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

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

Philip E. Stoffregen AT0007529
James L. Pray AT0006318
Jonathan M. Gallagher AT0009845
BROWN, WINICK, GRAVES, GROSS, BASKERVILLE AND SCHOENEBAUM, P.L.C.
666 Grand Avenue, Suite 2000
Des Moines, IA 50309-2510
Telephone: 515-242-2400
Facsimile: 515-283-0231
Email: stoffregen@brownwinick.com
Email: pray@brownwinick.com
Email: gallagher@brownwinick.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulatory Cases

Rules

Other Authorities

STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Whether the District Court properly held that the Iowa Utilities Board was not entitled to deference in interpreting the statutory terms "public utility" and "electric utility."

Cases

Doe v. Iowa Dep't of Human Services, 786 N.W.2d 853 (Iowa 2010)

Iowa Right to Life Committee, Inc. v. Tooker, 808 N.W.2d 429 (Iowa 2011)

Iowa State Commerce Commission v. Northern Natural Gas Company, 161 N.W.2d 111 (Iowa 1968)

Neal v. Annett Holdings, Inc., 814 N.W.2d 512 (Iowa 2012)

NextEra Energy Res. LLC v. Iowa Utilities Bd., 815 N.W.2d 30 (Iowa 2012)

Renda v. Iowa Civil Rights Com'n, 784 N.W.2d 8, (Iowa 2010)

Sherwin–Williams Co. v. Iowa Dep't of Revenue, 789 N.W.2d 417 (Iowa 2010)

Statutes and Administrative Rules

Iowa Code § 17A.19(10)(c)

Iowa Code § 390.1

Iowa Code § 476.1

Iowa Code § 476.2

Iowa Code § 476.22

Iowa Code § 476.25

Iowa Code Chapter 476

Iowa Code Chapter 490A

Other Authorities

Arthur E. Bonfield, Amendments to Iowa Administrative Procedure Act, Report on Selected Provisions to Iowa State Bar Association and Iowa State Government 63 rptr. cmt. (1998)

B. Whether the District Court properly held that SZ Enterprises, LLC d/b/a Eagle Point Solar ("EPS") would not be a public utility under the facts presented in the underlying Petition for Declaratory Order.

Cases

Chas. Wolff Packing Co. v. Court of Ind. Relations, 262 U.S. 522 (1923)

In re Interstate Power & Light Co., Docket No. EEP-08-1 (IUB June 24, 2009)

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)

Iowa-Illinois Gas & Elec. Co. v. Iowa State Commerce Com'n, 334 N.W.2d 748 (Iowa 1983)

Kehde v. Iowa Dep't of Job Service, 318 N.W.2d 202 (Iowa 1982)

Kucera v. Baldazo, 745 N.W.2d 481 (Iowa 2008)

Natural Gas Service Co. v. Serv-Yu Cooperative, Inc., 219 P.2d 324 (1950)

NextEra Energy Res. LLC v. Iowa Utilities Bd., 815 N.W.2d 30 (Iowa 2012)

PW Ventures, Inc. v. Nichols, 533 So.2d 281 (Fla. 1988)

State v. Public Employment Relations Bd., 744 N.W.2d 357 (Iowa 2008)

Statutes and Administrative Rules

Iowa Code § 17.19(10)(c)

Iowa Code § 390.1

Iowa Code § 476.1

Iowa Code § 476.1(5)

Iowa Code § 476.22

Iowa Code § 476.41

Iowa Code § 476.42

Iowa Code Chapter 476

Other Authorities

In the Matter of a Declaratory Order Regarding Third-Party Arrangements for Renewable Energy Generation, Case No. 09-00217-UT (NMPRC Oct. 23, 2009)

In the Matter of a Declaratory Order Regarding Third-Party Arrangements for Renewable Energy Generation, Case No. 09-00217-UT at 11 (NMPRC Dec. 17, 2009)

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)

NM Declaratory Order, Case No. 09-00217-UT, at 13

C. Whether the District Court properly held that EPS would not be an electric utility under the facts presented in the Petition for Declaratory Order.

Cases

NextEra Energy Res. LLC v. Iowa Utilities Bd., 815 N.W.2d 30 (Iowa 2012)

Statutes and Administrative Rules

Iowa Code § 17.19(10)(c)

Iowa Code § 390.1

Iowa Code § 476.1

Iowa Code § 476.22

Iowa Code § 476.23

Iowa Code § 476.25

Iowa Code § 476.26

Other Authorities

Lambda Energy Marketing Co. L.C. v. IES Utilities, Inc., Docket No. FCU-96-8 (Aug. 25, 1997).

D. Whether the District Court erred in holding that public policy supports a finding that EPS is not a public utility.

Cases

NextEra Energy Res. LLC v. Iowa Utilities Bd., 815 N.W.2d 30 (Iowa 2012)

Statutes and Administrative Rules

Iowa Code § 17A.19(10)(c)

Iowa Code § 476.25

Other Authorities

Lambda Energy Marketing Co. L.C. v. IES Utilities, Inc., Docket No. FCU-96-8 (Aug. 25, 1997).

E. Whether the District Court erred in holding that the definition of "electric utility" is broader than the definition of "public utility."

Cases

Doe v. Ray, 251 N.W.2d 496 (Iowa 1977)

NextEra Energy Res. LLC v. Iowa Utilities Bd., 815 N.W.2d 30 (Iowa 2012)

State v. Pickett, 671 N.W.2d 866 (Iowa 2003)

Statutes and Administrative Rules

Iowa Code § 17A.19(10)(c)

Iowa Code § 390.1

Iowa Code § 475.26

Iowa Code § 476.1

Iowa Code § 476.22

Iowa Code § 476.23

Iowa Code § 476.25(3)

Iowa Code § 476.26

Iowa Code Chapter 476

ROUTING STATEMENT

This Appeal should be retained by the Supreme Court pursuant to Iowa Rule of Civil Procedure 6.1101(d) because the case presents fundamental and urgent issues of broad public importance requiring prompt and final determination from the Court. The Board and the regulated utilities are asking that this Court sanction the use of the exclusive territory and public electric utility regulatory schemes to prohibit the ability of entities to install alternate energy projects, including solar energy panels, that are financed through per-kWh charges and which reside entirely *behind* a customer's meter connection with the regulated utility. Indeed, the solar energy project proposed by SZ Enterprises, LLC d/b/a Eagle Point Solar ("EPS") in the underlying Petition for Declaratory Order would significantly advance the legislative policy to promote alternate energy projects, and the ongoing threat to stifle such a project using regulations never meant to prohibit this activity is indefensible, particularly in light of controlling jurisprudence that favors EPS.

STATEMENT OF THE CASE

In accord with the established public policy promoting conservation and renewable energy development, 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 only that particular building. (App. 623 – App. 624). EPS filed a Petition for Declaratory Order asking the Iowa Utilities Board ("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"). (App. 628).

Ignoring this Court's controlling precedent in Iowa State Commerce Commission v. Northern Natural Gas Company, 161 N.W.2d 111 (Iowa 1968), the Board issued a declaratory order ruling 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. (App. 1149 – App. 1156). EPS timely filed a Petition for Judicial Review with the district court, which reversed the Board's decision. (App. 1175 – App. 1200) ("Ruling"). The district court held: (1) no deference was due the Board in answering the questions posed by EPS because of this Court's decision in NextEra Energy Res. LLC v. Iowa Utilities Bd., 815 N.W.2d 30, 36 (Iowa 2012), that the legislature did not vest the Board with interpretive power over the relevant Iowa chapter; (2) EPS would not be a "public utility" under this Court's decision in Iowa State Commerce Commission v. Northern Natural Gas Company, 161 N.W.2d 111 (Iowa 1968); and (3) EPS would not be an "electric utility" because it was not a public utility and because no exceptional circumstances existed requiring it to be considered as such. Id. Seeking to expand its regulatory reach, the Board, along with others, appealed these holdings. However, as discussed below, their appeal is unfounded and in contravention of existing Iowa law and public policy.

Finally, even though the district court ultimately ruled in favor of EPS on all major issues, EPS cross-appeals the district court's conclusion that exceptional circumstances can result in an entity's being an electric utility when it is neither a public utility nor a city utility.

STATEMENT OF THE FACTS

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. See 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 it 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. (App. 623).

Since 2006, the City of Dubuque ("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. (App. 624).

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. (App. 624).

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"). (App. 624).

The City Premises are located within the exclusive electric service territory of Interstate Power and Light Company ("IPL"). (App. 627).

EPS utilizes various forms of transactions in the course of conducting its business, including sales and leases. (App. 624).

In order to (1) mitigate the City's inability to utilize renewable energy incentives, tax credits, or other tax incentives associated with renewable energy resources, (2) offset with grants and incentives the upfront costs involved in installing a renewable energy resource at the City Premises, and (3) 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. (App. 624).

The primary characteristics of the contemplated Third-Party PPA are set out in the Petition for Declaratory Order 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 City's capital costs for the project to the costs 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 price escalated annually by an inflation factor of three percent.

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.

(App. 625 – App. 626).

ARGUMENT

A. The district court correctly concluded that the Board is owed no deference in interpreting the meaning of "public utility" and "electric utility" in light of this Court's precedents.

EPS agrees that the issue of deference has been preserved, but states that this Court reviews the decision to grant deference for errors at law, giving no deference to either the district court or the Board. See Renda v. Iowa Civil Rights Comm'n, 784 N.W.2d 8, 10-12 (Iowa 2010) (giving no deference when deciding whether an agency has been vested with interpretive power). As to the district court's conclusion that the Board was owed no deference in its interpretation of the terms "public utility" and "electric utility," the existing law compelled such a conclusion in the wake of this Court's recent decisions.

Relying on Iowa Code §§ 17A.19(10) & (11), this Court recently summarized the applicable law on deference to agency interpretation of statutes following the 1998 amendments to the Iowa Administrative Procedure Act as follows:

> 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., 814 N.W.2d 512, 518 (Iowa 2012) (emphasis added). Importantly, before a court may conclude that an agency's interpretation is entitled to deference, the court "'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.'" Doe v. Iowa Dep't of Human Services, 786 N.W.2d 853, 857 (Iowa 2010) (quoting Arthur E. Bonfield, Amendments to Iowa Administrative Procedure Act, Report on Selected Provisions to Iowa State Bar Association and Iowa State Government 63 rptr. cmt. (1998)). To aid in this determination, this Court has articulated several principles:

> 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 v. Iowa Civil Rights Com'n, 784 N.W.2d 8, 14 (Iowa 2010).

In this case, the district court correctly concluded that the Board was not entitled to any deference in interpreting the term "public utility" as the term is defined and used in Iowa Code § 476.1. As an initial matter, this Court previously interpreted the term "public utility" when it was similarly defined and used in former Chapter 490A. See Iowa State Commerce Commission v. Northern Natural Gas Company, 161 N.W.2d 111 (Iowa 1968). Both former Chapter 490A and current Chapter 476 define 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 previously 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.").

In addition, this Court has recently held that the Board is generally not entitled to deference in interpreting any of the provisions of Iowa Code Chapter 476 because the legislature never intended to confer this power on the Board. NextEra Energy Resources LLC v. Iowa Utilities Bd., 815 N.W.2d 30, 38 (Iowa 2012) (concluding that "the general assembly did not delegate to the Board interpretive power with the binding force of law."). This is in line with the "normal [understanding that] the interpretation of a statute is a pure question of law over which agencies are not delegated any special powers by the General Assembly" even if such agencies granted broad authority. Renda, 784 N.W.2d at 11; see also NextEra, 815 N.W.2d at 38 (noting that "simply because the general assembly granted the Board broad general powers to carry out the purposes of chapter 476 and granted it rulemaking authority does not necessarily indicate the legislature clearly vested authority in the Board to interpret all of chapter 476").

The district court similarly and correctly concluded that the Board is entitled to no deference with respect to its interpretation of the term "electric utility" as the term used in Iowa Code § 476.22. Iowa Code § 476.22 provides that "unless the context otherwise requires, 'electric utility' includes a public utility furnishing electricity as defined in section 476.1 and a city utility as defined in section 390.1." Since the Iowa legislature has defined what constitutes an "electric utility" – specifically, a "public utility" or "city utility" – there is simply no clear intent to vest the Board with the interpretation of this provision. See, e.g., Sherwin-Williams Co. v. Iowa Dep't of Revenue, 789 N.W.2d 417, 423-24 (Iowa 2010) ("The insurmountable obstacle to finding the department has authority to interpret the word 'manufacturer' in this context is the fact that this word has already been interpreted, i.e., explained, by the legislature through its enactment of a statutory definition."). Indeed, even the statement "unless the context otherwise requires" in Iowa Code § 476.22 does not vest the Board with discretion to interpret the term because, as the district court concluded, the phrase is by no means specific to the Board or this statute. See, e.g., Iowa Right to Life Committee, Inc. v. Tooker, 808 N.W.2d 429 (Iowa 2011); see also (App. 1194 – App. 1195). In sum, given the Court's holding in NextEra that the Board is generally not vested with interpretive power, there is

simply no basis to conclude that the Board is entitled to deference in this case.

The arguments to the contrary raised by the Board and the other utility interveners are meritless. The Board asserts that the definition of the terms "public utility" and "electric utility" are at the "central core" of its authority and that it is entitled to deference, given its "broad authority" to affect the purposes of the Iowa Code Chapter 476 and the overall regulatory framework of Chapter 476. However, this Court has already rejected this argument, finding that "simply because the general assembly granted the Board broad general powers to carry out the purposes of chapter 476 and granted it rulemaking authority does not necessarily indicate the legislature clearly vested authority in the Board to interpret all of chapter 476." NextEra, 815 N.W.2d at 38. Further, there is nothing in the aggregate structure of Iowa Code Chapter 476 that indicates the Board is entitled to discretion: the legislature has already provided definitions of the relevant terms, a fact that this Court has already recognized and accordingly held that no deference is due. See Sherwin-Williams, 789 N.W.2d at 424; Northern Natural, 161 N.W.2d at 113. Indeed, had the legislature clearly intended to vest the Board with conclusive interpretive authority over these terms, it would not have defined the terms with such specificity that, as the district

court found, the only arguable ambiguities relevant to this case relate to the phrase "to the public" in Iowa Code § 476.1 and "unless the context otherwise requires" in Iowa Code § 476.22, neither phrase is unique to the Board's regulation of utilities, and the interpretation of neither phrase requires the Board's special expertise.

Similar claims by Interstate Power and Light ("IPL")[1] fare no better. According to IPL, deference is owed to the Board because the NextEra case did not concern the specific terms at issue here; both "public utility" and "electric utility" are terms that are not routinely used in other areas of law and are substantive terms that the Board is vested with "broad general powers to effect"; and a long line of Supreme Court cases have routinely deferred to the Board's interpretation of similar substantive terms in Iowa Code Chapter 476. This argument, however, ignores the statutory history and case law. First, as noted above, the Iowa legislature has already defined both terms and this Court has already interpreted the term "public utility" without giving any deference to the agency, which effectively eviscerates any argument that the Iowa legislature intended to vest the Board with interpretive power entitled to deferential treatment with respect to either term. See Iowa Code §§ 476.1, 476.22; Northern Natural, 161 N.W.2d at

[1]IPL filed a joint brief with MidAmerican Energy Company; however, for simplicity's sake, EPS will only refer to IPL.

113. Second, as this Court explained in 2010 (after many of the cases IPL cites for support), the Iowa Administrative Procedures Act was clarified with respect to the deference owed an agency, and following that clarification, courts are hesitant to disturb the "normal" intent of the legislature not to vest an agency with interpretive power. Renda, 784 N.W.2d at 11. Indeed, while NextEra did focus on a separate provision of Iowa Code chapter 476, this Court plainly held in NextEra that "the general assembly did not delegate to the Board interpretive power with binding force of law" with respect to the statutes the Board implements and administers, including Chapter 476. NextEra, 815 N.W.2d at 38. The legislature has explicitly defined "public utility" and "electric utility." Neither of the key phrases from those statutory definitions at issue in this case – namely, "to the public" in the definition of "public utility" in Iowa Code § 476.1 and "unless the context otherwise requires" in the definition of "electric utility" in Iowa Code § 476.22 – is unique to the Board's regulation of utilities. Neither phrase requires the Board's special expertise. Consequently, there is no compelling reason for this Court to disturb the "normal" intent of the legislature not to vest the Board with interpretive power under these circumstances.

Finally, the deference claims raised by the Iowa Association of Electric Cooperatives ("IAEC") are likewise misplaced. Beyond the

arguments raised by the Board and IPL, the IAEC faults the district court for failing to "analyze the specific language in the statute." Also, IAEC summarily asserts that the Board's special expertise is needed to interpret these terms and contends, without support, that "the Board cannot fulfill its responsibilities under section 476.2 if it cannot ultimately determine which entities are subject to Chapter 476." For one thing, this argument ignores the plain fact that the legislature has the power to use and define its own terms when it enacts legislation. For another, as explained above, the district court was careful to follow this Court's guidance in NextEra, and this Court's ultimate decision in NextEra rested on a close reading of the legislative definition of each term viewed in light of case law. Moreover, the Board's expertise is not required to interpret those terms because the legislature has defined the terms and the key language in those definitions simply does not require the exercise of any special expertise of the Board. The notion that the Board cannot fulfill its duty to decide who is a public utility or electric utility if its decisions are subject to legal review is simply antithetical to more than forty years of practice. The Board has presumably been fulfilling this duty since this Court decided no deference was owed to the Board in 1968 in Northern Natural. Accordingly, no deference is owed here.

B. The district court correctly concluded that EPS is not a "public utility" as defined in Iowa Code § 476.1 because the factors relevant to making such a determination clearly warrant that conclusion.

Under the facts presented in the Petition for Declaratory Order, EPS is not a "public utility" as that term is defined in Iowa Code § 476.1. This issue has been preserved for review, and as explained above, the standard of review should be correction of errors at law, with no deference given to the Board's interpretation.[2] See NextEra, 815 N.W.2d at 37 (citing Iowa Code § 17A.19(10)(c)).

1. The district court correctly held that the eight Serv-Yu factors govern whether EPS is a public utility under the facts of this case..

As stated above, Iowa Code § 476.1 defines "public utility" to include any entity "owing or operating any facilities for . . . [f]urnishing gas by piped distribution system or electricity to the public for compensation." The pivotal phrase in the definition is "to the public" and, as the district court recognized, the salient case on the subject is Northern Natural. 161 N.W.2d at 111. In Northern Natural, this Court considered whether retail sales made to approximately 1800 "direct tap" Iowa customers from wholesale natural

[2]In an odd mixing of the standards, IPL asserts that this Court should grant deference to the Board even while reviewing the Board's decision for corrections of errors at law. Neither IAEC nor the Board itself share this view. Be that as it may, the appropriate standard is the one set forth in NextEra and this brief.

gas pipelines were subject to state regulation. In deciding the case, the 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). The Court proceeded to flesh out this standard by quoting eight factors established in an Arizona court decision interpreting a substantially similar provision. Id. at 115 ("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.*" (emphasis added)).

The Arizona case decision relied on by this Court in Northern Natural is Natural Gas Service Co. v. Serv-Yu Cooperative, Inc., 219 P.2d 324 (1950). The eight factors established in Serv-Yu and quote in Northern Natural are as follows:

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.

Northern Natural, 161 N.W.2d at 115 (internal citations omitted). Significantly, these factors are similar to the factors the United States Supreme Court has found to be relevant in determining whether a business corporation is "clothed with a public interest" for the purposes of public regulation. In light of their endorsement by the United States Supreme Court and by this Court on a prior occasion, the eight Serv-Yu factors should guide this Court's analysis just as it did the district court's analysis. Chas. Wolff Packing Co. v. Court of Ind. Relations, 262 U.S. 522, 537-38 (1923) (holding that 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).

2. Applying the eight Serv-Yu factors to the facts presented in the Petition for Declaratory Order, the district court correctly found that EPS is not a public utility.

Consideration of the Serv-Yu factors in this case leads to the ineluctable 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 Section 476.1. The district court indeed arrived at this conclusion, finding that "after applying the correct legal standard, [EPS] does not furnish electricity 'to the public' and thus does not meet the definition of 'public utility' provided in section 476.1." (App. 1193).

A discussion of the district court's application of the eight Serv-Yu factors follows:

Serv-Yu Factor 1: What the corporation actually does. The district court found that "this factor does not favor finding [EPS] is a public utility" because EPS's "primary business is to install solar panels" and the location of EPS's equipment is "behind the meter," which makes EPS's product "substantively similar to other [permissible] energy efficiency technologies when viewed from the utility's perspective." (App. 1188). This conclusion is correct. Indeed, EPS's business is to install solar panels and, as part of that business, EPS provides a variety of services to its customers, including

design, installation, maintenance, and assistance with 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 among these types of transactions; each gives EPS the opportunity to conduct its installation, maintenance, and financing transactions. As the district court recognized, these facts prove that EPS's current business activities do not focus on furnishing electricity but, rather, on providing an integrated bundle of various services to individual customers.

Moreover, although EPS promotes the distribution of systems that reduce a customer's use of 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 of electricity is only one of many components) – will allow its customer to reduce 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.

(App. 11).

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 even the Board agrees provides customers with the same benefits provided by energy efficiency services – namely, reduction of the customers' demand and energy use from the utility – 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. The district court similarly concluded that this second factor does not weigh in favor of a "public utility" finding because EPS has not dedicated its facilities to public use and because EPS seeks to provide service to a single customer at a single site rather than to a large segment of the population. (App. 1189). This conclusion is also correct. EPS does not dedicate facilities to public use.

The facilities EPS will use to provide electric service to the City Premises are only dedicated to a 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 – from a financial as well as operational perspective – an individual customer to employ an on-site solar facility for the purpose of serving its own specific needs.

Serv-Yu Factor 3: Articles of incorporation, authorization, and purposes. The district court found that this factor was "not particularly helpful or relevant," but concluded that there was no evidence of any intent by EPS to act as a public utility in its certificate of organization, operating agreement, or sales brochures. (App. 1189). The district court was right to conclude that, for the stated reasons, there was no evidence of any intent by EPS to act as a public utility, which supports a finding that, under the facts in the Petition for Declaratory Order, EPS is not a public utility.

Serv-Yu Factor 4: Dealing with the service of a commodity in which the public has been generally held to have an interest. The district court found that, while "the public has been generally held to have an interest" in

electricity, this factor did not require a finding that EPS was, in fact, a public utility because: (1) EPS offers a package of services and not just electricity; (2) the electricity being provided would come from a facility located on the City's premises rather than from common facilities that serve the public; and (3) the City will continue to receive electricity from IPL. (App. 1189 – App. 1190). The district court was correct to find that this factor does not support a finding that EPS is a public utility. In fact, it supports the contrary conclusion because the public does not have an interest in the package of services provided by EPS that would warrant the kind of economic or service regulation required for a public utility.

Indeed, 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 serve 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 of 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 provide sufficient safeguards for the customer such that the customer does not require additional protection in the form of public utility 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. In sum, consideration of this factor simply does not support a conclusion that EPS is a public utility.

Serv-Yu Factor 5: Monopolizing or intending to monopolize the territory with a public service commodity. Relying on an analogous administrative case decision from New Mexico, the district court likewise concluded that this factor does not favor a "public utility" finding because "[t]hird party renewable energy developers are not 'natural monopolies'." According to the district court, such developers are not natural monopolies because they do not have significant market power, there is competition to offer such services in the marketplace, customers are free to negotiate the

terms of service, the provider does not operate with exclusivity requirements, and all customers remain connected to the utility grid. (App. 1190). The New Mexico administrative decision relied on by the district court involved a third-party developer's sale of supplemental renewable energy to a single customer. In that decision, the New Mexico Public Regulation Commission ("NMPRC") determined in relevant part:

> . . . [T]hese renewable developers are offering a supplemental service. If one or more third-party developers refuse to contract for services with a particular customer, whether it's because the customer's premises are not well suited for a system, or for any other reason, that customer is not going to be without electric service. There is no obvious public policy basis for the [NMPRC] to regulate these third-party developers as public utilities. . . . [I]f a potential customer doesn't like what is being quoted, the customer may shop around or simply continue to rely exclusively on their rate-regulated public utility.

(App. 358).

The district court's conclusion is both sound and fully warranted. EPS simply is not a monopoly, does not have any significant market power, and must compete like any other ordinary 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 Premise, and 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. Thus, this fifth Serv-Yu factor does not support a finding that EPS is a public utility.

Serv-Yu Factor 6: Acceptance of substantially all requests for service. Noting that it was limited to the facts set forth in the Petition for Declaratory Order, the district court found that it lacked sufficient facts to make a finding with respect to this factor. (App. 1191). Although the district court was certainly correct to conclude that this factor does not favor a finding of EPS being a public utility, EPS contends that the facts presented in the Petition actually provide a solid basis for finding that this factor actually does support the conclusion that EPS is not a public utility.

The Petition for Declaratory Order makes it clear that the proposed agreement is a private and individualized contract; neither party is required

to enter into the agreement, and the agreement is based on a variety of individualized facts, such as installation and maintenance costs and site capabilities. See (App. 628 – App. 629). This discussion of the contract reveals that EPS cannot accept substantially all requests for service and that the package of services offered by EPS is neither suitable for, nor available to, all. Indeed, there would be no need or purpose served by considering site-specific "practical limitations" on the project or the various specific costs if EPS could simply accept substantially all requests. In fact, 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 capable of hosting a third-party-financed, on-site, solar PV facility, EPS will not and cannot 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. Consequently, this factor supports a finding that EPS is not a public utility.

Serv-Yu Factor 7: Service under contracts and reserving the right to discriminate is not always controlling. The district court found that this seventh factor does not favor a finding that EPS would be a public utility because EPS "certainly retains the right to discriminate as to who[m] it contracts with" and because, as explained above, the proposed Third-Party PPA is "a clearly individually-detailed contract, as evidenced by the primary characteristics of the City's PPA as set out in the Petition." (App. 1192). This conclusion is correct. EPS is under no obligation to contract with anyone, and EPS's highly individualized contract reveals that it exercises this right specifically to choose customers and arrangements based on cost concerns, site limitations, and technological capabilities. For example, as demonstrated by the Petition for Declaratory Order, individualized pricing and solutions are necessary because the specific sizes and capabilities of the solar panels affect the economies of scale of production and the cost of each kWh of electricity produced by a facility. Thus, this factor does not support a finding that EPS is a public utility.

Serv-Yu Factor 8: Actual or potential competition with other corporations whose business is clothed with public interest. The district court found that this last Serv-Yu factor does not support a finding that EPS would be a public utility because EPS will "never be able to produce all the

electricity needed on the City Premises" and thus any competition between IPL and EPS would necessarily be limited. (App. 1192). Again, the district court's reasoning is sound and the conclusion is warranted. 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 a provider of a means of allowing a customer to reach its renewable energy goals rather than as a competitor of any corporation whose business is clothed with public interest.

Based on its careful and detailed analysis of the eight Serv-Yu factors, the district court properly held that, under the facts presented in the Petition for Declaratory Order, EPS would not be a "public utility" within the meaning of Iowa Code § 476.1. Decisions by regulatory agencies in other states support this conclusion.

Under nearly identical facts and law, the Arizona Corporation Commission issued a declaratory order in 2010 finding in relevant part:

> 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.

(App. 437). Arizona law provides that "[a]ll corporations other than municipal engaged in furnishing electricity for light, fuel or power . . . shall be deemed public service corporations," which at the very least is just as broad as Iowa's definition of "public utility." (App. 374).

Similarly, NMPRC issued a declaratory order in 2009 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." (App. 454). The relevant facts upon which this New Mexico declaratory order is based are materially similar to those described in the statement of relevant facts set forth above in this brief. (App. 442); see also (App. 445 – App. 446). The New Mexico definition of "public utility" also tracks Iowa's

definition. New Mexico defines the term to include "every 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." significantly, the NMPRC treated "to the public" as the "key element" of this definition. (App. 354) (emphasis added); see also NMSA 1978, § 62-3-3(G)(1).

Finally, the district court's analysis and conclusion based on consideration of the Serv-Yu factors is supported by the established public policy of this state, as the district court recognized. (App. 1197). The district court noted that "[t]he legislature's stated public policy on alternate energy and conservation of our natural resources is found in Iowa Code § 476.41," which encourages "'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.'" (App. 1197) (quoting Iowa Code § 476.41). As the term is used in this statutory policy statement, "alternate energy production facility" expressly includes a solar facility and 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, this Court acknowledged 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 would frustrate those goals and purposes. It would 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 taxable entity in the top tax bracket would because the taxable entity, unlike a municipality, would 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. (App. 640). A $100,000 project would thus require a municipality to shoulder the entire $100,000 capital cost of the project in the absence of a Third-Party PPA. (App. 640). Use of a Third-Party PPA arrangement, on the other hand, would reduce the capital cost of the project for the municipality to approximately $35,000 to $40,000. (App. 640).

In sum, under established law, precedent, and policy of this state, EPS would not be a "public utility" within the meaning of Iowa Code § 476.1 under the facts presented in the Petition for Declaratory Order.

3. The cloud of arguments advanced by the appellants in support of their claim that EPS is a public utility lack any foundation in the law or in the facts of this case.

The Board takes the position that EPS would be a public utility under the facts stated in the Petition for Declaratory Order because it would be providing electric service to the City and charging for it on a price-per-kWh basis. This position is primarily based on two defective arguments.

First, the Board claims that Northern Natural is inapplicable because it concerns gas utilities, which are not assigned exclusive service territories, rather than electric utilities, which are assigned exclusive service territories, and because the decision in Northern Natural was issued "prior to the adoption of the language in § 476.1 related to alternate energy production facilities and prior to the adoption of the exclusive service territory statutes." Board Br. at 18-19. However, this argument ignores the fact that the legislature has defined "public utility" to include entities providing gas *or* electricity "to the public" for compensation and that nothing in the language of the statute indicates that the *same* phrase should be applied differently based on the type of service. See, e.g., Kehde v. Iowa Dep't of Job Service,

318 N.W.2d 202, 205 (Iowa 1982) ("It is a rule of statutory construction that when the same or substantially the same phrases appear in a statute, they will be given a consistent meaning absent a contrary legislative intent.").

Moreover, as the district court noted, the Board's argument is circular. (App. 1185). The determination that an entity is a "public utility" must precede any determination of whether the entity is an "electric utility." This follows from the fact that the term "electric utility" is defined to include public utilities under Iowa Code § 476.1 and city utilities under Iowa Code § 390.1. Iowa Code § 476.22. The district court appropriately rejected the Board's reliance on the fact that electric utilities, but not natural gas utilities, have exclusive service areas to distinguish Northern Natural:

> . . . [T]his distinction is only significant if [the exclusive service territory] statutes are applicable to it, which would require a presumption [EPS] is an "electric utility." There must be a determination of whether Eagle Point is a "public utility" under section 476.1(3) first before an analysis of whether [EPS] is an "electric utility" for purposes of the application of the exclusive service territory statutes in sections 476.22-476.26 is undertaken.

(App. 1185). In addition, there is nothing in Northern Natural to suggest that this Court's analysis would change based on the type of service being offered. The key phrase interpreted in Northern Natural is "to the public," and it applies to electric as well as to natural gas providers.

Finally, nothing in the alternate energy exemption contained in Iowa Code § 476.1(5) suggests that the legislature intended to expand the definition of "public utility." Indeed, as explained in depth below, Iowa Code § 476.1(5) does not even refer to the term "public utility" and only concerns exempting specific acts from the *entire* chapter, thereby undercutting any claim that is intended to have any bearing on the definition of "public utility." Id.

The Board's second primary argument fares no better. The Board asserts that the Serv-Yu factors are inapplicable, arguing that Northern Natural only cited the factors and never actually adopted them. The Board next goes on to argue that, even if the factors were applicable in the instant case, the district court erred in applying them, particularly with respect to the first and fifth factors.[3]

With respect to the first factor (what the corporation actually does), the Board asserts that EPS's activities are similar to those of a public utility because EPS will sell electricity. The Board then argues that the district

[3]The Board and the public utility interveners contend that, if the Serv-Yu factors are applicable, the Board should be allowed to apply them in the first instance; however, this argument overlooks the fact that there are no disputed facts for the Board to decide. Since there are no disputed facts for the Board to decide and since the Board is not owed any deference in its legal conclusions, as explained above, there is simply no reason to remand the case and a remand would be an utter waste of resources.

court erred by focusing only on the result of the transaction (namely, the reduction in sales of power from IPL to the City). With respect to the fifth factor (monopolizing or intending to monopolize the territory with a public service commodity), the Board claims that the district court erred by failing to realize that, "collectively and individually," developers such as EPS are in competition with the utilities and will ultimately undermine the public utilities. Allegedly, this is because such developers will reduce demand for the public utilities' power, which in turn will drive up the costs of electricity to an unreasonable level because the public utilities must serve all customers in their service areas.

This argument is based on purported "facts" that are not in the evidentiary record and simply brushes aside the reality that, as the district court noted, in Northern Natural this Court *did* effectively adopt the Serv-Yu test when it cited the factors favorably and proceeded to use the factors in the resolution of the case. Northern Natural, 161 N.W.2d at 115. It also ignores the fact that the district court properly considered the first factor when it found that EPS's "primary business is to install solar panels" on the basis of the undisputed – and undisputable – facts set forth in the Petition for Declaratory Order to which the district court and this Court must confine their analysis. (App. 1187).

The mere fact that the proposed project uses a financing option that includes a per-kWh price does not undercut the district court's decision because the financing is "incidental" to EPS's business. (App. 1187). Likewise, the Board's argument overlooks the fact that there is nothing in the evidentiary record to suggest that EPS intends to monopolize the energy market or is even capable of doing so. EPS operates in a competitive marketplace, which deprives it of any such ability. As to the aggregate effect of vendors like EPS, there is nothing in the record to support the Board's apocalyptic predictions about the undermining of Iowa's electric utility industry. The decisions in Arizona and New Mexico allowing companies like EPS to operate have not been overturned, which presumably would not be the case if the Board's dire predictions had been realized in those states.

In short, the Board's objections are unfounded, and its position must be rejected. In fact, acceptance of the Board's conclusion that EPS is a public utility *solely* on the basis that the financing of the project requires the city to pay EPS on a price-per-kWh basis would eliminate the "to the public" requirement of Iowa Code § 476.1, which renders the Board's interpretation of the statute defective on its face. See generally, State v. Public

Employment Relations Bd., 744 N.W.2d 357, 361 (Iowa 2008) (holding that courts "will not interpret a statute so as to render any part of it superfluous").

IPL advances many of the same arguments but focuses on three additional claims, each of which is equally misguided. First, IPL contends that finding EPS not to be a public utility would amount to improperly crafting an additional exception into Iowa Code § 476.1. According to IPL, electric producers are public utilities under Chapter 476 unless they fall within the explicit exception set forth in Iowa Code § 476.1(5). IPL further asserts that EPS cannot satisfy this specific statutory exception because the power EPS produces will not be primarily for EPS's own use, and concludes from this that EPS must be a public utility. For support, IPL cites the maxim that "the express mention of one thing implies the exclusion of others not so mentioned" and contends that a contrary conclusion would result in the judicially created exception that the legislature never intended. Kucera v. Baldazo, 745 N.W.2d 481, 487 (Iowa 2008).

However, as the district court concluded, this argument fails to take into account the plain language of the statutory exception. Iowa Code § 476.1(5) states in relevant part: "This chapter does not apply to . . . a person furnishing electricity to five or fewer customers either by secondary line or from an alternate energy production facility or small hydro facility, from

electricity that is produced primarily for the person's own use." Although it is certainly true that EPS does not fall within this exception, it simply does not follow that EPS is a public utility. As the district court acknowledged, "the plain language of the statute shows this exception concerns the chapter *as a whole* and not merely the definition of 'public utility,'" thereby revealing that "this exception does not go directly to the definition of 'public utility.'" (App. 1183). Indeed, the statutory exception does not even use the term "public utility." In addition, it makes no logical sense to first determine whether an arrangement meets the applicability criteria for an exception to the rule, and if it does not, jump to the conclusion that the arrangement is subject to the rule without considering whether the arrangement satisfies the applicability criteria of the rule itself.[4] The NMPRC rejected a similar argument. (App. 446 – App. 447). Moreover, IPL ignores the fact that the legislature has chosen not to modify or amend the definition of "public utility" since the time this Court interpreted the term in 1968 in Northern Natural. Northern Natural is still good law and, as explained above, fully supports EPS's position.

[4] The absurdity of IPL's argument is readily apparent. For example, an ice cream stand is obviously not a "public utility" even though it does not meet the criteria of the exception set forth in Iowa Code § 476.1(5). Similarly, EPS is not *ipso facto* a "public utility" simply by virtue of the fact that is does not qualify for the Section 476.1(5) exception.

Second, IPL claims that finding EPS not to be a public utility fails to properly account for Iowa's exclusive territory scheme for electric utilities. While IPL essentially advances the same claim as the Board, IPL focuses its efforts on attempting to distinguish the Arizona and New Mexico administrative decision (discussed above) that permit companies like EPS to operate. According to IPL, the Solar City Order is inapposite because "[a]n Arizona statue instructs the Arizona Corporation Commission . . . to transition to competition for electric generation service" and because some of the rules enacting this transition "were found to be unconstitutional." IPL Br. at 45. IPL also asserts that the NM Declaratory Order is not applicable because "New Mexico experimented with deregulation by statute in 1999 and repealed those laws in 2003." Id. IPL claims that this case is actually more similar to a 1988 case in which the Florida Supreme Court held that a thermo-electric facility seeking to sell its output was a public utility than it is to the New Mexico and Arizona cases. See PW Ventures, Inc. v. Nichols, 533 So.2d 281, 283 (Fla. 1988). This argument, however, overlooks the fact that the Arizona and New Mexico statutes are substantially similar to Iowa's statutes defining the characteristics of a public utility. See Northern Natural, 161 N.W.2d at 115. In addition, New Mexico's 2003 repeal of a 1999 act that purportedly experimented with deregulation occurred years *before* the

NMPRC issued its 2009 ruling permitting activities similar to those of EPS, thereby vitiating any claim that the 2009 holding is materially distinguishable.[5]

Third, IPL asserts that the Sery-Yu factors do not apply essentially for the same reasons that the Board claims; however, IPL goes further and separately argues that most of the factors actually support a finding that EPS is a public utility. With respect to the first factor, IPL challenges the district court's finding that EPS's "primary business is to install solar panels" on the grounds that this statement does not appear in the Petition for Declaratory Order and that "that is not what EPS is actually doing here," which is "selling electricity." IPL conveniently ignores Attachment B to the Petition for Declaratory Order, which is an EPS sales brochure that clearly supports the district court's finding that IPS's primary business is the installation of solar panels. In this specific instance, EPS is indeed selling electricity. However, selling electricity is not EPS's primary business. The Petition for Declaratory Order states that EPS utilizes various forms of transactions in the course of conducting its solar panel installation business, including sales,

[5] IPL also cites and attempts to rely on statutes from California, Colorado, and Oregon that place limits on some forms of Third-Party PPAs. These arguments, however, ignore the fact that Arizona and New Mexico have persisted in permitting entities like EPS to operate and that their statutes are substantively similar to Iowa's in terms of defining what constitutes a public utility.

lease, and in the special case of the City, which cannot take advantage of various tax incentives and grants, a Third-Party Purchase Agreement involving, among other things, the sale of electricity. The sale of electricity involved with a Third-Party PPA is thus clearly secondary to EPS's primary business of installing solar panels.

With respect to the second factor, IPL claims that there are no facts to support the district court's conclusions that EPS "does not provide service to a large segment of the population" and that EPS's activities are not "integral to the provisions of electricity to the public . . . like public utilities." IPL Br. at 53 (internal quotation marks omitted). Once again IPL has overlooked the plain language of the Petition for Declaratory Order, which makes it clear that the arrangement involves a single specific facility for a single specific customer and that the customer will continue to rely on IPL to provide electricity.

With respect to the third factor, IPL agrees with the district court's conclusion that EPS's articles of incorporation, authorization, and purpose do not tilt the scale in either direction. However, as discussed above, this factor actually supports EPS because those documents evidence a lack of intent to act like a public utility.

With respect to the fourth factor, IPL asserts that the district court made an unsupported leap in logic when it concluded that the public has an interest in the sale of electricity but not in the package of services EPS offers. The district court's conclusion is correct, however, because EPS's primary business is to install solar photovoltaic systems and not to provide electricity as public utilities do.

With respect to the fifth factor, IPL acknowledges that there are "no facts" to support the conclusion that EPS is monopolizing or intending to monopolize, but encourages this Court to make such a determination anyway based on PW Ventures. 533 So.2d at 282. However, a review of the PW Ventures decision indicates that the court failed to cite any specific factual support for its finding that permitting companies like EPS to operate would actually undercut public utilities. See PW Ventures, 533 So.2d at 283.

With respect to the sixth factor, IPL asserts there is no record to show the extent to which EPS would accept requests for services. As explained above, however, it is apparent from the facts in the Petition for Judicial Review that there are specific limitations restricting EPS's ability to install such facilities.

With respect to the seventh factor, IPL argues that EPS cannot avoid regulation with creative contracting. Again, as explained above, EPS is

doing no such thing; its core business is installing solar photovoltaic systems and providing related services.

With respect to the eighth factor, IPL asserts that EPS is in competition with IPL, thereby showing it is a public utility. This argument ignores the fact that the competition is limited: the City will still purchase electricity from IPL, and the impact of the Third-Party PPA on the City's need for IPL's energy will be similar to that of other energy efficiency programs.

IAEC repeats many of the Board's and IPL's arguments but advances several additional ones of its own making. First, IAEC argues that EPS's failure to meet the exemption contained in Iowa Code § 476.1(5) is determinative as to the finding that EPS is a public utility because this Court has previously stated that the first paragraph of § 476.1 deals with public utility regulation and "'the next five paragraphs define 'public utility.'" IAEC Br. at 17 (quoting Iowa-Illinois Gas & Elec. Co. v. Iowa State Commerce Com'n, 334 N.W.2d 748, 750 (Iowa 1983)). This claim, however, ignores the fact that the actual language of the exemption does not even mention "public utility" and does not go to the threshold determination of whether an entity is a public utility in the first instance, as explained above. In addition, this claim also ignores the fact that the Court in Iowa-Illinois Gas was not

considering this issue and made the cited statement only in passing. 334 N.W.2d at 749-50 (considering whether the Iowa State Commerce Commission could impose a rule requiring public utilities to act as lenders of last resort for residential customers). IAEC's claim further distorts the fact that the § 476.1(5) exemption covers a *different* set of circumstances.

Second, IAEC also asserts that the Serv-Yu factors as a whole support the conclusion that EPS is a public utility and that the district court erred by not considering these factors "in a holistic manner." IAEC Br. at 26. The thrust of IAEC's argument is that EPS is proposing to sell power on a price-per-kWh basis and that, regardless of the size of its business, this single feature makes EPS a public utility because, in part, a company cannot intentionally limit its size or business to avoid regulation. With respect to IAEC's holistic criticism, it should be noted that since each of the factors supports a finding that EPS is not a public utility, the eight factors taken as a whole support the same finding. The argument also overlooks the fact that this electricity must be sold "to the public" pursuant to the statute to trigger regulatory jurisdiction and that the size of EPS is an immaterial concern under that test. Accordingly, for all the reasons stated, the Board's, IPL's, and IAEC's arguments should be rejected in whole, and under the facts

presented in the Petition for Declaratory Order this Court should find that EPS is not a "public utility" as that term is defined in Iowa Code § 476.1.

C. The district court correctly concluded that EPS is not an "electric utility" as defined in Iowa Code § 476.22.

Under the facts presented in the Petition for Declaratory Order, EPS is not an "electric utility" as that term is defined in Iowa Code § 476.22. This issue has been preserved for review, and as explained above, the standard of review should be correction of errors at law, with no deference given to the Board's interpretation. See NextEra, 815 N.W.2d at 37 (citing Iowa Code § 17.19(10)(c)).

1. EPS is not an electric utility because it is neither a public utility nor a city utility.

Iowa Code § 476.22 provides: "As used in sections 476.23 to 476.26, unless the context otherwise requires, 'electric utility' includes a public utility furnishing electricity as defined in section 476.1 and a city utility as defined in Iowa Code § 390.1." In this case, it is undisputed that EPS would not be a "city utility" under the facts presented in the Petition for Declaratory Order. Also, as explained above, EPS would not be a "public utility." The district court agreed, and the analysis should end there with a finding that EPS would consequently not be an electric utility.

Although the district court ultimately reached the right conclusion that EPS would not be an electric utility, the district court nevertheless erred in applying an exceptional-circumstances test to the facts of this case instead of ending its analysis after finding that EPS was neither a public utility nor a city utility. The district court found that the phrase "unless the context otherwise requires" in the statutory definition of "electric utility" could theoretically permit a finding that, in exceptional circumstances, an entity could be an electric utility even if it is not a public utility or city utility. This error, which is the sole issue EPS raises in its cross-appeal, will be discussed below in Section E of this brief.

The district court concluded that only in exceptional circumstances could an electric utility be something other than a public utility or city utility, but determined that no exceptional circumstances are present in this case that would justify extending the definition of "electric utility" to encompass anything other than a public utility or city utility. In particular, the district court found no such justification in the statement of legislative policy prefacing the exclusive electric service territory statute. The statement of legislative policy stated at the beginning of Iowa Code § 476.25 provides as follows:

> 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.

Iowa Code § 476.25 (Emphasis added.). The district court found that the contemplated Third Party-PPA arrangement "furthers, is consistent with, at the least does not go directly against the legislative intent set forth in this section," and as a result concluded that this case does not present exceptional circumstances that would justify extending the definition of "electric utility" beyond public utilities and city utilities. (App. 1196 – App. 1197).

The district court determined that there is nothing about the contemplated Third Party-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 agreement 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.

The district court further determined that the contemplated Third Party-PPA arrangement will not result in unnecessary duplication of facilities. 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.

In addition, the district court observed that the Third-Party PPA is intended and designed to increase opportunities for financing the proposed renewable energy project by reducing transaction costs and expenses, and determined that this furthers the legislative purpose of promoting economical, efficient, and adequate electric service.

2. Arguments that EPS would be an "electric utility" as that term is defined in Iowa Code § 476.22 lack support in both the law and the facts.

Agreeing with the district court's conclusion that an entity can be an "electric utility" without being a "public utility," the Board argues that exceptional circumstances justify a finding that EPS would be a public

utility because allowing EPS to proceed with its project would hinder the purposes of the exclusive territory statutes, result in duplication of electric facilities, and ultimately result in other customers of public utilities paying more for their electricity. The Board also asserts that it is entitled to make this determination in the first instance because it is entitled to deference on this issue. However, as explained above, to the extent that the district court was correct in applying the exceptional-circumstances test, it did so properly because EPS's project promotes the public policy of energy efficiency and alternate energy generation and because the proposed facility is an on-site facility that will not result in the City's ceasing to be a customer of IPL. Further, since the Board is not entitled to deference on this issue and since the facts set forth in the Petition for Declaratory Order are not in dispute, there is simply no reason to remand this matter to the Board for further consideration.

IPL's arguments are similar to those of the Board, but IPL focuses more attention on the argument that "context" as used in the phrase "unless the context otherwise required" in Iowa Code § 476.22 refers to the statutory scheme creating exclusive electric service territories. IPL maintains that EPS's project would undermine this statutory regime. Again, however, this claim ignores the fact that "context" refers only to several other provisions

of the Iowa Code, namely Iowa Code §§ 476.23-476.26, and that none of those provisions expand the definition of electric utility, as explained above. Moreover, as also discussed above, even if an exceptional-circumstances test applied and could expand the definition of electric utility, it still would not encompass EPS. The project proposed by EPS in its Petition for Declaratory Order is not extraordinary because it furthers and promotes the energy efficiency and alternate energy generation public policy of this state; does not interfere with the exclusive territories of electric utilities because its impact is similar to that of other behind-the-meter conservation measures; and will not remove the City as an electric customer of IPL.

Finally, IAEC articulates many of the same arguments as the Board and IPL, but advances an additional argument based on a prior Board decision in Lambda Energy Marketing Co. L.C. v. IES Utilities, Inc., (App. 1367 – App. 1376). According to IAEC, this prior administrative decision stands for the proposition that the Board has already found that providing standby or backup generation is sufficient to interfere with an electric utility's service area. However, Lambda is materially distinguishable from the present situation. The key dispute in the Lambda decision involved the

interpretation of a "remote displacement" service[6] tariff of IPL's predecessor in interest, IES, and no such tariff is at issue in this proceeding. (App. 1369). Also, the complainant in Lambda desired to use existing capacity purchased from Central Iowa Power Cooperative to provide remote displacement service to IES's customers, whereas in this proceeding the capacity will be constructed behind the meter on the customer's premises. Id. Thus, the arrangements are markedly different. Also, Lambda is an administrative decision rendered by the Board, and thus is neither binding nor entitled to deference with respect to any issue of law. Accordingly, the Lambda decision should have no bearing on the Court's decision in this case.

D. The district court did not err in finding that public policy supports the project presented in the Petition for Declaratory Order because the project fulfills the established public policy of energy efficiency and alternate energy generation and because it does not interfere with any exclusive territory rights of any public or electric utility.

EPS acknowledges that error has been preserved on this issue; however, as explained above, the standard of review should be for corrections of errors at law, with no deference given to the Board's findings. NextEra, 815 N.W.2d at 37 (citing Iowa Code § 17A.19(10)(c)).

[6]"Remote displacement" service "allow[ed] customers to take advantage of lower interruptible rates while at the same time ensuring replacement power in the event service is actually interrupted." (App. 1368).

IPL asserts that public policy supports the finding that EPS would be both a public and electric utility under the facts stated in the Petition for Declaratory Order. Relying on Iowa Code § 476.25, IPL states that allowing such projects would interfere with the exclusive service areas of utilities. For support, IPL does not rely on any facts within the Petition for Declaratory Order.. Instead, IPL merely asserts that permitting such activities will inevitably undermine public utilities because a public utility will be required to continue to provide service to customers as if the utility had the obligation to serve all of the customer's electric needs but will be unable to recover the costs of providing such services because the customers will not always purchase all of their electricity from the utility. As explained above, this argument lacks any factual support in the record and ignores the fact that behind-the-meter projects like the one proposed by EPS produce the same benefits as do behind-the-meter energy efficiency measures.

E. The district court erred in finding that an entity that is not a public utility can still be an electric utility.

EPS has cross-appealed on the district court's conclusion that an entity that 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. This issue has been preserved, and as explained above, the standard of review should be for

corrections of errors at law, with no deference given to the district court's conclusion to the contrary. See NextEra, 815 N.W.2d at 37 (citing Iowa Code § 17A.19(10)(c)).

As used in Iowa Code § 476.25(3), the term "electric utility" is defined by Iowa Code § 476.22, which provides as follows:

> As used in sections 476.23 to 475.26, unless the context otherwise provides, "electric utility" includes a public utility furnishing electricity as defined in section 476.1 and a city utility as defined in section 390.1.

Iowa Code § 476.22 (Emphasis added). In this definition, the word "unless" clearly qualifies the word "includes." It must therefore be interpreted as authorizing exclusions from the combined class of public utilities and city utilities but not authorizing inclusions beyond that combined class. The phrase thus narrows the scope of the definition; it does not broaden it as the Board would have it. 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. Since no party disputes the fact that EPS is not a "city utility," if the Court determines EPS is not a "public utility" the Court must also conclude as a matter of simple logic that EPS cannot be an "electric utility" as the term is used in Iowa Code § 476.25(3). It logically follows from this conclusion that EPS is not prohibited by Iowa Code § 476.25(3) from providing the specific services

described in EPS's petition for declaratory order to the specific city-owned premises also described in that petition.

The phrase "unless the context otherwise requires" is restrictive in nature, given that the most reasonable interpretation of § 476.22 is for electric utility to "include" either a public or city utility unless another provision of law indicates that it should not be considered as such even though it is either a public or city utility. Indeed, for this Court to hold to the contrary and find that an entity can be an electric utility even if it is not a public utility would create an absurd result in the law because the Board is only given authority over public utilities in its enabling statute, Iowa Code § 476.1. See generally, State v. Pickett, 671 N.W.2d 866, 870 (Iowa 2003) (holding that "statutes are interpreted in a manner to avoid absurd results"). There is no indication that Iowa Code § 476.22 was meant to expand the jurisdiction of the Board to entities other than public utilities, and to so find would be a radical expansion of the Board's power that the legislature did not intend. See generally, Doe v. Ray, 251 N.W.2d 496, 500 (Iowa 1977) ("Of course, the polestar [of statutory interpretation] is legislative intent.").

EPS will note in summary, though, that "electric utility" is defined by Iowa Code § 476.22 to include either a "public utility" or a "city utility" unless another provisions of law further restricts the definition. The Board is

not empowered to expand the definition and, to permit the Board to do so, would enable the Board to expand its jurisdiction beyond that which the legislature intended. This is because Chapter 476 grant of jurisdiction to the Board extends only to "public utilities." Accordingly, the district court erred in its analysis.

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.

REQUEST FOR ORAL SUBMISSION

In accordance with Iowa Rule of Appellate Procedure 6.908, Appellant hereby requests oral argument in this matter.

Philip E. Stoffregen AT0007529
James L. Pray AT0006318
Jonathan M. Gallagher AT0009845
BROWN, WINICK, GRAVES, GROSS, BASKERVILLE AND SCHOENEBAUM, P.L.C.
666 Grand Avenue, Suite 2000
Des Moines, IA 50309-2510
Telephone: 515-242-2400
Facsimile: 515-283-0231
Email: stoffregen@brownwinick.com
Email: pray@brownwinick.com
Email: gallagher@brownwinick.com

ATTORNEY'S COST CERTIFICATE

I hereby certify that the true and actual cost for printing the foregoing Brief of Appellee/Cross-Appellant SZ Enterprises, LLC d/b/a Eagle Point Solar was $ 212.26 .

Philip E. Stoffregen AT0007529
James L. Pray AT0006318
Jonathan M. Gallagher AT0009845
BROWN, WINICK, GRAVES, GROSS, BASKERVILLE AND SCHOENEBAUM, P.L.C.
666 Grand Avenue, Suite 2000
Des Moines, IA 50309-2510
Telephone: 515-242-2400
Facsimile: 515-283-0231
Email: stoffregen@brownwinick.com
Email: pray@brownwinick.com
Email: gallagher@brownwinick.com

CERTIFICATE OF SERVICE AND FILING

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

David Lynch, General Counsel
Gary Stump, Deputy General Counsel
Iowa Utilities Board
1375 E. Court Avenue, Room 69
Des Moines, IA 50319

Dennis L. Puckett
Elizabeth Overton
Sullivan & Ward, P.C.
6601 Westown Parkway, Suite 200
West Des Moines, IA 50266

Mark R. Schuling, Consumer Advocate
Jennifer C. Easler, Attorney
1375 E. Court Avenue, Room 63
Des Moines, IA 50319

Joshua T. Mandelbaum
Bradley Klein
Staff Attorney
Environmental Law & Policy Center
505 Fifth Avenue, Suite 333
Des Moines, IA 50309

Paula N. Johnson
Senior Attorney-Regulatory
Alliant Energy Corporate Services, Inc.
P.O. Box 351
Cedar Rapids, IA 52406-0351

Deborah M. Tharnish
Scott M. Brennan
Sarah E. Crane
Davis, Brown, Koehn, Shors, & Roberts, P.C.
215 10th Street, Suite 1300
Des Moines, Iowa 50309

Suzan M. Stewart
Managing Senior Attorney
MidAmerican Energy Company
P.O. Box 778
Sioux City, IA 51102

I further certify that on September 26, 2013, I will file this document by having eighteen (18) copies of it hand delivered to the Clerk of the Supreme Court, 1111 East Court Avenue, Des Moines, Iowa, 50319.

Philip E. Stoffregen AT0007529
James L. Pray AT0006318
Jonathan M. Gallagher AT0009845
BROWN, WINICK, GRAVES, GROSS, BASKERVILLE AND SCHOENEBAUM, P.L.C.
666 Grand Avenue, Suite 2000
Des Moines, IA 50309-2510
Telephone: 515-242-2400
Facsimile: 515-283-0231
Email: stoffregen@brownwinick.com
Email: pray@brownwinick.com
Email: gallagher@brownwinick.com

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

1. The brief complies with the type-volume limitation of Iowa Rule of Appellate Procedure 6.903(1)(g)(1) or (2) because:

[X] this brief contains 13,180 words, excluding the parts of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(g)(1) or

[ ] this brief uses monospaced typeface and contains [number of] lines of text, excluding the parts of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(g)(2).

2. This brief complies with the typeface requirements of Iowa Rule of Appellate Procedure 6.9039(1)(e) and the type-style requirements of Iowa Rule of Appellate Procedure 6.903(1)(f) because:

[X] this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14 point Times New Roman, or

[ ] this brief has been prepared in monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

James L. Pray

9/26/2013
Date