

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: MIDAMERICAN ENERGY COMPANY	DOCKET NO. E-22417
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**ORDER GRANTING PETITION FOR ELECTRIC TRANSMISSION LINE FRANCHISE
AND RIGHT OF EMINENT DOMAIN**

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I. PROCEDURAL BACKGROUND

On March 14, 2019, MidAmerican Energy Company (MidAmerican) filed with the Utilities Board (Board) a request to hold an informational meeting to discuss the proposed construction of two 169,000-volt electric transmission lines near the city of Cumming in Madison County, Iowa. The informational meeting occurred at 5:30 p.m. June 20, 2019, in Winterset, Iowa.

On September 17, 2019, MidAmerican filed with the Board a petition for electric transmission line franchise. As subsequently amended, MidAmerican requests a franchise to construct, operate, and maintain 3.53 miles of 161 kV nominal operating voltage (169 kV maximum voltage) electric transmission line in Madison County. MidAmerican filed the petition under Iowa Code chapter 478 and the petition has been identified as Docket No. E-22417. MidAmerican requested the right of eminent domain over one parcel.

The proposed project consists of west and east segments. The west segment's western franchised endpoint would be at a point of interconnection with an existing MidAmerican 161 kV transmission line, and the eastern franchised endpoint would be at a point of interconnection with a proposed MidAmerican 161 kV transmission line located at the municipal boundary of West Des Moines, Iowa. The east segment's southern franchised endpoint would be at a point of interconnection with an existing MidAmerican 161 kV transmission line, and the northern franchised endpoint would be at a point of interconnection with a proposed MidAmerican 161 kV transmission line located at the municipal boundary of West Des Moines. The west segment's western terminus would be at a point of interconnection with MidAmerican's Booneville Substation, located in Dallas County, Iowa, and the eastern terminus would be at a

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point of interconnection with MidAmerican's Maffitt Lake Substation, located in Madison County. The east segment would have a southern terminus at a point of interconnection with MidAmerican's Norwalk Substation, located in Warren County, and the northern terminus would be at a point of interconnection with MidAmerican's Maffitt Lake Substation in Madison County. MidAmerican asserts the transmission line is necessary to increase system reliability and to serve anticipated load growth due to additional commercial, residential, and industrial customers in the area near the Maffitt Lake Substation.

Pursuant to Iowa Code § 478.5, any person, company, city, or corporation whose rights may be affected by the proposed transmission line may file a written objection to the project. Hilde DeBruyne¹ and Marnix Verhofste, Donny Herman, Jeremy Husk,² Gary Crews, Dan Hinch, Dan Melby, and Rachel Terhaar each filed objections. Also, on October 4, 2019, by and through her counsel, Linda K. Juckette filed an objection. On December 31, 2019, Ms. Juckette filed a petition to intervene, which the Board granted by an order issued on January 21, 2020.

Board staff issued four review letters and one follow-up letter to MidAmerican. Board staff also issued a staff report on March 13, 2020, in which staff asserted the petition and exhibits had been reviewed and concluded MidAmerican's filings appeared to be complete and sufficient to proceed to a hearing.

On September 23, 2020, the Board held a hearing at the Jackson Building on the Madison County Fairgrounds in Winterset, Iowa. MidAmerican appeared through its

¹ In her October 11, 2019 filed comment, Ms. DeBruyne identified her name as "Hilde DeBruyne." Elsewhere in the record, Ms. DeBruyne's name is identified as "DeBruyne." Except in those instances in which Ms. DeBruyne's name is used in a quote, the Board will use the spelling of her name that she identified in her comment.

² In addition to an October 1, 2019 objection, Mr. Husk also filed Pre-Filed Testimony on July 23, 2020.

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attorney, Andrew Magner. (HT³ p. 5.) Attorney Jeff Cook appeared on behalf of the Office of Consumer Advocate (OCA), a division of the Iowa Department of Justice. (HT p. 5.) Intervenor Juckette appeared through her counsel, John Lande and William Reasoner. (HT pp. 5-6.) Objector and landowner Jeremy Husk was present at the hearing but did not provide testimony. (HT pp. 6-7, 214.)

Following the hearing, the Board established a schedule for the submission of post-hearing briefs. On October 15, 2020, Ms. Juckette filed her post-hearing brief, and on October 19, 2020, MidAmerican and OCA filed post-hearing briefs.

II. LEGAL STANDARDS

Electric transmission line franchise proceedings are governed by Iowa Code chapter 478 and 199 Iowa Administrative Code (IAC) chapter 11. When a petition for franchise is filed, the Board, after considering the evidence, “may grant the franchise in whole or in part upon the terms, conditions, and restrictions, and with the modifications as to location and route as may seem to it just and proper.” Iowa Code § 478.4. Before granting a franchise, the Board must “make a finding that the proposed line or lines are necessary to serve a public use and represents a reasonable relationship to an overall plan of transmitting electricity in the public interest.” *Id.*

The Iowa Supreme Court has held that the transmission of electricity to the public constitutes a public use. *Vittetoe v. Iowa S. Utils. Co.*, 123 N.W.2d 878, 880 (Iowa 1963). The public use test is satisfied when proposed system changes will meet existing needs and constitutes a reasonable effort to meet future needs. See e.g., *Fischer v. Iowa State Commerce Comm’n*, 368 N.W.2d 88, 98 (Iowa 1985) (affirming

³ “HT” refers to the transcript of the September 23, 2020 hearing, which has been uploaded in this docket in the Board’s electronic filing system.

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the issuance of a franchise where evidence supported a finding that the proposed project increased current system reliability and improved the ability to meet future load demands). 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). Further, “cost savings are a legitimate consideration in determining whether the construction of transmission lines is necessary to serve a public use” and economic considerations alone may be sufficient to establish a public use. *South East Iowa Co-op Elec. Ass’n v. Iowa Utilities Bd.*, 633 N.W.2d 814, 820, 822-23 (Iowa 2001).

In cases where the right of eminent domain is sought, upon the granting of a franchise, the franchise holder “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(1). The right-of-way width shall not exceed 100 feet except that transmission lines with voltages of 200 kV or more may have a right-of-way up to 200 feet in width “for good cause.” *Id.*

III. BOARD ANALYSIS

A. Statutory Requirements

1. Notice Requirements

Both the Iowa Code and the Board’s administrative rules set forth a number of notice requirements with which MidAmerican must comply before the Board may grant its franchise request. Iowa Code § 478.2(3) provides “the person seeking the franchise for a new transmission line shall give notice of the informational meeting to each

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person, company, or corporation determined to be the landowner affected by the proposed project and any person, company, or corporation in possession of or residing on the property.”

Section 478.2 further requires MidAmerican to cause the notice to be published in a newspaper of general circulation in the county at least one week but no more than three weeks before the informational meeting. Notice was published on June 11, 2019, and the informational meeting was held on June 20, 2019. MidAmerican filed notice of the informational meeting on May 16, 2019; the proof of publication on July 15, 2019; and an affidavit regarding the informational meeting on September 17, 2019, as “Exhibit G” to the petition.

If a petition involves the taking of property under the right of eminent domain, Iowa Code § 478.6 requires a petitioner serve an eminent domain notice on the owners of record and on parties in possession of the property over which eminent domain is sought. Subrules 199—11.5(4) and 11.10(1) provide that a petitioner that seeks the right of eminent domain shall serve the written notice required by Iowa Code § 478.6, in the form prescribed by the Board, of the time and place of hearing to owners of record and parties in possession of land over which eminent domain is sought. On September 21, 2020, MidAmerican filed proof of delivery of the certified mailing to Marnix A. Verhofste and Hilde M.L. DeBruyne.

For those proceedings in which a hearing is required, Iowa Code § 478.5 requires a petitioner to publish the official hearing notice in a newspaper of general circulation in the county for two consecutive weeks. MidAmerican caused publication of the hearing notice in the Winterset Madisonian for two consecutive weeks, the last of

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which was on August 12, 2020, and filed the affidavit of publication on September 8, 2020.

In addition to the aforementioned statutory notice requirements, subrules 199 IAC 11.5(1) and 11.5(3) require a petitioner to provide notice to other entities that may be affected by the proposed transmission line. MidAmerican filed proof of such notices as Exhibit F to the petition.

Based on the evidence discussed above, the Board finds MidAmerican complied with all applicable notice requirements.

2. *Public use and reasonable relationship to an overall plan of transmitting electricity in the public interest*

Iowa Code § 478.4 requires that, before granting a franchise, the Board “shall make a finding that the proposed line or lines are necessary to serve a public use and represents a reasonable relationship to an overall plan of transmitting electricity in the public interest.” Each requirement will be discussed in turn.

a. Public use

MidAmerican claims the proposed project serves at least two purposes, namely, to increase reliability and to accommodate anticipated load growth. (MidAmerican Charleville Direct Testimony pp. 2-3). See *also* Petition, Exhibit D (providing that the “proposed lines are needed to support the load requirements of the new industrial customer [Microsoft Corporation data center], support future growth in the area for new residential, commercial and industrial customers, and will improve the reliability of the loads served in the area”).

With respect to system reliability, MidAmerican presented the testimony of Mr. Michael Charleville, a Senior Engineer II in MidAmerican’s Electric System Planning department, who stated that for a new 161-13.2 kV substation, the standard

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configuration is for two incoming 161 kV lines to source a substation with a single 33 megavolt-ampere (MVA) substation transformer. (MidAmerican Charleville Direct Testimony p. 2.) However, Mr. Charleville noted that if the substation load exceeds 150 MW, the substation should be configured to have three incoming 161 kV lines to source the substation. (*Id.* at p. 3.) Concerning the substation relevant to the proposed new transmission lines, Mr. Charleville testified:

[t]he Maffitt Lake Substation will have three 50 MVA transformers initially, with the ability to add up to three additional 50 MVA transformers and two 33 MVA transformers. In the event of a loss of the single 5.0 mile long Willow Creek – Maffitt Lake 161 kV line, the customers served by the Maffitt Lake Substation would have no service.

(*Id.*) Therefore, the proposed project provides the necessary incoming transmission lines to fully support the Maffitt Lake Substation.

Mr. Charleville explained that the Maffitt Lake Substation will initially serve only the load created by the Microsoft Corporation data center and that this load cannot be moved to other substations. (*Id.*) The Cumming area (areas south of Maffitt Lake) is currently served by distribution lines that are significant distances from their source substations. (*Id.* at pp. 4-5, 7.) As explained by Mr. Charleville, increased distribution “line distance complicates the ability to serve load . . . because of increased voltage drop down,” which occurs under normal and contingency conditions. (*Id.* at p. 7.) Therefore, the addition of the proposed 161 kV transmission lines to the Maffitt Lake Substation would “provide immediate reliability support” to the surrounding area. (*Id.* at p. 5.) If approved, the proposed lines will mean that the distribution lines serving the customers in this area will be moved closer to their supporting substation, which will “reduce their exposure caused by long distribution lines and the associated risks of outages.” (*Id.*)

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Finally, the proposed project will support the anticipated load growth in the area. (MidAmerican Charleville Direct Testimony p. 5; HT p. 111.) At hearing, Mr. Charleville explained the importance of proactive system planning based on anticipated future growth as opposed to responding to unanticipated load requirements. (HT pp. 140-42.) MidAmerican's conclusions are based on the results of its own analysis based on area load growth. (HT p. 113.) MidAmerican anticipates significant distribution load development along Veterans Parkway as well as additional residential and commercial growth southwest of the Des Moines metro toward the city of Cumming. (MidAmerican Charleville Direct Testimony pp. 4-5.) This project is necessary, according to MidAmerican, to serve the load levels that will result from this new development. (*Id.* at pp. 4-5, 7.)

Ms. Juckette challenges MidAmerican's projected load increases, arguing "it is completely subjective as to whether there will be future development which requires this requested franchise." (Juckette Post-Hearing Brief p. 13.) However, MidAmerican notes that the city of Cumming experienced a 31% population increase from 2008 to 2018 (compared to a West Des Moines population increase of 20% during that same period) and references a planned "agrihood" development in Cumming that could quadruple that city's current population. (MidAmerican Charleville Direct Testimony p. 6.) Further, in commenting on her own projections of growth, Ms. Juckette stated:

with the [] expansion that's happening through the City of West Des Moines and now to the west from the City of Norwalk and the City of Cumming, I anticipate that to come my direction quicker than anticipated. (HT p. 218.)

Noting the residential development occurring with a neighbor to her west, Ms. Juckette stated she intends to use her property for "upper-value estate homes" residential development (*i.e.*, homes with a value between \$1.5 million and \$2 million).

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(HT p. 218.) See *also* Juckette Exhibit J8 (document showing estate-home development in the relevant area). Simply put, while characterizing MidAmerican's projections as "speculative," Ms. Juckette not only appears to have reached the same conclusion as MidAmerican, but also intends to add to the residential development in the area.

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*, 368 N.W.2d at 98. 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).

The evidence presented by MidAmerican demonstrates that the proposed project is necessary to meet current and future transmission needs. The project will increase system reliability and flexibility and will support current and anticipated load growth. On this point alone, Mr. Charleville testified at hearing that the load at the Maffitt Lake Substation will exceed 150 MW in the near future. (HT p. 122.) Therefore, the Board finds the proposed line is necessary to serve a public use.

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- b. Reasonable relationship to an overall plan of transmitting electricity in the public interest

In determining whether a transmission line “represents a reasonable relationship to an overall plan of transmitting electricity in the public interest,” Iowa Code § 478.3(2)(a) sets forth the following factors relevant to the inquiry:

- (1) The relationship of the proposed project to present and future economic development of the area.
- (2) The relationship of the proposed project to comprehensive electric utility planning.
- (3) The relationship of the proposed project to the needs of the public presently served and future projections based on population trends.
- (4) The relationship of the proposed project to the existing electric utility system and parallel existing utility routes.
- (5) The relationship of the proposed project to any other power system planned for the future.
- (6) The possible use of alternative routes and methods of supply.
- (7) The relationship of the proposed project to the present and future land use and zoning ordinances.
- (8) The inconvenience or undue injury which may result to property owners as a result of the proposed project.

(Factors 1, 3, 5, and 7) Existing and Future Economic Development and Land Use and Needs of the Public. Through its evidence, MidAmerican demonstrated the proposed project took into consideration the present and future land use and anticipated economic development in the area, the public currently being served and future customer projections based on population trends, and anticipated future needs so as to meet the requirements set forth in § 478.3(2)(a)(1), (3), (5), and (7). In its revised Exhibit D, filed on February 14, 2020, MidAmerican states the “proposed project is necessary to reliably serve the new industrial load and anticipated load growth” (Petition, Revised Exhibit D, p. 1.) In addition to the aforementioned evidence concerning MidAmerican’s forecasted population and load growth in the area, MidAmerican took into consideration the surrounding cities’ comprehensive plans and future land use when making its load forecasts. (MidAmerican Charleville Direct

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Testimony pp. 6-7; MidAmerican Charleville Reply Testimony p. 2.) According to MidAmerican witness Charleville, a future land use plan provides information concerning the expected load types that are anticipated in a given area. See MidAmerican Charleville Direct Exhibit C (future land use map from the City of West Des Moines' Comprehensive Plan); MidAmerican Charleville Direct Exhibit D (future land use map from the City of Cumming's Comprehensive Plan). The future land use for the Veterans Parkway and Interstate 35 area has been designated as high density residential, regional and professional commerce, office, warehouse, and business parks. (MidAmerican Charleville Direct Testimony pp. 6-7.)

While MidAmerican demonstrated that the proposed project is necessary to meet the needs of its current customers and the anticipated needs of its future customers based on projected population growth, economic development, and land use, unquestionably the sole reason three transmission lines (*i.e.*, the existing transmission line supporting the substation and the two proposed lines subject of this proceeding) are needed to serve the Maffitt Lake Substation at this time is because of the Microsoft Corporation data center. See HT pp. 110-11 (Mr. Charleville testifying that the immediate need for the project and the "only reason for development now is Project Osmium," which is the name Microsoft designated to the project of the data center).

(Factor 2) Comprehensive Utility Planning. MidAmerican also established that its proposed plan is the product of comprehensive electric utility planning, meeting the § 476.3(2)(a)(2) requirement. MidAmerican contends the "proposed project is an integral part of and compatible with comprehensive utility planning for the immediate service area and MidAmerican's entire system." (Petition, Revised Exhibit D, p. 1.) According to Mr. Charleville, the proposed project "will reduce the distance between

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customers and the closest substation, increase reliability, reduce repair times in the event of an outage, and facilitate additional residential, commercial, and industrial growth in the vicinity of the Maffitt Lake Substation.” (MidAmerican Charleville Reply Testimony p. 2.)

(Factor 4) Existing Electric System and Parallel Existing Routes. Section 478.3(2)(a)(4) requires a showing of the relationship of the proposed project to the existing electric utility system and parallel existing utility routes.⁴ The evidence submitted by MidAmerican demonstrates that the proposed project will interconnect the Maffitt Lake Substation to the existing Booneville Substation, located in Dallas County, and the Norwalk Substation, located in Warren County. (Petition, Revised Exhibit D, p. 2.) As part of its design, MidAmerican intends to remove 0.98 miles of an existing 161 kV line, which has been franchised in Docket No. E-21752, between the Booneville and Norwalk substations. (Petition, Revised Exhibit D, p. 2; HT pp. 153-54, 233-34.) MidAmerican further intends to remove and not replace certain preexisting distribution lines to better align with the transmission line and to improve safety. (HT pp. 154-55.) MidAmerican demonstrated a relationship between the proposed project and MidAmerican’s existing utility system as required under § 478.3(2)(a)(4).

(Factors 6 and 8) Alternative Routes and Inconvenience/Undue Injury. The final factors require the examination of possible alternative routes and methods of supply and the inconvenience and undue injury that may result to property owners. MidAmerican submitted evidence showing it also considered alternative routes and,

⁴ MidAmerican states “[t]here are no parallel existing utility routes in the area of the proposed line.” (Petition, Revised Exhibit D, p. 2.)

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as part of its analysis, considered the impacts to landowners so as to meet the requirements of § 476.3(2)(a)(6) and (8).

With its Petition, MidAmerican filed two route studies that were prepared by MidAmerican's High Voltage Engineering Manager, William J. Schierbrock. (MidAmerican Schierbrock Direct Testimony p. 6.) The first, filed on September 17, 2019, addressed the east segment, which MidAmerican proposed to run southeasterly from the Maffitt Lake Substation and to connect with the existing Norwalk-to-Booneville 161 kV transmission line. (Petition, 9/17/19 Route Study, p. 4.) The second, filed on September 23, 2019, addressed the west segment, which MidAmerican proposed to run west and then south from the Maffitt Lake Substation and to connect with the existing Norwalk-to-Booneville 161 kV transmission line. (Petition, 9/23/19 Route Study, p. 4.)

The purpose of a route study, according to MidAmerican, is to provide a consistent and uniform route selection process. (Petition, 9/17/19 Route Study, p. 1; Petition, 9/23/19 Route Study, p. 1.) To be included within a study, a route must conform to all legal requirements and must meet all of MidAmerican's service requirements. (Petition, 9/17/19 Route Study, p. 1; Petition, 9/23/19 Route Study, p. 1.) See *also* MidAmerican Schierbrock Direct Testimony pp. 6-7 (discussing how MidAmerican conducted each route study). In preparing a route study, MidAmerican first identifies potential routes, considering the existing or proposed electrical system, the points to be connected, the criteria set forth in Iowa Code § 478.18(2), and the Board's administrative rules.⁵ (MidAmerican Schierbrock Reply Testimony p. 4;

⁵ The July 29, 2020 Iowa Administrative Bulletin included the Adopted and Filed version of the chapter 11 rule making, identified as ARC 5121C. In that rule making, the Board adopted a new chapter 11, which became effective on November 11, 2020. Under the current version of chapter 11, the route

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Petition, 9/17/19 Route Study, p. 1; Petition, 9/23/19 Route Study, p. 1.) MidAmerican then scores each proposed route by using the following criteria:

1. Meets all siting requirements set forth in Iowa Code § 478.18 and the Board's administrative rules;
2. Agricultural impacts;
3. Existing development along the route;
4. Buildings within 100 feet of the route;
5. Trees and other vegetation;
6. Overall line length;
7. Number of angles greater than 30 degrees;
8. Streams and potential wetlands; and
9. Overland access requirements.

(MidAmerican Schierbrock Direct Testimony pp. 6-7; Petition, 9/17/19 Route Study, p. 1; Petition, 9/23/19 Route Study, p. 1.) MidAmerican reviewed each prospective route under the nine criteria and for each criterion assigned a number from 1 to 10, with 1 being the best rating for each line criterion. (Petition, 9/17/19 Route Study, p. 7; Petition, 9/23/19 Route Study, p. 7.) If MidAmerican determined routes were equivalent for any criterion, those routes received equivalent criterion scoring. (Petition, 9/17/19 Route Study, p. 7; Petition, 9/23/19 Route Study, p. 7.)

With respect to the west segment, the route study area “was bound by the eastern quarter-section line of Sections 12 and 13, Range 26W, Township 77N on the east, the existing 161 kV transmission line on the south, Cumming Road/Vintage Road on the west, and 110th Lane (extended) on the north.” (MidAmerican Schierbrock Direct Testimony p. 6.) MidAmerican considered ten potential line routes. (Petition, 9/23/19 Route Study, p. 4.) Under its scoring matrix, MidAmerican identified Route 2 as the highest-scoring route; however, Route 2 would require MidAmerican to secure

selection provisions formerly located at rule 11.1(7) are found in substantially the same form at rule 11.3. In the interest of clarity, throughout the remaining sections of this “Order Granting Petition for Electric Franchise and Right of Eminent Domain,” the Board shall refer to the route selection rule by its current number (*i.e.*, 11.3).

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an easement for 1.5 miles of the route over private property and would otherwise negatively impact land due to the construction and maintenance of the line. (Petition, 9/23/19 Route Study, p. 8.) Consequently, MidAmerican selected Route 4, which “is the second-highest scoring route, finishing only one point behind Route 2 in the scoring.” (Id.) MidAmerican described Route 4 as:

Route 4 would extend north from the existing transmission line along the west section line of Section 13, Township 77N, Range 26W for approximately 0.50 miles, crossing Cumming Road, then continuing north along Woodland Avenue for approximately 1.0 mile, then east along 110th Lane for approximately 0.75 miles to the end of the study area at the intersection of the north section line and the east quarter-section line of Section 12, Township 77N, Range 26W.

(Petition, 9/23/19 Route Study, p. 5.) MidAmerican states Route 4 meets all regulatory routing requirements, is entirely parallel to roads and land divisions, has no building within 100 feet of the proposed line, and has only two line angles over 30 degrees. (Petition, 9/23/19 Route Study, p. 5.)

With respect to the east segment, the route study area “was bound by Interstate 35 on the east, the existing 161 kV transmission line on the south, the western quarter-section line of Sections 12 and 13, Range 26W, Township 77N on the west, and the northern quarter-section line of Section 12, Range 26W, Township 77N and Section 5, Range 25W, Township 77N on the north.” (MidAmerican Schierbrock Direct Testimony p. 6.) MidAmerican considered 26 potential line routes in the route study area and discussed the top ten scoring lines in the route study. (Petition, 9/17/19 Route Study, p. 4.) MidAmerican identified Route 7 as the highest scoring route, which is described as:

Route 7 would extend north from the existing transmission line along Warren Avenue for approximately 1.26 miles to the end of the study area at the intersection of the north quarter-section line and the eastern section line of Section 12, Township 77N, Range 26W.

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(Petition, 9/17/19 Route Study, pp. 6, 8.) MidAmerican states Route 7 meets all regulatory routing requirements, has no agricultural impacts, has no building within 100 feet of the proposed line, only has one line angle over 30 degrees, and requires no overland access. (Petition, 9/17/19 Route Study, p. 6.)

Ms. Juckette asserts a number of errors relating to MidAmerican's consideration of alternative routes. First, Ms. Juckette contends MidAmerican's east segment route study is flawed because it undervalues the costs of construction along Route 7.⁶ (Juckette Post-Hearing Brief pp. 25-27.) Ms. Juckette argues MidAmerican failed to include condemnation costs in its Route 7 analysis. (*Id.* at p. 25.)

Specifically, Ms. Juckette contends that MidAmerican erroneously assumes "eminent domain will not be necessary along the eastern border" of her property and that those condemnation costs "will be significant." (*Id.*) Ms. Juckette states that when these costs are considered, other east segment routes score higher than Route 7. (*Id.*)

Ms. Juckette's first argument is premised entirely on the presupposition that MidAmerican cannot build, operate, or maintain a transmission line along the eastern border of her property without the use of eminent domain. However, as Ms. Juckette acknowledges within her argument, MidAmerican is not requesting eminent domain authority over any portion of Ms. Juckette's property. Therefore, in the event Ms. Juckette is correct in her argument that MidAmerican lacks the easements necessary for Route 7 (an argument the Board will examine in greater detail below), then the lack of all necessary easements will serve as a basis to deny MidAmerican's request for a

⁶ While "costs" is not a force-ranked category, several of the route selection criteria implicate costs, including line length ("[a]dditional line length adds to the overall costs of the line") and angles over 30 degrees (use of line angles over 30 degrees increases costs). (Petition, 9/17/19 Route Study, pp. 2-3.)

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franchise covering the east segment, and this particular contention will be moot.

Conversely, if MidAmerican does not require eminent domain along Ms. Juckette's eastern border, then Ms. Juckette's contention fails.

Second, Ms. Juckette asserts MidAmerican's route study analysis is arbitrary and capricious. (*Id.* at pp. 27-31.) Specifically, Ms. Juckette asserts portions of MidAmerican's scoring centers on nominally important criteria while failing to consider more sound policy objectives (*i.e.*, avoiding potential interference with private landowners, considering the economic value of the land in the study area, etc.). (*Id.*) Ms. Juckette stated that the Board should analyze alternative routes with the precision she demands. The Board is aware of no authority that requires MidAmerican to consider private landowner rights or the economic value of property in conducting a route study. In fact, the Board is aware of no authority that requires the creation of a route study. Chapter 478, which governs this Board's review, neither includes the term "route study" nor identifies with any particularity what criteria a petitioner should consider in reviewing alternative routes. Instead, § 478.3(2)(a)(6) simply requires a petitioner consider the "possible use of alternative routes," and both route studies, as submitted by MidAmerican, establish that it did. *See also In re MidAmerican Energy Company*, Docket No. E-22313, "Order Granting Petition for Electric Franchise and Right of Eminent Domain, p. 12 (Nov. 14, 2019) (stating "MidAmerican demonstrated it considered alternative routes" so as to meet the § 476.3(2)(a)(6) requirement for the submission of a similar route study document). The route studies demonstrate MidAmerican considered a number of line routing criteria, including agricultural impacts, overall line length, angles, access requirements, and existing trees and other vegetation. (Petition, 9/17/19 Route Study, p. 1; Petition, 9/23/19 Route Study, p. 1).

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MidAmerican established it considered alternative routes as required under § 478.3(2)(a)(6).

While couched as a challenge to MidAmerican's route study, Ms. Juckette's underlying contention appears to be primarily focused on the east segment as proposed by MidAmerican and the inconvenience and injuries the east segment may cause her. Specifically, Ms. Juckette asserts MidAmerican lacks the necessary easements to construct, operate, and maintain in the area bordering to the east of Ms. Juckette's property, and that such a line would significantly reduce the value of her property. Ms. Juckette's contentions will be discussed as part of the route discussion below.

For purposes of the § 478.3(2)(a)(6) and (8) factors, the record supports a finding that MidAmerican considered methods of supply and alternative routes, which factored in the injury and inconvenience to landowners. The Board finds these criteria are met.

(Public Interest Factors Conclusion). For the reasons set forth above, the Board finds MidAmerican established that the proposed line is reasonably related to an overall plan of transmitting electricity in the public interest under § 478.3(2)(a).

3. *Route selected*

According to Iowa Code § 478.18(2), an electric transmission line:

shall be constructed near and parallel to roads, to the right-of-way of the railways of the state, or along the division lines of the lands, according to the government survey, wherever the same is practicable and reasonable, and so as not to interfere with the use by the public of the highways or streams of the state, nor unnecessarily interfere with the use of any lands by the occupant.

See Hanson v. Iowa State Commerce Comm'n, 227 N.W.2d 157, 159 (Iowa 1975)

(defining "[d]ivision lines of the lands" as "section lines, quarter-section lines, and

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quarter-quarter-section lines, which divide land into 640-acre, 160-acre, and 40-acre tracts respectively”). Consequently, route planning must “begin with routes that are near and parallel to roads, railroad rights-of-way, or division lines of lands” 199 IAC 11.3. Although a transmission line must follow a road, railway, or land division route when “practicable and reasonable,” if “such routes contain points of impracticability or unreasonableness, the utility may deviate from the route at those points.” *Hanson*, 227 N.W.2d at 163. See also 199 IAC 11.3(1) (providing deviations “based on landowner preference or minimizing interference with land use may be permissible”).

As set forth in greater detail above, MidAmerican prepared route studies for both the west and east segments. (Petition, 9/17/19 Route Study, p. 1; Petition, 9/23/19 Route Study, p. 1). With respect to the west segment, MidAmerican considered ten potential line routes. (Petition, 9/23/19 Route Study, p. 4.) With respect to the east segment, MidAmerican considered 26 potential line routes, discussing the lines scoring in the top ten in the route study. (Petition, 9/17/19 Route Study, p. 4.) The potential line routes were located near or parallel to roads, active railroads, and divisions of land. (*Id.* at p. 1; Petition, 9/23/19 Route Study, p. 1.) MidAmerican states that each evaluated route, including the segments MidAmerican ultimately chose, complied with § 478.18(2) and the Board’s administrative rules. (MidAmerican Schierbrock Direct Testimony p. 7; Petition, 9/17/19 Route Study, pp. 1-2; Petition, 9/23/19 Route Study, pp. 1-2.) Board staff likewise opined the final routes proposed by MidAmerican appear to comply with § 478.18(2) and the Board’s route selection rule. (Staff Report, 3/13/20, pp. 10-11; HT p. 18.)

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Conversely, Ms. Juckette asserts the east segment fails to comport with § 478.18(2) because it unnecessarily interferes with her private property. (Juckette Post-Hearing Brief pp. 25-31.) Ms. Juckette further contends the east segment fails because MidAmerican does not possess the necessary easements to construct, operate, and maintain an electric transmission line on the east border of her property. (*Id.* at pp. 13-24.) In the interest of clarity, each argument will be discussed in turn.

a. Unnecessary Interference

Iowa Code § 478.18(2) directs that a transmission line shall not be constructed so as to “unnecessarily interfere with the use of any lands by the occupant.” Because the legislature did not define “unnecessarily interfere,” the words should be given their plain and common meaning. *Banilla Games, Inc. v. Iowa Dep’t of Inspections & Appeals*, 919 N.W.2d 6, 14 (Iowa 2018). “The dictionary is an acceptable source of the common meaning of a word.” *State v. White*, 545 N.W.2d 552, 556 (Iowa 1996).

To “interfere” means “to interpose in a way that hinders or impedes.” *Interfere*, *Merriam-Webster*, <https://www.merriam-webster.com/dictionary/interfere>. See also *Interference*, Black’s Law Dictionary (11th ed. 2019) (defining “interference” to mean, in part, the “act or process of obstructing normal operations”). “Unnecessary” is defined to mean “[n]ot required under the circumstances.” *Unnecessary*, Black’s Law Dictionary (11th ed. 2019) (defining “unnecessary”).

Ms. Juckette presently uses her property as an equine breeding and training facility. (Juckette Direct Testimony p. 2; HT p. 217.) Ms. Juckette acquires her horses from the United States and Europe and her horses have run at tracks throughout the United States. (Juckette Direct Testimony p. 2; HT p. 217.) Ms. Juckette estimated she invested between \$3.5 million and \$4 million in the training/breeding operation and, at

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the time of hearing, she estimated the value of the racehorses at her facility to be \$2.5 million to \$3 million. (Juckette Direct Testimony p. 3; HT p. 217.)

With respect to the eastern edge of her property, Ms. Juckette states she has a V-Mesh safety wire installed approximately 50 feet from the road right-of-way. (HT p. 231.) Ms. Juckette explained that this barrier is a tension wire that prevents horses from passing. (*Id.*) As a secondary safety measure, Ms. Juckette also has an exterior fence that is closer to the road right-of-way. (HT pp. 231-32.) Ms. Juckette testified that she has no present intention of moving either of these fences closer to the public road or to otherwise expand her horse operation east toward the road right-of-way. (HT pp. 230-32.)

MidAmerican witness Schierbrock asserted that the east segment would not impede Ms. Juckette's use of her property. (HT p. 194.) In fact, Mr. Schierbrock testified that approval of MidAmerican's proposed project would lessen any interference MidAmerican's transmission lines may have on Ms. Juckette's use of her property. (MidAmerican Schierbrock Supplemental Reply Testimony p. 3.) Currently, a 161 kV transmission line exists approximately 22 feet from a metal fence Ms. Juckette placed at the southern border of her property. (*Id.*) If its petition is granted, MidAmerican intends to remove the southern 161 kV transmission line and anticipates placing a new transmission line on the east segment between 60 and 85 feet from the metal interior fence on the eastern side of Ms. Juckette's property. (*Id.*) Additionally, if the project is approved, Mr. Schierbrock asserts Ms. Juckette's total linear exposure would be reduced from 2,550 feet to 1,320 feet. (*Id.*) Finally, to avoid any impact the east segment may have on Ms. Juckette's land use, MidAmerican has offered to install grounding on the metal fence on the east side of her property. (HT pp. 195-96.)

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Ms. Juckette presented no evidence suggesting the east segment negatively constrains or restricts her current use of her property. Ms. Juckette neither claimed nor presented evidence demonstrating that she will be required to amend or alter any aspect of her current equine breeding/training operation on account of the east segment. Asked whether she intends to expand her equine operation toward the eastern boundary, which the east segment could have implicated, Ms. Juckette responded in the negative. (HT pp. 230-32.) Simply put, the record is devoid of any evidence suggesting the east segment interferes, unreasonably or otherwise, with the current use of Ms. Juckette's property.

Ms. Juckette contends that the east segment may negatively affect her future intended use of the property. Ms. Juckette testified that once she ceases using her property as a horse farm, she intends to use the property for high, upper-end estates with residences valued between \$1.5 million and \$2 million. (HT pp. 218-23.) Ms. Juckette anticipates that acreage lots within commuting distance of the Des Moines metro will be in high demand and further expects her land "would be highly sought after by potential buyers." (Juckette Direct Testimony p. 5.) Ms. Juckette opines that the east segment will reduce the value of her property notwithstanding the fact that if the project is approved, the transmission line bordering her property on the south would be removed. (*Id.*; Juckette Supplemental Testimony p. 4; HT p. 233-34.) In the event the east segment is approved, Ms. Juckette believes it will be difficult to sell the lots adjoining the proposed transmission line for amounts she believes the lots would otherwise be worth. (HT pp. 218-19.)

There are instances in which the location of a proposed transmission line has been found to unnecessarily interfere with anticipated future housing developments. In

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Docket No. E-22156, for example, the petitioning party requested a franchise to construct, operate, and maintain a transmission line that followed “a division line of land running directly east across a cultivated field” *In re ITC Midwest, LLC*, Docket No. E-22156, “Proposed Decision and Order Granting Franchise,” p. 28 (March 29, 2016).⁷ The landowner used the field for a crop rotation of soybeans, corn, and sometimes alfalfa. *Id.* While the proposed transmission line did not prevent the landowner from using the cultivated field as cropland, “it would mean the land could never be developed.” *Id.* As most germane to this point, the order provides:

It is true that ITC has taken important steps to minimize interference with the [landowners’] use of their cropland by increasing the height of the line and placing its poles in the fence line. Although ITC’s steps would reduce the impact of the transmission line on the [landowners’] farming operations . . . the presence of ITC’s proposed line across the field would hinder or prevent future development of the field. In this case, it appears that future residential development is a real possibility, as there are housing developments immediately adjacent to the [landowners’] farm and [the landowners’ property is] zoned rural residential. . . . At this location, there is a reasonable, relatively short alternative of running the proposed line along the roads instead of crossing the cultivated field. Under these circumstances, allowing ITC to construct its line across the [landowners’] field would unnecessarily interfere with the [landowners’] current and potential future use of their property. There are no engineering or construction problems that would prevent constructing the line along the roads. The additional cost and somewhat more complicated construction are reasonable considering the avoidance of the unnecessary interference with the [landowners’] use of their property.

Id. at pp. 33-34 (internal citations omitted). Therefore, in relevant part, the order approved the petitioner’s franchise request subject to moving that portion of the proposed route to an alternative location. *Id.* at p. 35. In that case, where a proposed

⁷ At the time of this decision, rule 7.26(2) provided that a “proposed decision and order of the presiding officer in a contested case shall become the final decision of the board unless, within 15 days after the decision is issued, the board moves to review the decision or a party files an appeal of the decision with the board.” In Docket No. E-22156, the Board did not move to review the March 29, 2016 proposed decision and no party sought an appeal of the proposed decision with the Board. Consequently, the March 29, 2016 proposed decision “became the final decision of the Board.”

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transmission line would prevent future residential development of agriculture land and where the hearing record establishes with specificity the existence of an alternative route with no engineering or construction problems, then “unnecessary interference” may be found.

Based on the evidence presented in this case, the record does not establish that MidAmerican’s proposed transmission line would preclude future residential development; rather, Ms. Juckette simply opines that she may not realize as much profit for such development if the proposed east segment is approved. (HT pp. 218-19.) Further, unlike the transmission line in Docket No. E-22156, the proposed east segment in this docket does not traverse through Ms. Juckette’s land; instead, the east segment follows a road right-of-way that borders Ms. Juckette’s property to the east. (Petition, 9/17/19 Route Study, pp. 6, 8, 15.) Finally, while Ms. Juckette contends MidAmerican should place the east segment adjacent to the interstate (HT pp. 222-23), the record is not sufficiently developed to support the conclusion that such an alternative route is possible from an engineering and construction perspective. More importantly, none of the landowners who would be implicated should the east segment be moved to a location adjoining the interstate are before the Board and have not had an opportunity to be heard on that point.

For these reasons, Ms. Juckette failed to establish that the east segment unnecessarily interferes with her current or future use of her property. Ms. Juckette’s testimony at hearing establishes that the proposed east segment would not interfere with her current equine training/breeding operations. (HT pp. 230-32.) Further, the record does not establish that the proposed east segment would prevent, impede, obstruct, or even hinder Ms. Juckette’s intended future use of her property.

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b. Necessary Easement

Next, Ms. Juckette asserts the east segment must fail because MidAmerican does not possess the necessary easements to construct, operate, and maintain an electric transmission line on the east border of her property. Undisputedly, MidAmerican has not sought condemnation over any property where the east segment is proposed to be located. (Petition, Exhibit E's.) See 199 IAC 11.5(1)(e) (providing that Exhibit E's are required if the petition requests the right of eminent domain and contains, in part, the legal description of the property made subject to the eminent domain request). Therefore, if MidAmerican lacks the necessary easements to construct, operate, and maintain the east segment, that portion of the petition must fail. The Board cannot approve a franchise for a route in which the petitioner possesses no right to install, operate, and maintain the transmission line.

MidAmerican asserts it requires no additional easement from Ms. Juckette, either voluntarily or involuntarily, in order to install, maintain, and operate a transmission line on the eastern edge of her property. (MidAmerican Gartenberg Direct Testimony p. 11.) First, MidAmerican asserts Gartenberg Supplemental Reply Exhibit A establishes the existence of an 80-foot road right-of-way along Warren Avenue. (MidAmerican Gartenberg Supplemental Reply Testimony p. 2.) MidAmerican asserts that the eastern edge of Ms. Juckette's property already contains MidAmerican-owned "utility facilities" as that term is defined in Iowa Code § 306.46(2). (*Id.*) Specifically, MidAmerican's distribution poles that provide electric service to Ms. Juckette and her neighbors are already located in the road right-of-way. (*Id.*) Second, MidAmerican contends it may

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install the proposed transmission line in the road right-of-way pursuant to Iowa Code § 306.46.

(1) Iowa Code § 306.46(1). Turning first to the statute, § 306.46(1) provides that a “public utility may construct, operate, repair, or maintain its utility facilities within a public road right-of-way” subject to compliance with § 318.9 and so long as the construction of the utility facility does not cause interference with the public use of the road. Section 306.46(1) was enacted in 2004, following the Iowa Supreme Court’s *Keokuk Junction* opinion. 2004 Iowa Acts ch. 1014.

In *Keokuk Junction*, the city of Keokuk condemned certain property through eminent domain proceedings from a landowner to build a road. *Keokuk Junction Ry Co. v. IES Industries, Inc.*, 618 N.W.2d 352, 354 (Iowa 2000). A few years later, a public utility requested permission from the city to install electric power lines within the city’s right-of-way on the landowner’s property and the city agreed. *Id.* The landowner brought a declaratory action in district court, claiming the construction of the electric power lines by the utility constituted an additional servitude for which the landowner was entitled to compensation. *Id.* The district court concluded that the “use of the electric transmission line constitutes an incidental use or incidental easement rather than a burden which is in addition to the street right-of-way.” *Id.*

On appeal, the Iowa Supreme Court observed that the national treatment of the issue had not been uniform, noting that the states addressing the issue generally fell into one of the following five categories:

(1) utility poles are within the highway easement; (2) utility poles are within the highway easement, but only if they are used to furnish power for reasons directly related to travel; (3) utility poles are within the highway easement, but only in relation to urban areas; (4) utility poles are within the highway easement if they (a) are necessary for travel purposes, and (b) the highway is in an urban area; or (5) utility poles are not within the

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highway easement.

Id. at 356 (citations omitted). For Iowa, the Court adopted the fifth category, holding “that power lines and utility poles are *not included* within the scope of the general public highway easement.” *Id.* at 362 (emphasis included in original).

Following *Keokuk Junction*, in 2004 the Iowa Legislature enacted § 306.46, which provides that a “public utility may construct, operate, repair, and maintain its utility facilities within a public road right-of-way.” For purposes of the statute, the term “public utility” includes MidAmerican and the term “utility facilities” includes transmission lines and poles. According to MidAmerican, the express legislative intent of the statute is to “permit public utilities to construct and maintain utility facilities such as cables, pipes, and poles, within public road rights-of-way.” (MidAmerican Post-Hearing Brief p. 27.)

The Board had cause to apply § 306.46 in Docket Nos. E-21988 and E-21989, a case involving 20.35 miles of 161 kV electric transmission line in Polk and Story counties. The approved transmission line route ran in public road right-of-way next to farmland owned by NDA Farms.⁸ *In re: Ames Municipal Electric System*, Docket Nos. E-21988, E-21989, “Proposed Decision and Order Granting Franchises,” p. 71 (March 21, 2012). The primary issue before the Board was whether NDA Farms should be compensated for a taking of its property rights. *In re: Ames Municipal Electric System*, Docket Nos. E-21988, E-21989, “Order on Appeal and Issuing Franchises,” pp. 19, 23 (Sept. 24, 2012).

⁸ The issue discussed herein involved property owned by NDA Farms and separate property owned by Ms. Denise M. Albaugh. *In re: Ames Municipal Electric System*, Docket Nos. E-21988, E-21989, “Proposed Decision and Order Granting Franchises,” p. 71 (March 21, 2012). The Board will, for convenience, hereafter refer to the property owner as simply “NDA Farms.”

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In analyzing the question, the Board stated that under *Keokuk Junction*, a landowner “whose property was subject to only a road easement would be entitled to seek additional compensation if utility lines or other facilities were subsequently constructed in the road right-of-way.” *Id.* at 19-20. The enactment of § 306.46 “changed the law by providing that utility infrastructure could be built within a public road right-of-way.” *Id.* at 20. However, the Board observed that “[t]here is nothing in the statute that directs the Board to determine whether it is appropriate to award additional compensation for the use of the road right-of-way if the easement predates the statute [and] the statute does not provide for the exercise of eminent domain over such property.” *Id.*

In examining the purpose of the statute, the Board noted the language the legislature used in § 306.46 was “remarkably similar” to an Alaska statute, AS 19.25.10, which led the Board to conclude “that § 306.46 was intended to change the law in *Keokuk Junction* so that Iowa law would match Alaska law and electric transmission lines (and other utility facilities) are considered to be included within the uses permitted by a road easement” such that eminent domain was not necessary. *Id.* at 22. With respect to the application of the statute to existing road easements, the Board held:

To the extent § 306.46 changed the property rights of holders of easements in existence as of 2004, it appears to be an exercise of the state’s police power, that is, a regulation of the use of private property for the public good, for which no compensation is required.

Id. at 23 (citing *Kelley v. Story County Sheriff*, 611 N.W.2d 475, 479 (Iowa 2000)).

Applying the *Penn Central* balancing factors,⁹ which are used in

⁹ The *Penn Central* balancing factors are: (1) the economic impact of the regulation, (2) the extent to which the regulation interfered with distinct investment-backed expectations, and (3) the character of the government action. *Brakke v. Iowa Dep’t of Natural Resources*, 897 N.W.2d 522, 543 (Iowa 2017) (citing *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124, 98 S. Ct. 2646, 2659 (1978)).

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determining whether a regulatory taking occurs, the Board concluded § 306.46 was:

a legitimate exercise of police power for the Legislature to change the rules of the game for all landowners in Iowa and declare that utility facilities can rely upon public road easements without purchasing a separate easement from the underlying landowner [such that] § 306.46 repeals the *Keokuk Junction* decision and applies to preexisting easements as well as new ones.

Id. at pp. 25-26. Finally, the Board found “there is no retroactive application of § 306.46 because the transmission line will not be built until many years after the statute’s passage.” *Id.* at 26.

Dissatisfied with the Board’s decision, NDA Farms sought judicial review. *NDA Farms, LLC v. Iowa Utilities Bd.*, Docket No. CV009448, 2013 WL 11239755, *1 (Polk County District Ct. June 24, 2013). The district court concluded the Board erred as a matter of law in applying § 306.46 to the applicable road rights-of-way. *Id.* at *9. Initially, the court summarily asserted the Board committed an error of law in applying § 306.46 to a right-of-way that predated the statute’s effective date, *Id.*; however, in its analysis that followed, the district court concluded that irrespective of § 306.46, an easement separate from the road right-of-way is required for the construction of a transmission line. *Id.* at *9-10. According to the district court, permitting a utility to construct, operate, and maintain a utility facility in the right-of-way without a separate utility easement “would constitute a governmental taking without just compensation.” *Id.* at *10. However, if this point is true, then the question of whether the statute should be applied retrospectively or prospectively would seem to be inconsequential.

In light of the aforementioned, a number of additional points are worthy of mention. First, neither the Board’s decision in Docket Nos. E-21988 and E-21989 nor the district court’s decision in *NDA Farms* is controlling legal authority. See e.g., Iowa

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R. App. P. 6.904(2)(c) (providing that unpublished decisions of a court or agency “shall not constitute controlling legal authority”). Second, the Board is duty-bound to follow legislative enactments and lacks the authority to consider the constitutionality of a statute. See *Shell Oil Co. v. Bair*, 417 N.W.2d 425, 429 (Iowa 1987) (quoting administrative law treatise for proposition that “[o]nly the courts have authority to take action which runs counter to the expressed will of the legislative body”). Finally, it must be understood that the legislature intended to accomplish some objective in enacting § 306.46. See *Hanover Ins. Co. v. Alamo Motel*, 264 N.W.2d 774, 778 (Iowa 1978) (stating “[w]e do not presume the legislature intended to enact a futile or ineffectual law”).

After consideration, the Board reaffirms its determination in Docket Nos. E-21988 and E-21989 that in enacting § 306.46, the legislature “changed the law by providing that utility infrastructure could be built within a public road right-of-way.” *In re: Ames Municipal Electric System*, Docket Nos. E-21988, E-21989, “Order on Appeal and Issuing Franchises,” p. 20 (Sept. 24, 2012).¹⁰ At the time of the statute’s 2004

¹⁰ The Board appreciates and, to some extent, agrees with many of the statements penned by Board Member Lozier in his dissent. If a utility’s use is not incidental or subordinate to a road easement, then as the *Keokuk Junction* Court held, “[a]llowing a utility company that operates for a profit to place its poles on the servient land without having to pay for this right is manifestly unfair to the servient landowner whose easement did not include utilities within its purview.” *Keokuk Junction*, 618 N.W.2d at 362. In attempting to harmonize the *Keokuk Junction* holding with § 306.46, the Board finds a certain amount of appeal in Board Member Lozier’s conclusion that § 306.46 only applies prospectively as measured from the creation of the road easement. However, the Board also appreciates that it has no inherent authority and only has those powers and such authority as conferred to it by the legislature. *Zomer v. West River Farms, Inc.*, 666 N.W.2d 130, 132 (Iowa 2003); Iowa Code § 17A.23(3). This Board solely exists because through § 474.1, the legislature created it.

The interpretation and construction of a statute is for the courts to decide. *Brakke v. Iowa Dep’t of Nat. Res.*, 897 N.W.2d 522, 533 (Iowa 2017). Although in certain instances a reviewing court will give appropriate weight to an agency’s interpretation of its own enacting statute, *Renda v. Iowa Civil Rights Comm’n*, 784 N.W.2d 8, 10 (Iowa 2010), in this instance, the Board has been asked to examine a statute that falls well outside both its enacting provisions and any area over which the Board possesses special expertise. Further, this Board lacks the authority to determine constitutional questions. *Soo Line R. Co. v. Iowa Dep’t of Transp.*, 521 N.W.2d 685, 688 (Iowa 1994). Under these circumstances, the Board believes its proper role is to apply § 306.46 as written to the pending controversy. The Board will leave the final interpretation and construction of § 306.46 – a statute over which the Board has no special interpretative authority – to the courts.

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enactment, the legislature knew the existing state of the law, including the Supreme Court's decision in *Keokuk Junction*, and intended to effectuate something. See *Beier Glass Co. v. Brundige*, 329 N.W.2d 280, 285 (Iowa 1983) (providing that in enacting a statute, the presumption is that "the legislature knew the existing state of the law"). The legislature understood that the Iowa Supreme Court refused to join the Alaska Supreme Court's recognition that a utility easement is not necessary for the construction of utility facilities in a road right-of-way. The legislature further understood that the Iowa Supreme Court stated that the "sole reason" the Alaska Supreme Court reached this conclusion was because of the presence of a state statute — a statute that did not exist in Iowa at that time. These details, coupled with the fact that the legislature drafted § 306.46 in a "remarkably similar" manner to the Alaska statute, leads to the conclusion that the legislature intended for Iowa's law be construed similarly to Alaska's.

Under such a reading, § 306.46 would "allow utilities to use public right-of-ways without the permission of the servient landowner." *Keokuk Junction*, 618 N.W.2d at 357 (discussing *Fisher v. Golden Valley Electric Ass'n, Inc.*, 658 P.2d 127 (Alaska 1983)). This is because the utility use is "an incidental and subordinate use of a highway easement," which means that the use of the right-of-way for the construction of utility facilities "does not call for acquisition of an additional servitude" from the landowner. *Fisher*, 658 P.2d at 130. If no additional servitude results, there is no taking. See e.g., *Kingsway Cathedral v. Iowa Dep't of Trans.*, 711 N.W.2d 6 (Iowa 2006) (discussing constitutional takings). As explained by the Wyoming Supreme Court:

The rights of the easement holder in another's land are determined by the purpose and character of the easement. The manner in which the easement is used does not become frozen at the time of grant. An easement for a road or a highway does not limit its use to the movement of vehicles. Uses related to traffic movement are within the scope of the easement. The grant of a public road easement embraces every

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reasonable method of travel over, under and along the right-of-way. Thus, the running of power and telephone lines above the ground and pipelines underneath do not increase the burden on the servient estate and are permissible uses.

State v. Homar, 798 P.2d 824, 826 (Wyo. 1990).¹¹

With respect to prospective versus retrospective application, whether § 306.46 is retroactive depends “upon what one considers to be the determinative event by which retroactivity or prospectivity is to be calculated.” *Republic Nat’l Bank of Miami v. United States*, 506 U.S. 80, 100, 113 S. Ct. 554, 565 (1992) (Thomas, J., concurring in part and concurring in the judgment). In this situation, the Board believes the determinative event is the conduct that is made subject of the statute, namely, the public utility’s construction, operation, repair, and maintenance of its utility facilities within a public road right-of-way.¹² Here, because MidAmerican’s construction, operation, and maintenance of the proposed transmission line has yet to occur, application of § 306.46 is prospective.

In sum, the Board is duty-bound to follow enacted statutes, and § 306.46 clearly and unambiguously provides that a “public utility may construct, operate, repair, or maintain its utility facilities within a public road right-of-way.” The primary point of divergence between this order and the district court’s ruling in *NDA Farms* concerns the effect of § 306.46. While concluding the legislature did not intend to modify, abrogate,

¹¹ Wyoming statute 1-26-813 provides that “[c]orporations authorized to do business in this state for the purpose of constructing, maintaining and operating a public utility . . . may set their fixtures and facilities along, across or under any of the public roads, streets and waters of this state in such manner as not to inconvenience the public in their use.”

¹² Ms. Juckette asserts the determinative event is the creation or formation of the road easement. (Juckette Post-Hearing Brief p. 19). Ms. Juckette’s argument is premised on the contention that § 306.46 enlarges the otherwise limited road easements. However, as explained in the authorities cited above, the statute does not enlarge the preexisting road easement; rather, the statute clarifies that the utility use is merely “an incidental and subordinate use of a highway easement.” Because the statute does not create an additional servitude, it does not follow that the determinative event is the creation of the road easement.

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or amend *Keokuk Junction* by enacting the statute, the district court did not explain what § 306.46 actually does if the statute does not do what its express language provides. Regardless, the Board is unaware of any authority that would invalidate § 306.46 or otherwise permit the Board to disregard the express provisions of the statute. Therefore, the Board must apply § 306.46 as written by finding MidAmerican may construct, operate, repair, or maintain the transmission line in the public road right-of-way.

(2) Existing Easement. MidAmerican also contends that it does not need an additional easement from Ms. Juckette because an easement allowing for the installation and operation of a transmission line along her eastern border already exists. MidAmerican's brief argues that (1) there is no easement that prohibits the placement of utility poles; (2) the plat recognized the right to place utility poles; and (3) there are poles in the road right-of-way that have been there at least since Ms. Juckette acquired the property. (MidAmerican Post-Hearing Brief p. 25.) With respect to point No. 1, easements are created to permit servient uses of the property, not to prohibit them. The fact there is no easement to prohibit a use does not grant that use. With respect to point No. 2, the only plat presented into evidence, Juckette Exhibit J5, is unartful at best in illustrating a utility easement. Section 9 of the restrictive covenants accompanying the plat says an easement for "utility installations and maintenance thereof" is created along a 10-foot strip adjacent to lots in the plat, but not along lots 9 and 20, which are the lots on which MidAmerican claims an easement. (Juckette Exhibit J5, p. 10.) The plat of survey contains a notation of a 40-foot road right-of-way to the east section line and an additional 40-foot road right-of-way immediately to the east for a total road right-of-way easement of 80 feet. The plat of survey also notes an "overhead elec & undergr

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tel,” presumably an easement, but does not precisely locate the easement and does not describe the width of the easement. (Juckette Exhibit J5, p. 16.) That may refer to the 10-foot utility easement described in section 9 of the restrictive covenants, but MidAmerican witness Gartenberg testified that MidAmerican requires a 25-foot easement. (HT p 27.) See also HT pp. 156-57 (explaining why MidAmerican requires a 25-foot easement).

As for MidAmerican’s point No. 3, there are utility poles and electric lines in the roadway adjacent to Ms. Juckette’s property, but those facilities are distribution lines and appear to be within the 10-foot strip and do not authorize the placement of transmission lines in a 25-foot easement. In any event, there is insufficient evidence to support MidAmerican’s claim to have a 25-foot transmission line easement on the east side of Ms. Juckette’s property.

In sum, under Iowa law, an easement may be created by express written grant, including by written dedication; by prescription; or by implication. See *e.g.*, *Johnson v. Kaster*, 637 N.W.2d 174, 178 (Iowa 2001) (stating that an easement by prescription is similar in concept to adverse possession). The record does not contain evidence of an easement created through a written document, and MidAmerican has not argued for easement by prescription or easement by implication. 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.

c. Route Selected Conclusion

As set forth in greater detail above, the Board finds that both the west and east segments proposed by MidAmerican follow the requirements contained in Iowa Code

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§ 478.18(2) and the Board's administrative rules. Ms. Juckette has not established that the east segment unnecessarily interferes with her current or future use of her property. Finally, the Board finds that while MidAmerican has not established the existence of a written easement covering the eastern portion of Ms. Juckette's property, § 306.46 allows MidAmerican to construct, operate, maintain, and repair its utility facilities in the road right-of-way that borders Ms. Juckette's property to the east.

B. Eminent Domain

The remaining issue before the Board is the extent to which MidAmerican should be vested with the power of eminent domain pursuant to Iowa Code §§ 478.6 and 476.15. Upon the granting of a franchise, a franchise holder "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(1).

At the time of hearing, MidAmerican asserted it obtained 12 of the required 13 easements for the project.¹³ (HT p. 23.) The property over which MidAmerican seeks eminent domain is identified in Exhibit E-1 to the Petition. Exhibit E-1 concerns one parcel titled to Marnix A. Verhofste and Hilde M.L. DeBruyne. (Petition, Ex. E-1.) The parcel is described as tract number MD-MS-018.000. (*Id.*)

MidAmerican requests a 25-foot-wide overhead easement¹⁴ containing approximately .98 acres on the parcel. (*Id.*) MidAmerican proposed to install five poles

¹³ At the point of filing its Petition, MidAmerican requested eminent domain authority over a second parcel described in Exhibit E-2 to the Petition. Exhibit E-2 involved one parcel titled to Timothy C. Slavens, Juliet A. Slavens, and Jeri A. Brown. (Petition, Ex. E-2.) However, at hearing, MidAmerican stated that it had obtained a voluntary easement from the parcel owners and was not seeking eminent domain authority over the property described in Exhibit E-2. (HT p. 23.)

¹⁴ An "overhead easement" is "an easement that provides horizontal electrical clearance to buildings, signs, and vertical clearance to the ground to meet the National Electrical Safety Code." (MidAmerican Gartenberg Direct Testimony p. 4.) An overhead easement includes "the right to place poles, towers or other structures in contact with the earth in the easement area and grants rights of ingress and egress during the construction, reconstruction, operating, maintaining, replacing or removing the lines." (*Id.*)

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in the easement area. (*Id.*) No dwellings or other buildings on the property are located within 100 feet of the easement area and the predominant land use in the easement area is agricultural and wooded area. (3/13/20 Staff Report p. 7.)

MidAmerican contends it made good-faith efforts to negotiate a voluntary easement with the landowner; however, those efforts were unsuccessful. (MidAmerican Gartenberg Direct Testimony p. 5). In detailing those efforts, MidAmerican witness Gartenberg testified as follows:

The first successful contact with Mr. Verhofste and Ms. Debruyne was on July 8, 2019 by a phone call to Ms. Debruyne in which she stated she was unaware the project would be located on her property. MidAmerican informed her of the location of the easement, the easement width, and easement compensation. MidAmerican and the landowner then set a date for an in-person meeting for July 18, 2019. On July 18, 2019, MidAmerican met with Mr. Verhofste and Ms. Debruyne at their residence. MidAmerican discussed with them the need for the project, the easement terms and tried to address any concerns they had. Following the in-person meeting, MidAmerican reached out to Ms. Debruyne on August 8, 2019 via telephone to discuss any additional concerns or questions she had about the easement.

On August 15, 2019, MidAmerican spoke with Mr. Verhofste to follow up on the telephone conversation of August 8, 2019. On September 18, 2019, MidAmerican called Mr. Verhofste and left a voicemail asking him to return the call. On September 25, 2019, a letter was sent to the landowners requesting they contact MidAmerican regarding the easement request. On October 11, 2019, Ms. Debruyne reached out to MidAmerican via e-mail inquiring about the most recent project plans. On October 15, 2019, MidAmerican sent a reply message informing her there had not been any changes to the original plan and asked to set up a second in-person meeting. Later that day, on October 15, 2019, she requested that MidAmerican continue to communicate with her via e-mail. On October 16, 2019, MidAmerican and Ms. Debruyne had the following e-mail exchanges: (1) MidAmerican sent an e-mail to Ms. Debruyne to address the concerns she referenced in her October 15, 2019 e-mail; (2) Ms. Debruyne asked for an updated drawing showing the easement area requested on their property; (3) MidAmerican provided Ms. Debruyne with a document showing the easement area; (4) Ms. Debruyne asked about where the line traveled north of her property; (5) MidAmerican responded and explained the route of the line; and (6) Ms. Debruyne asked for the other, more recent plans. On October 18, 2019, MidAmerican sent Ms.

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DeBruyne a copy of the route study that was filed with the Board on September 23, 2019.

(*Id.* at pp. 5-6.)

While neither Ms. DeBruyne nor Mr. Verhoste appeared at hearing, their son attended but did not testify. (HT pp. 214-15.) Ms. DeBruyne and Mr. Verhoste did file two comments in this docket. On October 11, 2019, at 3:06 p.m., Ms. DeBruyne and Mr. Verhoste filed a comment in which they expressed their opposition to the west segment and stated the proposed transmission line would negatively impact their property and may pose a potential health risk. On October 11, 2019, at 3:42 p.m., Ms. DeBruyne and Mr. Verhoste filed a second comment, in which they expressed their opposition to Route Nos. 5 and 6 and their preference for Routes 8, 9, and 10.¹⁵

As discussed in detail above, the Board finds the proposed transmission line is necessary to serve a public use and represents a reasonable relationship to an overall plan of transmitting electricity in the public interest. The proposed line is necessary to increase service reliability and to accommodate future load demands due to commercial, industrial, and residential customer growth. (MidAmerican Charleville Direct Testimony pp. 2-3.) The proposed lines will provide the necessary incoming transmission lines to fully support the Maffitt Lake Substation, which in turn will “provide immediate reliability support” to the surrounding area. (*Id.* at pp. 3-5.) Further, MidAmerican projects significant distribution load increases that will be served by this project. (*Id.*)

¹⁵ As shown in the west segment route study, MidAmerican selected Route 4 as the preferred route. (Petition, 9/23/19 Route Study, pp. 5, 8.)

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In their comments, Ms. DeBruyne and Mr. Verhoste expressed concerns regarding potential health concerns relating to electromagnetic fields.¹⁶ However,

MidAmerican witness Schierbrock testified:

The proposed transmission lines are less than 10% of the thresholds suggested in IEEE C95.6-2002 “Standards for Safety Levels with Respect to Human Exposure to Electromagnetic Fields, 0 – 3 kHz” and the International Commission on Non-Ionizing Radiation Protection standard “Limiting Exposure to Time-Varying Electric and Magnetic Fields (1 Hz – 100 kHz)”.

(MidAmerican Schierbrock Direct Testimony pp. 7-8.) Mr. Schierbrock’s testimony is consistent with information the Board has received in similar hearings. See *e.g., In re: ITC Midwest, LLC*, Docket No. E-22100, “Proposed Decision and Order Approving Franchise with Conditions,” p. 43 (Jan. 14, 2016) (stating the “evidence in the record shows the electric and magnetic field levels from the proposed transmission line will not adversely affect public health”); *In re: ITC Midwest, LLC*, Docket No. E-22043, “Proposed Decision and Order Granting Franchise,” p. 29 (March 20, 2013) (same).

Ms. DeBruyne and Mr. Verhoste also assert the transmission line will negatively affect the value of their property. However, the “purpose of payment for the easements across the eminent domain parcels is to compensate the landowners for the negative effects of having the transmission line on their property, including any negative effect on property value.” *In re: MidAmerican Energy Company*, Docket Nos. E-21752, E-21753, E-21754, “Proposed Decision and Order Granting Franchise,” p. 40 (July 26, 2006). The Board does not have the authority to determine the amount of compensation paid for the easement and the “proper place for the landowners to raise their concerns regarding devaluation of their property is before the [county]

¹⁶ In his October 1, 2019 objection, Mr. Husk raised similar concerns.

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compensation commission, which will set the amount to be paid for the easement when eminent domain is used.” *Id.*

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). While appreciating the concerns raised by Ms. DeBruyne and Mr. Verhoste, the Board is also mindful that “public interest means all the public” and “does not mean one member of the public, or one family living along the proposed route.” *In re: Cedar Rapids Utilities*, Docket No. E-21647, “Proposed Decision and Order Granting Franchise,” pp. 24-25 (July 6, 2005). Because the evidence demonstrates the transmission line will improve reliability of service and is necessary to accommodate anticipated future growth, the Board finds that the granting of eminent domain for the proposed route over the property described in Exhibit E-1 is necessary to serve the public use.

IV. FINDINGS OF FACT

1. The petitions and petition exhibits filed in this docket on September 17, 2019, by MidAmerican, as revised, substantially comply with Iowa Code chapter 478 and chapters 11 and 25 of the Board’s administrative rules.

2. Notice was published as required by 199 IAC 11.5 and Iowa Code § 478.5. Notice was also properly sent to the owners of record and parties in possession of the properties for which eminent domain is sought pursuant to Iowa Code § 478.6 and 199 IAC 11.5(4) and 11.10(1).

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3. The 161 kV electric transmission lines as described in the petition filed by MidAmerican on September 17, 2019, as revised, are necessary to serve a public use. The transmission lines provide significant benefit to the public by increasing electric system reliability and flexibility and anticipated load growth.

4. The proposed transmission lines represent a reasonable relationship to an overall plan of transmitting electricity in the public interest. MidAmerican provided the substantiation required by Iowa Code § 478.3(2)(a) to support this finding.

5. The transmission lines meet or exceed the minimum engineering requirements established by Board rules and Iowa Code chapter 478.

6. The proposed transmission lines will be constructed in a manner that does not unreasonably interfere with the use of any lands by occupants.

7. The granting of the right of eminent domain over the property described in Petition Exhibits E-1 is necessary for public use.

V. CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and subject matter of the petitions pursuant to Iowa Code chapter 478 and chapter 11 of the Board's administrative rules.

2. As required by Iowa Code § 478.4, the Board has found that the proposed lines are necessary to serve a public use and represent a reasonable relationship to an overall plan for transmitting electricity in the public interest.

3. Pursuant to Iowa Code §§ 478.6 and 478.15, the Board has found that vesting MidAmerican with the right of eminent domain is necessary for public use.

4. Pursuant to Iowa Code § 478.21(1), if a transmission line for which a franchise has been granted is not constructed in whole or in part within two years of the

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final order granting the franchise, the Board shall revoke the franchise unless the party holding the franchise petitions the Board for an extension of time.

VI. ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. The petition for a franchise to construct, operate, and maintain 161 kV electric transmission lines in Madison County, Iowa, filed by MidAmerican Energy Company on September 17, 2019, as revised, is granted, and Franchise No. F-21006 will be issued to MidAmerican Energy Company.
2. MidAmerican Energy Company is vested with the right of eminent domain over the property titled to Marnix A. Verhofste and Hilde M.L. DeBruyne, which is described in Exhibit E-1 to the petition.
3. The Utilities Board retains jurisdiction of the subject matter in this docket pursuant to Iowa Code chapter 478 and may at any time during the period of the franchise make such further orders as necessary.

UTILITIES BOARD

Geri Huser Date: 2021.02.01
15:36:53 -06'00'

ATTEST:

Anna Hyatt Date: 2021.02.01
15:54:25 -06'00'

Joshua J Byrnes Date: 2021.02.01
14:51:10 -06'00'

Dated at Des Moines, Iowa, this 1st day of February, 2021.

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VII. PARTIAL CONCURRENCE AND DISSENT

I concur with the majority's order granting MidAmerican Energy Company (MidAmerican) a franchise for the west segment of the proposed transmission line as described in the petition. I respectfully dissent from the order granting the franchise to include the east segment of the transmission line, part of which is located on the property of Linda Juckette.

Ms. Juckette owns approximately 126 acres of land in the NE ¼ of Section 13, Township 77, Range 26 in Madison County, Iowa, including land to the center line of the road (Warren Avenue) on the east edge of her property. The road is 80 feet in width, and Ms. Juckette owns the west half of the road right-of-way subject to an easement for road right-of-way as shown on a plat filed in the office of the Madison County Recorder on October 23, 1979, Exhibit J5. The plat has a marking of "overhead elec & undergr tel" in the road right-of-way (presumably an easement for electric and telephone facilities). Restrictive covenants filed with the plat provide a 10-foot utility easement in the interior roadway adjacent to several lots, but the plat does not identify an easement on the exterior part in Warren Avenue adjacent to lots 9 and 20, which are the lots at issue here. Nor does the plat in any way create a 25-foot utility easement that MidAmerican requires for its transmission line.

Ms. Juckette presently uses her property as an equine breeding and training facility. (HT p. 217.) With additional anticipated development of home sites southwest of the Des Moines metropolitan area, in the future, Ms. Juckette intends to subdivide her property and sell the lots in three-acre to four-acre parcels for "upper value estate homes" with a value of \$1.5 million to \$2 million. (HT p. 218.)

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Similarly, MidAmerican anticipates additional development in the area which, according to MidAmerican's witnesses, will require significant distribution load development along Veteran's Parkway as well as additional residential and commercial growth southwest of Des Moines into the city of Cumming. (Charleville Direct Testimony p. 3.)

In order to serve the anticipated increased load, as well as the Microsoft Corporation data center, MidAmerican proposes to construct a 161 kV transmission line on Ms. Juckette's property in the west half of the Warren Avenue road right-of-way. Ms. Juckette opposes construction of the transmission line as proposed and when requested to grant an easement for the transmission line, she refused. MidAmerican claims the route it selected for the transmission line is the best route based on its own route study and further claims that Iowa Code § 306.46 gives it the right to construct the transmission line in the road right-of-way on Ms. Juckette's property, whether or not Ms. Juckette grants an easement to do so.

Route Selection

MidAmerican submitted a route study to demonstrate compliance with Iowa Code § 478.3(2)(a)(6), but it is apparent that MidAmerican focused almost entirely on Route 7, part of which is proposed to be in the west half of Warren Avenue road right-of-way, on land owned by Ms. Juckette. While MidAmerican had several conversations with Ms. Juckette and her attorneys, MidAmerican did not contact landowners along alternative routes, nor did it do any engineering analysis of the feasibility of alternative routes. Moreover, MidAmerican does not appear to have given adequate consideration to future development and land use in the area. The land use map of the City of Cumming's comprehensive plan designates future land use along Warren Avenue and the Interstate

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35 corridor as medium-density and low-density residential, regional and professional commerce, office, warehouse, and business parks. (Charleville Direct, Exhibit E.) However, MidAmerican proposes to construct its 161 kV transmission line on Warren Avenue in the heart of the projected development.

During the hearing, the Board questioned MidAmerican witness Schierbrock about utilizing a route adjacent to Interstate 35 similar to another transmission line along Interstate 35 between Ankeny and Ames that serves the pump station for the Dakota Access pipeline. (HT p. 200.) Iowa Code § 478.3(2)(a)(6) requires any electric transmission company to consider “[t]he possible use of alternative routes and methods of supply.” While MidAmerican’s route study shows lines drawn on a map along the Interstate 35 corridor, MidAmerican and all electric transmission companies have a duty to make a fair evaluation of alternative routes. When asked, Mr. Schierbrock testified that MidAmerican never contacted the landowners adjacent to Interstate 35 to see if a voluntary easement could be obtained. (*Id.*) In addition, MidAmerican witness John Guy was asked how much more expensive it would be to construct the transmission line adjacent to Interstate 35; Mr. Guy testified simply that he didn’t know. (HT p. 95.)

Ms. Juckette testified that the land along Interstate 35 is already devalued, and that it would be preferable to locate the transmission line along the Interstate 35 corridor and that residential and commercial developments are less likely to occur immediately adjacent to an interstate highway. (HT p. 222.) The record in this case is not well developed on that issue because MidAmerican did not seriously consider the Interstate 35 corridor, or any other alternative route. MidAmerican’s failure to perform a complete analysis of the alternative route along Interstate 35 demonstrates MidAmerican’s lack of

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due diligence regarding alternative routes. On the basis of the existing record in this case, it is not possible to draw a conclusion about which route is preferable.

MidAmerican's route study should be given little weight because it does not address private property valuation, or consider relative costs of construction, or include discussions with private property landowners until after a route was selected. Based on MidAmerican's failure to give adequate consideration to alternative routes in the route study, I would deny MidAmerican's franchise for the east segment, part of which is proposed to be located on Ms. Juckette's property on Warren Avenue.

Iowa Code §§ 306.46 and 4.5

Prior to enactment of § 306.46, MidAmerican would not have been able to construct the proposed transmission line on Warren Avenue, because it did not have an easement for that purpose. The central issue with regard to Ms. Juckette's property is whether Iowa Code § 306.46(1) applies prospectively or retrospectively. The majority opines that it makes no difference. I think otherwise.

The road right-of-way easement in Warren Avenue was created by filing the plat in 1979. At that time, a landowner creating a road right-of-way easement would have no reason to expect a grant of a road easement would also include an easement for public utilities, such as an electric transmission line. If the landowner who dedicated the plat in 1979 had wanted to include an easement for utility facilities in the road right-of-way, he could have done so, but didn't. Conversely, a landowner who creates a road right-of-way easement after the enactment of § 306.46 would have reason to know and should know that creation of a road easement would also create an easement for placement of utility facilities in the road right-of-way. To apply § 306.46 retrospectively would expand the scope of an easement created before enactment of the statute and

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take from the landowner a property right the landowner previously held, did not intend to convey, and did not convey.

Section 4.5 of the Iowa Code provides that “[a] statute is presumed to be prospective in its operation unless expressly made retrospective.” The majority correctly points out that the legislature is presumed to be aware of that provision when it enacted § 306.46 in 2004, citing *Beier Glass Co. v. Brundige*, 329 N.W.2d 280, 285 (Iowa 1983), providing that in enacting a statute the presumption is that “the legislature knew the existing state of the law.” The legislature could have made § 306.46 retrospective, but didn’t. Perhaps it didn’t because either the legislature did not want to or knew it could not change the terms and conditions of an existing easement granted by a landowner to the public for a specified limited purpose.

The majority finds that the “determinative event” for considering prospective or retrospective application of § 306.46 is the time that a public utility places its facilities in the road right-of-way. I disagree. Section 4.5 is one of several sections of general application addressing rules of statutory construction, while § 306.46 is a statute of special application dealing with public utility easements in roadways. Section 4.7 provides that general and special statutes shall be construed, if possible, to give effect to both. (Emphasis added.) The majority’s interpretation ignores the general provisions of § 4.5, renders it meaningless, ignores the mandate of § 4.7, does not give effect to both statutes, and ignores the interests of landowners whose rights were established when the easement was created prior to enactment of § 306.46. Here, it is possible to give effect to both § 4.5 and § 306.46, and § 4.7 requires it. Contrary to the majority, I find that the “determinative event” is not the construction of the facilities, but is the creation of the easement.

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The majority further argues that in enacting § 306.46, the legislature intended to overturn the holding in *Keokuk Junction* and that to apply the statute only prospectively diminishes the impact of the statute, citing to *Hanover Ins. Co. v. Alamo Motel*, 264 N.W. 2d 774, 778 (Iowa 1978) “we cannot presume the legislature intended to enact a futile or ineffectual law.” I submit that enactment of § 306.46 would not be diminished by finding that the statute applied prospectively only, and this interpretation does not make the statute futile or ineffectual; it makes it focused. An interpretation that the statute applies prospectively only, and that the statute does not apply retrospectively, is consistent with the law that a statute should not be construed to change the terms of an easement created 25 years before enactment unless the statute so states, which § 306.46 does not do.

The majority notes that this issue has been before the Board previously in *NDA Farms*, Docket Nos. E-21988 and E-21989, in which the Board held that § 306.46 was intended to change the law and applied the statute retrospectively to expand the terms of an easement granted prior to enactment of § 306.46. The Board’s decision in *NDA Farms* was reversed by District Court on judicial review in an unpublished opinion, leading the Board to rightly conclude that there is no binding precedent. Nevertheless, the Board adopts the analysis of its decision in *NDA Farms*, notwithstanding that it was reversed on appeal. Of greater concern, the majority does not even mention § 4.5 and makes no effort to harmonize the provisions of §§ 4.5 and 306.46, which § 4.7 requires it to do.

The conclusion is inescapable that the proper interpretation of § 306.46 is that it is to be applied prospectively only, and it does not change the terms of the road right-of-

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way easement created more than 25 years before the enactment of § 306.46. The easement is for road right-of-way only, and for nothing else.

Conclusion

For the reasons stated in the majority's order, I concur in the majority's grant of a franchise for the west segment of the proposed electric transmission line. For the reasons stated herein, I dissent from the grant of a franchise for the east segment and would deny its issuance. Although there are constitutional implications regarding the application of § 306.46 to the franchise for the east segment, I reach these conclusions based entirely on the statutory language of § 306.46, which must be read in conjunction with § 4.5 to give effect to both.

I urge the majority to grant a stay of the majority order pending judicial review. Without a stay, MidAmerican could construct the transmission line in the east segment before the issues are resolved by the courts. In addition, I find that MidAmerican did not comply with § 478.3(2)(a)(6) by properly considering the use of alternative routes and methods of supply.

Richard W. Lozier, Jr. Date: 2021.02.01
15:41:52 -06'00'
