IN THE IOWA DISTRICT COURT FOR POLK COUNTY

SZ ENTERPRISES, LLC d/b/a EAGLE POINT SOLAR, Petitioner, v. **IOWA UTILITIES BOARD, A DIVISION OF THE IOWA DEPARTMENT OF COMMERCE, STATE OF IOWA,** Respondent.	**Case No. CVCV009166** **RULING ON PETITION FOR JUDICIAL REVIEW**

On January 18, 2013, the above-captioned matter came before this Court for hearing. The Petitioner was represented by Philip Stoffregen. Gary Stump appeared for the Respondent. The following attorneys appeared for various intervenors: Joshua T. Mandelbaum for the Environmental Law & Policy Center; Mark R. Schuling for the Office of Consumer Advocate; Elizabeth Overton for the Iowa Association of Electric Cooperatives; Suzan M. Stewart for MidAmerican Energy Company; and Paula N. Johnson for Interstate Power and Light Company. After hearing the arguments of counsel and reviewing the court file, including the briefs filed by the parties and the Certified Administrative Record, the Court now enters the following ruling.

I. COURSE OF PROCEEDINGS AND BACKGROUND FACTS.

This matter arises from a Petition for Declaratory Order filed by SZ Enterprises, LLC d/b/a Eagle Point Solar (Eagle Point) with the Iowa Utilities Board (the Board) pursuant to Iowa Code section 17A.9 (2011) and the Iowa Administrative Code 199-4.1. "The declaratory ruling procedure under section 17A.9 permits persons to seek formal opinions on the effect of future transactions and arrange their affairs accordingly." *Women Aware v. Reagen*, 331 N.W.2d 88, 92

(Iowa 1983) (citing A. Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access To Agency Law, The Rulemaking Process,* 60 Iowa L. Rev. 731, 807 (1975)). Declaratory rulings are, thus, often based on hypothetical facts. *See Bennett v. Iowa Dep't of Natural Res.,* 573 N.W.2d 25, 26 (Iowa 1997); *see also Int'l Union, United Auto, Aerospace, Agric. & Implement Workers of Am. v. Iowa Dep't of Workforce Dev.*, 649 N.W.2d 17 *3 (Iowa 2002) (Table); 2002 WL 1285965 (Iowa June 12, 2002) ("A declaratory order petition contemplates a ruling . . . on the specific facts alleged so long as the facts in question presented are purely hypothetical. . . . [T]he purpose of a declaratory order is to set forth a legal opinion based on hypothetical or future circumstances . . . ."). As a general rule, a petition for declaratory order is not a vehicle to adjudicate contested facts. *See* A. Bonfield, *Amendments to Iowa Administrative Procedure Act (1998) Chapter 17A, Code of Iowa (House File 667 as Adopted) Report on Selected Provisions to Iowa State Bar Association and Iowa State Government* 38 (1998) ("Note that there are no contested issues of fact in declaratory order proceedings because their function is to declare the applicability of the law in question to unproven facts furnished by petitioners"). Accordingly, the only relevant and reviewable facts here are the facts set forth by Eagle Point in its Petition and its exhibits attached thereto, as detailed below. *See* Iowa Code § 17A.9(1)(a) ("Any person may petition an agency for a declaratory order as to the applicability *to specified circumstances* of a statute, rule, or order. . .") (emphasis added); 199 IAC 4.1 (same).

Eagle Point is in the business of providing design, installation, maintenance, monitoring, operational, and financing assistance services with respect to photovoltaic solar electric (PV) generation systems in Iowa. Since 2006 the City of Dubuque (the City) has vigorously and systematically pursued sustainability as a major focus along with development of renewable

energy resources within the city. Various impediments to the development of renewable energy resources by the City exist, including technical and financial risk, the burden of upfront costs, and its inability to utilize federal and/or state tax credits or other tax incentives. The City is specifically interested in pursuing with Eagle Point the development of a renewable energy resource in the form of an on-site PV solar power system to satisfy a portion of the electric power needs of a single building owned by the City located in Lot 2 of Kerper Industrial Park in the city (the City Premises). The City Premises are located within the exclusive electric services territory of Interstate Power and Light Company (IPL).

In order to mitigate the City's inability to utilize renewable energy incentives, tax credits, or other tax incentives, as well as to reduce the City's exposure to technical and financial risks, the City seeks to enter into a special form of long-term financing agreement with Eagle Point referred to as a third-party power purchase agreement (PPA). Pursuant to the PPA, Eagle Point would finance, install, own, operate, and maintain an on-site PV generation system located on the City Premises to supply a portion of the City's electricity needs at those premises.

Other primary characteristics of the PPA include, but are not limited to: (1) the solar facility will be located on the customer's side of the existing IPL meter, and no IPL distribution lines or other IPL facilities or equipment will be used to transport electric power generated by the solar facility to the City Premises; (2) Eagle Point will provide a package of services to the City, including financing the costs of the solar facility, monetizing renewable energy incentives, maintaining and operating the solar facility on an ongoing basis, and selling the full electric output of the facility to the City for consumption on the City Premises; (3) the City will be charged by Eagle Point on a cent-per-kWh basis for the electric output; (4) the City will purchase the full electric output generated at an agreed-upon price escalated annually by an inflation factor

of three percent; (5) due to practical limitations, the electricity generated on-site will not serve the total electric load of the City Premises; (6) the City Premises will remain connected to the electric grid and the City would continue to purchase electricity from IPL for the portion of the electricity needs not served by Eagle Point's PV generation system; (7) Eagle Point is entitled to all incentives associated with the facility, including tax credits and accelerated depreciation, but will credit to the City one-third of any revenues received from the sale of such credits; (8) Eagle Point is required to comply with all applicable law and operational standards imposed by the interconnection agreement with IPL; and (9) at the conclusion of the term of the agreement, all right, title, and interest in the solar system will be transferred to the City without further action.

Eagle Point filed a Petition for Declaratory Order with the Board on January 11, 2012. The questions posed by Eagle Point were: (1) whether under the relevant facts stated above Eagle Point is a "public utility" as defined by Iowa Code section 476.1; and (2) whether Eagle Point is an "electric utility" that is prohibited by Code section 476.25(3) from serving, offering to serve, or constructing facilities to serve the City Premises located in IPL's assigned exclusive electric service area. Eagle Point's proposed answers were that it would *not* be a public utility and is *not* prohibited from offering the service described in its Petition to the City. On January 17, 2012, the Board issued a Notice of Declaratory Ruling Proceeding and Order Setting Comment Schedule and Scheduling Informal Meeting to be served electronically on IPL, MidAmerican Energy Company (MidAmerican), all electric cooperatives, all municipal electric utilities, the Iowa Utility Association, the Iowa Association of Municipal Utilities (IAMU), and the Iowa Association of Electric Cooperatives (IAEC). In addition, the Board noted the Petition and its Order would be posted on-line through the Board's electronic filing system.

Several parties filed Petitions to Intervene in this matter. On January 31, 2012, intervenor status was granted by the Board to IPL, MidAmerican, the Office of Consumer Advocate (OCA), IAEC, IAMU. Intervenor status was also granted to a group that is collectively referred to as the Solar Coalition, which includes the Environmental Law and Policy Center, Iowa Environmental Council, Iowa Solar/Small Wind Energy Trade Association, Iowa Renewable Energy Association, Interstate Renewable Energy Council, Solar City Corporation, Solar Energy Industries Association, SunRun, Inc., Suntech America, the Vote Solar Initiative, and Winneshiek Energy District. The parties had an opportunity to file initial comments on February 1, 2012, and reply comments by February 8, 2012. All intervenors except IAMU filed comments. An amended joint petition to intervene by the Solar Coalition was granted by the Board on February 14, 2012.

In its Petition Eagle Point requested an informal meeting pursuant to 199 IAC 4.7. Such meeting was held between members of the Board's staff, Eagle Point, and all intervenors on February 15, 2012. Eagle Point requested, and the Board granted by agreement of all the parties, an extension for the Board to issue its order from March 12 to April 13, 2012.

On April 12, 2012, the Board issued its Declaratory Ruling addressing the questions posed by Eagle Point. The Board concluded Eagle Point *would be* a public utility under section 476.1 and consequently *would be* prohibited by section 476.25(3) from offering the service described in its Petition to the City.

Eagle Point filed the present Petition for Judicial Review with this Court on May 11, 2012, challenging the Board's Declaratory Ruling. More specifically, Eagle Point contends, under the facts presented in its Petition, that the Board: (1) erred in ruling it would be a public

utility; (2) erred in ruling it would be an electric utility; and (3) erred by basing its ruling on purported facts beyond those included in the Petition.

II. SCOPE AND STANDARD OF REVIEW.

Iowa Code section 17A.19(10) governs judicial review of administrative agency decisions. *NextEra Energy Res. LLC v. Iowa Utilities Bd.*, 815 N.W.2d 30, 36 (Iowa 2012). To decide the issue here, the Court must interpret various sections of chapter 476.

> To determine the applicable standard of review of an agency's interpretation of a statute, we must determine whether the legislature clearly vested the agency with the authority to interpret the statute at issue. If the legislature clearly vested the agency with the authority to interpret specific terms of a statute, then we defer to the agency's interpretation of the statute and may only reverse if the interpretation is "irrational, illogical, or wholly unjustifiable." If, however, the legislature did not clearly vest the agency with the authority to interpret the statute, then our review is for correction of errors at law.

Id. at 36-37 (citations omitted); *see also* Iowa Code § 17A.19(10)(c) ("The court shall reverse, modify, or grant other appropriate relief from agency action . . . if it determines that substantial rights of the person seeking judicial relief have been prejudiced because the agency action is . . . [b]ased 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.") Our supreme court has determined, "simply because the general assembly granted the Board broad general powers to carry out the purposes of chapter 476 and granted it rulemaking authority does not necessarily indicate the legislature clearly vested authority in the Board to interpret all of chapter 476." *NextEra*, 815 N.W.2d at 38. The court then concluded, based on this and previous case law, that the "general assembly did not delegate to the Board interpretive power with the binding force of law" with regard to interpreting chapter 476. *Id.* Accordingly, here the Court will examine the Board's interpretation of the relevant sections of chapter 476 for correction of errors at law and will not give deference to the Board's interpretation. *Id.; see also* Iowa Code § 17A.19(11)(b)

(stating the court, "Should not give any deference to the view of the agency with respect to particular matters that have not been vested by a provision of law in the discretion of the agency."). The Court will not give deference to the agency's interpretation and will substitute its own judgment for that of the agency if it concludes the Board made an error of law. *See Renda v. Iowa Civil Rights Comm'n,* 784 N.W.2d 8, 14-15 (Iowa 2010).

III. MERITS.

Iowa Code section 476.1 provides, in relevant part:

> 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.
> . . .
> 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.

The question therefore is whether Eagle Point is furnishing electricity "to the public" by selling solar power to the City pursuant to the PPA.

The phrase "to the public" is not defined in this or any other statute in Iowa. However, our supreme court has addressed the issue of what the phrase "to the public" means in the context of a natural gas case in *Iowa State Commerce Commission v. Northern Natural Gas Company,* 161 N.W.2d 111 (Iowa 1968). *Northern* involved the issue of whether providing retail sales to approximately 1800 "direct tap" Iowa customers from wholesale natural gas pipelines made the company a public utilities and thus subject to state regulation. The court held, "the question of whether a business enterprise constitutes a public utility is determined by the nature of its operations. Each case must stand upon the facts peculiar to it." *Northern,* 161 N.W.2d at 114. It then established the following standard:

> The real question is: What does the statutory phrase "to the public" mean? We conclude it means sales 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. In making this determination, the supreme court relied in part on eight factors from an Arizona case, *Natural Gas Service Company v. Serv-Yu Cooperative, Inc.*, 219 P.2d 324 (Ariz. 1950), that should be given weight in determining whether an entity is a public utility. *Id.* These factors are: (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; and (8) actual or potential competition with other corporations whose business is clothed with public interest. *Northern,* 161 N.W.2d at 115. The eight *Serv-Yu* factors are somewhat similar to the factors the United States Supreme Court found to be relevant in determining whether a business is "clothed with a public interest" for the purpose of public regulation in *Chas. Wolff Packing Company v. Court of Industrial Relations,* 262 U.S. 522, 537-39, 43 S. Ct. 630, 633-34 (1923).

The Board did not apply the analysis from *Northern,* or the eight factors set forth therein, because it determined this case is distinguishable because it deals with an electric utility, and it found there is a "significant difference between electricity and natural gas." The reasons given by the Board for this distinction were there are exclusive service territory statutes applicable to electric utilities that do not apply to gas utilities, and the exclusionary language included in section 476.1.

First, the exclusionary language relied on, in part, by the Board states, "This chapter does not apply to . . . a person furnishing electricity to five or fewer customers either by secondary line or from an alternate energy production facility or small hydro facility, from electricity that is produced primarily for the person's own use." Iowa Code § 476.1. The Court agrees with the Board that Eagle Point does not fit within the exception quoted above because it is not producing the electricity primarily for its own use. There is no dispute Eagle Point is selling all of its output to the City, so this exemption does not apply.

However, the Court does not agree with the Board's inference that this language should be read as implying that if an entity such as Eagle Point "does not meet the criteria of the exclusionary language and furnishes electricity to the public for compensation, that [entity] is a public utility under § 476.1." The plain language of the statute shows this exception concerns the chapter *as a whole* and not merely the definition of "public utility." It specifically states, "This *chapter* does not apply", and nowhere uses the term "public utility." *Id.* (emphasis added). Accordingly, the Court concludes this exception does not go directly to the definition of "public utility", and it should not be seen as any "guidance" by the legislature as to what it intended when it defined "public utility" or whether it intended for a solar facility such as Eagle Point to be considered as such.[1] In addition, the Court believes providing for such an exception at all indicates the legislature's willingness to allow exceptions for whether something should be

[1] It is noted this section was amended and renumbered in the 2013 Code, which sets forth this exception in a totally separate subsection from the section defining public utility. *See* Iowa Code § 476.1(5) (2013). This further supports the Court's conclusion that the exclusionary language is not relevant or applicable to the decision of what is a "public utility" and it should not be seen as any indication of the legislature's intention with regard to such a determination.

considered a "public utility" for smaller providers.[2] Thus, the Board's reliance on this exception in section 476.1(3) as a reason for distinguishing *Northern* is erroneous.

Second, the Board is correct the legislature established exclusive service areas for electric service in Iowa and there are no such exclusive areas for natural gas utilities. *See* Iowa Code §§ 476.22-476.26.[3] Section 476.25 provides, in part,

> It is declared to be in the public interest to encourage the development of coordinated statewide electric service at retail, to eliminate or avoid unnecessary duplication of electric utility facilities, and to promote economical, efficient, and adequate electric service to the public. In order to effect that public interest, the board may establish service areas within which specified electric utilities shall provide electric service to customers on an exclusive basis.

It goes on to state in subparagraph (3),

> An electric utility shall not serve or offer to serve electric customers in an exclusive service area assigned to another electric utility, nor shall an electric utility construct facilities to serve electric customers in an exclusive service area assigned to another electric utility.

Since their enactment, all areas of the state have been assigned as the exclusive service territory of one of various electric utilities under these statutes. Iowa Code section 476.22 provides, "As used in sections 476.23-476.26, 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 argues the Board's reliance on the distinction between gas and

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[2] The Court notes there is currently proposed legislation before the Iowa Legislature that would allow for smaller "alternate energy aggregation projects" wherein the very type of agreement Eagle Point is seeking here would be allowed. Such proposed amendments to sections 476.1 and 476.49 would, in part, specifically allow such PPA agreements as proposed here and provide that such projects *shall not* be considered a public utility and *do not* violate the provisions prohibiting the unnecessary duplication of electric facilities in section 476.25 discussed herein. *See* 2013 Iowa House File No. 226, Iowa Eighty-Fifth General Assembly - 2013 Session (Introduced Feb. 15, 2013).

[3] The exclusive territory statutes were enacted after the court's decision in *Northern.* Thus, it is presumed the legislature was aware of the definition the supreme court had given to the phrase "for the public" at the time of their enactment. *See Miller v. Marshall County*, 641 N.W.2d 742, 748 (Iowa 2002) ("If a term used in a statute has a well-settled legal meaning, we assume the legislature was aware of this meaning when it enacted the statute."); *State v. Effler,* 769 N.W.2d 880, 883 (Iowa 2009) (same).

electric utilities due to these exclusive territory statutes is only significant if such statutes are applicable to it, which presumes Eagle Point is an "electric utility." It contends it must first be determined if it is a "public utility" before it can be determine if it is an "electric utility" and thus the Board's rationale and argument are circular.

The Court concludes the Board erred in relying on the fact electric utilities have exclusive service areas and gas utilities do not in order to distinguish and not apply the *Northern* case. It agrees with Eagle Point that this distinction is only significant if such statutes are applicable to it, which would require a presumption Eagle Point is an "electric utility." There must be a determination of whether Eagle Point is a "public utility" under section 476.1(3) first before an analysis of whether it is an "electric utility" for purposes of the application of the exclusive service territory statutes in sections 476.22-476.26 is undertaken. These are two separate questions with separate definitions and legislative intents to be taken into account. Although the fact electric utilities have exclusive service areas and gas utilities do not is certainly a difference between the two, the Court does not believe such difference is sufficient to disregard the precedent set in *Northern.* Nor does the Court believe this distinction is the *sine qua non* in determining whether Eagle Point is a "public utility" under section 476.1, as the Board seemed to conclude.

It is of importance that gas and electricity are *both* included in the *same subsection* of section 476.1(3), which includes the phrase "to the public" defined and analyzed in *Northern.* Iowa Code § 476.1(3)(a). Thus, the definition and analysis of "for the public" used by the Iowa Supreme Court in the context of natural gas in *Northern* should be equally and consistently applied to a similar determination in the context of electricity. *Northern,* 161 N.W.2d at 114-16. In addition, such a determination must be undertaken with other statutory provisions of chapter

476 in mind. More specifically, the Court believes section 476.41, which states, "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," must also be taken into account and balanced against the interests of section 476.25.

Accordingly, the Court concludes each of the Board's stated distinctions and reasons for not applying the *Northern* analysis to Eagle Point's questions were erroneous and without merit. The Board committed legal error in determining *Northern* was distinguishable and not applicable to the case at bar. The proper legal analysis of whether Eagle Point is a public utility under section 476.1 is that set out by our supreme court in *Northern.* As set forth above, the legislature did not delegate to the Board interpretive power of chapter 476 with the binding force of law and thus the Court does not give deference to the agency's interpretation. *See NextEra,* 815 N.W.2d at 36; *Renda,* 784 N.W.2d at 14-15. Accordingly, because the Court has concluded the Board made an error of law, it will substitute its own judgment for that of the agency in determining if Eagle Point is a public utility under section 476.1. *See Renda,* 784 N.W.2d at 14-15; Iowa Code § 17A.19(10)(c).

In evaluating whether an entity is a public utility, the Court should not consider just one of the *Serv-Yu* factors in isolation but should instead engage in a "practical approach" and analyze a variety of factors that center "on the nature of the actual operations conducted and its effect on the public interest." *N. Natural Gas Co. v. Iowa Util. Bd.*, 679 N.W.2d 629, 633 (Iowa 2004); *see also Northern,* 161 N.W.2d at 114 ("[T]he question of whether a business enterprise constitutes a public utility is determined by the nature of its operations. Each case must stand upon the facts peculiar to it"). The Court must therefore determine if Eagle Point, through its

PPA contract with the City, is furnishing electricity "to the public" for purposes of chapter 476 under the analysis in *Northern.* In doing so, the Court will look to the eight *Serv-Yu* factors set forth above to assist it in determining whether Eagle Point should be considered a public utility. The Court recognizes these eight factors are not necessarily controlling of the public utility determination but are helpful and instructive on such question. *See Northern,* 161 N.W.2d at 115. It will only look to those factors that are relevant to the specific facts here and to those there is proper evidence on based on the procedural posture of the case discussed above.

The first *Serv-Yu* factor for consideration is what the corporation actually does. *Northern,* 161 N.W.2d at 115. As set forth above, the court held in *Northern* that the "question of whether a business enterprise constitutes a public utility is determined by the nature of its operations." *Id.* at 114. Eagle Point's primary business is to install solar panels. 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. In all of these financing options the customer reduces its energy demand from the grid in the same way. Here, Eagle Point offered to finance the City's renewable energy project through a PPA. Thus, the economic exchange that takes place between Eagle Point and its customers is incidental to what the company "actually does."

The location of the renewable energy equipment with respect to the electric meter is also significant. Eagle Point installs the renewable energy systems on the customer's side of the meter, also known as "behind" the meter. This means the system is primarily intended to reduce the customer's demand for utility supplied electricity, here supplied from IPL, but not eliminate it. The customer will still be connected to the grid, will still be an IPL customer, and must continue to purchase energy and capacity from IPL. Eagle Point is neither attempting to replace

IPL or sever the link between IPL and the City. It is simply allowing the City to decrease its demand for electricity from the grid.

The Board has previously recognized that behind-the-meter generation of renewable energy used 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. In its Final Order in *In re Interstate Power & Light Co.,* Docket No. EEP-08-1, at 11 (Final Order, Iowa Utilities Board June 24, 2009), the Board stated,

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

Thus, a provider of behind-the-meter energy efficiency services is not subject to regulation as a public utility. Likewise, a third-party developer of renewable energy systems, which essentially provides the customer with the same service by different means, should be treated similarly. It makes little sense to regulate Eagle Point as a public utility simply because the City is choosing to reduce its demand and energy use from the grid through a behind-the-meter renewable energy facility rather than behind-the-grid energy efficiency measures. Furthermore, the Board seems to be distinguishing between behind-the-meter generation owned by a customer and such owned by a third party, even though the end result of both is the same. The Board's analysis focuses heavily on the financing method over substance and the fact the end result is the same. This is at odds with the "practical" analysis required by our supreme court in *Northern.* 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. Accordingly, the

Court concludes this factor does not favor finding Eagle Point is a public utility under section 476.1.

Serv-Yu factor number two is a dedication to a public use. *Northern,* 161 N.W.2d at 115. Based on the evidence in the Petition, it does not appear Eagle Point dedicates its facilities to public use. The facilities through which it would provide electric service to the City Premises is only dedicated to that single customer on that single site. In addition, Eagle Point does not provide service to a large segment of the population, nor are its activities integral to the provision of electricity to the public at large like the activities of IPL and other large electric utilities. It merely enables an individual customer to employ an on-site solar facility for the purpose of serving its particular needs from a financial as well as operational prospective. Thus, the Court does not believe this factor weighs in favor of finding Eagle Point is a public utility.

The Court does not find *Serv-Yu* factor three to be particularly helpful or relevant to its inquiry here. However, it does note 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, all of which are referenced and attached to its Petition for Declaratory Judgment. Nor does such seem to be a practicality at this point.

The fourth *Serv-Yu* factor is that the entity is "[d]ealing with the service of a commodity in which the public has been generally held to have an interest." *Northern,* 161 N.W.2d at 115. Clearly electricity is a commodity in which the public has generally been held to have an interest. Thus, this factor may be seen as weighing in favor of finding Eagle Point a public utility. However, it should be noted such is not the case with the entire package of services Eagle Point would provide to its customers. The electricity provided is not dependent on any common facilities that serve the public, and it is both generated and consumed on the customer's

premises. Moreover, Eagle Point would not provide all of the electric power required by the City. The City will remain connected to IPL and will receive power from IPL at any time necessary. Thus, any interruption of services by Eagle Point is substantially less serious than the effects of a shutdown in utility service by IPL.

The fifth *Serv-Yu* factor is monopolizing or tending to monopolize the territory with a public service commodity. *Id.* Public utility regulation is part of a long standing regulatory compact in which natural monopolies, like electric and natural gas providers, are granted the right to operate as monopolies in exchange for state regulation of their rates and terms of service. *See Jersey Cent. Power & Light Co. v. F.E.R.C.,* 810 F.2d 1168, 1189 (D.C. Cir. 1987) ("The utility business represents a compact of sorts; a monopoly on service in a particular geographical area (coupled with state-conferred rights of eminent domain or condemnation) is granted to the utility in exchange for a regime of intensive regulation, including price regulation, quite alien to the free market." (citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 756-57, 88 S. Ct. 1344, 1354-55, 20 L. Ed.2d 312 (1968)). Third-party renewable energy developers are not "natural monopolies," and there is no reason at the present time 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 service in the absence of or in supplement to any on-site renewable energy generation. The City could have elected to install its own solar system, chosen another third-party provider or other renewable energy system or continued to have IPL serve all its needs. As explained by the New Mexico Public Regulation Commission in an analogous case,

> [T]hese renewable developers are offering a supplemental service. If one or more third-party developers refuse to contract for services with a particular customer,

> whether it's because the customer's premises are not well suited for a system, or for any other reason, that customer is not going to be without electric service. There is no obvious public policy basis for the Commission to regulate these third-party developers as public utilities . . . . There is no obvious public policy that would require the Commission to step in and regulate prices charged by the third-party developers: 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.

In the Matter of a Declaratory Order Regulating Third Party Arrangements for Renewable Energy Generation, New Mexico Public Regulation Commission, Case No. 09-00217-UT at 11 (Dec. 17, 2009). Moreover, since regulated service is and must be available to the City Premises at all times, EPS is unable to monopolize the provision of electric. Accordingly, the Court concludes the particular facts and circumstances of this case show Eagle Point is not monopolizing and does not appear to intend to monopolize the territory with a public service commodity and this fact weighs against finding Eagle Point should be considered a public utility.

The next factor is "acceptance of substantially all requests for service." *Northern,* 161 N.W.2d at 115. Eagle Point argues it cannot accept substantially all requests because the packages of services is not suitable to all due to strict eligibility criteria, and only an "extremely limited portion" of the public is suitable for third-party financed on-site facility. It also alleges it is only one of several such providers in the market. However, none of these facts or anything to support them is set forth in the statement of relevant facts in the Petition. As set forth above, in ruling on a Petition for Declaratory Order, the Court is limited to the facts furnished in the Petition. *See* A. Bonfield, *Amendments to Iowa Administrative Procedure Act (1998) Chapter 17A, Code of Iowa (House File 667 as Adopted) Report on Selected Provisions to Iowa State Bar Association and Iowa State Government* 38 (1998) ("Note that there are no contested issues of fact in declaratory order proceedings because their function is to declare the applicability of the law in question to unproven facts furnished by petitioners."). Accordingly, the Court concludes

this factor cannot and will not be considered in making the public utility determination here because there are not sufficient, proper facts on this factor.

The seventh *Serv-Yu* factor states "[s]ervice under contract and reserving the right to discriminate is not always controlling." *Northern,* 161 N.W.2d at 115 (citations omitted). The PPA is a detailed and clearly individually-detailed contract, as evidenced by the primary characteristics of the City's PPA as set out in the Petition. In addition, Eagle Point certainly retains the right to discriminate as to who it contracts with. Although this factor is not controlling, it would tend to weigh against finding Eagle Point is a public utility.

The last factor for consideration is the actual or potential competition with other corporations whose business is clothed with public interest. *Id.* It is true that any need for electricity on the City Premises that remains unmet by Eagle Point will be met by IPL thereby placing the two in somewhat of a competitive relationship. However, Eagle Point states in the Petition it will never be able to produce all the electricity needed on the City Premises, the Premises will remain connected to the grid, and the City will continue to purchase from IPL above and beyond what Eagle Point cannot provide. Eagle Point therefore admits its capacity to provide electricity to the Premises is limited. Thus, at some point it and IPL would necessarily stop being competitors because Eagle Point simply cannot provide all the electric needs of the City Premises. Therefore, it is clear Eagle Point is neither trying to replace IPL nor sever the link between IPL and the City. The Court does not believe this factor would weigh in favor of finding Eagle Point a public utility.

Accordingly, looking at the eight *Serv-Yu* factors as a whole, the Court concludes the greater weight of the factors supports a determination that Eagle Point is not a public utility.

For all the reasons set forth above, the Court concludes that after applying the correct legal standard, Eagle Point does not furnish electricity "to the public" and thus does not meet the definition of a "public utility" provided in section 476.1. In making this determination, the Court has taken into consideration the particular facts and circumstances of this case, the nature of Eagle Point's actual operations and their effect on the public interest, the eight *Serv-Yu* factors, and Iowa's strong legislative polices supporting energy conservation and renewable energy development. *See* Iowa Code §§ 476.21, 476.41-48; *Northern,* 161 N.W.2d at 114-15; *N. Natural Gas,* 679 N.W.2d at 633; *see also 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 rationale for basis for the distinction drawn in section 476.5. . . ."). The Court emphasizes its determination here is limited to these parties, this PPA, and the particular facts and circumstances of the case before it, as directed to do by our supreme court. *See N. Natural Gas Co.*, 679 N.W.2d at 633 (Iowa 2004); *Northern,* 161 N.W.2d at 114 ("Each case must stand upon the facts peculiar to it").

Having concluded Eagle Point is not a "public utility" under section 476.1, the next question is whether it can and should be considered an "electric utility" as defined in section 476.22. Section 476.22 provides, "As used in sections 476.23-476.26, 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." All parties agree Eagle Point is not a "city utility" under section 390.1 and therefore that portion of the statute is not applicable here. Based on its conclusion that Eagle Point was a public utility, the Board determined the exclusive service territory statutes would apply to Eagle Point as an "electric utility" as well. Thus, Eagle

Point was "prohibited from selling electricity on a per-kWh basis to the City." More specifically, the Board concluded,

> Eagle Point does not have a service territory where it could sell electricity to retail customers and its sales would infringe on IPL's service territory, in violation of § 476.25(3).[4] The term "electric utility" as used in the exclusive service territory statutes could encompass a broader definition than the term "public utility" as used in § 476.1. However, because the Board has determined that Eagle Point is a public utility, the Board will not address the question of whether "electric utility" has a broader meaning at this time.

In other words, the Board concluded the term "electric utility" could encompass a broader definition than "public utility," but did not specifically determine whether Eagle Point could still be considered an "electric utility" for purposes of application of the exclusive service territory provisions in section 476.25 if it was found *not* to be a "public utility" because the Board did not need to do so based on its earlier determination. Eagle Point argues section 476.22 defines "electric utility" explicitly to include *only* a "public utility" under section 476.1 or a city utility under section 390.1. It contends because it is neither of these it cannot be an "electric utility" under this provision, and thus is not prohibited by section 476.25(3) from serving, offering to serve, or constructing facility to serve the City Premises located in IPL's exclusive electric territory.

The Court concludes because of the phrase "unless the context otherwise requires," and the fact the statute states "includes" and not any mandatorily limiting language such as "only" or "is limited to," that an "electric utility" could encompass something that is not a "public utility." However, a situation that would encompass this broader definition would clearly be the exception and not the rule. *See Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 588-89, 115 S. Ct.

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[4] As set forth above, under section 476.25(3), "An electric utility shall not serve or offer to serve electric customers in an exclusive service area assigned to another electric utility, nor shall an electric utility construct facilities to serve electric customers in an exclusive service area assigned to another electric utility."

1061, 1076, 131 L. Ed. 2d 1 (1995) (Thomas, J. dissenting) (stating the term "unless otherwise required" simply "indicates that [the legislature] intended simply to provide a 'default' meaning. . . ."); *Iowa Right to Life Comm. Inc. v. Tooker,* 808 N.W.2d 417, 429 (Iowa 2011) (holding the term "unless otherwise required" merely creates an "escape hatch" for when the context indicates a different result from the general meaning would be appropriate). Thus, the phrase "unless otherwise required" means "that in some cases the circumstances of a case may require the application of a modified definition of the pertinent statutory terms to carry out the legislature's intent regarding the statutory scheme." *Necanicum Inv. Co. v. Employment Dept.,* 190 P.3d 368, 370-71 (Or. 2008).

However, even when that phrase is present in a statutory definition, the Court will follow its standard interpretative methodology, namely that the ultimate goal is to give effect to the intent of the legislature. *See Citizens' Aide/Ombudsman v. Miller*, 543 N.W.2d 899, 902 (Iowa 1996); *Necanicum,* 190 P.3d at 170-71. In determining legislative intent the Court considers not only statutory language, but also the statutes "subject matter, the object sought to be accomplished, the purpose to be served, underlying policies . . . and the consequences of the various interpretations." *State v. Albrecht*, 657 N.W.2d 474, 479 (Iowa 2003). The Court reads the statute as a whole and seeks a reasonable interpretation that best effects the statute's purpose. *State v. Iowa Dist. Ct.,* 572 N.W.2d 587, 588 (Iowa 1997). Each part of the statute is presumed to have a purpose. *State v. Anderson*, 636 N.W.2d 26, 37 (Iowa 2001). Thus, the Court looks to the context in which the term is used and considers its relationship to associated words and phrases. *T & K Roofing Co., v. Iowa Dep't of Educ.*, 593 N.W.2d 159, 163 (Iowa 1999).

The Court does not believe this is an exceptional circumstance where the "context otherwise requires" the term "electric utility" to include broader definition of anything other than

a "public utility furnishing electricity as defined in section 476.1" or a "city utility as defined in section 390.1." The legislative policy and intent in establishing the exclusive electric territories is stated at the outset of section 476.25. "It is declared to be in the public interest to encourage the development of coordinated statewide electric service at retail, to eliminate or avoid unnecessary duplication of electric utility facilities, and to promote economical, efficient, and adequate electric service to the public." Iowa Code § 476.25. The proposed PPA furthers, is consistent with, or at the least does not directly go against the legislative intent set forth in this section.

First, there is nothing about the PPA that would discourage "the development of coordinated statewide electric service at retail." *Id.* The arrangement clearly contemplates a high degree of coordination between the City, IPL, and Eagle Point. It specifically requires Eagle Point comply with all applicable laws, including utility interconnection standards and approval and permit requirements, relating to the operations of the solar PV system. It also requires Eagle Point comply with operational standards and requirements imposed by the utility interconnection agreement with IPL, and that in all cases its interconnection must be acceptable to IPL. Second, on-site generation does not result in "unnecessary duplication of any electric utility facilities." *Id.* The behind-the-meter renewable energy project facilitated by the PPA is solely on the customer's side of the meter and does not rely on any IPL facilities that service the public or necessitate the creation of new electric utility infrastructure to serve the public. Third, the PPA is intended and designed to increase opportunities for financing the proposed renewable energy project by reducing transaction costs and expenses. This is not only consistent with the legislative purposes of promoting "economical, efficient, and adequate electric service to the public," but actually furthers it. *Id.*

The legislature's stated public policy on alternate energy and conservation of our natural resources is found in section 476.41. "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. Taking this statute together with the portion of section 476.25 quoted above, the Court concludes 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. *See Necanicum,* 190 P.3d at 370-71.

Accordingly, the Court concludes that based on the explicit language in section 476.22 (namely "unless the context otherwise requires") the Board is technically correct the term "electric utility" as used in the exclusive service territory statutes could potentially encompass a broader definition than the term "public utility" in section 476.1. Although there may be exceptional contexts when an entity that is *not* a "public utility" under section 476.1 could still be considered an "electric utility" under 476.22 in order to carry out the legislature's intent. For the reasons detailed above, this is not one of those instances where such a broader definition is necessary. *Id.* Therefore, the Court concludes Eagle Point is not an "electric utility" as defined in section 476.22, and as used in the exclusive service territory statutes found in sections 476.23-476.26. It is therefore not prohibited by section 476.25(3) from serving, offering to serve, or constructing facilities to serve the City Premises at issue here located in IPL's assigned exclusive electric service territory.

IV. CONCLUSION AND DISPOSITION.

For all the reasons set forth above, the Court concludes the Board erred in concluding the Iowa Supreme Court's decision in *Northern* is distinguishable and not applicable to the case at bar. The Board thus applied an incorrect legal standard in determining whether Eagle Point is a "public utility" under Iowa Code section 476.1. Applying the correct legal standard as set forth in *Northern* and subsequent relevant cases cited herein, the Court concludes Eagle Point does *not* provide electricity "to the public" and thus is *not* a "public utility" as defined in section 476.1. The Court further concludes Eagle Point is *not* an "electric utility" as defined in section 476.22, and thus is *not* prohibited from serving, offering to serve, or constructing facilities to serve the City Premises located in IPL's exclusive electric service territory. Based on the Court's rulings on these issues, it need not address the final issue raised by Eagle Point in its Petition regarding whether the Board based its ruling on improperly considered facts.

IT IS THE ORDER OF THE COURT that the Iowa Utility Board's Declaratory Ruling is **REVERSED.**

IT IS SO ORDERED this 29th day of March, 2013.

Carla T. Schemmel

Carla T. Schemmel, JUDGE
Fifth Judicial District of Iowa

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