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 **REPLY BRIEF OF MIDAMERICAN ENERGY COMPANY**

STATEMENT OF THE ISSUE

The Iowa Utilities Board has not shown that it is appropriate for an agency to rule on an asserted privilege where the agency is the one requesting the information and is not sitting in a neutral adjudicatory capacity.

Iowa Code §17A.19(1)
Iowa Code §17A.19(10)
Iowa Code §17A.19(11)
Iowa R. Civ. P. 1.503(3*)*
Exotica Botanicals, Inc. v. Terra Int'l, Inc., 612 N.W.2d 801 (Iowa 2000)
Hickman v. Taylor, 329 U.S. 495 (1947)
Mathis v. Iowa Utils. Bd., 934 N.W.2d 423 (Iowa 2019)
Service Employees Int'l Union, Local 199 v. Broadlawns Medical Center, Case 100036, 2016 WL 3181233 (IA PERB Feb. 29, 2016)

REPLY ARGUMENT

As was true with the Iowa Utilities Board's ("Board") Motion to Recast Complaint, the Board still appears to substantially miscomprehend the nature of MidAmerican Energy Company's ("MidAmerican") appeal. As a result, and as is further explained below, nearly all of the Board's responsive brief is irrelevant.[1] First and foremost, ***none*** of the key cases relied on by

[1] Except for the Board's correct admonishment that the initial brief did not follow the formatting instructions of the Court. Undersigned outside counsel takes full responsibility; when the first order was issued counsel saw the first brief date would be during a long-planned anniversary trip to Denmark and

the Board involve privilege issues; privilege and how it is properly addressed and protected is the sole issue here. As even the *Service Employees* case before the Public Employment Relations Board (PERB) which was ***relied on by the Board*** notes, privilege questions are different from other kinds of discovery disputes, like relevance. Noting one of the parties had relied on a case involving a mental health privilege, the PERB indicated a pre-disclosure protocol applicable to protect a privilege is a different issue than whether a similar protocol is appropriate to determine other discovery objections:

> *Fagen v. Grand View* involved a defendant's request for the privileged mental health records of a plaintiff whose claim against the defendant included damages for mental pain and mental disability. In its opinion the Court did announce its adoption of a protocol which balances a patient's right to privacy in his or her privileged mental health records against an alleged tortfeasor's right to discover evidence relevant to the plaintiff's damage claims. It did not announce a narrowing of the scope of discovery generally, or a pre-disclosure protocol applicable to the discovery of materials ***which are not even alleged to be privileged***. I consequently view *Fagen v. Grand View* and its pre-disclosure protocol as inapplicable to the dispute at hand.

Service Employees Int'l Union, Local 199 v. Broadlawns Medical Center, Case 100036, 2016 WL 3181233 (IA PERB Feb. 29, 2016) at *2-3 (bold italics added).

Which segues to the second problem with the Board's brief. The Board refers to the issue before the Court as a discovery issue or a discovery dispute (see, e.g., Board Br. at 17) – it

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immediately began work with other counsel to amend the schedule – without reading further. The amended schedule came out while undersigned was out of town and on seeing the Zoom information at the bottom of the page, erroneously believed that was the end of the content and simply overlooked the instructions. Counsel apologizes for any inconvenience, and has taken steps to implement internal procedures in his office for persons calendaring dates to flag additional instructions in scheduling orders as a second set of eyes, and to make the more appellate-like format the default for initial judicial review briefs in Polk County. The requested statement regarding deference is included at the end of this brief, and filed as an Attachment to this brief is a Statement of the Issue from the initial brief, including a list of cases, to assist the Court and parties in preparation for hearing. Had the issue been raised sooner, MidAmerican would have gladly refiled a corrected version, or, if needed to avoid prejudice, agreed to additional time to respond. Undersigned counsel appreciates the seriousness of this error, but does not believe it changes anything substantive or creates substantive prejudice (especially given the short nature of the brief) – accordingly, and given the significance of privilege, outside counsel's error should not prejudice the privilege rights of MidAmerican.

is not. The Board does not participate as a party in Iowa Utilities Board dockets. The dispute here is not over discovery between two parties litigating before the Board as an adjudicator. The issue here is that *the Board itself* ordered certain information, which included attorney work product, to be provided *for the Board's own use*. The Board's brief fails to recognize this issue at any point, but this is the critical issue in the case: can the Board, when it is sitting in a role other than neutral adjudicator and requests information, determine the validity of a privilege claim relating to that information? That particular factual scenario is not present in any of the cases relied on by the Board. As a result, the cases cited by the Board fail to rebut MidAmerican's arguments.

Finally, the Board claims that MidAmerican raises a new issue – that the Board should have subpoenaed the disputed documents -- and that MidAmerican should be precluded from doing so. Moreover, the Board argues that MidAmerican is incorrect that subpoenas are the sole manner in which the Board can seek information, citing *Iowa Power & Light v. Iowa St. Commerce Comm'n* which the Board suggests resolves the issues in this case. This entire argument, however, is knocking down a strawman. That MidAmerican didn't raise the subpoena issue below is irrelevant; the subpoena power is not actually the issue at all. The discussion of the Board's subpoena power is ancillary to the central point in the appeal: that the Board cannot both request information that it wants to see, and then also make a determination on whether that information is privileged and therefore should not be seen by the Board at all. MidAmerican pointed out the subpoena power solely to demonstrate the way this dispute could have and should have been resolved (notably, it would have ended up in the same place – before this Court.) But nowhere does MidAmerican suggest that the subpoena power is the only way the Board can obtain *any* information – although as a practical matter it may be the only way for the

Board to compel ***privileged*** information, which is a narrow and special subset. For the Board to argue against MidAmerican's proposed *solution* to the problem does not help the Board prevail on the issue of whether *there is a problem in the first place* with the Board's lack of protection for privileged information.[2]

Finally, the Environmental Intervenors' brief suffers a similar problem. It argues that MidAmerican has failed to establish privilege because it has not presented a privilege log. First, a privilege log is a creature of discovery processes; the order at issue in this case was not discovery promulgated under discovery rules. Second, the Board never ordered production of a privilege log. The biggest problem with Environmental Intervenors' argument, however, is that it still puts the cart before the horse. It makes sense to determine ***who*** will determine the privilege before worrying about ***how*** to determine the privilege. If the Court wants to see a privilege log, MidAmerican will certainly provide it.

The Iowa Rules of Civil Procedure demonstrate the strong policy interest in protecting the work product privilege. Materials prepared for or requested to be prepared in the anticipation of litigation have substantial protection in Iowa:

> a party may obtain discovery of documents and tangible things otherwise discoverable under rule 1.503(1) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) ***only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party seeking discovery is unable without undue hardship to obtain the substantial equivalent of the materials by other means***. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

[2] Board also argues about substantial evidence, but there is no substantial evidence claim in this appeal, which raises a purely legal issue. The discussion of substantial evidence is entirely irrelevant to the case.

Iowa R. Civ. P. 1.503(3)(emphasis added); *see also Exotica Botanicals, Inc. v. Terra Int'l, Inc.*, 612 N.W.2d 801, 804-05 (Iowa 2000)(discussing policy behind work product privilege; the *Exotica* Court ultimately gave work product privilege even stronger protection against waiver than the privilege for attorney-client communication). Here, the Board is the "party seeking discovery" of the information; it has not made the requisite showing to anyone, and it cannot be the case (as the Board appeared to want) that it only has to make such showing to itself. As the United States Supreme Court discussed in the case in which it initially recognized the attorney work product privilege,

> In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests.

Hickman v. Taylor, 329 U.S. 495, 510-11 (1947).

Here, where the Board is the party requesting information and investigating MidAmerican's generation plans, the Board is in a very real sense an "opposing party" in the context of the current dispute. The Board, in its investigatory role, has no more right to "intrude" on what information MidAmerican's counsel believed relevant to assemble in planning a strategy than the opposing party in *Hickman*. The question, however, is where MidAmerican asserts privilege and the Board seeks to make a determination of the veracity of that claim, who should make that determination? MidAmerican suggests that common sense and the importance of the privilege suggest it cannot be the Board: even were the Board, despite its obvious curiosity about the materials as shown in its request, to make an unbiased determination, if the Board determined

it should *not* see the materials because they are in fact privileged, it would be too late. The damage – that is, the seeing – would already be done.

The Board rejected MidAmerican's effort to craft a resolution using a neutral Administrative Law Judge or other master. As a result, and as the Board's own order said and as this Court has already suggested, the only real option is for this Court to resolve the matter[3] -- which ultimately is the point of MidAmerican's appeal. The appeal should be granted finding the Board is not the proper party to rule on privilege claims when such claims are made in response to the Board's own request for information, and where the Board does not sit as a neutral adjudicator.

STATEMENT ON STANDARD OF DEFERENCE

This appeal is brought pursuant to Iowa Code §17A.19(1). Accordingly, the Court

> may affirm the agency action or remand to the agency for further proceedings. The court shall reverse, modify, or grant other appropriate relief from agency action, equitable or legal and including declaratory relief, if it determines that substantial rights of the person seeking judicial relief have been prejudiced because the agency action is any of the following:
> . . .
> c. Based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency.

Iowa Code §17A.19(10). The decision by the Board of how to treat a claim of privilege is an erroneous legal decision on a matter not vested in the Board's discretion. As a result, no deference is warranted, see Iowa Code §17A.19(11)(a), (b), and the Court should review for error of law. *See also Mathis v. Iowa Utils. Bd.*, 934 N.W.2d 423, 426-28 (Iowa 2019)(collecting cases on review of Iowa Utilities Board actions, noting that generally the Court had found the

[3] See this Court's April 5, 2022 Order ("Here, in the event Petitioner was unwilling to turn over the purportedly privileged information, Respondent directed Petitioner to seek review with the district court. Petitioner should not now be precluded from exercising the proposed remedy offered by Respondent.")

Board lacked interpretative authority, and determining where Board was not delegated authority over interpretation of legal questions, "We therefore review . . . for errors at law.")

Filed this 15th day of July 2022.

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ATTORNEYS 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 July 15, 2022, which will send a notice of electronic filing to all registered parties.

/s/ Bret A. Dublinske
Bret A. Dublinske