

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

IN RE:  AMES MUNICIPAL ELECTRIC SYSTEM	DOCKET NOS. E-21743 E-21744
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**ORDER AFFIRMING, IN PART, AND  
MODIFYING, IN PART, PROPOSED DECISION**

(Issued July 2, 2008)

**I. BACKGROUND AND PROCEDURAL HISTORY**

On January 23, 2006, Ames Municipal Electric System (Ames) filed two petitions with the Utilities Board (Board) requesting franchises to construct, maintain, and operate a total of 19.75 miles of 161,000-volt (161 kV) nominal, 169 kV maximum, electric transmission line proposed to be constructed in Polk and Story counties, Iowa. The petitions were identified as Docket Nos. E-21743 (Polk County) and E-21744 (Story County). Ames subsequently filed various revisions to the petitions and exhibits.

The proposed transmission line would begin at MidAmerican Energy Company's (MidAmerican) existing Northeast Ankeny Substation outside the Ankeny city limits in Polk County and terminate at an existing Ames substation located within the city limits of Ames in Story County, Iowa. Pursuant to Iowa Code § 478.1 (2007), Ames's petition in Docket No. E-21744 (Story County) sought a franchise for only the part of the proposed transmission line located outside the corporate limits of the City of

Ames. The proposed transmission line is a single-circuit line without underbuild<sup>1</sup> except for two segments with single-phase distribution underbuild of 7.2 kV (0.14 mile in Polk County and 0.16 mile in Story County).

Ames's franchise petitions requested eminent domain authority pursuant to Iowa Code § 478.6 for eight parcels of land. One of those parcels is owned by the City of Huxley, Iowa but is located outside Huxley's city limits. In addition, a number of persons filed written objections with the Board.

On February 8, 2007, the Board issued an order consolidating the dockets and assigning the case to its administrative law judge (ALJ). A procedural order was issued, prefiled testimony submitted, and a hearing held on June 7, 2007, in Nevada, Iowa. Ames published timely notices of the hearing and submitted proofs of publication.

The ALJ issued a "Proposed Decision and Order Denying Franchises" (Proposed Decision) on September 12, 2007. The ALJ found that the proposed transmission line was necessary to serve a public use and represented a reasonable relationship to an overall plan of transmitting electricity in the public interest. However, Ames's franchise petitions were denied based on two findings concerning the proposed transmission line route.<sup>2</sup>

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<sup>1</sup> "Underbuild" is the practice of placing a second, typically lower voltage, distribution line, below the transmission conductors on the same pole. Underbuilding is typically used to preclude two sets of poles and potential physical conflicts when the poles are in road right-of-way and is encouraged by 199 IAC 11.6(1).

<sup>2</sup> "Proposed Decision and Order Denying Franchise," September 12, 2007, Finding of Fact number 8, p. 93.

In one of the findings in the Proposed Decision, the ALJ found that Ames had not established that the route it selected was reasonable or practicable or in compliance with Iowa law. Pursuant to Iowa Code § 478.18(12) and 199 IAC 11.1(7), a petitioner for franchise must begin its route planning using roads, railroads, and division lines of land. The ALJ found that Ames failed to follow these planning directives because in the planning process Ames also gave preference to existing transmission line corridors or routes, and the route ultimately proposed by Ames was parallel to an existing electric transmission line owned by Central Iowa Power Cooperative (CIPCO), rather than near and parallel to a division line of land, road, or railroad. The ALJ found that the proposed route therefore did not comply with the law, rules, or court precedents for the selection of an electric line route.

In making this finding the ALJ concluded that Ames had misinterpreted an Iowa Supreme Court case and two Board decisions that approved construction of new lines following an existing route by claiming that those cases allowed construction of a new line parallel to an existing route. The cases relied upon by Ames allowed construction of a new line that does not follow division lines of land, roads, or railroads, but would be built as joint construction (two circuits or sets of wires on one set of poles) on the route of an existing electric line. In such cases the impact on land use was minimized because most of the footprint was already there. In the proposed Ames situation, the impact on land use would not be minimized because the existing route is not used—Ames proposed to build alongside and parallel to an existing CIPCO line.

In a second finding that formed a basis for denying the franchise petitions, the ALJ found that Ames could not under law condemn property owned by the City of Huxley, but located outside Huxley's city limits. Therefore, the ALJ determined that the project could not be built on the route proposed. The Proposed Decision also made a number of conclusions and suggestions on other route issues, apparently anticipating that Ames might re-file its petitions with route modifications addressing the findings of the Proposed Decision.

On September 27, 2007, Ames filed a motion to reopen the hearing to take additional evidence; the case was reassigned to the ALJ to hear this motion. Ames wanted to introduce additional evidence on route selection and the adverse consequences of double-circuiting its line with the existing CIPCO line. In addition, Ames removed the Huxley parcel from the condemnation list. Resistances to the motion to reopen hearing were filed by the Consumer Advocate Division of the Department of Justice (Consumer Advocate) and other parties. On October 25, 2007, the ALJ denied the motion to reopen hearing because the evidence offered by Ames was not newly-discovered evidence that could not have been offered at hearing, but instead additional evidence to support Ames's case that it could have, but did not, introduce at hearing.

Ames appealed the ALJ's September 12, 2007, Proposed Decision to the Board on November 9, 2007. A briefing schedule was set by Board order issued December 21, 2007. In addition to Ames and Consumer Advocate, landowners

Cassie Cole, Michael O. Albaugh, and Connie Veasman, and a group comprised of Leonard and Sue Larson, Noel and Leona Larson, and James and Arlene Bates, participated in the appeal of the Proposed Decision by filing briefs or statements.

The joint brief or statement submitted by Mr. Albaugh and Ms. Veasman was filed on February 18, 2008, three days after the February 15, 2008, deadline for filing set by the Board in its December 21, 2007, briefing schedule. Mr. Albaugh and Ms. Veasman asked that the late filing be accepted, citing a family medical emergency that delayed their filing. Other parties had an opportunity to respond to the filing and no one filed an objection to the late filing. The late filing will be accepted.

In considering this appeal, the Board notes that attached to Ames's September 27, 2007, motion to reopen hearing were affidavits from proposed witnesses containing detailed summaries of what their additional testimony would be; responsive filings by other parties also referred to this additional evidentiary material. Because this additional evidentiary material was only used by the ALJ to rule on the motion to reopen record, it is not part of the evidentiary record in this proceeding and was not subject to cross-examination by the other parties. Therefore, the Board will not rely on any of the information contained in or attached to the September 27, 2007, motion or responses thereto in making its decision on appeal.

## **II. ISSUES ON APPEAL**

At page 7 of its notice of appeal, Ames includes a statement of what it considers the issues on appeal. However, Ames's subsequent arguments do not parallel that

statement or summary of issues. In addition, there are other matters the Board wants to address in this appeal. The issues that will be discussed are:

- A. Need for the proposed line;
- B. Relationship to an overall plan of transmitting electricity in the public interest;
- C. Construction and safety requirements;
- D. Electric and magnetic fields;
- E. Line location and route; and
- F. Other issues.

**A. Need for the proposed line**

Iowa Code § 478.4 contains two of the tests that must be met for an electric transmission line to receive a franchise. This section provides, in relevant part:

Before granting the franchise, the utilities board shall make a finding that the proposed line or lines are necessary to serve a public use and represents a reasonable relationship to an overall plan of transmitting electricity in the public interest. (Emphasis added).

Ames argued at length in its briefs about the need for the proposed line. However, there is little dispute on appeal on the need for the proposed line. The ALJ found in the Proposed Decision that "[t]he evidence presented in this case shows that the proposed transmission line is needed for the reasons given and is necessary to serve a public use." (Proposed Decision, p. 91). Most other parties to the proceeding did not object to or challenge the need for the transmission line. (Proposed Decision, pp. 17-18). One party, Ms. Cole, suggested before the ALJ that Ames investigate renewable energy sources, demand reduction, and improvements to generating capacity as an alternative to the proposed transmission line and raised those

arguments again in her briefs or statements on appeal. The Board agrees with the ALJ that there is nothing in the record that would suggest that Ames's needs could be met using Ms. Cole's suggestions. (Proposed Decision, p. 17). The Board notes that renewable energy resources, such as wind, also need transmission capacity to deliver their output to customers. The Board will affirm the ALJ's finding of need for the proposed line.

A finding of need, however, is not the end of the inquiry in franchise cases. On appeal, Ames contended that if there is a finding of need, the franchises must be granted. This is not a correct statement of the law. For example, in Docket No. E-21324,<sup>3</sup> the appellant petitioner argued that because the ALJ found the franchise petition met the requirements of § 478.4, it must be approved. On appeal, the Board held that "whether the proposed line is necessary is not the only factual consideration the statute directs the Board to determine."<sup>4</sup> A finding of need is only one of several tests a project must meet to obtain a franchise and a finding of need does not override or supercede the other legal requirements and considerations that must also be taken into account.

In the Proposed Decision, there was a discussion in the section titled "Need for the Proposed Line" that was devoted to whether the proposed line could be double-circuited (placing two lines on one set of poles) with the existing CIPCO

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<sup>3</sup> IES Utilities, Inc., ALJ "Proposed Decision and Order Denying Franchise" (issued March 18, 1999), and Board "Order Affirming Proposed Decision and Order" (issued March 1, 2000).

<sup>4</sup> Docket No. E-21324, "Order Affirming Proposed Decision and Order," pp. 4-5.

161 kV line that parallels Ames's proposed line for 4.5 miles. The discussion in this section of the Proposed Decision indicated that a double-circuit route was preferable, specifically stating that even at reduced capacity and reliability a double-circuited line could help Ames meet its needs and that such construction would not violate applicable reliability standards. (Proposed Decision, pp. 19, 91).

While the issue of possible double-circuit construction may have been relevant at some point in the decision, it is not directly relevant in connection with the need for the proposed line. The only routing issue relevant to the issue of need is whether the proposed termini<sup>5</sup> would serve that need. In these dockets an electric transmission line between MidAmerican's existing Northeast Ankeny Substation in Polk County and an existing Ames substation located within the city limits of Ames is proposed to meet the needs of Ames. Nothing in the record before the ALJ or in the arguments on appeal would suggest that the termini selected are not appropriate or reasonable termini to serve these needs. While the line's route between the termini is relevant to other issues, it is not relevant to a determination of need and must be considered separately from the need issue.

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<sup>5</sup> In franchise matters, there is an important distinction between the end points of a line and its termini. The end points are where the route approved by the franchise starts and stops and can be points of legal but not physical significance. Termini are the electrically functional end points without which the line could not serve a public use. (See subrule 11.3(6)). For example, in Docket No. E-21744 the end points are a county line and a city limit; the termini are substations inside of Ames or in another county.

A prior docket helps illustrate the point. In Docket No. E-21324, findings were made that the proposed line met the need and reasonable relationship tests of Iowa Code § 478.4. However, the decision denied the transmission line franchise petition based on routing issues.<sup>6</sup> The routing concerns played no part, and were in fact not even mentioned, in the discussion of the need and reasonable relationships tests.

Ames argued on appeal that the Proposed Decision would in effect, force Ames to double circuit its line with the existing CIPCO line. (Ames Notice of Appeal, pp. 12-16). The Proposed Decision did not make this finding or impose this requirement. While the ALJ in the Proposed Decision found that a double circuit line would not violate reliability standards and that Ames should have examined multi-circuit options more comprehensively, the Proposed Order did not say that Ames must, or even should, use multiple circuits. (Proposed Finding of Fact number 9, p. 94; Proposed Decision, pp. 20, 23, 94).

The ALJ and some of the parties appear to have focused on double or triple circuiting as a potential solution to landowner objections to the proposed route. The ALJ appears to anticipate the case will be refiled with route modifications and wants these options further explored. However, while this discussion may be appropriate to alert the parties to areas of potential interest if the petitions are refiled, they should not be read as prejudging routing issues for a franchise petition that has not been filed.

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<sup>6</sup> It was found that an abandoned and reverted former railroad right-of-way was not a "railroad" in the context of Iowa Code § 478.18.

In conclusion, while the Board affirms the Proposed Decision on the issue of need, the discussion of routing issues in the need section is misplaced. The Board will not adopt the Proposed Decision's findings regarding double circuiting with another line because once the proposed line met the need test, a discussion of other route options that could also have passed the test is irrelevant. Routing options are issues that are best addressed at another place in the decision.

**B. Relationship to an overall plan of transmitting electricity in the public interest**

The Proposed Decision stated that "[i]n general, the evidence presented in this case shows that the proposed 161 kV transmission line represents a reasonable relationship to an overall plan of transmitting electricity in the public interest."

(Proposed Finding of Fact number 4; Proposed Decision, p. 23). While Ames devoted a portion of its brief to this issue, the ALJ's findings and conclusions on this issue were decided in Ames's favor.

The Proposed Decision, however, expanded on the above finding by indicating that the "evidence in this case also shows that Ames should have analyzed the double-circuit option with the existing CIPCO line and the triple-circuit option with the MidAmerican transmission line earlier and more comprehensively as part of its comprehensive utility planning and consideration of the existing electric utility system and parallel routes." On the issue of reasonable relationship to an overall plan of transmitting electricity in the public interest, line routing may have some relevance, but

the comments on double and triple circuiting again appear to have been made for purposes of a potential future filing.

The reliability of the proposed project and the project's ability to serve its intended use and meet the needs it is designed to serve may depend, in part, on the route selected. However, once the Proposed Decision found that the line met the reasonable relationship to an overall plan of transmitting electricity in the public interest test, the comments on double and triple circuiting were dicta. The Proposed Decision is affirmed only in its conclusion that the line met the reasonable relationship test.

**C. Construction and safety requirements**

The Board notes that the Proposed Decision found that the proposed transmission line would conform to the Board's construction and safety requirements and that no additional terms, conditions, or restrictions were necessary. This finding is not challenged on appeal and the Proposed Decision's discussion and findings on this point are affirmed. (Proposed Finding of Fact number 5, p. 93; Proposed Decision, pp. 23-25).

**D. Electric and magnetic fields**

Several objectors expressed concerns that the electric and magnetic fields from the proposed line would adversely affect their health. (Proposed Decision, p. 33). The Proposed Decision found that Ames presented sufficient evidence that the electric and magnetic fields associated with the proposed line would not adversely affect public health or safety. (Proposed Order Finding of Fact number 6, p. 93; Proposed

Decision, p. 34). Additional concerns or arguments on this issue were not raised on appeal and the discussion and finding related to electric and magnetic fields will be affirmed.

**E. Line location and route**

**1. Background**

The 19.75 miles of 161 kV nominal voltage electric transmission line proposed for franchise in these two dockets run generally parallel to division lines of land or road right-of-way and mostly along the east side of Interstate 35 (I-35). However, for approximately 4.5 miles of the route, there is an existing CIPCO 161 kV line along the east side of I-35. In this area, the CIPCO line is along a quarter-section line, which qualifies as a division line of land under § 478.18. The CIPCO line predates the construction of I-35, and I-35 was built far enough west that there is a gap between the poles and the I-35 right-of-way; the poles are not immediately adjacent to the edge of the I-35 right-of-way, as is typical of electric lines paralleling roads.

There is not sufficient space between I-35 and the CIPCO line to install the Ames line, so Ames could not locate its line immediately adjacent to the I-35 right-of-way. (Proposed Decision, p. 42). Instead, Ames proposes to run its line along the east side of the CIPCO line and partially overlap its easement. This would result in two rows of electric poles running alongside each other separated by a distance typically 80 feet apart, CIPCO's preferred separation, although in some places the separation would be somewhat more or less than 80 feet to accommodate landowners. (Tr. 282).

This would place the Ames line approximately 110 to 150 feet from the edge of the I-35 right-of-way at most locations. (Board Staff Report, p. 7). This is the area where the ALJ found the route did not comply with Iowa law and formed the basis for the decision to deny the franchise petitions.<sup>7</sup> The Proposed Decision addressed all routing issues in a single finding, stating that "Ames has not proven that the route it selected is reasonable and practicable or that it is in compliance with the requirements of Iowa law." (Finding of Fact number 8, p. 93). This finding encompasses three subissues related to routing issues and the Board will address each separately. The routing issues are: (1) compliance with 199 IAC 11.1(7) and related court cases in route selection, (2) the NE 29<sup>th</sup> Street segment, and (3) authority to condemn city-owned property.

**2. Compliance with subrule 11.1(7) and related court cases in route selection**

Iowa Code § 478.18, which governs the location of electric transmission lines, provides:

Supervision of construction — location.

1. The utilities board shall have power of supervision over the construction of a transmission line and over its future operation and maintenance.

2. A transmission line shall be constructed near and parallel to roads, to the right-of-way of the railways of the state, or along the division lines of the lands, according to the government survey, wherever the same is

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<sup>7</sup> This is not the only area of departure from a road or division lines of land route – see Staff report, p. 7, and the Ploegstra property discussion in the Proposed Decision at pp. 52-55. However, those locations are not relevant to the denial or appeal.

practicable and reasonable, and so as not to interfere with the use by the public of the highways or streams of the state, nor unnecessarily interfere with the use of any lands by the occupant.

The Iowa Supreme Court has addressed the meaning and intent of § 478.18 in three important cases, Hanson v. Iowa State Commerce Comm'n, 227 N.W.2d 157 (Iowa 1975), Anstey v. Iowa State Commerce Comm'n, 292 N.W.2d 380 (Iowa 1980), and Gorsche Family Partnership v. Midwest Power, et al., 529 N.W.2d 291 (Iowa 1995). Hanson established the principle, which was reaffirmed in Anstey, that route selection for electric transmission lines must begin by examining routes near and parallel to railroads and division lines of land;<sup>8</sup> only after such routing is found impracticable or unreasonable can deviating routes be considered.<sup>9</sup>

To advise prospective petitioners of the need to comply with § 478.18(2) and the Supreme Court's directives in Hanson and Anstey regarding the route selection process, the Board adopted 199 IAC 11.1(7), which provides:

Route selection. The planning for a route that is the subject of a petition for franchise must begin with routes that are near and parallel to roads, railroad rights-of-way, or division lines of land, according to the government survey, consistent with the provisions of Iowa Code section 478.18(2). When a route near and parallel to these features has points where electric line construction is not practicable and reasonable, deviations may be proposed at those points, when accompanied by a proper evidentiary showing, generally of engineering reasons,

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<sup>8</sup> At the time of the Hanson and Anstey cases, the law did not include roads; that was added in a subsequent amendment to Iowa Code § 478.18.

<sup>9</sup> The weight to be given to landowner preference for a deviating route has not been adjudicated, but given the importance Iowa Code chapter 478 attaches to landowner notification and opportunity for input, the Board believes that landowner preference must be given some weight.

that the initial route or routes examined did not meet the practicable and reasonable standard. Although deviations based on landowner preference or minimizing interference with land use may be permissible, the petitioner must be able to demonstrate that route planning began with a route or routes near and parallel to roads, railroad rights-of-way, or division lines of land.

Further, no transmission line shall be constructed outside of cities, except by agreement, within 100 feet of any dwelling house or other building, except where such line crosses or passes along a public highway or is located alongside or parallel with the right-of-way of any railroad company, consistent with the provisions of Iowa Code section 478.20.

The methodology used by Ames in its routing study is discussed at pages 35 and 36 of the Proposed Decision:

In routing any transmission line, there can conceivably be an infinite number of alternative routes. In order to limit the study of alternative routes to reasonable scope, the approach used here was to first identify several routes, any of which appear to be feasible at this time. In identifying potential routes, some of the criteria included:

- Routes along existing corridors are preferred to routes that do not follow existing corridors. Examples of existing corridors include existing transmission lines, roads and railroads.
- Routes that follow property or field lines are preferred to routes that cut across parcels.
- Routes crossing commercial or agricultural land use are preferred to routes crossing residential land use.

- Close proximity to certain public facilities, such as schools, hospitals and parks, should be avoided if possible.

The Ames route study criteria are inconsistent with 199 IAC 11.1(7) in two respects. First, in a general sense, the study criteria do not specify that routes near and parallel to roads, railroads, and division lines of land must first be investigated and deviations considered only where such routing is found to be impracticable or unreasonable; i.e., they do not follow the sequence or process laid out by the rule or Anstey. Second, the study criteria gave routes along corridors containing existing transmission lines equal standing with roads and railroads, even though such corridors are not recognized in the statute or rule.

In examining pages 36-40 of the Proposed Decision, the ALJ in her questions at hearing appeared to give the Ames' witness on route selection an opportunity to expand on the prefiled testimony and explain the criteria used by Ames. This testimony only reinforced her findings and conclusion that the criteria contained in 199 IAC 11.1(7) were not followed.

Ames apparently relied on its interpretation of the Gorsche decision to conclude that existing transmission line corridors could be weighted equally with division lines of land in their initial study criteria. In Gorsche, the electric company wanted to construct a second transmission line on existing easements, which meant the current easements supporting the first line would have to be widened. The Court ruled that substantial evidence supported the Board's conclusion that new

construction along property division lines would not be practicable or reasonable, so as to allow for construction along a diagonal line of existing easements. The Court noted that the engineering testimony supported use of existing right-of-way and affirmed the Board's conclusion that use of an existing route on common structures would minimize interference with use of land and reduce disruption to landowners. 529 N.W.2d at 292-93.

While the Court found use of an existing route reasonable under the particular circumstances presented in Gorsche, nothing in that decision elevates existing routes to the same standing as division lines of land (or roads and railroads) in the initial route selection process. In Gorsche, the sharing of poles and right-of-way minimized interference with land use. While a wider easement was needed for the double-circuited lines, the actual physical footprint was less with the double-circuited lines than with the existing single line because the existing H-frame structures would be replaced with single poles.

Ames argues that overlapping an electric line easement with the CIPCO line it proposes to parallel allows it to rely on Gorsche.<sup>10</sup> However, the crux of the Gorsche Court's decision was that this sharing of right-of-way – even with a wider easement – minimized interference with land use. Here, Ames's proposal would not minimize interference with land use. The existing CIPCO line has H-frame support structures. Instead of removing those structures, Ames would add a new line of poles parallel to

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<sup>10</sup> There is nothing in the record to indicate if CIPCO has agreed to share its easement or if CIPCO's concurrence is even needed.

CIPCO's existing line on the affected properties. Instead of one double-circuited line with one set of poles, as in Gorsche, there would be two separate lines and two sets of poles running parallel to each other at a distance of about 80 feet.

The increased interference with land is apparent on the face of the proposal and was of concern to several objectors. The Larsons and Bates argued that a second line of poles would interfere with farm operations and potential economic development. (Proposed Decision, pp. 56-62). Ms. Cole claimed that it would place an undue burden on her current use of the property and cause loss of future revenue opportunities. (Proposed Decision, pp. 62-64). The Murphy family objected to the tree removal that would be required on their residential property if a second line were constructed.<sup>11</sup> (Proposed Decision, pp. 64-65). The City of Huxley stated the proposed second line would require relocation of planned wastewater treatment facilities and could hamper commercial or industrial development in the area. (Proposed Decision, pp. 67-68).

Ames attempted to rebut these objections, but none of its arguments change the fact that the proposed line would increase, rather than minimize, interference with land use. While most, if not all, electric transmission lines interfere to some extent with land use, the important point is that the Ames proposal does not reduce interference with land use, as was the case in Gorsche, and therefore Gorsche is inapplicable to this factual situation. Consumer Advocate and the other objectors

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<sup>11</sup> In Gorsche, a finding that major tree or brush clearing would not be required on shared right-of-way contributed to the finding that interference with land use would be minimized.

generally concurred with the ALJ's reasoning and interpretation of Gorsche, with Consumer Advocate referring to Ames's citation of Gorsche for support for its route as "inexplicable."

Ames also argued that the reasonableness of its route is demonstrated by the fact that 88 percent of the easements needed, including 10 of 15 parcels on the segment paralleling CIPCO, have been voluntarily obtained. The Board does not find this relevant to the concerns and objections of individuals who have not signed voluntary easements. While landowner preference might be relevant to a routing decision at some point in the process, it does not override or supercede the requirement that a utility's planning criteria must start with division lines of land (or roads and railroads).

In summary, Ames was mistaken in its reliance on Gorsche. First, nothing in Gorsche elevates existing transmission line corridors to the same standing or level as divisions lines of land and roads and railroads in the route selection process. Second, Ames's proposal does not reduce interference with land use, as was the case in Gorsche. By improperly relying on Gorsche, Ames's route selection process is flawed because it did not begin with an examination of division lines of land and roads and railroads to the exclusion of other factors. Other routes can be considered only after it is determined that routes along division lines of land, roads, or railroads are not practical or reasonable. Because Ames's route selection process was flawed from the beginning, the petitions for franchise must be denied.

It is important to note that the Board is not saying that the route selected by Ames could not be ultimately approved in a subsequent franchise case. However, the route cannot be approved and the franchises granted because the planning process inappropriately, and in violation of statute and rules, considered other routes in the initial planning phase on an equal footing with routes along division lines of land, roads, and railroads.

The Board is also not saying that a route that relies on an improper selection process must necessarily be rejected. It is possible for an applicant to arrive at a route that complies with the preferences of § 478.18(2) even if it does not precisely follow the route selection process specified in the Board's rules. In such an instance, errors in the selection process are not significant enough to deny a franchise because there is no harm in the error. Here, however, there is no evidence in the record that the proposed route complies with the statute. Instead, the proposed route deviates from roads, railroads, or division lines of land, so the decision process is critical and failure to follow the appropriate process is fatal to the franchise petitions.

Ames contended that it had routed its line "as close as it can" and "as nearly as practicable" to roads and division lines of land, including the segment paralleling the CIPCO line. (Notice of Appeal, pp. 19-20). As noted in the staff report submitted by the Board's Safety and Engineering Section, there is no set standard or precedent for how far from a division line of land or road a route can be and still be considered near and parallel. However, this proposed line would be far enough from any road, railroad,

or division line of land that the impact of its presence is not mitigated by features that are found near or parallel to existing roads. Accepting Ames's argument would allow an electric line to be placed almost anywhere, in the middle of fields and property, so long as it was at some distance parallel to a road, railroad, or division line of land. This is contrary to the intent of Iowa Code § 478.18(2) to minimize interference with land use. In fact, the route Ames selected is inconsistent with one of its own routing criteria, which states: "Routes that follow property or field lines are preferred to routes that cut across parcels."

While the Board generally accepts the ALJ's discussion in the order and her findings, proposed finding number 8 at page 93 incorporates unnecessary elements. The finding states that "Ames has not proven that the route it selected is reasonable and practicable or that it is in compliance with the requirements of Iowa law." There is no statutory provision that requires a route be found practicable and reasonable. Those elements come into play when a route along division lines of land, roads, or railroads is not practicable and reasonable; then, other routes can be considered. Finding of Fact number 8 will be modified.

### **3. The NE 29<sup>th</sup> Street segment**

The NE 29<sup>th</sup> Street segment is unrelated to the 4.5-mile parallel line section that would have run parallel with the existing CIPCO line. At the south end, the proposed line would run on private right-of-way along the east side of NE 29<sup>th</sup> Street. There is an existing MidAmerican double-circuit 161 kV line on the west side of the

same road for a distance of about one mile. There are no Iowa Code § 478.18(2) issues at this location and the Board does not need to discuss this segment in detail because the franchise petitions will be denied on other grounds. However, the Board will correct some aspects of the Proposed Decision's discussion regarding this segment.

The Proposed Decision cites 199 IAC 11.6(1) and National Electrical Safety Code (NESC) sections 221 and 222 in support of the following statement: "if Ames chooses to re-evaluate route options, it must consider these rules, discuss the possibility of triple-circuiting with MEC, and present evidence regarding this consideration in its revised petition." (Emphasis added). (Proposed Decision, p. 52). Ames noted in its brief that the ALJ and Consumer Advocate apparently believe that consideration of triple circuiting in this area is a requirement of Iowa law. Ames argued that this construction was in error. (Ames Reply Brief, p. 8).

Subrule 199 IAC 11.6(1) provides as follows:

Common use construction. Whenever an overhead electric line capable of operating at 69 kilovolts or more is built or rebuilt on public road rights-of-way located outside of cities, all parallel overhead electric supply circuits on the same road right-of-way shall be attached to the same or common line of structures unless the board authorizes, for good cause shown, the construction of separate pole lines.

The rule only applies to lines on public road right-of-way, not "along" public road right-of-way, as the Proposed Decision concluded. In this case, both MidAmerican's and the proposed line are outside the road right-of-way. While the rule is designed to

maximize the availability of space in road right-of-way for various utility installations (water, gas, electric, telephone), the rule is not applicable to multiple circuiting in other circumstances.

The Proposed Decision also notes an NESC preference for joint use of structures. (Proposed Decision, pp. 51-52) The NESC statements are recommendations only, not requirements, and in fact NESC 221 generally favors separation. NESC 222 encourages consideration of joint use for circuits along roads, but the full text of the rule recognizes that this can be a complex decision involving many factors, which the Proposed Decision did not acknowledge or discuss. For example, triple circuiting three major transmission lines might raise reliability and engineering issues that would not make it a viable option.

Like the CIPCO segment, the Proposed Decision views multiple circuiting as a potential solution to landowner objections to the proposed route. While Ames might want to consider multiple circuiting in the event it refiles the franchise petitions, the Proposed Decision should not be read as prejudging or endorsing multiple circuits along this segment and the Board specifically rejects the suggestion that 199 IAC 11.6 would require multiple circuiting in these circumstances.

#### **4. Eminent domain and the City of Huxley property**

Ames sought eminent domain authority for an easement on a parcel of land owned by the City of Huxley, but located outside Huxley's city limits. Huxley planned to use the property for a wastewater treatment facility and determined that granting

Ames an easement would require the facility to be located further east on the property than was originally contemplated, increasing Huxley's costs. (Proposed Decision, p. 67). Huxley and Consumer Advocate claimed the Board did not have the authority to grant eminent domain to one city over land owned by another city; Ames argued the Board has this authority.

The ALJ found that condemnation in chapter 478 franchise cases is available only over private property and not over city-owned property. Among other things, the ALJ cited the reference to "private owners of land" in Iowa Code § 478.15, which provides that "[i]f agreement cannot be made with the private owner of lands as to damages caused by the construction of said transmission line ... the same proceedings shall be taken as provided for taking private property for works of internal improvement." The ALJ also cited private property references in Iowa Code chapter 6A, which governs the eminent domain procedure. There are no Iowa Supreme Court cases expressly allowing or prohibiting the condemnation of city-owned property in a similar context. The ALJ's full discussion of this issue is found at pages 77-81 of the Proposed Decision.

In its initial brief on appeal to the Board, Ames said that it was withdrawing the Huxley parcel from the condemnation list. Ames is still requesting a route that goes through that property, but indicates it is confident it will be able to negotiate with Huxley an appropriate right to use the Huxley site. (Ames Initial Brief, p. 17). In its reply brief (responding to the arguments of Ms. Cole), Ames reiterated that it wished

the Board to consider its appeal without resolving the right of eminent domain over the Huxley parcel. (Ames Reply Brief, p. 13).

The Board does not need to address the condemnation issue in this appeal. Because the Board has determined the Proposed Decision denying the franchises will be affirmed on other grounds, the issue is moot and the Board does not express an opinion on the condemnation issue. In addition, Ames has withdrawn the issue from the appeal. Further, while the ALJ's Proposed Decision on this issue is well reasoned, there might be additional facts that could be important in a final determination in a specific case, assuming a bright line is not drawn that city property located outside city limits can never be condemned. For example, it maybe relevant to determine whether the land held for a public use, such as a sewer or airport, or being held for private development, such as land for an industrial park. There are many factors that could influence the final decision.

Objector Cassie Cole questioned if the Board can grant a franchise if all needed right-of-way is not obtained, either by voluntary easements or by approval of eminent domain. It happens occasionally that a petitioner is confident that it can obtain all easements voluntarily and proceeds to file a franchise petition without having secured all necessary easements. Subrule 11.5(2)"b" anticipates such filings by requiring a separate mailed notice to the "owners of record and parties in possession of the lands over which easements have not been obtained." This is also one reason the franchise petition form asks how many of the needed easements

have been obtained. The answer is that the Board can grant a franchise before all easements are obtained and without granting eminent domain for any remaining parcels; if voluntary easements are ultimately not obtained, the petitioner can subsequently ask the Board for eminent domain authority.

**F. Other issues**

**1. Whether the right of eminent domain should be granted for any of the other eminent domain parcels**

Other than the Huxley-owned property, the ALJ made no ruling on the Ames request for the right of eminent domain on seven other parcels. Because the franchise petitions will be denied, the Board does not need to address this issue.

**2. Ames allegations of staff support for the proposed route**

On appeal, Ames asserted that the ALJ disregarded the expert advice of the Board's staff concerning the route, contending the staff witnesses had found the route location acceptable and that Ames had addressed all issues to their satisfaction. (Ames Initial Brief, p. 9; Reply, p. 5). The record does not support such an allegation.

In its report dated February 2, 2007, Board staff found the route generally reasonable and acceptable, but noted that there was a potential Iowa Code § 478.18(2) route issue at two locations and advised that Ames be instructed to address the issue in prefiled testimony or at hearing. The report noted that the route proposed by Ames could be acceptable if certain legal requirements and court precedents were satisfied, but took no position on the compliance of the route. A

number of other issues were raised in the staff report and an updated staff report dated May 17, 2007, which Board staff recommended Ames address in testimony.

Ames cited three transcript pages in support of its allegation. The first, page 16, is simply an introduction of two staff witnesses. The other two cites, pages 26 and 29, contain the same question asked to each of the two staff witnesses, which was whether Ames had addressed the questions raised in the staff report to the satisfaction of the witness. In both cases the answer was yes. The Board reads this to mean that Ames had responded to the questions raised by staff in the reports; the answers do not mean staff concurred with Ames on the merits of the evidence or legal arguments on the routing (or any other) issue.

In any event, the Board's engineering staff provides technical advice regarding engineering considerations, not legal considerations. Franchise decisions are made in the first instance by the ALJ and, if appealed, by the Board. The opinion of the Board's staff, or any other witness, is not binding on the ALJ or Board in making the decision. All of the evidence and legal arguments are examined pursuant to the standards contained in Iowa Code chapter 17A and the Board's rules. The ALJ's and the Board's decisions stand on their own, supported by the evidentiary record. Any staff report is simply a tool for the ALJ or Board to reach their decision.

### III. FINDINGS OF FACT

The findings of fact contained in the Proposed Decision are modified as follows:

1. All of Finding of Fact number 3 beginning on page 91 of the Proposed Decision is stricken, except for the first sentence, which reads: "The evidence presented in this case shows that the proposed transmission line is needed for the reasons given and is necessary to serve a public use."

2. All of Finding of Fact number 4 on page 92 of the Proposed Decision is stricken, except for the first sentence, which reads: "In general, the evidence presented in this case shows that the proposed 161 kV transmission line represents a reasonable relationship to an overall plan of transmitting electricity in the public interest. Iowa Code § 478.3(2)."

3. All of Finding of Fact number 8 beginning on page 93 of the Proposed Decision is stricken and replaced with the following:

8(a) The evidence in this proceeding demonstrates that Ames's route selection process did not begin with division lines of land, roads, or railroads, and that it did not comply with the provisions of Iowa Code § 478.18, 199 IAC 11.1(7), and the Hansen and Anstey decisions.

8(b) It is reasonable to find that based on the evidence in this proceeding the Gorsche decision does not support the route selection criteria used by Ames.

8(c) Because Ames's franchise petitions are denied on other grounds and Ames has withdrawn the request for eminent domain on the Huxley property, it is reasonable to make no finding on the availability of eminent domain for this parcel.

#### **IV. CONCLUSIONS OF LAW**

The Conclusions of Law contained in the Proposed Decision are adopted, except for Conclusion of Law number 5 on page 95 of the Proposed Decision, which is stricken.

#### **V. ORDERING CLAUSES**

##### **IT IS THEREFORE ORDERED:**

1. The Proposed Decision issued on September 12, 2007, is affirmed in part, and modified in part, consistent with the discussion contained in this order. The franchise petitions filed by Ames Municipal Electric System, identified as Docket Nos. E-21743 and E-21744, are denied.
2. The late-filed brief or statement submitted by Michael O. Albaugh and Connie Veasman on February 18, 2008, is accepted.
3. Motions and objections not previously granted or sustained are denied or overruled. Any argument in the briefs not specifically addressed in this order is

rejected either as not supported by the evidence or as not being of sufficient persuasiveness to warrant comments.

**UTILITIES BOARD**

/s/ John R. Norris

/s/ Krista K. Tanner

ATTEST:

/s/ Judi K. Cooper  
Executive Secretary

/s/ Darrell Hanson

Dated at Des Moines, Iowa, this 2<sup>nd</sup> day of July, 2008.