

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

<p>Swan Lake Road Farms, LLC, Petitioner, v. Iowa Utilities Commission, Respondent.</p>	<p>Case No.: IUC Docket No.: E-22501 PETITION FOR JUDICIAL REVIEW OF AGENCY ACTION <i>Request for Stay</i></p>
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COMES NOW, Petitioner Swan Lake Road Farms, LLC, states the following for its Petition for Judicial Review pursuant to Iowa Code § 17A.19 concerning the Iowa Utilities Commission’s decision dated September 17, 2024 and all rulings inuring therein:

PARTIES, VENUE, AND JURISDICTION

1. Petitioner Swan Lake Road Farms, LLC (“SLRF”) is an Iowa limited liability company which owns real estate in Johnson County, Iowa.
2. Joan Young Ambrose and Robert Young are siblings and are SLRF’s members and managers.
3. Respondent Iowa Utilities Commission (“IUC”) is an administrative agency located at 1375 E. Court Avenue, Des Moines, Polk County, Iowa. At the commencement of the proceeding at issue in this judicial review action, the IUC was still known as the Iowa Utilities Board and was often referred to as the IUB. Effective July 1, 2024, the Iowa Utilities Board was reorganized and renamed the Iowa Utilities Commission. Any references in the proceeding to “Board” or “IUB” or “Iowa Utilities Board” should be construed to refer to the IUC which is the Respondent in this matter. Further, even though the procedural history would technically show certain filings were made to the IUB

because that was the name at the pertinent time, SLRF will simply use the term IUC in this petition.

4. Venue in Polk County District Court is proper under Iowa Code § 17A.19(2), which specifically allows venue to be in Polk County.

5. This Court has jurisdiction over this petition for judicial review of an agency action pursuant to Iowa Code § 17A.19.

NATURE OF AGENCY ACTION

6. On March 24, 2023, ITC Midwest LLC (“ITCM”) filed a Petition for Electric Transmission Line Franchise with the IUC. The requested franchise proposed erection of poles in and electric lines over SLRF’s real estate in Johnson County, Iowa. Specifically, ITCM requested a franchise to construct, operate, and maintain (as amended) 4.80 miles of 69,000 Volt Nominal operating voltage (72,500 maximum voltage) electric transmission line in Johnson County.

7. SLRF filed a Petition to Intervene on April 3, 2023 and on August 16, 2023, the IUC granted that Petition to Intervene.

8. On April 10, 2024, the IUC designated Jon Tack to serve as presiding officer for the proceeding.

9. The hearing in the proceeding occurred in-person in Johnson County on April 18, 2024.

10. The record consists of written pre-filed testimony and pre-filed exhibits in addition to in-person testimony which is contained in a transcript filed in the docket.

11. On July 24, 2024, presiding officer Tack filed a Proposed Order Granting Petition for Electric Transmission Line Franchise.

12. On August 7, 2024, SLRF filed an appeal of that proposed order to the IUC with a request for stay.

13. As a result of SLRF's August 7, 2024 appeal, the July 24, 2024 Proposed Order Granting Petition for Electric Transmission Line Franchise was not a final order or final agency action.

14. On September 17, 2024, the IUC denied SLRF's appeal when it filed its Order Affirming Proposed Order and Denying Request for Stay ("Order").

15. On September 17, 2024, the IUC also granted and filed Franchise No. F-23012.

16. SLRF has exhausted its administrative remedies and has timely filed this petition for judicial review.

17. The IUC's September 17, 2024 Order (and therefore the franchise granted as a result) contains numerous factual and legal errors.

18. The IUC's factual and legal errors are more thoroughly identified in SLRF's pre-hearing and post-hearing briefs and SLRF's appeal of the proposed order to the IUC, all of which are incorporated into this Petition with this reference.

THE PARTICULAR AGENCY ACTION APPEALED FROM

19. SLRF appeals:

a. The IUC's September 17, 2024 Order Affirming Proposed Order and Denying Request for Stay, which also encompasses an appeal of presiding officer

Tack's July 24, 2024 Proposed Order Granting Petition for Electric Transmission Line Franchise; and

- b. The IUC's September 17, 2024 grant of Franchise No. F-23012.

THE FACTS ON WHICH VENUE IS BASED

20. Venue is in Polk County which is expressly permitted in Iowa Code § 17A.19(2): ("Proceedings for judicial review shall be instituted by filing a petition either in Polk county district court or in the district court for the county in which the petitioner resides or has its principal place of business.").

21. Additionally ITCM and the IUC are based in Des Moines, Iowa and counsel for SLRF, ITCM, and the IUC are all located in Des Moines, Iowa. Polk County is not only a proper venue under the law, it is also the most convenient venue.

GROUND ON WHICH RELIEF IS SOUGHT

22. SLRF seeks judicial review of the IUC's final decision on the grounds that it violates SLRF's constitutional rights, misapplied facts, and misapplied the law pertaining to the standards necessary to grant electric transmission franchises. SLRF's substantial rights have been prejudiced as a result of the IUC's errors. Specifically:

- a. The IUC's final decision is unconstitutional as applied and facially based on the IUC's interpretation, because the decision results in an unconstitutional taking of SLRF's property. *See* Iowa Code § 17A.19(10)(a);

- b. The IUC's final decision is based on Iowa Code § 306.46 which is unconstitutional as applied and facially based on the IUC's interpretation, because

the statute's application results in an unconstitutional taking of SLRF's property.

See Iowa Code § 17A.19(10)(a);

c. The IUC's final decision allows ITCM to take property from SLRF without ITCM first seeking and proving elements necessary to obtain eminent domain authority, and such decision is beyond the authority delegated to the IUC by any provision of law and is in violation of SLRF's constitutional rights. *See* Iowa Code § 17A.19(10)(a) and § 17A.19(10)(b);

d. The IUC's final decision is based on its erroneous interpretation of Iowa Code § 306.46 and the IUC has not been clearly vested with discretion to interpret and apply. *See* Iowa Code § 17A.19(10)(c);

e. The IUC's final decision is based on its determination of facts clearly vested by a provision of law in the discretion of the agency that is not supported by substantial evidence in the record before the court when that record is viewed as a whole. *See* Iowa Code § 17A.19(10)(f). For example, the IUC has been vested with discretion in regards to application of Iowa Code Chapter 478 (determination of whether to grant an electric transmission franchise) but there was a lack of substantial evidence in this proceeding and the grant of the franchise is thus not supported by substantial;

f. The IUC failed to consider that the route study relied upon by ITCM assumed ITCM would secure easements from landowners or through eminent domain along the route that ITCM selected and a rational decision maker in similar circumstances would have considered that issue. *See* Iowa Code § 17A.19(10)(j);

g. The IUC failed to consider the substantial safety concerns for the route selected by ITCM and a rational decision maker in similar circumstances would have considered that issue. *See* Iowa Code § 17A.19(10)(j);

h. The IUC failed to consider that the route selected by ITCM cannot comply with Johnson County's spacing requirements for utilities in rights-of-way and a rational decision maker in similar circumstances would have considered that issue. *See* Iowa Code § 17A.19(10)(j);

i. The IUC failed to consider that ITCM's own witness acknowledged it might not be feasible to build line on the route because ITCM cannot comply with Johnson County's spacing requirements for utilities in rights-of-way and a rational decision maker in similar circumstances would have considered that issue. *See* Iowa Code § 17A.19(10)(j);

j. The IUC's final decision granting the franchise to ITCM was not required by law and the negative impact from the grant of the franchise on SLRF's private rights affected is so grossly disproportionate to the benefits accruing to the public interest from the grant of the franchise that the IUC's decision must necessarily be deemed to lack any foundation in rational agency policy. *See* Iowa Code § 17A.19(10)(k);

k. To the extent the IUC has been clearly vested with authority to interpret and apply, in its discretion, Iowa Code § 306.46, the IUC's final decision is the product of irrational, illogical, or wholly unjustifiable interpretation of said statutes. *See* Iowa Code § 17A.19(10)(l);

1. The IUC's final decision granting the franchise to ITCM was based upon an irrational, illogical, or wholly unjustifiable application of the facts to law that has clearly been vested by a in the discretion of the IUC. *See* Iowa Code § 17A.19(10)(m); and

m. The IUC's final decision was otherwise unreasonable, arbitrary, capricious, or an abuse of discretion for the reasons cited in this Petition and raised by SLRF in its briefing and initial appeal to the IUC. *See* Iowa Code § 17A.19(10)(n).

RELIEF SOUGHT

23. SLRF asks this Court to rule that the IUC's grant of the franchise to ITCM was unlawful and improper and to order that the IUC shall reject or dismiss or otherwise deny ITCM's Petition for Electric Transmission Line Franchise.

24. Alternatively, if the Court determines that ITCM is entitled to a franchise under Iowa Code Chapter 478 but that ITCM cannot rely upon Iowa Code § 306.46 that the Court order the franchise be denied until such time that ITCM obtains property rights to invade SLRF's property.

COUNT I: § 306.46 IS UNCONSTITUTIONAL
(Fifth Amendment of Constitution of the United States of America)

25. SLRF restates all prior paragraphs.

26. ITCM did not obtain a voluntary easement from SLRF, nor did ITCM request eminent domain authority to erect poles on and place electric lines over SLRF's real property. Instead, ITCM relied upon Iowa Code § 306.46 to erect the poles on and place electric lines over SLRF's property within the road right-of-way.

27. The IUC relied upon Iowa Code § 306.46 to allow ITCM to erect the poles on and place electric lines over SLRF's property within the road right-of-way without an easement or eminent domain authority.

28. Iowa Code § 306.46 provides that "A public utility may construct, operate, repair, or maintain its utility facilities within a public road right-of-way." ITCM and the IUC understand this statute to mean that a public utility, such as ITCM, can erect poles on and place electric lines over the portion of private real estate which is subject to a public road right-of-way easement without compensating the landowner.

29. An easement – such as a public road right-of-way – is a burden on the real estate. However, the servient landowner does not surrender a fee simple by virtue of granting an easement. Instead, all that is relinquished by the landowner by virtue of the easement is whatever rights are contemplated by the specific easement. When a servient landowner conveys a public road right-of-way easement, the landowner retains a fee simple interest in the real estate, subject only to the specific burdens contained in the easement. *See Keokuk Junction Ry. Co. v. IES Indus., Inc.*, 618 N.W.2d 352, 360 (Iowa 2000).

30. As a matter of law, the installation of electric lines creates an actual burden on real estate. *See Id.* Further, the erection of poles on and electric lines over a portion of real estate that is subject to a road right-of-way easement is an additional burden on the real estate. *Id.* 360-62.

31. The United States Constitution prohibits the taking of private property without just compensation. The IUC's application of Iowa Code § 306.46 in this case would result in a taking of SLRF's real property because ITCM would physically invade

SLRF's real property without paying just compensation to SLRF. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding that a statute which allows a third-party to physically invade real property without just compensation is unconstitutional).

32. The IUC's reliance on Iowa Code § 306.46 was unlawful in that the IUC applied it in violation of the United States Constitution. Iowa Code § 17A.19(10)(a).

33. The IUC therefore acted beyond its delegated authority and erroneously interpreted Iowa law. Iowa Code § 17A.19(10)(b), (c). *See also* Iowa Code § 17A.19(10)(k), (l), (m), and (n).

34. SLRF notes that the constitutionality of Iowa Code § 306.46 has not been decided by the Iowa Supreme Court. In *NDA Farms, LLC c. Iowa Utilities Bd., Dept. of Commerce*, No. CV 009448, 2013 WL 11239755, at *9-10 (Iowa Dist. June 24, 2013) the Polk County District Court (Judge Hanson) ruled that Iowa Code § 306.46 was unconstitutional as applied. In *Juckette v. Iowa Utilities Board*, No. CVCV061580 (Iowa Dist. November 7, 2021), the Polk County District Court (Judge Vaudt) ruled that Iowa Code § 306.46 was constitutional as applied. In *Juckette v. Iowa Utilities Board*, 992 N.W.2d 218 (Iowa 2023), the Iowa Supreme Court split 3-3 on the issue of the constitutionality of Iowa Code § 306.46 and affirmed Judge Vaudt's ruling as a matter of law only. *Juckette* is thus not binding precedent on the issue of the constitutionality of Iowa Code § 306.46.

WHEREFORE, Petitioner Swan Lake Road Farms, LLC respectfully requests the Court enter judgment in its favor and against the Respondent Iowa Utilities Commission on Count I of the Petition, and further request that the Court and enter an order denying

ITC Midwest, LLC's Petition for Electric Transmission Line Franchise, or, alternatively, order ITCM to re-petition the IUC for proper eminent domain authority over SLRF's property (*see Juckette v. Iowa Utilities Bd.*, 992 N.W.2d 218, 222 (Iowa 2023) (holding that that standards for obtaining a franchise under Iowa Code § 478.4 are separate from the constitutional-takings analysis necessary to obtain eminent domain)), and for all further additional relief the Court finds necessary and proper under the circumstances.

COUNT II: IOWA CODE § 306.46 IS UNCONSTITUTIONAL
(Article 1, Sec. 18 of Constitution of Iowa)

35. SLRF restates all prior paragraphs.

36. The Iowa Constitution prohibits the taking of private property without just compensation. Iowa Const. Art. 1, Sec. 18.

37. Application on Iowa Code § 306.46 in this case would result in a taking of SLRF's real property because ITCM would physically invade SLRF's real property without paying just compensation to SLRF.

38. The IUC's reliance on Iowa Code § 306.46 was unlawful in that the IUC applied it in violation of the Iowa Constitution. Iowa Code § 17A.19(10)(a).

39. The IUC therefore acted beyond its delegated authority and erroneously interpreted Iowa law. Iowa Code § 17A.19(10)(b), (c). *See also* Iowa Code § 17A.19(10)(k), (l), (m), and (n).

WHEREFORE, Petitioner Swan Lake Road Farms, LLC respectfully requests the Court enter judgment in its favor and against the Respondent Iowa Utilities Commission on Count II of the Petition, and further request that the Court and enter an order denying

ITC Midwest, LLC's Petition for Electric Transmission Line Franchise, or, alternatively, order ITCM to re-petition the IUC for proper eminent domain authority over SLRF's property (*see Juckette v. Iowa Utilities Bd.*, 992 N.W.2d 218, 222 (Iowa 2023) (holding that that standards for obtaining a franchise under Iowa Code § 478.4 are separate from the constitutional-takings analysis necessary to obtain eminent domain)), and for all further additional relief the Court finds necessary and proper under the circumstances.

COUNT III: THERE WAS NOT SUBSTANTIAL EVIDENCE IN RECORD WHICH SUPPORTS A FINDING THAT ITCM MET THE STANDARDS NECESSARY TO OBTAIN A FRANCHISE

40. SLRF restates all prior paragraphs.

41. ITCM had the burden of proof to establish that the proposed franchise met the requirements for a franchise under Iowa Code Chapter 478.

42. ITCM failed to prove, and the IUC erred in finding to the contrary, that the proposed franchise served a public interest.

43. ITCM failed to prove, and the IUC erred in finding to the contrary, that the proposed franchise was necessary for a public use.

44. ITCM failed to prove, and the IUC erred in finding to the contrary, that the proposed franchise was not unduly injurious.

45. ITCM failed to prove, and the IUC erred in finding to the contrary, that the proposed franchise did not unnecessarily interfere with landowner's, including SLRF's, current and future use of real property.

46. ITCM failed to prove, and the IUC erred in finding to the contrary, that ITCM considered alternative routes and methods of supply.

47. The evidence demonstrates that ITCM failed to prove its entitlement to a franchise under the facts and circumstances of this case, and the IUC erred in ruling to the contrary.

48. For these reasons, the IUC's decision: was not supported by substantial evidence, Iowa Code § 17A.19(10)(f); failed to take into consideration evidence which would have affected the conclusion of a reasonable factfinder, Iowa Code § 17A.19(10)(j); the IUC's decision was not required by law and the negative effects of granting the franchise outweigh any benefit, Iowa Code § 17A.19(10)(k); was irrational, illogical, and wholly unjustifiable on the factual record and statutes before the IUC, Iowa Code § 17A.19(10)(l), (m); was arbitrary, capricious, and an abuse of discretion, Iowa Code § 17A.19(10)(n).

WHEREFORE, Petitioner Swan Lake Road Farms, LLC respectfully requests the Court enter judgment in its favor and against the Respondent Iowa Utilities Commission on Count III of the Petition, and further requests that the Court and enter an order denying ITC Midwest, LLC's Petition for Electric Transmission Line Franchise, and for all further additional relief the Court finds necessary and proper under the circumstances.

REQUEST FOR STAY

49. Iowa Code § 17A.19(5) provides that a petitioner may seek a stay of the agency action – here, the commencement of construction of the franchise granted to ITCM by the IUC on September 17, 2024 (Franchise No. F-23012).

50. On August 7, 2024, SLRF filed with the IUC a request for stay of the agency action pursuant to 199 IAC § 7.26(5).

51. In its September 17, 2024, the IUC denied that request for stay indicating that it could not issue a stay until the franchise was granted even though the IUC in that same ruling granted the franchise for which SLRF sought the stay.

52. SLRF will, nearly contemporaneously with the filing of this petition, file with the IUC another request for stay which specifically requests the stay of commencement of construction of the franchise granted to ITCM by the IUC on September 17, 2024 (Franchise No. F-23012) pursuant to 199 IAC § 7.28.

53. SLRF believes that the IUC has already denied a request for stay in this proceeding. Based on that belief, SLRF now seeks for the Court to enter a stay pursuant to Iowa Code § 17A.19(5)(c).

54. Depending on the outcome of SLRF's second request for stay filed with the IUC, SLRF will supplement the record in this proceeding.

55. In the meantime, though, SLRF requests that the Court order a stay prohibiting ITCM from commencing any construction under Franchise No. F-23012.

56. Pursuant to Iowa Code § 17A.19(5)(c), the following grounds exist to support the request for stay:

a. **The extent to which the applicant is likely to prevail when the court finally disposes of the matter.** SLRF is likely to prevail on the merits of its appeal because the Order effectuates an unconstitutional taking of SLRF's property without due process and without just compensation. The statute at issue,

§ 306.46, is the subject of the equivalent of a circuit split. To SLRF's knowledge, there have been two cases decided by Iowa District Court judges on the constitutionality of § 306.46, one holding the law was unconstitutional as applied and one holding the law was constitutional as applied. The only known Iowa Supreme Court case addressing § 306.46 was undecided; one justice recused himself from the case and the remaining justices split 3-3 on the issue. There is thus no appellate ruling on the constitutionality of § 306.46. It is likely the issue of § 306.46's constitutionality will again be brought before the Iowa Supreme Court. It is very likely that the Iowa Supreme Court will determine that § 306.46 is unconstitutional as applied because doing so would up-end foundational property rights and constitutional case law relying on both the Iowa and United States' constitutions.

b. **The extent to which the applicant will suffer irreparable injury if relief is not granted.** Once SLRF's property is invaded by ITCM, that injury cannot be undone. If ITCM constructs its line and then the Court rules the franchise should have been denied because it effectuated an unconstitutional taking, there will be irreparable injury to SLRF's property because the line would already be constructed despite a lack of property rights. ITCM is likely to argue that SLRF's relief in that circumstance would be to seek compensation under a typical eminent domain procedure. This is a red herring argument, though. At issue in this proceeding is whether ITCM is entitled to a franchise for an electric transmission

line. The IUC's grant of the franchise is inextricably interwoven with its erroneous application of Iowa Code § 306.46. If the Court ultimately determines that § 306.46 has been applied unconstitutionally, the relief would be for the Court to order the denial of ITCM's petition for franchise because ITCM does not have legal rights to property on the route. Otherwise, SLRF's property would still be taking without due process. This is because even if ITCM would seek to resuscitate its petition by filing an application for eminent domain as outlined in Iowa Code Chapter 478, it is clear that there are separate factual public use standards within that Chapter. In *Juckette v. Iowa Utilities Bd.*, 992 N.W.2d 218, 222 (Iowa 2023), the Iowa Supreme Court held that the "public use" requirements to obtain a franchise under Iowa Code § 478.4 are separate and distinct from the "public use" requirements elsewhere in Iowa Code Chapter 478 necessary for a private utility to obtain condemnation authority. Thus, here, if the Court ultimately determines that § 306.46 cannot be relied upon to permit ITCM to take SLRF's property, ITCM cannot simply skip the line and tender just compensation. Instead, the franchise granted must fail because ITCM did not receive condemnation authority, which requires a separate legal and factual analysis. It is highly likely that ITCM could not prove the heightened standards necessary to obtain eminent domain authority. This would make any construction of the contested line during the pendency of this appeal be irreparable harm to SLRF and to all other affected landowners along the route.

c. **The extent to which the grant of relief to the applicant will substantially harm other parties to the proceedings.** A stay will not substantially harm ITCM or any other parties in the proceeding. A stay was issued in the *Juckette* proceeding (Docket No. E-22417) where similar constitutional issues were litigated and MidAmerican Energy never articulated that it suffered no harm from the stay. Here, there is no evidence in the record that ITCM will suffer harm if it cannot immediately construct its line. In fact, the evidence in the record tends to contradict any such argument. ITCM's claimed basis for the "need" to construct the line is that MISO allegedly required the project. However, that report relied upon by ITCM is more than 8 years old. The report was more than 5 years old at the time ITCM even commenced this proceeding. Thus, ITCM cannot plausibly claim that there is any immediacy for the construction of the line. Because there is no immediate need, ITCM will not suffer any harm by the issuance of a stay.

d. **The extent to which the public interest relied on by the agency is sufficient to justify the agency's action in the circumstances.** This final factor to be considered in the request for a stay does not quite fit this present matter. The only public interest the IUC might have relied upon would be the general contention that transmission of electricity is a public use. This general notion is not litigated here. Certainly, SLRF contends that ITCM failed to meet its burden of proof that this specific line is "necessary" for a public use, but that was not a public interest factor relied upon by the Presiding Officer. There was no evidence presented by ITCM on the immediate need for this transmission line, so there is

no public interest affected by the issuance of a stay. Moreover, the public interest in favor of a stay to prevent an unconstitutional taking weighs in favor of a stay.

WHEREFORE, Petitioner Swan Lake Road Farms, LLC respectfully requests the Court enter an order precluding ITC Midwest, LLC's from commencing any construction under Franchise No. F-23012, and for all further additional relief the Court finds necessary and proper under the circumstances.

By: _____



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