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 REPLY 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

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.

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.

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.

ARGUMENT

Throughout this proceeding, the Iowa Utilities Board ("IUB"), MidAmerican Energy Company ("MidAmerican"), the Office of Consumer Advocate ("OCA"), and their amici (which will be collectively referred to as "Resistors") have asserted that the legislature, by statute, can grant a utility company the right to occupy private real estate without compensation to the landowner. From the start, Linda Juckette ("Juckette") has maintained that if MidAmerican is going to occupy her property by placing utility structures in her real estate, MidAmerican must obtain a possessory right to her property by virtue of eminent domain. This case presents a simple question to the Court: can the Legislature designate portions of private property upon which a private company may place any utility structure free of charge? The answer to that question must be a resounding "no" for the simple reason that both the Federal and Iowa Constitutions explicitly prohibit the taking of private property without compensation. Any other answer offends fundamental private property law and constitutional protections which have been closely guarded for generations.

In their respective briefs, the Resistors generally assert the consistent theme that the Legislature believes the best location of electric lines are in road rights-of-way. The amicus brief submitted by three utility associations[1] imply Juckette argues that electrical utilities belong somewhere other than rights-of-way. Any such contention mischaracterizes the issues on appeal. Juckette takes no position on the public policy or historical practices of locating electric utilities in rights-of-way.

Each of the Resistors avoid the actual issue Juckette has raised throughout this proceeding. None of the Resistors are able to articulate to this Court how the Legislature can lawfully permit intrusion onto privately-owned real estate *without compensation*. Juckette's position has never been that either law or common-sense dictates electrical utilities be placed in a location other than a right-of-way. Instead, Juckette's position has consistently been that – regardless of public policy on where lines may be located – a private utility must always

[1] *See* Brief of *Amicus Curiae* for the Iowa Association of Electric Cooperatives, the Iowa Association of Municipal Utilities, and the Iowa Utility Association.

gain some legal right of possession to erect a utility structure on private property.

None of the Resistors address the contention raised by the amicus Iowa Farm Bureau Federation that at most, § 306.46 essentially lays out the policy that the State of Iowa approves locating utility structures in rights-of-way. Although the Legislature can state a policy, the Legislature still cannot take private property rights without eminent domain proceedings. The legislature's policy preference must nevertheless still respect Constitutional protections.

For all the pleas by Resistors that this Court read the plain language of § 306.46, the Resistors fail to show any language in the statute where the State has granted utilities the ability to possess private property free of charge. Any language granting a possessory right to property without compensation violates the Constitution just as much as a statute limiting free speech. Contrary to the bold claim by the *amici* electric associations, requiring utility companies to pay just compensation for placing utility structures on private property would not "be calamitous to utility companies and the pocketbooks of Iowans." *See* Association Brief, p. 16. Instead, requiring utility

companies to pay just compensation for use of private property simply abides by the Constitution. What would be "calamitous" would be a ruling that the IUB can grant a franchise to utility companies allowing for the invasion of private property without compensation in violation of the Federal and Iowa Constitutions.[2]

Again, this case is not about preventing utilities' use of rights-of-way; instead, this case is about whether utilities and the IUB may ignore constitutional takings protections to assist private utilities in avoiding the payment of just compensation for use of private property.

[2] Despite IUB's contention that it lacks the authority to resolve property and land disputes (IUB Brief, p. 40), the IUB's own order in a recent unrelated docket shows the opposite. In *Beane v. MidAmerican Energy Company*, IUB Docket No. FCU-2020-0003, the IUB ruled MidAmerican trespassed on private property when it erected a wind turbine without permission from the tenant in possession. *See* March 14, 2022 IUB Order, p. 17-18 ("[T]he Board determines that MidAmerican trespassed on the Beanes' leased property when it began constructing wind turbines without obtaining the Beanes' permission to do so."). The IUB should have made the same analysis here – without some property right (obtained by voluntary agreement or eminent domain), MidAmerican has no rights to take and use Juckette's property. The IUB's order granting the franchise ignores Juckette's property rights and is a state-sanctioned taking and trespass.

This is not a case about public policy desire for location of utility structures;[3] it is a case about payment for intrusion of private property.

The results of Resistors' theories about the scope of § 306.46 are absurd. For example, under the Resistors' position, it would be lawful for MidAmerican to erect a wind turbine in the right-of-way on the grounds of the Iowa State Capitol. Section 306.46 states that a "public utility may construct . . . its utility facilities within a public road right-of-way." *See* Iowa Code § 306.46 (Utility facilities are "any cables, conduits, wire, pipe, casing pipe, supporting poles, guys, and other material and equipment utilized for the furnishing of electric, gas, communications, water, or sewer service."). Likewise, MidAmerican

[3] In their brief, amici Iowa Association of Electric Cooperatives, the Iowa Association of Municipal Utilities, and the Iowa Utility Association contend the doctrine of justifiable reliance somehow trumps Juckette's constitutional protections. This argument is without any foundation and is wholly irrelevant to the issues on appeal. This case involves MidAmerican's request to place an electric facility (which has not yet been erected) on Juckette's property without compensation. This case does not involve any other electric line in the state. Moreover, amici fail to articulate any basis for why a private company's supposed justifiable reliance transforms unconstitutional results into lawful conduct in the future.

could place any wind turbine[4] in the right-of-way portion of the front lawn of Farm Bureau's headquarters without any compensation to Farm Bureau.

These examples demonstrate the absurdity of Resistors' arguments. Surely, there is no theory or argument to be raised which can explain how a state agency like the IUB may point to a statute to allow any other party (state or private) to obtain possession of a portion of privately-owned property without first paying just compensation.

This leads to another failing in the Resistors' arguments. As MidAmerican did at the IUB proceeding, Resistors repeatedly infer that the electric lines at issue in this case are not located on Juckette's property.[5]

---

[4] Wind turbines under certain wattage are exempt from IUB oversight. *See* Iowa Code Chapter 476A.1(5); *Mathis v. Iowa Utility Board*, 934 N.W.2d 423 (Iowa 2019). Thus, under Resistors' theory of § 306.46, nothing stops MidAmerican from entering Farm Bureau's property tomorrow and erecting a wind turbine in the area of the right-of-way. This outrageous example would clearly be unconstitutional.

[5] *See, e.g.,* MidAmerican Brief, p. 21; *Amicus Curiae* ITC Midwest LLC Brief, p. 8, 32-33; *Amici Curiae* Iowa Association of Electric Cooperatives, the Iowa Association of Municipal Utilities, and the Iowa Utility Association Brief, p. 20.

These inferences such as the lines being located in front of or "adjacent" to Juckette's property misstate the facts. Juckette is the owner of the portion of the real estate where MidAmerican seeks to locate the electric poles.

The proposed lines at issue are not "adjacent" to Juckette's property; they are *on* her property. A right-of-way is merely a description of an easement, and the law is abundantly clear that the grantor of a right of way easement still owns the property. *See Henry v. Dubuque & P.R. Co.*, 2 Iowa 288, 288 (1855) ("The fee of the land appropriated for railroad purposes [by a right of way], remains in the owner."); *see also City of Dubuque v. Maloney*, 9 Iowa 450, 456 (1859):

> The easement does not comprehend any interest in the soil, nor give the public the legal possession of it; the right of freehold is not touched by establishing a highway, but continues in the original owner of the land, in the same manner it was before the highway was established subject to the easement.
>
> Lord Coke (2 Inst. 705,) says "the fee of the road is in the lord of the manor, or the land owners on both sides of the way. A man may have a right of way without having an interest in the fee; and if such an one interfere with the soil under the surface or uses it in any other way than for passing or repassing, he is answerable as a trespasser to the owner of the fee. The public have the right of passing

> and repassing, and of digging and felling trees for the repair of the road, but subject to this easement, the exclusive ownership of the soil--the freehold and all its profits, remains in him who owned the soil before the highway was laid out, and he may maintain trespass or waste, or recover possession, subject to the easement. . ."

(internal citations omitted).

To be clear: Juckette is the owner of the portion of the real property upon which MidAmerican seeks to place electric facilities.[6] None of the Resistors cited any fact or law that support their implicit assertions that electric poles are being placed anywhere other than on real estate owned by Juckette.

Resistors also claim § 306.46 was specifically enacted to purposely overrule this Court's decision in *Keokuk Junction*. However, Resistors do not cite any support for this conclusion. There is no legislative history for the law that specifically addresses *Keokuk Junction*. *See* 2004 Iowa Acts Ch. 1014, *S.F. 2118*. To be clear, Juckette

[6] MidAmerican's conduct, despite its attempt to frame the location of the poles as "adjacent" to Juckette's land, demonstrates that MidAmerican knows Juckette is the owner of the real property. MidAmerican attempted to obtain a voluntary easement from Juckette for the use of that portion of her land. (CR 573:20-22.). Certainly, MidAmerican would not attempt to obtain an easement for use of land unless the other party was the owner of the land.

does not contend legislative history must cite to a case to overturn that case. However, if Resistors wish for this Court to read a statute by its plain language, Resistors need to identify more support for their conclusion that § 306.46 was specifically intended to overrule *Keokuk Junction*.

Regardless of the Legislature's opinion of *Keokuk Junction*, the text of § 306.46 does not accomplish what Resistors seek. Section 306.46 does not change anything contained in the *Keokuk Junction* case as it relates to Iowa law on scope of easements and what activities are incidental to right-of-way easements. Resistors repeatedly remind this Court to read the plain language of § 306.46; but, doing so does not support any abrogation of long-standing property law concerning easements and rights-of-way. No plain language of § 306.46 can be construed to abrogate *Keokuk Junction*'s ruling that utility facilities are not incidental to rights-of-way.

Moreover, even if the Legislature wanted to change the scope of easements or modify what is deemed an incidental use, that legislative change would be nothing other than legislatively modifying and expanding existing easements. Put differently, a statute purporting to

expand uses in an existing easement which were not previously granted[7] actually removes sticks from a property owner's bundle that were not contemplated when the easement was granted.[8] The Legislature may not constitutionally enact a statute which removes existing property rights. *See Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935).

It is important to note that on this appeal, the IUB's brief accounts for only two of the three opinions of the members of its

[7] The easement at issue in this case did not include any grant of any utilities. (CR 933) ("The record does not contain evidence of an easement created through a written document . . . Therefore, the Board cannot find that an existing easement, independent of § 306.46, would allow MidAmerican to construct, operate, and maintain a transmission line along the eastern edge of Ms. Juckette's property."). This issue was litigated at the IUB level, and no Resistor challenged at conclusion, nor has any Resistor argued in this appeal that the text of the easement included any specific grant for utilities.

[8] Importantly, this case concerns application of § 306.46 to an existing easement that was granted decades ago. This case is not a facial constitutional challenge on § 306.46 as it may apply to easements granted after the enactment of the statute or to easements which include specific grants for utilities.

board.[9] Board member Richard Lozier, in his dissenting opinion, agrees with several of the issues Juckette has raised in this appeal. Specifically, Board member Lozier wrote that § 306.46 cannot be applied in this case to permit MidAmerican to place utility structures in Juckette's property. (CR 944-947) ("[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"). Board member Lozier's dissent does discuss retrospective application of § 306.46, and the purpose of that discussion is grounded in fundamental takings law.

In arguing that § 306.46 applies to a right-of-way granted decades ago because MidAmerican just now elects to expand the scope of that right-of-way, Resistors point to this Court's recent decision in *Hrbek v. State*, 958 N.W.2d 779 (Iowa 2021). The reliance on that case,

[9] To be clear, Juckette does not imply any wrongdoing in the IUB's advocacy in this proceeding. The IUB is defending the majority opinion of the board, which is proper. Juckette simply desires to bring it to the Court's attention that a member of the IUB with a long history of involvement in Iowa utility law wrote a well-reasoned dissent and the IUB itself is not speaking unanimously on this appeal.

though, ignores the unconstitutional effect of § 306.46 if it is applied in this case to allow MidAmerican to possess Juckette's property without compensation.[10] There is no way to apply *Hrbek* to this proceeding without removing sticks from Juckette's bundle of property rights without compensation; such application would be unconstitutional.

Finally, despite MidAmerican's unsupported contention that Juckette's direct appeal from the IUB process is somehow a collateral attack on the IUB process, Juckette has raised the argument at each level of this proceeding that the franchise must be denied because MidAmerican does not possess the right to possess Juckette's

[10] OCA states: "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. If the legislature had desired this outcome, it would have included this language." OCA Brief, p. 29 (internal citations omitted). This argument ignores Iowa Code § 4.5 which states, "A statute is presumed to be prospective in its operation unless expressly made retrospective." To the extent OCA implies a statute must expressly state it is prospective to be prospective is incorrect. It is, in fact, the exact opposite which is true.

property.[11] This is an appeal from a state agency's ruling that MidAmerican is given permission (i.e. franchise) to locate poles in Juckette's property. This is a state-sanctioned taking.[12]

Because § 306.46 cannot constitutionally permit MidAmerican to possess Juckette's property, MidAmerican has no right to possess Juckette's property. The IUB stated in its order that if it was incorrect

---

[11] MidAmerican also claims that Juckette somehow has not preserved error on the portion of her brief which specified her requested relief based on the legal arguments raised throughout the brief. (MidAmerican Brief, p. 59-61). This is nonsensical. Juckette has requested denial of the franchise (at the IUB level) and reversal of the franchise grant (at the district court level). The reasons raised in support of her request for denial/reversal have been preserved and all other parties on this appeal agree that the issues have been preserved. To claim the requested relief which flows from the preserved issues is not preserved is incorrect and cannot be the proper standard.

[12] MidAmerican contends that placement of a utility pole in the ground is not permanent, but a temporary invasion. (MidAmerican Brief, p. 46). MidAmerican presented no evidence that the poles would be temporary. Regardless, whether the invasion is temporary or permanent makes no difference. If a utility pole in the ground is temporary, then so too must a television cable on a building be temporary. *See Lorretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding cable on building was a taking). Further, even temporary invasions are per se takings. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2074 (2021) ("To begin with, we have held that a physical appropriation is a taking whether it is permanent or temporary.").

about the lawful application of § 306.46, then MidAmerican's lack of possessory right mandates denial of the franchise: "the lack of all necessary easements will serve as a basis to deny MidAmerican's request for a franchise covering the east segment." (CR 915-916). Thus, if this Court rules in favor of Juckette under any of the issues she has raised, on this appeal, the proper remedy is to reverse the grant of the franchise. The IUB recognizes this is the proper outcome if indeed the IUB was incorrect regarding the application of Iowa Code § 306.46. (CR 915-916).

CONCLUSION

This case is about preserving constitutionally protected property rights. This case is about ensuring the State does not permit unlawful intrusion on a citizen's property. This case is about ensuring utility companies, by virtue of state-granted franchises, respect the Constitution.

The alleged tension between constitutionally protected private property rights and the public interest in expanding utilities throughout the state is not under fire. The public policy of locating utilities in rights-of-way is not at stake in this case. The State can

continue to promote location of utilities in rights of way. What is at stake, though, is whether the public policy for location of utilities can outweigh constitutional guarantees that private property will not be taken without the payment of just compensation.

Electric power expanded throughout the State of Iowa before the 2004 enactment of § 306.46. Utilities were not facing "calamity" before 2004. Utilities can continue to locate in rights-of-way. However, the State of Iowa, through the IUB, **must** ensure that any state-granted franchise respects private property owners' constitutional rights. To continue using existing rights-of-way which do not include grants to utilities, the company must obtain possessory rights through voluntary easements, or must seek eminent domain power from the IUB. To use existing rights-of-way, utilities must only pay in accordance with a voluntary agreement or pay just compensation after an eminent domain proceeding.

The IUB erred in granting MidAmerican a franchise to intrude upon Juckette's property without payment of just compensation. As the IUB has recognized, without rights of Juckette's property, the franchise must be denied. Because MidAmerican has no right to

Juckette's property, the franchise is unlawful, and the IUB's decision to grant the franchise must be reversed.

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 3,206 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1)

/s/ William M. Reasoner — 04/29/2022

Signature — Date

CERTIFICATE OF SERVICE

I hereby certify that on April 29, 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

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

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

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

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

Christina L. Gruenhagen
Daniel Peacock
David Meyers
PARKER & GEADELMANN, P.L.L.C.
5400 University Avenue
West Des Moines, IA 50266
CGruenhagen@ifbf.org
ATTORNEYS FOR AMICI CURIAE
IOWA FARM BUREAU FEDERATION

/s/ William M. Reasoner
William M. Reasoner