IN THE SUPREME COURT OF IOWA

SZ ENTERPRISES, LLC, Petitioner-Appellee/Cross-Appellant, v. IOWA UTILITIES BOARD, a Division of the Department of Commerce, State of Iowa, Respondent—Appellant/Cross-Appellee, And INTERSTATE POWER AND LIGHT COMPANY and MIDAMERICAN ENERGY COMPANY, Intervenors-Appellants/Cross-Appellees.	No. 13-0642 (Appeal of the Order of the Polk County District Court Case No. CVCV009166, The Honorable Carla T. Schemmel)

REPLY BRIEF OF APPELLANT/CROSS-APPELLEE IOWA UTILITIES BOARD

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IV. ARGUMENT

Summary of Reply

In making its decision that Eagle Point is not a public utility as defined by Iowa Code § 476.1, the District Court said it took into account the particular facts and circumstances of the case, the nature of Eagle Point's actual operations and their effect on the public interest, the eight Serv-Yu factors[1], and Iowa's strong legislative policies supporting energy conservation and renewable energy development. (App. 1193). What the District Court did not do, and what Eagle Point, the Solar Coalition, and Consumer Advocate failed to do, is adequately consider the state's policy regarding exclusive service territories and the regulatory compact, including the impact on other customers. Decisions are not made in a vacuum, and a decision that could have implications to dramatically impact the current utility business model and turn the regulatory compact upside down, is one more appropriately made by the General Assembly rather than the District Court.

[1] The eight factors are from an Arizona case, Natural Gas Service Co. v. Serv-Yu Cooperative, Inc., 219 P.2d 324 (Arizona 1950), which was cited by the Iowa Court in Iowa State Commerce Comm'n v. Northern Natural Gas Co., 161 N.W.2d 111 (Iowa 1968).

The District Court correctly determined that an "electric utility" as defined by the electric exclusive service territory statutes could mean something other than a "public utility" or "city utility." The District Court erred, however, in failing to remand the question to the Board and, instead, decided that no exceptional circumstances existed to warrant a broader definition in this case. (App. 1195-1196).

A. The District Court Erred in Determining Eagle Point was not a Public Utility

The Board is criticized for not applying the eight-factor test from Natural Gas Service Co. v. Serv-Yu Cooperative, Inc., 219 P.2d 324 (Arizona 1950), which was referred to and applied by the Iowa Court in Iowa State Commerce Comm'n v. Northern Natural Gas Co., 161 N.W.2d 111 (Iowa 1968). It is important to note that the Northern case was decided prior to Iowa's adoption of the exclusive service territory statutes in Iowa Code §§ 476.22 through 476.26, which cemented the utility's obligation to serve all customers within its exclusive service territory.

This case was the first time, in the context of a third-party provider of electricity, where the Board was faced with interpreting the term "public utility" in a manner consistent with other rights and responsibilities imposed by chapter 476 on public utilities providing retail electric service, such as

the obligation to serve all customers within an exclusive service territory. The administrative decision cited by the Solar Coalition, In Re: Hawkeye Land Co. v. ITC Midwest, LLC, 2011 WL 4640860 (Iowa U.B.), where the Board did cite the Northern case, involved determining whether an entity that provides wholesale transmission service is a public utility as defined by Iowa Code § 476.27(1)"e," the railroad right-of-way crossings statute. The Board did not go through the eight Serv-Yu factors in its decision but noted that the Northern case, even though it involved the definition of public utility under 476.1 rather than the railroad crossings statute, was instructive because the Court considered the overall public interest and how it is affected by the utility service in question. (App. 66). The entity involved in the Hawkeye case (ITC Midwest) provides transmission service to wholesale customers such as IPL, municipals, and cooperatives, and was found to be a public utility as defined by the railroad crossings statute. ITC Midwest is not a public utility pursuant to § 476.1 because it does not provide any service at retail to the public.

The key takeaway from the Hawkeye decision is the Board's consideration of all factors impacting the public interest, including the exclusive service territory statutes and the impacts on other IPL customers. The Board has consistently protected exclusive service territory statutes

from in-roads by competitors, including disallowing a request to "wheel" or transport off-site generation over a utility's poles and wires to a customer. While not involving the same type of situation that is involved here, the cases are noteworthy because of the importance placed on the exclusive service territory statutes in both cases. See, Lambda Energy Marketing Company, LLC v. IES Utilities, Inc., Docket No. FCU-96-8 (08/25/1997); In Re: MidAmerican Energy Company. Docket No. DRU-98-1, 186 P.U.R. 4th 1, 1998 WL 352662 (5/29/1998).

Even if the Court finds that it is appropriate to apply the Serve-Yu factors, the District Court's and various parties' arguments regarding application of the eight-factor test are not persuasive and appropriate application of the factors supports the Board's conclusion that Eagle Point is a public utility. The first Serv-Yu factor is what the corporation actually does, with the argument being that selling electricity is only incidental to what Eagle Point does. However, based on the facts posed in Eagle Point's petition, electricity is purchased from Eagle Point on a per kWh basis. The design, installation, maintenance, and financing of the facility are worth nothing unless the facility is able to produce and sell electricity to Dubuque on a per kWh basis—this is the core of the business. Without the production and sale of electricity on a per kWh basis from Eagle Point to

Dubuque, the solar installation is merely an expensive sculpture or oddity. While Eagle Point may provide services in other situations that are not the sale of electricity, here that is what it set out to do.

The second factor is a dedication to public use. While Eagle Point is only providing service to Dubuque, Dubuque is a member of the public. More importantly, the impact that Eagle Point's arrangement with Dubuque has on other IPL customers must be considered because it is those customers who must pick up the costs of facilities that were built by IPL to serve Dubuque but are no longer used for that purpose, because Eagle Point has replaced IPL as a provider of some of the energy used by Dubuque.

The third factor is Eagle Point's articles of incorporation. The corporate documents do not provide any information other than general corporate information and are not indicative one way or the other as to whether Eagle Point is a public utility.

The fourth factor is dealing with a service or commodity in which the public has generally been held to have an interest. As evidenced by Iowa Code chapter 476, electricity is a service or commodity in which the state has an interest. While Eagle Point and the Solar Coalition focus on the fact that Dubuque remains a customer of IPL (although purchasing less electricity), they ignore the impact that providing this service has on other

IPL customers, because those IPL customers pick up the costs of facilities that were built to serve Dubuque but are no longer used for that purpose.

The fifth factor is monopolizing, or intending to monopolize, the territory with a public service commodity. Here, public utility commissions should look not only at the impact of Eagle Point, but at the impact of numerous Eagle Points that could offer such services. Taken as a whole, companies offering services such as Eagle Point could make significant inroads into the exclusive offerings of IPL in its service territory, to the detriment of IPL and IPL customers unable to take advantage of solar companies' offerings because those customers pick up the costs of utility plant that is no longer needed to serve the customers with the solar installations.

The sixth factor, the acceptance of substantially all requests for service, was not developed in the record as there is no information regarding the extent Eagle Point accepts requests for service. The District Court therefore did not use this factor in its analysis.

The seventh factor relates to service under contracts and the right to refuse service. This factor provides that regulation cannot be avoided by entering into private contracts and reserving the right to discriminate. Northern, 161 N.W.2d at 117.

The eighth factor is actual or potential competition with other corporations whose business is clothed with the public interest. It is nonsensical to say that Eagle Point does not compete with IPL by limiting the examination to whether IPL or other utilities provide customers with solar panels. The more appropriate examination is to view both IPL and Eagle Point as suppliers of electricity. While Eagle Point may not supply all of its customer's load all of the time, by offering to provide electricity to one or more IPL customers Eagle Point is competing with IPL for a portion of that customer's electricity needs.

Eagle Point's promotional brochures, although not part of the declaratory ruling request but submitted in the agency record by IPL, indicate that Eagle Point would offer its service to members of the public and would not limit its activities to Dubuque, which the Board found are attributes of a public utility. (App. 1153-1154). The Board's finding that selling electricity on a per kWh makes Eagle Point a public utility is consistent with the language of Iowa Code § 476.1, the exclusive service territory statutes, and the Serv-Yu factors. Without a bright-line definition, electric utility regulation will become confusing as parties will not know how many customers could be served by an entity such as Eagle Point and enforcement could be difficult. Eagle Point acknowledged that it might try

to serve additional customers under its own risk, essentially waiting to see if the violation would be noticed or an enforcement action brought. (App. 609). Although the District Court limited its ruling to the current situation, the precedential value could have widespread impact on the electric industry, impacts that should first be addressed by the General Assembly.

Beginning at page 43 of its Initial Brief, the Solar Coalition cites various administrative decisions from other states in an attempt to bolster its position and attack the relevance of the Florida case cited by the Board, PW Ventures Inc. v. Nichols, 533 So.2d 281 (Fla. 1988). While the PW Ventures case is 25 years old, as noted by the Solar Coalition, the recognition of the impact of exclusive service territory statutes is as relevant today as it was then. A reading of the administrative decisions cited by the Solar Coalition in a footnote on page 44 of its Initial Brief is of little use to analyzing the Iowa situation. For example, Colorado passed a specific statute which changed the exclusive service territory statute parameter by specifically requiring utilities to accept on-site solar systems and allow them to be supplied by third-party developers. (App. 503). If Iowa is to experience such a change in utility regulation, that mandate should come from the legislature, not the Board or the courts. The District Court's decision is a rebalancing of the rights and obligations imposed by chapter

476 without appropriate direction from the General Assembly to support such a policy.

The Solar Coalition and Eagle Point both cite administrative decisions from Arizona and New Mexico as supporting their position. However, these decisions are not persuasive because of the differences from Iowa in those states regulatory schemes. Eagle Point in particular points out that the definitions of public utility are similar in Arizona, New Mexico, and Iowa. However, Eagle Point ignores the fact that neither Arizona nor New Mexico have state have exclusive service territory statutes like Iowa's and, as noted by IPL and MidAmerican in their joint initial brief at page 45, both Arizona and New Mexico have experimented with deregulation. While the impact of Eagle Point alone is small, it is clear that others have visions for large retailers to take advantage of similar offerings to reduce their energy costs. (App. 1249). This direct competition with exclusive utility service would turn the regulatory compact upside down and is an issue that should be addressed through legislation.

The Solar Coalition and Consumer Advocate rely heavily on policy arguments to support their position, primarily that alternate energy production and energy efficiency policies are strongly supported in Iowa. The Board does not dispute that Iowa is a leader in both alternate energy

and energy efficiency. However, these policies must be carried out in ways that do not negatively impact other state policies, such as the exclusive service territory statutes and obligation to serve. The Board's interpretation of the definition of public utility is consistent with all of the state's energy policies and also considered the impact on utility customers who would not be Eagle Point customers.

B. The District Court Erred in not Remanding to the Board the Question of Whether Eagle Point is an "Electric Utility" and Therefore Subject to the Exclusive Service Territory Statutes

Eagle Point argued that the District Court appropriately found that exceptional circumstances did not exist to find that Eagle Point is an "electric utility" as defined in Iowa Code § 476.22, arguing that the Eagle Point project is not extraordinary because it furthers and promotes Iowa's energy efficiency and alternate energy generation public policy. (Eagle Point Initial Supreme Court Brief, p. 58). Again, both Eagle Point and the District Court ignore the public policies behind the exclusive service territory statutes, such as reliability and the unnecessary duplication of facilities. See, O'Brien County Rural Elec. Cooperative. v. Iowa State Commerce Comm'n, 352 N.W.2d 264, 267-268 (Iowa 1984). The impact on other IPL customers is also ignored.

The determination of whether Eagle Point is an electric utility should have been remanded by the District Court to the Board for an initial determination. Because of the broad authority given to the Board to implement the exclusive service territory statutes (Iowa Code §§ 476.22 through 476.26), the courts appropriately should defer to the Board's interpretation of whether Eagle Point qualifies as an electric utility. This situation is analogous to Evercom Systems, Inc. v. Iowa Utilities Board, 805 N.W.2d 758, 762-763 (Iowa 2011), where the Court found that the Board had the authority to interpret "unauthorized change in service" because it was a specialized term and the Board had the authority to implement the relevant statutory section.

C. The District Court Correctly Concluded that an "Electric Utility" Could Encompass More than a "Public Utility" or "City Utility"

On cross-appeal, Eagle Point disagreed with the District Court's conclusion that an entity that is neither a "public utility" nor a "city utility" could still be an "electric utility" as that term is defined in Iowa Code § 476.22. The primary support for Eagle Point's proposition appears to be its assertion that the Board only has jurisdiction over public utilities. While it is generally true that the Board only has jurisdiction over public utilities, there are limited instances where this jurisdiction has been expanded.

For example, Iowa Code § 476.27 grants the Board jurisdiction over public utility crossing of railroad rights-of-way and allows the Board to prescribe terms and conditions for a crossing that apply both to the utility and the railroad. Iowa Code § 476.27(1)"e" expands the definition of public utility for purposes of this section and § 476.27(1)"f" defines a "railroad" and "railroad corporation," both of which are subject to the crossing statute. Likewise, Iowa Code § 476.22 grants the Board jurisdiction over "electric utilities" for purposes of enforcing the service territories statute, a category that is not limited to a "public utility" or "city utility."

Where the Board disagrees with the District Court is its conclusion that no exceptional circumstances were present such that the term "electric utility" meant anything other than a public utility under section 476.1 or a city utility. (App. 1195). The District Court should have remanded to the Board for an initial determination of whether Eagle Point qualified as an "electric utility" pursuant to § 476.22.

V. CONCLUSION

The long-term, heavy capital investment traditionally associated with electric utility operations is the fulcrum on which the General Assembly balanced the rights and obligations expressed in Chapter 476. Eagle Point's

interpretation of what is a public utility hypothesized in its declaratory ruling request undercuts this obligation to commit capital to utility infrastructure and upsets the balance. The Iowa legislature made the decision to adopt the regulatory compact found in Chapter 476. If Iowa is to change to a competitive retail electric environment to respond to changes occurring in the electric industry, statutory changes are required. Presumably, any changes would create a new balance of rights and obligations for those who provide electric service. The Board defined "public utility" consistent with the statutory language in Iowa Code § 476.1 and the other provisions of Iowa Code chapter 476. If Iowa is to become a retail or customer choice state on a full or limited basis, that is a decision for the Legislature to make. Iowa's current regulatory scheme does not allow it.

Respectfully submitted,

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VI. CERTIFICATE OF COMPLIANCE

The brief complies with the type-volume limitations of Iowa R. App. P. 6.903(1)(g)(1) because the brief contains 2,770 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief complies with typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2007 in 14-point New Times Roman.

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VII. COST CERTIFICATE

The cost of producing the necessary copies of this reply brief, exclusive of stenographic expense, was $ 22.68.

Gary Stump
Deputy General Counsel

VIII. CERTIFICATE OF SERVICE

I, Gary Stump, being one of the attorneys for the Iowa Utilities Board, certify that the attached " REPLY BRIEF OF APPELLANT IOWA UTILITIES BOARD " was served upon all of the parties to this appeal by enclosing a copy in an envelope with the postage fully paid and by depositing the envelope in a United States Post Office depository in Des Moines, Iowa, on the 26th of September, 2013, addressed to the following parties:

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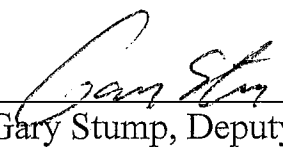

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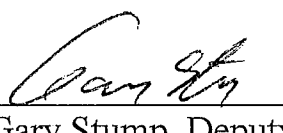
I further certify that on September 26, 2013, I filed this document by personally delivering eighteen (18) copies of it to the Clerk of the Supreme Court, 1111 Court Avenue, Des Moines, IA 50319.



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