

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: UNIFORM RULES ON AGENCY PROCEDURE	DOCKET NO. RMU-99-2
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ORDER ADOPTING RULES

(Issued August 27, 1999)

Pursuant to the authority of IOWA CODE §§ 476.1 and 476.2(1) (1999), the Utilities Board adopts the amendments attached hereto and incorporated by reference. This rule amends IOWA ADMIN. CODE 199-4 (1999). The reasons for this amendment are set forth in the attached notice of intended action.

IT IS THEREFORE ORDERED:

1. The amended rules attached hereto, and incorporated by this reference, are adopted by the Board, effective October 27, 1999.
2. The Executive Secretary is directed to submit for publication in the Iowa Administrative Bulletin a notice in the form attached to and incorporated by reference in this order.

UTILITIES BOARD

/s/ Allan T. Thoms _____

/s/ Susan J. Frye _____

ATTEST:

/s/ Raymond K. Vawter, Jr. _____
Executive Secretary

/s/ Diane Munns _____

Dated at Des Moines, Iowa, this 27th day of August, 1999.

UTILITIES DIVISION [199]

ADOPTED AND FILED

Pursuant to the authority of Iowa Code sections 17A.4, 476.1, and 476.2 (1999), the Utilities Board (Board) gives notice that on August 27, 1999, the Board issued an order in Docket No. RMU-99-2, In re: Uniform Rules On Agency Procedure, "Order Adopting Rules," to adopt new rules relating to declaratory orders.

These rules are the result of an inquiry initiated by the Board on February 4, 1999, through which the Board invited public comment on the possible adoption of new uniform rules for declaratory orders, rule making, and contested cases. Notice of the Board's inquiry was published in the Iowa Administrative Bulletin on February 24, 1999. The comments received generally supported the Board's proposal to adopt the uniform rules on declaratory orders (with only minor changes) and to modify the Board's existing rules regarding rule making and contested cases without adopting the uniform rules. The Board then initiated this proceeding on April 23, 1999, to consider and receive public comment on the adoption of the uniform rules regarding declaratory orders. Notice of intended action was published in the Iowa Administrative Bulletin on May 19, 1999, as ARC 8981A. Written comments were due on or before June 8, 1999.

Timely comments were filed by MidAmerican Energy Company (MidAmerican) and on June 21, 1999, supplemental comments were filed by the Consumer Advocate Division of the Department of Justice (Consumer Advocate). Consumer

Advocate also participated in an oral comment proceeding on June 23, 1999.

MidAmerican suggests certain revisions to the Board's proposed rules, as described below, along with Consumer Advocate's responses.

First, MidAmerican suggests new rule 4.9(1) would enlarge the power of the Board to deny a petition for declaratory order, by permitting the Board to refuse to issue an order, for example, whenever the questions presented in the petition are also presented in another proceeding that may definitively resolve them.

MidAmerican suggests the Board replace the word "question" in each of the rules with the phrase "precise legal issue" to limit the ability of the Board to deny a petition.

The Board declines the suggested revision in favor of the standard language from the state's uniform rules. The Board prefers not to vary from the standard language of Iowa's uniform procedural rules unless the variation is required to accommodate some unique aspect of the Board's practice. That rationale does not apply to the change suggested by MidAmerican.

Second, MidAmerican suggests the proposed rules "permit a substantial universe of persons to block issuance of a declaratory order." This is because the uniform rules permit any "interested person" to refuse to be bound by a declaratory order (prior to issuance of the order). If a refusal to be bound is filed, it may be inappropriate for the Board to issue the order. MidAmerican did not propose a specific remedy for this problem, but Consumer Advocate did. Consumer Advocate suggests the language from the uniform rules concerning "interested

persons" should be replaced with a reference to "any person who would be a necessary party to the proceedings under applicable substantive law." Consumer Advocate believes this revision would narrow the universe of persons who would have to be notified of a petition for a declaratory order and who would have the power to block issuance of a declaratory order by refusing to be bound by the resolution.

The Board will adopt Consumer Advocate's suggestion. While the broader language of the uniform rules may be appropriate for most agencies, it would unnecessarily interfere with the Board's ability to issue declaratory orders, due to the nature of the Board's jurisdiction. Adopting Consumer Advocate's suggested change will make the rules more closely conform to the statute, reduce the burden on petitioners, and permit the Board to issue more declaratory orders in more circumstances, as appropriate.

Third, MidAmerican suggests that the generic term "agency" used throughout the proposed rules should be replaced with the phrase "utilities board." The Board will adopt this suggestion, as it will clarify the application of the rules to the Board.

Finally, both MidAmerican and Consumer Advocate raise a question regarding the circumstances under which a party who has consented to be bound by a Board declaratory order may be permitted to withdraw that consent. Both commentators agree that the Board should address this question on a case-by-case basis, rather than in a rule making context, because the resolution of any particular case is likely

to depend upon the specific facts. The Board agrees and will reserve this issue to individual case resolution as it may arise.

The proposed rules implement Iowa Code section 17A.9, as amended by 1998 Iowa Acts, chapter 1202, effective July 1, 1999, and Iowa Code section 476.1.

The following rules are adopted, effective October 27, 1999.

Rescind 199 – Chapter 4 and adopt the following new chapter:

CHAPTER 4

DECLARATORY ORDERS

199–4.1(17A) Petition for declaratory order. Any person may file a petition with the Iowa utilities board for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the utilities board, at 350 Maple Street, Des Moines, Iowa 50319-0069. A petition is deemed filed when it is received by that office. The utilities board shall provide the petitioner with a file-stamped copy of the petition if the petitioner provides the agency with an extra copy for this purpose. The petition must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.

7. The names and addresses of other persons, or a description of any class of persons, known by petitioner to be affected by, or interested in, the questions presented in the petition.

8. Any request by petitioner for a meeting as provided for by rule 4.4(17A).

[The petition must be dated and signed by the petitioner or the petitioner's representative. It must also include the name, mailing address, and telephone number of the petitioner and petitioner's representative, and a statement indicating the person to whom communications concerning the petition should be directed.]

WHEREFORE, (insert petitioner's name) prays that the board issue a declaratory order on (insert proposed subject of the requested order).

Respectfully submitted,

(Signature of petitioner or representative)
(Typed or printed name of signer)
(Address and telephone number)

199–4.2(17A) Notice of petition. Within five days after receipt of a petition for a declaratory order, the utilities board shall give notice to all persons not served by the petitioner pursuant to rule 4.6(17A) to whom notice is required by any provision of law. The utilities board may also give notice to any other persons.

199–4.3(17A) Intervention.

4.3(1) Persons who qualify under any applicable provision of law as an intervenor and who file a petition for intervention within 14 days of the filing of a

2. The answers urged by the intervenor to the question or questions presented and a summary of the reasons urged in support of those answers.

3. Reasons for requesting intervention and disclosure of the intervenor's interest in the outcome.

4. A statement indicating whether the intervenor is currently a party to another proceeding involving the questions at issue and whether, to the intervenor's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.

5. The names and addresses of other persons, or a description of any class of persons, known by the intervenor to be affected by, or interested in, the questions presented in the petition.

6. Whether the intervenor consents to be bound by the determination of the matters presented in the declaratory order proceeding.

[The petition must be dated and signed by the intervenor or the intervenor's representative. It must also include the name, mailing address, and telephone number of the intervenor and intervenor's representative, and a statement indicating the person to whom communications concerning the petition should be directed.]

WHEREFORE, (insert intervenor's name) prays that the board grant it intervention and issue a declaratory order on (insert proposed subject of the requested order).

Respectfully submitted,

(Signature of intervenor or representative)
(Typed or printed name of signer)

(Address and telephone number)

199–4.4(17A) Briefs. The petitioner or any intervenor may file a brief in support of the position urged. The utilities board may request a brief from the petitioner, any intervenor, or any other person concerning the questions raised.

199–4.5(17A) Inquiries. Inquiries concerning the status of a declaratory order proceeding may be made to the Executive Secretary, Iowa Utilities Board, 350 Maple Street, Des Moines, Iowa 50319-0069.

199–4.6(17A) Service and filing of petitions and other papers.

4.6(1) *When service required.* Except where otherwise provided by law, every petition for declaratory order, petition for intervention, brief, or other paper filed in a proceeding for a declaratory order shall be served upon each of the parties of record to the proceeding and on any persons who, based upon a reasonable investigation, would be a necessary party to the proceeding under applicable substantive law, simultaneously with their filing. The party filing a document is responsible for service on all parties and other required persons.

4.6(2) *Filing—when required.* All petitions for declaratory orders, petitions for intervention, briefs, or other papers filed in a proceeding for a declaratory order shall be filed with the Executive Secretary, 350 Maple Street, Des Moines, Iowa 50319-0069. All petitions, briefs, or other papers that are required to be served upon a party shall be filed simultaneously with the utilities board.

4.6(3) *Method of service, time of filing, and proof of mailing.* Method of service, time of filing, and proof of mailing shall be as provided by 199–subrule 7.6(1).

199–4.7(17A) Agency consideration. Upon request by petitioner, the utilities board must schedule a brief and informal meeting between the original petitioner, all intervenors, and the utilities board, a member of the utilities board, or a member of the staff of the utilities board to discuss the questions raised. The utilities board may solicit comments from any person on the questions raised. Also, comments on the questions raised may be submitted to the utilities board by any person.

199–4.8(17A) Action on petition. Within the time allowed by 1998 Iowa Acts, chapter 1202, section 13(5), after receipt of a petition for a declaratory order, the utilities board or designee shall take action on the petition as required by 1998 Iowa Acts, chapter 1202, section 13(5).

199–4.9(17A) Refusal to issue order.

4.9(1) The utilities board shall not issue a declaratory order where prohibited by 1998 Iowa Acts, chapter 1202, section 13(1), and may refuse to issue a declaratory order on some or all of the questions raised for the following reasons:

1. The question does not substantially comply with the required form.
2. The petition does not contain facts sufficient to demonstrate that the petitioner will be aggrieved or adversely affected by the failure of the utilities board to issue an order.
3. The utilities board does not have jurisdiction over the questions presented in the petition.

4. The questions presented by the petition are also presented in a current rule making, contested case, or other agency or judicial proceeding, that may definitively resolve them.

5. The questions presented by the petition would more properly be resolved in a different type of proceeding or by another body with jurisdiction over the matter.

6. The facts or questions presented in the petition are unclear, overbroad, insufficient, or otherwise inappropriate as a basis upon which to issue an order.

7. There is no need to issue an order because the questions raised in the petition have been settled due to a change in circumstances.

8. The petition is not based upon facts calculated to aid in the planning of future conduct but is, instead, based solely upon prior conduct in an effort to establish the effect of that conduct or to challenge an agency decision already made.

9. The petition requests a declaratory order that would necessarily determine the legal rights, duties, or responsibilities of other persons who have not joined in the petition, intervened separately, or filed a similar petition and whose position on the questions presented may fairly be presumed to be adverse to that of the petitioner.

10. The petitioner requests the utilities board to determine whether a statute is unconstitutional on its face.

4.9(2) A refusal to issue a declaratory order must indicate the specific grounds for the refusal and constitutes final utilities board action on the petition.

4.9(3) Refusal to issue a declaratory order pursuant to this provision does not preclude the filing of a new petition that seeks to eliminate the grounds for the refusal to issue an order.

199–4.10(17A) Contents of declaratory order–effective date. In addition to the order itself, a declaratory order must contain the date of its issuance, the name of the petitioner and all intervenors, the specific statutes, rules, policies, decisions, or orders involved, the particular facts upon which it is based, and the reasons for its conclusions.

A declaratory order is effective on the date of issuance.

199–4.11(17A) Copies of orders. A copy of all orders issued in response to a petition for a declaratory order shall be mailed promptly to the original petitioner and all intervenors.

199–4.12(17A) Effect of a declaratory order. A declaratory order has the same status and binding effect as a final order issued in a contested case proceeding. It is binding on the utilities board, the petitioner, and any intervenors who consent to be bound and is applicable only in circumstances where the relevant facts and the law involved are indistinguishable from those on which the order was based. As to all other persons, a declaratory order serves only as precedent and is not binding

on the utilities board. The issuance of a declaratory order constitutes final agency action on the petition.

These rules are intended to implement 1998 Iowa Acts, chapter 1202, section 13, and Iowa Code section 476.1.

August 27, 1999

/s/ Allan T. Thoms

Allan T. Thoms

Chairperson