IN THE IOWA SUPREME COURT

NO. 13-0642

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

Petitioner-Appellee/Cross-Appellant,

v.

IOWA UTILITIES BOARD, a Division of the Department of Commerce, State of Iowa,

Respondent—Appellant/Cross-Appellee,

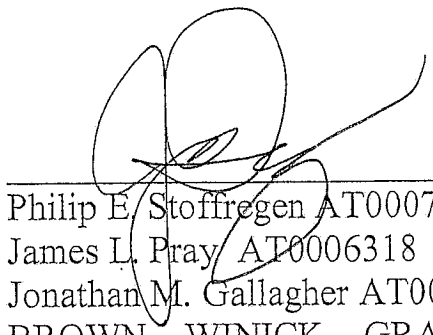
And

OFFICE OF CONSUMER ADVOCATE, a Division of the Iowa Department of Justice, INTERSTATE POWER AND LIGHT COMPANY, IOWA ASSOCIATION OF ELECTRIC COOPERATIVES, MIDAMERICAN ENERGY COMPANY, ENVIRONMENTAL LAW AND POLICY CENTER, IOWA ENVIRONMENTAL COUNCIL, IOWA SOLAR/SMALL WIND ENERGY TRADE ASSOCIATION, IOWA RENEWABLE ENERGY ASSOCIATION, SOLAR ENERGY INDUSTRIES ASSOCIATION, and VOTE SOLAR INITIATIVE

Interveners.

APPEAL FROM THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY, THE HONORABLE CARLA SCHEMMEL

REPLY BRIEF OF APPELLEE/CROSS-APPELLANT SZ ENTERPRISES, LLC d/b/a EAGLE POINT SOLAR



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As explained more fully in EPS's prior brief, EPS cross-appealed the district court's conclusion that an entity which is neither a "public utility" nor a "city utility" can still be an "electric utility," as that term is defined in Iowa Code § 476.22. EPS cross-appealed this issue because the statutory definition of "electric utility" is restrictive in nature; *i.e.*, an "electric utility" must be either a "public utility" or a "city utility, " but there may be a "public utility" or a "city utility" that is not an "electric utility" if the context requires it. Both the Board and the other utility interveners dispute this, but their arguments are at odds with the plain language and intent of Iowa Code § 476.22.[1]

The Board asserts that entities that are neither public utilities nor city utilities can still be electric utilities under Iowa Code § 476.22 because "there are limited instances where [the Board's] jurisdiction has been expanded" beyond public utilities. Board's Reply Br. at 12. For support, the Board cites Iowa Code § 476.27(1)(e), which states:

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[1]Because this is a reply brief concerning EPS's cross-appeal, EPS has limited its discussion to the issues raised by the Board and the other utility interveners in responding to EPS's appeal. As to the other issues raised by the Board and the other utility interveners, they are without merit as fully explained in EPS's original brief.

> "Public utility" means a public utility as defined in section 476.1, except that, for purposes of this section, "public utility" also includes all mutual telephone companies, municipally owned facilities, unincorporated villages, waterworks, municipally owned waterworks, joint water utilities, rural water districts incorporated under chapter 357A or 504, cooperative water associations, franchise cable television operators, and persons furnishing electricity to five or fewer persons.

Iowa Code § 476.27(1)(e). However, this claim is misguided for at least two reasons.

First, Iowa Code § 476.27 is a single-purpose statute intended to grant the Iowa Utilities Board jurisdiction over the competing interests that cross railroad rights-of-way. It has nothing whatsoever to do with the matters involved in this case.

Second, the language of subsections 22 and 27 are materially different. Iowa Code § 476.27(1)(e) expands the Board's jurisdiction by its use of the phrase "also includes." By contrast, Iowa Code § 476.22 does not contain the language of "also" and is restrictive because the phrase "unless the context otherwise provides" limits the later phrase that electric utilities "includes a public utility . . . and a city utility." Consequently, in light of the legislative decision to expand the Board's jurisdiction with express language in Iowa Code § 476.27(1)(e) for a very specific purpose and its decision to forgo any such language in Iowa Code § 476.22, the legislature clearly did not intend to expand the jurisdiction of the Board in Iowa Code § 476.22,

which the Court should find dispositive. See Doe v. Ray, 251 N.W.2d 496, 500 (Iowa 1977) ("Of course, the polestar [of statutory interpretation] is legislative intent.").[2] To conclude otherwise would be an example of the exception swallowing the whole.

IPL additionally argues that Iowa Code § 476.22 should be read expansively because the statute does not include any limiting language such as "only" or "is limited to" and because the statute uses the term "includes," which is "more susceptible to extensions of meaning." IPL Reply Br. at 24-25. This argument, however, ignores the language and intent of Iowa Code § 476.22. As an initial matter, as explained above, other provisions of Iowa Code chapter 476 – *e.g.*, § 476.27(1)(e) – use unequivocally expansive language when expanding the Board's power beyond public utilities. This means that the absence of specific restrictive language is not as telling as the

[2]The Board also references in passing Iowa Code § 476.27(1)(f), which defines "railroads," to supports its argument that since the Board has limited jurisdiction over railroad crossing pursuant to the crossing statute, Iowa Code § 476.22 should be read expansively. Again, however, this claim is misguided because Iowa Code § 476.27 expressly delegates certain duties to the Board concerning railroad crossings and because such express language is absent in Iowa Code § 476.22. See, e.g. Iowa Code § 476.27(2)("The board, in consultation with the state department of transportation, shall adopt rules pursuant to chapter 17A prescribing the terms and conditions for a [railroad] crossing."). Indeed, the mere fact that the Board recognizes that it is only in certain "limited instances" where the Board's jurisdiction is expanded just shows an overarching legislative intent to restrict the Board's authority to public utilities. This, in turn, clearly supports the contention that Iowa Code § 476.22 should be read restrictively.

absence of inclusive language. Further, while "[t]he word 'include' can enlarge the meaning of a word or . . . function as a restriction," the intent may be one of limitation "where a general term is followed by the word 'including,' which is itself followed by specific terms[.]". TLC Home Health Care, L.L.C. v. Iowa Dept. of Human Services, 638 N.W.2d 708, 713 (Iowa 2002) (internal quotation marks omitted). Here, "electric utility" is a general term that is followed by the word "includes," which itself is followed by the specific terms of public and city utilities, thereby evidencing a restrictive intent with respect to the word "includes." This is particularly true given that the phrase "unless the context otherwise requires" in Iowa Code § 576.22 reveals an overarching legislative intent to have electric utilities be either public or city utilities unless another provision of Iowa law dictates that the public or city utility should not be an electric utility.

IPL further argues that Iowa Code § 476.22 should be read expansively because the statute includes the phrase "unless the context otherwise requires" and because some courts have defined that language to be an "escape hatch." IPL Reply Br. at 25 (citing Iowa Right to Life Committee v. Tooker, 808 N.W.2d 417, 429 (Iowa 2011)). IPL's argument, though, again ignores the specific language and structure of Iowa Code § 476.22. As explained above, the term "includes" is restrictive in nature, and

as such, the phrase "unless the context otherwise requires" can only serve to *narrow* the definition of electric utility in certain circumstances. It cannot be an escape hatch to *expand* the definition of electric utilities to entities that are not public or city utilities, particularly when the legislature has generally chosen to limit the Board's authority to public utilities and, in the few instances where the Board is given broader authority, the legislature chose to use expansive language to provide an express grant of authority. See, e.g., Iowa Code § 476.27(1)(e). A ruling to the contrary would be antithetical to the intent of the legislature and the structure of Iowa Code chapter 476. See, e.g., Doe, 251 N.W.2d at 500.

The IAEC also argues that Iowa Code § 476.22 should be read expansively because the Board is given broad authority to implement the electric service territory provisions contained in Iowa Code §§ 476.23-.26 and because a holding to the contrary would create an absurd result that is not consistent with those statutory provisions. IAEC Reply Br. at 19. This cursory argument simply has no foundation in law. Indeed, while the Board may have authority to implement Iowa Code § 476.23-.26, it does not have the authority to expand the jurisdictional grant of authority by the Iowa legislature. The Iowa legislature was careful to limit the Board's authority to public utilities and to an extremely limited number of other areas. This

authority was conferred on the Board by the use of express language that is notably absent in Iowa Code § 476.22. See Iowa Code § 476.27(1)(e) (granting broader authority using unequivocal language of "also" in a statutory definition). In addition, limiting the Board's jurisdiction to that which the legislature intended does not create an absurd result because the Board was never meant to generally regulate entities that are not public utilities. See, e.g., Iowa Code § 476.1. In fact, to accept IAEC's argument would be to create an absurd result in the law, which simply cannot be the case. See State v. Pickett, 671 N.W.2d 866, 870 (Iowa 2003) (holding that "statutes are interpreted in a manner to avoid absurd results").

Finally, the IAEC asserts that this Court does not have the jurisdiction to hear this issue because the Board chose not to address it when ruling on EPS's Petition for Declaratory Order. IAEC's Reply Br. at 17. This argument, however, overlooks the fact that this issue was fully presented to the Board, extensively raised and briefed at every level, and requires *no deference* to the Board since the interpretation of Iowa Code § 476.22 has not been vested with the Board, as more fully explained in EPS's original brief. In short, it would be an utter waste of resources to remand this matter and invite another appeal on this very issue. In similar circumstances, this Court has routinely decided such issues. See, e.g., IBP, Inc. v. Burress, 779

N.W.2d 210, 218 (Iowa 2010) ("Where the district court has not reached certain issues because they were deemed unnecessary to the decision under the rationale it elected to invoke, we may in the interest of sound judicial administration decide the issues where they have been fully briefed and argued." (internal quotation marks and alterations omitted)).

CONCLUSION

WHEREFORE, for all the foregoing reasons, EPS respectfully requests that the district court's Ruling on Petition for Declaratory Order be affirmed in its entirety and that this Court grant any other relief the Court deems appropriate under the circumstances.

ATTORNEY'S COST CERTIFICATE

I hereby certify that the true and actual cost for printing the foregoing Reply Brief of Appellee/Cross-Appellant SZ Enterprises, LLC d/b/a Eagle Point Solar was $46.80.

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that on September 26, 2013, I served this Reply Brief on all other parties to this appeal by mailing one (1) copy thereof to the following attorneys of record:

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9/26/2013
Date