

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	:	
On Its Own Motion	:	
-vs-	:	
MidAmerican Energy Company	:	11-0672
	:	
Determination of compliance with	:	
Section 8-101 of the Public Utilities	:	
Act.	:	

PROPOSED ORDER

DATED: June 17, 2013

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By the Commission:

I. INTRODUCTION AND PROCEDURAL HISTORY

The instant proceeding was initiated in an Order (“Initiating Order”) entered by the Illinois Commerce Commission (“Commission”). MidAmerican Energy Company (“MEC” or “MidAmerican”) was made a respondent to the proceeding. The Initiating Order provides that a Commission Staff Report dated August 26, 2011 is made part of the record in the proceeding.

The Staff Report was prepared following completion by Staff of an investigation of an incident occurring on August 9, 2010. On that date, a two-man crew was replacing a guy wire on an MEC pole behind 705-5th Avenue W. in Andalusia, Illinois. The two men were employees of L.E. Myers Co. (“L.E. Myers” or “Myers”), an independent contractor engaged by MEC to repair certain electric distribution facilities. While replacing the guy wire, one of the employees, Mr. Hoskins, removed one of his protective gloves, contacted the primary jumper wire, and was injured. The Staff Report concluded that Mr. Hoskins should have been wearing safety gloves and that he should have covered up the energized primary jumper on the back side of the pole, or the open-wire secondary before leaning upon it, or both.

The Initiating Order directed that a proceeding be initiated pursuant to Section 8-507 of the Public Utilities Act, 220 ILCS 5/1-101 et seq. (“Act” or “PUA”) to determine whether MEC has failed to comply with Section 8-101 of the Act.

Hearings in the proceeding were held before an Administrative Law Judge. Appearances were entered by respective counsel on behalf of MEC and the Staff. No other appearances were entered and no intervening petitions were filed. MEC filed the testimony of Barry Campbell, Vice President-Delivery for MEC. Staff filed the testimony of Greg Rockrohr, a Senior Electrical Engineer. At the conclusion of the hearings, the

record was marked "Heard and Taken." Initial briefs ("IBs") and reply briefs ("RBs") were filed by MEC and Staff. A proposed order was served on the parties.

II. STATUTORY AUTHORITY

Staff investigated the incident pursuant to Section 8-507 of the Public Utilities Act. It provides in part:

The Commission shall investigate all accidents occurring within this State upon the property of any public utility or directly or indirectly arising from or connected with its maintenance or operation, resulting in loss of life or injury to person or property and requiring, in the judgment of the Commission, investigation by it, and shall have the power to make such order or recommendation with respect thereto as in its judgment may seem just and reasonable. Neither the order or recommendation of the Commission nor any accident report filed with the Commission shall be admitted in evidence in any action for damages based on or arising out of the loss of life, or injury to person or property, in this Section referred to.

Section 8-101 of the Act provides, in part:

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.

...

III. STAFF POSITION

Staff's position is summarized below. The Commission observes that the descriptions and summaries of the Staff and MEC positions and arguments on the issues, wherever they may be contained in the order, are not intended to reflect the opinions of or determinations by the Commission unless otherwise noted.

A. Staff Testimony

In his testimony, Staff witness Rockrohr sponsored the Staff Report and discussed his investigation of the accident on August 9, 2010 in Andalusia. Mr. Rockrohr concluded that MEC safety policies associated with contract employees fail to comply with Section 8-101 of the PUA. (Staff IB at 5; Ex. 1.0 at 2)

In Staff's view, Section 8-101 of the Act appears to indicate that a public utility must provide service in a manner that is safe for its employees. Section 8-101 of the Act provides in part, "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."

According to Staff, "since MEC does not investigate accidents involving contractor's employees, or monitor the investigation activities, MEC could not know whether its contractors enforce the safety rules and practices that MEC requires." The Commission regulates MEC, not MEC's contractors. Further, MEC is bound by Commission rules and the Act, while MEC's contractors are not. MEC's policy and practice relinquishes all responsibility to its contractor for ensuring safe work practices and could lead to unsafe work practices/policies remaining undiscovered by a public utility. (Staff IB at 5; Ex. 1.0 at 4)

In Staff's view, if a public utility could demonstrate it satisfied the following four requirements, then it could demonstrate that it met its responsibility pursuant to Section 8-101 of the Act with regard to the safety of employees working on its facilities or property:

1. The public utility must require that all work on its facilities and property is performed pursuant to safe working practices, [Occupational Safety and Health Administration ("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.

(Staff Ex. 1.0 at 4-5)

Staff recommended that the Commission utilize these four requirements when determining whether MEC has met the worker safety obligation that Section 8-101 of the Act assigns it. (Staff IB at 6; Staff Ex. 1.0 at 5)

MEC stated that it was in full agreement with three of Mr. Rockrohr's suggestions, and it was only with regard to the fourth suggestion that there may be a misunderstanding. (Staff IB at 6-7, citing MEC Ex. 1.0 at 12) MEC agreed on the need to investigate all OSHA recordable incidents in order to fully understand accident causes and 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.

In addition, Staff recommended that the Commission find that MEC has ultimate responsibility for ensuring the safe working practices of employees working on its facilities and property, including contract employees, and that MEC cannot relinquish this responsibility through the terms of a work agreement or contract. Further, the Commission should find that MEC's apparent practice of "ignoring" the safety practices of contract employees who work on its facilities or property is a violation of Section 8-101 of the PUA. Finally, Staff recommends that the Commission direct MEC to participate in any future accident investigations involving employees that are injured while working on its facilities or property, including contract employees. (Staff IB at 7)

B. Staff Argument

In its initial brief, Staff's arguments are set forth in Section III. According to Staff, the "core issue" revolves around whether MEC has the ultimate responsibility for the safety of its employees, whether direct employees or contractor employees, who work on its property or its facilities, and ultimate responsibility for conducting and monitoring investigations of accidents on its property or its facilities. (*Id.*)

The first question to resolve is the responsibility of MEC "to its contract employees." Staff believes that Section 8-101 of the PUA is the starting point for addressing this issue. Section 8-101 of the PUA provides in relevant part, "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."

It is Staff's contention that this provision of the PUA indicates that MEC must take an active role in monitoring and enforcing safe working practices for its workers, whether direct employees or contractor's employees. There is nothing in this provision

of the Act that specifically excludes a contractor's employees. The use of the term "employees" is not restricted in any manner to presume this language only meant direct employees. As such, it is reasonable to conclude this language included not only direct employees, but contractor's employees as well. (Staff IB at 8)

In Staff's view, the provisions of Section 8-101 of the PUA also clearly impose upon utilities a statutory duty to the general public, and, *a fortiori* invitees onto utility property, such as contractors, to maintain safe instrumentalities, equipment, and facilities. Illinois cases have held that electricity is an "inherently dangerous force" such that those engaged in the business of supplying it are obliged to exercise a high degree of care in protecting the public. (*Id.*, citing *Clinton v. Commonwealth Edison*, 36 Ill.App.3d 1064, 1068 (1st Dist. 1976))

This interpretation that a utility shall provide safe instrumentalities, equipment, and facilities to employees and the public is buttressed by the fact that the Commission regulates public utilities such as MEC, but does not specifically regulate contractors hired by public utilities. Staff believes it is unreasonable that MEC's policy and practice relinquishes primary responsibility to its contractor for ensuring safe work practices. By doing so, MEC is effectively avoiding its safety responsibilities to contract employees. (*Id.*)

MEC agrees with the first three suggestions of Staff witness Greg Rockrohr on what needs to be satisfied in order to demonstrate responsibility pursuant to Section 8-101 of the Act with regard to the safety of employees working on its facilities or property. It is only the fourth suggestion that there is disagreement. (*Id.* at 9)

According to Staff, MEC agrees with Staff's fourth suggestion that 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, a full investigation should be completed; however, MEC believes that an investigation by the independent contractor fulfills this suggestion. (*Id.*, citing MEC Ex. 1.0 at 3) As set forth in the Staff Report, Staff examined MEC's actions following the accident and concluded that the utility did not determine for itself exactly what happened during the accident, did not determine why the accident happened, and took no steps to prevent the accident from happening again. (*Id.*; Staff Report at 5)

In support of its position, Staff cites responses to Staff data requests what were contained in the Staff Report.

In response to Staff data request ENG 2.8, MEC stated, "The incident was investigated by L.E. Myers to ensure complete understanding of the event and to ensure potential mechanical failures, at-risk conditions and at-risk behaviors were identified and corrected. Pursuant to contract agreements, MidAmerican Energy Company will continue to require contractors to comply with federal, state, and local regulations and codes."

In response to Staff data request ENG 3.7(b), MEC stated, “Pursuant to Article 10, Sections 10.1.1, 10.1.2 of the contract agreed upon by L.E. Myers Co. and MidAmerican Energy Company: the contractor shall be solely responsible for initiating, maintaining and supervising all safety measures and programs in connection with the performance of this Contract.”

In Staff’s view, it is apparent from these responses that in MEC’s estimation, it “contracted away” all its responsibility for the safety of Myers employees. (Staff IB at 9-10; Staff Report, p. 5)

The MEC witness said that there may have been a mistaken impression that it was not involved in determining the circumstances of the accident. MEC witness Campbell testified that MEC’s Safety Supervisor, Jim Pauley, was on-site and determined the circumstances associated with the incident on MEC’s behalf. Myers also conducted a review, and prepared a Safety Alert. (Staff IB at 10, citing MEC Ex. 1.0 at 9)

Staff does not dispute that Mr. Pauley was on site following the incident of August 9, 2010. However, the fact that a representative of MEC was present following the incident does not relieve MEC from performing an investigation. MEC representatives were not present and did not witness the incident at the time it occurred.

Staff also does not dispute that Myers performed an investigation of the accident on August 9, 2010. What is equally clear to Staff is that MEC “did not perform its own investigation,” but reviewed the investigation and safety alert issued by Myers. MEC argues that it cannot be placed in this position to perform a safety investigation in lieu of what a contractor should do due to the potential assumption of liability concerns. It appears to Staff that MEC may have been under the belief from Staff that the performance of an investigation by MEC was to be in lieu of what the contractor should do. (*Id.*, citing MEC Ex. 1.0 at 10)

Staff is not suggesting that the utility should usurp the authority of a contractor to perform the only safety investigation for a contract employee who is hurt on the utilities property or facilities. Rather, Staff believes the provisions of Section 8-101 of the Act require a utility to perform its own investigation of an accident involving a contract employee hurt on the utilities property or facilities. Further, 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. (*Id.* at 10-11)

In Staff’s view, 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. By performing its own investigation of an accident, a

utility can ensure all the credible and relevant facts are compiled and an independent determination made about what occurred and how to prevent a similar occurrence from happening in the future. (*Id.* at 11)

MEC asserts that Staff is suggesting MEC should assume direct and primary supervision over the workers of its independent contractors. MEC states that such supervision would interfere with the labor relations or contracts of a third-party independent contractor and that a reading of Section 8-101 of the Act indicates nothing about interfering with the labor relations or contracts of a third party independent contractor over whom the Commission has no jurisdiction. (Staff IB at 11, citing MEC Ex. 1.0 at 12)

Staff is not claiming there is any provision in Section 8-101 of the Act about interfering with labor relations or contracts of a third-party independent contractor over whom the Commission has no jurisdiction and does not suggest interfering with such labor relations or contract. Likewise, Staff does not suggest that MEC assume day-to-day supervisory control over the employees of an independent contractor. Staff instead contends that a utility company is responsible for the safety of any employee or member of the public lawfully on its property or facilities. As a result of that responsibility, the utility has the ultimate obligation to investigate an accident involving a contract employee precisely as it does its own direct employee.

To Staff, the suggestion by MEC appears to be that a utility may “contract away” the statutory duty imposed by Section 8-101 of the Act. As a general matter, the requirements of a statute may not be avoided through contractual provisions. *Progressive Ins. v. Liberty Mutual*, 215 Ill.2d 121 (2005). Likewise, contracts in derogation of public policy may not be enforced. *Foreman v. Holsman*, 10 Ill.2d 551 (1957). (Staff IB at 12)

According to Staff, a utility may not shift its ultimate responsibility of an investigation to the independent contractor. While the utility is free to contract with an independent contractor regarding various rights and obligations, MEC may not relinquish or contract away the safety responsibility of its employees or the public, as required by statute, via the terms of a work agreement or contract. Even if it were to do so, being subject to the PUA, the utility has the ultimate responsibility to conduct an independent investigation of accidents on its property or its facilities. (*Id.*)

Staff believes the statute provides for the safety of the “public” and “employees” which can be interpreted to include those of a contractor.

Staff’s investigation led it to the conclusion that MEC “not only did not actively participate in the investigation of the accident involving its contractor’s employee, but that [it] denied all responsibility for any involvement in such an investigation.” (Staff IB at 13) In contrast to Staff’s investigation conclusion, MEC witness Campbell states, “Since MidAmerican already participates in the investigation of accidents involving workers that are injured while working on its facilities or property, this recommendation is already a

MEC practice and no Commission order appears necessary.” (MEC Ex. 1.0 at 15) Staff argues, “Since, according to Mr. Campbell, MEC already participates in investigations, there appears to be no reason for MEC to object to a Commission order requiring its full participation in such investigations.” (Staff IB at 13)

C. Staff Conclusion and Recommendation

Staff concludes, “Wherefore, for all of the following reasons, Staff respectfully requests that the Commission issue an order in this proceeding reflecting that MEC has ultimate responsibility for conducting and monitoring investigations of accidents on its property or its facilities, whether for employees, including contractor employees or the public, as Section 8-101 of the PUA assigns to it.”

IV. MEC POSITION

As indicated above, the descriptions and summaries of the MEC and Staff positions and arguments on the issues, wherever they may be contained in the order, are not intended to reflect the opinions of or determinations by the Commission unless otherwise noted.

A. Introduction and Summary of Position

According to MEC, there is little, if anything, at issue in this proceeding. The facts are not in dispute. After MEC filed its testimony, Staff agreed that there were no material facts in dispute and this matter could be briefed for decision. (MEC IB at 3)

The applicable law is not in dispute. MEC 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. MEC does question, however, whether Section 8-101 addresses a utility’s contracting practices.

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

MEC “entirely agrees” with the first three of the four suggestions that Staff witness Rockrohr testified are necessary to demonstrate compliance with the Public Utilities Act. (*Id.*)

Staff’s fourth suggestion was, “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 MEC has undertaken reasonable steps to address the fourth suggestion, above, with respect to an independent contractor. (*Id.* at 4)

B. Argument

In Section III.1 of its initial brief, MEC argues, “MEC utilized at least [the first] three of the four criteria set out in the Staff Report fulfilling its applicable statutory service obligations.” (MEC IB at 6)

Mr. Rockrohr submitted four suggestions as to how a utility could demonstrate compliance with Section 8-101. As Mr. Campbell testified, those suggestions are incorporated into MEC’s safety and work practices. First, Mr. Campbell testified that MEC does require that all work on its facilities and property be performed pursuant to safe working practices; OSHA regulations; and safety rules based on OSHA regulations. The requirements are similar whether the work is done by a MEC employee or by a contractor employee.

In the case of a MidAmerican employee, this requirement is met through a combination of MEC’s safety rules, safety supervision, and safety incident reviews. MEC’s safety rules meet or exceed the OSHA rules and are the subject of the collective bargaining process between MEC and the union which represents its workers, The International Brotherhood of Electrical Workers (“IBEW”). 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 MEC, participates in those reviews. (*Id.*)

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 that only qualified personnel perform the work. The record shows MEC required that these practices be met. As is the case with MEC’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 4th Step Apprentice who had completed four of the seven steps of the IBEW registered apprenticeship training program. 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. (*Id.* at 6-7)

Second, Mr. Campbell testified that MEC 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 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 MEC imposes on contractors to utilize qualified personnel to work on MEC's facilities. The contractor is required to attest to the level of training for each individual on the daily worksheets that are submitted for MEC review. In addition, MEC conducts site inspections to verify the quality of the work being performed. (*Id.* at 7-8, MEC Ex. 1.0 at 6-7)

MEC ensures that both MEC and independent contractor employees are fully trained and capable of performing the work safely, and random site visits are performed.

Third, MEC does inspect the work of its contractors. Mr. Campbell testified that MEC'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 MEC conducting on-site inspections of the work being performed. Further, any lessons learned from incidents, including contractor incidents, are reviewed by MEC personnel to potentially avoid similar situations in the future. (MEC IB at 8)

Fourth, Mr. Campbell testified that MEC was involved in determining the circumstances surrounding the August 9, 2010 accident. MEC's Safety Supervisor was on-site and determined the circumstances associated with the incident on MEC's behalf. That information was provided to Staff. In addition, 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 incident and a list of lessons learned resulting from the investigation of the accident. To MEC, 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 MEC's review of the Safety Alert, it is clear that MEC 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. MEC can and will ensure that the contractor performs an investigation and communicates the lessons learned with their employees. (MEC IB at 8-9)

Mr. Campbell further testified that MEC conducted a "stand-down" of all work within an hour after the 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. (*Id.* at 9)

In addition, Mr. Campbell testified that MEC's practice is, and will continue to be, that the circumstances of all accidents will be investigated whether the worker involved is a MEC employee or a contractor employee. While MEC expects its independent contractors to conduct their own investigation, MEC still performs its own review and determination of the circumstances involved with a contractor accident. MEC, 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. (*Id.* at 9-10)

Staff appears to acknowledge that there are other means of satisfying its responsibilities in selecting contractors. The Commission's Gas Engineering Staff 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. (*Id.* at 10-11)

In Section III.2 of its initial brief, MEC argues, "Staff has not questioned the safety programs of either MEC 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 does Staff claim that MEC's safety program is inadequate, in total or as it related to the accident. To the contrary, Staff correctly acknowledges that both MEC's and L.E. Myers' safety programs specifically require that its employees wear safety gloves when working on energized primary conductors. (*Id.* at 11)

In Section III.3 of its initial brief, MEC argues, "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." To MEC, 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. It is not that safety programs did not exist; they did. The fact is that the accident occurred despite the existence and implementation of comprehensive safety programs. (*Id.*)

There has been no showing of any systemic collapse of MEC's oversight of its contractors. There has not been a claim that the accident occurred because (1) the

safety programs were inadequate or lacking in any degree or (2) either MEC or the contractor employer was remiss in enforcing or supervising the employee prior to the accident. 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 MEC 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. (*Id.* at 11-12)

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 MEC did or did not do would have avoided the accident.

It is not apparent to MEC how greater involvement by MEC 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. (*Id.* at 13)

In Section III.4 of its initial brief, MEC argues, “MEC requires the use of qualified contractor employees.” MEC ensures that the contractors it employs have a history of safe work practices and a well-defined comprehensive safety program, and train and supervise their workers. In the accident in question, the contractor worker was a union member classified as a 4th 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 MEC IBEW union apprentice worker would have been. In summary, there is no factual basis for believing that contractor workers performing work for MEC are not as fully trained as MEC’s own employees, whether in general or as related to the single accident prompting this proceeding. (*Id.* at 13-14)

In Section III.5 of its initial brief, MEC argues, “The Commission-sponsored Jacobs Study provides some evidence that MEC appropriately uses independent contractors.” (*Id.* at 14) 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 MEC. 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.” Jacobs concluded

that “the overall adequacy of MEC’s workforce has been in harmony with its philosophy of maintaining a consistent level of employees and filling workload peaks and valleys with contractors.” The Study was not critical of MEC’s use of contractors or of MEC’s supervision of contractor workers. (MEC IB at 15)

Staff prepared an analysis of the Illinois electric utilities workforce focusing on staffing and training benchmarks which was provided to the Illinois General Assembly on August 16, 2010. Staff recommended that MEC “continue the programs as outlined in the Jacobs and MidAmerican Reports.” (*Id.*)

With respect to the references to the Jacobs Study and Staff analysis, the Commission notes that there are no citations to the evidentiary record in this docket, and there is no explanation of why they should be treated as citable legal authority.

In Section III.6 of its initial brief, MEC argues, “The independent contractor relationship is reasonable and well established under Illinois Law.” As with many, if not all, companies, MEC enters into contracts with other companies to obtain materials and services. The retention of contractors to supplement the utility’s workforce is commonplace in Illinois and is not limited to MEC. (MEC IB at 15-16)

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. 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. (MEC IB at 16, citing *Madden v. Paschen*, 395 Ill. App. 3d 362, 334 Ill. Dec. 315 (2009); *Cochran v. George Sollitt Construction Co.*, 358 Ill. App. 3d 865, 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. (*Id.*)

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. (*Id.*, citing *Madden*, 395 Ill. App. 3d at 382, 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. *Shaughnessy v. Skonder Construction Co.*, 342 Ill. App. 3d 730, 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. (MEC IB at 16-17)

MEC has struck the appropriate balance between insuring that its contractors operate safely, on the one hand, and so controlling their actions that MEC 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 MEC being responsible for the actions of numerous contractors to the ultimate detriment of its customers. (*Id.*)

In Section III.7 of its initial brief, MEC argues, "The ICC should not require a utility to assume direct and comprehensive oversight of the independent contractors' workforce." There is a question as to whether MEC 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 MEC's own employees. Such action would not be prudent. (*Id.*)

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. MEC 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. (*Id.*)

Mr. Hoskins is represented by 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. It would not be appropriate for MEC to superimpose another tier of requirements upon what was the subject of the collective bargaining process when there is no evidence that the safety practices and programs of either L.E. Myers or MEC are deficient. In MEC's opinion, any requirement that MEC 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. (*Id.* at 17-18)

In addition, requiring MEC to assume control over a contractor's work practices could also result in additional liability being imposed upon MEC 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 MEC. (*Id.* at 18)

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, 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, 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, 337 Ill. Dec. 105 (2010). (MEC IB at 18)

The 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. (*Id.*, citing *Ware v. Industrial Com'n*, 318 Ill. App. 3d 1117, 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, 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). (MEC IB at 19)

In this case, the issue is whether the responsibility for providing financial protection should rest with the independent contractor as the employer of the injured worker, or MEC. The greater the degree of control exercised by MEC over the actions of an independent contractor's worker, the greater the likelihood that MEC 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. (*Id.*)

In Section III.8 of its initial brief, MEC argues, "MidAmerican's facilities and management were adequate to fulfill its responsibilities under § 8-101." (MEC IB at 20) Section 8-101, in its entirety, reads as follows:

§ 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.”

By its express language, 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 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. Cases cited by MEC include, among others, *Central Ill. Public Service Co. v. Illinois Commerce Commission ex rel. Illinois Central R. Co.*, 1960 (interference with a railroad’s train-stop system caused by current from transmission lines); *Elgin Airport Inn, Inc. v. Commonwealth Edison Co.*, App. 2 Dist. 1980, 43 Ill. Dec. 620, 88 Ill. App. 3d 477, affirmed in part, reversed in part on other grounds (damage to air-conditioning equipment caused by low voltage electricity); *Clinton v. Commonwealth Edison Co.*, App. 1 Dist. 1976, 36 Ill. App. 3d 1064, (no duty to insulate all electrical wires). (MEC IB at 21)

According to MEC, there is no evidence that MEC’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. (MEC IB at 21-22)

In Section III.9 of its initial brief, MEC argues, “Staff’s concerns, if pursued, should be the basis for a statewide proceeding; not a show cause case against MidAmerican.” No evidence beyond the August 9, 2010 accident involving Mr. Hoskins has been presented by Staff suggesting MEC’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 MEC could have widespread ramifications beyond MEC’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. (MEC IB at 22)

C. MEC Reply Brief

In Section III.1 of its reply brief, MEC argues, “MidAmerican engaged in multiple efforts to assess the accident in question, and undertook proactive measures to minimize the potential for any future similar accident.” (MEC RB at 3)

Mr. Campbell testified as to the steps taken by MEC in monitoring the investigation activities of the contractor; specifically, the steps taken concerning Mr. Hoskins’ accident. MEC had a safety supervisor physically on-site and determined the circumstances of the incident on MEC’s behalf. MEC’s safety supervisor’s notes were provided to the Staff. Staff has not questioned the adequacy or contents of Mr. Pauley’s notes. When Mr. Pauley arrived on-site, three other MEC employees were already there. (*Id.* at 3-4, citing MEC Ex. 1.0 at 9 and 1.1 at 2)

In addition, 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. MEC 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. (*Id.* at 4)

Further, Mr. Campbell testified that MEC 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.

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 MEC expects its independent contractors to conduct their own investigation, MEC still performs its own review and determination of the circumstances involved with a contractor accident. Mr. Campbell noted that, based on MEC’s assessment (not that of the contractor), MEC may or may not agree as to the reasonableness of the contractor’s investigation and conduct. (*Id.* at 4-5)

In Section III.2 of its reply brief, MEC argues, “Hypothetical concerns are not grounds for finding any Public Utilities Act violation.” MidAmerican’s active involvement satisfactorily addresses Staff’s hypothetical concern about a possible bias in a contractor’s investigation of an accident. (MEC RB at 5-6)

In Section III.3 of its reply brief, MEC argues, “MidAmerican has a comprehensive and sound safety program in place.” MEC complains that Staff ignores the remainder of the comprehensive safety programs that MEC has in place, and that MEC requires its contractors to have in place. (MEC IB at 6)

In Section III.4 of its reply brief, MEC argues, “MidAmerican’s efforts to ensure contractor safety commence at the outset of the contractual relationship and contain multiple elements.” (MEC RB at 7)

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.” To the contrary, Mr. Campbell testified that MEC’s concern with contractor and contractor employee safety begins at the outset of the relationship when a contractor is retained. MEC reviews prospective contractors’ safety histories and does not retain a contractor who does not meet MEC’s safety expectations and standards. In addition, MEC contractually obligates its contractors to adhere to all applicable Occupational Safety and Health Administration (“OSHA”) regulations and standards. (*Id.*)

Furthermore, contractors are required to comply with all federal, state and local regulations and codes. MEC employs inspectors to perform spot checks to ensure safe work practices and to ensure electric and gas standards are followed. MEC also follows through with the contractors when a safety incident does occur.

The actions taken by MEC are not the actions of a utility that “contracted away all of its responsibility for the safety of Myers employee.” (*Id.* at 8)

Section III.5 of MEC’s reply brief is titled, “[MEC’s] potential liability is not analogous to governmental law enforcement agencies.” (MEC RB at 8)

MEC takes issue with Staff’s statement that “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.” According to MEC, Staff overlooks the broad immunity granted to law enforcement and public entities for actions taken in performance of their duties. Further, the independent contractor/company and employer/employee relationships are not at issue when a law enforcement officer investigates a car accident. (*Id.* at 8-9)

In Section III.6 of its reply brief, MEC argues, “Neither the accident nor MEC’s subsequent actions involved any defect with respect to MEC’s service instrumentalities, equipment and facilities or demonstrate a failure to comply with MEC’s safety obligations.” (MEC RB at 9)

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. 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 MEC’s service instrumentalities, equipment or facilities. (*Id.*)

In its “Conclusion,” MEC takes issue with Staff’s statement, “Since, according to Mr. Campbell, MEC 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.” (Staff IB at 13) MEC “does object to the entry of such a requirement specifying exactly how MidAmerican shall fulfill its safety obligations with respect to independent contractors.” According to MEC, there is nothing in Section 8-101 that dictates a utility must meet its obligations only through the use of its own employees, or that mandates a single approach to accident review. (MEC RB at 10)

V. STAFF REPLY BRIEF

According to Staff, MEC has agreed to many of the points made by Staff witness Greg Rockrohr, but the core issue remains in dispute. Staff’s main concern following the accident on August 9, 2010 was that MEC relegated most – if not all – responsibility for investigating the accident to its contractor. (Staff RB at 3-4)

MEC continues to argue that in the event of an accident involving its contract employees, MEC takes an active role (MEC IB, p. 4) and that MEC was involved in determining the circumstances surrounding Mr. Hoskins’ accident. In Staff’s view, the facts do not support these assertions. (*Id.* at 5)

To Staff, it is clear that MEC did not perform its own investigation, but simply reviewed the investigation report and safety alert issues by L.E. Myers. While it appears to be MEC’s position that performance of an investigation by its contractor is all that is required, Staff believes more is required of a utility under the jurisdiction of the Commission. Staff believes the provisions of Section 8-101 of the Act requires a utility to perform its own investigation of an accident involving a contract employee hurt on the utilities property or facilities.

Simply having someone on site after an accident to determine the facts of the incident and relying on the investigation report of its contractor, without a further “independent evaluation” by the utility itself, does not meet the requirements of the Act. MEC needs to “verify for itself” that the conclusions reached by the contractor address the safety issues implicated in the accident. (*Id.* at 5-6)

In conclusion, Staff reiterates its request that the Commission “issue an order in this proceeding reflecting that MEC has ultimate responsibility for conducting and monitoring investigations of accidents on its property or its facilities, whether for employees, including contractor employees or the public, as Section 8-101 of the PUA assigns to it.” (*Id.* at 7)

VI. COMMISSION CONCLUSIONS, FINDINGS AND ORDERING PARAGRAPHS

The instant proceeding was initiated following the submission of a Staff Report that was prepared after the completion by Staff of an investigation of an incident occurring in Andalusia, Illinois. A two-man crew was replacing a guy wire on an MEC

pole. The two individuals were employees of L.E. Myers, an independent contractor engaged by MEC to repair certain electric distribution facilities. While replacing the guy wire, one of the employees, Mr. Hoskins, removed one of his protective gloves, contacted the primary jumper wire, and was injured. Among other things, the Staff Report concluded that Mr. Hoskins should have been wearing safety gloves and that he should have covered up the energized primary jumper on the back side of the pole, or the open-wire secondary before leaning upon it, or both.

Staff made four recommendations relative to a utility's responsibilities pursuant to Section 8-101 of the Act. They 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.

MEC did not object to the first three recommendations. With regard to the fourth recommendation, however, there is some disagreement between MEC and Staff.

Staff believes MEC should have conducted its own investigation of the incident, rather than "contracting away" this responsibility to L.E. Myers. In conclusion, Staff "requests that the Commission issue an order in this proceeding reflecting that MEC has ultimate responsibility for conducting and monitoring investigations of accidents on its property or its facilities, whether for employees, including contractor employees or the public, as Section 8-101 of the PUA assigns to it."

According to MEC, it ensures that both MEC and independent contractor employees are fully trained in and capable of performing the work safely. In MEC's view, the accident in question was due to an individual's momentary lapse of attention, and was not due to a failure to have an appropriate safety plan in effect or to reasonably supervise the implementation of such a program. MEC also contends that it actively participated in the investigation of the accident. MEC further argues that it has struck an appropriate balance between ensuring that its contractors operate safely, on the one

hand, without controlling their actions to the point that MEC becomes legally liable for the contractors actions, on the other hand, under the legal principle of “retained control.”

Having reviewed the record, the Commission finds that the first three recommendations advanced by Staff, as set forth above, are appropriate and they are adopted. Adherence to these guidelines will help ensure that MEC will not contract away its safety-related obligations.

With respect to the investigation of OSHA-recordable incidents involving contractor employees, the Commission believes that MEC has important responsibilities. In that regard, the Commission finds that MEC shall actively participate in the investigation of such incidents to the extent necessary to ensure that such incidents are thoroughly and credibly investigated, and shall take appropriate actions to minimize the likelihood of any recurrence.

If the nature, circumstances and complexities of the incident are such that the conduct by MEC of its own independent investigation is reasonably necessary to ensure a complete and reliable investigation, then MEC will be expected to do so.

The Commission, having considered the entire record, is of the opinion and finds that:

- (1) MidAmerican Energy Company provides electric service to the public in portions of the State of Illinois, and is a public utility within the meaning of Section 3-105 of the Act;
- (2) the Commission has jurisdiction over the parties and the subject matter of this proceeding;
- (3) the facts stated and conclusions reached in the prefatory portion of this Order are supported by the record and are hereby adopted as findings;
- (4) MEC shall comply with the conclusions reached and determinations made above.

IT IS THEREFORE ORDERED by the Commission that MidAmerican Energy Company shall comply with the findings and determinations set forth above.

IT IS FURTHER ORDERED that any objections, petitions or motions in this proceeding which have not been ruled upon are deemed disposed of in a manner consistent with the ultimate conclusions herein contained.

IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

DATED: June 17, 2013

Larry M. Jones
Administrative Law Judge