

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: MIDAMERICAN ENERGY COMPANY	DOCKET NO. SPU-2021-0003
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**ORDER ADDRESSING PRESIDING OFFICER'S RECOMMENDATIONS
REGARDING ISSUE OF PRIVILEGE**

PROCEDURAL BACKGROUND

On May 13, 2021, the Utilities Board (Board) opened Docket No. SPU-2021-0003 as part of its final order in Docket No. EPB-2020-0156 to review MidAmerican Energy Company's (MidAmerican) long-term resource plans, to review the reasonableness and prudence of MidAmerican's procurement and contracting practices related to the acquisition of fuel for use in generating electricity, and to address a forecast of future gas requirements or electric generating needs. Additionally, the docket is to allow interested parties to analyze MidAmerican's long-term resource needs, including consideration of least-cost options for generation, environmental requirements, reliability, baseload generation, and economic development potential.

On August 12, 2021, MidAmerican made its initial filings along with a request for confidentiality encompassing most documents, including issues of both potential confidentiality and attorney-client privilege or attorney work product. In its filing, MidAmerican also made a request for clarification from the Board as to whether the docket is limited to a review of MidAmerican's management practices as permitted by

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Iowa Code § 476.2(4) and thus is an informational docket or if the docket is a contested case proceeding.

On August 23, 2021, the Iowa Business Energy Coalition (IBEC) filed a petition to intervene, stating that its members could be directly affected by any changes to MidAmerican's generating fleet and IBEC's interests are specific to large industrial customers.

On August 30, 2021, MidAmerican filed a reply to IBEC's petition for intervention, stating that if the docket is for informational purposes only, there is no statutory provision that would permit other groups to participate as parties in this information-gathering process and requesting IBEC's intervention request be denied.

On August 31, 2021, Facebook, Inc., and Google Inc. (Tech Companies) filed a motion to compel production and to extend the response deadline, arguing the Tech Companies are already parties to protective agreements with MidAmerican that require confidentiality and limit the use of information they obtain from MidAmerican. The Tech Companies identify that MidAmerican has refused to provide access to filings in the docket and state that since they have been unable to view the confidential information filed by MidAmerican, they cannot verify the completeness of MidAmerican's response or prepare their response. The Tech Companies request an additional 45 days beyond the September 27, 2021 deadline to file comments or responses to MidAmerican's filings.

On September 2, 2021, IBEC filed a joinder in the motion to compel production and to extend the response date filed by the Tech Companies. Additionally, IBEC filed a reply to MidAmerican's response to IBEC's petition to intervene, noting that the docket

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was created from the order in Docket No. EPB-2020-0156, in which outside groups were permitted to participate. IBEC argues that since materials are being withheld by MidAmerican despite IBEC's nondisclosure agreement with MidAmerican, a grant of intervention would allow IBEC access to filings and allow for meaningful participation.

Also on September 2, 2021, the Environmental Law & Policy Center (ELPC), Iowa Environmental Council (IEC), and Sierra Club (collectively, Environmental Organizations) filed a motion to compel and extend the response deadline, making the same arguments as the Tech Companies.

On September 3, 2021, the Office of Consumer Advocate (OCA), a division of the Iowa Department of Justice, filed its appearance and response. OCA argues that the proposed settlement agreement in the EPB docket between OCA and MidAmerican would allow parties to the EPB who executed a non-disclosure and confidentiality agreement (NDA) to receive and participate in the discussion of the confidential information filed by MidAmerican in this docket regarding MidAmerican's generating fleet and generation planning process. OCA supports the relief requested by the other participants in the pending motions to compel and the requests for additional time.

On September 14, 2021, MidAmerican filed a resistance to the various motions to compel, stating that MidAmerican views this proceeding as an informational review by the Board and, as such, it is not a contested case proceeding where discovery is available to groups other than the Board and the OCA. MidAmerican argues that Board rules make discovery methods that are available in civil proceedings available in Board contested case proceedings only.

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On September 17, 2021, the Tech Companies filed a reply to MidAmerican's resistance to motions to compel production, arguing that the docket should be a contested case proceeding; however, if the docket is determined to not be a contested case proceeding, the Tech Companies argue that MidAmerican still would be required to provide the information to the other interested parties pursuant to Board rules at 199 Iowa Administrative Code (IAC) chapter 7, and specifically rule 7.1(1), identifying that chapter 7 applies to contested case proceedings and to other types of agency action without other applicable rules, "unless the Board or presiding officer orders otherwise." Additionally, the Tech Companies argue that Board rules require MidAmerican to serve all filings on all parties, including those that contain confidential information, if confidentiality agreements are executed by the parties, and the docket was created to allow parties in Docket No. EPB-2020-0156 to provide input and comments on the filings in this docket.

On September 24, 2021, the Board issued an order that, among other things, assigned review of the request for confidentiality and the motions to compel to a presiding officer. The September 24, 2021 order stated that the assigned presiding officer would address the claim of attorney-client privilege and attorney work product, in addition to the issue of whether the participants in the docket could view the information claimed to be confidential. The order also deferred the Board's decision on whether IBEC's intervention request will be granted and whether this is a contested case proceeding or an informational docket until after the oral argument hearing and issuance of the corresponding order. The September 24, 2021 order scheduled oral

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argument for MidAmerican and participants to address the issues regarding confidentiality.

The oral argument was held on October 4, 2021. At its conclusion, the presiding officer requested that MidAmerican file the NDAs entered into with the Tech Companies, IBEC, and the Environmental Organizations. In addition, the presiding officer directed that MidAmerican provide to the presiding officer a sealed, paper copy of the documents that are subject to the claims of attorney-client privilege or attorney work product to be reviewed by the presiding officer *in camera*. MidAmerican agreed to provide the information to the presiding officer and to file a privilege log of the documents provided for *in camera* review.

On October 12, 2021, MidAmerican filed a pleading, along with the requested NDAs involving the participants, that included a request that the Board assign an administrative law judge (ALJ) as a special master to review the documents subject to its attorney-client privilege or attorney work product claims. MidAmerican did not provide the documents to the presiding officer or file the corresponding privilege log. On October 20, 2021, the Tech Companies filed a response to MidAmerican's additional information and request for ALJ stating that they take no position regarding MidAmerican's request.

On October 20, 2021, the presiding officer filed his order addressing MidAmerican's request to remove the presiding officer from review of the documents it identified containing privileged information. The presiding officer recommends that the Board remove the presiding officer from reviewing the information for which attorney-client privilege or attorney work product is claimed, deny MidAmerican's request to

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appoint an administrative law judge, and issue an order requiring that the information be provided by MidAmerican to the three Utilities Board members for *in camera* review.

On October 29, 2021, MidAmerican filed a response to the presiding officer's recommendation, reiterating its request to appoint an ALJ as special master to evaluate MidAmerican's claim of privilege, stating that MidAmerican was not seeking to remove the presiding officer from other matters beyond those of privilege, and identifying its concern that permitting the Board or a Board employee to review the material would effectively eliminate any attorney-client privilege for rate-regulated utilities. On November 23, 2021, the presiding officer filed his proposed order addressing MidAmerican's request for confidential treatment and the outstanding motions to compel.

BOARD DISCUSSION

A. Type of Appeal

The Board's September 24, 2021 order assigned a presiding officer to address MidAmerican's outstanding request for confidential treatment of certain information, the various motions to compel, and its claim of attorney-client privilege and/or attorney work product. Following the October 4, 2021 oral argument, MidAmerican filed a request on October 12, 2021, that the Board assign an ALJ, rather than the presiding officer, to perform the *in camera* review of the documentation MidAmerican identifies as attorney-client privileged or attorney work product. In the October 20, 2021 order, the presiding officer made specific recommendations to the Board to address MidAmerican's request for an ALJ; the presiding officer did not issue a proposed decision and order.

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If the presiding officer issues a proposed decision and order, an appeal from the proposed decision is required within a 15-day period. 199 IAC 7.26(1), (2). However, in this case, the presiding officer issued an order recommending Board action, not a proposed decision. The Board finds that the presiding officer's order was not a proposed decision and does not require an appeal to be filed within a 15-day period.

However, 199 IAC 7.25 allows any party, as well as the Board, to file a written request to review an interlocutory order of the presiding officer. In determining whether to do so, the Board may consider the extent to which granting the interlocutory appeal would expedite final resolution of the case and the extent to which review of that interlocutory order by the Board at the time it reviews the proposed decision would provide an adequate remedy. Any request for interlocutory review must be filed within ten days of issuance of the challenged order. In this case, MidAmerican filed a response to the presiding officer's recommendation on October 29, 2021. In a section entitled "Legal Standards," MidAmerican identifies the above rule outlining interlocutory appeals. The Board finds that MidAmerican's October 29, 2021 filing is a timely request for interlocutory appeal regarding the presiding officer's October 20, 2021 order.

B. Privileged Claim

1. MidAmerican's Requests

At the conclusion of the October 4, 2021 oral argument, MidAmerican agreed to hand-deliver to the presiding officer copies of those documents MidAmerican identified as attorney-client privileged or attorney work product, a privilege log, and the various NDAs it had with other docket participants. MidAmerican filed a pleading on October 12, 2021, along with attachments of the requested NDAs; MidAmerican did not provide

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the documents to the presiding officer or file the corresponding privilege log. Instead, MidAmerican requests the Board appoint an ALJ as a special master to review the purported privileged materials, stating that an ALJ will be able to make a fair privilege determination, will not have the same legal and ethical obligations to the Board as the presiding officer, and will be sufficiently removed to avoid any conflict of interest.

In its October 29, 2021 filing, MidAmerican states that it does not seek to disqualify the presiding officer from considering other issues in the docket; MidAmerican only seeks to remove the presiding officer from the process of determining whether the documentation it identifies is privileged. MidAmerican argues that the determination should be made by a person not employed or affiliated with the Board since the Board is the entity requesting the information. MidAmerican identifies legal support for its request as: 1) Iowa Code § 17A.11(1)(a) that permits a party to “request that the presiding officer be an administrative law judge assigned by the division of administrative hearings;” 2) Iowa Code § 17A.11(3)-(6) that address a request to disqualify a presiding officer in a contested case proceeding; and 3) Iowa Rules of Civil Procedure 1.602(2)(f) and 1.935, which permit the courts to appoint a master “on a showing of exceptional conditions requiring” an appointment of a master.

To support MidAmerican’s request that an ALJ to be appointed as a special master to review the privileged documents, MidAmerican argues that it is required because the presiding officer is an attorney with the Board, the Board is the presiding officer’s client, and the presiding officer’s legal and ethical obligations are to the Board, which creates an inherent conflict of interest. MidAmerican further argues that it is improper for the party requesting the information, in this case the Board, to also judge

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the validity of a privilege claim. MidAmerican states that if the Board reviews the documents, then utilities cannot meaningfully avail themselves of attorney-client privilege or attorney work product. MidAmerican states that even if the presiding officer, who is an employee of the Board, determines MidAmerican's privilege claim is legitimate, the information has ultimately been revealed to the Board. Finally, MidAmerican distinguishes between confidential materials, those materials that can be compelled by state agencies and must be kept confidential from disclosure to the public through open records requests, and privileged materials, those materials that are protected from disclosure and discovery entirely due to the privilege component so as to encourage candid communications between the parties to those relationships.

2. Presiding Officer's Analysis and Recommendations

In his October 20, 2021 order, the presiding officer identifies numerous, applicable Iowa Code provisions as well as administrative statutes and rules describing the role of the ALJ or presiding officer, disqualification grounds and procedures, and the judicial conduct code of ethics applicable to ALJs and presiding officers. The presiding officer then examines the Iowa Rules of Civil Procedure that detail an option for the court to appoint a master when "exceptional conditions" exist.

The presiding officer interprets MidAmerican's filing as a request for disqualification given MidAmerican's request for his removal and replacement with an ALJ. The presiding officer does not find that disqualification is necessary because Iowa Code § 17A.11(1)(b) provides that a presiding officer can be employed by and officed at the Board and is governed by the code of administrative judicial conduct.

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The presiding officer notes that Iowa Code § 17A.15(3) requires that a proposed decision issued by a presiding officer or ALJ is to be appealed to the Board either by a party or by the Board on its own motion. There are no provisions in chapter 17A or in the rules of the Administrative Hearing Division that eliminate the right of parties, or the Board on its own motion, to have someone other than the Board review the proposed decision. The presiding officer notes that MidAmerican failed to provide any procedure to remove the Board from reviewing the appeal and corresponding claimed privilege materials.

The presiding officer wrote that although the Iowa Rules of Civil Procedure provide that a court may appoint a master in “extraordinary conditions” and that the parties may stipulate the findings to be final, there are no similar provisions in Iowa Code chapter 17A for appointment of a master as an ALJ or presiding officer, and MidAmerican has not presented a stipulation by the parties for a master’s decision to be final. The presiding officer opined that if MidAmerican believes neither a presiding officer employed by the Board nor Board members should make the privilege determination, MidAmerican’s only option is to take the issue to the district court and have a judge, or a master appointed by a judge, review the documents to determine if MidAmerican’s privilege claim is justified.

In his October 20, 2021 order, the presiding officer recommends that the Board consider removing the presiding officer from reviewing the information for which attorney-client privilege or attorney work product is claimed, deny MidAmerican’s request to appoint an administrative law judge, and issue an order requiring that the

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information be provided by MidAmerican to the three Utilities Board members for *in camera* review.

3. Board Analysis

In its October 29, 2021 filing, MidAmerican identifies that it is claiming privilege over three documents that were prepared at the request of MidAmerican's general counsel. Since no privilege log has been filed, no further information is available. MidAmerican's arguments are addressed below.

a. Disqualification of Board Employee as Presiding Officer

MidAmerican's October 29, 2021 filing states that it is not requesting the designated presiding officer be disqualified from all outstanding matters; MidAmerican requests the presiding officer be removed from the review process determining whether the documentation it identifies is privileged. On November 23, 2021, the presiding officer issued his proposed order addressing the other issues the Board assigned to him, namely MidAmerican's request for confidential treatment and the outstanding motions to compel. As such, the Board need not address the disqualification issue beyond MidAmerican's privilege request. In his October 20, 2021 order, the presiding officer does not find that disqualification is required or appropriate in this matter.

The Board agrees with the presiding officer. Explicit statutory authority allows the Board to assign one of its employees as presiding officer and it properly did so pursuant to Iowa Code § 17A.11(1)(b). Although the code section also authorizes an agency to designate an ALJ assigned by the Division of Administrative Hearings as a presiding officer, that ALJ, as well as the current presiding officer, are governed by the judicial conduct code of ethics set forth in 481 Iowa Administrative Code chapter 15.

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MidAmerican did not adequately explain why the judicial conduct code of ethics could not sufficiently address its concerns given the statute authorizes the appointment of a Board employee. MidAmerican's argument for disqualification of the presiding officer to review the privileged material based upon his employment with the Board will be rejected.

b. Master Designation

MidAmerican requests the Board appoint an ALJ as a special master. The presiding officer wrote that an ALJ from another agency appointed as a special master will still issue the same type of ruling a presiding officer issues: a proposed decision. A proposed decision is reviewable by the Board on appeal, or on the Board's own motion.

The presiding officer is correct. MidAmerican's request that the Board assign an outside ALJ as a special master to perform the *in camera* review of the documents identified as privileged is without merit, especially given that an appeal from either an agency's presiding officer or an outside ALJ must come to the Board for its review and consideration.

The presiding officer also correctly notes that MidAmerican does not present a procedure for avoiding Board review. The Iowa Rules of Civil Procedure provide that a court may appoint a master in "extraordinary conditions." If a master is appointed by a court, parties may stipulate that the master's findings are final, and accordingly can only be reviewed on questions of law. Iowa R. Civ. P. 1.935, 1.942. Iowa Code chapter 17A detailing the roles of ALJs and presiding officers does not contain a master option. Even if a master option existed in chapter 17A, MidAmerican has not presented a

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stipulation by the parties for a master's decision to be final that would prevent review by the Board. MidAmerican's October 29, 2021 filing provides no agency precedent for an agency to designate an ALJ as a special master and cites only to criminal cases to support its special master argument. MidAmerican's request to appoint a special master to review the asserted privileged material will be denied.

c. *Presiding Officer, ALJ, or the Board*

MidAmerican requests that the presiding officer be removed from review of the privilege documents and replaced with an ALJ from the Iowa Department of Inspections and Appeals to perform the *in camera* review.¹ The presiding officer recommends the Board remove him from reviewing the documentation containing the identified privileged information and have MidAmerican submit it directly for the Board for its *in camera* review.

MidAmerican acknowledges that it had no concerns about the selection of the presiding officer and his competency to complete the *in camera* review, but rather its concerns arise from the Board requesting the information and its employee making the privilege determination. The presiding officer, who is an employee officed within the agency, concludes that he could perform the *in camera* review of the claimed privileged documentation since any knowledge learned from the documents would be governed by the judicial conduct code of ethics.

¹ The Board does not make a distinction between a presiding officer and an ALJ. As such, the Board concludes that MidAmerican's request is for an assignment of an ALJ employed by the administrative hearings division of the Iowa Department of Inspections and Appeals.

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The Board understands MidAmerican's position. In this case, the Board is the requester of the information MidAmerican claims to be privileged and is also the reviewer who will ultimately decide whether MidAmerican's privilege claim is appropriate. However, the Board declines to implement MidAmerican's identified solution, especially since MidAmerican has provided no precedent to support its arguments that an agency can waive its final review of a proposed decision by designating an outside ALJ to issue a final order (instead of a proposed order) and that an agency has the authority to appoint a master (similar to a district court's authority to appoint a master) to issue a final order without a stipulation by the parties.

The Board appropriately assigned as presiding officer an agency employee who is able to review the documents MidAmerican has claimed contain privileged information; however, in light of the presiding officer's recommendation and the fact that any appeal will ultimately come to back to the Board, regardless of whether the appeal is from the current Board's designated presiding officer or an ALJ assigned by the Iowa Department of Inspections and Appeals, the Board will require MidAmerican to provide the three Utilities Board members the purported attorney-client privileged information or attorney work product privileged information for *in camera* review. If MidAmerican believes neither a presiding officer employed by the Board nor Board members should make the privilege determination, MidAmerican's only option is to take the issue to the district court and have a judge, or a master appointed by a judge, review the documents to determine if MidAmerican's privilege claim is justified.

The Board will continue to defer its assessment on whether IBEC's intervention request will be granted and whether this is a contested case proceeding or an

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informational docket until both the pending privilege issue before the Board and the confidential treatment directives from the presiding officer have been resolved.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. The presiding officer is hereby removed from reviewing the purported attorney-client privilege or attorney work product privileged information claimed by MidAmerican Energy Company.
2. MidAmerican Energy Company's request to appoint an administrative law judge is denied.
3. MidAmerican Energy Company is required to provide the three Utilities Board members the purported privileged information for *in camera* review within 10 days from the date of this order. MidAmerican is to provide a sealed paper copy of the documents that are subject to the privilege claim to one of the three Utilities Board members.

UTILITIES BOARD

Geri Huser Date: 2021.12.15
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Richard Lozier Date: 2021.12.14
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ATTEST:

Louis Vander Streek Louis Vander Streek
2021.12.16 15:41:20
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Josh Byrnes Date: 2021.12.14
08:12:14 -06'00'

Dated at Des Moines, Iowa, this 16th day of December, 2021.