IN THE IOWA DISTRICT COURT FOR POLK COUNTY

SZ ENTERPRISES, LLC, Petitioner, v. IOWA UTILITIES BOARD, A DIVISION OF THE DEPARTMENT OF COMMERCE, STATE OF IOWA, Respondent.	05771 CV009166

INITIAL BRIEF

OF

SZ ENTERPRISES, LLC
(d/b/a EAGLE POINT SOLAR)

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Statutes:

Iowa Code § 17A.19
Iowa Code § 476.1
Iowa Code § 476.42
NMSA 1978, § 62-3-3(G)(1)

Court Decisions:

Chas. Wolff Packing Co. v. Court of Ind. Relations, 262 U.S. 522 (1923)
City of Coralville v. Iowa Utilities Board, 750 N.W.2d 523 (Iowa 2008)
Iowa Southern Utilities Co. v. Iowa State Commerce Commission, 372 N.W.2d 274 (Iowa 1985)
Iowa State Commerce Commission v. Northern Natural Gas Company., 161 N.W.2d 111 (Iowa 1968)
Natural Gas Service Co. v. Serv-Yu Cooperative, Inc., 70 Ariz. 235, 219 P.2d 324 (1950)
Neal v. Annett Holdings, Inc., No. 10-2117, --- N.W.2d ---, 2012 WL 676991 (Iowa March 2, 2012)
Northern Nat. Gas Co. v. Iowa Utilities Bd., 679 N.W.2d 629 (Iowa 2004)
Renda v. Iowa Civil Rights Commission, 784 N.W.2d 8 (Iowa 2010)
Sherwin-Williams Co. v. Iowa Dep't of Revenue, 789 N.W.2d 417 (Iowa 2010)

Administrative Decisions:

"Final Order" *In re Interstate Power & Light Co.*, Docket No. EEP-08-1 (IUB June 24, 2009)
"Decision No. 71795," *In the Matter of the Application of SolarCity that When It Provides Solar Service to Arizona Schools, Governments, and Non-Profit Entities It Is Not Acting as a Public Service Corporation Pursuant to Art. 15, Section 2 of the Arizona Constitution*, Docket No. E-20690A-09-0346 (ACC July 12, 2010)
"Declaratory Order Partially Adopting and Modifying Recommended Decision," *In the Matter of a Declaratory Order Regarding Third-Party Arrangements for Renewable Energy Generation*, Case No. 09-00217-UT (NMPRC Dec. 17, 2009)
"Recommended Decision," *In the Matter of a Declaratory Order Regarding Third-Party Arrangements for Renewable Energy Generation*, Case No. 09-00217-UT (NMPRC Oct. 23, 2009)

B. The Board erred by ruling that EPS would be an "electric utility" under the facts presented in the Petition for Declaratory Order.

Statutes:

Iowa Code § 17A.19
Iowa Code § 390.1
Iowa Code § 476.1
Iowa Code § 476.22
Iowa Code § 476.25(3)

C. The Board erred by basing the Declaratory Ruling on purported facts beyond those included in the hypothetical facts submitted by EPS.

Statutes:

Iowa Code § 17A.9(1)
Iowa Code § 476.1

Court Decisions:

City of Des Moines v. Public Employment Relations Bd., 275 N.W.2d 758 (Iowa 1979)

Administrative Rules:

199 Iowa Admin. Code 4.1

Administrative Decisions:

"Order Granting Intervention and Directing Response to Board Questions," *In re MCC Iowa, Inc. d/b/a Mediacom*, Docket No. DRU-2011-0001 (IUB Feb. 18, 2011)

Other Authority

Bonfield, Arthur E., *Amendments to Iowa Administrative Procedure Act, Report on Selected Provisions to Iowa State Bar Association and Iowa State Government* (1998)

II. STATEMENT OF THE CASE

A. Nature of the case

EPS and the City of Dubuque ("City") desire to enter into an arrangement whereby EPS would operate, install, own, maintain, and finance a solar photovoltaic facility on a City-owned building so that the array can provide a portion of the power needs of the building. EPS filed a Petition for Declaratory Order asking the Board to issue a declaratory order answering two questions: first, whether under the relevant facts EPS would be a "public utility" as defined in Iowa Code § 476.1; and second, whether under the relevant facts EPS would be an "electric utility" that is prohibited by Iowa Code § 476.25(3) from serving, offering to serve, or constructing facilities to serve the City-owned building located in the assigned exclusive electric territory of Interstate Power and Light Company ("IPL"). The Board issued a Declaratory Ruling in which the Board ruled that EPS would be a "public utility" and that EPS would be prohibited by the exclusive service territory statutes from offering the services to the City described in the Petition for Declaratory Order. EPS has filed a petition with this Court asking for judicial review of the Declaratory Ruling.

B. Course of proceedings and disposition before the agency

On January 11, 2012, EPS filed a Petition for Declaratory Order with the Board, identified by the Board as Docket No. DRU-2012-0001, asking that the Board "issue a declaratory order on Iowa Code §§ 476.1, 475.25(3) determining and declaring that, under the relevant facts stated above: (i) Eagle Point Solar is not a 'public utility' as the term is defined in Iowa Code § 476.1; and (ii) Eagle Point Solar is <u>not</u> an 'electric utility' as the term is used in Iowa Code § 476.25(3), and thus is <u>not</u> prohibited by that statute from serving, offering to serve, or constructing facilities to serve the building located on Lot 2 of Kerper Industrial Park in the

City of Dubuque and owned by the City." (Emphasis in original.) (Tab 1)[1] On January 17, 2012, the Board issued a procedural order deadline for parties to file written comments on the Petition for Declaratory Order and scheduling an informal meeting for the purpose of allowing discussion by the parties and the Board's staff of the questions raised by the Petition for Declaratory Order. (Tab 3)

On January 25, 2012, separate petitions to intervene in Docket No. DRU-2012-0001 were filed by: the Office of Consumer Advocate Division of the Department of Justice ("OCA"); MidAmerican Energy Company ("MEC"); IPL; the Iowa Association of Electric Cooperatives ("IAEC"); and the Iowa Association of Municipal Utilities ("IAMU"). (Tabs 4, 5, 6, 7, and 10) On the same date, a joint petition to intervene was filed by the Environmental Law & Policy Center ("ELPC"), the Iowa Environmental Council ("IEC"), the Iowa Solar/Small Wind Energy Trade Association ("ISETA"), the Iowa Renewable Energy Association ("I-Renew"), the Interstate Renewable Energy Council ("IREC"), the Solar Energy Industries Association ("SEIA"), the Vote Solar Initiative, and the Winneshiek Energy District. (Tab 8) On January 31, 2012, the Board granted all of the petitions to intervene filed on January 25, 2012. (Tab 11, Order) On February 1, 2012, ELPC, IEC, ISETA, I-Renew, IREC, SEIA, SunRun, Inc., Suntech America, the Vote Solar Initiative, and the Winneshiek Energy District, (collectively, the "Solar Coalition") filed an amended joint petition to intervene. (Tab 17) On February 14, 2012, the Board granted the Solar Coalition's amended joint petition to intervene. (Tab 22)

Written comments in support of the petition were filed by the OCA on February 1, 2012, by the Solar Coalition on February 1 and February 8, 2012, and by EPS on February 8, 2012. (Tab 13, 16, 21, 19) Written comments in opposition to the petition were filed by IPL,, MEC,

[1] The "Tab" references throughout this brief match the indexed pleadings filed as the administrative record in this case.

and IAEC on February 1, 2012, (Tab 12, 15, 14) and by IPL and IAEC on February 8, 2012. (Tab 18, 20) An informal meeting attended by the parties and the Board's staff was conducted on February 15, 2012, at which the issues raised by the Petition for Declaratory Ruling and the filed comments were discussed.

On April 12, 2012, the Board issued a Declaratory Ruling addressing the questions posed by EPS in the Petition for Declaratory Order. (Tab 25) Specifically, the Board ruled and declared that EPS would be a "public utility" under Iowa Code § 476.1 and consequently would be prohibited by Iowa Code § 476.25(3) from offering to the City the services described in the Petition for Declaratory Order. (Tab 25, Declaratory Ruling, at 17)

The Declaratory Ruling is final agency action pursuant to Iowa Code § 17A.9(7) and 199 IAC 4.12. EPS has exhausted all adequate administrative remedies before the Board. The particular agency action appealed from includes the Declaratory Ruling issued by the Board on April 12, 2012, in Docket No. DRU-2012-0001 and all orders and rulings inherent in that Declaratory Ruling. This court has jurisdiction over EPS's petition for judicial review. Iowa Code § 17A.19. Under Iowa Code § 17A.19(2), venue for a judicial review of agency action is appropriate in the Polk County District Court.

C. Facts relevant to the issues presented for review

Because this matter arises from a Petition for Declaratory Order pursuant to Iowa Code § 17A.9, the facts that are relevant to the review of the Board's decision are the facts presented to the Board by EPS therein. Iowa Code § 17A.9(5)"a". Those facts are recited below:

EPS is an Iowa limited liability company located at 923 Peru Road, Dubuque, Iowa 52001, and is in the business of providing design, installation, maintenance, monitoring,

operational, and financing assistance services with respect to photovoltaic solar electric power systems in Iowa. (Tab 1, Petition for Declaratory Order, at 1)

Since 2006, the City has vigorously and systematically pursued sustainability as a major focus along with the development of renewable energy resources within the City. The City remains committed to continuing these efforts in the present and for the foreseeable future. (Tab 1, Petition for Declaratory Order, at 1-2)

Various impediments to the development of renewable energy resources by the City exist, including but not necessarily limited to, technical and financial risk, the burden of upfront costs, and the City's inability (shared by other municipalities and by governments, schools, non-profit hospitals, and other non-profits) to utilize federal and/or tax state credits or other tax incentives, such as accelerated depreciation. (Tab 1, Petition for Declaratory Order, at 2)

The City was specifically interested in pursuing with EPS the development of a renewable energy resource in the form of an on-site photovoltaic solar power system to satisfy a portion of the electric power needs at a single city-owned building located in Lot 2 of Kerper Industrial Park in the City ("City Premises"). (Tab 1, Petition for Declaratory Order, at 2)

The City Premises are located within the exclusive electric service territory of IPL. (Tab 1, Petition for Declaratory Order, at 5)

EPS utilizes various forms of transactions in the course of conducting its business, including sales and leases. (Tab 1, Petition for Declaratory Order, at 2)

In order to mitigate the City's inability to utilize renewable energy incentives, tax credits, or other tax incentives associated with renewable energy resources, to offset with grants and incentives the upfront costs involved in installing a renewable energy resource at the City Premises, and to reduce the City's exposure to the technical and financial risks associated with

such a project, EPS and the City proposed to enter into a special form of long-term financing agreement commonly referred to as a "third-party power purchase agreement" ("Third-Party PPA") for the purpose of supplying a portion of the electric power needs at the City Premises from on-site renewable energy generation. (Tab 1, Petition for Declaratory Order, at 2)

The primary characteristics of the contemplated Third-Party PPA are set out in the Petition for Declaratory Order (Tab 1, Petition for Declaratory Order, at 3-4) as follows:

a. EPS will operate, install, own, maintain, and finance a solar photovoltaic facility located at the City Premises and will use the solar facility to generate electricity to provide a portion of the electric power needed at the City Premises.

b. The solar facility will be located on the customer's side of the existing IPL meter, and no IPL distribution lines or other IPL facilities or equipment will be used to transport electric power generated by the solar facility to the City Premises.

c. EPS will provide a package of services to the City, including financing the costs of acquiring the solar facility, monetizing renewable energy incentives related to the solar facility (and thereby reducing the capital cost of the project to the City to what a taxable entity would incur), maintaining and operating the solar facility on an ongoing basis, and selling the full electric output of the solar facility to the City for consumption at the City Premises.

d. The City will be charged by EPS on a price-per-kWh for the electric output of the solar facility for the entire package of services.

e. The City's charges will be computed based on electric power actually produced by the solar facility, and the City will purchase the full electric output generated by the facility at an agreed-upon prices escalated annually by an inflation factor of 3%.

f. Due to practical limitations (*e.g.*, available roof surface area for the facility), the electricity generated on-site will serve less than the total electric load for the City Premises.

g. The City Premises will remain connected to the electric grid, and the City will continue to purchase electric power from IPL for consumption at the City Premises to meet all of the remaining electric power requirements of the City Premises above and beyond what is produced by the solar photovoltaic system.

h. EPS will be entitled to all incentives associated with the facility, including tax credits and accelerated depreciation.

i. EPS will be entitled and authorized to market, sell, or transfer any renewable energy credits but will be required to pay the City one-third of any net revenues from the sale of renewable energy credits in the form of a credit against electric power charges payable to EPS.

j. EPS must comply with all applicable laws, including utility interconnection standards and approval and permit requirements, relating to the operation of the solar photovoltaic system and the sale of electricity at the City Premises.

k. EPS is specifically required to comply with operational standards and requirements imposed by the utility interconnection agreement with IPL and to ensure that in all cases EPS's interconnection is acceptable to IPL.

l. The City must cooperate with EPS and must provide such consents, and execute with IPL such agreements, as are necessary to permit interconnection of the solar photovoltaic system.

m. At the conclusion of the term of the agreement, all right, title, and interest in the solar system will be transferred to the City without further action by the City or EPS.

III. ARGUMENT

A. The Board erred by ruling that EPS would be a "public utility" under the facts presented in the Petition for Declaratory Order.

1. The Board is not entitled to deference with respect to its interpretation of the term "public utility."

Relying on Iowa Code §§ 17A.19(10) & (11), the Supreme Court of Iowa recently summarized the applicable law on deference to agency interpretation of statutes, stating in relevant part:

> In Renda, we explained 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." Renda, 784 N.W.2d at 13. We give deference to the agency's interpretation if the agency has been clearly vested with the discretionary authority to interpret the specific provision in question. Id. at 11. If, however, the agency has not been clearly vested with the discretionary authority to interpret the provision in question, we will substitute our judgment for that of the agency if we conclude the agency made an error of law. Id. at 14–15. Deference may be given to an agency's interpretation in a specific matter or an interpretation embodied in an agency rule. Sherwin–Williams Co. v. Iowa Dep't of Revenue, 789 N.W.2d 417, 422–23 (Iowa 2010). Indications that the legislature has delegated interpretive authority include "rule-making authority, decision-making or enforcement authority that requires the agency to interpret the statutory language, and the agency's expertise on the subject or on the term to be interpreted." Id. at 423.

Neal v. Annett Holdings, Inc., No. 10-2117, --- N.W.2d ---, 2012 WL 676991, at *3 (Iowa March 2, 2012). In *Renda*, the Supreme Court reviewed a determination by the Iowa Civil Rights Commission ("ICRC") of the meaning of the statutory terms "dwelling" and "employee." *Renda v. Iowa Civil Rights Commission*, 784 N.W.2d 8, 9 (Iowa 2010). The ICRC had determined that it did not have jurisdiction to hear prison labor dispute because the correctional facility at issue

did not satisfy the definition of "dwelling" and because the plaintiff did not fit the statutory definition of "employee" since she was a prisoner. *Id.* The Supreme Court reversed in part, finding that the legislature did not clearly vest the agency with the interpretation of the two words and finding that the plaintiff did meet the definition of employee. *Id.* In reaching its decision, the Supreme Court articulated several rules, stating in relevant part:

> We also think certain guidelines have become evident that may inform our analysis of whether the legislature has clearly vested interpretative authority with an agency. We note that when the statutory provision being interpreted is a substantive term within the special expertise of the agency, we have concluded that the agency has been vested with the authority to interpret the provisions . . . . When the provisions to be interpreted are found in a statute other than the statute the agency has been tasked with enforcing, we have generally concluded interpretive power was not vested in the agency . . . . When a term has an independent legal definition that is not uniquely within the subject matter expertise of the agency, we generally conclude the agency has not been vested with interpretative authority.

Renda, 784 N.W.2d at 14.

The Supreme Court has previously considered the definition of "public utility" at a time when the definition was still codified in Chapter 490A and not in Chapter 476 as it is now. *See Iowa State Commerce Commission v. Northern Natural Gas Company*, 161 N.W.2d 111 (Iowa 1968) ("*Northern Natural*"). Both former Chapter 490A and current Chapter 476 defined the term "public utility" in pertinent part to include any entity "owning or operating any facilities for . . . [f]urnishing gas by piped distribution system or electricity to the public for compensation." *Northern Natural*, 161 N.W.2d at 113; Iowa Code § 476.1. In interpreting this provision, the Supreme Court gave no deference to the agency's interpretation and conducted its own *de novo* review of the term. *Northern Natural*, 161 N.W.2d at 113 ("The legislature has defined public utility for the purposes of Chapter 490A in the above section. We therefore start with the

familiar statement that the legislature is its own lexicographer when it deems it advisable to define a word or phrase.").

The Supreme Court has found that the Board is vested with the authority to interpret the term "rates and services" as it is used in Iowa Code § 476.1,[2] and based on that finding concluded that it could overturn the Board's interpretation only if it is irrational, illogical or wholly unjustifiable. *City of Coralville v. Iowa Utilities Board*, 750 N.W.2d 523, 527 (Iowa 2008) ("*Coralville*"). The legislature did not define the term "rates and services" as it is used in Section 476.1, whereas the legislature did define the term "public utility" as it is used in Section 476.1. This difference warrants an entirely different conclusion about the standard of review applicable to the Board's interpretation of "public utility" than the conclusion the Court reached for the term "rates and services" in *Coralville*; namely, that the Board is owed no deference with respect to its interpretation of "public utility" as the term is used in Section 476.1.

As the Court recognized in *Northern Natural*, the legislature provided an explicit definition of "public utility" in Section 476.1 *Northern Natural*, 161 N.W.2d at 113 ("The legislature has defined public utility for the purposes of Chapter 490A in the above section."). The provision of an explicit legislative definition belies any claim that the legislature has clearly vested the Board with the authority to interpret the term. *See, e.g., Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 12 (Iowa 2010) ("We concluded that because the term was not defined in the statute and because the department must necessarily interpret the term in order to carry out its duties, the power to interpret the term was clearly vested in the department and deference was therefore given."). In addition, a critical word in the legislative definition of "public utility" is

[2] The first sentence of the statute provides: "The utilities board within the utilities division of the department of commerce shall regulate the rates and services of public utilities to the extent and in the manner hereinafter provided." (Emphasis added.)

"public," a commonly used word whose interpretation does not require the specific expertise of Board. *See, e.g., id.* ("When a term has an independent legal definition that is not uniquely within the subject matter expertise of the agency, we generally conclude the agency has not been vested with interpretative authority."); *see also Northern Natural*, 161 N.W.2d at 113 ("noting that a "key phrase[]" in the definition of public utility was "to the public"). Moreover, and most importantly, the Supreme Court has already authoritatively interpreted the term "public utility" in the *Northern Natural* case, and though there may be some differences between natural gas service and electric service, those difference are of no legal significance in light of the fact that the *Northern Natural* decision primarily hinged on the definition of the phrase "to the public," which is equally applicable to both natural gas service and electric service. *Northern Natural*, 161 N.W.2d at 115 ("What does the statutory phrase 'to the public' mean? We conclude that it means sales sufficient to the public to clothe the operation with a public interest and does not mean willingness to sell to each and every one of the public without discrimination."). The Board has no sound grounds for perfunctorily brushing aside the *Northern Natural* decision as it did in the Declaratory Order, particularly in light of the Supreme Court's reaffirmation of the *Northern Natural* decision after the Iowa Administrative Procedures Act was enacted. *See, e.g., Northern Nat. Gas Co. v. Iowa Utilities Bd.*, 679 N.W.2d 629, 633 (Iowa 2004) ("We have generally interpreted [the public utility provision] to mean that the Utilities Board has jurisdiction to regulate a business entity that furnishes gas by piped distribution to the public in such a manner that the public interest is affected." (citing *Northern Natural*, 161 N.W.2d at 115)).

2. *EPS is not a "public utility" as defined in Iowa Code § 476.1.*

Under the facts, EPS is not a "public utility" as defined in Iowa Code § 476.1. EPS would be a "public utility" as defined in Iowa Code § 476.1 only if its use of its solar power facility to furnish electricity to a single customer at a single site pursuant to the Third-Party PPA qualifies as furnishing electricity "to the public."

As discussed in the preceding subsection of this brief, the salient case on the meaning of the phrase "to the public" as it is used in § 476.1 is *Northern Natural*. In that case, which involved the issue of whether retail sales made to approximately 1800 "direct tap" Iowa customers from wholesale natural gas pipelines were subject to state regulation, the Supreme Court established the following standard:

> The real question is: What does the statutory phrase "to the public" mean? We conclude it means sales to sufficient of the public to clothe the operation with a public interest and does not mean willingness to sell to each and every one of the public without discrimination.

Id. at 115 (emphasis added). Immediately preceding its enunciation of this standard the Court made the following observation:

> Defendant distinguishes the foregoing Ohio and Arizona cases on the basis of language in the statutes and in the Arizona constitution. It is true those documents are broader than the language employed by our legislature but the definition of sales to the public is fully applicable here. We think the distinctions are more illusory than real.

Northern Natural, 161 N.W.2d at 115 (emphasis added).

The Arizona decision referred to by the Court in this discussion, *Natural Gas Service Co. v. Serv-Yu Cooperative, Inc.*, 70 Ariz. 235, 219 P.2d 324 (1950) ("*Serv-Yu*"), was previously quoted and discussed by the Court. In that discussion, the Court noted (and quoted at some length) an eight-factor test the *Serv-Yu* decision established for the purpose of determining whether an entity is a public utility. 161 N.W. 2d at 114-15. The eight *Serv-Yu* factors are:

1. What the corporation actually does.

2. A dedication to a public use.

3. Articles of incorporation, authorization, and purposes.

4. Dealing with the service of a commodity in which the public has been generally held to have an interest.

5. Monopolizing or intending to monopolize the territory with a public service commodity.

6. Acceptance of substantially all requests for service.

7. Service under contracts and reserving the right to discriminate is not always controlling.

8. Actual or potential competition with other corporations whose business is clothed with public interest.

161 N.W.2d at 115 (internal citations omitted). The *Serv-Yu* factors are similar to the factors the Supreme Court of the United States has found to be relevant in determining whether a business corporation is "clothed with a public interest" for the purposes of public regulation. *Chas. Wolff Packing Co. v. Court of Ind. Relations,* 262 U.S. 522, 537 (1923). A state's power to regulate rates and prices for a service ordinarily arises where there is a "fear of monopoly" because the service is an "indispensable" one that would subject the public to the risk of "exorbitant charges and arbitrary control" without regulation. *Wolff,* 262 U.S. at 538.

Consideration of the *Serv-Yu* factors in the present case leads to the conclusion that the weight of the factors supports a determination that EPS does not furnish electricity "to the public" and consequently is not a "public utility" as defined in § 476.1.

Serv-Yu Factor 1: What the corporation actually does. EPS provides a variety of services to its customers, including design, installation, maintenance, and assistance in the financing of solar equipment. EPS utilizes various forms of transactions in the course of

conducting its business, including sales, leases, and Third-Party PPAs. There is little, if any, functional distinction between these types of transactions because each gives EPS the opportunity to conduct its installation, maintenance, and financing transactions. As shown by the facts listed above, EPS's current business activities do not focus on furnishing electricity, but instead on providing varied services to individual customers. Although EPS promotes the distribution of systems that reduce a customer's use of the IPL's electric service, the customer must continue to rely on IPL for service when the solar facility is not operational and in other circumstances. EPS is neither attempting to replace IPL nor attempting to sever the link between IPL and the City. EPS's core business – the provision of a package of varied services (of which the sale electricity is only one of many components) – will allow its customer to decrease its demand for electricity from the grid, which from IPL's perspective is similar to other services or equipment (*e.g.*, energy efficiency measures) that allow a customer to accomplish the same purpose. As the Board observed in a recent case involving IPL:

> The Board can discern no difference between the use of renewable technologies and classic energy efficiency measures when those activities take place on the customer's side of the meter. As do classic energy efficiency measures, the use of renewable technologies reduces a customer's demand and energy use from the utility.

"Final Order," *In re Interstate Power & Light Co.*, Docket No. EEP-08-1, at 11 (IUB June 24, 2009). A provider of behind-the-meter energy efficiency services is not subject to regulation as a "public utility." A third-party developer of behind-the-meter renewable energy systems, which essentially provides customers with the same service as providers of energy efficiency services by different means, should be treated in the same manner. It makes no sense to regulate EPS as a "public utility" simply because the City chooses to reduce its "demand and energy use from the

utility" by installing EPS's behind-the-meter on-site renewable energy facility rather than (or perhaps in addition to) installing behind-the-meter energy efficiency measures.

Serv-Yu Factor 2: A dedication to a public use. EPS does not dedicate facilities to public use. The facilities through which EPS will provide electric service to the City Premises is only dedicated to the single customer at that single site. EPS will dedicate private property to private use by a single customer and has no need or intention to dedicate private property to public use. In addition, EPS does not provide an indispensable service to a large segment of the population. EPS's activities are not integral to the provision of electricity to the public at large because they merely enable an individual customer to employ an on-site solar facility for the purpose of serving its own specific needs from a financial as well as operational perspective.

Serv-Yu Factor 3: Articles of incorporation, authorization, and purposes. Neither EPS's certificate of organization nor its operating agreement reflects any intent to act as a public utility. Similarly, there is no evidence of any such intent in its current sales brochure or its website pages.

Serv-Yu Factor 4: Dealing with the service of a commodity in which the public has been generally held to have an interest. The public does not have an interest in the package of services provided by EPS that would warrant the economic or service regulation required for a public utility. Although electricity has been considered a service in which the public has an interest, this is not true of the package of services provided by EPS. The electricity provided as one component of the package is not dependent on any common facilities that service the public and is both generated and consumed on the customer's premises. Moreover, EPS will not supply all of the electric power required by the City Premises or supply power at all times of the day. The City will remain connected to IPL and can receive power from IPL at any time. The effects

of a cessation of EPS's services are substantially less serious than the effects from a shut-down in utility service by IPL. EPS's customer would still be able to receive electric service from IPL if for some reason EPS's services were temporarily or permanently unavailable. The contract terms, as well as the fact that EPS will be paid on the basis of power actually produced at the facility, substantially reduce customer risk and provide ample incentive for EPS to provide high-quality service. In addition, the provisions of the Third-Party PPA itself provides sufficient safeguards for the customer such that the customer does not require additional protection in the form of regulation. It should also be noted that a Third-Party PPA is primarily a financial arrangement that is designed and intended for the express purpose of creating significant benefits for the customer that otherwise would be unattainable.

Serv-Yu Factor 5: Monopolizing or intending to monopolize the territory with a public service commodity. EPS is not a monopoly, does not have market power, and must compete for business. EPS does not intend to monopolize any territory with respect to the provision of a public utility commodity, such as the provision of electric power. EPS will provide a package of services that is readily distinguishable from the service provided by a traditional public utility. The solar facility will operate on an intermittent basis and generate only a portion of the electric power used at the City Premises. Consequently, EPS will not replace IPL as a supplier of electricity to the City Premises. Since regulated utility service provided by IPL is available to the City Premises at all times, EPS is, in fact, unable to monopolize the provision of electric service. Moreover, the City is not a captive customer of EPS. The City could have elected to install its own solar system; could have chosen another third-party provider or a solar system or other renewable energy system; or could have opted to have IPL continue to serve all of its electric energy needs at the City Premises.

Serv-Yu Factor 6: Acceptance of substantially all requests for service. EPS cannot accept substantially all requests for service. The package of services offered by EPS in the Third-Party PPA EPS is neither suitable for nor available to all. Strict eligibility criteria must be satisfied on a host-specific basis; *e.g.*, financial viability, lender underwriting risk assessment, the surface area available for an installation, shading issues, development rights on neighboring property, and the orientation and tilt angle available for an installation. Since only an extremely limited portion of the public is suitable to host a third-party-financed, on-site, solar PV facility, EPS cannot and will not accept substantially all requests for service. Moreover, since EPS is only one of several solar PV providers and must compete vigorously for a share of the market, its activities do not exhibit the characteristics of a public utility that accepts substantially all requests for service.

Serv-Yu Factor 7: Service under contracts and reserving the right to discriminate is not always controlling. The Third-Party PPA is a detailed and individually-tailored contract. Individualized pricing is necessary because the specific size and capabilities of the solar panels of the facility affect the economies of scale of production and the cost of each kWh of electricity produced by the facility. Also, unlike a public utility, such as IPL, EPS uses contracts for each and every customer. Although this factor is not controlling, it certainly supports the determination that EPS is not a "public utility," particularly in light of the support for this determination provided by consideration of the other *Serv-Yu* factors.

Serv-Yu Factor 8: Actual or potential competition with other corporations whose business is clothed with public interest. The City Premises will remain connected to the electric grid, and the City will continue to purchase electric power from IPL for consumption at the City Premises to meet all of the remaining electric power requirements of the City Premises above

and beyond what is produced by the solar PV system. EPS is neither attempting to replace IPL nor seeking to sever the link between IPL and the City. EPS should properly be regarded as providing a means of allowing a customer to reach its renewable energy goals rather than a competitor of any corporation whose business is clothed with public interest.

Recent declaratory orders issued by public utility regulatory agencies in other states have concluded that, in circumstances virtually identical with those described in this petition, the third-party developer in a Third-Party PPA arrangement is not a public utility subject to regulation by the state public utility regulatory agency. In both cases, the statutory definition of "public utility" interpreted and applied by the state public utility regulatory agency is substantially identical with the Iowa statutory definition of the term. In July 2010 the Arizona Corporation Commission ("***ACC***") issued a declaratory order that includes the following two conclusions of law:

> Considering the public interest, the weight of the *Serv-Yu* factors supports a determination that when SolarCity designs, installs, owns, maintains and finances solar PV panels for schools, governmental entities, and non-profits pursuant to [a Third-Party PPA] arrangement, as described herein, its activities are not clothed with the public interest such that SolarCity is acting as a public service corporation.
>
> Based on the facts of this case, SolarCity is not acting as a public service corporation when it provides electric service to schools, governmental entities or non-profits, specifically limited to such an individual customer serving only a single premises of that customer, pursuant to [a Third-Party PPA] arrangement as described herein.

"Decision No. 71795," *In the Matter of the Application of SolarCity that When It Provides Solar Service to Arizona Schools, Governments, and Non-Profit Entities It Is Not Acting as a Public Service Corporation Pursuant to Art. 15, Section 2 of the Arizona Constitution*, Docket No. E-20690A-09-0346, at 70 (ACC July 12, 2010) ("*AZ Declaratory Order*"). The relevant facts upon which this declaratory order is based are virtually identical with those described in the statement

of relevant facts stated above in this petition. *See AZ Declaratory Order,* at 68-69. The constitutional definition of "public service corporation" interpreted and applied in the *AZ Declaratory Order* is, in pertinent part, as follows:

> All corporations other than municipal engaged in furnishing electricity for light, fuel or power . . . shall be deemed public service corporations.

Arizona Constitution, Art. 15, Sect. 2; *AZ Declaratory Order*, at 7. The ACC applied the eight *Serv-Yu* factors discussed above in this petition and, based on that analysis, concluded that the services that SolarCity provides to schools, government entities or non-profits pursuant to [a Third-Party PPA] do not cause SolarCity to act as a "public service corporation." *AZ Declaratory Order*, at 27, 53.

In December 2009, the New Mexico Public Regulation Commission ("NMPRC") issued a declaratory order determining, among other things, that a "third-party developer that owns renewable generation equipment that is installed on a utility customer's premises, pursuant to a long term contract with the customer to supply a portion of that customer's electric use, payments for which are based on a kilowatt-hour charge, is not a public utility subject to regulation by the Commission." "Declaratory Order Partially Adopting and Modifying Recommended Decision," *In the Matter of a Declaratory Order Regarding Third-Party Arrangements for Renewable Energy Generation*, Case No. 09-00217-UT, at 13 (NMPRC Dec. 17, 2009) ("*NM Declaratory Order*"). The relevant facts upon which this declaratory order is based are materially similar to those described in the statement of relevant facts stated above in this petition. *See NM Declaratory Order*, at 1; "Recommended Decision," *In the Matter of a Declaratory Order Regarding Third-Party Arrangements for Renewable Energy Generation*, Case No. 09-00217-UT, at 4-5 (NMPRC Oct. 23, 2009). The statutory definition of "public utility" interpreted and applied in the *NM Declaratory Order* is, in pertinent part, as follows:

> [E]very person . . . that may own, operate lease or control . . . any plant, property or facility for the generation, transmission or distribution, sale or furnishing to or for the public of electricity for light, heat or power or other uses . . . .

NMSA 1978, § 62-3-3(G)(1); *NM Declaratory Order,* at 7. According to the NMPRC, the "key element" to determining "under what circumstances might a developer contracting with an electric utility customer to provide supplemental electricity become an electric utility within the meaning the Public Utility Act" is "the meaning of the phrase 'to the public' in Section 62-3-3(G) of the Act." *NM Declaratory Order*, at 7. In its analysis of this "key element," the NMPRC quoted and relied on the Iowa standard from the *Northern Natural* case that was quoted and discussed above in ¶ 12.c. of this petition. *NM Declaratory Order*, at 9-10. Public policy also strongly supports a determination by the Board that, under the relevant facts stated above, EPS is not a "public utility" as defined in Iowa Code § 476.1.

Encouragement of "the development of alternate energy production facilities and small hydro facilities in order to conserve our finite and expensive energy resources and to provide for their most efficient use" is the established policy of this state. Iowa Code § 476.41. As the term is used in this statutory policy statement, "alternate energy production facility" expressly includes a solar facility along with the systems and improvements located at the project site that are necessary or convenient to the construction, completion, or operation of the solar facility. Iowa Code § 476.42. More than 25 years ago, the Supreme Court of Iowa recognized the "salutary public purpose" served by the conservation of non-renewable energy resources. *See Iowa Southern Utilities Co. v. Iowa State Commerce Commission*, 372 N.W.2d 274, 279 (Iowa 1985). A determination that EPS is a "public utility" will frustrate these goals and purposes. Such a determination will significantly reduce the opportunities for financing renewable energy projects like the one contemplated by the City, which will result in increased transaction costs

and greater expenses across the board, just as it would for the City in the present situation. In the absence of a Third-Party PPA arrangement, a municipality, such as the City, would have to pay between 60% to 65% more than a Third-Party PPA taxable entity in the top tax bracket would because the taxable entity, unlike a municipality, will benefit from the 30% business energy investment tax credit as well as receive the tax benefit of depreciation for an additional 30% to 35% of the project cost. A $100,000 project will thus require a municipality to shoulder the entire $100,000 capital cost of the project in the absence of a Third-Party PPA. Use of a Third-Party PPA arrangement, on the other hand, would reduce the capital cost of the project to approximately $35,000 to $40,000.

In sum, it would be wholly unreasonable to interpret the term "public utility" in Iowa Code § 476.1 in a manner that limits ownership and financing of third-party renewable energy systems in contravention of firmly established state policy encouraging the development of such systems. The Board should pursue policies that attract investment and jobs and create opportunities, particularly if those policies do not cost the state money.

B. The Board erred by ruling that EPS would be an "electric utility" under the facts presented in the Petition for Declaratory Order.

EPS is not an "electric utility" as the term is explicitly defined in Iowa Code § 476.22. Since EPS it neither a "public utility" as defined in Iowa Code § 476.1 nor a "city utility" as defined in Iowa Code § 390.1, EPS is not an "electric utility" as the term is explicitly defined in Iowa Code § 476.22.

Under the facts, EPS is not an "electric utility" as the term is used in Iowa Code § 476.25(3). For purposes of § 476.25(3), "electric utility" is defined in Iowa Code § 476.22 explicitly to include only a "public utility," as defined in Iowa Code § 476.1, and a "city utility," as defined in Iowa Code § 390.1, "unless the context otherwise requires." (Emphasis added.)

EPS is obviously not a "city utility" as defined in Iowa Code § 390.1. EPS, which will own and operate the solar PV facility, is not a city. Consequently, it cannot be a "city utility" as the term is defined in Iowa Code § 390.1. As demonstrated in the preceding section of this brief, EPS is not a public utility as defined in Iowa Code § 476.1.

The context presented by the Petition for Declaratory Order does not require a broader definition of the term that would include EPS under the relevant facts stated therein. The statutory section of which § 476.25(3) is a subsection begins with the following statement of legislative policy:

> It is declared to be in the public interest to encourage the development of coordinated statewide electric service at retail, to eliminate or avoid unnecessary duplication of electric utility facilities, and to promote economical, efficient, and adequate electric service to the public.

(Emphasis added.) The contemplated 3P-PPA arrangement, which is unworkable if under the relevant facts stated above the term "electric utility" as used in Iowa Code § 476.25(3) were construed broadly to include EPS, in all respects either furthers or is consistent with the public interest policy established by this declaration of legislative intent.

Encouraging the development of coordinated statewide electric service at retail. There is nothing about the contemplated 3P-PPA arrangement that would discourage the development of coordinated statewide electric service at retail. The arrangement clearly contemplates – indeed demands – a high degree of coordination among the City, IPL, and EPS on a continuing basis. The PPA includes a provision requiring EPS to comply with all applicable laws, including utility interconnection standards and approval and permit requirements, relating to the operation of the solar PV system and the sale of electricity at the City Premises. It specifically requires that EPS comply with operational standards and requirements imposed by the utility interconnection agreement with IPL, and provides that in all cases EPS's interconnection must be acceptable to

IPL. It further requires the City to cooperate with EPS and to provide such consents, and to execute with IPL such agreements, as are necessary to permit interconnection of the solar PV system.

Eliminating or avoiding unnecessary duplication of electric utility facilities. The contemplated 3P-PPA arrangement will not result in unnecessary duplication of facilities under the relevant facts stated above. The solar PV system is an on-site facility that will be constructed on the customer's side of the meter. Construction of additional electric transmission or distribution lines will not be necessary. No IPL distribution or transmission lines will be abandoned because the City Premises will continue to receive electric service from IPL.

Promoting economical, efficient, and adequate electric service to the public. As discussed above in ¶ 12.f. of this petition, the encouragement of alternate energy facilities, including solar PV facilities, for the purpose of conserving our finite and expensive energy resources and providing for their most efficient use is the statutorily established policy of this state. The contemplated 3P-PPA, which is intended and designed to increase opportunities for financing the proposed renewable energy project by reducing transaction costs and expenses, is not only consistent with this legislative purpose but actually furthers it.

Therefore, under the relevant facts stated above, EPS is not prohibited by Iowa Code § 476.25(3) from serving, offering to serve, or constructing facilities to serve the City Premises located in IPL's exclusive electric service territory. Only an "electric utility" is prohibited by Iowa Code § 476.25(3) from serving, offering to serve, or constructing facilities to serve electric customers located in IPL's exclusive electric service territory. As shown above, under the relevant facts stated above, EPS is not an "electric utility" as the term is used in §

476.25(3). Therefore, EPS is not prohibited by § 476.25(3) from serving, offering to serve, or constructing facilities to serve the City Premises under the relevant facts stated above.

C. The Board erred by basing the Declaratory Ruling on purported facts beyond those included in the hypothetical facts submitted by EPS.

Iowa law limits an administrative agency's ability to go beyond the facts as specified in a proper petition for declaratory order. Iowa Code § 17A.9(1) provides that a party may 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." (emphasis supplied). The rules promulgated by the Board further provide that a petition for a declaratory order shall provide a "clear and concise statement of all relevant facts on which the ruling is requested." 199 IAC 4.1.

In the present case, the Petition for Declaratory Order set out the hypothetical fact that the City wanted "an on-site PV solar power system to satisfy a portion of the electric power needs at a city-owned building." (Tab 1, Petition for Declaratory Order, at 2). Furthermore, the solar facility was to be "located on the customer's side of the existing [IPL] meter, and no IPL distribution lines or other IPL facilities or equipment will be used to transport electric power generated by the solar facility to the City Premises." (Tab 1, Petition for Declaratory Order, at 2). Finally, EPS was to provide a "package of services" that included "selling the full electric output of the solar facility to the City for consumption at the City Premises." (Tab 1, Petition for Declaratory Order, at 2). In other words, the hypothetical facts clearly provided that this was a stand-alone power generating facility that would only supply a portion of the power needs of a single City-owned building. There is nothing in the hypothetical facts to support any other conclusion.

The Declaratory Ruling appears to recognize this when it acknowledges that "[t]here is no dispute here that Eagle Point is selling all of its output to the City and not producing power

primarily for Eagle Point's own use . . . ." (Emphasis added.) (Tab 25, Declaratory Ruling, at 11) Ironically, the Board actually uses this undisputed proposition to support its holding that EPS is a public utility because it is selling all of its power to a single customer and therefore is not entitled to the benefit of a provision of Iowa Code § 476.1 that exempts sales to five or fewer customers if the power is produced "primarily for the person's own use."

However, the Board turns right around and ignore this same undisputed proposition when it concludes that "selling electricity on a per-kWh basis to multiple customers is a key factor in determining that Eagle Point would be a public utility under § 476.1." (Emphasis added.) (Tab 25, Declaratory Ruling, at 12) Under the facts provided in the Petition for Declaratory Order, the Board must assume that EPS's solar facility will not be used to provide power to anyone other than the City. The conjecture that EPS might enter into other power purchase agreements involving other customers and other renewable energy sources in other locations is irrelevant.

An administrative declaratory order is inherently non-judicial. The agency is not supposed to weigh or determine any facts whatsoever. Arthur E. Bonfield, *Amendments to Iowa Administrative Procedure Act, Report on Selected Provisions to Iowa State Bar Association and Iowa State Government* 40 (1998). The agency's process is supposed to be a purely executive and administrative function. Indeed, the facts underlying a declaratory ruling are supposed to be "purely hypothetical." *City of Des Moines, v. Public Employment Relations Bd.*, 275 N.W.2d 758, (Iowa 1979). The Board's use of a "fact" not presented by the Petition for Declaratory Ruling as the "key factor" in issuing a ruling contrary to the one sought by EPS is a clear exercise of judicial power in excess of the Board's jurisdiction conferred by Iowa Code § 17A.9.

This critical error by the Board is puzzling in light of the fact that the Board itself has recognized that the facts upon which the Board must base its declaratory rulings are the facts set forth in the petition. In the Board's own words:

> The Board will grant the City's petition to intervene. However, in response to the City's statement that it intends to fully participate in this proceeding by submitting testimony and presenting expert witnesses for cross-examination at a hearing, the Board observes that a proceeding involving a request for declaratory order does not involve submission of testimony or a contested case hearing. Office of Consumer Advocate v. Iowa State Commerce Commission, 395 N.W.2d 1 (Iowa 1986). The Board has set Mediacom's petition for declaratory ruling for a proceeding that will consist of briefs and reply briefs based upon the facts alleged in the petition, as contemplated by Iowa Code § 17A.9(5) "b" and Board rule 4.4, and the City, the Consumer Advocate Division of the Department of Justice, and any other intervening parties will be allowed to participate in that proceeding.

"Order Granting Intervention and Directing Response to Board Questions," *In re MCC Iowa, Inc. d/b/a Mediacom,* Docket No. DRU-2011-0001, at 3 (IUB Feb. 18, 2011) (emphasis added).

III. CONCLUSION

This Court has the authority to reverse, modify, or grant other appropriate relief from the Declaratory Ruling if the Court determines that substantial rights of EPS have been prejudiced by the Declaratory Ruling. Iowa Code § 17A.19(10). As shown in this brief, substantial rights of EPS have indeed been prejudiced by the Declaratory Ruling. Under the circumstances, the Court should grant the following forms of relief to EPS:

(1) Reversing the Declaratory Ruling.

(2) Finding that the Board erred by basing the Declaratory Ruling on purported facts beyond those facts set forth in the Petition for Declaratory Order.

(3) Finding and declaring that, under the facts presented in the Petition for Declaratory Order, EPS is not a "public utility" as defined in Iowa Code § 476.1.

(4) Finding and declaring that, under the facts presented by EPS in the Petition for Declaratory Order, EPS is not an "electric utility" as the term is used in Iowa Code § 476.25(3) and thus is not prohibited from serving, offering to serve, or constructing facilities to serve the City Premises located in IPL's assigned exclusive electric service territory.

Dated September 21, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served upon each of the attorneys of record of all parties to the above-entitled cause by enclosing the same in an envelope addressed to each such attorney at such attorney's address as disclosed by the pleadings of record herein on the 21st day of September 2012.

By: ☒ U.S. Mail ☐ Facsimile
☐ Hand Delivered ☐ Overnight Courier
☐ Federal Express ☐ Other

Signature