

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

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IN RE:  MIDAMERICAN ENERGY COMPANY	DOCKET NO. P-857
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**PROPOSED DECISION AND ORDER GRANTING PERMIT**

(Issued May 12, 2005)

**APPEARANCES:**

MR. ROBERT P. JARED, Attorney at Law, MidAmerican Energy Company, 106 East Second Street, P.O. Box 4350, Davenport, Iowa 52808, appearing on behalf of MidAmerican Energy Company.

MR. JOHN F. DWYER, Attorney at Law, 310 Maple Street, Des Moines, Iowa 50319, appearing on behalf of the Iowa Department of Justice, Office of Consumer Advocate.

**STATEMENT OF THE CASE**

On October 1, 2003, MidAmerican Energy Company (MidAmerican) filed a petition and exhibits for a pipeline permit for an existing 2-inch diameter natural gas pipeline approximately 6.05 miles long in Mills County, Iowa, known as the Henderson Lateral. (petition for permit; testimony of Mr. Grigsby; Helm and O'Neal reports). MidAmerican filed amendments to its petition and exhibits and provided additional information on December 29, 2003, February 12, 2004, and February 10, 2005. (petition for permit).

The petition is for an existing pipeline built in 1970 for which a permit was never requested or granted. (petition for permit; O'Neal report; testimony of

Mr. Grigsby and Mr. O'Neal). The pipeline has a maximum allowable operating pressure of 125 pounds per square inch gage (psig). (petition for permit; Helm and O'Neal reports; testimony of Mr. Grigsby). It transports natural gas from a connection with a Natural Gas Pipeline Company of America (NGP) pipeline to a regulator station in Henderson, Iowa. (petition for permit; Helm and O'Neal reports; testimony of Mr. Grigsby). At the Henderson regulator station, the gas pressure is reduced for delivery through gas distribution mains to customers in Henderson. (petition for permit; O'Neal report; testimony of Mr. Grigsby).

The pipeline requires a permit because it meets the definition of a transmission line. (O'Neal report; petition for permit; testimony of Mr. Grigsby). Iowa Code §§ 479.2, 479.5 (2005); 199 IAC 10.16; 49 CFR § 192.3. It meets the definition of a transmission line because it transports gas from another transmission line (and ultimately from gathering lines and/or storage facilities) to a gas distribution center, the regulator station in Henderson, Iowa. (O'Neal report; petition for permit; testimony of Mr. Grigsby). 199 IAC 10.16; 49 CFR § 192.3.

On March 14, 2005, the Utilities Board (Board) assigned this case to the undersigned administrative law judge, who issued an order establishing a procedural schedule, proposing to take official notice, and providing notice of the hearing on March 16, 2005. In that order, the undersigned set May 3, 2005, as the date for the hearing on the petition, and proposed to take official notice of two reports concerning the pipeline prepared by Mr. Reed Helm, utility regulatory inspector for the Board,

and Mr. Jeffrey O'Neal, utility regulatory engineer for the Board, dated October 20, 2003, and March 2, 2005, respectively.

The hearing was held on May 3, 2005, in the Board Hearing Room, 350 Maple Street, Des Moines, Iowa. MidAmerican was represented by its attorney, Mr. Robert P. Jared. Mr. David C. Grigsby, senior engineer in the MidAmerican Gas Engineering Department, testified on behalf of MidAmerican. Mr. Helm and Mr. O'Neal testified as the inspector and engineer selected by the Board to examine the proposed route pursuant to Iowa Code § 479.11. The Consumer Advocate Division of the Department of Justice (Consumer Advocate) was represented by its attorney, Mr. John Dwyer.

On May 11, 2005, MidAmerican filed a copy of the construction contract and the top sheet of the as-built drawings for the Henderson Lateral. It also notified the Board it had completed correction of two probable violations of the federal pipeline safety standards.

#### **DISCUSSION REGARDING ASSESSMENT OF CIVIL PENALTY**

Iowa Code § 479.31 provides that a person who violates Chapter 479 or a Board rule issued pursuant to the chapter is subject to a civil penalty not to exceed \$10,000 for each violation. The statute further provides that each day the violation continues constitutes a separate offense, but the maximum civil penalty is \$500,000 for any related series of violations. Iowa Code § 479.31. The statute provides that, in determining the amount of the penalty, the appropriateness of the penalty to the

size of the company, the gravity of the violation, and the good faith of the company in attempting to achieve compliance after notification of a violation, shall be considered. Iowa Code § 479.31.

### **The Consumer Advocate's Position**

The Consumer Advocate states that in earlier proceedings of a similar nature, it had taken the position that a civil penalty should be imposed to make it clear that rule violations have actual consequences and to maintain the integrity of the rules and respect for their enforcement. It notes that the Board chose not to impose a civil penalty in those cases based on various factors, including the manner in which the violations took place, the cooperation of the utilities, and the safe operation of the pipelines over multiple decades of operation. The Consumer Advocate states it does not believe there is a meaningful distinction between this case and the prior cases and therefore does not request that a civil penalty be imposed in this case.

### **MidAmerican's Position**

MidAmerican argues that Board precedent supports the determinations that no permit was required at the time of construction and that no civil penalty should be imposed. It argues the pipeline and permit issue in this case is virtually identical to that addressed by the Board in In re: City of Lorimor, Docket. No. P-852, "Proposed Decision and Order Granting Permit" (June 21, 2004) (Lorimor). MidAmerican argues that the analysis of the statutory change to Iowa Code § 479.5 and determination that a penalty should not be imposed in Lorimor should apply equally in this case. It argues that, of the four cases discussed in Lorimor, this case is most

analogous to In re: Interstate Power and Light Company, Docket No. P-850, "Order Affirming Proposed Decision and Granting Permit and Waiver" (November 17, 2003) (Interstate Power), in which the Board determined that a civil penalty should not be imposed. MidAmerican argues that the facts and circumstances of the Henderson Lateral are nearly identical to those of the Lorimor and Interstate Power pipelines, and the reasoning of those two cases support the same determination that no civil penalty should be imposed in this case.

MidAmerican further argues that there is uncertainty regarding the definition of "transmission line" and this also supports a determination that no civil penalty should be imposed. 199 IAC 10.16 is the applicable Board rule that states when a pipeline permit is required. The rule contains a two-part test, and if a pipeline meets either of the two prongs of the test, the owner must obtain a permit for the pipeline.

199 IAC 10.16. The first prong of the test is that a pipeline permit is required for any pipeline that will be operated at a pressure of over 150 psig. Id. The second prong of the test is that a pipeline permit is required for any transmission line as defined in ASME B31.8 or 49 CFR Part 192, regardless of operating pressure. Id. The rule further provides that questions on whether a pipeline requires a permit are to be resolved by the Board. Id.

MidAmerican states that, since the Henderson Lateral operates at a pressure of 125 psig, the first prong of the test does not require a permit for the line.

MidAmerican argues that the second prong of the test is less clear and has been the source of much confusion and uncertainty and is the reason it confers with Board

staff regarding whether a permit will be required for proposed pipelines. It argues that the definition of a transmission line in 49 CFR § 192.3 is unclear because there is no definition of "a distribution center" in the rules. MidAmerican further argues there is also uncertainty associated with the definition of a transmission line in ASME B31.8. It argues that the ASME B31.8, paragraph 803.21, definition of transmission system defines the transmission terminus as a high- or low-pressure distribution system, and the definitions of high- and low-pressure distribution systems do little to differentiate between distribution and transmission main<sup>1</sup>.

MidAmerican further argues that it appears the basis of staff's determination that the Henderson Lateral is a transmission line was that it served "a distribution center," namely, the city of Henderson. It argues that language in In re: Iowa-Illinois Gas and Electric Company, Docket No. P-564, "Order Closing Docket" (February 23, 1990) (Iowa-Illinois) raises uncertainty about using "a distribution center" as the basis for classifying a pipeline as a transmission line. It states the pipeline in P-564 provided natural gas service to the city of Princeton, Iowa, and was permitted with an operating pressure of 150 psig. MidAmerican argues that when it was discovered the pipeline was operating at 60 psig, the Board issued an order closing the docket and

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<sup>1</sup> In its prehearing brief, MidAmerican poses a series of questions related to whether a pipeline should be classified as a transmission line or a distribution line. The Board discussed transmission lines and distribution lines and applicable definitions and federal interpretations in a 1990 declaratory ruling. In re: Iowa Southern Utilities Company, Docket No. DRU-90-3, "Declaratory Ruling" (March 29, 1990). (Iowa Southern Declaratory Ruling). In the ruling, the Board answered many of the questions posed by MidAmerican and provided additional clarity to this issue. A copy of the declaratory ruling and accompanying memo, attachments, and the petition for declaratory ruling may be obtained by contacting the Board's Records and Information Center. There will be a charge for copying.

not requiring renewal of the existing permit. MidAmerican argues the status of the Henderson Lateral appears very similar to that of the line in P-564, in that both extend from an interstate natural gas pipeline to a city, and both operate at less than 150 psig.

MidAmerican does not contest the Board staff's determination that a pipeline permit is required, although it suggests the rules in effect when the pipeline was built were different than they are today, and it argues that reasonable persons could differ in their interpretation of the rules. MidAmerican states it only raises the issue to note that uncertainty can exist when relying on the Part 192 definitions, and the uncertainty helps explain, at least in part, why MidAmerican did not seek a permit for the Henderson Lateral until it was advised by staff in 2003 that a permit was necessary.

MidAmerican further argues that imposition of a civil penalty in this case would serve no valid punitive or deterrent purpose. It argues that one purpose of a penalty is to deter inappropriate conduct, and this reason does not exist in this case because there is no similar conduct to be deterred. It argues the permitting decision was made over 30 years ago, there is no reason to believe MidAmerican does not recognize and fully appreciate its responsibilities under the applicable statutes and rules, and MidAmerican takes its compliance responsibilities very seriously.

MidAmerican argues it has no history of prior violations of this type, it operates approximately 600 miles of Board-permitted pipelines in Iowa, and it is unlikely that similar pipeline situations exist in MidAmerican's system. MidAmerican further

argues it has intensified the oversight of the permit and franchise sections of its facilities in response to the Board's admonitions and statements in recent cases and as part of its ongoing compliance efforts.

MidAmerican argues that when Board staff notified it of the permit requirement, it did not debate the issue, but immediately began investigating its records to determine the pipeline status. It further argues that when no permit could be identified, it promptly filed the petition for a permit. MidAmerican further argues this case is one of a dormant, passive instance of noncompliance such as seen in Lorimor and Interstate Power, and no civil penalty should be imposed.

### **Analysis**

It is important to remember that each of these cases is fact-sensitive. The Henderson Lateral at issue in this case was constructed between March and October of 1970. (testimony of Mr. Grigsby; MidAmerican 5/11/05 filing; petition for permit; O'Neal report). The pipeline has a maximum allowable operating pressure of 125 psig and there is no evidence that indicates the line was ever operated at a different pressure. (testimony of Mr. Grigsby; petition for permit; Helm and O'Neal reports).

It is unclear whether the statutes and rules in effect in 1970 when the pipeline was constructed required the pipeline to have a permit because the statute was amended effective July 1, 1970. The statute in effect from January 1 through June 30, 1970, the 1966 Code of Iowa, contained no exclusions from the requirement to obtain a permit. Iowa Code § 490.5 (1966) required any pipeline company engaging in business in the state to file a petition asking for a permit to construct,

maintain and operate its pipeline or pipelines. The section did not contain any informational meeting requirement. Iowa Code § 490.2 (1966) defined pipeline as any pipe used for the transportation or transmission of gas, etc., within or through the state.

The only exception to the statutory requirement to obtain a permit was contained in the Board rule. In 1970, the applicable Board rule stated: "Distribution Mains. No petition need be made for permit to construct, operate or maintain a gas main or distribution main as technically defined in ASA B31.8 – 1958 and which will be operated at a pressure of less than one hundred fifty pounds per square inch." 1966 Iowa Departmental Rules, Iowa State Commerce Commission, Rules and Regulations Relating to Pipelines and Underground Storage, Rule PL-107<sup>2</sup>. ASA B31.8 – 1958, paragraph 805.63, stated: "Gas main or distribution main is a pipe installed in a community to convey gas to individual services or other mains." Although the undersigned agrees there could be some uncertainty in the application of the definition to some pipelines, it is a fair interpretation to state that the Henderson Lateral was not a "gas main or distribution main" as defined by Rule PL-107 and ASA B31.8 – 1958. (petition for permit; O'Neal Report; testimony of Mr. O'Neal, Mr. Grigsby). Iowa Southern Declaratory Order. Therefore, the rule did not provide an exception to the requirement that the Henderson Lateral obtain a permit.

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<sup>2</sup> This rule was renumbered at various times, and the reference to the ASA/ASME standard was updated, but the rule language remained essentially unchanged until 1995. The definition of "gas main or distribution main" in the ASA/ASME standard that was referred to in the rule also remained essentially unchanged. In 1995, rule 10.16 was amended to its current form. In re: Pipeline Permits and Safety, Docket No. RMU-94-4, Order Adopting Rules (April 21, 1995).

A permit would have been required if the pipeline was constructed prior to July 1, 1970.

However, in 1970, the legislature amended Iowa Code § 490.5 to add the requirements regarding informational meetings. 1970 Acts of the 63<sup>rd</sup> General Assembly, Second Session, Chapter 1231. The amendment was approved May 13, 1970. Id. Therefore, it was effective July 1, 1970. Iowa Code § 3.7 (1966). The amendment included a sentence that read: "For the purposes of this section, . . . 'pipeline' means any line transporting gas, gasoline, oils, motor fuels, or inflammable fluids under pressure in excess of one hundred fifty pounds per square inch and extending a distance of not less than five miles or future anticipated extension of an overall distance of five miles." (Emphasis added).

Although this sentence is contained in the unnumbered paragraphs discussing the informational meeting requirement, not the requirement to file a petition for a permit, and was added with the informational meeting requirements, the legislature stated the exclusion was for the purposes of "this section." "This section," that is, § 490.5, includes both the requirement to file a petition for a permit and the requirement to hold an informational meeting. "We determine legislative intent from the words chosen by the legislature, not what it should or might have said." Auen et.al v. Alcoholic Beverages Division, 679 N.W.2d 586, 590 (Iowa 2004). Although the location of the sentence in the section makes it somewhat unclear, the words used are "this section" not "the informational meeting."

Therefore, on July 1, 1970, once the statute was amended, it apparently no longer required MidAmerican to file a petition for a permit for this pipeline, since the pipeline had a maximum allowable operating pressure of less than 150 pounds per square inch (psi), even though the pipeline was a transmission line. Iowa Code § 490.5 (1966, as amended by Acts 1970 of the 63<sup>rd</sup> General Assembly, Second Session, Chapter 1231); Lorimor; Moulton (1975).

The Board's decisions interpreting this section were not consistent. In at least one case during the time the statute included this sentence, the Board issued a decision in which it stated that a pipeline installed in 1973 "was not subject to our permit requirements of Chapter 490 Code in that it was operating at less than 150 pounds per square inch operating pressure." In the Matter of the Petition of the City of Moulton, etc., Docket No. P-740, Decision and Order Granting A Permit (September 26, 1975). (Moulton 1975). It appears that the pipeline in the Moulton 1975 case was a transmission line.

However, in at least one case during the time the statute included this sentence, the Board issued a decision in which it stated that the definition of "pipeline" in Iowa Code § 479.5<sup>3</sup> related only to the informational meeting requirements of unnumbered paragraphs 3 through 7, and the definition of "pipeline" found in § 479.2 applied to the first two unnumbered paragraphs of § 479.5. In re:

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<sup>3</sup> Iowa Code § 479.5 was renumbered from § 490.5 in the 1977 Iowa Code.

Iowa Southern Utilities Company and ANR Pipeline Company, Docket Nos. P-761 and P-762, Decision and Order (May 10, 1985) (Iowa Southern Decision).

In 1988, the legislature again amended the pipeline statute. 1988 Iowa Acts, Chapter 1074. The stated purpose of the act was to establish a new chapter to define jurisdiction over interstate natural gas pipelines. 1988 Iowa Acts, Chapter 1074. However, section 29 of the act amended Iowa Code § 479.5, and among other things, changed the words "this section" to "the informational meeting." The sentence then read: "For the purposes of the informational meeting, . . . 'pipeline' means a line transporting a solid, liquid, or gaseous substance, except water, under pressure in excess of one hundred fifty pounds per square inch and extending a distance of not less than five miles or future anticipated extension of an overall distance of five miles." (Emphasis added). The chapter was approved April 12, 1988, and was therefore effective July 1, 1988. The change was published in the 1989 Iowa Code. Once the change was made, the definition of "pipeline" as "a line under pressure in excess of one hundred fifty pounds per square inch," etc., applied only to the informational meeting requirement, not to the requirement to apply for a permit. There was no longer any exclusion to the requirement to apply for a permit in the statute and, as discussed above, the Board rule in effect at the time did not provide an exception to the statutory requirement for the Henderson Lateral because it was not a "gas main or distribution main."

Therefore, as of July 1, 1988, MidAmerican should have applied for a permit to maintain and operate the Henderson Lateral. Whether a civil penalty should be

assessed for the failure to apply for a permit when the statute changed is an issue considered below.

Iowa Code Chapter 479 and the Board rules in effect today require that the Henderson Lateral have a permit. The Henderson Lateral is a transmission line with a maximum allowable operating pressure (MAOP) of 125 psig and a length of approximately 6.05 miles. (petition for permit; Helm and O'Neal reports; testimony of Mr. Grigsby, Mr. O'Neal). Iowa Code § 479.3 states that no pipeline company shall construct, maintain, or operate any pipeline except in accordance with chapter 479. Iowa Code § 479.5 states that a pipeline company shall file a verified petition asking for a permit to construct, maintain, and operate its pipeline. A pipeline is defined by § 479.2(2) as "a pipe, pipes, or pipelines used for the transportation or transmission of a solid, liquid, or gaseous substance, except water, within or through this state. However, the term does not include interstate pipe, pipes, or pipelines used for the transportation or transmission of natural gas or hazardous liquids."

Iowa Code § 479.5 further provides that a pipeline company seeking a permit for a new pipeline must hold an informational meeting for the public prior to filing the petition. Section 479.5, as it is currently written, states that "For the purposes of the informational meeting, . . . 'pipeline' means a line transporting a solid, liquid, or gaseous substance, except water, under pressure in excess of one hundred fifty pounds per square inch and extending a distance of not less than five miles or having a future anticipated extension of an overall distance of five miles [emphasis added]." Board rule 199 IAC 10.3 also requires an informational meeting for any proposed

pipeline project over five miles in length that is to be operated at a pressure of over 150 psig. Since the Henderson Lateral has a maximum allowable operating pressure of 125 psig, MidAmerican is not required to hold an informational meeting regarding the pipeline.

The only exception to the statutory requirement to apply for a permit is contained in Board rule 199 IAC 10.16, entitled "When a permit is required," which states that a pipeline permit is required for "any pipeline which will be operated at a pressure of over 150 pounds per square inch gage or which, regardless of operating pressure, is a transmission line as defined in ASME B31.8 or 49 CFR Part 192. Questions on whether a pipeline requires a permit are to be resolved by the board."

The Henderson Lateral meets the definition of a transmission line in 49 C.F.R. § 192.3. It is a transmission line within the meaning of § 192.3 because it transports natural gas from another transmission line (and ultimately from gathering lines and/or storage facilities) to a gas distribution center, the regulator station in Henderson, Iowa. (O'Neal Report; petition for permit; testimony of Mr. Grigsby, Mr. O'Neal). Since the Henderson Lateral is a transmission line, rule 10.16 requires it to have a permit. (petition for permit; O'Neal Report; testimony of Mr. O'Neal, Mr. Grigsby).

If an owner has any question regarding whether a permit is required for a particular line, the owner has an affirmative duty to ask the Board whether a permit is required. 199 IAC 10.16. MidAmerican witness Mr. Grigsby testified that MidAmerican does this. (testimony of Mr. Grigsby).

MidAmerican argues that the Iowa-Illinois decision raises uncertainty about using "a distribution center" as the basis for classifying a pipeline as a transmission line. (MidAmerican Prehearing Brief, p. 6). MidAmerican's reliance on Iowa-Illinois is not persuasive. Although originally a transmission line, the pipeline in Iowa-Illinois was physically modified and it then met the definition of a distribution main. Since it was a distribution main that operated at less than 150 psig, it met the requirements in 199 IAC 10.16, and no permit was required. In the "Order Closing Docket," the Board stated it had determined that the pipeline now met the criteria in rule 10.16. This criteria included both the requirement to be a distribution main and the requirement to operate at less than 150 psig. Although this is not entirely clear in the Board Order, the staff inspection report on which the order is based explicitly discusses this. Docket No. P-564 Inspection Report, June 22, 1989.<sup>4</sup>

Iowa Code § 479.31 provides that in determining the amount of a penalty, the appropriateness of the penalty to the size of the company, the gravity of the violation, and the good faith of the company in attempting to achieve compliance after notification of a violation, shall be considered. Each case is fact sensitive and is to be judged on its own merits. Interstate Power.

In the past few years, the Board and the undersigned administrative law judge have considered assessment of civil penalties in five prior electric franchise and pipeline permit cases: In re: Corn Belt Power Cooperative, Docket No. E-21570,

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<sup>4</sup> The Board Order and supporting documents are available from the Board's Records and Information Center. There will be a charge for copying.

Order Canceling Hearing, Accepting Compromise, and Assessing Civil Penalty (February 1, 2002) (Corn Belt I); In re: Corn Belt Power Cooperative, Docket No. E-21519, Order Canceling Hearing, Accepting Compromise, and Assessing Civil Penalty (August 28, 2003) (Corn Belt II); and the Interstate Power, Moulton, and Lorimor decisions discussed above.

The Corn Belt cases involved failure to seek an electric franchise prior to construction rather than failure to seek a pipeline permit prior to construction. Although there are differences in the amounts and types of penalties that may be imposed for violations of the electric franchise and pipeline permit statutes, the factors to be considered in compromising or determining the amount of the penalty are the same. Iowa Code §§ 478.24, 478.29, and 479.31. Therefore, the Corn Belt cases are sufficiently analogous so it is valid to consider them as guidance regarding the appropriate penalty in pipeline permit cases.

In Corn Belt I, Corn Belt filed a petition for a franchise to construct an electric line in December 2001, but began construction of the line prior to receiving the franchise. Board staff discovered the violation and notified Corn Belt that construction must cease immediately and not resume until a franchise was obtained from the Board. Corn Belt immediately ceased construction activities after this notification, accepted full responsibility for the violation, and by motion and affidavit, asked the Board to impose the appropriate penalty without hearing. In imposing a civil penalty of \$600, the Board stated: "While the Board finds the violation to be serious, Corn Belt's actions are mitigated by the fact it immediately ceased

construction after notification from Board's staff. Corn Belt has also accepted responsibility for the violation and taken corrective action so similar violations will not occur in the future." The Board also stated: "Since this is the first time this has happened, there is no reason to assess the maximum fine." Corn Belt I Decision, pp. 5-6.

In Corn Belt II, Corn Belt converted a segment of single circuit transmission line to double circuit without first filing a petition for amendment of its electric franchise in February 2003. Corn Belt became aware of the violation in May 2003 and immediately notified Board staff. The Board stated it did not view the violation to be as serious as that in Corn Belt I. Although Corn Belt promptly reported the violation and began corrective action, took steps to prevent additional violations in the future, and the violation was inadvertent, the Board imposed a civil penalty of \$300 because it was the second violation by Corn Belt in less than two years. In the Corn Belt II Decision, the Board stated the following: "By bringing this action and assessing this fine, the Board puts all companies on notice that franchise requirements must be followed. However, the Board recognizes that there are some violations that may have occurred many years ago that have only recently been detected. The Board encourages companies to report any such violations immediately and to cooperate with the Board's staff in remedying such violations. Any penalties that may be imposed would likely be mitigated if the violations are self-reported and not discovered by the Board's staff. The companies should also examine their processes, like Corn Belt has, to see if additional personnel or training

are needed to ensure future compliance with the Iowa statutes and Board rules.”

Corn Belt II Decision, p. 5.

The Interstate Power case involved a failure to obtain a permit for a pipeline constructed in 1980 and 1982 when a permit was clearly required as of 1982. Interstate Power did not discover it had failed to obtain the required permit until August 2002. In reaching a decision not to impose a penalty, the undersigned and the Board considered that the company discovered the violation, immediately contacted the Board upon discovery, promptly filed a petition for a permit, took steps to prevent future violations, did not have any other known violations of this nature, constructed, operated, and maintained the pipeline in conformance with all other Board rules, and there was no safety issue associated with the pipeline. Also considered were the facts that the violation was committed by prior staff who no longer worked for the company and current staff exhibited exemplary behavior once the violation was discovered. Therefore, the decisions held that imposition of a civil penalty would not serve a valid punitive or deterrent purpose. In its decision affirming the proposed decision and imposing no penalty, the Board stated: "The evidence supports the ALJ's findings that IPL's actions fully mitigated imposition of a civil penalty. This is consistent with the Board's decision in Corn Belt regarding self-reported violations that occurred many years ago." Interstate Power Decision, p. 5.

Although the Moulton case involved the failure to timely renew a permit, rather than the failure to obtain a permit when one was required, the case is sufficiently analogous so it is valid to consider it as guidance when determining whether a civil

penalty should be assessed in this case, and if so, the amount of the penalty to be assessed. At the hearing in the Moulton case, the parties proposed a compromise of the civil penalty issue, in which Moulton agreed to pay a civil penalty of \$375.

Moulton Decision, p. 3. Important factors considered in Moulton included that the failure to renew the permit was a relatively recent violation and Board staff, rather than Moulton's staff, discovered the violation. Other important factors included that Moulton was a very small town with limited staff, Moulton cooperated with Board staff upon discovery of the violation and promptly filed a petition for a permit, there were no other known violations, the pipeline had been operated and maintained in compliance with all requirements other than the failure to renew, there was no safety issue with respect to the pipeline, and Moulton implemented a procedure to ensure its permit would be timely renewed in the future. The parties' proposed compromise was approved. Moulton Proposed Decision, p. 10.

The Lorimor case involved a transmission line with a maximum allowable operating pressure of 150 psig that had been constructed in 1971 without a permit. There were a number of factors considered important in the decision not to impose a penalty. Lorimor was a very small town with a limited number of customers, one full-time employee, and one part-time employee. The Lorimor pipeline had been inspected by Board staff for many years, and when citations were issued as a result of the inspections, Lorimor timely corrected the matters. There were no major violations of applicable requirements. It was not known why a permit was not obtained prior to construction, although an engineer testified that to the best of his

knowledge, the consultants hired to design and construct the pipeline assumed no permit was required because the pipeline would be operated at 150 psig or less. Board staff discovered the line had no permit, notified the city a permit was required, and as soon as the city learned of the permit requirement, it promptly applied for one. Lorimor was cooperative with Board staff in seeking to obtain a permit once it learned one was required, and worked with Board staff to amend its petition as needed. The Lorimor pipeline conformed to all pipeline safety standards and there were no safety issues with respect to the pipeline. The city took steps to ensure the pipeline would be operated in conformance with all applicable requirements, and the city owned no other pipelines. Lorimor.

This case has a number of similarities to the prior cases that lead to the conclusion that imposition of a civil penalty would be inappropriate. As discussed above, it is unclear whether a permit was required when the pipeline was constructed in 1970. As of July 1, 1970, once the statute was amended, it apparently no longer required a permit for the Henderson Lateral. Board decisions interpreting the statute were conflicting. The first time it was clear that a permit was required for the Henderson Lateral was in 1988 when the statute was changed.

Board staff discovered that the Henderson Lateral did not have a permit, and since it was a transmission line, that a permit was required. (testimony of Mr. O'Neal, Mr. Grigsby; letter dated May 30, 2003). Once notified by Board staff that a permit was required, MidAmerican immediately began searching for records involving the pipeline. (testimony of Mr. Grigsby). Once it determined the pipeline did not have a

permit, MidAmerican promptly prepared a petition for a permit and filed it with the Board. (petition for permit; testimony of Mr. Grigsby, Mr. O'Neal). MidAmerican was cooperative with Board staff in working on obtaining a permit for the pipeline. (testimony of Mr. Grigsby, Mr. O'Neal).

Board staff has regularly inspected the pipeline and there are no safety issues regarding the pipeline, other than a probable violation of 49 C.F.R. § 192.469 and one of § 192.717. (testimony of Mr. O'Neal, Mr. Grigsby; O'Neal report). MidAmerican completed correction of these violations by May 3, 2005, and notified the Board it had completed the work. (testimony of Mr. Grigsby; MidAmerican 5/11/05 filing; Mr. O'Neal; O'Neal report). During the years staff has inspected this pipeline, it has found only two other safety violations, both of which were promptly corrected. (testimony of Mr. O'Neal, Mr. Grigsby).

MidAmerican has had no prior violations of the requirement to obtain a permit. (testimony of Mr. Grigsby). MidAmerican examines the applicable statutes and rules when considering new pipeline projects, and if there is any question regarding whether a permit is required, MidAmerican consults with Board staff. (testimony of Mr. Grigsby). It will review permitting requirements with its gas engineering group and will issue written guidance for staff. (testimony of Mr. Grigsby). MidAmerican has discussed the need for permits for its older facilities operating at less than 150 psig with Board staff, and to the best of its knowledge, there are no other pipelines that require permits. (testimony of Mr. Grigsby).

Failure to obtain a permit when one was required is a serious violation. It is unclear whether a permit was required at the time the pipeline was constructed in 1970. Even if a permit was required, the violation was committed by prior staff who no longer work for the company. (testimony of Mr. Grigsby). Current staff acted promptly to assess whether the line had a permit and to obtain a permit once it was learned that a permit was required. (testimony of Mr. Grigsby). Therefore, imposition of a civil penalty would not serve a valid punitive or deterrent purpose. Interstate Power.

Between 1971 and 1988, there was confusion regarding whether pipelines that operated at less than 150 psig were required to obtain a permit, and Board decisions were conflicting. It is clear that a permit was required in 1988 because the statute changed. Failure to seek a permit because the law changed is different than failure to seek a permit when a pipeline company takes some affirmative action such as construction of a pipeline. When a pipeline company plans to construct a pipeline, it must do so in conformance with applicable law, and it therefore must learn what the law requires. In this case, there was no triggering action on the part of MidAmerican that would have caused it to know the statute changed. Also, it must be noted that this statutory change was subtle and was contained in a bill that primarily dealt with regulation of interstate pipelines. This is a factor to be considered only in evaluating whether a penalty is appropriate. Companies that own pipelines including MidAmerican have an affirmative duty to know what is in the law and comply with it, even if the law changes.

Although it is somewhat troubling that MidAmerican did not learn that a permit was required beginning in 1988 and obtain a permit at that time, and Board staff rather than MidAmerican discovered the pipeline did not have a required permit, all other factors weigh against imposition of a penalty. (petition for permit; Helm and O'Neal Reports; testimony of Mr. Grigsby, Mr. O'Neal, Mr. Helm). Therefore, a civil penalty will not be assessed in this case. (testimony of Mr. Grigsby, Mr. O'Neal, Mr. Helm; petition for permit; Helm and O'Neal reports). Iowa Code §§ 479.5, 479.31; Iowa Code § 490.5 (1971); Corn Belt I; Corn Belt II; Interstate Power; Moulton; and Lorimor Decisions.

#### **FINDINGS OF FACT**

1. MidAmerican is a pipeline company within the meaning of Iowa Code § 479.2. (testimony of Mr. Grigsby; petition for permit).
2. On October 1, 2003, MidAmerican filed a petition for a pipeline permit for an existing 2-inch diameter natural gas pipeline approximately 6.05 miles long in Mills County, Iowa. (petition for permit; testimony of Mr. Grigsby; Helm and O'Neal reports). MidAmerican filed amendments to its petition and exhibits and provided additional information on December 29, 2003, February 12, 2004, and February 10, 2005. (petition for permit). The petition is for an existing pipeline built in 1970 for which a permit was never requested or granted. (petition for permit; testimony of Mr. Grigsby, Mr. O'Neal; O'Neal report). The pipeline is a transmission line with a maximum allowable operating pressure of 125 psig that transports natural gas from a

connection with an NGP pipeline to a regulator station in Henderson, Iowa. (petition for permit; Helm and O'Neal reports; testimony of Mr. Grigsby, Mr. Helm, Mr. O'Neal).

3. The pipeline follows a route described in Exhibit A and shown on Exhibit B attached to the petition for a permit (as amended). (petition Exhibits A and B). It begins at an NGP regulator station in Mills County, Iowa, and runs in a generally northwesterly direction to a regulator station in Henderson, Iowa. (petition for permit; Helm and O'Neal Reports). At the Henderson regulator station, the gas pressure is reduced for delivery through gas distribution mains to customers in Henderson. (petition for permit; O'Neal Report; testimony of Mr. Grigsby).

4. MidAmerican caused notice of the hearing to be published in Mills County in the Opinion Tribune, a newspaper of general circulation in the county, on April 6 and April 13, 2005. (proof of publication).

5. The pipeline is necessary to supply natural gas to existing customers in Henderson, Iowa. (petition for permit; testimony of Mr. Grigsby; O'Neal report). Therefore, the proposed pipeline promotes the public convenience and necessity as required by Iowa Code § 479.12. (testimony of Mr. Grigsby; petition for permit; O'Neal report).

6. A recent safety inspection found two probable violations of the Minimum Federal Safety Standards in 49 C.F.R. Part 192. (O'Neal Report). These violations involved 19 C.F.R. §§ 192.469 and 192.717. (O'Neal Report). MidAmerican completed correction of these violations by May 3, 2005, and notified the Board of the completion. (testimony of Mr. Grigsby, MidAmerican 5/11/05 filing; Mr. O'Neal;

O'Neal Report). The pipeline complies with the design, construction, and safety requirements of Iowa Code Chapter 479, 199 IAC § 10.12, and 49 C.F.R. Part 192. (petition for permit; testimony of Mr. Helm, Mr. O'Neal, Mr. Grigsby; MidAmerican 5/11/05 filing; Helm and O'Neal reports; inspection report).

7. Board staff has regularly inspected the pipeline for a number of years, and there are no safety issues regarding the pipeline, other than the two mentioned above, which have been corrected. (testimony of Mr. O'Neal, Mr. Grigsby; MidAmerican 5/11/05 filing; O'Neal and Helm Reports; inspection report). During the years staff has inspected the pipeline, staff has found only two other safety violations, and MidAmerican promptly corrected both. (testimony of Mr. O'Neal, Mr. Grigsby).

8. No further safety-related terms, conditions, or restrictions need to be imposed pursuant to Iowa Code § 479.12. (petition for permit; testimony of Mr. Grigsby, Mr. Helm, Mr. O'Neal; Helm and O'Neal reports).

9. There are no problems with the location and route of the pipeline and no further terms, conditions, or restrictions regarding them need to be imposed pursuant to Iowa Code § 479.12. (petition for permit; Helm and O'Neal reports; testimony of Mr. Helm, Mr. O'Neal).

10. MidAmerican has filed satisfactory proof of its solvency and ability to pay damages in the sum of \$250,000 or more pursuant to Iowa Code § 479.26 and 199 IAC 10.2(1)"d". (testimony of Mr. Grigsby; petition exhibit D).

11. No written objections to the petition for a permit were filed and no objectors appeared at the hearing. (testimony of Mr. Grigsby, Mr. O'Neal; Docket No. P-857 file).

12. The Henderson Lateral was constructed in 1970 and no additional construction is planned. (petition for permit; testimony of Mr. Grigsby).

13. At the time the pipeline was constructed in 1970, it is unclear whether a permit was required, because the pipeline was constructed between March 1970 and October of 1970. (testimony of Mr. Grigsby; MidAmerican 5/11/05 filing; petition for permit). In 1988, the statute was changed, and it became clear that a permit to maintain and operate the pipeline was required. MidAmerican did not know a permit was required until Mr. Don Stursma, manager of the Board's Safety & Engineering Section, informed it of the requirement by letter dated May 30, 2003. (testimony of Mr. Grigsby, Mr. O'Neal; O'Neal report; letter dated May 30, 2003). MidAmerican immediately inspected its records to determine whether the pipeline had a permit, and once it determined it did not, MidAmerican began preparing a petition for a permit, and filed it on October 1, 2003. (testimony of Mr. Grigsby; O'Neal report; petition for permit). MidAmerican was cooperative with Board staff in attempting to get the pipeline permitted. (testimony of Mr. O'Neal).

14. MidAmerican has had no prior violations of the requirement to obtain a permit. (testimony of Mr. Grigsby).

15. MidAmerican examines the applicable statutes and rules when considering new pipeline projects, and if there is any question regarding whether a

permit is required, MidAmerican consults with Board staff. (testimony of Mr. Grigsby). It will review pipeline permitting requirements with its gas engineering group and will issue written guidance for staff. (testimony of Mr. Grigsby). MidAmerican has discussed the need for permits for its older facilities operating at less than 150 psig with Board staff, and to the best of its knowledge, there are no other pipelines that require permits. (testimony of Mr. Grigsby).

### **CONCLUSIONS OF LAW**

1. The Board has the authority to grant, amend, and renew permits for the construction, operation, and maintenance of pipelines for the intrastate transportation of natural gas. Iowa Code §§ 479.1, 479.4, 479.12, 479.18, and 479.29; 199 IAC 9 and 10.

2. The Henderson Lateral pipeline requires a permit because it meets the definition of a transmission line. (O'Neal report; petition for permit; testimony of Mr. Grigsby, Mr. O'Neal). Iowa Code §§ 479.2, 479.5 (2005); 199 IAC 10.16; 49 CFR § 192.3. It meets the definition of a transmission line because it transports gas from another transmission line (and ultimately from gathering lines and/or storage facilities) to a gas distribution center, the regulator station in Henderson, Iowa. (O'Neal report; petition for permit; testimony of Mr. Grigsby, Mr. O'Neal). 199 IAC 10.16; 49 CFR § 192.3.

3. The Board has jurisdiction over MidAmerican and over the petition for a natural gas pipeline permit it has filed. Iowa Code §§ 479.2, 479.5, 479.6, 479.12, 479.18, and 479.29.

4. Since the pipeline was constructed in 1970 and MidAmerican will not be constructing any additional pipeline and will not disturb any agricultural land, it is not required to file a land restoration plan. Iowa Code § 479.29; 199 IAC 9.

5. The petition of MidAmerican for issuance of a permit for the natural gas pipeline in this docket should be granted. Iowa Code §§ 479.11, 479.12, 479.26, and 479.29; 199 IAC 9 and 10.

6. Iowa Code § 479.31 provides that a person who violates Chapter 479 or a Board rule issued pursuant to the chapter is subject to a civil penalty not to exceed \$10,000 for each violation. The statute further provides that each day the violation continues constitutes a separate offense, but the maximum civil penalty is \$500,000 for any related series of violations. Iowa Code § 479.31. The statute provides that in determining the amount of the penalty, the appropriateness of the penalty to the size of the company, the gravity of the violation, and the good faith of the company in attempting to achieve compliance after notification of a violation, shall be considered. Iowa Code § 479.31. It is unclear whether a permit was required when the pipeline was constructed in 1970. As of July 1, 1970, the statute was amended, and it apparently no longer required a permit for the Henderson Lateral. Lorimor. Board decisions interpreting the statute were conflicting. The first time a permit was clearly required was when the statute was changed in 1988. As

discussed in the body of this decision, considering the entire circumstances, it is not appropriate to impose a civil penalty in this case. Iowa Code §§ 479.5, 479.31; Iowa Code § 479.5 (1989); Iowa Code § 490.5 (1966 and 1971); Corn Belt I; Corn Belt II; Interstate Power; Moulton; and Lorimor Decisions.

7. If an owner has any question regarding whether a permit is required for a particular pipeline, the owner has an affirmative duty to ask the Board whether a permit is required. 199 IAC 10.16.

**IT IS THEREFORE ORDERED:**

1. Official notice is taken of the report dated October 20, 2003, filed in this docket by Mr. Reed Helm, utility regulatory inspector, and of the report dated March 2, 2005, filed in this docket by Mr. Jeffrey O'Neal, regulatory engineer for the Board.

2. Pursuant to Iowa Code Chapter 479, the petition for a pipeline permit filed by MidAmerican in this docket is granted. A permit will be issued if this proposed decision and order becomes the final order of the Board.

3. No civil penalty is imposed.

4. Arguments in the briefs not addressed specifically in this order are rejected, either as not supported by the evidence or as not being of sufficient persuasiveness to warrant comment.

5. The Board retains jurisdiction of the subject matter in this docket.

6. This proposed decision will become the final decision of the Board unless appealed to the Board within 15 days of its issuance or the Board votes to review the decision on its own motion. Iowa Code § 17A.15(3); 199 IAC § 7.8(2).

**UTILITIES BOARD**

/s/ Amy L. Christensen  
Amy L. Christensen  
Administrative Law Judge

ATTEST:

/s/ Judi K. Cooper  
Executive Secretary

Dated at Des Moines, Iowa, this 12th day of May, 2005.