

Petitioner

Court File No. C4-02-6854

MEMORANDUM  
OF THE CITY OF SUNFISH LAKE

v.  
City of Sunfish Lake,

Respondent.

• IN OPPOSITION TO THE XCEL MOTION  
FOR PARTIAL SUMMARY JUDGMENT  
AND  
• IN SUPPORT OF CITY'S CROSS-MOTION  
FOR SUMMARY JUDGMENT  
SUMMARY OF ARGUMENT

State law entrusts cities with significant responsibilities to regulate the placement of power lines. Recently, the Legislature has enacted new laws increasing the regulatory responsibilities of state agencies to safeguard the public interest in connection with power line issues. In this case, a utility is suing a city that exercised the authority and discretion delegated to it and denied a conditional use permit for construction of a power line.

The power line proposal at issue was originally introduced by Xcel in the late 1990s. Xcel wanted to tear down an existing single-circuit power line to erect new structures carrying a double-circuited 115kV power line. As originally proposed, the power line would run from Xcel's Red Rock substation in Newport to its Wilson substation in Bloomington, a distance of over 14 miles. Xcel proposed to locate the new double-circuit line in the same 50-foot corridor presently occupied by the single-circuit line since 1923. Xcel selected this route for one reason: cost. On November 13, 2001, Xcel submitted an application for a its conditional use permit ("CUP") to the City of Sunfish Lake in order to obtain permission to tear down the existing transmission line and

erect the new double-circuit line. The application included various materials purporting to justify the need for this new line. Xcel's application form identified the line as running from Red Rock to Wilson, the 14-mile route which had been the subject of discussions and proceedings with other cities and agencies.

The City of Sunfish Lake fulfilled its regulatory responsibilities seriously and fairly. Its Planning Commission held over seven hours of hearings, as did the Sunfish Lake City Council. During one of these hearings, Xcel revealed its intention to unilaterally abandon an 8-mile segment of the power line route. Xcel informed the City of Sunfish Lake that its proposal to build one segment of the 14-mile line originally contemplated must be viewed as a "stand alone" 6.36-mile project.

In addition, Xcel took a very hostile position with regard to the City's attempt to evaluate the CUP application. Xcel asserted the following legal positions in public hearings-positions which Xcel now asks this Court to endorse in this lawsuit.

- Xcel contends that Xcel retains the exclusive prerogative to determine whether a new transmission line is needed. Specifically, Xcel denies the authority of the State Public Utilities Commission to require a Certificate of Need for this power line, as would be required under state legislation effective August 1, 2001.
- Likewise, Xcel asserts that Sunfish Lake may not evaluate the need for this line, even though Xcel subsidized a \$130,000 study by an engineering firm purporting to justify need for the line to cities along the route.
- Moreover, Xcel asserts that the City does not retain the authority to address the impact of this proposal on the health and safety of the community.

- In fact, Xcel takes the extraordinary position that this City lacks either the responsibility or the authority to make any discretionary decisions which might prevent Xcel from constructing this power line.

*See* Record Document ("RD") 86, Transcript of February 4, 2002 City Council meeting, SFL 002489-2494.

Xcel made it clear in public hearings that if the City denied the application, Xcel would sue. The City refused to be intimidated. The City Attorney examined the law and informed the City Council that state law required Xcel to obtain a Certificate of Need from the MPUC. Because Xcel contested the application of this state law to its project, the City processed Xcel's application. The City determined that Xcel did not demonstrate need for the line in its Application materials because all such materials addressed the need for a 14-mile route. Since Xcel announced that it was abandoning that route and disavowing the assumptions which would have justified the route, the City Council determined that there was a lack of evidence supporting the line as Xcel now defined it: a 6.36-mile, double-circuited transmission line from Red Rock to Rogers substations (Newport to Mendota Heights).

The City of Sunfish Lake also based its denial of the CUP on the fact that the health risks associated with the proposed transmission line were both unjustified and avoidable. The Planning Commission and City Council received evidence concerning mounting scientific proof about the adverse health effects of EMF emissions. In light of such scientific research, scientific panels, world health organizations, and government agencies have encouraged utilities and regulators to minimize exposures to EMF emissions as part of the transmission line siting process. The most significant

way to minimize exposure to EMF emissions is to assure that there are adequate clearances between transmission lines and adjoining homes. Opponents of the power line and the experts who testified on their behalf presented evidence that the 50-foot wide corridor preferred by Xcel was inadequate to provide safe clearances for the neighboring residences. They further contended that utilities building new power lines would ordinarily seek clearances in excess of 50 feet, but that Xcel was insisting on reusing the existing corridor in order to save money.

In addition, the City examined Xcel's argument that the proposed power line would be sufficiently safe because it would reduce EMT emissions by 50 percent when compared to the original single-circuit line carrying the same amount of current. The City Council determined that the so-called reduced levels of EMF emissions would still exceed safe exposure levels, especially when considering that the new lines would carry increasingly more current in the future, which translates into higher EMF emissions at increasingly unsafe levels of exposure.

Thus, the City of Sunfish Lake was faced with site-specific circumstances bearing on the evaluation of health and safety risks posed by the proposed transmission line. The City determined that based upon the evidence received, the construction of a power line in this particular location with such minimal clearances, could not be justified.

The record demonstrates that City officials followed state law and their own ordinances conscientiously. Efforts to engage in dialogue with Xcel about alternate routes for the line were frustrated by Xcel's continual insistence that it was absolutely entitled to its preferred route and that the selection of any other option would obligate the City to pay for all costs in excess of the cost of the proposed line. The City publicly declared that it is not prohibiting power lines through Sunfish

Lake, but is rather seeking a proposal which reduces avoidable health risks. By so doing, the City is following the instructions of other government regulators and scientific organizations to address EMT-avoidance at the power line siting stage.

Finally, efforts to characterize this decision as "politically expedient" do not fit the facts set forth in the record. When reviewing the record, the Court will find that members of the Planning Commission and City Council took their responsibilities seriously, permitted both the Petitioner and the opponents of the proposal to develop a complete record and, ultimately, reached a decision that is based on that record and supported by specific and carefully drawn Findings of Fact and Conclusions.

LEGAL ISSUE

Was the denial of Petitioner's application for a conditional use permit to construct a new double-circuited, 115kV transmission line based upon Findings and Conclusions that are legally sufficient and supported by facts in the record?

DOCUMENTS RELIED UPON

The City considered the entirety of the record in making its decisions. Although by no means an exclusive list, the following portions of the record support the following key Findings of Fact included in the City's Resolution No. 02-04:

| Finding No.     | Corresponding Portion of Record (Exhibit A to City's Resolution)  |
|-----------------|---|
| 19              | Record Docume 34, SFL 001791-1793   |
| 21              | Record Docume 55, SFL 001960-1962   |
| 24              | Record Docume 1.Z, SFL 000267   |
| 25              | Record Docume 1.Z, SFL 000267; Record Document 48, SFL 00186  |
| 26              | Record Docume 22, SFL 000880; Record Document 84, SFL 002342-23; Record Document 85, SFL 002387-2398  |
| 27-33           | Record Docume 1.Z, Tables 3-2, 3-3, 3-4 and 3-5, SFL 000272-275   |
| 34              | Record Docume 1.Z, Tables 3-4 and 3-5, SFL 000274-275; Record Document 48, SFL 001857-1864  |
| 35-41; 43       | Record Docume 3, including exhibits, SFL 000630-664   |
| 42              | Record Docume 100, SFL 003158-3160  |
| 44              | Record Docume 1.Z., Tables 3-3, 3-4 and 3-5, SFL 000273 - 276   |
| 46-48           | Record Docume 21, SFL 000869; Record Document 84, SFL 002250; Record Docume 85, SFL 002374; Record Document 84, SFL 002492-24   |
| 49              | Record Docume 53, Exhibit 12, SFL 001941-1942   |
| 53              | Record Docume 1.Z., Table 7-1, SFL 000315; Record Document 13, SFL 000730-731; Record Document 53, Exhibit 5, SFL 001908-1911 and Exhibit 15(t SFL 001953   |
| 54-57;<br>59-60 | Record Docume 1.Z, Tables 3-2, 3-3, 3-4, 3-5, 3-6, 3-7, and 3-8, SFL 000272 - 000278; Record Document 26.B., SFL 000905-913; Record Document 26.1) SFL 000938-945; Record Document 26.E, SFL 000946-955; Record Document 26.N, SFL 001012-1040; Record Item 50, SFL 001866; Record Document 51, SFL 001867-1871; Record Document 86, SFL 002598 |

| Finding No. | Corresponding Portion of Record (Exhibit A to City's Resolution)   |
|-------------|--|
| 58          | Record Document 30, SFL 001785   |
| 65          | Record Document 10, SFL 000685-686; Record Document 11, SFL 000687-688; Record Document 12, SFL 000689   |
| 66          | Record Document 46, SFL 001842-001844  |
| 67          | Record Document 48, SFL 001857-1864  |
| 70          | Record Document 27, SFL 001096-001301; Record Document 28, SFL 001302-001783; Record Document 40, SFL 001817-1822; Record Document 52, SFL 001872-1874   |
| 71          | Record Document 97, SFL 003127-3142  |
| 72-73       | Record Document 98, SFL 003155; Record Document 99, SFL 003156-57; Record Document 105, SFL 003209-11  |
| 74-75; 83   | Record Document 1.A; SFL 000032-33; Record Document 1.X, SFL 000207-210; Record Document 1.Y, SFL 000217; Record Document 1.Z., SFL 000219, 000222-23, 000232, 000243, 000248-49; Record Document 22, SFL 000880; Record Document 26.N, SFL 000992; Record Document 48, SFL 001857 |
| 82          | Record Document 84, SFL 002265-2271  |
| 84          | Record Document 1.Z, SFL 000222; Record Document 26.N., SFL 000992-1003, 1005  |
| 89          | Record Document 1.Z, SFL 000271; Record Document 22, SFL 000880; Record Document 29, SFL 001784; Record Document 84, SFL 002265-2266; 2345-2352; Record Document 85, SFL 002387-2388   |

## STATEMENT OF FACTS

### **A. Municipal Authority Over The Placement of 115kV Transmission Lines.**

#### 1. Historic Authority

Municipalities for years have enjoyed near exclusive authority over the placement within their borders of transmission lines with capacities of less than 200kV. This authority includes the general authority granted to municipalities under the Municipal Planning Act, such as the power to control industry's use of its land at MINN. STAT. § 462.357, subd. 1(2001). Municipalities also have the power to designate certain land development activities, such as the installation of a transmission line, as a conditional use under their zoning regulations. MINN. STAT. § 462.3595, subd. 1 (2001).

Municipalities also exercise specific statutory authority over the installation of transmission lines. Under Mwn. STAT. § 216B.36 (1992), a municipality may require a public utility to obtain any "license, permit, right or franchise" required under "the terms, conditions, and limitations of that municipality's regulatory acts. This authority is especially significant in the case of a transmission line with a capacity of less than 200kV. Until recently, neither the Minnesota Public Utilities Commission (MPUC) nor the Minnesota Environmental Quality Board (MEQB) had the authority to regulate transmission lines of that size. The MPUC had the authority to issue a Certificate of Need prior to the construction or siting of a "large energy facility" by a utility. MINN. STAT. § 216B.243, subd. 2 (1992). And the MEQB had the authority to issue a Route Permit prior to the construction or siting of a "large energy facility" by a utility. Minn. Stat. § 116C.57, subd. 2 (1997). But the definition of "large energy facility" in both cases only included transmission lines with capacities of 200kV or more. MINN. STAT. § 216B.2421, subd 2 (1992); MINN. STAT. § 116C.52, subd. 4 (1997). The effect of that limitation on state agency authority, when combined

with the municipal authority preserved under MINN. STAT. § 21613.36, was to place and entrust the regulatory authority for the installation of lines with 200kV or less capacity on the shoulders of local government.

Minnesota courts have recognized the important role municipalities play in the placement of transmission lines within their communities. In *NSP v. Oakdale*, the Court of Appeals found that MINN. STAT. § 21613.36 conferred specific authority "to cities to regulate utility line placement." 588 N.W.2d 534, 539 (Minn. Ct. App. 1999) In rejecting this plaintiff's argument that state agency authority preempted local regulation of utility placement, the Court indicated that Minnesota, like many other jurisdictions, empowered local government to regulate utility line placement "despite statewide regulation through a P.U.C." *Id.*

## 2. Authority after August 1, 2001

As of August 1, 2001, certain transmission lines with less than 200kV capacity require state approvals prior to installation. For instance, after August 1, 2001, a utility proposing to build a transmission line with a capacity of 100kV or more and more than ten miles long in Minnesota must obtain a Certificate of Need from the PUC. MINN. STAT. § 21613.243, subd. 2 (2002 Supp.); MINN. STAT. § 21613.2421, subd. 2(3) (2002 Supp.). No exemption to this requirement exists under MINN. STAT. § 21613.243 (2002 Supp.).

These new state approval requirements were enacted without amending MINN. STAT. § 21613.36, leaving undisturbed the regulatory authority exercised by cities under that statute. The MEQB's authority also expanded after August 1. Now, lines with a capacity of 100kV or more require a MEQB-issued Route Permit prior to being sited. MINN. STAT. § 116C.57, subd. 2 (2002 Supp.); MINN. STAT. § 116C.52, subd. 4 (2002 Supp.). This requirement applies regardless

of the length of the line. *Id.* The MEQB also must prepare an Environmental Impact Statement (EIS) for each proposed transmission line that meets the above criteria. MINN. STAT. § 116C.57, subd. 2c (2002 Supp.).

**B. Facts Relevant to Summary Judgment.**

In the late 1990s, Xcel announced a proposal to build a new double-circuited 115kV transmission line from Newport to Bloomington, a distance of over 14 miles. See, e.g., Record Document ("RD") 48, In the Matter of Need for an Environmental Impact Statement for the Proposed Southeast Metro 11 SkV Transmission Line Project, November 18, 1999 ("EQB Findings"), SFL 001857-1864. Xcel wanted to locate this new transmission line along a right of way currently used by Xcel for a single-circuit transmission line originally constructed in 1923.

1. Administrative proceedings and the recognition of local regulatory responsibilities.

In 1999, the existing power line was the subject of administrative proceedings before the Minnesota Public Utilities Commission (MPUC). In the Matter of the Complaint Regarding the Safety of Northern States Power Company's Transmission Lines in the Southeast Metro Area, Docket No. E-002/C-99-902, 2000 WL 772434 (Minn. P.U.C.). A citizen's group sought an administrative ruling that would shut down the existing single-circuit power [line. \*Id.\* at 1](#). The MPUC ruled that the citizens group did not make a sufficient showing to justify the drastic action of shutting down an existing power [line. \*Id.\* at 5](#). However, noting that Xcel was proposing to replace its existing line with a new double-circuited line, the MPUC observed that five of the six cities through which the line will pass (including Sunfish Lake) have approval authority over the utility's specific proposals for running the line through their communities. *Id.* The MPUC stated

in its ruling, "These permit proceedings should provide more appropriate and wide-ranging forums for exploring the issues this line poses, not just in terms of health issues. . . ." Id.

Also in 1999, the MEQB declined to require the submission of an Environmental Impact Statement in conjunction with this proposed transmission line project. RD 48. The "project description provided to the MEQB" was for a "14.7-mile project alignment [which] begins at the Red Rock substation in Washington County, connects to the Rogers Lake substation in Dakota County, and ends at the Wilson substation in Hennepin County." Id., SFL 001857, 9[ 1. The alignment crosses portions of the cities of Newport, South St. Paul, Inver Grove Heights, Sunfish Lake, Mendota Heights and Bloomington. Id. Accordingly, the MEQB pointed out that many issues of concern to the citizens might best be addressed in the context of local review of site-specific circumstances:

The project is subject to local control, including conditional use permits. In addition, the project is subject to federal, state, or local permits as described in the EAW. These permits will also help make certain that the project is constructed and operated in accordance with the project description provided by the MEQB for the EAW.

Id., 9(34 (emphasis added).

2. The construction proposed for this project.

In order to construct the new, double-circuited 115kV transmission line, Xcel proposed to dismantle and remove all towers and structures supporting the existing transmission line. RD 83, Transcript of December 12 City Council Meeting, SFL 002114. The existing line was supported by wooden structures 51 to 85 feet high. RD 1.Z. "Independent Review of Double-Circuiting, Xcel Energy Red Rock-Wilson, 115kV Transmission Line," Commonwealth Associates, Inc. ("CAI Report"), SFL 000287. In place of the existing wooden structures, Xcel proposed to erect steel

structures designed to support two transmission circuits. Id.

The proposed steel structures differed from the existing wooden structures in several significant respects: (a) The proposed steel structures would range from 80 to 110 feet in height, about 25 to 41 feet higher than the existing structures (Id., SFL 000235; RD 83, SFL 002128; RD 85, Transcript of January 29, 2002 Planning Commission Meeting, SFL 002382); and (b) the proposed steel structures require concrete foundations to provide support (RD 83, SFL 002120-21). The concrete foundations will be drilled into the ground at a depth in excess of 30 feet. Id. The existing wooden poles are embedded into the ground without permanent foundations. Id.

Although Xcel's proposed project is sometimes referred to as an "upgrade" of an existing line, all structures comprising the existing line would be removed and replaced. Likewise, Xcel's characterization of its proposal as seeking to "add a second circuit transmission line to this 75-year-old single-circuit line" is intentionally misleading. *See* Petitioner's Brief, p. 1.

### 3. The "Manor's Steering Committee" and the CAI Report.

After Xcel announced its proposal to build the new transmission line, the mayors of three cities along the proposed route established an unofficial group termed the "Mayors' Steering Committee." *See*, RD 26.N, Transcript of the Steering Committee Hearing on the Proposed Line, March 22, 2001, SFL 000993. The Steering Committee was charged with gathering facts relevant to the Xcel proposal; it was not authorized to reach any decisions or make recommendations. Id. Xcel agreed to pay for a technical consultant to provide information relevant to the proposed transmission line to the Steering Committee. Commonwealth Associates, Inc. ("CAI") was engaged. Id., SFL 000994.

Xcel provided data and design objectives to CAI. CAI addressed selected changes in the regional electric transmission system which might be appropriate to achieve objectives defined by Xcel. Accordingly, CAI did not analyze the need for the proposed double-circuited line, nor did CAI critically examine Xcel's forecasts of demand for electricity. CAI accepted information provided by Xcel as the assumptions underlying its own focused analyses. This limited role was underscored by a CAI engineer during a meeting of the Steering Committee. Records Document 26.N, SFL 001061.

Equally important, CAI did not claim to have any expertise regarding the health consequences of EMT exposures. Rather, the Steering Committee heard from independently-retained experts on these subjects. *See, e.g.*, RD 26.B., Pre-filed testimony of Dr. Martin Blank, SFL 000905-13; RD 26.C, Curriculum Vitae of Dr. Blank, SFL 000914-937; RD 26.1), Pre-filed testimony of Dr. Magda Havas, SFL 000938-45; RD 26.E, Curriculum Vitae of Dr. Havas, SFL 000946-55; RD 26.N, Testimony of Drs. Blank and Havas before Steering Committee, SFL 001012-52.

CAI produced a report entitled "Independent Review of Double-Circuiting, Xcel Energy Red Rock-Wilson, 1 15kV Transmission Line." RD, 1.Z. The CAI review was not an informal equivalent to an "Environmental Impact Statement," but rather CAI's interpretation of technical data furnished by Xcel.

The Steering Committee invited citizen input at public hearings. *See generally* RD 26.N. Citizens concerned about the health impact of Xcel's proposed power line arranged for experts to testify regarding scientific and medical investigations of the effects of EMF emissions on human health. RD 26.N, SFL 001012-52. One expert who testified, Dr. Magda Havas of Toronto, is a

scientist who studies the biological effects of environmental contaminants generally, and the effects of EMF emissions on human health in particular. Her testimony was submitted in written form, on videotape, and in a live appearance before the Steering Committee. RD 26.D, SFL 000938-45; RD 26.N, SFL 001012-40. Dr. Martin Blank, a Professor of Physiology at Columbia University, also discussed scientific studies documenting the harmful effects of EMT-emissions. RD 26.B., SFL 000905-13; RD 26.N, SFL 001040-52.

Documentary and testimonial evidence submitted to the Steering Committee was incorporated into the record compiled by the Sunfish Lake City Council when evaluating Xcel's application for a CUP. RDs 26.A - 26.N, inclusive. However, the Steering Committee itself neither adopted any report that reached conclusions, nor did the Steering Committee issue conclusions or recommendations of its own.

4. The Xcel application to the City of Sunfish Lake.

On November 13, 2001, Xcel submitted an application to amend a conditional use permit ("CUP") to construct a double-circuit 115kV transmission line. RDs 1.A. - 1.CC, inclusive. The CUP application Form identified the project as "SE Metro Line (Wilson to Red Rock)." RD 1.A., SFL 000033. The Southeast Metro Line project had been described previously by Xcel as a 14-mile transmission line connecting its Red Rock substation in Newport to its Wilson substation in Bloomington. *See, e.g.*, RD 26.N, SFL 000992 (summarizing Xcel's proposed upgrade as a "14.7 mile project"; RD 48, SFL001857 (same). Indeed, Xcel submitted many materials in conjunction with its application addressing aspects of this 14-mile line. *See, e.g.*, RDs 1.X, 1.Y and 1.Z.

5. Xcel announces its abandonment of the Rogers to Wilson segment of the project.

At the January 16, 2002 meeting of the Sunfish Lake City Council, an Xcel representative explained for the first time that Xcel did not intend to build the Rogers-to-Wilson segment of the transmission line at any time. To emphasize this point, the Xcel representatives described the Red Rock to Rogers segment as a "stand alone" proposal. RD 84, SFL 002251. *See also* RD 85, SFL 002378-79 (referring to "Phase 1" as a "stand alone project"). Regarding the Red Rock to Wilson segment of the 14-mile line, an Xcel spokesman stated: "As of now, there is not a project." RD 84, SFL 002266.

6. Xcel's description of the project in its brief.

Xcel represents in its brief that "the Project" at issue includes the complete 14-mile line as originally described. However, the brief asserts that "the Project" is "planned in two separate phases with phase one being entirely independent of phase two." Petitioner's Brief, p. ii. In the Brief, "Phase One of the Project" is described as consisting of the 6.36 segment of "the Project." *Id.*

7. The CUP review process in Sunfish Lake.

Sunfish Lake ordinances prescribe a three-step process for the review and approval of a CUP application seeking to build a transmission line. RD 96, City's Zoning Code, section 1224.05, SFL 002935.

As a first step, the Sunfish Lake City Council considers whether to study potential routes in addition to the route proposed by the applicant. RD 96, Zoning Code section 1224.05.A, SFL 002935. The purpose of this initial step is to raise additional routing ideas for consideration as part of the application review process.

The second step of the process (known as the "CUP stage") involves scrutiny of the project within the context of a conditional use. The Planning Commission holds public hearings and considers the proposal first, ultimately issuing a recommendation to the City Council for approval or denial. *Id.*, section 1204.02.C, SFL 002844. The City Council may act on that recommendation or it may, if it chooses, hold its own public hearings on the proposal. *Id.*, section 1204.02.K, L, SFL 002845. When the public hearings have closed, the Council deliberates in open session and votes to approve or deny the requested conditional use permit. *Id.*, sections 1204.02.K, L and M. If the CUP is approved, the City Council next addresses proposals for site-specific details of construction. *Id.*, section 1224.05.L, SFL 002938-41. This last stage is sometimes referred to as "the site and building plan stage." If the CUP is denied, the site-specific construction proposals become moot and no further action is taken.

8. The City's review of the Xcel application.

City Attorney Tim Kuntz guided officials through the Planning Commission and City Council processes. *See, e.g.*, RD 106, Memo to Planning Commission Members, SFL 003212-14; RD 107, Memo to Planning Commission Members SFL 003238-2a; RD 108, Memo to Mayor and Council members, SFL 003287-88. In addition to explaining procedures prescribed by ordinances, Attorney Kuntz emphasized the importance of basing any recommendations or final actions on facts in the record. *Id.* To this end, Attorney Kuntz developed alternative proposed "Findings of Fact" documents: one set outlined Findings supporting approval; one set outlined Findings supporting denial. RDs 106, 107, and 108, draft findings of fact relating to denial and approval, dated January 10, January 25 and February 1, 2002, SFL 003212-3346. Attorney Kuntz cautioned that these alternative proposed Findings were developed to help officials organize and categorize evidence and

arguments. *Id.* He emphasized that the proposed Findings were "works in progress" subject to revision throughout the CUP review process. Both Xcel and members of the public were given opportunities to comment on the proposed Findings at various junctures. In fact, both Xcel and opponents of the proposal offered extensive comments to proposed Findings. See RD 21, Xcel's Objections to Draft Planning Commission Denial, dated February 1, 2002, SFL 000864-000876; RD 60, Roger Conant's Suggested Revisions to the Draft Findings of Fact, dated February 3, 2002, SFL 001976-02010. And the proposed Findings were explicitly modified in public hearings to comport with evidence that officials found persuasive or relevant. See e.g. RD 85, SFL 002454-56 By so doing, the City Attorney sought to focus all officials on their roles as quasi judicial decision makers who must make a determination supported by legally sufficient facts in the record.

The City followed the prescribed process for the review of the Xcel proposal. Here is a chronology of key events in the application hearing process and deliberation process.

|  |                   |              |
|--|-------------------|--------------|
| Application submission by Xcel   | November 13, 2001 | RD 1.A-LCC   |
| (Step One) Hearings addressing whether any additional routes should be studied | December 12, 2001 | RD 76; RD 83 |
| City Council   |                   |              |
| (Step Two) Hearings on the Applicant's Proposal                                |                   |              |
| Planning Commission  | January 16, 2002  | RD 79; RD 84 |
|  | January 29, 2002  | RD 80; RD 85 |
| City Council   | February 4, 2002  | RD 81; RD 86 |
|  | February 5, 2002  | RD 82; RD 87 |

- **Recommendations Made and Actions Taken.**

On January 29, 2002, the Sunfish Lake Planning Commission voted to recommend to the City Council that the Xcel application be denied. RD 80, SFL 002092; RD 85, SFL 002479-80. The vote was 4-0 (with one abstention). *Id.*

On February 5, 2002, the Sunfish Lake City Council voted to deny the Xcel Petition for a conditional use permit to permit the construction of the proposed power line. RD 82, SFL 002097; RD 87, SFL 002791-92. The City Council also finalized and adopted Findings of Fact and Conclusions supporting the action taken. *Id.* The Council voted 4-1 in favor of denial. *Id.*

**I. DISTRICT COURT REVIEW OF THE DENIAL OF A CONDITIONAL USE PERMIT IS LIMITED IN SCOPE AND FOLLOWS A DEFERENTIAL STANDARD OF REVIEW.**

Judicial review of the denial of a conditional use permit application is limited to a determination of whether the denial was unreasonable, arbitrary and capricious. *Trisko v. City of Waite Park*, 566 N.W.2d 349, 352 (Minn. App. 1997). The standard of review is sometimes expressed in terms of the absence of any rational basis: "Land use decisions are entitled to great deference and will be disturbed on appeal only in instances in which the City's decision has no rational basis." *Superamerica v. City of Little Canada*, 539 N.W.2d 264, 266 (Minn. App. 1995). Appellate opinions (including those cited by Petitioner) further instruct that when a city council states its reasons for denying a conditional use, "we limit our review to the legal sufficiency and the factual bases for those reasons." *Trisko*, 566 N.W.2d at 349.

The burden of persuasion is on the Petitioner to "demonstrate that the reasons stated by the Council for the denial of the permit are either without factual support in the record or are legally insufficient." *Hubbard Broadcasting, Inc. v. City of Afton*, 323 N.W.2d 757, 763 (Minn. 1982), citing *Barton Contracting Co., Inc. v. City of Afton*, 268 N.W.2d 712, 717 (Minn. 1978).

A city's denial of a land use request is not arbitrary when at least one of the reasons given for the denial satisfies the rational basis test. *St. Croix Dev., Inc. v. City of Apple Valley*, 446 N.W.2d 392, 398 (Minn. App. 1989), *review denied* (Minn. Dec. 1, 1989). Accord, *Hubbard Broad., Inc. v. City of Afton*, 323 N.W.2d 757, 765 n. 4 (Minn. 1982) ("Not all reasons" for the denial of a conditional use permit "need be legally sufficient and supported by facts in the record.") Stated conversely, a challenger must establish that every basis articulated by [the City] for its decision is

Finally, "it is the duty of the judiciary to exercise restraint and accord appropriate deference to civil authorities in the performance of their duties." *White Bear Docking v. City of White Bear Lake*, 324 N.W.2d 174, 176 (Minn. 1982). The courts in land use cases are not to substitute their judgment for that of the legislative body if the question is fairly debatable. *Sun Oil Company v. Village of New Hope*, 220 NW.2d 256, 263 (Minn. 1974).

**II. XCEL'S FAILURE TO ESTABLISH "NEED" CONSTITUTES A THRESHOLD BASIS FOR DENIAL OF THE CUP APPLICATION.**

**A. Xcel Must Obtain A Certificate Of Need From The Public Utilities Commission Before It Seeks Any Other State or Local Approval.**

1. Xcel failed to satisfy the requirement to obtain a Certificate of Need from the MPUC under MINN. STAT. & 21613.243.

The threshold basis for denying Xcel's application was Xcel's failure to obtain a Certificate of Need from the Minnesota Public Utilities Commission (MPUC), as required by MINN. STAT. § 21613.243, subd. 2 (2002 Supp.). Under that statute, a utility must receive a Certificate of Need from the MPUC before the utility may site or construct a "large energy facility." MINN. STAT. § 21613.243, subd. 2 ) (2002 Supp.). As of August 1, 2001, a "large energy facility" includes a transmission line if. (1) the transmission line's capacity exceeds 100kV and (2) the length of the transmission line exceeds 10 miles. MINN. STAT. § 21613.2421, subd. 2(3) (2002 Supp.).

Xcel's application to Sunfish Lake was submitted on November 13, 2001, three and one half months after the new law's effective date. The Xcel application described a 115kV line traversing a route between its Red Rock and Wilson substations, a distance of over 14 miles. See RD 1.A, Xcel's CUP Application Form, dated November 13, 2001 (stating "Project Name" as "SE Metro

Line (Wilson to Red Rock)"); RD 1.X., "NSP Community Information") (stating Xcel's intention to upgrade the existing 115kV line from its "Red Rock Substation to Wilson Substation," with the affected communities including "Bloomington, Inver Grove Heights, Mendota Heights, Newport, South St. Paul, and Sunfish Lake"); RD 1.Y., "Sunfish Lake Questions," SFL 000217 (explaining the need to upgrade the 115kV transmission line that "flows through the Red Rock to Rogers Lake to Wilson" as based on its projections of "fairly high load growth in the Southeast Metro area over the next 5-10 years"); RD 1.Z., Report from Commonwealth Associates, Inc. entitled "Independent Review of Double-Circuiting, Xcel Energy Red Rock - Wilson, 115kV Transmission Line," dated January 3, 2001 (emphasis added) (referencing project throughout as 14-mile line upgrade running from Red Rock substation to Wilson substation). The voltage and length of this line brings it within the definition of a "large energy facility" under MINN. STAT. § 216B.2421, subd. 2(3) (2002 Supp.). Xcel failed to comply with state law because it neither sought nor received a Certificate of Need from the MPUC. Therefore, the City appropriately identified the absence of a Certificate of Need as a threshold basis for denying Xcel's application.

2. Xcel must obtain this Certificate of Need before it obtains any other state or local approval.

As of August 1, 2001, a utility that wishes to site a transmission line with a capacity of 100kV or more must obtain a Route Permit from the MEQB.<sup>1</sup> But before it can do so, it must obtain

<sup>1</sup> Under the August 1 amendments to Minn. Stat. Ch. 116C, a utility may opt to seek local approval for the siting of a transmission line over obtaining a Route Permit from the MEQB. Minn. Stat. § 116C.576, subd. 1 (2002 Supp.). To invoke this option, however, the utility must notify the MEQB in writing of its decision within ten days of the utility's application to a local unit of government. MINN. STAT. § 116C.576, subd. 3. Xcel has not done so in this case; thus, it has not properly invoked the "local approval" option under MINN. STAT. § 116C.576. But even if it had, Xcel would still be required to obtain a Certificate of Need prior to seeking these local approvals. See MINN. STAT. § 216B.243, subd. 4 (2002 Supp.).

Xcel charges that the City has "fall [ed] to cite to where in its Ordinance or state statute Xcel Energy is required to procure a 'certificate of need' before pursuing its local zoning approval." Plaintiff's Brief, p. xxv. But MINN. STAT. § 216B.243, subd. 4 is clearly that statute. Without first obtaining a MPUC-issued Certificate of Need, Xcel is precluded from asking for other approvals from either the MEQB or local units of government for its proposed line. The City was merely following the requirements of state law when it noted these deficiencies in Xcel's proposal.

**B. Xcel Cannot Avoid The Certificate Of Need Requirement By Announcing A Self-Serving Revision Of The Project In The Middle Of The Approval Process.**

Despite Xcel's own description of the project in the CUP application and despite its historic representation of this project as an upgrade of the line between its Red Rock and Wilson substations, Xcel argues that MINN. STAT. § 216B.243, subd. 2 should not apply and that no MPUC Certificate of Need was required. This argument is based on Xcel's unilateral announcement in the midst of the hearing process that it had decided not to construct a segment of the power line. Specifically, Xcel now contends that "the project" is merely an upgrade running from the Red Rock to Rogers substations, a distance of 6.36 miles, less than the ten mile threshold necessitating application to the MPUC for a Certificate of Need.

Xcel did not submit revised application materials to Sunfish Lake. Rather, it simply announced the revision for the first time ever in the midst of the approval process. Prior to this surprising change of course, Xcel had consistently declared this upgrade project as running from its Red Rock substation in Newport to its Wilson substation in Bloomington, a length of at least 14 miles. See RD LA, 1.X, and 1.Z; RDs 48 and 53, Exhibit 4, MEQB Findings of Fact, Conclusions

and Order, dated November 19, 1999 (summarizing Xcel's project as a 14.7-mile 115kV transmission line connecting its Red Rock, Rogers and Wilson substations). In fact, the document on which Xcel relies to justify the need for its "project," the CAI Report, is based entirely on the premise that "the project" would be an upgrade of the line running between Newport and Bloomington. RD 12. Xcel's CUP Application Form, dated November 13, 2001 (stating "Project Name" as "SE Metro Line (Wilson to Red Rock)"); RD 1.Z., Report from Commonwealth Associates, Inc. entitled "Independent Review of Double-Circuiting," dated January 3, 2001 (referencing project throughout as 14-mile line upgrade running from Red Rock substation to Wilson substation); RD 48, MEQB Findings of Fact, Conclusions and Order, dated November 18, 1999, SFL 001857 (summarizing Xcel's project as a 14.7-mile 115kV transmission line connecting its Red Rock, Rogers and Wilson substations).

Xcel should not be permitted to evade the requirements of state law so casually. Xcel has represented in a number of contexts, including its CUP application to the City, that the contemplated project was an upgrade of the line between the Red Rock and Wilson substations. Xcel also made this representation to the MEQB. When endorsing municipal authority to require Xcel to obtain conditional use permits, the MEQB stated: "These permits will also help make certain that the project is constructed and operated in accordance with the project description provided to the MEOB for the EAW." RD 48, SFL 001857, para 1 (emphasis added). Xcel must be bound by those descriptions. If it wishes to revise a project, it should submit revised application materials. But more importantly, the Legislature determined that it was in the public interest for a state agency to confirm the need for transmission lines of a given size. This theme is not new; courts have recognized that prior legislation created a regulatory means to assure that utilities were not able to

dictate "need." No *Power Line, Inc. v. Minnesota Environmental Quality Council*, 262 N.W.2d 312, 321 (Minn. 1977)<sup>2</sup> Utilities cannot avoid statutory obligations by simply segmenting an entire transmission line project into individual units of less than ten miles in length. This is particularly true when, as here, the utility's own application and its historic representations of its intentions clearly contemplate a transmission line that is otherwise subject to the Certificate of Need requirement. The unilateral revisionism Xcel attempts here would result in eliminating the regulatory oversight that the Legislature has determined to be an essential component of the transmission line siting process.

**C.Xcel Cannot Claim An Exemption From the Certificate of Need Requirement Based On Applications Filed In Other Cities Before August 1, 2001.**

There are no exemptions from the Certificate of Need requirement under MINN. STAT. § 216B.243. If a utility wishes to site or to construct a "large energy facility," as defined under MIINN. STAT. § 216B.2421, subd. 2 after August 1 of last year, it must satisfy this requirement.

Xcel argues that, because it had applied for or received CUP approvals from other cities for this project prior to August 1, 2001, it does not have to obtain a Certificate of Need. But to make this argument, Xcel relies on an exemption in another, unrelated statute that has no application to the Certificate of Need requirement under MIINN. STAT. § 216B.243. MIINN. STAT. § 216B.2425 (2002 Supp.), a new law created by the Legislature last year, established a system under which utilities report transmission line projects to the MPUC, which may then certify the projects included on that list. MIINN. STAT. § 216B.2425, Subds. 2 and 3. Subdivision 6 of that statute states that

<sup>2</sup> "By enacting the PPSA, the Legislature sought to ensure that the future siting of power plants and transmission lines would be carried out in an orderly fashion, rather than haphazardly, and perhaps unnecessarily, at the whim of individual public utilities whose decisions might fail to consider or comport with the public interest." (Emphasis added.)

"[t]his section" does not apply to any transmission line proposal that had been approved by, or was pending before, a local unit of government, the MPUC or the MEQB on August 1, 2001. MINN. STAT. § 21613.2425, subd. 6 (emphasis added). "This section" is section 21613.2425, not section 21613.243 nor any other section of [MINN. STAT. Ch. 21613](#). If the Legislature had wanted to exempt transmission lines with applications pending before local units of government before August 1, 2001 from the Certificate of Need requirement, it would have included that exemption in its amendments to MINN. STAT. § 21613.243. That it did not proves that the Legislature intended to require that utilities obtain a Certificate of Need from the MPUC after August 1, 2001 prior to siting transmission lines of the type proposed by Xcel. The fact that Xcel may have had applications pending before other cities before August 1, 2001 may exempt it from having to comply with the transmission line project list requirements under MINN. STAT. § 21613.2425 as regards this project. It has no effect on Xcel's obligation to obtain a Certificate of Need from the MPUC before it seeks further approvals for this project.

**D. Xcel Cannot Excuse Its Non-Compliance With State Law By Contending That The City Did Not Point Out This Deficiency To Xcel Under MINN. STAT. § 15.99.**

Xcel argues that it is somehow excused from complying with a state-imposed obligation to secure a Certificate of Need because the City did not raise its noncompliance with state law within ten days of receiving the CUP application. Minnesota's "automatic approval" statute, MINN. STAT. § 15.99, cannot possibly be read so that actions of a city would negate the legislative mandate of state agencies to protect the public interest and confirm the need for transmission lines. *See No Power Line v. MEQC*, N.W.2d at 321 (stating that the Legislature sought to avoid leaving decisions about the necessity of power line transmission projects to the "whim of individual public utilities

whose decisions might fail to consider or comport with the public interest.")

Quite apart from the legislative policies which Xcel seeks to frustrate by advancing this argument, the plain terms of MINN. STAT. § 15.99, subd. 3(a) cannot be construed to relieve Xcel of its responsibility to follow state law in any event. Under the actual terms of the relevant sentence of section 15.99, the sole legal consequence of a failure to "send[] written notice within ten business days of receipt of the request telling the requester what information is missing" is to prevent the 60-day period from recommencing. MINN. STAT. § 15.99 subd. 3(a) in this case, however, is it immaterial whether the 60-day clock was reset, because the City denied the permit in a timely manner.

Xcel's argument disregards the purpose and the actual terms of section 15.99, subd. 3(a). "Subdivision 3(a), which details when extensions of time are permissible, specifies how to calculate the initial 60- day period." *American Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 313 (Minn. 2001). The Legislature chose the following words to accomplish that purpose:

The time limit in subdivision 2 begins upon the agency's receipt of a written request containing all information required by law or by a previously adopted rule, ordinance, or policy of the agency. If an agency receives a written request that does not contain all required information, the 60-day limit starts over only if the agency sends notice *within ten business days of receipt of the request telling the requester what information is missing.*

Xcel's interpretation would change the sole duty created by section 15.99-to act on permits within 60 days-by creating a second duty-to detect and disclose every flaw in the applicant's position within ten days. Had the Legislature so intended, it would have so provided. "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."

*American Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 313-14 (Minn. 2001) (vacating portion of Court of Appeals' interpretation of section 15.99 that limited a city's ability to extend the 60-day deadline to "extenuating circumstances," because the actual terms of section 15.99 merely required that the reasons for the extension be stated).

**E. Even If Xcel Did Not Require a Certificate of Need from the MPUC, it Still Did Not Meet its Burden to Prove the Need for this Line.**

Because Xcel denied that it was required to obtain a Certificate of Need for this project, the City also considered whether Xcel made the requisite showing of need for this line as part of its application.

Xcel points to the finding in the Commonwealth Associates, Inc. (CAI) Report, dated January 3, 2001, (RD 1.Z) as proving the need for its proposed project. That report, however, is based upon a review of the entire Red Rock to Wilson transmission line, a distance of at least 14 miles. *Id.* In recent months, however, Xcel has contradicted its previous representations of "the project" as running from the Red Rock to Wilson substations. Instead, Xcel now claims the segment running from the Red Rock to Rogers substations (a distance of only 6.36 miles) is a "stand alone" project that it is "Phase One" of the complete Red Rock-to-Wilson line. *See, e.g.*, RD 84, SFL 002265-66; 2345-52; RD 85, SFL 002387-90. In any case, it is apparent that Xcel has "segmented" this project in an effort to avoid having to obtain a Certificate of Need under MINN. STAT. § 21613.243, subd. 2.

Yet, as it has throughout this matter, Xcel undercuts one argument in its attempt to make another. Xcel relies on a review of the project by CAI that contemplated an upgrade along the entire Southeast Metro line, a distance of at least 14 miles. *See* RD 1.Z. When it changed the scope of its project, Xcel did not undertake another review of the revised project to ensure that the "need"

allegedly found in the 14-mile proposal necessarily existed in the downgraded 6.36-mile project. Furthermore, when Xcel modified the project, the City could no longer rely on Xcel's submissions, which were based on an entirely different set of circumstances and assumptions.

Xcel stated that a proposed new double-circuit transmission line between Red Rock and Wilson was needed to provide "double-contingency" protection in light of anticipated electric loads. RD 83, SFL 002113. Therefore, a central piece of evidence supporting Xcel's justification for building a new double-Circuited line was its forecast of load requirements. The only reference to forecasted load is Table 3-1 in the CAI report. RD 1.Z, SFL 000271. Xcel provided all data incorporated into Table 3-1; CAI assumed Xcel's forecast for peak loads. (Xcel submitted this same forecast to the MEQB.)

Table 3-1 purported to demonstrate that the load on the Red Rock to Wilson line would soon approach the critical load requiring double-contingency resources.

However, at the Sunfish Lake hearings, Xcel explained that it was eliminating the Rogers to Wilson segment of the Project because it had revised load projections in light of recent experience. When questioned at the January 16, 2002 Planning Commission meeting, an Xcel representative disavowed the forecast set forth in Table 3-1. RD 84, SFL 002344-2349 In fact, Xcel's counsel asserted that the hypothesis on which Table 3-1 was based is no longer utilized by Xcel in its current planning, that is, Xcel's assumptions have changed. *Id.*, SFL 002344.

These revelations created raised concerns among Sunfish Lake officials who had been studying the supporting materials submitted by Xcel with its application. *Id.*, SFL 002371. According to Xcel's application, these materials justified the need for a 14.7-mile double-circuited transmission line. Now, the assumptions on which the justifications of need for a 14.7-mile line

were abandoned. However, there were no new studies to justify the construction of a 6.36-mile line. More directly: the CAI report addressed a 14.7-mile project, not a 6.36-mile project. The CAI report was of little value once Xcel abandoned its original assumptions and revised its objectives.

The City Council would have breached its duty to engage in reasonable fact-finding had it granted Xcel's application for a conditional use permit in reliance on the application documents submitted by Xcel on November 13, 2001. Those application documents rested upon a crucial assumption that in fact changed from the time of Xcel's application in November 2001 to the time the City Council decided the application in February 2002. Specifically, Xcel had premised its "need" justification on a transmission line of 14.7 miles, then later substantially modified its proposal to a line of only 6.36 miles. Yet, all the analyses presented with Xcel's application still assume a transmission line of 14.7 miles. See RD 22, SFL 000880 (using entire stockyards to Wilson substation peak load information to justify "stand alone Phase One" project in document dated January 27, 2002). When Xcel itself cannot seem to settle on a definitive scope for its own project, the City is certainly justified in finding that Xcel has failed to establish "need" for its line, whatever size it turns out to be.

After the Planning Commission pointed out that there was no evidence supporting the need for a 6.36-mile line, Xcel shifted its position yet again to address this deficiency. Xcel's engineer, Rick Gonzalez, informed the City for the first time in the entire process that the critical load requiring double-circuiting was 511mw. However, in order to justify that the critical load would soon be reached, Xcel reverted to its original position that the project was actually 14 miles long, comprising all substations from Red Rock to Wilson. See RD 22, SFL 000880; RD 85, SFL 002391-94.

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fact-finding decision on reports whose conclusions rested on "a potentially inaccurate assumption"); Lettich's Case, 530 N.E.2d 159 (Mass. 1988) (reviewing board found that expert opinion based on facts not in evidence "must be rejected" and could not support decision); Burkhardt v. Harrod, 755 P.2d 759 (Wash. 1988) (Utter, J., concurring) (explaining that because experts had based opinions "on an inaccurate set of assumptions," their opinions are "therefore inadmissible").

In this case, Xcel's November 2001 application consisted of twenty-nine documents that rested on the fundamental assumption that the system contemplated was, in fact, at least 14 miles. But by the time the City was required to determine the application's fate, Xcel had rendered the application's supporting documents "valueless" by changing a key assumption of the application—the length of the transmission line. This court should follow the long history of affirming the fact-finder's rejection of conclusions that rest on changed or erroneous assumptions.

**F. The CAI Report Is Not Binding on the City and Carries No Legal Status.**

The City is not bound by the CAI report, as Petitioner suggests. The report was an unofficial document prepared to provide these mayors with information. Regardless of whether Petitioner refers to it as an "EIR," it has no legally significant status whatsoever. In addition, much of the CAI report was no longer relevant in any event, since it was based on withdrawn assumptions and abandoned projects.

**G. Xcel Cannot Evade Regulatory Review of "Need" by Invoking its Eminent Domain Authority or by Insisting on Deference to its "Business Judgment.**

Both at hearings and in its brief, Xcel asserts the power to determine the need for power lines without the oversight or involvement of the City of Sunfish Lake. Xcel bases this self-proclaimed



of these arguments can defeat the legislative intent to subject the need for power lines to government review.

Xcel is not exercising eminent domain authority here, so basing its argument for autonomy on this authority is quite strained. In any event, Xcel cites only one decision in support of this proposition, *Hubbard Broadcasting, Inc. v. City of Afton*, 323 N.W.2d 757 (Minn. 1982). Hubbard, does not resolve, or even focus on the authority of municipalities to regulate power line-related land use issues. Instead, the opinion makes a passing reference-without supporting authority-to the broad and unexplained proposition that the power of condemnation overrides local [zoning](#). *Id.* at 764. Such dicta cannot invalidate the specific statutory responsibilities which the Legislature has entrusted to local government to participate in the regulation of utilities' power line proposals. To the contrary, a specific statutory delegation of authority, MINN. STAT. § 216B, makes clear that a utility is not exempt from local regulation simply because it has eminent domain authority. See p. 8, *supra* (discussing the statutory responsibilities imposed on cities to regulate power lines). Indeed, the majority of jurisdictions that have considered the issues have implicitly or explicitly come to precisely this conclusion: local government retains its general police power and statutorily-conferred regulatory powers to address land use decisions involving utilities, unless these powers have been expressly preempted by state statute. See generally, Ziegler, Rathkopf's THE LAW OF ZONING AND PLANNING, §§ 76:9-76:10 (2001), *see also* *Porter v. Southwestern Public Service Co.*, 489 S.W.2d 361, 365 (Tex. App. 1973) ("The right of eminent domain ... does not exempt [the utility] from the zoning authority. The City, to which the state has specifically entrusted the police powers, has the power to inquire into the reasonableness of the manner by which eminent domain is exercised within its corporate limits.")

Likewise, where statutes have expressly made the need for power lines a matter of state and local regulation, Xcel cannot insist that government authorities defer to its own "business judgment" that a new line is necessary.

**III. THE CITY APPROPRIATELY IDENTIFIED THE RISKS ASSOCIATED WITH EMF EMISSIONS AS A BASIS FOR DENIAL OF THE APPLICATION.**

**A. The City Was Authorized and Obligated to Evaluate Health and Safety Risks Associated with Xcel's Proposal, Including the Impact of EMF Emissions.**

In Minnesota, cities have been entrusted with significant regulatory responsibilities with regard to the siting of transmission lines. See 9-10, *supra*. The City of Sunfish Lake was exercising that authority when evaluating Xcel's application for a CUP, seeking permission to construct new electric transmission facilities. Conditional use permits maybe denied "for reasons relating to public health, safety, and general welfare...." *C.R. Investments, Inc. v. Village of Shoreview*, 304 N.W.2d 320, 324 (Minn. 1981) (addressing special use permits).

Elected officials entrusted with protecting the health and safety of the public are not precluded from considering evidence of the health risks posed by EMF exposure because a causal relationship between EMF exposure and disease has not yet been conclusively established. To the contrary, scientific panels, health organizations, and regulatory authorities have determined that the scientific evidence of EMT-related health risks is sufficient to warrant taking steps to minimize human exposure to EMF emissions. In fact, industry and government have been encouraged to attempt to reduce EMT exposure when making power line siting decisions.

Both the Minnesota PUC and the NIEHS report cited extensively by Petitioner encourage industry and government to consider the risks of EMT in conjunction with power line siting decisions. When citizens comprising the Power Line Task Force tried to force Xcel to "shut down"

and remove the original single transmission line, the MPUC determined there was an insufficient scientific basis for such drastic action. However, the MPUC did not declare that industry or regulators should disregard the health risks posed by EMF. To the contrary, the MPUC recognized that the NIEHS report recommended "'passive' and 'inexpensive' regulatory measures to reduce EMF exposure, especially ... as new lines are sited." *In the Matter of the Complaint Regarding the Safety of Northern States Power Company's Transmission Lines in the Southeast Metro Area*, Docket No. E-002/C-99-902, 2000 WL 772434 at p. 6 (Minn. P.U.C.) (emphasis added). Such legitimate steps include siting power lines to reduce EMT exposures:

NIEHS suggests that the power industry continue its current practice of siting power lines to reduce exposures and continue to explore ways to reduce the creation of magnetic fields around transmission and distribution lines without creating new hazards.

[Id.](#) at p. 3, quoting National Institute of Environmental Health Sciences' "Report on Health Effects from Exposure to Power Line Frequency Electric and Magnetic Fields," pp. 37-38, May 4, 1999.

The application at issue-proposed construction of a new double-circuited power line with a capacity of 1600 amps per circuit-involves a power line siting decision. The City was therefore justified in considering evidence of the health risks posed by the proposed siting of the new line in the 50-foot corridor favored by Xcel.

**B. The Xcel Proposal Presented an Unusual Set of Factors Relevant to Health and Safety.**

Xcel's proposed transmission line project is distinctive, presenting several site-specific issues bearing on potential risk to health and safety.

1. A 50-foot transmission line corridor located in a residential area.

Xcel proposes to run a double-circuited transmission line capable of carrying 1600 amps of

current on each circuit along the fifty-foot wide easement corridor established in 1923 for only an existing single circuit. Evidence was presented during the hearings that if constructed, the double-circuited line would pass within 50 feet of 208 housing units (including apartments) located between South St. Paul and the Minnesota River. RD 53, Exhibit 5, SFL 001908-1911. Homes closest to the transmission line would face the greatest levels of exposure to EMF emissions. Greater distance from transmission lines causes a reduction in exposure levels to EMF emissions.

This reality has prompted government agencies, scientific panels, and health organizations to encourage industry to site new power lines in a manner reducing human exposure to EMT emissions. *See, e.g.* RD 44, World Health Organization fact sheet entitled, "Electromagnetic Fields and Public Health," dated October, 2001, SFL 001838 (recommending that power line siting decisions consider ways to reduce human exposure to extremely low frequency EMT).

Xcel has proposed to re-use the 50-foot corridor established for the existing line because it is Xcel's least expensive option. An Xcel representative explained that Xcel acquires 75 foot right-of-ways in agricultural areas. However, "when we get into the metropolitan area where land is very expensive ... we feel it's more appropriate to just minimize our right-of-way to acquire what is necessary and not go beyond that." RD 84, SFL 002264

Critics challenged whether Xcel sited and constructed 50-foot easements for any new power lines in urban, residential settings. Critics hoped to show that the use of a 50-foot transmission line corridor established in 1923 (before knowledge of and concerns regarding EMT emissions emerged) was unusual, and exposed residents to needless risks on the basis of avoiding land acquisition expenses.

Although Xcel denied these allegations, Xcel did not introduce evidence identifying any new

power lines capable of carrying 1600 amps newly sited on 50-foot corridors in urban settings. The absence of such evidence was effectively highlighted by critics of the proposal. See, e.g. RD 85, SFL 002407; RD 86, SFL 002507.

2. Three homes in closest proximity to the line.

Regardless of whether a 50-foot corridor is atypically narrow, there is no dispute that the proposed new line would pass within 50 feet of three homes in Sunfish Lake. RD 13.1, SFL 000730-31.

These distinctive circumstances were significant to Sunfish Lake officials evaluating the proposal. Rather than acting from a bias against power lines generally, officials focused on the site-specific health and safety issues before them. As Planning Commissioner Dr. Arne Svendsen observed at the conclusion of hearing presentations, " I believe the line is indeed unique due to homes and with the [50-foot] right of way." RD 85, SFL 002459.

3. The expansion intensification and perpetuation of an existing

The existing Xcel power line is designated as a nonconforming use under Sunfish Lake zoning ordinances. See Sunfish Lake Ordinances § 1215. The power to limit the expansion of a nonconforming use is inherent in a municipality's authority to broadly regulate zoning and land use planning in the public interest. The public policy behind that doctrine is to increase the likelihood that such uses will in time be eliminated due to obsolescence or destruction. See *Freeborn v. Claussen*, 295 Minn. 96, 203 N.W.2d 323, 325 (1972); see also, *Oswalt v. County of Ramsey*, 371 N.W.2d 241, 246 (Minn. Ct. App. 1985) pet for rev. denied (Minn. Jan. 13, 1989) (finding a court generally views a zoning ordinance in light of its underlying policy, which in this case was the

gradual elimination of nonconforming use through obsolescence, exhaustion or destruction). This in turn will lead to a uniform use of land consistent with the overall comprehensive zoning plan. *See Freeborn v. Claussen*, 295 Minn. 96, 203 N.W.2d 323 (1972); *see also Northgate Home, Inc. v. City of Dayton*, 126 F.3d 1095, 1100 (8th Cir., 1996).

The Sunfish Lake ordinances specifically advance these policy objectives with respect to nonconforming uses. The introductory "Purpose" provision of the Ordinance states: "Furthermore, it is the intent of this Section that all non-conformities shall eventually be brought into conformity." RD 92, section 1215.01, SFL 002882. These ordinances specifically prohibited nonconforming structures or uses from being "enlarged or reconstructed." *Id. at* section 1215.02.A. "Normal maintenance" and "incidental alterations" are permitted, provided they "do not physically extend or intensify the nonconformity." *Id. at* section 1215.02.B. These provisions are consistent with MINN. STAT. § 462.357 subd. 1e (2001) (permitting repair or maintenance of nonconforming structures or uses).

Xcel's proposal to remove all existing structures, including wood towers, and construct steel towers supported by concrete foundations is neither "normal maintenance" nor "incidental alterations." The complete tearing down of a structure does not qualify as repair, maintenance, or even alteration. *See Industrial Communications and Electronics, Inc. v. Town of Falmouth, No.s Civ. 98-397-P-H, Civ 99-96-P-H, 2000 WL 761002, (D. Me. 2000)* (application to tear down four existing towers and replace with a single tower and application to build a replacement tower for damaged tower were both considered replacements and not "structural alterations"); *Aegerter v. City of Delafield Wisconsin*, 174 F.3d. 886 (7th Cir. 1999) (City could deny the replacement of a cell tower with another taller tower where the ordinance only allowed for repairs or alterations). To the

contrary, the proposed taller steel towers "physically extend the nonconformity," as per Sunfish Lake Ordinances § 1215.02.13. Likewise, the proposed double-circuited wires capable of carrying 1600 amps of current in each circuit "intensif[ies] the nonconformity." *Id.*

The City Council legitimately questioned the justifications for a proposal which seeks to perpetuate, expand and intensify a nonconforming use and structures. Indeed, if a transmission line of this magnitude is constructed, it will have a profound and permanent impact on this community.

**C. The City's Determination That Xcel's Proposal Posed Unjustified and Avoidable Health Risks Was Based on Credible Scientific Evidence Presented by Qualified Witnesses.**

The City determined that the construction of the proposed double-circuited transmission line in the existing 50-foot corridor would pose an unjustified health risk. The City found that the health risk was unjustified because it was avoidable through prudent design and planning. If the transmission lines were sited so as to allow for greater clearance between the wires and adjoining homes, concerns about EMF exposure would be significantly reduced if not eliminated entirely. See, e.g. RD 1.Z, Table 3-5, SFL 000275; RD 26.13, SFL 000911; RD 26.1), SFL 000939.

The City based these Findings on credible evidence presented by qualified experts. RD 26.13, SFL 000911; RD 26.13, SFL 000939. These experts testified that the proposed proximity of a double-circuited transmission line (capable of carrying 1600 amps of current per circuit) to adjoining homes posed health risks that were both real and avoidable. RD 26.13, SFL 000905-913; RD 26.1), SFL 000938-000945. These experts based their testimony on scientific studies, including recently published research.

The City did not base its decision on the speculative observations of unqualified laypersons. Accordingly, the cases to the effect cited by Petitioner are wholly inapposite.

Xcel's argument that the City may not deny its permit because there is not scientific certainty that there is a causal relationship between EMF exposure and human illness cannot be supported. See Petitioner's Brief, p. 17 (citing City's Finding No. 60). The City's concern about the effects of EMF exposure is amply supported by evidence that there is a direct correlation between EMF exposure and a variety of human illnesses. An agency determination that a substance is a danger to human health is sufficient if it is supported by a body of "reputable scientific thought." *See Ascaro, Inc. v. Occupational Safety and Health Admin.*, 746 F.2d 483, 490 (9th Cir.1984) (quoting *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607,642 (1980)(plurality)). To require scientific certainty holds an agency to too high a standard. *See id.* *See also American Federation of Labor and Congress of Industrial Orgs.*, 965 F.2d 962, 973 (11th Cir. 1992). It is better for an agency to err on the side of overprotection than underprotection, see *Ascaro*, 746 F.2d at 490, because to force an agency to wait until it has irrefutable proof that the people it is charged to protect are dying from exposure to a certain substance makes little sense.

**D. Where Evaluating Conflicting Evidence, City Officials Legitimately Accorded Greater Weight to the Evidence Establishing That the Proposal Posed Unjustified and Avoidable Health Risks.**

1. Decision-makers could justifiably accord more weight to the evidence favoring denial.

The Petitioner introduced evidence in support of the safety of its proposed transmission lines. Where there is conflicting testimony and evidence, Petitioner bears the burden of persuasion that it met all criteria for a conditional use permit. Credibility determinations and the weight to be given to the evidence are matters solely left to the municipal authority in its role as fact-finder. *See Accelerated Enterprises, Inc. v. The Hazle Township Zoning Hearing Board, 773 A.2d 824,826 (Pa. Commw. Ct. 2001).* *See also Heritage Building Group Inc. v. Bedminster Township Board of Supervisors, 742 A.2d 708, 710 (Pa. Commw.1999)* (A zoning hearing board, as the fact-finder, has the power to reject even uncontradicted testimony if the board finds the testimony to be lacking in credibility.)

The credibility of Xcel representatives regarding the health risks posed by this proposal was called into serious question. For example, some Xcel representatives acknowledged the legitimacy of concerns about the potential EMF-related health risks at the same time that an Xcel representative wrote a letter stating EMF emissions from power lines posed no health risks to persons living nearby. RD 85, SFL 002400.

The City Council could also determine that greater weight should be accorded to the experts offered by opponents of the proposal. The experts offered by opponents of the proposals, Dr. Magda Havas and Dr. Martin Blank, are scientists who focus their professional research on the analysis of the effects of EMT exposure on human beings. RD 26.C, SFL 000914-937; RD 26.E, SFL

000946-955. On the other hand the "experts" offered by Xcel could legitimately be found to be less qualified, less knowledgeable, and less forthcoming than Drs. Havas and Blank.

Finally, the consultant advising the "Steering Committee," CAI, did not hold itself out as experts on the health effects of particular levels of EMT exposures. The CAI report focused almost exclusively on addressing issues related to system design.

2. The significance of Xcel's contention that its proposal "would effectively reduce levels of EMF" was convincingly challenged: Xcel's proposal presented risks that citizens would be exposed to levels of EMF which still threaten health and saw.

In its brief, and throughout the hearing process, Xcel emphasized that its double-circuit proposal would actually reduce levels of EMF exposure by 50 percent. Petitioner's Brief, pp. xi-xii; RD 83, SFL 002115; RD 85, SFL 002383. By so doing, Xcel argued, it is furthering the policies advocated by scientific studies and health organizations to make transmission line design and routing decisions in a manner which minimizes human exposures to EMF emissions. RD 83, SFL 002151: "We're talking about reducing the magnetic fields. If you don't know if there's an effect, you don't put people unnecessarily in large magnetic fields.") However, Xcel's representations that the new project would provide adequate margins of safety to neighbors was effectively challenged during the hearings.

The proposed lines are designed to carry 1600 amps of current per circuit. Electromagnetic fields (EMFs) are generated by current transmitted through the line. The more current (measured in amps) transmitted, the greater the levels of EMT emissions. See, e.g., RD 1.Z, SFL 000375, Table 3-5.

Xcel indicated that each of the new lines would actually carry only 400 amps when constructed, thereby reducing EMT emissions. However, Xcel witnesses conceded that future demand for electricity might require these circuits to carry more electric current (i.e. increased amperage) than required at the outset of service. RD 86, SFL 002548. The transmission of greater levels of electric current would result in increased EMF emissions. Accordingly, opponents of the line urged decisionmakers to disregard the initial levels of "reductions" of EMF as short-term, and to consider the potential maximum EMF exposures threatened by these lines if the lines are operated to transmit increasingly higher levels of current. *See*, e.g. RD 85, SFL 002419; RD 86, SFL 002507. Information submitted by CAI and Xcel themselves prompted concerns about increased amperages generating increased levels of EMF exposure. RD 85, SFL 002390 . Xcel discounted the value or accuracy of the charts projecting electric demand and load. *Id.*, SFL 002391. Significantly, Xcel did not promise to operate the line so that the level EMT reduction achieved at the outset of operation would be maintained into the future.

A resident with an engineering background appropriately questioned the significance of Xcel's "50% reduction" statements in an especially compelling manner:

Many times Xcel presents that EMF will be cut in half which is true for the year 2001, but over time, the EMF will continue to grow as the load on the system grows, and EMF will climb to a higher and higher number. They've characterized this in the past, because I've shown this curve in the past, as being extrapolated out into infinity, but in actuality, it's only extrapolated out as far as the current readings. So I don't think it's unreasonable to look out to 1,500 amps because that's what the line will be rated at.

It shows that at some point in the future as the load in the southeast metro grows, EMFs will climb to some pretty high numbers again. So don't think of your decision as cutting the EMFs in half because that's only what's going to happen next year if the line goes in.

Think about the EMT or the lifetime of the installation which our current installation has been in there 70 some years, so this is not a short-term decision. This is a long-term decision and the EMFs will continue to grow.

RD 86, SFL 002560-002561

**E. The City's Authority To Consider The EMF Effects Of The Proposed Line Is Preempted Only If The August 1, 2001 Amendments To The PUC and EQB Statutes Are Found To Apply Here.**

State regulations may only preempt local regulations when the former sufficiently "occupies the [regulatory] field" in question. *Mangold Midwest Co. v. Village of Richfield*, 143 N.W.2d 813, 819 (Minn. 1966). Specifically, preemption may occur "when the Legislature has fully and completely covered the subject matter, clearly indicated the subject matter is solely of state concern, or the subject matter itself is of such a nature that local regulation would have unreasonably adverse effects on the general populace. *Hannan v. City of Minneapolis*, 623 N.W.2d 281, 285 (Minn. Ct. App. 2001).

Before August 1, 2001, state approval authority, including the ability to make a determination as to the risks to human health and the environment posed by a proposed line, did not preempt local approval authority over transmission lines of this size. The Legislature did not "fully and completely cover the subject matter" as it specifically limited the authority of the PUC and the EQB to those transmission lines with 200kV or more capacity. MINN. STAT. § 216.B.2421, subd. 2(b) (1992) (defining "large-energy facility" to include high voltage transmission lines with capacities of 200kV or more); MINN. STAT. § 110C.52, subd. 4 (1997) (defining "high voltage transmission line" as one with 200 kV or more capacity). This limitation brought with it a limitation on their ability to consider the human health and environmental risks posed by a proposed line with less than 200kV

capacity.' The PUC was responsible for the preparation of an "Environmental Report" for each proposed "high voltage transmission line" (200kV or more capacity) at the Certificate of Need stage. Minn. R. 4410.7500, subp. 1 (2001). This Report was to include a "general evaluation of \*\*\* the environmental impacts, of the proposal and alternatives." Minn. R. 4410.7500, subp. 3.c. (2001).

The EQB's authority to consider environmental and health effects was more specific. When considering a Route Permit application for a "high voltage transmission line" (again, 200 KV or more capacity), the EQB was required to consider, among other things:

Evaluation of research and investigations relating to the effects on land, water and air resources of \*\*\* high voltage transmission line routes and the effects of water and air discharges and electric fields resulting from such facilities on public health and welfare, vegetation, animals, materials and aesthetic values.

MINN. STAT. § 116C.57, subd. 4(2) (1997).

Nor did the Legislature "clearly indicate" that the subject matter was "solely of state concern." To the contrary, it preserved local authority over transmission lines in MINN. STAT. § 216B.36. For those lines with less than 200kV capacity, the combination of these two factors meant that local units of government were the regulatory authority regarding those lines.

Finally, even the state agencies themselves in this particular case acknowledged that local regulation would not only not have an "unreasonably adverse effect on the general populace," such

' Petitioner attempts in its brief to argue the preemptive effect of Minnesota Department of Health proclamations regarding EMF on the City in this context. In fact, the Department has absolutely no role in the transmission line approval process, either before or after August 1, 2001.

The only time the EQB might get involved with the siting of a transmission line of less the 200kV capacity before August 1, 2001 was when, as here, third parties would petition the EQB to order an EAW under MINN. R. 4410.1100 or the utility could volunteer to do an EAW under Minn. R. 4410.1000, subp. 3.D.

local regulation was, to the contrary, necessary and appropriate. In the Matter of the Southeast Metro Line, 2000 WL 772434, at 5 (acknowledging that, while it did not have approval authority over the project, "five of the six municipalities through which the new line will pass" did); RD 48 (EQB Findings) Conclusion No. 6, SFL 001863, (Acknowledging authority of five of the six municipalities to receive a CUP and to "include mitigation provision in the permits if they approve the project").

After August 1, 2001, however, the authority of the PUC and the EQB was expanded to include transmission lines of a certain capacity (100kV or more) and in the case of the PUC, of a certain length (more than 10 miles in Minnesota). By expanding the authority of these agencies, the Legislature has arguably "fully and completely covered" the "subject" of transmission lines of 100kV or more capacity. Included in this expanded authority is the above-referenced authority to consider the environmental and human health effects of proposed transmission lines. In fact, the EQB is now required to prepare an Environmental Impact Statement (EIS) for each proposed transmission line with a capacity of 100kV or more. MINN. STAT. § 116C.57, subd. 2c (2002 Supp.).

Only one version of the law can apply here for all issues: the law as it existed before August 1, 2001, and the law as it exists after that date. If the pre-August 1 law applies here, Xcel is not required to obtain either a Certificate of Need from the PUC a Route Permit from the EQB. However, the City would maintain all of its pre-August 1 approval authority over the proposed line, which includes the authority to make judgments as to the health risks posed by the line. Conversely, If the post-August 1 law applies, the PUC's and the EQB's respective authority to consider health risks arguably preempts the authority of local governments to consider those issues themselves. But Xcel also would be required to obtain a Certificate of Need and a Route Permit from those agencies.

Xcel cannot have it both ways. It cannot argue that the pre-August version of the law applies as regards the Certificate of Need and Route Permit, so as to avoid those requirements, and then argue post-August-type preemption in the case of the City's EMT determinations, in an effort to strip the City of its ability to make that determination itself.

Xcel's real goal here is obvious. It wants to deny the ability of both the City and the state agencies to second guess Xcel's own determinations as to EMT risks and the need for its proposed line. But the law does not allow it such unfettered power. Regardless of whether the pre- or the post-August body of law is applied, Xcel must justify its proposal to a regulatory authority. It cannot, contrary to what it would like this Court to believe, simply decide for itself what it can do and how it can do it.

**F. State Agencies Have Not Issued "Conclusive" Rulings Which Foreclose Cities from Addressing EMF-Related.**

The state agencies which may have had occasion to consider EMT-related matters have not issued any preclusive or conclusive rulings preventing cities from addressing site-specific land use controls which minimize exposure to EMT emissions. To the contrary, state agencies have encouraged local consideration of health and safety issues in specific land use contexts. *See supra*. State agencies have also recognized that scientific knowledge is evolving rapidly, so re-examination of such issues is not foreclosed. *In the Matter of the Complaint Regarding the Safety of Northern States Power Company's Transmission Lines in the Southeast Metro Area*, Docket No. E-002/C-99-902, 2000 WL 772434, p. 5 (Minn. P.U.C.). The City is under no obligation to ignore new scientific evidence. In fact, the City considered recent scientific studies not addressed in prior state agency proceedings. *See, e.g.* RD 27, "Recent Government-Sponsored Studies Conducted in

**G. Petitioner's Suggestion That an "Incremental Harm" Standard Should Have Been Adopted by the City (And Applied by this Court) Must Be Rejected.**

The "incremental harm" standard of administrative review proposed by Petitioner is not the law in Minnesota, is bad public policy, and would not alter the outcome even if applied. First, limiting the evaluation of the health and safety impact of a new transmission line to its "incremental harm" over and above the preexisting dangers to which residents are presently exposed is not the governing law in Minnesota. Petitioner adopts this formula from the approach taken by one administrative law judge addressing a specific challenge to a rural power line. No Minnesota court has ever endorsed Petitioner's "incremental harm" limitation, and Petitioner cites no judicial decision from any jurisdiction to support this version of the law.

Second, the adoption of an incremental harm limitation on the review of the health and safety implications of new power lines would be bad policy. Using "incremental harm" as a shield, an applicant could disregard modern health information and design or siting innovations which would legitimately influence typical new power line decisions because certain residents have historically been exposed to risks and dangers reflecting the scientific unsophistication of an earlier era. Petitioner cannot set such low standards for proposals for new power lines.

Third, the harm threatened by the construction of the new transmission line would not be "incremental" in any event. The Petitioner intends to build a double-circuited line capable of carrying 1600 amps of current per circuit. If constructed, (and especially as the line is operated to service increasing loads in the future) residents would be exposed to levels of EMF emissions which authorities warn must be avoided. And Xcel has not promised to place operational restrictions on

their use of these proposed lines to transmit greater levels of current over time. Additionally, the proposed towers will be constructed 25 to 41 feet higher than the existing structures. This is hardly an "incremental" change in appearance to residents who previously could not see line from their property, and whose property values would be largely unaffected by the preexisting line.

**IV. THE COUNCIL'S FINDING THAT XCEL'S PROPOSAL WOULD ADVERSELY AFFECT REAL ESTATE VALUES IS SUPPORTED BY THE RECORD.**

The City Council received evidence that the construction of new, taller towers in conjunction with the double-wired transmission lines would have an adverse impact on property values. See, e.g., RD 34, "Property Values" except from Arrowhead EIS, SFL 001791, 93; RD 55, Realter Letters, SFL 001960-62. Evidence supporting the Finding that the proposed project would adversely affect real estate values appears at RD 86, SFL 002605-08. In addition, the City Council received evidence at the public hearings from realtors attesting to the likely decline in property values. RD 85, SFL 002380. Individuals testified about their own property values as well. *Id.*, SFL 002429. (Under Minnesota law, owners may testify about their own real estate values and circumstances bearing on real estate values. *Lehman v. Hansford Pontiac Co.*, 74 N.W.2d 305, 309 (Minn. 1955). The diminution in property values reflected both aesthetic considerations, and fears of health risks associated with EMT. Other courts have recognized that property values are legitimately reduced by fears of health consequences of living in the vicinity of high voltage transmission lines. See e.g. *Criscuola v. Port Authority of New York*, 621 N.E.2d 1195, 1196-7 (N.Y. 1993).

Petitioner cites evidence to the contrary. However, where a city council receives conflicting evidence regarding the impact of proposed development on property values, there is a factual bases supporting the Council's legally sufficient determination that the project would adversely affect

property values. *Hubbard Broadcasting, Inc. v. City of Afton*, 323 N.W.2d 757, 764 (Minn. 1982) ("Here, there was conflicting testimony [from real estate experts] .... Such testimony provides a factual basis" that the proposal would adversely impact property values.)

V. THE CITY FOLLOWED PROCEDURES ESTABLISHED BY ITS OWN ORDINANCES AND ITS EFFORTS TO PROPOSE ALTERNATE ROUTES WAS FRUSTRATED BY XCEL.

**A. City Ordinances Authorize the City Council to Approve or Deny CUP Applications for Transmission Lines.**

Xcel's suggestion that city procedures encouraging the recommendation of alternate routes somehow preclude the City from exercising quasi judicial authority to act on CUP applications is absurd. The CUP process set forth in the ordinances would be meaningless unless the application were subject to review and action.

**B. Xcel Opposed Consideration of Any Alternate Route Other than its Proposed Route.**

The consideration of alternative routes was complicated and constrained by the position taken by Xcel that it was absolutely entitled to build the new transmission lines within the corridor established for existing line. Xcel insisted that it would only consider alternate routes if the City or (the ratepayers living within the City) agreed to pay for all increased costs associated with alternate proposals. Most of these additional costs were associated with the acquisition of rights-of-way for new routes. RD 84, SFL 002242-43, 2264-65; RD 85, 002402-03. Furthermore, Xcel declared that the City could not delay or condition approval of any route upon a subsequent decision by the PUC regarding whether costs might to be spread systemwide or borne exclusively by Sunfish Lake or its ratepayers. Xcel would view any such delay as a violation of Minnesota's "automatic approval" Statute, MINN. STAT. § 15.99, requiring final action to be taken on applications within 60 days (120

days with extension). Xcel had sued South St. Paul on these grounds for conditioning its approval of the proposed line on a subsequent decision by the PUC that the costs of burying the line be absorbed systemwide.

Members of the Planning Commission and the public also expressed disappointment that Xcel refused to consider any alternate approaches, and that there was no "give and take." RD 86, SFL 002610-12. One Planning Commissioner observed:

Over the past two to three years that we've been looking at this project, I had hoped for some type of compromise from the applicant over time, but it seems that the opposite has occurred and now I have a feeling that this is being forced on the community involved.

RD 85, SFL 002459.

#### **VI. THE CITY DID NOT "EFFECTIVELY BAR" THE CONSTRUCTION OF TRANSMISSION LINES WITHIN ITS COMMUNITY.**

The Petitioner mischaracterizes the City's denial of the CUP application as effectively prohibiting new transmission lines in Sunfish Lake. The City has not foreclosed re-application. All the City has done is reject one Xcel proposal. Xcel remains free to apply again with a new proposal. Xcel may submit new applications for transmission line in Sunfish Lake in accordance with the new regulatory scheme prescribed by the Legislature. Moreover, Xcel's new proposal may more accurately define the project as a 6.36-mile long, double-circuited transmission line in the present easement corridor, supported by evidence addressing that project. Alternatively, Xcel is free to advance a proposal to construct a larger or shorter line, or a line along a different route.

Not only does the City's denial of the CUP application not prevent new applications by Xcel, the City's Findings do not have preclusive effect. Xcel may assemble new information supporting its future proposals, develop a more effective or persuasive presentation, or highlight new or

evolving scientific insights or developments relevant to the health and safety impact of the proposed line.

It is Xcel, and not the City, which has taken an inflexible position regarding power line siting options. Xcel asserts an absolute right to build the new double-circuited line in the existing corridor. Xcel refuses to consider other options-such as the utilization of highway right of way for this new project. Xcel insists that if the City seeks to explore any alternate route, the City must bear the increased expenses of executing those options.

City officials publicly invited Xcel to re-submit revised proposals. Dr. Arne Svendsen, a member of the Planning Commission, stated:

As a resident, planning commissioner and physician, I cannot vote for approval of this CUP with its potential risks. I would hope that the NSP planners, designers and engineers would return to the drawing board without economic constraints and utilize their training, ingenuity and creativity to design the regional electrical infrastructure consistent with concepts of prudent avoidance, industrial corridors and safety and for the long-term benefits of this area. Thank you.

RD 85, SFL 002460. Xcel's argument that the City acted "unreasonably" because the denial of the CUP applications "bars" new transmission lines in the City must fail.

Moreover, should Xcel elect to submit a new application, there will be no question that both the EQB and PUC must play an expanded regulatory role as authorized by the 2001 legislative amendments. Indeed, this case is likely to be the last arising from the era of predominant local regulation of transmission lines. The 2001 amendments create a new balance of regulatory

The authorities cited by Petitioner provide scant support for this argument in any event. The out-of-state case cited by Xcel stands for the proposition that "privately owned utilities should be subject to local zoning restrictions." *Potomac Edison Co. v. Jefferson County Planning & Zoning Comm.*, 512 S.E.2d 576, 581 (W.Va. 1998). That court rejected the same position Xcel asserts here, namely, that city zoning regulations are invalidated by the superior rights and responsibilities of utilities.

responsibilities conferring more authority on the PUC and the EQB. *See pp 9-11*. The PUC must play the preeminent role in future evaluations of need for the line. If Xcel submits a new application, the EQB will play a more significant role in considering routing issues. The City recognizes that should Xcel reapply in the future, its municipal areas of regulatory responsibility will have diminished.

However, for the application at issue, the Sunfish Lake City Council discharged all responsibilities delegated to it by state statutes then in force. The City reviewed and acted upon Xcel's application in accordance with fair procedures set forth in its ordinances.

VII. PETITIONER IS NOT ENTITLED TO "AUTOMATIC APPROVAL" OF PROPOSED SETBACK FEATURES, NOR IS PETITIONER ENTITLED TO A VARIANCE FROM EXISTING SETBACK REQUIREMENTS.

The City properly denied Petitioner's variance request as moot, after the denial of the CUP Petition. The Court need not address the merits of issues that have appropriately been denied as moot. Nevertheless, Xcel suggests it would be entitled to automatic approval of its request as constituting a setback "improvement." Petitioner's Brief, p. xii. The Xcel proposal cannot be characterized as an "improvement," nor does it "lessen" the nonconformity inherent in its present land use. To the contrary, Xcel seeks to construct a new power line that expands, intensifies, and perpetuates the present nonconforming use. This point is fully discussed at p. 37-39.

Similarly, in the context of a proposal to expand a nonconforming use, an applicant cannot argue that it is nonetheless entitled to a variance on the grounds of "undue hardship." This is especially so where the threshold denial of the CUP application addressed the same type of land use issues (safety and adequacy of setbacks and clearances) for which a "minor variance" is sought.

Accordingly, the Petitioner's request for a "minor variance" was properly denied as "moot," and Xcel is not entitled to "automatic approval" of any aspect of the proposal.

### **VIII. CITY OFFICIALS DISCHARGED DUTIES IMPOSED UPON THEM CONSCIENTIOUSLY AND IN ACCORDANCE WITH THE LAW.**

Xcel does not merely challenge the City's assessment of evidence and testimony. Xcel accuses Sunfish Lake city officials of "blatant political expediency." Petitioner's Brief, p. 26. This statement goes beyond advocacy and into the realm of slander. It must be addressed with references to a record which contradicts such rhetoric.

First, Xcel distorts the transcripts it purports to "quote." Council member Tim Stoddard did not say (as "quoted" by Xcel): "I don't think we got a chance in hell of winning." *Id.* The mis-cited excerpt omits both the beginning and the ending of Mr. Stoddard's statement. The actual, transcribed sentence did not end with a period after "winning." Instead, Council member Stoddard continued, ". . . but we have a chance as slim as it might be." RD 87, SFL 002778. (Moreover, if the improperly excerpted quotation is placed in the complete sentence, the statement is further qualified.)

The citizens who testified, and the volunteer public officials who heard them, focused on the record, not rhetoric. Each Council member received a personal version of the entire record for his or her ongoing review. Daily transcripts were made available to further focus discussion on relevant issues.

Some citizens brought their professional expertise to bear on the evidence. It is unwarranted and condescending for Xcel to disparage the good faith or sophistication of decisionmakers in Sunfish Lake. Indeed, there were several physicians on the Planning Commission and City Council.

Doctors, engineers, attorneys, and real estate professionals from the community testified. One physician testified about his professional experience using EMF to modify cell behavior in medical settings. RD 86, SFL 002574. Another physician presented his evaluation of the medical literature in the record. Id., SFL 002549. The record reflects that discussion addressed the evidence, concentrating on legitimate bases for approval or denial of the Petition.

Xcel's threat to sue if rebuffed undoubtedly added stress to the proceedings. Public officials willing to stick by their principles and call it like they see it-even while executives and lawyers from Xcel tell them they will lose in court-are not engaging in acts of "expediency." They are modeling civic courage of the highest order at a local level.

In the end, the transcripts of the public hearing and the Findings of Fact present the best evidence that Planning Commission and City Council members were diligent and focused on relevant issues, fair to the applicant and its critics alike, and made a decision amply supported by legally sufficient facts in the record.

### **CONCLUSION**

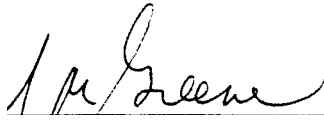
The denial of Xcel's application for a conditional use permit to build a double-circuited transmission line was properly denied. The action of the Sunfish Lake City Council was based upon legally sufficient facts in the record.

The issues requiring City Council evaluation were vigorously contested. The applicant and critics of the line each mustered significant evidence to influence Council members. Ultimately, four out of five Council members decided that the application before them should be denied. This decision may be controversial. But mere controversy is insufficient to warrant judicial reversal of the judgment rendered by citizen-officials who heard hours and hours of testimony and studied

volumes of evidence. This decision may also be disappointing and frustrating to Xcel. Obviously, Xcel has legitimate responsibilities to both the public (to provide electricity) and to its stockholders (for returns on their investments). However, Xcel must respect the prospect that its applications may be denied as well as approved if the authority to regulate utilities in the public interest is to have any meaning. Where there is evidence in the record supporting legal bases for the decision reached, Xcel may not ask this Court to substitute its own judgment of the evidence for the judgment of quasi judicial decisionmakers.

Accordingly, the City respectfully requests this Court to grant its cross-motion for summary judgment dismissing all of Petitioner's claims with prejudice discharge Petitioner's writ,' and denying Petitioner's motion for summary judgment.

Although the arguments made above amply support the City's actions in this case on its merits, the City preserves for future proceedings, if necessary, the additional argument that declaratory judgment, rather than mandamus, is the proper procedure for challenging a city's discretionary, quasi judicial decisions. The City acknowledges precedent exists for addressing discretionary land-use decisions in the context of mandamus proceedings. *Haen v. Renville County Bd. of Comm'rs*, 495 N.W.2d 466, 469 (Minn. Ct. App. 1993) (citing *McIntosh v. Davis*, 441 N.W.2d 115, 118 (Minn. 1989)). But the express language of the mandamus statute itself, as well as another line of cases, suggest mandamus should only be available where a city lacks discretion and has a clear duty to take a ministerial action. See MINN. STAT. § 586.01 (providing that mandamus "cannot control judicial discretion"); *Marine v. Whipple*, 104 N.W.2d 657, 659 (Minn. 1960) (holding that mandamus could issue "to compel the performance of a public duty which the law clearly imposed, but not to interfere with the exercise of discretion by public officers") (emphasis added); *State ex rel. Spurck v. Civil Serv. Bd.*, 42 N.W.2d 729, 730 (Minn. 1950) (calling it "settled law that mandamus will not lie to direct the manner in which administrative discretion will be exercised"); *Silver Bay Area Citizens v. Lake Superior Sch. Dist. No. 381*, 448 N.W.2d 92, 96 (Minn. Ct. App. 1990) (stating mandamus is an "extraordinary remedy" that is "not properly issued when the official has discretion with respect to the act in question"); *Tyo v. Ilse*, 380 N.W.2d 895, 897 (Minn. Ct. App. 1986) (same).

A handwritten signature in cursive script, appearing to read "C. M. Green", written in black ink on a white background.

By

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