

**IN THE IOWA DISTRICT COURT FOR POLK COUNTY****MIDAMERICAN ENERGY  
COMPANY,**

Petitioner,

v.

**IOWA UTILITIES BOARD,**

Respondent,

and

**ENVIRONMENTAL LAW AND  
POLICY CENTER, IOWA  
ENVIRONMENTAL COUNCIL,  
SIERRA CLUB, and OFFICE OF  
CONSUMER ADVOCATE,**

Intervenors.

**Case No. CVCV063014****RULING ON PETITION FOR  
INTERLOCUTORY JUDICIAL  
REVIEW**

On July 22, 2022, the above-captioned matter came before this Court for hearing. Petitioner MidAmerican Energy Company (MidAmerican) was represented by Bret Dublinske. Respondent Iowa Utilities Board (the Board) was represented by Kim Snitker. Intervenors Environmental Law & Policy Center, Iowa Environmental Counsel, Sierra Club (Environmental Intervenors), and the Office of Consumer Advocate (OCA), appeared through Joshua Mandelbaum, Michael Schmidt, and Jeffrey Cook, respectively. After hearing the arguments of Counsel and reviewing the court file, including the briefs filed by the parties and the Certified Record, the Court now enters the following ruling.

**I. BACKGROUND FACTS AND PROCEEDINGS.**

On March 24, 2021, the Board issued an Order approving MidAmerican's emission plan budget in Docket No. EPB-2020-0156 (EPB Docket). Certified Record (CR) p. 1. The Order also created Docket No. SPU-2021-0003 (SPU Docket) to review issues that were beyond the scope of

the EPB Docket, including an assessment of MidAmerican's long-term resource needs by reviewing least-cost options for generation, environmental requirements, reliability, and economic development potential. *Id.* at 1-2. On May 13, 2021, the Board issued an Order in the SPU Docket requiring MidAmerican to provide documentation to help the Board assess MidAmerican's long-term resources needs. *Id.* at 2-3. On June 30, 2021, MidAmerican filed a Request for Additional Time in the SPU Docket to respond to the Board's Order to supply the requested documents. *Id.* at 5-6. On July 7, 2021, the Board approved MidAmerican's request for additional time and extended the deadline to respond with the required documents until August 11, 2021. *Id.* at 10-12. On August 12, 2021, MidAmerican filed its Response to Board Order and Request for Clarification and filed a portion of the requested documents but did not file certain studies on its generating fleet. *Id.* at 27-39; Petition (Pet.) p. 3. MidAmerican stated that many of the withheld, yet requested, documents were subject to either attorney-client or attorney work product privileges. CR pp. 37-38. MidAmerican also requested clarification whether the SPU Docket would be handled as a contested case proceeding or an informational docket pursuant to Iowa Code section 476.2(4). *Id.* at 38.

Iowa Business Energy Coalition (IBEC) petitioned to intervene on August 23, 2021. CR pp. 276-77. On August 30, 2021, MidAmerican replied to IBEC's petition to intervene, arguing intervention was improper, as the SPU Docket was only informational. *Id.* at 278-79. On August 31, 2021, Facebook, Inc., and Google LLC (Tech Companies) filed a Motion to Compel Production and to Extend Response Deadline, seeking production of relevant documents through a preexisting protection agreement with MidAmerican. *Id.* at 280-84. IBEC filed a motion joining the Tech Companies' motion to compel on September 2, 2021. *Id.* at 285-286. The Environmental Intervenors filed their own Motion to Compel and Extend Response Deadline on September 2,

2021. CR pp. 290-97. On September 3, 2021, OCA filed an appearance and a response, supporting the other parties' motions to compel production. *Id.* at 298-301. MidAmerican responded to the various motions to compel production on September 14, 2021, arguing that the SPU Docket was only informational and that the various parties had no right to invoke discovery. *Id.* at 303-06. The Tech Companies responded on September 17, 2021, and argued that MidAmerican was required to produce the requested documents, even if the Board held that the SPU Docket was informational and not a contested case. *Id.* at 307-314.

Iowa Code section 17A.11 (2022) and Iowa Administrative Code rule 199-7.3 allow the Board to appoint a presiding officer to govern discovery disputes, to rule on admissibility of evidence, and to regulate the course of the proceeding. Iowa Code sections 17A.13, 17A.14, and 476.2 as well as Iowa Administrative Code rules 199-7.15, 7.16, and 7.20 address discovery processes that are available to a presiding officer as well as the Board. On September 24, 2021, the Board issued an order that assigned MidAmerican's request for confidentiality and the various motions to compel to be heard by a presiding officer, an attorney with the Board's General Counsel staff. CR pp. 340-43. The order stated that the presiding officer would hear arguments about MidAmerican's claims of attorney-client privilege and attorney work product of the documents at an October 4, 2021 oral argument. *Id.*

The presiding officer directed MidAmerican to provide to him a sealed paper copy of the documents that were subject to the claims of attorney-client privilege and attorney work product so he could review the documents *in camera*. CR pp. 432-34. MidAmerican agreed to provide these documents to the presiding officer and to file a privilege log of the documents it would provide for *in camera* review. *Id.* at 432-34. On October 12, 2021, MidAmerican filed a pleading entitled, "Offering Additional Information and Request for Administrative Law Judge," which

asked the Board to appoint a special master Administrative Law Judge (ALJ) to view the documents allegedly subject to attorney-client privilege and attorney work product exceptions. MidAmerican's filing did not contain a privilege log. *Id.* at 452-57. On October 20, 2021, the presiding officer filed his recommendation regarding MidAmerican's request to remove the presiding officer from reviewing the subject documents. *Id.* at 485-96. In that recommendation, the presiding officer suggested that the Board should remove him from viewing the allegedly privileged documents, advised that the Board itself should review the documents *in camera* to address MidAmerican's concerns, and recommended that the Board reject MidAmerican's request for the appointment of an ALJ to review the documents *in camera*. *Id.* at 494-95. On October 29, 2021, MidAmerican responded to the presiding officer's recommendation by renewing its request to appoint a special master ALJ to perform an *in camera* review of the allegedly privileged documents due to its concern that allowing the Board or its employee to view the documents would waive the asserted privilege. *Id.* at 497-504.

On December 16, 2021, the Board issued an order denying MidAmerican's request to appoint a special master ALJ and ordered MidAmerican to produce the allegedly privileged information for *in camera* review by the Board. CR pp. 819-33. The Board denied MidAmerican's request for the special master, because MidAmerican did not provide any precedent or authority for the appointment and, regardless, the Board would be the ultimate reviewer of the purportedly privileged documentation, even if an ALJ's or a presiding officer's proposed order was appealed. *Id.* at 830-31. The Board also found that the request to disqualify the designated presiding officer from the review process of the subject documents was improper. *Id.* at 829. The Board cited its statutory authority within Iowa Code section 17A.11(1)(b) to appoint the presiding officer instead of an ALJ assigned by the Division of Administrative Hearings. *Id.* The Board found that both

the assigned presiding officer and an ALJ would be governed by Iowa Administrative Code rule 481-15 and found the judicial code protected MidAmerican's interests. *Id.* at 829-30. However, the Board removed the designated presiding officer, since it would rule on any appeal of the presiding officer's or an ALJ's proposed decision. Thus, the Board ordered MidAmerican to provide the Board members the allegedly privileged documents for *in camera* review. *Id.* at 832. It reserved its ruling on whether the SPU Docket is a contested case proceeding until after the disputes regarding the alleged privileges are resolved. *Id.* at 832-33.

The Board further stated, "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." CR p. 832. The Board ordered MidAmerican to produce the subject documents within ten days. *Id.* at 833. On December 22, 2021, MidAmerican filed a request for an extension of time to comply and a request for stay to coincide with the deadline for appeal in Iowa Code section 17A.19(3). *Id.* at 858-62. On December 28, 2021, the Board granted MidAmerican an additional 20 days to comply. *Id.* at 875-76.

MidAmerican filed the present Petition for Interlocutory Judicial Review with this Court on January 13, 2022, pursuant to Iowa Code section 17A.19(1), to review the Board's December 16, 2021 Order Addressing Presiding Officer's Recommendations Regarding Issue of Privilege. CR p. 819. *In Re: MidAmerican Energy Co.*, EPB-2020-0156, 2021 WL 1159598 (Iowa U.B. Mar. 24, 2021). The Board granted MidAmerican's motion for stay on February 28, 2022, with regard to the production of the allegedly privileged material in response to MidAmerican's appeal. CR pp. 957-59. OCA was allowed to intervene in the present court action on

February 17, and the Environmental Intervenors were allowed to intervene on March 31, 2022. Respondent's Pre-Answer Motion to Recast the Petition was denied by this Court on April 5, 2022. MidAmerican filed its brief on June 7, 2022. The Board and all Intervenors filed their briefs on July 8, 2022. MidAmerican filed a Reply Brief on July 15 and Supplemental Information, including its Privilege Log, on July 21, 2022.

## **II. STANDARDS OF REVIEW.**

Iowa Code section 17A.19(1) provides, "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." As quoted above, the Board's December 16, 2021 Order directed MidAmerican that its only option, if it was unwilling to turn over the purportedly privileged information to the Board, was to bring the issue to this Court. As such, the Court concludes MidAmerican has exhausted its administrative remedies at this time. MidAmerican is pursuing the only remedy left to it by the Board's Order. In addition, the potential harm that would be incurred by the Board requiring MidAmerican to disclose allegedly privileged materials would occur as soon as the documents were produced. Therefore, here, the privilege issue meets the test for interlocutory review, because waiting for final action on the broader issue would not provide an adequate remedy to protect the alleged privileges. The Court concludes the Board's December 16 Order is reviewable in this Petition.

MidAmerican contends the decision of the Board that MidAmerican must provide it the claimed privileged information and allow the Board to rule on MidAmerican's claim of privilege was "[b]ased 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)(c). As such, the Court reviews the agency's decision for errors of law. *See* Iowa

Code § 17A.19(11)(a-b); *Mathis v. Iowa Utils. Bd.*, 934 N.W.2d 423, 426-28 (Iowa 2019) (collecting cases on review from the Board and noting that, generally, the Court has found the Board lacked interpretive authority and, as such, review was for errors of law).

### III. MERITS.

As set forth above, the Board opened docket SPU-2021-0003 as a “service proceeding,” not a complaint docket. It was not opened based on a petition from another party but on the Board’s own motion. CR at pp. 1-4. It was opened for the Board to investigate, review, explore, and consider MidAmerican’s “generating fleet, including the potential retirement of coal plants, and to consider the matters identified in the joint statement of issues and any other issues as provided in Iowa Code §§ 476.6(12) and 476.6(16).” *Id.* at 1. As part of this Order, the Board also ordered MidAmerican to provide it with certain specific documents. MidAmerican provided some of the documentation requested but asserted attorney-client privileges and attorney work product privileges regarding certain documents and did not provide those documents based on these asserted privileges. The Board then sought to review the materials to determine if they qualified for these privileges.

MidAmerican argues the Board cannot be the proper party to rule on privilege claims, when such claims are made in response to the Board’s own request for information, as they are not a disinterested party. It contends that, because the Board requested the information, it, of course, favors seeing the information. Moreover, if the Board should determine the materials do qualify for the privilege, it would be too late, as it cannot then “unsee” the privileged materials, and the harm would have already been done. Thus, the question before the Court is whether the Board can both request information it wants to see and use and then also make a determination on whether

that same information is privileged and, therefore, should not be seen by the Board at all. For the reasons set forth below, the Court concludes the answer to this question must be “no.”

MidAmerican contends that when it asserted privilege, the Board should have subpoenaed the withheld information under Iowa Code section 17A.13(1). At that time MidAmerican could have brought a motion to quash the subpoena to the Court. Alternatively, if or when MidAmerican continued to refuse to provide the subpoenaed information, the Board could have brought a motion to enforce the subpoena before the Court.

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 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).

There are also several cases from our supreme court to suggest that addressing these types of disputes over administrative agency subpoenas is the customary way to resolve such issues, especially with regard to alleged privileged information. *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).

In addition, though under the different legal regime of the labor relations law, *N.L.R.B. v. Interbake Foods, LLC*, 637 F.3d 492, 497-501 (4th Cir. 2011) has some similar facts, and, as such, the Court believes it can offer some guidance by analogy. There, the National Labor Relations Board (NLRB) issued a subpoena to Interbake as part of an unfair labor practices investigation. *Id.* at 494. Interbake provided many documents but asserted privilege over others. *Id.* An ALJ ordered Interbake to produce the documents, and they still refused. The NLRB then issued a subpoena and brought an action in court to enforce the subpoena. *Id.*

But when all is said, the NLRA [National Labor Relations Act] 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.

*Interbake*, 637 F.3d at 497-98 (internal citations and quotations omitted). The Fourth Circuit went on to state, “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.

The Board is correct it is not restricted or required to use a subpoena for obtaining information about a rate-regulated utility in all cases. It has broad investigatory powers under Iowa Code section 476.2(1) to “effect the purposes of this chapter notwithstanding the fact that certain specific powers are set forth in this section.” This statute also provides that the Board

“shall have authority to inquire into the management of the business of all public utilities, and shall keep itself informed as to the manner and method in which the same is conducted, and may obtain from any public utility all necessary information to enable the board to perform its duties.” Iowa Code § 476.2(4). Moreover, our supreme court has concluded that the “legislative grant of subpoena power found in section 476.2 and section 17A.13(1) does not suggest that the authority of the board to compel the production of records by those entities subject to the board’s continuing regulating authority is limited to the proceedings only by way of subpoenas.” *Iowa Power and Light Co. v. Iowa State Utils. Bd.*, 448 N.W.2d 468, 470 (Iowa 1989).

The Court is in no way holding the Board is restricted or required to use a subpoena to obtain information in all cases. However, based on the specific facts and circumstances of the case at hand, the Court concludes the use of a subpoena is the most appropriate way to ensure MidAmerican’s claimed privileges, if found, are honored and to allow both parties to bring forth their arguments regarding the issue before a neutral adjudicator. As the party seeking the information, the Board simply cannot also be the party determining if it is entitled to view the information, after a privilege has been alleged. If it views documents that are privileged and it should not be provided, it is already too late; that bell cannot be “unrung,” and the harm is done. As such, the Court concludes a subpoena from the Board is the best procedural route to protect these important claimed privileges. The legislature provided for the administrative subpoena procedures in 17A.13(1) for such purposes, and our supreme court has repeatedly approved of such as the appropriate procedural path to address these issues. Accordingly, the Board’s conclusion that it is the proper party to make the privilege determination is an erroneous legal decision on a matter not vested in the Board’s discretion.

Finally, the Intervenor contend MidAmerican has failed to establish privilege because it had not, at the time of briefing, presented a privilege log. Thus, they argue MidAmerican cannot meet its burden to establish privilege of the claimed documents. However, it is axiomatic that the procedural question of who is the proper body to determine if there is a privilege must be determined before the substantive question of whether that privilege can be proven under the relevant law. As such, the Intervenor have put the proverbial cart before the horse. In addition, MidAmerican has since provided a privilege log. Accordingly, the Court concludes the Intervenor's arguments are without merit.

#### **IV. CONCLUSION AND DISPOSITION.**

For all of the reasons set forth above, the Court concludes the Board's determination in its December 16, 2021 Order Addressing Presiding Officer's Recommendation Regarding Issue of Privilege regarding how to treat MidAmerican's claim of privilege was an erroneous legal decision. The Board's decision that it was the proper party to determine MidAmerican's claim that some of the documentation the Board itself had requested was privileged was an error of law. The Court further concludes that, based on the particular facts and circumstances of the case at hand, the proper procedure, once MidAmerican claimed privilege on some of the documentation requested by the Board, was for the Board to subpoena the allegedly privileged documents, as provided for under section 17A.13(1) and 476.2. This is the best and most appropriate procedural avenue to ensure any potential privileges are honored and to allow both parties to bring forth their arguments regarding the issue before a neutral decisionmaker.

Accordingly, the Court **GRANTS** MidAmerican's Petition for Interlocutory Judicial Review. The Court **REMANDS** the case for the Board, if it still so desires the alleged privilege

documents, to subpoena such documentation through the more proper procedures provided for under Iowa Code section 17A.13(1).



State of Iowa Courts

**Case Number**  
CVCV063014

**Case Title**  
MIDAMERICAN ENERGY COMPANY VS IOWA UTILITIES  
BOARD  
OTHER ORDER

**Type:**

So Ordered

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Samantha Gronewald, District Court Judge  
Fifth Judicial District of Iowa

Electronically signed on 2022-09-20 10:40:18