

IOWA UTILITIES BOARD

<p>IN RE:</p> <p>EXECUTIVE ORDER 10 — REVIEW OF ANNUAL REPORT RULES [199 IOWA ADMINISTRATIVE CODE CHAPTER 23]</p>	<p>DOCKET NO. RMU-2023-0023</p>
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ORDER COMMENCING RULEMAKING

INTRODUCTION

On January 10, 2023, Gov. Kim Reynolds issued Executive Order Number 10 (Executive Order), which put a moratorium on agency rulemaking and directed agencies, including the Utilities Board (Board), to engage in a comprehensive evaluation of existing rules. Pursuant to the Executive Order, the Board is conducting comprehensive reviews of each chapter of its administrative rules.

On September 1, 2023, the Board issued an order that, in part, opened the above-captioned docket, published the completed chapter 23 Red Tape Review Rule Report (as Attachment A to the order), published the draft chapter 23 Regulatory Analysis (as Attachment B to the order), and set a comment deadline and technical conference date. The Board also caused the draft regulatory analysis to be published in the October 4, 2023 Iowa Administrative Bulletin (IAB).

On October 26, 2023, a public hearing was held to allow interested persons the opportunity to present their views concerning the draft chapter 23 regulatory analysis and was attended by the Office of the Consumer Advocate (OCA), a division of the Iowa Department of Justice; Interstate Power and Light Company; Black Hills/Iowa Gas Utility

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Company, LLC d/b/a Black Hills Energy (Black Hills); and MidAmerican Energy Company (MidAmerican). The Board also received written filings from OCA, MidAmerican, and Iowa-American Water Company (Iowa-American).

Pursuant to the Executive Order, an agency may not commence a formal rulemaking without first approving a final regulatory analysis and receiving preclearance through a Request to Initiate Rulemaking. In an order previously issued in the above-captioned docket, the Board approved a final regulatory analysis for chapter 23, and as part of that order, indicated it was submitting a Request to Initiate Rulemaking. Since issuance of that order, the Board received preclearance to commence this chapter 23 rulemaking.

PROPOSED CHANGES FROM DRAFT REGULATORY ANALYSIS

In its comments, OCA objects to the Board's proposed replacement of certain restrictive terms. According to OCA, "replacements for the word 'shall' and other restrictive terms are neither required nor supported by Executive Order 10." *But see* Executive Order 10, Section IV(A)(1) (providing that agencies shall not initiate a rulemaking unless it is narrowly tailored to meet certain objectives, one of which is the reduction or removal of regulatory burdens, "including reducing restrictive terms"). OCA asserts, without any supporting authority, that the phrase "is to" is synonymous with "may" or "might" and is not commonly understood as imposing a duty.

However, Iowa law is replete with instances in which "is to" is used as a synonym for "shall" to recognize the imposition of a requirement. For example, in *Vroegh v. Iowa Department of Corrections*, 972 N.W.2d 686, 703 (Iowa 2022), the Iowa Supreme Court

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held that “every word and every provision in a statute *is to* be given effect.” (Emphasis added.) There should be little doubt that through this sentence, the Court intended to convey the requirement that every word in a statute “shall” be given effect. Similarly, in *In re D.S.*, 806 N.W.2d 458, 471 (Iowa Ct. App. 2011), the Court of Appeals considered a statutory requirement imposed on the courts, stating that the relevant Code provision “instructs that, after being fully informed by a qualified expert witness, the court *is to* consider” certain factors. (Emphasis added.) Again, the context suggests the Court used “is to” as a synonym for “shall.” Further, the use of “is to” as a synonym for “shall” in Iowa law is not a modern occurrence. See e.g., *Jefferson County Farm Bureau v. Sherman*, 208 Iowa 614, 226 N.W. 182 (1929) (holding that “[i]t is also a well-recognized rule of construction that the legislative intention is to be deduced from the language used, and the language is to be construed according to its plain and ordinary meaning”); *In re Wientjes’ Estate*, 206 Iowa 1314, 221 N.W. 935, 936 (1928) (stating “the validity of the will *is to* be tested by the circumstances existing at the time it was made, and not by after events”).

MidAmerican agrees, generally, with OCA’s comments and supports OCA’s recommendation to retain the restrictive terms. In its submitted comment, Iowa-American states that it does not oppose OCA’s comments. Conversely, Black Hills indicates that it does not oppose the Board’s proposed changes to chapter 23.

Administrative rules should be drafted to avoid ambiguity, and, as noted above, the Board has received comments suggesting that ambiguity exists in the revised version of chapter 23. Therefore, for the noticed version of chapter 23, the Board will reinsert “shall” in those sentences in rule 23.1 that impose requirements on public

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utilities. For those sentences that refer to Board conduct, the Board will maintain the revised language as included in the October 4, 2023 IAB. As noted within the metrics section of the chapter 23 Red Tape Review Rule Report, which was included as Attachment A to the Board's September 1, 2023 order, the revised version of chapter 23 that was published in the October 4, 2023 IAB would have eliminated 19 restrictive terms from the current version of chapter 23. Therefore, even adding a few restrictive terms back into chapter 23 will result in an overall restrictive term reduction.

CONCLUSION

The Board is proposing to rescind and re-promulgate a revised chapter 23, which is shown in the NOIA attached to this order as Attachment A and incorporated in this order by reference. The official version of the NOIA will be published in the IAB and may contain additional nonsubstantive editorial changes. The NOIA will be submitted to the Administrative Rules Code Editor and published in the IAB. Additionally, per the Executive Order, the Board will hold two public hearings, the dates for which will be contained in the NOIA published in the IAB. The date for filing written comments will also be contained in the NOIA published in the IAB.

ORDERING CLAUSE

IT IS THEREFORE ORDERED:

The Notice of Intended Action attached to this order will be submitted to the Administrative Rules Code Editor for review and publication in the Iowa Administrative Bulletin and may contain minor editorial changes that are not shown in the attached Notice of Intended Action. The Notice of Intended Action published in the Iowa

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Administrative Bulletin will identify the public hearing dates and the written comment deadline.

UTILITIES BOARD

Erik M. Helland Date: 2024.01.17
12:05:04 -06'00'

Joshua Byrnes Date: 2024.01.17
09:12:20 -06'00'

ATTEST:

Jackie Yearington Date: 2024.01.17
15:32:42 -06'00'

Sarah Martz Date: 2024.01.17
14:20:05 -06'00'

Dated at Des Moines, Iowa, this 17th day of January, 2024.

UTILITIES DIVISION [199]

DRAFT Notice of Intended Action

The following rule-making action is proposed:

ITEM 1. Rescind 199—Chapter 23 and adopt the following **new** chapter in lieu thereof:

**CHAPTER 23
ANNUAL REPORT**

199—23.1(476) General information.

23.1(1) Every public utility shall keep and render its books, accounts, papers, and records accurately and faithfully in the manner and form prescribed by the board and comply with all directions of the board relating to such books, accounts, papers, and records.

23.1(2) Each public utility subject to Iowa Code chapter 476 shall file an annual report with this board on or before April 1 of each year covering operations during the immediately preceding calendar year. This information will be used for a number of purposes, including to apportion the costs of the utilities division pursuant to Iowa Code section 476.10 and to determine whether rate-regulated utilities' earnings are excessive pursuant to Iowa Code section 476.32.

23.1(3) The forms that are to be completed by each utility will be made publicly available on the board's website or by other means readily accessible. The board may direct the utilities to file the completed forms through a portal on the board's website or the board's electronic filing system.

199—23.2(476) Annual report requirements.

23.2(1) Forms. The following annual report forms shall be filed by the following utilities:

a. Investor-owned, rate-regulated electric utilities file Form IE-1 with a copy of that utility's Federal Energy Regulatory Commission (FERC) Annual Report Form No. 1 or 1A as applicable.

b. Investor-owned, non-rate-regulated electric utilities file Form EC-1.

c. Investor-owned gas utilities file Form IG-1 with a copy of that utility's FERC Annual Report Form No. 2 or 2A as applicable.

d. Regulated water utilities file Form WA-1.

e. Cooperative electric utilities file Form EC-1.

f. Municipally owned electric utilities file Form ME-1.

g. Municipally owned gas utilities file Form MG-1.

h. Providers of telecommunications service file Form TC-1.

i. Competitive natural gas providers and aggregators file Form CNGP-1.

j. Generation and transmission cooperatives file Form EC-1N.

k. Storm water drainage and sanitary sewage utilities file Form SW-1.

23.2(2) Additional requirements for rate-regulated utilities. A rate-regulated utility is to include information concerning its Iowa operations in its report as requested on the forms and file as part of its annual report the following:

ATTACHMENT A

a. A list (by title, author and date) of any financial, statistical, technical or operational reviews or reports that a company may prepare for distribution to stockholders, bondholders, utility organizations or associations or other interested parties.

b. A list (by form number and title) of all financial, statistical, technical and operational review-related documents filed with an agency of the federal government.

These rules are intended to implement Iowa Code sections 476.2, 476.9, 476.10, 476.22, 476.31, and 546.7.