

**STATE OF ILLINOIS**  
**ILLINOIS COMMERCE COMMISSION**

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<b>Illinois Commerce Commission</b>	:	
<b>On its Own Motion</b>	:	
<b>vs.</b>	:	<b>Docket No. 11-0672</b>
<b>MidAmerican Energy Company</b>	:	
	:	
<b>Determination of compliance with</b>	:	
<b>Section 8-101 of the Public Utilities Act</b>	:	
	:	

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**INITIAL BRIEF**  
**OF**  
**MIDAMERICAN ENERGY COMPANY**

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COMES NOW, MidAmerican Energy Company (“MidAmerican”), and submits its Initial Brief in the above-captioned proceeding.

**I. Statement of the Case**

On August 9, 2010, a two man crew was working to replace a guy wire on a MidAmerican pole behind 705 – 5<sup>th</sup> Avenue W., Andalusia, Illinois. The two man crew consisted of Crew Foreman and Journeyman Shawn Felsing and Second Year 4<sup>th</sup> level Apprentice Cecil Hoskins, both employees of The L. E. Myers Co. (“L. E. Myers”). L. E. Myers was an independent contractor employed by MidAmerican to repair certain electric distribution facilities. While replacing the guy wire, Mr. Hoskins removed one of his protective gloves,

contacted the primary jumper wire, and was injured.<sup>1</sup> Mr. Hoskins made a full recovery from his injuries and has returned to work for L. E. Myers.<sup>2</sup>

MidAmerican advised the Illinois Commerce Commission Staff (“Staff”) of the accident and submitted a revised accident report to the Staff on August 10, 2010.<sup>3</sup> Staff sent MidAmerican three sets of data requests which MidAmerican answered on September 15, 2010, October 4, 2010, and November 29, 2010, respectively.<sup>4</sup>

On February 15, 2011, Staff sent MidAmerican a Draft Staff Report to the Commission for MidAmerican’s review. MidAmerican provided a response to the Draft Staff Report on March 10, 2011. On October 5, 2011, the Commission issued an Order initiating a citation proceeding. Attached to the Order was the Staff Report to the Commission, now dated August 26, 2011, and MidAmerican’s Response to the Staff Draft Report to the Commission as Attachment A.

Staff filed the direct testimony of Greg Rockrohr, Senior Electrical Engineer in the Energy Division, on November 22, 2011. MidAmerican filed the direct testimony of Barry Campbell, Vice President – Delivery, on January 12, 2012. At a status hearing on January 19, 2012, MidAmerican and Staff agreed to admit the prefiled direct testimony and exhibits of Mr. Campbell and Mr. Rockrohr, along with the Staff Report to the Commission and Response, and to proceed with the filing of briefs.

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<sup>1</sup> MidAmerican Exhibit 1.1, Page 2.

<sup>2</sup> MidAmerican Exhibit 1.6.

<sup>3</sup> MidAmerican Exhibit 1.5.

<sup>4</sup> MidAmerican Exhibits 1.2, 1.3, and 1.4.

## **II. Summary Statement**

There is little, if anything, at issue in this proceeding. The facts are not in dispute. After MidAmerican filed its testimony, Staff agreed that there were no material facts in dispute and this matter could be briefed for decision.

The applicable law is not in dispute. MidAmerican agrees that it has a responsibility to “promote the safety, health, comfort and convenience of its patrons, employees and the public...” as stated by Section 8-101 of the Public Utilities Act. MidAmerican questions whether Section 8-101 addresses a utility’s contracting practices.

MidAmerican does not believe there is any dispute as to its commitment to safety. As addressed in the direct testimony of MidAmerican’s Vice President – Delivery, the person responsible for oversight of MidAmerican’s electric transmission and distribution operations, MidAmerican has an extensive safety program to minimize the likelihood of any accident impacting workers, contractors and the public.

MidAmerican entirely agrees with three of the four suggestions that Staff witness Rockrohr testified are necessary to demonstrate compliance with the Public Utilities Act. Those four suggestions are:

1. The public utility must require that all work on its facilities and property is performed pursuant to safe working practices, OSHA regulations, and safety rules based on OSHA regulations.
2. The public utility must ensure that all persons performing work on its facilities and property have received training to perform the work pursuant to safe working practices, OSHA regulations, and safety rules based on OSHA regulations.
3. The public utility must inspect work in progress on its facilities and property to ensure that workers are complying with safe working practices, OSHA regulations, and safety rules based on OSHA regulations.

4. The public utility must investigate all OSHA recordable incidents to enable the utility to understand accident causes and then take the steps it deems necessary to avoid future accidents.

What may be at issue is whether MidAmerican has undertaken reasonable steps to address the fourth suggestion, above, with respect to an independent contractor. MidAmerican is not certain whether prior to the submission of Mr. Campbell's testimony there was an actual disagreement or simply a misunderstanding as to the efforts MidAmerican has undertaken.

As addressed in Mr. Campbell's testimony, MidAmerican is committed to the safety of its employees and, as well, to independent contractors retained by MidAmerican. MidAmerican acknowledges there are differences in how it fulfills its safety responsibilities. Nevertheless, its practices are appropriate to minimize the likelihood of accidents whether caused by an employee or by an independent contractor.

As elaborated upon in this brief, there are necessary and appropriate differences in the approach to safety with respect to independent contractors. First, and foremost, MidAmerican takes advantage of industry safety data to eliminate from consideration any potential independent contractor with an unacceptable safety record. MidAmerican believes that such diligence is an important step in preventing accidents from happening in the first place. Second, MidAmerican contractually imposes multiple safety obligations upon its independent contractors. These obligations include compliance with OSHA safety legal requirements, and a requirement to use only qualified personnel who are properly credentialed for the type of work they perform. In addition, MidAmerican provides a Contractor Safety Handbook with which contractors must comply. Third, MidAmerican conducts random site visits to see if contractual obligations are being fulfilled. Fourth, in the event of an accident, MidAmerican takes an active role. A MidAmerican representative goes to the site, reviews the contractor's own safety report, assesses

whether anyone should be removed from the job, and takes actions to ensure that lessons are learned to minimize the likelihood of any future similar accident.

Necessarily, there are some differences between hiring and supervising an employee, and hiring an independent contractor whose employees are not MidAmerican employees.

MidAmerican does not have the right to treat independent contractor employees as its own employees. Nevertheless, safety remains a concern, and MidAmerican has undertaken diligent efforts to minimize contractor accidents, and prevent future reoccurrences of such accidents in compliance with its statutory obligations.

MidAmerican meets the service needs of its customers with a combination of employee and independent contractor labor. MidAmerican uses contractor labor to supplement its employee workforce. However, regardless whether employee or contractor labor is used, all workers are fully trained to perform the jobs assigned and those tasks are performed in accordance with a comprehensive safety program. In the incident prompting this proceeding, the injured worker was a contractor employee subject to the contractor's safety program. The contractor's program was as comprehensive as MidAmerican's and provided a similar degree of attention to the tasks assigned. The accident which occurred was due to an individual worker's momentary lapse of good judgment and was a violation of both the contractor's and MidAmerican's safety programs. Consequently, it would not have mattered which safety program superseded the other; the accident could still have happened.

There is no reason to believe that even had MidAmerican assumed complete responsibility for the actions of all of its contractor workers, and in so doing destroyed the independent contractor relationship, this particular accident would not have occurred. However, loss of the independent contractor relationships would have serious legal and financial ramifications which would be unwise and imprudent.

### **III. Argument**

#### **1. MidAmerican utilized at least three of the four criteria set out in the Staff Report fulfilling its applicable statutory service obligations.**

Mr. Rockrohr submitted four suggestions as to how a utility could demonstrate compliance with Section 8-101.<sup>5</sup> As Mr. Campbell testified, those suggestions are incorporated into MidAmerican's safety and work practices. First, Mr. Campbell testified that MidAmerican does require that all work on its facilities and property be performed pursuant to safe working practices; Occupational Safety and Health Administration ("OSHA") regulations; and safety rules based on OSHA regulations. The requirements are similar whether the work is done by a MidAmerican employee or by a contractor employee. In the case of a MidAmerican employee, this requirement is met through a combination of MidAmerican's safety rules, safety supervision, and safety incident reviews. MidAmerican's safety rules meet or exceed the OSHA rules and are the subject of the collective bargaining process between MidAmerican and the union which represents its workers, The International Brotherhood of Electrical Workers ("IBEW"). In addition, safety supervision is provided by several safety professionals within the organization. Their efforts include conducting random audits and work site visits. Safety incident reviews are also conducted and corrective actions are instituted with the goal of avoiding future incidents. Mr. Campbell, as Vice President – Delivery for MidAmerican, participates in those reviews.

In the case of an independent contractor employee, this responsibility is met through similar efforts. The specific terms of the contract require that the contractor perform the work in accordance with all federal, state, and local laws, including OSHA. The contract also required

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<sup>5</sup> As discussed later, MidAmerican questions Staff's reliance on Section 8-101, but for purposes of discussion will treat the reference to Section 8-101 as a general reference to the Public Utilities Act.

that only qualified personnel perform the work. The record shows MidAmerican required these practices be met. As is the case with MidAmerican's employees, Mr. Hoskins was an IBEW member fully trained to perform the tasks assigned. At the time of the accident, Mr. Hoskins was an experienced 4<sup>th</sup> Step Apprentice who had completed four of the seven steps of the IBEW registered apprenticeship training program.<sup>6</sup> The program included rubber gloving techniques associated with electric distribution construction and qualified him for energized conductor work. Mr. Hoskins was fully trained in his employer's safety program and L. E. Myers Co.'s safety program complied with all applicable requirements. In addition, at the time of the accident, Mr. Hoskins was supervised on-site by a fully qualified Journeyman.

In addition, MidAmerican provides contractors, including L.E. Myers Co., with a copy of the MidAmerican Energy/MidAmerican Energy Holdings Company Contractor Safety Handbook. Contractors are required to comply with federal, state and local regulations and codes, including the OSHA regulations concerning workplace safety standards and conditions. Therefore, it makes no difference whether the individual worker is a MidAmerican employee or an independent contractor employee; MidAmerican requires the work to be done in a safe and effective manner in accordance with all applicable safety requirements, including OSHA. [MidAmerican Exhibit 1.0, at 4-6].

Second, Mr. Campbell testified that MidAmerican does ensure that all persons performing work on its facilities and property have received training to perform the work pursuant to safe working practices, OSHA regulations, and safety rules based on OSHA regulations. In the case of a MidAmerican employee, this requirement is met through a combination of the formal and standardized IBEW registered apprenticeship training program which is a four-year program that includes rubber gloving techniques associated with electric

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<sup>6</sup> Mr. Hoskins has now advanced to being a 5<sup>th</sup> Step Apprentice.

distribution construction, the required review of safety rules and expectations, and random site visits by supervisors and safety personnel. In the case of a contractor employee, this requirement is met through the contractual obligation MidAmerican imposes on contractors to utilize qualified personnel to work on MidAmerican's facilities. The contractor is required to attest to the level of training for each individual on the daily worksheets that are submitted for MidAmerican review. In addition, MidAmerican conducts site inspections to verify the quality of the work being performed. [MidAmerican Exhibit 1.0, at 6-7].

Again, it therefore, makes no difference whether the individual worker is a MidAmerican employee or an independent contractor employee, MidAmerican ensures that the worker is fully trained and capable of performing the work safely, and random site visits are performed.

Third, MidAmerican does inspect the work of its contractors. Mr. Campbell testified that MidAmerican's construction practices incorporate a system of contractor qualification oversight, material inspection, construction specification standards, and oversight of contractor activities as part of its quality management system. This includes MidAmerican conducting on-site inspections of the work being performed. Further, any lessons learned from incidents, including contractor incidents, are reviewed by MidAmerican personnel to potentially avoid similar situations in the future. [ MidAmerican Exhibit 1.0, at 7-8].

Fourth, Mr. Campbell testified that MidAmerican was involved in determining the circumstances surrounding Mr. Hoskins' August 9, 2010 accident. MidAmerican's Safety Supervisor was on-site and determined the circumstances associated with the incident on MidAmerican's behalf. That information was provided to Staff.<sup>7</sup> In addition, Mr. Hoskins' employer, L.E. Myers Co., conducted a review and, as an outcome of that review, prepared a Safety Alert. The Safety Alert included both an investigation report of the August 9, 2010

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<sup>7</sup> MidAmerican Exhibit 1.1

incident and a list of lessons learned resulting from the investigation of the accident. To MidAmerican, it was apparent that L.E. Myers understood the cause of the accident and had taken the appropriate steps to minimize the likelihood of a similar accident occurring in the future. The Safety Alert identified six items to be re-emphasized on all jobs: proper daily job briefing (with additional daily job briefs to be done if hazards change), job hazard analysis, the proper personal protective equipment (PPE) to be worn, minimum approach distance, proper cover up, and proper crew make up. In view of MidAmerican's review of the Safety Alert, it is clear that MidAmerican took the necessary steps "to understand accident causes and then take steps it deems necessary to avoid future accident" and that no further investigation was necessary. [MidAmerican Exhibit 1.0, at 8-10]. MidAmerican can and will ensure that the contractor performs an investigation and communicates the lessons learned with their employees. The results of that review will be shared with MidAmerican's employees as well.

Mr. Campbell further testified that MidAmerican conducted a "stand-down" of all work within an hour of Mr. Hoskins' accident. This consisted of the broadcast of an emergency radio message to all field personnel to immediately stand-down from the work they were doing and to assess that they had the proper work clearances from all energized equipment or the proper cover-up to help prevent brush contact with energized components.

In addition, Mr. Campbell testified that MidAmerican's practice is, and will continue to be, that the circumstances of all accidents will be investigated whether the worker involved is a MidAmerican employee or a contractor employee. This practice enables MidAmerican to learn how accidents happened and what can be done to prevent such accidents in the future. While MidAmerican expects its independent contractors to conduct their own investigation, MidAmerican still performs its own review and determination of the circumstances involved with a contractor accident. MidAmerican, therefore, agrees with the need to investigate, at a

minimum, the circumstances of all OSHA recordable incidents in order to fully understand accident causes, and to take appropriate actions to minimize the likelihood of any recurrence for its own employees and also to work with its independent contractors to do the same.

[MidAmerican Exhibit 1.0, at 10-11].

In summary, MidAmerican is fully aware of, and meets, its responsibilities, whether the worker is a MidAmerican employee or a contractor employee. In situations where contractors are utilized, MidAmerican meets that responsibility through its program of contractor selection which ensures that the:

- Contractors have an acceptable history of safe work practices.
- Contractors have a well-defined comprehensive safety program.
- Contractors supervise the work of its employees.
- Contractors train their workers.

MidAmerican selects its contractors to perform construction, operations, and maintenance activities based on a number of quality expectations such as safety performance, financial stability, operator/employee qualifications, contractor experience and competence, contractor expertise and particular skill, and the contractor's ability to perform the scope of work required.

In another context, Staff appears to acknowledge that there are other means of satisfying this responsibility. The Commission's Gas Engineering Staff recently proposed a comprehensive rewrite of Part 500 – Standards of Service for Gas Utilities and Alternative Gas Suppliers. One of Staff's proposed sections is Section 500.130 Qualified Personnel which reads:

“A utility shall ensure that only qualified personnel install, inspect, test, and adjust meters, auxiliary equipment, and tertiary equipment. A utility shall ensure its employees and agents have received adequate training regarding their specific responsibilities.”

The proposed gas rule correctly focuses on ensuring that workers are properly trained; it does not mandate that the gas utility necessarily perform the training or that the gas utility dictate and monitor every step of the training. It correctly focuses on the end-result; not the means.

2. **Staff has not questioned the safety programs of either MidAmerican or L. E. Myers Co.**

Neither in the Staff Report, nor in the testimony of Mr. Rockrohr, is it claimed that the safety program of L. E. Myers Co., Mr. Hoskins' employer, is inadequate, either in its entirety or as applied to Mr. Hoskins' accident. Further, nowhere in the Staff Report, nor in its testimony, does Staff claim that MidAmerican's safety program is inadequate, in total or as it related to Mr. Hoskins' accident. To the contrary, Staff correctly acknowledges that both MidAmerican's and L. E. Myers' safety programs specifically require that its employees wear safety gloves when working on energized primary conductors.<sup>8</sup>

3. **As a practical issue, the accident in question was due to an individual's momentary lapse of attention and was unrelated to which safety program was being followed.**

It is apparent from a review of the facts that the accident was not due to a failure to have an appropriate safety plan in effect or to reasonably supervise the implementation of such a program. This is not a matter of whether there were adequate safety rules in place. It is not that safety programs did not exist; they did. It is not that the safety programs were not in place; they were. The bottom line is that the necessary safety programs did exist and were in place. The fact is that the accident occurred despite the existence and implementation of comprehensive safety programs.

There has been no showing of any systemic collapse of MidAmerican's oversight of its contractors. As MidAmerican has shown in its direct testimony, there has not been a claim that the accident occurred because ( 1 ) the safety programs were inadequate or lacking in any degree

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<sup>8</sup> Staff Report to the Commission, August 26, 2011, Page 3.

or ( 2 ) either MidAmerican or the contractor employer was remiss in enforcing or supervising the employee prior to the accident. Surely, a single isolated instance of inattention or bad judgment on the part of an individual contractor or worker does not warrant a Commission determination that MidAmerican failed to promote the safety of patrons and employees.

The accident occurred because of a single error in judgment committed by a worker who did not follow established and documented safety practices. As stated on Page 2 of the Staff Report, the accident occurred when Mr. Hoskins removed his safety gloves while attempting to hit the end of a bolt with a hammer on the back side of a utility pole. When swinging the wooden-handled hammer with his ungloved hand, he contacted an energized jumper on the back side of the pole with the head of the hammer. Fortunately, Mr. Hoskins has made a full recovery and has returned to work.<sup>9</sup>

Not all accidents can be avoided by safety programs. Although the potential for accidents is minimized, accidents still can and do happen in spite of diligent safety programs. There is no evidence that anything L. E. Myers Co. or MidAmerican did or did not do would have avoided the accident. There is no evidence that Mr. Hoskins had not been provided the required safety equipment. There has been no suggestion that the L. E. Myers Co. safety program, or the MidAmerican safety program, was lacking in any way. There is also no reason to believe that requiring L. E. Myers Co. to follow MidAmerican's safety program [which prohibited the removal of the safety gloves] instead of L. E. Myers Co. safety program [which also prohibited the removal of the safety gloves] would have led to a different result. It made no difference if Mr. Hoskins was employed or supervised by L. E. Myers Co. or MidAmerican; it was the act of removing his safety gloves which precipitated the accident. The fact that a worker made an error and that an accident resulted does not mean that the safety programs were flawed, that

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<sup>9</sup> MidAmerican Exhibit 1.0 at 17; MidAmerican Exhibit 1.6

supervision was flawed, or that the training was flawed. In the real world of field conditions and human behavior, it matters not which program was violated.

It is not apparent how the greater involvement by MidAmerican in the employer - employee relationship between L. E. Myers Co. and Mr. Hoskins would have prevented Mr. Hoskins from removing his safety gloves and being injured. Nor is it apparent how the abrogation of the company/independent contractor and employer/employee relationships would prevent future instances of safety violations such as may occur due to the momentary lapse of concentration or sound judgment of individual workers. Any decision on the adequacy or implementation of MidAmerican's safety program should be based on the facts of MidAmerican's actual policies and practices. MidAmerican does not condone failures to follow the comprehensive safety programs, but Staff's Report purports to solve a theoretical problem, not one which actually exists.

**4. MidAmerican requires the use of qualified contractor employees.**

The notes of the Commission's October 5, 2011 bench session giving rise to this proceeding appear to raise a concern that MidAmerican's independent contractor workers were less qualified than MidAmerican's own employees. Specifically, the following comment was reported:

“When we have nonemployees of the utilities out there still must be, in my mind, an absolute safeguarding of those folks that are up on the wires. And without laying the blame at anybody's foot, I'm glad that we're going to open up this and look at this issue so that we ensure that the men and woman [sic] that are out there climbing all over our lines, in fact, have been instructed in the safety measures and there's a responsibility factor there. So I look forward to the results of this.” [Commission Minutes, October 5, 2011 Bench Minutes, page 38].

MidAmerican agrees that this concern is a hypothetically valid one. However, the Commission can be assured there is no factual basis for this concern, either as applied to

MidAmerican's operations in general, or as applied to the August 9, 2010 accident involving Mr. Hoskins. As Mr. Campbell testified, MidAmerican ensures that the contractors it employs have a history of safe work practices, have a well-defined comprehensive safety program, and train and supervise their workers. In the sole accident in question, the contractor worker was a union member classified as a 4<sup>th</sup> Step Apprentice in the IBEW union apprenticeship program at the time of the accident, and was engaged in duties for which he was fully trained. He was as qualified as any MidAmerican IBEW union apprentice worker would have been.

In summary, there is no factual basis for believing that contractor workers performing work for MidAmerican are not as fully trained as MidAmerican's own employees, whether in general or as related to the single accident prompting this proceeding.

**5. The Commission-sponsored Jacobs Study provides some evidence that MidAmerican appropriately uses independent contractors.**

Any concern about the qualifications of MidAmerican's contractor workers, or a requirement that MidAmerican must intervene in the contractor's employee/employer relationship, is all the more puzzling given the recent examination of employee workforce levels undergone by MidAmerican, the other Illinois electric utilities, and overseen by the Staff in 2008.

In Public Act 095-0081, The Illinois General Assembly directed the Commission to: "conduct a comprehensive workforce analysis study of each electric utility to determine the adequacy of the total in-house staffing in each job classification or job title critical to maintaining quality reliability and restoring service in each electric utility's service territory." [220 ILCS 5/4-602(a)].

Pursuant to this directive, the Commission retained Jacobs Consultancy, Inc. ("Jacobs") to conduct a workforce study analysis of MidAmerican. The objective and scope of the study was to:

“determine the adequacy of the total in-house staffing in each job classification or job title critical to maintaining quality, reliability, and restoring service in the Utility’s Illinois service territory. The analysis also examines the total number of contractor employees in the same manner as the in-house analysis”<sup>10</sup>

Jacobs concluded that “the overall adequacy of MidAmerican’s workforce has been in harmony with its philosophy of maintaining a consistent level of employees and filling workload peaks and valleys with contractors.”<sup>11</sup> Noticeably, the Study was not critical of MidAmerican’s use of contractors, nor was it critical of MidAmerican’s supervision of contractor workers.

Not only did Staff oversee the workforce analysis study of MidAmerican’s workforce conducted by Jacobs, but Staff also prepared an independent analysis of the Illinois electric utilities workforce focusing on staffing and training benchmarks <sup>12</sup> which was provided to the Illinois General Assembly on August 16, 2010. Ironically, this was one week after Mr. Hoskins’ accident. Staff recommended that MidAmerican “continue the programs as outlined in the Jacobs and MidAmerican Reports.”<sup>13</sup>

MidAmerican is not aware of any concerns about the training or supervision of contractor employees raised by Jacobs, by Staff in its review of the Jacobs Study, or by Staff’s presentation of the Jacobs’ Study to the Illinois General Assembly.

**6. The independent contractor relationship is reasonable and well established under Illinois Law**

As with many, if not all, companies, MidAmerican enters into contracts with other companies to obtain materials and services. As was exhaustively scrutinized in the recent inquiry

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<sup>10</sup> MidAmerican Energy Company Workforce Study Analysis Prepared for Illinois Commerce Commission, Jacobs Consulting, July 7, 2008, page1.

<sup>11</sup> Ibid, page 5.

<sup>12</sup> Report to the Illinois General Assembly; Illinois Commerce Commission Staff Analysis of Electric Utilities’ Workforce: Staffing and Training Benchmarks; August 16, 2010.

<sup>13</sup> Ibid, page 42.

conducted by Jacobs and overseen by the Staff, the retention of contractors to supplement the utility's workforce is commonplace in Illinois and is certainly not limited to MidAmerican.

Among many other matters, it is typical to include provisions in such contracts that protect a company and, indirectly, its customers who may ultimately bear the costs from defective materials, inadequate performance, negligence, etc. Far from being an abdication of any responsibility, it is a prudent business management decision as a means of providing for service to customers at the lowest reasonable cost. Indeed, a failure to contract wisely could be considered to be imprudent and could lead to the assumption of unnecessary risk and costs.

In general, one who entrusts work to an independent contractor is not liable for the acts or omissions of the independent contractor. A reason is because one who hires an independent contractor usually does not supervise the details of the contractor's work and is therefore not in a good position to prevent the contractor from acting negligently. However, if sufficient control is exercised over the independent contractor, then the rationale behind this general rule no longer applies. Madden v. Paschen, 395 Ill. App. 3d 362, 916 N.E.2d 1203, 334 Ill. Dec. 315 (2009); Cochran v. George Sollitt Construction Co., 358 Ill. App. 3d 865, 832 N.E.2d 355, 295 Ill. Dec. 204 (2005).

The Illinois courts have adopted the "retained control" exception which provides that a company is subject to liability for the negligence of its contractor by retaining control over the operative details of its contractor's work. *Ibid*, citing Restatement (Second) of Torts § 414, at 387 (1965).

The Illinois courts have further noted that the mere existence of a safety program, safety manual, or safety director is not sufficient to trigger this exception: Madden, 395 Ill. App. 3d at 382, 916 N.E.2d at 1219, 334 Ill. Dec at 331. Instead, there must be such a retention of a right of supervision that the contractor is not entirely free to do the work on his own way. Restatement

(Second) of Torts § 414, Comment c, at 388 (1965); Shaughnessy v. Skonder Construction Co., 342 Ill. App. 3d 730, 794 N.E.2d 937, 276 Ill. Dec. 687 (2003). For example, in Shaughnessy, the Court held that the contractor could not be held liable for a subcontractor's actions where it had a general right to impact the subcontractor's work, but did not control the way in which the subcontractor's employees carried out their jobs.

MidAmerican has struck the appropriate balance between insuring that its contractors operate safely, on the one hand, and so controlling their actions so that MidAmerican becomes legally liable for the contractors actions, on the other hand. A decision that has the effect of undermining the independent contractor status could result in MidAmerican being responsible for the actions of numerous contractors to the ultimate detriment of its customers.

7. **The ICC should not require a utility to assume direct and comprehensive oversight of the independent contractors' workforce.**

There is a question in this proceeding as to whether MidAmerican should assert a greater role in the control of its independent contractors, indeed to so control every act of its contractors with the legal result that the contractor's workers may well be legally deemed to be MidAmerican's own employees. Such action would be neither wise nor prudent.

When a company exercises a certain amount of control over a third party, it thereby assumes legal responsibility and liability for the actions of that third party. The higher degree of control MidAmerican exercises over a contractor's workers, the greater responsibility MidAmerican will legally assume for the actions of the contractor's workers. MidAmerican will then have been placed in the position of having responsibility for the actions for workers it did not hire, did not train, but it will have assumed the legal and financial responsibility for damages resulting from that employee's negligence or willful misconduct.

L. E. Myers' workers are represented by a union. In the case of Mr. Hoskins, that union is the IBEW. The wages, benefits, terms and conditions of employment of Mr. Hoskins, and others,

are determined by the collective bargaining negotiations between L. E. Myers and the IBEW. MidAmerican, as a third party to those negotiations, does not have a seat at that bargaining table. It would not be appropriate for MidAmerican to superimpose another tier of requirements upon what was the subject of the collective bargaining process. The situation might be different if it was shown that a vacuum existed allowing for unsafe practices to result. However, there is no evidence that the safety practices and programs of either L. E. Myers Co. or MidAmerican are deficient, so no “safety vacuum” exists. Any requirement that MidAmerican dictate and impose its programs into the relationship between L. E. Myers and its represented union employees would violate the negotiated collective bargaining agreement between L. E. Myers and its unions.

In addition, requiring MidAmerican to assume control over a contractor’s work practices could also result in additional liability being imposed upon MidAmerican for injuries sustained by the contractor’s employee in the course of his work for the contractor employer. That responsibility should be borne by the employer who has direct control over all actions of the employee. The employer is the one who has purchased worker’s compensation insurance to cover its employees; not a third party such as MidAmerican.

The purpose of the (Illinois) Workers’ Compensation Act, 820 ILCS 305/1 et. seq., is to provide financial protection for workers who sustain accidental injuries arising out of their employment. Boelkes v. Harlem Consol. School Dist. No. 122, 363 Ill. App. 3d 551, 842 N.E.2d 790, 299 Ill. Dec. 753 (2006). Proof that an employer – employee relationship existed at the time of the accident is an essential element of an award under the Workers Compensation Act. Menard v. Illinois Workers’ Compensation Com’n, 405 Ill. App. 3d 235, 940 N.E.2d 1159, 346 Ill. Dec. 555 (2010). The existence of an employer – employee relationship is generally a question of fact. Reed v. White, 397 Ill. App. 3d 975, 921 N.E.2d 1243, 337 Ill. Dec. 105 (2010).

No rigid rule of law exists regarding whether a worker is an employee or an independent contractor. The single most important factor in determining whether a worker is an employee or an independent contractor for purposes of the Worker's Compensation Act is whether the purported employer has a right to control the actions of the employee. Ware v. Industrial Com'n, 318 Ill. App. 3d 1117, 743 N.E.2d 579, 252 Ill. Dec. 711 (2000).

An independent contractor is not entitled to compensation under the Worker's Compensation Act. Alexander v. Industrial Commission, 72 Ill. App. 2d 444, 381 N.E.2d 669, 21 Ill. Dec 342 (1978). Under Illinois law, the determination of whether the relationship is that of independent contractor or employer/employee is fact – dependent. Among the factors to be considered are the manner of hiring, the right to discharge, the degree of supervision, and most importantly, the right to control, direct the work done. Belluomini v. United States, 64 F. 3d 299 (C.A.7, Illinois 1995). The right to control the work of the general contractor may be sufficient to establish liability on the part of the owner. Kirbach v. Commonwealth Edison Co., 40 Ill. App. 3d 587, 352 N.E.2d 468 (1976).

In this case, the issue is not whether Mr. Hoskins, or a future worker, will receive financial protection for accidental injuries arising out of employment. The issue is whether the responsibility for providing such financial protection should rest with the independent contractor as the employer of the injured worker, or MidAmerican. Illinois case law makes it clear that the most important factor to consider concerns the right to control the actions of the worker. Therefore, the greater the degree of control exercised by MidAmerican over the actions of an independent contractor's worker, the greater the likelihood that MidAmerican will be found to be liable under the Worker's Compensation Act. Dictating the specific provision of an independent contractor's safety program and directly overseeing the administration of the contractor's safety program could likely result in such a determination.

8. **MidAmerican's facilities and management were adequate to fulfill its responsibilities under § 8-101.**

The Commission's October 5, 2011 Order initiating this proceeding stated the purpose is to determine:

“whether MidAmerican Energy Company has failed to comply with the requirements of Section 8-101 of the Public Utilities Act in that it has failed to maintain such service instrumentalities, equipment, and facilities as shall promote the safety, health, comfort, and convenience of its patrons, employees.”

Section 8-101, in its entirety, reads as follows:

“5/8-101. Duties of public utilities; nondiscrimination

§ 8-101. Duties of public utilities; nondiscrimination. A public utility shall furnish, provide, and maintain such service instrumentalities, equipment, and facilities as shall promote the safety, health, comfort and convenience of its patrons, employees, and public and as shall be in all respects adequate, efficient, just, and reasonable.

All rules and regulations made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable.

A public utility shall, upon reasonable notice, furnish to all persons who may apply therefor and be reasonably entitled thereto, suitable facilities and service, without discrimination and without delay.

Nothing in this Section shall be construed to prevent a public utility from accepting payment electronically or by the use of a customer-preferred financially accredited credit or debit methodology.”

The October 5, 2011 Order, and Staff's testimony, focus on the 1st paragraph. By its express language, that paragraph, indeed the entire Section, is concerned with “service instrumentalities, equipment, and facilities,” in other words, the physical facilities utilized by the utility to provide service to the public. The Commission Staff has recently reached the same conclusion when it wrote that: “Section 8-101 imposes an obligation on public utilities to maintain their equipment and facilities as shall be in all respects adequate, efficient, just and reasonable.”<sup>14</sup>

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<sup>14</sup> Report to the Illinois General Assembly, Illinois Commerce Commission Staff Analysis of Electric Utilities' Workforce: Staffing and Training Benchmarks, August 16, 2010, Page 4.

The few reported cases that have interpreted Section 8-101 confirm that the Section addresses the physical facilities that are used to provide service to the public. For example, the cases include interference with a railroad's train – stop system caused by current from transmission lines [Central Ill. Public Service Co. v. Illinois Commerce Commission ex rel. Illinois Central R. Co., 1960, 18 Ill. 2d 506, 165 N.E. 2d 322, appeal dismissed, certiorari denied 81 S. Ct. 123 , 364 U.S. 336, 5 L. Ed. 2d 98]; power to order installation of certain types of equipment and supplies [Brotherhood of Railroad Trainmen v. Elgin J. & E. Ry. Co., 1943, 46 N. E. 2d. 932, 382 Ill. 55]; authority to require railroad to construct and maintain stairway for use of yard employees [Chicago, B. & Q. R. Co. v. Illinois Commerce Commission ex rel. Brotherhood of Railroad Trainmen, 1936, 4 N. E. 2d 96, 364 Ill. 213]; damage to air-conditioning equipment caused by low voltage electricity [Elgin Airport Inn, Inc. v. Commonwealth Edison Co., App. 2 Dist. 1980, 43 Ill. Dec. 620, 88 Ill. App. 3d 477, 410 N. E. 2d 620, affirmed in part, reversed in part on other grounds, 59 Ill. Dec. 675, 89 Ill. 2 d 138, 432 N. E. 2d 259]; no duty to insulate all electrical wires [Clinton v. Commonwealth Edison Co., App. 1 Dist. 1976, 36 Ill. App. 3d 1064, 344 N. E. 2d 509].

There is no evidence that MidAmerican's "service instrumentalities, equipment and facilities" was the cause of the accident cited. A greater involvement in managing the safety programs of independent contractors is not the type of issue that is the focus or subject of Section 8-101.

Nothing in Section 8-101 suggests that it was intended to address the specifics of a utility's contractual relationship with its independent contractors, to abrogate or modify the utility's contracts with such third parties, to interfere with the collective bargaining practices of the utility and its contractors, or to be used as a means of discouraging the use of third party

contractors. Clearly, there is no issue with regard to the adequacy of MidAmerican's physical facilities.

**9. Staff's concerns, if pursued, should be the basis for a statewide proceeding; not a show cause case against MidAmerican.**

This proceeding is a limited one directed solely at MidAmerican. Further, it is even more limited when the proffered justification for the proceeding is a single, isolated incident. No evidence beyond the August 9, 2010 accident involving Mr. Hoskins has been presented by Staff suggesting MidAmerican's safety practices in general, or those of any other electric utility, are inadequate or in need of Commission review. However, the implications of an order adverse to MidAmerican could have widespread ramifications beyond MidAmerican's contractor review practices. The Commission could launch a generic investigation into the contracting practices of Illinois electric utilities, but this is not the proceeding, or the record, upon which any finding of inadequacy can be found. However, such an investigation would also be redundant given the recent exhaustive study performed by Jacobs Consultancy, Inc. conducted at the direction of the Illinois General Assembly and overseen by Staff.

A single accident caused by the momentary lapse of attention by a single worker – whether that worker be employed by MidAmerican or by a contractor – is not sufficient to call into question the overall safety and contracting practices of MidAmerican or the Illinois electric utilities.

**IV. Conclusion**

In summary, the evidence shows that MidAmerican Energy Company's policies and practices are in full compliance with the pertinent provision of the Illinois Public Utilities Act. Therefore, MidAmerican Energy Company respectfully requests the Illinois Commerce Commission issue an order confirming that MidAmerican is in full compliance with Section 8-101 and all pertinent provision of the Public Utilities Act; that MidAmerican's use of

