

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

<p>LINDA K. JUCKETTE, Petitioner, v. IOWA UTILITIES BOARD, Respondent.</p>	<p>CASE NO. CVCV061580 BRIEF OF INTERVENOR MIDAMERICAN ENERGY COMPANY</p>
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STATEMENT OF ISSUES

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II. THE IUB CORRECTLY APPLIED IOWA CODE § 306.46(1) IN FINDING THAT EMINENT DOMAIN IS NOT NECESSARY TO PLACE A UTILITY FACILITY IN PUBLIC ROAD RIGHT-OF-WAY.

A. The IUB Correctly Applied the Facially Unambiguous Meaning of Iowa Code § 306.46(1).

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STATEMENT OF THE CASE

A. Nature of the Case

This case is a petition for judicial review of final agency action pursuant to Iowa Code § 17A.19. Petitioner Linda Petitioner (“Petitioner”) is challenging an electric transmission line franchise granted by the Iowa Utilities Board (“IUB”) to MidAmerican Energy Company (“MidAmerican”). The IUB found that MidAmerican’s proposed transmission line met the requirements of Iowa Code § 478.4. Petitioner is challenging the grant of the franchise on multiple grounds.

B. Course of the Proceedings

MidAmerican is a rate-regulated public utility that provides electric service to customers in the state of Iowa. CR, p. 160. On September 17, 2019, MidAmerican filed with the IUB a Petition for an Electric Transmission Line Franchise for 3.53 miles of 161,000-volt nominal voltage transmission line in Madison County, Iowa. CR, pp. 105-108. The transmission line consists of two segments, identified as the east segment and the west segment. CR, p. 63. Petitioner, a landowner along the east segment route, intervened in the proceeding and filed testimony and exhibits resisting MidAmerican’s petition. CR, pp. 151-54, 187-89, 190-92, 371-422.

On September 23, 2020, the Board conducted a hearing on MidAmerican’s petition in Winterset, Iowa. CR, p. 535. MidAmerican, the Office of Consumer Advocate (“OCA”), and Petitioner were represented by counsel at the hearing. CR, p. 535. MidAmerican presented the testimony of four MidAmerican witnesses who were cross-examined and questioned by the IUB. CR, p. 536. Petitioner also appeared and was subject to cross-examination. CR, p. 536.

On February 1, 2021, the IUB issued an order granting MidAmerican a franchise to construct the proposed transmission line. CR, p. 899. On February 16, 2021, Petitioner filed a request for rehearing. CR, p. 964. On February 19, 2021, the IUB issued a temporary stay for construction on the east segment of the transmission line. CR, p. 975. MidAmerican resisted Petitioner's request for reconsideration and requested that the IUB lift the temporary stay on the east segment. CR, pp. 979, 990. On March 18, 2021, the IUB issued an order denying Petitioner's request for rehearing and denying MidAmerican's request to lift the stay. CR, p. 1023.

Petitioner initiated this judicial review proceeding on March 24, 2021. Petitioner offered an amended petition for judicial review on April 5, 2021. The only other issue pending at the time of this brief is MidAmerican's Motion for Limited Stay and Remand, which was filed with the Court on June 16, 2021. The court conducted a telephonic hearing on the matter on July 16, 2021, and parties submitted proposed orders for the Court's consideration on July 30, 2021.

C. Statement of Facts

MidAmerican will include reference to the factual record as relevant to each issue.

ARGUMENT

The Court should affirm the grant of a franchise to MidAmerican because the IUB correctly applied the relevant legal standards in evaluating MidAmerican's petition and because the finding is supported by substantial evidence in the agency record. The Court should not replace more than 60 years of utility law with a new standard based on entirely different statutory standards as Petitioner advocates. The Court should also defer to the IUB's evaluation of the evidence presented by the parties in hearing, including evaluations as to the relevance of the evidence offered and credibility determinations about the witnesses and testimony offered during the proceeding.

Similarly, the Court should dismiss Petitioner's claims that a request for remand for a determination of eminent domain proceeding invalidates the franchise because the standard is unsupported in statute, rule or previous case law, and is directly contradicted by previous judicial and agency practice on the issue. Finally, the Court should affirm the IUB's application of Iowa Code § 306.46(1) because the statute is facially unambiguous. Further, the Court should find that this unambiguous application is the result intended by the Iowa Legislature to overturn the holding in *Keokuk Junction*, 618 N.W.2d 352 (Iowa 2000), and is not an unconstitutional taking because the legislature expressed its intent that the placement of a utility facility in existing public road right-of-way does not create an additional burden on the servient estate.

I. THE COURT SHOULD AFFIRM THE IUB'S GRANT OF FRANCHISE TO MIDAMERICAN BECAUSE APPROPRIATE CONCLUSIONS OF LAW AND FINDINGS OF FACT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

A. The Standard of Review on Judicial Appeal

Iowa Code section 17A.19(10) governs judicial review of administrative agency proceedings. The review is limited to errors at law. Under Iowa Code chapter 17A, the district court may interfere with the agency's decision if it is erroneous under one of the grounds enumerated in the statute and a party's substantial rights have been prejudiced. *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006). Similarly, the court will reverse or modify the agency's decision if it is not supported by substantial evidence in the record. Iowa Code § 17A.19(10)(f) (2001). Evidence is substantial if a reasonable person would consider it sufficient to support the agency's conclusion. *Id.*; *Northwestern Bell Tel. Co. v. Iowa Utilis. Bd.*, 477 N.W.2d 678, 682 (Iowa 1991).

The court reads the agency's findings broadly and liberally with an eye to uphold the decision rather than defeat it. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 632 (Iowa 2000). The court gives deference to the agency's determinations of credibility. *Broadlawns Med. Ctr. v. Sanders*,

792 N.W.2d 302, 306 (Iowa 2010). Thus, even if the court finds the record could support a different conclusion, the court must affirm the agency's decision if it is supported by substantial evidence. *Northwestern Bell*, 477 N.W.2d at 682; see *S.E. Iowa Co-op Elec. Ass'n v. Iowa Utils. Bd.*, 633 N.W.2d 814, 818 (Iowa 2001).

For judicial review of the IUB's authority to grant an electric transmission line franchise, the Court should utilize Iowa Code § 17A.19(11)(c) and shall give appropriate deference to the IUB with respect to the evaluation of whether the transmission line complies with Iowa Code § 478.4 as a particular matter vested by a provision of law in the discretion of the agency. "In enacting chapter 478, the legislature intended to entrust the [IUB] with the decision whether a public use existed and, if so, the necessity of the proposed line to serve the public use." *S.E. Iowa*, 633 N.W.2d at 819 (citing *Race v. Iowa Elec. Light & Power Co.*, 134 N.W.2d 335, 338 (Iowa 1965)).

B. The IUB Correctly Found MidAmerican's Proposed Transmission Line is Necessary to Serve a Public Use.

As an initial matter, MidAmerican notes that all of Petitioner's arguments were raised before the IUB, and that MidAmerican addressed each of the contentions in its brief, post-hearing brief, and resistance to reconsideration. MidAmerican reasserts all of the arguments contained in those filings and will use this brief to address the most salient arguments repeated by Petitioner in her brief. CR, pp. 423-35, 823-54, 990-1010.

The Court should affirm the IUB's finding that MidAmerican's proposed electric transmission line complies with the first part of Iowa Code § 478.4, which requires that the IUB find that the "proposed line or lines are necessary to serve a public use." The Iowa Supreme Court has unequivocally held since at least 1963 that providing electric service to any customer is sufficient to find a public use. "Much of defendant's argument is devoted to the proposition 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. This is not open to doubt.” *Vittetoe v. Iowa S. Utils. Co.*, 123 N.W.2d 878, 880 (Iowa 1963) (citing *Furnishing Electricity to the Public as Public Use or Purpose for Which Eminent Domain may be Exercised*, 44 A.L.R. 735 (last revised 2020)). The Iowa Supreme Court confirmed this holding two years later: “It is also settled that the transmission of electric current for distribution to the public is a public use for which the power of eminent domain may also be exercised.” *Race*, 134 N.W.2d at 337. Iowa courts have continued to apply this standard upon challenges to the IUB’s findings of public use. *S.E. Iowa*, 633 N.W.2d at 820 (“We have already found the transmission of electricity to the public constitutes a public use as contemplated by section 478.4.”); *see also Bradley v. Iowa Dept. of Commerce*, No. 01-0646, 2002 WL 31882863, at *5 (Iowa Ct. App. Dec. 30, 2002).

It is also well-established that the public use test is satisfied when proposed system changes will meet existing needs and constitute a reasonable effort to meet future needs. *Fisher v. Iowa State Commerce Comm’n*, 368 N.W.2d 88, 98 (Iowa 1985). As the Iowa Court of Appeals elaborated, a public use may be found when the “proposed transmission line is necessary to increase the reliability of the service, accommodate occurring and anticipated load growth, and [to] reasonably assure the availability, quality, and reliability of service.” *Bradley*, 2002 WL 31882863 at *5. These cases make clear: a public use is met when the utility needs to provide service to an existing customer and anticipate future growth. MidAmerican introduced substantial evidence in the record that both conditions are met: Microsoft Corporation (“Microsoft”) has an immediate demand for electric service and all information available to MidAmerican show that additional load growth is imminent.

As an initial matter, Petitioner's contention that the transmission line would only serve Microsoft is simply not supported by the record. In evaluating the evidence, the IUB's Order spends multiple pages addressing the voluminous evidence MidAmerican offered into the record that addresses the anticipated future growth in the area around the substation, in addition to demonstrating Microsoft's current need for the transmission lines to receive reliable service. CR, pp. 905-906; *accord* 199 IAC 20.18 (IUB's rule obligating MidAmerican to provide reliable electric service). MidAmerican offered the testimony of Michael Charleville, a senior engineer in the field of electric system planning, who testified as to the current, short-term, and long-term need for additional electric service to the substation and plans to expand the substation as new load is added. CR, pp. 198-205, 906. Mr. Charleville explained how a customer's distance from a substation can complicate the ability to serve customers through voltage drop-down over distance. CR, pp. 200-205, 906. Mr. Charleville also identified that radially-fed substations (i.e., those with one transmission line feed) are not favored in utility planning because an issue with that one line would lead to all customers taking service from that substation to lose service. CR, pp. 201-202.

MidAmerican offered official records prepared by the cities of Cumming and West Des Moines that identified future development projections and identified that both cities have seen significant population growth in the recent past. CR, pp. 210-211. However, the most effective counterpoint to Petitioner's continued claims that growth is "speculative" is Petitioner's own hearing testimony that the growth in the area is the reason for her subjective property valuation. CR, p. 759. Petitioner provided further evidence at hearing that the City of West Des Moines completed numerous infrastructure projects near Maffitt Lake in anticipation of additional growth in the area. CR, pp. 759-63. As MidAmerican testimony, governmental records, and Petitioner's

own testimony and exhibits all confirm, MidAmerican's proposed transmission line is designed to accommodate an immediate need and anticipated load growth.

Even if Petitioner's unfounded allegation that the transmission line would only serve Microsoft were true, the claim that the line is not for a public use fails. Petitioner's conclusion that Microsoft is somehow not a member of the public is unsupported by either law or fact. As Iowa courts have consistently and frequently held, providing service to a member of the public is a public use. *See, e.g.,* Bradley, 2002 WL 31882863 at *5. To try and avoid that conclusion, Petitioner alleges Microsoft is not a member of the public. Petitioner Brief, p. 8. This conclusory statement is legally and factually wrong. Petitioner cannot point to any rule, statute or case law that treats Microsoft as anything other than a member of the public. Microsoft is a MidAmerican customer like any other residential, commercial, industrial or institutional user of electricity, including Petitioner. Even if there is only one customer in a certain location within MidAmerican's service area, that customer is still considered "the public" and MidAmerican is still required to serve that customer.

This broad definition of the public use test is in harmony with MidAmerican's legal obligations to serve all customers within its exclusive service territory. MidAmerican, as a public utility, has an exclusive service territory in which other electric utilities are not permitted to serve customers. *See* Iowa Code § 476.25 (2021) (describing the establishment of exclusive service areas); *accord* Iowa Code §§ 476.3, 476.8. As a result of this exclusivity, MidAmerican has an obligation to provide service to any customer within that service territory who requests service. *See NextEra Energy Resources LLC v. Iowa Utils. Bd.*, 815 N.W.2d 30, 35-36 (Iowa 2012) (stating that "MidAmerican is obligated to serve all retail electric customers in its exclusive service territory" whereas NextEra "does not have an obligation to serve retail customers"); *accord* Iowa

Code § 476.1(3)(a) (identifying that MidAmerican, as a company that furnishes gas and electric service to the public for profit, is a public utility subject to the jurisdiction of the IUB). In order to meet this legal obligation to serve all customers within its service territory, MidAmerican must be able to actually *provide* service. Accordingly, the public use test is satisfied by a showing that a current customer or reasonably anticipated future customers need service. MidAmerican offered substantial evidence regarding both points in the administrative record.

Petitioner's primary contention is that the Court should replace the long-established and well-supported "public use" standard with an entirely new standard, pulled from a different regulatory regime and wholly inapplicable to the situation before the Court. Specifically, Petitioner asks the Court to read *Puntenney v. Iowa Utilities Board*, 928 N.W.2d 829 (Iowa 2019), to apply not only to determinations of "public convenience and necessity" for a hazardous liquid pipeline under Iowa Code chapter 479B, but to apply to electric transmission lines, which are addressed in Iowa Code chapter 478. Petitioner's Brief, pp. 4-7. Petitioner's reliance on *Puntenney* is misplaced, given that the *Puntenney* court affirmed the IUB's grant of eminent domain to the Dakota Access pipeline as a sufficient public use, although the pipeline offered no service to anyone in Iowa. 928 N.W.2d at 851-52. In effect, Petitioner asked the Court to replace 60 years of precedent with a partial reading of a case that identified that "public use" is a flexible standard. *See Puntenney*, 928 N.W.2d at 851 (identifying that the public use standard is broad enough to include common carriers, like utilities, to exercise eminent domain when the function is "essential to Iowa's economy" and noting "The concept [of public use] is flexible and adaptable to changes in society and governmental duty") (quoting *Transcon. Gas Pipe Line Corp. v. Calco Enters.*, 132 N.C.App. 237, 511 S.E.2d 671, 676 (1999)). Even if the Petitioner's reliance on *Puntenney* wasn't misplaced, the case is still distinguishable because the transmission line proposed by MidAmerican in this

case provides electric service to Iowa customers. *Puntenney*, 928 N.W.2d at 849 (“The Lamb petitioners assert that even if these [economic benefits to Iowa customers] are not enough, no Iowa business or customer will actually use the pipeline to deliver or receive crude oil.”). CR, p. 94. Petitioner failed to identify or discuss any of the applicable case law, much less explain why it is, and the Court should rely on the well-established precedent and not adopt her novel standard of “public use”.

Petitioner also incorrectly asserts that *SZ Enterprises, LLC v. Iowa Utilities Board*, 850 N.W.2d 441 (Iowa 2014) concludes that service to single customer is not a public use. It is a misapplication of *SZ Enterprises* to rely on it in this case. The issue in *SZ Enterprises* was whether a company providing electric service behind the meter to a customer should be considered a public utility for the purposes of regulation by the IUB under Iowa Code § 476.1(3). *SZ Enterprises*, 850 N.W.2d at 443-44. The question in *SZ Enterprises* did not involve the meaning of “public use”, but instead required the court to determine whether SZ Enterprises was a company owning or operating facilities for “furnishing . . . electricity to the public for compensation.” *Id.*; Iowa Code § 476.1(3)(a). As MidAmerican noted when Petitioner introduced this standard in a motion for reconsideration by the IUB, “it is inappropriate and misleading to apply the holding in a case about the definition of a public utility when examining whether the transmission line serves a public use.” CR, p. 992. As the IUB noted in response to Petitioner’s argument on reconsideration:

Simply put, Ms. Petitioner confuses and conflates the “public use” element used for determining whether to grant a franchise under § 478.4 with the “to the public” element for determining whether an entity is a public utility under § 476.1. The definition and purpose of each is dissimilar. Consequently, *SZ Enterprises* provides Ms. Petitioner no assistance.

CR, p. 1028. As the IUB correctly identified, *SZ Enterprises* examines a different question, subject to a completely different statutory regime and for a completely different purpose, none of which

are relevant in any way to the statutes that govern the granting of transmission franchises. *See* Iowa Code § 478.4.

Furthermore, Petitioner concedes that MidAmerican is a public utility and states, “It is true that Petitioner does not contend that MidAmerican is not a public utility.” Petitioner’s Brief, p. 14. The question posed in *SZ Enterprises* relates to a statute that contains neither the same “words and phrases” nor exists within the same statute as Iowa Code § 478.4. For these reasons, *SZ Enterprises* is irrelevant to the question before the Court.

Instead of offering a legal standard or pointing to evidence in the record to show that Microsoft is not a member of the public entitled to electric service, Petitioner makes unsubstantiated claims about Microsoft’s agreement with MidAmerican for the provision of electric service. Petitioner’s Brief, pp. 8-12. Petitioner even states that this arrangement results in MidAmerican double recovering costs associated with the project. Petitioner’s Brief, p. 12. Petitioner’s assertion is not supported by the record or by any provision of law. In fact, MidAmerican’s contract with Microsoft is *specifically required* by IUB rules as a way to protect other customers, including Petitioner, from bearing the costs associated with serving Microsoft. This is contrary to MidAmerican’s routine business practice, which is dictated by IUB rules and is designed to ensure that other MidAmerican customers, including Petitioner, do not bear the costs associated with extending new facilities to new customers. CR, pp. 860-62; *see also* 199 IAC 20.13(3)(c) (setting forth the appropriate requirements for payments in advance of construction for extensions of electrical service lines, like those in this case, based on a three-year base revenue estimate to ensure that customer extension requests not anticipated to pay for the extension within three years must pay a deposit to prevent other customers from bearing the cost).

Petitioner's argument includes conclusory statements, without reference to any law, that MidAmerican should have attempted to dictate where Microsoft should have purchased land and built its facility, nominally to ensure that Petitioner alone was not aggrieved. Petitioner's Brief, pp. 10-11.¹ Contrary to Petitioner's representation to this Court, MidAmerican's agreement with Microsoft is intended to require Microsoft to fund the cost of the needed service upgrades. Petitioner's Brief, pp. 11-12; CR, pp. 860-62. Petitioner goes on to claim that MidAmerican is double recovering from customers and that it is an "excellent business opportunity for MidAmerican." Petitioner's Brief, p. 12. This assertion ignores the fact that all of MidAmerican's rates and charges are established by the IUB after a thorough review and a finding of prudently and reasonably incurred expenses. Petitioner's Brief, p. 12; Iowa Code § 476.6(1). Petitioner claims the line doesn't serve an economic purpose because the costs would ultimately be borne by other MidAmerican customers, but fails to support this claim with any evidence from the record. Accordingly, the Court should reject Petitioner's claim on this issue.

- C. The IUB Also Correctly Found MidAmerican's Proposed Transmission Line Reasonably Relates to an Overall Plan of Transmitting Electricity in the Public Interest and is Not Unduly Injurious to Petitioner.

The second element the IUB must find before issuing a franchise is that a proposed transmission line "represents a reasonable relationship to an overall plan of transmitting electricity in the public interest." Iowa Code § 478.4(2). In order to make this finding, the IUB must consider the following factors:

- (1) The relationship of the proposed project to present and future economic development of the area. (2) The relationship of the proposed project to

¹ Petitioner claims this would "not unduly burden landowners" in general, but Petitioner's references to other landowners are undeveloped claims that other properties are better suited for development. Petitioner's Brief, p. 37 ("MidAmerican treats pasture or acreage ground adjacent to an interstate to be the same value as land used for a multi-million dollar horse farm that has the potential to be developed into high-end executive lots"); p. 38 (arguing the burden of the land would be less along the interstate than Petitioner's property); p. 40 ("While route 2 borders the interstate, route 7 borders a thoroughbred racing operation").

comprehensive electric utility planning. (3) The relationship of the proposed project to the needs of the public presently served and future projections based on population trends. (4) The relationship of the proposed project to the existing electric utility system and parallel existing utility routes. (5) The relationship of the proposed project to any other power system planned for the future. (6) The possible use of alternative routes and methods of supply. (7) The relationship of the proposed project to the present and future land use and zoning ordinances. (8) The inconvenience or undue injury which may result to property owners as a result of the proposed project.

Iowa Code § 478.3(2)(a). Petitioner has not challenged the IUB's findings on factors 1, 2, 4 or 5.

To the extent Petitioner's argument could be seen as a challenge to the IUB's findings on factor 3, MidAmerican addressed those claims as a challenge to the public use as described above. Further, MidAmerican will discuss the record relating to its consideration of alternate routes and methods of supply in the next section of this brief. This leaves two of Petitioner's claims: (1) that the transmission line doesn't comply with current and future land use; and (2) that it is "unduly injurious."

As an attempt to challenge the finding of public interest, Petitioner frequently cites to a response offered by MidAmerican witness Bill Schierbrock about the "spirit" of Iowa Code chapter 478. Petitioner's Brief, pp. 10, 35, 39, 40, 41. Petitioner's only authority for this reliance is a question directed to Mr. Schierbrock about the "spirit" of the chapter. CR, pp. 5-13, 705. Mr. Schierbrock's response to Petitioner's question should not replace the Court's identified purpose of the statute. Indeed, the Iowa Supreme Court has consistently found that the "spirit" of the chapter is to serve the public interest, not to protect private landowners. *See Race*, 134 N.W.2d at 338; *S.E. Iowa*, 633 N.W.2d at 819 ("The underlying purpose of chapter 478 is to serve the public interest."). Petitioner is again asking the Court to replace 60 years of caselaw about the intended purpose of the statute with irrelevant arguments, and the Court should reject that request.

Petitioner's primary argument against the public interest ultimately relies on an allegation that transmission line planning must be done in a least cost manner and that least cost should be

evaluated based on each landowner's subjective valuation of their own property. Petitioner's Brief. Petitioner cannot cite to any authority that would compel the IUB or the Court to require this type of analysis.

Finally, Petitioner contends that the placement of the transmission line would be unduly injurious to her. The standard for evaluating Petitioner's claim comes from Iowa Code § 478.3(2)(a), which requires the IUB to consider the inconvenience or undue injury of a proposed transmission line route. As the IUB found in its Order, MidAmerican offered significant evidence that the line would offer little to no interference or injury, much less undue interference or injury. Order at pp. 22-23. The IUB also noted that while it had previously found situations where a transmission line may interfere with future residential development on an affected property, the record contained no evidence that this line would preclude future residential development. Order at p. 25. Ultimately, Petitioner asks the Court to replace the Board's thorough review of the proposed route's potential for interference or undue injury to landowners. The Court should decline to do so.

D. The IUB Appropriately Considered MidAmerican's Routing Requirements.

The Court should also defer to the IUB's finding that the route offered by MidAmerican not only complies with Iowa Code § 478.18(2), but also appropriately demonstrates MidAmerican's evaluation of alternative routes as required by Iowa Code § 478.3(2)(a)(6). MidAmerican offered route selection studies for both segments that identified multiple potential routes and compared the routes on numerous factors in a forced-ranking list. CR, pp. 110-148.

Petitioner's argument against MidAmerican's route selection process is wide-ranging, but offers little more than conclusory statements that the planning process was incorrect. Ultimately, Petitioner cannot point to any statute, rule or case to support these claims of error and cannot

identify any support for her primary claim that any planning must consider the landowner's subjective valuation of their property as a required element of compliance with Iowa Code, rule or case law. The primary contention in Petitioner's brief related to the route selection is that the IUB incorrectly concluded MidAmerican's selection of Route 7 was unreasonable compared to Route 2. Petitioner's Brief, pp. 39-40. Petitioner's argument on this point goes directly to the IUB's legislatively-delegated authority to consider the evidence offered by the parties and to determine whether MidAmerican's proposed route is reasonable. Ultimately, the IUB agreed with MidAmerican that Route 7 is reasonable and does not unnecessarily interfere with Petitioner's use of the property. CR, pp. 914-17, 919-23.

Petitioner has not offered any evidence or legal standard that would render MidAmerican's evaluation of alternative routes insufficient to comply with Iowa Code § 478.3(2)(a)(6), Iowa Code § 478.18(2) or past IUB decisions. The Court should recognize the substantial evidence in the record to support the IUB's findings on the route study matter and should reject Petitioner's argument on this point.

E. The Court Should Defer to the IUB's Findings on the Relevance of Evidence and Credibility of the Witnesses.

In a judicial review proceeding, the Court should give deference to the credibility determinations of the presiding officer. *Broadlawns Med. Ctr. v. Sanders*, 792 N.W.2d 302, 306 (Iowa 2010). The Court should also defer to the agency's explanation of why the relevant information in the record supports its material findings of fact. *Id.* "In our evaluation of the evidence, we focus not on whether the evidence would support a different finding than the finding made by the [agency], but whether the evidence supports the findings actually made." *Id.* (citing *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006)).

As part of the proceeding, MidAmerican offered relevant testimony from expert witnesses trained and employed in public utility system planning and high voltage engineering to explain how utility systems are planned, to address how utilities work with customers within the confines of the rate-regulatory tariff system to make system expansions, and to discuss the engineering constraints associated with electric transmission planning. CR, pp. 198-212, 226-237. Petitioner offered opinions and assertions that were either confusing or contrary to fact. For example, Petitioner's brief states that projections of future development are "ad-hoc" generalizations, yet Petitioner asserts that her land is unusually valuable because, in part, "the [] expansion that's happening through the City of West Des Moines and now to the west from the City of Norwalk and the City of Cumming, I anticipate that to come my direction quicker than anticipated." CR, pp. 8-12, 752. The Court should defer to the IUB's evaluations of the credibility of the witnesses and testimony offered at hearing, and should not substitute its own evaluation of the record when the decision is supported by substantial evidence.

F. The IUB Dissent is Wrong as a Matter of Law and Should Not be Relied Upon to Overturn the Agency Decision.

Petitioner effectively asks this Court to replace the IUB's analysis of the route study with the conclusions reached in the dissent. Petitioner's Brief, pp. 42-43. As MidAmerican explained in its resistance to Petitioner's request for rehearing, the IUB should not overturn its decision in reliance on the dissent because the dissent is fundamentally flawed in both its reasoning and conclusion. CR, pp. 996-1003. MidAmerican reasserts all of the arguments contained therein and will specifically highlight a timing error in the dissent that speaks to the issue raised in Petitioner's brief and the fundamental failures of the dissent overall.

Petitioner relies on the dissent's notion that MidAmerican "focused almost entirely on Route 7" and "did not contact landowners along alternative routes." Petitioner's Brief, pp. 36-37

(citing CR, p. 942). It is accurate that MidAmerican did not contact landowners along alternative routes, but that is because both Iowa Code and IUB rules specifically require a utility to propose a single route when seeking approval of a transmission line franchise, and because the utility may not speak with landowners until the route is selected. CR, pp. 997-98; Iowa Code § 476.2.

Iowa Code § 478.2(2) requires a utility to conduct an informational meeting at least 30 days before it may file a petition for a transmission line franchise. Before the informational meeting, a utility must provide notice of the proposed transmission line to potentially affected landowners along the route. Iowa Code § 478.2(3). As part of the notice, the utility has to offer “a map showing the route of the proposed project.” Iowa Code § 478.2(3)(a)(6). Finally, Iowa Code § 478.2(4) states that a utility “shall not negotiate or purchase any easements or other interests in land in any county known to be affected by the proposed project prior to the informational meeting.” These statutes make the process clear: MidAmerican must select a single route for its proposed project months before filing a petition and before initiating any conversations with landowners. MidAmerican’s focus on a single route, which had to be selected even before MidAmerican offered notice to potentially affected landowners, is the standard required by law. Similarly, MidAmerican is specifically prohibited by Iowa Code § 478.2 from initiating the kinds of conversations the dissent contemplates. MidAmerican urges the Court to recognize that compliance with the law is not a failure of due diligence, as the dissent concludes.

II. THE IUB CORRECTLY APPLIED IOWA CODE § 306.46(1) IN FINDING THAT EMINENT DOMAIN IS NOT NECESSARY TO PLACE A UTILITY FACILITY IN PUBLIC ROAD RIGHT-OF-WAY.

A. The IUB Correctly Applied the Facially Unambiguous Meaning of Iowa Code § 306.46(1).

MidAmerican previously has offered multiple, lengthy analyses discussing the IUB’s appropriate application of Iowa Code § 306.46(1). CR, pp. 873-885, 1004-08. For the sake of

brevity here, MidAmerican generally reasserts the arguments previously made, but will reiterate one primary point: the IUB appropriately applied Iowa Code § 306.46(1) in this case to effect the legislative intent of the statute.

When interpreting a statute, the courts begin with the language of the statute at issue. *Doe v. State*, 943 N.W.2d 608, 610 (Iowa 2020). The court considers whether the language of the statute is ambiguous. *State v. Richardson*, 890 N.W.2d 609, 616 (Iowa 2017). “If the language is unambiguous, our inquiry stops there.” *Id.* “A statute is ambiguous if reasonable minds can differ or are uncertain as to the meaning of the statute.” *Id.* (quoting *Rhoades v. State*, 880 N.W.2d 431, 446 (Iowa 2016)). To consider whether a statute is ambiguous, the court considers the statute as a whole and considers the context of the language of the statute. *Id.* “The objective of statutory interpretation is to determine the legislature’s intent in passing the statute. *Myria Holdings Inc. v. Iowa Dep’t Revenue*, 892 N.W.2d 343, 348 (Iowa 2017).

Iowa Code § 306.46(1) is not ambiguous because there is no room for reasonable minds to differ on what the statute permits or what it means, especially because any potentially unambiguous terms are already defined at Iowa Code § 306.46(2). Petitioner’s arguments, including the reliance on *NDA Farms* and the dissent, are misplaced because none of them correctly begin with this step and instead immediately assume an ambiguity. *See generally NDA Farms, LLC v. Iowa Utils. Bd.*, No. CVCV009448, 2013 WL 11239755 (Polk Co. Dist. Ct. June 24, 2013). Further, the analysis of the statute offered by *NDA Farms* and the dissent are deficient because they assume the legislature could not have meant what the statute states, rely on incomplete applications of canons of construction, and incorrectly assume that the legislature actually meant the statute to apply to new easements acquired after 2004, without any evidence to that end in the statute. CR, pp. 1005-08. Finally, these analyses fail to consider their flawed

readings of the statute as part of the larger statutory regime and how their interpretations effectively render the statute meaningless. CR, pp. 875-77.

- B. Iowa Code § 306.46 (1) Clearly Stands as a Legislative Response to *Keokuk* and a Determination that Utility Facilities are not an Additional Burden on the Servient Estate to a Public Road Right of Way.

The IUB's application of Iowa Code § 306.46 also addresses another significant flaw in the *NDA Farms* analysis; namely, the assertion that the only way the legislature can abrogate a court ruling is by specific reference to the case to be corrected. *NDA Farms*, 2013 WL 11239755, at *10. The Iowa Supreme Court's primary discussion regarding the placement of public utility facilities in public road right of way comes from *Keokuk Junction Railway Co. v. IES Industries, Inc.*, 618 N.W.2d 352 (Iowa 2000). In *Keokuk*, the Iowa Supreme Court found that when a city exercises the right of eminent domain to take a public road right of way and the terms of the right of way do not specifically contemplate the placement of utility facilities, the city does not have the right to permit placement of utility facilities within the terms of the right of way. *Id.* at 354-55, 362-63. As part of the *Keokuk* analysis, the Iowa Supreme Court considered a broad survey of how other states had addressed the issue. *Id.* at 356-58.

In particular, the *Keokuk* court rejected the approach accepted by Alaska, Florida, Minnesota, and Washington that the placement of utility facilities in public road right-of-way does not create an additional burden on the servient estate that would require additional compensation to the servient estate owner. *Id.* The court rejected this approach for Iowa because the Alaska approach relied on specific statutory direction to that end. *Id.* The court stated that "no such provision exists in Iowa" and that "without the aid of such legislation, we are clearly not prompted to make the same decision." *Id.* at 357.

The legislature specifically changed this circumstance in 2004 with the passage of Iowa Code § 306.46. *See* 2004 Iowa Acts, ch 1014, § 1, 2 (codified at Iowa Code § 306.46). Indeed, the language of Iowa Code § 306.46 closely tracks the Alaska statute discussed by the *Keokuk* court. *Compare* Iowa Code § 306.46 and Alaska Stat. § 19.25.010 (1980). This statute can truly only be understood as an abrogation of the Iowa Supreme Court’s determination in *Keokuk*; any other reading would render the statute so narrowly as to render it moot. CR, p. 881.

III. THE COURT SHOULD DISMISS PETITIONER’S CLAIMS REGARDING MIDAMERICAN’S MOTION FOR STAY AND LIMITED REMAND.

Petitioner alleges that MidAmerican’s request for remand to the IUB for an evaluation of the right of eminent domain requires the Court to reverse the IUB’s order. Petitioner’s Brief, pp. 27-32. This argument is without merit. First, MidAmerican notes that Petitioner cites to no statute, rule, previous case law, previous IUB ruling or any authority of any sort to support this claim. Instead, Petitioner devotes multiple pages of the brief to conclusory statements. The primary “evidence” Petitioner offers in support for this unfounded claim is a passage from the Board’s Order that reads: “In the event Ms. Petitioner is correct in her argument that MidAmerican lacks the easements necessary for Route 7 . . . then the lack of all necessary easements will serve as a basis to deny MidAmerican’s request for a franchise covering the east segment, and [Petitioner’s argument that MidAmerican must exercise the right of eminent domain] is moot.” CR, pp. 915-16.

Read in the context of the Order, it is clear this statement does not support Petitioner’s claims. First, it is a summary of Petitioner’s own argument on the issue, as are the preceding paragraph and following paragraph in the Order. CR, pp. 915-16. The IUB makes clear two paragraphs later that this summary is not a conclusion of law or finding of fact: “Specifically, Ms. Petitioner asserts MidAmerican lacks the necessary easements to construct, operate and maintain

in the area bordering to the east of Ms. Petitioner’s property, and that such a line would significantly reduce the value of her property. *Ms. Petitioner’s contentions will be discussed as part of the route discussion below.*” CR, p. 917 (emphasis added). Indeed, the IUB addresses the argument eight pages later, again summarizing Petitioner’s claims and stating how it views the question in petition process: “The Board cannot approve a franchise for a route in which the petitioner possesses no right to install, operate, and maintain transmission line.” CR, p. 924. The IUB’s actual conclusion on this matter, after an evaluation of MidAmerican’s claim that Iowa Code § 306.46(1) provides the necessary possessory right, is that “MidAmerican may construct, operate, repair, or maintain the transmission line in the public road right-of-way.” CR, p. 932. As the IUB Order makes clear, Petitioner’s argument that the request for eminent domain would be a fundamental part of original petition is a clear misrepresentation of the agency record.

Second, the primary authority Petitioner relies upon for its analysis of Iowa Code § 306.46, *NDA Farms v. Iowa Utilities Board*, actually resulted in the very procedural remand to the IUB for the purpose of determining the correct right of eminent domain that Petitioner now alleges cannot be done. 2013 WL 11239755 at *11.² Even more confusing on the question of remand is the fact that Petitioner requests this very remedy three times in the initial petition. Petition, pp. 7-9 (requesting the Court to order MidAmerican “re-petition the Iowa Utilities Board for proper eminent domain authority over Petitioner’s property” or “commence proceedings before the appropriate county compensation commission”, which can only be done after the power of condemnation is granted by the IUB). Upon remand, Ames offered a revised petition seeking the

² “Section 478.6 provides that upon the issuance of a franchise, Ames may be vested with the power of condemnation to procure the required easement. The IUB, through the errors described above, failed to describe the extent to which Ames is vested with the power of condemnation for the property in question. . . . [t]he court finds that a limited remand is necessary only for the IUB to consider and provide the extent to which Ames is vested with the power of condemnation to procure property rights sufficient to construct the transmission line in Polk County. . . . [r]emand is limited only to the Consideration and determination of the power of condemnation vested in Ames.”

right of eminent domain that was approved by the IUB and initiated the appropriate compensation procedures. *N.D.A. Farms, LLC v. City of Ames through Ames Mun. Elec. Sys.*, 899 N.W.2d 739 (Table), 2017 WL 935067 at *1 (Iowa Ct. App. 2017). Petitioner's claims that MidAmerican's request for limited remand on this issue are purely conclusory and unsupported by any reference to any law or previous practice and, accordingly, should be denied by this Court.

IV. CONCLUSION

MidAmerican's transmission line clearly serves a public use and represents a reasonable relationship to a plan of transmitting electricity in the public interest. The IUB's grant of a franchise is well within the IUB's authority and expert discretion, and there is no legal or factual basis for the Court to disturb the IUB's decision. MidAmerican respectfully requests that this Court affirm the IUB's grant of franchise to MidAmerican as an appropriate application of the law to facts established by substantial evidence in the record.

Respectfully submitted,

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