

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

<p>LINDA K. JUCKETTE, Petitioner, vs. IOWA UTILITIES BOARD, Respondent, and OFFICE OF CONSUMER ADVOCATE, MIDAMERICAN ENERGY COMPANY, Intervenors.</p>	<p>Case No. CVCV061580</p> <p>INTERVENOR OFFICE OF CONSUMER ADVOCATE’S BRIEF IN RESISTANCE TO PETITION FOR JUDICIAL REVIEW</p>
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The Office of Consumer Advocate, a division of the Iowa Department of Justice, submits the following Brief in Resistance to Petition for Judicial Review:

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. The IUB’s Ruling Finding MidAmerican Carried its Burden in Demonstrating the Proposed Line is Necessary to Serve a “Public Use” is Supported by Substantial Evidence and Correct Application of the Relevant Law

Authorities:

- S.E. Iowa Coop. Elec. Ass’n v. Iowa Utils. Bd.*, 633 N.W.2d 814 (Iowa 2001)
- Robbennolt v. Snap-On Tools Corp.*, 555 N.W.2d 229 (Iowa 1996)
- Broadlawns Medical Ctr. v. Sanders*, 792 N.W.2d 302 (Iowa 2010)
- NextEra Energy Res. LLC v. Iowa Utilities Bd.*, 815 N.W.2d 30 (Iowa 2012)
- Renda v. Iowa Civil Rights Comm’n*, 784 N.W.2d 8 (Iowa 2010)
- Mathis v. Iowa Utilities Bd.*, 934 N.W.2d 423 (Iowa 2019), reh’g denied (May 30, 2019)
- Race v. Iowa Elec. Light & Power Co.*, 134 N.W.2d 335 (Iowa 1965)
- Fischer v. Iowa State Commerce Comm’n*, 368 N.W.2d 88 (Iowa 1985)
- Bradley v. Iowa Dep’t of Commerce*, No. 01- 0646, 2002 WL 31882863 (Iowa Ct. App. Dec. 30, 2002).
- Iowa Code § 17A.19(10) (2021)
- Iowa Code § 478.4

Iowa Code § 476.6
Iowa Code § 476.8
199 Iowa Admin. Code 20.18(3)

II. The IUB’s Ruling Finding MidAmerican Carried its Burden in Demonstrating the Proposed Line Bears “A Reasonable Relationship to an Overall Plan of Transmitting Electricity in the Public Interest” is Supported by Substantial Evidence and Correct Application of the Relevant Law

Authorities:

Renda v. Iowa Civil Rights Comm’n, 784 N.W.2d 8 (Iowa 2010)
S.E. Iowa Coop. Elec. Ass’n v. Iowa Utils. Bd., 633 N.W.2d 814 (Iowa 2001)
Bradley v. Iowa Dep’t of Commerce, No. 01- 0646, 2002 WL 31882863 (Iowa Ct. App. Dec. 30, 2002).
Iowa Code § 17A.19(10)
Iowa Code § 478.3
Iowa Code § 478.4
Iowa Code § 478.18

III. Iowa Code Section 306.46 Allows MidAmerican to Place the Proposed Line in the Public Road Right-of-Way Without First Obtaining Eminent Domain and is Constitutional as Applied to Intervenor Juckette.

Authorities:

NextEra Energy Res. LLC v. Iowa Utilities Bd., 815 N.W.2d 30 (Iowa 2012)
Renda v. Iowa Civil Rights Comm’n, 784 N.W.2d 8 (Iowa 2010)
Banilla Games, Inc. v. Iowa Dep’t of Inspections & Appeals, 919 N.W.2d 6 (Iowa 2018)
Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759 (Iowa 2016)
Marcus v. Young, 538 N.W.2d 285, 289 (Iowa 1995)
Irving v. Employment Appeal Bd., 883 N.W.2d 179 (Iowa 2016)
Hrbek v. State, 958 N.W.2d 779 (Iowa 2021), reh’g denied (May 19, 2021)
Keokuk Junction Ry. Co. v. IES Industries, Inc., 618 N.W.2d 352 (Iowa 2004)
Fisher v. Golden Valley Elec. Ass’n, 658 P.2d 127, 129 (Alaska 1983)
Crawford v. Alabama Power Co., 128 So. 454 (Ala. 1930)
NDA Farms, LLC v. Iowa Utilities Bd., Dept. of Commerce, No. CV 009448, 2013 WL 11239755 (Iowa Dist. Ct. 2013)
Iowa Code § 17A.19(10)
Iowa Code § 306.46
Alaska Stat. § 19.25.010 (2021)
An Act Regarding Public Utility Rights-Of-Way And Providing An Effective Date, Ch. 1014 (S.F. 2118) (Mar. 24, 2004) (codified as amended at Iowa Code § 306.46)

STATEMENT OF THE CASE

This court issued an Order Establishing Schedule For Conduct of Proceedings Pursuant to I.R.Civ.P.1.1603(2) on April 12, 2021, which, in part, set forth the requirements for briefing including a requirement that Petitioner Linda Juckette (Ms. Juckette) provide a statement of the case “supported by appropriate references to the record.” The Order allows Respondent, the Iowa Utilities Board (IUB), and Intervenors, the Office of Consumer Advocate (OCA) and MidAmerican Energy Company (MidAmerican), to include a statement of the case in their respective briefs if they “are dissatisfied with the statement of the Petitioner’s brief.” Ms. Juckette has not included a statement of the case with references to the record in her brief. OCA has reviewed the statement of the case set forth in the IUB’s brief and believes it appropriately states the nature of the case, the course of proceedings, and disposition of the case before the IUB. OCA incorporates by reference the IUB’s statement of the case.

ARGUMENT

Ms. Juckette presents four issues for judicial review of the IUB’s Order, including: 1) whether the IUB erred in concluding MidAmerican carried its burden in proving the requested franchise was necessary for a public use; 2) whether the IUB erred by in granting the franchise “absent any legal ability for MidAmerican to enter Juckette’s property;” 3) whether the routes proposed by MidAmerican are unreasonable; 4) whether the franchise is “unduly injurious and should not have been granted.” Ms. Juckette did not include a standard of review for any of the issues presented nor did she include a statement of what deference should be accorded to the IUB under Iowa Code section 17A.19(11) (2021).

While the issues presented by Ms. Juckette are wide-ranging, OCA believes it is efficient to organize these issues based on the standards for electric transmission franchises set forth in

Iowa Code chapter 478 and used by the IUB in its Order. Pursuant to chapter 478, a utility seeking an electric transmission franchise carries the burden of proving the proposed transmission line is necessary to serve a “public use” and bears “a reasonable relationship to an overall plan of transmitting electricity in the public interest.” Iowa Code §§ 478.3(1)(h), 478.3(2)(a), 478.4; *see South East Iowa Co-op Elec. Ass’n v. Iowa Utilities Bd.*, 633 N.W.2d 814, 820 (Iowa 2001).

First, OCA will argue the IUB’s finding that MidAmerican carried its burden in demonstrating the proposed line is necessary to serve a “public use” is supported by substantial evidence and complies with the relevant law (Juckette Issue 1). Second, OCA will argue the IUB’s finding that MidAmerican had carried its burden in demonstrating the proposed line bears “a reasonable relationship to an overall plan of transmitting electricity in the public interest” is supported by substantial evidence and complies with the relevant law (Juckette Issues 3, 4). Third, OCA will address Ms. Juckette’s claims concerning Iowa Code section 306.46 as applied to her property (Juckette Issue 2).

I. The IUB’s Ruling Finding MidAmerican Carried its Burden in Demonstrating the Proposed Line is Necessary to Serve a “Public Use” is Supported by Substantial Evidence and Complies with the Relevant Law (Juckette Issue 1)

A. Scope and Standard of Review

The scope of review encompasses the entire record before the agency and is not limited to the agency’s findings. Judicial review of final agency action is governed by the standards set forth in Iowa Code § 17A.19. The applicable standard of review depends upon the nature of the error claimed. If the alleged error is with the agency’s findings of fact, the proper question on review is whether there is substantial evidence in the record when it is viewed as a whole to support the agency’s findings of fact. Substantial evidence is defined in Iowa Code section

17A.19(10)(f)(1) as 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.” *See S. E. Iowa*, 633 N.W.2d at 818. The possibility of drawing two inconsistent conclusions from the evidence does not mean the agency’s decision is not supported by substantial evidence. *Robbennolt v. Snap-On Tools Corp.*, 555 N.W.2d 229, 233 (Iowa 1996). The ultimate question is not whether there is evidence that supports a different finding, but whether the evidence supports the findings actually made. *Broadlawns Medical Ctr. v. Sanders*, 792 N.W.2d 302, 306 (Iowa 2010).

If the legislature vested an agency with the authority to interpret a statute, this court defers to the agency’s interpretation of the statute and will only reverse the agency’s interpretation is “irrational, illogical, or wholly unjustifiable.” Iowa Code § 17A.19(10)(l); *NextEra Energy Res. LLC v. Iowa Utilities Bd.*, 815 N.W.2d 30, 37 (Iowa 2012); *Renda v. Iowa Civil Rights Comm’n*, 784 N.W.2d 8, 10 (Iowa 2010). “[W]hen the statutory provision being interpreted is a substantive term within the special expertise of the agency,” the Iowa Supreme Court concluded the agency was vested with interpretative power. *Renda*, 784 N.W.2d at 14. Conversely, if the relevant statute is not within the statutes the agency is tasked with enforcing or the “term has an independent legal definition that is not uniquely within the subject matter expertise of the agency,” the agency has not been vested with interpretive authority. *Id.* Where the legislature has not vested the agency with the authority to interpret the provisions of the relevant law, this court reviews for correction of errors at law. Iowa Code § 17A.19(10)(c); *NextEra*, 815 N.W.2d at 37–38.

Here, the IUB's findings of fact will be reviewed to determine if they are supported by substantial evidence. Iowa Code § 17A.19(10)(f)(1). For the interpretation of legal questions, chapter 478 is silent concerning the IUB's interpretative authority. In the last Iowa Supreme Court construing chapter 478, based on the undersigned's research, the court heavily deferred to the IUB's interpretations of chapter 478. *See S. E. Iowa*, 633 N.W.2d at 819 ("Moreover, we have frequently relied upon the Board's expertise in interpreting Iowa Code chapter 478."). However, in the most recent Iowa Supreme Court case generally addressing what deference to give to the IUB, the Iowa Supreme Court stated, "in recent years, we have generally not deferred to IUB interpretations of statutory terms." *Mathis v. Iowa Utilities Bd.*, 934 N.W.2d 423, 427 (Iowa 2019), *reh'g denied* (May 30, 2019) (finding the IUB's interpretation of Iowa Code section 476A.1 was not entitled to deference). Reconciling the dissonance created by *S.E. Iowa* and *Mathis*, OCA believes the IUB's interpretation of "public use" as applied in this matter should be granted deference by this court since it is a "substantive term within the special expertise of the" IUB. *See Renda*, 784 N.W.2d at 14.

B. Argument

Substantial evidence and a rational interpretation of the relevant law supports the IUB's finding that MidAmerican's proposed transmission line is necessary for a public use. Ms. Juckette argues the IUB erred in granting MidAmerican the electric transmission line franchise because MidAmerican failed to prove the franchise was necessary for a public use. *See Juckette Opening Brief*, at pg. 3.

In its Order, the IUB set forth the correct legal standard for "public use," stating:

The Iowa Supreme Court has long recognized that "the transmission of electricity to the public constitutes a public use contemplated by section 478.4." *South East Iowa Co-op Elec. Ass'n v. Iowa Utilities Bd.*, 633 N.W.2d at 820 (citing *Race v. Iowa Elec. Light & Power Co.*, 257 Iowa 701, 704, 134 N.W.2d 335, 337 (1965)).

If a transmission line is reasonably designed to meet existing needs, the public use test is satisfied. *Fischer v. Iowa State Commerce Comm'n*, 368 N.W.2d [88,] 98 [(Iowa 1985)]. Similarly, a public use may be found where the “proposed transmission line is necessary to increase reliability of service, accommodate occurring and anticipated load growth, and [to] reasonably assure the availability, quality, and reliability of service.” *Bradley v. Iowa Dep’t of Commerce*, No. 01-0646, 2002 WL 31882863, at *5 (Iowa Ct. App. Dec. 30, 2002).

Certified Record (CR.) pg. 908.

The IUB found MidAmerican presented evidence demonstrating the “proposed project is necessary to meet current and future transmission needs.” *Id.* In support of this conclusion, the IUB cited to evidence and testimony presented by MidAmerican that the proposed line would increase reliability and accommodate future load growth in the area. *Id.* at 905–908. The evidence shows the Maffitt Lake Substation, absent approval of the proposed lines, will be served by only one 161kV source (radially fed). *CR.* pg. 262. MidAmerican witness Charleville testified a radial feed is undesirable for reliability, since a disruption to the radial line would render the Maffitt Lake Substation without service. *Id.* at 201–02. The proposed lines would also increase reliability for the area as it would allow local distribution lines to be moved closer to the supporting substation, reducing the “exposure caused by long distribution lines and the associated risks of outages.” *Id.* at 202. MidAmerican provided evidence to demonstrate the proposed lines are meant to serve the needs of an industrial customer, Microsoft, and future load projections based on the forecasted increase in population in the subject area. *Id.* at 262. The forecasted increase in population for the relevant area is not only supported by analysis created by MidAmerican, but also by the Cities of West Des Moines and Cumming and by Intervenor Juckette. *Id.* 204–05, 209–12, 511, 534. While the proposed line will initially provide service solely to Microsoft, the evidence presented by MidAmerican overwhelmingly demonstrates the

relevant area will experience load growth necessitating increased reliability provided by the proposed transmission improvements.

Intervenor Juckette argues because the line will initially only serve one customer, Microsoft, this shows the project is not dedicated to the public use. However, service by a utility to a customer is unequivocally a “public use.” *S. E. Iowa Co-op. Elec. Ass’n* 633 N.W.2d at 840. MidAmerican has a duty to “furnish reasonably adequate service and facilities” for its customers, which includes making reasonable efforts to provide reliable service. Iowa Code § 476.8(1); 199 Iowa Admin. Code 20.18(3). As noted, a radial feed is inadequate to provide reliable service to the Maffitt Lake Substation and, in addition to providing reliable service to Microsoft, this proposed line will increase reliability for all customers in the relevant area. *CR.* at 905–908. Intervenor Juckette’s assertion that Microsoft should somehow be treated differently than other customers is not grounded in law nor precedent and Ms. Juckette is unable to cite any authority in support of this claim.

Ms. Juckette also asserts the proposed transmission line is detrimental to Iowa consumers and ratepayers because “MidAmerican retains the revenue and reimbursement of construction costs, all without reimbursing the ratepayers for their initial contribution to construction of lines and a substation that is exclusively used by Microsoft.” *Juckette Opening Brief*, pg. 12. Ms. Juckette asserts there are no public economic benefits from the proposed franchise, only potential profits for MidAmerican. *Id.* While cost is a relevant consideration in whether a proposed franchise is in the public interest, the cost of the proposed transmission line does not weigh against a finding that the proposed line is in the public interest in this case. Pursuant to Iowa Code section 476.6, MidAmerican cannot impose a new or changed rate until it has been approved by the IUB following a contested case proceeding, which involves a prudency review

of the costs MidAmerican seeks to pass to customers through its utility rates. Further, and as argued in OCA's Post-Hearing Brief, the proposed transmission line will likely benefit all MidAmerican ratepayers through revenue sharing:

OCA believes the revenues gained from Project Osmium will benefit MidAmerican's customers through MidAmerican's revenue sharing agreement. In response to OCA's data requests, in testimony, and at the hearing, MidAmerican presented evidence concerning the Facilities Construction Agreement it executed with Microsoft. Due to a finding that revenues from this project are projected to exceed the construction costs, Microsoft does not need to pay any upfront construction costs. In three years, if the projected revenues do not exceed the construction costs, Microsoft is obligated to pay for this shortfall. Based on the evidence submitted, OCA believes this is an appropriate arrangement in this matter.

Because revenues are projected to exceed the costs, OCA believes all customers will benefit from this arrangement. In the settlement for MidAmerican's last electric rate case, RPU-2013-0004, the parties defined the revenue sharing agreement as follows:

The threshold for revenue sharing shall be all Iowa jurisdictional electric operating income, including the Iowa jurisdictional portion of wholesale sales revenue (generation and transmission) and related costs, that exceeds a return on common equity of 11%. The methodology used to calculate revenue sharing will be as approved by the Board in Docket No. RPU-03-01. Any revenue sharing proceeds for the customers' benefit shall be used to reduce the regulatory asset created by the depreciation deferral referenced in Article VII.

The revenue sharing agreement has been subsequently amended through board orders, but the basic concept remains: If MidAmerican's revenues exceed a set return on equity, a percentage of the overage is applied to reduce the depreciation deferral. In recent years, MidAmerican has exceeded the set return on equity and flowed benefits back to customers.²⁸ Therefore, revenues earned from Project Osmium will benefit MidAmerican's customers once MidAmerican exceeds the set return on equity.

CR. at 890–91. In summary, MidAmerican cannot pass the costs of the proposed line to customers absent a section 476.6 rate proceeding, and customers will likely benefit from the increase in revenues that MidAmerican has projected the proposed line will generate from providing electric service to Microsoft. The revenue sharing arrangement prevents MidAmerican from earning above the revenue sharing threshold and ensures that excess revenues are used for customer benefit.

The IUB relied on substantial evidence and a rational interpretation of the “public use” standard to find the proposed line is necessary for a public use. OCA requests this court reject Ms. Juckette’s public use argument.

II. The IUB’s Ruling Finding MidAmerican Carried its Burden in Demonstrating the Proposed Line Bears “A Reasonable Relationship to an Overall Plan of Transmitting Electricity in the Public Interest” is Supported by Substantial Evidence and Correct Application of the Relevant Law (Juckette Issues 3, 4)

A. Scope and Standard of Review

If the alleged error is with the agency’s findings of fact, the proper question on review is whether there is substantial evidence in the record when it is viewed as a whole to support the agency’s findings of fact. Iowa Code § 17A.19(10)(f)(1).

Concerning the interpretation of sections 478.3 and 478.4 that outline the “reasonable relationship standard,” and section 478.18 concerning transmission line location, the Legislature has not explicitly vested the IUB with authority to interpret these provisions and there is no caselaw construing these statutes. For the same reasons given in OCA’s first argument, OCA believes this court should give appropriate deference to the IUB concerning its interpretation of the “reasonable relationship” standard. *See Renda*, 784 N.W.2d at 14.

B. Argument

Substantial evidence and a rational interpretation of the relevant law supports the IUB’s finding that MidAmerican carried its burden in demonstrating the proposed transmission line “represents a reasonable relationship to an overall plan of transmitting electricity in the public interest.” Iowa Code § 478.3(2)(a). Intervenor Juckette claims the IUB erred in granting the franchise because the “proposed routes are not reasonable and violate the mandate of Iowa Code Chapter 478 to avoid unnecessary interference with private property.” *Juckette Opening Brief*,

pg. 32. Intervenor Juckette also claims the IUB erred in concluding the proposed route would not be unduly injurious to private landowners. *Id.* at 41.

The “reasonable relationship” standard includes, but is not limited to, the eight criteria listed in Iowa Code section 478.3(2)(a) a utility must substantiate in its petition for a transmission line capable of operating at 69kV and extending not less than a mile across private property. The eight criteria include the requirement a utility must consider “[t]he possible use of alternative routes and methods of supply” and “[t]he inconvenience or undue injury which may result to property owners as a result of the proposed project.” There is no requirement in section 478.3 that one of the eight criteria should be weighted above others, rather, the criteria are to be considered together in the utility’s showing a proposed line “represents a reasonable relationship to an overall plan of transmitting electricity in the public interest.” Iowa Code § 478.3(2)(a). Indeed, “the underlying purpose of chapter 478 is to serve the public interest,” which involves the IUB’s legislatively granted authority discretion to weigh these criteria in deciding whether to grant a franchise. *See S. E. Iowa Co-op. Elec.*, 633 N.W.2d at 819–20 (Discussing the IUB’s discretion to balance various factors in determining whether the grant of a franchise is in the public interest); *see also Bradley*, 2002 WL 31882863, at *3. In addition, Iowa Code section 478.18(2) provides additional guidance for the location of electric transmission lines, including that lines

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.

Iowa Code § 478.18(2).

In its Order, the IUB dedicated nine pages to analyzing the chapter 478 criteria and weighing the evidence presented in determining MidAmerican had satisfied its burden in demonstrating the proposed line represented a reasonable relationship to an overall plan of transmitting electricity in the public interest. *CR.* at 909–17. The IUB’s Order shows it relied on substantial evidence in reaching its conclusion. This substantial evidence includes MidAmerican’s detailed route study that weighed ten routes for the proposed east segment using criteria derived from the Iowa Code and the IUB’s rules, and evidence presented by MidAmerican’s witnesses surrounding the reasonable decision-making behind its route selection, including considerations of alternative routes and potential inconvenience or injury to property owners. *CR.* at 231–32.¹

Ms. Juckette claims because the route study relies on “faulty cost data” because it did not account for the cost that could be incurred by MidAmerican in pursuing eminent domain resulting in a flawed route study and an “arbitrary and capricious” decision by the IUB. *Juckette Opening Brief*, pgs. 32–41. Ms. Juckette also asserts the route study was flawed in other ways. *Id.* While OCA believes the premise of this argument is not supported by the evidence in the record, even if the route study contained the *de minimus* flaws argued by Ms. Juckette, the IUB’s selection of the proposed route is supported by substantial evidence in the record as outlined above.² Further, chapter 478 grants the IUB “discretion to make decisions involving electric transmission lines.” *S. E. Iowa*, 633 N.W.2d at 819. This discretion clearly extends to the balancing of the “reasonable relationship” criteria where the IUB is only tasked to “*make a*

¹ The criteria of MidAmerican’s route study included consideration of: applicable law, agricultural impacts, existing development, buildings within 100 feet, trees and other vegetation, overall line length, number of line angles greater than 30 degrees, streams and potential wetlands, and overland access requirements. *CR.* at 110–128 (Route Study).

² OCA agrees with the IUB’s statement in the Order that there is no explicit legal requirement a utility must perform a route study. *CR.* at 916. OCA also agrees with the IUB there is no requirement that a utility “consider private landowner rights or the economic value of property in conducting a route study.” *Id.*

finding that the proposed line . . . represents a reasonable relationship to an overall plan of transmitting electricity in the public interest.” Iowa Code Ann. § 478.4. The IUB’s Order and the record support a finding that the IUB has made this finding concerning MidAmerican’s proposed line. Ms. Juckette has not shown how the purported issues with the route study would result in an error meriting reversal on judicial review.

OCA believes the IUB’s Order relied on substantial evidence and a rational interpretation of the applicable law in finding MidAmerican had satisfied its burden, as required by section 478.3(2)(a) and section 478.4, by showing the proposed line “represents a reasonable relationship to an overall plan of transmitting electricity in the public interest.” Iowa Code § 478.3(2)(a).

III. Iowa Code Section 306.46 Allows MidAmerican to Place the Proposed Line in the Public Road Right-of-Way Without First Obtaining Eminent Domain and is Constitutional as Applied to Intervenor Juckette (Juckette Issue 2)

A. Scope and Standard of Review

If the alleged error is with the agency’s findings of fact, the proper question on review is whether there is substantial evidence in the record when it is viewed as a whole to support the agency’s findings of fact. Iowa Code § 17A.19(10)(f)(1).

Iowa Code section 306.46 is not within the statutes the IUB is tasked with enforcing, therefore, the IUB has not been vested with interpretive authority and the IUB’s interpretation is reviewed by this court for errors at law. *Renda*, 784 N.W.2d at 14.

This court reviews constitutional questions de novo. *NextEra*, 815 N.W.2d at 44 (“We 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 province of the judiciary to determine the constitutionality of legislation enacted by other branches of government.”).

B. Argument

In her Brief, Ms. Juckette claims the IUB erroneously concluded Iowa Code section 306.46 granted MidAmerican the right to place utility poles in a public road right of way without obtaining an easement or exercising the right of eminent domain. *Juckette Opening Brief*, pgs. 17– 27. OCA believes the IUB did not commit legal error in its application of section 306.26 in determining MidAmerican did not need an easement or eminent domain to place utility poles in the public road right-of-way.

Iowa Code section 306.46(1) provides that “[a] public utility may construct, operate, repair, or maintain its utility facilities within a public road right-of-way.” In its Order, the IUB applied this statute as written—that a utility has an unambiguous right to construct, operate, repair, or maintain its facilities within a public road right-of-way.³ The Iowa Supreme Court provided the following guidance concerning the interpretation of statutes:

Our goal in interpreting a statute is to determine the legislative intent by looking at the language the legislature chose to use, not the language they might have used. *Ramirez-Trujillo v. Quality Egg, L.L.C.*, 878 N.W.2d 759, 770 (Iowa 2016). In other words, legislative intent cannot change the meaning of a statute if the words used by the legislature will not allow such a meaning. *Marcus v. Young*, 538 N.W.2d 285, 289 (Iowa 1995). . . .

When there is no statutory definition to guide us, we interpret terms “in the context in which they appear and give each [word] its plain and common meaning.” *Ramirez-Trujillo*, 878 N.W.2d at 770. If there is more than one interpretation of the plain meaning that is reasonable, we will employ traditional tools of statutory interpretation. *Irving[v. Employment Appeal Bd.]*, 883 N.W.2d [179,] 191 [(Iowa 2016)].

Banilla Games, Inc. v. Iowa Dep’t of Inspections & Appeals, 919 N.W.2d 6, 14 (Iowa 2018).

³ The only precedent construing section 306.46 is the non-binding precedent set forth in Polk County District Court case *NDA Farms, LLC v. Iowa Utilities Bd., Dept. of Commerce*, No. CV 009448, 2013 WL 11239755 (Iowa Dist. Ct. 2013). OCA agrees with the IUB’s analysis of this case contained in the IUB’s Order. *See CR*, pgs. 926–32.

OCA agrees with the IUB that the plain language of section 306.46(1) grants a public utility the right to use a public road right-of-way. The statute simply empowers public utilities to “construct, operate, repair, or maintain its utility facilities within the public road right of way.” Iowa Code §306.46(1). Reading the plain and common meaning of the statute allows utility companies to use the public road right of way and does not prescribe any additional requirements such as acquiring easements or applying for eminent domain.

Intervenor Juckette’s interpretation of this section attempts to include language the legislature did not use, namely that this provision should only apply prospectively to easements executed after the enactment of this statute. *Juckette Opening Brief*, pg. 20. If the legislature had desired this outcome, it would have included this language. *See Ramirez-Trujillo* 878 N.W.2d at 770. Further, OCA agrees with the IUB’s reasoning concerning the retrospective versus prospective application of this section. The “determinative event” in this statute is clearly the utility’s actions within the public road right-of-way and not the underlying execution date of the easement. Since MidAmerican has yet to construct, operate, and maintain the proposed line, application of the statute is prospective. *CR.* at 931. The Iowa Supreme Court recently affirmed this concept in *Hrbek v. State*, reasoning:

[A]pplication of a statute is in fact retrospective when a statute applies a new rule, standard, or consequence to a *prior* act or omission. *See Frideres v. Schiltz*, 540 N.W.2d 261, 264 (Iowa 1995) (en banc) (“A law is retroactive if it affects acts or facts which occurred, or rights which accrued, before the law came into force.”). The prior act or omission is the event of legal consequence “that the rule regulates.” *Landgraf [v. USI Film Products]*, 511 U.S. [244,] 291, 114 S. Ct. [1522,] 1524 [(1994)]. The event of legal consequence is the specific conduct regulated in the statute. *See id.*

....

Application of a statute to conduct occurring after the effective date is in fact a prospective and not retrospective application. *See Miller v. LaSalle Bank Nat'l Ass'n*, 595 F.3d 782, 788 (7th Cir. 2010) (analyzing the relevant retroactivity event and concluding statute had no retroactive effect); *Combs v. Comm'r of Soc. Sec.*, 459 F.3d 640, 648–49 (6th Cir. 2006) (“A focus on the ‘relevant activity’ in this

case leads inexorably to the conclusion that the change in the regulation was not impermissibly retroactive. ... [T]he regulatory change had no retroactive effect because the presumption defined by the listing is a rule of adjudication and therefore has its effect on claims at the time of adjudication.”)

Hrbek v. State, 958 N.W.2d 779, 782 (Iowa 2021), *reh’g denied* (May 19, 2021). OCA believes the IUB properly applied section 306.46 to the facts of this matter and should be affirmed.

Ms. Juckette also claims, assuming the IUB appropriately interpreted section 306.46 in this matter, section 306.46 is unconstitutional as applied to Ms. Juckette’s property. Based on Iowa Supreme Court precedent and the history of section 306.46, OCA believes section 306.46 is constitutional as applied to Ms. Juckette’s property.

The Iowa Legislature enacted section 306.46 in 2004 and only a few years after the Iowa Supreme Court’s decision in *Keokuk Junction v. IES Industries*. *See An Act Regarding Public Utility Rights-Of-Way And Providing An Effective Date*, Ch. 1014 (S.F. 2118) (Mar. 24, 2004) (codified as amended at Iowa Code § 306.46). In *Keokuk*, a public utility attempted to use a road right-of-way to construct transmission lines instead of condemning the property through eminent domain. *Keokuk Junction Ry. Co. v. IES Industries, Inc.*, 618 N.W.2d 352, 354 (Iowa 2004). After a review of five categories of conclusions reached by other states on this issue, the court found a road right-of-way does not include the right to build and maintain utility facilities such as transmission lines. *Id.* The court reasoned its decision disallowing construction may have been different if Iowa had a statute allowing the placement of utility facilities in the right-of-way. *Id.* at 357. The court compared the scenario in *Keokuk* to a similar case in Alaska where a statute allowed road right-of-way construction and the Alaska Supreme Court decided in favor of the utility company. *Id.* at 357; *see Fisher v. Golden Valley Elec. Ass’n*, 658 P.2d 127, 129 (Alaska 1983). Notably, Alaska was the only state analyzed by the court with a statute addressing this issue.

Iowa Code section 306.46 is similar to the statute in Alaska, which allows utilities to construct in the road right-of-way. Alaska Stat. § 19.25.010 (2021).⁴ Based on the similarity, it appears section 306.46 was likely intended to abrogate the decision in *Keokuk*, meaning section 306.46 should allow public utility companies to use the road right-of-way to construct transmission lines in a similar fashion as Alaska, which does not require an additional easement or eminent domain proceedings. In *Fisher*, the Alaska Supreme Court found section 19.25.010 “places Alaska among those states which permit powerline construction as an incidental and subordinate use of a highway easement.” *Fisher*, 658 P.2d at 129. In *Keokuk*, the Iowa Supreme Court noted that

This viewpoint is strongest when a public, rather than private, utility is involved because it puts the erection of power lines within the purview of the public need. This viewpoint bases its conclusion on the need to adapt the easement to the advancement of technology. *See Crawford v. Alabama Power Co.*, 221 Ala. 236, 128 So. 454, 457–58 (1930) (holding that as time has progressed, “the vanguard of progress moves steadily onward” and the public use is served by the installation of electric lines along highways).

Keokuk, 618 N.W.2d at 356.

Because the Iowa Supreme Court emphasized the fact Alaska had a statute concerning this issue, and now that Iowa has a similar statute, it is likely the Iowa Supreme Court would follow this precedent and find section 306.46 is constitutional as applied to Ms. Juckette’s property. The record in this matter also supports this finding since MidAmerican is a public utility seeking to place the proposed line in a road right-of-way (replacing existing distribution lines (*CR. 763*)), to serve the public use by providing statutorily-required reliable electric service

⁴ The Alaska statute states: “A utility facility may be constructed, placed, or maintained across, along, over, under, or within a state right-of-way only in accordance with regulations adopted by the department and if authorized by a written permit issued by the department. The department may charge a fee for a permit issued under this section.” Alaska Stat. § 19.25.010. Iowa Code section 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. 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.” Iowa Code § 306.46(1).

to its customer Microsoft and to increase area reliability for other customers. OCA believes section 306.46 is constitutional as applied to Ms. Juckette and should not be the basis for overturning the IUB's grant of MidAmerican's franchise.

CONCLUSION

WHEREFORE, OCA respectfully asks this Court deny the relief requested by Ms. Juckette and affirm the IUB's final agency decision.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was automatically served electronically to the parties of record via EDMS on August 13, 2021.

/s/ Jeffrey J. Cook
Jeffrey J. Cook