IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

LINDA K. JUCKETTE, *Petitioner*, v. **IOWA UTILITIES BOARD**, *Respondent*.	**CASE NO. CVCV061580** **BRIEF OF *AMICUS CURIAE* OF THE IOWA ASSOCIATION OF ELECTRIC COOPERATIVES**

COMES NOW, the Iowa Association of Electric Cooperatives ("IAEC"), as *Amicus Curiae*, and hereby submits this Brief (this "Brief"), by and through the undersigned counsel.

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INTEREST OF AMICUS CURIAE

The Iowa Association of Electric Cooperatives ("IAEC") represents Iowa's consumer-owned electric cooperatives, serving over 650,000 Iowans throughout all ninety-nine counties in the State of Iowa. Formed in 1942, the IAEC is a trade association whose aims include unifying and empowering Iowa's rural electric cooperatives through legal and legislative representation, regulatory oversight, training and education services, safety programs, and communications support and advocacy.

An important function of IAEC is to represent the interests of its members in matters before the courts and administrative agencies. To that end, IAEC regularly participates as *amicus curiae* before Iowa courts on issues that affect IAEC's membership and utility-related issues generally. *E.g.*, *Kragnes v. City of Des Moines*, 714 N.W.2d 632, 633 (Iowa 2006) (noting IAEC as *amicus curiae* in utility-related litigation); *Martins v. Interstate Power Co.*, 652 N.W.2d 657, 658 (Iowa 2002) (same); *Hawkeye Land Co. v. Franklin Cnty. Wind LLC*, Case No. 12-1568, 2013 WL 2371355, at *1 (Iowa Ct. App. May 30, 2013) (same). The issues presented in this litigation impact IAEC's membership. Therefore, this Court should take into consideration the unique viewpoints, information, and arguments hereby submitted by IAEC in this Brief. *See* IOWA R. APP. P. 6.906(4)(a)(3).

CERTIFICATE OF AUTHORSHIP

This Brief was authored in whole by the undersigned counsel on behalf of the above-captioned party. No other counsel or party contributed, in whole or in part, to the authorship or funding of this Brief. *See* IOWA R. APP. P. 6.906(4)(d).

INTRODUCTION

While this case is about a dispute between an investor-owned utility, MidAmerican Energy Company ("MEC"), and a private property-owner, Linda K. Juckette ("Juckette"), ***make no mistake***: This case clearly and obviously has implications for the electric energy sector as a whole in the State of Iowa. The questions of law involved in this case will impact thousands of Iowans that rely on dependable and affordable rural electric service to their homes and businesses every day.

In between all of the arguments the Court will hear in this case about property rights and statutory and constitutional law, lies a fundamental practical issue that is often forgotten: When someone uses electricity, where does it come from and how does it get there? For example, when a homeowner flips the switch to turn their lights on in the kitchen, how and why does the light bulb illuminate? When a small business owner flips the switch to turn the lights on at the opening of the market, how and why does the shop lighting illuminate? When a doctor switches on life-saving medical equipment during an emergency, it is expected that the electricity will flow as needed. How and why does that life-saving electric-powered machine function? Or, perhaps more apt, when a judge or court official needs a computer to access electronic filings in cases like this, they rightfully expect that the computer will turn on and that the electronic filing system they are seeking will function. What makes that possible?

All of these situations would not be possible without electricity and the necessary infrastructure that allows a power provider to deliver that electricity to the end user. Often times, that electricity is delivered through power lines that are placed, in whole or in part, in the public right-of-way. This is especially true in rural areas, where the delivery of electricity to more isolated locations, such as farms, small towns, and rural communities, often requires double utilization of

public right-of-ways as pre-existing and efficient pathways from points A to B to move electric currents.

In sum, there is more to this case than any single utility company or land owner. The use of public right-of-way lines across Iowa is of broad social and economic concern. *Amici* believes that placing these issues in careful context is crucial to the Court reaching the right result in this case. *Amici* requests that the Court consider the following:

ARGUMENT

I. THE COURT'S DISPOSITION OF THIS CASE WILL HAVE IMMEDIATE AND TANGIBLE IMPACTS ON IOWA'S RURAL ELECTRIC COOPERATIVES.

Iowa's rural electric cooperatives ("RECs") own, maintain and operate approximately 65 thousand miles of electric lines throughout the State of Iowa. Many of those lines rest within the public right-of-way. Given the multitude of these public right-of-way lines, any impact on their regulation is of paramount concern for how the RECs provide electricity to their predominantly rural consumers. Although the RECs do not have a specific interest in the precise property at stake in this case, the legal holding in this case will have far reaching implications for RECs nonetheless.

A. THE HISTORY OF RECS IS CRUCIAL TO UNDERSTANDING THIS CASE.

The first modern electric generation and transmission project in the United States that served street lighting and homes was in New York City in 1882. *See* Richard A. Pence, THE NEXT GREATEST THING 10 (1984) (hereinafter "Pence"). This began what some have called "America's and the industrial nations' charge into the 20th century on a trip propelled by electricity." *Id*. By the dawning of this new "American Century," lights glowed in nearly every major city, but that was not so for every small town, village, and hamlet in rural America. *Id*. For the rural people of America,

> [they] did not know electricity. They were told that, for them, it was not a commercial proposition. There was no profit in it. And because there was no profit, there were no lights for rural people. Sadly, what electricity did for them was to illuminate the difference between the urban population and the rural population.

Id. "Because there was no electric connection…a great gulf developed. Two nations, two classes, two centuries: One of light, and one of darkness. One 'backward,' one 'enlightened.'" *Id*.

The growing disparities between rural and urban lifestyles due to either the lack of, or advantage of, widespread electric power was essentially determinative of the economic viability of every locality in question. The ability to provide electricity (or not) in this era became so stark that in 1908, President Theodore Roosevelt commissioned a federal task force to study how farms and rural areas might be better served by electrification. *Id*. at 40. What resulted from that task force was the Country Life Commission Report of 1909, which is considered "the first official expression of federal concern over the need to electrify rural areas." *Id*. It is this report that birthed the idea of innovative new "associative efforts" — read: cooperatives — to "have for [their] object…the extension of electric lines…and other forms of betterment." Prof. L.H. Bailey, COUNTY LIFE COMMISSION REPORT 58 (Feb. 1909).

The idea behind this new "associative efforts" conception was to take the traditional economic profit motive that acted as a practical bar to rural electrification and dilute its influence in the real world application of the problem presented. After an additional 26 years of studying the issue, President Franklin D. Roosevelt signed the Rural Electrification Act of 1936 ("REA"). *See* 7 U.S.C. §§ 901, *et seq*. This law explicitly encouraged and gave federal loan preferences for "States, Territories, and subdivisions and agencies, thereof, municipalities, people's utility districts, ***and cooperative, nonprofit or limited dividend associations***" whose mission it was to bring electricity to those remote areas where traditional, for-profit enterprise had declined to do so. Pence, at 66 (emphasis added). It is from this history that the modern REC system was born.

B. THE USE OF PUBLIC RIGHT-OF-WAYS BY RECS TO PROVIDE ELECTRICITY HAS BEEN COMMON FOR NEARLY 100 YEARS.

"At the outset of the electric program, the REA did not approve use of funds to purchase rights-of-way over farmlands." *Id*. at 87. This presented an obvious challenge: sure, RECs were now formalized in the law, but as a matter of simple wrangling and difficult geography, the earliest "co-op organizers had to obtain thousands of easements across property, each one signed by the owner." *Id*. For "[s]ome idea of the size of this task," it took five years for the first REC organizers in America to collect the first one million easements — just easements, ***not*** electricity-using customers. *Id*. At the time, America had well over six million rural farms alone, not counting non-farm homesteads, small towns, and remote businesses. *Id*. at 61. In other words, the progress to electrify rural America was initially a slow endeavor.

To get around this problem, RECs started utilizing an infrastructure that dated well before the advent of electric power itself: public rights-of-way, such as county roads, farm-to-market routes, and the like. This made obvious sense because most of the rural population, by necessity, had to live near a road to be able to travel to and from their farmhouse to the closest nearby town to obtain supplies, or near a road that would lead to a market where the agricultural goods produced on the farm could be sold. *See id*. at 89 (providing early diagrams of REC lines running in tandem with "public roads."). Under the first iteration of the REA, the federal government required at least three hook-up points per mile in order for a cooperative to be authorized to operate. *Id*. at 87.[1] The best and most efficient way to meet this threshold was to overlay power lines across the most common routes where people lived; that is, by the most widely utilized rural public roads.

[1] This rule has since been liberalized by Congress. *See* Pence, at 87.

So common was this practice of using pre-existing public rights-of-way for the provision of electricity to the underserved rural population that there are documented cases of rural farmers ***literally moving their houses — foundation and all — closer to the public roads*** in order to get a hook-up line for electric energy. *Id*. at 87. It was this practice by the early RECs that helped create economic and practical efficiencies that dampened the problem of easement-by-easement gathering and eventually resulted in what we all see so commonplace today: Rural public roadways flanked by utility poles and high-line cables.[2]

C. UNDERMINING THE ABILITY TO USE PUBLIC RIGHT-OF-WAYS FOR PROVIDING ELECTRIC SERVICE WOULD SEND SHOCKWAVES THROUGH THE IOWA UTILITY COMMUNITY.

As stated above, RECs and their pervasive use of public rights-of-way to establish rural electrification have a long and consequential history. While the codification of this concept is

[2] Currently, all fifty states and the District of Columbia have some form of a statute or regulation regarding a utility's use of public right-of-ways. *See*, *e.g*., ALA. CODE §§ 11-43-62 and 11-50-B-3; ALASKA STAT. § 38.05.810(e); ARIZ. REV. STAT. §§ 9-581 through 9-583; ARK. CODE ANN. § 14-200-101; CAL. PUB. UTIL. COMM'N, Dec. No. 98-10-058, No. R. 95-04-043 (Filed Apr. 26, 1995); COLO. REV. STAT. §§ 38.5.5-101 through 38-5.5-108, and 38-5.5-104); CONN. GEN. STAT. § 16-228; DEL. CODE tit. 22, § 103 and tit. 26, § 901; D.C. CODE §§ 10-1141.03 and 43-1454(a); FLA. STAT. Ch. 202.10 through 10-202.41; GA. CODE §§ 32-4-92 and 46-5-1(a); HAW. REV. STAT. § 264-13; IDAHO CODE §§ 62-701 and 62-701A(2); 35 ILL. COMP. STAT. 635/5 and 625/10(b); IND. CODE § 8-1-2-101(b); IOWA CODE §§ 306.46 and 477.1; KAN. STAT. § 17-1902(B); KY. REV. STAT. § 278.540; LA. REV. STAT. §§ 33:4401, 48:381.1(C), and 48:381.3(A)(2); ME. REV. STAT. tit. 35-A §§ 2502 through 2507, and 2307; MD. CODE art. 23A, § 2; MASS GEN. LAWS ch. 166, § 25 and 25A; MICH. COMP. LAWS §§ 484.3101 through 484.3120; MINN. STAT. § 237.04; MISS. CODE § 21-27-1; MO. REV. STAT. § 67.1832; MONT. CODE §§ 7-3-4449, 7-3-2220, and 69-4-101; NEB. REV. STAT. § 86-704(1); NEV. REV. STAT. §§ 707.250 and 707.280; N.H. REV. STAT. § 231:161, I(a)-(c); N.J. STAT. §§ 48:5A-20(a) and 48:17-11; N.M. STAT. §§ 3-42-2A and 19-7-57; N.Y. GEN. CITY LAW § 20. N.Y. GEN. VILLAGE LAW § 4-412, N.Y. TOWN LAW § 64, and N.Y. TRANSP. CORP. LAW § 27; N.C. GEN. STAT. §§ 62-39 and 62.182; N.D. CENT. CODE § 49-09-16; OHIO REV. CODE § 4939.01 through 2939.09; Okla. Const. art. IX, § 2, Okla. Stat. tit. 11 § 36-101, and Okla. Stat tit. 18, § 601; 71 P.A. CONS. STAT. § 194; R.I. GEN. LAWS §§ 37-7-8 and 39-17-1; S.C. CODE §§ 58-9-2240 and 58-12-10; S.D. CODIFIED LAWS §§ 49-7-22 and 49-32-1; TENN. CODE §§ 65-21-103 and 65-21-201; TEX. LOC. GOV'T CODE §§ 203.001, 283.002, UTAH CODE §§ 54-4-25 and 72-7-102; V.T. STAT. tit. 19, § 1111(a) and tit. 30, § 2502; V.A. CODE §§ 56-458 and 566-462; WASH. REV. CODE §§ 35.99.020 and 35.99.040; W. VA. CODE §§ 8-31-1, 8-31-2, and 17-4-8; WIS. STAT. §§ 62.14(6)(b), 196.58, and 196.499(14); and WYO. CONST. art. 10, § 17, WYO. CONST. art. 13, § 4, and WYO. STAT. § 15-1-103.

comparatively recent, *see* IOWA CODE § 306.46(1), the practice is longstanding. It uniquely and smartly creates efficiencies not obtained by seeking individual easements on a case-by-case basis, deters the use of traditional eminent domain of purely private property, and it makes feasible the enterprise of serving the underserved with reliable energy possible where it otherwise may not be. The Iowa Legislature certainly had this in mind when it enacted IOWA CODE § 306.46 in 2004. *See* Iowa Acts 2004 (80th Gen. Assembly), ch. 1014, § 1 (formerly SF2118) (eff. Mar. 29, 2004).

Petitioner in this case argues that IOWA CODE § 306.46 is unconstitutional. If this position is accepted by the Court — and *Amici* argues it should ***not*** be — any IAEC member cooperative facilities installed within the last decade and a half in reliance on IOWA CODE § 306.46 would be impacted and potentially impaired. Such a ruling would harm the edifice upon which much of the historical and current REC model is based, putting the economic and practical operations of RECs at existential risk. The costs to legally retrofit existing REC facilities placed in public right-of-ways after doing so for years and years would come at a ruinous cost. Resolving potential disputes that would spring from such projects long thought to be permissible would certainly cost well into the millions of dollars, not to mention the increased costs that would be automatically tacked on to future projects in increased timelines and overhead for the location, design, construction, maintenance, and repair of new REC power lines going forward.

In other words, how the Court rules in this case could very well determine whether or not Iowa, as a State, will have to revisit the same morass of problems that delayed and hampered the electrification of rural America in the early days seemingly thought to be over. Prohibiting the use of public right-of-ways for the provision of basic electric services could mean that rural Iowa homes, businesses, cities — and yes, even courthouses — may struggle to find any actor willing and able to provide reliable and affordable electricity. There is no need to take such a backwards

step. *Amici* encourages the Court to take into consideration this history and the potential practical effects of disregarding it when ruling in this case.

II. THE COURT'S DISPOSITION OF THIS CASE WILL HAVE IMMEDIATE AND TANGIBLE IMPACTS ON CONSUMERS OF COOPERATIVE ENERGY.

If the Court sides with the Petitioner, it will not just be the ***business*** of the RECs that will be negatively impacted, it will be the ***membership*** of the RECs as well. Cooperative organizations are not nameless, faceless entities that simply illuminate lightbulbs and hang power lines on poles. Cooperatives are fundamentally membership organizations made up of real individual electricity users, be they people, businesses, or public entities. Thousands of these members receive electricity though REC facilities placed in public right-of-way.

If this Court concludes that electric utilities cannot be placed in public rights-of-way under the current practices as we now know them, the costs incurred by the RECs in developing a new business model less reliant on the use of electric lines in public right-of-ways will necessarily have to be passed on to the end-user consumers across the RECs' memberships. *Cf Comes v. Microsoft Corp*., 696 N.W.2d 318, 325 (Iowa 2005) (explaining how "increased costs will ultimately be passed on to the consumer" as rule of simple "economics."). This, at a minimum, will effectively impose a *de facto* tax that will fall heavily upon rural electricity users. Or, in some cases, could lead to RECs being reluctant to extend facility coverage to new prospective member-consumers where it may be difficult — if not outright impossible — to connect service without using the efficiencies provided by public right-of-ways.

After all, as the history of electrification in rural America shows, and this case itself illustrates, even the noblest electrification projects can be scuttled by "hold out" land owners who refuse to sign easement documents. *See* Pence, at 82 (describing the "hold out" landowner conundrum). *See also In re Marriage of Kolpek*, Case No.11-0745, 2012 WL 299512, at *3 (Iowa

Ct. App. Feb. 1, 2012) (considering a "hold out scenario" and its negative implications); John Fee, *Eminent Domain Use & Abuse:* Kelo *In Context* § 6.III (Feb. 2006) (discussing the "hold out problems" that arise when there "are important public interests" pitted against property rights, and identifying "utilities" as a common example).

Put simply, how the Court rules in this case will reverberate beyond the bank accounts of the RECs as businesses, it will impact (directly or indirectly) the pocketbooks of everyday Iowans in all ninety-nine counties.

III. THE OUTCOME OF THIS CASE COULD HAVE IMPACTS WELL BEYOND ELECTRICITY IN RURAL AREAS. IT COULD ALSO HURT THE EXPANSION OF BROADBAND AND FUTURE UTILITY EXTENSIONS.

The implications of this case stretch well beyond the provision of simple electricity lines. In today's global and interconnected economy, there is a pressing need to meet the interests of those who need to connect into, and reach out to, the global economy and information pipeline. *See* Gov. Kim. K. Reynolds, EXEC. ORDER NO. 3 (Jul. 18, 2018) (Establishing the "Empower Rural Iowa Initiative," whose mission is, in part, to further the "connecting rural Iowa" effort of providing and expanding high-speed internet broadband access across the State). This is most effectively and practically done through making fast, reliable, and affordable broadband internet available to the rural areas who otherwise would not have it. *See, e.g., In re Nat'l Broadband Plan and State Broadband Deployment Plan*, Dkt. No. NOI-2010-0002, 2010 WL 3377936, at *1 (Iowa U.B. Aug. 25, 2010) (referring to government reports "encourag[ing] targeted investment in broadband infrastructure, and emphasiz[ing] the importance of broadband in the future of [certain] programs….that would support broadband communications in areas that would remain unserved without support of which depend on universal support service to maintain existing service.").

Some Iowa RECs have already explored entering the market for the provision of such broadband services, to be marketed and provided alongside their already-existing electrical provision services facilitated by existing line routes. *E.g.*, *In re Allamakee-Clayton Electric Cooperative, Inc.*, Dkt. Nos. ETA-2015-0001, WRU-2015-0006-0901, 2015 WL 996836, at *1-2, 4 (Iowa U.B. Mar. 5, 2015) (involving an Iowa REC "provisionally selected to participate" in a broadband expansion program using its existing networks of electricity line locations with the "goal of developing voice and broadband networks in rural, high-cost areas and ensuring that rural customers benefit from innovations in technology."). The key to viability of these non-electric, but electric-adjacent, rural services is the ability of utilities to use "existing networks" and to "improve" them to increase "service quality for residents of underserved areas in rural Iowa." *Id.* at *4. In other words, RECs' already-established electric provider systems are a natural, efficient, and economical fit for the provision of broadband and new technology in the most remote — but underserved — areas of this State. *See id.* at *4-7.

Many of the rural REC "networks," such as those involved in the *Allamakee-Clayton* case, have already been placed in public right-of-ways. They have been targeted and favored specifically for their existing operational capacity and physical locations in such areas. If this Court rules in a manner that undermines the use of public right-of-ways for utility usage, then not only will there be a risk of electricity provision disruptions, but there most certainly will be a risk of broadband internet and similar service disruptions (or outright failures of service) in rural, underserved areas as well. The REC model for providing broadband is inescapably tied to existing networks that can be used to "piggyback" diverse services beyond electricity. If the electricity service options in public right-of-ways fall away through Court order, so too does the ability of providing high-speed, reliable, and affordable broadband internet through attachments to electric

utility poles in public right-of-way. A commodity and service that, if the recent pandemic has taught us anything, is vital for business transactions, remote learning for school children, and simple interpersonal communications with loved ones.

This Court would be prudent to carefully evaluate the costs and benefits of any ruling that might place these aims meant to "empower rural Iowa" in jeopardy. *E.g.*, Gov. Kim. K. Reynolds, EXEC. ORDER NO. 3 (Jul. 18, 2018); GOV.'S EMPOWER RURAL IOWA INITIATIVE, *Initial Task Force Recommendations*, at p. 7 (Dec. 18, 2018) (highlighting the role of connectivity and discussing the encouragement and partnerships with "rural electric cooperatives").

IV. THE TRANSMISSION OF ELECTRICITY FOR USE BY THE PUBLIC CONSTITUTES A PUBLIC USE.

Petitioner spends considerable time in its filing discussing the meaning of "public use" under Iowa constitutional and statutory law. *See* Pl.'s Opening Brief, pp. 3-15. While such briefing is informative to the extent it touches upon anything, this part of Petitioner's brief misses crucial components of settled law. While Petitioner notes that words and phrases, such as "public use," used within certain interrelated legal provisions are presumed to mean the same thing throughout the law unless otherwise noted, *see id.* at pp. 5-6, Petitioner's counsel fails to recognize or even cite relevant precedent concerning the term "public use" in the franchise context. The Iowa Supreme Court has long held that the distribution of electricity to the public is a public use. *See*, *Vittetoe v. Iowa Southern Utilities Company*, 255 Iowa 805, 123 N.W.2d 878 (Iowa 1963).The Petitioner attempts to argue that the transmission lines at issue in this case are only necessary to serve one customer (Microsoft). (Petitioner's Brief p. 8). Assuming this were true, which IAEC does not admit, the Petitioner contends the transmission lines are for private and not public use. However, Microsoft is no less a member of the public than any other electric utility customer. It is

settled law that the transmission of electric current for distribution to the public is public use. *Race v. Iowa Electric Light and Power Co.*, 257 Iowa 701, 134 N.W.2d 335 (Iowa 1965).

A. THE TERM "PUBLIC USE" FOR PURPOSES OF OBTAINING A FRANCHISE DOES NOT NECESSARILY REQUIRE CONSIDERATION OF THE CONSTITUTIONAL MEANING OF "PUBLIC USE" IN THE CONTEXT OF AN EMINENT DOMAIN REQUEST.

Petitioner acknowledges in her brief that there could be two separate standards for "public use" - one relating to obtaining a franchise and the other relating to the grant of eminent domain. (Petitioner's brief p. 5). However, the Petitioner argues that the term "public use" as used in Iowa Code § 478.4 (relative to the grant of franchise) must be given the same meaning as "public use" as used in Iowa Code § 478.15 (relating to the grant of eminent domain) (Petitioner's brief p. 6). In support of said argument, the Petitioner contends that identical words and phrases within the same statue should normally be given the same meaning (Id.) However, the Petitioner's argument fails to hold up to general rules of statutory construction.

Iowa Code § 478.15 provides that any person, company, or corporation "having secured a franchise", shall thereupon be vested with the right of eminent domain "to such extent as the utilities board may approve, prescribe and find necessary for public use." This Code section necessarily requires a finding of "public use" even if the company has already "secured a franchise." A franchise cannot be granted under Iowa Code § 478.4 without a finding of "public use"; thus, if Petitioner's argument were to hold, there would be no need to make another finding of "public use" under Iowa Code § 478.15. [3] Iowa Code §4.4 provides that it is presumed that an entire statue is intended to be effective. The Court should not interpret a statute in such a way to

[3] Similar analysis can be made under Iowa Code § 478.6(3), authorizing the Board when it grants a franchise (which requires a finding of public use) to vest the franchisee "with the power of condemnation to such extent as the board may approve and find necessary for public use."

make language meaningless. The legislature clearly contemplated two findings of public use, one for the grant of the franchise and one for the grant of eminent domain. The definition or interpretation of the former need not be constrained by the later as asserted by the Petitioner.

B. THE COURT SHOULD NOT BE DETRACTED FROM REACHING A PROPER RESULT.

Petitioner in this case asserts that there can be no "public use" for the project proposed because evidence exists that the project is aimed to provide electric power predominately to one consumer (*i.e.*, Microsoft). The Court should take a step back from this argument and instead consider the broader concept of "public interest." *See* IOWA ADMIN. CODE Rs. 199–32.4(4)(c) and 265–9.7(1)(d).

It is in the public interest that everyone receives electricity. *See Hendricks v. Hanigan,* Case No. Do37609, 2002 WL 397648, at *6 (Cal. Ct. App. Mar. 14, 2002) (noting the "broad public interest" of electric power to daily consumers at "just and reasonable rates"). *See also Penn. Water & Power Co. v. Consolid. Gas, Elec. Light, & Power Co. of Baltimore*, 89 F. Supp. 452, 470 (D. Md. 1950), *re'vd in part on other grounds*, 184 F. 2d 552 (4th Cir. 1950) (discussing the "manifold uses of electricity in this electric age" the "public interest [that] has enabled [everyone] to meet the public requirements" thereof); *McConkey v. Flathead Elec. Cooperative*, Case No. DV-02-427C (D. Ct. Mont. Mar. 26, 2004) ("The operations of an electrical co-op which provides electricity to everyone in this county is a matter of public interest."). RECs have a legal obligation to provide electricity to all of those in their service area that request it. *See* IOWA CODE § 476.25 ("It is declared in the public interest to encourage the development of…statewide electric service…[and to] establish service areas within which specified electric utilities shall provide electric service to customers….").

The fact that there may be one primary user of the electricity provided by any one power line does not mean that the "public interest" is not served. The "public interest" in extending electric connectivity is for the benefit of the community as a whole, not for any favored specific service seeker. *See* IOWA ADMIN. CODE Rs. 199–32.4(4)(c) and 265–9.7(1)(d). *See also Carpenter v. Comm'r of Pub. Works of City of Racine*, 339 N.W.2d 608, 611 (Wis. Ct. App. 1983) (noting "the city's legitimate public interest in providing efficient [services] to the community as a whole."); *In re Butte Fire Cases*, Case No. JCCP4853 (Cal. Super. Ct. Jun. 22, 2017) (recognizing a utility's "obligation to provide a vital public interest (electricity).").

The "public interest" is not served by the identity of the end user — after all, imagine if the objecting party in this case was Microsoft, and the party seeking to have an electric connection was the Petitioner, where Microsoft wished to obstruct Petitioner's electric connection "just because." In that alternate universe, the "public interest" would not be served by failing to pursue the perfection of the electric connection to Petitioner by the most efficient and economical means. Instead, the "public interest" would be best served by making sure that Petitioner received electrical power with minimal interference to Microsoft's property rights, including through utilizing any available public right-of-way. This converse conception of the case at hand is vital to the Court's understanding of the issues raised in this case. *See* IOWA ADMIN. CODE R. 265–9.7(1)(d) ("'public interest' means that which is beneficial to the public as a whole…"). *See also Powerex Corp.*, 2020 WL 3898160, at *12 (noting that "[e]very cooperative electric association, or nonprofit electric corporation or association…whether supplying electric energy for use of the public or for the use of its own members, is hereby declared to be affected with a public interest…").

V. ROAD MAP TO RESOLVE THIS CASE: IOWA LAW PERMITS THE CONSTRUCTION OF THE PROJECT IN QUESTION.

Petitioner argues that IOWA CODE § 306.46 is either unconstitutional or cannot apply in this case. Iowa Code § 4.4(1) requires a presumption that the statute is constitutional and the Court can readily interpret the statue as being applicable, just as has been done by the Board.

In *Keokuk Junction Ry. Co. v. IES Indus., Inc.*, 618 N.W.2d 352, 362-63 (Iowa 2000), the Iowa Supreme Court ruled an easement obtained by a city through condemnation did not include the right of a utility to install poles and power lines in a public right-of-way without just compensation. This ruling pre-dated a statute that was designed as a *de facto* abrogation of the *Keokuk* ruling in 2004. *See* IOWA CODE § 306.46. Currently, the law permits a "public utility to construct, operate, repair, or maintain its utility facilities within a public road right-of-way." *Id.* at 306.46(1).

Reasonable minds have disputed about whether or not this statute was meant to be prospective, retrospective, or both, *see, e.g.*, *NDA Farms v. IA Utils. Bd.*, Case No. CV 009448, 2013 WL 11239755 (Polk Cnty. Dist. Ct. Jun. 24, 2013), but the Court need not reach that issue in this case. As applied to the facts of this case, the statute is plainly prospective to the extent that it relates to "***construct*[*ing*]…utility facilities within a public road right-of-way." IOWA CODE § 306.46 (emphasis added). No one could credibly interpret this language as being a matter of retrospectivity because it deals with an affirmative action taken after the enactment date of the statute itself; that is, the construction of what is not yet built. *See* BLACK'S LAW DICT. 332 (8th ed. 1999) (defining "construction" using active present tense terms).[4]

[4] IAEC does not mean to forfeit any argument that IOWA CODE § 306.46 may have ***some*** applications in a retrospective manner. *See, e.g.*, *Hrbek v. State*, 958 N.W.2d 779, 783 (Iowa 2021) ("Whether a statute applies retrospectively, prospectively, or both is simply a question regarding the correct temporal application of a statute."); *Creighton v. Gordon*, 1840 WL 2829, at *3 (Iowa Terr. Ct. Jul. 1, 1840)

Put differently, a cooperative cannot fire up its "way-back machine" and construct poles dated in 2003 when the present day is 2021. Either something is construct***ed***, ***under construction***, or to be ***constructed***. The latter two examples are current or prospective — and therefore contemplated by IOWA CODE § 306.46 as written in 2004 — and the former is retrospective and therefore outside of the scope of IOWA CODE § 306.46 as of its effective date in 2004. This simple and intuitive reading of IOWA CODE § 306.46 should guide the Court in reaching a ruling in this case. If a statue can be construed as prospective in its application in a particular scenario, it should be. *See, e.g., Sisco v. Iowa-Illinois Gas & Elec. Co*., 368 N.W.2d 853, 861 (Iowa 1985). Therefore, IOWA CODE § 306.46 permits the construction of the line in question.

VI. THIS COURT SHOULD NOT ABANDON THE PUBLIC POLICY OF PUBLIC UTILITIES USING PUBLIC RIGHT-OF-WAYS FOR THE PROVISION OF VITAL SERVICES TO THE PUBLIC.

The use of public right-of-ways by utility providers is neither new, novel, nor confined to the State of Iowa. *See Edge v. Brice*, 113 N.W.2d 755, 759 (Iowa 1962) (acknowledging that "[a]ll parties concede public utilities have the right to use highway rights of way" and the "[u]tility facilities were occupying rights of way" long before the controversy in question.). *See also Pac. West Cable Co. v. City of Sacramento, Cal.*, 672 F. Supp. 1322, 1333 (E.D. Cal. 1987) (describing legislative history regarding "authoriz[ing] construction of [utility] systems over public rights of way and utility easements."); *PECO Energy Co. v. Penn. Pub. Util. Comm'n*, 791 A.2d 1155, 166 (Pa. 2002) (noting the "respective historic and prospective benefits that utilities and their ratepayers enjoy from placement of utility facilities in public rights-of-way," and rejecting any attempt to recede from that position as "abrogat[ing] common law rule [and] def[ying] logic...");

("at the pleasure of the legislature…statutes may be retrospective in their operation."). The arguments in this Brief only address a reasonable reading of the statute in a prospective manner that apply to the specific facts and circumstances of this case.

Rutherford Elec. Membership Corp. v. Time Warner Entertainment/Advance Newhouse Partnership, Case No. 13 CVS 231, 2014 WL 2159382, at *1 (N.C. Super. Ct. May 22, 2014) ("Networks for transmitting and distributing electric power and telecommunications have historically been above ground using utility poles placed in the public rights of way, usually along roads and highways.").

Entire superstructures of utility networks have been erected upon the widely and pervasively accepted theory that utility companies can use public right-of-ways to build out their service networks without the interference of individuals who find such projects idiosyncratically disagreeable. *See Northern States Power Co. v. Fed. Transit. Admin.*, Case No. 01-295 JRT/FLN, 2001 WL 1618532, at *10 (D. Minn. May 24, 2001) ("The common law rule, as noted above, has long been that utilities' rights to use streets and public rights of way are subject [only] to governmental police powers…"). This has been implicitly recognized by the Courts since before the effective electrification of the State of Iowa was ever perfected. *See New Orleans Gaslight Co. v. Drainage Comm'n of New Orleans*, 197 U.S. 453, 458-59 (1905) (recognizing that a gas company had been granted rights to use the city streets for its business of providing utility service). *See also Norfolk Redevelopment & Housing Auth. v. C & P Tele. Co.*, 464 U.S. 30, 35 (1984) (noting that it was permissible at common law for utilities to use public rights-of-way).

What the Petitioner in this case seeks to do is not simply shake dust off of old precedents, but to upend such precedents entirely. This Court should decline the invitation to do so and hold that IOWA CODE § 306.46 is enforceable as written and as commonly understood. *See State v. Walker*, 804 N.W.2d 284, 296 (Iowa 2011) ("*Stare decisis* is a valuable legal doctrine which lends stability to the law…") (internal quotation marks omitted)). Additionally, this Court should hold that IOWA CODE § 306.46 is constitutional at least as applied to this case, if not facially applied

across the board. *See State v. Mitchell*, 757 N.W.2d 431, 434 (Iowa 2008) ("Statutes are presumed to be constitutional, and a challenger must prove unconstitutionality beyond a reasonable doubt."). *See also Kiesau v. Bantz*, 686 N.W.2d 164, 180 (Iowa 2004) (Cady, J. dissenting) ("It nearly goes without saying that the doctrine of *stare decisis* is one of the bedrock judicial principles on which this Court is built. It is an important restraint on judicial authority and provides needed stability in and respect for the law.").

CONCLUSION

History, practicality, and the wording of the statute in question permit and encourage the construction of the project at issue in this case. For the foregoing reasons, the Court should rule in favor of facilitating — not frustrating — the connectivity of the electric line in question.

Respectfully submitted,

/s/Dennis L. Puckett
AT #0006476
/s/ Amanda James
AT #0009824
/s/ Colin C. Smith
AT #0011362
SULLIVAN & WARD, P.C.
6601 Westown Parkway
Suite #200
W. Des Moines, IA 50266-7733
E.: dpuckett@sullivan-ward.com
ajames@sullivan-ward.com
csmith@sullivan-ward.com
Ph.: #(515) 244-3500

COUNSEL FOR* AMICUS CURIAE *THE IOWA ASSOCIATION OF ELECTRIC COOPERATIVES.

Filed electronically.