

State of Minnesota
Wright County

District Court
Tenth Judicial District

Court File Number: **86-CV-10-7551**

Case Type: Condemnation

Notice of Filing of Order

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Northern States Power Company dba Xcel Energy et al vs Scott J Sypnieski, et al

You are notified that an order was filed on July 12, 2011.

Order-Other

Dated: July 12, 2011

Peggy Gentles, Court Administrator
By: Ruth Stoick, Deputy
Wright County District Court
10 2nd Street NW Rm 201
Buffalo MN 55313-1192
763-682-7539

cc: STEVEN JOHN QUAM
ADAM ALLEN RIPPLE
MICHAEL COYNE RAJKOWSKI
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BRADLEY V LARSON
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EDWARD J LAUBACH, Jr.
MICHAEL LEO PUKLICH, Jr.

A true and correct copy of this notice has been served by mail upon the parties herein at the last known address of each, pursuant to Minnesota Rules of Civil Procedure, Rule 77.04.

JUL 13 2011

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.

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Petitioners,

v.

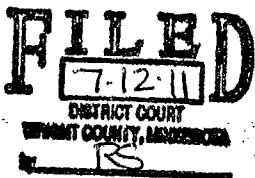
ORDER

Scott J. Sypnieski; et al.

Respondents.

On May 16, 2011, the above-entitled matter came on for a hearing before the undersigned, Judge of District Court, at the Wright County Government Center in Buffalo, Minnesota.

Steven Quam, Esq. and John Drawz, Esq. appeared on behalf of Petitioners. James Dorsey, Esq. and Stuart Alger, Esq. appeared on behalf of Respondent Lindbergs. Igor Lenzner, Esq. appeared on behalf of Respondents Carol Stice and David Shore. Patrick Neaton, Esq. appeared on behalf of Respondent MR III. Bradley Larson, Esq. appeared on behalf of Respondents Sypnieskis. The hearing regarded Respondents Lindbergs, Stice, Shore, Sypnieskis, and MR III's motions regarding Minn. Stat. § 216E.12. Petitioners and Respondents MR III agreed prior to the hearing and again on the record at the hearing that the matter regarding MR III's parcel of land would be continued to allow the parties to complete discovery regarding MR III's land. The Court therefore does not address Respondent MR III's motion in this Order. Based upon all of the reports, files and records herein, and the arguments of counsel at the hearing, and after being fully advised, IT IS HEREBY ORDERED THAT:



1. Respondent Stice and Shore's Motion regarding minimum compensation and relocation benefits is **GRANTED**.
2. Minimum compensation outlined in Minn. Stat. § 117.187, and relocation benefits outlined in Minn. Stat. § 117.52 apply to Minn. Stat. § 216E.12.
3. Stice and Shore may request minimum compensation and relocation benefits from the Commissioners appointed in this case.
4. Respondents Lindbergs' Motion regarding commercial viability is **DENIED**. The Court has insufficient information to determine as a matter of law if the Lindbergs' property is commercially viable.
5. Respondents Lindbergs' Motion regarding relocation assistance, minimum compensation and loss of going concern is **DENIED**.
6. Loss of going concern outlined in Minn. Stat. § 117.186 applies to Minn. Stat. 216E.12 subd. 4.
7. Respondent Sypnieskis' election under Minn. Stat. § 216E.12 subd. 4 is **DENIED**. Respondents Sypnieskis' election of § 216E.12 subd. 4 was untimely as it was outside the 60 day deadline.
8. Petitioners are not required to condemn Respondent Sypnieskis entire property pursuant to § 216E.12 subd. 4.
9. Any other motion not otherwise addressed herein is denied.
- ✓ 10. The matter remains scheduled for an evidentiary hearing regarding MR III's motion on July 25, 2011 at 1:30 p.m.
11. This Order is made for the reasons outlined in the attached Memorandum. The attached Memorandum is incorporated herein by this reference.
12. A copy of this Order shall be served upon the parties' counsel by U.S. Mail and shall constitute due and proper service upon the parties in lieu of personal service.

Dated: July 12, 2011

BY THE COURT:

Michele A Davis

The Honorable Michele A. Davis
Judge of District Court

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.

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Petitioners,

v.

MEMORANDUM

Scott J. Sypnieski; et al.

Respondents.

Background

This condemnation arose because Petitioners have condemned easements for the construction, operation, and maintenance of 345 kV high-voltage transmission lines (HTVL) across parcels of land in Wright County as part of a broader HTVL multi-state project. Petitioners noticed Respondents that owned or had an interest in property along the route for the project by petition. The Respondents that own four of the parcels affected have elected to have Petitioners take their entire property pursuant to Minn. Stat. § 216E.12 subd.4 rather than simply an easement. Specifically, pursuant to Minn. Stat. § 216E.12 subd. 4, “the fee owner . . . shall have the option to require the utility to condemn a fee interest in any amount of contiguous, commercially viable land” rather than the utility acquiring an easement for the project. *Id.*

Respondents Stice and Shore owners of parcels MQ015 and MQ016; Respondents Lindbergs owners of parcels MQ065, MQ067, and MQ068; and Respondents Sypnieskis, owners

of parcel MQ011, each made a Minn. Stat. § 216E.12 subd. 4 election. Petitioners dispute either the election itself, or the procedure and rights of Respondents once the election is made. The Court addresses each of Respondents' motions in turn.

Sypnieskis

The Sypnieskis filed a notice of intent to elect pursuant to Minn. Stat. § 216E.12 subd. 4 and in that election also request that Petitioners “provide an appraisal complete with a minimum compensation analysis pursuant to Chapter 117”. Sypnieski Notice of Intent, p. 4. Sypnieskis (“Sypnieskis”) acknowledge that their election was untimely but argue they should be entitled to make an election under Minn. Stat. § 216E.12 subd. 4 anyway because Petitioners are not prejudiced by their late election. Petitioners argue that the Sypnieskis' election was untimely. Petitioners rely on the laws of statutory interpretation arguing that when a statute is unambiguous the Court must apply the plain language of the statute. Minn. Stat. § 645.16.

In support of their motion Sypnieskis submitted an affidavit. In their affidavit the Sypnieskis state they received Petitioners' Notice of Hearing on the Petition on December 3, 2010 and sought legal advice regarding their rights. Sypnieski Affidavit, p. 5, filed March 28, 2011. On or about December 17, 2010 Sypnieskis received Petitioners' Notice of Intention to Take Title and Possession. *Id.* Sypnieskis acknowledge that when they made their election it was fourteen days late. *Id.* at p. 7. Sypnieskis state the reason the election was late is because they had not made up their minds regarding the election. *Id.* The Sypnieskis argue in further support of their motion that Petitioners neither advised them to obtain legal counsel nor advised them of their legal rights under Minn. Stat. § 216E.12 subd. 4. *Id.* at pp. 6-7. Therefore, the deadline to elect should be extended.

A court's statutory interpretation begins with the statute's language on its face and whether that language is clear or ambiguous. *Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2007). An ambiguity exists if a statute's language has more than one reasonable interpretation. *Hans Hagen Homes, Inc. v. City of Minnetrista*, 728 N.W.2d 536, 539 (Minn. 2007). If no ambiguity exists, courts apply the plain meaning. Minn. Stat. § 645.16. Words and phrases are to be given their plain meaning. Minn. Stat. § 645.08(1).

Minn. Stat. § 216E.12 states the fee owner must "elect in writing to transfer to the utility within 60 days after receipt of the notice of the objects of the petition filed pursuant to Minn. Stat. § 117.055." In this case the Sypnieskis state that they received the notice of the objects of the petition on December 17, 2010. The Sypnieskis filed their notice of intent under Minn. Stat. § 216E.12 with the Court March 1, 2011. The Sypnieskis acknowledge their election was 14 days late. Petitioners state they personally served Sypnieskis December 21, 2010. Petitioners state they received written notice of the Sypnieskis' election on March 1, 2011, and that the correspondence was postmarked February 28, 2011. Petitioners state that the election was 10 days late as it was mailed 70 days after the condemnation petition was personally served. Despite the discrepancy between dates, both Petitioner and the Sypnieskis agree that the election was untimely.

Furthermore, the Sypnieskis' counsel was present at the hearing on the Petition which occurred February 11, 2011 before the deadline to elect under Minn. Stat. § 216E.12 expired.¹ At the February 11, 2011 hearing the Court directed Petitioners to respond to any elections under Minn. Stat. § 216E.12 by March 1, 2011 and any issues would be address by the Court on May

¹ Regardless of which date is chosen, the February 11, 2011 hearing was well before the deadline for Respondents to elect pursuant to Minn. Stat. § 216E.12. At that hearing the parties discussed with the Court that some parties may still wish to make the election after the hearing.

16, 2011. The Sypnieskis state that their election was late because they had not made up their minds regarding Minn. Stat. § 216E.12.

Lastly, although Sypnieskis claim Petitioners did not advise them of their legal rights pursuant to Minn. Stat. § 216E.12, they offered no legal requirement for Petitioners to do so. Petitioners argue there is no duty to inform Respondents of their legal rights. The Court is also unaware of such a duty.

Petitioners also point out that Minn. Stat. § 216E.12 specifically states owners only have one option to elect, “[t]he owner . . . shall have only one such option and may not expand or otherwise modify an election without the consent of the utility.” Minn. Stat. § 216E.12 subd. 4. The rules regarding statutory analysis are outlined above, and the Court must apply the plain meaning of the language when the language is unambiguous as it is here. *See* Minn. Stat. § 645.16.

In this case the result is clear cut, Sypnieskis written notice was untimely, Sypnieskis acknowledge their written notice was untimely and the statutory 60 day deadline is unambiguous. Sypnieskis are not allowed to elect pursuant to Minn. Stat. § 216E.12.²

Included in their notice of election pursuant to Minn. Stat. § 216E.12 the Sypnieskis also request minimum compensation. Because the Court concludes that the election was untimely, the Court does not address Sypnieskis request for minimum compensation.

Stice and Shore

² If the Court allows Sypnieskis to elect despite the passed deadline the Court would create an undue burden on Petitioners. Over the next four years this project will affect 600 miles and hundreds of properties. Currently, in Wright County alone, this condemnation law suit affects 27 properties. Ultimately, there is no rule, law, or statute that allows the Court to except the Sypnieskis property.

Respondents Stice and Shore (“Stice and Shore”) filed a notice of intent to elect pursuant to Minn. Stat. § 216E.12 and request that Petitioners “provide an appraisal complete with a minimum compensation analysis pursuant to [Minnesota Statutes § 117.187]”. Stice and Shore have also indicated they seek relocation benefits pursuant to Minnesota Statute § 117.52.

Petitioners acknowledge that Stice and Shore timely elected in writing under Minn. Stat. § 216E.12. Petitioners assert that minimum compensation and relocation benefits are not available under Minn. Stat. § 216E.12. Petitioners’ arguments regarding all of the compensation benefits under Minn. Stat. Chapter 117 follow the premise that Stice and Shore elected to have Petitioners take all of their property and the benefits in chapter 117 are only allowed if an initial taking either destroys the land owner’s business or forces the land owners to relocate. Petitioners argue that the original taking in this case did not cause destruction and relocation, which are necessary before minimum compensation and relocation assistance apply. Petitioners argue that it was the owners choice to elect under Minn. Stat. § 216E.12 and therefore the owners created the circumstances where their business may be destroyed and they are forced to relocate. Petitioners also argue Stice and Shore will receive fair market value for their property subject to their Minn. Stat. § 216E.12 election and are not entitled to more.

In support of their request both Stice and Shore submitted affidavits. The affidavits are largely the same, Shore states he and his wife have lived on their property since 1996. Shore Affidavit, p. 2, ¶¶4-5. Shore’s home and property have not been for sale in the time he has owned it. *Id.* at ¶6. Petitioners’ project is “forcing” him to move from his home because the project changes the fundamental character of his home and property. *Id.* at ¶7. Poles and lines will be visible from nearly every room in the Shore/Stice residence. *Id.* Relocating their home will “consume a large amount of time, personal energy, and money” and without relocation

benefits and minimum compensation they will not be properly compensated for their property. *Id.* at ¶¶8-9. Both Stice and Shore also submitted “personal statements” in which they depict some history of their lives, their home and property, and the impact Petitioners’ project has had on their lives. Stice and Shore further submitted information regarding hearings held by the Minnesota House of Representatives regarding these statutes, a Relocation Assistance Brochure, and a Minnesota Department of Transportation Right of Way Manual.

Stice and Shore argue that Petitioners were delegated the power to condemn from the State of Minnesota. Stice and Shore also argue that Minn. Stat. § 216E.12 was the legislature’s response to the conflict between rural landowners and utilities. Stice and Shore further claim that Minn. Stat. § 117.012 is clear that it applies to all condemnation cases unless otherwise noted and therefore applies in this case. Because of the plain language of both Minnesota Statute section 216E.12 and Minnesota Statute chapter 117 the Court agrees with Stice and Shore.

Minimum compensation is part of the valuation process to determine fair market value and put an owner in the same place they were before a taking. Minimum compensation is outlined in section 117.187 and states, “[w]hen an owner must relocate, the amount of damages payable, at a minimum, must be sufficient for an owner to purchase a comparable property in the community . . .” *Id.*

Relocation assistance is different from minimum compensation because relocation assistance is made up of assistance in finding a replacement home, payment of actual and reasonable moving expenses, and payments to offset the costs of purchasing and financing a new home. Relocation assistance is to be provided to “displaced persons”. Relocation assistance is outlined in § 117.52 and states that a landowner shall be paid by the acquiring authority, “all

relocation assistance, services, payments and benefits required by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970”. *Id.*

The Court begins its analysis with sections of chapter 117, the eminent domain chapter. Minn. Stat. § 117.012 specifically states, “all condemning authorities . . . must exercise the power of eminent domain in accordance with the provisions of this chapter, including all procedures, definitions, remedies, and limitations.” *Id.* at. subd. 1. Further, “[a]dditional procedures, remedies, or limitations that do not deny or diminish the substantive and procedural rights and protections of owners under this chapter may be provided by other law, ordinance, or charter.” Additionally, Minn. Stat. § 117.012 subd. 3 outlines exceptions from the above rules for drainage or town roads because in those instances there are laws that “expressly provide for the taking and specifically prescribe the procedure”. *Id.* Nowhere does chapter 216E, expressly prescribe or carve out an exception to the procedure in chapter 117.

Notably, Minn. Stat. § 216E subd. 2 states, “[i]n eminent domain proceedings by a utility for the acquisition of real property proposed for construction of a route or a site, the proceedings *shall be* conducted in the manner prescribed in chapter 117, except as otherwise specifically provided in this section.” *Id.* (emphasis added). Again, nowhere does section 216E.12 state that minimum compensation or relocation benefits are excluded.

Petitioners argue that Stice and Shore do not fit the definition of displaced persons for relocation assistance because a displaced person is one who moves from real property or move their personal property from real property as a direct result of the initiation of negotiations for, or the acquisition of such real property in whole or in part for a program or project undertaken by a displacing agency. 42 U.S.C. § 4601(6). Stice and Shore point out that Minn. Stat. § 117.50 defines an acquisition as including “by eminent domain” and “by negotiation”. *Id.* Petitioners

argue that because in this case the project requires only the acquisition of an easement and it is Stice and Shore who are choosing to have Petitioner's take the entire property, Stice and Shore are therefore not displaced persons. Stice and Shore claim the acquisition of their entire property occurs upon electing Minn. Stat. § 216E.12 and that although they chose to elect Minn. Stat. § 216E.12 they did not choose to have a high voltage power line run across their property and are therefore displaced persons. Stice and Shore also argue in support of their motion that their property has not been for sale and they are not willing sellers, instead their entire property is being taken through condemnation proceedings.

As outlined above the court's statutory interpretation starts with an analysis of whether or not the language is ambiguous. *See Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277. The Court must apply the plain language of statutes and read provisions together if possible. Minn. Stat. § 645.16; Minn. Stat. § 645.08(1); *In re Appeal of Stanley*, 730 N.W.2d 289, 297 (Minn. Ct. App. 2007) (“[I]t is a cardinal rule of statutory interpretation that we read each statutory provision in reference to the whole statute.”).

In this case Minn. Stat. § 216E.12 states that chapter 117 applies and chapter 117 states that it applies to all condemnation proceedings unless otherwise addressed. There is no statute that excludes Minn. Stat. § 216E.12 from chapter 117. Based on the plain language and unambiguous meaning of those statutes taken together, the Court agrees with Stice and Shore that minimum compensation and relocation benefits do apply to Minn. Stat. § 216E.12.

Both parties also argue *Coop. Ass. v. Aasand*, 288 N.W.2d 697, 700 (Minn. 1980) is instructive as to how this Court should rule regarding chapter 117. The *Aasand* court held that Minn. Stat. § 216E.12 was constitutional as written and enumerated in 1980. That Court did not contemplate requests for loss of going concern, minimum compensation or relocation benefits

and was therefore silent on the issues. Nonetheless, Petitioners claim the case stands for the proposition that there is a reasonableness requirement in forcing a condemner to take an entire parcel pursuant to Minn. Stat. § 216E.12. Stice and Shore claim the case stands for the proposition that the legislature created Minn. Stat. § 216E.12 as a solution to the conflict between rural landowners and power companies, easing some of the difficulties rural landowners face. Stice and Shore point out *Aasand's* analysis that the legislature may impose reasonable conditions upon the exercise of the power of eminent domain and may modify the terms of a delegation of that power. *Id.*

Aasand did not address the issues of the benefits pursuant to chapter 117 as applied to Minn. Stat. § 216E.12. Because the statutes must be read together, the Court concludes that minimum compensation and relocation assistance do apply to Minn. Stat. § 216E.12.

Lindbergs

In this case Petitioners do not dispute that Lindbergs timely elected Minn. Stat. § 216E.12. The Lindbergs request, in their notice of intent to elect pursuant to Minn. Stat. § 216E.12, minimum compensation, relocation assistance, and loss of going concern. The analysis regarding minimum compensation and relocation assistance outlined above also applies to the Lindbergs. The Court here addresses loss of going concern. Lindbergs further request the Court determine as a matter of law that their parcel of land is commercially viable.

In support of their request Lindbergs (“Lindbergs”) submitted an affidavit which outlines the Lindbergs personal history of living on their farm. Mr. Lindberg is currently self-employed farming his property. Lindberg Affidavit, p. 2, ¶1. The Lindbergs’ property has not been for sale since they have owned it. *Id.* at p. 7, ¶11. The Lindbergs argue that although they chose to elect under Minn. Stat. § 216E.12 it was not voluntary because their property has never been for

sale and Petitioners' acquisition of the property pursuant to Minn. Stat. § 216E.12 automatically converts the taking to the entire parcel.

A prerequisite to electing Minn. Stat. § 216E.12 is that the parcel must be commercially viable. *See* Minn. Stat. § 216E.12 subd. 4. Minn. Stat. § 216E.12 states, “[c]ommercial viability shall be determined without regard to the presence of the utility route or site.” *Id.* As stated in *Aasand*,

“[a]s written, § 116C.63, subd. 4³ is subject to a construction that could produce bizarre and unjustifiable results; landowners could compel commercially unreasonable acquisitions which, in light of the purpose of the statute, would impose an undue burden on utilities. For § 116C.63, subd. 4 to survive review, a requirement of reasonableness must be read into its terms.”

Cooperative Power Ass'n v. Aasand, 288 N.W.2d 697, 701 (Minn. 1980).

The *Aasand* Court gave little guidance to the meaning of commercially viable. *Id.* at 701. That Court stated the parcel for that case was not an “unmarketable fragment” but instead was 150 acres of land. The same is true here, the Lindbergs have over 60 acres and have farmed the land for many years.⁴ Nevertheless, without further information, this Court is unable to determine commercial viability as a matter of law.

The parties argue about whether the property is in fact commercially viable. Respondent asks the court to determine as a matter of law the parcel is commercially viable and argues that the *Aasand* court correctly presumed the land in that case was commercially viable as a matter of law. Petitioner claims it cannot make an informed decision on the issue as the Lindbergs have not produced sufficient documentation. Lindbergs argue that the information Petitioner requests should be Petitioner's responsibility to procure as the burden and cost of producing those documents should not be on the shoulders of the Lindbergs. Petitioners claim that because it is

³ § 116C.63, subd. 4 has been renumbered since *Aasand* and is now § 216E.12 subd. 4.

⁴ The *Aasand* Court gives this court no guidance about what facts the Court relied on to determine commercial viability. Presumably, the Court had more facts than the two outlined in the opinion in making its decision.

Lindbergs election they should carry the burden. Since the matter was taken under advisement the Court was notified by the Lindbergs that the parties have exchanged further relevant information regarding the issue of commercial viability but have still not come to an agreement as there is one document the Petitioner is yet requesting; a certificate of septic system compliance. Although the Lindbergs outlined in their additional submission the type of information Petitioners are requesting and a summary of the information, the substance of those documents was not provided to the Court. The Court has insufficient information to determine as a matter of law whether the Lindbergs property is commercially viable. The Court notes however that based on what information is in the record the Lindbergs and Petitioners have been reasonable in working together to resolve this issue and anticipate they will resolve the issue without further Court involvement.

Compensation for loss of going concern is outlined in Minnesota Statute § 117.186. “Going concern” is defined in the statute as “benefits that accrue to a business or trade as a result of its location, reputation for dependability, skill or quality, customer base, good will, or any other circumstances resulting in the probable retention of old or acquisition of new patronage”. *Id.* at subd. 1(1). “If a business or trade is destroyed by a taking, the owner shall be compensated for loss of going concern”. *Id.* at subd. 2. If the Lindbergs can prove their property is commercially viable, compensation for loss of going concern will depend on whether the Lindbergs farming business can be relocated or is destroyed by this taking. This will be decided by the commissioners appointed to this case pursuant to Minn. Stat. § 117.186 subd. 3 (“[i]n all cases where an owner will seek compensation for loss of a going concern, the damages, if any, shall in the first instance be determined by the commissions under section 177.105 as part of the compensation due to the owner”). Similar to the analysis above, loss of going concern is part

of the eminent domain chapter, 117. Minn. Stat. §117.186 is not specifically excluded by Minn. Stat. § 216E.12 and Minn. Stat. § 216E.12 expressly states “the proceedings [for Minn. Stat. 216E.12] shall be conducted in the manner prescribed in chapter 117”. See Minn. Stat. § 216E.12. This is not an automatic right to compensation; it will depend on how the commissioners value the Lindbergs’ property. The Lindbergs are however, allowed to request compensation for loss of going concern from the commissioners if they can either reach an agreement with Petitioner regarding commercial viability or prove to this Court their property is commercially viable.

In sum, the Sypnieskis noticed their written intent pursuant to Minn. Stat. § 216E.12 late and because of their untimely request the Court denies their election. Because Minn. Stat. § 117.012 clearly states, “all condemning authorities . . . must exercise the power of eminent domain in accordance with the provisions of this chapter, including all procedures, definitions, remedies, and limitations.” *Id.* at. subd. 1. And because Minn. Stat. § 216E.12 clearly states, “[i]n eminent domain proceedings by a utility for the acquisition of real property proposed for construction of a route or a site, the proceedings *shall be* conducted in the manner prescribed in chapter 117, the Respondents Stice and Shore are allowed to request minimum compensation and relocation assistance of the commissioners. Although the Lindbergs made their Minn. Stat. § 216E.12 election timely, the Lindbergs have failed to produce facts sufficient for this court to determine as a matter of law their property is commercially viable. Therefore, at this time it is premature to decide they are permitted to request that the commissioners consider loss of going concern, minimum compensation, and relocation assistance during these proceedings. If the Lindbergs wish to go forward with their election under Minn. Stat. § 216E.12 and cannot reach an agreement with Petitioners regarding commercial viability without further Court involvement

they must request an evidentiary hearing to produce for the court additional facts to support their assertion that their property is commercially viable.

M.A.D.