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IN THE IOWA SUPREME COURT

NO. 21-1788

LINDA K. JUCKETTE,
Petitioner-Appellant,

vs.

IOWA UTILITIES BOARD,
Respondent-Appellee,

and

MIDAMERICAN ENERGY COMPANY, OFFICE OF THE CONSUMER ADVOCATE,
Intervenors.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
HONORABLE JEANIE VAUDT, JUDGE

APPELLEE'S FINAL BRIEF AND ARGUMENT

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the Iowa Utilities Board's finding that a proposed MidAmerican Energy Company's electric transmission line segment that adjoins Appellant Linda Juckette's property is necessary to serve a public use under Iowa Code section 478.4 is supported by substantial evidence.

Authorities

Arndt v. City of Le Claire, 728 N.W.2d 389 (Iowa 2007)
Berner v. Interstate Power Co., 244 Iowa 298, 57 N.W.2d 55 (1953)
Bradley v. Iowa Department of Commerce, No. 01-0646, 2002 WL 31882863 (Iowa Ct. App. Dec. 30, 2002)
Broadlawns Medical Center v. Sanders, 792 N.W.2d 302 (Iowa 2010)
Burton v. Hilltop Care Center, 813 N.W.2d 250 (Iowa 2012)
Carroll v. Cedar Falls, 221 Iowa 277, 261 N.W. 652 (1935)
Doe v. State, 943 N.W.2d 608 (Iowa 2020)
Evercom Systems, Inc. v. Iowa Utilities Board, 805 N.W.2d 758 (Iowa 2011)
Fischer v. Iowa State Commerce Commission, 368 N.W.2d 88 (Iowa 1985)
Hills & Dales Child Development Center v. Iowa Department of Education, 968 N.W.2d 238 (Iowa 2021)
Iowa Association of Business and Industry v. City of Waterloo, 961 N.W.2d 465 (Iowa 2021)
Iowa Insurance Institute v. Core Group of Iowa Association for Justice, 867 N.W.2d 58 (Iowa 2015)
LSCP, LLLP v. Kay-Decker, 861 N.W.2d 846 (Iowa 2015)
Mathis v. Iowa Utilities Board, 934 N.W.2d 423 (Iowa 2019)
NextEra Energy Resources, LLC v. Iowa Utilities Board, 815 N.W.2d 30 (Iowa 2012)
Race v. Iowa Electric Light and Power Co., 257 Iowa 701, 134 N.W.2d 335 (1965)
Renda v. Iowa Civil Rights Commission, 784 N.W.2d 8 (Iowa 2010)
S.E. Iowa Cooperative Electric Association v. Iowa Utilities Board, 633 N.W.2d 814 (Iowa 2001)
Villa Magana v. State, 908 N.W.2d 255 (Iowa 2018)

Iowa Code section 4.4(2)
Iowa Code section 17A.19(10)

Iowa Code section 474.9
Iowa Code section 475A.2
Iowa Code section 476.3
Iowa Code section 476.6
Iowa Code section 476.8
Iowa Code section 476.32
Iowa Code section 478.1
Iowa Code section 478.3
Iowa Code section 478.4
Iowa Code section 478.15
Iowa Code section 478.18(1)

II. Whether Iowa Code section 306.46 provides MidAmerican Energy Company the right to install utility facilities in the road right-of-way adjoining Appellant Linda Juckette's property.

Authorities

ABC Disposal System, Inc. v. Department of Natural Resources, 681 N.W.2d 596 (Iowa 2004)
Beier Glass Co. v. Brundige, 329 N.W.2d 280 (Iowa 1983)
Bormann v. Board of Supervisors for Kossuth County, 584 N.W.2df 309 (Iowa 1998).
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Hrbek v. State, 958 N.W.2d 779 (Iowa 2021)
Keokuk Junction Ry. Co. v. IES Industries, Inc., 618 N.W.2d 352 (Iowa 2000)
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Republic National Bank of Miami v. United States, 506 U.S. 80 (1992)
Renda v. Iowa Civil Rights Commission, 784 N.W.2d 8 (Iowa 2010)

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Iowa Code section 474.9
Iowa Code section 476.2

2004 Iowa Acts ch. 1014

ROUTING STATEMENT

Because this appeal involves application of existing legal principles, this case can and should be transferred to the Iowa Court of Appeals pursuant to Iowa Rule of Appellate Procedure 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case:

This is an appeal by Petitioner-Appellant Linda Juckette ("Juckette") from the district court's November 7, 2021 Ruling and Order on Juckette's Petition for Judicial Review, in which the court dismissed and denied the petition in its entirety and affirmed the Iowa Utilities Board's order granting MidAmerican Energy Company's ("MidAmerican") petition for an electric transmission line franchise.[1] (App. pp. 78-81; 11/22/21 Notice of Appeal).

The primary issue presented in this appeal is whether the Respondent-Appellee Iowa Utilities Board, a division of the Iowa Department of Commerce ("Board"), properly issued a franchise under Iowa Code chapter 478 to MidAmerican. In the event this Court concludes the Board's issuance

1. MidAmerican's franchise request covered two separate transmission line segments, which are referred to within the case as the "west segment" and the "east segment." (App. pp. 60, 145, 145; 11/7/21 Ruling p. 3; CR p. 63). While the Board granted a franchise that covered each segment, Juckette solely sought judicial review from the Board's findings and conclusions with respect to the east segment. Therefore, unless the context suggests otherwise, as used herein, "franchise" shall mean the electric transmission line franchise covering the east segment.

of the franchise is supported by law and fact, Juckette requests this Court determine the constitutionality of a statute located within the chapter of the Iowa Code concerning highways.

Course of Proceedings and Disposition in District Court:

On March 24, 2021, Juckette filed a Petition for Judicial Review, and on April 5, 2021, Juckette filed a First Amended Petition for Judicial Review. (App. pp. 6-13, 14-24; 3/24/21 Pet., 4/5/21 First Amend. Pet.). Juckette sought appellate review of a February 1, 2021 Board order granting MidAmerican a franchise and a March 19, 2021 Board order denying her Application for Rehearing. On April 12, 2021, the Board filed an Answer. (App. pp. 25-30; 4/12/21 IUB Answer).

On June 3, 2021, the district court issued an order that: (1) granted motions to intervene filed by MidAmerican and the Office of the Consumer Advocate ("OCA"), a division of the Iowa Department of Justice; and (2) granted amicus curiae status to the Iowa Association of Electric Cooperatives ("IAEC") and the Iowa Utility Association ("IUA"). (App. pp. 58-77; 6/3/21 Order). Through an August 25, 2021 order, the district court granted ITC Midwest LLC's request to submit a brief as amicus curiae. (App. p. 56-57; 8/25/21 order).

Following briefing, the parties and amici appeared before the district court for oral argument on September 8, 2021. (App. p. 58; 11/7/21 Ruling p. 1). On November 7, 2021, the district court issued an Order Denying and Dismissing Petition for Judicial Review. (App. p. 58; 11/7/21 Ruling p. 1). With respect to the agency action from which the judicial review was taken, the district court concluded that the record contains substantial evidence to support the Board's findings that under Iowa Code section 478.4,[2] the proposed transmission line is necessary to serve a public use and represents a reasonable relationship to an overall plan of transmitting electricity in the public interest. (App. p. 66; 11/7/21 Ruling p. 9). The district court further concluded that the Board's finding that the proposed transmission line route complies with Iowa Code section 478.18 is supported by substantial evidence. (App. pp. 68-69; 11/7/21 Ruling pp. 11-12). Thus, the district court concluded the statutory prerequisites to the issuance of an electric transmission line had been met. (App. p. 69; 11/7/21 Ruling p. 12).

Before the district court (as well as in the present appeal), Juckette also argued that MidAmerican lacks the necessary land rights to construct the electric transmission line over her property, and, consequently, according to Juckette, the Board's decision to issue a franchise to MidAmerican should

2. All citations to the Iowa Code are to the 2021 edition unless otherwise indicated.

be reversed. The district court observed, however, that "[n]either Iowa Code chapter 478 nor the governing administrative rules require a franchise petition prove it possesses all necessary land rights as a condition precedent to issuing a franchise." (App. p. 69; 11/7/21 Ruling p. 12). Regardless, the district court addressed Juckette's land right arguments and the applicability of Iowa Code section 306.46(1).[3] (App. pp. 69-75; 11/7/21 Ruling pp. 12-18).

First, in response to Juckette's claim that application of section 306.46(1) to MidAmerican's proposed transmission line would constitute an impermissible, retroactive application in violation of Iowa Code section 4.5, the district court found the determinative event for purposes of examining retroactivity/prospectivity is the specific conduct regulated in the statute. (App. pp. 71-72; 11/7/21 Ruling pp. 14-15). Because MidAmerican had not yet constructed, operated, repaired, or maintained a transmission line in the road right-of-way at the time of the

3. Iowa Code section 306.46(1) provides:

> A public utility may construct, operate, repair, or maintain its utility facilities within a public road right-of-way. The location of new utility facilities shall comply with section 318.9. A utility facility shall not be constructed or installed in a manner that causes interference with public use of the road.

Board's decision, the district court determined section 306.46 was being applied prospectively. (App. p. 72; 11/7/21 Ruling p. 15).

Second, in response to Juckette's claim that section 306.46(1) violates the Takings Clause of the Iowa Constitution, the district court determined that placing utility structures on the road right-of-way does not impose additional servitudes and, consequently, does not constitute a taking. (App. p. 73; 11/7/21 Ruling p. 16). In light of the Legislature's passage of section 306.46(1), and the Governor's signature thereto, the district court also questioned the continuing applicability of the Supreme Court's decision in *Keokuk Junction Railway Company v. IES Industries, Inc.*, 618 N.W.2d 352 (Iowa 2000). (App. p. 74-75; 11/7/21 Ruling pp. 17-18). For these reasons, the district court concluded section 306.46 does not violate the Takings Clause of the Iowa Constitution. (App. p. 75; 11/7/21 Ruling p. 18).

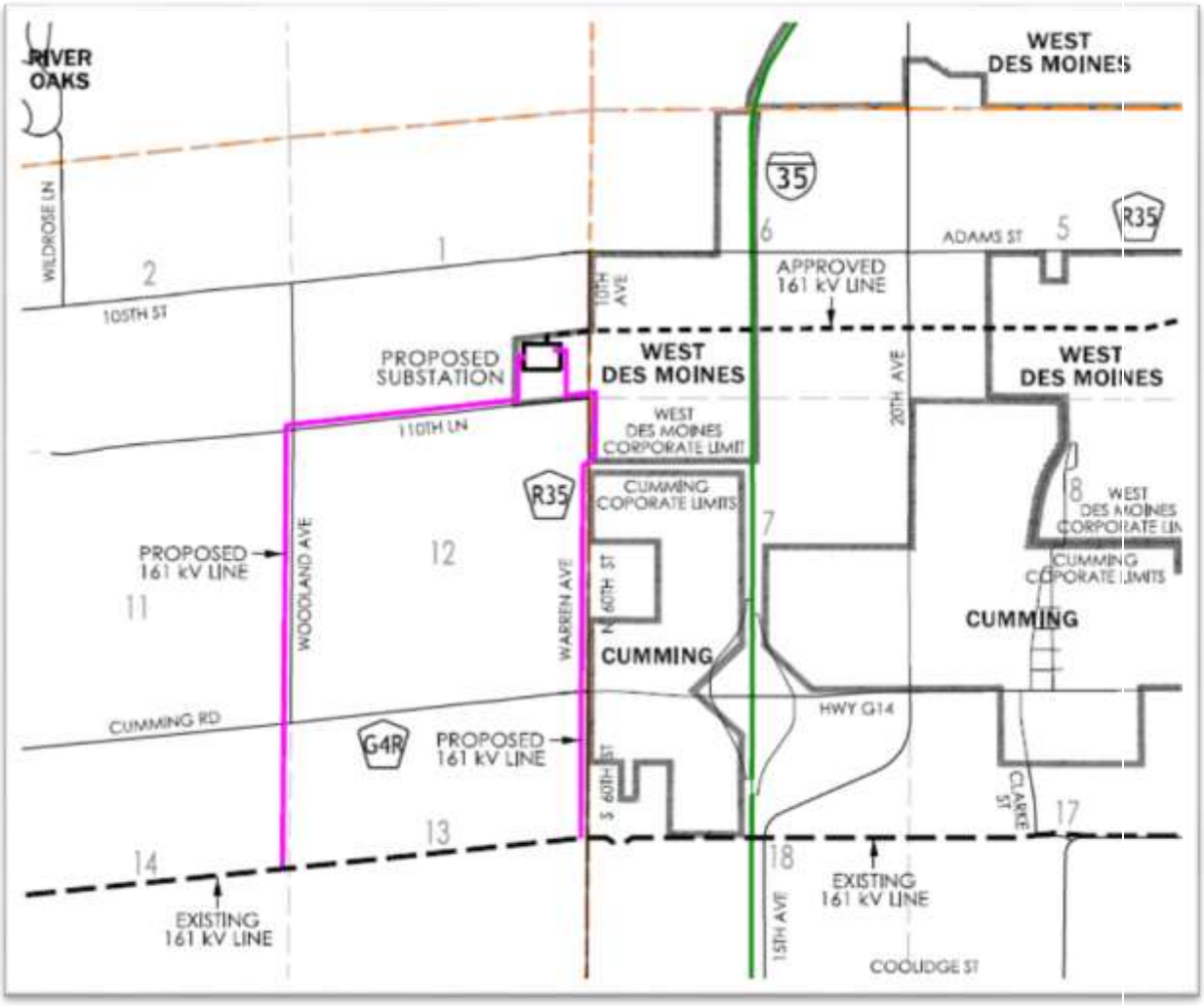
In sum, the district court affirmed the Board's order granting MidAmerican a franchise and denied and dismissed Juckette's Petition for Judicial Review. (App. p. 76; 11/7/21 Ruling p. 19).

On November 22, 2021, Juckette filed a Notice of Appeal. (App. p. 78; 11/22/21 Notice of Appeal).

STATEMENT OF THE FACTS

On September 17, 2019, MidAmerican filed a petition with the Board to construct, operate, and maintain 3.53 miles of 161 kilovolt ("kV") transmission line in Madison County, Iowa. (App. pp. 59-60, 187-190; 11/7/21 Ruling pp. 2-3; CR pp. 105-08). The proposed project consists of west and east segments. (App. pp. 60, 145; 11/7/21 Ruling p. 3; CR p. 63). Juckette's property adjoins a portion of the east segment. (App. pp. 60; 11/7/21 Ruling p. 3). MidAmerican did not request to be vested with the right of eminent domain over any property implicated in the east segment, including Juckette's property. (App. pp. 69, 1006; 11/7/21 Ruling p. 12; CR p. 924).

The following map shows a ***general overview*** of the area and the two segments (for the actual map of the two segments, please see App. p. 145; CR p. 63):



(App. p. 85; CR p. 3)[4] (west and east segments identified by pink colored lines). On December 31, 2019, Juckette requested to intervene in the proceeding, which the Board granted on January 21, 2021. (App. pp. 269-274; CR pp. 187-92).

4. The west and east segments connect to the substation identified on the map as the "Proposed Substation," which has become known as the Maffitt Lake Substation. (App. p. 353; CR p. 271). By the time of the contested case hearing before the Board, the Maffitt Lake Substation had been built. (App. p. 755; CR p. 673).

Following the filing of prehearing testimony and exhibits, the matter proceeded to a contested case hearing on September 23, 2020, at the Madison County Fairgrounds in Winterset, Iowa. (App. p. 619; CR p. 537). At hearing, the parties (*i.e.*, MidAmerican, OCA, and Juckette) stipulated to the admission of all prefiled testimony and exhibits. (App. p. 629; CR p. 547). The Board further admitted the live testimony of a Board witness, four MidAmerican witnesses, and Juckette, and one hearing exhibit offered by Juckette. (App. p. 618; CR p. 536).

While the specific evidence submitted to the Board will be discussed in greater detail below, in general, MidAmerican introduced evidence demonstrating, in part, that the proposed electric transmission lines were necessary (1) to meet industrial electric load requirements; (2) to support future growth in the area for new residential, commercial, and industrial customers, and (3) to improve the reliability of the electric loads served in the area. (App. pp. 176-77; CR pp. 94-95).

On February 1, 2021, the Board issued an order approving MidAmerican's franchise request. (App. pp. 981-1029; CR pp. 899-947). While all three Board members approved MidAmerican's request over the west segment, only two Board members (*i.e.*, Chairperson Geri D. Huser and Board Member Joshua J. Byrnes) found that MidAmerican met all necessary

statutory elements to issue a franchise over the east segment. (App. pp. 981-1029; CR pp. 899-947). The third Board member (*i.e.*, Richard W. Lozier, Jr.) filed a Partial Concurrence and Dissent, concluding that, with respect to the east segment, MidAmerican failed to adequately consider alternative routes, and application of Iowa Code section 306.46 to Juckette's property would be violative of section 4.5. (App. pp. 1023-29; CR pp. 941-47).

Following issuance of the franchise order, Juckette moved for rehearing and a stay. On March 18, 2021, the Board denied Juckette's request for rehearing and granted her request for a stay – staying the enforcement and execution of that portion of the Board's February 1, 2021 order that pertains to the east segment through the conclusion of this judicial review proceeding. (App. pp. 1115, 1129; CR pp 1033, 1047).

Additional facts will be discussed as necessary throughout the arguments of this brief.

ARGUMENT

I. THE IOWA UTILTIES BOARD'S DETERMINATION THAT THE EAST SEGMENT MEETS ALL STATUTORY PREREQUISITES FOR THE ISSUANCE OF AN ELECTRIC TRANSMISSION LINE FRANCHISE IS SUPPORTED BY THE EVIDENCE AND THE LAW.

Issue Preservation

Before the agency and the district court, Juckette raised her claim that the Board erred in finding that MidAmerican met the statutory elements for the issuance of a franchise over the east segment. Therefore, this issue appears to have been preserved. *See Strand v. Rasmussen*, 648 N.W.2d 95, 100 (Iowa 2002) (stating issues must be presented and decided by the agency and the district court to satisfy preservation requirements).

Standard of Review

Iowa Code section 17A.19(10) controls "judicial review of administrative agency decisions." *Hills & Dales Child Dev. Ctr. v. Iowa Dep't of Educ.*, 968 N.W.2d 238, 242 (Iowa 2021) (citation omitted). Under the provisions of section 17A.19(1), the governing "standard of review depends on the aspect of the agency's decision that forms the basis of the petition for judicial review." *Burton v. Hilltop Care Ctr.*, 813 N.W.2d 250, 256 (Iowa 2012).

To the extent Juckette's claim is premised on Board findings of fact, then pursuant to section 17A.19(10)(f), the question is whether the Board's determination is supported by substantial evidence when the record is viewed as a whole. *See S.E. Iowa Coop. Elec. Ass'n v. Iowa Utilities Bd.*, 633 N.W.2d 814, 818 (Iowa 2001) (applying a substantial evidence standard to an electric transmission line franchise judicial review). "'Substantial evidence' means the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance." Iowa Code § 17A.19(10)(f)(1). Under this standard, an "appellate court should not consider evidence insubstantial merely because the court may draw different conclusions from the record," *Arndt v. City of Le Claire*, 728 N.W.2d 389, 393 (Iowa 2007), and the appropriate focus is "not on whether the evidence would support a different finding than the finding made by the [agency], but whether the evidence supports the findings actually made." *Broadlawns Med. Ctr. v. Sanders*, 792 N.W.2d 302, 306 (Iowa 2010).

To the extent Juckette's claim is premised on the Board's interpretation of a provision of Iowa Code chapter 478, then the appropriate

standard of review is dependent on whether the legislature vested the Board with interpretive authority.

> If the legislature clearly vested the agency with the authority to interpret specific terms of a statute, then [courts will] defer to the agency's interpretation of the statute and may only reverse if the interpretation is "irrational, illogical, or wholly unjustifiable." If, however, the legislature did not clearly vest the agency with the authority to interpret the statute, then [the court's] review is for correction of error of law.

NextEra Energy Resources, LLC v. Iowa Utilities Bd., 815 N.W.2d 30, 37 (Iowa 2012) (internal citations omitted). "An agency can be vested with the authority to interpret a statutory provision 'when the statutory provision being interpreted is a substantive term within the special expertise of the agency.'" *Evercom Sys., Inc. v. Iowa Utilities Board*, 805 N.W.2d 758, 762 (Iowa 2011). *See also Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 14 (Iowa 2010) (stating that "when the statutory provision being interpreted is a substantive term within the special expertise of the agency, we have concluded that the agency has been vested with the authority to interpret the provisions").

Historically, the Iowa Supreme Court "frequently relied on the Board's expertise in interpreting Iowa Code chapter 478." *S.E. Iowa Coop. Elec. Ass'n*, 633 N.W.2d at 818 (citations omitted). With respect to electric transmission lines in particular, the Iowa Supreme Court stated that "[o]ur

legislature gave the Board discretion to make decisions involving electric transmission lines, and we are not to question the wisdom of the legislature in doing so." *Id.* (citations omitted). However, more recently, as Juckette noted in her Opening Brief, the Court has "generally not deferred to [Board] interpretations of statutory terms." *Mathis v. Iowa Utilities Bd.*, 934 N.W.2d 423, 427 (Iowa 2019). In light of the more recent opinions, it is unclear whether the reliance and discretion acknowledged in *S.E. Iowa* remains. The undersigned respectfully posits that the Board's authority and oversight of the statewide electric transmission system is evidence, in and of itself, of the special expertise it possesses over such matters. *See* Iowa Code § 474.9 (providing the Board with "general supervision" over all lines for the transmission, sale, and distribution of electric current). The legislature further vested the Board with the "power of supervision" over the construction, operation, and maintenance of electric transmission lines in Iowa. *Id.* at § 478.18(1).

Finally, the Board strongly disagrees with Juckette's contention that absent a request for eminent domain, an electric transmission line franchise implicates a landowner's constitutional rights. However, to the extent this issue raises constitutional questions, this Court's review is de novo. *LSCP, LLLP v. Kay-Decker*, 861 N.W.2d 846, 854 (Iowa 2015).

Argument

With respect to the first issue presented in her Opening Brief, Juckette forwards two overarching contentions. Juckette Opening Brief pp. 32-50. First, Juckette argues the "public use" element of section 478.4 "must be subject to constitutional analysis" and Iowa's constitutional "public use" standard is construed to prevent uses to benefit private parties. Juckette Open PP Brief pp. 32-40. Second, Juckette argues the Board erred in finding that MidAmerican met the "public use" element of section 478.4. Juckette Opening Brief pp. 40-50. Each will be discussed in turn.

A. The "Public Use" Element Contained in Iowa Code Section 478.4 Does Not Require a Constitutional Takings Analysis.

Juckette initially asserts that Iowa Code section 478.4 requires the Board to engage in a constitutional takings analysis as part of its franchise decision-making review. Specifically, Juckette argues that pursuant to section 478.4, prior to issuing a franchise, the Board must make a finding that the proposed transmission line is "necessary to serve a public use." Because the eminent domain section of chapter 478 (*i.e.*, Iowa Code section 478.15(1)) uses the same "public use" language, Juckette contends the phrases must be given the same meaning. Consequently, according to Juckette, all petitions for franchise must undergo a constitutional takings

analysis—even in those franchise cases in which the right of eminent domain is not sought. Juckette's contention is without merit.

First and foremost, an electric transmission line franchise, in and of itself, does not alter land rights. A franchise simply permits the franchise holder to construct, erect, maintain, and operate a transmission wire capable of operating at an electric voltage of 69 kV or more in Iowa. Iowa Code § 478.1. Juckette can point to no statute, administrative rule, or adjudicatory decision that suggests an electric transmission line franchise, in and of itself, alters whatever land rights may exist between a franchise holder and a landowner. This is not to say a franchise petitioner cannot request the Board modify land rights through the granting of the right of eminent domain; however, the eminent domain analysis under section 478.15 is separate from the Board's section 478.4 findings. In this case, MidAmerican did not seek the right of eminent domain over any portion of the east segment, including over Juckette's property. Because a franchise does not, in and of itself, alter land rights, requiring the Board to engage in a constitutional takings analysis prior to the issuance of the franchise makes little sense. *Iowa Ins. Institute v. Core Group of Iowa Ass'n for Justice*, 867 N.W.2d 58, 75 (Iowa 2015) (stating "statutes should not be interpreted in a manner that leads to absurd results").

Second, a reading of chapter 478 as a whole reveals that the issuance of a franchise and granting the right of eminent domain require separate analyses. *See Doe v. State*, 943 N.W.2d 608, 613 (Iowa 2020) (holding statutes should be read "as a whole rather than looking at words and phrases in isolation"). Phrased differently, the analysis required for granting the right of eminent domain is separate from the analysis required for the issuance of a franchise, although the evidence supporting each may be the same.

The issuance of a franchise is governed by Iowa Code section 478.4, and provides that in order to grant an electric transmission line franchise, the Board must first find that a proposed line (1) "[is] necessary to serve a public use" and (2) "represents a reasonable relationship to an overall plan of transmitting electricity in the public interest."[5] *See S.E. Iowa Coop. Elec. Ass'n*, 633 N.W.2d at 819 (stating that "[b]efore the Board may grant a petition for an electric transmission line franchise, it must find the proposed line is 'necessary to serve a public use and represents a reasonable relationship to an overall plan of transmitting electricity in the public interest'"). These findings are required in all franchise cases, regardless of

5. In order to issue a franchise, the Board must make a number other findings unrelated to section 478.4, including whether an informational meeting was held as required by section 478.2 and whether the proposed transmission line route comports with section 478.18(2).

whether the franchise petitioner requests the right of eminent domain. Even when a franchise petitioner possesses all necessary voluntary easements to construct a transmission line, which comprises the vast majority of franchise agency proceedings, the Board cannot issue a franchise without finding that the proposed transmission line is necessary to serve a public use and represents a reasonable relationship to an overall plan of transmitting electricity in the public interest.

In contrast, the granting of the right of eminent domain is governed by a separate provision in chapter 478 and provides, in relevant part:

> Any person, company, or corporation having secured a franchise as provided in this chapter, shall thereupon be vested with the right of eminent domain to such extent as the utilities board may approve, prescribe and find to be necessary for public use . . . .

Iowa Code § 478.15(1). This language is in its pronouncement that the Board's granting of the right of eminent domain cannot occur unless the petitioner first meets the section 478.4 requirements for the issuance of a franchise. If Juckette is correct in her contention that the Board must engage in a constitutional takings analysis as part of the franchise "public use" element under section 478.4, then the separate eminent domain inquiry contained in section 478.15(1) would be rendered superfluous. *See* Iowa Code § 4.4(2) (codifying presumption that the entire statute is intended to be

effective). A petitioner would be entitled to the right of eminent domain solely by virtue of its receipt of a franchise as opposed to being required to demonstrate compliance with both the franchise elements in section 478.4 and the eminent domain requirements of section 478.15(1). Simply put, read as a whole, the franchise and eminent domain inquiries in chapter 478 are separate and distinct. *See* Iowa Code § 478.1(4) (providing that a person "that cannot secure the necessary voluntary easements . . . may petition the board . . . for a franchise granting authority for such construction, erection, maintenance, or operation, **and** for the use of the right of eminent domain") (emphasis added).

Finally, and perhaps most importantly, the section 478.4 and 478.15 analyses are clearly distinct because the focus of each is different. Under section 478.4, the Board cannot issue a franchise unless it first finds the proposed line as a whole is necessary to serve a public use. Conversely, under section 478.15(1), the Board cannot grant the right of eminent domain unless it finds that the particular piece of property at issue is necessary for public use. Phrased differently, the inquiry under section 478.4 is whether the proposed line serves a public use while under section 478.15(1), the inquiry is whether the taking of particular parcels of property is necessary for public use. *See e.g., Race v. Iowa Elec. Light & Power Co.*, 257 Iowa

701, 134 N.W.2d 335 (1965) (examining the 1958 version of section 478.15, then found at section 489.14, and stating the purpose of the eminent domain provision is "to confer jurisdiction on the [Board] to determine the necessity of taking *the particular property* for the proposed use") (emphasis added).

In sum, the Board agrees that a constitutional takings analysis is required when determining whether to issue a franchise-holder the right of eminent domain. However, MidAmerican did not request the right of eminent domain over any portion of the east segment, including Juckette's property. Iowa law does not require the Board to engage in a constitutional takings review as part of its section 478.4 franchise analysis, and Juckette's arguments to the contrary are without merit. Regardless, for reasons to follow, even if such a review were required, the record in this matter supports a finding that MidAmerican met the section 478.4 public use element.

B. The Board's Finding that the Proposed Lines are Necessary to Serve a Public Use is Supported by Substantial Evidence.

Iowa has long recognized that the operation of electric transmission systems serves a public purpose. *See Carroll v. Cedar Falls*, 221 Iowa 277, 261 N.W. 652, 659 (1935) (holding that "[i]t must be conceded that private property for the construction of transmission electric systems and lines can be confiscated under the right of eminent domain because their operation is

for a public purpose"). Further, and as more relevant to the franchising statute, Iowa appellate courts have held that "the transmission of electricity to the public constitutes a public use as contemplated by section 478.4." *S.E. Iowa Coop. Elec. Ass'n*, 633 N.W.2d at 820. *See also Bradley v. Iowa Dep't of Com.*, No. 01-0646, 2002 WL 31882863 (Iowa Ct. App. Dec. 30, 2002) (stating same). Beyond the well-recognized general principle that transmission of electricity constitutes a public use, in its final order, the Board found MidAmerican's proposed lines were necessary to meet current and future transmission needs, to increase system reliability and flexibility, and to support current and anticipated load growth – each of which is recognized by Iowa adjudicatory law as meeting the necessary to serve a public use standard. (App. pp. 987-90; CR pp. 905-08).

1. The Board's Public Use Findings are Supported by Substantial Evidence.

In both its prehearing filings and at the contested case hearing, MidAmerican introduced the testimony of Mr. Michael Charleville, a senior engineer in its Electric System Planning Department. (App. pp. 280-87, 717-64; CR pp. 198-205, 635-82). Mr. Charleville testified that the most immediate need for the proposed lines was to provide additional "161 kV sources to the Maffitt Lake Substation and support the significant load growth in the area south of Maffitt Lake and Raccoon River." (App. pp.

281-82; CR pp. 199-200). Mr. Charleville further testified that the standard configuration for a substation similar to that of the Maffitt Lake Substation "is to have three incoming 161 kV lines to source the substation." (App. p. 282; CR p. 200). Without the additional transmission lines, the Maffitt Lake Substation would be served by a single source, which means that if a disruption of service were to occur with that one source line, the entire area and all the customers served by the Maffitt Lake Substation would be without service. (App. pp. 281-82; CR pp. 199-200). With the proposed additional transmission lines, three lines will source the Maffitt Lake Substation and even if a disruption of service affected two of the incoming lines, the remaining source line will be sufficient to serve the load of the substation. (App. pp. 281-82; CR pp. 199-200). Thus, the proposed lines will increase service reliability to the Maffitt Lake Substation and the customers it serves. (App. p. 282; CR p. 200).

Mr. Charleville further testified that MidAmerican's proposed lines will also "provide immediate reliability support" to the long rural distribution lines coming from three surrounding substations referred to as the Booneville, Army Post Road, and Patterson substations. (App. p. 284; CR p. 202). Customers in the area surrounding the Maffitt Lake Substation receive their electric service from source substations that are a significant

distance away. (App. p. 286; CR p. 204). With the issuance of a franchise, load that is currently served by these substations can be moved to the Maffitt Lake Substation, which means the customers in the area will be closer to their source substation. (App. p. 284, 286; CR pp. 202, 204). Moving customer electric load to a closer substation produces a number of reliability benefits, including the reduction of customer "exposure caused by long distribution lines and the associated risks from outages." (App. p. 284, CR p. 202). Additionally, long distribution lines cause complications in an electric utility's ability to provide electric service under normal conditions due to increased voltage drops that occur the farther away a line is from its source. (App. p. 286; CR p. 204). Furthermore, from a wider electric system perspective, the proposed lines would "provide an immediate increase in system contingency/outage support to" the substations surrounding the Maffitt Lake Substation. (App. p. 283; CR p. 201).

MidAmerican presented additional evidence from which the Board found the proposed lines are necessary to adequately and reliably serve current and anticipated load growth in the area. (App. pp. 281-83, 285-87; CR pp. 199-201, 203-05). While the evidence demonstrates that the most immediate need for the lines is the electric load demands from a new Microsoft data center (load demands that cannot be moved to other

substations), additional transmission infrastructure is required for anticipated growth. (App. pp. 281-83; CR pp. 199-201). "[A]s load density increases in a given area, the ability to serve distribution loading from long distances becomes constrained." (App. p. 283; CR p. 201).

An electric utility acting in a reasonable, prudent manner must proactively anticipate and plan for future load growth as opposed to remedying unanticipated load requirements. (App. p. 757; CR p. 675). As part of this planning process, MidAmerican selects substation locations as follows:

> MidAmerican formulates the desired distance between substations based on a specific [megawatt] load density value per square mile, which is then compared to standard distribution substation transformation capacity. Forecasted substation footprints and anticipated service areas are then aligned in relation to the existing transmission system, proposed transmission expansion, and area geography.

(App. p. 282; CR p. 200). Thus, MidAmerican selected the Maffitt Lake Substation because it aligned with its overall vision, taking into consideration existing substations, parcels purchased for future substation construction, and forecasted substation site preferences. (App. p. 282; CR p. 200).

MidAmerican further presented evidence that "significant industrial growth is occurring in the area" and due to the projected load growth and its

inability to serve these significant loads from existing facilities, MidAmerican determined new facilities were required. (App. pp. 283-84; CR pp. 201-02). Relying in part on analyses performed by the cities of West Des Moines and Cumming, MidAmerican also presented evidence of residential and business load increases. (App. pp. 283-87; CR pp. 201-05). Even in her own hearing testimony, Juckette stated that the expansion from the cities of West Des Moines, Norwalk, and Cumming was occurring quicker than she anticipated. (App. p. 834; CR p. 752).

In addition to providing load support for growth in the area surrounding the Maffitt Lake Substation, the proposed lines will provide support for growth as the Des Moines metro grows southwest toward Cumming and the southern sections of West Des Moines. (App. pp. 282-83; CR pp. 200-01). Due to this growth, MidAmerican states the Maffitt Lake Substation "will offer critical support to the distribution system between the Racoon River and the existing 161 kV line south of the Cumming exit" on Interstate Highway 35. (App. pp. 282-83; CR pp. 200-01).

Based on a review of the record as a whole, the Board's findings that the proposed lines were necessary to meet current and future transmission needs, to increase system reliability and flexibility, and to support current and anticipated load growth are supported by substantial evidence.

Furthermore, these are precisely the same factors Iowa appellate courts have recognized as meeting the "necessary to serve a public use" element in section 478.4. *See Fischer v. Iowa State Commerce Comm'n*, 368 N.W.2d 88, 97-98 (Iowa 1985) (affirming agency's § 478.4 public use finding where the evidence showed the proposed project increased current system reliability and improved the ability to meet future load demands); *Bradley*, 2002 WL 31882863, at * 5 (finding a public use under § 478.4 where the evidence demonstrated the proposed line "is necessary to increase reliability of service, accommodate occurring and anticipated load growth, and reasonably assure the availability, quality, and reliability of service").

2. Response to Juckette's Contentions.

Juckette contends the Board's decision should be reversed for five reasons that are wholly unsupported by the record or are immaterial and irrelevant. Juckette Opening Brief pp. 41, 50. First, Juckette argues, Microsoft Corporation ("Microsoft") "is the only user of the substation to which the proposed lines will run." Even if one were to disregard all other evidence submitted in the record, the evidence Juckette relies on does not support her contention. A fair and full reading of the portions of the record she cites reveals that the MidAmerican witness testified that the most "immediate reason" for the proposed project is the electric load required by

the Microsoft data center. (App. pp. 726-27; CR pp. 644-45). However, as already discussed above, a full reading of the entire record reveals the proposed lines will benefit MidAmerican electric customers near the Maffitt Lake Substation and farther away. The improvements to the electric system's reliability and flexibility will benefit MidAmerican's current and future customers beyond Microsoft.

However, even assuming solely for the sake of argument the record supported the conclusion that the proposed lines were to serve only one MidAmerican customer, public use must necessarily be found to exist. MidAmerican is an electric public utility with an exclusive service territory, which means no other electric utility may provide electric service in this territory. *See* Iowa Code § 476.23(1) & (2) (providing that an electric utility shall not furnish or offer to furnish electric service to a customer or prospective customer outside that electric utility's exclusive service territory without the express written agreement of the electric utility authorized to provide electric service in that service territory). Because MidAmerican operates as an electric utility monopoly, it is statutorily required to provide reasonably adequate service to each and every customer in that service area. *Id.* at §§ 476.3, 476.8; s*ee also Berner v. Interstate Power Co.*, 244 Iowa 298, 301, 57 N.W.2d 55, 56 (1953) (recognizing that an electric public

utility "has peculiar status in that, unlike the ordinary business operator, it is not free to accept or reject its patrons" and must provide electric service to all customers who abide by the utility's reasonable rules and regulations). Therefore, even if Juckette were correct in her contention that the proposed lines were necessary to serve but one customer, a public use under section 478.4 is nevertheless established.

Second, Juckette argues MidAmerican's evidence regarding future development is "completely speculative." Juckette Opening Brief p. 50. Again, the full and fair reading of the entire record belies this claim. In examining potential load growth, MidAmerican utilized its normal business processes and procedures and relied on future land use records prepared by the cities of West Des Moines and Cumming. (App. pp. 292-93, 756-58; CR pp. 210-11, 674-76). MidAmerican took into consideration the past residential growth in the area. (App. p. 285; CR p. 203). MidAmerican also took into consideration a planned "agrihood" development in Cumming, with plans for 700 homes, townhouses, condos, and apartments, that could quadruple the population. (App. p. 285; CR. 203). In addition to the anticipated load growth in the area surrounding the Maffitt Lake Substation, MidAmerican presented evidence that the proposed lines would provide critical support to other parts of the electric system as the Des Moines metro

grows southwest toward Cumming and the southern sections of West Des Moines. (App. pp. 282-83; CR pp. 200-01). Finally, in her own testimony, Juckette acknowledged quicker-than-expected growth in the West Des Moines, Norwalk, and Cumming communities. (App. p. 834; CR p. 752).

In her third and fifth points, Juckette asserts, "MidAmerican has a contractual commitment with Microsoft to obtain this franchise" and that all construction costs "will be borne by MidAmerican ratepayers to benefit Microsoft and MidAmerican." Juckette Opening Brief p. 50. First and foremost, Juckette's contention that the costs will be passed on to ratepayers is simply inaccurate, given MidAmerican is a rate-regulated electric utility. MidAmerican cannot pass on the costs to customers without going through a section 476.6 ratemaking, contested case proceeding. *See* Iowa Code § 476.6(1) (stating that a "public utility subject to rate regulation shall not make effective a new or changed rate, charge, schedule, or regulation until the rate, charge, schedule, or regulation has been approved" by the Board subject to two exceptions not relevant in this case). Additionally, OCA's comments on this issue are particularly assistive. Pursuant to Iowa Code section 475A.2(2), OCA's role in this proceeding is to "[a]ct as attorney for and represent all consumers generally and the public generally . . . ." Following its review of the evidence as a whole, OCA noted that the

revenues gained by MidAmerican from the Microsoft project are projected to exceed construction costs and opined that the project will actually provide a benefit to all MidAmerican customers. (App. pp. 972-73; CR pp. 890-91). In the event projected revenues do not exceed construction costs, OCA states the agreement between MidAmerican and Microsoft requires Microsoft to pay for the shortfall. (App. pp. 972-73; CR pp. 890-91). In sum, while costs may be relevant to the issue of whether a proposed transmission line represents a reasonable relationship to an overall plan of transmitting electricity in the public interest, *see* Iowa Code § 478.3(2)(a), Juckette has not appealed that portion of the Board's final agency action, and the costs in this case do not weigh against the Board's issuance of the franchise.

Finally, Juckette asserts the current line to the Maffitt Lake Substation "is sufficient to bear the anticipated burden on the substation." Juckette Opening \Brief p. 50. At hearing, evidence was introduced suggesting that if Microsoft's energy load never increased, the one existing 161 kV source line to the Maffitt Lake Substation would provide the necessary energy to serve Microsoft. (App. pp. 740-42; CR pp. 658-60). According to Juckette, this evidence proves MidAmerican's proposed east and west transmission line segments are not needed. The flaws with Juckette's conclusion are several: (1) it assumes the Maffitt Lake Substation's sole purpose is to support the

industrial facility; (2) it assumes the industrial facility's load will never increase; (3) it disregards the fact that the standard configuration for a substation is for multiple source lines; and, most importantly, (4) it disregards all the other reasons that the Board found support the issuance of the franchise, including the increases to the reliability of the electric system to areas surrounding and farther away from the Maffitt Lake Substation.

In sum, Juckette presented no reason to reverse the Board's section 478.4 public use finding.

3. Conclusion.

The Board's public use analysis conforms to the framework established in section 478.4 and the appellate decisions interpreting the same, and its finding that MidAmerican's proposed lines are necessary to serve a public use is supported by substantial evidence. Juckette's contentions to the contrary are either not supported by the evidence or are not relevant to the public use analysis.

Finally, in its decision granting MidAmerican's request for a franchise, the Board made a number of findings necessary for the issuance of a franchise beyond its finding that the proposed lines are necessary to serve a public use. For example, the Board found that the proposed lines represent a reasonable relationship to an overall plan of transmitting electricity in the

public interest as required by section 478.4. (App. pp. 991-999; CR pp. 909-17). Additionally, the Board found the proposed line routes complied with the routing requirements of section 478.18(2). (App. pp. 999-1005; CR pp. 917-23, 933-34). Before the district court, Juckette challenged the Board's reasonable relationship and route findings, and the district court affirmed the Board on these points. (App. pp. 62-69; 11/7/21 Ruling pp. 5-12).

In this appeal, however, Juckette has not argued in her Opening Brief that the Board's reasonable relationship or route findings were in error. Consequently, the undersigned respectfully posits that the reasonable relationship and route elements cannot be issues considered in this appeal. *See Iowa Ass'n of Business and Indust. v. City of Waterlo*o, 961 N.W.2d 465, 480 (Iowa 2021) (McDonald, J., concurring in part and dissenting in part) (stating a party's "failure to raise the issue in its briefing constitutes a waiver or forfeiture of the issue"). Further, the undersigned respectfully posits that Juckette could not attempt to resurrect the reasonable relationship or route issues by discussing for the first time in her reply brief. *See Villa Magana v. State*, 908 N.W.2d 255, 260 (Iowa 2018) (holding the Court will not normally "consider issues raised for the first time in a reply brief").

II. IOWA CODE SECTION 306.46 APPEARS TO PROVIDE MIDAMERICAN ENERGY COMPANY THE RIGHT TO INSTALL UTILITY FACILITIES IN THE ROAD RIGHT-OF-WAY ADJOINING APPELLANT LINDA JUCKETTE'S PROPERTY.

Issue Preservation

The Board does not assert Juckette failed to preserve error on her claim that MidAmerican does not possess the necessary property rights to build utility facilities on the road right-of-way that adjoins her property.

Standard of Review

The Iowa legislature provided the Board no special interpretive authority over section 306.46 and the Board possesses no special expertise over Iowa's roadways and property disputes that may exist over the use of a road right-of-way. Therefore, review of the Board's application of section 306.46 would appear to be for corrections of errors at law. *Lowe's Home Centers, LLC v. Iowa Dep't of Rev.*, 921 N.W.2d 38, 45 (Iowa 2018). Under such a review, the appellate court is to afford the agency's interpretations no deference, and the appellate court may substitute its own judgment for that of the agency. *City of Coralville v. Iowa Utilities Bd.*, 750 N.W.2d 523, 527 (Iowa 2008). To the extent this issue raises constitutional questions, review is de novo. *LSCP, LLLP v. Lay-Decker*, 861 N.W.2d at 854.

Argument

In Iowa Code section 474.1, the Iowa legislature created the Board as a division within the Iowa Department of Commerce. As an executive branch agency, the Board possesses no common law or inherent powers and only possesses those powers granted by statute. *Brakke v. Iowa Dep't of Natural Resources*, 897 N.W.2d 522, 533-34 (Iowa 2017), *see also* Iowa Code § 17A.23(3) (providing that "[a]n agency shall have only that authority or discretion delegated to or conferred upon the agency by law and shall not expand or enlarge its authority or discretion beyond the powers delegated to or conferred upon the agency").

The legislature delegated to the Board the general jurisdiction over "all pipelines and all lines for the transmission, sale, and distribution of electrical current for light, heat, and power pursuant to Iowa Code chapters 476, 476A, 478, 479, 479A, and 479B . . . ." *Id.* at § 474.9, *see also id.* at § 476.2 (identifying the Board's powers and rules). Absent from this delegated or conferred authority is the power to resolve property and land disputes. While the Board does possess the delegated power to alter property rights through the granting of the right of eminent domain and does possess the special expertise to prescribe necessary and reasonable eminent domain easement terms for the construction, operation, and maintenance of

transmission infrastructure, MidAmerican did not seek the right of eminent domain over Juckette's property and the Board did not grant MidAmerican the right of eminent domain over Juckette's property.

Additionally, as determined by the district court, "[n]either Iowa Code chapter 478 nor the governing administrative rules require a franchise petition prove it possesses all necessary land rights as a condition precedent" to obtain a franchise. (App. p. 69; 11/7/21 Ruling p. 12). Further, there is nothing in chapter 478 that suggests the issuance of a franchise, in and of itself and absent eminent domain, alters whatever land rights may exist between the land owner and the franchise holder. Absent eminent domain, a Board-issued franchise solely conveys to the transmission company the right to construct, erect, maintain, and operate an electric transmission line that is capable of operating at an electric voltage of 69 kV or more.

Because the Board has not been delegated authority to adjudicate property law disputes between a franchise holder and a landowner (other than the authority to grant the right of eminent domain), and because a franchise, in and of itself, does not alter whatever land rights may exist between a franchise holder and a landowner, a question may exist regarding the Board's authority to adjudicate the substance of Juckette's property right claim. This is especially true given MidAmerican claims a right to

construct, operate, and maintain its transmission facilities over the road right-of-way that adjoins Juckette's property, pursuant to Iowa Code section 306.46 – a statute that is not connected to or referenced in the Board's enacting statute, and a statute over which the Board possesses no interpretative authority or special expertise.

In its final order, the Board sought to provide guidance to the parties by addressing the issues the parties presented. However, the Board expressed concern with the parties' request for an interpretation of section 306.46 by stating:

> The Board appreciates and, to some extent, agrees with many of the statements penned by Board Member Lozier in his dissent. If a utility's use is not incidental or subordinate to a road easement, then as the *Keokuk Junction* Court held, "[a]llowing a utility company that operates for a profit to place its poles on the servient land without having to pay for this right is manifestly unfair to the servient landowner whose easement did not include utilities within its purview." [*Keokuk Junction Ry. Co. v. IES Industries, Inc.*, 618 N.W.2d 352, 362 (Iowa 2000)]. In attempting to harmonize the *Keokuk Junction* holding with § 306.46, the Board finds a certain amount of appeal in Board Member Lozier's conclusion that § 306.46 only applies prospectively as measured from the creation of the road easement. However, the Board also appreciates that it has no inherent authority and only has those powers and such authority as conferred to it by the legislature. *Zomer v. West River Farms, Inc.*, 666 N.W.2d 130, 132 (Iowa 2003); Iowa Code § 17A.23(3). This Board solely exists because through § 474.1, the legislature created it.
>
> The interpretation and construction of a statute is for the courts to decide. *Brakke v. Iowa Dep't of Nat. Res.*, 897 N.W.2d 522,

> 533 (Iowa 2017). Although in certain instances a reviewing court will give appropriate weight to an agency's interpretation of its own enacting statute, *Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 10 (Iowa 2010), in this instance, the Board has been asked to examine a statute that falls well outside both its enacting provisions and any area over which the Board possesses special expertise. Further, this Board lacks the authority to determine constitutional questions. *Soo Line R. Co. v. Iowa Dep't of Transp.*, 521 N.W.2d 685, 688 (Iowa 1994). *Under these circumstances, the Board believes its proper role is to apply § 306.46 as written to the pending controversy. The Board will leave the final interpretation and construction of § 306.46 – a statute over which the Board has no special interpretative authority – to the courts.*

(App. p. 1011; CR p. 929) (emphasis added). It is through this lens that the Board sought to address the issues the parties presented in the contested case.

Because resolution of the road right-of-way issue will provide much needed guidance to Iowa utilities, the Board encourages this Court to address and resolve the dispute. The Board fully appreciates that its discussion of the right-of-way issue is entitled to no deference. *See NextEra Energy Resources LLC v. Iowa Utilities Bd.*, 815 N.W.2d at 44 (holding that the courts "do not give any deference to the agency with respect to the constitutionality of a statute . . . because it is entirely within the providence of the judiciary to determine the constitutionality of legislation enacted by other branches of government"). Further, as expressed in the above-block quote, as an entity that exists solely through the legislature's delegation of

authority, the Board sought to apply section 306.46 as written. (App. p. 1011; CR p. 929). *See Shell Oil Co. v. Bair*, 417 N.W.2d 425, 429 (Iowa 1987) (quoting K. Davis, *Administrative Law* § 20.04, at 74-84 (1958) for the proposition that "[o]nly the courts have authority to take action which runs counter to the express will of the legislative body"). With that said, the undersigned will summarize the Board's discussion of the issue to the extent it may be of some benefit to this Court.

Section 306.46(1) provides that a "public utility may construct, operate, repair, or maintain its utility facilities within a public road right-of-way" subject to compliance with section 318.9 and so long as the construction of the utility facility does not cause interference with the public use of the road. There is no dispute that MidAmerican meets the definition of "public utility" as that term is defined in section 306.46. There is no dispute that MidAmerican's proposed transmission lines meets the definition of "utility facilities" as that term is defined in section 306.46. Finally, there is no dispute that MidAmerican intends to construct, operate, and maintain the transmission line within the public right-of-way on the road that adjoins Juckette's property. (App. p. 340; CR p. 258). Therefore, applying the statute as written, section 306.46 appears to permit MidAmerican to use the road right-of-way.

Juckette contends that application of section 306.46 to this case is improper for at least two reasons. First, Juckette contends that applying section 306.46 to this case constitutes an impermissible retroactive application in violation of section 4.5. Juckette Opening Brief pp. 61-75. Second, if section 306.46 is not being retroactively applied, Juckette contends the statute is unconstitutional. Juckette Opening Brief pp. 75-81. Juckette raised the same issues before the agency, and the Board responded to each.

A. Retroactive Application of Section 306.46.

In addressing Juckette's claim that applying section 306.46 to this case would constitute an impermissible, retroactive application, the Board stated:

> With respect to prospective versus retrospective application, whether § 306.46 is retroactive depends "upon what one considers to be the determinative event by which retroactivity or prospectivity is to be calculated." *Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, 100, 113 S. Ct. 554, 565 (1992) (Thomas, J., concurring in part and concurring in the judgment). In this situation, the Board believes the determinative event is the conduct that is made subject of the statute, namely, the public utility's construction, operation, repair, and maintenance of its utility facilities within a public road right-of-way. Here, because MidAmerican's construction, operation, and maintenance of the proposed transmission line has yet to occur, application of § 306.46 is prospective.

(App. p. 1013; CR p. 931).

After the Board's final decision, the Iowa Supreme Court issued *Hrbek v. State*, 958 N.W.2d 779 (Iowa 2021), which provided clarification on the question of how the determinative event is to be identified. The *Hrbek* Court examined the applicability of a newly adopted statute, which limited the types of filings that can be made by represented post-conviction relief ("PCR") applicants, to a pending PCR case. The PCR applicant asserted that application of the newly adopted statute to his pending PCR case would constitute "an unlawful retroactive application of the statute." *Id.* at 782.

The Court began its analysis by clarifying how the determinative event by which retroactivity or prospectivity is to be calculated. The Court stated:

> application of a statute is in fact retrospective when a statute applies a new rule, standard, or consequence to a *prior* act or omission. The prior act or omission is the event of legal consequence "that the rule regulates." The event of legal consequence is the specific conduct regulated in the statute.

Id. at 782-83 (emphasis in original) (internal citations omitted). In other words, a statute is applied retroactively when it applies a new rule to a "prior act," which means "the event of legal consequence." In turn, "the event of legal consequence" refers to the "specific conduct regulated in the statute."

Therefore, the determinative event is the "specific conduct regulated in the statute."

As applied to the facts of this case, to determine whether section 306.46 is being applied retroactively, the first step is to identify the determinative event – which means the specific conduct related in section 306.46. The only conduct referenced in section 306.46 is the construction, operation, repair, or maintenance of a utility facility within the public road right-of-way by a public utility. Consequently, under the *Hrbek* standard, the determinative event for purposes of examining whether section 306.46 is being applied retrospectively would appear to be the public utility's construction, operation, repair, or maintenance of its utility facilities within a public road right-of-way. Because MidAmerican has not yet constructed, operated, repaired, or maintained any utility facility within the public road right-of-way adjoining Juckette's property, section 306.46 is not being retroactively applied in violation of section 4.5.

B. Constitutionality of Section 306.46.

When asked to address the constitutionality of section 306.46, the Board noted that it "is duty-bound to follow legislative enactments and lacks the authority to consider the constitutionality of a statute." (App. p. 1011; CR pp. 929) (citing *Shell Oil Co*, 417 N.W.2d at 429). In her request for the

Board to reconsider its final decision, Juckette chastised the Board, arguing it "erred in failing to address [her] argument that Iowa Code § 306.46 is unconstitutional as applied to this proceeding because the Board and [MidAmerican's] reliance on Iowa Code § 306.46 would result in a physical intrusion upon Intervenor's real estate without just compensation." (App. p. 1055; CR p. 973). Other parties likewise requested the Board "render an opinion" as to the constitutionality of section 306.46 – again, a statute that is not within the scope of the Board's legislatively delegated authority and over which the Board has no interpretative authority. (App. p. 1100; CR p. 1018).

In response and in the Order Denying Application, the Board stated:

> The contention that an executive branch agency possesses the authority to hold [that] a legislative enactment is in violation of the Iowa Constitution, especially given that agencies possess no inherent or constitutional powers and only possess such authority as delegated by the legislature, runs contrary to the very underpinnings of the separation of powers and well-established judicial holdings. *See ABC Disposal Sys., Inc. v. Department of Nat'l Res.*, 681 N.W.2d 596, 604-05 (Iowa 2004) (stating that "[u]nder the doctrine of separation of powers, the judiciary is required to determine the constitutionality of legislation" and the Court "will not give any deference to the view of the agency with respect to the constitutionality of a statute or administrative rule, because it is *exclusively up to the judiciary to determine the constitutionality of legislation*") (emphasis added). The Board appreciates that, as the initial trier of fact, it is obligated to make factual findings relevant to the constitutional issues and, on this point, Ms. Juckette failed to identify any specific factual dispute the Board

neglected to address in its Final Order. Instead, Ms. Juckette simply disagrees with the findings the Board made. . . .

Article 1, section 18 of the Iowa Constitution provides that "[p]rivate property shall not be taken for public use without just compensation." The framework for a "takings" analysis is:

> (1) Is there a constitutionally protected private property interest at stake? (2) Has this private property interest been "taken" by the government for public use? and (3) If the protected property interest has been taken, has just compensation been paid to the owner?

Bormann v. Bd. of Sup'rs In & For Kossuth Cty., 584 N.W.2d 309, 315 (Iowa 1998). The critical question is whether a property interest has been taken. *Kingsway Cathedral v. Iowa Dep't of Trans.*, 711 N.W.2d 6, 9 (Iowa 2006).

In discussing this issue in the Final Order, the Board held:

Under such a reading, § 306.46 would "allow utilities to use public right-of-ways without the permission of the servient landowner." This is because the utility use is "an incidental and subordinate use of a highway easement," which means that the use of the right-of-way for the construction of utility facilities "does not call for acquisition of an additional servitude" from the landowner. If no additional servitude results, there is no taking. As explained by the Wyoming Supreme Court: The rights of the easement holder in another's land are determined by the purpose and character of the easement. The manner in which the easement is used does not become frozen at the time of grant. An easement for a road or a highway does not limit its use to the movement of vehicles. Uses related to traffic movement are within the scope of the easement. The grant of a public road easement embraces every reasonable method of travel over, under and along the right-of-way. Thus, the running of power and telephone lines above the ground and pipelines underneath do not increase the burden on the servient estate and are permissible uses.

(App. pp. 1127-29; CR pp. 1045-47).

The Board also acknowledged the *Keokuk Junction* Court decision, including the Court's discussion regarding the approached taken by other states. *Keokuk Junction Ry. Co.*, 618 N.W.2d at 356. Alaska, for example, takes the position that property owners cannot seek contribution for the installation of electric utility structures on a road easement. *Id.* In commenting on this approach, the *Keokuk Junction* Court stated:

> The reasoning underlying this position is that electric . . . lines supply communications and power which were in an earlier age provided through messenger and freight wagons traveling on public highways. So long as the lines are compatible with road traffic they are viewed simply as adaptations of traditional highway uses made because of changing technology: The easement acquired by the public in a highway includes every reasonable means for the transmission of intelligence, the conveyance of persons, and the transportation of commodities which the advance of civilization may render suitable for a highway.
> . . . .
> Hence it has become settled law that the easement is not limited to the particular methods of use in vogue when the easement was acquired, but includes new and improved methods, the utility and general convenience of which may afterwards be discovered and developed in aid of the general purpose for which highways are designed.

Id. at 356-57 (citation omitted). The *Keokuk Junction* Court opted against this approach, stating:

> The Alaska case . . . can similarly be distinguished from the present case because in Alaska, a statute was enacted to allow utilities to use public right-of-ways without the permission of

> the servient landowner. No such provision exists in Iowa. The sole reason the Alaska Supreme Court validated the utility's installation of electric poles within the easement was the presence of state legislation authorizing this use. *Without the aid of such legislation in Iowa, we are clearly not prompted to make a similar decision.*

Id. at 357 (internal citations omitted) (emphasis added).

Following *Keokuk Junction*, the Iowa Legislature enacted section 306.46(1), which is remarkedly similar to the Alaska statute. 2004 Iowa Acts ch. 1014. Thus, the question became, would the Iowa Supreme Court be prompted to make a decision similar to the Alaska Supreme Court with the aid of similar legislation in Iowa?

In attempting to answer this question, the Board noted the lack of a similar statute in Iowa must have had some bearing on the Court's decision – why reference the lack of an Iowa statute if the existence of the statute was immaterial? Additionally, when it enacted section 306.46, the legislature understood the *Keokuk Junction* holding and must have intended to accomplish something. *See Beier Glass Co. v. Brundige*, 329 N.W.2d 280, 285 (Iowa 1983) (providing that enacting a statute, the presumption is that "the legislature knew the existing state of the law"). The legislature would not have likely enacted a statute it knew would be unconstitutional the moment of enactment. *See Honomichi v. Valley View Swine, LLC*, 914 N.W.2d 223, 230 (Iowa 2018) (holding that statutes are presumed to

withstand constitutional review and require the challenger "refute every reasonable basis upon which the statute could be found to be constitutional").

In sum, the Board is duty-bound to follow enacted statutes, and section 306.46 clearly and unambiguously provides that a "public utility may construct, operate, repair, or maintain its utility facilities within a public road right-of-way." While the Board is likewise duty-bound to follow decisions of Iowa's appellate courts, the continued viability of the *Keokuk Junction* holding is unclear following the enactment of section 306.46. Under these circumstances, the Board opined it "must apply § 306.46 as written by finding MidAmerican may construct, operate, repair, and maintain the transmission line in the public road right-of-way." (App. p. 1014; CR p. 932). Again, as noted above, because this Court's review of section 306.46 and how that statute may alter *Keokuk Junction* will provide much needed guidance to Iowa utilities, the Board encourages this Court to address and resolve the dispute. However, as discussed in Issue I, because a franchise, in and of itself, does not alter land rights between a transmission company and a property owner, regardless of this Court's conclusion with respect to section 306.46, the Board's franchise decision should be affirmed.

CONCLUSION

Based on the authority, argument, and analysis contained herein, Appellee Iowa Utilities Board respectfully requests this Court affirm the district court's November 7, 2021 Order Denying and Dismissing Petition for Judicial Review.

NONORAL SUBMISSION

The undersigned believes this matter may be properly submitted based on the parties' briefs. In the event this matter is set for argument, the undersigned requests to be heard.

ATTORNEY'S COST CERTIFICATE

Undersigned counsel certifies there was no cost paid by the Iowa Utilities Board as contemplated by Iowa R. App. P. 6.903(2)(j).

/s/ Matthew Oetker
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CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

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/s/ Matthew Oetker
Matthew Oetker

May 12, 2022
Date

CERTIFICATE OF SERVICE

I, Matt Oetker, hereby certify that on March 12, 2022, I electronically filed the Appellee Final Brief with the Clerk of Court by using the Iowa Electronic Document Management System which will send a notice of electronic filing to the following:

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