IN THE IOWA DISTRICT COURT FOR POLK COUNTY

MIDAMERICAN ENERGY COMPANY, Petitioner, v. IOWA UTILITIES BOARD, A DIVISION OF THE DEPARTMENT OF COMMERCE, STATE OF IOWA, Respondent.	Case No. CVCV063014 **INITIAL BRIEF OF MIDAMERICAN ENERGY COMPANY**

This interlocutory judicial review involves a single, straightforward question: when the Iowa Utilities Board ("Board") is requesting information from a party, in a proceeding the Board itself initiated, can it also rule on claims of privilege raised by that party? MidAmerican Energy Company ("MidAmerican") asserts that it is not proper for the requesting entity to also resolve privilege disputes. Doing so would render the privilege meaningless, violating the rights of a party like MidAmerican. The Board simply followed the wrong procedure when wearing its "investigative hat" as opposed to the procedure provided by the Iowa Administrative Procedure Act. The Court should uphold the importance of the attorney privileges by granting MidAmerican's interlocutory appeal, and should require the Board use the proper procedure under Iowa law – which will correctly result in the Court, not the Board, ruling on issues of privilege.

BACKGROUND

While the procedural history is set forth more fully in the Petition for Interlocutory Judicial Review, this dispute originates in the effort by several interest groups to misuse MidAmerican's required biennial emission plan and budget docket (Board docket EPB-2020-0156) to litigate the issue of when MidAmerican's coal-fueled electric generating plans should

be retired. The Board correctly rejected that effort (and the Board's decision in that regard was recently affirmed by this Court[1]), but the Board did open a separate docket – a "service proceeding," SPU-2021-0003, to "explore MidAmerican's long-term resource needs, including consideration of least-cost options for generation, environmental requirements, reliability, and economic development potential."[2] Importantly, SPU-2021-0003 is not a complaint docket, and was not opened based on a petition from another party: it was opened on the Board's own motion for the Board to "explore" and "consider" MidAmerican's generation portfolio.

As part of the Order initiating SPU-2021-0003, the Board itself required MidAmerican to produce certain documents, including "Any current documents that provide details about [MidAmerican's] long-term resource requirements."[3] MidAmerican produced and filed most of the 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 repeated efforts interest groups were making to litigate the coal retirement issue. MidAmerican asserts such studies are protected by the attorney work product and attorney-client privileges.

The Board designated one of its senior attorneys to act as a Presiding Officer for portions of proceedings in SPU-2021-0003. The Presiding Officer set a hearing on various procedural issues, and ordered MidAmerican to bring the privileged studies to the hearing for in camera review by the Presiding Officer.[4] MidAmerican refused to produce the studies for review by an

---

[1] *See Environmental Law and Policy Center, Iowa v. Iowa Utils. Bd.*, Case No. CVCV061992, "Ruling on Petition for Judicial Review: (Dec. 7, 2021) (Gronewald, J.)

[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.

[3] *Id.* at 3.

[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.

agent of the Board because once a member of Board staff saw the studies, the proverbial bell could not be unrung – even if the Presiding Officer agreed that the studies are privileged, a key Board staffer would have already seen the contents. The full Board then issued an order giving MidAmerican a stark choice:

> [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] On January 13, 2022, MidAmerican filed the Petition for Interlocutory Judicial Review in this case, as contemplated under Iowa Code § 17A.19(1).

ARGUMENT

MidAmerican concedes that there is little if any controlling case law on the specific point raised by this case. MidAmerican believes there is a good reason for that, however: this particular issue rarely arises because the Board took an incorrect procedural path that led it where agencies rarely go. Critical to this case is recognizing that an agency like the Board acts in several different roles, and wears several different hats. The Board can act as a neutral adjudicator, similar to the court, in a dispute between two parties. In that case, the adversarial parties marshal and present their cases, and the Board acts on the contested case record consistent with Iowa Code § 17A.12. In such a case, if an adversarial party brought a discovery dispute involving claims of privilege to the Board, MidAmerican agrees that the Board, like a court presented with a discovery dispute, could make a determination regarding the privilege.

[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.

The Board can also, however, wear an investigative or regulatory hat as it does in SPU-2021-0003. That case was not brought before the Board by an independent party, and the Board is not adjudicating a dispute between two or more parties. Rather, the Board initiated the case, and the Board itself requested the disputed information. In such a case, the Board is not sitting as a neutral adjudicator and can no longer be analogized to a court – rather, the Board is now acting more like a prosecutor's office or other private party. There can be no doubt that if a party to a lawsuit served discovery and the other party asserted privilege, the party seeking the discovery does not get to see and decide whether the claim is valid. That claim is taken to the court, as the neutral adjudicator. This case, while unusual in many respects, is no different in that particular regard. As a matter of fairness and common sense, the Board should not rule on whether MidAmerican's claims of privilege are valid because the Board is not neutral and disinterested: the Board requested the information, so of course the Board favors seeing the information.[6]

The clearest indicator of this is that the Iowa Administrative Procedure Act expressly provides a mechanism for an agency to obtain information when wearing its investigative hat – that is, it provides the procedural path that this case should have taken when MidAmerican asserted privilege and withheld the privileged information. Iowa Code §17A.13 discusses subpoenas, and makes the same distinction described above – between the agency's ability to issue subpoenas to parties when it sits as an adjudicator to facilitate discovery and its ability to serve subpoenas for its own investigation when a case is not (or is not yet) a contested case:

> Agencies have all subpoena powers conferred upon them by their enabling acts or other statutes. In addition, prior to the commencement of a contested case by the notice referred to in section 17A.12, subsection 1, ***an agency*** having power to

[6] MidAmerican acknowledges that the intervenors are now also seeking to access the privileged materials. That does not, however, change what role the Board is playing or that the Board is wearing its investigative hat in this case. That the intervenors also seek access does not change the analysis or outcome of this particular issue.

> decide contested cases ***may subpoena*** books, papers, records, and any other real evidence necessary for the agency to determine whether it should institute a contested case proceeding. After the commencement of a contested case, each agency having power to decide contested cases may administer oaths and issue subpoenas in those cases. Discovery procedures applicable to civil actions are available to all parties in contested cases before an agency. Evidence obtained in discovery may be used in the hearing before the agency if that evidence would otherwise be admissible in the agency hearing. ***Agency subpoenas shall be issued to a party on request***. On contest, the court shall sustain the subpoena or similar process or demand to the extent that it is found to be in accordance with the law applicable to the issuance of subpoenas or discovery in civil actions. In proceedings for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in cases of willful failure to comply.

Iowa Code §17A.13(1)(emphasis added). This is where the proceeding below took a wrong turn, and is likely why there are no cases on the facts as they stand – because the procedural posture should never have ended up down this dead-end road. When MidAmerican asserted privilege, if the Board thought it sufficiently important the Board should have subpoenaed the withheld information at which time MidAmerican could have brought a motion to quash the subpoena to the Court (or the Board could have brought an action to enforce it). Both the statute and caselaw suggest that bringing disputes over administrative agency subpoenas is the customary way to resolve such issues. *See*, *e.g.*, *Sand v. Doe*, 959 N.W.2d 99, 103 (Iowa 2021) ("[T]wenty days after the subpoena was acknowledged by the Agency, Auditor Sand filed an application with the district court, asking it to enforce the subpoena served on January 8."); *State ex rel. Miller v. Publishers Clearing House, Inc.*, 633 N.W.2d 732, 735 (Iowa 2001) (attorney general moved to compel after subpoenaed party claimed that certain information was trade secrets); *In re Gillespie*, 348 N.W.2d 233, 236-37 (Iowa 1984)(dispute over subpoena served by school board on superintendent in teacher termination hearing; case remanded for *in camera* review with instructions); *see also Penfield Co. of Cal. v. Sec. & Exch. Comm'n*, 330 U.S. 585, 587 (1947)

("Upon Young's refusal to appear and produce the books and records, the Commission filed an application with the District Court for an order enforcing the subpoena.").

While it is a federal case and under the different legal regime of labor relations law, N.L.R.B. *v. Interbake Foods, LLC*, 637 F.3d 492, 497-501 (4th Cir. 2011) is nonetheless instructive as many of the underlying facts are similar. In that case, the National Labor Relations Board ("NLRB") issued a subpoena to Interbake as part of an unfair labor practice investigation. As in the present case, Interbake provided many documents, but asserted privilege over others. Unlike here, NLRB *as a party* brought an enforcement action before an Administrative Law Judge ("ALJ") against Interbake (similar to a process MidAmerican suggested below.) The ALJ ordered Interbake to produce the documents; Interbake still refused. The NLRB brought an action in court to enforce the subpoena. Again, while federal administrative law is not identical to the law in Iowa, the *Interbake* court found that

> But when all is said, the NLRA carefully recognizes the appropriate divide between the administrative authority to conduct hearings and issue orders and the exclusively judicial power of Article III judges to enforce such orders. . . .
>
> This structural limitation on the NLRB's authority, emanating from the Constitution's separation of powers and due process requirements, "protect[s] against abuse of subpoena power." [citation omitted]

Interbake, 637 F.3d at 497-98. The *Interbake* court then went on to explain explicitly that the role of the court includes the ability for a party to obtain a determination on questions of privilege:

> In short, on an application of an administrative agency for the enforcement of a subpoena in court, the respondent is guaranteed an opportunity to contest the subpoena's validity through any appropriate defense. . . .
>
> In addition to guarding against over breadth or a lack of specificity, the right to raise appropriate defenses includes the right to vindicate claims that a subpoena improperly calls for records protected by the attorney-client or work-product privileges.

Id. at 499.

This framework, which is consistent with Iowa Code §17A.13 and Iowa caselaw, simply makes sense – it is the only way to ensure that the privilege is in fact honored. Where an agency seeks information in its investigative or regulatory hat, a party like MidAmerican must ultimately have the right to have its claim to the privilege determined by a neutral adjudicator – the court – which is the only entity that can enforce the requested disclosure and only on a finding and only to the extent that the request is in fact appropriate and the materials are protected.

CONCLUSION

When MidAmerican declined, citing privilege, to provide certain documents requested by the Board itself, in a case the Board initiated, the Board's options were to either decide the documents were not that important and let the issue go or to serve an investigative subpoena. At that point, either MidAmerican could have sought a protective order from the court, or simply stood on its objection and the Board could have asked the court for enforcement. Either way, the actual substantive issue of privilege would have been brought to the court for independent *in camera* review. What this Court should confirm is that the Board when wearing its investigative hat cannot require the production of documents the Board itself is requesting when those materials are asserted to be privileged. Only a court can enforce such a request through the mechanism of a subpoena, and only after the requested party has an opportunity to raise any appropriate defenses to production – including, particularly, any privileges.

MidAmerican respectfully requests that the Court uphold the interlocutory judicial review, reversing and vacating the Board's December 16, 2021 Order Addressing Presiding Officer's Recommendation Regarding Issue of Privilege. If the Board still seeks the information after such ruling, it may subpoena the documents, MidAmerican will assert its privilege, and

either party can then return to court for a substantive review of the privilege claim and whether the subpoena should be enforced.

Filed this 7th day of June 2022.

/s/ Bret A. Dublinske
Bret A. Dublinske AT0002232
FREDRIKSON & BYRON, P.A.
111 East Grand Avenue, Suite 301
Des Moines, IA 50309-1977
Phone: (515) 242-8900
Fax: (515) 242-8950
Email: bdublinske@fredlaw.com

ATTORNEY FOR MIDAMERICAN ENERGY COMPANY

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 June 7, 2022, which will send a notice of electronic filing to all registered parties.

/s/ Bret A. Dublinske