determine that for wind energy projects the entire project, not just the wind turbines on a single gathering line, is a facility as defined in Iowa Code § 476A.1(5) that requires a certificate of public convenience, use and necessity from the IUB.

On February 2, 2018, the IUB issued a declaratory order that a facility requiring a certificate is the turbines on a single gathering line (Declaratory Order)(App. Vol. I, p. 124), not the entire wind energy project. The Mathis's then filed a Petition for Judicial Review in the Iowa District Court for Palo Alto County (Petition for Judicial Review)(App. Vol. I, p. 129).

On July 3, 2018, the district court entered a Ruling on the Mathis's Petition for Judicial Review, affirming the IUB Order (Ruling)(App. Vol. I, p. 140). The Mathis's filed a Notice of Appeal on July 10, 2018 (Notice of Appeal)(App. Vol. I, p. 149).

2. Statement of the Facts

MidAmerican Energy Company and Palo Alto Wind Energy LLC propose to develop a wind energy project in Palo Alto County. The project would consist of at least 170 wind turbines

producing at least 340 MW of electric power (Petitioners' IUB Brief, Ex. 4, 6)(App. Vol. I, p. 72,100). These 170 plus wind turbines would be crowded into a site among 167 residences. MidAmerican and Palo Alto Wind Energy were also advised of possible environmental impacts and archaeological and historical concerns regarding the project by the Iowa Department of Natural Resources and the Office of the Iowa State Archaeologist (Petitioners' IUB Brief, Ex. 1, 2, 3)(App. Vol. I, p. 54,62,69).

Although §§ 476A.1(5) and 476A.2 of the Iowa Code require that any electric generating power plant or combination of plants at a site that produces 25 MW or more of electric power must obtain a certificate of public convenience, use and necessity from the IUB, MidAmerican and Palo Alto Wind Energy contended that they are not required to seek a certificate from the IUB. Therefore, they had not applied for a certificate, even though the project will be at least 340 MW.

For 20 years wind project developers have been able to evade the requirement for a certificate from the IUB. Beginning with the declaratory order in the Zond Development Corporation case (Zond Order)(App. Vol. I, p. 13), the IUB has determined that for wind energy projects, if the turbines on a single gathering line produce less than 25 MW of power, they are not a facility as defined in Iowa Code § 476A.1(5)

and do not need to obtain a certificate. A gathering line is a buried electrical cable that ties some of the wind turbines in a project to the central substation. The substation, in turn, increases the voltage to put the electricity on the transmission line. However, the IUB's Zond decision failed to explain why the IUB determined that all of the wind turbines in a wind energy project are not a combination of power plants at a site pursuant to § 476A.1(5), and why the IUB adopted the gathering line concept. Further, none of the IUB decisions following Zond gave any rationale for the gathering line concept.

In this case Palo Alto Wind and MidAmerican have submitted a site plan that includes the entire 170 wind turbines. The entire 170 turbines are being developed at the same time as one project. The definition of "gathering lines" has no relevance in any context other than splitting up the site plan for purposes of evading the requirement of a certificate before the IUB. Indeed, Palo Alto Wind Energy has submitted its Application for Permit to Palo Alto County to include the entire 170 wind turbines. By its own actions, Palo Alto Wind Energy considered the 170 wind turbines as one project.

ROUTING STATEMENT

This case should be retained by the Supreme Court pursuant to Iowa Rule of Appellate Procedure 6.1101(2) because it presents substantial issues of first impression and it presents fundamental and urgent issues of broad public importance requiring prompt or ultimate determination by the Supreme Court.

This is a case of first impression because no court has previously determined how the definition of an electric generating facility, as defined in Iowa Code § 476A.1(5), should be applied to wind energy projects. With the rapidly growing proliferation of wind energy projects in Iowa and more concerns expressed by residents living near proposed wind projects concerning environmental and land use impacts, this is a substantial issue that should be resolved by the Supreme Court.

In addition, because of the rapid proliferation of wind energy projects and the increasing encroachment of those projects on residents in the area and the environmental impacts, this is an issue of broad public importance that should be decided by the Supreme Court as soon as possible. The Iowa legislature clearly intended for the IUB to evaluate the environmental and land use impacts of electric energy projects. Iowa Code § 476A.6(3). The IUB has abdicated its role in enforcing this legislative intent by allowing wind

energy project developers to evade environmental and land use review.

For these reasons, the Supreme Court should retain this appeal in the first instance.

ARGUMENT

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

A. Preservation of the Issue for Review

This issue was preserved for review by the Plaintiffs presenting argument on the issue in their Briefs to the district court.

B. Standard of Review

A court must defer to an agency's interpretation of the terms of a statute only if the legislature has clearly vested the agency with authority to interpret the statute. Renda v. Ia. Civil Rights Comm., 784 N.W.2d 8 (Iowa 2010).

C. Argument

Judicial review of administrative action is governed by Iowa Code § 17A.19. In reviewing agency action, the court must set aside the agency action if it 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). The issue in this case is the interpretation of the term "facility" in Iowa Code § 476A.1(5).

We start with the established rule that statutory interpretation is normally a judicial function. Doe v. Ia. Bd. of Med. Examiners, 733 N.W.2d 705 (Iowa 2007). As noted above, a court should defer to agency interpretation of a statute only if discretion to interpret the statute has been clearly vested in the agency. The Iowa Supreme Court set forth in Renda v. Ia. Civil Rights Comm., 784 N.W.2d 8 (Iowa 2010), the analysis a court must use to determine if discretion to interpret a statutory provision has clearly been vested in an agency:

> However, because the legislature does not usually explicitly address in legislation the extent to which an agency is authorized to interpret a statute, most of our cases involve an examination of the phrases or statutory provisions to be interpreted, their context, the purpose of the statute, and other practical considerations to determine whether the legislature intended to give interpretive authority to the agency. This sort of analysis has not proven conducive to the development of bright-line rules. It must always involve an examination of the specific statutory language at issue, as well as the functions of and duties imposed on the agency.
>
> *****************************
>
> Our review of authorities on this subject has confirmed our belief that each case requires a careful look at the specific language the agency has interpreted as well as the specific duties and authority given to the agency with respect to enforcing particular statutes. It is generally inappropriate, in the absence of any explicit guidance from the legislature, to determine

> whether an agency has the authority to interpret an entire statutory scheme. As we have seen, it is possible that an agency has the authority to interpret some portions of or certain specialized language in a statute, but does not have the authority to interpret other statutory provisions. Accordingly, broad articulations of an agency's authority, or lack of authority, should be avoided in the absence of an express grant of broad interpretive authority.

Id. at 11-14.

The Supreme Court further clarified the high threshold for finding that discretion has been clearly vested in an agency:

> In sum, in order for us to find the legislature clearly vested the Board with authority to interpret [a statutory provision], we
>
> > must have a firm conviction from reviewing the precise language of the statute, its context, the purpose of the statute, and the practical considerations involved, that the legislature actually intended (or would have intended had it thought about the question) to delegate to the agency interpretive power with the binding force of law over the elaboration of the provision in question.

NextEra Energy Res. LLC v. IUB, 815 N.W.2d 30, 37 (Iowa 2012)(emphasis added).

That high threshold for finding that interpretive discretion has clearly been vested in an agency is also demonstrated by an analysis of Iowa Supreme Court decisions since Renda. In 19 cases following Renda, where the question was considered, in only one case did the Iowa Supreme Court find that discretion had been clearly vested in the agency.

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 L. Rev. 591 (2015). And even in the one case where the court found that discretion had clearly been vested in the agency, the court held that the agency had abused that discretion and reversed the agency action. Evercom Systems, Inc. v. IUB, 805 N.W.2d 758 (Iowa 2011). Plaintiffs are not adopting or supporting the analysis and conclusion of the law review article regarding the viability of Renda or the need to amend the Administrative Procedure Act. The reference to the article is made only to demonstrate the high threshold an agency must overcome to claim it has clearly vested authority to interpret a statute.

Three of the cases referred to in the law review article may be instructive for the Court in this case.

In Evercom Systems, Inc. v. IUB, supra, the IUB had determined that charging for collect phone calls incurred by third-party fraud violated a statute and an IUB rule. The statute, Iowa Code § 476.103, prohibits an unauthorized change in telephone service, and directed the IUB to adopt rules to implement the statute.

Evercom provided telephone service for jail inmates to call collect. A company that had not accepted collect calls

through Evercom was charged for collect calls by Evercom due to a fraudulent scheme by a third party. A complaint was made to the IUB that the unauthorized charges violated § 476.103 and the implementing regulations. So the IUB was required to apply the statute and the rules to this situation.

The Supreme Court first held that because of the direct mandate in § 476.103 for the IUB to adopt rules to implement the statute, there was clear legislative intent to vest interpretive authority in the IUB. Nonetheless, the court further held that the IUB abused its discretion. The court determined that billing for the unauthorized calls by Evercom did not come within the statutory or regulatory definitions at issue.

With respect to Chapter 476A, unlike the statutory authority in Chapter 476 at issue in Evercom, there is no broad legislative directive in Chapter 476A for the IUB to adopt rules to implement the chapter. The sweeping language in § 476.2(1), granting the IUB "broad general powers," is drastically different than the much more narrow language in § 476A.12. Iowa Code § 476.2(1) states in pertinent part, "The board shall have broad general powers to effect the purposes of this chapter" and "shall establish all needful, just and reasonable rules . . . to govern the exercise of its powers." Iowa Code § 476A.12, which governs the IUB in this

case, states, "The board shall adopt rules . . . necessary to implement the provisions of this subchapter."

In contrast to the clear legislative intent under Chapter 476, as determined in Evercom, there is no broad legislative directive in Chapter 476A. The sweeping language within § 476.2(1), granting the IUB "broad general powers" is drastically different than the much more narrow language in § 476A.12.

It is also significant that the legislature has limited the scope of rulemaking authority. Iowa Code § 17A.23(3) states:

> An agency shall have only that authority or discretion delegated to or conferred upon the agency by law and shall not expand or enlarge its authority or discretion beyond the powers delegated to or conferred upon the agency. Unless otherwise specifically provided in statute, a grant of rulemaking authority shall be construed narrowly.

Furthermore, the Evercom court relied on the specific rulemaking authority directed by the legislature in Iowa Code § 476.103(3), where the legislature specifically directed the IUB to "adopt rules prohibiting an unauthorized change in telecommunications service." So it is clear that the legislature had clearly and specifically granted (indeed imposed) to the IUB the authority to adopt, and thus interpret, rules specifically addressing the issue presented in the

Evercom case. There is no such clear and specific directive from the legislature in this case.

In the second case referred to in the law review article, NextEra Energy Res. v. IUB, 815 N.W.2d 30 (Iowa 2012), NextEra objected to the IUB determining ratemaking principles for a wind energy project proposed by MidAmerican Energy. Iowa Code § 476.53 requires that a utility proposing an electrical generating facility must show, and the IUB must find, that the facility will be a reasonable alternative to meet electric supply needs. The IUB attempted to rely on the broad general powers granted to it in Iowa Code § 476.2(1), as set out above.

Even though the legislature gave the IUB broad general authority to carry out the purposes of Chapter 476 and to adopt rules to implement that chapter, the Supreme Court held that the legislature had not clearly vested interpretive authority to the IUB. So the court reviewed the IUB decision for corrections of errors at law.

Ultimately, the court upheld the IUB's interpretation of the "need" requirement in § 476.53. In making that determination the court considered the legislative intent. The court also upheld the IUB's interpretation of the requirement that MidAmerican consider other alternative sources of electric supply. Again, the court based its decision on legislative intent.

Applying the NextEra decision to the case on appeal here, there is no grant of broad general authority or broad rulemaking authority in Chapter 476A that would indicate legislative intent to clearly vest interpretive authority in the IUB. So this is even a weaker case for deferring to the agency than NextEra. In NextEra, even with broad authority granted to the agency, the court found that interpretive authority had not been clearly vested in the agency.

With respect to legislative intent, the legislative intent in Chapter 476A is to have the IUB ensure that an electric power facility, as defined in § 476A.1(5), 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." Iowa Code § 476A.6(3). If a wind energy project developer is allowed to evade IUB review by arbitrarily splitting the project into single gathering line pieces, that legislative intent is frustrated because the turbines on a single gathering line will have little environmental impact, but the entire project will.

In SZ Enterprises v. IUB, 850 N.W.2d 441 (Iowa 2014), the IUB issued a declaratory order determining that a solar energy company was a public utility and could not sell energy

directly to the City of Dubuque because that would infringe on the service territory of Interstate Power and Light, a regulated utility. The issue, therefore, was the definition of "public utility" and "electric utility."

In determining that the IUB had not been clearly vested with interpretive authority by the legislature, the court first noted where the legislature has provided a definition of a term that does not on its face appear to be technical in nature, that fact weighs heavily against agency discretion. The court also considered that the terms being interpreted were not very complex, were used in other contexts, and did not require any unusual expertise.

With respect to this appeal, the term "facility" in Iowa Code § 476A.1(5), has been defined by the legislature in the statute. Furthermore, the term "site" within the definition of facility in § 476A.1(5) is used in other contexts. As noted in the Petitioners' brief in the IUB declaratory order proceeding, the site plan submitted to Palo Alto County (Petitioner's Declaratory Order Brief, Ex. 5)(App. Vol. I, p. 76) referred to the entire 170-turbine project as the site. In addition, also noted in the Petitioners' Brief in the agency action, the IUB's own regulations, 199 I.A.C. § 24.2, defines "site" as "the land on which the generating unit of the facility, and any cooling facilities, cooling water

reservoirs, security exclusion areas, and other necessary components of the facility, are proposed to be located.” This is clearly a broad definition that includes more than just the turbines on a single gathering line.

Since the law review article’s publication, the Iowa Supreme Court has consistently not deferred to an agency’s interpretation of a statute. Kopecky v. Ia. Racing and Gaming Comm., 891 N.W.2d 439 (Iowa 2017); Ramirerz-Trujillo v. Quality Egg LLC, 878 N.W.2d 759 (Iowa 2016); Simon Seeding and Sod, Inc. v. Dubuque Human Rights Comm., 895 N.W.2d 446 (Iowa 2017); City of Des Moines v. IDOT, Iowa (2018); Brakke v. IDNR, 897 N.W.2d 522 (Iowa 2017); Irving v. Employment Appeal Bd., 883 N.W.2d 179 (Iowa 2016); JBS Swift and Co. v. Ochoa, 888 N.W.2d 887 (Iowa 2016); Roberts Dairy v. Billick, 861 N.W.2d 814 (Iowa 2015); Ia. Ins. Inst. v. Core Group, 867 N.W.2d 58 (Iowa 2015).

Another case, Reid v. Ia. State Commerce Comm., 357 N.W.2d 588 (Iowa 1984), is even more pertinent to the Palo Alto wind project. Reid was cited by the IUB in the Zond decision. That will be discussed in more detail in subsequent portions of this Brief. The important point here is that in Reid the Supreme Court specifically interpreted the definition of facility in Chapter 476A. In doing so, the court

gave no deference to the agency, but rather interpreted the statute as a legal matter.

A case that was cited by Palo Alto Wind and MidAmerican in its brief to the district court, in fact, supports the Petitioners' position. Neal v. Annett Holdings, Inc., 814 N.W.2d 512 (Iowa 2012) 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, 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. See, SZ Enterprises v. IUB, supra.

The district court erred in stating that the legislature granted the IUB broad general authority to implement the provisions of Chapter 476A. The district court further erred in granting deference to the agency's interpretation of the

definition of facility. The district court was also incorrect in finding that because § 476A.12 grants the IUB the authority to adopt rules regarding siting criteria, the court had to give deference to the agency decision. The issue in this case is not siting criteria. The issue the definition of a site for purposes of determining the IUB's jurisdiction in the first place.

Based on Iowa Supreme Court precedents, the district court erred in giving deference to the IUB decision 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.

A. Preservation of the Issue for Review

This issue was preserved for review by the Plaintiffs presenting argument on the issue in their Briefs to the district court.

B. Standard of Review

If authority to interpret the statute at issue in this case has not been clearly vested in the agency, this Court's review is for errors of law. Renda v. Ia. Civil Rights Comm., 784 N.W.2d 8 (Iowa 2010).

C. Argument

The project proposed by MidAmerican Energy and Palo Alto Wind Energy is a wind energy project consisting of at least

170 wind turbines generating at least 340 MW of power. Pursuant to Iowa Code § 476A.2 an electric power generating facility must obtain a certificate of public convenience, use and necessity from the IUB. A facility, in turn, is defined as:

> Any electric power generating plant or a 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.

This is clearly an expansive definition. It demonstrates the legislative intent to include all portions of a facility. It includes all components of the energy production system.

The only case that has addressed § 476A.1(5), Reid v. Ia. State Commerce Comm., 357 N.W.2d 588 (Iowa 1984), supports this view. In Reid the court interpreted § 476A.1(5) to mean that the 25 MW threshold applies to "all of the components of a facility even when the components are geographically separated." Id. at 590. In Reid the court held that a landfill located some 6 or 7 miles from an electric generating plant was part of the "facility" for purposes of requiring a certificate of public convenience, use and necessity.

In addition, the court in Reid quoted the legislative intent as follows:

> This bill establishes a consolidated hearing procedure for the siting, construction, operation and maintenance of electric generating facilities and certain associated transmission lines. . . . This bill requires the filing of an application resulting in a single proceeding.

Reid, 357 N.W.2d at 591. The court found that the legislative intent demonstrated by this language was to have a unitary proceeding to cover geographically separated components of a facility. Id. So, likewise, all of the turbines in a contiguous wind energy project should be taken together as one proceeding, not chopped up into gathering line parts that the project owner would use to evade the certificate requirement.

Legislative intent is also demonstrated by considering the statutory criteria for issuing a certificate of public convenience, use and necessity set forth in Iowa Code § 476A.6(3). One of those criteria is that "[t]he construction, maintenance, and operation of the facility will be consistent with reasonable land use and environmental policies and consonant with reasonable use of air, land and water resources, considering available alternatives." It is clear, therefore, that the legislature intended for the IUB to be able to evaluate the environmental impacts of a facility. The IUB cannot make that evaluation if a wind project developer can

evade the requirement by considering each gathering line as a site.

It is also significant that the IUB's own regulations support the Petitioners' position. 199 I.A.C. § 24.2 defines "site" as "the land on which the generating unit of the facility, and any cooling facilities, cooling water reservoirs, security exclusion areas, and other necessary components of the facility, are proposed to be located." This is clearly meant to be an expansive definition, taking into its ambit every aspect of the facility. It also infers that "facility" is more than just a "generating unit of the facility." That further confirms the expansive nature of the term "site."

It is also instructive to review the IUB rule on the requirements for an application for a certificate of public convenience, use and necessity. 199 I.A.C. § 24.4(1)(e) requires in the application a general description of the proposed facility including a description of "the portion (in MW) of the design capacity of the proposed facility which is proposed to be available for use by each participant." A "participant" is defined in 199 I.A.C. § 24.2 as "any person who either jointly or severally owns or operates a proposed facility." With respect to a wind energy project, the developer owns and operates the entire project, not just a

single gathering line. There would not be more than one participant on a gathering line. Therefore, the reference in the rule to a portion of the proposed facility owned or operated by a participant must refer to the entire project, not just the turbines on a gathering line.

Additionally, § 24.4(1)(e) states that "a group of several similar generating units operated together at the same location such that segregated records of energy output are not available shall be considered as a single unit." This statement further clarifies that all generating units are to be treated as a single unit. In the case of a wind energy project the turbines on a single gathering line will not have segregated records of energy output. Therefore, the rule contemplates that the facility is the entire project.

Upon further review of § 24.4(1), subsection (h) is related to interconnection with the transmission system. In that regard, that subsection requires "[a] system impact analysis performed by the operator of the transmission system with which the facility will be interconnected, as well as any analysis, . . . , concerning the impact of the facility on the area grid." This statement clearly shows that the entire wind project is the facility since the whole project will be a single interconnection with the transmission grid.

199 I.A.C. § 24.4(4) requires the applicant for a certificate of public convenience, use and necessity to set forth information related to the 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 the proposed site. This requirement is significant in the way it applies the terms “site” and “facility.” 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 the turbines on a gathering line could not be moved to an alternative site and still be part of the entire project. The only way there could be alternative sites for the facility is if the facility is the entire project.

In the above examples the IUB has essentially admitted that the definition of a “facility” is more holistic than a simple gathering line. Indeed, the gathering line concept appears to have one purpose, which is to eviscerate the requirement to obtain a certificate from the IUB. Has there ever been a certificate of public convenience, use and necessity granted by the IUB under Chapter 476A for a wind energy project? The gathering line exception has swallowed the rule.

Finally, there is one more very important point that the Court should consider indicating that a facility is more than just a few turbines. The definition of facility in § 476A.1(5) includes "those associated transmission lines connecting the generating plant to either a power transmission system or an interconnected primary transmission system or both." In wind energy projects the power transmission system is the line that connects the wind power plants to the utility grid. The interconnected primary transmission system is the high-voltage utility grid system that enables transmission of electrical energy within the system's coverage area. Both of these systems clearly go beyond the gathering lines. Therefore, a facility, if it includes the power and primary transmission systems, cannot be limited to the turbines on a single gathering line. The legislative intent in defining the term "facility" was clearly an expansive definition which cannot be limited to a single gathering line.

Based on the foregoing, an entire wind energy project is a facility that must obtain a certificate of public convenience, use and necessity. Any other interpretation would be contrary to the terms of the statute and legislative intent.

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

A. Preservation of the Issue for Review

This issue was preserved for review by the Plaintiffs presenting argument on the issue in their Briefs to the district court.

B. Standard of Review

If authority to interpret the statute at issue in this case has not been clearly vested in the agency, this Court's review is for errors of law. Renda v. Ia. Civil Rights Comm., 784 N.W.2d 8 (Iowa 2010).

C. Argument

On December 5, 2017, the Petitioners filed with the IUB a petition for declaratory order (Petition for Declaratory Order)(App. Vol. I, p. 29), pursuant to Iowa Code § 17A.9, asking the IUB to determine that the Palo Alto wind project is a facility that must obtain a certificate of public convenience, use and necessity pursuant to Chapter 476A of the Iowa Code. The IUB issued a declaratory order on February 2, 2018 (Declaratory Order)(App. Vol. I, p. 124).

In that declaratory order the IUB simply referred to its prior decision in the Zond Development Corporation case, and noted that it had followed Zond in subsequent cases. The declaratory order made no attempt to further explain or clarify its determination in Zond that a facility, as defined

in Iowa Code § 476A.1(5), is the turbines on a single gathering line, rather than the entire wind energy project.

The Zond decision was arbitrary, capricious, unreasonable and in violation of Chapter 476A of the Iowa Code. Since the declaratory order under review in this case simply referred to the Zond decision, it is also arbitrary, capricious, unreasonable, and an erroneous interpretation of the law.

Agency action is arbitrary and capricious when it is taken without regard to the law or the facts of the case. Soo Line R.R. v. Ia. Dept. of Transp., 521 N.W.2d 685 (Iowa 1994). Agency action is unreasonable when it is clearly against reason and evidence. Id.

The Zond decision and its progeny are flawed because the IUB in Zond did not explain any factual or legal basis why the gathering line was chosen as the basis for determining what is a site. The IUB simply said:

> The Board does not believe, in these cases, that the word "site" refers to a 15 or 20 square mile area. However, the Board also does not believe "facility" refers only to a single wind turbine." In these cases involving AEP wind energy projects built to help satisfy investor-owned utilities' statutory AEP purchase obligation, the Board believes "facility" refers to the wind turbines connected to a common gathering line.

So the IUB acknowledged that a single turbine would not be a site. But then the IUB arbitrarily said that a site does

not refer to the entire area of the wind project. However, the IUB did not say why the entire area would not be a site. The definition in § 476A.1(5) clearly says that a facility includes a combination of plants at a single site. There is nothing in that definition that would limit a site to a gathering line. There is no regard for law or fact when implementing the gathering line approach. As such, the gathering line concept was arbitrary and capricious.

The point is that the IUB in Zond provided no basis or justification for using the gathering line as the threshold for determining what is a facility for a wind energy project. The IUB simply said that a facility would not be the entire project. Why not? The entire project is certainly a combination of power plants at a site. Why can the entire project not be a site? Moreover, why is a single gathering line a site? Why not consider two or three or more gathering lines as a site? The IUB, in Zond, provided absolutely no factual or legal basis or justification for its decision. That is the perfect example of arbitrary, capricious, and unreasonable.

The IUB in Zond did refer to the decision in Reid v. Ia. State Commerce Comm., discussed in the previous section of this Brief. The IUB said in Zond that the Reid case meant that the landfill and the generating plant would not have

been a single site. In fact, the court in Reid said just the opposite. The court held that the plant and the landfill constituted a facility. In any event, the Reid case does not answer the question of whether the gathering line or the entire project area is a site.

In the Zond order the IUB also relied on a regulation of the Federal Energy Regulatory Commission (FERC). That regulation, 18 C.F.R. § 292.204(a)(2), which uses a one-mile radius for defining a facility, must be read in conjunction with 18 C.F.R. § 292.204(a)(1), which sets a limit on the size of small power production facilities to be qualifying facilities. The point of the FERC regulations is to restrict the size of the facility so it can be classified as a small power production facility. In contrast, the apparent purpose of the definition of facility in § 476A.1(5) is to ensure that an entire project is subject to IUB review for a certificate of public convenience, use and necessity.

Since the FERC regulations apply to small power production facilities, those regulations have no relevance to an industrial scale wind energy project. In other words, the purpose of the FERC regulations is to put a cap on the size of a facility that would qualify as a small power production facility. The purpose of the definition of facility in § 476A.1(5) is to ensure that the entire production system is

subject to the requirement for a certificate of public convenience, use and necessity.

The Zond decision also refers to the policy set forth in Iowa Code § 476.41 to encourage alternative energy production. But there is nothing in Chapter 476A requiring a certificate of public convenience, use and necessity that contradicts that policy. On the contrary, § 476.6(3) makes environmental policy one of the factors the IUB must consider in determining whether to issue a certificate. Therefore, the state policy to encourage renewable energy does not determine what is a facility. It is a factor to be considered by the IUB in granting a certificate of public convenience, use and necessity. The IUB was wrong in using the renewable energy policy as a basis for determining what is a facility. Ironically, environmental policies are being completely ignored when the gathering line approach eliminates the close scrutiny afforded by IUB proceedings, which examine whether a certificate should be granted to a mega-facility such as that which is proposed by MidAmerican and Palo Alto Wind Energy.

Although the Zond decision stated that "because of the legislative policy encompassed in the AEP statutes, any Board determinations required under Chapter 476A have already been made," there is absolutely nothing to indicate that the

legislature intended for the policy encouraging renewable energy to make Chapter 476A irrelevant to wind energy projects.

Nor does the district court's reliance on legislative changes to Chapter 476A in 2001 counter the Petitioners' argument. If the 2001 amendments to Chapter 476A were allegedly to promote renewable energy, and if the requirements of Chapter 476A are not applicable to wind energy projects, the legislature would have said so in the 2001 amendments.

It is significant, therefore, that the Zond decision said, "If these projects did not involve statutorily-mandated purchases of AEP power, the Board's construction may have been different." And, as explained above, there was no basis for the IUB to declare Chapter 476A irrelevant to wind energy projects on the basis of the statutory mandate. In other words, since there was no basis for using the policy encouraging renewable energy to define facility, and since the IUB said in Zond that absent that policy, the result may have been different, there was no rational basis for the Zond decision.

This last statement raises another point. The statutory mandate for renewable energy referred to above in Zond arises from Iowa Code § 476.44(2). That section requires electric utilities to own or purchase at least 105 MW of power from renewable energy sources. MidAmerican long ago far exceeded that requirement. Therefore, in this case there was no

imperative as alleged in Zond for the IUB to give MidAmerican a pass on the requirements of Chapter 476A, as it did in Zond.

All of these deficiencies were pointed out to the IUB in the Petitioners' declaratory order proceeding. So the IUB had the opportunity to explain and clarify the Zond decision but could not do so. The IUB's only response, other than simply relying on Zond, was the assertion that because the legislature has not taken any action to modify the statute, the Zond decision allegedly follows legislative intent. That is a hollow argument. The legislature had no reason to act since no one has challenged the Zond decision until now and there have been no court cases that would grab the attention of the legislature. Those are the kinds of situations where the legislature changes the law.

In the declaratory order proceeding in this case the IUB was also informed of the facts surrounding the Palo Alto wind project. The entire 170-turbine project has been developed as a single project to be constructed at the same time on contiguous parcels of land. The application filed with Palo Alto County by Palo Alto Wind Energy (Petitioners' IUB Brief, Ex. 5, p. 10)(App. Vol. I, p. 76) recites that "[t]he site plan is attached as Appendix A (for the entire project)." Appendix A of the application clearly shows that the site is the area for the entire 170 turbines (Petitioners' IUB Brief,

Ex. 6)(App. Vol. I, p. 100). So MidAmerican and Palo Alto Wind Energy have effectively admitted that the site is the area of the entire project. The declaratory order issued by the IUB in this case completely ignored that fact.

For the reasons stated herein, the Court should find that the IUB's declaratory order in this case was arbitrary, capricious, unreasonable, and an erroneous interpretation of the law.

CONCLUSION

This case is about the proper siting of wind energy projects and ensuring that environmental and land use impacts are adequately considered.

The Petitioners are not opposed to wind energy and are not trying to stop wind energy in Iowa. Renewable energy is important in addressing climate change, air pollution, the impacts of extracting fossil fuels, and in providing 21st Century jobs. But wind energy projects must be sited properly. The Petitioners are simply asking that the Iowa Utilities Board not shirk its duty to, as stated in Iowa Code § 476A.6(3), ensure that a wind energy project "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."

Iowa does not have an environmental policy act corresponding to the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq., that would require all state agencies to consider the environmental impacts of their actions, including permits, certificates, etc. The legislature clearly recognized the environmental impacts that an electric generating facility can have and specifically required the IUB to review those impacts before issuing a certificate of public convenience, use and necessity pursuant to Chapter 476A. The Zond decision, and the IUB's subsequent reliance on Zond, has allowed wind energy developers to evade that environmental review.

And there is no question that wind energy developers have worked to evade that requirement. The pleadings filed by the utilities in the Petitioners' declaratory order proceeding with the IUB confirm that they resisted having to comply with Chapter 476A because it would be a "regulatory burden."

The intent of the wind energy developers is further evidenced in the brief filed by the Office of Consumer Advocate in the IUB declaratory order proceeding (OCA brief)(App. Vol. I, p. 102). The Consumer Advocate noted that the developer of the Turtle Creek wind project "decided that it was better to increase the cost of the project $2,875,000 by manipulating multiple gathering lines rather than comply

with the regulatory requirements of chapter 476A." (OCA brief p. 4)(App. Vol. I, p. 105).

The scope and meaning of Chapter 476A with respect to wind energy projects have never been determined by a court. It is time to do so now.

Petitioners request that the district court's ruling be reversed and remanded.

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REQUEST FOR ORAL ARGUMENT

The Applicant-Appellant respectfully requests oral argument on all of the issues in this appeal.

/s/ *Wallace L. Taylor*
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R.App. Vol. I,P.6.903(1)(g)(1) or (2) because this brief contains 798 lines, excluding the parts of the brief exempted by Iowa R.App. Vol. I,P.6.903(1)(g)(1).
2. This brief complies with the typeface requirements of Iowa R.App. Vol. I,P.6.903(1)(e) and the type-style requirements of Iowa R.App. Vol. I,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 Brief with the Supreme Court of Iowa, and that a copy was served electronically on:

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