

IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

LINDA K. JUCKETTE,

Petitioner,

v.

IOWA UTILITIES BOARD,

Respondent.

Case No. CVCV061580

**IOWA UTILITY ASSOCIATION'S
AMICUS BRIEF**

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. The Statutory Framework and Canons of Construction Support the IUB's Decision.

Authorities

Iowa Code § 306.42(4)

Iowa Code §306.45

Iowa Code § 306.46

Iowa Code §318.9

Iowa Code §478.1

Iowa Code §478.4

Iowa Code §478.8

199 Iowa Administrative Code Chapter 11

Keokuk Junction Railway Co. v. IES Industries, Inc., 618 N.W.2d 352 (Iowa 2000)

II. The Determinative Event Under Iowa Code §306.46 Is the Date the Utility Facilities Are Located in a Public Road Right-Of-Way.

Authorities

Iowa Code §4.6

Iowa Code §306.4

Iowa Code §306.46

Republic Nat'l Bank of Miami v. United States, 506 U.S. 80, 100, 113 S.Ct. 554, 565, (1992)

III. *The Easement Governing Juckette's Two Subdivided Lots Includes Overhead Electric and The Franchise Puts No Increased Burden on the Servient Estate.*

Authorities

Iowa Code §478.1

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

IV. *Iowa Code §306.46 Has Been Relied Upon by Iowa Utilities When Locating Public Utilities In Right-of Ways and a Determination That §306.46 Results in a Taking of Juckette's Property Will Cause an Extremely Negative Impact on Iowa Consumers.*

Authorities

Iowa Code §4.6

Iowa Code §306.46

Iowa Code §§476.4

Iowa Code §§476.6 (1), (6), (12)

Iowa Code §§476.53(3)(b)

199 I.A.C. 20.10(2)

City of Coralville v. Iowa Utilities Board, 750 N.W.2d 523 (Iowa 2008)

STATEMENT OF THE CASE

The Iowa Utility Association (“IUA”) is an association comprised of five members who are investor-owned providers of electric, natural gas and transmission services to Iowa customers. (5/10/21 IUA Mtn to Intervene ¶1). Members of IUA serve approximately 72% of the electric customers in Iowa. (5/10/21 IUA Mtn to Intervene ¶2).

This matter involves a petition for judicial review of a February 1, 2021 order by the Iowa Utilities Board (“IUB”) which granted an electric transmission line franchise in a public road right-of-way. (3/24/21 Pet. for Jud. Rev.)

The members of IUA regularly obtain approval for the placement of utility facilities within public road right-of-ways (“ROW”) . (5/10/21 IUA Mtn to Intervene ¶7). IUA members rely on the authority provided in Iowa Code §306.46 for the placement of facilities within public road ROWs and, accordingly, IUA and its members have an interest in the preservation of their right to maintain facilities within the public road ROW. (5/10/21 IUA Mtn to Intervene ¶8). The

IUA is solidly in support of the decision by the IUB in this case and its application of Iowa Code §306.46 in reaching its decision.

ARGUMENT

This court should give appropriate deference to the decision of the IUB because the agency is vested with statutory authority to address applications for public utilities in public road ROWs under Iowa Code Chapter 478 and Iowa Code §306.46. See Iowa Code §17A.19(11)(c) .

Because of such deference, a review of the statutory framework is needed, along with a discussion of the reliance placed by IUA members and other public utilities on Iowa Code §306.46 when locating public utilities in public road ROWs. The practical implications involved with Juckette's requested outcome should also be considered.

I. The Statutory Framework and Canons of Construction Support the IUB's Decision.

The procedures to obtain an electric transmission franchise are set forth in Iowa Code Chapter 478 and 199 Iowa Administrative Code Chapter 11. A review of these provisions supports the decision reached by the IUB.

Whenever a member of IUA seeks to have an electric franchise, it must file a petition seeking approval from the IUB. See Iowa Code §478.4. In particular, a 69 kilovolt franchise requires IUB approval. See Iowa Code §478.1.

Before granting such a franchise, the IUB must make a finding that the proposed line is necessary to serve a public use and represents a reasonable relationship to an overall plan of transmitting electricity in the public interest. See Iowa Code §478.4.

As to the location for such a franchise, Iowa law provides that a "public utility may construct . . .its utility facilities within a public road right of way." Iowa Code §306.46.

This Iowa Code section is implicated in this case because there is a public road adjacent to the right of way where the new franchise will be located.

Several canons of statutory construction are helpful in understanding the application and effect of Iowa Code §306.46. In determining the Legislative intent when enacting Iowa Code §306.46 and the change sought to then-existing Iowa law, this court should consider the object sought to be attained by the Legislature, the circumstances under which the statute was enacted, the legislative history, the consequences of a particular construction and administrative construction of the statute. See Iowa Code §4.6.

First, the circumstances under which Iowa Code §306.46 was enacted are revealing, especially of the object sought to be attained by the Legislature. Iowa Code §306.46 was adopted as a direct response to the decision in *Keokuk Junction Railway Co. v. IES Industries, Inc.*, 618 N.W.2d 352, 361 (Iowa 2000) which, to some extent, limited the ability of a public utility to obtain a franchise to locate facilities in a public road ROW. The Legislature unmistakably wanted future public utility facilities to be located in public road ROWs. The court in *Keokuk Junction* spent considerable time discussing a decision of the Alaska Supreme Court which was based on the language in an Alaskan statute that was not contained in the Iowa Code. Subsequently, the language used by the Legislature when enacting Iowa Code §306.46 was remarkably similar to the Alaskan statute. Such circumstances demonstrate that the Legislature enacted Iowa Code §306.46 to change the effect of the holding in *Keokuk Junction* and bring Iowa into accord with the position taken in Alaska regarding location of public utilities in public road ROWs.

In the context of the construction of public utility facilities, if a public road ROW is available, then those facilities can be constructed without the exercise of eminent domain or the additional time and expense of acquiring voluntary easements. In other words, it is reasonable to conclude that the Legislature understood there is a substantial public benefit to be attained

through both lower costs and more reliable utility service when public utility facilities are constructed in existing ROWs.

Related provisions of the Iowa Code support this determination that the Legislature preferred public utility facilities to be located in public road ROWs. That strong preference is expressed in Iowa Code §478.8 which provides “no financial consideration shall be charged for such franchise.”

Second, when determining the object sought to be attained by the Legislature, it is revealing that Iowa Code §306.46 is found in an Iowa Code Chapter that deals with public highways. This statute is not in the portion of the Iowa Code that addresses real estate and easements. See Iowa Code Chapter 564 (easements). This placement within the Code was no mistake by the Legislature.

Iowa Code Chapter 306 addresses transfers of ROWs which are subject to a right of a utility. See Iowa Code § 306.42(4). Another provision in Chapter 306 also addresses ROWs. See Iowa Code §306.45. Clearly, the primary thrust of Iowa Code § 306.46 is use of public road ROW, not easements.

To underscore the primary use of a public road ROW and governmental authority over such use, Iowa Code §318.9 indicates that, even after utility poles such as these are installed, the highway authority¹ can require the public utility to remove the poles.

In addition, Iowa Code § 306.46(1) specifically provides that “[a] utility facility shall not be constructed or installed in a manner *that causes interference with public use of the road.*” The phrasing of this part of the statute indicates that the legislature recognized that there would

¹ That authority is now known as the Iowa Department of Transportation.

already be roads present and that utility facilities should not be allowed to interfere with the public's use of the road (and not just the ROW).

Legislative history is a proper subject of inquiry by court when interpreting Legislative intent. See Iowa Code §4.6. Iowa Code §306.46 went into effect immediately upon passage on March 29, 2004² instead of on July 1, 2004, which is the default effective date for legislation. The immediate effective date is proof of the importance the Legislature placed on the ability of a public utility to immediately file an application for a franchise in a public road ROW.

Thus, viewed in the proper context, Iowa Code §306.46 centers on public use of roadways and the right of ways adjacent thereto and a public utility's ability to install its facilities within a public road right of way. The Legislature when enacting Iowa Code §306.46 in 2004 set forth Iowa public policy that public utility franchises should be located in public road ROWs.

In furtherance of that legislative policy, the IUB has determined that replacing the existing utility poles with new poles in this case does not impede or interfere with public traffic.

² The legislative history reveals that Senate File 2118 - Public Utilities - Public Road Rights-of-Way (full text of bill). The Committee on Commerce noted that "This Act provides that a public utility may construct, operate, repair, or maintain the utility's facilities within a public road right-of-way so long as the utility facility does not interfere with the public use of the road. The Act defines "public utility" as a public utility defined in Code Section 476.1, which includes companies that provide gas or electricity, communication services, and mutual or cooperative telephone companies, and also includes waterworks, municipally owned waterworks, joint water utilities, rural water districts, and cooperative water associations." Division XVI of S.F. 2298 (see Appropriations) amends new Code Section 306.46, as enacted by this Act, to provide that the new section shall not impair or interfere with a city's authority to grant, amend, extend, or renew a franchise, and shall not impair or interfere with a city's existing general police powers to control the use of its right-of-way. The Act took effect March 29, 2004.

II. *The Determinative Event Under Iowa Code §306.46 Is the Date the Utility Facilities Are Located in a Public Road Right-Of-Way .*

The IUB correctly found the determinative event under Iowa Code §306.46 is the date the facilities subject to the electric franchise are located in the public road ROW.

In reliance upon *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 judgment), the IUB found the determinative event was “the conduct that is made the subject of the statute, namely, the public utility’s construction of its utility facilities within a public right-of-way.”

Administrative construction of the statute is also proper when a court interprets Legislative intent. See Iowa Code §4.6

Because the focus of the statute is indisputably on highways, the triggering or “determinative event” should be the date the utility facilities are located in a public road ROW. It is a flawed view and contrary to statutory construction principles, to view the triggering event as the date of the grant of the easement. The absence of the easement being mentioned anywhere in Iowa Code Chapter 478 and Iowa Code §306.46 regarding utility franchise rights indicates the date of the easement should not be the determinative event when analyzing whether the statute is being applied prospectively or retroactively.

Further, use of the date of location of utility facilities in a public road ROW as the determinative event provides a bright line test and supports the IUB’s finding that this case involves a prospective application of Iowa Code §306.46. See Iowa Code §4.6 (court should consider the consequences of a particular construction of a statute).

This result makes sense. Under *Keokuk Junction* no such rights could exist absent an express grant and the Legislature enacted a statute with a policy preference that public road ROWs should be used for all public utility franchises thereafter. To accord the Legislature’s

enactment the proper deference it is due, the trigger for rights provided to a public utility pursuant to Iowa Code §306.46 had to be prospective based on the location of the utility facilities in a public road ROW and the filing of an application for a franchise under Chapter 478. Notably for purposes of a trigger date, Iowa Code §306.46 and Chapter 478 are utterly silent on the date an easement was granted.

III. *The Easement Governing Juckette's Two Subdivided Lots Includes Overhead Electric and the Franchise Puts No Increased Burden on Servient Estate.*

Even if the date of the easement is deemed the triggering event, the easement granted before the plat was filed in 1979 included “overhead electric.” (Ex. Supp. Ex. J5 p. 16). At the time of the plat was recorded, 69 Kilovolt electric lines existed under Iowa Code §478.1. Consequently, such an easement would be contemplated as part of the “overhead electric” language on the plat adjacent to Lots 9 and 20 that are now owned by Juckette. (Supp. Ex. J5).

The public road ROW at issue has had distribution poles since at least 1979. This utility project has been approved to use poles 24' wide as opposed to 9' and would add height between 24-40 feet. (Tr. 155). There would not be any increase in the number of poles on Juckette's land. Thus, the IUB's order simply permits larger poles that would sit in almost the exact same spots along the fence line. (Rep. Ex. A).

In fact, MidAmerican also removed around half a mile of transmission line that is currently on the south edge of her property, reducing Juckette's total exposure to high-voltage lines by roughly a quarter mile. (Tr. 196).

This court should recognize that the manner in which the easement is used does not become frozen at the time of grant. *State v. Homar*, 798 P.2d 824, 826 (Wyo. 1990). As IUB found, this use of the public road ROW does not increase the burden on the servient estate. *Id.*

(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).

IV. Iowa Code §306.46 Has Been Relied Upon by Iowa Utilities When Locating Public Utilities In Right-of-Ways and a Determination That §306.46 Results in A Taking of Juckette's Property Will Cause an Extremely Negative Impact on Iowa Consumers.

IUA members and other Iowa utilities have relied upon Iowa Code §306.46 to install utilities within public ROW. Iowa Code §306.46 applies to natural gas and water lines as well.

As a practical matter, the members of the IUA along with other utilities mentioned, have relied upon Iowa Code §306.46 to apply *prospectively* when public utilities have been located in all right of ways. This expectation was based on the triggering event occurring when utility franchises are located in a public road ROW after the IUB approved an application for a franchise.

The consequences of a particular statute's construction are a proper area of inquiry by a court. See Iowa Code §4.6. Such franchises involve infrastructure that has resulted in multiple millions of dollars of improvements in public road ROWs throughout Iowa. Viewing the determinative event as the date of the easement could render Iowa Code § 306.46 as retroactive in this case. Such a construction could render every utility franchise granted since March 29, 2004 (effective date of Iowa Code §306.46) at risk for not being compliant with an easement granted before March 29, 2004. This would potentially require all public utilities, including those that installed underground facilities, to have to obtain additional easement rights after the fact of installation of the facilities.

Under such a set of circumstances, utilities and owners would need to find a specific grant of authority within the applicable easement. Further, to the extent eminent domain was necessary, proceedings would need to be instituted with the IUB and compensation may need to

be paid for those franchises already granted. Unlike other private businesses, such eminent domain costs incurred by the members of IUA and other utilities would ultimately be passed on to Iowa utility customers. See *City of Coralville v. Iowa Utilities Board*, 750 N.W.2d 523, 529-530 (Iowa 2008) (public utility, pursuant to IUB approved tariff, was authorized to recover costs incurred for relocation of electric lines in a public road ROW from consumers); see also Iowa Code §§476.4, §476.6 (1), (6), (12), §476.53(3)(b), 199 I.A.C. 20.10(2). Clearly such a result would cause undue disruption and turmoil within the State, and clearly that is something the legislature would seek to avoid if possible.

Significant legal and policy implications are involved in the outcome of this case:

- Does a ruling against the IUB mean removal of all public utilities installed in public road ROWs across the State of Iowa which were installed *before* March 29, 2004 where some uncertainty exists as to the scope of the easement?
- If such a ruling does not mandate removal of existing utilities throughout Iowa, must new eminent domain proceedings be instituted in the IUB?
- If such eminent domain proceedings are mandated, what burden does that place on customers of Iowa utilities to pay for the resulting costs?

The wiser course, both legally and practically, is to find that the IUB correctly granted the application of a public utility to be located in the public road ROW at issue.

CONCLUSION

For these reasons, the Iowa Utility Association requests that the Court uphold the decision by the Iowa Utilities Board and find that the Iowa Code §306.46 allows the public utility to construct the facility in the public road right-of-way.

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PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on August 13, 2021 by:

- FAX
 Hand Delivered
 Federal Express
 Email
 Other: ECF Filing

Signature: /s/ Stanley J. Thompson