

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF DAKOTA

FIRST JUDICIAL DISTRICT

CASE TYPE: Other Civil

Northern States Power Company  
d/b/a **Xcel** Energy,

Court File No...

Petitioner,

v.

**XCEL ENERGY'S VERIFIED  
PETITION FOR ALTERNATIVE  
WRIT OF MANDAMUS**

City of South St. Paul,

Respondent.

**TO: THE HONORABLE DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT, HASTINGS, MINNESOTA:**

Petitioner Northern States Power Company d/b/a Xcel Energy (Xcel Energy) for its Verified Petition for Alternative Writ of Mandamus against Respondent City of South St. Paul (City) represents:

**OVERVIEW**

1. On May 4, 2001, Xcel Energy applied to City for a conditional use permit (CUP) to upgrade its existing single-circuit 115kV transmission line within City by adding a second 115kV circuit and rebuilding the transmission line on above ground steel monopole structures.  
Ex. A.

2. The existing single-circuit transmission line has existed with improvements since the 1920's, and it was, pursuant to City's March 1992 Zoning Code (Code) § 1500.29, subd. 4(a)(4), "automatically approved" as a CUP in 1992.

3. City acknowledges the need for Xcel Energy's upgraded double-circuit transmission line (Ex. C at 3 § 2.06 and at 5. § 3.03) and implicitly accepts that the best location of the double-circuit transmission line within Xcel Energy's right-of-way for its existing single-circuit transmission line (Ex. C).

4. City failed to "approve or deny" Xcel Energy's CUP request within Minn. Stat. § 15.99, subd. 2's deadline, which expired on August 7, 2001. Ex. B. Instead, City ordered on August 6 that Xcel Energy's transmission line be constructed (if at all) underground. City further resolved that approval of the requested CUP would depend upon Minnesota Public Utilities Commission's (PUC) determination of whether City can force Xcel Energy to subsidize City by passing on to all of Xcel Energy's system-wide customers the estimated \$4,600,000 in excess cost of undergrounding the line. Ex. C at 5 § 4. In the unlikely event that PUC issues such an advisory opinion and determines that the cost of undergrounding the transmission line within City should be borne by all Xcel Energy customers, then the requested CUP (as modified for undergrounding the line) may be approved. *Id.* If PUC refuses to approve such a subsidy to City, then City will deny the requested CUP. *Id.* And, until PUC makes such determination in City's favor, City prohibits all transmission line construction. *Id.*

5. None of § 15.99, subd. 3's exceptions authorizes such an indefinite extension of the statutory deadline to "approve or deny" a zoning request pending a determination of another governmental body or agency. The result is "automatic[] approv[al]" of Xcel Energy's requested transmission line upgrade. *Demolition Landfill Servs., LLC v. City of Duluth*, C7-00-81, 2000 WL 1015893, at \* 1 (Minn. Ct. App. July 25, 2000), *review denied* (Minn. Oct. 17, 2000) (Ex. Q); *Demolition Landfill Set-vs., LLC v. City of Duluth*, 609 N.W.2d 278, 281 (Minn. Ct. App.) ("failure to deny a permit application within the statutory time period mandates an approval"),

*review denied* (Minn. July 25, 2000) (emphasis added); *Gun Lake Ass'n v. County of Aitkin*, 612 N.W.2d 177, 181 (Minn. Ct. App.), *review denied* (Minn. Sept. 13, 2000) (same).

6. The condition precedent to City's CUP approval is, in any event, illegal. City is not empowered to condition permit approval on the shifting of excessive construction costs onto Xcel Energy's system-wide customers rather than the recipients of the benefits - namely, electric customers within City. Faced with a legally indistinguishable attempt to impose a revenue condition to a transmission line permit, the Court of Appeals struck the condition because the municipality's "police power does not embrace revenue measures." *Interstate Power Co., Inc. v. Nobles County Bd. of Comm'rs*, No. C5-97-1704, slip [op. at](#) 3 ¶ 8 (Minn. Ct. App. Apr. 30, 1998) (court summarily rejected county's permit condition for transmission line which required the utility to accept responsibility "for any necessary relocation of their utilities and all costs incurred") (Ex. D).

7. City has no valid reason for requiring Xcel Energy to underground the line within City at the expense of the utility's system-wide customers. City's stated reasons for doing so are, in fact, foreclosed and preempted by Minnesota Environmental Quality Board's (EQB) finding that, as proposed with overhead lines, Xcel Energy's line does "not have the potential for significant environmental effects" (Ex. E), as well as by the similar findings of its own independent consultant (Ex. F) and the Minnesota Department of Health (MDH) (Ex. 0). City "'may not reject expert testimony without adequate supporting reasons,'" and no such reasons exist here. *Trisko v. City of Waite Park*, 566 N.W.2d 349, 356 (Minn. Ct. App.) (quoting *SuperAmerica Group, Inc. v. City of Little Canada*, 539 N.W.2d 264, 267 (Minn. Ct. App. 1995)), *review denied* (Minn. Sept. 25, 1997).

8. City's stated reasons for requiring Xcel Energy to underground its line are otherwise contrary to the record. City relies upon concerns raised with electric magnetic field

(EMF) (Ex. C at 5 § 3.07), but the uncontroverted record establishes EMF levels with Xcel Energy's upgraded double-circuit transmission line would be reduced to one-fourth of the current levels (Ex. C at 3 § 2.09; Ex. H at 4). City expresses, fear of the monopole steel structures falling down (Ex. C at 5 § 3.08), even though it is a record fact that the steel pole is "stronger" and thus "safer" than the existing wooden poles (Ex. E at 4 X124; Ex. H at 5; Ex. I at 211 11): City cites to noise level increases (Ex. C at 5 § 3.06);, yet the projected noise levels are less than one-half of the state's applicable noise standards (Ex. C at 3 § 2.08; Ex. H at 5). City references, as well, the supposed diminution in surrounding property values due to adjacent transmission lines (Ex. C at 5 § 3.05), but the record shows no material property value diminution adjacent to transmission lines (Ex. C at 4 § 2.11; Ex. H at 10) and Code § 1500.29, subd. 4(e)(3) (Ex. P at 117b) requires that City find that the use will "substantially diminish or impair property values." (Emphasis added). Finally, City objects to the proposed p 11 double-circuit transmission line, from the existing 51 to 85 feet to the proposed 84 to 100 feet. Ex. C at 5 § 3.04; Ex. E at 31115; Ex. H at 1. City ignores, however, that Code § 1500.29, subd. 20(a)(2) (Ex. P at 131) provides that "[h]eight limitations shall not apply to public utility facilities." Moreover, telecommunications towers can reach 170 feet. Code § 1500.28, subd. 35(c) (Ex. P at 111b).

### **PARTIES**

Xcel Energy is a Minnesota public service corporation organized under Minn.-Stat. Ch. 300 and a public utility regulated under Minn. Stat. § 216B.02.

10. City is a municipal corporation.

## JURISDICTION AND VENUE

11. Jurisdiction is proper pursuant to Minn. Stat. §§ 462.361, subd. 1 and 586.11. Under § 586.11, "[t]he district court has exclusive original jurisdiction in all cases of mandamus."

12. Venue is proper. The disputed portion of the proposed upgraded double-circuit transmission line is entirely located within Dakota County.

## RECORD FACTS

### **A. XCEL ENERGY'S TRANSMISSION LINE UPGRADE PROJECT (PROJECT)**

13. Xcel Energy's transmission system in the southeast metro area currently includes a single-circuit 115kV transmission line which crosses six communities and supplies power to the entire southeast metro area. The line connects the Red Rock Substation in Newport, the Stockyards Substation in South St. Paul, the Rogers Lake Substation in Mendota Heights, the Airport Substation at the Minneapolis/St. Paul International Airport and the Bloomington and Wilson Substation in Bloomington.

14. The Red Rock-Rogers Lake and Rogers Lake-Wilson lines work as components of the interconnected transmission system. Failure of one or more circuits in this system could result in an overload of these lines or other lines. Overloads, can damage equipment or become a public safety concern if not addressed. Furthermore, transmission line overload affects power supply reliability to portions of City, as well as St. Paul, West St. Paul, Mendota Heights, Eagan, Sunfish Lake, Bloomington, Inver Grove Heights and other southeast metro areas. Xcel Energy has already experienced some exposure to overloads, and, based on load forecasts, the situation will get progressively worse unless appropriate power system reinforcements are constructed.

15. In order to address the potential overloads on the existing southeast metro transmission system, Xcel Energy developed a plan for replacing the existing single-circuit

115kV transmission line with a double-circuit 115kV transmission line. The upgraded double-circuit transmission line will be installed on steel monopole structures (rather than the current wooden H-frames), and the new poles will be located on the center line in the existing right-of-way. The height of the new structures will be between 84 and 100 feet, or about 25 feet taller than the existing structures, which are between 51 and 85 feet. Ex. C at 5 § 3.04; Ex. E at 3 11 15; Ex. H at 1. No new right-of-way will be required. None of the existing substations will be expanded. Equipment additions at the substations will occur within the existing fenced area. Approximately 120 structures will be installed, spaced an average of 500 feet apart.

16. In order to replace the existing transmission lines, construction outages must be scheduled on the existing circuits. As customer loads increase, necessary outages become more difficult to schedule. Ultimately, if customer loads reach a level where a line cannot be removed from service for construction, Xcel Energy would have to construct the new line on a new right-of-way. Customer electric demand has already grown to the point where construction must be scheduled during off-peak periods — that is, when electric power demand is lower (November to April). Further delays will render it extremely difficult to replace the existing single-circuit lines on the same right-of-way with a double-circuit line without interrupting service to electric customers. Such energy supply interruption is not acceptable to customers or the utility.

17. Construction of the upgraded transmission line is planned in two phases. Phase one of the Project consists of the eastern portion of the line from the Red Rock Substation to the Rogers Lake Substation. Construction was originally scheduled to begin in the fall of 1999. Unfortunately, Mendota Heights' response to Xcel Energy's CUP application delayed construction commencement for two years. Construction will now begin in late fall of 2001.

18. In order to complete phase one of the Project on time, Xcel Energy must schedule the work over two off-peak periods. The Red Rock Substation will be prepared for the double-

circuit transmission from November of 2001 to March of 2002 and the Rogers Lake Substation will be prepared from January to June of 2002. Between January and June of 2002, Xcel Energy will pour most of the foundations for the new steel pole structures for the entire transmission line. From October of 2002 to June of 2003, Xcel Energy will finish the foundation construction and then install the structures and the new lines. In order to timely commence construction at the Red Rock Substation, the design must be completed, materials must be ordered, and construction crews must be scheduled no later than November 1, 2001.

**B. REQUIRED GOVERNMENTAL APPROVALS FOR THE PROJECT**

19. Zoning approvals are required from the six municipalities - i.e., Newport, Inver Grove Heights, City, Mendota Heights, Sunfish Lake and Bloomington - that have a portion of the upgraded transmission line running through it. The only municipal resistance to the Project appears to be from Mendota Heights and City.

20. Newport only requires a building permit. Inver Grove Heights has classified the Project as a permitted use for which further approval is required because the upgrade does not change the existing use. Sunfish Lake and Bloomington appear poised to approve the transmission line as a conditionally permitted use. Sunfish Lake's mayor has already publicly stated that he sees no basis to deny the yet to be submitted CUP request.. Bloomington has proposed that the City would pay the costs of undergrounding the line within Bloomington.

21. In contrast, Mendota Heights has refused to approve or deny Xcel Energy's March 2, 1999 CUP application. Mendota Heights justifies its action in its May 15, 2001 "Ordinance Prohibiting the Issuance of any Permits to Utility, Public or Private, that does not have a Current Franchise or Contract Agreement in Full Force and Effect." Xcel Energy has separately sued Mendota Heights, claiming that the city's refusal to "approve or deny" Xcel Energy's CUP request has caused the city to violate § 15.99, subd. 2's deadline to act on the

zoning request and, as a result, compels the "automatic approval" of the request. *See Northern States Power Co. d/b/a Xcel Energy v. City of Mendota Heights*, No. 19-C7-01-8264 (Minn. 1st Jud. Dist.).

22. The City defines transmission lines as an "essential service." As such, transmission lines are conditionally permitted in all four of City's residential zoning districts, as well as in its general business district. Code § 1500.03, subd. 14(c)(55) ("essential service"), 1500.09, subd. 2(c) (R-1 zone), 1500.10, subd. 2(a) (R-2 zone), 1500.11, subd. 3(a) (R-3 zone), 1500.13, subd. 2(a) (R-4 zone) and 1500.19, subd. 2(y) (general business zone) (Ex. P at 11, 33, 35, 36, 38 and 46).

23. Engineering and construction plans to acquire the applicable permits from the Corps of Engineers, Minnesota Department of Transportation (MnDot) and Department of Natural Resources (DNR) will be obtained after the CUP process.

### C. ENVIRONMENTAL REVIEW OF THE PROJECT

24. On November 18, 1999, EQB ruled "that the [P]roject does not have the potential for significant environmental effects." Ex. E, Concl. ¶ 1. With its negative declaration of the need for an environmental impact statement (EIS), EQB made the following findings.

- a. "The magnetic field from the proposed lines will be lower than the magnetic field from the existing line" (id., Finding 12) (emphasis added);  
\_ "Staff concludes in this memorandum that the Current evidence does not indicate that electric and magnetic fields expected from transmission lines represent a potential for significant environmental effect" (id., Finding 1119);
- c. "While such hazards [from downed lines and inadvertent contact] do exist, the risks are managed by regulatory code and preventative utility practice, and are not generally considered to be a significant safety threat" (id., Finding 1124) (emphasis added); and

- d. "Under certain conditions the line may produce a characteristic 'humming' noise during operation. The facility will be operated in compliance with State standards for noise. It is not a significant impact issue, particularly when compared to other noise sources in an urban environment" (id., Finding ¶ 25) (emphasis added).

25. Despite arguing EQB to require an EIS for the Project (Ex. F), neither City nor any of the other five affected municipalities appealed the negative EIS declaration within the 60-day period to do so. Minn. Stat. § 116C.65. That decision is final, binding and the law of the case.

26. The Power Line Task Force (PLTF) did, however, commence a legal challenge to EQB's November 18, 1999 negative EIS declaration. *See Power Line Task Force, Inc. v. Minnesota Env'tl. Quality Bd.*, No. 62-C3-99-010952 (Minn. 2d Jud. Dist.). On August 24, 2000, the district court granted summary judgment to EQB and dismissed PLTF's complaint, finding that "MEQB made a deliberate reasoned decision that is supported by the evidence." Ex. U at 12. On January 12, 2001, the court denied PLTF's motion for new trial. Ex. V. No appeal was filed and EQB's decision is now final as against that party as well.

27. Despite EQB's November 18, 1999 negative EIS declaration, Xcel Energy voluntarily agreed with City, Mendota Heights and Sunfish Lake in March of 2000 to submit the Project to a single, region-wide "environmental impact review" (EIR). Ex. G. In so doing, City expressly recognized "the urgency of time and desire that the study be completed by July 15, 2000, in order that the City can act on this application in a reasonable manner." *Id.* at 1.

28. The steering committee for the EIR agreed to "select and procure an independent technical consultant capable of analyzing" the identified issues, which included "the environmental impact of [Xcel Energy's] propos[al] .... assessing the need, feasible alternatives to meet the need, and the environmental, health and property impacts of the feasible

alternatives." *Id.* Xcel Energy agreed to pay the full cost and expense of the consultant (*id.* at 2 ¶ 3), which ultimately reached over \$130,000.

29. The steering committee hired Commonwealth Associates, Inc. (CAI). CAI's report was not complete until 20.01. Ex. H. Public input was allowed at the steering committee's final meeting on March 22, 2001, and the steering committee received written public comments until April 5, 2001.

30. CAI agreed that the Project was needed and that the Project would alleviate circuit overloads on these and associated lines. *Id.* at 2-4. And after comparing Xcel Energy's proposal with the five alternate plans for the transmission line upgrade, CAI concluded that Xcel Energy's "proposed plan comes closest to meeting the electrical supply requirements, taking into account the economic costs of the improvements." *Id.* at 4.

31. CAI also rejected each of the health, safety and welfare concerns regarding the Project.

32. CAI found no basis for an EMF concern. To the contrary, CAI found that the Project would dramatically reduce the EMF levels:

CAI calculated anticipated levels of electric and magnetic fields (EMF) and audible noise for the existing line on H-frame structures (Figure 2) and the proposed double-circuit line using steel pole structures (Figure 3). For the alternative route portions of Options A -and B, calculations were made for a single-circuit tangent (Figure 4) and light-angle structure configuration (Figure 5). For the reconducted lines put forward under Options C, D, and E, the expected EMF and audible noise 'values 'would be similar to the values\_ calculated for the existing line. Calculations were also made for a double-circuit underground line (Figures 6 and 7).

Calculated electrical and magnetic field values are shown in Table 2 (and plotted in Figures 8 through 10). Double-circuiting the existing line on the existing right-of-way will reduce the electric and magnetic fields. Maximum electric fields measured 3 feet above the ground at the edge of the right-of-way will be reduced from 1.0 to 0.6 kilovolt per meter (kV/m). Assuming a load of 800 amps for the existing circuit and 400 amps per circuit after double-circuiting, magnetic field strengths will be reduced from 86.7 to 21.0 milligauss (MG) at the edge of the 50-foot right-of-way assuming that the conductor phases are arranged on the new structures as shown in Figure 3.

*Id* (emphasis added).

33. CAI also dismissed, as follows, any real adverse noise impacts due to the Project:

Noise may be produced when the energized conductors are wet, such as during rainy periods. Compared to the existing line, CAI's calculations (Figure 10) indicate that audible noise will be slightly increased from 20.4 to 24.5 decibels (dB(A)) to a listener standing at the edge of the 50-foot right-of-way. The increase is accounted for in part by the increased number of conductors in the double-circuit line. However, this noise level is still very low and should be rarely heard in an outdoor setting. Conditions most likely to cause these noise levels to be noticed would be when other background noise is absent, the wind is still, and the conductors are wet from fog, rain, or snow.

*Id.* at 5 (emphasis added).

34. Concerns regarding the strength and safety of the proposed steel monopoles versus the existing wood frame poles were debunked as follows:

Generally, when adding circuits in urban areas where right-of-way space is limited, utilities use tubular steel poles instead of wood and lattice steel designs for the 115 kV class of transmission line. Vertical double-circuit tubular structures are compact, strong and lightweight, and can be assembled and erected with a minimum of effort at the work site. Tubular steel poles are also used for all sorts of other applications, such as antenna masts, light poles, and flagpoles.

The design work for the line will develop specifications so that the line can be properly constructed to withstand the static, construction, wind, and ice loads expected during \* the service life of the line. Many hundreds of miles of transmission lines across the United States are supported by single-pole tubular steel structures, including many miles of lines in the Twin Cities area. The opinion of CAI is that, if properly designed and fabricated, the proposed single-pole tubular steel structure is an extremely appropriate choice for this type of double-circuit line.

*Id.* (emphasis added). *See also* Ex. I at 2 111 ("the proposed steel structures used in the new transmission line would be stronger and more reliable than the existing wood structures and the possibility of outages to both circuits is reduced") (emphasis added).

35. Based largely upon its independent appraiser's study of the issue, CAI further found only slight adverse impact on neighboring property values due to an adjacent transmission line. It summarized property value impacts as follows:

A major concern of local residential property owners adjacent to a high-voltage transmission line is that the line will reduce the value of their property. These fears are based primarily on visual concerns, possible interference with the development of their property, and the potential for EMF concerns to repel potential buyers.

Many studies have been made of the effect of transmission lines on residential property values. Most of the studies are performed using one of two methods. The first method is to conduct an opinion survey of persons owning homes along transmission lines, other home owners, and real estate professionals. The second method is to compare the sale prices of homes along transmission lines to similar homes not along transmission lines. Opinion surveys generally show that people believe homes near a transmission line would sell for about 4 to 10 percent less than a similar house not near a transmission line. Most of the sale price comparisons show that actual sales prices for houses along transmission lines are either very similar to other comparable houses or that the price is generally no more than about 2 to 4 percent lower. The studies often show that houses adjacent to transmission lines take slightly longer to sell than a similar house not adjacent to a transmission line.

Minneapolis-based Colliers Towle, Inc., was requested to perform a survey of sale prices for the Steering Committee. The firm compared the recent sale prices of 12 subject houses along the existing Xcel Energy transmission line by pairing each subject house with three comparable similar houses in the same neighborhood. Colliers Towle also selected 10 other subject houses along a double-circuit transmission line in the Twin Cities area having the same type of tubular steel structures proposed for the Red Rock-Wilson line. The 10 houses along this line were paired with a total of 13 comparable houses in their neighborhoods. Colliers Towle appraisers adjusted the sale price of the comparable house to equalize differences in house characteristics with the subject house.

The study found that houses adjacent to transmission lines sold for an average of 0.5 percent less than houses not near transmission lines. The houses near the line took an average of 5.5 days longer to sell. Although the scope of the study is limited, the results are very similar to other studies that compare sales prices.

*Id.* at 9-10 (emphasis added). CAI identified no basis for suggesting that the upgraded transmission line proposed would cause a greater adverse impact on neighboring property values than the existing line. The lack of further diminution is significant because the adjacent residences were constructed decades after the line was first built in the 1920's. Ex. C at 3 § 2.05 ("[m]ost, if not all, of the *houses* adjacent to the transmission line were constructed after the transmission line existed and subsequent owners purchased with knowledge of the existence of the line"); Ex. L at 2 ("[a]lmost all of the existing South St. Paul residences adjacent to the powerline were constructed in. the 1950's").

36. Finally, CAI estimated that the cost of undergrounding the 3,000 feet of transmission line through the residential, segment of the right-of-way within City would be \$5,000,000 or over \$4,600,000 more than the \$390,000 for an overhead line. *Id.* at 6.

37. CAI's expert conclusions were largely uncontroverted by any credible evidence in the record.

#### **XCEL ENERGY'S CUP REQUEST TO CITY**

38. On May 4, 2001, Xcel Energy applied for a CUP to construct an upgraded double-circuit transmission line within City. Ex. A..

39. In addition to the explanatory information in its application, Xcel Energy also supplied City with a thorough information packet (Ex. J) and other presentation materials (Ex. K).

40. In the City, the transmission line is approximately one and one-half mile long and runs adjacent to "approximately 12 commercial/industrial businesses, and 35 residences." Ex. L at 1. The length of the residential segment of the route is approximately 3,000 feet.. *Id.*

41.. Besides the significant cost benefit of an overhead transmission line instead of an underground transmission line - i.e., \$390,000 versus \$5,000,000 (Ex. C at 4 § 2.15), placement overhead affords important maintenance and service advantages:

Our data show that while underground *distribution* systems reduce both the frequency and duration of outages under storm conditions, a risk is introduced that is much more pronounced with *transmission* lines: Damage to underground lines takes longer to locate and, therefore, to repair. Put simply, transmission lines carry power to too many customers to risk prolonged outages. A prolonged transmission outage potentially affects tens of thousands of customers within South St. Paul and beyond.

Ex. J at 5 (italics in original; underlining added).

### **CITY'S RESPONSE TO XCEL ENERGY'S CUP REQUEST**

42. City Staff recommended approval of Xcel Energy's CUP request with the following findings of fact:

- 1) The proposed project will reduce existing electrical & magnetic field (EMF) levels along the proposed route from 86.7 milligauss (mG) to 21.0 mG.
- 2) The Environmental Quality Board, in their negative declaration, determined that at this time, "health effects had not been conclusively demonstrated by any one study on human beings or animals, nor body of evidence from epidemiology and laboratory studies of animals, tissues, and cells."
- 3). The proposed upgrade will provide a system wide improvement both in terms of meeting increased demand for electricity and effectively dealing with double contingency outages.

*Id.* at 4.

43. City Staff' also agreed with CAI's report regarding the need for the upgrade, the superiority of this route to the alternatives, the proposed reduction in EMF and the slight adverse property value impact. *Id.* at 3.

44. City Staff added that "[b]y law, this cost [of undergrounding the transmission line] must be borne by the City of South St. Paul, not Xcel Energy." *Id.*

45. On June 13, 2001, Planning Commission recommended denial of Xcel Energy's requested CUP request, but it concluded that it "would favor an application for a conditional use permit to install the double-circuit 115kV transmission line underground in the residential area, with the condition that the excess cost above overhead construction be allocable on an [Xcel Energy] system wide basis and not confined to customers within the City of South, St. Paul." Ex. M at 3-4.

46. Xcel Energy immediately challenged via letter the bases for the Planning Commission's recommendation. Ex. N.

47. On June 20, 2001, City extended, pursuant to § 15.99, subd. 3(0, until August 7, 2001 the statutory deadline for it to "approve or deny" Xcel Energy's CUP request.

48. City did not "approve or deny" Xcel Energy's CUP request within the statutorily-imposed deadline; the August 7, 2001 deadline has passed.

49. City instead ordered on August 6 that the transmission line within City be constructed (if ever) underground rather than overhead as proposed. Ex. C at 5 § 4. And it resolved at the same time to approve or deny the CUP request at some indefinite date in the future - namely, when (if ever) PUC determines whether City can force Xcel Energy to pass on to its system-wide customers the \$4,600,000 in extra costs of undergrounding the transmission line within City. In other words, City resolved that it would approve the CUP, only if it obtained a subsidy for the Project from other utility customers.

50. Because City only resolved to be bound by a PUC decision that favored City (id.), such a PUC decision would be an advisory opinion. If PUC issues such an advisory opinion (which is highly unlikely) and approves the subsidy to City (which is even more doubtful), then City will approve the CUP request (as modified to place the line underground); if not, then City

will deny the request. *Id.* PUC's issuance of its, advisory opinion, if ever, is months away. In the interim, construction of the transmission line is stalled.

51. PUC is not likely to take up the issue required by City's August 6 resolution. PUC, like this Court, does not issue advisory opinions. Rather PUC only issues final rate decisions which bind the utility and its affected customers. *Northern States Power Co. v. City of Oakdale*, 588 N.W.2d 534, 537 (Minn. Ct. App. 1999) ("[t]he commission's decisions 'command the same regard and are. subject to the same tests as enactments of the legislature'" (quoting *Minneapolis Street Ry. Co. v. City of Minneapolis*, 251 Minn. 43, 71, 86 N.W.2d 657,676 (1957))).

52. Indeed City's resolution would effectively preclude PUC from addressing the issue. City would only abide by a PUC decision that requires Xcel Energy to pass the excess cost of undergrounding the transmission line within City to the system-wide customer base. Essentially City seeks to arrogate itself with electric utility rate making authority. But the allocation of transmission line costs among rate payers is within PUC's exclusive domain. Minn. Stat. § 216B.08; *see also*, Minn. Stat. § 21613.01, .02, subd. 4 & 5, .03, .04, .06 and .07. And, once PUC issues an order, the cost allocation is binding and cannot be disregarded, regardless of City's wishes. *Northern States Power Co.*, 588 N.W.2d at 537.

53. PUC is, moreover, highly unlikely to force Xcel Energy to pass on to its system-wide-customers the \$4,600,000 in excess costs of undergrounding the transmission line within City. This type of order would clearly constitute unlawful rate discrimination in violation of Minn. Stat. § 216B.07 and PUC tariff § 5.3E. Section 5.3E provides in relevant part:

Where special facilities are requested or required by a municipality and payment is not made by the municipality, the excess expenditures will be the responsibility of [Xcel Energy's] customers residing within the municipality and will be recovered from those customers through a rate surcharge or other method approved by the Commission.

*Northern States Power Co.*, 588 N.W.2d at 543.

54. PUC has, in fact, recently ruled that the excess costs of municipality-ordered underground distribution lines are to be borne by the utility's customers within that municipality. As it typically does, PUC adopted Minnesota Department of Commerce's recommendation to "avoid requiring taxpayers who reside outside a city that orders distribution undergrounding to bear the risk of paying for such costs in a subsequent rate case." Ex. T at 7.

55. City made the following conclusions in support of its August 6 resolution:

3.04 "The general characteristics of the residential neighborhood will not change because the configuration of an existing transmission line will only change. The  $\pi$  monopoles will be approximately 25 feet higher than the existing H-frame structures and will be the same number. However, the monopoles will be significantly more visible in the local community and will have a greater impact on the landscape than the existing structures. If the proposed double circuit line was constructed underground, the visual impact would be eliminated.

3.05 There will be diminution or impairment of property values and FHA insured loans may not be available because of the presence of the transmission line.

3.06 Noise levels will increase by approximately five decibels because of the proposed transmission line. Noise levels will not be a concern if the double circuit line is constructed underground.

3.07 Because of the uncertainty and inconclusiveness of the effects of EMF on human health and welfare, the sensible action in the interest of the public health, safety and welfare is to reduce exposure to EMF. While overhead construction of the double circuit line will reduce the magnetic field to 25.1 mG at the edge of the 40-foot right-of-way, undergrounding the double circuit line will reduce the magnetic field to a more acceptable level of 2.5 mG at the right-of-way edge.

3.08 An overhead transmission line would be more susceptible to damage from severe weather conditions and thus a greater threat to public safety than an underground transmission line.

3.09 The proposed overhead double circuit transmission line would be detrimental to the health, safety and general welfare of the community and would seriously depreciate surrounding property values because of the cumulative effects of noise, visibility, EMF and susceptibility to adverse weather conditions. These effects would be either eliminated or reduced to an acceptable level if the double circuit line was constructed underground. In such case there would not be a detriment to the health, safety and general welfare. of the community nor a serious depreciation of surrounding property values.

3.10 The proposed double circuit line will benefit the southeast metro area as well as the entire NSP system. Costs necessary to protect the public health, safety and general welfare should be system-wide cost. The excess cost to bury the double circuit line are for the protection of the public health, safety and general welfare and should be borne by the entire NSP system and not by just the City of South St. Paul or the NSP customers within the City who did not create the circumstances necessitating the construction of the transmission lines underground.

*Id.* at 5.

56. Before passing its August 6 resolution, City was apprised of MDH's confirmation of its January 2000 EMF assessment - namely, "the current weight of evidence does not support a cause and effect relationship between EMF and cancer (or any other adverse health effects)." Ex. 0 at 1. MDH's opinion regarding EMF "remains consistent with that of the [National Institute of Environmental Health Sciences (NIEHS)] and with the views of many (if not most) of the leading researchers in the scientific community." *Id.* at 2.

#### CAUSES OF ACTION

### **I. WRIT OF MANDAMUS: "AUTOMATIC APPROVAL" OF XCEL ENERGY'S CUP REQUEST DUE TO CITY'S FAILURE TO "APPROVE.. OR DENY" THE REQUEST WITHIN THE STATUTORY DEADLINE**

57. By its own resolution (Ex. B), City had, pursuant to § 15.99, subd. 2, until August 7, 2001 to "approve or deny" Xcel Energy's CUP request.

58. City did not "approve or deny" the request on or before August 7, 2001. Instead City on August 6 indefinitely extended its approval or denial of Xcel Energy's CUP request.

City's indefinite extension to approve or deny Xcel Energy's CUP request is prohibited by statute.

59. Section 15.99, subd. 2 preempts any local ordinance, regulation or "policy" that purports to extend its deadline due to other governmental or judicial action beyond that which is provided for in subdivisions 3(b), 3(d) and 3(e). Subdivision 2 imposes its deadline "[e]xcept as otherwise provided in this section and notwithstanding any other law to the contrary." The "notwithstanding" language of subdivision 2 indicates that a clear and concise state statute preempts that particular field of regulation from any local interference. *Canadian Connection v. New Prairie Township*, 581 N.W.2d 391, 394 (Minn. Ct. App. 1998) ("If a state law fully occupies a particular field of legislation, there is no room for local regulation"). Subdivisions 3(b), 3(d) and 3(e) provide the only situations in which the statutory deadline can be extended due to the impact of other governmental or judicial action on a given zoning request. Except upon agreement of the requester, these provisions do not authorize an extension of the statutory deadline pending action by another governmental body.

60. The Court of Appeals has already determined that a municipality cannot "bend the letter of [5 15.99] for the sake of administrative ease." *Demolition Landfill Servs.*, 609 N.W.2d at 281.

61. The consequence for City's failure to "approve or deny" Xcel Energy's request on time is "automatic[] approv[al]." *Demolition Landfill Servs.*, 2000 WL 1015893, at \*1 *Demolition Landfill Servs.*, 609 N.W.2d at 281; *Gun Lake Assn*, 612 N.W.2d at 181.

II. WRIT OF MANDAMUS: APPROVAL OF XCEL ENERGY'S CUP REQUEST DUE TO CITY'S LACK OF AUTHORITY TO ORDER XCEL ENERGY TO UNDERGROUND ITS TRANSMISSION LINES WITHIN CITY

62. "[M]unicipalities have no inherent powers and possess only such powers as are expressly conferred by statute \* \* \* or necessarily implied therefrom." *Northern States Power Co. v. City of Oakdale*, 588 N.W.2d at 538, (quoting *Northern States Power Co. v. City of Granite Falls*, 463 N.W.2d 541, 543 (Minn. Ct. App. 1990), *review denied* (Minn. Jan. 14 & 24, 1991)).

63. Neither of the Court of Appeals' two statutory bases - §§ 216B.36 and 222.37 - for finding municipal authority to order distribution lines underground support municipal authority to order transmission lines underground. Section 216B.36 only authorizes "the placing of distribution lines and facilities underground," not the undergrounding of transmission lines. And § 222.37 only authorizes municipal police power authority within the public right-of-way, not within Xcel Energy's private right-of-way.

64. The Court of Appeals distinguished between the cases allowing municipalities to order the undergrounding of distribution lines and the cases barring municipalities from ordering the undergrounding of transmission lines. *Northern States Power Co.*, 588 N.W. 2d at 538-39. And Code § 1500.03, subd. 14(c)(54) and (55) (Ex. P 'at 11) also distinguishes between the "[u]nderground or overhead ... electrical . . . distribution system" and overhead transmission lines.

111. **WRIT** OF MANDAMUS: APPROVAL OF XCEL ENERGY'S CUP REQUEST DUE TO CITY'S LACK OF AUTHORITY TO ORDER XCEL ENERGY TO PASS ON TO ITS SYSTEM-WIDE CUSTOMERS THE ADDITIONAL COSTS OF UNDERGROUNDING ITS TRANSMISSION LINES WITHIN CITY

65. City has already admitted that it has no police power authority to compel Xcel Energy to pass on to its system-wide customers the additional costs of undergrounding its transmission lines within City. City Staff volunteered that "[b]y law, this cost [of

undergrounding within City] must be borne by the City of South St. Paul, not Xcel Energy." Ex. L at 3.

66. The Court of Appeals agrees. *Interstate Power Co., Inc. v. Nobles County Bd. of Comm'rs*, No. C5-97-1704, slip [op.](#) [at](#) 3 ¶ 8 (Minn. Ct. App. Apr. 30, 1998) (Ex. D). The court summarily rejected County's conditional approval of a public utility's transmission line upgrade because it was contingent upon the utility's acceptance of responsibility "for any necessary relocation of their utilities and all costs incurred." *Id.*; *see also*, *Interstate Power Co. v. Nobles County Bd. of Comm'rs*, No. C4-98-1607 1999 WL 171495, at \*4 (Minn. Ct. App. Mar. 30, 1999) ("we cautioned the county in *Interstate '1* that it lacks power to regulate zoning matters for revenue purposes") (Ex. R), *rev'd and remanded on other grounds*, 617 N.W.2d 566 (Minn. 2000).

67. City's attempt to arrogate to itself electric utility rate making authority is otherwise preempted by Chapter 216B, as illustrated by PUC tariff § 5.3E.

**IV. WRIT OF MANDAMUS: APPROVAL OF XCEL ENERGY'S CUP REQUEST DUE TO CITY'S UNREASONABLE BASES FOR REQUIRING THE TRANSMISSION TO BE UNDERGROUNDED WITHIN CITY AT THE EXPENSE OF XCEL ENERGY'S SYSTEM-WIDE CUSTOMERS**

**A. STANDARD OF REVIEW**

68. Where, as here, the local government states its reasons for its zoning decision, the Court "limit[s] [its] review to the legal sufficiency and the factual bases for those reasons." *Trisko*, 566 N.W.2d at 352. The test is whether the decision was "reasonable." *Id.*

69. The "reasonableness" standard is subject to intense scrutiny where, as here, a local zoning body acts to thwart the undisputed best route for an admittedly "needed" transmission line upgrade (Ex. C at 5 § 3.03).

70. Xcel Energy's statutory eminent domain authority (§ 222.37) limits City's right to regulate lawful utility activities. *See Town of Oronoco v. City of Rochester*, 293 Minn. 468, 197

N.W.2d 426 (1972). This result is directly in line with other jurisdictions that have adopted a balancing test for municipal encroachments into utility service. *See, e.g., Potomac Edison Co. v. Jefferson County Planning and Zoning Comm'n*, 512 S.E.2d 576, 583 (W. Va. 1998). *See generally, Allan Mauly*, Annotation, *Applicability of Zoning Regulations to Projects of Nongovernmental Public Utility as Affected by Utility's Haying Power of Eminent Domain*, 87 A.L.R.3d 1265 (1978) ("Where the nature of the local zoning ordinance is exclusionary, it has been held that a utility would be immune from such an ordinance since to exclude the utility would be to destroy its power of eminent domain").

71. The "reasonableness" scrutiny is especially close where, as here; a municipality acts to bar an "essential service" (Code 1500.03, subd. 14(c)(55) (Ex. P at 11)).

72. Indeed, as explained by the two member concurrence in *Interstate Power Co. v. Nobles County Bd. of Comm'rs*, 617 N.W.2d 566, 586-87 (Minn. 2000), a municipality's effective denial of a CUP for a transmission line, which has by ordinance been characterized as an "essential service," shifts the burden to the municipality to substantiate the reasons for its decision.

73. It is, moreover, well settled that local zoning regulation which has the effect of prohibiting necessary utility activities are void as against public policy:

A municipal corporation may regulate,, but it may not prohibit, the installation of lines for the transmission of electricity... A municipality zoning ordinance which excludes high tension-lines,-or-confines-such-lines to an unrealistically small area, so as to prevent the furnishing of essential services to the residents of the community, is not reasonably related to the public health, safety or welfare.

K. Young, *American Law of Zoning*, Fourth Edition, § 12.33 at 609 (emphasis added).

**B. UNREASONABLENESS OF CITY'S STATED REASONS FOR REQUIRING XCEL ENERGY TO UNDERGROUND ITS TRANSMISSION LINE WITHIN CITY AT THE EXPENSE OF ITS SYSTEM-WIDE CUSTOMERS**

74. In justifying City's August 6 resolution based on the alleged adverse impacts caused by the proposed transmission line upgrade, "the determination .... must be made by looking to the difference between the operation of the existing power line and the upgraded line." *In the Matter of the Exemption Application by Minnesota Power for a 345/230kV High Voltage Transmission Line Known as the Arrowhead Project*, OAH Docket No. 10-2901-12620-2 (Minn. OAH Findings of Fact, Conclusions and Recommendation dated January 29, 2001) (in determining whether EIS was required, ALJ, found that "[t]he only question is whether the proposal so changes conditions as to create a significant human or environmental impact that does not now exist") (emphasis in original) (Ex: S).

75. The rationale is that adverse effects from the existing transmission line have already been approved by the municipality. *See Corvine v. Crow Wing County*, 309 Minn. 345, 352, 244 N.W.2d 482, 486 (1976) ("When a use permit is approved, the decision-making body is always implicitly giving the same reason - all requirements for the issuance of the permit have been met"). In March 1992, City "automatically granted" a CUP for Xcel Energy's existing transmission line. Code § 1500.29, subd. 4(a)(4) (Ex. P at 116).

76. City's stated reasons for requiring Xcel Energy to underground its upgraded transmission line are trumped by the uncontroverted expert opinions of EQB (Ex. E), CAI (Ex. H) and MDH (Ex. 0).

77. "[A] city may not reject testimony without adequate supporting reasons." *Trisko*, 566 N.W.2d at 356 (citation omitted). "Adequate supporting reasons" do not include the testimony of laypersons about matters beyond their knowledge and training, e.g., "scientific observations regarding the health consequences of dust and vibrations" or "the proposed gravel

pit's effect on [neighbors'] land value, water pollution, noise nuisance, and dust problems." *Id.* (citing. *Scott County Lumber Co. v. City of Shakopee*, 417 N.W.2d 721, 728 (Minn. Ct. App.), *review denied* (Minn. Mar.. 23, 1988)). Such lay testimony constitutes "unscientific speculation." *Id.*

78. City's stated reasons are, as discussed below, otherwise contrary to the record.
  - a. EMF levels with the upgraded transmission line will be one-fourth of the existing levels. And EQB, CAI and MDH all agree that these EMF levels do not pose a known risk to humans;
  - b. Noise levels will be less than one-half of the State's noise guidelines. EQB and CAI agree, and there is no contrary expert testimony in the record;
  - c. Expert testimony demonstrates but a slight (0.5%) diminution . in neighboring property values due to a transmission line. And there is no evidence that the double-circuit transmission line would cause a greater adverse property value impact than what already exists with the existing single-circuit transmission line, particularly given that the existing line predates by three decades the adjacent residences. City thus had no record basis that the upgrade will "substantially diminish or impact property values," as is required in its Code to deny the request. Code § 1500.29, subd. 4(e)(3) (Ex. P at 117b) (emphasis added);
  - d. There is no credible evidence in the record that the steel monopole structures are a hazard; and
  - e. City excludes transmission lines from its height restrictions. Code § 1500.29, subd. 20(c)(2) ("Height limitations shall not apply to ... public utility facilities") (*id.* at 131). And telecommunication towers are allowed to 170 feet, or 70 feet higher than Xcel Energy's proposed double-circuit transmission line. Code § 1500.29, subd. 35(c) (*id.* at 111 b).

#### V. WRIT OF MANDAMUS: § 586.09 DAMAGES

79. Xcel Energy's damage recovery is mandatory under Minn. Stat. § 586:09.

80. Xcel Energy is entitled to the recovery of its damages, which have been incurred due to City's wrongful and illegal conditional approval.

WHEREFORE, Xcel Energy requests that its requested Alternative Writ of Mandamus issue, ordering City to approve Xcel Energy's CUP request for its transmission line upgrade and ordering City to pay Xcel Energy its statutory damages, costs and disbursements.

DATED: August 2001

**BRIGGS AND MORGAN, P.A.**

By 

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COMPANY d/b/a XCEL ENERGY**

**ACKNOWLEDGMENT**

The undersigned acknowledges that sanctions may be imposed pursuant to Minn. Stat. 549.211, subd. 3.

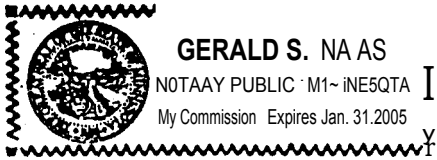
VERIFICATION

STATE OF MINNESOTA )

ss.

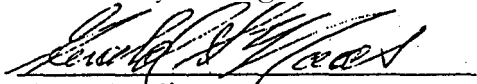
COUNTY OF HENNEPIN )

I, Dave G. Callahan, have read the contents of the above Verified Petition. Based on my personal knowledge, the facts stated therein, including the attached exhibits, are true, excepting those facts which are stated upon information and belief. Based upon reliable information, I believe that the facts stated upon information and belief are true.



Dave G. Callahan

Subscribed and sworn to before me  
this 9 day of August 2001.

  
Notary Public