Case No. A11-1116

STATE OF MINNESOTA
IN SUPREME COURT

Robert T. Pudas, *et al.*,
Brett R. Hanson, *et al.*,

Appellants,

vs.

Northern States Powers Company, *et al.*,

Respondents.

APPELLANTS PUDAS AND ENOS' BRIEF, ADDENDUM AND APPENDIX

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Other Authorities:

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Furby, Electric Power Transmission Lines, Property Values, and Compensation
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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. 19

Wertheimer N, Leeper E. Electrical wiring configurations and childhood cancer, American Journal of Epidemiology 109:273-284, 1979. 19

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). 19

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When a homeowner exercises rights under Minn. Stat. § 216E.12, which expressly triggers the rights, protections, and procedures of Minnesota Statutes Chapter 117, must NSP provide relocation benefits under Minn. Stat. § 117.52 and minimum compensation under § 117.187 to the homeowner, if NSP proceeds to take the property in fee under section 216E.12, subd. 4**.**

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Pudas, Enos, Stich and Hanson families all reside on the same block of Fairmont Road Southeast of St. Cloud. NSP decided to locate a high voltage transmission line and three towers in the back yards of these homes. The transmission line is part of the project initiated in 2004 by CapX 2020, an entity composed of Great River Energy, Minnesota Power, Otter Tail Power Company and NSP (Xcel Energy), jointly formed to construct two 345 kilovolt transmission lines to deliver power from South Dakota and North Dakota. Minnesota's Power Plant Siting Act, Chapter 216E, grants to public utilities the State's power of eminent domain to take property for high voltage transmission lines over routes approved and selected through certificate of need[1] and route siting[2] proceedings. Minn. Stat. § 216E.12[3]. NSP commenced three separate

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[1] See Minn. Stat. §§216B.2421 (large energy facility); 216B.243 (CON required) http://www.puc.state.mn.us/portal/groups/public/documents/pdf_files/001075.pdf (description of CON process); http://www.puc.state.mn.us/portal/groups/public/documents/pdf_files/001077.pdf (Flow Chart for CON process)

[2] Application to the Minnesota Public Utilities Commission for a Route Permit for the Monticello to St. Cloud 345 kV Transmission Line Project, Docket # ET-2, E002/TL-09-246, April 8, 2009. See:

certificate of need proceedings before the Public Utilities Commission for the Brookings-Twin Cities, Monticello-St. Cloud, and St. Cloud-Fargo routes respectively. Chapter 216E establishes a number of route location principles including a goal to avoid homes where possible. See Minn. Stat. § 216E.03 subdiv. 7(a). But environmental law and the Power Plant Siting Act also express an overriding anti-proliferation principle preferring the location of high voltage lines on or near existing highway or transmission line rights of way, and at times, the non-proliferation principle supercedes the goal of avoiding damage to homes. See Minn. Stat. § 216E.03 subdivision 7(e); PEER v. MEQC, 266 N.W.2d 858. Minn. App. (1978).

After receiving a certificate of need for the Monticello-St. Cloud route segment, NSP initiated route proceedings. The Power Plant Siting Act requires NSP to designate a "preferred route" and at least one alternative route for consideration by the PUC. An environmental impact statement was then prepared for presentation at the route siting hearings. The route siting hearings involved informal public hearings followed by the taking of testimony before an administrative law judge, and then Public Commission adoption of a permitted route. The route permit designated a route location ranging from

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http://www.capx2020.com/Regulatory/State/Minnesota/MSC-route-permit-app.html

[3] Section 216E.12 includes the following grant: "The power of eminent domain shall continue to exist for utilities and may be used according to law to accomplish any of the purposes and objectives of this chapter, including acquisition of the right to utilize existing high-voltage transmission facilities which are capable of expansion or modification to accommodate both existing and proposed conductors."

600 feet to 1.5 miles in width, within which NSP was free to locate the actual right of way. The route granted by the PUC generally follows and abuts the existing I-94 highway right-of-way.

A. NSP Routes the Transmission Line through the Backyards of the Fairmont Road Homes.

Throughout much of the Monticello to Fargo route segments, route designers were able to locate the transmission line on the I-94 corridor and still avoid conflict with homes. However, on a small stretch of I-94, just southeast of St. Cloud, residential homes closely abut the I-94 right of way on both sides of the freeway. Rather than depart from the freeway, the route permit authorized NSP to locate the transmission line through the backyards of the six homes located on Fairmont Road.

The four homeowners represented in these proceedings, Pudas, Enos, Hanson and Stich, are all neighbors living on that same block of Fairmont Road. Each of the four families decided that they couldn't accept living under the line because it would radically change the character of their homes. See Pudas Affidavit, Appendix (App. A-1 - App. A-16); Hanson and Stich affidavits, Appellant Hanson & Stich Brief, Appendix (A. App. 078 - A. App. 091). Safety considerations arising from the 345 KV voltage required removal of trees and shrubs within the transmission line easement, and consequently the trees that once shielded backyards from I-94 were removed. Pudas Affidavit, Appendix

(App. A-1 - App. A-5); Jeannie Stich Affidavit Paragraph 26.[4] One hundred thirty to one hundred fifty foot towers would be constructed in the backyards of the Pudas, Hanson and Stich homesteads[5], and the families felt that these towers ruined the home environment that they cherished. NSP also sought and obtained by quick-take blanket temporary easements for construction and permanent blanket easements for future maintenance and installation of additional lines, and these easements described the entire parcel, including the home without physical restriction. Landowners expressed concern about living with children in a construction zone and health and safety concerns for children living under the transmission line after the transmission line was energized.

By way of example, the Pudas home was located on 2.3 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 what they described as "a peaceful, retreat-like yard", a place that they could raise their children. In the summer, their large tree-enclosed yard was used by the family for gardening, lawn games, entertainment,

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[4] "Now that the NSP/CapX2020 easement has been granted, construction of the high voltage line will soon commence in the backyard, over 100 of our trees will be taken out when the construction starts. . . The place where we played baseball, football, soccer and other games is in the easement area. That place will no longer be a safe area where the kids can play those games." Jeannie Stich Affidavit, Paragraph 26.

[5] Mr. Hanson's affidavit, paragraph 5 explains: "The . . . easement will run the entire width of our property. The easement will take 75 feet lengthwise of our entire parcel, also located in our backyard. The high voltage electrical transmission line being installed will sit atop a 150 foot tall steel tower. The height of the tower will be more than twice as tall as our tallest trees. The tower will soar so high above the tree line that it will stand out like a sore thumb and will be an eyesore to the entire neighborhood."

hunting and other activities. NSP's transmission line easement for the line and tower occupied about 2/3 of the Pudas residential property. Pictures of their back yard showing the trees that were designated for removal are found at App. A-6 - App. A-16 of this brief.

B. The Condemnations.

After receiving its route permit for the Monticello to St. Cloud route segment, NSP commenced two separate eminent domain proceedings in Stearns County. The first petition dated October 21, 2010, NSP v. Spear, et al[6], sought rapid winter access to certain sites where NSP needed to place construction equipment on frozen ground, and included the Pudas family homestead. The second petition, dated December 1, 2010, NSP v. Aleckson, et al, included the homes of the Enos, Stich and Hanson families[7]. NSP also sought quick-take access to the Pudas, Enos, Stich and Hanson homes for construction purposes. At about the same time, to carry the Monticello-St. Cloud segment through Wright County, NSP commenced eminent domain proceedings in Wright County, Northern States Power Company, et al. v. Scott J. Sypnieski[8], which

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[6] Northern States Power v. Spears, et al, 73-CV-10-9472 involved parcels upon which NSP wanted quick takes allowing winter access so that heavy equipment could cross wet areas while the ground was still frozen. For this reason, at times, the Spears litigation is referred to as the "wet" proceeding. The Pudas family's parcel is included in the Spears proceedings.

[7] 73-CV-10-10828, sometimes referred to as the "dry" case.

[8] Wright County CV-10-7551

encompassed the homes of Stice and Shore, discussed in the Wright County order located at Appendix (App. A-23 - App. A-37).

NSP served each of the Fairmont Road neighbors with a condemnation petition seeking right-of-way easements describing the location of an easement for high voltage lines and towers. In each case, the petition also sought blanket temporary easements covering the entire homestead parcel for construction access, and a blanket permanent easement covering the entire parcel for future repair, maintenance or replacement of the lines[9]. Under the Power Plant Siting Act, the Fairmont Road homeowners had 60 days to decide whether they were willing to accept an easement and remain on the property, or instead trigger the "Buy the Farm" provisions of section 216E,[10] and each made that election within the statutory time period.

In each case, the landowner elections placed the landowners in the position of Chapter 117 condemnees for their entire homesteads[11]. In this regard, the "Buy-the-

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[9] A sample easement is found at Appendix (App. A-38). Each petition defines the term "Parcel" as the entire homestead property and then takes a blanket construction and maintenance easement covering "the parcel."

[10] 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).

[11] The option granted by section 216E.12, subdivision 4, requires the utility to condemn the fee. Moreover, section 216E.12, subdivision 4, converts any easement

Farm" moniker placed on these provisions is misleading, and the phrase "Condemn the Farm" (or "Condemn the Home") would be more appropriate. After the election occurs, NSP is granted full powers of eminent domain, and the designated property is subject to the takings procedure under the provisions of Chapter 117. There can be no question that NSP has condemned the Pudas, Enos, Stich and Hanson homes. Each of the homes have been the subject of appraisals prepared by both parties for submission at a Commissioners' hearing, as provided by Chapter 117. Condemnation Commissioners were designated to determine the fair market value, exactly as provided by Chapter 117. As of the writing of this brief, a taking price has been set by the Commissioners for each of the properties, and NSP has appealed the Commissioners' award in each of these cases.[12]

Although the election converted the takings to a fee taking of each of the four homes, NSP sought quick-take authority for the easement only and denied the families' requests for immediate relocation services. The Court's quick-take order granted NSP title and possession of the transmission line and construction easements, upon deposit in

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interest to a fee taking. "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." In each of these cases, NSP had covered the entire homestead with temporary and permanent blanket easements.

[12]Under the Court of Appeals' decision, without Relocation Act Protection, that means that NSP has the right to take possession by tendering only 3/4 of the commissioners' award.

court of NSP's appraised value for the easement only. For the four parcels the deposit amount ranged from $24,000 to $48,000 representing NSP's appraisal of the value of the easements (right of way, construction, and future maintenance access) together with any severance damages to the remaining home parcels[13]. Minn. Stat. § 117.042. NSP now planned to move forward with construction and ultimately to power up the lines while the homeowners remained on the premises.

As explained below, NSP's position that relocation protections did not apply meant that construction activity could commence and that the landowners could be forced to live with tower and line construction and tree removal in their backyards, and even remain with a fully powered-up transmission line in their backyard, before they received enough money to find a replacement home. NSP's position that minimum compensation provisions did not apply, left the parties, as well, with a dispute over what the Condemnation Commissioners should be asked to determine.

C. Court Rulings on Relocation and Minimum Compensation.

To resolve this dispute, both landowners and NSP sought an order from the district court resolving the relocation dispute and providing instructions to the Commissioners on whether they should apply the minimum compensation provisions to their deliberations.

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[13] NSP's appraisal of the easement typically includes a "before and after" opinion of value, arriving at the easement value by comparing the fair market value of the property without the easement, transmission lines and tower, to the value of the property with the easements, towers and lines in place.

In the meantime, in order to get off of their properties promptly, three of the homeowners (Pudas, Stich and Hanson) agreed provisionally to accept less than the fair market value and minimum compensation that they believed was fair, and they then used those funds to buy replacement homes. Under the terms of these three agreements, each of those three homeowners reserved the right to claim that the fair market value of their homes was higher than NSP's appraisals suggested, reserved the right to seek minimum compensation under section 117.587, and reserved the right to seek compensation for the relocation benefits, services and payments which NSP refused to provide. These three landowners, accordingly, temporarily absorbed the moving and other relocation costs, until the legal and factual disputes were resolved. The fourth homeowner, Enos, has failed to arrive at an agreement with NSP, and he and his family remain on the premises, living now with a powered-up line until such time this matter is resolved. Without relocation act protections, all four of the families are entitled to only 75% of the commissioners' condemnation award until NSP's appeal is tried to a jury to completion.

The Stearns County District Court resolved the motions of NSP and the homeowners by ordering NSP to apply the relocation act provisions and by instructing the Condemnation Commissioners to apply the minimum compensation provisions of Chapter 117. Appendix (App. A-17 - App. A-22). In its memorandum, the district court pointed out that neither Chapter 216E nor Chapter 117 contain any language excepting the condemnations arising from landowner elections from minimum compensation and

relocation:

> A critical starting point in this statutory analysis is that in proceedings for the acquisition of property for the "construction of a route or a site, the proceedings shall be conducted in the manner proscribed in chapter 117, except as otherwise specifically provided in this section." Minn. Stat. § 216E.12, subd. 2 (emphasis added). Upon review of Minnesota Statutes Chapter 216E, the Court finds that the legislature did not see fit to except minimum compensation under Minn. Stat. § 117.187 or relocation benefits under Minn. Stat. § 117.52 from Chapter 216E proceedings.

NSP's motion for district court certification of the question for appellate review was denied, but the Court of Appeals granted interlocutory review. In the meantime, a similar process in Wright County led to an order recognizing relocation and minimum compensation from the Wright County judge handling condemnations in that county. The Wright County District Court explained:

> "Notably, Minn. Stat. section 216E subd. 2-states,- `[i]n eminent 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.' nowhere does section 216E.12 state that minimum compensation or relocation benefits are excluded." Decision, Appendix (App. A-23 - App. A-37).

Before the Court of Appeals rendered its decision, the Commissioners' hearings were held on all four properties. Each of the Commissioners' awards determined that the fair market value of the respective homes was higher than opined by NSP's appraiser, and in addition, in each case, the Commissioners awarded the landowner minimum

compensation[14]. NSP has appealed all four awards, but has not paid anything additional to the landowners, nor has it deposited additional funds in Court.

In the Court of Appeals, NSP argued that the "by using terms such as 'option', 'elects,' and 'election,' the statute makes clear that the decision to remain on the property or move elsewhere is the landowner's decision alone." NSP Court of Appeals Brief pages 6-7. In so doing, NSP has consistently focused on the alleged voluntary nature of the landowner's initial decision to trigger the condemnation process, but not the compulsory nature of the process that follows. The Court of Appeals analogized the landowner's actions to the temporary sale, referred to in the Congressional Conference report, and reasoned that because the process is essentially a voluntary sale, the following language in the Congressional Conference hearings was instructive. The opinion quoted a portion of the language of the in the Conference Report as follows:

> "In certain cases, where a property owner voluntarily agrees to sell his or her property and moves from the property in connection with the sale, the move should not be considered to be permanent displacement as a direct result of the project." Slip opinion at page 8.

(In Part C of our Brief, we show that the opinion fundamentally misunderstands the way in which the federal and Minnesota relocation laws treat voluntary purchases.) With

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[14] NSP's appraisal of the Pudas homestead was $240,000. The Commissioners found that the fair market value of the homestead was $290,000. They awarded $35,000 in minimum compensation. NSP's appraisal of the Enos homestead was $152,000. The Commissioners found that the fair market value of the homestead was $165,000. They awarded $15,000 in minimum compensation.

respect to minimum compensation, the Court of Appeals reasoned that the phrase "must relocate" would be superfluous if applied to circumstances where the landowner elects to be subjected to condemnation, and therefore minimum compensation does not apply. This Court then granted discretionary review of the Court of Appeals' reversal of the Stearns County order.

II. SUMMARY OF THE ARGUMENT

This case requires examination of the interrelationship of the Power Plant Siting Act, Chapter 216E, Minnesota's Eminent Domain laws, Chapter 117, the state relocation and minimum compensation provisions Sections 117.52 and 117.187, and the federal Relocation Act. 42 USC Sections 4601, et seq. In subsequent sections we show that the plain statutory language of the statutes and federal regulations clearly and unequivocally require that these homeowners are entitled to relocation benefits, services and payments because the power plant siting act explicitly calls for the taking of their property by condemnation.

The Power Plant Siting Act prevents a high voltage transmission line project from forcing homeowners to live with a high voltage transmission line. Minn. Stat. § 216E.12 subd. 4. It does this by allowing the condemning utility to site its transmission line on residential parcels, even where the line occupies a significant portion of the residential property, as is the case here. But if the homeowners decide that the impact of the transmission line and towers located in their yards is unacceptable, they have the right to

require the utility to condemn their entire property instead. The Court of Appeals majority opinion fails to recognize as significant that the Power Plant Siting Act makes condemnation, not voluntary purchase, the vehicle for that acquisition.

Subdivisions 2[15] and 4[16] of Section 216E.12 both state that when a landowner makes an election to require condemnation of their home, the acquisition of the fee must be accomplished by condemnation pursuant to Chapter 117. Subdivision 2 explicitly states that all rights under Chapter 117 apply to the condemnation that follows "except as otherwise specifically provided in this section," and relocation and minimum compensation are not excepted in that section. The legislature could not have been clearer in manifesting its intent that all of the rights found in Chapter 117 apply to condemnees under this process. Subdivision 2 of the same section states that the "proceedings shall be conducted in the manner prescribed in chapter 117." In short, section 216E.12 confers upon homeowners the right to elect acquisition by eminent domain, including relocation rights and minimum compensation. The effect of the

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[15] 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.

[16] 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)."

election is to require the utility to condemn a fee interest in the property.

The Federal Relocation Act defines a displaced person as "any person who moves from real property . . . as a direct result of . . . the acquisition of such real property in whole or in part for a program or project . . . " 42 USC § 4601(c)(A)[17]. It seems undeniable therefore that a condemnation is in the direct chain of causation leading to the ultimate movement of these families. See Civ Jig 27.10 ("direct cause is a cause that had a substantial part in bringing about the [event]."). The first step in the chain of causation is NSP's decision to locate the transmission line in the backyard of these families, knowing that the legislature denies NSP the right to co-locate high voltage lines without the family's consent. (In fact, in a number of locations, after learning that families intended to elect, NSP relocated the line outside the property boundaries for this very reason). The second step in the chain of causation is the families' conclusion that they cannot bear to live and raise a family with a transmission line and towers in their backyards. But the ultimate cause is the condemnation conducted by NSP pursuant to section 216E.12 subdivision 4. The Power Plant Siting Act specifically instructs that the homes of the Fairmont Road families will be taken by condemnation. After these families make their election, they must relocate because they are the subject of a

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[17] The term "displaced person" means, except as provided in subparagraph (B)– (I) any person who moves from real property, or moves his personal property from real property– (I) 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...

condemnation action and their position is indistinguishable from any other condemnee in that regard.

The majority opinion completely misread the federal relocation regulations and the legislative history of the federal Relocation Act and concluded, erroneously, that the Act denies relocation benefits to persons who elect to sell their property to a condemning authority. On the contrary, the Federal Relocation Act applies to "all acquisitions of real property or displacements of persons resulting from..... programs or projects." 70 Fed. Reg. 590 (Jan 4, 2005) (Preamble to discussion of Rule on adoption). The definition of displaced person is triggered by an acquisition: a taking by eminent domain is simply not required, 49 CFR § 24.2(a)(9)(A), although in the case of electing landowners, the acquisition is effected through condemnation. When the acquiring entity consummates a truly voluntary sale, if the acquiring authority has eminent domain power, relocation benefits are still due unless the acquiring authority notifies the potential seller in advance that if negotiations fail, there will be no use of the power of eminent domain to take the property. 49 CFR § 24.101(a)(2) (federal acquiring authority); 49 CFR §24.101(b) (recipient of governmental financial assistance). To repeat, a person who relocates after a voluntary acquisition by a condemning authority is a displaced person under the regulations, unless the taking authority promises not to use its condemnation power to acquire the property. The fact that the acquisitions here are consummated by a taking plainly triggers relocation benefits under both the state and federal Relocation

Acts. See also Minn. Stat. § 117.521 (constraining waiver of relocation act benefits).

Denial of Relocation-Act protection has a practical consequence that our legislature could not possibly have contemplated when it provided that electing homeowners are entitled to all of the rights found in Chapter 117. Without relocation protection, a condemning power company is given the discretion to force the property owner to leave or stay at the power company's discretion and to withhold full compensation for the duration of the proceedings. Minn. Stat. §117.042. Without relocation protections, when the condemnation award issues, if the power company demands possession, the property owner must relocate, but by appealing the award, the condemning authority can require that relocation by tendering only 3/4 of the condemnation award. This power, to decide whether the landowner must stay during construction or must leave before receiving full compensation, creates an unfairness and inequality in bargaining power that the Relocation Act was designed to remedy. Although NSP claims that condemnees would not be displaced persons, in fact, NSP's position would allow a private company the right to exercise the public's eminent domain power to force homeowners to relocate without having anywhere near enough money to acquire a replacement home.

With respect to minimum compensation, although the plain language "must relocate" should be dispositive, the legislative history of the minimum compensation provisions also supports our position. In 2006, as part of eminent domain reform, the

legislature added the right to minimum compensation "when an owner must relocate," but denied that right as to takings by public service corporations, including power companies.

In 2009, after committee hearings which focused on potential unfairness to homeowners and farms that would likely result from impending CapX 2020 right of way condemnations, the legislature removed the public service corporation exemption as to high voltage transmission takings and thus extended the right to minimum compensation for public service condemnees. The four homeowners here must relocate because their property is being taken by eminent domain and the legislature's action in 2009 confirms that conclusion.

III. ARGUMENT

A. The Legislature Granted Transmission Line Condemnees the Right to Require Condemnation of their Homes as a Remedy for Unrecognized and Uncompensated Economic Damage and Concerns About Health and Safety Hazards.

The legislature passed the 1973 Power Plant Siting Act[18] to facilitate construction of Minnesota's first major high voltage trunk power line, running from Minneapolis to Underwood, North Dakota[19] The 1973 Act created a two step administrative process

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[18] Minnesota Laws 1973, chapter 591, codified at Minnesota Statutes sections 116C.51 – 116C.69, The Act was and later recodified to Chapter 216E in 2005. Biennial Report to the Legislature on the Minnesota Power Plant Siting Act (2010 Amended Feb. 22, 2011)

[19] 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 transmission 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

leading first to a certificate of need, followed by a siting process that grants a utility the right to locate and take transmission line easement within an administratively designated right of way,[20] and that procedure continues today. 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.[21] 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[22] and livestock had dominated the testimony of a significant subgroup of citizens at these hearings, and those

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Quality Council, 262 N.W.2d 312, 317 (Minn. 1977).

[20] 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 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). Appendix (App. A-40 - App. A-42).

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

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

concerns survive today,[23] fueled by recurring studies associating high voltage lines with childhood leukemia.[24] An additional frequent concern among landowners and their advocates has been the belief that the location of a transmission 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[25] in ways that are difficult to quantify and prove 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. As this Court in Aasand explained:

> The enactment of § 116C.63, subd. 4 reflects a creative legislative response to a conflict between rural landowners and utilities 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 commonweal serves a greater social good. The legislature,

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[23] 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 administrative law judge are available online.

[24] 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).

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

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. 4 in partial response. Cooperative Power Association v. Aasand, 288 N.W.2d 697 (1980).

The new siting provisions[26] sought to address landowner opposition by assuring them that power companies could not force families to have to live in close proximity to these lines. Minn. Stat § 116C.63, subdivision 4, now recodified to section 216E.12, subdivision 4, granted property owners the right to refuse to share their properties with a high voltage transmission line easement. As the Aasand Court explained:

> Section 116C.63, subd. 4 requires as a condition precedent to the exercise of the power of eminent domain delegated to utilities, the additional purchase from landowners electing under the statute of any property contiguous to easements condemned for the purpose of a HVTL right-of-way. The statute defines such acquisitions to be for a public purpose. In this manner, the legislature affords landowners not wishing to be adjacent to such right-of-ways the opportunity to obtain expeditiously the fair market value of their property and go elsewhere. The statute, in so doing, responds to parties most affected by the operation of high voltage transmission lines; the statute eases the difficulties of relocation by shifting the transaction cost of locating a willing purchaser for the burdened property from landowner to utility.

As we have said, this statutory opportunity somehow gained the popular name "Buy the

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[26] 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 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).

Farm," but that name is a misnomer, because the vehicle for implementing the new landowner right was condemnation, not voluntary sale. 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." Because the Court of Appeals relied on the voluntary acquisition exception in federal relocation regulations, it is important to emphasize that the legislature explicitly chose condemnation, not voluntary sale, as the mechanism to implement the new right, and we hammer that point home in the next sections of this argument.

The existence of the statutory election markedly eases the task of route designation, because the Public Utilities Commission and NSP can respond to landowner objections to proposals to site transmission lines on farms and residence by explaining that if the landowner finds the location offensive, they can utilize the statutory election. Without the statutory election procedure, the Fairmont road homeowners might, with considerable justification, have opposed the siting of these lines on their properties on the grounds that it created unacceptable damage to their homes. But if NSP is criticized in route siting proceedings for cramming these lines too tightly on residential properties, NSP can respond that any landowner who regards the damage as unacceptable can elect to be condemned. Instead of taking these homes outright in the first instance, NSP can

justify its decision to co-locate in the back yard of homeowners by pointing out that the family can always elect condemnation. In fact, the Court of Appeals' decision actually gives NSP an incentive not to condemn homes, even where the transmission line causes unacceptable damage, because taking a home evades relocation and minimum compensation obligations simply by forcing the homeowners to make the election themselves.

B. The Legislature Chose a Chapter 117 Condemnation as the Vehicle to Implement the Acquisition Required After a Homeowner Election.

Subdivision 4 of section 216E.12 makes it crystal clear that the legislature's intention was that the Fairmont Road properties will be taken by eminent domain. 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 statutory language leaves no doubt that once a family decides that it does not wish to reside with a transmission line or utility tower in its back yard, the mechanism of acquisition is condemnation. The condemnation process, not the homeowner, will determine the price that the homeowner will receive. Once the homeowner makes the statutory election, the election cannot be modified. Subdivision 4 states: "The owner or, when applicable, the contract vendee shall have only one such option and may not expand

or otherwise modify an election without the consent of the utility." In other words, once the homeowner jumps off the election cliff, a condemnation proceeds exactly as it would if the condemning utility had chosen to condemn the home in the first place. In addition, the legislature inserted an automatic easement conversion provision that enlarges the election to include all portions of the property designated as covered by an easement. Subdivision 4 provides as follows:

> 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.

The condemnation, not the homeowner, will determine the time that the homeowner must move. The condemnation statute (and relocation regulations), not the homeowner, will determine whether the condemnor can withhold the full purchase price until after the landowner is forced to move. Once the landowner serves an election notice, the landowner thus loses all control of the acquisition, which is now conducted in every respect under the provisions of Chapter 117. This places the family in the very same vulnerable position as any other condemnee, just as if NSP had decided to take the home.

Subdivision 4 directly answers the question whether homeowners will receive the rights and benefits found in Chapter 117:

> 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.

Actually, all of the substantive and procedural rights in Chapter 117 would apply to these condemnations, even if section 216E.12 were silent on the applicability of Chapter 117, because Chapter 117 contains its own pre-emption provision that assures that all acquisitions using governmental powers will be governed by all of Chapter 117. Minn. Stat. § 117.012. That section provides that:

> 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.

This preemption section alone would have been sufficient to make it clear that all of the provisions of Chapter 117 protect homeowners during the condemnations that occur pursuant to Chapter 216E. But the legislature was not satisfied with the section 117.02 pre-emption section alone. To hammer the point home, the legislature added section 216E.12 subdivision 2 to the election section as follows:

> 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.

Both relocation benefits (section 117.52) and minimum compensation (section 117.187)

are integral parts of Chapter 117. If the legislature actually intended to deny minimum compensation and relocation rights to electing landowners, it left us absolutely no hint in either Chapter 117 or Chapter 216E. In fact, as discussed Part D of this Memorandum, the legislature originally exempted the acquisition from minimum compensation, but then removed that exemption in 2009.

C. Electing Homeowners are "Displaced Persons" Because their Homes are Taken by Eminent Domain.

Under Minnesota's Eminent Domain provisions, 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[27]. In its argument to the Court of Appeals, we understood NSP to concede that the taking of these homes is an "acquisition by any acquiring authority," and that electing homeowners are thus covered by section 117.52, but to contend rather that homeowners are deprived of that coverage

[27] 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.

because a homeowner is not a displaced person under federal regulations because they elect to be condemned. This contention, accepted by the Court of Appeals, represents a fundamental misunderstanding of how the federal relocation regulations operate. In this section, we show that the Court of Appeals erred in concluding that federal relocation regulations are ambiguous on this point, and then proceeded to misread the legislative history.

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.” 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 <u>in whole or in part</u> 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). A mechanical application of the displaced person definition thus leads to the conclusion that the Fairmont Road families are displaced persons. Their properties have been acquired by condemnation at prices set not through negotiation but by exercise of the state’s condemnation power. The date that the homeowner must leave is likewise set by the state’s power to determine when title and possession is transferred. Minn. Stat.

§ 117.042. The fact that one part of the chain of events leading to the condemnation is the landowner election does not detract from the fact that the legislature chose condemnation as the statutory vehicle for consummating the acquisition. A direct cause is any cause that plays a substantial part in bringing about an event, See Civ Jig 27.10 and condemnation is the vehicle for effecting the acquisition.

Contrary to the Court of Appeals holding, relocation benefits must be paid even if the landowner volunteers to sell his land for a project, and even if the acquisition is accomplished by voluntary purchase agreement. 49 CFR § 24.101(a)(2); 49 CFR § 24.101(b). Under those regulations, only if the acquiring authority completely disclaims any intent to acquire the property by condemnation should negotiations fail, can the landowner be deemed to have waived the right to relocation benefits. Id. See also Minn. Stat. § 117.521 (waiver of relocation act benefits). The federal relocation regulations recognize that a negotiation that takes place under threat of possible condemnation triggers the statutory protections and makes the homeowner a displaced person. Thus, 49 CFR section 24.101(a),(b) exempts property owners from relocation benefits only if the acquiring authority with condemnation powers "will not acquire a property because negotiations fail to result in an agreement" and requires that "the owner of the property shall be so informed in writing." Even if the acquiring authority has no eminent domain powers, but is merely a recipient of federal financial assistance, the acquiring authority cannot deprive the displaced person of relocation benefits unless the homeowner is

specifically informed in writing that the power of eminent domain will not be exercised. 49 CFR § 24.101(b).

NSP convinced the Court of Appeals the displaced persons regulations were ambiguous on this point, but they are not. Concluding that they were ambiguous, the Court of Appeals reasoned that it could find guidance by referring to a short passage in the 2005 Congressional Conference Report, which supposedly supports NSP's position that voluntarily subjecting oneself to the condemnation process disentitles a homeowner to relocation benefits. Conference Report on H.R. 2, H. Rept. 100-27, 133 Cong Rec H 1333.

Actually, the full text of the Congressional Conference Report is completely consistent with our interpretation, not with the interpretation of the Court of Appeals majority opinion. The Court of Appeals quoted only the first sentence of the Conference Report's discussion of voluntary sales. The conference report is actually echoing the content of the regulations, making it clear that even a voluntary sale under threat of condemnation entitles the homeowner to relocation benefits:

> In certain cases, where a property owner voluntarily agrees to sell his or her property and moves from the property in connection with the sale, the move should not be considered to be permanent displacement as a direct result of the project. For example, such cases may include a person selling property to an entity that does **not have the authority to acquire that property under the power of eminent domain**. Another example is the sale of property to a Federal or State agency in response to a public invitation or solicitation for offers **by an agency which makes it clear that it will not purchase the property unless a mutually satisfactory agreement between the two parties can be reached.** (Emphasis added).

The Conference Report actually ties directly to the above quoted regulations, by confirming that an acquisition that leaves open even the possibility of a taking by eminent domain means that the property owner is displaced. 49 CFR § 24.101(a)(2) (federal acquiring authority); 49 CFR § 24.101(b)(recipient of governmental financial assistance). The Court of Appeals' reliance upon the "voluntary sale" reference in the Congressional Conference Report" is thus completely misplaced. Putting aside the fact that the landowners here did not consummate anything remotely like a voluntary sale, even a truly voluntary sale does not deprive property owner from relocation benefits. In fact, one of the purposes of the Relocation Act is to encourage agreement, but to ensure that the result of the voluntary sale is the product of fair and equal bargaining power. 49 CFR § 24.1(a)[28]. That purpose could not be attained if a landowner would forfeit the right to relocation benefits by entering into a voluntary acquisition agreement with an entity with compulsory taking powers.

As we said at the outset, the Federal Relocation Act applies to <u>all acquisitions</u> of real property or displacements of persons resulting from . . . programs or projects." 70 Fed. Reg. 590 (Jan 4, 2005) (Preamble to discussion of Rule on adoption). The definition

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[28] 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, to minimize litigation and relieve congestion in the courts, and to promote public confidence in Federal and federally-assisted land acquisition programs. 49 CFR § 24.1(a).

of displaced person is triggered by an acquisition: a taking by eminent domain is simply not required. 49 CFR § 24.2(a)(9)(A) (displaced person results from acquisition). When the acquiring entity consummates a truly voluntary sale, if the acquiring authority has eminent domain power, relocation benefits are still due unless the acquiring authority notifies the potential seller that if negotiations fail, there will be no use of the power of eminent domain to take the property. 49 CFR § 24.101(a)(2) (federal acquiring authority); 49 CFR § 24.101(b)(recipient of governmental financial assistance).

Minnesota Statutes section 117.521 reinforces the federal approach to the issue of voluntary acquisitions. Under section 117.521[29] relocation benefits may be waived by an owner-occupant of property who proposes to sell the property "prior to any action by the acquiring authority indicating an intent to acquire the property whether or not the owner-occupant is willing to sell", if the owner-occupant "requests that the property be acquired through negotiation," but only if the condemnor specifically disclaims any intent to acquire the property by condemnation. In other words, the legislature has made it

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[29] Any owner-occupant of property who (a) prior to any action by the acquiring authority indicating an intent to acquire the property whether or not the owner-occupant is willing to sell, requests that the property be acquired through negotiation, or (b) has clearly shown an intent to sell the property on the public market prior to any inquiry or action by the acquiring authority, may voluntarily waive any relocation assistance, services, payments and benefits, for which eligible under this chapter by signing a waiver agreement specifically describing the type and amounts of relocation assistance, services, payments and benefits for which eligible, separately listing those being waived, and stating that the agreement is voluntary and <u>not made under any threat of acquisition by eminent domain by the acquiring authority</u>. Prior to execution of the waiver agreement by the owner-occupant, the acquiring authority shall explain the contents thereof to the owner-occupant. (Emphasis added).

clear that proposing to be taken by condemnation does not, and cannot, trigger a waiver of relocation benefits.[30] Even if those circumstances apply, the waiver is still not effective unless the waiver is effected by:

> signing a waiver agreement specifically describing the type and amounts of relocation assistance, services, payments and benefits for which eligible, separately listing those being waived, and stating that the agreement is voluntary and not made under any threat of acquisition by eminent domain by the acquiring authority.

In order to be valid, the waiver must be without any express or implied threats of taking the property by eminent domain.

D. The History of Amendments to Chapter 117 and the Power Plant Siting Act Show the Legislative Intent that Relocation Protections and Minimum Compensation apply to Homeowners Electing Under Buy the Farm.

As discussed above, the Power Plant Siting Act mandates that utility companies exercising the power of eminent domain to acquire easements for power lines may be forced to condemn entire homesteads upon the election of the owner and must do so pursuant to the procedures set forth in Minnesota Statutes Chapter 117. Following implementation of the Act in the 1970's, and again in the 2000's after the CapX 2020 project was underway, the Minnesota legislature revisited Chapter 117 to specifically address the way in which particular provisions in that chapter affected landowners subject

[30] The other avenue for waiver applies to situations where owner - occupant has clearly shown an intent to sell the property on the public market prior to any inquiry or action by the acquiring authority.

to power line condemnations under Chapter 216E. Significantly, a review of the amendments to Chapter 117 reveals that the legislature was acutely aware of the interplay between the two chapters and sought to ensure that both relocation protections and minimum compensation apply 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 impact landowners exercising the Buy-the-Farm election.

In Cooperative Power Association v. Aasand, Cooperative Power did not contend that electing landowners should be denied relocation benefits, but warned the 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, (App. A-40 - App. A-42). In Aasand, the Court did not address Cooperative Power's concern about abuse of the right to relocation benefits, but did address Cooperative Power's concern that the election provision should specifically require landowners to identify only commercially viable parcels and invited the legislature to adopt an amendment confining landowner elections to commercially viable parcels.

The Court's invitation created an opportunity for the power industry to revisit the scope of the Buy-the-Farm election right at the legislature. In 1980, the legislature responded by Laws Minnesota 1980 Chapter 614 section 84, which amended section 216E.12, subdivision 4 (codified at the time as section 116C.63, subdivision 4). The amendment did require that the election cover commercially viable parcels only. In

addition, the amendment responded to power industry complaints that the compulsory resale provision should make allowance for the depression in value inflicted on the remaining parcel by the power line. The amended statute provided that the utility would not be compelled to disgorge the property 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."[31]

Conspicuously absent from the 1980 amendments was any attempt by the legislature to remove the relocation rights that the power industry had identified and discussed in its Aasand brief. To the contrary, the 1980 amendments added the automatic-conversion language referred to above, stating that upon the landowner's 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 Siting Act's mandate that all rights under Chapter 117, including relocation benefits, are available to power line condemnees.

In 2004, Great River Energy, Minnesota Power, Otter Tail Power Company and Xcel Energy jointly formed CapX 2020. This effort lead to 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

[31] Ironically, the utilities wanted relief from the same damage to the fee caused by the power line easements that motivated landowners to protest sharing their properties with high voltage power lines and towers.

these proceedings were followed by route-selection and permitting proceedings that implemented for the first time the Power Plant Siting Act as amended. In June of 2005, the United States Supreme Court decided Kelo v. City of New London, 545 U.S. 469 (2005), launching a complete reexamination of the fairness of condemnation procedures and condemnation compensation in Minnesota and many other states. The confluence of the CapX 2020 project and the issuance of Kelo placed landowner rights in power line takings front and center before the legislature.

One of the key reforms of the 2006 legislation was the recognition that "just compensation," even as supplemented by the Relocation Act protections in section 117.51 and following sections, was not adequate compensation for homeowners and business owners, and further, that the condemnation process itself was flawed and unfair to condemnees. Specifically, 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. at § 9. And pertinent here, it added new section 117.187, which provided 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 that "just compensation," even when supplemented by relocation benefits, did not account for the unacceptable economic burdens on homeowners, businesses and farms that result from certain condemnations. The minimum compensation provision contemplates 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 in the Court of Appeals that "just compensation" without minimum compensation is adequate compensation has been emphatically rejected by the legislature.

In this context, the legislature carefully considered which provisions of Chapter 117 should apply to high voltage power line condemnations as it implemented the 2006 reforms. Power line siting was at the forefront of the legislature's consideration because of the three major power line cases moving forward at the Office of Energy Security and Public Utilities Commission at that time. 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 Minnesota 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.

In addition, the legislature chose to provide specific exemptions to public service corporations like NSP. Notably, 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 for only two minor benefits within the universe of relocation benefits. As written in 2006, all relocation rights would extend to public service corporation condemnees, except those in section 117.52, subdivision 1(a) and 4. Section 117.189 now reads:

> Sections 117.031 [attorneys fees]; 117.036 [appraisal and negotiation requirements]; 117.055, subdivision 2, paragraph (b) [petition requirements]; 117.186 [loss of 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. § 117.189 (2007)).

In 2009, the legislature revisited this provision 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's 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~~ <u>$1,500</u> for all types of property <u>except for a public service corporation's use of eminent domain for a high-voltage transmission line</u>, <u>where the award may not exceed $3,000</u>. 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 subdivision 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 <u>all</u> the exemptions relative to high voltage utility lines[32]. Laws Minnesota 2010, Chapter 288. The 2010 amendments removed the

[32] 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.

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) <u>a high-voltage transmission line of 100 kilovolts or more, or ancillary substations</u>; or (2) a natural gas, petroleum, or petroleum products pipeline, or ancillary compressor stations or pumping stations. (Emphasis added)

As such, the 2010 amendments specifically extended the minimum compensation protections to power line and substation condemnations. Importantly, the legislature had already provided in numerous sections affirmation that all provisions of Chapter 117 not specifically exempted in Chapter 216E 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 1(a) and subdivision 4 of relocation section 117.52 as to acquisitions for a high-voltage transmission line. The primary beneficiaries of this change are persons forced to relocate as a result of the taking of their land for a high voltage line in fee, and that would almost always be persons electing to require the taking be in fee. In summary, the Minnesota legislature responded to the implementation of the Power Plant Siting Act in its subsequent amendments to Chapter

117. The Minnesota legislature was acutely aware of the interrelationship between the two chapters and the fact that landowners electing a Buy-the-Farm acquisition were subject to the same procedures, rights, and protections of all other condemnees of Chapter 117. As discussed below, the legislative intent to provide relocation benefits and minimum compensation to electing landowners is consonant with the particular harms inflicted on homeowners subject to high voltage power line condemnations as addressed in the federal relocation regulations.

E. Denying Relocation Rights would Subject Electing Landowners to the Very Evils that the Relocation Act is Designed to Correct by Allowing Utilities to Force Electing Landowners to Relocate Before Receiving Compensation Sufficient to a Find Suitable Replacement Dwelling.

While the language of the regulations clearly entitle electing homeowners to benefits, still it is helpful to understand how the Relocation Act operates in this context to prevent what would otherwise be an untenable unfairness to electing homeowners. The protections for displaced persons were designed to protect homeowners from two perceived evils of the condemnation process as it existed before passage of the Act. The evils addressed by the Uniform Act were procedural and substantive. Congress recognized that condemning authorities had tremendous advantages over individual landowners whose land was being taken at a time convenient to the condemnor, 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 to pay off their mortgage, let alone provide a down payment or obtain financing for a new property. Refusal of the offer, might force the homeowner who declines the condemning authority's offer to endure unwanted construction activity at inconvenient times. 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.

In addition to its goal to remove the inherent negotiating disadvantage experienced by individual landowners, the other purpose of the Relocation Act was to protect homeowners from absorbing costs not traditionally included in the definition of "just compensation." Congress and the Minnesota legislature both recognized that payment of "fair market value" shifts disproportionate costs to property owners. In his testimony supporting the original Federal Relocation Act, Richard C. Van Dusen, Under-Secretary of the Department of Housing and Urban Development, explained:

> 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).

Similarly, the Supreme Court explained:

> Another, equally important, purpose of the [Uniform Relocation] Act was 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 core idea of the Relocation Act is that a homeowner should not be required to move until the homeowner receives sufficient compensation to acquire a comparable replacement property. Under 24 CFR §24.204, no person to be displaced shall be required to move 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. [33] 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). Removing

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[33] 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).

Relocation Act protections is tantamount to granting to the power company the ability to decide when landowners must move, without the corresponding obligation to provide sufficient funds or assistance to relocate.

Once the Enos, Pudas, Stich and Hanson families elected to include their homes in the taking, their homes became subject to all of powers afforded to eminent domain authorities by Chapter 117. If they regret their decision, because they don't like the purchase price offered by NSP, they are not afforded the right by statute to modify the election. We have lived in Minnesota with the Relocation Act for so long, that we may have forgotten the oppressive nature of the eminent domain powers that existed before passage of the Relocation Act. Without the Relocation Act's protections, the power company has virtually unbridled power to decide whether the family will stay in the home during construction and power up of the line, or whether they must leave. Without the Relocation Act's protections, the homeowner can be compelled to vacate the premises at a time that the utility chooses, without receiving sufficient funds to purchase a replacement home. Without the Relocation Act's protections, even when the condemnation commissioners issue their compensation decision, the utility has the right to force the family to vacate the premises in return for receiving only 75% of the fair market value, withholding the remaining 25% until a jury trial is completed. Minn. Stat. § 117.042[34].

[34] Minn. Stat § 117.042 provides that in cases where there has not been a quick take: "petitioner has the right to the title and possession after the filing of the award by

But even if the transmission line condemnor chooses not to quick-take the home, still the homeowner is still placed in an unenviable position. Under section 117.042, NSP is required to deposit its appraised value for the easement, including any severance damages which the appraiser may have found. That amount, of course, is substantially below the fair market value of the homes themselves, and save in exceptional circumstances, would not be enough to pay off first mortgages, let alone find a replacement home. As a result, unless the homeowner can arrive at an agreement with the condemnor, it will likely be living in the home during construction and even when the line is powered up, even though leaving the home before construction commences - - and certainly before line power up - - is an important goal for most electing landowners.

In fact, the Commissioners' awards for each of these families determined that the fair market value of their homes exceeded NSP's appraisal. The Commissioners' awards for each of these families also determined that the cost of a suitable replacement home is greater than the fair market value of their homes. Yet, without the Relocation Act and minimum compensation protections, none of these families is entitled even now to

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the court appointed commissioners as follows: (a) if appeal is waived by the parties upon payment of the award; (b) if appeal is not waived by the parties **upon payment or deposit of three-fourths of the award.** The amount deposited shall be deposited by the court administrator in an interest bearing account no later than the business day next following the day on which the amount was deposited with the court. All interest credited to the amount deposited from the date of deposit shall be paid to the ultimate recipient of the amount deposited..

payment of the fair market value of their homes, nor sufficient funds to pay for a replacement home.

F. Electing Homeowners Must Relocate Because they are Condemnees and are Thus Entitled to Minimum Compensation.

Section 117.187, setting forth the requirement for minimum compensation, provides:

> 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.

Much of the argument regarding the application of this statute echoes the argument with regard to relocation, except for the difference in the legislative history of the application of minimum compensation to high voltage transmission condemnations, because after extensive testimony during 2009 hearings, the legislature explicitly removed the previous exemption from minimum compensation for high voltage transmission acquisitions. We discussed that difference.

The district court determined that the statute applied to owners making a Buy-the-Farm election because section 216E.12, subd. 2 explicitly states that proceedings under that chapter "shall be conducted in the manner prescribed in chapter 117, except as otherwise specifically provided in this section." The Court of Appeals reversed, reasoning that landowners who make a Buy-the-Farm election are not owners who "must

relocate." Specifically, the Court of Appeals emphasized that electing landowners have a "choice": the landowners may choose to stay on the property with the HVTL towers and lines or they may choose to require the utility company to acquire the parcel by making a Buy-the-Farm election. This reasoning is flawed in two important ways. The Court of Appeals also reasoned that the phrase "must relocate" would somehow be superfluous if the minimum compensation provision were applied to high voltage transmission condemnations.

The simple rejoinder to these arguments is that on the day that the Commissioners issue their award, if there has been no quick-take, the condemnor has a right to possession and title of an electing homeowner's property, exactly as it would for a home taken because NSP listed the home in the petition in the first place. The Court of Appeals fails to address the district court's compelling conclusion that section 216E.12, subd. 2 mandates that the provisions of chapter 117, including the minimum-compensation requirement, apply to HVTL condemnations unless otherwise specified in that section and that section 216E.12 does not in any way exempt application of minimum compensation. The legislature's intentions can not be any more plain in this regard.

Second, the Court of Appeals improperly shifted the focus of the analysis to the two words "must relocate," reasoning that the landowners making the Buy-the-Farm election did not technically *have* to relocate, but were *choosing* to relocate. This interpretation is contrary to the plain language of the minimum-compensation statute as it

applies in its substantive context. Section 216E.12, subdivision 4 explicitly 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). Subdivision 4 goes on to specify, "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 . . . ." With regard to the easement interest itself, subdivision 4 states, "Upon the owner's election . . ., the easement interest over and adjacent to lands designed 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*." (emphasis added). Thus, subdivision 4 unambiguously indicates that, once an owner makes a Buy-the-Farm election, the condemnation procedures set forth in chapter 117 are set into motion and the condemning authority, as a matter of law, must condemn both the HVTL easement and contiguous land as "any other acquisition for a public purpose" and the landowner, as a matter of law, must relocate. The Court of Appeals' analysis improperly places the landowner back in time to a point prior to making that election; as set forth in the statute, once the election is made, the landowner no longer has any choice in the matter.

Third, the Court of Appeals makes much of the contention that a landowner has a "choice" whether to stay on the property with the high voltage transmission tower and lines or to make the election and move, and therefore, the landowner is not forced to relocate. However, this choice is for all practical purposes a Hobson's choice: the landowner has absolutely no say whatsoever regarding the placement of high voltage transmission towers and lines on their property. Taking the landowners here, they had no choice regarding the cutting down of mature trees that separated their homes from the freeway. It is undisputable that the CapX 2020 project will indelibly change the character, appearance, and use of the subject homestead properties. As set forth in Section A, the legislature recognized that homeowners subject to such condemnations suffer in ways that are difficult if not impossible to rectify by mere diminution-in-fair-market-value compensation. The legislature sought to address these concerns when it enacted the Power Plant Siting Act and explicitly mandated that the procedures of Chapter 177 apply. Significantly, the Minnesota legislature specifically sought to provide minimum compensation to homeowners electing under Buy-the-Farm when in 2010 it removed the exemption. The legislature was obviously aware that landowners "have a choice" regarding whether to make a Buy-the-Farm election; the simple truth of the matter is, had the legislature believed that such a "choice" rendered the landowners ineligible for the benefits all other condemnees receive under Chapter 117, it would have expressed the same. Instead, it has consistently expressed the opposite. In light of the

overwhelming evidence that the legislature intended to provide minimum-compensation assurances to landowners electing under Buy-the-Farm, the Court of Appeals' they-have-a-choice argument is without merit.

The claim that "must relocate" would be superfluous ignores the fact that the minimum compensation legislation was written at a time when the legislature exempted transmission line takings from minimum compensation. It ignores the fact that the legislature purposely added minimum compensation to transmission line takings as a result of the 2009 hearings that focused on the CapX 2020 takings. It is NSP's construction that makes the amending act superfluous.

IV. CONCLUSION

In conclusion, the Court of Appeals erred in determining that relocation benefits under section 117.52 and minimum compensation under 117.187 do not apply to landowners making a Buy-the-Farm election under section 216E.12, subdivision 4. Therefore, the Court must reverse.

Dated: November 15, 2012

Respectfully Submitted,

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