

STATE OF IOWA
DEPARTMENT OF COMMERCE
IOWA UTILITIES BOARD

IN RE: MIDAMERICAN ENERGY COMPANY	DOCKET NO. SPU-2021-0003
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**MIDAMERICAN ENERGY COMPANY’S APPEAL
OF PROPOSED ORDER TO THE IOWA UTILITIES BOARD**

MidAmerican Energy Company (“MidAmerican”) appeals presiding officer Cecil Wright’s November 23, 2021 “Proposed Order Addressing Request for Confidential Treatment and Motions to Compel” (“Proposed Order”) to the Iowa Utilities Board (“Board”) for review. Pursuant to Iowa Code § 17A.15(2) and the Board’s rules at 199 Iowa Administrative Code (“IAC”) 7.26, MidAmerican offers the following in support of its appeal:

STATEMENT OF FACTS

1. The Board opened this docket to “review MidAmerican Energy Company’s long-term resource plans.” Order Opening Docket and Proposal to Take Official Notice,” Docket No. SPU-2021-0003, p. 3 (May 13, 2021). MidAmerican requested clarification whether the proceeding was a contested case proceeding, but the Board has not ruled on that motion. “Proposed Order,” p. 22. On August 12, 2021, MidAmerican provided documents requested by the Board pursuant to Iowa Code § 476.2(4) and sought confidential treatment for numerous documents. “Response to Board Order and Request for Clarification,” Docket No. SPU-2021-0003, pp. 11-12. Multiple groups filed motions to compel and asked the Board to require MidAmerican to provide the confidential information pursuant to voluntary non-disclosure agreements. “Proposed Order,” pp. 7-14. On November 23, 2021, the presiding officer appointed by the Board issued a Proposed

Order and concluded that MidAmerican's requests for confidential treatment should be granted, save the confidential Resource Plan filed in Docket No. ARC-2015-0156 ("2016 Resource Plan"). The presiding officer also concluded that Iowa Code § 476.2(4) and the Board's rules at 199 IAC chapter 7 permit the Board to disclose confidential information to interested groups outside of a contested case proceeding and require MidAmerican to enter into non-disclosure agreements with the Iowa Business Energy Coalition ("IBEC"), Facebook, Inc. and Google LLC (collectively, "Tech Customers"), and the Environmental Law and Policy Center ("ELPC") and the Iowa Environmental Council ("IEC").

HISTORY OF THE PROCEEDING

2. The Board opened this docket on May 13, 2021. In the order opening the docket, the Board requested that MidAmerican file responsive documents by July 12, 2021. On June 30, 2021, MidAmerican requested additional time to respond. The Board granted the extension, and MidAmerican provided the requested materials and a request for confidential treatment on August 12, 2021. As part of that response, MidAmerican requested clarification about whether the proceeding is informational or a contested case proceeding. On August 23, 2021, IBEC filed a petition to intervene. MidAmerican resisted the intervention on August 30, 2021, stating that intervention was inappropriate because the Board had not determined whether this proceeding is a contested case.

3. On August 31, 2021, the Tech Customers filed a motion to compel the production of the materials that MidAmerican had requested receive confidential treatment. On September 2, 2021, IBEC filed a joinder in the Tech Customers' motion to compel the materials. That same day, IBEC filed a resistance to MidAmerican's reply on the motion to intervene. Further, the ELPC, the IEC, and Sierra Club (collectively, "Environmental Groups") filed a motion to compel

production of the same materials. On September 3, 2021, the Office of Consumer Advocate (“OCA”) filed a response to the motions to compel and agreed that the Board should release the materials.

4. On September 14, 2021, MidAmerican filed a resistance to the motions to compel, stating that it is not a contested case proceeding, the other groups are not parties because it is not a contested case where discovery would be permitted, and there is no statutory right from either the emissions plan and budget statutes, which is not the subject of this proceeding, or any other statute or rule.

5. On September 24, 2021, the Board issued an “Order Addressing Long-Term Resource Plans and Scheduling Oral Argument on Confidentiality Issues,” and assigned Mr. Wright as the presiding officer to address the request for confidential treatment, the motions to compel, and the question of whether MidAmerican should provide responsive materials that are covered by attorney-client privilege. The Board set the question for an oral argument on October 4, 2021. The Board deferred ruling on MidAmerican’s request for clarification that the proceeding is not a contested case proceeding until after the presiding officer filed his proposed order.

6. On October 4, 2021, the presiding officer conducted an oral argument regarding the motions to compel and MidAmerican’s privilege claim. During the oral argument, the presiding officer requested that MidAmerican provide copies of non-disclosure agreements between MidAmerican and the other groups advocating for disclosure of the information.

7. On October 12, 2021, MidAmerican filed the requested non-disclosure agreements and filed a request for the appointment of an administrative law judge to review MidAmerican’s privilege claim for certain materials. MidAmerican argued that it was inappropriate for the Board or its employees to review the privilege claim because the Board itself requested the materials that

MidAmerican believes are privileged and the disclosure of those materials for review would effectively render moot the privilege claim.

8. On October 20, 2021, the presiding officer issued a “[Proposed] Order Addressing Request to Remove Presiding Officer from Review of Documents,” concluding that MidAmerican intended to seek removal of the presiding officer from the proceeding and recommending that the presiding officer be removed and that the Board should review the materials claimed privileged.

9. On October 29, 2021, MidAmerican filed a response to the presiding officer’s proposed order directing the Board to review the materials, arguing again that appointing an independent administrative law judge to review the privilege claim best preserves the public policy goals of attorney-client privilege.

10. The presiding officer issued the Proposed Order on November 23, 2021. MidAmerican contends the Proposed Order contains two erroneous conclusions: (1) the Resource Plan filed in Docket No. ARC-2015-0156 (“2016 Resource Plan”) is not entitled to confidential treatment, in part because Iowa Code § 22.7(18) does not apply to the Board; and (2) the motions to compel should be granted. Proposed Order, pp. 26, 28, 36.

ISSUES PRESENTED FOR APPEAL

11. Confidential Information: The Proposed Order erroneously concludes that MidAmerican’s 2016 Resource Plan should no longer be afforded confidential treatment. The information should be held confidential pursuant to Iowa Code § 22.7(6) because it still contains forward-looking, projected revenue and other figures that are still based on proprietary projection methodologies. Alternatively, the information should be held confidential pursuant to Iowa Code § 22.7(18), which does, in fact, apply to information filed with the Board by rate-regulated utilities.

The Proposed Order erroneously and without support or elaboration concluded that Iowa Code § 22.7(18) does not apply to rate-regulated utilities.

12. Motions to Compel: MidAmerican alleges the Proposed Order erroneously concludes that Iowa Code § 476.2(4) permits the Board to provide confidential information to outside groups outside of a contested case proceeding. The Proposed Order also erroneously inserts additional language into the Board's own rules at 199 IAC chapter 7 and ignores the definitions provided within the chapter to conclude that the Board can compel disclosure of confidential information without MidAmerican's consent outside of a contested case proceeding. This violates the terms of Iowa Code chapters 17A, 22, and 476 and deprives MidAmerican of its substantive and procedural due process rights.

STATEMENT OF ERRORS

13. *Confidentiality of MidAmerican Materials*. The Proposed Order erroneously concludes that MidAmerican's 2016 Resource Plan is no longer entitled to confidential treatment "because it does not contain any cost or risk analysis and is not prepared by a third party." Proposed Order, p. 28. The Proposed Order also erroneously concludes that although the Board previously granted confidential treatment for the document, "any support for holding the document from public disclosure has passed." *Id.*

14. The Proposed Order's conclusion is not supported by any evidence in the record or the content of the document and is directly contradicted by the Board's original order granting confidential treatment for the document. Specifically, MidAmerican asserted that the 2016 Resource Plan documents "include or comprise detailed generation dispatch information, customer load data, and revenue relating to MidAmerican's electric generating assets and proprietary forecasting methodology," the release of which "would provide advantage to MidAmerican's

competitors without public benefit.” “Application for Confidential Treatment,” Docket No. SPU-2021-0003, pp. 2-3 (Aug. 11, 2021). This was supported by an affidavit from MidAmerican’s general counsel. “Affidavit in Support of the Application for Confidential Treatment,” Docket No. SPU-2021-0003 (Aug. 11, 2021). This information supported a claim that the material should be held confidential pursuant to Iowa Code §§ 22.7(3) and 22.7(6).

15. The Board previously concluded that the information contained within the 2016 Resource Plan “qualifies as a report to a government agency,” and that “release of such information would serve no public purpose and could provide an advantage to its competitors” because it contains “specific costs and service characteristics of MidAmerican’s generating units.” “Order Granting Application for Confidential Treatment Filed December 16, 2016,” Docket No. ARC-2015-0156, p. 2 (Mar. 27, 2017). The Board concluded that the information should be held confidential pursuant to Iowa Code § 22.7(6). *Id.*

16. The Board directed MidAmerican to file the 2016 Resource Plan, which considers MidAmerican’s long-term resource plans, at the conclusion of its 2015 fuel procurement review. “Order Approving Fuel Procurement Plan,” Docket No. ARC-2015-0156, p. 9 (June 27, 2016). The 2016 Resource Plan includes MidAmerican’s demand and energy forecasts from 2016 to 2026, projected 2020 resource mix, identifies potential load and generation forecasts, including reserve margins, capacity needs, and short- and long-term capacity plans through 2037. Although some parts of the document may be less relevant five years later, revealing this information to the public could compromise MidAmerican’s ability to cost-effectively manage its generation and load requirements moving forward by damaging MidAmerican’s competitiveness in procuring necessary generation. The Board recognized this concern in 2016. However, the Proposed Order concluded, without analysis, that the information is no longer confidential, despite containing

forecasts through 2037. Accordingly, MidAmerican alleges that the Proposed Order erroneously ruled the 2016 Resource Plan should not be granted the same confidential treatment extended four years ago.

17. *Motions to Compel.* The Proposed Order erroneously grants the various motions to compel by requiring MidAmerican to enter into non-disclosure agreements with interested groups. “Proposed Order,” p. 36. MidAmerican believes the Proposed Order’s conclusion is erroneous for numerous reasons, beginning with the jurisdictional issues related to initiating the proceeding, an inaccurate interpretation of the Board’s authority under Iowa Code § 476.2(4), an inaccurate interpretation of the Board’s rules at 199 IAC chapter 7, and inapposite references to previous Board dockets and Board precedent. In total, these errors create an outcome that undermines MidAmerican’s procedural and substantive due process rights.

18. MidAmerican requested that the Board clarify whether this is a contested case proceeding. “Response to Board Order and Request for Clarification,” Docket No. SPU-2021-0003, p. 12 (Aug. 12, 2021). MidAmerican noted that the question is a threshold issue that determines what procedures and rights are afforded to MidAmerican as the subject of this proceeding. *Id.*

19. There is no statutory basis for a contested case proceeding to evaluate MidAmerican’s long-term generation planning process. Although the parties consistently state that the Board’s May 13, 2021 order permits other parties to opine on the proceeding, no party has, or could, cite to any statute that permits a party to do so. *See* “Response to Board Order and Request for Clarification,” Docket No. SPU-2021-0003, pp. 8-10 (Aug. 12, 2021) (providing a history of the passage and implementation of Iowa Code §§ 476.6(12) and (16) and demonstrating that neither statute permits a contested case review of generation planning materials).

20. Instead, the Board and parties agree that MidAmerican is providing these materials subject to the Board's "authority to inquire into the management of the business of all public utilities" and "may obtain from any public utility all necessary information to enable the board to perform its duties." Iowa Code § 476.2(4); *see also* "Response to Board Order and Request for Clarification," Docket No. SPU-2021-0003, pp. 11-12 (stating that MidAmerican is only providing the requested materials pursuant to this provision); "Proposed Order," p. 33 (concluding that materials provided pursuant to Iowa Code § 476.2(4) may be provided to other parties).

21. MidAmerican argued in its filings and during the oral argument that Iowa Code § 476.2(4) only permits the Board to receive information, not to provide the information to other parties. "Resistance to Motions to Compel," Docket No. SPU-2021-0003, p. 2 (Sept. 14, 2021); Hearing Tr. at 11, l. 8-14.

22. The Proposed Order's first erroneous conclusion of law is that Iowa Code § 476.4(2) "does not limit the Board's ability to allow other stakeholders . . . the ability to review the information about a rate-regulated utility's business and to provide analysis and comments." "Proposed Order," pp. 32-33. This is incorrect. Iowa Code § 476.2(4) states:

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.

There is no language in Iowa Code § 476.2(4) that states the Board may seek comment from other stakeholders to review this information. The Proposed Order's conclusion on this point directly contradicts Iowa Code § 17A.23(3). "An agency shall only have that authority or discretion delegated to or conferred upon the agency by law and shall not expand or enlarge its authority or discretion beyond the powers delegated to or conferred upon the agency." Iowa Code § 17A.23(3).

23. The Proposed Order further concludes that “[t]he existence of the statutory and rule requirements for discovery in contested case proceedings does not limit the Board’s authority to allow discovery in other proceedings.” “Proposed Order,” p. 33. This is incorrect. Iowa Code § 17A.13(1) states in part: “Discovery procedures applicable to civil actions are available to all parties in contested cases before agencies.” The Board’s rule at 199 IAC 7.15(1), which mirror the authority granted by the Iowa Code, states: “Discovery procedures applicable in civil actions are available to parties in contested cases.” The statute and rule are clear: discovery is permissible *only in a contested case proceeding*.

24. The Iowa Supreme Court took this position, in determining the type of administrative action, when it noted “[t]he importance of the distinction lies in the procedural due process which attaches to contested cases.” *Polk County v. Iowa State Appeal Board*, 330 N.W.2d 267, 276 (Iowa 1983). Furthermore, the concept is supported in scholarship on the Iowa Administrative Procedure Act. Arthur Bonfield, in describing the applicability of the Act to the various types of administrative action, wrote “[t]he precise definition of the term ‘contested case’ in the various administrative procedure acts is crucial, therefore, because of the important consequences that flow from falling in that definition. For instance, IAPA [Iowa Administrative Procedure Act] sections 10 through 17, and certain provisions of section 19, are applicable *only* to ‘contested cases.’” Bonfield, *The Definition of Formal Agency Adjudication under the Iowa Administrative Procedure Act*, 63 Iowa Law Review 285, 288 (1977) (emphasis provided by the original author). Considering the foregoing, MidAmerican asserts that the presiding officer committed legal error by granting motions to compel, absent a determination that the Board is conducting this docket as a contested case.

25. The presiding officer disagreed with this interpretation, stating that “a more reasonable interpretation of subrule 199 IAC 7.15(1) is that discovery is specifically allowed in contested case proceedings and any discovery or requirements for release of information in other dockets is subject to the decision of the Board or a presiding officer.” “Proposed Order,” p. 34. For purposes of this issue, it is important to understand the types of administrative action. “The IAPA divides administrative action into three categories: ‘rulemaking,’ Iowa Code § 17A.2(8); adjudication (referred to as a ‘contested case’), Iowa Code § 17A.2(2); and other ‘agency action,’ Iowa Code § 17A.2(9).”¹ *Polk County*, 330 N.W.2d at 276.

26. In a rulemaking, the Board adopts, amends or repeals rules, which are agency statements of general applicability. *See* Iowa Code §§ 17A.2(12) and 17A.2(11). The Board opened this docket, however, to review the generating fleet, including potential retirements of coal plants, to consider matters identified in the joint statement of issues from the emissions plan and budget proceeding, and to review the fuel procurement practices and electric generating needs of one public utility—MidAmerican Energy Company. As such, the Board actions are not generally applicable and cannot be characterized as rulemaking.

27. One of the defining characteristics of a contested case is that it be “required by Constitution or statute to be determined by an agency” Iowa Code § 17A.2(5). Required means that the agency has no discretion and is bound as a matter of law to determine certain legal rights only after an evidentiary hearing. *See* Bonfield, 63 Iowa Law Review at 300. Except for Iowa Code § 476.6(12), which is limited to the reasonableness and prudence of MidAmerican’s procurement and contracting practices for electric generating fuel, none of the statutes cited by the Board in

¹ There have been revisions to Iowa Code, Chapter 17A since the Iowa Supreme Court decided this case. The term “Rulemaking” is now codified at 17A.2(12); “Contested case” is now codified at 17A.2(5); and “Agency action” is now codified at 17A.2(2). Their meanings, however, remain unchanged.

opening this docket mandate a contested case proceeding be held. This means, as to any non-476.6(12) issue, the presiding officer is operating under other agency action. However, even this assumption has been difficult for MidAmerican to make, considering the presiding officer's decision to defer determining whether this docket is a contested case proceeding or an informational docket. *See* SPU-2021-0003, "Order Addressing Long-Term Resource Plans and Scheduling Oral Argument on Confidentiality Issues," p. 6 (September 24, 2021).

28. If the proceeding is neither rulemaking nor contested case, MidAmerican is left to assume the Board is operating as though this docket is other agency action. Under this type of administrative action, parties are "entitled to those procedures voluntarily promulgated by the agency, and to the general constitutional requirement that the agency act reasonably." *Greenwood Manor v. Iowa Department of Public Health, State Health Facilities Council*, 641 N.W.2d 823, 834 (Iowa 2002). Furthermore, the General Assembly directed the Board to conduct its proceedings, "when not otherwise prescribed by law, in such manner as will best conduce to the proposer dispatch of business and the attainment of justice." Iowa Code § 474.3. Assuming, for argument's sake, that the Board considers its chapter 7 procedural rules to be applicable to its agency action proceedings, the presiding officer's decision to grant the motions to compel is still legal error as the decision is not remotely reasonable for several reasons.

29. The presiding officer's decision to grant the motions to compel was driven by a belief that any other interpretation of the interplay between Iowa Code, Chapter 476, and 199 IAC, chapter 7 "would severely limit the Board's authority to inquire into the management of a rate-regulated utility and would prevent the Board from receiving meaningful and necessary analyses in dockets that are not contested case proceedings. With respect to the Board's authority to inquire, MidAmerican must be clear: The Company is not challenging the Board's regulatory and

investigative authority or its ability to receive information under Iowa Code §§ 476.2, 476.6, 476.8 or any other statute in Chapter 476. However, the Company is challenging what the Board does with that information.

30. With respect to the Board’s ability to receive meaningful and necessary analysis, MidAmerican disagrees with the presiding officer. The Board has at its disposal options to analyze information that do not violate or jeopardize the due process rights of the utilities it regulates. First, Iowa Code § 474.1(2)(b) allows the Board to “employ additional personnel as it finds necessary.” If the Board lacks the expertise among its current staff, it has the authority to hire additional staff as needed to assist with analysis, provide feedback, and help the presiding officer determine what type of agency action this docket represents and how the docket should proceed. Alternatively, if the presiding officer would like a less permanent solution than hiring new staff, he could have proceeded under Iowa Code § 476.10(3), which allows the Board to “employ additional temporary or permanent staff, or [to] contract with persons who are not state employees for” professional services, with the associated costs to be borne by MidAmerican.² The presiding officer could have hired a third-party vendor to review MidAmerican’s information and produce a report for the presiding officer to consider in moving this docket forward. If there is concern about receiving meaningful feedback, a public version of the report could have been made available for comment to those entities participating in this docket. The report, in concert with the comments, should provide the engagement the presiding officer desires to determine the direction of this proceeding, all while protecting MidAmerican’s due process rights should the presiding officer determine this docket is a contested case.

² Proceeding under Iowa Code § 476.10 requires that the presiding officer is carrying out the Board’s duties under section 476.6—a fact satisfied in the Board’s order opening this docket. *See* Docket No. SPU-2021-0003, Order Opening Docket and Proposal to Take Official Notice, p. 1 (May 13, 2021).

31. Instead, the presiding officer, to determine whether this docket is a contested case proceeding, ordered MidAmerican provide documents to interested parties. This is problematic when the interested parties will be the intervenors/opposing parties should a review and comment on the documents indicate a contested case is necessary. This situation is even more egregious when the documents to be provided represent all the relevant and non-privileged material MidAmerican possesses on this docket's subject. Once this information is out, there is no way to proceed with a contested case proceeding without severely prejudicing MidAmerican's due process rights. For these reasons, MidAmerican asserts that, should the Board believe this docket to be agency action, then the process afforded MidAmerican under chapter 7 of the Board's rules is unreasonable because the Board failed to avail itself statutory options that would provide for meaningful review, while protecting the Company's due process rights.

32. The Proposed Order assumes that absence of a prohibition grants the Board authority beyond Iowa Code chapter 17A. This again directly contradicts the law. *See* Iowa Code § 17A.23(3). The Proposed Order erroneously assumes that an agency has all powers not prohibited; instead, Iowa Code states that an agency only has those powers expressly enumerated.

33. Similarly, the Proposed Order concludes that other provisions of 199 IAC chapter 7 supersede the facially unambiguous language of 199 IAC 7.15(1). "Proposed Order," p. 34 (concluding that 199 IAC 7.1 and 7.4(6) should be read to overrule the specific language of 199 IAC 7.15(1)). This is incorrect. The Board's authority to facilitate discovery is limited to the authority granted by Iowa Code § 17A.13, which is mirrored at 199 IAC 7.15(1). The Board cannot expand its jurisdiction or authority by rule. Iowa Code § 476.2(1) (stating that the Board is subject to the provisions of Iowa Code chapter 17A and stating that its rules of procedure shall not be "inconsistent with law"); Iowa Code § 17A.23(3). By ignoring the limitation on discovery, the

Proposed Order impermissibly expands the scope of the Board's authority beyond that permitted by Iowa Code § 17A.13.

34. The Proposed Order's erroneous expansion of authority also contradicts the Board's own rules. 199 IAC 7.15(1) states that discovery proceedings applicable in civil actions are available to parties in contested cases. "Party" and "contested case" are both terms defined by the Board's rules at 199 IAC 7.2. A contested case is defined as "a proceeding defined by Iowa Code section 17A.2(5) and includes any matter defined as a 'no factual dispute' contested case under Iowa Code section 17A.10A." Iowa Code § 17A.2(5) defines a contested case as "a proceeding including but not restricted to ratemaking, price fixing, and licensing in which legal rights, duties, or privileges of a party are required by Constitution or statute to be determined by an agency after an opportunity for an evidentiary hearing." This is not a contested case proceeding as defined by Iowa Code § 17A.2(5), so discovery is not permissible under Iowa Code § 17A.13 and 199 IAC 7.15(1).

35. The Proposed Order also erroneously concludes that 199 IAC 7.4(6) provides a right to discovery beyond the right offered in 199 IAC 15.1 as a "reasonable interpretation." "Proposed Order," p. 34. This is erroneous because the rule and statute on which it is based are facially unambiguous. Any term which is not clearly understood is defined at 199 IAC 7.2 and Iowa Code § 17A.2. Accordingly, any reading of the rule that expands the scope of the agency's authority beyond that of the statute is incorrect.

36. The Proposed Order also states that it has broad authority pursuant to Iowa Code § 476.8 to conduct this proceeding. "Proposed Order," p. 33. This is incorrect. The authority to conduct a contested case proceeding is clearly enumerated when it is granted. *See* Iowa Code § 476.6(11)(a) ("The natural gas supply and cost review shall be conducted as a contested case

pursuant to Iowa Code chapter 17A”); Iowa Code § 476.6 (19)(a)(3) (“The initial multiyear plan and budget and any subsequent updates shall be considered in a contested case proceeding pursuant to Iowa Code chapter 17A”); Iowa Code § 476.53(3)(a) (“The board shall specify in advance, by order issued after a contested case proceeding . . .”). Iowa Code § 476.8 does not grant the Board the authority to conduct a contested case. The Proposed Order again attempts to expand the scope of the Board’s authority, contrary to Iowa Code § 17A.23(3).

37. The Proposed Order concludes that the Board can compel MidAmerican to provide materials to other parties pursuant to non-disclosure agreements despite this not being a contested case proceeding because “it is evident from the requirement by the Board to open this docket . . . that the Board expected the parties from Docket No. EPB-2020-0156 to participate in this docket.” “Proposed Order,” p. 31. This is erroneous. The Board cannot preempt either its own rules or the Iowa Code simply by stating it in an order. *See* Iowa Code § 17A.23(3) (affirming that an agency’s authority is limited to that delegated to it and that the agency cannot expand or enlarge that authority beyond what is delegated by the Legislature). Without statutory authority to conduct a contested case, the Board cannot open a contested case or provide discovery tools that are only limited to parties in a contested case proceeding. Docket No. EPB-2020-0156 was a contested case proceeding conducted pursuant to the terms of Iowa Code § 476.6(19). The Board specifically found that the materials in question in this proceeding were not within the scope of that proceeding. “Order Approving Emissions Plan Budget Update, Denying Joint Motion and Non-Unanimous Settlement Agreement, and Canceling Hearing,” Docket No. EPB-202-0156, p. 10 (Mar. 24, 2021). Accordingly, the Proposed Order erroneously concludes that an order can supersede Board rule and Iowa law.

38. The Proposed Order also erroneously concludes that the moving groups “already have access to some of the information pursuant to NDAs executed in Docket No. EPB-2020-0156.” “Proposed Order,” p. 35. This is incorrect. The record contains no evidence that the information provided by MidAmerican in this docket was provided to any party in Docket No. EPB-2020-0156 as part of that proceeding. The Proposed Order appears to erroneously conclude that because this docket took notice of the information contained in Docket No. EPB-2020-0156 that the information MidAmerican filed on August 12, 2021, was previously provided to parties in that proceeding. “Proposed Order,” pp. 10, 20. The Proposed Order fails to distinguish the materials provided confidentially by MidAmerican on August 12, 2021, and the materials provided confidentially to the parties of the EPB that has been included in this docket by notice. Alternatively, the Proposed Order may incorrectly conclude that MidAmerican provided information to be shared as part of the proposed settlement with other parties before the Board rejected the settlement. “Proposed Order,” p. 10 (summarizing OCA’s comments that the “settlement in Docket No. EPB-2020-0156 would have allowed” other groups access to the confidential information to be filed in that docket after entering into an NDA).

39. Finally, the Proposed Order’s conclusion that the Board can issue a protective order in this proceeding should MidAmerican fail to offer a non-disclosure agreement is improper. The Proposed Order cites to a protective order granted as part of a motion to compel in Docket No. TF-92-229. “Proposed Order,” p. 36. This procedure is inappropriate here because the docket cited by the Proposed Order was a contested case proceeding. “Order Regarding Discovery,” Docket No. TF-97-229, p. 2 (Jan. 22, 1998) (stating, as part of an order affirming an interlocutory discovery order, that “The Board’s December 17, 1997, order is not the final decision in Docket No. TF-97-229, a contested case proceeding.”). Again, a protective order is only permissible in a contested

case proceeding and the Proposed Order erred in concluding that a protective order is appropriate outside of a contested case.

RELIEF REQUESTED

40. MidAmerican requests relief from the Board by re-affirming the confidential treatment of MidAmerican's 2016 Resource Plan, as granted by the Board in 2017. MidAmerican further requests that the Board deny the motions to compel as beyond the Board's authority for information provided outside of a contested case proceeding pursuant to Iowa Code § 476.2(4).

BRIEFING

41. MidAmerican is not requesting additional argument or briefing as the record contains sufficient information for the Board to decide this appeal.

STAY

42. MidAmerican is not requesting a stay pending review of the presiding officer decision by the Board.

CERTIFICATION OF SERVICE

43. The presiding officer deferred a decision on intervention of any party in this proceeding; therefore, there currently are no parties. However, in the interest of due process, MidAmerican will serve a copy of this appeal on individuals who have made filings in this docket using the Board electronic filing system.

Dated this 8th day of December, 2021.

Respectfully submitted,

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