

BEFORE THE
MINNESOTA PUBLIC UTILITIES COMMISSION

Nancy Lange
Dan Lipschultz
Matt Schuerger
Katie Sieben
John A. Tuma

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of the Application of Freeborn
Wind Energy, LLC for a Route Permit for the
Freeborn Wind 161 kV Transmission Line
Project in Freeborn County, Minnesota

PUC Docket No. IP-6946/TL-17-322

ASSOCIATION OF FREEBORN COUNTY LANDOWNERS
COMMENT ON TRANSMISSION ROUTING

The Association of Freeborn County Landowners (hereinafter “AFCL”) is an informal association of landowners in and adjacent to the site footprint of the above-captioned Freeborn Wind Farm (hereinafter “Freeborn Wind”). AFCL hereby submit this Comments to the Administrative Law Judge based on our previous Completeness comments and Scoping comments, on comments made at the public meeting, and on issues raised of timing and easement acquisition and interference with non-participants land. AFCL requests that this project be denied, as it is premature for consideration, or in the alternative, delayed until the fate of the Freeborn Wind project siting application is clear.

The project proposed is for seven (7) miles of 161kV transmission “to interconnect the

proposed Freeborn Wind Farm project substation to the Glenworth Substation south of the City of Glenville.” Under the transmission siting statutes, the criteria for siting to be considered is found under Minn. Stat. §216E.03, Subd. 7. This project has been applied for under “alternate review,” and although Association of Freeborn Landowners is an intervenor in the Freeborn Wind siting docket, and a party with an interest in this transmission proceeding, AFCL has not intervened in this docket.

I. THE COMMISSION MAY CONSIDER ISSUES OF SIZE, TYPE AND TIMING

Although the statute prohibits consideration of issues of size, type and/or timing in the environmental review for a project,¹ the Commission is only prohibited from considering these issues where there is a Certificate of Need. When there is no Certificate of Need, then issues of size, type and/or timing can be considered:

7850.4200 FACTORS EXCLUDED.

When the Public Utilities Commission has issued a Certificate of Need for a large electric power generating plant or a high voltage transmission line or placed a high voltage transmission line on the certified HVTL list maintained by the commission, questions of need, including size, type, and timing, questions of alternative system configurations, and questions of voltage shall not be factors considered by the commission in deciding whether to issue a permit for a proposed facility.

There is no Certificate of Need for this project, and thus no prohibition for the Commission.

The timing of this application and permitting process should be questioned because the site permit is in question following the Recommendation of the Administrative Law Judge that the siting permit be denied:

SUMMARY OF RECOMMENDATIONS

The Administrative Law Judge concludes that Freeborn Wind has failed to demonstrate that the proposed Project will meet the requirements of Minn. R. 7030.0040, the applicable Minnesota Noise Standards. Therefore, the

¹ Minn. Stat. §216E.02 Subd. 2.

Administrative Law Judge respectfully recommends that the Commission either deny Freeborn Wind's Application for a Site Permit, or in the alternative, provide Freeborn Wind with a period of time to submit a plan demonstrating how it will comply with Minnesota's Noise Standards at all times throughout the footprint of the Freeborn Wind Project.²

With the Freeborn Wind siting permit at issue, at least delayed indefinitely, and likely reconfiguration or withdrawal of the project in Minnesota, which is likely to affect plans for transmission, there is no point in proceeding with transmission dedicated to the Freeborn Wind project. To do so would waste resources and time of all parties and regulators.

Even prior to issuance of the ALJ's Recommendation, the timing of the transmission docket is problematic, because even if moving forward, the schedule for the siting docket puts the construction of the wind project far behind the fast-track permitting of this transmission. Routing and construction of transmission, which can be built very quickly, should be behind the siting process upon which the wind project is dependent. This project will not be built but for the wind project – and if the wind project is in limbo, the related transmission project should be as well.

AFCL did request that this docket be delayed in the "Completeness" commenting period. At this time, it is even more obvious that this transmission permitting docket is putting the cart before the horse. AFCL requests that this permit be denied, or in the alternative, that this proceeding be delayed until there is a determination for the Freeborn Wind project.

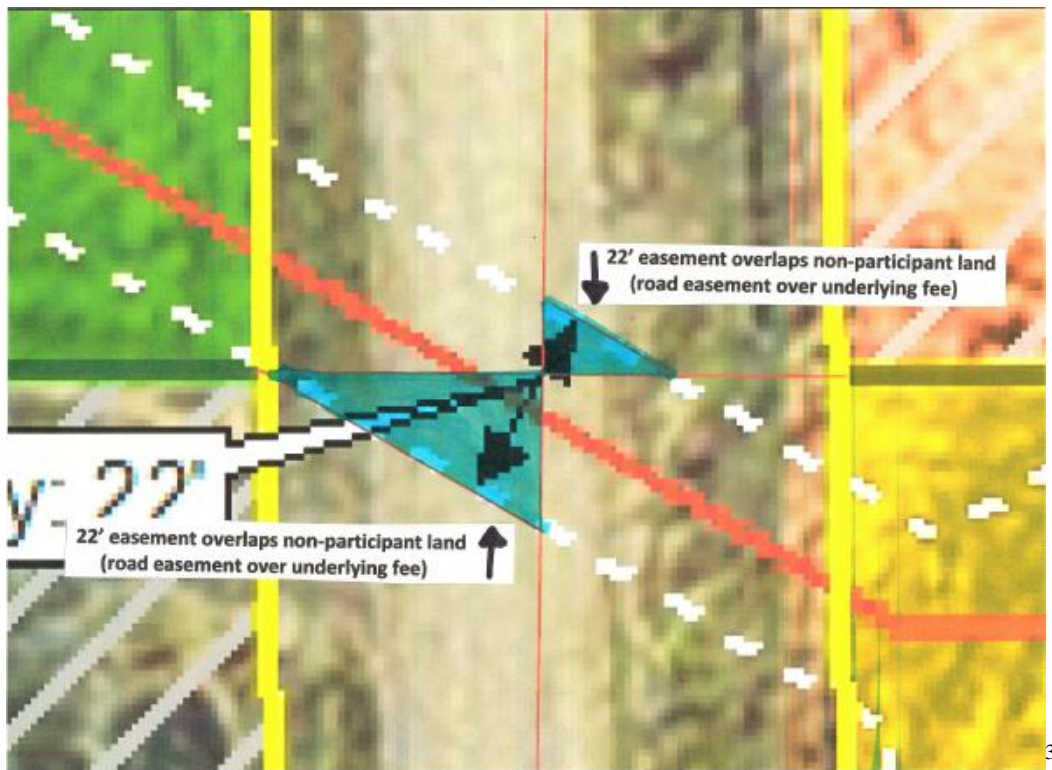
II. LAND RIGHTS AND CONSIDERATION OF USE OF EMINENT DOMAIN

The applicants claim that they have all land rights and that they may utilize the power of eminent domain to condemn land for this transmission. Both are problematic.

A. INVENERGY DOES NOT HAVE ALL LAND RIGHTS FOR ITS PREFERRED ROUTE.

² Findings of Fact, Conclusions of Law, and Recommendations, p. 2, PUC Docket 17-410 ([20185-143018-01](#)).

The applicants have declared a 400 foot route with, and smaller rights of way proposed, but at one crossing of a county road, applicants have reduced the easement to just 22 feet, claiming this narrowing was planned so as to not cross over non-participant land. However, that does not work. Because the county road is an easement, as admitted by Invenergy's Dan Litchfield at the Public Hearing, and the fee owners own land underlying that easement, the 22 foot easement will encroach on non-participant land. This may be seen in the following rendition – the exact location of the encroachment will be dependent on the position of the easement over the fee interests, but it will affect triangles of non-participants land, depicted in blue below in an enlarged snapshot of “Map of Crossing at County Road 108/830th Avenue” (Application, p. 18):



No matter how the 22' easement diagonally crosses County Road 108, it will encroach on

³ See Attachment A, p. 11-12, 17-19 , Minar “Buy the Farm” decision, Scott County District Court, Court File 70-CV-13-1182.

non-participants' fee interest underlying the county road. Invenergy claims it has land rights for transmission over its preferred route. This is not correct. Invenergy does not have all land rights for this transmission project.

B. INVENERGY IS NOT A UTILITY AND CANNOT UTILIZE THE POWER OF EMINENT DOMAIN.

If Invenergy does not have land rights, will it seek to utilize the power of eminent domain? In its application, Invenergy does state that condemnation is a possibility:

Freeborn Wind has, through voluntary agreements, obtained the private real estate rights necessary to construct the Project within the Proposed Route. If additional property rights are required for the Project, Freeborn Wind will seek to negotiate a voluntary easement agreement with each affected landowner. If Freeborn Wind and the landowner are unable to negotiate an easement for the right-of-way, Freeborn Wind will acquire the required real property rights through exercise of the power of eminent domain pursuant to Minnesota Statutes Chapter 117. The process of exercising the power of eminent domain is called condemnation.

Application, p. 1.

And again:

If the MPUC grants the requested Site Permit and Route Permit, the Freeborn Wind entity will be transferred from Invenergy to Xcel Energy. Xcel Energy will then become the owner of Freeborn Wind, and be responsible for fulfilling all of the conditions set forth in any Site Permit or Route Permit granted by the Commission. Freeborn Wind, then owned by Xcel Energy, would construct, own, and operate both the Freeborn Wind Farm and this Project.

Application, p. 6.

In the project notice:

Eminent domain: *If the Commission issues a route permit, the Applicant states it may use the power of eminent domain to acquire land for this project.*

Notice, p. 3 of 4, December 6, 2017.

Eminent domain may only be used for a public purpose. Minn. Stat. §117.012. Public

purpose does include creation or functioning of a public service corporation. Minn. Stat. §117.025, Subd. 11. Eminent domain is available to a public service corporation, and some aspects of eminent domain law are exempted for public service corporations. Minn. Stat. §117.025, Subd. 10; Minn. Stat. §216.01, Subd. 10. However, Freeborn Wind Energy, LLC is not a public service corporation nor is it a utility. Although Xcel Energy/NSP is a public service corporation, buying Freeborn Wind Energy, LLC, the LLC remains an LLC. Invenergy and Freeborn Wind do not have the power of eminent domain, nor does Freeborn Wind, LLC if owned by Xcel Energy.

C. IN SIGNING UP LANDOWNERS PRIOR TO PERMITTING, INVENERGY TAKES THE RISK THAT IT'S PREFERRED ROUTE MAY NOT BE APPROVED.

Invenergy and at least one of its participants claim that their preferred route should be approved because they have signed up landowners for transmission. This is not how the transmission routing process works. No route is final until the Commission orders it, and any actions taken to secure land rights is taken at the company's and at landowners' risk.

Transmission is a regulated activity, it is not a "free market" activity.

III. WHAT POTENTIAL HUMAN AND ENVIRONMENTAL IMPACTS SHOULD BE CONSIDERED BY THE COMMISSION?

The criteria for a transmission project has several environmentally related factors. The environmental assessment does not adequately consider the impact of the transmission project, and the wind project on which it is dependent, on this agricultural community's "future development and expansion and their relationship to the land, water, air and human resources of the state." The project area is a pre-existing community, a quiet, sparsely populated rural area, with residents strongly attached to the land, for their living as farmers, for their sense of community, and the feeling of contentment as they go about their day, as they drive down the

township roads, and as they look over the horizon greeting the day's sunrise or watching the sunset. Landowners in this community use and enjoy their land. Many families have lived in the area for generations, some on Century Farms. Others have moved in more recently, built homes, choosing this setting as their home specifically for its rural characteristics. In this area, the viewshed is expansive, and it is an important aspect of day to day life. The construction and operation of wind turbines and the transmission associated with it will forever change the viewshed. Aesthetic and community values must be considered in review of this project. This is particularly important where a project is moving into a community.

The impacts of this transmission line on property values and marketability should be addressed in the environmental review. There is no mention of this in the application. In a recent eminent domain proceeding, the utility testified that land purchased by the utility in its "Buy the Farm" condemnation lost 16% of its value, that resale "recovered 84 percent of the purchase cost."⁴ Robert Van Pelt has testified numerous times in this transmission docket and in the Freeborn Wind siting docket about loss of property value if these projects are built. He noted that the "fact sheet" by commerce contradicts claims that there will be no impact on property values. The decrease in property value will be a direct cost to landowners, and will also be a cost to the taxing jurisdictions – the applicants do not take these costs into account.

A commenter at the Commerce public meeting for the wind project referred to electric delivery problems with the Freeborn/Mower electric system. The Commission should address electrical issues from overloading of the line, to voltage instability, to inductive interference, and/or any other electrical issues. Commerce should verify whether this project will have any impact, positive or negative, on the Freeborn/Mower system. It has not done so.

⁴ See Attachment A, p. 9, Minar "Buy the Farm" decision, Scott County District Court, Court File 70-CV-13-1182.

Big picture transmission issues should be taken into account in the environmental assessment and permitting decision. In the application for the wind project, Invenenergy states that up to 200 MW of wind will be developed, of which 84 MW will be sited in Freeborn County, Minnesota, and the balance of the project is in Worth County, IA. The project is claimed to be a 200 MW project, yet according to Xcel Energy, just 150MW will be granted by MISO after network upgrades. Freeborn’s MISO queue number as J407. Xcel Energy states in its acquisition docket Petition:

The MISO System Impact studies show that the project will be granted 150 MW of NRIS upon completion of all required network upgrades.

Xcel Energy Petition, filed 10/24/2016.⁵

At the May 31 meeting, Invenenergy’s Dan Litchfield deflected a question about transmission capacity saying it had already been discussed. However, that was in another docket, and there is no information regarding transmission capacity or what has been approved by MISO in this docket. There is conflicting information, and the accuracy of Xcel’s and Applicant’s statements must be verified. The MISO approval for interconnection must also be considered in terms of efficiency and cost-effectiveness. If only 150MW can be put online, the project is neither efficient nor cost-effective, both considerations under routing criteria.

There are two MISO interconnection queue numbers associated with this project, J407 and J885, confirmed by Inenergy’s Litchfield at the December 19, 2017 Commerce scoping meeting, and again at the May 31, 2018 Public Hearing, but no specifics were provided. These two interconnection requests are for more than the project would “need”(though it makes more sense if J407 was approved for only 150MW and J885’s 64 MW was added, totaling closer to

⁵ PUC Docket E002/M-16-777, handed in at 5/31/2018 Public Hearing, and available online:

201610-125953-02	PUBLIC	16-777	<input type="checkbox"/>	M	XCEL ENERGY	OTHER--WIND GENERATION ACQUISITION	10/24/2016
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200 MW). The interconnection MW numbers must be clarified in this transmission docket, and the need for two interconnection requests to MISO must be satisfactorily explained.

It would be helpful in describing the specifications to state MVA capacity and whether line will be bundled or not (it appears not, but clarify). The 477 kcmil Hawk ACSR conductor seems to come in at 659 amps, whereas the amperage in the Magnetic Field charges is stated as 717 – and that level amperage likely can't be reached with a 477 kcmil conductor, and could be reached with a 556.5 kcmil conductor. On the other hand, Hawk ACSS has a rating of 1188 amps. The 265MW capacity claimed is more in keeping with the ACSS, but the amperage given is closer to ACSR. Again, clarification would be appreciated, but note that a larger value in Magnetic Fields modeling is better than understating!

In looking at alternatives, route alternatives sharing a corridor should clarify whether the corridor sharing would be building independent structures for each line, or whether the corridor sharing would include sharing structures. Minnesota has a policy of non-proliferation of transmission and other utility infrastructure, and this project has corridor and infrastructure sharing opportunities that the applicants do not seem to be willing to utilize.

Impacts on habitat and the wildlife in the area must be considered. In this case, the transmission project may have an impact on eagles, particularly considering the loss of multiple eagles from the Decorah eagle nest specifically due to transmission lines. Multiple commenters have raised the issues of eagle deaths caused by transmission and eagle collisions. Eagle nests are present but not acknowledged by the applicants. There are 10 potential eagle nests missing from the project map. Three golden eagles were sighted along the Shellrock River and the project area during the spring of 2018. Here are the nest locations:

1. North of 110th St 1/2 mile and west of 840th Ave, Glenville, MN
2. 140th St and 1/2 mil west of 830th Ave, Glenville MN

3. 52717 173rd St, Austin MN
4. St Johns Community, Albert Lea MN
5. East of Bridge Ave and south of Albert Lea High School field house, Albert Lea MN
6. A second nest near #5, Albert Lea MN
7. Near 13187 795th Ave, Glenville MN
8. Intersection of Cedar River and County Road 4, Austin MN
9. West of Hwy 65 and north of 120th St, Glenville MN
10. Deer Creek Watershed, 87000 State Line Road, Glenville MN

Nests numbers 1, 2, and 7 are very near proposed transmission line routes. There is also an existing-recognized eagle nest along Highway 65 south of the Glenworth Station. That means there are 4 nests in the path of the transmission line proposals.

There are other locations that have been provided where eagles are foraging, and feeding. Coordination with DNR and USFWS and verification of locations is necessary to document nests and foraging areas. Applicants continue to deny that these eagle nests exist!

Tree clearing status must be verified. Dan Litchfield stated at the Scoping meeting that he didn't think there would be any tree clearing. Habitat for wildlife in this predominately farming area is dependent on trees. The applicants should identify areas of tree clearing. See, e.g., Table 15, p. 56, showing approximately 0.8 acres of trees within the proposed Right of Way which would be removed at three locations.

Cumulative impacts must be considered, as well as efficiency of the project proposed. This project is a transmission line collecting electricity from both the Minnesota and the Iowa parts of this line. All energy generated by the wind project will go through these collector lines, into this transmission line, and to another substation before joining the grid. An example of cumulative impacts that should be addressed is the collector system that feeds the transmission line. The collector system map in the wind project application shows that electricity generated in Iowa will move north through at least two collector lines at Raven Avenue at the border and another just west of Raven Avenue, and east of that one collector may drop down into Iowa and

then back up at Raven Avenue. There may also be another collector system link south of turbine 45. See collector system on Freeborn Wind Project Application Figure 7, Topographic Map; Figure 11, Land Cover; Figure 16, Wetlands Inventory. Because the Iowa generation will be sent up to Minnesota for interconnection to the grid, the impacts of the collector system, its construction, and interconnection should be considered.

As for the wind project, the area may have karst formations and conditions, and efforts should be made to determine if karst is present along the transmission line route. There has been a karst study for the wind project, and that information should be reviewed to determine if it is useful for routing. There was also a study in the area of karst and its impact on the SA-04 System Alternative for the Line 3 pipeline, and the route segment going through Freeborn County was altered due to karst. The Enbridge Line 3 karst information should be added to this docket and considered by the Commission.⁶

A safety, public health, and welfare consideration, previously confirmed by the Department of Transportation in its comment, is potential for interference with the state's ARMER communication system and towers that feed into the ARMER system. This is an issue regarding both the wind project and its transmission lines. The Applicant states that the DOT has reviewed the wind project and has no issues of interference with the ARMER system. To assure prevention of interference with the ARMER system, Commerce should verify whether the DOT has any concerns about interference from the transmission line.

There is potential for inductive interference of the collector system and transmission lines with telephone and cable lines, as happened with the Blazing Star project. It is probably true that

⁶ Rough information is available from Geospatial Information Office, online at http://www.mngeo.state.mn.us/chouse/geology/county_regional.html

many of the telephone lines in the area are old, and that the age was a factor in the interference. It is also likely in this area that the lines are old, and as such, likely more susceptible to interference. This interference with telephone and cable lines is a phenomenon known to Commerce's Rich Davis. The potential for inductive interference in this project must be investigated, and inductive interference prevented

The transmission line must comply with the DOT's Policy of Accommodation, and the county and townships road regulations. The impact of these regulations and policies have not been made clear in the application or environmental review, should address these limitations. In addition, the transmission line's poles must be sufficiently distant from any roadway to be beyond the DOT's clear zone and not posing a hazard to traffic in the area. Other matters for consideration include the number of trips per day in the area during construction, and a determination of whether it is a public safety issue, and whether there is a need for mitigation of noise and dust.

IV. ARE THERE METHODS TO MINIMIZE, MITIGATE, OR AVOID POTENTIAL IMPACTS THAT SHOULD BE CONSIDERED?

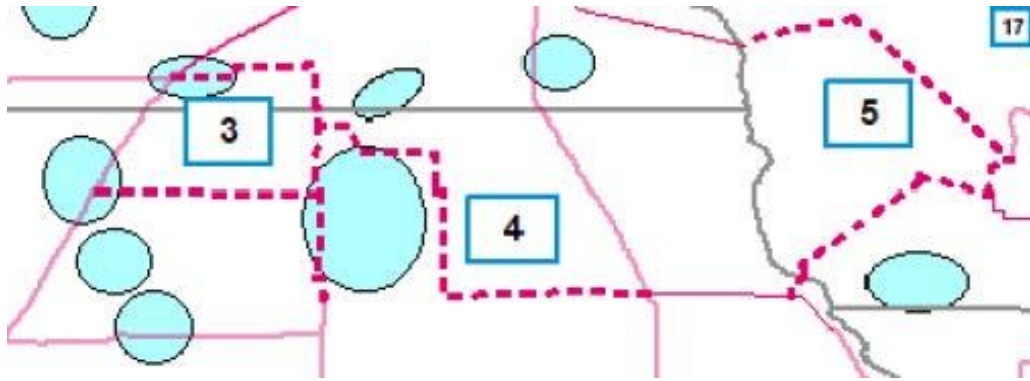
As stated previously, the best possible method to minimize, mitigate, and avoid potential impacts of the proposed project is prevention. This applies to transmission as well as to the wind project. Means of avoidance are those of respectful siting, development and observance of sufficient siting standards, and of preventative, thoughtful, careful siting to avoid impacts. AFCL strongly urges the Commission to adopt a preventative stance in its review of this project, particularly in light of the impacts which are likely or are a certainty, and in light of the problematic nature of correction and mitigation if impacts and problems are not acknowledged and addressed prior to permitting and construction. This is particularly important due to the

uncertainty surrounding the site permit of the Freeborn Wind project – without that project, there is no plausible need for this transmission.

Potential impacts can be minimized and/or mitigated by limiting land used for this project to land owned by participants – if they cannot do that, then there should be no project, no permit. There should be an update of the list in Appendix E to identify which landowners are participants and for which transmission easement rights have been acquired, and which landowners have not acquiesced to a transmission right-of-way. As above, it is apparent that there is unacceptable encroachment on non-participant land. Those who have not agreed to transmission on their land should not have their land considered for this project.

Potential impacts can be minimized and/or mitigated by use of existing utility and public rights-of-way, as required by Minnesota’s policy of non-proliferation and Minn. Stat. §216E.03, Subd. 7(e). Those potential rights of way could include local government or utility easements already in existence, and/or bootstrapping onto those easements. However, Freeborn Wind would need consent of the underlying fee owners to utilize county road rights of way.

There are also other substations that could be utilized, together with existing transmission, such as the Barton switching station, and the Hayward substation. ITC has built/is building new transmission through Worth County that should be considered, particularly because the majority of the Freeborn Wind project is in Iowa. The Worth County substation is a part of the MVP 4 project which connects both east and west to MVP projects, and north and south to existing transmission (Worth Co. is that northernmost E/W section of MVP 4 extending to where MVP 4 connects to N/S MVP 3):



Use of the Northwood/Glenworth line should also be considered because it is not double circuited, and thus could be double circuited with this proposed transmission. Although owned by another entity, Minnesota's policy of non-proliferation requires that it be considered. Parties can share right of way and poles, saving monetary and environmental costs.

Again, there is no prohibition of Commission consideration of these or other system alternatives as a routing issue because there is no Certificate of Need -- the prohibition only extends to consideration of size, type and timing issues in environmental review.

V. PERMIT CONDITIONS WOULD AID IN PREVENTION AND MITIGATION.

AFCL proposed permit conditions, and the Commission requested that Commerce consider these permit conditions in the Draft Site Permit as it forwarded this application for hearing. For the most part, that consideration by Commerce did not occur.

AFCL requests that this permit be denied, without prejudice, or, in the alternative, that this permitting proceeding be delayed until a determination is made on the Freeborn Wind project site permit.

If a permit should be granted, Permit conditions are an effective way to address issues that may arise if the project were to be permitted – prevention is always better than mitigation. Proposed conditions include:

CONDITION: Land used for the transmission line must be only that of participating and/or “good neighbor” landowners.

CONDITION: Agricultural land used during construction must be restored to pre-construction condition and all landowner reimbursed for crop loss during construction and for at least 5 years afterward for losses due to compaction.

CONDITION: All landowners must be compensated for loss of production due to construction and losses over time due to soil compaction (see typical landowner compensation protocol for transmission construction, compaction, drain tile repair issues as example).

CONDITION: Agricultural drainage tile must be mapped out prior to construction, and post construction testing and active monitoring after construction must be performed. Damaged or destroyed drain tile must be replaced, and all landowners upstream and downstream must be compensated for losses due to drain tile damage (see landowner compensation protocol for transmission construction, compaction, drain tile repair issues as example). All landowner complaints regarding drain tile, whether participating or non-participating, must be immediately addressed.

CONDITION: If foundations or penta-poles are used for the transmission line, foundation composition must be safe without leachate of harmful chemicals into wetlands, streams, or groundwater.

CONDITION: Transmission routing must be verified to observe wetland setback.

CONDITION: Transmission must be routed such that they do not interfere and/or obstruct aerial spraying. If it does interfere with aerial spraying, sprayers must be compensated for lost business opportunity and revenue, and all landowners for loss of production.

CONDITION: Transmission must be sited such that they do not impinge on eagle nests and foraging areas, specifically located at least 2 miles distant.

CONDITION: Transmission lines must not be sited in areas of covered, transition or active karst.

CONDITION: Broadcast radio and television signal and its microwaves must not experience interference from the transmission line.

CONDITION: Emergency radio (ARMER) system must not experience interference.

CONDITION: Telephone lines and cable must not experience inductive interference. Commerce must commission an engineering study to investigate project inductive interference with telephone lines and cable, and the applicant be assessed the cost of the study. Collector and transmission lines must not be routed such that there is inductive interference with telephone and/or cable signal.

CONDITION: Transmission line will not create magnetic fields greater than 2 mG at the edge of Right of Way.

CONDITION: Transmission system and collector system must not create or exacerbate stray voltage issues in the project area. Any stray voltage problems reported must be corrected immediately.

CONDITION: Freeborn and its contractors must adhere to county and township development and road agreements.

CONDITION: Any permit issued should have a "Special Condition" that "the Project will not be constructed unless the Commission issues a Site Permit for the Freeborn Wind Farm," and that if permitted, it may be transferred to, owned and built only by a public service corporation.

VI. THIS TRANSMISSION ROUTE PERMIT IS PREMATURE, AND SHOULD BE DENIED.

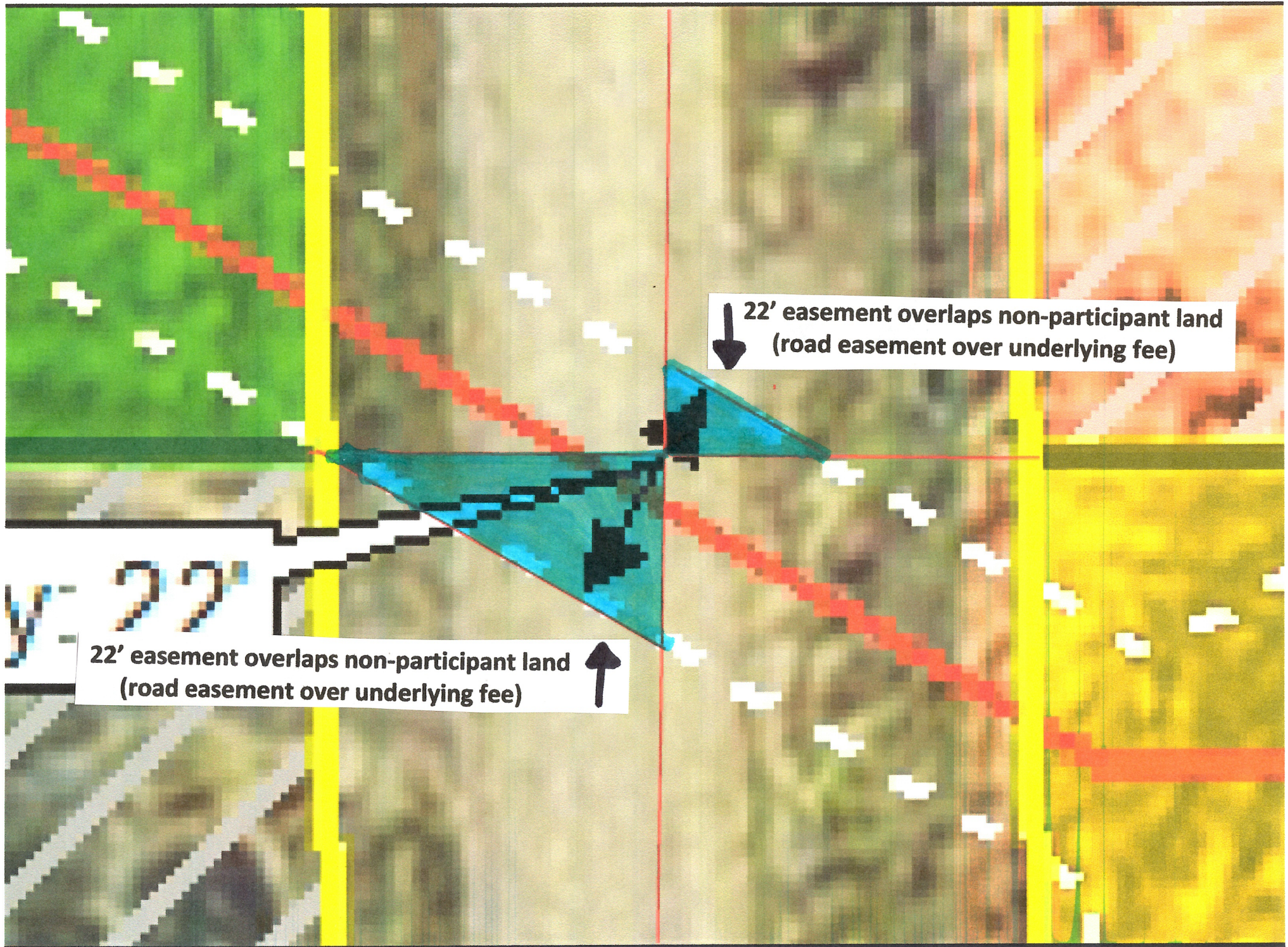
The Association of Freeborn County Landowners raises the above issues for consideration in a Recommendation to the Commission. AFCL requests that this transmission route application be denied, without prejudice, as premature. In the alternative, AFCL requests that this proceeding be delayed until the fate of the Freeborn Wind project is determined.

This comment is not all-inclusive, and incorporates as if fully stated herein the Completeness, Environmental Review, and Route Permit comments previously submitted in this docket. Thank you for the opportunity to submit these comments.

June 12, 2018



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↓ 22' easement overlaps non-participant land
(road easement over underlying fee)

22' easement overlaps non-participant land
(road easement over underlying fee) ↑

State of Minnesota
Scott County

District Court
First Judicial District

Court File Number: **70-CV-13-1182**

Case Type: Condemnation

Notice of Filing of Order

RACHEL RENEE MYERS
MALKERSON GUNN MARTIN LLP
220 SOUTH 6TH ST
SUITE 1900
MPLS MN 55402

**Great River Energy, a Minnesota cooperative corporation, by its Board of Directors;
Northern States Power Company (d/b/a Xcel Energy), a Minnesota corporation, by its
Board of Directors; Western Minnesota Municipal Power Agency, a Minnesota municipal
corporation and political subdivision, by its Board of Directors; Otter Tail Power
Company, a Minnesota corporation, by its Board of Directors; and Central Minnesota
Municipal Power Agency, a Minnesota municipal power agency, by its Board of Directors
vs Schoenbauer Farms, Inc., et. al.**

You are notified that on August 07, 2014, the following was filed:

Order-Other
& Findings of Fact, Conclusions of Law, and Order

Dated: August 12, 2014

Heather M. Kendall
Court Administrator
Scott County District Court
200 4th Avenue West JC 115
Shakopee MN 55379
952-496-8200

cc: MOLLIE MAE SMITH
Minnesota Pipe Line Company, LLC
Jami Kiecker
Bruce Kiecker
Jo Carol Nelson
HomeTown Bank
Nick Gerdes
Helena Township
Michael T Eischens
Shari M Eischens
Wells Fargo Bank, National Association
Robert F Nytes

Alice R Nytes
Thomas H Walerius
Ann M Walerius
AgStar Financial Services, FLCA
The Minnesota Valley Electric
Cooperative
First Minnesota Bank
Roundbank
Gregory J Stepka
Jean A Stepka
U.S. Bank, National Association, N.D.
Patricia A Kubes
Wencel J Kubes
Randolph J Kubes
Chris Kubes
Lisa M Kubes
Wencel A Kubes
Sonja Kubes
Mark C Lund
L Lund Tara
State Bank of New Prague
Bremer Bank, National Association
Muretta H Prokes
AgStar Financial Services, ACA
Cedar Summit Dairy, LLC
Scott Soil and Water Conservation
District
Elizabeth Marie Tisdell
John Allan Tisdell
Roger R Weiers
Patricia E Miller-Weiers
Hendricks Family Farm, Inc.
Jon C Hendricks
Mary Ruth Hendricks
James Williams
Pomije Farms, LLC
Cedar Lake Township
The Hendricks Family Limited
Partnership
Bruce C Polson
Teri R Polson
Wagner Funeral Home, Inc.
Teresa L Reese
Rebecca A Crooks
Daniel Stratton
Anita A York

Ronald A Tupy
Susan L Tupy
Francis J Tupy
Karen A Tupy
Bryan Logue
Kelley Logue
John J Puncochar
Amy J Puncochar
James L Nordwall
Lonna R Nordwall
Keith P Ploumen
Chad T Ryburn
Christina M Ryburn
South Metro Federal Credit Union
Dan Smude
David B Pickit
Bank of the West
Patrick C Delony
Calvin L Schumacher
Amy L Schumacher
Virginia R Odette
New Market Bank
Eileen M Wagner
Richard J Devine
Jacqueline Devine
Andrew Joseph Freiermuth
Anthony John Marchiafava
Leander Wagner
Thomas B Zweber
Barbara Ann Zweber
Bank of America, N.A.
New Market Township
Robert John Zweber
Leon Zweber
Karen K Howard
JP Morgan Chase Bank, National
Association
Citizens Bank Minnesota
Majestic Hills Ranch Foundation
Northern Natural Gas Company
George A Fiedler
Candace M Fiedler
Danny A Thompson
US Bank National Association
Fidelity Bank
Great Southern Bank

Scott County
State of Minnesota
Irene D Kubes
Ronald D Kubes
Mark S Kubes
PHILLIP R KRASS
CHRISTOPHER ANDREW NEISEN
R GLENN NORD
WILLIAM E SJOHOLM
ROB ANDREW STEFONOWICZ
GROVER C SAYRE, III
THOMAS ROBERT LEHMANN
PATRICK J NEATON
DAVID SCOTT KENDALL
ANTON CHESKIS

A true and correct copy of this notice has been served pursuant to Minnesota Rules of Civil Procedure, Rule 77.04.

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF SCOTT

FIRST JUDICIAL DISTRICT

File No. 70-CV-13-1182

Great River Energy, a Minnesota cooperative corporation, by its Board of Directors; Northern States Power Company (d/b/a Xcel Energy), a Minnesota corporation, by its Board of Directors; Western Minnesota Municipal Power Agency, a Minnesota municipal corporation and political subdivision, by its Board of Directors; Otter Trail Power Company, a Minnesota corporation, by its Board of Directors; and Central Minnesota Municipal Power Agency, a Minnesota municipal power agency by its Board of Directors,

Petitioners,

vs.

Schoenbauer Farms, Inc., a Minnesota corporation, *et al.*,

Respondents.

ORDER

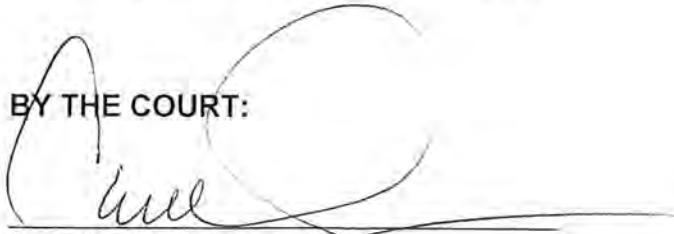
Parcels HCL 0230-1, HCL 0230-2, and PIP 05-923-009-1 (David V. Minar Living Trust and Florence L. Minar Living Trust)

IT IS HEREBY ORDERED that by the agreement of the parties the following Exhibits from the April 23, April 24, and April 25, 2014 Evidentiary Hearing shall be sealed by Scott County Court Administration:

1. Petitioners' Exhibit 129 containing Rule 106 Summary of Sales; and
2. Respondents' Exhibit 48 containing a chart of Respondents' gross revenues and profits.

Dated: August 7, 2014

BY THE COURT:


Caroline H. Lennon
Judge of District Court

FILED

AUG - 7 2014

SCOTT COUNTY COURTS

STATE OF MINNESOTA

COUNTY OF SCOTT

DISTRICT COURT

FIRST JUDICIAL DISTRICT

File No. 70-CV-13-1182

Great River Energy, a Minnesota cooperative corporation, by its Board of Directors; Northern States Power Company (d/b/a Xcel Energy), a Minnesota corporation, by its Board of Directors; Western Minnesota Municipal Power Agency, a Minnesota municipal corporation and political subdivision, by its Board of Directors; Otter Trail Power Company, a Minnesota corporation, by its Board of Directors; and Central Minnesota Municipal Power Agency, a Minnesota municipal power agency by its Board of Directors,

Petitioners,

vs.

Schoenbauer Farms, Inc., a Minnesota corporation, *et al.*,

Respondents,

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

**Parcels HCL 0230-1, HCL
0230-2, and PIP 05-923-
009-1 (David V. Minar
Living Trust and Florence
L. Minar Living Trust)**

The above-entitled matter came before the Honorable Caroline H. Lennon, Judge of District Court, on April 23, April 24, and April 25, 2014, at the Scott County Government Center, Shakopee, Minnesota for an Evidentiary Hearing to determine the validity of the Minar Trusts'¹ Buy-the-Farm election. Over the span of the three-day Evidentiary Hearing, the Court heard testimony and received numerous exhibits. Following the close of the record, the Court, Daniel Leshner (the project lead), and counsel for Petitioners and

¹ Any reference to "Respondent" or "Respondents" refers solely to the Minars and the Minar Trusts, and this Order does not affect the other Respondents in Court File No. 70-CV-13-1182.

Respondents visited the Minar Trusts' property. The visit to the property was conducted off the record, and counsel did not provide argument during the visit. The Court gave the parties until May 16, 2014 to submit closing arguments, at which time the Court took the matter under advisement.

Steven Quam and Patrick Mahlberg, Attorneys at Law, appeared as counsel for and on behalf of the Petitioners. Rod Krass and Paula Maccabee, Attorneys at Law, appeared as counsel for and on behalf of the Respondents, the Minar Trusts ("David and Florence Minar" or "the Minars").

Based upon the proceedings, this Court makes the following:

FINDINGS OF FACT

Background of the Petition

1. Petitioners are five electric utilities involved in a multi-year project to construct and operate four new high voltage transmission lines to provide improvements to the power grid in Minnesota. Collectively, Respondents are Minnesota landowners who elected for Petitioners to acquire their properties in fee.
2. Petitioners have undertaken to construct and operate a 345 kilovolt ("kV") high voltage transmission line ("HVTL") project between Brookings, South Dakota, and Hampton, Minnesota (the "Brookings Project"). The Brookings Project has a capacity of 200 kV or greater and is more than 1,500 feet in length, designating it as a "large energy facility." See Minn. Stat. § 215B.2421, subd. 2(2).
3. On September 14, 2011, The Minnesota Public Utilities Commission ("MPUC") issued an HVTL Route Permit to Petitioners for Segments 1, 2, 3, 5, and 6 of the Brookings Project, pursuant to Minn. Stat. § 216E.03 (2010), and Minn. R., Parts 7850.1700-

7850.2800. On March 1, 2011, the MPUC issued an Order Granting Route Permit for Remanded Segment of Route for Segment 4 of the Brookings Project.

4. Petitioners filed their Condemnation Petition on January 14, 2013. Following the hearing on the Petition, the Court, on April 22, 2013, entered Findings of Fact, Conclusions of Law, and an Order granting the Petition, quick-take motion, and appointing commissioners.
5. The April 2013 Order transferred title to and possession of the easement interests described in the Petition to Petitioners.

The Minar Trusts' Election (HCL 0230-1, HCL 0230-2, and PIP 05-923-009-1)

6. On March 1, 2013, the Minar Trusts made a written Buy-the-Farm election to compel Petitioners to expand the taking from the easement to a fee taking of the entirety of HCL 0230-1 and HCL 0230-2, which includes the portions of HCL 0230-2 which are on the east side of Drexel Avenue, and the 10-acre parcel (PID 05-923-009-1) in the northeast corner. The election totals 132 acres².
7. On May 20, 2013, Petitioners objected to the election, and on August 1, 2013, Petitioners served a supplemental response to the election. Petitioners argued that the Minar Trusts' election included ineligible noncontiguous land and failed the Buy-the-Farm statute's reasonableness requirement. The Court denied Petitioners' motion for partial summary judgment and Respondents' motion to overrule Petitioner's objection to the election on January 6, 2014 ("January 2014 Order"). The parties proceeded to an Evidentiary Hearing to determine whether Petitioners must purchase the Minar Trusts' election by statute.

² The overall size of the election including right-of-ways is 132 acres and 123 acres net of right-of-ways.

8. The Minar Trusts are the fee owners of an organic grass-fed dairy farm located in Helena Township, Scott County, Minnesota ("Home Farm"). David and Florence Minar are the trustees of the two Minar Trusts. The Home Farm consists of an 8.03-acre parcel designated as HCL 0230-1, a 114-acre parcel designated as HCL 0230-2, and a 10-acre parcel that was not designated by Petitioners, but is referred to by its tax identification number, PID 05-923-009-1.
9. HCL 0230-1, the 8.03-acre parcel, is located on the southwest end of the Farm and is unoccupied. HCL 0230-1 is used as a pasture for the Farm's cattle. HCL 0230-2, the 114-acre parcel, straddles Drexel Avenue, which runs through the parcel north-to-south. HCL 0230-2 contains barns and other improvements, including a house. The house is owned by the Minar Trusts, but it is leased to David and Florence Minar, and it serves as their homestead. In addition, there is a 10-acre parcel, identified by its tax identification number PID 05-923-009-1, and it is located on the northeast corner of the Farm. This 10-acre parcel is unoccupied land, which is used as a pasture for the Farm's cattle.
10. Petitioners require an easement for the transmission line right-of-way on the southwest corner of the farm, primarily located on HCL 0230-1 (8.03-acre pasture). The easement totals 0.70 acres and crosses both HCL 0230-1 and HCL 0230-2, but the easement does not touch the 10-acre parcel in the northeast corner of the Minar Trusts' property. The easement comprises 0.53% of the elected land. The Petitioners have already taken 0.7 acres of a permanent electric transmission easement for the placement of approximately-150-foot tall polls. The polls support a 345,000-volt HVTL, and Petitioners have obtained the approval for a second 345,000-volt HVTL to be

placed on the same poles sometime in the future.

11. In addition to the easement for the HVTL right-of-way, the Petition includes ancillary easements that permit Petitioners to acquire a temporary easement to enter upon the land to survey, as well as easements of ingress and egress over the property to the easement area through existing field roads and lanes, if available. In the event that there is no pre-established way to access the easement area, Petitioners may use the most reasonable and feasible route. This determination resides solely in Petitioners' discretion. Additionally, the ancillary easements permit Petitioners to enter the property from time to time for maintenance and replacement of power lines. These instances are specifically restricted to remote and unusual circumstances that are unforeseeable that require more land than is currently available in the easement area.

- a. The Court expressed concern in its January 2014 Order that the ancillary easements potentially created blanket easements, which would amount to an undue burden on Respondents. Accordingly, Petitioners sought testimony that the ancillary easements were in fact reasonable and there was not a significant risk in this case of Petitioners requiring frequent and cumbersome access to the easement area. David Minar testified on cross-examination that there is an existing field road by the HVTL access point; therefore, the possibility of requiring additional access across the Home Farm for the maintenance and upkeep of the line is unlikely, and the ancillary easements are not unduly burdensome on the Minars.

12. David and Florence Minar operate a certified organic grass-fed dairy farm on the Home Farm, which is called Cedar Summit Farms, and marketed as Cedar Summit Dairy.

David Minar has resided in the homestead located on the Home Farm since he was born in 1940. In addition to the Home Farm, the Minars lease land³ immediately to the west and southwest of the Home Farm to graze their herd (collectively referred to as "Cedar Summit Farm"). Some of the leased land is also burdened by the Brookings Project HVTL, which runs west-to-east along County Road 2. All three parcels of the Home Farm are farmed together for the production of Cedar Summit Dairy products.

13. On Cedar Summit Farm, the Minars feed 130 dairy cows⁴ with organic grass and hay grown on site. The Minars milk their cows in a milking parlor, and operate a creamery and attached retail store that sells their organic milk products and third-party products⁵. Additionally, the Minars hold marketing events, such as their annual "Milkapalooza,"⁶ and "Eat Local Farm Tour"⁷ on Cedar Summit Farm. Florence Minar testified that Cedar Summit Dairy's marketing seeks to appeal to customers' nostalgia, using the theme "a taste of the past" and invoking "the way milk used to taste back when cows were on grass all of the time." (Tr. 173:20-22).
14. At the time of David Minar's birth in 1940, the Home Farm was a conventional dairy farm. In 1974 The Minars changed their farming practice to an organic dairy farm. Since that time, Cedar Summit Farms has become the only 100 percent grass-fed

³ The Minars lease land to the west from Prokes and Kubes, and land to the south from Wilcox. The Minars have additional leased land from Tupy to grow feed to the east, which does not abut their Home Farm.

⁴ David Minar testified that there are an approximately equal number of younger cows who are not yet in production.

⁵ David Minar stated on cross-examination, that the retail store sells milk products from Cedar Summit Dairy, chicken from Callister Farm, turkey from Ferndale Farm, eggs, honey, pancake mixes, and candles.

⁶ Milkapalooza is an annual summer event sponsored by Cedar Summit Dairy and free to the public, which offers visitors the chance to tour the farm, listen to live music, visit local vendors, and pet the farm animals.

⁷ The farm tour is an annual spring/summer event that is sponsored by approximately 12-15 co-op food stores in the Twin Cities metropolitan area. The co-ops select local farms to open for public tours to show how the farms operate, as well as an opportunity for customers to see the animals and the people who create and raise their food. (Tr. 357:14- 360:20).

- organic dairy farm in the region, and has operated continuously in the same location.
15. Petitioners presented testimony to the Court through two expert witnesses, Benjamin Gallay and Dr. Peter Valberg, on the effects of the HVTL on people's and animals' health to dispute the Minars' concerns about the HVTL's stray voltage, impact on the rural landscape, and impact on their customer base. The Court finds that the Minars' subjective concerns about the HVTL influenced their decision to elect the entire property, which is of paramount importance to the Court's decision. Therefore, the Court disregarded the expert testimony of Mr. Gallay and Dr. Valberg as it pertained to the documentable risks of the HVTL.
 16. Cedar Summit Farm is a family farm. The Minar family members continue to have roles in the business and provide labor on the farm. David and Florence Minars' son Chris Minar testified that prior to the HVTL he intended to make an offer to buy the farm. Chris Minar stated, "my idea was to buy it [the Farm], keep it running, grow it as a future—something for the grandchildren in the future, whoever would want to be involved; but, you know, my entire family, all my siblings, are involved and their spouses in one form or another. So, it's just—it's very important to keep the family together and just to, you know, keep growing." (Tr. 231:4-11). However, after the construction of the HVTL on the Farm, Chris Minar testified that he will not buy the Farm as it stands with the power lines in its present location. Specifically, Chris Minar does not want to work adjacent to the HVTL and does not believe that the Farm will remain economically viable due to the presence of the HVTL.
 17. When asked on direct examination what impact the HVTL may have on Cedar Summit Farm's business, the business development and marketing manager Ryan Crum

testified that, "perception is greater than reality for our customers, and whether or not these experts can come and say it's not going to have an effect on anything [the product] or the animals, our customers believe it will, and that's going to affect their purchasing decisions." (Tr. 294:12- 16).

- a. To emphasize this point, the consumer affairs manager at Mississippi Market Natural Foods Cooperative ("Mississippi Market"), Elizabeth McMann, testified that Cedar Summit Dairy is Mississippi Market's number one selling milk. Ms. McMann went on to testify that the imagery of an idyllic farm is an important marketing tool to sell Cedar Summit Dairy products, and the farm is successful in part because "it's really very rare to see a farm that is just absolutely beautiful. It's everything that someone, I think, pictures in their mind when they think of a small scale sustainable farm, and that's actually the reality of this farm too." (Tr. 361:21- 25). When questioned about the response of the customers to the placement of the HVTL on the Farm, Ms. McMann testified that customers expect to see the Home Farm as it appears in promotional material, stating that, "people know to expect these rolling hills and green pastures and clear skies....I have never seen a picture of Cedar Summit Farm that includes high voltage power lines. I think that would come as a surprise and a shock for customers." (Tr. 366:15- 16; 366:19- 22). Ms. McMann stated that after the construction of the HVTL Cedar Summit Dairy remains the number one seller at Mississippi Market; however, Ms. McMann cautioned that, "it's my understanding that they [the HVTL] are not actually active yet.... that there's no power actually running

through the lines at this point. So things are going along as they have before.⁸
(Tr. 368:19- 20; 369:38- 42).

18. On July 26, 2012, Petitioners' appraiser, Jason Messner, appraised the Home Farm's land value⁹ at \$924,000 before the taking of the HVTL easement, and \$922,000 after the taking. With the consideration of a temporary cropland rent loss, Mr. Messner recommended \$2,200 as compensation for the taking of the Minars' easement. On April 15, 2014, at the request of Petitioners, Mr. Messner appraised the Home Farm to provide valuation guidance to Petitioners in the potential purchase of the property as elected. Based upon Mr. Messner's inspection of the property and factors impacting its overall value, he appraised the Home Farm at \$1,425,000.
19. Daniel Leshner, the project lead for the Brookings Line, testified that Petitioners have experience in selling properties purchased for the Brookings Line on the open market after construction of the power line. All three properties¹⁰ bought by Petitioners have sold. Mr. Leshner estimated that the properties sold within several months, and as early as one month after being listed. In Petitioners' experience, resale of the three properties recovered 84 percent of the purchase cost.
20. In 2013, the Home Farm was classified as "211R" by the Scott County Assessor's Office. Mr. Messner testified that "211" is a tax classification for rural vacant land. In 2014, the Home Farm was classified as "300 Commercial/211R." Mr. Messner testified that the "300 Commercial" designation indicates that the creamery along with an acre

⁸ Immediately following Ms. McMann's testimony, Benjamin Gallay, one of Petitioners' transmission line engineers, testified that the HVTL was turned on approximately two weeks prior to the commencement of the Evidentiary Hearing.

⁹ The land appraised by Petitioners is the same land elected by the Minar Trusts.

¹⁰ The properties were as follows: a residential property, a vacant agricultural property, and a mixed-use agricultural and residential property.

of land are taxed at a commercial rate, while the remainder of the Farm is taxed as agricultural, rural vacant, and homestead.

21. The Minars introduced exhibits and testimony concerning the Home Farm's zoning as agricultural,¹¹ as well as the conditional use permit to operate the creamery and retail store upon the land. In 2001, the Minars made a conditional use application with the County for a "Home-Extended Business" to process their milk produced on the farm into dairy products, yogurt, cheese, and milk. The Minars felt this was necessary because offsite creameries did not include other 100 percent grass-fed milk products.¹² Therefore, according to Mr. Minar, if Cedar Summit Dairy's products were processed at an offsite creamery with other organic dairies, the end product could not be marketed as 100 percent grass-fed. The conditional use permit explicitly states that its purpose is solely to allow the operation of a milk processing business for milk produced on the farm. Additionally, the permit requires that the business must be marketed as a route delivery business and not as a retail store.
22. Cedar Summit Farm has 43 dedicated grazing paddocks. Each paddock is approximately four to five acres. The Minars employ a system in which the cows graze for a twelve to twenty-four hour period on each paddock, to permit the forage on the paddock to regenerate between grazing. As such, the cattle are rotated between the paddocks, and eventually graze on all portions of the land. Of the 43 paddocks, Paddocks 1-21 are located on the Home Farm, and the remaining paddocks are located on the leased farms. A total of 11 paddocks are partially under the HVTL. Of

¹¹ The elected property is currently part of the "Urban Expansion Reserve District," and is guided for Urban Expansion under the 2030 Guiding Plan; however, agricultural use remains a permitted use in that zone.

¹² Mr. Minar testified that there are no offsite 100 percent grass-fed creameries that could process their milk products.

the Home Farm paddocks, paddocks 10-21 are located on the eastern side of Drexel Avenue. The cattle pass from the west to east side of Drexel Avenue to graze via an underground cattle pass. The cattle pass was completed by Scott County at the Minar Trusts' expense.

23. In 1969, there was a contract for deed from David Minar's parents to David and Florence Minar for the Home Farm. After satisfaction of the contract for deed, David Minar's mother deeded the Home Farm to David and Florence Minar in 1993. In 2009, the Minars deeded the property to their living trusts as an estate planning device. The 1993 and 2009 deeds contain the same description of the property contained in the 1969 contract for deed. Specifically the legal description contains an exception, which states: "...excepting therefrom any property taken for road purposes."
24. In 1972 there was a highway easement in favor of Scott County for a 100-foot right-of-way through the farm for Drexel Avenue. The County paid \$802.40 for the easement, which contains 1.18 acres, "in addition to the existing 66 foot highway right-of-way." Of particular importance is that neither Petitioners' nor Respondents' title examiner could find a document in the chain of title demonstrating that the County *purchased* the 66-foot easement in fee.
25. Petitioners and Respondents had dueling experts testify as to the underlying ownership of Drexel Avenue.
 - a. Respondents elicited testimony from the Scott County Examiner of Titles, Bruce Huemoeller, that, in his opinion, the Minar Trusts own the underlying land beneath Drexel Avenue, which is subject to an easement to Scott County for road purposes. Mr. Huemoeller testified credibly that prior to 1972, the County held a

66-foot easement in the location that is currently Drexel Avenue; however, Mr. Huemoeller testified that Drexel Avenue had been relocated from the east to its present location. According to Mr. Huemoeller, the law prior to 1975 stated that whenever a parcel of land was used for six years as a public right-of-way and maintained by a public entity, the public received a 66-foot easement, being 33 feet on each side of the center line of the roadway, known as a prescriptive easement.

- b. Petitioner's witness, Richard Little, former Deputy Title Examiner in Hennepin County, opined that the legal description of the property excepts out roadways, which means Respondents do not own the land underlying Drexel Avenue, despite the lack of evidence in the chain of title that the County ever acquired Drexel Avenue in fee. When pushed on cross-examination to state whether his opinion would change if there were evidence that Drexel Avenue had moved over time, Mr. Little admitted that if in fact the road moved location, then his opinion would be different. Additionally, Mr. Little was unable to provide an explanation as to why Scott County would purchase an easement over property that the County already owned in fee.

CONCLUSIONS OF LAW

1. Petitioners challenge the following aspects of the Minar Trusts' election: (1) the election does not meet the Buy-the-Farm statute's reasonableness requirement; (2) the election includes ineligible commercial property; and (3) the election includes ineligible noncontiguous property. All other issues were waived and not argued at the Evidentiary Hearing.

Legal Standard for Condemnation under Minnesota Statutes Section 216E.12

2. Minn. Stat. § 216E.12 is better known as the “Buy-the-Farm” statute, and was enacted in response to the conflict between rural landowners and utility companies building and maintaining HVTL right-of-ways. *Coop. Power Ass’n v. Aasand*, 288 N.W.2d 697, 699 (Minn. 1980).
3. The Buy-the-Farm statute recognizes the public concerns regarding high-voltage power line encroachments upon the rural landscape, effects upon the rural environment, and effects on public health. *Id.* at 699-700; *Northern States Power Co. ex rel. Bd. of Directors v. Aleckson*, 831 N.W.2d 303, 306-07 (Minn. 2013). “The statute defines such acquisitions to be for a public purpose. In this manner, the legislature affords landowners not wishing to be adjacent to such right-of-ways the opportunity to obtain expeditiously the fair market value of their property and go elsewhere. The statute, in so doing, responds to parties most affected by the operation of high voltage transmission lines; the statute eases the difficulties of relocation by shifting the transaction cost of locating a willing purchaser for the burdened property from landowner to utility.” *Aasand*, 288 N.W.2d at 700.
4. The Buy-the-Farm statute provides in pertinent part that:

When private real property that is an agricultural or nonagricultural homestead, nonhomestead agricultural land, rental residential property, and both commercial and noncommercial seasonal residential recreational property, as those terms are defined in section 273.13 is proposed to be acquired for the construction of a site or route for a high-voltage transmission line with a capacity of 200 kilovolts or more by eminent domain proceedings, the owner shall have the option to require the utility to condemn a fee interest in any amount of contiguous, commercially viable land which the owner or vendee wholly owns....Commercial viability shall be determined without regard to the presence of the utility route or site....

Minn. Stat. § 216E.12, subd. 4 (a).

5. The Buy-the-Farm statute empowers the owner of property proposed to be acquired for the construction of HVTL lines the option to require the utility to condemn a fee interest in *any amount* of contiguous and commercially viable land. *Aleckson*, 831 N.W.2d at 305. (emphasis added).

Reasonableness of the Election

6. In the 1980 Minnesota Supreme Court case, *Cooperative Power Association v. Aasand*, the court held that “to survive review, a requirement of reasonableness must be read into [the statute’s] terms. 388 N.W.2d at 701. The Court went on to hold that where a parcel is “commercially viable, respondents [landowners] avoid one of the constitutional problems created by the act.” *Id.* In response, the Buy-the-Farm statute was amended to include the “commercially viable” language. 1980 Minn. Laws. Ch. 614, § 87, at 1485-86. While the *Aasand* Court failed to define “reasonableness,” the court’s language indicates that the two factors that bear upon reasonableness of the election are potentially the commercial viability and the statute’s divestiture provision¹³. 388 N.W.2d at 701. The Minars’ election is commercially viable, and the statute’s divestiture provision provides protection for Petitioners. *See Infra* ¶ 12, n. 15.
7. In *Aasand*, the landowner’s election was reasonable, because he was not attempting to convey an unmarketable fragment, but rather the entirety of his 150-acre farm. 388 N.W.2d at 701. The *Williams* case included *dictum* that it would be unreasonable to require the utility company to purchase the entire 387.5 acres, which was worth

¹³ “...provided that that a utility shall divest itself completely of all such lands used for farming or capable of being used for farming not later than the time it can receive the market value paid at the time of acquisition of lands less any diminution in value by reason of the presence of the utility route or site.” Minn. Stat. § 216E.12, subd. 4 (a).

\$690,000, when the utility company only paid \$10,785 for 12.69 acres of the HVTL easement. *Northern States Power Co. v. Williams*, 343 N.W.2d 627, 633 (Minn. 1984) (dictum). The dispute in *Williams* centered on whether the property was eligible under the statute because it was unclear whether the land's use for growing Christmas trees was "agricultural" or ineligible timberland. *Id.* Ultimately the court concluded that the property fit the definition of timberland and therefore was ineligible for election. *Id.* The *Williams*' court *dictum* is not binding on this Court and serves merely as an aside on the *Williams*' court's interpretation of "reasonableness."

8. The case law post-*Aasand* and amendment to the Buy-the-Farm statute has not formulated a bright line rule for district courts to determine the reasonableness of a landowner's election; therefore, the task of determining reasonableness is passed to the district courts on a case-by-case basis. In the January 2014 Order, the Court stated: "In each case, reasonableness is determined under a totality of the circumstances analysis, with the court considering all relevant factors that bear upon the question of reasonableness. Such relevant factors would include, among others, the use of the farm, the products of the land, the years in business, the residences upon the land, the actual encroachment onto the land from the easement, the impact on the rural landscape, and the burden upon the utility in purchasing the elected land." (Concl. of Law ¶ 5 d).
9. Based upon the uniqueness of Cedar Summit Farm as the only 100 percent grass-fed dairy farm in the region, its longstanding history in the farming community in the same location, the perception and sensitivity of their customer-base to the presence of HVTL, and the home that the Minars live in on the land, there is ample evidence that there is

an encroachment on the rural landscape. There will be a burden upon Petitioners in purchasing the land due to its size, improvements, and unique value, which is estimated to be \$1,425,000. However, the Buy-the-Farm statute seeks to mitigate these burdens through the divestiture portion of the statute. There was sufficient evidence that Petitioners have experience in reselling the Buy-the-Farm properties, and are able to recoup a significant portion of their costs in the process. Therefore, there is not an undue burden upon Petitioners in acquiring the Minar Trusts' property in fee, with the understanding that they will sell it on the open market. The Minar Trusts' election is reasonable under the statute, case law, and totality of the circumstances.

Eligibility of Elected Property

10. The Buy-the-Farm statute limits the types of property that can be included in an election to six categories.¹⁴ Minn. Stat. § 216E.12, subd. 4. Commercial land is not eligible for election. *Id.* The Buy-the-Farm statute states that the permitted properties are defined according to Minn. Stat. § 273.13, which specifies tax classifications of property. However, it is the actual use of the property, and not the county tax assessor's classification of it, that controls when determining the eligibility of the elected property. *Williams*, 343 N.W.2d at 633 (finding Sherburne County erred in classifying appellant's use of the Buy-the-Farm-elected parcels). The statute does not provide language for the courts to rely upon zoning in determining the election's eligibility; however, zoning is relevant in light of *Williams*' instruction to consider the actual use of the property. *See Id.*

¹⁴ The six permitted categories of land found in the BTF statute are: agricultural homestead, nonagricultural homestead, nonhomestead agricultural land, rental residential property, commercial seasonal residential recreational property, and noncommercial seasonal residential recreational property. Minn. Stat. § 216E.12, subd. 4.

11. In 2013 (the year of the election), the Home Farm was assessed as rural vacant land by the Scott County Assessor's Office. Petitioners offered evidence that in 2014 part of the property was classified and taxed at the commercial rate due to the presence of the creamery, which was not an actual change from the prior year. The Home Farm is an organic farm for the production of milk products, and also serves as the Minars' homestead. The land includes a creamery to process the milk, with an attached small retail store. The creamery is necessary to maintain the 100 percent grass-fed status of the Farm's milk products. Therefore it is a necessity for the agricultural farm activities occurring on the land. The primary use of the land is agricultural, with the presence of the retail store primarily to sell the products produced in the creamery. The property is precisely the kind intended by the Legislature to protect in its enactment of the Buy-the-Farm statute, and the election consists of eligible property under the statute and case law.

Contiguity and Commercial Viability of Land Elected

12. The Buy-the-Farm statute requires the election to be composed of "contiguous, commercially viable land," but fails to define the term "contiguous." Minn. Stat. § 216E.12, subd. 4 (emphasis added). There is no dispute that the election is commercially viable¹⁵, as the Minars seek the purchase of their entire farm, which is appraised at \$1,425,000 by Petitioners' appraiser and is not an unmarketable fragment of land.
13. Pursuant to the canons of construction, "words and phrases are construed according

¹⁵ Commercial viability relates to the marketability of the election. *See Aasand*, 288 N.W.2d at 701; *See also* Minn. Stat. 216E.12, subd. 4 (a).

to rules of grammar and according to their common and approved usage; but technical words and phrases and such others as have acquired a special meaning, or are defined in this chapter, are construed according to such special meaning or their definition." Minn. Stat. § 645.08. The dictionary definition of "contiguous" is: "(1) touching; in contact. (2) In close proximity without actually touching; near." Contiguous Definition, Dictionary.com, <http://dictionary.reference.com/browse/contiguous> (last visited Jul. 21, 2013). The term "contiguous" was interpreted in a Stearns County District Court Order filed June 7, 2013, File No. 73-CV-12-1451. In that case, Judge Kundrat held that parcels that were purchased together, farmed together, and treated similarly were operating as one contiguous larger parcel. The Court finds Judge Kundrat's analysis persuasive under the present facts.

14. The Court concluded in the January 2014 Order that "there is ample evidence that the election is treated as one farming operation by the Minars, and they hold the same out to the local community." (Concl. of Law ¶ 6 b i). However, the Court denied partial summary judgment in part because there was a genuine issue of material fact as to the relevance of Drexel Avenue in determining contiguity. The portion of the property that is to the east of Drexel Avenue is in close proximity to the western parcels and is necessary for the rotational grazing of the cattle. In fact, the parcels on the west and east side of Drexel Avenue are so intertwined in usage that there is an underground cattle passage to connect the Farm for ease of the cattle's grazing. The testimony from Mr. Huemoeller established that Drexel Avenue was moved to its present location. Scott County has a prescriptive easement for Drexel Avenue, which means that the underlying fee ownership of the road does not belong to the County. Since it is illogical

to sell a small strip of land in the middle of a larger parcel to a third party, the underlying ownership of Drexel Avenue belongs to the Minar Trusts. Although the legal description in the original contract for deed contains language excepting out land for road purposes, there is no evidence that anyone *but* the Minars own the land underlying Drexel Avenue. The presence of Drexel Avenue does not destroy the underlying fee ownership. The presence of the HVTL on one portion of the property necessarily affects the entire property which is farmed together for the purpose of producing 100 percent grass-fed organic milk. The Minar Trusts' election is comprised of contiguous land.


ORDER

1. Petitioners' objection to the Minar Trusts' election is **OVERRULED**.
2. Petitioners shall purchase the Respondents' elected property, in compliance with Minn. Stat. § 216E.12.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: August 7, 2014

BY THE COURT:



Caroline H. Lennon
Judge of District Court