

A-040144

**STATE OF MINNESOTA
IN COURT OF APPEALS**

Power Line Task Force, Inc.,
a Minnesota not-for-profit corporation,
on its own behalf and on behalf of the State of Minnesota,

Appellant,

v.

Northern States Power Company,
d/b/a Xcel Energy, a Minnesota Corporation,

Respondent.

APPELLANT POWER LINE TASK FORCE'S BRIEF

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LEGAL ISSUES

- I. **Minn. Stat. § 116C.57** requires that a public utility obtain a route permit from the Environmental Quality Board for any high-voltage transmission line with a capacity of over 100 kilovolts. Xcel Energy never obtained a route permit for the Southeast Metro Transmission Line, which is designed to carry 115 kilovolts. Should the decision of the trial court be reversed where it found Xcel Energy was not required to obtain a route permit as a matter of law?

- II. **Minn. Stat. § 216B.243** requires that a public utility obtain a certificate of need from the Public Utilities Commission for construction of any high-voltage power line with a capacity of 100 kilovolts or more and greater than ten miles long. Xcel Energy never obtained a certificate of need for the Southeast Metro Transmission Line, which is designed to carry 115 kilovolts and is 14.7 miles long. Should the decision of the trial court be reversed where it found that Xcel Energy was not required to obtain a certificate of need as a matter of law?

STATEMENT OF THE CASE

The issue before this court is whether the trial court wrongly granted summary judgment to Respondent Northern States Power d/b/a Xcel Energy (“Xcel”) where it failed to obtain a certificate of need and a route permit prior to beginning construction of the Southeast Metro Transmission Line (“the Line”) in violation of Minn. Stat. §§ 216B.243 and 116C.557 (2001). The 14.7-mile Line runs partially on new right of ways and partially along the length of an existing 115 kilovolt (kV), single-circuit power line beginning at the Red Rock Substation in Washington County and ending at Wilson Substation in Hennepin County.

Effective August 1, 2001, Minn. Stat. § 216B.245 mandates that, before a high-voltage power line more than 10 miles long and capable of carrying over 100 kV can be certified for construction, the line’s sponsor obtain a certificate of need from Minnesota’s Public Utilities Commission (“PUC”). Section 116C.57 mandates that before beginning construction on *any* high-voltage power line over 100 kV, the line’s sponsor must obtain a route permit from Minnesota’s Environmental Quality Board (“EQB”). To date, Xcel has neither applied for, nor obtained, either a certificate of need or a route permit.

Construction of the Line requires Xcel to replace the single-circuit 115 kV line supported by standard wooden H-frame poles with two new lines supported by 80- to 110-foot tubular steel poles. The Line traverses the cities of Inver Grove Heights, Newport, Mendota Heights, South St. Paul, Sunfish Lake, Saint Paul and Bloomington.

On March 4, 2003, Appellant Power Line Task Force (“Task Force”), a Minnesota not-for-profit corporation made up of and representing the interests of homeowners and

residents of the cities of Sunfish Lake, Mendota Heights and South St. Paul, brought an action in Hennepin County District Court against Xcel. The Task Force claimed that, absent PUC and EQB approval, the Line constituted a violation of the Minnesota Environmental Rights Act, nuisance, trespass, and invasion of privacy. In its request for injunctive relief, the Task Force sought an order from the trial court requiring that Xcel obtain a certificate of need and a route permit for construction of the Line and restraining Xcel from construction of the Line until such time — if ever — Xcel obtained the requisite approvals from the PUC and EQB.

Xcel successfully moved for a change of venue to Dakota County. In April and May 2003, the Task Force and Xcel brought cross-motions for summary judgment. The Task Force argued that the requirements of sections 216B.243 and 116C.57 went into effect on August 1, 2001, and because it is undisputed that construction of the Line had not begun as of the effective dates of the statutes, Xcel was — and is — required to obtain approval from the PUC and EQB before beginning construction of the Line.

In response, Xcel made three primary arguments: (1) Xcel was not required to comply with the requirements of sections 216B.243 and 116C.57 because it had applied to the affected cities for zoning variances and/or conditional use permits prior to August 1, 2001; (2) because the construction of the Line was divided into two “phases” and because each phase of the Line was less than 10 miles long, the Line did not trigger the certificate of need requirement of section 216B.243; and (3) the zoning approvals obtained via court actions initiated by Xcel against local municipalities satisfied the requirements of Minn. Stat. § 116C.576.

On November 26, 2003, the Honorable Karen Asphaug, District Judge, Dakota County District Court, granted Xcel's motion for summary judgment and simultaneously denied the Task Force's motion for summary judgment. After concluding that this matter did not present any genuine issues of material fact, the trial court found that, in breaking up the construction of the Line into two phases, Xcel rendered each phase of the Line less than 10 miles and therefore Minn. Stat. § 216B.243 did not apply to the individual phases of the Line. Because it found no statutory violation, the trial court further found that the Task Force failed to support a prima facie case of a MERA violation, nuisance, trespass, or an invasion of privacy based "phase one" of the Project.

Finally, the trial court's conclusions of law do not address the fact that, regardless of the length of the Line or the number of phases of construction, Xcel was still required to (but did not) obtain a route permit. The Task Force now appeals the decision of the trial court granting Xcel's Motion for Summary Judgment.

STATEMENT OF FACTS

The Southeast Metro Transmission Line Project

In 1998, Xcel announced a plan to replace the Southeast Metro Transmission Line (the “Line”). As planned, Xcel would replace an existing 14.7-mile, 115 kilovolt (“kV”) single-circuit power line beginning at the Red Rock Substation in Newport and ending at Wilson Substation in Bloomington with a new 115 kV, double-circuit high-voltage power line. Both the current and the proposed new lines run through the cities of Inver Grove Heights, Newport, Mendota Heights, South St. Paul, Sunfish Lake, Saint Paul and Bloomington, affecting the Red Rock, Stockyards, Rogers Lake, Airport, East Bloomington, Bloomington and Wilson substations.¹

The Line will run within fifty feet of at least 208 homes in the five communities east of the Minnesota River and within 25 feet of many homes in South Saint Paul. To support the new double-circuit transmission lines, Xcel must to replace the existing H-frame wooden poles with 130 80- to 110-foot tubular steel poles spaced an average of 167 yards apart.² The new poles require concrete foundations six-feet in diameter and approximately 35–40 feet deep.³

¹ Exhibit 13. State of Minnesota Environmental Quality Board, *In the Matter of Need for an Environmental Impact Statement for the Proposed Southeast Metro 115 kV Transmission Line Project*, Findings of Fact, Conclusions and Order (November 18, 1999) (PLTF 0140).

² Exhibit 20 at p. 4, ¶ 7. Project Magnitude Data and Figure 6 (PLTF 0230 & PLTF 0235).

³ Exhibit 9. Plaintiff Power Line Task Force Inc.’s Response Letter to Dakota County District Court, Tab D. October 10, 2003 Letter from Xcel to Landowner’s abutting the Line, Page 3. (PLTF 0121).

Members of the Task Force are concerned about not only the impact on property values, but also about the potential health effects related to living so close to the electromagnetic fields (“EMFs”) that the power lines will produce. There are members of the Task Force who were never given notice of the proposal to build the Line even though the increased EMFs affected their homes and large poles would be placed adjacent to their property.⁴ Further, there is credible evidence that the increased EMFs will cause harm to the health and well-being of residents adjacent to the Line. For example, EMFs have been shown to be linked to an increased risk of childhood leukemia, adult brain cancer, Lou Gehrig’s Disease (or ALS), and miscarriage.⁵

Failure of Xcel to Gain Required Approval from the EQB and PUC for the Line

In March 1999, the EQB received a request pursuant to Minn. Rules 4410.1100 requesting the EQB to require Xcel to submit an Environmental Assessment Worksheet (“EAW”) for the line.⁶ On April 6, 1999, Xcel agreed to submit an EAW to the EQB. After submission of the EAW, the EQB received 23 comment letters.⁷ Ten of the 23 commentators recommended that the EQB order an Environmental Impact Statement (“EIS”) for the Line.⁸ After a hearing on November 18, 1999, the EQB found that Xcel

⁴ Exhibit 4. Affidavit of Steven Warford at ¶ 2. (PLTF 0032)

⁵ Exhibit 1. *California EMF Program Final Report, An Evaluation of the Possible Risks from Electrical and Magnetic Fields (EMFs) from Power Lines, Internal Wiring, Electrical Occupations and Appliances*, June 2002 at 3. (PLTF 0213)

⁶ Exhibit 13. State of Minnesota Environmental Quality Board, *In the Matter of Need for an Environmental Impact Statement for the Proposed Southeast Metro 115 kV Transmission Line Project*, Findings of Fact, Conclusion, and Order.

⁷ *Id.*

⁸ *Id.*

did not have to prepare an EIS for the Line.⁹ Because the EQB decision bore only on the issue of whether an EIS was necessary, it left to the local municipalities with jurisdiction over the Line the responsibility for determining whether the proposed new line was appropriate for the local communities it would affect.¹⁰

Starting in 1999, Xcel attempted to obtain zoning approval for the Line from some of the affected municipalities: Mendota Heights, South St. Paul, and Sunfish Lake. After public hearings and consideration of issues presented by the Line, all three cities denied Xcel's applications for conditional use permits.¹¹

On March 2, 1999, Xcel filed an application with the City of Mendota Heights for a conditional use permit ("CUP") for the Line under Minn. Stat. § 15.99.¹² Section 15.99 applies to zoning applications and mandates that unless a reviewing body acts within 60 days a zoning application is automatically approved unless written permission for an extension is provided by the applicant. Accordingly unless Mendota Heights acted within the time period provided by the statute, section 15.99 mandated that Mendota Heights issue the CUP. This time deadline was suspended pending completion of related proceedings before the EQB, discussed above.¹³ On December 3, 1999, Mendota Heights sent Xcel a letter outlining the agreement between the City and Xcel providing that the review period would resume on January 25, 2000. On January 25, 2000 Mendota

⁹ *Id.*

¹⁰ *See id.*

¹¹ *Northern States Power Co. v. City of Mendota Heights*, 646 N.W.2d 919 (Minn. Ct. App. 2002); *Northern States Power v. City of Sunfish Lake*, 659 N.W.2d 271 (Minn. Ct. App. 2003).

¹² *City of Mendota Heights*, 646 N.W.2d at 921.

¹³ *Id.*

Height's planning commission met and reviewed Xcel's CUP application. On February 22, 2000, the planning commission recommended denial of the CUP citing concerns related to health and safety risks, detrimental impacts on nearby property values, and the need for a review of the Line on a regional basis. On March 6, 2000, Mendota Heights proposed that Xcel hire an independent consultant and that a Regional Steering Committee be created to involve other cities along the power line. Xcel agreed to the proposal and agreed that the statutory period of review would be extended as long as work of the committee was done in good faith – within a set time limit.¹⁴

On April 4, 2000, the Mendota Heights City Council adopted a resolution authorizing the creation of a steering committee and the independent review of the Line. During the process, the September 8, 2000 deadline passed.¹⁵ In March 2001, the consultant hired and monitored by Xcel, Commonwealth Associates, Inc., issued a final report to the steering committee.¹⁶

On May 8, 2001, Xcel sent a letter to Mendota Heights demanding that the city issue the permit by June 5, 2001.¹⁷ In its demand, Xcel re-asserted its approval only through September 8, 2000, and affirmatively asserted its rights under Minn. Stat. §15.99.¹⁸ On May 15, 2001, Xcel brought a declaratory judgment action seeking a writ of mandamus from the Dakota County District Court. The District Court found that Xcel

¹⁴ *Id.* at 922-923.

¹⁵ *Id.*

¹⁶ *Id.* at 923.

¹⁷ *Id.*

¹⁸ *Id.*

was equitably estopped from asserting its rights for automatic and unconditional approval of the CUP under section 15.99.¹⁹

Xcel appealed the decision of the trial court. During the pending appeal, after reviewing the Commonwealth Associates study, and listening to citizen and expert testimony, the City of Mendota Heights rejected Xcel's application for a CUP. This Court reversed the trial court's decision, on the ground that section 15.99 barred the City of Mendota Heights from rejecting the CUP because Mendota Heights failed to obtain a voluntary extension of time to respond in writing from Xcel.²⁰ This Court, therefore, held that the City exhausted the time permitted under section 15.99 and that Xcel's CUP must be automatically approved.²¹ Consequently, despite the lengthy approval process and subsequent litigation, ultimately the concerns of the City of Mendota Heights related to the health and property values of its citizens were never considered in issuing the CUP.

Xcel also applied for a CUP from the City of South St. Paul. South St. Paul's Planning Commission conducted three public meetings and unanimously recommended to the City Council that it not issue the CUP.²² The City Council unanimously voted to decline the Line. The Planning Commission and City Council separately determined that the line would be dangerous and would reduce property values.²³ Xcel sued South St.

¹⁹ *Id.* at 924.

²⁰ *Id.* at 928.

²¹ *Id.*

²² Exhibit 14. *Northern States Power v. The City of South St. Paul*, No. C8-01-9262 Ramsey County District Court, Order Approving Settlement and Writ of Mandamus (August 13, 2001). (PLTF 0418)

²³ *Id.*

Paul, alleging a violation of the time limits under Minn. Stat. § 15.99.²⁴ Without conceding the merits of its claims or defenses, the City of South St. Paul settled with Xcel in order to resolve the pending lawsuit.²⁵ On October 21, 2001, the Dakota County District Court approved the settlement.²⁶ Just like the approval process in the City of Mendota Heights, the health and property value concerns of the City of South St. Paul related to its citizen's health and property values were never considered in issuing the CUP to Xcel.

On November 13, 2001, Xcel submitted an application to the City of Sunfish Lake for a CUP for the portion of the transmission lines within the city's boundaries.²⁷ The Sunfish Lake Planning Commission and City Council held several public hearings, heard from over 20 witnesses and reviewed over 100 documents addressing the proposed Line.²⁸ On February 5, 2002, the Sunfish Lake City Council adopted Resolution No. 02-04 by which the City denied Xcel's application for a CUP. Resolution No. 02-04 was 20 pages long, contained specific findings of facts and conclusions, and an appendix stating the evidence relied upon in arriving at its conclusions.

The Sunfish Lake City Council denied Xcel's request for a CUP, because, among other reasons (1) the Line did not have adequate right-of-way to support the upgrade; (2) the studies indicating adverse health effects from EMFs were credible; (3) the Line would

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Exhibit 17. City of Sunfish Lake, Dakota County Minnesota Resolution No. 02-04, Findings of Fact at p. 1, ¶ 1. (PLTF 0181)

²⁸ *Id.* at ¶ 4.

cause a reduction in the market value of residential homes; (4) the application to Sunfish Lake was premature, lacking a certificate of need from the PUC; and (5) Xcel had not adequately demonstrated a need for the upgraded Line.²⁹

In response, Xcel brought an action for a Writ of Mandamus seeking a district court order requiring Sunfish Lake to approve the CUP.³⁰ The district court ordered the City of Sunfish Lake to issue the CUP.³¹ Prior to entry of the judgment on the mandamus order Xcel and the City of Sunfish Lake entered into a settlement agreement and release. The settlement provided that Sunfish Lake would grant the CUP but did not require the City of Sunfish Lake to abandon its findings of fact or conclusions arising out of the Resolution No. 02-04.³² Thus, Xcel again obtained a CUP through a process that did not address the health and property value concerns of the property owners that lived within the shadow of the Line.

During the pendency of the Mendota Heights litigation, the Minnesota legislature enacted new legislation governing the approval process for high-voltage power lines. The legislation became effective August 1, 2001.³³ The new laws require that prior to beginning construction on any high-voltage power line exceeding 100 kV and over 10 miles long, a public utility must obtain a certificate of need from the PUC.³⁴ Once the certificate of need is obtained the public utility must obtain a route permit from the EQB

²⁹ *Id.* at 19-20, ¶¶ A – J.

³⁰ *City of Sunfish Lake*, 659 N.W.2d at 273.

³¹ *Id.*

³² *Id.*

³³ Minn. Stat. §§ 216B *et seq.* and 116C *et seq.*

³⁴ Minn. Stat. § 216B.243.

for any high-voltage power line with voltage in excess of 100 kV – regardless of length.³⁵ The route permit requirement may be met by an alternative process whereby a public utility may obtain permission to build the proposed power line from each affected municipality.³⁶ The alternative approval process also requires notice to all stakeholders, both public and private, of the construction required by proposed high-voltage power line. Moreover, the alternative process requires approval after consideration of all human and environmental impacts associated with the placement of the high-voltage power line by a Responsible Government Unit identified by the EQB.³⁷

Xcel Agrees Construction of the Project Began After August 1, 2001.

As part of its suit against South St. Paul, on August 13, 2001, Xcel submitted a Verified Petition for Alternative Writ of Mandamus to Ramsey County District Court. In the Petition, Xcel represented that construction of the new line would not begin until late 2001. Paragraph 17 of the Petition states:

Construction of the upgraded transmission line is planned in two phases. Phase one of the Project consists of the eastern portion of the line from the Red Rock Substation to the Rogers Lake Substation. Construction was originally scheduled to begin in the fall of 1999. Unfortunately, Mendota Heights' response to Xcel Energy's CUP application delayed construction commencement for two years. *Construction will now begin in late fall 2001.*³⁸

³⁵ Minn. Stat. § 116C *et seq.*

³⁶ Minn. Stat. § 116C.576.

³⁷ *Id.*; Minn. Stat. § 116C.57.

³⁸ Exhibit 22. *Northern States Power v. The City of South St. Paul*, Ramsey County District Court, Case No. C8-01-9262, Xcel Energy's Verified Petition for Alternative Writ of Mandamus (August 13, 2001) (emphasis added). (PLTF 0266)

There is no other credible evidence in the record to demonstrate that construction of the Line began prior to August 1, 2001.

At no time from March 1999 to date did Xcel ever obtain or apply for either a certificate of need from the PUC or a route permit from the EQB.

Length of the Total Project

In its various submissions to municipalities and to District Courts seeking approval for the Line, Xcel referred to it as a *single* line of 14.7 miles. Only during the case giving rise to this appeal did Xcel suggest that the line's two phases of construction render the Line two separate projects, requiring separate approval.

For example, in a March 31, 1999 letter to the EQB, Xcel stated,

we understand that a petition for an [EAW] has been filed with the [EQB] concerning a 115 kV transmission line project NSP is proposing in the southeastern part of the metropolitan area. . . . NSP proposes to construct a 115 kV transmission *line* in two phases in the southeastern metropolitan area.³⁹

Likewise, In June 2001, in *Xcel v. City of Mendota Heights*, David G. Callahan, employed by NSP as the "Team Lead" for Siting and Land Rights for the Project, stated in his affidavit to the Ramsey County District Court,

[t]he project involves upgrading NSP's southeast Twin Cities metropolitan electric transmission system with the addition of a second 115kV *line* connecting NSP's Red Rock, Rogers Lake and Wilson substations. The *14.7 mile project* begins at the Red Rock substation in Newport, Washington County, connects to the Rogers Lake substation in Mendota

³⁹ Exhibit 23. March 31, 1999 Letter to Bob Culpit of the Minnesota Environmental Quality Board from James Alders of Xcel (emphasis added). (PLTF 0287)

Heights, Dakota County, and ends approximately one half mile east of the Wilson substation in Bloomington, Hennepin County (the “Project”).⁴⁰

Finally, in an attachment to a January 10, 2003 letter to the Minnesota Department of Natural Resources’ Division of Land and Minerals addressing the Project’s crossing of protected water, Xcel represents the “Total Project Length” as a single 14.7 mile project.

New Line in Inver Grove Heights

Despite Xcel’s repeated representations that the Line would be completely encompassed by the existing right-of-way for the single-circuit transmission line, in April 2003 it built a new right-of-way without any notice to or approval from the affected homeowners in Inver Grove Heights.⁴¹

In re-routing the right-of-way Xcel obtained permission from the Inver Grove Heights City Council as the owner of some of the impacted land, not in its capacity as a zoning authority, as Inver Grove Heights has no relevant zoning requirements. The Inver Grove Heights City Council did not consider any environmental issues or health concerns either implicitly or explicitly nor did Xcel notify homeowners neighboring the new right-of-way of its proceedings, as mandated by Minn. Stat. §§ 216B.243 and 116C.57.⁴² There is no evidence in the record, nor does Xcel assert, that it notified or gained approval from either the PUC or the EQB for this 2003 route change.

⁴⁰ Exhibit 19. Affidavit of David G. Callahan in *Northern States Power v. City of Mendota Heights* mandamus action (emphasis added). (PLTF 0217)

⁴¹ Exhibit 16, Inver Grove Heights City Council Meeting Minutes (February 10, 2003). (PLTF 0179)

⁴² *See id.*

Current Litigation

On August 15, 2002, the Task Force served Xcel with its Summons and Complaint, filed in Hennepin County District Court.⁴³ The Task Force alleged Xcel violated Minn. Stat. § 216B.243 (2001) and Minn. Stat. § 116C.57 (2001).⁴⁴ Based on the alleged violation, the Task Force further alleged violations of Minnesota Environmental Rights Act, trespass, nuisance, and invasion of privacy.⁴⁵ In response, on March 24, 2003, Xcel successfully moved for Change of Venue or in the alternative Rule 12 Dismissal. On April 22, 2003, the Task Force moved the trial court for summary judgment.⁴⁶ Xcel opposed the Task Force's motion and brought its own cross-motion for summary judgment.⁴⁷ Both parties incorporated the records from the memorandums of law addressing change of venue into their motions for summary judgment.

On July 17, 2003, the Honorable Deborah Hedlund of the Hennepin County District Court granted Xcel's Motion for Change of Venue to Dakota County District Court. Oral arguments for the parties' cross-motions for summary judgment were heard before the Honorable Karen Asphaug of the Dakota County District Court on September 15, 2003. On October 7, 2003, Xcel sent a supplemental letter in support of its motion

⁴³ Exhibit 1. Power Line Task Force's Summons and Complaint. (PLTF 0001)

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Exhibit 2. Power Line Task Force's Notice of Motion and Motion for Summary Judgment. (PLTF 0011)

⁴⁷ Exhibit 6. Defendant Xcel's Memorandum of Law in Opposition to Plaintiff Power Line Task Force, Inc.'s Motion for Summary Judgment and In Support of its Cross-Motion for Summary Judgment. (PLTF 0039)

for summary judgment to the Dakota County District Court.⁴⁸ The Task Force responded to Xcel's letter to the Dakota County District Court on October 23, 2003.⁴⁹

On December 1, 2003, the trial court granted Xcel's Motion for Summary Judgment and denied the Task Force's Motion for Summary Judgment.⁵⁰ On January 2, 2004, the Task Force noticed its appeal before this Court.⁵¹ Now comes the Task Force for its argument in support of its appeal from the Dakota County District Court decision granting Xcel's Motion for Summary Judgment.

STANDARD OF REVIEW

On an appeal from an order granting summary judgment, the reviewing court must consider: (1) whether there are any genuine issues of material fact and (2) whether the district court erred in its application of the law.⁵² The trial court's grant of summary judgment to Xcel may only be affirmed if, taking all facts in a light most favorable to the Task Force, there remains no genuine issue of material fact and Xcel is entitled to judgment as a matter of law.⁵³ All questions of law are reviewed by this Court *de novo*.

⁴⁸ Exhibit 8. Defendant Northern State's Power Company's October 7, 2003 Supplemental Letter to the Dakota County District Court. (PLTF 0075)

⁴⁹ Exhibit 9. Plaintiff Power Line Task Force Inc.'s October 23, 2003 Response Letter to Dakota County District Court. (PLTF 0078)

⁵⁰ Exhibit 10 *Power Line Task Force v. Northern States Power*, Dakota County District Court File No. C7-03-9371, Findings of Fact and Conclusions of Law, Order and Order for Judgment, Hon. Karen Asphaug (December 1, 2004). (PLTF 0124)

⁵¹ Exhibit 12. Plaintiff Power Line Task Force, Inc.'s Notice of Appeal to Court of Appeals. (PLTF 0136)

⁵² *Northern States Power Co. v. Minnesota Metropolitan Council*, 667 N.W.2d 501, 506 (Minn. Ct. App. 2003).

⁵³ *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn.1993) (citation omitted).

ARGUMENT

Effective August 1, 2001, Minn. Stat. §§ 116C.57 and 216B.243 require Xcel to obtain a certificate of need from the Minnesota Public Utilities Commission (“PUC”) and a route permit from the Minnesota Environmental Quality Board (“EQB”) before beginning construction on the Southeast Metro Line. Section 216B.243, subd. 2 states,

No [high-voltage transmission line with a capacity of 100 kilovolts or more with more than ten miles of its length in Minnesota] shall be *sited or constructed* in Minnesota without the issuance of a certificate of need by the [PUC] . . . consistent with the criteria for assessment of need. (Emphasis added.)

Section 116C.57, subd. 2 states,

No person may *construct* a high voltage transmission line without a route permit from the board. A high voltage transmission line may be constructed only along a route approved by the board. (Emphasis added.)

These statutes are clear on their face. Neither section contains any exclusion or exception such that they would not apply to the Line at issue here. The applicability of the statutes to this dispute turns only on whether the construction of the Line began prior to August 1, 2001.

Statutory construction is a question of law, reviewed by this Court de novo.⁵⁴ Long-standing rules of statutory construction require that if a statute, as codified, is clear on its face and applies to the facts presented without ambiguity, Minnesota courts must apply the statute as written. Xcel urged the trial court, which wrongly acquiesced, to ignore the plain language of the statutes and look to the legislative history. In doing so, the trial court erred. Sections 216B.243 and 116C.57 clearly state the standards Xcel

⁵⁴ *Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 190 (Minn.1990).

must meet in order for construction of the Line to be approved under Minnesota law. Because the language of the statutes is clear and unambiguous, the law precluded the trial court from looking beyond the plain language of the statute.⁵⁵ Consequently, the trial court erred in its analysis of the law and must be reversed.

Minnesota courts must support the principle that every citizen of Minnesota must know that when he or she reads a statute that is clear on its face — that courts will enforce the statutory law as written. The fact that application of the law may cause a party inconvenience is not sufficient to overturn the long-standing rules of statutory construction. Nor should it undermine the very real public policy interest in ensuring that the law as written is the law that this Court will apply to the cases before it.

It is undisputed that the *construction* of the Line did not begin until after August 1, 2001. The legislature enacted the 2001 amendments to chapters 216B and 116C to ensure that high-voltage transmission lines are sited in an orderly manner to be compatible with environmental preservation, to encourage the efficient use of resources, to minimize adverse human and environmental impact, and to provide broad spectrum citizen participation as a principle of operation of the PUC and the EQB.⁵⁶ Allowing Xcel to avoid its responsibility under the statutes, merely because of inconvenience or cost, undermines stated purpose of the statutes. Xcel's attempts to evade the statutory requirements are particularly egregious because, despite its representations to the

⁵⁵ See generally Minn. Stat. § 615.16; See also *Mutual Servs. Cas. Ins. Co. v. League of Minn. Cities Ins. Trust*, 659 N.W.2d 755, 760 (Minn.2003) ("[W]here the intention of the legislature is clearly manifested by plain and unambiguous language, [courts] have neither the need nor the permission to engage in statutory interpretation.").

⁵⁶ See Minn. Stat. § 116C.53, subd. 1; Minn. Rules 4400.0300 (2004).

contrary, the Line has been hotly contested from its initial conception. Moreover, the Line has never survived a substantive review of the potential impact on the environment, health, and property values by any local municipality with jurisdiction over the proposed line.

Finally, this case presents two clear questions of material fact that demand remand to the trial court for resolution by the finder of fact. First, whether construction of the Line began on or before August 1, 2001. Second, whether Xcel substantially complied with the stated purpose of the statute by failing to obtain any substantive environmental approval from any local municipality.

A. Xcel Must Obtain a Route Permit From the Environmental Quality Board as Required Under Minn. Stat. § 116C.57.

As of August 1, 2001, in Minnesota, a public utility must obtain a route permit from the Minnesota Environmental Quality Board (“EQB”) prior to beginning construction of any high-voltage transmission line designed for and capable of operation at a nominal voltage of 100 kV or more.⁵⁷ The public utility’s application to the EQB for a route permit must propose at least two routes for the transmission line.⁵⁸ Within 15 days of submission of the application to the EQB the applicant must notify all stakeholders by (1) publishing notice of the application in a local newspaper of general interest; (2) mailing a copy of the application by certified mail to every affected

⁵⁷ Minn. Stat. § 116C.57, subd. 2 and 4; *see also* Minn. Stat. 116C.52, subd. 3 (defining “construction” as “any clearing of land, excavation, or other action that would adversely affect the natural environment of the site or route but does not include changes needed for the temporary use of sites or routes for non-utility purposes, or uses in securing survey or geological data, include in necessary borings to ascertain foundation conditions.”)

⁵⁸ Minn. Stat. § 116C.57, subd. 2a.

municipality and to each owner whose property is on or adjacent to any of the proposed routes for the transmission lines; and (3) mailing to any person who has requested to be on a list maintained by the EQB for receiving notice of proposed high-voltage transmission lines.⁵⁹ Once the application is received and the stakeholders notified, the EQB must hold a public hearing on whether to issue the route permit.⁶⁰

The stated purpose of requiring the EQB to issue route permits after PUC approval is to conserve resources, minimize human and environmental impacts, minimize human settlement conflicts, and ensure the state's electric energy security.⁶¹ Among other factors, section 116C.57 sets out the following factors the EQB must evaluate when reviewing a route permit application: (1) alternatives to the applicant's proposed route; (2) the effects of new electric power transmission and the environmental impacts; (3) analysis of the direct and indirect environmental effects that cannot be avoided; (4) analysis of the direct and indirect economic impact of the proposed routes; and (5) evaluation of research and investigations relating to effects on land, water, and air resources from high-voltage power lines and EMFs.⁶²

In this case, Xcel did not begin construction to replace the Southeast Metro Line until after August 1, 2001. Most importantly, despite Xcel's alleged attempts to obtain substantive approval for the proposed new line, no government entity that conducted an environmental, health, and economic review approved the proposed new line as safe.

⁵⁹ *Id.*, subd 2b.

⁶⁰ *Id.*, subd. 2d.

⁶¹ *Id.*, subd. 4.

⁶² *See generally* Minn. Stat. § 116C.57 subd. 4.

Xcel's approvals all arise from either litigation or the threat of litigation based solely on alleged procedural defects in the process for determining whether permission should be granted under the affected cities' zoning ordinances. Thus, because Xcel did not begin construction to replace the Line until after August 1, 2001, and has never survived a substantive environmental, health or economic review of the proposed replacement, it must be required to obtain a route permit from the EQB for the Line.⁶³

B. Whether Xcel “substantially complied” with the Alternative Approval Process Pursuant to Minn. Stat. § 116C.576 is a Question of Fact, Inappropriately Resolved by the Trial Court as a Matter of Law.

In lieu of obtaining a route permit, section 116C.576 provides an alternative approval mechanism for construction of a high-voltage power line. Under section 116C.576 to obtain approval a public utility may apply directly to the local units of government that have jurisdiction over the route instead of applying to the EQB.⁶⁴ If an applicant chooses to seek alternate approval under section 116C.576 it must notify the EQB within 10 days of application to the first local unit of government.⁶⁵ Any local governmental unit can cede jurisdiction back to the EQB within 60 days of application

⁶³ In April 2003, in violation of Minn. Stat. § 116C.57, subd. 2b, Xcel without notification to the affected citizens or holding a public hearing, moved a nearly mile-long stretch of the Project in Inver Grove Heights from vacant lots where there were no adjacent homes to a location in immediate proximity to existing homes. More importantly, by moving the line from where there were no nearby residents to immediately adjacent to homes, Xcel is in clear violation of the express public policy that all routes should be chosen to “minimize adverse human and environmental impact.” There can be no assumption that the EQB or an appropriately appointed RGU would have approved the route change unilaterally imposed by Xcel in the City of Inver Grove Heights.

⁶⁴ Minn. Stat. § 116C.576 *et seq.*

⁶⁵ *Id.*, subd. 3.

and force the applicant to go through the process as outlined in section 116C.57.⁶⁶ If no local unit of government objects to having jurisdiction over the decision-making process, then the EQB must appoint one of the local units of government to become the Responsible Governmental Unit (“RGU”) over the approval process.⁶⁷ The RGU is responsible for conducting the environmental review of the entire proposed high-voltage transmission line.⁶⁸ Under the alternative process, the applicant must still follow the notification process as outlined in section 116C.57, subd. 2b, as discussed above.⁶⁹

Under Minnesota law, a statute, like section 116C.576, that does not state the consequences of failure to comply with its requirements is a directive rather than a mandatory statute.⁷⁰ If a party’s actions fail to comply with the express terms of a directive statute but the party’s actions give effect to the statutory purpose, a court may find that the party has substantially complied with the directive statute. Conversely, if the action taken by that party fails to comply with the terms of a directory statute and the conduct reflects an undertaking in bad faith, undermines the purpose of the procedures, or prejudices the rights of those intended to be protected by the procedures, a court may not

⁶⁶ *Id.*, subd. 1(b).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ The RGU, however, is not affected by the time constraints of Minn. Stat. § 15.99 (providing for time limits on government actions for licenses, permits, and other governmental action). If either Mendota Heights or South St. Paul, been identified by the EQB as the RGU for the Line then the time taken for the proper environmental review would not have been affected by the 60-day time-limit that precluded those municipalities rejection of Xcel’s CUP.

⁷⁰ *Sullivan v. Credit Rivers Township*, 217 N.W.2d 502, 507 (Minn. 1974) (stating that “if a statute lacks a penalty clause is it directive rather than mandatory”).

find that the party substantially complied with the directive statute.⁷¹ Whether a party substantially complies with a directive statute is question of fact.⁷²

In *Olson v. Tufford*, the Minnesota Court of Appeals applied the doctrine of substantial compliance to an appeal by a dissenting shareholder asserting his rights under Minn. Stat. § 302A.473.⁷³ The trial court dismissed the action because the plaintiff did not strictly comply with the timing requirements of section 302A.473. The Court of Appeals found that section 302A.473 to be a directive statute because it did not provide any guidance regarding whether its time provisions should be strictly construed and did not contain any penalty for failure to follow the express time provisions. The Court of Appeals reversed the trial court, holding, that summary judgment was wrongly granted where there was sufficient evidence to find that the party dismissed substantially complied with directive time provisions of the statute.

In this case, the trial court wrongly granted summary judgment to Xcel by finding that Xcel “substantially complied” with the requirements of Minn. Stat. § 116C.576 as a matter of law. The trial court erroneously equated the zoning review for the CUPs issued by Mendota Heights, South St. Paul, Sunfish Lake and Commonwealth Associates’ report with the alternative approval process addressed in Minn. Stat. § 116C.576.

⁷¹ See *Manco of Fairmont, Inc. v. Town Bd. of Rock Dell Township*, 583 N.W.2d 293, 295 (Minn. Ct. App. 1998).

⁷² See generally *City of Hutchinson v. Otto*, 306 Minn. 136, 141, 235 N.W.2d 604, 608 (1975); *Jenkins v. Board of Ed.*, 303 Minn. 437, 442, 228 N.W.2d 265, 269 (1975).

⁷³ *Olson v. Tufford*, 392 N.W.2d 281 (Minn. Ct. App. 1986), *rev. denied* (Minn. Oct. 29, 1986).

In fact, a review of the facts of this case shows that Xcel's omissions cannot support a finding of substantial compliance with section 116C.576. First, the trial court's reliance on the "review" of the Line by various zoning authorities is misplaced. No review of the Line by any single zoning authority could or did satisfy the additional requirement of an environmental review that must be performed by a Responsible Government Unit ("RGU") pursuant to section 116C.576. Specifically, the RGU must prepare an environmental impact statement ("EIS") on a high-voltage power line for which an application has been submitted.⁷⁴ The EIS must be an analytical document that describes the proposed action in detail, analyzes its significant environmental impacts, discusses appropriate alternatives to the proposed action and their impacts, and explores methods by which adverse environmental impacts of an action could be mitigated.⁷⁵ The EIS must also analyze the economic, employment and sociological effects that arise out of construction of the Line that cannot be avoided. The review of the Line by Commonwealth Associates did not perform any of those functions. It did not come to any specific conclusions regarding the Line, it did not address mitigation of adverse environmental impacts, and did not address any unavoidable environmental, health, or sociological problems with the Line.

Second, the Commonwealth Associates review had no effect on the CUP approvals. After examining the Commonwealth Associates review and other relevant information, the City of Mendota Height refused to issue the CUP requested by Xcel.

⁷⁴ Minn. Stat. § 116C.57, subd. 2c.

⁷⁵ Minn. Stat. § 116C.04, subd. 2a.

Mendota Heights issued the CUP solely by order of this Court arising out of procedural errors relevant to zoning applications under Minn. Stat. § 15.99. Similarly, when the Cities of South St. Paul and Sunfish Lake, after review of the Commonwealth Associates' report and hearing expert and witness testimony, rejected Xcel's initial CUP applications, Xcel filed suit in Dakota County District Court. Xcel subsequently extracted the CUPs from those cities based on their apparent inability to endure lengthy and costly litigation as demonstrated by Mendota Heights' experience.

Finally, there are citizens that never received notification of the Line as required under the statute. The legislature took great pains to specify exactly which stakeholders are entitled to notice and the process for notifying those stakeholders, under both sections 116C.57 and 116C.576. Xcel did not provide any notice consistent with the statutory requirements in this case.

Ultimately, whether Xcel's actions undermined the purpose of the procedures outlined under chapter 116C or prejudiced the procedural rights of the stakeholders is a question of fact, inappropriately determined by the trial court as a matter of law. Xcel obtained approval, not by surviving any substantive environmental review, but by litigating procedural defects in the CUP approval process or by obtaining settlements from municipalities. There was never a RGU selected by the EQB and therefore no entity ever conducted a proper environmental review of the entire route. Xcel should not be permitted to use its procedural bullying of municipalities to block a serious environmental review of the Project. The intended environmental review must include an environmental impact statement, which must consider the economic and environmental

concerns of the affected citizens of Minnesota, and must include of meaningful public participation. Xcel did not meet most of the requirements under Minn. Stat. § 116C.576 for alternative environmental approval of the Line. As such, the decision of the trial court must be reversed and Xcel ordered to submit to an environmental review of the proposed Line. At a minimum, the issue should be remanded back to the trial court for a resolution of the factual questions.

C. Xcel Must Obtain a Certificate of need From the Public Utilities Commission as Required Under Minn. Stat. § 216B.243.

Under chapter 216B of the Minnesota Statutes before a public utility may begin construction of a high-voltage transmission line it must obtain a certificate of need from the PUC.⁷⁶ Chapter 216B applies to “any high-voltage transmission line with a capacity of 100 kilovolts or more with more than ten miles of its length in Minnesota. . . .”⁷⁷ To obtain a certificate of need the public utility must file an application with the PUC; the PUC must then hold public hearings to determine if the power line is necessary.⁷⁸ In issuing a certificate of need, the PUC must consider a number of factors, including: the

⁷⁶ Minn. Stat. § 216B.243 subd. 2.

⁷⁷ Minn. Stat. § 216B.2421 subd 2.

⁷⁸ Minn. Stat. § 216B.243, subd. 3. This Court should note that the same amendment that expanded the requirements of section 216B.243, created the State Transmission Plan (“the Plan”) at Minn. Stat. § 216B.2425 for regional planning purposes. The Plan requires that the PUC place all proposed high-voltage transmission lines on a list updated every two years. Once a proposed project is on the list required by the plan, the certificate of need requirement of section 216B.243 is satisfied. In order to avoid the necessary delay that projects in the process of certification would suffer if they were required to get on the list, the legislature enacted a “grandfather” clause whereby all projects that applied for the certificate of need prior to August 1, 2001, did not need to be a part of the State Transmission Plan. The grandfather clause is expressly limited to section 216B.2425 and there is no corresponding provision to the certificate of need requirement under section 216B.243.

assurance of the long-range energy demand forecasts on which the necessity for the power line is based; the relationship of the propose power line to overall state energy needs; promotional activities that may have given rise to the demand for the power line; and possible alternative for satisfying energy demand or transmission needs.⁷⁹

The Line as designed has a capacity of 115 kV. The only issue for this Court is whether the trial court erred in concluding as a matter of law that because Xcel constructed the Line in two “phases,” it is not a unified entity over 10 miles long requiring PUC approval. On the contrary, the record is clear that Xcel considered the Line a single unified entity with two phases of construction until it changed its representations as the new requirements of section 216B.243 wound their way through the Minnesota legislature. Each time Xcel sought approval from state or local entities from 1999 to 2003, Xcel represented the Line as a unified entity. Only when Xcel sought to evade the requirements of section 216B.243 did Xcel represent that the Project was two phases, each less than 10 miles.

Xcel is required to obtain PUC approval for construction of any high-voltage transmission line over 100 kV and more than 10 miles in length. There is no credible evidence in the record that any construction began on the Line prior to August 1, 2001 or that the Line is less than 10 miles long. At the very least, the question of whether the Line is one unified entity or two separate lines is a genuine question of fact and, as such, the trial court’s grant of summary judgment to Xcel should be reversed.

⁷⁹ *Id.*

CONCLUSION

For all the foregoing reasons, the decision of the trial court should be reversed. Or in the alternative, Xcel should be required to submit the Project for approval to the Environmental Quality Board and the Public Utility Commission for necessary administrative approval.

Respectfully submitted,

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