IN THE IOWA DISTRICT COURT FOR POLK COUNTY

LINDA K. JUCKETTE, Petitioner, v. IOWA UTILITIES BOARD, Respondent.	Case No.: CVCV061580 **JUCKETTE'S OPENING BRIEF**

COMES NOW, Petitioner Linda K. Juckette, by and through her undersigned counsel, and serves the following Opening Brief.

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FACTS AND PROCEDURAL HISTORY

Petitioner Linda Juckette ("Juckette") owns real estate located in rural Madison County. In September 2019, MidAmerican Energy Company ("MidAmerican") filed a petition requesting a franchise for an electric line. MidAmerican requested that the Iowa Utilities Board ("IUB") grant a franchise to MidAmerican for a route that entered Juckette's property. At no point in the IUB proceeding prior to the commencement of this judicial review proceeding did MidAmerican request a grant of eminent domain authority to enter Juckette's property. Following several amended petitions and the intervention of Juckette, the IUB held an evidentiary hearing on MidAmerican's request for a franchise. The IUB, in a 2-1 decision, granted MidAmerican its requested franchise. One IUB board member, Richard Lozier, dissented and concluded that MidAmerican should not be entitled to the requested franchise. Following the ruling, Juckette filed a request for rehearing, which the IUB denied. After Juckette had exhausted her administrative remedies, Juckette commenced this instant judicial review proceeding pursuant to Iowa Code § 17A.19.

ANALYSIS

In Iowa, an electric company must obtain a franchise from the IUB prior to construction and operation of any transmission line capable of operating at a voltage greater than sixty-nine kilovolts along a highway. Iowa Code § 478.1. Before obtaining a franchise, an electric company must prove to the IUB that the project is necessary to serve a public use, represents a reasonable relationship to an overall plan of transmitting electricity in the public interest, and meets all other legal requirements. Iowa Code §

478.4.[1] Moreover, the electric company seeking a franchise must present evidence of possible uses of alternative routes. Iowa Code § 478.3(2)(a)(6).

The IUB erred for several reasons when it granted a franchise to MidAmerican. First, the IUB erred in concluding that MidAmerican had proven that its requested franchise was necessary for public use. *See* Iowa Code § 478.4 and 478.15(1). Next, the IUB erred by granting IUB the franchise absent any legal ability for MidAmerican to enter Juckette's property. Third, as explained by Juckette below, MidAmerican's post-appeal request to tack on eminent domain powers is procedurally and substantively flawed, and such request provides a separate basis for determination that the IUB grant of the franchise must be reversed. Fourth, the routes proposed by MidAmerican are unreasonable and cannot be sustained. *See* Iowa Code § 478.3. Finally, the franchise granted by the IUB to MidAmerican is unduly injurious and should not have been granted.

I. MIDAMERICAN IS NOT ENTITLED TO A FRANCHISE BECAUSE THE PROJECT IS NOT FOR A PUBLIC USE

The IUB erred in granting MidAmerican a franchise because MidAmerican failed to prove that its requested franchise was necessary for public use. To obtain a franchise, MidAmerican has the burden of proving the necessity for public use of the proposed line. Iowa Code § 478.4. MidAmerican failed to satisfy its burden of proof, so MidAmerican is not entitled to a franchise and the IUB erred in nevertheless granting the franchise. Iowa

[1] *See* also https://iub.iowa.gov/regulated-industries/information-about-electric-franchises (accessed July 16, 21).

Code § 478.3(1)(h); § 478.4 ("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").

The legislature has given the IUB the ability to decide whether a franchise meets the element of "necessity of public use." *S. E. Iowa Co-op. Elec. Ass'n v. Iowa Utilities Bd.*, 633 N.W.2d 814, 819–20 (Iowa 2001). This legislative grant of deference to the IUB, though, is limited. If the franchise requires a utility's use of eminent domain, then the IUB is subject to the Iowa Constitution's limits on the utility's ability to use eminent domain. *See Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829, 836-37 (Iowa 2019).

In *Puntenney*, the Iowa Supreme Court reviewed the IUB's approval of an underground crude oil pipeline. The pertinent statutory standard for approval of the pipeline was "public convenience and necessity" under Iowa Code § 479B.9. The Iowa Supreme Court held the IUB had the authority to interpret the "public convenience and necessity" standard, and gave deference to the IUB's determination of whether the standard was met. *Id.* at 836. However, the Iowa Supreme Court made clear the IUB's analysis of a franchise petition is constrained by the Iowa Constitution and the judicial pronouncements thereof if the franchise depends on use of eminent domain. *Id.* at 836-37. *Puntenney* demonstrates that the IUB is not afforded unlimited deference. Instead, the IUB is always constrained by the Constitution in its proceedings.

Iowa Code § 478.15 provides that a utility may obtain powers of eminent domain "to such extent as the utilities board may approve, prescribe and find to be necessary for

public use." The Iowa Supreme Court has made clear that when it comes to determining "public use" in connection with the right of eminent domain, the term has independent legal significance outside of the utilities statutes, and the IUB is not afforded deference. The IUB must therefore adhere to Constitutional limits on the use of eminent domain. *See Puntenney* 928 N.W.2d at 836-37; citing *Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 14 (Iowa 2010) ("When a term has an independent legal definition that is not uniquely within the subject matter expertise of the agency, we generally conclude the agency has not been vested with interpretative authority.").

Although it is clear there are theoretically two separate standards for "public use" – (1) public use relative to obtaining a franchise and (2) public use to justify eminent domain powers – as a practical matter if a franchise does not meet the Constitutional standard, it in all likelihood does not meet the statutory standard for public use. Because the Iowa Supreme Court has held that the phrase "public use" has independent legal significance, *Puntenney,* 928 N.W.2d at 836-37, it follows that the IUB must look to the Iowa Supreme Court's interpretation of the phrase when applying it to a utility's request for a franchise, even when the franchise request does not contain a request for eminent domain. In other words, the constitutional analysis of "public use" cannot be divorced from the IUB's analysis of "public use" in the context of a franchise request. Thus, Iowa's analysis of the outer limits of public use arising from eminent domain issues ought to be used as a baseline for analysis of the franchise request under Iowa Code § 478.3(1)(h).

Moreover, words and phrases used in a statute are presumed to bear the same meaning throughout the statute. *Bribriesco-Ledger v. Klipsch*, 957 N.W.2d 646, 650

(Iowa 2021); *Hall v. United States*, 566 U.S. 506, 519 (2012) ("identical words and phrases within the same statute should normally be given the same meaning."). Iowa Code Chapter 478, governing electric line franchises, contains the phrase "public use" several times throughout the chapter. In § 478.15, "public use" is used in conjunction with a utility's attempt to obtain eminent domain powers. There can be no doubt that when "public use" is used in a statute concerning constitutional powers (i.e. eminent domain), that the phrase "public use" must have the independent legal meaning associated with constitutional analysis. *See Puntenney,* 928 N.W.2d at 836-37; *Renda*, 784 N.W.2d at 14.

Iowa Code Chapter 478 has no section purporting to create a definitional distinction between "public use" as used in § 478.15 and the other uses of that phrase throughout the chapter. It follows, then, that because identical words and phrases are to be given the same meaning throughout a statute, the phrase "public use" in § 478.4 *must* be given the same meaning "public use" has in § 478.15. Since *Puntenney* makes clear that "public use" as used in § 478.15 requires a constitutional analysis since it involves eminent domain, standard principles of statutory construction mandate that the IUB (and now require the Court) to construe "public use" as used throughout Chapter 478 in the same way "public use" is used in a constitutional analysis. Thus, the determination of whether MidAmerican's requested franchise is "necessary to serve a public use" must be considered in terms of the constitutional meaning of "public use." *See* Iowa Code § 478.4 (the IUB "may grant the franchise" upon "a finding that proposed line or lines are necessary to serve a public use. . .").

Turning to the baseline constitutional analysis, Iowa Const. Art. I, § 18 states:

> Private property shall not be taken for public use without just compensation first being made, or secured to be made to the owner thereof, as soon as the damages shall be assessed by a jury, who shall not take into consideration any advantages that may result to said owner on account of the improvement for which it is taken.

Iowa has unequivocally rejected the standard in *Kelo v. City of New London*, 545 U.S. 469, (2005), which permits taking private property for a private developer. *Puntenney*, 928 NW.2d at 845-49. In rejecting *Kelo*, the Iowa Supreme Court has explained that the "public-use requirement is to prevent abuse of the power for the benefit of private parties." *Clarke Cnty. Reservoir Comm'n v. Robins*, 862 N.W.2d 166, 172 (Iowa 2015). The public use standard must be strictly construed to prevent its use to benefit a private party. *Id.*; *see also Hawkeye Land Co. v. Iowa Utilities Bd.*, 847 N.W.2d 199, 208 (Iowa 2014).

While the legislature has enacted statutes that grant the power of eminent domain, subject to statutory limitations, the Iowa Constitution provides the outer limit on use of eminent domain powers. *Hawkeye Land Co. v. Iowa Utilities Bd.*, 847 N.W.2d 199, 209 (Iowa 2014) ("The power of eminent domain is a creature of statute, constitutionally limited by article I, section 18 for the protection of private property rights."). The statutes and Constitution work in tandem to provide powers and identify restraints on the use of eminent domain. *See State v. Johann*, 207 N.W.2d 21, 23–24 (Iowa 1973) ("a party seeking to take land by eminent domain must first satisfy the court that it has been authorized by the legislature to exercise the power, that the statute purporting to grant such authority is constitutional, that the conditions exist under which it was provided that the authority might be exercised, and that the condemning party has complied with the requirements

of the statute."). A statute granting a right of eminent domain or a statute purporting to identify what may be a public use, must nevertheless comply with the Constitutional limits under the circumstances of the case. In other words, a statute cannot itself proclaim certain conduct is compliant with the Constitution.

The transmission lines MidAmerican proposes to construct pursuant to this franchise are ultimately for a private, not public, use. There is no doubt Microsoft's presence is the sole reason MidAmerican applied for this franchise. MidAmerican has entered into an agreement with Microsoft for increased energy capacity. MidAmerican did not present any sufficient evidence that MidAmerican would be applying for the franchise absent Microsoft. In rebuttal, MidAmerican offered only ad-hoc generalizations that are nothing more than an insufficient "build it and they will come" mantra. These facts, which may have been accepted under the *Kelo* standard, have been expressly rejected by the Iowa Supreme Court and clearly do not meet Iowa's constitutional standard of "public use." *Robins*, 862 N.W.2d at 172.

MidAmerican admitted multiple times during the IUB proceeding the only reason for the requested franchise is to serve Microsoft. (Certified Record[2] 644-645, Trans. 110:17-20 and 111:18-25). MidAmerican generally contends that this line is necessary for future development in the Maffitt Lake area. Yet, MidAmerican has no idea when development will occur in the area. According to Mr. Charleville, development is "completely speculative due to the unknowns related to future growth. . ." (CR 318:2-5). MidAmerican

[2] Hereafter, the Certified Record shall be referred to as "CR."

has no idea when any development will occur.[3] All MidAmerican knows is that Microsoft wants the proposed lines. According to the Master Electric Facilities Construction and Reimbursement Agreement ("Facilities Construction Agreement" or "FCA"), a contract between MidAmerican and Microsoft, MidAmerican must construct electric lines in order to serve Microsoft's "peak electric load" and meet Microsoft's "electric requirements as identified in Exhibit A" of the FCA. (FCA § II(1)(b)). In fact, MidAmerican agrees that the only thing that is not speculative in this case is that Microsoft needs MidAmerican to get this requested franchise. (CR 647:18-20).

Even granting MidAmerican reprieve from its pure speculation on future development does not mean the franchise is for a public purpose. MidAmerican admits that the requested lines now just make future development easier on MidAmerican. (CR 675:21-676:1). Specifically, MidAmerican agreed that the purpose of looking to the future in requesting new franchise lines is for MidAmerican's business purposes. (CR 678:12-22). MidAmerican's convenience is not material to the determination of whether the requested franchise is for a public purpose. Nor may MidAmerican's business purpose equate to a public purpose. MidAmerican's desire for easier construction in future development is not a valid public purpose in this case where the development is pure speculation.

Moreover, the timing of events make it clear that MidAmerican is seeking this franchise wholly for the benefit of one private party: Microsoft. In April 2019,

[3] Even if MidAmerican's speculation is correct, the trickle down economic benefits of future development do not constitute a public use. *Puntenney*, 928 N.W.2d 829.

MidAmerican entered into the FCA with Microsoft. (FCA and CR 662, Trans. 128:15-18). MidAmerican was obligated by contract – the FCA – to construct a substation to service Microsoft. (FCA Exhibit A § 3(a)). As a concurrent part of the FCA execution, Microsoft deeded for $1 real estate to MidAmerican for the construction of the substation. (FCA Article II, § 2(a)). This real estate is surrounded by Microsoft's land. (CR 643:20-22). Microsoft chose the location of the substation. (CR 663:12-24). In response to a question about whether MidAmerican had any input on the location of the substation, MidAmerican witness Mr. Charleville responded "Why would we?" (CR 663:21-24). It was only ***after*** Microsoft chose the location of the substation that MidAmerican performed any route studies. (CR 736:12-737:1). Moreover, even after deeding the land for the substation to MidAmerican, Microsoft nevertheless agreed to "obtain required City of West Des Moines approval for the Maffitt Lake Substation . . . ." (FCA § II(2)(b)). In addition, Microsoft retains "unrestricted access to the" substation "at all times." (FCA § II(2)(c)).

Microsoft, by contract with MidAmerican, has in essence dictated the actions and requests MidAmerican has made in this proceeding. Microsoft wanted a substation for its operations. Microsoft chose the location without any input by MidAmerican. Only *after* Microsoft chose the location of the substation did MidAmerican look at the possible routes to Microsoft's desired substation. At that time, MidAmerican's route study was limited by the decisions dictated by Microsoft. MidAmerican chose to not get involved in selecting the location of the substation. Thus, MidAmerican chose to not proactively identify new routes and substation placements that would follow the spirit of Iowa Code

Chapter 478. Instead, MidAmerican allowed Microsoft to choose what Microsoft wanted, and only then did MidAmerican decide to perform route studies. MidAmerican could have looked at different routes that would not unduly burden landowners, but chose to take direction from Microsoft.

The substation, which currently serves Microsoft, is already connected to a 161kV line from Veterans Parkway. (CR 657:4-658:7). That current line is sufficient to accommodate the whole Microsoft load, even accounting for a ramp-up schedule in the FCA. (CR 658:12-17). It cannot serve a public purpose to run additional lines to the substation if the lines already connected to the substation accommodate the whole load at that substation. The FCA, however, requires MidAmerican to supply three lines to the substation. (FCA Article I, § 1(s) and FCA Exhibit A, § 3(b)(i) and § 3(c)(i)). This demonstrates that not only has MidAmerican failed to meet its burden to prove a public purpose, but that, in fact, the franchises sought in this proceeding are solely for the purpose of MidAmerican meeting a contractual agreement with Microsoft. This is not a sufficient reason to grant a franchise.

MidAmerican refers to "economic" benefits of the line, but those "economic" benefits will flow to MidAmerican and Microsoft. MidAmerican has not shown that its line will save Iowa consumers money; in fact, the evidence shows that consumers will actually *incur* costs because of the proposed lines. (CR 653:10-18 ("Q: So who pays for the cost of construction? A: The rate base") and CR 654:9-16 ("Q: So initially will customers other than Microsoft have to pay a part of the costs of construction? A: Based on the rate base, I would say the answer is yes.")). This is directly contrary to the regulatory principal

that the cost causer should incur the cost. (CR 64:21-649:18).

MidAmerican's witness who testified about the effect of the proposed franchise on MidAmerican ratepayers, Mr. Charleville, stated that he had no opinion about whether increased revenues for MidAmerican will benefit ratepayers as a whole. (CR 680:11-14). Additionally, Microsoft will pay the cost of construction to MidAmerican over time. Essentially, Microsoft will pay for the construction by virtue of energy usage estimates and commitments to pay MidAmerican if those usage estimates are not met. *See* (FCA § III(2)(A); *see also* CR 650:10-653:4 and CR 668:23-669:6).

MidAmerican essentially double-dips under this arrangement at the cost of Iowa consumers and ratepayers. MidAmerican does not incur upfront costs because those are borne by Iowa ratepayers other than Microsoft. MidAmerican gets paid the cost of construction from Microsoft, and then some. This is a no-lose situation for MidAmerican, because it is guaranteed to receive the total cost of construction, the "Commitment Cost", either through revenue paid by Microsoft or by an advance. (FCA § III(2)). MidAmerican generates revenue from Microsoft. MidAmerican retains the revenue *and* reimbursement of construction costs, all without reimbursing the ratepayers for their initial contribution to construction of lines and a substation that is exclusively used by Microsoft. This proposed franchise is an excellent business opportunity for MidAmerican, because it benefits without incurring costs. MidAmerican's business prospects, though, do not establish a public use. It is clear that there are no public economic benefits from the proposed franchise, only potential profits for MidAmerican, and detriment to ratepayers.

MidAmerican argues that the proposed line will increase reliability but MidAmerican has not submitted any evidence that the current electrical transmission system is or will be inadequate for the needs of Madison County. There is no evidence in the record that any other person or entity will use MidAmerican's proposed line. Indeed, Jeremy Husk testified he has never experienced issues with power reliability. (CR 480:21-22). These propositions by MidAmerican are without merit and such facial recitations of buzzwords do not satisfy the standard of a public purpose.

In sum, (1) Iowa consumers and rate payers incur the upfront cost of the construction; (2) Microsoft reimburses MidAmerican over time by virtue of offsetting credits and the commitment; (3) Iowa consumers and rate payers are not reimbursed for their initial upfront contributions to the construction; and (4) MidAmerican generates revenue from Microsoft's energy usage. These facts demonstrate that the franchise is for Microsoft.

When evaluating whether a utility is in fact serving the public, Iowa law requires the IUB to consider, among other factors, whether a particular project has been dedicated to a public use. *SZ Enterprises, LLC v. Iowa Utilities Bd.*, 850 N.W.2d 441, 447 (Iowa 2014). Public utilities are regulated as such because of the public service they provide. *Id.* It is for this same reason that entities which serve a single customer may not necessarily be public utilities. *Id.* (holding that entity which sold electricity to a municipality only was not dedicated to a public use). Hence, the nature of the customers served is one of several factors used to evaluate whether a particular a utility is indeed a public utility. Put another way, a public utility is so-designated because it is serving the public.

However, it is not necessarily true that a public utility that constructs improvements for a particular customer is serving the public interest. Rather, as in this case, the question must be whether the particular improvements serve a public purpose, not just the interests of Microsoft.

MidAmerican has argued that the Supreme Court's analysis in *SZ Enterprises* is inapplicable to this matter because that case addressed whether an entity was a public utility, while there is no dispute here that MidAmerican is indeed a public utility. However, this argument by MidAmerican is a red herring. It is true that Juckette does not contend MidAmerican is not a public utility. However, as articulated above, the phrase "public use" as used throughout the Iowa Code Chapter 476 should be afforded the same meaning. *Klipsch*, 957 N.W.2d at 650; *Hall v. United States*, 566 U.S. 506, 519 (2012) ("identical words and phrases within the same statute should normally be given the same meaning."). Thus, the Iowa Supreme Court's analysis of "public use" in *SZ Enterprises*, which construed "public use" as used in § 476.1, must guide this Court's analysis of "public use" in § 478.4.

In sum, MidAmerican has failed to prove a public purpose for the proposed franchise, and the IUB erred in finding to the contrary. The evidence instead shows:

1) Microsoft is the only user of the substation to which the proposed lines will run;

2) It is completely speculative as to whether or when there will be future development which requires this requested franchise;

3) MidAmerican has a contractual commitment with Microsoft to obtain this franchise;

4) The current line to the substation at issue is sufficient to bear the anticipated burden on the substation;

5) The construction of the line will be borne by MidAmerican ratepayers to benefit Microsoft and MidAmerican;

The IUB erred in concluding that MidAmerican's proposed franchise was "necessary to serve a public use" and therefore erred in granting MidAmerican its requested franchise. The facts demonstrate that MidAmerican's requested franchise is for the interests of Microsoft, as demonstrated by the economics and the directions taken by MidAmerican at the behest of Microsoft. MidAmerican did not present sufficient evidence that its franchise was "necessary to serve a public use" and the IUB erred in finding otherwise. *See* Iowa Code § 17A.19(10)(a), (f), (j), (k), (l), (m), and (n).

II. MIDAMERICAN HAS NO RIGHT TO BUILD ON JUCKETTE'S PROPERTY

As articulated above, MidAmerican is not entitled to the requested franchise because MidAmerican has failed to establish that the franchise is for a public use under Chapter 478. *See* Iowa Code § 478.4 and § 478.15(1). Without a valid franchise, MidAmerican is unable to exercise eminent domain. *Vittetoe v. Iowa Southern Utilities Co.*, 123 N.W.2d 878, 881 (Iowa 1963). Thus, because MidAmerican fails to prove its entitlement to a franchise, it has no right to build on Juckette's property.

To the extent, however, that the Court finds to the contrary and rules that the project is for a public purpose under Iowa Code Chapter 478, MidAmerican nevertheless cannot build on Juckette's property without the use of eminent domain. For the reasons articulated below, MidAmerican cannot avail itself of eminent domain powers in this case, and therefore, the IUB erred in granting the franchise.

A. MidAmerican Cannot Use Eminent Domain on Juckette's Property Because MidAmerican has Failed to Prove a Public Use

As indicated above, the limits of eminent domain under Iowa's Constitution are instructive as to whether a public use under Chapter 478 exists. If, however, the IUB rejects this proposition and determines that a public use under Chapter 478 does exist here, MidAmerican must nevertheless still prove it is entitled to exercise eminent domain in compliance with the Iowa Constitution.

The Constitutional analysis is described in full above. Briefly restated, Iowa has rejected the *Kelo* standard. *Puntenney*, 928 NW.2d at 845-49. Under the Iowa Constitution, public-use requirement is strictly construed to prevent the use of eminent domain to benefit a private party. *Robins*, 862 N.W.2d at 172 and *Hawkeye Land Co.*, 847 N.W.2d at 208. Additionally, MidAmerican cannot rely on a statute purporting to identify a public use, because any statute must still comply with the strict limits of the Iowa Constitution. *Hawkeye Land Co.*, 847 N.W.2d at 209 and *Johann*, 207 N.W.2d at, 23–24.

Juckette has previously identified all the facts that demonstrate that MidAmerican's proposed franchise is not for the public's benefit, but is for the benefit of a private party: Microsoft. The evidence instead shows that (1) Microsoft is the only user of the substation to which the proposed lines will run; (2) it is completely speculative as to whether or when there will be future development which requires this requested franchise; (3) MidAmerican has a contractual commitment with Microsoft to obtain this franchise; (4) the current line to the substation at issue is sufficient to bear the anticipated burden on the substation; and (5) the construction of the line will be borne by

MidAmerican ratepayers.[4]

The Iowa Constitution must be strictly construed to prevent MidAmerican's abuse of eminent domain to benefit Microsoft. *Robins*, 862 N.W.2d at 172; *Hawkeye Land*, 847 N.W.2d at 208. The Iowa Constitution forecloses MidAmerican's ability to exercise eminent domain in this proceeding because there is no public purpose. Thus, MidAmerican can only obtain this requested franchise and build on Juckette's property if it has some ability to do so absent the use of eminent domain. For the reasons described below, MidAmerican has no right to build on Juckette's property, and as a result, the IUB erred in granting the franchise. *See* Iowa Code § 17A.19(10)(a), (f), (j), (k), (l), (m), and (n).

B. The IUB Erred in Relying Upon Iowa Code § 306.46

At all times during the IUB proceeding, MidAmerican contended that it had a statutory right to erect utility poles and lines on Juckette's property based upon Iowa Code § 306.46(1) ("A public utility may construct, operate, repair, or maintain its utility facilities within a public road right-of-way.") Though Iowa Code § 306.46 purports to expressly authorize placement of utility facilities within a public road right-of-way, the statute does not apply retroactively.

A public road right-of-way is created by an easement. *SMB Investments v. Iowa-Illinois Gas & Elec. Co.*, 329 N.W.2d 635, 637 (Iowa 1983) ("The term right of way, when used in reference to the right to pass over another's land, is synonymous with the term easement."); *United States Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1844,

[4] An in-depth recitation of facts with citations to the record can be found in Section I of this brief.

207 L. Ed. 2d 186 (2020) ("a right-of-way grants the limited 'right to pass ... through the estate of another.'"). There is no dispute that there is an easement on Juckette's property for a public road right-of-way.

The Iowa Supreme Court has held, "*the easement language is controlling*, and a failure to indicate the right to place utility poles within in it is conclusive that this right does not exist." *Keokuk Junction,* 618 N.W.2d at 357 (emphasis added); *see also Id.* at 355 ("Once a valid easement has been created and the servient landowner justly compensated, the continued use of the easement must not place a greater burden on the servient estate than was contemplated *at the time of formation*." (emphasis added) (citing *Cline v. Richardson*, 526 N.W.2d 166, 169 (Iowa Ct. App. 1994); 39 Am. Jur. 2d *Highways, Streets, and Bridges* § 183 (1998) ("The general rule is that the law will not by construction effect a grant of a greater interest than is essential for the public use.")); *Keokuk Junction*, 618 N.W.2d at 360 ("*When* the servient land is burdened by an easement, the servient landowner does not surrender a fee simple. All that is relinquished is so much of the land as is necessary to accomplish the purposes of the easement." (emphasis added)).

When defining the scope of the burden on servient land, the Iowa Supreme Court focuses on the scope of the easement *at the time of its conveyance/formation*. It has not held that the passing of a statute like Iowa's current § 306.46 would wipe the slate clean by turning those limited easements (in place before the statute's enactment) into fee simple conveyances. Iowa's enactment of § 306.46 did not change this basic legal principle.

In fact, the *Keokuk Junction* decision and the enactment of § 306.46 are consistent. Today, post-enactment of § 306.46, a party conveying a public road right-of-way, either

voluntarily or because of a condemnation proceeding, is on notice that the property conveyed potentially includes, among other things, the right to build utility lines. Practically speaking, this would mean the value of the burden added on a servient estate for the erection of utility lines—even when this burden is not explicitly contained in the language of the easement—would be reflected in higher consideration paid in the case of a voluntary easement, or weighed appropriately by a county commission as damages after an eminent domain proceeding. *See Keokuk Junction*, 618 N.W.2d at 361.

For road right-of-way easements conveyed before § 306.46's enactment, like any easement that may exist on Juckette's land here, a reviewing authority must consider the additional burden represented by the erection of utility lines. This is consistent with § 306.46's language providing that erection and maintenance of such lines must be consistent with Iowa Code § 318.9. Section 318.9 provides that the location for the construction, among other things, of electric lines shall be "subject to the jurisdiction of the utilities board under chapters 476, 478, and 479." Iowa Code § 318.9(2). Iowa Code § 306.46 cannot be interpreted to retroactively permit taking property rights so carefully described by the Iowa Supreme Court, and that continue to exist on servient land when it is burdened only by a road right-of-away easement.

The existence of a statute that allows for the erection of utility lines on a road right-of-way does not abrogate the constitutional requirement that payment of damages is required whenever private property is being burdened for *public* use. Indeed, the Iowa Supreme Court rejected the decisions of state jurisdictions that held otherwise. *Keokuk Junction*, 618 N.W.2d at 357-58. It instead agreed with the well-reasoned dissent of Justice

Hall of the Utah Supreme Court:

> [E]mploying concepts of the advancement of civilization, and proper and consistent uses of highways in light of human progress, seems squarely to compromise the rights of landowners . . . . Any private roadway dedicated for use as a public thoroughfare thus becomes a pathway for whatever use a county authority, in its sole discretion, deems fit to impose, regardless of the detriment to the adjacent landowners. Little imagination is required to summon up possible uses which would be severely detrimental, if not completely destructive, of surrounding farm land; uses which, according to the majority view, could be imposed without the necessity of any compensation whatsoever.
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> [*Pickett v. California Pac. Utils*., 619 P.2d 325, 327 (Utah 1980)] (Hall, J., dissenting). The dissent properly recognized that when an easement is taken by the city through no choice of the landowner, the city should be bound by the purposes it provides and not those later implicated by progress of civilization. *Id.* at 329 (Hall, J., dissenting). Further, we agree with the dissent that were we to adopt this holding, it would be hard to envision any use that could not be related to the public use somehow and, therefore, authorized by the public highway easement.

Keokuk Junction, 618 N.W.2d at 357-58 (emphasis added).

A retroactive application of Iowa Code § 306.46 would undermine the bedrock constitutional principle that just compensation is the price for public taking of property. Iowa Code § 306.46 was given immediate effect, but not specifically made retroactive. *Public Utilities-Facilities-Right of Way* 2004 Ia. Legis. Serv. Ch. 1014 (S.F. 2118). Enacted legislation applies prospectively only, "unless expressly made retrospective." Iowa Code § 4.5. As explained above, prospective-only application of § 306.46 is consistent with due process. Grantors of easements prior to the enactment of § 306.46 would have not been aware that by granting a public right-of-way easement they were potentially allowing for the potential future intensification of that easement through the erection of utility lines.

Starting on the effective date of § 306.46, grantors are aware of that potential and can obtain appropriate compensation. Grantors of easements prior to § 306.46 would have had no such notice. *See also*, *Ginsberg v. Lindel*, 107 F.2d 721, 726 (8th Cir. 1939) ("It is the general rule that a retrospective operation will not be given to a statute which interferes with antecedent rights, unless such be the unequivocal and inflexible import of its terms and the manifest intention of the legislature.").

In *NDA Farms, LLC c. Iowa Utilities Bd., Dept. of Commerce*, the Polk County District Court adopted this reasoning as it specifically applies to § 306.46, concluding:

> Upon review of section 306.46 and considering relevant case law, the court concludes that *the IUB committed an error of law in concluding that section 306.46 applied retroactively to the easement granted to Polk County in 1956*. The statute applies prospectively only, so as to not interfere with the contractual relations created in the 1956 easement.
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> This court finds the IUB erred in concluding that section 306.46 abrogated the holding in *Keokuk*, and likewise erred when it determined that Ames did not need a second easement to construct the transmission line at issue. As an easement would be required to construct the transmission line, any construction based on the permission from the Polk County Engineer without compensation would constitute a governmental taking without just compensation. *See Keokuk*, 618 N.W.2d at 362; *Bormann v. Bd. of Sup'rs In and For Kossuth Cnty.*, 584 N.W.2d 309, 316-17 (Iowa 1998).

No. CV 009448, 2013 WL 11239755, at *9-10 (Iowa Dist. June 24, 2013) (emphasis added). Based on the District Court's legal analysis in *NDA Farms*, MidAmerican cannot rely on § 306.46 to overcome the requirement of condemnation and just compensation in order to construct electric transmission lines on Juckette's property. The IUB erred in ruling to the contrary.

In the IUB's initial decision, Board member Lozier wrote a dissent, specifically addressing the IUB's analysis of § 306.46. Board member Lozier criticized the majority's interpretation of § 306.46 and concluded that is "is inescapable that the proper interpretation of § 306.46 is that it is to be applied prospectively only, and it does not change the terms of the road right-of-way easement created more than 25 years before the enactment of § 306.46." (CR 946-47). In his analysis, Board member Lozier began with the fundamental proposition that prior to the enactment of § 306.46, there is no doubt that when a landowner created a road right-of-way easement, there was no reason the landowner could expect that road right-of-way easement to include an easement for public utilities. (CR 944). However, Lozier stated, a land owner who creates a road right-of-way after the enactment of § 306.46 would be on notice that the statute mandates that the creation of a road right-of-way easement also creates a public utility easement. (CR 944). Lozier then stated that "[t]o apply § 306.46 retrospectively would expand the scope of an easement created before enactment of the statute and take from the landowner a property right the landowner previously held, did not intend to convey, and did not convey." (CR 944-45).

Board member Lozier based his conclusion entirely on principles of statutory construction. (CR 947). Board member Lozier cited Iowa Code § 4.5 ("A statute is presumed to be prospective in its operation unless expressly made retrospective.") and § 4.7 ("If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general

provision."). Because Iowa Code § 306.46 is silent as to prospective versus retrospective application, Lozier concluded that Iowa Code § 4.5 mandates that § 306.46 be applied prospectively only. (CR 945). Moreover, according to Lozier, the IUB majority ignored § 4.7's requirement that § 306.46 and § 4.5 be construed together. (CR 945).

Board member Lozier's dissent is compelling, and is in line the with Polk County District Court's ruling in *NDA Farms*. Unless the statute specifically states, a statute ought not be able to change the terms of a private easement agreement that was made more than two decades before the enactment of the statute. (CR 946). The IUB majority even admitted it agreed with the reasoning of Lozier's dissent, but nevertheless concluded it could not be bound by the Polk County District Court's decision in *NDA Farms*. (CR 929, n. 10). The IUB erred in choosing to ignore the legal analysis as laid out by Lozier and *NDA Farms*. The IUB erred in granting MidAmerican its franchise request because MidAmerican had no right – statutory or otherwise – to erect utility poles and lines on Juckette's property. *See* Iowa Code § 17A.19(10)(a), (b), (c), (f), (j), (k), (l), (m), and (n).

C. Even if Iowa Code § 306.46 is Not Prospective, it is Unconstitutional

Even if Iowa Code § 306.46 is not prospective only, the statute is unconstitutional as applied to Juckette's property, and the IUB erred in relying upon § 306.46.

In 1982, the United States Supreme Court held that a private entity's physical intrusion onto private property pursuant to a New York statute was an unconstitutional taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In *Loretto*, a statute provided that certain private companies providing access to cable television could install cable infrastructure in/on apartment buildings and that owners of the buildings

could not interfere with said installation. The Supreme Court held: "We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve. Our constitutional history confirms the rule, recent cases do not question it, and the purposes of the Takings Clause compel its retention." *Id.* at 426. Under *Loretto*, a statute that purports to authorize **any** physical intrusion on real property results a **per se taking** without regard for the public interests addressed by the statute. The size of the intrusion makes no difference to the Constitutional impropriety of the invasion.

Here, Iowa Code § 306.46 is functionally equivalent to the New York statute at issue in *Loretto*. In *Loretto*, a statute purported to authorize a private entity to intrude on private real estate based on an articulated public purpose. Here, Iowa Code § 306.46 purports to allow construction of a utility in a public road right-of-way that is located on private real estate. Both statutes purportedly allow unilateral access to a private company to invade private real estate for a specific purpose. Both statutes run afoul of the Constitution.

Various MidAmerican witnesses testified that the right-of-way was "next to" or "adjacent" to Juckette's property. However, as acknowledged by MidAmerican witnesses, Juckette owns the property all the way to the centerline of the road. (CR 588:1-3); (CR 488-503). There is no dispute that the right-of-way at issue is located on Juckette's property. Moreover, there is no easement on Juckette's land which purports to grant an unlimited right to place utility poles even on the portion property devoted to the road right of way. A right of way is nothing more than an easement. *Brown v. Young*, 29 N.W.

941, 941 (Iowa 1886) ("A mere right of way over land is, we believe, always regarded as an easement."); *Chicago & N.W. Ry. Co. v. Sioux City Stockyards Co.*, 158 N.W. 769, 772 (Iowa 1916) ("In the absence of some showing to the contrary, a grant or gift of ground for right of way is presumed to be of an easement therein only."). The grantor of an easement still owns the real estate; the only difference is that the land is subject to the specific terms of the easement. *Keokuk Junction*, 618 N.W.2d at 360 ("When the servient land is burdened by an easement, the servient landowner does not surrender a fee simple. All that is relinquished is so much of the land as is necessary to accomplish the purposes of the easement. Contrary to IES's contention, the landowner would not be getting paid twice for the same land (once by the city and once by the utility) if the utility was forced to pay for its own right-of-way. This is because the land remains in the control of the servient landowner to be used for other uses as long as these uses do not interfere with the purposes of the easement.").

Juckette still owns the portion of her land which MidAmerican describes as a public right-of-way. (CR 588:1-3; CR 488-503). This portion of land is not public land; there is simply an easement on that land for a public right of way, which is an easement to the public for access to travel across the land.

Thus, to the extent that MidAmerican contends Iowa Code § 306.46 is constitutional because it does not allow for a physical invasion of Juckette's land, MidAmerican is factually and legally wrong. Unless Juckette or her predecessor in title granted a specific right to enter the land for the placement of the utility poles and lines MidAmerican seeks to erect in this case – which is not the case - MidAmerican cannot

rely on Iowa Code § 306.46 to invade Juckette's land. Just as in *Loretto*, Iowa Code § 306.46 is unconstitutional in this context.

The IUB, however, decided to avoid any question of statutory interpretation, and applied Iowa Code § 306.46 as written. (CR 931-932). In his dissent, IUB Member Lozier criticized the IUB's decision to not even attempt to interpret § 306.46 in light of *Keokuk Junction*. (CR 944-947); *Keokuk Junction Ry. Co. v. IES Indus., Inc.*, 618 N.W.2d 352, 361 (Iowa 2000). IUB's interpretation of a legal issue is not entitled to deference from the courts. *SZ Enterprises,* 850 N.W.2d at 451-52. However, the fact that deference may not be afforded to the IUB does not mean that the IUB lacks the authority to attempt to apply the law. In fact, in deciding to interpret and construe Iowa Code § 306.46 as written, the IUB actually engaged in its own interpretation of the Iowa Code by ignoring Iowa Code § 4.5 ("A statute is presumed to be prospective in its operation unless expressly made retrospective."). In other words, when the IUB chose to apply Iowa Code § 306.46 to allow MidAmerican to place poles in the right of way, the IUB did in fact engage in statutory construction to avoid the question of prospective versus retrospective application. The IUB therefore reached an erroneous conclusion when it decided that it did not have the power to apply § 306.46 in light of principles of statutory interpretation and *Keokuk Junction*.

In the IUB's order denying Juckette's Application for Rehearing, the IUB stated that it did engage in statutory interpretation by applying the statute as written without regard to any other statutes or constitutional consideration. Had the IUB applied the correct principles of statutory interpretation, then it would have concluded, as IUB

Member Lozier did, that MidAmerican cannot take advantage of the existing road right of way. Although the IUB refrained from so ruling, the IUB actually stated that it agreed with IUB Member Lozier's conclusion on the prospective nature of Iowa Code § 306.46 as urged by Juckette. (CR 929, n. 10). The IUB erred by nevertheless granting MidAmerican's franchise request notwithstanding the IUB's comment that it agreed with Lozier's dissent.

The IUB also erred when it concluded that the proposed utility lines would not further burden Juckette's property. (CR 919). The Iowa Supreme Court held in *Keokuk Junction* that utility lines are an additional servitude on the land, and therefore require compensation to the landowner. *Keokuk Junction*, 618 N.W.2d at 361. Therefore, the IUB erroneously concluded, as a matter of law, that the new lines do not interfere with Juckette's use of the property and that application of § 306.46 here did not violate Juckette's constitutional rights. *See* Iowa Code § 17A.19(10)(a), (b), (c), (f), (j), (k), (l), (m), and (n).

D. MidAmerican's Subsequent Conduct has Created Another Reason for Reversal of the IUB's Order

Subsequent to the commencement of this district court appeal proceeding, MidAmerican filed a new request in the IUB proceeding, seeking eminent domain power over Juckette's property. That subsequent conduct by MidAmerican has created another separate reason for reversal of the IUB's order.

Juckette has previously submitted legal and factual arguments to the Court in this proceeding articulating the faulty nature of MidAmerican's current request for eminent

domain before the IUB. As that matter is before the Court for reconsideration as of the time of the filing of this brief, Juckette restates and incorporates by this reference Juckette's resistance to MidAmerican's request for limited remand based upon its new request for eminent domain. It is nevertheless necessary for Juckette to further articulate herein how MidAmerican's current request before the IUB for eminent domain does not act as a cure-all to the IUB's errors that Juckette has explained above.

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

The IUB relied on MidAmerican's representation regarding the necessity for eminent domain in granting MidAmerican a franchise that did not include the power to exercise eminent domain on Juckette's property. After the IUB granted MidAmerican the franchise, the IUB stayed construction of the electric line that entered for Juckette's property pending judicial review before this Court. While review has been pending before this Court, MidAmerican filed a separate application with the IUB seeking to add the power of eminent domain to MidAmerican's franchise granted by the IUB. The IUB has not yet ruled on that application.

MidAmerican's omission of a request for eminent domain in its petition for a franchise was a significant factor in IUB's decision to grant MidAmerican the franchise that is on review before this Court. MidAmerican argued throughout the IUB proceedings that no eminent domain was necessary. IUB then granted MidAmerican's franchise based on MidAmerican's position that there would be no eminent domain, because MidAmerican 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.

(CR 915-916) (emphasis added). As previously noted, MidAmerican never requested eminent domain on Juckette's property. Therefore, as alluded to by the IUB above, if § 306.46 does not allow MidAmerican to place its lines in the road easements Juckette previously granted, MidAmerican must secure an easement to place poles in Juckette's property. As specifically noted by IUB above, MidAmerican did not have easements on Juckette's property. Therefore, based on the IUB's own analysis and statement, if § 306.46 does not apply then MidAmerican's franchise would have been denied.

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

relied on Iowa Code § 306.46 as the sole basis for invading Juckette's real estate. MidAmerican has now conceded the necessity of eminent domain by making a request for eminent domain. If Iowa Code § 306.46 granted MidAmerican the rights that MidAmerican asserted throughout the IUB proceeding, then there would be no necessity for eminent domain. This concession came only after Juckette obtained a stay of construction pending judicial review.

However, MidAmerican 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*." (CR 915-916).

MidAmerican 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. MidAmerican's changed posture demonstrates MidAmerican's proverbial attempt to have its cake and eat it too. MidAmerican's repeated representations to the IUB that MidAmerican did not need eminent domain was key to the IUB's consideration of MidAmerican's right to a franchise (in particular, the selected route). MidAmerican now seeks for this Court to avoid considering the legal errors contained in the IUB's grant of the franchise so that MidAmerican 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 MidAmerican should have been granted the franchise in the first place.

Contrary to MidAmerican's postulation that its request for eminent domain will cure all of Juckette's claims of error, MidAmerican's request for eminent domain now changes the factual circumstances relied upon by the IUB to grant the franchise in the first place. Juckette previously argued to the IUB that MidAmerican's franchise – including its selected route – should not be granted because MidAmerican's route selection process relied on assumptions that no eminent domain was necessary. The IUB agreed with MidAmerican specifically on the notion that eminent domain was unnecessary. Now, MidAmerican's request for eminent domain dismantles the reasoning accepted by the IUB in granting the franchise in the first place. MidAmerican 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.

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

Chapter 478 does not allow for multiple franchises covering the same segment. IUB granted MidAmerican a franchise subject to certain conditions. If MidAmerican now believes that franchise is inadequate, then the proper approach is for MidAmerican to start the process over. This is the core of the issue Juckette is presenting on judicial review. If MidAmerican 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. Contrary to MidAmerican's contention, MidAmerican's new request for eminent domain for not moot any issues raised by Juckette in this judicial review proceeding.

III. MIDAMERICAN'S PREFERRED ROUTES ARE NOT REASONABLE

Even if the Court determines that the requested franchise is for a public purpose and that MidAmerican has a right to erect utility poles and lines on Juckette's property, the Court should still rule that the IUB erred in granting MidAmerican's petition because MidAmerican's proposed routes are not reasonable and violate the mandate of Iowa Code Chapter 478 to avoid unnecessary interference with private property.

A. The September 17, 2019 Route Study Relies on Faulty Data on Cost

MidAmerican's September 17, 2019 route study ranked different route options using certain factors to come to a force-ranked result. One of the forced rank categories is the cost of each proposed route. This method, however, is flawed because the data for cost fails to account for the fact that eminent domain must be used to acquire property.[5] MidAmerican assumes, for example, eminent domain will not be necessary along the eastern border of Juckette's property. Thus, MidAmerican undervalues the cost of construction of the route designated as 7.[6] Because MidAmerican's route study failed to consider the condemnation and easements needed to construct the electric lines within

[5] MidAmerican concedes that the cost of the line would increase from the forced ranking analysis if MidAmerican is forced to expend funds to obtain the right erect poles on Juckette's property. (CR 707:21-708:1).

[6] Route 7 is the only route MidAmerican presented to the IUB and is the name of the route portion that is designed to enter Juckette's property.

the road right-of-way, the forced ranking system is misleading and arbitrary. The evidence presented to the IUB demonstrated that the monetary value of Juckette's land, if taken for the proposed franchise, will be subject to a dramatic decrease, and that the condemnation cost for MidAmerican to proceed will be significant. (CR 386-418; CR 511-512).

Bill Schierbrock, who conducted the route study for MidAmerican, agreed that the presence of electric utility poles near property can have a negative effect on the property's value. (CR 699:5-21). South Carolina research indicates the presence of larger utility towers can decrease property values by up to 45%, and by 17% even 1,000 feet from the towers. (CR 386). These costs are consistent with Jeremy Husk's[7] reduction on property adjacent to the western line route. He identified a 40% value reduction to his property. (CR 480:2-10); (CR 700:3-18). Within four miles of Juckette's and Husk's properties are lots currently for sale in the $275,000 to $400,000 range that have many of the same qualities as the lots belonging to Juckette and Husk. (CR 511-512). Using nearby lots as a reference point, including Husk's lots, Juckette could see the value of her property decrease by anywhere from $110,000 to $160,000.

The evidence shows that alternative routes would have less impact on property values as a whole, and therefore eminent domain costs would be less to MidAmerican. Route 2 of the September 17, 2019 route study runs parallel along Interstate 35 until Cumming Avenue. (CR 110-128). The private property that the poles would be located

[7] Jeremy Husk is the owner of real estate located adjacent to the western line route selected by MidAmerican.

on borders Interstate 35, so it is less likely to be used for development. (CR 756:20-25; CR 773:1-7; CR 777:3-22). In contrast, the route MidAmerican selected, Route 7, is prime development ground, and has a large number of homeowners along the route. (CR 777:3-22).

In the IUB proceeding, MidAmerican took the foregoing analysis of costs and diminution of value of property out of context and contended to the IUB that Juckette advocated for the IUB to treat her land differently because of its value. Juckette made no such argument. In the IUB proceeding and in this current appeal, Juckette raises issues with cost and diminution in value to illustrate the fundamental flaws in MidAmerican's route selection process associated with its franchise request. MidAmerican had no private right to invade Juckette's real estate for the placement of poles and lines. Moreover, MidAmerican chose to forgo any request for eminent domain to invade Juckette's property. Instead, MidAmerican wholly relied upon Iowa Code § 306.46 as its basis to enter Juckette's property. As is described in full above, § 306.46 is unlawful in this case and should not have been considered by MidAmerican.

When MidAmerican chose its routes, MidAmerican solely relied upon numerical conclusions from a forced-ranking matrix. MidAmerican input numerical data into a matrix that it created, and blindly relied upon the results of that matrix to determine its route selection.

Yet, because MidAmerican only relied on § 306.46 as it applies to Juckette's real estate, the numerical data MidAmerican put into the forced-ranking matrix is incorrect. It follows that the output relied upon by MidAmerican was necessarily flawed. In other

words, because MidAmerican ignored the cost associated with entering Juckette's real estate (i.e. substantial condemnation costs based on the value of Juckette's property compared to the decrease in value caused by MidAmerican's lines), the forced ranking data relied upon by MidAmerican is flawed. Because MidAmerican relied solely on the data output from a matrix that was flawed *ab initio* as a result of MidAmerican's failure to account for substantial costs and its improper reliance on § 306.46, MidAmerican's reliance on the matrix conclusion is arbitrary and capricious. The IUB's decision to grant the franchise and approve of the route selection was, then, an arbitrary and capricious decision by the IUB. *See* Iowa Code § 17A.19(10)(f), (j), (k), (l), (m), and (n).

B. The Route Study Misrepresents Minor Differences in Criteria

The IUB further erred in deferring to MidAmerican's sole reliance on the forced-ranking matrix MidAmerican created in this case for route selection. Even if the Court concludes that § 306.46 was available to MidAmerican to use, MidAmerican's reliance on the matrix was still nevertheless unlawful and the IUB erred by deferring to the matrix.

The purpose and spirit of Iowa Code Chapter 478 is to make sure that an electric line franchise does not unnecessarily interfere with the use of land by its owners. (CR 704:5-18); (CR 706:18-22). Mr. Schierbrock agreed that there is no exception to Chapter 478 for when it is "difficult" to figure out how to minimize impacts on landowners. (CR 706:23-707:1). Put another way, the spirit of Chapter 478 is to ensure that transmission lines interfere with private property only when it is absolutely necessary. Id.; *see also* Iowa Code § 478.18(2) ("A transmission line shall be constructed. . . so as not to. . . unnecessarily interfere with the use of any lands by the occupant."). In relying solely on the flawed

forced ranking system, MidAmerican disregarded Chapter 478's mandate.

In a transmission line routing analysis (or any analysis of alternatives with multiple criteria) each criteria should be weighted to provide a more realistic and sound comparison of alternatives. MidAmerican has chosen not to conduct this analysis because it would be difficult to determine how to weight the factors. (CR 706:3-6).

The "forced ranking" system overstates differences between factors by accentuating differences that are themselves minor. (CR 716:7-13). MidAmerican acknowledges that the forced ranking analysis – for example, as it applies to the ranking on angles – needs to be corrected to account for the disparate resulting difference in the analysis outcome compared to the relatively minor real-life difference. (CR 720:15-18).

Nevertheless, MidAmerican did not weight any factors in its forced ranking system, or make necessary adjustments to account for the wide disparities in factors. (CR 704:19-23). MidAmerican did not prioritize avoiding private landowners in its scoring system. (CR 704:24-705:8). In fact, avoiding interference with private property "was not a direct goal" of MidAmerican. (CR 705:3-8).

MidAmerican's disregard of the mandate of Chapter 478 is inexcusable. MidAmerican acknowledges that it is possible to weight different factors in a route study. (CR 705:11-14). MidAmerican even recognizes that other utilities do use a weighted analysis in their route selection processes. (CR 705:15-17).

In his dissent, Board member Lozier chided MidAmerican for failing to truly consider other routes, and stated that such failure was an independent reason for his decision to dissent from the IUB's grant of the franchise. (CR 944 and 947). After

reviewing the record evidence, Board member Lozier determined that "it is apparent MidAmerican focused almost entirely on Route 7." (CR 942). Lozier pointed to facts such as MidAmerican having several conversations with Juckette and her attorneys regarding the route when MidAmerican "did not contact not contact landowners along alternative routes, nor did it do any engineering analysis of the feasibility of alternative routes." (CR 942). Lozier highlighted that MidAmerican's own witness conceded that MidAmerican never contact landowners along alternate routes, such as along Interstate 35, to see if any voluntary easements would be given. (CR 943). Lozier stated that "MidAmerican's failure to perform a complete analysis of the alternative route along Interstate 35 demonstrates MidAmerican's lack of due diligence regarding alternative routes." (CR 943-44). Because, as Lozier noted, "MidAmerican and all electric transmission companies have a duty to make a fair elevation of alternative routes," the record did not permit the IUB to fairly evaluate whether MidAmerican's chosen path of Route 7 was preferable, Lozier voted to not grant MidAmerican its requested franchise. (CR 943-44).

MidAmerican also does not make any qualitative distinction between the lands that routes will impact. For example, MidAmerican does not consider whether the land along Warren Avenue, where Juckette's property is located, is more valuable for development than land directly adjacent to the interstate. (CR 713:9-714:10). The practical effect is that MidAmerican treats pasture or acreage ground adjacent to an interstate to be the same value as land used for a multi-million dollar horse farm that has the potential to be developed into high-end executive lots. *Id.* While the route along Interstate 35 may impact private property, the number of property owners affected and the degree of effects

will be less along the interstate than along Warren Avenue.

By relying solely on a flawed matrix for route selection, the routes proposed by MidAmerican unnecessarily interfere with the use of land by affected property owners. Stated differently, interference with land cannot be said to be necessary if the rationale for that chosen interference is based on a faulty matrix.

MidAmerican has conflated Juckette's contentions on this matter throughout this proceeding. MidAmerican has argued that Chapter 478 does not require a route selection matrix and, therefore, the IUB had no reason to consider deficiencies within MidAmerican's matrix. This argument misses the mark. Chapter 478 mandates that MidAmerican consider impacts of routes and that MidAmerican shall not unnecessarily interfere with private land. MidAmerican delegated its statutorily required considerations to a forced-ranking matrix. When MidAmerican chose to essentially outsource its decision making to a matrix, that matrix must be subject to scrutiny by the IUB and this Court. As described above, if the data put into the matrix is flawed, the decision made by MidAmerican based on the results of the matrix are necessarily flawed. Likewise, if the matrix itself forces major results based on minor differences and fails to account for important factors concerning the lands at issue, then the matrix must be scrutinized in this proceeding.

As Juckette testified before the IUB, the proposed line will have a significant impact on her use of land, as well as the use of land by other affected landowners. (CR 752:21-753:6). Juckette anticipates developing her land into executive lots with homes valued at $1.5 to $2 million. (CR 752:6-20). The presence of the line proposed by

MidAmerican would unduly burden Juckette's land, especially compared with the minimal interference the lines would have on land directly bordering Interstate 35. MidAmerican, though, ignored future development of land as a factor when it outsourced its route selection into a matrix, which ignores the spirit of Chapter 478. (CR 724:18-24).[8]

If the proposed line would run along Interstate 35, there would be minimal interference with the use of private land. Landowners whose property borders Interstate 35 likely have no ability to develop or use the portion of land directly bordering the interstate. A new electric transmission line directly along the interstate will have minimal interference on the possible uses of land in those locations. Moreover, the erection of lines will have minimal financial impact on the land which already borders a busy interstate. These factors should have been considered by MidAmerican's matrix, but they were not.

The additional cost to MidAmerican of selecting Route 2 is also nominal when compared to the scale of the project. Route 2 costs a mere $100,000 more than Route 7 in terms of total line length. (CR 708:8-709:1). That is before MidAmerican makes adjustments for the fact that it will need to exercise eminent domain on Juckette's property. The additional cost of angles over 30 degrees is $150,000 per angle. (CR 237:8-

[8] MidAmerican demonstrates its contradictory approach when it comes to MidAmerican's desire to erect new lines. MidAmerican argues that when advocating for a public purpose of a new franchise, it can look to the future and speculate on development to manufacture a reason for the franchise. However, when it comes to MidAmerican identifying the interference with the use of land, MidAmerican needs only look at the impact on the property exactly as it exists in the moment. (CR 724:18-24). MidAmerican cannot have it both ways.

15). There are three more angles involved in route 2 compared to route 7. (CR 110-128). Even if route 2 costs nominally more, Chapter 478's analysis is not restricted to cost. Chapter 478's goal is minimize impacts of electric transmission lines.

It is also not clear that route 2's line cost would be greater than route 7's cost. MidAmerican will not know the cost until the line is actually constructed. (CR 708:2-22).[9] Thus, even if cost is the only factor for the IUB to consider, MidAmerican has not demonstrated that the route it selected would have the least cost. The forced ranking nature of the matrix MidAmerican created a perceived difference in the routes when there is little to no difference in terms of cost to MidAmerican.

There are other qualitative impacts that MidAmerican has disregarded. While route 2 borders the interstate, route 7 borders a thoroughbred racing operation. (CR 728:1-25). MidAmerican has also disregarded all of the trees that will be impacted by route 7. (CR 730:22-25).

The cost differences between routes 2 and 7, when considered in total, are minor. (*See* CR 732:1-11). The bulk of the scoring difference between route 2 and 7 in the September 17 study is accounted for by the number of angles involved. However, when the route selection is considered in the context of the spirit of Iowa Code Chapter 478, the analysis should weigh in favor of route 2.

[9] Additionally, MidAmerican's testimony makes clear that the ultimate cost of construction will be borne by Microsoft. To the extent MidAmerican contends a certain route is not cost efficient, that contention falls flat because the *only* customer of the new line will be Microsoft for an unknown period of time and because Microsoft's financials are not pertinent to whether this franchise should be granted or denied.

MidAmerican's faulty forced ranking analysis is arbitrary and capricious, and it fails to even attempt to adhere to the spirit of Chapter 478. MidAmerican has failed to present a proposal to the IUB that does not unnecessarily interfere with private property. The IUB erred in granting the franchise. *See* Iowa Code § 17A.19(10)(f), (j), (k), (l), (m), and (n).

IV. MIDAMERICAN'S FRANCHISE IS UNDULY INJURIOUS

The IUB also erred in concluding that the proposed route was not unduly injurious. (CR 917); *see also* Iowa Code § 478.3(2)(a)(8) (requiring MidAmerican to prove that its requested franchise will not result in undue injury to property owners). MidAmerican agreed that the purpose of Chapter 478 is to avoid unnecessary interference with private landowners. (CR 704:5-18). In other words, Chapter 478 allows interference on private land by a public utility only when necessary. *Id.* However, MidAmerican did not prioritize avoiding interference with private landowners when it created its route selection matrix. (CR 704:19-705:8). This was something MidAmerican could have done, as demonstrated by the fact that other utility providers and consultants do it. (CR 705:15-23). The only explanation that MidAmerican provided as to why it did not try to weigh these factors was that it was difficult to do. (CR 706:3-6). MidAmerican acknowledged that this was inconsistent with the spirit of Iowa Code Chapter 478. (CR 706:13-707:7).

The IUB further erred in concluding that MidAmerican's east route does not unnecessarily interfere with Juckette's current and future use of her property for the same reasons it concluded the proposed route was not unduly injurious. *See* (CR 917-923).

MidAmerican's selection of the east route was based on a forced ranking matrix that considered multiple factors. MidAmerican's assumptions underlying the route selection matrix are flawed, though, because as Juckette described above, MidAmerican cannot interfere with Juckette's land without using eminent domain.[10] The cost to condemn Juckette's real estate would be significant to MidAmerican. Because MidAmerican failed to account for condemnation costs in its matrix, MidAmerican's matrix is necessarily flawed and relying on said matrix is unreasonable. Without any sound criteria for route selection, MidAmerican's choice to interfere with Juckette's real estate is unnecessary. Before MidAmerican, interferes with Juckette's real estate, MidAmerican must base its decision to do so on conclusions that are not based on flawed assumptions. Anything less by MidAmerican inherently counts as unnecessary interference with Juckette's real estate.

Framed another way, MidAmerican cannot have met its burden of showing a lack of undue injury to Juckette, nor has MidAmerican established the necessity of placing the route along Juckette's property, because MidAmerican has failed to actually conduct a merits-based analysis of the alternative routes. *See* (CR 943) (partial concurrence and dissent). MidAmerican presented no evidence to support its claim that the particular route which intrudes on Juckette's property is the route that adequately balances all of the competing interests defined in Chapter 478.

[10] As addressed in Section II(D) of this brief, MidAmerican's subsequent application for eminent domain power in the IUB for the franchise that is currently the subject of this appeal does not cure the deficiencies articulated by Juckette herein.

While MidAmerican may not be required to perform a route study under Chapter 478, MidAmerican is required to show that it considered alternative routes and methods of supply. Iowa Code § 478.3(2)(a)(6). Section 478.3(2)(a)(6) must mean more than mere pretextual "consideration" in the sense of thinking about different routes. Rather, there must be some effort to weigh the merits of alternative routes. While MidAmerican contends it performed a route study, MidAmerican failed to present evidence of doing even the most basic analysis of alternative routes. (CR 943) (partial concurrence and dissent). Thus, MidAmerican has not complied with Iowa Code § 478.3(2)(a) because it failed to carry its burden on establishing the relevant factors.

MidAmerican had to prove that its proposed route does not unnecessarily interfere with landowners' use of land. Iowa Code § 478.18(2). As described above, MidAmerican's assumptions relied upon in its route selection matrix were flawed. Yet, MidAmerican continued to solely rely upon a flawed route selection matrix. Sole reliance on a matrix that is flawed is by its own nature unreasonable. Further, if reliance is unreasonable, then an action based on unreasonable reliance cannot be a necessary action. Because MidAmerican was unreasonable in its reliance on the flawed matrix, MidAmerican has failed to prove that its proposed route was necessary. Since the route was not necessary, MidAmerican has, by definition, failed to prove that its proposed route did not unnecessarily interfere with Juckette's land. Iowa Code § 478.3(2)(a)(8). The IUB erred in concluding to the contrary.

MidAmerican did not truly consider any alternative routes as required by Iowa Code § 478.3(2). MidAmerican further failed to consider eminent domain costs in its route

selection matrix, rendering the matrix flawed. MidAmerican's blind reliance on the matrix, therefore, was unreasonable and MidAmerican, by definition, failed to prove that its interference with Juckette's property was necessary. MidAmerican failed to meet its statutory burdens of proof to be entitled to a franchise. The IUB erred in granting the franchise. *See* Iowa Code § 17A.19(10)(a), (f), (j), (k), (l), (m), and (n).

CONCLUSION

The record demonstrates that the IUB erred in granting MidAmerican its requested franchise. MidAmerican failed to prove that the project was necessary for a public use, that MidAmerican has a right to enter Juckette's property, that MidAmerican's routes were reasonable, and that MidAmerican's franchise would not be unduly injurious. For the reasons set forth above, Juckette respectfully requests that the Court reverse and vacate the IUB's decision to grant the franchise to MidAmerican.

By:_____

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CERTIFICATE OF SERVICE

I hereby certify that on July 16, 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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