STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

Case Type: Other Civil

Court File No. MC 03-003400

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

Plaintiff,

v.

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

Defendant.

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO MOTIONS FOR CHANGE OF VENUE AND DISMISSAL

"**No large energy facility shall be sited or constructed in Minnesota without the issuance of a *Certificate of Need*** by the [Minnesota Public Utilities] commission..."
--Minn. Stat. §216B.243, subd. 2.

* * * * * * * *

"**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 [Minnesota Environmental Quality] board..."
--Minn. Stat. §116C.57, subd. 2.

* * * * * * * *

"Fundamental principles of statutory construction require that courts give effect to the plain meaning of a statute when the language is clear." Martin ex rel. *Hoff v. City of Rochester*, 642 N.W.2d 1 at 11, rehearing denied (Minn. 2002).

Dated: May 12, 2003

MANSFIELD, TANICK & COHEN, P.A.

By: ______________________________

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I. INTRODUCTION

Castigating residents (and electricity subscribers) for "incessant rantings and fear mongering," Xcel Energy does a good job of name calling, but a poor job of legal analysis. *Xcel's Memorandum*, p. ix. Xcel's alternative Motions to send this case "back" to Dakota County, where it has never before been, or to dismiss the case on the face of the pleadings are both inappropriate.

This case was properly brought in Hennepin County, and its venue should remain here. The claims in the lawsuit are actionable and cannot be dismissed on their face.

Accordingly, Xcel's Motions for Change of Venue or Dismissal for failure to state a claim should both be denied.[1]

A. The 115 kV, 14.7 Mile Power line

Xcel is planning to build a 14.7 mile new double-circuit 115 kilovolts (kV) power line to replace an existing transmission line that runs over easements in seven communities in the southeast metropolitan section of the Twin Cities. The affected cities are: Newport, Inver Grove Heights, South St. Paul, West St. Paul, Sunfish Lake, Mendota Heights, and Bloomington. The line will run from Xcel's Red Rock substation in Newport, in Washington County, to its Wilson substation in Bloomington, located in Hennepin County. See *Affidavit of Roger Conant,* Exhibits 2, 3, and 4, submitted in support of Plaintiff's Motion for Summary Judgment.

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[1] Plaintiff Power Line Task Force, Inc. ("Task Force") has brought a Motion for Summary Judgment on all of its claims in the lawsuit, which is to be heard concurrently with Xcel's Motions for Change of Venue or Dismissal.

The new transmission line has been the subject of controversy and dispute in many of the communities through which it passes. Three of the cities, Mendota Heights, South St. Paul, and Sunfish Lake, conducted extensive municipal proceedings under their respective zoning codes to determine whether zoning permission in the form of a Conditional Use Permit (CUP) would be granted for the new line.[2] All refused to grant a CUP in the form that Xcel desired. *Northern States Power Co. v. City of Mendota Heights*, 646 N.W.2d 919 (Minn. Ct. App. 2002); *Northern States Power Co. v. City of Sunfish Lake*, 659 N.W.2d 271, 2003 Minn. App. LEXIS 406; *Northern States Power Co. v. City of South St. Paul*, (see Affidavit of Jack Y. Perry, Exhibit B-6, submitted in support of Xcel's Motion for Transfer of Venue or, in the Alternative, Rule 12 Dismissal).[3]

None of the zoning questions raised in the municipal proceedings is involved in this case. The present case concerns issues that have not been adjudicated or even addressed in other legal proceedings.

B. The Issues: PUC Certificate of Need and EQB Route Permit

1. The PUC Provisions

The issues in this case are whether Xcel is required to seek and obtain

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[2] In two Cities, Newport and Inver Grove Heights, zoning permission was not needed.

[3] Two of the decisions, in South St. Paul and Mendota Heights involved timeliness requirements under Minn. Stat. § 15.99, which requires local bodies to rule upon a CUP within 60 days. The Sunfish Lake case initially resulted in a decision by Dakota County District Court overruling the City Council's vote. Xcel and the City Council thereafter entered into a settlement agreement allowing the CUP to be granted, subject to various local conditions. The Task Force challenged two of those decisions, in South St. Paul and Sunfish Lake. Both appeals have been either denied or dismissed. *Northern States Power Co. v. City of Mendota Heights*, 646 N.W.2d 919 (Minn. Ct. App. 2002); *Northern States Power Co. v. City of Sunfish Lake*, 2003 Minn. App. LEXIS 406 (Minn. Ct. App. April 9, 2003).

approval from two state regulatory agencies for the 14.7 mile project. The Power Plant Siting Act, enacted by the legislature and signed by the Governor in May 2001, went into effect on August 1, 2001. It provides that power lines of at least 100 kV and 10 miles or longer must obtain a Certificate of Need from the Public Utilities Commission (PUC). Minn. Stat. § 216B.243, subd. 2. The process consists of filing an application with the agency, which then holds hearings to determine if the power line is warranted. The statutory requirement takes into account a number of factors, including: the accuracy of the long-range energy demand forecasts on which the necessity for the power line is based; the relationship of the proposed power line to overall state energy needs promotional activities that may have given rise to the demand for the power line; and possible alternatives for satisfying the energy demand or transmission needs. Minn. Stat. § 216B.243, subd. 3.

As part of the process of efficiently administering the ***Certificate of Need*** requirement, the legislature enacted another provision, Minn. Stat. § 216B.2425, entitled "State Transmission Plan." This section provides for a state "transmissions project report." This procedure used in developing the project report was described in a document submitted to the PUC by Xcel and the other Minnesota Utilities.

Minn. Stat. § 216B.2425 . . . amends the state's certificate of need ("CON" laws by requiring the state's electric utilities to file a state "transmission projects report," or State Transmission Plan with the Minnesota Public Utilities Commission by November 1 of each odd-numbered year. The filing shall:

- list specific present and foreseeable future transmission inadequacies;
- identify alternatives in addressing system inadequacies;
- identify general economic, environmental, and social issues associated with the alternatives; and
- summarize the input that transmission owners and operators have gathered from the public and local governments in assisting to develop and analyze the alternatives.[4]

The utilities explained the rationale for this filing requirement.

> The process is meant to allow the Commission the ability to review projects in a less confrontational manner than under traditional ***Certificate of Need*** proceedings and in the overall context of other regional transmission projects being considered. It satisfied on a number of factors, including an evaluation of feasible and prudent alternatives, the Commission is required to place the project on its transmission "priority list." Placement on the list satisfies the sponsoring utility's ***Certificate of Need*** obligation with respect to that facility.[5]

However, it is not necessary for a project to be placed on the list before an application for a ***Certificate of Need*** is considered by the Commission. Indeed, as the utilities note, at present there are no projects on the list.

> It is significant to note that no utility is asking that any transmission project be placed on the priority list as part of this year's report. As it turned out, the November 1 filing deadline allowed insufficient time for utilities to prepare and assemble the data necessary for priority list approval. This means that any transmission project that requires a COB before June 1, 2004 will continue to be processed under the Commission's existing rules for certifying need for transmission lines. Minnesota Rules

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[4] MINNESOTA TRANSMISSION PROJECTS REPORT. Submitted by: Dairyland Power Cooperative, Great River Energy, Hutchinson Utilities Commission, Interstate Power Company, Minnesota Power, Minnkota Power Cooperative, Missouri River Energy Services, Otter Tail Power Company, Southern Minnesota Municipal Power Agency, Willmar Municipal Utilities, and Xcel Energy, Inc. Prepared with the assistance of: Lindquist & Vennum, P.L.L.P; November 1, 2001, pages 1.

[5] *Id.*

Chapter 7849.[6]

That is exactly what has happened. On November 1, 2001, Xcel applied for a ***Certificate of Need*** for "Four High Voltage Transmission Projects in Southwestern Minnesota," even though these projects were not on the priority list. [PUC Docket No. E001/CN01-1958].

However, the law provides for a specific exception to being placed on the priority list. Minn. Stat. § 216B.2425 subd. 6 states that "This section does not apply to 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." Clearly the reference is to the section in which the subdivision appears, and presumptively reflects the legislative view that inclusion on a priority list is not needed for projects that are already in the planning stages.

Although Xcel is suggesting this grandfathering subdivision should be applied to all of Chapter 216B, this assertion clearly conflicts with Minn. Stat. § 645.21, which provides that "No law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature."[7]

2. EQB Requirements

Another portion of the Act, which also went into effect on August 1,

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[6] *Id.*,page 2.

[7] In construing § 645.21, The Minnesota Supreme Court reasoned in *Ekstrom v. Harmon*, 256 Minn. 166, 168, 98 N.W. 2d 241, 242 (1959): "If the legislature wishes to give retroactive operation to one of its statutes, so as to effect causes of action which arise before its enactment, even as to statutes relating to or governing procedure, it may easily make such an intention clearly manifest." Accord, *Cooper v. Watson*, 290 Minn. 362, 367, 187 N.W. 2d 689, 693 (1971)."

2001, known as the Minnesota Power Plant Siting Act[8] requires power lines of greater than 100 kV, *regardless of length*, to obtain a ***Route Permit*** from the Environment Quality Board (EQB). Minn. Stat. § 116C.57 subd. 2. The EQB Permit process focuses upon environmental issues and, like its PUC counterpart, requires an application and an administrative hearing. Minn. Stat. § 116C.57, subd. 2d.

The Rules adopted by these two agencies parallel the statutes. Under PUC Rule § 7849.0030, a large power line, 100 or more kV and more than 10 miles long, must obtain a ***Certificate of Need*** from the PUC. Under EQB Rules § 4400.0400 subparts (1) and (2), a high voltage transmission line to be operated at a nominal voltage of 100 kV or more must obtain a "Route Permit" from that agency.

In enacting the Power Plant Siting Act, the legislature determined that power lines of this intensity – 100 kV or more – are environmentally sensitive. As the legislature declared:

> "Policy. The legislature hereby declares it to be the *policy of the State* large electric power facilities in an orderly manner compatible with *environmental preservation* and the efficient use of resources. In accordance with the [environment quality] to choose locations that minimize adverse human and *environmental impact* while ensuring continuing electric power system reliability and integrity and ensuring that electric energy needs are met and fulfilled in an orderly and timely fashion."

Minn. Stat. § 116C.53 subd. 1 (emphases supplied).

To carry out this declaration of vital legislative policy, the statutes

[8] Minn. Stat. § 116C.51 "Sections 116C.51 to 116C.69 shall be known as the Minnesota Power Plant Siting Act.

establish the regulatory structure and detailed requirements for the ***Certificate of Need*** and ***Route Permit***. This process evinces a clear legislative design that administrative expertise should be brought to bear upon large power lines like the one proposed by Xcel.

C. The Present Lawsuit

The Power Line Task Force, Inc. is a not-for-profit organization consisting of residents of Sunfish Lake, supported by those in surrounding communities. *Conant Affidavit*, ¶ 2. Many of the members of the Task Force live alarmingly close to the new power line, which will run through the backyard of many of their homes. *Conant Affidavit,* Exhibit 1, p. 25. They are concerned, among other matters, about the health and environmental impact of the new power line. The City Council of Sunfish Lake, after extensive hearings consisting of expert testimony and a record of more than 100 documents comprising more than 2,000 pages, determined that the proposed power line was potentially hazardous to the health of its residents, including 10 who already have the types of diseases that are associated with the electro-magnetic fields (EMF) emitted by large power lines. *Id.*, pp. 25-26.[9]

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[9] The City Council of Sunfish Lake, by a vote of 4-1, denied a CUP for the power line on the grounds of diminution of property values, and health and environmental concerns, among other matters. *Conant Affidavit*, Exhibit 1, p. App. 34. The Plaintiff's (and the City's) health and environmental concerns are corroborated by a recent report of the California Department of Health, which conclusively reflects extreme health hazards of a new power line. According to the study, the electromagnetic field (EMF) that will be generated from the power line could have a 50-90% likelihood of causing diseases (depending on the disease), including increased likelihood of child leukemia, amyotrophic lateral sclerosis (ALS or Lou Gehrig's Disease), neurological disorders, breast cancer, and miscarriages, among other afflictions, especially among those already susceptible to those diseases. Conant Affidavit, ¶¶ 26 and 28 and Conant Exhibit 8, pp. 11-12.This official report may be taken into account as a matter of judicial notice. This official report may be taken into account as a matter of judicial notice. See Rule 201, Minnesota Rules of Evidence. See also Xcel's Memorandum, p. 2, n. 2 ("documents of

The Task Force brought this lawsuit on March 4, 2003. The Complaint seeks to enjoin Xcel from constructing the new line until — and unless — it seeks and obtains the ***Certificate of Need*** from the PUC and a ***Route Permit*** from the EQB. Both have been statutorily required under the Power Point Siting Act since August, 2001.

The Complaint asserts four causes of action: Count I alleges violation of the Minnesota Environmental Rights Act (MERA), Minn. Stat. § §116B.01, et seq., which allows any citizen to pursue a lawsuit for violation of a law, rule, or regulation that is intended to protect the environment; Count II alleges nuisance; Count III maintains a claim of trespass; and Count IV alleges invasion of privacy.

D. Xcel's Excesses

Xcel has brought Motions to transfer venue to Dakota County, pursuant to Minn. Stat. § 542.11, or, in the alternative, for dismissal of the lawsuit on the face of pleadings, under Rule 12.02(e) of the Minnesota Rules of Civil Procedures, while the Task Force has brought a Motion for Summary Judgment on all the claims. See *Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment*, April 22, 2003.

Xcel accompanies its Motion for Change of Venue or Dismissal with a number of patently inaccurate and excessive statements. It incorrectly asserts that the power line is being constructed in two phases and that the first phase, referred to as "Phase One," is only 6.3 miles in length and, therefore, not

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which the Court can take judicial notice").

subject to the ***Certificate of Need*** requirement from the PUC. *Xcel's Memorandum of Law*, p. 1.[10] The "Phase One" designation is specious because the power line is, and always has, been conceived of as an integrated 14-mile project. See *infra.*

Xcel also erroneously contends that the power line is "almost entirely in Dakota County." *Xcel's Memorandum*, p. 1. While recognizing that a small portion of the line, about 1,000 feet, intrudes into Washington County, *Id.*, Xcel wholly ignores that the projected power line will include a span where it crosses the Minnesota River near the Minneapolis-St. Paul International Airport and extends through its "Bloomington" substation in Hennepin County to its "Wilson" substation in Bloomington, Hennepin County, comprising a distance of about 6.7 miles. See *Conant Affidavit*, Exhibit 2.

Xcel also makes the erroneous (and irrelevant) contention that the Task Force is "zero for four" in challenges to the power line. *Xcel's Memorandum*, p. 3. In the prior *zoning* cases, which have no bearing on the present ***administrative regulatory*** case, the losing parties were the three cities, who had concluded that the line should be barred, not the Task Force, which only acted as a nominal intervenor in two of the cases, those launched by Mendota Heights and by Sunfish Lake. Moreover, none of those cases dealt with the merits of the PUC and EQB issues now pending before this Court.[11]

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[10] Unlike the PUC statute, the EQB Route Permit requirement for power lines does not have a length requirement for the statute to apply. Minn. Stat. § 116C.52, subd. 4.

[11] Xcel also maintains that the Task Force failed in prior efforts to bring about the relief it seeks in this case. *Xcel's Memorandum*, p. 2. The Task Force brought a proceeding before the EQB in December 1999 in which the issue was whether an environmental impact statement

At any rate, the success, or lack of success, of municipalities or even the Task Force in prior proceedings is of no moment in this case. The issues presented here, the statutory requirements of a ***Certificate of Need*** from the PUC and a ***Route Permit*** from the EQB, are matters of first impression that have not been previously addressed at all in connection with the ***Route Permit*** or only peripherally raised, but not definitively resolved, with respect to the **Certificate of Need**. The claimed "zero for four" track record, therefore, is both incorrect and irrelevant in this case.[12]

E. The PUC and EQB Issues in This Case

Xcel also rests its claim for evading the ***Certificate of Need*** requirement from the PUC on grounds that it is now a "two-phase construction," with Phase 1 consisting of the 6.3 mile eastern portion of the line from Red Rock to the Rogers Lake substation, and that it has no "current plans" to build the second

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was required. The EQB did not pass upon the merits of the power line and deferred to local authorities. *Conant Affidavit*, Exhibit 3, pp. App. 1 and 7**.** *The issue of whether an environmental impact statement is required is not involved in this case.* Xcel also asserts that the Task Force failed in a challenge before the PUC in January, 2000 to "shut down" the power line because of the EMF considerations. *Xcel's Memorandum*, p. 2. However, the question of EMF is for the EQB and PUC, not this Court, which is being simply asked to decide whether Xcel should be sent to the PUC (for it to consider a Certificate of Need) and the EQB (to decide whether a Route Permit is appropriate). Neither of those agencies is to rely primarily, or solely, upon EMF considerations. See Minn. Stat. § 216B.243, subd. 3, and Minn. Stat. §116C.57, subd. 4.

[12] Many important legal rights have been established in long, often grueling battles after initial lack of success. For example, the Supreme Court's ruling in *Brown v. Board of Education*, 347 U.S. 483 (1954), outlawing segregation in public schools, was the culmination of more than a half century of litigation, marked by many defeats for the forces that sought integration, dating back to *Plessy v. Ferguson*, 163 U.S. 537 (1896) and a bevy of other successful challenges to racial segregation during the first part of this century. If the past is prologue, as Shakespeare proclaims in *The Tempest*, it has not been absolute with regard to legal issues, especially ones of first impression, as in this case. Xcel would be better to follow the advice of President John F. Kennedy that "those who look only to the past or the present are certain to miss the future." *Speech in Frankfurt, Germany*, June 25, 1963. Or, as conservative British politician Edmond Burke once said: "You can never plan the future by the past." *E. Burke, Letter to a Member of the National Assembly* (1791).

phase from the Rogers Lake substation to three substations in Bloomington. *Xcel's Memorandum*, p. i. It also claims that it is not subject to either the PUC or EQB requirements because it began the application process "before August 1, 2001, the effective date of the two statutes." *Id.*, pp. iii, v.

Xcel asserts that because it filed an application for a CUP with Mendota Heights in March, 1999, and another one with South St. Paul in April, 2000, it is outside the purview of the law. *Id.*, p. iii. Strangely, Xcel also claims that it began the application process in Sunfish Lake on April 4, 2000, pursuant to some type of agreement between Mendota Heights and South St. Paul for "environmental impact review." *Id.*, p. v.

That Xcel applied for zoning classification in some other cities before the August 1, 2001 when the statute went into effect is interesting, but irrelevant. Moreover, the "environmental impact review" conducted by two communities has no bearing on whether, or when, an actual application was filed, which is the triggering date for the two respective statutes. Indeed, Xcel admits that it "submitted to Sunfish Lake an application" on November 13, 2001, which is four and one-half months ***after*** the Power Plant Siting Act went into effect. *Conant Affidavit*, ¶ 4.

These excesses by Xcel should not detract from the plain and simple issues in this case: a) that Xcel was required to obtain a ***Certificate of Need*** from the PUC for its 115 kV, 14.7 mile line, and b) that it was required to obtain a ***Route Permit*** from the EQB for the line. Those are the issues that must be addressed and resolved by the Court in this case.

II. THIS CASE SHOULD REMAIN HERE

Xcel's request that venue be transferred to Dakota County is misguided and should be denied. Xcel incongruously asks that the case be sent back to Dakota County," *Xcel's Memorandum*, p. 3, p. xiv (emphasis supplied), even though it did not start there and has never been there.

A. Objection to Venue Has Been Waived.

As a threshold matter, Xcel has waived any objection to venue. Before moving to change venue, it removed Judge LaJeune Lange, the first judge to which this case was assigned. It then moved this Court for a Stay of Discovery.

Xcel cannot have its venue and eat it, too. An objection to venue is deemed waived if a party participates in a case, especially by seeking affirmative relief before venue is transferred. *Albrecht v. Sell*, 110 N.W.2d 895, 897 (Minn. 1961)("...by voluntarily participating in proceedings in a given county, ...a party is thereafter foreclosed from questioning the propriety of such venue."); *Rosnow v. Commissioner of Public Safety*, 444 N.W.2d 591, 594 (Minn. Ct. App. 1989).

B. Venue is Proper in Hennepin County

Xcel's Motion is brought under Minn. Stat. § 542.11(4), which allows venue to be transferred in the "interest of justice." Xcel's claim that "justice" will be served by sending the case "back" to a venue where it never was before is based on three prior **zoning** cases, the prior ruling by Judge Stacy in a **zoning** case involving Sunfish Lake, the alleged greater "familiarity" of Dakota County with the "underlying legal and environmental claims at issue" in this

case, the false claim of the existence of the power line "almost entirely within Dakota County" and the corresponding false claim that any harm would be suffered only in Dakota County, the possible "viewing of the line" in Dakota County, and the residence of all Task Force members in Dakota County.[13]

Most of Xcel's reasons are factually flawed, and none of them is sufficiently compelling to transfer this case "back" to where it has never been before. This case properly was sued out in Hennepin County and it should remain here, rather than being sent "back" to Dakota County, a venue where it never has been previously.

Xcel has failed to establish that a change of venue is appropriate under Minn. Stat. § 542.11. The statute is conjunctive; it requires that *both* "convenience of witnesses *and* the ends of justice would be promoted by the change of venue." Minn. Stat. § 542.11(4) (emphasis supplied). There has been no showing that any witness would be inconvenienced by this matter being tried in Hennepin County. Thus, Xcel fails to satisfy a threshold statutory requirement.

But even if it could overcome this fundamental statutory shortcoming, Xcel's motion fails on other grounds, too. Public policy generally augurs *against* a change of venue. Minn. Stat. § 542.01 provides that:

> ". . . every civil action *stall be tried in the county in which it was begun*, unless the place of trial be changed as herein after prescribed . . ."

Minn. Stat. § 542.01. In addition, "Minnesota forum non conveniens law

[13] Xcel's disinclination to have this case decided in Hennepin County is reflected by its Rule 63 removal of Judge LaJeune Lange before the case was re-assigned.

establishes a strong presumption in favor of the plaintiff's choice of forum." *Independent Sch. Distr. No. 197 v. Accident & Cas. Ins. of Wintherthur*, 525 N.W. 2d 600, 604 (Minn. Ct. App. 1995) *rev. denied* April 27, 1995. See also *Bergquist v. Medtronic, Inc.*, 379 N.W. 2d 508, 511 (Minn. 1986) (citing *Gulf Oil Corp. v. Gilbert*, 33 U.S. 501, 508 (1947).

Minn. Stat. § 542.09 provides that, unless a provision for different venue is enumerated elsewhere:

> "all actions . . . shall be tried in a county in which *one* or more of the *defendants reside* when the action is begun or in which the cause of action or some part thereof arose . . . *[A] corporation . . . reside[s]* in any county wherein it has an office, resident agent, or *business place*.

See *Smith v. Utah Home Fire Ins. Co.,* 234 Minn. 169, 171, 47 N.W. 2d 785, 788 (1951) (emphasis supplied). Xcel has never contested the fact that it has an office at 414 Nicollet Mall, Minneapolis, Hennepin County. Indeed, this is its registered office with the Minnesota Secretary of State. See *Affidavit of Stephen H. Parsons*, ¶ 2. Thus venue was properly laid in this Court, as Xcel recognizes.

The utility's purported justification for sending the base "back" to Dakota County, where it has never been, is lame. The prior cases all involved local ***zoning*** issues – not the state regulatory issues involved in this case – and did not raise state statutory and regulatory questions.[14]

Xcel's contention that "almost" all of the power line lies in Dakota County

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[14] Although the Sunfish Lake zoning case in Dakota County passed upon the Certificate of Need, it did so in a zoning context, cited the wrong statute, and is not binding in this case. See *infra.* Any familiarity, with these issues in Dakota County is misleading because the Courts there have not addressed the issues at bar. These issues can be competently addressed by the trial bench in Hennepin County, which is at least equally capable as jurists in Dakota County.

is wrong. Nearly one-half of the 14.7 mile line, about 6.7 miles, will go through Bloomington, which granted Xcel's application in October, 2002, and is located in Hennepin County. *Conant Affidavit*, Exhibit 2. Another portion, about 1/5 of a mile, is in Washington County. *Xcel's Memorandum*, p. i, n. 1. Thus, nearly half the line lies outside Dakota County. Correspondingly, any harm, environmental or otherwise, is not confined to Dakota County, but will occur in Hennepin County (as well as the slight portion in Washington County).

Xcel's suggested "view of the line" is unnecessary. This case turns on looking at the statutory and regulatory scheme, not gazing at electricity poles.[15] The time devoted to this case should be spent looking at books of statutes and cases in the library or on computers on the 24th floor of the Hennepin County Government Center not in the "field."

Finally, the residences of the Task Force's members are not relevant. Although centered in Sunfish Lake, the Task Force draws support and membership from other communities, too. *Conant Affidavit*, ¶ 2. Further, MERA specifically authorizes this action by "any" resident of Minnesota whether they live in Mankato, Mazeppa, Mendota or Minnetonka. Minn. Stat. § 116.03, subd. 1 ("Any person residing within the state... may maintain a civil action in the district court for declaratory or equitable relief..."). Hennepin County is hardly inconvenient to the members of the Task Force, since many Task Force members live or work here. While Xcel does not expressly say so,

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[15] As a politician once remarked, in disclaiming a campaign visit to an inner city site: "Once you've seen one ghetto, you've seen them all," *Spiro Agnew,* 1968. Ronald Reagan, campaigning for the presidency in 1980, more sagaciously observed: "Once you've seen one Redwood tree, you've seen them all."

its suggestion that this venue is inconvenient for the Task Force is belied because the Task Force chose to bring it here, which is where Xcel's personnel work. Thus, Hennepin County is ***more*** convenient for both Xcel and the Task Force.

In sum, venue is proper in Hennepin County, as Xcel concedes: There is no basis to transfer venue under ¶ 542.11, especially in light of the failure to satisfy the ***two*** statutory requirements of "convenience" and "justice," let alone either of them. Therefore, venue should remain here and not be sent "back" to a court where it has never before been.

III. THE LEGAL STANDARD

Xcel's Motion for Dismissal for failure to state a claim under Rule 12.02(e) faces an exceedingly high legal standard. All allegations in the Complaint must be taken as true and construed most favorably to the plaintiff. *Marquette Nat. Bank of Minneapolis v.* Norris, 270 N.W.2d 290 (Minn. 1978); *Westcott v. Omaha*, 901 F.2d 1486, 1488 (8th Cir.1990). A lawsuit may not be dismissed on the pleadings unless there are no conceivable facts which, if proven, would establish the claims asserted in the Complaint. *Hedlund v. Hedlund*, 371 N.W.2d 232, 234-235 (Minn. Ct. App. 1985). As the Supreme Court instructs:

> A claim is sufficient against a motion to dismiss based on Rule 12.02(5) if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded. To state it another way, under this rule a pleading will be dismissed only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded.

Northern States Power Company v. Franklin, 122 N.W.2d 26 at 29 (1963).[16]

In short, the Court must assume all of the allegations in the Complaint to the true and, if so, determine if they state a cognizable legal claim. In this case, there are cognizable legal claims for violation of MERA, nuisance, trespass, invasion of privacy and, therefore, the Complaint cannot be dismissed on its face.

IV. XCEL MUST OBTAIN A CERTIFICATE OF NEED FROM THE PUC

A. The "plain and unambiguous" statutory language

The two statutes in question in this case, Minn. Stat. § 216B.243 with respect to a ***Certificate of Need*** from the PUC, and Minn. Stat. § 116C.57, regarding a ***Route Permit*** from the EQB, are both clear and precise. The PUC statute states, in relevant part, as follows:

> "Certificate required. No large energy facility ***shall*** be sited or constructed in Minnesota ***without the issuance of a Certificate of Need*** by the Commission . . . consistent with the criteria for assessment of need."

Minn. Stat. § 216B.243, subd. 2 (emphasis supplied).

The definitional provisions of the statute, Minn. Stat. § 216B.2421, describe the applicants who are required to obtain a ***Certificate of Need*** as "any high voltage transmission line with the capacity of 100 kV or more with

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[16] The same high standard applies under Federal law as well. A Motion to dismiss for failure to state a claim upon which relief can be granted, under the parallel provision of Rule 12(b)(6), F. R. Civ. P. may not be granted "...unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief... *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 546 (8th Cir. 1997). The Court must accept the plaintiff's factual allegations as true. *Albright v. Oliver*, 114 S.Ct. 807, 810 (1994); Further, the Court must construe the allegations in the Complaint and reasonable inferences arising from the Complaint favorably to Plaintiff. *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir.1986). See generally, *Krambeer v. Eisenberg*, 923 F. Supp. 1170, 1173 (D. Minn. 1996).

more than 10 miles of length in Minnesota . . ." Minn. Stat. § 216B.2421, subd. 2(4). Thus, Xcel's project is covered by the statute, and a ***Certificate of Need*** is required, if the project has a capacity of 100 kV or more, which Xcel concedes, and is greater than 10 miles in length, which it disputes.

The EQB statute, similar to its PUC counterpart, is crystal clear. It 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...

-- Minn. Stat. § 116C.57, subd. 2.

Another Minnesota statute comes into play. Minn. Stat. § 645.16 dictates that "[w]hen the words of a law and their application to an existing situation are clear and free from an ambiguity, the letter of the law shall not be regarded under the pretext of pursuing the spirit." This directive is followed by case law, which holds that if the intention of the legislature is clearly manifested by "plan and unambiguous language," that language should be honored, rather than despoiled under the guise of statutory interpretation. *State v. Larivee*, 656 N.W.2d 226 at 229 (Minn. 2003) ("...words and phrases are to be given their ordinary meaning."); *Martin ex rel. Hoff v. City of Rochester*, 642 N.W.2d 1 at 11, rehearing denied (Minn. 2002) ("Fundamental principles of statutory construction require that courts give effect to the plain meaning of a statute when the language is clear..."); *American Tower, L.P. v. City of Grant*, 636 N.W.2d 309 at 312 (Minn. 2001) ("Where the legislature's intent is clearly discernable from plain and unambiguous language, statutory construction is

neither necessary nor permitted and courts apply the statute's plain meaning."); *Ed Herman & Sons v. Russell*, 535 N.W. 2d 803, 806 (Minn. 1995).

The principle is applicable to both the ***Certificate of Need*** required by the PUC as well as the ***Route Permit*** that must be granted by the EQB.

B. The Statutes Apply To Xcel's Post-August 1, 2001 Application in Sunfish Lake

Xcel's contention that both statutes do not apply because Xcel sought local zoning approval from some communities, but not Sunfish Lake, before the laws went into effect on August 1, 2001, is misguided. Xcel miscasts the argument as one of "retroactivity," suggesting that the legislature has attempted to apply a new law to a pre-existing situation. It argues that the laws should not be applied retroactively unless such an approach was "clearly and unambiguously intended by the legislature." *Xcel's Memorandum*, p. 7.

But this is not a case of "retroactivity" in the sense that the term is incorrectly used by Xcel. The legislation went into effect on August 1, 2001 and covers all applications that occur *on or after* the effective date of the statute. In a pure "retroactivity" situation, conduct that is lawful at the time it is undertaken is subsequently made unlawful by virtue of new legislation. *Gomon v. Northland Family Physicians, Ltd.*, 645 N.W.2d 413 (Minn. 2002).[17]

But the legislature did not enact a measure as of August 1, 2001 that

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[17] See also *Midwest Family Mut. Ins. Co. v. Bleick*, 486 N.W.2d 435 (Minn. Ct. App.1992) review granted in part, denied in part: (Fact that preexisting insurance contract was affected by statute requiring insurers to provide add-on underinsured motorist coverage rather than difference of the limits coverage did not make application of statute to insured's accident and death occurring after statute's effective date retroactive application of statute; at time statute went into effect, insured and his heirs had no claim against insurer.

retroactively made any pre-existing conduct illegal. It only prescribed that any application made following that date comes within the purview of the two state regulatory agencies. This does not constitute "retroactive" legislation, but simply a new law that governs future conduct. It is akin to the legislature changing the speed limit on a highway and then having Xcel claim that the law is "retroactive" because it purchased vehicles before the speed limit was changed. Nothing in the legislation reaches back and imposes new obligations upon Xcel for conduct that occurred before August 1, 2001; rather, the law governs what Xcel is obligated to do ***after*** August 1, 2001.[18]

Xcel's contention that it "beat" the effective date of the statute by virtue of applications for local zoning permits in communities other than Sunfish Lake before August 1, 2001 is specious. *Xcel's Memorandum*, p. 8. It cites the clause that applies to Certificate of Need and Route Permits "applied to on or after August 1, 2001." Minn. Laws 2001, Chapter 212, Section 37. *Id.*, p. 7.

Xcel makes the unsubstantiated and unwarranted assertion that provisions make it exempt from the ***Certificate of Need*** and ***Route Permit*** requirements if *any* zoning permission was "approved by or is pending *before at least one local zoning body*" as of August 1, 2001. *Xcel's Memorandum*, p. 8. Xcel adds this new language to the text without any citation to statutory or case law authority. It contends that application for "any one segment" of the

[18] Ordinarily, laws go into effect on August 1 in the year in which they are enacted, unless otherwise specified by the legislature. Minn. Stat. § 645.21. In this case, the legislation itself states explicitly that it went into effect on August 1, 2001, which makes resort to the "statutory effective date" is unnecessary. However, the legislature's explicit declaration that the law goes into effect on August 1, 2001 is indicative of its intent to govern all powerline applications arising after that time.

power line is equivalent to "an application for the whole project," based upon Minn. Stat. § 116C.52, subd. 8, which defines a "route" as a "location . . . between two end points." *Id.* Therefore, according to Xcel's logic, or illogic, by applying to a single community before August 1, 2001, it evades the legislative intent that a utility obtain a ***Certificate of Need and*** a ***Route Permit*** for a power line that runs through other communities as well.[19]

The legislature certainly knew how to draft exemptions and did so in many circumstances. The PUC statute contains an express section. See Minn. Stat. § 216B.2422 subd. 5. addressing "exemption from ***Certificate of Need*** proceeding." Similarly, § 216B.243 subd. 8 contains other explicit "exemptions." Notably, ***none*** of those exemptions refers to Xcel's language of applications that were "pending before at least one local zoning body before August 1, 2001" if there are subsequent applications made to other communities ***after*** that date.

If the legislature had intended to exempt such power lines from the Certificate of Need process, it could and should have said so. That it did not is indicative that it had no intent to exempt in a long power line simply because it may have applied, prior to August 1, 2001, to only one city in a chain of

[19] Xcel also relies upon the "priority list" process for a Certificate of Need from the PUC under Minn. Stat. § 216B.24257 subd. 6, which exempts any project that has been "approved by, or is pending before, a local unit of government:" as of August 1, 2001. Interestingly, Xcel is not claiming, or seeking, "priority list" approval, which makes that statute inapplicable. However, the existence of the "priority list" exemption shows that the legislature knew how to specifically provide for a exemption for power lines that were pending before any local unit of government before August 1, 2001, if it chose to do so. That it did not do so with respect to the non "priority list" procedure involved in this case evinces that the lawmakers did not intend to exempt a large power line from the Certificate of Need requirements simply because an application may have been made in one community before August 1, 2001, when it makes applications to other communities after the legislatively-prescribed date.

communities through which the power line may pass when it would subsequently have to make ***other*** applications following that statutory date.

The silence of the legislature with respect to the exemption argued for by Xcel is deafening. The failure of the legislature to provide an exemption in one circumstance, when it provides exemptions in other circumstances, demonstrates that it does not intend the unspecified exemption to apply.[20]

Similarly, the legislature provided another exemption in the Power Plant Siting Act with respect to designation of anticipated sites or routes. Under Minn. Stat. § 216B.2425, operators of high voltage transmission lines must provide biennial lists of projects to the PUC of anticipated projects. That provision contains an explicit "exclusion" for any proposal that has been "approved by, or is pending before, a local unit of government, the Environment Quality Board, or the Public Utilities Commission, on August 1, 2001." Minn. Stat. § 216B.2425 subd. 6.

But that exclusion only applies to listing potential long-term projects, many of which may run up to 6 years, or more, in length. See Minn. Stat. § 216B.2425 subd. 4. It does not apply to the Certificate of Need (or Route Permit) requirements for construction of such lines which lack any such exemptions. However, the legislature was noticeably silent with respect to any such "exclusion" or exemption for the ***Certificate of Need*** requirements under Minn. Stat. § 216B.2423 or, for that matter, the Route Permit requirement

[20] The legal phrase of *expressio unius est exclusio alterius* addresses the same issue. Under that legal maximum, the expression by the legislature of one out of many items necessarily excludes other matters that are not mentioned.

under Minn. Stat. § 116C57. If the legislature wanted any such exemption or "exclusion" to apply to the ***Certificate of Need*** and the ***Route Permit*** requirements, as it did for the line listing requirement, it could have, and should have, said so. That it did not is indicative that it had no such intent.

The respective administrative rules adopted by the agencies also contain explicit exemptions and exclusions. The PUC rules state a ***Certificate of Need*** is not required for a facility exempted by Minn. Stat. §216B.243, subd8.[21] The EQB rules exclude "small projects" (less than 100 kV), Rule 4400.0650. None of these exemptions remotely applies here. Rules adopted by an administrative agency are presumed valid and entitled to substantial deference. *In re R.B.P.,* 640 N.W.2d 351 (Minn. Ct. App. 2002).

Simply put, the legislature and the agencies knew how to draft exemptions from the ***Certificate of Need*** requirement and, for that matter, from the ***Route Permit*** obligation, too. They include some exemptions and exclusions in the legislation, and ancillary rules, but have declined to include the one that Xcel argues for in this case: that any pre-existing zoning application before August 1, 2001 precludes a **Certificate of Need** for applications arising after that date.

Any lingering doubts about the legislative intent with respect to

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[21] E.g., cogeneration or small power production facilities; a high-voltage transmission line proposed primarily to distribute electricity to serve the demand of a single customer at a single location; the upgrade to a higher voltage of an existing transmission line that serves the demand of a single customer that primarily uses existing rights-of-way; a high-voltage transmission line of one mile or less required to connect a new or upgraded substation to an existing, new, or upgraded high-voltage transmission line; etc.

exemptions or exclusions for the ***Certificate of Need*** and ***Route Permit*** requirements is dispelled by the legislative history. An attempt was made in the legislature last year to amend Minn. Stat. § 216B.243, the ***Certificate of Need*** law. Legislation was proposed to exempt from the ***Certificate of Need*** process projects for transmission lines with capacities between 100-200 kV for which application was pending before any local unit of government, the EQB or the PUC on August 1, 2001. H.F. No. 2972 2nd Engrossment: 82nd legislative session (2001-2002), posted on March 22, 2002. See *Parsons Affidavit*, Exhibit 1, ll. 4.26 – 4.30. This is the same exemption that exists for the biennial listing of anticipated projects under Minn. Stat. § 216B.2425. It also is the same exemption that Xcel argues for in this case.

But it failed. The proposed legislation was struck from the language of the bill before it was passed. H.F. No 2972 3rd Engrossment: 82nd legislative session (2001-2002), posted on May 19, 2002. *Parsons Affidavit*, Exhibit 2 *language from 2nd Engrossment missing).* Thus, the legislature expressly declined to enact the exemption that Xcel now seeks this court to write into the law.

The legislature's refusal to accept to adopt the provision proposed by Xcel demolishes Xcel's contention in this case. In short, the legislative history reflects: a) that the legislature was presented with an opportunity to enact the exemption for projects that were applied for in part before August 1, 2001, and chose not to do so; b) that the legislature did not even take up any proposal to create a similar exemption from the ***Route Permit*** requirements from the EQB.

While Xcel maintains that there is "no serious dispute" that the project was "applied for" before August 1, 2001, there is a very "serious" shortcoming with Xcel's argument. Although it had applied to some communities before that date, it has not applied in Sunfish Lake, which is the focal point of this case. *Xcel's Memorandum*, p. 10. Since the statute requires PUC approval, through a ***Certificate of Need*** for any application after August 1, 2001, Xcel is not exempted or excluded from those requirements simply because it applied to some, but not all, of the communities before the statutory date. Xcel's claim of the "absurdity" of being obligated to seek a ***Certificate of Need*** or applications after August 1, 2001 should be addressed to the legislature, not this Court. It was the elected lawmakers, not the Task Force that chose that date and crafted the statute to require a ***Certificate of Need*** for any application occurring after August 1, 2001. It was the same lawmakers who declined to legislate the exemption that Xcel is now asking the Court to write into the law.

Xcel's lamentation that the "entire line must now be reviewed all over from scratch" is precisely what the legislature had in mind, this is why it used such strong language in adopting the Power Plant Siting Act, recognizing that the strong policy of the state to locate large electric power line facilities in an "orderly manner . . ." Minn. Stat. § 116C.53 subd. 1. Doing so in an "orderly manner" contemplates administrative review and approval of any large power line, which runs through many municipalities, by a state wide agency, rather than the process, as Xcel would like, of individual determinations by local

communities.[22]

The purpose of the law is to supplant individualistic determination by communities with preview by state-wide agencies that have broader purview over power lines that cross municipal jurisdictional boundaries. This can only be done by interpreting the law as it is plainly and unambiguously written: that it applies to all applications for power lines that occurred after August 1, 2001.

Since Xcel did not apply to Sunfish Lake until November 13, 2001, 4 ½ months ***after*** the law went into effect, it is covered by both the letter and spirit of the statute of the bill before it was passed. H.F. No. 2972 3rd Engrossment: 82nd legislative session (2001-2002), posted on May 19, 2002. *Parsons Affidavit,* Exhibit 2. Thus, the legislature expressly declined to approve the exemption that Xcel now seeks this Court to write into the law. Moreover, the legislature did not even contemplate, let alone reject, an exemption proposal from the ***Route Permit*** requirements under EQB under Minn. Stat. § 116C.57. Therefore, the legislative history reflects: a) that the legislature was presented with an opportunity to enact the exemption for projects that were applied for in part before August 1, 2001, and chose not to do so; b) that the legislature did not even take up any proposal to create a similar exemption from the ***Route Permit*** requirements from the EQB. This Court should not accept Xcel's invitation to re-write the statutes to include exemptions that were either

[22] Before enactment of the Power Plant Siting Act, approval of large power lines rested solely with local communities. *Xcel's Memorandum*, pp. ii. The law was changed generally to require approval by statewide agencies, the precise process that Xcel seeks to avoid here.

defeated, deflated, or disregarded, by the elected lawmakers of this state.

C. The Project Satisfies The 10-Mile Threshold of the PUC Statute

Xcel's contention that it is not covered by the PUC statute because its new transmission line does not exceed the 10-mile statutory threshold is fallacious. After having consistently represented to various municipal bodies that it plans to construct a 14.7 mile unified line, Xcel now, in the face of this lawsuit, contrives a new construction position that it really is only seeking to build the first phase, a 6.36 mile segment, while deferring the balance of the line. *Xcel's Memorandum,* p. 12.

Xcel's contention that the line it consistently represented to government bodies over the past several years as a 14.7 mile integrated project has been converted to a 6.36 "two phone" process is wrong, at best. Xcel has repeatedly described its project as being 14.7 miles, running from Newport to Bloomington. These representations have been made in the following documents and forums:

- Its Application to the EQB in 1999 regarding the need for an environmental impact statement for the proposed line described it as an upgrade of its existing 14.7 mile project. *Conant Affidavit,* Exhibit 3.
- In a report prepared by Xcel's representative, Commonwealth Associates, Inc., to the City of Sunfish Lake, it totaled up the new line as follows: "Distance in miles . . . Total 14.0." It goes on to described the project more specifically as covering ".5 miles of line

and four tower structures, coupled with another 13.4 miles of line and 127 structures," on a total of 13.9 miles." *Parson Affidavit*, Exhibit 4. (cover page + pp. 2-1 and 2-2).

Most telling, Xcel has described the project as being more than 14 miles along in Memoranda to district courts regarding cases in South St. Paul and Sunfish Lake, each accompanied by sworn verifications by David Callahan, an Xcel executive in charge of the project, that the facts are correct.[23]

Xcel now comes forward with the tale of the Incredibly Shrinking Power Line. But when it sought environmental reviews of the project, it described the line as one of about 14.7 miles in length. *Xcel's Memorandum*, p. 12. It now seeks to discard its earlier – and accurate – characterization on grounds that "it is always advisable to be over inclusive rather than under inclusive." *Id.* That still does not explain why Xcel has consistently characterized the project as 7 miles, or more, not only for environmental review purposes, but before municipal bodies and the courts.

There is no legal or logical basis for Xcel to try to Balkanize the line. Under Xcel's argument, a utility could evade the statutory requirements for a

[23] Xcel's Submission to the Court regarding South St. Paul's denial of the CUP August 2001: "Xcel Energy's transmission system in the southeast metro are currently includes a single-circuit 115kV transmission line which ***crosses six communities*** and supplies power to the entire southeast metro area. The 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 substation." Xcel's description of the line in its Petition for a Writ of Mandamus to the Court regarding the Sunfish Lake Case, February 22, 2002 "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."

Certificate of Need from the PUC by segmenting its line into dozens, perhaps hundreds, of parts. Indeed, each pole could be deemed a "separate segment" or "phase," or, as Xcel now tries to do, and it could treat each community in which it applies as a separate "segment" or "phase." But the reality is that this line has always been conceived of, and still remains, a 14.7 mile project.

Fundamental construction practices reflect this reality. Projects of this type, are often spread over many years, while recognized by the PUC statute. In the portion dictating that utilities furnish lists of anticipated projects biannually, Minn. Stat. § 216B.2425, the legislature required lines to be "reapproved" if they are not begun "not more than 6 years after being placed on the list." Minn. Stat. § 216B.2425 subd. 4. This reflects the recognition that most of these large power lines are planned over a significant period of time; it does not, however, warrant treating them in separate "phases," or segments, as Xcel seeks to do here.

An experienced power line construction manager, David Schoengold, recognizes this reality. As he points out, large field projects of this kind are usually planned as an integrated unit, but then constructed incrementally, depending upon governmental approval, financing, and a myriad of other considerations. *Affidavit of David Schoengold*, ¶ 5. As he states:

> Generally, large power line projects, such as Xcel's proposed Southeast Metro Transmission Line, are the product of many years of planning and construction. The projects usually are drawn up as a unitary, although they will, as a practical matter, be divided into several segments. The segmentation is due to the need for and necessity for government approval from various local municipal bodies, economic conditions, and a number of other factors. However, the construction project itself is generally viewed

> as the totality of the length of the line, even though it may be constructed incrementally over time. It is not unusual for portions of a power line to be deferred for a number of reasons, ranging from legal issues to financing to weather conditions. These delays may be inherent in a construction and not detract from the reality that the power line is considered to be an integrated project running from beginning to the end of the project.

Xcel first applied for a Conditional Use Permit for this project in Bloomington, which approved the CUP on October 16, 2000. Parsons *Affidavit*, Exhibit 3.[24] The line was to run near the Twin Cities International Airport (in Hennepin County, by the way). The airport previously planned to build a new runway in the vicinity, which prompted Xcel to anticipate building its line underground. When the runway plan was scrapped, Xcel changed its mind and sought to defer completion of the line. But the Bloomington City Council, on December 3, 2001, declined to extend the time. *Id*. This reflects that Xcel was planning to build the 14.7 mile power line, until other developments slowed down the plan.

But construction convenience is not a basis for public policy. The legislature, not Xcel, has declared that the ***Certificate of Need*** is required for power lines of more than 10 miles in length, and that mandate should not evaded by Balkanizing the line in a way that is both impractical and unrealistic.

Xcel's observation that it is "always advisable to be overly inclusive rather than under inclusive," *Xcel's Memorandum*, p. 12, applies to consideration of the ***Certificate of Need*** requirement in this case. Xcel's

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[24] Similarly, in Inver Grove Heights, Xcel plans to build the line in a new right-of-way. **Cite. P**

unassailable logic to be "overly inclusive, rather than under inclusive" dictates having it submit to the PUC for a ***Certificate of Need*** approval, rather than obviating the process altogether.

The plain and clear language of the PUC statute, Minn. Stat. § 216B.243 requires a ***Certificate of Need*** for this project. The application, at least as it occurred Sunfish Lake, came 4-1/2 months after August 1, 2001, the triggering date of the statute. There is no exemption, exclusion, or exemption applicable here, and the one now argued for by Xcel was expressly ***rejected*** by the legislature. The ***Certificate of Need*** requirement applies. Accordingly, Xcel's Motion to Dismiss should be denied.

D. The Dakota County Decision Is No Bar

The determination by Judge Stacy in the zoning case in Dakota County, peripherally addressed the issue of whether a ***Certificate of Need*** was needed. Citing the wrong statute, he determined that the legislature "grand parented" in the ***Certificate of Need*** requirement and that since Xcel applied to some cities, besides Sunfish Lake before August 1, 2001, when the new law went into effect, it need not obtain a ***Certificate of Need***.

In doing so, he relied upon the wrong statute. He cited Minn. Stat. § 216B.2425 subd. 2, which requires utilities to furnish a list to the PUC bi-annually of anticipated projects during the coming year. The provision contains a clause that exempts compliance for projects that were "approved" or "pending" as of August 1, 2001. But that provision, erroneously cited in the zoning case, has no bearing on the issue in this case of a ***Certificate of Need***,

which is codified in a different statute, Minn. Stat. § 216B.243 (not .2425) and contains no such exemption.[25]

Moreover, the Trial Court in the zoning case recognized that the City could, if it wished, condition a CUP on obtaining a ***Certificate of Need***. *Id.* That constitutes a recognition that Xcel is not exempted from the ***Certificate of Need*** provision merely because it applied for zoning approval in some comments, but ***not*** all, before August 1, 2001.

Regardless of these internal mistakes and inconsistencies, the Dakota County zoning case is not binding here for several reasons. For it to apply, the doctrine of collateral estoppel must be invoked. But the Dakota County decision does not constitutes collateral estoppel for several reasons.

The doctrine of collateral estoppel consists of four elements: an identity or privity of parties; identity of issues; a final determination of the merits on the prior case; and the full and fair opportunity to be heard on the disputed issue. *Care Institute, Incorporated-Roseville v. County of Ramsey*, 612 N.W. 2d 443 (Minn. 2000); *Johnson v. Consolidated Freightways, Inc.,* 420 N.W. 2d 608, 613 (Minn. 1988); *Kaiser V. Northern States Power Co.,* 353 N.W. 2d 899, 902 (Minn. 1984); *Willems v. Commissioner of Pub. Safety*, 333 N.W. 2d 619, 621 (Minn. 1983); quoting *Victory Highway Village, Inc. v. Weaver*, 480 F. Supp. 71, 74 (D. Minn. 1979).[26] None of these elements exists here as a matter of law, let

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[25] Nor was the "list" law germane in the zoning case, either. Its erroneous citing is apparently attributable to one of those highly unusual mistakes by a Trial Court judge or, even rarer, a law clerk.

[26] The 8th Circuit, following U.S. Supreme Court precedent, adds an additional requirement that the "determination (of the issue) in the prior action must have been essential to the

alone all of them.

1. No Privity

Although the Task Force nominally was a party, through its intervention in the prior CUP case, it was not truly a litigant because it was not permitted to address, argue, brief, or raise any issues in the litigation. *Conant Affidavit*, ¶ 17. Therefore, it did not have a say in the lawsuit to which it was not a party, or in privity, to parties in the lawsuit. Because of its inability to litigate issues, it was only a "nominal party" in the case. For collateral estoppel to attach to a party, it must be significantly involved in the prior litigation. As stated by the Appellate Court in *Houlihan v. Fimon*, 454 N.W. 2d 633, 636 (Minn. Ct. App. 1990): "being a party for purposes of collateral estoppel contemplates more than merely a name on the documents"). For practical purposes of the litigation, and in the subsequent settlement and dismissal, the Task Force had no role, despite its efforts to be heard by the Court.

A nominal party in the first case is entitled to bring suit in a separate action in its individual capacity without being estopped by prior adverse judgment. See *Minnesota Board of Health by Lawson v. City of Brainerd*, 241 N.W. 2d 624 (Minn. 1976); *Olson v. Linster*, 107 N.W. 2d 49 (Minn. 1960).

2. Non-Identity of Issues

The issues in this case are not identical to the prior CUP-zoning case. In

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judgment." *Anderson v. Genuine Parts co., Inc.* 128 F. 3d 1267, 1273 (8th Cir. 1997); *Tyus v. Schoemehl*, 93 F. 3 449, 453 (8th Cir. 1996), cert. denied, 520 U.S. 1166, 117 S. Ct. 1427, 137 L. Ed. 2ed 536 (1997). The 8th Circuit also has held that the issue must have been litigated in the prior action to be essential to the judgment. *Stoebner v. Parry*, 91 F. 3d 1091, 1094 (8th Cir. 1996). The Minnesota Supreme Court also has recognized these principles. See *Hauser v. Mealey*, 263 N.W. 2d 803, 806 (Minn. 1978).

the prior case, the issue was the reasonableness of the denial by the City of Sunfish Lake of a zoning permit to Xcel. In this case, the issues are totally different: whether Xcel is required to obtain: 1) a ***Certificate of Need*** from the PUC and 2) a ***Route Permit*** from the PUC. Neither of these issues was essential to the prior case.

The trial court in the CUP case did mention the ***Certificate of Need*** issue. Since the City partially denied the CUP on grounds of lack of need, including the absence of a PUC ***Certificate***, the trial court in *dicta* addressed that issue. It opined that a ***Certificate*** was not necessary as a condition to a CUP, but it did point out that the City could condition the gravity of the CUP upon obtaining a ***Certificate of Need***. This represents an implicit recognition that a ***Certificate*** may be required for zoning purposes.

But the issue of a PUC ***Certificate*** was not fully adjudicated in the prior case. Moreover, the requirements of a ***Route Permit*** from the EQB never came up at all in the prior case. It was not raised in the City Council proceedings, nor litigated in the CUP mandamus case. *Conant Affidavit*, ¶ 23. Since the EQB ***Route Permit*** issue has never been litigated before, it is not subject to collateral estoppel in the case.

3. No Final Judgment

The third prong of collateral estoppel, the requirement of a final judgment on the merits, also is lacking here. While judgment of mandamus does involve "final adjudication" that is immediately appealable. *State v. Anderson et al*, 58 N.W.2d 257 (Minn. 1953), but no judgment was ever entered

in the CUP case. Following the trial court's order, Xcel and the City reached a settlement and disposed of the case. The Task Force, as a nominal intervenor, sought to appeal, but its appeal was dismissed on grounds of mootness. *Northern States Power Co. v. City of Sunfish Lake, 659 N.W.2d 271*(Minn. Ct. App. 2003). The Appellate Court, therefore, did not pass on the merits of the appeal.

Thus, finality is lacking here because judgment was never entered by the trial court, and no appellate court has review the trial court's ruling.

4. Lack of Opportunity to be Heard

Finally, the Task force was not given a "full and fair" opportunity to be heard in the CUP case. See *Aufderhar v. Data Dispatch, Inc.*, 452 N.W. 2d 648, 652-653 (Minn. 1990) (party must have been allowed to present evidence in prior proceeding to invoke collateral estoppel).

In the zoning case, the Task Force was gagged by the trial court and not permitted to participate or make arguments before the court. Further, Xcel and the City then entered into secret negotiations, without the input, involvement, or notice to the Task Force, which predicated the settlement further excluding the Task Force from participating in the litigation. *Conant Affidavit,* ¶¶ 24-25. Lacking the opportunity to participate in the zoning case, the Task Force cannot be barred from raising the ***Certificate of Need*** issue here. See *Haavisto v. Perpeich*, 520 N.W. 2d 727 (Minn. 1998); *Brown v. State Auto and Casualty Underwriters*, 293 N.W. 2d 822, 825 (Minn. 1980).

V. A ROUTE PERMIT IS REQUIRED BY THE EQB

A. The Local Option Was Not Opted For by Xcel

Xcel's contention that the requirement for a ***Route Permit*** from the EQB, under Minn. Stat. § 116C.57 does not apply also lacks merit. *Xcel's Memorandum*, pp.15-16. Its arguments about the misnomer "retroactivity" theory falters for the same reasons as it fails under the PUC statute. See *supra.*[27]

Xcel's argument that it satisfies the EQB statute by virtue of the "local option" provision, Minn. Stat. § 116C.576, is incorrect. *Xcel's Memorandum*, p. 15. Under that provision, a power line otherwise meeting the statutory requirements, as this project does, need not seek or obtain a ***Route Permit*** from the EQB if the utility elects the "option of applying to those local units of government that have jurisdiction over the site or route for approval to build a project." Minn. Stat. § 116C.576 subd. 1. However, that provision requires the utility to make a specific written election and notify the agency, which Xcel has not done here. Subd. 3 of the statute states:

> "Notice of application. Within 10 days of submission of an application to a local unit of government for approval of an eligible project, *the applicant shall notify the Board that the applicant has selected to seek local approval of the proposed project.*

The applicable agency rule likewise mandates that to obtain the exemption, an applicant "***shall*** notify the EQB of such intent, ***in writing***, at least ten days before submitting an application for the project." Rule 4400.2000

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[27] As previously indicated, the Route Permit statute, unlike the PUC statute, does not have a 10 mile threshold. The only requirement for a Route Permit is that the power line have 100 kV, which Xcel concedes applies in this case.

subp. 2. The terms "shall" is mandatory. Xcel did not file a written notice with the Board at any time, before, during, or after the application process.

Xcel tries to dodge this requirement by asserting that the EQB knew about the project because it conducted an "initial environmental review of this project." *Xcel's Memorandum*, p. 15 n. 8. But, the EQB conducted no such review; rather it investigated whether is should order an Environmental Impact Statement. Even if it had conducted such a review, that does not satisfy the statute or corresponding rule, which mandate that a specific notice "shall" be given by the applicant to the Board that the applicant has "elected to seek local approval for the project." Minn. Stat. § 116C.576. Because Xcel never did so, it did not comply with the statute or the rule. Xcel's remonstration that it "substantially complied" is meaningless. *Id.* There was no compliance at all, substantial or otherwise.

Xcel's argument is akin to a voter claiming that her vote should be counted even though she did not register, did not show up at the polls, did not mark her ballot and did not cast the ballot. The purpose of the "opt out" provision is to allow the EQB to know that a utility is choosing to pursue local compliance, as well as to let those municipalities know that they, and they alone, are to conduct an environmental review. By not notifying the EQB that it has "elected to seek local approval," and by not filing its intent to do so "in writing" 10 days before applying to any locality, Xcel has wholly failed to comply with the statute and, therefore, cannot claim its exemption from the ***Route Permit*** requirement.

Xcel can hardly claim "ignorance of the law," even if that was a defense, which it is not. *Heidbreder v. Carton*, 645 N.W.2d 355, 373 (Minn. 2002) *In re Daly,* 171 N.W.2d 818 (Minn. 1969) *In re Olson*, 300 N.W. 398 (Minn. 1941) **Case cites regarding ignorance of the law is no defense.** Xcel has patently failed to comply, or even try to comply, with the requirements of the ***Route Permit*** statute, Minn. Stat. § 116C.57, which warrants denial of its Motion on this prong of the case, too.

VI. THE MERA CLAIM IS ACTIONABLE

Finally, Xcel maintains in its Motion to Dismiss, that the Minnesota Environmental Rights Act (MERA) claim is not maintainable because there is no "actionable or threatened environmental harm," which is a predicate for application of the statute. *Xcel's Memorandum*, p. 13.[28]

The legislature recognized that large power lines like this one are inherently potentially hazardous to the environment and, therefore, warrant EQB review for determination of a ***Route Permit***. In the Power Plant Siting Act, the legislature "declares it to be the policy of the state to locate large electric power lines in an orderly manner *compatible with environmental preservation . . .*" Minn. Stat. § 116C.537 subd. 1. This constitutes a realization that failure to comply with the statutory requirements threaten the environment, which suffices to trigger MERA.

Furthermore, there has been actual threatened environmental harm as a

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[28] Xcel's Motion to Dismiss is silent on all other causes of action asserted in the Complaint: nuisance, trespass, and invasion of privacy. Therefore, even if the MERA claim were to be dismissed, which it definitely should not be, the other claims would still survive.

result of this project. See *Affidavit of Arnulf Svendsen*, attached to *Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment*. As Mr. Svendsen states:

> Given my knowledge of the topography of our property, I cannot conceive of any way that Xcel can erect a new tower on our property without removing many of the unique trees located on it just to gain access for the equipment necessary to excavate for and then erect the tower. Many other residents, through whose properties the existing line runs, have mature trees and other flora of great natural beauty on their properties that will necessarily be destroyed if the new power line is constructed.

Id., ¶¶ 9-10.

Moreover, city councils and the affected communities, including Sunfish Lake, recognize the potential environmental harm caused by EMF resulting from the new project. Exhibit 1 to *Conant Affidavit*, pp. App. 33-34 This determination is corroborated by the recently-issued report of the California Department of Health, which definitively finds that increased EMF is casually connected to a number of major diseases, including childhood leukemia, adult brain cancer, Lou Gehring's Disease and, perhaps, miscarriages. *Conant Affidavit*, ¶ 28, Exhibit 8.[29] The purpose of the EQB ***Route Permit*** process is for the administrative agency with that expertise to make environmental determinations. Under the statute, the EQB is directed to prepare an environmental impact statement on the proposed power line and hold a public hearing on the requested route permit after giving notice to all affected governmental bodies and property owners adjacent to the line. Minn. Stat.

[29] The California study is a public document and may be taken into account via judicial notice. See Rule 201, Minnesota Rules of Evidence. See also *Xcel's Memorandum*, p 2, n. 2 (asking Court to exercise judicial notice on public documents).

§116C.57, subd. 2c and 2d.

The proper forum for this determination is the EQB, as ordained by the legislature. Xcel's argument to give its long transmission line a "free pass" should be directed to the EQB, which has authority to determine environmental matters under the ***Route Permit*** process. Therefore, the Motion to Dismiss the MERA claim must be denied.

VII. THE NEW LINE IN INVER GROVE HEIGHTS

Xcel has just built on a new right of way in Inver Grove Heights a new half-mile line that is a section of the SE Metro line. (See *Parsons Affidavit,* Exhibit 5). In so doing, it has removed the old line from a right of way that was not near homes, and routed it by existing homes. (See Affidavit of Steve Warford). It initiated this process by obtaining on February 10 from the City Council of Inver Grove Heights permission to move its easement.[30] The City granted the permission in its capacity as an owner of the land at issue, not in

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[30] **INVER GROVE HEIGHTS CITY COUNCIL MEETING MINUTES MONDAY, FEBRUARY 10, 2003 - 8150 BARBARA AVENUE--CALL TO ORDER/ROLL CALL**

The City Council of Inver Grove Heights met in regular session on Monday, February 10, 2003 in the City Council Chambers. Mayor Tourville called the meeting to order at 7:30 p.m. Present were Councilmembers Grannis, Madden, Klein and Piekarski Krech; City Administrator Willis, City Attorney Kuntz, Director of Public Works Johnson, Community Development Director Link, Planner Turnblad, Parks & Recreation Director Bisek, Engineer Thureen, and Deputy Clerk Iago.

4.G. Modification of Power Line Easement for NSP (Xcel Energy)
Councilmember Piekarski Krech asked if the City would benefit from the relocation of the easement. Mr. Johnson explained the new location has less impact on the property and other property in the area. Councilmember Grannis noted the stipulation stating the City agrees that future modification would be at our expense and asked if there were any expenses incurred at this time. Mr. Johnson stated no, this modification is at the request of NSP.
Motion by Piekarski Krech, seconded by Klein, to approve the Modification of Power Line Easement for NSP (Xcel Energy) on City-owned, Tax-Forfeited Property located North of 50th Street and West of Blaine Avenue as requested. Ayes: 5 Nays: 0 Motion carried

its capacity as a zoning authority. Xcel never applied for zoning permission in Inver Grove Heights, as would ordinarily be required by that City's ordinances. (Inver Grove Heights City Code, Section 515.40.)

The new line was constructed in April 2003, well after this court action was initiated. (Warford Affidavit)

We suggest herein that Xcel needs to apply for a Route Permit and a Certificate of Need for the full line. Xcel suggests that it met this requirement by engaging in various actions before August 1, 2001.

Xcel never notified the impacted residents (Warford affidavit). The woman living in the home lost her baby immediately after the line was activated, and both she and her doctor believe the line was responsible (Cherise A. Hanson Affidavit.)

This is a gross violation of two subdivisions of the law regarding Route Permits. Minn. Stat. § 116C.57 Subd. 2b provides that, with respect to the Route Permits, impacted homeowners should be notified and Subd. 2d requires that the EQB should hold a public hearing.[31]

There is every reason to believe that EQB might not issue a Route Permit

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[31] Subd. 2b. Notice of application. Within 15 days after submission of an application to the board, the applicant shall publish notice of the application in a legal newspaper of general circulation in each county in which the site or route is proposed and send a copy of the application by certified mail to any regional development commission, county, incorporated municipality, and township in which any part of the site or route is proposed. Within the same 15 days, the applicant shall also send a notice of the submission of the application and description of the proposed project to each owner whose property is on or adjacent to any of the proposed sites for the power plant or along any of the proposed routes for the transmission line
Subd. 2d. Public hearing. The board shall hold a public hearing on an application for a site permit for a large electric power generating plant or a route permit for a high voltage Transmission line....

for this new line. Since the new line passes near homes and the old line did not, the EQB might disapprove the line on the grounds that Xcel has violated the State's policy that mandates routes should be chosen "that minimize adverse human and environmental impact." [Minn. Stat. § 116C.53 subd. 1]

Even if the court should agree that, somehow, Xcel's proposed Red Rock-Wilson line is not subject to the Route Permit requirement because Xcel had contemplated the line before August 1, 2001, it cannot escape the requirement that Xcel is required to obtain the Route Permit for the new section, which was not even contemplated that date, and for which there has been no application for permits to any government body.

VIII. CONCLUSION

For the above reasons, Xcel's Motions for a Change of Venue or Dismissal of the lawsuit should be denied.

MANSFIELD, TANICK & COHEN, P.A.

Dated: May ____, 2003

By: ______________________________

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