IN THE SUPREME COURT OF 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 & POLICY CENTER, IOWA ENVIRONMENTAL COUNCIL, IOWA SOLAR/SMALL WIND ENERGY TRADE ASSOCIATION, IOWA RENEWABLE ENERGY ASSOCIATION, SOLAR ENERGY INDUSTRIES ASSOCIATION, and VOTE SOLAR INITIATIVE,

Intervenors.

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

PROOF BRIEF OF SOLAR COALITION INTERVENORS

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CERTIFICATE OF FILING & SERVICE

I, Bradley Klein, Attorney for the Solar Coalition Intervenors, hereby certify that I or someone acting on my behalf will file the attached Proof Brief in compliance with Iowa Rules of Appellate Procedure by filing two (2) copies thereof with the Clerk of the Iowa Supreme Court, Iowa Judicial Branch Building, 111 East Court Avenue, Des Moines, Iowa 50319 on the 19th day of August, 2013 by regular U.S. Mail.

I, Bradley Klein, Attorney for the Solar Coalition Intervenors, hereby certify that I or someone acting on my behalf served via regular mail, postage prepaid, a copy of the attached Proof Brief in compliance with Iowa Rules of Appellate Procedure upon all other attorneys of record as listed below, on the 19th day of August, 2013 by regular U.S. Mail.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 13, 296 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the 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 this brief has been prepared in a proportionally space typeface using Microsoft Office 2010 in font size 14 and type style Times New Roman.

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ROUTING STATEMENT

This case is appropriate for retention under Iowa R. App. P. 6.1101(2)(d), as it presents fundamental and urgent issues of broad public importance requiring prompt or ultimate determination by the Supreme Court. The case requires application of existing Supreme Court precedent to new facts, in particular *Iowa State Commerce Commission v. Northern Natural Gas Co.*, 161 N.W.2d 111 (Iowa 1968) and *Northern Natural Gas Co. v. Iowa Utilities Board*, 679 N.W.2d 629 (Iowa 2004). It is important for this Court to clarify the meaning of the term "public utility" (Iowa Code § 476.1) as it applies to businesses that help their customers finance rooftop solar systems using third-party power purchase agreements (PPAs). Third-party financing reduces transaction costs and helps simplify the process of rooftop solar and other forms of on-site renewable energy development, allowing homeowners, businesses, and municipalities to meet their sustainability goals and improve environmental and public health at lower overall cost. Third-party financing is an important element of a healthy and growing clean energy business sector, and the current regulatory uncertainty in Iowa is hindering the development of the market.

STATEMENT OF THE CASE

This case requires the Court to determine whether Eagle Point Solar is a "public utility" as the term is used in Chapter 476 of the Iowa Code. Eagle Point, a small Iowa business, filed a Petition for Declaratory Order urging the Iowa Utility Board to rule that its "power purchase agreement" (PPA) with the City of Dubuque – to finance the construction, maintenance and operation of a small solar array on a city-owned building – does not trigger public utility regulation under Iowa law. The Board rejected Eagle Point's position, finding that Eagle Point is a public utility and therefore prohibited from operating in the exclusive service territory of Interstate Power & Light (IPL), Dubuque's incumbent electric utility.

The Polk County District Court reversed the Board, finding that the Board "committed legal error" when it disregarded *Iowa State Commerce Commission v. Northern Natural Gas Co.* and other longstanding Iowa Supreme Court precedent for determining when an entity is a public utility. Applying the "proper legal analysis" from these Supreme Court cases, the District Court determined that Eagle Point does not provide electricity "to the public" and thus is not a "public utility" as defined in section 476.1 or an "electric utility" as defined in section 476.22. (*See* App. __; District Court Ruling at 12-13 (citing *N. Natural Gas Co. v. Iowa Util. Bd.*, 679 N.W.2d

629 (Iowa 2004) ("*Northern II*"); *Iowa State Comm. Comm'n v. N. Natural Gas Co.*, 161 N.W.2d 111 (Iowa 1968) ("*Northern I*".) The Board and several electric utilities appealed.

STATEMENT OF FACTS

Eagle Point Solar is a small business located in Dubuque, Iowa. Eagle Point designs, installs, operates and maintains solar panel systems on the rooftops of Iowa homes and businesses. The solar systems constructed by Eagle Point are located entirely on the property of its customers and are constructed pursuant to various contracts that Eagle Point enters with each one of its customers. As will be explained further below, Eagle Point provides a variety of solar financing options for its customers, including direct sales, in which the customer takes ownership of the system, and solar leases and power purchase agreements (PPAs), in which Eagle Point retains ownership of the systems for a period of time and recovers its costs for the solar panels, installation and maintenance either through a monthly lease payment or a "per-kilowatt hour" (kWh) charge for the electricity generated by the system.

In recent years, the City of Dubuque became interested in solar as part of its "vigorous" and systematic" pursuit of sustainability and the development of local renewable energy resources. (*See* App. __; Petition for

Declaratory Order at 1-2.) After discussions with Eagle Point, Dubuque decided to develop an on-site solar photovoltaic (PV) power system on the roof of a city-owned building in Kerper Industrial Park. The rooftop PV system is located behind the building's electrical meter so the power is fed directly into the building's electrical panel to serve the building's own electrical needs. (*Id.* at 3.) Because the system is located "behind-the-meter," no utility distribution lines or facilities will be used to transport electricity from the solar panels on the roof to the City premises. (*Id.*) Dubuque's new solar panels will only produce a small portion of the building's annual energy needs. (*Id.*) The premises will remain connected to the electric grid, and the City will continue to purchase electric power from IPL to meet its remaining electric power requirements. (*Id.* at 4.)

Dubuque elected to finance its new solar panels using a third-party power purchase agreement, or PPA, with Eagle Point. PPAs are popular financing tools to help make renewable energy more affordable and less complicated for entities like cities, school districts, homes and businesses across the country. Under PPA financing, a renewable energy business designs, installs, owns and operates a solar energy facility on the customer's own rooftop, and the customer compensates the third-party developer over time for these services by paying a "per-kWh" charge based on the energy

that the renewable energy system produces. This "per-kWh" charge pays down the cost of acquiring the solar panels over time, compensates the developer for design and installation of the system, monetizes any offsetting renewable energy incentives related to the system and covers the developer's costs of operating and maintaining the system on an ongoing basis. (*See* App. __; Petition for Declaratory Order at 3-4.) The PPA also enables nonprofit entities and municipalities like Dubuque to partner with a for-profit business in order to take advantage of federal tax credits and accelerated depreciation for solar energy projects. At the end of the PPA contract term with Eagle Point, Dubuque will own the solar system. (App. __; Petition for Declaratory Order at 4.)

Dubuque had several different options to finance its new solar panels. It could have purchased the system directly using cash reserves, it could have secured a traditional loan from a bank, it could have issued municipal bonds, it could have leased the solar equipment directly from Eagle Point or, as it ultimately decided to do, it could have signed a PPA with Eagle Point. Under any one of these financing options, the solar system would be identical and would operate in exactly the same way. Dubuque preferred the PPA financing option because it helped lower transaction costs and overall expenses for the City. (*See* App. __; Petition for Declaratory Order at 18.)

There is no dispute that if Dubuque had elected to finance its solar system using any of the other financing tools available to it, Eagle Point would not be considered a public utility. It is only the "per-kWh" nature of Dubuque's payment to Eagle Point under its PPA that provides a basis for the utilities' arguments in this case. In fact, once IPL informed Dubuque of its concerns about the solar project, the City, at IPL's suggestion, decided to convert its PPA to an equipment lease with Eagle Point and continued operating its new solar system without any interruption. (*See* App. __; District Ct. Br. of IPL at 5.)

In August 2011, IPL raised concerns that Eagle Point was operating as a public utility in the "exclusive service area" assigned to IPL pursuant to Iowa Code section 476.25. In order to resolve the dispute, Eagle Point filed a petition for declaratory order with the IUB, seeking clarification that Eagle Point would *not* be considered a "public utility" under Iowa Code 476.1 or an "electric utility" under section 476.22 as a result of its PPA contract with Dubuque. Several parties intervened, including multiple electric utility parties, the Consumer Advocate Division of the Department of Justice ("Consumer Advocate"), and a coalition of solar, small wind, and environmental groups represented by the Environmental Law & Policy Center (collectively, the "Solar Coalition").

Eagle Point, the Consumer Advocate, and the Solar Coalition argued that a pair of Iowa Supreme Court decisions (*Northern Natural Gas I* and *II*) supported an interpretation that Eagle Point was not a public utility. The Board disagreed that the *Northern* cases applied, finding that "[t]here are significant differences between electricity and natural gas." (App. __; Declaratory Order at 10.) Instead of applying the multifactor analysis set forth in the *Northern* cases, the Board found that the "per-kWh" basis of Eagle Point's contract with Dubuque was a "key factor" in determining that Eagle Point is a public utility. (*Id.* at 12.) The Board's decision effectively barred the use of PPAs for solar project financing in Iowa and would set Iowa apart from the growing market for solar PPAs in other parts of the country.

On March 29, 2013, the Iowa District Court for Polk County reversed the Board's Declaratory Order, concluding that the Board erred when it determined that the *Northern* cases were distinguishable and not applicable to the case at bar. After applying the practical, multi-factor analysis set forth in *Northern I*, the District Court determined that Eagle Point's business (installing solar panels) was not "clothed in the public interest" and did not raise the traditional reasons for public utility regulation in Iowa. (App. __; District Court Ruling at 13.) Thus, the Court concluded Eagle Point was

neither a public utility nor an electric utility, and its PPA with Dubuque did not violate Iowa law. (*Id.* at 23.)

On April 25, 2013, the IUB and several utility parties filed a notice of appeal. On May 3, 2013, Eagle Point filed a cross-appeal.

ARGUMENT

Summary of Argument

In this case, the IUB disregarded longstanding Iowa Supreme Court precedent and created a new test for public utilities in the *electricity* context (as distinguished from all other public utilities) where none appears in the Iowa code or legal precedent. Third-party owners delivering electricity under long-term PPAs do not have the characteristics of "public utilities" as defined by the Iowa Public Utilities Act and the cases that have interpreted it. Sales of electricity from on-site renewable energy systems raise none of the underlying reasons for public utility regulation—such as the presence of an "indispensable" service, the fear of a natural monopoly, or unequal bargaining power that could subject the public to exorbitant charges and arbitrary control. *See Chas. Wolff Packing Co. v. Court of Indus. Relations of the State of Kansas*, 262 U.S. 522, 538 (1923) (describing characteristics that determine when a business has become "clothed with a public interest").

Since at least 1968, courts in Iowa have engaged in a "practical analysis" that centers on the "nature of the actual operations conducted and its effect on the public interest" in order to determine whether a business should be considered a public utility. *See N. Nat. Gas Co. v. Iowa Util. Bd.*, 679 N.W.2d 629, 633 (Iowa 2004) ("*Northern II*") (discussing and applying the test for "public utility" first set forth in *Iowa State Comm. Comm'n v. N. Nat. Gas Co.*, 161 N.W.2d 111 (Iowa 1968) ("*Northern I*")). In its decision below, the district court faithfully applied this precedent by considering the set of eight public interest ("*Serv-Yu*") factors from the *Northern I* case, the nature of Eagle Point's business and its effect on the public interest.

As part of this analysis, the district court determined correctly that Eagle Point's "primary business" is to install solar panels and that the sale of electricity under Dubuque's PPA contract was incidental to the company's larger suite of services involving the "design, maintenance, and financing of solar equipment." (App. __; District Court Ruling at 13.) The district court also determined that third-party renewable developers are not "natural monopolies" and there is no reason to regulate them as such:

> They do not have market power; there is substantial competition between such entities; customers are free to negotiate individualized prices and terms of service; they do not operate with exclusivity requirements even for a single customer; and, again, all customers remain connected to the

> utility grid for services in the absence of or in supplement to any on-site renewable energy generation.

(*Id.* at 16.) Finally, as the district court recognized, the fact that Eagle Point offers its customers a number of different financing options (including PPA financing) does not change the essential character of its business as a solar developer, not a public utility furnishing electricity. (*Id.* at 14.)

Instead of examining the public interest factors from *Northern I* to determine whether Eagle Point's operations are "clothed with a public interest," the Board adopted a narrower test, concluding that sales of electricity "on a per-kWh basis" is the key factor in determining that Eagle Point would be a public utility. (App. __; Declaratory Order at 12); *see also* IUB Br. at 20 ("Selling electricity on a per kWh basis is a test that is understandable, readily applied, and based upon the language of § 476.1."). The Board's rejection of the *Northern* test is inconsistent with case law and the Board's own prior practice. In a case just two years ago, the Board cited *Northern* as the "appropriate analysis" to use in a case involving electric transmission companies. *See, e.g., In re Hawkeye Land Co. v. ITC Midwest LLC*, 2011 Iowa PUC LEXIS 338 at *52-*53 (IUB 2011). In any event, even if the Board would prefer a different test that is more "understandable" or "readily applied," it is not free to disregard Supreme Court precedent and more than four decades of "legislative quiescence" to fashion its own test as

if writing on a blank slate. *See Welch v. Iowa DOT*, 801 N.W.2d 590, 600 (Iowa 2011) (noting that "[s]tare decisis is a valuable legal tool which lends stability to the law").

The Board and utility parties repeatedly (and mistakenly) argue that allowing PPA financing would create "customer choice" and "back-door deregulation" while ignoring that several fully regulated states (including Colorado, New Mexico, Oregon and others) allow PPA financing of solar projects without the dire consequences predicted in the Board and utility briefs. The Board and utility parties also repeatedly (and mistakenly) argue that the district court was substituting its own policy preference or creating judicial exemptions in place of explicit legislation. Instead, the district court's opinion faithfully applies existing Supreme Court precedent by focusing on the nature of Eagle Point's business. (App. __; District Court Ruling at 13-14.) It is the IUB, and not the district court, that is creating an exception where none exists in Iowa Code or in the cases interpreting it. If the legislature had intended to create separate tests for determining whether entities furnishing electricity or natural gas are public utilities, it could have done so. Instead, as the district court noted, the Iowa legislature "was aware" of the Supreme Court's longstanding definition of the phrase "for the public" and yet did not amend and craft a separate definition for electric utilities at

the time it adopted the exclusive service territory statute. (App. __; District Court Ruling at 10, n.3); *see Welch*, 801 N.W.2d at 600 (citing several cases for the principle that "issues of statutory interpretation settled by the courts and not disturbed by the legislature over a period of time have become tacitly accepted by the legislative branch").

This Court has made clear that the Board should extend its public utility jurisdiction "only as necessary to address the public interest implicated." *Northern II*, 679 N.W.2d at 633. In this case, Eagle Point's use of PPA financing does not implicate the public interest factors that the Board should have considered under the applicable case law. Furthermore, there is no valid public interest reason for the Board to exert its jurisdiction over solar projects that happen to be financed with PPAs, but not solar projects built using other financing techniques. The Board in this case has overextended its jurisdiction, beyond this Court's guidance in *Northern*, to regulate a set of private business contracts governing activities that take place solely on a customer's property. Rather than protecting the public interest, the Board's interpretation of the Iowa Public Utility Act in this case appears intended to protect the utilities from their customers' reasonable efforts to generate renewable energy for their own use.

Based on Iowa Supreme Court precedent, the Iowa Code policy goals supporting renewable energy, and the purpose of regulating public utilities, the District Court's decision should be affirmed. Nothing in Iowa's Public Utility Act was intended to prevent Iowa residents, businesses, and municipalities to take advantage of low-cost financing tools for clean and renewable on-site generation that are available to hundreds of thousands of other utility customers in states across the country.

I. Standard of Review

A. The district court correctly reviewed the Board's decision for "correction of errors at law" as required by the Iowa Supreme Court's ruling in N*extera Energy Resources LLC v. Iowa Utilities Board.*

The Iowa Administrative Procedure Act sets forth the standards to guide judicial review of agency actions like the Board's Declaratory Order. *See* Iowa Code Ch. 17A. In relevant part, section 17A.19(10) provides that the court shall "reverse, modify, or grant other appropriate relief" if it determines that the substantial rights of the person seeking judicial relief have been prejudiced because the agency action is any of the following:

> ….
>
> c. Based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency
>
> ….

> h. Action other than a rule that is inconsistent with the agency's prior practice or precedents, unless the agency has justified that inconsistency by stating credible reasons sufficient to indicate a fair and rational basis for the inconsistency.
>
> i. The product of reasoning that is so illogical as to render it wholly irrational.
>
> ….
>
> l. Based upon an irrational, illogical, or wholly unjustifiable interpretation of a provision of law whose interpretation has clearly been vested by a provision of law in the discretion of the agency.
>
> ….
>
> n. Otherwise unreasonable, arbitrary, capricious, or an abuse of discretion.

Iowa Code § 17A.19(10). This court should review the district court's order by applying the Iowa Administrative Procedure Act to the agency action to decide whether it reaches the same conclusions as the district court did. *City of Dubuque v. Iowa Utils. Bd.*, 828 N.W.2d 326 at *7 (Iowa Ct. App. 2013) (citing *Ayers v. D & N Fence Co.*, 731 N.W.2d 11, 15 (Iowa 2007)).

The district court examined the Board's interpretation of Chapter 476 for "correction of errors at law" under subsection (c) of Iowa Code § 17A.19(10), without giving deference to the Board's interpretation. (App. __; District Court Ruling at 6). In determining that the Board's interpretation was not entitled to deference, the district court relied on the Supreme Court's recent opinion in *NextEra Energy Resources LLC v. Iowa Utilities Bd.*, 815 N.W.2d 30, 36 (Iowa 2012). In *NextEra*, the Court determined that the

legislature did not clearly vest the Board with authority to interpret Chapter 476. Thus, the Court reviewed the Board's decision for correction of errors at law and interpreted the term "electric supply needs" under section 476.53(4)(c)(2) without deference to the Board's interpretation. *Id.*

The Court in *NextEra* reached its decision after carefully examining both the explicit text and overall context of Chapter 476. First, it determined the legislature did not explicitly vest the Board with the authority to interpret specific terms in chapter 476. Thus, any legislative intent to delegate interpretative authority to the Board must be found, if at all, only through the general assembly's grant of "broad general powers" to implement the statute. *See id.* at 37 (citing Iowa Code § 476.2(1)). However, the Court concluded that the legislature's grant of "broad general powers" and rulemaking authority "does not necessarily indicate the legislature clearly vested authority in the Board to interpret all of chapter 476." *Id.* at 38. Indeed, the Court determined that the legislature did *not* intend the Board to "exercise sovereign authority" when implementing or administering chapter 476. *See id.*(concluding that the "general assembly did not delegate to the Board interpretive power with the binding force of law" with respect to chapter 476).

Other recent Supreme Court decisions, in addition to *NextEra*, support the conclusion that the legislature did not clearly vest the Board with sovereign authority to interpret Chapter 476. In *Renda v. Iowa Civil Rights Commission*, 784 N.W.2d 8 (Iowa 2010), the Court explained that when the legislature uses a term throughout the Iowa Code, it is an indication that the term has an "independent legal definition that is not uniquely within the subject matter expertise of the agency." *Renda*, 784 N.W.2d at 14. In this case, the legislature has used the term "public utility" in several other areas of the Iowa Code. *See e.g.* Iowa Code § 716.7(2)(f) and (6) (defining trespass in the Iowa Criminal Code to include entering or remaining on public utility property "as defined in section 476.1"); Iowa Code § 455H.304(2)(d) (applying the limitation of liability section of the land recycling and remediation standards to public utilities as defined in section 476.1); Iowa Code § 352.6(2)(b) (permitting a "public utility as defined in section 476.1" in an agricultural area). The fact that the term "public utility" is used in many different sections of the Iowa Code weighs against a determination that the legislature has clearly vested the Board with the authority to interpret its meaning. *See Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335, 344 (Iowa 2013) (declining to defer to agency's interpretation of the term "paternity" where it "appears in statutes that the

Department has no role in enforcing"); *Renda*, 784 N.W.2d at 14 (declining to defer to ICRC's interpretation of "employee" and "dwelling" where both terms are widely used in other areas of law).

The fact that the legislature provided its own detailed definition of "public utility" at Section 476.1 is yet another factor supporting the conclusion that the legislature never intended to vest interpretive authority with the Board. In fact, the Iowa Supreme Court recently held that the existence of an independent legislative definition of a statutory term is an "insurmountable obstacle" to a determination that the agency has been vested with interpretive authority. *See Iowa Dental Ass'n v. Iowa Ins. Div.*, 831 N.W.2d 138, 144-45 (Iowa 2013). In the *Iowa Dental* case, the Court declined to defer to the insurance commissioner's interpretation of the phrase "covered services" because "the legislature has provided its own definition." *See id.* at 145 (concluding that the existence of a statutory definition "indicates we ought to apply the legislative definition ourselves"). It is noteworthy that the statutory definition of "covered services" in the *Iowa Dental Ass'n* case is only six words long. *See* Iowa Code § 514C.3B(3)(b) ("'Covered services'" means services reimbursed under the dental plan."). In contrast, the legislature provided a much more detailed and lengthy definition of "public utility" at section 476.1. This is another factor

indicating that the legislature never intended to vest sole interpretive authority with the Board.

Finally, the Court must consider the consequences of the Board's interpretation when determining the meaning of the statute. *See* Iowa Code § 4.6(5). The Board's decision to reject the Supreme Court's longstanding interpretation of "public utility" and substitute a new method for identifying public utilities in the electricity context has important implications for the use of the term "public utility" in the other sections of the Iowa Code. It is important to have one, uniform meaning of public utility that flows from the Supreme Court's cases rather than a meaning that can change at the Board's discretion. *See Renda,* 784 N.W.2d at 14 (where terms are used in other areas of law they are "more appropriately interpreted by the courts"). For the reasons explained by the Court in *NextEra*, the Board does not have authority to interpret the term public utility in § 476.1 with the binding force of law, and the district court was correct to examine the Board's decision for corrections of error at law without deference to the agency's interpretation.

B. The Board's interpretation of "public utility" should be reversed even if the court applies a more deferential standard of review.

The Board and utility parties urge the Court to distinguish or overturn *NextEra* and hold that the Board's interpretation of "public utility" is entitled

to deference. For the reasons described above, the Board's interpretation is not entitled to deference under the principles of statutory construction described in *NextEra* and *Renda*. However, even if the Court were to apply a more deferential standard, the Board's decision should still be reversed. Deference does not mean that the Board can ignore controlling legal precedent or its own prior orders to fashion a new definition for "public utility" on a case-by-case basis. *See Sommers v. Iowa Civil Rights Comm'n*, 337 N.W.2d 470, 472 (Iowa 1983) (stating that when reviewing the ICRC's interpretation of statutory provisions "we may give deference to, but are not bound by," the ICRC's interpretation because "[t]he ultimate interpretation of Iowa statutory law is the province of the supreme court"). The Board's decision must be examined in light of the longstanding interpretation applied in case law and prior Board orders.

In this case, the Board's legal test for public utility is inconsistent not only with the Supreme Court's *Northern* cases but also with the Board's own recent precedent in both electricity and telecommunications cases. *See, e.g., In re Hawkeye Land Co. v. ITC Midwest LLC,* 2011 Iowa PUC LEXIS 338 at *52-*53 (IUB 2011) (endorsing the *Northern* analysis in an electricity case); *In re Level 3 Communications, LLC*, 2005 Iowa PUC LEXIS 125 at *2 (IUB 2005) (applying the *Northern* test in a telecommunications case); *In*

re Iowa Network Access Division, 1988 Iowa PUC LEXIS 1 at *5 (IUB 1988) (applying *Northern* in a telecommunications case). In *Hawkeye Land Co.*, decided just two years ago, the Iowa Utilities Board applied *Northern Natural Gas* to interpret the definition of "public utility" in an electric transmission case. The Board granted intervention to multiple parties including the Iowa Association of Electric Cooperatives, Interstate Power and Light Company and MidAmerican Energy Company, all intervening parties in this case. The Order issued by the Board stated:

> These two Iowa Supreme Court decisions [*Iowa State Comm. Comm'n. v. Northern Natural Gas*, 161 N.W.2d 111 (Iowa 1968) and *Northern Natural Gas Co. v. Iowa Utilities Board*, 679 N.W.2d 629 (Iowa 2004)] interpret the definition of a "public utility" in Iowa Code § 476.1 in the same manner the Board is interpreting the definition of a "public utility" under Iowa Code § 476.27, by considering the public interest and how it is affected by the utility service in question. The Iowa Supreme Court looked at the overall public interest in reaching the two decisions and *the Board considers this the appropriate analysis to use* in determining whether the three crossings are covered by Iowa Code § 476.27.

2011 Iowa PUC LEXIS 338 at *53-54 (emphasis added). Thus, the Board decided that *Northern* was the "appropriate analysis to use" in an electricity case decided just two years ago. Unlike this case, the Board did not distinguish the *Northern* cases or attempt to limit them to the natural gas context. Its contrary interpretation in the Eagle Point declaratory order,

without any explanation for the difference, is unreasonable, arbitrary and capricious and will create substantial uncertainty for regulated or potentially regulated entities in the future. *See Cover v. Craemer*, 137 N.W.2d 595, 599 (Iowa 1965) (declining to change the meaning of a statute decided almost sixty years earlier because the construction "has evidently met the approval of each successive legislature").

Thus, even if the Court decides not to review the Board's decision for "correction of errors at law" and determines that the Board's interpretation is entitled to deference, the Court should *still* reverse the Board's order under the standards articulated at Iowa Code § 17A.19(10)(h) (agency action that is "inconsistent with the agency's prior practice or precedents"), 17A.19(10)(l) (agency action that is "irrational, illogical, or wholly unjustifiable"), or 17A.19(10)(n) (agency action that is "unreasonable, arbitrary, capricious, or an abuse of discretion"). *See, e.g., Sherwin-Williams Co. v. Iowa Dep't of Revenue*, 789 N.W.2d 417, 433-44 (Iowa 2010) (reversing the agency's application of a term to the facts of the case under the "irrational, illogical, or wholly unjustifiable" standard of review at section 17A.19(10)(m) even through the Court found that the application of the law had clearly been vested by law in the discretion of the agency).

II. The District Court Correctly Applied the "Practical Analysis" Required by *Northern Natural Gas* and Subsequent Cases to Determine that Eagle Point is not a Public Utility.

In order to determine whether Eagle Point is a public utility, it is important to start with the principles underlying the need for regulation. The legislature's power to regulate the conduct of a business flows from the extent to which "the business or property involved has become 'affected with a public interest.'" *Duncan v. City of Des Moines*, 268 N.W.2d 547, 550 (Iowa 1936). As the United States Supreme Court has observed, the extent to which a business is "clothed with a public interest" depends on "the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared." *See Chas. Wolff Packing Co.*, 262 U.S. at 538. The Iowa Supreme Court looks to the "nature of the particular business operation" and "its effect on the public interest" to determine whether a public utility exists. *Northern II*, 679 N.W.2d at 633-34.

The seminal case setting out the test for public utility jurisdiction in Iowa is *Iowa State Commerce Commission v. Northern Natural Gas Co.*, 161 N.W.2d 111 (Iowa 1968) (*Northern I*). In *Northern I,* the Court examined whether the predecessor to the Iowa Utilities Board had jurisdiction to regulate Northern's retail sales of natural gas from its wholesale gas pipelines to approximately 1,800 "direct tap" customers in

Iowa. Northern maintained that the commission had no jurisdiction over this portion of its business because the "indefinite public" did not have a right to demand its service. The Court disagreed and held that Northern's direct tap business was "clothed with a public interest" and thus was subject to regulation as a public utility.

In reaching this decision, the Court first looked to the language of the statute:

> As used in this chapter, 'public utility' shall include any person, partnership, business association, or corporation, domestic or foreign, owning or operating any facilities for … Furnishing gas by piped distribution system or electricity to the public for compensation.

Id. at 113. There was no doubt that Northern was a "corporation," "furnishing gas," "for compensation." Thus, the Court observed:

> 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). In order to help determine whether Northern's direct tap sales were "clothed with a public interest," the Court looked to a variety of public interest factors from an Arizona Supreme Court case:

1. What the corporation actually does.
2. A dedication to 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.

Id. at 114 (citing *Natural Gas Service Company v. Serv-Yu Cooperative, Inc.*, 219 P.2d 324 (Ariz. 1950)). These *Serv-Yu* factors help reviewing courts determine whether a private service is sufficiently affected or "clothed" in the public interest to justify state public utility regulation. As the district court recognized, "these eight factors are not necessarily controlling of the public utility determination but are helpful and instructive on such question." (App. __; District Court Ruling at 13.)

In 2004, the Iowa Supreme Court revisited the jurisdiction of the IUB in another case involving the Northern Natural Gas Company. *See N. Natural Gas Co. v. Iowa Util. Bd.*, 679 N.W.2d 629 (Iowa 2004) ("*Northern II*"). In *Northern II*, the Court reiterated that the Court ultimately looks to the "nature of the particular business operation to determine if a public utility exists" and not just the number of customers it has. *Id.* at 634. This "practical analysis" requires the Court to examine a "variety of factors that

center[] on the nature of the actual operations conducted and its effect on the public interest." *Id.* at 633.

The IUB's Declaratory Order failed to conduct the multi-factor analysis required by the Court in the *Northern* cases. Instead, the Board focused narrowly on the "per-kWh" nature of PPA sales as the "key factor in determining that Eagle Point would be a public utility under § 476.1" (App. __; Declaratory Order at 11-12.) The Board's appellate brief makes clear that the Board still considers the "per kWh" sales as the overriding factor supporting its conclusion that Eagle Point is a public utility:

> Under the facts posed by Eagle Point in its request for declaratory order, it is clear that Eagle Point is proposing to sell electricity to Dubuque and to other, similarly-situated customers on a per kWh basis—this makes Eagle Point a public utility within the definition of section 476.1.

IUB Br. at 18. There is little discussion in the Board or utility briefs about the "nature" of Eagle Point's business or the underlying public interest factors requiring public utility regulation in this case. Instead, the Board would prefer a "bright-line" rule that turns primarily (or solely) on per-kWh sales to determine whether a public utility exists. *See* IUB Br. at 20 ("Selling electricity on a per kWh basis is a test that is understandable, readily applied, and based on the language of § 476.1."); IUB Br. at 21 ("Selling electricity

to Dubuque (and others) on a per kWh basis is selling to the public for compensation, satisfying the statutory definition of a public utility.").

The problem with the Board's rigid "per-kWh" test for public utility is that it ignores the body of case law in Iowa that requires a deeper analysis of "[w]hat the Corporation actually does." *See Northern I*, 161 N.W.2d at 114. By ignoring the nature of Eagle Point's business and focusing only on the form of the transaction, the Board has extended its jurisdiction beyond what is necessary to protect the public interest and the ultimate retail consumer. *See Northern II*, 679 N.W.2d at 633 (explaining that the Board should extend its jurisdiction "only as necessary to address the public interest implicated").

The district court's thoughtful examination and discussion of each *Serv-Yu* factor is persuasive and should be affirmed. The district court's analysis supports a determination that Eagle Point's business of developing, operating and maintaining rooftop solar systems does not have the characteristics of a "public utility" and is not "clothed with a public interest" that requires public utility regulation.

A. Eagle Point's primary business is to install solar panels, not sell electricity.

The first *Serv-Yu* factor requires the court to examine "[w]hat the Corporation actually does" in order to determine whether the operation of its

business is "clothed with a public interest." *Northern I*, 161 N.W.2d at 114. The district court correctly concluded that "Eagle Point's primary business is to install solar panels" and that it also provides "a variety of other optional services to its customers, including design, maintenance, and financing of solar equipment through various means including leases and PPAs." (App. __; District Court Ruling at 13). Only one of the company's "optional services" (the PPA) involves a "sale" of electricity, and this "sale" does not change the substance or nature of the work Eagle Point performs for the customer. Eagle Point will design, install, operate and maintain the customer's solar panels in exactly the same way; the system will reduce the customer's energy demand from the grid in exactly the same way; and the customer will ultimately end up owning the system at the end of the contract term. Thus, as the district court concluded, the financing option the customer chooses is "incidental to what the company 'actually does.'" *Id.*

The Board argues that a direct purchase or lease is "different" than a PPA "because Chapter 476 contemplates customer-owned self-generation, but it does not allow third-parties like Eagle Point to own generation and sell electricity to retail customers." IUB Br. at 25. This is circular reasoning. It assumes a legal conclusion (that Chapter 476 "does not allow third-parties like Eagle Point to own generation") in order to prove its desired outcome

(that Eagle Point is a "public utility"). Moreover, as the district court noted, the Board's logic elevates the form of the economic transaction over the substance of what Eagle Point "actually does," which is "at odds with the 'practical' analysis required by our supreme court in *Northern*." (App. __; District Court Ruling at 14). As the district court concluded, "the fact the customer chooses to finance a renewable energy system through a PPA rather than traditional loan or lease does not change the essential character of the project or what Eagle Point 'actually does' and thus should not militate in favor of considering it a public utility." *Id.*

B. Eagle Point's solar facilities are located "behind the meter" and are not "dedicated to a public use."

As described above, the solar panels that Eagle Point installs are located entirely on a customer's property and are installed pursuant to individual contracts between the customer and Eagle Point. Unlike the electricity generated by IPL, the solar panels installed by Eagle Point and the electricity those panels generate are not "dedicated to a public use," the second *Serv-Yu* factor, but instead are dedicated entirely to serve a single customer at a single site.

The location of the renewable energy equipment with respect to the electric meter is significant. Eagle Point installs solar panels on the customer's side of the meter, also known as "behind-the-meter." No public

utility infrastructure is used to distribute electricity generated by Eagle Point's solar panels to the customer. The Board itself has previously recognized that behind-the-meter generation of renewable energy that a customer uses to offset a customer's own demand from the grid is substantially similar to other energy efficiency technologies when viewed from the utility's perspective:

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

Interstate Power & Light, Final Order, Docket No. EEP-08-1 at 11 (Iowa Utilities Board June 24, 2009); *see also* Interstate Power & Light, Order Approving, in part and with Conditions, Renewable Energy Program, Docket No. EEP-08-1, at 3 (Iowa Utilities Board April 29, 2010).

There are many things that a utility customer in Iowa can do on their own property ("behind their own electricity meter") to reduce their energy demand from the grid. They can choose to turn the lights out when they leave the house. They can purchase more energy-efficient lighting, insulation and appliances. They can get a loan from a bank, purchase or lease solar panels, and hire a company like Eagle Point to install them on their roof. All of these steps will reduce the customer's electricity bill. None

of them involve a dedicated public use and none would subject the customer or the firm they have chosen to work with to regulation as a public utility by the IUB. As the district court noted, it would "make little sense" to single out and regulate Eagle Point's PPA with Dubuque when there are any number of other steps the City could have taken on its own property with essentially the same end result. (App. __; District Court Ruling at 14).

The Iowa Supreme Court has taken a conservative approach to public utility regulation, extending jurisdiction "only as necessary to address the public interest implicated." *Northern II*, 679 N.W.2d at 633. There is no "pubic interest" requiring the Iowa Utilities Board to regulate the form of the contract Dubuque chooses to finance on-site generation. Furthermore, the fact that Eagle Point's facilities are located entirely on Dubuque's property behind the building's utility meter requires careful attention; it would be an extraordinary exercise of the Board's jurisdiction to reach across the customer's meter to regulate activities that take place entirely on a customer's private property. The district court prudently determined that *Serv-Yu* factor number two does not weigh in favor of finding Eagle Point is a public utility. (*See* App. __, District Court Ruling at 15).

C. Eagle Point's articles of incorporation, authorization, and purposes, do not support a finding that Eagle Point is a public utility.

The district court, while not finding *Serv-Yu* factor three particularly helpful in the analysis, noted that "there is no evidence of any intent to act as a public utility to the public at large in Eagle Point's certificate of organization, its operating agreement, or its sales brochures" that were attached to the Petition for Declaratory Order. (App. __; District Court Ruling at 15.) This factor does not support a finding that Eagle Point is a public utility.

D. Solar panels and other supplemental solar services are not commodities in which "the public has been generally held to have an interest."

A state's power to regulate rates and prices typically arises when there is an "indispensable" service which would subject the public to the risk of "exorbitant charges and arbitrary control" without regulation. *See Chas. Wolff Packing Co.*, 262 U.S. at 538. In this case, the installation and financing of a solar system is not an "indispensable service" and there is no concern that Eagle Point could somehow exercise "arbitrary control" over the public's access to electricity. All of Eagle Point's customers remain connected to the utility grid, continue to be utility customers, and continue to purchase energy and capacity and other services from the utility.

As the New Mexico Public Regulation Commission determined in a very similar case, the solar design, installation, operation, maintenance and financing services that third-party solar developers provide to their clients are "supplemental" services, not public utility services:

> If one or more third-party developers refuse to contract for services with a particular customer, whether it is 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.

(App. ___, Ex. ___; *In the Matter of a Declaratory Order Regarding Third Party Arrangements for Renewable Energy Generation,* New Mexico Public Regulation Commission, Case No. 09-00217-UT at p.11 (Dec. 17, 2009) ("New Mexico Order").) IPL does not provide any of the services offered by Eagle Point to retail customers in Iowa. Neither does MidAmerican or any rural electric cooperative in the state. As noted by the Office of Consumer Advocate, "[i]t would be absurd to conclude that Eagle Point is engaging in a public service that would trigger its regulation as a public utility when public utilities neither provide nor can be mandated to provide the service in question." (App. __; OCA District Court Brief at 12.)

Furthermore, as the Arizona Corporation Commission observed, customers that hire third-party solar developers "do so entirely voluntarily":

> they are not captive customers, and may elect to own their own solar systems, or simply not to take service from SolarCity

> under [a PPA], choosing to have all of their electricity needs met by the incumbent utility.

(App. __, Ex. __; *In the Matter of the Application of SolarCity Corporation*, Arizona Corporation Commission, Decision No. 71795, Docket E-20690A-09-0346, 2010 Ariz. PUC Lexis 286, at *98-99 (July 12, 2010) ("Arizona Order").) Just as in the recently decided New Mexico and Arizona cases, "[t]here is no obvious public policy basis for the Commission to regulate these third-party developers as public utilities … if 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. __, Ex. __; New Mexico Order at p.11.) Thus, *Serv-Yu* factor four weighs against finding Eagle Point is a public utility.

E. Eagle Point is not a "natural monopoly."

One of the underlying economic rationales for public utility regulation is to protect consumers in the presence of a "natural monopoly" characterized by economies of scale or scope and high barriers to entry. *See Cantor v. Detroit Edison Co.*, 428 U.S. 579, 595 (U.S. 1976) ("public utility regulation typically assumes that the private firm is a natural monopoly and that public controls are necessary to protect the consumer from exploitation").

The district court convincingly explained why third-party renewable energy developers are not "natural monopolies," and there is no reason at the present time to regulate them as such. (App. ___; District Court Ruling at 16). There is substantial competition between third-party renewable energy developers. Customers are free to negotiate individualized prices and terms of service with PPA providers. Third-party PPAs do not operate with exclusivity requirements even for single customers. Finally, all utility customers remain interconnected to the utility grid for service in the absence of or to supplement any on-site renewable energy generation.

The concerns for consumer protection that arise in monopoly settings are not present here, and *Serv-Yu* factor five weighs against a finding that Eagle Point is a public utility.

F. Eagle Point does not and cannot accept substantially all requests for service.

The district court did not consider this factor in its analysis because it found that Eagle Point failed to support its argument with facts in the record. (*See* App. __; District Court Ruling at 17). However, the Court can simply take judicial notice of the fact that the sun does not shine on the rooftops of "substantially all" buildings to conclude that this factor weighs against finding that Eagle Point is a public utility. Rooftops that are shaded, face north or are in poor condition are not good candidates for solar panels.

Residents that live in multifamily housing or apartment buildings typically lack the ability to contract for solar power on their rooftops. Unlike IPL or other actual public utilities, Eagle Point cannot accept substantially all requests for service.

G. Eagle Point provides service under private contracts and retains the right to discriminate with whom it contracts.

The Iowa Supreme Court has held that public utility regulation turns not only on "the character of the service but also of the capacity in which each party contracted and the nature of the contract itself." *City of Des Moines v. City of West Des Moines*, 30 N.W.2d 500, 504 (Iowa 1948). In *City of Des Moines*, the Court determined that the City's contract for sewage disposal services with West Des Moines was a private business contract and not a public utility service:

> [The City] owed no duty to defendant. It could have refused to render it any service or could have exacted any price that defendant would have consented to pay. We must conclude that the agreement is a business contract, in no way subject to legislative rate regulation. In that respect it is private, not public.

Id. at 505.

Similarly, all of Eagle Point's business is pursuant to private contracts. Each contract is unique. The prices and projects are individually negotiated. The contracts and services are site-specific and apply to only one

customer. Each customer must choose terms and financing method and the customer has substantial bargaining power in the transaction. Both the customer and Eagle Point must reach an agreement about the terms of the deal before any contract can be formed. As the district court concluded, this seventh *Serv-Yu* factor tends to weigh against finding Eagle Point is a public utility. (App. __; District Court Ruling at 18).

H. Eagle Point does not "compete" with electric utilities.

A substantial portion of the utilities' briefs focus on the false premise that Eagle Point and other developers of on-site generation are in competition with electric utilities. There is nothing unique about PPA financing that results in more or less "competition" with electric utilities than any other type of energy efficiency or on-site generation option that is available to Dubuque or other Iowa cities, homeowners or businesses.

Eagle Point is not in competition with utilities for the provision of solar-related services. None of the Iowa utilities provide the kind of installation, operation, maintenance and financing services that Eagle Point provides. If the Court determines that Eagle Point is a public utility, then customers in Iowa will be left entirely without the option to finance solar projects using PPAs. Nonprofits and municipalities will be particularly affected because they lack the tax liability necessary to take advantage of

federal tax credits for solar. This means that citizens in Dubuque will be forced to pay more to meet the city's sustainability goals, for no good public policy reason.

The utilities' argument in this case is primarily economic – IPL is concerned that it will not be able to sell as much electricity to Dubuque if the city installs on-site generation. This concern is not one of the *Serv-Yu* factors that must be applied in this case and is simply not relevant to whether or not Eagle Point's business is "clothed with a public interest." It is ironic that the Board is using Iowa's public utility laws—which were developed largely to protect *customers* from utility market power—to protect the *utilities* in this case from their customers' reasonable efforts to self-generate renewable electricity.

III. The IUB and Utilities' Policy Arguments Are Not Supported by the Record, Do Not Distinguish PPAs From Other Solar Financing Options, and Are Contradicted by Actual Experience in Other States That Allow PPAs.

Instead of applying the legal analysis in *Northern,* Appellants argue that allowing PPAs will lead to bad public policy outcomes including higher electric rates, "backdoor deregulation," and unnecessary duplication of electric utility infrastructure. However, none of the utility allegations are supported by facts in the record, none distinguish self-generation using PPAs from other forms of self-generation, and all of the dire predictions are

contradicted by actual experience in the many states that allow PPA financing.

At the outset, it is important to emphasize that every single public policy reason advanced in the IUB or utility briefs for disallowing PPA financing applies equally to *all* on-site generation, whether it is financed via direct purchase, lease, or a PPA. In each case, regardless of the financing method used, the customer generates on-site power which reduces the customer's need to purchase electricity from their utility. The parties agree that direct purchasing and leasing of self-generation systems is allowed by the Iowa Code, even though it "reduces demand" for the utilities' product. There is nothing unique or special about PPAs that creates more risk. Instead, as discussed below, behind-the-meter solar projects have characteristics that will benefit the grid and could ultimately lower costs for all utility ratepayers.

A. PPAs will not have an adverse impact on the utility system.

The IUB and utilities claim that Dubuque's on-site generation will result in "unnecessary duplication" of electric utility facilities. *See* IAEC Br. at 38; IUB Br. at 27. This is not the case. Eagle Point's facilities are located entirely behind the customer's meter and do not involve or "duplicate" any electric utility facilities at all. The cases that the utilities cite to support their

"duplication" argument do not involve behind-the-meter projects. *See* IAEC Br. at 38 and IUB Br. at 29 (citing *Lambda Energy Marketing v. IES Utilities*, Docket No. FCU-96-8 (IUB August 25, 1997) and *In re MidAmerican Energy*, Docket No. DRU-98-1, 1998 WL 352662 (IUB 1998)). These Board Orders involve "retail wheeling" of off-site generation across a utility's transmission and distribution facilities. The facts of these retail wheeling cases are completely different from the behind-the-meter scenario presented here.[1] In any event, it is not clear why solar facilities installed pursuant to a PPA—the only activity at issue here—would result in "duplication" but solar facilities purchased or leased by a customer do not.

The utilities also argue that allowing on-site generation pursuant to PPAs will complicate the utilities' job to maintain a safe and reliable electricity grid and thereby undermine "economical, efficient and adequate electric service to the public." *See, e.g.*, IAEC Br. at 19 (quoting Iowa Code § 476.25). The Solar Coalition agrees that adequate and reliable service should be a paramount concern of the electric utilities and the IUB.

[1] IAEC implies that *Lambda* is a behind-the-meter case. *See* IAEC Br. at 37. It is not. Lambda Energy Marketing provided back-up and standby service that it offered to wheel to its customers *across the electric utilities' distribution lines.* Docket No. FCU-96-8, Final Decision and Order at 3 (August 25, 1997) ("Lambda wants to use existing capacity purchased from Central Iowa Power Cooperative (CIPCO) to provide remote displacement service to IES's customers.").

However, the utilities' concerns about reliability fail to acknowledge that this issue is already comprehensively addressed by Iowa's interconnection standards that the Board adopted in 2010. *See* IUB Docket RMU-2009-0008, Order Adopting Rules (May 26, 2010) (adopting new interconnection standards at 199 I.A.C. 45).[2] All of Eagle Point's facilities—both PPA projects and others—need to comply with these technical standards to ensure grid safety and reliability. The utilities have cited no evidence to suggest that rooftop solar panels installed under a PPA are less reliable than identical systems installed through other financing methods. Each and every system installed by Eagle Point will have to comply with all utility interconnection requirements and rigorous technical standards that were adopted through a comprehensive IUB rulemaking with the full participation of IPL, MidAmerican and the IAEC.

B. Installing rooftop solar pursuant to PPAs will not increase rates.

There is no evidence for the Board and utility parties' arguments that rooftop solar financed by customers through PPAs will cause "rising utility rates." *See* IUB Br. at 22; Utility Br. at 44. The customer, not the utility or ratepayer, is paying for the solar system, and, in reality, rooftop solar

[2] The Board's 108-page Order in this docket is available at https://efs.iowa.gov/efiling/groups/external/documents/docket/041781.pdf.

provides significant benefits to the grid. Rooftop solar produces power at exactly the time it is needed most—when the sun is shining, air conditioners are running, and demand for electricity "peaks." More rooftop solar means less need for utilities to start-up and run expensive "peaker plants" or to purchase expensive peak power on the spot market. Companies like Eagle Point help customers "shave" peak electricity demand. As more and more solar is installed on the grid, the expensive peak demand spikes will become less frequent, ultimately saving money for all Iowa ratepayers. (Germany—one of the world's leading solar markets—is experiencing this effect already.)

Rooftop solar also provides a number of other grid benefits that will create a more efficient and cost effective electric power system. Rooftop solar is located close to "load" (where the electricity is actually used), which helps reduce grid operation costs by relieving stress on high voltage transmission facilities, reducing congestion on distribution lines, and ultimately delaying the need for utilities to construct additional facilities, thereby saving money for ratepayers. The proximity of solar to the ultimate user also reduces "line losses" and other system losses associated with transporting power over long distances. A distributed energy supply is also more reliable and less prone to disruptions and blackouts. The utility briefs

fail to acknowledge any of these benefits of rooftop solar and focus instead on hypothetical lost utility revenues in isolation. The Court should reject the utilities' baseless claim that allowing rooftop solar to be installed pursuant to PPAs will raise utility rates for other Iowa customers.

C. PPAs are not equivalent to "customer choice" of retail electricity supply.

Another central theme of the IUB and utilities' argument is that allowing PPAs will create a slippery slope to full utility deregulation and retail customer choice. However, installing on-site solar pursuant to a PPA is not "customer choice" nor is it a step towards deregulation.

The only choice that a PPA provides a customer is a choice as to how to finance on-site generation – something that is allowed and encouraged under existing Iowa and federal law. The customer still connects to the grid through their public utility and still is required to use that utility for any energy that the customer cannot provide through self-generation. The utilities' argument that the use of PPAs somehow "upends" the regulatory compact is baseless. The IUB and utility intervenors fail to explain how the consequences of an on-site generation project change simply because the project is financed by PPA.

As discussed in more detail below, several states allow PPAs but still maintain a fully regulated utility system. In other words, the decision

regarding whether to allow PPAs is independent from the decision whether to allow customer choice of retail electricity supply.

D. Other state decisions support a determination that Eagle Point is not a public utility.

The appellants cite frequently to a case from Florida to support their argument that service under a PPA triggers the IUB's regulatory jurisdiction. *See PW Ventures Inc. v. Nichols*, 533 So.2d 281 (Fla. 1988). *PW Ventures* is 25 years old. It involves a large, industrial cogeneration plant, not rooftop solar. In fact, the rooftop solar industry did not even exist 25 years ago. Furthermore, the Florida court in *PW Ventures* did not analyze the type of case-specific public interest factors that the Iowa Supreme Court requires under the *Northern* cases.

States that have explicitly addressed the issue in more recent years have most often found that third-party ownership does not trigger the need for public utility regulation. For example, the Arizona Public Utility Commission observed that third-party solar developers must "compete[] for business" and are not monopolies. Thus, "the need to regulate rates is not the same as with the traditional monopolistic utility service." (App. __, Ex. __; Arizona Order at p.42.) The New Mexico Public Regulation Commission similarly held that "third-party renewable developers are not public utilities." (App. __, Ex. ___; New Mexico Order at p.11.) Other state

commissions have similarly determined that third-party financing does not trigger public utility regulation. *See, e.g.*, PUC Orders in Colorado,[3] Massachusetts,[4] Nevada,[5] Oregon[6] and Hawaii,[7] among others.

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[3] Decision No. C07-0676, *In the Matter of the Application of Public Service Company of Colorado for Approval of Its 2007 Renewable Energy Standard Compliance Plan and for Waiver of Rule 3661(F)(I)*, Colorado Public Utilities Commission Docket No. 06A-478E, at 26-33 (August 9, 2007); Decision No. C09-0990, *In the Matter of Proposed Amendments to the Rules of the Colorado Public Utilities Commission Relating to the Renewable Energy Standard*, Colorado Public Utilities Commission Decision No. C09-0990 (adopted Sept. 2, 2009) (adding rule 3658 to incorporate provisions of Colorado SB09-051 allowing for third-party owners or operators to serve on-site solar customers).

[4] Order Adopting Final Regulations, *Order Instituting a Rulemaking Pursuant to G.L. c. 30A, § 2 and 220 C.M.R. § 2.00 et seq. to Implement the Net Metering Provisions of An Act Relative to Green Communities, St. 2008, c. 169, § 78 and to Amend 220 C.M.R. § 8.00 et seq., Qualifying Facilities and On Site Generating Facilities, and 220 C.M.R. § 11.00 et seq., Electric Industry Restructuring*, Massachusetts Department of Public Utilities D.P.U. 08-75-A, at 10-14 (filed June 26, 2009).

[5] Order, *Investigation and Rulemaking to Adopt, Amend, or Repeal Regulations Pertaining to Chapters 703 and 704 of the Nevada Administrative Code Regarding Prescribing the Form and Substance for a Net Metering Prescribing the From and Substance for a Net Metering Contract and Other Related Utility Matters in Accordance with Assembly Bill 178*, Nevada Public Utilities Commission Docket Nos. 07-06024 and 07-06027 (filed Nov. 26, 2008).

[6] Order No. 08-388, *In the Matter of Honeywell International, Inc., and Honeywell Global Finance, LLC*, Oregon Public Utility Commission Docket No. DR 40 (entered July 31, 2008).

The Arizona and New Mexico commission orders cited above are particularly persuasive. Both states have a fully regulated utility system that is similar to Iowa; both cases were recently decided; both cases involve third-party rooftop solar developers; and the commissions in both of the cases applied similar public interest factors to those required by the Iowa Supreme Court in *Northern I.* (App. ___, Ex. ___ (Arizona Order) at 28-53 (discussing and applying the *Serv-Yu* factors); App. __, Ex. __ (New Mexico Order) at 9 (citing Iowa Supreme Court precedent and quoting from *Northern I*).) Indeed, the defendants in the *Northern I* case tried to distinguish Arizona's case law and public utility statute, but the Iowa Supreme Court found Arizona's statutory definition of "sales to the public" to be "fully applicable here" and determined that the distinctions offered by defendants were "more illusory than real." *See Northern I*, 161 N.W. 2d at 115. The detailed discussion in these cases—which are both included in the Solar Coalition's Designation of Appendix—are a much better reference point in this case than the 25-year-old Florida case cited in the IUB and utilities' briefs.

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[7] Decision and Order No. 20633, *In the Matter of the Petition of Powerlight Corporation for a Declaratory Ruling*, Hawaii Public Utilities Commission Docket No. 02-0182 (filed Nov. 13, 2003).

E. Barring PPAs will have an adverse effect on the public interest.

Finally, in interpreting Chapter 476, the Court should consider how the public interest will be affected if PPA financing is barred. A PPA allows a property owner to avoid upfront costs, which is one of the main barriers to residential and commercial solar development. A PPA transfers the up-front costs to an entity with greater access to capital, lower cost of capital or greater ability to take advantage of tax incentives. A PPA reduces the risk of a renewable energy project for the consumer by linking a customer's cost to the energy produced. PPAs also facilitate acquisition of the full range of services that make renewable energy projects possible including design, installation and maintenance of equipment. PPAs and other forms of third-party financing also reduce transaction costs and expenses, allowing municipalities like Dubuque to meet their sustainability goals and improve environmental and public health at lower overall cost. As the district court observed, this is "not only consistent with the legislative purposes of promoting 'economical, efficient, and adequate electric service to the public,' but actually furthers it." (App. __; District Court Ruling at 22).

To resolve ambiguity and ultimately determine legislative intent, Iowa courts must consider a "reasonable construction that will effectuate the statute's purpose rather than one that will defeat it." *IBP, Inc. v. Harker*, 633

N.W. 2d 322, 325 (Iowa 2001) (quoting *Voss v. Iowa Dep't of Transp.*, 621 N.W.2d 208, 211 (Iowa 2001) and *State v. Green*, 470 N.W.2d 15, 18 (Iowa 1991)). The public policy goals incorporated in the Iowa Public Utilities Act strongly support the development of renewable energy systems:

> It is the policy of this state to encourage 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.

Iowa Code § 476.41; *see also* Iowa Code § 476.8 (defining "reasonably adequate service and facilities" to include "programs for customers to encourage the use of energy efficiency and renewable energy sources"). The Iowa Supreme Court has also recognized the importance of conserving non-renewable energy resources. *See Iowa S. Util. v. Iowa State Commerce Comm'n*, 372 N.W.2d 274, 279 (Iowa 1985) ("We find in Iowa law and public policy promoting energy conservation the necessary rational basis for the distinction drawn in section 476.5 …."). The Board's interconnection standards similarly were intended to "facilitate the addition" of more on-site renewable energy and would be undermined by interpretations of Iowa law that make it more difficult to do so. *See* IUB Docket RMU-2009-0008, Order Adopting Rules at 4 (May 26, 2010). Iowa's Public Utility Act should not be interpreted in a manner that would undermine the legislative purposes

and public policy goals supporting the development of renewable energy and conservation of energy resources in Iowa.

For all of the foregoing reasons, the Court should reject the IUB and electric utilities' various public policy arguments and should find instead that the public policy of the state supports an interpretation that Eagle Point is not a public utility.

IV. The IUB's Reasons for Distinguishing *Northern* and Applying a Separate Definition for "Electric Utilities" is Flawed.

IUB and utility parties raise a number of arguments to rationalize the IUB's failure to apply the *Northern* precedent in its declaratory order. As the district court concluded, "[e]ach of the Board's stated distinctions and reasons for not applying the *Northern* analysis to Eagle Point's questions were erroneous and without merit." (App. __; District Court Ruling at 12).

A. *Northern Natural Gas* applies to both gas and electricity cases.

The Board attempts to distinguish the *Northern Natural Gas* precedent by observing that "[t]here are significant differences between electricity and natural gas." (App. __; Declaratory Order at 10). However, the Board cited no case law or prior commission orders that provide a reasoned basis to limit the *Northern* decision to the context of natural gas. In fact, as discussed above, the Board has routinely (and as recently as 2011)

applied the *Northern* test in electricity and telecommunications cases. *See supra* at 19-20 (discussing *Hawkeye Land Co*. and other recent IUB cases).

Gas and electricity are covered in the same subparagraph of section 476.1—in fact the very same sentence—as opposed to telecommunications and water utilities, which receive separate subsections. *See* Iowa Code 476.1 ("Furnishing gas by piped distribution system or electricity to the public for compensation."). The same operative phrase "to the public" is the qualifier for both gas and electric utilities, and the Iowa Supreme Court analyzed that phrase when making determination about public utility status in the *Northern Natural Gas* cases. The Court's language in *Northern I* provides no indication that the Court intended to limit its reasoning to the natural gas industry. The principles and public interest factors discussed in that case apply generally. The Court in *Northern* carefully analyzed decisions from no less than nine states and cited principles from gas, electric, and telecommunications and other public utility contexts. *See, e.g.*, *Northern I*, 161 N.W.2d at 113, 115, 116 (citing *City of Des Moines v. West Des Moines* (sewage services), *Elk Run Telephone Company v. General Telephone Co.* (telecommunications), *Rural Electric Co. v. State Board of Equalization* (electricity), and many others). The Board's position that *Northern* has limited value outside the natural gas context —a position that the Board has

apparently taken for the first time in this case—does not accurately reflect the language or structure of the *Northern I* decision.

B. The "five or fewer" exception does not modify the definition of public utility in Section 476.1.

The Board and utility intervenors also argue that the existence of a specific statutory exception to Chapter 476 (that all agree does not apply to Eagle Point), must mean that Eagle Point is affirmatively covered by the definition of public utility in section 476.1. *See*, *e.g.*, Utility Br. at 31-32 (arguing that "a specific exception within section 476.1 … demonstrates that EPS cannot operate through the third-party PPA without being subject to regulation as a public utility"). There are several problems with this argument. First, the structure of the statute makes clear that the "five or fewer" exception is not a part of the definition of "public utility." It appears in a separate paragraph of section 476.1 and is meant to modify the applicability of the *entire chapter* of 476. Section 476.1 appears below in its entirety. Paragraph 3 is the definition of public utility. The italicized language in paragraph 5 is the exception in question:

> **476.1 APPLICABILITY OF AUTHORITY.**
> 1. The utilities board within the utilities division of the department of commerce shall regulate the rates and services of public utilities to the extent and in the manner hereinafter provided.

2. As used in this chapter, *"board"* or *"utilities board"* means the utilities board within the utilities division of the department of commerce.

3. As used in this chapter, *"public utility"* shall include any person, partnership, business association, or corporation, domestic or foreign, owning or operating any facilities for:

a. Furnishing gas by piped distribution system or electricity to the public for compensation.
b. Furnishing communications services to the public for compensation.
c. Furnishing water by piped distribution system to the public for compensation.

4. Mutual telephone companies in which at least fifty percent of the users are owners, cooperative telephone corporations or associations, telephone companies having less than fifteen thousand customers and less than fifteen thousand access lines, municipally owned utilities, and unincorporated villages which own their own distribution systems are not subject to the rate regulation provided for in this chapter.

5. *This chapter does not apply* to waterworks having less than two thousand customers, municipally owned waterworks, joint water utilities established pursuant to chapter 389, rural water districts incorporated and organized pursuant to chapters 357A and 504, cooperative water associations incorporated and organized pursuant to chapter 499, *or 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.*

6. A telephone company otherwise exempt from rate regulation and having telephone exchange facilities which cross state lines may elect, in a writing filed with the board, to have its rates regulated by the board. When a written election has been filed with the board, the board shall assume rate regulation jurisdiction over the company.

> 7. The jurisdiction of the board under this chapter shall include efforts designed to promote the use of energy efficiency strategies by rate or service-regulated gas and electric utilities.

Iowa Code § 476.1 (emphasis added). The italicized "five or fewer" exception in paragraph 5 plainly does not modify the definition of "public utility" in paragraph 3, but instead provides a more generalized exception to the entire "chapter."

The Court should also consider the consequences of the Board's construction when interpreting chapter 476. *See* Iowa Code § 4.6(5). In this case, the legislature has cross-referenced the section 476.1 definition of public utility in several other locations in the Iowa Code. *See* Iowa Code § 716.7(6) (cross-referencing the 476.1 definition of "public utility" for the purposes of the Iowa criminal trespass definition); Iowa Code § 455H.304(2)(d) (cross-referencing the 476.1 definition of public utility for the purposes of Iowa's land recycling and remediation standards); Iowa Code § 352.6(2)(b) (cross-referencing the 476.1 definition of public utility for the purposes of identifying permitting uses in agricultural areas). Allowing the Board to depart from the Supreme Court's *Northern* case law and "interpret" exceptions that do not clearly appear in the statute would have significant unintended consequences and would complicate the administration of all of these laws. *See Renda*, 784 N.W.2d at 14 ("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.").

Even assuming for the sake of argument that the "five or fewer" exception modifies the definition of "public utility" (which it clearly does not), the statutory language would still not support the Board's conclusion. The "five or fewer" language in paragraph 5 covers a situation in which a customer generates power "primarily for their own use" but then wheels excess power over the electric utility distribution lines for sale to *other* customers. This is fundamentally different than the facts proposed by Eagle Point. With a PPA, power is never wheeled over the utilities' distribution lines. It is consumed entirely behind the customer's own meter. It would require a substantial leap in logic to infer that the existence of a specific statutory exception for wheeling power across utility distribution lines to five or fewer other utility customers demonstrates the legislature's intent to regulate sales to a single customer that occur entirely behind that customer's own electric meter.

C. Eagle Point is not an "electric utility" and a remand is not necessary for the Court to make this legal determination.

The IUB and utility parties also argue that Eagle Point may be an "electric utility" as defined in Iowa Code § 476.22 (and therefore subject to

Iowa's "assigned service area" provisions) even if the Court concludes it is not a "public utility" under section 476.1. This interpretation is not correct and would complicate the interpretation and judicial review of Iowa's public utility statutes.

Iowa Code § 476.22 defines the term "electric utility":

> **476.22 DEFINITION.**
> 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 section 390.1.

Eagle Point is not a public utility under the *Northern Natural Gas* analysis, and it is not a city utility by definition. Therefore it cannot be an electric utility under § 476.22.

The Board argues that the "context" in this case may require the Board to extend jurisdiction over Eagle Point even if it is not otherwise a "public utility." This argument is a real stretch. The service area provisions at sections 476.22-25 were adopted many years after the Supreme Court interpreted the meaning of public utility in *Northern I.* "The legislature is presumed to know the state of the law, including case law, at the time it enacts a statute." *State v. Jones*, 298 N.W.2d 296, 298 (Iowa 1980). If the legislature had intended to expand or change the definition of "electric utility" beyond the Supreme Court's settled interpretation, it would have

more clearly stated so. The fact that it didn't do so, and instead explicitly cross-referenced section 476.1 when defining "electric utility" at section 476.22, gives rise to an inference that the legislature "assented" the Court's interpretation of public utility expressed in the *Northern* cases. *See Welch*, 801 N.W.2d at 599 ("legislative silence gives rise to the inference of the legislature's assent to our jurisprudence"). This principle of "legislative assent" is "especially salient" where, as here, the general assembly has "amended the statutory provision in question without disturbing our previous interpretation." *Id.* Rather than redefine public utility when adopting the area of service provisions, the legislature assented to the Supreme Court's settled interpretation expressed in the *Northern* cases and subsequent case law.

Contrary to the Board's argument that the language "unless the context otherwise requires" somehow *expands* the Board's jurisdiction, it is more likely that the legislature intended this language to limit and clarify the definition of "electric utility." Section 476.22 cross-references the definition of city utility at section 390.1, which in turn cross-references section 362.2(6). This code section defines "city utility" as:

> all or part of a waterworks, gasworks, sanitary sewage system, storm water drainage system, electric light and power plant and system, heating plant, cable communication or television system, telephone or telecommunications systems or services

> offered separately or combined with any system or service specified in this subsection or authorized by other law, any of which are owned by a city, including all land, easements, rights-of-way, fixtures, equipment, accessories, improvements, appurtenances, and other property necessary or useful for the operation of the utility.

Iowa Code § 362.2(6). There are numerous types of city utilities described in this paragraph that are clearly not "electric utilities," including waterworks, gasworks, sanitary sewage systems, storm water systems, heating plants, and telecommunication systems. *Id.* The phrase "unless the context otherwise requires" in section 476.22 was likely meant to limit and clarify the types of "city utilities" that the Board should regulate as "electric utilities." (The legislature did not intend, for example, for the IUB to regulate a city-owned storm water system as an "electric utility" under section 476.22.) That is the "context" that section 476.22 refers to in the phrase "unless the context otherwise requires." It could not have been the legislature's intent for the Board to use the phrase "unless the context otherwise requires" to open up a loophole that would allow the Board to depart from the settled meaning of "electric utility" whenever the Board, in its own discretion, feels it is appropriate to do so. This type of amorphous, standardless loophole would be difficult for the public and regulated community to understand and difficult for courts to review. *See* Iowa Code § 4.6 (requiring courts to

consider the "consequences of a particular construction" when interpreting ambiguous terms in a statute).

In the proceedings below, MidAmerican and IPL took completely different positions regarding the meaning of the term "electric utility" than they do now. For example, in its initial comments to the Board, MidAmerican argued that there is "no difference" between "electric" and "public" utilities and that both terms are "used interchangeably":

> EPS tries to differentiate "public utility" from "electric utility", as both terms are used throughout Chapter 476. There is no difference. As seen in § 476.1, both terms are used interchangeably, with "electric utility" generally used when the context refers to electric service only and "public utility" when the context refers to any or all of electric, gas, water or telephone public utility service.

(App. __; MidAmerican Comments at 5, n.1.) Now, on appeal, the utilities' outside counsel are arguing that "the definition of electric utility is broader than the definition of public utility." Utility Br. at 57. The Court should not accept appellate counsel's "post hoc rationalization" for the Board's action below. *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962) (holding that courts "may not accept appellate counsel's post hoc rationalizations for agency action").

In any event, the district court reasonably determined that "this is not an instance where the application of a modified, broader definition of the

term ‘electric utility’ is required in order to carry out the legislature’s intent regarding the overall statutory scheme for providing economical, efficient and adequate electric service to the public.” (App. __; District Court Ruling at 23, *citing Necanicum Inv. Co. v. Employment Dep't*, 190 P.3d 368, 370-71 (Oregon 2008).) The Court should affirm this reasonable conclusion.

D. The Court should interpret the definition of “electric utility” as a matter of law and should not remand the question to the IUB.

Finally, the Board and utility parties argue that the Court should remand this case for the Board to interpret the term “electric utility” in the first instance. This is not necessary. There are no factual disputes requiring administrative resolution in this case. There is only a legal dispute over the meaning and construction of the statute. The matter has been fully briefed, there is clear legal precedent to apply and there is a district court decision below. This Court can and should resolve this issue as a matter of law without remanding to the agency. A remand would unnecessarily delay the resolution of this issue and lead to further uncertainty for the solar energy industry in Iowa.

CONCLUSION

WHEREFORE, for all the foregoing reasons, the Solar Coalition Intervenors respectfully request 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, the Solar Coalition Intervenors hereby request oral argument in this matter.

Respectfully submitted,

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CERTIFICATE OF COSTS

I hereby certify that the cost of printing this Proof Brief of Intervenors-Appellees was $68.40.

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