

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

LINDA JUCKETTE,

Plaintiff,

v.

IOWA UTILITIES BOARD,

Defendant.

NO. CVCV061580
(IUB Dkt. No. E-22417)

REPLY TO PLAINTIFF'S
RESISTANCE TO THE IOWA
ASSOCIATION OF ELECTRIC
COOPERATIVES' MOTION TO
INTERVENE

COMES NOW, the Iowa Association of Electric Cooperatives (the "IAEC") with this Reply To Plaintiff's Resistance To The Iowa Association Of Electric Cooperatives' Motion To Intervene pursuant to IOWA RS. CIV. P. 1.407(1)(b); 1.407(2)(b); and 1.603(1):

INTRODUCTION

The question before the Court on this Motion is whether or not a highly specialized and actively involved industry association has sufficient grounds to intervene in an ongoing legal proceeding over a discrete legal issue involving the judicial interpretation and constitutionality of a specific statute that, depending on the Court's ultimate determination, could directly impact the prospective and retrospective rights of the industry association's constituency and their customers. *The answer to that question is yes.* The IAEC is entitled to intervene in this action as of right. If intervention as of right is denied, the IAEC is entitled to intervene permissively. In the alternative, if intervention is entirely denied, the IAEC should be permitted to move forward as *amicus curiae* on-brief and during any future oral arguments.

ARGUMENT

I. INTERVENTION DETERMINATIONS REST WITHIN THE DISCRETION OF THE COURT.

The Court has the right to grant or deny interventions as circumstances permit. *See* IOWA R. CIV. P. 1.407(4). Decisions about intervention fall within the Court's broad discretion. *See In re Interest of E.F.*, Case No. 19-2141, 2020 WL 1881096, at *1 (Iowa Ct. App. Apr. 15, 2020). When analyzing a motion to intervene, "all allegations [of the motion to intervene] are assumed true." *Rick v. Boegel*, 205 N.W.2d 713, 717 (Iowa 1973). Iowa gives a "liberal construction to intervention statutes" to ensure parties' interests are adequately represented and protected. *Iowa State Dep't of Health v. Hertko*, 282 N.W.2d 744, 754 (Iowa 1979); *accord Iowa Dep't of Health v. Van Wyk*, 320 N.W.2d 599, 602 (Iowa 1982).

II. IAEC IS ENTITLED TO INTERVENE AS A MATTER OF RIGHT.

The Iowa Rules of Civil Procedure authorize intervention as a matter of right:¹

"[w]hen the applicant claims an interest relating to the property or transaction² which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

¹ Plaintiff Juckette appears to take the position that because this case comes to the Court through a judicial review of agency action under Iowa Code Chapter 17A that the intervention analysis is somehow unique and different. *See* Pl.'s Resist. To Intervene, at ¶¶ 4-5; and 29. That is not so. The IAEC seeks to intervene in this action under IOWA RS. CIV. P. 1.407 and 1.1603. These avenues of intervention are separate and apart from the Iowa Code Chapter 17A issues involved in the routing of this case from the administrative agency to the district court. *E.g., Lowe's Home Centers, LLC v. Iowa Prop. Assessment Appeal Bd.*, Case No. 20-0764, 2021 WL 610105, at *2 and *2 n.3 (Iowa Ct. App. Feb. 17, 2021) (noting, in a Chapter 17A administrative appeal case, that a third party intervened at the district court level after the filing of a petition for judicial review under the Iowa Rules of Civil Procedure). Plaintiff Juckette's own briefing acknowledges this. *See* Pl.'s Resist. To Intervene, at ¶ 7 ("Intervention is governed by Iowa Rules of Civil Procedure 1.407."); Pl.'s Resp. to Mot. To Intervene Of Off. Of Consumer Advoc. & MEC, at ¶ 3 (acknowledging intervention is allowed under IOWA R. CIV. P. 1.407).

² Although a literal reading of this rule might suggest intervention as a matter of right is only permitted in actions involving "property" or "transactions," Iowa courts have in fact recognized a much broader range of interests that adequately satisfy this rule. *See, e.g., In re Interest of A.G.*, 558 N.W.2d 400, 403 (Iowa 1997) (framing the inquiry as whether or not the applicant "has a legal right which will be directly affected"); *In re C.L.C.*, 479 N.W.2d 340, 343 (Iowa Ct. App. 1991) (same).

IOWA R. CIV. P. 1.407(1)(b). Thus, this Court should grant intervention as a matter of right if: (1) The motion is timely;³ (2) The proposed intervenor has a legally recognized interest in the action; (3) The action may impair, impede, or impact that interest; and (4) No existing party adequately represents the proposed intervenor's interests. *See id. Accord In re Marriage of Ballstaedt*, 606 N.W.2d 345, 350 (Iowa 2000) ("Intervention is a matter of right to parties interested in the litigation.").

IAEC and its members have legal rights that will be impacted by the disposition of this case. *See Mot. To Intervene*, ¶ 5. IAEC members rely upon an interpretation of IOWA CODE § 306.46 when placing utility infrastructure in public right-of-ways. *See id.* A judicial finding that deviates from IAEC's settled understanding of how IOWA CODE § 306.46 operates — or worse, a finding that IOWA CODE § 306.46 is unconstitutional to any degree — would mark a palpable shift in how IAEC and its constituent members operate their businesses. *See Gavin v. Branstad*, 122 F.3d 1081, 1084 (8th Cir. 1997) (noting that intervention was allowed where interests in the constitutionality of a statute was called into question). The outcome of this case hinges, in part, on that exact issue. *See First Amend. Pet. for Agency Review*, at ¶¶ 12(a)-(e); 14(d) and (h); 15-19; 20-25; and 26-29.

Put differently, the necessity of having an "interest" in ongoing litigation for intervention purposes is not a particularly demanding one. The "test of the right of intervention is 'interest' not necessity. Neither desire, advantage nor disadvantage of plaintiff or defendant is controlling." *Price v. King, Harford, Acc. & Indem. Co., Intervenor*, 122 N.W.2d 318, 322 (Iowa 1963). It is enough that a proposed intervenor have an "'interest' in the subject matter of the litigation." *Mata v. Clarion Farmers Elevator Coop.*, 380 N.W.2d 425, 429 (Iowa 1986).

³ There is no question that IAEC's Motion To Intervene was timely.

"The most important factor in assessing the adequacy of representation is how the [proposed intervenor's] interest compare with the interest of the existing parties." *See also Varnum v. Brien*, No. CV5965, 2006 WL 4826212, at *1 (Iowa Dist. Ct. Aug. 9, 2006) (marks omitted). Neither Plaintiff Juckette, MidAmerican Energy Company ("MEC"), nor the Iowa Utilities Board (the "Board") adequately represent IAEC and its members' interests in this case. Plaintiff Juckette is not a cooperative member and has no common interest with IAEC. MEC is an investor-owned utility that is not regulated the same way a rural electric cooperative is regulated, even if there is some degree of administrative overlap. *See Compare* IOWA CODE §§ 476.1; 476.1A; and 476.1B, *with*, IOWA CODE §§ 476.3(1) and 476.7. Likewise, the Board does not share identical — or even congruent — interests with the entities which it oversees (*i.e.*, the IAEC). *E.g., New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 690 F.2d 1203, 1209 (5th Cir. 1982) (granting intervention and stating that "[i]t cannot be said that the regulator's interests and the interests of the regulated are identical. This is one of the classic governmental confrontations. The regulators have independent interests in this litigation that [the regulated entity] does not.").

It is enough that the interests of the other participants in this action "***may be inadequate***" to protect IAEC's interests going forward. *Sierra Club v. Robertson*, 960 F.2d 83, 85 (8th Cir. 1992) (collecting authorities) (emphasis added). This is a "minimal burden" certainly met under these circumstances. *Id.* (citing and quoting *SEC v. Flight Transp. Corp.*, 699 F.2d 943, 948 (8th Cir. 1983)). Therefore, intervention as of right is proper. *See Fisher v. IA Bd. of Optometry Exam'rs*, 476 N.W.2d 48, 51-52 (Iowa 1991) (reversing decision to deny intervention).

III. IN THE ALTERNATIVE, IAEC IS ENTITLED TO PERMISSIVE INTERVENTION.

If the Court finds IAEC is not entitled to intervention as a matter of right, it should

nonetheless grant permissive intervention in this case. Permissive intervention is allowed "[w]hen an applicant's claim or defense and the main action have a question of law or fact in common." IOWA R. CIV. P. 1.407(2)(b).

Here, the defenses and arguments that IAEC will develop in this action share several questions of fact and law with the claims of the underlying Parties. For example, the scope, breadth, application, and constitutionality of IOWA CODE § 306.46 predominate the substantive issues in this case. See First Amend. Pet. for Agency Review, at ¶¶ 12(a)-(e); 14(d) and (h); 15-19; 20-25; and 26-29. IAEC and its members operate on a business model that fundamentally relies on how IOWA CODE § 306.46 is interpreted and applied. See Mot. To Intervene, ¶ 5. IAEC has viewpoints about how IOWA CODE § 306.46 may be construed to the benefit of its members that might be somewhat separate and distinct, but also overlies the viewpoints of MEC and other utility companies that operate in the State of Iowa. See *Taylor v. Hogan*, Case No. 12-0898, 2013 WL 1749777, at *6 (Iowa Ct. App. Apr. 24, 2013). This degree of commonality is sufficient for permissive intervention. See IOWA R. CIV. P. 1.407(2)(b). See also *Schimerowski v. Iowa Beef Packers, Inc.*, 196 N.W.2d 551, 555 (Iowa 1972) (affirming a permissive intervention where adequate common questions of law and fact existed).

If this Court has any doubts, "the most prudent and efficient course of action" is to grant permissive intervention. See *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States*, Case No. 02-C-0553-C, 2002 WL 32350046, at *6 (W.D. Wis. Nov. 20, 2002).

IV. INTERVENTION WILL NOT UNDULY INTERRUPT THIS PROCEEDING AND UTILITY GROUPS ARE ROUTINELY GRANTED INTERVENOR STATUS IN SIMILAR CASES.

IAEC's intervention in this case will not unduly delay or prejudice any Party or the orderly administration of this proceeding. See IOWA R. CIV. P. 1.407(2). If allowed to intervene,

IAEC will follow the same rules and deadlines imposed by the Court to prevent any interruption to the routine hearing of this case. *E.g.*, *Edwards v. Vos*, Case No. 20-cv-340-WMC, 2020 WL 6741325, at *1 (W.D. Wis. Jun. 23, 2020) ("Moreover...intervention will not unduly delay the case as [proposed intervenors] have committed to...following the same briefing schedule.").

Further, utility groups are regularly allowed in as intervenors in cases where the interests of various utility enterprises are at stake. *E.g.*, *SZ Enterprises, LLC v. IA Utils. Bd.*, 850 N.W.2d 441, 443 and 444 n.1 (Iowa 2014) (involving various utility company intervenors); *Office of Consumer Advocate v. IA Utils. Bd.*, 656 N.W.2d 101, 102 (Iowa 2003) (IAEC as allowed intervenors). There is nothing special about this case that would preclude intervention. Plaintiff Juckette's allegations to the contrary are unavailing. *See* Pl.'s Resist. To Intervene, at ¶ 28.

V. PLAINTIFF'S ATTEMPTS TO REDEFINE THE BOUNDARIES OF INTERVENTION ARE WITHOUT BASIS.

Plaintiff boldly asserts that IAEC has "no interest" in this proceeding. *See* Pl.'s Resist. To Intervene, at ¶¶ 10 and 19. That is a curious assertion given that IAEC has members regulated by the Board, many of whom would be dramatically impacted by the Court's interpretation of IOWA CODE § 306.46 at the ultimate disposition of this case, and who — despite not being regulated similarly to MEC as Plaintiff oddly claims, *see* Pl.'s Resist. To Intervene, at ¶ 22 — would stand to suffer legal and equitable consequences if the Court decides this case one way or another. This Court should not let Plaintiff "hide the ball" under these circumstances. *See State v. Adams*, Case No. 11-1210, 2013 WL 45023034, at *3 (Iowa Ct. App. Aug. 21, 2013) (noting the Court was "not persuaded" by "hide the ball" tactics).

VI. ALTERNATIVELY, THE COURT SHOULD GRANT IAEC AMICUS CURIAE STATUS, ACCEPT ITS FILINGS, AND ALLOW IAEC TO PARTICIPATE IN FURTHER ORAL ARGUMENT PROCEEDINGS AS AMICI.

If the Court does not grant IAEC's request for intervention, IAEC requests that, in the alternative, IAEC be granted leave to file briefs as *amicus curiae* in this action and participate in future oral arguments. *E.g.*, Iowa Supreme Court Order on Motion re: Amicus Briefs, *Griffin v. Pate*, Case No. 15-1661 (Feb. 16, 2016) (signed by Cady, C.J.) (granting *amici* the ability to participate in briefing and oral argument in ongoing proceedings).

Utility regulation is a complicated and nuanced area of the law. *E.g.*, *Office of Consumer Advocate v. IA Utils. Bd.*, 449 N.W.2d 383, 385 (Iowa 1986) (characterizing utility cases as "complicated, highly technical questions...[with] broad public policy ramifications..."). IAEC has a unique experienced and expert viewpoint on utility-related rules, regulations, and jurisprudence that will govern this action. *See Office of Consumer Advocate v. IA Utils. Bd.*, 452 N.W.2d 588, 591-92 (Iowa 1990) (quotations omitted) (noting "the unique individual circumstances surrounding each utility."); *Iowa Power & Light Co. v. IA State Comm'n*, 40 N.W.2d 236, 241 (Iowa 1987) (noting the uniqueness of each specific Iowa utility company's circumstances). Thus, any briefs submitted to the Court by IAEC will assist and help guide the Court in reaching a fair and just resolution to the present case. *Cf.* IOWA R. APP. P. 6.906(4)(a)(3) ("The Court will ordinarily grant a motion for leave to file an *amicus curiae* brief if...[t]he proposed...brief has a unique perspective or information that will assist the court"). *See also Martins v. Interstate Power Co.*, 652 N.W.2d 657, 658 (Iowa 2002 (recognizing IAEC as *amicus* in a utility-related action); *Hawkeye Land Co. v. Franklin Cnty. Wind LLC*, Case No. 12-1568, 2013 WL 2371355, at *1 (Iowa Ct. App. May 30, 2013) (noting IAEC as an *amicus* in a utility-related case);

In sum, if intervention is not granted, the Court should — at a minimum — grant leave for IAEC to participate in this action as a friend of the court. *See Griffin Pipe Products Co., Inc. v. Bd. Of Review*, 789 N.W.2d 769, 772 (Iowa 2010) (noting that “three filed *amicus* briefs...proved very helpful to the court”); *D & C Express, Inc. v. Sperry*, 450 N.W.2d 842, 844 (Iowa 1990) (recognizing “an exceptionally thoughtful *amicus curiae* brief in support” of a party's position as being notable to the disposition of an ongoing matter); *Varnum v. Brien*, No. CV5965, 2007 WL 2892486, at *1 (Iowa Dist. Ct. Aug. 30, 2007) (“conclud[ing] that the best exercise of discretion would be to allow submission of *amicus* briefs by those applicants.”).

CONCLUSION

For the reasons set forth above, this Court should: (i) Permit IAEC to intervene in this action as a matter of right; (ii) Permit IAEC to permissively intervene in this action; or (iii) Grant IAEC the ability to file briefs and participate in oral argument in this action on an *amicus curiae* basis. *See SZ Enterprises, LLC*, 850 N.W.2d at 444 n.1 (noting that “[i]n light of anticipated interests in the issues,” the IAEC was allowed to intervene in a utility matter involving the Board's regulatory authority).⁴

⁴ It should be noted that MEC has filed an Application for Eminent Domain regarding the underlying circumstances of this case. If that Application is granted, the grounds for these proceedings may become moot as it relates to MEC's right to use the right-of-way in question. This furnishes an alternative ground showing that MEC does not adequately protect IAEC's interests in the above-captioned proceeding.

Respectfully submitted,

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