

IN THE SUPREME COURT OF IOWA

No. 21-1788

POLK COUNTY NO. CVCV061580

LINDA K. JUCKETTE,
Petitioner-Appellant,

vs.

IOWA UTILITIES BOARD,
Respondent-Appellee,

And

MIDAMERICAN ENERGY COMPANY and
OFFICE OF CONSUMER ADVOCATE,
Intervenors.

APPEAL FROM THE DISTRICT COURT FOR POLK COUNTY,
THE HONORABLE JEANIE VAUDT, JUDGE

PROOF BRIEF OF INTERVENOR OFFICE OF CONSUMER
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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WHETHER THE IOWA UTILITIES BOARD'S RULING FINDING MIDAMERICAN ENERGY COMPANY CARRIED ITS BURDEN IN DEMONSTRATING THE PROPOSED LINE IS NECESSARY TO SERVE A "PUBLIC USE" IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND CORRECT APPLICATION OF THE RELEVANT LAW

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II. WHETHER IOWA CODE SECTION 306.46 ALLOWS MIDAMERICAN TO PLACE THE PROPOSED LINE IN THE PUBLIC ROAD RIGHT-OF-WAY WITHOUT FIRST OBTAINING AN EASEMENT THROUGH EMINENT DOMAIN.

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An Act Regarding Public Utility Rights-Of-Way And Providing An Effective Date, Ch. 1014 (S.F. 2118) (Mar. 24, 2004) (codified as amended at Iowa Code § 306.46)

ROUTING STATEMENT

Intervenor Office of Consumer Advocate (OCA) believes this case should be transferred to the Iowa Court of Appeals because it presents the application of existing legal principles. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

This is an appeal of a judicial review ruling by the Honorable Jeanie Vaudt of an Iowa Utilities Board (IUB) Order granting Intervenor MidAmerican Energy Company's (MidAmerican) petition for a franchise to construct, operate and maintain a transmission line. Certified Record (CR) at 940; App._____.

Course of Proceedings

In September 2019, MidAmerican filed a petition with the IUB to erect, maintain, and operate 3.53 miles of 161,000 volt (161kV) transmission line located in eastern Madison County. CR at 58; App._____. The IUB held a hearing on MidAmerican's petition in Madison County on September 23, 2020. OCA, MidAmerican, and Appellant Linda Juckette (Juckette) participated in the hearing. CR at 535; App._____. The IUB issued an Order on February 1, 2021, granting

MidAmerican's petition. CR at 899–940; App.____. IUB Member Richard Lozier partially concurred with, and partially dissented from, the Order. CR at 941–947; App.____. On February 16, 2021, Juckette filed an application for rehearing of the IUB's Order. CR at 964–974; App.____. Both OCA and MidAmerican resisted Juckette's application. CR at 990–1019; App.____. On March 18, 2021, the IUB issued an order denying Juckette's application. CR at 1035–1047; App.____.

On March 24, 2021, Juckette filed her Petition for Judicial Review with the District Court for Polk County. A hearing was held on the Petition on September 8, 2021, and included Juckette, the IUB, the OCA, MidAmerican, and amici curiae the Iowa Association of Electric Cooperatives, the Iowa Utility Association, and ITC Midwest LLC. On November 7, 2021, the district court issued an order denying and dismissing Juckette's petition for judicial review. Subsequently, Juckette timely filed for appeal.

STATEMENT OF THE FACTS

MidAmerican's proposed transmission line consists of an eastern segment and a western segment that both start at an existing MidAmerican 161kV transmission line and terminate at a point of

interconnection with MidAmerican’s Maffitt Lake substation. CR at 63–64, 199–200; App._____. The Microsoft Corporation (Microsoft) data center, Project Osmium, will initially constitute 100% of the load on the Maffitt Lake substation and the substation will also act as a contingency source to area distribution load. CR at 296–297, 301; App._____. MidAmerican estimates 20% of the Maffitt Lake substation load will eventually serve area distribution. *Id.*; App._____. Of note, MidAmerican did not seek eminent domain over any property on the east segment of the proposed transmission line, which borders Juckette’s property. CR at 924; App._____. MidAmerican relied on Iowa Code section 306.46 (2021) to contend it could install the proposed transmission line in the road right-of-way without seeking a voluntary easement or eminent domain. CR at 940–941; App._____.

MidAmerican states the proposed line is necessary to provide multiple 161kV sources for its Maffitt Lake substation “to support the significant load growth in the area south of Maffitt Lake and the Raccoon River.” CR at 199–200; App._____. Multiple sources will remedy the potential disruption in service to customers served by the Maffitt Lake substation in the event of a loss of the preexisting single Willow-Creek to Maffitt Lake 161kV line. CR 201; App._____.

MidAmerican provided documentation and testimony demonstrating the inadequacy of the current system and the projected growth potential in the relevant area. CR at 200–205, 207–212, 298, 301; App._____. MidAmerican acknowledges, due to Project Osmium, “the timing of the Maffitt Lake Substation and associated transmission lines is immediate to serve [Microsoft].” CR at 318; App._____. Absent Project Osmium, the Maffitt Lake substation would likely be a “typical distribution substation with two lines and a projected total of two substation transformers,” and the installation of the transformers “would be based on actual and projected customer growth.” *Id.*; App._____. Maffitt Lake will initially feature three 50 mega volt-amp (MVA) transformers and may add three additional 50 MVA transformers and two 33 MVA transformers. CR at 199–200; App._____.

For Project Osmium, Microsoft and MidAmerican entered into a “Facilities Construction Agreement.” CR at 299–300, 302–303, 319; Master Facilities Construction Agreement; App._____. The terms of the agreement dictate Microsoft will not owe an upfront payment for the construction costs because project net revenues over three-years will meet or exceed the construction costs of the substation and

transmission lines. *Id.*; App._____. If Microsoft’s net revenues, after three-years, does not exceed or equal the costs of the construction, it will owe a final payment for outstanding costs. *Id.*; App._____.

Upon careful consideration of the relevant facts and law, the IUB issued an order granting MidAmerican’s petition and finding the proposed line was necessary to serve a public use and represented a reasonable relationship to an overall plan for transmitting electricity in the public interest. CR at 940; App._____. The District Court affirmed the IUB’s order.

Additional facts will be discussed as necessary throughout the arguments in this brief.

ARGUMENT

Pursuant to Iowa Code chapter 478, a utility seeking an electric transmission franchise carries the burden of proving the proposed transmission line is necessary to serve a “public use” and bears “a reasonable relationship to an overall plan of transmitting electricity in

the public interest.”¹ Iowa Code §§ 478.3(1)(h), 478.3(2)(a), 478.4 (2021); *South East Iowa Co-op Elec. Ass’n v. Iowa Utilities Bd.*, 633 N.W.2d 814, 820 (Iowa 2001).

Pursuant to Iowa Code Section 475A.2, OCA represents all consumers generally and the public generally in all proceedings before the IUB concerning matters that may impact the rates and services of Iowa rate-regulated public utilities. In the context of a transmission franchise proceeding, OCA’s role focuses on ensuring the company seeking a transmission franchise adheres to the applicable legal requirements, ensuring consumers who wish to be heard on the proposed transmission line have an opportunity to do so, and ensuring the costs associated with the proposed line are reasonable and prudent.

¹ In briefing before the IUB and the District Court, Juckette made arguments addressing both the “public use” and “reasonable relationship” elements of chapter 478. *See, e.g.*, Order Denying and Dismissing Petition for Judicial Review, filed November 7, 2021, at 9; App.____. Here, Juckette’s Brief raises the “public use” element of chapter 478, but does not raise the “reasonably related” element. Due to this, OCA will only address the “public use” element in this brief. To the extent Juckette may make an argument in reply briefing concerning the “reasonably related” element, OCA contends that error has not been preserved on this issue since it was not raised in Juckette’s initial brief. *See Hills Bank & Tr. Co. v. Converse*, 772 N.W.2d 764, 770–71 (Iowa 2009) (citing *Young v. Gregg*, 480 N.W.2d 75, 78 (Iowa 1992) (stating “an issue cannot be asserted for the first time in a reply brief”)).

OCA does not participate in negotiations for voluntary easements between the company and impacted landowners. OCA also does not participate in the eminent domain process, except to ensure the company follows the applicable eminent domain legal requirements in the course of the proceeding before the IUB.

OCA's brief will address the issues raised by Juckette to the extent the issues impact OCA's role in representing all consumers and public generally. First, OCA will argue the IUB's finding that MidAmerican carried its burden in demonstrating the proposed line is necessary to serve a "public use" is supported by substantial evidence and complies with the relevant law. Second, OCA will address Ms. Juckette's claims concerning Iowa Code section 306.46, as applied to her property, and will argue the IUB properly applied the law as written.

I. THE IOWA UTILITIES BOARD'S RULING FINDING MIDAMERICAN ENERGY COMPANY CARRIED ITS BURDEN IN DEMONSTRATING THE PROPOSED LINE IS NECESSARY TO SERVE A "PUBLIC USE" IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND A CORRECT APPLICATION OF THE RELEVANT LAW

A. Error Preservation

OCA agrees error has been preserved on this issue.

B. Scope and Standard of Review

Judicial review of final agency action is governed by the standards set forth in Iowa Code section 17A.19. *Brakke v. Dep't Natural Resources*, 897 N.W.2d 522, 530 (Iowa 2017) (citing *Kay-Decker v. Iowa State Bd. of Tax Review*, 857 N.W.2d 216, 222 (Iowa 2014)). The court applies the standards of section 17A.19(10) to determine if it reaches the same results as the district court. *Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 10 (Iowa 2010). The court may properly grant relief if the agency action prejudiced the substantial rights of the petitioner and if the agency action falls within one of the criteria listed in section 17A.19(10)(a) through (n).

The applicable standard of review depends upon the nature of the error claimed. If the alleged error is with the agency's findings of fact, the proper question on review is whether there is substantial evidence in the record when it is viewed as a whole to support the agency's findings of fact. Substantial evidence is defined in Iowa Code section 17A.19(10)(f)(1) as the "quantity and quality of evidence that would be deemed sufficient by a neutral, detached and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of

great importance.” *See S. E. Iowa*, 633 N.W.2d at 818. The ultimate question is not whether there is evidence that supports a different finding, but whether the evidence supports the findings actually made. *Broadlawns Medical Ctr. v. Sanders*, 792 N.W.2d 302, 306 (Iowa 2010).

If the legislature vested an agency with the authority to interpret a statute, this court defers to the agency’s interpretation of the statute and will only reverse the agency’s interpretation is “irrational, illogical, or wholly unjustifiable.” Iowa Code § 17A.19(10)(I); *NextEra Energy Res. LLC v. Iowa Utilities Bd.*, 815 N.W.2d 30, 37 (Iowa 2012); *Renda*, 784 N.W.2d at 10. “[W]hen the statutory provision being interpreted is a substantive term within the special expertise of the agency,” the Iowa Supreme Court concluded the agency was vested with interpretative power. *Renda*, 784 N.W.2d at 14. Conversely, if the relevant statute is not within the statutes the agency is tasked with enforcing or the “term has an independent legal definition that is not uniquely within the subject matter expertise of the agency,” the agency has not been vested with interpretive authority and this court reviews for correction of errors at law. *Id.*; Iowa Code § 17A.19(10)(c); *NextEra*,

815 N.W.2d at 37–38. Further, this court reviews constitutional issues in agency proceedings de novo. *Id.* at 44.

Here, Juckette’s “public use” argument focuses on both the evidence submitted by MidAmerican and the IUB’s interpretation of the applicable statute. The IUB’s findings of fact will be reviewed to determine if they are supported by substantial evidence. Iowa Code § 17A.19(10)(f)(1). For the interpretation of legal questions, the Iowa Supreme Court’s reasoning in *Puntenney v. Iowa Utilities Board* suggests the IUB should be given deference in its interpretation of “public use” as used in Iowa Code sections 478.3 and 478.4. *Puntenney v. Iowa Utilities Board*, 928 N.W.2d 829, 836 (Iowa 2019). In *Puntenney*, the court deferred to the IUB’s interpretation of “public convenience and necessity” as used in Iowa Code section 479B.9. and provided three reasons for this holding *Id.*² First, the court reasoned “‘public convenience and necessity’ is a term of art within the

² The *Puntenney* Court also found the IUB lacked interpretative authority for the phrase “public use,” as used in Iowa Code chapter 6A. *Id.* at 836–37. The Court reasoned this was because “Chapter 6A is a general eminent domain law that applies to all state agencies, and the term ‘public use’ is not ‘uniquely within the subject matter expertise of the agency’—here the IUB.” *Id.* (citation omitted). For the reasons stated above, OCA believes the IUB should be afforded deference for its interpretation of “public use” as used in chapter 478.

expertise of the IUB.” *Id.* (citing *Renda*, 784 N.W.2d at 14). Second, the Court reasoned the language used by the Legislature in 479B.9—specifically the phrase “unless the board determines”—afforded interpretative authority to the IUB. *Id.* Third, the court cited to its past precedent stating “it is not a judicial function to determine whether a service will promote the public convenience and necessity.” *Id.* (citing *Application of Nat’l Freight Lines*, 186, 40 N.W.2d 612, 616 (Iowa 1950)). Like the statute at issue in *Puntenney*, “public use” as used in chapter 478 is a term of art within the expertise of the IUB. Similarly, the language used by the Legislature in section 478.4 grants the IUB leeway in determining public use by requiring the IUB to “make a finding that the proposed line or lines are necessary to serve a public use.” Finally, past precedent construing chapter 478 suggests this Court defers to the IUB’s interpretation of chapter 478. *See S. E. Iowa*, 633 N.W.2d at 819 (“Moreover, we have frequently relied upon the Board’s expertise in interpreting Iowa Code chapter 478.”).

To the extent Juckette’s argument implicates constitutional issues, the IUB’s interpretation should not be given deference and be reviewed de novo. *NextEra*, 815 N.W.2d at 37–38.

C. Argument

The district court did not err in affirming the IUB's Order finding MidAmerican had carried its burden in proving its proposed transmission line is necessary to serve a public use. Juckette argues the IUB erred in granting MidAmerican's petition for a transmission line franchise because MidAmerican failed to prove the franchise was necessary for a public use. *See Juckette Proof Brief*, at pg. 27. Juckette also argues this Court should subject the phrase "public use," as used in chapter 478, to a "constitutional analysis" akin to that used for eminent domain. *Id.* at 32. OCA urges this court to reject Juckette's argument and affirm the district court's order affirming the IUB's application of the well-settled interpretation of "public use" as used in Iowa Code sections 478.3 and 478.4.

In its order, the IUB set forth the correct legal standard for "public use," stating:

The Iowa Supreme Court has long recognized that "the transmission of electricity to the public constitutes a public use contemplated by section 478.4." *South East Iowa Co-op Elec. Ass'n v. Iowa Utilities Bd.*, 633 N.W.2d at 820 (citing *Race v. Iowa Elec. Light & Power Co.*, 257 Iowa 701, 704, 134 N.W.2d 335, 337 (1965)). If a transmission line is reasonably designed to meet existing needs, the public use test is satisfied. *Fischer [v. Iowa State Commerce Comm'n]*, 368 N.W.2d [88,] 98 [(Iowa 1985)]. Similarly, a public use may be found where the "proposed transmission line is

necessary to increase reliability of service, accommodate occurring and anticipated load growth, and [to] reasonably assure the availability, quality, and reliability of service.” *Bradley v. Iowa Dep’t of Commerce*, No. 01-0646, 2002 WL 31882863, at *5 (Iowa Ct. App. Dec. 30, 2002).

CR. pg. 908; App.____.

The IUB found MidAmerican presented evidence demonstrating the “proposed project is necessary to meet current and future transmission needs.” *Id.*; App.____. In support of this conclusion, the IUB cited to evidence and testimony presented by MidAmerican that the proposed line would increase reliability and accommodate future load growth in the area. *Id.* at 905–908; App.____. The evidence shows the Maffitt Lake Substation, absent approval of the proposed lines, will be served by only one 161kV source (radially fed). *CR.* pg. 262. MidAmerican witness Charleville testified a radial feed is undesirable for reliability, since a disruption to the radial line would render the Maffitt Lake Substation without service. *Id.* at 201–02; App.____. The proposed lines would also increase reliability for the area as it would allow local distribution lines to be moved closer to the supporting substation, reducing the “exposure caused by long distribution lines and the associated risks of outages.” *Id.* at 202; App.____. MidAmerican provided evidence to demonstrate the

proposed lines are meant to serve the needs of an industrial customer, Microsoft, and future load projections based on the forecasted increase in population in the subject area. *Id.* at 262; App._____. The forecasted increase in population for the relevant area is not only supported by analysis created by MidAmerican, but also by the Cities of West Des Moines and Cumming, and by evidence submitted by Juckette. *Id.* 204–05, 209–12, 511 (Juckette Exhibit J8 portraying a planned real estate development in the relevant area), 534; App._____. While the proposed line will initially provide service solely to Microsoft, the evidence presented by MidAmerican overwhelmingly demonstrates the relevant area will experience load growth necessitating increased reliability provided by the proposed transmission improvements.

Juckette argues because the line will initially only serve one customer, Microsoft, this shows the project is not dedicated to the public use. However, service by a utility to a customer is unequivocally a “public use.” *S. E. Iowa Co-op. Elec. Ass’n* 633 N.W.2d at 840. MidAmerican has a duty to “furnish reasonably adequate service and facilities” for its customers, which includes making reasonable efforts to provide reliable service. Iowa Code § 476.8(1); 199 Iowa Admin. Code 20.18(3). Based on the evidence in the record, a radial feed is

inadequate to provide reliable service to the Maffitt Lake Substation and, in addition to providing reliable service to Microsoft, this proposed line will increase reliability for all customers in the relevant area. *CR.* at 905–908; App._____. Juckette’s assertion that Microsoft should somehow be treated differently than other customers is not grounded in law nor precedent.

Juckette also asserts the proposed transmission line is detrimental to Iowa consumers and ratepayers because “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.” *Juckette Proof Brief*, at 46–47. Juckette asserts there are no public economic benefits from the proposed franchise, only potential profits for MidAmerican. *Id.* While cost is a relevant consideration in whether a proposed franchise is in the public interest, the cost of the proposed transmission line does not weigh against a finding that the proposed line is in the public interest in this case. Pursuant to Iowa Code section 476.6, MidAmerican cannot impose a new or changed rate until it has been approved by the IUB following a contested case proceeding, which involves a prudency review of the

costs MidAmerican seeks to pass to customers through its utility rates. OCA and other interested stakeholders participate in section 476.6 proceedings to ensure any proposed rates or charges are reasonable and prudent before they are imposed on customers.

Further, and as argued in OCA's Post-Hearing Brief, the proposed transmission line will likely benefit all MidAmerican ratepayers through revenue sharing:

OCA believes the revenues gained from Project Osmium will benefit MidAmerican's customers through MidAmerican's revenue sharing agreement. In response to OCA's data requests, in testimony, and at the hearing, MidAmerican presented evidence concerning the Facilities Construction Agreement it executed with Microsoft. Due to a finding that revenues from this project are projected to exceed the construction costs, Microsoft does not need to pay any upfront construction costs. In three years, if the projected revenues do not exceed the construction costs, Microsoft is obligated to pay for this shortfall. Based on the evidence submitted, OCA believes this is an appropriate arrangement in this matter. Because revenues are projected to exceed the costs, OCA believes all customers will benefit from this arrangement. In the settlement for MidAmerican's last electric rate case, RPU-2013-0004, the parties defined the revenue sharing agreement as follows:

The threshold for revenue sharing shall be all Iowa jurisdictional electric operating income, including the Iowa jurisdictional portion of wholesale sales revenue (generation and transmission) and related costs, that exceeds a return on common equity of 11%. The methodology used to calculate revenue sharing will be as approved by the Board in Docket No. RPU-03-01. Any revenue sharing proceeds for the customers' benefit shall be used to reduce the

regulatory asset created by the depreciation deferral referenced in Article VII.

The revenue sharing agreement has been subsequently amended through board orders, but the basic concept remains: If MidAmerican's revenues exceed a set return on equity, a percentage of the overage is applied to reduce the depreciation deferral. In recent years, MidAmerican has exceeded the set return on equity and flowed benefits back to customers. Therefore, revenues earned from Project Osmium will benefit MidAmerican's customers once MidAmerican exceeds the set return on equity.

CR. at 890–91.³ In summary, MidAmerican cannot pass the costs of this proposed transmission line to customers absent a section 476.6 rate proceeding, and customers will likely benefit from the increase in revenues that MidAmerican has projected the proposed line will generate from providing electric service to Microsoft. The revenue sharing arrangement prevents MidAmerican from earning above the revenue sharing threshold and ensures that excess revenues are used for customer benefit.

The IUB relied on substantial evidence and a rational interpretation of the “public use” standard to find the proposed line is

³ See, e.g., *MidAmerican Energy Company*, 2019 Iowa Revenue Sharing Calculation, RPU-2013-0004 (Iowa Utilities Board, Feb. 14, 2020) (demonstrating in excess of \$23 million would be flowed back to customers for 2019); *Id.* 2018 Iowa Revenue Sharing Calculation, RPU-2013- 0004 (Iowa Utilities Board, Feb. 15, 2019) (demonstrating in excess of \$68 million would be flowed back to customers for 2018).

necessary for a public use and in granting MidAmerican's franchise petition. OCA requests this court reject Juckette's public use argument and to affirm the district court and the IUB.

II. IOWA CODE SECTION 306.46 ALLOWS MIDAMERICAN TO PLACE THE PROPOSED TRANSMISSION LINE IN THE PUBLIC ROAD RIGHT-OF-WAY

A. Error Preservation

OCA agrees error has been preserved on this issue.

B. Scope and Standard of Review

Iowa Code section 306.46 is not within the statutes the IUB is tasked with enforcing, therefore, the IUB has not been vested with interpretive authority and the IUB's interpretation is reviewed by this court for errors at law. *Renda*, 784 N.W.2d at 14.

This court reviews constitutional questions de novo. *NextEra*, 815 N.W.2d at 44 (“We do not give any deference to the agency with respect to the constitutionality of a statute or administrative rule because it is entirely within the province of the judiciary to determine the constitutionality of legislation enacted by other branches of government.”).

C. Argument

Juckette claims the IUB erroneously concluded Iowa Code section 306.46 granted MidAmerican the right to place utility poles in a public road right-of-way without obtaining an easement or exercising the right of eminent domain. *Juckette Proof Brief*, pgs. 51–75. Juckette also claims section 306.46 is unconstitutional as applied. *Id.* at 75–81. OCA believes the IUB did not commit legal error in its application of section 306.46 in determining MidAmerican did not need an easement or eminent domain to place utility poles in the public road right-of-way. OCA declines to address Juckette’s constitutional claim as it falls outside the scope of OCA’s role in chapter 478 transmission franchise proceedings.

Iowa Code section 306.46(1) provides that “[a] public utility may construct, operate, repair, or maintain its utility facilities within a public road right-of-way.” In its Order, the IUB applied this statute as

written—that a utility has an unambiguous right to construct, operate, repair, or maintain its facilities within a public road right-of-way.⁴

The Iowa Supreme Court provided the following guidance concerning the interpretation of statutes:

Our goal in interpreting a statute is to determine the legislative intent by looking at the language the legislature chose to use, not the language they might have used. *Ramirez-Trujillo v. Quality Egg, L.L.C.*, 878 N.W.2d 759, 770 (Iowa 2016). In other words, legislative intent cannot change the meaning of a statute if the words used by the legislature will not allow such a meaning. *Marcus v. Young*, 538 N.W.2d 285, 289 (Iowa 1995). . . .

When there is no statutory definition to guide us, we interpret terms “in the context in which they appear and give each [word] its plain and common meaning.” *Ramirez-Trujillo*, 878 N.W.2d at 770. If there is more than one interpretation of the plain meaning that is reasonable, we will employ traditional tools of statutory interpretation. *Irving[v. Employment Appeal Bd.]*, 883 N.W.2d [179,] 191 [(Iowa 2016)].

Banilla Games, Inc. v. Iowa Dep’t of Inspections & Appeals, 919 N.W.2d 6, 14 (Iowa 2018).

OCA agrees with the IUB that the plain language of section 306.46(1) grants a public utility the right to use a public road right-of-

⁴ The only precedent construing section 306.46 is the non-binding precedent set forth in Polk County District Court case *NDA Farms, LLC v. Iowa Utilities Bd., Dept. of Commerce*, No. CV 009448, 2013 WL 11239755 (Iowa Dist. Ct. 2013). OCA agrees with the IUB’s analysis of this case contained in the IUB’s Order. *See CR.* pgs. 926–32.

way. The statute simply empowers public utilities to “construct, operate, repair, or maintain its utility facilities within the public road right of way.” Iowa Code §306.46(1). Reading the plain and common meaning of the statute allows utility companies to use the public road right-of-way and does not prescribe any additional requirements such as acquiring easements or the use of eminent domain.

Juckette’s interpretation of this section attempts to include language the legislature did not use, namely that this provision should only apply prospectively to easements executed after the enactment of this statute. *Juckette Proof Brief*, at 61. If the legislature had desired this outcome, it would have included this language. *See Ramirez-Trujillo* 878 N.W.2d at 770. Further, OCA agrees with the IUB’s reasoning concerning the retrospective versus prospective application of this section. The “determinative event” in this statute is clearly the utility’s actions within the public road right-of-way and not the underlying execution date of the easement. Since MidAmerican has yet to construct, operate, and maintain the proposed line, application of the statute is prospective. *CR.* at 931. The Iowa Supreme Court recently affirmed this concept in *Hrbek v. State*, reasoning:

[A]pplication of a statute is in fact retrospective when a statute applies a new rule, standard, or consequence to

a *prior* act or omission. See *Frideres v. Schiltz*, 540 N.W.2d 261, 264 (Iowa 1995) (en banc) (“A law is retroactive if it affects acts or facts which occurred, or rights which accrued, before the law came into force.”). The prior act or omission is the event of legal consequence “that the rule regulates.” *Landgraf [v. USI Film Products]*, 511 U.S. [244,] 291, 114 S. Ct. [1522,] 1524 [(1994)]. The event of legal consequence is the specific conduct regulated in the statute. See *id.*

....

Application of a statute to conduct occurring after the effective date is in fact a prospective and not retrospective application. See *Miller v. LaSalle Bank Nat'l Ass'n*, 595 F.3d 782, 788 (7th Cir. 2010) (analyzing the relevant retroactivity event and concluding statute had no retroactive effect); *Combs v. Comm'r of Soc. Sec.*, 459 F.3d 640, 648–49 (6th Cir. 2006) (“A focus on the ‘relevant activity’ in this case leads inexorably to the conclusion that the change in the regulation was not impermissibly retroactive. . . . [T]he regulatory change had no retroactive effect because the presumption defined by the listing is a rule of adjudication and therefore has its effect on claims at the time of adjudication.”)

Hrbek v. State, 958 N.W.2d 779, 782 (Iowa 2021), *reh'g denied* (May 19, 2021). OCA believes the IUB properly applied section 306.46 and should be affirmed.

Even if this Court believes the language used by the Legislature in 306.46 is ambiguous, the IUB’s interpretation of this statute is supported by a logical interpretation of the likely legislative purpose in enacting this statute. *Irving*, 883 N.W.2d at 191 (noting in the event a

statute is ambiguous this court will look to the “underlying legislative purpose” to construe the relevant statute).

The Iowa Legislature enacted section 306.46 in 2004, four years after the Iowa Supreme Court’s decision in *Keokuk Junction v. IES Industries*. See An Act Regarding Public Utility Rights-Of-Way And Providing An Effective Date, Ch. 1014 (S.F. 2118) (Mar. 24, 2004) (codified as amended at Iowa Code § 306.46). In *Keokuk*, a public utility attempted to use a road right-of-way to construct transmission lines instead of condemning the property through eminent domain. *Keokuk Junction Ry. Co. v. IES Industries, Inc.*, 618 N.W.2d 352, 354 (Iowa 2000). After a review of five categories of conclusions reached by other states on this issue, the court found a road right-of-way does not include the right to build and maintain utility facilities such as transmission lines. *Id.* The court reasoned its decision disallowing construction may have been different if Iowa had a statute allowing the placement of utility facilities in the right-of-way. *Id.* at 357. The court compared the scenario in *Keokuk* to a similar case in Alaska where a statute allowed road right-of-way construction and the Alaska Supreme Court decided in favor of the utility company. *Id.* at 357; see *Fisher v. Golden Valley Elec. Ass’n*, 658 P.2d 127, 129 (Alaska 1983).

Notably, Alaska was the only state analyzed by the court with a statute addressing this issue.

Iowa Code section 306.46 bears some similarities to the Alaska statute, which allows utilities to construct in the road right-of-way without obtaining an easement or pursuing eminent domain. Alaska Stat. § 19.25.010 (2021).⁵ Based on the similarity and timing of the enactment of section 306.46, it appears section 306.46 was likely intended to abrogate the decision in *Keokuk*. This likely means section 306.46 should allow public utility companies to use the road right-of-way to construct transmission lines in a similar fashion as Alaska, which does not require an additional easement or eminent domain proceedings. In *Fisher*, the Alaska Supreme Court found section 19.25.010 “places Alaska among those states which permit powerline

⁵ The Alaska statute states: “A utility facility may be constructed, placed, or maintained across, along, over, under, or within a state right-of-way only in accordance with regulations adopted by the department and if authorized by a written permit issued by the department. The department may charge a fee for a permit issued under this section.” Alaska Stat. § 19.25.010. Iowa Code section 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. The location of new utility facilities shall comply with section 318.9. A utility facility shall not be constructed or installed in a manner that causes interference with public use of the road.” Iowa Code § 306.46(1).

construction as an incidental and subordinate use of a highway easement.” *Fisher*, 658 P.2d at 129. In *Keokuk*, the Iowa Supreme Court noted that

This viewpoint is strongest when a public, rather than private, utility is involved because it puts the erection of power lines within the purview of the public need. This viewpoint bases its conclusion on the need to adapt the easement to the advancement of technology. *See Crawford v. Alabama Power Co.*, 221 Ala. 236, 128 So. 454, 457–58 (1930) (holding that as time has progressed, “the vanguard of progress moves steadily onward” and the public use is served by the installation of electric lines along highways).

Keokuk, 618 N.W.2d at 356.

The record in this matter also supports this interpretation of section 306.46 since MidAmerican is a public utility seeking to place the proposed line in a road right-of-way (replacing existing distribution lines (*CR. 763*)), to serve the public use by providing statutorily-required reliable electric service to its customer Microsoft and to increase area reliability for other customers.

OCA believes section 306.46 as applied to Juckette and should not be the basis for overturning the IUB's grant of MidAmerican's franchise and was appropriately applied by the IUB in this matter.⁶

CONCLUSION

The district court order should be affirmed because the IUB did not err in its application of Iowa Code chapter 478, and relied on substantial evidence in the record, in finding MidAmerican had carried its burden in showing the proposed transmission line served a "public use" as required by Iowa Code sections 478.3 and 478.4. The district court order should also be affirmed because the IUB did not err in its interpretation and application of Iowa Code section 306.46. OCA

⁶ Amicus Curiae, Iowa Farm Bureau Federation (Farm Bureau), suggests in its Brief that the IUB's Order either implicitly or explicitly created an easement over Juckette's property. *See Farm Bureau Final Brief*, at 9, 11. OCA believes this is a misinterpretation of the chapter 478 transmission franchise process. The utility seeking a transmission franchise is tasked with obtaining all necessary easements. Iowa Code § 478.1(4). If a utility is unable to obtain voluntary easements, the utility may petition the IUB, pursuant to section 478.3(1) for the use of the right of eminent domain. *Id.* MidAmerican did not seek eminent domain in this proceeding. CR at 924; App._____. Absent a request for eminent domain, the language used in chapter 478 and in Iowa Code section 306.46 does not anticipate the creation of an easement upon the grant of a transmission franchise by the IUB, nor do these statutes grant the IUB the authority to create an easement for an electric transmission line.

respectfully asks this court deny the relief requested by Juckette and affirm the district court and agency decisions.

REQUEST FOR NONORAL SUBMISSION

Intervenor, Office of Consumer Advocate, respectfully requests nonoral submission of this case.

Respectfully submitted,

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/s/ Jeffrey J. Cook 3/10/22
Signature Date

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I hereby certify the cost of printing the foregoing Intervenor Office of Consumer Advocate Proof Brief was the sum of \$0.00.

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CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies he electronically filed the foregoing Intervenor Office of Consumer Advocate Proof Brief on March 10, 2022, in EDMS.

The undersigned hereby certifies on March 10, 2022, the foregoing Intervenor Office of Consumer Advocate Proof Brief was served by EDMS to the respective counsel for said parties:

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