

STATE OF MINNESOTA
COUNTY OF DAKOTA
DISTRICT CASE TYPE: Other Civil

DISTRICT COURT
FIRST JUDICIAL

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

Court File No. C4-02-6854

Petitioner,

**ALTERNATIVE
WRIT OF MANDAMUS**

City of Sunfish Lake,

Respondent.

**THE STATE OF MINNESOTA TO THE ABOVE-NAMED RESPONDENT CITY OF
SUNFISH LAKE**

WHEREAS, Petitioner Northern States Power Company d/b/a Xcel Energy's (Xcel Energy) Verified Petition for Alternative Writ of Mandamus (Verified Petition) is incorporated by reference;

WHEREAS, Xcel Energy submitted to Respondent City of Sunfish Lake (City) a request for a conditional use permit and major site and building plan review (collectively, CUP), as well as a request for a minor variance from or, in the alternative, the striking of City's new transmission line setback requirements, for its second circuit 115kV transmission line through City's borders;

WHEREAS, City denied Xcel Energy's requests;

WHEREAS, where, as here, there is "[d]ocumentation demonstrating the need" for an electric transmission line (Ordinance § 1224.05(b)(1)), Ordinance § 1224.05(F) and (I) only authorizes City to select its preferred alternative route through its borders, not to deny the line. Despite Xcel Energy's demonstrated need for the second circuit transmission line, City denied

the requested CUP, thereby rejecting each of the only two possible routes for the second circuit through its borders - that is, (1) along the private easement for the existing single circuit line, and (2) along Highway 110 and Delaware Avenue;

WHEREAS, City's denial of Xcel Energy's requested CUP was invalid as (1) unauthorized, (2) unreasonable, and (3) arbitrary and capricious;

WHEREAS, City's denial of Xcel Energy's requested CUP was unauthorized under Ordinance § 1224.05;

WHEREAS, City's denial of Xcel Energy's requested CUP was unreasonable because City failed to apply the requisite "balancing of interests" analysis that is applicable to all local zoning restrictions on such electric utility uses;

WHEREAS, City's denial of Xcel Energy's requested CUP was arbitrary and capricious because each of City's three bases for denying Xcel Energy's requested CUP for its second circuit transmission line - i.e., (1) lack of need, (2) property value diminution, and (3) EMF concerns - is contrary to the record; and

WHEREAS, City's denial of Xcel Energy's requested minor variance from City's utility pole and transmission line setback requirements was arbitrary and capricious because Xcel Energy's proposal met each of the three variance requirements and the setbacks were otherwise invalid.

THEREFORE, City is hereby commanded immediately after the receipt of this Writ to show cause before this Court, at a Special Term thereof, to be held in the Courthouse, in the City of Hastings, Dakota County Judicial Center, on the 22nd day of February/March, 2002, at 9:00 AM o'clock why it has not granted Xcel Energy's requests relating to its transmission line upgrade, and that City then and there make return to this Writ.

WITNESS the Honorable Thomas R. Lacy, Judge of said Court, and the seal thereof,
this 27 day of February 2002.

Approved for Clerk's signature

Judge Thomas R. Lotz

2-27-02

Ann Cole

Clerk of District Court

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF DAKOTA

FIRST JUDICIAL
DISTRICT CASE
TYPE: Other Civil

Nothern States Power Company
d/b/a Xcel Energy,

Court File No. C9-02-6854

Petitioner,

**XCEL ENERGY'S VERIFIED
PETITION FOR ALTERNATIVE
WRIT OF MANDAMUS**

v.

City of Sunfish Lake,

Respondent.

**TO: THE HONORABLE DISTRICT COURT FOR THE FIRST JUDICIAL
DISTRICT, HASTINGS, MINNESOTA:**

Petitioner Northern States Power Company d/b/a Xcel Energy (Xcel Energy) for its Verified Petition for Alternative Writ of Mandamus against Respondent City of Sunfish Lake (City) represents:

OVERVIEW

1. Since March 2, 1999, Xcel Energy has been formally pursuing the necessary governmental approvals for its much needed upgrade to the 6.36-mile phase one segment of its existing 14.7-mile southeast metro single circuit 115kV transmission line, which runs from Newport to Bloomington. Xcel Energy seeks to add a second circuit transmission line to its existing 75-year-old single circuit line.

2. On November 13, 2001, Xcel Energy applied to City for a conditional use permit and a major site and building plan review (collectively, CUP) to upgrade the 1.268 mile portion of the existing single-circuit 115kV transmission line which runs through City. Since the 1920's, the existing single circuit line has operated within its 50-foot wide private easement through City. Pursuant to City's Zoning Ordinance (Ordinance) § 1201.07, the existing single circuit line

has "automatically ... received conditional use permit approval." Such transmission lines are defined by Ordinance § 1224.01 as providing an "essential service." Attach. A.

3. As a necessary part of its CUP request, Xcel Energy also applied to City for a minor variance from or, in the alternative, the striking of City's transmission line setback requirements. Ordinance § 1224.05(L)(3)(a) and (b) impose setback requirements on the electric utility - but not the adjacent property owners - of 60 feet from the transmission line poles and 37.5 feet from the transmission line. There are no residences within 60 feet of the transmission line poles. But, decades after the line was constructed, three residences were built partially within 37.5 feet of the transmission line. Thus, without exercising its eminent domain authority to acquire a wider right-of-way, Xcel Energy cannot comply with the wholly unnecessary and thus invalid setback requirement.

4. On February 5, 2002, City denied Xcel Energy's requests.. Attach. B. Xcel Energy challenges the denial as (1) unauthorized. (2) unreasonable; and (3) arbitrary and capricious.

5. City's denial of the requested CUP was unauthorized. Ordinance § 1224.05 bars City's denial of the CUP for the second circuit line. Where, as here, the transmission line CUP applicant has submitted "[d]ocumentation demonstrating the need, objectives and purposes for such a facility" (Ordinance § 1224.05(B)(1)), Ordinance § 1224.05(F) ;and (I) require City to select its "preferred" route for the proposal. In other City is required to decide where the proposed second circuit will be routed through its borders not if it will be routed through its borders.

6. By way of illustration, Ordinance §122-.05(D) only allows two possible routes for the needed second circuit transmission line through h and totally within City- that is, (1) along the private easement for the existing single circuit line, and (2) along Highway 110 and

Delaware Avenue. Subject to City's payment for all non-standard costs, Xcel Energy would accept either of the two routes for the second circuit line. But Xcel Energy's preferred route for the second circuit line is along the existing line. Because City has not offered to pay for the relocation of the existing line, the only other route - i.e., along Highway 110 and Delaware Avenue - would accommodate the second circuit line but leave the existing line in place. The alternative route would thus maintain the existing property value and much of the electric and magnetic field (EMF) impacts along the existing route and introduce similar impacts along the alternative route.

7. City's denial of the requested CUP was, in any event, unreasonable. Neither City nor any of the other affected municipalities can use its zoning authority to single-handedly thwart Xcel Energy's statutory obligation to provide reliable electric service throughout the entire southeast metro area. Rather, the courts have limited municipal zoning controls over lawful and essential utility activities. *Hubbard Broadcasting, Co. v. City of Afton*, 323 N.W.2d 757, 764 (Minn. 1982); *Northern States Power Co. v. City of Oakdale*, 588 N.W.2d 534, 542 (Minn. Ct. App. 1999).

8. City's denial of the requested CUP was otherwise arbitrary and capricious. City's three bases for denying the requested CUP - i.e., (1) lack of need, (2) property value diminution and (3) EMF concerns- are inadequate as a matter of law. First, Xcel Energy has established its need for the second circuit. And "[w]hen the record adequately supplies the reasons underlying a business decision, neither a municipal body nor a court should override that business judgment." *Trisko v. City of Waite Park*, 566 N.W.2d 349, 355 (Minn. Ct. App.) (emphasis added), *review denied* (Minn. Sept. 25,1997). Second, the uncontroverted expert opinion in the record identifies but a slight 1.1% adverse impact to neighboring property values due to adding a second circuit line to the existing single circuit line. "[A] city may not reject expert testimony without adequate

supporting reasons," and "[a]dequate supporting reasons" do not include the testimony of laypersons about matters beyond their knowledge and training, including a proposal's "effect on [neighbors'] land value." *Id.* at 356. Third and finally, EMF concerns cannot justify a denial. City has itself found that (1) Xcel Energy's proposed method for adding the second circuit line to the existing line would "reduce" by more than half - not increase - the EMF levels (Finding No. 27-34), and (2) the EMF studies have "not yet demonstrated a causal relationship" between EMF levels and "leukemia, lymphomas, nervous system tumors and breast cancer, as well as with various reproductive abnormalities." Finding No. 60 (emphasis added).

PARTIES

9. Xcel Energy is a Minnesota public service corporation organized under Minn. Stat. Ch. 300 and a public utility regulated under Minn. Stat. § 216B.02.

10. City is a municipal corporation.

JURISDICTION AND VENUE

11. Jurisdiction is proper pursuant to Minn. Stat. §§ 462.361, subd. 1 and 586.11. Under § 586.11, "[t]he district court has exclusive original jurisdiction in all cases of mandamus."

12. Venue is proper. The proposed second circuit line through City is located entirely within Dakota County.

RECORD FACTS

A. XCEL ENERGY'S STATUTORY OBLIGATIONS AND PROTECTIONS TO SATISFY THOSE OBLIGATIONS

13. In some respects, public utilities stand on equal footing with local units of government. Utilities are vested by State law with the right, indeed the obligation, to provide essential public services, and they have been given the power of eminent domain to facilitate that role. Minn. Stat. §§ 222.36 & 300.04.

14. Xcel Energy has a statutory obligation to provide universal service to all customers within its assigned geographic service areas. Minn. Stat. §§ 21613.04 & .38-.42. Among Xcel Energy's assigned service areas are City and its surrounding communities.

15. This obligation to serve means that Xcel Energy must construct the transmission and distribution lines that are necessary to deliver electricity to all of its customers. Since the customers are located within numerous local governments, those electric lines must necessarily pass through multiple zoning jurisdictions. Unreasonable interference with the permitting, construction and maintenance of those transmission and distribution lines seriously and adversely affects the public, as well as Xcel Energy's ability to satisfy its obligations to the public.

16. In recognition of these concerns, the Legislature has provided considerable protections to the electric utilities against undue interference from municipalities. A municipality, for example, cannot unilaterally replace its exclusive utility service provider with a competitor. Minn. Stat. § 21613.36-.42. In addition, a municipality is required to reimburse the utility for its system investments if it wishes to municipalize its services. Minn. Stat. §216B.44. State law prescribes uniform construction and maintenance licensing standards (*see* Minn. Stat. §§ 326.241-.248), and electric utility facilities are statutorily exempt from local building inspection. *See* Minn. Stat. § 326.244, subd. 5 and Uniform Building Code § 101.3.

17. In addition to these statutory constraints, the courts have further limited municipal zoning controls over lawful and essential utility activities. *Hubbard Broadcasting*, 323 N.W.2d at 764 ("utilities . . . have the power of condemnation, a power that overrides local zoning"); *Northern States Power Co.*, 588 N.W.2d at 542 (court found no cases that "stand for the proposition that a city may regulate a public utility solely for purposes of convenience and aesthetic value"). These decisions are in line with decisions in other jurisdictions that have

adopted a "balancing test" for municipal encroachments into utility service. *See, e.g., Potomac Edison Co. v. Jefferson County Planning & Zoning Comm'n*, 512 S.E.2d 576, 583 (W. Va. 1998). *See generally Applicability of Zoning Regulations to Projects of Nongovernmental Public Utility as Affected by Utility's Having Power of Eminent Domain*, 87 A.L.R.3d 1265 (1978) ("where the nature of local zoning is exclusionary, it has been held that a utility would be immune from such an ordinance, since to exclude the utility would be to destroy its power of eminent domain").

18. It is, moreover, well settled that local zoning regulation which has the effect of prohibiting necessary utility activities are void as against public policy:

A municipal corporation may regulate, but it may not prohibit, the installation of lines for the transmission of electricity . . . A municipality zoning ordinance which excludes high tension lines, or confines such lines to an unrealistically small area, so as to prevent the furnishing of essential services to the residents of the community, is not reasonably related to the public health, safety or welfare.

Kenneth Young, Anderson's American Law of Zoning, § 12.33 at 609 (4th ed. 1996) (emphasis added).

B. XCEL ENERGY'S TRANSMISSION LINE UPGRADE PROJECT

19. Xcel Energy's transmission system in the southeast metro area currently includes a single-circuit 115kV transmission line which crosses six communities and supplies power to the entire southeast metro area. The existing 14.7 mile line connects the Red Rock Substation in Newport, the Stockyards Substation in South St. Paul, the Rogers Lake Substation in Mendota Heights, the Airport Substation at the Minneapolis/St. Paul International Airport, and the Bloomington and Wilson Substations in Bloomington.

20. The Red Rock to Rogers Lake and the Rogers Lake to Wilson lines work as components of Xcel Energy's interconnected transmission system. Failure of one or more circuits in this system could result in an overload of these lines or other lines. Overloads can damage equipment or become a public safety concern if not addressed. Furthermore,

transmission line overload affects power supply reliability to portions of City, as well as St. Paul, West St. Paul, Mendota Heights, Eagan, South St. Paul, Bloomington, Inver Grove Heights and other southeast metro areas. Xcel Energy has already experienced some exposure to overloads. And, based on load forecasts, the situation will get progressively worse unless appropriate power system reinforcements are constructed.

21. In order to address the potential overloads on the existing southeast metro transmission system, Xcel Energy developed a project for upgrading the existing single-circuit 115kV transmission line to a double-circuit 115kV transmission line (Project). A second circuit line will be added to the existing line and the resulting double-circuit line will be installed on steel monopole structures (rather than the current wooden H-frames). The new poles will be located on the center line in the existing right-of-way and private easements. No new right-of-way or easement will be required. The height of the new structures will be between 84 and 100 feet, or about 25 feet taller than the existing structures. None of the existing substations will be expanded.

22. Construction of the Project is planned in two separate phases with phase one being entirely independent of phase two. Phase one of the Project consists of the 6.36 mile 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, municipal opposition to Xcel Energy's local CUP applications have already delayed construction commencement for two years.

C. REQUIRED GOVERNMENTAL APPROVALS FOR PHASE ONE OF THE PROJECT

1. A Certificate of Need from MPUC is Not Required

23. Effective August 1, 2001, the Legislature amended the Power Plant Siting Act in part to require each new non-exempt "large energy facility" to receive a certificate of need from MPUC. See Minn. Stat. §§ 216B.241, 2421 & 2425.

24. Phase one of the Project does not require a certificate of need from MPUC. Phase one is less than 10 miles long - *i. e.*, 6.36 miles long - and thus not a "large energy facility" under § 216B.2421. And, as testified to by Xcel Energy and confirmed by City's independent expert consultant on the Project, Commonwealth Associates, Inc. (CAI), phase one is a stand alone proposal that is not dependent upon the construction of phase two of the Project.

25. Phase one of the Project is otherwise statutorily exempt from the new certificate of need requirement. Section 216B.2425, subd. 6 "[e]xcludes . . . any transmission line proposal that has been approved by, or was pending before, [1] a local unit of government, [2] the environmental quality board, or [3] the public utilities commission on August 1, 2001." (Emphasis & brackets added).

26. Xcel Energy's "transmission line proposal" is for its 6.36 mile phase one upgrade, not the 1.268 mile segment of this upgrade through City. The "proposal" must, at a minimum, be for a full "route," and § 116.56, subd. 8 defines "route" as "the location of a high voltage transmission line between two end points." (Emphasis added). The only possible "end points" for a line are at substations or at an interconnection with another transmission line which does run between substations. There is not one, let alone two, such "end point[s]" anywhere within City.

27. This "proposal" thus meets several of the bases for exemption from the certificate of need requirement. "[O]n August 1, 2001," phase one of the Project was (1) "approved by"

two "local unit[s] of government" - i.e., Newport and Inver Grove Heights; (2) "pending before" two other "local unit[s] of government" - i.e., South St. Paul and Mendota Heights; (3) "approved by" Minnesota Environmental Quality Board (MEQB); and (4) "approved by" MPUC.

2. Required Zoning Approvals are Largely In Hand

28. Zoning approvals are required from the five municipalities - i.e., City, Newport, Inver Grove Heights, South St. Paul and Mendota Heights - that have a portion of phase one of the Project running through it. But the only municipal resistance to the Project appears to be from Mendota Heights and City.

29. Newport and Inver Grove Heights classified the Project as a permitted use for which no further zoning approval was required because the upgrade does not change the existing use. And, after Xcel Energy filed a lawsuit challenging South St. Paul's conditioning of its CUP for the Project on Xcel Energy's undergrounding of the line, South St. Paul removed this condition and issued the permit.

30. In contrast, Mendota Heights has refused to approve or deny Xcel Energy's March 2, 1999 CUP application. Xcel Energy has separately sued Mendota Heights, claiming that the city's refusal to "approve or deny" Xcel Energy's CUP request has caused the city to violate § 15.99, subd. 2's deadline to act on the zoning request and, as a result, compels the "automatic approval" of the request. *See Northern States Power Co. d/b/a Xcel Energy v. City of Mendota Heights*, No. 19-C7-01-8264 (Minn. 1st Jud. Dist.).

3. Repetitious, Exhaustive and Ultimately Very Favorable Environmental Review of the Project

31. At the request of the affected municipalities, including City and the citizens within these cities, notably the Power Line Task Force (PLTF), the Project has been subject to environmental review by three separate state agencies: (1) MEQB; (2) MPUC; and (3) Minnesota Department of Health (MDH), as well as by CAI, an independent consulting firm.

32. A primary issue before MEQB and CAI and the exclusive issue before MPUC and MDH was the Project's EMF impact. An electric field is the region in which a force exists between two particles because they are charged. Electric fields are present around any source where electric voltage exists. A magnetic field is the vector quantity that describes the forces of interaction between electric currents.

33. Each of these agencies, as well as CAI and City (Finding Nos. 27-34), recognized that Xcel Energy's proposed Project will "reduce" by more than half - not increase - the existing EMF levels. Each of these agencies, as well as CAI and City (Finding No. 60), also concluded that the EMF studies have "not yet demonstrated a causal relationship" between EMF levels and "leukemia, lymphomas, nervous system tumors and breast cancer, as well as with various reproductive abnormalities." (Emphasis added).

a. MEQB's Environmental Assessment of the Project

34. On March 24, 1999, citizens from City filed a petition with MEQB requesting the preparation of an Environmental Assessment Worksheet (EAW).

35. On November 18, 1999, MEQB ruled "that the [P]roject does not have the potential for significant environmental effects." In support of its negative declaration of the need for an environmental impact statement (EIS), MEQB made the following findings:

2. . . . The magnetic field from the proposed lines will be lower than the magnetic field from the existing line.

* * *

17. . . . the Board's consultant, found that health effects had not been conclusively demonstrated by any one study on human beings or animals, nor by the body of evidence from epidemiology and laboratory studies of animals, tissues, and cells.

* * *

19. EQB staff has reviewed the existing reports. EQB staff has prepared a memorandum on electric and magnetic fields reflecting the recent developments in scientific literature including the National Research Council and the National

Institutes of Environmental Health Sciences reports released this year. (Electric and Magnetic Fields of Power Frequency Transmission Lines, August 12, 1999, by John P. Hynes, mailed to the EQB on August 12, 1999). Staff concludes in this memorandum that the current evidence does not indicate that the electric and magnetic fields expected from transmission lines represent a potential for significant environmental effect.

(Emphasis added).

36. Contrary to City's Finding No. 67, MEQB did not "acknowledge[] that cities will have the primary role of examining the health and safety issues relating to Xcel [Energy's] project." Rather, in determining that it was the appropriate RGU to review the EAW, MEQB necessarily determined that it had the "greatest responsibility for supervising or approving the project" and/or that it had the "great[est] expertise" over the project. Minn. R. 4410.0500, subp. 5(B) & subp. 6 (emphasis added). And none of the cities along the proposed line - including City - objected to this selection as is allowed under the rules. Minn. R. 4410.0500, subp. 5(B)(2).

37. Despite asking MEQB to require an EIS for the Project, neither City nor any of the other five affected municipalities appealed the negative EIS declaration within the 60-day period to do so. Minn. Stat. § 116C.65. That decision is final, binding and the law of the case.

38. PLTF did, however, commence a legal challenge to MEQB's November 18, 1999 negative EIS declaration. See PLTF v. *MEQB*, No. 62-C3-99-010952 (Minn. 2d Jud. Dist.). On August 24, 2000, the district court granted summary judgment to MEQB and dismissed PLTF's complaint, finding that "MEQB made a deliberate reasoned decision that is supported by the evidence." On January 12, 2001, the court denied PLTF's motion for new trial. PLTF sought a new trial based on supposed new EMF studies. In denying PLTF's motion for a new trial, the district court held that "[t]he EMF studies are cumulative with information in the record. None of the information would have likely affected the outcome of the case." No appeal was filed and MEQB's decision is now final as against PLTF as well.

b. MPUC's Environmental Assessment of the Existing Line

39. On June 30, 1999, while MEQB proceeding was still pending, PLTF filed a complaint with MPUC alleging that EMF from the existing transmission line was causing illnesses and miscarriages and should be shut down. Pursuant to Minnesota Public Utilities Act, MPUC is responsible for ensuring that "[e]very public utility ... furnish safe, adequate, efficient, and reasonable service." Minn. Stat. § 216B.04.

40. On January 4, 2000, MPUC issued an order denying the relief requested by the complainants, finding that "the Commission does not believe that the current record, or any record that could be developed with the resources at hand and the current state of scientific knowledge, justifies shutting down the Southeast Metro Power Line."

41. On May 8, 2001, the Minnesota Court of Appeals affirmed MPUC's decision, based on the following four reasons:

a. "First, [MPUC] reasoned that because the National Institute of Environmental Health Sciences had conducted a six-year, \$60.5 million study of the issue, [MPUC] could not 'reasonably second-guess' the NIEHS conclusion that presently there was cause only for 'passive' and 'inexpensive' regulatory measures to reduce EMT exposure";

b. "Second, [MPUC] found that the [Xcel Energy] proposal to reconfigure 'the line in a way that is expected to cut EMF in half was consistent with the NIEHS recommendations.' A concurring member of [MPUC] also observed that a further investigation regarding the safety of the line could not occur until after the upgrading occurred";

c. "Relator gives us no cause to question [MPUC's] position that because of limited resources and the current state of scientific knowledge neither relator's record nor any record that could be developed at the present time could justify shutting down the line"; and

d. "[MPUC's] reliance on the \$60.5 million NIEHS study, which recommended inexpensive regulatory measures rather than a full shutdown of the lines, was sound."

(Emphasis added). The appellate opinion does not support the notion that MPUC was impressed by PLTF's position or that MPUC encouraged PLTF to reassert its position at a later date.

c. MDH's Environmental Assessment of EMF Impacts

42. MDH is statutorily charged with promoting the public's health by regulating environmental health hazards. Minn. Stat. § 144.05, subd. 1(c).

43. To this end, MDH has spent considerable time and energies on EMF impacts. In its January 2000 "Assessment of Health Effects Research on Electric and Magnetic Fields," MDH concluded that the current body of scientific evidence does not show that exposure to EMF is a health hazard. MDH stated:

Specifically, no conclusive and consistent evidence shows that exposures to residential electric and magnetic fields produce cancer or any other adverse human health effect.

(Emphasis added). MDH also noted:

The current body of research lacks fundamental evidence to support a cause and effect relationship between magnetic fields and childhood leukemia. This conclusion is based on laboratory studies which have failed to demonstrate adverse health effects or a plausible biological mechanism of causation (in vivo and in vitro).

(Emphasis added).

44. As with MEQB and MPUC, MDH's determination relies heavily on the \$60.5 million report of the National Institute of Environmental Health Sciences (NIEHS), which concludes:

"The scientific evidence suggesting that ELF-EMF exposures pose any health risk is weak. The strongest evidence for health effects comes from associations observed in human populations with two forms of cancer; childhood leukemia and chronic lymphocytic leukemia in occupationally exposed adults. While the support from individual studies is weak, the epidemiological studies demonstrate, for some methods of measuring exposure, a fairly consistent pattern of a small, increased risk with increasing exposure that is somewhat weaker for chronic lymphocytic leukemia than for childhood leukemia. In contrast, the mechanistic studies and the animal toxicology literature fail to demonstrate any consistent pattern across studies although sporadic findings of biological effects (including increased cancers in animals) has been observed."

"The lack of connection between the human data and the experimental data (animal and mechanistic) severely complicates the interpretation of these results. The human data are in the "right" species, are tied to "real-life" exposures and show some consistency that is difficult to ignore. This assessment is tempered by the observation that given the weak magnitude of these increased risks, some other factor or common source of error could explain these findings. However, no consistent explanation other than exposure to ELF-EMF has been identified."

"The ultimate goal of any risk assessment is to estimate the probability of disease in an exposed population. In general, this involves the combination of three basic pieces of information: the probability that the agent causes the disease, the response as a function of exposure given that the exposure does cause disease and the distribution of exposures in the population being studied. The NIEHS believes that the probability that ELF-EMF exposure is truly a health hazard is currently small. The weak epidemiological associations and lack of any laboratory support for these associations provide only marginal, scientific support exposure to this agent is causing any degree of harm."

"Epidemiological studies have serious limitations in their ability to demonstrate a cause and effect relationship whereas laboratory studies, by design, can clearly show that cause and effect are possible. Virtually all of the laboratory evidence in animals and humans and most of the mechanistic work done in cells fail to support a casual relationship between exposure to ELF-EMF at environmental levels and changes in biological function or disease status. The lack of consistent, positive findings in animal or mechanistic studies weakens the belief that this association is actually due to ELF-EMF, but it cannot completely discount the epidemiological findings."

"The NIEHS concludes that ELF-EMF exposure cannot be recognized as entirely safe because of weak scientific evidence that exposure may pose a leukemia hazard. In our opinion, this finding is insufficient to warrant aggressive regulatory concern. However, because virtually everyone in the United States uses electricity and therefore is routinely exposed to ELF-EMF, passive regulatory action is warranted such as a continued emphasis on educating both the public and the regulated community on means aimed at reducing exposures. The NIEHS does not believe that other cancers or non-cancer health outcomes provide sufficient evidence of a risk to currently warrant concern."

(Emphasis added).

45. On at least three separate occasions, by letters dated March 7, 2001, and July 27, 2001 and December 20, 2001, MDH has reasserted its conclusions found in its January 2000 "Assessment of Health Effects Research On Electric And Magnetic Fields." And, before the

City Council on February 4, 2002, MDH's Chuck Stroebel once again reaffirmed MDH's conclusions regarding EMF.

46. Contrary to City's Finding No. 65, MDH has not "repeatedly stressed that local units of government (i.e., cities) must themselves examine the health risk of EMF in the particularized land use settings of each city so as to determine what might be an appropriate regulating response in a given geographic area taking into account the surrounding land uses." Rather, consistent with its statutory mandate, MDH has exhaustively researched the issue of EMF because local governmental units, such as City, are not equipped with the expertise, time or resources necessary to research the voluminous studies on such complex health issues. Indeed, even MPUC with its massive resources concluded that it "could not 'reasonably second-guess' the NIEHS conclusion[s]." *PLTF v. MPUC*, 2001 WL 481949, at * 1 (Minn. Ct. App. May 8, 2001).

d. CAI's Assessment of the Environmental Impact, Need and Property Value Impact of the Project

47. Despite MEQB's November 18, 1999 negative EIS declaration, MPUC's January 4, 2000 refusal to shut down the line due to EMF, and MDH's January 2000 conclusion that EMF research does not show that exposure to EMF is a health hazard, Xcel Energy acquiesced to City, Mendota Heights and South St. Paul's insistence in March of 2000 that the Project be subject to a single, region-wide "environmental impact review" (EIR). The cities' mayors agreed to "select and procure an independent technical consultant capable of analyzing" the identified issues, which included "[1] the environmental impact of [Xcel Energy's] propos[al] ..., [2] assessing the need, [3] feasible alternatives to meet the need, and [4] the environmental, health and property impacts of the feasible alternatives." (Brackets added). In an unprecedented good faith and voluntary effort on Xcel Energy's part to address the joint concerns of the multiple local

jurisdictions, Xcel Energy agreed to pay the full cost and expense of the consultant, which ultimately reached over \$130,000.

(1) No EMF Concern with the Project

48. CAI found no basis for an EMF concern because Xcel Energy is proposing to reconfigure the double-circuit line so as to reduce the current EMF levels. In fact, CAI found that the Project would significantly reduce the EMF levels:

Calculated electrical and magnetic field values are shown in Table 2 (and plotted in Figures 8 through 10). Double-circuiting the existing line on the existing right-of-way will reduce the electric and magnetic fields. Maximum electric fields measured 3 feet above the ground at the edge of the right-of-way will be reduced from 1.0 to 0.6 kilovolt per meter (kV/m). Assuming a load of 800 amps for the existing circuit and 400 amps per circuit after double-circuiting, magnetic field strengths will be reduced from 86.7 to 21.0 milligauss (mG) at the edge of the 50foot right-of-way assuming that the conductor phases are arranged on the new structures as shown in Figure 3.

(Emphasis added).

(2) Demonstrated Need for the Project

49. CAI concluded that the Project is needed to satisfy Xcel Energy's double contingency objective. The 6.36-mile phase one of the existing 14.7-mile southeast metro transmission line does not meet Xcel Energy's double contingency planning requirements and, by the summer of 2002, the existing system will not even satisfy Xcel Energy's single-contingency criterion.

50. A single contingency system is one designed such that the failure of any single line, transformer or generator will not result in system overloading or blackouts. With respect to the Project, the critical load level is 511 megawatts; this is the load level at which overloading can first occur due to a single contingency.

51. In the summer of 2001, Xcel Energy's peak load (summer months) along the existing southeast metro line was 506 megawatts. Only a one-year growth rate of 1.010% is

required to increase the peak from 506 megawatts to 511 megawatts (i.e., the point at which a double contingency design is needed). That point may occur in the summer of 2002; if not, then it is expected that the critical point will occur in the summer of 2003 or 2004. This is because in the 10-year period (1992 to 2001, inclusive), the compound load growth rate has been 3.6% per year.

52. CAI concludes that Xcel Energy's system upgrade as proposed is the best method of curing the current single circuit line's various reliability and contingency deficiencies; these deficiencies will continue and may well be magnified in the future unless the upgraded double circuit line is installed.

(3) No Significant Property Value Diminution Due to the Project

53. CAI commissioned Colliers Towle, Inc., to evaluate the property value impacts due to the double circuiting of the existing single circuit line. Collier Towle's resulting evaluation and opinion is uncontroverted in the record.

54. Colliers Towle first compared sale prices among houses adjacent to transmission lines and those not adjacent to transmission lines. The study found that houses adjacent to transmission lines sold for an average 0.5 percent less than houses not near transmission lines, and houses near transmission lines took an average of 5.5 days longer to sell.

55. Collier Towle next studied whether the addition of a second circuit to the existing line and the resulting double circuiting of the lines on the new monopoles will cause any significant further diminution. Collier Towle's study demonstrated that the average negative impact on property value by conversion from a single circuit line on wooden H-frames to a double circuit line on steel monopoles is in the range of 1%.

D. ORDINANCE PROVISIONS REGARDING CUPS FOR TRANSMISSION LINES

1. Xcel Energy's Existing Line Has "Automatically ... Received Conditional Use Approval"

56. Ordinance § 1201.06 provides that "[a]ny established use or building legally existing prior to the establishment of this Ordinance and which is therein classified as a conditional use may be continued in like fashion and activity and shall automatically be considered as having received conditional use approval." (Emphasis added).

57. As such, Xcel Energy's nearly 75-year-old transmission line through City has "automatically ... received conditional use approval."

58. In so approving of the use, City "implicitly" found that "all requirements for the issuance of the permit have been met." *Interstate Power Co. v. Nobles Cty. Bd.*, 617 N.W.2d 566, 579 (Minn. 2000) (citation omitted).

2. Xcel Energy's Existing and Proposed Transmission Line Provides "Essential Services"

59. Ordinance § 1224.01 defines "electric transmission lines," including Xcel Energy's existing and proposed line, as providing an "essential service."

3. City's Six-Step CUP Process for New or Modified Transmission Lines Over 60 Feet in Height

60. Ordinance § 1224.05 sets forth a six-step "Conditional Use Permit and Major Site Building Plan Review" (CUP) process for electric transmission lines of "60 feet or more in height":

a. Step No. 1 constitutes City's "completeness" review, including whether the application contains "[d]ocumentation demonstrating the need, objectives and purpose for such a facility." Ord. § 1224.05(A)-(D). (By requiring itself to first determine whether the applicant has "demonstrat[ed] need" for the line, City avoids the otherwise unnecessary "alternatives" analysis and "major site plan review" - i.e., Step Nos. 2-6).

b. Step No. 2 requires City Council to decide within "30 days following the receipt of the application . . . whether any other alternative routes should be studied." Ord. § 1224.05(F) (emphasis added).

c. Step No. 3 requires Planning Commission to conduct a public hearing and to "make a recommendation to the City Council as to its preferred alternative."_Ord. § 1224.05(1) (emphasis added).

d. Step No. 4 requires City Council within 60 days of Planning Commission's recommendation to "select an alternative route," and this "selection shall be made in accordance with the requirements for approving a Conditional Use Permit under Section 1204." Id.

e. Step No. 5 authorizes the applicant to have an alternative route selected if "it is precluded from using the selected alternative because of a reason beyond its own control that was not apparent during the application process." Ord. § 1224.05(K). And,

f. "After the City Council has selected an alternative route," the applicant is subjected to Step No. 6, a "major site plan review." Ord. § 1224.05(L).

Step Nos. 2-4 presuppose the "demonstrated need" for the "essential service" and thus contain no provision for the denial of the application.

E. CITY'S REVIEW AND ULTIMATE DENIAL OF THE REQUESTED CUP

1. Step #1: City Determined Xcel Energy had Provided "Documentation Demonstrating Need"

61. Pursuant to Minn. Stat. § 15.99, subd. 3(a), City had 10 business days after Xcel Energy's CUP application was submitted to identify to Xcel Energy any incompleteness or deficiency in the application.

62. By November 27, 2001, the 10th business day (exclusive of Thanksgiving) after Xcel Energy's requested CUP was submitted, City did not identify any incompleteness or deficiency in Xcel Energy's "[d]ocumentation demonstrating need for such a facility," as is required by Ordinance § 1224.05(B)(1). Xcel Energy had "demonstrat[ed] need" in part by its submission of CAI's analysis of need.

63. As such, City determined that Xcel Energy had provided "[d]ocumentation demonstrating need ... for such a facility."

2. **Step #2: City Council Rejected the One Alternative to Xcel Energy's Preferred Route**

64. Pursuant to Ordinance § 1224.05(D), there are only two possible routes through City for the second circuit line: (1) along the private easement for the existing single circuit line, and (2) along Highway 110 and Delaware Avenue.

65. Xcel Energy proposed routing the second circuit line along the private easement for the existing single circuit line.

66. On December 12, 2001, City Council discussed and rejected the alternative route - i.e., along Highway 110 and Delaware Avenue. It instead directed Planning Commission to review the narrow issue of whether the proposed double-circuit line along the private easement route of the existing line should be placed above ground or underground.

67. City Council rejected construction on the alternative route - i.e., along Highway 110 and Delaware Avenue - because that would cause the existing line to remain in place, while establishing a second power line corridor in City. This would cause the property value impact, if any, along the existing route to remain unaffected and the EMF on the existing route to remain, while introducing these same conditions to those properties and residences along the new route.

3. **Step #3: Planning Commission Recommended the Denial of the CUP Request Rather Than Recommending "its Preferred Alternative"**

68. Planning Commission conducted its public hearing on the "preferred alternative," but it ignored City Council's directive, as well as the dictates of the Ordinance. Rather than "recommend[ing] to the City Council as to its preferred alternative," it recommended (5-0) denial of the second circuit line.

4. **Step #4: City Council Likewise Denied the CUP Request Rather than "Select[ing] an Alternative Route"**

69. Following Planning Commission's lead, City Council ignored its own ordinance mandate that it "select[] an alternative route." It instead denied (4-1) the application altogether. 70. City Council gave the following three reasons for its denial:

- a. Lack of demonstrated need (Finding Nos. 72-89);
- b. Diminution in property value along the existing route (Finding Nos. 19-22); and
- c. EMF concerns with double-circuiting the line along the existing route (Finding Nos. 23-34 & 46-71).

F. CITY'S THREE REASONS FOR DENYING THE CUP ARE NOT SUPPORTED IN THE RECORD

1. **Xcel Energy has Established its Need for the Proposal**

71. "When the record adequately supplies the reasons underlying a business decision, neither a municipal body nor a court should override that business judgment." *Trisko*, 566 N.W.2d at 355 (emphasis added).

72. Xcel Energy has set forth the need for the line upgrade based on its uncontroverted business judgment.

73. The need for Xcel Energy's proposed line upgrade is also proven by CAI's report. And such uncontroverted expert opinion cannot be rejected. *Trisko*, 566 N.W.2d at 356.

74. As determined by the Minnesota Supreme Court, the need for the Project is, as well, implicitly proven by Ordinance § 1201.06's classification of the transmission line as a conditionally permitted use and Ordinance § 1224.01's definition of the transmission line as providing an "essential service." *Interstate Power*, 617 N.W.2d at 586 (Gilbert, J. and Anderson, J., concurrence) (rejecting county's finding that "proposed pole placement [for upgraded transmission line from 34 kV to 69 kV] is 'inconsistent with ... the overall needs of the County'"

because transmission lines are a conditionally permitted use throughout the county and, "[i]n fact, transmission . . . lines are classified as 'essential services' under the County's zoning ordinances").

75. Pursuant to Minn. Stat. § 15.99, subd. 3(a), City is otherwise bound by its failure within 10 business days of Xcel Energy's submission of its application to identify any incompleteness or deficiency with Xcel Energy's "[d]ocumentation demonstrating the need . . . for such a facility," as is required by Ordinance § 1224.05(B)(1).

76. And the Project does not require a certificate of need from MPUC because phase one is less than 10 miles long and thus not a "large energy facility" under § 216B.2421, and the proposal is otherwise exempt under § 216B.2425, subd. 6 from the certificate of need requirement.

77. Even if it is assumed, *arguendo*, that Xcel Energy's proposal does require a certificate of need from MPUC, City could have and thus was required to address this concern through a CUP condition. "Evidence that a municipality denied a [land use request] without suggesting or imposing conditions that would bring the proposed use into compliance may support a conclusion that the denial was arbitrary." *Trisko*, 566 N.W.2d at 357. City proved its ability to impose such a CUP condition by proposing to do so with CUP Condition Nos. 1(a) and (h) of its draft "Resolution Approving the Application of Xcel Energy." Attach. C.

2. Lack of Significant Property Value Diminution

78. Every homeowner along the line either purchased or built their home long after the electric utility easement was acquired, and the transmission line was constructed and began to operate. They thus purchased or built their homes along the existing single circuit line with the property value impact from the line fully integrated into the price. And the existing line has "automatically . . . received conditional use approval" from City, thereby indicating City's

finding that "all requirements for the issuance of the permit have been met," including those relating to property value impacts.

79. As such, the only property value impact at issue is the incremental impact, if any, caused by adding the second circuit to the existing single circuit line. Collier Towle's analysis is the only expert opinion in the record regarding the property value impact of adding a second circuit to an existing single circuit transmission line. Collier Towle found but a 1% adverse impact from double circuiting the existing line. Collier Towle further found this slight impact to be within the tolerance for errors in surveys of this type.

80. City is bound by Collier Towle's uncontroverted expert opinion. *Trisko*, 566 N.W.2d at 356. This is particularly appropriate given that City commissioned and selected the consultants for this study.

81. Moreover, despite being legally obligated to mitigate where possible concerns that may otherwise support denial (*Trisko*, 566 N.W.2d at 357), City elected not to adopt the other alternative route through City - i.e., along Highway 110 and Delaware Avenue - which would have eliminated any such property value impact along the existing line due to the upgrade.

3. EMF "Reduction" Compels City's Approval - Not Denial - of the Project
a. Transmission Line Upgrade Projects are Analyzed by Their Incremental Impact Beyond What Currently Exists

82. In assessing whether a transmission line upgrade poses a significant environmental impact, "Minnesota law does not recognize the precautionary principle as the standard for determining a 'significant impact.' The term 'significant' is an important limitation in law. . . . [T]he determination of significance must be made by looking to the difference between the operation of the existing power line and the upgraded line proposed." *In the Matter of the Exemption Application by Minnesota Power for a 345/250kV High Voltage Transmission Line Known as the Arrowhead Project*, OAH Docket No. 10-2901-12620-2 at 20-21 (ALJ

Findings of Fact, Conclusion and Recommendation dated Jan. 29, 2001) (underlining in original; brackets added), aff'd 2002 WL 46991 (Minn. Ct. App. Jan. 15, 2002).

83. Otherwise stated, where, as here, the proposal is to upgrade an existing transmission line, "[t]he issue of whether power lines themselves create a significant human or environmental impact is not properly before the [Court]. There is a power line currently operating in the corridor. The only question is whether the proposal so changes conditions as to create a significant human or environmental impact that does not now exist." *Id.* at 21 n.118 (emphasis added).

b. There is No Adverse Incremental Impact from the Project Because City Found that EMF is to be "Reduced"

84. City's own findings confirm that the Project would "reduce" by more than half not increase - EMF levels in comparison with the existing line. Finding Nos. 27-34. This is determinative because the existing line has "automatically . . . received conditional use approval," thereby indicating City's finding that "all requirements for the issuance of the permit have been met," including those relating to EMF impacts.

85. And there is nothing in the record to support City's finding that the new line would be more permanent than the existing line or that the existing line would be less permanent if the new line is denied. The 75-year old line has "automatically... received conditional use approval" from the City; it is going nowhere.

86. Of the only two Ordinance-prescribed routes for the second circuit line, Xcel Energy's preferred route along the private easement for the existing line is the only route that will reduce the current EMF levels. The other route would keep the existing single circuit line where it is and simply erect the second circuit along the new route. Accordingly, the alternative would maintain EMF along the existing route and introduce EMF to those residing next to the new route.

c. There is No Adverse Incremental Impact from the Project because City Found that the EMF Studies Have "Not Yet Demonstrated A Causal Relationship" Between EMF Levels and Health Effects

87. City admits that the voluminous EMF studies have "not yet demonstrated a causal relationship" between EMF levels and "leukemia, lymphomas, nervous system tumors and breast cancer, as well as with various reproductive abnormalities." Finding No. 60 (emphasis added).

d. There is No Adverse Incremental Impact from the Project Because City is Bound by the Conclusions of MEQB, MPUC and MDH

88. MEQB, MPUC and MDH each agree with the NIEHS's conclusions regarding EMF - namely, "that presently there was cause only for 'passive' and 'inexpensive' regulatory measures to reduce EMF exposure." *PLTF v. MPUC*, 2001 WL 481949 at * 1 (emphasis added). City's complete denial of Xcel Energy's proposal is not a "'passive' and 'inexpensive' regulatory measure[]" to reduce EMF exposure."

89. City is bound by these state agency decisions.

90. Each of the three state agencies has the expertise, training, staff and time to analyze the EMF concerns; City does not.

91. These state agencies have been delegated with specific authority to review such environmental impacts; City has not.

92. The municipalities with jurisdiction over the Project, notably City, are specifically bound by MEQB's decision on the Project. None of the municipalities along the proposed line - including City - either objected to MEQB's designation of itself as the governmental body with the "greatest responsibility for supervising or approving the project" and/or with the "great[est] expertise" over the project or challenged MEQB's decision.

93. And Minn. R. 4410.0500, subp. 5(B)(2) dictates and §§ 116C.575, subd. 5 and 116C.576, subd. 1(b) confirm that there is to be but one environmental assessment of a utility

line project. But for this ineluctable conclusion, an electric utility line project - such as this Project - would be subject to multiple and possibly contradictory environmental assessments.

94. As a subdivision of the state, City is otherwise bound by the decisions of the State, including the decisions of MEQB, MPUC and MDH. *See National Solid Waste Management Assn v. Williams*, 146 F.3d 595, 599 (8th Cir. 1998).

G. XCEL ENERGY'S REQUESTED MINOR VARIANCE FROM OR, IN THE ALTERNATIVE, THE STRIKING OF CITY'S NEW SETBACK REQUIREMENTS

95. Xcel Energy requested a minor variance from or, in the alternative, the striking of Ordinance § 1224.05(L)(3)(a)-(b)'s setback requirements. With regard to new or modified transmission lines of more than 60 feet in height, City's Ordinance imposed a 60-foot setback from transmission line poles and a 37.5-foot setback from all wires. Consistent with the other municipalities in the State, Xcel Energy requested that it instead be bound by the uniformly accepted clearance requirements of the National Electric Safety Code (NESC).

96. City's new transmission line setback requirements were imposed in September 2000 in response to Xcel Energy's proposed Project. The obvious intent of the setback requirements was to thwart the Project. At the time that the new setback requirements were imposed, City had no substantive basis for its excessive setbacks.

97. There currently are no residences within 60 feet of the poles, which are to be placed along the centerline of the easement, but three residences are partially within 37.5 feet of the line:

Address	2001 Estimated Value	Yr. Built	Closest Distance of Residence from Centerline (ft.)	Closest Distance of Residence from Closest Wire (As Proposed) (ft.)
1. 50 Sunnyside Lane	\$443,500	1993	33.77	23.77
2. 25 Sunnyside Lane	\$760,500	1990	40.49	30.49
3. 2 Sunfish Lake	\$523,000	1948	45.61	35.61

98. Ordinance § 1202.02(V) defines a "variance" as "a relaxation of the terms of this Ordinance where such deviation will not be contrary to the public interest and where, owing to physical conditions unique to the individual property under consideration and not the result of the actions of the applicant, a literal enforcement of the ordinance would result in unnecessary and undue hardship." (Emphasis added). Ordinance § 1202.02(H) in turn defines a "hardship" as "[a] situation where [1] property in question cannot be put to a reasonable use under the conditions allowed by the official controls; [2] the plight of the landowner is due to circumstances unique to his property, not created by the landowner, and [3] the variance, if granted, will not alter the essential character of the locality. Economic considerations alone shall not constitute a hardship if a reasonable use for the property exists under terms of the official controls." (Brackets added).

99. Xcel Energy's requested variance clearly meets the three tests for hardship in order to grant a minor variance.

1. "Reasonableness" of the Requested Use

100. The undue hardship standard requires a showing that "the property owner[s] would like to use their property in a reasonable manner that is prohibited by ordinance." *Nolan v. City of Eden Prairie*, 610 N.W.2d 697, 701 (Minn. Ct. App. 2000) (emphasis added).

101. If the minor variance request is denied, then Xcel Energy is not able to upgrade the existing overhead transmission line to the necessary double-circuit 115kV line within its existing easement rights. A reasonable legal use of the easement is extinguished because strict compliance with the setback requirements results in the inability of Xcel Energy to upgrade the existing route without obtaining more easement area or undergrounding the transmission line, both of which threaten to be cost prohibitive to Xcel Energy's City rate payers who will ultimately pay for such non-standard costs.

2. City - Not Xcel Energy - Created the Need for the Variance

102. Xcel Energy's plight is due entirely to City's imposition of unreasonable setbacks.

103. The setback requirements are more excessive and thus inconsistent with the generally accepted NESC clearance standards. And there is no record supported need for the excessive setback requirements.

104. The setback requirements also fail to take into account that nearly all of City's existing residential structures, including the three residences that are partially within the minimum setback area from the line, were built long after the construction of the line.

105. The setbacks are otherwise nonsensical and discriminatory. They impose setback requirements on the utility, but no comparable setback requirements on the residential structures that have been or will be built adjacent to the line. Xcel Energy would thus have no authority or control over the erection of residential structures near the transmission line easement that would cause the transmission line to be out of compliance at any future point in time. And, as illustrated by the two residences that were built within the setback area in 1990 and 1993, this threat is real.

3. Upgrade Proposal's Consistency with the Character of the Locality

106. Granting the minor variance will not change the character of the locality. The existing residential structures will be allowed to remain and Xcel Energy will be able to replace the existing wooden H-frame structures with a double-circuit steel monopole structure. And the distance from the base of the pole to the edge of the easement and the edge of the outside conductor line to the edge of the easement will both be increased. Indeed, because the proposal significantly decreases the existing line's non-conformity with the setback requirements, the proposal is automatically allowed under the Ordinance. Ord. § 1215.02(H) ("[a] lawful non-conforming use of a building, structure or parcel of land may be changed to lessen the non-conformity of use").

107. City, nevertheless, denied Xcel Energy's variance request without stating a reason. And City ignored altogether Xcel Energy's alternative request that the setback requirements be struck.

CAUSES OF ACTION

**I. WRIT OF MANDAMUS: APPROVAL OF XCEL ENERGY'S
REQUESTED CUP DUE TO CITY'S (1) UNAUTHORIZED,
(2) UNREASONABLE, AND (3) ARBITRARY AND CAPRICIOUS DENIAL**

108. City's denial of Xcel Energy's requested CUP was (1) unauthorized, (2) unreasonable, and (3) arbitrary and capricious.

109. City's denial of Xcel Energy's requested CUP was unauthorized because, once there has been submitted "documentation demonstrating need" for a new or modified transmission line over 60 feet tall (Ordinance § 1224.05(B)(1)), Ordinance § 1224.05(F) and (I) requires City to select the best alternative route for the line through its borders.

110. City's denial of Xcel Energy's requested CUP was unreasonable because it failed to apply the requisite "balancing of interests" analysis that is applicable to all local zoning restrictions on such electric utility uses.

111. City's denial of Xcel Energy's CUP request was arbitrary and capricious because none of the three stated reasons for the denial are supported in the record.

112. Xcel Energy is thus entitled to its CUP.

II. WRIT OF MANDAMUS: APPROVAL OF XCEL ENERGY'S MINOR VARIANCE REQUEST

113. Xcel Energy's minor variance request satisfies each of City's three variance requirements.

114. City is bound by the reasons it gave for its denial of Xcel Energy's requested minor variance: none.

115. Xcel Energy is thus entitled to its minor variance request.

III. WRIT OF MANDAMUS: § 586.09 DAMAGES

116. Xcel Energy's damage recovery is mandatory under Minn. Stat. § 586.09.

117. Xcel Energy is entitled to the recovery of the damages which it has incurred and will incur due to City's (1) unauthorized, (2) unreasonable, and (3) arbitrary and capricious denial of its requested CUP and minor variance.

IV. DECLARATORY JUDGMENT - NEW SETBACK REQUIREMENTS ARE INVALID

118. A bona fide dispute exists between Xcel Energy and City regarding whether City's new setback requirements - i.e., Ordinance § 1224.05(L)(3)(a)-(b) - are valid and enforceable.

119. City has no legitimate basis to have imposed or enforced the increased setback requirements, particularly as the setback requirements only apply to the utility line and not to the adjacent landowners.

120. Pursuant to Minn. Stat. § 555.01, *et. seq.*, Xcel Energy is entitled to declaratory relief and judgment in its favor as against City that City's new setback requirements are invalid as arbitrary and capricious and thus inapplicable to Xcel Energy's proposal.

WHEREFORE, Xcel Energy requests the following relief from the Court: (1) that its requested Alternative Writ of Mandamus issue, thereby ordering City to approve immediately Xcel Energy's requested CUP and minor variance, and to pay Xcel Energy its statutory prescribed damages, costs and disbursements; (2) that City's new setback requirements - i.e., Ordinance § 1224.05(L)(3)(a)-(b) - be declared invalid and inapplicable to Xcel Energy's proposal; and (3) for such other relief as the Court may deem appropriate.

DATED: February 26 2002

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VERIFICATION

STATE OF MINNESOTA)
ss. COUNTY OF HENNEPIN)

I, David G. Callahan, have read the contents of the above Verified Petition. Based on my personal knowledge, the facts stated therein, including the attached exhibits, are true, excepting those facts which are stated upon information and belief. Based upon reliable information, I believe that the facts stated upon information and belief are true.

David G. Callahan

Subscribe and sworn to before me

this 22nd day of February, 2002.

Kimberly Ann Ganske

Notary Public