IN THE SUPREME COURT OF IOWA

NO. 21-1788

LINDA K. JUCKETTE,

PETITIONER-APPELLANT

v.

IOWA UTILTIES BOARD,

RESPONDENT-APPELLEE

and

MIDAMERICAN ENERGY COMPANY and OFFICE OF CONSUMER ADVOCATE

INTERVENORS-APPELLEES.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY THE HONORABLE JEANIE VAUDT

APPELLANT'S PROOF BRIEF

By: 

John E. Lande, AT0010976
William M. Reasoner, AT0013464
DICKINSON, MACKAMAN, TYLER & HAGEN, P.C.
699 Walnut Street, Suite 1600
Des Moines, Iowa 50309-3986
Telephone: (515) 244-2600
FAX: (515) 246-4550
jlande@dickinsonlaw.com
wreasoner@dickinsonlaw.com

Attorneys for Petitioner-Appellant Linda K. Juckette

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether MidAmerican is entitled to a franchise where the proposed utility line route is not necessary to serve a public use, because it serves a single, privately-owned commercial structure.

Cases

Bribriesco-Ledger v. Klipsch, 957 N.W.2d 646 (Iowa 2021)

Clarke Cnty. Reservoir Comm'n v. Robins, 862 N.W.2d 166 (Iowa 2015)

Hall v. United States, 566 U.S. 506 (2012)

Hawkeye Land Co. v. Iowa Utilities Bd., 847 N.W.2d 199 (Iowa 2014)

Higgins v. Iowa Dept. of Job Serv., 350 N.W.2d 187 (Iowa 1984)

Holland Bros. Const. Co., Inc. v. Iowa State Bd. of Tax Rev., 611 N.W.2d 495 (Iowa 2000)

Kelo v. City of New London, 545 U.S. 469 (2005)

Mathis v. Iowa Utilities Bd., 934 N.W.2d 423 (Iowa 2019)

Neil v. John Deere Component Works, 490 N.W.2d 80 (Iowa Ct. App. 1992)

NextEra Energy Resources LLC v. Iowa Utilities Bd., 815 N.W.2d 30 (Iowa 2012)

Organic Techs. Corp. v. State ex rel. Iowa Dept. of Nat. Resources, 609 N.W.2d 809 (Iowa 2000)

Puntenney v. Iowa Utilities Bd., 928 N.W.2d 829 (Iowa 2019)

Race v. Iowa Elec. Light & Power Co., 134 N.W.2d 335 (Iowa 1965)

Renda v. Iowa Civil Rights Comm'n, 784 N.W.2d 8 (Iowa 2010)

S. E. Iowa Co-op. Elec. Ass'n v. Iowa Utilities Bd., 633 N.W.2d 814 (Iowa 2001)

State v. Johann, 207 N.W.2d 21 (Iowa 1973)

SZ Enterprises, LLC v. Iowa Utilities Bd., 850 N.W.2d 441 (Iowa 2014)

Vittetoe v. Iowa S. Utilities Co., 123 N.W.2d 878 (Iowa 1963)

Statutes

Iowa Code § 17A.19

Iowa Code § 17A.20

Iowa Code § 478.3(1)(h)

Iowa Code § 478.4

Iowa Code § 478.15

Iowa Code § 479B.9

Iowa Const. Art. I, § 18

2. Whether Iowa Code § 306.46 can be applied retrospectively to take property rights from a property owner who did not previously grant rights to place utility lines in an easement.

Cases

Barfield v. Sho-Me Power Electric Coop., 852 F.3d 795 (8th Cir. 2017)

Bormann v. Bd. of Sup'rs In and For Kossuth Cnty., 584 N.W.2d 309 (Iowa 1998)

Brossart v. Corlett, 27 Iowa 288 (1869)

Brown v. Young, 29 N.W. 941 (Iowa 1886)

Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021)

Chicago & N.W. Ry. Co. v. Sioux City Stockyards Co., 158 N.W. 769 (Iowa 1916)

Cline v. Richardson, 526 N.W.2d 166 (Iowa Ct. App. 1994)

Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994)

Ginsberg v. Lindel, 107 F.2d 721 (8th Cir. 1939)

Hamner v. City of Bettendorf, 2016 WL 5930997 (Iowa Ct. App. Oct. 12, 2016)

Hrbek v. State, 958 N.W.2d 779 (Iowa 2021)

Johnston v. Veterans' Plaza Authority, 535 N.W.2d 131 (Iowa 1995)

Kaiser Aetna v. United States, 444 U.S. 164, 100 S. Ct. 383, 62 L. Ed. 2d 332 (1979)

Keokuk Junction Ry. Co. v. IES Indus., Inc., 618 N.W.2d 352,(Iowa 2000)

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)

Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935)

Mathis v. Iowa Utilities Bd., 934 N.W.2d 423 (Iowa 2019)

McGrane v. Maloney, 2009 WL 929048 (Iowa Ct. App. April 8, 2009)

Miranda v. Arizona, 384 U.S. 436 (1966)

NDA Farms, LLC c. Iowa Utilities Bd., Dept. of Commerce, No. CV 009448, 2013 WL 11239755 (Iowa Dist. June 24, 2013)

Nollan v. California Coastal Comm'n, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987)

Pickett v. California Pac. Utils., 619 P.2d 325 (Utah 1980)

Puntenney v. Iowa Utilities Bd., 928 N.W.2d 829 (Iowa 2019)

SMB Investments v. Iowa-Illinois Gas & Elec. Co., 329 N.W.2d 635 (Iowa 1983)

Stew-Mc Dev., Inc. v. Fischer, 770 N.W.2d 839 (Iowa 2009)

Tiemessen v. All. Pipeline (Iowa) L.P., 2016 WL 351471 (Iowa Ct. App. 2016)

United States Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 207 L. Ed. 2d 186 (2020)

Wisconsin Cent. Ltd. v. Pub. Serv. Commn. of Wisconsin, 95 F.3d 1359 (7th Cir. 1996)

Wright v. Vinton Branch of Mt. Tr. Bank of Roanoke, Va., 300 U.S. 440 (1937)

Statutes

Frazier-Lemke Act

Iowa Code § 4.5

Iowa Code § 306.46

Iowa Code § 306.46(1)

Other Authorities

2 W. Blackstone, Commentaries on the Laws of England 2 (1766)

39 Am. Jur. 2d *Highways, Streets, and Bridges* § 183 (1998)

Merrill, Property and the Right to Exclude, 77 Neb. L. Rev. 730 (1998)

Public Utilities-Facilities-Right-of-way 2004 Ia. Legis. Serv. Ch. 1014 (S.F. 2118)

RIGHT-OF-WAY, Black's Law Dictionary (11th ed. 2019)

Constitutional Provisions

Iowa Const. Art. I, § 9

U.S. Const. Amend. V

3. Whether Iowa Code § 306.46, as applied, violates Juckette's constitutional rights by taking property rights from a property owner who did not previously grant rights to place utility lines in an easement.

Cases

Barfield v. Sho-Me Power Electric Coop., 852 F.3d 795 (8th Cir. 2017)

Bormann v. Bd. of Sup'rs In and For Kossuth Cnty., 584 N.W.2d 309 (Iowa 1998)

Brossart v. Corlett, 27 Iowa 288 (1869)

Brown v. Young, 29 N.W. 941 (Iowa 1886)

Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021)

Chicago & N.W. Ry. Co. v. Sioux City Stockyards Co., 158 N.W. 769 (Iowa 1916)

Cline v. Richardson, 526 N.W.2d 166 (Iowa Ct. App. 1994)

Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994)

Ginsberg v. Lindel, 107 F.2d 721 (8th Cir. 1939)

Hamner v. City of Bettendorf, 2016 WL 5930997 (Iowa Ct. App. Oct. 12, 2016)

Hrbek v. State, 958 N.W.2d 779 (Iowa 2021)

Johnston v. Veterans' Plaza Authority, 535 N.W.2d 131 (Iowa 1995)

Kaiser Aetna v. United States, 444 U.S. 164, 100 S. Ct. 383, 62 L. Ed. 2d 332 (1979)

Keokuk Junction Ry. Co. v. IES Indus., Inc., 618 N.W.2d 352,(Iowa 2000)

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)

Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935)

Mathis v. Iowa Utilities Bd., 934 N.W.2d 423 (Iowa 2019)

McGrane v. Maloney, 2009 WL 929048 (Iowa Ct. App. April 8, 2009)

Miranda v. Arizona, 384 U.S. 436 (1966)

NDA Farms, LLC c. Iowa Utilities Bd., Dept. of Commerce, No. CV 009448, 2013 WL 11239755 (Iowa Dist. June 24, 2013)

Nollan v. California Coastal Comm'n, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987)

Pickett v. California Pac. Utils., 619 P.2d 325 (Utah 1980)

Puntenney v. Iowa Utilities Bd., 928 N.W.2d 829 (Iowa 2019)

SMB Investments v. Iowa-Illinois Gas & Elec. Co., 329 N.W.2d 635 (Iowa 1983)

Stew-Mc Dev., Inc. v. Fischer, 770 N.W.2d 839 (Iowa 2009)

Tiemessen v. All. Pipeline (Iowa) L.P., 2016 WL 351471 (Iowa Ct. App. 2016)

United States Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 207 L. Ed. 2d 186 (2020)

Wisconsin Cent. Ltd. v. Pub. Serv. Commn. of Wisconsin, 95 F.3d 1359 (7th Cir. 1996)

Wright v. Vinton Branch of Mt. Tr. Bank of Roanoke, Va., 300 U.S. 440 (1937)

Statutes

Frazier-Lemke Act

Iowa Code § 4.5

Iowa Code § 306.46

Iowa Code § 306.46(1)

Other Authorities

2 W. Blackstone, Commentaries on the Laws of England 2 (1766)

39 Am. Jur. 2d *Highways, Streets, and Bridges* § 183 (1998)

Merrill, Property and the Right to Exclude, 77 Neb. L. Rev. 730 (1998)

Public Utilities-Facilities-Right-of-way 2004 Ia. Legis. Serv. Ch. 1014 (S.F. 2118)

RIGHT-OF-WAY, Black's Law Dictionary (11th ed. 2019)

Constitutional Provisions

Iowa Const. Art. I, § 9

U.S. Const. Amend. V

ROUTING STATEMENT

This appeal should be retained by the Supreme Court under Iowa R. App. P. 6.1101 because this case presents substantial constitutional questions of the validity of a statute, Iowa Code § 306.46, which was applied below to take property rights without any compensation to the property owner. This case also presents issues of broad public importance, because the statute as applied below retroactively expanded the scope of a grant of property rights via an easement that occurred prior to the enactment of the statute.

STATEMENT OF THE CASE

This case is about whether a statute allows a utility to take property from a private landowner without paying just compensation. Linda Juckette ("Juckette") owns real estate located in rural Madison County. In September 2019, MidAmerican Energy Company ("MidAmerican") filed a petition requesting a franchise for an electric line. MidAmerican requested that the Iowa Utilities Board ("IUB") grant a franchise to MidAmerican for a route that entered Juckette's property. At no point in the IUB proceeding prior to the commencement of this judicial review proceeding did MidAmerican request a grant of eminent domain authority to enter Juckette's property. The IUB, in a 2-1 decision, granted MidAmerican its requested franchise, which included purported authorization for MidAmerican to place utility lines in Juckette's property without any compensation to Juckette. One IUB board member, Richard Lozier, dissented and concluded that MidAmerican should not be entitled to the requested franchise. After Juckette had exhausted her administrative remedies, Juckette commenced a judicial review proceeding pursuant to § 17A.19 in the Polk County District Court.

Following briefing and an oral hearing involving Juckette, respondent IUB, intervenors MidAmerican and Office of Consumer Advocate ("OCA"), and amici curiae Iowa Association of Electric Cooperatives ("IAEC"), Iowa Utility Association ("IUA") and ITC Midwest LLC ("ITC Midwest"), the District Court denied all relief requested by Juckette, affirmed the IUB's order granting MidAmerican an electric franchise, and dismissed Juckette's judicial review petition. This timely appeal followed.

STATEMENT OF FACTS

Appellant Linda Juckette owns property at 3386 Cumming Road in Madison County, which is on the west side of Warren Avenue between Cumming Road and 130th Street. (Certified Record[1] 151). In 2019, MidAmerican decided to construct two electric transmission lines – one of which would be constructed on Juckette's property. MidAmerican filed a petition for an electric franchise with the IUB, but MidAmerican did not request the right of eminent domain as it applied to Juckette's property.[2] Juckette did not grant MidAmerican an easement related to the electric lines. (CR 223:5-22). In granting the franchise requested by MidAmerican, the IUB entered an order which permitted MidAmerican to occupy Juckette's property without any requirement to pay any compensation to Juckette. (*See generally* CR 899 - 940).

---

[1] Hereafter, the Certified Record shall be referred to as "CR."

[2] MidAmerican did not ever seek eminent domain powers over Juckette's property in any of its amended petitions filed prior to the grant of the franchise. While this certiorari appeal was pending, MidAmerican did file a request for eminent domain rights over Juckette's property, but the IUB has not ruled on that request while the validity of the franchise is challenged in this appeal.

Throughout the franchise proceeding, MidAmerican relied on § 306.46 to support its contention that it could construct electric facilities on Juckette's property because there is a road right-of-way on Juckette's property. (*See, e.g.,* CR 223:5-22 and CR 880).

In 1979, Juckette's predecessor in interest dedicated a plat which contained a reference to "road right-of-way" on the eastern edge of the property. (CR 488-503). The plat did not contain any express statement as to whom the road right-of-way was granted. (CR 503). However, there does not appear to be any dispute that the right-of-way was granted to Madison County and the road is a county highway.

Further, there is no evidence in the record of any written document describing the road right-of-way easement – evidence of the easement is solely based on the 1979 plat. Importantly, though, there is no evidence in the record that the road right-of-way easement included any grant of use for utilities. The record concerning the road

right-of-way is limited to the words "road right-of-way" on a 1979 plat. (CR 503).[3]

In April 2019, MidAmerican entered into a facilities construction agreement with Microsoft concerning increased energy capacity at a Microsoft data storage location[4] north of Juckette's property ("FCA"). (FCA and CR 662:15-18). Under the FCA, Microsoft required MidAmerican to construct additional electric lines and to build a substation near Microsoft's property. (FCA Exhibit A § 3(a)). Concurrently with the execution of the FCA, Microsoft sold real estate

[3] To avoid confusion, the words "overhead elec. & undergr. tel" appear on the plat at CR 503. In the IUB proceeding, MidAmerican at one point contended those words constituted an easement granted for utility uses. (CR 879). The IUB disagreed and ruled that there was no evidence of any grant of easement on Juckette's property for utilities. (CR 932-933) (ruling the plat does not show the location of the claimed utility easement, and that the written restrictive covenants indicate an electric easement was located on lots not now owned by Juckette and that the size of the easement is not the size requested by MidAmerican). MidAmerican did not challenge this ruling and no party in the district court proceeding raised any argument that there was in fact a grant of an electric easement over Juckette's property. To the extent any party on this appeal now raises that issue, it should be disregarded.

[4] Microsoft's data storage location is known as "Project Osmium." (CR 534 and 642:6-10). Throughout this brief, "Microsoft" refers to both the entity and the data storage facility known as Project Osmium.

to MidAmerican for $1 – real estate on which MidAmerican was to construct the substation required by the FCA. (FCA Article II, § 2(a)). The transferred real estate is surrounded by Microsoft's land. (CR 643:20-22). After transferring the land for the substation to MidAmerican, Microsoft still agreed to "obtain required City of West Des Moines approval for the Maffitt Lake Substation . . . ." (FCA § II(2)(b)). Microsoft even retains "unrestricted access to the" substation "at all times." (FCA § II(2)(c)).

Microsoft chose the location of the substation. (CR 663:12-24). MidAmerican did not consider what routes to use until after Microsoft chose the location of the substation. (CR 736:12-737:1).

In the IUB proceeding, MidAmerican admitted multiple times the only reason for the requested franchise is to serve Microsoft. (CR 644:17-20 and 645:18-25). According to the FCA, MidAmerican must construct electric lines in order to serve Microsoft's "peak electric load" and meet Microsoft's "electric requirements as identified in Exhibit A" of the FCA. (FCA § II(1)(b)).

Development in the area around the proposed franchise is "completely speculative due to the unknowns related to future growth" as admitted by MidAmerican's witness (CR 318:2-5). MidAmerican's witness agreed that the only thing that is *not* speculative about development in the area is that Microsoft has a contractual right to demand MidAmerican obtain this requested franchise. (CR 647:18-20).

MidAmerican admits that the requested lines now just make future development easier on MidAmerican. (CR 675:21-676:1). Specifically, MidAmerican agreed that the purpose of looking to the future in requesting new franchise lines is for MidAmerican's business purposes. (CR 678:12-22).

There is no evidence in the record that any other person or entity will use MidAmerican's proposed line. In fact, a property owner in the area at issue testified he has never experienced issues with power reliability. (CR 480:21-22).

The record evidence shows that Microsoft does currently have adequate electricity at its facility. (CR 658-659). The substation which currently serves Microsoft is already connected to a 161kV line from

Veterans Parkway. (CR 657:4-658:7). That current line is sufficient to accommodate the whole Microsoft load, even accounting for a ramp-up schedule in the FCA. (CR 658:12-17). MidAmerican's employee testified that the current source of energy at Microsoft could serve the Microsoft substation forever. (CR 658-659).

The proposed franchise will not save Iowa consumers any money; in fact, consumers will actually *incur* costs because of the proposed lines. (CR 653:10-18 ("Q: So who pays for the cost of construction? A: The rate base") and CR 654:9-16 ("Q: So initially will customers other than Microsoft have to pay a part of the costs of construction? A: Based on the rate base, I would say the answer is yes.")). MidAmerican's witness stated he lacked any opinion about whether increased revenues for MidAmerican from the franchise will benefit ratepayers as a whole. (CR 680:11-14). MidAmerican admits that the cost burden on consumers is contrary to the regulatory principal that the cost causer should incur the cost. (CR 64:21-649:18).

Despite all the foregoing facts, the IUB ruled MidAmerican's proposed franchise was necessary for a public use and granted the franchise. The IUB further allowed MidAmerican to build on Juckette's

property without requiring the payment of any compensation to Juckette. The District Court affirmed the IUB on all matters and this appeal followed.

ARGUMENT

Iowa law does not allow the IUB to grant a franchise to place electric utility poles and lines in private property without paying any compensation to the landowner. In Iowa, an electric company must obtain a franchise from the IUB prior to construction and operation of any transmission line capable of operating at a voltage greater than sixty-nine kilovolts along a highway. Iowa Code § 478.1. Before obtaining a franchise, an electric company must prove to the IUB that the project is necessary to serve a public use, represents a reasonable relationship to an overall plan of transmitting electricity in the public interest, and meets all other legal requirements. Iowa Code § 478.4. Moreover, the electric company seeking a franchise must present evidence of possible uses of alternative routes. Iowa Code § 478.3(2)(a)(6).

The District Court erred in affirming the IUB's grant of a franchise to MidAmerican. First, the District Court and IUB erred in concluding that MidAmerican had proven that its requested franchise was necessary for public use. *See* Iowa Code § 478.4 and 478.15(1). Second, the District Court and IUB erred by granting IUB the franchise

absent any legal ability for MidAmerican to enter Juckette's property. As a result, the franchise must be vacated.

I. MIDAMERICAN IS NOT ENTITLED TO A FRANCHISE BECAUSE THE PROJECT IS NOT FOR A PUBLIC USE

A. Preservation of Error

Juckette has preserved error on this argument because it was raised in briefing and oral arguments before the Iowa Utilities Board and also before the Polk County District Court, and was the subject of the District Court's ruling.

B. Standard of Appellate Review

This is an appeal pursuant to Iowa Code § 17A.20 from the District Court's judicial review of an agency action. Under such circumstances, the appellate court reviews the District Court's ruling under the standards of Iowa Code § 17A.19. *Organic Techs. Corp. v. State ex rel. Iowa Dept. of Nat. Resources*, 609 N.W.2d 809, 815 (Iowa 2000). The appellate court applies the standards of Iowa Code § 17A.19 to determine whether its conclusions are the same as the conclusions made by the District Court. *Neil v. John Deere Component Works*, 490 N.W.2d 80, 82 (Iowa Ct. App. 1992). When the issue on appeal concerns a matter of statutory construction, the appellate court reviews to

determine if the agency's action was in violation of statutory provisions. *Holland Bros. Const. Co., Inc. v. Iowa State Bd. of Tax Rev.*, 611 N.W.2d 495, 499 (Iowa 2000). The scope of review is not limited to the agency's findings, and the review includes the entire record. *Neil*, 490 N.W.2d at 82 citing *Higgins v. Iowa Dept. of Job Serv.*, 350 N.W.2d 187, 191 (Iowa 1984).

As it applies to the standard of review of the determination that MidAmerican's franchise request was a public use, the Iowa Supreme Court has made clear that the IUB is no longer entitled to deference in interpretation of utility statutes. *Mathis v. Iowa Utilities Bd.*, 934 N.W.2d 423, 427 (Iowa 2019) ("Furthermore, in recent years, we have generally not deferred to IUB interpretations of statutory terms."). Moreover, constitutional issues in agency proceedings are reviewed de novo. *Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829, 836 (Iowa 2019).

C. Argument

To obtain a franchise, MidAmerican had the burden of proving the proposed lines are "necessary to serve a public use." Iowa Code § 478.4. Both the IUB and the District Court erred by concluding that "public use" as used in § 478.4 does not mean the same thing as "public

use" as used elsewhere in Chapter 478. Relying on that erroneous premise, the IUB and the District Court both concluded that MidAmerican cleared the lower "public use" threshold they read into Chapter 478 without considering how "public use" has been interpreted from a constitutional perspective. This is a significant omission in a case like this where the proposed utility line is to be placed on private property when the landowner has not provided any prior grant of authority to place such a utility line.

The District Court rejected Juckette's assertion, articulated below, that the term "public use" as used to determine whether a franchise may be granted necessarily includes an analysis of constitutional law. (11/7/21 Order, p. 8). The District Court stated Juckette provided no authority to support the contention, but that is inaccurate. As demonstrated below, the combination of case law concerning the Supreme Court's lack of deference to the IUB and rules of statutory construction support Juckette's assertion that MidAmerican failed to meet its burden of proving the lines are necessary to serve a public use.

1) Deference to the IUB is Limited

While the legislature has given the IUB the ability to decide whether a franchise meets the element of necessity of public use, *S. E. Iowa Co-op. Elec. Ass'n v. Iowa Utilities Bd.*, 633 N.W.2d 814, 819–20 (Iowa 2001), this legislative grant of deference to the IUB is limited. Starting with a basic premise, if the franchise requires a utility's use of eminent domain, then the IUB is subject to the Iowa Constitution's limits on the utility's ability to use eminent domain. *See Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829, 836-37 (Iowa 2019). When the Constitution is involved in the agency proceeding, courts do not give deference to the IUB on such constitutional issues. *Id*.

In *Puntenney*, the Iowa Supreme Court reviewed the IUB's approval of an underground crude oil pipeline. The pertinent statutory standard for approval of the pipeline was "public convenience and necessity" under § 479B.9. The Iowa Supreme Court made clear the IUB's analysis of a franchise petition is constrained by the Iowa Constitution and the judicial pronouncements thereof if the franchise depends on use of eminent domain. *Id*. at 836-37. *Puntenney* demonstrates that the IUB is not afforded unlimited deference.

Instead, the IUB is always constrained by the Constitution in its proceedings.

Further, the Iowa Supreme Court announced in *Mathis* that it has ceased deferring to the 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) ("[S]imply 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 are 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.

As it applies to MidAmerican's proposed lines in this case, whether such lines are necessary for a public use necessarily involves a Constitutional question for the reasons articulated below.

2) "Public Use" in § 478.4 Must be Subject to Constitutional Analysis

There is no definition or statutory guidance for the meaning of "public use" in § 478.4. Elsewhere in Chapter 474, the statute provides that a utility may obtain powers of eminent domain "to such extent as the utilities board may approve, prescribe and find to be **necessary for public use**." Iowa Code § 478.15 (emphasis added). The Iowa Supreme Court has made clear that when it comes to determining "public use" in connection with the right of eminent domain in utility law, the term has independent legal significance outside of the utilities statutes, and the IUB is not afforded deference. *Puntenney*, 928 N.W.2d at 837 ("[T]he

term 'public use' is not 'uniquely within the subject matter expertise of the agency'—here the IUB.").

When addressing issues involving a test of "public use" for eminent domain purposes associated with utility franchise, the IUB must adhere to Constitutional limits on the use of eminent domain. *See Puntenney,* 928 N.W.2d at 836-37; citing *Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 14 (Iowa 2010) ("When a term has an independent legal definition that is not uniquely within the subject matter expertise of the agency, we generally conclude the agency has not been vested with interpretative authority.").

The District Court's refusal to apply constitutional standards to the "public use" phrase in § 478.4 is essentially a ruling that there are two separate standards for "public use" in Chapter 478 – (1) public use relative to obtaining a franchise under Iowa Code § 478.4 and (2) public use to justify eminent domain powers under Iowa Code § 478.15.

Because the Iowa Supreme Court has held that the phrase "public use" has independent legal significance, *Puntenney,* 928 N.W.2d at 836-37, it follows that the IUB must look to the Iowa Supreme Court's interpretation of the phrase when applying it to a

utility's request for a franchise, even when the franchise request does not contain a request for eminent domain. In other words, the constitutional analysis of "public use" cannot be divorced from the IUB's analysis of "public use" in the context of a franchise request. Thus, Iowa's analysis of the outer limits of public use arising from eminent domain issues ought to be used as a baseline for analysis of the franchise request under Iowa Code § 478.3(1)(h) and § 478.4.

3) Statutory Construction Requires "Public Use" in Chapter 478 to be Subject to Constitutional Analysis

This conclusion is supported by rules of statutory construction. Words and phrases used in a statute are presumed to bear the same meaning throughout the statute. *Bribriesco-Ledger v. Klipsch*, 957 N.W.2d 646, 650 (Iowa 2021); *Hall v. United States*, 566 U.S. 506, 519 (2012) ("[I]dentical words and phrases within the same statute should normally be given the same meaning."). Iowa Code Chapter 478, governing electric line franchises, contains the phrase "public use" several times throughout the chapter. In § 478.15, "public use" is used in conjunction with a utility's attempt to obtain eminent domain powers. There can be no doubt that when "public use" is used in a

statute concerning constitutional powers (i.e. eminent domain), the phrase "public use" must have the independent legal meaning associated with constitutional analysis. *See Puntenney,* 928 N.W.2d at 836-37; *Renda*, 784 N.W.2d at 14.

Because Iowa Code Chapter 478 has no section purporting to create a definitional distinction between "public use" as used in § 478.15 (use eminent domain) and § 478.4 (ability to obtain franchise), it follows that because identical words and phrases are to be given the same meaning throughout a statute, the phrase "public use" in § 478.4 *must* be given the same meaning "public use" has in § 478.15. As amicus Iowa Association of Electrical Cooperatives stated in its submission to the District Court, 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 must 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*, 928 N.W.2d at 836-37. 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.

Since *Puntenney* makes clear that "public use" as used in § 478.15 requires a constitutional analysis because it involves eminent domain, standard principles of statutory construction mandate that the IUB (and now require this Court) construe "public use" as used throughout Chapter 478 in the same way "public use" is used in a constitutional analysis. Thus, the determination of whether MidAmerican's requested franchise is "necessary to serve a public use" must be considered in terms of the constitutional meaning of "public use." *See* Iowa Code § 478.4 (the IUB "may grant the franchise" upon "a finding that proposed line or lines are necessary to serve a public use. . ."). The District Court erred in failing to apply constitutional standards to MidAmerican's attempt to prove its lines are "necessary to serve a public use" under Iowa Code § 478.4.

4) The Iowa Constitution's "Public Use" Standard is Strictly Construed to Prevent Uses to Benefit Private Parties

Turning to the baseline constitutional analysis, Iowa Const. Art. I, § 18 prohibits the taking of private property for public use without just compensation. In contrast to the Federal Constitution, Iowa has unequivocally rejected the standard in *Kelo v. City of New London*, 545 U.S. 469 (2005), which permits taking private property for a private developer. *Puntenney*, 928 NW.2d at 845-49. In rejecting *Kelo*, the Iowa Supreme Court has explained that the "public-use requirement is to prevent abuse of the power for the benefit of private parties." *Clarke Cnty. Reservoir Comm'n v. Robins*, 862 N.W.2d 166, 172 (Iowa 2015). The public use standard must be strictly construed to prevent its use to benefit a private party. *Id.*; *see also Hawkeye Land Co. v. Iowa Utilities Bd.*, 847 N.W.2d 199, 208 (Iowa 2014).

While the legislature has enacted statutes that grant the power of eminent domain, subject to statutory limitations, the Iowa Constitution provides the outer limit on use of eminent domain powers. *Hawkeye Land Co. v. Iowa Utilities Bd.*, 847 N.W.2d 199, 209 (Iowa 2014) ("The power of eminent domain is a creature of statute,

constitutionally limited by article I, section 18 for the protection of private property rights."). The statutes and Constitution work in tandem to provide powers and restraints on the use of eminent domain. *See State v. Johann*, 207 N.W.2d 21, 23–24 (Iowa 1973) ("[A] party seeking to take land by eminent domain must first satisfy the court that it has been authorized by the legislature to exercise the power, that the statute purporting to grant such authority is constitutional, that the conditions exist under which it was provided that the authority might be exercised, and that the condemning party has complied with the requirements of the statute."). A statute granting a right of eminent domain or a statute purporting to identify what may be a public use, must nevertheless comply with the Constitutional limits under the circumstances of the case. In other words, a statute cannot itself proclaim certain conduct is compliant with the Constitution.

5) Electric Lines are not Automatically Public Uses

Appellees and amici below contend that the Iowa Supreme Court has supposedly determined once and for all that each franchise request

for electrical transmission 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.

Such reliance fails 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 478 would be meaningless. That is clearly not the case. Under the plain language of Chapter 478, 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.

6) MidAmerican Failed to Prove its Franchise was Necessary for a Public Use

The transmission lines subject to MidAmerican's franchise request are ultimately for a private, not public, use. There is no doubt Microsoft's presence is the sole reason MidAmerican applied for this franchise. MidAmerican has entered into an agreement with Microsoft for increased energy capacity. MidAmerican did not present any sufficient evidence that MidAmerican would be applying for the franchise absent Microsoft. In rebuttal, MidAmerican offered only ad-hoc generalizations that are nothing more than an insufficient "build

it and they will come" mantra. These facts, which may have been accepted under the *Kelo* standard, have been expressly rejected by the Iowa Supreme Court and clearly do not meet Iowa's constitutional standard of "public use." *Robins*, 862 N.W.2d at 172.

MidAmerican admitted multiple times during the IUB proceeding the only reason for the requested franchise is to serve Microsoft. (CR 644-645, Trans. 110:17-20 and 111:18-25). MidAmerican generally contends that this line is necessary for future development in the Maffitt Lake area. Yet, MidAmerican has no idea when development will occur in the area. According to MidAmerican's witness, development is "completely speculative due to the unknowns related to future growth. . ." (CR 318:2-5). MidAmerican has no idea when any development will occur.[5] All MidAmerican knows is that Microsoft wants the proposed lines. According to the Master Electric Facilities Construction and Reimbursement Agreement ("Facilities Construction Agreement" or "FCA"), a contract between

[5] Even if MidAmerican's speculation is correct, the trickle down economic benefits of future development do not constitute a public use. *Puntenney*, 928 N.W.2d 829.

MidAmerican and Microsoft, MidAmerican must construct electric lines in order to serve Microsoft's "peak electric load" and meet Microsoft's "electric requirements as identified in Exhibit A" of the FCA. (FCA § II(1)(b)). In fact, MidAmerican agrees that the only thing that is not speculative in this case is that Microsoft needs MidAmerican to get this requested franchise. (CR 647:18-20).

Even granting MidAmerican reprieve from its pure speculation on future development does not mean the franchise is for a public purpose. MidAmerican admits that constructing the requested lines now just make future development easier on MidAmerican. (CR 675:21-676:1). Specifically, MidAmerican agreed that the purpose of looking to the future in requesting new franchise lines is for MidAmerican's business purposes. (CR 678:12-22). MidAmerican's convenience is not material to the determination of whether the requested franchise is for a public purpose. Nor may MidAmerican's business purpose equate to a public purpose. MidAmerican's desire for easier construction in future development is not a valid public purpose in this case where the development is pure speculation.

Moreover, the timing of events makes it clear that MidAmerican is seeking this franchise wholly for the benefit of one private party: Microsoft. In April 2019, MidAmerican entered into the FCA with Microsoft. (FCA and CR 662, Trans. 128:15-18). MidAmerican was obligated by contract – the FCA – to construct a substation to service Microsoft. (FCA Exhibit A § 3(a)). As a concurrent part of the FCA execution, Microsoft deeded for $1 real estate to MidAmerican for the construction of the substation. (FCA Article II, § 2(a)). This real estate is surrounded by Microsoft's land. (CR 643:20-22). Microsoft chose the location of the substation. (CR 663:12-24). In response to a question about whether MidAmerican had any input on the location of the substation, a MidAmerican witness responded, "Why would we?" (CR 663:21-24). It was only after Microsoft chose the location of the substation that MidAmerican performed any route studies. (CR 736:12-737:1). Moreover, even after deeding the land for the substation to MidAmerican, Microsoft nevertheless agreed to "obtain required City of West Des Moines approval for the Maffitt Lake Substation . . ." (FCA § II(2)(b)). In addition, Microsoft retains "unrestricted access to the" substation "at all times." (FCA § II(2)(c)).

Microsoft, by contract with MidAmerican, has in essence dictated the actions and requests MidAmerican has made in this proceeding. Microsoft wanted a substation for its operations. Microsoft chose the location without any input by MidAmerican. Only *after* Microsoft chose the location of the substation did MidAmerican look at the possible routes to Microsoft's desired substation. At that time, MidAmerican's route study was limited by the decisions dictated by Microsoft. MidAmerican chose to not get involved in selecting the location of the substation. Thus, MidAmerican chose to not proactively identify new routes and substation placements that would follow the spirit of Iowa Code Chapter 478. Instead, MidAmerican allowed Microsoft to choose what Microsoft wanted, and only then did MidAmerican decide to perform route studies. MidAmerican could have looked at different routes that would not unduly burden landowners, but chose to take direction from Microsoft.

The most cited reason for a supposed public use identified by the appellees and amici below 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. (CR 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.). The substation, which currently serves Microsoft, is already connected to a 161kV line from Veterans Parkway. (CR 657:4-658:7). That current line is sufficient to accommodate the whole Microsoft load, even accounting for a ramp-up schedule in the FCA. (CR 658:12-17). It cannot serve a public purpose to run additional lines to the substation if the lines already connected to the substation accommodate the whole load at that substation. The FCA, however, requires MidAmerican to supply three lines to the substation. (FCA Article I, § 1(s) and FCA Exhibit A, § 3(b)(i) and § 3(c)(i)). This demonstrates that not only has MidAmerican failed to meet its burden to prove a public purpose, but that, in fact, the franchises sought in this proceeding are solely for the purpose of MidAmerican meeting a contractual agreement with Microsoft. This is not a sufficient reason to grant a franchise.

MidAmerican refers to "economic" benefits of the line, but those "economic" benefits will flow to MidAmerican and Microsoft. MidAmerican has not shown that its line will save Iowa consumers money; in fact, the evidence shows that consumers will actually *incur* costs because of the proposed lines. (CR 653:10-18 ("Q: So who pays for the cost of construction? A: The rate base") and CR 654:9-16 ("Q: So initially will customers other than Microsoft have to pay a part of the costs of construction? A: Based on the rate base, I would say the answer is yes.")). This is directly contrary to the regulatory principal that the cost causer should incur the cost. (CR 64:21-649:18).

MidAmerican's witness who testified about the effect of the proposed franchise on MidAmerican ratepayers stated that he had no opinion about whether increased revenues for MidAmerican will benefit ratepayers as a whole. (CR 680:11-14). Additionally, Microsoft will pay the cost of construction to MidAmerican over time. Essentially, Microsoft will pay for the construction by virtue of energy usage estimates and commitments to pay MidAmerican if those usage estimates are not met. *See* (FCA § III(2)(A); *see also* CR 650:10-653:4 and CR 668:23-669:6).

MidAmerican essentially double-dips under this arrangement at the cost of Iowa ratepayers. MidAmerican does not incur upfront costs because those are borne by Iowa ratepayers other than Microsoft. MidAmerican gets paid the cost of construction from Microsoft, and then some. This is a no-lose situation for MidAmerican, because it is guaranteed to receive the total cost of construction, the "Commitment Cost," either through revenue paid by Microsoft or by an advance. (FCA § III(2)). MidAmerican generates revenue from Microsoft. MidAmerican retains the revenue *and* reimbursement of construction costs, all without reimbursing the ratepayers for their initial contribution to construction of lines and a substation that is exclusively used by Microsoft. This proposed franchise is an excellent business opportunity for MidAmerican, because it benefits without incurring costs. MidAmerican's business prospects, though, do not establish a public use. It is clear that there are no public economic benefits from the proposed franchise, only potential profits for MidAmerican, and detriment to ratepayers.

MidAmerican has not submitted any evidence that the current electrical transmission system is or will be inadequate for the needs of

Madison County. There is no evidence in the record that any other person or entity will use MidAmerican's proposed line. Indeed, a property owner in the area at issue testified he has never experienced issues with power reliability. (CR 480:21-22).

When evaluating whether a utility is in fact serving the public, Iowa law requires the IUB to consider, among other factors, whether a particular project has been dedicated to a public use. *SZ Enterprises, LLC v. Iowa Utilities Bd.*, 850 N.W.2d 441, 447 (Iowa 2014). Public utilities are regulated as such because of the public service they provide. *Id.* It is for this same reason that entities which serve a single customer may not necessarily be public utilities. *Id.* (holding that entity which sold electricity to a municipality only was not dedicated to a public use). Hence, the nature of the customers served is one of several factors used to evaluate whether a particular utility is indeed a public utility. Put another way, a public utility is so-designated because it is serving the public.

However, it is not necessarily true that a public utility that constructs improvements for a particular customer is serving the public interest. Rather, as in this case, the question must be whether

the particular improvements serve a public purpose, not just the interests of Microsoft.

MidAmerican has argued that the Supreme Court's analysis in *SZ Enterprises* is inapplicable to this matter because that case addressed whether an entity was a public utility, while there is no dispute here that MidAmerican is indeed a public utility. However, this argument by MidAmerican is a red herring. Juckette does not contend MidAmerican is not a public utility. However, the phrase "public use" as used throughout the code chapters on utilities should be afforded the same meaning. *Klipsch*, 957 N.W.2d at 650; *Hall v. United States*, 566 U.S. 506, 519 (2012) ("[I]dentical words and phrases within the same statute should normally be given the same meaning."). Thus, the Iowa Supreme Court's analysis of "public use" in *SZ Enterprises*, which construed "public use" as used in § 476.1, must guide this Court's analysis of "public use" in § 478.4.

In sum, MidAmerican has failed to prove a public purpose for the proposed franchise, and the IUB erred in finding to the contrary. The evidence instead shows:

1) Microsoft is the only user of the substation to which the proposed lines will run;

2) It is completely speculative as to whether or when there will be future development which requires this requested franchise;

3) MidAmerican has a contractual commitment with Microsoft to obtain this franchise;

4) The current line to the substation at issue is sufficient to bear the anticipated burden on the substation; and

5) The construction of the line will be borne by MidAmerican ratepayers to benefit Microsoft and MidAmerican.

The District Court erred in concluding that MidAmerican's proposed franchise was "necessary to serve a public use" and therefore erred in granting MidAmerican its requested franchise. The facts demonstrate that MidAmerican's requested franchise is for the interests of Microsoft, as demonstrated by the economics and the directions taken by MidAmerican at the behest of Microsoft. MidAmerican did not present sufficient evidence that its franchise was "necessary to serve a public use" under the proper standards, and the District Court erred in finding otherwise.

II. MIDAMERICAN HAS NO RIGHT TO BUILD ON JUCKETTE'S PROPERTY

To the extent that the Court rules MidAmerican was entitled to a franchise because MidAmerican met its burden of proving necessity of public use, the District Court still erred in granting the franchise because MidAmerican has no right to erect poles in and lines over Juckette's real estate without utilizing the eminent domain process.[6] MidAmerican has no easement, has not obtained eminent domain and cannot rely on any lawful statute to enter Juckette's property; thus, the franchise was improperly granted.

A. Preservation of Error

Juckette has preserved error on this argument because it was raised in briefing and oral arguments before the Iowa Utilities Board and also before the Polk County District Court and was the subject of the Court's ruling.

[6] For the reasons explained above, MidAmerican would ultimately fail to satisfy the requirements for use of eminent domain, because there is no public use involved in this project.

B. Standard of Appellate Review

Because this issue involves review of constitutional issues in an agency decision, the Court's review is de novo without any deference to the IUB. *Puntenney*, 928 N.W.2d at 836; *Mathis,* 934 N.W.2d at 427.

C. Argument

The District Court stated there was no requirement under Chapter 478 or the governing administrative rules that a utility company such as MidAmerican must possess a right to possess a property owner's land prior to erecting poles in or lines over a private property owner's land. (11/7/21 Order, p. 12). The District Court ignored undisputed principles of law in making such a statement. In fact, none of the appellees or amici actually took the position that a private company like MidAmerican could enter any property owner's land and erect poles absent some sort of statutory or contractual right. It should not be in serious doubt that an entity which places a utility pole in private property absent any statutory or contractual right is trespassing. In fact, the IUB rightfully recognized that without a lawful right to enter Juckette's property, the franchise would have to be denied. (CR 915-16) ("in the event Ms. Juckette is correct in her

argument that MidAmerican lacks the easements necessary . . . then the lack of all necessary easements will serve as a basis to deny MidAmerican's request for a franchise . . ."). The District Court's failure to acknowledge that MidAmerican must have some sort of property right to place utility poles in and lines over Juckette's property was erroneous.

At all times in this proceeding, MidAmerican has contended that it has a statutory right to erect utility poles and lines on Juckette's property based upon Iowa Code § 306.46(1) ("A public utility may construct, operate, repair, or maintain its utility facilities within a public road right-of-way."). The District Court ruled that § 306.46 was being applied prospectively and that in any event, the poles in and lines over Juckette's property did not impose an additional servitude on Juckette's property. The Court erred in such conclusions. First, § 306.46 as applied in this case is necessarily applied retrospectively and is improper. Second, even if § 306.46 is not retrospectively applied, the statute as applied results in an unconstitutional taking of Juckette's property.

1) MidAmerican's Poles In and Lines Over Juckette's Land Are a Burden on the Property

The District Court ruled that MidAmerican's poles in and lines over Juckette's property within the road right-of-way did not impose an additional servitude on Juckette's land because utility use is an incidental and subordinate use of road rights-of-way. (11/7/21 Order, pg. 16). The Court cited only Alaska and Wyoming cases for this proposition. (Id.).

While this specific ruling arose in discussion of an unconstitutional taking, the Court's fundamental error in ruling that MidAmerican's proposed intrusion onto Juckette's land was not an additional servitude must first be addressed because the principles of the right-of-way limitations are necessary to address the Court's error in finding § 306.46 was applied prospectively.

Juckette's predecessor in interest dedicated a plat which contained a reference to "road right-of-way" on the eastern edge of the property in 1979. (CR 488-503). There is no express statement as to whom the road right-of-way was granted, but there does not appear to be any dispute that the right-of-way was granted to Madison

County because the road is a county highway. Because there is no express description of the road right-of-way, it is necessary to first understand the meaning of a "right-of-way."

A public road right-of-way is created by an easement. *SMB Investments v. Iowa-Illinois Gas & Elec. Co.*, 329 N.W.2d 635, 637 (Iowa 1983) ("The term right-of-way, when used in reference to the right to pass over another's land, is synonymous with the term easement."); *United States Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1844, 207 L. Ed. 2d 186 (2020) ("[A] right-of-way grants the limited 'right to pass ... through the estate of another.'"). There is no dispute that there is an easement on Juckette's property for a public road right-of-way.

The District Court erred in its conclusion that placement of utility poles in and lines over Juckette's property were not additional burdens on Juckette's land. There is no right for a third party – such as MidAmerican – to place utility structures in a right-of-way absent eminent domain or a grant of authority by the property owner to do so. A right-of-way is an easement for travel. Utilities are not subsumed

by a right-of-way easement. Black's Law Dictionary defines right-of-way as follows:

> 1. The right to pass through property owned by another. • A right-of-way may be established by contract, by longstanding usage, or by public authority (as with a highway). Cf. easement. 2. The right to build and operate a railway line or a highway on land belonging to another, or the land so used. 3. The right to take precedence in traffic. 4. The strip of land subject to a nonowner's right to pass through. — Also written right-of-way. Pl. rights-of-way.

RIGHT-OF-WAY, Black's Law Dictionary (11th ed. 2019). Notably, the definition is limited to a right of travel over property and does not include a right for a private company to erect utility structures in the right-of-way. *Brown v. Young*, 29 N.W. 941, 941 (Iowa 1886) ("A mere right-of-way over land is, we believe, always regarded as an easement."); *Chicago & N.W. Ry. Co. v. Sioux City Stockyards Co.*, 158 N.W. 769, 772 (Iowa 1916) ("In the absence of some showing to the contrary, a grant or gift of ground for right-of-way is presumed to be of an easement therein only.").

It is fundamental law that an easement holder cannot change the character of the easement or increase the burden on the servient estate beyond what was contemplated in the easement *ab initio*. *Stew-Mc Dev.*,

Inc. v. Fischer, 770 N.W.2d 839, 847 (Iowa 2009); *Brossart v. Corlett*, 27 Iowa 288, 293 (1869) ("[T]he servient estate shall not be burdened to a greater extent than was contemplated at the time of the creation of the easement."). It must follow, then, that a third party cannot expand the scope of the easement.

The plat dedicating the right-of-way did not grant any right to any utility company. A right-of-way has a specific meaning: it is the description given to an easement which grants a right of travel across property. *RIGHT-OF-WAY*, Black's Law Dictionary (11th ed. 2019).

Neither the IUB nor the District Court cited any Iowa case law, statute, or exhibit to support their conclusion that MidAmerican's placement of lines over and poles in Juckette's property is within the scope of the right-of-way easement granted to Madison County and were therefore not additional burdens or servitudes on Juckette's property.

As easement holder, Madison County is limited to use of the portion of Juckette's land for the purposes stated in the easement. Madison County has no right to expand that easement by placing utility poles in and lines over the property. There should be no doubt,

then, that a private utility company like MidAmerican has absolutely no right to expand the scope of the easement.

The Eighth Circuit, applying Missouri easement law – which appears identical to Iowa's in respect to the issues here – ruled that an electric cooperative exceeded the scope of an easement when it attempted to install a fiber-optic cable in an easement area. *Barfield v. Sho-Me Power Electric Coop.*, 852 F.3d 795 (8th Cir. 2017). In *Barfield*, an electric cooperative had easements to construct and operate electric transmission lines over thousands of parcels. *Id*. at 797-98. The cooperative decided to install fiber-optic cables in the easement area, and sold excess capacity on those cables to a telecommunications company. *Id*. at 798. The Eighth Circuit ruled that the easements only granted the cooperative the right to use the easements for construction and operation of electrical transmission, and that the cooperative had no right to install fiber-optic cables for use as telecommunications. *Id*. 801-02. The Court stated, "a cable can rightfully occupy the easement to serve the purpose authorized in the easement. But that cable cannot also serve the general public for purposes not authorized by the easement. That additional use—here, Tech's use for public-serving

commercial telecommunications unrelated to electric transmission—is an expanded use of the kind prohibited" under Missouri law. *Id.* at 802.

The Iowa Supreme Court has held that placement of utilities in an easement is an improper additional servitude on the easement if there is no express right for utility usage in the easement. *Keokuk Junction Ry. Co. v. IES Indus., Inc.*, 618 N.W.2d 352, 357 (Iowa 2000) (emphasis added) ("*[T]he easement language is controlling*, and a failure to indicate the right to place utility poles within in it is conclusive that this right does not exist."); *see also Id.* at 355 ("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*.") (emphasis added) (citing *Cline v. Richardson*, 526 N.W.2d 166, 169 (Iowa Ct. App. 1994); 39 Am. Jur. 2d *Highways, Streets, and Bridges* § 183 (1998) ("The general rule is that the law will not by construction effect a grant of a greater interest than is essential for the public use.")); *Keokuk Junction*, 618 N.W.2d at 360 ("*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.") (emphasis added).[7] Additionally, the Seventh Circuit – without any need for in-depth analysis – ruled that a statute authorizing the placement of utility facilities in a railroad right-of-way was obviously a physical taking triggering just compensation obligations. *Wisconsin Cent. Ltd. v. Pub. Serv. Commn. of Wisconsin*, 95 F.3d 1359, 1367 (7th Cir. 1996).

Here, the easement is for a right-of-way. That easement is for passage over land. An easement for electrical transmission in *Barfield* did not permit usage of the easement for fiber-optic cables. The easement granted to Madison County does not allow for use by electric utility infrastructure on Juckette's land. MidAmerican's attempt to put poles in and lines over Juckette's property in the easement is an additional servitude and is not permitted under the existing right-of-way easement. The District Court erred in concluding that the lines

[7] The legislature enacted § 306.46 following *Keokuk Junction*. As articulated in Section II(C)(2) below, the enactment of the statute did not change principles of property law.

here did not constitute an additional servitude and burden on Juckette's property.

2) Section 306.46 Cannot Be Applied Retrospectively

To place poles within the right-of-way, MidAmerican relied upon § 306.46, which provides that a "public utility may construct, operate, repair, or maintain its utility facilities within a public road right-of-way." The IUB and the District Court applied this section to allow MidAmerican to erect poles in and lines over Juckette's land without compensation to Juckette.

Statutes are prospectively applied unless expressly made retrospective. Iowa Code § 4.5. Section 306.46, enacted in 2004, contains no direction on timing, so it must be applied prospectively. In ruling that MidAmerican could rely on § 306.46, the District Court erred by applying § 306.46 retrospectively despite stating that it was applied prospectively.

The District Court did not analyze the prospective vs. retrospective issue in much depth. (Order, pg. 14-15). Citing *Hrbek v. State*, 958 N.W.2d 779 (Iowa 2021), the Court determined the

determinative event from which § 306.46 applied was MidAmerican's decision to construct the utilities in the right-of-way before it actually constructed the utilities, thus the statute was applied prospectively. (Order, pg. 15). The Court ruled the IUB properly applied § 306.46 prospectively. (Id.).

The IUB's analysis of this issue – though erroneous – was more in depth than the District Court's review. Throughout this proceeding, Juckette has maintained that applying § 306.46 to permit MidAmerican to construct utilities in an easement created in 1979 applies the statute retrospectively. Stated differently, in 2020, MidAmerican could not rely on § 306.46 (which was enacted in 2004) to change the extent of the easement granted in 1979. Since the 1979 easement was for a road right-of-way, and because § 306.46 did not exist in 1979, applying the statute in 2020 to now allow utility use in a right-of-way is retrospective application.

The IUB's analysis, which was affirmed by the District Court, relied on a fundamental error concerning the extent of the right-of-way. The IUB ruled that the construction of utilities in Juckette's right-of-way did not create an additional servitude. (IUB Order, pg. 22,

footnote 12). Because, according to the IUB, MidAmerican's planned construction was not an additional servitude, the determinative event for prospective vs. retrospective analysis was not the creation of the right-of-way easement. (IUB Order, pg. 22, footnote 12). As explained above, long-established property law leaves no doubt that use of an easement for purposes beyond the scope of the original easement is not permitted and is an additional servitude. The right-of-way did not include anything permitting electrical utilities in the easement, and MidAmerican's planned construction is an additional servitude. Thus, the IUB's analysis – and the District Court's reliance thereon – on prospective application of § 306.46 based on the incorrect application of easement law was flawed and erroneous.

When defining the scope of the burden on servient land, the Iowa Supreme Court focuses on the scope of the easement *at the time of its conveyance/formation*. *Stew-Mc Dev., Inc*, 770 N.W.2d at 847; *Brossart,* 27 Iowa at 293. It has not held that the passing of a statute like Iowa's current § 306.46 would wipe the slate clean by turning those limited easements (in place before the statute's enactment) into fee simple

conveyances. Iowa's enactment of § 306.46 did not change this basic legal principle.

Appellees 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, appellees 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 right-of-way easement, but without use for utilities.

How a landowner in 1979 should have known that in 2004, the stick he removed from his bundle in 1979 would, upon the enactment of a statute 25 years in the future, carry with it another stick that he thought he reserved in his bundle is impossible to say. No landowner would expect that his easement granted in 1979 would be expanded in the future and applied back in time to expand the scope of the easement he granted. The District Court's implicit finding that § 306.46 is applied prospectively back in time to the grant of the easement is incompatible with Iowa law.

In fact, the *Keokuk Junction* decision and the enactment of § 306.46 are consistent. Today, post-enactment of § 306.46, a party conveying a public road right-of-way is on notice that one of the sticks from the bundle of rights given away includes the potential that a utility will construct on the property. Practically speaking, this would mean the value of the burden added on a servient estate for the erection of utility lines—even when this burden is not explicitly contained in the language of the easement—would be reflected in higher consideration paid in the case of a voluntary easement, or weighed appropriately by a county commission as damages after an eminent domain proceeding. *See Keokuk Junction*, 618 N.W.2d at 361. Section 306.46 cannot be interpreted to retroactively permit reduction of property rights so carefully described in *Keokuk Junction*.

That the legislature may have intended to change the ruling in *Keokuk Junction* by enacting § 306.46 cannot abrogate long-standing property rights, the taking of which, without compensation, is a violation of the Iowa Constitution. Moreover, even after § 306.46 became law, the Iowa Court of Appeals has relied on and cited the *Keokuk* opinion when citing fundamental points of law concerning

easements and additional servitudes. *See McGrane v. Maloney*, 2009 WL 929048 (Iowa Ct. 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 Ct. App. Oct. 12, 2016); *Tiemessen v. All. Pipeline (Iowa) L.P.*, 2016 WL 351471 (Iowa Ct. App. 2016). The fundamentals of law articulated in *Keokuk* remain unchanged and good law.

Appellees generally assert that timing of the enactment of § 306.46 demonstrates the legislature's desire to create a public policy that utilities should exist in right-of-ways and that § 306.46 is an abrogation of *Keokuk Junction*. Such assertion fails to address the fundamental principle that the legislature cannot change the Iowa Constitution. If a statute's application results in an unconstitutional action, 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."). There is no doubt that a statute which removes a property right without

compensation is unconstitutional. If § 306.46 is applied to an easement granted in 1979, a stick in the bundle which was reserved in 1979 is taken in 2020 without compensation. This intersection of unchanged property rights and constitutional protections dictates that § 306.46 cannot be applied retrospectively to alter an easement granted in 1979 to include the right to place electric utility lines.

The Iowa Supreme Court has rejected the decisions of jurisdictions which have held that that erection of utility lines in a right-of-way can occur without compensation to the property owner. *Keokuk Junction*, 618 N.W.2d at 357-58. It instead agreed with the well-reasoned dissent of Justice Hall of the Utah Supreme Court:

> [E]mploying concepts of the advancement of civilization, and proper and consistent uses of highways in light of human progress, seems squarely to compromise the rights of landowners . . . . Any private roadway dedicated for use as a public thoroughfare thus becomes a pathway for whatever use a county authority, in its sole discretion, deems fit to impose, regardless of the detriment to the adjacent landowners. Little imagination is required to summon up possible uses which would be severely detrimental, if not completely destructive, of surrounding farm land; uses which, according to the majority view, could be imposed without the necessity of any compensation whatsoever.

> [*Pickett v. California Pac. Utils.*, 619 P.2d 325, 327 (Utah 1980)] (Hall, J., dissenting). The dissent properly recognized that when an easement is taken by the city through no choice of the landowner, the city should be bound by the purposes it provides and not those later implicated by progress of civilization. *Id.* at 329 (Hall, J., dissenting). Further, we agree with the dissent that were we to adopt this holding, it would be hard to envision any use that could not be related to the public use somehow and, therefore, authorized by the public highway easement.

Keokuk Junction, 618 N.W.2d at 357-58 (emphasis added).

A retroactive application of Iowa Code § 306.46 would undermine the bedrock constitutional principle that just compensation is the price for public taking of property. Section 306.46 was given immediate effect, but not specifically made retroactive. *Public Utilities-Facilities-Right-of-way* 2004 Ia. Legis. Serv. Ch. 1014 (S.F. 2118). Enacted legislation applies prospectively only, "unless expressly made retrospective." Iowa Code § 4.5. As explained above, prospective-only application of § 306.46 is consistent with established constitutional rights.

Grantors of easements prior to the enactment of § 306.46 would have not been aware that by granting a public right-of-way they were potentially allowing for the future intensification of that easement

through the erection of utility lines. Starting on the effective date of § 306.46, grantors are aware of that potential and can obtain appropriate compensation. Grantors of easements prior to § 306.46 would have had no such notice. *See also*, *Ginsberg v. Lindel*, 107 F.2d 721, 726 (8th Cir. 1939) ("It is the general rule that a retrospective operation will not be given to a statute which interferes with antecedent rights, unless such be the unequivocal and inflexible import of its terms and the manifest intention of the legislature.").

In *NDA Farms, LLC c. Iowa Utilities Bd., Dept. of Commerce*, the Polk County District Court adopted this reasoning as it specifically applies to § 306.46, concluding:

> Upon review of section 306.46 and considering relevant case law, the court concludes that *the IUB committed an error of law in concluding that section 306.46 applied retroactively to the easement granted to Polk County in 1956*. The statute applies prospectively only, so as to not interfere with the contractual relations created in the 1956 easement.
>
> ***
>
> This court finds the IUB erred in concluding that section 306.46 abrogated the holding in *Keokuk*, and likewise erred when it determined that Ames did not need a second easement to construct the transmission line at issue. As an easement would be required to construct the transmission line, any construction based on the permission from the Polk County Engineer without compensation would

> constitute a governmental taking without just compensation. *See Keokuk*, 618 N.W.2d at 362; *Bormann v. Bd. of Sup'rs In and For Kossuth Cnty.*, 584 N.W.2d 309, 316-17 (Iowa 1998).

No. CV 009448, 2013 WL 11239755, at *9-10 (Iowa Dist. June 24, 2013) (emphasis added). The District Court's legal analysis in *NDA Farms* is well-founded and should be adopted by this Court. MidAmerican cannot rely on § 306.46 to overcome the requirement of condemnation and just compensation in order to construct electric transmission lines on Juckette's property.

Case law from the United States Supreme Court in the 1930s sheds light on the unconstitutional effect of § 306.46. In reaction to the Great Depression, Congress enacted the Frazier-Lemke Act, which purported to give additional bankruptcy protections to farmers defaulting on mortgages. Under the act, farmers could force a stay of foreclosure proceedings and retain possession of property for up to five years. This applied even when the mortgage provided the bank remedies to the contrary.

In *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935), a farmer defaulted on a loan. The farmer elected to force the bank to

accept the five-year protections under the Frazier-Lemke Act. The election's effect 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 contended the Frazier-Lemke Act was an unconstitutional taking of property rights because it applied to pre-existing mortgages since the act took away the bank's pre-existing property rights as mortgagee.

The Supreme Court unanimously held the Frazier-Lemke Act was unconstitutional. Progressive Justice Louis Brandeis wrote that because the act applied to pre-existing mortgages, the takings provision of the Constitution was controlling. *Id.* at 589. The act was unconstitutional because the act took a property right – 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 <u>taken from the bank</u> without compensation, and given to Radford, <u>rights in specific property</u> which are of substantial value. As <u>we conclude that the act as applied has done so, we must hold it void</u>**; 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 revised the Frazier-Lemke Act, which was constitutionally approved 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 *Wright*, 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 to whether each 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 act was unconstitutional since the statute resulted in an uncompensated taking of a property right. The 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 be deemed unconstitutional as it applies to the easement granted by Juckette's predecessor approximately 25 years before the enactment of § 306.46.

Board member Lozier dissented from the IUB's analysis of § 306.46 in this proceeding. Lozier criticized the majority's interpretation of § 306.46 and concluded that it "is inescapable that the proper

interpretation of § 306.46 is that it is to be applied prospectively only, and it does not change the terms of the road right-of-way easement created more than 25 years before the enactment of § 306.46." (CR 946-47). Lozier began with the fundamental proposition that prior to the enactment of § 306.46, there is no doubt that when a landowner created a road right-of-way easement, there was no reason the landowner could expect that road right-of-way easement to include an easement for public utilities. (CR 944). Lozier concluded that "[t]o 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." (CR 944-45).[8]

Board member Lozier's dissent is compelling and in line the with the Polk County District Court's ruling in *NDA Farms* and the United States Supreme Court's ruling in *Radford*. Such reasoning should be adopted by this Court.

[8] The IUB majority even stated agreement with Lozier's reasoning, but nevertheless concluded it could not be bound by the Polk County District Court's decision in *NDA Farms*. (CR 929, n. 10).

This Court should reverse the District Court's ruling that § 306.46 allows MidAmerican to place electric facilities in Juckette's property without compensation because the section cannot be applied to the easement created 25 years before the statute's enactment.

3) Even if § 306.46 was Prospectively Applied, it is Unconstitutional

Even if the District Court was correct that § 306.46 is applied prospectively here, the result of the statute is unconstitutional as applied, and the District Court erred in ruling otherwise.

Both the Federal and Iowa Constitutions prohibit the taking of property rights without just compensation. U.S. Const. Amend. V; Iowa Const. Art. I, § 9. A regulatory taking occurs when a governmental action or statute results in deprivation of a property right. *Bormann v. Board of Supervisors In and For Kossuth County*, 584 N.W.2d 309, 316-17 (Iowa 1998). One category of a regulatory taking is a *per s*e taking caused by a physical invasion of property. *Id*. at 317-18.

In 1982, the United States Supreme Court held that a private entity's physical intrusion onto private property pursuant to a New York statute was an unconstitutional taking. *Loretto v. Teleprompter*

Manhattan CATV Corp., 458 U.S. 419 (1982). In *Loretto*, a statute provided that certain private companies providing access to cable television could install cable infrastructure in/on apartment buildings and that owners of the buildings could not interfere with said installation. The Supreme Court held: "We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve. Our constitutional history confirms the rule, recent cases do not question it, and the purposes of the Takings Clause compel its retention." *Id*. at 426. Under *Loretto*, a statute that purports to authorize **any** physical intrusion on real property results in a **per se taking** without regard for the public interests addressed by the statute. The size of the intrusion makes no difference to the Constitutional impropriety of the invasion.

The Supreme Court of the United States recently reiterated the holding in *Loretto*. In *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021), the Court held that a statute which granted third parties rights to enter private property was a *per s*e physical taking. The Court stated:

> The right to exclude is "one of the most treasured" rights of property ownership. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435, 102 S.Ct. 3164, 73 L.Ed.2d

> 868 (1982). According to Blackstone, the very idea of property entails "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 W. Blackstone, Commentaries on the Laws of England 2 (1766). In less exuberant terms, we have stated that the right to exclude is "universally held to be a fundamental element of the property right," and is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 179–180, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979); see *Dolan v. City of Tigard*, 512 U.S. 374, 384, 393, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); see also Merrill, Property and the Right to Exclude, 77 Neb. L. Rev. 730 (1998) (calling the right to exclude the "*sine qua non*" of property).
>
> **Given the central importance to property ownership of the right to exclude, it comes as little surprise that the Court has long treated government-authorized physical invasions as takings requiring just compensation. The Court has often described the property interest taken as a servitude or an easement**.

Id. at 2072-73 (emphasis added). The restrictions on taking of property without compensation extend even to invasion of an easement. *Id.*; *Kaiser Aetna v. U. S.*, 444 U.S. 164, 180 (1979).

The Iowa Supreme Court has ruled that the legislature exceeded its authority in enacting a statute which essentially took an easement from private property to a third party because the effect was a

violation of takings clauses of the Federal and Iowa constitutions. *Bormann,* 584 N.W.2d at 321. In *Bormann*, a statute was enacted to provide immunity to farmers whose activities would ordinarily constitute an actionable nuisance. The Court equated the immunity to an easement forced upon neighbors who could no longer sue for nuisance. *Id*. The Court held the statute amounted to a taking of private property in violation of the Federal and Iowa constitutions. *Id*. The Court ended its opinion as follows:

> We reach this holding with a full recognition of the deference we owe to the General Assembly. That branch of government-with some participation by the executive branch-holds the responsibility to sort through the practical realities and, through the political process, reach consensus in highly controversial public decisions. Those decisions demand our sincere respect. The rule is therefore that "[a] challenger must show beyond a reasonable doubt that the statute violates the constitution and must negate every reasonable basis that might support the statute." *Johnston v. Veterans' Plaza Authority,* 535 N.W.2d 131, 132 (Iowa 1995). The rule finding constitutionality in close cases cannot control the present one, however, because, with all respect, this is not a close case. When all the varnish is removed, the challenged statutory scheme amounts to a commandeering of valuable property rights without compensating the owners, and sacrificing those rights for the economic advantage of a few. In short, it appropriates valuable private property interests and awards them to strangers.

> The same public that constituted the other branches of state government to make political decisions with an eye on economic consequences expects the court to resolve constitutional challenges on a purely legal basis. We recognize that political and economic fallout from our holding will be substantial. But we are convinced our responsibility is clear because the challenged scheme is plainly-we think flagrantly-unconstitutional.

Id. at 322.

Here, Iowa Code § 306.46 is functionally equivalent to the *Loretto* statute. There, a law authorized a private entity to intrude on private property based on an articulated public purpose. Here, § 306.46 purports to allow construction of a utility in a right-of-way located on private property. Both statutes purportedly allow unilateral permanent access to a private company to invade private property. Both statutes violate the Constitution.

Since neither Juckette nor her predecessors have granted a specific right for a utility to enter the land for placement of poles and lines, MidAmerican cannot rely on § 306.46 to invade Juckette's land without compensation. Such invasion is an additional servitude on Juckette's property, as explained above, and § 306.46's attempt to

permit such burden and additional servitude results in an unconstitutional taking. *See Bormann*, 584 N.W.2d at 321.

The District Court ruled that § 306.46 was not unconstitutional "because placing utility structures on a road right-of-way does not call for acquiring an additional servitude from the landowner." (Order pg. 16). The District Court only cited cases from Alaska and Wyoming for that proposition. (Order, pg. 16). As explained above, the District Court erred in this conclusion: a right-of-way is an easement for travel and does not by itself include a right for a utility company to place electric facilities. Section 306.46's enactment did not change Iowa property law to transform right-of-ways granted before § 306.46's enactment into rights-of-way *plus* rights-of-utilities. The District Court's conclusion ignored long-standing property law principles and failed to truly address the unconstitutional nature of § 306.46.

Loretto and *Bormann* make clear that a statute – regardless of the legislative desire to reach a laudable goal – cannot result in a loss of a property right without just compensation. If a television cable attached to the exterior of a building is a separate property right and not a subsumed, incidental use of an apartment building, then placement of

utility poles in real estate cannot be an incidental use of a right-of-way. If the right to exclude a television cable from a building is a property right as noted in *Loretto*, then the right to exclude poles in and electric lines over property is certainly a property right which requires compensation if such right is taken by statute.

As applied, § 306.46 is unconstitutional because it purports to allow the IUB to permit MidAmerican to place utility structures in Juckette's property without just compensation. The placement is an additional servitude on Juckette's property beyond the right-of-way, and compensation is required. The District Court erred in ruling to the contrary.

III. THE FRANCHISE MUST BE VACATED

If the Court agrees that there was error below, MidAmerican's franchise must be vacated. First, if the Court determines the proposed franchise was not necessary for a public use, then the franchise request must fail and the franchise should be vacated. Next, if the Court concludes that the IUB and District Court applied the wrong legal standard to determine the necessity of the public use, but does not make the determination that the facts in the record allow the Court to

make such a finding, then the franchise must be vacated and remanded to the IUB for application of the facts to the proper "public use" standard for granting a franchise. Finally, even if the Court determines the IUB and District Court applied the proper legal analysis for necessity for a public use, the franchise still must be vacated and remanded to the IUB because MidAmerican still had no right to enter Juckette's property.

In its order granting the franchise, the IUB wrote:

> Ms. Juckette's first argument is premised entirely on the presupposition that MidAmerican cannot build, operate, or maintain a transmission line along the eastern border of her property without the use of eminent domain. However, as Ms. Juckette acknowledges within her argument, MidAmerican is not requesting eminent domain authority over any portion of Ms. Juckette's property. Therefore, *in the event Ms. Juckette is correct in her argument that MidAmerican lacks the easements necessary for Route 7* (an argument the Board will examine in greater detail below), 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 this particular contention will be moot. Conversely, if MidAmerican does not require eminent domain along Ms. Juckette's eastern border, then Ms. Juckette's contention fails.

(CR 915-16) (emphasis added). MidAmerican relied on § 306.46 throughout the IUB proceeding, and the IUB made clear that if

MidAmerican had no right to enter Juckette's property, then the franchise as presented to the IUB would have to be denied. (Id.) This makes sense because all of MidAmerican's assumptions and preferences for route selection were premised on its ability to enter Juckette's property via § 306.46. The IUB recognized that based on what MidAmerican presented to the IUB, the franchise request would have to be denied if MidAmerican was wrong about § 306.46.

Thus, even if the Court determines that the proper legal standard was applied for the necessity for public use analysis, the Court must still vacate and remand to the IUB for the IUB to consider all other aspects of the franchise request – including route selection – in light of this Court's ruling on the lawfulness (or lack thereof) of § 306.46. Stated another way, because the franchise which the IUB granted was on the premise that § 306.46 allowed MidAmerican to enter Juckette's property, the franchise's foundation is built upon an unlawful application of law and the franchise must therefore be vacated.

CONCLUSION

This case is about the limitation on state-sponsored intrusion of one's private property for another's private development. The statutory requirement for a utility to prove "necessity of public use" must be more than a rubber stamp. The standard must mean something, and the combination of case law and statutory construction demonstrate that for a utility to obtain a franchise, it must prove there is a necessity for lines to benefit the public as opposed to private development.

This is not a case where a private party is without electricity and needs an electric franchise to come to it; here, the private party does have adequate electricity even accounting for future ramp-ups. The Court should definitively rule on whether "necessity of public use" is a non-standard which may be automatically met or a standard that actually considers public need in the same way "public use" is analyzed in the context of Iowa's Constitution.

This case is also about whether a privately-owned utility company may occupy private property without compensation based on a single statute. This Court has recognized that although Iowans

look to the Legislative and Executive branches to make political decisions to solve important issues, the Judicial branch must still ensure those political and economic decisions do not tread on Iowans' rights enshrined in their Constitution. *Bormann*, 584 N.W.2d at 322. As in *Bormann*, though recognition of political realities must be afforded to the legislature, when all the varnish is removed from § 306.46, the statue "amounts to a commandeering of valuable property rights without compensating the owners, and sacrificing those rights for the economic advantage of a few. In short, it appropriates valuable private property interests and awards them to strangers." *Id*. As applied to this case where a right-of-way easement was granted a quarter of a century before the enactment of § 306.46, the statutory scheme is "plainly … [and] flagrantly unconstitutional." *See id.*

The franchise granted to MidAmerican must be vacated. The IUB and District Court applied the wrong standard to assess the entitlement to a franchise, and under the correct standard MidAmerican failed to meet its burden. Even if MidAmerican met the standard for franchise, the franchise must still be vacated because its

foundation is premised upon § 306.46, which cannot be lawfully applied to Juckette's property.

For all these reasons, the franchise must be vacated.

REQUEST FOR ORAL SUBMISSION

Juckette respectfully requests that an oral argument be held in this appeal.

CERTIFICATE OF COST

Undersigned counsel certifies there was no cost paid by Juckette as contemplated by Iowa R. App. P. 6.903(2)(j).

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

[X] this brief has been prepared in a proportionally spaced typeface using Book Antiqua in 14 point type, and contains 13,373 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1)

or

[ ] this brief has been prepared in a monospaced typeface using [state name of typeface] in [state font size] and contains [state the number of] lines of text, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(2).

/s/William M. Reasoner 02/08/2022
Signature Date

CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2022, 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:

Jon Tack
Matthew Oetker
Iowa Utilities Board
1375 E. Court Avenue
Des Moines, IA 50309
jon.tack@iub.iowa.gov
matt.oetker@iub.iowa.gov
ATTORNEYS FOR RESPONDENT, IOWA UTILITIES BOARD

Jeffrey J. Cook
Office of Consumer Advocate
1375 East Court Avenue
Des Moines, IA 50309
jeffrey.cook@oca.iowa.gov
ATTORNEY FOR OFFICE OF CONSUMER ADVOCATE

Dennis L. Puckett
Amanda A. James
SULLIVAN & WARD, P.C.
6601 Westown Pkwy., Ste. 200
West Des Moines, IA 50266
dpuckett@sullivan-ward.com
ajames@sullivan-ward.com
ATTORNEYS FOR IOWA ASSOCIATION OF ELECTRIC COOPERATIVES

Stanley J. Thompson
DENTONS DAVIS BROWN PC
215 10th Street, Suite 1300
Des Moines, Iowa 50309
stan.thompson@dentons.com
ATTORNEYS FOR IOWA UTILITY ASSOCIATION

Andrew L. Magner
MidAmerican Energy Company
666 Grand Avenue, Suite 500
Des Moines, IA 50309
andrew.magner@midamerican.com
ATTORNEY FOR MIDAMERICAN ENERGY COMPANY

Bret A. Dublinske
Brant M. Leonard
FREDRIKSON & BYRON, P.A.
111 East Grand Ave., Ste. 301
Des Moines, Iowa 50309
bdublinske@fredlaw.com
bleonard@fredlaw.com
ATTORNEYS FOR ITC MIDWEST LLC

/s/ William M. Reasoner
William M. Reasoner