IN THE IOWA DISTRICT COURT FOR POLK COUNTY

LINDA K. JUCKETTE, Petitioner, v. IOWA UTILITIES BOARD, Respondent.	Case No.: CVCV061580 **JUCKETTE'S REPLY BRIEF**

COMES NOW, Petitioner Linda K. Juckette, by and through her undersigned counsel, and submits the following Reply Brief.

INTRODUCTION

This case is not about "keeping the lights on" across the state, nor will the result of this case cast doubt upon utilities located in right of ways since the enactment of Iowa Code § 306.46.[1] This proceeding is about whether, under the facts and circumstances of this case, MidAmerican is entitled to the franchise which the IUB granted.

The consistent theme of the briefs filed in this matter by the amici (Iowa Association of Electric Cooperatives, Iowa Utility Association, and ITC Midwest LLC) is that their briefs generally fail to consider the evidence in the record. For example, ITC Midwest LLC stated that it did not "dig deeply into the specific facts of this case." (ITC Midwest LLC Brief, p. 1-2). The facts, though, are of utmost importance in this proceeding.

[1] Concerns about validity of utility usage of right of ways are not valid in light of the applicable statute of repose for improvements to real estate (8 years – § 614.1(11)) and statute of limitations for damage to real estate (5 years – § 614.1(3)).

Additionally, each brief – the three amicus briefs and the briefs of parties IUB, OCA, and MidAmerican – fail to meet the substance of Juckette's claims. This reply brief will not restate Juckette's prior arguments; instead, this brieff will concentrate on how the resisting parties fail to address or wrongly address Juckette's claims of error by the IUB.

ARGUMENT

Juckette's claims of errors by the IUB in this proceeding can be generally distilled into two topics, which are interrelated. First, the IUB should not have granted MidAmerican a franchise *based on the facts and circumstances in the record*. Second, even if MidAmerican is entitled to a franchise, it has no right to enter Juckette's land and must obtain eminent domain authority.

This Case is Ripe for Adjudication

Whether this Court should rule on the merits of the full appeal or remand to the IUB now is closely related to Juckette's second general claim of error. The resisting parties generally contend that because Juckette has stated MidAmerican must use eminent domain, and because MidAmerican has now sought use of eminent from the IUB, that all of Juckette's claims in this appeal are moot. This is not the case. As Juckette articulated in detail in her opening brief and in her resistance to MidAmerican's request for a limited remand, the issue of MidAmerican's eminent domain request does not moot Juckette's claims of error in this appeal. The Court should either vacate the entire grant of the franchise by IUB requiring MidAmerican to re-start the whole application process, or the

Court should rule on the validity of the franchise as it exists today without any eminent domain request or authority by MidAmerican.

When MidAmerican sought its franchise, MidAmerican consistently stated to the IUB that no eminent domain power was necessary over Juckette's property because of § 306.46. The IUB agreed and granted MidAmerican a franchise on the premise that § 306.46 gave MidAmerican a right to enter Juckette's property without any compensation.

As the resisting parties concede, *before* MidAmerican was entitled to a franchise from the IUB, MidAmerican was required to present facts that met statutory elements necessary to obtain a franchise. One such prerequisite is that MidAmerican show proof that it considered alternative routes. Iowa Code § 478.3(6).

MidAmerican – on its own accord and based on its own judgment – decided to present evidence to the IUB of MidAmerican's consideration of alternative routes by showing the IUB results of a route selection matrix. Juckette agrees that the Iowa Code does not require MidAmerican to create a route selection matrix. However, there can be no doubt in the record that MidAmerican relied solely on the results of the route selection matrix when it chose the route. This is undisputed.

The matrix used by MidAmerican relied solely on data inputted by MidAmerican. A major factor in the matrix was cost – including costs associated with placing poles on private property owners' property. Critically, when MidAmerican input the data, MidAmerican did **not** account for costs associated with eminent domain on Juckette's property. MidAmerican did not do so because of its reliance on § 306.46.

The IUB – agreeing with MidAmerican that § 306.46 gave MidAmerican the right to use Juckette's property – concluded that MidAmerican was entitled to the franchise. Again, a critical and fundamental inquiry was whether MidAmerican proved it considered alternative routes.

A major issue on this appeal is Juckette's contention that MidAmerican did not present adequate evidence that it considered alternative routes. Notably, one member of the IUB agreed and stated as much in his dissent. It follows, then, that if the IUB erred in determining that MidAmerican sufficiently presented evidence that it considered alternative routes, then the IUB necessarily erred in granting the franchise in the first place.

MidAmerican's new request to the IUB for eminent domain powers does not cure the defects of the IUB decision to grant the franchise *ab initio*. Even if MidAmerican is granted the right to use eminent domain, Juckette's claims of error over the grant of the franchise must still be adjudicated.

The franchise was granted on the premise that MidAmerican could use Juckette's property without any compensation to Juckette. MidAmerican's route selection matrix relied on that same presumption. If, as Juckette contends here, MidAmerican was not able to use her property without compensation, then the data relied upon by MidAmerican as its sole basis for route consideration is fundamentally flawed. If the data and output of the route selection matrix is flawed, then certainly MidAmerican cannot have presented adequate evidence to support its route selection.

Simply put, even if MidAmerican was not required to use a route selection matrix, when MidAmerican chose to rely on that matrix to present evidence to the IUB of the consideration of alternative routes, MidAmerican necessarily put the adequacy of the matrix into question. Because the matrix relies on MidAmerican's ability to use § 306.46 to use Juckette's property for free, the IUB's decision to grant the franchise is in error if there was no such right under § 306.46. Juckette's claim of error over the ability to use § 306.46 is inextricably intertwined with her claim of error that no franchise should have been granted in the first place. MidAmerican's pending request for eminent domain power does not untangle the claims of error necessary for this Court's review.

It is for those reasons that Juckette's appeal is not moot, and that adjudication of all of Juckette's claims of error is necessary before a remand to the IUB. If the Court agrees with Juckette that MidAmerican had no right to use her property under § 306.46, then the premise upon which MidAmerican's franchise is based crumbles. If the Court agrees that § 306.46 cannot be used in this situation, then the foundations underlying MidAmerican's evidence showing consideration of alternative routes must also be dismantled.

In sum, MidAmerican's ability to use § 306.46 is not only pertinent to questions of compensation to Juckette by eminent domain, but the adjudication of § 306.46 as applied in this case is so intertwined with the grant of the franchise in the first place that a remand allowing the franchise grant to stand and allowing MidAmerican to proceed with an eminent domain request does not resolve the issues presented on appeal.

There is No Necessity for Public Use

Regardless of the Court's determination of the use of § 306.46 in this case, the IUB still erred by granting MidAmerican a franchise *ab initio*. All parties and amici agree that in order for MidAmerican to obtain a franchise, MidAmerican must prove to the IUB that the proposed lines are necessary for a public use. The parties and amici, though, disagree about both the standard that the IUB ought to employ in reviewing the evidence as well as whether the evidence actually submitted by MidAmerican is sufficient to meet either standard.

"Public Use" Must be Given the Constitutional Meaning

In her opening brief, Juckette articulated the legal basis – citing rules of statutory construction and case law – that supports the contention that "public use" as used throughout Chapter 478 must be given the constitutional meaning. While the resisting parties and amici contend Juckette failed to present any case law supporting this argument, the opposite is true as is seen on the face of her brief. Moreover, case law cited by OCA further supports Juckette's position on this matter. The Iowa Supreme Court announced in *Mathis* that it has ceased deferring to IUB's legal interpretation of Chapter 478. *Mathis v. Iowa Utilities Bd.*, 934 N.W.2d 423, 427 (Iowa 2019), *reh'g denied* (May 30, 2019); *see also NextEra Energy Resources LLC v. Iowa Utilities Bd.*, 815 N.W.2d 30, 38 (Iowa 2012) ("simply because the general assembly granted the Board broad general powers to carry out the purposes of chapter 476 and granted it rulemaking authority does not

necessarily indicate the legislature clearly vested authority in the Board to interpret all of chapter 476.")*.*

The Iowa Supreme Court has made clear that the IUB is no longer entitled to deference in interpretation of utility statutes, specifically Chapter 478 which is at issue in this case. The Iowa Supreme Court's change in (lack of) deference to the IUB is important not only for the standard of review on this appeal, but also because it demonstrates that "public use" in Chapter 478 is not a term meant to be interpreted by the IUB with any deference. Thus, the arguments of resistors which claim that "public use" cannot be the constitutional meaning because of deference to the IUB is simply incorrect. In fact, the lack of judicial deference to the IUB supports Juckette's contention that the phrase "public use" in § 478.4 must be afforded the constitutional meaning as opposed to some other undefined meaning that the IUB may interpret as it pleases.

Further, as amicus Iowa Association of Electrical Cooperatives stated in its brief, there is no reason that there should be different standards for determination of "public use" in proceedings before the IUB under § 478.4 and § 478.15. (IAEC Brief, p. 16). The Iowa Association of Electrical Cooperatives is exactly right. As the resistors argue in this proceeding, the Court ought to apply the plain language of the statute. Chapter 478 contains no directive that the "public use" standard under § 478.4 ought to be different from the "public use" standard under § 478.15. The Iowa Supreme Court has made it abundantly clear that "public use" under § 478.15 **must** be given the constitutional meaning. *Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829, 836-37 (Iowa 2019). Despite resistors' arguments to the contrary, the rules of statutory construction, case law, and

common sense dictate that "public use" as used throughout Chapter 478 must be considered under constitutional framework.

With the exception of amicus ITC Midwest LLC, none of the resistors address *Kelo*[2] or *Clarke County Reservoir Commission*.[3] The Iowa Supreme Court clearly stated in *Clarke County Reservoir Commission* that *Kelo*'s standard of "public use" was not the law in Iowa. 862 N.W.2d at 172 ("The public-use requirement is to prevent abuse of the power for the benefit of private parties."). The evidence here shows that the franchise is sought for a single private entity: Microsoft. All of the *ad hoc* reasons that supposedly support a franchise for the public are not convincing under the record.

As ITC Midwest LLC explicitly recognized, it – and apparently the other resistors – did not look at the factual record. The most cited reason for a supposed public use identified by the resistors was that Microsoft is a member of the public and is entitled to receive electricity from MidAmerican. Yet, the record evidence shows that **Microsoft does currently have adequate electricity**. (Certified Record 658-659) (MidAmerican employee testifying that the current source of electricity could serve the Microsoft substation forever). The resistors' arguments that Microsoft is a member of the public and is entitled to electricity falls flat because even absent this requested franchise, Microsoft does have enough electricity. (Id.). MidAmerican's attempt to obtain a franchise is not necessary for a public use, and the constitutional limit on public use determinations that

[2] 545 U.S. 469 (2005)
[3] 862 N.W.2d 166, 172 (Iowa 2015)

is designed to "prevent abuse of the power for the benefit of private parties" dictates that the IUB erred in granting the franchise to MidAmerican.

The Iowa Supreme Court Has Not Declared Every Electrical Line is a Public Use

The resistors contend that the Iowa Supreme Court has supposedly determined once and for all that each franchise request for electrical transmissions lines is necessary for a public use. To support such statements, resistors generally rely on statements from the Iowa Supreme Court in the cases of *S. E. Iowa Co-op. Elec. Ass'n v. Iowa Utilities Bd.*, 633 N.W.2d 814, 820 (Iowa 2001) and *Vittetoe v. Iowa S. Utilities Co.*, 123 N.W.2d 878, 880 (Iowa 1963). The statement relied upon by resistors in *S. E. Iowa Co-op* is traced to *Race v. Iowa Elec. Light & Power Co.*, 134 N.W.2d 335, 337 (Iowa 1965), which in turn cites *Vittetoe*. The Supreme Court's statement in that case was:

> 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, 123 N.W.2d at 880.

Yet, in such reliance, resistors fail to recognize the importance of the totality of the Iowa Supreme Court's statement. The phrase "distribution to the public" is important. There is no black and white rule that every single electric transmission line is always a public use. If that was the case, the IUB would serve no purpose and the requirements of Chapter 487 would be meaningless. That is clearly not the case. Under the plain language of Chapter 487, the IUB must weigh the facts of each case to determine whether the line

is necessary for a public use. The issue here is what legal framework the IUB must use to make a finding.

Notably, the cases which form the basis of the Court's statement in *S. E. Iowa Co-op*, including *Race* and *Vittetoe*, concern the phrase "public use" in terms of the power of eminent domain for electric franchises. To claim that there is no basis for requiring courts and the IUB to apply facts of a requested franchise to constitutional notions of "public use" is incorrect and is belied by the very cases cited by resistors.

Reliance on § 306.46 is Misplaced in this Case

Even if the Court determines that MidAmerican is entitled to a franchise because it proved necessity of public use and proved that it appropriately considered alternative routes, the Court still should reverse the decision of the IUB because MidAmerican has no right to place electric lines in Juckette's property.

If the Triggering Event of a Statute is When the State Decides to Apply it, Every Statute can Apply Prospectively

The resistors generally contend that § 306.46 as applied to an easement granted by Juckette's predecessor in interest over 40 years ago is prospective in this case because the statute is being used now. Essentially, the resistors claim the triggering event of a statute is whenever the State decides to use the statute. This is nonsense. The resistors claim, as applied to this case, the triggering event of a statute enacted in 2004 was the creation of an easement in 1979 which granted a road right of way easement, but no easement for

use by utilities.[4] How a landowner in 1979 should have known that in 2004, his granted easement would be expanded and applicable back in time to 1979 is impossible to say. The only conclusion is that resistors' contentions that § 306.46 is applied prospectively back in time to the grant of the easement are baseless and that the statute must be applied prospectively from the grant of an easement after the enactment of § 306.46. Only then would a landowner know of the consequences of her grant of a road right of way easement.

Placement of Electrical Poles on and Electric Lines over Juckette's Property is an Interference

Resistors appear to contend that the erection of physical poles in Juckette's property and placement of lines over her property somehow do not interfere with Juckette's real estate. There is no question that Juckette owns the real estate at issue, including the portion of the property which has been granted for use as a road right of way. Despite this, the resistors contend that because there is one kind of servitude – a right of way – that an expanded use which physically places poles in Juckette's land is somehow not an expanded servitude and somehow does not interfere with Juckette's property.

[4] Amicus Iowa Utility Association claims that there is a utility easement. Brief, p. 8. This is factually incorrect. The IUB ruled that there was no utility easement granted for the property at issue. Order, p. 34-35. MidAmerican did not appeal this ruling. Amicus Iowa Utility Association's statements on this issue are so factually incorrect that they must be disregarded completely.

This contention was disposed of in *Keokuk*: "Once a valid easement has been created and the servient landowner justly compensated, the continued use of the easement must not place a greater burden on the servient estate than was contemplated at the time of formation." *Id*. at 355. The *Keokuk* Court further stated "When the servient land is burdened by an easement, the servient landowner does not surrender a fee simple. All that is relinquished is so much of the land as is necessary to accomplish the purposes of the easement." *Id*. at 360. As explained below, constitutional rights concerning property cannot be abrogated by statute, thus any argument that § 306.46 changes the fundamental premises of the law of easements and servitudes is not well-founded.[5] There can be no doubt that well-established principles of constitutional property law dictate that a physical intrusion of real estate is an interference and a taking.[6]

[5] Moreover, notwithstanding the fact of the enactment of § 306.46, the fundamental law of easements and additional servitudes described in *Keokuk* has been relied on by the Iowa Court of Appeals on several occasions. *See McGrane v. Maloney*, 2009 WL 929048 (Iowa App. April 8, 2009) ("A party's use of an easement must not place a greater burden on the servient estate than was contemplated at the time of the formation of the easement."); *Hamner v. City of Bettendorf*, 2016 WL 5930997 (Iowa App. Oct. 12, 2016); and *Tiemessen v. All. Pipeline (Iowa) L.P.*, 2016 WL 351471 (Iowa App. 2016).

[6] *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Brakke v. Iowa Dept. of Nat. Resources*, 897 N.W.2d 522, 545 (Iowa 2017) (noting that the *Loretto* case illustrates that a permanent physical invasion of property is a per se taking); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) ("Our precedents stake out two categories of regulatory action that generally will be deemed per se takings for Fifth Amendment purposes. First, where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation.").

Legislative Intent to Create a Policy Does Not Make a Statute Constitutional

The resistors generally assert that timing of the enactment of § 306.46 demonstrates the legislature's desire to "set forth Iowa public policy that public utility franchises should be located in public road ROWs" (*see* Iowa Utility Association Brief, p. 6) and that § 306.46 "can truly only be understood as an abrogation of the Iowa Supreme Court's determination in *Keokuk*." *See* MidAmerican Brief, p. 22-23. While it may be true that the legislature *wanted* to change the outcome of *Keokuk*, such legislative desire does not carry the day. Each of the resistors fail to address the fundamental principal that a statute cannot dictate the constitutionality of a statute. In other words, if a statute results in an unconstitutional taking, the Constitution is not ignored because of the legislature's public policy intention. *See Miranda v. Arizona*, 384 U.S. 436, 491 (1966) ("Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them.").

As held in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), a physical intrusion on real property under the cloak of a statute is an unconstitutional taking. Moreover, the Iowa Supreme Court in *Keokuk* has already held that erection of electric line poles on real property is a physical intrusion – even in a right of way. The act of a legislature cannot make that intrusion constitutional. Put another way, as applied to Juckette, who never granted any easement at issue *after* the enactment of § 306.46, the legislature and the IUB have taken a stick from Juckette's bundle of property rights without compensation by application of § 306.46. The legislature's desire to abrogate

Keokuk Junction is subordinate to Juckette's constitutional rights as applied to the facts in the record.

At the time the road right of way easement at issue in this case was granted, § 306.46 did not exist and Juckette's predecessor in interest had absolutely no reason to believe that when he granted road right of way easement to the county for use of a road (i.e. a specific stick in the bundle), that by a legislature's future action that stick would change form and take with it a second stick in the bundle – an easement granting the right to erect electric poles and lines. *See* IUB Order, p. 46-47 (Lozier dissent) ("To apply § 306.46 retrospectively would expand the scope of an easement created before enactment of the statute and **take from the landowner a property right the landowner previously held**, did not intend to convey, and did not convey.") (emphasis added).

Case law from the United States Supreme Court in the 1930s shed light on the unconstitutional effect of § 306.46 as it is used in this case. In reaction to the Great Depression, Congress enacted the Frazier-Lemke Act, which purported to give additional bankruptcy protections to farmers who defaulted on mortgage loans. A provision in the original enacted version of the Frazier-Lemke Act allowed farmers to force a stay of foreclosure proceedings for five years and allowed farmers to keep possession during that time, even when the mortgage agreement provided remedies to the bank to the contrary.

In *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935), a farmer defaulted on a loan to a bank and then filed for bankruptcy. The farmer chose protections under the Frazier-Lemke Act and elected to force the bank to accept the five year protections. The

effect of this election under the Act was that the bank was unable to enforce remedies under the mortgage such as taking possession and selling the property. There was no dispute that the bank's rights as mortgagee were real property rights.

The bank appealed, arguing that the Frazier-Lemke Act was unconstitutional because it applied to pre-existing mortgages. In other words, the bank contended that because the Act took away the bank's pre-existing property rights as mortgagee, the Act had the result of an unconstitutional taking of property rights.

The Supreme Court, in a unanimous opinion written by the progressive Justice Louis Brandeis, held that the Frazier-Lemke Act was unconstitutional in that case. Justice Brandeis ruled that because the Frazier-Lemke Act applied to pre-existing mortgages, the takings provision of the Constitution was controlling. *Id* at 589. The Act was held unconstitutional in that case because the Act took a property right – the rights under a mortgage – from a mortgagee without just compensation. *Id*. at 601-602. Justice Brandeis concluded:

> The province of the Court is limited to **deciding whether the Frazier-Lemke Act** (11 USCA s 203(s) **as applied has taken from the bank without compensation, and given to Radford, rights in specific property which are of substantial value. As we conclude that the act as applied has done so, we must hold it void**; for the Fifth Amendment commands that, however great the nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public.

Id. (internal citations omitted) (emphasis added).

Congress then revised the Frazier-Lemke Act, which was approved as now being constitutional by the Supreme Court two years later. *See Wright v. Vinton Branch of Mt. Tr. Bank of Roanoke, Va.*, 300 U.S. 440 (1937). In that opinion, again written by Justice Brandeis, the Court summarized the holding of *Radford*:

> The original Frazier-Lemke Act was there held invalid solely on the ground that the bankruptcy power of Congress, like its other great powers, is subject to the Fifth Amendment; and that, **as applied to mortgages given before its enactment, the statute violated that Amendment, since it effected a substantial impairment** of the mortgagee's security.

Wright at 456-57 (emphasis added).

The fundamental constitutional issues before the Supreme Court in *Radford* are present in this case. Like Congress did in *Radford* during the Great Depression, the Iowa Legislature enacted a law (§ 306.46) intended to address a social issue. Like in *Radford*, where the Frazier-Lemke Act applied to pre-existing grants of interest in real estate, § 306.46 – as applied here – purports to apply to pre-existing easements. An easement is no different than a mortgage when it comes down a question of whether they grant an interest in land: they both undisputedly do affect interests in real estate.

Because the Frazier-Lemke Act applied to pre-existing mortgages by changing the rights and limitations of those pre-existing mortgages, the Frazier-Lemke Act was unconstitutional since the statute resulted in an uncompensated taking of a property right. The exact same is true in this case. The effect of § 306.46 on Juckette's pre-existing right-of-way easement, which is removing a property right from Juckette, is the exact same effect that the Frazier-Lemke Act had on the mortgagee bank. Just as the Frazier-

Lemke Act was declared unconstitutional to pre-existing mortgages in *Radford*, so too must § 306.46 to deemed unconstitutional as it applies to Juckette in this proceeding.

Juckette Has Properly Stated Her Claims of Error for this Judicial Review Proceeding

The IUB appears to briefly contend on pages 8 and 17 that Juckette did not adequately plead her errors of appeal under § 17A.19. First, the IUB filed its answer to Juckette's amended petition on April 12, 2021. The IUB did not complain of any deficiencies with Juckette's claims of error in the petition. Moreover, Juckette's opening brief clearly states the basis of the IUB's errors. Any formalistic pleading or recitation of certain phrases or citations to Chapter 17A are not required. All parties are on notice of the basis of the claims of error at issue in this appeal and the content of Juckette's briefing is certainly sufficient to submit to this Court for adjudication.

CONCLUSION

For the reasons stated in Juckette's opening brief and in this reply, this Court should reverse the decision of the IUB by concluding that MidAmerican is not entitled to the requested franchise. Alternatively, the Court should reverse the IUB decision because MidAmerican has no right to place poles in Juckette's property.

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CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2021, I electronically filed the foregoing document with the Clerk of the Court by using the Iowa Judicial Branch electronic filing system which will send a notice of electronic filing to the following:

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