

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

IN RE:  SZ ENTERPRISES, LLC d/b/a EAGLE POINT SOLAR	DOCKET NO. DRU-2012-0001
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**DECLARATORY RULING**

(Issued April 12, 2012)

**I. INTRODUCTION AND PROCEDURAL HISTORY**

On January 11, 2012, SZ Enterprises, LLC d/b/a Eagle Point Solar (Eagle Point), filed with the Utilities Board (Board) a petition for declaratory order on the interpretation and application of Iowa Code §§ 476.1 and 476.25(3) as they relate to the ability of a company to enter into a long-term financing agreement with a city for the purposes of supplying a portion of the city's electric power needs from on-site renewable generation at the city's premises. The questions posed by Eagle Point are whether it would be a "public utility" under Iowa Code § 476.1 if it entered into such an arrangement and whether it is prohibited by Iowa Code § 476.25(3) from serving, offering to serve, or constructing facilities to serve city premises located in Interstate Power and Light Company's (IPL) exclusive service territory. Eagle Point's proposed answers are that it would not be a public utility and that is not prohibited from offering the service described in its petition to the City of Dubuque.

Because the issues raised by Eagle Point could impact all electric utilities providing retail electric service in Iowa, the Board directed that copies of its January 17, 2012, "Notice of Declaratory Ruling Proceeding and Order Setting Comment Schedule and Scheduling Informal Meeting" be served electronically on MidAmerican Energy Company (MidAmerican), IPL, 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 that the petition for declaratory order and the Board's January 17, 2012, order would be posted on-line through the Board's electronic filing system.

There are several intervenors in this proceeding. Intervenor status has been granted to IPL, MidAmerican, the Consumer Advocate Division of the Department of Justice (Consumer Advocate), IAEC, and IAMU. Intervenor status has also been granted to a group that 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, Vote Solar Initiative, and Winneshiek Energy District (collectively, the Solar Coalition). Parties had an opportunity to file initial comments on February 1, 2012, and reply comments on February 8, 2012. All intervenors except the IAMU filed comments. A summary of the comments and reply comments is attached to a memorandum to the Board from its staff dated March 13, 2012; a copy of this

memorandum is available through the Board's electronic filing system,  
<https://efs.iowa.gov/efs/>.

In its petition, Eagle Point requested an informal meeting pursuant to 199 IAC 4.7. The Board scheduled an informal meeting between members of the Board's staff, Eagle Point, and all intervenors that was held on Wednesday, February 15, 2012, at 10 a.m.

Pursuant to Iowa Code § 17A.9(8), the Board has 60 days to issue, or decline to issue, a declaratory ruling, unless the time is extended by the parties. The 60-day period in this proceeding would normally end on March 11, 2012, but the statutory deadline is extended to March 12, 2012, because March 11 falls on a Sunday. Iowa Code § 4.1(34).

On February 15, 2012, Eagle Point filed a motion for extension of deadline for final action. Eagle Point said that all parties to the proceeding except IAMU were represented at the informal meeting conducted on February 15, 2012, and that all parties present agreed to extend the deadline for the Board to issue, or decline to issue, a declaratory ruling from March 12, 2012, to April 13, 2012. Solar Point said its counsel contacted counsel for IAMU after the meeting and that IAMU agreed to the extension. The Board granted the extension by order issued February 21, 2012.

Although all their arguments were not identical, Eagle Point, Consumer Advocate, and the Solar Coalition supported an interpretation that would find that Eagle Point is not a public utility and that the service territory statutes do not prohibit Eagle Point from providing the service described in Eagle Point's petition to the City

of Dubuque. MidAmerican, IPL, and the IAEC supported an interpretation that would find that Eagle Point is a public utility and that the service territory statutes prohibit Eagle Point from offering the described service to the City of Dubuque.

## II. RELEVANT STATUTES

There are several sections of Iowa Code chapter 476 relevant to Eagle Point's request for declaratory order. These are:

Iowa Code § 476.1, which provides, in relevant part:

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:

1. Furnishing gas piped by piped distribution system or electricity to the public for compensation.

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 § 476.22, which provides that "[a]s used in section 476.23 to 476.26, unless the context otherwise requires, 'electric utility' includes a public utility furnishing electricity as defined in section 476.1 and a city utility as defined in section 390.1."

Iowa Code § 476.25, which provides, in relevant 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. Except for good cause expressed through formal public statement, that board shall establish these exclusive service areas on or before July 1, 1979 . . . .

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. The state, an electric utility, or any other person who is injured or threatened with injury by conduct prohibited by this section may initiate a contested case proceeding with the board under chapter 17A. Upon finding a violation of this section the board shall order appropriate corrective action including discontinuance of the unlawful service to electric customers, removal of the unlawful facility, or other disposition the board deems just and reasonable.

Iowa Code § 390.1, which refers to Iowa Code § 362.2(6), which defines "city utility" as "all or part of a[n] . . . electric light and power plant system . . . owned by a city."

### **III. EAGLE POINT'S HYPOTHETICAL FACTS**

Eagle Point states it 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. Eagle Point likens its sale of on-site PV generation equipment to the sale of behind-the-meter energy efficiency services and equipment by third-party vendors and argues that both activities are equivalent because they reduce a customer's demand and energy use from the utility.

Eagle Point seeks a declaratory order from the Board under 199 IAC 4.1 regarding Eagle Point's proposal to sell electricity to the City of Dubuque (City) on a cent-per-kWh basis from an on-site PV generation system using a special form of long-term financing known as a "third-party power purchase agreement" (third-party PPA). Under the third-party PPA, Eagle Point would finance, install, own, operate, and maintain an on-site PV generation system located at City premises to supply a portion of the City's' electricity needs at those premises. The City would continue purchasing electricity from IPL for the portion of the premises' electricity needs not served by Eagle Point's PV generation system.

Under the third-party PPA, the City would purchase the full electric output of the PV generation system from Eagle Point at an agreed-upon cent-per-kWh price, escalated 3 percent annually. In addition to purchasing electricity, the cent-per-kWh purchase price would also: a) finance the cost of acquiring the PV generation system; b) monetize the offsetting renewable energy incentives related to the system (which would belong to Eagle Point and be passed through to the customer); and c) cover Eagle Point's costs of operating and maintaining the system on an ongoing basis. Eagle Point would own any renewable energy credits (RECs) associated with the PV generation system, but would credit to the City one-third of any revenues received from the sale of RECs. At the conclusion of the third-party PPA, Eagle Point would transfer all ownership rights of the PV generation system to the City.<sup>1</sup>

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<sup>1</sup> As alluded to in IPL's comments and confirmed at the informal meeting, Eagle Point is currently providing electricity from the PV generation system to the City under a lease arrangement. While the lease arrangement allows the parties to take advantage of renewable tax credits, it does not allow for

The PV generation system would be located on the customer's side of the electric meter provided by the City's electric utility, IPL. No IPL distribution lines or facilities would be used to transport electricity from the on-site PV generation system to the City premises. Eagle Point would be responsible for interconnecting the PV generation system with IPL, and complying with all applicable laws, standards, and permitting requirements.

#### **IV. BOARD DISCUSSION**

Before addressing the questions posed by Eagle Point, a preliminary question must be addressed: Is this an appropriate case for a declaratory ruling?

MidAmerican and IAEC suggest that the Board should refuse to issue a declaratory ruling on the two questions presented by Eagle Point because the "facts or questions presented in the petition are unclear, overbroad, insufficient, or otherwise inappropriate as a basis upon which to issue an order." 199 IAC 4.9(1)"6." Among other things, MidAmerican and IAEC argue that Eagle Point did not include a copy of the third-party PPA or any information on the method for disputing billings and meter readings, disconnection of service for non-payment, or any other issues typically addressed by the Board's rules governing utility service.

Consumer Advocate, while supporting a Board ruling that would find that Eagle Point would not be a public utility if it operates as described, notes that it is not

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accelerated depreciation and use of investment tax credits, as does the third-party PPA. These facts help in an understanding of the relationship between Eagle Point and the City of Dubuque, but they are not relevant in deciding the questions posed by Eagle Point's request for declaratory ruling; the

the function of a declaratory order to resolve issues of a complex factual analysis "too complicated to handle outside of an actual adjudication."<sup>2</sup> Consumer Advocate points out that California and Colorado have statutory language that specifically allows for the sale of on-site generation by third-party providers<sup>3</sup> and that without specific legislation, the Board could find that the factual analysis required to answer the questions posed by Eagle Point is too complicated to handle outside of an actual adjudication.

While it is true that the information identified by IAEC and MidAmerican is not included in this docket, customer service protections are not as relevant here as in other situations because IPL continues to provide service to the City for demand in excess of the PV production; Eagle Point is not supplying all the City's needs. At times when there is no PV production, the City cannot be disconnected from IPL's service unless the City has defaulted with respect to services provided by IPL and IPL follows all applicable Board rules.

The comments were extensive and there is some dispute about peripheral facts, but the relevant hypothetical facts are not in dispute. A contested proceeding, such as a formal complaint proceeding, would not be a more viable option for resolving the dispute and would certainly be more expensive and time-consuming for

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declaratory ruling is based solely on the facts posed by Eagle Point. See, Office of Consumer Advocate v. Iowa State Commerce Comm'n, 395 N.W.2d 1 (Iowa 1986).

<sup>2</sup> Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, The Rulemaking Process*, 60 Iowa Law Rev. 731, 805, 807 (1975) at 807.

<sup>3</sup> Cal. Pub. Util. Code § 218, § 2868; Colo. Rev. Stat. § 40-1-103.

all parties concerned. There is sufficient information presented in Eagle Point's petition to issue a declaratory ruling on the questions posed by Eagle Point.

**A. Would Eagle Point be a Public Utility?**

Eagle Point states that whether it is a public utility as defined in § 476.1 depends on whether Eagle Point furnishes electricity "to the public" for compensation. Eagle Point acknowledges that the phrase "to the public" is not defined by statute. Eagle Point cites Iowa State Commerce Comm'n v. Northern Natural Gas Co., 161 N.W.2d 111 (Iowa 1968), as the key case defining the meaning of "to the public" in § 476.1. The case concerned the question of whether "direct tap" service to 1,800 retail natural gas customers from an interstate pipeline (rather than a local distribution utility) was subject to state regulation. Regarding sales "to the public" under Iowa Code § 476.1, Eagle Point quotes the court as saying "it means sales to sufficient of the public to clothe the operation with a public interest and does not mean willingness to sell to each and every one of the public without discrimination."<sup>4</sup> The Iowa court also referred to an eight-factor test in an Arizona case, Natural Gas Service Co. v. Serv-Yu Cooperative, Inc., 219 P.2d 324 (Arizona 1950). The eight factors include such things as what the corporation actually does, a dedication to a public use, dealing with the service of a commodity in which the public has generally been held to have an interest, and actual or potential competition with other corporations whose business is clothed with public interest. In the Northern Natural case, the Iowa court concluded that direct tap service to 1,800 retail

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<sup>4</sup> Id. at 115.

customers from an interstate pipeline made the interstate pipeline a public utility subject to regulation under chapter 476.

There are significant differences between electricity and natural gas. First and foremost, there are exclusive service territory statutes applicable to electric utilities that do not apply to gas utilities. See Iowa Code § 476.22 et seq. Eagle Point argues that one of the purposes of the service territory statutes, the "development of coordinated statewide electric service at retail," means the coordination between entities serving customers in the same service area. However, IAEC provides a more persuasive argument when it states that the phrase means coordination in the establishment of separate service territories so that utilities do not duplicate each other's facilities or make existing facilities unnecessary. It is important to note that all portions of the state have been assigned as the exclusive service territory of one electric utility—no area of the state is served by two electric utilities.

Another difference between electric and gas utilities is that there is exclusionary language in § 476.1 related to electric utilities, but not to gas utilities.

That paragraph provides that:

This chapter [chapter 476] 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.

IAEC contends that this exclusionary language specifically addresses renewable facilities such as that proposed by Eagle Point and excludes them from the definition of public utility only if the person is producing electricity primarily for that person's

own use (and furnishes any extra electricity to five or fewer customers). There is no dispute here that Eagle Point is selling all of its output to the City and not producing power primarily for Eagle Point's own use, so this exemption does not apply to Eagle Point in this situation.

Eagle Point argues that the secondary use exemption is not relevant or applicable here because the exemption concerns the application of chapter 476 and not the definition of "public utility." As Eagle Point notes, the exemption does not use the phrase "public utility."

Exempting a person owning a renewable facility that serves five or fewer customers and produces electricity primarily for its own use from the requirements of chapter 476 also exempts that person from being a public utility. The exclusionary language provides at least some guidance as to what the Legislature intended when it defined "public utility" as applied to those furnishing electricity. Arguably, if a person does not meet the criteria of the exclusionary language and furnishes electricity to the public for compensation, that person is a public utility under § 476.1.

From the hypothetical facts presented by Eagle Point, it would be selling electricity to the City on a per-kWh basis, at least until the contract is completed and ownership of the facility is transferred to the City. Selling electricity on a per-kWh basis is a significant fact in determining that Eagle Point is selling electricity to the public for compensation; unlike a facilities lease, the product or service being sold is clearly kWhs of electricity. Eagle Point's promotional materials indicate that it would offer its service to other members of the public and would not limit its activities to the

City. These are attributes of a public utility as defined in § 476.1. While there is not always a bright line indicating what activities constitute activities of a public utility, in this instance selling electricity on a per-kWh basis to multiple customers is a key factor in determining that Eagle Point would be a public utility under § 476.1.

While Eagle Point alleged that at least one other entity was providing a similar service, it does not appear that the other entity makes sales on a per-kWh basis. In any event, this information is irrelevant to this particular declaratory ruling because the request is not based on what the other company is doing, but the proposed business model of Eagle Point as described by Eagle Point in its petition.

**B. Would Eagle Point be an "electric utility" that is prohibited from serving, offering to serve, or constructing facilities to serve the City located in IPL's exclusive service territory?**

The exclusive service territory statutes apply to an "electric utility" and a "city utility." section 476.22 provides that "[a]s used in section 476.23 to 476.26, unless the context otherwise requires, 'electric utility' includes a public utility furnishing electricity as defined in section 476.1 and a city utility as defined in section 390.1." Given the definition of city utility in § 390.1, there is no dispute that Eagle Point is not a city utility. The question is whether it is an electric utility.

Eagle Point argues that because Eagle Point would not be a public utility or a city utility, it would not be an electric utility under § 476.22. Eagle Point states that the service territory statutes do not require a broader definition of "electric utility" that would include Eagle Point. As noted earlier, Eagle Point believes that its third-party PPA would further the purposes of the service territory statutes and not unnecessarily

duplicate facilities. Since Eagle Point does not believe it is an electric utility, the service territory statutes would not apply to it.

Consumer Advocate argues that if Eagle Point is not a public utility, then the question of whether Eagle Point is an electric utility infringing on another electric utility's service territory is moot. Consumer Advocate points out that a utility's customers can own and operate the same type of behind-the-meter generating equipment proposed by Eagle Point without violating the utility's exclusive service territory. Consumer Advocate suggests that ownership and financing arrangements such as third-party PPAs would not change this.

IPL, MidAmerican, and IAEC all believe that Eagle Point is a public utility and, therefore, an electric utility to which the exclusive service territory statutes would apply. IPL in particular argues that the business operations and practices of inexperienced third-party distributed generation operators such as Eagle Point might have a negative impact on consumer protections and the utility's ability to provide customers adequate and reliable service.

Because the Board found Eagle Point would be a public utility in response to the first question, the service territory statutes would apply and Eagle Point is prohibited from selling electricity on a per-kWh basis to the City. 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). 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 addition to the two questions posed by Eagle Point, there are some peripheral issues raised by one or more parties that the Board will address. These issues relate to one or both of the questions raised in the petition for declaratory ruling.

**C. Peripheral Issues**

One point made in Eagle Point's and the Solar Coalition's comments is that many states have allowed installations like Eagle Point's pursuant to a third-party purchase agreement. Eagle Point said that in similar declaratory ruling dockets, the Arizona Corporation Commission and the New Mexico Public Regulation Commission have determined that third-party developers such as Eagle Point using third-party PPAs are not public utilities subject to state regulation. Eagle Point quoted from the Arizona decision, which found that the developer's activities were not clothed in the public interest; however, the decision was limited to the developer providing electric service to schools, governmental entities, or non-profit organizations.<sup>5</sup>

Neither Arizona nor New Mexico have exclusive service territory statutes and in Iowa there is no statutory justification to make a different determination on the public utility question depending on whether Eagle Point serves a non-profit or

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<sup>5</sup> Decision No. 71795, *In the Matter of the Application of SolarCity that When It Provides Solar Service to Arizona Schools, Governments, and Non-Profit Entities It Is Not Acting as a Public Service*

governmental entity, as opposed to a residential customer or a for-profit company. Other states that allow third-party PPAs, like Colorado and California,<sup>6</sup> have specific legislation addressing the issue.

Another issue that was raised is whether the sale of on-site PV generation equipment is equivalent to the sale of behind-the-meter energy efficiency services and equipment by third-party vendors. Eagle Point and the Solar Coalition argue that these activities are equivalent because both reduce a customer's demand and energy use from the utility, and Consumer Advocate points out that a utility's customers can own and operate the same type of behind-the-meter generating equipment proposed by Eagle Point without violating the exclusive service territory laws.

As IPL notes, the key difference between the energy efficiency developer and a third-party generator operating "behind the meter" is that the first enables customers to reduce their electricity usage while the second produces and sells electricity to displace the electric service normally provided by the utility. IPL points out that in Docket No. EEP-08-1, it is conducting a pilot program that promotes the installation of customer-owned behind-the-meter renewable generation. IPL provides rebate incentives and educates customers about the benefits and costs of renewable generation equipment before installation, so that customers can make informed decisions about the most appropriate combination of energy efficiency and

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*Corporation Pursuant to Art. 15, Section 2 of the Arizona Constitution*, Docket No. E-20690A-09-0346, at 68-70 (ACC, July 12, 2010).

<sup>6</sup> Cal. Pub. Util. Code § 218, § 2868; Colo. Rev. Stat. § 40-1-103.

renewable generation options. IPL argues that Eagle Point's proposal is to sell customers electricity rather than PV generation equipment, contrary to Iowa Code § 476.1.

Under Iowa's electric service territory statutes, an electric utility has an exclusive service territory and, in return, the electric utility has an obligation to serve all customers within that territory. The only exception has been that a customer may self-generate. Third-party PPAs facilitate customer behind-the-meter generation and may reduce customer purchases from the utility. However, third-party behind-the-meter generation does not change or modify the utility's obligation to serve—if the third-party's facility fails to produce, the utility must continue to supply the customer with its full requirements. The option to self-generate, which has been present since the inception of chapter 476, does not mean that the statute permits all other forms of behind-the-meter generation that are not owned by the customer but by third-parties. While the end result of self-generation and a third-party PPA may appear to be the same (reduced purchases from the utility), one is contemplated by the statute while the other is not. Third-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.

A third argument presented by Eagle Point and the Solar Coalition is that customer-leased generation is permitted. IPL also believes a customer can lease on-site generation because the payment is for the facility, not for kWhs. While Eagle

Point's service may provide the same ultimate result (delivery of electricity to the City), it does so by means of kWh sales and not via some form of customer-owned generation. The regulatory compact struck when chapter 476 was enacted (exclusive service territories in return for the obligation to serve) is a balance, and where there is no express statutory authorization, that balance should not be altered. For example, the Legislature could decide to allow sales by entities such as Eagle Point on a limited basis (to non-profits or government entities), decline to allow such sales, or allow such sales but modify the regulatory compact so that the obligation to serve might not apply in all instances; there are numerous other possibilities for legislative action.

## **V. CONCLUSION**

The questions posed by Eagle Point are whether it would be a "public utility" under Iowa Code § 476.1 and whether it is prohibited by Iowa Code § 476.25(3) from serving, offering to serve, or constructing facilities to serve City premises located in Interstate Power and Light Company's (IPL) exclusive service territory. Eagle Point's proposed answers are that it would not be a public utility and that it is not prohibited from offering the service described in its petition to the City of Dubuque. The Board's answers are that Eagle Point would be a public utility and that it is prohibited by the exclusive service territory statutes from offering the service described in its petition to the City of Dubuque.

**VI. ORDERING CLAUSES**

**IT IS THEREFORE ORDERED:**

The petition for declaratory ruling filed by SZ Enterprises, LLC d/b/a Eagle Point Solar, on January 11, 2012, is granted. The answers to the two questions posed by Eagle Point are contained in the body of this order.

**UTILITIES BOARD**

/s/ Elizabeth S. Jacobs

/s/ Darrell Hanson

ATTEST:

/s/ Joan Conrad  
Executive Secretary

/s/ Swati A. Dandekar

Dated at Des Moines, Iowa, this 12<sup>th</sup> day of April 2012.