STATE OF IOWA

BEFORE THE IOWA UTILITIES BOARD

IN RE:	)	
	)	**DOCKET NO. RPU-2022-0001**
MIDAMERICAN ENERGY COMPANY	)	
	)	**MOTION TO COMPEL**

The Environmental Law & Policy Center (ELPC), Iowa Environmental Council (IEC), and Sierra Club (collectively, Environmental Intervenors) move the Iowa Utilities Board (Board) for an order compelling MidAmerican Energy Company (MidAmerican) to provide Environmental Intervenors information improperly withheld by MidAmerican based on unsupported privilege claims.

MidAmerican has withheld important and relevant generation planning studies, claiming work product, attorney-client, and self-critical analysis privileges exempted the studies from discovery. MidAmerican bears the burden of showing the privileges it claims exist and apply, and MidAmerican has not met this burden. The Environmental Intervenors move to compel the production of the Zero Emissions study, which MidAmerican conducted internally, and the Coal Plant Economics Assessment conducted by Siemens Energy Business Advisory. In support of the motion, Environmental Intervenors state as follows:

I. Introduction

A. Factual Background and Relevance of the Studies at Issue

MidAmerican filed an application for advance ratemaking principles for the Wind PRIME project to (1) add up to 2,092 megawatts of wind and solar generation and (2) fund technology studies including carbon capture at coal-fired electric generating units. (Application for Advanced Ratemaking (filed Jan. 19, 2022).) In order to evaluate the benefits and costs of MidAmerican's Wind PRIME project proposal and compare the proposal to other reasonable alternative resource additions, Environmental Intervenors sought through the discovery process information regarding the economics of MidAmerican's existing generation, including its coal-fired generating stations. (Motion to Compel, Ex. 7 (filed June 15, 2022), EI DR 20(c) ("Please produce any analysis of the cost-effectiveness of MidAmerican's coal [electric generating units] EGUs.").)

MidAmerican responded with misguided and misplaced objections. The parties were unable to resolve differences, and the Environmental Intervenors filed a motion to compel discovery responses on June 15, 2022.

Environmental Intervenors also sought discovery of generation studies MidAmerican withheld in docket number SPU-2021-0003. The discovery request, EI DR 49, expressly requested that any claim of privilege be accompanied by a privilege log and affidavit from counsel. (Motion to Compel, Exhibit 1 (filed July 8, 2022).) MidAmerican objected on relevance and privilege grounds, but without a privilege log or affidavit. Environmental Intervenors filed a second motion to compel on July 8, 2022.

As noted in Environmental Intervenors' first Motion to Compel MidAmerican's Response to Discovery Requests in this docket (filed June 15, 2022), information regarding the cost-effectiveness of MidAmerican's coal-fired power plants is relevant to this proceeding in several

ways. MidAmerican has tied the revenue sharing mechanism in the existing and proposed advanced ratemaking principles to paying off the undepreciated balances on the coal units. If certain coal units are currently uneconomic, then it may be in customers' best interests to pay the undepreciated balance of those units first in order to facilitate their removal from the rate base. MidAmerican has proposed to investigate installing carbon capture and sequestration technologies at its Louisa and Walter Scott Energy Center Unit 4 (WSEC 4) coal plants (through the "Technology Study Cost" advanced ratemaking principle). Whether these two coal plants are currently economic is directly relevant to whether it makes sense to commit additional ratepayer dollars to potential life-extending investments at those units (*see* Guyer Direct Testimony at 36-38); moreover, the economics of the other units are relevant to whether it was appropriate to select Louisa and WSEC 4 for the investigation, rather than another coal unit.

In addition, all of the coal units hold valuable transmission interconnection rights, which can be reused when the coal units are retired. This point has become even more relevant with the passage of the Inflation Reduction Act, which offers an additional 10 percent tax credit "bonus" for new clean energy projects sited in the same or adjacent census tract as a retiring coal plant. *See* The Inflation Reduction Act, §13101. Moreover, retirement of uneconomic coal units could reduce transmission congestion in a way that would further improve the economics of various alternative clean energy addition options.

Finally, the Board found that the "[i]mpact on baseload generation assets, including coal based generation, and whether retirement plans are changed due to Wind PRIME" is a relevant issue in this docket. ("Order Addressing Potential Consolidation of Dockets" at 4 (May 18, 2022).) MidAmerican has asserted that its coal units are needed to ensure reliable service during times when its wind fleet is not available (Hammer Direct at 36; MidAmerican Energy, "MidAmerican

Energy to hit 100% renewable goal" (June 19, 2018), *available at* https://www.desmoinesregister.com/story/sponsor-story/midamerican-energy/2018/06/19/midamerican-energy-hit-100-renewable-goal/36196051); whether other portfolios of resource additions could more cost-effectively meet system reliability needs is directly relevant to this proceeding.

MidAmerican objected to the information request regarding the cost effectiveness of MidAmerican's coal-fired electric generating units (EGUs) as "beyond the scope" of the docket. (Motion to Compel, at 6-7and Ex. 7 (filed June 15, 2022).) In its response to that motion, MidAmerican for the first time stated that it had documents in its possession responsive to EI IR 20(c), but claimed privilege for the documents. (MidAmerican Response to Environmental Intervenors' Motion to Compel, at 3 (June 22, 2022).) In reply, Environmental Intervenors pointed out that MidAmerican's privilege claim was both untimely and not supported by a privilege log or affidavit as required by the rules of civil procedure. (Environmental Intervenors' Reply to MidAmerican's Response to Motion to Compel (June 24, 2022).)

On July 13, 2022, the Iowa Utilities Board (Board) granted in part the Environmental Intervenors' first motion to compel and ordered MidAmerican to produce responses within seven days. (Order Granting in Part and Denying in Part Environmental Intervenors' Motion to Compel (filed July 13, 2022).) In its Order, the Board found that the information related to the cost-effectiveness of MidAmerican's coal units was relevant and discoverable, noting that the information is relevant to the Technology Study Cost advance ratemaking principle as well as the revenue sharing principle. (Order at 7.) Importantly, the Board further found that "the electric generation industry has significantly changed since the Board's decision in Docket No. RPU-2018-0003, and issues regarding retirement of coal generating facilities and reliability of renewable

generation are issues both at the state and regional level. The proposed construction of an additional 2,000-plus megawatts of wind generation raises these issues in this docket." (*Id*. at 8.) The Board concluded that data request 20(c) will "reasonably lead to the discovery of admissible evidence" and compelled MidAmerican to provide the information requested, and to provide a privilege log for any information to which the Company alleged a privilege exception applied. (*Id*.)

On July 21, 2022, under Board order and more than three months after the original discovery request, MidAmerican filed a supplemental response to EI DR 20(c), alleging privilege for the responsive documents under attorney-client, attorney work product, and self-critical analysis privileges and attaching a privilege log. (EI DR 20 Attachment, Privilege Log.[1]) The privilege log noted that the documents were also responsive to EI DR 49 (addressed in the second motion to compel). MidAmerican's privilege log listed three documents: a "Zero Emissions Study" conducted internally by Neil Hammer, MidAmerican's General Manager for Transmission Planning and Development, dated March 2019; a review of Sierra Club's 2018 Analysis of MidAmerican's Coal Plants, dated September 2019, conducted by Siemens Energy Business Advisory; and a "Coal Plant Economics Assessment" dated March 2020, also by Siemens Energy Business Advisory. (EI DR 20 Attachment, Privilege Log.) MidAmerican subsequently filed an accompanying affidavit from its former general counsel Robert Berntsen on August 8, 2022, almost three weeks after the delayed production of the privilege log, providing additional context regarding the withheld documents. (Affidavit of Robert Berntsen.) The affidavit includes an email in which Mr. Berntsen requested Mr. Hammer to conduct the first study on July 10, 2018 ("Zero

[1] While MidAmerican classifies only one document as responsive to EI DR 20, the description of the documents makes clear that they are all responsive to both EI DR 20 and DR 49, as well as to other discovery requests in the docket.

Emissions Study"). The affidavit did not attach similar emails for the two Siemens study. However, MidAmerican did provide the Siemens contract in response to a separate discovery request in EI DR 117. (Attached as Exhibit 1.)

On August 22, 2022, counsel for IEC, Sierra Club, ELPC, and MidAmerican met to discuss the discovery dispute related to MidAmerican's withholding of documents based on privilege claims. The conversation included a request that MidAmerican identify who had requested the Siemens studies be performed and on what date. MidAmerican indicated that no additional information would be forthcoming. The meeting did not resolve the dispute. Environmental Intervenors have made a good faith attempt to resolve the discovery disputes about privilege claims with MidAmerican before proceeding with this motion.

B. Privileges Asserted

In its privilege log, MidAmerican asserts that attorney-client, work product, and self-critical analysis privileges protect the studies from discovery. In support of these assertions, MidAmerican maintains that the studies were "[p]repared for and at the request of counsel in anticipation of litigation concerning MidAmerican Energy Company's emissions based on efforts to litigate the issue in prior IUB dockets including, but not limited to, MidAmerican's Wind XII and IPL's New Wind 2, as well as Sierra Club litigation in other states." (EI DR 20 Attachment, Privilege Log.)

II. Standard of Review

"Discovery rules are to be liberally construed to effectuate disclosure of all relevant and material information to the parties." *Hutchinson*, 392 N.W.2d at 140–41 (citing *Mason v. Robinson*, 340 N.W.2d 236, 241 (Iowa 1983)). There is a "general rule that the public 'has a right to every man's evidence.'" *Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc.*, 690 N.W.2d 38, 49

(Iowa 2004) (quoting Note, *The Privilege of Self-Critical Analysis*, 96 HARV. L. REV. 1083, 1083–84 (1983)). Asserted privileges are to be "narrowly construed" because they are exceptions to Iowa rules governing discovery, *id.* (quoting *Carolan v. Hill*, 553 N.W.2d 882, 886 (Iowa 1996)), and the party asserting a privilege bears the burden of showing not only that the privilege exists but also that it applies. *Exotica Botanicals, Inc. v. Terra Int'l, Inc.*, 612 N.W.2d 801 (Iowa 2000) (citing *Hutchinson v. Smith Labs, Inc.*, 392 N.W.2d 139, 141 (Iowa 1986)).

III. Argument Summary

MidAmerican has withheld important and relevant generation planning studies, claiming work product, attorney-client, and self-critical analysis privileges exempted the studies from the broad discovery rule. MidAmerican has made a general claim that the documents were prepared in anticipation of litigation based on arguments raised by intervenors in prior dockets, and that is the only basis provided for all three of the claimed privileges. MidAmerican bears the burden of showing the privileges it claims exist and apply, and MidAmerican has not met this burden.

The attorney work product doctrine shields from disclosure certain attorney files, prepared "in anticipation of litigation." IOWA R. CIV. P. 1.503(3). The primary purpose is to provide an attorney with a "'zone of privacy' within which to think, plan, weigh facts and evidence, and candidly evaluate a client's case, and prepare legal theories." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980). Courts have found this protection necessary in order to preserve the integrity of the "adversary trial process." *Id.* Accordingly, documents that are not prepared in anticipation of litigation, including documents prepared in the ordinary course of business, are not protected. The Zero Emissions Study and Coal Plant Economics Assessment are precisely the type of routine utility planning documents to which the privilege exemptions should not apply, particularly for a utility like MidAmerican that has both a 100% Renewable Vision and

a Net-Zero goal. Because the Zero Emissions Study and the Coal Plant Economics Assessment at issue here were prepared in the ordinary course of business, and not in anticipation of litigation, the Board should reject MidAmerican's work product doctrine claim.

The attorney-client privilege prevents attorneys from disclosing "confidential communication between an attorney and the attorney's client . . . against the will of the client." *Keefe v. Bernard*, 774 N.W.2d 663, 669 (Iowa 2009). The privilege exists in order to protect communications about legal problems. *Young v. Gibson*, 423 N.W.2d 208, 209–10 (Iowa Ct. App. 1988). The privilege does not shield relevant information from discovery where the communications at issue do not pertain to a client seeking legal advice or counsel providing legal advice. MidAmerican's claim of attorney-client privilege is an attempt to turn ordinary utility business decisions and evaluations into privileged communications by simply involving an attorney. MidAmerican has not met its burden of showing that these documents were produced because of litigation or for the purpose of MidAmerican procuring legal advice, and the Board should reject MidAmerican's attorney client privilege claim.

MidAmerican has also asserted a general privilege of self-critical analysis, despite the rejection of such a general privilege by Iowa courts and the inapplicability of the narrow self-critical analysis privilege to MidAmerican's documents. The Board should reject MidAmerican's efforts to expand the self-critical analysis privilege to encompass utility planning documents.

The Environmental Intervenors move to compel the production of the Zero Emissions study conducted internally by MidAmerican and the Coal Plant Economics Assessment conducted by Siemens Energy Business Advisory because MidAmerican has not met its burden to demonstrate the documents are privileged.

IV. The Documents at Issue Are Not Protected by the Attorney Work Product Doctrine

A. Work Product Doctrine

Iowa Rule of Civil Procedure 1.503(3) codifies the work product doctrine.[2] This doctrine protects from discovery documents and tangible things that a party or a party's representative prepared "in anticipation of litigation." IOWA R. CIV. P. 1.503(3). In other words, in order "[t]o constitute work product, something must be (1) a document or tangible thing, (2) prepared in anticipation of litigation, and (3) prepared by or for another party or by or for that party's representative." *Iowa Insurance Institute v. Core Group of the Iowa Association for Justice*, 867 N.W.2d 58, 70 (Iowa 2015). A document must satisfy each to shield it from discovery, and the simple fact that a lawyer was involved in the preparation of a document does not automatically convey work product status upon that document. *See United States v. Textron Inc. & Subsidiaries*, 577 F.3d 21, 29–30 (1st Cir. 2009)[3] ("Nor is it enough that the materials were prepared by lawyers or represent legal thinking. Much corporate material prepared in law offices or reviewed by lawyers falls in that vast category."); *Petersen v. Douglas Cnty. Bank & Trust Co.*, 967 F.2d 1186, 1189 (8th Cir. 1992) ("Documents are not protected under the work product doctrine, however, merely because the other party transferred them to their attorney, litigation department, or insurer."); *Nicklasch v. JLG Indus., Inc.*, 193 F.R.D. 570, 573 (S.D. Ind. 1999) ("There is . . . consensus in the case law that the involvement of an attorney is not enough to convey work product status.")

[2] The Board's administrative rules apply the Iowa Rules of Civil Procedure to contested cases. 199 Iowa Admin. Code § 7.15.

[3] The Iowa rule mirrors Federal Rule of Civil Procedure 26(b)(3). As such, cases interpreting Federal Rule of Civil Procedure 26(b)(3) provide guidance to Iowa courts interpreting Iowa Rule of Civil Procedure 1.503(3). *Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc.*, 690 N.W.2d 38, 44 (Iowa 2004) (citing *Ashmead v. Harris*, 336 N.W.2d 197, 198 (Iowa 1983)).

The primary inquiry for reviewing a work product claim is whether the document or other tangible thing was "prepared in anticipation of litigation." In *Wells Dairy, Inc. v. American Indus. Refrigeration, Inc.*, the Iowa Supreme Court adopted its current standard, which requires courts to assess "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.'" 690 N.W.2d 38, 48 (Iowa 2004) (citing 8 Wright & Miller § 2024, at 198-99) (emphasis added). While a document does not necessarily lose protection when multiple motivations factored into its creation, *Wells Dairy, Inc.*, 690 N.W.2d at 48, documents that "*would have been created in essentially similar form irrespective of the litigation . . .* cannot fairly be said [to have been] created 'because of' actual or impending litigation." *Id.* (quoting *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998)) (alterations omitted and emphasis added). In essence, the "because of" test requires the Board to "consider what would have happened had there been no litigation threat." *Durling v. Papa John's International, Inc.*, 2018 WL 557915, at *7 (S.D.N.Y. Jan. 24, 2018). The burden is on the party asserting the work product doctrine to demonstrate that, but for the prospect of litigation, the documents "would not have been prepared in the ordinary course of business or in substantially the same form." *Id.*

Even documents that may be *useful* in preparing for litigation do not satisfy the "because of" test if those documents would have been "created in essentially similar form" irrespective of the possibility of litigation. *Wells Dairy, supra.* In the insurance business context, courts have routinely found that investigation and evaluation of claims, even if conducted by a lawyer, do not generally qualify as shielded attorney work product, because such documentation is part of the "regular, ordinary, and principal business of insurance companies." *St. Paul Reinsurance Co. v. Com. Fin. Corp.*, 197 F.R.D. 620, 634 (N.D. Iowa 2000) (quoting *Piatkowski v. Abdon Callais*

Offshore, L.L.C., 2000 WL 1145825 at *2 (E.D.La. Aug. 11, 2000). In general, "materials assembled in the ordinary course of business" do not merit the qualified immunity afforded by the attorney work product doctrine. Fed. R. Civ. P. 26(b)(3) advisory committee notes;[4] *see also Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir. 1987) (holding same).

In fact, general litigation risk assessments or general strategies to avoid litigation are likewise insufficient to satisfy the "because-of" test justifying work product protection. *See Chen-Oster v. Goldman, Sachs & Co.*, 293 F.R.D. 547, 553 (S.D.N.Y. 2013) ("[T]o find that avoidance of litigation without more constitutes 'in anticipation of litigation' would represent an insurmountable barrier to normal discovery and could subsume all compliance activities by a company as protected from discovery.") (citation omitted); *see also Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401-02 (8th Cir. 1987) (noting that general litigation planning can be a subset of business planning). In *Chen-Oster v. Goldman, Sachs & Co*, the court found that "[w]hile legal risks may ripen into litigation, not all risk management qualifies as anticipation of litigation[,]" and "[g]eneralized steps to avoid non-specific litigation are not accorded work product protection." 293 F.R.D. at 553.

Notably, even when certain documents are found to qualify as attorney work product, disclosure is still appropriate when the "party seeking discovery has substantial need of the materials in the preparation of the case and that the party seeking discovery is unable without undue hardship to obtain the substantial equivalent of the materials by other means." IOWA R. CIV. P. 1.503(3). In making this determination, Iowa courts generally interrogate whether the party seeking discovery has sought other means to obtain the same information. *See, e.g., Shook*, 497 N.W.2d 883 (Iowa 1993); *Squealer Feeds*, 530 N.W.2d 678, 689 (Iowa 1995).

[4] As in Iowa, the Federal Rules of Civil Procedure follow a "because of" test to determine whether a document was prepared "in anticipation of litigation."

The work product doctrine also provides greater protection to an attorney's mental impressions than it does to purely factual analyses. *See, e.g., In re Chrysler Motors Corp. Overnight evaluation Program Litigation,* 860 F.2d 844, 846 (8th Cir. 1988) (holding that the attorney work product doctrine is designed "to prevent unwarranted inquiries into the files and mental impressions *of an attorney*") (emphasis added) (internal citations and modifications omitted); *see Iowa Ins. Inst.*, 867 N.W.2d 58, 70. "Ordinary work product," which includes "raw factual information," is discoverable where the party seeking the information demonstrates a substantial need and inability to obtain the substantial equivalent of the material by other means. *Peterson v. Martin Marietta Materials, Inc.*, 310 F.R.D. 570, 573 (N.D. Iowa 2015).

B. The Documents at Issue Constitute Materials Assembled in the Ordinary Course of Business, and Not in Anticipation of Litigation.

MidAmerican claims that the documents at issue were "[p]repared for and at the request of counsel in anticipation of litigation concerning MidAmerican Energy Company's emissions based on efforts to litigate the issue in prior IUB dockets including, but not limited to, MidAmerican's Wind XII and IPL's New Wind 2, as well as Sierra Club litigation in other states." (EI DR 20 Attachment, Privilege Log.). However, when the assertion is reviewed "in light of the nature of the documents and the factual situation at hand," *Wells Dairy,* 690 N.W.2d at 48, it becomes clear that each document would have been "created in essentially similar form" irrespective of the possibility of litigation. *Wells Dairy, supra.* Each study squarely pertains to MidAmerican's resource planning, which is part of an electric utility's "regular, ordinary, and principal business. . ." *St. Paul Reinsurance Co. v. Com. Fin. Corp.*, 197 F.R.D. 620, 634 (N.D. Iowa 2000) (internal citations omitted). General risk-management actions do not satisfy the standard for work product. *Chen-Oster,* 293 F.R.D. at 553. The documents therefore do not qualify as attorney work product.

The "Zero Emissions Study," authored by Neil Hammer, concerns "the impact of retiring all of MidAmerican's fossil fuel generation and replacing it with wind, solar PV, and storage resources." (EI DR 20 Attachment, Privilege Log.) This is the type of utility study that is necessary irrespective of litigation because it tests the economics of MidAmerican's fossil fuel fleet against viable alternatives. In fact, Mr. Berntsen's affidavit acknowledges that the study was intended "to better inform strategy with respect to *generation planning* [and] *regulation*" in addition to litigation. (Affidavit of Berntsen, ¶ 3 (emphasis added).) This makes sense because in 2018, MidAmerican had already launched its "100% Renewable Vision," a goal that gave its customers the impression that MidAmerican would generate zero emissions electricity. Studying zero emissions and the retirement of fossil fueled generation would be a natural part of MidAmerican's 100% Renewable Vision and ultimately, its "Destination Net Zero," a general commitment by the Company to transition to net zero greenhouse gas emissions. *See* MidAmerican's Destination NetZero website, *available at* www.midamericanenergy.com/net-zero-greenhouse-emissions (last visited Sept. 1, 2022). "Destination Net Zero" is now a central part of MidAmerican's business strategy, and the Company even made it the centerpiece of its 2022 Iowa State Fair display. (Exhibit 2.) MidAmerican's president and CEO Kelcey Brown has testified that "there is growing customer emphasis on being consumers of energy that is net zero for greenhouse gas emissions in each hour of their usage" and that customer preference for net zero energy "is the basis of [MidAmerican's] interest in studying" energy storage, carbon capture technology, and other topics related to net zero emissions. (Direct Testimony of Kelcey Brown at 5.) In a recent presentation, MidAmerican's parent company Berkshire Hathaway Energy stated that "We are striving to achieve net zero greenhouse gas emissions in a manner our customers can afford, our regulators will allow and technology advances support." (OCA Tessier Direct Ex 3, Berkshire Hathaway

Energy 2021 EEI Financial Conference (November 2021) at 15.) This presentation indicates that MidAmerican intends to retire its remaining six coal units between 2031 and 2049 – clearly linking its net zero ambitions to its remaining fossil generation. (*Id.* at 22.) MidAmerican's peer utilities are increasingly committing to a carbon free electricity future and coal plant retirements. For example, NextEra recently announced its "Real Zero" plan,[5] and Xcel was the first utility to announce a commitment to 100% carbon-free electricity by 2050.[6] The pursuit of zero emissions electricity production will continue to be a fundamental driver of MidAmerican's business planning in an effort to remain competitive in attracting customers.

In order to "better inform strategy with respect to generation planning [and] regulation," the Zero Emissions Study included "a load and forecast study which assumes the retirement of fossil-fueled generation assets." (Affidavit of Robert Berntsen, paragraph 3 and email attachment (filed Aug. 8, 2022).) Mr. Hammer, the Company's General Manager for Transmission Planning and Development, conducted the study. The assessment falls within the scope of his ordinary duties. (Hammer Direct Testimony at 1 (filed Jan. 19, 2022) ("I am responsible for overseeing . . . resource planning and evaluation").) As far as can be ascertained from the privilege log, the study is a purely factual piece of analysis. Even if litigation risk were part of the MidAmerican's consideration when developing the study, MidAmerican has been working towards a zero-emissions target for business purposes in the same timeframe. The documents would exist in

[5] "NextEra Energy plans to cut all carbon emissions by 2045, partly via FPL adding 140 GW of solar, storage," Utility Dive, June 14, 2022, *available at* https://www.utilitydive.com/news/nextera-eliminate-carbon-emissions-2045-solar-storage-fpl/625464/?utm_source=Sailthru&utm_medium=email&utm_campaign=Issue:%202022-06-14%20Utility%20Dive%20Newsletter%20%5Bissue:42421%5D&utm_term=Utility%20Dive (last visited Aug. 31, 2022).

[6] "Leading the Clean Energy Transition" (2021) *available at* https://www.xcelenergy.com/staticfiles/xe-responsive/Company/Sustainability%20Report/2021%20SR/2021-Leading-the-Clean-Energy-Transition-SR.pdf (last visited Aug. 31, 2022).

essentially similar form irrespective of litigation and are not protected under the work product doctrine. Given the nature of the document and the factual situation at hand, such is clearly the case for the Zero Emissions Study. The idea that MidAmerican conducted this analysis "because of" feared future litigation rather than "because of" its business planning requirements, when MidAmerican has self-proclaimed goals of 100% renewable energy and achieving net-zero emissions, strains credulity.

Notably, MidAmerican has prepared *and disclosed in this case*, without objection on relevance or privilege grounds, studies with similar (if not identical) goals. For instance, in response to Environmental Intervenors' request for "any cost-benefit or resource modeling analysis MidAmerican has done into the ability for storage, carbon capture, and nuclear to each assist in net zero greenhouse gas emissions in each hour of MidAmericans' customers' usage," MidAmerican produced a study conducted by the not-for-profit electricity consultant RMI on MidAmerican's behalf. (EI Motion to Compel Exhibit 1 (MidAmerican Response to EI DR 5) (filed July 8, 2022)). This study aimed "to assess certain impacts of two accelerated low carbon strategies" and "the establishment of an acceptable, well-defined and cost-effective pathway to achieving net-zero greenhouse gas emissions in the near-term." (EI Motion to Compel Exhibit 1 at 4 (MidAmerican Response to EI DR 44) (filed July 8, 2022).). The RMI study included the assumption [redacted]" (*Id.*, EI DR 5 Attachment at 19.). Yet, MidAmerican has made no attempt to shield the RMI study from disclosure by asserting attorney work product or privilege claims. MidAmerican has not offered any explanation as to how or why the RMI study can be materially distinguished from Mr. Hammer's Zero Emissions study.

Mr. Hammer's study is thus clearly the sort of study produced in the routine course of business of a public utility, particularly one that is contemplating or has made a public commitment to achieving "net zero" emissions. This study should have been produced in response to EI IR 20(c), EI DR 5, and other discovery requests.

The "Coal Plant Economics Assessment" authored by Siemens Energy Business Advisory[7] is a coal plant economic assessment directly responsive to EI IR 20(c), which requested "any analysis of the cost-effectiveness of MidAmerican's coal EGUs [electric generating units]." The scope of work on the coal plant study required Siemens to [redacted] (Ex. 1, EI DR 117 Confidential Attachment.) Despite addressing the topic requested in EI DR 20(c), MidAmerican did not identify in the privilege log that it is responsive to 20(c).

The study is a clear-cut example of basic business planning that MidAmerican would necessarily undertake irrespective of potential future litigation and that should not qualify for the work product exemption. MidAmerican has previously asserted that the Company "***is constantly evaluating the current usefulness of its existing fleet*** and applying a consistent approach to analyzing potential additions to its fleet to serve MidAmerican customers [in order to] maximize[] both flexibility and market responsiveness." Docket no. SPU-2021-0003, "MidAmerican Energy Company's Response to Board Order and Request for Clarification" (filed August 12, 2021) (emphasis added). "[C]onstantly evaluating the usefulness" of existing generation would necessarily require assessing the economics of generation sources. In other words, if

[7] It is further notable that Siemens Energy *Business Advisory* conducted these economic assessments. This suggests that MidAmerican retained the consultancy to evaluate the economics of MidAmerican's coal fleet, a central component of MidAmerican's business, and not provide an opinion on legal risk.

MidAmerican, as it claims, regularly monitors the relative "usefulness" of its generation resources, then it is entirely predictable that, in the normal course of business, MidAmerican would conduct its own independent economic assessment of those assets (e.g., the Coal Plant Economics Assessment). In fact, the *failure* to conduct such assessments would likely have constituted imprudent decision making, as utilities are required to respond to changing factual circumstances. *See, e.g.,* Scott Hempling, *Regulating Public Utility Performance: The Law of Market Structure, Pricing and Jurisdiction*, Ch. 6 at 236 (explaining that, as part of a utility's obligations not to charge "unreasonable," "extravagant," or "wasteful" costs, "a utility seeking cost recovery through rates must show that it 'went through a reasonable decision making process to arrive at a course of action, and given the facts as they were or should have been known at the time, responded in a reasonable manner."). Given how dramatically the economic landscape of coal-fired generation has changed over the past several years as the Board and others have noted,[8] specifically analyzing the economics of MidAmerican's coal fleet would not only be expected, but a required business action. When a report's purpose and goals do not relate to litigation, and the report would have been prepared in similar form regardless of litigation, it was not prepared in anticipation of litigation. *Wells Dairy*, 690 N.W.2d at 48.

The timing of this assessment further suggests that MidAmerican developed it as part of standard business practices, and not in anticipation of litigation. MidAmerican signed the contract for Siemens to conduct its "perform an economic analysis of the Iowa based coal fleet and address

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[8] Order Granting in Part and Denying in Part Environmental Intervenors' Motion to Compel (filed July 13, 2022); see, e.g., IEEFA, "2022 US Power Sector Outlook: The Renewable Energy Transition Takes Off," April 2022, available at https://ieefa.org/wp-content/uploads/2022/04/2022-US-Power-Sector-Outlook_April-2022.pdf ("coal's share of the [U.S.] electricity market has fallen sharply, from 42 percent to 22 percent. These trends will accelerate through 2030").

future economic viability of each individual Iowa unit in the MISO market place," was signed in May 2019, more than six months *after* the final order for the Wind XII contested case docket in which Sierra Club's testimony by Mr. Chernick had been presented. (Ex. 1, EI DR 117, attached as Exhibit 1, at 18.) Siemens completed the study almost a year after the conclusion of the contested case. (EI DR 20 Attachment, Privilege Log.) IPL's New Wind II and the Wind XII docket had both concluded long before then (April 17, 2018 and December 4, 2018, respectively). The contract indicates this study was a purely factual analysis by an engineering and power systems consultant, not a legal piece of analysis. The Board should therefore find that the Siemens "Coal Plant Economics Assessment", like the Zero Emissions Study, is not protected attorney work product.

The norm across the vast majority of rate-regulated public utilities is to disclose analyses of the cost-effectiveness of its generation to both regulators and interested stakeholders, indicating that conducting such studies is a routine business practice throughout the industry. This is of course true when an integrated resource plan is required, as is the case for MidAmerican's sister utility, PacifiCorp, which is also a subsidiary of Berkshire Hathaway Energy. PacifiCorp submits a biennial IRP to its regulators, disclosing the underlying modeling to parties that have signed a nondisclosure agreement. But even where a formal IRP is not explicitly mandated by law, as is the case in Iowa, utilities routinely conduct economic analyses of the cost-effectiveness of generating assets and disclose those analyses to their regulators and the public. For instance, in Tennessee, where no IRP is required, the Tennessee Valley Authority (TVA) nevertheless conducts resource expansion plan modeling and publicly publishes the results. *See,* Integrated Resource Plan, Tennessee Valley Authority, *available at* https://www.tva.com/environment/environmental-stewardship/integrated-resource-plan. In Texas, another state where IRPs are not required, utilities

perform forward-looking economic analyses using resource modeling tools like EnCompass that are disclosed to parties through various proceedings, including Certificate of Public Convenience and Necessity and rate proceedings. *See, e.g.*, *Application of Southwestern Public Service Company to Amend its Certificate of Convenience and Necessity to Convert Harrington Generating Station from Coal to Natural Case*, Pub. Util. Comm'n of Texas, Direct Testimony of Ben Elsey on behalf of Southwestern Public Service Company, Docket No. 52485 (Aug. 27, 2021) *available at* https://interchange.puc.texas.gov/Documents/52485_5_1150434.PDF (discussing 2019 and 2021 economic analyses evaluating the Harrington Generating Station units). Again, it makes sense that utilities would conduct such studies as a routine business practice even where IRPs are not required, because they are necessary to ensure the continued usefulness of their generation assets.

MidAmerican has only made the most generalized claim of anticipation of future litigation. Even assuming for the sake of argument that MidAmerican did intend for the studies to assist in some future, unspecified litigation, general litigation risk management is insufficient to satisfy the "because of" test. *Chen-Oster v. Goldman, Sachs & Co.*, 293 F.R.D. 547, 553 (S.D.N.Y. 2013); *see also Prowess, Inc. v. RaySearch Laboratories AB*, No. WDQ-11-1357, 2013 WL 509021, at *7 (D. Md. Feb. 11, 2013) ("The work product protection only extends to documents created because of a specific litigation is anticipated, and it is not enough that the mere possibility of litigation exists." (alterations in original omitted)).

This is particularly important in the context of rate-regulated public utilities. By claiming that the factual, generation and economic studies at issue are protected attorney work product that were prepared in anticipation of unspecified future litigation, rather than as part of MidAmerican's routine business planning, MidAmerican is attempting to subvert the rules of discovery.

MidAmerican is essentially claiming that it feared that intervenors might challenge the prudence of its decision to continue operation of its coal generation at some point in the future. But, as a rate-regulated monopoly utility, MidAmerican bears the burden of showing that *all* of its resource decisions are prudent. This includes showing that its decision-making process is reasonable. By definition, every single utility decision regarding rate-regulated assets is subject to litigation in a case at some point—most generally, in a future rate case. By MidAmerican's rationale, MidAmerican could shield from discovery documents related to any and all of its decisions because it could allege a concern that those decisions might be challenged in a future proceeding. Under this one-sided standard, MidAmerican could also then cherry pick which studies to share – for example, in this proceeding, MidAmerican has shared the RMI study's results, which the Company claims justify maintaining the status quo (even though they do not), while shielding presumably unfavorable analyses from Board or intervenor scrutiny. (*See* EI Motion to Compel Exhibit 1 at 4 (MidAmerican Response to EI DR 44) (filed July 8, 2022).)

Courts evaluate work product claims within their fact-specific context. Environmental Intervenors were not able to identify an Iowa case or federal case interpreting the application of the work product doctrine to protect generation studies conducted by or for public utilities. Because of the utilities' unique status as rate-regulated monopolies that exist only pursuant to state and federal law, the Board should scrutinize utility claims of work product with particular care to ensure that it is not weaponized against the public interest.

Combined, "the nature of the documents and the factual situation at hand" demonstrate that the Zero Emissions Study and the Coal Plant Economics Assessment would have been prepared in substantially similar form, regardless of any future litigation threat. Mr. Berntsen's affidavit, asserting that these documents were prepared for future litigation purposes, is therefore

unpersuasive and should be given little weight by the Board. *See, e.g., Wells Dairy, Inc.*, 690 N.W.2d at 48 (holding that the district court did not abuse its discretion in affording little weight to an affidavit asserting that a report was prepared to assist with responses to legal claims in light of "other circumstances indicating the report was prepared for business reasons . . ."). The Board should find that the work product privilege does not protect MidAmerican's Net Zero Emissions Study net zero study or the Coal Plant Economics Assessment conducted by Siemens.

C. Even if the Documents at Issue Were Created In Anticipation of Litigation, Disclosure is Appropriate Because the Environmental Intervenors Have a Substantial Need for the Information and the Information Cannot Be Obtained by Other Means.

Even if the Board finds that the MidAmerican created the withheld documents "because of" anticipated litigation, the attorney work product doctrine is not an absolute shield from discovery. Under Iowa Rule of Civil Procedure 1.503(3), documents and other tangible things prepared in anticipation of litigation are still discoverable "upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party seeking discovery is unable without undue hardship to obtain the substantial equivalent of the materials by other means." IOWA R. CIV. P. 1.503(3). For this exception to the privilege to apply, "the party seeking discovery, at the very least, 'must make an independent discovery effort to obtain the same information.'" *Exotica Botanicals, Inc.*, 612 N.W.2d at 809 (quoting *Shook v. City of Davenport*, 497 N.W.2d 883, 888 (Iowa 1993), *overruled on other grounds by Wells Dairy*, 690 N.W.2d at 44–47). Both the Environmental Intervenors' substantial need of the documents and their inability to gain the same information through any other means, despite independent efforts to do so, supports disclosure in this instance.

The Environmental Intervenors have a substantial need for the documents. The studies are highly relevant to this proceeding for the reasons outlined in section I.A., above. The advance

ratemaking principles MidAmerican has proposed in this case include revenue sharing to pay down the capital costs of coal units. If MidAmerican's analyses have shown that certain coal units are no longer economic, customers may be left paying hundreds of millions of dollars in undepreciated capital investments after those assets are no longer "used and useful" because the revenue sharing has not paid down those costs during the units' operation.

Environmental Intervenors have sought to obtain the same information through other means by expending substantial resources to compile expert analysis of the cost-effectiveness of MidAmerican's coal plants and pathways to net zero emissions electricity. *See, e.g., In re MidAmerican Company*; Docket No. RPU-2018-0003 (testimony of Paul Chernick); *In re MidAmerican Company*, Docket No. EPB-2020-0156 (testimony of David Posner); *In re MidAmerican Energy Company*, SPU-2021-0003 (analysis by Synapse Energy Economics). MidAmerican has consistently responded to these analyses by arguing, in part, that MidAmerican disagrees with the methodology used and therefore the analyses are unreliable. For instance, MidAmerican recently criticized a report by the Environmental Intervenors (Synapse Report), claiming that the report did not contain important information on capacity accreditation and the full costs of retiring coal generation, and did not adequately account for reliability needs. MidAmerican Reply to Environmental Organizations, Docket No. SPU-2021-0003 (filed Feb. 15, 2022).

To date, MidAmerican has consistently argued that other parties' efforts to conduct the needed analysis is inadequate and insufficient. *Id.*; RPU-2022-0001, Hammer Rebuttal at 14-16, 20-22 (filed Aug. 31, 2022); RPU-2018-0003, MidAmerican Hammer Rebuttal Testimony, at 10-13 (filed Aug. 18, 2018). What is needed by the Board and intervenors is *MidAmerican's* analysis of the cost-effectiveness of the assets, using a methodology it considers to be reasonable.

MidAmerican, as the monopoly utility, has a unique viewpoint into its generation system that cannot be replicated by an outside party. MidAmerican must share that insight to allow the Board to determine the prudence of its decisions. Further, with MidAmerican's analysis, the parties could attempt to replicate it, correct any problematic assumptions, and conduct alternative analyses.

The Board should not condone practices wherein the utility effectively weaponizes doctrines such as attorney work product to shield information that should rightfully be before both the Board and the public. As the Board rightly noted in its Order compelling MidAmerican to respond to information request 20(c), the coal plants are paid for by ratepayers, and ratepayers—as represented by various intervenors—should be able to review the utility's analysis of the value of those assets owned on their behalf. (Order Granting in Part and Denying in Part Environmental Intervenors' Motion to Compel, July 13, 2022, at 4.)

Further, the analyses at issue are factual, as opposed to the mental impressions or opinions of an attorney. *See, e.g., In re Chrysler Motors Corp. Overnight Evaluation Program Litigation*, 860 F.2d 844, 846 (8th Cir. 1988) (holding that the attorney work product doctrine is designed "to prevent unwarranted inquiries into the files and mental impressions of an attorney") (internal citations and modifications omitted). "Ordinary work product," which includes "raw factual information," is discoverable where the party seeking the information demonstrates a substantial need and inability to obtain the substantial equivalent of the material by other means. *Peterson v. Martin Marietta Materials, Inc.*, 310 F.R.D. 570, 573 (N.D. Iowa 2015). Here, the Environmental Intervenors are not seeking any of MidAmerican's attorneys' post-hoc, subjective interpretations of the analyses at issue, or even edits that may have been subsequently made to the analyses. For example, Environmental Intervenors do not seek disclosure of any attorney notes or emails that discuss the studies or the implications they derived therefrom. Accordingly, the Environmental

Intervenors are not seeking the mental impressions, conclusions, opinions, or legal theories of MidAmerican's counsel. Rather, the Environmental Intervenors merely request that the analyses themselves be disclosed, allowing both the Board and interested stakeholders the opportunity to evaluate the raw data, which speaks for itself.

Environmental Intervenors have repeatedly attempted to produce equivalent generation analyses independently using publicly available information in order to provide relevant analyses as a party to Board proceedings. MidAmerican has consistently and vociferously criticized the shortcomings of the analyses. The Environmental Intervenors have demonstrated a substantial need for the documents and an inability to obtain substantially equivalent information by other means, therefore disclosure is appropriate even if the Board finds MidAmerican prepared the documents because of litigation.

V. Documents at Issue Are Not Shielded from Disclosure By the Attorney Client Privilege Because They Do Not Represent Legal Advice from an Attorney.

The attorney-client privilege prevents attorneys from disclosing "confidential communication between an attorney and the attorney's client . . . against the will of the client." *Keefe v. Bernard*, 774 N.W.2d 663, 669 (Iowa 2009) (quoting *Shook*, 497 N.W.2d at 886); *see also* Iowa Code § 622.10 (codifying the attorney-client privilege). In order for a communication to be covered by the privilege, the communication must be for the purpose of seeking legal counsel. *See Keefe*, 774 N.W.2d at 671-72. In other words, the communication must be "made by the client to procure legal advice or legal services from an attorney." *Kuehl v. Tegra Corp.*, No. 21-0416, 2022 WL 2155269 at *4 (Iowa Ct. App. June 15, 2022) (quoting Laurie Kratky Doré, *Iowa Practice Series: Evidence* § 5.502:1 (Nov. 2021 Update)); *see also Tausz v. Clarion-Goldfield Cmty. Sch. Dist.*, 569 N.W.2d 125, 128–29 (Iowa 1997); *United States v. Jason*, No. 09-CR-87, 2010 WL 1064471, at *2 (N.D. Iowa Mar. 18, 2010) (applying Iowa law). The privilege exists in order to

protect communications about legal problems. *Young v. Gibson*, 423 N.W.2d 208, 209–10 (Iowa Ct. App. 1988). The privilege, then, is decidedly *not* intended to shield relevant information from discovery where the communications at issue do not pertain to a client seeking legal advice or counsel providing legal advice.

The only legal issue that MidAmerican has identified in its privilege log is a general anticipation of litigation. This is an attempt to turn ordinary utility business decisions and evaluations into privileged communications. As described above, MidAmerican has not met its burden of showing that these documents were produced because of litigation. Following the same reasoning, MidAmerican has not shown that the communications of these documents were made for the purpose of MidAmerican procuring legal advice. Once again, the only indications of such are MidAmerican's assertion that the documents were prepared in anticipation of litigation, Robert Berntsen's affidavit claiming the same, and overbroad boilerplate in the contracts with Siemens Energy Business Advisory attempting to claim an indistinct panoply of privileges. These stand in contrast to the documents themselves, which indicate planning, development, and economic purposes. Like other reports for which MidAmerican did not claim privilege, the reports at issue were prepared in conjunction with advancing MidAmerican's 100% Renewable Vision and Destination Net Zero plans irrespective of litigation. MidAmerican has therefore not met its burden of showing that these documents are protected by attorney-client privilege.

Accordingly, any claim by MidAmerican that the documents at issue should be shielded from discovery under the attorney-client privilege is without merit and should be summarily rejected by the Board.

VI. Self-Critical Analysis Privilege Does Not Apply and Should Not Be Expanded by the Board in this Case.

MidAmerican has asserted a general privilege of self-critical analysis despite the rejection of such a general privilege by Iowa courts and the inapplicability of the narrow self-critical analysis privilege to MidAmerican's documents. The Board should reject MidAmerican's efforts to expand the self-critical analysis privilege to encompass utility planning documents.

The self-critical analysis privilege exists to mitigate the chances that the threat of discovery will deter "candid self-examination" or "socially useful investigations and evaluations," *Wells Dairy, Inc.*, 690 N.W.2d at 49 (quoting Donald P. Vandegrift, Jr., *The Privilege of Self-Critical Analysis: A Survey of the Law*, 60 Alb. L. Rev. 171, 176 (1996)). Few federal courts have recognized the privilege, and when they have it has been a narrow privilege. *See,* Jessica Brennan, Mike Zogby & Tiffany Riffer, *From* Bredice *to the Laboratory or the Boardroom: Careful Consideration for Applying the Self-Critical Analysis Privilege in the Review of Internal Process Improvement*, 16 In-House Def. Q. 14, 16 (2021) (explaining that "many courts narrowly apply the privilege, or refuse to apply the privilege at all, rending it 'neither widely recognized nor firmly established in federal common law.'" (quoting *Abdallah v. Coca-Cola Co.*, No. 98CV3679, 2000 WL 33249254, at *5 (N.D. Ga. Jan. 25, 2000)).

There is no general self-critical analysis privilege in Iowa. Instead, Iowa law codifies very narrow self-critical analysis privileges for medical peer review committees and specific environmental audit reports. Iowa Code §§ 147.135 and 455K. The privilege against disclosure for medical peer review committees applies only to "the writings and other records generated by a peer review committee," *Carolan v. Hill*, 553 N.W.2d 882, 886 (Iowa 1996); Iowa Code § 147.135, and the environmental audit privilege applies only to evaluations that are "designed to identify historical or current noncompliance with environmental laws, rules, ordinances, or permit

conditions, discover environmental contamination or hazards, remedy noncompliance or improve compliance with environmental laws, or improve an environmental management system." Iowa Code § 455K.2(2). The party asserting the privilege bears the burden of establishing its applicability, *id.* § 455K.3(5), and the resulting report must be labeled "ENVIRONMENTAL AUDIT REPORT: PRIVILEGED DOCUMENT." *Id.* § 455K.3(1). The privilege does not apply to information obtained by "source[s] not involved in the preparation of the environmental audit report." *Id.* § 455K.6(1). The documents at issue here clearly do not fall into either of these narrow categories

The Iowa Supreme Court has specifically declined to extend the privilege beyond either of these narrow statutory circumstances. *Wells Dairy, Inc.*, 690 N.W.2d at 50. In declining to extend the privilege to new circumstances, the Court in *Wells Dairy* held that the weighing of competing interests, which is necessary before applying the privilege in new contexts, is an exercise appropriately left to the legislature. *Id.* This case has important similarities to *Wells Dairy, Inc.* There, the Court refused to extend the privilege to a type of industry in which the privilege had not previously applied. *Id.* at 49. And like *Wells Dairy*, the reports at issue in this case are fact-based analyses, which do not fall within the privilege. *Id.* at 50 (the privilege is "clearly limited to expressions of opinion or recommendations, and not to facts underlying such opinions or recommendations" (internal citations omitted)).

The Board should not expand the self-critical analysis privilege to utility generation studies not only due to the limitation imposed by the Supreme Court in *Wells Dairy, Inc.* but also because public policy weighs against expanding the privilege to MidAmerican in this circumstance. Self-critical analysis privilege requires a balance between the efficiency and fairness of allowing matters to be argued using all available evidence and the interest in preserving socially useful self-

evaluations. *Id.* at 50. Allowing MidAmerican to shield all of its evaluations of its practices and processes under the self-critical analysis privilege would render the Company a virtual black box. As a regulated monopoly, there is a compelling public interest in maintaining effective regulatory oversight of MidAmerican by the Board, the Office of Consumer Advocate, stakeholders, and the public. Expanding the self-critical analysis privilege would severely undermine that interest. The Board has the "authority to inquire into the management of the business of all public utilities" as well as the ability to "obtain from any public utility all necessary information to enable the board to perform its duties." IOWA CODE §476.2(4). The self-critical analysis privilege as MidAmerican claims here would eviscerate Board authority and oversight. Any benefit gained from allowing MidAmerican to perform such evaluations under impenetrable privilege is comparatively negligible. The legislature has declined to designate such a broad privilege for companies like MidAmerican, and the Board should follow suit.

MidAmerican has asserted a general privilege of self-critical analysis despite the rejection of such a general privilege by Iowa courts. MidAmerican has not attempted to show the applicability of one of the statutory privileges of self-critical analysis, nor could it successfully do so. Therefore, MidAmerican has failed to meet its burden of showing that the self-critical analysis privilege applies to the documents at issue.

VII. Conclusion

MidAmerican's Zero Emissions Study and Coal Plant Economics Assessment are generation planning documents that utilities regularly prepare or commission. These documents were not created "in anticipation of litigation," and, regardless, are purely fact-based analyses that cannot be replicated without undue hardship to the parties, who have a compelling need to review them in this proceeding. Further, MidAmerican has provided nothing to demonstrate that these

documents provide any legal advice, and therefore the attorney client privilege does not apply. The limited self-critical analysis privilege recognized in Iowa statute does not apply, and the Board should not expand the privilege here. Therefore, Environmental Intervenors respectfully request that the Board compel MidAmerican to produce the Zero Emissions Study and Coal Plant Economics Assessment in response to the Environmental Intervenors discovery requests. Further, the Board has indicated a new procedural schedule is pending. The Board's new procedural schedule should allow sufficient time for parties to review these documents once MidAmerican provides them.

Respectfully submitted this 2nd day of September 2022.

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