

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
IOWA UTILITIES BOARD

In Re:  MidAmerican Energy Company	DOCKET NO.: E-22417  <b>INTERVENOR LINDA JUCKETTE'S OBJECTION TO MIDAMERICAN ENERGY COMPANY'S APPLICATION FOR EMINENT DOMAIN</b>
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Intervenor, Linda K. Juckette ("Juckette"), submits the following for her Objection to MidAmerican Energy Company's May 7, 2021 Application for Eminent Domain:

1. On May 7, 2021, MidAmerican Energy Company ("MEC") for the first time sought use of eminent domain powers as it applied to Ms. Juckette's real estate.

2. Ms. Juckette raises two objections to MEC's request for eminent domain: (1) the latest request from MEC is inconsistent with MEC's previously articulated legal and factual position in requesting this franchise, and (2) Iowa Code Chapter 478 requires a hearing prior to the granting of eminent domain authority. Based on the analysis contained below, Ms. Juckette respectfully requests that the Board stay consideration of the petition for eminent domain pending the outcome of judicial review of the franchise, or alternatively deny the petition for eminent domain.

**I. MEC's Petition for Eminent Domain Is Inconsistent with MEC's previously Articulated Basis for Requesting a Franchise.**

3. In the proceeding before the Board, Ms. Juckette articulated various objections to MEC's request for a franchise. Among those objections were that MEC could not rely upon Iowa Code § 306.46, and that MEC's route selection was flawed because it did not account for the eminent domain costs associated with the various routes. In other

words, MEC's route selection matrix relied on inaccurate information, because the real costs of the various routes – if eminent domain was required – was not properly weighted in the matrix. Ms. Juckette argued that because MEC's route selection matrix was so fundamentally flawed, the Board's decision granting the requested franchise for MEC's selected route was necessarily irrational and not supported by the record.

4. MEC challenged Ms. Juckette's argument by relying on Iowa Code § 306.46. Throughout this proceeding, MEC argued that no eminent domain powers were needed as it related to Ms. Juckette's real estate:

Q. [Mr. Lande:] I want to get back to the plat now. It's your position-or I should say MidAmerican's position that it isn't necessary to exercise the right of eminent domain along Ms. Juckette's property because the plan is to place the poles in this road right-of-way; is that right?

A. [Mr. Gartenberg:] Correct.

(9/23/20 Tr. at 38:18-24).

5. In its post-hearing brief, MEC further emphasized that eminent domain was not necessary:

If a utility is required to request the right of eminent domain to place poles in the public road right of way, this relationship fractures, as the utility itself, having now paid compensation for the right to place its facilities, would have an independent, cognizable interest that may be contrary to the existing public road right-of-way easement. This creates a paradox: forcing the utility to vacate an easement that it had paid for would almost certainly be considered a taking; yet permitting the utility to continue using the easement rights it obtains through eminent domain could be contrary to the interests of the highway authority.

(MEC's Post-Hearing Brief, p. 22, filed on October 19, 2020, hereafter "MEC Br.").

6. MEC generally denied that there were any problems with its route selection

process. (MEC Br. at 10). MEC cited cost factors as being one of the core criteria for consideration in its route selection matrix. However, by filing this petition for eminent domain, MEC admits that the cost factors MEC relied upon in developing its route selection matrix were inaccurate, because MEC failed to include all relevant data points. Specifically, MEC failed to consider the cost of eminent domain, which MEC now admits it requires, even as MEC argued that no eminent domain was necessary.

7. Ms. Juckette has commenced a judicial review proceeding for the Board's grant of the franchise. Two of the issues on which Ms. Juckette seeks judicial review are whether the specific route selected by MEC is consistent with Iowa Code Chapter 478, and whether the decision to grant the franchise was supported by the evidence.

8. The present petition for eminent domain undermines MEC's contention that the route selection framework, and therefore the franchise itself, is consistent with Iowa law.

9. Having secured its franchise on the premise that eminent domain was not necessary, MEC is now back to request eminent domain. However, as the Board noted in its February 1, 2021 order, MEC's petition has undermined a central premise in MEC's argument in support of obtaining its franchise along MEC's preferred route across Ms. Juckette's property.

10. The doctrine of judicial estoppel bars MEC from seeking eminent domain while also continuing to defend the franchise the Board granted. The central contradiction is that MEC argued it would create a "paradox" to seek eminent domain in the original franchise. However, now MEC has created the very paradox it threatened would exist.

11. “[J]udicial estoppel is a commonsense doctrine that prohibits a party who has successfully and unequivocally asserted a position in one proceeding from asserting an inconsistent position in a subsequent proceeding.” *Tyson Foods, Inc. v. Hedlund*, 740 N.W.2d 192, 196 (Iowa 2007) (internal quotations omitted). Having staked out a position that eminent domain was not necessary, and indeed succeeding in its argument on that point, MEC should not now be able to circumvent the Board’s process by filing a petition for eminent domain while also defending the franchise.

12. The doctrine of judicial estoppel applies equally to the fact finding process of administrative agencies as well as courts. *Winnebago Indus., Inc. v. Haverly*, 727 N.W.2d 567, 573 (Iowa 2006) (“However, because judicial estoppel is intended to protect the integrity of the fact-finding process by administrative agencies and courts, the issue may properly be raised by courts, even at the appellate stage, on their own motion.”); *Tyson Foods*, 740 N.W.2d at 195.

13. Further, the Iowa Supreme Court has applied the rule of judicial estoppel in the same proceeding. *State v. Duncan*, 710 N.W.2d 34, 44 (Iowa 2006); *Duder v. Shanks*, 689 N.W.2d 214 (Iowa 2004).

14. The doctrine of judicial estoppel therefore bars MEC from taking a contrary position in this proceeding. Specifically, MEC cannot request that a franchise be granted on the premise that eminent domain is not necessary across Ms. Juckette’s property, and then simultaneously argue that eminent domain is necessary to serve the public purpose that MEC contends the franchise serves.

15. MEC’s about-face on the need for eminent domain over Ms. Juckette’s

property fundamentally undermines the Board's analysis of MEC's franchise petition:

Ms. Juckette's first argument is premised entirely on the presupposition that MidAmerican cannot build, operate, or maintain a transmission line along the eastern border of her property without the use of eminent domain. However, as Ms. Juckette acknowledges within her argument, MidAmerican is not requesting eminent domain authority over any portion of Ms. Juckette's property. Therefore, *in the event Ms. Juckette is correct in her argument that MidAmerican lacks the easements necessary for Route 7* (an argument the Board will examine in greater detail below), then the lack of all necessary easements *will serve as a basis to deny MidAmerican's request for a franchise covering the east segment*, and this particular contention will be moot. Conversely, if MidAmerican does not require eminent domain along Ms. Juckette's eastern border, then Ms. Juckette's contention fails.

(2/1/21 Order at 17-18) (emphasis added). MEC's new petition for eminent domain undermines the Board's analysis, and casts doubt on whether the franchise was properly granted.

16. MEC should be estopped from denying the availability of eminent domain, or should be estopped from denying that its route selection was fundamentally flawed. In either case, MEC should not be permitted to take contradictory positions for the purpose of securing a franchise and then securing access across Ms. Juckette's property.

17. Moreover, MEC's complete reversal of positions underscores Ms. Juckette's previously asserted contentions that the route selection matrix relied upon by MEC is not supported by credible information and the reliance thereon is unreasonable.

18. MEC's reliance on the route matrix is unjustified because it did not account for eminent domain costs on the various routes. By seeking eminent domain now, MEC has rendered its matrix un-useable. MEC should not be able to obtain a franchise from this Board based on assertions concerning the reasonableness of its route based on the

matrix, and then – while the case is on appeal – fundamentally change its position. MEC must present evidence that the change in strategy and request for eminent domain power still makes the selected route the most reasonable to the rate-base.

19. Now that MEC has sought the use of eminent domain, the Board must consider evidence and argument concerning how the use of eminent domain affects MEC's route selection and the scope of a grant of franchise. MEC cannot back-door its way into using eminent domain for a route that the Board granted only after MEC vehemently contended no eminent domain was necessary.

20. Ms. Juckette further objects to MEC's request for eminent domain because MEC's requested franchise is not for public use, but is instead designed only for the benefit of a single private party: Microsoft. Ms. Juckette incorporates with this reference the prior argument regarding the lack of public purpose from her post-hearing brief, filed on October 15, 2021.

## **II. Necessity for a Hearing.**

21. MEC's application for eminent domain further asserts that no hearing is necessary for its request for eminent domain. Contrary to MEC's request, Iowa Code § 478.6 does not permit any discretion over whether to hold a hearing:

*Upon the filing of objections or when a petition involves the taking of property under the right of eminent domain, the utilities board shall set the matter for hearing and fix a time and place for the hearing. The hearing shall be not less than thirty days from the date of last publication and, where a new proposed transmission line exceeds one mile in length, shall be held in the county seat of the county located at the midpoint of the proposed electric transmission line. . . .*

Iowa Code § 478.6(1) (emphasis added). As acknowledged by MEC, MEC's original

petition for a franchise did not seek to use eminent domain across Ms. Juckette's property. Now that a petition for a franchise includes a request for eminent domain, Iowa Code § 478.6(1) requires a hearing to be held, regardless of whether has already been granted a franchise by the board.

22. Further, MEC's abrupt reversal requires a hearing to address whether the franchise was properly granted, now that core premise of MEC's franchise petition is no longer accurate.

### **III. Remedy**

23. MEC's petition for eminent domain creates procedural problems. MEC has undermined a central premise of its franchise petition by requesting eminent domain.

24. The order granting the franchise is currently on appeal with a briefing schedule on file. This parallel petition for eminent domain is inconsistent with MEC's stated petition in the franchise application and with its position in the judicial review proceeding. In these parallel proceedings, MEC will be arguing to the Board that eminent domain is necessary to serve a public purpose, and to the district court that no eminent domain is necessary.

25. There are only two solutions to resolve this procedural conflict. First, the Board could deny MEC's petition for eminent domain. Ms. Juckette urges the board to do so based not only on the conflict with MEC's previously stated position but also because there is no public purpose served by granting eminent domain. Second, and alternatively, the Board could extend the stay previously granted on March 18, 2021 to the present petition for eminent domain.

WHEREFORE, Ms. Juckette respectfully requests the Board stay consideration of MEC's petition for eminent domain pending the outcome of the appeal of the franchise in the district court. Alternatively, Ms. Juckette respectfully requests that the Board set a hearing date as required by Iowa Code § 478.6, and that the Board deny MEC's request for eminent domain after the mandatory hearing.

By: /s/ John E. Lande

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