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October 7, 2003

VIA MESSENGER

The Honorable Karen Asphaug
Dakota County District Court
Dakota County Judicial Center
1560 West Highway 55
Hastings, MN 55033

**Re: Power Line Task Force, Inc. v. Northern States Power Company d/b/a
Xcel Energy
Court File No.: 19-C7-03-9371**

Dear Judge Asphaug:

Defendant Northern States Power Co. d/b/a Xcel Energy (Xcel Energy) respectfully raises the following issues for the Court's consideration regarding Xcel Energy and Plaintiff Power Line Task Force, Inc.'s (PLTF) pending cross-dispositive motions.

A. PLTF HAS APPARENTLY ABANDONED ITS PRIOR WRITTEN ARGUMENTS TO THE COURT

In its briefing, PLTF could not have been more clear as to what the Power Plant Siting Act (PPSA) amendments required. PLTF represented to the Court in its Memorandum of Law in Opposition to Motions for Change of Venue and Dismissal (PLTF Oppos. Brief) at 26 that "[the purpose of PPSA amendments] 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." (Emphasis added); *see also* PLTF Reply Memo. in Support of Motion for Summary Judgment (PLTF Reply Memo.), at 5 (PPSA amendments "went into effect on August 1, 2001, requiring a **Certificate of Need** from the PUC and a **Route Permit** from the EQB for all new power line applications" (bold in original; emphasis added)). PLTF thus concluded that, "[a]lthough [Xcel Energy] had applied in some communities before [August 1, 2001], it has not applied in Sunfish Lake, which is the focal point of this case." PLTF Oppos. Brief at 25 (emphasis added); *see also* PLTF Reply Memo. at 8 (citing to Minn. Stat. § 216B.243, PLTF added that "the legislature did not provide any exemption from the requirements for a **Certificate of Need** for any project that has not been fully applied for before August 1, 2001. as in the present case" (bold in original; emphasis added)).

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PLTF's own expert has testified that one cannot segmentize one portion of a transmission line from another portion of that same line other than at substations. Indeed state law defines a transmission line "route" as the line between two "end points" - i.e., substations. Minn. Stat. § 116C.52, subd. 8. As such, Xcel Energy's "route" upgrade application began with its March 2, 1999 application for the Mendota Heights' portion of the 6.36-mile "route" between Newport (i.e., Red Rock Substation) and Mendota Heights (i.e., Rogers Lake Substation).

Based upon its oral arguments, PLTF no longer wants the "focal point of this case" to be when the 1.268-mile Sunfish Lake segment of this "route" was begun. Instead, PLTF's new "focal point of this case" is whether construction had commenced for the "route" by August 1, 2001. As discussed below, PLTF's new argument fails, as it is based upon a false premise - that is, that construction of the "route" had not commenced by August 1, 2001. The new argument otherwise fails because the controlling "effective date" for the amendments is prospective.

B. REGARDLESS, CONSTRUCTION OF THE PROJECT DID COMMENCE BY AUGUST 1, 2001

With regard to its new "focal point of this case" - i.e., that no construction of the transmission line "route" had commenced by August 1, 2001, PLTF is simply wrong. Because PLTF's "construction" argument is new, Xcel Energy respectfully submits for the Court's review Exhibit 31. With regard to Xcel Energy's 6.36-mile "route," Exhibit 31 illustrates that construction commenced well before August 1, 2001.

C. PLAINTIFF'S LACK OF ANY ANALYSIS OF THE PROPER REMEDY PRECLUDES ITS REQUESTED INJUNCTIVE RELIEF AT THIS STAGE

Respectfully submitted for this Court's consideration in the above-entitled matter as Exhibit 30 is the recent Court of Appeals decision, *Jackel v. Brower*, No. CX02559, slip op. (Minn. Ct. App. filed Sept. 16, 2003). The *Jackel* case holds that, even upon a finding of regulatory non-compliance, the proper remedy is not necessarily specific performance or injunctive relief, as demanded by PLTF.

In *Jackel*, the defendant Jon W. Brower (Brower) constructed his feedlot 948 feet from plaintiff Dorthy Jackel's (Jackel) residence, which was 52 feet less than the Steele County-required 1,000 foot setback. In response to the setback violation, "Steele County Planning Director Dale Oolman ... concluded that requiring Brower to move the facility to comply with the 1,000-foot-setback requirement will not address the Jackels' concerns about odor. Oolman recommended that Brower agree to additional odor-control measures, and the Steele County Board of Adjustment supported additional odor mitigation rather than strict enforcement of the 1,000-foot-setback requirement." Slip op. at 3-4. "The district court granted summary judgment to the Jackels on the setback claim and issued an injunction compelling the county to enforce the setback requirement and compelling Brower to abate the violation." *Id.* at 4.

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The Court of Appeals reversed this summary disposition. The Court ruled as follows:

We conclude that the district court must engage in an analysis of [1] the harm caused by the violation, [2] whether there is an adequate legal remedy, and [3] whether an injunction is necessary, giving consideration to the reasonableness of the county's proposals to address the violation. Because there are insufficient facts in the record to support summary issuance of injunctive relief, we reverse the order for injunctive relief and remand for consideration of this issue on the record that will be fully developed at trial.

Id. at 10 (emphasis & brackets added).

Similarly, all PLTF has done to date is to argue for a declaration of Xcel Energy's statutory non-compliance. Conspicuously absent from PLTF's moving papers is any substantive discussion of the appropriate remedy for Xcel Energy's alleged non-compliance with the PPSA amendments for upgrading the 6.36-mile transmission line "route" from Newport to Mendota Heights. Indeed, in its 80 pages of briefing, PLTF submits but one conclusory sentence in favor of its requested injunctive relief. PLTF Opening Brief at 13 ("the appropriate relief would be to bar Xcel [Energy] from proceeding with the new power line until - and unless - it obtains both a *Certificate of Need* from the PUC and a *Route Permit* from the EQB" (italics in original)). In contrast, Xcel Energy has submitted four pages of reasons why PLTF has failed to substantiate the environmental justification for such injunctive relief. Xcel Energy Opening Brief at 13-17. Thus, setting aside all of Xcel Energy's legal and factual bases for claiming that it did comply with the PPSA amendments, the issue of what remedy is appropriate must, at best for PLTF, be further briefed and presented to the Court at the appropriate time, if ever.

D. CLARIFICATION OF ITS PENDING DISPOSITIVE MOTIONS

Finally, because of the apparent procedural confusion as to what motions were before the Court, Xcel Energy submits its Amended Notice of Motion and Motion for Rule 12 Dismissal and, in the Alternative, for Summary Judgment.

Sincerely,



Jack Y. Perry

JYP/kg

Enclosures

cc: Court Administrator
R. Morgan
H. Bagley
D. Callahan