Case No. A11-1116

STATE OF MINNESOTA
IN COURT OF APPEALS

Northern States Powers Company, *et al.*,

Appellants,

vs.

Roger A. Aleckson, *et al.*,

Respondents.

BRIEF OF RESPONDENTS PUDAS AND ENOS AND APPENDIX

Steven J. Quam, #250673
John E. Drawz, #24326
Richard Snyder, #191292
FREDRIKSON & BYRON, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402-1425
(612) 492-7000

Attorneys for Appellants

Gerald W. Von Korff, #113232
Igor S. Lenzner, #234023
RINKE NOONAN
1015 West St. Germain Street, Suite 300
P.O. Box 1497
St. Cloud, MN 56302-1497
(320) 251-6700

Attorneys for Respondents Robert and Charlene Pudas and Matthew Enos

Michael C. Rajkowski, #195303
Sarah J. Jewell, #0392268
QUINLIVAN & HUGHES, P.A.
400 First Street South, Suite 600
PO Box 1008
St. Cloud, MN 56302-1008
(320) 251-1414

Attorneys for Respondents Brett and Nancy Hanson, John and Jeannie Stich

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases: **PAGE**

Minnesota Statutes/Session Laws:

Federal Statutes/Regulations:

Other Authorities:

APPENDIX INDEX

ISSUES PRESENTED

Are electing homeowners whose homesteads are being taken by right of eminent domain entitled to relocation benefits and minimum compensation?

FACTS AND PROCEDURAL HISTORY

This is an appeal from an interlocutory order of the District Court in Chapter 117 eminent proceedings brought by NSP against the Enos and Pudas families and others. The Pudas and Enos families are each homeowners whose residential property was designated by Petitioner (NSP) to be encumbered by power line right-of-way with massive 130+ foot towering polls and 345 KV power lines. The Pudas had lived in their home for more than 18 years. Neither Pudas nor Enos had their home listed for sale and neither had any intent to move from their home until NSP took their home by eminent domain.[1] In both cases, NSP decided to acquire a permanent easement that encompasses the entirety of the Pudas and Enos homestead properties respectively.

NSP suggests that the level of intrusion on the Pudas and Enos homesteads would be nominal[2], but the record demonstrates otherwise. Appendix RA6 - RA16 contains

---

[1] NSP argues that "the reasons underlying Respondents' elections are not relevant to the legal issues presented on this appeal," Statement of Facts and Procedural History, page 6. However, one of the reasons that our adversary system requires adjudications of real live cases is that the facts and circumstances of the case serve as concrete implementation of the statutes before the court.

[2] NSP's brief states that "The transmission line easement does not require the Pudases' residence to be altered, demolished, or moved. Nor does it require that the Pudases move." The Pudas believed, and testified otherwise, and their judgment is supported by the Power Plant Siting Act.

photographs demonstrating the extent of the impact on the Pudas property. Their home was located on 2.6 acres of land which, before the taking, was screened from adjoining I-94 by over 200 evergreen trees and surrounded by mature oaks, affording the Pudas a peaceful, retreat-like yard, a place that they could raise their children. In the summer, their large tree-enclosed yard was used by family for gardening, lawn games, entertainment, hunting and other activities.

Safety standards resulting from the proximity of very high voltage lines required clearance of trees and brush across a minimum of 150 feet right of way, and NSP consequently designated more than half of the Pudas residential property within the clear zone, which meant that the trees shielding the home from the I-94 had to be removed. After the taking, Pudas home would be exposed directly to I-94 and transversed by the 345 KV high voltage power line and tower. In addition to the clear zone, NSP designated all of the rest of the Pudas property – the entire parcel – to be encumbered by a permanent easement for access, maintenance, repairs, construction, etc, giving the utility a right to enter any part of the property at will with maintenance equipment at a time and manner of its choosing.

Matthew Enos is a 38 year-old single man who lives with an extended family in his rambler which fronts I-94. Matthew's condemnation case has recently proceeded to a commissioner's award including a determination of fair market valuation and minimum compensation. Matthew's goal in these proceedings, in addition to receiving fair

compensation, is to locate a comparable home that he can afford that allows him reasonable access to his current employment, and to make that happen prior to the energizing of the line. As of the date of writing, Matthew has not yet received relocation services from NSP.

In October of 2010, NSP commenced a petition for eminent domain seeking to take easements covering the entirety of both the Pudas and Enos homestead. NSP sought quick-take of the easements covering both families homesteads. Both families decided that living with a high voltage power line was unacceptable, and they exercised their rights under the Power Plant Siting Act to insist that NSP take the fee. Because the easement designated by NSP covered the entire homestead, the takings were automatically converted to a fee taking by operation of law[3]. From that point further, the Pudas and Enos families became subject to the same legal consequences and same dislocation pressures as any other home owner that is the target of a taking. They could not rescind their election if NSP refused to pay compensation sufficient to allow them to purchase a suitable home. Without relocation protection they could be evicted even if they were unable to find a suitable replacement home. They could not control the time of their displacement, which now became entirely governed by the provisions of Chapter

[3] Upon the owner's election made under this subdivision, the easement interest over and adjacent to the lands designated by the owner to be acquired in fee, sought in the condemnation petition for a right-of-way for a high-voltage transmission line with a capacity of 200 kilovolts or more shall automatically be converted into a fee taking.

117. Without protection of relocation and minimum compensation provisions, they could be subject to the same oppressive negotiation tactics that the Uniform Act and the Minnesota 2006-2010 legislative reforms were designed to correct. See Part (C), infra.

When NSP refused to proceed with the relocation requests of Enos and Pudas, both sought guidance from the District Court. The District Court found that both relocation and minimum compensation provisions of Chapter 117 apply, because Enos and Pudas homesteads are both subjects of a condemnation proceeding which will ultimately result in their displacement from their homes. The District Court in Wright County has issued a similar order, which we have included in the Appendix. Northern States Power, et al v. Sypnieski, et al., Wright County Court File No. 86-CV-10-7551, Respondents' Appendix RA17 - RA24.

ARGUMENT

A. Summary of the Argument: The Plain Language of the Statutes Establish Pudas and Enos Rights to Relocation and Minimum Compensation.

Enos and Pudas' right to relocation benefits and minimum compensation flows naturally and unambiguously from the plain language of Chapter 117 and section 216E.12, subdivisions 2 and 4, of the Power Plant Siting Act. Subdivisions 2 and 4 of Section 216E.12 both state that when a landowner makes an election to require condemnation of their home, the acquisition is accomplished by condemnation pursuant to Chapter 117. Section 216E.012 subdivision 2 states:

> "In eminent domain proceedings by a utility for the acquisition of real property proposed for construction of a route or a site, the proceedings shall be conducted in the manner prescribed in chapter 117, except as otherwise specifically provided in this section." Laws Minnesota 1977 Chapter 439 section 17.

Chapter 117 includes both the relocation and the minimum compensation protections at issue in this case. There is no provision that carves out either the relocation or the minimum compensation provisions.

As applied to homes, like Pudas and Enos, Subdivision 4 of section 216E. 12 states:

> When private real property that is homestead.....is proposed to be acquired for the construction of a site or route for a high-voltage transmission line with a capacity of 200 kilovolts or more by eminent domain proceedings, the fee owner....shall have the option to require the utility to condemn a fee interest in any amount of contiguous, commercially viable land which the owner .....wholly owns....(emphasis added).

This language in Subdivision 4 leaves no doubt that the Chapter 117 governs the procedures and substantive rights that apply to the takings here. Subdivision 4 continues:

> The required acquisition of land pursuant to this subdivision shall be considered an acquisition for a public purpose and for use in the utility's business, for purposes of chapter 117 and section 500.24, respectively.

Subdivision 4 also makes it clear that the easement designated across the entire Pudas and Enos properties is itself converted to a fee taking under Chapter 117:

> Upon the owner's election made under this subdivision, the easement interest over and adjacent to the lands designated by the owner to be acquired in fee, sought in the condemnation petition for a right-of-way for a high-voltage transmission line with a capacity of 200 kilovolts or more shall automatically be converted into a fee taking.

NSP's contention that the Enos and Pudas families will not be displaced by condemnation is thus incorrect. Enos and Pudas applied for relocation benefits and minimum compensation after making their statutory election. At the time that Pudas and Enos applied for relocation benefits, they were the subjects of condemnation proceedings in which their properties were to be taken by NSP under the procedures of Chapter 117. The condemnation process removed entirely from Enos and Pudas the ability to decide whether they must relocate. They will be displaced by operation of eminent domain at a time and at a price that is determined entirely by Chapter 117. Acquisition of their home explicitly proceeds under the power of eminent domain, and NSP can point to no statutory exception which suggests that the relocation and minimum compensation provisions do not apply to them. There exists no statutory or case authority that even remotely suggests that the Uniform Relocation Act's protections to displaced persons do not apply to persons whose property is acquired by use of the Chapter 117 power.

Under the relocation regulations and statute, the term displaced person means ".....any person who moves from the real property or moves his or her personal property from the real property ...(A) As a direct result of the initiation of negotiations for, or the acquisition of, such real property in whole or in part for a project." 42 U.S.C. § 4601(6)(A)(I). NSP's approach looks at Enos and Pudas's eligibility for relocation benefits at the time that they receive a petition designating the taking of an easement. NSP argues that there is an intervening cause between the attempt to acquire the easement

and the later displacement, and consequently the displacement is not the "direct result" of acquisition of the real property.

The problem with that approach is that it ignores the fact that Enos and Pudas submitted their relocation request after making the election which the statute entitles them to make. Section 216E.12 subdivision 4 instructs us that upon the election, their property is taken in fee pursuant to Chapter 117, and they must move, as a direct result of that taking. If the legislature had intended to deny them some of the rights under Chapter 117 that arise from that taking, the legislature would have explicitly so stated, but in fact it explicitly stated that all Chapter 117 rights apply to these takings. Once Pudas and Enos made their election, their position was exactly the same as all other displaced landowners. They will be forced to move whether they wish to do so, and they will be paid as a result of negotiations under threat of condemnation, or as a result of a judicial proceeding. In Section (C) of our argument we discuss the reasons that Chapter 117 provides relocation protections and benefits to landowners, and every one of those reasons, without exception, apply equally to Pudas and Enos. But our argument is not addressed to reason, inference, or policy alone. The legislature answered this question by specifically stating that after the election parties rights and obligations are governed by Chapter 117.

Similarly, the minimum compensation statute plainly applies to Enos and Pudas when analyzed from the time that compensation is determined. They are both owners

"who must relocate." Again, the application of the statute must be viewed from the perspective of the procedure that the legislature envisioned when it drafted the Power Plant Siting Act. It granted NSP the first right to decide whether to take an easement, but it granted Pudas and Enos the right to reject NSP's decision, and upon rejection, it stated that the provisions of Chapter 117, all of them, would apply. In Part (D) of this Argument, we show that the legislature's intention in this regard was reinforced by its handling of the amendments to Chapter 117, and to the Power Plant Siting Act.

Later in our argument, we show that the fundamental policies behind Chapter 117 and the Power Plant Siting Act demand that persons in the position of Pudas and Enos receive the benefit of the relocation and minimum compensation provisions. But we want to emphasize at the outset, that Pudas and Enos rights flow naturally from the plain language of the statutes even without reference to the underlying purpose. Both minimum compensation provisions and relocation provisions are integral parts of Minnesota's basic eminent domain procedures found in Chapter 117. Section 117.52, governing relocation assistance, provides that "In all acquisitions undertaken by any acquiring authority ...the acquiring authority, as a cost of acquisition, shall provide all relocation assistance, services, payments and benefits required by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970." The relocation protections apply to voluntary acquisitions and they apply to relocations that result from acquisitions of a citizen's property "in whole or in part...." The legislature could not

have made it clearer that it intended to apply the entirety of Chapter 117 to apply to all exercises of eminent domain authority.

Section 117.012, subdivision 1, expressly requires all condemning authorities to exercise the power of eminent domain in accordance with the provisions of this chapter (117), including all procedures, definitions, remedies, and limitations. Laws Minnesota 2006 Chapter 214 § 12. Section 117.189, which enumerates certain specific exceptions to the application of the 2006 eminent domain reforms in Chapter 117, explicitly denies those exceptions as to high voltage power transmission lines[4]. Laws Minnesota 2006 Chapter 214, Section 14; Laws Minnesota 2009 Chapter110, Section 3; and Laws Minnesota 2010 Chapter 288, Section 1.

If the Legislature had intended to exempt persons like Pudas and Enos from relocation benefits, its decision explicitly to make all of chapter 117 (with a few enumerated exceptions) applicable to the Power Plant Siting Act is inexplicable. As discussed in Part (D) of our argument, the 2006-2010 amendments to Chapter 117 explicitly removed exemptions benefitting public service corporations like NSP in section 117.189 and did so at a time when the Legislature was fully aware that major high voltage power line projects were about to proceed. The legislature exempted public service

---

[4] Sections 117.031; 117.036; 117.055, subdivision 2, paragraph (b); 117.186; 117.187; 117.188; and 117.52, subdivisions 1a and 4, do not apply to the use of eminent domain authority by public service corporations for any purpose other than construction or expansion of (1) a high-voltage transmission line of 100 kilovolts or more, or ancillary substations.....

corporations from carefully selected provisions of chapter 117, but conspicuously retained application of the relocation provisions.

B. Minnesota's Power Plant Siting Act Specifically Incorporates the Protections for Displaced Landowners Found in Chapter 117.

In 1977, the Minnesota legislature revamped the 1973 Power Plant Siting Act to address deficiencies in the Siting Act made manifest in the highly controversial Minneapolis to Underwood power line proceedings. In 1973 the Minnesota Legislature had passed the first Power Plant Siting Act. Minnesota Laws 1973, chapter 591, codified at Minnesota Statutes sections 116C.51 – 116C.69, and later recodified at 216E in 2005[5]. The 1973 version of the Act was written in contemplation of the construction of the first Minnesota major high voltage trunk power line, that would run from Minneapolis to Underwood, North Dakota[6] The 1973 Act created a two step administrative process leading first to a certificate of need, followed by a siting process that grants a utility the right to locate and take power line easement within an administratively designated right of way[7]. However, the original Siting Act fell short in realizing its core purpose, to

---

[5] Biennial Report to the Legislature on the Minnesota Power Plant Siting Act (2010 Amended Feb. 22, 2011)

[6] Prior to May 24, 1973, the effective date of the Power Plant Siting Act (PPSA), the location and construction of electrical transmission lines were not regulated on a statewide basis. Instead, a public utility that wished to construct a power line had to secure permits from the local authorities of the counties and municipalities through which it proposed to locate its facilities. No Power Line, Inc. v. Minnesota Environmental Quality Council, 262 N.W.2d 312, 317 (Minn. 1977).

[7] The Supreme Court has stated: "The enactment of § 116C.63, subd. 4 reflects a creative legislative response to a conflict between rural landowners and utilities

resolve conflict in ways that acceptably harmonized the region's need for power with the interests of individual citizens as well as the goal of environmental protection. As a result, the first use of the Siting Act to locate high voltage lines northwesterly through Wright, Sherburne, Stearns and Polk Counties engendered tremendous controversy and at times even violence.[8]

In the Minneapolis to Underwood proceedings, homeowners and farmers consistently complained that location of high voltage lines across their properties near homes and farmsteads inflicted unrecognized and uncompensated economic damage and unacceptable health hazards. Concerns about EMF, stray voltage and other feared or potential threats to the health of humans[9] and livestock had dominated the testimony of a significant subgroup of citizens at these hearings, and those concerns survive today [10]

---

concerning HVTL right-of-ways. Opponents of the utilities, resisting further encroachments upon the rural landscape and fearing the effects upon the rural environment and public health, not only challenge the placement and erection of high voltage transmission lines, but question whether the rural community's sacrifice to the commonwealth serves a greater social good. The legislature, sensitive to these concerns but perceiving the occasion as demanding the construction of additional power-generating plants and high voltage transmission lines, enacted § 116C.63, subd. in partial response. Cooperative Power Association v. Aasand, 288 N.W.2d 697 (Minn. 1980).

[8] Casper & Wellstone, Powerline, The First Battle of America's Energy War; See also Biennial Report, supra at page 11.

[9] See Casper supra at pages 75-77.

[10] In the Matter of the Application for a Route Permit for the Fargo to St. Cloud 345 kV Transmission Line Project OAH 15-2500-20995-2 PUC E-002, ET-2fTL-09-1056 pages 21-24. Examples of concerns expressed in current proceedings may be found in Final Environmental Impact Statement, January 7, 2011, PUC Docket No. E002, ET2/TL-09-1056 as well as the administrative record. The proceedings of the PUC and

fueled by recurring studies associating high voltage lines with childhood leukemia.[11] An additional frequent concern among landowners and their advocates has been the belief that the location of a power line within home and farm right of way is likely to reduce the value of the parcel as a result of stigma and actual depredation[12] in ways that are difficult to quantify because of the wide range of study results. Many landowners felt that condemnation procedures left them uncompensated for the losses and left them holding homes with significantly reduced market appeal. In addition, Minnesota's environmental non-proliferation policy made it significantly more difficult to avoid conflict between right of way and human settlement. People For Environmental Enlightenment and Responsibility (PEER), Inc v. Northern States Power, 266 N.W.2d 858 (Minn. 1978).

The new siting provisions[13] sought to address landowner opposition by assuring

---

administrative law judge are available online.

[11] ICNIRP (International Commission for Non-Ionizing Radiation Protection) Standing Committee on Epidemiology, Review of the Epidemiologic Literature on EMF and Health, Environmental Health Perspectives Supplements Volume 109, Number S6, December 2001; See, e.g., Wertheimer N, Leeper E. Electrical wiring configurations and childhood cancer. American Journal of Epidemiology 109:273-284, 1979; Brodeur P. The Great Power Line Cover-Up: How the Utilities and Government Are Trying to Hide the Cancer Hazard Posed by Electromagnetic Fields. (Little-Brown, 1993).

[12] E.g., Furby, Electric Power Transmission Lines, Property Values, and Compensation Journal of Environmental Management (1988) 27, 69-83.

[13] The 1977 amendment was predicated on the following legislative declaration: The legislature hereby declares it to be the policy of the state to locate large electric power facilities in an orderly manner compatible with environmental preservation and the efficient use of resources. In accordance with, this policy the

them that power companies could not force families to have to live in close proximity to these lines. Minn. Stat § 116C.63, subdivision 4, granted property owners the right to refuse to share their properties with a high voltage power line easement. The amendments included an express determination that acquisitions conducted under the revised statute would be conducted under newly revised Chapter 117. Minn. Stat. § 116C.63, subd 2. The Act determined that the additional land "shall be considered an acquisition for a public purpose and for use in the utility's business, for purposes of chapter 117." It contained a divestment procedure to assure that agricultural property would not be held by a corporation indefinitely. Laws 1977 Chapter 439[14] section 17. The legislature might have compelled the utility to take all such properties in fee, but that would have served no meaningful purpose, because it would have forced landowners to move, even if they preferred not to do so.

NSP wrongly suggests that the 1977 amendments served only the landowners' purpose. The 1977 amendments furthered the goal of energy security by eliminating several powerful arguments that otherwise impeded the location of these lines. Landowners who found the health and safety risks intolerable could now be told that their entire property would be taken. Landowners skeptical of the contention that their

---

board shall choose locations that minimize adverse human and environmental impact while insuring continuing electric power system reliability and integrity and insuring that electric energy needs are met and fulfilled in an orderly and timely fashion. Laws 1977 Chapter 439 § 6 (originally codified to Minnesota Statutes 1977 116C.53, subd 1).

[14] Then codified at section 116C.63, subd. 4.

property values would not be destroyed by uncompensated damages would no longer be forced to prove the magnitude of the loss through costly and contentious litigations. The loss would now be determined by the marketplace, when the utility subsequently sold the property to a willing buyer. The wisdom of the new legislative scheme has been demonstrated repeatedly by a significant improvement in the atmosphere surrounding power line siting hearings. Although landowners continue to oppose the co-location with power lines, the 1977 Power Plant Siting Act makes it far easier to obtain public support for new lines by creating a safety valve for landowners like Enos and Pudas, and the amendments have plainly created a vastly more civil process and which made it far easier for the citizens, regulators and the utility to come to closure on the location of the line. This legislative purpose would be significantly undermined if the result of homestead takings inflicted significant uncompensated economic loss on the targeted homeowner.

C. The Enos and Pudas Families were Subject to Displacement by Eminent Domain.

Under Minnesota's Eminent Domain provisions, Chapter 117, relocation assistance, services, payments and benefits are a "cost of acquisition" required to be paid by an "acquiring authority" Minn. Stat. § 117.52, subd.1 (2010). Chapter 117's relocation provisions apply to "all acquisitions undertaken by any acquiring authority" where relocation assistance would be available if it were a federally assisted project. Section 117.52 states:

> In all acquisitions undertaken by any acquiring authority ... in which, due to lack of federal financial participation, relocation assistance, services, payments and benefits under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, United States Code, Title 42, Sections 4601 to 4655, as amended by the Surface Transportation and Uniform Relocation Assistance Act of 1987, Statutes at Large, Volume 101, Pages 246 to 256 (1987), are not available, the acquiring authority, as a cost of acquisition, shall provide all relocation assistance services, payments and benefits required by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended by the Surface Transportation and Uniform Relocation Assistance Act of 1987, and those regulations adopted pursuant thereto ....

The State Relocation Act affords its benefits to displaced persons defined as "any person who, notwithstanding the lack of federal financial participation, meets the definition of a displaced person under United States Code, title 42, sections 4601 to 4655, and regulations adopted under those sections." In short, as NSP explains, one must look to the federal definition of displaced person. The Federal Act defines a displaced person as "any person who moves from real property, or moves his personal property from real property as a direct result of a written notice of intent to acquire or the acquisition of such real property in whole or in part for a program or project undertaken by a Federal agency or with Federal financial assistance." 42 USC § 4601(c)(A) (emphasis added). That definition is mirrored in the implementing regulations. 24 CFR § 24.2(a)(9)(i)(A).

NSP's argument wrongly applies the displacement test to the initial taking that transpires if the landowner does not exercise the statutory election. The entitlement to compensation for the Enos and Pudas homesteads does not arise from the initial petition description seeking only an easement. Their request for relocation benefits was

submitted after their homestead became the subject of a taking by operation of the Power Plant Siting Act. The statute very clearly states that once Pudas and Enos make their election, Chapter 117 applies in every respect. From that point forward, Enos and Pudas lose control over the price of their home. The amount of payment and the timing of that payment, the date of their eviction, all are judicially determined, whether the landowners like it or not. As part of the election, Enos and Pudas become persons who will be forced to relocate, as a direct result of the pendency of a statutory eminent domain proceeding. If the legislature had intended to exempt them from the statutory relocation rights found in section 117.51, why then did it expressly state that the acquisition would be governed by all provisions of Chapter 117?

NSP argues that Pudas and Enos should be barred from relocation services because they "will receive just compensation for their property in the condemnation," and so we think it pertinent to this argument to look at the actual legislative policies which motivated the relocation and minimum compensation provisions in Chapter 117. NSP's claim that Pudas and Enos don't deserve relocation and minimum compensation, because they will receive just compensation is directly contradicted by nearly thirty years of legislative history in Minnesota and the national government, both of which have recognized that the traditional "just compensation" historically paid to homeowners and business is not fair and adequate, and indeed, that payment of fair market value shifts

disproportionate costs to property owners[15]. Over several decades, in response to concerns that specific programs were forcing displaced landowners to bear disproportional costs and consequences , the federal government developed program-specific relocation protections for homeowners. The purpose of these programs are reflected in the testimony of Richard C. Van Dusen, Under-Secretary of the Department of Housing and Urban Development, in connection with the original Federal Uniform Relocation Act.

> While the Constitution clearly provides that private property may not be taken for public purposes without just compensation, we have applied in many situations an unrealistic concept of "just compensation." .....We have assumed that if the owner of the property, or some legal interest in it, is paid the market value of what is taken from him, the Government's obligation to him then comes to an end. Quoted in Moorer v. Department of Housing & Urban Development, 561 F.2d 175, 180 (8th Cir. 1977).

Adoption of both state and federal relocation Acts represent emphatic legislative rejection of NSP's assertion here that the taking of Pudas and Enos without relocation act protection works no unfairness or harm. As the Supreme Court has stated:

> Another, equally important[16], purpose of the [Uniform Relocation] Act was

[15] The federal Uniform Act was passed to ensure that owners of real property to be acquired for Federal and federally-assisted projects are treated fairly and consistently, to encourage and expedite acquisition by agreements with such owners.... and to ensure that persons displaced as a direct result of Federal or federally assisted projects are treated fairly, consistently, and equitably so that such displaced persons will not suffer disproportionate injuries as a result of projects designed for the benefit of the public as a whole. 24 CFR § 24.1.

[16] The other purpose referred to in the Supreme Court's quotation here is the attempt to make administration of relocation protections uniform across federal programs.

> to ensure that persons displaced by federal and federally funded programs would "not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole." 42 U. S. C. § 4621. Under traditional concepts of eminent domain, a homeowner would receive only the market value of his condemned house. H. R. Rep. No. 91-1656, p. 8 (1970). A tenant at will, residing or doing business at condemned premises, received nothing. Id., at 12. Yet both would incur significant, perhaps devastating, expenses in moving personal property. S. Rep. No. 91-488, pp. 6-7 (1969); H. R. Rep. No. 91-1656, supra, at 2-3. The Relocation Act was intended to alleviate the "disproportionate injuries" suffered by such persons. Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co., 464 U.S. 30 (U.S. 1983)
>
> The evils addressed by the Uniform Act were procedural and substantive.

Procedurally, Congress recognized that condemning authorities had tremendous advantages over individual landowners whose land was being taken at a time convenient to the government, but often at times completely inconvenient to the landowner in terms of their personal financial situation and their personal or business circumstances. Without relocation protections, the quick-take provisions of condemnation necessary to assemble parcels for an expedited project, could place the landowner in the position of being forced to accept the condemnor's offer, or being forced to relocate from a home or business without resources even to pay off their mortgage, let alone provide a down payment for a new property. There was, as well, evidence that condemnors' frequently offered citizens substantially less than the condemnor's own appraised value taking advantage of the property owner's compromised position to consummate an otherwise unfair sale. The implementing federal regulations thus contain a number of procedural protections to assure that the acquiring authority will make a fair appraisal-based written offer of just

compensation for any property which will be acquired, and to make a good faith attempt to negotiate the acquisition and bars coercive conduct. 24 CFR § 102(a)-(h). In fact, one of the principal purposes of Relocation Act protections is to encourage acquisition by fair agreements fairly arrived at rather than condemnation, and the Act accomplishes this objective by encouraging condemnor's to provide sufficient compensation to make the landowner whole. 24 CFR 24.1(a).

These procedural protections – policies that police the bargaining process and assure good faith negotiation and prohibit abusive practices by condemnors,– apply to displaced persons by virtue of the Relocation Act[17]. When NSP argues that the relocation Act protections do not apply to Enos and Pudas and others like them, it is asserting that the Minnesota legislature intended to exempt NSP from these protections during post-election negotiations and leave Enos and Pudas open to the abuses and unfairness that the Act was designed to cure.

In addition to the procedural protections designed to supervise the bargaining process, the Relocation Act contains substantive compensation provisions designed to prevent economic loss and hardship which might arise when a homeowner is forced to move without receiving sufficient compensation to acquire a comparable replacement property. Under 24 CFR §24.204 no person to be displaced shall be required to move

[17] These requirements apply to the relocation of any displaced person as defined at § 24.2(a)(9). Any person who qualifies as a displaced person must be fully informed of his or her rights and entitlements to relocation assistance and payments provided by the Uniform Act and this regulation. 24 CFR 24.202 (applicability).

from his or her dwelling unless at least one comparable replacement dwelling (defined at § 24.2 (a)(6)) has been made available to the person. When possible, three or more comparable replacement dwellings shall be made available. In addition, the acquiring authority is required to provide relocation advisory services designed to assist homeowners in finding property that is at least equal to the property from which they are displaced. [18] The Act and its implementing regulations provide for prompt payment of relocation expenses, 24 CFR § 24.207, including payment for actual reasonable moving and related expenses. 24 CFR §§ 301, 302(residential moving expenses).

A significant procedural and substantive protection of the Relocation regulations is the requirement that before requiring the owner to surrender possession of any real property, the Agency must pay the agreed purchase price to the owner, or in the case of a condemnation, deposit with the court, for the benefit of the owner, an amount not less than the Agency's approved appraisal of the market value of such property, or the court award of compensation in the condemnation proceeding for the property. 24 CFR § 102(j). When NSP argues that persons like Enos and Pudas are not displaced, it is essentially contending that NSP can use eminent domain powers to force them to move from their home even though a comparable replacement dwelling has not been available to them and they may be forced to acquire a new residence, even though they don't yet have the proceeds of their equity available to invest in their new residence. The

[18] The Agency shall carry out a relocation assistance advisory program....and offer the services described in paragraph (c)(2) of this section. 24 CFR § 205(c)(1).

legislature left us not a trace of language in the Power Plant Siting Act or Chapter 117 that would suggest that it wished to subject homeowners like Pudas and Enos to either the substantive or procedural unfairness that relocation and minimum compensation seeks to redress. Quite the contrary, the 2006-2010 leave us with a plain language indication that the legislature expected that those landowners would receive full protection of those provisions.

D. The History of Amendments to Chapter 117 and the Power Plant Siting Act Reinforce Applicability of Relocation Protections and Minimum Compensation.

In 1980, after the Aasand decision, the legislature amended the statute governing landowner elections in response to an invitation to clarify by the Supreme Court. Then, from 2006-2010 the Minnesota legislature implemented changes to Chapter 117 designed to reinforce protection of property owner rights, and the these amendments strongly reinforce our position that the legislature recognize the need to protect high-voltage power line condemnees. The history of legislative action since 1980 show that the legislature has considered carefully the application of minimum compensation and relocation to power line acquisitions and has acted to make sure that both relocation provisions and minimum compensation apply specifically to high voltage power line acquisitions. These actions are all the more powerful, because the legislature could not possibly have failed to recognize that the amendments would be impacting landowners exercising the statutory option.

In Cooperative Power Association v. Aasand, supra, Cooperative Power warned the Supreme Court that the statutory election might be abused by landowners who already intended to sell their property. See Cooperative Power Association brief to the Supreme Court, pgs. 75-76, see Respondents' Appendix RA25 - RA27. Cooperative Power did not contend that electing landowners should be denied relocation benefits. Instead, Cooperative power's brief warned the Supreme Court that a some of the electing condemnees might already have intended to sell their property even before the condemnation, and that their election might arguably provide a windfall by providing relocation benefits for the additional property to a landowner who wanted to sell it anyway. When the Supreme Court issued its Aasand decision, the Supreme Court did not address Cooperative Power's concern about abuse of the relocation right, but did address Cooperative Power's concern that the election provision should have more specifically required that landowners identify only commercially viable parcels. To solve this problem, the Supreme Court invited the legislature to adopt an amendment that would confine landowner elections to commercially viable persons.

The Supreme Court's invitation created an opening to the power industry to revisit the scope of the election right at the legislature. The legislature responded in 1980 by passing Laws Minnesota 1980 Chapter 614 section 84 which amended section 216E.12 subdivision 4.[19] The 1980 amendments did require that the election cover commercially

[19] Codified at the time as 116C.63 subdivision 4.

viable parcels only. The amendment also responded to power industry complaints that the compulsory resale provision should make allowance to the acquiring utility for the depression in value inflicted on the remaining parcel caused by the power line. The amended statute would now state that the utility would not be compelled to disgorge the property so acquired, unless they recovered at least "the fair market value paid less any diminution in value by reason of the presence of the utility route or site[20]."

Conspicuously absent from the 1980 amendments was any attempt by the legislature to remove the relocation rights that the power industry had identified in its Aasand brief. Instead, the 1980 amendments added the automatic conversion language referred to above, stating that upon the election, the entire easement taking would be automatically converted to the taking of a fee. This amendment thus strengthened the force of the Power Plant's Siting Act's injunction that all rights under Chapter 117, including relocation benefits, are available to power line condemnees.

In 2004, Great River Energy[21], Minnesota Power, Otter Tail Power Company and Xcel Energy jointly formed CapX 2020. This effort triggered three major certificate of need proceedings before the Public Utilities Commission (Brookings), (Monticello) and (St. Cloud-Fargo), each with its own docket number and Administrative Law Judge. Each of these three certificate of need proceedings were followed by route selection and

[20] In short, the utilities wanted to be held harmless from the same damage to the fee caused by the easement that motivated citizen landowners to avoid sharing their properties with the high voltage easement.

[21] Great River Energy includes Cooperative Power.

permitting proceedings which were to implement the Siting act as reformed. In June of 2005, the United States Supreme Court decided Kelo v. City of New London, 545 U.S. 469 (2005), and that decision launched a complete re-examination of the fairness of the condemnation procedures as well as the fairness of condemnation compensation in Minnesota and many other states. The confluence of these two proceedings placed landowner rights in power line takings front-and-center before the legislature. The ultimate judgment of the legislature was that existing procedural and substantive protections for landowners were still inadequate to protect landowners, including high voltage line condemnees.

One of the key reforms of the 2006 legislation was the recognition by the legislature that "just compensation", even supplemented by the Relocation Act protections in section 117.51 and following sections, is not adequate compensation for homeowners and business owners, and, further, that the condemnation process itself was flawed and unfair to condemnees. The 2006 reforms added new appraisal and negotiation requirements to section 117.036. Laws 2006, Chapter 214 § 5. It raised the amount of appraisal fees allowable to landowners by the commissioners. Id., § 9. And, it added new section 117.187 which afforded landowners minimum compensation as follows:

> When an owner must relocate, the amount of damages payable, at a minimum, must be sufficient for an owner to purchase a comparable property in the community and not less than the condemning authority's payment or deposit under section 117.042, to the extent that the damages will not be duplicated in the compensation otherwise awarded to the owner of the property. For the purposes of this section, "owner" is defined as the

person or entity that holds fee title to the property.

The minimum compensation provisions represented recognition by the legislature of the concept that "just compensation", even when supplemented by relocation benefits, imposes unacceptable economic burdens on homeowners, businesses and farms. The minimum compensation provisions rests on the concern that condemnations may occur at a time when the landowner cannot find suitable replacement property in the same community, forcing the landowner to relocate out of the community of employment, or to purchase an inadequate replacement property. Minn. Stat. § 117.187. NSP's suggestion that just compensation is adequate compensation has been emphatically rejected by the legislature.

In this context, the legislature carefully considered which of the provisions of chapter 117 should be applicable as it implemented the 2006 reforms. As the next few paragraphs of this brief explain, the legislature's position on applicability of the reforms to public service corporations and high voltage line condemnations evolved from 2006 through 2010. In 2006, the legislature added a new preemption section 117.012 which stated:

> Notwithstanding any other provision of law, including any charter provision, ordinance, statute, or special law, all condemning authorities, including home rule charter cities and all other political subdivisions of the state, must exercise the power of eminent domain in accordance with the provisions of this chapter, including all procedures, definitions, remedies, and limitations. Additional procedures, remedies, or limitations that do not deny or diminish the substantive and procedural rights and protections of owners under this chapter may be provided by other law, ordinance, or

charter.

The import of this clause was to assure that any rights found in Chapter 117 would not be implicitly overridden by inference.

The 2006 legislature carefully considered which provisions of the 2006 reforms should apply to public service corporations like NSP. The legislature must have had power line siting at the forefront of its consideration because of the three major power line cases moving forward at the Office of Energy Security and Public Utilities Commission at that time. In the 2006 amendments, the legislature chose to provide specific exemptions to public service corporations like NSP. The 2006 amendments did exempt public service corporations like NSP from the minimum compensation requirement (although as we shall see, the exemption was thereafter removed as to high voltage lines). But the public service corporation exemption language retained the application of Chapter 117's relocation provisions, affording exemptions to only two minor benefits within the universe of relocation benefits. As written in 2006, all relocation rights would extend to public service corporation condemnees, excepting only section 117.52, subdivision 1(a) and 4. Section 117.189 now read:

> Sections 117.031 [attorneys fees]; 117.036 [appraisal and negotiation requirements]; 117.055, subdivision 2, paragraph (b) [petition requirements]; 117.186 [going concern]; 117.187 [minimum compensation]; 117.188[substitute property]; and 117.52, subdivisions 1(a) [reestablishment cost limits and 4 [administrative proceedings for relocation], do not apply to public service corporations. For purposes of an award of appraisal fees under section 117.085, the fees awarded may not exceed $500 for all types of property. Laws Minnesota 2006 Chapter 214 §

14 (adding new section, Minn. Stat. 2007 § 117.189).

The legislature revisited this provision in 2009, in a Bill dealing with energy and utilities. the legislature took a second look at the public service corporation exception (section 117.189) and kept all of the exemptions untouched, but provided a higher appraisal fees limit for high voltage transmission line condemnations, again indicating that the legislature attention had been directed specifically to high voltage line condemnations. The line and strike provision as passed in 2009 read as follows:

> Sections 117.031; 117.036; 117.055, subdivision 2, paragraph (b); 117.186; 117.187; 117.188; and 117.52, subdivisions 1a and 4, do not apply to public service corporations. For purposes of an award of appraisal fees under section 117.085, the fees awarded may not exceed ~~$500~~ $1,500 for all types of property except for a public service corporation's use of eminent domain for a high-voltage transmission line, where the award may not exceed $3,000. Laws of Minnesota 2009 Ch. 110 § 3.

In this amendment, the legislature confirmed once again that the only relocation protection that would be denied to targets of public service corporation condemnations would be the section 117.52, subdivision 1(a) and 4 benefits. Again, the power industry had an opportunity to convince the legislature to remove other relocation benefits from the rights conferred in the pending cases, and again, the industry failed to do so.

Then in 2010, again with several major PUC route proceedings pending, the legislature acted directly to remove all the exemptions relative to high voltage utility

lines[22]. Laws Minnesota 2010 Chapter 288. The 2010 amendments removed the exemptions contained in section 117.189 altogether for both high voltage transmission lines and subsidiary substations as follows:

> Sections 117.031; 117.036; 117.055, subdivision 2, paragraph (b); 117.186; 117.187; 117.188; and 117.52, subdivisions 1a and 4, do not apply to the use of eminent domain authority by public service corporations for any purpose other than construction or expansion of: (1) a high-voltage transmission line of 100 kilovolts or more, or ancillary substations; or (2) a natural gas, petroleum, or petroleum products pipeline, or ancillary compressor stations or pumping stations. (Emphasis added)

Thus, the 2010 amendments specifically extended the minimum compensation protections to power line and substation condemnations. The legislature had already provided, in numerous sections, affirmation that all provisions not specifically exempted from Chapter 117, apply to landowners in Pudas and Enos's circumstances. The 2010 amendments now make it clear that minimum compensation provisions apply to power line right of way acquisitions. Since minimum compensation does not apply to easement acquisitions, it seems incontrovertible that the legislature intended to grant minimum compensation to electing landowners. The 2010 legislation also reinstated the protections found in subdivision 1a and 4 of relocation section 117.52 as to acquisitions for a high-voltage transmission line. The primary target of this change, would be persons who are forced to

[22] An act relating to eminent domain; clarifying use of eminent domain authority by public The Act was titled: "service corporations; regulating the granting of route permits for high-voltage transmission lines; requiring a report; amending Minnesota Statutes 2008, sections 117.225; 216E.03, subdivision 7; Minnesota Statutes 2009 Supplement, section 117.189.

relocate as a result of the taking of their land for a high voltage line in fee, and that would almost always would be persons electing to require the taking be in fee.

E. NSP's Federal Cases Have Nothing to Do With the Issue Before this Court.

NSP cites a few federal cases discussing the inapplicability of the federal relocation protections to persons whose lands were not acquired or taken by a federal program. None of these cases involve a landowner that was required to move by a federal acquisition. Indeed, NSP cites not a single case where a landowner is required to move by eminent domain where the Court has denied relocation protections.

Highway Pavers, Inc. v. United States Dept. of Interior, 650 F. Supp. 559 (S.D. Fla. 1986) involved the claim of Ochobee Rock and its former licensee, Highway Pavers, Inc., against the Department of Interior. Ochobee Rock, which was owned by Highway Pavers, Inc., had been purchasing the subject property with a purchase money mortgage owing to the seller, the Caldwells. The plaintiff claimed that some stockpiled fill had been sitting on Ochobee's property during that time period. When Ochobee defaulted on the mortgage, the Caldwells initiated and completed a valid foreclosure, thus recovering back the property. After Ochobee's property rights were extinguished by the foreclosure, the property was reacquired by the Caldwells in 1977. The Department of Interior brought an eminent domain proceeding two years after Ochobee's interest was extinguished. Ochobee claimed that it still owned the stockpiled material, but the administrative law judge disagreed. The Administrative Law Judge ruled that at the time

of the Government's acquisition of the property, the plaintiff did not own the stockpiled material, and consequently, Highway Pavers was seeking relocation benefits for property that it did not own, and which it had not lost by virtue of the eminent domain or any government acquisition. The issue was whether the Administrative Law Judge's conclusion that Highway Pavers had not lost property by virtue of eminent domain was arbitrary and capricious. The court explained:

> **The Plaintiff lost its right to possess the land** and the corresponding right to conduct a business thereupon **as a result of a foreclosure action that concluded with the sale of the real property on April 4, 1977.** The fact that Ochobee may have made a business decision, for any reason, to leave its personal property on land in which it had no right to possess, use, or enjoy, in no way changes this analysis. Ochobee discontinued its quarry operation on the property later acquired by the government because it had no right to continue mining limestone on the property after April 1977. **The government acquired the property as part of Big Cypress National Preserve program over two years later**. (Emphasis added)

The Highway Pavers case stands for the proposition that one cannot claim relocation benefits for losing property two years before the condemnation.

Dawson v. US Dep't of Hous. And Urban Dev., 428 F. Supp. 328 (N.D. Ga. 1976) involved a claim by person displaced by the City of Atlanta. Dawson is among the line of cases that deal with the issue whether a person who is evicted by a private landlord in order to take advantage of a City or State program that receives some federal assistance. See also Moorer v. Department of Housing & Urban Development, 561 F.2d 175, 180 (8th Cir. 1977). The Court merely ruled that the City of Atlanta is not a federal acquiring authority and thus if its actions caused displacement, federal relocation benefits are not

due. If the State of Georgia had a state relocation act in force at the time, Dawson would have been entitled to benefits.

Alexander v. United States Department of Housing and Urban Development, 441 U.S. 39 (1979), also cited by NSP dealt with tenants ordered to vacate housing projects acquired by HUD acquired when the private project owner defaulted on a federal insured loans. The narrow question in Alexander was the applicability of the "written order" requirement of displaced person definition which extends benefits to a person displaced "as a result of the written order of the acquiring agency to vacate real property, for a program or project undertaken by a Federal agency." The Supreme Court held that the written order provision did not apply, because the tenants were not vacating "for a program or project undertaken by a Federal Agency."

CONCLUSION

The facts of our case are starkly different. Pudas and Enos's home is being taken by eminent domain for a power line acquisition under legislation that specifically says that under the circumstances of the acquisition, all aspects of Chapter 117 apply, including the relocation and minimum compensation provisions. The legislative intent is

plain: the legislature intended that relocation and minimum compensation benefits would be provided to landowners like Enos and Pudas.

Dated: December 19, 2011

Respectfully Submitted,

RINKE NOONAN

By _____

Gerald W. Von Korff, #113232
Attorneys for Respondents Charlene and Robert Pudas and Matthew Enos
P.O. Box 1497
St. Cloud, MN 56302-1497
320 251-6700