

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Case Type: Other Civil

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

Court File No. MC03-003400

Plaintiff,

v.

**PLAINTIFF’S REPLY MEMORANDUM
IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

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

Defendant.

“Construction of the upgraded transmission line . . . will now
begin in late fall 2001.”

Verified Petition of Xcel Energy for Alternative Writ of Mandamus
against City of South St. Paul, August 9, 2001.

* * * * *

**“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 Qualify] board . . .”

Minn. Stat. § 116C.57, subd. 2.

MANSFIELD, TANICK & COHEN, P.A.

Dated: May 15, 2003

By: _____
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I. INTRODUCTION

Both parties agree on one issue: this case is subject to summary judgment. Plaintiff Power Line Task Force, Inc. (“Task Force”) has timely moved for summary judgment, and now Defendant Xcel Energy (“Xcel”) has belatedly made a cross motion for summary judgment too.¹ The Task Force’s motion is timely, proper and should be granted; Xcel’s motion, which is untimely, should be denied.

The Task Force is entitled to Summary Judgment on all four claims asserted in this case: violation of the Minnesota Environmental Act (MERA); nuisance; trespass; and invasion of privacy. The arguments made by Xcel Energy do not detract from the Task Force’s entitlement to Summary Judgment in this case.

The core issues in this case are whether Xcel is required to obtain a **Certificate of Need** from the Public Utilities Commission (PUC) and a **Route Permit** from the Environmental Quality Board (EQB) in connection with the construction of its 15 kilovolt (kV) power line, running for 14.7 miles through six southeast suburban communities from Newport to Bloomington in Hennepin County. Plaintiff Task Force maintains that both a **Certificate of Need** and a **Route Permit**, or at least one of them, is required. Xcel contends that neither is needed, despite the clear and plain language of the two

¹ Excel’s motion for cross-summary judgment is not timely. See Rule 56.03, Minn. R. Civ. (Motion for Summary Judgment must be noted “at least” 10 days in advance); Rule 115.03, General Rules of Practice for the District Court 28 day advance notice requirement.

respective statutes: the PUC law, Minn. Stat. §216B.243 and the EQB measure, Minn. Stat. §116C.57, subd. 2.

The Task Force's Motion for Summary Judgment should be granted. Conversely, Xcel's Motion for a Change of Venue or, in the alternative, Dismissal for Failure to State a Cause of Action, which is scheduled to be heard concurrently with the Task Force's Summary Judgment should be denied. See *Plaintiff's Memorandum of Law in Opposition to Motions for Change of Venue or Dismissal*, May 11, 2003.

II. XCEL'S EXTENDED EXCESSES

As it did in its Memorandum supporting its Motion for a change of venue "back" to Dakota County (where the case has never been before), or for dismissal on the face of the pleadings, Xcel continues to make excessive and unsubstantiated assertions in its supporting Memorandum of law opposing summary judgment. Its extended excesses include the following:

- Xcel feigns shock due to the timing of this motion for summary judgment, claiming that it is "premature." See *Xcel's Memorandum of Law in Opposition to Plaintiff Power Line Task Force, Inc.'s Motion for Summary Judgment and in Support of Its Cross-Motion for Summary Judgment* (hereinafter "*Xcel's Memorandum*"), p. 1. A motion for summary judgment may be made "at any time after the expiration of 20 days from the service of the summons." Rule 56.01, M.R. Civ. P. The Summons in this case was served on March 5, 2003. The motion was brought on April 20, 2003, well more than "20 days" after the action was commenced.

- Moreover, Xcel has brought a cross-motion for summary judgment, albeit late, which is premised on the assertion that there are no disputed issues of material fact. See p. 1, n. 1. In short, Xcel maintains that summary judgment is timely for it, but “premature” for anyone else. Xcel fails to explain why there are no disputed issues of material fact that entitle it to judgment, while there needs to be extensive, time-consuming and costly “discovery” for summary judgment against it. See *Id.*, p. 13. Both parties implicitly agree on one thing: this case is ripe for summary judgment, as asserted in Plaintiff’s Memorandum of Law for Summary Judgment and as reflected in the cross-motion by *Xcel*.

- Xcel also erroneously maintains that Sunfish Lake hired some type of “independent third party” to conduct an environmental review of Xcel’s project in April, 2000, about 16 months before the new Power Plant Siting Act 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. In fact, the environmental review was undertaken in anticipation of a possible application by Xcel for a CUP, but no such application was made until November 13, 2001, three and one-half months **after** the law went into effect. To contend that Xcel “effectively applied for” a Conditional Use Permit (CUP) from Sunfish Lake because an environmental review was undertaken is spurious. *Xcel’s Memorandum*, p. 3. There is a precise procedure for seeking a CUP, which is commenced by filing an application, not conducting a general environmental review whether the project is viable or not.

Xcel's argument that it effectively applied for a CUP 16 months before it ever applied for a CUP from the City of Sunfish Lake is akin to a litigant claiming that she "effectively" commenced a lawsuit when she notified the other party that a lawsuit might be brought at a much later date, without actually serving (or filing) the Summons and Complaint. Just as the rules for litigation do not provide for "effectively" commencing a lawsuit by telling someone else that you might do it 1½ years later, neither the Sunfish Lake zoning code nor the PUC and EQB statutory requirements provide for having "effectively applied for" a zoning permit, a **Certificate of Need**, or **Route Permit**, before one actually does so.

- Additionally, the independent "third party" that Xcel extols is hardly "independent" at all. Xcel refers to Commonwealth Associates, Inc., an organization that has done work for years for Xcel and is hardly "independent" at all. It was paid \$130,000 by Xcel to do the work, about 14 months **before** Xcel applied for a CUP. It also has done work for Xcel in the past on other projects over the past 25 years.² In short, CAI was about as "independent" from Xcel as the Baath Party was from Sadaam Hussein.

III. THE CERTIFICATE OF NEED (PUC) AND ROUTE PERMIT (EQB) REQUIREMENTS APPLY

A. Xcel Is Not Exempt

The thrust of **both** parties' Summary Judgment Motions is whether the statutory requirements for a **Certificate of Need** from the PUC and a **Route**

² Barry M. Casper and Paul David Wellstone, *Powerline, The First Battle of America's Energy War*, Amherst: University of Massachusetts Press, 1981, p. 16.

Permit from the EQB apply to Xcel. The statutory effective date for both provisions is August 1, 2001, and Xcel did not, despite its protestations, apply to Sunfish Lake, until November 13, 2001. See *Affidavit of Roger Conant*, ¶ 4, submitted in support of *Plaintiff's Memorandum in Support of Motion for Summary Judgment*, and *Affidavit II of Stephen H. Parsons (in Support of Plaintiff's Motion for Summary Judgment)*, ¶ 7, and Exhibit 6 thereto.

There is no merit to Xcel's contention that other bodies have endorsed its position that the August 1, 2001 effective date is obviated by virtue of Xcel having applied to some, but not all, of communities before that date. The Sunfish Lake case, which is discussed at length in the *Task Force's Memorandum of Law in Opposition to Motion for Change of Venue or Dismissal*, did not involve the same issues. The issue there was solely one of zoning. See *Task Force's Memorandum in Opposition*, pp. 6-7. Moreover, the Dakota County Judge (or law clerk) plainly erred by referring to a wrong statute in suggesting that Xcel was exempt from the statutory requirements. In so doing, he quoted language identical to the provision dealing with identifying anticipated projects. There is no comparable language addressing the requirement to obtain a **Certificate of Need**. *Conant Affidavit*, ¶¶19-20, and Exhibit 5, p. 26.

Furthermore, the Dakota County determination is not binding, by collateral estoppel or otherwise, in this case. The parties are different, the issues are different, the Task Force was not given an opportunity to address the issues, and there was no final judgment – all of which are required for

collateral estoppel to apply. See *Task Force Memorandum of Law in Opposition to Motion for Change of Venue or Dismissal*, pp. 31-35.³

Xcel relies in its cross-motion for summary judgment, as it does in its motion for dismissal, on the explicit statutory exemption for projects for which applications were made, in part, before August 1, 2001. *Xcel's Memorandum*, p. 4. However, Xcel makes the same mistake in its cross-motion for summary judgment as it does in this Motion for dismissal: it relies upon the wrong statute. This case does not involve the listing of anticipated projects, which is covered by Minn. Stat. § 216B.2425. Rather, it concerns a **Certificate of Need**, which is codified in Minn. Stat. § 216B.243.

As pointed out in the Task Force's Memorandum of Law in Opposition to Motion for Change of Venue or Dismissal, the two statutes differ. The legislature explicitly provided an "exemption" from the requirement that utilities are to furnish the PUC with a list of anticipated projects for those projects that were in progress as of August 1, 2001, the effective date of the statute. Minn. Stat. § 216B.2425, subd. 6. However, 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. Minn. Stat. § 216.243. Thus, the statutory scheme supports the

³ Xcel's assertion that the City of Sunfish Lake did not raise the issue of a Route Permit in its "extraordinary efforts" in the zoning case is nonsensical. *Xcel's Memorandum*, p. 7, n. 3. The Task Force was not a meaningful party to that lawsuit, so it should not be credited, or blamed, for any of the "extraordinary efforts" undertaken by the City of Sunfish Lake, through its appointed insurance counsel. See *Conant Affidavit*, ¶¶13, 14, and 17, and *Conant Affidavit Exhibit 5*, p. App. 102. Since the case only concerned municipal zoning, the Route Permit issue would not necessarily arise, which is an issue for the EQB, not the Sunfish Lake City Council.

Task Force position and cuts against Xcel's contention. The exemption from listing of pre-August 1, 2001 projects, Minn. Stat. § 216B.2425, subd. 6, does not apply to the obligation to obtain a **Certificate of Need** from the PUC or, for that matter, the **Route Permit** from the EQB, which is addressed in a completely different chapter of the statutes: Minn. Stat. § 116.57, et seq.

To dispel any doubt, the legislature expressly declined to adopt an exemption from the **Certificate of Need** requirements for projects that were partially applied for before August 1, 2001, when subsequent applications are made after August 1, 2001. See *Task Force Memorandum of Law in Opposition to Motion for Change of Venue or Dismissal*, p. 24.

In short, Xcel argues for the wrong exemption, from the wrong statute, contrary to the legislative intent when the original statutes were enacted and re-affirmed when the legislature refused to adopt the amendment that Xcel now asks this court to write into the statute.

Xcel's contention that it is not covered by the PUC and EQB laws because it applied to some communities, but not all, prior to August 1, 2001, the effective date of the statute, also is misguided because it selects the wrong time period for statutory analysis.

The PUC law states that no large line (100 kV or greater) "shall be sited or **constructed** in Minnesota "without a **Certificate of Need.**" Minn. Stat. §216B.243 subd. 2 (emphasis supplied). The EQB language is even stronger: "No person may **construct** [after August 1, 2001] a high voltage transmission line **without a route permit** from the board." Minn. Stat. § 116C.57 subd. 2

(emphasis supplied). Thus, both statutes make clear that a large power line (100 kV, 10 miles long for the PUC; 100 kV, regardless of length, for the EQB) may not be “constructed” after August 1, 2001 without the requisite agencies’ approval. The triggering event in both statutes is the *construction* of the line. High voltage transmission lines cannot be constructed after that date without the requisite **Certificate of Need** and **Route Permit**.

Xcel’s construction began *after* August 1, 2001, the effective date of those laws, as Xcel acknowledges. As it states in its *verified petition* for mandamus against South St. Paul describing the project: “Construction of the upgraded transmission . . . will now begin in late fall 2001.” Exhibit B-6, ¶ 17 to *Xcel’s Memorandum in Support of Dismissal*. Even Xcel cannot credibly argue that “late fall” retroactively took place before August 1, 2001.

Xcel’s reliance on a couple of other projects is misguided. *Xcel’s Memorandum*, p. 5. The Great River Energy Project, which apparently runs from Hutchinson to Big Swan in west central Minnesota, involved two applications that were made before August 1, 2001, and one after the effective date of the statute. Xcel contends that the EQB declined to pass upon a **Route Permit** because the project was “begun prior to the “effective date” of the statute. However, the situation resulted because no one, apparently, contested whether a **Route Permit** is required, which means that the matter essentially proceeded as by default.

The Minnetonka project, which dates back to 1999, is totally irrelevant. In Minnetonka, Xcel applied for zoning approval in 1999, more than two years

before the statute went into effect. Although the permit was initially denied, ensuing negotiations resulted in the project going forward. This is an interesting piece of Minnetonka history, but it has no bearing on this case, where the application to Sunfish Lake was made on November 13, 2001, 3½ months **after** the statute went into effect.

No one is contending that the 2001 statute necessarily applies retroactively to 1999 applications. The Task Force contends that the statute, by its clear and plain terms, applies to “construction” that occurs after August 1, 2001. Since the application to Sunfish Lake occurred after that date – as would the construction of the project – the statute applies, regardless of what happened to a 1999 application in Minnetonka.

B. The No Power Line Case is No Defense.

Xcel’s vaunted reliance on *No Power Line v. Minnesota Environmental Quality Council*, 262 N.W.2d 312 (Minn. 1977) is misplaced and actually supports the position of the Task Force in this case. *No Power Line* involved a statutory exemption to Minnesota’s first Power Plant Siting Act (PPSA) 30 years ago. The legislature made an explicit exemption for “...high voltage transmission lines, the construction of which will commence prior to July 1, 1974.”⁴

⁴ The 2001 legislation involved in the present case contains no such clear blanket exemption for all high voltage transmission lines. See, Minn. Stat. § 216B.243.

The Supreme Court held that the legislation was prospective and did not apply to preexisting power lines. It reasoned that,

“...the legislature intended the savings clause to protect public utilities whose projects had already begun from being overly burdened by the new statute.”

262 N.W.2d at 321. The case demonstrates that the legislature knows how to draft explicit exemptions and the judiciary will enforce the precise language used, but will not add terminology that was not used or intended by the exemptions themselves.

It is clear that the 2001 Legislature had the same intent as did the 1973 Legislature. The earlier law’s exemption of lines when construction begins *before* the effective date has precisely the same effect as the recent law’s subjection of lines to the regulatory scheme when constructed *after* the effective date. By providing no exemption for power lines whose construction had not yet begun, the legislature manifested its intent that the new regulatory scheme (**Certificate of Need** and **Route Permit**) apply to the fullest extent reasonably possible. Had the legislature intended Xcel (or any other utility) to be exempt from post August 1, 2001 “construction” because it applied for local zoning permits in a few communities, but not all, before August 1, 2001, it could have said so. Its failure to do so is why Xcel’s misnamed “retroactivity” argument fails, too.

C. The Line Meets the Statutory Length Requirement

Xcel also erroneously regurgitates the fallacy that the project is less than 10 miles in length, which would make it outside the purview of the PUC statute, which requires a line of 10 miles in length or greater to activate the **Certificate of Need** requirement. Minn. Stat. § 216B.243, subd. 2. Notably, there is no such requirement for a **Route Permit**, which applies to 100 kV lines regardless of length. Minn. Stat. § 116C.57, subd. 2.

In order to avoid beating a dead horse (or a dying power line) the Task Force rests upon its recitation of the repeated representations of the length of the line by Xcel, as set forth in its Memorandum of Law in Opposition to Motion to Change of Venue or Dismissal. However, discovery produced by Xcel *after* the due date for the Task Force’s Memorandum in Opposition to Xcel’s Motions fortifies the Task Force’s position that the line is a 14.7 mile project, not a “phase one” 6.36 mile one. *Affidavit II of Stephen Parsons*, Exhibits 1-5 include:

- A letter of March 2, 1999 from David Callahan, Xcel’s Senior Right of Way Agent, to the City of Mendota Heights describing the line as having “completion targeted for 2004,” running from the Rogers substation in Newport to its 14-mile endpoint in Bloomington. Exhibit 1.
- On March 31, 2002, Xcel official James Alder wrote to the Environmental Quality Board that the line “will connect the Rogers Lake substation and the Wilson substation in Bloomington” – a distance of about 14 miles. The submission included a map showing the 14 mile length. Exhibit 2.

- David Callahan, the Right of Way Agent, prepared an affidavit in a zoning case in June, 2001, explicitly describing the line as a “**14.7 mile project alignment.**” Exhibit 3.
- On November 7, 2001, an internal Xcel e-mail describes the line as an “upgrade [that] will stretch from Newport to Bloomington,” referring to the nearly 15-mile distance. Exhibit 4.
- On January 10, 2003, Xcel filed an application for crossing protected water in which it again, as it had in the past, described the project as one having “length in feet” . . . total 77,616,” which is about 14.9 miles, including nearly 19,400, over 25% in Bloomington. The application goes on to state: “Total project length: 14.7 miles”. Exhibit 5.

These explicit representations complement other representations consistently made by Xcel that the project is a 14-plus mile line. Perhaps the most recent example is the “Description of the Upgraded Line” in the report prepared by Xcel’s designer, Commonwealth Associates, Inc. (“CAI”). It states that the “Distance in miles . . . Total 14.0” miles. *Parsons Affidavit I(in opposition to Xcel’s Motin to Dismiss)*, Exhibit 6. Subsequently, in the same report, Xcel’s surrogate, CAI, includes a half-dozen alternative lines, including “Length (miles)” ranging from 12.41 to 20.42. The average of the six variations is 16.11 miles. Exhibit 7.

Xcel’s contention that its application to Sunfish Lake, which was filed 3½ months **after** the PUC/EQB laws went into effect, was “explicit” stating that the line was intended to be 6.3 miles is false. In fact, the Application describes

the “project” as “SE Metro Line (Wilson to Red Rock).” *Parsons Affidavit II, Exhibit 6*. The City at all times considered Xcel to be seeking a 14.7 mile line, which Xcel never disagreed with or disclaimed in writing, only belatedly making a verbal representation at the Sunfish Lake Planning Commission Hearing on January 16, 2002 – nineteen days before the City was to rule on its application for the CUP. *Conant Affidavit*, ¶ 12. Indeed, the findings of fact made by the City Council in the Sunfish Lake zoning matter expressly referred to the line as being 14.7 miles in length, a matter not refuted by Xcel. *Conant Affidavit, Exhibit 1*, pp. 15-16 (Findings 81-83).

That the project, whether in a single phase or two, will run more than 10 miles (the statutory threshold for a PUC **Certificate of Need** but not a **Route Permit** from the EQB), is further reflected in other Xcel representations. On August 9, 2001, before Xcel applied to Sunfish Lake, Xcel’s attorney, Jack Perry, and its right-of-way guru, David Callahan, described the line in Xcel’s *verified* mandamus petition against South Saint Paul as follows: “The line connects the Red Rock Substation in Newport, the Stockyards Substation [in So. St. Paul], the Rogers Lake Substation in Mendota Heights, the Airport Substation at the Minneapolis/St. Paul International Airport, and Wilson Substation in Bloomington,” – which happens to be about 14.7 miles – not less than 10. *Exhibit B-6*, p. 5, ¶ 13 to *Perry Affidavit I* in support of Xcel’s *Memorandum in Support of Motion to Dismiss*. Perry and Callahan further state in their *verified Petition* that “[a]pproximately 120 structures will be installed,

spaced an average of 500 feet apart.” *Id.*, p. 6, ¶ 15. This calculation alone (120 poles x 500 feet) is 60,000 feet or 11.36 miles.

Similar representations litter the landscape of Xcel’s zoning applications.

It represented in the Mendota Heights litigation that:

“the existing 115 kV transmission line connects the Red Rock Substation in Newport, the Stock yards 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.”

Id., Exhibit B-4, ¶ 21 pp. 4-5. It is accompanied by a schematic drawing of the line showing its 14-plus mile length. *Id.*, p. 39, “Exhibit A.” It also expands the length in its enumeration of the poles for the new line, telling Mendota Heights officials:

“Under Xcel Energy’s plan, approximately 120 monopoles would be installed . . . on average about 600 feet apart.”

Id., p. 6, ¶ 28. This represents about 72,000 feet, or 13.6 miles – a 2.3 mile enlargement. This assertion is similarly supported by a sworn verification by Xcel’s David Callahan. Exhibit B4, p. 37 to *Perry Affidavit I (in support of Motion to Dismiss)*.

Even the Sunfish Lake zoning case was permeated with such references to the 14.7 mile length of the line. In its Amended *Verified* Petition for Alternative Writ of Mandamus challenging the zoning denial by Sunfish Lake, Xcel asserted that the “transmission system includes a single-circuit 115 kV transmission line **which crosses six communities**” – the same 14.7 mile path described in other legal submissions. See *Parsons Affidavit II*, Exhibit. 7, p.

App. 50 (¶ 19). The Court, in its mandamus ruling, agreed with Xcel's characterization of the length of the line. As the Court states:

The underlying facts are not in dispute . . . Xcel's transmission system currently includes a single-circuit 115 kV transmission line crossing six communities . . . 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. (emphasis added)

Memorandum Opinion, May 30, 2002, pp. App. 105-106, *Conant Affidavit, Exhibit 6*. Thus, Xcel has consistently — and accurately — described the 115 kV project as (1) commencing after August 1, 2001, and (2) being 14-plus miles in length. These characterizations bring it within the scope of both the PUC **Certificate of Need** and the EQB **Route Permit** statute.

Thus, the record is abundant, clear, and overwhelming that this project satisfies the 10-mile length limitation for the **Certificate of Need** standard of the PUC statute, and necessarily satisfies the requirement for a **Route Permit** from the EQB, which has **no** length threshold.

Xcel's contention that it complied with the EQB statute by seeking "alternative Route Permit approval" is also erroneous. *Xcel's Memorandum*, p. 13. Xcel makes the unsubstantiated — and incorrect — assertion that seeking zoning approval from local communities is equivalent to obtaining a **Route Permit** from the EQB. *Id.* This is nonsense. The EQB is a statewide body that is directed by the legislature to take into account statewide concerns, not local zoning matters. The standards for zoning approval differ markedly

from those under the **Route Permit** requirements, which consists of much more intensive environmental review.

But even if “local” approval is similar, although not equivalent, to obtaining a **Route Permit** from the EQB, Xcel failed to follow the statutory requirements. Under the Power Plant Siting Act, a utility may opt out from the **Route Permit** requirements by obtaining approval from local communities. In order to do so, however, the utility must take several actions under Minn. Stat. § 116C.575. They consist of the following:

- Furnishing notice to the local communities, and
- Furnishing notice to the EQB within 10 days of submitting an application to a local unit of government.

The reasons for these requirements are self-evident. They place the local communities on notice that they and they alone will be responsible for environmental matters, without resort to the EQB **Route Permit** process, unless they request the EQB to assume jurisdiction. They also frees up the EQB from having to oversee the process. While this is a perfectly permissible approach, it was **not** used by Xcel. Whether deemed waiver, ignorance of law, or whatever, the simple fact of the matter is that Xcel did not follow the statutory procedures in order to exempt itself from the EQB **Route Permit** requirements by obtaining local permits in lieu of EQB approval. Xcel, which is so assiduous about localities following the law, should follow the admonition that it preaches to others.

IV. ALL FOUR CLAIMS IN THE LAWSUIT ARE ACTIONABLE

Xcel devotes hardly any attention to the four causes of action asserted in this case. It maintains that, because the power line is 80 years old, and pre-dates most of the lives of the members of the Task Force, it somehow poses “no environmental threat.” *Xcel’s Memorandum*, p. 13. But this case does not concern the existing power line which has run through the community since 1920’s. It concerns a **new** power line that Xcel seeks to construct on the same right-of-way, which will have higher poles with larger, heavier footings, affecting the natural resources and aesthetics in the area. Importantly, it ultimately may emit more intense electro-magnetic fields (EMF) than the existing line. A number of government bodies, ranging from the City Council of the City of Sunfish Lake to the California Department of Health, have concluded that EMF at such levels creates serious health risks. See *Plaintiff’s Memorandum of Law in Opposition to Change of Venue or Dismissal*, p. 41 and *Conant Affidavit* ¶28, and Conant Exhibits 1, pp. 33-34 and 8.

All four causes of action asserted in this lawsuit are actionable, especially because Xcel does not contest them. The MERA claim arises out of the failure to follow a rule or regulation that is intended to protect the environment. Minn. Stat. § 116B.02, subd. 5. In this case, the **Certificate of Need** and **Route Permit** requirements clearly are intended to protect the environment. As the legislature declared in adopting the statutory scheme for power plant siting:

The legislature hereby declares it to be the policy of the state to locate large electric power facilities in an orderly manner compatible with environmental preservation and the efficient use of resources. In accordance with this policy the board shall choose locations that minimize adverse human and environmental impact while insuring continuing electric power system reliability and integrity and insuring that electric energy needs are met and fulfilled in an orderly and timely fashion.

Minn. Stat. § 116C.53., subd. 1

The Task Force has established environmental harm that will occur by virtue of Xcel's disregarding these statutes. See *Affidavit of Arnulf Svendsen*, attached to *Plaintiff's Memorandum in Support of Motion for Summary Judgment*. Xcel has chosen not to contest that Affidavit, leaving the record undisputed that environmental harm or will occur. A party opposing summary judgment must come forward with admissible, legally concrete evidence to refute summary judgment and, if it fails to do so, summary judgment should be granted. See Rule 56.05, M.R. Civ. P. *DLH, Inc. v. Russ*, 566 N.W. 2d 60 at 69-71 (Minn. 1997).

Similarly, Xcel does not offer any evidence to refute the claims of nuisance, trespass, and invasion of privacy. It simply ponders: "Where then is the requisite environmental harm, nuisance, trespass, and/or invasion of privacy." *Xcel's Memorandum*, p. 14. The question was addressed and answered by the Task Force in its Summary Judgment Motion. See *Plaintiff's Memorandum in Support of Motion for Summary Judgment*, pp. 11. Xcel has not, and cannot, refute the factual and legal showing simply by asking a rhetorical question unsupported by any facts, case law, or other legal authorities.

Finally, Xcel's request to conduct elaborate, extensive, and expensive discovery is obfuscatory. As Xcel itself claims, there are no factual disputes in this case, which is why it moved to dismiss the case on the pleadings and for summary judgment. If Xcel thought that there were factual disputes, it should not have moved to dismiss the case on the face of the pleadings, which requires that there be no "conceivable" basis for the Task Force to prevail on the facts, or for summary judgment, which requires that there be no genuine issues of fact in dispute.

In short, the parties agree that the issues before the Court are ripe for adjudication. Therefore, no further discovery is needed.

V. CONCLUSION

For the above reasons, the Motion for Summary Judgment by the Task Force should be granted.

MANSFIELD, TANICK & COHEN, P.A.

Dated: May 15, 2003

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