STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE: MIDAMERICAN ENERGY COMPANY	DOCKET NO. RPU-2022-0001

ORDER ADDRESSING APPLICATION FOR CONFIDENTIAL TREATMENT AND PROTECTIVE ORDER

BACKGROUND

On January 19, 2022, MidAmerican Energy Company (MidAmerican) filed with the Utilities Board (Board) an Application for a Determination of Ratemaking Principles (Application) seeking advance ratemaking principles regarding the company's Wind PRIME project pursuant to Iowa Code § 476.53. MidAmerican's Wind PRIME project includes up to 2,042 megawatts of wind generation, 50 megawatts of solar generation, and particular treatment for technology study costs relating to carbon capture, energy storage, and small modular nuclear reactor technologies. MidAmerican concurrently filed a Request for Waiver (Waiver) on January 19, 2022, seeking waiver of Board rules 199 Iowa Administrative Code (IAC) 20.9(1) and (2), as they apply to MidAmerican's energy adjustment clause, and 199 IAC 41.3(1)(c)-(g) to the extent information requested by such rules is not reasonably available and presented in MidAmerican's Application.

On February 8, 2022, the Office of Consumer Advocate (OCA), a division of the Iowa Department of Justice, filed an objection to the Application and Waiver and requested that the Application be docketed for further review. Appearances and

petitions to intervene were filed by the Environmental Law & Policy Center, Iowa Environmental Council, and Sierra Club (collectively, Environmental Intervenors); Facebook, Inc., and Google LLC, (together with Microsoft as noted below, the Tech Customers); and the Iowa Business Energy Coalition (IBEC). All were granted on April 4, 2022.

Additional petitions to intervene were filed on May 19, 2022, by Microsoft Corporation (Microsoft) and on May 20, 2022, by the Iowa Business for Clean Energy, the Iowa Association of Municipal Utilities, and Interstate Power and Light Company (IPL), independently. All were granted on June 10, 2022.

MIDAMERICAN REQUEST FOR CONFIDENTIAL TREATMENT AND PROTECTIVE ORDER

On October 20, 2022, MidAmerican filed an application for confidential treatment and protective order (Confidential Application) with respect to the Zero Emissions Study conducted by MidAmerican staff and the Coal Plant Economics Assessment conducted by Siemens Energy Business Advisory (Studies), which were the subject of a Motion to Compel filed by the Environmental Intervenors on September 2, 2022. The Motion to Compel was withdrawn and the Studies were produced to certain parties to the docket. The Studies were produced pursuant to both a discovery agreement specific to the Studies filed on November 3, 2022, as Exhibit A (Discovery Agreement) to the Objection (as defined below) and the RPU-2022-0001 Protective Agreement filed in the docket on November 3, 2022, as Exhibit B to the Objection (Protective Agreement). MidAmerican also provided copies of the Studies to the Board with its filing of the Confidential Application. It is not clear whether all parties to the docket have received the Studies.

In the Confidential Application, MidAmerican asserts the Studies are confidential pursuant to Iowa Code § 22.7(3) as a trade secret; pursuant to § 22.7(6) as a report to a governmental agency, which, if released, would give an advantage to competitors and serves no public purpose to release; and pursuant to Iowa Code § 22.7(18), which represents a communication not required by law, rule, procedure, or contract that, if released, would threaten the economic interests of the filing party. MidAmerican states that the disclosure of the Studies could be used to accurately evaluate MidAmerican's costs, cost tolerances, proprietary forecasting methodology, contract terms, contract vendors, revenue, net earnings, proprietary economic analysis, future market price assumptions, future fuel price assumptions, capacity factor assumptions, processes and methodologies for developing renewable projects, future generation operation and maintenance assumptions, and other proprietary information.

MidAmerican further asserts that the Studies are subject to attorney-client privilege, attorney work product, and/or self-critical analysis protections. In support of its claim of privilege, MidAmerican references an affidavit filed on August 8, 2022, from Mr. Berntsen, who served as MidAmerican's general counsel when the Studies were conducted. Mr. Berntsen asserts that the Zero Emissions Study was conducted at his direction to "better inform strategy with respect to generation planning, regulation, and litigation." *Id.* p. 2. Similarly, Mr. Berntsen asserts that the Coal Plant Economics Assessment was prepared "…to further enhance the understanding of the issues and the litigation strategy." *Id.* p. 3. MidAmerican asserts that release of the information contained within the Studies would undermine MidAmerican's good faith efforts to protect and maintain its asserted privileges.

ENVIRONMENTAL INTERVENORS' OBJECTION

On November 3, 2022, the Environmental Intervenors filed an objection to the Confidential Application (Objection). The Environmental Intervenors argue that under the Discovery Agreement and Protective Agreement, they have reserved the right to object to the Confidential Application, and that MidAmerican's assertions of confidentiality and privilege are overbroad, unsupported, and inconsistent with the Iowa Open Records Act policy that supports disclosure, citing Iowa Code § 22.8(3) and *Ripperger v. Iowa Pub. Info. Bd.*, 967 N.W.2d 540 (Iowa 2021).

With respect to the claim of confidentiality for trade secrets under Iowa Code § 22.7(3), the Environmental Intervenors assert that the Studies contain "high level analysis and conclusions similar to the type of information that is routinely made public in Board proceedings" and that the claims asserted by MidAmerican relating to damage resulting from disclosure are not linked to specific information contained in the Studies. In support of the Environmental Intervenors' argument that the Studies contain information routinely disclosed, the Objection includes four examples of similar disclosures by peer competitors of MidAmerican in other jurisdictions' regulatory dockets and a reference to IPL's Clean Energy Blueprint filing with the Board.

In response to the claim of confidentiality under Iowa Code section 22.7(6), the Environmental Intervenors note that the statute requires a finding that the release would "serve no public purpose." Disputing that conclusion, they argue that the Studies contain information that is "highly relevant to the public interest," and that targeted redaction instead of blanket withholding of the information is more consistent with Iowa law and policy. The Environmental Intervenors provide proposed redacted versions of

the Studies that would address MidAmerican's concerns while allowing disclosure of the larger conclusions. In support of that argument, they cite *Iowa Film Prod. Servs. v. Iowa Dep't of Economic Development*, 818 N.W.2d 207, 225 (Iowa 2012) for the proposition that the exceptions to public disclosure are narrow, and the burden of proof is on the party requesting the confidentiality exception. They also cite to the conclusions of the Studies, their direct relevance to the issues in dispute in the docket, and the need for transparency by the Board in deciding the $3.9 billion Wind PRIME advance ratemaking proposal.

The Environmental Intervenors also argue that Iowa Code § 22.7(18) is inapplicable to the Confidential Application and that MidAmerican has not provided any precedent showing it is applicable, and they assert that the type of information contained in the Studies is typically discoverable by other parties and/or the Board in contested case proceedings in which MidAmerican is a regular participant, and that granting the exception here would run counter to the purpose and intent of the statute.

Finally, the Environmental Intervenors argue that the Studies are not privileged and reference the prior arguments in the Motion to Compel, supporting the lack of privilege. The Environmental Intervenors argue that the Studies are "clearly the type of analyses conducted as part of routine utility planning, and are also the type of analyses the Board reviews on a regular basis" and argue that the fact that Mr. Berntsen requested the Studies is not dispositive, citing *Wells Dairy, Inc. v. American Indus. Refrigeration, Inc.*, 690 N.W.2d 38 (Iowa 2004). They further argue that the Studies primarily relate to generation planning, which is a part of regular utility business, and to allow the application of privilege to the Studies would "eviscerate" the regulatory

framework that allows the Board to review and make prudency determinations regarding MidAmerican's business decisions.

MIDAMERICAN RESPONSE

MidAmerican filed a response to the Objection on November 17, 2022. MidAmerican argues that it meets the criteria for confidential treatment, citing Board precedent of granting treatment for similar types of information in the past and referencing the definition of a trade secret under Iowa Code § 550.2. MidAmerican also cites to the discovery dispute over the mailing list submitted by Summit Carbon Solutions, LLC, stating that, unlike in that case where confidentiality was not found, the Board may not have been able to order production of the Studies and therefore it is a voluntary disclosure qualifying under Iowa Code § 22.7(18).

MidAmerican also argues that the objection by the Environmental Intervenors is contrary to the terms of the Discovery Agreement and that they should be estopped from objecting, and that MidAmerican should not be punished for filing the Studies in the docket. MidAmerican further incorporates by reference its arguments in resistance to the Motion to Compel, and emphasizes that the dual-purpose nature of the Studies does not obviate a claim of privilege.

ENVIRONMENTAL INTERVENORS' REPLY

The Environmental Intervenors filed a motion for leave to file a reply on November 21, 2022, seeking to specifically address the new estoppel argument raised in MidAmerican's reply on November 17, 2022. The Environmental Intervenors emphasize that the Discovery Agreement incorporates by reference the terms of the

already-signed Protective Agreement. They argue that since the Protective Agreement's terms were incorporated without change, and the Protective Agreement specifically authorizes objections to confidentiality claims in the docket, that they should not be estopped from asserting the current objections.

They also assert that it was a material term of the Discovery Agreement to allow such objections, since the Environmental Intervenors would otherwise be waiving a right to object without having first been able to examine the Studies. The reply is supported by an affidavit of Mr. Mandelbaum, averring that the Environmental Intervenors would not have entered into the Discovery Agreement but for preservation of the right to object to the confidentiality and privilege of the Studies as appropriate at a later date. The Board accepts the motion for leave to file a reply and will consider the arguments set forth therein as a response to new arguments raised in MidAmerican's response.

BOARD DISCUSSION

A. Estoppel

As an initial matter, the Board considers MidAmerican's arguments that the Environmental Intervenors are estopped from asserting their objection due to the Discovery Agreement. The Discovery Agreement resolved the then-pending Motion to Compel filed September 2, 2022, whereby the Environmental Intervenors withdrew the motion and MidAmerican provided the Studies. Section 2 of the Discovery Agreement states:

> The Documents shall be provided subject to the Confidential designation included in the RPU-2022-0001 Protective Agreement, dated April 2022, between Counterparty and MidAmerican. All terms and conditions of the RPU-2022-0001 Protective Agreement are incorporated by reference herein and shall be deemed to have the same force and effect as to the

> Documents. Nothing in this agreement shall alter or change the terms of the RPU-2022-0001 Protective Agreement.

This provision requires the Environmental Intervenors to agree to keep the Studies confidential pursuant to the existing Protective Agreement. The Discovery Agreement fully incorporates by reference, without modification, the entirety of the Protective Agreement. There appears to be no dispute that the Discovery Agreement required the Environmental Intervenors to withdraw their motion and agree to hold the Studies confidential.

The issue turns to the impact of the Protective Agreement on the Discovery Agreement, as incorporated. MidAmerican asserts the Discovery Agreement precludes additional argument regarding confidentiality, and the Environmental Intervenors assert that the Protective Agreement allows for the Objection. Section 9 of the Protective Agreement states:

> The Parties retain the right to question, challenge, or object to the designation (as Confidential or Confidential – Attorneys' Eyes Only), production, non-production, admissibility, or inadmissibility of the Protected Material.

Relatedly, Section 13 of the Protective Agreement states:

> The rights to discovery and disclosure of Protected Material hereunder are in addition to the rights of the Parties under applicable law; provided, however, that in no event will the Parties be denied their rights to discovery or disclosure of any document if the Iowa Utilities Board or any regulatory agency or court of competent jurisdiction determines such document or information is not confidential under the law.

Given that the Discovery Agreement did not contain an explicit waiver of the rights contained in the Protective Agreement, and indeed the Protective Agreement is incorporated without change by reference into the Discovery Agreement, the Board finds that the Environmental Intervenors retain the right to raise the Objection.

B. Request for Confidentiality

As a state agency, the Board is governed by the general policy statement at Iowa Code § 22.2, which states that "[e]very person shall have the right to examine and copy a public record and to publish or otherwise disseminate a public record or the information contained in a public record" and the direction of the Iowa Supreme Court, recently articulated in *Ripperger v. Iowa Pub. Info. Bd.*, 967 N.W.2d 540, 551 (Iowa 2021), that "[t]here is a presumption in favor of disclosure and a liberal policy in favor of access to public records." The Board takes the competing needs of public transparency and the need for regulated utilities to maintain certain information as confidential seriously, so the utility can effectively compete in those areas where it is not a monopoly provider. The burden of proof is on the utility to overcome the statutory presumption of publication.

MidAmerican is seeking confidential treatment pursuant to three subsections of Iowa Code § 22.7:

> (3) Trade secrets which are recognized and protected as such by law.
>
> (6) Reports to governmental agencies which, if released, would give advantage to competitors and serve no public purpose.
>
> (18) Communications not required by law, rule, procedure, or contract that are made to a government body or to any of its employees by identified persons outside of government, to the extent that the government body receiving those communications from such persons outside of government could reasonably believe that those persons would be discouraged from making them to that government body if they were available for general public examination.

Each of the grounds for confidentiality of the Studies asserted by MidAmerican and objected to by the Environmental Intervenors is considered below.

1. Iowa Code § 22.7(3) Trade Secrets

The Board has reviewed the Studies and finds that they contain data relating to the cost of generation, cost of supplies, cost tolerances, contract terms, identified contract vendors, anticipated revenue, and net earnings assumptions (Studies Data), as well as other high-level analysis recommendations and conclusions that will be addressed separately. The type of information represented by the Studies Data has regularly been held as confidential by the Board in past dockets. Based on MidAmerican's representations and a review of the Studies, the Board finds that the Studies Data qualifies as trade secrets, pursuant to Iowa Code § 550.2(4). MidAmerican has compiled the Studies Data, from which it derives economic value by not publishing it generally; the Studies Data is not readily ascertainable by a person able to obtain economic value from its disclosure or use; and the Studies Data has been subject of reasonable efforts to maintain its secrecy. Therefore, the Studies Data will be deemed confidential information.

However, the Studies themselves *in toto* do not qualify as a trade secret. There is limited to no economic value that MidAmerican would derive by keeping plans for future generation assets secret. This is clear since MidAmerican has publicly filed, in this docket petitioning for advance ratemaking principles, its proposal for generation asset development for a number of years, including generation type and cost estimates. Further, MidAmerican has publicly announced its intention, through media announcements and otherwise, of an overarching goal to transition to a zero-emissions generation portfolio under the moniker "Destination Net Zero." The public filing and

announcement of generation asset investment plans is inconsistent with the statutory requirement that MidAmerican take reasonable efforts to maintain secrecy. The high-level analysis and conclusion contained in the Studies are similar in nature and type to public filings that are routinely made by MidAmerican and other utilities with the Board, and with other jurisdictions.

Additionally, it is within the regular authority of the Board to review the generation portfolio and business decisions of MidAmerican in ratemaking dockets, advance ratemaking dockets, annual reports, approvals regarding cost recovery riders, and otherwise. All utility decisions regarding expenditures and investments that are sought to be recovered through rates are subject to prudency determinations by the Board, especially significant ones regarding investment in generation assets. As OCA has previously argued in this docket, if the Board is to ensure just and reasonable rates for a utility's customers, the Board, as well as other parties to a proceeding, must have access to all study results related to the prudency of the utility's decisions, not just the results of studies favorable to the utility's case. It would be inappropriate to deem information that can be required to be filed publicly as part of a normal review of a rate-regulated utility to be a trade secret. Therefore, the Studies in their entirety do not qualify as a trade secret supporting granting confidentiality under Iowa Code § 22.7(3).

2. Iowa Code § 22.7(6) Report to Government Agency

For information to qualify as confidential under Iowa Code § 22.7(6), it must, if released, give advantage to competitors and serve no public purpose to be disclosed. That is not the case here; public access and understanding of the Studies, the Studies Data, and/or other information contained in the Studies would serve a significant public

purpose. Public purposes that would be served by disclosure include providing transparency regarding MidAmerican's capital investments in generating assets that are to meet capacity, reliability, and cost goals; the impact of MidAmerican's Destination Net Zero generation portfolio strategy on the utilities' business and costs ratepayers will be asked to support; the prudency of incurred investment; and available alternatives to the proposed investment strategy. It is difficult to imagine a more impactful decision to the Iowa ratepayers within MidAmerican's monopoly service area than a multibillion-dollar, long-term capital investment strategy for the provision of electric generation assets. Therefore, since it would serve a public purpose for the information contained in the Studies and the Studies Data to be disclosed, neither qualifies for confidential treatment under Iowa Code § 22.7(6).

3. Iowa Code § 22.7(18) Voluntary Reports

As the Board has repeatedly held in prior examinations of confidentiality requests in multiple dockets, including in the Order Granting Applications for Confidential Treatment issued August 18, 2022, in this docket, the Board does not consider Iowa Code § 22.7(18) to be applicable to information provided by rate-regulated utilities in a contested case proceeding. MidAmerican fails to articulate a rationale for why its initiation of an advance ratemaking petition, which is by definition a contested case hearing, does not automatically disqualify the applicability of this exception.

Further, MidAmerican has asserted that there is "no statute, rule, procedure or contract of or with the Board that requires these specific documents to be produced." (*See* MidAmerican Response). The Board does not agree that it lacks authority to require submission of the Studies, or more generally studies regarding the long-term

capital investment strategy of a rate-regulated utility. Indeed, MidAmerican itself acknowledges the extent of the Board's authority through this docket. MidAmerican's Application is a request to deem, in advance of the normal rate case process, that a $3.9 billion capital investment in generation assets is prudently incurred and, therefore, the ratepayers within the monopoly territory of the utility are required to pay in their rates the cost of such investment plus a reasonable rate of return to the utility's equity holders. In considering MidAmerican's petition, the Board, pursuant to Iowa Code § 476.53(3)(c)(2), must decide whether the requesting utility has "…considered other sources for long-term electric supply and that the facility or lease is reasonable when compared to other feasible alternative sources of supply." It is incumbent upon MidAmerican to make a *prima facie* case that it has so considered the issues, but the Board retains the ability to request information in evaluating that and other statutory criteria. The Board has in the past, and may in the future, required responses to directives for additional information relating to statutory criteria or requested advance ratemaking principles, which would include subject matter such as the Studies Data and potentially the Studies themselves.

The Studies are clearly relevant to the statutory criteria and could have been required to be produced by the Board. MidAmerican's choice to not provide the Studies as supporting evidence regarding the statutory criteria in its testimony or exhibits, or disclose the existence or nature of the Studies in response to information required by the Board in its Order Granting Interventions, Continuing Technical Conference Date, and Requiring Information issued June 10, 2022, (*See* Information Requests 21, 24, and 31) is not dispositive on whether or not the Board could require the Studies to be

submitted in the docket. The Board retains its ability to review the business practices, investment decisions, prudency of cost incurrence, generation portfolio composition, and other issues addressed by the Studies. Additionally, the Board would not expect the provision of a long-term capital investment analysis such as the Studies to the Board to dissuade MidAmerican from providing similar information in future ratemaking dockets; indeed, MidAmerican could and likely will be required to provide that information as part of the Board's oversight responsibilities. Therefore, neither the Studies nor the Studies Data qualify for confidential treatment under Iowa Code § 22.7(18).

In conclusion, the Board grants confidential treatment to the Studies Data under Iowa Code § 22.7(3) only, and denies the request for confidentiality of the Studies in their entirety under any of the grounds requested. The Board finds that the proposed redactions offered by the Environmental Intervenors in Exhibit C and Exhibit D to the Objection are reasonable and protective of the confidential Studies Data and consistent with the state of Iowa's policy goal of transparency for the public. It is of public interest to understand the high-level analysis, conclusions, and recommendations considered by MidAmerican regarding long-term capital investment strategy that has material implications for adequate capacity, reliability, and avoiding service outages during peak load events, and represents the investment of billions of dollars for which ratepayers will be responsible.

C. Protective Order

MidAmerican has requested a protective order recognizing the agreements between MidAmerican and the other parties to this docket pursuant to Iowa Rule of

Evidence 5.502(e), which states "[a]n agreement on the effect of disclosure in a state proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order." MidAmerican's request is to incorporate the Protective Agreement and the Discovery Agreement into a Board-issued protective order. Specifically, as stated in Mr. Lowe's affidavit filed with the Confidential Application:

> MidAmerican requests that access to the information, other than the Office of Consumer Advocate, which has already confidentially received the Privileged Documents, be limited to parties to this contested proceeding who have both a confidentiality agreement with MidAmerican that limits access to and use of such information and a discovery agreement with MidAmerican pursuant to Iowa Rule of Evidence 5.502, consistent with those parties that have already received the Privileged Documents in this matter.

MidAmerican's Confidential Application states that, other than the Board and OCA, the Studies are being provided only to parties to the docket who have executed both the Protective Agreement and the Discovery Agreement. It is unclear what additional benefit would be derived from the protective order, and granting the relief requested runs counter to the Board's determination of the extent of confidentiality accorded to the Studies and the Studies Data as previously discussed. Board rules regarding the treatment of confidential information and the existing Protective Agreements should be sufficient to address MidAmerican's concerns with respect to the Studies Data. Therefore, the Board declines to issue a protective order.

D. Privileges Assertion

In addition to requests for confidentiality under the cited statutory provisions, MidAmerican has also asserted that the Studies are subject to attorney-client privilege, attorney work product, and/or self-critical analysis protections that independently allow the Studies to not be disclosed to the public. Since the Studies are being produced to

participants in the docket pursuant to agreements substantially similar to the Discovery Agreement and Protective Agreement entered into by the Environmental Intervenors as stated in MidAmerican's Confidential Application, the assertion of privileges does not relate to the disclosure in discovery of the Studies to other contested case participants, but whether or not the privileges asserted independently overcome the statutory default under the Iowa Open Records Law of publication for the public of information provided in a contested case hearing before the Board.

Both MidAmerican and the Environmental Intervenors have incorporated by reference their arguments made in the filings relating to the Motion to Compel in the context of a discovery dispute, and those arguments will be considered here to the extent relevant to the request by MidAmerican for non-publication of already-produced documents.

As a preliminary matter, the Board will only consider to what extent the privileges claim against publication applies to those portions of the Studies that have not been deemed confidential pursuant to the statutory analysis above (Non-Confidential Information). The Board's determination that the Studies Data is confidential and will not be published, in conjunction with the Protective Agreements in place with parties to the docket, preserves MidAmerican's request for non-disclosure of privileged materials with respect to the Studies Data. The burden of proof rests with MidAmerican to demonstrate the applicability and scope of the asserted privileges with respect to the Non-Confidential Information.

The Board, in its review of case law, finds no support that Iowa recognizes the self-critical analysis protection as asserted by MidAmerican, and indeed the Iowa

Supreme Court specifically declined to extend the self-critical analysis privilege in *Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc.*, 690 N.W.2d 38, 44 (Iowa 2004). Therefore, the Board will limit its review to consideration of assertions of attorney-client privilege and attorney work product to the Non-Confidential Information.

Wells Dairy, as cited by both parties, remains the primary guidance from the Iowa Supreme Court in determining the scope and applicability of attorney-client privilege and attorney work paper privileges to the production of documents, interpreting Iowa Rule of Civil Procedure 1.503(3). In this docket, MidAmerican is asserting an independent exemption to publication of the Studies based on the privileges asserted, issues that are normally resolved as part of the discovery process. The Board believes the guidance of the Court in *Wells Dairy* is on point regarding to what extent documents are considered privileged or should be produced in discovery, as analogous to whether the documents in a contested case hearing before the Board are considered privileged or should be published as required by Iowa Open Records Law.

The *Wells Dairy* Court noted that "[a]n asserted privilege is narrowly construed because it is an exception to rules governing discovery." *Id.* at 49, citing *Hutchinson v. Smith Labs., Inc.,* 392 N.W.2d 139, 141 (Iowa 1986). In this instance, the Board will narrowly construe the asserted privileges because they are seeking to be used as an exception to the Iowa Open Records Law and related rules that are not included in the explicit list of exceptions within the statute. In setting forth the required inquiry, the Court stated:

> The overarching inquiry in determining whether a document was prepared in anticipation of litigation, for purposes of work-product privilege, is whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared

> or obtained because of the prospect of litigation. *Id.* at 48, approvingly citing *8 Wright & Miller § 2024*, at 198–99.

This standard of "because of" the prospect of litigation will guide the Board's analysis below.

Applying that standard to the Studies, the Board finds it difficult to credit that MidAmerican undertook the Studies — an evaluation of the economics of the operation of its coal generating facilities and the optimal capital investment strategy for producing low-carbon electricity to meet capacity and reliability demands — because of the prospect of litigation. The evaluation of the cost-effectiveness of its business practices, and conducting studies to optimize capital investment in generation assets, is part of the ordinary course of business for any utility, or any business. It would be entirely appropriate for the Board to find MidAmerican derelict in its responsibilities as a rate-regulated utility if it was not conducting such studies, and the Board would be deeply troubled to learn that MidAmerican only considers such issues because of potential litigation. The Board's statutory obligation is to ensure that only just and reasonable rates are imposed on customers within MidAmerican's monopoly service territory in Iowa. As part of that obligation, the Board conducts evaluations of the prudency of business decisions made and usefulness of assets purchased or constructed to establish those rates — including operational and capital investment decisions and their alternatives — making consideration of the kind of information contained in the Studies highly relevant to the Board and the public, and a consistent obligation of MidAmerican to consider and provide to the Board as part of conducting its normal business functions.

The Board is cognizant of the multidocket argument between MidAmerican and the Environmental Intervenors regarding the latter's desire to accelerate the retirement of coal-utilizing generating facilities, and the Board makes no statement with respect to that argument here. The fact that the Studies might inform that argument, or that the Studies were requested in some form through counsel for MidAmerican, is not dispositive. As stated in *Wells Dairy,* if documents "would have been created in essentially similar form irrespective of the litigation[,] . . . it [cannot] fairly be said that they were created 'because of' actual or impending litigation." *Id.* at *48*, (quoting *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998)) (alterations in original). As noted above, the Board presumes and indeed can require that MidAmerican produce work similar to the Studies as a regular part of its responsibilities as a rate-regulated utility in Iowa generally, and specifically with respect to the statutory criteria for advance ratemaking set forth in Iowa Code § 476.53(3)(c)(2).

Additionally, Mr. Berntsen's affidavit provided by MidAmerican in support of its claims asserts that the Zero Emissions Study was conducted at his direction to "better inform strategy with respect to generation planning, regulation, and litigation." Generation planning and general regulatory interactions are not grounds supportive of a determination that the Studies were created "because of actual or impending litigation." Generation asset planning is at the heart of MidAmerican's business. Interacting with the Board and the Federal Energy Regulatory Commission are also part of the regular, ordinary, and principal business activities of MidAmerican as a rate-regulated utility. In reviewing the Studies, the Board finds the Non-Confidential Information does not speak to litigation strategies, attorney thoughts or impressions, or other litigation-specific

items. Rather, the Non-Confidential Information speaks to engineering or expert recommendations regarding the future operation of major generation assets and the optimal investment strategy for the construction of additional generation capacity — areas not normally within the realm of advice of counsel regarding litigation. Therefore, the Board determines that the Non-Confidential Information is not covered by the asserted attorney-client privilege and/or attorney work product privilege. The Studies may be published in redacted form as directed above.

This analysis is informed and supported by the fact that it is appropriate for the Non-Confidential Information to be both disclosed and discussed in the docket given the purpose and nature of the advance ratemaking petition submitted by MidAmerican. As determined above, there is significant public purpose and interest in the disclosure of the Non-Confidential Information. The non-redacted portions of the Studies will allow participants in the docket and the public generally to evaluate and opine regarding the Wind PRIME proposal. This is particularly relevant since MidAmerican has argued that other parties' testimony regarding similar analysis of long-term capital investment and/or coal economics is inadequate and insufficient. (*See e.g.* RPU-2022-0001, Hammer Rebuttal at 14-16, 20-22 (filed Aug. 31, 2022).) Having the Non-Confidential Information available for consideration in the docket supports the public goals of transparency and an informed citizenry who may provide comments into the docket regarding the decision the Board is being asked to make by MidAmerican.

Finally, as incorporated by reference, the Environmental Intervenors assert that MidAmerican failed to properly or timely assert the privileges claimed, a position supported by other parties to the docket including OCA, IBEC, and the Tech Customers

in their filings in support of the Motion to Compel. The Board is concerned that it appears MidAmerican failed to timely assert and properly inform other parties of the claimed privilege as required. However, the Board need not reach a determination on whether or not MidAmerican waived its right to assert the privilege with respect to the Studies because, as previously stated, it has determined that the Non-Confidential Information is not privileged and that the Studies Data is confidential pursuant to Iowa Code § 22.7(3) irrespective of whether or not it is privileged.

In conclusion, the Board finds that the Studies Data qualifies for confidentiality under Iowa Code § 22.7(3) as a trade secret, but the Studies as a whole do not qualify for confidentiality under any of Iowa Code § 22.7(3), (6), or (18), nor are they exempt from publication due to asserted attorney-client or attorney work product privileges. A redacted form of the Studies will be published in the docket consistent with the ordering clauses below.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. The application for confidential treatment filed by MidAmerican Energy Company on October 20, 2022, is granted with respect to the information deemed a trade secret in the Zero Emissions Study and the Coal Plant Economics Assessment, as defined in Ordering Clause 3.

2. The application for confidential treatment and protective order filed by MidAmerican Energy Company on October 20, 2022, is denied with respect to the entirety of the Zero Emissions Study and the Coal Plant Economics Assessment and the granting of a protective order.

3. The versions of the Zero Emissions Study and the Coal Plant Economics Assessment filed by the Environmental Law & Policy Center, the Iowa Environmental Council, and Sierra Club on November 3, 2022, as Exhibit C and Exhibit D, respectively, reflecting redactions of the trade secret information granted confidential status under Ordering Clause 1, are approved for publication subject to Ordering Clause 4.

4. Pursuant to 199 Iowa Administrative Code 1.9(6)(d), the Board will hold the information denied confidential treatment under Ordering Clause 2 confidential for 14 days to allow MidAmerican Energy Company an opportunity to seek injunctive relief. After the 14 days expire, the materials will be available for public inspection, unless the Utilities Board is directed by a court to keep the information confidential.

UTILITIES BOARD

Geri Huser Date: 2023.01.18 16:27:14 -06'00'

Richard Lozier Date: 2023.01.19 13:28:21 -06'00'

ATTEST:

Kerrilyn Russ Date: 2023.01.19 15:27:45 -06'00'

Dated at Des Moines, Iowa, this 19th day of January, 2023.