

STATE OF MINNESOTA
COUNTY OF DAKOTA

DISTRICT COURT
FIRST JUDICIAL DISTRICT

CASE TYPE: Other Civil

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

Court File No. C4-02-6854

Petitioner,

XCEL ENERGY'S
REPLY MEMORANDUM OF LAW
IN SUPPORT OF ITS
MOTION FOR PARTIAL
SUMMARY JUDGMENT

v.

City of Sunfish Lake,

Respondent.

OVERVIEW

Most conspicuous about City's response brief is its near total avoidance of the first two of Xcel Energy's three principal arguments. These arguments are that City's denial of the requested CUP was (1) barred by City's own Ordinance procedures, and (2) an unreasonable exercise of City's zoning authority in that it effectively bars any future lines through the City. Rather than addressing these issues upfront and head-on, City buries its cryptic discussion of these two arguments at the end of its memorandum. *See City Memo* at 50-53.

By doing so, City apparently wants the Court to simply accept that City can treat Xcel Energy's transmission line proposal in the same way as any other land use application. But it cannot do this. City's zoning authority does not allow it to regulate a transmission line for purposes of convenience or general prosperity, including aesthetic value, as it might other types of land use. *Northern State Power Co. v. City of Oakdale*, 588 N.W.2d 534, 541-52 (Minn. Ct. App. 1999). Rather, *City* must regulate this type of land use as an "essential service," which is how a transmission line is defined in Ordinance § 1224.01. *See Interstate Power Co., Inc. v. Nobles County Bd. of Comm'rs*, 617 N.W.2d 566, 586 (Minn. 2000) (Gilbert, J. and Anderson, J.,

concurring in part/dissenting in part) (rejecting county's finding that proposed pole placement for upgraded transmission line was inconsistent with needs of county where transmission lines are classified as "essential services" under county zoning ordinance). And such "essential services" cannot be banned by the unreasonable exercise of local zoning. *Cf. NSP v. Oakdale*, 588 N.W.2d 534 at 544 (Halbrooks, 7., concurring in part/dissenting in part).

Regardless, City's stated reasons for denying the CUP and variance are indefensible even if the use was an unwanted use, let alone an "essential service." The uncontroverted expert testimony on need, property value diminution, and EMF concerns preclude these feigned reasons for denial. "[A] city may not reject expert testimony without adequate supporting reasons," and "[a]dequate supporting reasons" do not include the testimony of laypersons about matters beyond their knowledge and training, including a proposal's "effect on [neighbors'] land value." *Trisko v. City of Waite Park*, 566 N.W.2d 349, 356 (Minn. Ct. App. 1997), *rev. denied* (Minn. Sep. 25, 1997).

ARGUMENT

I. CITY'S ORDINANCE COMPELS CUP APPROVAL ONCE NEED IS SHOWN

City's Ordinance, as amended in September 2000, does not allow for denial. Rather, upon the utility showing a "demonstrat[ed] ... need" for a new or modified electric transmission taller than 60 feet, Ordinance § 1224.05(F) and (I) only authorize City to select its preferred alternative route through its borders, not to deny the line.

More specifically, Step No. 1 of the Ordinance's six-step process requires City to finish, within the 10 business days allotted by § 15.99, subd. 3(a), its "completeness" review of the request, including whether the application contains "documentation demonstrating the need, objectives and purpose for such a facility." Ex. 7, Ord. § 1224.05(A)-(D) (emphasis added). Step Nos. 2 through 6 all presuppose need. Indeed, why would City look at routing alternatives

if there is no "demonstrated need" to do so? The only two issues that must be resolved after an applicant has "demonstrat[ed] ... need" pursuant to Step No. 1 is for City to consider what is its preferred alternative route and to impose any appropriate CUP conditions.

City does not dispute that its Ordinance requires it to select the preferred route for the line once its "need" is proven, but it does dispute whether Xcel Energy has "demonstrated the need" for the upgrade.

Xcel Energy has, however, proven need in several ways. First, Minnesota holds that where, as here, an applicant adequately supplies the reasons underlying its business decision that it needs a CUP, the local zoning body must defer to the applicant's business judgment. *See Trisko*, 566 N.W.2d at 355. Second, City recognized back in March 2000 that it lacked expertise to, among other things, assess the need for the Project, and it thus retained CAI to do, among other things, a needs analysis for the line upgrade, which it did and confirmed the need. Third, with City's EIR Report in hand since March 2001, there is no basis to find inadequate Minn. Stat. § 15.99, subd. 3(a)'s requirement that City identify within 10 days of Xcel Energy's March 16, 2001 submission of its CUP and minor variance application the deficiencies, if any, in Xcel Energy's "documentation demonstrat[ing] the need" for the proposal. And fourth, the City Council rejected the "no build alternative" on December 12, 2001 and thus reaffirmed its prior acceptance that Xcel Energy had "demonstrat[ed] the need" for the upgraded line

II. CITY'S ZONING BAR TO THE UPGRADED LINE IS ILLEGAL

It is uncontested that municipal zoning power does not authorize the prohibition of necessary electric utilities. *See Hubbard Broadcasting, Inc. v. City of Afton*, 323 N.W.2d 757, 764 (Minn. 1982) (noting condemnation power of utilities overrides local zoning). City has, nevertheless, effectively barred any new lines through the City.

At the heart of Xcel Energy's claim that City is illegally barring transmission lines is the fact that there are only two possible routes that any such line can take through the City. One is the existing private easement corridor in which the current line runs; the other is along Highway 110 and Delaware Avenue. City has identified no other possible route for a transmission line.

Once City narrowed the options for transmission lines to only two routes, it further decided that it will not allow a line to be placed along one of those routes. On December 12, 2001, City Council voted not to place a transmission line along Highway 110 and Delaware Avenue because that would end up with additional Sunfish Lake property owners being affected by a transmission line. This route is, therefore, not an option for any future line.

Having identified the only route which an upgraded transmission line could take through its borders, City has, nevertheless, refused to identify any conditions that would allow such a line to be approved. This is despite Minnesota's clear mandate that City identify and impose those CUP conditions which would alleviate the concerns that otherwise support the denial of the *CUP*. *See Trisko*, 566 N.W.2d at 357 (a municipality's decision to deny a land use request without suggesting or imposing conditions that would bring the proposed use into compliance may be treated as arbitrary).

City's two grounds for claiming it has not barred new or modified transmission lines through City are baseless. City first states that it has "publicly invited" Xcel Energy to come to them again with a proposal that would win City's favor. City Memo. at 52. Noticeably absent from the invitation, however, is any indication of what exactly needs to be done to meet City's concerns such that it would ever approve an upgraded line. *See id.* As noted above:

- City's rejection of the Hwy. 110/Delaware route cannot be overcome by any new proposal by Xcel Energy; and

- City has not met its legal obligation to suggest or impose conditions that would make an Xcel Energy proposal to route an upgraded line along the current line's route acceptable to City.

City alternatively asserts that because the State will in the future be involved in the regulation of transmission lines of the voltage involved here, the Court can simply disregard whatever preclusive effect City's denial might have on future CUP applications. But, of course, City provides no case law that supports this theory that the circumvention of legal restrictions on local zoning authority can be forgiven where the party harmed can simply re-apply to some other public authority and plead its case. This gives short shrift to the immediacy of Xcel Energy's need for the upgrade. As is proven in the record, these power needs cannot continually be put off. This also ignores the preclusive effect this CUP denial has on all other electric line proposals that are not subject to state regulatory review.

One of the undeniable consequences of this denial is its precedential effect on any future CUP application by a utility. This is particularly true for any proposal where City is the only authority making determinations about whether and how a utility facility can be sited, for instance for an electric line less than 60-feet high or under 100kV. In those cases, City has established that it may, in its sole judgment, fall back upon a finding that the proposal has failed to demonstrate its need, without specifying any conditions that would alleviate concerns about other issues which may have prompted City's denial. Of course, if state law is amended again, their utility proposals for transmission lines above 100kV could also come within the scope of City's asserted unbridled zoning power.

III. CITY FAILS TO SUPPORT ANY OF ITS THREE STATED REASONS FOR DENIAL

A. Lack of need provides no basis for denial

1. There is no record basis for City to find that Xcel Energy did not adequately demonstrate its need for line upgrade

City has no record basis to claim that Xcel Energy did not demonstrate the need for a line upgrade. Both Xcel Energy and CAI, City's own expert consultant, put extensive data into the record demonstrating the need for the proposed upgrade of its 14.7-mile line running from Newport to Bloomington. When this data was challenged as not being sufficient to support the need for the 6.36-mile Phase I segment of the Project, City's own expert clarified that "[l]imiting the project to Phase I would not change the need." Ex. 31 at 1 (emphasis added).

While Xcel Energy volunteered that year-by-year load growth calculations can be unreliable, neither Xcel Energy nor CAI backed away from the critical conclusion that "continued electrical load growth in the area will eventually require the reconductoring or double-circuiting of most or all of the existing line in the project area." Ex. 25 at 4. Given this situation, CAI stated that "Phase I would still constitute the best solution, since it does reinforce the power system into the Rogers Lake substation from the Red Rock 345kV source and it does not preclude future expansion of the system in any way." Ex. 31 at 1.

City can point to no expert testimony or other authority in the record that can justify its rejection of not only Xcel Energy's expertise in this area of need, but also that of City's own expert consultants. "When the record adequately supplies the reasons underlying a business decision, neither a municipal body nor a court should override that business Judgment." Trisko, 566 N.W.2d at 355 (emphasis added). And City provides no logical basis for asserting that this Court should pay less heed to Xcel Energy's business judgment on its transmission line needs than the business judgment of a local gravel operator regarding its aggregate needs. *Cf. id.* To the

contrary, Xcel Energy's statutory obligation to supply reliable electrical services compels even greater deference to the public utility. This is particularly true given City's admitted lack of qualifications to even evaluate Xcel Energy's showing of need. City has no more qualifications to question Xcel Energy's showing of need for transmission line upgrades than it has to scrutinize MnDOT's identified road project needs.

2. Xcel Energy is never required - let alone required before proceeding with local approvals - to procure a PUC "certificate of need" for its line upgrade

Pursuant to the 2001 amendments to the Power Plant Siting Act, PUC's "certificate of need" requirement is now applicable to transmission lines over 100kV that are also more than 10 miles in length. Minn. Stat. §§ 21613.2421, subd. 2 and 21613.243, subd. 4 (Supp. 2001). This "certificate of need" requirement is inapplicable here for several reasons.

First, Xcel Energy seeks to permit only the 6.36-mile length of line in Phase I of its two-phase 14.7-mile project. Given that the threshold basis for its CUP denial is Xcel Energy's purported failure to provide evidence justifying the need for this 6.36-mile long line, City cannot now be heard to say that the line is really 14.7 miles long and subject to PUC's "certificate of need" proceedings.

Second, PUC's "certificate of need" requirement is only necessary where a route and site permit is applied for after August 1, 2001. Minn. Laws 2001, ch. 212, art. 7, § 37 (see attached Ex. C, Minn. Stat. § 21613.243, effective date language at page 4). And, in accordance with City's permitting procedure, Xcel Energy was working closely with City and CAI on its route and site permit nearly two and one-half years before August 1, 2001, although its formal application was not made until November 13, 2001. Indeed Xcel Energy initiated its pursuit of the necessary governmental approvals for this Project on March 24, 1999 with its voluntary EAW before EQB. And, in March 2000, Xcel Energy voluntarily agreed with City to subject the

Project to what turned out to be a year-long EIS that was not concluded until the March 2001 submission of City's EIR Report. In addition, by August 1, 2001 Xcel Energy had already received approvals from or had pending applications for approval from four of the five affected local municipalities.

Third, given this set of facts, neither Xcel Energy, nor for that matter City, considered at the time of Xcel Energy's November 2001 formal permit application that PUC's "certificate of need" was required. This conclusion was consistent with what other cities have determined about the application of the new amendments under analogous circumstances. *See* Ex. A (Minnetonka's city manager concluded that law did not apply where applicant was already acting pursuant to city permit procedures but had yet to submit a formal permit application by law's effective date of Aug. 1, 2001).

Fourth, the 2001 revisions to Minn. Stat. §§ 216B.2421 and .243 were part of a package of revisions, which included Minn. Stat. § 216B.2425's "fast track" PUC review alternative to the "certificate of need" requirement for transmission line projects. Pursuant to the same effective date provision for the other two laws, § 216B.2425 only became effective for siting and routing permits sought after August 1, 2001, pursuant to the same effective date provision for the other two laws. *See* Minn. Laws 2001, ch. 212, art. 7, § 37. But in addition, § 216B.2425 has an explicit provision that explains what the effective date language means - namely, that the new PUC review system does not apply to transmission line proposals that were approved by or pending before a local unit of government, EQB, or PUC as of August 1, 2001. *See* Minn. Stat. § 216B.2425, subd. 6. While this clarification of the effective date language appears in only this

¹ Minnetonka's situation is particularly illuminating because City's new transmission line CUP procedures were lifted from Minnetonka's like ordinance.

one statute, the clarification clearly applies to all of the statutory provisions to which the effective date language applies, including Minn. Stat. § 21613.243.

Fifth, City's ultimate position is, in any event, that it could not grant the CUP because a PUC "certificate of need" was required first. That is simply wrong. The certificate of need statute provides that, where required, the certificate must be applied for either prior to applying for a site permit or prior to construction of the facility. Minn. Stat. § 21613.243, subd. 4 (Supp. 2001). City has no grounds for denying the CUP under the statute because Xcel Energy would be free to obtain a certificate after seeking and obtaining a route permit from City but before construction.

The City attorney agrees. His draft resolution for approval included as a condition that Xcel Energy would subsequently procure either the certificate of need or a confirmation from PUC that such a certificate is not required. Of course, lawyers ethical rules would have precluded Attorney Kuntz from advising that City approve such a condition if it were, as City now argues, illegal.

Sixth and finally, if City had reasonably exercised its zoning authority, then it would have met its obligations under the law to impose those conditions necessary to bring Xcel Energy's proposed use into compliance. *Trisko*, 566 N.W.2d at 357. That could have been simply done by imposing the condition that Xcel Energy obtain PUC's "certificate of need" to the extent it is required.

B. Property value diminution provides no basis for denial

City attempts to justify its CUP denial due to alleged property value diminution by claiming that there was conflicting testimony in the record on this issue. There was, however, no such conflicting testimony.

The sole issue before City on property values was whether there would be an incremental adverse property value impact due to the proposed upgrade. The impact, if any, that the 75-year old line already had on neighboring property values was not before City because the municipality had previously permitted the existing line. By its "automatically approved" CUP for the line, City found as a matter of law that the existing line met all requirements for the issuance of the permit, including those relating to property value impacts. *Interstate Power*, 617 N.W.2d at 579.

And the only expert testimony City received on the incremental property value impact due to the line upgrade was that provided by City's commissioned expert, Collier Towle. Collier Towle's report showed that the adverse property value impact from upgrading the current line would be a roughly 1%. Ex. 26, Tab D at 8. This opinion was uncontroverted. Because there is no testimony that undermines the Collier Towle study that there would be minimal diminution in neighboring property values due to the line upgrade, City was bound, as is this Court, by this conclusion. *Trisko*, 566 NW.2d at 356.

C. EMF concerns provide no basis for denial

As reflected in City's own findings, the uncontroverted record shows that the upgraded line will result in an 80% reduction in EMF levels over the current single-circuit line. Ex. 9, Finding Nos. 27-34. City cannot dispute its own findings. *Shetka v. Aitkin County*, 1997 WL 118134, at * 1 (Minn. Ct. App. Mar. 18, 1997). Whatever evidence the various experts put in the record, none of it controverted the record fact that the proposed upgraded line will dramatically reduce EMF levels on the existing line. City's CUP denial thus leads to a wholly indefensible increase in the very health risks that City is relying upon to excuse its denial.

City attempts to justify its illogical reliance on these EMF reductions to support its denial by claiming that the new line will perpetuate a "nonconforming use" which might otherwise be eliminated. But there is no record basis to find that the existing 75-year-old transmission line

that has been rebuilt twice and conditionally permitted as an "essential service" is either a "nonconforming use" or less permanent than the proposed upgrade. Indeed, the line is an "automatically approved" CUP and the only record evidence on the "permanency" of the existing line is that provided by Xcel Energy, which is that even if the CUP was denied it would never remove the existing single circuit 115kV line. Finding Nos. 47-48.

City makes much of the fact that it heard from different experts who had conflicting views about the health hazards of EMF and that it was thus free to find more credible those experts who claimed that the EMF reduction of the upgrade did not go far enough to reduce EMF levels. But, of course, the question for City was not which expert opinion to accept as to the appropriate reduction in EMF levels. Rather, the question was whether City could deny the CUP on the basis that the upgrade's 80% reduction in EMF exposure presented an unacceptable health risk as opposed to no reduction in EMF exposure at all if the current line was maintained. Certainly none of the expert testimony can be read to support the conclusion that reducing EMF by 80% poses a greater health risk than doing nothing at all, which would maintain the existing higher EMF levels. Tellingly, City cites to absolutely no case law or treatise to support its conclusion that the dramatic health risk reductions documented here can be treated as a health threat that can justify the denial of the CUP.

And City cannot serve up a maximum EMF exposure standard that must be met without first amending its Ordinance, which is something that it has not done as required under Ordinance § 1203. Moreover, it cannot insist that these drastic new standards are reasonably necessary when the Minnesota Court of Appeals has already found that the PUC and NIEHS were justified in their conclusion that only "passive and inexpensive regulatory measures need be

applied to deal with transmission line EMF." *PLTF. v. MPUC*, 2001 WL 481949, at * 1-2 (Minn. Ct. App. May 8, 2001) (emphasis added).

In any event, City was obligated to address any grounds for denying Xcel Energy's CUP request by identifying the conditions which, if met, would remove those grounds as a basis for denying the CUP. *Trisko*, 566 N.W.2d at 357. City could have done that here by either imposing the supposedly necessary setback from the line or requiring the line to be buried so as to allow EMF levels to fall to the aggressively low standards City would like to impose. But City did not do that, plainly because under Minnesota law the prohibitively high cost of such measures would have to be recovered from City residents alone and not from all of Xcel Energy's system-wide ratepayers. *Northern States Power Co. v. City of Oakdale*, 588 NW.2d at 543.

IV. CITY'S DENIAL OF XCEL ENERGY'S REQUESTED MINOR VARIANCE FALLS ALONG WITH ITS ILLEGAL CUP DENIAL

A. City may not now argue that its minor variance denial was valid on grounds different than those upon which it stated in its February 5, 2002 denial

City is bound by its stated reasons for denying Xcel Energy's requested minor variance. *Trisko*, 566 NW .2d at 352. And City's sole reason for denying the variance was that the request was "mooted" by its CUP denial. Ex. 9 at 20, Conclusion (J). Because City's CUP denial is invalid, so, too, is the basis of its minor variance denial, and it cannot now attempt to rely on other grounds upon which it did not rely on February 5, 2002. *See Trisko*, 566 N.W.2d at 352.

B. Even if City's post hoc justification for denying the requested minor variance could be considered, it is baseless

Under City's Ordinance, the existing line is an "essential service" with an "automatically approved" CUP. But, due to new setback requirements, the existing utility poles and lines are "non-conforming structures." With the line upgrade, the new steel monopoles will, however,

substantially improve the line's compliance with the setback requirements and, therefore, render minor variance appropriate. Ordinance §§ 1215.02(F) and (H) (allowing movement and change of non-conforming structures when it substantially improves compliance or lessens non conformity).

City does not dispute that the upgrade will, in fact, substantially improve the existing setbacks. City asserts instead that the upgrade would impermissibly "extend" the line's "non conforming use" through taller poles, "intensify" its "non-conforming use" through higher voltage on the lines, and otherwise perpetuate the line's "non-conforming use." City Memo. at 38-39. City's argument is erroneously premised on its desire to transform the conditionally permitted "essential service" use into a "non-conforming use" which cannot be expanded. There is, however, no record or legal support for the notion that this 75-year-old line is such a "non conforming use." Rather, the only relevant non-conformity here is with regard to the structure -i.e., the horizontal setback of the poles and lines from the edge of the easement is less than the required distance. And the purported "extension," "intensification" and "perpetuation" of the conditionally permitted "essential service" use does nothing to undo the record fact that the upgrade will substantially improve this "non-conforming structure." City's issues with the alleged "extension," "intensification" and "perpetuation" of the "use" are plainly irrelevant to Ordinance §§ 1215.02(F) and (H)'s allowance for improvements to such "non-conforming structures."

V. NOTWITHSTANDING ITS PROTESTATIONS TO THE CONTRARY, CITY FAILED TO DISCHARGE ITS ZONING AUTHORITY CONSCIENTIOUSLY AND IN ACCORDANCE WITH THE LAW

We are not before this Court due to City's trumped up need, property value, and EMF concerns. Rather, we are before this Court for two reasons: (1) City does not want the proposed upgraded transmission line to run above ground through its community, preferring instead that it

be located in someone else's backyard; and (2) City is unwilling to bear the costs of either moving the line to the only other permissible route - i.e., Highway 110 and Delaware Avenue - or burying it in its existing easement. Instead, City would have all of Xcel Energy's system-wide ratepayers bear the huge expense of either moving or burying the line for its benefit. But upon realizing that Xcel Energy would not - indeed could not - agree that the huge expense of City's beautification plans be borne by all of Xcel Energy's system-wide ratepayers, City decided it would simply say "no" to Xcel Energy's proposed upgrade.

Of course, in order to do this, City had to assiduously ignore the testimony of the very experts it had retained who concluded that (1) there is a need for the upgrade, (2) the upgrade's incremental impact on property values will be minimal, and (3) the upgrade will actually and dramatically reduce the much ballyhooed EMF levels. That, in the face of all of this, counsel for City would sanctimoniously proclaim City's denial of the upgrade as an example of City "modeling civic courage of the highest order" is both absurd and contrary to the record.

For its part, Xcel Energy tried to cooperate with City and address its concerns throughout the permitting process. Rather than insist that City either act within the statutorily imposed 120-day deadline or accept EQB's negative declaration of the need for further environmental review for the upgrade, Xcel Energy agreed to let City have more time than is statutorily allowed so that it could conduct the equivalent of what EQB had determined was not necessary - that is, an EIS on the need, property value, and EMF issues. In an unprecedented move, Xcel Energy even agreed to and did pay the \$130,000 price tag for this purely voluntary EIS. And at no time did Xcel Energy act in any way to circumvent the permitting process as City alleges. Xcel Energy was, moreover, at all times well aware of PUC's "certificate of need" requirement, having testified in regard to the bill, and it understood from its involvement that the requirement would

not be applicable to projects such as this that were already before the various permitting authorities as of August 1, 2001²

CONCLUSION

Xcel Energy agrees with City on one thing. Xcel Energy, too, asks the Court to look hard at the record before it. Based on this review, Xcel Energy is confident that the Court will conclude that City has not discharged its authority conscientiously or in accordance with the law, and that it will then summarily reverse City's CUP and variance denials, and order the City to grant the requests.

DATED: May 9, 2002

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² As a result of the apparent confusion regarding the application of Minn. Stat. § 216B.243 to this and other cases, the Legislature is about to pass an amendment to the statute which clearly states that a certificate of need from the PUC is not required for 100- 200 kV lines that had applications before at least one local unit of government on August 1, 2001. *See* attached Ex. B, H.F. No. 2972 at lines 4.4- 4.6 and 4.26- 4.30.