

No. A0-40144

State of Minnesota
In Court of Appeals

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

Appellant

v.

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

Respondent.

APPELLANT'S REPLY BRIEF

BOWMAN AND BROOKE LLP
Richard G. Morgan (#157053)
David S. Miller (#239860)
Keesha M. Gaskins (#310074)
150 South Fifth Street
Suite 2600
Minneapolis, Minnesota 55402
(612) 339-8682

*Attorneys for Appellant Power Line Task
Force, Inc.*

BRIGGS AND MORGAN PA
Jack Y. Perry (#209272)
Thomas Erik Bailey (#236871)
2300 IDS Center
Minneapolis, Minnesota 55402
(612) 977 8400

Of Counsel
Kerry Koep
Assistant General Counsel Xcel Energy
U.S. Bancorp Center
800 Nicollet Mall
Suite 2900
Minneapolis, Minnesota 55402
(612) 251-4583

*Attorneys for Respondent Northern
States Power Company d/b/a Xcel
Energy*

INTRODUCTION

This case presents three legal questions that this Court reviews *de novo*: First, because construction of the project did not begin until after August 1, 2001, is Xcel required to comply with the requirements of Minnesota Statutes §§ 216B.243 and 116C.57 – .576 that became effective on August 1, 2001? Second, if yes, did Xcel’s conduct prior to August 1, 2001 give rise to a genuine issue of material fact as to whether that conduct constitutes substantial compliance with the statutory requirements of Minnesota Statutes §§ 216B.243 and 116C.57 – .576? Finally, did the trial court err in engaging in a substantial compliance analysis where Minnesota Statute § 116C.68 provides a penalty for non-compliance with sections 116C.57 and 116C.57 – .576?

In its responsive brief, Xcel does not contend it complied with the letter of the law. Instead, it argues that based on the legislative history of Minnesota Session Laws 2001, sections 216B.243 and 116C.57 – .576 do not apply to the project. In the alternative, if the statutes do apply to the project, Xcel argues that it “substantially complied” with the statutory requirements.

Minnesota’s long-standing rules of statutory interpretation require that a court must make a threshold finding that the language of a statute is ambiguous, before it may look to the statute’s legislative history for interpretation; otherwise, Minnesota Courts must enforce the statute at issue as codified.¹ Xcel does not

¹ See *Heaslip v. Freeman*, 511 N.W.2d 21, 22, (Minn. Ct. App. 1994) *review denied* (Minn. Feb. 24, 1994) (holding that the fundamental rule of statutory

assert in its responsive brief that the language of sections 216B.243 and 116C.57 – .576 is ambiguous or unclear. It simply states that statutes should not be applied retroactively and then bases its entire legal argument on the interpretation of Minnesota Session Laws 2001. Xcel’s failure to assert that the statutes at issue in this case are confusing or ambiguous, necessary to permit this Court to look past the statutory language, is fatal to its statutory construction argument.

Moreover, because the statutory language of sections 216B.243 and 116C.57 – .576 is clear, the only remaining question is whether Xcel’s zoning approval constitutes “substantial compliance” with the statutes. “Substantial compliance” is a question of fact to be determined by the trier of fact.

There is sufficient evidence in the record to support a finding that Xcel did not substantially comply with the substantive and procedural requirements of sections 116C.575 – .576. Xcel’s actions undermined the purpose of the procedures outlined under section 116C.575 – .576 and prejudiced the procedural rights of the stakeholders, including the cities, the citizens of the affected communities, and the landowners with property on or adjacent to the project. Xcel’s zoning approval obtained by litigating procedural defects in the CUP approval process and obtaining settlements from small municipalities that could not afford litigating against Xcel, was unrelated to any substantive environmental

construction is that court should look first to specific statutory language and be guided by its natural and most obvious meaning, and a tenet of plain meaning has as its corollary that ordinary rules of grammar apply).

review of the project. Indisputably, no responsible governmental unit selected by Minnesota’s Environmental Quality Board (or any equivalent municipal body) ever conducted a full-blown environmental review of the *entire route* as required by § 116C.57 – .576. Taken together, the facts before this Court on the issue of Xcel’s “substantial compliance” present sufficient issues of material fact to preclude summary judgment on this issue as a matter of law.

Finally, this case is not moot. As Xcel repeatedly points out in its brief this project remains under construction and as such, Xcel continues to violate the statutes at issue. For these reasons and those argued in the Task Force’s main brief, the trial court wrongfully granted summary judgment to Xcel and the Task Force respectfully requests that this Court reverse the decision of the trial court and remand this case for trial.²

A. XCEL’S REPEATED MISUSE OF NON-DISPOSTIVE, ALBIET RELATED, PRIOR LITIGATION.

This project has been hotly disputed and litigated since initially proposed by Xcel. In a misplaced attempt to persuade this Court that the legal and factual issues in dispute in the instant case have already been resolved, Xcel cites to previous decisions by this Court, trial courts, and administrative bodies

² The Task Force further notes that Minn. Stat. § 116C.68 provides for criminal penalties for violations of the section 116C.57 – .576. While it is certainly understandable that Xcel wishes to receive “judicial approval” of the alleged legality of its actions with regard to this project, the courts should refrain from setting such a precedent that could potentially cut off the executive branch’s prerogative to pursue such criminal penalties.

surrounding this project. Those decisions are neither dispositive of the legal issues presented here nor are they the law of this case.

As just one example, rather than citing to the facts found by Judge Asphaug below in this case, Xcel cites directly to Judge Stacey's Dakota County District Court unentered decision in *NSP v. City of Sunfish Lake*, No. C4-02-6854 (Minn. 1st Jud. Dist. Order & Memorandum, May 31, 2002).³ In *City of Sunfish Lake* the district court addressed a separate issue regarding Sunfish Lake's rejection of Xcel's CUP application. The Task Force, nominally granted intervenor status in that case, was effectively precluded from having a role in *City of Sunfish Lake*; indeed, both the trial court and this Court rejected the Task Force's objections to the settlement agreement between Sunfish Lake and Xcel.⁴ Instead of relying on the findings it seeks to have this Court affirm, Xcel cherry-picks factual language from previous non-dispositive cases in order to persuade this Court to affirm the dismissal order from the trial court below.⁵

³ The Task Force does not, of course, concede that Judge Asphaug's "findings" of fact below were proper in any way. In fact, the Task Force's main argument is that there are numerous genuine issues of material fact exist that preclude the entry of summary judgment below.

⁴ See generally *NSP v. City of Sunfish Lake*, 659 N.W.2d 271 (Minn. Ct. App. 2003).

⁵ Not only does Xcel cherry-pick favorable language from prior decisions, the language chosen by Xcel will, upon remand, be demonstrated to be substantially incorrect. For example, Xcel quotes Judge Stacey from *City of Sunfish Lake* for the assertion that the project will be built solely on existing rights of way. (Xcel's Br. at 5-6.) In fact, upon information and belief, Xcel built parts of the project on new rights of way.

B. XCEL'S ARGUMENTS DO NOT ADDRESS THE FACT THAT MINN. STAT. §§ 116C.57 – .576 AND 216B.243 ARE CLEAR ON THEIR FACE, THUS PRECLUDING THE COURTS FROM REFERING TO THE LEGISLATIVE HISTORY TO INTERPRET THE LAW.

It is a fundamental principle of statutory construction that statutes are to be construed and enforced as written, and only where a statute as codified is unclear on its face may Minnesota courts ignore the statutory language and look to legislative history for interpretation.⁶ Xcel's arguments rely exclusively on the willingness of this Court to ignore the rules of statutory construction look beyond the language of the statute to the legislative history to determine the "effective date" of the statutes.

Nowhere does the trial court find nor does Xcel contend that the statutes at issue as codified are confusing or otherwise unclear on their face. Nor does Xcel contend that any language in sections 216B.243. or 116C.57 – .576 is susceptible to more than one meaning. As such, "[w]hen the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit."⁷

As argued in the Task Force's opening brief, Xcel did not begin construction on the project prior to the effective date of the statutes at issue on August 1, 2001. Xcel does not dispute this fact in its responsive brief. Section

⁶ See *Abrahamson v. Abrahamson*, 613 N.W.2d 418 (Minn. Ct. App. 2000) (holding that statutory construction is unwarranted where the language of a statute is not reasonably susceptible of more than one interpretation).

⁷ See Minn. Stat. § 645.16; See also *Mutual Service Cas. Ins. Co. v. League of Minnesota Cities Ins. Trust*, 659 N.W.2d 755, 760 (Minn. 2003).

116C.57, subd. 2 provides, “[n]o person may *construct* a high voltage transmission line without a route permit from the [Environmental Quality Board]” (emphasis added). The statute further provides that “[a]ny person seeking to construct a high voltage transmission line must apply to the [Environmental Quality Board] for a route permit.” *Id.*, subd. 2a. Because Xcel was still seeking to construct the line by August 1, 2001, it was obligated to obtain a route permit from the EQB prior to beginning construction. There is no ambiguity about either the statutory language or Xcel’s conduct.

Xcel’s complete failure to assert any legal rationale that requires this Court to look beyond the plain statutory language renders all its arguments related to the legislative history irrelevant, and similarly, the trial court’s grant of summary judgment in favor of Xcel erroneous. As such, this Court should find Minnesota Statutes sections 216B.243 and 116C.57 – .576 clear on their face, that construction of the project began after the effective date of the statutes on August 1, 2001 is undisputed, and consequently, Xcel should be required to comply with the statutory mandates of sections 216B.243, 116C.57 – .576. This Court should therefore remand this case back to the trial court for adjudication of the remaining factual issues.

C. XCEL’S RELIANCE ON “ZONING APPROVALS” DOES NOT SATISFY THE PURPOSE OF THE APPLICABLE STATUTES AND CANNOT MEET THE SUBSTANTIAL COMPLIANCE STANDARD AS A MATTER OF LAW.

Substantial compliance is an issue of fact to be decided by a finder of fact, not by a court. Moreover, Xcel’s zoning “approvals” do not constitute “substantial compliance” with the alternative review process as defined by § 116C.575 – .576. Xcel concedes, as it must, that each of the cities that considered the environmental effects of the line denied or effectively denied Xcel’s CUP requests.⁸ Consequently, Xcel procured the CUPs through court actions. Most of these court-ordered “approvals” addressed procedural defects under Minnesota Statutes § 15.99, which is legally deficient as a matter of law to meet the environmental review standard set out in section 116C.57 – .576.

Xcel’s reliance on the \$130,000 so-called “environmental review” as establishing the requisite environmental consideration is misplaced. When Xcel refers to the “environmental impact review”⁹ it is referencing the Commonwealth Associates Inc. (“CAI”) report, funded by Xcel, in response to concerns expressed by the cities of Mendota Heights, Sunfish Lake and South St. Paul. The report does not come close to meeting the environmental review standards of 116C.57 – .576. Xcel’s its characterization of the report as “favorable” is disingenuous. The limited purpose of the CAI report was to examine the route proposed by Xcel and to provide alternative routes to meet Xcel’s alleged needs. The report did not make

⁸ Xcel’s Br. at 8.

⁹ Xcel’s Br. at 20.

any of the necessary conclusions or recommendations regarding the line or its environmental effects that would satisfy the environmental review requirements of sections 116C.57 – .576.

Section 116C.576 requires that prior to construction, a “responsible government unit” must take responsibility and perform a study of the entire proposed power line in order for environmental approval to be granted. No municipality did so here. Indeed, every municipality that considered the environmental and health effects of the project refused to allow Xcel to build the project. Although Mendota Heights, Sunfish Lake and South St. Paul, faced with time-consuming and expensive litigation, eventually capitulated and issued the requested CUPs – the cities never changed or altered their factual findings or conclusions regarding the project.

Xcel never survived an environmental review of the entire project. Accordingly Xcel cannot show it has “substantially complied” with the statutory requirements. As such, the Task Force has presented sufficient evidence on the fact issue of “substantial compliance” to preclude summary judgment on this issue as a matter of law.¹⁰

¹⁰ See generally *City of Hutchinson v. Otto*, 306 Minn. 136, 141, 235 N.W.2d 604, 608 (1975); *Jenkins v. Board of Ed.*, 303 Minn. 437, 442, 228 N.W.2d 265, 269 (1975)

D. THE TRIAL COURT ERRED IN ENGAGING IN A “SUBSTANTIAL COMPLIANCE” ARGUMENT WHERE SECTION 116C.68 PROVIDES FOR ENFORCEMENT AND PENALTIES FOR VIOLATIONS OF SECTIONS 116C.57-.576.

In its Order granting Xcel’s motion for a summary judgment, the trial court cited to *Sullivan v. Credit River Township*, 299 Minn. 170, 176-77, 217 N.W.2d 502, 507 (1974), and *Manco of Fairmont, Inc. v. Town Bd. of Rock Dell Township*, 583 N.W.2d 293, 295 (Minn. Ct. App. 1998), for the principle that “statutory requirements [that have] no consequence for non-compliance,” require only “substantial compliance” to satisfy the statutory mandates.¹¹ In turn, both the Task Force and Xcel cited to the same cases for the same principle.¹² All parties and the trial court failed to cite to Minnesota Statute § 116C.68 which provides for enforcement of and penalties for violations of sections 116C.51 – .69. Section 116C.68 specifically provides as follows:

Subd. 1. Any person who violates sections 116C.51 to 116C.69 or any rule promulgated hereunder, or knowingly submits false information in any report required by sections 116C.51 to 116C.69 is guilty of a misdemeanor for the first offense and a gross misdemeanor for the second and each subsequent offense. Each day of violation shall constitute a separate offense.

Subd. 2. The provisions of sections 116C.51 to 116C.69 or any rules promulgated hereunder may be enforced by injunction, action to compel performance or other appropriate action in the district court of the county wherein the violation takes place. The attorney general shall bring any action under this subdivision upon the request of the board.

¹¹ Task Force Br. App. at 133.

¹² Task Force Br. at 25-26; Xcel’s Br. at 44.

Subd. 3. When the court finds that any person has violated sections 116C.51 to 116C.69, any rule hereunder, knowingly submitted false information in any report required by sections 116C.51 to 116C.69 or has violated any court order issued under sections 116C.51 to 116C.69, the court may impose a civil penalty of not more than \$10,000 for each violation. These penalties shall be paid to the general fund in the state treasury.

Because sections 116C.57 – .576 have enforcement provisions and penalties for failure of compliance, the statutes are not directory but mandatory, and therefore substantial compliance cannot constitute a defense for Xcel’s non-compliance.

The Task Force is aware that generally, a legal argument not raised in the opening brief cannot be raised in the reply brief.¹³ In the interests of justice, this Court may, however, consider legal arguments not properly raised.¹⁴ Moreover, all cases must be decided in accordance with existing law when there is nothing novel or questionable about the relevant law.¹⁵ That principle is not “diluted by counsel’s oversights”¹⁶

In this case, the Task Force argues that the issue of substantial compliance was addressed in its opening brief and this section is merely an extension of those arguments. In the alternative, the fact that the enforcement clause was overlooked by the trial court and counsel for all parties should not serve to prejudice the Task

¹³ Eric J. Magnuson and David F. Herr, 3 Minn. Prac., Appellate Rules Annotated R. 128 (2004 ed.) (citing *Frank v. Winter*, 528 N.W.2d 910, 913 (Minn. Ct. App. 1995)).

¹⁴ *Frank v. Winter*, 528 N.W.2d 910, 913 (Minn. Ct. App. 1995).

¹⁵ *Jerry Mathison Const., Inc. v. Binsfield*, 615 N.W.2d 378, 381 (Minn. Ct. App. 2000) (holding that an appellate court decision on legal grounds not considered by the trial court, not briefed on appeal, and not presented at oral argument is appropriate).

¹⁶ *Id.*

Force where the principle of law it seeks to enforce is not novel or questionable. The legal principle affirmed by all parties is that where a statute has an enforcement mechanism, compliance with that statute is mandatory. The “substantial compliance” principle applies only to statutes without enforcement mechanisms. Because Minnesota Statutes § 116C.68 provides a statutory penalty and an enforcement mechanism for sections 116C.57 – .576, they are mandatory statutes, and substantial compliance may not serve as a defense for Xcel’s non-compliance. As such, if this Court finds that the statutes at issue do apply to Xcel, substantial compliance does not provide a defense and the trial court’s grant of summary judgment to Xcel should be reversed.

E. XCEL HAS BEGUN CONSTRUCTION AND OBTAINED APPROVAL FOR “PHASE 2” OF THE PROJECT.

Xcel misrepresents the status of construction for Phase 2 of the project in its responsive brief to this Court. In fact, Xcel built a section of Phase 2 in Bloomington simultaneously with Phase 1.¹⁷ Phase 2 is far more than a “vision” as demonstrated by the CUP obtained from Mendota Heights for both Phase 1 and

¹⁷ A trial will reveal that Xcel misrepresents the fact when it suggests it built this portion of Phase 2 only in connection with the Runway Protection Zone associated with the new north-south runway under construction at the western side of the MSP International Airport. Rather upon information and belief, the portion of the line it built is immediately south of the Fort Snelling cemetery, which is Southeast of the airport and is approximately one mile east of the new runway.

Phase 2, and the permission Xcel obtained from Bloomington.¹⁸ Xcel is working to complete Phase 2 as part of the single project with Phase 1. Xcel always sought approval as a 14.7-mile project. Only since 2001, when the legislature changed the requirement for the certificate of need for lines over 10 miles long did Xcel begin to refer to Phase 1 and Phase 2 as separate projects rather than two parts of the single project as it was presented until 2001.

F. BECAUSE XCEL CONTINUES TO VIOLATE MINNESOTA LAW AND THE CONSTRUCTION OF THE PROJECT IS NOT COMPLETE, THIS APPEAL IS NOT MOOT.

This appeal is not moot. Xcel continues to construct the project in violation of Minnesota law. Xcel had every opportunity to comply with the statutes, but chose not to do so. It is important in this context that Xcel indisputably built a substantial part of Phase 1 on new rights of way that were obtained after the August 1, 2001 deadline. The construction is on rights-of-way for which it did not obtain approval from any entity, be it local, state, or federal; be it legislative, judicial, or executive.

With its mootness argument, Xcel is essentially asserting the right to build when and where it chooses without obtaining any of the mandated environmental approvals. It is further asserting that, when it decides to seek approvals, it can arbitrarily divide its projects into as many segments as it chooses and obtain

¹⁸ Even if no one accepts Xcel's assertion that Phase 2 is a separate line, Xcel makes no attempt to explain why it splits its so-called Phase 2 into at least three parts for the environmental review processes, nor why Xcel is relying on zoning approvals from Mendota Heights for a 2.5 mile section of Phase 2, while obtaining no approvals for a short section. These issues should be addressed at trial.

environmental clearances for each segment under whatever section of the law suits its convenience of the moment for that particular section. This Court should not countenance Xcel's statutory violations which are intentional and ongoing.

At its core, Xcel's mootness argument is based on the specious principle that completion of any part of the line, no matter how illegal, renders the entire line immune from judicial review. Such a position is unacceptable as a matter of law and public policy. Xcel should not be permitted to ignore statutory requirements and then claim it cannot be required to comply because it started or completed construction without the requisite approval. This appeal should not be dismissed for mootness where Xcel ignored its obligations under the law and now alleges that it would be too expensive and inconvenient for it to comply with the statutes it knew was in place prior to beginning construction.

Xcel's argument that the Task Force has not provided a sufficient basis to seek injunctive relief is similarly incorrect. Section 116C.68, subd. 2, provides for enforcement of 116C.57 – .576 by “injunction, [an] action to compel performance, or other appropriate action,” where a party is shown to have violated either statute. Xcel's refusal to comply with the known statutory requirements is basis enough for the Task Force to seek injunctive relief.

G. THERE ARE A NUMBER OF GENUINE ISSUES OF MATERIAL FACTS IN THE INSTANT CASE THAT PRECLUDE SUMMARY JUDGEMENT AS A MATTER OF LAW.

Xcel's repeated misrepresentations of the record reflect a number of genuine disputes of material fact in this case. As such, the trial court's grant of

summary judgment was inappropriate as a matter of law. Xcel presents many disputed factual statements, including, but not limited to, the following:

Xcel's factual contention: There is not now a plan to upgrade "Phase 2" from Rogers Lake to Bloomington, and Xcel has not applied for or received local approval from any local zoning body except as related to the runway construction.¹⁹

Task Force's dispute: There is sufficient evidence in the record that Xcel has always planned to begin construction on Phase 2, and the approvals from the City of Bloomington and the zoning approval from Mendota Heights go far beyond the scope of the runway construction zone. There has never been a determination made by a proper trier of fact as to the material issue of whether these phases are in fact separate transmission lines. This Court should remand this case for such a determination.

Xcel's factual contention: Mendota Heights, Sunfish Lake and South St. Paul issued a favorable "environmental impact review" in March 2001.²⁰

Task Force's dispute: There was no "favorable" report or review issued. Rather, while it is true that Xcel funded and supervised the production of a report by CAI, the report only developed data about the proposed route and configuration about the project, including alternatives, but did not make any recommendations. Ultimately, after considering all information, including that referred to by Xcel, all

¹⁹ Xcel's Br. at 6.

²⁰ Xcel's Br. at 9.

the cities rejected Xcel's applications for CUPs. This is material because Xcel attempts to inflate the CAI report to a level of "substantial compliance." As the Task Force argued in its opening brief, whether Xcel "substantially complied" is an issue of fact.

Xcel's factual contention: The Task Force has already unsuccessfully challenged the project on the grounds it was a health hazard in front of two state agencies – the Environmental Quality Board and the Public Utilities Commission.²¹

Task Force's dispute: Neither agency has substantively reviewed Xcel's proposal or ruled upon the project's potential health and environmental impacts, as required by § 116C.57-.576. Whether Xcel's proposal complies with the requirements of the statute presents multiple issues of material fact.

Xcel's factual contention: The entire line was subject to environmental review solely because of Minnesota's "phase" and "connect" rules.

Task Force's dispute: Xcel only subjected the entire project to a limited environmental review that did not satisfy the requirements of sections 116C.57-.576 because even though the construction was planned in two phases it is a single project to serve a single purpose.

²¹ Xcel's Br. at 14.

Xcel's factual contention: It is the dilatory nature of the appellate brief that renders this appeal moot because the Task Force took so long to file its opening brief.²²

Task Force's dispute: The Task Force noticed this appeal properly under Minnesota's Rules of Appellate procedure. The 30-day extension granted by Xcel to file the affirmative brief was necessary because the Task Force changed representation shortly before the due date of the appellate brief. At the time, Xcel did not object or suggest that the delay would somehow prejudice it based on the construction schedule. Instead, Xcel granted the 30-day extension without protest. Moreover, if Xcel had obeyed the law and on August 1, 2001 applied for EQB and PUC review with the accompanying tight procedural deadlines, the process would have been completed, quite literally, years ago.

Based on these factual disputes alone, this case is not appropriate for summary judgment and should be remanded back to the trial court for a finder of fact to resolve these issues.

²² Xcel's Br. at 2.

CONCLUSION

For these, and all the reasons argued in the Task Force's main appellate brief, the Task Force respectfully requests that this Court reverse the decision of the Dakota County District Court and remand this case for adjudication by a finder of fact.

Date: July 19, 2004

Respectfully submitted,

Richard G. Morgan (#157053)
David S. Miller (#239860)
Keesha M. Gaskins (#310074)
BOWMAN AND BROOKE LLP
150 South Fifth Street
Suite 2600
Minneapolis, Minnesota 55402
Telephone: (612) 339-8682

*Attorneys for Appellant Power Line Task
Force, Inc.*