

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: MIDAMERICAN ENERGY COMPANY	DOCKET NO. DRU-06-2
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DECLARATORY ORDER

(Issued June 1, 2006)

PROCEDURAL HISTORY

On April 17, 2006, MidAmerican Energy Company (MidAmerican) filed with the Utilities Board (Board) a petition for declaratory ruling. MidAmerican posed two questions related to whether the Board's jurisdiction over MidAmerican's electric tariff and utility cost recovery and cost allocation is superceded and rendered void by passage of a municipal ordinance specifying the cost recovery and allocation of municipally-mandated overhead-to-underground conversion costs. MidAmerican's proposed answer is that the Board retains jurisdiction over an electric public utility's rates and charges for providing electric service and MidAmerican's electric tariff remains effective.

The Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed an appearance and statement on May 2, 2006, supporting the Board's primary jurisdiction over the validity and application of the tariff. Also on May 2, 2006, the city of Coralville, Iowa (Coralville), filed a petition for intervention and request for stay. On May 3, 2006, MidAmerican filed a resistance to the request

for stay. The arguments for and against the stay focused primarily on whether the Iowa District Court for Johnson County previously decided the questions posed by MidAmerican's petition for declaratory ruling in 2003 in its ruling in City of Coralville v. MidAmerican Energy Company, Johnson County No. LACV61728 (Coralville I) and whether addressing the questions posed by MidAmerican in a declaratory ruling would infringe upon Coralville's right to control its public rights of way.

Coralville I resulted in a ruling by the District Court (which was not appealed) that Coralville could require that certain electric lines be placed underground; the ruling did not determine who would ultimately pay the additional cost. There is now pending in Johnson County District Court a second case between Coralville and MidAmerican, City of Coralville v. MidAmerican Energy Company, Johnson County No. CVCV06692 (Coralville II). Coralville II involves the issues presented by MidAmerican's petition for declaratory ruling (who pays the additional cost of undergrounding).

The Board issued an order denying the request for stay on May 15, 2006. The Board said that in its initial review of the pleadings, it did not see that the questions posed by MidAmerican, regardless of how they were answered by the Board, would infringe upon or limit Coralville's right to control what goes on or under its public rights of way. The Board said Coralville I related to issues of Coralville's police power and home rule; Coralville II involves public utility rates and charges. While the issues in Coralville II and the petition for declaratory ruling are similar or identical, the Board said it would not issue a stay pending district court resolution because as the

agency charged by statute with utility regulation, the Board is the appropriate body to consider questions such as the ones posed by MidAmerican.

In the order denying stay, the Board also noted that Coralville qualified as an intervenor in the declaratory ruling proceeding before the Board. The Board allowed all parties an additional seven days, or until May 22, 2006, to file any additional comments. Finally, the Board indicated its intent to issue a declaratory ruling within the 60-day time limit (computed using the filing date of MidAmerican's petition) provided by Iowa Code § 17A.9(8). Consumer Advocate filed additional comments on May 19, 2006, and MidAmerican and Coralville each filed additional comments on May 22, 2006. MidAmerican did not request an informal meeting pursuant to I99 IAC 4.7.

MIDAMERICAN'S POSITION

In its petition for declaratory ruling, MidAmerican summarized the relevant facts upon which the ruling is requested as follows: MidAmerican has filed electric service tariffs with the Board establishing the rates, terms, and conditions of service under which MidAmerican provides electric service to the public within the state of Iowa. Iowa Code §§ 476.4, 476.5, and 476.6(1). MidAmerican's Revised Tariff Sheet Number 50 is part of these filed tariffs and provides that conversion of existing overhead facilities to underground or relocation of facilities will be allowed, with certain exceptions. The tariff goes on to provide that "[i]f conversion is required by a governmental unit, the conversion cost will be charged to the governmental unit or to the Company's (MidAmerican's) customers in the governmental unit."

Coralville adopted an ordinance which provides that upon written notification by Coralville, existing overhead facilities located in the right-of-way shall be removed and replaced (i.e., converted to underground facilities) at the utility's (MidAmerican's) expense. Coralville has commenced a series of public projects and has ordered MidAmerican to convert existing overhead electric transmission and distribution facilities to underground at its own expense and is seeking to prohibit MidAmerican from applying the terms and conditions of its Board-approved tariff, which would charge the expense of the conversion to either Coralville or to MidAmerican's ratepayers residing in Coralville.

Based on the facts as posited by MidAmerican, MidAmerican asks the following questions: (1) whether the jurisdiction of the Board and MidAmerican's First Revised Tariff Sheet No. 50, filed with the Board pursuant to such jurisdiction, remains effective or (2) whether that jurisdiction is superceded and rendered void by the passage of a municipal ordinance specifying the cost recovery and allocation of municipally mandated overhead to underground conversion costs. MidAmerican's proposed answers are that the Board retains jurisdiction over MidAmerican's rates and charges for providing electric service and that MidAmerican's tariff remains effective, meaning that the Board's jurisdiction preempts that of a municipality attempting by local ordinance to nullify the application of a Board-approved tariff.

In support of its proposed answers, MidAmerican argued that preemption could be express or implied and that Iowa law "requires some legislative expression of an intent to preempt home rule authority, or some legislative statement of the

state's transcendent interest in regulating the area in a uniform manner.” Goodell v. Humboldt County, 575 N.W.2d 486, 493 (Iowa 1998). MidAmerican said the Iowa Constitutional provision giving political subdivisions home rule prohibits them from exercising that power in a manner “inconsistent with the laws of the General Assembly.” Iowa Const. Art. III, § 39A. MidAmerican also cited Iowa Code § 364.1, which contains similar limitations on home rule powers.

MidAmerican acknowledged the authority of political subdivisions to enact ordinances in furtherance of public health and safety under their general police power, including the right to require relocation of utility poles and lines located in public right-of-way when those poles or lines became an obstacle due to enlargement or repair of a highway or street. However, MidAmerican said the questions posed do not relate to the authority to order MidAmerican to underground its facilities, but whether Coralville can contravene MidAmerican's tariff provisions relating to cost recovery. MidAmerican said its tariff addresses which of its customers must bear the cost of conversion from overhead to underground.

MidAmerican noted that prior to 1963, public utility regulation in Iowa was the responsibility of municipalities. In 1963 MidAmerican said the Legislature adopted a system of statewide regulation of public utilities that gave the Board's predecessor, the Iowa State Commerce Commission, authority over utility rates and charges. Because the Legislature has occupied the field of regulation of public utility rates and charges, MidAmerican argued local ordinances must yield to state law and that the valid rule of a state agency (the Board's tariff rules) have the force of state law.

Department of Revenue v. Iowa Merit Employment Comm'n, 243 N.W.2d 610, 615 (Iowa 1976); 199 IAC 20.2. MidAmerican cited authority indicating a tariff adopted pursuant to agency rules also has the force of state law. Woodburn v. Northwestern Bell Tel. Co., 275 N.W.2d 403, 405 (Iowa 1979).

MidAmerican said that Coralville not only seeks to use its police power to compel undergrounding of facilities, but to impose favorable utility rate treatment for its citizens. MidAmerican argued Coralville's ordinance seeks to transfer the costs of its beautification and development projects away from its citizens to potentially all MidAmerican customers. MidAmerican noted that statewide rate and charge stability could easily degenerate into a web of competing local demands, leaving customers in unincorporated areas particularly vulnerable because they could be responsible for costs related to beautification of 368 communities in MidAmerican's service territory.

CONSUMER ADVOCATE'S POSITION

Consumer Advocate urged the Board to issue a declaratory ruling affirming its primary jurisdiction over the validity and application of MidAmerican's tariff under Iowa Code chapter 476. Consumer Advocate said that in Coralville II, Coralville is asking the District Court to rule that the tariff cannot authorize MidAmerican to charge ratepayers residing in Coralville for the costs of certain utility construction in the city; the litigation is a direct challenge to the validity of the tariff and hence the Board's statutory authority.

Consumer Advocate noted that prior to 1963, then-Iowa Code § 397.28 provided cities with the authority to regulate rates of utilities operating within their

borders. Consumer Advocate said that in 1963, this section was repealed to the extent it conflicted with the new Act granting authority over utility rates and charges to the Iowa State Commerce Commission (now the Board). Chapter 286, Laws of the Sixtieth General Assembly (1963). Consumer Advocate said that Coralville's position is both without legal merit and bad public policy because cities across Iowa could impose all manner and type of costs on utilities, regardless of reason, and have ratepayers in other areas pay the bill.

CORALVILLE'S POSITION

Coralville argued that the Board lacked jurisdiction to enforce, interpret, limit, adjudicate, hinder, or otherwise claim or exercise any control or rights over or concerning the administration of public right of way. Coralville noted that in Coralville I, the District Court determined that the city was not a customer of, nor a recipient of, MidAmerican services and that MidAmerican cannot come before the Board now to make a contrary claim. Coralville said the Board should not issue a ruling because the District Court's ruling in Coralville I is binding on MidAmerican and the District Court is addressing remaining issues in Coralville II. Coralville also argued MidAmerican's petition for declaratory ruling was defective pursuant to 199 IAC 4.1 because it did not mention the District Court order in Coralville I.

Coralville said that the District Court in Coralville I decided that Coralville had the authority to order that facilities be relocated underground at MidAmerican's expense. Coralville argued the issues in the declaratory ruling are indistinguishable from the issues in Coralville I because MidAmerican seeks to use the same provision

in its tariff to recover the cost of relocation not from Coralville but from its citizens; nothing in Coralville I justifies any claim that the expenses of placing facilities underground can be charged exclusively to the citizens of Coralville. Coralville claimed the Board lacks jurisdiction over a dispute that is not about rates and services but about use of right of way.

Coralville cited cases from other jurisdictions that it said supported its position that the public utility must pay the costs of relocating utilities that are in the public right of way if the relocation is made necessary by public improvements. (Coralville May 22 additional comments, pp. 4-7). Coralville noted the District Court said Coralville was not a customer of MidAmerican when it places facilities in the public right of way and therefore MidAmerican has no right to impose the expense of relocation on Coralville. Also, because Coralville is not a customer of MidAmerican, Coralville said the filed rate doctrine does not apply.

Coralville cited Iowa Code § 476.4 and some of the Board's rules regarding tariffs (199 IAC 20.2(4)) and concluded there was nothing that would allow a utility to dictate via its tariff the allocation of costs for underground construction within a city's public right of way. Because there is no dispute over rates and charges, Coralville argued the Board does not have jurisdiction and that the franchising rights of cities are specifically reserved by Iowa Code § 476.23(4)"a."

APPLICABLE STATUTES

In addition to the citations provided by the parties, the Board believes it is useful to set forth several provisions of current Iowa Code chapter 476. Section

476.1 provides that the Board shall regulate the rates and services of public utilities to the extent and in the manner thereafter provided; section 476.9 provides that the Board has general supervision of all lines for the transmission, sale, and distribution of electrical current for light, heat, and power.

Iowa Code § 476.4 provides that public utilities shall file with the Board tariffs showing their rates and charges. Iowa Code § 476.5 specifically provides:

No public utility subject to rate regulation shall directly or indirectly charge a greater or less compensation for its services than that prescribed in its tariffs, and no such public utility shall make or grant any unreasonable preferences or advantages as to rates or services to any person or subject any person to any unreasonable prejudice or disadvantage.

Iowa Code § 476.6(1) further provides:

Filing with board. A public utility subject to rate regulation shall not make effective a new or changed rate, charge, schedule or regulation until the rate, charge, schedule, or regulation has been approved by the board, except as provided in subsections 8 (automatic adjustments) and 10 (temporary rate authority).

DISCUSSION AND RULING

The Board has reviewed the District Court's decision in Coralville I. The District Court said that "[t]he central question in the case is whether the City of Coralville has authority to order a utility to move overhead utility service and place it underground at the utility's expense." Coralville I, 9/22/03 order, p. 2. In other words, the decision and issues in that case related to issues of Coralville's police power and home rule. The District Court found that MidAmerican could not impose

the costs of undergrounding on Coralville because, for these purposes, Coralville is not a customer of MidAmerican and therefore not subject to MidAmerican's tariff. The District Court cited Interstate Power Co. v. Dubuque County, 391 N.W.2d 227, 230 (Iowa 1986), for the proposition that Coralville has the authority to order the utility to move the service at the utility's cost. It appears to be the general rule in Iowa that utility poles and lines located in public right-of-way must be relocated at the owner's cost whenever those poles and lines must be moved because of enlargement or repair of a highway. Iowa Electric Light & Power Co. v. Iowa State Commerce Comm'n, 231 N.W.2d 597, 598 (Iowa 1975).

Coralville I, however, does not address the ratemaking issues presented by Coralville II and MidAmerican's request for declaratory ruling. The District Court in Coralville I only determined that Coralville could require the undergrounding at the utility's expense; the District Court did not determine who would ultimately pay the cost of the conversion from overhead to underground lines, that is, from whom MidAmerican would recover these costs. MidAmerican is responsible for numerous and various expenses, including employee salaries, cost of repair and maintenance of existing facilities and construction of new facilities, advertising, and fuel for generating facilities. To say that MidAmerican is responsible for those costs, as the District Court said MidAmerican was responsible for the costs associated with the conversion from overhead to underground lines, does not answer the question of how those costs are allocated between the various state jurisdictions that MidAmerican operates in, how costs are allocated between ratepayers and shareholders, or how

costs are allocated among various customer classes or groups. As a regulated utility, MidAmerican is generally allowed (and legally entitled) to a reasonable opportunity to recover all expenses prudently incurred in providing utility service to its customers.

The petition for declaratory ruling asks questions related to utility tariffs, cost recovery, and cost allocation, matters that are squarely within the Board's Iowa Code chapter 476 jurisdiction. In response to the first question posed by MidAmerican, the Board retains jurisdiction to determine which customers should be charged with the costs of city-mandated undergrounding of public utility facilities, even though there is a city ordinance that purports to prohibit the utility from charging such costs to those of its customers residing within the city. Since 1963, the Board (or its predecessor) has had jurisdiction over the rates and charges of public utilities like MidAmerican. This jurisdiction over rates and charges relates to tariffs, costs recovery, and cost allocation.

The General Assembly clearly occupied the field of public utility regulation and therefore local ordinances in conflict must yield to the state law. In a similar case, the Iowa Supreme Court held that the state Commerce Commission's (predecessor to the Board) ruling that City of Des Moines franchise fees should be paid only by Des Moines customers of the electric utility did not impair any franchise rights of the city or abridge any other rights of the city. City of Des Moines v. Iowa State Commerce Comm'n, 285 N.W.2d 12 (Iowa 1979). In a more recent case involving the City of Des Moines franchise fee, the Court confirmed that the issue in City of Des Moines was not whether home-rule powers authorized the amount of the fee charged, but

which customers were responsible for paying it. Kragnes v. City of Des Moines, Iowa, Iowa Supreme Court No. 41 / 06-0026 (5/26/2006), p. 15. There is no conflict between a city determining under its home rule authority that there will be a franchise fee (or an overhead line to underground line beautification program) and the Board determining that such a fee (or the cost of the conversion) must be paid for by residents of that community; each body has its respective areas of authority.

No one disputes that the MidAmerican tariff provisions in question were in fact validly filed with and approved by the Board. In City of Des Moines, the Court noted that a rate fixed by the Commission (now Board) is presumed to be valid and reasonable. 285 N.W.2d at 16. Therefore, in response to MidAmerican's second question, MidAmerican's First Revised Tariff Sheet No. 50 remains in full force and effect. In enacting its ordinance, Coralville infringed on the Board's jurisdiction related to utility tariffs, cost recovery, and cost allocation. As noted by Consumer Advocate, Coralville's position not only does not have legal merit but also is bad public policy. Cities across Iowa could impose all manner and type of costs on utilities, regardless of reason, and force ratepayers in other areas to pay the bill.

As a footnote, Coralville argued the questions posed in the declaratory ruling are more appropriate for resolution in state district court, and the Board should therefore decline to issue a declaratory ruling. The Board rejected that argument in its May 15, 2006, order denying request for stay and rejects it again here. As the agency charged by statute with utility regulation, the Board is the appropriate body to rule on questions such as those posed in MidAmerican's request for declaratory

ruling. To decline to rule on such questions would be an abrogation of the Board's statutory duties and responsibilities.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. The request for declaratory ruling filed by MidAmerican Energy Company on April 17, 2006, is granted to the extent discussed in this order.
2. Any argument in the pleadings not specifically addressed in this order is rejected as not being of sufficient persuasiveness to warrant comments.

UTILITIES BOARD

/s/ John R. Norris

/s/ Diane Munns

ATTEST:

/s/ Margaret Munson
Executive Secretary, Deputy

/s/ Curtis W. Stamp

Dated at Des Moines, Iowa, this 1st day of June, 2006.