

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. CVCV063014</p> <p>MIDAMERICAN ENERGY'S RESISTANCE TO THE MOTION TO RECAST PETITION</p>
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On January 13, 2022, MidAmerican Energy Company (“MidAmerican”) filed a Petition for Interlocutory Judicial Review, as contemplated under Iowa Code § 17A.19(1). That provision allows for an interlocutory review of intermediate agency action where review of a final action would not provide an adequate remedy. Such is the present case where a claim of attorney-client and attorney work product privilege is involved: MidAmerican would either be prejudiced by disobeying the intermediate order of the Iowa Utilities Board (“Board”) to produce the privileged information, or it would concede and the privilege would be eviscerated before the final appealable order would exist.

As the Petition explains at Paragraph 12, the specific agency action appealed from is a December 16, 2021 Order that provided the following options:

[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.)¹ The Board appears to affirm that this is the basis for the appeal at Paragraph 7 of its Motion.

In making its Motion to Recast Petition, however, the Board appears to misconstrue the basis for the request for judicial review. The Motion suggests that MidAmerican has brought two claims – a request for judicial review and, separately, an original claim for a different kind of review: *in camera* review and determination of privilege. These are not, however, separate claims: they are one and the same. The Board has ordered MidAmerican to produce privileged documents. MidAmerican is appealing that order. While the main issue MidAmerican raises on appeal is procedural – that a body sitting in an investigative capacity and who requested the documents cannot also be the body to rule on a claim of privilege – the *existence* of the privilege is inextricable from the appeal. Put differently, one defense to the Board’s order to disclose the documents is that the documents are privileged (and, conversely, if they are not than the rest of the appeal is arguably moot.)

While the Court could, conceptually, rule solely on the procedural issue and find the Board on the present facts cannot properly be the decision-maker on privilege, it would be extraordinarily inefficient for the Court and the parties to do so without reaching the substantive issue as such a ruling would then require MidAmerican to file a second action to have the Court be the decision-maker on the substance of the privilege claim. Moreover, it presumably would be a natural part of the context for the Court’s decision on this appeal to see the documents and understand the background. The way the Board conceptualizes this case, presumably the Court would never see the documents in question – the Board sees such an *in camera* review as a

¹ *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 to the Petition as Exhibit 3.)

separate cause of action. That is an overly constrained reading of the appeal brought by MidAmerican and of the permitted grounds for interlocutory appeal under the Iowa Administrative Procedures Act. The problem with the Board's approach is obvious in Paragraph 18 of its Motion: it suggests that the Court could return the documents in question to the Board for a privilege determination even if the Court determines "there was good reason to have not presented the evidence to the agency". That is circular, however, as it simply recreates the conditions that lead to the appeal; it is effectively an invitation to the Court to not answer the question before it, despite § 17A.19(1) expressly contemplating a valid appeal on these facts. The Court should decline the invitation.

MidAmerican has brought a proper interlocutory appeal – notably, the Board hasn't moved to dismiss as a matter of law. The appeal is from an order wherein the Board gave MidAmerican a stark choice: turn over documents MidAmerican believes to be privileged so the party requesting the documents can review them and will have seen them, whether they are privileged or not, or go to court to appeal the order requiring production. MidAmerican had little choice but to do the latter. While the main basis for appeal is the *process* for protecting privilege, the privileged status of the documents is also relevant to and a part of the appeal. It does not require a separate or original action, and confirming the underlying privilege does not require multiple kinds of relief. Reviewing the documents *in camera* is a natural consequence of the appeal, and ruling on the privilege is a relevant part of the appeal as it is a defense to the order to produce the documents, an order where the dispute between the parties is about the privilege and how it is protected. The Court should deny the Motion to Recast Petition.

Filed this 22nd day of February, 2022.

Respectfully submitted,

/s/ Bret A. Dublinske

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CERTIFICATE OF SERVICE

The undersigned certifies the foregoing document was electronically filed with the Clerk of Court using the Electronic Document Management System (EDMS) on February 22, 2022, which will send a notice of electronic filing to all registered parties.

/s/ Sarah McCray