

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

<p>MIDAMERICAN ENERGY COMPANY,</p> <p>Petitioner,</p> <p>v.</p> <p>IOWA UTILITIES BOARD, A DIVISION OF THE DEPARTMENT OF COMMERCE, STATE OF IOWA,</p> <p>Respondent.</p>	<p>Case No.</p> <p>PETITION FOR INTERLOCUTORY JUDICIAL REVIEW</p>
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The privilege protecting the communications with and preparation by attorneys is “of ancient origin. It is premised on a recognition of the inherent right of every person to consult with legal counsel and secure the benefit of his advice free from any fear of disclosure.” *Bailey v. Chicago, Burlington & Quincy R.R.*, 179 N.W.2d 560, 563 (Iowa 1970). MidAmerican Energy Company (“MidAmerican”) brings this interlocutory action pursuant to Iowa Code § 17A.19(1) to protect and preserve its attorney work product and attorney-client privilege in certain documents prepared at the request of its counsel for purposes of or in anticipation of litigation.

PARTIES AND VENUE

1. MidAmerican is an Iowa corporation with its principal place of business in Des Moines, Iowa.

2. The Iowa Utilities Board (“IUB” or “Board”) is an administrative agency of the State of Iowa, and part of the Iowa Department of Commerce. It is the agency charged with regulation of certain defined utilities in Iowa and is an Agency for purposes of the Iowa Administrative Procedures Act. *See* Iowa Code § 17.2(1).

3. Venue is proper in Polk County pursuant to Iowa Code § 17A.19(2), which establishes venue in Polk County by statute. Moreover, the decisions and actions at issue occurred at the Board's office in Polk County.

FACTS

4. MidAmerican is the largest retail utility in Iowa by customers served. MidAmerican is also a national leader in renewable energy, having invested over \$13 billion in 7,000 megawatts of wind generation in Iowa. In 2020, MidAmerican Energy delivered 83.6% renewable energy on an annual basis to customers across the state.

5. Nonetheless. Over the past several years, special interest groups have pushed in a variety of different IUB dockets for MidAmerican to eliminate all coal-fired generation from its portfolio of generation sources – or for IUB to require that MidAmerican do so.

6. Several groups again pushed to litigate the retirement of MidAmerican coal plants as part of MidAmerican's biennial emissions plan and budget docket, EPB-2020-0156. The Board correctly rejected those efforts, and approved MidAmerican's emissions plan and budget as submitted.¹

7. After completion of the emissions plan and budget docket, however, the Board opened a "Service Proceeding" or "SPU" docket on its own motion:

[T]he Board ordered a new docket, Docket No. SPU-2021-0003, be opened to review MidAmerican's generating fleet, including the potential retirement of coal plants, . . . This docket will explore MidAmerican's long-term resource needs, including consideration of least-cost options for generation, environmental requirements, reliability, and economic development potential.

¹ This decision was recently affirmed by the Polk County district court in *Environmental Law and Policy Center, Iowa v. Iowa Utils. Bd.*, Case No. CVCV061992, "Ruling on Petition for Judicial Review: (Dec. 7, 2021) (Gronewald, J.)

It is evident from the quoted language that this docket was not opened on a complaint from another party, and the Board is not adjudicating a dispute – rather it is engaging in investigation, “reviewing,” “exploring” and “considering” on its own initiative.²

8. As part of its order initiating SPU-2021-0003, the Board required MidAmerican to produce certain documents:

MidAmerican Energy Company shall file within 60 days of the date of this order the following information:

a. ***Any current documents that provide details about its long-term resource requirements;***

b. An overview of its current generating fleet and how it meets the needs of MidAmerican’s customers;

c. A least-cost analysis addressing options considered to meet its long-term resource needs, including the potential effects on reliability and economic development potential; and

d. An analysis of the issues identified in Docket No. EPB-2020-0156 that have been deferred to this docket. The analysis should include consideration of fuel switching, generating unit retirement, modified dispatch, addition of new generation sources, wholesale market transactions, and the costs of alternative compliance options, as well as any economic development potential for those options.

Id. at 3 (emphasis added).

9. MidAmerican produced and filed information required by the order but withheld certain studies regarding the generation fleet that had been requested by MidAmerican’s General Counsel to evaluate and develop a strategy to address the arguments the special interest groups had been raising (and presumably would continue to raise) in various MidAmerican dockets, including contested case dockets, being litigated before the Board. Such studies are protected by the attorney-client and attorney work product privileges.

10. The Board designated a Presiding Officer, Cecil Wright, who is an attorney on the Board’s General Counsel staff, to manage certain procedural aspects of the case, including

² *In re MidAmerican Energy Company*, Docket No. SPU-2021-0003, “Order Opening Docket and Proposal to Take Official Notice” (Iowa Utils. Bd., May 13, 2021) at 1-2. (Attached as **Exhibit 1**)

MidAmerican's claims of privilege. The Board issued an order setting a hearing on various confidentiality matters³, and ordered MidAmerican to bring the privileged studies to the hearing for *in camera* review by the Presiding Officer.⁴

11. MidAmerican refused to provide the documents for in camera review by the Board's attorney, again citing attorney privileges. In an effort to work with the Board, MidAmerican proposed an alternative: that the Board designate an Administrative Law Judge ("ALJ") from the Iowa Department of Inspections and Appeals pool of ALJs to conduct the *in camera* review and to determine whether the documents were privileged.

12. The Board rejected MidAmerican's proposal and issued a ruling providing:

[T]he 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.

(Emphasis added.)⁵

13. MidAmerican has exhausted its administrative remedies, as indicated by the options set out by the Board above.

14. Iowa Code 17A.19(1) provides that:

A preliminary, procedural or intermediate agency action is immediately reviewable if all adequate administrative remedies have been exhausted and review of the final agency action would not provide an adequate remedy.

³ Numerous procedural filings were made by the parties and several orders issued; the Petition does not cite to or mentioned each filing but rather summarizes the process citing key orders.

⁴ *In re MidAmerican Energy Company*, Docket No. SPU-2021-0003, "Order Addressing Long-Term Resource Plans and Scheduling Oral Argument on Confidentiality Issues" (Iowa Utils. Bd., September 24, 2021) at 7. (Attached as **Exhibit 2.**)

⁵ *In re MidAmerican Energy Company*, Docket No. SPU-2021-0003, "Order Addressing Presiding Officer's Recommendations Regarding Issue of Privilege" (Iowa Utils. Bd., December 16, 2021) at 14. (Attached as **Exhibit 3.**)

The Board is requiring MidAmerican to disclose privileged materials to the Board. The harm would be incurred, and could not be undone, as soon as the privileged documents are produced. Privilege is an issue that meets the test for interlocutory review because waiting for final agency action on the broader issue in the docket would not provide an adequate remedy to protect the privilege.

CLAIM FOR JUDICIAL REVIEW

15. MidAmerican adopts and incorporates paragraphs 1-14.

16. The Board's intermediate action requiring MidAmerican to provide the Board privileged documents when the Board is not sitting in a purely adjudicatory capacity is a violation of Iowa law on attorney privileges and is procedurally improper and therefore contrary to Iowa Code § 17A.19(10)(b) and § 17A.19(10)(d).

17. The Board's position that it can act as both the investigative requesting party for documents and the decision-maker as to privilege claims is an erroneous interpretation of law whose interpretation has not been vested in the Board, in violation of Iowa Code § 17A.19(10)(c).

18. The Board's requirement that MidAmerican provide it with documents that are privileged, despite the fact that the Board is also the requesting party, and ignoring both that the Board can "unsee" the documents if it decides privilege was properly invoked and the critical significance of the attorney-client and work product privileges constitutes an arbitrary and unjustifiable act that failed to consider relevant matters in violation of Iowa Code §§ 17A.19(10)(j), (k) and (m).

REQUEST FOR RELIEF

THEREFORE, MidAmerican Energy Company respectfully requests that the Court reverse the intermediate decision of the Board.

MidAmerican states that upon the Answer by the Board and determination of what issues remain in dispute, MidAmerican anticipates filing a Motion for In Camera Review, allowing MidAmerican to provide the judge alone the disputed documents and such relevant information as will establish the privileged nature of those documents.

MidAmerican requests that the Court enter an order finding the documents privileged and vacating the Board's order requiring that they be produced, and that the Court enter such other relief as it finds proper on the facts and law before it.

Filed this 13th day of January, 2022.

Respectfully submitted,

/s/ Bret A. Dublinske

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