

**STATE OF MINNESOTA**

**OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE PUBLIC UTILITIES COMMISSION**

In the Matter of the Application for a  
Route Permit for the Fargo to St. Cloud                      OAH 15-2500-20995-2  
345 kV Transmissions Line Project                      PUC No. ET-2, E-002/TL-09-1056

**Avon Township's  
POST HEARING BRIEF  
February 18, 2011**

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## **I. Introduction and Summary**

Based on the closing statement submitted by Xcel, it appears that there are now three routes in serious contention: (1) the modified Preferred Route option, advocated by Xcel, (2) Route E (also supported by Xcel), and (3) Route G, which appears to be the distinct preference of all intervenors and commentators such as the Minnesota Department of Natural Resources, Nature Conservancy, and Audubon Society. Based on discussions with intervenors, it appears that the common position of all intervenors is that Route E represents a significant improvement on the northerly Preferred Route, but that Route G further improves upon Route E.

Avon Township began its active participation in the CapX2020 proceedings by sending representatives to the early-stage, informal public hearings. As the Township became concerned with potential impact on environmental resources within the township, the Township redoubled its involvement, and that involvement culminated with its active participation with other governmental representatives who sat on the Advisory Task Force (ATF). Frankly, many constituents encouraged the Township to support Route D in these proceedings. Some township citizens were attracted by the slogan “Back to I-94,” and the Township originally regarded I-94 as a logical choice because of anti-proliferation principles. But the Township has persistently resolved to base its position on science, planning principles and the hard facts developed before the ATF and in these proceedings, and it became clear that Route D was simply not a technically feasible option. The Township’s commitment to science, further led it to resist any strategy that would seek to exploit public concerns about electro-magnetic fields. By sound technical analysis, the Township concluded that Route G was superior to all other routes.

The Township's commitment to science and hard facts likewise led the Township to retain a nationally recognized consulting firm to make recommendations based on ecology, biology, and planning principles, and that firm was instructed to provide its honest, science-based recommendation on the route which best minimizes environmental impacts. The Township has listened as well to the technical concerns advanced by Xcel during the ATF proceedings, the testimony and comments. The Township believes that the evidence overwhelmingly supports choice of a southerly route option and further establishes that Route G is the best of the southerly route choices.

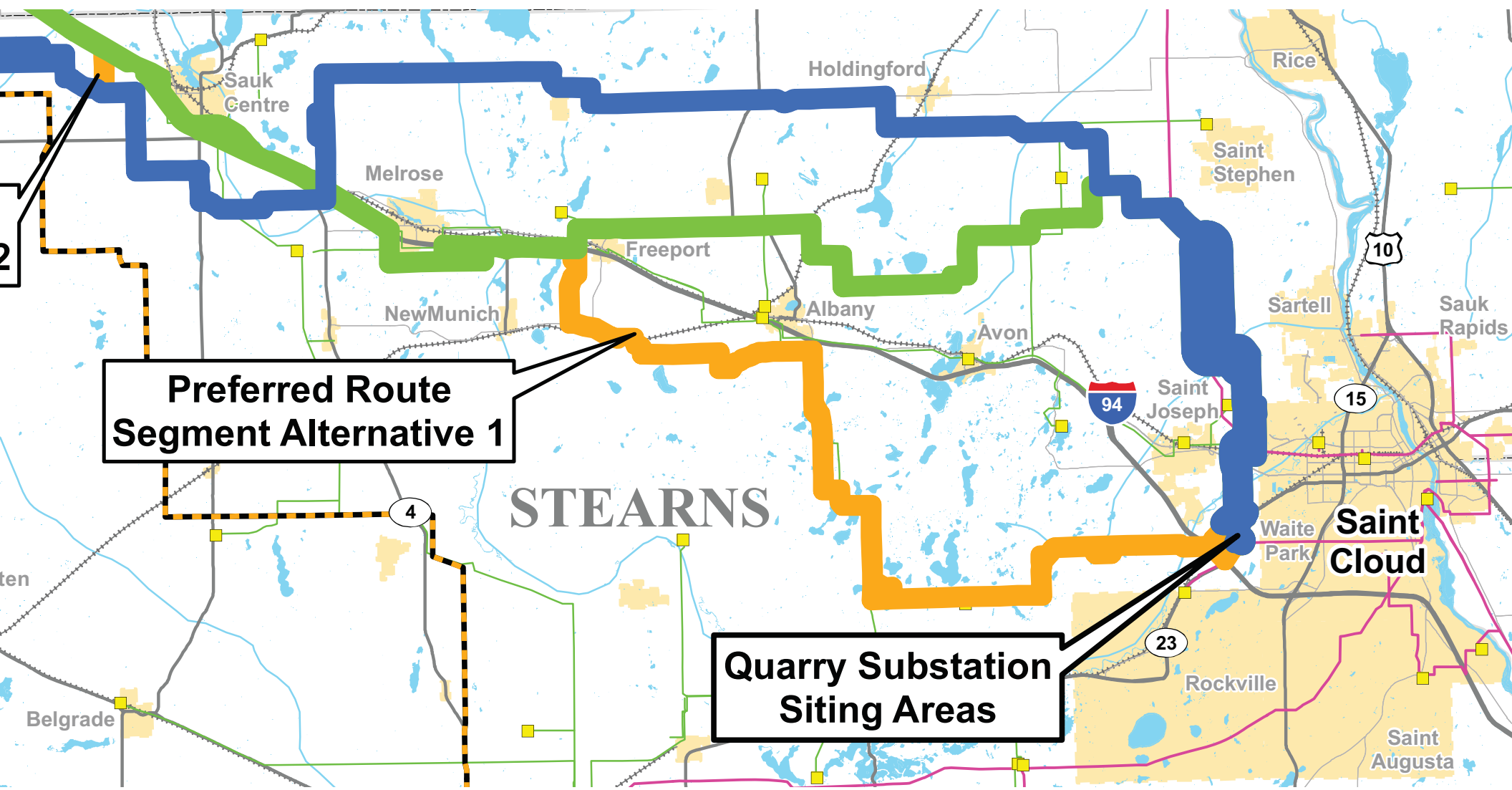
The label "Preferred" when applied to the northerly route is somewhat misleading in this context, because actually, both Route E and the Preferred Route were simultaneously advanced by Xcel when it filed its original route application in October of 2009.<sup>1</sup> See Application Appendix A<sup>2</sup>, (Closing Argument Plate 1.) As you can see on the following Plate 1, Xcel's application actually advanced Preferred Route Option 1 as a method to avoid the environmental and other difficulties caused by the northerly route. The designation "Route E," instead of Preferred Route Option 1, occurred during the Citizens Advisory Task Force Proceedings. During this brief, we follow the ATF convention and refer to the southerly option of the Preferred Route (Option 1) as Route E to avoid confusion.

The northerly branch of the Preferred Route departs I-94 on the north side, meanders here and there in the easterly direction, following streets, roads, and significant stretches of open country, traverses the northerly edge of the Avon Hills forest, passes through bogs and wetlands

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<sup>1</sup> In fact, during ATF proceedings Lahr consistently stated the "Preferred Route" was not to be construed as a preference. Rather, he indicated that the Public Utilities Commission required the applicant to make a designation. See Minutes of the ATF from 2/4/2010.

<sup>2</sup> Application to the Minnesota Public Utilities Commission for a Route Permit for the Fargo to St. Cloud 345 kV Transmission Line Project, Docket #ET2, E002/TL-09-1056, October 1, 2009.



**Preferred Route  
Segment Alternative 1**

**Quarry Substation  
Siting Areas**

and other environmental resources of high quality. It then joins Route A and turns south. These two routes then jointly follow another power line for a time, then proliferate again and arrive at the St. Cloud substation. Route E, Xcel's southerly preferred option, departs I-94 near Freeport and runs to the South. It exhibits 6.4 miles less proliferation than the northerly Preferred Route option. Moreover, it is superior to the northerly Preferred Route in almost every respect—from its impact on residential structures, to its impact on regions of biological significance, to its lesser impact on the Avon Hills. Xcel's southerly Route E does significantly improve upon the northerly Preferred Route, but just not as much as the ATF's proposed Route G.

The Advisory Task Force designed Route G to improve upon Xcel's existing route options, including Route E, and it does this in a number of ways. It runs through flatter regions with less erodible soils and follows straighter, generally wider county roads that supply greater easement setbacks. As Mr. Birkholz explained, Route G was devised by the ATF to reduce agricultural impact, avoid Albany and Avon, and minimize the impact on ecological and conservation areas:

One of the issues that was looked at is using a route like this impacted larger tracts of farmland. In other words, one of the priorities that the advisory task force discussed was smaller parcels and impact on smaller parcels, a potentially larger impact on smaller parcels and larger number of impacts. So this route [Route G] was designed to do that and avoid Albany and Avon, again, of course. And then to avoid the ecological or conservation area. (Tr. Volume 5, 132)

An impressive range of evidence supports the conclusion Routes E and G are superior to the Preferred Route, and that Route G is superior to Route E. That conclusion is supported by the environmental experts including the Department of Natural Resources, Nature Conservancy, Audubon Society, Avon Hills Initiative, Ecologist Dr. Chapman, as well as witnesses Kroll and Bresnahan. In fact, there really is no credible competent evidence that would allow the

conclusion that Preferred Route is superior to Routes E or G. Here are some of the major comparison factors, each of which is discussed in more detail in subsequent sections.

1. **Preferred Route Inflicts Greater Biological Route Impact:** The Preferred Route impacts seven times as many significant biodiversity sites. It also impacts about double the number of acres of native plant communities in comparison to Route E or Route G. The north Preferred Route option bisects a biologically significant area which connects with the St. Wendel's Bog Complex. Route E exhibits modest impact in that it abuts a Legacy Marsh Wildlife Management Area, whereas Route G avoids directly impacting significant natural areas. See Section II-D, below and EIS Table 3.6-10:12. Public Comments (Johannes and Lyon).<sup>3</sup>
2. **Preferred Route Inflicts Significantly Greater Proliferation:** Both Routes E and G exhibit significantly less proliferation than the northerly Preferred Route option. The Preferred Route engages in 17.8 miles of proliferation, as compared to 11.4 miles and 12.0 miles for Routes E and G respectively.<sup>4</sup> Moreover, the Preferred Route proliferates in areas of significantly greater environmental significance. These facts trigger the "feasible and suitable alternative" standard of the PEER case, discussed in detail in section IV below. People For Environmental Enlightenment and Responsibility (PEER), Inc v. Northern States Power, 266 N.W.2d 858 (Minn. 1978). Schwalbe comment #319; Schmitt comment #472-473.
3. **Preferred Route Inflicts Unacceptable Damage to Avon Hills Region:** Although Xcel seems to suggest that each of the three routes impacts the Avon Hills region equally, this conclusion is not supported by the

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<sup>3</sup> Public Comment #280, Donna Johannes, "I strongly oppose the North "Preferred & Alternate Route A". Negative effects on ecology and environment, including natural areas and wildlife (ex. Shepards Lake, St. Wendel Swamp, which was given to the DNR from Stearns County. A rare swamp with unusual cold water bog and home to rare plants and numerous lady slippers.) And other ecologically sensitive wetlands and areas." Public Comment #327, Joe Lyon, "Whereas, Shepard Lake is an important part of an exceptionally rare St. Wendel Bog complex and is just a little over two miles from the St. Wendel Bog area which is a designated scientific and wildlife management area by the MNDNR. The distance between the two areas results in Shepard Lake being an important migration and nesting supplement to the extremely rare and unique wildlife and birds that reside in the St. Wendel Bog area.

<sup>4</sup> The Final Environmental Impact Statement masks the true proliferation comparison by including that portion of the Preferred Route that follows field boundaries in the total. As a result, 13.2 miles of the Preferred Route which do not utilize existing right-of-way are given improper credit for proliferation avoidance. This practice—of summing field boundaries and other natural geographic features – renders use of the Final EIS almost useless for route proliferation analysis, See Section IV-A,B, below. This is especially problematic, because use of existing right-of-way corridors was by far the highest priority of the Citizens Advisory Task Force. See Section II-C, below.



evidence. All testimony, and the great weight of comments, supports the conclusion that Route G has the least impact on the environmentally significant Avon Hills region and that the Preferred Route has the most impact, by far. See Section II-B, *infra*. EIS 3-48:49.

4. **Preferred Route Impacts More Residences:** The Preferred Route impacts more residences within 500 feet of the alignment (93) than either Route E (76) or Route G (88). According to EIS Table 3.6-2, the Preferred Route impacts almost 200 residential structures within the route area, whereas Routes E and G impact about 90 and 100 respectively. The Preferred Route impacts over 400 non-residential structures within 500 feet of the route areas, whereas Routes E and G impact about 275 and 250 respectively. See Tables section II-D *infra*; EIS Table 3.6-4.
5. **Preferred Route Has More Wooded Lands in Right-of-Way:** The Preferred Route impacts significantly more acres of wooded lands (132 acres) than Route E (72 acres) or Route G (78 acres). In addition, the Preferred Route impacts over four times the area of forest wetlands in the right-of-way (32 acres) than either Routes E or G, both of which impact only 7 acres of forested wetlands. EIS Table 3.6-8;.
6. **Preferred Route Inflicts Greater Impact on the 100-year Floodplain:** The Preferred Route permanently impacts significantly more square feet of the 100-year floodplain (25 acres) than either Routes E or G, both of which impact 14 acres. This and other similar comparisons are manifestation of the more difficult and challenging terrain through which the northern Preferred Route option runs. Draft EIS Appendix K, 6-11; Pubic comment #158<sup>5</sup>; Applicant's Brief, p. 61.<sup>6</sup>
7. **Preferred Route Inflicts Greater Impacts on the Avon Hills Important Bird Area:** The Preferred Right-of-Way impacts significantly more acres of the Avon Hills Important Bird Area (IBA) (275 acres) than either Route E (160 acres) or Route G (155 acres). EIS 3-48:53; EIS Table 3.6-10:12; Russell comment #436.<sup>7</sup>

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<sup>5</sup> Hyla comment #158, The north routes contain a significantly higher number of floodplains impact versus other routes. And this is highly regulated by the state and FEMA.”

<sup>6</sup> Applicant's brief, page 60 states, “Numerous surface water resources including lakes, rivers, streams, wetlands and floodplains will be crossed by or located in the right-of-way of the proposed routes.”

<sup>7</sup> Russell comment #436, “The Avon Hills Important Bird Area includes 70,000+ acres of Avon and Collegeville Townships and parts of St. Joseph, St. Wendell, Farming, and Wakefield Townships and includes all of the St. John's Arboretum, several Federal waterfowl production areas, and two state natural areas. This and Camp Ripley to the north are the two most important hardwood forest tracts in central Minnesota for avian resources and as such would lose many of their attributes and value from forest

8. **Route G Offers the Best Road Right-of-Way:** Route G utilizes more robust County road rights-of-way, whereas the northerly Preferred Route and Route E are more frequently on smaller streets and back-roads.<sup>8</sup>
9. **Preferred Route Inflicts Greater Impacts on Agricultural and Commercial Zoning:** According to Final EIS, the Preferred Route impacts 10,000 acres of agriculturally zoned land, while Routes E and G each impact about 6,000. The Preferred Route impacts about 700 acres of commercial/industrial zoned land, whereas Routes E and G would impact 200 and 140 respectively. The impacts on residential zoning are not materially different. Moreover, Route G was specifically designed to reduce impact on farmsteads by running through regions where farms are larger, and thus have significantly more room to accommodate right-of-way. See Birkholz testimony (Tr. Volume 5, 132-134).

Routes E and G are preferable from the standpoint of proliferation and from the standpoint of impact on environmental areas of significance. Both of these considerations have significant legal consequences under the PEER decision, People for Environmental

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fragmentation that such a power line would likely cause. This is one of the most important breeding areas in the state for several species of birds that are on state, Federal, and Minnesota Audubons species of conservation concern lists. These lists include the Trumpeter Swan (migrant, occasional on ponds adjacent to I-94 at St. John's University), Bald Eagle (nests at south end of St. John's and .4 mile south of I-94 in Albany, other nests may be present in Avon Hills), Wood Thrush(probably breeds at St. John's, recorded in May various years), Cerulean Warbler (breeds), Golden-winged Warbler (may breed at St. John's), Mourning Warbler (breeds), and the Red-shouldered Hawk (2 pairs north of I-94 at St. John's, likely one pair west of I-94 near Lake Hillary where courtship has been documented). Several local breeding species such as Red-shouldered Hawk, American Woodcock, and Common Nighthawk perform spring aerial courtship flights that would risk collision with any towers and transmission lines in their habitat. Migrant species of "special concern" (Minnesota's List of Endangered, Threatened, and Special Concern Species updated 11/13/07) that have been seen in the vicinity of the I-94 corridor include Marbled Godwit, Wilson's Phalarope, Franklin's Gull, and Forster's Tern all found at or flying over the St. John's ponds adjacent to I-94 (south/west side). All of these species are protected by the Migratory Bird Treaty Act. Serious fragmentation that this line would cause would likely increase existing Brown-headed Cowbird nest parasitism and mammalian predation on these and other protected bird species in the Avon Hills. Migratory Birds urges that serious consideration be taken into routing this line to the south or north of the Avon Hills to avoid this very resource-rich landscape."

<sup>8</sup> "Routes G and H follow existing road rights-of-way or other rights-of-way for a good three-quarters of their lengths, roughly, whereas the northern routes do it to a lesser extent..." "G and H do a very good job of striking the balance between just running it down Highway 23 or down 94... they do much better than the preferred route and Route A where you're down in the 50 to 60 percent range running along right-of-way." (Tr. Volume 3, 114-115, 140).

Enlightenment and Responsibility (PEER), Inc v. Northern States Power, 266 N.W.2d 858 (Minn. 1978), because PEER establishes a “feasible and suitable alternative” standard that prohibits proliferation or other significant environmental impact if a feasible and suitable alternative exists. The PEER decision specifically overturned a Commission decision which approved proliferation over a 7 mile route segment of a much longer 375 kV line, to avoid taking seven homes. We show in section IV and section V that Xcel’s suggestion that PEER allows the Commission to ignore a “mere 7 miles” of proliferation is inconsistent with the clear holding of PEER, which requires comparison of individual segment options on their individual options. In fact, the PEER decision struck down – reversed as unlawful – a decision to proliferate on a 7 mile route segment, even though the segment under review was a tiny percentage of the entire route. PEER thus stands for the following legal propositions:

PEER’s anti-proliferation principle is a fundamental environmental principle protected by MERA, MEPA, and Minnesota’s common law of environmental protection and not a mere power line siting criterion, to be disregarded as the Commission or applicant deems convenient.

The anti-proliferation principle is not trumped by power line siting statutes and regulations, even if they were passed subsequent to the environmental protection statutes from which anti-proliferation principles flow.

Anti-proliferation principles apply to route segment selection, and a small route segment which violates those principles will be struck down, unless there is no feasible and prudent alternative.

We turn now to the body of our argument.

## **II. Overwhelming Evidence Establishes that Routes G and E are Significantly Less Damaging to the Environment than the Northerly, Preferred Route Option.**

**A. All Environmental Experts Agree that Southerly Routes are Preferable to the Northerly Routes.**

A review of the testimony and comments shows that the endorsement of Route G and Route E by persons and organizations with environmental credentials is essentially unanimous. The endorsements of the southerly routes include the Department of Natural Resources (DNR), Nature Conservancy, the Avon Hills Initiative, and the testimony of ecologist Dr. Chapman.<sup>9</sup>

The final Department of Natural Resources review of route options was based on an intense post trial DNR staff review in response to the Administrative Law Judge's request that the DNR clarify its original remark. The DNR obliged this request with a careful and searching review. As the January 5, 2011 letter explains:

DNR staff from this area have conducted an additional review of each portion of this route section and connecting portions of the Alexandria to Sauk Centre Section, primarily using DNR databases such as the Natural Heritage Information System, Geographic Information System (GIS) layers available through the DNR Data Deli, United States Fish and Wildlife Service (USFWS) "Thunderstorm" maps showing waterfowl habitat, and figures included in the appendices of the Draft EIS.

After that intensive review, the DNR recommended that the ALJ select the Preferred Route along I-94 until it reaches the junction point with Route E, and then depart onto Route G with Option 11.

The DNR recommends following the route labeled as Route G (pink) with Option 11 (orange) ... G with Option 11 is generally recommended in this section for avoidance of effects to habitat and wildlife associated with MCBS sites of bio-diversity significance and public waters...

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<sup>9</sup> MnDNR to Judge Heydinger, Document ID 20111-58417-01, Efiled 1/11/11; Nature Conservancy to Judge Heydinger, Document ID 201012-57785-01, Efiled 12/22/2010; Avon Hills Initiative to Judge Heydinger, Document ID 201012-57503-01, Efiled 12/15/2010; Chapman Testimony (Tr. Volume 3, 113-115).

The DNR comments are consistent with, and reinforce, the comments submitted by the Nature Conservancy, an organization known for a long history of cautious and careful advocacy. In its December 1, 2010 comments, the Nature Conservancy begins by explaining that its “mission to preserve the plants, animals and natural communities that represent the diversity of life on Earth by protecting the lands and waters they need to survive.” Its comments endorse in many respects, the written direct testimony of Dr. Kim Chapman<sup>10</sup> regarding the unique nature of the Avon Hills Region:

The Conservancy has identified through its science-based planning methods a geographic area that encompasses portions or all of Avon, Collegeville, St. Wendel, and St. Joseph Townships in Stearns County as a priority conservation area for its unique and irreplaceable resources. The Avon Hills conservation area contains both large blocks of unfragmented native maple, basswood and mesic oak forests of regional importance, home to area-sensitive and specialist species such as the cerulean warbler and red-shoulder hawk, and a largely unfragmented tamarack swamp system of high and outstanding biodiversity significance.

The Nature Conservancy continues:

As Kim Chapman, Principal Ecologist for Applied Ecological Services, Inc. wrote in his direct testimony on October 29, 2010, "the large forest patches and extensive forest cover in Avon Hills, as well as populations of area-sensitive and specialist species, are rare in the Prairie-Forest Border region and should be protected from additional habitat fragmentation. The clearing of forests along I-94 on Routes C and D or intrusions on a large forest patch elsewhere in the Avon Hills, will increase 'edge effects' in the affected forests. Once in place, the wider and permanent corridor cannot be reversed, precluding the potential to reduce forest fragmentation in the vicinity of the corridor, and ensuring that the effects of grassland and edge species on nearby forest species will continue long term."

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<sup>10</sup> Ecologically, Route G and, to a lesser extent, Route H have the least impact on the large forest areas that define the Avon Hills ecological system. And also they have a minor effect on the ecological - the rare ecological resources such as high-quality natural communities and rare species. So from that standpoint, they're superior to other routes which seem to have-impinge more on the large forest blocks of the area where the sensitive and special species are residing, and they have - they have more of an effect- the other routes have more of an effect on some of the rare features as well (Tr. Volume 3, 114:5-115:2).

The greatest concerns regarding forest impact focus on the Avon Hills Region, to which we now turn.

**B. The Northerly Route Inflicts Unacceptable Impacts on the Avon Hills Region Which may be Avoided by a Feasible and Suitable Alternative**

As we explained in our intervention petition, the Avon Hills region is characterized by rolling hills of the St. Croix Moraine, deposited by the glaciers 10,000 years ago, and is dotted with wet depressions, pot holes and lakes. Within the Avon Hills region is located the Avon Hills Forest Scientific and Natural Area (SNA).<sup>11</sup> The SNA contains large tracts of oak forest, forested swamp, marsh, and sedge meadow native plant communities. It is home to two species of rare birds that only inhabit large forests, cerulean warblers and red-shouldered hawks. It is known for hills, lakes and streams, lovely scenery and diverse wildlife habitat. The Avon Hills Initiative (AHI) has been formed as a community based organization to preserve the rich cultural history, natural beauty, and biological diversity of the Avon Hills region for generations to come.

In fact, it is the attempt to run the Preferred Route through this challenging terrain that accounts for many of the problems with the Preferred Route. Nobody contends that Xcel set out intentionally to ignore the environment, destroy forests, or proliferate off through woods, wetlands and open spaces. The problems with the Preferred Route arise instead from problems inherent in trying to run a power line route through hilly, forested, environmentally sensitive terrain. One of the reasons that roads in this area don't run straight for very long is that the road builders too had great difficulty finding locations where wide roads could be run flat and straight.

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<sup>11</sup> The Scientific & Natural Areas (SNA) program preserves natural features and rare resources of exceptional scientific and educational value. The SNA program seeks to "Preserve and perpetuate the ecological diversity of Minnesota's natural heritage, including landforms, fossil remains, plant and animal communities, rare and endangered species, or other biotic features and geological formations, for scientific study and public edification as components of a healthy environment." (MnDNR webpage, <http://www.dnr.state.mn.us/eco/sna/index.html>)

The smaller farm sizes cause farmsteads to be clustered more closely to narrower roads. The hilly landscape and highly erodible soils create significant environmental challenges in this region.<sup>12</sup> The prairie pot hole-based characteristics of this area, as opposed to the flatter, more open terrain of Route G, create challenge after challenge to the route designers.

Despite Xcel's best intentions, the Preferred Route imposes unacceptable impacts on the Avon Hills region. As Dr. Chapman testified, the Avon Hills region is ecologically significant for several reasons:

It is a regionally significant because it encompasses a rare complex of undeveloped forest, native plant communities, and wildlife that preserves the historic environment for this region. The majority of the Avon Hills lies within the Hardwood Hills ecological subsection. The area was predominantly forested in 1850 and today key habitats are upland deciduous forest, non-forested wetland and prairie. Surrounding the Avon Hills the predominant vegetation historically was prairie and savanna and today is cropland. A distinct set of species is known to occupy forests and wetlands in the Hardwood Hills. These species are area-sensitive and specialist species, have larger populations in the Avon Hills than outside, and will decrease in abundance as a result of habitat fragmentation.<sup>13</sup>

The importance of the Avon Hills Region to Central Minnesota as an environmental asset is echoed throughout the written comments and testimony. See for example, Testimony of witness for St. John's Abbey, Tom Kroll (Tr. Volume 3, 103-106); Comment of Avon Hills Initiative,

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<sup>12</sup> Bresnahan commented on these characteristics, noting that "... there's a very unique environment in Avon Township where there's very small farms on highly erodible soils... the severe topography of the hills in that particular area and the highly erodible soils place a variety of problems, given water contamination, invasive species, and being able to work in long-term planning for when individuals need to have services, water and sewer. So, given the problems in the past in this particular area it was important that the township identify those soils and make sure that we locate human settlement where these services can be provided, water, sewer, and electricity." (Tr. Volume 4, 27)

<sup>13</sup> Dr. Chapman continues: "In the early 1990s the Avon Hills was recognized as a regionally significant ecological area because it contains some of the largest remaining patches of native hardwood forest in the Prairie-Forest Border Ecoregion. ... The 40,000-acre Avon Hills is 36% forested, with large forest blocks occurring near each other Agricultural regions around the Avon Hills have a total forest cover of 5-12% and few or no large forest blocks." (Direct Testimony of Dr. Kim Chapman, page 2).

December 2, 2010<sup>14</sup>; Oral Testimony of Dr. Kim Chapman<sup>15</sup>; Comment of Audubon Society, January 5, 2011.<sup>16</sup> A power transmission line threatens the integrity of the natural forested area in a variety of ways: it encroaches on the outer edges of the forested region, diminishing its reach and cuts a wide clear-cut swath through these areas eliminating natural plant communities and introducing new invasive plant species that threaten to expand into the uncut forest areas. Additionally, it creates a zone of periodic invasion by power company vendors, who clear or poison emerging vegetation and it reverses the collaborative efforts of government and community to restore the natural environment as it once existed.

In this regard, a number of witnesses and commenters emphasized that the Preferred Route attacks the very region of the Avon Hills which local governments have worked so hard to protect through planning and zoning controls, and through community cooperation.<sup>17</sup> In collaboration with township government, the county comprehensive plan was modified in 2008

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<sup>14</sup> “The Avon Hills Initiative has worked hard to preserve the natural habitat~ rural character, and scenic values of the Avon Hills.....As Chair of the Avon Hills Initiative, I urge your Honor to avoid those routes which cross lands that have already been identified as having special natural resource values (Preferred Route, Routes A, C, & D) and especially those which have been designated through a public process as worthy of special zoning protection, (Preferred Route and Routes C & D).” (Document # 201012-57503, public comment)

<sup>15</sup> “From an ecological standpoint, the most important thing about the Avon Hills is the fact that you have large blocks of contiguous forest habitat indicated-and the functionality of these habitats, as indicated by the presence of species, that you don't find just anywhere. You typically find them [species] in large contiguous blocks of habitat or high-quality forest habitat.” (Volume 3, 117:20-118:2)

<sup>16</sup> “Audubon feels strongly that the route should avoid the Avon Hills area in Steams County.....The Avon Hills Important Bird Area includes all of Avon and Collegeville Townships and parts of St. Joseph, St. Wendel, Farming, and Wakefield Townships in Steams County (map attached) including the campus of St. John's University. This area is important because of its extensive forested landscape and the populations of Red-shouldered Hawks, Blue-gray Gnatcatchers, Wood Ducks, Cerulean Warblers and other species that are found here. A number of Waterfowl Production Areas managed by the U.S Fish and Wildlife Service are within the Important Bird Area, as are two Minnesota DNR Scientific and Natural Areas, the St. Wendel Bog, and the St. Johns Arboretum.” (Document ID #20111-58663-05)

<sup>17</sup> The Comprehensive Plan notes that Avon Township “includes the largest concentration in the county of steep slopes, wooded areas, erodible soils, wetland complexes and high-quality native plant communities.”



to create a conservation overlay district that included lands in Collegeville Township, St. Wendel Township, St. Joseph Township, and Avon Township. Two townships, primarily Collegeville and Avon Township, elected to implement intensive planning which would foster—indeed require—long term protection of the Avon Hills region.<sup>18</sup> Other townships elected not do so. As Mr. Kroll explained:

In theory, all the areas had high conservation value, but only lands then - at a township option, only lands in Avon Township and Collegeville Township plus just those acres of St. John's in St. Wendel and St. Joseph, were included in the final conservation overlay district.<sup>19</sup> (Tr. Volume 3, 103)

This explains, Dr. Chapman’s testimony about the doubly unique nature of the Avon and Collegeville portions of the Avon Hills Region:

As a direct result of the 2003 Avon Hills Initiative, protective partnerships and regulations were developed to conserve the region's natural resources and aesthetic beauty. The Avon Hills Initiative Conservation Vision was adopted as a Conservation Overlay District by Avon and Collegeville Townships as well as the portions of St. Wendell and St. Joseph Townships within St. John's University ownership. In its Comprehensive Plan and zoning ordinances, Stearns County created for the Avon Hills a "Natural Resource Conservation Design Only" land use zone. **The ordinance is regarded as a model for proactive protection and conservation against development impacts.** Among other protections, it

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<sup>18</sup> According to Peter Dwyer, AHI Chair and member of ATF, “One of the most recent accomplishments which benefits the Avon Hills area is the passage of the revised Stearns County zoning ordinances in May of 2010. These ordinances were based on the collective knowledge that our local communities gained through a variety of land use conferences which featured nationally-recognized experts. The new ordinance is one of the strongest in the USA for preserving the rural character when development occurs. 80% of any land being developed in the designated areas must be retained as open space through permanent conservation easements. Townships had the option of participating in this extra level of conservation protection. Avon and Collegeville townships chose to designate and enroll significant portions of their townships for this protection. St. Wendell and St. Joseph Township chose not to include any acres except for those specifically requested by Saint John’s.” Avon Hills Initiative to Judge Heydinger, Document ID 201012-57503-01, Efiled 12/15/2010

<sup>19</sup> At least one witness from Farming Township contended that Farming Township recognizes the Avon Hills Region as an important resource. But his testimony failed to acknowledge the important distinction between placing the region on the map (which Farming Township may have done) and actually imposing special planning and zoning controls, which Farming Township simply has not done. Kroll Testimony (Tr. Volume 3, 105). See also Comments of Avon Hills Initiative, supra.

mandates that 80% of a land parcel being developed must be preserved in a natural state and development plans must follow guidance for natural resource conservation and management. (Dr. Chapman Direct Testimony, pages 5-6; Emphasis added)

The northerly Preferred Route option attacks that portion of the Avon Hills region which is receiving the highest degree of regulatory protection, and the portion where restoration efforts are most active and productive.

### **C. The ATF Final Report Raised Significant Concerns with the Preferred Route and Prioritized Proliferation Avoidance**

The Citizens Advisory Task Force was convened to address concerns arising from the applicant's proposed Preferred Route and alternative route. Predominantly, its membership consisted of representatives of the local governments, townships, cities and the County, charged with planning, zoning—the elected representatives of the citizens impacted. The ATF operated with the assistance of the Office of Energy Assistance. Xcel representatives attended the meetings to provide technical information and answer questions. Here are the problems with the Preferred Route identified by the ATF:

#### **Cons**

- Proliferation of new corridors, 42 percent of route uses new corridors
- Longest of three applicant routes, 48.3 miles; because of length, higher cost [Note: Length of applicant routes: Preferred Route – 48 miles; Alternate Route A – 48 miles; Preferred Route Segment Alternative 1 [Route E] – 44 miles. These routes are determined by applicant from the Quarry Substation area to where the Preferred Route and Alternate Route A converge west of Melrose and east of Sauk Center. This requires extending the Preferred Route Segment Alternative 1 west along the Preferred Route in order to make a true comparison.
- Seventeen angle structures used at 90 degree turns of line; angle structures are three times the cost of tangent structures
- Long-term impact on St. Wendel tamarack bog (These include wetland fill impacts for footings and construction/maintenance access, as well as vegetation impacts from the removal of tamarack trees and other wetland vegetation.)
- Impact on native vegetation noted in Stearns County mapping; also lakes impacted

- Proliferation of environmental concerns including lakes, high value native vegetation, and prairie grasses in area (Minnesota Department of Agriculture reseeding program – of native prairie grasses – in area along County Road 2).
- Long-term maintenance of the route corridor will require routine spraying of chemical defoliant to manage vegetation.
- Future development area for City of St. Joseph and Waite Park; land has been identified in a comprehensive plan for development; Also, land has been purchased and some infrastructure (sewer and water) has been put in place
- Impacts development area of Tressel Ridge in Albany Township
- Route crosses area of high rural population in St. Wendel Township; where there is a higher density on east side of township: The area is characterized by people, small tract ownership of farms, and area plotted for development
- Route crosses orderly annexation area in St. Wendel Township west of St. Joseph and Waite Park
- Population growth potential area in St. Wendel Township west of St. Joseph and Waite Park;
- More homes reside within 1000 foot of center line for route – 75 identified by applicant with task force members noting some homes were missed or not counted; an ATF member noted 105 homes identified as within 1000 foot center line for route in all of St. Wendel Township
- Area noted above in St. Wendel Township has a high concentration of prime farmland; an ATF member noted that Stearns County Comprehensive Plan's top priority is the preservation of prime farmland. The ATF member noted that Brockway Township also had prime farmland but another member noted that prime farmland soils are primarily in the western half of Stearns County.
- Twenty-seven documented century farms are crossed by the Preferred Route
- Task force member noted that the townships of St. Wendel, St. Joseph, and Collegetown are the three most difficult areas to deal with because of all the demands on the area.

You can see on Appendix D to the ATF report that avoidance of proliferation was by far the highest priority of the ATF members, drawing 14 votes out of the 14 Commission members. The next closest priority drew nine of 14 votes, and all the rest drew well substantially fewer. While Xcel argues that proliferation should be a lower priority than other concerns, that contention is simply not supported by the representatives of local government closest to the people.

## Appendix D

# Freeport to St. Cloud Advisory Task Force

January 22 and February 4, 2010

**Identification of Impacts and Issues as prioritized** - *What land use planning or other impacts and issues need to be considered in the evaluation of proposed transmission line routes and/or sub-station locations?*

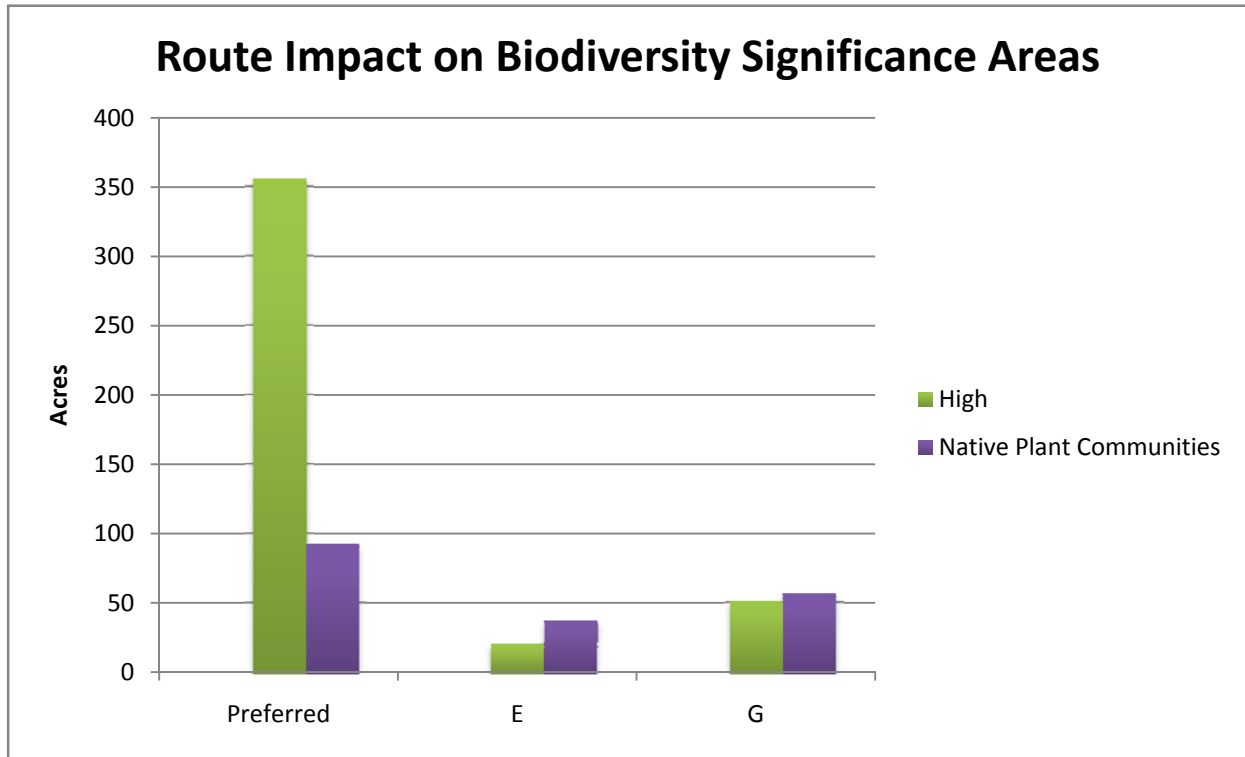
Design considerations	Environmental impacts	Economic impact	Impacts on residents (direct and indirect)			Historical Implications	Zoning impacts
			Public health and safety	Aesthetics	Electronic interference		
<i>Top Priority Fourteen votes</i>	<i>Second Priority Five votes</i>	<i>Third Priority Three votes</i>				<i>Third Priority Two Votes</i>	<i>Second Priority Six votes</i>
<ul style="list-style-type: none"> <li>• “State of the art” project: option to go underground and address aesthetics, some environmental concerns, public health and safety, impact on residents, and greater security from weather</li> <li>• <i>Follow existing public use corridors</i></li> <li>• <i>Avoid proliferation of new corridors (Eleven of the 14 votes were for these two items in this category)</i></li> </ul>	<ul style="list-style-type: none"> <li>• Environmental Impacts: 150 ft. swath, trees, significant natural resources in the area – bogs, lakes, wetlands, woodlands; bio-impact survey</li> <li>• Least environmental impact</li> <li>• Avoid wetlands, flood plains and all environmentally sensitive areas</li> <li>• Preserve wetlands and woodlands</li> <li>• Wildlife; designated areas, wildlife survey, production areas, recreational areas</li> </ul>	<ul style="list-style-type: none"> <li>• Avoid agriculture land with irrigation systems; loss of productive land, nuisance of electro-magnetic fields on ag operation</li> <li>• Irrigation potential</li> <li>• Avoid disrupting farmland by not criss-crossing farmland, only follow road right-of-ways</li> <li>• Minimize economic impact; preserve jobs and businesses, consider businesses ability to expand, preserve farmland, avoid impacts on farm operations</li> </ul>	<ul style="list-style-type: none"> <li>• Impacts on residents, loss of homes and living next to the line</li> <li>• Public health and safety, electromagnetic fields, impacts on current or newer electronic devices, e. g. pacemakers</li> <li>• Health both human and animal; magnetic fields, electrical induction issue, stray voltage issue</li> </ul>	<ul style="list-style-type: none"> <li>• Aesthetics, visual</li> <li>• Have a large buffer between power lines and residential dwellings</li> <li>• Large tract acres vs. small tract areas</li> </ul>	<ul style="list-style-type: none"> <li>• TV and radio reception</li> </ul>	<ul style="list-style-type: none"> <li>• Historical implications,, century farms and others – churches, cemeteries</li> <li>• Century farms; 100 years in business, emotion, family farms, historical, heritage character</li> <li>• Large tract acres vs. small tract areas</li> </ul>	<ul style="list-style-type: none"> <li>• Avoid city limits and defined/annexed potential city growth areas</li> <li>• Annexed future residential development along County Road 138 between Waite Park and County Road 121</li> <li>• Southwest beltway corridor between Waite Park and St. Joseph cities</li> <li>• Affect on property value</li> </ul>

**D. The Preferred Route Exhibits Vastly Greater Biological Route Impact**

According to the Final Environmental Impact Statement, the Preferred Route affects the most acreage of natural areas identified as ‘High’ biodiversity significance by the Minnesota County Biological Survey (MCBS). These sites are characterized by "high quality occurrences of the rarest plant communities and/or important functional landscapes" (Final EIS, 3-48). The Preferred Route bisects a cluster of high biodiversity significance areas which are connected to the ‘Outstanding’ biodiversity area of the St. Wendel's Tamarack Bog Scientific Natural Area, described as "one of the top two sites for Significant Biological Diversity in Stearns County and is a large wetland complex, which encompasses one of the largest remaining blocks of native vegetation in the county" (Final EIS, 3-51). Routes E and G avoid directly and indirectly impacting High and Outstanding Biodiversity sites.

**PREFERRED ROUTE HAS GREATEST IMPACT ON SIGNIFICANT BIODIVERSITY AND NATIVE PLANT COMMUNITY AREAS**

<b>Route</b>	<b>High Biodiversity Significance (acres)</b>	<b>Native Plant Communities (acres)</b>
<b>Preferred</b>	<b>356</b>	<b>92</b>
<b>E</b>	<b>20</b>	<b>37</b>
<b>G</b>	<b>51</b>	<b>56</b>



**E. Southerly Routes are equal to or superior to the Northerly Routes in Other Respects**

This section is a miscellaneous catchall section to include some detail on other aspects of the route comparisons. Of the three comparisons routes, Preferred Route the Preferred Route is the most disruptive route for residential land owners. Within the 1,000 foot route area, the Preferred Route impacts significantly more non-residential structures and over twice the number of residential structures than Routes E and G. The Final EIS (Table 3.6-2) found that 26 additional residential structures exist within the Preferred Route area than were originally identified in the Draft EIS (Table 7.1-5). No additional structures were identified for Routes E and G.

**PREFERRED ROUTE HAS GREATEST IMPACT ON  
RESIDENTIAL AND NON-RESIDENTIAL STRUCTURES**

<b>Route Impact</b>	<b>Preferred</b>	<b>Route E</b>	<b>Route G</b>
Residential Structures within 1,000 foot route area	191	91	98
Non-Residential Structures within 1,000 foot route area	409	279	251
<b>Total Structures within 1,000 foot route area</b>	<b>600</b>	<b>370</b>	<b>349</b>

The Preferred Route impacts more residential structures within the 500-foot route right-of-way than routes G and E. The Final EIS found an additional 10 residences within the 500-foot proximity that originally stated in the Draft EIS. Furthermore, as seen in Table 3.6-4 of the Final EIS, the Applicant’s Preferred Route is aligned within 75 feet of a residential structure. Routes E and G have fewer residential impacts and are aligned at least 75 feet away from any residential buildings.<sup>20</sup>

When considering the residential zoned area of the various options, Route G is superior to the Preferred Route or Route A. Route G has 79 acres of residential zoned land use, the Applicant Preferred has 90 acres of Residential zoned land use, and Route E has 122 acres of residential zoned land use. Note that the difference between Routes G and E suggest that in the locations where the two routes are separate Route E goes through areas of significantly higher

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<sup>20</sup> Lahr commented that Route E and Option 11 was created at the request of property owners. (Tr. Volume 6, 147-149)

areas of residential land, whereas Route G does not.<sup>21</sup> In other words, Route G improves upon E by reducing residential impact.

**PREFERRED ROUTE HAS GREATEST IMPACT ON AGRICULTURE- AND RESIDENTIAL- ZONED LANDS AND WOODED LANDS**

<b>Route Impact</b>	<b>Preferred</b>	<b>Route E</b>	<b>Route G</b>
Agriculture-zoned land use area within route (Acres)	10,196	6,112	6,038
Residential-zoned land use area within route (Acres)	90	122	79
Wooded lands in route right-of-way (Acres)	132	72	78

Land use and zoning characteristics of each route area is represented in Table 3.6-1 in the Final EIS. The Applicant’s Preferred Route has 10,196 acres of Agriculture zoned land within the route, the highest amount of all the route options. Routes E and G have considerably lower amounts of agriculture zoned land use, 6,112 and 6,038 acres respectively, within their route areas.

**III. Xcel Has appropriately abandoned its advocacy for Route A**

It is apparent from the Closing brief of Xcel that Xcel has abandoned its advocacy for Route A. For this reason, we have not made an effort to include Route A in our comparisons. For completeness, however, we wanted to emphasize that Avon Township believes that the

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<sup>21</sup> Birkholz explained that “Route G, in particular, that’s the route that comes down off of E, it came down from Freeport. One of the issues that was looked at is using a route like this impacted larger tracts of farmland. In other words, one of the priorities that the advisory task force discussed was smaller parcels and impact on smaller parcels, a potentially larger impact on smaller parcels and larger number of impacts. So this route was designed to do that and avoid Albany and Avon, again, of course. And then to avoid the ecological or conservation area.” (Tr. Volume 5, 132)



evidence confirms its earlier position that Route A is inferior to both the both Southerly Routes G and E. Among the considerations which militate against Route A are the following:

Route A is the second-most expensive overhead route, costing approximately \$294,000,000. In comparison, Route E's estimated cost is \$253,000,000 and Route G's estimated cost is \$255,800,000 (Final EIS Table 3.2-1). Also, following the Preferred Route, Route A uses the second-most acreage of agriculture-zoned land (EIS Table 3.6-1).

Route A is one of the most disruptive route options for residential land areas and private homeowners. Within a 1,000 foot route area, Route A has over 200 residences and has the highest total of residential and non-residential structures (EIS Table 3.6-2). Within 500 feet of alignment, Route A has over 100 residences in the route area (EIS Table 3.6-4).<sup>22</sup> Also, Route A has the highest number of residences within 150 feet of the route alignment (EIS table 3.6-4). Route A's ecological impact is also highly significant. Route A has the second highest acreage of Avon Hills Important Bird Area acres within the route area (EIS table 3.6-4). Furthermore, Route A and the Preferred Route have the greatest impact on areas of significant biodiversity (EIS Table 3.6-10).

- Route A proliferates 16 miles by our calculations (as opposed to the erroneous EIS calculation of 3.6 miles). (EIS Table 3.2-4) See part IV, *infra*.

The decision to avoid Route A is likewise supported by the recommendations of the environmental experts.

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<sup>22</sup> Route E-76 residences, Route G-88 residences, Preferred Route- 93 residences.

#### **IV. PEER Mandates that the Commission Must Avoid Significant Environmental Harm if a feasible and Suitable Alternative Exists**

During the hearing proceedings, we've frequently referred to the anti-proliferation aspect of the PEER decision, but it is critical to understand that PEER addresses power line siting more broadly. PEER holds that proliferation that causes significant environmental harm must be avoided if a feasible and suitable alternative exists, even if that feasible and suitable alternative requires the taking of homes. It holds that significant environmental impacts are prohibited by MEPA and MERA, and that these environmental protections trump the balancing that would otherwise be left to the Commission's discretion under the siting Act. It holds that proliferation is a form of negative environmental impact which must be avoided if a feasible and suitable alternative exists, even if that requires impacts on residences, farms and commerce. But the PEER principle applies to other significant environmental harms, even where proliferation does not occur. Thus, if the Preferred Route damages the Avon Hills and its forest, or if it damages native plant communities, that damage would have to be avoided under PEER, even if the damage was incurred by siting the line on an existing route, if a suitable and feasible alternative exist.

In this section, we proceed as follows. First, we clear up a confusion in the way that the Final EIS counts proliferation. Second, we analyze PEER in detail and show that Xcel's Brief does not acknowledge the true holding of that case. Third, we argue that a Southerly route must be selected because a Southerly route exists that avoids the significant environmental damage that all credible evidence recognizes will occur if the Northerly route is selected.

**A. The Preferred Route Exhibits 6.5-7.0 miles more proliferation through environmentally sensitive areas than Routes E and G**

In this section, we address a significant confusion in the way that the EIS tabulates proliferation. When proliferation is counted properly, it is beyond dispute that the Preferred Route has significantly more proliferation than Routes E and G.

**NORTHERLY ROUTE EXHIBITS SIGNIFICANTLY MORE PROLIFERATION THAN SOUTHERLY ROUTES**

<b>Route</b>	<b>Total Miles<sup>23</sup></b>	<b>Miles Proliferation<sup>24</sup></b>
<b>Preferred</b>	<b>47.1</b>	<b>17.8</b>
<b>E</b>	<b>43.8</b>	<b>11.4</b>
<b>G</b>	<b>44.4</b>	<b>12</b>

Proliferation prevention is environmentally important, because “unless utility lines are limited wherever possible to existing corridors, rural areas will become islands in between ever multiplying power line ribbons spreading with spider web affect across the open land.”<sup>25</sup>

Unfortunately, the Final Environmental Impact Statement does not make these differences completely transparent, because it does not report the actual miles of proliferation in an obvious way. The following table shows that Final EIS table 3.2-4 inadvertently suppresses the differences in actual proliferation shown above. Because following property and other invisible lines, the EIS makes it appear that the Preferred Route exhibits only 4.6 miles of proliferation.

<sup>23</sup> Total miles taken from Final EIS Table 3.2-4.

<sup>24</sup> Miles of proliferation computed from Final EIS Table 3.2-4, using mileage where route coincides with existing right-of-way.

<sup>25</sup> Quoted from Appellants Brief in PEER.

**FINAL EIS CONCEALS TRUE PROLIFERATION COMPARISON,  
BY INCLUDING PROPERTY BOUNDARIES IN TOTAL**

Route	<b>Actual Total Proliferation<sup>26</sup></b>	Miles following property <sup>27</sup> or field boundaries	Counted on Final EIS <sup>28</sup> Table 3.2-4 (None)
<b>Preferred</b>	<b>17.8</b>	<b>13.2</b>	<b>4.6</b>
<b>E</b>	<b>11.4</b>	<b>7.8</b>	<b>3.6</b>
<b>G</b>	<b>12</b>	<b>4.3</b>	<b>7.7</b>

The confusion engendered by both Draft EIS and the Final EIS, results from a summing of two different factors, as if they were one. PEER requires avoidance of proliferation into environmentally sensitive areas and open spaces. It prevents the acquisition of brand new route corridors when a suitable and feasible alternative is available. The statutory siting criteria involving proliferation is found in two places. There is a findings requirement<sup>29</sup> at section 216E.03 subd. 7(e); and there is an evaluation requirement which drives the content of the EIS at section 216E.03 subd. 7(b)(8). The statute requires the Commission to conduct an “evaluation of potential routes that would use or parallel existing railroad and highway rights-of-way.” This is the proliferation evaluation.

<sup>26</sup> Actual proliferation includes portion of route that is counted by the Final EIS as “none” and any portion of route that shares no existing right-of-way, even if it happens to runs along a field or property boundary. Minnesota Statutes section 216E.03 subd. 7(b)(8).

<sup>27</sup> Miles on route that proliferates—does not share existing right-of-way—but corresponds to existing property or field boundaries- Identified as “Field” in Final EIS. Minn Stat. section 216E.03 subd. 7(b)(9).

<sup>28</sup> Final EIS reports total portion of route that “parallels linear features,” by which the Final EIS means sharing rights-of-way, or running on property or field boundaries.

<sup>29</sup> “The commission must make specific findings that it has considered locating a route for a high-voltage transmission line on an existing high-voltage transmission route and the use of parallel existing highway right-of-way and, to the extent those are not used for the route, the commission must state the reasons.”

But then a separate evaluation is required by the section 216E.03 subd. 7(b)(9). That section, which the EIS calls the “field boundary” criteria, requires the Commission to report the extent of any proposed line which departs from “governmental survey lines and other natural division lines of agricultural land.” This section encourages the Commission to make sure that if a route cannot share existing right-of-way, which it should then seek to minimize the impact on farmers by putting the line in a place that reduces the damage to the farmers’ field that results from proliferation.

Following field borders is a completely different issue. If it is necessary to acquire brand new right-of-way, why then Section 216E.03 subd. 7(b)(9) requires that where possible the new right-of-way must be field and other legal boundaries where possible. The point is that farmers turn their equipment around at the edge of their fields. Generally, they would prefer that if they have to endure the creation of a new right-of-way, which the poles get located where it does the least damage to their cropping regimen, and that usually means putting the poles at the edge of their fields.

#### **B. The Term Field Borders Does Not Adequately Describe the 13.2 Miles of Proliferation Disregarded by the Final EIS**

A review of the Video prepared by Xcel suggests also that the phrase “field boundary” hardly does justice to what is actually occurring on the ground. When one views the white lines superimposed on the video by Xcel’s consultant, it appears that “field boundary” actually means artificial linear lines such as property boundary, Township section lines, dirt access roads, and occasionally field boundaries as well.

### Plate 3



Plate 3 is taken from the video along the Preferred Route, at time stamp 1:04. The white lines shown here are completely artificial, and indicate that the proposed route runs right through forest, albeit along an artificial legal boundary. This area can also be found on tile I-9, St. Wendel Township, Sections 25 and 26.

The second example, Plate 4, occurs along the Preferred Route at time stamp 3:51. Again, notice how the section lines go through significant tracts of large forested wooded area and wetlands with no physically existing, natural geographic linear features. This location can also be found on Tile I-8, Avon Township, Sections 3,4,9,10. The decision to follow the artificial white line may have some negligible benefit to the County recorder, but giving the line

credit for following linear features, as if it were not proliferating, makes absolutely no sense and if that has been done, represents a fatal flaw in the Final EIS.

Plate 4

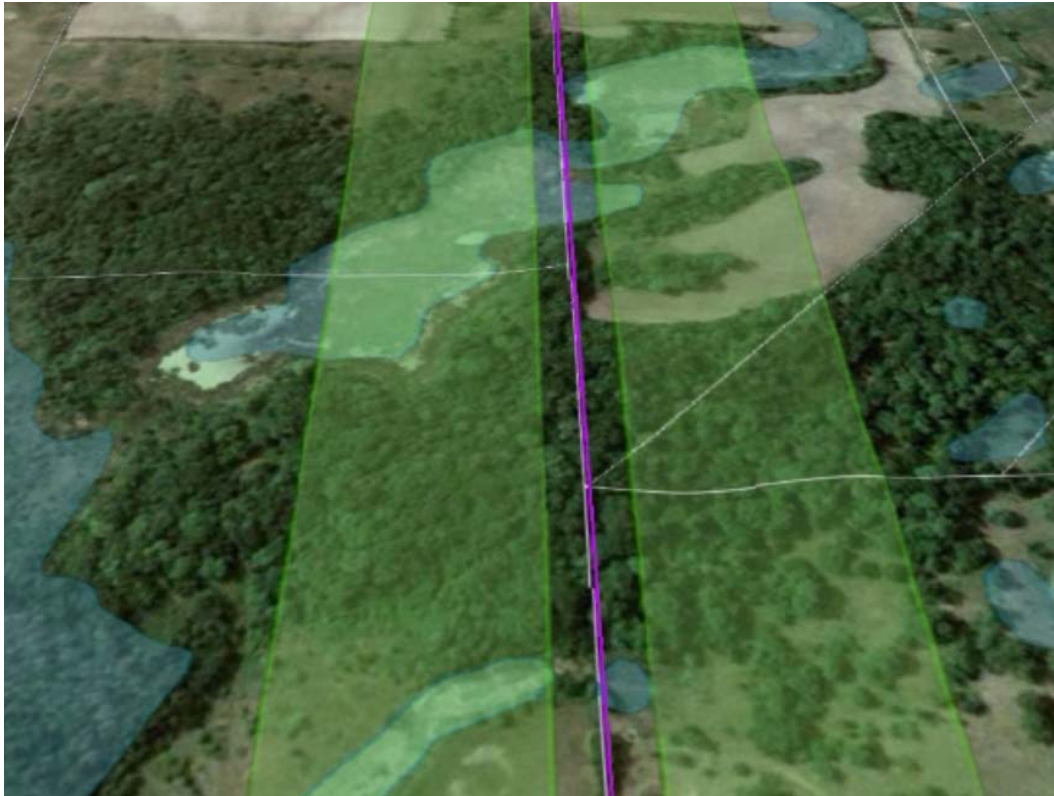


Plate 5, following is a third example. This is an example where it appears that the linear feature of section lines has been given routing priority over existing road rights-of-way in the routing process. At time stamps 2:08-2:18 of the Preferred Route, the proposed power line travels along a property boundary line through agricultural fields and wooded areas, however this boundary line is parallel and directly in between two existing roads, 380th Street and 385th Street. Evidently, there are no significant residential areas nor are there biological areas which would defend this routing choice to deviate from the road right-of-way. In fact, by following the

section line the power line fragments one of the most biologically-rich forest tracts in Brockway Township. It may be that there are good power line siting reasons for proceeding in this fashion, but our point is that the selection of the Preferred Route, with all of its challenging terrain, is what forces the route designer to have to consider proliferating along wooded areas.

Plate 5



When one subtracts proliferation mileage that happens to land on property borders and field boundaries, a subdivision 7(b) (9) issue, the result is to make it appear as if the Preferred Route is slightly inferior to Route E, but substantially better than Route G, when actually, both Route E and Route G are significantly better from a proliferation standpoint than the Preferred Route. It should be obvious that treating a line that runs off through open territory, not on



existing rights-of-way, as if it weren't proliferating, is unacceptable. Under this view of proliferation, a power line could run from St. Cloud to Fargo entirely on a brand new right-of-way, and be counted as creating no proliferation, so long as it manages to follow field and property boundaries.

**C. Xcel Fails to Distinguish Between Proliferation as a Power Line Siting Criterion and Proliferation as an Environmental Criterion Which must be Avoided under PEER**

We now reach the core of the legal issue that separates Xcel's position and our own. It is true that anti-proliferation is a power line consideration, to be weighed along with other siting criteria, but it is much more than that. As a power line siting principle, the weight afforded to anti-proliferation is subject to Commission control and regulation. The Commission's requirement that proliferation must be considered is found in Minnesota Statutes Section 216E.03 subdivision 7(e) as follows:

The commission must make specific findings that it has considered locating a route for a high-voltage transmission line on an existing high-voltage transmission route and the use of parallel existing highway right-of-way and, to the extent those are not used for the route, the commission must state the reasons.

There are numerous power-line specific practical reasons for seeking to locate power lines on existing right-of-way, where possible, some of which have nothing to do with the environmental principles considered by PEER. Co-locating a power line on a pre-existing easement reduces the amount of property which must be taken out of private hands. Or, put differently, it leaves landowners with more land to farm, or put to residential or commercial uses. Co-locating a power line on pre-existing easements reduces the cost of acquisition for the same reason. When located on highway right-of-way, the lines are far more accessible. They can be inspected and repaired more readily. Maintenance crews can access trees and prevent

interference with lines and line right-of-way with greater ease. When a power line departs from existing rights-of-way, the power company must run equipment over private property to access the line for maintenance, and we heard concerns expressed that in some circumstances, the access is done in ways that are insensitive to the property rights of neighboring properties by power company maintenance vendors. Co-location avoids these problems.

But it is a fundamental misunderstanding of the PEER principles to treat proliferation as if it were only a technical power line siting issue.

**D. PEER Requires that Proliferation or other Environmental Damage Caused by Preferred Route Must Be Avoided Because Routes E and G are Suitable and Feasible Alternatives**

We disagree with Xcel's suggestion that anti-proliferation is just one of many co-equal power line siting criteria. That is a misinterpretation of PEER. The PEER case involved a dispute over a 7 mile segment of a 375 Kilovolt line that would run from the twin-cities metropolitan area to a terminus near Virginia Minnesota. But the segment before the Court was a 7 mile segment that the Commission decided should proliferate through a forest in order to avoid taking seven homes. PEER directly rejects the suggestion in Xcel's closing statement that proliferation may be disregarded simply because it occurs only in a proportionately small segment of the power line. PEER held that the Commission's allowance of proliferation to avoid actual taking of seven homes violated Minnesota's environmental laws made applicable in administrative proceedings through the Minnesota Environmental Rights Act (MERA).

The basic concept addressed in PEER is the fact that route-sharing will always impinge on existing homes and commerce, because homes and commerce tend to locate near rights-of-way, and because rights-of-way are intentionally located near homes and commerce. As a result, if the Commission were to adopt the principle that avoidance of homes and commerce justifies proliferation, why then proliferation would be rampant. Indeed, in the PEER case itself, Xcel, the applicant NSP, acknowledged before the Environmental Quality Council that the proliferation principle required a higher level of impact on developed areas, stating:

It's our experience, after evaluation the impacts of other lines, and taking a look at it, that we would be better off to incur the immediate impact by taking more homes rather than just proliferate them out over the landscape. It is better to concentrate them in one area than spread them out. (Quoted in appellant's PEER's Brief before the Supreme Court, page 12.

When PEER was decided, the Environmental Quality Council was responsible for power-line siting decisions, and judicial review occurred in the District Court, subject to final review by Minnesota Supreme Court. The District Court affirmed the EQC's decision to authorize forest proliferation to avoid the taking of seven homes.

The problem with this balancing approach is that balancing continually leads to proliferation and incremental attack on the environment. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); County of Freeborn v. Bryson, 243 N.W. 2d 316 (1976). The argument in defense of the EQC's decision is exactly the same argument used to justify proliferation here, to wit, that anti-proliferation was a mere power line citing criterion. Accordingly, the Council argued, the Council was free to choose freely between taking homes and proliferation. It argued also that the power line siting act, and implementing regulations were passed after the laws affording environmental protection to natural resources, and

consequently the later passed power line siting statute would trump any previously passed environmental protections.

The Minnesota Supreme Court emphatically rejected these contentions. It held, first, that “Administrative decisions on the routing of HVTLs are subject to MERA as well as to other applicable environmental legislation.” 266 N.W.2d at 864. Power line siting is governed, the Court found, by the provisions of MERA in which the legislature found and declared:

"that each person is entitled by right to the protection, preservation, and enhancement of air, water, land, and other natural re-sources located within the state and that each person has the responsibility to contribute to the protection, preservation, and enhancement thereof. The legislature further declares its policy to create and maintain within the state conditions under which man and nature can exist in productive harmony in order that present and future generations may enjoy clean air and water, productive land, and other natural resources with which this state has been endowed. Accordingly, it is in the public interest to provide an adequate civil remedy to protect air, water, land and other natural resources located within the state from pollution, impairment, or destruction."

Id. This policy, the Court held, must be read together with the other lynchpins of Minnesota’s environmental law, which together form a fundamental commitment to environmental protection, a commitment which could not be sustained if protection of the environment were simply balanced as a co-equal power line siting criteria as the EQC had done. Following the lead of Michigan, the Supreme Court explained, “this court has recognized that MERA provides not only a procedural cause of action for protection of the state's natural resources, but also delineates the substantive environmental rights, duties, and functions of those subject to the Act.” County of Freeborn v. Bryson, 309 Minn. 178, 243 N.W.2d 316 (1976); Corwine v. Crow Wing County, 309 Minn. 345, 244 N.W.2d 482 (1976); MPIRG v. White Bear Rod & Gun Club, 257 N.W.2d 762 (Minn.1977).

Once a party to an administrative proceeding makes a prima facie case that a project impairs a protectable environmental resource, then, the Court held, the proponent may not proceed with the environmental destruction, unless (a) the proponent effectively rebuts with persuasive evidence the contention that there is environmental impairment, or (b) the proponent shows that there is no feasible and suitable alternative which avoids that destruction. 266 N.W.2d at 867. “We therefore conclude,” the Court continued, “that in order to make the route-selection process comport with Minnesota’s commitment to the principle of nonproliferation, the MEQC must, as a matter of law, choose a pre-existing route unless there are extremely strong reasons not to do so.”

Id. Under the PEER decision, which Xcel itself has acknowledged to be applicable and binding on the Commission in its own application, the Commission lacks discretion to approve the Preferred Route. Overwhelming and un rebutted evidence, submitted by the MnDNR, the Nature Conservancy, the Avon Hills Initiative, and Dr. Chapman, as well as the Final EIS, establish that the Preferred Route inflict significant environmental damage. Much of that damage comes via proliferation, but other damage is inflicted merely as a result of the selection of a route that runs through environmentally challenging terrain. PEER requires avoidance of significant environmental impacts, if a feasible and suitable alternative exists. Xcel itself admits that a feasible and suitable alternative does exist – having submitted Preferred Route Option 1, Route E, in its own application. We merely argue that Route G improves on that option.

#### **V. Xcel’s “End-to-End” Approach Unlawfully Would Authorize Selection of Inferior Route Choices**

At finding 171, Xcel advances its “end-to-end” theory. Simply stated, Xcel is advocating that the Commission can select a route segment that is inferior under applicable legal criteria, if the route segment is small enough in terms of the percentage of the total route, so that when the

damage done is assessed in terms of the entire route the damage done is a small percentage of the entire route. Under this theory, the Commission could destroy a forest unnecessarily, provided that the rest of the route was long enough, and free of forest destruction, simply because the destroyed forest is a small percentage of the entire route. Under this theory, the Commission could authorize the taking of 10 houses unnecessarily, even though a perfectly acceptable route alternative exists, on the grounds that 10 houses is not all that many, over a 200 mile route. Under this theory, on a 200 mile route, the Commission could let Xcel choose not to utilize ten miles of existing power line right-of-way for no good reason, simply because 10 miles is a mere ½ percent of the entire right-of-way. And, the longer the route, the more that the route length could justify environmental destruction, impairment of human settlement, or any of the other factors, because the destruction could be made to appear but a small percentage of a very long route. Short routes would have to be well designed. Long routes could be composed of a series of poorly designed route segments, the inferiority of which is excused, because they are just a small portion of the whole.

We've touched on this in the proliferation section, by pointing out that the PEER case the Court was dealing with 7 miles of a route that extended from Minneapolis to near Virginia, Minnesota. If Xcel were correct, then the Supreme Court should have said, well, 7 miles is such a tiny percentage of the entire route, that the EQC is fully justified in ignoring that damage. If Xcel were correct, then a State highway could inflict damage on a wetland even though a feasible alternative exists, simply because the rest of the extent of the highway damages no wetlands, a proposition plainly rejected by the Bryson case, supra.

The selection of Route E or G has nothing to do with any portion of the route west of Freeport. If G is selected, the rest of the route west is still just as good and the totality of the

route is improved. If route A or the modified preferred route is selected, the rest of the route west is still just as good, but the totality of the route is worse. What Xcel is basically saying is that since the route west of Freeport is pretty darn good, the ALJ can select any route, regardless of proliferation, regardless of impact on the environment, or impact on human settlement. In fact, if the so-called “end-to-end” approach is taken, one might as well have never convened the ATF in the first place. The Commission might just as well have stated, “the region east of Sauk Centre is difficult, but it’s only about 40 miles, so who cares whether we choose the best route segment in that region.”

The undersigned, a former math teacher, is inclined to approach this from a mathematical perspective. In math we say that if A is better than B, and B is better than C, then it follows that A is better than C. Or from a different perspective, if A is greater than D, then  $A+B > A+D$ . In plain English, you improve the whole by making incremental improvements in route segments, because improvement of each segment of the route causes the entire route to be improved.

Xcel’s approach leads to a preposterous result, really. Under that approach, the ALJ could select Route G, and having reduced proliferation and environmental impacts at the easterly end, could then be free to select an inferior route option out on the westerly end, on the grounds that it’s a small portion of the overall route. This idea, that Xcel is free to make bad route choices, as long as the bad route choice is dwarfed by the magnitude of the rest of the route is unsupported in the law and unsupportable. The people who live in the Avon Hills Region have the right to expect that their environment has appropriate protection whether the power company is building the route one segment at a time, or whether it is building it as a part of a 500 mile, 1,000 mile or 3,000 mile power line. Xcel’s approach is plainly unlawful.

**VI. CONCLUSION**

Avon Township submits that approving the modified preferred route (or Route A) is not only wrong, but would be arbitrary, capricious, and unlawful under the PEER decision. Xcel admits that Route E is acceptable – it is a route that was designed by Xcel itself. Route G is, by consensus, environmentally superior and comports more effectively with the planning and other objectives of the persons closest to the citizens of the region, the ATF representatives. Choosing the preferred route would inflict significant and unacceptable environmental harm, when a feasible and suitable alternative exists.

We conclude with a word about the organization of our proposed findings. We have not attempted to replicate Xcel’s efforts in proposing comprehensive findings. Instead, we have proposed findings targeted at the region considered by the ATF. We have inserted Xcel’s captions where appropriate, so as to identify the portion of the findings to which our proposals are directed. Where our proposed finding adds to, contradicts, or supplements a specific finding offered by Xcel, we have so indicated in the footnote and tried to explain the difference.

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Respectfully Submitted,

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