IN THE IOWA DISTRICT COURT FOR POLK COUNTY

LINDA K. JUCKETTE, **Petitioner,** **v.** **IOWA UTILITIES BOARD,** **Respondent.**	**CASE NO. CVCV061580** **BRIEF OF AMICUS CURIAE ITC MIDWEST LLC**

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INTRODUCTION

In this case, the Iowa Utilities Board ("Board"), after the extensive processes required by Iowa Code chapter 478 and under the lengthy list of required showings and criteria in that chapter and 199 Iowa Administrative Code chapter 11, approved a franchise for a new electric transmission line proposed by MidAmerican Energy Company ("MEC"). Linda Juckette, a landowner on the approved route unhappy with the prospect of the electric line running adjacent to the road in front of her house, brought this suit to challenge the line -- as occasionally happens with infrastructure construction.

However, what Ms. Juckette asks of this Court ignores or misunderstand the realities of the electrical system and the legal and regulatory framework around it, instead of focusing on the broader public good that the electric system and the Board as a regulator must serve. As a result, the outcome Juckette seeks would significantly hinder critical infrastructure development.

ITC Midwest LLC ("ITC Midwest"), headquartered in Cedar Rapids, Iowa, is an independent, stand-alone transmission company engaged exclusively in the development, ownership and operation of facilities for the transmission of electric energy in interstate commerce. ITC Midwest provides transmission service in Iowa, Minnesota, Illinois and Missouri where it owns and operates approximately 6,700 circuit miles of transmission lines with the overwhelming majority of those lines in Iowa. ITC Midwest is a subsidiary of ITC Holdings Corp., which invests exclusively in the electric power transmission grid to improve electric reliability, facilitate access to renewable and other generation, improve access to power markets, and reduce the overall cost of delivered electric power.

As an amicus, it is not ITC Midwest's place to dig deeply into the specific facts of this case, which are not ITC Midwest's facts. Rather, ITC Midwest's interest is that the law and the policy that impacts the electric system -- transmission owners and operators beyond this one case

-- remains true to the intent of the Iowa Legislature, the Iowa Utilities Board, and the Federal Energy Regulatory Commission and continues to allow both transmission and distribution utilities to provide safe, reliable electric service to all customers. ITC Midwest's interest is in two particular issues where Juckette's challenges to the Board are both without merit but are also problematic for similar cases that may involve ITC Midwest, challenges that are contrary to both law and good policy.

First, Juckette urges this Court to apply an improper and unsupported version of the "public use" element of the multi-part test for a transmission franchise, which would not only make it harder to build adequate transmission facilities in a timely way but also disadvantage many families and businesses who Juckette would subjectively exclude from qualifying as "the public." Second, Juckette seeks to overturn the Board's correct application of the plain language of Iowa Code § 306.46, a statute passed with the intent of both facilitating infrastructure, but also with the salutary intent to site different types of infrastructure together in existing corridors to minimize overall impacts on land use. As ITC Midwest explains below, the Court should reject Juckette's arguments on these issues as wrong on the law, but also because they would be bad for Iowa's electric customers – that is, ultimately, bad for virtually every Iowan.

ARGUMENT

I. THE COURT SHOULD AFFIRM THE BOARD'S GRANT OF THE FRANCHISE AND REJECT AN IMPROPERLY NARROW VIEW OF "PUBLIC USE."

Before arguing about specific issues with routing and siting, Juckette argues broadly that the Board should not have issued a transmission franchise in the first instance because, allegedly, MEC's proposed line is not "necessary for a public use." To get there, however, Juckette relies on the convoluted argument that because sometimes the term "public use" is part of a constitutional test for use of eminent domain, it must be used the same way when it appears as an element of the

test for a franchise. Not surprisingly, there are no cases directly supporting this novel theory that requires a court to ignore the context in which terms are used. To the contrary, Juckette's argument cannot overcome Iowa Supreme Court precedent interpreting the term "public use" as an element of a transmission franchise. The analysis the Supreme Court used in *S.E. Iowa Cooperative*[1] is entirely different from what Juckette asks this Court to use. The Court should, of course, follow the binding Supreme Court precedent instead. Indeed, *S.E. Iowa Co-op* addressed – and rejected – numerous arguments raised by Juckette.

A. The Court Should Reject Juckette's Unfounded Arguments that an Electric Transmission Line May Not be a Public Use, as the Iowa Supreme Court Has Conclusively Determined that Electric Lines are Public Uses Under Any Standard.

As an initial matter, Juckette argues that the Court should not give deference to the Board's interpretation of the "public use" element. While ITC Midwest believes this is incorrect – in *Puntenney*[2] the Iowa Supreme Court deferred to the Board's interpretation of the functionally similar term "public convenience and necessity" in a similar context of approving linear underground pipeline energy infrastructure – ultimately this case should not turn on deference.

Whether the Court defers to the Board or reviews the Board's legal determinations for error, the Board was correct in finding the proposed line is "necessary for a public use" as that term is used in Iowa Code § 478.4. In *S.E. Iowa Co-op*, the Supreme Court analogized the "necessary for public use" test to cases requiring a finding of "public convenience and necessity," which is not a constitutional standard. *Id.* at 819. The Court similarly analogized to other states that described the test in terms of "public need." *S.E. Iowa Co-op.*, 633 N.W.2d at 820 (citing *Niagara Mohawk Power Corp. v. Pub. Serv. Comm'n*, 637 N.Y.S.2d 981, 991 (N.Y. App. Div.

[1] *S.E. Iowa Co-op. Elec. Ass'n v. Iowa Utils. Bd.*, 633 N.W.2d 814 (Iowa 2001).

[2] *Puntenney v. Iowa Utils. Bd.*, 928 N.W.2d 829, 841 (Iowa 2019).

1996)). In its discussion, the Supreme Court discussed a variety of considerations, including adequacy and reliability of electrical service, as well as cost, as factors the Board could consider in finding public use for purposes of a franchise. Critically, however, the Court repeatedly reiterated that it is the Board's decision to make.

Most important to the public use issue, however, is that the Iowa Supreme Court bluntly stated: "We have already found the transmission of electricity to the public constitutes a public use as contemplated by section 478.4." *Id*. at 820. This would appear to be fully dispositive of the "public use" challenge raised by Juckette. Juckette appears, however, to argue that service to the substation that provides retail service to Microsoft is somehow not service to "the public." As ITC Midwest discusses in more detail below, this is simply incorrect. It is an obligation of the companies providing the distribution and transmission functions of the electric system to provide adequate service to all customers, not just some. The rule Juckette proposes here would make growth in low-population areas of Iowa difficult because, under such a narrow approach to public use, if only one or two homes or businesses would be on a service line, it wouldn't be a "public use" to get transmission close enough for a distribution utility to serve them.

B. Even if the Court Applied the Meaning of Public Use from Constitutional Takings Law, Electric Transmission Lines Like that Proposed by MEC are Still a Public Use.

A constitutional takings test is not, contrary to Juckette's argument, appropriate to apply to the public use test in § 478.4. Moreover, it is not at all clear that there even is a truly separate public use test for eminent domain where electric transmission is involved: the Iowa Supreme Court has said "it is not open to doubt" that "the transmission of electric current for distribution to the public is a public use for which the power of eminent domain may be exercised". *Vittetoe v. Iowa Southern Utilities Co.*, 123 N.W.2d 878, 880 (Iowa 1963); *see also Carroll v. City of Cedar Falls*, 261 N.W.652, 656-67 (Iowa 1935). Nonetheless, MEC's proposed line and other similarly

situated lines would also meet any constitutional public use test. While Juckette argues that legislation can't establish its own constitutionality, courts have made very clear that the legislature in fact has great latitude to determine the scope of a public use. "[I]t is initially for the legislature to determine whether private property is being taken for a public use. Courts should not substitute their judgment as to what constitutes a public use unless the use is palpably without reasonable foundation." *CMC Real Estate*, 475 N.W.2d at 169 (citations omitted); *Bankhead v. Brown*, 25 Iowa 540, 545 – 47 (Iowa 1868) ("When the public exigencies demand the exercise of the power of taking private property for the public use, is solely a question for the legislature, upon whose determination the courts cannot sit in judgment.…" (citations omitted)); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 239 (1984); *see also Milligan v. City of Red Oak*, 230 F.3d 355, 359 (8th Cir. 2000). These legislative determinations are entitled to a strong presumption of validity. *See Milligan*, 230 F.3d at 359 ("Legislation calling for condemnation enjoys the same presumption in its favor as when the constitutionality of [any other] statute is challenged").

In the present case, the legislature has spoken explicitly, determining that electric transmission lines are entitled to eminent domain authority. Under Iowa Code chapter 478, where the Board has found it proper to grant a franchise under that chapter, the legislature mandated that the applicant "shall thereupon be vested with the right of eminent domain to such extent as the utilities board may approve, prescribe and find to be necessary for public use." Iowa Code § 478.15 (emphasis added). That is, if the Board finds eminent domain necessary, the legislature has deemed that a public use – which is within its prerogative. While this is the most specific and relevant statute to the facts in this case, the legislature has made similar provision in Iowa Code § 6A.22, the general eminent domain statute, where "public use" is defined as including "[t]he acquisition of any interest in property necessary to the function of a public or private utility,

common carrier, or airport.…" Iowa Code § 6A.22(2). Transmission lines are both property necessary to the function of utilities and they are also common carriers – a point that no one has disputed in this case.

The legislative determination of the scope of the eminent domain power is binding and not to be overturned by a court unless the legislature's judgment is "palpably without reasonable foundation." *See CMC Real Estate*, 475 N.W.2d at 169. Juckette cannot come close to clearing that high bar: the legislative decision (and its application in this case) was not only reasonable, but consistent with the mainstream of cases both in Iowa and across the country. As early as 1943, this Court upheld language similar to §478.15 (but in the context of a pipeline) against many of the same challenges brought here. *See Browneller*, 8 N.W.2d at 479 ("The power of eminent domain granted to pipe line companies by chapter 383.3 [a predecessor to chapter 479B] is broad and general in its terms. It is not for this court to say that the legislature did not have the power to provide for the right of condemnation as provided for in said chapter.").

Juckette makes three arguments in an attempt to show MEC's proposed line would not meet a constitutional definition of "public use." None of them show the legislature in adopting 478.15 was "palpably without reasonable foundation," and in fact none of them hold up to scrutiny. The first argument is that Iowa courts have not followed the majority decision in the landmark U.S. Supreme Court takings case, *Kelo v. City of New London*, 545 U.S. 469 (2005), which took a very broad view of "public use." While that is true, it doesn't undermine the Board's decision: the Iowa Supreme Court has instead followed Justice O'Conner's dissent in *Kelo*, which allows for three categories of takings to be public uses, one of which includes:

> Transfer [of] private property to private parties, often common carriers, who *make the property available for the public's use – such as with a railroad, a public utility, or a stadium.*

Id. at 497-98. Again, transmission lines are by law common carriers, and generally are various types of utilities, and therefore would be permitted to use eminent domain even under Justice O'Connor's narrower interpretation of "public use." Further, as cited above, the Iowa Supreme Court has said "it is not open to doubt" that "the transmission of electric current for distribution to the public is a public use for which the power of eminent domain may be exercised". *Vittetoe, supra,* 123 N.W.2d 878, 880 (Iowa 1963).

The second argument is that this case is different because Microsoft is the only entity for whom the transmission line is being built. The problems with this argument are numerous. First, Microsoft is part of the public, they have as much right to receive adequate, reliable electrical service as anyone else – every individual customer does. Second, even if Microsoft is the only customer *today* who would be served by the substation the transmission line would feed, other customers now or in the future can be served from that substation. Juckette attempts to argue that such future customers are speculative but misses the fact that it simply doesn't matter. It is the *ability* of the line to serve multiple customers that makes it a common carrier (and therefore a public use), not the likelihood other customers will actually use the line. See, e.g., *Wright v. Midwest Old Settlers and Threshers Ass'n*, 556 N.W.2d 808, 810–11 (Iowa 1996) (noting that "a common carrier need not serve all the public all the time."); *Circle Exp. Co. v. Iowa State Com. Commn.*, 86 N.W.2d 888, 893 (Iowa 1957) ("the distinctive characteristic of a common carrier is that he *holds himself out as ready* to engage in the transportation of goods for hire, as a public employment, and not as a casual occupation, and that he undertakes to carry for all persons indifferently, within limits of his capacity and the sphere of the business required of him.") (citations omitted, emphasis added). Further, in the context of determining whether an activity is a "public use" for purposes of constitutional analysis, the U.S. Supreme Court has explained,

> The Court long ago rejected any literal requirement that condemned property be put into use for the general public. "It is not essential that the entire community, nor even any considerable portion, ... directly enjoy or participate in any improvement in order [for it] to constitute a public use." *Rindge Co. v. Los Angeles*, 262 U.S. at 707, 43 S. Ct. at 692.

Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984).

Courts around the country have long held that providing open access to the relevant users satisfies the constitutional public use test. *See, e.g., Mid-Am. Pipe Line Co. v. Missouri Pac. R. Co.*, 298 F. Supp. 1112, 1123 (D. Kan. 1969) (holding that anhydrous ammonia pipeline satisfied public use test because, "[w]hile Mid-America will begin operation of the anhydrous ammonia line with one [customer], it is committed to Hill for only 2/5 of the practical economic volume of the pipeline. . . . Like the early stages of Mid-America's petroleum products pipeline, the anhydrous ammonia line has room to grow in the number of [customers] serviced."); *Linder v. Arkansas Midstream Gas Services Corp.*, 362 S.W.3d 889, 897 (Ark. 2010) (rejecting landowners' argument that a natural gas pipeline was not a public use because "the taking is for the exclusive use of a collection of individuals less than the public," and concluding, "it makes no difference that only 'a collection of a few individuals' may have occasion to use the pipeline after its completion. Again, the character of a taking, whether public or private, is determined by the extent of the right to use it, and not by the extent to which that right is exercised. If all the people have the right to use it, it is a public way, although the number who have occasion to exercise the right is very small.") (citations omitted).

Here, not only is it possible for other end user electric customers to be served off of the substation the MEC line would feed, multiple generators can also move their electricity on the proposed MEC line and similarly situated lines because the transmission system is based on open access principles. The principles of open access were initially promulgated by FERC in its Orders

888 and 889.[3] The goals of these Orders were described succinctly by the Court of Appeals for the District of Columbia Circuit in upholding them.[4] Specifically, the Orders required utilities to:

> provide access to their transmission lines to anyone purchasing or selling electricity in the interstate market on the same terms and conditions as they use their own lines. By requiring utilities to transmit competitors' electricity, open access transmission is expected to increase competition from alternative power suppliers, giving consumers the benefit of a competitive market.[5]

Over the years, the principles of open access have become foundational to the development and operation of the grid. Simply stated, generation resources must be able to connect to the transmission system. In conjunction with that statutory framework, the Commission also holds jurisdiction over and regulates the terms of interstate transmission service, such as requiring open access to transmission service through Order No. 888 in Open Access Transmission Tariffs. This federal overlay calls for particular caution from state agencies and courts. It does show, however, that under this regime, not only do transmission providers "hold themselves out as ready" to transport electricity, federal law *requires* that as a duty that attaches to most transmission lines.

Juckette's third argument appears to rely on *Puntenney*, but that case not only fails to support Juckette's position, it very strongly supports the Board's order and MEC's position. As

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[3] *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 FR 21540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996) ("Order 888"), order on reh'g, Order No. 888-A, 62 FR 12274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998); *Open Access Same–Time Information System and Standards of Conduct*, Order No. 889, FERC Stats. & Regs. ¶ 31,035, 61 Fed.Reg. 21,737 (1996) ("Order 889"), on reh'g, Order No. 889–A, FERC Stats. & Regs. ¶ 31,049, 62 Fed.Reg. 12,484 (1997), on reh'g, Order No. 889–B, 81 FERC ¶ 61,253 (1997).

[4] *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 at 681 (D.C. Cir. 2000), aff'd sub nom. *New York v. FERC*, 535 U.S. 1 (2002) 75 F.E.R.C. ¶ 61,080 (Apr. 14, 1996).

[5] *Id.*

was discussed above, the *Puntenney* Court deferred to the Board on the test for a permit. But *Puntenney* also cuts against the proposed narrower definition of a public use. The fighting issue with regard to public use in *Puntenney* was the Appellants' argument that a pipeline with no on-ramps or off-ramps in Iowa, that was just passing under the state, did not provide any service to any producer or consumer in Iowa and therefore was not a public use. Here, there is both electricity being put on the line in Iowa, and electricity being taken off the line in Iowa. The objectors to the pipeline in *Puntenney* would have conceded the proposed MEC line is a public use. The *Puntenney* court clearly concluded that "the use of eminent domain for a traditional public use such as an oil pipeline does not violate the Iowa Constitution"[6] – and the use of eminent domain for electric lines is just as "traditional" as that use for an oil pipeline and serves a functionally similar role in the universe of energy infrastructure. With regard to being a common carrier, the *Puntenney* court agreed that "[t]he key is whether spot shippers have access," which due to the open access regime, is true of most electric transmission lines as well. Whether on procedure or substance, and whether discussing the permit or the public use standard for eminent domain, *Puntenney* supports the positions of the Board and MEC. As none of the arguments regarding the public use standard for granting franchises holds up, the Court should affirm the Board's grant of a franchise for the proposed MEC line.

[6] *Puntenney*, 928 N.W.2d at 833.

II. IOWA CODE SECTION 306.46 AUTHORIZES THE PLACEMENT OF UTILITY INFRASTRUCTURE WITHIN ROAD RIGHT-OF-WAY WITHOUT THE USE OF EMINENT DOMAIN.

A. The Polestar of Statutory Interpretation – Legislative Intent – Dictates that Code Section 306.46 Applies to Road Easements Entered-Into Both Before and After its Enactment.

Iowa Code § 306.46 provides, in relevant part, "A public utility may construct, operate, repair, or maintain its utility facilities within a public road right-of-way." Relying on a single rule of statutory construction, Juckette argues that because the statute does not expressly state that it applies retroactively, it must apply prospectively only. This argument confuses the issue, ignores other rules of statutory construction, and asks the Court to focus on one tool of statutory construction at the expense of the ultimate goal of statutory interpretation – discerning and giving effect to legislative intent. *See, e.g., Carlon Co. v. Bd. of Rev. of City of Clinton*, 572 N.W.2d 146, 154 (Iowa 1997) ("The polestar of statutory construction is, of course, legislative intent.") (citations omitted); *Klinge v. Bentien*, 725 N.W.2d 13, 18 (Iowa 2006) ("The polestar of statutory interpretation is to give effect to the legislative intent of a statute.").

As a threshold matter, the framing of the argument as one of retroactivity is a misnomer. The statute does not authorize a retroactive act – location of new utility infrastructure cannot be performed "retroactively." Rather, Section 306.46 merely authorizes an act to take place on property that presently existed at the time of its enactment. Public road right-of-way existed at the time of the statute's enactment, something the legislature was well-aware of at the time of its enactment. The plain and unambiguous reading of the statute indicates the legislature authorized utilities to locate within public road right-of way, including the public road right-of-way that existed at the time of the statute's enactment. Juckette's suggestion incorrectly frames the issue as one of retroactive applicability, where the legislature is simply authorizing an act to take place

on presently existing property. No rule of statutory construction suggests that a statute must expressly state that a law applies to property that is in existence at the time of its enactment.

Even if the rule of statutory construction cited by Juckette were applicable, it is merely one potential tool a court may use in interpreting the statute. The Iowa Supreme Court has recognized that it will not adhere to a single, particular rule of construction where such adherence would run counter to the polestar of statutory interpretation – legislative intent. *See Dindinger v. Allsteel, Inc.*, 860 N.W.2d 557, 562–63 (Iowa 2015) ("Legislative intent determines if a court will apply a statute retrospectively or prospectively."); *Anderson Fin. Services, LLC v. Miller*, 769 N.W.2d 575, 581 (Iowa 2009) (noting that a statute would apply prospectively "unless a legislative intent that the statute have retrospective application appears 'by necessary and unavoidable implication.'") (quoting *Baldwin v. City of Waterloo*, 372 N.W.2d 486, 491 (Iowa 1985)).

When discerning legislative intent, the court examines "both the language used and the purpose for which the legislation was enacted." *Klinge*, 725 N.W.2d at 17. Where applicable, examining the purpose of the legislation includes considering the timing of the enactment and recent court decisions addressing the issue at which the legislation is aimed. See id. at 17 – 18. Here, the timing of the enactment of Section 306.46, when considered in light of the Iowa Supreme Court's decision in *Keokuk Junction Ry. Co. v. IES Industries, Inc.*, 618 N.W.2d 352 (Iowa 2000), reveals the legislature's intent to abrogate the holding in *Keokuk Junction*.

In *Keokuk Junction*, the city of Keokuk permitted an electric transmission line to be constructed within its road easement. *Id.* at 354. A landowner, Keokuk Junction Railway Company ("KJRC"), brought suit arguing that the transmission line owner had no right to install the transmission line within the roadway easement without its approval. *Id*. The Iowa Supreme Court ultimately sided with KJRC, determining that the language of the underlying road easement

did not permit the erection of a transmission line without permission from KJRC. Importantly, however, the Court in *Keokuk Junction* distinguished an Alaska case on the basis that Alaska had in place a statute which permitted public utilities to locate infrastructure within the road right-of-way. The Court explained:

> The Alaska case relied on in *Nerbonne* 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. *See Fisher*, 658 P.2d at 130 (applying Alaska Stat. § 19.25.010 (Michie 1980)). *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. Id. at 130–31. Without the aid of such legislation in Iowa, we are clearly not prompted to make a similar decision*.

Id. at 357 (emphasis added).

Following *Keokuk Junction*, the legislature enacted Section 306.46, permitting public utilities to locate infrastructure within public road easements – a statute just like, and in fact nearly identical to, the Alaska statute referenced in *Keokuk Junction*.[7] The necessary implication, of course, is that the legislature intended to abrogate the *Keokuk Junction* holding by enacting a statute which the Iowa Supreme Court expressly noted was missing at the time *Keokuk Junction* was decided.

That the legislature intended for Section 306.46 to permit the placement of utility infrastructure within road right-of-way, regardless of when an underlying road easement was obtained, is made clear by practical reality and the language of the statute itself. As a practical matter, the vast majority of roadway within the State of Iowa was installed long before the

[7] Iowa Code § 306.46 states, in relevant part, "A public utility may construct, operate, repair, or maintain its utility facilities within a public road right-of-way." The Alaska statute discussed in *Keokuk Junction* stated, "A utility facility may be constructed, placed, or maintained across, along, over, under, or within a state right-of-way…). Alaska Stat. § 19.25.010

enactment of Section 306.46, which the legislature was aware of at the time of the statute's enactment. If the statute is to have a useful impact at all, it must be interpreted to allow locating utility infrastructure in that existing roadway. Further, if the statute only applied prospectively, it wouldn't solve the problem posed by *Keokuk Junction*, which the legislature sought to resolve. After the holding in *Keokuk Junction* (had it not been altered by Section 306.46) parties were on notice that they would have to contract for the right to place utility facilities within a road easement. Thus, the enactment of the statute would not be helpful if it applied only to easements entered into prospectively – which the parties could already control. *See Klinge*, 725 NW.2d at 18 ("We consider the objects sought to accomplished…seeking a result that will advance, rather than defeat, the statute's purpose.")

Moreover, the language of the statute itself implies retroactive applicability. The first two sentences of Section 306.46 provide:

> 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.

Iowa Code § 306.46 (emphasis added).

The legislature's use of "new utility facilities" in the second sentence of Section 306.46 implies that the first sentence, which does not distinguish between "new" and "old" facilities, is meant to refer to both "new" facilities constructed after its enactment as well as "old" facilities that existed prior to its enactment. *See Carlon Co.*, 572 N.W.2d at 154 (noting that rule of "statutory construction requires us to consider all parts of the enactment."); *Matter of Est. of Franken*, 944 N.W.2d 853, 859 (Iowa 2020) ("In determining the ordinary and fair meaning of the statutory language at issue, we take into consideration the language's relationship to other provisions of the same statute and other provisions of related statutes.").

In sum, the "polestar" of statutory interpretation is legislative intent – discerned from "both the language used and the purpose for which the legislation was enacted." *Klinge*, 725 N.W.2d at 17. In this case, both the statute's purpose and the language used support a reading of the statute that permits location of utility infrastructure within public road right-of-way, including public road right-of-way that existed at the time of the statute's enactment. The argument to the contrary relies on a single, particular rule of statutory construction, which is of questionable applicability from the outset, and ignores the timing of the statute's enactment, its following on the heels of the *Keokuk Junction* decision, practical realities, and the statute's own language when considered in light of its additional provisions. The Court should determine that Section 306.46 permits location of utility infrastructure within public road right-of-way, including public road right-of-way that existed at the time of the statute's enactment.

B. The Court Should Apply the Incidental Use Doctrine to Find that Utility Infrastructure May Be Located in Public Road Right-of-Way without Further Compensation to Adjacent Landowners.

Prior to the enactment of Section 306.46, the *Keokuk Junction* Court decided the issue based upon the particular language of the easement before it, suggesting that the Court would be required to consider each case presenting the issue based on the specific language of the easement involved. *See Keokuk*, 618 N.W.2d at 354 (discussing easement language authorizing "permanent right of way easement for construction purposes and highway purposes…"). The enactment of Section 306.46 changed that, creating a uniform approach whereby utility infrastructure may be located in public road right-of-way without regard to the timing, specific language, or manner of acquisition of the roadway easement. In line with that uniform approach, this Court should apply the incidental use doctrine to the constitutional issue presented.

The Iowa Supreme Court has adopted the incidental use doctrine with respect to the closely analogous issue of railroad right-of-way. *See McSweyn v. Inter-Urban Ry. Co.*, 130 N.W.2d 445,

448-49 (Iowa 1964). In a thorough law review article by Professor Dayana C. Wright and attorney Jeffrey M. Hester[8] (which has been cited with approval by the Iowa Court of Appeals)[9] it is explained that under the "incidental use doctrine" a railroad:

> may use its easement to conduct not only railroad-related activities, but also any other incidental activities that are not inconsistent and do not interfere with the operation of the railroad.

Wright & Hester at 421.

As the Iowa Supreme Court noted in *McSweyn*, addressing a restrictive covenant in the deed creating the ROW, the railroad

> . . . may make any use of its land which is incidental to railroad purposes or, as frequently expressed, is not a misuse of it. And whatever the railroad may do itself it may license another to do.

McSweyn, 130 N.W.2d at 448 – 49.

Wright & Hester summarize the policy justifications for the incidental use doctrine as follows:

> (1) the use is nominal compared to the already burdensome railroad use; (2) the easement gives the railroad exclusive use rights to the land, so no one else could authorize the third party uses; and (3) the use is a railroad use insofar as it relates in some way to the railroad's business. Because railroad easements are so large and burdensome, and incidental uses are usually so minimal compared to the primary rail use [any] damages would be nominal.

Wright & Hester at 423.

The same justifications exist for application of the incidental use doctrine to locating utility infrastructure within public road right-of-way. A roadway easement is a burdensome use. Similar to a railway easement, while the underlying landowner may hold fee title to the property, the road

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[8] Danaya C. Wright & Jeffrey M. Hester, *Pipes, Wires, and Bicycles: Rails-to-Trails, Utility Licenses, and the Shifting Scope of Railroad Easements from the Nineteenth to the Twenty-First Centuries*, 27 Ecology L.Q. 351 (2000), *available at* http://scholarship.law.ufl.edu/facultypub/217 (hereafter "*Wright & Hester*").

[9] *See Hawkeye Land Company v. City of Iowa City*, 918 N.W.2d 503 (Iowa Ct. App. April 18, 2018) (Table, text in Westlaw), 2018 WL 1858401 (Iowa Ct. App., Apr. 18, 2018) at *10.

easement deprives the landowner of possession or use of the property. As one court described the government's interest in a highway easement:

> It is comparable to a fee in the surface and so much beneath as may be necessary for support. This estate, taken from an owner under the right of eminent domain, has no further practical value to the owner in view of the rights of the state in it, unless the easement is formally abandoned.

In re Marivitz, 636 A.2d 1241, 1243 (Pa. Cmmw. 1994).

Similarly, the landowner cannot permit third-party use of the land, as the government possesses it, and, because the landowner has such minimal remaining interest in the property subject to the road easement, damages (if any) arising from the installation of utility infrastructure on property the owner does not possess and cannot use, are nominal. Further, it is beyond question that location of utility infrastructure, including electric transmission lines, is not *inconsistent* with the use of the right-of-way for road purposes. There are already thousands of miles of utility infrastructure within public road right-of-way throughout Iowa today. The enactment of Section 306.46 makes clear that the Iowa law contemplates that utility infrastructure within public road right-of-way is consistent with its use for road purposes.

Accordingly, the Court should apply the incidental use doctrine in this case and determine that an electric transmission line's placement in the road right-of-way is an incidental use, allowing the government to permit public utilities to place utility infrastructure within public road right-of-way without further permission or compensation to adjacent landowners.

C. Public Policy Supports a Reading of Section 306.46 that Permits Location of Public Utility Facilities within Public Road Right-of-Way Regardless of the Timing of the Underlying Road Easement.

That Section 306.46 authorizes co-locating utility infrastructure with road infrastructure is not surprising. The development of a road establishes a corridor for public use, and good infrastructure siting practices dictate co-location of infrastructure where possible. Where sound

engineering allows for co-location with existing infrastructure, co-location in an existing corridor eliminates the need to impact other, previously undisturbed land, which results in many benefits, including minimizing impacts to lands, minimizing interference with existing and future land uses, reducing disruption to surrounding landowners, and minimizing environmental concerns by avoiding previously undisturbed areas. All of these benefits of co-location have been recognized by the Board on multiple occasions and have been approved by the Iowa Supreme Court as sufficient to meet the siting criteria of Iowa law. *See Gorsche Fam. Partn. v. Midwest Power, Div. of Midwest Power Sys., Inc.,* 529 N.W.2d 291, 293 (Iowa 1995) (affirming Board's Order locating new electric transmission line within existing easement corridor based upon benefits including minimizing "the interference with the use of land"; reducing "disruption to landowners"; and alleviating environmental concerns such as tree clearing).

In addition to the aforementioned benefits, where co-location of utility infrastructure is with a road, additional benefits are created because the road allows for easy and efficient accessibility to that utility infrastructure for maintenance and repair activities. It is no surprise, then, that utility infrastructure has been located within road right-of-way for decades, and there presently are thousands of miles of utility infrastructure located within public road right-of-way throughout Iowa. That utility infrastructure goes well beyond electric transmission lines, and includes electric distribution lines, natural gas lines, water and sewer lines, and telephone and cable lines. These lines for essential services have been placed in road right of way with the consent of local counties and cities because these entities understand the policy benefits of grouping such uses together when feasible, but also because they rightly have believed, as have the utilities, that the area adjacent to the road is intended to be a utility right of way. Reaching a result that disallows the placement of public utility infrastructure within the existing public road right-of-way as

suggested by Juckette not only runs counter to the benefits of co-location of infrastructure but calls into question the legal validity of thousands of miles of infrastructure that delivers important and necessary services to homes and businesses throughout Iowa on a daily basis.

III. THE COURT SHOULD REMAND THE CASE TO THE BOARD TO ALLOW IT TO RULE IPON MEC'S APPLICATION FOR EMINENT DOMAIN.

While the applicability of Section 306.46 and its constitutional implications is an important issue that potentially impacts thousands of miles of existing infrastructure in the State of Iowa, it is not an issue the Court need reach at this juncture. MEC has filed with the Board an Application for Eminent Domain ("Eminent Domain Application") which asks the Board to grant the right of eminent domain to MEC to the extent necessary over Juckette's property. MEC filed has also filed with this Court a Motion for Limited Remand ("Limited Remand Motion") to allow the Board to rule upon the Eminent Domain Application. The Court should grant the Limited Remand Motion, in the interest of judicial economy, and permit the narrowing the issues before the Court, thus allowing the Court to avoid unnecessary constitutional issues in line with Iowa law.

In the event the Board grants the Eminent Domain Application (and assuming Juckette maintains her judicial review action thereafter) this Court would be reviewing the Board's grant of the franchise and grant of eminent domain authority under Code Chapter 478, narrowing the issues before the Court substantially by making analyses of Section 306.46 arguments unnecessary. This result serves judicial economy, allowing the Court to preside over a single case and issue a single decision, as opposed to ruling on the present matter, only to have to review a later matter challenging the Board's Order on the Eminent Domain Application. Further, if the Board were to grant the Eminent Domain Application, it permits the Court to avoid addressing unnecessary constitutional issues surrounding Section 306.46, which is consistent with Iowa's constitutional avoidance doctrine. *See, e.g., Salsbury Laboratories v. Iowa Dept. of Envtl. Quality*,

276 N.W.2d 830, 837 (Iowa 1979) ("Avoidance of constitutional issues except when necessary for proper disposition of controversy is a bulwark of American jurisprudence."); *Renda v. Polk County*, 319 N.W.2d 250, 253 (Iowa 1982) ("…we will not render constitutional decisions unnecessarily.") (citations omitted).

Finally, ITC Midwest notes that Juckette's suggestion that it is somehow procedurally improper to seek eminent domain authority from the Board after the franchise has been issued is inaccurate. That position finds no support in Iowa Code chapter 478, nor does Juckette cite any cases that stand for that proposition. A franchise owner may, on occasion, have to return to the Board to seek eminent domain authority over a particular property after a franchise has issued. Most commonly, this occurs where in-field conditions and/or engineering or environmental considerations require route deviations after the franchise has issued. The statute governing the Board's authority to grant franchises and to grant eminent domain authority do not create the sort of "all or nothing" approach that Juckette suggests. Rather, Code Section 478.4 sets forth the elements that a transmission owner must for issuance of a franchise. Iowa Code § 478.4 (setting forth test of "necessary to serve a public use and represents a reasonable relationship to an overall plan of transmitting electricity in the public interest."). Code Section 478.6, in turn, sets forth the requirements and parameters for when the Board should grant the power of eminent domain. See Iowa Code § 478.6 (allowing the Board to vest a franchise owner with the "power of condemnation ***to such extent as the board may approve and find necessary for public use***…") (emphasis added). The Court should not read a limitation into the statute that appears nowhere on its face. The Board has the discretion to allow eminent domain to a franchise holder at any time the Board finds it "necessary."

CONCLUSION

Essential public services like electricity, natural gas, telecommunications, and water have located facilities in the rights of way of public roads in Iowa for generations. They've done so for good reason: once a road has already burdened the land and taken exclusive use of that corridor, the additional burden of other utilities is at most incidental, and certainly much less than creating a new path away from the road. Being road adjacent also serves the public good when it comes to repair and restoration of these essential services when damage or disruption occurs. When these long-settled expectations of local governments and utilities alike were upended in the *Keokuk Junction* case, the Iowa Legislature was quick to address it, and reassert the public policy favors use of road right of way for siting utilities. The legislature passed a statute much like the Alaska statute the Iowa Supreme Court noted could result in a different outcome than *Keokuk Junction*.

The attempt in this case to make it harder for Iowans to keep their lights on by making it harder to obtain a franchise and to site electric transmission lines is bad public policy. More important for purposes of this case, it is not supported by the law, and appears based in misunderstandings about the nature of the electrical system and the legal framework in which it operates. This Court should uphold the Board's decision on granting a franchise and find that MEC's request for authority to use eminent domain to obtain an easement over Juckette's parcel renders the §306.46 question before the Board moot. Doing so recognizes the Board's authority to consider eminent domain in the first instance, avoids needless rulings on a constitutional question, and restores certainty to the numerous utilities that have long been located along public roads – and to the Iowans who depend on the services they provide.

Respectfully submitted,

Dated: August 13, 2021

By: */s/ Bret A. Dublinske*

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CERTIFICATE OF SERVICE

The undersigned certifies the foregoing document was electronically filed with the Clerk of Court using the Electronic Document Management System (EDMS) on August 13, 2021, which will send a notice of electronic filing to all registered parties.

/s/ *Sarah McCray*