IN THE SUPREME COURT OF IOWA

NO. 21-1788

LINDA K. JUCKETTE,

Petitioner – Appellant,

vs.

IOWA UTILITIES BOARD,

Respondent – Appellee

and

OFFICE OF CONSUMER ADVOCATE AND MIDAMERICAN ENERGY COMPANY

Intervenors – Appellees.

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

PROOF BRIEF OF AMICUS CURIAE ITC MIDWEST LLC

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STATEMENT OF AMICUS CURIAE ITC MIDWEST LLC

Amicus curiae ITC Midwest LLC ("ITC Midwest"), headquartered in Cedar Rapids, Iowa, is an independent, stand-alone transmission company engaged exclusively in the development, ownership and operation of facilities for the transmission of electric energy in interstate commerce. ITC Midwest provides transmission service in Iowa, Minnesota, Illinois and Missouri, where it owns and operates approximately 6,700 circuit miles of transmission lines with the overwhelming majority of those lines in Iowa. ITC Midwest is a subsidiary of ITC Holdings Corp., which invests exclusively in the electric power transmission grid to improve electric reliability, facilitate access to renewable and other generation, improve access to power markets, and reduce the cost of electric power.

ITC Midwest has a direct interest in the issues in this case. Its interests are significantly impacted by Appellant's arguments regarding public use, which are contrary to longstanding, extensive precedent at the Iowa Utilities Board ("Board") and in courts and which has been and will be relied on by ITC Midwest to develop reliable electrical delivery in Iowa. Similarly, ITC Midwest has a vested interest in the application and interpretation of Iowa Code Section 306.46, which facilitates the placement of vital infrastructure for the electric system in Iowa in the road right-of-way.

DISCLOSURE STATEMENT

ITC Midwest's Brief of Amicus Curiae has been authored wholly by counsel for ITC Midwest, at its sole expense. No other party has contributed money to fund the preparation or submission of the brief.

INTRODUCTION

In this case, after following the extensive processes required by Iowa Code chapter 478, utilizing the lengthy list of required showings and criteria in that chapter and 199 Iowa Administrative Code chapter 11, the Board approved a franchise for a new electric transmission line proposed by MidAmerican Energy Company ("MEC"). Linda Juckette, a landowner on the approved route unhappy with the prospect of the electric line running adjacent to the road in front of her property, appealed the Board's decision. However, the relief Juckette asks of this Court ignores the realities of the electrical system and the legal and regulatory framework around it. It also ignores the broader public good that the electric system and the Board as a regulator must serve. Further, Juckette's argument improperly ignores the intent of the Iowa Legislature when it amended Iowa Code §306.46, an amendment meant to clarify the ability of infrastructure like electric transmission lines to use the road right of way ("ROW"). As a result, the outcome Juckette seeks would significantly hinder critical infrastructure development.

As an amicus, it is not ITC Midwest's place to dig deeply into the specific facts of this case. Rather, ITC Midwest's interest is that the law and the policy that impacts the electric system remains true to the intent of the Iowa Legislature, the Board, and the Federal Energy Regulatory Commission

and continues to allow both transmission and distribution utilities to provide safe, reliable electric service to all customers. ITC Midwest's interest is in two particular issues where Juckette's challenges to the Board are without merit and are also problematic for similar cases that may involve ITC Midwest, challenges that are contrary to both law and good policy.

First, Juckette urges this Court to apply an improper and unsupported approach to the "public use" element of the multi-part test for a transmission franchise, which would not only make it harder to build adequate transmission facilities in a timely way but also disadvantage many families and businesses who Juckette would subjectively exclude from qualifying as "the public." *Second*, Juckette seeks to overturn the Board's correct application of the plain language of Iowa Code § 306.46, a statute passed with the intent of facilitating infrastructure and also with the salutary intent to site different types of infrastructure together in existing corridors to minimize overall impacts on land use. As ITC Midwest explains below, the Court should reject Juckette's arguments on these issues as wrong on the law, but also because they would be bad for Iowa's electric customers – that is, ultimately, bad for virtually every Iowan.

ARGUMENT

I. THE COURT SHOULD AFFIRM THE BOARD'S GRANT OF THE FRANCHISE AND REJECT AN IMPROPERLY NARROW VIEW OF "PUBLIC USE."

Juckette argues that the Board erroneously issued the franchise because, allegedly, MEC's proposed line is not "necessary for a public use." To get there, however, Juckette argues erroneously that because sometimes the term "public use" is part of a constitutional test for use of eminent domain, it must be used the same way when it appears as an element of the test for a franchise. Not surprisingly, there are no cases directly supporting this novel theory requiring a court to ignore the context in which terms are used. The Court should reject Juckette's unfounded arguments that an electric transmission line may not be a public use, as the Iowa Supreme Court has conclusively determined that electric lines *are* public uses under any standard.

Juckette's argument is contrary to cases on which she relies, as well as other precedent from this Court interpreting the term "public use" as an element of a transmission franchise. This Court's decision in *S.E. Iowa Co-op. Elec. Ass'n v. Iowa Utils. Bd.,* 633 N.W.2d 814 (Iowa 2001), for example, stands in stark contrast to the approach Juckette suggests. Further, even if the

constitutional standard for public use were applied, transmission lines in cases like this constitute public uses.

A. The Court Should Reject Juckette's Unfounded Arguments that an Electric Transmission Line May Not be a Public Use – This Court Has Already Determined that Electric Lines are Public Uses.

To issue an electric transmission line franchise, the Board must determine that the project is "necessary to serve a public use and represents a reasonable relationship to an overall plan of transmitting electricity in the public interest." Iowa Code § 478.4. Juckette devotes a large portion of her Brief to arguing that the term "public use" as used in the above franchise test must be given the same meaning it carries when considered in the constitutional context of eminent domain. Juckette's attempt to collapse two inquiries – whether to grant a franchise and whether a particular project is a public use for eminent domain purposes – is mistaken in several respects.

Initially, Juckette argues that the Court should not give deference to the Board's interpretation of the "public use" element. While this case should not turn on deference in any event, Juckette's reliance on *Puntenney*[1] – both for her argument regarding deference and more broadly – is misplaced.[2] Juckette

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

[2] Juckette's reliance on *Mathis* (934 N.W.2d at 427) for her broad statement that "the Iowa Supreme Court…has ceased deferring to the IUB's legal interpretation of Chapter 478" (Juckette Br. at 31) is mistaken. This Court in

repeatedly cites *Puntenney* for her arguments that: (1) the Board is entitled to no deference with respect to whether a utility project constitutes a public use; and (2) that *Puntenney* demonstrates that the term "public use" has the same meaning in Section 478.4 as it does in its constitutional context. In doing so, Juckette attempts to lump together the separate inquiries of whether the Board should grant a permit (or franchise) for a particular utility project and whether that particular project is a constitutionally-permissible public use for eminent domain purposes.

The approach this Court took in *Puntenney directly contradicts* what Juckette's suggests. While Juckette's approach would eliminate the distinction between a permitting test and an eminent domain analysis, in *Puntenney* the Court considered each question separately. There, the Court first considered whether the pipeline promoted the "public convenience and necessity" – the test for whether to issue a permit – and expressly deferred to the Board's interpretation of that term. *See id*. at 836 ("Here, we think the legislature clearly vested the IUB with the authority to interpret 'public convenience and necessity' as used in Iowa Code section 479B.9."). After

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Mathis emphasized, "Our focus here is on the narrow question of whether the legislature gave interpretive authority to the IUB to determine what is a 'single site' within the meaning of Iowa Code section 476A.1(5)." *Id*. at 427. Notably, the Court affirmed the IUB on review for errors at law.

analyzing the decision to grant the permit, the Court considered the eminent domain question regarding whether the pipeline was a "public use" under constitutional precedent. *Id*. at 844. In sum, the *Puntenney* Court applied the very approach advanced by MEC and IUB here, not the approach suggested by Juckette.

Further, Juckette's suggestion is inconsistent with this Court's past interpretation of Iowa Code chapter 478. In evaluating the public use element of the franchise test in *S.E. Iowa Co-op*, this Court approved a balancing test incorporating a variety of factors and did not refer to any constitutional precedent for that public use test. 633 N.W.2d at 821. Rather, the Court analogized the "necessary for public use" test to cases requiring a finding of "public convenience and necessity," (like *Puntenney*) which is not a constitutional standard. *Id*. at 819. The Court similarly analogized to other states that described the test in terms of "public need." *Id.* at 820 (citing *Niagara Mohawk Power Corp. v. Pub. Serv. Comm'n*, 637 N.Y.S.2d 981, 991 (N.Y. App. Div 1996)). In *S.E. Iowa Co-op*, the Court discussed a variety of considerations, including adequacy and reliability of electrical service, and cost, as factors the Board could consider in finding public use for purposes of a franchise. And critically, the Court reiterated that the franchise decision is the Board's decision to make. *Id*. at 819 ("In enacting chapter 478, the

legislature intended to entrust the Board with the decision whether a public use existed and, if so, the necessity of the proposed line to serve the public use."). *See also Fischer v. Iowa State Commerce Commission*, 368 N.W.2d 88, 89 (Iowa 1985) (considering service reliability and load growth projections in affirming grant of franchise); *Bradley v. Iowa Department of Commerce*, No. 01-0646, 2002 WL 31882863 (Iowa Ct. App. Dec. 30, 2002) (finding evidence regarding anticipated load growth, reliability and quality of electric service sufficient to affirm grant of franchise).

Accordingly, Juckette's argument that the term "public use" as used in the franchise test must have the same meaning as it has in the constitutional context of eminent domain is inconsistent with the approach approved by this Court in *Puntenney,* the legislative intent set forth in the structure of the statutes, and this Court's opinions specifically interpreting Iowa Code Section 478.4. *See S.E. Iowa Co-op*, 633 N.W.2d at 820 ("We have already found the transmission of electricity to the public constitutes a public use as contemplated by section 478.4."). Juckette's argument must therefore be rejected.

A. Even if the Court Applied the Meaning of Public Use from Constitutional Takings Law, Electric Transmission Lines Like that Proposed by MEC are Still a Public Use.

A constitutional takings test is not appropriate to apply to the public use element for a franchise in § 478.4. However, this debate is irrelevant: electric transmission lines are a public use regardless of the test applied. This Court previously said "it is not open to doubt" 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." *Vittetoe v. Iowa Southern Utilities Co.*, 123 N.W.2d 878, 880 (Iowa 1963); *S.E. Iowa Co-op*, 633 N.W.2d at 820 ("We have already found the transmission of electricity to the public constitutes a public use as contemplated by section 478.4."). As a result, at least for electric transmission lines, the argument about which public use framework applies is a distinction that makes no difference to the outcome of this case.

While Juckette argues that the public use language in Iowa Code chapter 478 cannot establish its own constitutionality, courts have made very clear that the legislature has ample latitude to determine the scope of a public use. "[I]t is initially for the legislature to determine whether private property is being taken for a public use. Courts should not substitute their judgment as to what constitutes a public use unless the use is palpably without reasonable

foundation." *CMC Real Est. Corp. v. Iowa Dept. of Transp., Rail and Water Div.*, 475 N.W.2d 166, 169 (Iowa 1991) (citations omitted); *Bankhead v. Brown*, 25 Iowa 540, 545 – 47 (Iowa 1868) ("When the public exigencies demand the exercise of the power of taking private property for the public use, is solely a question for the legislature, upon whose determination the courts cannot sit in judgment.…" (citations omitted)); *see also Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 239 (1984); *Milligan v. City of Red Oak*, 230 F.3d 355, 359 (8th Cir. 2000). These legislative determinations are entitled to a strong presumption of validity. *See Milligan*, 230 F.3d at 359 ("Legislation calling for condemnation enjoys the same presumption in its favor as when the constitutionality of [any other] statute is challenged").

In the present case, the legislature has spoken explicitly, determining that applicants who obtain franchises for electric transmission lines are entitled to eminent domain authority. Under Iowa Code chapter 478, pursuant to which the Board found it proper to grant MEC a franchise, the legislature mandated that the applicant "shall thereupon be vested with the right 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. That is, if the Board finds eminent domain necessary, the legislature has deemed it a public use. While this is the most specific and relevant statute to the facts in this

case, the legislature made similar provision in Iowa Code § 6A.22, the general eminent domain statute, where "public use" is defined as including "[t]he acquisition of any interest in property necessary to the function of a public or private utility, common carrier, or airport.…" Iowa Code § 6A.22(2). Transmission lines are both property necessary to the function of utilities and they are also common carriers.

The legislative determination of the scope of the eminent domain power is binding and not to be overturned by a court unless the legislature's judgment is "palpably without reasonable foundation." *See CMC Real Estate*, 475 N.W.2d at 169. Juckette does not clear that high bar: the legislative decision (and its application in this case) was not only reasonable, but consistent with the mainstream of cases in Iowa and across the country. As early as 1943, this Court upheld language similar to §478.15 (but in the context of a pipeline). *See Browneller*, 8 N.W.2d at 479 ("The power of eminent domain granted to pipe line companies by chapter 383.3 [a predecessor to chapter 479B] is broad and general in its terms. It is not for this court to say that the legislature did not have the power to provide for the right of condemnation as provided for in said chapter."). While it is important to note that this case does not in fact involve eminent domain, to the extent Juckette urges this Court (incorrectly) to apply the body of eminent domain

law to define "public use" in Iowa Code §478.4, the law is clear that it would make no difference in the result: the legislature has determined that an electric transmission line is a public use – including for purposes of eminent domain law.

Juckette's primary argument regarding constitutional public use, however, is that she alleges this line is being built solely for Microsoft, rather than the public. This argument has numerous problems. First, Microsoft is part of the public, having as much right to receive adequate, reliable electrical service as anyone else. The electric system is a system of interconnected transmission and distribution wires and their associated substations with both a goal and a regulatory obligation of making safe, affordable, reliable electricity available to all households and businesses. There are places where customers are close together and many of them can be served from the same facilities; there are places where those customers exist in lower-density settings and the facilities may currently run only to them. It would be an odd standard to discriminate against building electric lines to one customer over another simply due to the closeness of other unrelated customers.[3]

[3] Such lower density new homes and business would more likely be located in rural areas, which makes Farm Bureau's position somewhat surprising. Juckette's position that lines serving a single member of the public are not "public uses" would make it harder, slower, and more costly to extend new

Second, even if Microsoft were the only customer served by the substation *today,* the transmission line is capable of feeding other customers, now or in the future, from that substation (and such customers are likely). Juckette argues that future customers are speculative but misses the fact that it simply doesn't matter. It is the *ability* of the line to serve multiple customers that makes it a common carrier (and therefore a public use), not the likelihood other customers will actually use the line. *See, e.g., Wright v. Midwest Old Settlers and Threshers Ass'n*, 556 N.W.2d 808, 810–11 (Iowa 1996) (noting that "a common carrier need not serve all the public all the time."); *Circle Exp. Co. v. Iowa State Com. Commn.*, 86 N.W.2d 888, 893 (Iowa 1957) ("the distinctive characteristic of a common carrier is that he *holds himself out as ready* to engage in the transportation of goods for hire, as a public employment, and not as a casual occupation, and that he undertakes to carry for all persons indifferently, within limits of his capacity and the sphere of the business required of him.") (citations omitted, emphasis added). Further, in the context of determining whether an activity is a "public use" for purposes of constitutional analysis, the U.S. Supreme Court has explained,

> The Court long ago rejected any literal requirement that condemned property be put into use for the general public. "It is not essential that the entire community, nor even any

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services of all kinds – electric, telephone, broadband, water – where customer density is lowest, mainly to the farms and rural areas of the state.

> considerable portion, ... directly enjoy or participate in any improvement in order [for it] to constitute a public use." *Rindge Co. v. Los Angeles*, 262 U.S. at 707, 43 S. Ct. at 692.

Hawaii Hous. Auth., 467 U.S. at 244.

Courts around the country have long held that providing open access to the relevant users satisfies the constitutional public use test. *See, e.g., Mid-Am. Pipe Line Co. v. Missouri Pac. R. Co.*, 298 F. Supp. 1112, 1123 (D. Kan. 1969) (holding that an anhydrous ammonia pipeline satisfied public use test because, "[w]hile Mid-America will begin operation of the anhydrous ammonia line with one [customer], it is committed to Hill for only 2/5 of the practical economic volume of the pipeline. . . . Like the early stages of Mid-America's petroleum products pipeline, the anhydrous ammonia line has room to grow in the number of [customers] serviced."); *Linder v. Arkansas Midstream Gas Services Corp.*, 362 S.W.3d 889, 897 (Ark. 2010) (rejecting landowners' argument that a natural gas pipeline was not a public use because "the taking is for the exclusive use of a collection of individuals less than the public," and concluding, "it makes no difference that only 'a collection of a few individuals' may have occasion to use the pipeline after its completion. Again, the character of a taking, whether public or private, is determined by the extent of the right to use it, and not by the extent to which that right is exercised. If all the people have the right to use it, it is a public way, although

the number who have occasion to exercise the right is very small.") (citations omitted).

Here, not only is it possible for other end-user electric customers to be served by the substation the MEC line would feed, multiple generators can also move their electricity on the proposed MEC line and similarly situated lines because the transmission system is based on open access principles. These principles were initially promulgated by FERC in its Orders 888 and 889.[4] The goals of these Orders were described by the Court of Appeals for the District of Columbia Circuit[5], which upheld the requirements for utilities to :

> provide access to their transmission lines to anyone purchasing or selling electricity in the interstate market on the same terms

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[4] *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 FR 21540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996) ("Order 888"), order on reh'g, Order No. 888-A, 62 FR 12274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998); *Open Access Same–Time Information System and Standards of Conduct*, Order No. 889, FERC Stats. & Regs. ¶ 31,035, 61 Fed.Reg. 21,737 (1996) ("Order 889"), on reh'g, Order No. 889–A, FERC Stats. & Regs. ¶ 31,049, 62 Fed.Reg. 12,484 (1997), on reh'g, Order No. 889–B, 81 FERC ¶ 61,253 (1997).

[5] *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 at 681 (D.C. Cir. 2000), aff'd sub nom. *New York v. FERC*, 535 U.S. 1 (2002) 75 F.E.R.C. ¶ 61,080 (Apr. 14, 1996).

> and conditions as they use their own lines. By requiring utilities to transmit competitors' electricity, open access transmission is expected to increase competition from alternative power suppliers, giving consumers the benefit of a competitive market.[6]

Over the years, the principles of open access have become foundational to the development and operation of the grid because generation resources must be able to connect to the transmission system. In conjunction with that statutory framework, FERC has jurisdiction over and regulates the terms of interstate transmission service, such as requiring open access through Order No. 888 in Open Access Transmission Tariffs. This federal overlay calls for particular caution from state agencies and courts, but it also shows that under this regime, not only do transmission providers "hold themselves out as ready" to transport electricity, federal law *requires* such open access of most transmission lines.

Juckette's arguments on the term "public use" in Iowa Code §478.4 ignore the structure of the statute, with separate provisions for the franchise (§478.4) and for eminent domain when needed (§478.15). They also misinterpret this Court's *Puntenney* decision and ignore this Court's controlling opinion in *S.E. Iowa Co-op*. And Juckette's arguments apply eminent domain law incorrectly to the facts when they assert that energizing a

[6] *Id*.

substation that serves Microsoft is not a public use. Again, however, the Court should keep in mind that not only is Juckette's argument wrong, *it is irrelevant*: MEC had not, at the time of the Board's decision, sought eminent domain in this case; there is no merit to Juckette's effort to import eminent domain law to challenge the grant of a franchise.

II. IOWA CODE SECTION 306.46 AUTHORIZES THE PLACEMENT OF UTILITY INFRASTRUCTURE WITHIN ROAD RIGHT-OF-WAY WITHOUT THE USE OF EMINENT DOMAIN.

A. The Polestar of Statutory Interpretation – Legislative Intent – Dictates that Code Section 306.46 Applies to Road Easements Entered-Into Both Before and After its Enactment.

Iowa Code § 306.46 provides, in relevant part, "A public utility may construct, operate, repair, or maintain its utility facilities within a public road right-of-way." Juckette argues that because the statute does not expressly state that it applies retroactively, it must apply prospectively only. This argument confuses the issue, ignores other rules of statutory construction, and asks the Court to focus on one tool of statutory construction at the expense of the ultimate goal of statutory interpretation – discerning and giving effect to legislative intent. *See, e.g., Carlon Co. v. Bd. of Rev. of City of Clinton*, 572 N.W.2d 146, 154 (Iowa 1997); *Klinge v. Bentien*, 725 N.W.2d 13, 18 (Iowa

2006) ("The polestar of statutory interpretation is to give effect to the legislative intent of a statute.").

As a threshold matter, the framing of the argument as regarding retroactivity is a misnomer. The statute does not authorize a retroactive act – location of *new* utility infrastructure cannot be performed "retroactively." Rather, § 306.46 merely authorizes an act to take place on property that presently existed at the time of its enactment. Public road ROW existed at the time of the statute's enactment, something the legislature fully understood at the time of its enactment. The plain and unambiguous reading of the statute indicates the legislature authorized utilities to locate within existing public road ROW. Juckette's suggestion incorrectly frames the issue as one of retroactive applicability, where the legislature is simply authorizing an act to take place on presently existing property. No rule of statutory construction suggests that a statute must expressly state that a law applies to property that is in existence at the time of its enactment.

Even if the rule of statutory construction cited by Juckette were applicable, it is merely one potential tool a court may use in interpreting the statute. This Court has recognized that it will not adhere to a single, particular rule of construction where such adherence would run counter to the polestar of statutory interpretation – legislative intent. *See Dindinger v. Allsteel, Inc.*,

860 N.W.2d 557, 562–63 (Iowa 2015) ("Legislative intent determines if a court will apply a statute retrospectively or prospectively."); *Anderson Fin. Services, LLC v. Miller*, 769 N.W.2d 575, 581 (Iowa 2009) (noting that a statute would apply prospectively "unless a legislative intent that the statute have retrospective application appears 'by necessary and unavoidable implication.'") (quoting *Baldwin v. City of Waterloo*, 372 N.W.2d 486, 491 (Iowa 1985)).

When discerning legislative intent, the court examines "both the language used and the purpose for which the legislation was enacted." *Klinge*, 725 N.W.2d at 17. Where applicable, examining the purpose of the legislation includes considering the timing of the enactment and recent court decisions addressing the issue at which the legislation is aimed. See id. at 17 – 18. Here, the timing of the enactment of Section 306.46, when considered in light of the Court's decision in *Keokuk Junction Ry. Co. v. IES Industries, Inc.*, 618 N.W.2d 352 (Iowa 2000), reveals the legislature's intent to abrogate the holding in *Keokuk Junction*.

In *Keokuk Junction*, the city of Keokuk permitted an electric transmission line to be constructed within its road easement. *Id.* at 354. A landowner, Keokuk Junction Railway Company ("KJRC"), brought suit arguing that the transmission line owner had no right to install the line within

the roadway easement without its approval. *Id*. The Court ultimately sided with KJRC, determining that the language of the underlying road easement did not permit the erection of a transmission line without KJRC's permission. Importantly, however, the *Keokuk Junction* Court distinguished an Alaska case on the basis that Alaska had in place a statute which permitted public utilities to locate infrastructure within the ROW. The Court explained:

> The Alaska case relied on in *Nerbonne* can similarly be distinguished from the present case because in Alaska, a statute was enacted to allow utilities to use public right-of-ways without the permission of the servient landowner. *See Fisher*, 658 P.2d at 130 (applying Alaska Stat. § 19.25.010 (Michie 1980)). *No such provision exists in Iowa. The sole reason the Alaska Supreme Court validated the utility's installation of electric poles within the easement was the presence of state legislation authorizing this use. Id. at 130–31. Without the aid of such legislation in Iowa, we are clearly not prompted to make a similar decision*.

Id. at 357 (emphasis added).

Following *Keokuk Junction*, the legislature enacted Section 306.46, permitting public utilities to locate infrastructure within public road easements – a statute nearly identical to the Alaska statute referenced in *Keokuk Junction*. The necessary implication is that the legislature intended to abrogate the *Keokuk Junction* holding by enacting a statute which the Court expressly noted was missing at the time *Keokuk Junction* was decided.

The practical reality and language of the statute itself makes clear that the legislature intended to permit placement of utility infrastructure within the

road ROW, regardless of when an underlying road easement was obtained. The vast majority of roadway within the State of Iowa was installed long before the enactment of §306.46, which the legislature knew when enacting the statute. If the statute is to have any meaningful impact, it must be interpreted to allow locating utility infrastructure in the existing roadway. Further, if the statute only applied to prospective creation of road easement, it wouldn't solve the problem posed by *Keokuk Junction*, which the legislature sought to resolve. After the holding in *Keokuk Junction* (had it not been altered by §306.46) parties were on notice that they would have to contract for the right to place utility facilities within a road easement. Thus, the enactment of the statute would not be helpful if it applied only to easements entered into prospectively – which the parties could already control. *See Klinge*, 725 NW.2d at 18 ("We consider the objects sought to be accomplished…seeking a result that will advance, rather than defeat, the statute's purpose.")

Moreover, the language of the statute itself implies applicability to new utility facilities even if they are in old (so-called "retrospective") ROW. The first two sentences of §306.46 provide:

> A public utility may construct, operate, repair, or maintain its utility facilities within a public road right-of-way. The location of new utility facilities shall comply with section 318.9.

Iowa Code § 306.46 (emphasis added).

The legislature's use of "new utility facilities" in the second sentence of §306.46 implies that the first sentence, which does not distinguish between "new" and "old" facilities, is meant to refer to both "new" facilities constructed after its enactment as well as "old" facilities that existed prior to its enactment. *See Carlon Co.*, 572 N.W.2d at 154 (noting that rule of "statutory construction requires us to consider all parts of the enactment."); *Matter of Est. of Franken*, 944 N.W.2d 853, 859 (Iowa 2020) ("In determining the ordinary and fair meaning of the statutory language at issue, we take into consideration the language's relationship to other provisions of the same statute and other provisions of related statutes.").

Finally, this Court's decisions since *Keokuk Junction* have elaborated on the application of a statute to different events in different time periods. The District Court correctly applied this Court's decision in *Hrbek v. State*, 958 N.W.2d 779 (Iowa 2021) to the legislature's language in Iowa Code § 306.46 and the facts of this case.

> Consequently, under the *Hrbek* standard, the determinative event for purposes of examining whether section 306.46 is being applied retrospectively is the "specific conduct regulated in the statute"—*i.e.*, a public utility's construction, operation, repair, or maintenance of its utility facilities within a public road right-of-way. Because MidAmerican had not constructed, operated, or maintained a transmission line in the road right-of-way at the

> time of the Board's final decision, the Board properly concluded that section 306.46 was being applied prospectively.

District Court at 15 (citing *Hrbek*, 958 N.W.2d at 782-83).

The Court should affirm the District Court's determination that §306.46 permits location of utility infrastructure within public road ROW, including public road ROW that existed at the time of the statute's enactment.

B. The Court Should Affirm the District Court's Application of the Incidental Use Doctrine.

Prior to the enactment of Section 306.46, the *Keokuk Junction* Court decided the issue of use of public road ROW based upon the particular language of the easement before it, requiring courts to consider each case presenting the issue based on the specific language of the easement involved. *See Keokuk Junction*, 618 N.W.2d at 354 (discussing easement language authorizing "permanent right of way easement for construction purposes and highway purposes…"). The enactment of §306.46 changed that, creating a uniform approach whereby utility infrastructure may be located in public road ROW regardless of the timing, specific language, or manner of acquisition of the roadway easement. In further support of that uniform approach, this Court should apply the incidental use doctrine to the issue presented.

This Court has applied the incidental use doctrine with respect to the closely analogous issue of railroad ROW. *See McSweyn v. Inter-Urban Ry.*

Co., 130 N.W.2d 445, 448-49 (Iowa 1964). Addressing a restrictive covenant in the deed creating the right-of-way, the Court noted that the railroad

> …may make any use of its land which is incidental to railroad purposes or, as frequently expressed, is not a misuse of it. And whatever the railroad may do itself it may license another to do.

Id.

In a law review article by Professor Dayana C. Wright and attorney Jeffrey M. Hester[7] (which has been cited with approval by the Iowa Court of Appeals)[8] the policy justifications for the incidental use doctrine are summarized as follows:

> (1) the use is nominal compared to the already burdensome railroad use; (2) the easement gives the railroad exclusive use rights to the land, so no one else could authorize the third party uses; and (3) the use is a railroad use insofar as it relates in some way to the railroad's business. Because railroad easements are so large and burdensome, and incidental uses are usually so minimal compared to the primary rail use [any] damages would be nominal.

Wright & Hester at 423.

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[7] Danaya C. Wright & Jeffrey M. Hester, Pipes, Wires, and Bicycles: Rails-to-Trails, Utility Licenses, and the Shifting Scope of Railroad Easements from the Nineteenth to the Twenty-First Centuries, 27 Ecology L.Q. 351 (2000) (hereafter "Wright & Hester").

[8] *See Hawkeye Land Company v. City of Iowa City*, 918 N.W.2d 503 (Iowa Ct. App. April 18, 2018) (Table, text in Westlaw), 2018 WL 1858401 (Iowa Ct. App., Apr. 18, 2018) at *10.

The same justifications exist for application of the incidental use doctrine to locating utility infrastructure within public road ROW. A roadway easement is a burdensome use. Like a railway easement, while the underlying landowner may hold fee title to the property, the road easement deprives the landowner of possession or use of the property. As one court described the government's interest in a highway easement:

> It is comparable to a fee in the surface and so much beneath as may be necessary for support. This estate. . . has no further practical value to the owner in view of the rights of the state in it, unless the easement is formally abandoned.

In re Marivitz, 636 A.2d 1241, 1243 (Pa. Cmmw. 1994).

Similarly, the landowner cannot permit third-party use of the land, as the government possesses it. Because the landowner has such minimal remaining interest in the property subject to the road easement, there are no (or at most *de minimis*) damages to the owner arising from the installation of utility infrastructure on property the owner does not possess and cannot use.[9]

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[9] While the review of every easement is beyond the scope of this case, if the road easement deprives the fee owner of the ability to permit other uses within the ROW granted to the county it shows how impractical Juckette's argument really is. Juckette's proposed outcome would require an electric transmission company or other utility to negotiate an easement with the fee landowner – but in most, if not all, cases that will be prohibited by the easement creating the ROW. The only way to build infrastructure in the road right-of-way is to conclude, under either §306.46 or the incidental use doctrine (or both), that the road authority can allow it. The alternative would require the use of condemnation for each and every parcel. If an easement is

Further, it is beyond question that location of utility infrastructure, including electric transmission lines, is not *inconsistent* with the use of the right-of-way for road purposes. There are already thousands of miles of utility infrastructure within public road ROW throughout Iowa today and have been for generations. The corridor is for transportation by linear infrastructure: of goods and people in vehicles on the linear road, but also transportation of electricity, water and other needed commodities in the linear infrastructure of wires, conduits and pipes. The enactment of § 306.46 resolves any doubt that under Iowa law utility infrastructure within public road ROW is consistent with its use for road purposes.

Accordingly, like the District Court below, the Court should apply the incidental use doctrine in this case and determine that an electric transmission line's placement in the road right-of-way is an incidental use, allowing the government to permit public utilities to place utility infrastructure within

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required where it cannot be voluntary provided, mass condemnation would be the only option. That clearly is not a good public policy outcome – it would be an exceedingly inefficient way to install utilities, and moreover would vastly raise the costs in time and expense for both utilities (costs that end up in every ratepayer's bills) and landowners. This also makes the Farm Bureau position difficult to understand: if individual easements with the fee owner are required, but voluntary easements can only be for land outside of the road ROW, more infrastructure will likely be placed on land that is currently cultivated.

public road right-of-way without further permission or compensation to adjacent landowners.

C. Public Policy Supports a Reading of Section 306.46 that Permits Location of Public Utility Facilities within Public Road Right-of-Way Regardless of the Timing of the Underlying Road Easement.

That Section 306.46 authorizes co-locating utility infrastructure with road infrastructure is not surprising. The development of a road establishes a corridor for public use, and good infrastructure siting practices dictate co-location of infrastructure where possible. Where sound engineering allows for co-location with existing infrastructure, co-location in an existing corridor eliminates the need to impact other, previously undisturbed land. This results in many benefits, including minimizing impacts to lands, minimizing interference with existing and future land uses, reducing disruption to surrounding landowners, and minimizing environmental concerns by avoiding previously undisturbed areas. All of these benefits of co-location have been recognized by the Board on multiple occasions and have been approved by the Iowa Supreme Court as sufficient to meet the siting criteria of Iowa law. *See Gorsche Fam. Partn. v. Midwest Power, Div. of Midwest Power Sys., Inc.,* 529 N.W.2d 291, 293 (Iowa 1995) (affirming Board's Order locating new electric transmission line within existing easement corridor based upon benefits including minimizing "the interference with the use of land";

reducing “disruption to landowners”; and alleviating environmental concerns such as tree clearing).

Co-location of utilities within road ROWs can also allow easy and efficient accessibility to such utilities for maintenance and repair activities; as a result, while there are myriad considerations in siting a transmission line, use of the road ROW will often be the best option. Thousands of miles of utility infrastructure have been located within road ROW in Iowa for decades. That utility infrastructure goes well beyond electric transmission lines, and includes lines for electric distribution, natural gas, water and sewer, and telephone and cable. These lines for essential services have been placed in road ROW with the consent of local municipalities because these entities understand the policy benefits of grouping such uses together when feasible, and also because they rightly have believed, as have the utility companies, that the area adjacent to the road is *intended* to be a utility ROW. Reaching a result that disallows the placement of public utility infrastructure within the existing public road ROW as suggested by Juckette not only runs counter to the benefits of co-location of infrastructure but calls into question the legal validity of thousands of miles of infrastructure that delivers important and necessary services to homes and businesses throughout Iowa on a daily basis. It would make extension of new or improved infrastructure take longer,

would make it more costly, and accordingly would delay vital services while raising costs that are ultimately paid by consumers (who have already, through their taxes, purchased a transportation corridor that is well-suited to hosting other infrastructure.)

CONCLUSION

Essential public services like electricity, natural gas, telecommunications, and water have located facilities in the rights of way of public roads in Iowa for generations. They've done so for good reason: once a road has already burdened the land and taken exclusive use of that corridor, the additional burden of other utilities is at most incidental, and certainly much less impactful to the land and land uses than creating a new path away from the road. When these long-settled expectations of local governments and utilities alike were upended in the *Keokuk Junction* case, the Iowa Legislature was quick to address it, and reassert that public policy favors use of road ROW for siting utilities. The legislature passed a statute much like the Alaska statute the Court noted could result in a different outcome than *Keokuk Junction*. Further, this Court has since shed new light on the distinction between retroactive and prospective application in its *Hrbek* decision, which the District Court correctly applied to this case below.

Juckette's arguments in this matter are wrong on the law, ignoring both this Court's precedents and the clear intent of the legislature in Iowa Code §306.46. They are wrong on the application of law to the facts, erroneously arguing that some electric customers do not count as part of the "public." And by attempting in this case to make it harder for Iowans to keep their lights on by making it harder to obtain a franchise and to site electric transmission lines is bad public policy.

This Court should, as the District Court did below, uphold the Board's thorough decision granting a franchise, determine that Iowa Code Section 306.46 permits the placement of utility infrastructure within road ROW regardless of when the underlying road easement was created.

CERTIFICATE OF COST

The undersigned certifies that the cost for printing and duplicating paper copies of this brief was $0.00.

Respectfully submitted this 10th day of March, 2022.

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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) because it has been prepared in a proportionally spaced typeface using 14 point Times New Roman font in and contains 6,957 words, excluding the parts of the brief exempted from the type-volume requirements by Iowa R. App. P. 6.903(1)(*g*)(1).

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The undersigned certifies the foregoing document was electronically served on the Clerk of the Supreme Court using the Electronic Document Management System on March 10, 2022, which will serve a notice of electronic filing to all registered counsel of record.

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