

## SZ ENTERPRISES V. IOWA UTILITIES BOARD: IMPACT ON RURAL IOWA

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### I. INTRODUCTION

On January 11, 2012, Eagle Point Solar [hereinafter Eagle Point] petitioned for a Declaratory Ruling with the Iowa Utilities Board [hereinafter IUB] on the interpretation of “public utility” and “electric utility” under Iowa Code Sections 476.1 and 476.25(3).<sup>1</sup> Declaratory Rulings provide the petitioner with “the Board’s interpretation of the law in its application to a particular hypothetical circumstance.”<sup>2</sup> Eagle Point sought to form a third-party power purchase agreement (PPA) with the city of Dubuque where the city would purchase electricity generated by Eagle Point’s photovoltaic solar electric power systems placed on the property of the city on a per kilowatt hour basis.<sup>3</sup> Under the agreement, the city

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1. IOWA CODE §§ 476.1, 476.25 (2015); *In re SZ Enters., LLC*, No. DRU-2012-0001, 2012 WL 1263494, at \*1 (Iowa Utils. Bd. Apr. 12, 2012) (admin. declaratory ruling), <https://efs.iowa.gov/cs/groups/external/documents/docket/mdaw/mte0/~edisp/089097.pdf>.

2. IOWA UTILS. BD., ANNUAL REPORT 49 (2013), [http://iub.iowa.gov/sites/default/files/files/records\\_center/reports/AnnualReport\\_CY2013\\_Final.pdf](http://iub.iowa.gov/sites/default/files/files/records_center/reports/AnnualReport_CY2013_Final.pdf) [hereinafter ANNUAL REPORT].

3. Petition of SZ Enters., LLC d/b/a Eagle Point Solar for a Declaratory Order on Iowa Code §§ 476.1, 476.25(3) at 2-3 (No. DRU-2012-0001) (Iowa Utils. Bd. Jan. 11, 2012),

would continue to purchase the remainder of its electric power from Interstate Power and Light Company, also known as Alliant Energy (hereinafter “Alliant”), when not provided by Eagle Point.<sup>4</sup> MidAmerican Energy Company (hereinafter “MidAmerican”), Alliant, the Iowa Association of Electric Cooperatives (hereinafter “IAEC”), and the Iowa Association of Municipal Utilities intervened in the Declaratory Ruling on behalf of electric distribution groups.<sup>5</sup> The Environmental Law & Policy Center, Interstate Renewable Energy Council, Iowa Environmental Council, Iowa Renewable Energy Association, Iowa Solar/Small Wind Energy Trade Association, Solar Energy Industries Association, Vote Solar Initiative, and Winneshiek Energy District intervened in the Declaratory Ruling to support renewable energy.<sup>6</sup>

IUB concluded that Eagle Point would be considered a “public utility” under this arrangement, and therefore, would be prohibited from providing electric power to the city because the city is located in Alliant’s exclusive service territory.<sup>7</sup> IUB did not determine in the Declaratory Ruling what criteria would allow an entity that is not a public utility to still be considered an electric utility under Iowa Code.<sup>8</sup>

Eagle Point sought judicial review, and the district court reversed the IUB declaratory ruling by finding that Eagle Point is not a public or electric utility.<sup>9</sup> IUB and the electric distribution intervenors appealed the ruling, and on July 11, 2014, the Iowa Supreme Court, in an opinion written by Justice Appel, affirmed the district court’s decision.<sup>10</sup>

The purpose of this Note is to analyze the *SZ Enterprises v. Iowa Utilities Board* opinion and discuss the implications this decision will have on rural Iowa. Prior to the analysis there will be an in-depth discussion of the infrastructure of electric utilities, as well as state and federal regulations. This Note concludes with potential solutions and recommendations for the Iowa Legislature on how to continue to provide affordable and reliable electricity in rural Iowa in wake of the

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<https://efs.iowa.gov/cs/groups/external/documents/docket/mdaw/mte0/~edisp/089097.pdf>.

4. *Id.*

5. *In re SZ Enters.*, No. DRU-2012-0001, at 1 (Iowa Utils. Bd. Jan. 31, 2012) (order granting petitions),

<https://efs.iowa.gov/cs/groups/external/documents/docket/mdaw/mti2/~edisp/090738.pdf>.

6. *Id.*

7. IOWA CODE §§ 476.1, 476.25 (2015); *In re SZ Enters., LLC*, No. DRU-2012-0001, 2012 WL 1263494, at \*7 (Iowa Utils. Bd. Apr. 12, 2012) (admin. declaratory ruling), <https://efs.iowa.gov/cs/groups/external/documents/docket/mdaw/mte0/~edisp/089097.pdf>.

8. IOWA CODE § 476.22; *SZ Enters. v. Iowa Utils. Bd.*, 850 N.W.2d 441, 444 (Iowa 2014).

9. *SZ Enters.*, 850 N.W.2d at 444.

10. *Id.* at 442-44.

*SZ Enterprises* decision.

## II. RURAL ELECTRIC UTILITIES

### A. Background

Public utilities are businesses that provide everyday necessities to the public like water, electricity, natural gas, and telephone service.<sup>11</sup> Due to the necessary large investment on infrastructure, typically electricity and water are delivered to the customer from a private or public monopoly, which is heavily rate regulated by local, state, and the federal government.<sup>12</sup> The process of providing electricity is divided into generation, transmission, and distribution.<sup>13</sup> The generation plant produces the electrical power, the transmission lines deliver the power to the electric grid over long distances, and the distribution lines deliver the electricity to customer's homes, farms, and businesses.<sup>14</sup>

In Iowa, the generation and transmission of electricity is done through the open market,<sup>15</sup> unlike distribution, which is a monopoly provided by exclusive service territories.<sup>16</sup> The production of electricity occurs at generation plants powered typically by coal, natural gas, hydroelectric, nuclear, solar, wind, or geothermal energy.<sup>17</sup> The Energy Policy Act of 1992 deregulated generation to meet national demand, which allowed for wholesale competition to let electrons be sold on the open market.<sup>18</sup> These electrons are then transported from the generation facility to the delivery company through the transmission grid.<sup>19</sup> Finally, the electricity is delivered to the individual consumer.<sup>20</sup>

The production and delivery of electricity has many limitations. Because

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11. *Public Utilities*, THE FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/Public+Utilities> (last visited Feb. 8, 2016); *see, e.g.*, IOWA CODE § 476.1.

12. *Public Utilities*, *supra* note 11.

13. *Energy*, IOWA ASS'N OF ELEC. COOPS., <http://www.iowarec.org/energy/> (last visited Feb. 8, 2016).

14. *How Dependable Electricity Reaches You*, IOWA ASS'N OF ELEC. COOPS., [http://www.iowarec.org/media/cms/How\\_Dependable\\_Electricity\\_Reaches\\_\\_C5DBEBC082E35.pdf](http://www.iowarec.org/media/cms/How_Dependable_Electricity_Reaches__C5DBEBC082E35.pdf) (last visited Feb. 8, 2016).

15. *Energy*, *supra* note 13.

16. IOWA CODE § 476.25.

17. *Power Generation, Transmission, and Distribution: Where Does Demand Side Management Fit into the Equation?*, ENERNOC, <http://www.enernoc.com/our-resources/term-pages/more-about-power-generation-transmission-and-distribution> (last visited Feb. 8, 2016).

18. Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat 2776; *see Energy*, *supra* note 13.

19. *Energy*, *supra* note 13.

20. *Id.*

power is difficult and expensive to store, it is distributed at the time of generation.<sup>21</sup> Electrical usage also varies by time of day, season, and weather conditions, so power generation and transmission have to adjust to both low and peak demand.<sup>22</sup> During peak demand, the transmission system, including farm service delivery lines, is constrained to distributing a specific amount of current, depending on line capacity.<sup>23</sup> As demand along a distribution line increases, the line's capacity to deliver electricity can reach a point where it is constrained and cannot deliver the increased quantities of electricity to meet demand.<sup>24</sup>

As farms become more self-sufficient, use larger equipment, and become more technologically advanced, the demand for electricity on an individual farmstead grows.<sup>25</sup> Single-phase electric lines serve most farms, but many farms are upgrading to three-phase service lines.<sup>26</sup> Farmsteads will experience interruptions in service during peak demand once capacity on a distribution line has been reached.<sup>27</sup>

An upgrade to an electric distribution line is usually necessitated when there is new demand for electricity on the line, which causes or would cause the line to be constrained.<sup>28</sup> Often the last customer to add demand on the line is the customer who is charged for the upgraded line, with no additional infrastructure costs charged to the other customers on the line who may also benefit in the future if they increase their electrical demand.<sup>29</sup> Costs for a new three-phase line can cost \$40,000 or more per mile of line.<sup>30</sup>

With the increased promotion of renewable energy, background discussion of rural electric utilities must also include a discussion of net metering and distributed generation. Net metering is one mechanism to subsidize the cost of using renewable energy<sup>31</sup> and is described as “a single meter monitoring only the net amount of electricity sold or purchased.”<sup>32</sup> The utility customer draws elec-

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21. NAT'L RENEWABLE ENERGY LAB., SOLAR POWER AND THE ELECTRIC GRID 1 (2010), <http://www.nrel.gov/docs/fy10osti/45653.pdf>.

22. *See id.* at 2.

23. *See generally* *How Dependable Electricity Reaches You*, *supra* note 14.

24. *See* CONSUMERS ENERGY, AGRICULTURE, THREE-PHASE ELECTRIC SERVICE 1 (2006), [https://www.consumersenergy.com/uploadedFiles/CEWEB/YOUR\\_BUSINESS/Ag-Services-Fall-06.pdf?n=4786](https://www.consumersenergy.com/uploadedFiles/CEWEB/YOUR_BUSINESS/Ag-Services-Fall-06.pdf?n=4786).

25. *See id.*

26. *See id.*

27. *See id.*

28. *Id.*

29. *See id.*

30. *Id.*

31. *Wind Energy*, IOWA ASS'N OF ELEC. COOPS. (newsletter article) (on file with author).

32. IOWA ADMIN. CODE r. 199-15.11 (2015).

tricity from, and provides excess electricity back to the utility over the same meter, making the meter run both forwards and backwards.<sup>33</sup> This results in one “netting” against the other, which is economically equivalent to the utility customer selling electricity back to the utility at the utility’s retail rate.<sup>34</sup> Net metering does not involve separate purchase and sale transactions, which is different than the issue in *SZ Enterprises*.<sup>35</sup> Net metering is simply nets usage versus production.<sup>36</sup>

“‘[D]istributed generation’ [generally] refer[s] to energy sources located behind the retail meter or connected to a micro grid, where the intent is to remove some load or demand from the system of integrated electric generation, transmission, and distributed facilities . . . .”<sup>37</sup> The third-party PPA discussed in *SZ Enterprises* would be an example of distributed generation since it is on the customer side of the electric meter.<sup>38</sup> Third-party PPAs have been developed by renewable energy advocates as a way for the “developer-owner [to] absorb[] the high initial costs, [to] retain[] the responsibility of maintenance of the system, and [to be] compensated based on electricity actually produced by the system.”<sup>39</sup>

There is no denying that the electricity market is changing with the increased competition in electricity generation.<sup>40</sup> There is more competition in the market than ever before with the federal and state support for renewable energy.<sup>41</sup> IAEC notes the below laws and mechanisms in Iowa alone that encourage renewable energy and distributed generation:

1. Iowa Code 476.46 establishes the Alternate Energy Revolving Loan Program;
2. Iowa Code 476.47 requires electric utilities, whether or not rate-regulated by the Board, to offer an alternate energy purchase program to customers, based on energy produced by alternate energy production facilities in Iowa.
3. Iowa Code 476.44 establishes mandatory renewable energy purchase

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33. See *Wind Energy*, *supra* note 31.

34. *Id.*

35. See *SZ Enters. v. Iowa Utils. Bd.*, 850 N.W.2d 441, 441 (Iowa 2014).

36. See *Wind Energy*, *supra* note 31.

37. David B. Raskin, *The Regulatory Challenge of Distributed Generation*, HARV. BUS. L. REV. ONLINE, at 39 n.5, <http://www.hblr.org/2013/12/the-regulatory-challenge-of-distributed-generation/>.

38. See *SZ Enters.*, 850 N.W.2d at 441.

39. *Id.* at 454.

40. Joseph P. Tomain, *Traditionally-Structured Electric Utilities in A Distributed Generation World*, 38 *Nova L. Rev.* 473, 474 (2014).

41. See *id.*

- requirements for the investor-owned electric utilities that are rate regulated by the Board;
4. Iowa Code 476.8 requires public utilities to furnish reasonably adequate service and facilities. For public utilities furnishing gas or electricity, “reasonably adequate service and facilities” is defined to include “programs for customers to encourage the use of energy efficiency and renewable energy sources;”
  5. Iowa Code 473 includes a number of provisions designed to promote alternate and renewable energy production;
  6. Iowa Code 476B provides a wind energy tax credit;
  7. Iowa Code 476C provides a renewable energy tax credit;
  8. Iowa Code 437A.6 provides an exemption from the generation replacement tax;
  9. Iowa Code 423.3 provides various exemptions from sales tax that benefit renewable generation, including wind energy conversion property (423.3(54)) and solar energy equipment (423.3(90));
  10. Iowa Code 441.21(8) includes certain property tax exemptions for renewable facilities;
  11. Iowa Code 422.11L provides for Solar Energy system tax credits equal to 50% of the federal residential energy efficient property credit related to solar energy provided in Section 25D of the Internal Revenue Code (not to exceed \$3,000) and 50% of the federal energy credit related to solar energy systems provide in Section 48 of the internal revenue code (not to exceed \$15,000);
  12. Iowa Code 427B.26 provides for a special valuation for wind energy conversion property as it relates to local real estate taxes;
  13. 199 IAC 15 includes provisions regarding cogeneration and small power production facilities, including provisions related to the interconnection of QF and AEP facilities;
  14. 199 IAC 45 includes standard interconnection procedures and agreements;
  15. Iowa Code 476.48 establishes a procedure for the creation of small wind energy zones and 199 IAC 15.22 includes rules regarding the same;
  16. Iowa Code 476.53 sets forth policy designed to encourage the development of renewable electric power generation to meet local needs and the development of transmission capacity to export wind power generated in Iowa.
  17. Iowa Code 564A includes provisions concerning solar energy easements.
  18. 199 IAC 15.11(5) requires net metering to be offered by the utilities

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that are subject to rate regulation by the Board. In addition, a number of locally rate-regulated utilities have adopted net metering policies on a voluntary basis as set forth in their electric tariffs.<sup>42</sup>

The federal government has also “promoted investment in alternate energy facilities by providing powerful tax incentives, including a thirty-percent investment tax credit in certain types of ‘energy property’ and accelerated tax depreciation deductions for alternate energy projects.”<sup>43</sup> With support for renewable energy always being a politically attractive vote for elected officials, they must consider the implications even more laws and mechanisms supporting distributed energy will have on “distribution capacity in rural areas[,] the costs of upgrading and maintaining the electric distribution system[,] the connection of on-farm power generation to the distribution system[,] and how system costs should be reasonably distributed among ratepayers . . . .”<sup>44</sup>

### *1. State Regulations and Policies*

In 1976, the Iowa General Assembly enacted exclusive service territory legislation that established boundaries for which electric utilities could provide service in a given area.<sup>45</sup> The Iowa Code explicitly shows the legislative intent by stating “[i]t 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 facilities, and to promote economical, efficient, and adequate electric service to the public.”<sup>46</sup> IUB determines these exclusive service area boundaries.<sup>47</sup> Currently, Iowa has two investor-owned utilities, MidAmerican and Alliant, 136 municipal utilities, and forty-seven rural electric cooperatives.<sup>48</sup> Iowa’s rural electric cooperatives provide power to 650,000 Iowans, making up 14.34% of the customers in the state.<sup>49</sup>

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42. *In re* Distributed Generation at 14-15, (NOI-2014-0001), (Iowa Utils. Bd. Feb. 25, 2014), (Response/Comments of Iowa Association of Electric Cooperatives) (on file with author).

43. *SZ Enters.*, 850 N.W.2d at 453.

44. Letter from Christina L. Gruenhagen, Gov’t Relations Counsel, Iowa Farm Bureau, to Iowa Utilities Board (Feb. 25, 2014) (on file with author).

45. See *History of the Iowa Utilities Board*, IOWA UTILS. BD, <http://iub.iowa.gov/history.html> (last visited Feb. 8, 2016).

46. IOWA CODE § 476.25 (2015).

47. *Id.*; see *Electric Service Area Reference Map*, IOWA DEP’T OF TRANSP. (Mar. 11, 2013), <http://www.iowadot.gov/maps/msp/electrical/StatewideElectricalBoundaryMap.pdf>.

48. ANNUAL REPORT, *supra* note 2, at 13, 128-31, 133-34.

49. *About*, IOWA ASS’N OF ELEC. COOPS., <http://www.iowarec.org/about/> (last visited Feb. 8, 2016).

IUB regulates the rates and services of MidAmerican and Alliant.<sup>50</sup> The municipal electric utilities and rural electric cooperatives provide electricity to areas of the state that are not financially beneficial to the investor owned utilities because of the lower ratio of population per mile of infrastructure.<sup>51</sup> Municipal electric utilities are regulated only to the extent of Iowa Code Section 476.1B.<sup>52</sup>

The rural electric cooperatives are not subject to rate regulation by IUB, unless opted into like the Linn County REC.<sup>53</sup> The rural electric cooperatives are regulated for services only to the extent of Iowa Code Section 476.1A.<sup>54</sup> Rural electric cooperatives and municipal utilities, which serve less than 10,000 customers, are governed locally by boards or city councils that determine the utilities' rates and procedures for upgrades to service distribution lines.<sup>55</sup> The IUB regulates some aspects of their service including "[s]afety and engineering standards for equipment, operations, and procedures," service areas, alternative energy purchase plans, and energy efficiency plans.<sup>56</sup>

To contrast with the exclusive service territory legislative intent, it should also be noted that Iowa Code Section 476.41 states, "[i]t is the policy of this state to encourage the development of alternate energy production facilities . . . in order to conserve our finite and expensive energy resources and to provide for their most efficient use."<sup>57</sup>

## 2. Federal Regulations and Policies

Iowa's statute does not explicitly authorize IUB to mandate net metering; their authority is implicit through IUB's enforcement of the Public Utilities Regulatory Policies Act (PURPA).<sup>58</sup> "PURPA requires [the Federal Energy Regulatory Commission] to adopt 'such rules as it determines necessary to encourage cogeneration and small power production,' including rules that require electric utilities to purchase electric energy from qualifying cogeneration facilities."<sup>59</sup> The rates of the energy from these alternate energy producers must be "just and

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50. ANNUAL REPORT, *supra* note 2, at 13.

51. *See About*, *supra* note 49.

52. IOWA CODE § 476.1B (2015).

53. ANNUAL REPORT, *supra* note 2, at 13.

54. IOWA CODE § 476.1A.

55. *Id.*; *see About Cooperatives*, IOWA ASS'N ELEC. COOPS., [http://www.iowarec.org/about/frequently\\_asked\\_questions/organizational\\_issues/](http://www.iowarec.org/about/frequently_asked_questions/organizational_issues/) (last visited Feb. 8, 2016).

56. IOWA CODE §§ 476.1A, 476.1B.

57. *Id.* § 476.41.

58. Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117.

59. 16 U.S.C. § 824a-3(a)(2) (2012); *Windway Techs., Inc. v. Midland Power Coop.*, 696 N.W.2d 303, 306 (Iowa 2005).

reasonable to the electric consumers of the electric utility and in the public interest,” and they must “not discriminate against [alternate energy] producers.”<sup>60</sup> The Iowa Supreme Court noted in *Windway Technologies, Inc. v. Midland Power Co-op*, “Congress considered, but did not adopt, a requirement that utilities purchase energy from [alternate energy producers] on a net metering basis.”<sup>61</sup> However, the rules adopted by FERC make electric utilities purchase energy from qualifying facilities.<sup>62</sup>

Using this PURPA authority, the IUB has required Iowa’s rate-regulated utilities (MidAmerican and Alliant) to make net metering service available upon request to any customer that the utility serves.<sup>63</sup> The customer must have an eligible on-site generating facility.<sup>64</sup> As described in Iowa Code Section 476.42, an alternate energy production facility would include “[a] solar, wind turbine, waste management, resource recovery, refuse-derived fuel, agricultural crops or residues, or wood-burning facility.”<sup>65</sup>

### III. ANALYZING SZ ENTERPRISES V. IUB

The purpose of this Note is to analyze the *SZ Enterprises* opinion and discuss the implications this decision will have on rural Iowa. In the case, the court first determined that IUB does not deserve deference for its interpretation of the public utility statutes.<sup>66</sup> The court further determined that Eagle Point is not operating as a public utility or as an electric utility, and therefore, would not be violating Iowa’s exclusive service territories.<sup>67</sup>

#### *A. The Iowa Supreme Court Failed to Use the Proper Standard of Review*

The district court and Iowa Supreme Court ruled that IUB’s interpretation of the statutes involved in this case did not receive deference under *NextEra Energy Resources LLC v. Iowa Utilities Board* and *Renda v. Iowa Civil Rights Commission* standards.<sup>68</sup> In determining whether IUB deserves any deference in judicial review, the court looked to see “whether the legislature clearly vested the agency with the authority to interpret the statute at issue.”<sup>69</sup> The court has found

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60. Public Utility Regulatory Policies Act, §§ 210(b)(1) – (2).

61. *Windway Techs., Inc.*, 696 N.W.2d at 306.

62. 18 C.F.R. § 292.303 (2015).

63. See IOWA CODE § 476.47 (2015).

64. See IOWA CODE § 476.42; IOWA ADMIN. CODE. r. 199-15.11 (2015).

65. IOWA CODE § 476.42.

66. *SZ Enters. v. Iowa Utils. Bd.*, 850 N.W.2d 441, 452 (Iowa 2014).

67. *Id.* at 468, 470.

68. *Id.* at 446, 451.

69. *Id.* at 449; *NextEra Energy Res. v. Iowa Utils. Bd.*, 815 N.W.2d 30, 36 (Iowa 2012)

that when the General Assembly has provided a specific definition in a statute to an agency, less deference is given to the agency interpretation during judicial review.<sup>70</sup> Because the court believed that the legislature did not explicitly grant IUB authority “to interpret the terms ‘public utility’ and ‘electric utility’”<sup>71</sup> due to the legislature already defining these terms, and that the subject matter of public and electric utilities are not of sufficient complexity to require an agency legal interpretation, the court did not believe the “legislature clearly vested the agency with the authority to interpret the statute at issue.”<sup>72</sup> The court also emphasized that the terms public and electric utility “are not exclusively within the expertise of the [IUB]” and that the legislature has used these terms throughout the Iowa Code.<sup>73</sup> Therefore, IUB was not entitled to deference on judicial review.<sup>74</sup> Because the court found that the legal issues were not subject to the deference of IUB, the appeal was reviewed *de novo*.<sup>75</sup>

The court incorrectly found that IUB does not deserve any deference on review. Historically, agencies have received large discretion when interpreting statutes clearly within their expertise.<sup>76</sup> In *Renda v. Iowa Civil Rights Commission*, the court changed the focus of deference away from whether the agency had been granted broad interpretative authority, to specifically reviewing the terms of the statutes.<sup>77</sup> IUB has unquestionably been delegated rulemaking authority by the Iowa General Assembly and has broad general powers to carry out the purpose of Iowa Code Chapter 476,<sup>78</sup> which include regulating all electric, gas, telephone, telegraph, water utilities, pipelines, and underground gas storage tanks in Iowa.<sup>79</sup> The definition of public utility has ramifications throughout all of Chapter 476, and the IUB is best situated to determine the effects of the definition.

The court barely analyzed whether the terms in question are complex

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(internal quotations omitted).

70. *SZ Enters.*, 850 N.W.2d at 450; see *Renda v. Iowa Civil Rights Comm’n*, 784 N.W.2d 8, 14 (Iowa 2010).

71. *SZ Enters.*, 850 N.W.2d at 451.

72. *Id.* at 449-52; *NextEra Energy Res. LLC*, 815 N.W.2d at 36.

73. *SZ Enters.*, 850 N.W.2d at 452; *Gartner v. Iowa Dep’t of Pub. Health*, 830 N.W.2d 335, 344 (Iowa 2013) (alteration in original).

74. *SZ Enters.*, 850 N.W.2d at 452.

75. *Id.*

76. See IOWA CODE § 17A.19 (2015).

77. Melissa H. Weresh & Aaron W. Ahrendsen, *Rectifying Renda: Amending the Iowa Administrative Procedure Act to Remove the Legal Fiction of Legislative Delegation of Interpretive Authority*, 63 DRAKE L. REV. 591, 591 (2015).

78. IOWA CODE § 476.2 (2015); *NextEra Energy Res. LLC*, 815 N.W.2d at 38.

79. *Frequently Asked Questions: Utility Basics*, IOWA ASS’N OF ELEC. COOPS., [http://www.iowarec.org/about/frequently\\_asked\\_questions/utility\\_basics/](http://www.iowarec.org/about/frequently_asked_questions/utility_basics/) (last visited Feb. 8, 2016).

enough to deserve agency interpretation.<sup>80</sup> The court did recognize that “the IUB decides some highly complex and technical terms under Iowa Code Chapter 476 that require this court to defer with respect to the IUB’s legal interpretations.”<sup>81</sup> However, in response to the terms at issue in this case (public and electric utility), the court simply responded, “we can determine the scope of the legislatively defined terms in this case without any unusual expertise.”<sup>82</sup> In doing so, it completely ignored IUB’s argument that the subject matter jurisdiction in this case “requires an understanding of complex technical issues such as the purpose of the exclusive service territory statute and whether Eagle Point’s proposed project would undermine economical, efficient, and adequate electric service to the public.”<sup>83</sup>

In Justice Mansfield’s dissent, he pointed out

[t]he issue under *Renda* is not whether the term itself is technical or complex, in the sense that you would not encounter it in everyday speech or would need a college-level vocabulary to understand it . . . . The issue under *Renda* is whether the term appears across a variety of legal contexts, such as ‘employee’ did in *Renda*, or whether it appears to have a ‘specialized’ meaning.<sup>84</sup>

Justice Mansfield stated that “public utility” is not simply a legal concept, but a “concept embedded in the law relating to the supply and regulation of energy, communications, and water services.”<sup>85</sup> Unlike the majority, Justice Mansfield would have given deference to IUB on the interpretation of “public utility,” and upheld IUB’s Declaratory Order.<sup>86</sup>

#### *B. Third-party Power Purchase Agreements Will Go Unregulated*

Because the court determined IUB does not deserve deference on judicial review, the court reviewed “public utility” and “electric utility” *de novo*.<sup>87</sup> The threshold issue for the court then becomes “whether the developer-owner in a third-party PPA is a public utility or electric supplier subject to state regulation.”<sup>88</sup> The court was concerned about the potential viability of third-party

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80. *SZ Enters.*, 850 N.W.2d at 452.

81. *Id.*

82. *Id.*

83. *Id.* at 449.

84. *Id.* at 473 (Mansfield, J., dissenting).

85. *Id.*

86. *Id.* at 470.

87. *Id.* at 452 (majority opinion).

88. *Id.* at 454.

PPAs as a public utility or electric supplier because some states would determine that a PPA violates its exclusive service territory provisions, like in Iowa, and others would subject the PPAs to substantial regulations as a public utility with tariffs and require the developer-owner to provide service to all who desire it.<sup>89</sup>

The court discussed how there has been increased deregulation in the airline, natural gas, telephone, trucking, and railroad industries.<sup>90</sup> The court implied that even though utilities have not seen similar deregulation, there is broad support to see electric utilities become an open market rather than a monopoly.<sup>91</sup> The court continued to discuss how third-party PPAs in photovoltaic generation help reduce cost to the consumer seeking behind the meter solar energy by minimizing the upfront cost barrier.<sup>92</sup>

The court chose to do its own research on the potential of solar photovoltaic generation and technological advances on the consumer side of the meter rather than give discretion to the agency that deals with this information daily and better understands the ramifications to Iowans.<sup>93</sup> Justice Mansfield rightly pointed out that the majority made many statements in its opinion that were not supported by authority or did not come from the record or the parties' briefs.<sup>94</sup> To provide for the court's own renewable energy at-all-means policy, the court manipulated the law to create a workaround so third-party PPAs are not subject to exclusive service territories and will go unregulated by IUB. Again, the court ignored the purpose of exclusive service territories and clearly works contrary to the Iowa General Assembly's intent to provide "economical, efficient, and adequate electric service to the public."<sup>95</sup>

The court gave no consideration to the common pool effect this will have on the public at large that does not form third-party PPAs. The ramifications of this decision will affect far more than just Alliant, Eagle Point, and the city of Dubuque.<sup>96</sup> IUB served MidAmerican, Alliant, all electric cooperatives that serve Iowans, all municipal electric utilities, the Iowa Utility Association, the Iowa Association of Municipal Utilities, and IAEC with the "Notice of Declaratory Ruling Proceeding and Order Setting Comment Schedule and Scheduling

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89. *Id.*; see IOWA CODE § 476.25 (2015).

90. *SZ Enters.*, 850 N.W.2d at 452.

91. See *id.* CONSUMER ENERGY COUNCIL OF AM. RESEARCH FOUND., RESTRUCTURING THE ELECTRIC UTILITY INDUSTRY: A CONSUMER PERSPECTIVE 3 (1998).

92. *SZ Enters.*, 850 N.W.2d at 453-54.

93. *Id.* at 471 n.9 (Mansfield, J., dissenting).

94. *Id.*

95. IOWA CODE § 476.25 (2015).

96. *In re SZ Enters., LLC*, No. DRU-2012-0001, 2012 WL 1263494, at \*1 (Iowa Utils. Bd. Apr. 12, 2012) (admin. declaratory ruling), <https://efs.iowa.gov/cs/groups/external/documents/docket/mdaw/mte0/~edis/089097.pdf>.

Informal Meeting” because it believed this decision would impact all electric utilities providing retail electric service in Iowa, and therefore, affect the public at large.<sup>97</sup> Justice Mansfield also pointed out that IUB recognized in their extensive proceedings that “if Eagle Point is allowed to take electricity sales away from [Alliant], which has made long-term investments based on projections of customer demand and which is authorized by law to recover its costs plus a reasonable rate of return, [Alliant’s] other ratepayers could be forced to make up the difference.”<sup>98</sup> *SZ Enterprises* specifically involved a PPA with the city of Dubuque, with a population of almost 58,000.<sup>99</sup> The court did not once discuss the impact this decision will have on the rate payers of municipal utilities and rural electric cooperatives that service less than 10,000 customers.<sup>100</sup> This ruling will impact the wealth transfer between low- to high-income consumers far greater in Iowa’s rural communities compared to a large city like Dubuque.<sup>101</sup>

Based on the *SZ Enterprises* ruling, third-party PPAs will not be subject to any regulation by IUB unless the legislature explicitly delegates authority to the Board over these types of agreements.<sup>102</sup> All the previous protections that IUB oversees for the investor-owned utilities, rural electric cooperatives, and municipal utilities, will not be enforced for third-party PPAs.<sup>103</sup> Eagle Point, and companies like it, will be able to pick and choose customers and discriminate against certain consumers because of the clever workaround of exclusive service territories by the court.<sup>104</sup> These companies will be able to pick off customers that are financially capable from the regulated utilities, which will likely lead to increased rates for those who are unable to afford to pay a third-party PPA.<sup>105</sup>

### C. Court Misinterprets “To the Public”

#### 1. Review of Different State’s PPA Laws

The court relied on *Iowa State Commerce Commission v. Northern Natural Gas Co.* when determining what constitutes a “public utility” providing services “to the public.”<sup>106</sup> *Northern Natural Gas Co.* involved a gas company with a

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97. *Id.*

98. *SZ Enters.*, 850 N.W.2d at 471 (Mansfield, J., dissenting) (alteration to original).

99. *Id.* at 444 (majority opinion); *Demographics*, THE CITY OF DUBUQUE, <http://www.cityofdubuque.org/844/Demographics> (last visited Feb. 8, 2016).

100. *See About Cooperatives*, *supra* note 55; *see generally SZ Enters.*, 850 N.W.2d at 441.

101. *See Raskin*, *supra* note 37, at 42.

102. *See SZ Enters.*, 850 N.W.2d at 468.

103. *See* IOWA CODE §§ 476.1A, 476.1B (2015).

104. *See SZ Enters.*, 850 N.W.2d at 461, 470.

105. *See id.* at 476 (Mansfield, J., dissenting).

106. *See id.* at 455 (majority opinion).

pipeline servicing 1800 retail customers, and the decision rested upon if the company was a public utility and therefore could be regulated.<sup>107</sup> In finding that the company was providing gas to the public, the court relied on the following: “(1)[p]laintiff [dealt] in a commodity in which the public as a whole is generally interested, (2) it [was] actually engaged in supplying its commodity to some of the public[, and] (3) [i]t served a substantial portion of the public.”<sup>108</sup> The court also considered the anticipation of expansion to more of the public.<sup>109</sup> Based on these considerations, the court found that the gas company was a public utility.<sup>110</sup> In *Northern Natural Gas Co v. Iowa Utilities Board*, the Court further found that “jurisdiction should be extended ‘only as necessary to address the public interest implicated.’”<sup>111</sup>

In *SZ Enterprises*, the court also looked to other states to see how the rest of the country determined if third-party PPAs are subject to regulation as “public utilities.”<sup>112</sup> In *PW Ventures, Inc. v. Nichols*, the Florida Supreme Court found that a cogeneration project that would sell its output under a long-term contract to an industrial site would be a public utility under Florida law.<sup>113</sup> The Florida Supreme Court applied a deferential review to the agency decisions and said it would not depart from the agency unless the agency decision was clearly unauthorized or erroneous.<sup>114</sup> The court upheld the decision of the Florida Public Service Commission that the electrical supplier was a public utility, but also noted “that the legislature had granted express exemptions from regulation for natural gas suppliers who market wholesale or direct to industrial customers and for water and sewer systems that serve fewer than one hundred persons, but that the legislature did not provide a similar exemption for electrical suppliers.”<sup>115</sup> The court found that if the electrical supplier was not determined to be a public utility, then “nothing would prevent ‘one utility company from forming a subsidiary and raiding large industrial clients within areas served by another utility.’”<sup>116</sup> However, in *SZ Enterprises*, the Iowa Supreme Court grasped on to the lone dissenter who found that “providing electricity to a single industrial customer was plainly insuf-

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107. *Id.*; see *Iowa State Commerce Comm’n v. N. Nat. Gas Co.*, 161 N.W.2d 111 (Iowa 1968).

108. *Iowa State Commerce Comm’n*, 161 N.W.2d at 116.

109. *SZ Enters.*, 850 N.W.2d at 455.

110. *Id.*; see *Iowa State Commerce Comm’n*, 161 N.W.2d at 119.

111. *SZ Enters.*, 850 N.W.2d at 456; *N. Nat. Gas Co. v. Iowa Utils. Bd.*, 679 N.W.2d 629, 633 (Iowa 2004).

112. *SZ Enters.*, 850 N.W.2d at 456.

113. *PW Ventures, Inc. v. Nichols*, 533 So. 2d 281, 283-84 (Fla. 1988).

114. *Id.* at 283.

115. *PW Ventures, Inc.*, 533 So. 2d at 283; *SZ Enters.*, 850 N.W.2d at 456.

116. *PW Ventures, Inc.*, 533 So. 2d at 283 n.5; *SZ Enters.*, 850 N.W.2d at 456.

ficient.”<sup>117</sup>

The Iowa Supreme Court was unable to find any other appellate case law that determines whether a third-party PPA is a public utility within the scope of regulatory statutes however, it noted that Arizona, Nevada, New Mexico, and Oregon have regulatory decisions that address the issue and all determine that the PPAs are not public utilities.<sup>118</sup> The court also found that California, New Jersey, and Colorado have explicitly addressed the issue of third-party PPAs by enacting legislation that exempts them from regulation.<sup>119</sup> The court then ridiculously believed that Iowa had “recent legislative activity on the issue.”<sup>120</sup> The court oddly thought that H.F. 226, which did not make its way out of subcommittee and was never enacted, shows some movement on the issue in Iowa.<sup>121</sup> The bill “explicitly stated that third-party PPAs related to ‘alternate energy aggregation projects’ would not be considered ‘public utilities’ and would not violate the exclusive territory provisions of [S]ection 476.25.”<sup>122</sup> Again, this legislation was never enacted.

The court did not explicitly state in the case that it relied upon the precedent of other states or the failed legislative bill in Iowa as a basis, but it obviously provided a rationale for their ruling or they would not have written multiple pages in the opinion about the bill.<sup>123</sup> Again, the court seemed to be trying to justify

117. *PW Ventures, Inc.*, 533 So. 2d at 284-85; *SZ Enters.*, 850 N.W.2d at 456.

118. *SZ Enters.*, 850 N.W.2d at 456-57; see *In re SolarCity Corp.*, No. E-20690A-09-0346, 69-70 (Ariz. Corp. Comm’n July 12, 2010), <http://images.edocket.azcc.gov/docketpdf/0000114068.pdf>; Investigation and Rulemaking to Adopt, Amend, or Repeal Regulations Pertaining to Chapters 703 & 704 of the Nev. Admin. Code, No.07-06024 & 07-06027, 12 (Nev. Pub. Utils. Comm’n Nov. 20, 2008); *In re Declaratory Order Regarding Third-Party Arrangements for Renewable Energy Generation*, No. 09-00217-UT, at 13 (N.M. Pub. Reg. Comm’n Dec. 30, 2009), <http://www.nmprc.state.nm.us/commissioners/pdf/Third%20Party%20Order.pdf>; *Honeywell Int’l, Inc.*, No. 08-388, 15 (Or. Pub. Util. Comm’n July 31, 2008), <http://apps.puc.state.or.us/orders/2008ords/08-388.pdf>; see also KATHARINE KOLLINS ET AL., DUKE UNIV., NAT’L RENEWABLE ENERGY LAB., SOLAR PV PROJECT FINANCING: REGULATORY AND LEGISLATIVE CHALLENGES FOR THIRD-PARTY PPA SYSTEM OWNERS 11-13 (2010), <http://www.nrel.gov/docs/fy10osti/46723.pdf> (cataloging state administrative decisions).

119. *SZ Enters.*, 850 N.W.2d at 459-60; see, e.g., CAL. PUB. UTIL. CODE § 218(b)(2) (West 2004); COLO. REV. STAT. § 40-1-103(2)(c) (2013).

120. *SZ Enters.*, 850 N.W.2d at 460.

121. *Id.*; see H.F. 226, § 1, 85th Gen. Assemb., Reg. Sess. (Iowa 2013); see also *Bill History for HF 226*, IOWA LEGISLATURE, <http://coolice.legis.iowa.gov/Cool-ICE/default.asp?Category=BillInfo&Service=DspHistory&var=HF&key=0256C&ga=85> (last visited Feb. 8, 2016).

122. *SZ Enters.*, 850 N.W.2d at 460; Iowa H.F. 226, § 1.

123. See *id.* at 456-60.

the fact that it is legislating and determining policy rather than interpreting the law with other state's PPA cases, regulations, and statutes. The fact the court even mentioned an Iowa bill that did not get out of subcommittee as a showing of a shift in public opinion is contrary to legislative history. H.F. 226 came up after IUB made its Declaratory Order, and the legislature had already acquiesced to the decision, or it would have passed the bill out of subcommittee.<sup>124</sup> Further, the bill was only brought up by one member of the Iowa House, with no senators sponsoring a similar bill their chamber.<sup>125</sup> As Justice Mansfield properly asks, "is it the proper role of courts to act as experts on the delivery of electrical energy? I would argue it is not."<sup>126</sup>

## 2. Issues for De Novo Review

The court analyzed two issues on review: whether Eagle Point is a public utility, and whether Eagle Point is an electric utility even if not determined to be a public utility.<sup>127</sup>

Iowa Code Section 476.1 states, "'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."<sup>128</sup> The Iowa Code does provide for an exception to this Chapter if the person is "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."<sup>129</sup> The court disagreed with IUB that the *Northern Natural Gas Co.* test does not apply because gas suppliers are not subject to exclusive territorial provisions like electric utilities are.<sup>130</sup> The court based this decision on the fact that the definition of public utility was enacted in the 1963 legislation, and that the later 1977 legislation that implemented exclusive service territories did not revise the preexisting Code.<sup>131</sup>

Because the court determined that *Northern Natural Gas Co.* is the appropriate standard in evaluating if Eagle Point's PPA is a public utility, it utilizes the

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124. Petition of *SZ Enter.*, *supra* note 3; Iowa H.F. 226, § 1.

125. See *Iowa - HF 226 - 2013*, ADVANCED ENERGY LEGISLATION TRACKER, <http://www.aeltracker.org/bill-details/364/iowa-2013-hf-226> (last visited Feb. 8, 2016).

126. *SZ Enters.*, 850 N.W.2d at 471 (Mansfield, J., dissenting).

127. *Id.* at 460-61 (majority opinion).

128. IOWA CODE § 476.1(3)(a) (2015).

129. *Id.* § 476.1(5).

130. *SZ Enters.*, 850 N.W.2d at 465.

131. *Id.*

eight-factor *Natural Gas Service Co. v. Serv-Yu Cooperative* test.<sup>132</sup> The eight 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
8. Actual or potential competition with other corporations whose business is clothed with the public interest.<sup>133</sup>

The court agreed with the district court and found that after weighing the *Serv-Yu* factors, it supported a finding that the third-party PPA is not a public utility.<sup>134</sup>

Justice Mansfield criticized the majority on this analysis in two ways. First, he properly noted that *Northern Natural Gas Co.* was decided before the Iowa Administrative Procedures Act was adopted.<sup>135</sup> Using a case for analysis that was decided prior to the primary state law that governs how state agencies may operate is improper. Second, Justice Mansfield noted that the majority was incorrect to disregard that gas and electricity should follow a different standard when determining if the entity is a “public utility” because of the “significant” statutory differences.<sup>136</sup> Justice Mansfield properly emphasized that “[C]hapter 476 provides for exclusive territories for electric utilities but not gas utilities, based on a legislative determination that there should not be duplication of electric facilities. Second, [S]ection 476.1 contains a specific exclusion limited to certain providers of electricity.”<sup>137</sup> Iowa Code Section 476.1 only excludes “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 elec-

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132. *Id.* at 466-68.

133. *Nat. Gas Serv. Co. v. Serv-Yu Coop.*, 219 P.2d 324, 326 (Ariz. 1950); *see also* Iowa State Commerce Comm’n v. N. Nat. Gas Co., 161 N.W.2d 111, 115 (Iowa 1968) (citations omitted).

134. *SZ Enters.*, 850 N.W.2d at 468.

135. *Id.* at 473 (Mansfield, J., dissenting).

136. *Id.* at 474.

137. *Id.*

tricity that is produced primarily for the person's own use."<sup>138</sup> Eagle Point clearly is not covered by this exclusion and should be classified as a "public utility."

*D. Court Improperly Disregards Eagle Point as an Electric Utility*

The court dismissed the entire argument that Eagle Point could be an electric utility in two short paragraphs of this twenty-six-page opinion.<sup>139</sup> IUB suggested that the matter of if Eagle Point is an electric utility under Iowa Code Section 476.22 should be remanded to the Board since in the Declaratory Ruling it did not address the issue.<sup>140</sup> The court disagreed and simply stated that IUB "has not offered a clear explanation as to why Eagle Point should be considered an electric utility even if it is not a public utility."<sup>141</sup> The analysis by the court is almost non-existent on this issue, and at the very least, the court should have remanded this issue to the agency with expertise in this matter.

In the Declaratory Order, there was no reason for the IUB to make a decision on whether Eagle Point would be considered an electric utility if it was not a public utility, because IUB had already concluded that Eagle Point was a public utility.<sup>142</sup> At the very least, the court should have remanded the determination on if Eagle Point was an electric utility after both the district and Supreme Court found that Eagle Point wasn't a public utility.

The court did not consider the far-reaching implications of not remanding the decision to IUB on if Eagle Point was an electric utility. Not once during the court's analysis of the deference issue did it discuss exclusive service territories.<sup>143</sup> Iowa Code states, "[a]n 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."<sup>144</sup>

The court clearly defied legislative intent in not remanding this decision to the agency the legislature had delegated exclusive service territories to under Iowa Code Chapter 476.<sup>145</sup> The legislature found that it was "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

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138. IOWA CODE § 476.1(5) (2015).

139. See *SZ Enters.*, 850 N.W.2d at 470 (majority opinion).

140. *Id.* at 469.

141. *Id.* at 470.

142. *In re SZ Enters., LLC*, No. DRU-2012-0001, 2012 WL 1263494, at \*7 (Iowa Utils. Bd. Apr. 12, 2012) (admin. declaratory ruling).

143. See *SZ Enters.*, 850 N.W.2d at 450-52.

144. IOWA CODE § 476.25(3) (2015).

145. *Id.* § 476.25.

promote economical, efficient, and adequate electric service to the public.”<sup>146</sup> Rather than letting the agency delegated rulemaking authority under this provision determine if the third-party PPA proposed by Eagle Point with the city of Dubuque would not be economical and provide unnecessary duplication of services,<sup>147</sup> the court chose to act outside its scope. As Justice Mansfield pointed out, “the majority opinion is a good case study on the limits of judicial competence and why the legislature wanted us to defer, in large part, to the regulatory agency.”<sup>148</sup>

IUB found in the April 12, 2012 Declaratory Ruling that “[t]hird-party PPAs erode the integrity of the service territory statutes without any change in the utility’s obligation to serve; any such rebalancing of a utility’s rights and obligations, absent clear statutory direction, should be a legislative decision.”<sup>149</sup> The court instead decided to act in a legislative capacity out of a preference for renewable energy, rather than allow the process to work out with the more qualified and experienced IUB.

The contrast between *SZ Enterprises* and *Windway Technologies, Inc. v. Midland Power Co-op* should also be discussed. In *Windway Technologies, Inc.*, the plaintiffs sought to sell back their excess energy to their electric cooperative.<sup>150</sup> The issue was “whether a nonrate-regulated utility should be required to sell energy to alternate energy producers on a net metering basis.”<sup>151</sup>

The court determined that there is no express or implied requirement for net metering in PURPA.<sup>152</sup> The court decided that “[g]iven the broad discretion granted to regulatory authorities and nonrate-regulated utilities to determine whether and when to use net metering, we conclude it would be wrong to interpret PURPA to require Midland to offer net metering to all AEPs in its tariffs.”<sup>153</sup>

Most importantly, in the conclusion, the court noted several reasons for its decision to not require non-rate-regulated utilities to require net metering:

- (1) the specialized and technical nature of the net-metering issue, (2) the absence of any meaningful guidance for case-by-case determinations of when net metering is appropriate and when it is not, (3) the broad precedential effect of requiring net metering in this case, which would be contrary to

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146. *Id.*

147. *Id.*

148. *SZ Enters.*, 850 N.W.2d at 470 (Mansfield, J., dissenting).

149. *In re SZ Enters., LLC*, No. DRU-2012-0001, 2012 WL 1263494, at \*7 (Iowa Utils. Bd. Apr. 12, 2012) (admin. declaratory ruling).

150. *Windway Techs., Inc. v. Midland Power Coop.*, 696 N.W.2d 303, 304 (Iowa 2005).

151. *Id.*

152. *Id.* at 307.

153. *Id.*

FERC's position that net metering is appropriate "in some situations," (4) the authority of the Iowa legislature and the utilities board to require net metering for nonregulated utilities and their failure to do so, and (5) the authority of FERC to regulate the implementation of PURPA by nonrate-regulated utilities, including ordering net metering.<sup>154</sup>

In *Windway Technologies, Inc.*, the court properly determined it is not the place of the judiciary to make the policy decision the plaintiffs were asking for.<sup>155</sup> Since the *Windway Technologies* decision, the make-up of the Iowa Supreme Court, and the justices' opinions on the role of the judiciary has changed significantly.<sup>156</sup> The current court took a major shift in the judiciary's role in energy policy with *SZ Enterprises*.<sup>157</sup> It must also be noted that despite the *Windway Technologies* decision, twenty-three rural electric cooperatives have voluntarily provided net metering through their locally elected board.<sup>158</sup> "[T]he financial impact of net metering will vary from one [electric cooperative] to another, depending upon the utility's rate structure."<sup>159</sup>

#### IV. IMPACT ON RURAL IOWA

When discussing the economic impact of increased renewable energy use, it is necessary to discuss Germany, which has gone further to promote distributed generation than any other country.<sup>160</sup> In Germany, "the average residential price for electricity is almost 36 cents per kWh" compared to only 12.5 cents per kWh in the United States.<sup>161</sup> "Because the average U.S. residence uses approximately 1,000 kWh of electricity per month, the current German rate would be equivalent to an average household tax of \$3,000 per year."<sup>162</sup> A report by the California

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154. *Id.* at 308.

155. *Id.*

156. See *Past Iowa Supreme Court Justices*, IOWA JUDICIAL BRANCH, [http://www.iowacourts.gov/For\\_the\\_Public/Court\\_Structure/Iowa\\_Courts\\_History/Past\\_Iowa\\_Supreme\\_Court\\_Justices/](http://www.iowacourts.gov/For_the_Public/Court_Structure/Iowa_Courts_History/Past_Iowa_Supreme_Court_Justices/) (last visited Feb. 8, 2016).

157. See *SZ Enters. v. Iowa Utils. Bd.*, 850 N.W.2d 441 (Iowa 2014).

158. *In re Distributed Generation at 8* (Iowa Utils. Bd. June 24, 2014) (No. NOI-2014-0001) (on file with author).

159. *Id.* at 9.

160. Raskin, *supra* note 37, at 39.

161. *Id.*; Jesse Morris, *How Germany's Solar Evolution Impacts America*, EARTHTECHLING (Oct. 12, 2013), <http://earthtechling.com/2013/10/how-germanys-solar-evolution-impacts-america/>.

162. Raskin, *supra* note 37, at 39. *But see How Much Electricity Does an American Home Use?*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/tools/faqs/faq.cfm?id=97&t=3> (last updated Oct. 21, 2015) (stating in 2014 the average American home used an average of 911 kWh per month).

Public Utilities Commission estimates that net metering alone will cost the state \$1.1 billion per year in 2020 with the average net metering customer having “an income almost twice the state’s average.”<sup>163</sup>

It should also be noted that grid-connected renewable generators are paid at a much lower market price for their energy compared to a distributed solar generator, even though grid-connected solar generators are more efficient.<sup>164</sup> In Iowa there has been increased use of renewable energy, especially wind generation, by the investor-owned utilities even with the lower market price for grid-connection.<sup>165</sup> Solar is being utilized by the utilities, and increasingly by the rural electric cooperatives as a source of electricity.<sup>166</sup> Farmers are also looking to renewable energy on their farm as a way to decrease their electric bill.<sup>167</sup>

In January 2014, IUB began a Notice of Inquiry into distributed generation.<sup>168</sup> IUB began this because there are broad policy and technical issues associated with the widespread use of distributed generation that could affect consumer protection, interconnection and safety.<sup>169</sup> This Notice of Intent began before the court made its ruling in *SZ Enterprises*, and is still continuing today. Again, this is something the Court failed to mention in the entire twenty-six-page opinion.<sup>170</sup>

#### V. IOWA LEGISLATURE RECOMMENDATIONS

In wake of the *SZ Enterprises* decision, the Iowa General Assembly should consider some legislative changes to ensure all Iowans, both rural and urban, are

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163. Raskin, *supra* note 37, at 42; CAL. PUB. UTILS. COMM’N, CALIFORNIA NET ENERGY METERING RATEPAYER IMPACTS EVALUATION 6, 110 (2013), <http://www.cpuc.ca.gov/NR/rdonlyres/75573B69-D5C8-45D3-BE22-3074EAB16D87/0/NEMReport.pdf>.

164. Raskin, *supra* note 37, at 41.

165. *Greenfields: Iowa Ranks Third in New Wind Generation*, DES MOINES REGISTER (Jan. 30, 2015), <http://www.desmoinesregister.com/story/money/business/2015/01/31/greenfields-iowa-ranks-third-new-wind-generation/22595023/>.

166. Karen Uhlenhuth, *Move Over Wind? Solar Energy Market ‘Exploding’ in Iowa*, MIDWEST ENERGY NEWS (Dec. 18, 2013), <http://www.midwestenergynews.com/2013/12/18/move-over-wind-solar-energy-market-exploding-in-iowa/>.

167. Darcy Maulsby, *Harvesting the Sun and Wind*, PROGRESSIVE FARMER (Nov. 2014), [http://dtnpf-digital.com/article/Harvesting\\_the\\_Sun\\_and\\_Wind/1840055/229666/article.html](http://dtnpf-digital.com/article/Harvesting_the_Sun_and_Wind/1840055/229666/article.html).

168. *In re Distributed Generation at 1*, (No. NOI-2014-0001) (Iowa Utils. Bd. Jan. 7, 2014) (Order Opening Inquiry on Distributed Generation and Soliciting Comments), <https://efs.iowa.gov/cs/groups/external/documents/docket/mdaw/mjez/~edisp/213037.pdf>.

169. *Id.*

170. *See SZ Enters. v. Iowa Utils. Bd.*, 850 N.W.2d 441 (Iowa 2014).

receiving affordable and reliable electricity. The first issue the Court incorrectly ruled on was the standard of review given to IUB.<sup>171</sup> Since the *Renda* decision, the Iowa Supreme Court has been ruling against giving deference to administrative agencies almost uniformly.<sup>172</sup> The court has not given deference to state agencies in eighteen cases, and has only once found that interpretive authority has been clearly vested in an agency.<sup>173</sup> The legislature must clarify to the court the authority they have delegated to the agencies. The court in *SZ Enterprises* found that since the legislature did not explicitly delegate the authority to IUB to interpret “public utility” and “electric utility,” that they did not deserve deference.<sup>174</sup> The legislature must clarify that IUB has this authority.

The legislature should also consider explicitly delegating the authority to regulate third-party PPAs to IUB. Under the *SZ Enterprises* decision, third-party PPAs, like Eagle Point, will go completely unregulated. This will allow companies like Eagle Point to pick and choose customers with no oversight on the rates charged.

The issue the legislature must consider that is most important to this Note, is whether to exempt non-rate-regulated utility exclusive territories from allowing third-party PPAs. As noted earlier, *SZ Enterprises* specifically involved the city of Dubuque, the tenth largest city in the state.<sup>175</sup> The opinion did not once discuss the impact this decision will have on non-rate-regulated utility services, which service populations below 10,000.<sup>176</sup> The loss of a customer to an electric utility in rural Iowa will have a larger financial impact than the loss of a customer to an investor-owned utility in Dubuque. As IUB wrote in the Declaratory Ruling “[t]hird-party PPAs erode the integrity of the service territory statutes without any change in the utility’s obligation to serve; any such rebalancing of a utility’s rights and obligations, absent clear statutory direction, should be a legislative decision.”<sup>177</sup> In wake of the *SZ Enterprises* decision, the Iowa General Assembly must provide this legislative direction.

## VI. CONCLUSION

In *SZ Enterprises*, the Iowa Supreme Court clearly stepped beyond the proper role of the judiciary in deciding that IUB did not deserve deference in in-

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171. *See id.* at 449.

172. Weresh & Ahrendsen, *supra* note 77, at 593-95.

173. *Id.* at 593.

174. *SZ Enters.*, 850 N.W. at 451.

175. *Id.* at 444.

176. *See generally id.*

177. *In re SZ Enters., LLC*, No. DRU-2012-0001, 2012 WL 1263494, at \*7, (Iowa Utils. Bd. Apr. 12, 2012) (admin. declaratory ruling).

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terpreting “public utility” and “electric utility,” and that the Eagle Point PPA was neither a “public utility” nor an “electric utility.” As discussed in the first section of this Note, electric utility generation, transmission, and distribution are extremely complex and technical, and its extent of regulation should not be determined by the courts instead of the experts that work daily on utility issues. The Iowa General Assembly must consider some statutory changes to limit this judicial activism.