

STATE OF MINNESOTA
COUNTY OF DAKOTA

DISTRICT COURT
FIFTH JUDICIAL DISTRICT
CASE TYPE: 14. Other Civil

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

Plaintiff,

Court File No.

vs.

Paul and Shannon Burke; Roger and Ingrid Conant; Stephen A. and Andrea C. McCue; Edward and Jacqueline Paster; Michael and Melissa Prueher; Michael and Joanne Silverman; David and Wendy Smith; Arnulf and Denis Svendsen; and Dennis and Jacqueline Turso,

Defendants.

**COMPLAINT FOR DECLARATORY,
INJUNCTIVE, AND OTHER RELIEF**

Plaintiff Northern States Power Company, a Minnesota corporation, d/b/a Xcel Energy ("NSP or Xcel Energy"), for its Complaint for Declaratory and Injunctive Relief, states as follows:

INTRODUCTION

I. This is an action for declaratory and temporary, preliminary and permanent injunctive relief arising under Minn. Stat. § 555.01 *et seq.* and Minn. R. Civ. P. 65.01-.02, respectively. Xcel Energy owns, operates, and maintains a transmission line for the purpose of transmitting electric energy in the southeast metro area (Southeast Metro). A portion of this line, which has been in constant use for over 75 years, traverses the northern shore of Sunfish Lake and is within the City of Sunfish Lake. The transmission line is located in a 50-foot wide easement that traverses defendants' parcels (excepting the McCue parcel) all of which are within the City of Sunfish Lake.

2. In 1923 Northern States Power Company (NSP) obtained a 50-foot utility right-of-way over lands that now include the Svendsen, Conant, Prueher and other parcels in an easement grant from Mary and Ferdinand Lick (Lick Easement). Along with the 50-foot utility right-of-way, Xcel Energy obtained the right to enter upon the entire Lick farm to reach the transmission line.

3. NSP obtained similar utility right-of-way and access easements over what is now the Paster, Smith, Silverman, Tursso, and Burke parcels through a 1928 condemnation decree (Condemnation Decree).

4. Over the past 75 years Xcel Energy has exercised its periodic need to enter upon all of the parcels described in the Condemnation Decree, including the Paster, Smith, Silverman, Tursso, Burke, and other parcels as well as all of the parcels described in the Lick Easement, including the Svendsen, Conant, McCue, Prueher, and other parcels for constructing, maintaining, and improving the transmission line as well as for trimming and removing trees.

5. Xcel Energy is upgrading from single-circuit to double-circuit the 6.36 mile phase I segment of the Southeast Metro transmission line (Phase I Upgrade) to meet electrical reliability needs created by business and residential development within the Southeast Metro area. Xcel Energy has obtained local zoning and regulation approvals for the Phase I Upgrade. Construction on the defendants' parcels will commence in January 2004. The winter construction start is necessary to minimize damage to the property. Frozen ground is able to support the heavy trucks and equipment required to construct the transmission poles. Despite repeated attempts by Xcel Energy to work with defendants to minimize the impact from the transmission line construction (and pay for any damage), defendants have refused to allow Xcel

Energy to exercise its right to enter upon Sunfish Lane and their parcels to reach the transmission line in order to construct the Phase I Upgrade.

6. Xcel Energy brings this action to declare its rights under the 1923 Lick Easement and 1928 Condemnation Decree and to enjoin defendants from interfering with Xcel Energy's right to enter upon Sunfish Lane and their parcels for the purpose of exercising its easement rights.

THE PARTIES AND PARCELS

7. Plaintiff Northern States Power Company is a Minnesota corporation, doing business as Xcel Energy.

8. Defendants Paul and Shannon Burke are adult residents of Dakota County, Minnesota, who reside at 2154 Charlton Road, St. Paul, Minnesota, 55118. Burkes, each or both of them, are the fee owners of said residence, identified for tax purposes as PID 38-84200-03001, and legally described as Lot 3, Block 1, William E. Pederson Addition, Outlot A, William E. Pederson Addition in the deed dated July 22, 1991 and recorded at the County Recorder's office on September 9, 1991 as Document Number 10004329.

9. Xcel Energy has a 50-foot wide transmission line easement over the Burke Parcel, as well as the right to enter upon the Burke Parcel to access the 50-foot utility right-of-way pursuant to the Condemnation Decree. Paul and Shannon Burke have refused to allow Xcel Energy to enter upon the Burke Parcel. (Burke Parcel).

10. Defendants Edward J. and Jacqueline S. Paster are adult residents of Dakota County, Minnesota, who reside at 2166 Charlton Road, St. Paul, Minnesota, 55118. Pastors, each or both of them, are the fee owners of said residence, identified for tax purposes as PID 3803000-011-54, and legally described in the deed dated July 13, 2001 and recorded at the County

Recorder's office September 25, 2001 as Document Number 1814769 and attached hereto as Exhibit A. (Paster Parcel).

11. Xcel Energy has a 50-foot wide transmission line easement over the Paster Parcel, as well as the right to enter upon the Paster Parcel to access the 50-foot utility right-of-way pursuant to the Condemnation Decree. Edward and Jacqueline Paster have refused to allow Xcel Energy to enter upon the Paster Parcel.

12. Defendants Michael and Joanne Silverman are adult residents of Dakota County, Minnesota, who reside at 2158 Charlton Road, St. Paul, Minnesota, 55118. Silvermans, each or both of them, are the fee owners of said residence, identified for tax purposes as PID 38-03000-03 1-54, and legally described in the deed dated October 12, 1995 and recorded at the County Recorder's office on November 20, 1995 as Document Number 1313902 and attached hereto as Exhibit B. (Silverman Parcel).

13. Xcel Energy has a 50-foot wide transmission line easement over the Silverman Parcel, as well as the right to enter upon the Silverman Parcel to access the 50-foot utility rightof-way pursuant to the Condemnation Decree. Michael and Joanne Silverman have refused to allow Xcel Energy to enter upon the Silverman Parcel.

14. Defendants David and Wendy Smith are adult residents of Dakota County, Minnesota, who reside at 2162 Charlton Road, St. Paul, Minnesota, 55118. Smiths, each or both of them, are the fee owners of said residence, identified for tax purposes as PID 38-03000-02154, and legally described in the deed dated September 22, 1997 and recorded at the County Recorder's office on December 2, 1997 as Document Number 1459587 and attached hereto as Exhibit C. (Smith Parcel)

15. Xcel Energy has a 50-foot wide transmission line easement over the Smith Parcel, as well as the right to access the 50-foot utility right-of-way over and across the Smith Parcel pursuant to the Condemnation Decree. David and Wendy Smith have refused to allow Xcel Energy access over the Smith Parcel.

16. Defendants Dennis and Jacqueline Turso are adult residents of Dakota County, Minnesota, who reside at 2152 Charlton Road, St. Paul, Minnesota, 55118. Turssos, each or both of them, are the fee owners of said residence, identified for tax purposes as PID 38-84200020-01, and legally described as Lot 2, Block 1, William E. Pederson Addition in the deed dated March 1 1, 1987 and recorded at the County Recorder's office on March 12, 1987 as Document Number 772793. (Turso Parcel).

17. Xcel Energy has a 50-foot wide transmission line easement over the Turso Parcel, as well as the right to enter upon the Turso Parcel to access the 50-foot utility right-of-way pursuant to the Condemnation Decree. Dennis and Jacqueline Turso have refused to allow Xcel Energy to enter upon the Turso Parcel.

18. Defendants Roger and Ingrid Conant are adult residents of Dakota County, Minnesota, who reside at 2 Sunfish Lane, St. Paul, Minnesota, 55118. Roger Conant is the fee owner of said residence, identified for tax purposes as PID 38-03000-010-83, and legally described in the deed dated January 12, 1989 and recorded at the County Recorder's office as Document Number 877534 and attached hereto as Exhibit D. (Conant Parcel).

19. Xcel Energy has a 50-foot wide transmission line easement, as well as the right to enter upon the Conant Parcel to access the 50-foot utility right-of-way pursuant to the Lick Easement. Roger and Ingrid Conant have refused to allow Xcel Energy enter upon the Conant Parcel.

20. Defendants Michael and Melissa Prueher are adult residents of Dakota County, Minnesota, who reside at 50 Sunnyside Lane, St. Paul, Minnesota, 55118. Pruehers, each or both of them, are the fee owners of said residence, identified for tax purposes as PID 38-42601-020-01, and legally described as Lot 2, Block 1, Knutson Addition No. 2 in the deed dated May 21, 1993 and recorded at the County Recorder's office on May 25, 1993 as Document Number 1121834. (Prueher Parcel).

21. Xcel Energy has a 50-foot wide transmission line easement, as well as the right to enter upon the Prueher Parcel to access the 50-foot utility right-of-way pursuant to the Lick Easement. Michael and Melissa Prueher have refused to allow Xcel Energy to enter upon the Prueher Parcel.

22. Defendants Arnulf and Denis Svendsen are adult residents of Dakota County, Minnesota, who reside at I Sunfish Lane, St. Paul, Minnesota, 55118. Svendsens, each or both of them, are the fee owners of said residence, identified for tax purposes as PID 38-11850-02001, and legally described as Lot 2, Block 1, Arcadia in the deed dated June 7, 1984 and recorded at the County Recorder's office on June 26, 1984 as Document Number 658333 and attached hereto as Exhibit E. (Svendsen Parcel).

23. Xcel Energy has a 50-foot wide transmission line easement, as well as the right to enter upon the Svendsen Parcel to access the 50-foot utility right-of-way pursuant to the Lick Easement. Arnulf and Denis Svendsen have refused to allow Xcel Energy to enter upon the Svendsen Parcel.

24. Defendants Stephen A. and Andrea C. McCue are adult residents of Dakota County, Minnesota, who reside at 6 Sunfish Lane, St. Paul, Minnesota, 55118. McCues, each or both of them, are the fee owners of said residence, identified for tax purposes as PID 38-03000

030-82, and legally described in the deed dated March 2, 1979 and recorded at the County Recorder's office as Document Number 533404 and attached hereto as Exhibit F. (McCue Parcel).

25. The McCue Parcel is not burdened by a 50-foot utility right-of-way, but Xcel Energy has the right to enter upon the McCue Parcel to access its utility right-of-way pursuant to the Lick Easement. Xcel Energy does not currently require access over the McCue Parcel other than over Sunfish Lane.

26. The McCue Parcel is burdened by an easement for Sunfish Lane, a private road, dated August 22, 1972 and recorded October 13, 1972 in the County Recorder's office as Document Number 406248 and attached hereto as Exhibit G.

27. Xcel Energy enjoys the right to enter upon Sunfish Lane pursuant to the Lick Easement. On March 26, 2003, Stephen McCue sent Xcel Energy a letter denying Xcel Energy the right to enter upon Sunfish Lane. Svendsens and Conants have also refused to allow Xcel Energy to exercise its right to enter upon Sunfish Lane.

STATEMENT OF JURISDICTION AND VENUE

28. This Court has jurisdiction as the property in question is located in Minnesota and as the actions complained of occurred in Minnesota.

29. Venue is proper pursuant to Minn. Stat. §§ 542.02 & .09, as the property in question is located in Dakota County and as the actions complained of occurred in Dakota County.

FACTUAL BACKGROUND

General Easement Background

30. Xcel Energy has been providing and maintaining reliable electric energy for light, heat, power, and other purposes to numerous communities in Minnesota, including the Southeast Metro area, for over 75 years.

31. In 1923, Xcel Energy acquired the rights to construct, operate, and maintain transmission lines to transmit electric energy to and from various sources in the Southeast Metro area.

32. In 1923, the north and northeastern shore of Sunfish Lake was predominantly farm land.

33. On February 8, 1923, Mary and Ferdinand Lick, the owners of a large farm on Sunfish Lake, granted Northern States Power Company:

The right, privilege and authority to construct, operate and maintain its lines for the transmission of electrical energy, including the necessary steel towers, poles, wires, guys, stubs and other fixtures over, across and upon the following described real estate, now owned by us in the County of Dakota, and State of Minnesota, to-wit: A strip of land Fifty (50) feet in width over and across the South-Half of South East quarter (S^{1/2} - SE1/4) and the East nineteen and fourtenths (19.4) Rods of the South West quarter (SW1/4) all in Section thirty (30), Township Twenty-eight (28) North, Range Twenty-two (22) West, The center line of said strip being described as follows:- Beginning at a point on the East line of said (S^{1/2} - SE1/4) said point being Two Hundred and Eighty-five and Eight tenths (285.8) feet North of the South-east (SE) corner of said distance of Two Thousand Forty-four and two tenths (2044.2) feet to a point, said point being One Hundred and Fifty (150) feet North of the South line of said Section (30), Thence continuing westerly in a straight line to a point on the West line of said East (19.4) Rods of (SW1/4) of said Section (30) where the said center line of said strip intersects said west line One Hundred and Fifty (150) feet North of the South line of said Section (30),

It is further agreed that said center line of said strip is not closer than One Hundred and Ten (110) feet from the South side of the House as now located on said Si of SE' / of said Section (30),

The said grantors hereby reserve to themselves, and their heirs and assigns, the right to fence said tract of land or any part thereof, and the said Company, its successors and assigns hereby agree to construct and maintain gates through which to enter upon the said easement, and also hereby grant unto said Company its successors and assigns, the right, privilege and authority to trim or cut down any trees which may interfere with the construction, maintenance and operation of such lines; and do also grant unto said Company, its successors and assigns, the right to enter upon the above described premises at any and all times for the purposes above set forth.

(Emphasis added.) A copy of the Lick Easement is attached as Exhibit H.

34. Over the years, the property burdened by the Lick Easement was divided into smaller lots, including the Svendsen Parcel, Conant Parcel, McCue Parcel, and Prueher Parcel. Sunfish Lane, originally part of the Lick farm, has existed in its present course since at least the 1930s and is also burdened by the Lick Easement.

35. NSP acquired additional easements for the Southeast Metro transmission line in the Condemnation Decree dated February 18, 1928 and recorded February 24, 1928 with the county recorder as document number 116741. The Paster Parcel, Smith Parcel, Silverman Parcel, Burke Parcel, and Turso Parcel, are burdened by the Condemnation Decree. The 1928 Condemnation Decree grants:

Northern States Power Company is hereby vested with, the perpetual right, privilege, easement and right of way to construct, operate and maintain an electric transmission line with the necessary poles, towers, cross-arms, guys and braces, wires and appurtenances over, upon and across the following described lands lying and being in the County of Dakota, State of Minnesota, to-wit:

(2) A Strip of land fifty (50) feet in width extending in an Easterly and Westerly direction over and across that part of the Southwest Quarter (SW1/4) of Section Thirty (30), Township Twenty-eight (28) North, Range Twenty-two (22) West, described as follows, to-wit: Commencing nineteen and four-tenths (19.4) rods West of the Southeast (SE) corner of the Southwest Quarter (SW1/4) of Section Thirty (30), Township Twenty-eight (28) North, Range Twenty-two (22) West; thence North to the South line of a ten (10) acre tract sold to F. Bruntz, et al; thence West on the South line of said tract sold to F. Bruntz to the Sunfish Lake road; thence Southerly on said road to the South line of said Section Thirty (30); thence East on said South line to point of beginning containing forty-six and two-tenths (46.2) acres; the center line of said strip being described as follows: Beginning at a point on the East line of said forty-six and two

tenths (46.2) acre tract and one hundred and fifty (150) feet North of the Southeast (SE) corner of said 46.2 acres tract; thence Westerly in a straight line a distance of Fifteen hundred and eighty-eight and seven-tenths feet (1588.7) more or less to a point where said center line of said strip intersects said Sunfish Lake road and one hundred and fifty-one and nine-tenths (151.9) feet northerly of and measured along said Sunfish Lake Road from the southwest corner of said forty-six and two tenths (46.2) acre tract hereinabove described; the Northerly boundary line of said strip being twenty-five (25) feet North of and parallel to said center line and the Southerly boundary line of said strip being twenty-five (25) feet South of and parallel to said center line;

(3) A strip of land fifty (50) feet in width, extending in an easterly and westerly direction over and across the South half of the Southeast Quarter (S1/2 of SP1/4) and the Southeast Quarter of the Southwest Quarter (SE' / of SW1/4) all in Section Twenty-five (25), Township Twenty-eight (28) North, Range Twenty-three (23) West, the center line of said strip being described as follows: Beginning at a point on the east line of said section Twenty-five (25) one hundred and twenty-four (124) feet North of the southeast corner of said Section Twenty-five (25); thence westerly in a straight line a distance of six hundred and sixty-five and eight-tenths (665.8) feet to a point which is one hundred (100) feet north of the south line of said Section Twenty-five (25); thence Westerly in a straight line to a point where said center line of said strip intersects the west line of said Southeast quarter of Southwest quarter (SE1/4 of SW1/4) of said Section Twenty-five (25) and one hundred (100) feet North of the Southwest (SW) corner of said Southeast quarter of Southwest quarter (SE1/4 of SW1/4) of said Section Twenty-five (25); the Northerly boundary line of said strip being twenty-five (25) feet north of and parallel to said center line and the Southerly boundary line of said strip being twenty-five (25) feet south of and parallel to said center line.

(5) A strip of land one hundred (100) feet in width over and across the North half of the Southeast Quarter (N/2 of SE1/4) of Section Twenty-six (25), Township Twenty-eight (28) North, Range Twenty-three (23) West, the center line of said strip being described as follows: Beginning at a point on the south line of said North half of Southeast Quarter (N% of SE1/4), said point being ten hundred and eighty-eight (1088) feet West of the Southeast corner of said North Half of Southeast Quarter (N/2 of SE1/4), thence Northerly in a straight line to a point on the North line of said North Half of Southeast Quarter (N% of SE1/4) ten hundred fifty-three (1053) feet West of the northeast corner of said North Half of Southeast Quarter (N' /2 of SE1/4) of said Section Twenty-six (26); the easterly boundary line of said strip being fifty (50) feet east of and parallel to said center line and the westerly boundary line of said strip being fifty (50) feet west of and parallel to said center line;

(6) A strip of land one hundred (100) feet in width, over and across the north ten (10) acres of the Northeast Quarter of the Northeast Quarter (NE` 4 of NE1/4) of Section Twenty-three (23), Township Twenty-eight (28) North, Range Twenty-three (23) West, and Government Lot Six (6), and Lot Three (3) of Auditor's Subdivision No. 5 Lilydale, Section Fourteen (14), Township Twenty-eight (28) North, Range Twenty-three (23) West, the center line of said strip being described as follows: Beginning at a point on the South line of said ten (10) acres of said Section Twenty-three (23), said point

being nine hundred and ninety-seven and eight tenths (997.8) feet West of the Southeast corner of said ten (10) acres; thence due North a distance of twenty-three hundred and seventy-three and four-tenths (2373.4) feet to a point, thence North thirty-three (33) degrees and fifteen (15) minutes East, a distance of two hundred fifty-nine (259.9) feet more or less to the South line of Block Two (2), Hendricks and McDowells Acre Lots; the westerly boundary of said strip being fifty (50) feet west of and parallel to said center line, and the Easterly boundary line of said strip being fifty (50) feet east of and parallel to said center line; and the Easterly boundary line of said strip being fifty (50) feet east of and parallel to said center line;

(7) Lots Fifteen (15), Nineteen (19), Twenty (20) and Twenty-one (21), in Block Four (4), Long's 2nd (Second) Addition to St. Paul, according to the plat thereof on file and of record in the office of the Register of Deeds in and for Dakota County, Minnesota;

(8) Lot Eighteen (18), Block Four (4), Long's 2nd (Second) Addition to St. Paul, according to the plat thereof on file and of record in the office of the Register of Deeds in and for Dakota County, Minnesota;

(9) Lots Sixteen (16) to Thirty (30) inclusive, in Block Six (6), Pyramid Addition to St. Paul, according to the plat thereof on file and of record in the office of the register of deeds in and Dakota County, Minnesota;

(10) Lots Nine (9) to Fifteen (15) inclusive, in Block Five (5) Pyramid Addition to St. Paul, according to the plat thereof on file and of record in the office of the Register of Deeds in and for Dakota County, Minnesota;

together with the right and privilege to enter upon said premises for the purpose of erecting and operating and forever maintaining said poles, towers, and electric transmission line, and stringing and installing all necessary wires and other appliances and repairing, replacing, patrolling and improving the same and with the right and privilege to successfully transmit electricity in and through said wires and with the right, whenever necessary to the proper protection of said line, to cut, trim and remove trees, timber, brush, and other material under and in the vicinity thereof. No other or further order or determination herein is required.

(Emphasis added.) (defendants' parcels are burdened by description (2)). A copy of the 1928 Condemnation Decree is attached as Exhibit I.

History of Xcel Energy's Access to its Right-of-Way Easement

36. Since 1923, Xcel Energy has continued to maintain and make improvements to its Southeast Metro transmission system in order to continue to provide and maintain reliable electrical energy for its customers.

37. The landscape of the area surrounding Xcel Energy's utility right-of-way has not changed significantly since 1923. Ravines and Sunfish Lake intersect the 50-foot utility right-of-way making it impracticable to access the transmission line along the utility right-of-way. At that time, in order to install its transmission line, NSP utilized the existing driveway of the farm and crossed over the farmland to bring in the equipment necessary to construct the transmission line.

38. In 1961, NSP upgraded the Southeast Metro transmission line by increasing its electrical current carrying capacity with heavier wires. NSP replaced the entire then existing line, including replacing the lattice towers with new stronger H-frame wood pole structures to support the heavier wires. In the 1961 upgrade, NSP utilized the existing driveways of landowners and/or farmers in order to access its utility right-of-way. Although technology and construction practices changed from 1923 to 1961, NSP's method of accessing its utility right-of-way remained the same.

39. In 1988, NSP discovered that woodpeckers had caused damaged to Structure #14, which is located on the Turso Parcel. In order to review the structure, NSP again accessed its utility right-of-way by crossing over the landowners' property.

40. In 1988, NSP also needed to reconductor (utility industry jargon for increasing the electrical capacity of current carrying wires by replacement) its transmission line in Sunfish Lake. While Sunfish Lake experienced extensive development since 1961, NSP's access to its

transmission line remained the same-NSP gained access to its utility right-of-way by going through the landowners' property.

41. Up until 1995, **NSP** routinely trimmed trees and cleared the utility right-of-way on a four-year cycle. Typically, NSP's crews would notify the landowners of an upcoming visit and would arrange an access route to bring in their equipment for clearing. NSP's crews would access the utility right-of-way via the landowners' property and/or sometimes from Sunfish Lake, depending upon the time of the year (access over Sunfish Lake is possible in areas if the lake is frozen to a sufficient depth).

42. From 1995 to 2001, Xcel Energy's Vegetation Management Department did not trim or clear any trees on the utility right-of-way in anticipation of the current upgrade, the Southeast Metro Phase I Upgrade. In 2002 Xcel Energy recommenced tree trimming and removal to avoid outages from tree contact. In 2002 and 2003, Xcel Energy entered upon Sunfish Lane and defendants' parcels to reach the utility right-of-way.

Need for the Current Phase I Upgrade

43. Xcel Energy's Southeast Metro Phase I Upgrade is necessary to ensure reliability and safety to customers in the Southeast Metro service area.

44. Xcel Energy's Southeast Metro Phase I Upgrade will add a second circuit (additional wires) to an existing 115 kV transmission line from Red Rock substation in Newport to the Rogers Lake substation in Mendota Heights. The Southeast Metro transmission line is part of Xcel Energy's interconnected transmission system. Failure this line could overload other system lines. Transmission line overloads can affect power supply reliability to Sunfish Lake and the surrounding communities.

45. Xcel Energy has already experienced some exposure to overloads in its Southeast Metro transmission system. Projections forecast additional exposure to overloads without an upgrade to a double circuit. The Phase I Upgrade solves a number of single contingency (N-1) and multiple contingency conditions (N-2) beginning in the year 2004. A contingency is the failure of another component in the transmission system. Construction of the double circuit upgrade is necessary to avoid this increased overload exposure.

General Project Background for the Southeast Metro Phase I Upgrade

46. In January 2003 Xcel Energy met with the Sunfish Lake City Council and residents of Sunfish Lake at a preliminary construction meeting. Preliminary construction was scheduled to begin in February 2003 with soil borings and vegetation removal. At this meeting, Xcel Energy presented an overview of the current Phase I Upgrade, including the construction process, and the construction schedule. Xcel Energy informed residents that it would try to perform the majority of the construction during winter freeze in order to minimize damage to the properties from the equipment. Xcel discussed meeting with the landowners to obtain access routes to be used for construction as well as to take the soil borings. After its presentation, Xcel Energy invited questions from the attendees. Most of the questions related to landowner issues such as conducting the soil borings, erosion control, tree removal, septic systems, special considerations, restoration, and access. The Sunfish Lake City Council supported finding proposed access routes and the winter construction schedule to minimize damage to the affected properties.

47. Prior to taking soil borings and removing vegetation, Xcel Energy met with several landowners to determine access routes with the least impact on the land and to address

any special concerns of the landowners. Xcel Energy also met with the City Engineer and City Forester to receive their input as well.

48. In February 2003, American Engineering Testing, Inc. (AET) performed the soil boring testing in Sunfish Lake. AET accessed the utility right-of-way via Sunfish Lane and by crossing over the Paster and Svendsen Parcels.

49. On August 15, 2003, Xcel Energy sent an update to the City of Sunfish Lake and the affected landowners to keep them informed of the project. In this update, Xcel Energy again reiterated that it selected access routes that would cause the "least amount of impact" on the properties.

50. As part of the conditions of the current Phase I Upgrade, Xcel Energy will install silt fencing where needed for erosion control and mark drip lines of significant trees to eliminate soil compaction in root zones. Xcel Energy met with the City Engineer of Sunfish Lake in October 2003 as required by the CUP in order to plan these preliminary construction conditions.

51. Xcel Energy sent another update to the City of Sunfish Lake and the landowners affected by the route on October 10, 2003. In this letter, Xcel Energy stated that it was continuing to review access from Sunfish Lake once the lake freezes. Xcel Energy's engineers are currently in the process of engineering an ice road to be prepared this coming winter if the lake freezes to a sufficient depth to allow trucks and heavy equipment to safely cross the ice. In its October 10, 2003 update to the landowners, Xcel Energy identified the access routes which are "believed to have the least amount of impact on the land" and provided the landowners with maps and descriptions of the access routes for the project. A true and correct copy of Xcel Energy's October 10, 2003 letter to the affected landowners is attached here to as Exhibit J.

Minimum Necessary Access Routes for Phase I Upgrade

52. Xcel Energy has gone to great effort to plan access routes to minimize impact on the landowners' property. In order to reach Structure #13, which is located on the Paster Parcel, Xcel Energy plans to access its utility right-of-way directly off of Charlton Road at the bend where the driveway of the owner's former house was located. Xcel Energy will then follow along the water's edge up to the structure. Xcel Energy may need to place some silt fencing along the water's edge for erosion control by the lake. Some landscaping, pines and possibly other landscaping will need to be removed during construction and replaced when the Southeast Metro Phase I Upgrade is completed.

53. In order to reach Structure #14, which is located on the Turso Parcel, Xcel Energy plans to access its utility right-of-way directly off of Charlton Road at the bend where the driveway of the Pasters' former house was located. Xcel Energy will then follow along the water's edge taking the same path it will use to access Structure #13. In order to access Structure #14 from Structure #13 a fencepost will need to be removed and replaced upon completion of construction. Xcel Energy will then travel north past the tee box and then proceed east through the native brush and sumac. There are some smaller oak trees along a property line that Xcel Energy would like to mark in order to go around them. Xcel Energy will continue east over the open yard to the next property line where it will need to clear out some buckthorn and remove some small property line trees (to be replaced upon completion of project). Xcel Energy's crew would then continue east over a landscaped yard with ornamental trees and large rocks, which will need to be removed for construction. The rocks and the ornamental trees will be replaced upon completion of the project. Xcel Energy will continue east down the utility right-of-way to Structure # 14.

54. In order to reach Structure #15, which is located on the Svendsen Parcel, Xcel Energy plans to utilize Sunfish Lane to get to the Svendsens' driveway and will travel along the yard on the west side of their home. Xcel Energy will then cross the Svendsens' yard at marked locations to stay clear of their septic system, flower garden and outside the drip lines of the large tree in the yard. Xcel Energy's crew will then continue along the westerly side of the yard by the woods. A sprinkler faucet at the southwest corner of the yard will be marked to stay clear. Xcel Energy will then cross a wooded area, removing only those trees necessary to clear a path to Structure #15. Trees will be replaced upon completion of the project. Xcel Energy will also mat (placing temporary ground protection panels) along its access route through the yard. Matting on the hill may also be necessary, together with silt fencing.

55. In order to access Structure #16, Xcel Energy plans to drive down Sunfish Lane to the Tostruds' driveway. To date, the Tostruds have not denied Xcel Energy the right to access its utility right-of-way.

56. In order to access Structure #17, which is located on the Park Parcel, Xcel Energy plans to drive down Sunfish Lane to the Tostruds' driveway. Xcel Energy will proceed south from the driveway to the utility right-of-way and go east to Structure #17. To date, neither the Tostruds nor the Parks have denied Xcel Energy the right to access its utility right-of-way.

57. In order to reach Structure #18, which is located on the Lacina Parcel, Xcel Energy plans to utilize Sunnyside Lane. Xcel Energy will stay west of the white pine tree off of Sunnyside Lane to get to Structure #18. To date, Lacina has not denied Xcel Energy the right to access its utility right-of-way.

58. In order to reach Structure #19, which is located on the Prueher Parcel, Xcel Energy plans to drive down Sunnyside Lane to the Pruehers' driveway and access Structure #19

from the Prueher driveway. Xcel Energy may need to remove some pine trees at the time of construction and install silt fencing.

Xcel Energy Can Not Reach the Southeast Metro Transmission Line Without Entering Upon Defendants' Parcels

59. Xcel Energy is unable to construct the Southeast Metro Phase I Upgrade without entering upon defendants' parcels. The topography of the land within the 50-foot utility right-of-way contains some steep inclines and ravines making it impossible for heavy equipment to cross without building bridges or filling the ravines. Also, part of the 50-foot utility right-of-way goes directly over Sunfish Lake thereby making it impossible for Xcel Energy's trucks and heavy equipment to stay within the 50-foot utility right-of-way. Finally, even if Xcel Energy's trucks could go straight down the utility right-of-way, Xcel Energy would need to clear-cut trees and vegetation in the utility right-of-way and build bridges over the ravines, thereby greatly increasing the impact, not only on the defendants' parcels, but on other landowners' property as well.

Defendants Deny Xcel Energy Its Right to Enter Upon Sunfish Lane and Defendants' Parcels to Access the Transmission Line

60. On January 30, 2003, Xcel Energy sent a letter to Ingrid Conant, President of the Sunfish Lane Improvement Association, stating that Xcel Energy would have the road's condition surveyed before and after construction to determine any impact on the road. Xcel Energy also offered to repair any damage caused to Sunfish Lane by its equipment.

61. On March 9, 2003, the Sunfish Lane Improvement Association responded to Xcel's Energy's letter stating that "Xcel Energy has no right to use Sunfish Lane and the adjacent properties."

62. Xcel Energy followed up with a letter to the Sunfish Lane Improvement Association on March 18, 2003 indicating that Xcel Energy intends to proceed with the construction of this project pursuant to its easement rights. Xcel Energy informed Ingrid Conant that, although Xcel Energy had reviewed access routes with landowners, no landowner proposed a route other than Sunfish Lane that would have less of an impact on the land.

63. On March 25, 2003, Ingrid Conant, on behalf of the Sunfish Lake Improvement Association, sent a letter to Xcel Energy indicating that "Xcel does not have the right to cross our premises . . . [and] you are not to enter or encroach upon Sunfish Lane except for purposes of maintaining the distribution line." Conants refused to allow access over Sunfish Lane for the Phase I Upgrade. In a letter to Mrs. Conant dated March 25, 2003, Xcel Energy stated that it intends to proceed with its current Phase I Upgrade in the upcoming winter 2003/2004 season "to reduce impact to the landowners."

64. In April 2003, Xcel Energy offered to again meet with Mrs. Conant to discuss an access route over her property that she felt would have less impact on the land than routes previously selected.

65. Xcel Energy scheduled a meeting with the defendants for September 10, 2003 to review a possible access route over their property to structure #14. None of the defendants appeared at the meeting.

66. The next day, on September 11, 2003, Xcel Energy received a letter from an attorney representing defendants Smith, Silverman, Svendsen, Burke, Turso, and Paster stating that Xcel Energy is not permitted to visit his clients' properties and cannot "trespass" beyond the boundaries of the 50-foot utility right-of-way.

67. Xcel Energy has been unable to commence its current Phase I Upgrade. In October 2003, Xcel Energy's crews arrived at the site and discovered that the landowners had erected a "Private Drive No Trespassing" sign at the entrance to Sunfish Lane. Xcel Energy encountered other "No Trespassing" signs, including several "Road Closed No Trespassing" signs that had not been previously posted. Several landowners also erected barricades to prevent Xcel Energy from accessing its utility right-of-way easement.

**COUNT I:
DECLARATORY JUDGMENT - SCOPE OF LICK EASEMENT**

68. Pursuant to Minn. Stat. § 555.01, *et seq.*, Xcel Energy is entitled to a Declaration from the Court that its rights under the Lick Easement include the rights to:

- (a) construct, operate and maintain its current 115kV transmission line,
- (b) construct, operate, and maintain the Phase I Upgrade,
- (c) "trim or cut down any trees which may interfere with the construction, maintenance, or operation of its electric transmission lines, and
- (d) otherwise construct, operate, maintain, and improve the transmission line,

within the 50-foot utility right-of-way described in the attached Lick Easement.

**COUNT II:
DECLARATORY JUDGMENT - ACCESS UNDER LICK EASEMENT**

69. Pursuant to Minn. Stat. § 555.01, *et seq.*, Xcel Energy is entitled to a Declaration from the Court that its rights under the Lick Easement include the right to enter upon Sunfish Lane, and the Svendsen Parcel, Conant Parcel, McCue Parcel, and Prueher Parcel at any and all times in order to access the 50-foot utility right-of-way for the purposes described in the Lick Easement, including but not limited to, (a) constructing, operating, and maintaining its current 115kV transmission line, (b) trimming or cutting down any trees which may interfere with the construction, maintenance, or operation of the current 115kV transmission line, (c) constructing,

operating, and maintaining the Phase I Upgrade, and (d) trimming or cutting down any trees which may interfere with the construction, maintenance, or operation of the Phase I Upgrade.

**COUNT III:
DECLARATORY JUDGMENT - SCOPE OF CONDEMNATION DECREE**

70. Pursuant to Minn. Stat. § 555.01, *et seq.*, Xcel Energy is entitled to a Declaration from the Court that its rights under the Condemnation Decree include the perpetual right and privilege to:

- (a) construct, operate and maintain its current 115kV transmission line,
- (b) construct, operate, and maintain the Phase I Upgrade,
- (c) "cut, trim and remove trees, timber brush, and other material under and in the vicinity of its transmission line," and
- (d) otherwise construct, operate, maintain, and improve the transmission line,

within the 50-foot utility right-of-way described in the Condemnation Decree.

**COUNT IV:
DECLARATORY JUDGMENT - ACCESS UNDER CONDEMNATION DECREE**

71. Pursuant to Minn. Stat. § 555.01, *et seq.*, Xcel Energy is entitled to a Declaration from the Court that its rights under the Condemnation Decree include the right and privilege to enter upon the Paster Parcel, Smith Parcel, Silverman Parcel, Burke Parcel, and Turso Parcel in order to access the 50-foot utility right-of-way on said parcels for the purposes described in the Condemnation Decree, including but not limited to, (a) constructing, operating, and maintaining its current 115kV transmission line, (b) trimming, cutting and removing trees, timber, brush, and other material under and in the vicinity of the current 115kV transmission line, (c) constructing, operating, and maintaining the Phase I Upgrade, and (d) trimming, cutting and removing trees, timber, brush, and other material under and in the vicinity of the Phase I Upgrade.

COUNT V:
PRELIMINARY, PERMANENT, AND MANDATORY INJUNCTIVE RELIEF

72. Xcel Energy will suffer irreparable harm and has no adequate remedy at law for defendants' disruption and delay of its right of access to the transmission line and construction of the Phase I Upgrade.

73. Accordingly, Xcel Energy is entitled to temporary, preliminary and permanent injunctive relief preventing defendants, and each of them, from interfering with Xcel Energy's access, maintenance, and upgrade activities, including without limitation Xcel Energy's current 115kV transmission line and its Phase I Upgrade. Such injunction is necessary to prevent further harm and to preserve the status quo.

COUNT VI:
NUISANCE

74. The Lick Easement and the Condemnation Decree grant Xcel Energy the right to construct, operate and maintain its Southeast Metro transmission line over defendants Paster, Burke, Conant, Prucher, Silverman, Smith, Svendsen, and Turso's parcels and the right to enter upon Sunfish Lane and all defendants' parcels to gain access to its 50-foot utility right-of-way.

75. By erecting barricades, erecting "road closed" and "no trespassing" signs, and by telling Xcel Energy representatives both verbally and in writing that Xcel Energy does not have the right to enter upon Sunfish Lane and their parcels, defendants have, and continue to, intentionally obstruct and interfere with Xcel Energy's free use and enjoyment of its right to construct, operate, and maintain its Southeast Metro transmission line and to enter upon Sunfish Lane and defendants' parcels to gain access to its 50-foot utility right-of-way.

76.

Defendants' actions obstructing interfering with Xcel Energy's free use of its 50-foot utility right-of-way and its access rights constitute a nuisance under Minn. Stat. § 561.01

entitling Xcel Energy to an injunction abating the nuisance and to damages.

WHEREFORE, Defendant Xcel Energy prays for the Order and judgment of this Court in its favor and against Plaintiffs as follows:

1. As to Count I, a declaration of the scope of the Lick Easement;
2. As to Count 11, a declaration that the Lick Easement grants Xcel Energy the right and privilege to enter upon Sunfish Lane, the Svendsen Parcel, the Conant Parcel, McCue Parcel and the Prueher Parcel for the purposes described in the Lick Easement, including but not limited to, 1) tree trimming and tree cutting, 2) constructing, operating, and maintaining the existing 115 kV line and 3) constructing, operating, and maintaining the Phase I Upgrade;
3. As to Count III, a declaration of the scope of the Condemnation Decree;
4. As to Count IV, a declaration that the Condemnation Decree grants Xcel Energy the right and privilege to enter upon the Paster Parcel, Smith Parcel, Silverman Parcel, Burke Parcel, and Turso Parcel for the purposes described in the Condemnation Decree, including but not limited to, 1) tree trimming and tree cutting, 2) constructing, operating, and maintaining the existing 115 kV line and 3) constructing, operating, and maintaining the Phase I Upgrade;
5. As to Count V, temporary, preliminary and permanent injunctive relief prohibiting defendants from interfering with Xcel Energy's right to enter upon Sunfish Lane, the Paster Parcel, Smith Parcel, Silverman Parcel, Burke Parcel, Turso Parcel, Svendsen Parcel, Conant Parcel, McCue Parcel, and Prueher Parcel for the purposes described in the Lick Easement and Condemnation Decree;

6. As to Count VI, temporary, preliminary, and permanent injunctive relief abating the nuisance and such damages as shall be proved at trial;

7. Awarding Xcel Energy its costs and disbursements herein; and

8. Awarding Xcel Energy such other and further relief as the Court deems proper.

Dated: November 18, 2003

BRIGGS AND MORGAN - .

By 

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ACKNOWLEDGMENT

The parties hereby acknowledge that sanctions may be imposed for a violation of Minn. Stat. § 549.211, subd. 2, pursuant to Minn. Stat. § 549.211, subd. 3.

BRIGGS AND ORGAN, P.A.

