

IOWA UTILITIES BOARD

IN RE:

EXECUTIVE ORDER 10— REVIEW OF
DECLARATORY ORDER RULES [199
IOWA ADMINISTRATIVE CODE
CHAPTER 4]

DOCKET NO. RMU-2023-0004

ORDER COMMENCING RULEMAKING

PROCEDURAL BACKGROUND

On January 10, 2023, Gov. Kim Reynolds issued Executive Order Number 10 (Executive Order), which put a moratorium on agency rulemaking and directed agencies, including the Utilities Board (Board), to engage in a comprehensive evaluation of existing rules. Pursuant to the Executive Order, the Board is conducting comprehensive reviews of each chapter of its administrative rules.

On July 28, 2023, the Board issued an order that, in part, opened the above-captioned docket, published the completed chapter 4 Red Tape Review Rule Report¹ (as Attachment A to the order), published the draft chapter 4 Regulatory Analysis (as Attachment B to the order), and set a comment deadline and technical conference date. The Board also caused the draft regulatory analysis to be published in the August 23, 2023 Iowa Administrative Bulletin (IAB).

On September 21, 2023, a public hearing was held to allow interested persons the opportunity to present their views concerning the draft chapter 4 regulatory analysis

¹ The “metrics” section of the Red Tape Review Rule Report erroneously indicated the version of chapter 4 published in the August 23, 2023 IAB proposed to eliminate a total of four restrictive terms. That version actually proposed to eliminate 17 restrictive terms. Consequently, even with the additional restrictive terms added into the version to be noticed, the end result will be the reduction in the number of restrictive terms.

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and was attended by the Office of the Consumer Advocate (OCA), a division of the Iowa Department of Justice; Interstate Power and Light Company; Iowa-American Water Company; Black Hills/Iowa Gas Utility Company, LLC d/b/a Black Hills Energy (Black Hills); MidAmerican Energy Company (MidAmerican); ITC Midwest, LLC (ITC Midwest); Iowa Association of Electric Cooperatives; and CenturyLink. The Board also received written filings from OCA, Black Hills, ITC Midwest, and MidAmerican.

Pursuant to the Executive Order, an agency may not commence a formal rulemaking without first approving a final regulatory analysis and receiving preclearance through a Request to Initiate Rulemaking. In an order previously issued in the above-captioned docket, the Board approved a final regulatory analysis for chapter 4, and as part of that order, indicated it was submitting a Request to Initiate Rulemaking. Since issuance of that order, the Board received preclearance to commence this chapter 4 rulemaking.

PROPOSED CHANGES FROM DRAFT REGULATORY ANALYSIS

From the proposed version of chapter 4 published in the August 23, 2023 IAB, the Board is proposing the following changes and notes the following oral and written comments received.

A. Rule 4.1.

OCA proposed a number of revisions to rule 4.1; namely, (a) shortening the first sentence of rule 4.1, (b) deleting subrule 4.1(1) as being unnecessary, and (c) altering the first sentence of subrule 4.2(2), including the reinsertion of a “shall.” MidAmerican and ITC Midwest support OCA’s proposed changes, and Black Hills does not oppose OCA’s recommendations. Because OCA’s proposed amendments provide for greater clarity and reduce unneeded and unnecessary language, the Board will make these

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changes. While OCA's suggested changes do add two restrictive terms back into chapter 4, as noted above and as a whole, the revised version of chapter 4 will result in a reduction of the number of restrictive terms. Finally, to avoid rule 4.1 only containing one subrule after the deletion of subrule 4.1(1), the Board will remove the subrule heading and incorporate the language contained in subrule 4.1(2) into rule 4.1.

B. Rule 4.2.

In the third sentence of rule 4.2, OCA suggests a few minor changes and the reinsertion of the word "shall." MidAmerican and ITC Midwest support, and Black Hills does not oppose, OCA's proposed amendments. Again, because the proposed language provides for greater clarity and still results in a reduction of the number of restrictive terms, the Board will include OCA's proposed amended language within the Notice of Intended Action (NOIA).

Further, based on the possibility that the intervention rule in chapter 7 may be renumbered, the Board will replace the specific intervention rule number with the catchword (*i.e.*, the name of the rule).

C. Rule 4.3.

As the "Briefs" rule is currently written in chapter 4, the Board "may require that the petitioner file a brief and may request that any intervenor or any other person submit a brief concerning the questions raised." In the version published in the August 23, 2023 IAB, the Board proposed to shorten the length of the rule and to remove a restricted term with the following language: "[t]he board may request that the petitioner, intervenor, or other person submit a brief concerning the questions raised."

OCA, joined by MidAmerican and ITC Midwest, opposes the use of the word "request," stating that the Board has the authority to direct the filing of briefs by the

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parties. While this is undoubtedly true, it is questionable whether the Board possesses the authority to order the filing of briefs in a rulemaking docket by “any other persons” (*i.e.*, a non-party).

The purpose of the rule is to inform the parties (*i.e.*, the petitioner and any intervenor) that they may file a brief, and to inform the public that the Board may seek additional briefing on specific issues. Regardless of whether the Board has the authority to require briefing by the parties and has the authority to request briefing by non-parties, the Board will speak through an order. Therefore, to address the issues raised by OCA, MidAmerican, and ITC Midwest, the Board will propose to modify rule 4.3 to read as follows:

The petitioner or any intervenor may file a brief in support of that party’s position, and the board may order additional briefing.

D. Rule 4.4.

In its comments to rule 4.4, OCA suggested the rule could be shortened through the elimination of unnecessary language, and OCA proposed alternative language, which was supported by ITC Midwest and not opposed by Black Hills. The Board agrees with OCA’s recommendations with modifications. Specifically, within its proposed language, OCA internal citations to other rules are made by rule or subrule number; however, because those cited chapters have not undergone an Executive Order review, it is possible that following those rulemakings, the cited rule and subrule numbers may be different. Therefore, in lieu of the rule and subrule number, the Board will use the rule and subrule catchword (*i.e.*, rule/subrule title) and chapter number, such that rule 4.4 will provide as follows:

At the same time a petition for a declaratory order is filed, the petitioner shall serve the petition, in accordance with the “Service of documents” subrule in 199—chapter 7 and the “Electronic service” rule in 199—

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chapter 14, upon any person who, based upon a reasonable investigation, would be a necessary party to the proceeding under applicable substantive law. The petitioner is to file with the board a list of all persons served.

Once all the Executive Order rulemakings have concluded and at the next time a chapter 4 rulemaking is opened, the Board can replace the catchwords with the specific rule and subrule numbers.

E. Subrule 4.6(1).

Finally, the first sentence of subrule 4.6(1), begins as follows: “The board will not issue a declaratory order that” In this sentence, MidAmerican recommends the word “will” be replaced with “shall” to provide a clearer understanding of obligations.

In this instance, the Board cannot discern a meaningful difference in “will” versus “shall.” See *e.g.*, *We Shall Overcome Foundation v. The Richmond Organization, Inc.*, Case No. 16cv2725, 2017 WL 3981311, at *15 (S.D.N.Y. Sept. 8, 2017) (stating that the “words ‘will’ and ‘shall’ are both common words. Neither is unusual. Grammatically, both words perform similar functions in a phrase or sentence They can be readily substituted in a sentence”); *The Associated Press Stylebook and Briefing on Media Law 2017*, “shall,” p. 255 (52nd ed. 2017) (providing that either “*shall* or *will* may be used in first-person constructions that do not emphasize determination) (italics in original).

Therefore, for purposes of an initial NOIA version, the Board will leave “will.”

CONCLUSION

The Board is proposing to rescind and revise chapter 4. The proposed rescission and revision is shown in the NOIA attached to this order as Attachment A and incorporated in this order by reference. The official version of the NOIA will be published in the IAB and may contain additional nonsubstantive editorial changes. The

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NOIA will be submitted to the Administrative Rules Code Editor and published in the IAB. Additionally, per the Executive Order, the Board will hold two public hearings, the dates for which will be contained in the NOIA published in the IAB. The date for filing written comments will also be contained in the NOIA published in the IAB.

ORDERING CLAUSE

IT IS THEREFORE ORDERED:

The Notice of Intended Action attached to this order will be submitted to the Administrative Rules Code Editor for review and publication in the Iowa Administrative Bulletin and may contain minor editorial changes that are not shown in the attached Notice of Intended Action. The Notice of Intended Action published in the Iowa Administrative Bulletin will identify the public hearing dates and the written comment deadline.

UTILITIES BOARD

Erik M. Helland Date: 2024.01.17
12:05:35 -06'00'

Joshua Byrnes Date: 2024.01.17
09:11:35 -06'00'

ATTEST:

Jackie Yearington Date: 2024.01.17
15:16:10 -06'00'

Sarah Martz Date: 2024.01.17
14:20:37 -06'00'

Dated at Des Moines, Iowa, this 17th day of January, 2024.

UTILITIES DIVISION [199]

DRAFT Notice of Intended Action

The following rule-making action is proposed:

ITEM 1. Rescind 199—Chapter 4 and adopt the following **new** chapter in lieu thereof:

CHAPTER 4
DECLARATORY
ORDERS

199—4.1(17A) Petition for declaratory order. Any person may file a petition with the Iowa utilities board for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the board. The petition shall conform with this chapter and with Iowa Code § 17A.9. A petition shall be dated and signed by the petitioner, include the petitioner’s appropriate contact information, and include all of the following information (a sample form of a petition for a declaratory order is available on the board’s website at iub.iowa.gov):

a. The question or questions that petitioner wishes the board to determine, stated clearly and concisely;

b. A clear and concise statement of all relevant facts on which the ruling is requested, including the petitioner’s interest in the issue;

c. A citation to and the relevant language of the statutes, rules, policies, decisions, or orders that are applicable or whose applicability is in question and any other relevant law;

d. The petitioner’s proposed answers to the questions raised and a summary of the reasons urged by the petitioner in support of those answers, including a statement of the legal support for the petitioner’s position;

e. A statement indicating whether the petitioner is currently a party to another proceeding involving the questions at issue and whether, to the petitioner’s knowledge, those questions have been decided by, are pending determination by, or are under investigation by any governmental entity;

f. The names and addresses of other persons, or a description of any class of persons, known by the petitioner to be affected by or interested in the questions presented in the petition; and

g. A statement indicating whether the petitioner requests a meeting as provided for by rule 199—4.5(17A).

199—4.2(17A) Intervention. A person having an interest in the subject matter of a petition for a declaratory order may file with the board a petition for intervention pursuant to the “Intervention” rule contained in 199—chapter 7 within 20 days of the filing of a petition for a declaratory order. The board may at its discretion entertain a late-filed petition for intervention. A petition for intervention in a proceeding on a petition for declaratory order shall be dated, be signed by the prospective intervenor with that person’s appropriate contact information, include the information set forth in the “Intervention” rule contained in 199—

ATTACHMENT A

chapter 7, and include all of the following:

1. The answers urged by the intervenor to the question or questions presented and a summary of the reasons urged in support of those answers, including a statement of the legal support for the intervenor's position;
2. A statement indicating whether the intervenor is currently a party to another proceeding involving the questions at issue and whether, to the intervenor's knowledge, those questions have been decided by, are pending determination by, or are under investigation by any government entity;
3. The names and addresses of other persons, or a description of any class of persons, known by the intervenor to be affected by or interested in the questions presented in the petition; and
4. Whether the intervenor consents to be bound by the determination of the matters presented in the declaratory order proceeding.

199—4.3(17A) Briefs. The petitioner or any intervenor may file a brief in support of that party's position, and the board may order additional briefing.

199—4.4(17A) Service and filing of petitions. At the same time a petition for a declaratory order is filed, the petitioner shall serve the petition, in accordance with the "Service of documents" subrule in 199—chapter 7 and the "Electronic service" rule in 199—Chapter 14, upon any person who, based upon a reasonable investigation, would be a necessary party to the proceeding under applicable substantive law. The petitioner is to file with the board a list of all persons served.

199—4.5(17A) Informal meeting. Upon request by petitioner, the board will schedule an informal meeting between the petitioner, all intervenors, and the board, a member of the board, or a designated member of the staff of the board to discuss the questions identified in the petition. The board may solicit comments from any person on the questions raised.

199—4.6(17A) Refusal to issue order.

4.6(1) Grounds. The board will not issue a declaratory order that would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to determination of the matter in a declaratory order proceeding. The board may refuse to issue a declaratory order on some or all of the questions raised for any of the following reasons:

- a. The petitioner requests that the board determines whether a statute is unconstitutional on its face.
- b. The petition does not contain facts sufficient to demonstrate that the petitioner will be aggrieved or adversely affected by the failure of the board to issue an order.
- c. The board does not have jurisdiction over the questions presented in the petition.
- d. The questions presented by the petition are also presented in a current rulemaking, contested case, or other agency or judicial proceeding that may definitively resolve them.
- e. The questions presented by the petition would more properly be resolved in a different type of proceeding or by another body with jurisdiction over the matter.
- f. The facts or questions presented in the petition are unclear, overbroad, insufficient,

ATTACHMENT A

or otherwise inappropriate as a basis upon which to issue an order.

g. There is no need to issue an order because the questions raised in the petition have been settled due to a change in circumstances.

h. The petition is not based upon facts calculated to aid in the planning of future conduct but is, instead, based solely upon prior conduct in an effort to establish the effect of that conduct or to challenge an agency decision already made.

i. The petition requests a declaratory order that would necessarily determine the legal rights, duties, or responsibilities of other persons who have not joined in the petition, intervened separately, or filed a similar petition and whose position on the questions presented may fairly be presumed to be adverse to that of the petitioner.

4.6(2) *Content and effect of refusal.*

a. The board's refusal to issue a declaratory order will include a statement of the specific grounds for the refusal and constitutes final board action on the petition.

b. Refusal to issue a declaratory order pursuant to this rule does not preclude the filing of a new petition that seeks to remedy the grounds for the refusal to issue an order.

199—4.7(17A) Effect of a declaratory order.

4.7(1) The issuance of a declaratory order constitutes final agency action on the petition. A declaratory order is binding on the board, on the petitioner, on any intervenors who consent to be bound, and on any persons who would be necessary parties, who are served pursuant to rule 199—4.4(17A),

and who consent to be bound, in cases in which the relevant facts and the law involved are substantially indistinguishable from those on which the order was based. As to all other persons, a declaratory order serves only as precedent and is not binding on the board.

4.7(2) A declaratory order is effective upon the date of issuance.

These rules are intended to implement Iowa Code sections 17A.3(1)“b,” 17A.9 and 476.2.