

STATE OF IOWA
DEPARTMENT OF COMMERCE
IOWA UTILITIES BOARD

IN RE: MIDAMERICAN ENERGY COMPANY	DOCKET NO. E-22417
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RESPONSE TO OBJECTION

MidAmerican Energy Company (“MidAmerican”), by and through its representative, offers the following response to Intervenor Linda Juckette’s (“Intervenor”) “Objection to Application for Eminent Domain” (“Objection”) filed with the Iowa Utilities Board (“Board”) on May 26, 2021. The Objection relates to MidAmerican’s May 7, 2021 “Application for Eminent Domain,” which asks the Board to grant the right of eminent domain to the minimum extent necessary for MidAmerican to begin construction on the east segment of a 161,000 volt nominal voltage electric transmission line in Madison County, Iowa. The Board approved the franchise on February 1, 2021, and denied Intervenor’s request for reconsideration or rehearing on March 18, 2021. MidAmerican offers the following response to Intervenor’s Objection:

I. JUDICIAL ESTOPPEL IS INAPPLICABLE

Intervenor alleges that the Board should apply the doctrine of judicial estoppel. However, the citations to legal authority included by Intervenor in the Objection omit critical elements of the doctrine, its purpose, and how it should be applied. First, MidAmerican has not changed its legal or factual arguments with respect to Iowa Code § 306.46, as alleged by Intervenor. Second, Intervenor has not shown how MidAmerican’s request for eminent domain is prejudicial to her. Finally, Intervenor’s argument regarding the need for a hearing ignores that the Board already

conducted a hearing on the matter and that Intervenor was a full, active participant in the entire proceeding.

A. MidAmerican Still Supports the Board’s Application of Iowa Code § 306.46.

Judicial estoppel is a simple, equitable doctrine. “A party who has, with knowledge of the facts, assumed a particular position in judicial proceedings is estopped to assume a position inconsistent therewith to the prejudice of the adverse party.” *Snouffer & Ford v. City of Tipton*, 129 N.W. 345, 350 (Iowa 1911) (quoted by *Kinseth v. Weil-McLain*, 913 N.W.2d 55, 74 (Iowa 2018)). “The doctrine aims to protect the integrity of the judicial process by preventing intentional inconsistency. Further, it addresses the incongruity of allowing a party to assert a position in one tribunal and the opposite in another, thereby creating the perception that at least one court has been misled.” *Kinseth*, 913 N.W.2d at 74.

The first element of judicial estoppel requires a showing that MidAmerican has assumed an inconsistent position during the course of a proceeding or subsequent proceedings. This is not the case. MidAmerican asserts unequivocally that Iowa Code § 306.46 permits a utility to place utility structures in public road right of way without additional easement rights, including the right of eminent domain. MidAmerican has consistently argued this position to the Board and will continue to argue this position in Intervenor’s challenge to the franchise in Polk County District Court. *See generally* *Juckette v. Iowa Utilities Board*, Polk County District Court No. CVCV061580.

MidAmerican filed a request for eminent domain at this time because one potential outcome from the district court would be a remand to the Board for a determination as to the appropriate scope of eminent domain. MidAmerican seeks an expeditious resolution to these matters in order to proceed with construction of the transmission line that the Board approved on

February 1, 2021. As the Board found in granting the franchise, the transmission line is necessary to serve a public use. MidAmerican made its first filing in this docket over two years ago and the Board granted a franchise more than four months ago. Without the ability to proceed with construction of the line, an important public service need is not being met.

MidAmerican seeks eminent domain authority from the Board in order to address Intervenor's contention in district court that Iowa Code § 306.46 does not permit utilities to place utility structures in public road right of way. In challenging the Board's application of Iowa Code § 306.46 before the district court, Intervenor relies almost exclusively on *NDA Farms, LLC v. Iowa Utilities Board*, No. CVCV009448, 2013 WL 11239755 (Polk Co. Dist. Ct. June 24, 2013) ("NDA Farms"). In *NDA Farms*, the Polk County District Court remanded the issue to the Board for eminent domain proceedings, which the Board conducted without a hearing. "Order Granting Request for Eminent Domain Authority," Docket No. E-21988 (Aug. 14, 2013).

In short, Intervenor is arguing to the district court that MidAmerican cannot rely on the right-of-way statute, while simultaneously arguing to the Board that MidAmerican cannot rely on eminent domain. Intervenor has not explained to either tribunal how MidAmerican can exercise its franchise rights if it cannot use either Iowa Code § 306.46 or eminent domain. Ultimately, MidAmerican is not changing its legal position on Iowa Code § 306.46 or its applicability in this proceeding. MidAmerican is attempting to follow the precedent of *NDA Farms* and doing everything possible to serve the public interest.

B. Intervenor Has Not Alleged or Shown Any Prejudice.

Another element of judicial estoppel is that any change in position must also be prejudicial to the opposing party. *Snouffer & Ford*, 129 N.W.2d at 350. Intervenor has not argued that MidAmerican's request for eminent domain would be prejudicial to Intervenor's interest. Indeed,

one likely outcome from Intervenor's appeal to the Polk County District Court would be a remand to the Board for eminent domain proceedings. That is precisely what occurred in *NDA Farms*, which Intervenor relied upon in this proceeding. Intervenor publicly acknowledged that this is a likely outcome by asking the district court "to order MidAmerican Energy Company to re-petition the Iowa Utilities Board for proper eminent domain authority over Juckette's property or, alternatively, MidAmerican Energy Company to commence proceedings before the appropriate county compensation commission to determine compensation for the use and taking of Juckette's property." "First Amended Petition for Judicial Review of Agency Action," Polk Co. Dist. Ct. No. CVCV061580, pp. 8-9 (Apr. 5, 2021) ("Petition"). Intervenor cannot show any prejudice in this proceeding because it is the very relief Intervenor is seeking from the district court. Accordingly, the elements of judicial estoppel have not been met.

C. Intervenor is Asking the District Court to Require MidAmerican to Seek Eminent Domain.

Although Intervenor failed to establish the elements of judicial estoppel with respect to MidAmerican's petition, Intervenor managed to establish that judicial estoppel should be applied to its own position. Indeed, Intervenor is now arguing that MidAmerican cannot utilize eminent domain in this proceeding, while arguing in Polk County District Court that MidAmerican cannot use Iowa Code § 306.46 to place its approved transmission line. In effect, Intervenor is arguing that MidAmerican, despite having a right to construct a transmission line on a route approved by the Board, cannot utilize either eminent domain or Iowa Code § 306.46 to place the transmission line. Intervenor argues that the Board has no authority, either through Iowa Code § 306.46 or Iowa Code § 478.15, to permit utilities to construct facilities once the Board approves a franchise. This is untenable and contradicts the outcome of *NDA Farms*.

Ultimately, judicial estoppel is an equitable doctrine and should be applied to protect the rights of the parties and the integrity of the tribunal. To permit Intervenor to argue that MidAmerican can use neither Iowa Code § 306.46 nor Iowa Code § 478.15 to construct the Board-approved transmission line would lead to an absurd result, which is precisely what the doctrine of judicial estoppel is meant to prevent.

II. THE REQUEST FOR EMINENT DOMAIN IS APPROPRIATE

A. Eminent Domain Does Not Render A Route Deficient.

Iowa Code § 478.15 provides:

Any person, company, or corporation *having secured a franchise* as provided in [Iowa Code chapter 478] *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[.] (emphasis added).

When a utility needs eminent domain to construct an approved transmission line on the approved route, the Board must consider eminent domain to the extent necessary for public use. The Board has previously found that MidAmerican properly showed that the transmission line complies with Iowa Code §§ 478.3(2) and 478.4, which requires a showing that the proposed “line or lines are necessary to serve a public use,” which is substantively the same standard as Iowa Code § 478.15. Because the Board found that the line is necessary to serve a public use, the Board should consider and approve MidAmerican’s request for eminent domain authority to construct the transmission line and begin to serve that public use. In other words, the use of eminent domain depends on the grant of a franchise, not vice versa.

B. Intervenor Mischaracterizes MidAmerican’s position, the Board’s Order, and Applicable Eminent Domain Law.

Intervenor’s arguments mischaracterize the record in this docket. Specifically, Intervenor asserts that MidAmerican’s proposed route is now deficient because of a request for the authority

to use eminent domain. Objection at pp. 5-7. This assertion is not supported by law or by the record. Iowa Code § 478.4 requires the Board to find 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” before granting a franchise. Iowa Code § 478.3(2) outlines the elements a utility must show in establishing that the transmission line represents a reasonable relationship to an overall plan of transmitting electricity in the public interest. None of the enumerated elements in the statute require MidAmerican to avoid the use of eminent domain. Whether a franchise is granted depends on the public interest and not upon whether or not eminent domain is needed.

Intervenor continues to argue that an owner’s subjective valuation of a property should dictate how a utility selects, and how the Board approves, the route for a transmission line. Objection at pp. 3, 5, 6. This is not the law in Iowa. The Board correctly determined that MidAmerican made the showings required by Iowa Code §§ 478.3(2) and 478.4. The Board also disposed of Intervenor’s property valuation argument. “Order Granting Petition for Electric Transmission Line Franchise and Right of Eminent Domain,” Docket No. E-22417, p. 18 (Feb. 1, 2021) (“The Board is aware of no authority that requires MidAmerican to consider private landowner rights or the economic value of property in conducting a route study.”). Finally, the Board conclusively ruled against Intervenor’s claims that the line only serves one customer:

While the record does support a finding that the most immediate need for the transmission line is due to the Microsoft Corporation data center, the record is replete with evidence that the proposed project is necessary to meet current and future transmission needs and will increase system reliability and accommodate future load growth, all of which benefits innumerable MidAmerican customers beyond Microsoft. . . . [E]ven assuming for the sake of argument that Ms. Juckette was correct in her contention that the transmission lines were necessary to solely serve Microsoft, a public use is nevertheless established.

“Order Denying Reconsideration,” Docket No. E-22417, pp. 4-6 (Mar. 18, 2021) (citing *S.E. Iowa Co-op Elec. Ass’n v. Iowa Utilities Bd.*, 633 N.W.2d 814, 820 (Iowa 2001)). The Board conclusively addressed Intervenor’s arguments on this issue and should not reconsider them.

The Board should ignore these arguments because they are not founded upon the Iowa Code, case law, the Board’s rules or the Board’s prior practice. This newly-created standard does not align with Iowa Code §§ 478.3(2), 478.4, or 478.15 and would place the Board in the position of making property valuation determinations that are properly before a county compensation commission. *See Hawkeye Land Co. v. Iowa Utilities Bd.*, 847 N.W.2d 199, 219 (Iowa 2014) (stating that Iowa Code Chapter 6B governs the compensation owed a landowner for transmission line easements that require the use of eminent domain). As the Board stated in this docket, “The Board does not have the authority to determine the amount of compensation paid for the easement and the ‘proper place for the landowners to raise their concerns regarding devaluation of their property is before the county compensation commission, which will set the amount to be paid for the easement when eminent domain is used.’” Order, pp. 39-40 (citations omitted). Accordingly, the Board should deny Intervenor’s new standard.

C. The Request for Eminent Domain Complies with the Procedural History of *NDA Farms*.

Intervenor has consistently relied upon *NDA Farms* and subsequent proceedings for the appropriate interpretation of Iowa Code § 306.46 and its connection to the use of eminent domain. *See e.g.* “Pre-Hearing Brief,” pp. 5-6 (June 24, 2020); “Post-Hearing Brief,” pp. 21-22 (Oct. 15, 2020); “Motion for Stay Pending Application for Rehearing and Judicial Review,” p. 4 (Feb. 11, 2021). Intervenor also relies on *NDA Farms* in its appeal of the Board’s order to Polk County District Court. Petition at p. 6 (Apr. 5, 2021).

Curiously, Intervenor did not cite to *NDA Farms* in its Objection. Indeed, in *NDA Farms*, the Polk County District Court found:

Section 478.6 provides that upon the issuance of a franchise, [the utility] may be vested with the power of condemnation to procure the required easement. . . . Therefore, the court finds that a limited remand is necessary only for the IUB to consider and provide the extent to which [the utility] is vested with the power of condemnation to procure property rights sufficient to construct the transmission line.

NDA Farms, 2013 WL 11239755 at *11.

MidAmerican's request for eminent domain at this time aligns with the Board's procedure after remand from the district court in *NDA Farms*. MidAmerican prepared the appropriate notices, served those notices on the appropriate parties via certified mail, and seeks a determination of the need for a hearing. Given that Intervenor requested precisely this relief in district court, the Board should continue to review the materials and request any additional information it may need to complete the proceeding, should the district court remand to the Board for this action.

III. NEITHER AN ADDITIONAL HEARING NOR A STAY IS NECESSARY

A. Intervenor Had Full Opportunity to Participate at Hearing and Did Participate Fully.

MidAmerican requested that the Board find that no hearing is necessary to consider MidAmerican's request for eminent domain. This aligns with the standard used in *NDA Farms* and is a common-sense approach to addressing the remaining issues. Intervenor cites to Iowa Code § 478.6 to say that a hearing is necessary, yet does not address why the September 23, 2020 hearing does not meet the standard. Iowa Code § 478.6 requires a hearing, either after a filing of an objection or when the right of eminent domain is requested. In this case, since there were a number of objections and MidAmerican requested the right of eminent domain, the Board conducted a hearing on September 23, 2020. Intervenor was afforded every right to participate in the hearing

and took full advantage of every opportunity. Intervenor has not stated why the first hearing was insufficient to comply with the terms of Iowa Code § 478.6 given her participation before, during, and after the hearing.

B. A Stay is Neither Necessary Nor Appropriate.

Finally, Intervenor argues the Board should stay consideration of MidAmerican's request until the district court makes a final order. Objection at p. 7. Specifically, Intervenor requests that the Board stay consideration under the stay of construction granted by the Board on March 18, 2021. *Id.* This is inappropriate for two reasons.

First, the stay of construction is based largely on the "irreparable harm" Intervenor alleged would occur if MidAmerican began physical construction on the transmission line. Moving legal proceedings would not have that effect. Indeed, moving forward with this proceeding would consolidate and expedite a final, conclusive resolution of this proceeding, which benefits all parties.

Second, there is no outcome in this proceeding that would compromise Intervenor's ability to protect her interests. Should the Board prevail in the judicial review proceedings, MidAmerican would withdraw its request. If the district court remands for additional proceedings, the district court would necessarily be asking the Board to continue this very proceeding. Even assuming Intervenor wins on every count through the judicial review and the issue is remanded to the Board for full reconsideration, MidAmerican would amend the filings to comply with the terms of the remand. Accordingly, there is no reason to either deny or stay the proceedings at this time.

In conclusion, MidAmerican asks the Board to continue its review of MidAmerican's request for eminent domain authority in this proceeding.

Dated this 8th day of June, 2021.

Respectfully submitted,

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