IN THE IOWA DISTRICT COURT FOR POLK COUNTY

LINDA K. JUCKETTE, **Petitioner,** **vs.** **IOWA UTILITIES BOARD,** **Respondent,** **and** **MIDAMERICAN ENERGY COMPANY, OFFICE OF CONSUMER ADVOCATE,** **Intervenors.**	**CASE NO. CVCV061580** **RESPONDENT'S BRIEF IN RESISTANCE TO PETITION FOR JUDICIAL REVIEW**

COMES NOW, the Iowa Utilities Board, by and through its undersigned counsel, and hereby submits the above-captioned Respondent's Brief in Resistance to Petition for Judicial Review.

I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW.

A. The Iowa Utilities Board's finding that the proposed line is necessary to serve a public use is supported by the evidence and the law.

Authorities:

Bradley v. Iowa Dep't of Commerce, 2002 WL 3188263 (Iowa Ct. App. Dec. 30, 2002)
Cedar Rapids Cmty Sch. Dist. v. Pease, 807 N.W.2d 839 (Iowa 2011)
Fischer v. Iowa State Commerce Comm'n, 368 N.W.2d 88 (Iowa 1985)
Mathis v. Iowa Utilities Bd., 934 N.W.2d 423, 427-28 (Iowa 2019)
Patterson v. Iowa Bonus Bd., 246 Iowa 1087, 71 N.W.2d 1 (1955)
Puntenney v. Iowa Utilities Bd., 928 N.W.2d 829 (Iowa 2019)
S.E. Iowa Coop. Elec. Ass'n v. Iowa Utils. Bd., 633 N.W.2d 814 (Iowa 2001)

Iowa Code § 17A.19
Iowa Code § 478.4

B. The Iowa Utilities Board's finding that the proposed line represents a reasonable relationship to an overall plan of transmitting electricity in the public interest is supported by the evidence and the law.

Authorities:

Bradley v. Iowa Dep't of Commerce, 2002 WL 3188263 (Iowa Ct. App. Dec. 30, 2002)
Fischer v. Iowa State Commerce Comm'n, 368 N.W.2d 88 (Iowa 1985)
Puntenney v. Iowa Utilities Bd., 928 N.W.2d 829 (Iowa 2019)
S.E. Iowa Coop. Elec. Ass'n v. Iowa Utils. Bd., 633 N.W.2d 814 (Iowa 2001)
Iowa Code § 478.3
Iowa Code § 478.4

C. The Iowa Utilities Board's finding that the proposed line is compliant with Iowa Code § 478.18(2) and other provisions of law is supported by the evidence and the law.

Authorities:

Hanson v. Iowa State Commerce Comm'n, 227 N.W.2d 157 (Iowa 1975)
SZ Enterprises, LLC v. Iowa Utilities Board, 850 N.W.2d 441 (Iowa 2014)
Iowa Code § 478.3
Iowa Code § 478.18

D. Ms. Juckette's remaining contentions are without merit and serve no basis to reverse the final agency action.

Authorities:

ABC Disposal Sys., Inc. v. Department of Nat'l Res., 681 N.W.2d 596 (Iowa 2004)
Bormann v. Bd. of Sup'rs In & For Kossuth Cty., 584 N.W.2d 309 (Iowa 1998)
Hrbek v. State, 958 N.W.2d 779 (Iowa 2021)
Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 110 S. Ct. 1570, 108 L. Ed. 2d. 842 (1990)
Keokuk Junction Ry Co. v. IES Industries, Inc., 618 N.W.2d 352 (Iowa 2000)
Kingsway Cathedral v.Iowa Dep't of Trans., 711 N.W.2d 6, 9 (Iowa 2006)
NDA Farms, LLC v. Iowa Utilities Board, No. CV009448, 2013 11239755 (Polk County Dist. Ct. June 24, 2013)
NextEra Energy Resources LLC v. Iowa Utilities Bd., 815 N.W.2d 30 (Iowa 2012)
Shell Oil Co. v. Bair, 417 N.W.2d 425 (Iowa 1987)

State v. Homar, 798 P.2d 824 (Wyo. 1990)
SZ Enterprises, LLC v. Iowa Utilities Board, 850 N.W.2d 441 (Iowa 2014)
Iowa Code § 306.2
Iowa Code § 306.46
Iowa Code § 478.4
Iowa Code § 478.18

II. STATEMENT OF THE CASE.

A. Nature of the Case and Parties in the Agency Proceeding.

This judicial review arises from final agency action taken by the Iowa Utilities Board ("IUB" or the "Board") in a contested case proceeding. The underlying agency action involves a MidAmerican Energy Company ("MidAmerican") petition for an electric transmission line franchise under Iowa Code chapter 478. Pursuant to Iowa Code § 475A.2(2), the Office of Consumer Advocate ("OCA"), a division of the Iowa Department of Justice, was a party in the agency proceeding, acting as "attorney for . . . all consumers generally and the public generally . . . ." Petitioner Linda K. Juckette ("Ms. Juckette") became a party through intervention. (CR[1] pp. 190-92).

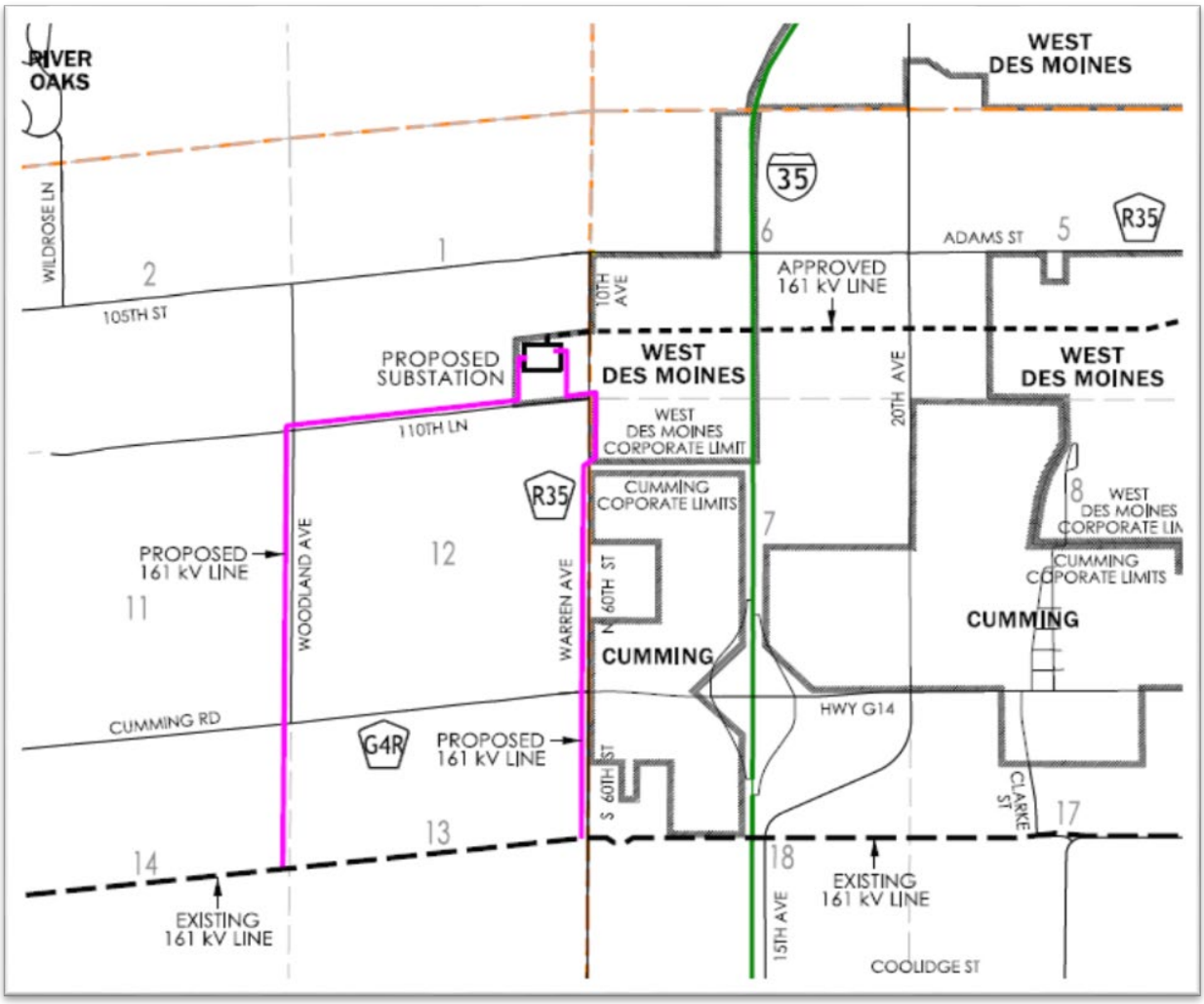
B. Course of Proceedings and IUB Disposition.

On March 14, 2019, MidAmerican filed a request to hold an informational meeting to discuss the proposed construction of an electric transmission line near Cumming, Iowa. (CR p. 1). On March 28, 2019, the IUB approved the request and the informational meeting occurred on June 20, 2019, in Winterset, Iowa. (CR pp. 2, 53-54).

On September 17, 2019, MidAmerican filed with the IUB a petition for electric transmission line franchise to construct, operate, and maintain 3.53 miles of 161 kV

1. "CR" stands for the Certified Record filed in this docket. Each "CR" citation shall be followed by the referenced Certified Record Page number(s).

transmission line in Madison County, Iowa. (CR pp. 105-08). The IUB assigned the case as Docket No. E-22417. (CR p. 105). The proposed project consists of west and east segments. (CR p. 63). The west segment's western franchised endpoint would be at a point of interconnection with an existing MidAmerican 161 kV transmission line, and the eastern franchised endpoint would be at a point of interconnection with a proposed MidAmerican 161 kV transmission line located at the municipal boundary of West Des Moines, Iowa. (CR p. 63). The east segment's southern franchised endpoint would be at a point of interconnection with an existing MidAmerican 161 kV transmission line, and the northern franchised endpoint would be at a point of interconnection with a proposed MidAmerican 161 kV transmission line located at the municipal boundary of West Des Moines. (CR p. 63). The following map shows a ***general overview*** of the area and the two segments (for the actual map of the two line segments, please see Certified Record Page Number 63):



(CR p. 3) (west and east segments identified by pink colored lines).

On December 31, 2019, Ms. Juckette filed a petition to intervene in the agency proceeding, which the IUB granted on January 21, 2020. (CR pp. 187-92).

The contested case hearing occurred on September 23, 2020, at the Madison County Fairgrounds in Winterset. (CR pp. 353-57). Following the submission of post-hearing briefs, the IUB issued its Order Granting Petition for Electric Transmission Line Franchise and Right of Eminent Domain on February 1, 2021. (CR pp. 899-947). With respect to the west segment, the IUB unanimously concluded that MidAmerican met all

necessary statutory elements to issue a franchise. (CR pp. 938-40, 41). With respect to the east segment, which is the segment that adjoins Ms. Juckette's property, two Board members concluded that MidAmerican met all necessary statutory elements to issue a franchise. (CR pp. 938-40). One Board member dissented, based on his conclusions that MidAmerican "failed to give adequate consideration to alternative routes" and because the majority misapplied Iowa Code § 306.46 – a statute that permits MidAmerican to construct the transmission line in the road right-of-way that adjoins Ms. Juckette's property. (CR pp. 941-47).

In light of Ms. Juckette's contentions, it must be emphasized that MidAmerican did not request the right of eminent domain over any property on the east segment, including Ms. Juckette's. ***Consequently, the IUB did not grant MidAmerican the right of eminent domain over any portion of Ms. Juckette's property.***

On February 11, 2021, Ms. Juckette filed a motion to stay pending rehearing and judicial review. (CC pp. 953-62). The Board granted a temporary stay on February 19, 2021, which the IUB extended through the completion of this judicial review proceeding on March 18, 2021. (CR pp. 975-76, 1023-34).

On February 16, 2021, Ms. Juckette filed an application for hearing, which MidAmerican and OCA resisted. (CR pp. 964-74, 990-1019). On March 18, 2021, the IUB denied the application for rehearing. (CR pp. 1035-48).

C. Statement of the Facts.

Facts will be discussed as relevant to each argument.

III. ARGUMENT.

In analyzing whether to issue an electric transmission franchise in any case, including this one, the IUB engages in a multistep, statutory analysis. These analytical steps and necessary findings include: (1) is the proposed line or lines necessary to serve a public use, (2) does the proposed line or lines represent a reasonable relationship to an overall plan of transmitting electricity in the public interest, and (3) is the proposed route layout compliant with Iowa Code § 478.18 and any other applicable provisions of law.[2] To provide structure for the court's review of the agency's findings and conclusions, this brief will discuss each analytical step in turn, addressing Ms. Juckette's arguments as relevant in each step.

The IUB does note, however, that for each of her separate contentions set forth in her brief, Ms. Juckette fails to argue (or even assert) that her "substantial rights" have been prejudiced as a direct result of any final agency action that falls within lettered paragraphs 17A.19(10)(a) through (n). Further, Ms. Juckette fails to explain how or why any of the challenged agency decisions fall within the scope of any lettered paragraph (a) through (n) and, instead, simply string cites to numerous lettered paragraphs at the conclusion of each argument without any explanation of how those lettered paragraphs apply. The undersigned will attempt to deduce which letter paragraphs apply to each

2. As part of its franchise analysis, the IUB also determined compliance with a number of other legal requirements, including, but not limited to, whether proper notice has been provided and whether an informational meeting was held. However, Ms. Juckette has not challenged those findings in this judicial review. Further, in situations in which a franchise petitioner has requested the right of eminent domain, the Board conducts an eminent domain analysis. However, in this case and concerning Ms. Juckette's property, the IUB did not conduct an eminent domain analysis because MidAmerican had not requested the right of eminent domain over Ms. Juckette's property until after the issuance of the final agency action and the filing of Ms. Juckette's petition for judicial review.

contention; however, Ms. Juckette's failure to explain what her substantial rights are that have been prejudiced and how that harm is causally connected to any lettered paragraph 17A.19(10)(a) through (n) is a basis, in and of itself, to deny her petition for judicial review and requires the undersigned to guess as to the basis of her claims.

A. The Iowa Utilities Board's finding that the proposed line is necessary to serve a public use is supported by the evidence and the law.

Pursuant to Iowa Code § 478.4, before granting a franchise, the IUB must make "a finding that the proposed line or lines are necessary to serve a public use . . . ." Based on the evidence submitted in the record, the Board concluded that MidAmerican demonstrated the proposed project was "necessary to serve a public use" because the proposed line is essential to meeting current and future transmission needs, will increase transmission system reliability and flexibility, and will support current and anticipated electric load growth. (CR pp. 905-08).

1. Standard of Review/Statement of the Law.

The Iowa Supreme Court has long recognized that the Iowa "legislature gave the [IUB] discretion to make decisions involving electric transmission lines, and [the Court is] not to question the wisdom of the legislature in doing so." *S.E. Iowa Coop. Elec. Ass'n v. Iowa Utils. Bd.*, 633 N.W.2d 814, 819 (Iowa 2001) (citations omitted). Further, the Court has "frequently relied upon the [IUB's] expertise in interpreting Iowa Code chapter 478." *Id.* (citations omitted). However, in interpreting terms that are not "uniquely within the subject matter expertise" of the IUB, no deference is provided. *Mathis v. Iowa Utilities Bd.*, 934 N.W.2d 423, 427-28 (Iowa 2019).

With respect to the appropriate standard of deference to be accorded the IUB's decision under Iowa Code § 17A.19(11), the undersigned respectfully posits that the Court should give appropriate deference to the IUB's "public use" determination. *See S.E. Iowa Coop. Elec. Ass'n*, 633 N.W.2d at 819-20 (citation omitted) (stating that in "enacting chapter 478, the legislature intended to entrust the [IUB] with the decision whether a public use existed and, if so, the necessity of the proposed line to serve the public use"); *see e.g., Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829, 836 (Iowa 2019) (providing deference to IUB's "public convenience and necessity" finding for issuance of a pipeline permit).

The Iowa Supreme Court has already held that the "transmission of electricity to the public constitutes a public use as contemplated by section 478.4." *Id.* at 820. Therefore, the pertinent issue in an electric transmission franchise case is whether the line proposed in the case is necessary to serve that public use. *Id. See also Bradley v. Iowa Dep't of Commerce*, No. 01-0646, 2002 WL 31882863, at * 3 (Iowa Ct. App. Dec. 30, 2002) (engaging in same analysis). The IUB's findings on this issue are subject to the "substantial evidence" review. *Bradley*, 2002 WL 31882863, at * 4 (stating in that case that the IUB's decision was supported by substantial evidence).

For purposes of judicial review proceedings, the term "substantial evidence" means:

> the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance.

Iowa Code § 17A.19(10)(f)(1). "Evidence is not insubstantial merely because different conclusions may be drawn from the evidence" and to that end, findings may be supported by substantial evidence even though a court may draw a different conclusion. *Cedar Rapids Cmty Sch. Dist. v. Pease*, 807 N.W.2d 839, 845 (Iowa 2011).

2. Substantial evidence supports the IUB's conclusion that the proposed line is necessary to serve a public use.

As noted above, because the Iowa Supreme Court has already concluded that the transmission of electricity to the public constitutes a public use for purposes of § 478.4, the issue is simply whether the proposed line is necessary to serve that public use. *S.E. Iowa Coop. Elec. Ass'n v. Iowa Utils. Bd.*, 633 N.W.2d at 820. Based on the evidence submitted, the Board found the proposed line is necessary to meet current and future transmission needs, will increase system reliability and flexibility, and will support current and anticipated load growth – each of which is a reason Iowa appellate courts have recognized as meeting the "necessary to serve a public use" standard. (CR pp. 905-08).

In both its pre-hearing filings and at hearing, MidAmerican presented the testimony of Mr. Michael Charleville, a Senior Engineer II, who is employed in MidAmerican's Electric System Planning department. (CR pp. 198-205, 635-82). Mr. Charleville testified the purpose of the proposed lines is "to provide additional 161 kV support to the Maffitt Lake substation and to support the significant load growth in the area south of the Maffitt Lake and Raccoon River." (CR p. 199). Absent approval of the proposed project, only one line would feed the Maffitt Lake substation, which

means that if a disruption of service occurs with that one line, the entire area and customers served by that substation would be without service. (CR pp. 199-200). Both the west and east segments of the proposed project would provide additional electric feeds to the substation (for a total of three incoming lines), which increases electric service reliability to the substation and the customers it serves. (CR p. 200).

Additionally, the proposed lines would allow for "immediate reliability support" in the area by allowing for more of the local load to be moved to the Maffitt Lake substation as opposed to the existing substations that are further away. (CR p. 202). As Mr. Charleville testified, moving that customer load to the Maffitt Lake substation "will reduce their exposure caused by long distribution lines and the associated risk for outages." (CR p. 202).

The evidence further demonstrates that additional transmission infrastructure is required in the area to adequately and reliably serve anticipated load growth. (CR p. 201). As phrased by Mr. Charleville, "significant industrial growth is occurring in the area, with the construction of a third data center in southern West Des Moines and Cumming area [and d]ue to the projected load growth and MidAmerican's inability to serve significant loads from the existing area feeders, new facilities are required." (CR p. 201). MidAmerican's conclusions regarding anticipated load growth are mirrored by analyses performed by the Cities of West Des Moines and Cumming. (CR pp. 203-04). Even in her own testimony, Ms. Juckette recognized the "quicker than anticipated" development in the area, testifying:

> With the [ ] expansion that's happening through the City of West Des Moines and now to the west from the City of Norwalk and the City of Cumming, I anticipate that to come in my direction quicker than anticipated.

(CR p. 752).

In her opening brief, Ms. Juckette claims, "Microsoft's presence is the sole reason MidAmerican applied for this franchise." (Juckette's Opening Brief p. 8). Not only is Ms. Juckette's assertion an unfair or inaccurate representation of the evidence, its immaterial. In the immediate area of the Maffitt Lake substation is a Microsoft Corporation data center, which receives electric utility service from MidAmerican. (CR p. 200). While the evidence does support a finding that the most immediate need for the proposed lines is to provide reliable electric service to the Microsoft location, the record demonstrates that the proposed lines are also 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.

Further, even assuming arguendo that the evidence submitted by MidAmerican supported the singular conclusion that the proposed project is intended to serve the electric needs of one customer (an assertion that is not supported by the record), such conclusion nevertheless supports a finding of public use under § 478.4. Under Iowa law, electric public utilities are assigned exclusive service areas in which only that public utility may provide electric utilities service. Iowa Code § 476.25. In exchange for holding an electric service monopoly for that territory, the public utility is statutorily bound to provide reasonably adequate electric service to each and every customer in that

service area. *Id.* at §§ 476.3, 476.8. Therefore, even if Ms. Juckette were correct in her contention that the proposed lines were only necessary to serve the electric load of one customer, a public use under § 478.4 is nevertheless established. *See S.E. Iowa Coop. Elec. Ass'n v. Iowa Utils. Bd.*, 633 N.W.2d at 820 (holding that the transmission of electric for customer use constitutes a public use under § 478.4).

In sum, substantial evidence in the record supports the Board's findings that the proposed line is necessary to meet current and future transmission needs, will increase system reliability and flexibility, and will support current and anticipated load growth. Iowa appellate courts have recognized each of these reasons constitutes a "public use" under § 478.4. *See Fischer v. Iowa State Commerce Comm'n*, 368 N.W.2d 88, 97-98 (Iowa 1985) (affirming agency's § 478.4 public use finding where the evidence showed the proposed project increased current system reliability and improved the ability to meet future load demands); *Bradley*, 2002 WL 31882863, at * 5 (finding a public use under § 478.4 where the evidence demonstrated the proposed line "is necessary to increase reliability of service, accommodate occurring and anticipated load growth, and reasonably assure the availability, quality, and reliability of service").

3. "Public Use" for Purposes of a Transmission Line Franchise under Iowa Code chapter 478 means something wholly different than "public use" as used in the Federal and State Constitutional Takings Clauses.

Ms. Juckette's primary argument regarding "public use" appears to be that MidAmerican has not proven the "public use" necessary to support eminent domain under the United States and Iowa Constitutions. *See* U.S. Constitution amend V (providing private property shall not "be taken for public use, without just

compensation); Iowa Constitution art. I, § 18 (same). According to Ms. Juckette, because "public use" under § 478.4 is not defined, "public use" must be given the same meaning that "public use" has in Iowa's eminent domain proceedings. (Juckette's Opening Brief p. 6). Ms. Juckette's argument is supported by neither Iowa adjudicatory law nor a fair reading of chapter 478.

First and foremost, Ms. Juckette provided no authority to support this argument – an argument that runs contrary to the authority not only discussed herein but also in the IUB decisions from which this judicial review is taken. In its final order, and in its order denying Ms. Juckette's rehearing request, the IUB cited several Iowa appellate cases (including those same cases discussed above) that unequivocally state that "public use" for purposes of § 478.4 is established where the evidence shows the proposed project will increase system reliability, and is intended to address current and future load demand. *See S.E. Iowa Coop. Elec. Ass'n v. Iowa Utils. Bd.*, 633 N.W.2d at 820 (stating "[w]e have already found the transmission of electricity to the public constitutes a public use as contemplated by section 478.4"); *Fischer v. Iowa State Commerce Comm'n*, 368 N.W.2d 88, 97-98 (Iowa 1985) (affirming a § 478.4 public use finding where project would increase reliability and improve ability to meet future electric load); *Bradley*, 2002 WL 31882863, at * 5 (finding § 478.4 public use where proposed line increases reliability of service and accommodates load growth). In her argument, Ms. Juckette does not reference those cases or even discuss their existence. Rather, without acknowledging their existence, Ms. Juckette requests this Court reach a conclusion contrary to these cases, and find that "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.'" (Juckette's Opening Brief p. 6).

Second, the foundation to her claim that "public use" as used in § 478.4 should be provided the same meaning as "public use" in eminent domain analyses is that generally, "words and phrases in a statute are presumed to bear the same meaning throughout the statute." (Juckette's Opening Brief pp. 5-6) (citing *Bribriesco-Ledger v. Klipsch*, 957 N.W.2d 646, 650 (Iowa 2021)). However, as the Iowa Supreme Court has long recognized, the presumption is not rigid and the meaning of words and phrases may vary where the subject matter is not the same. *Patterson v. Iowa Bonus Bd.*, 246 Iowa 1087, 1094-95, 71 N.W.2d 1, 6 (1955). As applied here, the "public use" required to show the necessity of a transmission line is most certainly a different subject matter than "public use" for taking private property in eminent domain proceedings. This is perhaps best demonstrated through a review of chapter 478, which reveals that the Board's "public use" inquiry and findings for the issuance of a franchise under § 478.4 is wholly separate and distinct from the Board "public use" findings required for the grant of eminent domain under § 478.15. Very few electric transmission franchise petitions seek the right of eminent domain[3] and, consequently, to require a constitutional "public use" analysis when the vast majority of franchise cases do not implicate constitutional rights defies sense and does not constitute a reasonable construction of the requirements contained in chapter 478 as a whole. The IUB agrees that a constitutional "public use" analysis is

3. The undersigned estimates that approximately 7% of all ***new*** franchise petitions include a request for the right of eminent domain and that approximately 2% of all franchise petitions include a request for the right of eminent domain.

required when eminent domain is requested; however, the Board did not grant MidAmerican the right of eminent domain over Ms. Juckette's property. *See e.g.*, Iowa Code § 478.15(1) (authorizing the IUB to grant the right of eminent domain to the extent "necessary for public use" and providing that the "burden of proving the necessity for public use shall be on the person, company, or corporation seeking the franchise").

4. "Public Use" Conclusion.

The IUB conducted its "public use" analysis under the framework established in § 478.4 and applicable appellate decisions, and its conclusion that the proposed lines are necessary to serve a public use is supported by substantial evidence. Ms. Juckette's eminent domain contentions are not supported by the facts (MidAmerican did not seek the right of eminent domain over any land on the east segment and the Board did not grant MidAmerican the right of eminent domain over any portion of Ms. Juckette's property) and are not supported by existing law. Further, Ms. Juckette failed to present any argument or analysis as to why these existing appellate decisions are inapplicable and failed to present a good faith argument for the extension, modification, or reversal of these decisions. The IUB's "public use" finding should be affirmed.

B. The Iowa Utilities Board's finding that the proposed line represents a reasonable relationship to an overall plan of transmitting electricity in the public interest is supported by the evidence and the law.

In addition to "public use," Iowa Code § 478.4 provides that as a condition precedent to the granting of an electric franchise, the IUB must find that the proposed line "represents a reasonable relationship to an overall plan of transmitting electricity in the public interest." In her Amended Petition, Ms. Juckette has not alleged the IUB's

"reasonable relationship" finding was in error. *See* Amended Petition at Count IV (no allegation that the IUB's "reasonable relationship" finding is erroneous). In her Opening Brief, Ms. Juckette did not argue or even assert that the IUB's "reasonable relationship" finding is erroneous. Therefore, the Court should deem any challenge to this IUB finding waived and summarily affirm the same. Notwithstanding, the IUB's "reasonable relationship" finding is supported by substantial evidence.

1. Standard of Review/Deference.

For the same reasons set forth above in Section I.A.1, the undersigned respectfully posits that the IUB's "reasonable relationship" may be subject to a "substantial evidence" challenge. See *Bradley*, 2002 WL 31882863, at * 4 (reviewing IUB's public use and reasonable relationship under substantial evidence analysis). The undersigned further posits that the Court should give appropriate deference to the IUB's "reasonable relationship" determination. *See S.E. Iowa Coop. Elec. Ass'n*, 633 N.W.2d at 819-20 (citation omitted) (stating that in "enacting chapter 478, the legislature intended to entrust the [IUB] with the decision whether a public use existed and, if so, the necessity of the proposed line to serve the public use"); *see e.g., Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829, 836 (Iowa 2019) (providing deference to IUB's "public convenience and necessity" finding for issuance of a pipeline permit).

2. Substantial evidence supports the IUB's conclusion that the proposed line represents a reasonable relationship to an overall plan of transmitting electricity in the public interest.

In determining whether a proposed line represents a reasonable relationship to an overall plan of transmitting electricity in the public interest, Iowa Code § 478.3(2)(a) sets

forth a number of factors that must be examined. In its final order, the Board examined each and found that "MidAmerican established that the proposed line is reasonably related to an overall plan of transmitting electricity in the public interest under § 478.3(2)(a)." (CR pp. 909-17). The Board's review included:

- *Numbered Paragraphs 1, 3, 5, and 7:* Numbered paragraphs 1, 3, 5, and 7 focus on the relationship between the proposed project and present and future economic development, the public's present and future needs, other planned power systems, and present and future land use and zoning. Iowa Code § 478.3(2)(a)(1), (3), (5), and (7). The IUB found that MidAmerican proved the proposed lines are necessary to meet the needs of its current customers and the anticipated needs of its future customers based on projected population growth and economic development. (CR pp. 909-10). In addition to the evidence submitted and discussed regarding the "public use" inquiry, MidAmerican demonstrated that it took into consideration the surrounding cities' comprehensive plans and future land uses. (CR pp. 203-04, 318). Simply put, the evidence establishes that the proposed line is necessary to adequately and reliably serve current and anticipated load growth. (CR p. 201-02).

- *Numbered Paragraph 2 and 4:* Numbered paragraphs 2 and 4 require a review into the relationship of the proposed project to comprehensive utility planning and to the existing electric utility system and parallel utility routes. Iowa Code § 478.3(2)(a)(2) and (4). The IUB concluded that MidAmerican established that the "proposed project is the product of comprehensive electric utility planning," taking into consideration the existing utility system and parallel utility routes." (CR pp. 910-11).

MidAmerican demonstrated the relationship between the proposed project and existing transmission infrastructure in the immediate service area (as well as MidAmerican's entire system). The proposed project will interconnect the Maffitt Lake substation to the existing Booneville substation, located in Dallas County, and the Norwalk substation, located in Warren County, and remove the existing 161 kV line running between the Booneville and Norwalk substations. (CR pp. 153-54, 261-62). MidAmerican further demonstrated that the proposed project "will reduce the distance between customers and the closest substation, increase reliability, reduce repair times in the event of an outage, and facilitate additional residential, commercial, and industrial growth in the vicinity of the Maffitt Lake Substation." (CR pp. 199-200, 910-11).

- *Numbered Paragraphs 6 and 8:* Numbered paragraphs 6 and 8 require a review into possible alternative routes and the inconvenience that may result to property owners. Iowa Code § 478.3(2)(a)(6) and (8). On the topic of alternative routes, MidAmerican introduced the testimony of William J. Schierbrock, MidAmerican's manager of High Voltage Engineering. (CR p. 226). Mr. Schierbrock testified as to the steps MidAmerican took in considering prospective routes, including whether the routes "met the requirements of Iowa Code section 478.18 and 199 IAC 11.1(7)." (CR p. 231-32). MidAmerican also introduced two route studies, which described its route selection process. (CR pp. 110-28, 130-48). The IUB found that MidAmerican demonstrated that it considered the "possible use of alternative routes," which took into consideration numerous private land use criteria, including agricultural impacts, overall

line length, angles, access requirements, and existing trees and other vegetation. (CR pp. 911-17).

At hearing, in her post-hearing filings, and her Opening Brief, Ms. Juckette asserts MidAmerican's route study is erroneous for a number of reasons. (Juckette's Opening Brief pp. 32-41). Without citing any authority for her contentions, Ms. Juckette argues the route study is not reasonable because the study fails to account for certain costs MidAmerican will bear, fails to consider the effects the lines may have on surrounding land values, and does not make any qualitative distinction between the lands the proposed routes will impact. (Juckette's Opening Brief pp. 32-41).

As noted by the IUB in its "Order Denying Application for Rehearing:"

> Ms. Juckette's contention is flawed for a number of reasons, not the least of which being that she has failed to demonstrate or cite to any authority that supports her contention that a transmission line route study ***must even be performed*** or ***must identify with any particularity those factors*** she believes would warrant moving the route to a different location. *See* OCA Objection p. 5 (stating "OCA agrees with the Board's assertion that there is no explicit legal requirement a utility must perform a route study" or that a route study consider private landowner rights or the economic value of property). ***Iowa Code § 478.3(2)(a)(6) simply requires a petitioning party consider the "possible use of alternative routes," and Ms. Juckette has failed to bring to the Board's attention any authority standing for the proposition that a final route selected must be the least expensive, taking into consideration any potential eminent domain compensation.***

(CR pp. 1041-42) (emphasis added). Simply put, since the contested case hearing, Ms. Juckette has challenged the adequacy of MidAmerican's route study, and the IUB has repeatedly stated through its orders, that it is unaware of Iowa authority that requires a transmission company perform a route study with the specificity she demands (or even conduct a route study at all). *See* CR p. 916 (stating in the final order that "the Board is

aware of no authority that requires the creation of a route study. Chapter 478, which governs this Board's review, neither includes the term 'route study' nor identifies with any particularity what criteria a petitioner should consider in reviewing alternative routes. Instead, § 478.3(2)(a)(6) simply requires a petitioner consider the 'possible use of alternative routes,' and both route studies, as submitted by MidAmerican, establish it did"). Within her Opening Brief in this judicial review, Ms. Juckette has still failed to cite to any authority in support of her argument. For this reason alone, this Court should deny Ms. Juckette relief based on her route study contentions.

In conclusion, the IUB found that after considering the factors set forth in numbered paragraphs 478.3(2)(a)(1) through (8), MidAmerican demonstrated the proposed line is reasonably related to an overall plan of transmitting electricity in the public interest. (CR p. 917). Again, Ms. Juckette failed to challenge this finding in either her Amended Petition or in her Opening Brief. Regardless, for the reasons set forth in its "Order Granting Petition for Electric Transmission Line Franchise and Right of Eminent Domain," in its "Order Denying Application for Rehearing," and herein, the Board's finding on this element is supported by substantial evidence. *See e.g., Fischer v. Iowa State Commerce Comm'n*, 368 N.W.2d at 97-98 (affirming IUB's determination that the proposed route represents a reasonable relationship to an overall plan of transmitting electricity in the public interest where record showed the proposed line will increase reliability, will address future load demands, and was integrated into the company's overall transmission plan despite landowner's argument that other routes were preferable).

C. The Iowa Utilities Board's finding that the proposed line is compliant with Iowa Code § 478.18(2) and other provisions of law is supported by the evidence and law.

1. Standard of Review/Deference.

The undersigned has been unable to locate any authority setting forth the appropriate standard of review and level of deference to be provided for IUB findings under § 478.18(2). However, for the same reasons set forth above in Section I.A.1, the undersigned respectfully posits that the IUB's factual determinations under § 478.18(2) are subject to a "substantial evidence" review.

With respect to the appropriate level of deference, the undersigned posits that none of the terms included in § 478.18(2) are exclusively within the expertise of the IUB. *See SZ Enterprises, LLC v. Iowa Utilities Board*, 850 N.W.2d 441, 452 (Iowa 2014) (providing no deference to terms that are not within the expertise of the agency).

2. Substantial evidence supports the IUB's conclusion that the proposed line complies with Iowa Code § 478.18(2) and other provisions of law.

After finding MidAmerican's proposed project is necessary to serve a public use and represents a reasonable relationship to an overall plan of transmitting electricity in the public interest, the IUB next examined whether the proposed routes were compliant with § 478.18(2) and other provisions of law. (CR pp. 917-34). Iowa Code § 478.18(2) provides that an electric transmission line:

> shall be constructed near and parallel to roads, to the right-of-way of the railways of the state, or along the division lines of the lands, according to the government survey, wherever the same is practicable and reasonable, and so as not to interfere with the use by the public of the highways or streams of the state, nor unnecessarily interfere with the use of any lands by the occupant.

See also Hanson v. Iowa State Commerce Comm'n, 227 N.W.2d 157, 159 (Iowa 1975) (defining "[d]ivision lines of the lands" as "section lines, quarter-section lines, and quarter-quarter-section lines, which divide land into 640-acre, 160-acre, and 40-acre tracts respectively").

With respect to the route relevant to this judicial review, MidAmerican considered 26 potential line routes, each of which was located near or parallel to roads, active railroads, and division lines of land. (CR p. 110). The route selected and approved by the Board runs straight north-south next to a road (*i.e.*, North 60th Street), which meets the route location requirements of § 478.18. (CR p. 258).

Ms. Juckette contends, however, that the east segment unnecessarily interferes with her use of her property. (Juckette's Opening Brief pp. 41-44). However, at no point within her brief does Ms. Juckette cite to any part of the record to show how the proposed line will unnecessarily interfere with her present or anticipated future use. Within her brief, Ms. Juckette does not even explain how the proposed line will unnecessarily interfere with any present or future use. Instead, Ms. Juckette summarily concludes that the "unnecessary interference" is shown because: (1) MidAmerican used a forced ranking route selection matrix, (2) MidAmerican failed to conduct a merit-based analysis of alternative routes, and (3) MidAmerican's consideration of alternative routes was not

thorough. (Juckette's Opening Brief pp. 41-44). Even if true,[4] none of the reasons asserted by Ms. Juckette demonstrates the proposed line unnecessarily interferes with *her present or future use* of her property and for this reason alone, any basis of judicial review that is premised on Ms. Juckette's land use should be deemed waived.

Further, the Board's finding that the proposed line will not interfere with Ms. Juckette's use of her land is supported by the record. Because "unnecessary interference" is not defined by statute, the IUB determined the words should be given their plain and common meaning. (CR p. 919) (citing *Banilla Games, Inc. v. Iowa Dep't of Inspections & Appeals*, 919 N.W.2d 6, 14 (Iowa 2018)). The IUB determined "interfere" means "to hinder or impede," and "unnecessary" means "not required under the circumstances." (CR p. 919).

Concerning the present use of her property, Ms. Juckette testified that she had no present intention of expanding the current use of her property towards the public road. (CR pp. 764-66, 920). MidAmerican's witness Mr. Schierbrock testified that the east segment would not impede Ms. Juckette's use of her property and, in fact, because the proposed project involved the removal of an existing 161 kV transmission line that ran next to the southern border of her property, the proposed project would lessen any potential interference with her property. (CR pp. 469, 728, 920). Finally, to avoid any impact the potential route may have on Ms. Juckette's property, MidAmerican also

4. As already explained above, Ms. Juckette's arguments concerning the route study are without merit and without supporting authority. As relevant to Ms. Juckette's route study contention, Iowa law simply requires an electric transmission line petitioner consider the "possible use of alternative routes." Iowa Code § 478.3(2)(a)(6). The undersigned is aware of no Iowa authority (and Ms. Juckette failed to identify any Iowa authority) that prohibits a forced ranking route study, requires a merit-based route study, or imposes any thoroughness requirements on consideration of alternative routes.

offered to install metal grounding on her metal fence on the east side of her property. (CR pp. 729-30). As properly concluded by the IUB, "the record is devoid of any evidence suggesting the east segment interferes, unreasonably or otherwise, with the current use of Ms. Juckette's property." (CR p. 921).

With respect to the future use of her property, Ms. Juckette testified that once she ceases using her property as a horse farm, she intended to use the land for high, upper-end development with residences valued between $1.5 and $2 million. (CR pp. 752-56). Ms. Juckette opined that the east segment will make it more difficult to sell the lots adjoining the line for amounts she believes the lots would otherwise be worth. (CR p. 752-53).

In discussing whether the east segment "unnecessarily interfered" with Ms. Juckette's expected future use of her property, the IUB noted that whether a proposed line interferes with future development has been addressed in prior agency cases. (CR pp. 921-23) (*citing In re ITC Midwest LLC*, Docket No. E-22156, "Proposed Decision and Order Granting Franchise" (Iowa Utilities Bd. March 29, 2016)).[5] In that case, the transmission company proposed to run a transmission line through a field, which the landowner currently used for crops but contemplated developing someday. (CR p. 922) (*citing In re ITC Midwest LLC*, Docket No. E-22156, "Proposed Decision and Order Granting Franchise," p. 33-34). The line as proposed through the field would hinder, if not preclude entirely, future development of the land and the landowner

5. In addition to the hyperlink to the decision contained in the IUB's electronic file system, the prior IUB decision may be obtained at 2016 WL 1276435. The pagination in each source document is different though. For purposes of this discussion, the undersigned will use the pagination from the document obtained from IUB's electronic filing system.

presented a viable route alternative of running the line along the roads, which was described as a "short" alternative with "no engineering or construction problems." (CR p. 922 (*citing In re ITC Midwest LLC*, Docket No. E-22156, "Proposed Decision and Order Granting Franchise," p. 33-34). In discussing that case, the IUB stated that "where a proposed transmission line would prevent future residential development of agriculture land and where the hearing record establishes with specificity the existence of an alternative route with no engineering or construction problems, then 'unnecessary interference' may be found." (CR pp. 921-22). As applied to this case, Ms. Juckette: (1) did not establish the proposed transmission line would preclude any future residential development, (2) did not present a viable alternative route, and (3) did not show the alternative route was possible from an engineering and construction standpoint. (CR p. 923).

MidAmerican presented sufficient evidence in the record from which a reasonable trier of fact could find that the east segment would not unnecessarily interfere with Ms. Juckette's use of her property. (CR pp. 469, 728). Therefore, as the IUB correctly found, "the record does not establish that the proposed east segment would prevent, impede, obstruct, or even hinder Ms. Juckette's intended future use of her property." (CR p. 923).

As set forth herein the IUB's finding that the proposed line complies with Iowa Code § 478.18 is supported by substantial evidence and should be affirmed.

D. Ms. Juckette's remaining contentions are without merit and serve no basis to reverse the final agency action.

1. Standard of Review/Deference.

Although not entirely clear, it appears Ms. Juckette's remaining contentions center on the constitutionality of the final decision. The courts "do not give any deference to the agency with respect to the constitutionality of a statute or administrative rule because it is entirely within the providence of the judiciary to determine the constitutionality of legislation enacted by other branches of government." *NextEra Energy Resources LLC v. Iowa Utilities Bd.*, 815 N.W.2d 30, 44 (Iowa 2012) (citing, in part, Iowa Code § 17A.19(11)(b)). Courts are to "review constitutional issues in agency proceedings de novo." *Id.* (citations omitted).

With respect to the appropriate level of deference, the undersigned posits that none of the terms included in § 478.18(2) are exclusively within the expertise of the IUB. *See SZ Enterprises, LLC v. Iowa Utilities Board*, 850 N.W.2d 441, 452 (Iowa 2014) (providing no deference to terms that are not within the expertise of the agency).

2. Section 306.46 was not applied retroactively and is not unconstitutional on its face or as applied.

As shown in the above, each IUB finding discussed above concerns a specific statutory prerequisite to the issuance of an electric transmission line franchise. The IUB found the proposed line is necessary to serve a public use under § 478.4. The IUB found a proposed line represents a reasonable relationship to an overall plan of transmitting electricity in the public interest under § 478.4. The Board found the proposed line follows a permissible route and does not unnecessarily interfere with the use of the land

by the occupant under § 478.18(2). For lines that the transmission company has not sought eminent domain, such as the east segment that runs near Ms. Juckette's property, these three findings are all that is required under chapter 478 for the issuance of an electric transmission line franchise. Because the statutory prerequisites to the issuance of a franchise have been met as shown above, the agency action should be affirmed.

With this said, however, in its final order, the IUB examined whether MidAmerican possessed the necessary easements or other legal authority to construct, operate, and maintain an electric transmission line along the east border of Ms. Juckette's property, stating that "if MidAmerican lacks the necessary easements to construct, operate, and maintain the east segment, that portion of the petition must fail." (CR pp. 924-34).

Undisputedly, prior to the issuance of final agency action, MidAmerican did not seek condemnation over any property adjoining the east segment.[6] (CR p. 924). Instead, MidAmerican argued: (1) it does not need an additional easement from Ms. Juckette because legal authority permitting the installation and operation of a transmission line along her eastern border already exists, (CR pp. 932-33), and (2) because it may install the proposed transmission line in the road right-of-way pursuant to Iowa Code § 306.46(1). (CR pp. 925-32). The IUB found against MidAmerican on the first ground, concluding the record does not contain evidence of an easement, independent of

6. On May 7, 2021, and after Ms. Juckette filed her petition for judicial review, MidAmerican filed with the IUB an "Application for Eminent Domain," requesting the right of eminent domain to locate the electric transmission line in the public road right-of-way adjacent to the property owned by Ms. Juckette. In re: MidAmerican Energy Company, Docket No. E-22417, "MidAmerican Energy Company's Application for Eminent Domain" (May 7, 2021). The Board has not acted on MidAmerican's eminent domain application because of the pending judicial review. *See Christiansen v. Iowa Bd. of Educ. Examiners*, 831 N.W.2d 179, 190 (Iowa 2013) (stating that "the filing of a proper petition for judicial review divests the agency of jurisdiction unless and until the district court remands the case").

§ 306.46, that would allow MidAmerican to construct, operate, and maintain a transmission line along the eastern edge of Ms. Juckette's property. (CR p. 933). MidAmerican did not seek judicial review on this aspect of the final agency order; therefore, this issue boils down to the application of the public road rights-of-way statute.

Iowa Code § 306.46(1) provides:

> A public utility may construct, operate, repair, or maintain its utility facilities within a public road right-of-way. The location of new utility facilities shall comply with section 318.9. A utility facility shall not be constructed or installed in a manner that causes interference with public use of the road.

For purposes of § 306.46, the term "public utility" means "electric transmission owners" and the term "utility facilities" means "any cables, conduits, wire, pipe, casing pipe, supporting poles, guys, and other material and equipment utilities for the furnishing of electric, gas, communications, water, or sewer service." *Id.* at § 306.46(2). There is no dispute that MidAmerican falls within the definition of "public utility" and the electric transmission line falls within the definition of "utility facilities." Further, there is no dispute that MidAmerican proposes to construct, operate, and maintain the proposed line within the public right-of-way on North 60th Street. (CR p. 258). In its final order, the IUB concluded "§ 306.46 allows MidAmerican to construct, operate, maintain, and repair its utility facilities in the road right-of-way that borders Ms. Juckette's property to the east." (CR p. 934). Ms. Juckette claims the IUB's reliance on § 306.46 is erroneous for two reasons, namely: (1) Ms. Juckette argues the IUB erred by applying § 306.46 retroactively, (Juckette's Opening Brief at pp. 17-23), and (2) Ms. Juckette contends that

even if § 306.46 is applied prospectively, it is nevertheless unconstitutional. (Juckette's Opening Brief pp. 23-27). Each argument will be addressed in turn.

a. Whether the IUB applied § 306.46 retroactively.

Pursuant to Iowa Code § 4.5, a statute is presumed to be prospective in its application unless expressly made retrospective. In addressing the question of prospective versus retrospective application, the IUB held:

> With respect to prospective versus retrospective application, whether § 306.46 is retroactive depends "upon what one considers to be the determinative event by which retroactivity or prospectivity is to be calculated." *Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, 100, 113 S. Ct. 554, 565 (1992) (Thomas, J., concurring in part and concurring in the judgment). In this situation, the Board believes the determinative event is the conduct that is made subject of the statute, namely, the public utility's construction, operation, repair, and maintenance of its utility facilities within a public road right-of-way. Here, because MidAmerican's construction, operation, and maintenance of the proposed transmission line has yet to occur, application of § 306.46 is prospective.

(CR p. 931). In asserting the IUB's analysis was incorrect, Ms. Juckette points to Judge Robert Hanson's "Ruling on Petition for Judicial Review" in *NDA Farms, LLC v. Iowa Utilities Board, Department of Commerce*, Polk County Case No. CV009448, 2013 WL 11239755 (Polk County Dist. Ct. June 24, 2013).

In *NDA Farms*, Judge Hanson addressed this precise issue; namely, whether the IUB erred in applying § 306.46 to a road right-of-way that existed prior to the statute's effective date. *Id.* at *9. In that case, and pursuant to § 306.46, the IUB approved a franchise for a transmission line that ran in the public road right-of-way that ran adjacent to farmland owned by NDA FarMs. *Id.* at *2. The road easement was created and recorded in 1956. *Id.* at *1. The court stated:

> [u]pon review of section 306.46 and considering the 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.

Id. at *9.

To be clear, the undersigned requests this Court reach a decision contrary to that reached in *NDA Farms* and to do so for two primary reasons. First, the *NDA Farms* decision is silent on how it identified the determinative event for purposes of examining whether § 306.46 is applied retroactively or prospectively. *See Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 494 U.S. 827, 857 n. 3, 110 S. Ct. 1570, 1588 n. 3, 108 L.Ed.2d 842 (1990) (Scalia, J., concurring) (stating that whether a statute is applied retroactively will "depen[d] on what one considers to be the determinative event by which retroactivity or prospectivity is to be calculated"). The *NDA Farms* court selected the 1956 easement as the determinative event without analyzing or explaining why. The undersigned respectfully posits that the *NDA Farms* court erred in selecting the 1956 easement as the determinative event for reasons to follow.

Second, since the *NDA Farms* ruling, the Iowa Supreme Court has clarified how the determinative event is to be selected. In *Hrbek v. State*, 958 N.W.2d 779 (Iowa 2021), the Court examined the applicability of a newly adopted statute, which limited the types of filings that can be made by represented post-conviction relief ("PCR") applicants, to a pending PCR case. The PCR applicant argued that his rights to prosecute his case and make filings in the case vested when he initiated the PCR case and that

application of the new statute, which restricted his filing rights, "would be an unlawful retrospective application of the statute." *Id.* at 782.

The Court began its analysis by identifying the determinative event by which retroactivity or prospectivity is to be calculated. The Court stated:

> application of a statute is in fact retrospective when a statute applies a new rule, standard, or consequence to a *prior* act or omission. The prior act or omission is the event of legal consequence "that the rule regulates." The event of legal consequence is the specific conduct regulated in the statute.

Id. at 782-83 (emphasis in original) (internal citations omitted). In other words, a statute is applied retrospectively when it applies a new rule to a "prior act." For purposes of this analysis, a "prior act" is intended to mean "the event of legal consequence." In turn, "the event of legal consequence" means the "specific conduct regulated in the statute." Therefore, the determinative event is the "specific conduct regulated in the statute."

Contrary to the *NDA Farms* holding, the determinative event for purposes of determining whether § 306.46 is being applied retrospectively cannot be the date the road easement is created. Section 306.46 in no manner or respect relates to the creation of road rights-of-way or road easements. Section 306.46 does not concern or even mention road easements. The only conduct referenced in § 306.46 is the construction, operation, repair, or maintenance of a utility facility within the public road right-of-way by a public utility. Consequently, under the *Hrbek* standard – a standard which had not been elucidated when the *NDA Farms* ruling was issued – the determinative event for purposes of examining whether § 306.46 is being applied retrospectively is the "specific conduct

regulated in the statute" (*i.e.*, a public utility's construction, operation, repair, or maintenance of its utility facilities within a public road right-of-way).

As properly found by the Board, "because MidAmerican's construction, operation, and maintenance of the proposed transmission line has yet to occur, application of § 306.46 is prospective." (CR p. 931). The undersigned respectfully posits that the *NDA Farms* holding on this point should not be followed given the Iowa Supreme Court's pronouncements in *Hrbek*, and requests this Court affirm the IUB's conclusion.

b. Whether § 306.46 is unconstitutional.

Finally, Ms. Juckette contends that even if § 306.46 is being applied prospectively, the statute is unconstitutional as applied to her. (Juckette's Opening Brief pp. 23-27).

On this point, it is important to appreciate several principles that guided the IUB's review of § 306.46. The IUB noted that it is duty-bound to follow legislative enactments and recognized its limited role in examining the constitutionality of a lawfully adopted statute. *See Shell Oil Co. v. Bair*, 417 N.W.2d 425, 429 (Iowa 1987) (quoting administrative law treatise for proposition that "[o]nly the courts have authority to take action which runs counter to the expressed will of the legislative body"). (CR p. 929). While appreciating that as the trier of fact, it is obligated to make factual findings relevant to constitutional issues, the IUB recognized that executive branch agencies possess no inherent or constitutional powers and only possess such authority as delegated by the legislature. (CR p. 1045-46). For the IUB to do anything except apply § 306.46 as written would seem to run contrary to the very underpinnings of the separation of powers and well-established judicial holdings. *See ABC Disposal Sys., Inc. v. Department of*

Nat'l Res., 681 N.W.2d 596, 604-05 (Iowa 2004) (stating that "[u]nder the doctrine of separation of powers, the judiciary is required to determine the constitutionality of legislation" and the Court "will not give any deference to the view of the agency with respect to the constitutionality of a statute or administrative rule, because it is *exclusively up to the judiciary to determine the constitutionality of legislation*") (emphasis added).

Further, it is important to appreciate that the statute in question is one over which the IUB possesses little, if any, authority to interpret or apply. (CR p. 929, n. 10). While the Board does possess special expertise in matters of public utilities, *see e.g., SZ Enterprises, LLC v. Iowa Utilities Board*, 850 N.W.2d 441, 471-72 (Iowa 2014) (Mansfield and Waterman, J.J., dissenting), no Iowa authority has recognized the IUB possessing any special expertise in property law, including road rights-of-way. The statute in question is placed in a chapter of the Iowa Code dealing with highways, and the Iowa Department of Transportation appears to be the executive branch entity with authority in chapter 306. *See* Iowa Code § 306.2(3) (defining "department" to mean the Iowa Department of Transportation). Under such circumstances, the IUB stated that its role is to apply § 306.46 as written and to "leave the final interpretation and construction of § 306.46 – a statute over which the [IUB] has no special interpretative authority – to the courts." (CR p. 929, n. 10).

With these caveats, in its final order and order denying rehearing, the IUB did find that § 306.46 is not violative of the Taking Clause of the Iowa Constitution. The IUB's analysis began with *Keokuk Junction Ry Co. v. IES Industries, Inc.*, 618 N.W.2d 352 (Iowa 2000). (CR p. 925). In *Keokuk Junction*, the city of Keokuk granted permission to

a public utility to install electric power lines within the city's road right-of-way on the landowner's property and the city agreed. *Id.* at 354. The landowner claimed the electric power lines constituted an additional servitude on the land for which the landowner was entitled to compensation. *Id.* The district court concluded that the "use of the electric transmission line constitutes an incidental use or incidental easement rather than a burden which is in addition to the street right-of-way." *Id.*

On appeal, the Iowa Supreme Court noted that states were not uniform on the issue and observed that Alaska, for example, takes the position that property owners cannot seek contribution for the installation of electric utility structures under a road easement. *Id.* at 356. The Court described the legal underpinnings of this approach as follows:

> The reasoning underlying this position is that electric . . . lines supply communications and power which were in an earlier age provided through messenger and freight wagons traveling on public highways. So long as the lines are compatible with road traffic they are viewed simply as adaptations of traditional highway uses made because of changing technology: The easement acquired by the public in a highway includes every reasonable means for the transmission of intelligence, the conveyance of persons, and the transportation of commodities which the advance of civilization may render suitable for a highway.
>
> ....
>
> Hence it has become settled law that the easement is not limited to the particular methods of use in vogue when the easement was acquired, but includes new and improved methods, the utility and general convenience of which may afterwards be discovered and developed in aid of the general purpose for which highways are designed.

Id. at 356-57 (quoting *Nerbonne, N.V. v. Florida Power Corp.*, 692 So.2d 928, 929 (Fla Dist. Ct. App. 1997)). Ultimately, however, the Court rejected the Alaska approach, stating:

> [t]he Alaska case . . . can similarly be distinguished from the present case because in Alaska, a statute was enacted to allow utilities to use public right-of-ways without the permission of the servient landowner. No such provision exists in Iowa. The sole reason the Alaska Supreme Court validated the utility's installation of electric poles within the easement was the presence of state legislation authorizing this use. With the aid of such legislation in Iowa, we are clearly not prompted to make a similar decision.

Id. at 357. Shortly following the *Keokuk Junction* decision, the Iowa legislature passed § 306.46, adopting language similar to the Alaskan statute referenced by the Court.

The *Keokuk Junction* analysis suggests that if the Iowa legislature had adopted a statute authorizing the use of utility structures in public road right-of-ways similar to the Alaskan statute, then the Court's decision could be different[7]. Why reference the lack of an Iowa statute if the existence of the statute would have no bearing on its conclusion? Regardless, a full and fair reading of *Keokuk Junction* suggests that its central holding regarding the placement of utility structures in public road rights-of-way is called into

7. The IUB also stated the Iowa legislature intended to accomplish something in its enactment of § 306.46. (CR pp. 929-30). At the time of the statute's enactment, the legislature understood that the Iowa Supreme Court refused to join with the Alaska Supreme Court's recognition that a utility easement is not necessary for the construction of utility facilities in a road right-of-way. The legislature further understood that the Iowa Supreme Court stated that the "sole reason" the Alaska Supreme Court reached this conclusion was because of the presence of a state statute – a statute that did not exist in Iowa at that time. These details, coupled with the fact that the legislature drafted § 306.46 in a "remarkably similar" manner to the Alaska statute, leads to the conclusion that the legislature intended for Iowa's law be construed similarly to Alaska's.

question following the Iowa Legislature's adoption of § 306.46 and Ms. Juckette's continued reliance on *Keokuk Junction* may be misplaced.[8]

Finding the continued viability of *Keokuk Junction* to be in question, the IUB next examined whether § 306.46 is violative of the Takings Clause of the Iowa Constitution. (CR pp. 928-32, 1046-47). Article 1, section 18 of the Iowa Constitution provides that "[p]rivate property shall not be taken for public use without just compensation." The framework for a "takings" analysis is:

> (1) Is there a constitutionally protected private property interest at stake? (2) Has this private property interest been "taken" by the government for public use? and (3) If the protected property interest has been taken, has just compensation been paid to the owner?

Bormann v. Bd. of Sup'rs In & For Kossuth Cty., 584 N.W.2d 309, 315 (Iowa 1998). The critical question is whether a property interest has been taken. *Kingsway Cathedral v. Iowa Dep't of Trans.*, 711 N.W.2d 6, 9 (Iowa 2006).

The IUB concluded § 306.46 did not violate the Takings Clause of the Iowa Constitution because the placement of utility structures on a road right-of-way did not call for the acquisition of an additional servitude from the landowner. (CR pp. 930-31). In other words, the "utility use is 'an incidental and subordinate use'" of the road easement. (CR p. 930) (quoting *Fisher v. Golden Valley Electric Ass'n, Inc.*, 658 P.2d 127 (Alaska 1983)). As recognized by the Wyoming Supreme Court:

---

8. The NDA Farms court determined that the legislature did not intend to abrogate *Keokuk Junction* as evidenced by the continued citation to *Keokuk Junction* by appellate courts. *NDA Farms, LLC*, 2013 WL 11239755, at *10 (citing *Olsen v. Hennings*, No. 11-0659, 2012 WL 1245951 (Iowa Ct. App. April 11, 2012) and *113th Avenue Road Fund Association v. I & R Properties, Inc.*, No., 10-0394, 2011 WL 5387094 (Iowa Ct. App. Nov. 9, 2011)). However, neither decision cited by the NDA Farms case actually examined the placement of utility structures on public road rights-of-way and the continued viability of the *Keokuk Junction* holding following the legislature's adoption of § 306.46.

> The rights of the easement holder in another's land are determined by the purpose and character of the easement. The manner in which the easement is used does not become frozen at the time of grant. An easement for a road or a highway does not limit its use to the movement of vehicles. Uses related to traffic movement are within the scope of the easement. The grant of a public road easement embraces every reasonable method of travel over, under and along the right-of-way. Thus, the running of power and telephone lines above the ground and pipelines underneath do not increase the burden on the servient estate and are permissible uses.

State v. Homar, 798 P.2d 824, 826 (Wyo. 1990).

The IUB requests the Court affirm these IUB conclusions.

IV. CONCLUSION.

For the reasons set forth above, the IUB's conclusions that the proposed line is necessary to serve a public use, that the proposed line represents a reasonable relationship to an overall plan of transmitting electricity in the public interest, and that the proposed line is compliant with Iowa Code § 478.18(2) and other provisions of law is supported by substantial evidence and should be affirmed. Ms. Juckette's remaining contentions are without merit and do not serve as a basis to reverse the final agency action.

The IUB respectfully requests this Court deny the relief requested by Ms. Juckette, affirm the final agency decision, and assess costs of this action against Ms. Juckette.

Respectfully submitted,

/s/ Jon Tack
Jon Tack (AT0007738)
Iowa Utilities Board
1375 E. Court Avenue Des Moines, IA 50319
Telephone: (515) 725-7333
E-mail: jon.tack@iub.iowa.gov

/s/ Matthew Oetker
Matthew Oetker (AT0005843)
Iowa Utilities Board
1375 E. Court Avenue Des Moines, IA 50319
Telephone: (515) 725-7300
E-mail: matt.oetker@iub.iowa.gov
ATTORNEYS FOR RESPONDENT IOWA UTILITIES BOARD

ALL PARTIES SERVED ELECTRONICALLY THROUGH EFS