

STATE OF IOWA
DEPARTMENT OF COMMERCE
BEFORE THE IOWA UTILITIES BOARD

IN RE:

DOCKET NO. DRU-2017-0002

MIDAMERICAN ENERGY COMPANY

**MOTION TO DISMISS AND/OR CONVERT TO AN IOWA CODE § 476.6 RATE
CHANGE PROCEEDING**
And
INITIAL COMMENTS

COME NOW Facebook, Inc. (“*Facebook*”), Google Inc. (“*Google*”) and Microsoft Corporation (“*Microsoft*”) (collectively, the “*Tech Customers*”), and pursuant to the Iowa Utilities Board’s (“*Board*”) May 25, 2017 Order Setting Procedural Schedule hereby submit the following Motion to Dismiss and/or Convert to an Iowa Code § 476.6 Rate Proceeding and Initial Comments, and in support thereof state:

INTRODUCTION

As the Board and MidAmerican Energy Company (“*MidAmerican*”) are aware, the Tech Customers are the owners of large business facilities in Iowa that have large electric loads that they source from MidAmerican. As such, they are among MidAmerican’s largest customers and ratepayers. It is also well-known that the Tech Customers are very strong supporters of renewable energy. In fact, MidAmerican and Iowa governmental officials regularly cite the Tech Customers’ interest in and support for renewable energy as valuable to the state of Iowa.¹

¹ See, e.g., “Wind blown: MidAmerican zeroes in on 100% renewable energy”, <http://www.desmoinesregister.com/story/tech/science/environment/2017/04/22/wind-blown-midamerican-zeroes-100-renewable-energy/100581038/>; “MidAmerican Energy Plans to Invest Additional 280 Million in Wind Generation”, <https://www.berkshirehathawayenergyco.com/news/midamerican-energy-plans-to-invest-additional-280-million-in-wind-generation>; “Iowa’s new energy plan: More renewable energy, stronger power grid”, <http://www.governorswindenergycoalition.org/?p=20175>; Iowa Energy Plan, <http://www.iowaenergyplan.org/docs/IowaEnergyPlan.pdf>, at p. 4.

However, the Tech Customers also believe very strongly that proper regulatory procedural mechanisms and data should drive any Board decisions. They also strongly believe that if there are any risks associated with repowering existing wind generation facilities that will be shouldered by MidAmerican's customer ratepayers, then the benefits that flow from such facilities should also flow directly to the customer ratepayers.

The Tech Customers have two major concerns with MidAmerican's Repowering Filing. First, a declaratory ruling is not the appropriate procedural vehicle in which to examine MidAmerican's repowering proposal, and issuance of a declaratory ruling in this context would violate several Iowa statutes and common law principles. Second, and perhaps even more important, the Tech Customers believe that the prudence of the proposal must be examined now, not when MidAmerican brings its next rate case, which it says will not be for at least ten more years.

MidAmerican's attempt, through the use of an inappropriate declaratory ruling proceeding, to short-circuit a decision on its proposed repowering project should be rejected. The Board must thoroughly consider the proposal in a deliberative process to ensure that it arrives at the right decision. That requires a full investigation, not a 60-day process that limits the involvement of other interested parties. Accordingly, the Tech Customers ask the Board to dismiss MidAmerican's Repowering Filing. Alternatively, if the Board deems it appropriate, it can convert the declaratory ruling proceeding to an Iowa Code § 476.6 rate investigation proceeding, with all due process rights accorded to the intervening parties.

BACKGROUND

On May 12, 2017, MidAmerican filed a Petition for Declaratory Order that asks the Board to declare an exemption to MidAmerican's Energy Adjustment Clause ("*EAC*") Tariff (the "*EAC*

Tariff” or the “*Tariff*”), so as to allow MidAmerican to exclude the Production Tax Credit (“*PTC*”) benefits associated with the repowering of 706 wind turbines from flowing through the EAC, as would otherwise be required in the absence of the requested change in the Tariff (the “*Repowering Filing*”).² MidAmerican states that without the change, it will not repower the wind turbines.³ MidAmerican proposes to defer any determination on the prudence of the repowering proposal until its next rate case, estimated to occur not sooner than ten years from now.⁴

During its last rate case, Docket No. RPU-2013-0004, MidAmerican specifically proposed implementing the EAC Tariff, and specifically proposed including the PTCs in the EAC in an effort to offset costs that MidAmerican proposed to remove from base rates and flow through the EAC.⁵ The EAC Tariff was explicitly the subject of and included in the Non-Unanimous Settlement Agreement filed with the Board⁶, and was the subject of filings following

² “[MidAmerican], pursuant to 199 IAC 4.1, requests that the [Board] issue a declaratory order declaring that MidAmerican can create a specific exemption from the [EAC] in its Tariff. The exemption sought in this docket, if approved by the Board, will allow MidAmerican to exclude the [PTC] benefits from the EAC that are associated with repowering certain existing wind turbines with new equipment.” Repowering Filing, p. 1.

³ “MidAmerican requests an Order from the Board to modify the application of the EAC to allow MidAmerican to retain the PTCs. Without this modification, it will not make sense for MidAmerican to repower the 706 turbines . . .” Repowering Filing, p. 6.

⁴ See, Repowering Filing, p. 7;

⁵ Direct Testimony of William J. Fehrman, p. 16:303-310 (“MidAmerican is proposing to implement a retail EAC in this application. As described by MidAmerican witness Debra L. Kutsunis, the EAC is designed to remove the fuel and purchased power costs related to Iowa jurisdictional sales from base rates and recover such costs through the EAC. Additionally, we propose to include consumable chemical costs and, for the benefit of customers, apply pre-tax-level federal production tax credits (“PTCs”) related to the wind facilities and renewable energy credit (“REC”) sales to offset some of these costs.”); Direct Testimony of Debra L. Kutsunis, p. 13:284, 14:293-96 and (Q. Please describe the Clauses and Riders Schedules portion of the Tariff. . . A. EAC – Energy Adjustment Clause, which recovers costs related to the production of energy and purchased power. This is a new adjustment clause. The application and function of the EAC is discussed further in a later section of this testimony.”)

⁶ Non-Unanimous Settlement Agreement, Docket No. RPU-2013-0004, filed November 20, 2013, p. 4 and attached Clause EAC – Energy Adjustment.

the settlement.⁷

MidAmerican's EAC Tariff provides in pertinent part that:

The cost of energy will be adjusted by the pre-tax amount of any federal production tax credits associated with renewable power projects, grossed up at the rate of 1.643 as entered into account 409.1.⁸

Because the EAC Tariff as proposed by MidAmerican did not comply with the Board's EAC rules, MidAmerican asked for, and was granted, waivers of certain of those rules so as to permit the Tariff as proposed.⁹

ARGUMENT

I. A Declaratory Order Proceeding is Improper for the Sort of Relief that MidAmerican is Requesting.

The relief requested by MidAmerican is not properly considered as part of a declaratory order proceeding. Iowa Code Section 17A.9 provides in part that:

1. a. Any person may petition an agency for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the agency.

b. (1) An agency shall issue a declaratory order in response to a petition for that order unless the agency determines that issuance of the order under the circumstances would be contrary to a rule adopted in accordance with subsection 2. (2) However, any agency shall not issue a declaratory order that would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding.¹⁰

MidAmerican's Repowering Filing is inappropriate because it does not request the Board's

⁷ Additional Information Regarding Energy Adjustment Clause Waivers, Docket No. RPU-2013-0004, filed December 10, 2013.

⁸ MidAmerican Energy Company, Electric Tariff No. 2; Substitute Original Sheet No. 433.

⁹ Order Approving Settlement with Modifications and Requiring Additional Information, Docket No. RPU-2013-0004, issued March 17, 2014, at p. 101.

¹⁰ I.C. § 17A.9.

opinion on the applicability of a statute, rule or order on a specific set of circumstances or facts.

Under the Board's rules, the Board may refuse to issue a declaratory order for various reasons, including the following:

The questions presented by the petition would be more properly resolved in a different type of proceeding or by another body with jurisdiction over the matter.¹¹

In this case, MidAmerican is requesting a change to its EAC Tariff, and tariff changes require a specific set of procedures outlined in Iowa Code § 476.4, .5 and .6 as further detailed below. Accordingly, the Board should refuse to rule on MidAmerican's request for declaratory order.¹²

II. Granting MidAmerican's Request for Declaratory Order Would Violate the Filed Rate Doctrine, which Common Law Doctrine is embodied in Iowa Code §§ 476.4 and .5.

Simply put, the filed-rate doctrine is a common law rule that provides that any entity that is required to file tariffs governing the rates, terms and conditions of service must adhere strictly to those terms. This principle forbids a regulated entity from charging a rate other than the one on file with the appropriate agency, in this case the Board. That is, the legal rights of the utility and the customer are measured exclusively by the published tariff." *AT&T Communications of*

¹¹ IAC 199-4.9(1)(5).

¹² The Tech Customers further urge the Board to order MidAmerican to refrain from filing further declaratory ruling proceedings where the relief requested makes a declaratory ruling proceeding clearly inappropriate. This is the second time in as many months that MidAmerican has filed a declaratory ruling in inappropriate circumstances. *See, Re: MidAmerican Energy Company, Docket No. DRU- 017-0001.* The Tech Customers and other parties should not have to expend significant time and resources to defend against such inappropriate proceedings.

the Midwest, Inc. v. Iowa Utilities Board, 678 N.W.2d 554, 562 (Iowa 2004).¹³

The common law filed rate doctrine has been codified in the Iowa Code as §§ 476.4 and .5. Section 476.4 requires all rates and charges of a public utility to be set forth in tariffs filed and subject to investigation by the Board. Section 476.5 states in pertinent part that, “[n]o public utility subject to rate regulation shall directly or indirectly charge a greater or lesser compensation for its services than that prescribed in its tariffs . . .”

In this case, the filed rate doctrine, in both its common law and statutory embodiments, compels the conclusion that MidAmerican’s declaratory ruling request must be denied. MidAmerican’s EAC Tariff requires the PTCs to flow through the EAC. So long as the Tariff remains in effect, MidAmerican must flow through the PTCs to its customers. MidAmerican candidly admits that its present EAC Tariff requires PTCs to be included in the EAC.¹⁴

¹³ See also, *Carter v. American Tel. & Tel. Co.*, 354 F.2d 486, 496 (5th Cir. 1966) (“A tariff, required by law to be filed, is not a mere contract.”) (emphasis added); *Coon Valley Gravel Co. v. Chicago, R. I. & P. R. Co.*, 41 N.W.2d 676, 677 (Iowa 1950) (“A tariff schedule must be on file with the Iowa State Commerce Commission before service or transportation may be furnished by the carrier, and then only in accordance with the filed schedule.”) (emphasis added); *AT&T Communications of the Midwest, Inc. v. Iowa Utilities Board*, 2003 WL 2527806, *11 (Iowa District Court for Polk County, March 20, 2003) (“The Board rejected AT&T’s argument on the basis the filed rate doctrine states that a filed, tariffed rate should normally be held applicable and enforceable until it is found to be unlawful. * * * Once filed, the tariff exclusively controls the rights and liabilities of the parties as a matter of law. The duly filed tariff is the ‘only lawful charge.’ Deviation from it is not permitted upon any pretext.”) (emphasis added; citations omitted); *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 126 (1990) (“The Act requires a motor common carrier to publish its rates in a tariff with the Commission. This Court has long understood that the filed rate governs the relationship between shipper and carrier.”) (emphasis added; citations omitted); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981) (“These straightforward principles underlie the ‘filed rate doctrine,’ which forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority.”) (emphasis added); *Archer Daniels Midland Co. v. State, Dept. of Commerce*, 485 N.W.2d 465, 467 (Iowa 1992) (The “filed-rate doctrine” provides that “a regulated utility may not charge – nor be forced by the regulatory agency to charge – rates at variance with the filed tariff.”) (emphasis added); *Fibercomm, L.C. et al. v. AT&T Communications of the Midwest, Inc.*, Docket Nos. FCU-00-3, WRU-02-2-290, Order Denying Rehearing, Lifting Stay, and Waiving 199 IAC 22.14(2) “d”(1), at 14 (IUB Jan. 25, 2002) (“AT&T’s argument ignores the filed rate doctrine, which requires that a filed, tariffed rate is normally applicable and enforceable until it is found to be unlawful.”) (emphasis added).

¹⁴ “This provision of the MidAmerican Tariff requires PTCs to be included in the EAC unless and until the Board modifies the application of this provision.” Repowering Filing, p. 7.

MidAmerican also admits that that it is required to adhere to its schedules¹⁵, but then immediately proceeds to ask the Board to exempt it from this requirement.¹⁶ MidAmerican has not sought to change its filed EAC Tariff as it could do utilizing the process outlined in Iowa Code § 476.6. Rather, MidAmerican asks the Board to “declare an exemption” to the Tariff by regulatory fiat. The Board cannot do this. So long as the EAC Tariff language remains as it is currently written, MidAmerican must charge the rates set forth in its EAC Tariff, as provided in Iowa Code §§ 476.4 and .5. The Board cannot “exempt” or “waive” MidAmerican’s compliance with those statutes. As the Board’s rules provide¹⁷ the Board cannot waive (i.e. cannot create an exemption from) a plainly stated statutory requirement.

III. Any Request to Retain PTCs Must Take the Form of a Proposed Tariff Change Filing Pursuant to Iowa Code § 476.6.

Iowa Code § 476.6 provides that a public utility subject to rate regulation shall not make effective a new or changed rate, charge, schedule of regulation until the rate, charge, schedule or regulation has been approved by the Board. While the statute does appear to create one type of exception for automatic adjustments, that exception clearly applies *only* to the up and down fluctuation in monthly charges caused by operation of an approved automatic adjustment mechanism, not to a change in the tariff that provides for the automatic adjustment mechanism itself. MidAmerican’s request to be allowed to retain PTC benefits involves a change in the Tariff itself, which is not the equivalent of the month-to-month costs and revenues flowing through a previously approved automatic adjustment tariff. MidAmerican’s proposed EAC

¹⁵ “MidAmerican’s request is based on the requirement that MidAmerican adhere to its schedules pursuant to Iowa Code § 476.5.” Repowering Filing, p. 8.

¹⁶ “MidAmerican requests that, with respect to the PTC and its application to the repowered facilities identified in this Petition, the Board establish an exemption from this requirement.” Repowering Filing, p. 8.

¹⁷ See 199 Iowa Admin. Code § 1.3(3).

Tariff change, which has the immediate effect of increasing the rates paid by its customers via the EAC, should and must take the form of a proposed tariff change/rate filing pursuant to Iowa Code § 476.6(1) *et seq.* Among other things, written customer notice must be provided pursuant to the procedures established by Iowa Code § 476.6(2) because MidAm's retention of the PTCs requires exclusion of the PTCs from the EAC and consequently increases customer rates/charges.

As a result, the Tech Customers ask the Board to dismiss this proceeding. If the Board believes it is appropriate, the proceeding can be converted to a rate change proceeding under Iowa Code § 476.6, to require MidAmerican to give its customers notice of its proposed Tariff change, to set a procedural schedule which allows for discovery and testimony and thereafter determine whether MidAmerican's proposed Tariff change should be approved.

IV. Iowa Customers are Necessary Parties Who Are Entitled to Written Notice.

Iowa Code Section 17A.9(1)“b”(2) provides that “an agency shall not issue a declaratory order that would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding.”¹⁸ MidAmerican's request for a declaratory order that allows MidAmerican to retain the PTCs substantially prejudices the right of each and every MidAmerican customer to the benefit of the PTCs as explicitly granted by MidAmerican's Tariff.¹⁹ The need for customers to be notified of MidAmerican's Repowering Filing is made abundantly clear when one considers that the substantial revenue effect of the PTCs MidAmerican is asking that it be

¹⁸ I.C. § 17A.9(1)“b”(2)

¹⁹ MidAmerican Energy Company Electric Tariff No. 2, Substitute Original Sheet No. 433.

permitted to retain.²⁰ Accordingly, any change to the EAC Tariff should be considered only after adequate notice is given to all affected customers as part of a § 476.6 proceeding.

V. MidAmerican’s Proposal to Defer any Consideration of the Prudence of its Repowering Plan until its Next Rate Case should be Denied and its Proposal Investigated Now to Clarify Outstanding Questions.

If MidAmerican were proposing to construct a new wind generation facility consisting of 706 turbines, it would have filed an application for advance ratemaking principles (“ARP”) under Iowa Code § 476.53. That code section, however, does not reference “repowering”, in all likelihood because the concept was not conceived of at the time. However, MidAmerican’s repowering proposal represents the equivalent of the construction of a new wind generation facility. As such, the prudence of the proposal and its subsequent impact on ratepayers should be addressed now, not ten or more years from now (the timing of MidAmerican’s anticipated next rate case). In ten or more years from now, the impacted customers may well have changed, and any potential negative rate impacts on Iowa MidAmerican’s residential and business customers will have already been realized through the EAC Tariff.

The fact that the ARP statute does not address repowering does not prevent the Board from looking into the prudence of the repowering proposal. The Board has broad general powers to effect the purposes of its enabling legislation, notwithstanding that certain enumerated powers are set forth. Iowa Code § 476.2(1). Further, the Board has the authority to inquire into the management of the business of all public utilities and to obtain from any utility all necessary information to enable the Board to perform its duties. Iowa Code § 476.2(4). Clearly, a proposal to repower 706 wind turbines that are not yet 10 years old, that are being depreciated over between 20 to 30 years and that are in rate base currently and earning a return for MidAmerican

²⁰ See, Repowering Filing, Confidential Exhibit B.

is something the Board should investigate. In its request, MidAmerican describes the purported customer “benefits” that will be experienced, but does not discuss the costs and other information that is important to determining whether repowering is in the best interests of MidAmerican’s customers.

The repowering proposed by MidAmerican is sizeable, long-lasting and will have important impacts on ratepayers. As such, the proposed repowering should be subject to an adequate review, and should not be rushed. A few examples of needed factual clarifications and overly-optimistic projections include:

- Repowering would increase the output of certain wind farms resulting in more zero cost energy and lower EAC charges.
- There is no substantive analysis supporting many of MidAmerican’s projections.
- As facilities are repowered, a growing amount of existing rate-based investment may no longer be used and useful, and retail customers would be required to pay stranded costs without any obligation on MidAmerican’s part to mitigate those costs.
- How did MidAmerican determine that repowering will reduce capital expenditures?
- What will happen to the functional parts of the wind turbines that are only 10 years old that are being replaced?
- How will repowering impact the operation or costs for MidAmerican’s existing conventional fleet?
- In what ways, if any, will the ratemaking principles/rate treatment previously approved for the wind fleet in question be changed by the repowering proposal?
- Will any of the investment associated with the original facilities be removed from rate base and replaced with the newly repowered facilities?
- Is there any salvage value associated with the replaced equipment and how will that be treated for rate purposes?
- In what way, if any, will depreciation on the repowered facilities be changed?
- In what ways, if any, will repowering change the use of revenue sharing to accelerate depreciation on existing facilities approved in MidAmerican’s last rate case?

These questions and likely many others must be answered before the Board can determine whether repowering is prudent at this time.

CONCLUSION

WHEREFORE, the Tech Customers respectfully request that the Board issue an order permitting their intervention in this docket and to participate as their interests appear and further request that the Board enter an order dismissing MidAmerican declaratory ruling request and/or convert this proceeding to one under Iowa Code § 476.6, setting a procedural schedule which allows for discovery and the filing of testimony, and thereafter determine whether MidAmerican's proposed repowering proposal is prudent and its attendant proposed tariff change is reasonable and just.

Dated June 1, 2017.

Respectfully submitted,

FACEBOOK, INC.
GOOGLE INC.
MICROSOFT CORPORATION

By /s/ Sheila K. Tipton
Sheila K. Tipton

By /s/ Haley R. Van Loon
Haley R. Van Loon

Brown, Winick, Graves, Gross, Baskerville &
Schoenebaum, P.L.C.

666 Grand Avenue, Suite 2000

Des Moines, IA 50309-2510

Tel.: (515) 242-2438 (SKT)

Tel.: (515) 242-2422 (HRV)

Fax: (515) 323-5838 (SKT)

Fax: (515) 323-8522 (HRV)

tipton@brownwinick.com

vanloon@brownwinick.com

THEIR ATTORNEYS