

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

LINDA K. JUCKETTE,

Petitioner,

v.

IOWA UTILITIES BOARD,

Respondent.

CASE NO.: CVCV061580

**PETITIONER'S RESISTANCE TO
APPLICATION FOR LIMITED
REMAND BY MIDAMERICAN
ENERGY COMPANY**

COMES NOW, Petitioner Linda K. Juckette, by and through her undersigned counsel, states the following for her Resistance to the Application for Limited Remand by MidAmerican Energy Company ("MEC"):

1. MEC's request for limited remand asks the Court to fashion a new remedy whereby a utility obtains a franchise under Chapter 478 by denying the need for eminent domain, and then requests to have the Court and Iowa Utilities Board ("IUB") add eminent domain to that franchise.

2. MEC has engaged in a flurry of motion practice with the Court and IUB to try to circumvent the process of judicial review and obtaining a franchise with the power of eminent domain. In doing so, MEC has filed pleadings with IUB that undermine the very premise upon which IUB granted the franchise. Then, without waiting for a ruling from IUB, MEC has asked this Court to weigh in by remanding this proceeding to IUB. For the reasons set forth below, Ms. Juckette respectfully requests the Court vacate the entire franchise, and remand this case for further proceedings.

A. Summary of the Issues Created by MEC's Motion.

3. MEC first petitioned IUB for an electric line franchise under Iowa Code Chapter 478 in September 2019. The original petition, and all subsequent amendments by MEC, never sought from IUB the power to exercise eminent domain on Ms. Juckette's property. To the contrary, throughout the contested IUB proceeding, MEC claimed eminent domain was not necessary on Ms. Juckette's property, because Iowa Code § 306.46 allowed MEC to construct its utility lines in the easement granted on Ms. Juckette's property for a road.

4. IUB relied on MEC's representation regarding the necessity for eminent domain in granting MEC a franchise that did not include the power to exercise eminent domain on Ms. Juckette's property.

5. After IUB granted MEC the franchise, IUB stayed construction of the electric line targeted for Ms. Juckette's property pending judicial review before the Court.

6. While review has been pending before the Court, MEC filed a separate application with IUB seeking to add the power of eminent domain to MEC's franchise granted by IUB. However, MEC's application does not follow the procedures in Iowa Code Chapter 478 for obtaining such authority.

7. Ms. Juckette resisted MEC's request in the IUB, because MEC's application undermines the premise upon which the franchise was granted in the first place. IUB has not yet ruled on that application.

8. MEC now is asking the Court to remand this case to IUB to engage in proceedings not contemplated by Iowa Code Chapter 478. If MEC now acknowledges

that the only way to build its line is by obtaining the power of eminent domain to use on Ms. Juckette's property, then MEC needs to follow the procedure established in Iowa Code Chapter 478.

9. At this point, Chapter 478 and the analysis in IUB's ruling granting MEC the franchise requires the Court to vacate IUB's order awarding the franchise, and remand this case for further proceedings with IUB.

B. Iowa Code Chapter 478 and IUB Regulations Have a Specific Process for Obtaining the Power of Eminent Domain that MEC is Trying to Circumvent.

10. There is no procedure established under Iowa Code Chapter 478 for a utility to obtain a franchise without requesting eminent domain, join in on an appeal that challenges the very grant of the franchise, and then seek to augment that franchise with additional requests for eminent domain so as to moot a related but separate issue on appeal before the District Court.

11. Statutory and regulatory construction demonstrate the opposite is true. If MEC wanted to utilize eminent domain on Ms. Juckette's property, then it must have done so at the outset of the proceeding in IUB. If MEC now concedes that eminent domain is necessary along Ms. Juckette's property, the only remedy is for the Court to vacate IUB's grant of a franchise, and remand this case to IUB for further proceedings.

12. The analysis begins with Iowa Code § 478.1, which requires entities constructing electric lines of more than 69 kilovolts outside of a city to obtain a franchise from the IUB. Iowa Code § 478.1(1).

13. To commence the proceeding for a franchise, MEC must file a petition with the IUB. Iowa Code § 478.2(1). The petition must include, among other requirements:

d. A general description of the public or private lands, highways, and streams over, across, or along which any proposed line will pass.

...

g. Whether or not the exercise of the right of eminent domain will be used and, if so, *a specific reference to the lands described in paragraph "d" which are sought to be subject thereto.*

Iowa Code § 478.3(1) (emphasis added).

14. MEC did not provide "specific reference" to Ms. Juckette's property when it filed its petition and subsequent amendments with the IUB.

15. After the filing of the franchise petition, which requests eminent domain, the IUB "shall set the matter for hearing and fix a time and place for the hearing." Iowa Code § 478.6. The hearing requirement is not discretionary, because it protects the interests of landowners whose property rights might be prejudiced by a taking under eminent domain.

16. In short, for MEC to obtain eminent domain on private property as part of an electric line franchise, MEC must file a petition with a "specific reference to the lands" which will require eminent domain, and then IUB must hold a public hearing prior to grant of the franchise. Chapter 478 does not provide a process where a utility can file a petition that does not specifically seek eminent domain, and then come back after a franchise is granted to make such a request.

17. Indeed, the very constitutionality of the electric line franchise chapter of the Iowa Code depends on the specific request for eminent domain being included as part of

the petition for IUB approval. In addressing a challenge to the constitutionality of the electric line franchise chapter, the Iowa Supreme Court ruled: “the right of eminent domain is limited *to the extent necessary as found by the commission* and prescribed and approved by it. Determination of the extent necessary *is not left for future determination*. Under section 489.5 the commission *is required to make that determination*.” *Race v. Iowa Elec. Light & Power Co.*, 134 N.W.2d 335, 338 (1965) (emphasis added). Critically, Chapter 487 – previously codified at Chapter 489 – cannot leave the scope of eminent domain up to future determination. That is precisely what MEC proposes to do here, by attempting to tack a request for eminent domain onto an existing proceeding.

18. This construction of Chapter 478 is further confirmed by review of the regulations promulgated by the IUB. Iowa Admin. Code § 199-11.1, *et. seq.*, which governs petitions for franchise, has no procedures for the addition of eminent domain to a previously granted franchise. Such a procedure would be inconsistent with the statutory rules of Iowa Code Ch. 478, which require eminent domain to be specifically requested for specific parcels, and then for IUB to hold a hearing.

19. Thus, MEC has asked both IUB and the Court to fashion a new path, without any support identified in Chapter 478, to allow MEC to add eminent domain to a previously granted franchise without following any of the statutory steps for obtaining that power.

C. MEC's Decision Not to Request Eminent Domain on Ms. Juckette's Property Was Material to IUB's Decision to Award a Franchise

20. MEC's omission of a request for eminent domain was a significant factor in IUB's decision to grant a franchise. MEC argued throughout the IUB proceedings that no eminent domain was necessary. IUB then granted MEC's franchise based on MEC's position that there would be no eminent domain, because MEC was going to rely on Iowa Code § 306.46:

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). As previously noted, MEC never requested eminent domain on Ms. Juckette's property. Therefore, as alluded to by the IUB above, if § 306.46 does not allow MEC to place its lines in the road easements Ms. Juckette previously granted, MEC must secure an easement to place poles in Ms. Juckette's property. As specifically noted by IUB above, MEC did not have easements on Ms. Juckette's property. Therefore, if § 306.46 does not apply then MEC's franchise should have been denied.

21. In other words, IUB granted the franchise to MEC for the line at issue precisely because MEC had *not* sought the use of eminent domain, and instead relied on

Iowa Code § 306.46.

22. MEC has now conceded the necessity of eminent domain by making a request for eminent domain. If Iowa Code § 306.46 granted MEC the rights that MEC asserted throughout the IUB proceeding, then there would be no necessity for eminent domain.

23. This concession came only after Ms. Juckette obtained a stay of construction pending judicial review.

24. However, MEC cannot simply bolt a request for eminent domain onto its existing franchise. As noted above, IUB's decision to grant the franchise was based on the premise that no eminent domain was necessary. If that premise is no longer true, then as noted by IUB, "the lack of all necessary easements *will serve as a basis to deny MidAmerican's request for a franchise covering the east segment.*" (2/1/21 Order at 17-18).

25. MEC should not be permitted to obtain a franchise on the premise that no eminent domain is necessary, and then ask the Court and IUB to permit exercise of eminent domain when the statutory process has not been followed. MEC's changed posture demonstrates MEC's proverbial attempt to have its cake and eat it too. MEC's repeated representations to the IUB that MEC did not need eminent domain was key to the IUB's consideration of MEC's right to a franchise (in particular, the selected route). MEC now seeks a remand from this Court - where Ms. Juckette is challenging the grant of the franchise (in particular, the selected route) - so that MEC can go back to the IUB to bootstrap a new request for eminent domain while, at the same time, preventing Juckette from obtaining judicial review of whether MEC should have been granted the franchise

in the first place.

26. Contrary to MEC's postulation that its request for eminent domain will cure all of Juckette's claims of error, MEC's request for eminent domain now changes the factual circumstances relied upon by the IUB to grant the franchise in the first place. Ms. Juckette previously argued to the IUB that MEC's franchise – including its selected route – should not be granted because MEC's route selection process relied on assumptions that no eminent domain was necessary. The IUB agreed with MEC specifically on the notion that eminent domain was unnecessary. Now, MEC's request for eminent domain dismantles the reasoning accepted by the IUB in granting the franchise in the first place. MEC cannot reap the benefits of the granted franchise by seeking a remand in this Court now while changing the fundamental assumptions that gave rise to the grant of the franchise.

27. Moreover, the reason MEC's request for a limited remand is inappropriate is because it seeks limited remand to engage in a proceeding not contemplated by Chapter 478 – the addition of eminent domain to previously granted franchise.

D. Conclusion

28. If MEC has conceded the necessity of eminent domain on Ms. Juckette's property, then MEC should so state and the Court should vacate the award of the franchise and remand this case to the IUB for further proceedings.

29. Chapter 478 does not allow for multiple franchises covering the same segment. IUB granted MEC a franchise subject to certain conditions. If MEC now believes that franchise is inadequate, then the proper approach is for MEC to start the process

over. This is the core of the issue Ms. Juckette is presenting on judicial review.

30. If MEC desires to use eminent domain to build the eastern segment then it may seek permission to do so in accordance with Iowa Code Chapter 478.

WHEREFORE, Petitioner Linda K. Juckette respectfully requests the Court deny MEC's application for limited remand.



By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2021, I electronically filed the foregoing document with the Clerk of the Court by using the Iowa Judicial Branch electronic filing system which will send a notice of electronic filing to the following:

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