

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

<p><b>MIDAMERICAN ENERGY COMPANY,</b></p> <p><b>Petitioner,</b></p> <p><b>vs.</b></p> <p><b>IOWA UTILITIES BOARD,</b></p> <p><b>Respondent.</b></p>	<p><b>CASE NO. CVCV063014</b></p> <p><b>RESPONDENT’S PRE-ANSWER MOTION TO RECAST PETITION AND MOTION TO ENLARGE TIME TO TRANSMIT CERTIFIED RECORD</b></p>
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**COMES NOW** Respondent Iowa Utilities Board, by and through its undersigned counsel, pursuant to Iowa Rules of Civil Procedure 1.421 and 1.1602, and Iowa Code §§ 17A.19(4), (6), and (7) and for its Pre-Answer Motion to Recast Petition and Motion to Enlarge Time to Transmit Certified Record, respectfully states as follows:

**I. PRELIMINARY STATEMENT.**

1. On January 13, 2022 and in the above-captioned docket, Petitioner MidAmerican Energy Company (“MidAmerican”) filed a Petition for Interlocutory Judicial Review (“Petition”) from an agency order filed on December 16, 2021, by Respondent Iowa Utilities Board (the “Board”).
2. The Board respectfully suggests that MidAmerican’s Petition for Interlocutory Judicial Review appears to include an original claim and, consequently, this Court should enter an order requiring MidAmerican to file a recast petition, or, alternatively, confirming that *in camera* inspection is an appropriate application of Iowa Code § 17A.19(7).
3. The Board further requests the Court enlarge the time to transmit the agency record, if required, until 30 days after MidAmerican’s filing of a recast petition or, if the

Court denies the Board's motion, until 30 days after any such order.

**II. MOTION TO RECAST PETITION.**

4. "Judicial review of administrative agency action is a special proceeding [that] is in all respects dependent upon the statutes which authorize its pursuit." *Anderson v. W. Hodgeman & Sons, Inc.*, 524 N.W.2d 418, 421 n.1 (Iowa 1994). The judicial review provisions of Iowa Code chapter 17A are "the exclusive means by which a person or party who is aggrieved or adversely affected by agency action may seek judicial review of such agency action." Iowa Code § 17A.19 (2021). The procedures contained in chapter 17A "must be adhered to in order for the district court to obtain jurisdiction." *Tindal v. Norman*, 427 N.W.2d 871, 872 (Iowa 1988).

5. Iowa Code § 17A.19(1) identifies that an aggrieved person or party who has exhausted all remedies may file a petition for judicial review. Section 17A.19(1) also provides that an 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.

6. It is well-recognized and established under Iowa law that a petition for judicial review may not be joined with any original cause of action and all such original claims must be dismissed. *Black v. University of Iowa*, 362 N.W.2d 459, 463-64 (Iowa 1985). In proceedings such as this one, "the district court exercises only appellate jurisdiction and has no original authority to declare the rights of the parties or the applicability of any statute or rule." *Id.*, 362 N.W.2d at 462 (internal quotation marks and citation omitted).

7. MidAmerican takes issue with the language and directive ordered by the Board in its December 16, 2021 ruling:

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.

*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; Petition for Interlocutory Judicial Review, Exhibit 3.

8. The Board has not seen the documents MidAmerican claims are privileged and the Board has not made a ruling on MidAmerican's claim of privilege.
9. In response to the Board's December 16, 2021 ruling, MidAmerican filed this Petition for Interlocutory Judicial Review.
10. MidAmerican argues in its Petition for Interlocutory Judicial Review's averment 14 that, "(p)rivilege 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.”

11. Additionally, in its request for relief in its Petition for Interlocutory Judicial Review, MidAmerican identifies that upon the Board filing its Answer to the Petition for Interlocutory Judicial Review, MidAmerican anticipates filing a Motion for In Camera Review, allowing the judicial review judge to examine the documents MidAmerican claims are privileged and presumably make a finding of fact. Petition for Interlocutory Judicial Review, page 6.

12. MidAmerican’s request for relief asks the Court to adjudicate if the purported privileged documents are in fact privileged and, as such, MidAmerican is asking the Court to make an original determination in a judicial review proceeding under Iowa Code § 17A.19.

13. Regardless of whether MidAmerican’s argument that privilege is an issue that satisfies the test for an interlocutory judicial review, MidAmerican’s request for relief combines an original action (the actual determination of privilege) with its Petition for Interlocutory Judicial Review (the claim of error by the Board’s order requiring MidAmerican to produce the documentation) which is inappropriate.

14. The Board acknowledges that Iowa Code § 17A.19(7) provides that a court in a judicial review proceeding may hear and consider such evidence as it deems appropriate. The statute also provides that in a contested case, the court shall not hear further evidence as to an issue of fact that was entrusted to the agency. *Id.*

15. The Board has not yet determined if Docket No. SPU-2021-0003 will proceed as an investigatory docket or as a contested case proceeding.

16. If the Board determines the docket will proceed as a contested case, Iowa Code

§ 17A.19(7) also provides (at least with regard to a Petition for Judicial Review from a final agency ruling):

If it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the contested case proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision in the case by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court and mail copies of the new findings or decisions to all parties.

17. This language does not designate the Court, in a judicial review proceeding, to make an independent determination of a fact. Iowa Code § 17A.19(7) states that the Court may order the additional evidence be taken before the agency.

18. Given that MidAmerican indicates that it anticipates filing a Motion for In Camera Review in this case, the Court, pursuant to Iowa Code § 17A.19(7), could return the documents in question to the Board for a factual determination if, upon review, the Court determines the evidence is material and there was a good reason to have not presented the evidence to the agency in a contested case proceeding.

19. The Board requests the Court provide guidance as to whether this Petition for Interlocutory Judicial Review is an appropriate type of filing that can include an original determination of whether documents are privileged or whether a recast petition, such as a Petition for a Writ of Injunction or Mandamus or a Declaratory Order, or some other type of filing, would be a more appropriate filing.

### **III. MOTION TO ENLARGE TIME TO TRANSMIT CERTIFIED RECORD.**

20. Iowa Code § 17A.19(6) permits the district court to enlarge the time by which the agency must transmit to the reviewing court a certified copy of the entire contested case record.

21. As previously identified, the Board has not yet determined if Docket No. SPU-2021-0003 will proceed as an investigatory docket or as a contested case proceeding.

22. If a determination is made that Docket No. SPU-2021-0003 is a contested case proceeding, the Board requests the period in which it must file the certified record be extended until this Court has an opportunity to review and rule on the above-captioned Motion to Recast Petition.

23. The Board further requests the Court set the deadline for the transmittal of the certified record, if required, as 30 days from either the filing of MidAmerican's recast petition, or the Court's order denying the Board's motion, whichever occurs later.

**WHEREFORE**, Respondent Iowa Utilities Board respectfully requests this Court address the above-captioned Pre-Answer Motion to Recast Petition and, if necessary, order Petitioner MidAmerican Energy Company to file a recast petition that corrects the deficiencies identified herein and replaces and supersedes the January 13, 2022 petition. Respondent Iowa Utilities Board also requests the Court extend the deadline for the transmission of the certified record, if required, 30 days from either the filing of a recast petition or an order denying the Board's motion, whichever occurs later.

Respectfully submitted,

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**ATTORNEYS FOR RESPONDENT IOWA  
UTILITIES BOARD**

**ALL PARTIES SERVED ELECTRONICALLY  
THROUGH EFS**