IN THE IOWA DISTRICT COURT FOR POLK COUNTY

SWAN LAKE ROAD FARMS, LLC, **Petitioner,** **v.** **IOWA UTILITIES COMMISSION,** **Respondent.**	Case No. CVCV068000 IUC Docket No. E-22501 **BRIEF OF INTERVENOR ITC MIDWEST LLC**

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STATEMENT OF THE CASE

On September 17, 2024, the Iowa Utilities Commission ("IUC") issued a Final Order[1], affirming the proposed order of a hearing officer, granting a franchise to ITC Midwest LLC ("ITC") for what is known as the Swan Lake-Tharp line (also referred to here as "the Project"). The Project is an approximately five circuit-mile (2.5 miles double-circuited) 69-kilovolt ("kV") electric transmission line in Johnson County, Iowa, between the Central Iowa Power Cooperative ("CIPCO") Swan Lake substation and an existing ITC transmission line near North Liberty, Iowa. The Project is one piece of a comprehensive plan to upgrade the electrical system in the North Liberty-Coralville-Tiffin area as the existing transmission system in the area no longer has the capacity to maintain acceptable loading and voltage levels during contingencies due to continued load growth in the area. The Project will increase system reliability and accommodate future load growth that would be difficult to reliably serve with the current system.

The IUC's decision followed three rounds of testimony, an in-person evidentiary hearing, pre- and post-hearing briefing, and the creation of a resulting record that is thousands of pages in length.[2] The IUC's General Counsel, serving as Presiding Officer, issued a proposed order, after which further briefing was filed, and the full IUC – the expert agency charged with and having extensive experience in overseeing the electric system in Iowa – unanimously, in a thorough and explanatory order, affirmed.

Swan Lake Road Farms, LLC ("SLRF") now seeks judicial review. While SLRF throws many bare assertions out in passing, SLRF's arguments on judicial review focus on two main

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[1] *In re ITC Midwest LLC*, Docket No. E-22501, "Order Affirming Proposed Order and Denying Request for Stay" (Iowa Utils. Comm'n, Sept. 17, 2024)("Final Order") [Agency Record ("AR") Page 02376 – AR02397]

[2] As SLRF itself conceded in its appeal to the full IUC from the Proposed Order, "this proceeding contains hundreds of pages of pre-filed testimony, thousands of pages of exhibits, and a transcript from a full-day hearing" as well as "lengthy pre-hearing and post-hearing briefs arguing both facts and law." [AR02347]

issues: (1) whether the franchise itself was properly granted; and (2) whether ITC can utilize that franchise by using Iowa Code § 306.46 to locate facilities in the road rights-of-way without condemning land from SLRF. Each of these has two primary sub-issues, as is discussed further below. As ITC demonstrates, SLRF falls far short of the high bar for overturning the IUC's franchise decision, a decision similar to others routinely affirmed by the courts in Iowa. Moreover, in light of the Iowa Supreme Court's *Juckette* decision[3], the intent of the Iowa Legislature, and good public policy, this Court should affirm ITC's right to locate the Swan Lake-Tharp line in the road right-of-way without the need for condemnation.

ARGUMENT

I. IUC's Issuance of a Franchise for the Project is Supported by Substantial Evidence and Clear Legal Precedent.

As this Court observed in the similar *Juckette-District* decision, "The most fundamental tenet of administrative law is that 'administrative decisions are to be made by agencies, not the courts.'" *Juckette-District*, Slip. Op. at 3 (*citing Midwest Auto III, LLC v. Iowa Dep't of Transp.*, 646 N.W.2d 417, 422 (Iowa 2002)). SLRF nonetheless argues that ITC did not produce adequate evidence on the two primary statutory criteria for an electric transmission franchise under Iowa Code chapter 478: that the Project is "necessary to serve a public use" and that the Project has "a reasonable relationship to an overall plan of transmitting electricity in the public interest." Iowa Code § 478.4. To make this argument, SLRF materially misrepresents the record to the Court, omitting reference to the significant amount of evidence on both points. Further, Iowa Supreme Court precedents make clear that the bar to SLRF's challenge to the substantial nature of ITC's

[3] *Juckette v. Iowa Utils. Bd.*, 992 N.W.2d 218 (Iowa 2023). That case affirmed a decision of this Court, in Case No. CVCV061580, "Order Denying and Dismissing Petition for Judicial Review" (Iowa Dist. Ct., Polk Co., Nov. 7, 2021)(Vaudt, J.) The District Court order will be cited herein as "*Juckette-District*."

evidence is an exceedingly high bar. The Iowa Supreme Court in *Juckette* reviewed the relevant cases:

> "[W]e review the IUB's factual findings under a substantial evidence standard." *Puntenney v. Iowa Utils. Bd.*, 928 N.W.2d 829, 837 (Iowa 2019); *see also* Iowa Code § 17A.19(10)(*f*). Substantial evidence is defined as "the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance." Iowa Code § 17A.19(10)(*f*)(1). "The agency's decision does not lack substantial evidence merely because the interpretation of the evidence is open to a fair difference of opinion." *Puntenney*, 928 N.W.2d at 837 (quoting *NextEra Energy Res. LLC v. Iowa Utils. Bd.*, 815 N.W.2d 30, 42 (Iowa 2012)). "Thus, even if we find the record could support a different conclusion, we must affirm the agency's decision if it is supported by substantial evidence." *S.E. Iowa Coop. Elec. Ass'n v. Iowa Utils. Bd.*, 633 N.W.2d 814, 818 (Iowa 2001).

Juckette, 992 N.W.2d at 221. And as this Court explained,

> Courts "'should broadly and liberally' apply the agency's findings of fact 'to uphold rather than defeat the agency's decision.'" Sydnes v. Iowa Dep't of Human Servs., No 15-1862, 2016 WL 6636810, at *2 (Iowa Ct. App., Nov. 9, 2016)(quoting Taylor v. Iowa Dep't of Human Servs., 870 N.W.2d 262, 266 (Iowa Ct. App. 2015).

Juckette-District, Slip Op. at 4.

A. The Project Is "Necessary To Serve A Public Use" As The Electric System In The Area Cannot Accommodate Future Load Growth, And Is Already Demonstrating Thermal Violations Under Various Contingencies.

It is difficult to understand how SLRF can argue that the Project is not necessary. It appears that any evidence that SLRF did not understand, it chooses to disregard – which is why these decisions are made by an expert agency staffed with its own engineers, attorneys and other subject matter experts. Further, SLRF repeatedly implies that the sworn testimony of ITC's in-house experts is somehow not evidence – although the Court is well aware that sworn testimony from a competent witness is valid evidence, and in many cases it is the key or even (in the "he said, she

said" of a sexual harassment case, for example) the primary or only evidence.[4] SLRF reaches to discredit such evidence because it knows that the agency as fact-finder is generally not disturbed on appeal as to its evaluations of witness credibility and credentials. *See Broadlawns Med. Ctr. v. Sanders*, 792 N.W.2d 302, 306 (Iowa 2010).

The transmission of electricity to the public constitutes a public use under § 478.3(1)(h) and § 478.4. *S.E. Iowa Coop. Elec. Ass'n v. Iowa Utils. Bd.*, 633 N.W.2d 814, 820 (Iowa 2001). As detailed in ITC Midwest's direct testimony, the Project is part of a long-term comprehensive plan to ensure acceptable loading and voltage levels taking into account contingencies and potential future load growth. *See* Direct Testimony of Robert Walter ("Walter Direct") at 6:5-13 [AR00131]. Specifically, this Project will provide a connection to an additional 69 kV source into the existing 69 kV system that runs between the Cedar Rapids, Iowa and North Liberty, Iowa areas to ensure long term area reliability. *See* Walter Direct at 6:11-13 [AR00131].

While SLRF has questioned the need for the line, those objections merely raise general questions about ITC Midwest's evidence – but they do not in any way rebut that evidence or provide competing expert testimony. *See, e.g.,* Ambrose Direct at 6:11-7:8; Young Direct at 15:8-21 [AR00633 – AR00634; AR00287] (in both cases, asserting – incorrectly – the ITC witness Walter has not supported his position that the Project is needed.)

At the hearing, SLRF's counsel examined ITC witness Walter on this issue – unsuccessfully.

> 10. Q. You provided no explanation of any data
> 11 that supports those conclusions, did you?
> 12 A. There are exhibits that have that data that
> 13 supports that statement, yes.
> 14 Q. What are those exhibits?

[4] Notably, the discussion of the evidence by this Court in the *Juckette-District* decision only discusses the sworn testimony of internal MidAmerican Energy witnesses. *See* Slip Op. at 7-8.

. . .

A. If you look at Table P-9668-1, there's contingency overload listed in the area as well as Table P-9668-2. And then on page [8], MISO's conclusion is with the facilities and service under the project description, those overloads are mitigated.

. . .

Q. Thank you. Nowhere in here is there any data that supports your allegation that there is no longer capacity for acceptable loading and voltage levels, though, is there?

A. There are. If you look at that Table P-9668-2, ***what those are are overloads on the system based on the different contingency.***

When you see that loading percent, that is the percent overload of that facility for that outage based on the system at the time of the study.

Q. At the time of the study, but there's no data in here that the system in the area no longer has capacity to maintain the acceptable loading, is there? This chart is simply a chart of certain times when there was an overload; correct?

A. The chart is based on the output from a power flow model that shows that from that power flow model there are these overloads for those outages.

Transcript ("Tr.") 15:10-17:1 [AR02132 – AR02134] (emphasis added). In short, as ITC witness Walter points out, a standard power flow study using forecasted loads and planning contingencies resulted in numerous overloads on the system absent some relief. The Swan Lake-Tharp Project, in conjunction with the rest of the comprehensive plan for the area, would mitigate all of those

overloads providing the needed relief. That is, fundamentally, what it means for a line to be *needed* in an electric transmission system.

SLRF then sought to show that the overloads were not caused by load growth. *See* Tr. 17:21-25 [AR002134]. As an initial matter, the cause of the studied overloading is not relevant – the overload results in the power flow study need mitigated regardless of the cause. Nonetheless, as ITC witness Walter explained in detail on redirect examination, both information from load-serving entities and ITC Midwest's own systems have shown a trend toward load growth:

> Q. Mr. Walter, Mr. Reasoner asked you several questions about support for load growth. In your planning, do you obtain load growth information from load-serving entities?
> A. That's correct. Through the regular MISO process, load-serving entities submit their projected load data for the two, five and ten-year horizon, and that's done annually, as well as in the targeted study that was submitted as Walter Rebuttal Exhibit 1, I believe.
> Because we were doing a targeted area in a long-term study for this area, CIPCO and ITC Midwest actually approached the area load in FTEs to get a 20-year growth projection for both Linn County REC and Alliant Energy IPL for this area.
>
> . . .
>
> Q. And do you also monitor ITC's own system for load over time?
> A. Yeah. So as those models are built annually, we get those load projections submitted by load-serve entities.
> We run analysis annually to make sure the system is maintaining the required levels of loading and voltage outside of a targeted study, and then we also perform a targeted study from time to time like we did in this area.
> Q. And ***do both the communications from***

load-serving entities and your own system monitoring suggest that there has been a load growth trend in this area?

A. ***Yes, there has.*** In fact, I just got my docs from CIPCO several weeks ago after my rebuttal testimony was filed that Linn County REC is actually planning to add an additional transformer at Church REC Substation in North Liberty as well as building new Tiffin West, I believe what they're calling, distribution substations.

They're going to be adding [more] transmission capacity on top of what I already supplied in my direct testimony.

Tr. 22:23-24:14 [AR02139 – AR02141] (redirect examination; emphasis added).

The term "need" as used in Chapter 478, however, is more than broad enough to include this Project. It includes not only ITC's role in helping local utilities keep the lights on *today* for their retail customers, it also includes building a safe, reliable and efficient integrated system for customers over a broader area, and for a period reaching well into the future. Looking at an analogous statutory use of the term "need," the Iowa Supreme Court upheld the Board's conclusion that

> the "need" requirement not only includes present capacity, but that it also includes needs based on compliance with present and future environmental regulations, fuel diversity, the supply of less expensive energy to its consumers, and the promotion of economic development and Iowa's energy policy. The Board stated consideration of these needs demonstrated MidAmerican's compliance with its statutory ***obligation to plan prudently to provide reasonable and adequate service*** to its retail customers at just and reasonable rates.

See NextEra Energy Resources LLC v. Iowa Utils. Bd., 815 N.W.2d 30, 38 (Iowa 2012) (emphasis added). When ITC Midwest plans its system, it plans to withstand various contingencies under future load conditions. Doing so fulfills ITC Midwest's obligation to plan prudently – that is, it meets a need. This evidence is materially the same as what MidAmerican Energy presented in *Juckette*, which this Court found sufficient, and which the Iowa Supreme Court upheld:

> As to the specific question before us, we have long recognized that "the transmission of electricity to the public constitutes a public use as contemplated by section 478.4." [*S.E. Iowa*, 633 N.W.2d] at 820. And the record contains ***222** substantial evidence that MidAmerican's proposed transmission lines are necessary to increase reliability and accommodate anticipated growth in and around Cumming and West Des Moines. So, like the district court, we affirm the IUB's findings that the transmission lines are "necessary to serve a public use" as required by Iowa Code section 478.4. *See Fischer v. Iowa State Com. Comm'n*, 368 N.W.2d 88, 97 (Iowa 1985) (affirming finding of public use under section 478.4 where the utility "presented evidence from which the commission could and did conclude that the proposed system changes were necessary to meet existing needs and, because of the additional future capacity which such changes provided, constituted a reasonable effort to provide for future needs"); *see also Bradley v. Iowa Dep't of Com.*, No. 01-0646, 2002 WL 31882863, at *5 (Iowa Ct. App. Dec. 30, 2002) ("The record contains substantial evidence that the proposed transmission line is necessary to increase reliability of service, accommodate occurring and anticipated load growth, and reasonably assure the availability, quality, and reliability of service. The transmission line thus serves a public purpose.").

Juckette, 992 N.W.2d at 221-222.[5]

SLRF also fails to give proper weight to the role of the Midcontinent Independent System Operator ("MISO") and the process behind a line being analyzed in the MISO Transmission Expansion Plan ("MTEP") and being an Attachment A project. MISO's review provides further evidence that the Project has been evaluated and found appropriate.

As the Presiding Officer found in the Proposed Order, ITC obtained demand evidence from all of the area retail electric companies through those companies' submission to MISO, obtained more granular data from Linn County Rural Electric Cooperative ("LCREC") and Interstate Power & Light ("IPL"), and also had its own system data all showing increasing demand for electricity in the area. Proposed Order at 10 [AR002325]. And as Mr. Walter's Rebuttal Testimony and live hearing testimony points out, MISO-validated power flow analyses show there are system violations in this area based on existing configuration and projected loads. This Project, as part of

[5] The *Juckette-District* opinion sets forth the evidence presented at Slip Op. 7-8 (preceded by a collection of the relevant law in similar electric transmission cases at pages 5-7).

the overall comprehensive plan, effectively mitigates all observed issues on the system. While SLRF protests that its witnesses – who have no demonstrated expertise in power flow analysis or electrical system planning – raised questions about ITC's asserted facts that the IUC should have given weight, that misconstrues the substantial evidence standard. Here the expert agency had before it evidence of the kind routinely relied on in determining the needs for transmission lines (the same kind of facts testified to in *Juckette*, for example). That is all that is required to support the agency decision.

B. ITC's Project Represents a Reasonable Relationship to an Overall Plan of Transmitting Electricity in the Public Interest, as it is the Product of Both Joint Planning With Local Distribution Utilities and the MISO Planning Process.

To establish that the Project represents a reasonable relationship to an overall plan of transmitting electricity in the public interest, the Board must consider eight criteria set forth in Iowa Code § 478.3(2)(a), including the relationship of the proposed project to: (1) present and future economic development of the area; (2) comprehensive electric utility planning; (3) the needs of the public presently served and future projections based on population trends; (4) the existing electric utility system and parallel existing utility routes; (5) 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; and (8) the inconvenience or undue injury which may result to property owners as a result of the proposed project. ITC addressed all relevant criteria at length in its Exhibit D [AR00014 – AR00016] and in its pre-filed testimony. *See, e.g.,* Walter Direct at 11-16 [AR00136 – AR00141]; Whisner Direct at 5 [AR00114].

The issues raised by SLRF do not line up specifically with the factors in § 478.3(2)(a), but generally address (7) and (8) pertaining to present and future land uses and injury to property

owners. These issues are addressed further below. Some of the eight criteria overlap with the "necessary to serve a public use" requirement. Several were not raised as issues in this case. For completeness, however, and to remove any doubt regarding the correctness of IUC's decision and the sufficiency of the record, ITC addresses each below.[6]

(1) The relationship of the proposed project to present and future economic development of the area.

While economic development was not a central issue in the case, the evidence demonstrated that the Project is critical to serve any future economic development. ITC witness Walter testified extensively that the current system in the area is already experiencing system violations and could not reliably handle any load growth. *See* Walter Dir. at 6:5-7:12, 9:5-14, 9:23-10:8 [AR00131, AR00134, AR00134 – AR00135]; Walter Rebuttal at 8:6-9:20 [AR02031 – AR02032]. Further, while the Parties viewed the importance of the North Liberty Comprehensive Plan differently, it is undisputed that the Plan assumes growth in the area surrounding North Liberty in the future. *See* Walter Reb. 9:21-25 [AR02032]. Finally, as is discussed above regarding need, both the local load serving entities and ITC's own system data are showing a trend toward growth, suggesting economic development in the area is occurring, which will require extra transmission system support.

(2) The relationship of the proposed project to comprehensive electric utility planning.

The project is the product of extensive planning. ITC worked with local retail electric cooperative CIPCO to identify and plan the project, including exploration of alternative options. *See* Walter Dir. at 9:5-14, 10:9-11:3 [AR00134 – AR00136], and Walter Rebuttal Exh. 1 [AR02037 – AR02050] (joint analysis of area needs with CIPCO). Further, this line was reviewed in the MISO MTEP planning process. Through that process, the line was reviewed through

[6] Doing so also addresses many of the stray issues SLRF raises in passing but never fully develops.

MISO's open and transparent stakeholder process, was recommended for approval by MISO staff, and approved by MISO's Board of Directors, being included in the MTEP 16 study report as an approved Appendix A project. *See* Walter Dir. at 6:14-7:12 [AR00131 – AR00132], Walter Direct Exhs. 1, 2 [AR00143 – AR00154]. This Project is the subject of extensive and comprehensive electric utility planning; there was no evidence presented to the contrary.

(3) The relationship of the proposed project to the needs of the public presently served and future projections based on population trends.

The relationship of the Project to the needs of the public is covered above. Although the exact amount of population grown is arguable, there is clear evidence that there is load growth from both the reports from the load serving entities and from ITC's own system data. This project will accommodate that future growth. No evidence to the contrary was presented by any party.

(4) The relationship of the proposed project to the existing electric utility system and parallel existing utility routes.

The very purpose of this Project is its positive relationship to the existing electric utility system – it connects a substation with an existing line in a way that helps eliminate existing system violations as well as overloads that show in power flow analysis of potential contingencies. As discussed above, the Project was identified as part of a joint ITC-CIPCO study and is a MTEP 16 Appendix A approved project. The Project provides additional capacity and voltage support, redundancy, and a shorter line to the Swan Lake substation all of which will increase reliability and support load growth that has been observed and is predicted in the area.

Once the need for the project was identified through these planning processes, ITC retained third-party expert international engineering firm Burns & McDonnell to assist with a Route Study.[7] The Route Study evaluated several potential routes, including numerous line segments. The

[7] *See* ITC Midwest Samuelson Direct Exhibit 1 [AR00168 – AR00251] ("Route Study").

segments can be grouped into a three groups of options: one group that ran essentially due east out of the Swan Lake substation, a "middle route" group that ran a short distance north up James Avenue and then east to the connection at ITC's existing line, and finally the furthest north set of options that go north on James to Swan Lake Road and follow Swan Lake Road for the west-to-east portion.

While analysis of the route study and route selection is discussed in more detail in element (6) below, the proposed route in this case obviously does parallel existing utility routes. This is true both because the line will be sited in road right-of-way in what is commonly considered a utility easement, but also because LCREC has a distribution line along Swan Lake Road which will be moved to the same alignment as the Project.[8] *See also* Proposed Order at 15 [AR002330].

(5) The relationship of the proposed project to any other power system planned for the future.

As ITC witness Walter Rebuttal Exh. 1 discusses, the Project is part of a coordinated and comprehensive effort to address system violations, increase reliability, and plan for load growth in the Tiffin, North Liberty and Coralville area. There are other substation upgrades and other lines in the vicinity that will, in tandem with this Project, address the concerns ITC and the local load serving entities have with current and future service in the area. Again, there is no evidence in the case to the contrary and no issue was raised relating to this criteria in the case.

(6) The possible use of alternative routes and methods of supply.

As discussed in the pre-filed testimony of ITC witness Samuelson and in the Route Study, ITC explored and evaluated alternative routes, each of which would have resulted in greater impacts than the proposed route. While SLRF appears to have dropped its specific arguments

[8] Letter from Linn County Rural Electric Cooperative, filed Dec. 8, 2023 as an attachment to ITC Midwest's Response to Fifth Staff Review Letter. [AR00100]

about the route, in the interest of demonstrating compliance with this factor ITC addresses the arguments at the IUC regarding the route. The primary argument raised by the intervenors and objectors below was that the Project should be built on a different route – most often, to the extent objectors proposed a specific route rather than mere generalized opposition to the Project, opponents argued for a route that proceeds straight east from the Swan Lake substation until it meets the existing ITC 69 kV line that will serve as the other terminus. *See, e.g.,* Raim Objection (Mar. 29, 2024) [AR02071 – AR02072] ("It still seems that the shortest and best route would be to go straight east out of the substation"); Nile and Lois Dusdieker Objection (July 19, 2023) [AR00047 – AR00048] ("Clearly the shortest path between two points is a straight line, which from Swan Lake Substation to North Liberty Substation would be down 240th Street.").

These arguments are based on an incorrect assumption, that the "straight line" route would be shorter. The analysis of the engineering firm in the Route Study states otherwise. In fact, the record is clear that this "straight line" alternative, which is referred to in the Route Study as the "Segment 1 Routes," involves greater impacts, and greater costs, as compared to the proposed route. As the Route Study and ITC witness Samuelson's testimony demonstrate, the Swan Lake Road route (Route 11) was actually shorter than the 240th Street route (one of the Segment 1 or "straight line" Routes) and was near a much smaller number of homes than it would pass along 240th Street. Due to the relatively short length of the route, for many of the criteria reviewed in the Route Study there are minimal differences, although the Segment 1 Routes are longer than the proposed route (Route 11) which generally corresponds to more impacted land and greater costs. *See* ITC Midwest Samuelson Direct Exhibit 1 at p. 29 (Table 3-1) [AR00196]. There is, however, one glaring exception where the differences are substantial: for the proposed route along Swan Lake Road, there are only two (2) homes and no public facilities within 300 feet of the line; for

the Segment 1 Routes that go due east out of the substation in a straight line ***that number jumps to 58 homes*** and one public facility within 300 feet. The IUC was on solid ground, as a matter of evidence and law, approving ITC's proposed line over a line that runs past ***29-times*** as many homes.

While there are residents along the proposed route who voiced objections (several of which are addressed further under Criteria (8) below), there is no evidence to rebut the Route Study or to support a different route, or to show that the proposed route presents unique objections that aren't common to most other transmission line. Those same objections would likely arise – but in much more numerous fashion – on the Segment 1 Routes. As required by law, ITC studied the possible use of alternative routes in the same manner the Board has approved many, many times before – and chose the alternative with the least total impacts to land and, because it is incrementally shorter, the alternative with the lowest expected costs.[9]

(7) The relationship of the proposed project to the present and future land use and zoning ordinances.

With regard to zoning ordinances, ITC Midwest has been in regular contact with Johnson County throughout the process and has confirmed that the Project is consistent with their most recent land use and zoning ordinances, and that no anticipated future zoning ordinance impacts the Project. *See* Weary Direct at 6:3-11 [AR00124]. Johnson County has not expressed any concerns with the Project, nor about the specific route.

Regarding present land use, the Project is consistent with the present land use in the area, which is broadly agricultural although, as on many rural roads, there are some homes.

[9] SLRF raises cost arguments here that it did not develop below, and which are generally beyond the scope of an individual franchise proceeding. It is notable, however, that SLRF and other objectors seem to want it both ways: denying use of road rights-of-way for transmission lines will *raise* the cost of such lines, and in this case choosing a route other than the route approved by the IUC would result in a longer route that costs *more* to build.

Transmission lines are built throughout rural Iowa by ITC and other transmission owners and have been, without significant issues, for generations. In the case of this Project, the line follows the road right-of-way, creating the least possible impact to agricultural land (in fact the line will cross zero acres of actively-farmed land). While certain objectors raised concerns about items such as impacts on drainage systems and movement of farm equipment, the IUC is familiar with these issues that have been repeatedly addressed in franchise proceedings. None of the evidence put forth by the objectors demonstrates any uniquely unworkable situation for which a solution has not been provided in this case.

It is notable that ITC's proposed route within the road-right-of way actually *minimizes* interaction with drain tile. To the extent it does interact with any drain tile, those issues are covered by ITC's damages policy and Iowa Code § 478.17, which requires repair or replacement, or compensation for the repair and replacement, of drain tile to a condition as good as before any damage occurred. Also, with regard to movement of farm equipment, ITC witness Whisner testified that the line will be built to meet or exceed the requirements of the National and Iowa Electrical Safety Codes, which exist for the very purpose of establishing safe distances and heights in various situations, including agricultural uses. *See* Whisner Direct 4:1-9 [AR00113]; Whisner Reply 3:5-19 [AR02079].

Whether to avoid drainage outlets or to accommodate farm drives where large equipment passes, ITC can, does, and will work with landowners and Johnson County on placement of poles. *See* Wilkinson Reply 4:15-18 [AR020276]; Whisner Reply 4:19-21 [AR02080]. As ITC's testimony reflects, ITC has informed objectors about its ability and willingness to make minor adjustments in pole locations. *See*, *e.g.*, Whisner Reply 2:13-3:4, 4:16-24 [AR02078, AR02080]

(discussing flexibility in pole placement to avoid drain tile and existence of underground facilities already within the road-right-of-way).

With regard to specific pole placements, SLRF places significant emphasis on SLRF's belief that the alignment approved by the IUC is not "allowed" by Johnson County. This argument is entirely a red herring. First, nowhere in the record is there any evidence of an actual legal requirement in Johnson County for utility poles to be one-foot from the back edge of the road right-of-way. To the contrary, the record clearly shows that is little more than a guideline, with more than a little flexibility. SLRF witness Young, Exhibit 5, page 10 [AR00462], is a diagram showing utility placement with respect to the right of way, and on the left-hand side under "ROW line," it says "1 to 3 feet TYP" – suggesting the one-foot standard is not a bright line, or even the three-foot distance as the "TYP" here stands for "typical." "Typical" connotes that it is not always the case, which is consistent with SLRF's own brief, which quotes an email from a Johnson County engineer as saying "We realize that the 1 ft offset ***is not always possible***, but we would ***like*** for it to be maintained in as many locations as possible." SLRF Br. at 32 (emphasis added). ITC witness Weary testified extensively that ITC had staked proposed pole locations and drove the route with representatives of Johnson County, and that ITC has worked with and will continue to work with Johnson County on precise pole placement. Which gets to the second reason this argument isn't relevant: it blurs together two entirely separate processes. The IUC does not approve specific pole placement – it approves a route. Johnson County will have to approve pole placement, but the general route has to be approved before the specific pole placement, so Johnson County approval comes after the IUC process. Johnson County can decide for itself whether the pole placement is acceptable; that question cannot be before this Court because no final determination was made when this case was filed. As the IUC pointed out in its Final Order,

> [T]he record does not support a finding that any governing authority requires or even desires Commission assistance with respect to that authority's permitting requirements. . . . the Commission is mindful that no governmental entity intervened in this case or even filed an objection or comment. If a governmental entity required or even desired permitting assistance, the Commission trusts that the entity would have made its concerns or requests known.

Final Order at 9 [AR02384].

(8) The inconvenience or undue injury which may result to property owners as a result of the proposed project.

No evidence of undue injury has been presented in this case. While certain objectors suggested impacts to their property, no actual evidence was presented to show that any of these properties would suffer the harms about which objectors have speculated. Indeed, there has long been an above-ground LCREC distribution line along the route of the Project; the incremental difference in impacts created by the Project is minimal. As was discussed under Criteria (7) above, impacts on land here are minimized by sharing an existing utility corridor in the road right-of-way. As a result, the poles and the line are in land that the private landowners already cannot use. Further, the types of impacts discussed like concerns about farm access drives can be mitigated by minor changes in pole placement, moving them slightly farther from such locations. That is a normal and standard part of final design.

At the end of the day, SLRF's argument is simply that they'd like to push needed infrastructure away from their own parcel and closer to someone else's, who would theoretically make the same argument. In sum, nothing in this case shows that this Project creates any unique or "unduly" burdensome impact. To the contrary, the evidence demonstrates that any impacts, if they exist at all, are the same as or similar to those experienced by other landowners of property adjacent to necessary linear infrastructure, and that ITC has taken steps to minimize them.

II. ITC's Use of Road Right-of-Way to Site the Project Properly Follows Iowa Code § 306.46, and the Court Should Find § 306.46 to be Constitutional.

There is nothing remarkable about locating transmission lines in road right-of-way; it has happened repeatedly, for decades, all across the state. Such use of road right of way was explicitly approved by the Iowa legislature in Iowa Code § 306.46(1), which provides: "A public utility may construct, operate, repair, or maintain its utility facilities within a public road right-of-way." Electric transmission lines are expressly included in the definition of "public utility" in § 306.46(2). The plain language of this provision was challenged by Linda Juckette (who had the same attorney as SLRF) before the IUC in *In Re: MidAmerican Energy Co.*, Docket No. E-22417. In that case, the IUC correctly followed the language of the binding statute. *See* "Order Granting Petition for Electric Transmission Line Franchise and Right of Eminent Domain" (I.U.B. Feb. 1, 2021). Juckette then challenged the IUC's order, which was affirmed by this Court and ultimately affirmed in *Juckette v. Iowa Utilities Bd.,* 992 N.W.2d 218 (Iowa 2023).

Nonetheless, SLRF challenges the constitutionality of Iowa Code § 306.46's allowance of siting ITC's line in the road right-of-way and asserts that the constitutionality of § 306.46 is unresolved.[10] In doing so, SLRF attempts to conflate two distinct issues: (1) whether the statute authorizes utilities to locate infrastructure in the road right-of-way; and (2) if so, whether compensation is required for such placement to be constitutional. The Iowa Supreme Court clearly

[10] SLRF attempts to argue that there is a "tie" in Polk County, with Judge Hansen's prior *NDA Farms* case holding that § 306.46 was inapplicable, and Judge Vaudt's *Juckette* decision allowing placement of electric transmission lines in the road right-of-way and finding doing so pursuant to § 306.46 is not a taking. SLRF Br. at 11. SLRF suggests that as a result, this Court is able to write on a blank slate. That is incorrect. *NDA Farms* relied extensively on an argument regarding the retroactive application §306.46. The issue regarding retroactivity of statutes was clarified by the Iowa Supreme Court in *Hrbek v. State*, 958 N.W.2d 779 (Iowa 2021) in a way that negates the reasoning of *NDA Farms*, as this Court explained in *Juckette-District*, Slip Op. at 14-15. As a result, SLRF has not even raised the retroactivity issue here. Accordingly, *NDA Farms* is arguably no longer operative; *Juckette-District* is more recent, more on point with the arguments in the present case, and was ultimately affirmed by the Iowa Supreme Court. This Court should follow the *Juckette-District* decision.

found siting of electric lines in the public road right-of-way to be permissible. In *Juckette*, the Iowa Supreme Court expressly held,

> As we noted at the outset, we believe section 306.46 creates a statutory easement that allows utilities like MidAmerican to "construct, operate, repair, or maintain [their] utility facilities within a public road right-of-way," Iowa Code § 306.46(1), including the right-of-way that encumbers Juckette's property. ***There is no question, then, that MidAmerican is statutorily authorized to construct electric transmission lines within the Juckette right-of-way***.

Juckette, 992 N.W.2d at 222 (emphasis added).[11] This affirmation of the statutory easement was unanimous; this passage was, contrary to SLRF's argument, a clear holding in the case.

Emphasizing that whether compensation is required is a distinct issue from the right to locate in the road right-of-way, the *Juckette* Court then explained, "The ***only question*** is whether such construction could result in a taking that requires compensation under the Fifth Amendment to the United States Constitution and article I, section 18 of the Iowa Constitution." (emphasis added). *Id*. The Court did not question whether such construction invalidated the statute. At no point did the Court discuss whether the use of right-of-way itself was constitutional; to reiterate, the only question was whether such a use was a taking that would also require compensation. Which makes sense: even if there was a taking (and, as discussed below, placing electric poles in public road right-of-way should ***not*** be considered a taking) such a taking is perfectly lawful if it is for a public use and just compensation in provided. Because courts construe statutes to be constitutional where possible, *State v Hernandez-Lopez*, 639 N.W.2d 226, 233 (Iowa 2002)("if the statute is capable of being construed in more than one manner, one of which is constitutional, we must adopt that construction"), and there are several ways to do that in this case, there is little

[11] The Court also found the transmission line was a public use.

chance that § 306.46 would be stricken as unconstitutional. At most, the implementation would be found to require a mechanism for just compensation.

There are, however, at least three approaches by which the Court can uphold the use of § 306.46 as written, finding no constitutional problems or need for further process or compensation.

- ***First***, the Court can observe that the Iowa Supreme Court in *Keokuk Junction* explicitly anticipated that its decision may be different if Iowa had a statute like the Alaska statute discussed in the case – and find that such a statute now exists in § 306.46.

- ***Second***, the Court, as it did in the *Juckette-District*, could hold that electric transmission lines are an "incidental use" that does not add a cognizable burden to the servient estate due to the nature of the road right of way already in place.

- ***Third***, SLRF seeks to argue that the recent U.S. Supreme Court case *Cedar Point Nursery* supports its position, but in fact *Cedar Point* discusses exceptions where interference with land rights are not considered takings – one of which is applicable here and demonstrates why Iowa Code § 306.46 is constitutional, even without compensation to SLRF.

A. The Court Should Find That *Keokuk Junction* is No Longer Applicable

The timing of the enactment of Section 306.46, when considered in light of the Iowa Supreme Court's decision in *Keokuk Junction Ry. Co. v. IES Industries, Inc.*, 618 N.W.2d 352 (Iowa 2000), reveals the legislature's intent to abrogate the holding in *Keokuk Junction*. In *Keokuk Junction*, the city of Keokuk permitted an electric transmission line to be constructed within its road easement. *Id.* at 354. A landowner, Keokuk Junction Railway Company ("KJRC"), brought suit arguing that the transmission line owner had no right to install the line within the roadway easement without its approval. *Id*. The Court ultimately sided with KJRC, determining that the language of the underlying road easement did not permit the erection of a transmission line without KJRC's permission. Importantly, however, the *Keokuk Junction* Court distinguished an Alaska case on the basis that Alaska had adopted a statute which permitted public utilities to locate infrastructure within the right-of-way. The Court explained:

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

Id. at 357 (emphasis added).

Following *Keokuk Junction*, the legislature enacted Section 306.46, permitting public utilities to locate infrastructure within public road easements – a statute nearly identical to the Alaska statute referenced in *Keokuk Junction*. The necessary implication is that the legislature intended to abrogate the *Keokuk Junction* holding by enacting a statute which the Court expressly noted was missing at the time *Keokuk Junction* was decided. It follows further that the Iowa Supreme Court now "clearly" ***may*** be "prompted to make a similar decision."

B. As This Court Did in the *Juckette* District Court Decision, the Court Should Find ITC's Line to be an Incidental Use.

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

As this Court explained in *Juckette-District*, the framework for a "takings" analysis is:

(1) Is there a constitutionally protected private property interest at stake?

> (2) Has this private property interest been "taken" by the government for public use? And
> (3) If the protected property interest has been taken, has just compensation been paid to the owner?

Juckette-District, Slip Op. at 16 (*citing Bormann v. Bd. of Supervisors, Kossuth Co.*, 584 N.W.2d 309, 315 (Iowa 1998)). In reviewing the facts and looking at both Keokuk Junction and cases in other jurisdictions, this Court held:

> Section 306.46 does not violate the Takings Clause of the Iowa Constitution because placing utility structures on a road right-of-way does not call for acquiring an additional servitude from the landowner. Because the "utility use is 'an incidental and subordinate use'" of the road right-of-way, the use of the road right-of-way for constructing, operating, and maintaining an electric transmission line "does not call for acquisition of an additional servitude" from the property owner. *Fisher v. Golden Valley Elec. Ass'n, Inc.*, 658 P.2d 127 (Alaska 1983). If no additional servitude results from constructing, operating, and maintaining the transmission line, there is no taking. Consequently, Iowa Code section 306.46 is not unconstitutional.

Juckette-District, Slip Op. at 16.

The Iowa Supreme Court has applied the incidental use doctrine with respect to the closely analogous issue of railroad right of way. *See McSweyn v. Inter-Urban Ry. Co.*, 130 N.W.2d 445, 448-49 (Iowa 1964). Addressing a restrictive covenant in the deed creating the right-of-way, the Court noted that the railroad

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

Id.

In a law review article by Professor Dayana C. Wright and attorney Jeffrey M. Hester[12] (which has been cited with approval by the Iowa Court of Appeals)[13] the policy justifications for the incidental use doctrine are summarized as follows:

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

Wright & Hester at 423.

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

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

In re Marivitz, 636 A.2d 1241, 1243 (Pa. Cmmw. 1994). SLRF makes much of the "right to exclude" as a key property right, but that ignores that SLRF has already lost the "right to exclude." SLRF cannot, for example, exclude certain travelers from driving down the road – or even walking along side of it where ITC proposes to site its transmission line. SLRF cannot override decisions by the county of what to grow in the right-of-way, or how to maintain it. Those property rights were taken as part of the easement for the highway.

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

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

Similarly, the landowner cannot permit third-party use of the land, as the government possesses it. Because the landowner has such minimal remaining interest in the property subject to the road easement, there is no compensation due to the underlying landowner (because the change in value is de minimis at most) arising from the installation of utility infrastructure on property the owner can neither control nor use. *See*, *e.g.*, *Bogart v. CapRock Commc'ns Corp.*, 69 P.3d 266, 271-73 (Ok. 2003) (distinguishing *Loretto*, holding "When the landowner has been compensated for the taking of the highway, it is too difficult to follow a contention that he is additionally damages by each new, different, or additional use of the highway for travel, transportation or transmission. . . [installation of a fiber optic cable] must be held to be no such additional burden or servitude as would entitle the abutting landowner to additional compensation", and collecting cases.)

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

As it did in the *Juckette* case, this Court should apply the incidental use doctrine and determine that an electric transmission line's placement in the road right-of-way is an incidental use of the existing easement, allowing the government to permit public utilities to place utility

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

C. The U.S. Supreme Court's Recent *Cedar Point Nursery v. Hassid* Decision Supports the Constitutionality of § 306.46.

It is surprising that SLRF cites *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021) as if it supported SLRF's position. It does not. *Cedar Point* is a narrow case on its specific facts, and a WestCheck shows nearly 60 courts, federal and state, all across the country have already declined to extend or distinguished *Cedar Point* in its short history. More important here, however, is that *Cedar Point* explains three exceptions to when an interference with property rights amounts to a taking. Relevant in this case is the second exception, where "government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights." *Cedar Point*, 594 U.S. at 160-61. The gist of it is that property rights, while important and strongly protected, are far from absolute. The Iowa Supreme Court has already applied the exceptions in *Cedar Point*, finding a statutory right to involuntary, pre-condemnation access for surveys for new pipelines is constitutional because it is not a taking. *See Summit Carbon Solutions, LLC v. Kasischke*, 14 N.W.3d 119 (Iowa 2024). That case, like this one, presented a facial challenge to the statute.[14] The Iowa Supreme Court reiterated the high bar for such challenges:

> "[W]e presume statutes are constitutional, 'imposing on the challenger the heavy burden of rebutting that presumption.'" *In re Guardianship of L.Y.*, 968 N.W.2d 882, 892 (Iowa 2022) (*quoting Santi v. Santi*, 633 N.W.2d 312, 316 (Iowa 2001)). "[I]n a facial challenge, the challenger must prove that a statute is 'totally invalid and therefore, incapable of any valid application.'" *Kluender*, 985 N.W.2d at 470 (emphasis omitted) (*quoting Bonilla v. Iowa Bd. of Parole*, 930 N.W.2d 751, 766 (Iowa 2019)). "A facial challenge asserts the law always operates

[14] While SLRF is silent as to whether its challenge is a facial or an "as applied" challenge to the constitutionality of § 306.46, it is obvious that it is not dependent on any facts specific to their parcel. Rather, the assertion is that any use of § 306.46 to cite utilities facilities in road right of way where a private landowner is the fee owner underlying the road is a taking and therefore the statute is allegedly unconstitutional.

> unconstitutionally and not just as applied in particular circumstances," making it the most difficult challenge a plaintiff can mount. *League of United Latin Am. Citizens of Iowa v. Pate*, 950 N.W.2d 204, 209 (Iowa 2020) (per curiam). Facial challenges are disfavored because they "run contrary to the fundamental principle of judicial restraint." *Kluender*, 985 N.W.2d at 470 (*quoting Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008)).

Kasischke, 14 N.W.3d at 126.

The U.S. Department of Transportation has explained the long history of co-location of utilities in road rights-of-way, and the positive policy interests such co-location serves.

> Historically it has been in the public interest for public utility facilities to use and occupy the rights-of-way of public roads and streets. This is especially the case on local roads and streets that primarily provide a land service function to abutting residents, as well as on conventional highways that serve a combination of local, State, and regional traffic needs. This practice has generally been followed nationwide since the early formation of utility and highway transportation networks. Over many years it has proven to offer the most feasible, economic and reliable solution for transporting people, goods, and public service commodities (water, electricity, communications, gas, oil, etc.), all of which are vital to the general welfare, safety, health, and well being of our citizens. To have done otherwise would have required a tremendous increase in the acquisition of additional rights-of-way for utility purposes alone. This could have also resulted in significant added costs to be borne by the utility consumers through increased rates for utility services so provided.

Utility Relocation and Accommodation: A History of Federal Policy Under the Federal-Aid Highway Program, U.S. Department of Transportation (J. Kirk, Author, June 1980) at 1.[15] Accordingly, this Court should find that the use of existing road rights-of-way for utility facilities is not a "taking" *either* under *Cedar Point* and *Kasischke*, or because it is merely an incidental use.

Such a result also comports with good public policy that has long been recognized in Iowa. Indeed, that § 306.46 authorizes co-locating utility infrastructure with road infrastructure is not surprising. The development of a road establishes a corridor for public use, and good infrastructure siting practices dictate co-location of infrastructure where possible. Where sound engineering

[15] Found at: https://rosap.ntl.bts.gov/view/dot/14982 (last visited Feb. 1, 2025).

allows for co-location with existing infrastructure, co-location in an existing corridor eliminates the need to impact other, previously undisturbed land. This results in many benefits, including minimizing impacts to lands, minimizing interference with existing and future land uses, reducing disruption to surrounding landowners, and minimizing environmental concerns by avoiding previously undisturbed areas. These benefits of co-location have been recognized by Iowa law, see e.g., Iowa Code § 478.18(2)[16], and have been approved by the Iowa Supreme Court as sufficient to meet the siting criteria of Iowa law. *See Gorsche Fam. Partn. v. Midwest Power, Div. of Midwest Power Sys., Inc.,* 529 N.W.2d 291, 293 (Iowa 1995) (affirming Board's Order locating new electric transmission line within existing easement corridor based upon benefits including minimizing "the interference with the use of land"; reducing "disruption to landowners"; and alleviating environmental concerns such as tree clearing).

Co-location of utilities within road right-of-way can also allow easy and efficient accessibility to such utilities for maintenance and repair activities; as a result, while there are myriad considerations in siting a transmission line, use of the road right-of-way will often be the best option. Thousands of miles of utility infrastructure have been located within road right-of-way in Iowa for decades. That utility infrastructure goes well beyond electric transmission lines, and includes lines for electric distribution, natural gas, water and sewer, and telephone and cable. (The record in the current case shows that electric distribution lines and poles were already in the road right-of-way along the proposed route for the Project.) These lines for essential services have been placed in road right-of-way with the consent of local municipalities because these entities understand the policy benefits of grouping such uses together when feasible, and also because they

[16] "A 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. . ." Certainly locating within the road right of way best meets the "near and parallel" requirement.

rightly have believed, as have the utility companies, that the area adjacent to the road is *intended* to be a utility right-of-way. Reaching a result that disallows the placement of public utility infrastructure within the existing public road right-of-way as suggested by SLRF not only runs counter to the benefits of co-location of infrastructure but calls into question the legal validity of thousands of miles of infrastructure that delivers important and necessary services to homes and businesses throughout Iowa on a daily basis. It would make extension of new or improved infrastructure take longer, would make it more costly, and accordingly would delay vital services while raising costs that are ultimately paid by consumers (who have already, through their taxes, purchased a transportation corridor that is well-suited to hosting other infrastructure.)

In the end, the fact the legislative history of § 306.46, the incidental use doctrine, the background property restrictions approach of *Cedar Point*, and good public policy all point to the same result and all reinforce each other. In light of this alignment, this Court should find that the sole outstanding issue of whether § 306.46 effects a taking for which compensation is resolved in favor of ITC.

D. In Any Event, A Finding That 306.46 Effectuates A Taking Requiring Compensation Does Not Invalidate The Franchise Itself.

Even if the Court were to find that § 306.46 effectuates a taking, SLRF is mistaken as to the impact of such a ruling. There is no reason to believe it would in any way negate the franchise or require remand on the franchise case. The issuance of the franchise and the determination of land rights are two separate and separable issues; the IUC has a very limited role in determining and acquiring land rights. As the IUC recently explained in the context of a transmission line in a railroad corridor,

> A determination of whether the utility has acquired the underlying land rights is beyond this scope of the Board's jurisdiction. It does not follow that review of routing necessarily creates plenary real property jurisdiction for the Board, as argued by Farm Bureau; rather, the nature of the review is tailored to the utility

> subject matter expertise of the Board. The Board makes no assertion of unique expertise in real property rights. . . . In conclusion, the Board does not have statutory authority to determine the sufficiency of a petitioner's land rights, even if asserted in the context of objections or routing.

In re SOO Green HVDC Link ProjectCo, LLC, Docket No. E-22436, "Order Granting Petition for Electric Transmission Line Franchise and Right of Eminent Domain" (Sept. 13, 2023) at 10-12.

Further, as this Court explained in *Juckette-District*,

> Ms. Juckette contends that MidAmerican does not possess the necessary land rights to construct the proposed line over her property and, consequently, the Board's decision to issue a franchise to MidAmerican should be reversed. Ms. Juckette did not cite to any statute or administrative rule supporting her proposition that a franchise petitioner must prove it possesses all necessary land rights before the Board can issue a franchise. Neither Iowa Code chapter 478 nor the governing administrative rules require a franchise petitioner prove it possesses all necessary land rights as a condition precedent to issuing a franchise.
> . . .
> MidAmerican did not seek the right of eminent domain prior to the Board issuing its final decision. This does not mean, however, that MidAmerican could not seek the right of eminent domain after the Board issued the franchise. As section 478.15(1) makes clear, the issuance of a franchise must occur before the Board can grant the right of eminent domain. This statute relevantly provides that once "having secured a franchise," the franchise holder can request the right of eminent domain "to such extent as the utilities board may approve . . . ."

Juckette-District at 12-13. SLRF's attorney (who was also Ms. Juckette's attorney) makes the same argument here that he knows was unsuccessful previously. There was substantial evidence to support a finding of public convenience and necessity for ITC's Swan Lake-Tharp Project, and the franchise is consistent with applicable law, statutory and case precedent. Nothing about the § 306.46 issues in the case changes that, and no determination on § 306.46 requires (or even allows) reversal of the franchise decision. Just as if a regulated developer of linear energy infrastructure obtained a franchise or permit from IUC for a route and, when seeking to construct, found an unexpected subsurface feature (tribal artifacts, or an underground sinkhole) that required a change in alignment and new land rights – in that case, the applicant would not need to restart

the entire franchise or permit process, but rather would come back and seek approval to use eminent domain, despite it being separate from and well after the franchise case. Nothing in Iowa Code chapter 478 (or any other provision of law) prevents such an outcome ***because the franchise and the acquisition of land rights are conceptually separable and are in fact separate***. This is why the Iowa Supreme Court carefully used the particular language in *Juckette* that the only remaining issue unresolved by the Court was whether § 306.46 effected a "taking *that requires compensation*" under the Iowa and U.S. Constitutions. *Juckette*, 992 N.W.2d at 222 (emphasis added). Compensation is never an issue addressed by the IUC – it is a separate process.

CONCLUSION

On an extensive – and certainly a substantial – record, the Presiding Officer and subsequently the full IUC correctly granted ITC a franchise for the Project. SLRF's challenge to the franchise ignores, disregards, and misrepresents the evidentiary record; ITC has easily shown both necessity for a public use by showing power flow studies that indicate overloading on the existing electrical system under certain operating conditions. ITC has similarly shown a reasonable relationship to an overall plan of transmitting electricity through its cooperative planning with CIPCO, the inclusion of the Project in MISO planning, and through ITC's consideration of the demand for electricity and proposed new construction of retail electric utilities in the area.

SLRF's challenge to the siting of the Project in road right-of-way under § 306.46 also fails. The passage by the Iowa Legislature of the statute satisfies the concern the Iowa Supreme Court had in *Keokuk Junction*. Such a result is supported not only by strong public policy, but by the incidental use doctrine as applied by this Court in *Juckette-District*, and also by the background restriction exception in *Cedar Point*.

The Court should affirm the IUC, and deny and dismiss the petition for judicial review.

Dated this 7th day of February, 2025.

By: */s/ Bret A. Dublinske*
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 7th day of February, 2025, the foregoing document was filed with the Clerk of Court using the EDMS system, which will serve a Notice of Electronic Filing upon all parties registered to receive electronic notice in this docket.

/s/ Ryan Carlile
Ryan Carlile