

STATE OF MINNESOTA

Case Type: Condemnation
DISTRICT COURT

COUNTY OF STEARNS

SEVENTH JUDICIAL DISTRICT

Northern States Power Company (d/b/a Xcel Energy)
a Minnesota corporation, by its Board of Directors;
Great River Energy, a Minnesota cooperative
corporation, by its Board of Directors; ALLETE, Inc.
(d/b/a Minnesota Power), a Minnesota corporation, by
its Board of Directors; Western Minnesota Municipal
Power Agency, a municipal corporation and political
subdivision of the State of Minnesota, by its Board of
Directors; and Otter Tail Power Company, a
Minnesota corporation, by its Board of Directors,

Petitioners,

vs.

James Rachey, *et al.*,

Respondents.

**MEMORANDUM OF LAW
OBJECTING TO APPROVAL
OF PETITION AND
OBJECTING TO
PETITIONERS' QUICK TAKE
MOTION**

Court File No. 73-CV-11-9591

Respondents Gerald J. Sonnen (AQ183, AQ184); Ralph Doubek and Joseph Doubek,
d/b/a Gold Meadows Hunting Preserve (AQ351); Robert L. Eisenschenk and Jeanette L.
Eisenschenk (AQ372); David Dingmann, a/k/a David M. Dingmann and Lynn Dingmann, a/k/a
Lynn E. Dingmann (AQ394-AQ396); Joseph J. Kammermeier and Cynthia M. Kammermeier
(AQ397); Roger Bechtold and Annella Bechtold, a/k/a Annella M. Bechtold (AQ403); William
J. Ware, a/k/a William Jeffrey Ware and Patricia A. Ware, a/k/a Patricia Ann Ware (AQ404);
Richard R. Weiman (HQ405); Jason Goerger, a/k/a Jason W. Goerger and Cindy Goerger, a/k/a
Cindy R. Goerger (AQ406); Michael M. Zimmer and Mary Ann Holdvogt (AQ417); Cold
Spring Granite Company, a Minnesota corporation (AQ434); Terwey Brothers, a Minnesota

partnership (AQ428); Kenneth J. Koltes and Teresa M. Koltes (AQ427); Michael J. Zimmer and Diane D. Zimmer (AQ423, AQ426, AQ424); Eugene H. Marthaler Revocable Trust, Cyril Marthaler, Marjorie E. Marthaler (AQ422, AQ425); David P. Minnerath and Ruth A. Minnerath (AQ373, AQ377) submit the following Memorandum of Law in support of their objection to the Petition to acquire certain portions of their land for purposes of constructing a 345 kV high voltage transmission line (HVTL) from Monticello, Minnesota to Fargo, North Dakota.

Procedural Background

Petitioners are part of the CapX 2020 utility company joint venture. As part of this joint venture, Petitioners are constructing approximately 700 miles of high voltage power lines. Petitioners, using a delegation of power from the State of Minnesota, seek to condemn three easements from the listed Respondents. These easements are summarized as follows (see Exhibit B of Petition for exact wording):

1. **CORRIDOR “RIGHT OF WAY” EASEMENT.** The first easement is an easement corridor defined by survey across Respondents’ various properties (the “Corridor Easement”). The Corridor Easement ranges in size but generally corresponds to Petitioners’ needs to have a 150 foot wide utility corridor in which to locate its high voltage power lines and poles. The Corridor Easements are defined in the Petition as the “Easement” and cover a defined “Easement Area.”
2. **EASEMENT FOR INGRESS AND EGRESS.** The second easement sought by Petitioners is an ingress and egress easement to provide access to the Corridor Easement area (the “Ingress and Egress Easement”). The Ingress and Egress Easement covers all property held in fee title by Respondents --referred to in the Petition as the “Premises”. The Ingress and Egress Easements are blanket easements across the entire Premises owned by Respondents.
3. **CONSTRUCTION EASEMENT.** The third easement to be condemned by Petitioner is an easement for use of the Premises “adjacent” to the Easement Area (the “Construction Easement”). The Construction Easement is also a blanket easement covering the entire Premises owned by Respondents. This allows Petitioner to work outside of the Corridor Easement on property “adjacent” to the Easement Area. This

easement is unconfined in space or time. However, after the initial construction the Construction Easement is restricted to undefined “remote and unusual circumstances...”

In previous condemnation actions brought by Petitioners, property owners objected to the scope of the three easements to be acquired. In those matters, the petitions were approved with the understanding that the Petitioners and property owners would agree to confine and better define the three easements. That concept has failed miserably, and has also forced impacted property owners into the position of expending funds to appraise and argue damages just to have the Petitioners appear at the last minute and agree to release or confine the easements. Allowing this Petition to move forward will require that Respondents unnecessarily expend attorneys’ fees, appraisal costs, time, lost wages, and efforts in order to pursue “just compensation” without knowing what has or has not been taken from them.

Respondents respectfully request that the Court deny Petitioners’ request for approval of their Petition and deny Petitioners’ quick take motion.

The Court should not approve the Petition because (1) the three easements as described in the Petition violate Minn. Stat. § 301B.03 in addition to well-settled caselaw requiring easements to be described in the Petition with accuracy and certainty; (2) Petitioner fails to show that the takings are “necessary” to serve a public purpose; and (3) Petitioner lacks the authority to take these three easements.

THE EASEMENTS PROPOSED TO BE TAKEN EXCEED LEGISLATIVE AND CONSTITUTIONAL LIMITS.

The United States Constitution and the Minnesota Constitution provide that the government shall not take private property for public use without “just compensation.” U.S.

Const. amend. V; Minn. Const. art. I, § 13. The power of eminent domain is legislatively created and prescribed, and thus can be exercised only as authorized by statute. *Minnesota Canal & Power Co. v. Fall Lake Boom Co.*, 148 N.W. 561, 562 (Minn. 1894). Petitioner, Northern States Power Company (d/b/a Xcel Energy) is a public utility and public service corporation that derives its eminent domain powers from the Minnesota Power Plant Siting Act (PPSA), codified in Minnesota Statutes Chapter 216E. “By enacting the PPSA, the legislature sought to ensure that the future siting of . . . transmission lines would be carried out in an orderly fashion according to a rational design, rather than haphazardly, and possibly unnecessarily, at the whim of individual public utilities whose decision might fail to consider or comport with the public’s interest.” *No Power Line, Inc. v. Minnesota Environmental Quality Council*, 262 N.W.2d 312, 321 (Minn. 1977).

Because Petitioner is a public service corporation, as opposed to a state agency, the delegation of eminent domain power must be strictly construed and the courts may not imply any power that is not expressly granted by statute. *In re Fuchs*, 19 N.W.2d 394, 400 (Minn. 1945). In other words, if there is doubt as to whether a statute confers a certain power to condemn, it must be resolved against the condemning authority. *Minnesota Canal & Power Co. v. Koochiching Co.*, 107 N.W. 405, 435 (Minn. 1906) (“In these days of enormous property aggregation, where the power of eminent domain is pressed to such an extent, and where the urgency of so-called public improvements rests as a constant menace upon the sacredness of private property, no duty is more imperative than that of the strict enforcement of these constitutional provisions intended to protect every man in the possession of his own.”).

A condemning authority, before taking private land, must determine that there is a public use for the land and that the taking is “reasonably necessary or convenient for the furtherance of that public use.” *Lundell v. Cooperative Power Ass’n*, 707 N.W.2d 376, 380 (Minn. 2006). To this end, a condemning authority must obtain a certificate of need. Minn. Stat. § 216B.243 (2010). While a condemning authority’s general determination of public necessity is subject to great deference, *Lundell*, 707 N.W.2d at 381, the condemning authority’s power to determine public necessity is not limitless. Significantly, property owners have the right to challenge “whether the specific interest in a particular piece of property is necessary to accomplish the general project.” *Cooperative Power Ass’n v. Eaton*, 284 N.W.2d 395, 397 (Minn. 1979). For example, in *Eaton*, two power cooperative corporations obtained a certificate of need to construct and maintain a HVTL and petitioned the district court under Minnesota Statutes Chapter 117 to condemn easements over certain private properties to that end. *Id.* at 396. Property owners challenged the eminent domain Petition and requested a trial, arguing, among other things, that the proposed acquisitions were not for public uses or purposes, arguing alternatively that the language granting the easement was too broad to effectuate the purpose. *Id.* Relying in large part on the issuance of the certificate of need, the district court granted the cooperatives’ Petition. *Id.* at 397. The Minnesota Supreme Court reversed, determining that the landowners should have the chance to “address the factual issue of whether the requested easement is too broad to effectuate the purpose in question.” *Id.*

In addition to the requirement to establish public necessity for the taking of particular property, condemning authorities must also describe in the Petition the land sought to be taken, including easements, “with accuracy and certainty.” *Monongahela Power Co. v. Shackelford*, 73

S.E.2d 809, 813 (W.Va. 1952) (quoting *Otter Tail Power Co. v. Von Bank*, 8 N.W.2d 599 (N.D.)); *see also Bell Telephone Co. v. Parker*, 79 N.E. 1008, (Ct. App. N.Y. 1907) (“The command of the Condemnation Law is that the Petition shall contain ‘A specific description of the property to be condemned, and its location, by metes and bounds, with reasonable certainty.’”); *City of Gastonia v. Glenn*, 11 S.E.2d 459, (N.C. 1940) (“The right of way is to be located before it can be taken. It must be fixed and not fugitive.”); *Dailey v. Missouri Pacific Railway Co.*, 170 N.W. 888, (Neb. 1919) (“A petition to condemn the land of another for the use of a railroad is the basis of the proceeding, and before an owner over his protest can be compelled under the sovereign power of eminent domain to part with the title to his land, it is essential to the validity of the proceedings that the petition filed with the county judge under [the Nebraska statute] accurately describe the tracts ought to be condemned”). Certainty and accuracy are essential “so that both the owner of the easement and the owner of the property subjected to it may know exactly what their rights are with respect to their different interests.” *Monongahela Power Co.*, 73 S.E.2d at 813 (quotation omitted). Moreover, certainty is required in order to determine the value of the interest taken and the damage done to the remainder of the property. *Id.*

For example, in *Monongahela Power Co.*, the condemning authority sought to condemn an easement for the construction and operation of an electric transmission line over the appellants’ properties, as well as the rights of ingress and egress over the properties for purposes of construction and maintenance. *Id.* at 810-11. The Petition described the easement by defining the center line, but failed to provide the width. The West Virginia Supreme Court reversed the district court’s order allowing the taking, reasoning that because the description was so vague, it

could not determine whether the property sought to be acquired was, as required by statute, “limited to such quantity as is necessary for the purpose or purposes for which it is appropriated.” *Id.* at 813.

Similarly, in *Bell Telephone Co.*, the district court properly determined that a Petition lacked sufficient specificity when it allowed the condemning authority “to trim such trees as may be necessary to protect said line from interference,” but did not specify the distance deemed necessary to maintain the safety of the line. 79 N.E. at 1009. The Court of Appeals of New York reasoned that the distance necessary to maintain the safety of the line must be stated in the Petition in order to inform the property owner in advance of the extent of the interest being acquired and to allow the commissioners to justly assess the damage sustained by the taking. *Id.* The Court concluded, “It is not enough in a proceeding to condemn an interest in land for public purposes to describe the interest sought to be acquired so vaguely as to leave it dependent upon the undisclosed opinion of the condemning party as to the quantum of the interest which it may be deemed necessary to take.” *Id.*

The requirements of specificity and certainty also apply to the right of ingress and egress for purposes of maintenance. In *Lloyd v. Southwest Arkansas Utilities Corp.*, for example, the condemning authority sought to acquire, in addition to an easement for an electric line, an undefined right of ingress and egress over all of the appellants’ property. 580 S.W.2d 935, 936 (Ark. 1979). The Arkansas Supreme Court rejected the condemning authority’s argument that such a right was a “secondary easement” that passed by express or implied grant with the main easement, concluding instead that it was a “separate and distinct right of ingress and egress over all the Loyds’ property” similar to the easement itself. *Id.* at 938. Specifically, the Court

reasoned, “any vehicle that would be needed for the maintenance or operation of the line could be driven across the Loyds’ land.” *Id.* Citing Arkansas’s rule of strict construction in favor of landowners, the *Loyd* Court held that easement, as defined, was not sufficiently located and remanded. *Id.* at 938-39.

In accord with well-settled caselaw, Minnesota statutes provide:

When public service corporations, including pipeline companies, acquire easements over private property by purchase, gift, or eminent domain proceedings, except temporary easements for construction, they must definitely and specifically describe the easement being acquired, and may acquire an easement in a width necessary for the safe conduct of their business.

Minn. Stat. § 301B.03 (2010). Section 301B.03 further provides that a public service corporation meets the requirements for definiteness and specificity when it includes in the description of the easement (1) the specific legal reference points as to the location the easement enters and departs the property, the width of the easement, and its changes of course; or (2) a drawing that identifies the same reference points. *Id.* (b). When the recorded description of the easement lacks a definite and specific description, as set forth in the statute, the public service corporation must produce and record an instrument that provides such description upon the request of a property owner. *Id.* (c). The Minnesota Supreme Court addressed section 301B.03 in *Scherger v. Northern Natural Gas Co.*, noting that in 1993, it “was amended by the addition of language intended to protect landowners from marketability of title problems caused by easements covering large tracts of land.” 575 N.W.2d 578, 581 (Minn. 1998) (holding that section 301B.03 does not apply to easements acquired before its enactment).

In the Petition at issue here, Petitioner seeks to condemn, in addition to the Corridor Easement for the HVTL line, an Ingress and Egress Easement over and across the Premises to the Corridor Easement area “by the use of the most reasonable and feasible route selected by Petitioners in their reasonable discretion.” This description is deficient because it does not confine the Ingress and Egress Easement by location on the property. Petitioner also seeks to acquire a Construction Easement, which is “a temporary easement for use by Petitioners of the premises adjacent to the Easement Area from time to time during construction, repair, or replacement of the Electric Lines.” The description of the Construction Easement is also deficient because it does not confine the Construction Easement by width or duration. Thus, the Court must deny approval of the Petition and Petitioners’ quick take motion.

A. Blanket easements are unnecessary and overly broad.

The property interests sought by Petitioner are most accurately characterized as blanket easements over Respondents’ entire property. The description of the Ingress and Egress Easement set out in the Petition allows Petitioner, if there are no existing field roads or lanes, to enter the entirety of Respondents’ property on routes “selected by Petitioners in their reasonable discretion.” In other words, if there are no existing field roads or lanes, Petitioners may traverse, drive vehicles, and haul equipment over the entirety of Respondents’ land to reach the Corridor Easement. While “reasonable discretion” may appear to provide some kind of limits for the Ingress and Egress Easement, it fails to provide the accuracy required by caselaw and necessary for valuation purposes, among other things. Similarly, the “temporary” Construction Easement contained in the Petition allows Petitioner to enter Respondents’ property “adjacent to the Easement Area” for purposes of construction, repair, or replacement. “Adjacent” is defined as

“[l]ying near or close to, but not necessarily touching.” *Black’s Law Dictionary, supra* at 16.

Thus, because the Construction Easement covers all land “lying near or close to” to the Easement Area, unconfined by a specified width, Petitioner may use the entirety of Respondents’ property. Petitioner can occupy Respondents’ entire property with equipment, vehicles, or construction materials for unlimited periods of time. Such actions, allowed by the overly broad easement descriptions, are not necessary for the enjoyment of a limited right of way for placement of HVTL lines. Therefore, Petitioner cannot properly justify the inclusion of the Ingress and Egress Easement nor the “temporary” Construction Easement.

Further, the Construction Easement and Ingress and Egress Easements are “blanket easements” that cover Respondents’ entire property because it restricts Respondents’ right to exclude with regard to the entirety of the property. *See generally Hendler v. The United States*, 952 F.2d 1364, (U.S. App. 1991) (“In the bundle of rights we call property, one of the most valued is the right to sole and exclusive possession—the right to exclude strangers, or for that matter friends, but especially the Government.”); *see also Otay Mesa Property v. The United States*, 93 Fed. Cl. 476, 485-86 (Fed. Cir. 2010).

Lastly, the description of the interest sought by Petitioner with regard to the Construction Easement is deficient because it describes the easement as “temporary” when it plainly allows Petitioner to enter the entirety of Respondents’ property for unlimited periods of time into the undefined future. The Construction Easement described here is not limited by any time constraints with regard to both periods of construction or repair, or overall duration.

Blanket access easements are not necessary. Petitioners in many cases can travel the Corridor Easement area to access other areas, the lines are inspected and strung by helicopter, and even if ground access is required, only a defined access driveway is needed.

As to the “temporary” Construction Easement, Petitioner does not need nor can they justify the blanket easement covering the entire Premises of Respondents.

Furthermore, given the language of the easements and testimony of Xcel Energy’s Engineer at previous commissioners’ hearings, landowners are left with no certainty as to the right they have retained in their underlying land.

B. The Court should deny Petitioners’ Petition and quick take motion because the easements to be acquired violate Minn. Stat. § 301B.03 and well-settled caselaw requiring easements to be described with certainty and accuracy.

Perhaps most plainly, Petitioner, a “public service corporation,” is required to “definitely and specifically describe the easement being acquired” pursuant to Minn. Stat. § 301B.03(a) (2010). The Ingress and Egress Easement lacks the requisite specificity because, if there are no existing field roads and lanes, it covers the entirety of Respondents’ property. The “temporary” Construction Easement lacks the requisite specificity because it covers the entirety of Respondents’ property and lasts indefinitely into the future.

Section 301B.03 further provides that a public service corporation “may acquire an easement in a width necessary for the safe conduct of their business.” The language in the Petition fails to limit either the Construction Easement or the Ingress and Egress Easement to any specific width; therefore, it would be impossible for a court to determine whether it is in fact “necessary for the safe conduct of [Petitioner’s] business.” *See Monongahela Power Co.*, 73 S.E.2d at 813 (reasoning that because the easement description was so vague, it could not

determine whether the property sought to be acquired was, as required by statute, “limited to such quantity as is necessary for the purpose or purposes for which it is appropriated”).

The deficiency of the easement descriptions implicates the policies behind section 301B.03, as well as policies set forth in caselaw requiring easements to be defined with accuracy and certainty. First, the descriptions fail to allow “the owner of the easement and the owner of the property subjected to it [to] know exactly what their rights are with respect to their different interests.” *See id.* For example, the description of the Construction Easement states that the easement is “temporary,” when it fails to limit Petitioner’s right to use the entirety of Respondents’ property by any temporal restrictions. Further, it is unclear whether a property owner may build on the property “adjacent” to the Easement Area, or even what area is considered to be “adjacent.” Such ambiguity in the description may lead to future litigation regarding its exact meaning. Likewise, the Ingress and Egress Easement allows Petitioner to access the entirety of Respondents’ property in order to reach the Corridor Easement. Disputes may arise regarding what is a “reasonable” path through Respondents’ property. There is simply no criteria to determine what is reasonable; in effect, Petitioner’s discretion is boundless and unchecked.

In addition, the vague and overly broad descriptions make it difficult for the condemnation commissioners to determine the “just compensation” for the damage sustained. *See id.* “The Supreme Court has defined just compensation as ‘the full and perfect equivalent in money of the property taken. The owner is to be put in as good [a] position pecuniarily as he would have occupied if his property had not been taken.’” *Otay Mesa Property*, 93 Fed. Cl. at 484 (quoting *United States v. Miller*, 317 U.S. 369, 373 (1943)).

It is difficult to determine the fair market value of Respondents' property in light of the broad and overly vague Ingress and Egress Easement because it is unclear what portions of Respondents' property Petitioner may choose to use "in their reasonable discretion." See *Otay Mesa Property*, 93 Fed. Cl. at 485 ("The Court cannot determine just compensation . . . without first identifying the precise scope of the easement . . ."). The language as it is now allows Petitioner, in the absence of existing field roads and lanes, to ingress and egress over whatever route it deems reasonable, without regard to Respondents' right to exclude Petitioner from portions of their property, is not necessary to accomplish the project. It is even more problematic to value the "temporary" Construction Easement because it is unclear how often and to what extent Petitioner will occupy Respondents' property for purposes of maintenance and repair. The language is broad enough to allow Petitioner to occupy the entirety of Respondents' property with vehicles, equipment, and construction materials from "time to time" for as long as they wish into the unlimited future. Therefore, any determination of "just compensation" for the interests is speculative and unlikely to represent "the full and perfect equivalent in money of the property taken." See *Otay Mesa Property*, 93 Fed. Cl. at 484 (defining "just compensation").

Lastly, the vague and overly broad description of the perpetual Construction Easement may constitute a cloud on Respondents' title that will affect Respondents' ability to sell their property in the future. Significantly, the *Scherger* Court noted that section 301B.03 was amended in 1993 "by the addition of language intended to protect landowners from marketability of title problems caused by easements covering large tracts of land." 575 N.W.2d at 581 (providing that the statute was amended to allow property owners to request a definite and specific description of a questionable easement and to require public service corporations to

“produce and record in a timely manner a definite and specific description”). The vague and overly broad Construction Easement here may adversely affect Respondents’ ability to insure the title to the property.

C. Petitioner lacks authority to take the easements as described.

As set forth above, “[t]he power of eminent domain rests exclusively in the legislature and can be exercised only as authorized by the legislature.” *Minnesota Canal & Power Co.*, 148 N.W. at 562. And, because Petitioner is a public service corporation, its power to condemn must be strictly construed and the Court may not imply any power not expressly granted by statute. *See In re Fuchs*, 19 N.W.2d at 400.

Here, Petitioner derives its authority to condemn private land for purposes of constructing and maintaining HVTLs pursuant to the PPSA, codified in Minnesota Statutes Chapter 216E. “By enacting the PPSA, the legislature sought to ensure that the future siting of . . . transmission lines would be carried out in an orderly fashion according to a rational design, rather than haphazardly, and possibly unnecessarily, at the whim of individual public utilities whose decision might fail to consider or comport with the public’s interest.” *No Power Line, Inc.*, 262 N.W.2d at 321. The PPSA provides that a utility may only construct an HVTL with a route permit and certificate of need issued from the Commission. Minn. Stat. § 216E.03, subd. 2 (2010) (requiring route permit); Minn. Stat. § 216B.243 (2010) (requiring certificate of need). The route permit issued by the Commission states, “When the transmission line is placed cross-country across private land, an easement for the entire right-of-way (150 to 180 foot width) shall be acquired from the affected landowner(s).” The permit provides a list of “specific construction practices” the Petitioners are required to follow, including the requirement that Petitioners “shall

limit temporary easements to special construction access needs and additional staging or lay-down areas required outside of the authorized right-of-way. Space should be selected to limit the removal and impacts to vegetation.”

The certificate of need establishes the general necessity of the HVTL project, but does not discuss the details of the easements to be acquired. It notes that under Minn. R. 7849.0120, an applicant must show its proposal will comply with all relevant laws. As discussed above, the descriptions of the Ingress and Egress Easement and “temporary” Construction Easement violate Minn. Stat. § 301B.03. And lastly, the descriptions are contrary to the PPSA’s policy to ensure that the siting of power lines is accomplished in a rational manner “rather than haphazardly, and possibly unnecessarily, at the whim of individual public utilities whose decision might fail to consider or comport with the public’s interest.” *See No Power Line, Inc.*, 262 N.W.2d at 321.

In short, nothing in the Route Permit or Certificate of Need grants Petitioner the authority to condemn blanket easements on the entirety of Respondents’ property for purposes of ingress and egress to the HVTL, and then maintaining and repairing the HVTL. To the contrary, the language in the route permit specifically delineates the 150-to-180-foot right of way to be acquired and emphasizes the need to limit temporary easements. And because Petitioner is a private corporation, as opposed to a state entity, the Court may not imply any authority that is not expressly conferred by statute. *See In re Fuchs*, 19 N.W.2d at 400.

Respondent respectfully requests that the Court deny approval of the Petition and deny the motion for a quick take because the easements described in the Petition violate Minnesota statute and well-settled caselaw.

Dated: 1-11, 2012

Respectfully submitted,

RINKE NOONAN

BY

Igor S. Lenzner, #234023

Adam A. Ripple, #0386989

Attorney for Respondents named herein

1015 West St. Germain St., Ste. 300

P.O. Box 1497

St. Cloud, MN 56302

(320) 251-6700