

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

CASE TYPE: Other Civil

Power Line Task Force, Inc., on its behalf and
on behalf of the State of Minnesota,

Court File No. MC 03-003400

Plaintiff,

v.

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

**DEFENDANT NORTHERN STATES
POWER COMPANY d/b/a
XCEL ENERGY'S MEMORANDUM
IN SUPPORT OF ITS MOTION FOR
TRANSFER OF VENUE OR,
IN THE ALTERNATIVE,
RULE 12 DISMISSAL**

Defendant.

ARGUMENT OVERVIEW

Defendant Northern States Power Company d/b/a Xcel Energy (Xcel Energy) has for over four full years been seeking to upgrade the 6.36-mile "phase one" portion of its 14.7-mile long southeast metro transmission line from a single circuit 115kV line to a double-circuit 115kV line. The 6.36-mile phase one segment of this 80-year-old line is almost entirely in Dakota County.¹

Xcel Energy's Dakota County transmission line upgrade project has been unsuccessfully opposed at every step by Plaintiff Power Line Task Force, Inc. (Task Force), which is a Minnesota nonprofit corporation "formed by homeowners residing in the cities of Sunfish Lake, Mendota Heights and South St. Paul, whose properties are in close proximity to the electrical

¹Approximately 900-1,000 feet of the eastern-most segment of the line extends into the City of Newport in Washington County.

transmission line." Ex. B 10² Task Force unsuccessfully challenged the Minnesota Environmental Quality Board's (MEQB) November 18, 1999 negative declaration on the need for an environmental impact statement (EIS) for the line upgrade project. *In the Matter of the* □

Need for an Environmental Impact Statement for the Proposed Southeast Metro 115kV Transmission Line Project, MEQB Order dated November 18, 1999 (Ex. A1); *Power Line Task Force, Inc. v. MEQB*, No. 62-3-99-010952 (Minn. 2nd Jud. Dist. Orders dated Aug. 24, 2000 and Jan. 16, 2001) (Exhs. A-2 & A-3). Task Force unsuccessfully challenged the Minnesota Public Utilities Commission's (MPUC) January 4, 2000 order refusing Task Force's request to shut down the existing line because of environmental concerns - namely, electromagnetic field □

(EMF). *In the Matter of the Complaint Regarding the Safety of Northern States Power Company's Transmission Line in the Southeast Metro Area*, MEQB Docket No. E-0021 C-99902, Order dated Jan. 4, 2000); *Power Line Task Force, Inc. v. MPUC*, 2001 WL 481949 (Minn.

Ct. App. May 8, 2001) (Ex. A5). And Task Force unsuccessfully challenged two of the court-ordered local zoning approvals of the project.³ *NSP v. Mendota Heights*, 646 N.W.2d 919 (Minn. Ct. App.), *review denied* (Minn. Sept. 25, 2002) (petition filed by Task Force); *NSP v. Sunfish Lake*, No. C4-02-6854 (Minn. 1st Jud. Dist. Order & Memo. dated May 31, 2002) (Ex. B9), *appeal dismissed*, No. C0-02-1285 (Minn. Ct. App. Order dated Sept. 3, 2002) (appeal filed by Task Force) (Ex. B13); *NSP v. Sunfish Lake*, No. C4-02-6854 (Minn. 1st Jud. Dist.

² Exhibits are public documents of which the Court can take judicial notice. Minn. R. Evid.201(b) (allowing court to take judicial notice of adjudicative facts); *Rohricht v. O'Hare*, 586 N.W.2d 587, 589 (Minn. Ct. App. 1998) (permitting district court in malpractice action to take judicial notice of adjudicated facts in considering motion to dismiss). As such, Xcel Energy's reliance on these documents for relevant background information does not transform this Rule 12 motion to dismiss into a Rule 56 summary judgment motion. *Id.*

³ Task Force did not challenge South St. Paul's court-ordered approval of the project. *NSP v. South St. Paul*, No. 19-C8-01-9262 (Minn. 1st Jud. Dist. Order dated Oct. 19, 2001) (Ex. B7).

Order dated August 7, 2002) (Ex. B11), *appeal dismissed*, _____ N.W.2d ____, No. C3-02-1409, 2003 WL 1860689 (Minn. Ct. App. Apr. 9, 2003) (appeal filed by Task Force) (Ex. B 12).

With all of the required local zoning permits finally in place, Xcel Energy has commenced construction of the line upgrade. Undaunted by being zero for four in the legal challenges to this project, Task Force's fifth and presumably last legal maneuver is its Minn. Stat. Ch. 116B Minnesota Environmental Rights Act (MERA) action. Task Force's MERA action seeks to enjoin Xcel Energy's construction due to the alleged significant environmental threat posed by Xcel Energy's supposed non-compliance with the new Power Plant Siting Act (PPSA) requirements for transmission lines between 100kV and 200kV. Task Force alleges that Xcel Energy has not complied with either § 216B.243's certificate of need requirement or § 116C.57's route permit requirement. Even though the new PPSA requirements are to apply prospectively to projects "applied for on or after August 1, 2001" (Exhs. C2 & C3 (emphasis added)), Task Force seeks to apply these requirements retroactively to projects that were "applied for [before] August 1, 2001" - namely, Xcel Energy's long-since pending project. Task Force unsuccessfully raised this same argument in support of Sunfish Lake's February 5, 2002 denial of Xcel Energy's requested zoning approval for the project. Ex. B9 at 6 & 25-27.

By this motion, Xcel Energy seeks a Minn. Stat. § 542.11(4) transfer of venue back to Dakota County where (1) each of the three prior zoning approvals were litigated; (2) virtually the entire line is located;³ (3) any harm would be incurred; and (4) all of the Task Force members reside. In the alternative, Xcel Energy seeks a Rule 12 dismissal. The dismissal of Task Force's entire MERA action is compelled because the new PPSA requirements apply prospectively not retroactively. The dismissal of Task Force's MERA action as it relates to Xcel Energy's

³ See footnote 1.

supposed non-compliance with the certificate of need requirement is otherwise compelled because the certificate of need requirement only applies to transmission line projects of at least 10 miles in length and Xcel Energy's line project is but 6.36 miles long. There is, in any event, no requisite environmental threat posed by Xcel Energy's supposed non-compliance with the certificate of need requirement because environmental review is expressly excluded from this requirement. And the dismissal of Task Force's MERA action as it relates to the route permit requirement is compelled because, as provided for in Minn. Stat. § 116C.576, the local zoning approvals satisfy the route permit requirement.

FACTS

A. XCEL ENERGY'S DAKOTA COUNTY TRANSMISSION LINE UPGRADE PROJECT

Prior litigation has established the following relevant background facts on Xcel Energy's Dakota County transmission line upgrade project:

Xcel Energy's transmission system currently includes a single-circuit 115kV transmission line crossing six communities and serving the entire Southeast Metro area. The line was constructed in 1923. . . . One of the experts hired to review the proposed upgrade testified at a public hearing that the line has "been upgraded before." The existing 14.7-mile line connects the Red Rock Substation in Newport, the Stockyards Substation in South St. Paul, the Rogers Lake Substation in Mendota Heights, the Airport Substation at the Minneapolis/St. Paul International Airport and the Bloomington and Wilson Substations in Bloomington.

The Red Rock to Rogers Lake and Rogers Lake to Wilson lines are components of Xcel Energy's interconnected transmission system. Failure of one or more circuits in this system could result in an overload of these and other lines. Transmission line overloads can affect power supply reliability to [Sunfish Lake], St. Paul, West St. Paul, Mendota Heights, Eagan, South St. Paul, Bloomington and Inver Grove Heights. Xcel Energy has already experienced some exposure to overloads and based on forecasts, the construction of power system reinforcements is necessary.

In order to address these potential overloads on the system, Xcel Energy proposes to upgrade the existing single-circuit 115kV transmission line to a double-circuit 115kV transmission line (Project). Besides addressing reliability, added capacity will help meet expected growth in the electric load over the next decade. A second circuit line will be added to the existing line and the resulting doublecircuit line will be installed on steel monopoles. The new poles will be located on the centerline of the existing 50-foot wide right-of-way and private easements. No new right-of-way or easement will be required.

The height of the new structures will be between 84 and 100 feet, about 25 feet taller than the existing wooden H-frames. This will allow a vertical orientation of lines as opposed to the present horizontal one, placing the double-circuit line significantly further away from the edge of the easement than the current singlecircuit line. None of the substations will be expanded.

Construction of the Project is planned in two separate phases. Phase one consists of the 6.36-mile eastern portion of the line from the Red Rock Substation to the Rogers Lake Substation. There are no current plans to build phase two running from the Rogers Lake Substation to the Wilson Substation. David G. Callahan,

Team Leader in the Siting and Land Rights Division of Xcel Energy, told the City Planning Commission on January 16, 2001, "[p]hase two is something that will be addressed in the future, and as of now, there's not a project." He later explained, "[i]t's a matter of timing. The load growth projections as load has added on to the system, if it occurs more rapidly, then it's sooner. If the growth is slower, then it's later."

Ex. B9 at 7-9 (emphasis added & internal citations omitted).

Because there is not now a clearly defined need for the remaining 8.34-mile "phase two" segment of the southeast metro line from the Rogers Lake Substation in Mendota Heights to the three substations in Bloomington, Xcel Energy has not applied for or received approval from any local zoning body for phase two. In contrast, the 6.36-mile phase one transmission line project from the Red Rock Substation in Newport to the Rogers Lake Substation in Mendota Heights is currently needed and it has, therefore, been applied for and received approvals from each of the required local zoning bodies.

B. XCEL ENERGY'S PROCUREMENT OF THE REQUIRED LOCAL ZONING APPROVALS THROUGH THE DAKOTA COUNTY DISTRICT COURT

When Xcel Energy began in early 1999 seeking governmental approvals for its Dakota County transmission line upgrade project, the only permit requirements for such 115kV transmission lines were local zoning approvals. *No Power Line v. Minnesota Environmental Quality Council*, 262 N.W.2d 312, 317 (Minn. 1977). Before the initial PPSA became effective in 1973, "a public utility that wished to construct a power line had to secure permits from the local authorities of the counties and municipalities through which it proposed to locate its facilities." *Id.* After the effective date of the initial PPSA, transmission line projects of at least 200kV had to procure permits from MPUC and MEQB, but transmission line projects of less than 200kV still had to get local zoning approvals. *Id.* □

Local zoning approvals for Xcel Energy's project were required from the five communities through which the 6.36-mile line runs: Sunfish Lake, "Newport, Inver Grove

Heights, South St. Paul and Mendota Heights." Ex. B9 at 9. "Newport and Inver Grove Heights classified the project as a permitted use for which no further zoning approval was required because the upgrade does not change the existing use." *Id.* But Mendota Heights, South St. Paul and Sunfish Lake each required Xcel Energy to procure a local conditional use permit (CUP). And each of these cities proceeded to deny, or effectively deny, Xcel Energy's CUP requests. Xcel Energy was thus forced for each of these cities to procure its CUP approvals through the Dakota County District Court.

1. **Xcel Energy's Dakota County District Court actions procure its CUP from Mendota Heights**

On March 2, 1999, Xcel Energy submitted to Mendota Heights a CUP application for the upgrade of the portion of its 6.36-mile long transmission line which runs through the city. Ex. B3; *NSP v. Mendota Heights*, 646 N.W.2d at 921 ("[t]he line runs through several other cities in the southeast metropolitan area, including South St. Paul and Sunfish Lake"). Mendota Heights denied the CUP application but not until March 7, 2002, or three years after its application was initially submitted.⁵

Xcel Energy challenged the untimeliness of Mendota Heights' permit denial in the Dakota County District Court. Xcel Energy successfully claimed that Mendota Heights' long delay in "approv[ing] or deny[ing]" its CUP request violated Minn. Stat. § 15.99, subd. 2's deadline to act on the zoning request and, as a result, compelled the "automatic approval" of the

⁸ Mendota Heights' review of this application was statutorily stayed for several months as MEQB reviewed the project pursuant to Task Force's March 24, 1999 petition for an environmental assessment worksheet (EAW). As discussed below, MEQB issued on November 18, 1999 a negative declaration on the need for an EIS (Ex. A1), which Task Force unsuccessfully appealed (Ex. A2). On April 4, 2000, Xcel Energy nevertheless voluntarily agreed with Mendota Heights, South St. Paul and Sunfish Lake not only to subject the project to an "environmental impact review," but to do so at its own expense. Ex. B I. The cities issued their final environmental impact review in March 2001. Ex. B2 (executive summary).

request. *NSP v. Mendota Heights*, 646 N.W.2d 919. By court order, the permit was thus granted. *Id.* Task Force unsuccessfully petitioned for review by the Supreme Court. *Id.*

In the interim, Xcel Energy also challenged the arbitrariness of Mendota Heights' permit denial in the Dakota County District Court. *NSP v. Mendota Heights*, No. C6-02-007388 (Minn. 1st Jud. Dist. complaint filed April 1, 2002) (Ex. B4). This challenge was, however, mooted by the Court of Appeals' automatic approval of the CUP because of the city's untimely denial of the project. *NSP v. Mendota Heights*, 646 N.W.2d 919.

2. **Xcel Energy's Dakota County District Court action procures its CUP from South St. Paul**

Xcel Energy began its application process with South St. Paul on April 4, 2000, pursuant to its agreement with Mendota Heights, South St. Paul and Sunfish Lake to subject the project to an "environmental impact review." Ex. B1; Ex. B5 at 3 (because of this "environmental impact review" process, "Xcel Energy is in the process of obtaining the required conditional use permits from South St. Paul, Mendota Heights and Sunfish Lake") (emphasis added). Then, on May 4, 2001, shortly after the cities issued their favorable environmental impact review, Xcel Energy submitted to South St. Paul a CUP application for the upgrade to the portion of its 6.36-mile long line which runs through the city. Ex. B5 at 1 ("this upgrade involves rebuilding line 0818," which is the 6.36-mile line between the Red Rock and Rogers Lake Substations; "Xcel Energy proposes to add a second 115kV circuit between the Red Rock and Rogers Lake Substation"). South St. Paul effectively denied Xcel Energy's CUP application on August 6, 2001 by conditioning its CUP approval on the cost-prohibitive requirement that the company underground the line.

Xcel Energy immediately challenged South St. Paul's effective CUP denial in the Dakota County District Court. Ex. B6. Pursuant to a settlement agreement that was approved by the

Dakota County District Court on October 19, 2001, South St. Paul approved Xcel Energy's CUP without the condition that the line be undergrounded. Ex. B7. Task Force has never challenged South St. Paul's CUP approval.

3. Xcel Energy's Dakota County District Court action procures its CUP from Sunfish Lake

Xcel Energy began its application process with Sunfish Lake on April 4, 2000 pursuant to its agreement with Mendota Heights, South St. Paul and Sunfish Lake to subject the project to an "environmental impact review." Ex. B1; Ex. B5 at 3 (because of this "environmental impact review" process, "Xcel Energy is in the process of obtaining the required conditional use permits from South St. Paul, Mendota Heights and Sunfish Lake") (emphasis added). Then, on November 13, 2001, after the March 2001 issuance of the cities' favorable environmental impact review and South St. Paul's October 19, 2001 CUP issuance, Xcel Energy submitted to Sunfish Lake a CUP application for the upgrade to the 1.268-mile portion of its 6.36-mile long line which runs through the city. Ex. B8 at 2 ("the entire line upgrade project involves an upgrade of the existing 115kV transmission line from the Red Rock Substation in Newport to the Rogers Lake Substation in Mendota Heights") (emphasis added).

On February 5, 2002, Sunfish Lake denied Xcel Energy's CUP. Sunfish Lake concluded that the line upgrade would (1) adversely impact property values, (2) pose unwarranted health hazards from EMF, and (3) had neither been shown to be needed nor procured the alleged statutorily required "certificate of need" from MPUC. Ex. B9 at 6. "The Councilman who made the motion to deny put it this way, 'I don't think we've got a chance in hell of winning, but we have a chance as slim as it might be.' In its resolution denying the application, [Sunfish Lake] specifically found that denial would force Xcel [Energy] to consider [Sunfish Lake's] favored option (and [Task Force's]) of removing the existing line altogether." *Id.* (citations omitted).

On February 26, 2002, Xcel Energy petitioned the district court for a writ of mandamus seeking, among other things, to compel Sunfish Lake to grant the requested CUP because Sunfish Lake's CUP denial was arbitrary and capricious. On May 31, 2002, the district court issued its 28-page Order and Memorandum (May 31 Order) denying Sunfish Lake's motion for summary judgment and granting Xcel Energy's partial summary judgment motion for an order compelling Sunfish Lake to grant the CUP. In granting partial summary judgment in favor of Xcel Energy, the district court rejected the factual and legal bases for each of Sunfish Lake's three reasons for denying the CUP. Ex. B9 at 16-28.

The district court concluded that Sunfish Lake's denial based on diminution of property values was "arbitrary and capricious." Ex. B9 at 2 1-22. It found that Sunfish Lake erroneously rejected the only relevant and credible expert opinion on this issue in the record - that is, the uncontroverted opinion of the real estate appraisal expert Colliers Towle. Colliers Towle found through a detailed study of house sales near transmission lines that the type of line upgrade Xcel Energy was proposing would have a negligible impact on property values of only 1%. Sunfish Lake, instead, relied on three last-minute letter "testimonials" from real estate agents that generally and conclusory stated that the proximity of transmission lines to a property presented a health risk and had an adverse impact on property values. Sunfish Lake's reliance on these testimonials was found by the court to be inappropriate because there was no record proof that these testimonials were reliable or that the real estate agents were qualified to give such opinions. In any event, the court concluded that, because the 80-year-old line predates the adjacent homes, "the only property value impact at issue is the incremental impact, if any, caused by adding the second circuit to the existing line" (which was addressed by Colliers Towle), not whether

transmission lines adversely impact neighboring property values (which was addressed by the three real estate agents). *Id.* (emphasis added).

The district court also concluded that Sunfish Lake's denial based on the health risks of EMF was "arbitrary and capricious" because the upgrade met Sunfish Lake's requirement that "reasonable and prudent measures" be taken to mitigate EMF. Ex. B9 at 22-25. Indeed Sunfish Lake "identified no other measures that Xcel [Energy] might take to reduce EMFs except for undergrounding the line, and [Sunfish Lake] rejected this alternative due to its costs." *Id.* at 2425. The court found that the upgrade not only met all state and national safety standards but, even according to Sunfish Lake, it may reduce exposure to EMF "by as much as 80%" over the current line. Task Force had, moreover, already unsuccessfully challenged in front of two state agencies MEQB and MPUC the line upgrade on the grounds that it was a health hazard. *Id.* at 10-13. The decisions by these state agencies not to take action against the line because of purported health risks had been upheld in both the Ramsey County District Court and the Court of Appeals, respectively. *Id.* at 5-6. The Minnesota Department of Health (MDH) also reviewed the line upgrade project and it, too, found that the project would reduce the EMF levels. *Id.* at 10.

Finally, the district court concluded that Sunfish Lake's determination that the CUP request should be denied because there was no need for the upgrade violated Sunfish Lake's own zoning procedures and regulations. Ex. B9 at 16-19. It further found the denial based on lack of need to be "arbitrary and capricious" because (1) "[v]irtually no one testified before any responsible governmental body to a lack of need for the Project," and (2) "Xcel [Energy] has already established need for the second circuit and '[w]hen the record adequately supplies the reasons underlying a business decision, neither a municipal body nor a court should override that

business judgment." *Id.* at 19-20 (quoting *Trisko v. City' of Waite Park*, 566 N.W.2d 349, 355 (Minn. Ct. App.), *review denied* (Minn. Sept. 25, 1997)).

The district court likewise rejected Sunfish Lake's related contention that it had to deny the CUP because Xcel Energy had yet to procure a Minn. Stat. § 216B.243, subd. 4 "certificate of need" from MPUC. Ex. B9 at 25-27. Certificates of need are only "required for construction of 100+ kV lines of over ten miles in length," and Xcel Energy's proposed upgrade is for only 6.36 miles. *Id.* at 14. The court, nevertheless, also rejected Sunfish Lake's denial based on this certificate of need requirement "[b]ecause Xcel [Energy] had an application for approval of this project before various cities before August 1, 2001[.] [which is the effective date of the certificate of need requirement,] it does not need [M]PUC review at all." *Id.* at 26 (emphasis added).

Shortly after the Dakota County District Court issued its May 31, 2002 Order, Sunfish Lake issued the CUP pursuant to a settlement agreement between Xcel Energy and Sunfish Lake which was approved by the Dakota County District Court on August 7, 2002. Ex. B11. As an intervenor in the case, Task Force unsuccessfully appealed both the Dakota County District Court's interlocutory decision ordering the city to grant the CUP, as well as the Court's dismissal with prejudice of the case upon approving Xcel Energy and Sunfish Lake's settlement agreement. Exhs. B13 & B12. But Task Force has never directly challenged Sunfish Lake's CUP approval.

C. THE EXHAUSTIVE ENVIRONMENTAL REVIEWS OF XCEL ENERGY'S DAKOTA COUNTY TRANSMISSION LINE UPGRADE PROJECT

Xcel Energy's Dakota County transmission line upgrade project has already been subjected to a gauntlet of environmental reviews by MEQB, MPUC and MDH, as well as by the cities of Mendota Heights, South St. Paul and Sunfish Lake. None of the multiple environmental

reviews for this project even arguably concluded that the line upgrade would cause significant environmental harm. To the contrary, the environmental reviews were judicially summarized as follows:

A primary issue before these state agencies was [EMF] impacts. An electric field is the region in which a force exists between two charged particles. Electric fields are found around any source of electric voltage and are expressed in units of kilovolts per meter (kV/m). A magnetic field is the vector quantity that describes the forces of interaction between electric currents and is expressed in milliGauss (mG). Each of the [state] agencies [that reviewed the project], and the [Sunfish Lake] City Council, recognized that the Project will dramatically "reduce" existing EMF levels. In addition, the [Sunfish Lake] City Council concluded that EMF studies have "not yet demonstrated a causal relationship" between EMF levels and "leukemia, lymphomas, nervous system tumors and breast cancer, as well as with various reproductive abnormalities."

Ex. B9 at 10 (emphasis added; internal citations omitted); *see also NSP v. Mendota Heights*, 646 N.W.2d at 923 ("[d]ouble-circuiting the existing line on the existing right-of-way will reduce the [EMF]") (emphasis added). Despite its incessant rantings and fear mongering about the health concerns with EMF, Task Force has yet to explain how the line upgrade project's 80% reduction in EMF levels could possibly pose a health threat.

1. MEQB's environmental review

MEQB's environmental review of Xcel Energy's Dakota County transmission line upgrade project has been judicially summarized as follows:□

On March 24, 1999, [MEQB] was petitioned to prepare an [EAW] with respect to the proposed upgrade of Xcel Energy's existing transmission line serving the Southeast Metro area. MEQB ruled that "the project does not have the potential for significant environmental effects" and issued a negative declaration on the need for an in-depth [EIS]. [Ex. A1]. [Task Force] challenged the negative - declaration in court and lost. [Exhs. A2 & A3].

In support of their negative declaration on the need for an EIS, MEQB found that "health effects had not been conclusively demonstrated by any one study on human beings or animals, nor by the body of evidence from epidemiology and laboratory studies of animals, tissues and cells." MEQB staff conducted a review of recent developments in scientific literature regarding EMF including the

National Research Council and the National Institute of Environmental Health Sciences (NIEHS) reports released in 1999 and concluded that "the current evidence does not indicate that the electric and magnetic fields expected from transmission lines represent a potential for significant environmental effect." Neither the cities nor anyone else appealed the negative declaration, as allowed by law. Minn. Stat. Sec. 116C.65.

The Ramsey County District Court dismissed [Task Force's] legal challenge to the negative declaration, finding that MEQB's decision was not arbitrary or capricious and that they properly considered the NIEHS study. The Court stated, "[t]he gist of the report is that there is weak scientific evidence suggesting that EMF exposure may pose a leukemia hazard, but that the evidence is not sufficient to require aggressive regulatory concern." [Task Force's] motion for a new trial based on "new" EMF studies was denied, the Court finding that "[t]he [new] EMF studies are cumulative with information on the record. None of the information would have likely affected the outcome of the case." No appeal was filed.

Ex. B9 at 5 & 10-11 (emphasis & brackets added; internal citations omitted).

MEQB's negative declaration is dispositive of Task Force's scientifically unsubstantiated environmental concerns with Xcel Energy's Dakota County transmission line upgrade project. MEQB was designated as the responsible governmental unit (RGU) for reviewing the EAW petition. And, pursuant to Minn. R. 4410.0500, subp. 5(B), this designation meant that MEQB was the governmental unit with either the "greatest responsibility for supervising or approving the project" or the "great[est] expertise" over the project, or both.

2. MPUC's environmental review

MPUC's environmental review of Xcel Energy's Dakota County transmission line upgrade project review was likewise judicially summarized as follows:□

On June 30, 1999, [Task Force] filed a complaint with [MPUC] alleging that [EMF] from the transmission line was causing illnesses and miscarriages and asking that it be shut down. By Order dated January 4, 2000, MPUC refused to shut down the line, finding that [Task Force] "wives us no cause to question the commission's position that because of limited resources and the current state of scientific knowledge neither [Task Force's] record nor any record that could be developed at the present time could justify shutting down the line." The Minnesota Court of Appeals upheld MPUC's Order. [Ex. A5].

In affirming MPUC's decision, the Minnesota Court of Appeals stated, "[MPUC] reasoned that because the [NIEHS] had conducted a six-year, \$60.5 million study of the issue, [MPUC] could not 'reasonably second-guess' the NIEHS conclusion that presently there was cause only for 'passive' and 'inexpensive' regulatory measures to reduce EMF exposure." [Id.].

Ex. B9 at 5-6 & 11 (emphasis & brackets added; internal citations omitted).

MPUC's environmental review of Xcel Energy's line upgrade project is critical. MPUC is, by statute, responsible for ensuring that "[e]very public utility . . . furnish safe, adequate, efficient, and reasonable service." Minn. Stat. § 216B.04 (emphasis added). If MPUC found there to be a safety risk posed by the line upgrade project, then it was thus duty bound to eliminate or mitigate that risk. Yet it found no such risk.

3. MDH's environmental review

MDH's environmental review of Xcel Energy's Dakota County transmission line upgrade project was also judicially summarized as follows:□

MDH is charged with promoting public health by regulating environmental health hazards. Minn. Stat. Sec. 144.05, subd. 1(c). In its January 4, 2000, *Assessment of Health Effects Research on Electric and Magnetic Fields*, MDH concluded, "no conclusive and consistent evidence shows that exposures to residential electric and magnetic fields produce cancer or any other adverse human health effect." [Ex. A6] at 4. MDH also notes "[t]he current body of research lacks fundamental evidence to support a cause and effect relationship between magnetic fields and childhood leukemia. This conclusion is based on laboratory studies which have failed to demonstrate adverse health effects or a plausible biological mechanism of causation (in vivo and in vitro)."

By letters dated March 7, 2001, July 27, 2001 and December 20, 2001, MDH reasserted the above conclusions. [Exhs. A7-A9]. Chuck Strobel, MDH Environmental Research Scientist, appeared before the [Sunfish Lake] City Council on February 4, 2002, spoke at length (55 minutes by [Task Force's] account) and reaffirmed his agency's position regarding EMF. [Ex. A10] at 2778.

B9 at 1 1-12 (emphasis & brackets added).

MDH's environmental review of Xcel Energy's line upgrade project is similarly important.

Minn. Stat. § 144.05, subd. 1(c) grants to MDH the authority to impose

environmental health standards. But MDH found the line upgrade project to violate no environmental health standards.

4. The cities' \$130,000 "environmental impact review"

The cities' \$130,000 "environmental impact review" of Xcel Energy's Dakota County transmission line upgrade project was judicially summarized as follows:

In March of 2000, resistance to the Project prompted the Mayors of Sunfish Lake, South St. Paul and Mendota Heights to create the "Transmission Line Steering Committee" and commission the preparation of a region-wide "environmental impact review" (EIR). [Ex. B1]. Documentary and testimonial evidence submitted to the Steering Committee was later incorporated into the record compiled by [Sunfish Lake]. The finality of MEQB's negative declaration on the need for an EIS left the cities with no legal authority to mandate such an undertaking. Likewise, Xcel Energy was under no legal obligation to subject its Project to such a review. Nonetheless, Xcel Energy agreed to allow the Committee's independent contractor, Commonwealth Associates, Inc. (CAI), to conduct the review and on January 3, 2001, CAI issued a several hundred-page report together with a 12-page executive summary. The costs incurred in preparing the report (in excess of \$130,000) were paid by Xcel Energy.

[Task Force] alleges that the CAI report is biased toward Xcel Energy. At the December 12, 2001, [Sunfish Lake] City Council Meeting, [its] Mayor Tiffany described the report as "a slightly scaled down environmental impact statement." He also stated, in response to remarks directed at CAI by [Task Force], that the Steering Committee "[was] totally satisfied that [CAI] produced an unbiased report" and "[i]ts unbelievable the volume of objective measurable data to support [CAI's] conclusions."

The focus of the review by CAI was on 1) the need for the second circuit, 2) potential alternative system improvements rendering the second circuit unnecessary, 3) effects of EMF and audible noise, 4) appropriateness of the tubular steel structure, 5) the economic cost of the project and alternatives 6) possible alternative routes for the second circuit, and 7) potential impacts to the natural and cultural environment.

The EIR concludes that the Project, including the 6.36-mile phase one of the existing 14.7-mile Southeast Metro transmission line, is needed to satisfy Xcel Energy's double contingency objectives. The existing line does not meet Xcel Energy's double contingency planning requirements, and by the summer of 2002, the line will not meet Xcel Energy's single contingency criterion. Using computer modeling, CAI examined Xcel Energy's proposed line upgrade along with five other alternatives and concluded that the proposed upgrade was the best method of curing the various reliability and contingency deficiencies of the current line.

Ex. B9 at 12-14 (emphasis & brackets added).

D.TASK FORCE'S MEBA ACTION

Despite its several prior unsuccessful actions to obstruct Xcel Energy's Dakota County transmission line upgrade project, Task Force has filed yet another claim - that is, this MERA action. Task Force's MERA action is premised exclusively upon the alleged significant environmental threat posed by Xcel Energy's supposed non-compliance with the retroactive application of the new PPSA requirements. Specifically, Task Force alleges that "Xcel [Energy] may not construct the aforesaid transmission line without first obtaining [1] a Certificate of Need from the [M]PUC [under § 216B.243] and [2] a Route Permit from the [M]EQB" under § 116C.57. Complaint ¶¶ 18, 24, 29 & 34 (brackets added).

The certificate of need requirement applies to transmission line projects of at least 100kV that are no less than 10 miles in length. Minn. Stat. § 216B.2421, subd. 2(3). The certificate of need requirement previously applied just to transmission line projects that were at least 200kV. Minn. Stat. § 116C.52, subd. 4 (2000). The initial PPSA provided for environmental review in determining the certificate of need requirement. Minn. R. 7849.0200-.0400. But, under the new PPSA, the certificate of need requirement solely determines "questions of need, including size, type and timing; alternative system configurations; and voltage." Minn. Stat. § 116C.53, subd. 2 (emphasis added).

Similarly, the route permit requirement extends to transmission line projects that are no less than 100kV. Minn. Stat. § 116C.575, subd. 2(3). The route permit requirement previously applied just to transmission line projects that were at least 200kV. Minn. Stat. § 116C.52, subd. 4. The route permit review determines the proper route for the project, and it provides the

exclusive environmental review of the project. Minn. Stat. §§ 116C.575, subd. 5 & 116C.57, subd. 2c.

Task Force's complaint conspicuously fails to explain, among other things, (1) its change of venue from Dakota County to Hennepin County; (2) its retroactive application of the new PPSA requirements to projects that were "applied for [before] August 1, 2001"; (3) how the 6.36-mile transmission line project triggers the certificate of need requirement, which only applies to transmission line projects that are at least 10 miles long; (4) the basis for claiming that Xcel Energy's purported non-compliance with the certificate of need requirement poses a significant environmental threat, given that environmental review is exclusively contained within the route permit review process under §§ 116C.575, subd. 5 and 116C.57, subd. 2; and (5) why the route permit requirement was not satisfied by the local zoning approvals, as provided for in § 116C.576. As a result, the complaint should be either transferred back to the Dakota County District Court or, in the alternative, dismissed under Rule 12.02(e) for failing to state a claim upon which relief can be granted.

ARGUMENT

I. PURSUANT TO MINN.STAT. § 542.11(4), VENUE SHOULD BE TRANSFERRED TO DAKOTA COUNTY

Minn. Stat. § 542.11(4) grants this Court broad authority to transfer venue "when . . . the ends of justice would be promoted by the change." *See Roterling v. Jones*, 277 Minn. 253, 152 N.W.2d 353 (1967). Several factors demonstrate that "the ends of justice would be promoted by the change" of venue back to the district court where this project has thrice previously been - i.e., the Dakota County District Court.

All three prior district court actions regarding Xcel Energy's Dakota County transmission line upgrade project were venued in the Dakota County District Court. All three actions resulted in Court-ordered CUP approvals. The Dakota County District Court has, therefore, already reviewed the voluminous records for this project. For the zoning dispute with Sunfish Lake alone, "the Court has reviewed the 109 documents totaling more than 2,000 pages comprising the administrative record before the City." Ex. B9 at 3. The Dakota County District Court has also already addressed the precise legal issue being raised here (*id.* at 25-27) (dismissing argument that § 216B.243's certificate of need requirement barred local zoning approvals), as well as the same underlying environmental issues - notably, EMF. *Id.* at 22-25. Hence, judicial economy would be advanced by transferring venue back to the Dakota County District Court because of its familiarity not only with the project but also with the underlying legal and environmental claims at issue.

The Dakota County District Court is otherwise the logical court to review this action. The 6.36-mile long transmission line upgrade project is almost entirely within Dakota County.' 6 See footnote I .

Generally, disputes over real estate are to be venued in the county where it lies. Minn. Stat. § 542.02. Moreover, because of the project's location entirely within Dakota County, any purported environmental harm arising from this project will necessarily be incurred in Dakota County. Plus, any viewing of the line by the finder of fact will have to be done in Dakota County.□

Finally, Task Force will not be prejudiced by the transfer of venue back to Dakota County. Task Force members all reside in Dakota County. Ex. 1310. And in none of the three prior Dakota County District Court actions did Task Force ever object to the venue.

II. ALTERNATIVELY, TASK FORCE'S MERA ACTION MUST BE DISMISSED UNDER RULE 12.02(e)

On its face and as reviewed with the prior adjudicated facts, Task Force's MERA action fails to state a claim upon which relief can be granted.

A. Xcel Energy's Rule 12.02(e) motion to dismiss presents legal issues for the Court

Whether the new PPSA requirements apply retroactively (as proposed by Task Force) or prospectively (as proposed by Xcel Energy) is a statutory construction issue for the Court.□

Metropolitan Sports Facilities Commission v. County of Hennepin, 561 N.W.2d 513, 515 (Minn.1997) ("[s]tatutory construction [is a] question[] of law"); *Luna v. Zeeb*, 633 N.W.2d 540, 542 (Minn. Ct. App. 2001) ("[s]tatutory construction is a question of law, which this court reviews *de novo*"). This Court must also determine the questions of law presented by (1) whether the length of line at issue is Xcel Energy's actually applied-for 6.36-mile project (as proposed by Xcel Energy) or the 14.7-mile line that was subject to the multiple environmental reviews (as proposed by Task Force); (2) whether the certificate of need requirement poses the statutorily required significant environmental threat; and (3) whether the court-ordered local zoning approvals of the project satisfy § 16.576's alternate route permit requirement. *Id.*

B. Xcel Energy's supposed violations of the new PPSA requirements do not, as a matter of law, state a MERA action because Xcel Energy's long-since pending project is exempt from these requirements

1. New PPSA's purpose

The purpose of the initial PPSA was two-fold: "that the process should be orderly and that there should be public participation in all stages of agency decision-making." *No Power Line*, 262 N.W.2d at 321 (emphasis added); *id.* at 322 ("the twin legislative goal of ensuring the orderliness of the decision-making process and providing the opportunity for public participation"). The new PPSA emphasizes the need for an efficient process - that is, that permitting of large utility projects is "done in a sensible, reasonable, non-duplicative fashion." 5/16/01 Sen. Comt. at 13 (Ex. C 1).

2. New PPSA requirements only apply prospectively

Rules of statutory construction require statutes to be prospective unless expressly stated otherwise. It has been long-settled law in Minnesota that "[n]o law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature." Minn. Stat. § 645.21 (emphasis added); *see also, Chapman v. Davis*, 233 Minn. 62, 45 N.W.2d 822 (1951), and *Hughes v. Luckner*, 233 Minn. 207, 46 N.W.2d 497 (1951).

The new PPSA is not "clearly and manifestly" retroactive! Rather Minn. Laws 2001, ch. 212 provides as follows:□

Sec. 37 **EFFECTIVE DATE.** This article is effective for [1] certificates of need and [2] route and site permits applied for on or after August 1, 2001.

Exhs. C2-C3 (underlining & brackets added). Thus, consistent with its purpose, the new PPSA requirements expressly apply prospectively-- that is, to projects that were "applied for on or

⁷ "This article" includes the certificate of need requirement under § 216B.243 and the route permit requirement under § I 16C.57. Exhs. C2-C3.

after August 1, 2001." (Emphasis added). Conversely, then, the new PPSA requirements do not apply retroactively - that is, to projects that were "applied for [before] August 1, 2001."

3. A 115kV transmission line was "applied for [before] August 1, 2001" if it was then approved by or pending before at least one local zoning body in which the line was located

The question, then, is what does it mean for a 115kV line project to have been "applied for [before] August 1, 2001." Based on the then-existing law, it necessarily means that the project had already been approved by or was pending before at least one local zoning body in which the line was located. This is because (1) until the new PPSA was effective, the only governing bodies with jurisdiction over 100kV to 200kV lines were the local zoning bodies (*No Power Line*, 262 N.W.2d at 317); and (2) the application for any one segment of the line project constitutes an application for the whole project. Transmission line projects refer to the entire route being applied for because § 116C.52, subd. 8 defines "route" as "the location of a high voltage transmission line between two end points," which for a transmission line are at its substations. (Emphasis added).□

The new PPSA itself - notably, §§ 116C.576, subd. 1(b) and 216B.2425, subd. 6 - compels the conclusion that a 100kV to 200kV line project was "applied for [before] August 1, 2001" if at that time it was approved by or pending before at least one of the local zoning bodies in which the line is located. Section 116C.576, subd. 1(b) allows utilities to procure their required route permit from the local zoning bodies rather than MEQB. And this local alternative provides that the application to one local zoning body with jurisdiction over the project triggers the application date for each of the required local zoning bodies with jurisdiction over the project. *Id.* More specifically, recognizing that a transmission line project may have several local zoning bodies with jurisdiction over the project and that the applicant may not apply for all local approvals at once, the 60 days in which each of the local zoning bodies has to demand that

MEQB conduct the route permit review commences when the application is first received by any one of these bodies. *Id.*

Similarly, § 216B.2425, subd. 6 sets forth a "fast-track" for MPUC's certificate of need determination, which expressly exempts "any transmission line proposal that has been approved by, or was pending before, a local unit of government, the environmental quality board, or the public utilities commission on August 1, 2001." (Emphasis added). Subdivision 6 thus exempts projects that were "pending before a local unit of government" i.e., a single local zoning body. And there is absolutely no reason for the legislature to have intended to exempt approved or pending line projects from § 216B.2425, subd. 6's "fast-track" certificate of need requirement but not from the non-"fast-track" certificate of need requirement under § 216B.243 or the route permit requirement under § 116C.57.

Perhaps most importantly, MPUC agrees that a 100kV to 200kV line project that was by August 1, 2001 approved by or pending before any one local zoning body is exempt from the new PPSA requirements. On March 20, 2002, MPUC ordered the utilities to provide it with "a listing of projects that the utilities believe are exempt by virtue of having one or more applications pending before local governments by August 1, 2001." Ex. C4 at 4 ¶ A(4) (emphasis added). And in its March 31, 2002 response filing, Xcel Energy identified the "Southeast Metro 115kV transmission line" as such an exempt project. Ex. C5 at 5 ¶ 4. Xcel Energy explained that "[p]ermits were pending and local units of government had made final decisions on this project prior to August 1, 2001." *Id.* Such agency determinations are entitled to deference. *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824-26 (Minn. 1977) (adhering to the "fundamental concept that decisions of administrative agencies enjoy a presumption of correctness, and deference should be shown by courts to the agencies' expertise and their special

knowledge"); *see also* Minn. Stat. § 14.69 (2002) (defining the scope of judicial review of an administrative agency determination).

Finally, *No Power Line* illustrates the need for such prospective application of the new PPSA. In discussing an analogous "grandfather" clause for approved or pending line projects under the initial PPSA, the Minnesota Supreme Court explained:

It seems obvious that the legislature intended the savings clause to protect public utilities whose projects had already begun from being overly burdened by the new statute. Recognizing that such projects often took many years to complete, the legislature did not wish to impose conditions on the utilities for which they had been unable to plan.

No Power Line, 262 N.W.2d at 321-22 (emphasis added). It is just as "obvious" that nearly three decades later the legislature likewise intended the "effective date" of the new PPSA requirements to "grandfather in" the then-approved or pending projects, such as Xcel Energy's 6.36-mile Dakota County transmission line upgrade project. The "effective date" language, as well as §§ 116C.576, subd. 1(b) and 216B.2425, subd. 6, underscore that "the legislature did not wish to impose conditions on the utilities for which they had been unable to plan." And there is no dispute that Xcel Energy could not plan for the new PPSA requirements that were not passed until 2001, which was two years after it had begun its permitting process.

4. Xcel Energy's Dakota County transmission line upgrade project was "applied for [before] August 1, 2001"

There is no serious dispute that Xcel Energy's 6.36-mile long Dakota County transmission line upgrade project was "applied for [before] August 1, 2001." As of August 1, 2001, Xcel Energy had local zoning approvals from two of the five municipalities that it needed zoning approval: Newport and Inver Grove Heights. Of the remaining three municipalities, Xcel Energy had by August 1, 2001 voluntarily subjected its project to a \$130,000

"environmental impact review" for all three cities and submitted CUP applications to two of the three cities - i.e., Mendota Heights and South St. Paul.

These facts demonstrate the absurdity of Task Force's legal theory. Task Force is asserting that because the CUP for the 1.268-mile line running through Sunfish Lake was not formally applied for until November 13, 2001, the fact that the other 5.092 miles of the line were either approved or pending is meaningless, as are the multiple state environmental reviews of the project, and the entire line must now be reviewed all over from scratch.

Tellingly, despite the high profile of this dispute, neither MPUC nor MEQB has ever suggested that Xcel Energy's project was not "applied for [before] August 1, 2001." Indeed, to suggest otherwise would be counter to the new PPSA's objective that the permitting of such transmission lines be "done in a sensible, reasonable, non-duplicative fashion." Ex. Cl. To construe Xcel Energy's project as not being "applied for [before] August 1, 2001" would effectively render moot each of the prior state and local decisions on this project - notably, MEQB's judicially-upheld environmental review and the three judicially-ordered local zoning approvals. Task Force asks the Court to reach this conclusion despite the lack of any basis to claim that the review under the new PPSA requirements would address any new issues or concerns or that such review would cure any deficiencies in the already completed review. This Court is to avoid such an absurd result. Minn. Stat. § 645.17(1); *Burkstrand v. Burkstrand*, 632 N.W.2d 206, 210 (Minn. 2001).

C. **Regardless, Xcel Energy's supposed violation of the certificate of need requirement does not, as a matter of law, state a MERA claim**

1. **The certificate of need requirement is, as a matter of law, inapplicable to this project**

The certificate of need requirement only applies to transmission line projects that are at least 10 miles long. Minn. Stat. § 216B.2421, subd. 2(3). Xcel Energy's local zoning applications for its project were for less than 10 miles i.e., 6.36 miles. *See NSP v. Mendota Heights*, 646 N.W.2d at 921; Ex. B5 at 1; Ex. B8 at 2; Ex. B9 at 14. The certificate of need requirement is, therefore, inapplicable as a matter of law.□

In order to trigger the certificate of need requirement, Task Force desperately seeks to expand Xcel Energy's project to the full 14.7-mile length of its southeast metro line. But Xcel Energy has not sought the approval of the remaining 8.34-mile phase two segment of the southeast metro line from the Rogers Lake Substation in Mendota Heights to the three substations in Bloomington. Xcel Energy has instead represented that "[p]hase two is something that will be addressed in the future, and as of now, there's not a project." Ex. B9 at 9 (emphasis added).

Task Force relies solely upon the undisputed fact that the environmental reviews for the 6.36-mile long project analyzed the entire 14.7-mile southeast metro line. But Xcel Energy's decision to allow the entire 14.7-mile line to be subject to the environmental reviews does not transform what Xcel Energy actually applied for -- i.e., the 6.36-mile long project - into a *de*□
facto application for the entire 14.7-mile long line. With regard to environmental concerns on hotly contested permit applications, it is always advisable to be overinclusive rather than underinclusive. It was particularly appropriate to be overinclusive here. There is little question that, if Xcel Energy restricted the environmental reviews to the 6.36-mile long transmission line upgrade project at issue, then Task Force would be complaining that the limited environmental

review was inadequate. Indeed Minnesota Rules on "phased" and "connected" actions arguably required the environmental reviews to include the 8.34-mile phase two segment of the line along with the 6.36-mile segment, even if the phase two approval was not currently being sought. Minn. R. 44 subp. 4 and 4410.2000, subp. 4.

2. Xcel Energy's supposed violation of the certificate of need requirement does not, as a matter of law, meet the requisite threshold showing under MERA of a threat of significant environmental harm

In order to sustain this MERA claim, Task Force must make "a prima facie showing that the conduct of [Xcel Energy] has, or is likely to cause the pollution, impairment, or destruction of the air, water, land or other natural resources located within the state." Minn. Stat. § 11613.04 (emphasis added). In other words, a MERA claim must allege an actual or threatened environmental harm.

And, in assessing whether a transmission line upgrade poses a significant environmental impact, "Minnesota law does not recognize the precautionary principle as the standard for determining a 'significant impact.' The term 'significant' is an important limitation in law. . . . [T]he determination of significance must be made by looking to the difference between the operation of the existing power line and the upgraded line proposed." *In the Matter of the*

Exemption Application by Minnesota Power for a 345/250kV High Voltage Transmission Line

Known as the Arrowhead Project, OAH Docket No. 10-2901-12620-2 at 20-21 (ALJ Findings of Fact, Conclusion and Recommendation dated Jan. 29, 2001) (underlining in original) (Ex. DI), *affil*, 2002 WL 46991 (Minn. Ct. App. Jan. 15, 2002) (Ex. D2). Otherwise stated, where, as here, the proposal is to upgrade an existing transmission line, "[t]he issue of whether power lines themselves create a significant human or environmental impact is not properly before the [Court]. There is a power line currently operating in the corridor. The only question is whether

the proposal so changes conditions as to create a significant human or environmental impact that does not now exist." Ex. D 1 at 21 n.118 (emphasis added).

The Dakota County District Court agreed. It ruled that, because Xcel Energy proposes to expand its existing line along the same 80-year-old line, the only relevant impact is the "incremental impact," if any, of the upgraded line vis-à-vis the existing line. Ex. B9 at 22.

Xcel Energy's supposed violation of § 216B.243's certificate of need requirement does not even arguably satisfy this requisite showing of significant environmental harm. Nothing in § 216B.243 requires the certificate of need determination to address environmental risks with the project. To the contrary, the certificate of need determination is, under the new PPSA, expressly not to include the "scope of environmental review conducted under Sections 116C.51 to 116C.69." In fact, §§ 116C.575, subd. 5 and 116C.57, subd. 2c provide that environmental issues are to be exclusively resolved within the route permit review.

Section 116C.575, subd. 5 states that "[t]he environmental assessment [under the route permit review] shall be the only state environmental review document required to be prepared on the project." (Emphasis added). Section 116C.57, subd. 2c adds that "[n]o other state environmental review documents shall be required" besides that required for the route permit review. (Emphasis added). Conversely, the route permit review does not address need. Section 116C.53, subd. 2 provides that "questions of need, including size, type, and timing; alternative system configurations; and voltage are not within [MEQB's] siting and routing authority and must not be included in the scope of environmental review conducted under sections 1 16C.51 to 116C.69." (Emphasis added); *see also* Minn. Stat. § 116C.57, subd. 2c ("[f]or any project that has obtained a certificate of need from the public utilities commission, [MEQB] shall not consider whether or not the project is needed").

In sum, even if Xcel Energy's project was somehow subject to the certificate of need requirement, that requirement raises no environmental concerns upon which to base a MERA action; environmental concerns are addressed exclusively by the route permitting process.

D. Likewise, Xcel Energy's supposed violation of the route permit requirement does not, as a matter of law, state a MERA action

Once projects are subject to the new PPSA's route permit requirement, local zoning regulations are expressly preempted. Minn. Stat. § 116C.61. But the applicant can under § 116C.576 unilaterally opt for local, instead of MEQB, approval of the route permit. Local zoning bodies with jurisdiction over the project have 60 days from when the application is first sent to any one of the local zoning bodies with jurisdiction over the project to demand that MEQB assume the route permit review. Minn. Stat. § 116C.576, subd. 1(a). If at least one of the local zoning bodies does not send the application to MEQB within this timeline, then the local zoning bodies must review the application under their respective local zoning ordinances and at least one of them must conduct the appropriate environmental review. Minn. Stat. 116C.576, subd. 1(b).□

Even if the new permitting process applied (which it does not), Xcel Energy has complied with § 116C.576's alternative for local zoning approval⁸ Xcel Energy submitted a CUP application to each of the local zoning bodies with jurisdiction over the project. And none of the cities with zoning authority over the project exercised its right within 60 days to require

⁸ Task Force will no doubt suggest that Xcel Energy failed to trigger § 116C.576's alternate route permit review process by the local zoning bodies because it did not provide MEQB with its notice of so proceeding. But MEQB had far more than adequate notice. Indeed MEQB conducted the initial environmental review of this project. In any event, as is mandated by such requirements that have no consequence for non-compliance, Xcel Energy only had to "substantially comply" with § 116C.576. *Sullivan v. Credit River Township*, 299 Minn. 170, 176-77, 217 N.W.2d 502, 507 (1974); *Manco of Fairmont, Inc. v. Town Bd. of Rock Dell Township*, 583 N.W.2d 293, 295 (Minn. Ct. App. 1998).

MEQB to conduct the route permit review. Minn. Stat. § 116C.576, subd. 1(b). The 60-day deadline expired on May 7, 1999, July 3, 2001 and January 12, 2002, or 60 days after Xcel Energy first submitted its CUP applications to Mendota Heights, South St. Paul and Sunfish Lake, respectively. The cities were then court-ordered to and did issue their CUPs for the project.

The cities' route selection was certainly proper. Where, as here, the project is for the expansion of an existing line, the route permit review process is quite limited. Due to a judicially-recognized state public policy against the proliferation of new transmission line corridors, the cities had to, "as a matter of law, choose a pre-existing route [for the upgraded transmission line] unless there [were] extremely strong reasons not to do so." *People for Environmental Enlightenment and Responsibility (PEER) v. Minnesota Environmental Quality Council*, 266 N. W.2d 858, 868 (Minn. 1978) (emphasis added). No such "extremely strong reasons" are anywhere in the record before the local zoning bodies.

Before issuing the court-ordered CUPs for the project, the cities also conducted an appropriate environmental review of the project. Even though the new PPSA provides for only one environmental review, the cities had multiple environmental reviews of the project. Besides MEQB's judicially-upheld environmental review, the cities procured what they described in their own words as a \$130,000 "slightly scaled down environmental impact statement." Ex. B9 at 14. The cities additionally reviewed MPUC's judicially-upheld refusal to shut down the line and MDH's repeated findings of no EMF concerns with the line.

Regardless of the propriety of the cities' § 116C.576 alternative route approval, the route permit approval is final. Under Minn. Stat. § 116C.65, Task Force had to, but did not, challenge the cities' alternative route permit approvals under § 116.576 within 30 days to the Court of

Appeals. Task Force has never challenged either South St. Paul or Sunfish Lake's approvals, and the 30-day time to do so has long since lapsed. In addition, the Minnesota Supreme Court refused to hear Task Force's petition for review of Mendota Heights' court-ordered approval.

CONCLUSION

Task Force's MERA action should not provide it with yet another bite at the apple, particularly in this Court. Judicial economy compels the transfer of venue back to where this project has already thrice been reviewed that is, the Dakota County District Court. But, regardless of which court reviews Task Force's MERA action, the litigation must be dismissed under Rule 12.02(e). The entire action relies upon the retroactive application of the new PPSA requirements as Xcel Energy's line upgrade project was certainly "applied for [before] August 1, 2001," which is the "effective date" of the new requirements. But neither the statutory language nor its purpose support Task Force's retroactive application of the new PPSA requirements. Not surprisingly, this Court will not be the first Court to reject Task Force's same argument. *See* Ex. B9 at 22-25. Task Force's MERA claim is, in any event, itself fatally deficient: (1) the 6.36-mile long project does not satisfy the minimum 10-mile length required to trigger the certificate of need requirement; (2) there is no environmental concern raised by the certificate of need requirement, which expressly excludes any environmental review; and (3) the route permit requirement was otherwise satisfied by the local zoning approvals, as is specifically allowed under § 116C.576. Task Force's fifth and final legal challenge to Xcel Energy's project must, therefore, be summarily dismissed. Task Force has wasted enough of the judiciary's resources and Xcel Energy's ratepayers' monies to protect against an environmental threat with this project that has long-since been debunked.

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

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