

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

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

REPLY BRIEF
OF
MIDAMERICAN ENERGY COMPANY

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

I. Summary Statement

The initial briefs demonstrate that the Commission Staff and MidAmerican are in agreement that the fundamental issue in this proceeding is whether MidAmerican has complied with the requirements of Section 8-101 of the Public Utilities Act with respect to the promotion of the safety, health, comfort and convenience of its patrons, employees.

Barry Campbell, the MidAmerican officer with responsibility for MidAmerican’s electric and gas distribution facilities in Illinois and the other three states in which MidAmerican provides utility services, provided testimony and exhibits addressing this issue. His evidence covered both MidAmerican’s overall approach to ensure that independent contractors perform

safely, as well as the specific safety measures MidAmerican undertook both before and after the incident involving an L.E. Myers employee. He was not cross-examined regarding such sworn testimony and exhibits.

The initial Staff brief in important respects did not fully acknowledge MidAmerican's practices addressed by Mr. Campbell demonstrating overall, and with regards to the L.E. Myers matter in particular, that MidAmerican has undertaken sound and reasonable efforts to promote public safety with respect to the use of independent contractors.

As addressed in the body of this Reply Brief, the evidence in this proceeding demonstrates:

- MidAmerican makes its own judgment as to the cause of any accident, whether the accident involves a MidAmerican employee or a third party.
- With respect to the L.E. Myers matter, MidAmerican undertook a number of independent initiatives to confirm that it fully understood the cause of the accident, and that lessons learned from the accident were passed on both to MidAmerican employees and L.E. Myers employees in a conscientious effort to minimize the reoccurrence of a similar incident.
- The uncontroverted evidence shows that MidAmerican has a process in place and utilized such process to avoid hiring any contractors with poor safety records.
- There is no evidence that improper safety training had taken place prior to the accident.
- Hypothetical concerns unrelated to the incident in question do not give rise to a violation of the Public Utilities Act.

II. Argument

- 1. MidAmerican engaged in multiple efforts to assess the accident in question, and undertook proactive measures to minimize the potential for any future similar accident.**

On page 5 of its Initial Brief, Staff states "MEC does not monitor the investigation activities." This statement is incorrect. Mr. Campbell testified as to the steps taken by

MidAmerican in monitoring the investigation activities of the contractor; specifically, the steps taken concerning Mr. Hoskins' August 9, 2010 accident. As Staff concedes on page 10 of its Initial Brief, MidAmerican had a safety supervisor physically on-site and determined the circumstances of the incident on MidAmerican's behalf. MidAmerican's safety supervisor's notes were provided to the Staff. [MidAmerican Exhibit 1.0 at 9; MidAmerican Exhibit 1.1.] Notably, Staff has not questioned the adequacy or contents of Mr. Pauley's notes. MidAmerican also notes that when Mr. Pauley arrived on-site, three other MidAmerican employees were already there. [MidAmerican Exhibit 1.1, page 2.]

In addition, Mr. Hoskin's employer (L.E. Myers) prepared a Safety Alert as a result of its review of the accident. The Safety Alert consisted of an investigative report of the accident and a list of lessons learned. MidAmerican did not simply accept the Safety Alert at face value and file it away, but conducted its own review of the Safety Alert and was able to determine that the contractor understood the cause of the accident and that sufficient action had been taken to minimize the likelihood of a similar accident happening in the future. [MidAmerican Exhibit 1.0 at 9-10].

Further, Mr. Campbell testified that MidAmerican conducted a stand-down of all work within less than one hour of the accident. This stand-down consisted of a message being sent to all field personnel to immediately cease work and to confirm that they had the proper work clearances from all energized equipment or the proper cover-up to prevent brush contact with energized components. [MidAmerican Exhibit 1.0 at 10-11].

These activities constitute far more than a passive "monitoring" of the actions of another. Contrary to Staff's characterization, these activities constitute active participation in the investigation of the accident and a clear intention to proceed further if it had been determined that the initial investigation was lacking in some manner. As Mr. Campbell testified, 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. Mr. Campbell noted that, based on MidAmerican's assessment (not that of the contractor), MidAmerican may or may not agree as to the reasonableness of the contractor's investigation and conduct. [MidAmerican Exhibit 1.0 at 11].

2. Hypothetical concerns are not grounds for finding any Public Utilities Act violation.

Staff's reference to "the Commission regulates MEC – not MEC's contractors" is not the issue. This proceeding is not about the authority or jurisdiction of the Commission; it is about the provision of safe electric service to the public. In this regard, Staff has failed to provide any factual support for its claims that MidAmerican's safety programs or practices have resulted in any diminished level of public safety.

Staff raised hypothetical concerns. Those concerns are not supported by the facts of this case. The circumstances surrounding the one accident that prompted this show cause proceeding were investigated; MidAmerican did participate in the accident review; and Staff has made no showing that the investigation and review was deficient in any way.

On Page 11 of Staff's Initial Brief, Staff states:

By allowing a contractor to perform the only direct investigation of an accident, the utility incents the contractor to skew the facts of an investigation more favorable than if another interested entity did an investigation. Relinquishment of this responsibility by MEC to perform its own investigation could lead to unsafe work practices/policies remaining undiscovered or ultimately discovered only after a serious injury or fatality has occurred.

This appears to be the only supported justification for Staff's insistence that the utility conduct all accident investigations, irrespective of whose employee was involved. MidAmerican objects to this characterization. There is no factual basis for this accusation directed against MidAmerican or L.E. Myers. It is MidAmerican's actual practices, specifically those involved in

the investigation of Mr. Hoskins' accident, that are at issue in this show case proceeding; not hypothetical concerns. As noted in the previous section of this Reply Brief, in MidAmerican's Initial Brief and as testified to by Mr. Campbell, MidAmerican's active involvement addresses Staff's concern about a possible bias in a contractor's investigation of an accident. Staff has raised a general concern divorced from the question as to whether MidAmerican adequately undertook measures to minimize the potential of an accident, and subsequently to minimize the potential for any reoccurrence. Such general concerns might be considered in a rulemaking proceeding in which general concerns and responses could be examined resulting in a rule of statewide application. Instead, Staff initiated a show cause proceeding directed solely against MidAmerican without factual support of the likelihood that its hypothetical concerns either are or are likely to become real problems.

3. MidAmerican has a comprehensive and sound safety program in place.

Staff's focus in this proceeding is on the investigation of accidents involving Company or contractor employees. Staff ignores the remainder of the comprehensive safety programs that MidAmerican has in place, and that MidAmerican requires its contractors to have in place. Staff is focused solely on the means, rather than the ultimate goal to be achieved. In contrast, MidAmerican's focus is on public, contractor and employee safety. MidAmerican recognizes there is more than one way to achieve that goal. Staff does not fault either the quality and scope of MidAmerican's, and its independent contractors', safety programs. MidAmerican does not minimize the importance of past-accident investigations, but to focus on one aspect of a comprehensive safety program to the exclusion of all else does not put MidAmerican's comprehensive safety efforts into a proper perspective.

4. MidAmerican's efforts to ensure contractor safety commence at the outset of the contractual relationship and contain multiple elements.

On Page 7 of its Initial Brief, Staff refers to “MidAmerican’s apparent practice of ignoring the safety practices of contract employees who work on its facilities or property.” There is no factual basis for this statement. Quite to the contrary, Mr. Campbell testified that MidAmerican’s concern with contractor and contractor employee safety begins at the very outset of the relationship when a contractor is retained. MidAmerican reviews prospective contractors’ safety histories and does not retain a contractor who does not meet MidAmerican’s safety expectations and standards. [MidAmerican Exhibit 1.0 at 14]. In addition, MidAmerican contractually obligates its contractors to adhere to all applicable Occupational Safety and Health Administration (“OSHA”) regulations and standards. [MidAmerican Exhibit 1.0 at 14]. Staff misinterprets this step as an abdication of MidAmerican’s responsibility. It is not; rather, it is a means enabling MidAmerican to contractually enforce adherence to the safety standards by resorting to the remedies set forth in the contract.

Finally, MidAmerican follows through with the contractors when a safety incident does occur. As Mr. Campbell testified, this action could extend to the removal from MidAmerican’s property of those not meeting MidAmerican’s standards. [MidAmerican Exhibit 1.0 at 14]. Far from being a violation of Section 8-101, to the extent that statute is relevant to a utility’s contracting practices, the selective retention of contractors with a demonstrated and documented history of safety coupled with MidAmerican’s contractual performance remedies and ongoing reviews demonstrate compliance with its responsibilities under the Public Utilities Act.

As MidAmerican explained in its response to Staff Data Request ENG 2.2, contractors are provided a copy of The MidAmerican Energy/MidAmerican Energy Holdings Company Contractor Safety Handbook. Furthermore, contractors are required to comply with all federal, state and local regulations and codes including OSHA 29 CFR 1910.269 Electric Power

Generation Transmission, and Distribution. As MidAmerican stated in its response to Staff Data Request ENG 2.6, a failure to comply with safety or engineering standards or regulations can result in the termination of the contract and the removal of the contractor from MidAmerican property. Further, MidAmerican employs inspectors to perform spot checks to ensure safe work practices and to ensure electric and gas standards are followed. These, along with the other actions taken by MidAmerican detailed in MidAmerican's responses to Staff Data Request ENG 3.1– 3.9, are not the actions of a utility that “contracted away all of its responsibility for the safety of Myers employee.” [Staff Initial Brief at 9-10].

5. MidAmerican's potential liability is not analogous to governmental law enforcement agencies.

On Page 11 of its Initial Brief, Staff states:

the fact that MEC performs an investigation does not mean that MEC assumes liability for the incident, just as a law enforcement body does not assume liability when it investigates an accident.

That position is factually and legally incorrect. First, Staff overlooks the broad immunity granted to law enforcement and public entities for actions taken in performance of their duties. For example, the Local Government and Governmental Employees Tort Immunity Act, 745 ILCS 10/1-101, et. seq., grants broad immunity to public entities and public employees. 745 ILCS 10/2-105 provides that a public entity is not liable for injury caused by its failure to make an inspection, or by reason of making an inadequate or negligent inspection. Similarly, 745 ILCS 10/2-207 provides that a public employee is not liable for an injury caused by his failure to make an inspection, or by reason of making an inadequate or negligent inspection. Similar immunities for state employees are found in the State Lawsuit Immunity Act, 745 ILCS 5/1, et. seq. Absent these statutory immunities, there would be no basis for believing that a state or local agency or

employee would not be vulnerable to suit for its failures or negligent actions. MidAmerican does not have any statutory immunity from suit or responsibility.

Further, the independent contractor/company and employer/employee relationships discussed on pages 15 through 19 of MidAmerican's Initial Brief are not at issue when a law enforcement officer investigates a car accident. In contrast, the well developed body of Illinois court decisions cited by MidAmerican in its Initial Brief make it clear that the Illinois courts have adopted the "retained control" exception providing that a company is subject to liability for the negligence of its contractor and worker's compensation liability, for example, by retaining control over the operative details of its contractor's work. [MidAmerican Initial Brief at pages 15-19 and the cases cited therein.].

6. Neither the accident nor MidAmerican's subsequent actions involved any defect with respect to MidAmerican's service instrumentalities, equipment and facilities or demonstrate a failure to comply with MidAmerican's safety obligations.

Contrary to Staff's assertion, there is nothing in Section 8-101 that "require a utility to perform its own investigation of an accident involving a contract employee hurt on the utilities property or facilities." [Staff Initial Brief at 11]. As MidAmerican explained on pages 20-22 of its Initial Brief, Section 8-101 is not concerned with a utility's contracting practices. There was nothing associated with Mr. Hoskins' accident which calls into question the adequacy of MidAmerican's service instrumentalities, equipment or facilities. Mr. Hoskins' accident was due to a momentary lapse of attention to a safety matter by a highly trained worker; not any defect in MidAmerican's service instrumentalities, equipment, or facilities. As addressed above and in MidAmerican's Initial Brief, MidAmerican undertook responsible actions demonstrating its commitment to safety of employees, contractors and the public.

II. Conclusion

Staff's final statement in its Initial Brief is that:

“Since, according to Mr. Campbell, MidAmerican already participates in investigations, there appears to be no reason for MidAmerican to object to a Commission order requiring its full participation in such investigations.”

MidAmerican does object to the entry of such a requirement specifying exactly how MidAmerican shall fulfill its safety obligations with respect to independent contractors.

Throughout this proceeding Staff has interpreted Section 8-101 to narrowly proscribe exactly what MidAmerican should be doing in managing its employee and contractor workforce. Section 8-101 does not address how a utility is to meet its responsibilities under the Public Utilities Act. The means to compliance are properly left to the discretion of utility management. There is nothing in Section 8-101 that dictates to a utility that it must meet its obligations only through the use of its own employees, or that mandates a single approach to accident review. MidAmerican, as with all Illinois utilities, meets its service requirements through a combination of employer and contractor labor. That is not prohibited by Section 8-101; it is not even referenced in Section 8-101.

Staff is focused solely on the means by which the utility must operate. That decision is not for Staff to dictate. Staff's goal in this proceeding is to obtain a Commission order requiring MidAmerican (and only MidAmerican) to abide by Staff's opinion as to how MidAmerican must interact with its contractors. It is clear that the one incident cited by Staff resulted in no threat to public safety. No claim has been made that the necessary safety programs were not in place, that the level of supervision was in any way inadequate, or that the results of the post-accident investigation were incorrect.

The concerns raised are merely hypothetical concerns about what could happen if some things occurred. That is not, however, what happened on August 9, 2010, and that is not how

