

STATE OF MINNESOTA
COUNTY OF DAKOTA

DEC 1, 2003

DISTRICT COURT
FIRST JUDICIAL DISTRICT

DEPUTY

File No. C7-03-9371

Power Line Task Force, Inc., on its behalf
and on behalf of the State of Minnesota,

Plaintiff,

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
ORDER AND
ORDER FOR JUDGMENT**

v.
AND JUDGMENT

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

Defendant.

The above-entitled matter came before the Honorable Karen Asphaug, Judge of District Court, on September 15, 2003, at the Dakota County Government Center, Hastings, Minnesota.

Richard D. Morgan, Esq., appeared on behalf of Plaintiff.

Jack Y. Perry, Esq., appeared on behalf of Defendant.

Based upon the record, file, arguments and submissions of counsel, and proceedings herein, the Court makes the following:

FINDINGS OF FACT

1. Power Line Task Force, Inc. (hereinafter "PLTF") is a Minnesota nonprofit corporation consisting of homeowners and interested persons residing in the cities of Sunfish Lake, Mendota Heights and South St. Paul, whose properties are near the Southeast Metro transmission line.
- 2- Northern States Power Company, d/b/a Xcel Energy (hereinafter "Xcel Energy") is a public utility corporation.
3. Xcel Energy's Southeast Metro transmission system currently consists of a single-circuit 115kV transmission line that crosses six communities and serves 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.

4. Failure of one or more circuits in this system could result in an overload of these and other lines. In the present case, transmission line overloads could affect power supply reliability to Sunfish Lake, St. Paul, West St. Paul, Mendota Heights, Eagan, South St. Paul, Bloomington and Inver Grove Heights. Some system overloads have already occurred and Xcel Energy anticipates additional overloads in the future.

5. To address overloads on the system, Xcel Energy sought to commence work on "phase one" of a longer-term, two-phase plan. The existing single-circuit 115kV transmission line would be upgraded to a double-circuit 115kV transmission line (hereinafter "Project"). Specifically, a second circuit line would be added to the existing *line* and the resulting double-circuit line would run vertically (one line atop the other) upon steel monopoles. The new poles would be located on the centerline of the existing 50-foot wide right-of-way and private easements. No new right-of-way or easement would be required for the upgrade, although the height of the new structures would be between 84 and 100 feet (about 25 feet taller than the existing wooden H-frames). Upgrading the line in this manner would place the lines even further from the edge of the easement than is presently the case.

6. "Phase one" of the Project would upgrade a 6.36-mile section running from the Red Rock Substation to the Rogers Lake Substation.

7. "Phase two" of the Project would upgrade an 8.34-mile section running from the Rogers Lake Substation to the Wilson Substation. Xcel Energy has not sought approvals for "phase two," except as it relates to the portions of the line affected by the Metropolitan

Airport Commission's north-south runway construction. There are no current plans to build "phase two."

8. In March 1999, when Xcel Energy began seeking governmental approvals for "phase one," the only permit requirements for 115kV transmission lines were local zoning approvals. Before the initial Power Plant Siting Act, Minn. Stat. § 116C.51 - .69, (hereinafter "PPSA") became effective in 1973, "a public utility that wished to construct a power line had to secure permits from the local authorities of the counties and municipalities through which it proposed to locate its facilities." *No Power Line v. Minnesota Environmental Quality Council*, 262 N.W.2d 312, 317 (Minn. 1977). After the effective date of the initial PPSA, transmission line projects of at least 200kV had to procure permits from the Minnesota Public Utilities Commission (MPUC) and the Minnesota Environmental Quality Board (MEQB), but transmission line projects of less than 200kV still had to get local zoning approvals. *Id.* The purpose of the original PPSA was two-fold: "that the process should be orderly and that there should be public participation in all stages of agency decision-making." *No Power Line*, 262 N.W.2d at 321.

9. In Xcel Energy's case, local zoning approvals for "phase one" were required from the five communities through which the 6.36-mile line runs: Sunfish Lake, Newport, Inver Grove Heights, South St. Paul and Mendota Heights.

10. Newport and Inver Grove Heights approved the project as a permitted use. Mendota Heights, South St. Paul, and Sunfish Lake each required Xcel Energy to obtain a CUP. The three remaining municipalities, along with PLTF, challenged the Project.¹

¹ See *In the Matter of the Need for an Environmental Impact Statement for the Proposed Southeast Metro 115kV Transmission Line Project*, MEQB Order dated November 18, 1999; PLTF v. MEQB, No. 62-3-99.010952 (Minn. 2^d Jud. Dist. Orders dated Aug. 24, 2000 and Jan. 16, 2001); *NSP v. Sunfish Lake*, No. C4-02-6854 (Minn. 1st Jud. Dist. Orders dated May 31, 2002 and August 7, 2002); *NSP v. Mendota Heights*, 646 N.W.2d 919 (Minn. CL App., 2002) rev/ew denied (Minn. Sept. 25, 2002). *NSP v. Sunfish Lake*, No. CO-02-1285, 2002 WL 2004718 (Minn. Ct. App. Sept. 3, 2002); *NSP v. Sunfish Lake*, 659 N.W.2d 271 (Minn. CL App., 2003).

11. Despite these challenges, as of September 15, 2003, Xcel Energy had obtained all required local zoning approvals for "phase one" of the Project.

12. In this case, PLTF alleges four separate causes of action, including violation of Chapter 1168, the Minnesota Environmental Rights Act (MERA), nuisance, trespass, and invasion of privacy. Each of PLTF's four claims center upon the contention that Xcel Energy has violated the new PPSA by attempting to upgrade the Southeast Metro transmission line without obtaining a Certificate of Need from the Minnesota Public Utilities Commission (hereinafter 'MPUC') pursuant to Minn. Stat. § 216B.243 and a Route Permit from the Minnesota Environmental Quality Board (hereinafter "MEQB") pursuant to Minn. Stat. § 116C.57.

13. The purpose of the old PPSA was to provide an orderly process that included public participation at all stages of agency decision-making. *No Power Line*, 262 N.W.2d at 321.

The legislature likewise intended that the new PPSA would provide an efficient approval process without disadvantaging public participation in the permitting process. *Minnesota Energy and Security Reliability Act: Hearing on S.F. 722 Before the Senate Telecommunications, Energy and Utilities Committee* 2001 Regular Leg. Sess. (Minn. 2001) (statement of Sen. James P. Metzen, Chairman, Senate Telecommunications, Energy and Utilities Committee).

14. Under the new PPSA, a Certificate of Need is required for transmission lines of at least 100kV and more than 10 miles in length. Minn. Stat. § 216B.2421, subd. 2(3). Previously, a Certificate of Need was required for transmission lines of at least 200kV. Minn. Stat. § 116C.52, subd. 4 (2000). The initial PPSA provided for environmental review in determining the Certificate of Need requirement. Minn. R. 7849.0200-.0400. Under the new PPSA, the Certificate of Need requirement solely determines "questions of need,

including size, type and timing; alternative system configurations; and voltage." Minn. Stat. § 116C.53, subd. 2.

15. The Certificate of Need determination, under the new. PPSA, expressly excludes the "scope of environmental review conducted under Sections 116C.51 to 116C.69." Minn. Stat. § 116C.53, subd. 2. In fact, §§ 116C.575, subd. 5 and 116C.57, subd. 2c provide that environmental issues are to be exclusively resolved within the Route Permit review.

16. The Certificate of Need requirement is inapplicable in this case. The Certificate of Need requirement only applies to transmission line projects that are at least 10 miles long. Minn. Stat. § 2168.2421, subd. 2(3). Xcel Energy's local zoning applications for its "phase one" upgrade were for upgrade to a transmission line less than 10 miles in length, i.e., 6.36 miles.

17. In order to trigger the Certificate of Need requirement, PLTF seeks to expand Xcel Energy's proposal to the full 14.7-mile length of its southeast metro line. Xcel Energy has not sought the approval of the remaining 8.34-mile "phase two" segment of the Southeast Metro line from the Rogers Lake Substation in Mendota Heights to the three substations in Bloomington. Approval of "phase two" is not the subject of this case.

18. PLTF relies solely upon the undisputed fact that the environmental reviews for the 6.36-mile long "phase one" analyzed the entire 14.7-mile Southeast Metro line. However, Xcel Energy's decision to allow the entire 14.7-mile line to be subject to the environmental reviews does not transform what Xcel Energy actually applied for - i.e., the 6.36-mile long "phase one" - into *a de facto* application for the entire 14.7-mile line. Minnesota Rules regarding "phased" and "connected" actions appear to have required the environmental reviews to include the 8.34-mile "phase two" segment of the line along with the 6.36-mile segment, even if the "phase two" approval was not currently being sought. Minn. R. 4410.1000, subp. 4 and 4410.2000, subp. 4.

19. Under the new PPSA, in addition to a Certificate of Need, a Route Permit is required for transmission line projects greater than 100kV. Minn. Stat. § 11 6C.575, subd. 2(3). The Route Permit requirement previously applied to transmission line projects that were greater than 200kV. Minn. Stat. § 116C.52, subd. 4. The Route Permit review determines the proper route for the project and provides the exclusive environmental review. Minn. Stat. §§ 116C.575, subd. 5 and 116C.57, subd. 2c.

20. Once projects are subject to the new PPSA's Route Permit requirement, local zoning regulations are expressly preempted. Minn, Stat. § 116C.61. However, the applicant may, under Minn. Stat. § 1160.576, unilaterally opt for local, instead of MEQB, approval of the Route Permit, Local zoning bodies with jurisdiction over the project have 60 days from the date the application is first sent to *any one* of the local zoning bodies with jurisdiction over the project to demand that MEQB assume the Route Permit review. Minn. Stat. § 116C_576, subd. 1(a). If none of the local zoning bodies sends the application to MEQB within this timeframe, then the local zoning bodies must review the application under their respective local zoning ordinances and at least one of them must conduct the appropriate environmental review. Minn. Stat. § 116C.576, subd. 1(b).

21. The new PPSA requirements apply prospectively. Rules of statutory construction require statutes to be prospective unless expressly stated otherwise. It is well-settled in Minnesota that "[n]o law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature." Minn. Stat. § 645.21; see also *Chapman v. Davis*, 233 Minn. 62, 45 N.W.2d 822 (1951), and *Hughes v. Lucker*, 233 Minn. 207, 46 N.W.2d 497 (1951). The new PPSA is not "clearly and manifestly" retroactive. Minn. Laws 2001, ch. 212, art. 7 provides:

Sec. 37 EFFECTIVE DATE. This article is effective for certificates of need and route and site permits ***applied for on or after August 1, 2001.***

(emphasis added). (The term "[t]his article" includes the Certificate of Need requirement under Minn. Stat. § 2168.243 and the Route Permit requirement under Minn. Stat. § 116C.57). The new PPSA expressly applies prospectively - that is, to projects that were "applied for on or after August 1, 2001." Accordingly, projects that were applied for *before* August 1, 2001 are exempt from the new requirements.

22. Xcel Energy's "phase one" upgrade was applied for before August 1, 2001.

23. Xcel Energy formally began the approval process for "phase one" on March 2, 1999 when it applied for a Conditional Use Permit (hereinafter "CUP") to the City of Mendota Heights.

24. A zoning application before August 1, 2001 for any one municipal segment of a line renders the entire line "applied for."

25. Under the new PPSA, the phrase "applied for" is undefined. Rules of statutory construction compel the conclusion that for purposes of determining when it has been "applied for," the entire line project must be evaluated as one project, with the application for one municipal segment of the project constituting commencement of the application process for the entire line project. The project cannot be "segmentized" by the individual municipal applications required and sought according to local zoning laws.

26. "Applied for" must be construed to advance the purpose of the statute. Minn. Stat. § 645.16 (the object of all interpretation and construction of laws is to ascertain and effectuate the intention of the Legislature). The purpose of the new PPSA requirements is to ensure that permitting of large utility projects is done efficiently without compromising public participation.

27. There is no public policy benefit to PLTF's requested review of the "phase one" upgrade under the new PPSA requirements. Under PLTF's statutory construction and requested relief, Xcel Energy's Southwest Metro transmission line (along with other pending

energy projects in the state) would be (1) automatically stripped of its existing local zoning approvals; (2) enjoined from either completing the pending construction of the project or using the already built projects; and (3) required to complete the entire permit approval process again. If Xcel Energy were not exempt from the new PPSA requirements, it would be required to procure a Certificate of Need. Xcel Energy would not necessarily have to undergo MPUC review because it could, pursuant to Minn. Stat. §116C.576, opt for the same local Route Permit approval that has already been procured. Xcel Energy's "phase one" project is an upgrade of an existing line along the same right of way. Consequently, the review of this project under the Route Permit review process would be quite limited. On the basis of a judicially-recognized state public policy against the proliferation of new transmission line corridors, the cities had to, "as a matter of law, choose a pre-existing route [for the upgraded transmission line] unless there [were] extremely strong reasons not to do so." *PEER v. Minnesota Environmental Quality Council*, 266 N.W.2d 858, 868 (Minn. Ct. App., 1978). There were no such "extremely strong reasons" in the record before the local zoning bodies.

28. The public interest has already been advanced in the present case because MEQB and MPUC have already had a full opportunity to review the "phase one" upgrade. Any omissions of that review were addressed by the \$130,000 environmental review conducted by Commonwealth Associates, Inc. (CAI) for the cities of Sunfish Lake, South St. Paul, and Mendota Heights. The public interest would not be further advanced by repeating what has already been a protracted and expensive review and approval process.

29. Use of the term "[a]ppplied for" must also be reconciled with the new legislation as a whole. *Pestka v. County of Blue Earth*, 654 N.W.2d 153 (Minn. Ct. App 2002) (statutes that form part of a complete statutory scheme should be construed together). PLTF's argument that each municipal segment of a line project had to have been applied for before

August 1, 2001 in order for that project to be exempt is irreconcilable with the alternative Route Permit review process under Minn. Stat. § 116C.576.

30. Minn. Stat. § 11 6C.576, subd. 1(b) allows utilities to procure the Route Permit from local zoning bodies rather than MEQB. This local alternative provides that the application to one local zoning body with jurisdiction over the project triggers the application date for each of the required local zoning bodies with jurisdiction over the project to request the M12013 to assume jurisdiction over the route review. *Id.* Recognizing that a transmission line project may well have several local zoning bodies with jurisdiction over the project and that the applicant may not apply for all local approvals at once, the 60 days within which each of the local zoning bodies have to demand that MEQB conduct the Route Permit review commences when the application is first received by any one of these bodies. *Id.*

31. Similarly, Minn. Stat. § 2168.2425, subd. 6 sets forth a "fast-track" for MPUC's Certificate of Need determination, which expressly exempts "any transmission line proposal that has been approved by, or was pending before, a local unit of government, the environmental quality board, or the public utilities commission on August 1, 2001 ." Subdivision 6 thus exempts *projects* that were "pending before a local unit of government" - i.e., a single local zoning body. There is no reason that the Legislature would have intended to exempt approved or pending line projects from the "fast-track" Certificate of Need procedure under Minn. Stat. § 216B.2425, subd. 6, but not exempt approved or pending projects from the non-"fast-track" Certificate of Need requirement under Minn. Stat. § 2168.243 or the Route Permit requirement under Minn. Stat. § 116C.57.

32. The term "[a]ppplied for" should not be interpreted to lead to an absurd result. Minn. Stat. § 645.17(1); *Burkstrand v. Burkstrand*, 632 N.W.2d 206, 210 (Minn. 2001). There could be few, if any, results that would be more out-of-step with the legislature's intent to provide a smoother process for approval of large transmission lines.

33. During the course of this litigation, PLTF changed its focus from the issue of when "phase one" was "applied for" to when construction began. There is no reference to "construction" in the "Effective Date" provision of the new PPSA. Clearly, the effective date is controlled by when a project is "applied for," not when it may be constructed.

34. The "phase one" upgrade is exempt from the requirements of the new PPSA despite the fact that Xcel Energy formally filed a CUP with Sunfish Lake on November 13, 2001 for the 1.268-mile segment of the line running through the city.

35. Xcel Energy effectively applied for its CUP pursuant to Sunfish Lake's April 4, 2000 resolution, which required Xcel Energy to prepare and pay for what turned out to be an independent third party's yearlong \$130,000 environmental review of the project. The environmental review was part of Sunfish Lake's application review process and would not have been undertaken had Xcel Energy not sought (or effectively "applied for") the requisite local zoning approval.

36. The Sunfish Lake segment of the southeast metro line is not a stand-alone project. The Sunfish Lake segment is one subsection of the "phase one" upgrade. Municipal segments of a line are part of the entire project. A "route" is statutorily defined as "the location of a high voltage transmission line between two end points." Minn. Stat. § 11 6C.52 subd. 8. Substations constitute end points of a transmission line. There are no substations in Sunfish Lake. Thus, the 1.268-mile segment of line running through Sunfish Lake does not constitute a "route."

37. Even if the Court were to accept PLTF's argument that the new PPSA requirements apply in this case, Xcel Energy has substantially complied with the alternative to a Route Permit pursuant to Minn. Stat. § 11 6C.576 - i.e. local zoning approval.

38. As mandated for statutory requirements having no consequence for non-compliance, Xcel Energy only had to "substantially comply" with Minn. Stat. § 116C.576. *Sullivan v.*

Credit River Township, 299 Minn. 170, 176-77, 217 N.W.2d 502, 507 (1974); *Manco of Fairmont, Inc. v. Town Bd. of Rock Dell Township*, 583 N.W.2d 293, 295 (Minn. Ct. App., 1998).

39. Xcel Energy more than substantially complied with the requirements of Minn. Stat. § 11 6C.576. MEQB had sufficient notice of the "phase one" upgrade. Indeed, MEQB conducted the initial environmental review of the "phase one" upgrade.

40. Xcel Energy submitted a CUP application to each of the local zoning bodies with jurisdiction over the "phase one" upgrade. None of the cities with zoning authority over the "phase one" upgrade exercised its right within 60 days to *require* MEQB to conduct the Route Permit review. Minn. Stat. § 116C.576, subd. 1(b). The 60-day deadline expired on (1) May 7, 1999, (2) July 3, 2001 or (3) January 12, 2002 - that is, 60 days after Xcel Energy first submitted its formal CUP applications to (1) Mendota Heights, (2) South St. Paul and (3) Sunfish Lake, respectively. The cities were then court-ordered to and did issue their CUPs for the portion of the "phase one" upgrade running through their boundaries.

41. The cities' route selection was proper. Where, as here, the "phase one" upgrade is for the expansion of an existing line, the Route Permit review is necessarily limited to a preexisting route in the absence of "extremely strong reasons" to establish a new route. *PEER*, 266 N.W.2d at 868.

42. Before issuing the court-ordered CUPS for the "phase one" upgrade, the cities also conducted an appropriate environmental review of the upgrade. Even though the new PPSA provides for only one environmental review, the cities had multiple environmental reviews. In addition to MEQB's environmental review, the cities procured a \$130,000 environmental review that was nearly as extensive in scope as an environmental impact statement_ The cities additionally reviewed MPUC's refusal to shut down the line and

Minnesota Department of Health's repeated findings that there were no EMF concerns with the line.

43. The Route Permit approval is now final. Under Minn. Stat. § 116C.65, PLTF had to, but did not, challenge the cities' alternative Route Permit approvals to the Court of Appeals under Minn. Stat. § 116.576 within 30 days. PLTF has not challenged either South St. Paul or Sunfish Lake's CUP approvals, and the 30-day time to do so has long since lapsed.

CONCLUSIONS OF LAW

1. The pleadings and other documents before the Court indicate that there is no genuine issue of material fact and that Xcel Energy is entitled to judgment as a matter of law. *Holiday Acres No. 3 v. Midwest Federal Savings & Loan Ass'n of Minneapolis*, 308 N.W.2d 471 (Minn. 1981).
2. Xcel Energy's procurement of local approvals for its "phase one" upgrade to the Southeast Metro transmission line did not violate the requirements of the new PPSA.
3. PLTF has failed to support a prima facie case that Xcel Energy's procurement of local approvals for its "phase one" upgrade of the Southeast Metro transmission line violated MERA or constituted nuisance, trespass or invasion of privacy.

ORDER

1. PLTF's Motion for Summary Judgment is hereby DENIED.
2. Xcel Energy's Motion for Summary Judgment is hereby GRANTED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: 11/26/03

BY THE COURT:

Karen Asphaug
Judge of District Court